

Painting on Walls

Street Art without Copyright?

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When a street artist and a graffiti writer are looking at a wall, considering whether to put up a work—a stencil in the first case, an elaborate signature in the second—they may not know that if they produce an original work of authorship, copyright will grant them certain exclusive economic rights.¹ They probably don't care. A typical justification for copyright protection is that it incentivizes and rewards creativity, but this creativity takes place largely without reference to the copyright framework. Yet given the vulnerability of graffiti writing and street art to exploitation, copyright might well be useful in enabling creators to control their works in certain situations. So if it is not the possibility of economic reward that might flow from copyright protection that encourages street art and graffiti creativity, what is it instead? This chapter explores the motivations of graffiti writers and street artists to suggest that these works are produced for the sake of creating something beautiful; to symbolize membership of a creative community; for the sheer pleasure of holding a spray can and giving color to the street. These motivations underpin a number of key norms that regulate the creativity of street artists and graffiti writers: the choice of appropriate surfaces on which to paint, the prohibition against copying, and the prohibition against destruction of works. Moreover, creators hold particular views about how their works ought to be used by members of the public—that is, that copying and dissemination take place for non-commercial purposes.

This chapter argues that while the prospect of copyright protection does not motivate street artists and graffiti writers to produce their works, their creativity is nonetheless regulated by norms that act as a

substitute for, and move beyond, copyright law. The first part introduces street art, graffiti, and the empirical work on which the chapter is based before considering what that work reveals about the creators' motivations for producing these works. The second and third parts consider the norm against copying and the norms regulating the placement of works, including which surfaces are acceptable for painting on and when another creator's work can legitimately be destroyed. While these sections consider how creators regulate creativity among themselves, the fourth part examines the creators' expectations around copying by members of the general public, including the exploitation of their creativity. It also considers some of the unsuccessful attempts by creators to protect their work via copyright law and concludes that even when copyright law might apply to graffiti writing and street art, protection may be limited. It is thus unsurprising that creators of graffiti and street art forgo copyright protection, especially since revealing their names may invite criminal prosecution.² Subcultural norms by contrast offer a context-sensitive, and hence more appropriate, means of promoting and protecting creativity.

Setting the Scene

The empirical research into rules regulating creativity among graffiti writers and street artists discussed here echoes other studies that have challenged the relevance of copyright law to certain cultural practices, including stand-up comedy, haute cuisine, tattooing, fan fiction, and Irish traditional music.³ This part considers the scope of the empirical research on which this chapter is based as well as the history and cultural significance of street art and graffiti writing. It then identifies the motivations of the creators interviewed in order to explain why subcultural norms rather than copyright law are more appropriate in regulating their creativity.

While certain forms of street art have met with significant, if not unanimous, public acclaim, graffiti writing—writing a name in a particular style ranging from the tag (the writer's signature) to a throw-up (one-color letter outlines or different colors for the outline and fill) and pieces (large-scale works often with complex lines and shading)⁴—attracts rather less praise. This is not because the creators lack technical

proficiency; graffiti writing tends to be done freehand, and it requires considerable skill. Both street art and the writing of letters change the color of the street, but unlike the latter, the former is a “crime of style”⁵ and carries significant risks including jail time and public opprobrium.⁶

There are two points to be made about discussing street art and graffiti writing together. First, discussing “street art” as a single phenomenon elides the distinction between diverse forms of creativity that include everything from stencils to paste-ups to sculpture,⁷ while precluding a detailed exploration of the more elaborate set of norms present within the graffiti subculture and the particular difficulties graffiti writing poses for copyright law. The difference between graffiti writers and street artists is not simply one of substance—that writers write letters and street artists tend not to—but also of how the works are made, how individuals self-identify and what their mind-set is. As one creator observed: “[I]t depends on what style, how you apply what you’re doing. If you’re using masking tape and scalpels and stencils and you know all sorts of stuff then you’re definitely a street artist . . . Graffiti tends to be done just with cans.”

More significantly, perhaps, an argument might be made that stronger norms for the regulation of creativity are to be found in the graffiti subculture because graffiti writers are more likely to identify themselves as belonging to a community of writers than are street artists. Writers are motivated not only by personal fulfillment but also by the attainment of fame within the subculture.⁸ Nevertheless, discussing graffiti writing and street art together here allows for a broad discussion of the regulation of usually uncommissioned works found in public places, in particular with respect to copying and competition for space. Where graffiti differs from street art generally, the more specific term is used here in order to highlight the similarities and differences between the two types of creativity.

Second, as Jeff Ferrell identified in his seminal study of Denver graffiti writers, it is only ever possible to provide an insight into graffiti as it relates to one particular time and place.⁹ The same might be said of street art. There is no attempt to provide a universal narrative of the regulation of subcultural creativity. The interviews that form the basis of this chapter were undertaken with creators identifying as graffiti writers and/or street artists in 2010–2011, largely in London. It is therefore *that*

time and *that* place which inform the creators' responses. The picture is further complicated by the fact that the London scene is the product of the transplant of graffiti culture from the United States and so is heavily influenced by it; the documentation of New York graffiti in *Subway Art*¹⁰ proved highly influential. The creators' responses nevertheless serve to illustrate a more general point about how creativity occurs, what creators expect to be done with it, and how this is regulated without copyright law.¹¹

Copyright protection may be justified in a variety of ways.¹² One of these justifications is that copyright provides economic incentives to create works. Yet the prospect of copyright protection does not appear to motivate street artists and graffiti writers. Sketching out these creators' stated motivations thus goes some way toward explaining why street artists and graffiti writers make little or no reference to copyright in the process of producing their works. The empirical research suggests that personality concerns situated within a broader concern with the development of culture animate the production of graffiti writing and street art. It matters to the creators of graffiti and street art works that their works are seen, and it matters that their production allows creators to express their personality and be recognized by others. Indeed, there is an overarching concern with recognition—by both other creators and by members of the public. This is not to say that these things matter to all creators—and indeed, for graffiti writers, gaining fame within the subculture is arguably even more important than either—but considering these particular motivations helps explain why creators would risk putting up their works on the street without permission. Risks are taken both to satisfy the need for personal expression as well as to be seen.

In relation to the more obviously personal motivations, one street artist said, simply: "I do it for me." Another street artist expressed similar sentiments: "[i]t's the fewest strokes of a paintbrush or a spray can to express something really important to me." There is an almost visceral link between the expression of personality and accepting the risks inherent in street art and graffiti creation that make it seem far from any economic considerations. It speaks to the emotional aspects of creativity, including quite simply "adrenaline." For some, the feeling of personal satisfaction is largely unrelated to the creative expression itself. It is the *process* of creation that matters. In choosing a character to repeat on city

walls, a street artist said: “I could put that emotion into anything, I’ve just chosen this character arbitrarily really ’cause it’s the quickest thing to do.”

For some, this personal drive also translates into a desire to have an impact beyond the personal by communicating with the public at large. This was summarized neatly by a street artist who said: “Putting stuff up on the streets is the most immediate way of getting into the public consciousness.” The desire to make their voices heard, to make a social statement, dovetails with the excitement of creation: “[I]t is the purest and most direct . . . form of art I know. There is also buzz and excitement. And I feel it is a way to vocalize my dissent at society, government, corporations etc.” For another creator, street art presented an opportunity to change the urban environment: “I just painted a huge painting on [the building] so it’s not ugly anymore.”

This sketch of creators’ motivations with respect to recognition of their expression goes some way toward explaining why creators would need to address scarcity of space—because finding space is necessary in order to be seen—and why creators were happy for their works to be disseminated by members of the public, albeit for non-commercial purposes: It makes the creativity visible. Furthermore, it explains why individual expression is respected by disallowing copying: The prohibition safeguards the personal autonomy of the creators. The subsequent three sections of this chapter thus address the norms that substitute, and move beyond, copyright law. Two issues arise: first, to what extent copying is regulated among graffiti writers and street artists, and second, what happens when there is competition for space on a wall. That is, if personal autonomy and the desire to be seen rather than the prospect of copyright protection provide the motivation to create works, and so street artists and graffiti writers do not generally resort to making copyright claims to settle disputes among themselves, how is their creativity regulated without copyright?

Creating without Copyright

If copyright law is largely irrelevant to the incentivization of creativity, it is perhaps surprising that a loose set of informal norms relating to originality and copying—concepts at the heart of copyright law—are

nevertheless adhered to by street artists and graffiti writers. This part of the chapter identifies the broad contours of the norm against copying and its limits, as well as the ideas of personal expression and recognition that creators invoke in order to explain its existence.

Prohibiting copying is a means of respecting the individuality of a creator's expression. The norm that forbids it is thus closely allied to the expectation that works will be original, which in turn is premised on the need for respect among creators: "It is important to get on with your contemporaries or at least acknowledge them, even if they might not personally get on." One of the ways of getting on is to respect others, and one way of respecting others is not to copy. This means not reproducing the works of others and passing them off as your own.

In particular, for graffiti writers, respect means not copying another writer's name or style of writing letters. The prohibition against copying—known as "biting" in the subculture—is of particular importance to graffiti writers insofar as writers aim to get their name up in the most visible places possible, in their own style, and to stay up.¹³ While this part considers copying among graffiti writers and street artists generally, it is worth noting that originality for graffiti writers is more circumscribed in that it is based on the production of *letters* in different styles, where minute changes of angle might be sufficient to set the work apart as original even where any such difference is invisible to the untrained eye. "It's a pretty well-known thing," one graffiti writer said, "that you can't go around writing someone else's tag."

The norm against copying is also important because it forces creators to develop their creativity in order to set themselves apart on the street: "[I]f you're going to be in it for the long term you've got to get your own style. As I've developed my own styles, I think you consciously try to veer away from what everyone else is doing."

In steering clear of the creativity others are developing, another creator explained copying was acceptable only to the extent that it will not appropriate someone else's personality: "It's using the principles of it and making your own . . . You don't get respect for [copying] because . . . it's [about] individuality."

The norm must, to some extent, reflect the importance of personality concerns. It is the appropriation of another's personality in your own work that delineates the boundary between acceptable and unaccept-

able copying. But the prohibition against copying was justified also in terms of not appropriating someone else's effort: "When it's a direct rip of someone's [work] then: not acceptable, because you know that someone worked for long hours and worked for a lot of years to build up a certain thing . . . I think it's just morally incorrect." The norm against copying is thus situated within an understanding of how creativity occurs, that is, with creators working alongside each other who see their work in the context of the works of others.

Furthermore, there would appear to be an intuitive acceptance, especially in relation to graffiti writing, that rules circumscribing individual creativity are employed in the context of participation in, and enrichment of, a common graffiti culture. For graffiti writers in particular, and perhaps less so for street artists because they are not similarly constrained regarding the content of their works, the acknowledgment of a common pool of creativity from which to draw is important: Any writer can write letters, what matters is the originality of an individual style. One creator, identifying as a graffiti writer but open to employing street art aspects in their work, observed: "you tend to adopt a memory bank of different styles in your head." A writer's style might take "aesthetic cues" from the work of New York writers chronicled in *Subway Art*, for example, but will be unmistakably the writer's own. There is neither a sense here that copying can be, nor that it should be, at all costs, prevented. Copying, while respecting the core of another's individual expression, is part of the development of creativity generally. In other words, the norm against copying—at least within the graffiti subculture—is important in helping an individual distinguish themselves from others, to express themselves and be recognized but in doing so to consciously help the culture evolve. The norm against copying balances the protection of individual creativity and the preservation of culture.

There appear to be limits placed on the prohibition of copying—that is, circumstances in which copying is accepted as permissible—which include the appropriation of popular culture, the appropriation of mere ideas as well as certain practical concerns. Some level of appropriation, from popular culture for example, is expected to occur when creators draw upon the material available to everyone in order to create their own works. Indeed, creators recognized that some copying was inevitable. As one street artist explained: "The thing is, I think in anything

there's always a level of plagiarism isn't there? Even if you don't set out to do that, everything has been done before, nothing is new. . . . I think the whole idea of originality is completely rubbish.”

This understanding would also seem to implicitly recognize the idea/expression dichotomy¹⁴ that is familiar to copyright lawyers:

I'll do stuff that [I'm] not necessarily copying from other people but I'm aware that other people have done before but I always set out to do it the best. . . . [T]here are times when you will do something, and I'm not talking about something incredibly specific . . . I want to do that myself, I want to do my own kind of personal representation of that. Artists have done it for thousands of years. At the end of the day, how many paintings of bowls of fruit are there out there really?

While particular ideas might be reproduced by different creators, it is what sets the work apart—its execution—that is important. A further limitation on enforcing the copying norm is a practical one: Copying may be accepted by street artists because of a recognition that their creativity is transient and may, at some point, be beyond their control. In extreme cases, it may be necessary to simply change their work: “If someone kept copying [the character] I might just have to do something else.”

The preceding discussion makes clear that the norm in question is highly sensitive to context. This is especially the case with graffiti writers, where the protection of a name and style is important to gaining, and maintaining, status within the subculture. In short, there is an awareness that creativity draws from the broader culture but, more importantly, that creativity occurs within a community of creators. As such, the norm against copying is not solely directed at the protection of an individual creator's works. It is not the prospect of copyright protection but rather the subcultural norm against copying that is supporting creativity.

Finding Space on the Wall

Unlike other artistic endeavors that might require only a canvas or a sketchbook, graffiti writers and street artists must consider not just the substance of their work—whether it copies someone else, for

example—but also its placement. In some instances, desirable wall space will be scarce. This part of the chapter addresses three issues, the first relating to placement and the second and third to the management of scarcity: first, choosing an appropriate surface; second, how street artists and graffiti writers compete for space; and third, the acceptability of destroying another creator’s work when space is scarce.

Both street artists and graffiti writers temper their desire for visibility by adhering to a norm relating to the acceptability of certain surfaces. The choice of where to place a work depends on a number of factors, including whether the space is deemed to be “individual” property such as a house or a car, or, public or commercial property such as a shop-front shutter.¹⁵ A street artist, echoing aspects of graffiti writers’ views on the choice of surface, said: “Private houses, cars, historic buildings . . . I do not believe in damaging another individual’s property. For me, corporate and civic spaces, industrial spaces, abandoned shops etc. are where I prefer to paint.”

It seems likely, too, that the choice of abandoned places provides an element of safety and freedom to paint: the sense that a creator is less likely to be interrupted or, indeed, to have their work removed by property owners or local authorities. Another street artist, considering the acceptability of surfaces with respect to their aesthetics more generally, rather than the type of property, said:

Some places people clearly don’t want painted. You know if someone’s got something out the front of their home and they clearly care about it and they maintain it, or if someone’s got a look going I don’t want to mess with their look, you know. It’s disrespectful. I think if somebody clearly doesn’t care about a wall or if someone clearly wants graffiti on a wall . . . I think then it kind of implies consent. Really, just go ahead. I try to make a good job of it, try to use the whole surface.

There was no clear consensus on this point among creators, but a further motivation relating to the choice of surface is worth considering here: the impact of street art on public space and the effect it has on the public. One street artist described the potentially positive aesthetic impact of choosing a surface as follows: “I’m always doing it because I want to brighten up people’s lives and make them smile, make them think.”

The choice is made specifically with the public in mind. Regulating placement then is arguably a means of respecting by leaving alone certain types of property while at the same time designating enough surfaces as appropriate in order to potentially transform the experience of public space. This opens up the possibility of using street art to, as Alison Young puts it, “contest social arrangements and indicate new attitudes to shared public spaces.”¹⁶

Having chosen an appropriate surface, the next decision a creator needs to make relates to any work that already occupies that surface. Before considering the circumstances in which a creator may decide to cover someone else’s work and replace it with their own, the next section provides context by considering the competition for space between street artists and graffiti writers.

The regulation of the appropriateness of a surface creates scarcity insofar as certain surfaces—on places of worship, houses—are effectively not available to creators to paint on. In addition to these are surfaces that are physically difficult or impossible for most creators to access in order to paint on. Scarcity is also the product of competition between creators for the remaining public spaces leading to contests over territory. As the following discussion shows, finding and keeping a spot where a work will remain visible is likely to be difficult.

Although it is important not to overstate the competition for space among and between graffiti writers and street artists, it is worth highlighting that, in the experience of some of the creators interviewed, graffiti writers were more successful in making space for their works. That is, they were more likely, though this was certainly not routine, to go over the works of street artists than vice versa. One street artist described the position as follows: “There is this old school, new school thing that sometimes you get from traditional graffiti writers . . . [Writers] can sometimes all look down on the new school of street artists, but it’s only a minority thing in my experience.”

Moreover, street artists are much less likely to retaliate either among themselves or with respect to graffiti writers, as one creator explained: “[I]t doesn’t happen really in the street art world. Street art gets dogged, capped, crossed out but it never leads to tit for tat between the street artist and graffiti writer, that I know of anyway.” Another creator made a similar point: “[I]t gets quite territorial and so it’s like you’ve got over my

tags and my throw-ups with your paste-ups, it's like, why don't I just put my tag and throw-ups back over your paste up? . . . [But] street artists won't hardly ever retaliate against graffiti writers."

This perhaps points to a different, more territorial, approach to space by graffiti writers as opposed to street artists. Competition between creators, combined with day-to-day vulnerability to destruction by local authorities and property owners, also means creators may need to keep going back to a surface to keep their work visible. "I don't get off on that kind of competitiveness, I'm not really into that game," one street artist said, while acknowledging the importance of going back when works have been erased: "You've got to be very tenacious to actually keep your work there."

Notwithstanding the above points regarding scarcity of space, competition between creators also has positive aspects. A street artist described competition for space as a potential driver for creativity in terms of the space that is available for those wanting to get up:

Climbing up fire escapes, hanging off bridges . . . It's a very competitive field but I think it's a very healthy competition . . . It's a very vibrant thing and I think it keeps the whole scene in check . . . [T]here's this territorial thing going on and I don't like the idea of street art getting too smug and cushy. I like that there's this constant battling for space.

There seems to be an implicit acknowledgment that producing art in public space is a process requiring constant engagement not only in relation to the acceptability of surface choice but also in regard to the actions of other creators. Competition for space might thus make individual works vulnerable but nevertheless contribute to the development of street art culture as a whole.

Popular types of spots tend to be those that are "in full view of the public."¹⁷ Thus certain places are more desirable than others. For example, a wall hidden away may be less desirable than one that is on a busy street and is thus prominent. Though, of course, it may well be easier to paint in the former compared to the latter. The choice of place is of particular relevance to graffiti writers since visibility is key to attaining respect within the subculture, and writers are highly adept at choosing spots.¹⁸ A creator, having chosen the right surface, may well be facing a wall that is

already covered with other creators' works, making some form of regulation, however loose, helpful where a creator must decide whether or not to go over an existing work. Perhaps the most relevant norm arising as a response to the scarcity of space thus relates to the acceptability of going over another creator's work and replacing it with one's own.

The regulation of scarcity has a number of aspects, three of which are highlighted here: first, that going over another's work is undesirable and should be avoided if possible; second, that the acceptability of destruction will depend on the quality of the work in question including the effort that has gone into it and whether it is in good condition; and, third, that destruction may be unacceptable regardless of the quality of the work because of the creator's status or, related to this point, because the work is memorializing a particular creator.

Creators expressed the view that if there is blank space available on a wall with a work or works already there, the blank space ought to be taken up first. As one creator explained, there are "spaces where it is expected that works will not last" but clearly, if there is space on the wall then "it would be out of order to paint over someone else's work just for the hell of it." Similarly, another creator said that the work is "on the street" and while "it's natural" to expect that it might not last, "you wouldn't purposely go out to ruin someone's work."

In considering the appropriateness of going over another creator's work, the *quality* of the work matters. Taking quality into account means considering two things: whether the work that will potentially be destroyed is already significantly damaged and whether the new work is superior in style. This was relevant to street artists and graffiti writers but especially to the latter in terms of whether the work is stylistically impressive in some way. Certainly, copyright law is not interested in the relative merits of different works in quite the same way, except perhaps in the narrow field of the moral right of integrity when considering destruction of works of "recognized stature."¹⁹

A graffiti writer summarized the prohibition against going over works of a superior aesthetic quality as a rule, stating simply: "don't go over [something] better than you." As another creator put it: "I don't tend to [go over other's work]. I don't see any need, there's enough, the world is big enough that you don't need to go over someone else's work especially if it's a piece of importance."

Relating to the quality of the work, the interesting question here is what exactly it means for the work of a fellow creator to be better. The traditional graffiti writing approach was described by one creator as follows: “It is old school rules. Throw up over tag, piece over throw up, never the other way around. If someone puts a throw up or tag over a piece they are seriously disrespecting the artist and the piece.” The quality of the work replacing the original creator’s work is important to street artists too:

[I]t was a new fresh clean space in London and everyone just kind of went crazy on it but it was fine, they didn’t go over the actual artwork, just the background . . . It’s weird how you sometimes get this respect. It’s nice how some people think, “I want to work on that wall but I’m not going to go over that, I’ll just find my own little space. . . .” If someone comes along and does something over my work I don’t care if they start doing it as I’m finishing as long as what they’re doing is better or at least on a par.

Similarly, another creator said: “I really respect the bigger pieces that people do, the multi-colored stencils, multi-layered and quirky.”

An assessment of quality also relates to the condition the work is in. When a work has been significantly damaged already, it may be appropriate to simply go over the work by putting a new work in its place. Similar concerns were expressed by street artists, though in slightly different terms when considering whether to go over graffiti writing. Relating to the damage a work might have suffered already, a street artist explained:

The only reason I would go over someone else’s work is if there was a need to so, for example, you had a piece that had been so heavily tagged that it was completely unrecognizable, the artist had made no effort to keep it there or change it or whatever and then you just think, well, hang on, anything is better than that and it’s time for the piece to evolve and it’s time for the area to evolve.

Making the same point, another street artist said going over would be fine: “If their work is looking shoddy, out of condition, out of context . . . and it doesn’t seem that it would be missed . . .” To complicate matters,

however, even where a work is damaged and destruction appears to be acceptable, a creator will need to consider whether the *status* of the creator indicates that the work should be left alone regardless.

The relevance of status is especially important within the graffiti subculture because graffiti writers operate within a hierarchy where, in any particular city's scene, a writer will know who is up and who is not—that is, who is famous within the subculture.²⁰ A work may be “better” by virtue of a creator's renown. Thus it is not necessarily the aesthetic quality of the work that matters, though that may have contributed to the creator's fame. As one creator explained: “The rules of the game are really important. You gotta respect writers who display superior skills or who have been in the game a long time.”

What this means is that a creator will need to have a good understanding of who the other active creators are and, crucially, how prolific they are. A key source of knowledge is that gained through an awareness of the works in a creator's city: Prolific creators will, quite simply, be visible over a long period of time. A creator will need to, as one street artist put it, “take a walk, have a look and see what's going on, learn about different artists.” Of course, there is no official arbiter of a creator's standing vis-à-vis other creators, making conceptions of status, at least to an extent, fluid.

The recognition of status does not, however, only apply to creators currently producing works. A specific prohibition that was noted by graffiti writers, and also some street artists, is that memorial works—either produced by a creator who subsequently died or created in such a person's honor—must be left alone. As one street artist explained: “[I] don't like going over people's work but it's a matter of how much work has gone into it and, you know, the significance of it, whether that person's alive or dead. [. . .] Memorial pieces tend to be untouchable.”

It is also worth noting here that, unlike the norm against copying, the regulation of scarcity moves beyond the substitution of copyright rules. It provides an additional, context-sensitive norm addressing the specific problem of scarcity by considering the nature of street art and graffiti writing practice, including taking account of competition between creators. The notion of respect among creators underpins the resulting norm against destruction and might be seen as the fundamental basis on which scarcity is addressed.

This concern with respect also suggests that the norm against going over potentially helps to preserve works that are significant to the community of creators, in particular as exemplified by the respect afforded to memorial works. It suggests that creators are willing to give up space because they do not appear to see themselves as atomized creators but rather as creators alongside others. At the same time, the norm against destruction appears to act as a shield for the individual labor expended in creating a work.

Copying and Copyright

The preceding section considered competition between graffiti writers and street artists as well as different aspects of the norm against destruction of works. Of course, street art is not only visible to other creators; how the other people on the street interact with the works of graffiti writers and street artists also matters. This part traces creators' expectations about the acceptable copying of their works by members of the public before turning to consider recent cases in order to determine whether, outside of their own creative communities, creators are likely to succeed in making copyright claims.

The interviews with graffiti writers and street artists indicated that there was a keen awareness of how their works should be used. This either was articulated without reference to copyright or was considered quite separately from the potential application of copyright law. Several points are relevant in examining creators' views on exploitation of their works by others: first, placement of their works in public makes copying inevitable and, to an extent, welcome; second, sharing street art and graffiti is potentially beneficial for the development of street art culture; and third, commercial copying of works is unacceptable both because of the lack of remuneration provided to creators and because it debases graffiti and street art creativity.

The fact of public placement of works on the street effectively meant, according to a number of creators, that reproduction of these works is to be expected. Indeed, some creators were bold in their acceptance of copying, specifically where it took the form of photographs. One creator commented that their work should not be protected from such copying, "nor should anyone else's."²¹ The expectation that copying would occur

is grounded in an understanding that the physical situation of a work must change how that work can be used. As a graffiti writer asked: “If you do it in a public place how can you then comment when it’s in the public?” In particular, creators articulated an awareness that when their work was in public it was no longer only their interests as creators that mattered. Giving up rights, up to a point, to works in public space appears to stem from the motivation to be seen by others, suggesting a sort of implied license to copy.

Reproduction is accepted as a precursor to sharing street art and graffiti. Members of the general public making copies, in particular making works available for others to see on the Internet, “keeps the scene alive.” Such reproduction increases creators’ visibility and becomes a part of how the culture develops; it is not antagonistic to the creator’s interests as members of the creative community being celebrated. For example, taking photographs of graffiti writing contributes to the documentation of graffiti writing culture, and in turn, may inspire its further creation in the manner of *Subway Art* and other books that inspired the first generation of UK writers. Indeed, a prevailing view of non-commercial use was that it is flattering: “I’m flattered if people take the time to photograph the work [for] their own personal documentation, that’s wonderful. What really frustrates me is when people take photos to sort of make a commercial gain from it.”

The important thing to note is that sharing graffiti writing and street art is not simply justified on the basis of benefit to an individual creator. As one street artist put it: “I am part of the public. I am painting for us, really inasmuch as I can gauge what other people are feeling, what the area means to them.” There appears to be a disjuncture between what copyright can do—provide a remedy to an *individual* creator—and the creator’s expectation that this recognition of individual creativity is *part* of the development of street art culture that is experienced by creators and members of the public alike.

However, creators did not state that there was no limit to what they would be happy to see done with their work, despite comments such as “[you] give up all rights to have a say.” Rather, once the work is in public, it matters how that work is consumed. Creators’ expectations regarding copying gleaned from the interviews might be summarized thus: Sharing with others is acceptable while copying for commercial gain—for

example, placing works on canvas or on clothing or using works in advertising without permission, and without compensating the creator—is usually unacceptable. Two explanations, among others, were given for this: that such copying ought to be compensated, but that even when compensated it may be unacceptable because it negatively exploits the cultures of graffiti writing or street art.

One street artist was clear that the use of graffiti and street art ought not to exploit it negatively: “I think it’s further encroaching on our individual freedom, onto our social freedom. That’s why I strongly object to commercial graffiti.” And it is not only the appropriation of the images but also of the process and style of street art that the creator objected to. Considering a bank using stencils in its advertisements, the same street artist said: “This is so offensive, that in the guise of offering you a service they’re actually trying to make money, trying to draw you in and use the cachet of a folk art . . . [They] are trying to hijack that social forum for their gain. I think that’s really wrong.” There is an underlying plea here for the recognition of the social value of works aside from their potential economic value: “There are emotional and social motives and these are pure, really pure motives. That is beautiful.”

This is not to say that graffiti writers and street artists in general eschew commercial opportunities. Some creators will, apart from producing works on the street, also participate in solo or group exhibitions, undertake commissioned work, or sell their works.²² Whether creators are opposed to the commercialization of their work appears to depend on whether they are in control of the nature and range of uses of the work. As one creator said: “[S]treet artists have come in and kind of branched out in different ways, making furniture and making clothes. . . . I don’t think it’s selling out.”

Where reproductions exploit the creator’s works without recompense of the moral or economic variety, far less tolerance was expressed. Discussing the experience of a fellow street artist, a creator expressed distaste at a well-known clothing store that “blatantly ripped off” other artists’ works.²³ A small number of creators also mentioned that their work had been copied by big clothing stores. At least one creator felt resigned to this happening: “[The company] has copied an idea of mine and made a t-shirt they sell in their shops, also places sell photographs

of my street work printed on canvas. There's nothing that can be done about that."

It was, for a number of creators, problematic that their works were being reproduced without compensating them: "[W]hen you do street art you are allowing people to publish your work, but if they earn money you can control it." The street artist above does not consider copyright specifically as a means of control here but rather raises the expectation of being rewarded in some way. This came up for other creators too. For example: "If someone's making money out of my art I wouldn't mind seeing some of that money, but when someone takes a photograph, it's their photograph . . . [I]t can be stealing or it can be a new artwork in itself depending on how well that photograph's been taken."

Interestingly, for another street artist, changes made to a photograph of their work would not necessarily matter. Asked about this, a street artist said: "I don't know, I can't imagine it happening but it'd be interesting if it did . . . I'd have to see it before I made any judgment." This again points to the importance of sustaining the culture as a whole—for example, by sharing the work.

It is worth noting that the creators' expectations regarding copying by the public described here echo the prohibition in copyright law against reproduction without a copyright owner's permission.²⁴ The expectations also broadly track existing copyright exceptions in the United States and UK: fair use/fair dealing and the public place exceptions. First, the expectation that copying will be non-commercial seems to suggest something of the fair use²⁵ approach to copying. Second, the acceptance that publicly visible works will be reproduced is akin to the architectural works exception in U.S. law,²⁶ albeit covering pictorial works, and section 62 CDPA in the UK, which provides an exception to infringement for copying buildings and three-dimensional artistic works on public display. Yet the creators' more expansive approach to copying works on public display is, at the same time, potentially narrower than section 62 because it disallows commercial reproductions.²⁷

Alongside the expectations creators have about how the public can interact morally with their works, they may well be aware that their creations are potentially protected by copyright; the question remains whether these rights can be enforced. As the remainder of the discussion

shows, creators are not likely to have their expectations regarding appropriate public copying met by making copyright infringement claims.

Some creators, assuming they are able to meet the costs of litigation, have been pushed to seek redress under copyright law in an effort to prevent the exploitation of their works for commercial ends and without remuneration. Yet two recent examples of U.S. litigation relating to economic and moral rights highlight the shortcomings of copyright law in protecting graffiti writing and street art. Specifically, copyright law cannot protect the process of making these works nor the process of creation as part of a community, especially in the case of graffiti writing, by recognizing and protecting particular letter styles.

In relation to economic rights, for example, *Reece v. Ecko*²⁸ concerned, among other things, the ultimately successful motion to dismiss the author's copyright infringement claim regarding reproduction of graffiti writing—specifically, the stylized word “Dip”—in the defendant's video game.²⁹ In granting the motion, the court first identified the potentially protectable parts of the plaintiff's graffiti work, namely the name “Dip,” letter style, color schemes, geometric shapes, and backgrounds.³⁰ As the discussion above suggests, for graffiti writers, the reproduction of a name, even in a different style, and/or the reproduction of certain elements of style including the style of letters and associated shapes, would contravene the norm against copying within the subculture. In *Reece v. Ecko* such subcultural sensitivities were considered somewhat obliquely.

The court noted that the expression of the word “Dip” was copyright protected and that for “graffiti art, the form of the lettering at issue is arguably central to the artistic expression of particular words”³¹ and that the “personalized, artistic variations of lettering” were relevant to determining whether an infringement had occurred.³² Nevertheless, the court found that Reece would not have been able to demonstrate copyright infringement: The two works were similar but the “ordinary observer” would not find that their “aesthetic appeal” was the same.³³ This, the empirical research suggests, is in marked contrast to graffiti writers who, in determining whether copying has occurred, are highly attuned to apparently minor stylistic differences. It remains to be seen what the outcome of a recent complaint by two graffiti writers over the appropriation of the stylized forms of “Revok” and “Steel” for clothing will be.³⁴ Even so, perhaps this is the start of a greater assertiveness by graffiti

writers and street artists in resisting the exploitation of their works, as demonstrated in the recent complaint by Rime against Moschino and Jeremy Scott for reproducing his work on a dress worn by singer Katy Perry.³⁵

With respect to moral rights, courts may also be willing to at least entertain such claims. In *Cohen v. G & M Realty*,³⁶ the District Court for the Eastern District of New York, while initially granting a restraining order, declined to grant a preliminary injunction to the plaintiffs to prevent the destruction of works of visual art at a site known as 5Pointz alleged by the plaintiffs to be works of “recognized stature” under VARA. In *Cohen*, the position was more fraught because the site itself was being demolished and redeveloped; the best chance to save the works lay in engaging with formal copyright law and making a moral rights claim. Yet the works were whitewashed before the judgment denying an injunction was handed down and the whole building was demolished some time afterward.³⁷ The merits of the claim for destruction of works of “recognized stature” are yet to be fully litigated,³⁸ but the reasoning in the judgment suggests that subcultural creativity in the form of graffiti writing and street art will prove difficult to protect. The stature of street art is difficult to demonstrate unless subcultural fame is taken seriously as a mark of esteem and street art is accepted to have (potentially) broader cultural significance that makes it worth protecting even when this conflicts with real property rights. Both the lack of recognition of the reproduction of style in *Reece v. Ecko* and the lack of recognition of the respect afforded to the works in *Cohen v. G & M Realty* present a marked contrast to the informal norms for regulating creativity among graffiti writers and street artists that are highly sensitive to the creative processes in a way that copyright law is not and, perhaps, cannot be.

Conclusion

Recent controversies over street art and graffiti creativity suggest that such creativity will continue to beguile members of the public and commercial enterprises alike. Copyright claims may increase and creators may come to find success. And yet, for graffiti writers and street artists, and indeed many of the other creators featured in this edited collection, intellectual property will only ever be a minor part of the

normative framework within which they operate. Certainly, the outline of the norms regulating street art and graffiti writing presented here raises questions about the justifications for copyright and its efficacy in promoting and protecting creativity. Copyright law cannot, for example, protect the process of creating street art and graffiti; it cannot protect pleasure, nor can it promote the community-led development of subcultures. Copyright does not incentivize this form of creativity, nor does it present the most effective means for regulating it, at least as considered from within the relevant community itself.

Instead, this chapter suggests that graffiti writers and street artists adopt copyright-like norms—relating to copying by other creators as well as members of the public—which differ from copyright in that they are attentive to not only the subject matter of the works but also the process of creating them. Indeed, the discussion here suggests that creators' norms are not only directed at regulating works but are constitutive of communities of creators. Especially in the graffiti subculture, the norms demonstrate a communitarian approach to creativity in which the rules addressing individual behavior are finely balanced so as to protect individual creativity only to the extent that this enables graffiti culture as a whole to flourish by, for example, reducing the chances of works being destroyed and encouraging letter style innovations.

It seems unlikely that a more sensitive copyright system would be capable of incentivizing the production of more street art and graffiti writing. Even without such a system, street art and graffiti writing will likely continue to flourish. This continued flourishing, combined with the currently limited copyright enforcement where graffiti writing and street art are concerned, however, ought not to be used as an excuse to exploit the creativity of the street without regard to the moral or economic rights of its creators. Rather, it is another reason for wanting to reform copyright in a manner that is sensitive to the creative processes of the creators it seeks to protect and the culture(s) it hopes to promote.

NOTES

This chapter reflects a part of the empirical and other research (undertaken during doctoral studies at King's College London, 2008–2012) forming a detailed study of copyright and graffiti writing norms published as: Marta Iljadica, *Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture* (Oxford: Hart Publishing, 2016).

- 1 In the United States, as a pictorial work under U.S.C. §102(a)(5); in the UK as an original artistic work under s. 1(1)(a) Copyright Designs and Patents Act 1988 (“CDPA”). Authors have certain exclusive rights including to reproduce their works: U.S.C. 17 §106(1); s. 16(1)(a) CDPA.
- 2 E.g., in the UK, under s. 1 Criminal Damage Act 1971.
- 3 Dotan Oliar and Christopher Sprigman, “There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy,” *Virginia Law Review* 94, no. 8 (2009): 1787–1867. Emanuelle Fauchart and Eric von Hippel, “Norms-Based Intellectual Property Systems: The Case of French Chefs,” *Organization Science* 19, no. 2 (March 2008): 187–201; Aaron Perzanowski, “Tattoos & IP Norms,” *Minnesota Law Review* 98, no. 2 (2013): 511–591. Rebecca Tushnet, “Payment in Credit: Copyright Law and Subcultural Creativity,” *Law & Contemporary Problems* 70 (2007): 135–174; Luke McDonagh, *Does the Law of Copyright in the UK and Ireland Conflict with the Creative Practices of Irish Traditional Musicians? A Study of the Impact of Law on a Traditional Music Network*, PhD thesis (School of Law, Queen Mary, University of London, 2011). For an overview of creativity that flourishes despite copyright forbearance see: Elizabeth L. Rosenblatt, “A Theory of IP’s Negative Space,” *Columbia Journal of Law and the Arts* 34, no. 3 (2011): 317–365, 330–334.
- 4 For definitions of types of graffiti see, e.g., glossary in Henry Chalfant and James Prigoff, *Spraycan Art* (London: Thames & Hudson, 1987), 12. See also Craig Castleman, *Getting Up: Subway Graffiti in New York* (Cambridge, MA and London: MIT Press, 1982), 26–31.
- 5 Jeff Ferrell, *Crimes of Style: Urban Graffiti and the Politics of Criminality* (Boston: Northeastern University Press, 1996).
- 6 On the different treatment of graffiti writing and street art, see Alison Young, “Criminal Images: The Affective Judgment of Graffiti and Street Art,” *Crime, Media, Culture* 8, no. 3 (2012): 297–314, 298–299.
- 7 For descriptions of the different “genres” of street art, see Alison Young, *Street Art, Public City: Law, Crime and the Urban Imagination* (Abingdon and New York: Routledge, 2014), 10–14.
- 8 On the hierarchy, fame, and recognition, see Mark Halsey and Alison Young, “The Meanings of Graffiti and Municipal Administration,” *Australian and New Zealand Journal of Criminology* 35, no. 2 (2002): 165–186, 172–173. Also, see generally Nancy Macdonald, *The Graffiti Subculture: Youth, Masculinity and Identity in London and New York* (Hampshire and New York: Palgrave Macmillan, 2001).
- 9 Ferrell, *Crimes of Style*, 27–28.
- 10 Martha Cooper, and Henry Chalfant, *Subway Art* (London: Thames & Hudson, 1984). Referred to by a number of people during the fieldwork as the “bible of graffiti.”
- 11 That intellectual property law might not be a good fit has been discussed in other contexts. See, e.g., Jessica Silbey, *The Eureka Myth: Creators, Innovators and Everyday Intellectual Property* (Stanford: Stanford Law Books, 2015); Kirsty Robertson,

- “No One Would Murder for a Pattern: Crafting IP in Online Knitting Communities,” in *Putting Intellectual Property in Its Place: Rights Discourses, Creative Labor, and the Everyday*, ed. Laura J. Murray et al. (Oxford and New York: Oxford University Press, 2014).
- 12 For an overview of the justifications for intellectual property, see William Fisher, “Theories of Intellectual Property,” in *New Essays in the Legal and Political Theory of Property*, ed. Stephen R. Munzer (Cambridge: Cambridge University Press, 2001).
 - 13 Jeff Ferrell and Robert D. Weide, “Spot Theory,” *City* 14, no. 1–2 (2010): 48–62, 55.
 - 14 For an overview of the UK/EU position, see Lionel Bently and Brad Sherman, *Intellectual Property Law*, 4th ed. (Oxford: Oxford University Press, 2014), 212–217.
 - 15 The complexities of this norm in particular are beyond the scope of this chapter and are discussed elsewhere: Iljadica, *Copyright Beyond Law*.
 - 16 Young, *Street Art, Public City*, 29. For another empirical account of street art in the city, including an exploration of street art creativity as a ritual, see Rafael Schacter, *Ornament and Order: Graffiti, Street Art and Parergon* (Farnham and Burlington, VT: Ashgate, 2014).
 - 17 *Ibid.*, 51.
 - 18 For an account of how to choose and the norms relating to this choice, see Ferrell and Weide, “Spot Theory.” Though train writing is outside the scope of this chapter, it is important to note that trains are an especially desirable surface for graffiti writers. For empirical accounts of the regulation of graffiti writing including train writing, see, e.g., Andrea Mubi Brighenti, “At the Wall: Graffiti Writers, Urban Territoriality, and the Public Domain,” *Space and Culture* 13, no. 3 (April 15, 2010): 315–332.
 - 19 Under the Visual Artists Rights Act (“VARA”), U.S.C. §106A.
 - 20 On these dynamics, including on “off-limits” spots: *ibid.*, 55.
 - 21 Another creator assumed their work could not be legally protected: “The law doesn’t protect the work, I don’t know if [it] should.” There may be a legal basis for this, at least in the UK where courts could potentially refuse to enforce copyright on public policy grounds (s. 171(3) CDPA) where a work was placed on property without permission.
 - 22 For example, by selling prints, see Luke Dickens, “Pictures on Walls? Producing, Pricing and Collecting the Street Art Screen Print,” *City* 14, no. 1–2 (2010): 63–81. This commercial engagement, however, is unlikely to be attractive to graffiti writers concerned first and primarily with writing their name and attaining fame within the graffiti subculture.
 - 23 It is worth noting, however, that imbalances of bargaining power means that even licensing works would not necessarily prove lucrative. On the position of UK creators of visual art see Martin Kretschmer et al., *Copyright Contracts and Earnings of Visual Creators: A Survey of 5,800 British Designers, Fine Artists, Illustrators and Photographers* (CIPPM, Bournemouth University, 2011).

- 24 U.S.C. §501(a); U.S.C. §106 grants authors the exclusive right to reproduce their works. Similarly, in the UK, it is an infringement to copy: s. 17(1) CDPA.
- 25 Echoing, in particular, U.S.C. §107(1) by taking into account whether it is a “commercial” use.
- 26 U.S.C. §120(a): “ordinarily visible from a public place.”
- 27 Since it appears that this would also allow for commercial copying. See New Zealand case decided on a very similar provision: *Radford v. Hallenstein Bros Limited*, HC Auckland CIV 2006-404-4881 [2007] NZHC 1654.
- 28 *Daniel Reece v. Marc Ecko Unltd et al.* 10 Civ. 02901 (JSR)(DF)(SDNY) 2011 US Dist Lexis 102199 201.
- 29 The motion to dismiss also included a moral right of attribution claim: *Reece v. Ecko*, 41-44.
- 30 *Ibid.*, 24.
- 31 *Ibid.*, 28.
- 32 *Ibid.*
- 33 *Ibid.*, 36.
- 34 Complaint, *Williams et al. v. Roberto Cavalli SpA et al.* CV 14-06659-AB, February 12, 2015, Central District Court of California.
- 35 Complaint, *Tierney v. Moschino* CV 2:15-cv-05900, August 5, 2015, Central District Court of California, Western Division.
- 36 No. 13-CV-5612 (FB)(JMA) Eastern District of New York, November 20, 2013.
- 37 Cara Buckley and Marc Santora, “Night Falls, and 5Pointz, a Graffiti Mecca, Is Whited Out in Queens,” *New York Times*, November 19, 2013, www.nytimes.com; Amand Holpuch, “New York’s graffiti mecca 5Pointz torn down,” *The Guardian*, August 22, 2014, www.theguardian.com.
- 38 Complaint, *Castillo et al. v. G&M Realty LP et al.* Case No. 15-CV-03230 (FB) (RLM) Eastern District of New York, June 3, 2015.