

Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 32 XXXII
Number 3

Article 2

2022

Graffiti on Cities' Forgotten Landscapes: An Application of Adverse Possession Law to the Visual Artists Rights Act

Minelli E. Manoukian

Follow this and additional works at: <https://ir.lawnet.fordham.edu/iplj>



Part of the [Intellectual Property Law Commons](#)

Recommended Citation

Minelli E. Manoukian, *Graffiti on Cities' Forgotten Landscapes: An Application of Adverse Possession Law to the Visual Artists Rights Act*, 32 Fordham Intell. Prop. Media & Ent. L.J. 592 ().

Available at: <https://ir.lawnet.fordham.edu/iplj/vol32/iss3/2>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Graffiti on Cities' Forgotten Landscapes: An Application of Adverse Possession Law to the Visual Artists Rights Act

Cover Page Footnote

* Minelli E. Manoukian, Esq., Executive Director for the Center for Art Law in Brooklyn, NY, is a recent graduate of the Michigan State University College of Law, an avid participant and supporter for the arts, and a licensed attorney in Indiana. She can be reached at mannoukianminelli@gmail.com. She would like to thank Professor Nancy Costello of the Michigan State University College of Law for her guidance and support in the completion of this Article.

Graffiti on Cities' Forgotten Landscapes: An Application of Adverse Possession Law to the Visual Artists Rights Act

Minelli E. Manoukian*

Artists use any surface available to them as a canvas. There is the common: cloth and paper; the modern: skin; and even the illegal: buildings and privately-owned property. However, today, the cultural value that artwork instills in its community has grown, regardless of its legal status. Examples can be found in artwork created by graffiti artist Banksy, or even the urban installations of Tyree Guyton, creator of the Heidelberg Project in Detroit. Artists create masterpieces placed in plain sight that enrich the surrounding communities but often interfere with others' property rights. However, the illegal or encroaching nature of the artwork makes it vulnerable to destruction just as often as it brings it fame. What if the hard work that artists put into creating their urban artwork was not in vain? What if there was a way artists could consistently protect artistic moral rights against the property rights of building owners who have abandoned any upkeep or maintenance on the building, or who have not seen the building in years?

INTRODUCTION 593

I. GRAFFITI ART AND ARTISTS' MORAL RIGHTS 595

A. *Background: History of Graffiti Art in the United*

* Minelli E. Manoukian, Esq., Executive Director for the Center for Art Law in Brooklyn, NY, is a recent graduate of the Michigan State University College of Law, an avid participant and supporter for the arts, and a licensed attorney in Indiana. She can be reached at mannoukianminelli@gmail.com. She would like to thank Professor Nancy Costello of the Michigan State University College of Law for her guidance and support in the completion of this Article.

<i>States</i>	595
<i>B. The Moral Rights of Artists</i>	601
<i>C. Disputes in the Modern Age: Should Graffiti Be Offered Copyright Protection?</i>	604
<i>D. Disputes in the Modern Age: Does Trespassory Graffiti Art Receive VARA Protections?</i>	608
<i>E. The Protection of Graffiti Currently: 5Pointz</i>	609
II. ADVERSE POSSESSION.....	615
<i>A. Background: History of Adverse Possession</i> .	615
<i>B. What is Adverse Possession?</i>	616
<i>C. Factors of Adverse Possession</i>	618
1. Actual Possession.....	618
2. Open/ Notorious Possession.....	620
3. Continuous or Uninterrupted Possession	620
4. Exclusive Possession.....	623
5. Hostile Possession	624
III. THE SOLUTION: APPLICATION OF ADVERSE POSSESSION TO GRAFFITI ART	625
<i>A. The Addition to VARA</i>	625
<i>B. The Policy in Practice</i>	627
CONCLUSION.....	629

INTRODUCTION

In nearly every American city, there are derelict buildings to which residents turn a blind eye. There are warehouses that fall into disrepair, abandoned schools from the city's past, and ghostly edifices of a community that faced harder times. This is where graffiti artists thrive, and Detroit, Michigan is a prime artistic breeding ground.

One particular breeding ground for graffiti artists in Detroit was the Packard Automotive Plant,¹ which was effectively abandoned in

¹ *Packard Automobile Plant*, DETROITURBEX, <http://www.detroiturbex.com/content/industry/npackard/index.html> [<https://perma.cc/3NC3-8CAD>].

2006.² At the height of its glory, the plant spread across eighty acres, making quality cars and engines during World War II.³ When the last Packard automobile was produced in 1956, the Detroit plant officially closed.⁴ In 1999, scrappers turned the plant's eighty acres into "rubble and ruin," and it became a haven for graffiti artists⁵ despite its purchase in 2013.⁶ Both on the interior and exterior walls, graffiti marks every nook and cranny.⁷ Despite efforts to reconstruct and repurpose the plant in 2017, and the plant's current impending demolition, the graffiti remains prevalent.⁸

This graffiti is the definition of public art. Tourists pass by to see the work.⁹ Wedding parties use the plant's crumbling dilapidation for photograph backdrops.¹⁰ Internet videos even provide the public with access to see the exterior and interior of the building. Thus, this Article poses the following question: can the graffiti art adorning

² *Plan News*, PACKARD PLANT PROJECT (2019), <http://packardplantproject.com/history/index.html> [<https://perma.cc/YP45-R9KR>].

³ *Packard Plant*, HISTORIC DETROIT, <http://historicdetroit.org/building/packard-plant/> [<https://perma.cc/3CWG-3X5P>]. While the Packard Plant closed in 1956, some parts of the complex were transformed into the "Motor City Industrial Park" for a short amount of time until this, too, was closed by the City in 1999. *Id.*

⁴ *Id.*

⁵ *Id.*; Ashley Woods, *The Packard Plant: Big. Ugly. Dangerous.*, HUFFPOST (Dec. 2, 2012, 12:07 PM), https://www.huffpost.com/entry/packard-plant-detroit_n_2227920 [<https://perma.cc/K6N7-XQL9>].

⁶ Dustin Block, *Packard Plant Sold: Peru Developer Makes Final Payment on Blighted Factory*, MLIVE (Dec. 13, 2013, 11:04 AM), https://www.mlive.com/news/detroit/2013/12/emergency_manager_kevyn_orr_de.html [<https://perma.cc/8MNB-AG2Y>].

⁷ A Google Maps search allows users to walk alongside the building and view the graffiti scattered on the building.

⁸ JC Reindl, *Detroit's Abandoned Packard Plant Site Could Be Bought, Demolished Soon*, DETROIT FREE PRESS (Oct. 16, 2021), <https://www.freep.com/story/money/business/2021/10/16/detroit-packard-plant-owner-sale-demolition/8455931002/?gnt-cfr=1> [<https://perma.cc/9D2N-MSR4>].

⁹ Sarah Rahal, *Pure Detroit Offers Tours of the Packard Plant*, DETROIT NEWS (Aug. 3, 2017, 5:44 PM), <https://www.detroitnews.com/story/news/local/wayne-county/2017/08/03/pure-detroit-offers-tours-packard-plant/537989001/> [<https://perma.cc/6XFM-PBGV>].

¹⁰ *The Crumbling Packard Plant in Detroit . . . a Crazy or Amazing Wedding Venue?!*, PACKARD PLANT PROJECT NEWS (Oct. 24, 2018), <http://packardplantproject.com/news/?cat=22> [<https://perma.cc/77XH-9LR5>] (featuring the article originally posted by 100 LAYER CAKE (OCT. 24, 2018), <http://www.100layercake.com/wedding-inspiration/the-crumbling-packard-plant-in-detroit-a-crazy-or-amazing-wedding-venue/> [<https://perma.cc/PQ37-5DG9>]).

these walls be protected from new owners taking care of this abandoned building for the first time in decades?

This Article proposes that if an artist can show and maintain adverse possession by placing her artwork on another's property, the artist's moral rights should prevail under the Visual Artists Rights Act ("VARA")¹¹ against the property owner's right to his property. The artist would retain these rights until she no longer maintains the work, or when she neglects or abandons it altogether. Adverse possession, in this case, is defined as the actual, open, notorious, exclusive, hostile, continuous, or uninterrupted claim of ownership to a piece of property.¹² Part I provides background about the graffiti art movement throughout the ages and examines the rights and legal issues affecting graffiti artists. Part II examines the property law concept of adverse possession and posits that an application of adverse possession in the conflict between an artist's moral rights and a building owner's property rights could settle the debate over whose rights should prevail in a legal battle. Finally, Part III offers a synthesis of adverse possession law and the existing protections offered by VARA to protect works of trespassory graffiti art placed on abandoned buildings.

I. GRAFFITI ART AND ARTISTS' MORAL RIGHTS

A. *Background: History of Graffiti Art in the United States*

Graffiti as an artistic form refers to writings, drawings, figures, and images that have been drawn, marked, scratched, etched, sprayed, painted, or written on surfaces where the artist has not obtained permission from the property owner.¹³ This art form is not

¹¹ 17 U.S.C. § 106A.

¹² THOMPSON ON REAL PROPERTY § 87.01 (David A. Thomas ed., 1998).

¹³ Jeffrey Ian Ross, *Introduction: Sorting It All Out*, in ROUTLEDGE HANDBOOK OF GRAFFITI AND STREET ART 1, 1 (Jeffrey Ian Ross ed., 2016). This Article does recognize that there are forms of graffiti that are not illegal and may, in fact, be commissioned by property owners in the form of murals and other public art displays. *Id.* However, the discussion created by this Article does not seek to alter the contractual rights created during those "legal" transactions. Another type of art form that is similar to graffiti and is typically considered a subset of this trespassory art is the "street art" movement. *Id.* Street art is narrower in its definition and refers to "stencils, stickers, and noncommercial

new. It has existed in cultures around the world for thousands of years.¹⁴ Across the ancient world, graffiti has appeared in a variety of artistic media forms.¹⁵ It was inscribed in plaster, painted, scratched, or drawn on structures and even carved into stone and pottery.¹⁶ No surface was sacred; there is evidence of ancient graffiti on floors and on indoor and outdoor walls alike.¹⁷ In the first century BCE, Romans regularly wrote on the walls of their cities.¹⁸ This early form of graffiti included letters, profiles of men, and the images of palm fronds—an ancient symbol of victory.¹⁹ In Pompeii,

images/posters that are affixed to surfaces and objects . . . where the owner of the property has NOT given permission to the perpetrator.” *Id.* While this Article does not discuss street art specifically, it acknowledges that the topics discussed in this Article may apply to similar situations within the practice of creating street art. Street art has the same vandalism connotations as graffiti art does due to its typically “illegal” status, and therefore it is probable that an application of adverse possession law, as later discussed in this Article, may preserve posters and other forms of street art so long as they meet the requirements set out in this Article. Other types of graffiti not included in the analysis of this Article include: gang graffiti, prison inmate graffiti, latrinalia (more commonly recognized as bathroom stall graffiti), yarn bombing, and American Indian graffiti, among others. *Id.* While each of these forms is unique in its existence, and while some of them have inherently artistic aspects, these graffiti forms are not discussed within this Article, even while it is possible that the contents of the Article may apply to them.

¹⁴ Kelly Wall, *A Brief History of Graffiti*, TEDED, <https://ed.ted.com/lessons/a-brief-history-of-graffiti-kelly-wall#watch> [<https://perma.cc/BPT7-8DES>].

¹⁵ J.A. Baird & Claire Taylor, *Ancient Graffiti*, in ROUTLEDGE HANDBOOK OF GRAFFITI AND STREET ART 17, 17 (Jeffrey Ian Ross ed., 2016).

¹⁶ *Id.* at 18. There are a variety of different definitions, distinctions, and categorizations for dealing with ancient graffiti due to the wide variety of scholarly backgrounds from which people studying ancient graffiti come. *Id.* at 17. Because of this wide variety of graffiti categorizations, scholars do not always agree on which graffiti is ancient. *Id.* For example, etchings on pieces of broken pottery, also known as ostraca, are not considered graffiti in some circles. However, Roman election notices, or programmata, painted onto buildings in Pompeii—much like modern day political campaign or advertising posters—are considered a form of graffiti. *Id.* at 18. The ancient graffiti mentioned in this Article includes both types of etchings and drawings under the “graffiti” umbrella.

¹⁷ *Id.* at 18.

¹⁸ Wall, *supra* note 14.

¹⁹ Kristin Ohlson, *Reading the Writing on Pompeii’s Walls*, SMITHSONIAN MAG. (July 26, 2010), <https://www.smithsonianmag.com/history/reading-the-writing-on-pompeiiis-walls-1969367/?no-ist> [<https://perma.cc/VND6-ZYUR>]. Ancient graffiti took all forms—simple math calculations, literary illusions, mystical text—and was even the source of political commentary. Baird & Taylor, *supra* note 15, at 19–20. Much like modern day etchings and forms of vandalism, crude sexual imagery was also a popular graffiti etching choice. *Id.* at 20.

some forms of graffiti advanced Rome's simple etchings further,²⁰ including drawings, political commentary, and even championing gladiators.²¹ Archeologists have even identified passionate poetry competitions expressed through the graffiti that peppers the city's ruins.²² Outside of Italy, the ancient Mayans partook in graffiti, carving different drawings into their city walls, and even today examples of ancient graffiti can be found in places such as modern day Syria and Turkey.²³

With graffiti plastered and carved into the walls and streets of multiple civilizations, the fifth century marked the advent of graffiti's negative undertones.²⁴ However, graffiti did not find itself

²⁰ Wall, *supra* note 14.

²¹ *Id.* Graffiti that peppered the walls of Pompeii and Herculaneum included a drawing of a face supposed to be Medusa. *Drawing of a Face*, ANCIENT GRAFFITI PROJECT, <http://www.ancientgraffiti.org/Graffiti/graffito/AGP-EDR128583> [<https://perma.cc/9HBD-3AH2>]. There were also simple greetings, like "Greetings to Sextus Burenus." *Greeting*, ANCIENT GRAFFITI PROJECT, <http://www.ancientgraffiti.org/Graffiti/graffito/AGP-EDR168483> [<https://perma.cc/7MTZ-MPR8>]. Some graffiti even included commentary on the landscape and potentially the company, like "We came! We came here desiring, much more do we desire to go." *Poetic Graffito*, ANCIENT GRAFFITI PROJECT, <http://www.ancientgraffiti.org/Graffiti/graffito/AGP-EDR153487> [<https://perma.cc/EHW3-5J42>]. Overall, the population was unafraid to broadcast their comings and goings for all of history, including this ancient "review" on the outside of the Suburban Baths: "Two friends were here, and they had a servant named Epaphroditus who was terrible at everything for the whole time, so they finally kicked him out. (Then?) they spent 105 1/2 sestertii most delightfully when they had sex." *Graffito About Leisure*, ANCIENT GRAFFITI PROJECT, <http://www.ancientgraffiti.org/Graffiti/graffito/AGP-EDR154179> [<https://perma.cc/9S55-B4DN>].

²² Ohlson, *supra* note 19. One famous piece of poetry in ancient Pompeii, while not evidence of a poetry battle, is a poem of love known for its Sapphic tones. KRISTINA MILNOR, *GRAFFITI AND THE LITERARY LANDSCAPE IN ROMAN POMPEII 197-98* (2014) (translating the text of this poem as: "Oh, would that it were permitted to grasp with my neck your little arms as they entwine [it] and to give kisses to your delicate little lips. Come now, my little darling, entrust your pleasures to the winds. (En)trust me, the nature of men is insubstantial. Often as I have been awake, lovesick, at midnight, you think on these things with me: many are they whom Fortune lifted high; these, suddenly thrown down headlong, she now oppresses. Thus, just as Venus suddenly joined the bodies of lovers, daylight divides them and if(?)").

²³ Wall, *supra* note 14. Other places that have shown evidence of graffiti include ancient Egypt and pre-Islamic Arabia, among others. See Baird & Taylor, *supra* note 15, at 17.

²⁴ Wall, *supra* note 14. Specifically, in 455 AD, the Germanic people known as the "Vandals" famously invaded Rome, causing the city's destruction. *Id.* This is where the word "vandalism" found its roots. *Id.*

associated with vandalism until the French Revolution in 1789.²⁵ Because much famous art was destroyed during this time period, and because graffiti was frequently associated with acts of deliberate rebellion and provocativeness, the French Revolution was the first time period to plaster the “vandalism” label on graffiti.²⁶

In the United States, “monikers” were the precursors to the graffiti movement.²⁷ Monikers were “simple chalk line signatures of a nickname along with a single icon, caricature, or symbol.”²⁸ These signatures were commonplace on freight train lines dating back to the end of the Civil War.²⁹ Monikers were carved into the wooden sides of freight cars and later written using chalk and oil sticks.³⁰ Much like graffiti art today, many “boxcar artists” became famous.³¹ Some artists, such as BOZO TEXINO, reached a level of popularity that allowed their monikers to live on in a new form when adopted by artist GRANDPA BOZO TEXINO after the original artist’s death.³² Creators of these monikers wrote with and without the

²⁵ *Id.* Iconoclasm, or the action of attacking or rejecting religious images as heretical, swept through the French population during and right after the French Revolution. See Stanley J. Idzerda, *Iconoclasm During the French Revolution*, 60 AM. HIST. REV. 13, 16 (1954). By rejecting the past monarchy and aristocrats, the French people began to tear down monuments which had immortalized the aristocratic lines, and determined that if the monarchy was to disappear, that all of the symbols that represented it also needed to disappear. See *id.* at 16. Therefore, feudal monuments were destroyed, as were any objects that were deemed to contain dangerous ideological content. See *id.* at 16–17. Artwork had been used as a form of social control, and when the Revolution came, it was time for this control to be destroyed. See *id.* at 13–14.

²⁶ Wall, *supra* note 14. Previously, graffiti did not have an illegal connotation, as the ancient world welcomed graffiti on its walls. See Baird & Taylor, *supra* note 15, at 20. Many types of ancient graffiti appeared on the inside of houses or other places that would implicitly require some sort of permission to enter. See *id.* For example, the home of Maius Castricius, a wealthy Roman and property owner in Pompeii, contained graffiti on its interior walls in the places that had the most foot traffic. *Id.* Seventy individual works of graffiti were found throughout the Castricius home by archeologists. See Rebecca R. Benefiel, *Dialogues of Ancient Graffiti in the House of Maius Castricius in Pompeii*, 114 AM. J. ARCHAEOLOGY 59 app. 1 (2010).

²⁷ ROGER GASTMAN & CALEB NEELON, *THE HISTORY OF AMERICAN GRAFFITI* 24 (Chelsea Fulcher ed., 2010).

²⁸ *Id.*

²⁹ *Id.* These freight train monikers were a precursor to the later aerosol freight train graffiti subculture. See *id.*

³⁰ *Id.*

³¹ *Id.* at 35.

³² *Id.*

permission of freight train owners throughout the years.³³ Some were created by homeless people, known during the 1930s depression era as “hobos,” looking to communicate information about the safest travel routes, while others were freight car inspectors and rail workers looking to pass time.³⁴

Graffiti as we know it today emerged in the United States in the 1960s.³⁵ The first modern graffiti writer, known as “Cornbread,” began tagging city walls in Pennsylvania to get the attention of a girl.³⁶ By the 1970s, graffiti spread into the five boroughs of New York City.³⁷ There, graffiti evolved from simple tags—a nickname or mark written on a surface—into the complex and colorful scripts that people famously associate with the graffiti art movement now.³⁸ Prior to 1983, graffiti mainly coated the sides of subway cars.³⁹

³³ *Id.*

³⁴ *Id.*

³⁵ *The History of American Graffiti: From Subway Car to Gallery*, PBS (Mar 31, 2011, 3:25 PM), <https://www.pbs.org/newshour/arts/the-history-of-american-graffiti-from-subway-car-to-gallery> [<https://perma.cc/LF9T-PXDUI>]. One of the most famous monikers that originated in the United States was the phrase “Kilroy Was Here.” GASTMAN & NEELON, *supra* note 27, at 38. This moniker was the text “Kilroy Was Here,” accompanied by a cartoon of a bald man with his nose hanging over a fence. *Id.* This moniker was created by James J. Kilroy, a rate-setter working for Bethlehem Steel at the Fore River Shipyard during World War II. *Id.* To check off the tasks he completed, Kilroy would make his “Kilroy Was Here” mark on the rivets he inspected. *Id.* As soldiers and sailors headed off to war, they saw the moniker emblazoned on the ships and vehicles that would take them overseas. *Id.* Once these soldiers made it overseas, the “Kilroy Was Here” moniker spread across Europe and became an international phenomenon. *Id.* at 41.

³⁶ Cornbread got his nickname from his time at the Youth Development Center reform school in Philadelphia. GASTMAN & NEELON, *supra* note 27, at 48. It was there that Darryl Alexander McCray repeatedly asked the cook at the center to make him cornbread, to the point that the cook complained to the school’s counselor to “[k]eep this Cornbread out of my kitchen!” *Id.*

³⁷ *The Surprising History of Graffiti on NYC Subway Cars and Tunnels*, MILROSE CONSULTANTS (May 29, 2018), <https://www.milrose.com/insights/the-surprising-history-of-graffiti-on-nyc-subways-cars-and-tunnels> [<https://perma.cc/34DT-XL6U>].

³⁸ *Id.*

³⁹ *Id.* One subculture of aerosol subway car graffiti is the aerosol freight train graffiti that people see on commercialized transportation cars. Robert Donald Weide, *The History of Freight Train Graffiti in North America*, in *ROUTLEDGE HANDBOOK OF GRAFFITI AND STREET ART* 36, 36–38 (Jeffrey Ian Ross ed., 2016). This form of graffiti sprang up in the 1980s soon after the popularity of subway graffiti art collapsed. *Id.* This graffiti movement is evidence of the reach graffiti subcultures are able to gain over a wide geographic area. *Id.* at 37. Like other types of graffiti, freight train graffiti is an example of a subculture’s

While subway car graffiti was met with resistance from New York City—most notably in the form of the all-white anti-graffiti paint that adorned a quarter of subway cars in 1983—graffiti-style writing persisted.⁴⁰ While the subway car art scene diminished due to anti-graffiti efforts, abandoned buildings and old subway tunnels in New York and other major cities are still graffiti hot spots.⁴¹

Today, works of aerosol graffiti art⁴² can be found in galleries, museums, or as the subject of bidding wars at auction houses.⁴³ The artistic pieces created by anonymous graffiti artist Banksy⁴⁴ are a prime example of the fame that now epitomizes graffiti art.⁴⁵ In 2013, when Banksy first arrived in New York City, fans flocked the city to hunt for the daily works he created for thirty days before they were removed, defaced, or covered up.⁴⁶ Ironically, these “vandalistic” works were often protected by the property owners whose land Banksy trespassed.⁴⁷ These protective measures included covering

fight against a dominant authority and capitalistic system of commerce while allowing for the possibility of an intercontinental recognition of status and style. *Id.* See generally JEFF FERRELL, *CRIMES OF STYLE: URBAN GRAFFITI AND THE POLITICS OF CRIMINALITY* (Northeastern Univ. Press 1996). This graffiti subculture is a noted byproduct of the moniker movement that started back toward the end of the Civil War. See GASTMAN & NEELON, *supra* note 27, at 24. However, because the medium in which these tags are written and the complexity of the artwork between the two freight train movements is different, this Article differentiates the two movements as separate styles of art. See Weide, *supra*; see also GASTMAN & NEELON, *supra* note 27, at 24.

⁴⁰ *The Surprising History of Graffiti on NYC Subway Cars and Tunnels*, *supra* note 37.

⁴¹ *Id.*

⁴² As it is mentioned in this Article, aerosol refers to painting with aerosol spray paint cans. Spray paint is “paint that is packaged in an aerosol container for spraying directly onto a surface.” See *Spray Paint*, DICTIONARY.COM, <https://www.dictionary.com/browse/spray-paint> [<https://perma.cc/EPS2-HNQG>].

⁴³ See, e.g., Andrew Liptak, *One of Banksy’s Paintings Self-Destructed Just After It Was Auctioned*, VERGE (Oct. 7, 2018, 10:04 AM), <https://www.theverge.com/2018/10/7/17947744/banksy-ballon-girl-artwork-self-destructed-sothbys> [<https://perma.cc/3FBK-DVL7>]; ‘*The History of American Graffiti: From Subway Car to Gallery*, *supra* note 35.

⁴⁴ Banksy is an anonymous graffiti artist who is known for impressive graffiti works on buildings all over the world. See *Banksy: Who is Banksy? What We Know About the Anonymous Graffiti Artist*, BBC (Feb. 14, 2020, 12:00 AM), <https://www.bbc.co.uk/newsround/51504255> [<https://perma.cc/P7G3-6963>]. These works, when sold, have been priced at over a million dollars, and many of Banksy’s works reflect a theme criticizing or bringing light to certain parts of society. *Id.*

⁴⁵ See ‘*The History of American Graffiti: From Subway Car to Gallery*, *supra* note 35.

⁴⁶ *Id.*

⁴⁷ *Id.*

the works with plexiglass to discourage the destruction or distortion of Banksy's art by others.⁴⁸ Some property owners even removed the portion of wall where the work resided to sell to high-end art galleries.⁴⁹

Despite the debated legitimacy of street and graffiti art as an accepted art form, and despite the clear commercial value some works achieve, the question remains whether an art form that originates from a trespassory act should receive any protection under the law.

B. *The Moral Rights of Artists*

Long before the United States implemented legislative rights specific to visual artists, European societies created the concept of a moral right protection, or *droit moral*.⁵⁰ These moral rights emerged in France in the 1870s.⁵¹ There, intellectual works had a dualist nature.⁵² An author's work was viewed to house myriad rights separated into moral and patrimonial sections.⁵³ Compared to these dualistic rights recognized across most of Europe, Germany believed that intellectual works had a monist nature.⁵⁴ This melded the exploitative, or commercial rights, and the moral rights into a singular right that expires seventy years after the author's death.⁵⁵ While the two different views regarding moral rights still exist, the French concept of the dualistic *droit moral* rights is adopted by most nations today.⁵⁶

In the United States, two prevailing legal regimes protect the creations and rights of visual artists: the United States Copyright

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See RALPH E. LEIMER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS § 12:1 (3d ed. 2005). Depending on the laws within a jurisdiction, moral rights abroad fall into three general categories: "(1) personal, (2) perpetual, and (3) inviolable and unassignable." *Id.* § 12:3.

⁵¹ See *id.* § 12:2:4.

⁵² See *id.* § 12:3.

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See, e.g., *id.* §12:4:6[E]. This monist nature is more similar to the traditional copyright protections offered to copyright owners in the United States.

⁵⁶ See *id.* § 12:1.

Act⁵⁷ and VARA.⁵⁸ The Copyright Act specifically affords protection to original works of authorship that are fixed in tangible mediums.⁵⁹ VARA affords visual artists specific rights to their works, often referred to as “moral rights.”⁶⁰ These moral rights—derived from the original French *droit moral*—fall into two categories: rights of paternity and rights of integrity.⁶¹ The coined “moral right” of paternity grants artists authorship in works of their creation, in addition to the right to choose whether to associate their name with those same works.⁶² In regard to artistic integrity rights, VARA gives visual artists a right to “prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation” and “to prevent any destruction of a work of recognized stature,” along with “any intentional or grossly negligent destruction of [a] work.”⁶³ The Copyright Act addresses this right of integrity further and discusses a situation where a work of art is incorporated onto a building by providing:

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 [VARA], the author’s rights under [VARA] shall apply unless—(A) the owner has made a diligent, good faith attempt

⁵⁷ See 17 U.S.C. §§ 101–1332.

⁵⁸ See 17 U.S.C. § 106A. Although VARA is a designated portion of the United States Copyright Act, it is typically treated as a separate, distinct legal act. The First Amendment of the United States Constitution additionally may grant works of visual art some protections. See generally U.S. CONST. amend. I. However, any such protections will not be discussed in the contents of this Article.

⁵⁹ 17 U.S.C. § 102.

⁶⁰ See 17 U.S.C. § 106A(a). Unlike copyright, which affords rights to the owner, and not necessarily the author of the copyrighted work, VARA offers the actual author—in this case, a visual artist—the ability to protect their works from distortion or destruction, even if the author does not hold ownership in the copyrighted work anymore. See *id.* § 106A(a)(2).

⁶¹ See 17 U.S.C. § 106A(a)(1).

⁶² See *Moral Rights in U.S. Copyright Law*, COPYRIGHTLAWS.COM (Nov. 10, 2021), <https://www.copyrightlaws.com/moral-rights-in-u-s-copyright-law/> [<https://perma.cc/42CV-ZRTB>].

⁶³ 17 U.S.C. § 106A(a)(3).

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 [ninety] days after receiving such notice, either to remove the work or to pay for its removal.⁶⁴

Although VARA and the Copyright Act offer interconnected protections for artists' moral rights, a gap arises when looking at works with more deviant or trespassory natures. Specifically, the language of VARA mentions commissioned works or works of art that were placed with the permission of the owner but does not specifically address works lacking permission from the property owner.⁶⁵ The language of the Copyright Act, however, leaves enough ambiguity in its language that a potential protection may occur by not specifically mentioning caveats to the type of work it protects.⁶⁶

An application of VARA would look like this: assume Polly Painter has created a beautiful mural of a nature landscape on the side of a local building. Once installed, the painting receives acclaim from the city and art critiques alike. Thirty years down the line, new owners acquire the building and decide they want to remove the piece altogether and immediately begin to paint over the mural. This action constitutes intentional destruction and has prevented Polly from attempting to remove the piece. In addition, this destruction or distortion of Polly's work has affected her reputation as an artist, especially because of how poor the paint over the mural appears. If Polly Painter so chooses, she can now use VARA to gain retribution for the damage to her work, reputation, and honor.

Outside the federal scope, a few state-sponsored legislations follow the protections provided by VARA, some more restrictive than others. For example, in California, the state civil code grants protection to works of "fine art" and declares that any physical alterations

⁶⁴ 17 U.S.C. § 113(d)(2).

⁶⁵ See generally 17 U.S.C. § 106A.

⁶⁶ See 17 U.S.C. § 113.

to such works would be detrimental to the artist's reputation.⁶⁷ It puts forth "a public interest in preserving the integrity of cultural and artistic creations."⁶⁸ Finally, much like the U.S. Copyright Act, the California code attempts to balance the rights of building owners and artists that place their works on another's property.⁶⁹ Massachusetts also adopted its version of VARA.⁷⁰ The Massachusetts law echoes the sentiments of the California code in the rights it gives artists against physical alterations or destruction of their art.⁷¹

C. Disputes in the Modern Age: Should Graffiti Be Offered Copyright Protection?

Even though visual art on its own may be granted copyright protection, the trespassory nature of graffiti art sparks challenges and debates. In fact, even states that typically value the intrinsic cultural value of art have stringent laws against graffiti and the sale of aerosol products to prevent the spread of graffiti on buildings.⁷²

⁶⁷ See CAL. CIV. CODE § 987(a) (West 2021). The statement "fine art" echoes the meaning associated with the "work of recognized stature" phrase in VARA. *Compare id.* with 17 U.S.C. § 106A.

⁶⁸ CAL. CIV. CODE § 987(a) (West 2021).

⁶⁹ See *id.* § 987(h)(1)–(3). In particular, the California Code's specifications, potentially due to the stringent anti-graffiti regulations, leans more toward the rights that building owners hold in their property. If a situation arises in which a piece of fine art is unable to be removed from a building without substantial destruction to it, any rights the artist may have in the work are waived, unless specified in a written agreement signed by the owner of the building on which the work is placed. *Id.* § 987(h)(1).

⁷⁰ See MASS. GEN. LAWS ch. 231, § 85S (2019). The Massachusetts law echoes the sentiments of the California code in the rights it gives artists against physical alterations or destruction of their art. See *id.* In fact, minus a few stylistic differences in the writing, the Massachusetts law regarding artists moral rights to integrity is almost identical to that of the California code. *Compare id.* with CAL. CIV. CODE § 978. Other states that have some variation of VARA or some protection for artists moral rights embedded into their own state law are as follows: New York, Maine, Louisiana, New Jersey, Pennsylvania, New Mexico, Rhode Island, Connecticut, Nevada, and Utah, among others. N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 2011); ME. REV. STAT. ANN. tit. 27, § 303 (2011); LA. STAT. ANN. §§ 51:2151–2156 (2011); N.J. STAT. ANN. §§ 2A:24A-1–8 (West 2011); 73 PA. STAT. AND CONS. STAT. ANN. §§ 2101–2110 (West 2011); N.M. STAT. ANN. §§ 13-4B-1–3 (West 2011); R.I. GEN. LAWS ANN. §§ 5-62-2–6 (West 2010); CONN. GEN. STAT. ANN. §§ 42-116s–t (West 2011); NEV. REV. STAT. ANN. §§ 597.720–760 (West 2009); UTAH CODE ANN. § 9-6-409 (West 2011).

⁷¹ See MASS. GEN. LAWS ch. 231, § 85S (2019).

⁷² See CAL. PENAL CODE § 594 (2019); see also N.Y.C. ADMIN. CODE § 10-117 (2019).

California specifically includes “graffiti” language in its criminal laws regarding acts of vandalism to another’s property.⁷³ It defines the term as “any unauthorized inscription, word, figure, mark or design that is written . . . drawn, or painted on real or personal property.”⁷⁴ In addition, New York law specifically states: “[n]o person shall write, paint or draw any inscription . . . on any public or private building . . . unless the express permission of the owner or operator of the property has been obtained.”⁷⁵ In New York, even possessing an aerosol can with the intent to use it for graffiti purposes can leave a person vulnerable to a misdemeanor charge.⁷⁶

With these anti-graffiti and anti-vandalism laws, artists who create aerosol art are left in a legal quandary when their works are infringed. The precarious legal nature of graffiti work has provoked vivid debate centering around whether illegal works of art should be granted copyright protection.⁷⁷ Recently, graffiti artist Jason Williams, also known as “Revok,” sent a cease-and-desist letter to popular clothing company H&M when the company used Williams’ artwork in an advertising campaign for its products.⁷⁸ This piece of graffiti was a series of black lines cascading across the wall of a handball court in Brooklyn, New York.⁷⁹ A situation that could have been quickly resolved with a simple license and an apology escalated when H&M filed a countersuit against Williams.⁸⁰ The company’s claim argued that graffiti does not warrant copyright

⁷³ CAL. PENAL CODE §§ 594(a)(1), (c) (2019).

⁷⁴ *Id.*

⁷⁵ N.Y.C. ADMIN. CODE § 10-117a (2019).

⁷⁶ *Id.* §§ 10-117b, f. Specifically, the statute states that “[N]o person shall possess an aerosol spray paint can, broad tipped indelible marker or etching acid with the intent to violate the provisions of subdivision a of this section.” *Id.* § 10-117b. Additionally, “[a]ny person who violates the provisions of paragraph a of this section shall be guilty of a class A misdemeanor . . . [while] [a]ny person who violates the provisions of paragraph b of this section shall be guilty of a class B misdemeanor” *Id.* § 10-117f.

⁷⁷ Lia McGarrigle, *H&M Drops Lawsuit Against Revok Claiming Illegal Graffiti Doesn’t Have Copyright*, HIGHSNOBIETY (Mar. 15, 2018, 7:48 PM), <https://www.highsnobiety.com/p/hm-graffiti-copyright-lawsuit/> [<https://perma.cc/3ZRC-X2WZ>].

⁷⁸ *Id.*

⁷⁹ Marc Bain, *H&M Made a Big Mistake Going After a Graffiti Artist*, QUARTZ (Mar. 16, 2018), <https://qz.com/quartz/1231170/hm-dropped-its-lawsuit-against-a-graffiti-artist-after-backlash/> [<https://perma.cc/8UPU-UMC3>].

⁸⁰ McGarrigle, *supra* note 77.

protection due to its illicit nature, specifically stating that “[u]nder the circumstances, in which [one’s] client’s claimed ‘artwork’ is the product of criminal conduct, [an artist] has no copyright rights to assert.”⁸¹ However, this claim ignores the reality of the Copyright Act—the language of the statute does not require that a work is legal for it to receive copyright protection.⁸² While the court never addressed H&M’s claim because the case settled out of court, this case demonstrates the legal grey area that the trespassory nature of graffiti inhabits.⁸³

However, even graffiti art permissibly placed on a building has been at the center of legal debates due to its incorporation into the architecture. Graffiti artist Adrian Falkner (also known as SMASH 137) sued General Motors Company (“GM”) after his graffiti mural on a parking structure in Detroit was used in a Cadillac ad campaign without Falkner’s consent.⁸⁴ The mural in question was on the top floor of the Detroit “Z Garage.”⁸⁵ It was a colorful, abstract piece that embodied many stylistic shapes for which graffiti is known.⁸⁶ This graffiti artwork, unlike that created by Revok, was placed on the “Z Garage” as part of a collaboration between Bedrock Detroit

⁸¹ *Id.* The premise this countersuit is based on is the “unclean hands doctrine,” a defense where a defendant claims that a plaintiff should not receive a legal remedy when they have acted unethically, illegally or in bad faith. *See id.*

⁸² *See generally* 17 U.S.C. § 102.

⁸³ *See* Sarah Cascone, *Who Owns Graffiti? A Judge Allows a Street Artist’s Lawsuit Against General Motors to Move Forward*, ARTNET (Sept. 21, 2018), <https://news.artnet.com/art-world/judge-greenlights-street-artists-copyright-lawsuit-against-gm-1352788> [<https://perma.cc/NQT4-JGCH>]. The case was settled out of court, and because of this, no judge had the chance to weigh in on the “unclean hands” argument. *Id.* However, as a part of the out-of-court settlement, H&M agreed to fund a variety of Detroit art charities and programs. Marc Daalder, *In Settlement, Revok and H&M Pledge Donations to Detroit Arts Groups*, DETROIT FREE PRESS (Sept. 6, 2018, 7:00 AM), <https://www.freep.com/story/news/local/michigan/detroit/2018/09/06/revok-and-h-m-pledge-donations-detroit-arts-groups/1206836002/> [<https://perma.cc/D3FF-PAM7>]. These organizations include “City Year, Living Arts Detroit, MOCAD Teen Council, (and) the Empowerment Plan.” *Id.* (quoting an Instagram post made by Revok).

⁸⁴ Alan Feuer, *G.M. Used Graffiti in a Car Ad. Should the Artist Be Paid?*, N.Y. TIMES (July 17, 2018), <https://www.nytimes.com/2018/07/17/arts/design/general-motors-graffiti-artist-copyright.html> [<https://perma.cc/58LZ-JCZ9>].

⁸⁵ *Id.*

⁸⁶ *Id.*

and the Library Street Collective.⁸⁷ Yet in this case, the question was not whether graffiti should be granted copyright protection despite its illegality, but whether photographs of graffiti should be granted protection when the graffiti is painted on architecture.⁸⁸ Because the graffiti was placed on an architectural work, GM argued it was part of the garage, and any pictures of it would classify as non-infringing works.⁸⁹ This argument mainly relied on the portion of the Copyright Act allowing pictorial representations of architectural works in public places.⁹⁰ However, the court disregarded this argument and held the mural was not a part of the architectural design, but instead was placed there after the garage was constructed.⁹¹ Because the graffiti was a separate creation from the garage and not part of the architectural design, the court rejected GM's argument, and stated that the copyright infringement claim could move forward.⁹²

Regardless of the difficult legal nature of graffiti art, there is little in the statutory language of either the Copyright Act or VARA specifically preventing graffiti from receiving protection.⁹³ Nothing in the Copyright Act precludes a work from obtaining copyright protection so long as the work meets the minimum standards of copyrightability—namely, being an original work of authorship fixed in

⁸⁷ *The Z Garage as Urban Art Museum in Downtown Detroit: How & Nosm, Lucy McLauchlan, Pose & Revok, Saner, Cyrle and Smash 137*, ST. ART NYC (Nov. 6, 2015), <http://streetartnyc.org/blog/2015/11/06/the-z-garage-as-urban-art-museum-in-downtown-detroit-how-nosm-lucy-mclauchlan-pose-revok-saner-cyrle-and-smash-137/> [<https://perma.cc/9U4T-MXZY>]. This collaboration allowed for multiple graffiti artists to place their work on the building with the permission of the owners. *Id.* Some of the artists that contributed included Lucy McLauchlan, Pose, Revok, Saner, Cyrle, and Smash 137. *Id.*

⁸⁸ Cascone, *supra* note 83; Boodle Hatfield, *Win for Street Artist Who Took on General Motors*, LEXOLOGY (Oct. 3, 2018), <https://www.lexology.com/library/detail.aspx?g=2a22fad5-a7db-4bca-89a9-cb24af70bb31> [<https://perma.cc/Q8D5-RTMF>].

⁸⁹ Cascone, *supra* note 83; Hatfield, *supra* note 88.

⁹⁰ 17 U.S.C. § 120(a) (stating, “[t]he copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied or located in or ordinarily visible from a public place.”).

⁹¹ Cascone, *supra* note 83; Hatfield, *supra* note 88.

⁹² Cascone, *supra* note 83; Hatfield, *supra* note 88.

⁹³ See 17 U.S.C. § 106A.

a tangible medium.⁹⁴ Additionally, VARA does not mention any specific caveats or limitations regarding works' potential illegality.⁹⁵

D. Disputes in the Modern Age: Does Trespassory Graffiti Art Receive VARA Protections?

While there may be no statutory bar preventing copyright and VARA protection of illegally placed works of art, courts have done little to clarify the existing ambiguities.⁹⁶ Because of this, public policy is the deciding factor when balancing the rights of artists and property owners.⁹⁷

Famously, in *Botello v. Shell Oil Co.*,⁹⁸ a California court considered whether a mural painted on the wall of a service station and later destroyed should afford the artist compensation.⁹⁹ While the primary question was whether a mural was considered a "painting" under California statute, the court commented on illegal graffiti as well.¹⁰⁰ Specifically, it sought to protect property owners from artistic interlopers, stating that the California statute protecting fine art from alteration or destruction only "contemplates structures owned by the artists and to art that is affixed or attached by arrangement with the owner."¹⁰¹ Further, the court stated that the statute "obviously does not apply to graffiti, which lacks these characteristics, [the graffiti] is hardly classifiable as 'fine art'" and is instead "the subject of several criminal laws."¹⁰² In this case, protecting property

⁹⁴ See *id.* § 102.

⁹⁵ See *id.* § 106A.

⁹⁶ There is currently nothing in the language of either VARA or the Copyright Act that limits moral right protections to works that are of a non-trespassory nature. The only language that does refer to building owners comes from 17 U.S.C. § 113(d)(2), which references the steps that a building owner must take when he wishes to remove artwork that has been incorporated into a building he owns. See *id.* § 113(d)(2). This, although it may imply reference to a commission or permission-based installation of artwork, does not explicitly limit the applicability of VARA's protections to copyrighted works. *Id.*

⁹⁷ *English v. BFC&R E. 11th St. LLC*, No. 97 Civ. 7446, 1997 U.S. Dist. LEXIS 19137, at *16 (S.D.N.Y. Dec. 2, 1997).

⁹⁸ *Botello v. Shell Oil Co.*, 229 Cal. App. 3d 1130 (Cal. Ct. App. 1991).

⁹⁹ *Id.* at 1332–33.

¹⁰⁰ *Id.* at 1134 n.2.

¹⁰¹ *Id.*

¹⁰² *Id.*

owners was held to be more important than artists' rights. This decision established persuasive authority for other courts to dismiss claims of protections for illegal artwork.¹⁰³

Continuing to protect property owners, the court in *English v. BFC&R* evaluated the destruction of a community garden in New York City that contained sculptures and murals on the wall of an adjacent building, some of which were illegally placed.¹⁰⁴ There, the court determined that "VARA is inapplicable to artwork that is illegally placed on the property of others, without their consent, when such artwork cannot be removed from the site in question."¹⁰⁵ Two public policy concerns underpinned this outcome. First, any contrary decision would place a responsibility on city officials or building owners to patrol all vacant and abandoned lots, "lest the [c]ity give up its rights to the property."¹⁰⁶ Second, a contrary holding would effectively stop the development of adjoining pieces of property simply by adding a mural or drawing to its face because constructing a building could cover, mutilate, or distort the mural.¹⁰⁷

E. The Protection of Graffiti Currently: 5Pointz

While debates about property ownership rights versus artists' rights are still in flux, the scales have slowly tipped toward VARA protection for graffiti artists despite the historic disdain for the art form.

Cohen v. G & M Realty, LP ("5Pointz") is the most prevalent case demonstrating this shift.¹⁰⁸ In *5Pointz*, the court focused on a VARA lawsuit brought by twenty-one "aerosol"—or graffiti—artists against Gerald Wolkoff after Wolkoff planned to demolish one of his own warehouse buildings.¹⁰⁹ This warehouse building housed

¹⁰³ *See id.*

¹⁰⁴ *English v. BFC&R E. 11th St. LLC*, No. 97 Civ. 7446, 1997 U.S. Dist. LEXIS 19137, at *2–5 (S.D.N.Y. Dec. 2, 1997).

¹⁰⁵ *Id.* at *10.

¹⁰⁶ *Id.* at *14.

¹⁰⁷ *Id.* at *16.

¹⁰⁸ *Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421 (E.D.N.Y. 2018).

¹⁰⁹ *Id.* at 427.

the graffiti “mecca” known as 5Pointz.¹¹⁰ While Wolkoff legally owned the building¹¹¹ from 1993 onward, he allowed graffiti artists to use his tenantless building as a canvas.¹¹² When the original graffiti project on the property, known as the Phun Factory, fell into disrepair, Wolkoff designated globally-recognized aerosol artist Cohen as the “*de facto* curator” of the space.¹¹³ Cohen determined which works of art would remain on the buildings, decided where artists could paint, and created general community rules, slowly curating 5Pointz to be a well-known graffiti monument.¹¹⁴ During their pseudo-tenancy of the space, the artists did whatever they could to make the property as welcoming and safe as possible, stating to the court that:

We took it upon ourselves to clean the loading dock The dumpsters were overflowing. We took it upon ourselves, we hired [Wolkoff’s] employees, we paid for the lighting. We put motion sensors up so that when you came to the loading dock it was inviting. It actually drew you in as opposed to scaring you away.¹¹⁵

As the graffiti mecca grew, the public also became more interested in the works pictured there.¹¹⁶ While the artists controlled

¹¹⁰ See *id.* The name of 5Pointz stood for the concept of the five boroughs of New York City “coming together as one” to create unique and creative urban and street art. Eli Anapur, *The Legendary 5 Pointz—History and Legacy*, WIDEWALLS (Nov. 15, 2016), <https://www.widewalls.ch/magazine/5-pointz> [<https://perma.cc/6G3B-7LCL>] (internal quotations omitted).

¹¹¹ This particular building stood on Jackson Avenue in Queens, NY. *Cohen*, 320 F. Supp. 3d at 427.

¹¹² *Id.* at 431.

¹¹³ *Id.* at 431–32. Originally, the Phun Phactory was a project founded by Pat DiLillo in an effort to clean up graffiti and to combat vandalism in the Woodside neighborhood. *5Pointz*, SPACES (Feb. 23, 2018), <http://spacesarchives.org/explore/collection/environment/5pointz/> [<https://perma.cc/A3N6-MP33>]. However, prior to the installment of Cohen as the curator, there was no control over the works of art created on the warehouse walls, or any assurance of quality in the artwork presented. *Cohen*, 320 F. Supp. 3d at 432. Before Cohen arrived, the dilapidated property was just another example of vandalism and low-grade graffiti. See *id.*

¹¹⁴ *Cohen*, 320 F. Supp. 3d at 432.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 431. As the fame associated with 5Pointz increased, it was no longer just graffiti artists from the five boroughs of New York that were interested in painting there. See *id.*

5Pointz, Wolkoff remained uninvolved in day-to-day operations relating to the artwork.¹¹⁷ In fact, due to Wolkoff's hands-off attitude, parts of the buildings fell into such disrepair that in 2009, one of the exterior courtyard staircases collapsed, injuring an artist in the process.¹¹⁸ Despite leaving the building in the artists' care, and despite the artists' efforts to cultivate one of New York City's largest and most prominent curations of graffiti art, in 2013, Wolkoff decided to demolish the 5Pointz site to repurpose for luxury condos.¹¹⁹

The impending destruction came as a surprise to the artists who did everything legally possible to prevent the destruction of 5Pointz, including a failed attempt to purchase and preserve the property as a culturally significant landmark.¹²⁰ In a final attempt, the artists filed a lawsuit asking the court to enjoin Wolkoff from destroying 5Pointz and its artwork.¹²¹ However, the court denied the preliminary injunction.¹²²

The court cautioned Wolkoff that he would be subject to monetary damages "if it [was] ultimately determined after trial that plaintiffs' works were of recognized stature under VARA."¹²³ Instead of waiting for this determination, however, Wolkoff quickly—and

Artists from London, West Virginia, and other places immigrated to New York, just for the chance to emblazon their artwork on the walls of 5Pointz. *Id.* 5Pointz became more than just a site to do graffiti in New York City, it became a landmark of the city and an attraction that brought in daily visitors, school trips, weddings, and more. *Id.* Notably, 5Pointz was used as a location in part of the 2013 motion picture *Now You See Me* (starring famous actors like Jesse Eisenberg and Mark Ruffalo), for one of R&B singer Usher's tours, and in 2011, 5Pointz was the location of the series finale of the television show *Rescue Me*. *Id.* at 433; Joseph Anastasio, *5 Pointz Explored*, LTV SQUAD (Mar. 25, 2014), <http://ltvsquad.com/2014/03/25/5-pointz-explored/> [<https://perma.cc/ZC3X-RZ8V>].

¹¹⁷ *Cohen*, 320 F. Supp. 3d at 432.

¹¹⁸ Anastasio, *supra* note 116. For a short time after this accident, the NYC Department of Buildings asked that the artist studios be vacated due to the multiple number of safety violations present throughout the building. *Id.*

¹¹⁹ *Cohen*, 320 F. Supp. 3d. at 434.

¹²⁰ *Id.* Originally, Cohen sought funding to purchase the property for around the \$40 million dollars at which the 5Pointz property was appraised. *Id.* However, in October 2013, the property's value rose to over \$200 million, placing any chance of purchasing the property out of reach. *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 427 (internal quotations omitted).

inconsistently—whitewashed the works on the 5Pointz walls.¹²⁴ When the poorly-executed whitewashing left the works unsalvageable, the artists filed a lawsuit under VARA, seeking monetary relief.¹²⁵ Wolkoff immediately pushed back and sought to establish that VARA should not afford protections to “temporary works” like graffiti.¹²⁶ This argument was rejected by the court.¹²⁷ Although VARA does not directly address protection for temporary works, Section 113(d) of the Copyright Act clarifies that temporary works are protected.¹²⁸ Therefore, the court found no bar for “temporary works” in VARA.¹²⁹

After addressing the temporary works argument, the court lastly considered whether the destroyed works were of a recognized stature—a requirement to receive VARA protection.¹³⁰ The court used the seminal case of *Carter v. Helmsley-Spear* to define the phrase, “recognized stature.”¹³¹ The court defined the requirements to establish such a status as follows: “(1) that the visual art in question has stature, i.e. is viewed as meritorious, and (2) that this stature is ‘recognized’ by art experts, other members of the artistic community, or by some cross-section of society.”¹³² To arrive at this decision, the jury analyzed the proffered expert testimonies and presence of social

¹²⁴ *Id.* at 435–36. In the context of this situation, whitewashing refers to the act of covering up of the artworks by white paint. *See id.*

¹²⁵ *Id.* at 435.

¹²⁶ *Id.*

¹²⁷ *Id.* at 435–37.

¹²⁸ 17 U.S.C. § 113(d).

¹²⁹ *Cohen*, 320 F. Supp. 3d. at 436–37. As part of their analysis, the court relied on a few cases, including *Board of Managers of Soho International Arts Condominium v. City of New York*. Bd. of Managers of Soho Int’l Arts Condo. v. City of New York, No. 01 Civ. 1226, 2003 WL 21403333 (S.D.N.Y. June 17, 2003). In that case, the Southern District ignored an artist’s argument that removal of their work from a building was equivalent to the work’s destruction, as “[n]owhere in the [dictionary] definition of ‘remove’ does the temporality of the act of removal arise.” *Id.* at *10. Instead, the court determined that Congress intended that the protections of 17 U.S.C. § 113(d) focused on the consequences of the removal aspect of the artwork, and not whether the work was temporary in the first place. *Id.*

¹³⁰ 17 U.S.C. § 106A(a)(B).

¹³¹ *Cohen*, 320 F. Supp. 3d at 435–37.

¹³² *Id.* at 437 (quoting *Carter v. Helmsley-Speare, Inc.*, 861 F. Supp 303, 325 (S.D.N.Y. 1994) (internal quotations omitted)).

media buzz.¹³³ The court evaluated opinions by Cohen (Wolkoff's graffiti curator for 5Pointz), artists from the 5Pointz community, art appraisers, professors, and museum directors.¹³⁴ It also considered the works' fame, noting their permanence and prominence on the walls of 5Pointz, visible to millions of people from the streets and passing trains.¹³⁵

Additionally, the court reviewed folios of the artists in question and exhibits in support of the artists' claims that their works reached fame outside of 5Pointz.¹³⁶ This included the presence of their works at 5Pointz in "films, television, newspaper articles, blogs, and online videos, in addition to social media buzz."¹³⁷ Evaluating the evidence in totality, the court found that thirty-seven works created by twenty-one artists reached a level of recognized stature to be granted VARA protections.¹³⁸ For these twenty-one artists, the damages received from the destruction of their works totaled \$6,750,000, with the amount per artist ranging from \$75,000 to \$1,325,000.¹³⁹

¹³³ *Id.* at 429, 438–40. The jury's opinion in this case was tantamount, especially because part of the "work of recognized stature" status depends upon the judgement of the community. *Id.* at 428–29. In addition to determining whether the works were of a recognized stature, the jurors also needed to determine whether the works were "mutilated, distorted, or otherwise modified to the prejudice of the artist's honor or reputation by the whitewashing." *Id.* at 431.

¹³⁴ *Id.* at 431–32.

¹³⁵ *Id.* at 438.

¹³⁶ *Id.* at 439.

¹³⁷ *Id.*

¹³⁸ *Id.* at 439–40 (noting the names of the works that reached this status as follows: "Johnathan Cohen's *Eleanor RIP*, *7-Angle Time Lapse*, *Patience*, *Character*, *Clown with Bulbs*, *Meres Outdoor Wildstyle*, and *Inside Wildstyle*[,] Sandra Fabara's *Green Mother Earth*[,] Luis Lamboy's *Blue Jay Wall*, *Inside 4th Floor*, *World Traveler*, *Logo for Clothing Brand aka Monopoly Man*, and *Electric Fish*[,] Esteban Del Valle's *Beauty and the Beast*[,] Christian Cortes's *Skulls Cluster*, *Jackson Avenue Skulls*, *Up High Blue Skulls*, and *Up High Orange Skulls*[,] Carlos Game's *Geisha*, *Marilyn*, *Red*, *Denim Girl*, and *Black and White 5Pointz Girl*[,] James Rocco's *Bull Face*, *Lord Paz*, and *Face on Jackson*[,] Steven Lew's *Crazy Monsters*[,] Nicholai Khan's *Dos Equis Man*[,] James Cochran's *Subway Rider*[,] Luis Gomez's *Inside King Kong*[,] Richard Miller's *Monster II*[,] Johnathan Cohen and Maria Castillo's *Love Girl and Burner*[,] Johnathan Cohen and Akiko Miyakami's *Underwater Fantasy*[,] William Tramontozzi, Jr. and James Rocco's *Jimi Hendrix Tribute*[,] Akiko Miyakami and Carlos Game's *Japanese Fantasy*[,] Bienbenido Guerra and Carlo Nieva's *Return of New York*[,] and Jonathan Cohen, Luis Lamboy, and Thomas Lucero's *Angry Orchard*.").

¹³⁹ *Id.* at 496. From greatest total award to lowest total award, the amount of money received by the artists of 5Pointz is as follows: Johnathan Cohen, \$1,325,000; Carlos

While the graffiti in this case was not created pursuant to trespassing activity, the results confirmed that graffiti art, unlike prior holdings in *Botello* and other cases, could actually rise to a work of fine art, or “recognized stature.”¹⁴⁰ Because VARA protections and other state statutes often require the protected art to be of a recognized stature, this groundbreaking precedent shows that graffiti is a notable and protectable form of art.¹⁴¹

The issue here is whether VARA protections stipulated in the 2018 *5Pointz* case can be adopted to guarantee protections for illegally-placed graffiti art in the future. This Article posits that VARA protections could apply. While the *5Pointz* case made strides for the protection of graffiti art, it did not discuss the potential of applying the same holding for *trespassory* graffiti art. The question becomes: can trespassory graffiti art muster additional protection from any other source of property law? This Article argues that it can and offers adverse possession as a theory to effectively protect trespassory graffiti art when a property owner negligently fails to maintain his property.

Game, \$825,000; Luis Lamboy, \$800,000; Christian Cortes \$600,000; James Rocco, \$525,000; Akiko Miyakami \$375,000; Nicholai Khan, \$300,000; Richard Miller, \$300,000; Thomas Lucero, \$200,000; Kenji Takabayashi, \$150,000; James Cochran, \$150,000; Luis Gomez, \$150,000; Steven Lew, \$150,000; Francisco Fernandez, \$150,000; Estaban Del Valle, \$150,000; Rodrigo Henter de Rezende \$150,000; Sandra Fabara, \$150,000; Maria Castillo, \$75,000; William Tramontozzi, \$75,000; Carlo Nieva, \$75,000; and Bienbenido Guerra, \$75,000. *Id.* When the court determines the amount of statutory damages given to victims of copyright infringement, they consider the following factors:

- (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.

Id. at 445. According to the court, “Wolkoff [rang] the bell on each relevant factor.” *Id.*

¹⁴⁰ *See id.* at 440.

¹⁴¹ The destruction of *5Pointz* has also inspired others to open their walls to graffiti artists. *See Sarah Cascone, 5Pointz Is Gone but Its Artists Have Reunited to Turn a New York Stairwell into a ‘Museum of Street Art,’ ARTNET* (Sept. 17, 2018), <https://news.artnet.com/exhibitions/5pointz-artists-reunite-hotel-street-art-museum-new-york-1349192> [<https://perma.cc/QZ3J-J9BZ>]. After *5Pointz* was whitewashed, the citizenM hotel in Manhattan opened the walls of a stairwell to some of the artists of *5Pointz*. *Id.* Twenty of the artists whose works were destroyed were invited to create a new work for the hotel that cascaded down twenty flights of stairs, a space that adds up to over 5,000 square feet. *Id.*

II. ADVERSE POSSESSION

Although the Copyright Act and VARA are the most prevalent pieces of legislation governing art, property law has dealt with its possessory functions, just as much as VARA has dealt with its moral functions. As art is typically physical in its manifestation, its tangible portions are often subject to property law. Similar to disputes regarding who owns a possessory interest in property, there may be debates centering around the possessory interests in works of art. Since graffiti art involves both moral and physical interests, it is crucial to understand how these trespassory works of art intersect with the property owner's rights.

A. Background: History of Adverse Possession

Adverse possession law in the United States stems from centuries-old laws in old England.¹⁴² Since the early thirteenth century, laws like the Statute of Westminster in 1275 prevented land owners from recovering property from adverse possessors.¹⁴³ These early "statutes of limitation" punished land owners if they failed to bring timely actions in recovering their lost property.¹⁴⁴ Thanks to these provisions, it was lawful for recent seisin¹⁴⁵ to turn into a protected

¹⁴² 16 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 91.01. While the direct source of American adverse possession law may stem from the English, the oldest evidence of the theory of adverse possession comes from the Code of Hammurabi. CODE OF HAMMURABI (L. W. King trans.) (1772 B.C.E.) (translation available at <https://avalon.law.yale.edu/ancient/hamframe.asp> [<https://perma.cc/SN82-3J6R>]). There, Hammurabi, in discussing the waste of land stated, "[i]f a chieftain or a man leave his house, garden, and field . . . and some one else takes possession of his house, garden, and field and uses it for three years: if the first owner return and claims his house, garden, and field, it shall not be given to him, but he who has taken possession of it and used it shall continue to use it." *Id.* at Code of Laws no. 30. Later in the Roman system of property, which was designed to create wealth for the entire Roman state, a system known as "precarium" existed. ANDREW LINTOTT, JUDICIAL REFORM AND LAND REFORM IN THE ROMAN REPUBLIC 34 (1992). Under this system a landowner with excess property could allow another person to tend to the surplus. *Id.* at 35. By doing so, this person would hold property rights against all others except for the original property owner himself. *Id.*

¹⁴³ POWELL, *supra* note 142 (referencing Stat. of Westminster I 1275, 3 Edw. 1 c. 39). Chapter 39 of the Statute of Westminster I provided several limitations of prescriptions in several types of writs. *Id.* Specifically, it prevented suitors from bringing writs for the recovery of land if the claim was dated. *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Recent seisin was also known as the possession of land by freehold. *Id.*

form of ownership even if the possession was initially unlawful.¹⁴⁶ Later, other provisions and statutes were enacted to further establish limitations on the timeline for landowners attempting to recover property from adverse possessors.¹⁴⁷ The 1623 statute from which these limitations derive has been noted as the origin of the adverse possession statutes that exist today in the United States.¹⁴⁸

B. *What is Adverse Possession?*

Adverse possession is a legal concept rooted in the principle that a neglectful property owner can and should lose his possessory interest in the land or chattel he owns if he fails to take care of it.¹⁴⁹ Therefore, adverse possession only allows for protection of property

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (quoting Limitation Act 1623, 21 Jac. 1 c. 16, §§ 1, 2) (“For quieting of men’s estates and avoiding of suits [described types of action] shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years . . . and that no person or persons shall at any time hereafter make any entry into any lands, tenements or hereditaments, but within twenty years next after his or their right of title which shall hereafter first descend or accrue to the same, and in default thereof, such persons, so not entering and their heirs, shall be utterly excluded and disabled from such entry after to be made . . .”).

¹⁴⁸ *Id.*

¹⁴⁹ THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY PRINCIPLES AND POLICIES 161 (Robert C. Clark et al. eds., 3d ed. 2017). Additionally, there is the law of prescriptive easements. A prescriptive easement is an interest that an adverse possessor may hold in the land of another person that entitles the adverse possessor of the easement to a limited use of the original owner’s land. *Restrictions on Right to Exclude Others From Real Property*, N.Y.C. BAR, [https://www.nycbar.org/get-legal-help/article/real-property-law/restrictions-on-right-to-exclude-others-from-real-property/#:~:text=A%20%E2%80%9Cprescriptive%20easement%E2%80%9D%20is%20a,10%20years%20\(i.e.%2C%20the%20New](https://www.nycbar.org/get-legal-help/article/real-property-law/restrictions-on-right-to-exclude-others-from-real-property/#:~:text=A%20%E2%80%9Cprescriptive%20easement%E2%80%9D%20is%20a,10%20years%20(i.e.%2C%20the%20New) [https://perma.cc/L8SA-XTL7]. This is typically gained by regular use and does not result in the transfer of title to the land. *Id.* The main difference between adverse possession and prescriptive easements, is that an easement must not exclude the use of the land by the owner. *See id.* The goal of this Article is to prevent a property owner from destroying the work of the artist that is on their property, if the artwork has satisfied the “work of recognized stature” factor and has maintained an actual, open, notorious, exclusive, hostile, continuous or uninterrupted claim of ownership on the piece of property. This goal excludes the original owner of the property from enjoying full use of his property because its main purpose is to prevent the property owner from making use of that portion of property or to prevent him from destroying something on that portion of property. If the concept of a prescriptive easement was instead adopted, the owner would be potentially forced to allow graffiti art to be put on his property; however, there would be no barring his destruction of the artist’s work or the property as a whole.

outside of a trespassing context when an owner maintains his property, regularly exercises his rights to use his property, and excludes others from doing so.¹⁵⁰ The driving rationale behind adverse possession is simple: property owners are the “gatekeepers” of their property, and when an owner fails to perform his gatekeeping duties by taking care of and monitoring his property, the law refuses to reward such inattention.¹⁵¹ Beyond punishing a neglectful owner, underlying policy recognizes the adverse possessor’s reliance as another justification for the law.¹⁵²

Today, there exists a variety of adverse possession statutes across all U.S. jurisdictions.¹⁵³ However, each have a set of factors that must be met to successfully transfer a property title to an adverse possessor.¹⁵⁴ To acquire title to another’s land, the adverse possessor’s use of the property must be: (1) actual; (2) open and notorious; (3) continuous or uninterrupted; (4) exclusive; and (5) hostile.¹⁵⁵ While not all jurisdictions have adopted every aforementioned element, these are the most commonly applied.¹⁵⁶ In addition to these factors, each jurisdiction has its own general time limitation that an adverse possessor must maintain control over the property.¹⁵⁷ This time span ranges between five and 118 years of use before the

¹⁵⁰ MERRILL & SMITH, *supra* note 149, at 173.

¹⁵¹ *Id.*

¹⁵² *See, e.g.*, Letter from Oliver Wendell Holmes to William James (Apr. 1, 1907), in THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 417, 417–18 (Max Lerner ed., 1943) (explaining the base public policy and importance of the doctrine of adverse possession). Most popularly, Oliver Wendell Holmes wrote that “man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can’t be displaced without cutting at his life.” *Id.* (explaining why adverse possessors should have a vested interest in the property in which they invested time controlling).

¹⁵³ *See* THOMPSON ON REAL PROPERTY § 87.01 (David A. Thomas ed., 1998).

¹⁵⁴ *See id.*

¹⁵⁵ *See* Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2423 (2001).

¹⁵⁶ *See* THOMPSON ON REAL PROPERTY, *supra* note 153. Some states require extra factors outside of the norm; these can include requiring the adverse possession to be “peaceable,” or that the possessor pay taxes on the property they are attempting to seize, among others. *Id.* This Article posits that these extra factors need not be applied when dealing with adverse possession of a property in the protection of trespassory artwork.

¹⁵⁷ *See id.*

adverse possessor may claim title to the property, with the majority of states having ranges between five and twenty years.¹⁵⁸

C. Factors of Adverse Possession

To fully understand adverse possession, this Article offers a hypothetical to be analyzed under the five-factor test of adverse possession. Imagine that Ollie Owner and Andy Adversary are next door neighbors. Both own large plots of land with the back ends of their properties being adjacent. Ollie is a bit lazy and does not take care of every part of his land. In particular, the side of Ollie's property adjacent to Andy's is covered with quite a few dead trees and overgrown bushes. Because dealing with these bits of foliage would be too much effort, Ollie has not bothered to do any upkeep on that part of his land. One day, Andy becomes sick of the dead and overgrown plants interfering with his serene backyard view and decides he'll take care of this problem once and for all. In Andy and Ollie's jurisdiction, a period of only five years is needed to establish adverse possession.

1. Actual Possession

To trigger the statutory time requirement, the adverse possessor must be in actual possession of the property in question.¹⁵⁹ Actual possession requires an adverse possessor to exhibit: (1) an intent to take possession from the actual owner; and (2) sufficient acts of dominion.¹⁶⁰ These two factors emphasize an intent to adequately maintain the property in question, actually physically occupy it, and control the land.¹⁶¹ To establish a claim, a claimant must meet his

¹⁵⁸ *Id.* An outlier in the term of adverse possession, the 118-year limitation originates in Colorado. *Id.* § 87.01. Like most statutes, there are exceptions to each of the statutory periods, which can change the required number of years depending on the form the property seized or the manner in which it was possessed. *Id.*

¹⁵⁹ *Id.* § 87.10.

¹⁶⁰ *Id.* § 87.04; *see also* Stake, *supra* note 155, at 2424 (stating actual possession must include some type of "physical control over the thing and the intent to maintain dominion" over the thing).

¹⁶¹ THOMPSON ON REAL PROPERTY, *supra* note 153, § 87.04. Actual possession can also be established when an actual *possessio pedis* is established on the land. Stake, *supra* note 155, at 2423 n.22. The *possessio pedis* doctrine, Latin for "possession of a foot," is an example of an older adverse possession law, from when land was taken from the public domain. *Pedis Possessio Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019). This

burden by “clear and positive” evidence.¹⁶² The purpose of establishing possession is to show the original owner had notice of an adverse possessor’s presence.¹⁶³

The focus on physical possession within actual possession is derived from the old legal concept “disseisin.”¹⁶⁴ Much like adverse possession, “disseisin” occurred when the original owner of a property had their ownership rights revoked due to the actions of a third party.¹⁶⁵ The second factor of actual possession, intent, manifests by some degree of dominion over the property in question.¹⁶⁶ The court determines whether exercised dominion is sufficient by considering: (1) the true nature and location of the property in question; and (2) the reasonable uses of the property.¹⁶⁷ For example, if an adverse possessor attempts to establish dominion over land that is perfect for agriculture, an unreasonable use of the land would be constructing a commercial building on it.

In our hypothetical, let us assume Andy wanted to get rid of the plants once and for all. So, he slowly began to cut down and dispose of the dead trees and pruned the overgrown shrubs. In this case, Andy wanted to take possession or control of this part of the land since Ollie was not taking care of it. By cultivating and landscaping part of Ollie’s property, Andy fulfilled the “actual” possession factor in the adverse possession analysis.

doctrine, from 1958, establishes that “a prospector working on land in the public domain is entitled to freedom from fraudulent or forcible intrusions while actually working on the site.” *Id.* So long as the possessor made actual use of the parcel of land, and established a reasonable dominion over it, they held a possessor interest in the property. R. G. Patton, *Title by Adverse Possession*, in 3 AMERICAN LAW OF PROPERTY 752, 765 (A. James Casner ed., 1952). Much like adverse possession, pedis possession required an actual physical occupancy, an act of dominion, and a hostile exclusion of others. *Pedis Possessio Doctrine*, *supra*.

¹⁶² THOMPSON ON REAL PROPERTY, *supra* note 153, § 87.06. Additionally, all presumptions are held in favor of the adverse possessor over that of the original owner. *Id.*

¹⁶³ *Id.* § 87.04.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* Like today’s actual possession factor, disseisin also required an intent to claim ownership or dominion over the original owner’s property. *Id.*

¹⁶⁶ *See id.*

¹⁶⁷ *See Striefel v. Charles-Keyt-Leaman P’ship*, 1999 ME 111, 733 A.2d 984, 989–90.

2. Open/ Notorious Possession

Although one may not want to advertise that they have been adversely possessing the property of another, that is essentially what they need to do in order to fulfill the open and notorious possession factor.¹⁶⁸ While it need not be a blatant announcement, the property owner must have some awareness that a portion or the entirety of his property is being used, utilized, or possessed by a third party.¹⁶⁹ This factor's main purpose is to protect the original property owner.¹⁷⁰ The policy behind this part of the test supports the idea that an owner should not be divested of his property if he did not know it was at risk of being taken.¹⁷¹ By engaging in open and notorious possession of the owner's property, the adverse possessor declares an interest in it, and simultaneously gives the owner the opportunity to take preventative action.¹⁷² This factor is arguably the most important factor to show when claiming adverse possession, not simply because of its difficulty, but also because of its connection with the other factors needed.¹⁷³

Looking to our working example, Andy's work on Ollie's property would be considered open and notorious. If Ollie was a responsible property owner, he would have noticed that Andy was doing work on his land. If Ollie was not a responsible property owner, it follows that he should be punished for neglecting and not cultivating his property. Andy's work on the property was hardly inconspicuous, and because of this, Andy satisfied the open and notorious factor of the adverse possession test.

3. Continuous or Uninterrupted Possession

Even if possession taken of another's property is open, notorious, and visible, such possession is only significant if it is

¹⁶⁸ THOMPSON ON REAL PROPERTY, *supra* note 153, § 87.04.

¹⁶⁹ *See id.*

¹⁷⁰ *See id.*

¹⁷¹ *See id.*

¹⁷² *See id.*

¹⁷³ *See Stake, supra* note 155, at 2464 (“The open-and-notorious and continuous elements work in conjunction with the hostile and actual elements to establish [adverse possession] would feel a loss of an endowment to a tangible asset if she were to lose the case.”).

continuous or uninterrupted.¹⁷⁴ Continuous and uninterrupted possession requires that an adverse possessor exercises reasonable acts of dominion over the property in question throughout the required statutory time period.¹⁷⁵ Therefore, continuous control must be consistent with actions the original owner of the property would have taken.¹⁷⁶ Under this factor, the court takes into account what uses are reasonable and suitable for the specific piece of land in question.¹⁷⁷ Overall, the possessor must act as if they are, for all intents and purposes, the rightful owner of the property for as long as the state's statutory period requires before possession of the property can be rightfully transferred to the adverse possessor.¹⁷⁸

However, if the adverse possessor ceases to exercise continuous control, the effects of the possession become void.¹⁷⁹ If this happens, the statutory clock starts over.¹⁸⁰ Interruption of a possessor's control comes in a variety of forms.¹⁸¹ First, an adverse possessor's use is not considered continuous if there is an interruption act taken by the rightful property owner.¹⁸² An example of such an act is an action brought by a property owner to recover land from a possessor.¹⁸³

¹⁷⁴ See POWELL, *supra* note 142, § 91.07.

¹⁷⁵ See Sally Brown Richardson, *Abandonment and Adverse Possession*, 52 HOUS. L. REV. 1385, 1397 (2015) (explaining that sporadic cultivation of the land does not constitute a continuous and uninterrupted use of the land but that seasonal usage of property, if such usage is in line with the normal usage of the property, can act as an exception to the rule); *Mahoney v. Heebner*, 178 N.E.2d 26, 27 (Mass. 1961) (providing an example of the seasonal usage of a lake house that was meant to be used in the summer time); *Nechow v. Brown*, 120 N.W.2d 251, 252 (Mich. 1963) (ruling that if the seasonal usage of property is made in conjunction with actions that are similar to the type of exclusion that would be exercised on a seasonal property, the usage can be considered continuous and uninterrupted); *Ray v. Beacon Hudson Mountain Corp.*, 666 N.E.2d 532, 535–36 (N.Y. 1996).

¹⁷⁶ See POWELL, *supra* note 142, § 91.07.

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

¹⁷⁹ See *id.* § 91.07[2]

¹⁸⁰ See *id.* (“For example, if the owner of the property comes and kicks the adverse possessor off of his property, then the adverse possessor will have to complete a new period of continuous and uninterrupted possession on the property for the required statutory period in order to receive title in it.”).

¹⁸¹ See POWELL, *supra* note 142, § 91.07[2].

¹⁸² See *id.* § 91.07[2]–[3].

¹⁸³ See *id.* § 91.07[2].

Second, use is not considered continuous if a third party engages in an interceding act.¹⁸⁴ To interrupt the adverse possessor's use, any interceding acts by third parties must be done at the behest of or on the behalf of the rightful property owner.¹⁸⁵ If the third party is unrelated to the original owner, his action "seldom constitutes an interruption of possession," especially when the possessor acts to protect the property.¹⁸⁶

Third, an adverse possessor's, or even a property owner's, own lack of diligence can destroy continuity of control.¹⁸⁷ One such example is where a possessor abandons the controlled property.¹⁸⁸ Conversely, any act of neglect by the original property owner that may cause an inadvertent shift of possession, such as would occur during foreclosure or bankruptcy, would also break the adverse possessor's control over the property.¹⁸⁹ Finally, the possessor must take caution to not acknowledge the dominion of the original owner. Any unequivocal recognition by the adverse possessor that "they hold in subordination to the true owner constitutes an end" of adverse possession.¹⁹⁰ Such acknowledgement is powerful because it implies the possessor only occupies the land by way of lease.¹⁹¹

Turning to our hypothetical, let's say that over a span of five years, Andy took care of the part of land Ollie neglected. Andy replanted fallen-over trees and pruned the unruly shrubs into something aesthetically pleasing. Ollie never spoke out against Andy's actions during the cultivation, and instead entirely ignored Andy's

¹⁸⁴ *See id.* § 91.07[2]–[3].

¹⁸⁵ *See id.*

¹⁸⁶ *Id.* ("When the interference with the adverse possession consists of some act of a third person, that is, someone unrelated to the true owner, it seldom constitutes an interruption of possession. When the possessor acts with diligence to protect the adverse possession against such an interference, the element of continuity is maintained.").

¹⁸⁷ *See id.*

¹⁸⁸ *See id.* §91.07. One exception to the abandonment rule is in the case of a superseding force. *Id.* For example, if the abandonment is caused by a superseding force, such as a natural disaster, the departure will not cause a break in the continuous control of the possessor because this type of abandonment was not intentional or deliberate. *See id.* ("Departure caused by a supervening force such as a flood, however, does not amount to such cessation.").

¹⁸⁹ *See id.*

¹⁹⁰ *Id.*

¹⁹¹ *See id.*

tending to the trees and shrubs.¹⁹² By taking care of the land in a reasonable way for five years, Andy established continuous and uninterrupted use of the land. Even if, during these five years, the neighborhood children ran across the lawns of both neighbors and played in the area Andy maintained, Andy would still be considered to have maintained continuous and uninterrupted control of the land. This is because the children were running around to entertain themselves, not acting on behalf of Ollie.

4. Exclusive Possession

A successful adverse possession claim requires more than a simple statement that the possessor has exclusive control of the property in question.¹⁹³ Like the possessory requirement, the exclusivity factor of the adverse possession inquiry must be proven by clear and satisfactory evidence in the possessor's favor.¹⁹⁴ This can be done by showing acts that prove a possessor's interest to exert exclusive dominion over a piece of property or chattel.¹⁹⁵ Exclusive control cannot be held on behalf of another, nor may exclusive control be held by two or more people working in opposition of each other at the same time.¹⁹⁶ When the court determines whether use of property is exclusive, it considers the property's "character and locality" and the uses for which it is normally adopted.¹⁹⁷ This prevents trespasses upon the land by strangers, even if the trespasser is the original owner, from destroying the exclusive control element.¹⁹⁸

In our example, Andy was the sole person taking care of the neglected area of Ollie's property. Andy often refused help from neighbors who noticed his work. Further, Andy received no help from Ollie, either financially or in terms of labor. For this reason, Andy's possession of the land and its cultivation was exclusive.

¹⁹² An example of a true interruption by Andy of Ollie's continuous control would be if Andy wrote Ollie a letter asking Ollie to vacate his land, thus re-establishing his control over the land.

¹⁹³ THOMPSON ON REAL PROPERTY, *supra* note 153, § 87.09.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

5. Hostile Possession

The hostile factor of adverse possession contains many similar attributes to the actual possession factor.¹⁹⁹ First and foremost, hostile possession occurs when an adverse possessor, either on purpose or by mistake, takes hold of another person's property.²⁰⁰ Similar to actual possession, hostile possession must be present and continuous from the beginning of the statutory period.²⁰¹ If the original entry is not "hostile" itself, the statutory period begins once the possession turns hostile.²⁰²

The hostility inquiry speaks to the "adverse" portion of an adverse possession claim.²⁰³ Under this factor, possession of property will not be considered hostile if the possessor obtained permission from the original owner.²⁰⁴ In such a circumstance, possession becomes hostile when the possessor's use falls outside the scope of the owner's permission.²⁰⁵ For example, use would become hostile where an individual who only has permission to enter an owner's land begins landscaping the property.²⁰⁶ Overall, this factor simply requires a clear claim of right, without which the adverse possessor cannot succeed.²⁰⁷

In our hypothetical, Andy originally did not have a bad faith intention in taking over the overgrown portion of Ollie's property. However, as has been discussed, this subjective intent does not matter so long as possession later becomes hostile. Soon after Andy

¹⁹⁹ See *id.* The "hostile" factor also goes by a variety of other names including "adverse," "under claim of title," "under claim of right," and "hostile and under claim of right." Stake, *supra* note 155, at 2426.

²⁰⁰ THOMPSON ON REAL PROPERTY, *supra* note 153, § 87.10. Overall, the subjective state of mind surrounding the adverse possessor's possession does not matter. See *Chaplin v. Sanders*, 676 P.2d 431, 436 (Wash. 1984) (en banc). However, this subjective intent is only about whether the possession of the property was done in good faith or not. See Patton, *supra* note 161, at 762 ("It necessarily follows that the statute runs against the owner's right of action in ejectment from the time the wrongdoer took possession irrespective of his mental attitude.").

²⁰¹ THOMPSON ON REAL PROPERTY, *supra* note 153, § 87.09.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*; Stake, *supra* note 155, at 2423.

²⁰⁵ THOMPSON ON REAL PROPERTY, *supra* note 153, § 87.10.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

began taking care of Ollie's part of the property, he found himself believing that Ollie should not be in possession of something over which Ollie did not exercise any degree of care. Andy took physical possession of the land with sufficient acts of dominion and held the property without the permission of the owner. Therefore, Andy's possession was hostile.

Looking back through the different factors of adverse possession, it is helpful to analyze our hypothetical. First, we see that Andy actually possessed the property. He held a physical presence and took sufficient acts of dominion to show his intent to take the property away from Ollie. His cultivation of the land was public, and both Ollie and the neighbors saw the work that Andy did on the land. Therefore, his possession was open and notorious. Further, for a period of five statutory years, Andy took care of the property alone. No intervening acts interrupted Andy's possession, and he prevented others from trespassing on the bit of land he maintained. Finally, Andy's possession was hostile because Andy took hold of the property without the permission or direction of Ollie. Therefore, Andy would be able to make out each element of an adverse possession claim and could successfully take title to part of Ollie's land.

III. THE SOLUTION: APPLICATION OF ADVERSE POSSESSION TO GRAFFITI ART

A. *The Addition to VARA*

Adverse possession has been characterized as the law of the "landless."²⁰⁸ With this definition in mind, adverse possession becomes the perfect type of law to protect artists across the United States who inspire and foster creativity on property to which they would otherwise have no legal claim. This Article argues for a form of the currently existing adverse possession statute to be adopted into VARA to help regulate situations where irremovable works of art are placed on surfaces not belonging to the artists. This addition would be applicable to works that are trespassory in nature and

²⁰⁸ *Id.* § 87.01.

balance the property rights of negligent property owners and the moral rights of artists who create works of a recognized stature.

The version of adverse possession statute that should be adopted into VARA would require an artist to show her artwork, when placed on a building for a statutory period of seven years,²⁰⁹ fulfills the requirements of a typical adverse possession claim. The artist would need to present sufficient evidence that her artwork maintains actual, exclusive, continuous and uninterrupted, open or notorious, and hostile possession of the part of the property on which the art resides. If established, VARA's new adverse possession provision would prevent the distortion, mutilation, modification, and destruction of graffiti artists' works.²¹⁰ In addition, it would grant conditional title of whatever portion of property the art occupies to the artist. This Article posits that a statutory period of seven years for ownership is appropriate.²¹¹

This conditional title would last as long as the artist continues to maintain the integrity of their work. If the artist upkeepes the piece

²⁰⁹ While the statutory limitation range is between five and 118 years in the United States, this Article proposes that a seven-year statutory limitation would be appropriate. THOMPSON ON REAL PROPERTY, *supra* note 153, § 87.01.

²¹⁰ While there are adverse possession statutes in specific states that require that an adverse possession is made "in good faith" or "peaceably," or may only be acquired if the adverse possessor pays taxes on the property, this Article suggests that these qualifications be dismissed from the test that should be adopted into VARA. THOMPSON ON REAL PROPERTY, *supra* note 153. Across the United States, only a minority of states require that an adverse possession be "in good faith" or "peaceable," and because these are in the minority, this Article sees no reason as to adopt them into a nation-wide amendment to VARA. *Id.* Additionally, the qualification of a "good faith" adverse possession, or an adverse possession that was done without the intent to deprive the owner of the property, goes against the meanings in the "hostile" or "actual" possession factors that are already accepted by the majority of states. *Id.* Additionally, there are some states, such as California, that require that an adverse possessor pay taxes on the property that they are adversely possessing for title to be transferred to the adverse possessor. *Id.* This Article additionally purports that this factor be disregarded in the VARA amendment. Because the temporary title would only prevent the use of a portion of the property, and not the entire piece of land on which it lies, this Article posits that a tax paying requirement would be an overly excessive requirement, especially considering how impractical, if not impossible, it might be for a trespassing artist to attempt to pay taxes on a small portion of a potentially large property.

²¹¹ It is reasonable that owners should be visiting their property on a reasonable basis so that they know that others have not broken into the property and take measures to care for, or see the property.

of the property, and the artwork on it, she would be entitled to a possessory interest much like that of the adverse possessor of an entire building. If an artist fails to maintain her artwork or the piece of property, the possessory interest in that portion of property would revert to its original owner. This is not unlike the transfer of property back to the original owner of land when an adverse possessor fails to maintain and exhibit control over the property she acquired. This potential transfer to the original owner prevents the piece of property from falling into dereliction and gives the artist equal bargaining power with the original owner who otherwise may have destroyed the artist's graffiti without hesitation.

B. The Policy in Practice

Let us revisit the original example of graffiti placed upon the walls of the Detroit Packard Automotive Plant. Imagine a graffiti artist painted a design of his choosing on one of the plant's interior walls in 2006. Fast forward to 2013 when the land is purchased. At this time, the graffiti artist's work has been viewed by thousands of people touring the post-industrial ruins of the plant. The work has been featured in videos posted on YouTube, and wedding parties and tourists alike have made it a point to get an "Instagram worthy" photo in front of the work. Meanwhile, the graffiti artist has maintained the integrity of her artwork. She has repainted over faded lines and prevented other artists from painting over her work or debasing it. Now, imagine it is 2017 when the cleanup of the plant has occurred. Still, the artist's artwork is featured online, praised by artists and the public, and the artwork remains prominent on the plant's walls despite the cleanup of debris by the new owners of the plant.

But the new owners of the Packard Plant announce they plan to paint over the walls of the plant in an attempt to prepare the property for new construction. The artist learns of these development plans and wants to protect her artwork from destruction, mutilation, and distortion. Under the proposed adverse possession provision of VARA, she would have the means to do so.

Under the proposed VARA provision, the court would first look to whether the artist's work constitutes a "work of recognized stature" that VARA aims to protect. In the Packard Plant hypothetical, due to the evidence of praise and notoriety of the artwork on social

media and by public commentary, this first hurdle would be met. Without the proposed addition to VARA, courts would simply weigh the rights of the artist against the rights of the property owner. In contrast, under an adverse possession provision, the balancing test would measure the property owner's negligent care and maintenance of the land against the artist's continuous maintenance of the artwork.

The court would find the Packard Plant artist actually possessed the property, satisfying another element of the claim. By painting a portion of the wall, the artist staked a claim and interest in that part of the property and physically possessed it. Next, the court would look to whether the artwork was open and notorious. With all the buzz the work received on social media, notice was certainly given to the public that this work was present and adverse to the owner's possession. It may be argued that illegal graffiti does not constitute a reasonable act of dominion because the original owner would not have used his property to display artwork on walls of an empty building. However, it is difficult to imagine what the reasonable use of a long abandoned and dilapidated building might be, besides becoming an empty canvas for graffiti and other trespassory vandalism.²¹²

The court would then consider the exclusivity of the artist's use. The Packard Plant artist prevented others from distorting and destroying her work, and from using the portion of the property upon which her work resides. This would be deemed exclusive use of this portion of the property. Next is the hostility inquiry. Whether the Packard Plant artist intended hostile use from the outset, she prevented the building's owner from taking control of the wall upon which her art was placed. Therefore, she would satisfy the hostile factor. Finally, the statutory time period to establish adverse possession would be five years. All five factors of adverse possession would be satisfied in the Packard Plant hypothetical simultaneously for a period of over eleven years. Thus, the artist could prevail

²¹² However, it could be argued that in the scope of urban destruction, societies typically have an expectation that graffiti will show up on the face of buildings. Also, looking at the usage of the abandoned warehouse seen in the *5Pointz* case discussed *supra* Part I.E., the allocation of abandoned space for usage by artists can be considered a reasonable use of the space, because that is exactly what occurred in that situation.

against the property owner's desire to destroy her art under this Article's proposed adverse possession provision of VARA.

CONCLUSION

What options does this leave the new property owner of Detroit's Packard Plant? Several, if some imagination is employed. The artist's work could be a free-standing display between the new stores or restaurants developed in the repurposed plant. It could be incorporated as a wall of art with an explanatory plaque or handout literature within a new restaurant that opens on the property. It could be the premier attraction of the repurposed area as a gallery for rotating art exhibits, with adjoining shops, restaurants, or other commercial venues built around it. Rather than junk slated for destruction, the artwork protected by adverse possession could be an architectural or interior design jewel in the redevelopment of the Packard Plant.

In the world of property law, a person's land or property is their castle. While admirable, this ideal is starkly individualistic. It often overlooks the disturbance created when architectural monoliths of the past become the dilapidated ruins of today. While adverse possession offers a solution to transfer property from a negligent owner to a diligent one, it does nothing to protect a society that attempts to reclaim the eyesores of their hometowns. Graffiti is more than an act of trespass or vandalism. It is an artist's claim of a public or quasi-public space, a fleeting attempt to make a moment permanent, or light cast on a thought or issue to which the population is blind. Like all art, graffiti adds value to the culture in which it is found; this is true regardless of whether society is able to see it. The addition of an adverse possession provision to VARA would recognize the intrinsic value graffiti art instills in the community. Further, it would preserve that value for future generations. This solution forms a partnership between the artist attempting to bring life to the darkest corners of a city and a society that has recognized the worth of art and appropriately balances the capitalistic desires of property owners wanting to unload property for which they never bothered to care.