

INCENTIVIZING GRAFFITI:  
EXTENDING COPYRIGHT PROTECTION TO A  
PROMINENT ARTISTIC MOVEMENT

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INTRODUCTION

“Copyright is for losers.”<sup>1</sup> Or so asserted graffiti artist Banksy while also asserting his rights under the Copyright, Designs and Patent Act of 1988.<sup>2</sup> Banksy claims to be anti-copyright, yet simultaneously uses copyright law to enforce his intellectual property rights. As the popularity of graffiti rises, there is a growing need for legal protection for graffiti artists who create unsanctioned work. Consumers and the public are gaining interest in this artistic movement and often are appropriating these artists’ work without permission, and artists in turn are bringing more lawsuits in an attempt to assert a copyright to protect their art. The question then becomes whether graffiti, specifically unsanctioned graffiti, has copyright protection and whether it deserves such protection.

This Note focuses solely on copyright issues and not the destruction or removal of works of graffiti art. Owning the physical embodiment of the work, such as the wall on which it was painted, does not create title to the copyright.<sup>3</sup> The property owners have the rights over the physical embodiment,<sup>4</sup> but copyright law protects the intangible aspects of the work.<sup>5</sup> Part I of this Note outlines a brief history of graffiti and explains

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1 Dan Karmel, *Off the Wall: Abandonment and the First Sale Doctrine*, 45 COLUM. J.L. & SOC. PROBS. 353, 356 n.23 (2012) (quoting BANKSY, WALL AND PIECE 2 (2005)).

2 *Id.* at 356 n.24 (quoting BANKSY, *supra* note 1, at 2).

3 Celia Lerman, *Protecting Artistic Vandalism: Graffiti and Copyright Law*, 2 N.Y.U. J. INTELL. PROP. & ENT. L. 295, 317 (2013).

4 *See id.*

5 *Id.* at 309. An owner then has the right to paint over or destroy the graffiti that is on the owner’s property. *Id.* at 326. Assuming that graffiti is copyrightable, the physical property owner does not have a right to the underlying intellectual property in that work. *See id.* at 325. For instance, the owner could not take a photo of that graffiti, reproduce it on a bag, and sell it.

what constitutes a work of graffiti. Part II emphasizes the growing importance of graffiti as an accepted and widespread artistic movement. Part III explains the copyright requirements under the Copyright Act and the Visual Artists Rights Act (VARA), and then Part IV applies these requirements to graffiti. Finally, Part V argues that under an incentive-based theory of intellectual property, copyright law should not exclude graffiti when it already fits within statutory law, as this would create inefficiency and contradiction in copyright law, which is meant to continually expand to accept new art forms.

## I. WHAT IS GRAFFITI?

The current graffiti movement gained popularity in the 1970s, but it is rooted in the deeper history of La Grotte de Lascaux from 18,000 BCE, Egyptian hieroglyphs, markings found on tombs from the pre-Christian era, and 2000-year-old murals from Pompeii.<sup>6</sup> Graffiti is not only a modern art form, but also “an ancient configuration of the artistic dialogue.”<sup>7</sup> The current style of graffiti began in the 1970s with “tagging” or signing one’s name in a particular style in order to mark territory or as a form of rebellion.<sup>8</sup> This practice soon developed from merely signing one’s name to focusing on the artistic style of the writing.<sup>9</sup> In the 1980s, graffiti began to move from vandalism to an artistic form of expression.<sup>10</sup> Today graffiti is no longer found purely on the streets, but is also sold in art galleries and displayed in museums,<sup>11</sup> illustrating the growing acceptance and popularity of what was once seen as mere defacement of property with a spray can.

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.<sup>12</sup> Street art is a subset of graffiti that includes “stickers, wheat-paste posters, stenciled paintings, downloaded images from the Web, as well as free-hand graffiti.”<sup>13</sup> Street art is “often purely artistic,” meaning that it is “an aesthetic work that [the] general public is able to interpret.”<sup>14</sup>

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6 See ALEXANDRA DARRABY, 1 ART, ARTIFACT, ARCHITECTURE AND MUSEUM LAW § 1:18, Westlaw (database updated Apr. 2014); Brittany M. Elias & Bobby Ghajar, *Street Art: The Everlasting Divide Between Graffiti Art and Intellectual Property Protection*, 7 LANDSLIDE 48, 48 (2015).

7 DARRABY, *supra* note 6.

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

9 *See id.*

10 *Id.*

11 *Id.* at 965.

12 Lerman, *supra* note 3, at 298–99.

13 DARRABY, *supra* note 6.

14 Lerman, *supra* note 3, at 298.

This Note concentrates on unsanctioned or illegal graffiti, which includes all the subsets and styles described above. Illegal graffiti is created without the permission of the owner of the surface on which it is painted and is illegal even if the work does not harm the property owner.<sup>15</sup> This Note will not include tagging within the definition of graffiti. Tagging is not copyrightable under 37 C.F.R. § 202.1,<sup>16</sup> which prohibits the copyright of “[w]ords and short phrases such as names, titles, and slogans . . . mere variations of typographic ornamentation, lettering or coloring.”<sup>17</sup> While the graffiti found most commonly in the 1970s would not be copyrightable as it was mainly tagging, graffiti has grown into a more expansive art form outside of tagging.

## II. FROM VANDALISM TO AN ARTISTIC MOVEMENT

Graffiti has developed from vandalism in the 1970s to a predominant, widespread, and respected art movement. Prime Minister David Cameron presented President Barack Obama with the graffiti work of Ben Eine on his first trip to Washington. The work was a spray-painted alphabet on shop shutters from London.<sup>18</sup> Michelle Obama experimented with tagging alongside a well-known British graffiti artist, Mr. Brainwash, as part of her Let Girls Learn initiative.<sup>19</sup> There is also the iconic *Hope* poster created by Shepard Fairey during Obama’s presidential campaign.<sup>20</sup>

Graffiti is not just accepted by political figures, but is also highly regarded by museums and entire cities. In 2008, the Tate Modern held the first major display of graffiti in London, showing six internationally acclaimed graffiti artists.<sup>21</sup> Entire cities such as Melbourne, Warsaw, Prague, and Paris have legalized graffiti.<sup>22</sup> Some cities also provide “free walls” where the city or owners grant space for the use of graffiti artists.<sup>23</sup>

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15 *Id.* at 311–12.

16 *See* 37 C.F.R. § 202.1(a) (2016); *see also* Lerman, *supra* note 3, at 308–09, 308 n.58.

17 37 C.F.R. § 202.1(a).

18 *David Cameron Presents Barack Obama with Graffiti Art*, BBC NEWS (July 21, 2010), <http://www.bbc.co.uk/news/uk-politics-10710074>.

19 Mark Hensch, *Michelle Obama Tries Out Graffiti Tag*, HILL (Mar. 9, 2016, 3:52 PM), <http://thehill.com/blogs/in-the-know/in-the-know/272413-michelle-obama-goes-graffiti-tagging-in-dc>.

20 *Shepard Fairey—Life and Biography: Controversy, Copyrights and Graffiti*, STENCIL REVOLUTION, [http://www.stencilrevolution.com/profiles/shepard-fairey/#The\\_Obama\\_HOPE\\_Poster](http://www.stencilrevolution.com/profiles/shepard-fairey/#The_Obama_HOPE_Poster). (last visited Sept. 20, 2016).

21 *Street Art*, TATE MODERN, <http://www.tate.org.uk/whats-on/tate-modern/exhibition/street-art> (last visited Sept. 20, 2016).

22 Elias & Ghajar, *supra* note 6, at 51.

23 Roundtree, *supra* note 8, at 964.

These free walls can also be unofficial spaces where the city does not enforce vandalism laws,<sup>24</sup> such as the *zona de graffiti* in Buenos Aires.<sup>25</sup>

Unofficial graffiti zones or free walls are comparable to property easements. If an individual consistently goes through his neighbor's yard to get to a lake and the owner does not protest, then this can create an easement. Similarly, if graffiti artists consistently paint on a wall without protest from the owner or the authorities, this can also create an easement. The most pertinent type of easement relating to graffiti is easement by prescription. This type of easement requires that the use of the property is open and easily discoverable, the owner does not grant permission, and the use is uninterrupted and continuous for a certain number of years according to state statute.<sup>26</sup> If the practices in these unofficial graffiti zones satisfy these requirements, then they are easements and the graffiti is arguably no longer unsanctioned.

The theory of a graffiti easement was argued in *Cohen v. G & M Realty L.P.*<sup>27</sup> This case involved the 5Pointz building in New York, an unused warehouse whose owner originally welcomed graffiti artists to the building. The owner "gave his oral blessings to permit qualified aerosol artists . . . to display their works on his buildings."<sup>28</sup> The owner encouraged the graffiti artists, and 5Pointz became a significant tourist attraction.<sup>29</sup> In this case, a group of graffiti artists sued the building's owner after it was announced that the building would be destroyed to build new apartment homes. The plaintiffs brought suit under the VARA,<sup>30</sup> and also argued that one plaintiff had an easement in gross to use the building's surfaces.<sup>31</sup> The court dismissed the easement argument, though, because an easement in gross must be in writing, rather than in the form of a revocable license.<sup>32</sup> An easement by prescription was not considered, which could have altered the opinion of the court on this matter, as this type of easement does not require writing or even the owner's permission.

Official zones of graffiti and the possibility of easements in such areas illustrate some ways in which communities have accepted graffiti as an important artistic movement and a defining characteristic in certain cities

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24 *Id.*

25 *Fasoli v. Voltage Pictures, LLC*, No. 14-C-6206, 2014 WL 7365936, at \*1 (N.D. Ill. Dec. 22, 2014).

26 *See 3 Ways Easements Are Created*, FIN. WEB, <http://www.finweb.com/real-estate/3-ways-easements-are-created.html#axzz45zyUvmif> (last visited Sept. 20, 2016).

27 988 F. Supp. 2d 212, 218–19 (E.D.N.Y. 2013).

28 *Id.* at 219.

29 *See id.* at 214.

30 *See infra* Part III for an explanation of VARA and its application to graffiti art.

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

32 *Id.*

and areas.<sup>33</sup> Presidents, prime ministers, museums, cities, and communities encourage graffiti art, showing the importance of this artistic movement and a change in public perception. In spite of graffiti's prominence in the artistic world, though, the world of intellectual property (IP) considers unsanctioned graffiti a "negative space" where "areas and industries [are] unregulated, or only partially regulated, by de jure IP law."<sup>34</sup> This Note explores the negative space of graffiti to determine if unsanctioned graffiti should be excluded from copyright protection.

### III. COPYRIGHT REQUIREMENTS

Under Section 102(a) of the Copyright Act of 1976, copyright protection exists for "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."<sup>35</sup> Among the list of protected works are "pictorial, graphic, and sculptural works."<sup>36</sup> Creators of original works of visual art thereby have "the exclusive right to make, distribute, and sell copies of the works, the right to create derivative works, and the right to display their works publicly."<sup>37</sup> These rights extend for the lifetime of the creator plus seventy years.<sup>38</sup> A copyright exists at the time the work is "fixed," and an author need not register the work with the U.S. Copyright Office in order to obtain protection.<sup>39</sup> Yet, registration creates legal advantages to prove copyright ownership, notice of ownership, and increased damages for unauthorized uses.<sup>40</sup>

In 1990 Congress passed VARA, which amended the Copyright Act.<sup>41</sup> VARA protects works of visual art created on or after June 1, 1991, by

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33 As another example, the Shoreditch neighborhood of London is arguably an unofficial graffiti zone where graffiti is seen as part of the culture of the community and street art tours are offered to explore and explain its importance. *See Street Art Walking Tour*, YPLAN, <https://yplanapp.com/london/street-art-walking-tour-36414/> (last visited Sept. 20, 2016).

34 Roundtree, *supra* note 8, at 961 (citing Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1764 (2006) (coining the term "negative space" in IP)).

35 17 U.S.C. § 102(a) (2012).

36 *Id.* § 102(a)(5).

37 Griffin M. Barnett, *Recognized Stature: Protecting Street Art as Cultural Property*, 12 CHI.-KENT J. INTEL. PROP. 204, 206 (2013) (citing 17 U.S.C. §§ 102, 106, 302(a)).

38 *Id.*

39 Roundtree, *supra* note 8, at 968.

40 *Id.*

41 Pub. L. No. 101-650, 104 Stat. 5128 (codified at 17 U.S.C. § 106A).

adding the protection of moral rights for certain works.<sup>42</sup> Moral rights of an artist protect “the artist’s personality and the work’s spirit and integrity through preservation of the art.”<sup>43</sup> Under VARA, the author of a visual work has a right of authorship, right of integrity, and right against destruction.<sup>44</sup> The first right allows the artist to claim authorship, prevent the use of her name in a work she did not create, and prevent the use of her name in the event of a distortion, mutilation, or modification of the work that would cause harm to her reputation.<sup>45</sup> The right of integrity prevents an intentional distortion, mutilation, or modification that would be prejudicial to the artist’s reputation.<sup>46</sup>

When looking purely at the statutory requirements without taking into account the illegality of the creation act, graffiti qualifies for copyright protection. Under Section 102, graffiti is a fixed original work of authorship that qualifies for protection under “pictorial, graphic, and sculptural works.”<sup>47</sup> Scholars and courts consider sanctioned graffiti copyrightable.<sup>48</sup>

The statutory fixation requirement could potentially create a difficulty in justifying the copyrightability of graffiti. Section 101 of the Copyright Act establishes that a work is fixed in a tangible medium of expression when it is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>49</sup> Graffiti is often temporary, in that it fades away or is often painted over by the owner of the surface or another graffiti artist.<sup>50</sup> Some graffiti artists welcome other artists to paint over their work so as to continue an “artistic dialogue.”<sup>51</sup> Yet, this fading or painting over does not preclude the justification of a copyright. A painting is no less fixed when done on a wall as opposed to a canvas, as either surface can fade or be painted over. For copyright purposes, a work need not be strictly and

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42 Timothy Marks, Note, *The Saga of 5Pointz: VARA’s Deficiency in Protecting Notable Collections of Street Art*, 35 LOY. L.A. ENT. L. REV. 281, 285 (2015); see also 17 U.S.C. § 106A (providing the title to take effect six months after date of enactment of VARA).

43 Elias & Ghajar, *supra* note 6, at 50.

44 Lerman, *supra* note 3, at 330.

45 Lerman, *supra* note 3, at 330 (quoting 17 U.S.C. §§ 106A(a)(1)–(2)).

46 *Id.* (quoting 17 U.S.C. §§ 106A(a)(3)(A), (c)(1)).

47 17 U.S.C. § 102(a)(5).

48 See Roundtree, *supra* note 8, at 968 (first citing *Murray Hill Publ’ns, Inc. v. ABC Commc’ns, Inc.*, 264 F.3d 622 (6th Cir. 2001); then citing *Mager v. Brand New Sch.*, 78 U.S.P.Q. 2d 1389 (S.D.N.Y. 2004); and then citing *Tracy v. Skate Key, Inc.*, 697 F. Supp. 748 (S.D.N.Y. 1988)).

49 17 U.S.C. § 101.

50 Lerman, *supra* note 3, at 309–10.

51 *Id.* at 306.

forever permanent, but must merely be “sufficiently permanent.” Graffiti then qualifies as fixed under this definition.<sup>52</sup>

Yet, trouble arises when graffiti’s illegality is taken into account. Scholars against copyrighting graffiti have used Section 103 of the Copyright Act to justify their arguments.<sup>53</sup> Section 103 does not extend copyright protection in compilations and derivative works that unlawfully use copyrighted material.<sup>54</sup> Yet, there is no explicit prohibition that illegal work itself cannot be copyrighted, and courts have yet to rule definitively on this matter.<sup>55</sup>

#### IV. EXTENDING COPYRIGHT PROTECTION TO UNSANCTIONED GRAFFITI IN CASELAW

Copyright infringement cases involving graffiti are generally not favorable to graffiti artists or are settled out of court. Yet, the cases illustrate that courts approach unsanctioned graffiti art under a copyrightability analysis rather than merely denying copyright protection due to illegality of creation. In so doing, courts have implicitly accepted that unsanctioned graffiti is copyrightable.

The most applicable graffiti case under VARA dealing with the destruction of graffiti is *English v. BFC & R. East 11th Street LLC*, where six artists created work in a community garden on East 11th Street.<sup>56</sup> This community garden was a city-owned lot until sold to BFC & R 11th Street LLC.<sup>57</sup> The artists based their claims under VARA, but BFC argued that VARA was inapplicable because the artwork was illegally placed on the property.<sup>58</sup> The court concluded, “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.”<sup>59</sup> Yet, it is arguable that the case should not be read as preventing copyright claims over unauthorized works because the Copyright Act states that VARA rights are distinct from “ownership of any copy of that work.”<sup>60</sup> Therefore, VARA rights and copyright are distinct protections and this ruling does not necessarily prevent artists from having a copyright claim for their artwork.

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52 See *id.* at 309; see also *Villa v. Pearson Educ., Inc.*, No. 03-C-3717, 2003 WL 22922178, at \*1 (N.D. Ill. Dec. 9, 2003) (denying motion to dismiss copyright infringement claim of graffiti).

53 See *Elias & Ghajar*, *supra* note 6, at 49.

54 17 U.S.C. § 103(a).

55 See *Roundtree*, *supra* note 8, at 968–69.

56 No. 97 Civ. 7446, 1997 WL 746444, at \*1 (S.D.N.Y. Dec. 3, 1997).

57 *Id.*

58 See *id.* at \*2–4.

59 *Id.* at \*4.

60 Lerman, *supra* note 3, at 333 (quoting 17 U.S.C. § 106A(e)(2) (2012)).

In *Villa v. Pearson Education, Inc.*, a work of graffiti's copyright protection was challenged due to the work's illegality.<sup>61</sup> The graffiti artist Hiram Villa, known as UNONE, brought an action for copyright infringement against Pearson Education for publishing a book featuring his murals entitled *Tony Hawk's Pro Skater 2 Official Strategy Guide*.<sup>62</sup> The case was at first dismissed under lack of subject matter jurisdiction, because Villa had not obtained a copyright registration in the work.<sup>63</sup> Villa then registered with the U.S. Copyright Office and filed a new suit.<sup>64</sup> Pearson moved to dismiss on the grounds that the murals were illegal graffiti and thus not protectable under copyright law.<sup>65</sup> This illegality defense echoes the doctrine of unclean hands. This doctrine began with the general legal principle that "no one should benefit from his crimes," and it is defined as "one cannot seek protection under the law if he has acted wrongly with respect to the matter of the complaint."<sup>66</sup> Yet, in a previous motion, the district court found this argument unpersuasive, stating, "We assume, without deciding, that the work is copyrightable and was, at some point before its appearance in the Guide, fixed in a tangible form."<sup>67</sup> The court denied the motion to dismiss because the copyrightability of the work was a question of fact<sup>68</sup> and the case then settled out of court.<sup>69</sup> Yet, *Villa* highlights that the court accepted, without deciding, that the unsanctioned mural was copyrightable.

Many cases involving copyright infringement of unsanctioned graffiti have settled out of court. One dispute involved Peter Rosenstein's book *Tattooed Walls*, which displayed over one hundred murals found in New York City.<sup>70</sup> A dozen artists whose works were featured in the book sought a settlement, but Rosenstein argued that he did not need their permission because "the murals were in public spaces" and his use was covered under the fair use doctrine.<sup>71</sup> In sum, Rosenstein defended himself on illegality grounds, but also appealed to an exception to copyright liability—fair use.

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61 *Villa*, 2003 WL 22922178, at \*2.

62 *Id.*; Lerman, *supra* note 3, at 301.

63 *Villa v. Brady Publ'g*, No. 02-C-570, 2002 WL 1400345, at \*3 (N.D. Ill. May 2, 2002).

64 *Villa*, 2003 WL 22922178, at \*1.

65 *Id.* at \*2.

66 Lerman, *supra* note 3, at 316 (quoting 30A C.J.S. *Equity* § 109 (2013)).

67 *Villa v. Brady Publ'g*, No. 02-C-570, 2002 WL 1400345, at \*3 (N.D. Ill. June 27, 2002).

68 *Villa*, 2003 WL 22922178, at \* 3.

69 Elias & Ghajar, *supra* note 6, at 49.

70 Lerman, *supra* note 3, at 300.

71 *Id.* at 301 (quoting David Gonzalez, *Walls of Art for Everyone, but Made by Not Just Anyone*, N.Y. TIMES (June 4, 2007), <http://www.nytimes.com/2007/06/04/nyregion/04citywide.html>).



Adding fair use as an avenue of defense shows that Rosenstein recognized that the court could have found the graffiti murals protected by copyright, and that he would need the fair use doctrine to evade infringement liability. The parties ultimately settled, and the book was taken off the publisher's catalogue.<sup>72</sup> In another dispute, the clothing company Urban Outfitters printed t-shirts depicting the signature of graffiti artist Cali Killa. Urban Outfitters discontinued the use of his work according to the terms of a settlement.<sup>73</sup> These severe settlements, resulting in the rescinding of the books and clothing rather than just damages, reveal the power a copyright infringement case can have for appropriation of unsanctioned graffiti.

In *Reece v. Marc Ecko Unlimited*, the graffiti artist Daniel Reece, known as Dip, brought suit under Section 501 of the Copyright Act for infringement of his artwork and persona, which were used in a video game developed and sold by the defendants.<sup>74</sup> The magistrate judge determined that the name "Dip" is not protected by copyright law, that certain fonts or lettering styles are "mere variations of typographic ornamentation, lettering and coloring,"<sup>75</sup> that use of certain colors is not itself subject to copyright protection, and that copyright is not afforded to familiar symbols or designs such as the circles, squares, and stars used to ornament the "i" in Dip.<sup>76</sup> The magistrate judge recommended that the defendant's motion to dismiss be granted due to the work's inability to obtain a valid copyright because of color, lettering, and fonts, but not because of its illegality.<sup>77</sup>

In *Seltzer v. Green Day*, artist and illustrator Derek Seltzer created *Scream Icon* posters, which were sold and given away.<sup>78</sup> His work was prominently displayed across Los Angeles as street art. Green Day then used the *Scream Icon* on its tour as a video backdrop to the song "East Jesus Nowhere."<sup>79</sup> The work was modified with a red spray-painted cross over the middle of the screaming face, a change in contrast and color, and by adding black streaks running down the sides of the face. Yet, the *Scream Icon* was still "clearly identifiable in the middle of the screen throughout the video."<sup>80</sup>

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72 *Id.*

73 *Id.* (citing Hrag Vartanian, Opinion, *Street Artist Triumphs Over Urban Outfitters Copyright Case*, HYPERALLERGIC (Sept. 20, 2011), <http://hyperallergic.com/36016/cali-killa-urban-outfitters/>).

74 No. 10-Civ-02901, 2011 WL 4112071, at \*1–2 (S.D.N.Y. Aug. 19, 2011).

75 *Id.* at \*9 (quoting 37 C.F.R. § 202.1(a) (2000)).

76 *See id.* at \*8–10.

77 *Id.* at \*16.

78 *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1173 (9th Cir. 2013).

79 *Id.* at 1174.

80 *Id.*

In its motion for summary judgment below and on appeal, Green Day argued the video backdrop constituted fair use under Section 107 of the Copyright Act.<sup>81</sup> Under this Section, fair use is determined by four factors:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and sustainability of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>82</sup>

The first requirement illustrates the importance of transformation, which means adding “something new, with a further purpose or different character, altering the first with new expression, meaning or message.”<sup>83</sup> The court determined that Green Day’s use was transformative because it was only a component of a “street-art focused music video about religion.”<sup>84</sup> Green Day’s use was also only incidentally commercial, as it never used it to market its concert, CDs, or merchandise.<sup>85</sup> Under the second requirement, published works are more likely to qualify as fair use, and Seltzer controlled the first public appearance of *Scream Icon* by disseminating it throughout Los Angeles in poster form.<sup>86</sup> Third, copying little of the original work likely points to fair use, but here Green Day used the entire image. Yet, the court stated that the entire work was necessary and this factor did not weigh against Green Day.<sup>87</sup> Finally, Seltzer testified that Green Day’s use had “tarnished” him personally, but admitted the value of his work was unchanged—this factor weighed in Green Day’s favor.<sup>88</sup> The court therefore concluded that it was fair use.<sup>89</sup> This entire fair use analysis presumes that *Scream Icon* was a copyrightable work, even though it was illegally plastered on a wall. The court treated it as any other work of art that had been sufficiently transformed.

Recently, graffiti artists have been more successful in maintaining causes of action despite the illegality of their work.<sup>90</sup> In a highly publicized

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81 *Id.* at 1175.

82 17 U.S.C. § 107 (2012).

83 *Seltzer*, 725 F.3d at 1176 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

84 *Id.* at 1176.

85 *Id.* at 1178.

86 *Id.*

87 *Id.* at 1178–79.

88 *Id.* at 1179.

89 *Id.*

90 For example, graffiti artists sued fashion designer Roberto Cavalli for the use of their mural in his clothing designs. *Williams v. Cavalli*, No. CV 14–06659, 2015 WL 1247065, at \*1 (C.D. Cal. Feb. 12, 2015). Cavalli used high-resolution photography to obtain images of the mural and rearranged the signatures of the artists, but kept the rest of

recent case, pop musician Katy Perry<sup>91</sup> attended the Met Gala wearing a dress designed by Jeremy Scott, who replicated a mural by Joseph Tierney or “Rime” for the dress’s fabric.<sup>92</sup> Tierney sued for copyright infringement, falsification of copyright, unfair competition, appropriation of name and likeness, and negligence.<sup>93</sup> The defendants, Scott and the brand Moschino, asserted that they were exercising their constitutional rights as a matter of public interest.<sup>94</sup> The court found the dress qualified as public interest because the designer and apparel brand are household names in high fashion.<sup>95</sup> Tierney also alleged falsifying copyright management information in a work of authorship under federal law because putting “Moschino” on the dress with his graffiti falsely suggested that the fashion brand made the design rather than Tierney.<sup>96</sup>

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the mural intact. *Id.* Cavalli also superimposed his brand name over images of the mural. The artists complained that the designs damaged their reputations and credibility, bringing suit under federal copyright law, as well as state statutory and common law. *Id.* The court denied Cavalli’s motion to dismiss in 2015. *Id.* at \*6; *see also* Fasoli v. Voltage Pictures, LLC, No. 14-C-6206, 2014 WL 7365936 (N.D. Ill. Dec. 22, 2014) (street artists bring copyright infringement action against California production companies for reproducing their mural from the *zona de graffiti* in Buenos Aires, Argentina, in the film *The Zero Theorem*); Complaint at 1–2, 4–5, Kosse v. Universal Music Grp., No. 1:16-cv-00160 (E.D.N.Y. Jan. 12, 2016) (artist Kosse suing for copyright infringement based on display of his painted mural in a Kiesza music video without permission).

91 Model Gigi Hadid also wore the dress on a catwalk in a 2015 fashion show and Tierney also named Hadid in the suit. Tshepo Mokoena, *Katy Perry’s Met Ball Dress the Subject of Copyright Infringement Lawsuit*, GUARDIAN (Aug. 6, 2015), <http://www.theguardian.com/music/2015/aug/06/katy-perry-met-ball-moschino-dress-copyright-infringement-lawsuit>.

92 Eriq Gardner, *Judge Allows Graffiti Artist’s Lawsuit over Katy Perry’s Met Gala Dress*, HOLLYWOOD REP. (Jan. 14, 2016), <http://www.hollywoodreporter.com/thr-esq/judge-allows-graffiti-artists-lawsuit-855973>.

93 *See* Complaint at 9–17, Tierney v. Moschino S.p.A., No. 2:15-cv-05900 (C.D. Cal. Aug. 5, 2015).

94 *See* Tierney v. Moschino S.p.A., No. 2:15-cv-05900, slip op. at 10 (C.D. Cal. Jan. 13, 2016).

95 *Id.* at 11. Tierney also claimed that the dress constituted unfair competition and violated his publicity rights. “Rime” appears on the dress, which Tierney argued could create the false impression that he endorsed the collection. Complaint at 11–12, Tierney, No. 2:15-cv-05900. This alleged false impression potentially could harm Tierney’s “reputation and credibility in the art world.” *Id.* at 8. His complaint specified that he was “diligent in controlling distribution channels of his work,” and due to this dress, many people believed he was “selling out.” *Id.* Note that he has previously endorsed Disney and Adidas. Gardner, *supra* note 92. The court denied the defendants’ motion to dismiss and allowed the claim of misuse of Tierney’s nickname even though pseudonyms are not necessarily protected under California law. Tierney, slip op. at 9.

96 Tierney, slip op. at 4. Scott recently filed another motion to dismiss, which compares Rime to the Black Dahlia murder. He stated, “The Black Dahlia’s killer was, no doubt, a felon. But was he also a valuable copyright holder as a result of his illegal activities?” Ellie Shechet, *Jeremy Scott’s Lawyers Compare Graffiti Artist Suing Him to*

These cases reveal that courts tend to analyze cases regarding unsanctioned graffiti on the premise that such works are copyrightable, though they have not held explicitly that such works hold valid copyrights. They have focused on copyright defenses in dismissing causes of action, rather than the defense of illegality. Courts have had ample opportunities to rule that unsanctioned art is not copyrightable and thereby end the debate, but they have chosen to analyze the cases as copyright infringements and dismiss or allow them to continue on grounds of statutory copyright law. This widespread judicial approach gives weight to the argument that unsanctioned graffiti is copyrightable.

#### V. DOES GRAFFITI DESERVE COPYRIGHT PROTECTION UNDER AN INCENTIVE-BASED THEORY OF IP?

While courts have not explicitly stated that unsanctioned graffiti deserves copyright protection, the incentive-based theory of intellectual property requires this protection for graffiti. This theoretical foundation constructs copyright as necessary to “provide[] an incentive for authors to create and disseminate works of social value.”<sup>97</sup> The American IP regime widely accepts the incentive-based theory as the primary justification for copyright. The IP clause of the Constitution states that IP laws are to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>98</sup> Though scholars have proposed various justifications for copyright law,<sup>99</sup> American courts tend to interpret the IP clause as authorizing Congress to legislate to confer rewards on creators that will incentivize them to make and disseminate works, thereby contributing to the progress of society. In *Sony Corp. of America v. Universal City Studios, Inc.*, for example, the Supreme Court stated that copyright’s monopoly privileges are “intended to motivate the creative activity of authors and inventors by the provision of a special reward.”<sup>100</sup> The incentive-based argument asserts that if free-riders are allowed to appropriate another’s work then authors will cease to create.<sup>101</sup> As applied to the graffiti movement, copyright protection is necessary to encourage

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*‘the Black Dahlia’s Killer’*, JEZEBEL: THE MUSE (May 1, 2016, 12:00 PM), <http://themuse.jezebel.com/jeremy-scotts-lawyers-compare-the-graffiti-artist-suing-1774240147>. Scott creatively argued that the murderer killed the victim with artistic originality, but the murderer could not sue for copyright of photos of the murders. *Id.*

<sup>97</sup> Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1197 (1996).

<sup>98</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>99</sup> See, e.g., Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL’Y 817 (1990).

<sup>100</sup> 464 U.S. 417, 429 (1984).

<sup>101</sup> See *id.*

artists to continue creating graffiti without the fear of “free-riding copyists”<sup>102</sup> such as Pearson Education, Green Day, Roberto Cavalli, and Moschino.

Harm to reputation can disincentivize an artist to continue her work.<sup>103</sup> Copyright law chooses to recognize reputation as a valid means of protection for certain visual arts under VARA.<sup>104</sup> In the context of the graffiti movement, reputation is a key component of a graffiti artist’s identity and work. In *Williams v. Cavalli*, reputation was an important concern, and the graffiti artists argued that the use of their artwork in the Cavalli Collection damaged their “reputation and credibility.”<sup>105</sup> In the case of Katy Perry’s dress, Tierney argued that he was accused of “selling out” by appearing to have endorsed Katy Perry and a high-end fashion collection, which harmed his credibility in the art community.<sup>106</sup> In a world where many artists attempt to remain anonymous and keep an air of rebellion, appropriation of graffiti artists’ works for commercial gain could disincentivize artists from continuing their work by harming their reputations.

The problem of using incentive theory to justify copyrighting graffiti art, though, is that in many instances, the given copyright protections would be incentivizing an illegal activity. Celia Lerman, an IP scholar from Columbia Law School and Universidad Torcuato Di Tella (Buenos Aires, Argentina), argues that extending copyright protection to unsanctioned graffiti would not encourage illegal activity because it would help artists to view the law as their ally.<sup>107</sup> Artists would more quickly become prestigious and therefore be able to paint legally on walls more readily because their artwork would be desired and sought after.<sup>108</sup> On the other hand, Brittany Elias, a recent law student, and Bobby Ghajar, a trial attorney leading his firm’s worldwide trademark group, argue that extending copyright protection would not incentivize the creation of more street art because in the past decade street art has flourished without

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102 Sterk, *supra* note 97, at 1207.

103 *But see id.* at 1242 (arguing that copyright is unnecessary to protect against harm to reputation when defamation law can provide an adequate remedy).

104 17 U.S.C. § 106A(a) (2012) (“[T]he author of a work of visual art . . . shall have the right 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 reputation. . .”).

105 No. CV 14–06659, 2015 WL 1247065, at \*1 (C.D. Cal. Feb. 12, 2015).

106 Complaint at 8, *Tierney v. Moschino S.p.A.*, No. 2:15-cv-05900 (C.D. Cal. Aug. 5, 2015).

107 *See Lerman, supra* note 3, at 324.

108 *See id.*

protection and the negative space of IP in this area has not destroyed the prevalence of graffiti.<sup>109</sup>

Instead of asking if graffiti artists would be incentivized to innovate, though, a better question exists: What is the incentive for copyright law to *exclude* graffiti? As previously established, graffiti should, on its face, qualify for protection under the Copyright Act, as it is an original and fixed work of authorship.<sup>110</sup> Since it satisfies these statutory requirements for protection, and the question becomes what reason copyright law has to refuse it protection, which can only be rationalized based on the illegality of the act.

Lerman argues that illegal graffiti still warrants copyright protection because copyright should be neutral to the issue of illegality.<sup>111</sup> She states, “Because copyright should only be concerned with the immaterial work, the artist’s material transgressions should not exclude the work from copyright protection.”<sup>112</sup> Lerman asserts that the wrongdoing is irrelevant to the copyrightability of the work because copyright law does not impose negative consequences for illegal acts, and the illegal acts should be addressed under civil sanctions and criminal penalties.<sup>113</sup> The text of the Copyright Act supports this formulation. The Act states, “Ownership 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.”<sup>114</sup> Accordingly, copyright protection is concerned with the intangible work, which is protected independently from its physical embodiment. The illegality of that physical embodiment, then, should not affect the copyrightability of the intangible work.<sup>115</sup>

In contrast, Professor Eldar Haber compares graffiti to child pornography and argues that the law should not condone such works.<sup>116</sup> He alleges that graffiti is undesirable and illegal. Similar to Lerman, he acknowledges that the content of the work is disconnected from the criminal activity.<sup>117</sup> Yet, he still opposes copyright protection because “the

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109 See Elias & Ghajar, *supra* note 6, at 51.

110 See *supra* Part III.

111 Lerman, *supra* note 3, at 296.

112 *Id.* Lerman cites numerous examples of illegal acts that retain copyright protection, such as paparazzi photographs that violate a celebrity’s privacy; a journalist’s article that revealed state secrets; and a student painting of a minor killing a policeman even though it could constitute an illegal threat under criminal law. *Id.* at 317–18.

113 *Id.* at 316.

114 17 U.S.C. § 202 (2012).

115 See Lerman, *supra* note 3, at 316.

116 See Eldar Haber, *Copyrighted Crimes: The Copyrightability of Illegal Works*, 16 YALE J.L. & TECH. 454, 485–86 (2014).

117 *Id.*

law should not aid in creating social injustice,”<sup>118</sup> whether that be protecting the pornographic photo of a child or a mural vandalizing a wall. Congress should therefore suppress these undesirable works by blocking legal incentives in their creation.<sup>119</sup> This argument is justified in accordance with child pornography where the contents of the photo itself are illegal, not just the act of depicting those contents. In contrast, the act of painting on a wall without the owner’s permission is not tied to the intellectual property in the work, where the content itself is not illegal. If the same were painted on a canvas it would be legal, but a pornographic photo of a child printed on any medium is illegal. Therefore, this extreme comparison and argument does not hold ground.

## VI. THE ACCOMMODATING NATURE OF COPYRIGHT LAW

Graffiti should receive copyright protection because copyright is a flexible and adaptable law that looks towards the future by promoting progress. Throughout copyright’s history, the law has recognized growing art forms and extends rights to them. Graffiti is the newest of these art forms. Copyright law should protect graffiti for the sake of efficiency and lack of contradiction because the law is continually expanding to accept new art forms.

The justification for copyright to protect graffiti can be shown by a historical comparison with motion pictures. The Townsend Amendment of 1912 extended copyright protection to motion pictures.<sup>120</sup> Before this amendment, motion pictures were protected as photographs by assigning a copyright to each still of the film,<sup>121</sup> which originally made sense in the early development of motion pictures as stop-motion photography.<sup>122</sup> The congressional report regarding the Townsend Amendment explained, “The occasion for this proposed amendment is the fact that the production of motion-picture[s] . . . has become a business of vast proportions.”<sup>123</sup> The first film to gain international success was created in 1902,<sup>124</sup> and ten years later all motion pictures gained copyright protection in the United States. The legislature therefore recognized the growing importance of motion pictures and granted them protection. Without such copyright protection, it

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118 *Id.* at 485.

119 *Id.* at 485–86.

120 WILLIAM F. PATRY, 1 PATRY ON COPYRIGHT § 1:47, Westlaw (database updated Sept. 2016).

121 *Id.*

122 David A. Cook & Robert Sklar, *History of the Motion Picture*, ENCYC. BRITANNICA (Mar. 11, 2016), <http://www.britannica.com/art/history-of-the-motion-picture>.

123 PATRY, *supra* note 120 (citing H.R. REP. NO. 62-756, at 1 (1912); S. REP. NO. 62-906, at 1 (1912)).

124 *See* Cook & Sklar, *supra* note 122. The film was titled *Le Voyage dans la Lune* and produced by the French filmmaker Georges Méliès.

is likely that efficiency would have suffered due to the countless lawsuits that would have been brought in order to protect each photo still of a film.

While the graffiti movement is not as predominant or commercialized as motion pictures, it is still a growing and widespread movement that has gained notoriety and respect. It has been over four decades since the beginning of the graffiti art movement, and the amount of litigation surrounding it is growing. As graffiti becomes more mainstream, more free-riders will attempt to profit off of these artists. The number of ongoing cases listed in Part IV illustrates that lawsuits in this area are multiplying. Forcing artists to continuously litigate to protect their intellectual property or use litigation as a threat to create a settlement does not promote progress, but stagnates it with inefficiency.

Copyright has stayed at the forefront of protecting new innovations and art forms from sound recordings to architectural works.<sup>125</sup> Copyright law therefore does not exclude new art forms, but recognizes their importance. Graffiti is no longer vandalism, but a recognized and important artistic expression that has been legalized in community zones and entire cities. An argument based on illegality would have been successful in the 1970s, but due to modern society's acceptance of graffiti, that argument is disintegrating. Excluding graffiti from copyright protection, even though it already meets the statutory requirements for copyrightability, goes against the spirit of a law that should remain at the forefront of protecting new art forms. The continuous amendment of Section 102 to encompass new art mediums teaches that copyright is meant to expand under the broad framework of the Constitution. Accordingly, copyright law should accept that graffiti holds a place under Section 102 as an efficient means of recognizing a modern artistic movement.

#### CONCLUSION

The list of copyrightable subject matter is ever expanding. Choosing to exclude graffiti when it satisfies the threshold for protection in the Copyright Act and has been implicitly accepted by courts would go against the promotion of progress that copyright law is meant to foster under the incentive theory of copyright law. The growing amount of litigation will create further inefficiencies in the judiciary as the graffiti movement continues to grow more mainstream, which makes it a more desirable commodity that third parties will try to profit off of for free. While graffiti is still an illegal activity, in many areas it has become sanctioned by law or implicitly through the theory of easements. An argument to exclude copyright protection for graffiti lacks merit when taking into account the growing legality and acceptance of this art form. Copyright law may not wish to incentivize an illegal activity, but copyright law is not meant to

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125 See 17 U.S.C. § 102 (2012).



deny protection to new art forms and create inefficiency. When balancing these reasons, efficiency and continuing a tradition of expanding copyright protection for new art forms is more persuasive than an illegality argument that is beginning to wash away.