

The Right to Create Art in a World Owned by Others – Protecting Street Art and Graffiti Under Intellectual Property Law

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“The people who run our cities don’t understand graffiti because they think nothing has a right to exist unless it makes a profit...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...Well they started the fight and the wall is the weapon of choice to hit them back. Some people became cops because they want to make the world a better place. Some people become vandals because they want to make the world a better *looking* place.”

Banksy¹

I. INTRODUCTION

The rising popularity of what was widely regarded, until very recently, as the underground artistic movement of graffiti and street art has unearthed a centuries old conflict that is rooted in the throes of human expression. For hundreds of thousands of years, humans have found creative, political, societal, emotional, and psychological shelter through the medium of expression known as art.² At its most basic form, art is a means of communication. Communication is a skill mostly exclusive to the human species and an inherent right, which each individual is born with, and which we have sought, and fought, throughout time to protect.³ This much is evident in the First Amendment of the Constitution, which guarantees, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of

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1. Banksy, *Wall and Piece* 9 (2005).
2. Mark Turner, *Prologue*; in *The Artful Mind: Cognitive Science and the Riddle of Human Creativity* xv (Mark Turner ed., 2006).
3. Larry Alexander, *Freedom of Expression as a Human Right*, in *Protecting Human Rights: Instruments and Institutions* 40 (Tom Campbell, et al. eds., 2003).

the people peaceably to assemble, and to petition the government for a redress of grievances.”⁴ However, when addressing the largely grey area that graffiti occupies in matters of the law, the issue is not as black and white as it seems. The art of graffiti has never occupied a more visible, controversial, and even profitable, space in contemporary society than it does right now. While the artistic movement of street art and graffiti has certainly surfaced time and again throughout history, the form of expression has become the focal point of a heavily polarized debate, given its more often than not unsanctioned nature.⁵ At the heart of the debate lies the question of whether graffiti and street art should be formally and legally recognized as forms of art, and, therefore, extended the protections enjoyed by other forms of art and related intellectual property?

At its core, graffiti breaks boundaries and defies human-engendered laws. While mainstream society may regard it as the lowest form of art, graffiti is, arguably, the most honest form of art. There is no elitism or hype; it exhibits its author’s ideas unfettered from censorship, 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. The art form is extremely versatile—a trait born out of necessity, given that graffiti has been characterized on a wide scale. Graffiti ranges from a social nuisance to innovative, to vandalism, to revolutionary, to a hidden commodity, which the world has suddenly awoken to, and presently seeks to take advantage of as profitable opportunities. One thing remains unchanged. Graffiti and street art continue to be unapologetically displayed across walls throughout the world. As graffiti swiftly becomes more visible and appreciable as a popular modern art form, communities around the world are beginning to embrace its imagery so that it essentially becomes as much a part of the communities as the walls it calls home. As communities started to demonstrate inclinations towards graffiti and an appreciation for it, companies and world markets subsequently took notice. Consequently, street art is commonly stolen from its creators, appropriated, copied and reprinted on merchandise without the artist’s authorization; it is exhibited in galleries, and even “sold at auction” for astonishing prices without the artist’s consent.⁶ As the graffiti “art form” continues to burgeon throughout the world, the movement yields what is, arguably, the fastest growing art market—a development which, in itself, is antithetical to the artistic movement, and the ideals enshrined in graffiti and street art. The question presented above grows in importance and arises frequently today: can street artists enjoy intellectual property protection for their artwork, and should they be able

4. U.S. CONST. amend I, (1791).

5. Lu Olivera, *Graffiti Is A Public Good Even As It Challenges The Law*, N.Y. Times (July 11, 2014), <https://www.nytimes.com/roomfordebate/2014/07/11/when-does-graffiti-become-art/graffiti-is-a-public-good-even-as-it-challenges-the-law> [<https://perma.cc/HJF7-ZAUH>].

6. Janus Kopfstein, *Banksy’s missing ‘Slave Labor’ Mural sold for \$1.1 million at private auction*, The Verge (June 3, 2013) <https://www.theverge.com/2013/6/3/4391522/missing-banksy-slave-labor-mural-sold-at-private-auction> [<https://perma.cc/4BRW-83TW>].

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to prevent the unauthorized copying, removal, sale, and/or destruction of their work?

Part I of this article examines the nature of the relationship between humans and street art; summarizes the historical and social implications of art as a medium of expression, and shaper of public perception; and addresses the emergence and evolution of graffiti and street art, and its modern perception.

Part II examines the multitude of legal issues surrounding the street art and graffiti art form, and summarizes relevant intellectual property laws, as well as the legal rights of the artist, the property owner, and the community.

Finally, Part III posits that the current legal landscape fails to adequately protect graffiti and street art and its artists, and addresses the challenges to enforcement of artists' rights.

II. BACKGROUND: THE EVOLUTION OF PUBLIC PERCEPTION OF STREET ART

A. ART AS A FLUID MEDIUM OF HUMAN EXPRESSION

Art is an integral part of, and is inextricably intertwined with, human existence. For example, defining art would require an answer that encapsulates the multifaceted relationship between humans and art. In doing so, the inquiry would become an exploration into history, theory, philosophy, evolution, culture, commerce, politics, society, and more. Accordingly, the implications of what evolved from a simple means of communication and expression at the advent of human history are now endless.

The term “art” is infused with a variety of meanings, including and not limited to, legal, social, cultural, and historical connotations. The Oxford dictionary defines “art” as “the expression or application of human creative skill and imagination, typically in a visual form such as painting or sculpture, producing works to be appreciated primarily for their beauty or emotional power.”⁷ *Meriam-Webster* refers to “art” as something that is created with imagination and skill and that is beautiful or that expresses important ideas or feelings.⁸ The legal definition of “art” in the context of copyright law requires the work in question to have “at least a modicum of creativity.”⁹ Indeed, courts have determined that originality is an indispensable element of artistic authorship, opining “[one] who has slavishly or mechanically copied from others may not claim authorship.”¹⁰ Imagination, skill, creativity, originality, aesthetics, beauty, and the intent or the desire to communicate, or express ideas or emotions, are all common themes of artistic inclinations. The

7. *Art*, The English Oxford Living Dictionary, <https://en.oxforddictionaries.com/definition/art> [<https://perma.cc/KMZ9-7T7K>] (last visited Aug. 30, 2019).

8. *Art*, *MERRIAM-WEBSTER DICTIONARY*, <https://www.merriam-webster.com/dictionary/art> [<https://perma.cc/ZPG6-RF2C>] (last visited Aug. 30, 2019).

9. *Feist Publ'n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

10. *Sherry Mfg. Co. v. Towel King of Fla., Inc.*, 753 F.2d 1565, 1568 (11th Cir. 1985).

association of these connotations with the term “art,” has facilitated the shaping and molding of public perception regarding which types of art are acceptable and desirable, and which types of art are not acceptable, or are of a so-called lower form.

As time progressed, so did human development, artistic capabilities, and the desire to manifest expression and ideas in a way that was captured and fixed for a period of time. The genesis of this history is demonstrated by Paleolithic¹¹ etchings and paintings of bison, horses, bulls, and human figures on cavern walls in Altamira, Spain and Lascaux, France.¹² The history of art is, thus, often related as a chronology of works created as time progressed, or artistic movements throughout the world. The Medieval era saw the rise of Byzantine art, Romanesque art, and Gothic art that was dominated by religious references and the expression of biblical truths at the insistence of the church.¹³ There was no need to depict the reality of the material world, where man was born into a corporeal state of sin.¹⁴ From the 14th to the 17th century, the Renaissance gave rise to Baroque art, which retained notes of past art forms’ religious devotion in its theatrical, and, arguably, melodramatic depiction of religious grandeur, while allowing a return to the reality of the material world, in its exploration of a new life-like or naturalist style of painting landscapes, flowers, and animals.¹⁵ Baroque artistry also exemplified “easel-art”, a form of “genre-painting” of pictures, that depicted imagery such as “narratives”, or situations and scenes of everyday life, or “still-life.”¹⁶ The 18th and 19th century were even more indicative of a movement towards realism in art forms, as demonstrated by Neoclassicism and Romanticism.¹⁷ Romantic art specifically celebrated intense emotion, such as passion, or horror as an authentic source of aesthetic experience. Moreover, Romantic art highlighted individuality and subjectivity as a reaction to the dominance of logical thought, and the scientific rationalization of the world by the Industrial Revolution and the Enlightenment.¹⁸ The advent of the Impressionist art¹⁹ movement paved the way for Modern art in the late 19th century, and for all subsequent 20th century artistic movements, including

11. *Paleolithic*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/Paleolithic> [<https://perma.cc/MR55-JE9U>] (last visited Aug. 30, 2019) (defining “paleolithic” as “of or relating to the earliest period of the Stone Age characterized by rough or chipped stone implements”).

12. *Brief History of Cave Paintings*, Beacon Learning Center (Jan. 2004), www.beaconlearningcenter.com/documents/1137_01.pdf [<https://perma.cc/E5XR-XRQW>].

13. Leslie Ross, *Medieval Art: A Topical Dictionary* xv (Greenwood Press 1996).

14. *Id.*

15. *Baroque Art*, Encyclopedia of Art History, <http://www.visual-arts-cork.com/history-of-art/baroque.htm> [<https://perma.cc/6JNX-GYQN>].

16. *Id.*

17. Cybele Gontar, *Neoclassicism* Essay in *Hallbrunn Timeline of Art History*, The Met (Oct. 2003), https://www.metmuseum.org/toah/hd/neoc_1/hd_neoc_1.htm [<https://perma.cc/NCA4-BKBY>].

18. Rebecca Seiferle, *Romanticism* The Art Story: Modern Art Insight (Sept. 25, 2017), <http://www.theartstory.org/movement-romanticism.htm> [<https://perma.cc/BY6G-BC32>].

19. Margaret Samu, *Impressionism: Art and Modernity*, Essay in *Hallbrunn Timeline of Art History*, The Met (Oct. 2004), https://www.metmuseum.org/toah/hd/imml/hd_imml.htm [<https://perma.cc/TYN3-8ET9>] (last visited Jun. 17, 2019).

Expressionism, Bauhaus, Cubism, Dadaism, Minimalism, Pop art, and Post-modernism.²⁰

The similarities between the aforementioned art forms are few and far between. Yet, it is not unreasonable to characterize each movement as an artistic reaction to cultural, political, religious, and/or social norms. It is exceedingly important to note that significant historical transitions were accompanied by a reactionary artistic movement, or a paradigm shift in society's appreciation of art.²¹ These transitions in artistic movements and shifts in societal appreciation have weighty implications in reflecting the kinds of art forms that are publicly revered, celebrated, and considered as acceptable art at a particular point in time. Upon returning to an examination of the nature of the relationship between humans and art, it becomes evident that the relationship is neither stagnant, nor subject to pressure to yield art in a single acceptable or desirable form.²² Rather, the relationship between humans and artistic expression is consistently in flux, as public perception and attitudes evolve, in accordance with, and as a reaction to, the realities of the material world.

B. GRAFFITI AND STREET ART: HISTORY AND MODERN PERCEPTION

As discussed in the previous section, public perception is paramount to the legitimacy and recognition of an artistic movement. Works that hail from any one of the artistic movements are lauded as transformative or revolutionary pieces. The historical recognition and public appreciation of the artistic movements discussed in Section A of this article should be compared and consolidated with this Section's consideration of the history and public perception behind graffiti and street art. How do graffiti and street art fit into the evolution of the public's perception of what constitutes acceptable and desirable art? Accordingly, this Section examines whether contemporary attitudes are suggestive of a public appreciation for graffiti and street art as desirable or acceptable modes of modern expression.

Similar to the examination of the term, "art," the term, "graffiti," can be defined both broadly and narrowly. Graffiti is an artistic movement that encompasses many subsets and styles. It can be created through spray-paint, stencils, painting with brushes and rollers, stickers, posters, mosaics, lighting installations, and many other materials.²³ Street art is a subset of graffiti that includes "stickers, wheat-paste posters, stenciled paintings, downloaded

20. *List of art and design movements of the 20th Century*, Encyclopaedia Britannica (2019), <https://www.britannica.com/topic/list-of-art-and-design-movements-of-the-20th-century-2004700> [<https://perma.cc/86RD-5T8G>].

21. The Metropolitan Museum of Art, *Europe In The Age of Enlightenment And Revolution*: Vol. 7 9 (John P. O'Neill et al. eds., 1987).

22. Amei Wallach, *ART: Is It Art? Is It Good? And Who Says So?*, N.Y. Times (Oct. 12, 1997), <https://www.nytimes.com/1997/10/12/arts/art-is-it-art-is-it-good-and-who-says-so.html> [<https://perma.cc/97DF-7VAV>].

23. Celia Lerman, *Protecting Artistic Vandalism: Graffiti and Copyright Law*, 2 N.Y.U. J. Intell. Prop. & Ent. L. 295, 298-99 (2013).

images from the Web, as well as free-hand graffiti.”²⁴ Street art is “often purely artistic,” meaning that it is “an aesthetic work that [the] general public is able to interpret.”²⁵

Unlike its predecessors which were primarily captured on canvas, graffiti works can be found in a multitude of public spaces, especially those promising significant public exposure, such as trains, subways, streets, and buildings.²⁶ Higher public exposure affords higher visibility to the artists’ works. However, artists also seek out public spaces that are not entirely physically accessible, so as to prevent the removal or destruction of their work.²⁷ Certainly, the versatility of graffiti and street art is indicative of the art forms’ occupation of a grey area in society. Specifically, graffiti occupies the grey space between being a form of street art, which is celebrated, and being vandalism, which involves the desecration or destruction of public or private property²⁸.

For example, a child picking up a spray gun and writing a few words, or drawing a scribble on a public wall, would constitute vandalism, according to the law, public authorities, and to some members of the public. However, when a graffiti artist uses his talent to turn an ordinary wall into a large canvas housing a mural,²⁹ it is not automatically labeled vandalism; rather, the public may recognize it and even celebrate it as street art. To some extent, both the child and the artist are engaging in an act of vandalism. However, it is public perception that elevates a petty crime to a work of art.

Due to the glaring disparity in the reception of the same artistic expression, it becomes exceedingly difficult to pinpoint what constitutes socially acceptable graffiti to the public. Some individuals may refer to all graffiti as vandalism, holding fast to the legal notion that if it is done without the building owner’s permission, it is illegal and destructive³⁰. However, public perception, in large part, has evolved to appreciate the nuances of graffiti, so that it is regarded as a street art form that is, worthy of protection from removal or appropriation or subsequent vandalism³¹. The term “street artist” has also evolved, because street art is often far more detailed and artistic than

24. Lerman, *supra* note 23.

25. Lerman, *supra* note 23.

26. *Decorating Hallowed Ground With Street Art*, CBS News (Sept. 16, 2018), <https://www.cbsnews.com/news/decorating-hallowed-ground-with-street-art/> [https://perma.cc/97DF-7VAV].

27. Bill White, *Graffiti Punks In High Places Spur Curiosity*, The Morning Call (Aug. 7, 2004), <https://www.mcall.com/news/mc-xpm-2004-08-07-3557464-story.html> [https://perma.cc/9VB3-53WN].

28. 36 C.F.R. § 2.31 (2010).

29. *Murals*, Clarion Alley Street Project, <https://clarionalleymuralproject.org/murals/> [https://perma.cc/V7HZ-MKGV].

30. Benjamin Walker, *Graffiti Psychology: Why Vandals Strike*, Clean Link (Feb. 2, 2004), <https://www.cleanlink.com/cp/article/Graffiti-Psychology-Why-Vandals-Strike-1131> [https://perma.cc/848E-Y965].

31. Shaunacy Ferro, *Can Graffiti Be Good For Cities?*, Fast Company (Jan. 27, 2014), <https://www.fastcompany.com/3022524/can-graffiti-be-good-for-cities> [https://perma.cc/5LD5-VPBX].

the average vandal's graffiti scribble.³² Where one might associate graffiti with a spray-painted tag or moniker, street art is often far more in-depth, in that it makes social or political commentary.³³

The origins of graffiti art, like those of so many other³⁴ artistic movements throughout history, are rooted in the human urge to create and express. When compared with its earlier predecessors and their historical reception, graffiti is, arguably, one of the fastest growing artistic movements.³⁵ It has drawn art critics' comparisons to the Cubist revolution³⁶ and is widely regarded as the 21st century heir to Pop Art.³⁷ In keeping with the Modern art movement of the 20th century, graffiti entered the scene as the 1960s came to an end.³⁸ While the first "credited" graffiti writing occurred in North Philadelphia, the emergence of graffiti as a modern form of street art was seen in New York in the 1970s.³⁹ Early forms of graffiti consisted mostly of "tags," or simple acts of writing one's name, or pseudonym, on a wall, using spray paint or markers.⁴⁰ Soon thereafter, tagging of⁴¹ subway trains emerged;⁴² then bridges; then buildings, eventually resulting in some of the most iconic and mural-covered walls to have come out of the early graffiti and street art scene.⁴³ The graffiti that was created also started to evolve, and become more unique, with artists developing their techniques, individual styles, and flair.⁴⁴ As the hip-hop music scene emerged, it became linked with graffiti and street art culture.⁴⁵ Street artist Fab 5 Freddy enjoyed increased attention when he was "name-checked"⁴⁶ in the hit song *Rapture*, by Blondie in 1981, and upon appearing in the music video for the song,

32. Nicole Martinez, *Street Art or Vandalism*, art law journal from artpreneur (Jan. 25, 2017), <https://artlawjournal.com/street-art-or-vandalism/> [https://perma.cc/4UQT-Y2EA].

33. *Id.*

34. The Metropolitan Museum of Art, *supra* note 21.

35. Carlo McCormick, *Trespass: A History Of Uncommissioned Urban Art 10* (Ethel Seno ed., 2010) (stating that "never before have we seen public art reach such a scale as we now see with the works of Blu, or become so pervasive as we see with Shepard Fairey's, or so copied as that of Banksy, or so delicate as that of Swoon").

36. Magda Danysz & Mary-Noëlle Dana, *From Style Writing To Art: A Street Art Anthology 18* (2011); *see generally* Anna Waclawek, *Graffiti and Street Art* (2011) (surveying graffiti's evolution).

37. Lisa Gottlieb, *Graffiti Art Styles: A Classification System And Theoretical Analysis 49* (2008).

38. 'The History of American Graffiti.' From Subway Car to Gallery, PBS (Mar. 31, 2011), <https://www.pbs.org/newshour/arts/the-history-of-american-graffiti-from-subway-car-to-gallery> [https://perma.cc/B6Q7-VW7H].

39. Steve Grey, *20th Century Graffiti – The Rise of Graffiti Art*, *widewalls* (Mar. 19, 2015), <https://www.widewalls.ch/20th-century-the-rise-of-graffiti/> [https://perma.cc/6YF2-3HZX].

40. Norman Mailer & Jon Naar, *The Faith of Graffiti 14-15* (2009).

41. *Id.*

42. *Id.*

43. Grey, *supra* note 39.

44. *Id.*

45. Cab, *Graffiti And Hip Hop*, https://csdt.rpi.edu/culture/legacy/subcult/graffiti/Graffiti_and_Hip_Hop.html [https://perma.cc/QMY3-9WSF] (last visited Aug. 30, 2019).

46. When a street artist's name or tag line is referenced in a hit song, *Namecheck*, Dictionary.com, <https://www.dictionary.com/browse/namecheck> [https://perma.cc/6DLL-KFZB] (last visited Sept. 10, 2019).

alongside world-renowned street artist, Jean-Michel Basquiat.⁴⁷ The song would become the first so-called hip-hop music video to be aired on *MTV*—a testament to the symbiotic relationship between graffiti art and hip-hop music.⁴⁸ The two formerly underground art forms established an urban, cultural camaraderie of sorts: one influencing the other.⁴⁹ The rise in media attention surrounding the hip hop music scene also led to the graffiti scene being labeled as encouraging crime and fear, a clear departure from the artistic intentions behind the art forms.⁵⁰

These humble beginnings and less than positive connotations with graffiti and street art were not confined to American borders either. The emergence of graffiti occurred throughout the world and its controversial reception followed closely behind. In London, UK anarcho-punk music band Crass, featured stencil-like images on their releases, and undertook a graffiti stencil campaign on the London Underground system in the late 1970's and early 1980's, touting popular anti-war, anarchist, feminist and anti-consumerist messages.⁵¹ Similarly, Amsterdam experienced a debut of graffiti that became an important part of the punk music scene and, specifically, yielded a magazine called *Gallery Anus* to document the graffiti work throughout the city.⁵² The streets of metropolitan cities in Spain,⁵³ including Madrid and Barcelona, also bore witness to graffiti and street art forms, in addition to public spaces in Berlin, Germany⁵⁴ and Paris, France.⁵⁵

Unchecked by local laws and prohibitions, graffiti and street art gained a foothold in the modern art world, affording even more visibility to culturally-appreciated works, such as those by Keith Haring and Jean-Michel Basquiat.⁵⁶ Indeed, since its initial explosion onto city walls and subway cars in the 1970s, the increasing popularity of graffiti as an art form has garnered commercial success for street artists.⁵⁷ Graffiti and street art now maintain a regular and influential presence in modern pop culture, and the

47. Grey, *supra* note 39.

48. *Id.*

49. Cab, *supra* note 45.

50. Kara-Jane Lombard, *Art Crims: The Governance of Hip Hop Graffiti*, 17 J. Cult. Res. 255, 255-278 (2012).

51. Grey, *supra* note 39.

52. Grey, *supra* note 39.

53. Laurent Jacquet, *20 Spanish Street Artists You Absolutely Need To Know*, StreetArt360 (May 30, 2017), <https://streetart360.net/2017/05/30/20-spanish-street-artists-you-absolutely-need-to-know/> [<https://perma.cc/4LNJ-VNNP>].

54. Katherine Sacks, *A tour of Berlin's most awesome street art*, Thrillist (Jan. 21, 2014), <https://www.thrillist.com/entertainment/berlin/berlin-s-best-graffiti-a-tour-of-berlin-s-most-awesome-street-art> [<https://perma.cc/AVF5-RV9T>].

55. The Alternative Parisian, *The Underground Paris: Street Art, Graffiti & Culture*, Under-ground Paris (Nov. 16, 2015), <http://undergroundparis.org/>.

56. Lisa Wainwright, *Jean-Michel Basquiat*, Encyclopedia Britannica, <https://www.britannica.com/biography/Jean-Michel-Basquiat> [<https://perma.cc/9JFH-XLHD>] (last visited Aug. 30, 2019).

57. Eileen Kinsella, *Inside the Craze for Kaws: How a New Jersey Graffiti Artist Achieved Art-Market Domination Without Following Any of the Rules*, Art Net News (Mar. 25, 2019), <https://news.artnet.com/market/inside-the-craze-for-kaws-1495774> [<https://perma.cc/6HPG-T3MB>].

contemporary art world.⁵⁸ Galleries⁵⁹ throughout the world regularly showcase graffiti as artwork.⁶⁰ In addition, auctioneers and private collectors shell out thousands, even millions of dollars,⁶¹ for street art and artwork that incorporates stylistic elements of street art and graffiti. This presents a number of intellectual property issues, which will be discussed at length in Part II.

In keeping with many of the artistic movements of the past, graffiti and street art experienced humble beginnings as part of one underground movement, much like our predecessors and their caves.⁶² Contrary to other artistic movements, the graffiti and street art form allow artists to bypass the rigid, and relatively elitist confines of the formal art world.⁶³ Indeed, graffiti and street art provide artists with a conduit to communicate directly with the public by presenting socially or politically relevant content while at the same time beautifying the bleak sprawl of urban decay, all at no cost of admission to the viewer.⁶⁴

Accessibility by all is an inherent part of graffiti. Many street artists do not come from a socioeconomic background of privilege that often acts as a prerequisite for entry into the art world.⁶⁵ Accordingly, a street artist may penetrate the art world in a manner that does not require the usual elitist connections, gallery exposure, expensive materials, wealth, or specialized artistic training.⁶⁶ The sheer cost of oil paints, brushes, and canvases are enough to exclude a number of budding artists.⁶⁷ Instead, a street artist's work may readily be displayed on a brick wall or a street corner with the help of an aerosol spray can. Street artists also seek to make their work available to those who cannot enjoy art displayed in museums, galleries, or art shows that often charge a price of admission to fuel the capitalistic and enterprising engines of the art world. In its most honest and purest form, graffiti or street art is a defiant and public exhibition—a form of art that rallies behind anti-establishment commentary, reacts against conformity, emphasizes a

58. *Id*

59. *Banksy Laugh Now*, Moco Museum, <https://mocomuseum.com/artists/banksy/> [<https://perma.cc/H8BK-3JSM>] (last visited Aug. 30, 2019).

60. *In Miami, New Work from Hijack*, Artsy (Dec. 8, 2016, 9:03 PM), <https://www.artsy.net/article/artsy-in-miami-new-work-from-hijack-the-street-artist-son-of-mr-brainwash> [<https://perma.cc/52SH-BW8D>].

61. Kopfstein, *supra* note 6.

62. Mailer, *supra* note 40, at 11-17.

63. Evan Beard, *The Four Social Classes of the Art World*, Artsy (Nov. 13, 2018) <https://www.artsy.net/article/artsy-editorial-four-social-classes-art> [<https://perma.cc/6LAA-WMWG>].

64. *Id*

65. *Id*

66. *Id*

67. Lori Woodward, *A Simple Formula for Pricing Artwork*, ArtistsNetwork, <https://www.artistsnetwork.com/artist-life/a-simple-formula-for-pricing-artwork/> [<https://perma.cc/LD63-LYQN>] (last visited Aug. 30, 2019).

community's diversity, and seeks to express social and political truths that are unfettered by government or corporate influence.⁶⁸

Neighborhoods⁶⁹ and communities have come to acknowledge and appreciate street art and graffiti as a modern breed of artistic expression. One that is accessible, cool, and speaks to the public, unlike many other art forms, that adheres to the traditional canvas, posh gallery, and bears cost to view or purchase.⁷⁰ Modern perception embraces street art while rejecting⁷¹ other art forms on the basis of cultural relevance and the degree to which the public identifies with the art. Additionally, it is important to note that such perception is the essential nature of the relationship between people and art. The Romantic art era constituted a rebellion against the dominance of logical and scientific thought. During the Industrial Revolution, graffiti and street art represented a similar artistic reaction against conformity. These reactions highlight the desire for people to critique social and political contemporary developments through a somewhat rebellious yet accessible way. Instead of the artists' ideas being manifested on an easel or canvas, their ideas are expressed and communicated through the medium of spray paint and walls.

While viewers and street artists undoubtedly welcome the rising tide of appreciation for their art, the art form's positive reception by the modern public has, as a result, also captured the attention of global markets. Entities have turned to appropriating graffiti or street art in company ads and products in order to enhance their marketing appeal to consumers, much to street artists' chagrin. In response to the increase in capitalistic opportunities and commercial gains associated with popularized street art, a new breed of graffiti-style artists have emerged. This new wave of creativity has blossomed using artistic and stylistic elements of graffiti, and at times even appropriating graffiti and street art forms from their place on walls and placing them onto canvases, satisfying the market's growing demand for graffiti by selling the works.⁷² The recent developments all raise a great deal of artist and public concern. Accordingly, the question posed at the onset of this article resurfaces: can and should street art be formally and legally recognized as a form of legitimate art and human expression? Further, should street artists be able

68. Will Ellsworth-Jones, *The Story Behind Banksy*, Smithsonian Magazine (Feb. 2013), <https://www.smithsonianmag.com/arts-culture/the-story-behind-banksy-4310304/> [<https://perma.cc/D8F7-HB6J>].

69. Benjay Caplan, *Paint The Wall*, The New Times (Apr. 18, 2019), <http://features.miaminew-times.com/wynwood-street-art/> [<https://perma.cc/D8F7-HB6J>].

70. Annie Armstrong, *Claude Monet's Haystack Will Hit The Auction Block At Sotheby's New York In May With \$55 M. Estimate*, ARTNews (Mar. 15, 2019) <http://www.artnews.com/2019/03/15/estimated-at-55-million-claude-monets-meules-could-break-the-artists-auction-record-this-may-at-sothebys-new-york/> [<https://perma.cc/R8BB-P8JG>].

71. Scott Raybern, *Winning Bidder for Shredded Banksy Painting Says She'll Keep It*, N.Y. Times (Oct. 11, 2008), <https://www.nytimes.com/2018/10/11/arts/design/winning-bidder-for-shredded-banksy-painting-says-shell-keep-it.html> [<https://perma.cc/D8F7-HB6J>].

72. *Contemporary Art Boom Is 'Historic Change' in Art Market*, ARTMARKET.COM, (August 6, 2017), <https://artmarketinsight.wordpress.com/2017/08/06/contemporary-art-boom-is-historic-change-in-art-market/> [<https://perma.cc/6KYR-B73Z>].

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to benefit from legal protections afforded to visual artworks by intellectual property laws?

III. EVALUATION OF INTELLECTUAL PROPERTY, AND THE GREY SPACE STREET ART OCCUPIES THEREIN

A. A MOVEMENT DIVIDED: IS IT ART OR ILLEGAL VANDALISM?

Whether graffiti constitutes art or crime is a matter of great significance in the wider debate around the extent of legal protection of a street artist's work.⁷³ Norman Mailer, in his book, *The Faith of Graffiti*, was among the first to examine the origins and importance of graffiti in modern urban culture.⁷⁴ While Mailer's perception of street art as a legitimate artistic form was an unpopular view in 1974, graffiti artists have slowly begun to win the battle between those who view graffiti as art and those who consider it vandalism.⁷⁵ Critics argue that street art is a criminal act—an act of vandalism.⁷⁶ This critique hinges on the fact that most street artists do not obtain permission or authorization from property owners before placing their work onto walls.⁷⁷ Street art can be an aesthetic enhancement to a neighborhood or a city. On the other hand, many street artists neither seek nor have authorization to create their piece thereby rendering it vandalism. Both the penal code and the city administrative code of New York specifically bar the making of graffiti without “the express permission of the owner or operator” of the property.⁷⁸ New York law defines the term “graffiti” as “the etching, painting, covering, drawing upon or otherwise placing of a mark upon public or private property with intent to damage such property.”⁷⁹ This is but one example of laws that render graffiti and street art illegal, as there is no shortage of codified prohibitions against the controversial art form.⁸⁰ Other states, such as⁸¹ California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Nevada, New Jersey, New Mexico, Oklahoma, Pennsylvania, Tennessee, Utah and Washington also criminalize graffiti.⁸²

Whether graffiti is art or illegal destruction of property remains a central issue. Cities throughout the world have made headlines by addressing this

73. Martinez, *supra* note 32.

74. Mailer, *supra* note 40, at 11-14.

75. *Id.*

76. *Murals*, *supra* note 29.

77. Martinez, *supra* note 32.

78. *See* N.Y. Penal Law § 145.60 (McKinney 1992) (barring the making of graffiti without “the express permission of the owner or operator” of the property); *see also* N.Y. City Admin. Code § 10-117 (McKinney 2006) (municipal regulation, barring graffiti without the “express permission of owner or operator of the property.”).

79. *Id.*

80. *Murals*, *supra* note 29.

81. Cal. Penal Code § 594 (West 2011).

82. Ralph Lerner & Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers, and Artists* 947 (2005).

issue head on.⁸³ Los Angeles recently passed a “new murals ordinance” that makes street art legal, provided the artist or creator pays for a permit, obtains permission from the location, and publicly posts their intentions.⁸⁴ Here, the purpose behind the law is to consolidate and unify the social and legal interests of the artists, the community, and property owners as part of the city’s wider objective to celebrate the cultural diversity of its neighborhoods; to encourage civil compliance with the law, and to combat the unauthorized, illegal graffiti.⁸⁵ Similarly, the New York City government embraced a mural painted by Keith Haring, named “Crack is Wack,” after its illegal creation in a plaza in Harlem.⁸⁶ The mural, done in Haring’s signature style of thick black outlines, bright colors and intermingling, cartoon-like bodies, was painted to send a serious anti-drug message to the neighborhood and wider community.⁸⁷ The city extended protection to the mural and renamed the plaza, “the Crack is Wack Playground,” in an attempt to pay homage to the late artist’s political and social influence as a gay, anti-drugs activist, and human rights advocate.⁸⁸

In the legal arena of graffiti art, such developments are highly indicative of evolving public attitudes towards the weighty question of whether street art is art or illegal. The *legal* and authorized street artwork of artists serves as a testament to the success of implementing protective measures for street artists.⁸⁹ For instance, Shepard Fairey collaborated with renowned graffiti artist, Risk, to create a mural on Skid Row in Los Angeles. This mural, titled the “Peace and Justice Collaboration”⁹⁰ was the result of the successful implementation of protective measures for street artists. Housed in an area predominantly occupied by homeless individuals, the mural was intended to brighten the neighborhood and to make it a more pleasant place to live⁹¹.

While many artists work in conjunction with public legal objectives and laws like those adopted by Los Angeles and New York City, others thrive on the illegality of their work, and continuously cultivate public interest and anticipation, as they await the artists’ next “creative exploit.”⁹² It is undeniable that this factor of illegality is one that goes hand in hand with the artistic movement of graffiti and street art, similar to the rejection of logic and

83. Deborah Vankin, *L.A.’s mural ordinance is beginning to reveal its effects*, L.A. Times (Mar. 7, 2015), <http://www.latimes.com/entertainment/arts/la-et-cm-los-angeles-mural-restore-20150401-story.html> [<https://perma.cc/2ZPJ-8LFK>].

84. *Citywide Mural Program*, City of Los Angeles Department of Cultural Affairs, <http://culturela.org/murals/> [<https://perma.cc/TSF4-7HWV>] (last visited Aug. 30, 2019).

85. *Id.*

86. *Crack Is Wack Playground*, NYC Parks, <http://www.nycgovparks.org/parks/M208E/history> [<https://perma.cc/H4KP-FQSP>] (last visited Sept. 13, 2017).

87. *Id.*

88. *Id.*

89. Martinez, *supra* note 32.

90. Deborah Vankin, *Shepard Fairey, RISK team up again to paint a wall on L.A.’s skid row*, L.A. Times (Feb. 11, 2014), <https://www.latimes.com/entertainment/arts/la-xpm-2014-feb-11-la-et-cm-shepard-fairey-risk-skid-row-mural-20140211-story.html> [<https://perma.cc/6SAA-NLSB>].

91. *Id.*

92. *Id.*

intellectual pursuits that accompanied the Romantic artistic movement of the 18th and 19th centuries.⁹³ Artistic movements can be characterized as a reactionary force. The substantive nature of artistic expression depends on the social climate at the time. The rejection of governing law, coupled with a desire to express an individual, naked, uncensored, and unauthorized truth, is at the root of the graffiti art form. The struggle to reconcile these inherent ideals of the art form, with a contemporary legal climate, and the public's desire to protect the artwork and its artists, is one that continues to drive the central, unresolved issue of whether graffiti is art or illegal.⁹⁴ Courts continue to skirt the legal conundrum. As graffiti gains traction with the public, it may be only a matter of time before judges feel compelled to directly address the issue, balance the interests involved, and follow suit in declaring graffiti as a recognizable, legitimate, and legal form of human expression, either in full or in part.⁹⁵

B. A RISING ARTISTIC MOVEMENT: WHERE OWNERSHIP RAISES CONCERNS

As the rising tide of graffiti and street art continues to take the contemporary world by storm, the increase in attention that the artistic movement brings up concerns centered around ownership of artworks.⁹⁶ To say that the modern art market, the artists, and the public were entirely unprepared for the explosion of street art's popularity would be an understatement. For one thing, the material treatment of street art diverges from that received by other forms of artwork, given that a great deal of graffiti is created anonymously.⁹⁷ For a street artist, the act of coming forward and claiming a work as his or her own, poses as much of a potential economic benefit as it poses a risk of legal consequences.⁹⁸ It is important to recognize that any economic benefit to be derived from the sale of a removed or lifted piece of graffiti may not be realized by the artist, if the artist placed the work on the property of another.⁹⁹ Should the owner of the building on which a work appears decide to lift or remove the work and sell it, this individual is unjustly enriched at the expense of the person that created the work.¹⁰⁰ Critics may counter that building owners are entitled to profiting off a work if it sits on the owner's

93. Seiferle, *supra* note 18.

94. Olivera, *supra* note 5.

95. Martinez, *supra* note 32.

96. Alan Feuer, *G.M. Used Graffiti in Car Ad. Should Artist Be Paid?*, N.Y. Times (July 17, 2018), <https://www.nytimes.com/2018/07/17/arts/design/general-motors-graffiti-artist-copyright.html> [<https://perma.cc/KWB9-HKHU>] [hereinafter Feuer, *Graffiti in Car*].

97. *See* Banksy, *supra* note 1 (Banksy, for example, among many other street artists and graffiti artists, operates under a guise of anonymity. We do not know Banksy's true identity, much less whether he or she is one artist or a collective of artists working together.).

98. *Murals*, *supra* note 29.

99. Alexxa Gotthardt, *Banksy and Fellow Street Artists Are Refusing to Fuel the Market for Paintings Taken from the Streets*, *artsy* (Oct. 2004), <https://www.artsy.net/article/artsy-editorial-banksy-fellow-street-artists-refusing-fuel-market-paintings-streets> [<https://perma.cc/JCX7-R89S>].

100. *Id.*

property,¹⁰¹ and that any profits, realized as a result of lifting and selling the work, will go towards remedying the damage done to the individual's building or property. Yet, growing public appreciation for street art and graffiti has fostered public desire to protect street artists, and their ownership rights to the works they create.¹⁰² While a great deal of street artists never gain the fame and notoriety required to even run afoul of ownership issues presented by the removal and sale of works, street artists have a legitimate interest in the ownership of their work, as the authors or creators of said work.¹⁰³

One British street artist, Banksy,¹⁰⁴ has thoroughly capitalized—and not simply in a crude, monetary fashion—on the public's growing appreciation for modern urban culture. Banksy's street art appears to combat the homogenous nature of urban sprawl, displaying non-conforming imagery and anti-establishment messages.¹⁰⁵ No one knows who Banksy is, despite a number of hypotheses that suggest Banksy, who may have originally started as one artist, is actually a collective of street artists.¹⁰⁶ "He, she, or them"¹⁰⁷ creates street artwork under an unbroken guise of anonymity, and, consequently, has gained infamy among law enforcement officials, fame throughout the public, and a flurry of admiration and enduring desire within the contemporary art market.¹⁰⁸ Property owners whose buildings or walls have been graced with Banksy art, have hired guards to protect the art, while others have removed or lifted the art off the walls and made them available for sale, for upwards of £208,000.¹⁰⁹ It has been noted that the artist's prints, stencils, and sculptures have been removed or lifted off of their respective mediums of fixture, and sold for a combined sum of \$4.67 million in 2014.¹¹⁰ While maintaining anonymity through social media, Banksy has protested and objected, in vain, to the removal and sale of his art.¹¹¹ Given that these sales occur at the hands of the property owners, or persons who "lift" the Banksy art, it is highly unlikely that Banksy receives any sum of money for his own works. In an effort to combat secondary, unauthorized sales of his works,

101. *Id.*

102. Feuer, *Graffiti in Car*, *supra* note 96.

103. Gotthardt, *supra* note 99.

104. *See* Banksy, *supra* note 1 (While staunchly opposing the tenets and effects of capitalism and seeking to promote free, non-conforming thought, Banksy has simultaneously benefitted from the rise of his street art as a commodity in the art world.).

105. Hollis Johnson, *29 photos from Banksy's twisted 'Dismaland' theme park*, Business Insider (Aug. 21, 2015), <http://www.businessinsider.com/29-photos-from-banksys-twisted-dismaland-2015-8> [<https://perma.cc/5ER2-Z5NZ>].

106. Henri Neuendorf, *Who Is Banksy?*, Art Net News (Oct. 13, 2016), <https://news.artnet.com/art-world/who-is-banksy-we-rank-the-ten-most-plausible-theories-699059> [<https://perma.cc/L97P-C44A>].

107. Macimilian Braun, *5 Wealthiest Street Artists Who Know How To Earn Their Living*, Widewalls (Feb. 28, 2014), <https://www.widewalls.ch/5-wealthiest-street-artists/> [<https://perma.cc/7FSF-L5M3>].

108. Neuendorf, *supra* note 106.

109. *Wall painted by Banksy sells for £200,000*, DailyMail (Jan. 15, 2008), <http://www.dailymail.co.uk/news/article-508290/Wall-painted-Banksy-sells-200-000—new-owner-fork-brick-can-vas.html> [<https://perma.cc/C8XT-RSXD>].

110. Braun, *supra* note 107.

111. *Exit Through the Gift Shop* (Paranoid Pictures 2010).

where he sees none of the realized profits, Banksy has opted to sell directly to galleries and persons, all the while maintaining anonymity.¹¹² Unlike most of “its, his, or her” artist counterparts, Banksy has an estimated net worth of \$20 million.¹¹³ This sum is subject to increase over time, as the public spectacle surrounding Banksy works intensifies, the art market demand grows, and the appearance, and preservation of new Banksy works becomes rare due to law enforcement, surveillance efforts, and the likelihood that it will be removed off the streets and sold, obliterating the artist’s exhibitionist intent and ending public access to the works.¹¹⁴

On the opposite end of the spectrum from street artists who embrace the art form’s subculture roots like Banksy, lies a different, new breed of artists. As part of the new breed that emerged in response to the demand for street art and graffiti, Mr. Brainwash (a.k.a Thierry Norton), has experienced a surge in popularity among modern pop culture, the art world, and the sophisticated buyers, collectors, glitterati, and artists that comprise it.¹¹⁵ Despite their overt similarities, the dichotomy between Banksy and Brainwash is representative of the issues that surface with the popularization and commercialization of graffiti art, and the legal issues that ensue.¹¹⁶ Unlike Banksy, Mr. Brainwash does not operate under a guise of anonymity and illegality. Brainwash forayed into the world of graffiti as a videographer,¹¹⁷ while producing Academy Award nominated street art documentary *Exit Through the Gift Shop*.¹¹⁸ He thrives on the fame accrued by his film and his artwork, and is presently a regular fixture of the high profile art scene, both on a domestic (Miami and Los Angeles) and international scale.¹¹⁹ Brainwash happily associates with celebrity and the social elite, and welcomes expense-driven commissions—a nod to the side of the artistic spectrum he occupies, away from Banksy, and opposite from the subculture of real street artists.¹²⁰ Brainwash’s creative works arguably undermine the very nature of street art, given that he works exclusively on canvas, or authorized exhibition walls, and that he often assigns and pays a collective of artists to create socially palatable, unoriginal works bearing his name.¹²¹ Regardless, the artist has amassed a fortune of well over \$10 million by putting on graffiti-style exhibitions that aim to please, and, more importantly, *sell*, as opposed to the non-conformist, anti-capitalist messages which the art of graffiti is grounded upon.¹²²

112. *Id*

113. Martinez, *supra* note 32.

114. *Wall painted by Banksy sells for £200,000*, *supra* note 109.

115. Caroline Caldwell & RJ Rushmore, *The 50 Most Influential Street Artists of All Time*, Complex Magazine (Oct. 11, 2013), <http://www.complex.com/style/2013/10/famous-street-artists/mr-brainwash> [<https://perma.cc/HP4F-LWW3>].

116. Feuer, *Graffiti in Car*, *supra* note 96.

117. Braun, *supra* note 107.

118. *Exit Through the Gift Shop*, *supra* note 111.

119. Braun, *supra* note 107.

120. *Exit Through the Gift Shop*, *supra* note 111.

121. Caldwell, *supra* note 115.

122. Braun, *supra* note 107.

Brainwash represents a new breed of artists that have capitulated street art culture in a movement that is the anathema of a street art subculture opposing commercial reward for art. Brainwash and Banksy, while occupying opposite ends of the spectrum, are among the artists enjoying the commercial gains associated with graffiti art. Their differences set aside, Brainwash and Banksy serve as representations of how the art form's popularization and commercialization triggers several, wide-ranging legal issues that mire street art works and artists in a grey area.

C. EVALUATION OF APPLICABLE INTELLECTUAL PROPERTY LAW

In any thorough examination of legal issues, it is necessary to address the appropriate source(s) of law. U.S. intellectual property law affords two modes of protection *to works of art* the Copyright Act of 1989¹²³ and the Visual Arts Right Act of 1990¹²⁴ (“VARA”). This section will introduce and examine both the Copyright Act¹²⁵ and VARA, while highlighting provisions of both laws that are relevant to the issue of whether adequate protective legal measures are afforded to street art and street artists.

As the primary basis of copyright law in the United States, the Copyright Act extends protection to a number of types of works; defines the basic rights of copyright holders, authors, and creators and codifies the fair use doctrine.¹²⁶ Under §102 of the Act, copyright protection extends to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹²⁷ The Act goes on to detail the works of authorship include: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.¹²⁸ As such, the foregoing are the types of works that are copyrightable and for which, their authors and creators may receive exclusive rights to reproduce the works; to prepare derivative works based upon the original work; to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; and lastly, to perform the copyrighted work publicly.¹²⁹ For purposes of this discussion, it is necessary to address that the Act expressly defines a “work of visual art” as:

123. 17 U.S.C. § 106 (1990).

124. 17 U.S.C. §§ 102-122 (1979).

125. It should be noted that historical amendments pursuant to the Copyright Act will also be discussed.

126. 17 U.S.C. § 106.

127. 17 U.S.C. § 102.

128. *Id*

129. 17 U.S.C. § 106.

... a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author.¹³⁰

The creator of the original expression in a work is its author.¹³¹ The author is also the owner of copyright, unless there is a written agreement, by which the author assigns or transfers the copyright to another person or entity, such as a publisher.¹³² In cases of works made for hire or works made within the scope of an individual's employment, the employer or commissioning party is considered to be the author.¹³³

Lastly, it is important to note that, despite its thoroughness, its numerous provisions, and subsequent amendments, the Copyright Act does *not* explicitly reject or bar a work from qualifying as copyrightable subject matter, simply on the basis of illegality.¹³⁴ Under its current interpretation, Copyright law does not impose content-based restrictions on the copyrightability of works.¹³⁵ Yet, prior to the 1976 legislation, the Copyright Office was permitted to refuse registration to illegal or obscene materials.¹³⁶ As noted by the Copyright Register of 1941:

The Copyright Office is not an office of censorship of public morals. In passing upon applications for registration of such material, the only official interest to be exercised is in deciding...whether or not the material is copyrightable and hence registrable...Registration of such material [which tends to disturb the public peace, corrupt morals, or libel individuals, or is a seditious, blasphemous, immoral or libelous production], when its nature is brought to the attention of the examiner in the Copyright Office, is refused.¹³⁷

Until 1979, courts denied most illegal and immoral works judicial remedies, rather holding that the works were not copyrightable in the United States. The Fifth Circuit adopted a different approach in 1979. In *Mitchell Bros. Film Grp. v. Cinema Adult Theater*,¹³⁸ the court favored a more liberal interpretation of copyright law that did not consider the nature or content of a

130. 17 U.S.C. § 101.

131. *Id.*

132. *Id.*

133. *Community for Creative Non-Violence v. Reid*, 490 US 730, 737-38 (1989).

134. 17 U.S.C. § 106.

135. *Mitchell Bros. Film Grp. v. Cinema Adult Theater*, 604 F.2d 852, 854-55 (5th Cir. 1979).

136. It should be noted that the official copyright registration policy regarding illegal works was only applied after registration, when their nature was brought to the attention of the examiner. Hence, illegal works were copyrightable to some extent at that time.

137. See Copyright Office, 44th Annual Report of the Register of Copyrights for the Fiscal Year Ending June 30 29 (1941), <http://www.copyright.gov/reports/annual/archive/ar-1941.pdf> [<https://perma.cc/9Y8R-YGS8>].

138. *Mitchell Bros. Film Grp.*, 604 F.2d at 855.

work for fear of overstepping its bounds and overriding legislation. The Fifth Circuit held that, “[t]he legislative history of the 1976 Act reveals that Congress intends to continue the policy of the 1909 Act of avoiding content restrictions on copyrightability.”¹³⁹ It should be noted that the historical shift in the congressional view towards illegal or immoral works is a key distinction in weighing the copyrightability of “grey-area works,” such as street art and graffiti.¹⁴⁰ The Seventh Circuit followed suit in noting, “that the prevailing view is that even illegality is not a bar to copyrightability.”¹⁴¹ However, it has been noted “since these cases tend to settle long before they get in front of a judge and the Copyright Act is silent on the protectability of illegally-created graffiti, we do not have a bright line rule.”¹⁴² Thus, the law’s current stance on copyright for illegal works is uncertain.¹⁴³

It is the expressed intent of the Constitution to empower Congress to enact copyright laws in order to “promote the progress of science and useful arts,” and to protect authors for a limited time.¹⁴⁴ In view of this framework, it is necessary to inquire whether works of questionable legality, such as street art and graffiti, promote these constitutional goals? In order to answer this, a court would need to determine whether street art and graffiti constitute desirable or undesirable works: whether it is a socially appreciated art form that runs parallel to legislative intent, or one that threatens the progress of useful arts. Such a determination will inevitably run afoul of the content-based restrictions of copyright law, which render presently applicable copyright laws at a standstill, the implications of which this article will consider in the next section.¹⁴⁵

VARA is also relevant for our analysis.¹⁴⁶ VARA, legislation inspired by continental moral rights and preservation laws, grants authors of works of visual art the following rights¹⁴⁷:

Right of Authorship: Authors have a “right (1)(A) to claim authorship over their works; (1)(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create; and (2) to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation or other modification of the work which would be prejudicial to his or her honor or

139. *Id.*

140. *Id.*

141. *FlavaWorks, Inc. v. Gunter*, 689 F.3d 754, 755 (7th Cir. 2012).

142. *What Rights Do Street Artists Have In Illegally-Created Graffiti?*, *The Fashion Law* (Mar. 29, 2018), <http://www.thefashionlaw.com/home/what-rights-to-street-artists-have-in-illegally-created-graffiti> [<https://perma.cc/2DMF-VWFC>].

143. *Id.*

144. U.S. Const. art. I, § 8, cl. 8.

145. *See infra* Section III.D.

146. 17 U.S.C. § 106A (1990).

147. Christopher Robinson, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 *Fordham L. Rev.* 1935, 1935–36 (2000).

reputation;”¹⁴⁸

Right of Integrity: Authors are entitled to prevent any intentional distortion, mutilation or other modification of that work which would be prejudicial to his or her honor or reputation. This excludes, however, modifications that are a result of the passage of time or the inherent nature of the materials.¹⁴⁹

Right Against Destruction: Authors have a right to prevent any intentional or grossly negligent destruction of a work of recognized stature.¹⁵⁰

Furthermore, VARA does not protect the modification of visual works that occur as a result of conservation efforts, and, by virtue of this, VARA laws are preservationist in nature, given that they only apply to the original works of art and not to any subsequent reproductions.¹⁵¹ In considering the applicability of VARA to the issues raised by the protection of street art and graffiti, it is necessary to address relevant case law. In *English v. BFC & R East 11th Street LLC*¹⁵², a group of six artists filed suit to prevent the removal of an art display in a community garden, consisting of several sculptures and murals, much of which had been set up without permission on New York City property. The artists based their claims on their rights to integrity, and against destruction under VARA.¹⁵³ Yet, the district court ruled that illegal murals could not be protected under VARA.¹⁵⁴ The court specifically dismissed the artists’ complaint on the grounds that VARA “does not apply 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.”¹⁵⁵ In this case, the artists could not assert any rights over the tangible aspect of their work, including VARA rights that preserve the physical embodiment of the work, because the artists violated the city’s property rights over the same tangible object in the process of creating said tangible object.¹⁵⁶ Further, the court recognized that it would not be equitable to allow the artists to claim the right of protection of their work because that would, effectively, prevent the property owner from modifying its own property (the walls upon which the murals were placed).¹⁵⁷

In accordance with the *English* court’s rationale, VARA cannot be invoked by an artist to protect the tangible aspect of a work, including its physical location, against modification by the owner of the property in which the

148. 17 U.S.C. §§ 106A(a)(1)–(2) (1990).

149. 17 U.S.C. §§ 106A(a)(3)(A)(c)(1) (1990).

150. 17 U.S.C. § 106A(a)(3)(B) (1990).

151. 17 U.S.C. § 106A(c)(3) (1990).

152. *English v. BFC & R East 11th St. LLC*, No. 97 Civ. 7446, 1997 WL 746444, at *1 (S.D.N.Y. Dec. 3, 1997).

153. *Id.* at *2-3.

154. *Id.* at *4.

155. *English*, 1990 WL 746444, at *5.

156. *Id.*

157. *Id.*

work is embodied or situated.¹⁵⁸ Further, VARA does not protect the public presentation and placement of a work.¹⁵⁹ Ultimately, the court's ruling does not preclude graffiti artists from claiming protection under VARA. Instead, the ruling adopted the Unclean Hands Doctrine¹⁶⁰ in protecting the property owner's rights in a manner that prevents graffiti artists from asserting rights to the piece of property upon which the artist placed their art.

Under VARA, street artists or graffiti artists seeking to assert ownership of their works have the option to enforce their right of attribution over the original work.¹⁶¹ Whereas artists may not necessarily be able to prevent property owners from erasing their work from a wall, an artist may prevent the property owner from claiming authorship of the graffiti work because the owner made no authorial contribution to the work. Alternatively, a street artist may seek to protect his or her work against third parties. It should be noted that street artists may not enforce their VARA rights against the affected property owner because of the Unclean Hands Doctrine, not because the artists forfeit their VARA rights.¹⁶² In keeping with this rationale, street artists should be able to enforce their VARA rights against third parties, unaffected by the placement or creation of the street art or graffiti. Although VARA rights to the integrity of a work and against destruction would not be enforceable against the owner of the property, they could be enforced against everyone else, such as bystanders who paint over a work or destroy it.¹⁶³

Artists may also seek to prevent destruction of their works by enforcing their VARA rights. However, this may prove to be difficult, given that the right applies only to works of "recognized stature."¹⁶⁴ Courts have interpreted the recognized stature requirement as a two-tiered standard, which requires: "(1) that the visual art in question has 'stature' *i.e.* is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society."¹⁶⁵ This requirement was met in *Hanrahan v. Ramirez*, which found that an anti-drug, alcohol and smoking mural had recognized stature in its community.¹⁶⁶ It is likely that street art works of artists, which are featured or published in specialized books on graffiti, or which are included in national and international graffiti and street art meetings, like the "Meeting of Styles," would fulfill the recognized stature requirement.¹⁶⁷

158. 17 U.S.C. § 106A(c)(2) (1990).

159. *Id.*

160. *English*, 1990 WL 746444, at *5.

161. 17 U.S.C. § 106A(a) (1990).

162. *English*, 1990 WL 746444, at *5.

163. 17 U.S.C. § 106A(a)(3) (1990).

164. 17 U.S.C. § 106A(a)(3)(B) (1990).

165. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994).

166. *Hanrahan v. Ramirez*, No. 2:97-CV-7470 RAP RC, 1998 WL 3436997, at *4, 6 (C.D. Cal. June 3, 1998).

167. See *FAQs: The Mind Behind Meeting of Styles*, <http://www.meetingofstyles.com/faqs/> [<https://perma.cc/9R9N-XXUG>] (last visited Dec. 11, 2017).

Accordingly, while applicable United States intellectual property law does not explicitly address the protection of graffiti and street art, nor the legal remedies afforded to street artists, there remain a few, limited avenues which an artist may pursue under the Copyright Act and the VARA. The lack of express prohibition¹⁶⁸ by either of these sources of law against intellectual property protections for street art and graffiti is certainly promising for street artists and a supportive, appreciative public. However, the lack of developed case law may continue to hinder the protective measures afforded to both the works and artists, until courts decide to explicitly address the grey area, or, “negative space,”¹⁶⁹ that this artistic movement occupies in the legal realm.

1. Protection of the Art

Following the foregoing discussion of applicable sources of law, an important issue facing street art and graffiti is whether it falls within the categories of works to which Congress and legislature intends to extend intellectual property protection. As applied to the matter at hand, copyright law would initially appear to classify street art and graffiti as visual works or “pictorial, graphic, and sculptural works.”¹⁷⁰ As an original work of authorship, a street art piece is just as entitled to protection from reproduction, copying, or appropriation without the express authorization of its creator, as a painting on a canvas.¹⁷¹ Whereas, courts have rejected extending protection to ideas and works that are not outwardly expressed in a tangible manner, street art is, undoubtedly, “fixed in a tangible medium of expression,” albeit on streets and walls.¹⁷² Despite its adherence to the general requirements of copyrightable subject matter, courts have not yet determined whether street art or graffiti works fall within the category of protected works that usually includes paintings, etchings, drawings, sculptures, art installations, etc.¹⁷³ The hesitation unquestionably stems from the future implications of affording street art copyright protections. Primarily, courts are unwilling to indirectly encourage and enable vandalism, and defacement of public and/or private property.¹⁷⁴ This 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.¹⁷⁵

168. *What Rights Do Street Artists Have In Illegally-Created Graffiti?*, *supra* note 142.

169. *See generally* Kal Raustiala & Christopher Sprigman, *The Knockoff Economy: How Imitation Sparks Creation* (2012) (discussing the changing relationship between creating and copying and the manner in which this evolving dynamic affects legal protections, innovation, and economic success).

170. 17 U.S.C. § 106 (1990).

171. Lerman, *supra* note 23, at 310.

172. 17 U.S.C. §101 (2010) (stating that a work is fixed “when its embodiment [. . .] by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration”) (emphasis added).

173. Lerman, *supra* note 23, at 309.

174. *Id*

175. *Id*

Nevertheless, street art, neighborhood murals, and cultural graffiti ultimately suffer the consequences of courts' refusal to address the application of the Copyright Act and its provisions to the works of art. Similarly, street art and graffiti murals are afforded little to no protection by the VARA, simply on the basis that a great deal of the art works are created without permission or authorization from the owners' of the walls which they call home. The examples¹⁷⁶ discussed in this article attest to the regular threats that these artworks face, specifically as their creators gain public exposure, notoriety, and the unsought fame that follows. News reports following the removal and sale of Banksy's £208,1000 sale of the "Portobello Road Wall," went so far as to broach the topic of the sale posing a number of interesting questions for the art world, including how you move a piece of work like this, how do you display it, and how do you insure it?¹⁷⁷ The art world continues to grasp for answers to such queries, while racing to keep pace with the increase in demand for street art works and graffiti style pieces, and the millions of dollars that eager collectors and galleries have to offer. Graffiti works increasingly attract the attention of numerous collectors, gallery owners, publishers, filmmakers, and journalists.¹⁷⁸ Galleries are experiencing sold out shows and exhibitions when featuring graffiti works.¹⁷⁹ The art form has breathed new life into the slowing and aging publishing world, as it has triggered a boom of photographic books on graffiti and street art¹⁸⁰. President Obama¹⁸¹ was even presented with the diplomatic gift of graffiti art by former British Prime Minister, David Cameron.¹⁸² The work, "Twenty First Century City," is by Ben Eine, and consists of a spray-painted alphabet on shop shutters in a London street.¹⁸³ Accordingly, there appears to be a light at the end of the tunnel for street art and graffiti art.

In *Williams v. Roberto Cavalli*, California federal judge held that the signatures of graffiti artists on a San Francisco mural constitute source-identifying information, and the inclusion of one of those signatures on Cavalli apparel (sold at retailers like Amazon and Nordstrom) constitutes false designation of origin under the Lanham Act.¹⁸⁴ Plaintiffs sued Cavalli as well as Amazon.com, Inc., Nordstrom, Inc., and Zappos.com, Inc. following the launch of Cavalli's "Graffiti" collection, including clothing, bags, backpacks,

176. *Wall painted by Banksy sells for £200,000*, *supra* note 109.

177. *Id.*

178. Loney Abrams, *How Does Banksy Make Money? (Or: A Quick Lesson in Art Market Economics*, Artspace (Mar. 30, 2018), https://www.artspace.com/magazine/art_101/close_look/how-does-banksy-make-money-or-a-lesson-in-art-market-economics-55352 [<https://perma.cc/PKN6-3JXZ>].

179. *Id.*

180. *Id.*

181. Barack Hussein Obama II is an American attorney and politician who served as the 44th president of the United States from 2009 to 2017. A member of the Democratic Party, he was the first African American to be elected to the presidency.

182. *David Cameron presents Barack Obama with graffiti art*, BBC News (July 21, 2010), <http://www.bbc.com/news/uk-politics-10710074> [<https://perma.cc/5JY9-KPVM>].

183. *Id.*

184. *Williams v. Cavalli*, No. CV 14-06659-AB (JEMx), 2015 WL 1247065, at *4 (C.D. Cal. Feb. 12, 2015).

all splashed with images of street art—all of which was copied directly, and without permission, from the critically acclaimed mural the plaintiffs painted in San Francisco’s Mission district in 2012.¹⁸⁵ Defendant, Cavalli, reportedly included a small “Just Cavalli” signature on the items from the collection, which implied that the plaintiffs’ artwork was created for the fashion house’s new line. The federal judge noted that when defendants placed images of the mural onto items in the collection, they essentially appropriated plaintiffs’ copyrighted mural and source-identifying imagery.¹⁸⁶ This case, unfortunately, does not address whether the plaintiff artists’ mural was created with or without authorization of the property owner’s permission, yet the facts stipulate that the mural bears a valid copyright registration otherwise the court would not have issued a ruling that found copyright infringement.¹⁸⁷ The *Cavalli* case is nonetheless significant in building upon the case law concerning street art and graffiti, especially with respect to whether the art forms merit intellectual property protection from appropriation, unauthorized reproduction and derivatives at the hands of exploitative corporate entities.

Further, in a surprising verdict, the jury in the long-awaited and pivotal *5Pointz*¹⁸⁸ graffiti case, ruled that a property owner and developer broke the law when he unexpectedly whitewashed the 5Pointz graffiti mecca in 2014.¹⁸⁹ For the better part of 20 years, the 5Pointz graffiti works represented an aesthetic collaboration between the developer defendant, Wolkoff, a crew of graffiti artists, and over 350 works of graffiti placed on a complex of buildings in Long Island City. It should be noted that this case marked the first time that a jury decided a VARA claim in court.¹⁹⁰ The jury’s decision hinged upon the fact that the graffiti art works had long become works of “recognized stature”¹⁹¹ as the “world’s largest open-air aerosol museum.”¹⁹² At trial, art experts sought to establish that stature by showing the art was esteemed by appraisers, other artists, and by the public in general; the works have been valued at \$50,000 to \$90,000 each.¹⁹³ The case represents an absolutely pivotal point in the discussion of whether intellectual property protection should extend to street art and graffiti¹⁹⁴. The jury’s verdict is unquestionably clear in asserting that there will be legal implications for the

185. *Id.* at 1-2.

186. *Id.* at 15.

187. *Id.* at 2.

188. *Cohen v. G&M Realty*; 988 F. Supp. 2d 212, 226-27 (E.D.N.Y. 2013).

189. Alan Feuer, *Brooklyn Jury Finds 5pointz Developer Illegally Destroyed Graffiti*, N.Y. Times (Nov. 7, 2017), <https://www.nytimes.com/2017/11/07/nyregion/5pointz-graffiti-jury.html> [<https://perma.cc/D7H4-WSZ5>] [hereinafter Feuer, *Illegally Destroyed Graffiti*].

190. *Id.*

191. 17 U.S.C. § 106A(a)(3)(B) (1990).

192. Feuer, *Illegally Destroyed Graffiti*, *supra* note 189.

193. Thomas Macmillian, *NYC Graffiti Case Could Leave Its Mark On Legal Arena*, Wall St. J. (Nov. 27, 2017), <https://www.wsj.com/articles/nyc-graffiti-case-could-leave-a-big-mark-on-legal-arena-1511811378> [<https://perma.cc/8MH4-UCZM>].

194. Feuer, *Illegally Destroyed Graffiti*, *supra* note 189.

destruction of graffiti and street art, even when it occurs on private property.¹⁹⁵ Indeed, the case sends a public message that street art and graffiti works are not disposable, are worthy of recognition as true works of art, and deserve the protective measures that are afforded to works of art that may not be free to view, or have the same degree of accessibility by persons from all classes of society.¹⁹⁶

2. Protection of the Artists

As discussed throughout this article, street artists have a limited number of avenues for protecting their works under United States intellectual property law. Further, artists of illegal, unauthorized, or unsanctioned works have even fewer options and face limiting exclusions that ultimately leave their works vulnerable with little to zero protection under the Copyright Act as well as under VARA. Despite the staggeringly few protective measures undertaken to shield its creators, street art has bloomed in such a way that it now stands prominently among global industries of art collecting, fashion, product sales, and entertainment—all while continuing to reside in intellectual property's "negative space."¹⁹⁷ It is not unreasonable to posit that perhaps there is a need to bring street art out of this grey area and into the light. We must continue to close the widening gap between the enormous opportunities for profitability surrounding the street art form and the embarrassing inadequacy of protective measures put into place for its artists.

In cities across the country, corporations have wised up to this glaring gap in profitability, and the ease with which they can usher themselves into a world largely absent of legal consequences.¹⁹⁸ Nike Inc., Time magazine, International Business Machines Corp., Google, Inc., Nokia, Inc., and Sony, Inc., are among the growing list of companies that have dabbled in street art to get their marketing messages out.¹⁹⁹ Marketers are desperate to reach out to younger consumers, as the youth stands to occupy a sizeable foothold, as one of the largest age group of consumers.²⁰⁰ In response, corporations have taken advantage of the need for creative and artistic ways to reach the modern consumer, one pop-cultured, and inherently more likely to take notice of such marketing techniques. This, more often than not, occurs at the expense of street artists, as they witness the appropriation of their own original works, and the works' subsequent false association with a commercial enterprise that runs contrary to their ethos as street artists and proponents of a subculture

195. *Id.* at 40-41.

196. Lerman, *supra* note 23.

197. Raustiala, *supra* note 169.

198. *What Rights Do Street Artists Have In Illegally-Created Graffiti?*, *supra* note 142.

199. *Big corporations get hip to street art advertising*, Denver Post (Jan. 2, 2006), <http://www.denverpost.com/2006/01/02/big-corporations-get-hip-to-street-art-advertising/> [<https://perma.cc/FF99-K7JC>].

200. *Id.*

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art form.²⁰¹ The lawsuit against fashion-house *Cavalli* attests to street artists' lack of enthusiasm towards the commercialization of their purely artistic, creative expression: "Nothing is more antithetical to the outsider 'street cred' that is essential to graffiti artist... than association with European chic, luxury and glamour—of which *Cavalli* is the epitome," the complaint says.²⁰² "To anyone who recognizes their work, plaintiffs are now wide open to charges of "selling out."²⁰³

In another nod to rampant corporate appropriation of street artist's works, American Outfitters was sued by Miami street artist David Anasagasti, for using his famed "droopy eyes" graffiti in a global advertising campaign.²⁰⁴ The copyright suit was based on Anasagasti's claims that American Eagle not only splashed his work—rows of sleepy-looking eyes—across websites, billboards and store fronts without permission, but (adding insult to injury), the company posed a clean-cut model with a can of spray paint in front of it, thereby implying that the graffiti work was done specifically by, and for, the apparel company.²⁰⁵ The plaintiff artist's concerns echoed those in the *Williams v. Cavalli* case. The suit stated, "Given that he hails from the counterculture world of underground street artists, Mr. Anasagasti's reputation as an artist has been founded, in part, on a public perception that Mr. Anasagasti doesn't 'sell out' to large corporate interests."²⁰⁶ It should be noted that Anasagasti was commissioned to create his murals in the Wynwood Art District, meaning, the works were created legally.²⁰⁷ This case had the potential to force the court to confront the issue of whether legal street art was entitled to the same list of exclusive rights and the same scope of protection as other visual artworks.²⁰⁸ It could have compelled the court to distinguish between legal and illegal artworks, with respect to their copyright entitlements and the implications of this on the rights retained by the works' artists.²⁰⁹ Unfortunately, the case settled shortly after it was filed, once again leaving little closure on this issue.²¹⁰

There is a clear need to further establish street artists' rights, as indicated by the growing number of lawsuits alleging the appropriation of, infringement of, and/or destruction of street art and graffiti works.²¹¹ Critics of expanding street artists' protections hone in on the deterrence argument, and

201. Exit Through The Gift Shop, *supra* note 111.

202. Bill Donahue, *Graffiti Artists Sue Roberto Cavalli for Copying Mural*, Law360 (Aug. 26, 2014), <https://www.law360.com/articles/570914> [<https://perma.cc/JU8T-YIJ7>].

203. *Id.*

204. Bill Donahue, *American Eagle, Street Artist Settle Copyright Suit*, Law360 (Dec. 2, 2014), <https://www.law360.com/articles/600542?scroll=1> [<https://perma.cc/8E8K-6D89>].

205. *Id.*

206. *Id.*

207. *Id.*

208. Brittany M. Elias & Bobby Ghajar, *Street Art: The Everlasting Divide Between Graffiti Art and Intellectual Property Protection*, 7 *Landslide*, no. 5, [date of issue] [page number] (2015).

209. *Id.*

210. Donahue, *supra* note 204.

211. *Cohen*, 988 F. Supp. 2d at 226-27.

the notion that allowing intellectual property protection to extend to street art and graffiti, incentivizes the artists (or, in their opinion, vandals) to continue to deface or vandalize property.²¹² On the other hand, proponents argue that illegality should not preclude intellectual property protection, and that street art is unlikely to spike in its occurrence simply because of a shift in the laws at issue.²¹³ The artistic movement has flourished despite public resistance, and the minimal protection afforded to its artists. It is reasonable to assert that the ownership issues street artists are confronted with, and the unjust enrichment that occurs while courts continue to stagger and take stabs at the matter, will persist until confronted, and explicitly addressed. It is unquestionable that street artists should continue their attempts to exercise U.S. copyright entitlements, and continue to assert protective measures under VARA to protect their works from unauthorized, copying, removal, sale, and destruction.²¹⁴

IV. CONCLUSION

In view of all of the cases, examples, laws, and arguments, it should be noted that protecting graffiti does not equate to the promotion of illegal acts. Extending intellectual property protection to street art and graffiti, and the artists who venture to create the works at the risk of the works' later exploitation, is merely the promotion of creative expressions, *without looking into the legality of those expressions*. Copyright does not incentivize artists to engage in illegal creative acts, because copyright is neutral towards the legality of creative acts, as long as copyright laws are not violated or infringement does not occur. The frequent criticism that shielding street art and graffiti from appropriation, infringement, sale, removal, or destruction will further incentivize the unsanctioned creation of these works is counterintuitive. Why would street artists, when afforded with the option of gleaning exclusive rights in their original works, opt to fight the umbrella of protection afforded by the system, by continuing to paint outside the lines simply for the joy of exposing themselves to criminal liability, while simultaneously rendering the fruits of their creative effort to exposure to appropriation by a commercial entity, unauthorized removal, sale, or potential destruction? Many street artists, including Keith Haring and Jean Michel Basquiat²¹⁵ who had roots in creating unsanctioned, illegal art and graffiti began obtaining property owners' permission or painting on walls in a legal manner, as they gained popularity and esteem within the art world. It is exceedingly difficult to develop an artistic career solely through the vehicle of illegal street art and graffiti, regardless of

212. Brian Sherman, *Institutional Critique or Institutional Sabotage? Is The Current Direction of Graffiti Art Worth Defending?*, Fine Art Views (Jan. 17, 2013), <https://fineartviews.com/blog/54842/institutional-critique-or-institutional-sabotage-is-the-current-direction-of-graffiti-art-worth-defending> [https://perma.cc/U37E-JZAV].

213. *Id.*

214. 17 U.S.C. § 106A (1990).

215. Liza Ghorbani, *The Devil on the Door*, N.Y. Magazine, (Sept. 18, 2011), <http://nymag.com/arts/art/features/jean-michel-basquiat-2011-9/> [https://perma.cc/383X-6S7F].

whether the street artist is disinterested in the commercial value that may or may not be associated with their work. On the contrary, granting protection may result in street artists looking for more *legal* places to paint where their works will more likely be preserved and protected. Indeed, it does not seem equitable for the dominating argument against expanding street art's protective measures to be grounded in other bodies of law as opposed to being explicitly addressed in intellectual property law. Certainly, unsanctioned or unauthorized street art is illegal. However, other areas of law, such as criminal law, retain the responsibility to address the legal consequences of creating street art—not the Copyright Act as provided by legislative intent and the Constitution. With further regard to the Constitution, the court in the landmark *Mitchell* case,²¹⁶ concluded that the Copyright Clause in the Constitution was best served by allowing all creative works (in a copyrightable format) to be afforded copyright protection regardless of subject matter or content.²¹⁷

As a practical matter, it seems counterintuitive and, arguably, goes against the interests of fair play and substantial justice for intellectual property law to continue to skirt the issue of whether street art and graffiti merit the protections that have been put into place for other visual works of art and the other works' creators and artists. As this article has discussed, street art and graffiti are no different than art forms that pay homage to or bear roots to the Modern Art movement, Cubism, Romanticism, or the Enlightenment. The aforementioned artistic movements constitute human reactions to social, cultural, and political developments in their given time period and fixed in a tangible medium of expression such as a visual works of art or sculptures. As such, society's views towards what constitutes palatable, acceptable, or desirable art are consistently evolving in response to public attitudes at the time. The modern world seems increasingly poised to defend and attach value to street art and graffiti art forms, whereas past generations may not have been as welcoming or receptive of an outsider, non-elitist artistic subculture—all of which is in line with the fluid manner in which the public weighs various artistic movements and mediums of expression. As creators and authors of original art works that seek to express an idea or message, street artists should have the same access to the artillery of legal protections as artists who adhere to other artistic styles or movements. This includes a street artist's ability to prevent the unauthorized reproduction, sale, removal, destruction, or appropriation of his or her work by others. The inherent purpose of intellectual property law is to advance and promote the progress of human interest in useful arts, but instead, the current capacity of said laws stifles such progress, on the basis of the inadequacy of the law it puts forth, with respect to street art, graffiti, and the individual artists behind the works. Or perhaps, "copyright is for losers" as Banksy suggests in his book, *Wall and Piece*, despite having asserted and obtained a copyright registration in the

216. *Mitchell Bros. Film Grp.*, 604 F.2d 852 at 855.

217. *Id.*

photographic book that details his many un-copyrighted, unsanctioned, uncensored, anti-establishment and purely creative expressions.²¹⁸

218. Banksy, *supra* note 1, at 3. (It should be noted that in the book, *Wall and Piece*, Banksy states, “[A]gainst his better judgment, Banksy has asserted his right under the [UK] Copyright, Designs and Patent Act, 1988 to be identified as the author of this work.”)