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Outlawed Art: Finding a Home for Graffiti in Copyright Law

Nicole A Grant, Columbia University

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An intractable tension exists between the existence of graffiti as iconoclastic youth expression and the emergence of its recognition as an art form, and the boundaries of American copyright law. As graffiti gains more traction in the mainstream art world, copyright law has come to frame much of the discussion surrounding the rights that stem from (and that are overlooked by) the creation of these works. While graffiti is heralded for its uniqueness, it also thrives in a culture of appropriation that encourages dialogue among graffiti artists, in addition to establishing as the norm the pilfering of everyday cultural referents for artistic use. On the one hand, the Copyright Act grants protection to all original works of authorship fixed in a tangible medium of expression, which ostensibly could include illegal works of graffiti. On the other hand, the rights that could be extended to graffiti artists are limited by the nature of graffiti itself—by virtue of its illegality, there is the risk that works lose a layer of protection when pitted against the property owners whose buildings act as unwitting canvases, and other artists from whom a graffiti artist/secondary user culls material for his own work. This Paper addresses the competing interests and tensions that arise from these considerations, ultimately asking the question whether copyright law can find any coherence in the culture and art of graffiti.
“I spray the sky fast. Eyes ahead and behind. Looking for cops. Looking for anyone I don’t want to be here. Paint sails and the things that kick in my head scream from can to brick. See this, see this. See me emptied onto a wall.” –Cath Crowley, Graffiti Moon

**INTRODUCTION**

When traveling through New York City, whether by subway or bus, it is difficult not to take in the bold irreverence of the graffiti that line subway tunnels and pocks the city’s buildings. Responses to this visual assault range from indifference to fascination to abject fear of who and what those images could represent. Graffiti, in its broadest definition, has been around for centuries. Traveling back in time to the Greco-Roman world, where cities were swathed in graffiti, we encounter similar displays of daringness with ancient authors unleashing their thoughts about various topics on public property. Graffiti is nothing new to the modern world; however, beyond the illicit nature of the art, there still is no clear framework that speaks to a particular location or style for this form of expression. Legally and historically, the means of creating graffiti have involved a spray can (or a similar tool) and public property; our current penal codes reflect this. But recently society has witnessed the evolution of public vandalism into different styles known as “street art.”

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1 In order to narrow the visual focus of this Paper, I have chosen to limit the thrust of my discussion to New York City graffiti and its outer boroughs, with occasional forays into other cities.


3 The *Oxford Dictionary* only goes as far as describing graffiti as “writing or drawings scribbled, scratched, or sprayed illicitly on a wall or other surface in a public place.” *Graffiti Definition*, Oxford Dictionary, [http://oxforddictionaries.com/definition/graffiti](http://oxforddictionaries.com/definition/graffiti) (last visited Feb. 25, 2012). The Oxford Dictionary’s definition is quite similar to the definitions found in state penal codes. See infra notes 53–57 and accompanying text. See also infra note 24.

4 See infra note 58 and accompanying text.
graffiti catch up, it is mostly known by a different name. Moreover, there are rules and methodologies governing the expression of graffiti writers, which cast a conservative light on a culture that is viewed as anti-establishment.\(^5\)

Modern graffiti is generally regarded as a tool of expression that attempts to convey a message.\(^6\) Throughout history, the tenor of that message has hardly been static, ranging from the political pushing for social change\(^7\) to the less ambitious, quasi-narcissistic desire to place oneself on a community’s map and simply be known.\(^8\) Graffiti is often illegal and exists under the most informal circumstances, with writers adopting monikers in lieu of their birth names, and their works being removed from buildings and subway cars as quickly as they were painted.\(^9\) American graffiti was largely developed by 1960s and 1970s-era adolescents under the age of nineteen who took the art form from its inchoate beginnings as names scribbled on public surfaces to colorful, intricate murals that demand their writers to have knowledge of geometry, patterning, shading, and proportions.\(^10\) The technical evolution of graffiti has given the world notice of the creativity that bubbles behind the paint cans, earning graffiti recognition as a valued form of art.

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7 *Id.*
8 *Don’t Bomb These Walls (5 Pointz Documentary)*, NEW YORK CITY GRAFFITI BLOG—KINGS OF NEW YORK (Dec 15, 2011), http://www.kingsofnewyork.net/blog/2011/12/15/dont-bomb-these-walls-5-pointz-documentary.html (quoting a graffiti artist: “I love bombing—there’s something about seeing my name all over New York City. And also, when you talk about graffiti, all you’re really talking about is someone saying, ‘I was here.’”).
Culturally, graffiti uncomfortably straddles the line between the private and public, compelling society to reconcile our notions of race and class and the concept (and associated value) of high art. As with much art, the “meaning” of graffiti is left to the interpretation of the viewing public, but the resultant interpretations are at complete odds. On the one hand, works of graffiti are seen as “profiles in courage” that provide visual documentation of the lives of marginalized communities.\textsuperscript{11} On the other hand, graffiti is also seen as nothing more than the work of criminals that needs to be policed in order to stem increases in crime.\textsuperscript{12} There is an ongoing question as to whether open displays of graffiti, which clearly flout the law, act as a signal to the public to be more disobedient.\textsuperscript{13} Is graffiti a symptom, a cause or, perhaps, an alleviant for the blight found in many urban communities? Referring to the Brooklyn Museum’s recently canceled exhibition,\textsuperscript{14} \textit{Art in the Streets}, Charlie Finch quotes an editorial from the \textit{New York Daily News}, which levels a harsh critique against graffiti and its supporters:

\begin{quote}
We’ll make a deal with Brooklyn Museum director Arnold Lehman. He can welcome this exhibit next year and promote the hell out of it. But he also has to let graffiti ‘artists’ (sic) have a go at the museum’s bright white walls and its landmark facade and its beautiful, expensive new entrance pavilion. And he must not dare clean the painters ‘free expression’. Deal?\textsuperscript{15}
\end{quote}

\textsuperscript{12} See Karen Kaplan, \textit{Wherefore, Litterbug?}, L.A.Times (Nov. 21, 2008), http://articles.latimes.com/2008/nov/21/science/sci-graffiti21 (discussing the impact of graffiti and other forms of lawless behavior vis-à-vis the broken windows theory).
In addition to highlighting the cultural jostling taking place over the rise of graffiti in the mainstream, the above quote underscores the legal tension that can exist between writers (the more formal term for graffiti artists), who have traditionally used the city as their canvas, and the property owners of the structures those writers choose to mark.

The popularization of graffiti in the mainstream public as a legitimate form of art (however contested this label may be) brings new questions as to the effects such institutionalization will have on a counterculture that is known for its subversion. The subversion of graffiti coupled with its near ubiquity in urban centers has engendered particularized interactions with the public. On an individual level, works of graffiti lack the permanence of sanctioned pieces of public art (commissioned murals excepted), and contain no more than the moniker and general style adopted by the writer as identifying information. On a more general level, however, without regard for individual works, graffiti oftentimes exists as a part of (as opposed to a part from) the neighborhood landscape. To a certain extent, they are just as ordinary and “natural” to the surroundings as the buildings themselves. The history of graffiti is footnoted by its ongoing tête-à-tête with municipal authorities,¹⁶ but with the popularity of writers such as Banksy¹⁷ lending credibility to the art form with their


¹⁷ Banksy is a British graffiti writer known for his sardonic and political street art that has been displayed all over the world. His true identity is still officially unknown. See The 2010 Time 100 Poll: Banksy, TIME MAG. (Apr. 1, 2010),
wit and fame, many writers have begun to assert their presence in the public sphere, demanding more than anonymity, and their intellectual property rights, demanding greater protection. The irony of these assertions is that the spread and success of graffiti is owed in part to writers embracing “a culture of communal ownership of public space.”18

Examples include the recent lawsuit (and settlement) initiated by TATS CRU against Chrysler for the unauthorized use of a copyrighted TATS CRU mural in the Bronx in Chrysler’s commercial for the Fiat 500C,19 and the lawsuit by TATS CRU and a dozen other writers against Peter Rosenstein, periodontist by day, photographer of graffiti by night, who compiled a decade’s worth of his photographs of New York graffiti into his book, Tattooed Walls.20 In an interesting reversal of these cases, courts have been treated to at least one instance of a writer unsuccessfully defending his work against a claim of copyright infringement: writer Thierry Guetta, known as Mr. Brainwash, was sued by photographer Glen Friedman for reproducing Friedman’s 1985 photograph of famed rap group Run DMC in Guetta’s 2008 debut

20 See David Gonzalez, Walls of Art for Everyone, but Made by Not Just by Anyone, N.Y. TIMES (June 4, 2007), http://www.nytimes.com/2007/06/04/nyregion/04citywide.html?pagewanted=all. Countering Rosenstein’s defense that he did not seek permission to use the photographs of the murals in his book because the murals were in public spaces, and therefore fell under fair use provisions, the writers in this case “insist[ed] that just because their murals, painted on commission or with the landlord’s permission, are out for anyone to enjoy…does not mean others can do whatever they want with them.” Id. See also Hogarty, supra note 18. As with TATS CRU’s lawsuit against Chrysler, the murals at issue in the Rosenstein case are copyrighted, and even marked with the encircled “c.” See Gonzalez, supra note 20.
exhibition, “Life is Beautiful.” Recognizing graffiti’s reliance on images in popular culture, art journalist Anny Shaw likens the development of graffiti to pop art’s “cut and paste culture,” and notes that “[w]hile street art’s predisposition towards copying, sampling and riffing on pre-existing imagery may have an art historical precedent in pop art, its underground status has, until now, largely protected it from litigation.”

These encounters with intellectual property law make for interesting anecdotes for an art form that has operated primarily within an extra-legal framework. The above cases document works that have entered the institutionalized mainstream either through uncontested copyright registration or gallery exhibitions. But not all examples of graffiti fit so neatly into the category of commissioned murals—indeed the lack of clear distinctions among types of graffiti in the public discourse encourages the conflation of legal graffiti-style works and graffiti. These blurred boundaries make it difficult to develop a legal framework that courts can use to conceptualize graffiti as a thing that should be treated in particular ways, thus enabling them to effectively enforce any rights writers may have with respect to their work. Moreover, the robustness of graffiti counterculture, as it has come to be

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22 Shaw, supra note 21.

23 As mentioned earlier, and as will be discussed throughout the remainder of this Paper, graffiti’s primary distinguishing factor is its illicit nature. Anything else may be characterized as graffiti-style.

24 Artist and researcher of urban art Javier Abarca identifies several categories of graffiti: traditional graffiti, which he defines as “words written on walls”; postgraffiti, which “came out of the confluence
understood, reviled and revered in American society, may be directly at odds with the legal establishment it is meant to flout: American [intellectual] property law. Many creators of graffiti do not care about the legal status of their work, particularly because they view their work as a representation of the street and their communities. Nevertheless, they seek recognition (some seek to publish photographs of their work in a book), and weave back and forth between categories of recognition.

Part I of this Paper begins with an exploration of the history and development of graffiti in New York. Since no two works of graffiti are alike, Part II briefly addresses the fundamental concepts of graffiti and its various classifications. Part III tackles the development of a legal framework for addressing graffiti. Part IV juxtaposes the current social setting of graffiti with the legal framework (and the concomitant issues) addressed in Part III, and attempts to answer the question of whether there is any room for graffiti in American copyright law, and if there is, whether this is a desirable outcome.

I. **BACKGROUND**

a. **GRAFFITI’S VISUAL HISTORY**

Although the appearance of unauthorized images on public surfaces in the United States can be traced to the Great Depression, the distinct combination of “name and fame” that became the hallmark of American graffiti writing began in

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of contemporary art with graffiti and other forms of popular culture” and is created at the hands of artists who are usually academically trained, and whose “way of occupying public surfaces is much more respectful than that of graffiti writers”; and outsider public art, which he likens to postgraffiti with the distinguishing characteristic of it being “produced by persons without artistic training and free from any contact with the art system.” For a discussion of these different categories, see URBANARIO: STUDYING URBAN ART, http://urbanario.es/en (last visited Dec. 26, 2011).

25 *Id.*

26 *Id.*
Philadelphia sometime around 1959, though its development has yet to be thoroughly tracked. Philadelphia writers CORNBREAD and COOL EARL are credited with introducing the city to its first “bombing” movement. “Bombing” simply means to “apply graffiti intensively to a location.” Though contested, the history of writing in New York is thought to have begun with JULIO 204, who left his visual mark (his name and his street number—204th Street) within the boundaries of his gang’s territory during the late 1960s. JULIO 204 later served as inspiration for TAKI 183, a Greek youth from Washington Heights, who canvassed the streets of New York City looking for strategic spots to write his name that would help him be noticed by his

27 See Austin, supra note 9, at 42; De Melker, supra note 10. See also Carolina A. Miranda, Art in the Streets, ARTNEWS (June 1, 2011), http://www.artnews.com/2011/06/01/art-in-the-streets/ (“Illegal and ephemeral, [graffiti’s] principal venues are grimy alleyways and roaring freeway underpasses. Its history is largely oral and documentation can be slapdash or nonexistent. And its artists operate under monikers…that they regularly discard and resuscitate….All of this makes telling the story of graffiti a thorny undertaking.”).

Location: New York City
Photo: Bombing Science
30 For an explanation of the adoption of the “[name] [street number]” moniker, see Austin, supra note 9, at 42 (the pseudonyms may have been a response to the effects of “living in a densely populated city where the lives of young people are organized by mass institutions…where one’s first name alone cannot provide a reliable means of distinction from others….It is likely to have been of greater importance that the street number located his identity within a specific neighborhood, which simultaneously placed [a writer] in a particular street gang.”).
31 Id.
peers, and possibly the media.\footnote{See SNYDER, supra note 16, at 23-24. TAKI 183 (a combination of his nickname and street number) wrote his name on public monuments, walls, stoops, and subway stations in Manhattan). See CRAIG CASTLEMAN, GETTING UP: SUBWAY GRAFFITI IN NEW YORK 53 (1984). By July 1971, the New York Times had taken notice of this new form of expression. See SNYDER, supra note 16, at 23-24.} During this early period, many writers gave little thought to what their tags looked like—for those writers who wanted to assert their presence in their environments, what mattered is that they were able to make the tags at all, and that people could read them.\footnote{See CASTLEMAN, supra note 32, at 53.} As the population of writers grew, so too did the style of writing as writers attempted to find new ways to make their tags stand out.\footnote{Id. See also GOTTLIEB, supra note 6, at 6 (“Just as important as the graffiti writer’s name is how that name is rendered. Creating painted masterpieces from the act of writing one’s name transforms the name from a simple verbal expression—a word—into a complex visual expression.”).} When style was no longer enough to distinguish one tag from another, writers began experimenting with size and color. Graffiti began to vary greatly in appearance, with some writers using the full length of a train car to paint their names in thin white lettering, and others painting their names with multicolored concentric bands to create a silhouette.\footnote{Id. at 55.} With TAKI as the inspiration, the technique employed by new writers evolved from one of scribbled magic-marker signatures on storefronts to one demanding the use of multiple aerosol cans of different colors to create intricate masterpieces, or “pieces,” for short.\footnote{See SNYDER, supra note 16, at 24.} 

SUPERKOOK pioneered the piece in 1972, after discovering that he could achieve greater coverage with spray cans by attaching the larger caps from cans of spray starch to cans of spray paint.\footnote{See id.; CASTLEMAN, supra note 32, at 55.} By the following year, a number of writers had authored elaborate pieces, called “burners,”\footnote{See Writer’s Vocabulary, GRAFFITI DICTIONARY @149ST, http://www.at149st.com/glossary.html (last visited Dec. 27, 2011).} featuring bubble letters and 3-D, that
could be found on the façade of trains, sometimes covering an entire car.39 The explosion of pieces onto the graffiti scene and the evolution of graffiti style among writers along with a competitive atmosphere led to the establishment of standards against which the quality of works could be judged.40 The style of these burners was called “wildstyle,” coined by TRACY 168 and his Bronx crew, and noted for its bright colors, intricacy and illegibility.41 Craig Castleman notes that

[a]s the painting of whole cars grew in popularity, they were enhanced with complex backgrounds and drawings. By the mid-1970s the best writers in the city were specializing in the painting of enormous whole-car murals that often contained caricatures, cartoon characters, outdoor scenes, holiday settings, and even the writers’ own interpretations of life in the city.42

The 1980s ushered in the next wave of graffiti talent, who took their cans of spray paint from train cars to canvas, adding more dynamism to the pre-existing visual vocabulary.43 The emergence of now-famous writers such as SEEN, ZEPHYR, CRASH, FUTURA, LADY PINK and others, coupled with the expansion of the graffiti landscape to include locations other than trains, attracted national and international

40 See GASTMAN & NEELON, supra note 16, at 23 (“As the parameters of size—those of subway cars—were being set, standards of quality simultaneously evolved: Painting and lettering techniques became more sophisticated, and everything was done in high quantities.”).
41 See Snyder, supra note 16, at 24. An example of a wildstyle burner:

Photo: Rick Hernandez
42 See CASTLEMAN, supra note 32, at 60. See also GASTMAN & NEELON, supra note 16, at 23 (“These kids looked to kid reference material: comic books, Sunday funnies, cartoons, toys, advertisements, candy wrappers, cereal boxes, and album covers. But most of all, they looked to one another for inspiration, while simultaneously creating a culture where “biting”—copying from another—was shameful.”).
attention.\textsuperscript{44} This change was brought about by the inability of graffiti writers to continue using city subway cars as their canvas. The graffiti movement’s romp with trains came to a close in 1989 when city officials refused to put painted trains into service; with this avenue of publicity gone, writers branched out to other areas of the city.\textsuperscript{45} Graffiti’s growth in other areas of the city changed the nature of writers’ approaches to their work. The putative graffiti kings of the 1990s were memorable for being among the first to go “all city” in their approach to graffiti.\textsuperscript{46} With trains having lost their primacy as the surface of choice, “these writers rarely used specific terms to denote the size of their work. The focus became how the surface was covered rather than how much.”\textsuperscript{47}

b. **GRAFFITI’S SOCIAL AND LEGAL CONTEXT**

The magic surrounding the development of graffiti in New York City over the last several decades is largely owed to the imagination of the adolescents behind the cans of spray paint. During the period between 1971 and 1975, only a small number of writers were over the age of twenty; the majority were between the ages of twelve and eighteen.\textsuperscript{48} Demographically, writers have been African-American and Latino from poor or working class families. Because the communities in which these writers

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\textsuperscript{44} *Id.* The first gallery show featuring graffiti took place in 1978 at the Fashion Moda gallery in the Bronx. In 1980, art collector Samuel Esses invited ZEPHYR, FUTURA and other writers to his studio to translate their works onto canvas (“aerosol-on-canvas”) in an effort to preserve graffiti art. In this setting, writers learned that they could transfer their talents to and use their tools in another medium. *Id.* at 25-26. However, not all writers viewed “aerosol-on-canvas” fondly. Writers who found success both on and off the street often found that their success in galleries was inimical to their continued success on the trains, where their work was targeted and destroyed by others. *See GASTMAN & NEELON, supra* note 16, at 127.

\textsuperscript{45} *See SNYDER, supra* note 16, at 31. This move by city officials also represented the culmination of the city’s “war on graffiti.” *See infra* note 53 and accompanying text.

\textsuperscript{46} The 1990s reintroduced such notables as JOZ, COPE, JOSH 5, and REVS to the graffiti scene. *See SNYDER, supra* note 16, at 32.

\textsuperscript{47} *Id.*

\textsuperscript{48} *See GASTMAN & NEELON, supra* note 16, at 23.
were raised were predominantly urban and poor, and thus proximate to highways and subway lines, the writers’ territory was largely linear, sticking to the major arteries of transportation in northern Manhattan, the South Bronx, and central Brooklyn. A small percentage of the original writers were Caucasian and from more economically stable households, and over the years there has been greater representation of this group in the graffiti scene, but by and large, that scene has been one dominated by young African-American and Latino artists.

The popularity of graffiti as a tool of expression during the 1970s and 1980s was arguably in response to decaying urban environments, and the need of youths to assert some measure of control over the cities that had all but forgotten them. Following the Cold War, many neighborhoods in New York were structurally and economically isolated, and matters were certainly not helped by tightened school budgets that eliminated many arts programs. Even though graffiti served as an outlet for adolescents, its growth was met with disdain by those who saw it as blatant vandalism and a larger symptom of urban problems. Former New York City

49 See Austin, supra note 9, at 42; David Ley & Roman Cybriwsky, Urban Graffiti as Territorial Markers, 64 Annals Assoc. Am. Geographers 491, 492 (Dec. 1974).
50 See Austin, supra note 9, at 42. See also Gastman & Neelon, supra note 16, at 23 for a first-hand account of these forgotten neighborhoods and adolescent responses:

“My first impression of why other people were writing was because I felt people were angry,” explains LSD OM, “upset that they didn’t have a voice in the world, that the government was telling us how it was and how it was going to be, and I think people were free to let that happen. Writing was a way of saying ‘Don’t make a decision without consulting us. Look at this wall and all these lives here. You may not see these people standing on the platform of the train, but all of these names you see are people with lives and meaning.’”

As another graffiti writer explains, “You could see what the South Bronx looked like in the seventies and eighties, and that did not look like a borough within the five boroughs of New York City—that looked like an actual fucking war zone in a third world country. But here it was in New York City and nobody paid attention to it, so what do you think the children were gonna do? . . . You [had] to express what the hell you were going through.” Don’t Bomb These Walls, supra note 8.
52 David Gunn, New York’s Chairman of the Metropolitan Transit Authority (MTA) from 1984-1990, opined: “The people who were doing graffiti in New York City were bad people...If you’re defacing
mayors John Lindsay launched a veritable war against graffiti in 1972 in a mission to halt, what he saw as, the aesthetic degradation of the city, and that mission was aggressively advanced by former mayor Ed Koch throughout the 1980s.\textsuperscript{53}

The entrenchment of graffiti and its support from the mainstream arts community has done nothing to deter its criminalization in the United States. Indeed, engaging in an act of vandalism—regardless of how artistic it is—subjects an individual to the very real risk of civil or criminal liability. Across the variety of statutes that cite graffiti as an offense, the language used to conceptualize graffiti is anchored by graffiti’s illicit nature in addition to the intent of the graffiti writer to deface or damage (by painting, drawing, etching, scratching et cetera) public and private property. New York State’s penal code defines graffiti as “the etching, painting, covering, drawing upon or otherwise placing of a mark upon public or private property with intent to damage such property,” and categorizes it as a class A misdemeanor.\textsuperscript{54} California’s penal code defines graffiti as including “any unauthorized inscription, word, figure, mark, or design, that is written, marked, etched, scratched, drawn, or painted on real or personal property,”\textsuperscript{55} and it makes no

\textsuperscript{53} See GASTMAN \& NEELON, supra note 16, at 23 (quoting Ed Koch, “[Y]ou cannot excuse this on the basis that some people used it as a way to demonstrate their talent and become famous. While they were doing that, they were destroying the city and costing us millions of dollars...Sure, New York City is the greatest canvas in the world! But it doesn’t belong to you—it belongs to the people!”); SNYDER, supra note 11, at 24; Dimitri Ehrlich \& Gregor Ehrlich, \textit{Graffiti in Its Own Words}, N.Y. MAG. (June 25, 2006), http://nymag.com/guides/summer/17406/.

\textsuperscript{54} N.Y. PENAL LAW § 145.60 (McKinney 2011) (emphasis added).

\textsuperscript{55} CAL. PENAL CODE § 594 (Deering 2011) (emphasis added).
distinction between permanent images and those that can easily be removed.\textsuperscript{56} Pennsylvania identifies graffiti as “an \textit{unauthorized} inscription, word, figure, mark or design which is written, marked, etched, scratched, drawn or painted,”\textsuperscript{57} and finds an offense where an individual “\textit{intentionally defaces or otherwise damages} tangible public property or tangible property of another with graffiti by use of any aerosol spray-paint can, broad-tipped indelible marker or similar marking device.”\textsuperscript{58} These statutory definitions may be functional for those who see graffiti as nothing more than brute vandalism, but may fall short for those who see graffiti as beautifying and an overall improvement on decrepit surroundings. The conflict between graffiti and the law is very much a public one, which the above statutes make apparent. Graffiti is a power struggle—it is one that exists among graffiti artists, between graffiti artists and the physical structures they attempt to dominate and between graffiti artists and the establishment they defy. This is where the tension between graffiti and the law exists.

\section{II. \textbf{Classifying the Various Forms of Graffiti}}

Under state criminal laws, there is no distinction among types of graffiti—graffiti is graffiti whether simple or intricate, figurative or abstract, and all graffiti is considered bad. When considering, however, whether graffiti and copyright law are a comfortable fit, it is necessary to first identify and distinguish among the primary types of graffiti that are found on city structures: tags, throw-ups, and pieces.\textsuperscript{59}

\begin{itemize}
\item \textsuperscript{56} \textit{See, e.g.}, In re Nicholas Y., 102 Cal. Rptr. 2d 511 (Cal. App. Dep’t Super Ct. 2000).
\item \textsuperscript{57} 18 Pa. Cons. Stat. § 3304(c) (2011) (emphasis added).
\item \textsuperscript{58} \textit{Id.} § 3304(a)(4) (emphasis added).
\item \textsuperscript{59} This list is not exhaustive, but for the purposes of this Paper, I have chosen to focus on the most major forms of graffiti. When encountering graffiti on the street, one may also find: (1) stenciled works, which are quick and easy ways of achieving a level of detail that may not be easily obtained by the sole use of a spray can; (2) stickers, which are a simple way to quickly tag a wall, with graffiti artists working on the details at home; (3) blockbusters, often consisting of block lettering, are
\end{itemize}
Tags are the simplest and most common form of graffiti, featuring only the writer’s street name and appearing in one color. Fairly small in size, a tag is considered the writer’s signature, and can be executed using a variety of tools including, “wide felt tip markers, paint pens, spray paint, and other creative household items such as shoe polish bottles filled with industrial ink and markers made from chalkboard erasers stuffed into roll-on deodorant bottles.” In addition to serving as the writer’s signature, tags may also contain the name of the writer’s crew if he belongs to one.

executed in the smallest amount of time for maximum coverage; and (4) heavens, which are pieces executed in dangerous, hard-to-reach locations. See Delana, Graffiti Designs + Styles: Tagging, Bombing, Painting, WEBURBANIST; http://weburbanist.com/2009/09/24/graffiti-designs-styles-tagging-bombing-painting/ (last visited Dec. 27, 2011). There is also the increasing prominence of abstract street art—still conceptualized as graffiti, which does not necessarily fit into any of graffiti’s traditional visual categories and aims to serve a different purpose. For these artists, there is less of a focus on words and figurative imagery. See Carolina A. Miranda, Beyond Graffiti, ARTNEWS (Jan. 1, 2011), http://www.artnews.com/2011/01/01/beyond-graffiti/.

See SNYDER, supra note 16, at 41; Delana, supra note 59.

See SNYDER, supra note 16, at 41.

In this context, a crew is an informal group of graffiti artists operating together.

See Delana, supra note 59.
Next on the hierarchy of complexity is the throw-up. Although the throw-up was the last of the three writing styles to develop, its intricacy falls somewhere between the tag and the piece, and has been described as the “bolder version of the tag.” The term was originally used to describe “poorly done piece[s]—something just ‘thrown up’ on the train without much effort or style.” As competition among writers increased, and available painting surfaces on trains decreased, a few writers decided to focus solely on saturation techniques, with some crews developing methods for commandeering entire train lines by saturating train cars with quickly executed names. For those mastering the technique of the throw-up, the focus shifted from style to speed and efficiency.

In the case of throw-ups, “style follows function,” which is a necessary feature for any throw-ups painted illegally—there simply is not enough time for writers to concern themselves with the detail that is normally found in a piece. Mastery of the style is achieved through smooth lines, and a big picture view of the entire word instead of its component parts. Throw-ups usually begin with an outline in a light color that is subsequently filled in, followed by a second outline on top of the original in a darker color. They are most often only executed using two strongly contrasting

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64 See JANE BINGHAM, GRAFFITI 8 (2009); SNYDER, supra note 16, at 40. Although the throw-up was the last style to develop, there is a hierarchy in graffiti culture that dictates what type of graffiti can go over another (and to go against this is disrespectful): a throw-up can go over a tag, a piece over a throw up, and a burner over a piece. See SCAPE MARTINEZ, GRAFF 2: NEXT LEVEL GRAFFITI TECHNIQUES 124 (2011).
65 See SNYDER, supra note 16, at 40.
66 Id.
67 Id. That said, it is considered erroneous to assume this new focus on speed and efficiency detracted from the style of throw-ups. Id.
68 Id. at 41.
69 Id.
70 Id. at 40.
colors, and feature large bubble letters. They require a certain level of precision and coordination, as writers must achieve clean lines with “sweeping arm movements” and, depending on the size of the throw-up, lateral moves across the length of the wall. Over time, and with repetition, a writer’s throw-up may eventually function as his trademark.

Harnessing the full artistic power of graffiti writers brings us to the highest level on the hierarchy: the piece, which is the graffitist term for a colorful, multidimensional mural. Stylistically, pieces represent everything that the mainstream has come to appreciate about graffiti as art. Extending over the length of a wall, they can be quite intricate and complex, oftentimes displaying a multiplicity of stories within one image. Graffiti writers who have mastered the piece demonstrate deftness with shadowing and depth, in addition to occasionally incorporating the features of the surface they are painting on into the work. The murals are complex,

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71 See id.; Bingham, supra note 64, at 8.
72 See Snyder, supra note 16, at 40.
74 See Snyder, supra note 16, at 32.
bold, and visually arresting, with some containing such a high level of detail that they invoke the frenetic style of Hieronymus Bosch. Because pieces are most similar to traditional art forms (like paintings or murals) they also tend to receive the most support from entrepreneurs and community activists who wish to provide legal access to graffiti spots. Consequently, they are also the least controversial of the three forms. The detailed style and sophistication of pieces, in addition to their clear resemblance to traditional forms of art, position them as the most emblematic of the divide between sanctioned and unsanctioned graffiti.

“Big Oil” by KERZ, KAIS, JEW, HEF, PER, SKE, PAS, KING, BEE, and POSE 2
Location: New York
Photo: Slice

While the history of pieces has illicit beginnings and graffiti writers today continue to create pieces without authorization, it is not uncommon for pieces to be sanctioned (e.g., commissioned or given community approval over time) by

75 Hieronymus Bosch was a Netherlandish painter from the Fifteenth and Sixteenth Centuries, who is known for his highly detailed and symbolic works depicting mankind’s sin and moral failings. For more information about the artist, and a closer look at his work, see HIERONYMUS BOSCH: THE COMPLETE WORKS, http://www.hieronymus-bosch.org/ (last visited Feb. 26, 2012).
76 See SNYDER, supra note 16, at 35.
77 Id.
78 Notable graffiti artist Keith Haring created, without permission from New York City authorities, his now-famous “Crack is Wack” mural on a handball court located at East 128th Street and 2nd Avenue. The work was created to speak out against the crack epidemic that plagued the city. Though the work was created illegally, the City eventually allowed it to be restored and repaired, and the area was later
politicians and community leaders. Much of the context surrounding the creation of pieces has changed over the years. No longer are they created under harsh circumstances, in the dark of night, and at perpetual risk of discovery by the police.

Early writers had a limited amount of time to channel their creative energy with the shake of their paint cans, and watch their creative visions take shape on train cars and building walls. Today, writers who create pieces with authorization paint elaborate, perfect, mind-blowing productions on sunny afternoons, sometimes taking two days to finish. The pressure they experience comes from their own desire to push themselves creatively as well as the expectations that come with fame. They have to do their best work with gawkers and autograph-seekers wanting their attention and causing constant distractions.

Still, however, in spite of the laws prohibiting their work in the absence of express permission, many writers have continued to take advantage of the creative evolution of the style and methods behind the creation of pieces. One example of this is the method of using buckets of paint with large paint rollers on extended poles to paint writers’ names in prominent, but difficult and hard-to-reach places. Another example is the simple use of the paintbrush, which not only allows artists to achieve a particular visual look but also enables them to “hide in plain sight, because few


See SNYDER, supra note 16, 35-38.

Id. See also supra note 58 for a brief discussion of these new methods of writing or tagging.
people take issue with someone brushing paint on a wall.” These techniques exemplify graffiti writers’ attempt to best a system that condemns their work. Though there is no true artistic distinction between sanctioned and unsanctioned pieces, the legality of the work ultimately determines the terminology that attaches to a piece and its treatment under the law and in American culture: an illegal, unsanctioned piece remains graffiti while a piece created with permission or that acquires approval over time is distinguished as a mural or something equally sanitized. The logic behind this assertion applies to other forms of graffiti, as well. If any work of graffiti is legal or authorized, then it is not graffiti as we know it.

III. GRAFFITI AND COPYRIGHT

As the state laws described above make clear, painting on anything you do not own may lead to civil or criminal liability. The nature and location of a particular work of graffiti can carry heavy implications for the level of copyright protection afforded to it. Despite graffiti’s mainstreaming and success in gallery spaces, there is no copyright issue that arises from graffiti-style works that are placed on canvas (“aerosol-on-canvas”). When considering “aerosol-on-canvas,” it should be abundantly clear that the resultant works are copyrightable. They are arguably no

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85 See Miranda, Beyond Graffiti, supra note 59 (“[O]n the street, spray paint is the devil…But if you paint with a brush….no one bothers you. It’s not considered aggressive.”) (quotations omitted).
86 Keith Haring’s mural, discussed supra note 78, is a good example of this particularly because of the work’s transformation from an illegal work of graffiti to a landmark community mural. Upon becoming authorized, the “Crack Is Wack” mural lost its illegal status that initially placed it within the framework of penal codes like those discussed earlier. See supra notes 53–57.
87 See supra Part I.b.
88 It is more appropriate to characterize works of “aerosol-on-canvas” as “graffiti-style,” rather than true graffiti, which has always interacted with public space. See De Melker, supra note 10 (“[G]raffiti is, by definition, a defiant and public exhibition….There’s also an intrinsic subversion and vanity to an art form that defines itself by writing one's name over and over again on property, which doesn’t translate when it moves into a more sterile setting like a gallery.”). See also supra note 44.
different than any other work on canvas and therefore are not a source of conflict (or even an interesting point of study in intellectual property). Moreover, in consideration of the public “canvases” that graffiti writers use to their advantage, unlike actual graffiti works of “aerosol-on-canvas” find their haven in sanctioned environments. Irate property owners and state laws do not threaten their existence.

For other forms of graffiti whose creation is not necessarily dependent on their ultimate placement (e.g., stickers), the question of copyright protection ultimately depends on the particular work involved and whether it meets the threshold for originality. Unlike “aerosol-on-canvas”—which, in their similarity to traditional forms of art, are more representative of works that unquestionably meet the copyright standard—less complex works of graffiti that employ short words and phrases may not meet copyright’s minimum requirements. The extent to which they are protected by copyright law is much less certain, and therefore more appropriate for the discussion ahead.

One of the cruces of the conflict between graffiti and copyright law lies in the illegal act of placing a putative work of art on another’s property. The act of defiance that makes graffiti what it is specifically involves the interaction between the image and public space.\(^{89}\) The other crux centers on the protection of illegal graffiti apart and separate from the property on which it is displayed. In other words, whether writers of illegally placed graffiti may be protected from the creation of reproductions, derivatives, and other rights granted to copyright owners in the

\(^{89}\) See Ley & Cybriwsky, supra note 49, at 494 (Dec. 1974) (“The conquest of territory, even in fantasy, is always an act performed for an audience. Locations have a meaning; to claim access to an inaccessible location is to make a claim of primacy for oneself.”).
exclusive bundle of rights identified in Section 106 of the Copyright Act. Before addressing this conflict, it would be helpful to ask first whether standing alone, i.e., apart from propertarian considerations, certain types of graffiti would qualify as original works under copyright law. If they do qualify as original works, are they protectible; and if so, then in what sense?

a. **IS GRAFFITI PROTECTED BY COPYRIGHT?**

The Copyright Act was enacted with the goal of “promot[ing] 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.” American copyright law protects all “original works of authorship fixed in any tangible medium of expression,” and includes “pictorial, graphic, and sculptural works.” While it is evident that graffiti falls under the pictorial and graphic descriptors, it is not as evident that its different forms qualify as “original works of authorship” as understood by American copyright law. Pieces, with their bright colors and complex visual elements depicting a range of scenes, would easily qualify as original, protectible works under copyright law. Throw-ups are less complex but still involve creative and highly original features that are not so basic as to elude copyright protection. Indeed their distinctiveness and originality lend themselves to defining the style of individual graffiti writers. Polish graffiti writer Dair, of the EWC crew,
emphasizes that “only by the shape of letters and not by the number of colours and effects can a true style be recognized.”

Tags, the simplest form of graffiti, even though elaborate and original to the writer, may fall outside the realm of copyright law for several reasons. Firstly, on a basic level, copyright may present a bar for tags in light of the prohibition on names (including pseudonyms), titles, short words and phrases. Under copyright law, these categories of expression do not present the requisite level of creativity to meet the originality standard. Though they may exhibit a particular style, tags, in their simplicity, may be too basic to merit protection. In fact, when presented as a pseudonym, word or phrase, their brevity speaks to a reliance on the most rudimentary elements of thought in order to convey their message; as such, they are closer to an idea—whose protection is absolutely barred by copyright—than an expression.

Secondly, tags function as signatures and therefore could be viewed as utilitarian in nature. The question here is whether tags should be considered artistic works in their own right, or signatures as ordinary as those signed on legal documents. Though many writers develop their tags so that they are unique, and in a certain sense artistic, the basic function of the tag is essentially to leave one’s mark—in essence, to say, “I was here.” The development of a distinctive signature speaks to

93 Tomasz Rychlicki, Legal Questions About Illegal Art, 3 J. INTELL. PROP. L. & PRACTICE 393, 397 n. 24 (2008) (“A piece has style when everything sits in its places, letters go well together, interact with each other, transcend each other. A style is the harmony of letters.”).
the tag’s function as an identifying agent.\textsuperscript{96} In this sense, apart from any design elements it may have, it is utilitarian.

Moreover, parallels can be drawn between the graffiti tag and typefaces, the latter being denied copyright protection in the United States.\textsuperscript{97} In order for any useful article to qualify for copyright protection, its artistic elements must be conceptually separate from its functional elements.\textsuperscript{98} In the case of typefaces, it has been argued that novelty typefaces—as opposed to traditional ones—merit copyright protection, as their artistic elements are conceptually separable from their function as typeface.\textsuperscript{99} Thus, the question with respect to tags should be whether their artistic elements are conceptually separable from their function as a signature. As an obvious point, the answer to this depends on how elaborate the tag is and, perhaps, the extent to which it incorporates non-alphanumeric elements.\textsuperscript{100}

b. **DO GRAFFITI WRITERS HAVE AN EXCLUSIVE BUNDLE OF RIGHTS?**

\textsuperscript{96} *Signature Definition, The Living Webster Encyclopedic Dictionary of the English Language* 899 (1977) ("A person’s name, or a mark representing it, as signed or written by himself...").

\textsuperscript{97} Denial of copyright protection for typefaces was etched into American case law in *Eltra Corp. v. Ringer*, 579 F.2d 294 (4th Cir. 1978). See also 37 CFR §202.1(e) (1998).

\textsuperscript{98} See Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980).


\textsuperscript{100} For example, consider the following tag by New York writer, KATSU:

\begin{center}
\includegraphics[width=0.2\textwidth]{tag.png}
\end{center}

One is clearly able to discern its more textual elements, but the tag also takes the form of a head with clearly marked anatomy.
The issues presented in the tussle between graffiti and copyright law (and the law, generally) taper into a legal analysis that falls under two standards: (1) whether graffiti could be protectable under copyright law, generally, and (2) whether graffiti is protectable under the Visual Artists Rights Act of 1990 (VARA), which imbues certain works of art with moral rights. Copyright law, generally, grants artists an exclusive bundle of rights\textsuperscript{101} for works that are copyrightable.\textsuperscript{102} The rights that a graffiti writer might consider under Section 106 of the copyright statute specifically include the following: (1) the right to reproduce; (2) the right to prepare derivative works; (3) the right to distribute copies of his work; and (4) the right to display his work publicly. Because several graffiti writers\textsuperscript{103} have turned their illegal activity into commercial endeavors, the ability to prevent others from profiting off of their works is incredibly important. And even for those graffiti writers who have no desire to financially benefit from their work, or who view the pecuniary element as separate

\textsuperscript{101} Copyright Act, 17 U.S.C. § 106 (2006)

\textsuperscript{102} Id. § 102.

\textsuperscript{103} See Gonzalez, supra note 20 (“We’re in the business of living off our art. We usually try to get money or a credit, which adds up to money later on.”). See also, Peter Dominicczak, Banksy Under Fire for Promotion at HMV, LONDON EVENING STANDARD (Sept. 9, 2010), http://www.thisislondon.co.uk/standard/article-23876238-banksy-under-fire-for-promotion-stunt-at-hmv-do; Banksy – Shop, BANKSY, http://www.banksy.co.uk/shop/shop.html (last visited Feb. 26, 2012). Shepard Fairey also has an online website where purchases of his work can be made. Obey Giant Store, OBEY, http://www.obeygiant.com/store/ (last visited Feb. 26, 2012). Mr. Brainwash does, as well. Mr. Brainwash Store, MR. BRAINWASH DOT COM, http://www.mrbrainwash.com/store/store.html (last visited Feb. 26, 2012)
and apart from more intangible considerations, the ability to exclude others from use enables those writers to exert control over and to maintain the integrity of what they do and what they create.104 Discussed more at length in the proceeding section, the multi-authorial nature of many graffiti works could present itself as a problem in the legal context if copyright protection is granted. Specifically, the extent to which graffiti writers could leverage their rights over the rights of other graffiti writers with respect to a singular work. Would first creators (those who create the initial work) have seniority over subsequent creators? Would that give first creators the right to exercise their Section 106 rights over the complete work in any way that they wish, or would use be limited to the portion that they created? And if that use should be limited, how would one go about separating the work, and how would this separation affect the overall meaning of that work?

The universe of case law concerning graffiti and copyright protection is quite sparse, as courts have just begun to scratch the surface of the issue, but the few cases that do exist hint toward some of the overarching factors that could influence future judicial decisions. In Villa v. Pearson Educ., Inc., Plaintiff Hiram Villa brought suit against Defendants Pearson Education, Inc. and Brady Publishing for their use of a reproduction of one of Villa’s works in a book without his permission.105 Villa is an outdoor muralist who operates under the pseudonym, “UNONE,” the lettering of which often accompanies his works.106 This was case was actually the third attempt

104 See Gonzalez, supra note 20 (objecting to the publication of a book that, without authorization, included the work of many graffiti writers, one writer explained, “For us, the whole purpose of doing this is to give voice to people and let them express themselves in public. So it is important the way their work is characterized.”).
106 Id.
by Villa to bring the defendants to court. At the time of his initial complaint, the court refused to consider the copyright claim due to lack of subject matter jurisdiction because the work at issue was not registered. Villa later registered his work with the Copyright Office, and filed a new complaint with allegations pertinent to the now-registered work. Defendants’ motion to dismiss in this case was denied on procedural grounds, however, the court noted that the determination of whether there had been any copyright infringement would turn on the factual question of the legality of the circumstances under which the mural was created. In consideration of “unclean hands” and whether the transgression “relates directly to the subject matter of the infringement,” however, it may be fair to say that the use of the defense was more appropriate in English than it was in Villa, where the reproduction of the work in a book is not even tangentially related to the work’s legality.

While no determination was made as to the legality of the mural, the acknowledgment by the Court that this was a relevant factual question—in a case not directly involving the property rights of an owner—suggests a disinclination to recognize a graffiti writer’s Section 106 rights under the Copyright Act. It is fair to say that the question of whether a writer has rights against the owner of the building or structure upon which his work illegally exists is qualitatively different than the question of whether a writer has rights against someone who without authorization reproduces or makes derivatives of his work. The latter speaks to the general

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107 Id.
108 Id.
109 Id.
110 Id. at *3.
112 See supra Part III.c for a discussion concerning this question.
application of copyright law to the images depicted, and whether they can be separated from the fact of their illegality. It is a question that asks courts to determine the appropriateness of using the legal status of a work to further assess—in addition to the standard already set forth in the Copyright Act—that work’s copyrightability. The motivation behind Copyright is to “promote the Progress of Science and useful Arts,” but is there any need for Courts to promote what has been deemed illegal by State legislatures, when more constructive means exist for expressing and encouraging the style of art found in graffiti? Does it make sense to encourage activity that has been deemed inappropriate? And from the standpoint of the graffiti writer, when copyright law is intended to protect his rights and maintain the integrity of his work, does it make sense to open up intellectual property law to a form of art that has its own rules and is meant to flout the establishment?

Before answering those questions, it would be helpful to look at the treatment of other types of discouraged activity: obscene works and marijuana smoking pipes (colloquially known as “bongs”). The problem found in obscene works speaks more to a content issue that concerns itself with morals and public order, than a status issue that involves the legality of a thing. However, the parallel found between obscene works and graffiti is that both are viewed as a moral blight on a community (whether

113 U.S. Const. art. I § 8, cl. 8.
114 Graffiti writers certainly do not have to invoke the law even if it were made available to them, but the prospect of this happening begs the question of what could happen to the art should this door be opened? For example, in a culture where a hierarchy has permitted graffiti writers to paint on top of another work, what would happen if writers had to start being concerned that they were creating unauthorized derivative works and could summarily be dragged into court? Across the pond, a related dispute between King Robbo and Banksy played out on a public wall, with King Robbo making it clear that Banksy “broke a graff code of conduct and for a lawless community we have a lot of laws, so I had to come back.” See Jo Fuertes-Knight, King Robbo Exclusive Interview: My Graffiti War With Banksy, SABOTAGE TIMES (Feb. 28, 2012), http://www.sabotagetimes.com/people/king-robbo-exclusive-interview-my-graffiti-war-with-banksy/.
national or local), and so the question is how that consideration might affect a claim for copyright protection. Both the Fifth and Ninth Circuits have rejected obscenity as a defense against copyright protection.\textsuperscript{115} In \textit{Mitchell Bros. Film Group v. Cinema Adult Theater},\textsuperscript{116} the Fifth Circuit reasoned that copyrightability has never concerned itself with the content of the work, and that the absence of such a consideration by Congress intimates that Congress “has decided that the constitutional goal of encouraging creativity would not be best served if an author had to concern himself not only with the marketability of his work but also with the judgment of government officials regarding the worth of the work.”\textsuperscript{117} Moreover, recognizing the morass that is obscenity laws in this country, the Court explained that obscenity law was never adopted as a check against copyright law, which was enacted “with no stated limitations of taste or governmental acceptability.”\textsuperscript{118} The Ninth Circuit court in \textit{Jartech Inc. v. Clancy} anchored its rejection of obscenity as a defense in the following:

\begin{quote}
There is nothing in the Copyright Act to suggest that the courts are to pass upon the truth or falsity, the soundness or unsoundness, of the views embodied in a copyrighted work. The gravity and immensity of the problems, theological, philosophical, economic and scientific that would confront a court if this view were adopted are staggering to contemplate. It is surely not a task lightly to be assumed, and we decline the invitation to assume it.\textsuperscript{119}
\end{quote}

\begin{footnotes}
\textsuperscript{115} See Jartech, Inc. v. Clancy, 666 F.2d 403 (9th Cir. 1982); Mitchell Bros. Film Grp. v. Cinema Adult Theater, 604 F.2d 852 (5th Cir. 1979).
\textsuperscript{116} Nimmer describes this case as “the most thoughtful and comprehensive analysis of the issue [Limitations on Copyrightability by Reason of Illegal Content or Use], 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.17 (2005) (citations omitted).
\textsuperscript{117} Mitchell, 604 F.2d at 856.
\textsuperscript{118} The Court went on to note our society’s changing definitions of the obscene, and the affect this may have on the valid copyrights of various works over time. Id. at 856-57.
\textsuperscript{119} Jartech, 666 F.2d at 406 (quoting Belcher v. Tarbox, 486 F.2d 1087, 1088 (9th Cir. 1973)).
\end{footnotes}
While there have been courts who have rejected the Fifth and Ninth Circuits’ rationale, by and large, Mitchell’s logic serves as the prevailing view for this issue.

Marijuana bongs are much closer in association to the issues presented by graffiti, but unfortunately not much exists in the way of case law with respect to whether copyright protection may be afforded. The most significant difference between bongs and graffiti is that the former, when treated as a sculptural work, loses the function that makes it illegal. Moreover, with a bit of linguistic jiu-jitsu, what many of us know as “bongs,” a word commonly associated with cannabis, can be sanitized to the more general “smoking pipe” or “smoking device” that makes legality a moot point—the more general smoking pipe can be used for tobacco use, which is legal. Thus, as long as the sculptural work, designed as a marijuana bong, is not primarily created or used for illegal ends, it may be recognized by copyright law as an original work worthy of protection.

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121 See NIMMER supra note 116, § 2.17.
123 See 21 U.S.C. § 863(a) (“It is unlawful for any person… (1) to sell or offer for sale drug paraphernalia; (2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia; or (3) to import or export drug paraphernalia.”). Marijuana bongs are classified as drug paraphernalia. Id. § 863(d).

The term “drug paraphernalia” means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under this subchapter. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana…such as (1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls; (2) water pipes…. Id (emphasis added).
A recent case that is instructional for the points explored in this section is *Stratton v. Upper Playground Enterprises, Inc.* Plaintiff Randy Stratton is the author and illustrator of *Build This Bong: Instructions and Diagrams for 40 Bongs, Pipes and Hookahs.* Stratton’s book, a blatant how-to guide for which he applied for and received copyright registration, contains “the materials needed and the steps involved to create forty different bongs, as well as mechanical-type illustrations showing the bongs made out of...honey bears, apples, cantaloupes, dryer hoses and crushed aluminum cans.” Defendant is a designer and distributor of clothing that obtained a copy of Stratton’s book, and subsequently used one of the illustrations on one of its t-shirts for sale. The Court recognized Stratton’s copyright as presumptively valid, and did not look into the nature of the articles depicted when determining whether infringement actually took place. In fact, the Court ultimately found for the Plaintiff with its decision that the Defendant willfully, and without authorization, copied Plaintiff’s diagrams of how to create an apple bong, a vaporizer and an acrylic hookah. Although marijuana bongs are not explicitly at issue in this case, they are referenced explicitly and clearly distinguished from smoking pipes and hookahs. There is no mention of obscenity, rewarding inappropriate activity, or even tacitly sanctioning it. The Court limits its treatment of the illustrations (the apple bong, in particular) to just that—illustrations. The creation of the illustrations does not...

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125 *Id.*
126 *Id.*
127 *Id.* at *4-5.
128 *Id.* at *6, appx.
129 Admittedly, the fact that the book was not per se illegal—it just informed readers how to make something illegal—may have figured into the Court’s calculus.
necessarily point to the subsequent use of the smoking devices for illicit purposes, so in that sense their form can be separated from their function.

To briefly summarize, the nature of content (i.e., its quality, legal status, etc.) should not be a factor of consideration when determining whether a work is copyrightable, and therefore courts are to treat creative works as creative works with no judgment as to their obscenity or appropriateness. Obscene works address the issue of illegal content, which courts do not see themselves as fit to judge given the unevenness of obscenity law and changing social mores. Graffiti, however, does not require immediate consideration of the legality of its content, but rather the legal status of the act behind it—that of placing it on public or private property. The two types of works seem to be peas in the same pod when one considers that both are classified as illegal in the United States, but simply for very different reasons. Where the content of obscene works is immune from judicial judgment and considered irrelevant for the purposes of determining whether there should be copyright protection, there may be no reason why the same could not be held for illegally-placed graffiti whose actual content (i.e., the image) is even less of a consideration. Yes, illegality is an issue in both cases; however, “obscenity is a community standard which may vary” and its “[a]cceptance…would fragment copyright enforcement, protecting registered materials in a certain community, while, in effect, authorizing pirating in another locale.”

Vandalism, on the other hand, is a much more static concept that courts could understandably consider if not for the doctrine of unclean hands, which argues against this. In order for the doctrine to be used as a defense, the wrongdoing must be

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130 Jartech, Inc. v. Clancy, 666 F.2d 403, 406 (9th Cir. 1982).
directly related to the issue.\textsuperscript{131} There is a sharp distinction between a graffiti writer asserting his rights against a wronged property owner versus that same writer asserting his rights against an infringing party who reproduces his work, creates a derivative, distributes the work to the public, and/or displays the work publicly. The distribution of fault is very obviously different, with the graffiti having more leverage in the latter scenario than he does in the former. When approaching a case of copyright infringement, the owner of the property on which the graffiti is located is not even a party to the action. The legality of the graffiti should be, as in the case of obscene works, irrelevant when granting copyright protection. A part from other factors,\textsuperscript{132} a graffiti writer should be able to prevent other parties from using his work without his authorization (subject, of course, to fair use considerations), especially when that use has commercial consequences.

Refusing to take into account the illegality of a work of graffiti would not make it any less subversive; the location of the graffiti and the meaning derived from that location would remain the same until and unless the graffiti is removed. The graffiti would also still be illegal regardless of its status under copyright law. Regarding the question of rewards and incentivizing writers to vandalize property for their art, it is not in the realm of copyright law to negotiate the sometimes awkward boundaries of civil and criminal law; civil and criminal law already exist as checks against wrongdoing.\textsuperscript{133} As the Stratton Court demonstrated with its sole focus on the illustrations, this was a non-issue.

\textsuperscript{131} See infra notes 141-143 and accompanying text.
\textsuperscript{132} See infra Part IV.
\textsuperscript{133} See Mitchell Bros. Film Grp. v. Cinema Adult Theater, 604 F.2d 852 (5th Cir. 1979).
c. **What about Moral Rights?: Graffiti versus Property**

The Copyright Act is resoundingly silent on the issue of whether protection may be accorded to illegal works.\(^{134}\) With respect to property, the issues behind graffiti invoke the right of the property owner to do as she will with her property, with the risk of destroying or mutilating the graffiti for her own purposes, and the right of the writer to protect his work. The Visual Artists Rights Act of 1990 (VARA) notably, and most importantly for this Paper, seeks to protect the moral rights of artists seeking “to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation,” and “to prevent any destruction of a work of recognized stature.”\(^{135}\)

Although copyright law, generally, does not concern itself with the legality of a work, VARA, a subsection of copyright law, does. *English v. BFC & R East 11th Street LLC*, the leading case on this issue, 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.”\(^{136}\) In this case, plaintiffs were a group of six artists who created artwork consisting of five murals and five sculptures in a community garden (“the lot”). One of those murals was painted without permission

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\(^{134}\) *Id.* §§ 101-1332.

\(^{135}\) *Id.* § 106A.

\(^{136}\) No. 97 Civ. 7446(HB), 1997 WL 746444, at *3 (S.D.N.Y. Dec. 3. 1997).
on a building owned by the city.\textsuperscript{137} Respondents included New York City, the NYC Partnership Housing Development Fund ("the Partnership"), and the developers BFC & R East 11\textsuperscript{th} Street LLC.\textsuperscript{138} Following the sale of the lot by New York City to the Partnership, the artists sought to protect their work under VARA.\textsuperscript{139} The Court noted the conflict that would arise if protection were given to illegally placed works of art: community development could be frozen by the simple act of placing artwork where it legally does not belong.\textsuperscript{140}

While the English Court succinctly wrapped up the issue of illegality for graffiti works placed on public property, the case calls to mind other issues that could serve as obstacles for writers. Though the Court focused its argument on VARA and the policy implications of offering copyright protection, the case arguably stems from consideration of the doctrine of "unclean hands,"\textsuperscript{141} which functions as a defense in an action for copyright infringement, and prevents a plaintiff from profiting from his bad behavior.\textsuperscript{142} The defense is recognized "when the plaintiff's transgression is of serious proportions and relates directly to the subject matter of the infringement action."\textsuperscript{143} In cases like English where illegally placed graffiti is competing with the right of the property owner to control use of his property (including the right to sell without encumbrance), it seems ironic that a writer could bring a defense of moral rights in light of his own clear transgression. Whatever a court's attitude may be

\begin{flushleft}
\textsuperscript{137} Id. at *1. Regarding the other murals: one was located on a city-owned building as part of New York City's anti-smoking campaign, and the other three were painted on a building owned by several of the plaintiffs. Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at *3.
\textsuperscript{141} Id. at *4.
\textsuperscript{142} Nimmer, supra note 116, § 13.09[B].
\textsuperscript{143} Id.
\end{flushleft}
toward “graffiti as art,” it seems unlikely that the interests of the owner—her right to exclude others\footnote{White-Smith Music Publ’g Co. v. Apollo Co., 209 U.S. 1, 9 (1908) (Holmes, J., concurring) (“The notion of property ... consists in the right to exclude others from interference with the more or less free doing with it as one wills.”).}—would be turned into a secondary consideration.

VARA also has a right of attribution that allows “the author of a work of visual art...(a) to claim authorship of that work, and (b) to prevent the use of his or her name as the author of any work of visual art which he or she did not create.”\footnote{Copyright Act, 17 U.S.C. § 106A(a)(1) (2006).}

As mentioned above, a writer creates using a moniker, in many instances more than one, over the course of his career.\footnote{See Rychlicki, supra note 93.} Where the works are commissioned or granted permission, the writer will “usually disclose[] his identity, and simultaneously identif[y] himself with that work.”\footnote{Id. at 398.} Illegally placed works, however, carry the risk of civil and criminal liability, so there is less of an incentive for a writer to take advantage of VARA’s right of attribution and reveal himself to the public.\footnote{Id.} For graffiti activities that are considered illicit, and for which there are penalties, a shroud of pseudonymity is encouraged.\footnote{Id.} Moreover, over time a writer is identified by his tag, color choices, style, and/or technique within the culture.\footnote{Id.} This ad hoc system of identification makes it possible for writers to credibly disclaim works that are not theirs and claim works that are based on their reputation. Things obviously become more difficult, however, when images of their works appear outside of graffiti culture in books, magazines, commercials, and other media. Additionally, the fact that so many works of graffiti exist as a dialogue among graffiti writers (insofar as the
frequency of writers physically painting their work over the work of another\(^{151}\) leads to fuzzy authorship issues. The culture of graffiti supports a level of sharing and appropriation that makes it difficult to say after a certain point who the “true” author of a work is. Practically speaking, to what extent would subsequent writers be able to assert their own moral rights over a work?\(^{152}\) If attempting to prevent the destruction of a graffiti work, could a singular writer successfully bring a claim on his own? Would it depend on his particular contribution? Or would he perhaps need to bring his claim with a clear majority of the other writers? There are logistical issues for multi-authorial works that compromise the traction that VARA could otherwise have. Notwithstanding *English*’s denial of VARA protection to illegal works, it is worth noting that a writer’s hands would be bound by the risk of civil or criminal liability if he were to step forward and assert a right of attribution or integrity. This may simply be the price a writer would have to pay in order to create his work illegally.

Another hurdle graffiti writers of illegal works would have to overcome is the VARA requirement that the work be one of recognized stature if there is to be a right against its destruction. VARA does not actually define “recognized stature,” leaving the scope of the phrase to judicial discretion. Unfortunately for the plaintiffs in *English*, this enabled the Court to discredit in a brief aside the possibility that their work is of recognized stature, and also supported the position of the defendant’s expert who denied that plaintiffs would suffer a loss of honor or reputation should

\(^{151}\) See BINGHAM, supra note 64. Another way to look at this would be say that subsequent graffiti writers are incorporating their work into the work of another.

\(^{152}\) See supra Part III.b for a similar but brief treatment of this topic for Section 106 rights. In order to avoid being repetitive, the discussion was placed here in the context of the right of attribution, which is directly tied to authorship.
their work be destroyed. Nevertheless, the recognized stature requirement was not meant to be a huge hurdle for artists. Instead, if the work is viewed as meritorious, courts are permitted to look to a work’s reputation among “art experts, other members of the artistic community, or [to] some cross-section in society.”

In the case of graffiti works, usually pieces, commissioned by the city or private business owners, the likelihood of their being treated as works of recognized stature is much higher. As commissioned works, there is the basic desire that they exist for a particular purpose. Illegally placed works, however, do not have the same level of approval even if some recognize them as art. That said, a more flexible approach to the “recognized stature” requirement may allow room for illegal works that are, over time, held in high regard by communities. The general opprobrium that graffiti faces in society may not be found in the smaller communities where graffiti works are often found, and for whom they are often created. Courts could consider the place these works have in their home communities before dismissing them as nothing more than vandalism. Given the subculture of graffiti, it may also be worthwhile—in an ideal world, perhaps—to look to communities of graffiti writers, as opposed to “art experts, or other members of the artistic community” to assess the merits of a particular work. The approval of the artistic community seems beside the point when evaluating graffiti; the artistic community isn’t graffiti’s target audience

155 Id.
156 See Pollara v. Seymour, 344 F.3d 265, 271 (2d Cir. 2003) (Gleeson, J., concurring) (“While the concept of “recognized stature” under VARA may give rise to some difficult cases, it seems clear that a work that has never been exhibited cannot, as a matter of law, be a work of recognized stature. The plain language of the provision suggests that the work must have attained a recognized stature by the time it is destroyed.”).
157 See, e.g., the Keith Haring “Crack is Wack” mural discussed supra note 78.
by any means, and approval from the establishment in this way may ultimately cut
against the qualities of the work that make it graffiti.158

Broadening VARA protection would enable graffiti artists to create a
permanent store of their work by protecting it from the constant removal is usually
faces. Graffiti works would survive through more than just photographs, and
continue to be seen in the locations that provide them with context and meaning. But
this would still clearly conflict with the rights of property owners, in addition to
creating contradictory law: in effect, courts would be sanctioning the illegal
placement of graffiti on public and private buildings, in spite of state law and city
ordinances, as long as they were recognized to have some level of artistic merit by
others. Nevertheless, the fleeting presence of graffiti would make it difficult for
specific works to develop the reputation needed to meet the “recognized stature”
requirement.

IV. FINDING A HOME FOR GRAFFITI

The first half of this Paper was spent assessing the feasibility of granting
copyright protection to graffiti. Part III.A addressed VARA and came to the

158 In other words, this level of approval in the mainstream may lead to backlash within the smaller
graffiti community, which prides itself on not bowing to the establishment. See Florence Waters,
“Born in the Streets”: Glorified Graffiti Loses Its Gravitas, THE TELEGRAPH (July 14, 2009),
http://www.telegraph.co.uk/culture/art/art-features/5779221/Born-in-the-Streets-glorified-graffiti-
loses-its-gravitas.html. Discussing Paris’s Foundation Cartier’s exhibit, Born in the Streets, the author
takes the mainstreaming of graffiti to task:

Street art still has its place: on pee-stained ugly buildings in cities where dissidents
reshuffle the power balance on the pavement. And on railway routes through
suburban hell, where grit and grime – rather than destroying the pictures – actually
add to their dirty aesthetic. If we wanted to look for enlightening and unexplored
social history in Paris’s illustrious graffiti scene, we would skip the Louvre on our
weekend city breaks and amble through the rough streets of the 18th arrondissement.
We would take cameras, and our kids, and a slang dictionary to help translate the
French expletives so that we could appreciate the artworks’ full meaning. Id.
conclusion that the rights of the property owner would never be sidelined in favor of
the errant graffiti writer. Part III.B asked whether copyright protection could be
granted apart from propertarian considerations, and more or less concluded that, yes,
it could. Part IV of this Paper seeks to explain why could does not necessarily mean
should. As a practical matter, given graffiti’s rise to prominence and the celebrity of
a few notable artists, it makes sense—recognizing copyright as a system of economic
incentives—that writers would want to protect the work that may have garnered them
so much success and given them livelihoods (or that could give them livelihoods).159
As a theoretical exercise, however, and looking at graffiti at large, copyright may not
be the right answer. Copyright law’s application to various works could exist as one
of the great ironies of contemporary graffiti culture. But even so, this irony may also
serve as another form of graffiti’s subversive impact on the establishment,
destabilizing copyright doctrine and forcing artists, property owners and practitioners
to work together to come up with new and better solutions.

A very apparent tension exists between graffiti as a clear act of defiance
against the law, and any effort to reward graffiti with the benefits of copyright
protection. When considering the Constitutional mandate to Congress to promote
creativity, and understanding that Copyright is an incentive mechanism, there does
not appear to be any need on the part of writers to be inspired by economic incentives
in order to create. Graffiti culture in the streets has flourished and evolved with its
own incentives and sense of order. This culture has thrived off of co-opting symbols
and iconic figures from popular culture, and the entrance of graffiti onto the copyright
scene—where writers are profiting from their work—could quickly expose those

159 Id.
writers to liability for their own copyright infringement. Having to consider the licensing of images that they choose to incorporate in their works would squelch the freedom that many writers have with respect to their craft. Once graffiti entered the realm of copyright law it would be subject to all of the rules of the game that provide both benefits and restrictions. Those restrictions may come at the cost of the art itself, and writers would need to ask themselves whether the benefits they receive from activity that is illegal, and for which they would be subject to civil and criminal penalties, would outweigh those costs. The costs, however, vary from situation to situation. This is not a suggestion that copyright protection be avoided altogether. It is a caution to graffiti writers to enforce their intellectual property rights in limited circumstances in order to maintain the art and the culture surrounding the art. In other words, graffiti writers should not initiate lawsuits against other graffiti writers for painting over their work because there are cultural norms that are available to settle that issue. Graffiti writers could, however, bring claims against other graffiti writers or non-graffiti writers for the unauthorized distribution of t-shirts or postcards bearing a work of graffiti, for example. Where there are commercial implications, copyright law might serve graffiti writers effectively.

With its rise in popularity, and presence in both European and American art galleries, there is an obvious appreciation for the skill of graffiti writers, but viewed in isolation, separate from the

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160 For example, see the Run DMC case discussed in Bonner, supra note 21.
161 But see supra Part III.b for discussion about the risks in resorting to copyright protection for works that have multiple authors.
fact that graffiti art is still vandalism, graffiti loses its bite.\textsuperscript{162} It not only loses the edge it has, but it loses the edge that imbued it with meaning.

Questions about graffiti and copyright have arisen in response to its rise in popularity and the few cases that have attracted attention in the media—but with the exception of the Run DMC case,\textsuperscript{163} where the use of the photograph was unauthorized, and the graffiti work was found to be infringing, the other cases involved works that were painted legally. It is absolutely understood why those artists, who work without fear of liability, and who have attracted some measure of fame, would want to protect their financial interest. While the chance for unauthorized use exists with illegal graffiti, it is on a much lower scale as this type of graffiti is more impermanent given city and property owner efforts to clean structures that have been vandalized. Not only is it more impermanent because of clean-up efforts, but also because it is not uncommon for works to be painted over by other artists.\textsuperscript{164} For the sake of argument, one might be able to imagine a scenario where graffiti writers are suing other graffiti writers for “mutilating” or “distorting” their work under VARA, when such actions have been deemed completely acceptable by the long-held standards of graffiti culture. Or, in another scenario, where one graffiti writer incorporates elements of another graffiti writer’s work into his own, and the first graffiti writer brings a claim of copyright infringement against the other. While this behavior is frowned upon anyway in graffiti culture,\textsuperscript{165} the introduction of

\textsuperscript{162} See Waters, supra note 158. \textit{But see} Schwender, supra note 89. In this author’s view, the wrongs committed have everything to do with the art created. If that art is considered graffiti, then it was created under illegal circumstances. Otherwise, the work is graffiti-style.

\textsuperscript{163} See supra note 21 and accompanying text.

\textsuperscript{164} See MARTINEZ supra note 64.

\textsuperscript{165} See GASTMAN & NEELON, supra note 16, at 23 (“[T]hey looked to one another for inspiration, while simultaneously creating a culture where “biting”—copying from another—was shameful.”); Marina
litigation in this way would introduce a level of formality that could balkanize street corners and neighborhood blocks. This type of environment would stifle the creativity and mutual inspiration that has existed in graffiti culture.

V. CONCLUSION

The complex issues entrenched in the grant of copyright protection to graffiti demand more thought and attention than this Paper can provide. Perhaps the rise of graffiti to the mainstream as a legitimate form of art—whether legal or illegal—requires that more attention be paid to protecting the intellectual property rights of these artists. Whether city mayors and anti-graffitiists like it or not, graffiti is being featured prominently in commercials and books, and artists are making it clear that their works are not just there for pure public consumption. Recognizing the individual interests of writers, equal attention should be paid to maintaining—if we are interested in the purity of graffiti art—the culture at large. This in itself should count as a matter of self-interest for graffiti writers. If graffiti is treated as graffiti, as vandalism, the tension that exists between it and the law will not abate, potentially making its relationship with copyright an uncomfortable union. As stated above, could does not necessarily mean should, and in the case of graffiti which has operated and flourished outside of legal boundaries for so long, “could” may lead to the asphyxiation of a vibrant and ever-fascinating culture.