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FLIPPING A COIN FOR COPYRIGHTABILITY OF ILLEGALLY PLACED STREET ART

Abstract

Street art is visual art usually placed in public locations, such as on buildings or train cars. Once upon a time, this concept was being treated very stringently within the borders of criminal law. So that, graffiti used to be scrutinised as criminal behaviour or vandalism. We all know how the “Subway Surfers” game starts, do not we? However, tables have turned, and graffiti are now under the umbrella of a concept called an art – street art. Even discussions were commenced on the copyrightability of street art. The uprising role of this concept took this debate to another level, granting copyright protection to even illegally placed street art. But the runner in “Subway Surfers” still runs because the act of painting surfaces unsolicitedly is still considered illegal. That is why granting copyright protection for illegally placed street art is controversial, especially when the “unclean hands” doctrine is on the other side of the scale. Furthermore, if illegally placed street art gets copyright protection, the discussions will potentially extend to what economic and moral rights street artists can have. This article will address the issues of copyright protection for street art (both legally and illegally placed) and the potential economic and moral rights of street artists.

Annotasiya

Küçə sənəti, adətən, ictimai yerlərdə, məsələn, binaların və ya vaqonların üzərində əks etdirilən təsviri incəsənətdir. Bir vaxtlar bu anlayışa cinayət hüququ çərçivəsində çox sərt yanaşılmışdır. Belə ki, qraffitiilər cinayət əməli və ya vandalizm kimi dəyərləndirilmişdir. “Subway Surfers” oyununun necə başladığını hamımız bilirik, elə deyilmi? Bununla belə, son dövrlərdə bu məsələyə yanaşma dəyişmişdir və qraffitiilər artıq incəsənət – küçə sənəti adlanan bir konsepsiyanın çətiri altındadır. Hətta artıq küçə sənətinin müəlliflik hüquqları ilə qoruna bilməsi barəsində müzakirələr mövcuddur. Bu konsepsiyanın yüksəlişi mövcud müzakirəni başqa səviyyəyə qaldırmışdır: qanunazidd olaraq həyata keçirilən küçə sənətinin müəlliflik hüquqları ilə qoruna bilməsi də artıq müzakirə mövzusunda çevrilmişdir. Bununla belə, “Subway Surfers”dəki oyunçu hələ də qaçır, çünki divarların icazəsiz rənglənməsi qanunazidd əməl hesab edilir. Buna görə də qeyri-qanuni şəkildə yaradılmış küçə sənətinin müəlliflik hüquqları ilə qorunması, xüsusən də “çirkli əllər” doktrinasını nəzərə aldıqda böyük mübahisələrə səbəb olur. Bundan əlavə, qanunazidd olaraq yaradılmış küçə sənəti müəlliflik hüquqları ilə qorunma hüququ əldə edərsə, müzakirələr küçə rəssamlarının sahib ola biləcəkləri iqtisadi və mənəvi hüquqlara qədər genişlənəcəkdir. Bu məqalədə küçə sənətinin (həm qanuni, həm də qanunazidd şəkildə yaradılan) müəlliflik hüquqları ilə qorunması, eləcə də küçə sənətkarlarının əldə edə biləcəyi iqtisadi və mənəvi hüquqlar araşdırılacaqdır.

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Introduction

“Street art” is a special type of art, and its forms are widely spread worldwide. A. Young refers to graffiti artists as citizens who have a special connection to cities, and they make cities better than they are right now.¹

Just a quick look at the walls of our cities is enough to understand how common these phenomena are. Even sometimes popular street artists’ works can be sold for six-figure amounts, and the value of street art can outstrip the wall on which it is painted.²

The conventional approach to this type of art has tended to depict it as an issue better dealt with under property or criminal law. This did not necessarily pose an obstacle for street artists, many of whom opt to locate scrutiny of their work outside of the law. One of them even went the extra mile by stating that “copyright is for losers”. This statement belongs to the well-known street artist Banksy, who is least interested in copyright protection for his artwork. Banksy tried to obtain trademark protection for his famous graffiti named “Monkey Sign”, a drawing of a monkey with a board that reads “laugh now, but one day we’ll be in charge”.

In May 2021, this was first rejected by the European Union Intellectual Property Office (EUIPO). However, in November 2022, the Fifth Board of Appeal reversed the previous decision, providing that just because a trademark might be subject to copyright protection, it should not mean it cannot act as a trademark.³ This means Banksy has obtained a trademark for his graffiti. But what about potential copyright protection for graffiti? Can the same result be reached if the matter is examined under copyright law?

One thing is for sure that copyright protection for street art can ensure economic gains for authors. It is also common practice for some corporations to use these art forms in their commercial activities without the artists’ permission. Therefore, a significant rise was observed in the number of cases dealing with street artists suing companies in wide-ranging fields, namely

¹ Alison Young, *Cities in the City: Street Art, Enchantment, and the Urban Commons*, 26 *Law & Literature* 145, 156 (2014).

² Aislinn O’Connell, *The writing on the wall: street art and copyright*, 14 *Journal of Intellectual Property Law & Practice* 530, 530 (2019).

³ EUIPO, Decision of the Fifth Board of Appeal, R 1246/2021-5 (2022).

food, entertainment, fashion, real estate, cars, etc.⁴ For some, copyright may be the exact legal tool that street artists require.⁵ Nowadays, there are a lot of street and graffiti artists who operate within the scope of the law.⁶ Considering all these, it is possible to emphasise that the issue of copyright protection for street art is becoming more important as street artists' interest in this protection grows. Therefore, there is a need to analyse this topic in detail.

In the first part of this work, it will be assessed whether copyright rules can protect street artworks, especially graffiti. The examination will be done for both legally and illegally placed graffiti, and the light will be shed on the different domestic jurisdictions. In the second part, it will be discussed what economic rights artists can have under copyright protection, and then the issues dealing with the moral rights of artists will be covered. In this part, the paper will mainly concentrate on illegally placed graffiti since the problems are related to their illegality element. Having no case from the EU courts – both The Court of Justice of the European Union (hereinafter CJEU) and The General Court (hereinafter GC) in dealing with the copyright and street art issues occurred to be the main difficulty for achieving the purposes of this paper. However, relevant CJEU copyright precedents and legal tests will be used to accomplish specific assessments. The different EU member states' practices and cases from national courts will also be analysed, as well. Other jurisdictions, such as the UK and the USA, will also be examined to assess issues comparatively. Additionally, international and regional legal documents alongside academic articles, theories, and opposing views from the legal doctrine will be used.

I. Copyright protection for street art (graffiti)

In this part of the paper, possible protection under the copyright rules for street art (for both legally and illegally placed ones) will be investigated.

A. General legal framework for the copyright protection of street art

Under this section, it will be analysed whether street art can be subject to copyright or not. As mentioned before, there is no EU court practice on this matter. For that reason, this issue remains hotly debated with some unanswered questions.

1. Relevant statutory authority under international and EU level

The provisions of some international treaties will be first considered to find relevant provisions for copyright protection. The CJEU consequently treats them as the starting point for its interpretation of all statutory instruments in

⁴ Enrico Bonadio, *The Cambridge Handbook of Copyright in Street Art and Graffiti*, 1 (2019).

⁵ *Id.*, 3.

⁶ *Ibid.*

the copyright and related rights field.⁷ For example, in the case of *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben*,⁸ the CJEU, in its interpretation of the concept of “copy” within the meaning of Article 9 (1) (b) of Directive 2006/115,⁹ used different international conventions to define the term.

Looking at Article 2 of the Berne Convention for the Protection of Literary and Artistic Works (1979), it will be possible to identify the protected categories of “literary and artistic works” as follows: “*scientific and artistic domain, whatever may be the mode or form of its expression, such as ... works of drawing, painting, architecture, sculpture, engraving, and lithography*”¹⁰ By borrowing the words of W. Paula, it can be stated that “this is a broad category into which graffiti and street artworks, as either artistic or perhaps even literary works, can in theory perfectly fit”.¹¹

At the EU level, this definition is entrenched through¹² the different laws requiring member states to ensure copyright protection for all protected works within Article 2 of the Berne Convention.¹³ Also, Article 1 (1) of the Community Directive 2006/116/EC establishes that “the rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and 70 years after his death”.¹⁴ Subsequently, there is an expansive definition of the subject matter¹⁵ that European states must protect the copyright, extending to all authorial works or expressive (intellectual) creations, whatever may be the mode or form of expression.

2. Requirements and a legal test to be fulfilled under the EU dimension

In EU jurisdictions, the subsistence of copyright and related rights occurs in any subject matter that:

- (1) is of a protectable type;
- (2) is sufficiently connected to the territory of the protecting state;
- (3) satisfies any applicable formalities.¹⁶

⁷ Justine Pila and Paul L.C. Torremans, *European Intellectual Property Law*, 225 (2nd ed. 2019).

⁸ *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben*, C-476/17 (2019).

⁹ Directive of the European Parliament and of the Council on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, 2006/115/EC (2006).

¹⁰ Berne Convention for the Protection of Literary and Artistic Works, art. 2 (1979). Available at: <https://www.wipo.int/wipolex/en/text/283698> (last visited Dec. 20, 2022).

¹¹ Bonadio, *supra* note 4, 62.

¹² *Supra* note 10.

¹³ Tanya Aplin and Jennifer Davis, *Intellectual Property Law: Text, Cases, and Materials*, 251 (2nd ed. 2013).

¹⁴ Directive of the European Parliament and of the Council on the Term of Protection of Copyright and Certain Related Rights, 2006/116/EC, art. 1 (1) (2006).

¹⁵ This will be better observed when some member states’ practices such as France, Germany, Italy, and the Netherlands will be examined.

¹⁶ Pila, *supra* note 7, 277.

An association of international and EU instruments and relevant case law has largely harmonised the principles governing each of these requirements.¹⁷ A few things about the second and third requirements have to be mentioned shortly. The second condition enshrines that a sufficient connection to the territory of the protecting state must exist to require protection through its domestic laws.¹⁸ As for the third condition, Article 5 (2) of the Berne Convention provides “the enjoyment and the exercise of [authors’] rights shall not be subject to any formality other than, at the discretion of individual countries”.¹⁹

Turning to the first condition, the requirements for any work gaining copyright protection are established by the CJEU’s judgments in the cases of *Infopaq International A/S v. Danske Dagblades Forening*, and *Eva-Maria Painer v. Standard VerlagsGmbH and Others*. Beginning with *Infopaq*, the CJEU established a two-step test that any authorial work is subject to copyright if:

- i) Creation of which leaves scope for free and creative choices;²⁰
- ii) The extent, if any, to which that scope has been exploited by its alleged author in the course of creating it such that the work bears the author’s personal mark.²¹

This shows the CJEU’s confirmation of the expansive definition of “authorial work”, which covers any expression that its creation leaves scope for the exercise of free and creative choices. By this, the CJEU means that different categories of subject matter are taken on their terms, only subject to the parameters set by their protection as authorial works. As for now, we have a few examples from the CJEU’s case law that certain types of subject matter that fail to pass this test and are not protectable by copyright. To illustrate, the CJEU went on to say that the nature of football games and other sporting events²² and tastes²³ deprive them of having copyright protection since there is no room for free and creative choices for the authors.

Applying this test to graffiti or any other form of street art will depend on the factual background of each specific case (case-by-case approach). When it is generally considered, the *Infopaq* case conditions will be presumed to have been fulfilled for our hypothetical consideration. It would be impossible to say that no street art could meet the requirement of originality since there are a lot of examples of street art exhibited in galleries and museums.²⁴

¹⁷ *Id.*, 276.

¹⁸ *Id.*, 269.

¹⁹ *Supra* note 10, art. 5 (2).

²⁰ *Infopaq International A/S v. Danske Dagblades Forening*, C-5/08, para. 45 (2009).

²¹ *Eva-Maria Painer v. Standard VerlagsGmbH and Others*, C-145/10, para. 92 (2011).

²² *Football Association Premier League Ltd and Others v. QC Leisure and Others*, C-403/08 and *Karen Murphy v. Media Protection Services Ltd*, C-429/08 (2011).

²³ *Levola Hengelo BV v. Smilde Foods BV.*, C-310/17 (2018).

²⁴ Emma C. Peplow, *Paint on Any Other Canvas: Closing a Copyright Loophole for Street Art on the Exterior of an Architectural Work*, 70 *Duke Law Journal* 885, 899 (2021).

Nonetheless, it can be very easily argued how much space the use of stencils²⁵ leaves for the artists' free and creative choices, given that stencils are used to leave their design on the surface by just painting on them. In this case, claiming copyright protection for the stencils might be a good idea.

Coming to the second step of this test, the CJEU ruled that the authors needed to stamp their works with their "personal touch", and by doing so, it created the personality element in the case of *Painer*.²⁶ Street artists are likely to comply with this element as well, even if they leave pseudonyms behind them. In the second part of this work, we will later discuss that, even when artists decide to stay anonymous, it will potentially not hinder them from getting paternity right.

Therefore, we do not see any obstacles for legally created street art to gain copyright protection. This view is also supported in the literature by a lot of authors, E. Bonadio, A. O'Connell, and S. Cloon, just to name a few. For some, *it is even straightforward* that a legally created mural would satisfy all the requirements of copyright protection.²⁷

3. The requirement of fixation for "artistic works" and different domestic jurisdictions

Article 2 (2) of the Berne Convention provides that "works in general or any specified categories of works shall not be protected unless they have been fixed in some material form".²⁸ When different jurisdictions are examined, it is found that the application of the "fixation" requirement is not the same under domestic laws. As it will be further depicted, most of them do not explicitly have this requirement for artistic works. Nevertheless, it can still be argued that artistic works should be fixated permanently in a medium to be considered copyrightable.²⁹ Some even point to case law which requires the permanency of the tangible medium.³⁰

Before turning to them separately, we should clarify the issue from the graffiti perspective in general. Whether legally or illegally; artists draw their graffiti on different surfaces, namely walls, trains, cars, etc. Given this, it can be said that they are indeed fixed in a tangible form. During the research on the topic, it was observed that some sprays and other methods used by artists lead to their works vanishing quickly because of weather elements. However, we will see cases in which even "hairstyles" and "bouquets of flowers" got copyright protection. Also, we came across a lot of examples in the literature

²⁵ Stencils are pieces of metal, plastic or paper that has a design cut out of it. Stencils are placed on a surface and are painted so that paint goes through the holes of them and leaves a design on the surface.

²⁶ *Eva-Maria Painer v. Standard VerlagsGmbH and Others*, C-145/10, para. 92 (2011).

²⁷ O'Connell, *supra* note 2, 532.

²⁸ *Supra* note 10, art. 2 (2).

²⁹ Enrico Bonadio, *Copyright Protection of Street Art and Graffiti under UK Law*, *Intellectual Property Quarterly* 1, 5 (2017).

³⁰ *Supra* note 9, 83.

where authors confidently stated that street art “is tangible, fixed (though often temporary due to eradication efforts)”.³¹ Another author, Peplow, is also confident on this matter: “Walls are inarguably a tangible medium; therefore, as long as the street art passes the originality requirement, it should be eligible for copyright protection”.³²

Section 1 (1) (a) of the UK’s Copyright, Designs, and Patents Act (hereinafter CDPA) provides that copyright exists in any artistic work.³³ Section 3 (2) establishes the fixation requirement for the literary, dramatic, and musical works.³⁴ This is in line with Article 2 (2) of the Berne Convention.³⁵ Although there is no express statutory fixation requirement for artistic works in CDPA, in the *Merchandising Corp. of America Inc. & others v. Harpbond Ltd & others* case,³⁶ it was denied copyright protection for the facial make-up as it could not exist independently of Adam Ant’s face (permanent materialisation).³⁷ However, UK courts do not seem to be unanimous to this end. It was suggested in the *Metix Ltd v. G.H. Maughan Ltd* case³⁸ that an ice sculpture (not permanent apparently) can be protected as it is a three-dimensional work made by an artist. Maybe that is why some scholars keep their positivity for the copyrightability of street art in the UK. Dr. Marta Iljadica believes photographs of street art and graffiti can potentially help to fulfill the fixation condition to get a copyright.³⁹

Moreover, the French Intellectual Property Code (hereinafter IPC) defines artistic works as “all works of the mind, whatever their kind, form of expression, merit, or purpose” (Article L 112-1).⁴⁰ There is no trace of the illegality of the creation of work in this code. France has traditionally granted a broader protection to artistic works.⁴¹ Previously, French courts held that “wrapping of a Parisian bridge with canvas”,⁴² “bouquets of flowers”,⁴³ “hairstyles”⁴⁴ can be protected by copyright law. When this approach is applied to street art, courts can also grant protection for graffiti.

Furthermore, Article 2 of the Italian Copyright Act gives a broader definition for artistic works and provides a list of subject matter that can be

³¹ Jamison Davies, *Art Crimes? Theoretical Perspectives on Copyright Protection for Illegally-Created Graffiti Art*, 65 *Maine Law Review* 27, 30 (2012).

³² *Supra* note 14, 901.

³³ Copyright, Designs and Patents Act of United Kingdom, section 1 (1) (a) (1988).

³⁴ *Id.*, section 3 (2).

³⁵ *Supra* note 10, art. 2 (2).

³⁶ *Merchandising Corp. of America Inc. & others v. Harpbond Ltd & other.*, FSR 32 (1983).

³⁷ *Id.*, FSR 46.

³⁸ *Metix Ltd v. G.H. Maughan Ltd*, FSR 718 (1997).

³⁹ M. Iljadica, *Copyright Beyond Law – Regulating Creativity in the Graffiti Subculture*, 103 (2016).

⁴⁰ Code de la propriété intellectuelle, art. L 112-1 (1992).

⁴¹ *Supra* note 4, 180.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

protected.⁴⁵ There is no fixation requirement, and artistic works can be protected if they have a creative character.⁴⁶ Italian courts extended the boundaries of copyright protection to even “a television reports on sport events”,⁴⁷ “a character”,⁴⁸ “a floral composition”,⁴⁹ etc. The paper assumes that such case law will likely grant street art copyright protection.

There is a non-exhaustive list in the Dutch Copyright Act (hereinafter DCA) providing copyright protection “for literary, scientific or artistic works”.⁵⁰ Under Dutch law, a form of expression does not affect the copyrightability of the work. However, to get copyright protection, a work must have an aesthetic character.⁵¹ It cannot be considered that street art cannot meet this requirement, for example, mosaics can easily fulfil this condition. An interpretation from the Dutch Supreme Court makes us believe that street art can be protected under Dutch law. It reads as follows: “Works that are perceptible by senses other than audio and visual, in particular taste, feel and smell, fall within the scope of protection”.⁵² Given the fact that street art and its types are always visible to one’s eyes in a visible sense, they are likely to fall within the scope of this interpretation.

Under the German Authors Rights Act (hereinafter ARA), a non-exhaustive list of protected artistic works is also available.⁵³ German law also does not require any fixation or form of creation. By pointing out this, some authors state that protected work can be even made of any perishable material and even ice.⁵⁴ Copyright may exist in a work that is simply performed without being recorded under German law.⁵⁵

While examining the fixation requirement, it was observed that the definition of artistic works is broad in those domestic laws. This can easily let the street art fall within those provisions’ scope. I would like to conclude the discussion on this requirement in the words of E. Bonadio: “Under EU law and in particular, in light of the Infopaq decision, anything that constitutes an intellectual creation should be protected by copyright”.⁵⁶

B. Copyright and illegally created street art

The illegality of street art can refer to both its content (hate speech) and the form of its establishment (trespassing or vandalism). The first matter will not

⁴⁵ Protezione del diritto d’autore e di altri diritti connessi al suo esercizio, art. 2 (1941).

⁴⁶ *Id.*, art. 1 (1).

⁴⁷ Radioincontro S.r.l. v. Emi Music Italy S.r.l. (2007).

⁴⁸ Luca Faraci v. Interteam S.r.l. and Premium S.r.l. (2002).

⁴⁹ Banti Pereira v. Gorlich, Temi (1967).

⁵⁰ Auteurswet, art. 1-10 (1912).

⁵¹ Screenoprints v. Citroën, NJ 1987 (1985).

⁵² Kecofa v. Lancôme, No. C04/327HR (2006).

⁵³ Urheberrechtsgesetz, art. 2 (1965).

⁵⁴ Hartwig Ahlberg and Horst Peter Götting, Kommentar Urheberrecht, Beck’scher Online, 24 (21st ed. 2018).

⁵⁵ *Supra* note 4, 190.

⁵⁶ Bonadio, *supra* note 29, 6.

be covered since it would not fit within the purposes of this article. Therefore, this paper will focus on the illegality in the establishment of graffiti, meaning that when they are placed without the consent of property owners.

In the words of Marta Iljadica, “illegality is one of the attractive and defining sides of graffiti practice”.⁵⁷ Artists need a surface to draw their graffiti. Therefore, sometimes, or maybe most of the time, they choose their spots and create their works without the property owner's permission. This is the main challenge of the issue. Copyrightability of such graffiti becomes a dispute topic when the property owner opposes that or third parties use graffiti for commercial purposes.

Some might argue from a moral perspective that nobody should profit from their wrongdoing (the “unclean hands” doctrine).⁵⁸ One can even say, “providing copyright protection for works created illegally could create an extrinsic incentive for individuals to engage in illegal behaviour, or weaken the disincentives created by the criminal law”.⁵⁹

However, it will be argued whether the copyright for illegal graffiti is all about benefiting from wrongdoing, or is there more to consider? The outcomes of this research revealed that it is common law jurisdictions where public policy requirements and the “unclean hands” doctrine can potentially deprive protection of illegal graffiti. Nonetheless, civil law jurisdictions tend to grant protection for illegal graffiti despite its very nature.

1. Illegal street art under common versus civil law jurisdictions

The matter will first be analysed in common law jurisdictions, and then the light will be shed on civil law jurisdictions. Let us have a short glance at one case that took place in the UK jurisdiction. In the *Creative Foundation v. Dreamland* judgement (this was a property dispute that a wall with Banksy mural belongs to whom), the judge, Justice Arnold stated: “For the avoidance of doubt, I am not concerned with the copyright in the artistic work, which *prima facie* belongs to Banksy”.⁶⁰ Some even read this case as a presumption that not only recognises the copyright in work belonging to Banksy but *ipso facto* presumes that copyright exists in the illegally placed work.⁶¹ Nevertheless, this is a mere assumption from the judge, and it is not enough to confirm protection.

Looking at the USA practice, it can be found a lot of cases in which matters dealing with illegal graffiti came before the courts. The main argument for opposing the protection was the illegality element of graffiti in these cases;

⁵⁷ *Supra* note 4, 55.

⁵⁸ Ned Snow, *Copyright, Obscenity, and Unclean Hands*, 73 *Baylor Law Review* 386, 395-396 (2021). To explain in a short way, the unclean hands doctrine allows courts to prevent wrongdoers from employing the legal system to support their wrongful acts. When it comes to specifically copyright matters, the doctrine entails if the copyright owner acts unlawfully in creating the work or in exercising rights to the work, courts may deny enforcement of the copyright.

⁵⁹ *Supra* note 31.

⁶⁰ *Supra* note 2, 538.

⁶¹ *Id.*, 9.

Jason Williams and others v. Roberto Cavalli SpA,⁶² *H&M GBC AB v. Williams*,⁶³ and *Villa v. Pearson Education*,⁶⁴ just to name a few.

Unfortunately, in all cases, parties settled before the final judgement, leaving scholars in difficulty in this debate. Nevertheless, in *Villa v. Pearson Education* case, it is *obiter dictum* stated by the judge that granting copyright protection for illegal graffiti “would require a determination of the ... circumstances under which the mural was created”.⁶⁵ For D. Schwender, this is an implicit statement; if it is proven that the mural was created illegally, the copyright would be invalid for that mural.⁶⁶ However, for another author, “this [D. Schwender’s reading] overreads the court’s decision substantially”.⁶⁷ This paper agrees with the latter interpretation of D. Schwender’s reading of *Villa v. Pearson* case. Because the court just dictated circumstances under which work is created should be assessed. It was not explicitly stated, but finding illegality in the creation can cease copyright protection. It can be suggested that read in a reverse way, *Villa* doctrine explicitly confirms copyright protection for legally created murals. Some also think that in the *Villa* case “if a court were to consider the question directly, illegally created graffiti art probably would receive copyright protection”.⁶⁸

Whereas the paper analysed literature from the USA doctrine, one approach drew our attention. Some authors compared the copyrightability of illegal graffiti with the copyrightability of obscene and fraudulent works.⁶⁹ For example, in *Mitchell Bros. Film Group v. Cinema Adult Theater* case,⁷⁰ it was held that “there is not even a hint in that the obscene nature of a work renders it any less a copyrightable writing”. Moreover, the Copyright Act should be content-neutral with “no stated limitations on taste or government acceptability”.⁷¹ By examining decisions from this line of judgements, those authors draw attention to the fact that the illegality element (with regards to different laws) in those cases did not hinder gaining protection under copyright rules. When this type of argumentation is applied to the issue in question, it suggests copyright protection should not be rejected for illegally placed graffiti. This point of view seems convincing.

Turning to civil law jurisdictions, W. Paula states that countries in these jurisdictions “tend to grant copyright protection regardless of whether the graffiti is done illegally and attempt to resolve issues by balancing the

⁶² Jason Williams, and others v. Roberto Cavalli SpA, CV 14-06659-AB (2016).

⁶³ H&M GBC AB v. Williams, 1:18-cv-01490 (2018).

⁶⁴ Villa v. Pearson Education, № 03-C3717 (2003).

⁶⁵ *Supra* note 31, 29.

⁶⁶ Danwill Schwender, *Promotion of the Arts: An Argument for Limited Copyright Protection of Illegal Graffiti*, 55 Journal of the Copyright Society U.S.A. 257, 268-269 (2007).

⁶⁷ *Supra* note 31, 31.

⁶⁸ *Id.*, 30.

⁶⁹ *Supra* note 2, 535.

⁷⁰ Mitchell Bros. Film Group v. Cinema Adult, 604 F.2d 852, 854 (5th Cir. 1979).

⁷¹ *Id.*, 856.

competing interests”.⁷² Whereas those jurisdictions were examined, this finding was also observed in the relevant case law.

Looking at the French experience, the *Tribunal de Grande Instance de Paris*, in the *Space Invader*⁷³ case, *de facto* recognised copyright protection for illegally placed street art. Although the main issue there was about the originality of the mosaic, which was mainly based on some previous video games, the court also provided that “the nature of the pool tiles attached to urban walls, the choice of the location of their placement bears the imprint of the personality of the author”.⁷⁴ It is also mentioned that it “did not appear to regard illegality as an obstacle when considering the originality of the work”.⁷⁵ For some, it is maybe not perfect, but a strong precedent for the copyrightability of illegal graffiti.⁷⁶

In Germany, the *Pictures on the Berlin Wall* case provided: “It is not in principle relevant to the possibility of copyright protection by statute for the creation of a work that how it was produced is unlawful - in this case, by an act of damage to property subject to civil and criminal sanctions”.⁷⁷ Deriving conclusions from this statement, being placed illegally is not in principle to reject copyright protection for the street art considered as ground since even damaging the property is not considered as ground. Therefore, it seems convincing that this reasoning can grant copyright protection for unsolicitedly placed street art.

2. Illegal street art and human rights perspective

Article 15 (1) of the United Nations International Covenant on Economic Social and Cultural Rights (hereinafter ICESCR) 1966 provides that everybody has a right to:⁷⁸

- “(a) take part in cultural life;
- (b) enjoy the benefits of scientific progress and its applications;
- (c) benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author”.

Article 15 (3) adds that “the States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity”.⁷⁹ Thus, contracting states would be found in violation of this convention if they failed to provide an appropriate system of enforcement for everyone to actively participate in cultural life and benefit from the results of their creative works. With this, it can be argued that by depriving street artists of copyright protection for their works by just referring to their

⁷² *Supra* note 4, 57-58.

⁷³ Tribunal de grande instance de Paris, Chambre civile 3, 06/12982 (2007).

⁷⁴ *Supra* note 2, 534.

⁷⁵ *Supra* note 4, 58.

⁷⁶ *Supra* note 2, 535.

⁷⁷ *Supra* note 4, 58.

⁷⁸ United Nations International Covenant on Economic Social and Cultural Rights, art. 15 (1) (1966).

⁷⁹ *Id.*, art. 15 (3).

illegality element, states can be found breaching this provision. Some even go further and state that “discriminating against illegal graffiti and street artists to deny copyright protection may also arguably conflict with the principle of non-discrimination in the ICESCR”.⁸⁰

3. “Fairness” related arguments and illegal street art

From this point of view, considering copyright protection for illegally placed street art as an encouragement of vandalism would not be fair. It can also be pondered as means of ensuring fair treatment for a varied portion of the artistic community, as Iljadica states: “a normative claim might usefully be made here for the protection of graffiti writing in order to promote a diverse culture”.⁸¹

Copyright protection for this kind of street art can also ensure the economic interests of artists as it can help to put a curb on the commercial misappropriation of their works (this will further be discussed). Therefore, copyright protection can open career paths⁸² for graffiti artists and pave the way for them out of criminality.⁸³

Moreover, artists’ choice of a place for their works is an issue of great importance. Artists need places that can be visible to the public, and getting permission to draw over some places is not always possible. For many writers, illicit venues remain more culturally and symbolically lucrative for artists.⁸⁴ Therefore, sometimes artists do not have an option but to unsolicitedly paint those surfaces.

4. Concluding remarks on the copyrightability of illegally placed street art

What is discussed here is the basic level of protection. Given the importance of graffiti artworks to creativity and culture, leaving graffiti works unprotected would be contrary to the goals and ethos of international copyright law, such as ensuring justice for authors.

This view is also heavily supported in the legal doctrine. A. O’Connell concludes her thoughts on the same discussion by stating that “the doctrine of illegality would not prevent copyright from arising in an artwork that was created through criminal damage”.⁸⁵ Additionally, S. Cloon considers that the theory of copyright requires protection for graffiti, even though there is no explicit statement from the courts.⁸⁶ C. Lerman also agrees that illegal street art should be protected by copyright regardless or by remaining neutral

⁸⁰ *Id.*, 6.

⁸¹ *Supra* note 39.

⁸² Gregory Snyder, *Graffiti Lives: Beyond the Tag in New York’s Urban Underground*, 3-4 (2009).

⁸³ Susan A. Phillips, *Wallbanging: Graffiti and Gangs in L.A.*, 313 (1999).

⁸⁴ Laura MacDiarmid and Steven Downing, *A Rough Aging out: Graffiti Writers and Subcultural Drift*, 7 *International Journal of Criminal Justice Sciences* 605, 612-616 (2012).

⁸⁵ *Supra* note 2, 538.

⁸⁶ Sara Cloon, *Incentivizing Graffiti: Extending Copyright Protection to a Prominent Artistic Movement*, 92 *Notre Dame Law Review* 54, 65 (2016).

towards the means of creation.⁸⁷ W. Paula, in her turn, firmly believes that “copyright could (and should) protect illegally created graffiti regarding both subsistence and enforcement”.⁸⁸ This paper shares the same conclusions on the debate as described opinions. Therefore, a mere reference to street arts’ illegal placement would not probably deprive them of copyright protection. Choosing to conclude this discussion on the other side of the debate would contradict the arguments mentioned on the human rights, fairness, and civil law jurisdictions perspectives. And there is still no final judgement in common law practice where the “unclean hands” doctrine and public policy doctrines hinder copyright protection at the time of writing.

II. Economic and moral rights of street and graffiti artists, balancing conflicting interests

The debate on the copyrightability of illegal street art will surely involve the following parties:

- a) commercial users;
- b) property owners.⁸⁹

In this part, the economic rights of artists will first be examined with regard to the unauthorised commercial exploitation of their works. Then, the moral rights of street artists and their conflicting interests with property owners will be addressed.

A. Economic rights of street and graffiti artists

The dispute starts when companies in different sectors, such as food, entertainment, and fashion, use street artworks in their commercial activities without the artists’ permission. Using street art in this way is common as some emphasise: “many companies use graffiti advertising campaigns because they create a “spectacle” that gains attraction on social media”.⁹⁰ This also happens when somebody takes pictures of graffiti and publishes them in a book. When artists oppose the unauthorised exploitation of their works, the other side uses the illegality element as an argument to justify their potential breach of copyright rules. In the light of further discussions, it will be examined what economic rights street artists can have and how one can make “fair use” of their works.

⁸⁷ Celia Lerman, *Protecting Artistic Vandalism: Graffiti and Copyright Law*, 295 NYU Journal of Intellectual Property & Entertainment Law 295, 295 (2013).

⁸⁸ *Supra* note 4, 60.

⁸⁹ *Id.*, 56.

⁹⁰ Madylan Yarc, *Mural Mural on the Wall: Revisiting Fair Use of Street Art*, 19 UIC Review of Intellectual Property Law 267, 267 (2020).

1. Economic rights of street and graffiti artists under EU law

Article 2 of the Infosec Directive provides one of the exclusive rights of copyright holders - right to reproduction.⁹¹ This provision gives authors an “exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part”. Article 3 of the abovementioned Directive ensures the right of communication to the public of works and right of making available to the public other subject matter.⁹² The list of any exceptions and limitations is dictated under Article 5, and that list is exhaustive.⁹³ According to the CJEU, no other exceptions can be considered under the domestic laws other than those stated in Article 5.⁹⁴ Although the article entails “exceptions and limitations”, it also confers some rights to users. To illustrate, in the case of *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, the CJEU stated that the rights of the users are derogated from Articles 5 (3) (c) and (d). After mentioning “any derogation from a general rule must, in principle, be interpreted strictly”,⁹⁵ the CJEU went on to say:

*“To ensure a fair balance between, on the one hand, the rights and interests of rightsholders, which must themselves be given a broad interpretation and, on the other hand, the rights and interests of users of works or other subject matter”.*⁹⁶

After mentioning the importance of striking this balance, the CJEU rules that the rights of users should be interpreted broadly.⁹⁷ With this, the CJEU establishes how to make fair use of copyrightable work. This can only be made while that balance is maintained.⁹⁸ From the street art point of view, this fair balance can be potentially achieved by using quotations as it is stated in Article 5 (3) (d).⁹⁹

Therefore, commercial exploitations without quotations, including the author's name, leave no space for speaking about the fair use of street art.

2. Balancing conflicting interests

The issues related to the “fair use” of illegally placed graffiti are directly addressed under this subheading. It will be argued that where the work was used commercially by other stakeholders, the protection of copyright for street art should not be refused on the ground that it was created illegally.

⁹¹ Directive of the European Parliament and of the Council on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001/29/EC, art. 2. (2001).

⁹² *Id.*, art. 3.

⁹³ *Id.*, art. 5.

⁹⁴ See *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, C-469/17 (2019); *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben*, C-476/17 (2019); *Spiegel Online GmbH v. Volker Beck.*, C-516/17 (2019).

⁹⁵ *Funke Medien NRW GmbH*, 69.

⁹⁶ *Id.*, 70.

⁹⁷ *Id.*, 76.

⁹⁸ *Id.*, 70.

⁹⁹ *Supra* note 91, art. 5 (3) (d).

In the *Mercedes Benz* case,¹⁰⁰ it is mentioned that to determine whether Mercedes satisfied the fair use test four issues should be considered:

“(1) the purpose and character of the use, including whether such use is commercial or is for non-profit educational purposes;

(2) the nature of the copyrighted work;¹⁰¹

(3) the amount and substantiality of use;

(4) the effect of the use upon the potential market for or value of the copyrighted work”.¹⁰²

Under these conditions, it is inexcusable to reject copyright protection to authorise pure commercial exploitation of street artwork without any payment to artists. In the first part, *Jason Williams and others v. Roberto Cavalli SpA*, *H&M GBC AB v. Williams*, and *Villa v. Pearson Education* cases are mentioned.¹⁰³ In all these cases, there was an unauthorised commercial use of street art and the cases were settled after the alleged parties accepted to make payments to artists.

E. Bonadio considers that it is “unfair to allow persons other than the artist to rely on the illegal nature of a street artwork to copy and exploit it for their commercial purposes”.¹⁰⁴ The paper tends towards this statement. Because otherwise, the monetisation of artists’ creative activity would let financially strong parties (who are not seeking permission or remuneration for authors) take advantage of them.

Some argue that the “unclean hands” doctrine should not be applied to commercial misappropriation of graffiti since the illegal behaviour of artists does not hurt the individual or organisation which has misappropriated the illegally placed art.¹⁰⁵ By doing the same, another author goes further and states that the application of the unclean hands to unlawful commercial use of street art can have a bizarre effect on its legitimising co-option.¹⁰⁶

Having arguments mentioned in the first part of this paper in rewind, I would conclude that the material interests of artists have to be satisfied to fairly use their artistic creativity. Without adequate remuneration for authors, allowing third parties to do commercial misappropriations cannot strike a fair balance. Peplow also agrees with this as she states copyright law should protect “authors’ interest in realising the commercial value of their work by

¹⁰⁰ *Mercedes Benz, U.S. v. Lewis*, No. 19-10948 (E.D. Mich., 2019).

¹⁰¹ The second criteria focuses on originality than the alleged infringement.

¹⁰² *Supra* note 67, 274-275.

¹⁰³ Central California District Court, *Jason Williams, and others v. Roberto Cavalli SpA* case, CV 14-06659-AB (2016); East District of New York District Court, *H&M GBC AB v. Williams* case, 1:18-cv-01490 (2018); Northern District of Illinois District Court, *Villa v. Pearson Education* case, 03 C 3717 (2003).

¹⁰⁴ E. Bonadio and N. Lucchi, *Non-Conventional Copyright: Do New and Atypical Works Deserve Protection?*, 105 (2018).

¹⁰⁵ *Supra* note 4, 68.

¹⁰⁶ *Supra* note 31, 51.

prohibiting and providing an opportunity to recover for the commercial exploitation of the work".¹⁰⁷

B. Moral rights of street and graffiti artists

Article 6bis of the Berne Convention entails moral rights for authors of artistic works.¹⁰⁸ This provision provides that "the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action about, the said work, which would be prejudicial to his honour or reputation".¹⁰⁹ So, the text contains both the right to paternity (or attribution) and integrity. Paternity right allows authors to claim authorship¹¹⁰ and integrity right lets them prevent derogatory treatment of their works.¹¹¹ However, different pictures emerge when the matter is examined from the illegal street art perspective, especially concerning integrity rights. Also, the transposition of this provision into national laws is not unanimous. These issues will be separately examined in this section.

1. Right of attribution/paternity: Can street artists stay anonymous?

The right of attribution or paternity provides authors with a chance to be recognised as the authors of their works with regard to the use and reproduction of their works.¹¹² Speaking from the street art perspective, there might be some difficulties. It is a fact that most of the time street and graffiti artists do not use their names to mark their works. They usually use pseudonyms or tags.¹¹³ Anonymity is an even bigger challenge than this.¹¹⁴ To avoid legal consequences such as being prosecuted, sometimes artists place their works anonymously on the streets. Since moral rights are not harmonised at the EU level, the paper will now turn to different member states and other jurisdictions to see how paternity right is regulated.

According to Article L.113-6 of the French IPC, authors of pseudonyms and anonymous works should benefit from copyright protection.¹¹⁵ This provision further stipulates that such authors must be represented by their editor or publisher concerning the exercise of their rights so that their identity is not revealed.¹¹⁶

¹⁰⁷ *Supra* note 14, 901.

¹⁰⁸ *Supra* note 10, art. 6bis.

¹⁰⁹ *Ibid.*

¹¹⁰ Joseph Zuber, *Do Artists Have Moral Rights*, 21 *Journal of Arts Management and Law* 284, 284 (1992).

¹¹¹ Susan P. Liemer, *Understanding Artists' Moral Rights: Primer*, 7 *Boston University Public Interest Law Journal* 41, 50 (1998).

¹¹² Zuber, *supra* note 110, 290.

¹¹³ *Supra* note 29, 15.

¹¹⁴ *Supra* note 1, 149.

¹¹⁵ *Supra* note 40, art. L 113-6.

¹¹⁶ *Ibid.*

It is also allowed for artists to remain anonymous and enjoy the full scope of copyright protection under German law.¹¹⁷ The German Federal Court of Justice (hereinafter GFCJ) in *the Pictures on the Berlin Wall* decision has held that the street artist who drew the mural over the premises of the UN city could still rely on his moral rights even if he did not sign his work as it would usually be required.¹¹⁸

In the Netherlands, Article 25 (1) (a) and (b) of the Dutch Copyright Act gives authors the power to stay anonymous and disclose their works to the public with a name other than their own.¹¹⁹ Thus, artists are not required to be identifiable to get paternity right. Under the Dutch law for artists: “using their real name, a pseudonym or initials, or creating artworks anonymously, does not raise issues: the paternity right is always available”.¹²⁰

Additionally, under the UK’s Copyright, Designs, and Patents Act,¹²¹ if it is impossible to identify an author’s identity, the unknown authorship will be considered. Section 12 clearly states that such unknown work will still be protected under copyright.¹²² This approach of the UK law is beneficial for artists who can choose to present themselves afterwards.

Henceforth, not using their names does not constitute a hindrance to getting paternity rights for artists. They can even choose to remain anonymous to avoid being prosecuted. Nevertheless, those risks will no longer exist after the expiration of the statute of limitation¹²³ (duration may differ from country to country).

To wrap up the discussions related to right to attribution, the artists are likely to be recognised as the authors of their works, even in the cases if they decide to stay anonymous. If this discussion is extended to the “personal touch” element of *Painer* case (as it is discussed in the first part of this paper), a pseudonym or initials can potentially help street artists to fulfill this requirement as they are likely to be able to leave their personal marks by using these means.

2. Street artists’ right to integrity versus property owners’ rights to property, balancing conflicting interests

As mentioned, the right to integrity will allow artists to oppose any derogatory treatment against their works. This treatment can include

¹¹⁷ *Supra* note 4, 199.

¹¹⁸ *Ibid.*

¹¹⁹ *Supra* note 47, art. 25 (1) (a) and (b).

¹²⁰ *Supra* note 4, 231.

¹²¹ Copyright, Designs and Patents Act, art. 9 (4) and 9 (5) (1988).

¹²² *Id.*, section 12.

¹²³ A statute of limitation is a law that sets the maximum amount of time that parties involved in a dispute have to initiate legal proceedings from the date of an alleged offense, whether civil or criminal.

completely erasing murals (whitewashing),¹²⁴ and removing or selling¹²⁵ the wall over which street art is created. In the case of unsolicited graffiti, the interests of property owners who did not want to have those drawings on their walls in the first place and artists will collide, and there is going to be a need to balance those interests. This collision will involve the provisions of the laws governing the protection of private property and the moral rights of authors.¹²⁶

In the doctrine, street art is referred to as site-specific works.¹²⁷ This derives from the fact that street artists choose specific locations to exhibit their works for the reasons of publicity and visibility. Therefore, some authors by referring to this nature of street art state that “any removal of the work from its site would significantly dilute the artistic meaning and importance of the work”.¹²⁸ The other one considers that the place specifically chosen by artists turns out to be a part of the artistic concept and representation, “therefore, removing these works from their natural environment and bringing them into galleries or other closed venues would often be, as also stressed by Banksy, akin to locking wild animals in zoos”.¹²⁹

However, the right to integrity itself is not enough for artists to oppose the removal of their works from the surfaces on which they are painted due to the illicit nature of their works and the property law provisions. Since the right to integrity is not harmonised at the EU level, different jurisdictions will now be examined to see how this right is regulated and find possible remedies for balancing conflicting interests.

When the paper scrutinised civil law jurisdictions (for example, France and Germany), it was observed that they were more likely to grant protection for illegal graffiti. The presumption would be that these jurisdictions would ensure regimes with stronger protection for the moral rights of copyright owners. However, the approach of balancing conflicting interests is applied to the disputes between property owners and authors in those jurisdictions. Interestingly, this kind of balancing does not seem to favour moral rights against the private property rules.

To illustrate this in a better way, in the *Space Invader* case (mentioned in the first part), the court said that “the work in question could be detached from the wall without causing its destruction”.¹³⁰ This illustrates that the balancing view has a limited application to illegal street art.

¹²⁴ Mary Daniel, *Not a VARA Big Deal: How Moral Rights, Property Rights, and Street Art Can Coexist*, 94 Southern California Law Review 927, 942 (2021).

¹²⁵ *Supra* note 14, 917.

¹²⁶ Tatiana Flessas & Linda Mulcahy, *Limiting Law: Art in the Street and Street in the Art*, 14 Law, Culture & Humanities 219, 222 (2018).

¹²⁷ *Supra* note 29, 16.

¹²⁸ Griffin M. Barnett, *Recognized Stature: Protecting Street Art as Cultural Property*, 12 The Chicago-Kent Journal of Intellectual Property 204, 213 (2013).

¹²⁹ *Supra* note 29, 16-17.

¹³⁰ *Supra* note 4, 62.

Moreover, paragraph 946 of the German Civil Code provides that “when a movable good is combined with a plot of land in such a way that it becomes an essential part of this plot of land, then the ownership of the plot of land extends to the movable good”.¹³¹ This abstract provision means that when it is impossible to remove moveable goods (in our case that would be a mural on it) from the building, the property owner has a right to destroy that work since his property rights extend over the painting. This is exactly what the court ruled in the *Pictures on the Berlin Wall* case: “self-evident that the owner of the property must also remain free to destroy a work of art that is thrust upon him against his will”.¹³²

According to the CDPA, the right to integrity is not able to prevent artwork (no matter if it is legally or illegally created) from being destroyed in the UK.¹³³ This is also held in *the Hyde Park Residence Ltd v. Yelland* that the right to integrity “should not be interpreted to interfere with a private property right without compensation”.¹³⁴

Protection from any derogatory treatment for graffiti seems likely to be ensured under the Visual Artists Rights Act (hereinafter VARA) of the USA. Paragraph 106 (A) 3 of VARA provides that the moral rights of authors of visual works allow them to prevent any intentional distortion, mutilation, or other modification of their works.¹³⁵ It is also enshrined in paragraph 113 (d) (2) that “the real property owner is required to show a good faith effort to notify of his intent to destroy the work; if the artist does not do the removal or pay for the removal within 90 days, the property owner may proceed for destroying the work”. By referring to this some might argue that the protection of VARA from destruction can be extended to illegal graffiti to solve conflicts with the property owner. However, this view is not supported by the case law, because the illegality element allows the courts to reject applying these VARA provisions in favour of the moral rights of artists. In the case of *English v. BFC*,¹³⁶ it was held that measuring moral rights against the property owners in the case of illegal graffiti can potentially defy rationality and it is not what is intended by Congress in passing VARA.¹³⁷ Therefore, those provisions of VARA protecting the works from derogatory treatment could not be applied to illegally placed graffiti.¹³⁸ The same is held in *Pollara v. Seymour* that the property owner has a right to remove or destroy the unsolicited work “incorporated in or made a part of a building in such a way that removing the work from the building will cause the destruction,

¹³¹ *Id.*, 195.

¹³² *Supra* note 4, 62.

¹³³ *Supra* note 29, 22.

¹³⁴ *Hyde Park Residence Ltd v. Yelland*, Ch. 143, 3 WLR 215 (2001).

¹³⁵ The Visual Artists Rights Act, 17, U.S.C. § 106A (a)(3)(A) (1990).

¹³⁶ *English v. BFC & R East 11th Street LLC*, WL 746444 (1997).

¹³⁷ *Id.*, 2.

¹³⁸ *Id.*, 4.

distortion, mutilation, or other modification of the work".¹³⁹ To this extent, one can bring about the Brooklyn Supreme Court's recent ruling in favour of artists in the whitewashing of their works in the *5Pointz* case.¹⁴⁰ However, it was not against the property owner, it was against the company which destroyed the work.¹⁴¹

Now the paper continues with the discussions on how to balance the conflicting interests of artists and property owners.

As can be seen, the illegality element constitutes a significant hindrance to the right to the integrity of artists when it is weighted against the property right of owners. There are also some arguments in favour of property owners allowing them to exercise their rights on the property by removing unsolicited works.

"First sale" doctrine is also able to limit integrity rights. This doctrine entails that the rightful owner of a particular physical copy of a work may lawfully sell or otherwise transfer that copy.¹⁴² Therefore, commentators agree that the artist retains the copyrights to the work. However, "if a piece is painted onto a building owned by another, the building owner is the rightful holder of that particular "copy" of the work".¹⁴³

It should also be considered what the point of having all those laws for protecting private property is. Those are the basic rights of property owners to exclude any other parties from the use and possession of their property, including but not limited to reaping any potential benefits steaming from it. This is an obvious reason why vandalism and trespassing are criminalised under domestic laws. Therefore, it is not difficult to comprehend why some scholars consider "rights that may be associated with art affixed to the private property of another without the property owner's consent are secondary to the rights of the property owner to control the use of the property".¹⁴⁴

Having fairness-related arguments mentioned in mind, this time it would not be fair to heavily measure integrity right against property rights. However, artists should still be able to prevent any other third parties from committing derogatory acts against their works. Moreover, available remedies should be applied while balancing conflicting interests. Artists, at least, should be given a chance to remove their works if possible in any given case. Alternatively, as others also propose,¹⁴⁵ if the owner wants to sell the property itself, artists can also be offered to purchase it, earlier than anyone. Last but not least, artists should also be given a chance to document their

¹³⁹ Brittany M. Elias and Bobby Ghajar, *Street Art: The Everlasting Divide between Graffiti Art and Intellectual Property Protection*, 7 *Landslide* 48, 50 (2015).

¹⁴⁰ See *Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020).

¹⁴¹ *Supra* note 124.

¹⁴² Barnett, *supra* note 128, 207.

¹⁴³ *Ibid.*

¹⁴⁴ *Supra* note 128, 208.

¹⁴⁵ Marta Madero, *Tabula Picta: Painting and Writing in Medieval Law*, 6 (2010).

works (through picturing)¹⁴⁶ before the possible whitewashing or destruction. In the worst-case scenario, where applying the other remedies is not possible, it is fair to grant artists a chance at least to document their works.

It is eventually logical to conclude that street artists' right to integrity will not be enough to oppose the derogatory treatment by the property owners. Case law and the legislation in the jurisdictions that were analysed, fairness point of view, the first sale doctrine, the basic logic and purpose of property law, and most importantly the illegality element in the placement of the street art are the grounds to conclude in this way. However, street artists' integrity right will still possibly protect their work from the derogatory treatment of other third parties.

Conclusion

To conclude, if street art can comply with the requirements and the existing legal tests (which is highly likely), it can easily get copyright protection. Assessing the originality will however be dependent on the factual background with regard to each specific street art (meaning that case-by-case approach). Interestingly, it would be impossible to say that no street art could meet the requirement of originality since there are a lot of examples of street art exhibited in galleries and museums. It is also discussed that street art is highly likely to fulfill fixation requirements as it is at least fixed in a tangible medium. Therefore, this paper did not see any hindrances for legally placed artworks failing to get copyright protection.

Turning to illegally placed street art, as it is heavily supported in the doctrine, the reference to the mere fact of being placed as unsolicited would hinder the street art from getting copyright protection. This view is also adopted in the examined civil law jurisdictions and there is still no final judgement in common law jurisdictions where the "unclean hands" doctrine hinders copyright protection for illegally placed street art at the time of writing. Copyright protection for illegally placed street art and graffiti is also supported by human rights and fairness-based arguments.

When it comes to economic rights-related issues, the paper went on to strongly oppose unauthorised commercial use of street and graffiti works by economically strong third parties, whose excuse is an illegality element of those works. Therefore, it is concluded that commercial exploitations cannot be done without quotations. It is considered that any commercial use should satisfy the "fair use" test meaning that the material interests of artists should be fulfilled. Concluding in this way also serves to achieve a balance between street artists and commercial stakeholders and support the arguments related to granting copyright protection for unsolicited street art since remuneration

¹⁴⁶ *Supra* note 14, 928.

will potentially ensure fairness, career path for street artists and their participation in cultural life.

Shedding light on potential moral rights that street artists can have, they are likely to be recognised as authors of their artistic creativity even when they decide not to reveal their identity. Staying anonymous did not seem as a ground to reject copyright protection as it is depicted in this paper. Thus, street artists are likely to be attributed as authors of their works even when they decide to hide their identity, and the use of pseudonyms or initials can better serve to get the right to paternity. However, their right to integrity would not be enough to oppose derogatory treatment regarding their works by the property owner. To this end, the paper tried to identify beneficial remedies for authors with the help of the balancing interest approach. Speaking of balancing the conflicting interests of artists and property owners, the paper further stated that available remedies should be applied even though the intervention by the property owners cannot be abolished. Artists should first be given a chance to remove their works if it is possible in the first place. When this is impossible, maybe applying other remedies mentioned can strike a balance, for example, documenting the work or priority in the property's purchase.

As the last remarks before the dead stop, this paper tried to discuss issues related to the copyrightability of street art from scratch. It tried to spill ink on the matters from copyrightability of legally placed street art to illegally placed ones together with possible economic and moral rights that artists can get. Nonetheless, whatever is being done here is more of a coin flipping even though presented arguments and other means support all findings. Because it will be up to the courts in relevant jurisdictions to do all those assessments and apply legal tests, most importantly weighing the "unclean hands" doctrine against the copyrightability of illegally placed street art. However, it will not be in line with the context of this paper to conclude it in a pessimistic way. On the contrary, the uprising role of street art within today's societies will hopefully support the growth of jurisprudence encouraging copyright protection for street art, maybe even illegally placed ones.