



Local artist Joe C. Rock talks to the media about the temporary mural he created on the wooden boards on the Reno City Hall building on June 19, 2020.

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PROTECTING Protest Art

BY CALEB L. GREEN, ESQ.

The death of George Floyd¹ has resulted in a recent international outcry for social and criminal justice reform, sparking a wave of creative protests and artistic expressions. For example, on June 5, 2020, a team of eight artists joined a group of community volunteers to create a street mural with letters 50 feet in length spelling out “BLACK LIVES MATTER” across two city blocks leading to the White House. Washington D.C. Mayor Muriel Bowser commissioned the street mural as a symbolic affirmation of the Black Lives Matter movement and those “who are demanding that we have a more just criminal justice system.”² Since then, artists and volunteers in other cities have joined the movement and created street art throughout the U.S., including Brooklyn, San Francisco, Austin, Cincinnati and Charlotte. In downtown Raleigh, North Carolina, inspired artists and protesters painted “END RACISM NOW” in large lettering on a public street. Several similar murals are planned to be installed on public streets in various other U.S. cities in effort to amplify the ongoing social injustices in our country.

Nevada is also home to public artworks that were created to address ongoing social and political issues. For example, in 2019, artist Isaac Zevalking revealed a mural in the downtown Las Vegas Arts District protesting the current U.S. immigration system. The mural depicts the Statue of Liberty in handcuffs while being detained by immigration and customs enforcement, and it illustrates the “existing and escalating anti-immigration rhetoric in America.”³ Additionally, earlier this year in northern Nevada, artist Joe C. Rock adorned Reno’s City Hall with an Equality and Unity mural. The mural, considered to be a strong acknowledgment of the Black Lives Matter movement, was comprised of a collection of paintings on plywood panels that were used to cover broken windows at city hall following a protest in downtown Reno.⁴

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Protecting Protest Art

This wave of protest art not only demonstrates the powerful impact of creative expression, but also the consensual application of these artistic works to physical buildings and public streets illuminates an interesting legal inquiry regarding the intersection of real property law and intellectual property law. The unique case of *Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020), *as amended* (Feb. 21, 2020), provides guidance on how courts balance the intellectual property interests of artists against the property rights of municipalities and property owners.

Facts and Background

In 2002, Gerald Wolkoff, the owner of several New York warehouses, enlisted Jonathan Cohen, a renowned artist, to turn Wolkoff's warehouses into an exhibition space for other artists. Under Cohen's leadership, this exhibition space—known as 5Pointz—evolved into an epicenter for street art in New York. In fact, 5Pointz has attracted thousands of visitors and received extensive media coverage, including creating vast buzz on social media. In 2013, Cohen learned that Wolkoff sought to demolish 5Pointz and build luxury apartments in its place. Wolkoff deployed a group of workers to whitewash and destroy all 49 existing artworks. Cohen and his entourage of artists, whose artworks were ultimately destroyed, successfully sued Wolkoff under the Visual Artists Rights Act (VARA) and were awarded \$6.75 million in statutory damages. On February 20, 2020, the Court of Appeals for the Second Circuit affirmed the judgment.

What is VARA?

Although the U.S. Copyright Act governs VARA, registration with the U.S. Copyright Office is not required for an artist to bring claims for violation of VARA. Typically, an artist would need to file a copyright application and obtain a registered copyright to assert his or her rights in an artwork. Unlike most copyright assertions, an artist can bring claims for violating his or her rights under VARA without having

a registered copyright for his or her protected works. However, the statutory coverage of VARA is restricted to specific categories of fine art (e.g., murals, sculptures, paintings and photographs) that have achieved “recognized stature.” Notably, VARA does not define the term “recognized stature” and therefore, U.S. courts determine whether an artwork has achieved “recognized stature.” Courts have deemed “recognized stature” to mean meritorious work by art experts, other members of the artistic community or some other cross-section of society.⁵

VARA rights extend to works of art that may be destroyed or altered by property owners—a lesson Wolkoff learned the hard way. VARA is an amendment to U.S. Copyright Act that was adopted in 1990 and provides protection for a limited set of moral rights for artists. Specifically, under VARA, the U.S. recognizes: (1) the right of integrity and (2) the right of attribution.⁶ An artist's right of integrity includes the right to prevent the modification, mutilation or distortion of the artist's work, and in some cases, to prevent its destruction. Rights of attribution generally include an artist's right to be recognized as the author of his or her work, to publish anonymously and pseudonymously, to prevent attribution of his or her name to works he or she did not create and to prevent his or her work from being attributed to other artists.

Key Takeaways

Street Murals May Be Protectable under VARA

As noted above, in the *Castillo* case, the Court of Appeals for the Second Circuit affirmed that the artists' street art adorning Wolkoff's building constituted art of “recognized stature”—a basic requirement for invoking VARA protection. The Second Circuit provided a clear definition of works of “recognized stature” as works of “high quality” that have been acknowledged as such by the relevant community.⁷ The court went on to acknowledge that evidence from art historians, art critics, curators and other experts supporting the quality of a work could demonstrate street art as a recognized stature warranting moral-right protections under VARA. In fact, widespread sharing of artwork on social media and the internet—like the Black Lives Matter and other social justice-

inspired street murals—can evidence high-quality stature of artwork warranting moral-rights protections.⁸

However, despite the growing recognition of Black Lives Matter-inspired street art, including murals, illegally placed artwork will likely be subject to the wishes of the property owner. Even when an artwork achieves VARA protection, courts may still deny relief when the artwork has been installed without authorization from the property owner. Accordingly, artworks that are affixed to property, without the property owner's permission (e.g., vandalism), may be subject to destruction, removal or transfer of that manifestation.

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Temporary Outdoor Murals May Be Protected under VARA

Temporary artworks, such as street art made from chalk or any other erosive materials, may be protected by VARA. In *Castillo*, Wolkoff argued that the artists' artworks were temporary as a defense to VARA claims. The court rejected Wolkoff's position and emphasized that the temporary lifespan of the street art was not a bar against

VARA claims, holding that “the gradual erosion of outdoor artwork exposed to the elements ... does not threaten liability.”⁹

Property Owners Should Take Caution Before Destroying or Altering Street Art

Additionally, property owners have options to mitigate VARA liability. The *Castillo* court noted that Wolkoff could have explored two statutory exceptions under VARA by either: (1) entering into a written agreement with the artists prior to installation of their creative works, or (2) providing a 90-day notice and giving the artists an opportunity to preserve their artistic works before destruction of the artworks or property.¹⁰ Accordingly, property owners and municipalities alike should employ one of these options prior to removing, altering or destroying protected artworks from the property or streets.

In summary, *Castillo* extends intellectual property rights to street artists and their works affixed to the property of others. Artists of street murals may have intellectual property claims against individuals or organizations that deface or destroy their works. Likewise, this case is instructive for property owners regarding how to remove unwanted works from their property while avoiding the pitfalls of VARA.

ENDNOTES:

1. On May 25, 2020, George Floyd, a 46-year-old black man, was killed in Minneapolis, Minnesota, during an arrest for allegedly using a counterfeit bill at a convenience store. His death has sparked, throughout the U.S. and in various other countries, a series of protests against police brutality and racism.
2. D.C. Mayor Comments On “Black Lives Matter” Road Banner And Funding The Police, NPR, <https://www.npr.org/2020/06/09/873377522/d-c-mayor-comments-on-black-lives-matter-road-banner-and-funding-the-police> (last visited on Sept. 26, 2020).
3. Controversial mural in Arts District sparks immigration conversation in Las Vegas, News 3 Las Vegas, <https://news3lv.com/news/local/controversial-mural-in-arts-district-sparks-immigration-conversation-in-las-vegas> (last visited on Sept. 26, 2020).
4. Downtown Reno City Hall Mural now complete, KOLO 8 News Now, <https://www.kolotv.com/2020/07/10/downtown-reno-city-hall-mural-now-complete/> (last visited on Sept. 26, 2020).
5. *Castillo*, 950 F.3d at 166.
6. 17 U.S.C.S. § 106A.
7. *Castillo*, 950 F.3d at 166.
8. *Id.* at 162.
9. *Id.*
10. *Id.* at 169; 17 U.S.C. § 113(d)(1)(B).

CALEB L. GREEN is an associate attorney in the Las Vegas office of Dickinson Wright. He primarily practices intellectual property law, and assists clients with brand development and with identifying various protectable aspects of the clients’ products, services and concepts.



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