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## How Muralists, Street Artists, and Graffiti Writers Can Protect Their Artworks

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## TRANSCRIPT

# HOW MURALISTS, STREET ARTISTS, AND GRAFFITI WRITERS CAN PROTECT THEIR ARTWORKS

ENRICO BONADIO\*

### THEME 1: ECONOMIC RIGHTS TO COPYRIGHT IN PUBLIC/STREET ART

#### *Section 1: Copyright and Street Art*

*Introduction:* Good morning and welcome everyone to these classes on the legal protection of public art or street art graffiti. In these weeks we will focus on how muralists, street artists, and graffiti writers may, if they wish, protect their artworks by relying on copyright. We will deal with both economic rights and moral rights, which street artists and muralists could use to protect their pieces of art. We start with the economic rights and how artists

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His current research agenda focuses on copyright protection of non-conventional forms of creativity, amongst other areas. He recently edited the “Cambridge Handbook of Copyright in Street Art and Graffiti” (Cambridge University Press, 2019) and “Non-Conventional Copyright – Do New and Atypical Works Deserve Protection?” (Elgar, 2018). He is currently finalising his monograph “Copyright in the Street: An Oral History of Creative Processes in the Street Art and Graffiti Sub-Cultures” (CUP forthcoming, 2023). Enrico is a Member of the Editorial Board of the NUART Journal, which publishes provocative and critical writings on a range of topics relating to street art practice and urban art cultures.

Enrico has delivered classes and talks at more than 120 universities and institutions spanning six continents. He is a Distinguished Guest Professor at Keio University (Tokyo) as well as a Visiting Professor at Université Catholique de Lyon, University of Ankara (Turkey), and several other institutions. He has been Visiting Scholar at the University of Melbourne (2013), CUNY Law School (New York, 2016), University of Tel Aviv (2018 and 2019) and Hokkaido University (2019).

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who paint works in the public environment may protect the fruit of their creativity. So, as we will see in a few minutes, it's important to study the intersection between street art and graffiti on the one end and copyright on the other end.

Q: *"What is copyright?"*

A: Copyright, as you may know, is an intellectual property right which is offered to all artists to protect their pieces, their artwork. It is indeed a legal tool which can be used by artists to stop imitators, people who copy their artwork. Copyright is also an instrumental legal tool which is useful for street artists and muralists to extract economic benefits out of their works.

Q: *"Why is it important to look at copyright and public art together?"*

A: Well, if you look back in the last ten to fifteen years, there has been a spike, a significant increase, in cases where corporations, especially in the sectors of fashion, cars, movies, food, real estate, and publishing, have used and exploited, economically and commercially, public art without asking the artists permission to do so. And, more importantly, without sharing with the artist any profits or percentage of the profits made by using such art. Especially in countries such as the United States what we have witnessed in recent years is an increased awareness amongst street artists, muralists, and even graffiti writers, about the legal tools, especially copyright, which could be used to stop such corporate appropriation of these forms of art.

Q: *"Do you have examples of where corporations have incorporated public art into their advertising?"*

A: Yes, I have a few examples of recent cases where corporations have copied or have incorporated public art, graffiti art, or street art into their advertising messages, the background of a TV ad, and so on and so forth. For example, in one case, the American company, Oakley, decided to use in its own advertising message a beautiful graffiti piece painted by the artists KEPTIONE and DJ RAKUS. You may know by now what graffiti writing entails, which is the art of painting letters and the interpretation of the alphabet. So, writers write their name in a stylish way. Here, the artists complained about corporate infringement because Oakley used their artwork commercially without their permission. Quite surprisingly, Oakley defended its case by saying, "But there is nothing original in this artwork," suggesting that graffiti art is not protectable. Well, here, Oakley tried to push the argument that such kind of graffiti art does not reach the necessary level of originality. We will see that copyright subsists in original artwork, so originality of the artwork is the requirement for protection. In the end, this case was then settled out of court. Most of these copyright cases, especially in the U.S., have been settled out of court, often with the payment by the company to the artist of an undisclosed sum.

Another case, which you may have heard about, is the H&M case. H&M, the famous Swedish fashion retailer, incorporated into their advertising message a mural that was painted in New York, in Williamsburg, Brooklyn, by a very famous American writer and artist, Revok. Well, again, here, the case was later abandoned. There was an agreement between the two parties, but this case caused a lot of controversy, many people within the graffiti subculture began boycotting H&M and disliking H&M on social media because of this blatant appropriation of graffiti art. Interestingly, it was H&M that started litigation by saying: “look, these artists are asking for money for using this graffiti mural.” So, H&M went to court and wanted the judge to say that there is no copyright because the artwork was painted illegally by Revok. So, that was the position of H&M before the court. The issue of copyright protection of illegal graffiti is a delicate issue. We will come back on this later.

In another case from 2014, Ahol Sniffs Glue, an artist, painted in Miami a beautiful mural with these eyes all around his signature “eye” symbol. American Eagle Outfitters, a company in the fashion industry, basically appropriated this mural for advertising purposes. Again, there was a case in America for copyright infringement and the case was settled afterwards by the parties.

In another very famous case from 2016, the American writer, Rime, painted a mural in Detroit, called ‘Vandal eye,’ a very beautiful mural with style. It was appropriated by the Italian fashion company Moschino. Rime’s mural imagery was depicted on a dress that was shown at a glamorous event in Hollywood, California. Here, the artist took action against Moschino for copyright infringement, and, then again, the case was settled. Here, the corporation defendant, Moschino, raised the illegal works defense, which I mentioned before. Again, what Moschino said is, “Look, there is no copyright here that can be enforced because the mural was illegal.” As I said, this case was settled out of court, but the issue remains, the issue of copyright over illegally created artworks. And we know that much of street art and graffiti are still illegal, right? We will come back to this issue later.

Another case involved Revok, Reyes, and Steel, three former American writers and now street artists. These artists took action against another Italian company, Cavalli fashion company, for the exploitation of their mural on fashion products. Again, this was a corporate infringement suit, but then the case was settled out of court in America.

In another case involving the food industry, McDonald’s started targeting graffiti art for some marketing reasons. Of course, McDonald’s costumers are very young and most of them might like street art and graffiti art. So, what McDonald’s did in recent years was decorate the walls of some of its restaurants around the world, especially London, with graffiti art. But, in this case, what McDonald’s did was appropriate a graffiti work. Techni-

cally, in jargon, the graffiti work which was appropriated in this case was a “throw-up” kind of bubble letters. McDonald’s used, and quite blatantly appropriated, the signature, the throw-up, of a very famous former writer, now deceased, Dash Snow. The case was started in America, again in California, but then it was dismissed for lack of jurisdiction on procedural grounds. I was waiting for a decision of the court in this case, so I was not happy that it dismissed because I would have liked the judge in this case to clarify whether this kind of graffiti signatures, throw-ups or tags, can be protected by copyright. We are going to go back to these issues in a few minutes: whether graffiti lettering such as tags and throw-ups could be protected by copyright.

Q: *“Are there cases that are currently pending?”*

A: Yes, we have some cases that are still open and are still pending. For example, Chris A. Williams was a muralist whose mural was incorporated into a television commercial used by Hy-Vee, the grocery store chain. Another artwork which has been incorporated in fashion products without permission is the Julian Rivera artwork. In 2019, Rivera sued the famous U.S. company Walmart, which distributes many goods. The case was settled in 2020. And then there is an Italian case from a couple of years ago. Jorit, who is a very famous Italian muralist, was painting in his own hometown of Napoli, and the mural was appropriated in the advertising message of a quite famous Italian beer producer. As far as I know, there was an action, a legal complaint, but I’m not sure how the proceeding ended up, or whether they are trying to settle the case or not. But we will watch how it plays out.

Conclusion: We have now seen just a few cases of unauthorized commercial use of murals, public art and how muralist, writers, street artists, have started reacting with legal actions, especially in America, but also in some European countries. But of course, in America, the awareness amongst artists of the legal tools—copyright—that could be used to protect the artwork is more evident.

## *Section 2: Is Street Art Copyrightable?*

Q: *“So, having said that, does street art, graffiti art, and muralism deserve copyright? Is the originality requirement met?”*

A: As I said before, copyright arises if the artwork is original. Well, of course, it depends on the kind of work. It depends on the kind of artwork, right? For example, there are street artworks—artworks that are labeled street art—and I’m referring not to graffiti writing with letters, but to more figurative art. So, for street artworks such as colorful, figurative murals there is little doubt that most of these artworks are protected by copyright because they are original. I mean, of course the judge will decide case by case if there is a dispute, but most of the artwork that we have seen here is original and figurative. They reach the level of creativity, which is neces-

sary to get copyright protection, like we saw before in that example of the graffiti lettering copied by McDonald's. So, when it comes to this kind of graffiti lettering-based art, well, we need to verify whether, for example, tags might be protected by copyright. On the face of it, a person who is external, who is not within the graffiti subculture, may think, look, this is not original art, this is scribble. This is visual pollution, right? I mean, even myself, before starting to be passionate about writing, my first thought was that this is not really pleasant. This is really not original art. So, that's what a member of the general public, outside the graffiti subculture, may think. But if we then appreciate the same tag on a canvas, we may start thinking, look, that's not just scribble, seems to be quite pleasant and probably creative enough, original enough.

Q: *"What are some examples of graffiti writing or tags?"*

A: So, we have a tag painted by the writer, Easy, a graffiti writer in New York, whom I've met and talked to. In one example, the tag has been painted on a shop shutter outside a building, and in the second example it has been painted on a canvas. Well, one may say, okay, the one on the canvas is an artwork, but the one on the building is not an artwork. But it's the same artwork, basically just on different mediums. So why should we think just the one on the canvas deserves copyright? Well, my point here is that the medium upon which the artwork is placed—could be a shop shutter, a wall, a dustbin, whatever—should not be conclusive, should not be determinate, should not prejudice, nor condition our assessment of originality. So, it's something that we should think about. I mean, tags altogether may form an artwork. For example, you might have a plurality, a multitude of tags, colorful tags next to each other. So, you can start thinking about tags as something really artistic when they are drawn in an artistic way. You may start thinking, "Well, that's not just a multitude of unoriginal tags, that starts to be an artwork."

In another example, you can see this is a painting by two very famous British artists, fine artists. You can see how at the top of this painting they have incorporated the tag "Oker," a tag by a famous British writer who I have interviewed in London, and I can assure you that he was not so happy about these painters appropriating his tag. I wanted to show this example to convey the message that even taggers, even writers, not street artists, writers, are affected by this. So, people who just go to a tube station, train station, or in the street to "bomb" and just write their name in a stylish way; even those writers might be annoyed by the fact that other people, in this case, fine artists, appropriate their tags, their writing details and style.

Q: *"What are some cases that have decided the originality aspect of street art?"*

A: If we look at the law and what judges have said in cases where graffiti lettering has been appropriated by someone, we start seeing how judges really treat or perceive graffiti lettering as a type of calligraphy art,

and therefore, potentially deserving copyright. There was a case between Reece, an artist and former writer, and a video game producer, Mark Ecko Unlimited. This was a case of a video game which had incorporated in the video game several graffiti artworks, tags, colorful graffiti pieces, and lettering in general. “Dip” and “Dipism” were the letters. In the end, the judge did not find copyright infringement, however, the judge said something interesting. The judge said, “the form of the lettering at issue is arguably central to the artistic expression of particular words. In this unusual context, aspects of the lettering shown in the Reece art . . . such as the degree of abstraction of the letters, the connectivity of the letters, the relative size of the letters, and the two and three-dimensional appearance of the letters, may reveal the artist’s personal style and strongly influence the ‘total concept and feel’ of the subject works.” Well, very clear. “[A]lthough the words in question, ‘Dip’ and ‘Dipism’ are not themselves subject to copyright protection, the original manner in which Reece expressed these words is protectable. . . . The color combinations and arrangements of the Reece Art may constitute protectable elements of that artwork.” So, these findings by the judge are quite revealing. It’s a kind of lettering style which can be original and, therefore, can attract protection. That was the main point of the judge in this case. A very important finding.

What about other, let’s say, artworks, which are quite common in our cities? I’m talking about street messages, sentences, even just one or two words painted or stenciled in urban spaces. I have an example of John Fekner messages. John Fekner is a multi-disciplinary visual artist active in New York since the late seventies, mid-seventies. And these are messages that were popularized by John Fekner in the seventies and eighties: “My ad is no ad.” There are also the messages by Jean-Michel Basquiat and Al Diaz in Brooklyn, New York in the late seventies, early eighties. Banksy is also quite well known for stenciling very funny satirical or sarcastic phrases and sentences.

Q: “*Can street messages be protected by copyright?*”

A: There are some uncertainties about whether, at least in some countries, street messages may be protected by copyright. In the U.K., in the EU, it seems that in light of recent decisions regarding copyright protection of sentences, there might be space for copywriting sentences. But in other countries, for example, in the U.S., there might be more doubts. And for single words, I mean, painting single words, it’s quite difficult to try to copyright them and to rely on copyright to protect words as judges may perceive them as too small to support the copyright claim. So, they might be considered uncopyrightable, let’s say.

Q: “*Are there any other cases involving originality that you would like to discuss?*”

A: Yes, to conclude the part on originality, I want to mention the case of a French judge, years ago, regarding the artwork by Space Invader.

Space Invader is a street artist from Paris who has been attaching this kind of mosaic tiles representing, or interpreting, the Space Invader video game and attaching this kind of mosaic tiles on the streets of many cities in the world. There was a case where someone copied such mosaic tiles and the French judge clearly said that these artworks are original, even if it is based on a previous video game or video game image. But the way the video game has been interpreted, arranged by the artist, and also the place where such artworks are placed in the street, give the artwork a level of originality which is enough to attract a copyright. I think this was a very important French case, which established that the Space Invader mosaic tiles, as attached in parts of the cities or in the streetscape of our city, reached the originality requirement. In this part, we have started seeing copyright protection of street art, graffiti, and public art, and whether originality may subsist in these artworks. In the next part, we will talk about other requirements, in particular the fixation requirement.

Q: *“Does street art meet the fixation requirement for copyright?”*

A: Originality is not the only requirement that must be met in order to have a copyrightable work. In some countries, such as the U.K. and the U.S., works must also be fixed in a tangible support. Tangibility is the word used to describe these requirements, fixation, tangibility. It means that the artwork must be embodied into a tangible support. Let’s think about a canvas, right? A fine art or sculpture. I mean, these artworks are incorporated into an object which is the canvas or the statue itself. So, we need to verify whether graffiti artworks, street artworks, placed in the public environment can be considered fixed. Well, for murals that stay on the wall for many months, sometimes years, there is no doubt that they are fixed. They are fixed in a tangible medium, into tangible support such as the wall, right? We need, however, to verify whether more ephemeral, more transient, or provisional street artworks could be considered as fixed on a tangible support for a relatively short period of time. So, we know that some graffiti, and some street artworks as well, may not last for long. In some cases, the graffiti artwork, a tag or even a street artwork, may last for just a few minutes. Think about some graffiti cleaning squads deleting and whitewashing artworks just a few minutes after they are being created.

Q: *“What are some examples of street art that may not meet the tangibility requirement?”*

A: There is the reverse graffiti made by a Russian artist Nikita. The reverse graffiti is done by working on “dusted” surfaces. For example, you may have seen cars sometimes, which are very dirty full of dust, and artists just with their fingers, or with other instruments, cleaning the dust in a way as to form an artwork. Well, examples of reverse graffiti are not uncommon, and they might be concealed relatively quick. They may last just for a few minutes, actually.

Q: *“Can we consider such ephemeral works as fixed?”*

A: There is no doubt that they are original. However, I will challenge anyone telling me that artwork on reverse graffiti artwork is not original. It is highly original, and it is also a very beautiful work of art. But is it fixed on a tangible support where its life, the life of this artwork, may last just for a few minutes? Well, if we look at U.S. copyright law, we find this interesting. Under U.S. law, copyright subsists in works which are “fixed in any tangible medium of expression.” One may say that these kinds of artworks are transient, provisional, or ephemeral, and that we can’t consider them as fixed in a tangible medium expression. However, I think this objection would be quite weak because fixation only demands work to be sufficiently permanent or stable to allow the work to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. We could argue that although many graffiti or street artworks are certainly ephemeral, their temporary, provisional existence is sufficient to meet these requirements. In particular, it is sufficient to allow people to perceive this artwork, even if it lasts for just a few minutes. Even if it’s being drawn, even provisionally, for a few minutes on a surface, it allows viewers to appreciate it. Thus, I think an argument could be made that the fixation requirement is met even if the artwork is ephemeral.

Q: “*How does fixation in photography or film impact copyright?*”

A: We have to take into account the role of photographic documentation. Street artworks, graffiti artworks, and public artworks in general, very often are photographed and pictured exactly to document their existence. Writers and artists are often happy to keep the photograph of their artwork, being not concerned about whether their artworks will be whitewashed or destroyed by someone. Here, it’s important to look at the role of photography to document and preserve their artwork. So, the fixation requirement could also be met due to the photographic documentation. For example, I have inserted an image of a British artist called Slinkachu who is very famous for these miniature-based phenomena. What he does is leave these miniatures, very little artworks, in the street, and then take a picture of them. So actually, the artwork itself becomes the picture. But the photograph here helps in meeting the fixation requirement because the artwork in the street is fixed in the photo. That’s an important aspect to remember.

Q: “*What about defenses to copyright infringement?*”

Let’s move on and look at other issues, in particular, copyright infringement issues. We know that graffiti artworks, street artworks, are out in the street. So, if there is someone shooting a movie in the street, let’s imagine that a group of people are talking in the street in the movie and the camera inevitably may incorporate street artwork. I mean, that’s quite inevitable, right? But is there an infringement of the copyright over the public artwork incorporated in the movie? Well, this issue was dealt with by an American judge in a 2018 case, *Itoffer Gayle v. Home Box Office*. Gayle was an artist, he painted street artwork and complained that the defendant,

Home Box Office, had incorporated his artwork in a TV series, Vinyl, without authorization. During an episode of the series, a woman walked through the streets of New York and passed just in front of the graffiti-style words, "Art we all." So, this graffiti artist complained.

Well, in that case, the judge said there is no copyright infringement. Why? Has there been an incorporation of the graffiti artwork into the movie? Yes, there has been, said the judge, but it has been de minimis. Now, the de minimis exception is a defense which can be raised by a defendant in copyright infringement proceedings which have incorporated the artwork or reproduced the artwork in a minimal way. So, in the *Gayle* case, the incorporation of the mural into the movie was de minimis just for a few seconds, like three to four seconds. There was no intention to commercially exploit the artwork. The use was minimum reuse, so there was no copyright infringement. A different decision would have probably been made if the artwork had been incorporated, not just for three seconds, but for ten to twenty minutes, and a narrative had been created around the artwork in the movie. But this did not happen here. There was de minimis use and therefore legal use of a public artwork.

Q: "What other defenses could be raised by those who use street art that is placed in public?"

A: First, the "freedom of panorama exception." The name is self-explaining: freedom of panorama. There are some uses of public artworks that are placed in the public environment, which could freely be used by anybody. However, the freedom of panorama works differently in different countries of the world.

An example that I want to give you, which shows the seriousness of the issue, is the Eiffel Tower in Paris. We know the Eiffel Tower could be considered as a work of architecture, right? The architect here was Eiffel, who devised and directed the works for the construction of the Eiffel Tower starting in the 19th century. Well, Eiffel, the architect, died more than 70 years ago. And we know that a copyright is valid for only 70 years after the death of the artist, of the author. Seventy years after the death of the author or the artist the copyright expires, which means that everyone can use the work that has fallen in the public domain. So, everyone can commercially exploit images of the Eiffel Tower. For example, selling shirts incorporating the Eiffel Tower. It's free. It's free because Eiffel, the architect, died more than 70 years ago. But if people use the images of the Eiffel Tower at night, that is considered infringement of the copyright over the tower. Why? The Eiffel Tower with the lights on at night is another artwork. It is an artwork which is different from the Eiffel Tower during the day without lights. Who created that other artwork? Not Eiffel, the architect, because he died more than 70 years ago, but it is the company which manages the Eiffel Tower. By doing so, they created another artwork which is currently protected by copyright.

The bottom line of this is that the Eiffel Tower with the lights on at night is a copyrighted work which cannot be copied by anyone. Otherwise, it's copyright infringement. That's why, if you start selling t-shirts, for example, incorporating the image of the Eiffel Tower at night with the lights on, you may commit copyright infringement. The Eiffel Tower was built more than 150 years ago, so, there is a freedom of panorama exception for the original Eiffel Tower during the day. But, there is no freedom of panorama exception for the Eiffel Tower at night when the lights are on.

Q: *"Are there other cases that have addressed the freedom of panorama exception?"*

A: The freedom of panorama exception was also applied in an American case, *Adrian Falkner v. General Motors LLC*. General Motors had incorporated into its advertising message a mural with a car. According to the artist, Adrian Falkner, his mural was used commercially by General Motors without his consent, which is why there was a complaint about copyright infringement. General Motors, which appropriated and used the mural, argued that the mural must be considered as incorporated into the building as architectural work. The mural had been painted on the building as architectural work, and therefore, we have a unique architectural work which has also incorporated the mural. There is a provision in U.S. law which guarantees freedom of panorama for architectural works. So, you can see here how the car company tried to invoke the freedom of panorama exception for architectural works, for commercial uses, by arguing that it's not just the mural that has been painted on the surface, it's a mural which is incorporated into the architectural work. And since architectural works can be reproduced commercially by third parties, the incorporated mural could be also.

The judge did not buy these arguments and sided with the artist by deciding there had not been incorporation. The mural had not been incorporated into the architectural work because they have two different functions. The architectural work was originally there, the building, but the fact that the mural had been painted on the architectural work does not make the painting part of the architectural work. Let's look at what the judge said in this case, very interesting. "There is also no indication that the mural was designed to appear as part of the building or to serve a functional purpose that was related to the building. Instead, there is undisputed evidence that Smash 137 was afforded complete creative freedom with respect to the mural . . ." Smash is the name of the artist who complained. "Smash was not instructed that the mural should play a functional role with respect to the parking garage or that the design of the mural should match design elements of the garage. Indeed, the architecture of the parking garage and accompanying building were already complete before Smash 137 started painting."

Another case in the U.S. focused on the freedom of panorama exception. On the one hand we have Mercedes, the famous German car manufacturer. On the other hand, we have four artists, Jeff Soto, Maxx Gramajo, Daniel Bombardier, and James Lewis, who painted three murals in Detroit. The murals were incorporated by Mercedes in an advertising message posted on Instagram. The photo was digitally modified to, in my opinion, make the mural more visible and more appealing.

Mercedes took action by asking the judge to say, “Look, this behavior, this incorporation is lawful.” Mercedes started the legal action because the artists started complaining to Mercedes about the commercial exploitation of their mural. Again, Mercedes relied on the freedom of panorama exception by saying the paintings have been incorporated into an architectural building. Because in America there is a freedom of panorama for architectural buildings, but not for paintings, the car manufacturers tried to rely on the architectural freedom of panorama exception because there was no corresponding freedom of panorama provision for paintings. That’s why the appropriators, the car companies in these cases, have tried to rely on the architectural works freedom of panorama exception by saying the painting is now part of the building.

The case has been settled. If the judge had sided with Mercedes by saying the mural is incorporated into an architectural building, and therefore can be freely reproduced by anyone, it may open the floodgates for appropriators of murals, that would have been a bad outcome. This would allow other companies to use murals for commercial purposes without the artist being able to successfully start and finish a copyright infringement action. It’s very dangerous because it could really encourage companies in any sector to target graffiti and street and public art and use such art for commercial purposes by relying on this defense. That’s why it’s quite a delicate issue, which we need to be monitoring.

### *Section 3: Can Illegal Works be Protected by Copyright?*

Q: “*Can we use copyright to protect illegal artwork?*”

A: We know that most street art and graffiti is still illegal because these artworks and graffiti pieces are painted without authorization of the owner of the wall. My question is: Can we use copyright to protect illegal artwork such as illegal graffiti and street art? Well, this is a gray area of the law in several jurisdictions, we still don’t know. The debate is still on, although I must say most legal scholars, and some judges, think that there is no need for street artwork to be legalized or protected by copyright—yet copyright acts and corporate laws of several countries do not say anything about illegal artworks. More specifically, is there a paradox in giving illegal graffiti and illegal street art copyright protection? I use the word paradox because some commentators have pushed the argument that copyright would not be a suitable tool to protect what, at the end of the day, is vandal-

ism, to protect a kind of activity which is prosecutable. There are graffiti artists and several street artists that do go to jail. Some jurisdictions, including the U.S., France, and the U.K., have strict laws in force, and several of these artists and writers have spent time in prison. Would it be paradoxical to give them an award in the form of a copyright claim if they are committing a crime? In my opinion, there would not be a paradox. By this, I mean that I would still protect illegally created works via copyright, even though they are created illegally. I don't see a paradox in having the same artist paying the consequences of the criminal act—going to prison or paying heavy fines—but at the same time, owning a copyright of the illegal artwork. I don't see a contradiction or paradox here.

Q: *“Have there been any cases that have discussed this paradox?”*

A: This issue, the fact that artworks are created illegally and therefore do not deserve copyright, has been raised in several recent cases. One was the *H&M v. Revok* case from 2018. H&M, the Swedish fashion retail giant, relied on the criminal act to say that the artwork was illegal and therefore cannot be protected by copyright; therefore, H&M claimed it could use the artwork commercially as well. This was a defense raised by H&M, which, in my opinion, is an unfair defense because it is not fair to deprive artists of their rights just because the artwork has been created illegally. This case was settled, so the judge could not clarify this issue. A similar defense was raised by Moschino in the case we have already come across. Again, Rime, the writer here, painted this mural without authorization, so he committed the supposedly criminal act. And that was the defense raised by Moschino. Again, the case was settled out of court, so the judge did not have the chance to clarify this issue.

Q: *“Have commentators expressed opinions on copyright’s applicability to illegal street art?”*

A: What some commentators believe is that street artists and writers who have committed an illegal act cannot be protected by the law. They rely on the so-called “unclean hands doctrine,” which is quite popular in the U.S. It states that whoever has committed an illegal act cannot go to court and ask a judge for legal protection because their hands are unclean.

The unclean hands doctrine was mentioned in dicta in the U.S. case *Villa v. Pearson Education*. Villa was an artist who painted an artwork in a public space without authorization. Pearson Education was the publisher of a book where a photo of this illegal artwork was published. There was a dispute between the artist and the publisher because, of course, there was no authorization from the artist to use the photo in the book. The judge said in dicta that whether there is copyright infringement in this case depends on the factual question of illegality, implying that we first need to verify whether the artwork is illegal. If it is illegal, there might be no copyright protection. This was the suggestion between the lines, but it was not a clear statement by the judge and was only mentioned in dicta. We still don't

know whether there is protection. So, I will welcome clarification by a judge in the U.S., Europe, or in any country.

In my opinion, the unclean hands doctrine, as applied to street art and graffiti, does not work. I think it is not feasible to govern the creative process in these subcultures. My point is that those who exploit art without authorization and invoke the defense that the artist has committed a crime is not the victim of the vandalistic act. If there is a victim, it is the property owner whose wall, for example, has been vandalized. The property owner however is not party nor involved in these disputes. So, you can see how accepting the unclean hands doctrine in these cases would lead to an absurd result because it ends up rewarding parties who are not victims of the alleged vandalistic act, such as the property owner. In other words, as has been noted by a commentator, it would legitimize the appropriation of street art but not reward its very creation. I think it is unfair to give appropriators of street art the chance to justify such appropriation but not to reward the creators of these artworks in the first place.

Q: *“How does the process of creating the artwork impact copyright?”*

A: In my opinion, the process of creating artwork in general, whether it is street art or fine artwork, should be irrelevant under copyright law. Copyright should be neutral regardless of whether the artwork has been created through an illegal act. Copyright should be blind toward the process of creating the artwork. There is no paradox. Here, criminal laws and copyright laws work in parallel. You paint a wall without permission, and you may face the consequences of such an illegal act, such as going to prison or paying fines. But, on the other hand, why shouldn't you be allowed to rely on copyright to protect the artwork? At the end of the day, even fine artworks might be created illegally. For example, I steal a canvas from a shop, and I start painting the canvas. Why should the painting be deprived of copyright? I don't think it makes sense.

But, once we accept that illegal street art and graffiti is copyrightable, is it really convenient for the artist to take legal action against the appropriator? Well, there is the risk of being prosecuted. In some countries, you may end up in jail if you paint a wall without authorization, that's true. And, I must say, many artists and writers I talked to have confirmed this fear; they don't want to run these risks. But we could say after the statute of limitations expires, there is no risk of being sued. What is a statute of limitation? You commit a crime, and after a period of time, the crime can no longer be prosecuted. Many countries have statutes of limitations. Depending on the country, it could be six or seven years from the date the crime was committed. In this case, there is no risk of facing legal consequences. Indeed, in the case I mentioned earlier, Dash Snow, a graffiti artist, who was very active in the nineties in New York, had illegally painted his tag throughout New York. What happened many years later, as you know, was that McDonald's, the fast-food giant, incorporated several of Dash Snow's

graffiti pieces. Dash Snow was deceased, so his fiancée and estate took legal action against McDonald's. In this case, there was no risk of being prosecuted because the artist was already dead, right? So, you can see how copyright actions may be started to protect artwork after the death of the artist, as there is no risk there.

Q: *“At times street art is created as a form of protest against the establishment. Is copyright, established by the government, the right tool to protect this art?”*

A: I want to introduce another issue which is more philosophical than legal: Is copyright suitable to regulate and protect street art and graffiti? We aren't asking whether the copyright protects street art, we already saw that the requirements for protection are often met. Here, we are asking another question: Whether copyright is the right tool to protect these forms of art? These forms of art are often anti-establishment. The artworks convey an anti-establishment message against the government and against the system in general, they denounce and highlight injustices, the power of media, police brutality—all anti-establishment, anti-government messages.

But is there not a contradiction here between such messages and copyright itself? Copyright is a legal tool that is granted and is provided by the government, the law, or the Parliament. The law, as we know, is created by the Parliament or by the government. So, it's an establishment, too. Wouldn't it be paradoxical or contradictory for anti-establishment artists to rely on an establishment too? I don't think so. Some commentators have highlighted this contradiction, but I think there is no paradox or contradiction. You can be anti-establishment but at the same time ask for protection from the government by, for example, starting a legal action against an infringer. So copyright, again, here, is neutral. Copyright should not be bothered about whether an anti-establishment message is conveyed by that artwork. Copyright is a blind and neutral legal tool which can be used for many purposes. Copyright is flexible and could also be the right legal tool to keep that message anti-establishment. Copyright is an ally of artists to prevent other people from appropriating the artwork and from using the artwork in a way that is not accepted by the artist.

The artists and writers whose artworks had been exploited commercially by the fashion, fast food, and car industries in the case I mentioned earlier, complained about the association of their art with messages which could not be accepted by the artists themselves—profit-oriented messages, marketing related messages. They were not happy about that. In the proceedings, they asked such association to be stopped by the judge because they wanted to keep their message an anti-establishment one, and not a consumerist or a profit-oriented message. You can see how here copyright could really be used—and is used—to prevent the artist from being associated with a concept that they don't accept. Here, you can see how copyright is flexible. It is so flexible that it could be used for any purpose.

Here, I have inserted this slide of a very famous artwork by Stik, a London street artist and muralist. He paints iconic stick figures. If you go to London, especially East London, you will see many of these artworks. Stik is also a socially engaged artist. He embraces socially important causes, such as supporting the National Health Service (NHS) in the U.K., charity organizations fighting homelessness, such as *The Big Issue* magazine, and LGBTQ communities. He allows these organizations and charities to use his artwork in connection with these causes, using posters, placards, flags, and banners. He authorizes these charity organizations to use the stick figures as a mascot or logo to promote these activities. When he does so, he is very keen on these organizations signing specific usage agreements in which the organizations commit to using the stick figures in a way that is approved by the artist.

Basically, this is a license—a royalty-free copyright license in most of these cases, but it is still a license. It is still a contractual tool that the artist uses to regulate the use of their artwork, copyright law allows the artist to do so. You can see how copyright is flexible here. It is used to guarantee exclusivity regarding how the artwork is used. Without copyright, it would be difficult for the artist to exercise such control.

Of course, if you wanted to sell your art, you can do that, and copyright helps you maximize profits. You want to do merchandising incorporating your artwork—why not? Many do that to just make a profit, they sometimes take care of their merchandising. It could be just selling t-shirts or hats, incorporating the artwork, and selling such products to raise money to support other artistic projects. It could be an activity to put food on the table for the family, or it could be a way of making large profits. You can see how copyright is flexible here. It helps in maximizing profits if this is what the artist wants to do, and several artists and writers do that.

Q: “*How does the culture of sharing in street art impact copyright?*”

A: Another characteristic of these forms of artwork is their “sharing and appropriation” culture. What several street and graffiti artists do is take inspiration from the works of other peers. So, there is a widespread practice of sharing or appropriating details and styles developed by other writers and artists, especially in graffiti’s lettering subculture. Historically, graffiti writers have taken inspiration from older graffiti writers in their community. In New York, in the seventies, what we witnessed was old writers mentoring young writers and young writers being able to use the styles and details of older writers or writers from other geographical areas. This is broadly accepted in the subculture, provided acknowledgement is given. For example, in social media where the picture of the artwork is disseminated, there is a widespread practice of sharing and appropriation. In the field of street art, I would say not just amongst peers, there is a trend to appropriate imagery from popular culture. But this was also the case for other artistic movements, such as pop art. Pop art in the U.S. in the sixties and seventies was

when we had a widespread practice of incorporating imagery from popular culture. For example, think about Andy Warhol appropriating the Campbell's Soup cans or imagery from Disney.

Let's talk about some examples. Banksy certainly took inspiration from Blek le Rat, the one who pioneered the stencil technique in the early eighties in France. Blek le Rat has certainly had an influence on Banksy. Banksy has even acknowledged this influence by saying: "every time I think to have painted something original, I promptly discover that Blek le Rat has done the same thing twenty years earlier."

What I can say is that when there is acknowledgment of the inspiration of the source, sharing is broadly accepted within the graffiti and street art subcultures. Many artists and writers accept and even appreciate such appropriation. It's a form of flattery at the end of the day, and they take it as a sign of respect. Yet, graffiti artists may not tolerate blatant imitations, especially where there is no acknowledgement of the source. When there is an imitation between artists or writers without acknowledgement, a kind of blatant imitation or a sort of plagiarism, several writers and artists do complain. Of course, what they do is to rely on the so-called "street justice." Obviously, they don't take legal action against the fellow writer, a fellow peer, because the other writer has copied their artwork. They just rely on street justice, which means, for example, painting their artwork over the artist who has imitated his or her piece. Basically, they are vandalizing the artist who was disrespectful. Another way of reacting is shaming the imitating artist on social media as a sort of gossip, which has an effect because nobody would like to see social media feeds being flooded with negative gossip which could affect their reputation. And these social norms kind of work in the subculture.

Q: *"Is there a time when social norms might not be good enough to solve a dispute between street artists or writers?"*

A: When money is at stake, social norms might not be enough. For example, a street artist or writer starts copying the artwork of a colleague and starts making money off it by doing merchandising or any kind of economic activity. The artist-writer being copied cannot accept economic exploitation and may be ready to react, not by relying on social justice, but by relying on copyright. You can see how social norms and street justice go hand-in-hand and are complimentary to copyright. For some aspects, social norms are okay, they are enough. For example, shaming the imitator on social media or just vandalizing the imitator's artwork. For these issues, social norms may be enough.

But when it comes to money and stopping a colleague and artists from making money off your artwork, copyright starts having a role, and this is not irreconcilable with the main nature of copyright. The fact that some writers and street artists rely on street justice and not on copyright does not mean copyright is not suitable to govern the whole subculture. There are

some aspects which are governed by social norms and other aspects which are governed, and could be well-governed, by copyright.

This also, to some extent, happens in the field of fine art. I have talked to some fine artists, and not all of them react by sending cease and desist letters to colleagues, other fine artists, graphic designers, that have appropriated their work. They often just let it pass because they don't have time to waste on contacting lawyers and sending letters because that takes time. They may rely just on social justice. For example, they may go on social media and start shaming the imitator on social media. You can see that this same pattern is also found in the field of fine art.

Q: "Could you talk about the phrase 'copyright is for losers?'"

A: We have seen that copyright can regulate certain creative aspects of street art and graffiti. You can see that many street artists and writers do rely on copyright. We have seen some cases, and from my ethnographic research, I have found that many street artists and writers do care about copyright. Thus, we can see that copyright has already penetrated the graffiti and street art cultures.

Q: "What happens if a street artist or writer decides copyright is the right avenue to pursue?"

A: Once we accept that copyright may be able to govern creativity in these subcultures, and that copyright is fit for the purpose, artists and writers must accept the rules of the game and must stick to it.

For example, they may lose cases they bring before judges. That's what happened in the case *Seltzer v. Green Day*. Green Day is a famous pop band that used, as a backdrop for one of their gigs, an image taken from a poster created and placed on the street by a street artist in Los Angeles. Seltzer was the artist. What the artist did was to take action against the band for alleged copyright infringement. The American judge in that case sided with the band and against the artist by saying that it's true that an image of the poster has been used by Green Day at their gig, but that this is fair transformative use. There is a doctrine in U.S. copyright law, the Fair Use Doctrine, that says copyrighted works in general can be used by third parties in a way which is transformative, which is different from the way the artwork was meant by the artist. You can see here how artists may lose cases against the imitators.

They may also be condemned for copyright infringement. *Friedman v. Guetta* is a case of a street/studio artist, Guetta, also known as Mr. Brainwash, who created a studio artwork by using stencil to reproduce a famous photograph taken by Friedman, a famous photographer of the hip-hop/rap band Run-DMC. The artist projected the image of the picture on cardboard and made a stencil. The photographer took action against the studio artist and won the case. The judge in California said there is no way this can be

transformative fair use, and the street/studio artist was condemned for copyright infringement.

*Morris v. Guetta* is another case involving the same artist, Mr. Brainwash, or Guetta. Again, what he did here was to take as an inspiration, or more than inspiration, the famous photo of Sid Vicious, the punk musician in the Sex Pistols, and reproduce the image in a mural and in other studio artworks. Dennis Morris, the photographer who took the picture, took legal action against the artist and won. Again, the American judge here said there is no transformative fair use.

There is another case where the artist is a street/studio artist, Shepard Fairey, who created the famous “OBEY” sticker. What Shepard Fairey did was to take, as a source, the picture of Obama when Obama was an Illinois senator. He created the famous poster that was used in the 2008 Obama presidential campaign, it was an iconic image. The artist was sued by AP, the news agency, Associated Press, because AP had the rights over the original photograph. The case was ultimately settled out of court, but the judge strongly suggested that the artist should settle because otherwise he would be condemned.

We can therefore see how street artists and writers may take action. Actions may be settled. Actions may be lost by the artist, such as in the case of Green Day, or they may be even condemned because the mural has imitated previous artworks. My point is that once street artists and writers accept the rules of the copyright game, they must accept it in full and may lose cases.

### *Theme 1 Conclusions:*

Some conclusions on the first parts of the module, mainly the economic exploitation of graffiti and street artworks. We have seen that copyright may be fit to regulate this creativity because copyright is neutral and flexible, allowing street artists to pursue different aims, not only stopping people from making money, but also stopping corporations from appropriating and associating their mission with street and graffiti art.

Graffiti and street art cultures, in my opinion, are experiencing an evolution. In the seventies, most, if not all, writers and street artists were not really concerned about copyright and protecting the fruits of their works with copyright, but this has changed. In the last ten to fifteen years, the subculture has experienced an evolution. More and more writers and artists have become interested in copyright, despite often conveying anti-establishment messages. We have seen that copyright may be invoked and enforced by street artists and writers, in addition to social norms and street justice. To conclude, I see street justice and social norms as being complimentary to copyright.

Next, we will talk more about the moral rights of artists and writers, moral rights that can be potentially enforced where the artwork, the murals,

are treated in a way which is prejudicial to the honor and reputation of the artist. For example, being destroyed or being moved into another indoor location. We will see the legal tools that could be used by the artist and writer to protect and to preserve their murals and their street artwork in general.

## THEME 2: MORAL RIGHTS TO COPYRIGHT IN PUBLIC/STREET ART

Q: *“We’ve discussed the potential of Economic Rights for Street Art protection, but there is another alternative as well, correct? The availability of Moral Rights?”*

A: Yes, we are going to look at whether street artists, writers, or artists that place their works in the public environment could rely on moral rights, especially the moral right of integrity, to oppose the treatment of their works which are prejudicial to their honor or reputation. It may be a good legal tool in the hands of artists to try to stop, for example, other people from destroying their artwork or, in any way, treating their artwork in a way which is prejudicial to the artist.

Q: *“So could moral rights be used to preserve street art and graffiti, for example? Would it be possible for artists to enforce moral rights to prevent erasure or whitewashing?”*

A: The issue of whether a moral right, in particular the moral right of integrity, could be used and how it could be used was raised in the *5Pointz* case in New York, a seminal case from 2018. *5Pointz* was a very well-known mural in Queens, New York, and the artist painted it legally, with permission. The property owner had allowed artists to paint for many years. Then, in November 2014, the property owner whitewashed all the artworks, both the graffiti and street artworks, that were painted on the building, and it did so without any notice to the artists themselves. Of course, the artists were not happy about that—they felt that their reputation and honor was kind of prejudiced. The artists started a legal action under the Visual Artists Rights Act of 1990 (VARA), which is the U.S. piece of legislation granting moral rights to visual artists, including the right to prevent destruction, if possible, or in the case of destruction, to ask for and obtain damages. This kind of protection is given to visual artworks of “recognized stature.” This is the threshold which must be met for artworks to be protected under the Visual Artists Rights Act.

One of the main issues in this dispute was whether the forty-five artworks mentioned in the complaint had reached that “recognized stature.” Judge Block found they had reached that threshold. In particular, the Judge did not agree with the property owner’s expert who was pushing the argument that only artworks that have reached an academic or high level of fame, such as the paintings of Picasso, could be saved from destruction under this piece of legislation. On the other hand, the Judge thought that in

order to assess whether graffiti and street artworks have reached “recognized stature” level, we cannot take into account academic publications or the usual benchmark which is used in fine art disputes. It doesn’t matter if the artist has not been cited in academic publications, for example. But, as far as graffiti and street art is concerned, just being mentioned on social media, a high number of likes on social media, the viewings, all these elements typical of Internet platforms are relevant. So, this decision on “recognized stature” as applied to graffiti has been revolutionary. The Judge believed that these kinds of artworks, both figurative artworks and graffiti lettering, the forty-five artworks in this case, could be considered as having a “recognized stature.”

Q: “*What is the important takeaway from this case?*”

A: It’s an important decision because it narrows the gap between fine art and street art. Traditionally, this kind of protection had been granted to mostly fine artworks. Also, the level of damages that was granted in the *5Pointz* case, was exceptional. The twenty-one artists and writers were awarded \$6.7 million in damages, the highest damage ever awarded under this piece of legislation. This gives you an idea of the importance of the ruling.

The Judge also dealt with a procedural issue. The property owner did not serve the ninety-day notice to the artists to inform them about the planned destruction. The Visual Artists Rights Act allows property owners to destroy artworks placed on their buildings, if they give ninety-days’ notice to the artist in order to allow the artist to save their artworks, if possible, without damaging the artwork itself. Another way for the property owner to lawfully destroy the artwork is to obtain a waiver from the artist waiving this moral right of integrity—this moral right to prevent destruction. If the property owner does follow this procedure, there is no violation of VARA rights. But this did not happen in the *5Pointz* case because the property owner, at night, without prior notice, entered the premises and whitewashed all the artworks with cheap white paint, which allowed viewers to see the artworks underneath. The fact that the property owner had used cheap paint was perceived by the Judge as mean, epitomizing the sort of “bad faith” on the part of the property owner.

This has been a revolutionary case that may change the perception which the general public has always had about graffiti and street art. In my opinion, this case had a strong impact on public perception. By reading social media reactions, even traditional media reactions, it seems that now graffiti and street art have acquired a more respectable position, let’s say, as opposed to pre-*5Pointz*. The first decision in the *5Pointz* case was made in February 2018 by Judge Block, and in early 2020, the U.S. Court of Appeals for the Second Circuit affirmed the high award of damages, \$6.7 million for the 21 artists.

Q: “*Are there cases outside the United States that have protected this right to protect destruction?*”

A: In general, the right to prevent destruction is allowed in several jurisdictions. For example, in continental Europe—France, Italy, Germany—there have been cases where judges have affirmed the rights of artists, in general, to prevent the owner of the actual piece from destroying it. In the United States, this right is available under the VARA legislation. In other jurisdictions, for example the United Kingdom and other countries, it might be doubtful whether it is possible to save artworks, including those placed in a public environment, from destruction.

In a Canadian case, regarding the infringement of the moral right of integrity of an artist, the Canadian judge had to decide whether a certain treatment of an art installation was allowed. The case concerns an artwork of the early eighties placed on a commercial mall in Toronto, where the artist installed birds hanging from the roof of the mall. After the artist had installed this artwork, the mall’s management company added some ribbons hanging from the birds’ necks. Well, the artist believed that such a treatment of his own artwork by the management company was prejudicial to the reputation of the artist himself. So, the artist felt a bit ridiculous and that his reputation was prejudiced. The judge said in this decision that this treatment would have been the same as putting earrings on the Venus de Milo sculpture.

Q: “*Have there been other United States cases that have looked at similar destruction rights?*”

A: Yes, there have been several other cases dealing with the destruction or modification of artworks in the United States. Now we’re going to see a few cases where muralists relied on some form of moral rights to object to the destruction of their mural by the property owner. First is the *Jesus Campusano* case. In 1986, the artist, Jesus Campusano, painted a mural on a building in San Francisco, California, being assisted by three painters and his partner. After the building’s owner covered the mural in 1998, the partner and the children of the artist sued the property owner under the VARA. They claimed that the owner of the property had not notified them about the intention to cover the mural. The case was settled out of court, and a sum of \$200,000 was paid to the artist’s partner and children.

In another case, from 2006, a mural painted by Kent Twitchell over the course of nine years in Los Angeles was painted over with no preliminary notice given to the artist. The artist sued the property owner, which was the U.S. Government, and eleven other defendants, for damages under the Visual Artists Rights Act in a California court. Almost two years later, the case was settled for \$1.1 million. At the time, this was the highest settlement for a moral rights case. Thus, it was an important case. The artist, whose artwork was destroyed, was able to get \$1.1 million in damages for the destruction of the mural, which is quite a high figure.

Next was the 2014 case *Henderson v. Ziman* where the court debated the “recognized stature” requirement. Here, in April 2014, the artist, Victor Henderson, started a legal action under the Visual Artists Rights Act over the destruction of the artist’s mural. The mural was named the Brooks Avenue painting, which the artist had co-created in 1969. Henderson claimed that his mural had major historical significance. While Henderson seemed to have a good case and strong evidence showing that his mural was of “recognized stature,” for some reason, he voluntarily abandoned the litigation. So, there was not a settlement or sum paid to the artist.

In *Thrasher v. Siegel*, from 2017, the muralist, Monte Thrasher, sued several individuals and corporate defendants in a California state court, claiming that the defendants had painted over his “Six Heads” mural without permission. The artist thought it was painted over to paint other stuff, so he was a bit annoyed. The case is about the violation of the moral right of integrity and, also, the paternity right, another moral right that can be asserted by artists, which recognizes their right to be acknowledged as the author of the artwork. To my knowledge, the case is still pending, or it has been recently settled out-of-court. So, there has not been a decision by the judge on this case. What all these cases confirm is that there is an inevitable tension between the property owner and the artist because the artist places the artwork on a surface which is owned by someone else, and sometimes even without the permission of the property owner.

Q: “What are some factors judges should weigh when considering the arguments of artists and property owners?”

A: Judges that need to resolve these disputes must find the balance between two conflicting interests. On the one hand, the interest of the artist to preserve his or her own artwork for a variety of reasons. Of course, the artist may feel prejudiced by the destruction of a mural. In my own ethnographic research, I found that the more time an artist takes to work on and finalize the piece, the higher the artist’s interest will be in trying to preserve it, which makes absolute sense. An artist, a muralist, spends hours and days and weeks, and sometimes months, to do big projects. Of course, the artist would be disrespected if the property owner decides to get rid of the mural in a few weeks, a few months, or even just one year after. That’s a real concern for artists. But on the other hand, we need to consider the position and interest of the property owners. A property owner cannot be obliged to accept forever, or even for many years, an artwork, especially if the artwork had been placed on his or her property without authorization of the property owner.

So, judges need to find a balance by considering the following different factors. For example, the existence of any prior agreement between the property owner and the artist. This could be the case where the property owner asks for the mural or even commissions the mural to the artist. If there is a commission to place a certain artwork on a building, a clear in-

struction of the property owner to embellish the wall, then the judge would probably consider the position of the artist. The existence of a prior agreement may be an important factor for the judge. Also, the length of time the artwork has been allowed to stay. The artist may argue that since the mural has been accepted for many years, this may be interpreted by a judge as a final acceptance by the property owner. Another factor to consider is the advantage obtained by the property owner from the mural. There are murals and public artworks that embellish the building or the area that may attract tourism. Think about the murals by very famous muralists, artists. You may know that, for example, walls where Banksy pieces had been placed by Banksy and/or his crew have significant value. I mean, the fact that the Banksy piece has been placed on the wall makes the wall, the piece of wood, very valuable. That is also why sometimes such murals have also been removed by being cut surgically from the wall. We will come back to this treatment later.

Another factor which could be considered by judges is the public interest served by the proposed new use of the property once the street artwork is removed. For example, in the *5Pointz* case, the property owner had plans to build luxury condos on the same site where *5Pointz* was, and actually, it did build those condos. You may say, well, this is a matter for the property owner to decide, which is true, it's his own property. But judges need to look at the broader picture. It's one thing if the property owner thinks about building up a cultural space, a museum, a new venue space which does have some artistic connotation or does serve some public interests. It's another thing to build luxury condos. So, this is another factor that could be considered by judges.

Also, the change of destination of the building is another factor. What will be the future purpose of the building? What is necessary to adapt the building or wall to modern functional requirements? That could be a factor which plays in favor of the property owner. Also, the cost of maintenance and restoration is another factor. I mean, the property owner cannot be obliged to tolerate an artwork on his or her building when such maintenance is very expensive. I remember recently there was a Banksy mural in Port Talbot, Wales, and the property owner of the wall where the Banksy piece was placed, after a while, had to cut the wall to sell it because it could not afford the cost of maintenance. For example, he had to build up a gate to prevent people from getting closer. He had to protect the Banksy artwork through plexiglass, and he had to pay guards, twenty-four hours a day, to ensure that no one would vandalize the piece. I mean, it costs a lot to maintain a Banksy piece, and a property owner may not be able to do that.

Another factor is whether the property owner commissioned the work, as I said before, and whether the owner is an organization on which a moral duty lies to take care of cultural heritage. For example, a museum or an

organization which does have this function. This should be considered by a judge if a dispute involves such an entity.

Q: “So, what about destruction of illegally created street art and graffiti? Can an artist rely on moral rights to prevent the property owner or other people from destroying artwork that is placed without authorization on the property?”

A: That’s an important issue. One may say, well, it is reasonable to allow the property owner to destroy an artwork which has been placed on her property without permission. At the end of the day, it’s her property, and she didn’t ask for that artwork to be placed there. The refusal by the property owner to keep it and their action aimed at destroying, removing, or whitewashing it, seem to be legitimate and reasonable. In a case that decided this issue, *Ron English v. BFC*, the court sided with the property owner. The group of artworks, murals, and sculptures had been placed in a community without authorization. The court sided with the property owner who wanted to destroy it because if the property owner is not able to do that, if artists are able to enforce their moral right of integrity to prevent the property owner from destroying any legal piece, then artists could effectively freeze redevelopments of vacant lots by placing their artwork there without permission. The court in this case found that such a construction of the law would be constitutionally troubling, would defy rationality, and cannot be what lawmakers intended when they introduced the VARA. This finding makes sense.

However, in a following case a few years later, *Pollara v. Seymour*, the court seemed to take a different approach. The court said that the finding in the *Ron English* case, that artists cannot rely on VARA to prevent destruction of illegal artwork, only applies to illegal artworks that cannot be removed without destroying them. The court’s finding impliedly suggests that in a case of illegal removable works, i.e., artworks which can be removed from the wall without damaging them, and most street art is like this, destruction may be prevented by relying on the moral right of integrity. The court added that there is no basis in the law to find the general right to destroy works of art that are on property without the authorization of the property owner, that is, those created illegally. That’s an important finding which leaves the door open and the issue unresolved. I would say, at least in America, but also in other countries, it would be doubtful whether or not any illegal artwork would be protected from destruction or not. It’s still a gray area of the law in many countries.

There was another case in Germany in 1995 regarding an artwork painted on the Berlin Wall that was later destroyed. The artist took action by relying on the moral right of integrity, and the German Federal Court in this case held that the artist could rely on the law to prevent or to object to the destruction of an artwork, even if the artwork has been created illegally. We know that at the time of the Berlin Wall, all artworks there were unau-

thorized, but such a moral right of integrity could be enforced by the artist against third parties who destroyed the artwork, not against the owner of the wall or the tangible support. That conclusion makes sense because the owner of the property is the entity which is damaged by the illegal act. So, if someone places an artwork illegally, without authorization, on his or her property, it is quite understandable that the property owner could get rid of the artwork without incurring any kind of legal consequences. The same does not hold true for third parties who destroy the artwork. This was a very important decision of the German Federal Court.

So, what can we infer from all these cases? There is little doubt that, in certain circumstances, artists should accept the fact that placing their pieces on other people's properties may carry the risk of losing control over such pieces, even if they are authorized or commissioned to do that. Of course, property owners can get rid of artworks placed on their properties if they follow the correct procedures. For example, in the U.S., as we have already seen, the VARA requires the property owner to give notice to the artist, ninety days' written notice, before lawfully destroying the artwork. If the property owner follows that procedure, he or she cannot be held liable. Also, in other jurisdictions where there is no specific provision on the destruction of artworks, it would be advisable and recommendable for a property owner to inform the artist about the intention of the property owner to destroy, whitewash, or remove the artwork. In that case, the position of the property owner will be stronger when the decision to destroy an artwork is taken in a transparent way, by informing all parties who were interested in such art, not only the artist, but other organizations which may have an interest in keeping the art there. Also, property owners may be obliged in certain circumstances to remove a wall or other surface where the artwork is placed. For example, a property owner on safety grounds may be obligated to take action to remove it. There have been some cases in France and England where the property owner had to remove a wall that was about to fall, for example. In that case, the property owner is obliged, otherwise they could be liable, even under criminal law, for any damages that may happen to people. That's why artists' attempts to prevent the destruction of artworks in the past, in some countries, have sometimes been rejected, because it would be dangerous to keep the surface or support upon which the artwork was placed. There was a case in the eighties in New York about an art installation by Richard Serra, an artist who was commissioned to design and place a very long sculpture which occupied a significant part of Foley Square in New York. Well, this artwork was quite big and the reaction of the public to this sculpture was quite negative. After a while, there was a decision by the council to remove the artwork because it made life for pedestrians more difficult. Serra did not like the idea of his hard work being removed, so he took action, prior to the enactment of VARA, but was not successful. This case shows, once again, the tension between the artist on

the one end and the property owner and members of the public on the other. The decision to keep a public artwork on-site must consider people or entities whose interests are basically the opposite of the artist, such as the property owner or a member of the public whose freedom might be affected.

Q: *“Could you explain the concept of decontextualization as it relates to street art?”*

A: Yes, let me talk now about the so-called phenomenon of decontextualization of street art and graffiti. I’m referring to those surgical removals of murals and their relocation into indoor environments, such as galleries, museums, auction houses, and so on and so forth. Well, this has happened with several murals by Banksy, “No Ball Games” and “Slave Labor,” and by other famous muralists or street artists.

Q: *“Could a street artist rely on moral rights to prevent decontextualization?”*

A: Well, on the one hand, one may say that the artist’s honor or reputation is jeopardized by this removal and relocation. So, it would be fair and appropriate to allow artists to rely on the law to object and prevent it, if possible. However, I must say, this is still a gray area of the law because we haven’t had a specific case on this yet, even though there have been several removals in the last few years.

Another removal, a famous one, was the one which affected a mural painted by famous London-based artist, Stik, who is very well known for painting stick figures. If you go to London, in particular East London, you will find many of these stick figures on urban surfaces. One piece had been painted by Stik in 2011 in Gdansk, Poland. It was painted as part of a community project led by Stik, and he was helped by local kids to finalize the mural. It was a very long piece that included around fifty-six stick figures. So, it was a unique, stand-alone artwork with these fifty-six stick figures, also painted by kids. A few years after it was painted, several chopped pieces of this mural resurfaced in a gallery in West London. The pieces were offered for sale at a price of around £12,000 each. The artist was quite annoyed because the artwork was meant to be just one artwork; its chopping into several panels—the artist believed—meant that the unique artwork was mutilated. Especially considering that some of these pieces had been chopped by removing parts of the legs or the arms of the stick figures.

In my opinion, this was clearly a violation of the moral right of integrity of the artist. Under U.K. law, there is a provision in the U.K. Corporate Act which states that the artist can object to mutilation of the artwork which is prejudicial to the honor or reputation of the artist. In my opinion, it’s a mutilation, but the decontextualization per se should also be considered as a violation of the integrity right. Street art is almost always site-specific, and these pieces confirm that. Street art does have a meaning in the original place where it is placed, and if you decontextualize it by bringing it into an

indoor environment, such as a gallery or museum, you denaturalize such artwork. Also, this Stik case was settled out of court, and so far, there have not been other cases addressing this point. But I very much like the idea of a judge telling us whether the moral right of integrity could be enforced to fight decontextualization.

But, under U.S. law the scenario is problematic because the Visual Artists Rights Act cannot protect site-specific works. So, site-specific works are not covered by the Visual Artists Rights Act. This was confirmed by a court in *Kelley v. Chicago Park District*, a case regarding the destruction of an environmental artwork. In U.S. law, it is still a gray area and artists probably cannot rely on VARA to fight decontextualization. In continental Europe, there potentially could be more chances to fight decontextualization by relying on the moral right to integrity, but we don't have cases so far, so we must wait for a specific case.

In another case of decontextualization, in Italy, the famous and highly rated street artist Blu complained about some of his murals being detached in his own native city of Bologna and then relocated into a private exhibition organized by a bank. The artist did not take legal action, but he showed his disappointment and anger at what he considered a decontextualization and exploitation of his art, by taking to the streets of Bologna and destroying the other artworks he had painted in the city. As I said, there was no court case here.

Q: "*What about heritage protection of public street art?*"

A: There have been recent cases where murals have been protected by relying on heritage law. For example, in my hometown of Pisa, Italy, there is a mural painted by Keith Haring, the famous American artist. It is a huge mural painted by Haring in June 1989, and sadly, Haring would die just a few months later. The mural was preserved with the help of money from the local city council and the government, and the restoration of the mural cost around eighty or ninety thousand euros. So, not a huge amount of money if you think about the cultural importance of this artwork. Also, there is a glass protection at the bottom of the mural, just two meters high, which does not really have a strong impact on the enjoyability of the artwork. Then in 2013, the mural by Keith Haring was declared as having significant cultural interest and was protected under heritage law with a specific decree, a national decree. This gives you an idea of the value of certain works of public art. This was a legal artwork commissioned to Keith Haring in 1989, but there have been cases of originally illegal street artwork being protected under heritage law. For example, a mural painted by Blek le Rat decades ago in the German town of Leipzig was protected first by putting a protective glass on it and then with specific legislative intervention declaring the artwork as having a cultural interest. You can see that heritage laws could be used sometimes, not often, to protect works of street art and murals if they reach a certain artistic level, of course.

Q: “What are the ways in which public art can be conserved?”

A: There are three ways public art, including street art and graffiti, could be conserved. First, there is *in situ* conservation. This is where an artwork is placed on the street, sometimes illegally, and then a decision is made to place some glass to protect it and avoid vandalism. For example, many Banksy pieces have been covered with glass. Second, there is *ex situ* conservation, which basically is the removal of the mural from the wall and relocation into a safer indoor environment. Third, there is photography, which is probably the most widespread tool to preserve street art and graffiti, and to a lesser extent, also more works of public art.

Q: “What impact do these methods of conservation have on the pieces?”

A: It is inevitable that each of these methods, *in situ* conservation, *ex situ* conservation, and photography, have an impact on the authenticity of the artwork. The authenticity of the artwork is affected by *in situ* conservation, for example, because the public, the viewers, must accept a visible protective glass, for example, which might have an impact on the enjoyability of the artwork because of reflections. The *ex situ* conservation also has a negative effect on authenticity because the artwork is removed from its original venue, and we know that most street art is site-specific. Artworks have a meaning because they have been placed in that specific environment, so it’s not the same to enjoy the artwork in another location. Then, of course, a photograph of an artwork is not the artwork, it is a presentation of the artwork. Photography of an artwork does not give the same feeling.

My point here is that if a decision is made to preserve the street artwork, we should choose the method which is least impactful on the authenticity. For example, for exceptionally meritorious artworks, the *in situ* conservation could be the best tool, but only for exceptional artworks. Of course, the Keith Haring mural is an exceptional artwork, and the *in situ* conservation does not impact too much the enjoyability of the piece. But I would say, for other kinds of artworks, especially for illegally created artworks which do not reach a high level of artistic merit, photographic documentation could be the right tool to preserve it, unless the artist, the property owner, and the local community agree on the preservation of the illegally created artwork, even if it doesn’t reach a high artistic level. I mean, if all stakeholders are happy with preserving it, of course, it should be preserved.