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**LAW & HUMAN DIGNITY**

# GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY

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# IDEOLOGICAL VANDALISM OF PUBLIC ART STATUES: COPYRIGHT, THE MORAL RIGHT OF INTEGRITY AND RACIAL JUSTICE

MARIE HADLEY, SARAH HOOK & NIKOLAS ORR\*

*This paper considers the regulation of ideological vandalism by the Australian copyright and moral rights regimes in the context of the defacement of public art statues that occurred in Australia and overseas during the Black Lives Matter protests in 2020. Statue vandalism is approached as a form of anti-racist or anti-colonial iconoclasm that contributes to discourse around previous and continuing racial inequities. Law is approached as a form of symbolic action that can consolidate the alienation and othering of vulnerable groups in public spaces. The authors investigate whether, when public statues are within the copyright term, intellectual property rights symbolically devalue anti-racist discourse by de-prioritising agonistic art encounters. It is identified that copyright's exclusive rights do not render direct physical interventions with the statue unlawful, but that the moral right of integrity held by the statue's creator is problematic. The moral right of integrity privileges the connection between the artist and their work as a matter of reputation, and any public interest in the graffitied counter-monument is irrelevant to a finding of infringement, which in our view justifies reform. The paper concludes that public spaces should be democratic spaces, and that intellectual property law in post-colonial states and states with a history of racial injustice should do more in support of this goal.*

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## I INTRODUCTION

This article discusses the value of ideological vandalism<sup>1</sup> — that is, the purposeful ‘defacement of a symbolic object for the sake of conveying a political message’<sup>2</sup> — for confronting public art legacies of colonial and other forms of racial oppression. It also considers the legal status of ideological vandalism as an act that, at least potentially, infringes the intellectual property (‘IP’) rights of authors and copyright owners. As defined by sociologist Stanley Cohen, ideological vandalism frames ‘property destruction as a conscious tactic’ which aims to ‘draw attention to a specific grievance, to gain publicity for a general cause’ or ‘challenge symbolically’.<sup>3</sup> In examining the status of ideological vandalism under the copyright and moral rights regimes in Australia, we seek to determine whether and to what extent the political message expressed in ideological

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<sup>1</sup> Stanley Cohen, ‘Property Destruction: Motives and Meanings’ in Colin Ward (ed), *Vandalism* (Architectural Press, 1973) 23–53: see especially at 39.

<sup>2</sup> Sabine Marschall, ‘Targeting Statues: Monument “Vandalism” as an Expression of Sociopolitical Protest in South Africa’ (2017) 60(3) *African Studies Review* 203, 205. Here, Marschall describes the typology of tactical/ideological vandalism advanced by sociologist Stanley Cohen. See *Ibid.*

<sup>3</sup> Cohen (n 1) 39.

vandalism is prioritised within the IP law frame, and the implications of this for how individuals engage with objects and each other in public spaces.

The assumption underpinning the discussion that follows is that IP law, through its assignments of private rights, can have an effect whether direct, indirect, or symbolic on experiences of, and discourse around, racial injustice. In the context of the global Black Lives Matter ('BLM') protest, we ask: does IP law in Australia hinder or aid the speech around racial injustice and the confrontation with colonial pasts that ideological vandalism constitutes? This article looks at possible reform opportunities but ultimately argues that this is an important issue concerning the democratisation of public spaces. For these spaces to be inclusive, individual rights must give way to the freedom to acknowledge the past. Public rights of expression, while governed by the criminal law, should not have the added layer of personal property concerns in a seemingly public domain space.

The BLM movement began in the US in 2013 and gathered momentum in 2014 in response to the deaths of unarmed black men at the hands of white police officers, who have often benefitted from impunity.<sup>4</sup> Since 2017, the BLM movement has enlivened resistance to racism in Australia, strengthening existing debate and community-led activism on Aboriginal deaths in custody, sovereignty, and self-determination.<sup>5</sup> As with contemporary social movements generally, BLM makes extensive use of an 'aesthetics of protest', generating visually compelling material through graffiti, image-based media, and performative interventions to invigorate and propel the movement.<sup>6</sup>

June 2020 was a watershed moment for public memory in nations with a history of colonialism or slavery — seeing statues of historical figures graffitied, toppled, beheaded, and set on fire in the wake of BLM protests prompted by the killing of George Floyd on 25 May 2020 by Minneapolis Police. In the following weeks, in Richmond, Virginia, a monument of Confederate General Robert E Lee (1807–1870) was transformed with graffiti, including anti-racist slogans and the names of black people killed in police

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<sup>4</sup> Garrett Close, 'The Early History of the Black Lives Matter Movement, and the Implications Thereof' (2018) 18(3) *Nevada Law Journal* 1091–1112. Note that the murderer of George Floyd, Derek Chauvin, was convicted in July 2021 and sentenced to 22.5 years imprisonment.

<sup>5</sup> Yadira Perez Hazel, 'Bla(c)k Lives Matter in Australia' (2018) 126(1) *Transition* 59, 59–67.

<sup>6</sup> Johanna Gibson, 'No More' (2020) 10(3) *Queen Mary Journal of Intellectual Property* 271, 273. See also Aidan McGarry et al, *The Aesthetics of Global Protest: Visual Culture and Communication* (Amsterdam University Press, 2020).

custody (see Figure 2). Around the same time, a bronze statue of merchant Edward Colston (1636–1721), Deputy-Governor of the Royal African Company — which monopolised the English trade in African slaves — had its hands and face spray-painted red, before being tied, toppled from its plinth (see Figure 3), and dragged into Bristol Harbour in the United Kingdom (UK). On 21 June 2020, political activist Peter John Wright and an unnamed accomplice spray-painted the bronze statue of colonist Robert Towns (1794–1873) located at Pioneers Walk in the Townsville Central Business District, Far North Queensland, Australia (see Figure 1).<sup>7</sup> Towns' hands were painted red, with droplets of red paint accenting the base of the statue. 'Slave trader' was written over an accompanying plaque.



Figure 1: A statue of Robert Towns located in Townsville's city centre with red paint on its hands. Sofie Wainwright © 2020 ABC. Reproduced by permission of the Australian Broadcasting Corporation – Library Sales.

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<sup>7</sup> Dorothy Shineberg, 'Towns, Robert (1794–1873)', *Australian Dictionary of Biography* (Web Page, 2006) <<https://adb.anu.edu.au/biography/towns-robert-4741>>.

While recent movements abroad calling for the toppling of statues have prompted replication in Australia, this phenomenon is not a new feature of the Australian political landscape, nor can its origins be reduced solely to, say, US influence on national debate. Without understating the significance of BLM-inspired action on statues, anti-colonial challenges to public memory in Australia have a distinctly local character. BLM-inspired attacks on monuments to Captain James Cook, Queen Victoria, and Governor Lachlan Macquarie have been concentrated in the days leading up to Australia Day (26 January) as part of national 'Change the Date' campaigns.

Many earlier instances attest to ideological vandalism as a political strategy in anti-colonial movements in Australia since at least the 1990s. In 1991, Aboriginal activists Gary Foley and Robbie Thorpe orchestrated the public trial of a statue of John Batman,<sup>8</sup> who was responsible for Aboriginal deaths during Tasmania's 'Black War' and the divisive treaty for the expropriation of Naam (Melbourne) from its original custodians. Similarly, in 1995, a memorial marking John Bowen's settlement of Risdon Cove, in current-day Tasmania, suffered the first of many attacks in recognition of it being a massacre site.<sup>9</sup> Like Peter John Wright's intervention on the Robert Towns statue (and countless cases globally in the BLM era), both interventions in 1990's Australia drew on the imagery of bloodshed.

In this article, we explore the contribution to public discourse of ideological vandalism of publicly placed colonial monuments, and its nature as a potentially rights-infringing act under the copyright and moral rights regimes. We seek to better understand the concerns around public art and oppression in settler-states, and how these concerns manifest in graffiti and intersect with private IP interests in these public spaces. Our turn to IP recognises that criminal law is not the only source of law that applies to public art. Even as the law might punish statue vandalism through criminal law penalties, it assimilates it within IP frameworks.<sup>10</sup> Many of the statues vandalised during the 2020

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<sup>8</sup> Mark Holsworth, *Sculptures of Melbourne* (Melbourne Books, 2015) 69–70.

<sup>9</sup> Jeremiah Garsha, 'Red Paint: The Defacing of Colonial Structures as Decolonization' (2019) 5(1) *Transmotion* 76, 88–92.

<sup>10</sup> Marta Iljadica, 'Street Art and the Properties of Resistance' in Lucy Finchett-Maddock and Eleftheria Lekakis (eds), *Art Law Power: Perspectives on Legality and Resistance in Contemporary Aesthetics* (Counterpress, 2020) 198, 199.

BLM protests in Australia were within the copyright term.<sup>11</sup> The Towns statue, created by sculptor Jane Hawkins (1958–) in 2004 is one such example. It was first ‘published’ when it was unveiled *in situ* by Councillor Jack Wilson on 18 May 2005.<sup>12</sup> When a public art statue meets the originality threshold and the other subsistence criteria — that is, it is created by an author with sufficient connection to Australia (i.e. an Australian resident or citizen), has material form, and falls within the definition of ‘artistic work’ under s 10(1) of the *Copyright Act 1968* (Cth) (*Copyright Act*)<sup>13</sup> — it will subsist in copyright. As a form of sculpture, statues satisfy these criteria and so enjoy coverage for 70 years after the author’s death.<sup>14</sup> The themes of the statue, such as colonial victories or even genocide, are irrelevant to copyright subsistence — there are no provisions in the *Copyright Act* preventing IP rights in obscene or immoral material.<sup>15</sup> Where copyright subsists, the moral rights regime will also be enlivened,<sup>16</sup> providing authors the right of attribution, the right against false attribution, and the right of integrity with respect to the work under pt IX of the *Copyright Act*.<sup>17</sup> Analysing the interplay between the rights and interests of various IP stakeholders — the author of the statue, copyright owner of the work, the vandal who seeks to intervene in the physical object, and the broader public — prompts discussion around the racial implications of the law’s regulation of public spaces, and the symbolic messages that IP law sends around the legitimacy of challenges to the continuing public presence of colonial monuments.

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<sup>11</sup> Notable examples of statues vandalised in 2020 in Australia that were within the copyright term include the statue of Captain James Stirling in Perth CBD designed by Clement P Somers in 1979, and the bronze busts of former Prime Ministers Tony Abbott and John Howard in Ballarat created by sculptor Linda Klarfield (1976–) and cartoonist and sculptor Peter Nicholson (1946–), respectively. Many of the high-profile statues vandalised during BLM protests overseas were *not* within the copyright term. The Lee statue, for example, pictured in Figure 2, was created in 1890 and it was likely public domain by at least 1932. Under the 1831 revision of the Copyright Act of 1790 (US), the term of protection of copyrighted works was 28 years with the possibility of a 14-year extension.

<sup>12</sup> ‘Robert Towns’, *Monument Australia* (Web Page, 2020–2021)

<<https://monumentaaustralia.org.au/themes/people/industry/display/92821-robert-towns>>.

<sup>13</sup> The definition of ‘artistic work’ in the *Act* includes ‘a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not...’ In the *Copyright Act 1968* (Cth) (*Copyright Act*), sculpture is defined non-exhaustively as ‘a cast or model made for purposes of sculpture’: s 10(1) (definition of ‘sculpture’).

<sup>14</sup> *Copyright Act* s 33(2).

<sup>15</sup> Note that this has not always been the case in Australia as copyright law historically intersected with censorship concerns. Under the *Copyright Act* s 6 ‘blasphemous, indecent, seditious, or libellous’ was not entitled to copyright protection: see Catherine Bond, ‘There’s Nothing Worse Than a Muddle in all the World: Copyright Complexity and Law Reform in Australia’ (2011) 34(3) *University of New South Wales Law Journal* 1145, 1152–4.

<sup>16</sup> *Copyright Act* s 195AZE.

<sup>17</sup> The right of integrity is the focus of the moral right analysis in section III.

This article firstly considers the significance of ideological vandalism by reflecting upon the meaning and function of public art statues and memorials, as well as the nature of graffiti as a generative and destructive contestation of those same monuments. Ideological vandalism of a neo-colonial, white supremacist or otherwise racist typology is not considered here, although it too constitutes a significant legacy in countries with colonial pasts and histories of slavery. It is argued that ideological vandalism in its anti-racist and anti-colonial guises contributes to public discourse around racial justice and sets the stage for a more equitable future. When practised on a monument, ideological vandalism re-writes public memory. In doing so, it produces a *counter-monument* by modifying the original monument's material characteristics and meaning.

We propose a novel take on the term counter-monument, drawing on two existing approaches. Germanophone sources, from which the term originates, employ *Gegendenkmal* (literally counter monument) to refer to a sculptural intervention which opposes an existing monument. A study by Quentin Stevens et al indicates that its usage, however, denotes a discrete object, nearby but separate from the contested monument, which it opposes through a 'dialogical' relationship.<sup>18</sup> A second definition of the counter-monument, following memory studies scholar James E Young's formulation, is of a commemorative strategy exhibiting characteristics atypical of the traditional monument.<sup>19</sup> Termed 'anti-monumental' by Stevens et al, this second approach earns its name by undermining the 'prominence and durability, figurative representation and the glorification of past deeds' characteristic of the traditional monument.<sup>20</sup> Vandalism can certainly do all of these things. Yet, taken by themselves, neither the anti-monumental nor dialogical conceptions are appropriate analytical frameworks for the present case. Our approach to ideological vandalism qualifies as dialogical in that it frames the counter-monument in opposition to an existing monument, but it also contains an important difference. Here the 'dialogue' occurs internally — within the object itself, between its original and modified states. Transformed through vandalism, the defaced monument exhibits characteristics atypical of the traditional monument (anti-monumental) and speaks back to itself as a new work (dialogic). In this respect, we draw on recent

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<sup>18</sup> Quentin Stevens, Karen Franck and Ruth Fazakerley, 'Counter-Monuments: The Anti-Monumental and the Dialogic' (2012) 17(6) *Journal of Architecture* 951, 952.

<sup>19</sup> James E Young, 'The Counter-Monument: Memory Against Itself in Germany Today' (1992) 18(2) *Critical Inquiry* 267, 271–94.

<sup>20</sup> Stevens, Franck and Fazakerley (n 18) 952.

philosophical literature that theorises the efficacy of statue vandalism over alternative strategies of removal, contextualisation (through plaques containing historical revision), or counter-monuments that are placed too far from the monument or are given insufficient prominence to be effective.<sup>21</sup> Ideological vandalism has immediate and unavoidable effects. By inhabiting the very object of contestation, the message or speech act of the original monument is interrupted at the moment of reception, in a way that more deferred strategies are not.<sup>22</sup>

Second, the article considers the private rights held by artists and copyright owners in publicly placed statues, as against the vandal and the broader public's interest in speech that questions the place and role of colonial monuments in contemporary society. Australian copyright law and the moral right of integrity is the primary focus of this legal analysis. Nevertheless, examples are drawn from the US and UK where relevant to contextualise the relationship between the law and the vandalised statue and its underlying intangible property. Canadian cases are referred to in section III to discuss the nuances of Australian moral rights law, in circumstances where case law in Australia is thin.

In investigating IP law as a site where racial injustice may be perpetrated, consolidated, and exacerbated in section III, we ultimately find that the limited exclusive rights held by the copyright owner in Australia do not directly speak to protestor engagement with public statues. The copyright owner's exclusive rights and interests do not cover direct engagements with the artwork, and thus, such actions by a third party like applying graffiti to the work are not copyright infringing. The copyright regime therefore does not de-prioritise or constrain the speech of the anti-racist activist; it is silent on such actions. However, the accretion of matter and meaning produced during the additive process of graffiti likely infringes the statue artist's moral of integrity, not to mention the more

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<sup>21</sup> See Chong-Ming Lim, 'Vandalizing Tainted Commemorations' (2020) 48(2) *Philosophy & Public Affairs* 185–216, particularly 207; Macalester Bell, 'Against Simple Removal: A Defence of Defacement as a Response to Racist Monuments' (2021) *Journal of Applied Philosophy* 1–15 <<https://doi.org/10.1111/japp.12525>>; Ten-Herng Lai, 'Political Vandalism as Counter-Speech: A Defense of Defacing and Destroying Tainted Monuments' (2020) 28(3) *European Journal of Philosophy* 602–16. Cf other scholars who argue for removal and/or museum display: see, e.g., Arianne Shahvisi, 'Colonial Monuments as Slurring Speech Acts' (2021) 55(3) *Journal of Philosophy of Education* 53–68; Helen Frowe, 'The Duty to Remove Statues of Wrongdoers' (2019) 7(3) *Journal of Practical Ethics* 1–31; Travis Timmerman, 'A Case for Removing Confederate Monuments' in Bob Fischer (ed) *Ethics, Left and Right: The Moral Issues that Divide Us* (Oxford University Press, 2020) 513–22.

<sup>22</sup> Lai (n 21) 606, 608.

destructive treatments of inscription, decapitation, or otherwise subtractive means. We argue that the law's privileging of the statue artist's control over their own work, in both the rights granted to the author and the narrow reasonableness defence to infringement, results in an illegitimate privatisation of public art spaces. How individuals receive, respond, and interact with the artwork (and with problematic histories) is constrained at the cost of the broader public. Reform is required if the moral rights regime is to cease symbolically devaluing the counter-monument's social critique.

Third, the article discusses possible reform pathways, given our identification of problems in the moral right of integrity. While the primary focus is on understanding the significance of ideological vandalism and its legal status under IP law rather than solving the law's racial implications per se, we offer ways in which the value of antagonistic public art encounters could be better recognised in the legal frame. In section IV, legislative reform to the moral rights regime and acknowledgement by the courts of the burden that such private rights have on the implied freedom of political communication are considered. Such reforms would not make permissible the vandalism of statues, but they would take the matter out of private right adjustment and permit a more robust balancing of the rights of authors against the rights of others in enjoying and engaging with public art paid for by the public purse — thus, securing more democratic public spaces.

The article concludes that ideological vandalism is a legitimate form of political speech, and that IP law should be responsive to a recalibration of stakeholder interests when ideological vandalism is of public benefit, as it is in the instance of BLM counter-monuments. Symbolic othering should be eradicated from the structure of moral rights law. The meaning and significance of public art statues and ideological vandalism will now be considered.

## II PUBLIC ART STATUTES AND IDEOLOGICAL VANDALISM

### *A Meaning and Significance of Public Statues of Historical Figures*

As a subtype of monument, statues are a figurative representation intended to enshrine 'a great public figure, a great public event, a great public declaration' in collective

memory.<sup>23</sup> Comparatively rarer is the collective, national or otherwise, that ‘call[s] on itself to remember the victims of crimes it has perpetrated’.<sup>24</sup> Although monuments typically ‘mesh with the beliefs and aspirations of the majority’, they do not ‘emanate’ from the collective.<sup>25</sup> The statue in a public park or a busy city street only notionally transmits group values<sup>26</sup> because the curation of particular narratives, to the exclusion of others, naturalises some community values and alienates others.<sup>27</sup> The public statue can even be said to impose group values; its placement in the physical commons — imagined as a shared, civic physical space, occupied by a desirable singular community — effectively frames the sculpture as an object of consensus.<sup>28</sup> Whether state-sponsored or not, monuments are widely perceived by the public to express the attitudes, values, and beliefs of government institutions, which ‘purport to speak in our name’.<sup>29</sup> This institutional backing endows monuments with ‘considerable authority and publicity’.<sup>30</sup> When the community that occupies the site is not homogenous and certain groups are absent from, or are misrepresented in the narratives being memorialised, public art can become a focal point ‘for disidentification and general ambivalence’ rather than a ‘site for identification and community unity’.<sup>31</sup>

In settler-states and states with a history of slavery or colonialism, statues celebrating individuals that participated in the state’s oppression of vulnerable community groups can be particularly polarising. For example, while none of the vandals of the Robert E Lee statue were identified, charged nor spoken publicly about their motivations, critics of Confederate memorials and statues typically consider them ‘slave trophies’ and

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<sup>23</sup> JB Jackson quoted in Elizabeth Scarbrough, ‘Burying the Dead Monuments’, *aestheticsforbirds* (Blog Post, 18 June 2020) <<https://aestheticsforbirds.com/2020/06/18/burying-the-dead-monuments/>>.

<sup>24</sup> Young (n 19) 270.

<sup>25</sup> Kirk Savage, *Standing Soldiers, Kneeling Slaves: Race, War, and Monument in Nineteenth-Century America* (Princeton University Press, 1997) 210.

<sup>26</sup> C Thi Nguyen, ‘Monuments as Commitments: How Art Speaks to Groups and How Groups Think in Art’ (2019) 100(4) *Pacific Philosophical Quarterly* 971, 979.

<sup>27</sup> See Chong-Ming Lim’s discussion of the multiple ways in which monuments do racist work: Lim (n 21) 185–216.

<sup>28</sup> Kathy Bowrey, Catherine Bond and Mehera San Roque, ‘Moral Rights and Public Art’ (Conference presentation, Centre for Media and Communications Law Conference Melbourne, Australia, 25–26 November 2010).

<sup>29</sup> Lai (n 21) 605; Bell (n 21) 12. For survey results into public perception of monuments in the US context, see Daniel Hemel and Lisa Larrimore Ouellette, ‘Public Perceptions of Government Speech’ (2017) 33 *The Supreme Court Review* 33–92.

<sup>30</sup> Lai (n 21) 605.

<sup>31</sup> Caitlin Bruce, *Painting Publics: Transnational Legal Graffiti Scenes as Spaces for Encounter* (Temple University Press, 2019) 15.

commemorative of white supremacy due to the Confederacy’s defence of slavery. Walking past the vandalised Lee statue, hip-hop artist Gregory Carden, known as Radio B, commented: ‘There was a lot of money and manpower and a lot of symbolism that went into creating that monument ... how much effort and how much care was put into the meaning ... which was the oppression of my people’.<sup>32</sup>



Figure 2: Defaced monument of Confederate General Robert E Lee monument, Richmond, Virginia 2020 © Mk17b. CC BY-SA 4.0 License via Wikimedia Commons

<sup>32</sup> Gregory Carden quoted in Sarah McCammon, ‘In Richmod Va., Protestors Transform a Confederate Statue’, *NPR* (online, 12 June 2020) <npr.org/2020/16/12/876124924/in-richmond-va-protestors-transform-a-confederate-statue>. Carden’s emphasis on ‘the oppression of my people’ is particularly astute in identifying racist monument’s principal wrong-doing, not in the psychological trauma they are alleged to cause, but in their erosion of the social and moral worth of persons implied as lesser through the monument. On this point see Bell (n 21) 5-6, 13. For further insight into the role of monuments in shaping citizens’ attitudes and assumptions see George Tsai, ‘The morality of state symbolic power’ (2016) 42(2) *Social Theory and Practice* 318, 321.

The presence of oppression behind the statue is also keenly felt by those that actively respond to it, which suggests that the meaning of public statues is located in the audience as much as the statue's author or commissioning body.<sup>33</sup> Affected groups may choose to take matters into their own hands and intervene in the sculptural object by spray-painting, inscribing, yarn-bombing, toppling, virtually 'griefing', or otherwise modifying or destroying it. At his hearing at Townsville Magistrates Court, Peter John Wright told the court that his graffiti of the Robert Towns bronze was 'street art' that commented on Towns' exploitation of Pacific Island labourers via his bloodied hands.<sup>34</sup> To Wright, the continued presence of the statue in Townsville 'is a stain on the moral conscious [sic] of this town'<sup>35</sup> — a stain Wright's actions sought to manifest in public discourse. Statues are not only passively viewed or experienced by the public; their meanings are collectively worked and reworked within the discursive field surrounding the work and the viewer.<sup>36</sup>

In calling for racial justice, BLM protest has, alongside other social movements like Rhodes Must Fall,<sup>37</sup> helped alter the discursive field surrounding public statues, leading to more critical understandings. Calls from within South Africa and western metropolises for the removal of colonial and racist monuments have certainly intensified in recent years. For example, two years before the Edward Colston statue was toppled into Bristol Harbour, a petition was presented to Bristol City Council with 11,000 signatures for the statue's removal.<sup>38</sup> However, it must be remembered that the meaning of public statues is not only subject to reinterpretation through contextual shifts, but also through direct

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<sup>33</sup> Roland Barthes, 'The Death of the Author' in Vincent Leitch and William Cain (eds), *The Norton Anthology of Theory and Criticism* (WW Norton, 1968) 1466, 1466–9. On the field of reception studies, see generally Robert Holub, *Reception Theory: A Critical Introduction to Reception Studies* (Methuen, 1984).

<sup>34</sup> Peter John Wright quoted in Chloe Chomicki, 'Townsville Man Fined for Vandalising Statue of Colonist Robert Towns by Painting 'Blood on his Hands'', *ABC News* (online, 18 September 2020) <<https://www.abc.net.au/news/2020-09-18/robert-towns-statue-townsville-vandal-fined/12677876>>. For a detailed treatment of the Towns statue as a contested object see Sebastian Rees, 'Statue of Robert Towns' (2020) V *A Contested Histories Occasional Paper* 1, 1–13 <<https://contestedhistories.org/wp-content/uploads/Paper-V-Statue-of-Robert-Towns.pdf>>

<sup>35</sup> *Ibid.*

<sup>36</sup> Richard Clay, 'Bouchardon's Statue of Louis XV: Iconoclasm and the Transformation of Signs' in Stacy Boldrick and Richard Clay (eds), *Iconoclasm: Contested Objects, Contested Terms* (Ashgate, 2007) 93, 116–18.

<sup>37</sup> The Rhodes Must Fall campaign is a protest movement that was initiated in South Africa in 2015. It questions the legacy of imperialist, businessman, and politician Cecil Rhodes. See generally Brian Kwoba, Roseanne Chantiluke and Athinangamso Nkopo (eds), *Rhodes Must Fall: The Struggle to Decolonise the Racist Heart of Empire* (Zed Books, 2018).

<sup>38</sup> Haroon Siddique and Clea Skopeliti, 'BLM Protesters Topple Statue of Bristol Slave Trader Edward Colston', *The Guardian* (online, 8 June 2020) <<https://www.theguardian.com/uk-news/2020/jun/07/blm-protesters-topple-statue-of-bristol-slave-trader-edward-colston>>.

physical interventions with the sculptural object. Graffiti as direct action, and as a meaning-generating act affecting how public artworks are understood, will now be explored.



Figure 3: The empty pedestal of the statue of Edward Colston in Bristol, UK the day after it was toppled by protesters. Black Lives Matter placards cover the ground. 2020 © Caitlin Hobbs. CC BY 3.0 License, via Wikimedia Commons

### *B Graffiti as a Generative and Destructive Act*

Within the criminal frame, graffiti is understood as vandalism, and approached as a violation against the community and a signal of disorder, as well as disrespect for the rule of law.<sup>39</sup> It is criminal damage — an unauthorised act upon property owned by a third party. In Queensland, where Wright’s vandalism of the Towns statue took place, wilful damage to property in a public place caused by the ‘spraying, writing, drawing, marking

<sup>39</sup> See, for example, the discussion of the ‘broken windows theory’ of graffiti in Gabry Vanderveen and Gwen van Eijk, ‘Criminal but Beautiful: A Study on Graffiti and the Role of Value Judgements and Context in Perceiving Disorder’ (2016) 22 *European Journal of Criminal Policy Research* 107, 108. See also Alison Young, *Street Art Public City: Law Crime and the Urban Imagination* (Routledge, 2014) 99.

or otherwise applying paint or another marking substance' carries a maximum penalty of seven years' imprisonment, and the court can order compensation to be paid to any person.<sup>40</sup> Wright pled guilty to wilful damage and was ultimately convicted and fined \$500. He also agreed to pay \$404.45 to Townsville City Council as compensation for the costs of cleaning the statue.<sup>41</sup> While 'vandalism' is a contested term for the defacement or destruction of art objects within art history circles,<sup>42</sup> our choice to refer to graffiti as such throughout this paper recognises the deliberate nature of the vandalic act and the criminal law ramifications that are triggered when the perpetrator is identified. Moreover, it is also used because Cohen's formulation of *ideological* vandalism lays the ground for the legitimacy of symbol destruction within political activism. It helps the reader see behind and beyond the criminality of the act and the private property dimensions of physical interventions, to its nature as social critique and political action.

Aesthetic sensibility is at play in both the production and reception of the vandalised statue. In Australia, statue vandalism has been perceived as social critique, as in Wright's justifications of his actions, as well as 'disrespectful' and 'unaustralian [sic]'.<sup>43</sup> Yet, regardless of these varied interpretations, it is apparent that even if graffiti is destructive, it also has a generative quality and organising potential.

The symbolic contestation of an oppressive past through the application of graffiti is more than a therapeutic manoeuvre, a reaction against oppression. It is also a 'manifest sign of readiness to grasp new human possibilities'.<sup>44</sup> In this sense, contemporary ideological vandalism is similar to the iconoclasm of all modern revolutionary movements, where symbolic statue-breaking is 'a regular mode of advertising the inauguration of new regimes'.<sup>45</sup> The counter-monument not only serves as a powerful repudiation of the racist past, it is socially significant activism that offers opportunities to shape and humanise the

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<sup>40</sup> *Criminal Code Act 1899* (Qld) ch 469, s 9(1)-(2). Wilful damage to property is an offence under ch 46.

<sup>41</sup> Chomicki (n 34).

<sup>42</sup> See especially Dario Gamboni, *The Destruction of Art: Iconoclasm and Vandalism Since the French Revolution* (Reaktion Books, rev ed, 2018) 20–6. In art history circles, 'iconoclasm' is typically the preferred term as 'vandalism' is widely used within legal frameworks and media communications to construe an action as criminal or bereft of social legitimacy. Accordingly, it is understood as wanton destruction, the handiwork of hoodlums, and lacking any programmatic or rational basis.

<sup>43</sup> NSW Premier Gladys Berejiklian quoted in Danuta Kozaki, 'NSW Government to Consider Tightening Laws After Second Captain Cook Statue Vandalised', *ABC News* (online, 15 June 2020) <<https://abc.net.au/news/2020-06-15/second-captain-cook-statue-vandalised-in-sydney/12354896>>.

<sup>44</sup> Albert Boime, 'Perestroika and the Destabilization of the Soviet Monuments' (1993) 2(3) *ARS: Journal of the Institute for History of Art of Slovak Academy of Sciences* 211, 218.

<sup>45</sup> Margaret Aston, *England's Iconoclasts* (Oxford University Press, 1988) vol 1 'Laws Against Images', 3.

city. As street artist Crisp argues, '[t]he appearance of public spaces cannot and should not just be the domain of the wealthy and powerful'.<sup>46</sup>

These generative and transformational qualities of graffiti are poorly recognised in the criminal law frame. The act of vandalism is reduced to an unlawful interference with a property object, and where protest motivations exist, they may be irrelevant or at least secondary to the purpose of punishment: usually, deterrence.<sup>47</sup> The sentencing comments of Deputy Chief Magistrate Michael Allen in an Australian case involving the vandalism in 2020 of the (out-of-copyright) statue of mariner James Cook located in Hyde Park, Sydney are instructive. Political staffer Xiaoran Shi tagged the statue with 'no pride in genocide' and 'sovereignty never ceded' before he pleaded guilty to possessing graffiti implements and wilfully defacing the statue. Magistrate Allen stated that her \$1760 fine was intended to send a message to 'would-be offenders' that 'there is no place — even in a liberal democracy such as ours — for people who are prepared to cross the line from lawful conduct to illegal conduct'.<sup>48</sup> He criticised Shi's actions as undermining the 'absolute, unquestionable' right to peaceful protest and lighting a 'match' under racial tensions.<sup>49</sup>

As Shi's sentencing took place in September 2020 after the initial burst of BLM vandalism had subsided, it is difficult to gauge the effect of this criminal penalty on would-be activists. However, it is possible that the association of vandalism with destruction and disorder through the imposition of criminal penalties could inform rather than decrease the value of the act to the vandal. Bruno Latour, for example, suggests that some protestors commit acts of statue vandalism *because* the act is perceived to be destructive by others.<sup>50</sup> Central to this is the mediagenic quality of monument destruction; it captures

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<sup>46</sup> Crisp, 'One Person's Vandalism is Another's Masterpiece' (2015) Special Art Issue *Griffith Journal of Law and Human Dignity* 67, 71.

<sup>47</sup> Note that in the UK, 'damage caused to cultural assets' and evidence of community impact are aggravating factors for criminal damage under sentencing guidelines. For discussion, see Sadia Habib et al, *The Changing Shape of Cultural Activism: Legislating Statues in the Context of the Black Lives Matter Movement* (Report, Runnymede Trust, 2021) 2  
<<https://www.runnymedetrust.org/uploads/projects/CoDE%20Briefings/Runnymede%20CoDE%20Cultural%20Activism%2C%20Statues%20v1.pdf>>.

<sup>48</sup> Michael Allen quoted in Alasdair Duncan, 'NSW Greens Staffer Convicted Over Spray Painting Captain Cook Statue in Hyde Park', *PedestrianTV* (online, 18 July 2020)  
<<https://www.pedestrian.tv/news/xiaoran-shi-convicted/>>.

<sup>49</sup> *Ibid.*

<sup>50</sup> Bruno Latour, 'What Is Iconoclasm? Or Is There a World Beyond the Image Wars in Bruno Latour and Peter Weibel (eds), *Iconoclasm: Beyond the Image Wars in Science, Religion and Art* (MIT Press, 2002) 14.

attention for a political cause.<sup>51</sup> In these circumstances, criminalising graffiti may consolidate, rather than remove, the value of ideological vandalism to some offenders. However, regardless of whether this relationship can be empirically proven, the criminal law framing is narrow. The formal legal framework does not attend to the range of competing public and private interests that can coexist in public spaces and be recognised, sidelined, or devalued by other forms of law. Granted that multiple laws can directly, indirectly, or symbolically shape experiences of racial justice in public art sites, and to better understand the interests that are prioritised in the regulation of the counter-monumental intervention, we will apply the alternative lens of IP to ideological vandalism in the following analysis.

### III IDEOLOGICAL VANDALISM AND IP LAW

#### *A Rationale for an IP Lens*

While the criminal laws protecting property rights are visible — in that most people would be aware of or, at least, not surprised that some sanction would apply to property damage — there exists an undercurrent of other rights that seek to prioritise and regulate property relations within a public space. This ordering of private individual property relations through copyright (and moral rights) are hidden in that they sit behind the criminal actions. They are not unknowable but, as they take a back seat to the more prominent criminal act, they are frequently forgotten and are often highly complex. In this subsection, and the subsection that follows, we consider whether this hidden ordering ties the structure and operation of the law to the hierarchies that much of the ideological vandalism is seeking to protest. In other words, does having an artwork that is privately owned with private interests on public land consolidate the alienation and othering these hierarchies seek to reinforce? Does it lead to social differentiations (‘this is mine’; ‘do not trespass’), that marginalise vulnerable individuals and communities and affect experiences of and engagements within public spaces?

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<sup>51</sup> Gamboni (n 42) 147. See generally Garsha (n 9).

We thus approach law beyond ritualistic practice as a form of symbolic action.<sup>52</sup> Law's communicative nature can be dissected like any other aspect of literature by analysing 'its grammatical structure in order to uncover the relationships between its meaning as a social institution and its structure as a communicative language.'<sup>53</sup> Considering the symbolic ordering of private IP rights facilitates exploration of whether the interests of copyright owners and authors are hierarchised over the interests of the vandal and the public in the speech inherent in the counter-monument.

The key question is not whether IP rights are, in practice, important in this space, especially if they are hidden and rarely litigated, but whether the underlying private rights are symbolic of differentiation of how individuals navigate public spaces. The status of ideological vandalism will firstly be considered as against the rights of the copyright holder, then the moral rights of the statue author.

### *B Statue Vandalism as Copyright Infringement*

As previously mentioned, the themes that an artwork might explore is not relevant to the factual inquiry of whether copyright subsists in the work.<sup>54</sup> This means that regardless of the moral, or indeed immoral, qualities of a statue of a figure associated with colonialism, when a statue's design meets the originality threshold, it will likely subsist in copyright as an 'artistic work' under pt III of the *Copyright Act* (presuming the other subsistence criteria are met). Under s 31(b), the copyright owners of all artistic works that subsist in copyright have the exclusive right to control copies of the work; the right of first publication; and the right to make the work available online during the copyright duration — a period of 70 years after the death of the author.<sup>55</sup> Once this period expires, the work is public domain and able to be used without restriction. While the author is the default owner of copyright's exclusive rights as per s 35(2) of the *Act*, public sculptures are typically created pursuant to commissions that may include an express contractual agreement with the author that modifies their default IP rights.<sup>56</sup> The Towns statue was,

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<sup>52</sup> Thomas Meisenhelder, 'Law as Symbolic Action: Kenneth Burke's Sociology of Law Author(s)' (1981) 4(1) *Symbolic Interaction* 43, 43–57. On law as ritualistic practice see, e.g., Emile Durkheim's work in *The Division of Labor in Society* (Free Press, 1965).

<sup>53</sup> *Ibid* 45.

<sup>54</sup> The morality of a work is similarly irrelevant to the vesting of moral rights in the author.

<sup>55</sup> *Copyright Act* s 35. The limited period of protection is one of the ways in which copyright strikes a balance between the rights of copyright owner and the public.

<sup>56</sup> *Ibid* s 35(3). Note that in Australia, the commissioned art rules do not apply to sculptures as a class of works: s 35(5).

for example, initiated and funded by Townsville CBD Promotions but ultimately commissioned by Townsville City Council.<sup>57</sup> The copyright owner may be Townsville City Council as the commissioning body, if an express contractual term secured their ownership rights over that of the author Jane Hawkins.

In Australia, like the question of copyright subsistence, the morality or motives behind an infringing act are irrelevant to the question of whether copyright infringement has occurred. It is simply an infringement of copyright to exercise or authorise any of the exclusive rights comprised in the owner's copyright.<sup>58</sup> Outside of the fair dealing defences,<sup>59</sup> there are specific exceptions to copyright infringement in the instance of publicly placed artworks that have a degree of permanency. These exceptions, outlined in ss 65-68 of the *Act*, seek to preserve the right to enjoy the physical commons by permitting the making of 'two dimensional copies of three-dimensional works of art that are situated in a public place'.<sup>60</sup> However, they do not capture other types of engagements with artworks like physical interventions. In these circumstances, the question of whether a vandal's actions are copyright infringing will be answered by examining the nature and extent of the copyright owner's exclusive rights grant. If controlling interventions with the physical object is not within the copyright owner's rights grant, then the vandal's act is neither copyright infringing nor we would argue the counter-monument symbolically de-prioritised within the copyright regime.

The owner of a copyright artwork in Australia has the exclusive right to control copies of the work, the right of first publication, and the right to make the work available online.<sup>61</sup> None of these rights provide for the right to modify or alter the material form of the three-dimensional artistic work. There is an adaptation right in Australia's *Copyright Act*<sup>62</sup> — a form of derivative right that includes dealings such as the translation of a literary work

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<sup>57</sup> Rees (n 34) 5.

<sup>58</sup> *Copyright Act* s 36.

<sup>59</sup> Fair dealing defences include uses for news and criticism as well as parody and satire: *Copyright Act* ss 41-41A. As we find that there is no copyright infringement with statue vandalism it is not necessary to explore these sections. However, it is apposite to note that these are exceptions to copyright infringement *not* moral rights infringement for which the only defence is 'reasonable use' as discussed below.

<sup>60</sup> See the report of the Copyright Law Review Committee that recommended the introduction of these exceptions: *Report to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (Report, Attorney General's Department, 1959) 43. The Committee saw it as 'reasonable' to ensure freedom in reproducing public art in the physical commons: at 43.

<sup>61</sup> *Copyright Act* s 35(2).

<sup>62</sup> *Ibid* s 31(1)(a)(iv).

into another language or its adaption into another forms, for example, adapting a book into a stage play — but it only applies to literary, dramatic or musical work, and not in the case of visual arts.<sup>63</sup> Yet, even if such an adaptation right applied to artistic works, it is unlikely that statue vandalism is the type of conduct that would fall within the ambit of such a right. This is because physically building upon or adding to the expressive elements of the original work, while it creates a counter-monument, does not transform the intangible property — that is, the object of the exclusive rights grant — from one thing into another. The copyright regime protects the intangible property, not the physical object itself.

In summary, given that copyright infringement in Australia only pertains to exercising or authorising any of the exclusive rights comprised in the owner's copyright, painting over a public statue will not be copyright-infringing behaviour, unless one of the rights specified in s 31(1)(b) are also infringed.<sup>64</sup> For example, by producing and publishing a three-dimensional reproduction of the statue with the graffiti applied (a violation of the reproduction right). However, in its straightforward guise as an agonistic public engagement with the physical art object, copyright does not directly act upon ideological vandalism nor speak to these types of engagements in public spaces. Nevertheless, copyright might indirectly proscribe ideological vandalism through its animation of the moral rights regime. This possibility, and the extent to which the moral rights regime prioritises the author's interest in the integrity of the artwork over other stakeholder interests, will now be explored.

### *C Statue Vandalism as Moral Rights Infringement*

In Australia, when copyright subsists in a statue, the moral rights regime will be enlivened in accordance with s 195AZE of the *Copyright Act*. These rights provide for authors, artists, and performers the right of attribution, the right against false attribution, and the right of integrity with respect to certain works (literary, dramatic, musical, or artistic works, and cinematograph films) in which copyright subsists.<sup>65</sup> The author's right of integrity that protects against 'derogatory treatment' is particularly relevant to statue

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<sup>63</sup> Ibid s 31(1).

<sup>64</sup> By extension, this means that the fair dealing defences, such as parody or satire, will be irrelevant to proceedings unless one of the rights specified in s 31(1)(b) is also infringed.

<sup>65</sup> *Copyright Act* pt IX.

vandalism as it captures physical interventions to the artwork. Derogatory treatment means the doing of anything in relation to the work, or of anything that results in a 'material distortion', 'destruction', 'mutilation' or a 'material alteration', that is prejudicial to the author's honour or reputation.<sup>66</sup> The breadth of this definition captures non-physical contextual placements, such as putting the statue 'on trial' for war crimes occurred in the public trial of the John Batman statue in 1991, the creation of completely separate objects or graphic work, and material alterations to the physical work, including the application of graffiti.

While copyright subsists, moral rights in respect of the work including the right of integrity will continue in force until copyright ceases to be held by the author.<sup>67</sup> This is the case irrespective of whether copyright has been assigned.<sup>68</sup> As such, regardless of who holds copyright in the Towns statue, the artist Jane Hawkins will hold moral rights in relation to the work until copyright expires. Moreover, in Australia one cannot sell or offer a blanket waiver as you may be able to do with copyright.<sup>69</sup> In this way moral rights are not property rights per se, but more akin to a personal right or tort where the tortious act is not to the person, but to the work itself. That act has repercussions on one's reputation (similar to defamation) whether it be falsely attributing it to another, not attributing it to the artist (not quite defamatory but still affecting the right to have one's reputation enhanced) or derogatory treatment of one's work.

Underpinning the doctrine of moral rights, and especially the right of integrity, is the assumption that an author and their work have an integral bond that is to be protected. Particularly, visual art is seen as a special category due to its tangibility as well as its intangible aspects.<sup>70</sup> While you may buy a chair and break it, paint it, and do whatever you like to it, when the piece is considered 'art' certain inalienable rights attach to it that go beyond property and contract concerns. You may not break, damage, eat, or play with art as you might a chair. This close relationship between the artist and their work encapsulates the Romantic theory of authorship which privileges the personal bond

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<sup>66</sup> Ibid s 195AK.

<sup>67</sup> Ibid s 195AM(2). As noted earlier, s 35 of the *Act* gives the duration of copyright as 70 years after the calendar year in which the author of the work died.

<sup>68</sup> 'Subject to this section, a moral right in respect of a work is not transmissible by assignment, by will, or by devolution by operation of law': s 195AN.

<sup>69</sup> Right holders can consent to certain acts with respect to their work: s 195AWA.

<sup>70</sup> See further KE Glover, *Art and Authority: Moral Rights and Meaning in Contemporary Visual Art* (Oxford University Press, 2018).

existing between artist and work.<sup>71</sup> An artist's work is part of their personality and, correspondingly, an artwork is an attribute of its maker. As Raymond Sarraute has argued, moral rights 'give legal expression to the intimate bond which exists between a literary or artistic work and its author's personality'.<sup>72</sup> This Romantic aesthetic conceives an attack on the integrity of a work as a personal attack on the author's character, their honour, and reputation, obscuring both the motivations of the actor engaging with the work and the reception of their actions by others. The engagement with the artwork is *only* a violation of the authorial interests vested in the source work: the creation and reception of the counter-monument, the interests of the vandal and the broader public in the counter-monument's social critique is irrelevant.

The primacy of the bond between the artist and their work and the exclusion of stakeholder interests is evident in the right of integrity. The artist's reputation is so closely connected to the integrity of the piece that transforming the meaning or doing 'anything' to it, no matter how trifling, such as the temporary addition of Christmas decorations,<sup>73</sup> can be seen as derogatory treatment that may harm the reputation and honour of the artist. Painting over a statue simply falls squarely within the type of conduct contemplated by 'derogatory treatment': it *does something* to the work.<sup>74</sup> Neither the moral qualities of the work that is vandalised nor the significance of its destruction for furthering public discourse around racial injustice, is relevant to this factual inquiry.

The second requirement for moral rights infringement that the vandalism be considered prejudicial to a public sculptor's honour or reputation also privileges the author's close relationship to their work. Here, the artist does not have to prove the vandal's actions caused actual harm, merely the *capacity* for harm as the ordinary, natural meaning of 'prejudicial' encompasses future effects.<sup>75</sup>

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<sup>71</sup> Christopher Aide, 'A More Comprehensive Soul: Romantic Conceptions of Authorship and the Common Law Doctrine of Moral Right' (1990) 48(2) *University of Toronto Faculty of Law Review* 211, 211–28.

<sup>72</sup> Raymond Sarraute, 'Current Theory on the Moral Right of Authors and Artists under French Law' (1968) 16(4) *American Journal of Comparative Law* 465, 465. This quotation was subsequently relied on to define moral rights in Copyright Law Review Committee, *Report on Moral Rights* (Report, Attorney General's Department, 1988).

<sup>73</sup> See, e.g., the Canadian case *Snow v Eaton Centre Ltd* (1982) 70 CPR (2d) 105.

<sup>74</sup> *Copyright Act* s 195AK.

<sup>75</sup> This view of prejudice also aligns with the wording of the *Berne Convention Article 6bis* which uses the phrase 'which would be prejudicial'. A Canadian case (with a similar provision) also accords with the view that it is capacity rather than actual harm that need be proved: *Prise de Parole Inc v Geurin, Editeur Ltee*

Very little case law has tested the boundaries of the standard of ‘prejudicial to the author’s honour or reputation’. Neither ‘honour’ nor ‘reputation’ is defined in Australia, though the courts may be more familiar with the latter from defamation case law.<sup>76</sup> The use of both terms in the legislative provision suggests that they mean different things, which provides an author with two potential standalone pathways for substantiating infringement. In support, Perram J in the recent case of *Boomerang Investments Pty Ltd v Padgett (Liability)*<sup>77</sup> found in obiter that the two concepts are distinct. In this case, a songwriter duo’s song had been adapted for a French airline advertisement, and the moral rights claim was rejected because the act had taken place overseas and therefore the Australian provisions could not apply.<sup>78</sup> Perram J stated that had the infringement occurred in Australia, it is possible that the artists’ honour was injured, but not their reputation.<sup>79</sup> This interpretation of the law is consistent with the reasoning of Federal Magistrate Driver in the case of *Perez & Ors v Fernandez*,<sup>80</sup> who, in relying on the earlier authority of *Meskenas v ACP Publishing Pty Ltd*,<sup>81</sup> stated that ‘an author may also claim for injured feelings arising from the infringement’.<sup>82</sup> The damages were subsequently assessed as comparable to a copyright infringement case, the magistrate stating ‘I do not accept that Mr Perez’s reputation has suffered any lasting damage’, yet ordering compensation as well as additional damages under s 195AZA(1) for injured feelings.<sup>83</sup> If prejudice to the author’s honour or reputation are two distinct forms of injury, as Perram J and Magistrate Driver suggest, it could be argued that even if statue vandalism did not hurt the reputation of the sculptor as an artist, their injured feelings alone could satisfy the test for infringement. The relevance of the self-perception of an author in the work, and not simply their reputational standing in the eyes of others, means that the

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(1995) 66 CPR(3d) 257 (Canada: Federal Court, Trial Division), affirmed in *Prise de Parole Inc v Geurin, Editeur Ltee* (1996) 73 C.R.R. (3d) 557 (Canada: Federal Court of Appeal). However, note when it comes to the Australian right against false attribution, case law suggests actual harm is required: *Adams v Button* [2002] QSC 223, [31].

<sup>76</sup> Adeney argues the defamation standard should not be imported to moral rights, given the different legal contexts. See Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford University Press, 2006) 584. See also Patricia Loughlan, ‘The Right of Integrity: What is in that Word Honour? What is in that Word Reputation?’ (2001) 12 *Australian Intellectual Property Journal* 189, 189–98.

<sup>77</sup> [2020] FCA 535 (*Boomerang Investments*’).

<sup>78</sup> *Ibid* [395].

<sup>79</sup> *Ibid* [400].

<sup>80</sup> [2012] FMCA 2 (*Perez*’).

<sup>81</sup> [2006] FMCA 1136.

<sup>82</sup> *Perez* (n 80), [91].

<sup>83</sup> *Ibid* [107].

author can exert absolute control over direct physical interventions in the work including but not limited to its uses in counter-monuments. Therein lies the potential for perpetuating a hierarchy that privileges the statue artist's personal experiences and concerns over all other concerns. Whether or not an author brings an infringement claim, this IP regime does not afford an opportunity to consider, let alone weigh up the private and public interests that converge in the public artwork and counter-monumental works alongside the author's interests.

This situation is compounded by the operation of the one defence to moral rights infringement that exists in Australia: reasonable use.<sup>84</sup> When considering whether a moral rights infringement constitutes reasonable use, the *Copyright Act* asks the court to focus on the nature, purpose, manner, and context in which the work is used by the infringer as well as any industry practice or any voluntary code of practice.<sup>85</sup> While this purportedly includes contextual considerations relevant to the infringement, what is reasonable will be assessed on the basis of private interests only, and particularly as they are relevant to the artist's experience.<sup>86</sup> This is problematic. The public interest is not necessarily commensurate with, or limited to, preserving the relationship between an artist and their work. Moreover, while the author's private interests are legally enshrined through their grant of moral rights, the vandal too has a private interest in engaging with, and contesting, the work. Furthermore, in the reasonable use provision, there is no specific mention of free speech or public comment in contrast to defamation law which includes a qualified privilege defence to take into account the balancing of political speech and reputational damage.<sup>87</sup> As such, it remains that the meaning of the ideological vandalism is not captured within the nature, purpose, manner, or context in which the work is used by the vandal, nor are there any other embedded statutory avenues for the work to be considered a *reasonable* use of the original work due to its nature as political speech.

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<sup>84</sup> *Copyright Act* s 195AS.

<sup>85</sup> *Ibid* s 195AS(2).

<sup>86</sup> As argued by Sainsbury, while it may be that the defence leaves some room for 'transformative use' it is unlikely to include acts that are seen as offensive or speech that could have been done in some other way: Maree Sainsbury, 'Parody, Satire, Honour and Reputation: The Interplay Between Economic and Moral Rights' (2007) 18 *Australian Intellectual Property Journal* 149, 157. We argue that the courts should see the counter-monuments as transformative and reasonable, but this is unlikely in the absence of reform.

<sup>87</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

Simply adhering to the integrity of the object without considering the possibility of other interests, even when the artist favours preservation, ‘ignores the rhythm of protest, the performance of the spectator’<sup>88</sup> and the meaning of the iconoclastic act and counter-monument. It also dispels the opportunity for a diverse public to integrate messages of justice and other accounts of truth in public spaces, allowing the authors’ moral rights to erode public agency over, access to, and enjoyment of those spaces.<sup>89</sup> This in turn leaves little room for equality, connection, and reconciliation to occur.

Critical reflection on IP law, and the signals it sends, requires that attention be paid to how the moral rights regime reiterates problematic hierarchies, and devalues the transformative and subversive nature of the counter-monument. Anti-racist dissent possesses genuine public interest in its acknowledgement of previous and continuing injustice, and commitment to racial equality. The moral rights regime can be used as a means for an artist to manage their externalised self-representation through their art. In doing so, regardless of whether an individual artist would sue over ideological vandalism of their work, the symbolic action of the law perpetuates inequality.

Possible pathways for remedying the racial implications of the author’s right of integrity will now be considered.

#### IV REFORM OPTIONS

There are a few ways that reform could take place to better protect the dialogue advanced in counter-monuments and foster more democratic public spaces: reform to the reasonable use defence, extension of the public art exceptions, or investigation as to whether any other sources of rights trump that of the author.

As discussed above, there is one defence to a moral rights infringement in Australia: reasonable use.<sup>90</sup> As it currently stands, while public interests are technically addressed in the existing defence, in practice the public interest is aligned with the author’s interest in the integrity of the work and the protection of private property overrides all other interests. To achieve the required recalibration and broadening of stakeholder interests

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<sup>88</sup> Gibson (n 6) 279. See also Amy Adler, ‘Against Moral Rights’ (2009) 97(1) *California Law Review* 263, 274.

<sup>89</sup> Gibson (n 6) 279.

<sup>90</sup> *Copyright Act* s195AS.

recognised within the moral rights regime to reflect the public interest in the counter-monument, *political speech* could be added as a relevant factor to the reasonable use assessment in s 195AS. In the instance of such a reform, the intervention with the physical statue would still be infringing conduct, but it would be infringing conduct that could be excused by a defence to infringement in appropriate circumstances where the anti-racist meaning of the counter-monument is of public benefit.

Alternatively, statutory reform could take place through a designated *public art* exception to moral rights infringement. Similar to the public art exceptions to copyright infringement noted earlier, this reform would see the moral rights infringement of art in public spaces excused. The justification for this intervention is that since most public art is publicly funded, an individual should give up the right to an integrity claim.<sup>91</sup> However, while this reform option appears to neatly align with the public art exceptions to copyright infringement that recognise that the placement of art in the public must be met with some affordances for engagement, the introduction of such a legislative provision is potentially problematic. Without *public interest* as the basis of the exception or an associated balancing act between the interests of the various stakeholders, all physical interventions with public art would be automatically excused from right of integrity infringements. The *Act* would not affect a symbolic othering, but it also would not discern between anti-racist and racist interventions, or their relative value. The capacity for discernment between anti-racist and racist speech is crucial for the law to function appropriately as a moral signal.

To limit the possibility of reform amplifying or remaining complicit in racist agendas, we submit that a more appropriate alternative to amendment of the reasonable use defence is to investigate whether the moral rights regime unduly burdens the implied freedom of political communication. If this is the case, as the implied freedom involves a balancing exercise, it might provide a suitable legal mechanism to restrict authors' control over the work when the benefits to democratic citizenship of engagement with public art carries greater weight. This option would mean that moral rights infringement would still take place, but that the interest in political communication would effectively trump the other

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<sup>91</sup> See for example the breadth of the panoramic exception under German law as detailed in Melanie Dulong de Rosnay, and Pierre-Carl Langlais, 'Public artworks and the freedom of panorama controversy: a case of Wikimedia influence' (2017) 6(1) *Internet Policy Review* 1, 4.

rights and interests under the *Copyright Act*. The *Copyright Act's* symbolic othering would still occur, but the implied freedom could remedy this situation without the need for statutory reform, by achieving a balancing of public interests as against private interests. The relationship between the implied freedom of political communication and the *Copyright Act* is a fruitful area of future study.

We submit that legislative reform to the reasonable use defence or, alternatively, implied freedom of political communication arguments, could achieve a better integration of messages of justice and other accounts of truth in public spaces than the current moral rights regime. In addition to the capacity to affect legal outcomes in integrity cases, these avenues would, directly in the instance of statutory reform and indirectly in the instance of the implied freedom, symbolically be recognised as legitimatising the counter-monument. This is vital in ensuring that IP law is not seen to be standing in the way of political expression around racial injustice and the democratisation of public spaces.

#### V CONCLUSION

When Peter John Wright and his unidentified accomplice bloodied the hands of the Robert Towns statue in Townsville, Queensland, an act both creative and destructive took place. For Wright, this act had criminal law ramifications. As social critique, however, the act also contributed to public discourse around racial injustice. In Australia, as in other settler-colonial states, this critique has often taken the form of ideological vandalism, such as the painting over of public statues, as part of grassroots de-colonial strategies.

This article investigated whether the vesting of IP rights in public art mirrors and reinforces the very power relations implicit in BLM protestors' objection to racial hierarchies embodied in the monumental landscape. It was found that interventions into the physical art object of another author are not rendered unlawful as an infringement of copyright in Australia. Nevertheless, the subsistence of copyright in the source work animates the author's moral right of integrity, which, in theory, is significantly more problematic for activists and bears racial implications. In Australia, where the threshold for prejudice to the author's honour and reputation is low, statue vandalism is likely to infringe the author's moral right of integrity. As the reasonable use defence, like the moral right of integrity, privileges the connection between the statue and the artist, there is no available defence to infringement that recognises the value and significance of the

counter-monument created by the application of anti-racist graffiti. It is severely limiting of IP law's ability to shape a just society that the statue's role in perpetuating racial hierarchies and biased narratives, and the counter-monument's role in triggering public interrogation of those narratives, are irrelevant to the application of legal principles.

Having argued in favour of reform to remedy this situation, it is worth anticipating a possible rebuttal. In light of racist forms of vandalism, it is arguable that the moral rights regime may protect racial minorities' interests (assuming that the statue artist's interest in preservation is a constant). Indeed, the political motivations driving ideological vandalism need not be limited to offensives against social injustice or racial inequality.<sup>92</sup> Far-right action against memorials to victims of dictatorships has occurred overseas,<sup>93</sup> and Indigenous monuments have suffered ignominious racist attacks in Australia. The repeated decapitation of Noongar leader Yagan's statue on Heirisson Island, Perth is a notorious example.<sup>94</sup> However, even if moral rights can indirectly protect the interests of the Noongar, privatising public space — as moral rights do through their privileging of the relationship between the author and their work — does not grant subject status to a racial minority, nor create a space for the reclamation of that subject status. The author's rights still dominate. Positive recognition by the law of the value and significance of anti-racist speech, and its value as against racist speech, is in the public interest.

All privatisation of public spaces should be critically considered, and even more so when systemic inequality characterises society. Public spaces ought to be democratic spaces, and states with a history of racial injustice must imagine new futures that render visible racial inequities — and seek to resolve them. When the same public sculpture that is challenged for its role in racism is protected by the formal legal frame, it is time to ask whose interests are being prioritised.<sup>95</sup> The neutrality of law cannot be presumed. In its current form, the moral rights regime of Australia consolidates the racial hierarchies and symbolic othering that so-called vandals seek to transform. There is a public interest in viewing, analysing, and debating the content and significance of their ideological

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<sup>92</sup> In the South African context, Marschall observes 'black on white', 'white on black' and 'black on black' iconoclasms: Marschall (n 2) 216.

<sup>93</sup> In the context of Argentina, see Marisa Lerer, 'Banners, Bridges, Stencils and Christmas Trees: Creating and Concealing Aesthetic Protest Actions in Argentina' (2018) 8(2) *Public Art Dialogue* 198, 198–223.

<sup>94</sup> Stephen Gilchrist, 'Surfacing Histories: Memorials and Public Art in Perth' (2018) 38(2) *Artlink* 42, 46.

<sup>95</sup> Bowrey, Bond, and San Roque (n 28).

vandalism. The anti-racist graffiti of public art statues contributes to this venture. So too should intellectual property law.

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