



# CLIENT ALERT

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## BLACK LIVES MATTER MURALS: INTELLECTUAL PROPERTY vs. REAL PROPERTY RIGHTS

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In response to the death of George Floyd<sup>1</sup> and a public outcry for social justice reform, on June 5, 2020, a team of eight artists joined a group of community volunteers to create a street mural with letters fifty 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.”<sup>2</sup> Since then, artists and volunteers in other cities have joined the movement and created street art throughout the United States, including Brooklyn, San Francisco, Austin, Cincinnati, and Charlotte. For example, 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 an effort to amplify the ongoing social injustices in our country.

This street art not only conveys a powerful message, but also, the consensual application of these artistic works to physical buildings and public streets illuminates an interesting legal inquiry regarding the crossover of intellectual property law and real property. The landmark 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 & BACKGROUND

In 2002, Gerald Wolkoff, the owner of several New York warehouses, enlisted renowned artist Jonathan Cohen to turn his 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 a 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)<sup>3</sup> and were awarded \$6.75 million in statutory damages.<sup>4</sup> On February 20, 2020, the Court of Appeals for the Second Circuit affirmed the judgment.<sup>5</sup>

### 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/her rights in an artwork. Unlike most copyright assertions, an artist can bring claims for violating his/her rights under VARA without having a registered copyright for his/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, US 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.<sup>6</sup>

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 the U.S. Copyright Act that was adopted in 1990 and protects a limited set of moral rights for artists. Specifically, under VARA, the United States recognizes: (1) the right of integrity and (2) the right of attribution.<sup>7</sup> 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/her work, to publish anonymously and pseudonymously, to prevent attribution of his/her name to works he/she did not create, and to prevent his/her work from being attributed to other artists.

### KEY TAKEAWAYS

#### 1. 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

<sup>1</sup> 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 convenient store. His death has sparked, throughout the United States and in various other countries, a series of protests against police brutality and racism.

<sup>2</sup> 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 July 5, 2020).

<sup>3</sup> 17 U.S.C.S. § 106A.

<sup>4</sup> *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 164 (2d Cir. 2020).

<sup>5</sup> *Id.* at 162.

<sup>6</sup> *Id.* at 166.

<sup>7</sup> 17 U.S.C.S. § 106A.

provided a clear definition of works of “recognized stature” as works of “high quality” that have been acknowledged as such by the relevant community.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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 particular manifestation.

## 2. 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.<sup>12</sup> 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.”<sup>13</sup>

## 3. 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.<sup>14</sup> Accordingly, property owners and municipalities 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.

## CONCLUSIONS AND RECOMMENDATIONS

- Street art, including temporary street murals, may be protected under the Visual Artist Rights Act (VARA).
- Prior to installing or affixing artwork to property, artists should obtain proper permissions and authorizations from the property owners to secure protections under VARA.
- Property owners—including building owners and municipal governments—should work with and identify the artists and the local community members prior to installation and placement of street art, including murals and other artwork.
- It is advisable that property owners enter into written agreements with the individuals creating the street art prior to installation of any creative works.
- Prior to removing, altering, or destroying existing street art, property owners should give timely notice to the artist and provide the artist(s) reasonable time to preserve the artistic works.

Dickinson Wright’s attorneys have considerable experience in assisting companies and individuals in litigating legal matters, protecting their intellectual property, and defending against intellectual property lawsuits. The firm remains committed to helping our clients navigate this unprecedented time and remains fully available to provide any assistance that may be required. Property owners and artists are encouraged to consult with one of Dickinson Wright’s attorneys experienced in copyright matters.

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<sup>8</sup> *Castillo*, 950 F.3d at 166.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 162.

<sup>11</sup> *English v. BFC&R East 11th St., LLC.*, 1997 WL 746444 (S.D.N.Y. 1997)

<sup>12</sup> *Castillo*, 950 F.3d at 168.

<sup>13</sup> *Id.* at 162.

<sup>14</sup> *Id.* at 169; 17 U.S.C. § 113(d)(1)(B).

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