

RECOGNIZED STATURE: PROTECTING STREET ART AS CULTURAL PROPERTY

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INTRODUCTION

I was very embarrassed when my canvases began to fetch high prices, I saw myself condemned to a future of painting nothing but masterpieces.

—Henri Matisse¹

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** Photograph provided by Fine Art Auctions Miami.

¹ *Frequently asked questions*, BANKSY, <http://web.archive.org/web/20130627165741/http://www.banksy.co.uk/QA/qaa.html> (accessed by searching <http://www.banksy.co.uk/QA/qaa.html> in the Internet Archive index). When asked, “What do you think about the auction houses selling street art?,” Banksy quoted Henri Matisse.

On February 23, 2013, Fine Art Auctions Miami (FAAM) pulled from an auction a piece by renowned London-based street artist Banksy after public outcry erupted over the work's removal from a wall in north London.² The piece was expected to fetch about \$700,000.³ The owner of FAAM, Frederic Thut, has refused to divulge the identity of the seller of the piece or how it came to be listed by his gallery, and he would not give a specific reason for the piece's withdrawal from the auction.⁴ The auction house released a brief statement: "[a]lthough there are no legal issues whatsoever regarding the sale of lots six and seven by Banksy, FAAM convinced its consignors to withdraw these lots from the auction and take back the power of authority of these works."⁵ A spokesperson for the convenience store on whose wall the piece was painted has stated that he does not know who removed the portion of the wall from the side of its shop, and the owner of the building, Wood Green Investments Ltd., has refused to confirm whether the company was involved in the events.⁶

Some commentators believe that selling Banksy's works without his permission is legitimate because Banksy places his work on the property of others without permission.⁷ But is the statement that there are "no legal issues" surrounding this "rip it and flip it" approach to street art entirely accurate? Part I of this Article examines the legal issues surrounding publicly displayed "street art"⁸ and summarizes the legal rights of the artist, the property owner, and the

² See Richard Luscombe, *Sale of 'stolen' Banksy mural cancelled at 11th hour*, THE GUARDIAN (Feb. 23, 2013, 5:47 PM), <http://www.guardian.co.uk/artanddesign/2013/feb/23/banksy-missing-mural-auction-stopped>. The artwork, a stenciled graffiti piece entitled *Slave Labour (Bunting Boy)*, depicts a kneeling child making Union Jack flag bunting on a sewing machine. The piece was painted on the exterior wall of the Turnpike Lane Poundland convenience store sometime in May 2012, in advance of Queen Elizabeth's Diamond Jubilee; see Sophie Tedmanson, *'Lost' Banksy mural withdrawn from US auction*, THE TIMES OF LONDON (Feb. 24, 2013, 4:45 PM), <http://www.thetimes.co.uk/to/arts/visualarts/article3697659.ece>.

³ Luscombe, *supra* note 2.

⁴ See *id.*

⁵ *Id.* (noting that the consignor of *Slave Labour* was a "well-known collector").

⁶ *Id.*

⁷ See *Londoner campaign to bring back Banksy*, CHANNEL 4 NEWS (Feb. 20, 2013), <http://www.channel4.com/news/banksy-mural-wood-green-miami-sold-auction-house> ("Even though Banksy's murals are often given the status of public art and are protected, the owner of the property housing the mural is the legal owner and has the right to sell it. If Banksy claimed authentication, he would be liable for vandalism, says Stephan Keszler, a Banksy expert and New York City gallery owner.").

⁸ In this Article, "street art" refers generally to visual art developed in public spaces including on private property, both sanctioned and unsanctioned; in other words, "all art on the street that's not [merely] graffiti." CEDAR LEWISOHN, STREET ART: THE GRAFFITI REVOLUTION 23 (1st ed. 2008) (quoting John Fekner, a seminal figure in the street art movement).

community.⁹ Part II posits that current legal regimes fail to adequately protect culturally significant works of street art, and will propose a possible “cultural property” amendment to extend protection to certain works of street art so as to more appropriately balance the rights of the artist and community against those of the property owner.

I. BACKGROUND: RIGHTS OF ARTISTS, PROPERTY OWNERS, AND COMMUNITIES

A. *The Artist*

In the United States, there are two main legal regimes that protect the rights of visual artists: the Copyright Act¹⁰ and the Visual Artists Rights Act (VARA).¹¹ The Copyright Act grants to creators of original works of visual art the exclusive right to make, distribute, and sell copies of the works, the right to create derivative works, and the right to display the works publicly for their lifetime plus 70 years.¹² VARA gives the author of a work of visual art the right during his or her lifetime to prevent “any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation” and to prevent “any [intentional or grossly negligent] destruction of a work of recognized stature.”¹³ VARA further provides:

If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in [VARA], the author’s rights under [VARA] shall apply unless (A) the owner has made a diligent, good faith attempt without success to notify the author of the owner’s intended action affecting the work of visual art, or (B) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.¹⁴

A number of cases have discussed the scope and limitations of the rights conferred on visual artists by the Copyright Act and VARA. First, while many legal commentators agree that even street artists, who apply their work to private

⁹ See *infra* Part II. While UK law would generally be applicable to Banksy’s work, for purposes of this Article, these legal rights are based on U.S. law.

¹⁰ 17 U.S.C. §§ 101-1332 (2012).

¹¹ 17 U.S.C. § 106A (2012) (technically, VARA is part of the Copyright Act though it is generally treated distinctly from the Copyright Act). The First Amendment to the U.S. Constitution also provides certain protections to expressive works of art, though these protections are beyond the scope of this paper. In any event, just like the protections of VARA and the Copyright Act may yield where they violate private property rights, the First Amendment, too, is subject to similar restrictions.

¹² 17 U.S.C. §§ 102, 106, 302(a) (2012).

¹³ 17 U.S.C. § 106A(3) (2012). These rights are often termed “moral rights.”

¹⁴ 17 U.S.C. § 113(d)(2) (2012).

property without the property-owners' permission, own the copyrights to the work,¹⁵ some courts have allowed defendants to raise illegal conduct as an unclean hands defense in cases of copyright infringement.¹⁶

The first sale doctrine may also operate to limit the copyright protection afforded an artist in his work of street art. The first sale doctrine states that the rightful owner of a particular physical copy of a work may lawfully sell or otherwise transfer that particular copy. Most legal commentators agree that while the artist retains the copyrights in the work, generally, "if a piece is painted onto a building owned by another, the building owner is the rightful holder of that particular 'copy' of the work."¹⁷

The protections of VARA are much broader than, and exist separately from, those provided under the Copyright Act, and the purpose of VARA is to protect the moral, rather than economic, rights of visual artists.¹⁸ Under VARA, the artist may prevent any intentional distortion, mutilation, or other modification of a work that would be prejudicial to his or her honor or reputation. Courts have interpreted such prejudicial changes as any that would cause injury or damage to the artists' good name, public esteem, or reputation in the artistic community.¹⁹ The artist may also prevent the intentional or grossly

¹⁵ See Sheppard Mullin, *Some Artists Paint Buildings*, ART LAW GALLERY BLOG, (Nov. 1, 2010), http://www.artlawgallery.com/2010/11/articles/art/some-artists-paint-buildings/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Art+Law+Gallery+%28Art+Law+Gallery%29&utm_content=Google+Reader ("Through stencils, sketches, and the final 'graffiti' image, the street artist fixes his creative expression 'in a tangible medium;' thus, earning the artist the protections afforded by copyright law."); *Street Art, Visual Artists Rights Act, private property and the First Sale Doctrine*, ART CULTURE LAW, (Nov. 2, 2010), <http://artculturelaw.com/post/1464382985/street-art-visual-artists-rights-act-private-property> ("[T]he most highly respected street artist has decorated your house. Does he retain copyrights in this work? In a word, yes, definitely. Although he has infringed your right to YOUR physical property, if you so much as photograph or make a home video of the vandalism, you may be liable for infringing HIS intellectual property.").

¹⁶ See, e.g., *Villa v. Pearson Educ., Inc.*, No. 03 C 3717, 2003 WL 22922178, at *1 (N.D. Ill. Dec. 9, 2003) (stating that whether defendant is liable for copyright infringement of plaintiff's work of graffiti art depends on factual question of illegality of the work). The doctrine of unclean hands essentially states that a plaintiff should not profit from his wrongdoing. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.09[B] (2005).

¹⁷ See Mullin, *supra* note 15; cf. *Bd. Managers of Soho Int'l Arts Condo v. City of N.Y.*, No. 01 Civ.1226(DAB), 2004 WL 1982520, at *16 n.12, 18-19 & n.14 (S.D.N.Y. 2004) (suggesting that a work of art attached to a building would be a fixture on the property, and thus part of the property, if it is a "permanent accession to the freehold").

¹⁸ See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) (VARA was intended to protect "moral rights" of artists); *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 313 (S.D.N.Y. 1994) ("[M]oral rights afford protection for the author's personal, non-economic interests in receiving attribution for her work, and in preserving the work in the form in which it was created, even after its sale or licensing.").

¹⁹ *Carter*, 861 F. Supp. at 323.

negligent destruction of a work if the work is of “recognized stature.”²⁰ For a work of visual art to be protected under this section, a plaintiff must make a two-tiered showing, generally through expert testimony, that 1) the visual art in question has “stature,” i.e., is viewed as meritorious, and that 2) this stature is “recognized” by art experts, other members of the artistic community, or by some cross-section of society.²¹

If the piece was painted in the United States, Banksy’s *Slave Labour* would almost certainly be protectable under VARA. The additional wrinkle surrounding Banksy’s and other street artists’ work, however, is that it is typically affixed to private property without the property owner’s permission. Whether VARA protects these works of art from modification or destruction depends on the rights of property owners.

B. The Property Owner

At a fundamental level, the right of the property owner is the right to exclude all others from the possession or use of the property. The property owner may, therefore, control the use of the property, reap any benefit from the property, and transfer or sell the property.

As a result, states have enacted various laws to protect private property from unauthorized use and damage including laws against vandalism, which is generally defined as defacing, damaging or destroying the property of another without the property owner’s consent.²² Graffiti and other potentially artistic works are often included within the meaning of “vandalism.”²³ As a result, most courts in the U.S. agree that any rights that may be associated with art affixed to the private property of another without the property owner’s consent are secondary to the rights of the property owner to control the use of the property.²⁴

For example, in *Botello v. Shell Oil Co.*, the court noted that the California state law that parallels VARA applied only to “art that is affixed or attached by arrangement with the owner” and that it “obviously does not apply to graffiti, which lacks these characteristics.”²⁵ Similarly, in *English v. BFC&R East 11th Street LLC*, the court found that VARA does not apply to artwork that

²⁰ 17 U.S.C. § 106A (2012).

²¹ *Id.* at 325. The court further noted that “recognized stature” need not be at the level of Picasso, Chagall, or Giacometti in order to be protectable under VARA, but merely that the work be deemed meritorious by a sufficient cross-section of other artists, critics, etc.

²² See, e.g., CAL. PENAL CODE § 594 (West 2013); TENN. CODE ANN. § 39-14-408 (2011).

²³ See, e.g., CAL. PENAL CODE § 594(a)(1) (West 2013); S.C. CODE ANN. § 16-11-770 (2007).

²⁴ See, e.g., *English v. BFC&R East 11th Street LLC*, No. 97 Civ. 7446(HB), 1997 WL 746444 (S.D.N.Y. Dec. 3, 1997); *Botello v. Shell Oil Co.*, 280 Cal. Rptr. 535 (Cal. Ct. App. 1991).

²⁵ *Botello*, 280 Cal. Rptr. at 537 n.2.

is illegally placed on the property of others, without their consent, when such artwork cannot be removed from the site in question.²⁶ The court noted that any other construction “would be constitutionally troubling, would defy rationality and cannot be what Congress intended in passing VARA.”²⁷

On the other hand, in *Pollara v. Seymour*, the court found that “there is no basis in [VARA] to find a general right to destroy works of art that are on property without the permission of the owner.”²⁸ The court distinguished *Pollara* from *English* on the basis that the work at issue in *English* was site-specific and would be destroyed merely by removing it, whereas the work at issue in *Pollara* could be removed from its site on the defendant’s property and moved without destroying the work itself.²⁹ Thus, the artist in *Pollara* retained his VARA rights although, and perhaps because, the property owner was able to relocate the work.

In *English*, the plaintiffs also made the interesting argument that because the property owner (in this case the City of New York) had never opposed the unauthorized works of sculpture and murals—even though they had been displayed openly for many years—that it should be estopped from modifying or destroying the works under VARA even if the works were initially illegally placed on the property.³⁰ The court rejected this argument.³¹ The court’s conclusion was based in part on the fact that at the time the work was done the property owner was a public municipality not a private property owner, and the municipality had no duty to “vigilantly patrol all vacant lots in the City to ensure that any activity proceeding therein was promptly stopped, lest the City give up its rights to the property.”³² This case therefore seems to leave open the

²⁶ *English*, 1997 WL 746444, at *4–5.

²⁷ *Id.* at *4.

²⁸ *Pollara v. Seymour*, 150 F. Supp. 2d 393, 396 n.4 (N.D.N.Y. 2001) (denying motion for summary judgment based on plaintiff’s failure to obtain a permit to place his work on defendants’ property); see also Keith A. Attlesey, *The Visual Artists Rights Act of 1990: The Art of Preserving Building Owners’ Rights*, 22 GOLDEN GATE U.L. REV. 371, 387 (1992) (“The VARA fails to define the rights of building owners where art is attached to buildings without their knowledge or consent. Manifestly, art attached to buildings so that it cannot be removed without damage is protected by the VARA for the author’s life. Thus, it seems that building owners must protect art attached to their buildings for the author’s life, despite the fact that it was incorporated without their knowledge or consent. Obviously, such a result is unfair to building owners, but it is the effect of the VARA’s art in buildings section.”).

²⁹ See *Pollara*, 150 F. Supp. 2d at 396 n.4. The murals at issue in *English* were painted directly onto the walls of defendants’ building and could therefore not be removed without destroying the work or destroying the walls; the mural at issue in *Pollara*, on the other hand, was painted onto paper and then affixed to the wall of defendant’s building, and could be detached from the wall relatively easily without destroying or mutilating the work.

³⁰ *English*, 1997 WL 746444, at *5.

³¹ *Id.*

³² *Id.*

possibility that a private property owner, at least, may be estopped from modifying or destroying an unauthorized work of art affixed to his property if he acquiesces or fails to take legal action against such unauthorized use of his property within a reasonable time period after discovering the work.

Paralleling this estoppel argument is the question of whether a community has any cognizable legal interest in works of art placed on private property without authorization but which enhance the value or quality of life of the community.

C. *The Community*

In addition to the main underlying purpose of VARA—protecting the artists’ reputations—VARA also advances the Constitutional mandate of promoting the “Progress of Science and the useful Arts”³³ by protecting society’s interest in the preservation of works of artistic merit.³⁴ Thus, VARA, as a mechanism to preserve works of art, inherently recognizes “the beneficial effects art has on the spiritual and mental health of those who live among it.”³⁵ In this vein, the law should “protect art ... when it is most vulnerable to the perils of development, neglect, and greed.”³⁶ As Representative Kastenmeier noted with respect to VARA, “society is the ultimate loser when [important] works are modified or destroyed.”³⁷

Nevertheless, despite the “broad rhetorical recognition of a societal claim on the protection of art,” VARA clearly focuses on the individual rights of artists rather than the communal and societal interests in culturally valuable works of art.³⁸ Under VARA, only the artist has standing to sue, and the protections provided by VARA end when the artist dies. In addition, because of this statutory design, anonymous or pseudonymous artists may be unable to

³³ U.S. Const. art. I, § 8, cl. 8.

³⁴ See *Pollara v. Seymour*, 150 F. Supp. 2d 393, 397 (N.D.N.Y. 2001).

³⁵ Christopher J. Robinson, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935, 1941 (2000).

³⁶ *Id.* The Supreme Court has also recognized that the preservation of aesthetic values is a legitimate public purpose under the Takings Clause of the Fifth Amendment, so long as such preservation does not unreasonably interfere with the economically viable use of the property. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 140 (1978) (noting also that “one who owns something deemed especially valuable to the community . . . has somehow incurred an obligation to protect or preserve the object for the benefit of the community); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1047 (1992).

³⁷ 136 CONG. REC. 12,608 (1990).

³⁸ See JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* 26 (1999). In this respect, VARA differs markedly from certain state moral rights laws, which more robustly protect the public interest in works of art. See *id.* at 22, 25; see also, e.g., California Art Preservation Act, CAL. CIV. CODE § 989 (West 2007); MASS. GEN. LAWS 231 § 85S (West 2005). Pennsylvania, Louisiana, and New Mexico have also passed moral rights laws that recognize the societal benefit to the preservation of artistic heritage. See Robinson, *supra* note 35, at 1943.

protect their purposefully unsigned or unattributed works without revealing their identities for the purposes of notice or legal proceedings.³⁹ Finally, VARA fails to provide adequate protection for site-specific works,⁴⁰ and the standard by which a work is deemed site-specific is too subjective and uncertain.

To address these shortcomings, several commentators have proposed amendments to VARA and other parts of the law to more explicitly recognize and protect community interests in publicly-displayed works of art.⁴¹ To date, however, Congress has not acted to improve VARA. Thus, the community in which an important work of art resides—whether affixed with or without the permission of the property owner—has essentially no control over the fate of the work of art even though the work may have a direct impact on the community’s pecuniary and social value.

Congress has established other legal regimes that address similar concerns for articles of cultural significance such as historical sites and monuments, sunken treasures, and Native American artifacts.⁴² Such articles are generally deemed “cultural property,” reflecting the judgment that we as a nation possess a shared cultural heritage that should be preserved.⁴³ While current cultural property laws in the U.S. generally focus on ancient artifacts,⁴⁴ Congress has enacted legislation to preserve certain more modern architectural works of historic or symbolic significance.⁴⁵ Building on this idea of cultural property, some commentators have suggested that Congress extend cultural property-type protections to certain modern works of art.⁴⁶ This proposed legislation, however, fails to specifically address street art.

³⁹ This would obviously have a chilling effect for artists like Banksy who operate totally pseudonymously and whose pseudonymity is a critical component of their cachet.

⁴⁰ See, e.g., *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 143 (1st Cir. 2006).

⁴¹ See, e.g., Christian Ehret, *Mural Rights: Establishing Standing for Communities Under American Moral Rights Laws*, 10 U. PITT. J. TECH. L. & POL’Y 3, 12 (2010); Danwill Schwender, *Promotion of the Arts: An Argument for Limited Copyright Protection of Illegal Graffiti*, 55 J. COPYRIGHT SOC’Y U.S.A. 257, 280 (2008); Nicole B. Wilkes, *Public Responsibilities of Private Owners of Cultural Property: Toward a National Art Preservation Statute*, 24 COLUM.-VLA J.L. & ARTS 177, 205–06 (2001).

⁴² See Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 64–66 (1993).

⁴³ See *id.*

⁴⁴ See, e.g., Antiquities Act of 1906, 16 U.S.C. §§ 431–33n (2012).

⁴⁵ See, e.g., Historic Sites, Buildings and Antiquities Act, 16 U.S.C. §§ 461–67 (2012); National Historic Preservation Act, 16 U.S.C. § 470 (2012). The National Historic Preservation Act also represents the first time Congress identified “cultural property” as a special category of property. See Wilkes, *supra* note 41, at 198 n.178.

⁴⁶ See Wilkes, *supra* note 41, at 205–09.

II. RECOMMENDATION: A CULTURAL PROPERTY AMENDMENT TO VARA THAT SPECIFICALLY EXTENDS TO STREET ART

While the Copyright Act and VARA provide important economic and moral protections to certain street artists, they do not go far enough. Even legislation proposed by commentators to protect certain works of art as cultural property does not adequately address the unique legal issues surrounding street art. As a result, meritorious works of street art may be altered or destroyed to the detriment of the artist, the community, and society as a whole. Of course, the rights of street artists must be weighed against the significant and fundamental rights of property owners, especially considering that a substantial portion of street art is made without the permission of the property owner. This Article, therefore, proposes a cultural property-based amendment to VARA, which would provide certain protections to meritorious works of street art where the work does not appreciably interfere with the beneficial enjoyment of the private or public property to which the work is affixed.⁴⁷

A. To Receive Protection, a Work of Street Art Should Satisfy the VARA Standard of “Recognizable Stature”

VARA requires that a work be of “recognizable stature” in order to receive protection. The “recognizable stature” requirement is “preservative in nature” rather than a “reputational right” and serves as a “gate-keeping mechanism” by which only art valued by society is afforded protection against destruction. Using this mechanism, street art would need to rise above the level of mere gang graffiti or tagging⁴⁸ and must be of such artistic value that the community, as the relevant cross-section of society, is prepared to recognize as meritorious and worthy of preservation. This standard, already built into VARA, would be an appropriate standard for providing legal protection to certain culturally valuable works of street art since it considers the opinion of art experts, the art community, and lay people within the community or society in general and therefore serves the preservative purpose of a cultural property amendment to VARA for works of street art.

⁴⁷ The administrative structure of such a system could consist of a federal registry of works that meet the appropriate criteria. Artists and members of communities could apply to register works. A Board of art experts and designated laypeople would determine whether the works meet the criteria. These procedures could be similar to the administrative structure of landmark preservation laws.

⁴⁸ “Tagging” is the writing of the author’s moniker written in a stylized way but with no discernible individual style or artistic development. See Schwender, *supra* note 41, at 260. “Gang graffiti” is the tagging of certain territory by members of a gang or group to demonstrate the ascendancy of the gang rather than for any artistic purpose.

B. Site-Specific Works Should Be Protected & Street Art Should Be Presumed Site-Specific

Under VARA, “site-specific” works are not protected.⁴⁹ This automatically disqualifies a large number of works of street art from VARA protection because many works of street art are specifically incorporated into a building in such a way that removing the work from the building would destroy, distort, mutilate, or modify the work.⁵⁰ While this exception protects legitimate rights of property owners, the exception is overly broad and fails to adequately address legitimate interests of both artists and the community. Furthermore, many street artists select specific locations for their works for reasons of visibility and publicity, and to enhance the artistic or political statements they are making with the work.⁵¹ Thus, any removal of the work from its site would significantly dilute the artistic meaning and importance of the work. Therefore, works of street art should be presumed to be site-specific and a cultural property amendment to VARA should extend moral rights to such site-specific works.

C. Certain Parties in Addition to the Artist Should Have Standing to Preserve a Protected Work

Under VARA, only the artist has the right to sue to protect his or her work from modification or destruction, and protection therefore ends when the

⁴⁹ See *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 143 (1st Cir. 2006) (“We do not denigrate the value or importance of site-specific art, which unmistakably enriches our culture and the beauty of our public spaces. We have simply concluded, for all of the reasons stated, that the plain language of VARA does not protect site-specific art.”).

⁵⁰ See 17 U.S.C. § 113(d)(1)(A) (2012).

⁵¹ For instance, Banksy’s *Slave Labour* was located on the wall of a Poundland variety store (analogous to a dollar store in the U.S., everything is sold for £1) in Wood Green, a busy urban middle class neighborhood of London with a sizeable shopping area. David Trifunov, ‘Missing’ Banksy Art Slave Labor (Bunting Boy) on Auction in Miami for \$500,000, GLOBAL POST (Feb. 20, 2013, 2:29 PM), <http://www.globalpost.com/dispatch/news/culture-lifestyle/130220/missing-banksy-slave-labor-bunting-boy-auction-miami>. The neighborhood was also damaged during the 2011 England riots, which scholars attribute to a variety of factors including classism and economic decline, as well as hooliganism and gang culture. Chuck Bentley, *The Sword or the Savior: The Only Two Constraints for Evil*, CROWN FINANCIAL MINISTRIES HANDWRITING ON THE WALL (Dec. 20, 2012), <http://blog.crown.org/2012/12/20/the-sword-or-the-savior-the-only-two-real-constraints-for-evil/>; *UK Activist Blames Classism for Riots* (CNN television broadcast Aug. 11, 2011), available at <http://edition.cnn.com/video/data/2.0/video/world/2011/08/11/uk.riots.classism.cnn.html>. Scholars believe *Slave Labour* is a commentary on consumer culture, and more specifically the use of sweatshops and child labor to manufacture Diamond Jubilee and London Olympics memorabilia. Anthony Bond, ‘Stolen’ Banksy Mural Withdrawn from Sale at U.S. Auction House Following Storm of Protest as Mysterious New Graffiti Appears in Its Place, MAILONLINE.COM (Feb. 21, 2013, 7:05 PM), <http://www.dailymail.co.uk/news/article-2283475/Stolen-Banksy-mural-withdrawn-sale-U-S-auction-house-following-storm-protest-mysterious-new-graffiti-appears-place.html>

artist dies. Even though copyrights in the work persist and pass to the artist's estate, the moral rights in the work end. Thus, the property owner may modify or destroy the original work without any ability of the artist's heirs or the community to intervene.

However, both the estate and the community have reputational and pecuniary interests in the work. First, the alteration or destruction of the artist's original work could have the same reputational impact that VARA is designed to prevent during the artist's life. A negative reputational impact associated with the alteration or destruction of the artist's original work may also harm the economic interests of the estate. Second, the alteration or destruction of the work could also harm the social and economic well-being of the community. Removing a beloved mural from a neighborhood harms both its aesthetics and lowers property values of the entire community. A cultural property amendment to VARA should therefore provide standing to the artist's estate or heirs and members of the relevant community so that they can intervene to preserve the work in its original location.

D. The Work Should Not Interfere with the Beneficial Enjoyment of the Property to Which It Is Affixed

A cultural property amendment to VARA would certainly give significant rights to artists and the community, to the potential detriment of property owners. Thus, such an amendment would require certain countervailing protections for property owners. This Article proposes three tiers of property rights based on the purpose of the property and its level of exposure to the public. The following tiers represent three different types of property owners and their ability to interfere with street art on the property, ordered from least to greatest: (1) Government-Owned or Public Property, (2) Commercial Property, and (3) Residential Property.

1. Government-Owned or Public Property

The public trust doctrine "provides that a state holds public trust lands . . . in trust for the benefit of its citizens, establishing the right of the public to fully enjoy them for a variety of public uses and purposes."⁵² A cultural property amendment to VARA would extend the public trust doctrine to protect the public interest in works of street art placed on public property. Thus, the government could only alter or destroy a work of street art that meets the qualifying criteria with permission from the artist or the community for whom the public property is held in trust. This tier of protection will ensure that the artist and the community decide what is worth preserving as part of the local cultural heritage.

⁵² Wilkes, *supra* note 41, at 195.

The only limitation would be if the work itself interferes with the public's beneficial enjoyment of the property. An example of this might be a work so violent that it drives members of the public away from the area. Regardless of the artistic merit the work might have in another context, such a work would not be afforded protection under a cultural property amendment to VARA, and the government would have the ability to remove or destroy the work. These same principles would apply to land that is privately owned but has been dedicated to the public.⁵³

2. Commercial Property

The principles underlying preservation of buildings, particularly the emphasis on maintaining structures of architectural significance, translate quite easily into a framework for preserving art affixed to commercial property,⁵⁴ including works of street art that meet the criteria for protection under a cultural property amendment to VARA. In this tier, works of street art that achieve the appropriate level of artistic merit and community recognition would be protected from destruction by a commercial property owner to whose property the work is affixed with or without permission.

Just as with commercial buildings designated as landmarks or other works requiring architectural preservation, street art designated as cultural property would require reasonable preservation by the commercial property owner so long as the work does not interfere with the beneficial commercial use of the property. An example of a work that might interfere with the beneficial commercial use of the property would be a work that is painted over pre-existing signage advertising the business or providing the business's phone number or website address. In that case, the property owner would be permitted to remove the work and restore the pre-existing signage.

3. Residential Property

Protections afforded to street art that might otherwise be designated cultural property within the meaning of the proposed VARA amendment should not extend to works affixed without permission to a residential property. The privacy of the home is paramount in the American legal tradition, and as such the home should be protected from unwanted public attention. Additionally, unwanted street art affixed to a residential property would likely be antithetical to the purpose of a cultural property treatment of street art because such a work would disrupt desirable aesthetic conformity within a residential community, thereby acting to alienate certain residents from the community rather than promoting unity within and improving the community. Of course, where the work of art is authorized or approved by the property owner, normal VARA protections should apply.

⁵³ See *id.* at 196–97 (discussing the common law doctrine of public dedication).

⁵⁴ See *id.* at 199.

CONCLUSION

The public outcry over the removal of Banksy's *Slave Labour* from its wall on the side of a North London variety store demonstrates the cultural and community importance of certain works of street art. In the U.S., although the Copyright Act and the Visual Artists Rights Act provide significant protection to works of visual art, including certain street art, against harmful modification or destruction, certain gaps in protection remain. As Banksy and other similar artists have demonstrated, street art has become an important artistic mode, and has achieved critical recognition and praise by fine art critics and the public alike. Like historically significant works of architecture or cultural artifacts, street art deserves consideration as cultural property. Without such additional protection, important works of art may be lost to future generations.