

**INK, SPRAY & COPYRIGHT: PROTECTION OF STREET ART'S IP & THE
PALETTE OF COMMERCIALIZATION**

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ABSTRACT

Graffiti or Street art, in the midst of the teeming fabric of urban landscapes, stands out as a vivacious testament and a vibrant dialogue with a social-cultural milieu. These artists, through every stroke of paint, with each ethereal design of stencil, and every exuberant flourish of a graffiti tag, embellish walls and streets by soaking them in narratives that transcend beyond the conventional artistic notions. There is a two-fold perspective to street art, wherein one aspect shows the creativity entailed in them, and the other aspect is about the constantly increasing growth of such form of art and how this growth acts as a beacon for various issues. One of the biggest complexities associated with street art is that of IP and its commercialization. Literature does indicate that street art is subject to copyright, albeit not entirely. However, the lacunae are that street art, despite fulfilling the components of copyrightability, still doesn't attract the same protection as museum-art paintings. Why would it be difficult to give and enforce legal protection for street art if it fits the standards for such protection? Maybe it's because street art is usually illegal, or maybe it just doesn't fit the traditional definition of "fine arts".

These lacunae and conundrums surrounding street art are the subject of discussion throughout this paper. This research paper endeavors to explore the nexus of copyright and street art by providing a comparative analysis of different domestic laws and delving into the question as to what happens when the art is illegal, will it still, to some extent, be provided with copyright protection? The paper further deals with other aspects regarding the same such as the de minimis principle, along with certain case studies. The paper further delves into the commercialization issue with respect to street art and copyright, dealing with aspects relating to author's permission, "droit de suite", transformative use and fair use doctrine, and also the rights of artists in case of illegal street art. By its findings, this research attempts to add to the current discourse about street art's IP conundrum and commercialization aspect while also advocating certain suggestions for better regulation.

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I. INTRODUCTION

“Street Art is like good fiction, it speaks out on behalf of everyone, for us all to see”.

– Carla Krueger¹

Working against the clock and frequently against the law, they breathe life into the drab black and grey of the streets and fill them with hues and patterns in the middle of the night, when the rest of the world has already given in to slumber. Some refer to it as vandalism, and some as an artistic endeavor. In the midst of the bustling fabric of urban landscapes, street art stands out as a lively testimonial and a vivid engagement with the social-cultural setting. Street art has been a portrayal of a lot many ideological tenets. It could be a piece of poetic literature unravelling the artistic excellence that is even celebrated worldwide, for example, the Southend-on-Sea Art Festival, which happened recently and was reported to be the biggest street art festival in Europe, attracting more than 200 artists all over the world who are expected to paint over 100 walls, including a collection of cube installations at Warrior Square.²

On the other hand, street art could also be used as a tool for political uprising. The example of the London Street Art Wall in Brick Lane could be taken here, wherein the wall was found to be covered with slogans extolling Chinese Communist Party ideology.³ Similarly, the extensive lineage of murals and other public art in Iran has a fresh chapter added to it because of the country's current surge in feminist activism⁴ that symbolized defiance, resistance and resilience, taking roots from Mahsa Amini's death⁵ in police custody.

Street art has the underlying potential to illustrate societal, socio-economic, political, cultural predicaments, and create communities. *“When I finish my art piece, it doesn't belong to me anymore. It belongs to the street, and it belongs to the people”*, said Oumeme Bosuassida⁶ while explaining how street art evolved her life, while sharing her story with The Irish Times. Street art has been revolutionary, life-changing and inspirational for a vast majority of people. An example could be taken from the

¹ *Street Art Quotes*, GOODREADS, <https://www.goodreads.com/quotes/tag/street-art>.

² Anglia, *South-End City Centre Transformed Thanks To Europe's Largest Free Street Art Festival*, ITVX (Sep. 3, 2023), <https://www.itv.com/news/anglia/2023-09-02/city-centre-awash-with-colour-thanks-to-europes-largest-street-art-festival>.

³ Ivana Kottasova, *Chinese Propaganda Slogans Turn London Street Art Wall Into A Protest Site Against Beijing*, CNN WORLD (Aug. 8, 2023), <https://edition.cnn.com/2023/08/08/china/chinese-political-slogan-brick-lane-london-intl-hnk/index.html>.

⁴ Jo Adentunji, *Iran's Street Art shows defiance, resistance and resilience*, THE CONVERSATION (Aug. 30, 2023), <https://theconversation.com/irans-street-art-shows-defiance-resistance-and-resilience-209678>.

⁵ Narges Bajoghli, *“Woman, Life, Freedom”: Iran's Protests Are a Rebellion for Bodily Autonomy*, VANITY FAIR (Sep. 29, 2022), <https://www.vanityfair.com/news/2022/09/mahsa-amini-irans-protests-rebellion-bodily-autonomy>.

⁶ Sally Hayden, *Graffiti artist finds her freedom in Tunisia's streets*, THE IRISH TIMES (Sep. 2, 2023), <https://www.irishtimes.com/world/africa/2023/08/30/graffiti-artist-finds-her-freedom-in-tunisiastreets/>.

street artist from Melbourne named “Man of Darkness”, who himself faced issues because of his talent as it was then majorly seen as a clandestine affair, but now he has undertaken the task of providing his talent to the youth of Melbourne, through a city programme called the Signal, which aims at inspiring the developing talent in the youth to never give up on their talent of art.⁷ In March 2023, the Lodhi District in Delhi, India, was named the first Art District in India, entailing more than 65 beautiful and breath-taking murals by both domestic and global artists, who have emphasized one major message that streets are where the people are, and street art has the power to shape people’s perspectives.⁸

Now that there has been a major shift with regards to the legality of street art, the perspectives of artists have also evolved, which hasn’t reduced their intent to create art, rather it has developed in them the thought of getting their art protected from being copied. The legal status of street art still falls under the category of ‘uncertain’. The problem associated with the legality of street art is the fact that it, to some extent, qualifies as vandalism because it is done on street walls which is either public or private property. For example, in France, Article 322-1 of the Criminal Code⁹ labels property distortion as misdemeanor. Similarly, every state has its law regarding the right to one’s property, however, what increases the problems further is when a state specifically stands against street art. For example, in San Francisco, the government has in place a strict “no-graffiti” policy.¹⁰ Nevertheless, street art, specifically graffiti, is being termed as the 21st century heir to pop art.¹¹

The major conundrum here is with regards to the fact that due to the ever-increasing likeness towards graffiti and other street art, it usually acts as a beacon for plenty of gallery heads, publishers, filmmakers, and so on, to lay claim over the same somehow.¹² Hence, the quandary of intellectual property and its relationship to commercialization is one of the most challenging aspects of street art. Although not totally, according to literature, street art is protected by copyright. The flaw is that, despite meeting the requirements for copyrightability, street art doesn’t

⁷ Michael Georgiou, *Man of Darkness provides lightness to Melbourne youth through street art*, NEOS KOSMOS, (Sep. 5, 2023), <https://neoskosmos.com/en/2023/09/05/life/arts/man-of-darkness-provides-lightness-to-melbourne-youth-through-street-art/>.

⁸ Shreya Agrawal, *‘Streets art where the people’: Artist underscore the power and potential of street art in India*, THE INDIAN EXPRESS (Mar 31, 2023), <https://indianexpress.com/article/lifestyle/art-and-culture/street-art-power-potential-india-lodhi-festival-murals-8518469/>.

⁹ Code pénal [C. pén.] [Criminal Code] art. 322-1 (Fr.).

¹⁰ Louise Carron, *Street Art: Is Copyright for “Losers”? – A Comparative Perspective on the French and American Legal Approach to Street Art*, NYSBA (Jan. 11, 2019), <https://nysba.org/street-art-is-copyright-for-losers-a-comparative-perspective-on-the-french-and-american-legal-approach-to-street-art/>.

¹¹ Apurva Sontakke, *Art in the 21st century: Street Art and Graffiti*, RETHINKING THE FUTURE, <https://www.rethinkingthefuture.com/architectural-community/a10481-art-in-the-21st-century-street-art-and-graffiti/>.

¹² David Diallo, *From the Street to Art Galleries: How Graffiti Became a Legitimate Art Form*, REVUE DE RECHERCHE EN CIVILIZATION AMÉRICAINNE (Sep. 5, 2024), <http://journals.openedition.org/rcca/601>.

enjoy the same level of protection as artworks that are displayed in galleries. Street art, particularly that which is categorized as sculptural, is likely to conform with copyright rules, which makes it eligible for protection. This is especially true for urban art.¹³ Why, if street art meets the requirements for legal protection, would it be challenging to grant and enforce that protection? Perhaps it's because street art is typically prohibited or because it doesn't adhere to the conventional notion of what "fine art" is.¹⁴ The major issues of copyright and ownership surrounding street art involve firstly the unauthorized reproduction/use of street art by means of certain other methods of expression or showcase, such as cinematographic film, books, clothing, television shows, etc.¹⁵

There have been a variety of cases wherein third parties have made an unauthorized attempt to showcase the murals and street art from various places through their medium without the permission of the artists and this has given rise to a lot of conflicts, which shall be dealt with in the paper. Then next point of dispute comes related to the preservation and ownership of physical graffiti works. There have been, again, instances for example the 5 Pointz building in Long Island New York, whose walls have been home to a variety of graffiti designs. However, disputes arose in 2013 when the owner of the building decided to demolish the same and this sparked a huge number of street artists who then petitioned against this demolition together.¹⁶ This dispute ultimately resulted in the US court finding in favor of the graffiti artists and awarded a compensation of \$6.7 Million to a total of 21 graffiti artists because of their murals were destroyed due to the demolition.¹⁷

The subject of this paper's discussion is the gaps and challenges that surround street art's copyrightability. This research paper seeks to look into the relationship between copyright and street art by comparing and contrasting various domestic laws and exploring the issue of whether copyright protection will still be granted to the art despite the fact that it is illegal. The research also addresses pertinent topics, including the de minimis principle and other case studies. The paper further explores the commercialization dilemma in relation to street art and copyright,

¹³ Sidhant Singh, *Navigating Copyright And Ownership Complexities In Street Art: An In-Depth Analysis*, MONDAQ (Jan. 24, 2024), <https://www.mondaq.com/india/copyright/1415796/navigating-copyright-and-ownership-complexities-in-street-art-an-in-depth-analysis>.

¹⁴ Celia Lerman, *Protecting Artistic Vandalism: Graffiti and Copyright Law*, 2 N.Y.U J. INTELL. PROP. & ENT. L. 295, 302 (2013).

¹⁵ Pascale Chapdelaine, *Graffiti, Street Art, Walls and The Public in Canadian Copyright Law*, 123 U. WINDSOR 126 (2019).

¹⁶ *Id.* at 304.

¹⁷ Alan Feuer, *Graffiti Artists Awarded \$6.7 Million for Destroyed 5 Pointz Murals*, THE NEW YORK TIMES (Feb. 12, 2018), <https://www.nytimes.com/2018/02/12/nyregion/5pointz-graffiti-judgment.html>.

addressing areas such as author's permission, "droit de suite", transformative use, and fair use doctrine, as well as the rights of artists in the event of unlawful street art. This research paper endeavors to contribute to the ongoing conversation regarding the IP Conundrum and Commercialization of street art by presenting its findings and also pushing for specific recommendations for effective governance.

II. AN INSIGHT INTO GRAFFITI: ETHEREAL ART OR AESTHETIC VANDALISM

A. Writings on the Wall: A Peek into a City's Soul

Street art means broadly covers many forms of art including, but not limited to, writings on the wall, spray paintings, stencils, stickers, mosaic tiling, wood blocking, dance, structures, posters, video projections, etc.¹⁸ Graffiti is a kind of street art which is made by individuals on public spaces, primarily by the use of spray paints. This form of art is usually made in public view, but without the proper authorization or permission from the concerned authorities.¹⁹

Here, it is pertinent to highlight that graffiti is not some modern form of art; rather, it is something which can be traced back to the Roman Empire, ancient Greece, and ancient Egypt.²⁰ The term most widely used to describe such art is "graffiti", evolving from the Italian word "graffiato" (to scratch), which in turn has been extracted from the Greek term "graphein" (to write).²¹ It was used in pottery to make designs by scratching off a layer of the surface to reveal another, as well as in cave paintings in ancient times by carving on the cave walls using a sharp object. Broadly, graffiti can be classified into two – (i) tagging which mostly consists of writing names on the wall), and (ii) mural art which is of more elaborate and complex in nature.²²

Moreover, graffiti art is significant to preserving culture.²³ For instance, it was only upon the examination of the graffiti (inscriptions on walls and rocks) found in Syria, Jordan, and Saudi

¹⁸ CRAIG CASTLEMAN, *GETTING UP: SUBWAY GRAFFITI IN NEW YORK* (The MIT Press, Cambridge, Massachusetts, 1984).

¹⁹ C. HUNDERTMARK, *THE ART OF REBELLION – WORLD OF STREET ART* (Ginko Press, 2003).

²⁰ Ileana Nicoleta Salcudean, *Art and Vandalism: Crossbreeding of Street Art (re)interpretation of Street Art from a Sociological, Aesthetical, and Interactivity Perspective*, 12 J. MEDIA RSCH. 45, 48 (2012).

²¹ Ramesh Sampui, *Graffiti Art: A Modern Approach to Address Social Concern*, 9(7) J. RSCH. HUMAN. & SOC. SCIS. 42, 47 (2021).

²² Iliana Mercier, *Graffiti and Neighborhood Change: From Vandalism to Street Art*, BACHELOR'S THESIS, UNIVERSITY OF ARIZONA, TUCSON, USA 1, 13 (2022).

²³ Lynn Van Matre and Peter Baniak, *Question of Mural Integrity*, CHICAGO TRIBUNE (Mar. 26, 1995), <https://www.chicagotribune.com/1995/03/26/question-of-mural-integrity/>.

Arabia that an ancient Arabic language (Safaitic) was recovered.²⁴ In the classical era, graffiti carried a different connotation wherein it was used to portray “phrases of love declarations, political rhetoric, magic spells, curses, famous quotes, and simple words of thought as compared to today’s popular messages of social and political ideals.”²⁵ So, graffiti gives the future generations a peek into the lives led by the past generations.

Further, the role of graffiti is significant as an effective tool for the achievement of political and social goals within the society by way of spreading awareness and addressing issues.²⁶ In areas where there are some ongoing conflict or strife, graffiti acts as a mode of expression of the voices of the people.²⁷ It allows them a platform for communication in conditions where these same people are oppressed by institutional means. This is of extreme importance for persons belonging to social, ethnic, and racial minorities. In the 1970s²⁸, graffiti became popular in the U.S. as angry and anti-authoritarian individuals flooded the walls and subways as a medium to express their anger.²⁹ They voiced their demands arising from racism, poor environment, violence, poverty, neglect, and homelessness.³⁰ So, in the backdrop of a fragmented social fabric, the cities became an open art gallery.

B. Graffiti in India

In India, similar to the examples found in the other parts of the world, some of the oldest murals can be found in the Ajanta caves in the form of cave paintings in Maharashtra, which have been traced back to 200 B.C³¹. Likewise, paintings on the walls of the houses belonging to tribes exist as part of their tradition. In the contemporary times, graffiti has seeped into various fields and has evolved further in the forms of “hand painted Bollywood posters, typographic sign boards, truck art, images of Gods painted along sidewalks, tiles fixed to prevent people from urinating in public, painted advertisements by small businesses, political graffiti, etc.”³²

²⁴ David F. Graf, *Language and Lifestyle as Boundary Markers: The North Arabian Epigraphic Evidence*, 16 MEDITERRANEAN ARCHEOLOGY 27, 28 (2003).

²⁵ Kritika Verma, *Historical Background of Graffiti and Street Art in India*, ABIR POTHI (Mar. 6, 2023), <https://abirpothi.com/historical-background-of-graffiti-and-street-art-in-india/>.

²⁶ Andreea-Loreta Cercleux, *Graffiti and Street Art between Ephemerality and Making Visible the Culture and Heritage in Cities: Insight at International Level and in Bucharest*, 12(5) SOCIETIES 129, 137 (2022).

²⁷ Lori L. Hanesworth, *Are They Graffiti Artists or Vandals? Should They Be Able or Canned?: A Look at the Latest Legislative Attempts to Eradicate Graffiti*, 6(2) DEPAUL J. OF ART. TECH. & INTELL. PROP. L. 225, 226 (1996).

²⁸ Elizabeth G. Gee, *City Walls Can Speak: The Street Art Movement and Graffiti's Place in First Amendment Jurisprudence*, 20 JEFFREY S. MOORAD SPORTS L. J. 209, 213 (2013).

²⁹ Lori L. Hanesworth, *supra* note 27 at 227.

³⁰ Elizabeth G. Gee, *supra* note 28 at 213.

³¹ Aparajita Bhasin, *The Evolution of Street Art and Graffiti in India*, 2 CHANGING TIMES: RESILIENCE 112, 114 (2018).

³² Kritika Verma, *Street Art and Graffiti in Indian Public Spaces*, ABIR POTHI (Jun. 1, 2023), <https://abirpothi.com/street-art-and-graffiti-in-indian-public-spaces/>.

Some of the cities where graffiti on the walls is prevalent are Kolkata, Delhi, and Mumbai.³³ Among other Indian graffiti artists such as Yantra and Zine, one notorious graffiti artist that started off in 2008 was Daku, who mostly acted in Delhi and commented on social and political issues going on in the city. Notably, he made “Mat Do” signs during the 2014 elections, and added graffiti to the Stop signs to address the topics of rape and consumerism.³⁴

C. Criminality of Graffiti

The issue concerning with graffiti art arises because it is considered to be illegal in most countries. There is a clash between the graffiti artists and the owners of the property as well as the civic authorities, who perceive graffiti art to be plain vandalism or defacement of the property.³⁵ It is viewed as a problem in the urban areas, which stems from the use of graffiti by gangs to “mark their territories.”³⁶ One prime example is the New York City subway station that has been plastered with a bunch of graffiti, which is widely considered as a nuisance and eye-sore to both the authorities and the general public.³⁷

The question of illegality of graffiti exists in the first place because of its location, alongside factors such as permission and permanency.³⁸ Protection may be contemplated for graffiti that is made on public property, or on private property where permission has been given. “The law does not distinguish between aesthetic styles, artistic media, and the subcultural groupings of practitioners.”³⁹ Generally, in countries where graffiti is given protection to some extent, the graffiti artists retain the rights of reproduction and preparation of its derivatives, whereas the owner of the property retains the rights of displaying and selling the artwork.⁴⁰ So, the subsequent rights and obligations are split between the owners of the property and the graffiti artists, regardless of whether the graffiti itself is considered to be legal or illegal.

³³ Ar. Kiran Rathi, *The Rise Of Graffiti in India: 15 Street Stories*, THE ARCHITECT’S DIARY (Jan. 11, 2024), <https://thearchitectsdiary.com/the-rise-of-graffiti-in-india-15-street-stories/>.

³⁴ Ramesh Sampui, *supra* note 21 at 43.

³⁵ Enrico Bonadio, *Street Art, Graffiti and the Moral Right of Integrity: Can Artists Oppose the Destruction and Removal of Their Works?*, 1 NUART JOURNAL 17, 18 (2018).

³⁶ Alethea B.T. Barbaro et. al., *Territorial Developments Based On Graffiti: A Statistical Mechanics Approach*, 392 PHYSICA A: STATISTICAL MECHANICS AND ITS APPLICATIONS 252, 260 (2013).

³⁷ Chelsea Kim, *An Examination of Graffiti Protection and the Social Obligation Theory of Property*, 36 EMORY INT’L L. REV., 539, 549 (2022).

³⁸ TIM CRESSWELL, THE CRUCIAL “WHERE” OF GRAFFITI, IN PLACE/OUT OF PLACE: GEOGRAPHY, IDEOLOGY, TRANSGRESSION 13 (UNIV. OF MINN. PRESS 1996).

³⁹ Alison Young, *Criminal Images: The Affective Judgment of Graffiti and Street Art*, 8(3) CRIME MEDIA CULTURE: AN INTERNATIONAL JOURNAL 297, 299 (2012).

⁴⁰ Brittany M. Elias and Bobby Ghajar, *Street Art: The Everlasting Divide Between Graffiti Art and Intellectual Property Protection*, 7 LANDSLIDE 1, 5 (2015).

Now, the response of the government is what determines the legality of graffiti. (i) In China, in contrast to the general belief, there is minimal police interference with graffiti artists as long as it does not concern any political party or any religious sentiment.⁴¹ (ii) In Taiwan, a similar lenient nature of the authorities can be observed. The government has taken steps to grant concessions to graffiti artists.⁴² They have been allowed to freely display their artwork on certain sections/areas. However, a fine may be imposed if graffiti is made in places other than these designated areas. (iii) In Hong Kong, there is a famous graffiti artist named Tsang Tsou Choi who makes calligraphy graffiti. Some of his works are officially preserved, and he has even gone to the extent of claiming ownership over the area. Contrary to that, in case of a graffiti artist painting a Chanel logo above the banner of an Armani showroom,⁴³ the Court ordered for the payment of millions of dollars as damages to the property owner. (iv) In Singapore, however, a student charged with vandalism of expensive cars was sentenced to 4 months in jail, a fine of USD 2,233, and 6 strokes of caning.⁴⁴ Similar to its tag of being a litter-free city, the same attitude flows into how graffiti is treated in Singapore.⁴⁵ (v) In South Korea, during the G-20 Summit in 2011, Park Jung-Soo spray painted the word rat on the posters, which was prosecuted to be a derogatory statement against the then President of the State. It was held to be part of “an organized criminal activity”, and he was fined. Moreover, some other forms of punishments, which can serve as an alternative to caning, can be imposition of fine, revocation of driving license, mandatory community service.⁴⁶

From a socio-economic perspective, it has been argued that graffiti should be decriminalized as a matter of justice because vandalism or trespass, strictly, refers to violation of rights over a private property whereas graffiti art is what is drawn on public property.⁴⁷ It further reflects the contention to privatize such public spaces which would, in turn, become a pragmatic benefit for the graffiti artists.

⁴¹ Kao Chien Hui, *Tattoos on Shared Social Skin: The Art and Laws of Street Murals and Graffiti*, ASIA ART ARCHIVE (Dec. 1, 2011), <https://aaa.org.hk/en/like-a-fever/like-a-fever/free-art-vs-public-law-tattoos-on-shared-social-skin-the-art-and-laws-of-street-murals-and-graffiti>.

⁴² Cindy Sui, *Taiwan Opens Up To Graffiti Artists*, BBC NEWS (Sept. 3, 2016), <https://www.bbc.com/news/av/world-asia-36947305>.

⁴³ Kao Chien Hui, *supra* note 34.

⁴⁴ Rujun Shen, *Two Germans To Be Caned, Jailed For Singapore Train Graffiti*, REUTERS (Mar. 5, 2015), <https://www.reuters.com/article/idUSKBN0M10DK/>.

⁴⁵ T.C. Chang, *Writing on the Wall: Street Art in Graffiti-free Singapore*, 43(6) INT’L J. URB. & REG’L RSCH. 1046, 1050 (2018).

⁴⁶ Marisa A. Gomez, *The Writing on Our Walls: Finding Solutions Through Distinguishing Graffiti Art From Graffiti Vandalism*, 26 UNIVERSITY OF MICHIGAN JOURNAL OF LAW 636, 666 (1993).

⁴⁷ Daniel J. D’Amico and Walter Block, *A Legal and Economic Analysis of Graffiti*, 23 HUMANOMICS 29, 33 (2007).

Even from a criminological perspective, it has been analyzed that graffiti would not qualify as a crime upon applying most of the criminological theories.⁴⁸ The neutralization theory implies that deviants i.e., the graffiti artists, are simply justifying their actions by providing alternative definitions. However, the strain theory implies that they are disappointed or frustrated by their surroundings, and are clearly announcing their intent to bring a change, whereas the rational choice theory implies that they have weighed the means & ends, costs & benefits, and made a rational choice to proceed.⁴⁹ Then, from a capitalistic viewpoint, graffiti poses a threat to, “not only the economic value of private property, and the political control of property and space, but also the sense of ordered style, the aesthetic of authority that is intertwined with them.”⁵⁰ Some also argue that illegality of graffiti is its essence because it portrays the audacity, danger, and risk and addressing issues which would otherwise be banned.⁵¹ So, sanctioned art would be censored art.

III. THE NEXUS OF COPYRIGHT PROTECTION AND STREET ART

As discussed above, the major issue with regards to street art is that of its ownership violation, be it by means of unauthorized reproduction or use of the street art by means of other mediums such as film, photograph, painting, clothing, and so on, or be it the issue concerning ownership and preservation of physical graffiti works. Thus, the street art society has definitely felt the urge for seeking protection of ownership for the art that they themselves created. There have been many cases wherein copyright of street art artists has been infringed, and they have been pro-active about approaching the courts for the same.⁵² However, that has acted as a missed opportunity for the courts to establish jurisprudence around street art and copyright, because majority of the cases got settled outside courts.

A. The Copyright Uprising & Courts' Wasted Potential

The famous book, titled “*Tattooed Walls*” which was published by Peter Rosenstein, a photographer and graffiti aficionado, was an anthology of a plethora of photographs of street art and murals that he had taken over a span of 10 years. He published the same and didn't take authorization from any of the artist whose work was in the book.⁵³ This act caused a spark which led to the creators

⁴⁸ Zeynep Alpaslan, *Is Street Art a Crime? An Attempt at Examining Street Art Using Criminology*, 2(1) SCIENTIFIC RESEARCH – ADVANCES IN APPLIED SOCIOLOGY 53, 57 (2012).

⁴⁹ *Id.*

⁵⁰ JEFF FERRELL, *CRIMES OF STYLE: URBAN GRAFFITI AND THE POLITICS OF CRIMINALITY* (Garland, New York, 1996, 179).

⁵¹ Tony Chackal, *Of Materiality and Meaning: The Illegality Condition in Street Art*, 74(4) THE JOURNAL OF AESTHETICS AND ART CRITICISM 359, 365 (2016).

⁵² Sondra Bacharach, *Street Art and Consent*, 55 THE BRITISH JOURNAL OF AESTHETICS 483, 495 (2015).

⁵³ Jo Adetunji, *Graffiti copyright battles pitch artists against advertisers*, THE CONVERSATION (Aug. 9, 2014), <https://theconversation.com/graffiti-copyright-battles-pitch-artists-against-advertisers-30291>.

of those murals to file for compensation, to which Peter Rosenstein replied that he didn't deem necessary to take the permission of the artists because their works were on public spaces, and hence were covered under the fair use doctrine.

However, the US court didn't agree with the same, and eventually the parties reached a settlement, and the book was discontinued.⁵⁴ Another instance of unauthorized use of a street art in print form was by Pearson Education, also known as Brady Publishing, who, in their book titled "*Tony Hawk's Pro Skater 2 Official Strategy Guide*" had mimeographed the graffiti work of a Chicago based artist named Hiram Villa, without his consent. Initially, the court ordered that there couldn't be any protection given since Villa's work lacked copyright. Post that, Villa got his work registered at the Copyright Office, and then again filed a suit for infringement against the publishers, as a reaction to which the publishers filed for the dismissal of the complaint. However, the events weren't in the pockets of the publishers this time as the court rejected their move.⁵⁵ Regardless, this was another wasted potential because the parties resorted to a settlement, before the court could delve into the intricacies of the matter and establish the jurisprudence.⁵⁶

Despite being a missed chance for the court to establish something substantial within the sphere of copyright and street art, the Villa case did act as a beacon for many other street artists to enter the race for getting their work protected. For example, in 2014, a Miami based street artist, David Anasagasti, had initiated proceedings against American Eagle Outfitters,⁵⁷ because they had, without his authorization, reproduced his work on their apparel advertisement programs. However, once again this case was settled as well, of which the settlement details were kept confidential.⁵⁸ In another instance, the America based artist Maya Hayuk had filed a lawsuit against pop star Sara Bareilles,⁵⁹ Epic Records, Sony Music and the luxury brand Coach, because they had, without her consent, used her "*Chem Trails NYC*" mural in their advertisement and promotional campaigns.⁶⁰ To add to the dismay again, this case was settled as well.

⁵⁴ David Gonzalez, *Walls of Art for Everyone, but Made by Not Just Anyone*, THE NEW YORK TIMES (Jun. 4, 2007), <https://www.nytimes.com/2007/06/04/nyregion/04citywide.html>.

⁵⁵ Villa v. Pearson Education, 03 C 3717.

⁵⁶ Nathan Cole & Joanna Liu, *Unchartered Territory: Enforcing an Artist's Rights in Street Art*, HHR ART LAW, (Jan. 11, 2017), <https://www.hhrartlaw.com/2017/01/unchartered-territory-enforcing-an-artists-rights-in-street-art/>.

⁵⁷ Anasagasti v. American Eagle Outfitters, Inc., Case No. 1:14-cv-05618 (S.D.N.Y. July 23, 2014).

⁵⁸ Carlos Suarez De Jesus, *Abolsniffsglue, American Eagle Outfitters Reach Settlement in Copyright Lawsuit*, MIAMI NEW TIMES (Dec. 2, 2014), <https://www.miaminewtimes.com/arts/aholsniffsglue-american-eagle-outfitters-reach-settlement-in-copyright-lawsuit-6497593>.

⁵⁹ Rich Calder, *Artist sues Sara Bareilles for using her work in concert ads*, PAGE SIX (Aug. 21, 2014), <https://pagesix.com/2014/08/21/artist-sues-sara-bareilles-for-using-her-work-in-concert-ads/>.

⁶⁰ Hayuk v. Coach Servs., Inc., No. 1:14-cv-06668 (S.D.N.Y. Aug. 19, 2014).

Another major event that contributed to the rise of street art and copyright issues was the case filed by street artist Cali Killa against Urban Outfitters. The case involved the company using her signature artwork on their t-shirts without permission, but it ultimately resulted in wasted potential as the courts failed to develop any jurisprudence on the matter. However, before anything more could be said, the parties reached out a settlement between them.⁶¹ Another major instance, although this time involving unauthorized use of an artist's graffiti in a commercial, was between a group of artists called the Tats Cru and Fiat plus Jennifer Lopez. Although, in this case as well, a settlement between the parties were reached.⁶²

B. Street Art's Shield of Copyright: Comparative Analysis

Street art's copyright conundrum varies as we cross domestic borders. Some of the major street art dominant nations like the UK, Germany, and France, all have different regulation mechanisms with regards to Street art's copyright. Hence, a comparative analysis of these nations shall be useful.

1. The United Kingdom

The emergence of graffiti artworks can be traced back to the urban landscapes of London and Bristol during the early 1980s.⁶³ These artistic expressions experienced rapid growth and evolution throughout the subsequent decade of the 1990s. The narrative of the graffiti movement in England has been enriched by the artistic contributions of notable writers such as Robbo, Eine, Drax, Elk, and Oker in London.⁶⁴ The street and graffiti art found within the confines of the British landscape is presently being produced in accordance with the prevailing legal framework. The local governing bodies frequently provide access to communal areas where artistic expressions are permitted, and the displayed artworks undergo periodic alterations. One notable example is the renowned Leake Street situated in the Waterloo region of London, which is commonly referred to as the Graffiti Tunnel.⁶⁵ However, irrespective of the street art welcoming nature as described above, issues actually arise with the unauthorized making of street art, because the UK law is strict on that part.

⁶¹ Hrag Vartanian, *Street Artist Triumphs Over Urban Outfitters in Copyright Case*, HYPERALLERGIC (Sept. 20, 2011), <https://hyperallergic.com/36016/cali-kill-a-urban-outfitters/>.

⁶² Don Kaplan, *Fiat settles claim with Bronx graffiti artists over J. Lo ad*, NEW YORK POST (Nov. 30, 2011), <https://nypost.com/2011/11/30/fiat-settles-claim-with-bronx-graffiti-artists-over-j-lo-ad/>.

⁶³ Sarah Doyle, *Art in Bristol, England, Moves Beyond Museum Walls*, THE NEW YORK (DEC. 23, 2015), <https://www.nytimes.com/2015/12/27/travel/bristol-england-street-art.html>.

⁶⁴ Luke Dickens, *Placing Post-Graffiti: The Journey of the "Peckham Rock"*, 15 CULTURAL GEOGRAPHIES 471, 478 (2008).

⁶⁵ ENRICO BONADIO, STREET ART, GRAFFITI AND COPYRIGHT: A UK PERSPECTIVE, THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI (Cambridge University Press, 2019).

In the UK, Section 4 of the Copyright, Designs and Patent Act 1988 [“CDPA”] states that art forms as placed in the street such as paintings, posters, mosaics, urban knitting and so on, fall within the ambit of artistic works, and hence are subject matter of copyright. With regards to the copyrightability of street art in UK, the first element is its ephemeral nature. Courts initially did rule that if an art cannot establish its permanent nature, it isn’t subject to copyright protection.⁶⁶ However, such jurisprudence hasn’t been given acceptance by courts unanimously. For example, in the case of *Metix (UK) Ltd. v. G.H. Maughan*⁶⁷ it was stated by the court that despite the fact that an ice sculpture isn’t permanent, it’d still be copyrightable because it’s a 3D work created by the hands of an artist.

Another point of focus here is the copyrightability of the sketch drawn by an artist before putting that sketch art prototype on the streets. This means that most artists, if not all, draw their art in a sketch before actually drawing it on the walls of the streets. So, the question is whether this sketch could be copyrighted? The courts in UK have held that making a preliminary artwork before a final piece doesn’t strike down the originality of the final artwork, and hence both are subject to copyright protection.⁶⁸ The provision of copyright for the preliminary sketches play a huge role for artists to protect their art if the same is termed illegal. This is because the law under section 171.3 of CDPA clearly prevents or restricts copyright enforcement on public interest grounds. This was upheld by the court in *Hyde Park Residence Ltd. v. Yelland*⁶⁹ that this provision of the act is aimed to prevent enforcement of copyright over any illegal form of street art. Therefore, in instances where it is held that copyright pertaining to illegal street art cannot be upheld, it is still plausible to content that the copyrightable initial sketches do serve as the foundation for the artists to assert enforcement rights, and hence protect their illegal street art from exploitation.⁷⁰

2. Germany

Germany boasts a vibrant and prospering street art and graffiti milieu, captivating the attention of both scholars and enthusiasts alike.⁷¹ This artistic subculture has permeated the urban landscape, leaving an indelible mark on the cultural fabric of the nation. In the realm of urban artistic expression, Berlin undoubtedly emerges as a paramount subject, owing to its status as Germany’s

⁶⁶ *Merchandising Corporation of America v. Harpond*, [1983] FSR 32.

⁶⁷ *Metix (UK) Ltd. v. G.H. Maughan*, [1997] FSR 718.

⁶⁸ *Biotrading and Financing OY v. Biohit Ltd.*, [1997] FSR 393.

⁶⁹ *Hyde Park Residence Ltd. v. Yelland*, [2000] 3 W.L.R. 215.

⁷⁰ Melanie Dulong de Rosnay & Pierre-Carl Langlais, *Public Artworks And The Freedom Of Panorama Controversy: A Case Of Wikimedia Influence*, 6 INTERNET POLY REV. 1, 4 (2017).

⁷¹ Simon Thomas, *The Heritage of Berlin Street Art and Graffiti Scene*, SMASHING MAGAZINE (Jul. 13, 2011), <https://www.smashingmagazine.com/2011/07/the-heritage-of-berlin-street-art-and-graffiti-scene/>.

preeminent hub for street art and graffiti.⁷² Moreover, it is imperative to acknowledge that Berlin's prominence in the realm of copyright is unparalleled when compared to other urban centers in Germany. Numerous incidents that delve into the intricate nuances of copyright pertaining to street art predominantly revolve around the significant canvas known as the Berlin Wall.⁷³ The Berlin Wall is a profound influence on the artists, as it is the representation of the city's illustrious past, from the city's division to its momentous unification, that has led to the city's present-day reputation as an unparalleled epicenter for artistic expression.

Section 2(1) of the German Authors Rights Act,⁷⁴ in German: Urhebergesetz, [**UrhG**] is the ruling regulation that states the categories of works that fall within the subject matter of copyright. However, unlike many other nations, Germany's copyright law has adapted the "*open list system*" wherein in order to be eligible for copyright, it isn't necessary for a work to fall within the categories as mentioned in the act.⁷⁵ This wide scope of the German Copyright law falls in favor of street art, thus enabling them for copyright protection. Section 2(2) of the UrhG mandates that there should be an author's personal intellectual originality in his work. In the Wall Pictures decision⁷⁶ by the German Federal HC, i.e., *Bundesgerichtshof* [**BGH**], it was held that images of faces on the Berlin Wall and its elements would fall within the ambit of copyrightability as they are personal creation of the author's own intellect.

Even with regards to commissioned work, the copyright of the work, pursuant to Section 7 of UrhG,⁷⁷ falls on the creator of the artwork, and the exclusive right can only be transferred by means of a contractual arrangement between the parties. This is again a unique feature of this legislation, because unlike Germany, UK's copyright law is not having any express provision that gives the ownership and authorship rights to the actual creator in commissioned works.

Specifically with regards to illegal street art, the conundrum in the German jurisprudence is that it brings about a clash between the IP law and the property law of the nation. It is nevertheless clear that the maker of the art still possesses the ownership of the art, however, he/she shall not possess

⁷² Mallika Bhagat, *Writing On The Wall: The World's Most Captivating Street Art Destinations*, THE INDIAN EXPRESS, <https://indianexpress.com/article/et-al-express-curated/writing-on-the-wall-the-worlds-most-captivating-street-art-destinations-8882582/>.

⁷³ MARC MIMLER, STREET ART, GRAFFITI AND COPYRIGHT: A GERMAN PERSPECTIVE, ENRICO BONADIO, THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI 188 (Cambridge University Press, 2019).

⁷⁴ Urheberrechtsgesetz [UrhG] [Copyright Act], § 2(1), Sept. 9, 1965, BGBl I at 1273 (Ger.).

⁷⁵ Nishant Thakur & Sandra Anil Varkey, *Closed list approach versus open-ended approach in subject matter copyright*, SCC ONLINE BLOG (Mar. 28, 2021), <https://www.sconline.com/blog/post/2021/03/28/copyright-2/>.

⁷⁶ *Wall Pictures*, IIC 282 (BGH) (1997).

⁷⁷ Urheberrechtsgesetz [UrhG] [Copyright Act], § 7, Sept. 9, 1965, BGBl I at 1273 (Ger.).

ownership of the physical body on which the art is made.⁷⁸ The property law of the German Civil Code states that when a movable good (which in case of street art is the paint by which it is made) becomes an essential part of the property to which it is attached, then the ownership of the property shall also include the movable good.⁷⁹ This creates an overlap between the IP law and the property law. This was dealt with in the *Mauer-Bilder* decision⁸⁰ by the BGH wherein it held that in case when the work is legitimate, the owner of the property cannot claim right over the artwork on the property, as the same shall be exclusive to the artist. However, if the case involves illegal street art, then the fundamental right to property enshrined in German Basic Law⁸¹ shall prevail to the extent that the property owner can destroy the art piece, but in no way can he monetize by commercializing the contended art piece, as the economic rights shall persist with the copyright holder.

However, in the Berlin wall case the issue persisted regarding the jurisdiction because the wall was just inside the border, i.e., it was barely on the territory of GDR. Therefore, West Berlin's government had no jurisdiction. The BGH ruled that the writers could not have abandoned their economic rights since they did not intend for their work to be commercially exploited when it was created. Unlike graffiti and street art, the creators have not kept their identities hidden. Instead, they have accepted their copyright and been credited as writers in publications on the murals. German copyright law does not allow for the abandoning of property rights, similar to dereliction in real property. The court clarifies that there is no "ownerless" copyright.⁸²

Thus, it can be said that the German copyright jurisprudence with regards to street art is very well established, as it has answered a lot of questions associated with street art's copyrightability.

3. France

France has a very long-standing history with respect to street art, for graffiti can be traced back to pre-historic times as substantiated by the cave drawings on the walls at the Lascaux Caves.⁸³ And today, when it comes to street art, France has been seen as the most prolific bastion of the

⁷⁸ Marc Mimler, *supra* note 73 at 195.

⁷⁹ Bürgerliches Gesetzbuch (BGB) § 93 (1900).

⁸⁰ *Mauer-Bilder*, 1995 GRUR 673, 675 (BGH).

⁸¹ Grundgesetz [GG] art. 14 (Ger.).

⁸² Marc Mimler, *supra* note 73 at 196.

⁸³ Precious Rongmei, *Lascaux Caves in France has completed some prehistoric tales to tell*, TIMES TRAVEL (Aug. 29, 2023), <https://timesofindia.indiatimes.com/travel/destinations/lascaux-caves-in-france-has-some-prehistoric-tales-to-tell/articleshow/103173754.cms>.

movement.⁸⁴ With regards to copyright of street art, firstly there is no requirement under the French Law that the works must be fixed, i.e., even short-term works may also be protected.⁸⁵ With regards to commissioned works in France, as per the perusal of Article L.111-1,⁸⁶ it is evident that the copyright in such cases vests initially upon the artist. And that the only way to acquire these rights by the assignment giver could be by way of a contract.⁸⁷ In the Intellectual Property Code of France, there isn't any express provision deliberating upon the fact as to whether illegal works are protected or not. However, on a perusal of Article 16 of the Civil Code, it comes to light that the works which violate human dignity won't be protected by copyright. Illegal street art calls a question on the conflict between the property rights and IP rights. An effort to reach a balance of interests between these rights was made by the Tribunal of Grande in the case of *Benjamin Aichouba et autres v. Francis Lecole*.⁸⁸ This case involved a mosaic on the wall and the court had ordered the mosaic artists to remove it within a specified time frame, and if they didn't then the property owner shall have the right to with it as per his wish. Irrespective, in the French jurisprudence, a better clarification is the need of the moment.

4. India

Art in public spaces is approximately a 2000-year-old tradition in India, with the oldest evidence of the same can be traced back to the cave paintings in Ajanta, Maharashtra.⁸⁹ The tradition in India is such that street art is majorly commissioned in India and hence the objection of it being illegal is seldom seen. Irrespective of this, the copyright law of India is unclear with regards to the street art regulation.⁹⁰

The Copyright Act 1957 in India, under Section 2(c)⁹¹, defines artistic work. As per the letter of the law, artistic work includes a painting, sculpture, drawing, engraving, architecture, and all of

⁸⁴ Ana Bambic, *History of Street Art in France: A Quick Overview*, WIDEWALLS (Oct. 5, 2014), <https://www.widewalls.ch/magazine/history-of-street-art-in-france>.

⁸⁵ Louise Carron, *Perspective On The French And American Legal Approach To Street Art*, NYSBA (Nov. 1, 2019), <https://nysba.org/street-art-is-copyright-for-losers-a-comparative-perspective-on-the-french-and-american-legal-approach-to-street-art/>.

⁸⁶ Code de la propriété intellectuelle [C. prop. intell.] [Intellectual Property Code] art. L111-1 (Fr.).

⁸⁷ SHANE BURKE, GRAFFITI, STREET ART AND COPYRIGHT IN FRANCE, ENRICO BONADIO, THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI 182 (Cambridge University Press, 2019).

⁸⁸ TGI Paris, 3e ch., Oct. 13, 2000.

⁸⁹ Avilash Kumbhar & Tanisha Das, *Art Meets Law: The Uneasy Tussle of Street Art and Intellectual Property Law*, FOX MANDAL SOLICITORS & ADVOCATES (Nov. 8, 2022), <https://www.foxmandal.in/art-meets-law-the-uneasy-tussle-of-street-art-and-intellectual-property-law/>.

⁹⁰ NANDITA SAIKIA, STREET ART, GRAFFITI AND INDIAN COPYRIGHT LAW, ENRICO BONADIO, THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI 271 (Cambridge University Press, 2019).

⁹¹ The Copyright Act, No. 14 of 1957, § 2(c).

them having artistic quality in them. A literal interpretation of this shall enable us to conclude that prima facie, street art does fall in the category of artistic work.

The Copyright Act is unclear on the position as to whether illegal or immoral work can be copyrighted or not. There is no reported Indian case law that could build jurisprudence on this matter. However, it has been presumed that removal of artworks or offering them for sale could not amount to copyright infringement when the art itself has been created illegally. Even when an art is anonymous, it would be difficult for courts to establish if the moral rights of the author have been violated.⁹² The Delhi HC in the case of *Amarnath Sehgal v. Union of India*⁹³ did recognize the need to interpret Section 57 of the Copyright Act 1957 in a way so as to widen its ambit in order to include art destruction in extreme form of mutilation in it, as this would prevent reputation damage of the artist. However, this decision has seldom been seen to be followed and folk art hasn't benefitted from it.⁹⁴ The law nowhere deals with the right enforcement of the artist specially in case of illegal work, hence the role here is that of the judiciary, which so far hasn't been able to establish any set of case laws to develop the jurisprudence.

C. The De Minimis Doctrine

The de minimis concept is very relevant, since the Indian Copyright Act includes specific exemptions to the strict framework of copyright protection. This legal doctrine allows for the use of copyrighted materials in trivial and negligible manners that do not amount to copyright infringement. Within the realm of street art and murals, this theory has great importance. The de minimis concept allows for flexibility due to the sometimes complex and subtle nature of modern art forms, which may use components of previous works or urban environments in a modest and inconspicuous way. Artists are able to get inspiration from their surroundings and cultural context without worrying about violating copyright laws, as long as the use is considered insignificant and inconsequential. This ideology acknowledges the unique challenges faced by street artists and promotes a creative atmosphere that thrives at the convergence of many components, while yet respecting the rights of copyright owners.⁹⁵

⁹² Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 THE JOURNAL OF LEGAL STUDIES 95, 100 (197).

⁹³ *Amarnath Sehgal v. Union of India*, (2005) MANU/DE/2016/2005.

⁹⁴ Shane Burke, *supra* note 87 at 282.

⁹⁵ King Stubb & Kasiva, *Street Art and Copyright In Indi: A Legal Perspective*, KING STUBB AND KASIVA (Nov. 8, 2023), <https://ksandk.com/intellectual-property-rights/street-art-and-copyright-in-india/#the-doctrine-of-de-minimis>.

A major product of the courts with regards to the nexus of street art and copyright is the principle of De Minimis. In essence, the courts do not uphold every infringement claim, particularly when they believe that the duplication that has occurred is too trivial to warrant a response. This is called the De Minimis Rule. An example of this can be taken from the case of *Gayle v. Home Box Office, Inc.*⁹⁶ In this case HBO's show "Vinyl" was in the ocean of distress because the show had a scene where artist Gayle's street art was captured. He claimed this to be unauthorized use of his art. The court rejected the claim stating that the artwork is too hard to be noticed as the camera focus is on the protagonist on screen. Hence, the court ruled this out stating it to be a de minimis case.

IV. THE COMMERCIAL CONUNDRUM

A. Commercialization of Graffiti

Now, as the world of graffiti is growing in popularity and as it is gradually being legitimized, there are growing concerns regarding the commercialization of graffiti.⁹⁷ For those who strive for mass coverage of their art and the message they carry, the recognition that they seek from the society would hardly be possible without some form of commercialization.

For instance, inclusion of graffiti in advertising campaigns by large MNCs is a form of commercialization which is gaining demand. One prominent example is when I.B.M. spray painted symbols of peace and heart along with the company's logo as part of its advertising campaign in the cities of San Francisco and Chicago back in 2001.⁹⁸ However, as a result of this campaign, I.B.M. had to pay punitive damages and costs for cleaning amounting up to USD 120,000 to the states. Reflecting on what happened in case of I.B.M, Sony decided to launch a similar advertising campaign in 2005 in the cities of L.A., Miami, Atlanta, Chicago, New York, and Philadelphia to promote its new PSP gaming system.⁹⁹ To avoid the dire repercussions faced by IBM., Sony made payments to the owners of the property beforehand in order to obtain rights from the owners to paint the said property.

One form of commercialization of graffiti is to display photographs and paintings of/inspired by graffiti in museums and exhibitions. This is a way of intermixing graffiti and high art. (i) In the

⁹⁶ *Gayle v. Home Box Office, Inc.*, No. 17-CV-5867 (JMF), 2018 WL 2059657 (S.D.N.Y. May 1, 2018).

⁹⁷ Claire Doyle, *Yield to Pedestrians: The Commercialization of Street Art*, THE GEORGETOWN VOICE (Feb. 10, 2015), <https://georgetownvoice.com/2015/02/10/yield-to-pedestrians-the-commercialization-of-street-art/>.

⁹⁸ James Nicolai, *IBM's Graffiti Ad Runs Afoul of City Officials*, CNN (Apr. 19, 2001), <https://edition.cnn.com/2001/TECH/industry/04/19/ibm.guerilla.idg/>.

⁹⁹ Rusty Kennedy, *Graffiti Ads for PSP Mark Controversy*, NBC NEWS (Dec. 30, 2005), <https://www.nbcnews.com/id/wbna10641138>.

1970s, Burhan Dogancay used pictures of graffiti to make paintings of his own, and he has mentioned graffiti to be a source of inspiration for his paintings. He has made a project out of such paintings called ‘Walls of the World’.¹⁰⁰ (ii) In the 1980s, there was an art exhibition in Manhattan that displayed graffiti which was curated by Fashion Moda.¹⁰¹ (iii) In 2006, there was an art exhibition in the Brooklyn Museum, wherein 22 graffiti of famous graffiti artists was also displayed as a form of art.¹⁰² Charlotta Kotik (the curator) mentioned that she hoped for the public to reconsider their preconceived notions about graffiti.¹⁰³

B. Artists’ Rights

1. *Economic Incentives*

There are also some opponents of commercialization of graffiti who contend that the graffiti artists are not at all concerned with economic incentives,¹⁰⁴ so it would just be like chasing fool’s gold. They argue that such artists do not work for any financial gain, and that their values lie in expressing their authentic thoughts, untainted by such materialistic desires. Accordingly, following the same argument, even providing IP protection of graffiti would have no meaning because it would primarily serve economic incentives by way of generating profits from their artworks.¹⁰⁵

However, a stark contrast can be seen if we take a look at the legal provisions which will show that the commissioned “less valuable” work is given strong legal protection, whereas the non-commissioned “more valuable” work is given no such protection.¹⁰⁶ Stripping the entire economic aspect out of graffiti serves no end. Regardless of highly we may attempt at putting the non-commissioned and authentic pieces, the reality remains that such speech will ultimately end up being driven out of social discourse. The society is built as such that, both the private and public bodies alike, will always favor establishing such rules that serve some prospect of economic gain.

¹⁰⁰ Paul Vitello, *Burhan Dogancay, Artist Inspired by Urban Walls, Dies at 83*, THE NEW YORK TIMES (Jan. 20, 2013) <https://www.nytimes.com/2013/01/21/arts/design/burhan-dogancay-artist-inspired-by-urban-walls-dies-at-83.html>.

¹⁰¹ Alya Sama, *The City as Canvas: The Underground Birth of Graffiti in New York*, SOTHEBY’S (Sept. 20, 2021) <https://www.sothebys.com/en/articles/the-city-as-canvas-the-underground-birth-of-graffiti-in-new-york>.

¹⁰² Ken Johnson, *When Aerosol Outlaws Became Insiders: Graffiti Art at the Brooklyn Museum*, THE NEW YORK TIMES (Jun. 30, 2006) <https://www.nytimes.com/2006/06/30/arts/design/30graf.html>.

¹⁰³ *Id.*

¹⁰⁴ Brittany M. Elias and Bobby Ghajar, *Street Art: The Everlasting Divide Between Graffiti Art and Intellectual Property Protection*, 7 LANDSLIDE 1, 7 (2015).

¹⁰⁵ Andrea Baldini, *Beauty and the Bebest: Distinguishing Legal Judgment and Aesthetic Judgment in the Context of 21st Century Street Art and Graffiti*, 65 RIVISTA DI ESTETICA 91, 101 (2017).

¹⁰⁶ Katya Assaf Zakharov, *The Dilution of Culture and the Law of Trademarks*, 49 IDEA 1, 22 (2008).

It is not a necessity for graffiti to be criminalized for it to retain its authenticity. It merely provides them a larger platform and reach out to a larger audience to voice the same issues they were already addressing. It would be illogical to hope for continuous suppression to result in preservation of graffiti. “Sentencing some graffiti artists for vandalism while providing others with copyright protection, the legal system reflects the social attitude towards non-compensated creativity: we can only know it is art and not nonsense after it has gained commercial value and social recognition”.¹⁰⁷

2. *Rights in case of Destruction of Graffiti*

In the case of *Cohen v. G&M Realty L.P.*¹⁰⁸, wherein the Eastern District Court of New York delved into the question of whether graffiti was worthy of any protection at all, given its nature. It centered around the bunch of graffiti painted in the area of 5Pointz in NYC that had been destroyed by the owner of the property. The Court determined that the graffiti art was covered within the meaning of “visual art” protected under Section 106A of the VARA.¹⁰⁹ The Court awarded maximum damages to the graffiti artists, as per Section 504 of the VARA,¹¹⁰ totaling up to 6,75,000 in this case on the basis that these artworks received wide recognition.¹¹¹ So, it was determined that the property owners were the ones who had committed a willful violation on their part by destroying such artwork. The end goal, even for the society, is to prevent vandalism.¹¹² However, if all graffiti were to be labelled as vandalism, then it fails to take into consideration the actual cause (mischief) which motivated the graffiti artist to act in the first place.

This view has also been supported by stating that graffiti, even one made without consent of the property owner, is a form of activism/expression that is necessary for the audience to experience as part of the environment that they live in.¹¹³ There is still no solid or substantial legal framework on an international level regarding the protection of graffiti. The current framework provides the rights, liabilities, and procedure regarding copyright on an international level; but where graffiti itself is considered to be an illegal act, and there is dissonance between the views of different countries regarding criminality of graffiti, it becomes difficult to establish that graffiti is automatically covered under the traditional international framework. However, the Courts in some

¹⁰⁷ Katya Assaf- Zakharov, *Reading the Illegible: Can Law Understand Graffiti?*, 53(1) CONN. L. REV. 117, 137 (2021).

¹⁰⁸ *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212 (E.D.N.Y. 2013).

¹⁰⁹ Visual Artists Rights Act, 17 U.S.C. § 106A (1990).

¹¹⁰ Visual Artists Rights Act, 17 U.S.C. § 504 (1990).

¹¹¹ Drew Thornley, *The Visual Artists Rights Act’s “Recognized Stature” Provision: A Case for Repeal*, 67 CLEV. ST. L. REV. 351, 355 (2019).

¹¹² Ivy Clarice Estoesta, *Cohen v. G&M Realty L.P.: A Judicious Gentrification Of Graffiti*, STERNE KESSLER GOLDSTEIN & FOX P.L.L.C (Feb. 27, 2020), <https://www.sterneessler.com/news-insights/publications/cohen-v-gm-realty-lp-judicious-gentrification-graffiti/>.

¹¹³ Sondra Bacharach, *Street Art and Consent*, 55(4) BRITISH JOURNAL OF AESTHETICS 481, 488 (2015).

of the countries have started to take a more proactive approach towards the same. The focus is primarily on protecting the moral rights of the graffiti artists in order to prevent outright violation or destruction of their artwork. Such protection from destruction of graffiti becomes pertinent to facilitate commercialization of graffiti. Otherwise, if there is no such guarantee, then the interest of the graffiti artists is compromised.

3. *Rights in case of Commercialization without Permission*

Commercially making profits out of a graffiti artist's work without their permission is bound to offend such artist. For instance, a photograph of a Finnish graffiti artist's (named Psyke) work was published in a newspaper in 2020 without his permission.¹¹⁴ His graffiti was used as a background for an article. Expressing his displeasure upon the actions of the newspaper agency, Psyke stated that he is not seeking out for any compensation here; he was simply against the commercial use of his works without his consent.

Another scenario is where other fellow graffiti artists make copied versions of some original well-known graffiti by some other artist. Shepard Fairey took the chance to create a compilation out of all such bootleg versions of his graffiti and displayed them on a website.¹¹⁵ In this way, the upcoming artist is not put down, and at the same time, artists like Shepard gain influence and recognition by embracing such recreations of his work.

Such instances of commercialization without permission of the graffiti artist can be avoided by bringing in the aspect of copyright over the said graffiti. Drawing a parallel from the existing legal framework of copyright, even if unregistered, once the graffiti art is drawn onto a surface, such art can become subject matter of copyright, whereby the artist can also gain the right to file a suit for infringement of such right.¹¹⁶ The artwork is deemed eligible for protection once it is "fixed" in a physical medium, such as canvas or paper, within the realm of traditional art forms like painting, sculpture, or photography. As soon as a painting is completed, the artist is immediately awarded copyright protection, which enables them to safeguard their work against unlawful copying or sale. Although graffiti is often produced in public areas and may be seen as ephemeral or as vandalism, its artistic worth and the artist's ownership rights are not diminished. This would confer onto

¹¹⁴ Kritika Verma, *supra* note 19.

¹¹⁵ MOIRA FIONA HAMPSON, REBRANDING STREET ART: AN EXAMINATION OF STREET ART AND EVOLUTION INTO MAINSTREAM ADVERTISING, BRANDING, AND PROPAGANDA (May 25, 2018) (University Hons. Thesis, Paper 631, Portland State University).

¹¹⁶ Aaron B. Rabinowitz, *Criminal Prosecution for Copyright Infringement of Unregistered Works: A Bite at an Unripe Apple*, 49(3) SANTA CLARA L. REV. 793, 800 (2009).

graffiti artists the same entitlements as painters or sculptors, empowering them to oversee the replication, exhibition, or commercial exploitation of their artistic creations. Thus, ensuring the right against commercialization without permission of the artist also becomes an incentive for the artists to take an initiative in this regard to safeguard their artwork.

C. Anonymity: Protection of Artists or Hindrance of Commercialization

Graffiti artists remaining anonymous is a common phenomenon, which is usually done in order to protect their identities so as to avoid prosecution and charges. Nonetheless, this paper is primarily concerned with the question of whether commercialization of anonymous graffiti is a possibility or not. In fact, there is no bar to graffiti artists opting for anonymity, even for artworks that are legally allowed. Here, it must also be noted that German courts have ruled that some forms of graffiti, which are signed and fulfil particular durability and uniqueness standards, are eligible for copyright protection.¹¹⁷ Copyright eligibility is determined by two important factors – the work's originality and its fixing in a physical medium, such as a wall or other permanent surface. This includes graffiti artwork that goes beyond simple marks or signatures to show artistic expression. The court regarded the impugned graffiti as a valid work for copyright protection since it was signed, original, and permanent.¹¹⁸

One prominent graffiti artist who is infamous for remaining anonymous to this day is Banksy. His works are mainly centered around London, but his works have also been found in Palestine and L.A. Banksy focusses on using his art as a medium to highlight controversial cultural and political issues, while avoiding arrest by maintaining his anonymity.¹¹⁹ His works are always under fire for debates on whether graffiti is vandalism or art. The reaction to his works usually goes either of the two ways – receiving official protection, or being removed.

Similarly, Pixnit is yet another graffiti artist who chooses to remain anonymous.¹²⁰ However, as compared to Banksy's works,¹²¹ Pixnit's work has gained more acceptance as a form of art. It

¹¹⁷ Jan Bernd Nordemann, *The case law of the German Federal Court of Justice and other German courts in 2022 – Part II*, KLUWER COPYRIGHT BLOG (Mar. 18, 2024) <https://copyrightblog.kluweriplaw.com/2023/06/07/the-dawn-of-pastiche-first-decision-on-new-german-copyright-exception/>.

¹¹⁸ Susan Bischoff, *The dawn of pastiche: First decision on new German copyright exception*, KLUWER COPYRIGHT BLOG (Jun. 7, 2023) <https://copyrightblog.kluweriplaw.com/2023/06/07/the-dawn-of-pastiche-first-decision-on-new-german-copyright-exception/>.

¹¹⁹ Sondra Bacharach, *supra* note 113.

¹²⁰ ANELIESE K. DAR, *IDENTIFYING WITH THE GRAFFITI SUBCULTURE: THE IMPACT OF ENTERING AND EXITING THE GRAFFITI SUBCULTURE ON THE SOCIAL IDENTITIES OF GRAFFITI WRITERS* (2013) (MA Thesis, The University of North Carolina).

¹²¹ Will Ellsworth-Jones, *The Story Behind Banksy*, SMITH SONIAN MAGAZINE (Feb. 2013), <https://www.smithsonianmag.com/arts-culture/the-story-behind-banksy-4310304/>.

focuses more on design and beauty. She mostly makes graffiti in the urban areas of Boston, which primarily incorporates floral designs.¹²² The owners of shops and stores in these areas are usually present a more welcoming attitude towards her work, and even encourage others to do the same. So, in this case, it becomes easier for artists like Pixnit to commercialize their work, because there would already be an audience waiting to endorse her work and invest in them. Often, graffiti carries the connotation of crime, whereas terms such as “urban art” carry the connotation of cultural expression.¹²³

One solution that has been in discussion to balance the interest of the graffiti artists in maintaining anonymity and the commercialization of such graffiti art is to incorporate the aspect of NFTs (non-fungible tokens) within the framework.¹²⁴ When an NFT is minted, it is assigned a unique identifier and metadata that includes information about the asset it represents (i.e., the graffiti art).¹²⁵ Geo-tagging of graffiti art can help maintain a detailed chronological history,¹²⁶ and act as a bridge to connect the artists willing to commercialize their artwork with their target audience while maintaining their anonymity. Although there might still arise challenges when it comes to conflict resolution, if proper safeguards are formulated, this approach can be the starting point of providing a platform where anonymous graffiti artists can communicate and transact with their audience.

D. Murals to Beautify: India’s Vibrant Street Art Festivals

Before the introduction of Street Art Festivals, the graffiti artists painted locally with barely any engagement with the public. Gradually, there was an increase in the practice of organized street art in the form of street art festivals in India, such as the Shillong, Delhi, and Kolkata Street Art Festival, and the St+art India Foundation Festival, etc.

One of the first festivals, that was organized in 2012 by Matteo Ferraresi and Astha Chauhan,¹²⁷ was named the ‘Khirkee Extension’ which was held in Delhi.¹²⁸ The aim was to bring together people organically without any funding to display their art styles. It was meant to give the artists a

¹²² Aneliese K. Dar, *supra* note 120.

¹²³ Myra Taylor and Ida Marais, *Does Urban Art Deter Graffiti Proliferation: An Evaluation of an Australian Commissioned Urban Art Project*, 9 PAPERS FROM THE BRITISH CRIMINOLOGY CONFERENCE 57, 58 (2009).

¹²⁴ Eynat Mendelson-Shwartz, et al., *Protecting Street Art Rights Using an NFT-Based System*, 30(3) JOURNAL OF URBAN TECHNOLOGY 81, 82 (2023).

¹²⁵ *Id* at 89.

¹²⁶ M. Graf, *Facets of Graffiti Art and Street Art Documentation Online: A Domain and Content Analysis*, Doctoral Dissertation, University of Pennsylvania (2018).

¹²⁷ Aparajita Bhasin, *supra* note 24 at 112.

¹²⁸ Bhawna Chauhan, *The Impact of Social-Culture on the Acceptance of Graffiti Art in Delhi*, 6(6) INT’L J. RSCH. HUMAN., ARTS & LITERATURE 319, 323 (2018).

platform to express themselves freely.¹²⁹ Moreover, these organized acts also help revitalize the areas, as was the case in the creation of the Sassoon Dock Art and the Lodhi Art District in Mumbai and Delhi, respectively.¹³⁰

Delhi Street Art and St+art India Foundation are some of the organizations that have taken significant steps towards building a proper system of regulating street art.¹³¹ They collaborate with government organizations as well, such as the CPWD, NDMC, Ministry of Urban Development, DMRC.¹³² The focus was less on the propagation of religious, social, and political agendas and more on the aspect of beautification of properties and public spaces.¹³³ However, it can also be argued that such art lacks authenticity and meaning as it is under the control of the government to a large extent.

Organizing such festivals reflect a legal and positive approach towards graffiti, which poses the possibility of commercializing such art. The attendees and admirers of these festivals become a base market and audience who could potentially become the consumers of such graffiti. For instance, even the notorious graffiti artist Daku participated in the 2016 edition of the St+art India Festival that took place in the Lodhi Art District.¹³⁴ It reflects a shift of graffiti artists from practicing graffiti which most would question to be vandalism, moving towards sanctioned and commissioned works. In a sense, it is similar to creating an art gallery in the streets, exposing the art to a larger audience.

V. CONCLUSION

The fundamental potential of street art lies in its ability to depict social, socio-economic, political, and cultural predicaments, as well as its propensity to establish communities. For the great majority of people, street art has been innovative, influential, and life-changing. It has also been inspiring. The viewpoints of artists have also changed as a result of the significant change that has occurred

¹²⁹ Sonika Sandhu, *From Rock Art To Street Art- Caves To Walls: An Insight Into The Artistic Development Of Painted Wall Art From Prehistoric To Modern-Day In India*, 3(1) JOURNAL OF HISTORY, ART & ARCHAEOLOGY 85, 92 (2023).

¹³⁰ Bhawna Chauhan, *supra* note 128 at 325.

¹³¹ Chanpreet Khurana, *Art Out On The Streets*, LIVE MINT (Apr. 17, 2015), <https://www.livemint.com/Leisure/jatuIdIVDA8h3qlSPPx1DL/Art-out-on-the-streets.html>.

¹³² Suneet Zishan Langar, *This Street Art Foundation Is Transforming India's Urban Landscape – With The Government's Support*, ARCH DAILY (Aug. 8, 2017), <https://www.archdaily.com/876705/this-street-art-foundation-is-transforming-indias-urban-landscape-with-the-governments-support>.

¹³³ Steven, *The St+art of Something Big In India?*, URBAN KULTUR BLOG (Mar. 16, 2015), <https://urbankulturblog.com/2015/03/16/the-start-of-something-big-in-india/>.

¹³⁴ Niharika Lal, *Daku Casts His Shadow On This Lodhi Wall*, TIMES OF INDIA (Sep. 16, 2016), <https://timesofindia.indiatimes.com/city/delhi/daku-casts-his-shadow-on-this-lodhi-wall/articleshow/54347894.cms>.

concerning the legitimacy of street art. This has not resulted in a decrease in their intention to produce art; rather, it has resulted in the development of the perception that they want their work to be safeguarded from being imitated.

The Indian copyright law is not successful in protecting art, as demonstrated through this paper. There is a lack of a structure within the law that addresses illegal street art as well as street art itself. In the event of a disagreement, this will always cause injury to one of the parties involved. As a result of the fact that case laws do not result in the production of jurisprudence, the court has not made any constructive contributions. Should ownership be held by the artist or by the people that commissioned the work? There is a probability that illegal labour might be protected. They symbolize the pathway that Indian copyright law, and not Robert Frost, traversed.

For this reason, the juxtaposition that was indicated before is quite important. In light of the reality that it governs the bulk of problems about street art and graffiti by direct legislation and case law, the German Copyright Regime is consequently well-established. Since it covers street art in such a comprehensive manner, the Open List system in Germany has the potential to have an impact on the copyright law in India. Open lists are used by a number of other countries, including Canada. According to the legislation of Germany, compositions that have been commissioned belong to the copyright, which belongs to the artist. There are a great number of further examples that might serve as a source of inspiration for the Indian legislature to improve its copyright legislations.

For the purpose of illustrating the commercialization of intellectual property, it is reasonable to utilize street art festivals in India as examples. With this protection, writers are protected from legal action in the event that their works are used for commercial purposes or destroyed without their permission. Through the sale of prints and other types of digital art, graffiti artists have the potential to expand their audience reach and further their own business objectives.