University of Colorado Law Review

Volume 94 | Issue 1 Article 6

Winter 2023

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KEEPING IT REAL: PROPERTY ANALOGIES FOR GRAFFITI INFRINGEMENT

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INTRODUCTION

On a stroll through downtown, something in your peripheral vision strikes your eye. It is a graffiti wall: a colorful work of uninhibited creativity, simultaneously random and cohesive, deeply moving and yet somehow incomprehensible.[1] An anonymous creator put this here just so you could enjoy this moment, with neither admission fees nor physical barriers. It is there for you to visit on your own volition, or to happen upon in a moment of serendipity, to infuse a bit of life in an otherwise mundane day. The value in these moments is intangible and immaterial and lives between you, the artist, and the community. It represents a unique, nonmonetary subculture near extinction—one in which money has no bearing on the actual value of the work "and without the interruptive pressures of capitalism or profit-based artistic creation; it's exhibited on the best walls a town may have to offer; and not one viewer is put off by the price of admission."[2]

For a moment, step into the artist's perspective. As you walk down the street where you gifted the public with art, you see awe in its viewers' eyes and take joy in watching a busy person pause to connect with the urban environment. You continue moving forward until you notice a storefront plastered with posters featuring your own creation as the backdrop for a clothing advertisement. You look up and see a billboard flaunting the same. While you wonder how far this advertising scheme reaches, you feel the sinking disappointment that your art is now associated with corporate America. Just like that, your art's intended value ceases to exist. What could be a beautifully untouched moment of pure artistic appreciation is tarnished and cheapened when corporations opportunistically infringe graffiti art for use in advertising.

This Note focuses on coping with disputes between graffiti artists and corporate infringers in the legal system. Street art

1. For the purposes of this Note, the terms "graffiti" and "street art" are used interchangeably, although it is worth noting that the terms may carry different meanings within the street artist subculture. *See* Manpreet Kaur, *Graffiti: On the Fringes of Art; Protected at the Edges of the Law*, EREPOSITORY @ SETON HALL (2019), https://scholarship.shu.edu/student_scholarship/967 [https://perma.cc/8RU4-RQ2C].

2. Britney Karim, *The Right to Create Art in a World Owned by Others – Protecting Street Art and Graffiti Under Intellectual Property Law*, 23 UNIV. S.F. INTELL. PROP. & TECH. L.J. 53, 54 (2019).

squarely fits within intellectual property's domain, yet intellectual property largely protects those interests that are irrelevant to street artists, and when it does protect relevant interests, the applicable standards impose high bars that are disadvantageous to the typical graffiti artist. As such, intellectual property law is only capable of imperfect application. Moreover, while intellectual property law confers its bundle of exclusive rights to artists, these rights are inherently limited by the rights that owners of the property on which graffiti art sits possess, which arms a corporate infringer with a strong defense against liability. This is not to advocate, however, that the graffiti artist's rights should supersede the property owner's right to remove works to which it does not consent. Rather, this Note suggests that because graffiti does not fit neatly within existing intellectual property frameworks, it calls for a blended analysis that incorporates both intellectual property law and doctrinal principles drawn from property law. Ultimately, this is an argument about reevaluating the intended scope of intellectual property, remedying the legal system's priorities when faced with stark power imbalances, and shifting away from rigidly formalistic adherence to the intellectual property regime in areas where it does not fully apply. In short, art worth copying is worth legal protection.

In Part I, this Note first explains the background and current state of street art. Part II then contains a comparison of the theoretical underpinnings of intellectual property laws to the broader array of philosophy that informs property's legal standards. This will demonstrate that the latter better justifies the need for more robust protection of street art. With these theoretical foundations in mind, Part III applies the most aptly fitting property doctrines to graffiti infringement disputes. Finally, Part IV proposes a sui generis approach to graffiti infringement disputes informed by both bodies of law.

I. BACKGROUND: THE STATE OF THE ART

> *Its subversiveness, its connections to hip-hop culture, its periodic forays into museums and other forms of establishment recognition and its paradoxical blend of pervasiveness and impermanence measure things in our society that nothing else quite does.*
>
> *– Steven Winn*[3]

A tag as old as time, graffiti art is a form of human expression dating back thousands of years to cave paintings, hieroglyphs, and murals.[4] Indeed, the oldest known figurative cave painting in the world is estimated to be 45,500 years old.[5] Graffiti was not always perceived as vandalistic and countercultural. In Pompeii, for example, "ordinary citizens regularly marked public walls with magic spells, prose about unrequited love, political campaign slogans, and even messages to champion their favorite gladiators."[6] Its negative perception was conceived during the French Revolution when the public grew appalled by the deliberate defacing of art.[7]

Fast forward to the twentieth century—graffiti evolved to become incorporated into the modern urban landscape. Its cultural value is not to be understated. In the United States, graffiti gained traction as a pillar of hip-hop culture in the

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3. Steven Winn, *Vandalism or Art? / Part One: The Urge to Express Oneself by Writing on a Blank Wall Is As Old and Primal As Cave Painting. But One Tagger's Imagery Is Another Person's Ugly Scrawl. One Thing Is Certain: Graffiti's Not Going Away.*, SFGATE (Mar. 7, 2005), https://www.sfgate.com/entertainment/article/VANDALISM-OR-ART-PART-ONE-The-urge-to-express-2693657.php [https://perma.cc/9FUL-EQDJ].

4. Sara Cloon, *Incentivizing Graffiti: Extending Copyright Protection to a Prominent Artistic Movement*, 92 NOTRE DAME L. REV. ONLINE 54, 55 (2017), http://scholarship.law.nd.edu/ndlr/vol92/iss6/10 [https://perma.cc/9VBW-5Q4A]. ("[Graffiti] is rooted in the deeper history of La Grotte de Lascaux from 18,000 BCE, Egyptian hieroglyphs, markings found on tombs from the pre-Christian era, and 2000-year-old murals from Pompeii.").

5. Morgan Meis, *Discovering the Oldest Figural Paintings on Earth*, NEW YORKER (Nov. 13, 2021), https://www.newyorker.com/science/elements/discovering-the-oldest-figural-paintings-on-earth [https://perma.cc/VYS7-WVL6].

6. Kelly Wall, *Is Graffiti Art? or Vandalism?*, TEDED (Sept. 6, 2016), https://ed.ted.com/lessons/a-brief-history-of-graffiti-kelly-wall [https://perma.cc/FW9J-STAU].

7. *Id.*

1970s.[8] Street art also served, and continues to serve, as a vital means to engage in political discourse globally. A famous example is the Berlin Wall's west side, "a symbolic target for politically motivated art," which still stands today.[9] Even President Roosevelt hired muralists "to represent social ideals" in San Francisco.[10] The trend is not merely incidental; street art is a global mechanism for commentary on political crises,[11] harmful social norms,[12] racism,[13] and to condemn war and violence.[14]

Mural in Barcelona, Spain by Skount[15]

Notwithstanding graffiti's deep roots, public distaste for the art form persisted. In the 1990s, authorities were determined to stonewall the efforts of graffiti artists, whom authorities regarded as "vandals and nothing more than vandals," and thus employed graffiti task forces in an effort to eradicate the artists'

8. Al Roundtree, *Graffiti Artists "Get Up" in Intellectual Property's Negative Space*, 31 CARDOZO ARTS & ENT. L.J. 959, 963 (2013).

9. ED BARTLETT, STREET ART 26 (Samantha Forge & Nick Mee eds., 2017).

10. *Id.* at 100.

11. *Id.* at 14 ("The ongoing Greek financial crisis and the recent influx of refugees have also motivated politically conscious artists to produce insightful, powerful works.").

12. *Id.* at 24–25.

13. *Id.* at 85.

14. *Id.* at 42 ("As is often the case, conflict inspires creativity, and 2016 saw the launch of ArtUnitedUs, a groundbreaking urban art project that aims to bring together 200 leading street artists from around the world to raise public awareness of war, aggression and violence."); *see also ArtUnitedUs – The Largest Urban Art Project*, MURALFORM (Apr. 6, 2017), https://muralform.com/2017/artunitedus-the-largest-urban-art-project [https://perma.cc/662E-WUD3].

15. BARTLETT, *supra* note 9, at 24–25.

works.[16] One of the task force officers summarized the perceived issue, stating, "[A]n insidious thing, this graffiti, and we don't intend to let it get away from us."[17] Courts, too, shared this view, calling graffiti "the outrageous scarring of real property both public and private with unintelligible markings made by irresponsible persons."[18]

Despite public aversion to graffiti, the rise of renowned graffiti artists like Banksy, Keith Haring, Shepherd Fairy, and John-Michel Basquiat have helped shift the public's view of graffiti in a more favorable direction.[19] This is particularly evident through the growing adoption of the term "street art" and the commonplace description of pieces as "murals."[20] Banksy, arguably the most famous street artist in the world, is thought to have "elevated street art into an entirely new level."[21] Just in the past two decades, the art form dramatically rose to fame in mainstream popular culture.[22] Around the world, graffiti has found its way into prestigious art museums,[23] has debutedin specialized galleries,[24] and is celebrated and promoted in street art festivals.[25] Indeed, many cities provide walls where street artists can legally allow their passions to run free.[26] Now prolific in nearly every corner of the globe, street

16. Stephanie Strom, *Subway Graffiti Back and Bothersome*, N.Y. TIMES, Feb. 11, 1991, at B1.

17. *Id.*

18. Sherwin-Williams Co. v. City & Cnty. of S.F., 857 F. Supp. 1355, 1357 (N.D. Cal. 1994).

19. *See* Roundtree, *supra* note 8, at 965 (discussing financial success of graffiti artists and placement of their works in galleries and museums).

20. Sue Farran & Rhona Smith, *Graffiti in a Time of Covid-19: Spray Paint and the Law*, 32 KING'S L.J. 84, 84 (2021).

21. BARTLETT, *supra* note 9, at 6; *see also* Will Ellsworth-Jones, *The Story Behind Banksy*, SMITHSONIAN MAG. (Feb. 2013), https://www.smithsonianmag.com/arts-culture/the-story-behind-banksy-4310304 [https://perma.cc/EM3S-SNDS] (noting that Banksy was listed in Time Magazine's one hundred most influential people in the world in 2010).

22. BARTLETT, *supra* note 9, at 5.

23. Roundtree, *supra* note 8, at 965.

24. BARTLETT, *supra* note 9, at 5.

25. *Id.* at 158–220.

26. *See, e.g.*, *Find Legal Graffiti Walls Around the World*, LEGAL-WALLS, http://www.legal-walls.net [https://perma.cc/8S3L-CMV8]. Even where street art is created illegally, the public does not necessarily tend to reject its presence. For instance, in Melbourne, Australia, graffiti is still illegal but is met with a generally positive response from the public. *See* BARTLETT, *supra* note 9, at 152; @smileboulder, INSTAGRAM (Dec. 12, 2020), https://www.instagram.com/p/CIs_4n7lj8D/?utm_source=ig_web_copy_link

art's "true audience is measured in the billions."[27] Even with these positive developments, the art form's historic association with vandalism is partially why many graffiti artists choose to stay anonymous, and "the very illegality of graffiti-making that forced it into the shadows also added to its intrigue and growing base of followers."[28]

Banksy's famous self-destructing painting, "Love is in the Bin," hanging in Sotheby's, London, photographed by Ben Stansall.[29]

Inevitably, graffiti's surge in popularity brought the burdens of commercialization.[30] Commercial success helped to legitimize graffiti as art,[31] and in the most benign form of

[https://perma.cc/YRF4-FPFF] ("I didn't get permission to paint this, didn't get paid to paint it, but got smiles for painting it.").

27. BARTLETT, *supra* note 9, at 6.

28. Wall, *supra* note 6, at 2:14.

29. Seph Rodney, *Banksy's Shredded Painting Stunt Was Viral Performance Art. But Who Was Really Trolling Who?*, NBC NEWS (Oct. 18, 2018, 4:49 AM), https://www.nbcnews.com/think/opinion/banksy-s-shredded-painting-stunt-was-viral-performance-art-who-ncna921426 [https://perma.cc/EG66-NHFM].

30. *Gambling with Graffiti: Using Street Art on Goods or in Advertising Comes With Significant Risks*, NAT'L L. REV. (Aug. 4, 2020), https://www.natlawreview.com/article/gambling-graffiti-using-street-art-goods-or-advertising-comes-significant-risks [https://perma.cc/9QWT-F4CJ] ("[I]t should . . . be no surprise that street art has become increasingly commercialized.").

31. *From Graffiti to Galleries: Urban Artist Brings Street Style to Another Level*, CNN (Nov. 4, 2005, 4:49 PM),

capitalistic behaviors, businesses now seek to hire graffiti artists to paint elaborate murals in an effort to attract bystanders to their establishments.[32] Corporations, too, are attuned to mainstream trends, and graffiti's rise presented an opportunity "to capitalize on the hot world of street art to reach an urban market that has learned to tune out traditional advertising."[33] Corporate marketing schemes incorporate street art on billboards, online advertisements, and social media posts, and their products are likewise distributed to the masses.[34] While it is true that graffiti artists sometimes gift their consent to such uses or contract to create for commercial ends,[35] in many instances their works are still used despite withheld consent, or the artists are not even asked.[36] For example, in *Williams v. Cavalli*, a company used photographs of a street artist's mural on the company's clothing line without the artist's knowledge—the company even superimposed its brand name over the

http://www.cnn.com/2005/US/03/21/otr.green/index.html [https://perma.cc/P8SW-ZZH9] (quoting street artist Doze Green) ("I started seeing advertising plastered all over buses . . . . Back in the day . . . we used to tag trains top to bottom, and all of a sudden it was legitimized by these corporations.").

32. Richard Chused, *Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 COLUM. J.L. & ARTS 583, 584 (2018).

33. *See, e.g.*, The Washington Post, *Big Corporations Get Hip to Street-Art Advertising*, DENVER POST (May 8, 2016, 6:52 AM), https://www.denverpost.com/2006/01/02/big-corporations-get-hip-to-street-art-advertising [https://perma.cc/2QSC-6BBE].

34. *Gambling with Graffiti*, *supra* note 30.

35. *See* Greg Ritchie, *Luxury Brands Are Taking over the Street Art Scene*, BLOOMBERG (July 22, 2019, 10:00 PM), https://www.bloomberg.com/news/features/2019-07-23/luxury-brands-gucci-louboutin-graffiti-ads-take-over-street-art [https://perma.cc/DL6U-LTRA] ("Gucci, Louboutin, and Fendi are hiring graffiti artists in a bid to fit in with street culture . . . ."); David Gonzalez, *Walls of Art for Everyone, but Made by Not Just Anyone*, N.Y. TIMES (June 4, 2007), https://www.nytimes.com/2007/06/04/nyregion/04citywide.html [https://perma.cc/HM9U-QVRP] (explaining that the television show "Law & Order" frequently calls graffiti artists to seek permission to show murals in background shots); Brittany M. Elias & Bobby Ghajar, *Street Art: The Everlasting Divide Between Graffiti Art and Intellectual Property Protection*, 7 NO. 5 LANDSLIDE 48, 49–50 (2015) (explaining that photographers and filmmakers understand that the "unspoken etiquette" in the Wynwood Art District is to ask for permission and pay a licensing fee to use it).

36. *Gambling with Graffiti*, *supra* note 30 ("The list of retailers who have found themselves in disputes with recognized street artists over unconsented-to uses of graffiti includes American Eagle Outfitters, Coach, Fiat, General Motors, H&M, Epic Records, McDonald's, Mercedes Benz, Moschino, Roberto Cavali [*sic*] and Starbucks.").

mural.[37] The products were sold globally, and the artist rightfully argued that the company "profited from [its] use of the artwork."[38] As this Note later explains in detail, intellectual property regimes often fail to protect graffiti artists in these instances.

Unauthorized use of graffiti for corporate gains is especially troubling to street artists that "see their work as an expression of freedom and insurgency, an attempt to reclaim and energize a public space that is either soulless or cynically controlled by corporate advertisers."[39] Although some street artists seek to earn a profit through commissioned works, street artists are often displeased with these unauthorized uses; as one artist put it, "[J]ust because their murals . . . are out for anyone to enjoy, that does not mean others can do whatever they want with them."[40] The commercial use of graffiti inherently conflicts with the nature of graffiti—art that is intended to be enjoyed freely is placed into a vehicle for consumerism. Moreover, associating graffiti works with money can impose reputational costs on the artist by diminishing their legitimacy within the larger graffiti subculture.[41]

Due to the legal system's historic scorn toward graffiti through pervasive vandalism laws and graffiti eradication

37. No. CV 14-06659-AB JEMX, 2015 WL 1247065, at *1 (C.D. Cal. Feb. 12, 2015).

38. *Id.*

39. Winn, *supra* note 3.

40. Gonzalez, *supra* note 35; *see also* Mia Fineman, *The Image Is Familiar; the Pitch Isn't*, N.Y. TIMES (July 13, 2008), https://www.nytimes.com/2008/07/13/arts/design/13fine.html [https://perma.cc/9VBF-TYNY] (photographer stating, "I make art that reflects the culture I live in . . . I'm not trying to sell phones").

41. Jamison Davies, *Art Crimes?: Theoretical Perspectives on Copyright Protection for Illegally-Created Graffiti Art*, 65 ME. L. REV. 27, 38 (2012); Tiermy v. Moschino S.p.A., No. 215-CV-05900-SVW-PJW, 2016 WL 4942033, at *2 (C.D. Cal. Jan. 13, 2016) ("Tiermy alleges that Defendants' actions have damaged his reputation and credibility in the art world based upon the perceived association with and endorsement of the Moschino and Jeremy Scott brands. Tiermy explains that his perceived association with Defendants' clothing has banned his 'street cred' and that he is now subject to charges of 'selling out.'"); *Williams*, 2015 WL 1247065, at *1 ("Plaintiffs complain that Defendants' use of their artwork has damaged Plaintiffs' reputation and credibility."); Reply Memorandum in Support of Defendant's Motion to Dismiss the Complaint at 6, Villa v. Pearson Educ., Inc., No. 03 C 3717, 2003 WL 23801408 (N.D. Ill. Dec. 2, 2003) ("Plaintiff has claimed that his damages are that it appeared that he had 'sold out to the man.'"); *From Graffiti to Galleries*, *supra* note 31 (street artist explaining that associating with corporations can "destroy[] your legitimacy in the art world sometimes—like people look at you like you're selling out").

tactics,[42] street artists are often reluctant to turn toward the legal system when these disputes arise.[43] Given that many of these works, if not most, are created illegally, these artists typically prefer to remain anonymous.[44] This is understandable because bringing a legal action risks revealing their identities to the world and potentially facing criminal penalties.[45] Pursuing a lawsuit is further complicated given the uncertainty of the artist's success and the intimidation felt by taking on infringers with deep pockets.[46] Despite these barriers, lawsuits concerning graffiti infringement are on the rise—most commonly under the doctrines of copyright and trademark law.[47] In fact, graffiti infringement claims are common enough that attorneys are publishing articles addressing strategies and potential defenses that can be asserted for graffiti infringement in commercial content.[48]

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42. For example, in California, one who creates graffiti may be subject to jail for up to one year or a fine ranging from $1,000 to $50,000, depending on the amount of damage to the property. CAL. PENAL CODE § 594.

43. Roundtree, *supra* note 8, at 966.

44. Elias & Ghajar, *supra* note 35, at 49.

45. *See* Louise Carron, *Street Art: Is Copyright for 'Losers©™'? A Comparative Perspective on the French and American Legal Approach to Street Art*, N.Y. ST. B.J. 34, 38 (Nov. 2019); John Eric Seay, *You Look Complicated Today: Representing an Illegal Graffiti Artist in a Copyright Infringement Case Against a Major International Retaile*r, 20 J. INTELL. PROP. L. 75, 82 (2012) (lawyer expressing concern that the graffiti infringers would raise an unclean hands defense and bring police attention to graffiti, who could then prosecute his client); Cathay Y. N. Smith, *Street Art: An Analysis Under U.S. Intellectual Property Law and Intellectual Property's "Negative Space" Theory*, 24 DEPAUL J. ART, TECH. & INTELL. PROP. L. 259, 283–84 (2014).

46. For example, a photographer, whose photo was used without authorization in an Apple advertisement campaign chose not to pursue a legal action, stating, "When people with that much power and money copy you, there's not much you can do." Fineman, *supra* note 40.

47. *See, e.g.*, Gayle v. Hearst Commc'ns, Inc., No. 19 CV 4699-LTS-DCF, 2021 WL 293237 (S.D.N.Y. Jan. 28, 2021) (graffiti tag used in magazine advertisement); *Williams*, 2015 WL 1247065 (graffiti used in clothing line); *Tiermy*, 2016 WL 4942033 (same); Robbins v. Oakley, Inc., No. CV 18-5116 PA (KSX), 2018 WL 5861416 (C.D. Cal. Sept. 27, 2018) (graffiti used in advertising and catalogues); Daar v. Oakley, Inc., No. CV 18-6007 PA (KSX), 2018 WL 9596129 (C.D. Cal. Sept. 27, 2018) (same); Baird v. ROK Drinks, LLC, No. CV 17-4703 PA (AFMX), 2018 WL 5294867 (C.D. Cal. Jan. 9, 2018) (graffiti used on wine bottle labels); Falkner v. Gen. Motors LLC, 393 F. Supp. 3d 927 (C.D. Cal. 2018) (advertising agency for automobile company posted photo in front of mural on social media).

48. *See* Guy R. Cohen et al., *Copyright and Graffiti*, INTELL. PROP. MAG., Sept. 2019, at 42; Mark Peroff & Darren Saunders, *Preventing a Graffiti Infringement Lawsuit*, IPWATCHDOG (Sep. 5, 2018), https://www.ipwatchdog.com/2018/09/05/preventing-graffiti-copyright-infringement-lawsuit/id=100833 [https://perma.cc/F2XG-2P8M]; *Copyright Claims*

Courts also struggle when faced with graffiti disputes. Because these cases rarely move beyond settlement,[49] there is little applicable precedent that would otherwise provide courts with some guidance. Judges' expertise tends not to extend to the particularities of artistic movements and the unique legal issues they pose; as a result, many judges will often "search for easy ways to construe statutory language and unthinkingly apply ill-fitting cultural norms about creative movements to avoid facing issues arising in rapidly changing and dynamic artistic realms."[50] The few decisions courts have issued "in this area reflect the courts' attempt to fit the proverbial square peg in a round hole."[51]

All is not lost, however, because street art has gained legal recognition in recent decisions. *Castillo v. G&M Realty L.P.*, decided in 2020, is the first and only lawsuit involving graffiti to reach a final judgment.[52] The dispute involved graffiti whitewashing, or removal, and the artists brought the claim under the Visual Artist's Rights Act (VARA).[53] VARA gives the artist the right, amongst other rights, to prevent the destruction of their works if they are of "recognized stature,"[54] meaning that the works have achieved a high status in the community.[55] The Second Circuit held that most of the graffiti works at issue qualified as works of "recognized stature" within the meaning of

for Graffiti Artists, INST. FOR INTELL. PROP. & SOC. JUST. (July 19, 2018), https://iipsj.org/copyright-claims-for-graffiti-artists [https://perma.cc/32X5-83CZ] (advising companies to obtain permission from graffiti artists, and if the artist is unwilling or cannot be found, "it may end up being less expensive to start from scratch than to manage the fallout from an allegation of stolen artwork, damaged reputation, and a lawyer for the lawsuit that follows").

49. *See* Gonzalez, *supra* note 35 (graffiti artists seek settlement from photographer for unauthorized use of murals in book); Bill Donahue, *American Eagle, Street Artist Settle Copyright Suit*, LAW360, (Dec. 2, 2014), http://www.law360.com/articles/600542/americaneagle-street-artist-settle-copyright-suit [https://perma.cc/LW89-NS8Z] (American Eagle settles with graffiti artist); Henri Neuendorf, *Street Artist Revok and H&M Settle Dispute over an Ad That Featured His Work Without Permission*, ARTNET NEWS (Sep. 7, 2018), https://news.artnet.com/art-world/revok-hm-ad-campaign-1345127 [https://perma.cc/3VT3-UQ4J] (H&M settlements with Revok).

50. Chused, *supra* note 32, at 590.

51. *Cf.* Comput. Assocs. Int'l v. Altai, Inc., 982 F.2d 693, 712 (2d Cir. 1992) (discussing application of copyright to computer software).

52. 950 F.3d 155 (2d Cir.), *as amended* (Feb. 21, 2020).

53. *Id.* at 163.

54. 17 U.S.C. § 106A(a)(3).

55. *Castillo*, 950 F.3d at 166 ("[A] work is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community.").

VARA, that the realtor defendant violated VARA by destroying said works, and ultimately affirmed the district court's award of maximum statutory damages—$6.75 million—to the graffiti artists.[56] Narrowly construed, the decision has no application in the context of graffiti *copying* because it dealt with graffiti *destruction*, which is a statutorily recognized claim in the Copyright Act. More broadly, however, *Castillo* is notable as "the first case to legally recognize the artistic and cultural value of graffiti or street art."[57] Other decisions also recognized merit in street artists' intellectual property claims, but only at the pleading and summary judgment stages.[58] Still, without any relevant precedential decisions, many questions in this area remain unanswered, particularly whether street artists have the legal right to prevent the unauthorized copying of their works.

II. THEORIES

Having laid the foundation of street art's historical, cultural, and legal development through present day, this Part analyzes street artists' values through a theoretical lens. It first explains how utilitarianism, the dominant justification for intellectual property law, is not equipped to cope with these artists' interests in litigation when they seek to disassociate with consumerism. This Part then discusses two alternative justifications, the personhood and distributive justice theories, arguing that they more accurately identify the values of street artists whose work is the subject of unauthorized copying.

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56. *Id.* at 169–73.

57. Meredith Burtin, *From the Street to the Courtroom: The Legalization of Graffiti Art*, 89 UMKC L. REV. 1019, 1020 (2021).

58. *See, e.g.*, Williams v. Cavalli, No. CV 14-06659, 2015 WL 1247065, at *1, *3–4 (C.D. Cal. Feb. 12, 2015) (denying defendant's motion to dismiss plaintiff's Digital Millennium Copyright Act [hereinafter DMCA], Lanham Act, and unfair competition claims); Tiermy v. Moschino S.p.A., No. 215-CV-05900-SVW-PJW, 2016 WL 4942033, at *1–2 (C.D. Cal. Jan. 13, 2016) (same); Falkner v. Gen. Motors LLC, 393 F. Supp. 3d 927, 939 (C.D. Cal. 2018) (denying defendant's motion for partial summary judgment on copyright infringement claim); Baird v. ROK Drinks, LLC, No. CV 17-4703 PA (AFMX), 2018 WL 5294867, at *3 (C.D. Cal. Jan. 9, 2018) (denying defendant's motion to dismiss DMCA claim for removal and alteration of copyright management information); Daar v. Oakley, Inc., No. CV 18-6007 PA (KSX), 2018 WL 9596129, at *3 (C.D. Cal. Sept. 27, 2018) (denying defendant's motion to dismiss mural artist's DMCA claim because the facts alleged were sufficient to satisfy the low threshold required at the pleading stage); Robbins v. Oakley, Inc., No. CV 18-5116 PA (KSX), 2018 WL 5861416, at *3 (C.D. Cal. Sept. 27, 2018) (same).

A. Utilitarianism

What is the incentive for copyright law to exclude graffiti?

– Sara Cloon[59]

Utilitarianism is the mainstream philosophy informing intellectual property law.[60] Because the constitutional command is to "promote the Progress of Science and useful Arts,"[61] the legislature crafts intellectual property laws by "balancing the social benefit of providing *economic incentives* for creation and the social costs of limiting the diffusion of knowledge."[62] In other words, this area of law attempts to strike the "optimal" balance between providing enough exclusive rights to ensure that the creator can profit from the work, thereby encouraging creation, while also ensuring that society remains able to access and build off of existing creative works.[63] Importantly, the goal is not to award the labor invested in creating; rather, economic incentives are the means to the end of advancing society's metaphorical and literal library of knowledge.[64] A prototypical example is a book author's use of copyright protection to prevent others from copying the fruits of their intellectual labor.[65] Writing a book is costly to the author, while copying the book is cheap and allows the copier to benefit financially—and significantly more than the author—from placing that same book in the marketplace.[66] The utilitarian theory posits that if there were not copyright protection, the author would be less likely to place their book on the marketplace, thereby depriving society of its enjoyment.[67] On the other hand, granting the author a temporary monopoly over the rights to their book prevents these opportunistic

59. Cloon, *supra* note 4, at 67 (emphasis omitted).

60. 3 JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, COPYRIGHT LAW: CASES AND MATERIALS 10 (2021).

61. U.S. CONST. art. I, § 8, cl. 8.

62. 1 PETER S. MENELL ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2021, at 21 (2021) (emphasis added).

63. FROMER & SPRIGMAN, *supra* note 60, at 13.

64. *See* MENELL ET AL., *supra* note 62, at 18–28; Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 352–53 (1991) (rejecting the Lockean "sweat of the brow" doctrine, which would otherwise grant copyright protection for labor rather than creative output).

65. *See* MENELL ET AL., *supra* note 62, at 19–20.

66. *See id.*

67. *See id.*

behaviors[68] while also ensuring that the book will be freely accessible at some time in the future.[69]

Like books, graffiti can be cheaply copied, which allows infringers to benefit from placing it in the marketplace. Aside from those that create commissioned murals, many graffiti artists are not motivated primarily by these economic incentives. Rather than the prospect of monetary gain, street artists that create solely for the sake of disseminating art or sending a message to society find motivation in the freedom of personal expression, reputational gains within the street art community, bringing the public's attention to social issues,[70] and "rebelliously carv[ing] a space for art within our daily lives."[71] Besides, the legal benefits that intellectual property owners enjoy are not necessarily attractive to artists that are not motivated by prospective commercial reward; they instead "view their works as gifts to the public."[72] Moreover, the lengthy copyright term and potentially indefinite term of trademark are not appealing because these artists, especially those that create illegal works, know, and even expect, that their creations are temporary and subject to nature's elements and removal by local authorities.[73] Not only do the artists' incentives exist outside of those recognized under utilitarianism, they also must outweigh the financial cost of creating and the inherent risk of being held criminally liable for creating illegal work.[74]

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68. *See id.*

69. Generally, copyright confers an author the exclusive rights to their work for the author's life plus seventy years after their death. 17 U.S.C. § 302. To understand the nuances of the duration of copyright protection, see FROMER & SPRIGMAN, *supra* note 60, at 177–80.

70. Katya Assaf-Zakharov & Tim Schnetgöke, *Reading the Illegible: Can Law Understand Graffiti?*, 53 CONN. L. REV. 117, 121–22 (2021).

71. Andrea Baldini, *Street Art: A Reply to Riggle*, 74 J. AESTHETICS & ART CRITICISM 187, 190 (2016).

72. Carron, *supra* note 45, at 34; *see also* Smith, *supra* note 45, at 284; BARTLETT, *supra* note 9, at 64 ("When I paint in the streets I intend to give a present to the people of the city.").

73. *See* Carron, *supra* note 45, at 34; Smith, *supra* note 45, at 284.

74. Davies, *supra* note 41, at 38–39; Assaf-Zakharov & Schnetgöke, *supra* note 70, at 129 ("[Intellectual property remedies] are entirely dissonant with the core logic of graffiti culture, which presumes creating without the prospect of economic gain or open public recognition—since signing works with one's real name would be akin to admitting having committed a crime—knowing that the works are very likely to be modified, painted over, or destroyed altogether.").

It is unclear whether graffiti should be protectable from a utilitarian standpoint.[75] While courts and legislatures alike may be reluctant to provide intellectual property rights to graffiti art due to the risk of incentivizing vandalism,[76] "[t]his hesitation is not contested among street artists, who do not operate with vandalistic intent nor by a supportive public, who welcomes the culturally positive, aesthetic benefits that street art and graffiti provide."[77] Cherished street murals, commissioned or not, confer benefits on society by beautifying the urban landscape, building a community's identity, stimulating tourism, and attracting business investment.[78] Yet, under the utilitarian framework, there is no need to carve out a space in intellectual property law when the benefits are already prolific and where remedying the harm of reputational damage caused by the negative association with commercial activity is not a legally cognizable basis for relief.[79] It is also worth mentioning that graffiti artists who create illegal works, as opposed to permissive or commercially commissioned works, generally adhere to the subculture's norms, including a ban on defacing small businesses or religious establishments.[80] As graffiti art continues to flourish, despite the lack of formal rights and little opportunity for monetary gains, its growth arguably demonstrates that graffiti may not

75. *See* CAROL DIEHL, BANKSY: COMPLETED 61 (2021) ("All attempts at graffiti legislation ultimately become a struggle between our concepts of property ownership and freedom of expression. And in reality, there are only three legislative options: bless it wherever it appears, make it entirely illegal, or designate areas where it can be practice unmediated – solutions that will make no majority happy."). *Compare* Davies, *supra* note 41, at 30 (graffiti is protectable under copyright), *with* Roundtree, *supra* note 8, at 968–69 (legal graffiti is copyrightable, but illegal graffiti is not).

76. Cloon, *supra* note 4, at 66 ("The problem of using incentive theory to justify copyrighting graffiti art, though, is that in many instances, the given copyright protections would be incentivizing an illegal activity."); Karim, *supra* note 2, at 73 ("Primarily, courts are unwilling to indirectly encourage and enable vandalism, and defacement of public and/or private property."); *see* Sherwin-Williams Co. v. City & Cnty. of San Francisco, 857 F. Supp. 1355 (N.D. Cal. 1994) (discussing the constitutionality of an ordinance designed to deter graffiti).

77. Karim, *supra* note 2, at 73.

78. Chris Godinez, *Painting over VARA's Mess: Protecting Street Artists' Moral Rights Through Eminent Domain*, 37 T. JEFFERSON L. REV. 191, 218–22 (2014).

79. *See, e.g.*, Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946) ("The plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts.").

80. *Language and Rules of Graffiti Artists*, GRAFFITI VS. STREET ART DISCOURSE GROUPS, https://iwillnotbeconsumed.wordpress.com/language-and-rules-of-graffiti-artists [https://perma.cc/S3P2-NPSB].

have much need for legislative or judicial protection from a utilitarian standpoint because the benefits of legal protection are incentives by design.[81] Despite this utilitarian implication, legal protection is still needed to prevent infringers from reaping the benefits of copying artwork in bad faith.

Protecting graffiti artists through legal means comes with its own challenges. On the one hand, it is unlikely that allowing such unauthorized copying to continue will cause a graffiti-creation strike,[82] and courts are likely to acknowledge the difficulty imposed on prospective copiers required to track down elusive and often anonymous owners of so-called orphan works.[83] On the other hand, allowing such misconduct permits advertisers to "free-ride" on others' creations,[84] thereby inhibiting the creation of more desirable forms of street art because companies will have neither the need to seek out an artist to capture their vision nor to obtain permission from the artist of an existing work. In requiring companies to either obtain express authorization or otherwise procure a willing artist, there is no risk of excluding anything valuable to the public because graffiti is already openly available to all. Still, one of the reasons courts might be more prone to protect corporate marketing schemes over graffiti artists is because corporate aims fit better into the utilitarian framework: intellectual property protection incentivizes the corporate party to disseminate creative works to society by promising financial reward.

It is worth expanding this discussion to analyze unauthorized graffiti copying through a modified utilitarian cost-benefit analysis—even though such incentives do not exist to warrant adherence to this philosophy—to demonstrate why graffiti should receive heightened protection when corporations

81. *See* Davies, *supra* note 41, at 39–42; Smith, *supra* note 45, at 282.

82. *See* Smith, *supra* note 45, at 287–88.

83. *See* Gonzalez, *supra* note 35 (arguing that producers know to research images and seek permission from artists); Danwill Schwender, *Promotion of the Arts: An Argument for Limited Copyright Protection of Illegal Graffiti*, 55 J. COPYRIGHT SOC'Y U.S.A. 257 (2008) (arguing that the orphan works issue is overstated). For more information about "orphan works," see Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 81 (2007) (defining "orphan works" as "[w]hen a work is still protected by copyright, but the copyright holder is difficult or impossible to find"). *See generally* Aaron C. Young, *Copyright's Not So Little Secret: The Orphan Works Problem and Proposed Orphan Works Legislation*, 7 CYBARIS INTELL. PROP. L. REV. 202 (2016).

84. Cloon, *supra* note 4, at 65–66.

copy it without authorization. This modified analysis removes the economic aspect of the utilitarian balancing test, instead asking whether the social benefits outweigh the costs of granting corporations the same level of protection when they infringe the rights of small-scale creators. If graffiti artists are precluded from asserting their rights in these disputes or afforded weaker protection, it implicitly prioritizes corporate interests over the personal interests of both the artist and the community.[85] Although marketing undoubtedly can be the product of creative minds,[86] it is worth questioning whether this is the socially beneficial spur of creation that intellectual property is designed to protect, particularly when the creative work is drowned out by corporate messages. In Banksy's words, "The people who truly deface our neighborhoods are the companies that scrawl giant slogans across buildings and buses trying to make us feel inadequate unless we buy their stuff."[87] Moreover, the public generally believes that "advertising is currently too pervasive and intrusive," with advertising firms annually ranking as one of the least trusted professions.[88] While advertising can sometimes spread useful information, it is often the case that they instead inject problematic messages into society and produce undesirable feelings of anxiety, depression, envy, and guilt.[89] Thus, the better question—rather than which creations fit better into the utilitarian framework—is whether the law should allow, and thereby incentivize, intrusive marketing schemes produced through undesirable means at the cost of the artist that *actually* conferred a benefit on society.

If the constitutional objective of granting intellectual property rights to the creator is to incentivize creation through granting the owner rights to commercialize their works, then it follows that this philosophy is ill-fitted to justify protection for

85. As Banksy observed, "[Y]ou are forbidden to touch [advertisers]. Trademarks, intellectual property rights and copyright law mean advertisers can say what they like wherever they like with total impunity." DIEHL, *supra* note 75, at 60.

86. Lastowka, *supra* note 83, at 65 ("Advertisements are creative forms of information. Like paintings, novels, and software, advertisements take creativity and labor to produce and are legally protected by copyright."); Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–52 (1903) (holding that advertisements are copyrightable subject matter).

87. DIEHL, *supra* note 75, at 60. Banksy termed the practice "brandalism." *Id.*

88. Lisa P. Ramsey, *Intellectual Property Rights in Advertising*, 12 MICH. TELECOMM. & TECH. L. REV. 189, 233–34 (2006).

89. *Id.* at 231–32.

graffiti because street artists do not always seek financial reward.[90] Alternatively, this analysis shows that when utilitarianism does not apply, intellectual property protection need not in all instances be rigidly informed by unworkable philosophical norms.

B. Alternative Theoretical Justifications: Personhood and Distributive Justice

Unlike traditional intellectual property, the theoretical justifications underlying other bodies of law more broadly encompass other philosophical norms beyond utilitarianism. As discussed, the value of graffiti to the artist is not neatly reducible to potential monetary reward. Instead, offering graffiti artists legal protection to prevent the unauthorized copying of their works is more fully justifiable when considering the interests at stake in totality, including the work's inherent connection to the artist, its relationship with the community, and general notions of equity. This Section explores each of these interests in turn through the lenses of personhood and distributive justice respectively.

1. Personhood

> *When a work of authorship is understood as an embodiment of the author's personal meaning and message, the author's desire to maintain the original form and content of her work becomes manifest.*
>
> *– Roberta Rosenthal Kwall*[91]

The personhood theory posits that possession of property can become so closely bound to one's identity that "its loss causes pain that cannot be relieved by the object's replacement."[92] Property is thus categorically divided between that which is personal and fungible, where for the former, "the price of replacement will not restore the status quo," but the latter is

90. *See supra* notes 60–63 and accompanying text.

91. ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES, at xiii (2010).

92. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982).

"perfectly replaceable with other goods of equal market value."[93] For example, ownership of a wedding ring may be described as personal, while the interests of an automobile dealer or commercial landlord are more fairly characterized as fungible.[94] This "perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement."[95]

Under the personhood conception of property, and perhaps the theoretical anathema of utilitarianism, the idea of "market-inalienability" precludes those things that are bound with one's personhood from commodification.[96] Inalienability need not be applied in the strictest sense, such that something must either be a commodity or removable from the market altogether.[97] Rather, society can "decide that some things should be market-inalienable only to a degree, or only in some aspects."[98] This is especially apropos when power imbalances are taken into consideration, and the rightful owner might prefer to have the choice of whether or not to commodify the object of value.[99]

The competing personal interests of the street artist and the fungible interests of the corporation fit well under this view. Street art is personal because it embodies the artist's individual expression "free of the everyday social restraints that normally prevent people from giving uninhibited reign to their thoughts."[100] They are often uncompensated, which does more to develop one's personality and can "bring[] more joy and satisfaction than compensated creative work."[101] Furthermore, graffiti is more often created in opposition to fungible and materialistic norms. For instance, in Buenos Aires, graffiti was removed and placed in a gallery for sale without the artists' consent, and the artists set off a fire alarm on opening night to destroy each of their pieces, preferring "their work be destroyed than to allow others to profit from their work or to see their work

93. *Id.* at 959–60.
94. *Id.*
95. *Id.* at 986.
96. *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1904 (1987).
97. *Id.* at 1855.
98. *Id.*
99. *See id.* at 1904.
100. ERNEST L. ABEL ET AL., THE HANDWRITING ON THE WALL: TOWARD A SOCIOLOGY AND PSYCHOLOGY OF GRAFFITI 3 (1977).
101. Assaf-Zakharov & Schnetgöke, *supra* note 70, at 145.

out of context, hanging in a gallery or museum."[102] Banksy also refuses to authenticate his, her, or their works, thereby boosting the works' values, "because they were not created as commercial works of art."[103] In sharp contrast with commercial entities' inherently fungible interest, the personal value of graffiti is important and separable from the encumbrances of utilitarianism, thus raising the artist's interest in ownership above those of the infringer. For this reason, "commercial entities who are in the best position to exploit the works"[104] should not have the ability to use their monetary power to deprive the artist of "their personhood interests in their creations," notwithstanding the lack of discernable monetary value.[105]

2. Distributive Justice

> *For us, the whole purpose of doing this is to give voice to people and let them express themselves in public.*
>
> *– Amy Sananman*[106]

The distributive justice approach seeks to allocate social resources to promote equality and just outcomes.[107] It is concerned with power concentrated in the hands of a few actors and considers the interests of those who use a valuable resource to achieve a more desirable equilibrium.[108] Meaningful opportunities to express oneself are "far from equally distributed among members of society,"[109] and the distributive justice approach operates to reconcile this concern. Originally formulated by John Rawls, two foundational principles guide

102. Smith, *supra* note 45, at 278–79.

103. *Id.* at 279 (quoting Paul Howcroft, *Selling Banksy Street Art*, ART L. LONDON (May 15, 2013), http://artlawlondon.blogspot.co.uk/2013/05/selling-banksy-street-art.html [https://perma.cc/S6QP-HBM3]).

104. Davies, *supra* note 41, at 45.

105. *Id.*

106. Gonzalez, *supra* note 35 (quoting Amy Sananman).

107. Dr. Shlomit Yanisky-Ravid, *The Hidden Though Flourishing Justification of Intellectual Property Laws: Distributive Justice, National Versus International Approaches*, 21 LEWIS & CLARK L. REV. 1, 10–12 (2017).

108. *Id.*

109. Assaf-Zakharov & Schnetgöke, *supra* note 70, at 146.

this approach.[110] The first principle entitles each person to an equal right to fundamental liberties.[111] The second provides that inequalities are only acceptable if they can provide the most benefit to those disadvantaged in society.[112] These principles should be judged from three points of view: the ideal framework for society, the community within that society, and one's own perspective regarding "setting up justice as fairness."[113] Some consider Rawls's approach "[a] profound work [that] has caused us all to reconsider simple-minded utilitarianism."[114]

At the outset of this topic, it is important to reiterate that graffiti gained popularity in the United States as one of the four pillars of hip-hop culture,[115] a movement predominantly comprised of Black Americans. This has been cited as a reason that graffiti is viewed as correlative with counterculture and criminal activity,[116] thus street art necessarily carries a racial undertone, whether consciously or subconsciously. Modern society is well equipped to abandon these archaic negative associations in favor of a more welcoming and equitable approach.

110. Justin Hughes, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513, at 516, 519 (2016).

111. *Id.* at 519.

112. *Id.*

113. *Id.* at 524–25 (quoting JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT § 13.4, at 45 n.8 (Erin Kelly ed., 2001)).

114. *Id.* at 518 (quoting Kenneth J. Arrow, *Rawls's Principle of Just Savings*, 75 SWEDISH. J. ECON. 323, 323 (1973)).

115. *See* Roundtree, *supra* note 8 and accompanying text.

116. *Id.*

Mural by Cyrcle in Los Angeles, California.[117]

Graffiti fits well into the distributive justice framework in three ways. First, street art helps to uplift the public's access to art, especially for those unable to pay admission fees typical of art museums and galleries.[118] Moreover, "[i]t doesn't need the credibility of any third party for thousands of people to see it every day."[119] One scholar adds that street art operates to promote greater understanding amongst different social groups.[120] Street artist Vhils believes "that art in general can contribute to create a better environment for people and its communities . . . . Since you often tend to work in the most neglected areas of the city, you become aware of what surrounds you. Street art has always been about confronting these realities."[121]

Second, graffiti serves as a creative outlet for marginalized voices in society because "[m]any street artists do not come from a socioeconomic background of privilege that often acts as a

117. BARTLETT, *supra* note 9, at 85.
118. Karim, *supra* note 2, at 61.
119. BARTLETT, *supra* note 9, at 125.
120. Assaf-Zakharov & Schnetgöke, *supra* note 70, at 149.
121. BARTLETT, *supra* note 9, at 53.

prerequisite for entry into the art world."[122] The art world is laden with exclusivity. For example, most art galleries require artists to have a master of fine arts degree before considering their works.[123] Banksy feels that "[w]riting graffiti is about the most honest way you can be an artist. It takes no money to do it, you don't need an education to understand it, and there's no admission fee."[124] Street artist Remi Rough further described how graffiti gave artists a "voice" when growing up in "rough" and "broken" cities.[125] It can also provide troubled youth with "creative alternatives to delinquent habits," albeit not technically legal ones.[126]

Finally, because the distributive justice approach tolerates some level of inequality if the goal is to promote social and economic justice, this approach is an obvious fit in the context of graffiti infringement at the hands of corporate giants.[127] Because these companies often have exorbitant financial resources, artists often remain silent instead of pursuing legal relief, or alternatively accept settlements before their claim is even assessed for its legal merits.[128] Distributive justice thus provides an apt justification for remedying grossly unequal results by placing corporate infringers on the same playing field as uncompensated artists.[129]

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122. Karim, *supra* note 2, at 61.

123. DIEHL, *supra* note 75, at 62.

124. *Id.* at 63.

125. BARTLETT, *supra* note 9, at 5 ("London was a rough city to grow up in during the early 1980s, but graffiti gave us a voice in much the same way it did for the kids in the bankrupt and broken New York of the late 1970s.").

126. Godinez, *supra* note 78, at 218; *see also From Graffiti to Galleries*, *supra* note 31 ("Green credits graffiti for keeping him out of the worst trouble—even if it was, generally, illegal. '[Graffiti] got me on a more positive direction towards expressing myself instead of smashing a window or smashing a head.'"); BARTLETT, *supra* note 9, at 104 (StART initiated a program aimed at providing graffiti artists with creative outlets to avoid the undesirable vandalistic forms of graffiti).

127. *See* Hughes, *supra* note 110, at 519 ("[A] society ought to tolerate 'only those social and economic inequalities that work to the advantage of the least well off members of society.'") (quoting MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 142 (2009)).

128. *See supra* note 45 and accompanying text.

129. For an argument that copyright promotes distributive justice, see Hughes, *supra* note 110, at 528 ("[E]ven if the copyright law causes some concentration of income and wealth among creators and copyright owners, this may be justified as inequalities that make better off the least advantaged citizens."). However, Hughes further argues "that to the degree copyright unduly benefits corporations, the right policy response in terms of distributive justice is to strengthen the propensity of copyright to increase the wealth and income of creative professionals, not to abandon copyright altogether." *Id.* at 539.

Affording a legal remedy to graffiti infringement with this view in mind serves socially desirable ends: it would distribute corporate gains to the harmed artist, rectify power imbalances in the market, and promote the sanctity inherent in the art form where there is no expectation of return.

As demonstrated, it takes a stretch of the imagination to apply utilitarian principles in the context of unauthorized graffiti copying, whereas the personhood and distributive justice theories offer more fitting justifications for affording street artists protection in these scenarios. However, the consequences of applying the traditional framework or an alternative is not merely theoretical—they inform the ultimate basis for an artist's likelihood of success in real-world legal disputes.

III. THE SHORTCOMINGS OF INTELLECTUAL PROPERTY

Copyright is for losers.

– Banksy[130]

Having established the interests at stake, and that these interests are not legally cognizable under the utilitarian framework informing intellectual property law, this Part explains the shortcomings of the most common intellectual property causes of action available to graffiti artists: copyright infringement and VARA via the Copyright Act as well as trademark infringement via the Lanham Act.

A. Copyright Act

Copyright protection is afforded to "original works of authorship fixed in any tangible medium of expression."[131] Graffiti falls squarely within this definition,[132] and of the enumerated categories of protectable works, graffiti is best

130. BANKSY, WALL AND PIECE 2 (2006).

131. 17 U.S.C. § 102(a).

132. Although graffiti is created with the knowledge that the work is temporary, subject to both natural forces and potentially removal by property owners or local authorities, it is nonetheless "sufficiently permanent" to meet copyright qualifications. *See* Castillo v. G&M Realty L.P., 950 F.3d 155, 167–68 (2d Cir.), *as amended* (Feb. 21, 2020) (temporary nature of graffiti did not bar plaintiff's copyright claim); Cloon, *supra* note 4, at 59–60; Seay, *supra* note 45, at 83–84.

characterized as a graphic work.[133] The owner of a copyright in a graphic work is conferred "a bundle of exclusive rights,"[134] including rights to reproduce copies of the work, prepare derivative works, distribute the work, and display the work publicly.[135] Furthermore, the author of a visual artwork may also enjoy rights to attribution and integrity under VARA, an amendment to the Copyright Act which ensures that certain artists are accurately represented as the authors of their works and allows them to prevent the destruction of their works.[136] The Act provides that "anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright or right of the author."[137] Thus, street artists have two avenues to vindicate their rights in the courtroom: traditional copyright infringement and VARA infringement.

Street artists have had limited success with Copyright Act claims in recent decisions. Courts have found that graffiti tags qualify as "copyright management information" under the Digital Millennium Copyright Act;[138] thus street artists can seek relief for the removal or alteration of tags intended to conceal copyright infringement.[139] One court seemingly foreclosed the defense that murals are part of architectural works,[140] which would otherwise allow others to freely display photographs of a mural to the public "if the building in which the work is embodied is located in or ordinarily visible from a public place."[141] Still, Banksy's famous assertion that "[c]opyright is for losers"[142] holds true. Although this statement was an expression

133. 17 U.S.C. §§ 101, 102(a)(5); *see also* Seay, *supra* note 45, at 83 (graffiti qualifies as a graphic work).

134. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985).

135. 17 U.S.C. § 106.

136. *See infra* Section III.A.2.

137. 17 U.S.C. § 501(a).

138. *See* Baird v. ROK Drinks, LLC, No. CV 17-4703 PA (AFMX), 2018 WL 5294867 (C.D. Cal. Jan. 9, 2018); Williams v. Cavalli, No. CV 14-06659-AB JEMX, 2015 WL 1247065 (C.D. Cal. Feb. 12, 2015); Tiermy v. Moschino S.p.A., No. 215-CV-05900-SVW-PJW, 2016 WL 4942033 (C.D. Cal. Jan. 13, 2016); Daar v. Oakley, Inc., No. CV 18-6007 PA (KSX), 2018 WL 9596129 (C.D. Cal. Sept. 27, 2018); Robbins v. Oakley, Inc., No. CV 18-5116 PA (KSX), 2018 WL 5861416 (C.D. Cal. Sept. 27, 2018); Falkner v. Gen. Motors LLC, 393 F. Supp. 3d 927 (C.D. Cal. 2018); 17 U.S.C. § 1202.

139. 17 U.S.C. §§ 1202, 1203.

140. *Falkner*, 393 F. Supp. 3d at 937.

141. 17 U.S.C. § 120(a).

142. BANKSY, *supra* note 130. Unfortunately, this assertion seemed to weigh against Banksy in his trademark claim in the European Union, with the court

of rebellion and nonconformity with legal frameworks, it is correct in a different sense: copyright is an insufficient means of protection for graffiti artists and imposes significant barriers in the way of a successful legal action.

This Section examines the challenges street artists face when bringing claims under the Copyright Act. First, bringing a traditional copyright claim requires adherence to formalisms that can act as barriers to reaching the merits of the dispute. Even if the case reaches the courtroom, the infringer can arm itself with defenses including "unclean hands" and "fair use." Second, bringing a claim under VARA requires showing that the law applies to graffiti infringement scenarios and, if it does, showing that the artwork can meet the high bar required to qualify for its protections.

1. Copyright Infringement

The unauthorized copying of street art for commercial ends is a clear case of copyright infringement. Graffiti is copyrightable because it is an original work fixed in a "tangible medium of expression,"[143] and copying a protected work is a violation of the copyright holder's exclusive rights.[144] Although the claim seems strong, the obstacles to prevailing are robust, even before the parties reach the courtroom.

To bring an action for copyright infringement, the artist must first formally register for ownership with the U.S. Copyright Office.[145] Although the registration fee can be as little as $45 for a single work,[146] the cost may deter destitute artists from applying (as may the exorbitant legal fees associated with litigation).[147] Even though copyright registration is considered

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noting, "In his book, *'Wall and Piece',* Banksy stated that 'copyright is for losers' and that the public is morally and legally free to reproduce, amend and otherwise use any copyright works forced upon them by third parties. Banksy has known for years that his works are widely photographed and reproduced on a massive and widespread scale by a range of third parties without there being any commercial connection between these parties and Banksy." Full Colour Black Ltd. vs. Pest Control Off. Ltd., No 33 843 C (EUIPO 2020).

143. 17 U.S.C. § 102(a). *But see infra* notes 137–141 and accompanying text.

144. 17 U.S.C. §§ 106(a), 501(a).

145. *Id.* § 412.

146. *Fees*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/about/fees.html [https://perma.cc/2M8G-EDYL].

147. Stephanie Plamondon Blair, *Impoverished IP*, 81 OHIO ST. L.J. 523, 536–37 (2020) ("[B]arriers such as unfamiliarity with the IP system, inability to pay the

an easy process, the cost formality is particularly disadvantageous to artists unfamiliar with the legal system and with less access to pertinent information.[148] There does exist a newly created copyright small claims court, which provides copyright owners with a quick and inexpensive means to enforce their rights, as opposed to filing in federal court.[149] In this court, monetary damages are capped at $30,000 dollars,[150] which may be far less than the graffiti artist is entitled to in the context of mass corporate infringement. Still, familiarity with the copyright legal system is needed for street artists to know that a potentially more accessible option exists. This limitation to legal opportunities presents a distributive justice issue, and perhaps serves as evidence that the Copyright Act does not recognize this normative ideal.

If the artist does obtain legal ownership, the artist must show (1) the corporate defendant copied the art and (2) such copying was improper.[151] Street artists may be hopeful to prevail given that copying can be directly proven through the use of their work in the advertising campaign or placement on products. Because unauthorized use is precisely what the Copyright Act is designed to prevent, no inferences need to be drawn to come to the conclusion that the copying was improper. However, defendants have an array of tenable defenses at their disposal to successfully rebut such a claim, including the unclean hands and fair use doctrines.

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required fees, or even bias on the part of IP's gatekeepers may prevent her from acquiring or enforcing IP rights in her creation.").

148. *Id.*; K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. ENT. L.J. 339, 353–54 (1999).

149. 17 U.S.C. §§ 1501–1511.

150. *Id.* § 1504(e)(1)(D).

151. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946). However, in a string of lawsuits filed by a graffiti artist for the use of his graffiti tag, one court ironically rejected a graffiti artist's claim because there was no widespread dissemination of the graffiti tag, despite the artist's involvement in six lawsuits against separate entities in the same court. Gayle v. Villamarin, No. 18 Civ. 6025 (GBD)(GWG), 2021 WL 2828578, at *5 (S.D.N.Y. July 7, 2021), *R. & R. adopted,* 2021 WL 4173987 (S.D.N.Y. Sept. 14, 2021). *But see* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1068 (9th Cir. 2020) ("[N]othing in copyright law suggests that a work deserves stronger legal protection simply because it is more popular or owned by better-funded rights holders.").

a. Unclean Hands

The "unclean hands" defense is available when the plaintiff has acted unethically or illegally with respect to the events leading up to the lawsuit.[152] While the Copyright Act does not expressly bar protection for illegally created works, infringers could plausibly argue that the street artist's claimed copyright ownership is void because illegal graffiti is not copyrightable.[153] Some draw this inference from the Act's bar on protection for illegally made derivative works,[154] while others assert that illegal works do not meet the U.S. Constitution's demand to "promote the progress of science and useful arts."[155] The court in *Villa v. Pearson Educ., Inc.*, for example, suggested that illegally placed graffiti might bar a copyright infringement action in stating that copyright protection depended on "the legality of the circumstances under which the mural was created."[156] By comparison, the Second Circuit in the landmark case *Castillo* endorsed the trial court's praise of the plaintiff artists for conducting themselves legally from the outset.[157]

Although it is unclear whether this could be a successful defense, precluding copyright protection on the grounds of unclean hands overlooks that illegal street art may be impliedly authorized due to the community's appreciation for the work or the property owner's acquiescence.[158] It also raises fairness

152. Seay, *supra* note 45, at 81.

153. For example, graffiti artist Revok sued retailer H&M for the unauthorized use of Revok's mural in an ad campaign, and H&M countersued Revok alleging that, because the work was conducted illegally, it was not entitled to copyright protection. Complaint, H&M Hennes & Mauritz GBC AB v. Williams, No. 1:18-CV-01490 (E.D.N.Y. Mar. 9, 2018). H&M faced strong backlash from the street art community and later rescinded the claim. Neuendorf, *supra* note 49.

154. 17 U.S.C. § 103(a).

155. Elias & Ghajar, *supra* note 35, at 49 (quoting U.S. CONST. art. I, § 8, cl. 8).

156. No. 03 C 3717, 2003 WL 23801408 at *3 (N.D. Ill. Dec. 2, 2003).

157. Castillo v. G&M Realty L.P., 950 F.3d 155, 173 (2d Cir.), *as amended* (Feb. 21, 2020).

158. *See* English v. BFC & R E. 11th St. LLC, No. 97 Civ. 7446(HB), 1997 WL 746444 (S.D.N.Y. Dec. 3, 1997), *aff'd sub nom.* English v. BFC Partners, No. 98-7238, 198 F.3d 233 (2d Cir. 1999) (the court rejected plaintiff's argument that, because the property owner had never opposed the open display of unauthorized works for many years, the owner should be estopped from modifying or destroying the works under VARA; the court's reasoning rested on the fact that the owner was a municipality at the time the work was created); Griffin M. Barnett, *Recognized Stature: Protecting Street Art as Cultural Property*, 12 CHI.-KENT J. INTELL. PROP. 204, 209–10 (2013) (inferring that *English* "seems to leave open the possibility that

concerns when considering that "the standard for copyright infringement does not turn on the intent of the copyist."[159]

b. Fair Use

A "fair use" argument presents another challenge to prevailing on copyright infringement claims. The Copyright Act authorizes the copying of a protected work if the following four factors, balanced together, weigh in the copier's favor:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[160]

The first and fourth factors are the most critical in this analysis.[161]

While the first factor carries the presumption that use for commercial purposes is unfair,[162] if the subsequent work is sufficiently transformative, the use is more likely to be considered fair.[163] A work is considered transformative if it "adds something new, with a further purpose or different

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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").

159. MENELL ET AL., *supra* note 62, at 690; *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 n.18 (1994) (the fact that the defendant was denied permission had no bearing on fair-use inquiry); Blanch v. Koons, 467 F.3d 244, 256 (2d Cir. 2006) ("We are aware of no controlling authority to the effect that the failure to seek permission for copying, in itself, constitutes bad faith."); Eldar Haber, *Copyrighted Crimes: The Copyrightability of Illegal Works*, 16 YALE J.L. & TECH. 454, 491 (2014) (arguing for less protection of illegal works but recognizing that graffiti artists should still retain the benefits of copyright law).

160. 17 U.S.C. § 107.

161. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985); *Campbell*, 510 U.S. at 578–79; *What Is Fair Use?*, COPYRIGHT ALL., https://copyrightalliance.org/faqs/what-is-fair-use [https://perma.cc/8WSJ-JK5B].

162. *Harper & Row*, 471 U.S. at 562 ("The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.").

163. *Campbell*, 510 U.S. at 579.

character, altering the first with new expression, meaning, or message."[164] Because an advertisement or product design featuring a mural arguably changes the message of the artwork into a message about a product, this may be sufficient to weigh in the corporate infringer's favor.[165] Even though commercialization is exactly what the artist sought to avoid, this very conduct could support the legality of the defendant's conduct.

Even if the secondary use is not found to be transformative, a finding that it does not curtail the market of the original work under the fourth factor might defeat the claim. Recall that the purpose of intellectual property is to incentivize creation by affording the creator with profitable rights.[166] Comporting with utilitarian notions, "copyright law has historically limited artists' protection to only economic rights,"[167] and its focus on the prospect of monetary gain looks more favorably on paid works over unpaid endeavors.[168] Considering that graffiti artists often do not market their works, the advertiser takes nothing from the street artist's *legally* protected interest. However, this factor does recognize that the original creator has a right to the works' derivative market, or in simpler terms, to license the use of the work to another.[169] Yet, if the street artist patently refuses to perform commissioned murals, then no such derivative market exists to curtail. And, again, the infringer prevails.

The remaining two factors do not provide much consolation or clarity. The second factor weighs in favor of the original creator if the work is creative as opposed to factual. This distinction is premised on the notion that facts are in the public domain, and copyright should not confer a monopoly on factual

164. *Id.*

165. Reply in Support of Defendant's Motion to Dismiss at 3, Kulig v. Aldo Grp., No. 2:19-CV-01181-SVW-FFM (C.D. Cal. June 24, 2019) ("Defendant has transformed the work by changing the expression from a mural presumably about love to a photograph about fashion.").

166. *See supra* notes 61–64 and accompanying text.

167. Burtin, *supra* note 57, at 1021.

168. Assaf-Zakharov & Schnetgöke, *supra* note 70, at 136.

169. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 48 (2d Cir. 2021) ("This analysis embraces both the primary market for the work and any derivative markets that exist or that its author might reasonably license others to develop, regardless of whether the particular author claiming infringement has elected to develop such markets.").

information.[170] In this context, the copied street art is indisputably creative, but it is plausible that a court may extend this logic and find fair use because the original graffiti work is already available to the public. Finally, if the amount of the artwork used is unsubstantial with respect to the total advertisement, the third factor also weighs against a finding of infringement.[171]

As demonstrated, the fair use analysis is firmly grounded in utilitarianism, leaving little room for the artist's personal interest in ensuring that the artwork preserves its intended noncommercial purpose.[172] Although no decisions addressing a fair use argument in the context of graffiti infringement have been rendered to date,[173] a persuasive attorney may very well lead the court to find that the totality of the analysis weighs in favor of their corporate client.

2. Visual Artists Rights Act

VARA represents the legislature's departure from the traditional utilitarian perspective, providing authors of visual art with moral rights, which "are best described as rights of personality."[174] The United States incorporated this amendment to the Copyright Act in 1990 to adhere to the Berne Convention's international copyright standards.[175] Intended to protect an artist's reputation, VARA grants some artists with rights of attribution and integrity.[176] Attribution rights ensure that the author is accurately represented, and integrity rights

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170. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985) ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.").

171. Peroff & Saunders, *supra* note 48 (advising companies to "only use a small portion of the artwork so that it is not prominently displayed in the ad campaign" in order to support a fair use defense).

172. *See supra* notes 90–92 and accompanying text.

173. Retailer Aldo raised a fair use defense in response to an artist's copyright infringement claim because the retailer posted a photograph of a model standing in front of the artist's mural on social media. Complaint, Kulig v. Aldo Grp., No. 2:19-CV-01181-SVW-FFM (C.D. Cal. Feb. 15, 2019); Reply in Support of Defendant's Motion to Dismiss at 3, Kulig v. Aldo Grp., No. 2:19-CV-01181-SVW-FFM (C.D. Cal. June 24, 2019). However, the artist later voluntarily dismissed the claim. Notice of Voluntary Dismissal, Kulig v. Aldo Grp., No. 2:19-CV-01181-SVW-FFM (C.D. Cal. Feb. 21, 2020).

174. TAD CRAWFORD, LEGAL GUIDE FOR THE VISUAL ARTIST 69 (2010).

175. KWALL, *supra* note 91, at 27–28.

176. 17 U.S.C. § 106A(a).

"allow[] artists to protect their works against modifications and destructions that are prejudicial to their honor or reputations."[177]

As discussed in Part I, the decision in *Castillo* is the greatest legal success for street artists insofar as it is the first case of precedential value to recognize their legal rights under VARA.[178] The dispute in *Castillo* centered around a property owner whitewashing graffiti walls that hosted contributions from street artists around the world, totaling over 10,000 works over the course of its existence.[179] The property owner invited these artists to create at the site under rental agreements but later decided to destroy the building to build luxury apartments.[180] Located in New York City, and colloquially known as "5Pointz," the site captured an audience of thousands, including "daily visitors, numerous celebrities, and extensive media coverage."[181] The Second Circuit first concluded that "a work is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community," and ultimately held that graffiti art can qualify as works of recognized stature subject to VARA protection.[182]

Although the decision in *Castillo* was a breakthrough in the law's recognition of graffiti as artwork, it is important to highlight two of its paramount limitations. First, the most crucial is the high bar set for works to qualify as "recognized stature," requiring the artist to show that the art gained substantial recognition from either the art world or the community, which often requires the plaintiff to present expert testimony or "substantial evidence of non-expert recognition" on its behalf.[183] Most street art under VARA would not be considered works of "recognized stature," and presenting supportive expert testimony is virtually impossible and prohibitively expensive. In fact, only twenty-eight of the forty-nine works at issue in *Castillo* were found to achieve "recognized

177. H.R. REP. NO. 101-514, pt. 1, at 6915 (1990).

178. *See supra* notes 51–56 and accompanying text.

179. Castillo v. G&M Realty L.P., 950 F.3d 155, 162 (2d Cir.), *as amended* (Feb. 21, 2020).

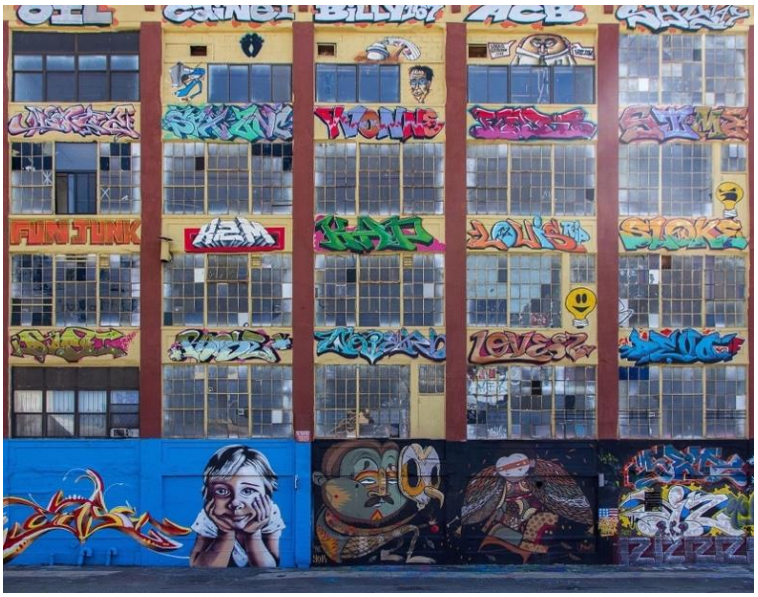
180. *Id.*

181. *Id.*

182. *Id.* at 166.

183. *Id.*; *see also* Kaur, *supra* note 1, at 10. The "recognized stature" element applies only to the destruction of a work of visual art. 17 U.S.C. § 106A(a)(3)(B).

stature," even with such evidence.[184] VARA therefore reflects the legal system's "attitude toward non-compensated creativity: we can only know it is art and not nonsense after it has gained commercial value and social recognition."[185] *Castillo* further "demonstrates the inadequacy of copyright tools in the context of graffiti, their inability to capture the real value of the works, and their significance beyond money."[186] Second, the Court also reinforced the notion that illegal graffiti may not be copyrightable by praising the plaintiffs for acting in accordance with the law.[187]



5Pointz prior to the destruction, photographed by P. Lindgren.[188]

While VARA's theoretical underpinnings are aptly fit to graffiti,[189] it potentially has no application in the context of

184. *Castillo*, 950 F.3d at 163.
185. Assaf-Zakharov & Schnetgöke, *supra* note 70, at 137.
186. *Id.* at 133.
187. *Castillo*, 950 F.3d at 173.
188. *5 Pointz*, WIKIPEDIA, https://en.wikipedia.org/wiki/5_Pointz [https://perma.cc/MKK7-YK22].
189. *See* discussion *supra* Section II.B.1.

commercial infringement disputes.[190] This assumption is drawn from the text of the Act itself, which expressly provides that "any such *reproduction*, . . . or other use of the work is not a destruction, distortion, mutilation, or other modification."[191] Moreover, VARA does not extend protection to "artwork that is illegally placed on the property of others, without their consent, when such artwork cannot be removed from the site in question."[192] Even if the copying of illegal graffiti did fall within the Act's ambit, a fair use argument is still applicable.[193] The use might be found legally "fair," but the artist may still find it objectionable on the grounds that it is "prejudicial to their honor or reputation[]."[194] Although VARA's goal was to recognize moral rights under copyright law, "VARA's excessive limitations have impeded its ability to truly achieve that goal."[195]

B. Trademark

As a final alternative, some graffiti artists turn to trademark law. Codified in the Lanham Act, trademark law protects "any word, name, symbol, or device, or any combination thereof" used in commerce to identify or distinguish goods or services from other competitors.[196] Simply put, to receive trademark protection and launch an infringement action, the

190. However, two pending cases involve graffiti artists raising VARA claims for commercial misappropriation, one involving a mural aired in a grocery store's commercial, see Complaint, Williams v. Hy-Vee, Inc., No. 2:19-CV-06671 (C.D. Cal. Aug. 1, 2019), and the other involving the use of a graffiti artist's tag and design in a clothing line collaboration between Walmart and Ellen DeGeneres, see Complaint, Rivera v. Walmart, Inc., No. 2:19-CV-06550 (C.D. Cal. July 29, 2019). These artists claim reputational damage in violation of VARA. Sara Osinski, *Commercial Misappropriation: Where Do Street Artists Draw The Line?*, CTR. ART L. (Apr. 14, 2020), https://itsartlaw.org/2020/04/14/commercial-misappropriation-where-do-street-artists-draw-the-line/#post-45918-footnote-ref-3 [https://perma.cc/LF2A-HXHU].

191. 17 U.S.C. § 106A(c)(3) (emphasis added); *see also* KWALL, *supra* note 91, at 28 ("VARA also specifically excludes protection for reproductions of works, and fails to provide any remedy when works are used in a context found objectionable or distasteful by the author.").

192. English v. BFC & R E. 11th St. L.L.C., No. 97 Civ. 7446 (HB), 1997 WL 746444, at *4 (S.D.N.Y. Dec. 3, 1997), *aff'd sub nom.* English v. BFC Partners, No. 98-7238, 198 F.3d 233 (2d Cir. 1999).

193. *See* 17 U.S.C. §106A.

194. H.R. REP. NO. 101-514, at 6915 (1990).

195. Burtin, *supra* note 57, at 1033.

196. 15 U.S.C. §§ 1051, 1127; *see also* CRAIG NARD ET AL., THE LAW OF INTELLECTUAL PROPERTY 2 (2d ed. 2008).

mark must be used in interstate commerce in a manner that could create confusion among consumers.[197] The Act seeks to promote fair trade practices, give consumers ease in finding satisfactory products, and protect the trademark holder's investments in identification measures.[198]

"False designations of origin" is the most applicable cause of action under the Lanham Act, which holds parties liable for selling products using another's trademark in a false or misleading way, and:

> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities.[199]

The subject matter of trademark law covers those elements of graffiti art that are unprotectable under copyright.[200] Because street artists use "tags" and unique designs to distinguish their works from another's,[201] it would seem that trademark law would provide an avenue of relief because the use of graffiti in commercial endeavors may lead onlookers who recognize the tag to believe that the artist is affiliated with or endorses the product. Thus, the unauthorized use of street art to boost the images of large brand names can create a high "likelihood of confusion by consumers as to the sponsorship or association of these products."[202]

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197. Danielle Crinnion, *Get Your Own Street Cred: An Argument for Trademark Protection for Street Art*, 58 B.C. L. REV. 257, 266 (2017).

198. NARD ET AL., *supra* note 196, at 19.

199. 15 U.S.C. § 1125(a)(1).

200. *See* 37 C.F.R. § 202.1 ("[W]ords and short phrases such as names, titles, and slogans . . . mere variations of typographic ornamentation, lettering or coloring" are not copyrightable); Seay, *supra* note 45, at 84 ("Moreover, in the graffiti world, tags are viewed as signatures. In that respect, many tags would be considered too utilitarian to warrant copyright protection.").

201. Roundtree, *supra* note 8, at 963–64.

202. Crinnion, *supra* note 197, at 270–71. However, in a string of lawsuits filed by a graffiti artist for the use of his graffiti tag, one court ironically rejected a graffiti artist's claim because the graffiti tag was not "widely disseminated," despite the artist's involvement in six lawsuits against separate entities in the same court. Gayle v. Villamarin, No. 18 Civ. 6025 (GBD) (GWG), 2021 WL 2828578

However, the barriers to prevailing on an infringement suit under the Lanham Act are no less challenging than under the Copyright Act. Trademark law does not extend protection to authorial misattribution,[203] and courts are reluctant to protect art under trademark law because it is considered the province of copyright.[204] Even if a tag is found protectable, the holder must then show that the mark is used in commerce and is distinctive.[205] Because "there can be no trademark absent goods sold" across state lines,[206] the vast majority of graffiti artists are precluded from bringing a trademark claim as they often do not put products with their artwork on the market. Even though graffiti tagging is a form of artistic branding, "its connection to non-commercialization creates challenges for street artists claiming trademark rights."[207]

Trademark law further exemplifies intellectual property's preference for those with easily ascertainable economic interests. For instance, in *Tiermy v. Moschino S.p.A.*, "world-renowned graffiti artist" RIME's work had been featured in prominent museums and galleries, commissioned by Disney, and used in a footwear-line collaboration with Adidas and Converse.[208] These facts weighed in RIME's favor because they demonstrated extensive use of the mark in commerce, and the district court denied the defendant's motion to dismiss the action.[209] By contrast, in *Gayle v. Hearst Commc'ns, Inc.*, the court dismissed the less-renowned graffiti artist's lawsuit against the owner of Elle Magazine for using his trademark "Art We All" in their photograph, bluntly stating that the artist presented no allegation "to suggest that the [mark] has any significance to consumers," even though Gayle had sold goods

(S.D.N.Y.), *R. & R. adopted*, No. 18 Civ. 6025 (GBD) (GWG), 2021 WL 4173987 (S.D.N.Y. Sept. 14, 2021).

203. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003) (holding that trademark law does not extend to the protection of authorial attribution); Lastowka, *supra* note 86, at 77 ("[T]rademark law after *Dastar* cannot provide a remedy for authorial misattribution.").

204. Crinnion, *supra* note 197, at 273.

205. 15 U.S.C. § 1051(a)(3); Time, Inc. v. Petersen Pub. Co., 173 F.3d 113, 117 (2d Cir. 1999) ("A mark is entitled to protection when it is inherently distinctive.").

206. Am. Express Co. v. Goetz, 515 F.3d 156, 161 (2d Cir. 2008) (per curiam).

207. Crinnion, *supra* note 197, at 259.

208. No. 215-CV-05900-SVW-PJW, 2016 WL 4942033, at *1 (C.D. Cal. Jan. 13, 2016).

209. *Id.* at *1, *5.

containing the mark, albeit on a lesser scale.[210] Notwithstanding that both plaintiffs satisfied the use in commerce requirement, these cases demonstrate how trademark law strongly prefers conferring protection to those using marks in a commercially *significant* manner, thus leaving small artists at a disadvantage.

As demonstrated, the current intellectual property framework fails to adequately serve the interests and protect the rights of graffiti artists. Copyright infringement claims will be attacked head-on with several tenable defenses, the application of VARA in this context will be questionable, and trademark claims will fail for most street artists without marketable goods bearing their works. In any event, a plausible claim must be backed by a showing of a protectable economic interest, as in copyright and trademark infringement, or a showing that the work is of such high caliber to warrant protection for noneconomic interests, as in VARA. In solving whether or how graffiti fits into the law, a look to creative alternatives is warranted.

IV. APPLYING COMMON LAW PROPERTY PRINCIPLES TO GRAFFITI

> *It is possible . . . to speak of IP as property while resisting the idea that IP is or ought to be intensively expansive across all its dimensions.*
>
> *– Robert P. Merges*[211]

This Part explores the remaining question as to whether a street artist can successfully bring a legal action under alternative claims drawn from the common law doctrines of real and personal property, including: (1) the principle of "better title" as drawn from the finders doctrine; (2) the accession principle; (3) constructive trust; (4) prescriptive easements; and finally (5) trespass to chattels. While artists will necessarily incur costs in bringing these property-based suits, such expenses

210. No. 19 CV 4699-LTS-DCF, 2021 WL 293237, at *4 (S.D.N.Y. Jan. 28, 2021) (quoting Defendant's Motion to Dismiss).

211. Robert P. Merges, *What Kind of Rights Are Intellectual Property Rights?*, *in* THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW 58 (Rochelle Dreyfuss & Justine Pila eds., 2017).

may be viewed as justifiable if the outcomes are more favorable to the artists. Approached with an open mind, they represent a variety of tenable claims that street artists could raise to assert their rights against commercial misappropriation.

A. Finders Doctrine

According to the ancient "finders doctrine," as originally stated in Old England, finding personal property does not confer absolute ownership on the finder, but instead enables the finder "to keep it all against all but the rightful owner."[212] Later adopted in the United States, *Anderson v. Gouldberg* provided some expansion on the doctrine: "When it is said that to maintain replevin the plaintiff's possession must have been lawful, it means merely that it must have been lawful as against the person who deprived him of it; and possession is good title against all the world except those having a better title."[213] Simply put, the question of ownership in finders cases is not whether the claimant has the true title to property, but which party has better title.

Although neither the artist nor the advertiser could properly be considered a "finder," the doctrine should be interpreted to more broadly convey the message that the party with a stronger interest in the property at issue, no matter how the property was obtained, should be entitled to dispossess the property from the subsequent taker, unless that taker is the true owner. In application, this would call on courts to enjoin the commercial entity from continuing to use the artwork, even if the street art was illegally created. This approach would still allow the property owner to retain their rights to remove the graffiti if they choose, a right the owner should remain entitled to, while leaving the unlawful copying dispute between the artist and the infringer.

B. Doctrine of Accession

The doctrine of accession seeks to resolve ownership disputes when one party takes personal property from another and transforms it into something fundamentally different than

212. Armory v. Delamirie (1722) 1 Strange 505, 93 Eng. Rep. 664.
213. 53 N.W. 636 (Minn. 1892).

the original object.[214] The foundational case, *Wetherbee v. Green*, provides the relevant inquiries for this analysis.[215] First, the court determines whether the party that took from the original owner acted in bad faith.[216] If so, the analysis stops, and the "transformed" object falls in the original owner's possession.[217] If the taking was involuntary or mistaken, the court will award ownership to the wrongful possessor only if it added value to the original object.[218]

In cases of commercial appropriation, the analysis could plausibly stop at the "bad faith" inquiry, but only for commissioned muralists or legal graffiti. A street artist could reasonably argue that the corporate party had actual knowledge that a work of art, even in a public setting, is not for the taking. Marketers are considered sophisticated parties that are in the business of devising advertising, and their job requires knowing the applicable legal limits.[219] The "bad faith" requirement "performs an equitable function by reducing the risk of opportunism," and in these cases would serve its purpose by eliminating the risk that a party can benefit from opportunistic acts.[220] On the other hand, illegal graffiti might not qualify for such a claim because its creation was made in "bad faith." In that case, the corporate infringer might be able to argue that it added the requisite monetary value to an otherwise unprofitable work.

C. Easements

Easements confer the right to use another's property for a particular purpose.[221] In the absence of consent, a claimant may be awarded a prescriptive easement if they can show that their use of another's property was (1) adverse, meaning without permission; (2) open and notorious, meaning visible to the ordinary observer; and (3) continuous and uninterrupted use for

214. THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 161 (Robert C. Clark et al. eds., 2d ed. 2012).

215. 22 Mich. 311 (1871).

216. *Id.* at 313–14.

217. *Id.* at 314–15.

218. *Id.*

219. *See* sources cited *supra* note 35.

220. *Accession on the Frontiers of Property*, 133 HARV. L. REV. 2381, 2385 (2020).

221. MERRILL & SMITH, *supra* note 214, at 983.

the state's statutory period,[222] commonly for ten, fifteen, or twenty years.[223]

Easements may be a plausible avenue for graffiti artists to refute an illegality defense.[224] The theory of a graffiti easement was introduced in *Cohen v. G&M Realty L.P.*,[225] the predecessor to the landmark *Castillo* decision. In the 2013 *Cohen* lawsuit, the plaintiff artists sought to advance an alternative argument that they had an easement giving them the right to use portions of the buildings to install art on the property.[226] The court quickly rejected this argument because the artists lacked a written document expressing the owner's intent to create an easement.[227] The artists used the wall space openly and notoriously and did not cease to do so for eleven years, surpassing New York's ten-year statutory period.[228] However, the use was not adverse, as the plaintiffs received verbal permission from the building owners.[229]

The idea of applying a prescriptive easement—a type of implied easement that requires no writing if the other elements are met—to these facts is instructive for others, although the *Cohen* artists would likely not have prevailed on this claim. Unlike the artists in *Cohen*, many graffiti artists create without explicit permission. More often, the law explicitly makes it illegal. Under such circumstances, artists can readily establish adverse use of the property.[230] As to the remaining elements,

222. *See*, *e.g.*, State v. Johnson, 45 A.D.3d 1016, 1019 (N.Y. App. Div. 2007). A ten-year prescriptive period applies in New York. *Id.*

223. States vary in their statutory period terms for prescriptive easement claims. Emily Doskow, *State-by-State Rules on Adverse Possession*, NOLO, https://www.nolo.com/legal-encyclopedia/state-state-rules-adverse-possession.html [https://perma.cc/YZ9D-ARDM].

224. Cloon, *supra* note 4, at 57 ("Unofficial graffiti zones or free walls are comparable to property easements."); *see also supra* Section III.A.1.a.

225. 988 F. Supp. 2d 212, 215 n.3 (E.D.N.Y. 2013); *see also* Barnett, *supra* note 158.

226. Plaintiffs' Original Complaint at 200–06, *Cohen*, 988 F. Supp. 2d 212 (No. CV13-5612).

227. *Cohen*, 988 F. Supp. 2d at 215 n.3.

228. Plaintiffs' Original Complaint at 201–04, *Cohen*, 988 F. Supp. 2d 212 (No. CV13-5612); *Johnson*, 45 A.D.3d at 1019.

229. *Cohen*, 988 F. Supp. 2d at 219; *see also* Brown v. Faatz, 197 P.3d 245, 249 (Colo. App. 2008) ("Permissive use during any or all of that period defeats a claim of adverse use, and therefore precludes the acquisition of the prescriptive easement.").

230. *See* Cloon, *supra* note 4, at 57 ("[I]f graffiti artists consistently paint on a wall without protest from the owner or the authorities, this can also create an easement.").

graffiti art is open and notorious by nature because it is painted in public spaces specifically to be seen. The only significant barrier is fulfilling the required, and often lengthy, statutory period because the work will only continue to exist until some other actor intentionally removes the work or the work is naturally degraded by the elements.

Prescriptive easements seem well suited to graffiti and could serve to refute an illegality defense because an essential element of the claim is that the use was without permission. This, moreover, would not detract from the rebellious nature of the work. A version modified to reduce, or even eliminate, the required statutory period would be appropriate for graffiti, even though it is created with the artist's knowledge that the work may only be affixed temporarily. If the policy justification for providing prescriptive easements is that "after a significant amount of time, the claimant . . . forms a personal attachment that is stronger than the true owner's attachment,"[231] it also justifies granting the street artist the right to object to uses in such a way that impairs their own rights to works intertwined with their personality.[232]

D. Trespass to Chattels

Trespass to chattels requires a showing of (1) intentional (2) use or interference with another's personal possession without justification.[233] If the use or interference is so substantial that the trespasser exercises ownership rights in committing the trespass, the plaintiff may have an option to bring the higher claim of conversion, which would entitle the plaintiff to additional damages.[234] Although trespass and conversion traditionally were not applied to intangible property, this was largely because property was mostly tangible when the rules were formulated and thus drafted to reflect this basic

231. McLean v. DK Trust, No. 06 CV 982, slip op. at 6 (Dist. Ct. Colo. Oct. 17, 2007).

232. *See supra* Section II.B.1.

233. 7 AMERICAN LAW OF TORTS § 23:28 (2021).

234. DAN B. DOBBS ET AL., THE LAW OF TORTS § 60 (2d ed. 2022).

assumption.[235] Courts are increasingly adapting the law to harmonize with modern demands.[236]

Trespass to chattels is a fitting claim in the graffiti copying context. First, showing the defendant's intent to commit the trespass "does not require a guilty or culpable intention; all that is necessary is an intention to physically interfere with the goods themselves."[237] A mistake of fact does not relieve the defendant's liability.[238] Thus, a company cannot escape the legal consequences even if it mistakenly believes that it is not wrongful to use photographs of a mural or incorporate portions thereof into mass marketing or products. Second, showing that the wrongful use or interference caused legally cognizable harm to the rightful owner may be established directly or indirectly, so long as the defendant's "misconduct was the legal cause of the harm."[239] Harm can be shown by the impairment of the plaintiff's "legally protected interest" in a thing.[240] Thus, the street artist can assert that the misconduct permanently impairs the value of the graffiti[241] because it abrogates the anti-commercial nature of the work.[242] Yet, in present application, a

235. Val D. Ricks, *The Conversion of Intangible Property: Bursting the Ancient Trover Bottle with New Wine*, B.Y.U. L. REV. 1681, 1683–90 (1991).

236. *Cf.* Steward Software Co. v. Kopcho, 266 P.3d 1085 (Colo. 2011) (holding that federal copyright law did not apply to a civil theft action concerning software code because ownership of a work was distinct from ownership of a copyright in that work).

237. Mountain States Tel. & Tel. Co. v. Horn Tower Constr. Co., 363 P.2d 175, 178 (Colo. 1961).

238. RESTATEMENT (SECOND) OF TORTS § 244 (AM. L. INST. 1965).

239. *Id.* § 217 cmt. d.

240. *Id.* § 218.

241. *See id.*

242. While the stronger argument is that the artist is deprived of two core exclusive rights in his or her copyright, the right to reproduce copies of the creation and distribute those copies to the public, this could potentially lead to the court finding that the Copyright Act preempts the trespass claim. *See, e.g.*, Healthcare Advocs., Inc. v. Harding, 497 F. Supp. 2d 627, 650 (E.D. Pa. 2007). For a state law claim to survive preemption, the artist must therefore present "proof of an act other than the reproduction, performance, distribution, or display of a copyrighted work . . . ." Long v. Cordain, 343 P.3d 1061, 1066 (Colo. App. 2014). Courts have found trespass to chattels claims not preempted by the Copyright Act. eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1072 (N.D. Cal. 2000) (finding that the Copyright Act did not preempt a trespass claim because "[t]he right to exclude others from using physical personal property is not equivalent to any rights protected by copyright"). *But see* Ticketmaster Corp. v. Tickets.com, Inc., No. CV 99-7654 HLH (BQRX), 2000 WL 525390, at *4 (C.D. Cal. Mar. 27, 2000) (finding trespass claim preempted by Copyright Act because allowing state law to protect factual compilations is contrary to the Copyright Act and finding that "entering a publicly available website" weighed against a finding of trespass).

showing of "legal harm" may present an obstacle for street artists to prevail on this type of claim. However, such harm could be readily proven if invoking the theories of personhood and distributive justice, rather than utilitarianism.

These state law claims may provide street artists with more flexibility than intellectual property laws, which are a monolithic federal creature designed to apply uniformly. Although imperfect, they provide a legal basis for justifying why street artists are deserving of cognizable rights and relief.

V. PROPOSAL: SUI GENERIS APPROACH TO STREET ART

> *Yet if they command the interest of any public, they have a commercial value,—it would be bold to say that they have not an aesthetic and educational value,—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights.*
>
> *– Justice Holmes*[243]

The examples explained in Part IV demonstrate how doctrines from real and personal property can fill the respective gaps in intellectual property law. This is not to suggest that graffiti should be strictly treated as property.[244] Rather, the idea is to adopt a sui generis approach to graffiti, drawing from the principles of real and personal property to inform the bounds of street artists' intellectual property rights.

The idea is not without precedent; the laws of intellectual property are designed to adapt with the ever-changing realities of the modern world.[245] Even the legislature has authorized such an approach time and time again. For instance, the Copyright Act's amendment to include VARA's "moral rights"

243. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 252 (1903).

244. Recognizing strict real property ownership in the wall space that graffiti art occupies would ultimately preclude graffiti art from any protection under the Architectural Works Copyright Protection Act, which provides for permissible photographing of buildings in public spaces. 17 U.S.C. § 120.

245. Cloon, *supra* note 4, at 68 ("Graffiti should receive copyright protection because copyright is a flexible and adaptable law that looks towards the future by promoting progress.").

approach marked a departure from the Act's default utilitarian basis.[246] It is further exemplified by Congress's enactment of a sui generis approach to cope with the inadequacies of copyright and patent laws in the context of semiconductor designs.[247] Courts also already analogize applicable rules determining the rights and responsibilities of joint ownership in real property to the rights of co-ownership of copyright, finding that the relationship between co-owners of copyright is that of a tenancy-in-common.[248] Most recently, the Supreme Court departed from a longstanding practice of excluding fashion from copyright by allowing protection for clothing designs.[249] Despite their differences, the laws of intellectual property and property share in common the balancing of exclusive rights with the public interest.[250]

Departing from strict conformity to intellectual property regimes and their utilitarian underpinnings is warranted in this context. Copyright's safeguards should be applied to the unauthorized copying of street art, particularly when those uses are in fundamental opposition with the artist's intent.

A. The Approach

To begin with, the registration requirement should be abandoned as a prerequisite to bringing a copyright infringement claim. Not only is this already the case with VARA claims, but this is a change that better comports with the obligations provided by the Berne Convention.[251] To be clear, registration should be encouraged when possible because it can aid the court in delineating competing ownership claims.

246. *See supra* notes 160–163 and accompanying text.

247. MENELL ET AL., *supra* note 62, at 556.

248. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.09.

249. Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002 (1986) (holding that designs of cheerleader uniforms are protected by copyright law).

250. *See* Randall Bezanson & Andrew Finkelman, *Trespassory Art*, 43 U. MICH. J.L. REFORM 245, 281–89 (2010); Cathay Y. N. Smith, *Community Rights to Public Art*, 90 ST. JOHN'S L. REV. 369, 398 (2016) ("American courts and legislatures are not constrained to obey historically based distinctions between real and personal property when such distinctions are not useful or relevant.") (quoting Note, *Protecting the Public Interest in Art*, 91 YALE L.J. 121, 130–31 (1981)).

251. *See Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WORLD INTELL. PROP. ORG., https://www.wipo.int/treaties/en/ip/berne/summary_berne.html#_ftn2 [https://perma.cc/L64B-FTMZ] ("Protection must not be conditional upon compliance with any formality.").

However, in the instances where a preexisting work is photographed or otherwise copied, relief should only depend on the presence of a licensing agreement or permission, or lack thereof, to use the work. This not only makes practical sense, but it also would ensure equal access to the law because it would remove one barrier for street artists[252] and deter corporations from freely copying works that they presume unprotected by the law.[253]

Copyright should also recognize that street artists' noneconomic interests are a legally cognizable basis for relief outside of destruction or misattribution. Such recognition aligns well with the personhood model and would appreciate that, "although intellectual works are capable of commodification, the author retains general rights of personality that survive market exploitation of the external work."[254] Thus, the moral rights conferred through VARA should be made applicable to the copying and public display or transmittance of a work that the original creator feels is repugnant to their original intent or otherwise objectionable when the original creator is not asserting economic interests.[255]

In infringement disputes involving advertisements, whether in the ordinary sense or product design, "Congress and courts should treat advertising differently from other copyrighted works because most advertising is likely created for reasons unrelated to copyright incentives and the net public benefit of an increase in advertising creation and dissemination is debatable compared to other works."[256] For this reason, courts should steer away from the traditional nondiscrimination principle and closely scrutinize any apparent copying. When it appears that the defendant used a work of graffiti in bad faith or made no attempts to obtain the artist's consent, the scale should tip strongly in favor of finding infringement.

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252. *See supra* notes 130–133 and accompanying text.

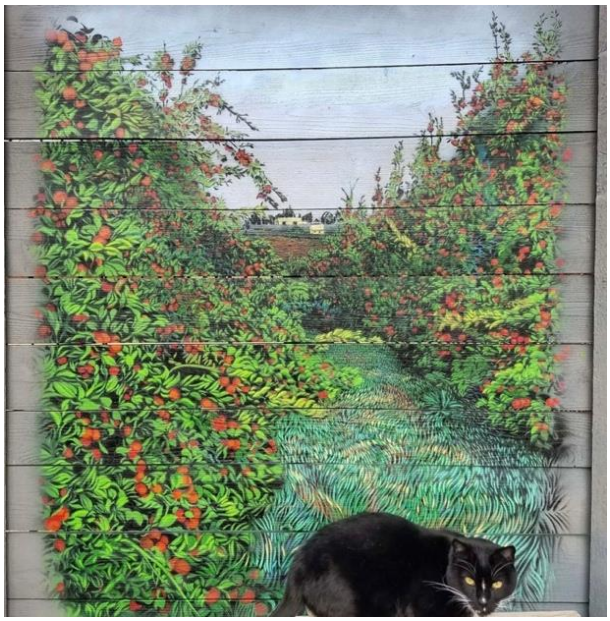
253. *See supra* note 84 and accompanying text.

254. KWALL, *supra* note 91, at 39–40.

255. *See, e.g.*, *id.* at 151 (recommending modifying the right of integrity "(1) when objectionable modifications are made to the work or a reproduction of the work or a close copy, or (2) when the original work, or a reproduction or close copy, is publicly displayed, distributed, or transmitted in a context deemed objectionable by the author – and the work is either expressly attributed to the original author, or absent attribution, still likely to be recognized as the author's original work").

256. Ramsey, *supra* note 88, at 246.

It is expected that the defendant will raise the typical defenses, including "unclean hands" and "fair use." As to the former, supposing that the graffiti work was created illegally, the artist's claim should not be barred on this fact alone. This is especially important when either the property owner or local authorities have acquiesced to the work's existence. Regardless, the illegality of the work has no bearing on the wrongful, exploitative act of copying. The likelihood of success should not hinge on the circumstances that gave rise to the creation; instead, it should depend on the *acts of the parties* to the suit.



[W]hen I'm out on the streets late at night sneaking around making #unauthorized #art it feels like the stars shine for me and the animals come out to watch and I know that in the morning the locals will be happy and the police [will] look the other way and I smile a smile that never fades from my heart.

– SMiLE – Boulder, Colorado[257]

257. @smileboulder, INSTAGRAM (Jan. 25, 2020), https://www.instagram.com/p/B7v_7qdlRF0/?utm_source=ig_web_copy_link [https://perma.cc/ALD2-RFVL].

As to the fair use argument, the first (purpose and character of the use) and fourth (the effect of the use on the market) factors should include additional considerations. The first factor should weigh even more heavily on the presumption of unfairness when the original work is put to commercial uses, notwithstanding its "transformativeness." This approach is not without its limits. For instance, the use of graffiti in other creative endeavors should continue to be analyzed under the current framework,[258] but those uses that are solely for profit maximization should be closely scrutinized with strong consideration of the artist's nonfungible interests. The fourth factor should consider the artist's noneconomic interests when no such market exists for the copier to supplant. The value of the work lies in its ability to gift the public with beauty or convey thought-provoking messages, all without the ulterior motive of pushing a product on its onlookers. More broadly, this factor should view unlawfully copied graffiti as "market-inalienable" to a degree.

Finally, injunctions, a common remedy in property law, are the preferable route to remedy the harms of graffiti infringement. The artist would need to show that they suffered irreparable harm, that such harm is not compensable with money damages, that the hardships the artist or corporation will suffer in the absence of an injunction tips in the artist's favor, and that an injunction will not disserve the public interest.[259] The street artist can readily show damage to their reputation and the integrity of their artwork, both of which are not compensable with money damages.[260] Likewise, disallowing the continued use of the unlawfully copied graffiti would not be

258. *See* Richard Chused, *Sculpture, Industrial Design, Architecture, and the Right to Control Uses of Publicly Displayed Works*, 17 NW. J. TECH. & INTELL. PROP. 55 (2019) (using graffiti art in movies is acceptable because it is predicated on creative work and talent of another). *See generally* LMNOPI v. XYZ Films, LLC, 449 F. Supp. 3d 86 (E.D.N.Y. 2020) (mural used in film); Gayle v. Larko, No. 18 Civ. 3773 (ER), 2019 WL 4450551 (S.D.N.Y. Sept. 17, 2019) (graffiti tag used in painting); Gayle v. Allee, No. 18 Civ. 3774 (JPC), 2021 WL 120063 (S.D.N.Y. Jan. 13, 2021) (same); Gayle v. Home Box Off., Inc., No. 17-CV-5867 (JMF), 2018 WL 2059657 (S.D.N.Y. May 1, 2018) (graffiti tag shown in television episode); Seltzer v. Green Day, Inc., 725 F.3d 1170 (9th Cir. 2013) (artist's illustration in music video backdrop); Fasoli v. Voltage Pictures, LLC, No. 14-C-6206, 2014 WL 7365936 (N.D. Ill. Dec. 22, 2014) (mural shown in film); Complaint at 1–2, 4–5, Kosse v. Universal Music Grp., No. 1:16-cv-00160 (E.D.N.Y. Jan. 12, 2016) (mural shown in music video).

259. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

260. *See supra* notes 222–226 and accompanying text.

detrimental to society.[261] The most challenging piece is showing that the artist will suffer more hardship than the corporate defendant that would be required to completely oust its advertising scheme or product line,[262] but this need not be the result. Injunctions would afford the artist the option and leverage to negotiate a fair licensing fee[263] if the artist finds the prospect of a financial return preferable,[264] and it also aids courts in avoiding calculating damages in an area outside of their legal expertise.[265]

Congress or the Copyright Office should publish explicit guidance to this effect. Courts would not be called on to grapple with novel situations that do not fit clearly in the current copyright design. Moreover, the legislature is responsible for crafting laws in response to modern demands, and the growing expanse of intellectual property issues necessarily requires nuance. Specifically, these institutions are being called on to take corrective measures to neutralize exploitative corporate acts.

Of course, not all graffiti artists will bring claims in a court of law due to the risk of revealing their identities. Yet, the number of claims brought recently show that some will opt-in to legal relief.[266] If these claims can prevail, then they may serve as a deterrent on these types of behaviors that are detrimental to society. Similarly, it would convey a message to corporations that these practices will not be tolerated under the law, no matter how much money is funneled into the lawsuit. Even those artists that reject copyright protection or forgo litigation would benefit from this outcome.

B. Anticipated Pushback

This Section next addresses the anticipated objections to the approach outlined above. First, some might argue that the better solution is to modify the existing intellectual property

261. *See supra* notes 84–88 and accompanying text.

262. However, the Copyright Act gives the court discretion to require destruction of the infringing articles. 17 U.S.C. § 503(b).

263. *See* Walgreen Co. v. Sara Creek Prop. Co., B.V., 966 F.2d 273 (7th Cir. 1992) (identifying negotiation as a benefit of upholding an injunction for breach of contract).

264. *See* discussion *supra* Section II.B.2.

265. *See* Chused, *supra* note 23, at 590.

266. *See supra* note 47 and accompanying text.

framework in other ways to accommodate street art, such as amending copyright's fair use factors to include a provision of attribution,[267] precluding defendants from raising an illegality defense,[268] or replacing trademark law's "use in commerce" requirement with the "fame" of the work.[269] However, any statutory modifications to this effect could have far reaching implications that these proposals are not intended to reach. For instance, including an attribution provision to the fair use factors could allow the corporation to avoid liability by associating the artist's name with the product, but the artist may not want such an association.[270] Eliminating an illegality defense might allow one to assert copyright ownership over a work that they stole from another. And using "fame" to circumvent trademark's "use in commerce requirement" presents the same dilemma as VARA's "recognized stature" requirement.[271] While these are respectable positions, the task is best accomplished through the issuance of context-specific guidance.

Some challengers may want to distinguish which graffiti works are worthy of legal protection from those which are more fairly characterizable as vandalism. Consistent with this approach, courts need not take a stance on whether an artist committed vandalism nor attempt to assign a subjective value on the work. The mere fact that a particular piece of street art was selected for use in a marketing scheme necessarily reflects its value beyond the eyes of the artist. Therefore, the answer is simple: a work worth copying is a work worth legal protection.

One might doubt the need for formal copyright protection of graffiti because it clearly thrives absent legal protection. If the constitutional command underlying copyright protection is to "promote the progress of science and the useful arts," then copyright protection is not warranted where there is no need to incentivize such creations. However, the focus of this approach

267. Lastowka, *supra* note 83, at 85 (proposing an amendment to fair use factors to add a provision of attribution).

268. Cloon, *supra* note 4, at 76 ("The illegality of that physical embodiment, then, should not affect the copyrightability of the intangible work."); *see also* Schwender, *supra* note 83, at 257 (arguing that doctrine of unclean hands should not apply to graffiti).

269. Crinnion, *supra* note 197, at 284. It is also worth noting that this article presents an interesting and valid proposal to classify street art as a charitable activity in order to circumvent the "use in commerce" requirement. *Id.* at 282–83.

270. *See supra* note 41 and accompanying text.

271. *See supra* notes 169–171 and accompanying text.

is not necessarily to incentivize creation; rather, it is to disincentivize exploitative practices that hinder this objective. To this, one could counter that social momentum to shame companies for improper graffiti copying is enough of a disincentive.[272] If the utilitarian reader needs more justification, recall the instance of graffiti artists destroying a gallery after their works were placed in the gallery for sale without their consent.[273] Albeit extreme, this exemplifies how some artists would prefer for the works to cease existing rather than enter the market without their express intent to do so. Moreover, forbidding unauthorized graffiti copying would lead to the creation of more works. Absent consent, marketers would be obliged to commission an artist to independently create a mural that embodies their vision. This outcome is not hypothetical; it is the common and proper practice in the industry.[274]

The counterargument would assert that protection confers the copyright owner with a monopoly, a result unnecessary and unproductive to the goal of building a robust domain for others to gain creative inspiration. Be that as it may, graffiti is already openly available for the public to view, and many artists welcome photographs of their works.[275] Furthermore, street artists inspire each other, and this has allowed the creative form to evolve over the years from simple tagging to elaborate murals. The idea is not to monopolize street art from any and all use; it is only to provide protection from shameless corporate endeavors.[276]

272. *See, e.g.*, Jenna Amatulli, *People Are Boycotting H&M Over Alleged Infringement of An Artist's Graffiti*, HUFFPOST (Mar. 15, 2018, 2:09 PM), https://www.huffpost.com/entry/hm-boycott-graffiti-copyright-infringement_n_5aaa835ce4b045cd0a6f5083 [https://perma.cc/ABA6-9LXY].

273. *See supra* note 102 and accompanying text.

274. *See supra* note 35.

275. Carron, *supra* note 45, at 35, 37 ("[Street a]rtists are often appreciative when their works are photographed by passerby and amateurs, but not in cases of commercial appropriation.").

276. *See supra* note 258 and accompanying text.

All that I've ever really wanted in life is the chance to inspire others with my passion and then in turn to be inspired by their passion.

– SMiLE[277]

CONCLUSION

Picasso believed that '[t]he purpose of art is washing the dust of daily life off our souls.' . . . This fits the aerosol artist to a 'T,' and our souls owe a debt of gratitude to the plaintiffs for having brought the dusty walls of defendants' buildings to life.

– Judge Block[278]

The value of public art in society is apparent to the ordinary observer. Cities invest in beautifying the urban landscape, such as carving out space for parks, fountains, and sculptures, for this very reason. Some street art is legitimately a part of this same

277. @smileboulder, INSTAGRAM (Jan. 15, 2022), https://www.instagram.com/p/CYwZfrulix7/?utm_source=ig_web_copy_link [https://perma.cc/G35Y-RQM6].

278. Cohen v. G&M Realty L.P., 988 F. Supp. 2d 212, 225 (E.D.N.Y. 2013).

effort, and it is officially recognized through the implementation of sanctioned graffiti zones.[279] It seems odd that the corporate giant has a better chance of prevailing in an infringement action when no similar efforts are made to enhance the role of consumerism in our daily lives, except for those efforts made by the company. Therefore, "[w]e must continue to close the widening gap between the enormous opportunities . . . surrounding the street art form and the embarrassing inadequacy of protective measures put into place for its artists."[280] The sanctity between the creator and the community is one deserving of legal protection.

279. *See Find Legal Graffiti Walls Around the World*, *supra* note 26 (listing locations where graffiti artists can paint with permission).

280. Karim, *supra* note 2, at 76.