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## Tear Down This Wall?: The Destruction of Sanctioned Street Art Under U.S. and Italian Law

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## Tear Down This Wall?: The Destruction of Sanctioned Street Art Under U.S. and Italian Law

### Cover Page Footnote

Sara Rosano is an Italian attorney, and she has an LL.M. in U.S. and Comparative Law ('20) from Fordham University School of Law. Birgit Kurtz is an attorney in New York City; she has a German law degree from Westfälische Wilhelms Universität, Münster, Germany, as well as a J.D. ('96) and an LL.M. in Corporate Compliance ('19) from Fordham University School of Law. The authors are grateful to Massimo Sterpi of the law firm of Gianni, Origoni, Grippo, Cappelli & Partners in Rome, Italy, for his invaluable advice on Italian art law.

# Tear Down This Wall?

## The Destruction of Sanctioned Street Art Under U.S. and Italian Law

Sara Rosano and Birgit Kurtz\*

*The United States and Italy are important countries for art and artists, including “street art”—also known as “aerosol art.” How does the law treat street artists in the two countries? Specifically, what are the legal consequences if an artist creates aerosol art on a wall or building with the property owner’s permission, and the property owner tears down the wall or building, thus destroying the artwork? In the United States, the 2018 decision in the 5Pointz case provided a detailed analysis of the applicable law; the court found in favor of a group of aerosol artists against the property owner. How would the same situation be adjudicated in Italy? Which party’s interests would be protected? It appears that, even though works of street art are generally copyrightable in Italy, the conflict between property owners and street artists would most likely be resolved in favor of the property owner. The authors recommend that Italy enact a statute affirmatively protecting sanctioned street art.*

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\* Sara Rosano is an Italian attorney, and she has an LL.M. in U.S. and Comparative Law (‘20) from Fordham University School of Law. Birgit Kurtz is an attorney in New York City; she has a German law degree from Westfälische Wilhelms Universität, Münster, Germany, as well as a J.D. (‘96) and an LL.M. in Corporate Compliance (‘19) from Fordham University School of Law. The authors are grateful to Massimo Sterpi of the law firm of Gianni, Origoni, Grippo, Cappelli & Partners in Rome, Italy, for his invaluable advice on Italian art law.

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## INTRODUCTION

Graffiti has been around for thousands of years—whether in French caves, on Egyptian cliffs, or on the walls of the ancient city of Pompeii.<sup>1</sup> In modern times, graffiti was initially considered illegal vandalism.<sup>2</sup> But recently, a form of graffiti “has begun to gain cultural and artistic credibility around the world.”<sup>3</sup> That type of graffiti has been rebranded as “street art.”<sup>4</sup>

The United States and Italy are important countries for art and artists, including “street art”—also known as “aerosol art.”<sup>5</sup> How does the law treat street artists in the two countries? The goal of this Article is to answer this question by examining both the applicable law and recent case law involving aerosol art in each country, and then comparing the two. Specifically, this Article will analyze what the legal consequences of the following scenario are: an artist creates aerosol art on a wall or building with the owner’s permission, and the property owner subsequently tears down the wall or building, thus destroying the artwork.

In the United States, this question was answered in the landmark *5Pointz* decision issued in early 2018.<sup>6</sup> As will be discussed in more detail below, the *5Pointz* decision was a revolutionary judgment in favor of aerosol artists and against the property owner.<sup>7</sup> Would the

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<sup>1</sup> See Cathay Y. Smith, *Street Art: An Analysis Under U.S. Intellectual Property Law and Intellectual Property’s “Negative Space” Theory*, 24 DEPAUL J. ART, TECH. & INTELL. PROP. L. 259, 260 (2014).

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

<sup>3</sup> *Id.* at 260–61.

<sup>4</sup> *Id.* at 260.

<sup>5</sup> See, e.g., Matt Randal, *10 American Urban Artists You Should Know*, WIDEWALLS (July 8, 2015), <https://www.widewalls.ch/10-american-urban-artists/> [<https://perma.cc/6AX3-RD54>]; Laurent Jacquet, *20 Italian Street Artists You Absolutely Need to Know about*, STREETART360 (Mar. 9, 2018), <https://streetart360.net/2018/03/09/best-20-italian-street-artists/> [<https://perma.cc/DMX6-MBT8>].

<sup>6</sup> *Cohen v. G & M Realty L.P.*, 320 F. Supp. 3d 421 (E.D.N.Y. 2018), *aff’d sub nom. Castillo v. G & M Realty L.P.*, Nos. 18-498-cv (L), 18-538-cv (CON), 2020 WL 826392, 2020 U.S. App. LEXIS 5228 (2d Cir. Feb. 20, 2020). Because the Second Circuit decision was issued just before this Article went to print, the below discussion of the *5Pointz* case is focused on the proceeding in the district court.

<sup>7</sup> See *infra* Part I.C.

same scenario yield the same result in Italy? Which party in the dispute would be protected? In Italy, even though a work of street art is generally copyrightable even if it emanates from illegal activity, it appears that the conflict between property owner and street artist is, in practice, resolved in favor of the property owner.

This Article will analyze the law applicable to street art in the United States and Italy. Part I will examine street art law in the United States, starting in Part I.A with a brief look at the Berne Convention of 1886, which introduced the concept of moral rights. Part I.B. will examine the Visual Artists Rights Act of 1990 (“VARA”), which enacted those moral rights into U.S. law. The Article will next recount the application of VARA in the *5Pointz* litigation in New York in Part I.C and then summarize the interest-balancing approach under current U.S. law in Part I.D. Part II will explore street art law in Italy by setting forth the relevant sources of Italian law, i.e., the Italian Constitution, the Italian Criminal Code, including three important cases, and the Italian Code of Cultural Heritage and Landscape. Part II will then analyze the legal conflicts that arise in street art cases under Italian Civil Law. In Part III, the Article will discuss possible future developments in Italy and suggest that Italian law follow the United States’ example of fixing the parties’ rights in a statute similar to VARA.

## I. STREET ART LAW IN THE UNITED STATES

U.S. law on the status of street art is, for the most part, found in the federal copyright law,<sup>8</sup> specifically in VARA, which is the United States’ response to the Berne Convention’s establishment of “moral rights.”<sup>9</sup> “Moral rights” are independent of an author’s economic rights in his or her work, and include both the right to claim authorship of the work, and to object to certain distortions, modifications, and other derogatory action regarding the work. The 2018 federal court decision regarding the destruction of the *5Pointz* site in New York created wide awareness of the issues that can arise

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<sup>8</sup> 17 U.S.C. §§ 101 *et seq.* (2012).

<sup>9</sup> See Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, S. TREATY DOC. NO. 27, 99th Congress, 2d Sess. 41 (1986) [hereinafter Berne Convention].

when a property owner destroys a building covered in street art.<sup>10</sup> The *5Pointz* decision shows that U.S. law grants a level of protection to street artists' moral rights that does not inequitably violate the rights of property owners.

*A. The Berne Convention of 1886*

The Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”)<sup>11</sup> was signed in 1886 by ten countries, including Italy.<sup>12</sup> More than 100 years later, in 1988, the United States acceded to the Convention.<sup>13</sup> In addition to protecting certain economic rights,<sup>14</sup> the Berne Convention also provides for “moral rights” by protecting the attribution and integrity of artists’ works.<sup>15</sup> Moral rights “spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist’s personality, as well as the integrity of the work, should therefore be protected and preserved.”<sup>16</sup> Article 6*bis* of the Berne Convention grants the author of a work of art “the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work which would be prejudicial to his honor or reputation.”<sup>17</sup> Thus, the essence of the

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<sup>10</sup> See, e.g., Alan Feuer, *Graffiti Artists Awarded \$6.7 Million for Destroyed 5Pointz Murals*, N.Y. TIMES (Feb. 12, 2018), <https://www.nytimes.com/2018/02/12/nyregion/5pointz-graffiti-judgment.html> [<https://perma.cc/XPJ6-MCXV>]. The *5Pointz* case will be discussed in detail *infra* Part I.C.

<sup>11</sup> Berne Convention, *supra* note 9. For the text of the Berne Convention and a list of the contracting parties, see *WIPO-Administered Treaties*, WIPO, [https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15) [<https://perma.cc/WE5X-SN8Z>].

<sup>12</sup> See the list of contracting parties to the Berne Convention, *WIPO-Administered Treaties*, *supra* note 11.

<sup>13</sup> *Id.*

<sup>14</sup> Economic rights protected under the Berne Convention include the right to translate, the right to make adaptations and arrangements, the right to perform certain works in public, the right to recite literary works in public, the right to communicate to the public the performance of such works, the right to broadcast works, and the right to make reproductions. See Berne Convention, *supra* note 9, arts. 8–12.

<sup>15</sup> The 1928 Rome revisions to the Berne Convention added moral rights to the treaty. See Elizabeth Schéré, *Where Is the Morality? Moral Rights in International Intellectual Property and Trade Law*, 41 FORDHAM INT’L L.J. 773, 777 (2018).

<sup>16</sup> *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995).

<sup>17</sup> Berne Convention art. 6*bis*, as revised, provides in full:

Berne Convention’s “moral rights” is the potential for *reputational harm* to artists.

The Berne Convention is significant because it led to VARA, the statute at the center of the *5Pointz* case on the protection of authorized street art. The balancing of interests promoted by VARA could be instructive to the Italian legislature in resolving the current legal standing of street artists in Italy, which the authors of this Article perceive as unfair.

### *B. The Visual Artists Rights Act of 1990*

“[I]ntended to protect the ‘moral rights’ of artists,”<sup>18</sup> VARA was enacted to implement the United States’ obligations under the Berne Convention.<sup>19</sup> “Because they are personal to the artist, moral rights exist independently of an artist’s copyright in his or her work.”<sup>20</sup> VARA provides, *inter alia*, the right to prevent the destruction of art works—but only if the works are of “recognized stature.”<sup>21</sup>

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(1) Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

<sup>18</sup> *English v. BFC & R E. 11th St. LLC*, 1997 WL 746444, at \*3 (S.D.N.Y. Dec. 3, 1997), *aff’d sub nom. English v. BFC Partners*, 198 F.3d 233 (2d Cir. 1999).

<sup>19</sup> Visual Artists Rights Act of 1990, Pub. L. No. 101-650, title VI, § 604, 104 Stat. 5130 (1990).

<sup>20</sup> *Carter*, 71 F.3d at 81 (citing 2 NIMMER ON COPYRIGHT 8D-4 & n.2 (1994)).

<sup>21</sup> *English*, 1997 WL 746444, at \*3; *see also generally* Christopher J. Robinson, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 *FORDHAM L. REV.* 1935 (2000).



VARA is found in 17 U.S.C. § 106A and is entitled “Rights of certain authors to attribution and integrity.” Subsection (a) of VARA is entitled “Rights of Attribution and Integrity” and provides that the author of a work of visual art has different types of rights.<sup>22</sup> Specifically, subject to certain limitations,<sup>23</sup> the author has the rights, *inter alia*,<sup>24</sup> 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 . . . ;<sup>25</sup> and
- prevent any *destruction of a work of recognized stature*, and any intentional or grossly negligent

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<sup>22</sup> See 17 U.S.C. § 106A(a) (2012).

<sup>23</sup> The enumerated rights are “[s]ubject to section 107 and independent of the exclusive rights provided in section 106 . . . ” *Id.* Section 107 is entitled “Limitations on exclusive rights: Fair use” and provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. *Id.* § 107.

<sup>24</sup> An author also has the rights to claim authorship of a work; prevent the use of his or her name as the author of any work of visual art which he or she did not create; and 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 *See id.* §§ 106(a)(1)(A); 106A(a)(1)(B)–(a)(2).

<sup>25</sup> *Id.* § 106A(a)(3)(A) (emphasis added). This right is “subject to the limitations set forth in section 113(d).” *Id.*

destruction of that work is a violation of that right. . . .<sup>26</sup>

Importantly, the rights of an author under (a)(3)—i.e., the rights to prevent distortion, mutilation, other modification, or destruction—are subject to § 113(d), which distinguishes between *removable* and *non-removable* works of art.<sup>27</sup>

A work of visual art is “*non-removable*” if it “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.”<sup>28</sup> If an author consents to the installation of a *non-removable* work in a building, then, under certain circumstances, that author does not have the right, *inter alia*, to prevent the intentional distortion, mutilation, or other modification of that work.<sup>29</sup> For the author’s consent to result in this exclusion, the consent must have been given either: (i) before VARA’s effective date (December 1, 1990) or (ii) in a writing signed by both the building owner and the author that “specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal.”<sup>30</sup>

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<sup>26</sup> See *id.* § 106A(a)(3)(B) (emphasis added). This right is also “subject to the limitations set forth in section 113(d).” *Id.*

<sup>27</sup> Section 113(d) provides:

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 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 § 106A(a) shall not apply.

*Id.* § 113(d) (emphasis added).

<sup>28</sup> See *id.* § 113(d)(1)(A).

<sup>29</sup> See *id.* § 113(d)(1)(B).

<sup>30</sup> See *id.* § 113(d)(1).

A work of visual art is “removable” if it can be removed from a building without its destruction, distortion, mutilation, or other modification.<sup>31</sup> If a property owner wants to remove a removable work, the work’s author has the right to prevent the modification or destruction of the work, unless the owner has unsuccessfully tried to notify the author of his intentions,<sup>32</sup> or the owner did notify the author in writing but the author “failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.”<sup>33</sup>

Finally, subsection (3) of section 113(d) provides for the registration with the Copyright Office of works of art on buildings.<sup>34</sup> This provision gives authors of works of visual art that have been incorporated in or made part of a building the opportunity to record their identity and address with the Copyright Office.<sup>35</sup> The provision

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<sup>31</sup> See *id.* § 113(d)(2), which provides, in pertinent part (emphasis added):

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.

<sup>32</sup> *Id.* § 113(d)(2)(A). The statute further provides: “[f]or purposes of subparagraph (A), an owner shall be presumed to have made a diligent, good faith attempt to send notice if the owner sent such notice by registered mail to the author at the most recent address of the author that was recorded with the Register of Copyrights pursuant to paragraph (3).” *Id.* § 113(d)(2).

<sup>33</sup> *Id.* § 113(d)(2)(B).

<sup>34</sup> *Id.* § 113(d)(3). The subsection states:

The Register of Copyrights shall establish a system of records whereby any author of a work of visual art that has been incorporated in or made part of a building, may record his or her identity and address with the Copyright Office. The Register shall also establish procedures under which any such author may update the information so recorded, and procedures under which owners of buildings may record with the Copyright Office evidence of their efforts to comply with this subsection.

*Id.*; see also Visual Arts Registry, 37 C.F.R. § 201.25 (2019).

<sup>35</sup> 17 U.S.C. § 113(d)(3).

further allows for “procedures under which owners of buildings may record with the Copyright Office evidence of their efforts to comply with” their obligations under Section 113(d).<sup>36</sup> The provisions in § 113(d) are highly relevant to the rights of aerosol artists who create works of art on the property of others and to the procedure that the parties must follow to protect their rights.

Since the enactment of VARA, some courts have had occasion to opine on the statute’s scope. For example, in *English v. BFC & R East 11th Street LLC*, the Southern District of New York held that VARA does not apply to works of street art that have been placed on the property illegally.<sup>37</sup> Viewing the alternative as “constitutionally troubling,” irrational, and contrary to Congressional intent, the *English* court astutely noted that, if VARA protected unsanctioned street artworks, then “parties could effectively freeze development of vacant lots by placing artwork there without permission.”<sup>38</sup> This holding has been described as “consistent with the application of the unclean hands doctrine.”<sup>39</sup>

Another court has, however, raised doubts regarding this part of the *English* holding. In *Pollara v. Seymour*, the Northern District of New York explained that “*English* is limited to the situation where the artwork cannot be removed without destroying it.”<sup>40</sup> Furthermore, in dictum, the court contended that “there is no basis in the statute to find a general right to destroy works of art that are on property without the permission of the owner.”<sup>41</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *English v. BFC & R E. 11th St. LLC*, 1997 WL 746444, at \*4 (S.D.N.Y. Dec. 3, 1997), *aff’d sub nom. English v. BFC Partners*, 198 F.3d 233 (2d Cir. 1999).

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

<sup>39</sup> See, e.g., Celia Lerman, *Protecting Artistic Vandalism: Graffiti and Copyright Law*, 2 N.Y.U. J. INTELL. PROP. & ENT. L. 295, 332 (2013). The doctrine of “unclean hands” is an equitable defense that bars relief to a party that has engaged in inequitable behavior (e.g., fraud, deceit, unconscionability or bad faith) related to the subject matter of that party’s claim. See *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814–15 (1945).

<sup>40</sup> *Pollara v. Seymour*, 150 F. Supp. 2d 393, 396 n.4 (N.D.N.Y. 2001), *aff’d*, 344 F.3d 265 (2d Cir. 2003).

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

Meanwhile, some courts have opined on other issues of VARA's applicability. For example, in *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel*,<sup>42</sup> the First Circuit held that *unfinished* works can be protected by VARA.<sup>43</sup> And in *Phillips v. Pembroke Real Estate, Inc.*,<sup>44</sup> the First Circuit held that "VARA does not apply to site-specific art at all."<sup>45</sup> Further, in *Carter v. Helmsley-Spear, Inc.*,<sup>46</sup> the Second Circuit confirmed that the general rule excluding "works for hire" from the definition of "works of visual art"<sup>47</sup> applies to VARA.<sup>48</sup>

When VARA does apply, it is important that the parties follow the rules set forth in the statute, including the requirement that the property owner make a good faith attempt to notify the artist—and then grant the artist 90 days to remove the work—before destroying the work.<sup>49</sup> In addition to complying with VARA's procedures, it is a best practice for the property owner and the artist to memorialize their agreement in a detailed writing, preferably with the advice of experienced counsel.<sup>50</sup> Nonetheless, there is no guarantee how a court will interpret VARA, due at least in part to the dearth of detailed federal appeals court decisions analyzing VARA to date.

### C. Application of VARA in the 5Pointz Case

The recent *5Pointz* case illustrates many of the issues that arise under VARA when a property owner destroys works of street art.<sup>51</sup>

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<sup>42</sup> 593 F.3d 38 (1st Cir. 2010).

<sup>43</sup> *Id.* at 50–52.

<sup>44</sup> 459 F.3d 128 (1st Cir. 2006).

<sup>45</sup> *Id.* at 143.

<sup>46</sup> 71 F.3d 77 (2d Cir. 1995).

<sup>47</sup> 17 U.S.C. § 101 ("A work of visual art does not include . . . (B) any work made for hire . . .").

<sup>48</sup> *Carter*, 71 F.3d at 85–88.

<sup>49</sup> *See* 17 U.S.C. § 113(d)(2).

<sup>50</sup> *See* *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, 41 (1st Cir. 2010) ("Unfortunately, the parties never memorialized the terms of their relationship or their understanding of the intellectual property issues involved in the installation in a written agreement.").

<sup>51</sup> *See* *Cohen v. G & M Realty L.P.*, 320 F. Supp. 3d 421 (E.D.N.Y. 2018), *aff'd sub nom.* *Castillo v. G & M Realty L.P.*, Nos. 18-498-cv (L), 18-538-cv (CON), 2020 WL 826392, 2020 U.S. App. LEXIS 5228 (2d Cir. Feb. 20, 2020).

In that case, a group of aerosol artists sued the owner of a building who had destroyed their works, and were awarded several million dollars in damages.<sup>52</sup> While the outcome of the case is based on its unique facts and circumstances, the court's discussion of the various factual and legal issues serves as a useful roadmap for the application of VARA in other cases.

The plaintiffs were twenty-one artists who had created aerosol art works in, on, and around a group of warehouse buildings known as “5Pointz” in Long Island City, Queens, New York.<sup>53</sup> The defendants, Gerald Wolkoff and four of his wholly-owned real estate entities, held title to the 5Pointz buildings.<sup>54</sup> Starting in the early 1990s, aerosol artists had painted on the dilapidated warehouses in a then-“crime infested” neighborhood.<sup>55</sup> In 2002, Wolkoff put Jonathan Cohen, a successful aerosol artist and one of the plaintiffs, in charge of the site.<sup>56</sup> Over the next decade, Cohen organized and oversaw all activities in and around the buildings. Working seven days a week with no pay, Cohen created systems and rules for the site, and acted as the curator of the art works created there.<sup>57</sup> The site became a tourist attraction and was featured in movies, TV shows, and music videos.<sup>58</sup> Initially, Wolkoff liked what Cohen did and “thought it was terrific.”<sup>59</sup>

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<sup>52</sup> As set forth in more detail below, the court multiplied the number of affected works of art (forty-five) by the maximum award of statutory damages (\$150,000) under 17 U.S.C. § 504(c)(2), for a total award of \$6,750,000. *Cohen*, 320 F. Supp. 3d at 439.

<sup>53</sup> *See id.* at 427. Long Island City (also known as “LIC”) is a formerly industrial neighborhood right across the East River from Manhattan—a desirable location that has recently become gentrified and was the potential home to Amazon, Inc.’s failed HQ2. *See* J. David Goodman, *Amazon Pulls Out of Planned New York City Headquarters*, N.Y. TIMES (Feb. 14, 2019), <https://www.nytimes.com/2019/02/14/nyregion/amazon-hq2-queens.html> [<https://perma.cc/4QMV-VMTG>].

<sup>54</sup> *Cohen*, 320 F. Supp. 3d at 427.

<sup>55</sup> *Id.* at 425.

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

<sup>57</sup> *Id.* at 433.

<sup>58</sup> For example, the movie NOW YOU SEE ME (K/O Paper Products & TIK Films 2013) was shot in part at the 5Pointz site. *See Now You See Me*, MOVIE-LOCATIONS, <https://www.movie-locations.com/movies/n/Now-You-See-Me.php> [<https://perma.cc/A5HD-CBG7>].

<sup>59</sup> *Cohen*, 320 F. Supp. 3d at 432.

When the neighborhood improved, Wolkoff decided to convert the site into luxury apartments.<sup>60</sup> Upon learning in May 2013 that Wolkoff sought the legal approvals necessary to undertake the conversion, Cohen applied for the preservation of the site as a landmark with the New York City Landmarks Preservation Council because of its cultural significance.<sup>61</sup> That application was, however, denied because the artworks were not old enough.<sup>62</sup> Cohen also tried to raise funds to buy the site, but the variance issued in October 2013—converting the site to land on which the construction of condominiums would be legally permitted—raised the value from \$40 million to \$200 million, which put Cohen’s re-purchase plan out of reach.<sup>63</sup> Thereafter, Cohen and the other plaintiffs commenced a lawsuit in the Eastern District of New York to enjoin Wolkoff from destroying *5Pointz*.<sup>64</sup>

In November 2013, the court denied the artists’ application for a preliminary injunction.<sup>65</sup> In the opinion that followed eight days later, the court noted “that the rights created by VARA were at tension with conventional notions of property rights and tried to balance these rights.”<sup>66</sup> The court sought to achieve such a balance by, on the one hand, allowing Wolkoff to tear down the warehouses so that he could build apartments, but on the other hand, cautioning him that he may be subject “to potentially significant monetary damages” if the art works at issue were ultimately determined “to be of ‘recognized stature’ under VARA.”<sup>67</sup>

After the court denied the artists’ application but before it issued its written opinion, Wolkoff had the site whitewashed, which covered virtually all the artworks with white paint.<sup>68</sup> The plaintiffs were also no longer permitted to enter the site.<sup>69</sup> Thereafter, the

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<sup>60</sup> *Id.* at 434.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

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

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

<sup>65</sup> *Cohen v. G & M Realty L.P.*, 988 F. Supp. 2d 212 (E.D.N.Y. 2018).

<sup>66</sup> *Cohen*, 320 F. Supp. 3d at 427.

<sup>67</sup> *Cohen*, 988 F. Supp. 2d at 227.

<sup>68</sup> *Cohen*, 320 F. Supp. 3d at 427.

<sup>69</sup> *Id.* at 435.

focus of the case shifted from a lawsuit seeking to *prevent the destruction* of the site to one *seeking damages* for the destruction of forty-nine works at the site that the plaintiffs specifically selected for their claims under VARA.<sup>70</sup>

Following a three-week trial involving “complex” issues,<sup>71</sup> the court issued a detailed decision in February 2018.<sup>72</sup> The court explained that “VARA amended existing copyright law to add protections for two ‘moral rights’ of artists: the rights of attribution and integrity.”<sup>73</sup> It held that VARA applied to the plaintiffs’ aerosol artworks as works of “visual art.”<sup>74</sup> As a result of this application, the plaintiffs had “the right to sue to prevent the destruction of [their] work[s]” if the works are “of ‘recognized stature’” and the right “to seek monetary damages . . . if the work[s] w[ere] distorted, mutilated, or otherwise modified to the prejudice of the artist’s honor or reputation.”<sup>75</sup>

The court held that there was no legal support for the defendants’ argument that the artworks were not protected by VARA because they were temporary works.<sup>76</sup> The court found that forty-five of the forty-nine pieces at issue were works of “recognized stature” by applying a two-prong test developed by the district court in *Carter v. Helmsley-Spear, Inc.*<sup>77</sup> Under that test, plaintiffs had to show that the works at issue have “stature”—i.e., that they are “viewed as meritorious”—and that such stature “is ‘recognized’ by art experts.”<sup>78</sup> Based on the testimony of the twenty-one plaintiffs,

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

<sup>71</sup> *Id.* at 427, 431. The trial was held before an “advisory jury” pursuant to Fed. R. Civ. P. 39(c), consisting of eight jurors. *Id.* at 430–31. Judge Block explained that, while an advisory jury allows for “community participation,” he was not bound by any of the jury’s findings. *Id.* at 430. Instead, the judge announced that he would “take the jury’s verdicts under advisement” in making his decisions, “especially on issues that require judgment of the community.” *Id.*

<sup>72</sup> *See id.*

<sup>73</sup> *Id.* at 428.

<sup>74</sup> *Id.* (quoting 17 U.S.C. § 106A(a)(3)).

<sup>75</sup> *Id.* (quoting 17 U.S.C. § 106A(a)(3)).

<sup>76</sup> *Id.* at 435–37.

<sup>77</sup> *Id.* at 437; *see also* *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994), *aff’d in part, vacated in part, rev’d in part*, 71 F.3d 77 (2d Cir. 1995).

<sup>78</sup> *Cohen*, 320 F. Supp. 3d at 437 (quoting *Carter*, 861 F. Supp. at 325).



other fact witnesses, and the parties' multiple expert witnesses, as well as a "plethora of exhibits,"<sup>79</sup> the court found that the thirty-seven pieces that had been selected by Cohen for prominent wall space had acquired recognized stature.<sup>80</sup> The court adopted the advisory jury's finding that eight more works had acquired that stature and that four other pieces had not.<sup>81</sup>

The court did not award actual damages because the works did not have a provable market value due to the "unique challenges and costs of selling those artworks at *5Pointz* which were the size of a building wall."<sup>82</sup> Instead, the court awarded statutory damages, which "exist in part because of the difficulties in proving—and providing compensation for—actual harm in copyright infringement actions."<sup>83</sup> Statutory damages are "not meant to be merely compensatory or restitutionary" but are also meant "to discourage wrongful conduct."<sup>84</sup> While ordinarily, an award of statutory damages may be \$750 to \$30,000 per work, in cases of *willful* conduct by the defendant, an award may be up to \$150,000 per work.<sup>85</sup>

The court held that Wolkoff acted willfully and viewed Wolkoff's whitewashing immediately after the court's rejection of the

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<sup>79</sup> *Id.* at 438.

<sup>80</sup> *Id.* at 431–32, 439–40.

<sup>81</sup> *Id.* at 440. As to those four works, plaintiffs also did not show that the works were distorted so as to prejudice the artists' honor or reputation. *Id.* at 441.

<sup>82</sup> *Id.* at 442.

<sup>83</sup> *Id.* at 443 (quoting *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 460 (D. Md. 2004)).

<sup>84</sup> *Id.* (quoting *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 113 (2d Cir. 2001)).

<sup>85</sup> See 17 U.S.C. § 504(c):

Statutory Damages. (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just. . . .

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000.

preliminary injunction as “an act of pure pique and revenge for the nerve of the plaintiffs to sue to attempt to prevent the destruction of their art.”<sup>86</sup> The court noted that, had Wolkoff delayed the destruction of the site until he received his permit a few months later, “the court would not have found that he had acted willfully.”<sup>87</sup> Thus, the court quintupled the maximum available damages because Wolkoff chose to destroy the works before he could even develop the new luxury condos. This holding adds another wrinkle to future disputes between street artists and property owners and suggests that the bar for willful behavior under VARA may be somewhat contingent on the immediate development potential of the property on which the street art is located. In other words, the success of plaintiff artists may depend on the immediacy of construction and the extent to which the property owners have already obtained approval for their developments. Thus, if a developer has all permits in place and is perhaps a mere day or two away from breaking ground, a court might look more favorably on that developer’s decision to destroy a wall containing aerosol art than the *5Pointz* court did on Wolkoff’s actions.

In order to determine the amount of statutory damages, the court analyzed the six factors recognized by the Second Circuit in *Bryant v. Media Right Products* as relevant to the determination of fair statutory damages amounts in copyright infringement disputes:

- (1) the infringer’s state of mind;
- (2) the expenses saved, and profits earned, by the infringer;
- (3) the revenue lost by the copyright holder;
- (4) the deterrent effect on the infringer and third parties;
- (5) the infringer’s cooperation in providing evidence concerning the value of the infringing material; and
- (6) the conduct and attitude of the parties.<sup>88</sup>

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<sup>86</sup> *Cohen*, 320 F. Supp. 3d at 445.

<sup>87</sup> *Id.* at 447.

<sup>88</sup> *Id.* at 445 (quoting *Bryant v. Media Right Prods.*, 603 F.3d 135, 144 (2d Cir. 2010)).

The court concluded that, with his behavior, “Wolkoff rings the bell on each relevant factor,”<sup>89</sup> supporting the maximum award of statutory damages for willful conduct towards each of the forty-five eligible works, for a total award of \$6.75 million.<sup>90</sup> In addition, the artists asked the court to grant them an award of attorneys’ fees in the amount of \$2.6 million for the litigation,<sup>91</sup> which had lasted more than four years.<sup>92</sup> The defendants appealed the district court’s final decision, and the Second Circuit affirmed on February 20, 2020.<sup>93</sup>

#### D. *Balancing of Interests*

As the *English* court noted, the legal conflict between a street artist and a property owner lies in the clash of two very important interests.<sup>94</sup> The question that must be answered is which rights are more important, i.e., more worthy of protection: the constitutionally guaranteed rights of property owners<sup>95</sup>; or the “moral rights” of street artists in their works? VARA tries to strike a just and workable balance.<sup>96</sup> Nevertheless, the *5Pointz* case shows the difficulties encountered by street artists in protecting their rights, even in light of VARA’s enhanced protection.<sup>97</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 445–47.

<sup>91</sup> See *Graffiti Artists Request \$2.6 Million in Attorneys’ Fees After Last Month’s Victory*, FOX ROTHSCHILD LLP (Mar. 20, 2018), <https://artlaw.foxrothschild.com/2018/03/articles/litigation-issues/graffiti-artists-request-2-6-million-in-attorneys-fees-after-last-months-victory/> [<https://perma.cc/A8PH-TCEK>].

<sup>92</sup> The lawsuit was commenced in October 2013, and the court issued its decision in February 2018. See *supra* text accompanying notes 64, 72.

<sup>93</sup> *Castillo v. G & M Realty L.P.*, Nos. 18-498-cv (L), 18-538-cv (CON), 2020 U.S. App. LEXIS 5228, 2020 WL 826392, 2020 U.S. App. LEXIS 5228 (2d Cir. Feb. 20, 2020).

<sup>94</sup> *English v. BFC & R E. 11th St. LLC*, 1997 WL 746444, at \*4 (S.D.N.Y. Dec. 3, 1997), *aff’d sub nom.* *English v. BFC Partners*, 198 F.3d 233 (2d Cir. 1999).

<sup>95</sup> See U.S. CONST. amends. V; XIV, § 1.

<sup>96</sup> See 17 U.S.C. § 106A (subsections (c)(1) and (c)(2) highlight the statute trying to balance the rights by providing exceptions).

<sup>97</sup> See *generally* *Cohen v. G & M Realty L.P.*, 320 F. Supp. 3d 421 (E.D.N.Y. 2018), *aff’d sub nom.* *Castillo v. G & M Realty L.P.*, Nos. 18-498-cv (L), 18-538-cv (CON), 2020 WL 826392, 2020 U.S. App. LEXIS 5228 (2d Cir. Feb. 20, 2020) (highlighting the need for artists to litigate to protect their rights).

It appears that the litigation—lasting more than four years<sup>98</sup> and costing in excess of \$2.5 million on the artists' side alone<sup>99</sup>—could have been largely avoided if the parties had made the effort of memorializing their agreement in a clear and comprehensive writing at a time when they were still on good terms. Instead, without a written agreement, the property owner apparently thought he was within his rights when he made the unilateral decision to have the works destroyed. If he had followed the rules set forth in VARA—i.e., if he had notified the artists of his intent and given them the opportunity to remove their works during the statutory 90-day period<sup>100</sup>—years of acrimonious litigation and millions of dollars in litigation costs could have been avoided.

While VARA appears to offer a balanced approach, there are no guarantees that, in any specific case: the statute will be applied swiftly and correctly; artists will be able to meet their evidentiary burdens through credible fact witnesses, persuasive expert witnesses, and convincing documentary evidence; or that the parties can even afford the ever-rising costs of litigation.<sup>101</sup> Thus, instead of making unilateral decisions, street artists and property owners should try to: work together, ensure that any agreements are thoroughly vetted by experienced art lawyers, and memorialize the agreements in a clear and comprehensive written instrument. As is generally true in other areas, litigation should be avoided here because it can be extremely costly and frustrating. Having seen the application of VARA to street art disputes in the United States, we now turn to street art law in Italy.

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<sup>98</sup> The lawsuit was filed in October 2013, and the court issued its decision in February 2018. The Second Circuit affirmed the decision on February 20, 2020. *See supra* text accompanying notes 91–93.

<sup>99</sup> *See Graffiti Artists Request \$2.6 Million in Attorneys' Fees After Last Month's Victory*, *supra* note 91.

<sup>100</sup> *See* 17 U.S.C. § 113(d)(2)(B).

<sup>101</sup> *See, e.g.*, DUKE LAW SCH., LITIGATION COST SURVEY OF MAJOR COMPANIES 2 (2010), [https://www.uscourts.gov/sites/default/files/litigation\\_cost\\_survey\\_of\\_major\\_companies\\_0.pdf](https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf) [<https://perma.cc/VS7R-HXRS>].

## II. STREET ART LAW IN ITALY

Italy's Camonica Valley—also called the “Valley of Landmarks”—is known for its variety of engraved rock art from prehistoric times and has been on the UNESCO World Heritage List since 1979.<sup>102</sup> Graffiti was also popular in ancient Rome, where it was broadly used for political purposes, advertisement, and romantic poetry, which present a unique snapshot into Roman culture two thousand years ago.<sup>103</sup> Developing mostly in the three large cities of Milan, Bologna, and Rome, the modern street art movement arrived in Italy at the end of the 1980's; today, however, street art is present throughout Italy.<sup>104</sup>

Extensive research has not surfaced a published Italian case in which a property owner destroyed a piece of sanctioned street art, similar to the *5Pointz* scenario.<sup>105</sup> Because there is no known precedent by an Italian court adjudicating a civil dispute between a street artist and a property owner who had, at least initially, permitted the artist to paint on the property owner's wall or building and then destroyed it, a review of a broad range of potentially relevant Italian law is necessary to attempt to predict the likely outcome of such a case. In order to get an idea of what an Italian court might decide, this Article will review various sources of Italian law pertinent to street art, as well as some recent criminal cases involving street artists.

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<sup>102</sup> See *Rock Drawings in Valle Camonica*, VALLE CAMONICA LA VALLE DEI SEGNI, <http://www.vallecamonicaunesco.it/> [<https://perma.cc/NZ7P-J4JU>].

<sup>103</sup> See *Unesco Office*, POMPEII, <http://pompeiiisites.org/en/archaeological-park-of-pompeii/unesco-office/> [<https://perma.cc/Y6PM-T8KZ>].

In particular, the archaeological sites of Pompeii, Herculaneum and Torre Annunziata represent a valuable record of the daily life and society at a specific moment in history unlike any other in the world. The excavation activities, undertaken during the Bourbon period and continued over time, have enabled experts to recover structures, decorations, furnishings, inscriptions and graffiti, allowing them to reconstruct all aspects of ancient life both public and private.

*Id.*

<sup>104</sup> See Claudio Musso, *Street Art in Italia: una storia (im)possibile, un futuro (in) certo*, ARTRIBRUNE (June 19, 2014), <https://www.tribune.com/attualita/2014/06/street-art-in-italia-una-storia-impossibile-un-futuro-incerto/> [<https://perma.cc/HHX6-K7ED>].

<sup>105</sup> See *supra* Part I.C.

Italian law relevant to street art can be found in various sources: in addition to the Italian Constitution, which is considered the superior “law of laws”<sup>106</sup> and explicitly protects the right to free expression, there are primary sources of law related directly or indirectly to street art. For instance, the Italian Criminal Code and the Italian Civil Code contain rules that, respectively, protect the owners from crimes against their property, and regulate civil rights in property.<sup>107</sup> In addition, there are specific laws regarding art and copyright—the Italian Statute *D.Lgs. 22 gennaio 2004, n. 42 (Codice dei Beni Culturali e del Paesaggio)* and the *Legge 22 aprile 1941, n. 633 (“LdA”—Legge sul Diritto d’Autore)*—which this Article will discuss below.

#### *A. The Italian Constitution*

The conflict between the artist and the property owner reflects the higher conflict existing between two equally important articles of the Italian Constitution that the Italian courts are constantly striving to resolve: the right to free expression<sup>108</sup> and the right to property.<sup>109</sup> The official translation of the relevant portions of the two provisions as provided by the Italian Senate (*Senato della Repubblica*) is as follows:

Art. 21: Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication. The press may not be subjected to any authorization or censorship. . . .

Art. 42: Property is public or private. Economic assets may belong to the State, to public bodies or to private persons. Private property is recognized and guaranteed by the law, which prescribes the ways it is acquired, enjoyed and its limitations so as to ensure its social function and make it accessible to all. In the cases provided for by the law and with provisions for

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<sup>106</sup> *Leggi*, DIRITTO PRIVATO IN RETE, <https://www.dirittoprivatoinrete.it/leggi.htm> [<https://perma.cc/P6A7-ZFLX>].

<sup>107</sup> *See infra* Parts II.B., II.D.

<sup>108</sup> COSTITUZIONE [Constitution] Dec. 27, 1947, Part I, art. 21 (It.).

<sup>109</sup> COSTITUZIONE Dec. 27, 1947, Part III, art. 42 (It.).

compensation, private property may be expropriated for reasons of general interest. . . .<sup>110</sup>

Street Art is clearly a form of expression and, thus, deserves protection.<sup>111</sup> Nevertheless, as the following discussion will illuminate, the Italian courts, who must strike a balance between these two conflicting interests with regards to street art, generally consider the right to property more important.

### *B. The Italian Criminal Code*

In Italy, whoever makes an unauthorized artwork on someone else's property commits the crime of "*Deturpamento e imbrattamento di cose altrui*."<sup>112</sup> In general, it punishes the conduct of a person who defiles or defaces movable or immovable things. The three cases discussed below show the evolution of Italian court decisions on the relationship between vandalism and street art. The most important and noticeable change highlighted by these cases is the recognition by some courts of exemptions—such as the intention of the artist to improve a wall which is already ruined, and the artistic value of the work—that led, and should always lead, to the street artist's acquittal.

#### 1. Daniele Nicolosi a/k/a Bros

Artist Daniele Nicolosi, known as Bros,<sup>113</sup> was born in 1981 and started his art career in 1996.<sup>114</sup> In 2007, he had exhibitions at the Padiglione d'Arte Contemporanea di Milano (PAC)<sup>115</sup> and at the

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<sup>110</sup> Art. 21 and Art. 42 Costituzione [Cost.] (It.). The concept that "private property is . . . accessible to all" means that the right to private property is available to all citizens, not that all private property must be open to the public.

<sup>111</sup> Art. 21 Costituzione [Cost.] (It.).

<sup>112</sup> Art. 639 Codice penale [C.p.] (It.). This phrase roughly translates in English to "Defacing and soiling of other people's things."

<sup>113</sup> See *About the Artist*, KOOKNESS, <https://www.kooness.com/artists/bros> [<https://perma.cc/8MMV-JRRX>].

<sup>114</sup> *Id.*

<sup>115</sup> See *Padiglione d'arte contemporanea di Milano*, WIKIPEDIA, [https://it.wikipedia.org/wiki/Padiglione\\_d'arte\\_contemporanea\\_di\\_Milano](https://it.wikipedia.org/wiki/Padiglione_d'arte_contemporanea_di_Milano) [<https://perma.cc/5PW4-HXTA>].

Palazzo Reale<sup>116</sup> in Milan.<sup>117</sup> He is one of the most important Italian street artists, and also the first whose criminal trial was based on newly passed, stricter rules that provide that the trial must be carried out before the trial court, rather than the lower court (*Giudice di pace*), which deals with less serious crimes.<sup>118</sup>

In 2009, Bros was charged with numerous acts, including defacing the headquarters of a company in late 2007, and previously creating graffiti on the exterior walls of the prison of San Vittore, a subway stop, and other buildings in the center of Milan.<sup>119</sup> In 2010, the trial ended with the defendant Bros's acquittal because the statute of limitations had expired and certain other procedural requirements had not been met.<sup>120</sup> The judge, Guido Piffer,<sup>121</sup> nonetheless shared his thorough opinion on the merits of the case, which analysis subsequent courts can choose to follow, since Italy has a civil law system in which all court decisions are persuasive, i.e., not binding on other judges.<sup>122</sup> Piffer stated that "all conduct that defaces a building without the willingness of the property owner has to be considered a crime regardless of the fact that the artist has a reputation" (like in this case where Bros was able to present his art at

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<sup>116</sup> See PALAZZO REALE, <https://www.palazzorealemilano.it/> [<https://perma.cc/92TR-CZA8>].

<sup>117</sup> See *About the Artist*, *supra* note 113.

<sup>118</sup> Redazione, *Street art a processo: prosciolto il writer Bros*, IL GIORNALE.IT (July 2010), <http://www.ilgiornale.it/news/street-art-processo-prosciolto-writer-bros.html> [<https://perma.cc/9D8G-96TN>]. For an explanation of Italy's judicial system, see *Judicial Systems in Member States—Italy*, EUR. E-JUSTICE, [https://e-justice.europa.eu/content\\_judicial\\_systems\\_in\\_member\\_states-16-it-en.do?member=1](https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-it-en.do?member=1) [<https://perma.cc/L9LA-FGRZ>].

<sup>119</sup> *Finisce in tribunale l'arte di "Bros" prima udienza del processo al writer*, LA REPUBBLICA MILANO (Apr. 2010) [https://milano.repubblica.it/cronaca/2010/04/07/news/finisce\\_in\\_tribunale\\_l\\_arte\\_di\\_bros\\_prima\\_udienza\\_del\\_processo\\_al\\_writer-3172316/](https://milano.repubblica.it/cronaca/2010/04/07/news/finisce_in_tribunale_l_arte_di_bros_prima_udienza_del_processo_al_writer-3172316/) [<https://perma.cc/B22J-52TB>].

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

<sup>121</sup> Italy has a civil law system, and there are no U.S.-style juries. The factfinder in the majority of Italian civil and criminal trial courts is a single professional judge, who is admitted to the bench after taking a rigorous public exam. See *Judicial Systems in Member States—Italy*, *supra* note 118.

<sup>122</sup> See Cristina Baldacci, *Bros prescritto*, IL GIORNALE DELL'ARTE (Sept. 2010), <https://www.ilgiornaledellarte.com/articoli/bros-prescritto/103940.html> [<https://perma.cc/KW4D-EGFU>].



Palazzo Reale) and that “the only exception to this is when the property is deliberately left in ruins.”<sup>123</sup>

## 2. Alice Pasquini a/k/a Alicè

Alice Pasquini is a Italian artist internationally known as Alicè.<sup>124</sup> Her works have been featured in publications from all around the world, such as the international edition of *The New York Times* and *The Wall Street Journal*.<sup>125</sup> In 2013, after a report from the municipal police to the Prosecutor’s Office, Alicè was charged with the above-mentioned crime of “*imbrattamento*”<sup>126</sup> for making drawings on some walls of Bologna’s buildings located in Via Centotrecento, Via Mascarella, Via Zamboni, Via del Pratello, and in the Bolognina neighborhood.<sup>127</sup>

In 2016, despite the prosecutor’s request for her acquittal, the Court of Bologna convicted Alicè and sentenced her to pay a fine of €800 for her street art.<sup>128</sup> In its ruling, the court was very strict, and failed to consider certain crucial relevant facts, such as the status of the walls and the reputation of the artist.<sup>129</sup> Instead, the court stated that the fact that the building already had existing graffiti or tags does not excuse the artist for the crime committed.<sup>130</sup> The court noted that regardless of the status of the wall or the artistic nature of the work, a crime was committed.<sup>131</sup> The court rationalized this holding by expressing a desire not to determine criminal liability based on personal and subjective evaluations regarding the artistic

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<sup>123</sup> *Id.*

<sup>124</sup> *See Alicè*, ALICÈ, <https://www.alicepasquini.com/bio> [<https://perma.cc/PNT3-XKCC>].

<sup>125</sup> *See id.*

<sup>126</sup> *See supra* text accompanying note 112.

<sup>127</sup> F. Q., *Bologna, AliCè condannata: “Imbrattò muro”. Multa di 800 euro per la street artist consacrata dal New York Times*, IL FATTO QUOTIDIANO (Feb. 15, 2016), <https://www.ilfattoquotidiano.it/2016/02/15/bologna-alice-condannata-imbratto-muro-multa-di-800-euro-per-la-street-artist-consacrata-dal-new-york-times/2468233/> [<https://perma.cc/7P5B-ST4V>].

<sup>128</sup> Trib. Bologna, 15 feb. 2016, n.674 (It.).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

value of the work,<sup>132</sup> most likely reasoning that the consideration of such personal or subjective criteria could potentially lead to discriminatory treatments of defendants.

### 3. Manu Invisible

Manu Invisible is a masked artist who wears a shiny black mask with sharp shapes, inspired by geometry and night.<sup>133</sup> He embarked on his artistic career at the beginning of the twenty-first century in Sardinia, and then eventually in Milan.<sup>134</sup> After graduating from the Artistic High School, he held several exhibitions at the Spazio Galileo in Milan and completed a big mural at Lycée Carnot Jean Bertin in France.<sup>135</sup> He has held private courses on the subject of frescos, both in Florence, one at the Academy of Giglio, and the other at the Bottega del Bon Fresco of the Master Massimo Callossi.<sup>136</sup> He has participated in many projects, and in 2018 also completed a traditional fresco along the walls of the Aula Magna Capitini of the University of Cagliari.<sup>137</sup>

In 2011, Manu Invisible was charged with “*imbrattamento*” for a street artwork in a tunnel at the Milano Lambrate train station.<sup>138</sup> The Milan trial court acquitted him because, in its opinion, the conduct did not constitute a crime.<sup>139</sup> Specifically, the judge, Marialillia Speretta, accounted for circumstances that the Alicè court had not taken into consideration.<sup>140</sup> Judge Speretta considered crucial the

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<sup>132</sup> *Id.*

<sup>133</sup> See *Biography*, MANU INVISIBLE, <http://www.manuinvisible.com/en/biography/> [<https://perma.cc/72CZ-7PYL>].

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

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

<sup>138</sup> Cass. Pen., sez. II, 5 aprile 2016, n.16371 (It.); F. Q., *Street artist prosciolto in Cassazione, si tratta del primo caso in Italia*, IL FATTO QUOTIDIANO (Apr. 7, 2016), <https://www.ilfattoquotidiano.it/2016/04/07/street-artist-prosciolto-in-cassazione-si-tratta-del-primo-caso-in-italia/2617372/> [<https://perma.cc/KL5L-LJA9>]; Francesca Mulas, *Writer di San Sperate assolto dal Tribunale di Milano: E' un artista, non un vandalo*, SARDINIAPOST MAG. (Apr. 1, 2014), <https://www.sardiniapost.it/culture/manu-invisible-assolto-dal-tribunale-di-milano-il-giudice-e-un-artista-non-un-vandalo/> [<https://perma.cc/H9NS-MSSL>].

<sup>139</sup> See *supra* sources cited in footnote 138.

<sup>140</sup> Cf. Trib. Bologna, 15 feb. 2016, n.674 (It.).

fact that the work was created with the intention of rejuvenating the wall (which was already dirty and dilapidated), and also acknowledged that *Manu Invisible*'s artistic skills were recognized by the art community.<sup>141</sup> The appellate court affirmed the trial court decision (although for different reasons), and the prosecutor appealed.<sup>142</sup> The filed appeal was, however, declared inadmissible by the Court of Cassazione, which concluded the litigation.<sup>143</sup>

This case is significant because it might mark the beginning of a shift in the Italian courts' point of view; the courts seem to be beginning to recognize the artistic nature and the value of street art as valid reasons to acquit the artist who makes such art, even if such art is created on property without the owner's permission.<sup>144</sup> To celebrate his acquittal, *Manu Invisible* and his lawyer, who is also an artist known as *Frode*, created a work of art called "Art 639 = reato di espressione."<sup>145</sup> Their goal was to express their opinion that Article 639 of the Italian Criminal Code might, at least in this street art context, limit the right of free expression protected by Article 21 of the Italian Constitution, because it does not distinguish between artistic actions and vandalism.<sup>146</sup>

### C. *The Italian Code of Cultural Heritage and Landscape*

The Italian Code of Cultural Heritage and Landscape (*Codice dei Beni Culturali e del Paesaggio*) provides protection and enhancement for the Italian cultural heritage and landscape in order to preserve the memory of Italy's national community and territory, and to promote the development of culture.<sup>147</sup> Article 2 of this Code defines key terms; this Article is set forth here in an unofficial translation:

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<sup>141</sup> See *supra* sources cited in footnote 138.

<sup>142</sup> Cass. Pen., sez. II, 5 aprile 2016, n.16371 (It.); see also F. Q., *supra* note 138.

<sup>143</sup> Cass. Pen., sez. II, 5 aprile 2016, n.16371 (It.).

<sup>144</sup> Cass. Pen., sez. II, 5 aprile 2016, n.16371 (It.); see also Mulas, *supra* note 138.

<sup>145</sup> Claudia Zanella, *Street art, nel Milanese il grafitto-manifesto contro il codice penale: "L'arte non sporca"*, FRODESTYLE (May 6, 2017), <http://www.frodestyle.com/articolo-639-reato-di-espressione/> [<https://perma.cc/W97P-PH3Q>]. "Reato di espressione" translates to English as "crime of expression."

<sup>146</sup> *Id.*

<sup>147</sup> D.Lgs. 22 gennaio 2004, n.42, G.U. Feb. 24, 2004, n.45 (It.).

- (1) The cultural heritage is made of cultural and landscape heritage assets.
- (2) Cultural property is made of immovable and movable things which, under Articles 10 and 11, have artistic, historical, archaeological, ethno-anthropological, archival and bibliographic value and of *other things identified by law or under the law* as evidence having the force of civilization.
- (3) Landscape heritage assets are the immovable things and the areas referred to in Article 134, constituting an expression of the historical, cultural, natural, morphological and beauty of the land, and other assets identified by law or under the law.
- (4) The assets of the publicly owned cultural heritage are for the enjoyment of the community, in accordance with the requirements of institutional use and if it is not precluded because of protection reasons.<sup>148</sup>

Article 50 of that Code states, in unofficial translation:

- (1) It is prohibited, without the authorization of the superintendent, to arrange and perform the detachment of frescoes, coats of arms, graffiti, headstones, inscriptions, tabernacles and other ornaments, displayed or in public view.
- (2) And it is prohibited, without the authorization of the superintendent, to arrange and perform the detachment of coats of arms, graffiti, headstones, inscriptions, tabernacles as well as removing stones and monuments, vestiges of the First World War under the legislation.<sup>149</sup>

Works of street art are considered as the “other assets identified by the law or under the law” mentioned in Article 2, comma 3, if an

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<sup>148</sup> *Id.* at n.2 (emphasis added).

<sup>149</sup> *Id.* at n.50.

official authority recognizes and declares the work of art to be a national treasure.

This actually happened to the work “Tuttomondo,”<sup>150</sup> painted by the American artist Keith Haring on the external walls of the monastery of the Church of San Antonio in Pisa in 1989, now declared a *Bene Culturale* by *Soprintendenza Archeologia, Belle Arti e Paesaggio per le province di Pisa e Livorno*.<sup>151</sup> Detailing the administrative process to obtain the declaration of cultural interest works would go beyond the scope of this Article. It is enough to underline that it is regulated by Article 13<sup>152</sup> and can be activated by the *Soprintendente* (the Administrative officer) *sua sponte* or because of a motivated request from a region<sup>153</sup> or a territorial entity.<sup>154</sup> Simply put, once a work is declared to be a *Bene Culturale* and the decision is served on the owner or the holder, Article 50, comma 1 (which expressly mentions “*Graffiti*”) applies, and the work of art cannot be detached.<sup>155</sup> This approach does not appear to be a realistic and practical solution for artists who want their street art to be recognized and appreciated by the community. In fact, there is no guarantee for the artist to obtain the above-mentioned declaration because the process for it might end with a denial. Rather, the best solution for an artist seems to be the contractual one outlined *supra*.<sup>156</sup>

#### D. Legal Conflicts Encountered by Street Artists in Italy

The key distinguishing feature of street art is the fact that the work is typically realized by the artist on a “canvas” owned by

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<sup>150</sup> Gabriele Rossetti, *Pisa: il murale “Tuttomondo” di Keith Haring ottiene il vincolo della Soprintendenza: vivrà per sempre*, ILNOTIZIABILE (Aug. 30, 2013), <https://ilnotiziabile.wordpress.com/2013/08/30/pisa-murale-tuttomondo-keith-haring-ottiene-vincolo-soprintendenza-vivra-per-sempre/> [<https://perma.cc/B9AQ-5WDT>].

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

<sup>152</sup> Art. 13 D.Lgs. n. 42/2004.

<sup>153</sup> Italy is divided into twenty regions, which have some administrative and law-making power. *See also Regions of Italy*, WIKIPEDIA [https://en.wikipedia.org/wiki/Regions\\_of\\_Italy](https://en.wikipedia.org/wiki/Regions_of_Italy) [[perma.cc/58RD-MDG8](https://perma.cc/58RD-MDG8)].

<sup>154</sup> *Id.*

<sup>155</sup> *See* Art. 50 D.Lgs. n. 42/2004. Article 50 forbids the “*distacco*,” meaning the detachment, indicating that the artwork cannot be touched by the owner.

<sup>156</sup> *See supra* Part I.D.

someone else. Therefore, the two most common legal conflicts that might arise are: (1) the conflict between the property owner and the street artist; and (2) conflicts between artists because of the alleged wrongful reproduction of the work of art. While the first point represents the core of this Article, the second one is helpful to obtain a complete idea of where street artists' rights stand today in Italy.

### 1. Street Artist Versus Property Owner

In order to understand what kind of legal protections the property owner and the street artist have under Italian civil law, it is important to distinguish between cases where the work is authorized and cases when the work is not.

#### a) Authorized work of street art

If the property owner authorizes the artwork at issue, he or she will own it under Article 936 of the Italian Civil Code,<sup>157</sup> in the absence of any contrary agreement. This article expresses the principle of accession,<sup>158</sup> which allows the owner to acquire the additional property and value of any plantation, building, or work that is created by a third party on the original property in exchange, unless otherwise agreed, for a payment to the artist either 1) for the materials, tools, and labor used, or 2) equal to the increase of the value that the building had.<sup>159</sup>

In tension with the principle of accession is copyright, which right arises for the artist at the moment of the creation of the work of art.<sup>160</sup> Copyright in Italy consists of economic rights and moral rights. Economic rights last for the author's life plus seventy years,<sup>161</sup> unless they are transferred to the employer by an express contract. The author's moral rights, however, are perpetual, and they cannot be transferred or renounced by the artist.<sup>162</sup> Therefore, if the

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<sup>157</sup> Art. 936 Codice civile [C.c.] (It.).

<sup>158</sup> See *id.*; see also *Accessione*, SIMONE DIZIONARI ONLINE, <https://www.simone.it/newdiz/newdiz.php?id=21&action=view&dizionario=1> [perma.cc/72ZV-F5CL].

<sup>159</sup> Art. 936 Codice civile [C.c.] (It.).

<sup>160</sup> Art. 6 Legge 22 aprile 1941, n.633, G.U. 16 luglio 1941, n.166 (It.).

<sup>161</sup> Art. 25 L. n.633/1941.

<sup>162</sup> Art. 20 L. n.633/1941.

work of art is used with commercial purpose by the property owner or third parties, this use of the artwork must be authorized by the artist.<sup>163</sup> In addition, independent of the artist's economic rights and even after the transfer thereof, the artist has the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of his or her work of art that would be prejudicial to his or her reputation.<sup>164</sup>

Thus, the combination of the Italian Civil Code with the Italian Law which regulates copyrights (*Legge 22 aprile 1941, n. 633*—“LdA”—*Legge Italiana sul Diritto d'Autore*) determines the applicable level of protection for both the artist and the property owner. Simply put, when the work is authorized, and in the absence of any contrary agreement, the property owner owns the artwork, while the artist owns the copyright, including its corresponding economic and moral rights, unless the artist decides to transfer the economic rights to the property owner. Even when the artist transfers the economic rights to the owner, however, some conflicts concerning the moral rights, which belong perpetually to the artist, might arise. For example, in the above-mentioned “author's reputation issue,”<sup>165</sup> what would happen if the owner authorized another street artist to create a new work of art next to the first which distorts the first piece's original meaning? Might this be a case of violation of moral rights? Italian courts have not decided these or other related issues, leaving street artists and property owners with legal uncertainties.

Since there are too many grey areas left open to interpretation, and in order to avoid conflicts and expensive and time-consuming court proceedings, the parties once again are well advised to enter into a detailed contract that regulates all of the aforementioned rights.<sup>166</sup>

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<sup>163</sup> Angela Saltarelli, *Street art e diritto: un rapporto ancora in via di definizione*, BUSINESSJUS (2017), <http://www.businessjus.com/wp-content/uploads/2017/10/STREET-ART-E-DIRITTO-2.pdf> [perma.cc/4KSZ-STLW].

<sup>164</sup> Art. 20 L. n.633/1941 (It.).

<sup>165</sup> See *supra* Part II.B.

<sup>166</sup> That is also the recommendation of Angela Saltarelli, an Italian attorney. See Saltarelli, *supra* note 163.

## b) Unauthorized work of street art

When a work of art on a building is unauthorized, the property owner becomes the owner of the piece. Under Article 936 of the Italian Civil Code, the property owner can choose between: (1) maintaining the work of art in exchange for either a payment to the artist for the materials, tools, and labor used, or an amount equal to the increase of the value that the building had; or (2) asking the artist to remove the work of art within six months from the incorporation of it into the building.<sup>167</sup>

One important question arising from street art is whether an artwork is copyrightable by the street artist if it arises out of an illegal activity. Italian academics are divided on the applicability of the U.S. doctrine of “unclean hands” to copyright of unauthorized artworks.<sup>168</sup> Some scholars advocate a concept similar to the U.S. doctrine,<sup>169</sup> while others reject the doctrine because Article 1 of the Italian LdA does not provide the lawfulness of the work as a condition to obtain protection for the author.<sup>170</sup> Article 1 instead provides that intellectual works categorized as literature, music, visual art, architecture, theater, or cinema are protected by copyright, regardless of the means or form the expression takes.<sup>171</sup>

The Italian courts’ interpretations are consistent with the above-mentioned Article: in fact, there are cases that have been decided in favor of the copyrightability of a certain work of art, regardless of its lawfulness.<sup>172</sup>

But practically, how is a conflict between the artist’s copyrights and the property owner’s rights resolved? Typically, in Italy,

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<sup>167</sup> Art. 936 Codice Civile [C.c.] (It.).

<sup>168</sup> Saltarelli, *supra* note 163. In the United States, the “unclean hands” defense bars relief to a party that has engaged in certain inequitable behavior. *See, e.g.*, Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814–15 (1945).

<sup>169</sup> *See* English v. BFC & R E. 11th St. LLC, 1997 WL 746444, at \*4 (S.D.N.Y. Dec. 3, 1997), *aff’d sub nom.* English v. BFC Partners, 198 F.3d 233 (2d Cir. 1999).

<sup>170</sup> Art. 1 Legge 22 aprile 1941, n.633, G.U. 16 luglio 1941, n.166 (It.).

<sup>171</sup> *Id.*

<sup>172</sup> *See, e.g.*, Giovanni Maria Riccio, “Street Heart”: *Urban Murals as Common Goods*, *MEDIA LAWS* (June 25, 2018), [http://www.medialaws.eu/street-heart-urban-murals-as-common-goods/#\\_ftn14](http://www.medialaws.eu/street-heart-urban-murals-as-common-goods/#_ftn14) [<https://perma.cc/W2WG-AMDL>] (citing App. Roma, 10 oct. 1957, IDA 58, 590 (It.); Pret. Bologna, 20 apr. 1971, Giust. Civ. 71, 694 (It.)).



the property owner's rights, including the right to cover and remove the artwork, trump the artist's copyrights (and also the artist's right to the consideration under the above-mentioned Article 936 of the Italian Civil Code<sup>173</sup>) because of the lawlessness of the work of art itself.<sup>174</sup>

A significant example of a conflict between the two different rights is the Art Exhibition called "Street Art Banksy & Co. *L'Arte allo stato urbano*" organized in 2016 at the Museo della Storia in Bologna. This exhibition showed more than 250 works of art made by artists such as Blu, Obey, Alicè, and Os Gemeos, which had been removed from their original location in private buildings, without the authorization of the artists.<sup>175</sup> The artists complained about two issues. First, the organization of an art exhibition for a limited audience directly conflicted with the anti-establishment nature of the street art, which is accessible to everybody. Second, the exhibition, the artists alleged, violated their moral rights, which include the right to not have a work of art "decontextualized" by removing it from its original location.<sup>176</sup>

With regards to the first contention, one of the artists, Blu, decided to protest the exhibition by erasing twenty years of paintings on Bologna's walls in order to prevent them from ending up in the museum.<sup>177</sup> As for the second point, as explained above, artists' moral rights include the right of the integrity of the work of art, and thus encompass the right for the artist to reject any action that modifies it from the original artist's conception.<sup>178</sup> Therefore, under Italian law, the placement of the street work of art in a museum could be considered a violation of this right, as well as harmful to the artist's honor and reputation.

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<sup>173</sup> See *supra* note 167 and accompanying text.

<sup>174</sup> Art. 832 Codice Civile [C.c.] (It.).

<sup>175</sup> Saltarelli, *supra* note 163.

<sup>176</sup> *Id.*

<sup>177</sup> Michele Smargiassi, *Street Writer Blu Destroys His Works in Bologna in Fight Against "Private Predators"*, LA REPUBBLICA (Mar. 16, 2016), [https://bologna.repubblica.it/cronaca/2016/03/12/news/street\\_writer\\_blu\\_destroys\\_its\\_works\\_in\\_bologna\\_in\\_fight\\_against\\_private\\_predators\\_-135316522/](https://bologna.repubblica.it/cronaca/2016/03/12/news/street_writer_blu_destroys_its_works_in_bologna_in_fight_against_private_predators_-135316522/) [<https://perma.cc/3GHD-ELTC>].

<sup>178</sup> Art. 20 Legge 22 aprile 1941, n.633, G.U. 16 luglio 1941, n.166 (It.).

This legal issue has not been raised in many decisions issued by Italian courts. One example of an opinion which deals with the relocation topic (without discussing moral rights) was issued by the trial court of Naples in 1997.<sup>179</sup> The case dealt with the relocation of some sculptures for an art exhibition.<sup>180</sup> The judge stated that the transfer of a visual work of art from its designated location to a different place can be considered an infringement of the artist's right of integrity, and consequently of the artist's moral rights, only if the transfer itself damages the work of art or the honor and reputation of the artist because of the context of the new collocation.<sup>181</sup>

In the above-mentioned case regarding the Bologna art exhibition, it is clear that neither the administration office nor the organizers of the art exhibition accounted for the artists' copyrights, but rather only the property owner's rights.<sup>182</sup> This confirms the fact that there is no strict regulation, and therefore attention, concerning the legal issue of the relocation of the artwork.

Overall, the conflict between the artist's copyrights and the property owner's rights in Italy does not have a permanent solution yet, only ones proposed by scholars. Aspects of these doctrines resolve the conflict by denying the right for the artist to object to the destruction of the work because of its ephemeral nature. This solution was based on the assumption that street art is always ephemeral.<sup>183</sup> But this does not fully resolve the dispute because it does not consider that works of art are often the outcome of a great deal of time and intellectual effort. This is also corroborated by the copyrightability of street art, discussed in the next paragraph, which confirms the intellectual value of the works.

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<sup>179</sup> See Curzio Cicala, *Street art e conflitto tra diritto di proprietà e diritto di autore*, BDL STUDIO LEGALE (Jan. 29, 2019), <http://www.studiobdl.it/wp-content/uploads/2019/03/Street-art-e-conflitto-tra-diritto-di-proprietà-e-diritto-di-autore.pdf> [https://perma.cc/9FDJ-H4MJ] (citing Trib. Napoli, 9 oct. 1997 (It.)).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Saltarelli, *supra* note 163.

<sup>183</sup> See Cicala, *supra* note 179.

## 2. Artist Versus Artist—Wrongful Reproduction of Street Art

The other legal conflict that might arise is one between street artists when one of them wrongfully reproduces or elaborates another's copyrighted work. In this case, the reproduction right<sup>184</sup> and the right to elaborate on the original work of art<sup>185</sup> are violated. In Italy, one significant case involved the artist Marco Mantovani, known as KayOne,<sup>186</sup> and another street artist in competition with him, Nicola Leonetti.<sup>187</sup> KayOne was a young street artist from Milan, who had an international reputation and gained notoriety by exposing his works at the Biennale of Venice in 2011.<sup>188</sup>

The facts of the case are simple: in 2011, Nicola Leonetti reproduced, with marginal modifications, KayOne's works on his blog named "*Arteblog Italia Leonettinicola*" without obtaining any license from KayOne.<sup>189</sup> In addition, Leonetti put the works up for sale at a lower price than KayOne, and claimed that they were his own works.<sup>190</sup> The trial court of Milan rejected the idea that the Leonetti, as the second author, refrained from copying by contributing at least a minimal amount of creativity.<sup>191</sup> Furthermore, the judge noted that Leonetti posted a picture of his works together with KayOne's original works.<sup>192</sup> For these reasons, the court held that this was an intentional attempt to generate confusion about the ownership of the works and granted a preliminary injunction ordering Leonetti to remove the works from his blog.<sup>193</sup> In addition, the court authorized the plaintiff KayOne to seize the unlawful

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<sup>184</sup> Art. 13 Legge 22 aprile 1941, n.633, G.U. 16 luglio 1941, n.166 (It.).

<sup>185</sup> Art. 18 L. n. 633/1941 (It.).

<sup>186</sup> See *Biography: KAYONE*, KAYONE, <http://www.kayone.it/biography/biography.html> [<https://perma.cc/T6NV-76EF>].

<sup>187</sup> Luigi Ferrarella, *Il graffitato benedetto dal giudice "Le sue opere vanno tutelate,"* CORRIERE DELLA SERA: MILANO CRONACA (Nov. 3, 2011), [https://milano.corriere.it/notizie/cronaca/11\\_novembre\\_3/kayone-graffitato-benedetto-giudice-diritto-autore-ferrarella-1902032811475.shtml](https://milano.corriere.it/notizie/cronaca/11_novembre_3/kayone-graffitato-benedetto-giudice-diritto-autore-ferrarella-1902032811475.shtml) [<https://perma.cc/CB6V-HF8R>].

<sup>188</sup> *Biography: KAYONE*, *supra* note 186.

<sup>189</sup> Ferrarella, *supra* note 187.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

works and ordered Leonetti to publish the judgment in the periodical *Flash Art*.<sup>194</sup>

The KayOne decision is crucial for the future of street art in Italy because it establishes that street art works are copyrightable. The local press celebrated KayOne's victory by proclaiming, exuberantly, that the artist was "blessed by the judge" who decided that his work was eligible for protection.<sup>195</sup> In order to better understand the context of the KayOne decision, it is important to point out that Italy does not recognize the doctrine of "fair use"<sup>196</sup> to the same extent as the United States. The only exception to the unlicensed use of a copyrighted work is provided by Article 70 of the LdA.<sup>197</sup> Subject to some conditions, this provision allows the summary, citation, and reproduction of some kinds of work (such as pieces or parts of operas) if they are made for critical or analytical purposes.<sup>198</sup> If the reuse takes place for educational or scientific reasons, then such reuse must have an illustrative rather than a commercial scope.<sup>199</sup> In addition, the publication online of certain kinds of pictures and music is allowed if done for educational or scientific reasons, and not with commercial purpose.<sup>200</sup> Thus, in light of Italy's stricter fair use doctrine, Leonetti could not raise this affirmative defense in the suit brought by KayOne, and KayOne ultimately succeeded in his copyright infringement claim.

The *KayOne* decision does signal a recognition by Italian courts of the copyrightability of street art, and, by implication, street art's artistic value. Thus, the *KayOne* case could be an important starting point for Italian courts to provide an exemption to street artists in criminal vandalism cases, allowing them to be acquitted from the accusation of perpetrating sheer vandalism by recognizing the artistic value of these artists' works.

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<sup>194</sup> Trib. Milano, 2 nov. 2011, ord., n. 40675 (It.); Ferrarella, *supra* note 187. "*Flash Art*" is an Italian and international contemporary art magazine founded in 1967 by Giancarlo Politi. See FLASH ART, <https://flash—art.com/> [<https://perma.cc/NKZ2-Q5RQ>].

<sup>195</sup> Ferrarella, *supra* note 187.

<sup>196</sup> See 17 U.S.C. § 107.

<sup>197</sup> Art. 70 L. n. 633/1941 (It.).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

### III. SUGGESTIONS FOR ENHANCING STREET ART PROTECTION IN ITALY

In Italy, the idea of street art as a form of visual expression has not been wholly accepted, as it has in other countries, such as the United States. If the works are not authorized, they are considered, ambiguously, as both an act of vandalism and a form of artistic expression.<sup>201</sup>

As discussed above, in both criminal and civil law, the artist is almost always less protected than the owner of the wall. Nevertheless, some courts' views on the issue are gradually changing, and the protection of street works of art is becoming increasingly accepted.

In fact, with regards to criminal law, the *Manu Invisible* case established that some factors—such as the intention of the artist to improve a wall which is already ruined, plus the artistic value of the work—should be taken into consideration when deciding whether to acquit or convict an artist.<sup>202</sup> In addition, the trial court opinion in the *Bros* case is important because it confirms the principle that, when the property is deliberately left in ruins, a street artist does not commit any crime if he or she paints on it.<sup>203</sup> This “already ruined” exception may be street artists' most powerful defense and it might open the door to a gradual change for the legal status of street art. The argument's power stems from its status as an objective evaluation of the wall's status rather than a subjective evaluation of the artwork itself.<sup>204</sup> As the *Alicè* case showed, the court was skeptical about basing its decision about whether a crime had been committed on such a subjective and, in effect, personal opinion.<sup>205</sup> If the ultimate arbiter of law in Italy, the *Suprema Corte of Cassazione*, were to issue a decision holding that the artist does not commit any crime when the “already ruined” exception is satisfied,

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<sup>201</sup> Saltarelli, *supra* note 163, at 19–20.

<sup>202</sup> See Cass. Pen., sez. II, 5 aprile 2016, n.16371 (It.); Mulas, *supra* note 138.

<sup>203</sup> See Cristina Baldacci, *Bros prescritto*, IL GIORNALE DELL'ARTE (Sept. 2010), <https://www.ilgiornaledellarte.com/articoli/bros-prescritto/103940.html> [<https://perma.cc/KW4D-EGFU>].

<sup>204</sup> See Trib. Bologna, 15 feb. 2016, n.674 (It.).

<sup>205</sup> *Id.*

this would lead to a crucial change, which eventually might even be codified into statute by the legislative branch.

With regards to Italian civil law (including property and torts law), so far there are no relevant cases involving a dispute between street artists and property owners, but it appears that the conflict between the rights of these two parties is practically solved in favor of the owner, as demonstrated by the previously discussed example of the Art Exhibition called “Street Art Banksy & Co. *L’Arte allo stato urbano*” organized in 2016 at the Museo della Storia in Bologna.<sup>206</sup>

The issue of copyright law is different, however, because of the *KayOne* decision, which marks a crucial improvement in street artist protection since it established the copyrightability of street art.<sup>207</sup> The latter legal issue is very important because the recognition of copyrightability creates a value that balances the right of the property owner, not only with the rights of the artist, but also with the rights of the Italian community that is interested in promoting art and creativity. It might be a first step toward the introduction of a law in Italy similar to VARA in the United States.<sup>208</sup>

Giovanni Maria Riccio,<sup>209</sup> a professor at the University of Salerno, believes that in order to balance the private interest with the public interest, a law like VARA, which protects street art, is probably necessary.<sup>210</sup> The practical solution Riccio proposes is that a property owner seeking to destroy or edit a work of art on his or her wall should send a formal communication to the local *Soprintendenza* and advise this Office about their intention.<sup>211</sup> After that, the Office should have a reasonable amount of time to evaluate the work and to inform the owner not to proceed with destroying the work, or not respond at all; if the Office does not respond, after a

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<sup>206</sup> See *supra* Part II.D.1.b.

<sup>207</sup> Trib. Milano, 2 nov. 2011, ord., n. 40675 (It.).

<sup>208</sup> See *supra* Part I.B.

<sup>209</sup> Giovanni Maria Riccio, *Street art, leggi e tutela*, ARTRIBUNE (June 13, 2019), <https://www.artribune.com/professioni-e-professionisti/diritto/2019/06/street-art-leggi-tutela/> [<https://perma.cc/8H5Y-DGSK>].

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

certain mandated amount of time has passed, the owner can proceed to destroy the work.<sup>212</sup>

Riccio's proposal might also be a good solution to balance the street artist's interest with the property owner's interest because Italian courts appear to give preference to the owners of buildings over street artists, even though the Italian Constitution puts those interests on the very same level. Thus, an explicit statute setting forth the rights of the street artists may be the only way that street artists will be able to enjoy their constitutional protections of free expression. If such a statute provides for practicable conditions under which an artist can remove the work at issue, including a reasonable period of time during which the owner is restrained from destroying the work, then the legitimate rights of both the owner and the artist will be fairly protected. For instance, a period of ninety days, as provided by VARA,<sup>213</sup> during which the artist can make arrangements to remove the art at issue is unlikely to cause substantial harm to the owner—especially if that owner is developing its property, and that same period coincides with the often lengthy process of obtaining real estate development permits.<sup>214</sup> The fear, as expressed by the district court in the English case, that street artists “could effectively freeze development of vacant lots”<sup>215</sup> would thus be alleviated because any delay would be of a relatively short duration.

#### CONCLUSION

In both Italy and the United States, courts must balance the interests of street artists and property owners. As illustrated by the *5Pointz* case, U.S. law sets relatively clear rules that the parties must follow: street artists should obtain the permission of the property owner before creating street art on the property at issue, in order to

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<sup>212</sup> *Id.*

<sup>213</sup> 17 U.S.C. § 113(d)(2)(B) (1990).

<sup>214</sup> See *Cohen v. G & M Realty L.P.*, 320 F. Supp. 3d 421, 445 (E.D.N.Y. 2018), *aff'd sub nom. Castillo v. G & M Realty L.P.*, Nos. 18-498-cv (L), 18-538-cv (CON), 2020 WL 826392, 2020 U.S. App. LEXIS 5228 (2d Cir. Feb. 20, 2020) (criticizing property owner for destroying art works before receiving permits).

<sup>215</sup> *English v. BFC & R E. 11th St. LLC*, 1997 WL 746444, at \*4 (S.D.N.Y. Dec. 3, 1997), *aff'd sub nom. English v. BFC Partners*, 198 F.3d 233 (2d Cir. 1999).

secure VARA protection; and property owners should notify street artists of their intent to destroy the art and grant them a period of ninety days to remove the art, in order to avoid damages claims.

Italian law, on the other hand, is currently unclear on the scope of protection regarding street art. Based on the disparate sources of Italian law regulating street art and the few court decisions involving such art, it appears that in future civil litigation, the interests of property owners will generally outweigh the interests of street artists, unless there is a formal authorization or a contract between the two parties, or the work is declared a national treasure. In criminal cases, on the other hand, street artists can raise the “already ruined” physical condition of the wall as a potentially winning argument to protect their artworks and avoid criminal punishment. Although there is general skepticism about recognizing the artistic value of an artwork as an exception to acquit the artist (because it would be the result of a court’s subjective evaluation), some courts are becoming more open to using this valuable exemption.

In both Italy and the United States, however, it behooves street artists to seek express written permission from property owners before painting on their properties. Obtaining such permission appears to be the only practical way to protect street artists’ moral rights. Without this permission, the street artist risks losing the art without any recourse. A written permission is also the best insurance against time-consuming and expensive litigation. In either country, expensive litigation should be avoided altogether because it distracts artists from their main job: creating art!