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STREET ART:

AN ANALYSIS UNDER U.S. INTELLECTUAL PROPERTY LAW AND INTELLECTUAL PROPERTY'S “NEGATIVE SPACE” THEORY

Cathay Y. N. Smith*

ABSTRACT

Street art, in its original and purest form, is artwork created without authorization, usually illegally, on either private or public property. Until recently, street art has been considered a social nuisance and is almost universally illegal, but it is now slowly becoming a “hot commodity” garnering press and social media attention. In recent years, local communities are increasingly beginning to value street art in their neighborhoods, and the art world has also caught on to the street art trend. As a result, street art is being copied and reprinted on clothing, posters, commercial items, and exhibited and sold in auction houses and galleries. Cities, such as Bristol, Bethlehem, and Taichung, are embracing street art by offering guided tours to show off their famous street art. Street art—no longer considered merely a social nuisance as it once was—is now becoming the “next big thing” in the art world and market. As street art evolves into commodity, the questions naturally are: who owns street art, and should intellectual property law protect street art from unauthorized copying, removal and sale, or destruction?

This Paper attempts to answer these questions under U.S. law and under recent scholarship examining “negative spaces” in intellectual property. Specifically, this Paper concludes that street artists could attempt to use U.S. copyright law and VARA to protect their artwork from unauthorized copying and destruction. However, due to the nature of street art, and the ethos of street

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artists, intellectual property law is not an effective way to protect street art. Nevertheless, as has been evident in the past decade, innovation and creativity in street art will thrive even without the artificial exclusivity created by intellectual property. Street artists have been protecting their work through normative rules developed over the years, and communities are also looking for creative ways to protect street art from being destroyed or removed from their neighborhoods. The concern that the lack of formal intellectual property protection will “discourage” street art’s creation is not a valid justification to impose or create stronger intellectual property protection for street art. Economic incentives are not necessary to motivate the creation—or the continued creative output—of street art. The evidence of this can be found on the streets of any big city, where street art continues to flourish in a norms-based, low-IP world.

I. INTRODUCTION

*TV has made going to the theatre seem pointless,
photography has pretty much killed painting, but
graffiti remains pretty much unspoiled by progress.
– Banksy*

Graffiti has existed since ancient times. Pre-historic cave paintings adorned the walls of the Lascaux Caves in France,¹ Semitic soldiers created carvings on the cliffs of Egypt dating back to the 19th century B.C.,² and almost two thousand year-old murals have been excavated from the walls of the ancient city of Pompeii. In the modern world, graffiti is generally considered illegal vandalism, destruction of property, and a social nuisance. In fact, most cities and states in the United States have anti-graffiti legislation to discourage and punish graffiti artists.

In the past decade, however, a style of graffiti—commonly known as “street art”—has begun to gain cultural and artistic

1. See *Lascaux: Visite de la grotte*, LASCAUX, <http://www.lascaux.culture.fr/?lng=en#/fr/00.xml> (last visited Aug. 21, 2013).

2. See *Ancient Graffiti May Display Oldest Alphabet*, THE JAPAN TIMES, Dec. 1, 1999, <http://www.trussel.com/prehist/news170.htm> (last visited Aug. 21, 2013).

credibility around the world. The online encyclopedia Wikipedia.org defines *street art* as “art, specifically visual art, developed in public spaces . . . [the term is] used to distinguish contemporary public-space artwork from territorial graffiti, vandalism, and corporate art.”³ Street art is expressed in different mediums, including spray paint, brushes, rollers, pallets, stickers, posters, installations, mosaics, and stencils.⁴ In spite of its illicit past, local communities are increasingly beginning to value street art in their neighborhoods, and the art world has also caught on to the street art trend. A genre of art that was once underground and beneath the radar of mainstream consciousness, street art is now being caught up in the conventional art world. “Street art started out as a subculture—it gave a generation a voice they didn’t have—and it was all about reclaiming public space and working outside the art world. Now it has become more like a traditional art market.”⁵

Many attribute the commercialization and commodification of street art to the famous British street artist Banksy—the phenomenon sometimes referred to as “The Banksy Effect.”⁶ “Banksy” is the pseudonym used by a British street artist whose street art, often communicating political, cultural and social satire, has been featured on buildings, walls and other public spaces throughout the world.⁷ His work is unconventional and sardonic, and has attracted a celebrity-like cult following around the world.

3. *Street Art*, WIKIPEDIA, http://en.wikipedia.org/wiki/Street_art (last visited Nov. 14, 2012).

4. See Celia Lerman, *Protecting Artistic Vandalism: Graffiti and Copyright Law*, 2 N.Y.U. JOURNAL OF INTELL. PROP. & ENT. LAW, Vol. 295, 298-99 (2013).

5. Quotation by Mike Snelle, curator of Museum of Curiosity in London’s Soho, in Justin Sutcliffe and Francesca Angelini, *BANKSY RAID: The Fate of a Painting on a Shop Wall is Dividing the Art World*, THE SUNDAY TIMES, May 19, 2013.

6. Mary Elizabeth Williams, *Part I: Who Owns Street Art?*, CENTER FOR ART LAW, (Mar. 25, 2013), <http://itsartlaw.com/2013/03/25/part-i-who-owns-street-art/> (last visited Aug. 22, 2013).

7. See, e.g., *Banksy Paradox: 7 Sides of the Most Infamous Street Artist*, WEB URBANIST, <http://weburbanist.com/2007/07/19/banksy-paradox-unofficial-guide-to-the-worlds-most-infamous-urban-guerilla-street-artist/> (last visited Nov. 14, 2012).

Nowadays, Banksy's work is not only found in public spaces, but also reprinted in books, copied onto t-shirts, postcards, tote bags, and mugs by third-parties and sold in market stalls, over the Internet, and in local shops. Some of Banksy's street art has also been carved off of their original walls and sold in galleries and auction houses in the United States, United Kingdom and elsewhere, fetching prices in the millions of dollars.⁸ Indeed, a recent controversy involved a Banksy creation titled "Slave Labour" (pictured below⁹) in Wood Green, North London, which was carved out of the side of a building—to the dismay of the local community—and sold at auction in June 2013 for \$1.1 million.¹⁰



Street art today has become a hot commodity. It is being copied and reprinted on clothing, posters, commercial items, and used as backdrops in TV commercials and music videos. It is being

8. See, e.g., Katherine Brooks, *Banksy Mural Sells: 'Slave Labour' Fetches \$1.1 Million at Private London Auction*, HUFFINGTONPOST, June 3, 2013, http://www.huffingtonpost.com/2013/06/03/banksy-mural-sells-slave-labour-fetches-millions-at-london-auction_n_3378755.html (last visited Aug. 22, 2013); *Wall Painted by Banksy Sells for £200,000 – But the New Owner Must Also Fork Out to Move the Brick Canvas*, MAIL ONLINE, Jan. 15, 2008, <http://www.dailymail.co.uk/news/article-508290/Wall-painted-Banksy-sells-200-000—new-owner-fork-brick-canvas.html> (last visited Nov. 14, 2012).

9. Brooks, *supra* note 8.

10. *Id.*

removed off of walls, and exhibited and sold in auction houses and galleries. Cities, such as Bristol, Bethlehem, and Taichung are embracing street art by offering guided tours to show off their famous street art. No longer considered merely a social nuisance as it once was, street art has become the “next big thing” in the art world and art market.

As street art evolves into commodity, the questions naturally are: who owns street art, and should intellectual property law protect street art from being copied, removed and sold, or destroyed without the street artists’ consent? This Paper attempts to answer those questions under U.S. law and under recent scholarship examining “negative spaces” in intellectual property. This Paper focuses on “street art,” as compared to territorial graffiti or vandalism, and focuses on unsanctioned street art created on another party’s property without authorization, as opposed to street art sanctioned or commissioned by the property owner or government. Section II of this Paper analyses the rights, if any, street artists have under U.S. copyright right law, the U.S. Visual Artists Rights Act, state moral rights laws, and U.S. common law. Section III examines other ways street art is protected, including locally through community rights, or through employment of social norms, rules and procedures outside of intellectual property laws by the street art community. Section IV argues that street art exists in intellectual property’s negative space, and stronger intellectual property protections may not be necessary to encourage the continued flourishing of street art. Section V concludes this Paper.

II. UNSANCTIONED STREET ART AND U.S. INTELLECTUAL PROPERTY LAW

*The art world will never allow an underground movement to remain hidden from the view of the market. As soon as an artist achieves recognition, his works acquire value. That is what has happened to Banksy and some of his cohorts, such as D*face, Paul Insect and Pure Evil. Their work has been absorbed into the commercial world. Never mind those irreverent, anti-capitalist images, feel the*

*auction estimates, which can run into hundreds of thousands of pounds. – Peter Aspden, Writer at Financial Times*¹¹

U.S. intellectual property law does not effectively protect street art from the unauthorized copying, sale or destruction.¹² As explored below, street artists could *attempt* to use copyright law or moral rights laws to prevent unauthorized copying, sale or destruction of their works, but courts have recognized carve outs in the past potentially excluding “illegal” street art from traditional intellectual property protection.

A. Protecting Unsanctioned Street Art from Copying

Street art is often photographed and reprinted, without permission, in books, on postcards or posters, copied onto t-shirts,

11. Peter Aspden, *Street Art Acquires Value*, FINANCIAL TIMES, Feb. 22, 2013, <http://www.ft.com/cms/s/2/e2860dc2-7d06-11e2-8bd7-00144feabdc0.html#ixzz2ZIVpizZ6> (last visited Aug. 22, 2013).

12. This statement only applies to unsanctioned street art. There have been a limited number of instances where street artists have negotiated successful settlements from parties that used, without their consent, their sanctioned or commissioned street art and murals. *See, e.g.*, David Gonzalez, *Walls of Art for Everyone, but Made by Not Just Anyone*, THE NEW YORK TIMES, June 4, 2007, http://www.nytimes.com/2007/06/04/nyregion/04citywide.html?_r=1&pagewanted=all& (last visited Aug. 25, 2012) (group of street artists demanded a settlement from Peter Rosenstein, a photographer who published a book of street art, “Tattooed Walls,” without seeking permission from the street artists); *Cali Killa Ends Dispute with Urban Outfitters: Re-Releasing Shirts!*, MELROSE AND FAIRFAX, Sept. 19, 2011, <http://melroseandfairfax.blogspot.co.uk/2011/09/cali-kill-wins-dispute-with-urban.html> (last visited Aug. 25, 2013) (Urban Outfitters marketed and sold a T-shirt featuring street artist Cali Killa’s work without authorization. The parties settled the dispute); David Gonzalez, *Graffiti Muralists Reach Settlement in Case of Contentious Fiat 500 Commercial*, THE NEW YORK TIMES, Dec. 2, 2011, <http://wheels.blogs.nytimes.com/2011/12/02/graffiti-muralists-reach-settlement-in-case-of-contentious-fiat-500-commercial/> (last visited Aug. 25, 2013) (Fiat aired a commercial for its Fiat 500 car, which featured Jennifer Lopez driving by several murals. Fiat never sought permission from the street artists to use their murals in its commercial. The street artists complained, and the parties settled their dispute.).

tank tops, tote bags, mugs, and other commercial products for sale. These products are often sold by third-parties with no connection to the street artists, and without authorization or permission from the street artists. One need only browse London's Camden Market, Portobello Road or Oxford Street, or perform a search of "Banksy" on the Internet or on Amazon.com, to see how prevalent these sales have become. Street artists are generally not consulted before their artwork is copied, reproduced and sold, and they generally do not receive royalties from the sale of their artistic expression.

In the U.S., a street artist may be able to use copyright law to prevent the copying and reprinting of his artwork. U.S. copyright law protects "original works of authorship fixed in any tangible medium of expression."¹³ Once an original piece of artwork is created and fixed in a tangible medium, it is automatically protected under U.S. copyright law. A street artist generally has the exclusive right to reproduce the copyrighted work, to prepare derivative works based upon the copyrighted work, to distribute copies of the copyrighted work to the public, and to display the copyrighted work publicly.¹⁴ These exclusive rights are collectively referred to as copyright's "bundle of rights." Typically, no one else but the artist has these rights. This view is held by a number of commentators that have analyzed street art and copyright law.¹⁵

However, language from the Northern District of Illinois' decision in *Villa v. Pearson Education* has led other commentators to speculate that courts in the United States may be reluctant to grant copyright protection to a piece of unsanctioned street art, or

13. 17 U.S.C. § 102(a) (2014).

14. 17 U.S.C. § 106 (2014). The exception to this rule would be if the street art was a "work made for hire." In a work made for hire, the party who commissioned the work would own the copyright.

15. See, e.g., John Eric Seay, *You Look Complicated Today: Representing an Illegal Graffiti Artist in a Copyright Infringement Case Against a Major International Retailer*, 20 J. INTEL. PROP. L. 75, 79-82 (2012); Jamison Davies, *Art Crimes?: Theoretical Perspectives on Copyright Protection for Illegally-Created Graffiti Art*, 65 ME. L. REV. 27, 36 (2012) ("[T]hough the outcome is not by any means certain, graffiti would likely receive copyright protection upon full consideration.").

may allow “illegality” to be raised as a defense to copyright infringement, similar to the concept of an “unclean hands” defense.¹⁶ In *Villa v. Pearson Education*, the street artist Hiram Villa, known by his pseudonym UNONE, brought a copyright infringement suit against a book publishing company for the reproduction of his unsanctioned street art in a book without his permission.¹⁷ The publishing company moved to dismiss Villa’s copyright claim arguing that the street art in question was not protected by copyright because it was illegal.¹⁸ The court denied the publishing company’s motion because it involved factual inquiries, specifically, “a determination of the legality of the circumstances under which the mural was created.”¹⁹

Even though the street artist successfully defended against a motion to dismiss because there were factual questions not appropriate for a motion to dismiss, the court’s language in its decision led many commentators to speculate that courts in the U.S. may be willing to consider “illegality” as a valid defense to copyright infringement, or may be unwilling to recognize copyright protection for illegal street art.²⁰ This case ultimately settled without the court deciding the issue, and the issue of whether “illegality” may be a valid bar to copyright protection or a defense to copyright infringement is not settled in U.S. courts.

B. Protecting Unsanctioned Street Art from Removal and Sale

Even if a street artist could use copyright law to prevent the

16. See, e.g., Danwill Schwender, *Promotion of the Arts: An Argument for Limited*

Copyright Protection of Illegal Graffiti, 55 J. COPYRIGHT SOC’Y U.S.A. 257, 269-72 (2008); Nicole A. Grant, *Outlawed: Finding a Home for Graffiti in Copyright Law*, SELECTED WORKS OF NICOLE A. GRANT, 28 (2012), available at <http://ssrn.com/abstract=2030514> (last visited July 15, 2013) (“[T]he acknowledgement by the Court that [the legality of the mural] was a relevant factual question . . . suggests a disinclination to recognize a graffiti writer’s Section 106 rights under the Copyright Act.”).

17. See generally *Villa v. Pearson Educ., Inc.*, 2003 WL 22922178 (N.D. Ill. Dec. 9, 2003).

18. *Id.* at *2.

19. *Id.* at *3.

20. See Schwender and Grant, *supra* note 16.

copying of his artwork, he cannot use copyright law to prevent the removal and sale of his unsanctioned street art. With the rise in value of street art, street art is being carved off walls, and taken from its original context and environment to be sold in galleries, auction houses, or displayed in museums and art exhibitions. The street artists are generally not consulted before the removal of their works and do not receive royalties from the sale of their artwork.

Under U.S. copyright law, if a street artist creates an unsanctioned work on another party's building or wall, the real property owner owns the "material object" or "tangible medium," and therefore owns the actual physical copy of that artwork. 17 U.S.C. § 202 states that "[o]wnership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied." In other words, under U.S. copyright law, a street artist may own the exclusive right to reproduce his artwork, prepare derivatives of his artwork, and distribute duplicates of his artwork, but the owner of the wall could have the right to display the artwork and sell the original piece. Merely creating a work of art on another person's property does not render ownership of that real property to the artist. Therefore, under copyright law, if Banksy were to create a piece of artwork on a property owner's wall without permission, the real property owner may display, remove or sell his physical copy of Banksy's street art (in this case the wall or the building) to a third person notwithstanding the interests of Banksy, the copyright holder.

C. Protecting Unsanctioned Street Art from Destruction

Finally, street artists could attempt to prevent the *destruction* of their work under moral rights laws, which are embodied in the federal U.S. Visual Artists Rights Act (VARA) or state moral rights acts. VARA was enacted in order to protect the moral rights of artists.²¹ "The rights spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist's personality, as well as the integrity of the work, should

21. See generally *English v. BFC & R East 11th Street LLC*, 1997 WL 746444 (S.D.N.Y. Dec. 3, 1997).

therefore be protected and preserved.”²² VARA grants authors of certain works of visual arts the right of attribution and the right of integrity, which, in the case of visual arts of “recognized stature,”²³ also encompasses the right of the artist to prevent destruction of his work.²⁴ Specifically, VARA requires that the real property owner make a good faith attempt to notify an artist before destroying his work, and if the artist fails to remove his artwork or pay for the removal of his artwork within 90 days, the property owner may destroy the work.²⁵ Unlike copyright law, an artist’s moral rights under VARA survive whether or not he owns the copyright to the work or the physical copy of the work.²⁶

In *English v. BFC & R East 11th Street LLC*, a group of artists attempted to use VARA to prevent the destruction of unsanctioned murals and sculptures they created in a community garden.²⁷ The owners of the land wished to develop the garden into a building, thereby removing or destroying some of the artwork created by the artists.²⁸ The artists brought suit under VARA against the land owner and developer in the Southern District of New York for a permanent injunction against the destruction of the murals.²⁹ The court held 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.³⁰ The court’s reasoning relied heavily on public policy—seeing it unfit to allow individuals to use VARA as a tool to prevent development

22. See generally *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995).

23. Whether or not a piece of artwork is of “recognized stature” has been debated in many court cases in the U.S. Generally, courts have focused on the following two factors to determine whether a work is of recognized stature: (1) whether “the visual art in question has ‘stature,’ i.e. is viewed as meritorious;” and (2) whether “this stature is ‘recognized’ by art experts, other members of the artistic community, or by some cross-section of society.” *Pollara v. Seymour*, 150 F. Supp. 2d 393, 397 (N.D.N.Y. 2001).

24. 17 U.S.C. § 106A.

25. See 17 U.S.C. § 113(d)(2) (2014).

26. 17 U.S.C. § 106A(b).

27. *English*, 1997 WL 746444, at *1.

28. *Id.* at 1.

29. *Id.* at 2-3.

30. *Id.* at 4.

of property.³¹ However, in its opinion, the court specifically stated that it “expresses no view on VARA’s application to the individual sculptures, also illegally placed but not permanently affixed to the site.”³²

The Northern District of New York reinforced VARA’s distinction between removable and non-removable art in *Pollara v. Seymour*, where the court specifically explained that the holding in *English v. BFC & R East 11th Street LLC* was limited to the situation “where the artwork cannot be removed without destroying it.”³³ In *Pollara v. Seymour*, Joanna Pollara created and displayed a mural on a long scroll of paper in a public plaza without a permit.³⁴ The mural was removed from its frame by employees of the plaza and was torn and severely damaged in the process.³⁵ Pollara commenced an action against the owners and manager of the plaza under VARA. The property owners and manager moved for summary judgment on the ground that Pollara illegally placed the painting in the public plaza.³⁶ The court denied the plaza owner’s argument and held that there was “no basis in the [VARA] statute to find a general right to destroy works of art that are on property without the permission of the owner.”³⁷

Whether a piece of work is “removable” is a debatable issue. Under VARA, if the street art has been “incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work,” then the street art is not considered “removable” and the real property owner may remove or destroy the unsanctioned artwork without being subject to VARA.³⁸ Street art such as intricately designed and carved bird houses that are installed by the street artist XAM on public walls and utility poles

31. *Id.*

32. *Id.* at 5.

33. *Pollara*, 150 F. Supp. 2d at 396, n. 4.

34. *Id.* at 395.

35. *Id.*

36. *Id.* at 396.

37. *Id.* at 396, n. 4.

38. 17 U.S.C. § 113(d)(1)(A).

in New York are clearly removable without destruction.³⁹ However, based on the holding in *English v. BFC & R East 11th Street LLC*, a court would likely consider murals or paintings that are applied directly to a building wall to be non-removable, even though the general opinion in the art world is that most murals are considered removable,⁴⁰ and a number of street art pieces have been successfully removed for sale without damaging the work.

VARA may prevent the automatic destruction of certain street art, but it does not grant a street artist the right to insist that his art be preserved or maintained in its original location or context. Indeed, modification of the street art which is the result of “passage of time or the inherent nature of the materials” or the result of “conservation, or of the public presentation, including lighting and placement, of the work” is expressly excluded under VARA.⁴¹ For instance, the company Amazon removed graffiti paintings off of the side of its old office building in Seattle before tearing the building down, and then re-hung the graffiti paintings in its new corporate headquarters.⁴² It did not seek authorization from the artists.⁴³ This modification, for the purpose of “preserving” the street art, does not violate VARA.

Besides VARA, certain states in the U.S. also have their own moral rights laws protecting the moral rights of artists.⁴⁴ For

39. Steven Kurutz, *Birdhouses with Street Cred*, THE NEW YORK TIMES, July 10, 2013, http://www.nytimes.com/2013/07/11/garden/birdhouses-with-street-cred-courtesy-of-xam.html?_r=0 (last visited Aug. 22, 2013).

40. Michelle Bougdanos, *The Visual Artists Rights Act and its Application to Graffiti Murals: Whose Wall is it Anyway?*, 18 N.Y.L. SCH. J. HUM. RTS. 549, 568 (2002).

41. 17 U.S.C. § 116A(c)(1)-(2) (2014).

42. Jen Graves, *The Legal Art of Illegal Artists: What Happens When Graffiti Writers Make Public Art*, THE STRANGER, Sept. 2, 2010, <http://www.thestranger.com/seattle/the-legal-art-of-illegal-artists/Content?oid=4793225> (last visited Aug. 22, 2013).

43. *Id.*

44. This list includes California, New York, Connecticut, Louisiana, Maine, Massachusetts, Nevada, New Jersey, New Mexico, Pennsylvania, and Rhode Island. See Christian Ehret, *Mural Rights: Establishing Standing For Communities Under American Moral Rights Laws*, 10 PITT. J. OF TECH., LAW AND POLICY, 1-19, available at

instance, California's Art Preservation Act requires owners of artworks to give artists 30 days' notice to remove their works before they are destroyed.⁴⁵ However, even though "murals" qualify as protectable works under California's Art Preservation Act, the California state appellate court has explicitly stated that its state moral rights act does not apply to unsanctioned street art. Specifically, in *Botello v. Shell Oil Co.*, artists sued Shell Oil for the destruction of a mural created by the artists on the wall of a gas station owned by Shell Oil.⁴⁶ Although the mural at issue in *Botello* was commissioned and sanctioned by the property owner, the court in passing expressed its opinion that California's state moral rights act would not apply to unsanctioned street art – that it would only apply to "art that is affixed or attached by arrangement with the owner. It obviously does not apply to graffiti, which lacks these characteristics."⁴⁷

In conclusion, U.S. copyright law may protect street art from being copied and reproduced without a street artist's consent, but a court could discount the street artist's copyrights based on the illegality of his work. Copyright law also does not prevent a real property owner from selling an original piece of unsanctioned street art that was created on his property. Similarly, VARA may—in limited circumstances—protect street art from being destroyed, but it cannot prevent a real property owner from moving, preserving, or selling unsanctioned street art created on his property. State moral rights laws, furthermore, likely do not protect unsanctioned street art.

<http://tlp.law.pitt.edu/ojs/index.php/tlp/article/view/50> (last visited July 16, 2013).

45. Shauna Snow, *Court: Murals Are Art: Ruling Extends Protection to Street Paintings*, LOS ANGELES TIMES, May 6, 1991, available at http://articles.latimes.com/1991-05-06/entertainment/ca-999_1_state-supreme-court (last visited Aug. 24, 2013).

46. See generally *Botello v. Shell Oil Co.*, 229 Cal. App. 3d 1130 (Ct. App. 1991).

47. *Id.* at 1131, n. 2.

III. OTHER WAYS TO PROTECT STREET ART

Banksy gives these paintings to communities. They're cultural assets that generate a huge sense of civic pride. Morally, if not legally, we act as guardians rather than owners. – Claire Kober, Leader of Haringey Council

Even though street artists may be unable or reluctant to use formal intellectual property laws to protect their work from copying, sale or destruction, the street art community has developed its own norms, rules and procedures to protect street artists' intellectual property. Similarly, as local communities begin to assign value to the street art in their neighborhoods, communities are also looking for ways to keep street art from being destroyed or removed from their neighborhoods.

A. Street Art and Community Action

In recent years, communities have started to embrace street art in their neighborhoods. Communities embrace street art not only because they may beautify their streets and “offer aesthetic pleasure in place of . . . blight,” but also because they bring communities together and can add to the cultural identities of neighborhoods.⁴⁸ Street art can also bring tourism and economic development to an otherwise overlooked community.

For instance, in 2009, the Bristol Museum of Art opened a special exhibition of Banksy's artwork. It was estimated that visitors to the exhibition spent around 10.5 million GBP in restaurants, bars, cafes, hotels and taxis in Bristol, England.⁴⁹ Bristol—Banksy's hometown—whose streets are decorated with a number of Banksy pieces as well as pieces by other talented street artists—has also experienced a surge in street art tourism.⁵⁰

48. Ehret, *supra* note 44, at 3.

49. ANTHONY PLUMRIDGE AND ANDREW MEARMAN, *Banksy: The Economic Impact*, BANKSY: THE BRISTOL LEGEND, 110-17 (Gough ed. 2012).

50. *Id.*

Indeed, there are even guided tours and self-walking tours dedicated to showing off Bristol's street art.⁵¹

On the other hand, when street art is removed from its original wall by profit minded individuals or companies, the public often loses access to the work, the artwork is removed from its original context, and the local community loses the benefit they would have otherwise gained from a famous piece of street art in their neighborhood. In 2007, Banksy stenciled six satirical pieces of artwork on walls in the West Bank of Bethlehem, which highlighted the Israeli/Palestinian conflict.⁵² Banksy released the following statement: "Because of the troubles Bethlehem is no longer a top tourist destination, but it would be good if more people came to see the situation for themselves . . . [i]f it is safe enough for a bunch of sissy artists, then it is safe enough for anyone."⁵³ Within a year, however, at least two of those pieces were carved out of their original wall and ended up across the world hanging in galleries in London and New York.⁵⁴ As for the remaining Banksy pieces in Bethlehem, they have become pseudo tourist sites with organized tours guiding tourists to see them.⁵⁵ Similarly, in 2010, Banksy created a piece of artwork on a broken wall in inner-city Detroit—an area of total urban desolation since the closing of Packard motor factory in 1956.⁵⁶ The artwork

51. See, e.g., *Bristol Street Art Tours*, WHERE THE WALL, <http://www.wherethewall.com/tours> (last visited Aug. 22, 2013); *Banksy Walking Tour*, VISIT BRISTOL, <http://visitbristol.co.uk/things-to-do/banksy-walking-tour-p1354013> (last visited Aug. 21, 2013).

52. Aidan Jones, *Guerrilla Artist Banksy in Holy Land*, THE GUARDIAN, Dec., 2, 2007, <http://www.guardian.co.uk/uk/2007/dec/03/israel.artnews> (last visited Aug. 22, 2013).

53. *Id.*

54. Henry Lydiate, *Who Owns Street Art*, ARTQUEST, 2013, http://www.artquest.org.uk/articles/view/who_owns_street_art (last visited Aug. 22, 2012).

55. *Banksy Graffiti Bethlehem Tour*, MURAD TOURS, <http://www.muradtours.com/Pages/BanksyTour.aspx> (last visited Aug. 23, 2012).

56. WILL ELLSWORTH-JONES, *BANKSY: THE MAN BEHIND THE WALL* 235 (2012).

poignantly portrayed a sad child, standing with his paint brush and bucket, next to the words “I remember when all this was trees.”⁵⁷



The piece was swiftly removed from the abandoned building site and put into a gallery.⁵⁸ Many bloggers were outraged by the removal of the piece. They argued that “the power of that piece was its environment. Outside of that what does it say?”⁵⁹ and that they would “rather venture into the Packard to see a dissed Banksy, and stand where he stood than see it butchered and hacked from the wall in some gallery.”⁶⁰

One of the most effective ways to preserve street art seems to be to utilize community action. For instance, in Taichung, Taiwan, an old military dependents’ village was transformed into a “Rainbow Village” by 86-year-old veteran-turned-street artist Huang Yung-fu.⁶¹ Huang started painting the walls and streets of his nearly-abandoned village in 2009, slowly covering almost

57. *Banksy Environmental Message*, INSPIRATION GREEN, <http://www.inspirationgreen.com/banksy-environment.html> (last visited Aug. 21, 2013).

58. ELLSWORTH-JONES, *supra* note 56, at 235.

59. *Id.* at 239.

60. *Id.*

61. Kaushik, *Rainbow Village of Taichung, Taiwan*, AMUSING PLANET, Dec. 10, 2011, <http://www.amusingplanet.com/2011/12/rainbow-village-of-taichung-taiwan.html> (last visited Aug. 27, 2013).

every space in the village with his vibrant and colorful artwork.⁶² The old village was originally slated to be destroyed. However, following an instantly popular campaign launched by Internet users to save Rainbow Village, the City of Taichung promised to preserve the village.⁶³ Rainbow Village has now become a must-see tourist hotspot in Taiwan. Similarly, in 2006, the Bristol City Council held an online poll seeking the public's views on the Park Street Banksy⁶⁴—a street art piece by Banksy on the wall of a sexual health clinic, displaying a naked man hanging from a window. Over 90% responded that the artwork should be preserved from removal.⁶⁵ As a result, not only did the Council pass a resolution preventing the city's removal of the work, it actually made efforts to professionally preserve the artwork.⁶⁶ Now, the "Park Street Banksy" has become one of Bristol's must-see tourist sites, and most street art pieces around the city that may be identified as Banksy's work are also being preserved.

Unfortunately, community action does not always guarantee results. In the Banksy Slave Labour case briefly described in Section II above, the citizens of Wood Green were outraged at the removal of Banksy's Slave Labour piece from its North London location. Banksy's Slave Labour artwork was purportedly inspired by the Queen's diamond jubilee. It depicted a young boy, hunched over and sitting on the ground over a sewing machine producing Union Jack bunting.⁶⁷ It seemed appropriate on the wall of a Poundland store in Wood Green, which sells everything for one pound. Since its disappearance from the wall, the community of Wood Green vocally petitioned their local government and held protests to seek back the piece.⁶⁸ However, despite strong

62. *Id.*

63. *Taichung's Rainbow Village to be Preserved: Mayor Hu*, TAIWAN NEWS, Sept. 13, 2010, http://www.etaiwannews.com/etn/news_content.php?id=1373473&lang=eng_news (last visited Aug. 27, 2013).

64. John Webster, *Protecting Banksy's Legacy: A Lawyer's View*, BANKSY: THE BRISTOL LEGACY 132-37 (Gough ed. 2012).

65. *Id.*

66. *Id.*

67. Sutcliffe, *supra* note 5.

68. Williams, *supra* note 6.

community and local government pressure, Slave Labour ended up selling at auction for approximately \$1.1 million dollars.⁶⁹



In order to allow communities to have a say in preserving street art, one commentator in the U.K. proposes allowing communities to list popular street art under England's Listed Building Act in order to prevent the destruction of such "cultural icons."⁷⁰ For instance, the zebra crossing featured on The Beatles' famous album, Abbey Road, has been listed for preservation under England's Listed Building Act.⁷¹ In the U.S., many municipalities—especially those with significant historical resources—have historical preservation laws protecting historic buildings or historic features of buildings from being demolished or altered.⁷² For street art that resonate with communities,

69. Brooks, *supra* note 8. Image from Alexi Mostrous, *To Buy or Not to Buy? That's a Question for Banksy Fans*, THE AUSTRALIAN, Feb. 25, 2013, <http://www.theaustralian.com.au/news/world/to-buy-or-not-to-buy-thats-a-question-for-banksy-fans/story-fnb64oi6-1226585000473> (last visited Aug. 21, 2013).

70. Webster, *supra* note 64.

71. *Id.*

72. See, e.g., CHICAGO LANDMARKS ORDINANCE (2011), available at https://www.cityofchicago.org/content/dam/city/depts/zlup/Historic_Preservation/Publications/Chicago_Landmarks_Ordinance.pdf (last visited Aug. 22, 2013), and other landmark designation or historical preservation guidelines for New York, Boston, Baltimore, Denver.

communities could attempt to petition their local government officials to list and preserve popular street art under their local historical preservation laws, or create new laws to protect less historic but still valuable cultural assets.

Another commentator suggests changing moral rights laws to allow communities to be treated as “joint authors” in order to prevent the destruction and mutilation of street art.⁷³ This would extend “standing” to bring suit under moral rights laws to community members and organizations in a limited fashion when the art at issue is public art or outdoor murals, allowing communities to have rights to prevent the destruction of street art.⁷⁴ This solution may be especially appropriate where a street artist is unwilling or unable to identify himself or unwilling to attempt to preserve his own artwork.

However, until such changes in legislation are seriously considered, the most effective way for a community to prevent the destruction or removal of street art from its neighborhood seems to be community pressure and action—although, as evident in the Banksy Slave Labour case, such pressure may not be enough to dissuade profit-minded property owners from cashing in on their lucky graffiti fortune.

B. Street Art Normative Rules and Procedures

No tagging churches/places of worship.

No tagging cars or houses.

No going over someone who is a lot better than you unless its beef.

Dont tag your personal property (except of course black books and such).

Dont tag schools. – blitzmoney94

Street artists’ inability or reluctance to use intellectual property laws to protect their artwork does not mean that they do not observe normative rules, or use other tactics to prevent third-parties from profiting from their artwork without permission.

73. Ehret, *supra* note 44, at 14.

74. *Id.* at 12.

“Contrary to the popular myth which presents subcultures as lawless forms, the internal structure of any particular subculture is characterized by an extreme orderliness.”⁷⁵ This is true in the subculture of street art. In fact, many industries that do not or cannot rely on formal intellectual property laws have developed social norms and rules to protect their intellectual property, such as cuisine,⁷⁶ stand-up comedy,⁷⁷ and magic,⁷⁸ but “graffiti art has developed its rules and codes way beyond other subcultures.”⁷⁹

Street artists, for instance, have been known to destroy their own work to prevent unauthorized third-parties from profiting financially from their artwork. A well-known case occurred in Buenos Aires in 2011. Jose Carlos Martinat, a conceptual artist, commissioned the removal of pieces of street art and portions of street murals from various outdoor walls in Buenos Aires.⁸⁰ Martinat did so without permission and did not consult any of the street artists whose work he removed.⁸¹ He then exhibited the removed artwork in a gallery and offered them for sale.⁸² On the opening night of his exhibition, furious local street artists reportedly set off a fire alarm and used the distraction to destroy every single piece of their own artwork in the exhibition.⁸³ These street artists would rather their work be destroyed than to allow

75. DICK HEBDIGE, *SUBCULTURE-THE MEANING OF STYLE* 113 (1979) (citing PAUL E. WILLIS, *PROFANE CULTURE* (1978)).

76. Emmanuelle Fauchart and Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 *ORG. SCI.* 2, 187-88 (2008).

77. Dotan Oliar and Christopher Sprigman, *Intellectual Property Norms in Stand-Up Comedy*, *THE MAKING AND UNMAKING OF INTELLECTUAL PROPERTY* (M. Biagioli ed. 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635023 (last visited Aug. 22, 2013).

78. Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law*, *LAW AND MAGIC: A COLLECTION OF ESSAYS* 123-24 (C. Corcos ed. 2010).

79. James E. Walmesley, *In the Beginning There Was The Word*, *BEAUTIFUL LOSERS* 197 (A. Rose and C. Strike ed. 2004).

80. *Paredes Robadas: Street Art Theft in Buenos Aires*, *GRAFFITIMUNDO*, Oct. 15, 2011, <http://graffitimundo.com/media/paredes-robadas-the-theft-of-buenos-aires-street-art/> (last visited Aug. 22, 2013).

81. *See id.*

82. *Id.*

83. *See id.*

others to profit from their work or to see their work out of context, hanging in a gallery or museum.

Another strategy street artists have employed to prevent third-parties from profiting from their work is the refusal to sign or “authenticate” pieces of street art. For instance, Banksy’s official certification organization, Pest Control, will not authenticate street art pieces “because they were not created as commercial works of art.”⁸⁴ As in all artwork, an unauthenticated work is generally worth much less than a signed or authenticated piece. In the case of Banksy, because there have been past instances of “fakes,”⁸⁵ refusing to authenticate a piece of work could drive down the potential price or make pieces harder to sell. In fact, Sotheby’s London refuses to sell any Banksy artwork not accompanied by a certificate of authenticity from Pest Control.⁸⁶

The ultimate offense in street art is writing over someone else’s work.⁸⁷ When this rule is not observed, street artists often take to the streets to punish each other for failure to follow normative street art rules, resulting in street art “feuds.” Arguably, the most famous street art feud in recent history is between Banksy and Robbo. The feud started in the early 1990s, but escalated in 2009 when Banksy purportedly committed an “unforgiveable transgression of strict graffiti rules” by painting over a 1985 Robbo piece on the Regents Canal in London with the image of a workman wall-papering up Robbo’s artwork.⁸⁸ Robbo—who was in “retirement”—came out of retirement for retaliation by changing the image of Banksy’s workman to make it look like he

84. Paul Howcroft, *Selling Banksy Street Art*, ART LAW LONDON, May 15, 2013, <http://artlawlondon.blogspot.co.uk/2013/05/selling-banksy-street-art.html> (last visited Aug. 22, 2013).

85. See Ellsworth-Jones, *supra* note 56, at 204-22.

86. Williams, *supra* note 6.

87. *Language and Rules of Graffiti Artists*, GRAFFITI VS. STREET ART DISCOURSE GROUPS, <http://iwillnotbeconsumed.wordpress.com/language-and-rules-of-graffiti-artists/> (last visited Aug. 22, 2013).

88. *Graffiti Wars*, CHANNEL 4, <http://www.channel4.com/programmes/graffiti-wars/episode-guide> (last visited Aug. 22, 2013); Jo Fuytes-Knight, *King Robbo Exclusive Interview: My Graffiti War with Banksy*, SABOTAGE TIMES, Mar. 27, 2013, <http://sabotagetimes.com/people/king-robbo-exclusive-interview-my-graffiti-war-with-banksy/> (last visited Aug. 22, 2013).

was painting the tag “King Robbo.”⁸⁹ In Robbo’s words, “[Banksy] broke a graffiti code of conduct and for a lawless community we have a lot of laws, so I had to come back.”⁹⁰ The piece was changed again by Banksy, which was changed again by Robbo. Over the years, the feud between Banksy and Robbo resulted in the following artistic dialogue and exchange between the two artists and their supporters on the Regents Canal wall.⁹¹



89. Fuertes-Knight, *supra* note 88.

90. *Id.*

91. Images from Banksy’s Official Website. *Questions*, BANSKY, <http://www.banksy.co.uk/QA/camden/camden4.html#> (last visited Aug. 21, 2013).



Another way street artists, or communities, preserve street art is through photography or on the Internet, such as on websites maintained by street artists like Pest Control, or on third party websites like Streetsy, Melrose and Fairfax, and Wooster Collective. Street artists recognize that their artwork is impermanent and temporary, and they archive and preserve it through photography and online. This provides a permanent record of the street art in the environment in which it was created.⁹²

In conclusion, street artists have—over the decades—developed norms, rules and procedures to protect their intellectual property from being exploited or destroyed. These norms are not fool proof, as exemplified by some of the cases described above, but this does not mean that stronger intellectual property protections should be automatically implemented or introduced into the street art culture. Introducing intellectual property laws into a community that is self-reliant and self-governed through established norms and rules could create unintended and damaging consequences.

92. Ellsworth-Jones, *supra* note 56, at 237.

IV. STREET ART EXISTS IN INTELLECTUAL PROPERTY'S "NEGATIVE SPACE"

Copyright is for losers©™ – Banksy

If you've built a reputation on having a casual attitude towards property ownership, it seems a bit bad-mannered to kick off about copyright law.

– Banksy

As described above, there are not many legal avenues under U.S. intellectual property law that a street artist may pursue to prevent the copying, removal, or destruction of his street art. There are either potential caveats in the law excluding “illegal” street art, or street artists are reluctant to use intellectual property laws to protect or preserve their artwork. However, despite existing in such a low-IP environment, one need only to peruse the streets of London, New York, Los Angeles, Buenos Aires or any city to recognize that street art is flourishing in our society. The fact that street art has thrived instead of diminished in a low-IP environment supports the argument that street art is a creative industry successfully existing in intellectual property's “negative space,” and may not need the artificial exclusivity offered by intellectual property laws in order to exist.

As defined by Raustiala and Sprigman, to exist in intellectual property's “negative space” is characterized as existing in “the territory where IP law might regulate, but (perhaps for accidental or nonessential reasons) does not.”⁹³ However, as Rosenblatt clarifies, “[t]o qualify as existing in IP's negative space, an industry must not only *exist* in a low-IP environment, but must also *thrive* there.”⁹⁴ There are many well-known examples of successful creative industries that exist and thrive in intellectual property's negative space, such as fashion, stand-up comedy,

93. Kal Raustiala and Christopher Sprigman, Response, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201 (2009).

94. Elizabeth R. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUMBIA JOURNAL OF LAW & THE ARTS 317, 325 (2011) (emphasis added).

food/cuisine, and American football.⁹⁵ As explored below, street art is also one of those industries.

A. *Street Art Exists in a Low-IP Environment*

In her article, *A Theory of IP's Negative Space*, Rosenblatt attempts to seek a unifying theory of what makes certain industries well-suited to IP's negative space by examining the commonalities between well-known negative space industries.⁹⁶ She argues that all negative spaces may be divided into three low-IP categories: "doctrinal no man's land," "areas of IP forbearance," and "use-based carve outs."⁹⁷ Street art straddles the categories of *IP forbearance* and *use-based carve outs*.

1. *IP Forbearance*

"IP forbearance occurs when traditional intellectual property is available to creators, but those creators commonly opt either to forego protection, or not to pursue infringers."⁹⁸ Even though, as discussed above, there may be certain legal avenues a street artist could take to attempt to protect his work, generally, street artists often choose not to rely on intellectual property laws.

One of the primary reasons for this is straightforward: because street art—in its original and purest form—is created illegally or without authorization, on private or public property not owned by the street artists. By attempting to enforce the street artist's intellectual property rights in his expression, the street artist could subject himself to civil and criminal liability for trespass, vandalism, destruction of property and other crimes or torts. Additionally, most street artists create their work under pseudonyms, such as "Banksy," "XAM," "Robbo," "SpY," "Blu," "Invader," "Borf." By attempting to initiate proceedings in court, they will necessarily need to reveal their true identities. The high social and monetary costs of civil litigation serve as a deterrent to

95. See KAL RAUSTIALA AND CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION*, Introduction (2012).

96. Rosenblatt, *supra* note 94, at 317.

97. *Id.* at 323-24.

98. *Id.* at 330.

street artists, because the expected benefits from litigation often do not justify the costs.

Furthermore, intellectual property laws are often contrary to the ethos of street artists. Intellectual property law provides exclusivity—whereas street artists want to freely share their work with the public, their street or community. Street artists do not care about the legal status of their work, because they view their work as a representation of the street and their communities. In fact, the association of street artists with money may cause reputational damage to street artists, making them appear as if they have “sold out to the man.”⁹⁹

Finally, street artists may not want to prevent the destruction of their work because impermanence is often critical to the expression of the street artist. Street artists recognize that, by choosing the street as their medium of expression, their work is temporary, it could be removed by the authorities, painted over by another street artist, or degraded by the passage of time and weather.¹⁰⁰

Accordingly, even though there may be certain limited legal remedies under intellectual property law available to street artists to protect their work from copying or destruction, street artists tend to forbear from using such legal remedies, and these legal remedies are not ideal or practical solutions for street artists to prevent the copying or destruction of their works.

2. Use-Based Carve Outs

Another low-IP category Rosenblatt recognizes is “use-based carve outs.” Use-based carve outs occur where lawmakers or courts have exempted certain types of intellectual property use from liability.¹⁰¹ As discussed in Section II above, courts in the U.S. have carved out common protections offered to artwork under VARA or U.S. copyright law for street art that is created illegally.

99. See Reply Memorandum in Support of Defendant’s Motion to Dismiss the Complaint at 6, *Villa v. Pearson Educ., Inc.*, 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.’”).

100. See, e.g., *Paredes Robadas*, *supra* note 80.

101. *Rosenblatt*, *supra* note 94, at 322.

Recall the decision in *English v. BFC & R East 11th Street LLC*, where the court granted summary judgment to the land owner and held that “VARA is inapplicable 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.”¹⁰² The court’s primary reasoning was based on public policy concerns—if VARA applied to illegally-placed street art, then “parties could effectively freeze development of vacant lots by placing artwork there without permission.”¹⁰³ Similarly, in *Botello v. Shell Oil Co.*, the court noted in dicta that the California moral rights act applied only to “art that is affixed or attached by arrangement with the owner. It obviously does not apply to graffiti, which lacks these characteristics.”¹⁰⁴ Finally, in *Villa v. Pearson Education, Inc.*, many commentators interpret the court’s language in its decision to suggest that “illegality” may be a viable defense to copyright infringement or that courts may be disinclined to recognize street artists’ copyright in illegal street art.¹⁰⁵ Therefore, for public policy reasons, courts have created certain carve outs from U.S. intellectual property law for “illegal” street art.

B. Street Art is Well-Suited to Low-IP Treatment

Street art not only *exists* in a low-IP environment, it is also *well-suited* to low-IP treatment. According to Rosenblatt, any industry that consistently experiences any of the following four overlapping sets of conditions is better suited to low-IP treatment than an industry that does not: (1) where creation is driven by rewards that do not depend on exclusivity; (2) where there is high public or creator interest in free access to the work without damage to creativity; (3) where exclusivity would harm further creation; and (4) where creators prefer to reinvest resources in further creation than in protection or enforcement of intellectual property.¹⁰⁶ Street art satisfies these conditions.

102. *English*, 1997 WL 746444, at *4.

103. *Id.* at 4.

104. *Botello*, 229 Cal. App. 3d at 1138, n. 2.

105. See Schwender, *supra* note 16, at 269-73; Grant, *supra* note 16, at 28.

106. Rosenblatt, *supra* note 94, at 342.

I. Creation of Street Art is Not Driven by Exclusivity

Street artists are not generally driven by exclusivity, or financial or monetary rewards to create artwork. Many street artists create artwork in order to “express themselves” or to send a message to the public—often times the message is commentary on, or criticism or satire of current social, cultural, political, or economic events. Street artists may be compelled to create artwork on walls because of the magical appearance of an idea, which inspires the street artist forward,¹⁰⁷ or the simple pleasure of “play,”¹⁰⁸ or what Davies describes as an “addiction or possession.”¹⁰⁹

Some street artists view galleries and museums as profit-making businesses that disconnect art from everyday life; therefore, they create street art on cities walls in order to allow everyone to enjoy “art”—not just the “rich and educated” museum goers.¹¹⁰ Other street artists believe that they are creating artwork in order to beautify their neighborhoods or the city environment, and some are compelled to create artwork because of the freedom to be rebellious and creative, and perhaps the thrill or “rush” of illegally expressing their ideas in public.¹¹¹

Even though street artists often work anonymously, they often sign their work—or put up “tags.”¹¹² These street artists may create artwork in order to be noticed—to gain recognition within the street art and local community. According to Walmesley, the reason many street artists start their career is to be noticed, to gain fame, even though they are, at the same time, hiding behind an

107. Jessica Silbey, *Harvesting Intellectual Property: Inspired Beginnings and “Work-Makes-Work,” Two Stages in the Creative Processes of Artists and Innovators*, 86 NOTRE DAME L. REV. 2091, 2103-04 (2011).

108. *Id.* at 2111.

109. Davies, *supra* note 15, at 52.

110. Allan Hough, *I Heart Street Art: Why Do You Make Street Art?*, SF WEEKLY, May 12, 2009, http://blogs.sfweekly.com/shookdown/2009/05/i_heart_street_art_why_do_you.php (last visited Dec. 10, 2012).

111. *Id.*

112. “Tags” are used by graffiti and street artists like personal marks, they are the artists’ brand name. *See* *Reece v. Marc Ecko Unltd.*, 2011 WL 4112071, at *1, n.1 (S.D.N.Y. Aug. 19, 2011).

alias.¹¹³ Finally, street artists may create out of a desire to be part of a community; “[t]hese communities share an ethos of independence and even mild transgression: ‘We are bucking the establishment.’”¹¹⁴ By the very nature of their work, which is meant to be displayed and shared publicly, street artists are not driven by the reward of “exclusivity” to create artwork.

2. There is High Interest in Free Access Without Harm to Creativity, and Exclusivity Could Harm Further Creation

The appropriation of street art will not harm creativity. To some, like Walmesley, it is actually a sign of street art’s power and endurance.¹¹⁵ “Popularizing graffiti only serves to increase its appeal” and attract a new generation of street artists.¹¹⁶ In fact, the lack of intellectual property protection of a street artist’s work may, theoretically, *encourage* creativity and innovation in street art.

Street artists recognize that, eventually, their work will be degraded by time and weather, will be destroyed by authorities, or will be painted over or added upon by other street artists. To send a message through one’s artwork, the message must be *current* in order to remain relevant. The constant destruction or painting over of street art forces street artists to come up with new ideas, a new creative or innovative message about current events to express through their artwork. This allows street art to always stay fresh, new, and interesting. Accordingly, many street artists would likely agree that this transience is part of the very nature of street art.

Additionally, street art is inherently impermanent—but the copying and distributing of the street art (even without the artist’s permission) makes the work (and message) permanent. This allows more of the world to enjoy the street artist’s work. It also provides recognition or affirmation to the street artist—a signal that he has created something worth copying and distributing. This in turn may encourage and push the street artist to create more creative or innovative works that will receive the same

113. Walmesley, *supra* note 79, at 195-97.

114. Rosenblatt, *supra* note 94, at 345.

115. Walmesley, *supra* note 79, at 206.

116. *Id.*

amount of attention and recognition in the future. Furthermore, if street artists want to send a message of social change or commentary through their work, what better way to spread this message than by having it copied (albeit without authorization) and publicized through books, posters, photos, t-shirts, tote bags, baseball caps, etc.? “The point is to get the word out, and it may not matter whether that word is copied, imitated, attributed or paid for.”¹¹⁷

The hacking, alteration or copying of street art by other street artists also may help to drive street art forward—and exclusivity offered by intellectual property law may harm further creation. Creativity spurs creativity—”[c]reators are inspired by previous creations. Artists borrow from their predecessors.”¹¹⁸ A simple mural or scribbling of graffiti on a wall could inspire another street artist to create his own artwork, allowing society to benefit from both artists’ creative output. The culture of graffiti includes much sharing and appropriation, and also supports artistic dialogues between artists expressed on the street.¹¹⁹ Not only do street artists recognize that their artwork is temporary, they also recognize that their artwork is not static—and that their work will likely be intervened or added on by other street artists.¹²⁰ When this does happen, street artists have developed normative rules of responding to each other without the use of intellectual property laws.¹²¹ Indeed, many significant, beautiful, and creative murals—a few examples shown below¹²²—began as one street artist’s work that was added upon by other artists to create a masterpiece of creativity through the collaborative efforts of many. According to

117. Rosenblatt, *supra* note 94, at 350.

118. Dan L. Burk, *Law and Economics of Intellectual Property: In Search of First Principles*, Legal Studies Research Paper Series No. 2012-60, University of California, Irvine – School of Law (2012).

119. *See, e.g.*, Banksy vs. Robbo feud, *supra* Section III.B.

120. *See* Lerman, *supra* note 4, at 335 n. 179.

121. *See supra* Section III.B.

122. Images of “collaborative” murals from *New by Banksy*, STREET ART UTOPIA. <http://www.streetartutopia.com/?p=2831>; Image from Tumblr. http://24.media.tumblr.com/tumblr_m7ah1f87BF1qkdixgo1_1280.jpg; *If These Walls Could Talk: A Guide to L.A.’s Latest Street Art*, REFINERY29. <http://www.refinery29.com/la-street-art/slideshow#slide-11> (last visited Aug. 22, 2013).

Silbey, “[t]he intellectual property literature is rich with critiques of how strengthened intellectual property protection restricts access and use of creative or innovative work thereby stifling the very creativity and innovation the intellectual property laws were meant to incentivize.”¹²³ Introducing intellectual property rights into this culture, where street artists may be sued by other street artists under VARA or copyright law for intervening in another artist’s work, could significantly change the culture and norms of street art and harm further creation.



123. Silbey, *supra* note 107, at 2111, n. 65.



3. Street Artists Prefer to Reinvest Resources in Further Creation than in Protection or Enforcement of Intellectual Property

The monetary and non-monetary costs to street artists to pursue infringers outweigh the potential benefits. The expected benefits from litigation often do not justify the costs, which include costs of civil litigation, having to reveal one's identity, and subjecting oneself to potential civil or criminal liability for trespass, vandalism, destruction or property or other crimes and torts. By attempting to enforce their intellectual property rights, street artists could be tied up in litigation for years trying to protect one piece of artwork instead of using this time and money to create new and innovative expressions of art on the streets. Most street artists would likely prefer to invest their time in creating further art than attempting to enforce their intellectual property rights. In conclusion, based on an analysis of street art and Rosenblatt's

overlapping conditions discussed above, street art is an industry that is well-suited to low-IP treatment.

C. More IP Protection for Street Art?

Analyzed under Rosenblatt's theory, street art is well-suited to low-IP treatment. However, some commentators have argued for an increase in traditional intellectual property protection for street art. They argue that "illegality" should not be a bar or defense to copyright infringement claims brought by street artists against third-parties, and that unsanctioned street art should receive the same protection as traditional visual arts under U.S. intellectual property laws.

For instance, Schwender argues that "[i]llegal graffiti is an important form of art deserving the same copyright protection as similar artistic formats."¹²⁴ He is primarily concerned that denial of traditional intellectual property protection to street artists' works would "preclude a great artist from further development or deny the public of a wonderful artist" and "could work to discourage the development of the Arts."¹²⁵ He proposes a new sample legislation that should be added to the U.S. Copyright Act in order to specifically protect illegal graffiti from unauthorized reproduction, derivation, or distribution.¹²⁶

Similarly, Lerman argues that "[w]hen an unauthorized graffiti work complies with the minimum requirements for copyright protection it should be protected under copyright law despite its illegality."¹²⁷ She justifies this argument by reasoning that protecting graffiti "may have the consequence of incentivizing graffiti artists to create more legal works" and that "[g]ranting copyright protection to graffiti will simply promote more art, regardless of whether that art is legal or illegal."¹²⁸

The reasons posited by Schwender and Lerman are often cited by advocates of stronger intellectual property protections—namely, that intellectual property law provides incentives for creative

124. Schwender, *supra* note 16, at 257.

125. *Id.* at 280-81.

126. *Id.* at 277-78.

127. Lerman, *supra* note 4, at 336.

128. *Id.* at 322 and 337.

intellectual efforts that will benefit the society at large, and, that without such incentives, artists may not be motivated to create.¹²⁹ However, as numerous other commentators have explored in recent years, intellectual property—as a formal legal entitlement—is not necessarily a motivating or incentivizing factor in the creation of artistic work. For instance, Silbey recognizes that “IP as a formal legal entitlement is not clearly present in the beginning of [creative] endeavors—or even in the early stages of the work—despite the myth we tell about IP as a motivating or incentivizing factor from inception.”¹³⁰ Similarly, Johnson suggests that “[e]xternal rewards are, as a general matter, unnecessary for the flourishing of arts, entertainment, and technology.”¹³¹ Even social scientists such as Benkler, and business speakers such as Pink, who have studied creativity or the empirical evidence on financial reward and creativity, have found that creativity does not necessarily happen because of the financial rewards from outputs.¹³² In other words, external rewards—such as those granted by intellectual property law—may not be necessary for the flourishing of the arts.¹³³

There is not a more apt example of these arguments than in street art. One may simply walk down the streets of any great city like London, New York, Sao Paulo, Buenos Aires, Berlin to find evidence that creativity and innovation in street art—despite the lack of intellectual property protection—is actually flourishing, and street artists continue to create masterpieces on city walls, buildings, and bridges throughout the world. This alone is persuasive evidence that the lack of formal intellectual property protection of street artists’ work has not destroyed—and will not

129. See generally William W. Fisher, *Theories of Intellectual Property*, NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY (2001).

130. Silbey, *supra* note 107, at 2128-29.

131. Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 624 (2012).

132. See generally YOCHAI BENKLER, *THE PENGUIN AND THE LEVIATHAN: HOW COOPERATION TRIUMPHS OVER SELF-INTEREST* (2011); DANIEL H. PINK, *DRIVE: THE SURPRISING TRUTH ABOUT WHAT MOTIVATES US* (2009) (claiming that financial rewards may in fact stifle creativity); see also RSA ANIMATE, <http://www.youtube.com/watch?v=u6XAPnuFjJc> (last visited Nov. 17, 2012).

133. Johnson, *supra* note 131, at 624.

destroy—street art. As Raustiala and Sprigman argue, “IP rights are costly monopoly grants that ought to be created only when necessary to foster innovation.”¹³⁴ Where—as in the case of street art—intellectual property is not necessary to foster innovation or creativity, stronger “intellectual property” protection may not be warranted.

V. CONCLUSION

Despite what they say graffiti is not the lowest form of art. Although you might have to creep about at night and lie to your mum it's actually one of the more honest art forms available. There is no elitism or hype, it exhibits on the best walls a town has to offer and nobody is put off by the price of admission. – Banksy

In conclusion, street artists could attempt to use U.S. copyright law and VARA to protect their artwork from unauthorized copying and destruction. However, due to the nature of street art, and the ethos of street artists, intellectual property law is not an effective way to protect street art. Nevertheless, as has been evident in the past decade, innovation and creativity in street art will thrive even without the artificial exclusivity created by intellectual property. Street artists have been protecting their work through normative rules developed over the years, and communities are also looking for creative ways to protect street art from being destroyed or removed from their neighborhoods. The concern that the lack of formal intellectual property protection will “discourage” street art’s creation is not a valid justification to impose or create stronger intellectual property protection for street art. Economic incentives are not necessary to motivate the creation—or the continued creative output—of street art. The evidence of this is on the streets, where street art continues to flourish in a norms-based, low-IP world.

134. Raustiala, *supra* note 93, at 1225.