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An Examination of Graffiti Protection and the Social Obligation Theory of Property

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AN EXAMINATION OF GRAFFITI PROTECTION AND THE SOCIAL OBLIGATION THEORY OF PROPERTY

ABSTRACT

With graffiti art booming, artists all around the world want their creations protected. Current copyright laws in the United States as well as Europe are incentive-based; however, this is an inadequate justification for protection when many artists are motivated by social contribution to the community. This Comment discusses graffiti protections under intellectual property law from an international standpoint—comparing the United Kingdom, France, Greece, and Germany—then analyzes graffiti protections under a progressive property theoretical framework. This Comment argues that the progressive property approach would support the need to better protect graffiti art under copyright law and to contemplate the interests of both artists and the property owner. It also argues that Germany could be a global leader in setting norms surrounding graffiti protection. A combination of U.S. case law on graffiti art and Germany’s inclusion of social obligation in its property laws could pave the way for more protective street art protections internationally.
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INTRODUCTION

To the extent that graffiti enjoys some degree of legal coverage under copyright law, this Comment argues that a social obligation theory of property explains and justifies any protection provided, and recourse granted, to artists. According to Merriam-Webster’s Dictionary, the definition of graffiti is “usually unauthorized writing or drawing on a public surface[.]”1 The term

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“graffiti” refers to “the technique of painting stylishly names and letters on various urban surfaces, such as . . . railway trains as well as walls.” The art of graffiti involves varying “subsets and styles[,]” and graffiti artists fall under the category of writers in the subculture. The term “street art” encompasses more elaborate forms of art, like murals. In some cases, “street art” describes legal works that are commissioned, and “graffiti art” describes illegal and unsanctioned artwork. However, the difference between these two terms is becoming more inconsequential as this subculture is gradually becoming more popularized and accepted. This Comment will use the terms “graffiti” and “street art” interchangeably and clarify when discussing illegal and unsanctioned artwork.

When it comes to illegal and unsanctioned graffiti art, protections under intellectual property (IP) law are questionable and not clearly defined. However, internationally, artists may receive protection for their artwork in IP’s “negative space[.]” This “negative space” refers to “industries involving substantial creativity that are unregulated or only partially regulated by de jure IP law.” The problem is that IP law can technically regulate works that fall within this category, but it does not. Thus, a number of graffiti artists face minimal protection for their unsanctioned art.

There have also been justifications for graffiti protection under copyright law; however, this Comment suggests a different framework. This Comment considers whether graffiti protection should be justified by a non-incentive-based theory of property rights. While the existing incentive-based theory...

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4 Bonadio, supra note 2, at 9.
5 Id.; see Halberstadter, supra note 2.
6 Id., supra note 2, at 9.
7 Bonadio, supra note 2, at 9.
9 Id. at 2.
11 Id.
12 Id. (“Banksy is one street artist who without question has witnessed the minimal protection granted to unsanctioned street art in what Professors Kal Raustiala and Christopher Sprigman consider IP’s ‘negative space’ . . . .”).
justifies graffiti protection by arguing for “an incentive for authors to create and disseminate works of social value[,]” a non-incentive-based perspective, such as progressive property theory, would ground protection in social obligation and allow graffiti artists to utilize property more often to enhance human flourishing. For example, in the United Kingdom, artists are “entitled to the full scope of copyright entitlements, irrespective of the illegality of their work[,]” unlike artists in the United States. The United Kingdom finds a balance: artists can prevent copying and reproduction of their works, and the property owners retain the right to display and sell those works.

First, this Comment will discuss graffiti and its protections under IP law, starting from an international standpoint. Then it will examine the rules in specific countries—the United Kingdom, France, Greece, and Germany. Second, this Comment will discuss prevailing theoretical justifications for copyright protections, mainly critiquing the incentive-based theory. Third, this Comment will argue that a progressive property theoretical framework better justifies legal protections for graffiti. The progressive property approach would contemplate the interests of both graffiti artists and the owner of the underlying medium on which the art appears—specifically, it would contemplate the contributions of each to the well-being of the community when determining legal protections. A combination of U.S. case law on graffiti art and Germany’s inclusion of social obligation in its property laws could pave the way for more street art protections internationally. Progressive property theory forces us to rethink copyright law and possibly widen its protective measures. Finally, this Comment will attempt to illustrate how protection based on progressive property theory would work in practice.

This Comment will discuss both legal and illegal graffiti, and will address who has the right to do what with it between the property owner and the artist. However, this Comment will not discuss or make statements about any clear rules relating to illegal graffiti. Instead of presuming the owner can destroy the work, it should be determined whether there is any kind of dialogue or consideration given to the artist.

13 Cloon, supra note 3, at 65 (citing Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 Mich. L. Rev. 1197, 1197 (1996)); see U.S. Const. art. I, § 8, cl. 8 (stating that Congress shall “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[,]”).
15 Elias & Ghajar, supra note 8, at 7.
16 *Id.*
I. BACKGROUND

A. Current Legal Status of Graffiti

In a matter of first impression, the U.S. District Court for the Eastern District of New York was tasked with “determin[ing] whether the work of an exterior aerosol artist—given its general ephemeral nature—[was] worthy of any protection under the law.”17 5Pointz, located in Queens, New York City, was the “repository of the largest collection of exterior aerosol art . . . in the United States, and had consequently become a significant tourist attraction[.]”18 On November 20, 2013, the owner of the warehouse buildings, Gerald Wolkoff, destroyed nearly all of the works by the plaintiffs (for future high-rise luxury condos to be built) before the district court’s opinion was issued in the initial case, Cohen v. G&M Realty L.P. (Cohen I).19 Wolkoff’s destruction resulted in the court’s assessment for damages.20 In February 2020, the U.S. Court of Appeals for the Second Circuit affirmed the district court’s judgment in awarding the maximum statutory damages under the Visual Artists Rights Act of 1990 (VARA): a total of $6,750,000 for all forty-five works of art to plaintiffs-appellees—twenty-one 5Pointz artists.21 The court determined that the works of art, although temporary, achieved recognized stature to be protected under VARA, and the defendants’ destruction was a willful violation of VARA.22 5Pointz had approximately 10,650 works of art, and forty-five of those works had achieved recognized stature.23 Damages for violations of VARA are usually governed by general copyright law, providing actual and statutory damages.24 However, if a court finds a willful intent to violate VARA, it “may increase the award of statutory damages to a sum of not more than $150,000 per work[,]”25 which was the case here. Under VARA, the artists were entitled to a ninety-day notice and opportunity to remove their works, but Wolkoff had hired

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18 Id.
20 See id. at 447. If it were not for Wolkoff’s premature destruction of the warehouse, the court would have most likely applied a more modest amount of statutory damages. See Cohen I, 988 F. Supp. 212 for the initial ruling.
22 Castillo, 950 F.3d at 166-63.
23 Id. at 162-63.
24 Id. For more information on damages, see 17 U.S.C. § 504(c)(1).
25 Castillo, 950 F.3d at 164 (alteration in original). The artist has the burden of proof for the willful intent. See id. at 166. For more information on damages for willful intent, see 17 U.S.C. § 504(c)(2).
help to destroy the works instead.\textsuperscript{26} In deciding for the plaintiffs, \textit{Cohen I} was a landmark decision for all artists; it was the highest amount of statutory damages awarded under VARA.\textsuperscript{27} The holding acknowledges artists’ rights under VARA and has the capacity to ensure future protections for artists.

Graffiti’s legal status is not only debated in the United States, but it is also a hot topic internationally. With graffiti art booming and receiving widespread attention, artists all around the world want their creations protected.\textsuperscript{28} More artists are fighting to assert their rights under copyright law.\textsuperscript{29} In general, copyright law protects the intangible aspects of graffiti.\textsuperscript{30} In the United States, a work receives copyright protection the moment it qualifies as an “original work of authorship fixed in any tangible medium of expression.”\textsuperscript{31} The artist also has exclusive rights to reproduction, derivative works, distribution of copies, and public display of the work.\textsuperscript{32} On the other hand, copyright law does not provide protection to graffiti that only consists of “titles, names . . . mottos, short phrases or slogans, familiar symbols or designs, or mere variations of typographic ornamentation, fonts, lettering, or coloring[]”—even if legally created.\textsuperscript{33} Artists may assert their rights under trademark law for these kinds of works.\textsuperscript{34} Currently, to the extent there are protections, they are on shaky theoretical ground where the artist does not retain all their essential rights.\textsuperscript{35} First of all, when it comes to graffiti art, both legal and illegal, the rights are split between the property owners and the artist:

The artist retains the right to reproduce the work and prepare derivatives, whereas the property owner retains the right to display the work and sell the original piece. Thus, there is an inherent conflict between property law and copyright law, giving the property owner essential rights that would otherwise belong exclusively to the artist.\textsuperscript{36}

\textsuperscript{26} Castillo, 950 F.3d at 171.
\textsuperscript{27} Bonadio, supra note 21, at 18.
\textsuperscript{28} \textit{Id.} at 17. Some famous artists are Bansky, Cornbread (Darryl McCray), Roa, DAZE, Gaia (Andrew Pisacane), DONDI (Donald Joseph White), Vhils (Alexandre Manuel Dias Farto), and INTI. JD, \textit{The Most Famous Street Artists of All Time}, LET’S ROAM (May 2021), https://www.letsroam.com/explorer/famous-street-artists.
\textsuperscript{29} See Halberstadter, supra note 2.
\textsuperscript{30} Cloon, supra note 3, at 54.
\textsuperscript{31} Elias & Ghajar, supra note 8, at 3 (quoting 17 U.S.C. § 102(a)).
\textsuperscript{32} Cloon, supra note 3, at 58; see 17 U.S.C. §§ 102, 106, 302(a).
\textsuperscript{33} Halberstadter, supra note 2.
\textsuperscript{34} \textit{See id.}
\textsuperscript{35} \textit{See Elias & Ghajar, supra note 8, at 5.}
\textsuperscript{36} \textit{Id.}
Despite this split between the protections available for legal and illegal works, U.S. IP may hold the key. Scholars have debated whether unsanctioned graffiti is protected. However, the court in the 5Pointz case was able to rule in the artists’ favor without factoring in the legality of the works.

Although there are various international treaties, like the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), that speak to artistic works under copyright law, an international norm concerning graffiti protection has not been substantially developed. Currently, most countries have moral rights—some having been incorporated in their constitutions and some having been specifically implemented within their copyright law—and the Berne Convention protects moral rights at the international level. However, by examining graffiti protections offered by various countries, this Comment will attempt to provide a stronger justification for an existing international norm that may provide better protections for artists around the world.

B. What Is Graffiti? Evolutions and Transitions

The term “graffiti” may bring images of spray paint on city walls, but this art goes back thousands of years. The French Lascaux Caves have paintings dating to 18,000 BC, and Pompeii’s inhabitants created murals on their city walls dating back 2000 years. In the 1960s, contemporary graffiti was born in New York City, although some sources say the movement was born in Philadelphia. Graffiti has been associated with “rock and roll and later . . . [with] the antiestablishment punk rock movement[.]” More recently, in the 1970s, graffiti gained popularity through hip-hop culture. During this decade, graffiti mainly consisted of “‘tagging’ or signing one’s name in a particular style in order to mark territory or as a form of rebellion[,]” otherwise known as
“bombing[.]”48 In New York, artists used the subway system as their canvas.49 Since the subway system is a central transportation method there, it was a fast and efficient way to gain recognition.50

Throughout this period, graffiti was equated to vandalism in the public eye.51 Beginning in the 1980s, graffiti acceptance began to grow more, moving from “vandalism to an artistic form of expression.”52 As competition between artists rose, graffiti shifted from “bombing” to more calligraphic styles, which then shifted to more artistic pieces and murals.53 Also, in the 1980s, graffiti gained “domestic and international fame with the release of books such as Henry Chalfant and Martha Cooper’s Subway Art, magazines like International Graffiti Times, and films such as Style Wars.”54 At present, graffiti is not only found on streets,55 but also in art galleries, exhibitions, and museums, as mentioned earlier in this Comment.56 Well-known companies such as Sony and Coca-Cola have also used graffiti art as a marketing tool for advertisements.57 The Internet and social media have also helped greatly in increasing graffiti fame.58

As in the United States, the graffiti scene in the United Kingdom is large and vibrant.59 The anonymous, world-famous Banksy has numerous works throughout the United Kingdom’s streets.60 Graffiti first emerged in the cities of London and Bristol in the 1980s, and quickly became popular throughout the 1990s.61 With its increasing popularity, local councils in Britain have made public spaces available for the public to create art, and “[p]rivate property owners and businesses” are giving more artists public locations to create their

48 See Crinnion, supra note 43.
49 Id. at 262.
50 Id.
51 Id. at 261.
52 Id. at 263.
53 Crinnion, supra note 43, at 262.
54 Id. at 263.
55 See Bonadio, supra note 2, at 1. Some graffiti-friendly areas include “Stoke Croft in Bristol, Kreuzberg in Berlin, Williamsburg and Bushwick in Brooklyn (New York), Hosier Lane and Fitzroy in Melbourne, Florentin and Nachalat Binyamin in Tel Aviv, La Candelaria and Puente Aranda in Bogotá[.]” Id.
56 See also Roundtree, supra note 46, at 965.
57 Rychlicki, supra note 43, at 393.
58 Id.
59 Enrico Bonadio, Street Art, Graffiti and Copyright: A UK Perspective, in CAMBRIDGE HANDBOOK, supra note 2, at 159.
60 Id.
61 Id. “Writers such as Robbo, Eine, Drax, Elk and Oker in London and 3D . . . and several others have contributed to the story of the graffiti movement in England.” Id.
works. However, as in the United States, conflict still exists between property owners and artists.

France’s graffiti scene developed earlier than that of the United States. In the 1970s, graffiti in Paris already had a “distinct street art direction,” unlike tagging in the United States. French street art grew “on the country’s artistic heritage,” and included poster wheat pasting and stenciling. Similar to the public in the United States and the rest of the world, the French public has conflicting opinions towards graffiti—some view it more as vandalism and less as a work requiring creative input. Yet, legal graffiti continues to be displayed in more than sixty galleries in Paris, constituting ten percent of galleries in the city.

In Greece, graffiti is nearly as old as the city of Athens—“more than 800 examples of graffiti from ancient times, dating from the eighth century BC to the late sixth century AD” were discovered. More currently, Athens was filled with street art on “political insights” and offers of hope when the city was going through many hardships during the Greek economic crisis.

Similar to graffiti in the countries mentioned, including the United States, the beginning of graffiti in Germany can be dated back to the late 1970s and early 1980s, when hip-hop culture was on the rise. Munich, Frankfurt, Cologne, Stuttgart, and Leipzig are only some of the cities that have been home to street art. The most well known and most frequently mentioned work of graffiti in Germany is the Berlin Wall. Due to the symbolic meaning of the wall, artists have come together from all around the world in unification. The Berlin Wall illustrates the growing social acceptance of graffiti art: Berlin is home to a street art museum called Urban Nation, which is similar to many of the museums

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62 Id. at 160.
63 Shane Burke, *Graffiti, Street Art and Copyright in France*, in *CAMBRIDGE HANDBOOK*, supra note 2, at 175.
64 Id.
66 Burke, *supra* note 63, at 176.
67 Id.
68 Id. at 177.
70 Id. at 239.
71 Marc Mimler, *Street Art, Graffiti and Copyright: A German Perspective*, in *CAMBRIDGE HANDBOOK*, supra note 2, at 188.
72 Id.
in the United States, and the 1.3 kilometer-long East Side Gallery, where Berlin’s government “commissioned famous murals, such as the ‘Fraternal Kiss’ by Dmitri Vrubel.”73

This expansion of graffiti illustrates “the growing [social] acceptance and popularity of what was once seen as mere defacement of property with a spray can.”74 As graffiti and its artists gain popularity, legal protection is necessary to prevent the public from “appropriating these artists’ work without permission, and artists in turn are bringing more lawsuits in an attempt to assert a copyright to protect their art.”75

C. Graffiti in Society

In the past, graffiti was viewed more as a nuisance than a form of art.76 In recent times, graffiti’s place in the world has shifted.77 It is a “respectable form of art” and a “hot commodity among art collectors and connoisseurs.”78 It is viewed more as a means of artistic expression and social conscience—a form of “cultural capital.”79 Indeed, graffiti is now shown in museums. In the United States, the City of Miami has an entire museum dedicated to graffiti in the Wynwood Arts District,80 which also boasts the largest open-air gallery in the world.81 In New York City, the Guggenheim exhibited Jean-Michel Basquiat’s painting *The Death of Michael Stewart*.82 The Museum of Contemporary Art in Los Angeles, California, and the Corcoran Gallery of Art in Washington, D.C. are other places where graffiti artists have been able to showcase their works.83 Street artists have exhibited at the Bristol Museum and Art Gallery in England, and at the Palazzo Cipolla in Italy.84 England-based artist Banksy is famous for

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73 Id. at 189.
74 Cloon, supra note 3, at 55.
75 Id. at 54.
76 Elias & Ghajar, supra note 8, at 1.
77 See id.
78 Id.
79 Id. at 2.
80 MUSEUM OF GRAFFITI, https://museumofgraffiti.com (last visited Sept. 18, 2020); see also Elias & Ghajar, supra note 8, at 4 (noting that Miami artist AholSniffsGlue’s famous droopy eyeball graffiti has been featured in the Wynwood Arts District).
83 Halberstadter, supra note 2.
84 Id.
his work, which has been valued at “hundreds of thousands of dollars.”85 “Two Banksy’s have already been sold for $1 million plus at auction . . . .”86 Banksy’s work, Slave Labour, was somehow removed from its wall in North London and sold at an auction for $1.1 million—none of the proceeds were given to Banksy.87 Graffiti’s presence in museums and galleries illustrates “the growing [social] acceptance and popularity of what was once seen as mere defacement of property with a spray can.”88

Some local governments even provide places for artists to place their work.89 Sometimes, these walls are “unofficial spaces where the city does not enforce vandalism laws[.].”90 For instance, Buenos Aires has a zona de graffiti.91 Communities around the world are embracing the value of graffiti in their streets.92 In London, many neighborhoods celebrate this movement.93 Brick Lane, Red Church Street, and Hackney Wick are some of the neighborhoods filled with “free-hand graffiti pieces[.]”94 Another neighborhood in London called Shoreditch offers tours of its street art in its community.95 Other cities around the world, including Bristol, England; Bethlehem, Palestine; and Taichung, Taiwan, all offer guided street art tours.96 Furthermore, graffiti is legal in Melbourne, Australia; Warsaw, Poland; Prague, Czech Republic; and Paris, France.97 Some property owners protect these works of art with Plexiglas acrylic or bring them indoors; this brings forth questions on whether artists possess rights to prevent removal and destruction.98 Given how graffiti seems to provide significant social contribution to the community, and growing in acceptance and importance, its protections and ways of conservation should also be expanded.

87 Elias & Ghajar, supra note 8, at 2.
88 Cloon, supra note 3, at 55; see also Roundtree, supra note 46, at 965.
89 Cloon, supra note 3, at 56.
90 Id. at 57.
91 Id.
92 Elias & Ghajar, supra note 8, at 1.
93 See Bonadio, supra note 2, at 1.
94 Id.
95 Cloon, supra note 3, at 58 n.33; see Bonadio, supra note 2, at 1.
96 Elias & Ghajar, supra note 8, at 2.
97 Cloon, supra note 3, at 56, see Elias & Ghajar, supra note 8, at 7.
98 Enrico Bonadio, Conservation of Street Art, Moral Right of Integrity and a Maze of Conflicting Interests, in CAMBRIDGE HANDBOOK, supra note 2, at 71.
D. What Motivates Graffiti Artists?

Graffiti is often a voice of the artist, and property owners may have a social obligation to allow artists reasonable means of access since many artists’ motivations are not related to economic gain. The words “private property” are usually associated with “individual rights, not social obligations.” However, Gregory S. Alexander, a renowned professor of property law, states that the purpose of property is to allow human flourishing, “a matter of what a person is able to do rather than what he has.”

First and foremost, perhaps the most significant source of motivation for graffiti artists is the love of painting and the related desire to earn respect in their subculture. When graffiti first gained popularity, people were using it as “an outlet to express themselves and be heard.” This is why most, if not all, graffiti works in the 1960s were tags—what better way to express themselves than writing their own names. Graffiti artists are not generally focused on exclusivity or financial rewards; instead, they want to “beautify” their neighborhoods and “leave a mark in the city.”

Second, graffiti art and street art are commonly known as antieestablishment. Besides expressing themselves, sending the public or community at large a message is also a motive. This view, which in some ways can be seen as a social contribution, is often reflected in the artwork. The message is usually a “commentary on, or criticism or satire of current social,
cultural, political, or economic events.” Some themes may be war opposition, criticism of consumerism, and critiques of modern media’s function. Some artists draw on the public walls of cities to relay the message that galleries and museums are profit-making businesses, and that everyone should enjoy art, not just the “rich and educated.” Similarly, there are artists who create graffiti to “be part of a community.” By creating works of art, the artists are uniting as a community to go against establishment. Overall, the artists’ “self-expression, peer recognition, and a desire to strike back at society” are critical.

It is also feasible that some graffiti artists break property laws because they want to change property laws. In the alternative, some artists break property laws because this is their way of making a statement about larger social issues. Lawbreaking and illegality are often important elements of graffiti and a big motivator for graffiti artists. Because “[a]n integral aspect of the art is to mark highly visible public spaces with the artist’s imagery[,]” danger, illegality, and anonymity are “integral components” of graffiti. There is an argument among scholars objecting to copyright protections for graffiti artists because such protections could potentially “corrupt and negatively change the very anti-establishment nature of these subcultures.”

E. Problem: Do Graffiti Artists Need Stronger Legal Protection for Their Work?

As graffiti grows in acceptance and popularity, “conflicts . . . with respect to graffiti artists and their rights[]” are also growing in numbers. Recently, there has been a rise in cases “where corporations from as diverse sectors as fashion, food, entertainment, cars and real estate, have been sued by street and graffiti artists” for exploiting the artists’ graffiti without permission. “Street art is

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111 Id.
112 Id.
113 Smith, supra note 99, at 287.
114 Id.
115 Id.
117 Id.
118 See Bonadio, supra note 21.
119 Elias & Ghajar, supra note 8, at 3.
120 Id.
121 Id.
122 Bonadio, supra note 2, at 3 (alteration in original).
123 Elias & Ghajar, supra note 8, at 2.
124 Bonadio, supra note 2, at 1.
consistently copied and reprinted on clothing, posters, and merchandise. It is
used in other artistic works such as television, film, books, and music videos and
is even excavated from its surface for exhibition and sale in auction houses and
galleries.”125 Also, in an internet world, social media influencers are constantly
posting pictures of themselves in front of the artists’ works, which end up on all
kinds of social media platforms—often without the consent of the artists and
also without recognizing the artists.126 As interest in graffiti increases, artists
need “legal tools” to protect their work.127 In the graffiti subculture, certain
social norms exist to protect artists’ creativity.128 For instance, the “don’t go
over” rule exists to prevent an artist from covering another’s work.129 However,
increasingly more artists are looking beyond social norms to protect their
works.130 Additionally, the desire for protection is greater when artists create
large works requiring weeks of effort and skill.131 Thus, graffiti’s increasing
value in today’s world brings along questions about the kinds of IP protections
available to artists.132

Current copyright laws in the United States and Europe are incentive-based.
The existing incentive-based theory suggests that graffiti artists need IP
protections because these protections incentivize them to produce more art, and
thus governments grant artists monopolies for a limited time.133 According to
this theory, if appropriating another’s work was allowed, then artists would not
create, and thereby would not contribute to societal progress.134 However,
around the world, graffiti is gaining more popularity and flourishing in places
despite a lack of updates to IP protections.135 This shows that economic
incentives are not a necessary component to creating street art.136

125 Elias & Ghajar, supra note 8, at 2.
126 Halberstadter, supra note 2.
127 Bonadio, supra note 21, at 18.
128 Id.
129 Id. The “don’t go over” rule says that an artist should “respect writers who display superior skills” or
who have been around for a long time, and only go over another’s work if theirs is better or if other exceptions
apply. MARTA ILJADICA, COPYRIGHT BEYOND LAW: REGULATING CREATIVITY IN THE GRAFFITI SUBCULTURE
235 (2016).
130 Id.
131 Id.
132 Elias & Ghajar, supra note 8, at 2.
133 See Bollea v. Gawker Media, LLC, 913 F. Supp. 2d 1325, 1329–30 (M.D. Fla. 2012); Crippin, supra
note 43, at 273 n.112.
134 Cloon, supra note 3, at 65.
135 Smith, supra note 99, at 293; Elias & Ghajar, supra note 8, at 7.
136 Smith, supra note 99, at 293.
Even if these artists are not motivated by economic incentives, perhaps the incentive-based theory is an inadequate justification for protection. The incentive-based theory is still a useful way for graffiti artists to protect their artwork—especially in American courts, where it is most commonly used.\textsuperscript{137} However, when issues like destruction arise between property owners and artists, a different theory could prove useful—one that focuses more on the artist and the community. Therefore, a more robust theory for graffiti protection is necessary, especially as society grows “more complex” and “more interdependent.”\textsuperscript{138} Progressive property theory provides such a foundation.

A non-incentive-based theory, such as progressive property theory, suggests that property owners have a larger social obligation that governs how property should be used, and recognizes that property can facilitate the “flourishing” of community members.\textsuperscript{139} The term “flourishing” is based on “what a person is able to do rather than what [they] ha[ve].”\textsuperscript{140} More specifically, Professor Alexander describes “human flourishing” as morally pluralistic—as in “there is no available metric by which one can commensurate goods such as equality and personhood[ ]”—and objective—as in “a person has the opportunity to live a life as fulfilling as possible for him or her.”\textsuperscript{141} Flourishing demands more than general public access—it asks for a balance between “the legitimate interests of property owners with the public interests at stake in property law.”\textsuperscript{142} In this regard, if graffiti art is considered property, then it should be protected because of its social contribution to the community.

II. GRAFFITI AND IP PROTECTION

A. Treaties and International Norms

Numerous international agreements and agencies exist presently to protect property rights and create a balanced system for IP law. The World Intellectual Property Organization (WIPO), one of United Nations’ many agencies, serves as a global forum for IP.\textsuperscript{143} The agency consists of 193 member states.\textsuperscript{144} According to the WIPO Convention, which established WIPO in 1967, one of

\begin{thebibliography}{9}
\bibitem{137} Cloon, supra note 3, at 65.
\bibitem{138} Alexander, supra note 100, at 456.
\bibitem{140} Alexander, supra note 100, at 456.
\bibitem{141} Id. at 453–54.
\bibitem{142} Rosser, supra note 139, at 171.
\bibitem{144} Id.
\end{thebibliography}
the agency’s objectives is to “promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization[.]”\textsuperscript{145} Furthermore, under the convention, “intellectual property” includes rights to (1) “literary, artistic and scientific works[]” and (2) “trademarks, service marks, and commercial names and designations[].”\textsuperscript{146} Since graffiti is an artistic work and, in certain cases, a trademark, it should fall under the umbrella of protections offered by WIPO.

The Berne Convention is an international treaty on copyright administered by WIPO.\textsuperscript{147} The purpose of the copyright treaty is to protect artists, musicians, and others. Currently, there are 181 signatory countries.\textsuperscript{148} The treaty’s scope of protections covers “every production in the literary, 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[].”\textsuperscript{149} The Berne Convention leaves it to legislatures in Berne Union countries (referring to the countries to which the convention applies) to decide whether works of art “shall not be protected unless they have been fixed in some material form.”\textsuperscript{150} The Berne Convention does not contain a requirement for legal work.\textsuperscript{151} In 1928, the Berne Convention included explicit protections for moral rights in Article 6.\textsuperscript{152} With the addition of these moral rights, artists may have the right to claim authorship of their work and the right to object to any action that would be detrimental to the artists’ honor or reputation.\textsuperscript{153}

The Berne Convention’s protections apply to authors who are nationals of one of the countries in the Union, whether their works are published or unpublished, and authors who are not nationals of one of the countries in the

\textsuperscript{146} Id. art. 2.
\textsuperscript{147} Bonadio, supra note 21, at 17.
\textsuperscript{149} Paris Act Relating to the Berne Convention for the Protection of Literary and Artistic Works art. 2, ¶ 1, Sept. 9, 1886, 1161 U.N.T.S. 31 [hereinafter Berne Convention]. According to the U.S. Copyright Act, “[n]o right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention[]” 17 U.S.C. § 104(c).
\textsuperscript{150} Berne Convention, supra note 149, art. 2, ¶ 2.
\textsuperscript{151} Id. art. 5(2).
\textsuperscript{152} Bonadio, supra note 21, at 17.
Union only if their works were published in one of those countries first. The Berne Convention considers a work to be published when, with the consent of the authors, copies are manufactured in a way “to satisfy the reasonable requirements of the public, having regard to the nature of the work.” The protection lasts fifty years after the author’s death. Exceptions exist when the author is anonymous, in which case the protection lasts fifty years after the work has been made public.

In 1952, under the U.N. Educational, Scientific and Cultural Organization, the Universal Copyright Convention (UCC) was adopted. States parties to this Convention have taken on the responsibility to adequately and effectively protect the rights of authors in “literary, scientific and artistic works[.]” Also, Article 15 of the U.N. International Covenant on Economic, Social and Cultural Rights (ICESCR) “recognize[s] the right of everyone . . . (a) to take part in cultural life . . . and (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” ICESCR’s purpose is to encourage creators and advance society.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is another international agreement, not under WIPO but instead the World Trade Organization. Currently, this agreement is the “most comprehensive multilateral agreement on intellectual property.” The agreement includes many areas of IP such as patents and industrial design; however, based on the scope of this Comment, the focus will be on the copyright

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154 Berne Convention, supra note 149, art. 3, ¶ 1.
155 Id.
156 Id.
157 Id.
158 Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886), supra note 153; Berne Convention, supra note 149, art. 7, ¶ 3.
161 Paula Westenberger, Copyright Protection of Illegal Street and Graffiti Artworks, in CAMBRIDGE HANDBOOK, supra note 2, at 55, 64 (quoting International Covenant on Economic, Social and Cultural Rights art. 15, ¶ 1, 993 U.N.T.S. 9 [hereinafter ICESCR]).
162 Id. at 64 (quoting ICESCR, supra note 161, art. 15, ¶ 1).
164 Id.
Although TRIPS includes WIPO’s conventions, such as the Berne Convention, and all their main substantive provisions, it does leave out the Berne Convention’s moral rights provisions. Importantly, Article 13 requires its members “to confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

B. Rules in the United States

Internationally, the United States is part of the Berne Convention, UCC Geneva, UCC Paris, TRIPS, and WIPO Copyright Treaty. In the United States, artists enjoy protections mainly under copyright and trademark law. Copyright law is centered on protecting property rights and thereby incentivizing people to create. According to the U.S. Constitution, IP rights should “promote the Progress of Science and useful Arts[.]” “The incentive-based argument asserts that if free-riders are allowed to appropriate another’s work then authors will cease to create.”

According to the U.S. Copyright Act of 1976 (Copyright Act), a work of graffiti is defined as an original work of authorship fixed in any tangible medium of expression, and falling under the categories of pictorial, graphic, and sculptural works of authorship. A work of graffiti is protected as long as it meets this criteria. A work is “fixed” if it is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than a transitory duration. Works are entitled to copyright protection as soon as the fixation requirement is met. Authors seeking copyright protection do not need to register with the U.S. Copyright Office for protection,
but doing so comes with many benefits. 177 According to Section 102(a), copyright protection is in effect for “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 178 The act then states eight different categories of “works of authorship.” 179 Graffiti falls under category “(5): pictorial, graphic, and sculptural works.” 180

In Section 106, the Copyright Act states the exclusive rights in copyrighted works. 181 The copyright owner has exclusive rights and authority to reproduce the work, produce derivative work, distribute copies of the work, and display the work publicly. 182 Scholars have argued that graffiti falls within copyright and the artist is granted protection as soon as the work is “fixed.” 183

It bears noting that the legal status of the work is not addressed in this context. 184 In this regard, competing rights are largely at issue—those of the graffiti artists and those of the owner of the medium on which the art appears: “The property owners have the rights over the physical embodiment, but copyright law protects the intangible aspects of the work.” 185 The U.S. Court of Appeals for the Second Circuit in the 5Pointz case handled this issue by applying VARA. In the 5Pointz case, instead of determining the legal status of the artwork, the court analyzed whether the graffiti was of recognized stature and whether “any intentional or grossly negligent destruction” was present. 186

The United States amended the Copyright Act through VARA. 187 The amendment added the right of attribution and the right of integrity, 188 which are like the rights in Article 6 of the Berne Convention. 189 However, for a graffiti

177 Cloon, supra note 3, at 58. Some benefits are proof of copyright ownership, notice of ownership, and possibly more damages for unauthorized uses. Id.
179 Id.
180 Id.
181 Id. § 106.
182 Id.
183 See Elias & Ghajar, supra note 8, at 3. For more details on the “fixed” requirement, see 17 U.S.C. §§ 101–102(a).
184 See Cloon, supra note 3, at 60.
185 Id. at 54; see Elias & Ghajar, supra note 8, at 5.
189 Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 133 (1st Cir. 2006).
work to qualify for this extension, it must be a work of visual art. A “work of visual art” is defined in 17 U.S.C. § 101:

[A] painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author.[191]

VARA provides the following:

[T]he author of a work of visual art . . . (1) shall have the right . . . (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; (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and (3) subject to the limitations set forth in section 113(d), shall have the right . . . (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.192

VARA also contains an exception: “The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.”193

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190 See also Elias & Ghajar, supra note 8, at 5.
192 17 U.S.C. § 106A; see also Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995) (“The right of attribution generally consists of the right of an artist to be recognized by name as the author of his work or to publish anonymously or pseudonymously, the right to prevent the author’s work from being attributed to someone else, and to prevent the use of the author’s name on works created by others, including distorted editions of the author’s original work. . . . The right of integrity allows the author to prevent any deforming or mutilating changes to his work, even after title in the work has been transferred.”); Cohen I, 988 F. Supp. 2d at 215 (“And ‘[i]n some [international] jurisdictions the integrity right also protects artwork from destruction.’”).
193 17 U.S.C. § 106A(c)(2); see Phillips, 459 F.3d at 133.
By enacting VARA, Congress added moral rights to the existing copyright law. Unlike copyrights, moral rights “rest upon the ‘belief that an artist in the process of creation injects his spirit into the work and that the artist’s personality, as well as the integrity of the work, should therefore be protected and preserved.’” This is what separates visual artists from those like novelists or composers, who may depend less on physical manifestations of their works. The right of attribution is codified in sub-sections (a)(1) and (a)(2). The right of integrity is codified in sub-section (a)(3). By enacting VARA, Congress made the integrity right a federal right: “VARA protects against the destruction of works of visual art,” which is often seen as a separate right.

The scope of exclusive rights in pictorial and graphic works includes “a work of visual art [that] has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work[.]” The building owner may remove the work of art if he or she has made a “diligent, good faith attempt without success to notify the author” about the removal, or the owner provided the notice in writing but failed to remove the work or pay for its removal within ninety days. Under VARA, an unsanctioned artwork does not have any protections if the work is non-removable.

The 5Pointz case is one of the famous cases that tested this act for graffiti. In the final proceedings, the judge awarded $6.7 million to the artists because the works were of “recognized stature” and the owner of the property had not given the artists ninety-days written notice. A work achieves “recognized stature” when “it is one of high quality, status, or caliber that has been

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195 Id. at 215–16; see Elias & Ghajar, supra note 8, at 5.
198 Id. § 106A(a)(3). In some international jurisdictions, the right of integrity “also protects artwork from destruction.” Cohen I, 988 F. Supp. at 216.
199 Id.
200 Id.
202 An owner sending notice by registered mail to the author at the most recent address according to the Register of Copyrights satisfies the “diligent, good faith attempt[,]” 17 U.S.C. § 113(d)(2).
205 Elias & Ghajar, supra note 8, at 5.
207 Bonadio, supra note 21, at 18.
acknowledged as such by a relevant community." A work’s high quality, status, or caliber is its stature, and the acknowledgment of that stature speaks to the work’s recognition. According to the Second Circuit, the most important factor for “recognized stature” is artistic quality, and the relevant community that determines artistic quality includes “art historians, art critics, museum curators, gallerists, prominent artists, and other experts.” The court notes that there are circumstances where a work of art with “poor” artistic quality may receive protection under VARA if the artist is highly regarded. This approach exists because one of VARA’s main interests is to protect “the public interest in preserving [the] nation’s culture[,]” According to the expert in the 5Pointz case, the artists’ works achieved this stature, and these findings could only be reviewable by the Second Circuit if there was clear error, but there was none.

The court in the 5Pointz case also addressed the durational limit imposed by Congress: a work is “fixed” when it is “perceived for a period of more than a transitory duration.” It is important to note that “expert testimony” and “substantial evidence of non-expert recognition” are usually required to prove “recognized stature.” The Second Circuit had previously held that a work existing for 1.2 seconds is “merely transitory[,]” and a work existing for several minutes is more than transitory. Since the works involved in the 5Pointz case existed for far more than a minute, they satisfied the durational requirement as well.

Although VARA was successfully applied in the 5Pointz case, this secondary statute is very narrow and faces many shortcomings in protecting graffiti in litigation. As noted in the 5Pointz case, the fact that 5Pointz was a “prominent tourist site” was “outside of VARA’s language.” The state and local authorities had the authority to preserve the site but, in this case, they decided not to. Furthermore, in the United States, “moral rights cannot be

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208 Castillo v. G&M Realty L.P., 950 F.3d 155, 166 (2d Cir. 2020).
209 Id.
210 Id.
211 Id.
212 Id.
213 Id. at 167.
214 Id. at 168 (alteration in original).
215 Id. at 166.
216 Id. at 168.
217 Id.
218 Marks, supra note 191, at 298.
219 Id. at 299.
enforced to save site-specific artworks.”221 Phillips v. Pembroke Real Estate, Inc. and Kelley v. Chicago Park District are two cases in which the artists did not qualify for protection under VARA because of fixation or integration issues.222 In the United States and United Kingdom, “artists might not have many chances to successfully oppose removals and relocations of their pieces by relying on the moral right of integrity[.]”223 On the other hand, in countries like France, Germany, and Greece, artists were able to more freely exercise their integrity rights.224

When graffiti consisted of tagging, it was not copyrightable.225 According to the Code of Federal Regulations, “[t]he following are examples of works not subject to copyright and applications for registration of such works cannot be entertained: (a) Words and short phrases such as names, titles, slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents[.]”226 However, graffiti including the artist’s pseudonym or “tag” receive protection under trademark law.227 Now that graffiti is often an expression of art more than tagging, artists are entitled to more protections under copyright law in addition to trademark.

There is much debate in terms of protections awarded to illegal and unsanctioned work. Illegal and unsanctioned work occurs when the art is made without consent and created on private or public property.228 The illegal aspect of a work could either be the “content (e.g., immoral or hate speech) or form of placement of the graffiti or street artwork (e.g., vandalism or trespassing).”229 Works may be illegal even if they do not harm the property owner.230 One argument is that illegal graffiti does not fall under traditional IP protections like it does under VARA.231 Even though the Copyright Act does not explicitly state its stance on illegal works, Section 103 excludes protection for derivative works made illegally.232 Also, scholars and courts both have stated that “illegal works are not copyrightable because they fail to ‘promote the progress of science and

221 Bonadio, supra note 21, at 20.
222 Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128 (1st Cir. 2006); Kelley v. Chi. Park Dist., 635 F.3d 290 (7th Cir. 2011).
223 Bonadio, supra note 21, at 20.
224 Id.
225 Cloon, supra note 3, at 56.
227 Halberstadter, supra note 2.
228 Elias & Ghajar, supra note 8, at 1.
229 Westenberger, supra note 169, at 56.
230 Cloon, supra note 3, at 56.
231 Roundtree, supra note 46, at 961.
232 Elias & Ghajar, supra note 8, at 3.
useful arts’ as set forth in the U.S. Constitution.” Other scholars state that illegal art should still be protected under copyright law because it is still creative expression. Moreover, usefulness is not a factor for copyright, unlike for patent. Another argument is that as long as the graffiti is “an ‘original work[] of authorship fixed in any tangible medium of expression[,]’” then it must be protected by IP law, especially because nothing about the legal status of the work is mentioned under VARA.

In Villa v. Pearson Education, graffiti artist Hiram Villa (also known as UNONE) brought a copyright infringement suit against Brady Publishing for reproducing and publishing his unsanctioned art in a book without his consent. This case demonstrated that artists who create unsanctioned, unauthorized works may not be “entitled to the full scope of their exclusive rights[]” and “acknowled[ed] a need to assess illegality.”

C. Rules in Europe

1. United Kingdom

Currently, in the United Kingdom, the Copyright, Designs and Patent Act 1988 is the applicable copyright law in the realm of graffiti protection. Graffiti falls under the category of “original literary, dramatic, musical or artistic works[].” Under EU law, “anything that constitutes an intellectual creation should be protected by copyright[,]” which broadens the U.K. standard.

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233 Id.

234 Lerman, supra note 170, at 322.

235 Id. at 323. “Furthermore, in an incentive-based copyright system it is not necessary that every work promote the progress of science, but instead, that the system as a whole promotes that desired end. The system does so by granting protection to all works, regardless of their legality.” Id.


237 17 U.S.C. § 106A.


239 Elias & Ghajar, supra note 8, at 3. This case also “created a presumption (still relevant today) that illegality may be used as a defense to copyright infringement, similar to the concept of unclear hands.” Id.

240 Id. at 4; Villa, 2003 WL 22922178. The case was initially dismissed due to jurisdiction issues, and then later settled out of court. Elias & Ghajar, supra note 8, at 3–4.

241 UK Copyright Law: An Introduction, UK COPYRIGHT SERVICE, https://copyrightservice.co.uk/copyright/uk_law_summary#:~:text=The%20Copyright%2C%20Designs%20and%20Patents%20Act%201988%20is%20the%20current,their%20material%20may%20be%20used.&text=Normally%20the%20individual%20or%20collective,will%20have%20exclusive%20ownership%20of%20the%20rights (last visited Oct. 22, 2020).

Unlike in the United States, tags and throw-ups that are comparable to typefaces are protected by copyright in the United Kingdom.\textsuperscript{244} In the United Kingdom, “copyright is a property right which subsists in artistic works, irrespective of artistic quality, including paintings or drawings.”\textsuperscript{245} Under U.K. law, artists “are entitled to the full scope of copyright entitlements, irrespective of the illegality of their work. . . . [T]hey can prevent the copying and reproduction of their illegal works, although the property owner still retains certain rights with respect to the original work such as displaying and selling the work.”\textsuperscript{246} This country’s law demonstrates that property law and IP law can work together instead of conflict.

Moral rights were factored in much later in the United Kingdom, compared to the United States.\textsuperscript{247} The United Kingdom’s attribution (paternity) right allows graffiti artists to remain anonymous as long as their artwork contains a pseudonym or initials.\textsuperscript{248} Unlike in the United States, the “right to prevent destruction of artworks is not expressly provided” under the Copyright, Designs and Patents Act 1988.\textsuperscript{249} The United Kingdom’s integrity right also fails to mention anything about de-contextualization of site-specific works.\textsuperscript{250} In terms of illegal graffiti, the judge in \textit{Creative Foundation v. Dreamland} held that illegally produced works should be protected by copyright; however, more in-depth case law has not been developed on the matter.\textsuperscript{251}

2. \textit{France}

Unlike in the United States, there is no fixation requirement under French law.\textsuperscript{252} Its originality requirement is quite broad, and similar to the courts in the United Kingdom, French courts have adapted the European Court of Justice’s standard of originality: “author’s own intellectual creation.”\textsuperscript{253} French copyright law also does not evaluate the “aesthetic, technical, cultural, merits, or qualities of the original work” when determining whether a work of art should be protected.\textsuperscript{254} Like VARA, French law does not contain anything about legality

\textsuperscript{244} Bonadio, \textit{supra} note 21, at 163.
\textsuperscript{245} Rychlicki, \textit{supra} note 43, at 396.
\textsuperscript{246} Elias & Ghajar, \textit{supra} note 8, at 7.
\textsuperscript{247} Bonadio, \textit{supra} note 21, at 167.
\textsuperscript{248} \textit{Id.} at 168.
\textsuperscript{249} \textit{Id.} at 169.
\textsuperscript{250} \textit{Id.}
\textsuperscript{251} \textit{Id.} at 173. For more information on the case, see Creative Foundation v. Dreamland Leisure Ltd. [2015] EWCH (Ch) 2556, [2016] Ch 253 (Eng.).
\textsuperscript{252} Burke, \textit{supra} note 63, at 178.
\textsuperscript{253} \textit{Id.}
\textsuperscript{254} \textit{Id.} at 180.
of a work. In terms of conflicts between property owners and graffiti artists, there is no hierarchy in rights—it is up to French courts to “balance the competing rights.” This lack of hierarchy may cause greater confusion in deciding whether French courts have considered public safety, utilitarian nature, and commercial realities in finding the balance. Most courts have sided with the buildings’ owners.

3. Greece

In Greece, graffiti artists can receive protection for their works under the Greek copyright act. In Article 2, the act defines work as “any original intellectual literary, artistic or scientific creation, expressed in any form, . . . works of fine art, including drawings, works of painting[.]” Article 2(4) states, “The protection afforded under this Law shall apply regardless of the value of the work and its destination and regardless of the fact that the work is possibly protected under other provisions.” Therefore, under Greek law, as long as an artistic work is intellectual, an expression of an idea, and original, it may be protected. More importantly, the “aesthetic quality” and “artistic merit[,]” are not contributing factors for protection. Furthermore, the Greek copyright act does not speak to legality.

Like with VARA in the United States, Greece also has moral rights in its Civil Code and copyright act. In Article 4, the act states that the moral right grants the author the powers to determine the time, place, and manner of publication; receive acknowledgement or remain anonymous; prohibit any distortion, mutilation, or other modification; and have access to the work even when the economic right and physical entity of the work belongs to another. However, unlike in the United States, “the destruction of a work of art would only be justifiable to the extent that the owner of the material support does not exceed the social purpose of the right, including the public interest in the

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255 Id.
256 Id. at 184.
257 Id. at 184–85.
260 Id.
261 Id. at 246.
262 Id.
263 Id.
264 Id. at 246.
preservation of cultural and intellectual goods[]."

In Greece, public interest plays an enormous role in determining the existence of artistic value in a graffiti work.267

4. Germany

As mentioned earlier in this Comment, graffiti is often created to relay a message to the community, especially antiestablishment sentiments.268 Again, the Berlin Wall is a perfect example of this.269 The once-low-rent area has attracted property developers over the years, driving up costs.270 To protest gentrification and property development, the Italian artist, Blu, authorized people to whitewash two of his famous murals near the Oberbaumbrücke.271 He would rather cover his works of creation than allow the property developers to utilize the murals for their businesses.272

In terms of copyright law, the German Authors’ Rights Act (Urheberrechtsge setz, UrhG) governs what is protected.273 Under the UrhG, “[a]ny work within the literary, artistic or scientific domain can qualify for copyright protection[].”274 Compared to the United Kingdom, Germany offers a wider scope of protections for artists because in Germany, copyright protection does not depend on the work falling within a category listed in the statute—copyright protection is non-exhaustive.275 Therefore, “qualification of the work within a category of protected works[]” is not necessary in Germany.276 In addition to the lack of a fixation requirement, the aesthetic quality, material used, and permanency of the work are not factors in determining copyrightability.277 Street art made of “paste-ups and posters,” which deteriorate quickly, would be protected under German law.278 However, according to UrhG § 2(2), the work needs to constitute the author’s personal intellectual creation, similar to the

266 Karapapa, supra note 69, at 249.
267 Id.
268 Bonadio, supra note 21, at 21.
269 Mümler, supra note 71, at 189.
270 Id.
271 Id.
272 Id.
274 Mümler, supra note 71, at 190; see UrhG § 1.
275 Mümler, supra note 71, at 190.
276 Id.
277 Id.
278 Id.
requirements in other European countries. This is a relatively easy threshold for street and graffiti artists because their works require a “level of creativity.” The German Federal High Court (Bundesgerichtshof, BGH) confirmed this in its Wall Pictures decision. The Court affirmed that the murals at issue “qualif[ied] as copyright-protected works since they . . . constitute[d] a ‘personal creation of individual expressiveness.’”

In Germany, the “[c]opyright in the work is originally vested in its creator.” When it comes to property and IP conflicts, German copyright establishes that when the art is attached to a wall where its removal would cause destruction, the “ownership of the plot of land extends to the movable good[.]” In other words, the property owner becomes the owner of the physical paint, and the artist retains ownership of the “immaterial copyright-protected work[.]” German law also provides artists with exclusive rights of reproduction and distribution. Compared to common law countries, Germany has “a high standard of moral right protection” that goes beyond the Berne Convention’s Article 6 protections. Most importantly, graffiti that is created without the property owner’s consent does not prevent copyright protection.

As for property rights, Germany and the United States have different conceptions of land ownership—most likely as a result of “distinct notions of the individual’s place in society.” The U.S. Constitution “emphasizes individual freedom,” while German law “considers the individual’s place in and relationship to the social order in defining ownership rights.” To start, the property clause in the German constitution, “contains an affirmative social obligation alongside its positive guarantee of ownership rights.” In interpreting German property laws, the Federal Constitutional Court stressed the

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280 Id., supra note 71, at 191.
281 Id.
282 Id. (citing Bundesgerichtshof [BGH] [Federal Court of Justice] 1997, 28 [IIC] 282 (Ger.)).
283 Id. at 194; see UrhG § 7.
284 Id., supra note 71, at 195; see Bürgerliches Gesetzbuch [BGB] [Civil Code], § 94, para. 1, http://www.gesetze-im-internet.de/englisch_bgb/index.html (Ger.).
285 Id., supra note 71, at 195.
287 Id., supra note 71, at 198.
288 Id. at 206.
289 Id.
290 Id. at 3, 15.
importance of the relationship between the individual and society, and how an individual is not in isolation but rather a part of the community.\footnote{Id. at 16.} Under German law,\footnote{Id. at 7.}

The property owner is thought to participate in the social order both by using her property—seen as an expression of freedom and a means for development of personhood—and by recognizing the social obligation as an important limit on the exercise of these rights. The State is also thought to participate in this social order by creating a property regime with the most favorable conditions for the greatest number of people to acquire property and by demanding social responsibility from property owners through land-use regulation.\footnote{Id. at 7.}

III. PREVAILING THEORETICAL JUSTIFICATION FOR COPYRIGHT PROTECTION CRITIQUE

A. Incentive-Based Theory

In the United States, the incentive-based theory is widely accepted as the main justification for copyright laws.\footnote{Cloon, supra note 3, at 65.} The U.S. Constitution’s IP Clause states that the purpose of IP laws is to “promote the Progress of Science and useful Arts[.].”\footnote{For the full IP Clause of the Constitution, see U.S. Const. art. I, § 8, cl. 8.} Courts have a tendency to interpret the IP Clause to mean the authorization of Congress “to legislate to confer rewards on creators that will incentivize them to make and disseminate works, thereby contributing to the progress of society.”\footnote{Id. at 16.} The incentive-based theory “asserts that if free-riders are allowed to appropriate another’s work then authors will cease to create.”\footnote{Cloon, supra note 3, at 65.}

Therefore, copyright’s monopoly privileges exist to motivate authors with a special reward—confirmed by the U.S. Supreme Court in \emph{Sony Corp. of America v. Universal City Studios, Inc.}.\footnote{Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).}

B. Weakness of Prevailing Theories (Including Incentive-Based Theory)

In her essay for the Notre Dame Law Review, Sara Cloon argues that “[c]hosing to exclude graffiti when it satisfies the threshold for protection in the Copyright Act and has been implicitly accepted by courts would go against
the promotion of progress that copyright law is meant to foster under the incentive theory of copyright law.” 299 The reasoning here is unpersuasive. Graffiti artists are more concerned about the social aspect—what they are bringing to the community—rather than economic gain. 300 They tend to want legal protection for works that are larger and required more dedication and time. 301 Graffiti artists do pursue copyright claims, and some may be seeking monetary compensation; however, their main purpose in creating street art is to prevent others from using their work for profit, send a message to the community, and beautify the walls of the community. 302 Moreover, an incentive-based theory is not the strongest legal justification because it presumes that creators need to be motivated—specifically by economic factors. Progressive property law would provide a stronger justification for an artist’s protections by focusing on the community’s obligation to contribute to society instead. Graffiti artists are trying to send a message through their work; thus, the incentive-based-theory is not the best legal justification for copyright protection.

IV. CONSIDERING PROGRESSIVE PROPERTY THEORY

A. What Is Progressive Property Theory?

The basis of progressive property theory is that the traditional view of property alone is not adequate in resolving property conflicts, and that it may be necessary to reconsider the focus on the “right to exclude” in traditional property law. 303 In A Statement of Progressive Property, Professors Alexander, Eduardo M. Peñalver, Joseph W. Singer, and Laura S. Underkuffler explain that the internal tensions within traditional property law and “the inevitable impacts of one person’s property rights on others make it inadequate as the sole basis for resolving property conflicts or for designing property institutions.” 304 Instead, they suggest looking “to the underlying human values that property serves and the social relationships it shapes and reflects.” 305 Other progressive property scholars argue for a “connection between property law, equality, and social

299 Cloon, supra note 3, at 69.
301 Bonadio, supra note 21, at 18.
302 Smith, supra note 99, at 286.
304 Id.
305 Id.
This Comment focuses on the social-obligation part of progressive property theory. The social-obligation view is that there is “an obligation to participate in and support the social networks and structures that enable us to develop those human capabilities that make human flourishing possible.”

The authors provide an example of social obligation at play in the United States: in certain beaches, the public is granted access to “dry sand portions of the beach owned by private parties.” In general, property promotes “individual interests, wants, needs, desires, and preferences” especially “human flourishing.” Progressive property theory would expand recognition of the public’s interest in privately held property.

B. Why Is Progressive Property Theory Better Suited to Justify Graffiti Protection?

The motivation of graffiti artists may be a critical factor in legal-protection justifications. The social obligation theory looks beyond economic interests and the right to exclude—it incorporates the right to promote human values, such as the right to free expression. Graffiti is becoming more subversive and possibly protest-oriented. The subculture’s growing social importance requires us to reconsider art, its importance, and its role in society in addition to strategizing how to protect it. Although VARA provides a certain level of protection to artists, the act “focuses on the individual rights of artists rather than the communal and societal interests in culturally valuable works of art.” If graffiti creation is based on a social movement, symbolism, and community, we need a social theory of property to justify its protection, especially if society has a property interest in the graffiti. This pushes the courts and laws to address the parameters of copyright with respect to graffiti.

By using a progressive property framework, governments in cities and states can expand existing property laws, especially the right to exclude, to reasonably allow artists places to create. Since the main motives of graffiti artists are not “driven by the reward of ‘exclusivity’ to create artwork[,]” the justification

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306 Rosser, supra note 139, at 110.
307 Id. at 116.
308 Id. at 117.
309 Alexander et al., supra note 303, at 743–744 (“Because of the equal value of each . . . person to obtain the material resources necessary for full social and political participation.”).
310 Id. at 743.
311 Rosser, supra note 139, at 145.
313 Barnett, supra note 85, at 210.
314 Smith, supra note 99, at 287.
for the protection of graffiti art should take the community aspect into consideration. As of now, communities in Europe and the United States do not have much say or control “over the fate of the work of art even though the work may have a direct impact on the community’s pecuniary and social value.”

On the other hand, progressive property theory is less individualistic than the incentive-based theory, which at most protects only the artist. Progressive property theory would serve as a tool for the community.

1. Graffiti Artists as Property Outlaws

In Part I.D., this Comment reviewed a few motivations for creating graffiti, especially the illegal aspect of creating graffiti. Danger, illegality, and anonymity are “integral components” of graffiti. While we can theorize legal graffiti protections, illegal graffiti protections are questionable; however, perhaps illegal graffiti is important to understanding graffiti protection. Studying the illegal aspect of graffiti may push us toward understanding how graffiti in general should be protected and may help scholars understand why illegal graffiti should have protection.

In a way, graffiti artists are, or have very similar characteristics to, property outlaws. A side-by-side comparison forces us to grapple with the treatment of graffiti artists—pushing us to consider a larger picture. One of the central elements of property law is private ownership, and with private ownership comes exclusivity. To protect stability and “liberty,” property law provides several tools: enforcement of trespass, “larceny, fraud, robbery, and burglary” laws. In Property Outlaws, Eduardo Peñalver and Sonia Katyal suggest that the “role of the lawbreaker” also protects the stability and liberty of property ownership. Property outlaws are people who intentionally violate property laws for several reasons: they are reluctant of or cannot afford civil litigation and lack influence in legislative change. By violating property laws, these outlaws force the necessary legal change and reform that property law might need.

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315 Barnett, supra note 85, at 211.
316 Rosser, supra note 139, at 116.
317 Baron, supra note 14, at 928.
318 Elias & Ghajar, supra note 8, at 3.
319 Katyal, supra note 312, at 552.
321 Id. at 1098.
322 Id.
323 Id. at 1100.
324 Id. at 1099.
Peñalver and Katyal mention two categories of lawbreaking: "‘expressive’ and ‘acquisitive’ lawbreaking."325 Graffiti artists’ motivations are more closely related to expressive lawbreaking. Expressive lawbreaking "seeks to send a strong message about the perceived injustice of existing property arrangements."326 Property outlaws who fall under this category are not interested in owning the property themselves; instead, they are interested in the current owners’ use or enjoyment of their property rights.327 Furthermore, property outlaws’ motivations are often larger than individual properties in that they want “to bring about systematic change” in the community as a whole.328 Similar to property outlaws under the expressive lawbreaking category, graffiti artists, as discussed in Part I.D, have motivations based on addressing social issues and being a voice for the community at large. Akin to expressive property outlaws, perhaps graffiti artists should not be “unfairly punish[ed]” and law enforcement should be wary that certain lawbreaking is useful.329

CONCLUSION: HOW WOULD PROTECTION BASED ON PROGRESSIVE PROPERTY THEORY WORK IN PRACTICE?

The United States and the European countries of the United Kingdom, France, and Greece all have similar rights for graffiti artists. In terms of case law, the United States may be a leader due to the holdings in the 5Pointz case which set a precedent for subsequent litigation; many European countries lack case law when it comes to street art.330 By applying progressive property theory, the outcome or analysis of the 5Pointz case could have been different. Again, progressive property theory emphasizes a social obligation “on owners to sacrifice their property interests in some way to ‘cultivat[e] the conditions necessary for members of our communities to live well-lived lives and to promote just social relations, where justice means something more than simply aggregate wealth-maximization.”331 The fact that 5Pointz was a famous tourism site in the community could have potentially been a factor in the court’s analysis if the concept of progressive property had been introduced.

That the 5Pointz case did not apply progressive property theory presents an opportunity for Germany to be a leader in this area. Compared to the United

325 Id. at 1102.
326 Id.
327 Id. at 1105.
328 Id.
329 Id. at 1186.
331 Baron, supra note 14, at 928.
States and the European countries mentioned above, Germany has similar copyright laws pertaining to graffiti art. However, Germany already has a social-obligation clause within its laws. As such, Germany could serve as an example for the United States and other countries to focus more on the community and thereby provide stronger copyright protections for artists. If German laws were applied to the 5Pointz case, then the fixation requirement would have not been a factor in determining copyrightability.

Social obligation as a part of property ownership is not unheard of in U.S. law. The U.S. government at all levels—state and federal—“use public land-use controls to decide which development of private land may be carried out and which may not.” Also, the U.S. government “monitor[s] the behavior of landowners[]” for any “negative impacts of their property use on neighboring property owners or on society in general.” However, this level of social obligation pales in comparison to Germany’s. Germany’s Basic Law authorizes the state to “balance[e] individual freedom against the interests of the general welfare and courts regularly refer to this affirmative duty of the property owner and of the State.” German law further states that property is “an expression of freedom” and a way to develop personhood, closely resonating with Professor Alexander’s interpretation of “flourishing” and social obligation. Combining Germany’s inclusion of social obligation in its laws and society’s property interest in graffiti could prevent incidents like what had happened at 5Pointz—destruction of famous graffiti by the property owner. By recognizing social obligation as a limit on property rights and implementing changes that will create “a property regime with the most favorable conditions for the greatest number of people[,]” the United States and European countries could promote a welcoming community for graffiti artists. Public use of privately-held property could become a more common feature in these countries.

Viewing graffiti protection through progressive property theory, a non-incentive-based perspective leads us to a more “flourishing” society better fit for
the expanding world of graffiti. Non-incentive-based theory asks the world to adopt an unconventional perspective that would nonetheless promote diversity. It provides a space where the larger community could enjoy art. By combining the U.S. case law in graffiti and Germany’s inclusion of social obligation in its property laws, a more protective international norm could be set for street art protection. Progressive property theory forces us to rethink copyright law, and possibly widen its protective measures.

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