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# Graffiti: On the Fringes of Art; Protected at the Edges of the Law

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## Graffiti: On the Fringes of Art; Protected at the Edges of the Law

Though graffiti has recently become a more accepted art form, graffiti artists still appear to have a few options when it comes to protecting their work. And, in many cases, the options are often not viable. In deciding to pursue a case, the graffiti artist will often have to decide what claims to allege and which to leave unchallenged and the relief he or she is seeking. Ultimately, the course of litigation will be controlled by the type of relief the artist pursues. The Visual Artists Rights Act (VARA) would be the best choice for an artist seeking preservation of his artwork while the Lanham Act would be more preferable if the artist was seeking economic damages from the commercialization of his work. And, a third option, copyright protection, exists only in theory.

In an increasingly interconnected society, Copyright Law, VARA, and the Lanham Act may be archaic mediums for street artists to fight their legal battles, leaving many street artists unprotected from corporate and other unauthorized uses of their, admittedly unsanctioned, works of art.

### **Introduction: The History of Graffiti and Street Art**

It would not be a stretch to say that for as long as society has existed, humans have sought to express themselves through the arts. And, the use of walls as a medium for that expression can be traced back to the Sulawesi Islands in Indonesia more than 35,000 years ago.<sup>1</sup> The use of walls for artistic expression is a tradition that has not changed much; however, certain types of expression, such as murals, are more socially acceptable than others such as graffiti.<sup>2</sup>

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<sup>1</sup> Jo Marchant Justin Mott, A Journey to the Oldest Cave Paintings in the World SMITHSONIAN.COM (2016), <https://www.smithsonianmag.com/history/journey-oldest-cave-paintings-world-180957685/> (last visited Jun 24, 2018).

<sup>2</sup> Patrick Verel, GRAFFITI MURALS: EXPLORING THE IMPACTS OF STREET ART (2015). *See also* Sondra Bacharach, *Finding Your Voice in the Streets: Street Art and Epistemic Injustice*, 101 THE MONIST 31–43 (2018).

Society’s views of what constitutes art is ever-changing and graffiti is one such example. Originally considered a hallmark of urban blight, increased crime, and illegality; graffiti has recently undergone a transformation and is now seen as contemporary and celebrated as a vehicle for social and political commentary, as well signaling gentrification of a neighborhood.<sup>3</sup> This is not to say that all graffiti is viewed in such a positive manner; however, there is an increased tolerance for certain types of graffiti.<sup>4</sup> Scholars have recently begun to classify and draw distinctions between different types of street art.<sup>5</sup> In her photographic cartography, Ulmer compiled and defined the different terms and are imported below:<sup>6</sup>

<b>Term</b>	<b>Artistic method</b>
Graffiti	Creating “tags” and “pieces” through stylized words and text, often with spray paint in aerosol cans
Graffito	The singular of graffiti; an inscription or drawing on a public surface
Piece	A graffiti mural
Tag	The personal signature of an artist or crew, often written, repetitively, to gain recognition or mark territory
Street art	Visual art placed in public spaces, usually without permission; includes traditional graffiti; also referred to as post-graffiti or urban art
Paper paste-up	Art printed on paper and affixed to walls with wheatpaste

<sup>3</sup> See Verel, *supra* note 2 (discussing the connection between street art and graffiti); See also Bacharach, *supra* note 2 (discussing how street art has gained popularity and appeal); D.K., How did graffiti become respectable?, THE ECONOMIST (2013), <https://www.economist.com/the-economist-explains/2013/11/10/how-did-graffiti-become-respectable> (last visited Jun 20, 2018); SOTHEBY, FROM THE STREETS: THE RISE OF URBAN ART SALAI HEAD OF CHRIS OLD MASTER PAINTINGS SOTHEBY’S n08282lot3h2h3en (2018), <https://www.sothebys.com/en/articles/from-the-streets-the-rise-of-urban-art> (last visited Jun 20, 2018); Cameron McAuliffe, *Graffiti or Street Art? Negotiating the Moral Geographies of the Creativity City*, 34 J. URB. AFF. 189, 189 (2012) (describing graffiti-filled cities as a signifying urban blight).

<sup>4</sup> Virág Molnár, *Street Art and the Changing Urban Public Sphere*, 29 PUBLIC CULTURE 385–414, 385 (2017); See also, Sotheby, *supra* note 3 (discussing the increasing acceptance of graffiti by the public and institutions while noting that artists can still be arrested for vandalism)

<sup>5</sup> Jasmine B. Ulmer, *Writing Urban Space: Street Art, Democracy, and Photographic Cartography*, 17 CULTURAL STUDIES ↔ CRITICAL METHODOLOGIES 491–502 (2016).

<sup>6</sup> *Id.* at 493.

Posters	Large, printed placards and bills that often are used to announce or advertise; in similar form, may be referred to as paper fliers
Reverse graffiti	The removal of rust or dirt from surfaces with cleaning solvents
Scratchiti	Etchings made on glass and plastic surfaces with sharp objects
Stencils	Official-looking metal signs placed in public thoroughfares
Signage	Words or images cut into thin piece of plastic, cardboard, or metal; spray paint then covers the surface to leave a print below
Stickers	Pre-made labels, name tags, shipping labels, and stickers placed on garbage receptacles, signs, letter boxes, and similar surfaces; used in sticker bombing, sticker tagging, and culture jamming
Street installations	Three-dimensional art placed in, and worked into, urban settings
Murals	A large painting or visual artwork situated on a wall

Though these distinctions are important stylistically, there is also a difference in society's acceptance of each type of street art. This paper will use the general terms "street art" and "graffiti" interchangeably so that the term graffiti also subsumes all of the terms and definitions under "street art." This author will make the distinction between legal and illegal art where needed.

### The Rise of Banksy and Other Graffiti Artists

As mentioned earlier, graffiti has often been associated with urban blight and life at the edges of a city.<sup>7</sup> But more recently, some forms of graffiti have gained popularity and acceptance

<sup>7</sup> See McAuliffe, *supra* note 3. See also Jareen Imam, FROM GRAFFITI TO GALLERIES: STREET VS. PUBLIC ART CNN (2012), <http://www.cnn.com/2012/08/03/living/ireport-street-art-public-art/index.html> (last visited Jun 20, 2018) ("graffiti's aerosol imagery is gaining popularity and becoming increasingly socially acceptable.")

among society and are viewed as integral to uplifting and gentrifying cities and communities.<sup>8</sup> Contemporary graffiti first appeared in Philadelphia in the 1960s and travelled to New York by the 70s.<sup>9</sup> Graffiti is often used for a range of activities such as for social and political commentary, political protest, declarations of love, hate speech, and for marking gang territory.<sup>10</sup>

Artists such as Banksy, Reyes, Steel, Revok, Fairey, and Rime have not only gained a reputation among graffiti artists but among the larger public as well.<sup>11</sup> Banksy has become so popular that he has an Instagram following of 2.3 million.<sup>12</sup> He is arguably the most well-known graffiti artist in the world.<sup>13</sup> His work often focuses on satirizing and providing commentary on political and social issues in his native United Kingdom and around the world.<sup>14</sup> Banksy began his graffiti artist career in Bristol in 1992.<sup>15</sup> He started as part of a crew called the DryBreadZ Crew and adopted the moniker ‘Banksy’ to protect his identity.<sup>16</sup> As in other artistic fields, Banksy was also influenced by other artists in his field and modeled his visual style and political messaging after French graffiti artist, Blek le Rat.<sup>17</sup> Banksy eventually moved to London, where he became involved with more graffiti artists and collaborators.<sup>18</sup> His work garnered the attention

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<sup>8</sup> See Seres Lu, THE STRUGGLE BETWEEN GRAFFITI AND STREET ART COLUMBIA JOURNALISM SCHOOL, <http://www.columbia.edu/~sl3731/graffitiART/> (last visited Jun 20, 2018) (discussing the Bushwick Collective, a group of artists with authorization to paint on walls in Bushwick as a ‘weapon for gentrification’).

<sup>9</sup> Marta Iljadica, COPYRIGHT BEYOND LAW: REGULATING CREATIVITY IN THE GRAFFITI SUBCULTURE 9-19 (2016).

<sup>10</sup> *Id.* at 128-131. See also Imam, *supra* note 7 (“artists have used public spaces to showcase themes and bring awareness to issues.”).

<sup>11</sup> The Best Graffiti Artists, RANKER, <https://www.ranker.com/list/famous-graffiti-artists/kevin> (last visited Jun 28, 2018).

<sup>12</sup> Banksy (@banksy): Instagram photos and videos, INSTAGRAM, <https://www.instagram.com/banksy/> (last visited Jun 28, 2018).

<sup>13</sup> Luke Dickens, IWONDER - HOW DID BANKSY BECOME THE WORLD'S MOST FAMOUS VANDAL? BBC News, <https://www.bbc.com/timelines/zytpn39> (last visited Jun 22, 2018).

<sup>14</sup> *Id.* See also Banksy (@banksy) *supra* note 12 (a personal and visual representation of his political and social commentary).

<sup>15</sup> See Dickens, *supra* note 13.

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

<sup>17</sup> *Id.* See also The Rise Of Street Art Popularity Through The Anonymity Of Banksy, SPOKEN VISION (2016), <http://spokenvision.com/the-rise-of-street-art-popularity-through-the-anonymity-of-banksy/> (last visited Jun 21, 2018).

<sup>18</sup> See Dickens, *supra* note 13.

of the mainstream press and he developed a working relationship with photographer Steve Lazarides.<sup>19</sup> The pair published a series of books—"Brandalism," "Existencilism," and "Cut Out and Collect."<sup>20</sup> In London, Banksy honed and refined his political messaging on issues such as globalism and corporate greed.<sup>21</sup> Eventually, Banksy also started to host exhibitions of his art in abandoned tunnels, and continued to take his work international, targeting the West Bank wall to comment on the Israeli involvement in Palestine.<sup>22</sup> By 2006, his work was internationally known and art collectors paid thousands to own pieces of his work.<sup>23</sup> While such a career certainly sounds illustrious, it is important to note that it began illegally. Indeed, Banksy's work remains largely illegal—his work appearing on property that is not his, often without permission.

The works by Banksy and other graffiti artists has become so popular that is regularly reprinted on commercial items or removed from its original location and displayed in galleries and museums.<sup>24</sup> Banksy regularly receives invitations from galleries and museums to feature his work.<sup>25</sup> In Germany, a local tour company has a walking tour featuring Banksy art in Berlin.<sup>26</sup> However this popularity has not given Banksy's creations blanket protection—his pieces are

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

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* See also Banksy (@banksy) *supra* note 12.

<sup>22</sup> See Dickens, *supra* note 13.

<sup>23</sup> *Id.* See also, Imam, *supra* note 7 (discussion of Banksy's rise from the streets to galleries).

<sup>24</sup> The Story Behind Banksy, SMITHSONIAN.COM (2013), <https://www.smithsonianmag.com/arts-culture/the-story-behind-banksy-4310304/> (last visited Jun 20, 2018).

<sup>25</sup> Banksy on Instagram: "I entered an early version of this into the RA summer exhibition under the pseudonym Bryan S Gaakman - an anagram of 'banksy anagram'. It...", INSTAGRAM (2018), <https://www.instagram.com/p/Bj47OxbUNj/?taken-by=banksy> (last visited Jun 21, 2018); See also Sotheby, *supra* note 3 (discussing how some famous artists whose work is now featured in major museum collections started their careers in the streets).

<sup>26</sup> Street Art Tour, ALTERNATIVE BERLIN TOURS (2018), <http://alternativeberlin.com/tours/street-art-tour/> (last visited Jun 20, 2018); See also Imam, *supra* note 7 (interviewee personal account of art appreciation tours which include street art in Brooklyn).

often still removed or sold off without his permission.<sup>27</sup> And, many other artists face similar challenges.<sup>28</sup>

More recently, US -based artist Revok has gained recognition and drawn the attention of would-be infringers. As recently as this year, Revok saw the retail giant H&M use his work in an advertising campaign without his permission.<sup>29</sup> In March 2018, the clothing giant H&M filed for summary judgment against graffiti/street artist Revok a.k.a Jason Williams, asking the court to declare that Williams' has no right to copyright protection because his artwork on the park handball court was an illegally created work and that illegally created works are not provided protection under Copyright Law.<sup>30</sup>

However H&M may have lost this battle simply by filing a suit— with street artists and the public have coming together to boycott H&M and shine a light on the issue and the struggles of street artists.<sup>31</sup> In a time when artists have more support than big conglomerates, the threat of a boycott has worked and H&M has issued a statement of their intention to dismiss the suit.<sup>32</sup> H&M's most recent public statement regarding graffiti, "H&M respects the creativity and uniqueness of artists, no matter the medium. We should have acted differently in our approach to

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<sup>27</sup> See Brittany M. Elias & Bobby Ghajar, Street Art: The Everlasting Divide Between Graffiti Art and Intellectual Property Protection, 7 LANDSLIDE, 48, 49 (2015) (art by Banksy sold for \$1.1 million at auction in June 2013 without his permission).

<sup>28</sup> See Molnár *supra* note 4 (MoMA decided to keep art by Banksy after he put his art in the museum and National Portrait Gallery acquired Fairey's portrait of former President Barack Obama); See also Elias, *supra* note 27; Sotheby's, *supra* note 3 (Sotheby's in London curated a retrospective of Banksy's work and in 2016, Sotheby's in Hong Kong curated an exhibition, *They Would Be Kings*, displaying artwork by prominent urban artists).

<sup>29</sup> Keith Estiler, UPDATE: H&M FILES LAWSUIT AGAINST GRAFFITI ARTIST, DENIES COPYRIGHT PROTECTION HYPEBEAST (2018), <https://hypebeast.com/2018/3/hm-revok-copyright-infringement-case> (last visited Jun 21, 2018); See also Sonia Rao, ANALYSIS | H&M'S BATTLE WITH THE ARTIST REVOK SHOWS HOW STREET ART IS BEING TAKEN SERIOUSLY. THE WASHINGTON POST (2018), [https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/03/16/hms-battle-with-the-artist-revok-shows-how-street-art-is-being-taken-seriously/?utm\\_term=.a4d0c42e04d0](https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/03/16/hms-battle-with-the-artist-revok-shows-how-street-art-is-being-taken-seriously/?utm_term=.a4d0c42e04d0) (last visited Jun 20, 2018); See also Complaint, H&M Hennes & Mauritz GBC AB v. Williams, No. 1:18-cv-01490 (E.D.N.Y. N.Y. Mar. 9, 2018).

<sup>30</sup> See Complaint H&M Hennes & Mauritz GBC AB, *supra* note 29.

<sup>31</sup> Jake Woolf, H&M TRIED (AND FAILED) TO STEAL GRAFFITI GQ (2018), <https://www.gq.com/story/hm-tried-and-failed-to-steal-graffiti> (last visited Jun 20, 2018).

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

this matter. It was never our intention to set a precedent concerning public art or to influence the debate on the legality of street art.”<sup>33</sup> These are strong words, especially, in the face of H&M’s earlier statements and request for summary judgment, where they stated, “the entitlement of copyright protection is a privilege under federal law that does not extend to illegally created works.”<sup>34</sup>

Just seven days into filing, H&M asked that the suit be dismissed<sup>35</sup> and the clothing company may now be seeking to settle the matter outside the court system as Revok has done with other brands in the past.<sup>36</sup> However, the debate is far from over—in a day and age when a giant such as H&M can backtrack on a suit within a week because of threat of boycott and mounting public pressure, what role, if any, does and can Copyright Law play in street art? As mentioned, this was not the first case of large retail companies co-opting graffiti for their commercial gain while leaving the artists without relief.<sup>37</sup> While many artists do file claims, oftentimes artists end up settling—leaving the law unsettled for later artists. For other forms of art, copyright and moral rights are the most common modes of protection; however, they do not protect illegally created works of art with the same level of intensity

More than monetary losses, these unauthorized uses by third parties can also harm the artists’ reputation within the graffiti community and this is in fact what many artists cite if and

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<sup>33</sup> *Id.*

<sup>34</sup> See Woolf, *supra* note 31.

<sup>35</sup> Bill Donahue, H&M ISN’T THE FIRST BRAND TO FACE GRAFFITI GRIPES - LAW360 THE NEWSWIRE FOR BUSINESS LAWYERS, <https://www.law360.com/articles/1023866/h-m-isn-t-the-first-brand-to-face-graffiti-gripes> (last visited Jun 21, 2018).

<sup>36</sup> See Complaint, Williams v. Cavalli, No. 2:14-cv-06659 (C.D. Cal. Aug. 25, 2014); See also HB Team, UPDATE: ARTISTS REVOK, REYES AND STEEL ARE SUING ROBERTO CAVALLI FOR COPYRIGHT INFRINGEMENT HYPEBEAST (2015), <https://hypebeast.com/2015/2/artists-revok-reyes-and-steel-are-suing-roberto-cavalli-for-copyright-infringement> (last visited Jun 21, 2018); Scarlett Conlon, CAVALLI SETTLES TWO CASES OUT OF COURT VOGUE (2017), <https://www.vogue.co.uk/article/roberto-cavalli-settles-mto-shahmaghsoudi-school-and-graffiti-cases> (last visited Jun 21, 2018).

<sup>37</sup> See Complaint, Williams v. Cavalli, *supra* note 36.



when they choose to bring a suit.<sup>38</sup> The increasing commercialization of graffiti art begs the question, should graffiti artists receive more protections than currently afforded under Copyright Law?

I. Can VARA provide the protection street artists and their art deserve?

There are many policy considerations for the protection of graffiti stemming from the same interest society has in protecting all forms of art. As with other artists, graffiti artists should also have the right to prevent the use of their work for commercial gain by third parties, or by other distortion, mutilation, or modification of an artists' work that can impact the artists' reputation in the community and beyond.

The Visual Artists Rights Act (VARA) is one potential source of protection that graffiti artists may be able to rely on. Moral rights were first introduced via the courts in *Gilliam*.<sup>39</sup> Before the *Gilliam* court, the concept of moral rights was only a continental one.<sup>40</sup> Moral rights are rights of integrity and attribution and they provide the author of a work with proper attribution of his work and with the right to preserve the work in the form in which the work was created.<sup>41</sup> The Berne Convention for the Protection of Literary and Artistic Works included a provision for moral rights for member countries and when the US adopted the treaty, Congress subsequently codified these rights in the Visual Artists Rights Act, also known as VARA, in 1990.<sup>42</sup>

The Visual Artists Rights Act provides an artist with a limited ability to control the fate of their work and to protect against reputational harm. VARA was initially established on the

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<sup>38</sup> *Id.*; Complaint Tierney v. Moschino S.P.A. No.2:15-cv-05900-SVW-PJW (C.D. Cal. Aug. 5, 2015); Complaint, Tierney v. Camuto Consulting, Inc. No.2:17-cv-04936 (C.D. Cal. Jul. 5, 2017).

<sup>39</sup> *Gilliam v. ABC*, 538 F.2d 14, 24 (2d Cir. 1976).

<sup>40</sup> ROBERT A. GORMAN, JANE C. GINSBURG & R. ANTHONY REESE, COPYRIGHT: CASES AND MATERIALS, 781 (2017).

<sup>41</sup> *Id.*

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

belief that an artist should not be subject to criticism of work that has been deformed because to “deform his work is to present him to the public as the creator of a work not his own, and makes him subject to criticism for work he has not done.”<sup>43</sup>

The wording of the statute provides protection for only a limited class of artists and works. The statute provides for the protection of only those *visual* works which are of ‘recognized stature’ of artists whose ‘honor or reputation’ would be prejudiced by ‘intentional distortion, mutilation, or other modification.’<sup>44</sup> In relevant part, VARA provides that an artist—

- (1) shall have the right—
  - (A) to claim authorship of the work, and
  - (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;
- (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation and
- (3) subject to the limitations set forth in section 113(d), shall have the right—
  - (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
  - (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right<sup>45</sup>

Since VARA only provides limited protection to visual work, an artist wishing to pursue a claim under VARA must prove that his graffiti work is a ‘piece of visual art’ of sufficiently ‘recognized stature’ deserving of protection. Furthermore, the statute defines a work of visual art

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<sup>43</sup> *Gilliam, supra* note 39 at 24.

<sup>44</sup> 17 U.S.C.S. § 106A.

<sup>45</sup> *Id.* at §106A(a)(1) - (3).

as “a painting, drawing, print, sculpture, or still photographic image produced for exhibition purposes only.”<sup>46</sup>

While the parameters on what can be considered a visual work under VARA are severely limiting, the bigger hurdle in a VARA claim is the second prong of the statute which states that the work must be of ‘recognized stature.’<sup>47</sup> In *Carter v. Helmsley-Spear, Inc.*, the court set the standard for “recognized stature” by providing 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. In making this showing, plaintiffs generally, but not inevitably, will need to call expert witnesses to testify before the trier of fact.”<sup>48</sup> This is a prohibitive and often subjective bar where artists must often present testimony to prove their worth.

Stature played a very prominent role in a more recent case in New York. The case, colloquially known as the 5Pointz case concerned a building in Long Island City, Queens that—to some—had become a mecca of sorts for graffiti artists around the world.<sup>49</sup> In *Cohen v. G&M Realty*, the court heard testimony from the owner of the building, Mr. Gerald Wolkoff, and his curator/manager, Mr. Jonathan Cohen.<sup>50</sup> During the trial Wolkoff testified that beginning in 2002 he and Cohen had a verbal arrangement that Cohen would manage the Long Island City building and interface with the artists who wished to paint at the site, making it a legal and safe place for artists to paint their work.<sup>51</sup> Though the artists had initially lost their motion for preliminary

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<sup>46</sup> 17 U.S.C.S. §101.

<sup>47</sup> VARA statute, *supra* note 43 at §106A(a)(3)(B).

<sup>48</sup> *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994).

<sup>49</sup> Sarah Rogers, A VISUAL HISTORY OF 5 POINTZ, NYC'S GRAFFITI MECCA THE DAILY BEAST (2018), <https://www.thedailybeast.com/a-visual-history-of-5-pointz-nycs-graffiti-mecca/1> (last visited Jun 21, 2018). *See Cohen v. G&M Realty L.P.*, No. 13-CV-05612(FB)(RLM), 2018 U.S. Dist. LEXIS 22662 (E.D.N.Y. Feb. 12, 2018).

<sup>50</sup> *Cohen*, *supra* note 49.

<sup>51</sup> *Id.* *See* Rogers, *supra* note 49.

injunctive relief, the court, in its final decision, recognized that “Cohen oversaw the site, kept it clean and safe, allotted wall space, and explained the site’s rules and norms to new artists. Over time, crime in the neighborhood dropped and the site became a major attraction drawing thousands of daily visitors, including busloads of tourists, school trips, and weddings... And, 5Pointz became ‘this outdoor museum’... [and] emerge[d] as a mecca for the world’s largest collection of quality outdoor aerosol art.”<sup>52</sup> Because Wolkoff whitewashed and destroyed the artwork before the final decision could be rendered, the Judge ordered the maximum in statutory damages totaling 6.75 million.<sup>53</sup>

While difficult, the 5Pointz case shows that it is not impossible to gain protection under VARA; however, protection is often limited by section 113(d) of the Act and to preventing the mutilation or destruction of the work.<sup>54</sup> VARA would not help an artist seeking to prevent unauthorized commercialization of his work nor can VARA be used to preserve illegal works of visual art.<sup>55</sup> The 5Pointz case was unique in the graffiti and street art culture in that though the building was first filled with illegal graffiti works, through the agreements between Wolkoff and Cohen, the building became a place where graffiti artists could paint legally.<sup>56</sup>

For graffiti artists who do not use legal walls, winning a suit under VARA becomes increasingly difficult, if not outright impossible.<sup>57</sup> In *English v. BFC&R*, the Southern District of New York 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.”<sup>58</sup>

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<sup>52</sup> *Cohen*, *supra* note 49 at 17.

<sup>53</sup> *Id.* at 49.

<sup>54</sup> 17 U.S.C.S. § 113(d).

<sup>55</sup> *English v. BFC&R E. 11th St. LLC*, 97 Civ. 7446 (HB), 1997 U.S. Dist. LEXIS 19137 (S.D.N.Y. Dec. 2, 1997) (works placed illegally on city property not subject to protections under VARA).

<sup>56</sup> See *Rogers*, *supra* note 49; *Cohen*, *supra* note 49.

<sup>57</sup> See *English*, *supra* note 55.

<sup>58</sup> *Id.* at 14.

Additionally, judicial recognition of stature may not occur in the majority of graffiti cases as the element requires a factual determination to be decided on a case-by-case basis. And while artists such as Banksy and Revok have arguably gained the requisite stature, the majority of their artwork continues to be outside the protection of the Visual Artists Rights Act. Graffiti, by and large, is a form of art that occurs outside the law—often painted on private property without the consent of the owner. When Banksy came to New York City early this year, he painted several pieces throughout the city; however, since the pieces were put up illegally on private property, the owners had no difficulty in removing the pieces from public view.<sup>59</sup> Because of these barriers, many graffiti artists would not receive or benefit extensively from protection under VARA. Graffiti, by its nature, is impossible to remove without its complete destruction. And, as mentioned, protections afforded under VARA are limited under section 113(d) of the Act and do not extend to those types of works that would inhibit an owner’s right to “improve, renovate, or raze their property.”<sup>60</sup>

In his dispute against H&M, VARA would be of little use to Revok. Though H&M used Revok’s artwork in their advertising campaign without his permission, the art was created by Revok on a municipally owned wall without permission from the city.<sup>61</sup> Though Revok’s moral rights are impacted, the illegality of his work puts the issue outside VARA’s protections. By using the graffiti as background in their advertising campaign, H&M created the illusion, unintentionally or not, that Revok supported and approved of H&M.<sup>62</sup> In fact, this is not the first

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<sup>59</sup> Time Has Already Run Out for New Banksy Stencil | WNYC | New York Public Radio, Podcasts, Live Streaming Radio, News, WNYC, <https://www.wnyc.org/story/new-banksy-stencil-has-already-been-removed> (last visited Jun 23, 2018); Isaac Kaplan, A BANKSY APPEARS ON A BUILDING OVERNIGHT. WHO GETS TO CASH IN? ARTSY (2018), <https://www.artsy.net/article/artsy-editorial-banksy-appears-building-overnight-cash-in> (last visited Jun 23, 2018).

<sup>60</sup> 17 U.S.C.S. § 113(d); *English*, *supra* note 55.

<sup>61</sup> *See Estiler*, *supra* note 29; *Woolf*, *supra* note 31.

<sup>62</sup> *See Complaint*, *Williams v. Cavalli*, *supra* note 36.

time that Revok has had his work used commercially without this permission.<sup>63</sup> In 2011, Revok, along with two other graffiti artists, filed suit against the brand Roberto Cavalli for introducing a clothing and accessories line named *Just Cavalli*, which heavily featured artwork from a piece the artists painted. The artists claimed that they had “never consented to lend their artwork to consumer products of any kind,” and that such consent would be “antithetical to the outsider ‘street cred’ that is essential to graffiti artists.”<sup>64</sup> While H&M originally filed suit for summary judgment against Revok, the immediate public backlash prompted the company filed to voluntarily dismiss the case and the company and artist will be looking to settle the case outside of court.<sup>65</sup> In the case with Roberto Cavalli, the Central District Court of California held that Cavalli had violated section 43(a) of the Lanham Act since the mural had source-identifying attributes.<sup>66</sup>

While both of Revok’s cases impacted his moral rights, neither case was pursued under VARA. Indeed, neither case would have won under a VARA claim—which begs the question: what relief can graffiti artists seek to protect their art? Can current copyright law protect graffiti artists where VARA fails? Should graffiti artists should have more legal avenues to protect their art?

The argument for protection centers on providing recognition of the artists’ work, progression of the arts, and encouraging artistic expression. Graffiti artists should be able to protect the ownership of the art they create and failing to provide that protection to graffiti artists

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

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

<sup>65</sup> See Woolf, *supra* note 31; Notice of Voluntary Dismissal, H&M Hennes & Mauritz GBC AB v. Williams. No. 1:18-cv-01490-ENV-PK. (E.D.N.Y. N.Y. Mar. 16, 2018).

<sup>66</sup> Erickson Law Group, RETAILERS NORDSTROM, AMAZON, ZAPPOS, AND "JUST CAVALLI" LINE LOSE MOTION TO DISMISS TRADEMARK AND COPYRIGHT CLAIMS IN LAWSUIT BY PROMINENT GRAFFITI ARTISTS PR NEWswire (2015), <https://www.prnewswire.com/news-releases/retailers-nordstrom-amazon-zappos-and-just-cavalli-line-lose-motion-to-dismiss-trademark-and-copyright-claims-in-lawsuit-by-prominent-graffiti-artists-300037089.html> (last visited Jun 23, 2018).

inhibits the “advancement and progression of the arts.”<sup>67</sup> As Justice Holmes stated in *Bleistein v. Donaldson Lithographing Co.*, “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits.... Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—.”<sup>68</sup> This potential for commerciality of a street artist’s work cannot be addressed by VARA and so street artists must look to other avenues to protect their work.

## II. Copyright: The second arrow of lost potential in a street artists’ quiver.

In addition to considering VARA, graffiti artists may also seek protection under traditional copyright law, as codified in title 17 of the United States Code. As Gorman, et al. state, “the purpose of copyright is to reward authors as a matter of justice...to support a system, a macrocosm, in which authors and publishers compete for the attention and favor of the public....”<sup>69</sup> The subject matter of copyright is “original works 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.”<sup>70</sup> And, to state a claim of copyright infringement, the artist must allege ownership of the copyright, registration, and prove infringement.

For a work to qualify for copyright protection, it needs to have some creativity and fixed in any tangible medium. While graffiti artwork definitely meets these two criteria, proving that graffiti is deserving of copyright protection is slightly harder.

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<sup>67</sup> U.S.C.S. CONST. Art. I, § 8, Cl 8. (stating the purpose of the Copyright Clause).

<sup>68</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-2 (1903).

<sup>69</sup> Gorman, *supra* note 40 at 29.

<sup>70</sup> 17 U.S.C.A. § 102(a).

In the case against Moschino for copyright infringement, the defendants argued that the criminal nature of graffiti makes it devoid of copyright.<sup>71</sup> This is essentially the argument that H&M put forward in their request for summary judgement against Revok this past year.<sup>72</sup> The essential idea is the doctrine of unclean hands, which states that no person should benefit from their crimes. Unfortunately, most cases in which defendants attempt to use this argument are settled out of court before a court can rule on the issue, as it happened with H&M, Moschino, and others.<sup>73</sup> While the threat of negative press may keep the issue from ever reaching the courts, there was one case which came closer than any other in addressing this issue is *Villa v. Pearson Education*.<sup>74</sup>

In *Villa*, graffiti artist Hiram Villa sued Pearson Education for the use of his work in a video game and Pearson Education attempted to dismiss the case, invoking the doctrine of unclean hands; however, the judge refused to dismiss, stating that the legality of the art is a fact-based inquiry.<sup>75</sup> However, before the judge could issue his final ruling on the parties reached a settlement.<sup>76</sup>

While proving copyright infringement may seem to be a simpler path than pursuing relief under VARA, copyright infringement comes with its own set of challenges. Little case law exists with respect to graffiti and copyright infringement as most such cases are usually settled outside

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<sup>71</sup> Complaint, Tierney v. Moschino S.P.A., *supra* note 38; *See* Graffiti: At the Edge of Copyright, PLAGIARISM TODAY (2018), <https://www.plagiarismtoday.com/2018/03/15/graffiti-at-the-edge-of-copyright/> (last visited Jun 22, 2018).

<sup>72</sup> Complaint, H&M Hennes & Mauritz GBC AB v. Williams, *supra* note 29.

<sup>73</sup> *Id.*; Complaint, Williams v. Cavalli, *supra* note 36; Complaint, Tierney v. Moschino, *supra* note 38; Complaint, Tierney v. Camuto Consulting, *supra* note 38.

<sup>74</sup> *Villa v. Pearson Educ., Inc.*, No. 03 C 3717, 2003 U.S. Dist. LEXIS 24686 (N.D. Ill. Dec. 8, 2003).

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

<sup>76</sup> Graffiti: At the Edge of Copyright, *supra* note 71.



of the courts.<sup>77</sup> While the courts have not yet decided the issue and could potentially side with the artists in the future, it seems unlikely to happen.

While the *Villa* complaint checks all the boxes for a copyright infringement claim, the judge still did not decide on the issue of copyright protection for street art and a close look at the opinion will show that—had the parties not settled—the court would have looked at the “legality of the circumstances under which the mural was created” to make a determination. This allows future courts to potentially exclude ‘illegal’ street art from copyright protection.

Though such a decision to exclude illegal street from copyright protection would go against the purpose of Copyright as stated in the Constitution, there is a strong argument against providing protection for illegal works of street art. The idea of rewarding those artists for illegal behavior is antithetical to the very idea of fair play and the American Dream.

The barrier erected by the doctrine of unclean hands may be the reason why no street artist has pursued litigation to the end, preferring, instead, to try their cases in the court of public opinion. This is essentially what happened in the case against H&M. Though H&M has initially filed the case seeking summary judgment, the company soon realized the extent of the public outcry as famous street artists called for the boycott of H&M and one of their main stores abroad was vandalized overnight.<sup>78</sup> While H&M may have had a substantive legal claim, in the eyes of the public, the company was in the wrong and the company dropped the case within a week of filing.<sup>79</sup>

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<sup>77</sup> Claire Voon, H&M LAWSUIT AGAINST STREET ARTIST COULD CHANGE COPYRIGHT LAW HYPERALLERGIC (2018), <https://hyperallergic.com/432709/hm-lawsuit-street-artist-revok-copyright-law/> (last visited Jun 20, 2018). *See also* Conlon, *supra* note 36; Jeremy Scott, Moschino Settle Graffiti Copying Lawsuit, THE FASHION LAW (2014), <http://www.thefashionlaw.com/home/jeremy-scott-moschino-settle-graffiti-copying-lawsuit> (last visited Jun 23, 2018).

<sup>78</sup> Woolf, *supra* note 31.

<sup>79</sup> *Id.*

If the courts allowed copyright protection of graffiti art after *Villa*, street artists may have to overcome additional hurdles or barriers that others seeking copyright protection do not. In this way, graffiti artists would be at a disadvantage that may possibly stifle the artistic community. Once an artist becomes significantly more visible and popular, often the value of their work becomes commercially viable and owners who have had their private property “vandalized” by these famous artists often cash in and sell the artwork. The work of Banksy is often sold by private owners and property featuring Banksy’s work is no longer considered vandalized but rather more akin to “winning the Banksy lottery.”<sup>80</sup> This puts another layer of complexity that copyright law is not equipped to handle and shows that something more than copyright law is needed to provide the protections that street artists need.

III. Can street artists rely on the Lanham Act for any help in protecting their work from unauthorized commercialization?

Finally, street artists could also pursue claims under the Lanham Act. The relevant claims would be for trade dress infringement and false designation of origin. A claim of unfair competition under section 43(a) of the Lanham Act needs to prove that the mark in question is 1) distinctive and 2) has developed a secondary meaning. For graffiti artists who are not well-known among the larger public or within their field, these requirements may prove to be a major obstacle. However, well-known artists such as Banksy and Revok would be better situated to satisfy these elements. Additionally, since graffiti is a style that is based on originality, each artists’ unique style should be considered trade dress associated and having developed a secondary meaning associated with that particular artist.

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<sup>80</sup> Kaplan, *supra* note 59.

Another option under the Lanham Act is a claim for the false designation of origin. This claim can provide artists with protection and remedy if the artist can prove (1) a false designation was used; (2) is a likelihood of confusion caused by the use; and (3) there is harm. This would be relatively easy for artists to prove; however, the same hurdle exists for artists who are not well-known. If an artist is not well-known, even among his field, confusion may be difficult to prove and the Act would not provide protection.

Trade dress is defined as “the design and shape of the materials in which a product is packaged.”<sup>81</sup> Under the Lanham Act, even unregistered trademarks can be afforded protection only against infringement so long as the marks are valid under common law.<sup>82</sup> Under common law, designs that are *distinct* will be afforded protection.<sup>83</sup> This requirement was developed in the Supreme Court case: *Wal-Mart v. Samara Bros.*<sup>84</sup>

In *Wal-Mart v. Samara Bros.*, the Supreme Court granted certiorari to the Second Circuit and reversed judgment denying petitioner’s motion for judgment as a matter of law.<sup>85</sup> The case involved petitioner Wal-Mart and respondent Samara Bros where petitioner was alleged to have sold knock-offs of Samara Bros dress designs.<sup>86</sup> The Court found in favor of Wal-Mart and held that without a distinctive element, trade dress confusion would be unlikely.<sup>87</sup>

According to the Court, a mark can be distinctive if (1) it is inherently distinctive, where its “intrinsic nature serves to identify a particular source, or (2) a mark has acquired a secondary

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<sup>81</sup> 15 U.S.C.S. § 1125.

<sup>82</sup> 15 U.S.C.S. § 1125(a).

<sup>83</sup> *Wal-Mart Stores v. Samara Bros.*, 529 U.S. 205 (2000).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 208.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 213.

meaning; “whose primary significance, in the minds of the public, is to identify the product’s source rather than the product itself.”<sup>88</sup>

Finally, in order to prove infringement under the Lanham Act, the petitioner must argue that the mark in question was used in commerce, in connection with a good or service, in a manner likely to cause confusion, mistake, or deception in regard to ‘affiliation, connection, or association.’<sup>89</sup> In *Sleekcraft*, the court used an eight factor test to inform likelihood of confusion analysis.<sup>90</sup> These factors are: “(1) strength of the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels; (6) type of goods and degree of care likely to be exercised by the purchaser; (7) defendant’s intent in selecting mark; and (8) likelihood of expansion of the product lines.”<sup>91</sup> This analysis is always a fact-based inquiry and while no one factor is dispositive though certain factors are given more weight than others depending on the specific facts of the case.<sup>92</sup>

Many street artists utilize a tag or signature in their work and can thus claim trade dress infringement of their signature or mark because it identifies a specific source: the artist. Street artists can often work for years in developing their signature style and in cultivating their reputation. Banksy began his street artist career in 1992 and did not begin to gain acclaim until the mid-2000s.<sup>93</sup> Street artists can work for years to develop their reputation and style and as a result can potentially pursue trade dress infringement when third parties use their artwork and commercialize with without the artists’ permission. In addition to providing social and political commentary, Banksy’s artwork style is easily identifiable to him. In this way, his artwork would

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<sup>88</sup> *Id.* at 206.

<sup>89</sup> See Lanham Act, *supra* note 80.

<sup>90</sup> *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979)

<sup>91</sup> *Id.* at 348-9.

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

<sup>93</sup> Dickens, *supra* note 13.

have acquired a secondary meaning, where upon seeing his artwork, any person familiar with this work would be able to identify Banksy as the author of the work.

Reyes, Steel, and Revok could potentially have won against designer Cavalli in their 2015 suit against the designer had they not settled the case. The artists were able to successively argue that the designer removed their signatures pseudonyms and that the signatures constituted copyright management information (CMI) and thus the case could not be dismissed without a trial.<sup>94</sup> Therefore, trade dress infringement of street art could be a hypothetically viable claim for a graffiti artist seeking protection from unauthorized commercial use of their art; however, there may be a limiting factor in who or rather, which artist, may be able to claim such infringement. The wording in the *Wal-Mart* case suggests that the artist may have to be well-known in order to properly apply the “in the minds of the public” test for the distinctiveness of a mark.<sup>95</sup>

In addition to protection from trade dress infringement, the Lanham Act also protects registered marks protection against false designation of origin.<sup>96</sup> Section 43(a) of the Lanham Act provides for a civil cause of action against

“any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false misleading representation of fact, which is likely to cause confusion, or to cause mistake, or deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.”<sup>97</sup>

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<sup>94</sup> Aebra Coe, AMAZON CAN'T ERASE CAVALLI GRAFFITI COPYRIGHT SUIT - LAW360 LAW360 - THE NEWswire FOR BUSINESS LAWYERS (2015), <https://www.law360.com/articles/621306/amazon-can-t-erase-cavalli-graffiti-copyright-suit> (last visited Jul 30, 2018); *Williams v. Cavalli*, No. CV 14-06659-AB (JEMx), 2015 U.S. Dist. LEXIS 34722, 6 (C.D. Cal. Feb. 12, 2015) (“[s]ince Plaintiffs allege that the signatures fall into § 1202(c)(2) and were conveyed in connection with the mural, Plaintiffs adequately claim that the signatures constitute CMI.”).

<sup>95</sup> *Samara Bros.*, *supra* note 82.

<sup>96</sup> Lanham Act, *supra* note 80.

<sup>97</sup> *Id.*

To state a claim of false designation of origin under the Lanham Act, three elements must be met. The elements, as codified in the Lanham Act, are: “(1) the alleged violator must employ a false designation; (2) the false designation must deceive as to origin, ownership, or sponsorship; and (3) the plaintiff must believe that he or she is or is likely to be damaged by such act.”<sup>98</sup>The courts will use the same 8-factor likelihood of confusion analysis as used earlier for trade dress infringement.<sup>99</sup>

While section 43 of the Lanham Act does not allow the use of “false designations of origin, false descriptions, and false representations in the advertising and sale of goods and services, it does not prohibit false statements generally.<sup>100</sup> The Act prohibits only “false or misleading descriptions or false or misleading representations of fact made about one's own or another's goods or services.”<sup>101</sup>

To prove infringement under the Lanham Act, the ‘use in commerce’ element must be met. This means that the street artist will often have to prove that his mark was used in interstate commerce in such a way that it would cause confusion among the public. The term is a term of art and is defined by the Act as a “bona fide use of a mark in the ordinary course of trade.”<sup>102</sup>

This is exactly what Reyes, Rime, and Revok set out to do in their suit against Cavalli. In their complaint, they alleged that Cavalli used material portions of their mural, made commercial items such as dresses and bags, and sold them to the larger public and caused confusion as to the artists’ involvement with the Cavalli brand.<sup>103</sup>

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<sup>98</sup> *Am. Online, Inc. v. IMS*, 24 F. Supp. 2d 548 (E.D. Va. 1998).

<sup>99</sup> *Sleekcraft*, *supra* note 89.

<sup>100</sup> *See generally* Lanham Act, *supra* note 80.

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

<sup>102</sup> *Id.*

<sup>103</sup> *See* Complaint H&M Hennes & Mauritz GBC AB, *supra* note 29.

Ironically, *Gilliam*—the first case which discussed moral rights—also discussed false designation of origin as a potential avenue for relief.<sup>104</sup> In *Gilliam*, the American Broadcasting Network had substantially changed the script of an original work. The Court stated that the script of the show that was aired was changed to such an extent that it changed the nature of the work. The changes were made without the permission of the author and thus the Court stated that in such cases where the work has been changed to such a substantial extent, “it is the writer or performer, rather than the network, who suffers the consequences of the mutilation, for the public will have only the final product by which to evaluate the work...[and] plaintiff’s work seeks to redress the very rights sought to be protected by the Lanham Act, 15 U.S.C. § 1125(a), and should be recognized as stating a cause of action under the statute.”<sup>105</sup> After *Gilliam*, changing the nature of the work become a hallmark for the courts in deciding whether or not the Lanham Act would provide protection to the petitioner.<sup>106</sup>

In *Choe v. Fordham*, the courts made it clear that in order for protection to be provided under the “changing the nature of the work” standard, the change had to be so substantial that the essential or original meaning of the work was essentially lost.<sup>107</sup> This requirement is a potential barrier for street artists as companies that often seek to either use the artwork in a campaign or incorporate it into their brand, often do not radically change the work in question.<sup>108</sup> However, if the statute and case law can be distinguished to recognize that even the action of changing the medium for graffiti by transferring the work onto new mediums such as postcards or clothing would be a dramatic change in the nature of the work as to constitute a loss of the essential

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<sup>104</sup> *Gilliam*, *supra* note 39.

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

<sup>106</sup> *Id.*

<sup>107</sup> *Choe v. Fordham Univ. Sch. of Law*, 920 F. Supp. 44 (S.D.N.Y. 1995).

<sup>108</sup> See Complaint, *Williams v. Cavalli*, *supra* note 36; Complaint *H&M Hennes & Mauritz GBC AB*, *supra* note 29; Complaint *Tierney v. Moschino S.P.A.* *supra* note 38; Complaint, *Tierney v. Camuto Consulting, Inc.*, *supra* note 38. *Contra* Complaint, *Hayuk v. Starbucks Corp.* 1:15-cv-04887 (S.D.N.Y. N.Y. Jun 23, 2015).

meaning of the original work, street artists would have a better chance in protecting their works from commercialization under trademark law.

Another barrier for street artists is the ‘use in commerce’ element needed for protection under the Act. The Lanham Act is “designed to make actionable the misleading use of marks in interstate commerce and to protect those engaged in interstate commerce against unfair competition,”<sup>109</sup> and technically it is not the artists but rather the infringers who would engage in interstate commerce with the artists’ works.

Still, there are three types of marks that artists can try to qualify for protection under the Lanham Act. These are the artists’ style, his signature, and his pseudonym. An artist’s pseudonym is often used to identify the artist with his work. Since graffiti started as an illegal art form, a pseudonym was a necessary part of the craft. For artists such as Banksy whose work still consists of illegal and often controversial works, a pseudonym is often the only name the public knows and can associate with their artwork. Since the pseudonym is particular to a unique artist, the name essentially functions in the same way that a tradename would function, calling the public’s attention to the work product that the name is associated with. An artists’ signature and style can benefit from similar arguments as they also are often very distinct and a representation of a particular artist.

In the Eastern District of Virginia, a marking company, IMS, accidentally send close to 60 million unauthorized email advertising with “aol.com” in the subject line.<sup>110</sup> The plaintiffs, AOL, filed a complaint alleging trademark infringement.<sup>111</sup> The court found that AOL had a viable claim under which relief could be sought because the public was likely confused about the

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<sup>109</sup> Lanham Act, *supra* note 80.

<sup>110</sup> *IMS*, *supra* note 98.

<sup>111</sup> *Id.*



sender of the email—some people could rightly have assumed the emails originated with AOL. A similar argument can be made street art when an infringer uses or incorporates the original artwork into a new product—a follower of the original graffiti artist, by seeing the artists’ signature on the infringers goods and services would assume that the artist was working with the company.

In the way that the use of the AOL’s signature in the email by IMS likely caused confusion, graffiti artists can claim that the use of their art by retail brands and companies have the potential to cause confusion. This is particularly evident when the art includes the artists’ signature as it did in the Cavalli case. Among the many allegations in the complaint, the artists asserted that Cavalli appropriated their art and signatures in such a way that their use by Cavalli signaled to their followers and the general public that the artists were associated with and approved of the Cavalli brand.<sup>112</sup> Particularly, the artists alleged that the unauthorized use by Cavalli harmed their reputation because followers of the artists believed that the artists had “sold out.”<sup>113</sup>

### **Conclusion**

Though there are advantages and disadvantages to each type of protection; however, even within each type of relief, graffiti artists face particular obstacles in their pursuit of justice. There are three major hurdles for street artists seeking protections under VARA. The main obstacle with VARA is that it requires that the work of the artist be of ‘recognized stature.’ This restriction is very limiting on the artist because it requires that the artist have some stature and be known among his community as an artist. Additionally, another shortcoming of VARA is that it does not protect from third-party commercialization of the art; VARA provides protection

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<sup>112</sup> See Complaint, Williams v. Cavalli, *supra* note 36.

<sup>113</sup> *Id.*

against destruction of the art but it does not protect against economic harms that the artist may suffer. Finally, infringers could be able to use against graffiti artists would the unclean hands doctrine as graffiti is often put on private property without permission and therefore, would not be provided protection under VARA.

Similarly, Copyright is an as yet untested source of protection for street artists. Most cases involving copyright protection have settled outside of court before a decision has been reached on the issue. This happened in the case against Cavalli—with both parties coming to a confidential settlement. In the more recent case with Revok, while H&M initially filed a complaint, they later withdrew it by pressure from the public and are potentially working towards a settlement as well. One case, *Villa*, provided a glimpse as to what the outcome of such cases would be if the courts were left to decide. For street artists, the outcome was not a good one—*Villa* placed three obstacles in front of street artists: (1) registration of their work; (2) originality of their work; and (3) legality of their work. While the additional requirements of registration and originality shows the public disfavor of graffiti as an art, the real obstacle for street artists would be the legality of their work. Most graffiti is done outside the bounds of society and hence, illegally painted on private or public property.

While imperfect, the Lanham Act, is the best avenue for protection in terms of protecting the artists' economic freedom. Under trade dress infringement or false designation of origin, the Lanham Act provides street artists with a better chance at success. One way to frame the argument for protection of graffiti is that art is a "good" and graffiti is a form of art and therefore, the Lanham Act should extend protection because the defendant's failure to give proper attribution to the artist gives the public the false illusion that the infringer is the owner of the art. Taking a picture of the artwork and reprinting it on a different product is the same as

repackaging the good and reselling it as your own. Additionally, there are strong policy reasons for protecting graffiti and encouraging the creation of art, such as the advancement and protection of the arts.

Furthermore, in using the false designation of origin analysis, the unclean hands doctrine can be flipped on defendants like Roberto Cavalli to prevent them from profiting from their wrongdoing. Instead of allowing these defendants to use this affirmative defense as a shield to liability, the defense can instead be a sword for plaintiffs.

Trademark protection via the Lanham Act may be the best possible protection that street artists can utilize to protect their signature, artistic style, and pseudonym. An artists' name can act as a trade name deserving of protection. However, under section 43(a) of the Lanham Act, the artist must have used his mark in commerce to pursue an infringement claim. The "use in commerce" is a term of art defined under the Lanham Act as the "bona fide use of a mark in the ordinary course of trade."<sup>114</sup> Commerce under the Act refers to activities that can be regulated under the Commerce Clause of the US Constitution.

For artists who want to commercialize their street art, registering a trademark may be the best solution to prevent unauthorized commercialization of their work. Considering that most street art is not done with commercialization in mind, there is inadequate protection afforded to a medium of art that has become increasingly popular and accepted among society and US copyright law needs to change to provide adequate protection for these artists. Indeed, many if not most street artists do not undertake such an act for commercializing their art. Increasingly, street artists paint to provide commentary on a local or global scale about the community. Famed British artists Banksy gained recognition through such political and social commentary. Banksy

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<sup>114</sup> Lanham Act, *supra* note 80.

has transversed the globe to paint and people have flocked to see his artwork before it is eventually taken down and destroyed.

However, in the absence of such statutory change, artists seeking to enhance their art may need to think more creatively as to how they can showcase their talent without breaking the law or burdening private owners with potentially unwanted graffiti and removal costs. Artists can look to the recent 5Pointz case for inspiration. In February, the Second Circuit awarded a ruling against the defendant, ordering him to pay \$6.75 million for destroying thirty-six works of art of recognized stature.

As the case goes through the appeals process, 5Pointz is set to become a landmark case, providing clarity not only in VARA claims, but in the larger street art community as to what protections may be available as graffiti continues to challenge society and copyright law.