

## A Potential Status Update for the Visual Artists Rights Act: The Role of Social Media Response in Judicial Analysis of Recognized Stature

Olivia Calamia

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

## NOTES

# A POTENTIAL STATUS UPDATE FOR THE VISUAL ARTISTS RIGHTS ACT: THE ROLE OF SOCIAL MEDIA RESPONSE IN JUDICIAL ANALYSIS OF RECOGNIZED STATURE

OLIVIA CALAMIA<sup>†</sup>

### INTRODUCTION

In 2020, visual artists used the power and reach of social media platforms to share works of art inspired by the Black Lives Matter movement,<sup>1</sup> which experienced renewed vigor following the police murder of George Floyd on May 25, 2020.<sup>2</sup> Many of these works have taken the form of murals painted on city streets, building faces, and other spaces that promote public viewing.<sup>3</sup> Many artists hope that their works will endure long past this moment of social and political reckoning. Manhattan-based artist Amir Diop expressed his wishes simply but eloquently: “My hope is that [my art] is a part of history . . . . We can teach kids in the future that this is what happened in 2020, and there are different artists that were coming out and putting beautiful stuff up that can impact the future.”<sup>4</sup>

---

<sup>†</sup> Senior Articles Editor, *St John’s Law Review*, J.D. Candidate, 2022, St. John’s University School of Law; B.S., 2019, Macaulay Honors Program at CUNY The City College of New York. I would like to thank my Note advisor, Professor Patricia Montana, for her very helpful comments and feedback. This Note is a tribute to my mother Angela, who was my inspiration for going to law school, who supported me unconditionally, and who instilled in me a love for the law.

<sup>1</sup> Bettina Makalintal, *On Instagram, Artists Are Creating a Shareable Language of Protest*, VICE (June 9, 2020, 8:44 AM), <https://www.vice.com/en/article/xg8d97/on-instagram-artists-are-creating-a-shareable-language-of-protest> [https://perma.cc/JKB5-6ZNJ].

<sup>2</sup> See Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES, <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> (Nov. 1, 2021).

<sup>3</sup> See Rani Boyer, *How Graffiti Artists Are Propelling the Vision of the Black Lives Matter Movement*, ARTSY (July 20, 2020, 3:13 PM), <https://www.artsy.net/article/artsy-editorial-graffiti-artists-propelling-vision-black-lives-matter-movement> [https://perma.cc/JJZ9-EBHU].

<sup>4</sup> Justine Calma, *Protest Art Leaves the Streets*, VERGE (Oct. 21, 2020, 11:00 AM), <https://www.theverge.com/21509952/street-art-murals-black-lives-matter-blm-protests-new-york-city-artists> [https://perma.cc/AY92-SWXY].

With the creation of artwork comes the question of how such artwork can be preserved.<sup>5</sup> The Visual Artists Rights Act of 1990 (“VARA”) grants visual artists the right “to prevent any destruction of a work of recognized stature.”<sup>6</sup> In February 2020, the Second Circuit held in *Castillo v. G&M Realty L.P.* that a work of visual art “is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community.”<sup>7</sup> In an age when artwork can reach broad audiences via online platforms such as Instagram and Facebook, the question has arisen of what protections, if any, online recognition might provide to works of art.<sup>8</sup> At least one court—the district court in *Cohen v. G&M Realty L.P.*, the case that ultimately gave rise to the Second Circuit’s decision in *Castillo*—has explicitly accounted for online and social media response in determining whether certain works of art had achieved recognized stature.<sup>9</sup> Moreover, in the legal community, the thought is emerging that the expansive reach of online platforms can help cement the stature of works of art, including works of mural and protest art inspired by the Black Lives Matter movement.<sup>10</sup>

This Note advocates for a judicial approach to recognized stature analysis under VARA that gives due consideration to online response to artworks while acknowledging and accounting for its limitations. This Note consists of three parts. Part I provides an overview of the “recognized stature” provision of VARA and examines its recent judicial treatment by the Second Circuit and district court in *Castillo*. Part II explores the potential for courts to factor online response into judicial assessments of whether certain artworks have achieved recognized stature under VARA. More specifically, Part II(A) discusses the role that social media platforms have played in

---

<sup>5</sup> See Andrea Arndt & Caleb Green, *Black Lives Matter Murals: Intellectual Property vs. Real Property Rights*, JD SUPRA (July 9, 2020), <https://www.jdsupra.com/legalnews/black-lives-matter-murals-intellectual-83384/> [https://perma.cc/J76D-HLLW].

<sup>6</sup> 17 U.S.C. § 106A(a)(3)(B).

<sup>7</sup> *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 166 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020).

<sup>8</sup> Blake Brittain, *Protest Art Fate Tied to Obscure, Rarely Litigated Copyright Law*, BLOOMBERG L. (July 16, 2020, 5:01 AM), <https://news.bloomberglaw.com/ip-law/protest-art-fate-tied-to-obscure-rarely-litigated-copyright-law>.

<sup>9</sup> *Cohen v. G&M Realty L.P. (Cohen II)*, 320 F. Supp.3d 421, 440 (E.D.N.Y. 2018), *aff'd sub nom., Castillo*, 950 F.3d at 162.

<sup>10</sup> Brittain, *supra* note 8.

increasing public accessibility to and engagement with art, particularly street art, and Part II(B) discusses the foundations for incorporating online response into recognized-stature analysis and considers some of the merits and complications of such an approach. Finally, Part III recommends that courts expand their analysis to include online response to the extent that courts can extrapolate qualitative information that will help them determine whether a work of art has achieved recognized stature. This approach encourages careful analysis that appropriately accounts for the value that online response can contribute to an artwork's stature.

## I. HISTORY OF THE "RECOGNIZED STATURE" PROVISION

### A. *The Recognized Stature Provision of the Visual Artists Rights Act*

The Visual Artists Right Act of 1990 is a federal copyright law that grants certain "moral rights" to artists who create works of visual art.<sup>11</sup> Derived from the French legal concept of *droit moral*, moral rights recognize a work of art as having not only economic value as a commercial good but also personal value "as an expression of the author's personality."<sup>12</sup> Specifically, VARA grants artists the moral rights of attribution and integrity.<sup>13</sup> The right of attribution grants an artist the right to claim authorship of a work that they have created and to prevent their name from being associated with any work that they have not created.<sup>14</sup> The right of integrity grants an artist the right "to prevent any intentional distortion, mutilation, or other modification of [their work] which would be prejudicial to [their] honor or reputation."<sup>15</sup>

---

<sup>11</sup> Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 946 (1990). VARA defines a "work of visual art," in principal part, as "a painting, drawing, print, or sculpture, existing in a single copy [or] in a limited edition of 200 copies or fewer." 17 U.S.C. § 101. Certain types of visual works are excluded from VARA's protections, including works that principally serve a promotional purpose. *Pollara v. Seymour*, 344 F.3d 265, 270 (2d Cir. 2003).

<sup>12</sup> Damich, *supra* note 11, at 949.

<sup>13</sup> 17 U.S.C. § 106A(a).

<sup>14</sup> *Id.* § 106A(a)(1).

<sup>15</sup> *Id.* § 106A(a)(3). The right of integrity is subject to certain exceptions; for example, modification of a work that "is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification" within the meaning of subsection (a)(3)(A). *Id.* 106A(e)(1).

The right of integrity also grants an artist the right “to prevent any destruction of a work of recognized stature . . . .”<sup>16</sup> Under the so-called “recognized stature provision,”<sup>17</sup> if a work of visual art that has been made part of a building can be removed without destroying or mutilating it, the owner of the building is required to make a good-faith effort to notify the artist and provide the artist an opportunity to remove the work or pay for its removal.<sup>18</sup> An artist may also seek a court-ordered injunction to halt destruction of a work by the property owner.<sup>19</sup> The recognized stature provision also establishes that “any intentional or grossly negligent destruction of [a] work” constitutes a violation of the right of integrity.<sup>20</sup> Such a violation would entitle an artist to seek damages ranging from \$750 to \$30,000 and potentially up to \$150,000 if the destruction was “committed willfully . . . .”<sup>21</sup>

Congress included the recognized stature provision in VARA in acknowledgement that the “destruction of works of art has a detrimental effect on [an] artist’s reputation, and . . . represents a loss to society.”<sup>22</sup> Congress also intended to promote preservation efforts, finding that the protection and preservation of artistic works “serve an important public interest.”<sup>23</sup> In a report issued pursuant to the enactment of VARA, the House Judiciary Committee stated that “the bill protects lesser-known authors” and “covers destruction as well as modification.”<sup>24</sup> These statements reveal that the preservation of visual artworks,

---

<sup>16</sup> *Id.* § 106A(a)(3)(B).

<sup>17</sup> Christopher J. Robinson, Note, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 *FORDHAM L. REV.* 1935, 1937 (2000).

<sup>18</sup> 17 U.S.C. § 113(d)(2).

<sup>19</sup> See Brittany M. Elias & Bobby A. Ghajar, *Street Art: Growing Clarity on VARA’s Applicability to Unsanctioned Street Art*, AM. BAR ASS’N, (Sept./Oct. 2017) [https://www.americanbar.org/groups/intellectual\\_property\\_law/publications/landslide/2017-18/sepember-october/street-art-digital-feature/](https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2017-18/sepember-october/street-art-digital-feature/) [https://perma.cc/QP3C-4LPP].

<sup>20</sup> 17 U.S.C. § 106A(a)(3)(B).

<sup>21</sup> 17 U.S.C. § 504(c)(1)–(2).

<sup>22</sup> H.R. REP. NO. 101-514 (1990), as reprinted in 1990 U.S.C.C.A.N. 6915, 6926.

<sup>23</sup> *Id.* at 6916.

<sup>24</sup> *Id.* at 6926. The Committee cited an incident involving artist Kenneth Snelson as an example of the preservative function VARA could serve. *Id.* As part of his first commission, Snelson created a series of sculptural towers, two of which he later sold at the New York World’s Fair in 1964. *Id.* When the fair ended, the towers were sold for scrap metal, without Snelson’s knowledge or consent. *Id.* The Committee asserted that, had VARA been in effect at that time, Snelson would have been able to protect his works because VARA is intended to protect the works of lesser-known artists against destruction or modification. *Id.*

including those by less well-known artists, was an important congressional aim in enacting the statute.

Although the protective aims of VARA are clear, the meaning of “recognized stature” is far more elusive. The statute does not provide a definition of recognized stature, nor does it provide any sort of standard for determining whether a work of visual art has achieved such stature.<sup>25</sup> An early version of the law, proposed by the late Senator Edward Kennedy in 1987, did provide some guidance for making a judicial finding of recognized stature.<sup>26</sup> The 1987 VARA bill provided:

In determining whether a work is of recognized stature, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, restorers and conservators of fine art, and other persons involved with the creation, appreciation, history, or marketing of fine art.<sup>27</sup>

In a hearing on the bill, the Register of Copyrights at the time, Ralph Oman, described the right to prevent the destruction of a work as an “extraordinary right” to “be awarded exclusively to works of fine art in recognition of the national interest in preserving both the unique intellectual property and its embodiment.”<sup>28</sup> The 1987 bill failed to pass, largely due to a dispute over another provision regarding the resale of an artist’s work.<sup>29</sup>

VARA legislation was reintroduced to Congress in 1989 in the form of a bill entitled H.R. 2690.<sup>30</sup> The original version of the bill contained guidelines for determining recognized stature that were nearly identical to the guidelines that Senator Kennedy provided in his 1987 VARA bill.<sup>31</sup> However, the House Judiciary

<sup>25</sup> Damich, *supra* note 11, at 953.

<sup>26</sup> See S. 1619, 100th Cong. § 101 (1987).

<sup>27</sup> *Id.*

<sup>28</sup> *Visual Artists Rights Act of 1987: Hearing Before the Subcomm. on Pats., Copyrights and Trademarks of the S. Comm. on the Judiciary, 100th Cong. 26* (1987) (statement of Ralph Oman, Register of Copyrights).

<sup>29</sup> Robinson, *supra* note 17, at 1946.

<sup>30</sup> See generally H.R. 2690, 101st Cong. (as introduced in the House, June 20, 1989).

<sup>31</sup> See *id.* § 3. The bill provided in relevant part:

In determining whether a work is of recognized stature, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, conservators, and other persons involved with the creation, appreciation, history, or marketing of works of visual art.

Committee, following a series of hearings on the matter, adopted a version of H.R. 2690 that completely omitted those guidelines.<sup>32</sup> In its report, the Committee provided no explanation for its omission of the guidelines, nor did it propose any of its own.<sup>33</sup> Consequently, VARA, as it was enacted in 1990 and currently stands, offers no official definition of “recognized stature” or standards for determining whether a work of visual art has achieved recognized stature.<sup>34</sup>

*B. Judicial Interpretation of the Recognized Stature Provision*

In the absence of a statutory definition of “recognized stature,” courts have had to supply their own interpretations. The United States District Court for the Southern District of New York was the first known court to establish a test for determining whether a work was of recognized stature.<sup>35</sup> In *Carter v. Helmsley-Spear, Inc.*, the court held that an artist bringing suit under VARA to prevent the destruction of a work had to make a two-tiered showing.<sup>36</sup> First, the artist had to demonstrate that the work had stature, which the court defined as being “viewed as meritorious . . . .”<sup>37</sup> Second, the artist had to demonstrate that the stature of the work was “‘recognized’ by art experts, other members of the artistic community, or by some cross-section of society.”<sup>38</sup> According to the court, an artist must generally call expert witnesses who could testify to the stature and recognition of the work in question.<sup>39</sup> The court in *Carter* relied on the testimony of expert witnesses to rule that a work consisting of multiple, interrelated sculptural pieces was of recognized stature.<sup>40</sup> The court, in particular, credited the

---

*Id.*

<sup>32</sup> See generally H.R. 2690, 101st Cong. (1990); see also Robinson, *supra* note 17, at 1947.

<sup>33</sup> See H.R. REP. NO. 101-514 (1990), as reprinted in 1990 U.S.C.C.A.N. 6915, 6926.

<sup>34</sup> Drew Thornley, *The Visual Artists Rights Act's “Recognized Stature” Provision: A Case for Repeal?*, 67 CLEV. STATE L. REV. 351, 365 (2019).

<sup>35</sup> See *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994), vacated on other grounds, 71 F.3d 77, 88 (2d Cir. 1995); see also Robinson, *supra* note 17, at 1948 (“The earliest and most influential case addressing the recognized stature provision of VARA is *Carter v. Helmsley-Spear, Inc.*”).

<sup>36</sup> *Carter*, 861 F. Supp. at 325.

<sup>37</sup> *Id.*

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

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* The work was described as having “a number of sculptural elements including art work attached to the ceiling and the floor, interactive art, [and] a vast

testimony of a professor and expert in sculptural design, a New York University professor of art history, and the president and director of an art gallery that specialized in the type of art created by the plaintiffs.<sup>41</sup>

The court in *Carter* developed the two-tiered test to reflect the preservative goals of VARA.<sup>42</sup> The court interpreted the inclusion of the recognized stature provision in VARA as a “gate-keeping mechanism” designed to afford protections “only to those works of art that art experts, the art community, or society in general views as possessing stature.”<sup>43</sup> The standard was not so elevated as to require an artist to demonstrate that their work had stature equal to that of works by Picasso or Chagall.<sup>44</sup> Nevertheless, the standard had the advantage of “barring nuisance law suits” over the destruction of arguably mundane or trivial works of art, such as “the destruction of a five-year-old’s fingerpainting by her class mate . . . .”<sup>45</sup>

Several courts have adopted or relied on the test established in *Carter*.<sup>46</sup> For example, despite suggesting that the test “may be more rigorous than Congress intended,” the Seventh Circuit still adopted it to resolve the dispute in *Martin v. City of Indianapolis*.<sup>47</sup> Other courts, however, have relied on a more fact-specific analysis to determine whether a given work has achieved recognized stature.<sup>48</sup> The vagueness of the recognized stature provision has produced a general state of “confusion” among the courts regarding the purpose of the provision and the

---

mosaic covering the majority of the floor of the [l]obby and portions of walls and several sculptural elements . . . .” *Id.* at 314. The court found the work, with the exception of certain pieces, to be “a single work of art whose elements are interrelated . . . .” *Id.*

<sup>41</sup> *Id.* at 314, 323–24.

<sup>42</sup> *Id.* at 325.

<sup>43</sup> *Id.* at 324–25.

<sup>44</sup> *Id.* at 325.

<sup>45</sup> *Id.* (quoting Damich, *supra* note 11, at 954).

<sup>46</sup> See, e.g., *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999); *Phillips v. Pembroke Real Est., Inc.*, 288 F. Supp. 2d 89, 101–02 (D. Mass. 2003); *Lubner v. City of Los Angeles*, 45 Cal. App. 4th 525, 531 (Cal. Ct. App. 1996).

<sup>47</sup> *Martin*, 192 F.3d at 612 (“[P]laintiff argues that the *Carter v. Helmsley-Spear* test may be more rigorous than Congress intended. That may be, but we see no need for the purposes of this case to endeavor to refine that rule.”).

<sup>48</sup> See, e.g., *Hanrahan v. Ramirez*, No. 97-CV-7470, 1998 WL 34369997, at \*4 (C.D. Ca. 1998) (identifying a community mural as a work of recognized stature based on several factors, including that the mural had been one of fifty winners selected in a national contest, had been published in a book on mural art, and had been displayed photographically in the Cannon Building of the House of Representatives).

proof sufficient to satisfy it.<sup>49</sup> There have been recent efforts, however, to provide greater substance to the recognized stature provision. The most prominent recent example is the so-called “5Pointz case” that resulted in the Second Circuit’s decision in *Castillo v. G&M Realty L.P.*<sup>50</sup>

C. *The 5Pointz Case: The Second Circuit’s Elaboration on Recognized Stature*

At issue in *Castillo* were numerous works of graffiti art that were collectively displayed at what was formerly the 5Pointz site in Queens, New York.<sup>51</sup> In the early 1970s, real estate developer Jerry Wolkoff purchased several abandoned buildings in Long Island City in Queens.<sup>52</sup> In the 1990s, Wolkoff began leasing space within the complex to aerosol artists, who quickly filled the walls of the buildings with colorful murals and other works of street art.<sup>53</sup> In 2002, a graffiti artist named Jonathan Cohen began curating the site as an art hub.<sup>54</sup> The complex was dubbed 5Pointz in reference to the five New York City boroughs and an infamous nineteenth century Manhattan slum known as Five Points.<sup>55</sup> Over the next several years, 5Pointz evolved into a sprawling “graffiti museum” that cumulatively displayed the work of thousands of artists.<sup>56</sup> Its fame was of such magnitude that it was described as “the ‘graffiti mecca’ of the world.”<sup>57</sup>

---

<sup>49</sup> Robinson, *supra* note 17, at 1948 (“The litigation reveals confusion over the purpose of the recognized stature provision—for example, whether the standard is intended merely to filter out nuisance suits or should act as a substantial hurdle for the plaintiff—and what type of proof is required to satisfy the standard.”).

<sup>50</sup> Kate Lucas, *Artists Win Second Circuit Appeal in 5Pointz Graffiti Art Case*, GROSSMAN LLP (Feb. 25, 2020), <https://www.grossmanllp.com/Artists-Win-Second-Circuit-AppealIn-5Pointz-G> [<https://perma.cc/STA2-HC2W>].

<sup>51</sup> Geoff Cobb, *The Tragic Death and Lasting Legacy of Five Pointz*, GREENPOINTERS (Apr. 30, 2019), <https://greenpointers.com/2019/04/30/the-tragic-death-and-lasting-legacy-of-five-pointz/> [<https://perma.cc/86KH-28L3>].

<sup>52</sup> *Id.*

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

<sup>54</sup> *Id.*

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

<sup>56</sup> Cara Buckley & Marc Santora, *Night Falls and 5Pointz, a Graffiti Mecca, Is Whited Out in Queens*, N.Y. TIMES (Nov. 19, 2013), <https://www.nytimes.com/2013/11/20/nyregion/5pointz-a-graffiti-mecca-in-queens-is-wiped-clean-overnight.html>.

<sup>57</sup> Pam Seltzer, *Essential Visit: 5Pointz, the “Graffiti Mecca” of the World*, CITY ATLAS (Aug. 5, 2013), <http://newyork.thecityatlas.org/lifestyle/5pointz/> [<https://perma.cc/H8FZ-PXZE>].

Despite the enormous success of 5Pointz, Wolkoff sought approval from the New York City Planning Commission to convert the complex into luxury apartment buildings.<sup>58</sup> In August 2013, the Commission approved his request.<sup>59</sup> Upon learning of Wolkoff's plan, Cohen took action to prevent the destruction of the site.<sup>60</sup> A court for the Eastern District of New York granted a temporary restraining order forestalling demolition of the complex.<sup>61</sup> Cohen and several other artists later sought a preliminary injunction against the building's destruction.<sup>62</sup> On November 12, 2013, the court denied the preliminary injunction.<sup>63</sup> However, before the court could issue a written opinion confirming its decision, Wolkoff took matters into his own hands.<sup>64</sup> On the night of November 19, Wolkoff hired workers to whitewash the complex, obliterating the artwork displayed there.<sup>65</sup>

In June 2014, Cohen and seventeen artists filed an amended complaint, seeking damages under VARA for intentional destruction of the works at 5Pointz.<sup>66</sup> The following June, Maria Castillo and nine other artists filed a separate lawsuit on the same grounds.<sup>67</sup> In March 2017, the court consolidated the two lawsuits into a single case, *Cohen v. G&M Realty L.P.*<sup>68</sup> One of the key issues of the case concerned whether the works of the artists seeking damages had achieved recognized stature.<sup>69</sup> Based on the evidence presented at trial, the court found that thirty-seven of the forty-nine works at issue were of recognized

---

<sup>58</sup> Cobb, *supra* note 51.

<sup>59</sup> *Id.*

<sup>60</sup> Castillo v. G&M Realty L.P., 950 F.3d 155, 162–63 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020).

<sup>61</sup> Cohen v. G&M Realty L.P. (*Cohen I*), 988 F. Supp. 2d 212, 214 n.1 (E.D.N.Y. 2013).

<sup>62</sup> *Id.* at 214.

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

<sup>64</sup> Cohen v. G&M Realty L.P. (*Cohen II*), 320 F. Supp. 3d 421, 427 (E.D.N.Y. 2018), *aff'd sub nom.*, Castillo v. G&M Realty L.P., 950 F.3d 155, 162 (2d Cir. 2020); Cobb, *supra* note 51.

<sup>65</sup> *Cohen II*, 320 F. Supp. 3d at 427; Cobb, *supra* note 51.

<sup>66</sup> Louise Carron, *Case Review of the 5Pointz Appeal: Castillo et al. v. G&M Realty L.P. (2020)*, CTR. FOR ART L. (Mar. 2, 2020), <https://itsartlaw.org/2020/03/02/case-review-castillo-et-al-v-gm-realty-l-p/> [<https://perma.cc/CE6H-9FWD>]. The case was filed against Wolkoff and four real estate entities owned by Wolkoff. See *Cohen II*, 320 F. Supp. 3d at 427.

<sup>67</sup> Carron, *supra* note 66.

<sup>68</sup> *Id.*

<sup>69</sup> *Cohen II*, 320 F. Supp. 3d at 427.

stature.<sup>70</sup> According to the court, those works had achieved recognized stature “by virtue of their selection by Cohen for . . . highly coveted spaces” within the complex.<sup>71</sup> The finding was also supported by “compelling expert testimony” by two witnesses “as to [the works’] artistic merit and embrace by the artistic community.”<sup>72</sup>

The court in *Cohen* also adopted the findings of the jury as to twelve additional works of art.<sup>73</sup> The court considered the findings to be persuasive given that the jurors served “[a]s representatives of the community and a ‘cross-section of society’ ”<sup>74</sup> in a case that involved “community-based standards.”<sup>75</sup> The court noted that the eight works that the jury deemed to have recognized stature had “garnered third party attention, social media presence, and/or promises from Cohen that they would be long-standing.”<sup>76</sup> The court also noted that the four works that the jury did not deem to have recognized stature had not received significant or, in some cases, any “third-party attention or social media buzz . . . .”<sup>77</sup> Altogether, the court identified forty-five of the forty-nine works at issue as having recognized stature and awarded the plaintiffs \$6.75 million in statutory damages.<sup>78</sup> Wolkoff and the other defendants filed an appeal soon thereafter.<sup>79</sup>

On appeal, the Second Circuit, in *Castillo v. G&M Realty L.P.*, affirmed the decision of the district court.<sup>80</sup> Identifying the question of recognized stature as the “crux of the parties’ dispute”

---

<sup>70</sup> *Id.* at 439.

<sup>71</sup> *Id.* The “highly coveted spaces” referred to long-standing walls that displayed art on a permanent or semi-permanent basis within the complex. *Id.* at 439, 434. The art displayed on these walls was considered some of the “best works by the best artists . . . .” *Id.*

<sup>72</sup> *Id.* at 439.

<sup>73</sup> *Id.* at 440. The case was initially tried before a jury; however, prior to summations, the plaintiffs waived their rights to a jury trial. *Id.* at 427. Rather than dismiss the jury altogether, the court decided to convert the jury trial into an advisory trial whose findings would not be binding upon the court. *Id.* at 427, 430.

<sup>74</sup> *Id.* at 440 (quoting *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994)).

<sup>75</sup> *Id.* (quoting *NAACP v. Acusport Corp.*, 226 F. Supp. 2d 391, 398 (E.D.N.Y. 2002)).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 440, 447.

<sup>79</sup> Carron, *supra* note 66.

<sup>80</sup> *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 162 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020).

on appeal, the Second Circuit held that a work is of recognized stature “when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community.”<sup>81</sup> The court stated that “[t]he most important component of stature will generally be artistic quality.”<sup>82</sup> The “relevant community,” the court explained, “will typically be the artistic community, comprising art historians, art critics, museum curators, gallerists, prominent artists, and other experts.”<sup>83</sup>

Elaborating on its standard, the Second Circuit asserted that “expert testimony or substantial evidence of non-expert recognition will generally be required to establish recognized stature.”<sup>84</sup> Although the standard prioritizes the artistic quality of a work and recognition by the artistic community by default, the Second Circuit acknowledged that recognized stature is “necessarily a fluid concept . . .”<sup>85</sup> Thus, a case could arise where a work of poor quality by a renowned artist could warrant protection as a work of recognized stature under VARA.<sup>86</sup> Based on its interpretation of the recognized stature provision, the Second Circuit affirmed the decision in *Cohen*, finding that the district court had reasonably relied on ample testimony and evidentiary exhibits to reach its conclusions.<sup>87</sup> The defendants in *Castillo* petitioned the Supreme Court of the United States for a writ of certiorari.<sup>88</sup> On October 5, 2020, the Supreme Court denied the petition, thus finalizing the judgment of the Second Circuit.<sup>89</sup>

---

<sup>81</sup> *Id.* at 166. The Second Circuit further explained that the high quality, status, or caliber of a work constitutes its stature, whereas acknowledgement of stature represents its recognition. *Id.*

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

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* According to the Second Circuit, an exceptional case that would not require expert testimony or substantial evidence of non-expert recognition could arise “where an artist or work is of such prominence that the issue of recognized stature need not be tried . . .” *Id.*

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

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

<sup>87</sup> *Id.* at 166–67. The Second Circuit weighed other factors as well, including the fact that the site where the works were displayed was highly regarded. *Id.* at 170. The court concluded that the eminent status of the 5Pointz complex was itself “some evidence of the [5Pointz] works’ recognized stature.” *Id.*

<sup>88</sup> Petition for Writ of Certiorari, *Castillo*, 950 F.3d 155 (No. 20-66).

<sup>89</sup> *G&M Realty L.P. v. Castillo*, 141 S. Ct. 363, 363 (2020); Mike Nepple, *Graffiti Artists See Victory Under Visual Artists Rights Act Claim*, JD SUPRA (Oct. 15, 2020), <https://www.jdsupra.com/legalnews/graffiti-artists-see-victory-under-14271/> [<https://perma.cc/AV7R-PFZV>].

D. *A Recent Call for Direct Revision of VARA*

The Second Circuit's decision in *Castillo* represents a recent judicial attempt to articulate the meaning of "recognized stature" under VARA. In April 2019, a year prior to the *Castillo* ruling, the United States Copyright Office ("USCO") issued a report recommending, among other things, that Congress revise the law itself to clarify the meaning of "recognized stature."<sup>90</sup> In its report, the USCO expressed concern that an unduly restrictive definition of "recognized stature" would unjustifiably exclude works that do not fall within the category of traditional fine art or that might not have garnered sufficient scholarly analysis.<sup>91</sup> The report criticized the tendencies of some courts to rely exclusively on scholarly consensus to evaluate the stature of a work.<sup>92</sup> In fact, the report highlighted the analysis of the district court in *Cohen*, noting that "[i]nstead of focusing solely on the scholarly merits of the work, the [*Cohen*] court considered the graffiti works at 5Pointz within the appropriate community and context for that particular medium."<sup>93</sup>

Accordingly, the USCO report recommended the inclusion of a statutory mandate that courts "consult a broad range of sources" when determining whether a work has achieved recognized stature.<sup>94</sup> Specifically, the USCO recommended amendment of the recognized stature provision to incorporate language from the California Art Preservation Act of 1979, modified to include "reference to the opinions of the relevant community":

In determining whether . . . a work of visual art is of recognized stature, the trier of fact shall rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of art, as well as the opinion of the relevant community.<sup>95</sup>

---

<sup>90</sup> See U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 39 (2019) [hereinafter AUTHORS, ATTRIBUTION, AND INTEGRITY]. The report represents the culmination of a public study undertaken by the USCO on the state of moral rights protections for authors in the United States. See Notice of Inquiry, 82 Fed. Reg. 7870 (Jan. 23, 2017).

<sup>91</sup> AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 90, at 79.

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

<sup>93</sup> *Id.* According to the USCO, the community-conscious approach taken by the district court in *Cohen II* "potentially addresses some of [the] concerns regarding the exclusion of certain types of art." *Id.*

<sup>94</sup> *Id.* at 5, 144.

<sup>95</sup> *Id.* at 80–81 (quoting CAL. CIV. CODE § 987(f) (2019)).

According to the USCO, incorporation of this language could enable public or non-traditional artists to demonstrate that their works are of recognized stature within a particular community, even if the works would not have qualified as such “under a more academic focus . . . .”<sup>96</sup> Thus, the proposed amendments “would improve significantly the usefulness of VARA to protect artists’ attribution and integrity interests” without unduly expanding VARA’s scope to cover works that Congress did not intend to protect.<sup>97</sup> At present, Congress has not revised VARA to incorporate the suggestions made in the USCO report.

## II. RECOGNIZED STATURE PROTECTION FOR ARTWORKS IN THE DIGITAL AGE

The recognized stature provision has been criticized as an arbiter of which artworks are worthy of protection against destruction under VARA and which are not.<sup>98</sup> One commenter to the public study that produced the 2019 USCO report offered the criticism that judicial application of the recognized stature provision “has been overly restrictive and thwarted fulfillment of [VARA’s] objectives,” particularly in the context of public art.<sup>99</sup> However, recent trends in the exhibition and dissemination of art could widen the scope of VARA’s recognized stature protections.

Online platforms are transforming how art is shared by its creators and viewed by spectators.<sup>100</sup> Works of art by local and non-traditional artists are receiving recognition on a scale previously unseen.<sup>101</sup> Members of the legal community have

---

<sup>96</sup> *Id.* at 81.

<sup>97</sup> *Id.* at 5.

<sup>98</sup> See Emma G. Stewart, Note, *United States Law’s Failure to Appreciate Art: How Public Art Has Been Left Out in the Cold*, 97 WASH. U. L. REV. 1233, 1251 (2020); Timothy Marks, Note, *The Saga of 5Pointz: VARA’s Deficiency in Protecting Notable Collections of Street Art*, 35 LOY. L.A. ENT. L. REV. 281, 301 (2015); Damich, *supra* note 11, at 962–63.

<sup>99</sup> AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 90, at 78–79 (quoting Letter from the Art Law Committee of the New York City Bar Association to the U.S. Copyright Office (Mar. 27, 2017)). Other observers have raised the concern that public art, particularly street art, categorically receives less protection under VARA. See, e.g., Marks, *supra* note 98, at 301.

<sup>100</sup> Ben Luke, *Art in the Age of Instagram and the Power of Going Viral*, ART NEWSPAPER (Mar. 27, 2019, 11:48PM), <https://www.theartnewspaper.com/2019/03/27/art-in-the-age-of-instagram-and-the-power-of-going-viral> [https://perma.cc/T9NF-PZCR].

<sup>101</sup> Mona Paul, *Viral Street Art – When Social Networks and Street Art Meet*, WIDEWALLS (Feb. 10, 2015), <https://www.widewalls.ch/magazine/when-street-art-meet-viral-february-2015> [https://perma.cc/C8JC-MYQ6].

posited that social media and other forms of online recognition can contribute to the stature of an artwork for the purposes of establishing VARA protections for the work.<sup>102</sup> And as the decisions issued in the 5Pointz lawsuit indicate, the weight of online recognition is not lost on courts either.<sup>103</sup> Giving consideration to online public input could bring more artworks under the protective umbrella of VARA, furthering the statute's purpose of preserving art for the benefit of society.<sup>104</sup> Nevertheless, certain aspects of online engagement could complicate judicial analysis of whether online recognition contributes to a work's stature.

A. *The Internet and Social Media as a Vehicle for Sharing Art*

The Internet and social media are playing an increasingly prevalent role in sharing, accessing, and interacting with art. Works of art are being digitally captured and shared to social media platforms, particularly Instagram, where they can garner significant attention from audiences who otherwise might not have had access to those works.<sup>105</sup> Internet and social media platforms—hereinafter, referred to collectively as “online platforms”—can generate such a high volume of response that artists who share their works on these platforms are “receiving just as much, if not more recognition than a person who solely relies on traditional exhibitions.”<sup>106</sup> Widescale appreciation of an artwork by the general public can, in turn, create opportunities for artists to advance their careers and “to connect with legitimate members of the artistic community.”<sup>107</sup>

Street art, in particular, has acquired a new presence in the art world through the use of online platforms.<sup>108</sup> The once “esoteric practice” of street art in obscure locations—alleys, junkyards, abandoned buildings, and the like—has become a

---

<sup>102</sup> Brittain, *supra* note 8.

<sup>103</sup> See *Cohen II*, 320 F. Supp. 3d 421, 440 (E.D.N.Y. 2018); *Castillo v. G&M Realty*, 950 F.3d 155, 162 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020).

<sup>104</sup> H.R. REP. NO. 101-514 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6915, 6915–16.

<sup>105</sup> Luke, *supra* note 100.

<sup>106</sup> Diego Williams, *Art in the Age of Digital Reproduction*, GLOSSI MAG (Mar. 27, 2020), <https://glossimag.com/art-in-the-age-of-digital-reproduction/> [<https://perma.cc/6CCP-CYBL>].

<sup>107</sup> *Id.*

<sup>108</sup> Andrea Baldini, *Street Art in the Digital Age: Photos, Documents, Urban Agency*, ARCHDAILY (Feb. 18, 2020), <https://www.archdaily.com/933982/street-art-in-the-digital-age-photos-documents-urban-agency> [<https://perma.cc/6X3U-VYPR>].

“global phenomenon” in the age of social networking.<sup>109</sup> Indeed, photographs shared online and over social media “constitute our primary access to works of street art.”<sup>110</sup> Accessibility via online platforms has important implications for works of street art, which are often subversive and political in nature.<sup>111</sup> Street artists are able to broadcast messages through their art to global audiences, bringing certain political and social ills into the mainstream consciousness.<sup>112</sup> As one commentator aptly put it, “[e]xperienced as a digital object, street art . . . has the opportunity to endure and reach a larger audience, it is no longer [a] victim of its own location or ephemerality.”<sup>113</sup>

A recent and powerful example of the amplification that online platforms can give to protest art is the sharing of artworks created in contribution to the Black Lives Matter (“BLM”) movement.<sup>114</sup> Established in 2013 to address systemic racial inequities,<sup>115</sup> the BLM movement experienced renewed vigor in the spring and summer of 2020 following several incidents involving police killings of Black individuals, including George Floyd and Breonna Taylor.<sup>116</sup> Such incidents galvanized nationwide and global protests demanding racial justice and reform.<sup>117</sup> One significant mode of protest was the creation of

---

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

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

<sup>112</sup> *Id.*

<sup>113</sup> Naomi Martin, *How Social Media is Shaping Art – The Impact of an Instagram Obsessed Culture*, ARTLAND, <https://magazine.artland.com/how-social-media-is-shaping-art-the-impact-of-an-instagram-obsessed-culture/> [<https://perma.cc/6E7F-KS87>] (last visited Feb. 5, 2021).

<sup>114</sup> Boyer, *supra* note 3.

<sup>115</sup> *About – Black Lives Matter*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> [<https://perma.cc/4PGW-69EY>] (last visited Feb. 6, 2022).

<sup>116</sup> Jenna Wortham, *A ‘Glorious Poetic Rage’*, N.Y. TIMES (June 5, 2020), <https://www.nytimes.com/2020/06/05/sunday-review/black-lives-matter-protests-floyd.html> [<https://perma.cc/8G3C-5XUT>]. George Floyd, a 46-year-old resident of Minneapolis, Minnesota, was killed while in police custody as a result of a police officer forcibly pressing down on Floyd’s neck with his knee. *Id.* Breonna Taylor, a 26-year-old resident of Louisville, Kentucky, was shot and killed by officers executing a no-knock search warrant on her apartment. *Id.* Numerous other incidents of police violence perpetrated against Black Americans contributed to a resurgence in anti-racist activism in the months following. *Id.*

<sup>117</sup> Syreeta McFadden, *Black Lives Matter Just Entered Its Next Phase*, ATLANTIC (Sept. 3, 2020), <https://www.theatlantic.com/culture/archive/2020/09/black-lives-matter-just-entered-its-next-phase/615952/> [<https://perma.cc/NX6R-ZUDJ>].

street art.<sup>118</sup> Across the United States, artists created thousands of murals and other public artworks to memorialize victims of racial violence, demand racial equality, and uplift the Black community.<sup>119</sup> Not only was the creation of protest art voluminous, but the public response and media attention were as well.<sup>120</sup> Vince Ballentine, a street artist based in New York who painted several BLM-inspired murals during the months of protest, stated, “People are now responding to my work like they never have before.”<sup>121</sup>

*B. “Recognized Stature” in Light of Social Media Engagement with Art*

The ability to share local art to a large online audience has raised the question of whether online response can or should play a role in determining whether a work of art has achieved recognized stature under VARA. Courts could be reckoning with this issue not too far from now. Works of BLM-inspired street art have been removed from public spaces or threatened with such action, much to the concern of the artists who created them.<sup>122</sup> The *Castillo* decision provided a strong foundation for the notion that works of street art can receive protection under VARA.<sup>123</sup> Significantly, the Second Circuit acknowledged that

<sup>118</sup> Boyer, *supra* note 3.

<sup>119</sup> *Id.* A database created by students and professors at the University of St. Thomas to document these works of anti-racist street art has accumulated over 2,500 entries as of the beginning of 2022, which is likely an undercount. *Urban Anti-Racist Street Art Mapping*, UNIV. ST. THOMAS, <https://georgefloystreetart.omeka.net/items> [<https://perma.cc/YPF2-P8RA>] (last visited Jan. 24, 2022).

<sup>120</sup> Emily Stewart & Shirin Ghaffary, *It's Not Just Your Feed. Political Content Has Taken Over Instagram*, VOX (June 24, 2020, 11:20 AM), <https://www.vox.com/recode/2020/6/24/21300631/instagram-black-lives-matter-politics-blackout-tuesday> [<https://perma.cc/7XT3-M38R>].

<sup>121</sup> Ashan Singh et al., *Street Artists Memorialize Black Lives Lost to Racism and Police Violence*, ABC NEWS (Sept. 18, 2020, 7:00 PM), <https://abcnews.go.com/US/street-artists-memorialize-black-lives-lost-racism-police/story?id=73095622> [<https://perma.cc/SL2E-PW4K>].

<sup>122</sup> Calma, *supra* note 4.

<sup>123</sup> See *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 167–69 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020). Indeed, commentators have advocated for establishing street art as a protectable category of art under VARA. See, e.g., Susanna Frederick Fischer, *Who's the Vandal? The Recent Controversy Over the Destruction of 5Pointz and How Much Protection Does Moral Rights Law Give to Authorized Aerosol Art?*, 14 J. MARSHALL REV. INTELL. PROP. L. 326, 341 (2015); Griffin M. Barnett, *Recognized Stature: Protecting Street Art as Cultural Property*, 12 CHI.-KENT J. INTELL. PROP. 204, 216 (2013).

street art has become “a major category of contemporary art” and that works of street art are capable of achieving a level of stature and recognition that can afford them protections under VARA.<sup>124</sup> The question that is now emerging among members of the legal community and other observers is what role online response can play in securing those protections.<sup>125</sup>

### 1. The Potential for Recognition of Online Response

Public engagement with art via social media and other online platforms could play a substantive role in litigating future VARA lawsuits. New York-based attorney Megan Noh has posited, “It’s not impossible to imagine a mural painted in the context of the Black Lives Matter protests achieving recognized stature—potentially even relatively quickly, given the inherent ability of art to effectively communicate powerful political messages combined with the incredible reach of social media at this unique moment.”<sup>126</sup> Indeed, the foundation for courts factoring online response into recognized-stature analysis has already been laid. The district court in *Cohen* adopted the jury’s findings that eight works at the 5Pointz site were of recognized stature, expressly noting that those eight works had “garnered third party attention” and “social media presence.”<sup>127</sup> Additionally, the district court agreed with the jury’s findings that four other works had not achieved recognized stature, in part, because they had not received any significant third-party attention or social media buzz.<sup>128</sup> Thus, online response formed a substantive part of the district court’s analysis of whether those works had achieved recognized stature.

In *Castillo*, the Second Circuit affirmed the ruling of the district court.<sup>129</sup> The Second Circuit noted that the district judge, in reaching his conclusions, had “credited the artists’ evidence of

---

<sup>124</sup> *Castillo*, 950 F.3d at 167–68.

<sup>125</sup> Brittain, *supra* note 8.

<sup>126</sup> *Id.* It should be noted that, to be afforded protection, murals such as those inspired by the Black Lives Matter movement would have to satisfy certain other criteria under VARA. For example, the creator of a work would have to be known for protective status to be asserted under VARA. *Id.* Additionally, VARA affords less protections to works constructed on property without permission of the property owner. *Id.* This could present different challenges to establishing protections for murals and other works of street art, which are beyond the scope of this Note.

<sup>127</sup> *Cohen II*, 320 F. Supp. 3d 421, 440 (E.D.N.Y. 2018), *aff’d sub nom.*, *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 162 (2d Cir. 2020).

<sup>128</sup> *Id.*

<sup>129</sup> *Castillo*, 950 F.3d at 162.

outside recognition of the 5Pointz works.”<sup>130</sup> The court also noted that the district judge had declined to make a finding of recognized stature with respect to four works, in part, because they “were insufficiently discussed outside of 5Pointz.”<sup>131</sup> Although the Second Circuit did not make reference to online response in its own recognized stature analysis, it did not disavow the district court’s reliance on online response as a contributing factor to recognized stature analysis. Thus, the Second Circuit left open the possibility of accounting for online response in a judicial determination of recognized stature.

The Second Circuit’s own analysis of the recognized stature provision provides a reasonable basis for giving weight to online recognition. The court defined recognized stature in terms of recognition “by a relevant community.”<sup>132</sup> Although the court reckoned that the “relevant community” would typically comprise “the artistic community,” it acknowledged the concept of recognized stature as “necessarily a fluid concept” that is dependent on the specific factual circumstances of a case.<sup>133</sup> Megan Noh, an attorney with extensive experience in art and cultural property law, states that online platforms like Instagram can create a “more fertile environment for works to be recognized,” by enabling them to reach the relevant community.<sup>134</sup> Online platforms have made art accessible in ways that became especially importantly at the height of the COVID-19 pandemic, which severely restricted the ability to travel and visit physical exhibitions.<sup>135</sup> Thus, online platforms can make artwork more accessible to a predefined relevant community.

Moreover, the users of online platforms themselves can constitute the relevant community. As Noh has commented, “[t]he relevant community is going to vary depending on the art . . . . If we are thinking about community in terms of the geographic location of the intended audience, some art has a

---

<sup>130</sup> *Id.* at 164. The Second Circuit also mentioned the district judge’s crediting of “expert testimony as to the works’ stature,” thereby highlighting expert testimony as distinct from outside recognition. *Id.*

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

<sup>132</sup> *Id.* at 166.

<sup>133</sup> *Id.*

<sup>134</sup> Brittain, *supra* note 8; Megan E. Noh, PRYOR CASHMAN LLP, <https://www.pryorcashman.com/megan-e-noh> [<https://perma.cc/6XWU-5L9P>] (last visited Feb. 14, 2022).

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

highly local community, and some is appreciated globally.”<sup>136</sup> Thus, for a work of art that reaches or is intended to reach a broad audience on a virtual platform, an online community of viewers can itself be the relevant community that gives the work recognition. Therefore, whether online platforms serve as vehicles for bringing art to a predetermined relevant community or comprise the relevant community themselves, they have the power to elevate a work of art to recognized stature.

Accounting for online and social media response in recognized-stature analysis would help further the USCO’s aims of broadening the protective scope of VARA. The USCO was critical of the rigidly academic approach to recognized-stature analysis that many courts have taken.<sup>137</sup> Such an unduly restrictive approach, the agency stated, would represent an unreasonable bar to protection for “art that may not qualify as traditional fine art.”<sup>138</sup> Broadening the analysis under the recognized stature provision to include the online input of laypersons would provide one solution to the issue of overreliance on scholarly treatment of artworks. It would also be consistent with the USCO’s recommendation to amend the provision to provide that courts must consult “the opinion of the relevant community,” not just the opinion of those in the institutionalized art community.<sup>139</sup>

Accounting for online and social media response in recognized-stature analysis would also further VARA’s overall preservative purposes. The legislative history of VARA indicates that the law is intended to prevent “a loss to society” that results from the “destruction of works of art.”<sup>140</sup> The recognized stature provision of VARA, in particular, “reflects a different policy goal from other provisions of copyright law, focusing on the cultural importance of certain visual works of art that are difficult or even impossible to copy.”<sup>141</sup> Giving due weight to online recognition can help establish VARA protections for culturally impactful works that are shared on virtual platforms, consistent with the

---

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

<sup>137</sup> AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 90, at 79.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 80–81.

<sup>140</sup> H.R. REP. NO. 101-514 (1990), as reprinted in 1990 U.S.C.C.A.N. 6915, 6926.

<sup>141</sup> Susan J. Kohlmann & Jacob L. Tracer, *NY Art Disputes Highlight Fame’s Role in Copyright Status*, LEXOLOGY (Oct. 7, 2020), <https://www.lexology.com/library/detail.aspx?g=e6dfc00a-e063-4d9f-9938-ed34148c4c44> [https://perma.cc/Z98E-WCMM].

statute's preservative goals. The legislative history of VARA also indicates that Congress intended the law to protect works by "lesser-known authors."<sup>142</sup> Accounting for the online recognition that works of art receive can broaden VARA protections for artists who are not established names in the art world or otherwise well-known. This has significant implications for creators of street art, including creators of murals and other works of street art inspired by the BLM. As one legal scholar stated: "Graffiti and street art live on the internet. They thrive on the internet more than fine art."<sup>143</sup>

## 2. Possible Challenges to Recognizing Online Public Input

Although online recognition can arguably give voice to public opinion and expand VARA protections to a greater number of artworks, certain aspects of online engagement could present complications for recognized-stature analysis. For one, it is not clear what weight courts would or should assign to the various forms of online engagement with artwork. Determining what weight to attribute to a "like" versus a comment or a "reaction"<sup>144</sup> versus a share could result in a highly subjective analysis that varies from jurisdiction to jurisdiction, or even from court to court. Some courts may be reluctant to give weight to more surface-level interactions with artwork, such as likes, which users can give in mere seconds and without much thought; other courts might credit a sufficiently high volume of likes as an indication that a work is of recognized stature.<sup>145</sup> The very

---

<sup>142</sup> H.R. REP. NO. 101-514, at 6926.

<sup>143</sup> Calma, *supra* note 4.

<sup>144</sup> In the context of social media engagement tools, "reactions" are alternative options to the staple "like" reaction that almost all social media platforms feature. Liz Stinson, *Facebook Reactions, the Totally Redesigned Like Button, Is Here*, (Feb. 24, 2016, 8:00AM), <https://www.wired.com/2016/02/facebook-reactions-totally-redesigned-like-button/> [<https://perma.cc/MJ9X-89VX>]. Reactions allow users to express a wider range of emotional reactions to online content. *Id.*

<sup>145</sup> In some contexts, certain tools of online engagement are given more weight than others by some objective standard. For example, Facebook assigns more value to reactions than to likes; a user who "react[s]" to a post is considered to have a higher level of engagement or interest in the post than if they simply "like" the post. Kevin Gallagher, *Facebook Is Pushing 'Reaction' Over 'Likes'*, INSIDER (Mar. 1, 2017, 10:11AM), <https://www.businessinsider.com/facebook-is-pushing-reactions-over-likes-2017-3> [<https://perma.cc/8GVL-TL46>]. However, the comparative value of likes, reactions, and other engagement tools remains subjective to a large extent. See Caz Bevan, *Social Media Metrics Compared: Which Are the Most Valuable?*, SOC. MEDIA WK. (Oct. 19, 2017), <https://socialmediaweek.org/blog/2017/10/social-media-metrics->

question of what volume of online response would be sufficient to deem it a significant factor invites further subjective analysis. The Second Circuit in *Castillo* stated that, in the absence of expert testimony, “substantial evidence of non-expert recognition will generally be required to establish recognized stature.”<sup>146</sup> While this establishes some threshold for measuring the significance of online response to a work of art, the term “substantial” itself is vague, although there is reason to believe that this evidentiary standard would not be particularly difficult to meet.<sup>147</sup>

The often surface-level nature of online engagement could present additional challenges in cases where an artwork has not only artistic value but political dimensions as well. The Second Circuit in *Castillo* held that “[a] work’s high quality, status, or caliber is its stature.”<sup>148</sup> The court elaborated that “[t]he most important component of stature will generally be artistic quality.”<sup>149</sup> A simple “like” or “reaction” to a work of art that conveys a political message might be insufficient evidence that a viewer is passing judgment on the artistic quality of the work. In liking an Instagram post of a BLM-inspired mural, the viewer might be showing an appreciation for the artistic qualities of the mural in addition to its underlying message. The viewer, however, might also simply be expressing support for the BLM movement as a whole, without having any particular opinion on the mural as a work of art. It is also unclear what weight courts would or should attribute to negative online response to a work of art, especially when negative response, like positive response, might not relate to the artistic merit of a work, but rather the underlying message that the work conveys. The nature of online engagement with artwork could thus muddy judicial analysis of whether online response to a work of art is indicative of the work’s stature.

---

compared-valuable/ [https://perma.cc/69YJ-PZ98] (examining the variable weights that can be attributed to different tools of Internet and social media interaction).

<sup>146</sup> *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 166 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020).

<sup>147</sup> The Supreme Court has defined “substantial evidence” as “more than a mere scintilla” and “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” See *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

<sup>148</sup> *Castillo*, 950 F.3d at 166.

<sup>149</sup> *Id.*

Even if workable methods of weighing online response can be developed, there is also a concern that the publicity of a VARA lawsuit could itself generate the quality or quantity of online response to an artwork sufficient to support a finding of recognized stature.<sup>150</sup> In such cases, deference to public opinion could “open[] the judicial process to a significant risk of manipulation, where the connected or media-experienced plaintiff can manufacture ‘recognized stature’ overnight in the course of a trial.”<sup>151</sup> Thus, a media-savvy plaintiff could artificially inflate public recognition of their artwork by publicizing the details of their lawsuit and inviting their followers and other interested parties to engage with the work online.<sup>152</sup> An artist might even resort to more deceptive practices, such as purchasing social media followers to increase their follower base or creating bots to flood posts of their artwork with reactions and comments.<sup>153</sup> Thus, a court could unknowingly give weight to false indicia of widespread public recognition of artwork that is shared online.

Even without any disingenuous behavior on the part of the artist, the publicity of a trial itself could artificially inflate online recognition of an artwork. Media coverage can turn a trial into a highly publicized matter that invites copious public commentary.<sup>154</sup> Indeed, the 5Pointz case was a highly-publicized case that formed the subject of countless news articles dating back to when the litigation was in its early stages.<sup>155</sup> Although

---

<sup>150</sup> Keshawn M. Harry, Note, *A Shattered Visage: The Fluctuation Problem with the Recognized Stature Provision in the Visual Artists Rights Act of 1990*, 9 J. INTELL. PROP. L. 193, 205 (2001) (citing Robinson, *supra* note 17, at 1967).

<sup>151</sup> Robinson, *supra* note 17, at 1967. Robinson’s article was published in 2000 when digital sharing capabilities were comparatively more limited than they are now, but the concerns he raised about artificial inflation of recognition are still applicable today—arguably even more so, considering the ease with which an image or post can be shared on social media.

<sup>152</sup> *Id.*

<sup>153</sup> Nicholas Confessore et al., *The Follower Factory*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/interactive/2018/01/27/technology/social-media-bots.html> [<https://perma.cc/8L6M-FQLL>]; Lindsay Flanagan, *Social Media Bots: Are They All Bad?*, MEMBERPRESS, <https://memberpress.com/using-social-media-bots-the-good-and-bad/> [<https://perma.cc/5K5E-75WM>] (last updated Jan. 18, 2021).

<sup>154</sup> Joshua Hamilton, *Navigating the Media in High-Profile Cases*, DAILY J. (Feb. 21, 2018), <https://www.lw.com/thoughtLeadership/navigating-media-in-high-profile-cases-Joshua-Hamilton> [<https://perma.cc/6LP4-JMXM>].

<sup>155</sup> See, e.g., Corey Kilgannon, *5Pointz Graffiti Artists Whose Works Were Erased Will Get Day in Court*, N.Y. TIMES (Apr. 9, 2017), <https://www.nytimes.com/2017/04/09/nyregion/5pointz-graffiti-artists-whose-works-were-erased-will-get-day-in-court.html> [<https://perma.cc/9WJP-6W3S>]; Abby Ronner,

there is no suggestion in the lower court or appellate court decisions that the publicity of the case distorted the recognition that the artworks at 5Pointz received,<sup>156</sup> that does not bar the issue from arising in a future VARA lawsuit. An artist suing under VARA may suddenly receive an influx of online response to their artwork that is more a product of the litigation itself than of organic engagement with the artwork in its own right. One solution that a court could adopt to avoid giving undue weight to litigation-induced online response could be to draw a cutoff point for considering online response as evidence at the commencement of the litigation or at least some point before the case begins to receive significant publicity. Of course, this solution may not be entirely effective where an artist seeks to manipulate public response before filing a lawsuit.

### III. A CONSCIENTIOUS APPROACH TO INCORPORATING ONLINE RESPONSE

In evaluating whether a work of art has achieved recognized stature, online platforms can serve as informative tools for courts. However, they can also represent potential pitfalls. Online platforms can bring considerable attention to works of art, especially those created in response to contemporary issues.<sup>157</sup> The significant reach that these platforms can have should not be categorically dismissed, particularly if courts are to address the concerns that the recognized stature provision is not being applied consistently with VARA's preservative aims.<sup>158</sup> At the same time, courts must be equipped to handle the various challenges that online engagement poses to substantive analysis. Therefore, as a general matter, courts should take a conscientious, fact-inquisitive approach that examines both the

---

*5Pointz Graffiti Artists Sue Developers in Long Island City*, VICE (July 5, 2015, 9:30AM), <https://www.vice.com/en/article/nz4d4d/5pointz-graffiti-artists-sue-developers-in-long-island-city> [https://perma.cc/4JX3-ZGMT]; Clare Trapasso, *Graffiti Artists of 5Pointz Go to Court to Save Building*, N.Y. DAILY NEWS (Nov. 6, 2013), <https://www.nydailynews.com/new-york/queens/graffiti-yes-art-article-1.1508909> [https://perma.cc/7JUD-7CEW]; Susanna Kim, *Artists Sue to Prevent Destructions of 'Graffiti Mecca' in New York*, ABC NEWS (Oct. 16, 2013), <https://abcnews.go.com/Business/artists-sue-preserve-york-graffiti-mecca/story?id=20577648> [https://perma.cc/D3D3-YNM5].

<sup>156</sup> See generally *Castillo v. G&M Realty*, 950 F.3d 155 (2d Cir. 2020), cert. denied, 141 S. Ct. 363 (2020); *Cohen II*, 320 F. Supp. 3d 421 (E.D.N.Y. 2018), aff'd sub nom., *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 162 (2d Cir. 2020).

<sup>157</sup> Williams, *supra* note 106; Baldini, *supra* note 108.

<sup>158</sup> See *supra* Part I.D.

quantity and substance of online public input on a case-by-case basis. When considered together with other forms of non-expert recognition, the quantity and substance of online public input should be such that the non-expert recognition can, in its totality, be considered “substantial.”<sup>159</sup> However, the threshold for substantiality should not be so high as to render consideration of online public input essentially performative or meaningless.

In taking a measured, fact-specific approach to evaluating the weight of online public input, courts can balance several considerations. For example, courts should afford particular consideration to Internet and social media response if the lay public is the intended audience for the work, which is often the case for street art and protest art.<sup>160</sup> Where applicable, courts should consider online response not merely in quantitative terms, such as the number of likes or reactions a work has received, but also in qualitative terms, such as the substantive comments a work has received.<sup>161</sup> Additionally, courts should assess, to the best of their ability, the nature of the responses to a work of art. If a work of art conveys a political message, as works of street and protest art often do,<sup>162</sup> a court should make a reasonable effort to determine what proportion of the responses to the artwork relate to its artistic qualities as compared to other qualities of the work, such as its political undertones. If a work has likely or in fact elicited responses to aspects other than its artistic qualities, the court must decide what weight, if any, to attribute to those responses.

Courts could also base their degree of deference to online public opinion on the availability of other forms of input regarding the work of art being litigated. If a given work of art has received extensive scholarly treatment or other forms of expert opinion, a court could give less consideration to online public input—although the court might still find it advisable to consider whether the work has received substantial online public input as well, if it is to avoid applying an unduly restrictive approach to recognized-stature analysis.<sup>163</sup> If, on the other hand,

---

<sup>159</sup> *Castillo*, 950 F.3d at 166.

<sup>160</sup> *See Boyer*, *supra* note 3.

<sup>161</sup> Comments on a social media post should ostensibly be assigned more value than simple likes or reactions based on, among other things, the fact that leaving a comment typically takes more time and effort than simply tapping on a picture to “like” it. Bevan, *supra* note 145.

<sup>162</sup> *See Baldini*, *supra* note 108; *Boyer*, *supra* note 3.

<sup>163</sup> AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 90, at 79.

a given work of art has not received extensive scholarly or expert treatment, a court can examine whether the work has received substantial non-expert recognition, including through online platforms. Such an approach is consistent with the views of the Second Circuit in *Castillo*.<sup>164</sup> It would also ensure that nontraditional forms of art, which “may not have received sufficient scholarly attention,”<sup>165</sup> are afforded a meaningful possibility of receiving protection under VARA.

Additionally, courts could rely on expert testimony to establish the value or weight that should be attributed to the online response that a given work of art has generated. In the context of VARA lawsuits, expert testimony has been regarded as an important means of establishing whether a work of art has achieved recognized stature.<sup>166</sup> In fact, the Second Circuit in *Castillo* referred to expert testimony as the frequent “linchpin” of recognized stature claims.<sup>167</sup> While ordinarily introduced to establish the merits of a work of art itself,<sup>168</sup> expert testimony may also be introduced to establish the merits of weighing online public opinion in a specific case, given the volume and substance of feedback that the artwork has received on Internet and social media platforms. This would relieve courts of the burden of having to sift through potentially multiple sources of online public input by shifting the burden to the parties and their attorneys.

Permitting the testimony of media and data analysts could also provide the court with a more objective standard for gauging the scope and significance of online public input. Expert testimony could, for instance, be used to determine whether any portion of public input through an online platform has been manufactured by the plaintiff, such as whether artificial bots were created to leave comments on posts about the artwork. The use of expert witnesses to analyze and extrapolate conclusions from data has tremendous precedence in American legal

---

<sup>164</sup> *Castillo*, 950 F.3d at 166 (providing that “expert testimony or substantial evidence of non-expert recognition will generally be required to establish recognized stature”) (emphasis added).

<sup>165</sup> AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 90, at 79.

<sup>166</sup> *Castillo*, 950 F.3d at 166, 170.

<sup>167</sup> *Id.* at 170.

<sup>168</sup> *See, e.g., Cohen II*, 320 F. Supp. 421, 431–32 (E.D.N.Y. 2018), *aff’d sub nom.*, *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 162 (2d Cir. 2020); *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 314, 323–24 (S.D.N.Y. 1994), *vacated on other grounds*, 71 F.3d 77, 88 (2d Cir. 1995).

tradition and so would not be misplaced in the context of VARA lawsuits.<sup>169</sup> Using expert witnesses in this capacity could also mitigate the risk of taking an unduly restrictive approach to recognized stature analysis. In addition to serving as scholarly and institutional sources of recognition for works of art, expert witnesses can serve as interpreters of other forms of recognition that an artwork can receive.

Finally, to guide their analysis of online response in VARA cases, courts could look to ways in which online forms of engagement have been interpreted and weighed as evidence in other types of cases. Although interpretation of online interactions is a nascent body of caselaw, a handful of courts have engaged in such interpretation. For example, the Fourth Circuit in *Bland v. Roberts* held that the act of “liking” a Facebook page created for a political campaign could be considered an act of speech.<sup>170</sup> According to the Fourth Circuit, “[t]hat a user may use a single mouse click to produce [the] message that he likes [a] page instead of typing the same message with several individual key strokes is of no constitutional significance.”<sup>171</sup> Although that case was a free speech case brought under the First Amendment,<sup>172</sup> it could offer some guidance as to how courts can weigh the evidentiary value of the use of online engagement tools such as “like” buttons. Other cases interpreting various forms of online engagement can serve as general aides to courts analyzing online engagement in VARA suits.

There are a variety of considerations that courts must weigh in factoring online response in their analysis of works of art under the recognized stature provision of VARA, some of which can present legitimate challenges. However, by taking a conscientious and fact-sensitive analytical approach, courts can use substantial online public input to guide their analysis of whether a given work of art has achieved recognized stature.

---

<sup>169</sup> Ric Simmons, *Conquering the Province of the Jury: Expert Testimony and the Professionalization of Fact-Finding*, 74 U. CIN. L. REV. 1013, 1016–18 (2006).

<sup>170</sup> *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013).

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

<sup>172</sup> *Id.* at 371.

## CONCLUSION

Internet and social media platforms have transformed the experience around creating and sharing works of art,<sup>173</sup> and they could play a vital role in protecting those works in the future. The recognized stature provision of VARA has been criticized as unduly restrictive and contrary to the statute's purpose of protecting artists and their works.<sup>174</sup> As the 5Pointz case illustrates, however, courts are pushing against those boundaries, acknowledging protections for nontraditional forms of art and input from those outside the institutionalized art world.<sup>175</sup> Street art, in particular, stands to benefit from this expanded approach. Amir Diop expressed hope that his art will form "a part of history" that "can impact the future."<sup>176</sup> By taking a conscientious approach to integrating online engagement into recognized stature analysis, courts can use Internet and social media platforms to enhance their understanding of whether a work has achieved recognized stature. There is still hope for Amir.

---

<sup>173</sup> Williams, *supra* note 106.

<sup>174</sup> See AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 90, at 78–79.

<sup>175</sup> See *Castillo v. G&M Realty*, 950 F.3d 155, 166–168 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020); *Cohen v. G.M. Realty L.P. (Cohen II)*, 320 F. Supp. 3d 421, 440 (E.D.N.Y. 2018), *aff'd sub nom.*, *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 162 (2d Cir. 2020).

<sup>176</sup> Calma, *supra* note 4.