ART CRIMES?: THEORETICAL PERSPECTIVES ON COPYRIGHT PROTECTION FOR ILLEGALLY-CREATED GRAFFITI ART

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ABSTRACT

This paper begins by examining whether illegally-created graffiti art is entitled to copyright protection under the current copyright law. Analogies are made to other forms of unwanted expression, fraud and obscenity, and their historical and current copyright status. The remainder of the paper uses graffiti art as a lens through which to examine various theoretical explanations of copyright, both as descriptive theories of production and as normative theories of protection.

I. INTRODUCTION

"It's an insidious thing, this graffiti, and we don't intend to let it get away from us."

- Michael A. Lombardi, Metropolitan Transit Authority, 1991[1]

In July 2006, the University Press of Mississippi published a book containing photographs of graffiti murals taken by a New York periodontist, Peter Rosenstein.[2] In response, more than a dozen artists joined to seek damages from Rosenstein for the alleged illegal use of their copyrighted works and to enjoin publication of the book. The publisher withdrew the book within a month of its release and the artists later settled with Rosenstein on undisclosed terms.[3] Rosenstein argued that his photographs were a fair use because the murals were on public display and because the photographs were for the purpose of illustrating art criticism and reviews. The artists responded that his book was thinly researched, contained a variety of inaccuracies and mischaracterizations of the artists' works,[4] and, for good measure, that Rosenstein had displayed photographic prints of the works at a Chelsea art gallery.

At the 2008 Summer Olympics in Beijing, when the Spanish synchronized swim team was not allowed to wear suits embedded with waterproof lights, they decided instead to wear suits featuring a large cartoon character across the front

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1. Stephanie Strom, *Subway Graffiti Back and Bothersome*, N.Y. TIMES, Feb. 11, 1991, at B1, *available at* http://www.nytimes.com/1991/02/11/nyregion/subway-graffiti-back-and-bothersome.html.

2. PETER ROSENSTEIN & ISABEL BAU MADDEN, TATTOOED WALLS (2006) (out of print).

3. David Gonzalez, *Walls of Art for Everyone, but Made by Not Just Anyone*, N.Y. TIMES, June 4, 2007, at B1, *available at* http://www.nytimes.com/2007/06/04/nyregion/04citywide.html.

4. His book, for instance, claimed to focus on "edgy" graffiti, but incorporated many murals done with the permission of the property owner and in close collaboration with local residents. *Id.*

and back.[5] German graffiti artist Cantwo alleged that the character was a copy of one he had spraypainted (legally) in 2001.[6] No one sought his permission, and it is unclear how the work even ended up on the team's swimsuits. When interviewed on the subject, Cantwo pointed out that copyright issues plague graffiti artists: "people think that because our work is public and it is sometimes illegally painted, they could [sic] use it any way they want."[7]

Though these two cases can be resolved fairly easily, as the infringed artwork was created legally, the question of whether or not illegally created graffiti is entitled to copyright protection remains open. Though nothing in the Copyright Act itself[8] denies protection to any class of works based on the legality of the work's origin, the one court to have considered this issue has indicated that illegally-created graffiti art may not be entitled to copyright protection. In *Villa v. Pearson Education, Inc*.,[9] Hiram Villa sued Brady Publishing for publishing, without permission, a piece he painted in its strategy guide for one of the Tony Hawk videogames. The defendant asserted that the complaint should be dismissed because "the mural in question is not protected by copyright, either because it is illegal graffiti or because it incorporates words or letters."[10] The court denied the defendant's motion to dismiss, holding that "[b]oth of [defendant's] . . . arguments turn on questions of fact . . . ."[11] The court found that the claim that the work was not copyrightable due to its illicit origin "would require a determination of the . . . circumstances under which the mural was created."[12] This seems implicitly to suggest that if the defendant could prove that the work was created illegally then the plaintiff's copyright would be invalid, and one commentator has read the case this way.[13]

In addition, there is a strong normative intuition that a work made in violation of the law should not be entitled to copyright protection.[14] This seems to stem from a moral judgment that people should not profit from their own wrongdoing, the

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5. Markus Balser, *Cantwo Says "Can Not!" to Spanish Swimmers*, WALL ST. J. L. BLOG (Sep. 9, 2008, 4:44 PM), http://blogs.wsj.com/law/2008/09/09/cantwo-says-can-not-to-spanish-swimwear/

6. *Id.*

7. *Id.* Cantwo has declined, thus far, to pursue his claim against the Spanish Olympic team, citing the need to "to find an [sic] Spanish lawyer first" and the fact that "the Spanish system works different [sic] from the German system." E-mail from Cantwo, German Graffiti Artist, to Author (Mar. 23, 2010, 16:27 EST) (on file with author).

8. 17 U.S.C. § 101 *et seq*. (2007 & Supp. 2011).

9. No. 03 C 3717, 2003 WL 22922178 (N.D. Ill. Dec. 9, 2003).

10. *Id.* at *2.

11. *Id.* at *3.

12. *Id.*

13. Danwill Schwender, *Promotion of the Arts: An Argument for Limited Copyright Protection of Illegal Graffiti*, 55 J. COPYRIGHT SOC'Y U.S.A 257, 268–69 (2007).

14. As an anecdotal example, *see, e.g.,* Comments to *Cantwo Says "Can Not!" to Spanish Swimmers*, *supra* note 5 ("[I]f some guy vandalizes public or private property with his graffiti, literally creating these images on someone else's wall against their will, how can he later claim copyright protection?" . . . "[W]hat about that maxim . . . that no one should profit from his own wrongdoing[?]" . . . "There should be no copyright attached as a public policy consideration favoring the elimination of graffiti.").

same intuition that undergirds the "unclean hands" doctrine,[15] and "Son of Sam" laws.[16] Instrumentally, providing copyright protection for works created illegally could create an extrinsic incentive for individuals to engage in illegal behavior, or weaken the disincentives created by the criminal law.[17]

This Article will examine various theoretical justifications that militate for or against granting copyright to a work created in violation of the criminal law, focusing in particular on graffiti art as a salient example. The next section will outline the current state of the copyright doctrine as it relates to graffiti[18] and conclude that, if a court were to consider the question directly, illegally created graffiti art probably would receive copyright protection. The third section will consider the intellectual property protection of graffiti from a variety of theoretical perspectives and argue that neither full copyright protection nor the denial of copyright would effectively address the issues that are raised by graffiti art. The fourth section will then consider what would be the best allocation of rights to graffiti art if one were to design the system *ex ante*.

II. DOES ILLEGAL GRAFFITI ART HAVE COPYRIGHT PROTECTION?

A. The Current State of the Doctrine: Villa v. Pearson Education

As a threshold matter, graffiti satisfies all of the statutory requirements for copyright protection.[19] It is tangible, fixed (though often temporary due to eradication efforts), and certainly satisfies the minimal originality requirement set out by the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co*.[20] If we are to find an exception to the copyrightability of graffiti, it must lie outside the Copyright Act itself.

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15. The principle that "'whenever a party who, as *actor*, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.'" Keystone Driller Co. v. Gen. Excavator Co. 290 U.S. 240, 244–45 (1933) (quoting JOHN NORTON POMEROY, 1 EQUITY JURISPRUDENCE § 397 (4th ed. 1918)). Generally, however, "[m]isconduct . . . unrelated to the claim to which it is asserted as a defense, does not constitute unclean hands." A.H. Emery Co. v. Marcan Prods. Corp., 389 F.2d 11, 18 (2d Cir. 1968) (quotations and citations omitted); *contra* Devils Films, Inc. v. Nectar Video, 29 F. Supp.2d 174, 175 (S.D.N.Y. 1998) (invoking unclean hands in refusing to order seizure of defendant's infringing copies of plaintiff's video tapes because plaintiff's tapes were obscene).

16. *See, e.g.*, N.Y. EXEC. LAW § 632-a (McKinney 2005) (requiring "profits from crime" to be paid to victims); KAN. STAT. ANN. § 74-7319 (2012) (requiring money gained from books, magazines, TV appearances, etc. to be paid to victims).

17. *See* Note, *Can Intellectual Property Law Regulate Behavior? A "Modest Proposal" for Weakening "Unclean Hands,"* 113 HARV. L. REV. 1503, 1515 (2000) ("[A] person anticipating the receipt of a federal [copyright] privilege might actually be motivated to break various laws . . ."). This is, of course, true but equally applicable to any federal benefit. For example, persons who anticipate Medicare reimbursement might be motivated to defraud the Medicare system, but this tells us little about the intrinsic desirability of Medicare.

18. To avoid repetition, unless otherwise mentioned, graffiti refers to graffiti created in violation of one or more criminal laws.

19. 17 U.S.C. § 101 (2007 & Supp. 2011) (defining "copies").

20. 499 U.S. 340 (1991).

Villa v. Pearson Education, Inc.[21] is the only case that directly raises the point of the copyrightability of graffiti. The *Villa* court indicated that graffiti may not be eligible for copyright protection if it was created illegally.[22] One commentator reads *Villa* as establishing that "the current state of the law denies street graffiti artists any protection from copyright infringement due to the defense of illegality."[23] This overreads the court's decision substantially. While the court did write that the question of whether the work was copyrightable "require[d] a determination of the . . . circumstances under which the mural was created,"[24] the court does not state explicitly that a finding of illegality would preclude copyright protection, and engages in no substantive discussion of the issue. It is perfectly possible that, were the issue properly before the court, it would conclude that the illegality of the work did not affect its copyrightability. Since the plaintiff needed only to survive a motion to dismiss, there was no reason for the court to engage the issue of copyrightability. Even under the defendant's theory of the law, the plaintiff could win if he could show that the mural was legally created and the motion could not be granted while construing all the facts in favor of the plaintiff. Absent briefing on the issue and direct consideration of the relevant law, it is too much to say that the court definitively held that illegally created graffiti was not entitled to copyright protection.

B. Analogous Domains: Copyright in Obscene and Fraudulent Works

Though only one decision directly addresses the issue of whether illegally created graffiti is copyrightable, there is a fairly extensive history of two analogous domains where works' copyrightability has been challenged due to violations of other laws. Though we most often study obscenity in the context of the First Amendment, there have been several cases discussing whether obscene works can obtain copyright protection, even though they are otherwise properly the subject of anti-obscenity laws. Similarly, the courts have weighed whether fraudulent materials can gain the benefits of copyright, notwithstanding their illicit intent. These two domains give us some indications of various courts' thinking on how the copyright law interacts with other domains and whether independent legal obligations ought to weigh in our consideration of whether a work merits copyright protection.

1. Obscenity

The federal courts' treatment of copyright in two other realms, fraud and obscenity, is instructive about the general copyrightability of works that are created in violation of some other (non-copyright) law. Early cases found that works which were "grossly indecent and calculated to corrupt the morals of the people" were not copyrightable.[25] As such works did not "promote the [p]rogress of

21. No. 03 C 3717, 2003 WL 22922178 (N.D. Ill. Dec. 9, 2003).
22. *Id.* at *3.
23. Schwender, *supra* note 13, at 257.
24. Villa, 2003 WL 22922178, at *3.
25. Martinetti v. Maguire, 16 F. Cas. 920, 922 (C.C.D. Cal. 1867).

Science and useful Arts,"[26] it was beyond the power of Congress to extend copyright to them.[27]

Courts have since retreated from this position. The leading case on the copyrightability of obscene materials, *Mitchell Bros. Film Group v. Cinema Adult Theater*,[28] found that "[t]here is not even a hint in [17 U.S.C. § 4 (1970)] that the obscene nature of a work renders it any less a copyrightable 'writing.'"[29] The court found that the Copyright Act was purposefully chosen to be content-neutral with "no stated limitations on taste or government acceptability."[30] In addition, because the test for obscenity requires consideration of local community standards, and copyright law is meant to be nationally uniform, an obscenity exception "would create the dilemma of choosing between using community standards that would (arguably unconstitutionally) fragment the uniform national standards of the copyright system and venturing into the uncharted waters of a national obscenity standard."[31] The Mitchell Bros. court also rejected a variety of equitable doctrines to avoid enforcement of copyrights in obscene materials, including the unclean hands doctrine.[32]

The Mitchell Bros. court further considered the deterrence argument for denying protection for obscene materials.[33] It recognized that the denial of copyright protection would have two effects on the deterrence calculus for producers of obscene materials. Denying protection would likely increase the production of obscene material in the short run, as copyists would be free to copy and distribute obscene works with impunity,[34] at a price equal to their marginal cost. In the long term, however, distributors of obscene materials would be discouraged from producing obscene works if they were aware, *ex ante*, that courts would refuse to protect their works from unauthorized reproduction. This deterrence calculus is analogous to the graffiti context, as will be explored further below.

Similarly, in *Jartech, Inc. v. Clancy*,[35] the Ninth Circuit held that obscenity was not a defense to a claim of copyright infringement. The court engaged in a relatively sparse discussion of the law, relying mainly on the Fifth Circuit's opinion in Mitchell Bros. to find that obscenity was not a valid defense to copyright and noting that "[t]he leading treatise on copyright has called the Fifth Circuit's *Mitchell Brothers* case 'the most thoughtful and comprehensive analysis of the

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26. U.S. CONST. art. 1, § 8, cl. 8.

27. Martinetti, 16 F. Cas. at 922; *see also* Edward S. Rogers, *Copyright and Morals*, 18 MICH. L. REV. 390 (1920) (arguing that extending copyright to obscene materials would be unconstitutional); Franklin J. Wallahan, Comment, *Immorality, Obscenity and the Law of Copyright*, 6 S.D. L. REV. 109, 109–16 (1961) (tracing the doctrine of denying copyright based on obscenity).

28. 604 F.2d 852 (5th Cir. 1979); *see also* Jartech, Inc. v. Clancy, 666 F.2d 403, 406 (9th Cir. 1982).

29. Mitchell Bros. Film Grp. v. Cinema Adult Theater, 604 F.2d at 854.

30. *Id.* at 856.

31. *Id.* at 858.

32. *Id.* at 861–63.

33. *Id.* at 862–63.

34. *Id.* Copyists would possess impunity from copyright infringement liability, at least. The threat of criminal sanction remains.

35. 666 F.2d 403 (9th Cir. 1982).

issue."[36] The court went on to a brief discussion of the fragmentation argument, noting that because obscenity is a community standard which varies from place to place, "[a]cceptance of an obscenity defense would fragment copyright enforcement, protecting registered materials in a certain community, while, in effect, authorizing pirating in another locale.[37]

The view that obscenity is not a defense to copyright violations is not uniformly held among the federal courts, however. In *Devils Films, Inc. v. Nectar Video*,[38] the court found that, while it did not need to decide whether "obscenity is a defense to a claim of copyright violation[,]"[39] it was "far from clear that the Second Circuit will follow the Fifth and Ninth Circuits in rejecting the argument that obscene material is entitled to copyright protection."[40] The plaintiff in that case was asking the court to order the impoundment of the defendant's pornographic materials which allegedly were copies of the plaintiff's films. The court found that once a work had been deemed by the courts to be obscene, there was no reason to "expend its resources on behalf of a plaintiff who it could as readily be tried for a violation of the federal criminal law."[41] Though the situation in this case was somewhat unique, as the court was asked to exercise its equitable powers on behalf of the producer of concededly obscene works, it suggests that there remains a strong distaste for enforcing copyright protections for producers of obscenity and a willingness to extend the "unclean hands" doctrine beyond its traditional limits to cover "'[m]isconduct . . . unrelated to the claim to which it is asserted as a defense . . . .'"[42] Indeed, the court's distaste was so strong that it later refused to sign a proposed consent final judgment and permanent injunction, stating that it would not "aid and abet the plaintiff's pornography business by implicitly agreeing to use its contempt powers to punish the defendant from copying the plaintiff's pornography."[43] Also, it again invoked the unclean hands doctrine as a justification for its refusal to aid the plaintiff.[44]

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36. *Id.* at 406 (quoting NIMMER ON COPYRIGHT, § 2.17, 2-194.2 (1980).

37. *Id.*

38. 29 F. Supp. 2d 174 (S.D.N.Y. 1998).

39. *Id.* at 176.

40. *Id.*

41. *Id.* The court also rejected the argument that it lacked discretion to deny equitable relief under the Copyright Act. *Id.* (citing Midway Mfg. v. Omni Video Games, 668 F.2d 70, 72 (1st Cir. 1981); Paramount Pictures Corp. v. Jane Doe, 821 F. Supp. 82, 85 (E.D.N.Y. 1993)).

42. A.H. Emery Co. v. Marcan Prods. Corp., 389 F.2d 11, 18 (2d Cir.1968) (quotations and citations omitted).

43. Devils Films, Inc. v. Nectar Video, No. 98 CIV 8016 JSM, 2000 WL 1201383, at *1 (S.D.N.Y. Aug. 23, 2000). Indeed, the court's distaste is palpable. It could not bring itself even to refer one of the categories of the plaintiff's films, referring to it only as "one even more explicit category" and wrote that "[i]t strains credulity that Congress intended to extend the protection of the copyright law to contraband." Devils Films, 29 F. Supp. 2d at 175–76.

44. Devils Films, 29 F. Supp. 2d at 175. It should be noted that this is a novel application of the unclean hands doctrine, which traditionally extended only to misconduct related to the claim at bar, i.e. if a copyright plaintiff was suing to enjoin infringement of a work it did not actually own and was itself infringing. *See, e.g.*, BRUCE P. KELLER & JEFFREY P. CUNARD, *Copyright Law: A Practitioner's Guide* § 11.7.5.E (2012) ("The equitable defense of unclean hands may also be asserted against a copyright owner, but only when the owner's acts rise to the level of 'blatant willful fraud' or unconscionable conduct that *relates to* the subject matter of the copyright litigation.") (emphasis added); *see also* Dream Games of Ariz., Inc. v. PC Onsite, 561 F.3d 983, 990–91 (9th Cir. 2009) ("the defense of illegality or

A later decision from the District Court for the Southern District of New York came to a somewhat different conclusion. In *Nova Products, Inc. v. Kisma Video*, Inc.,[45] the court found that the question of whether a work was obscene was "inherently a fact-sensitive inquiry that is highly dependent upon both the individual work and the governing community standards."[46] Thus, the court found that it could not resolve the issue on summary judgment. More importantly, the court discussed *Mitchell Bros.* and *Jartech* and found that there was "no reason to depart from these thoughtful opinions" and hold that obscenity was a bar to copyright protection.[47] The court distinguished *Devils Films* mainly on the basis that it was a denial of preliminary relief only, but, in the main, disagreed with the *Devils Films* court and indicated that the Fifth and Ninth Circuits' holdings that obscenity was not a defense to copyright infringement should be followed.[48]

Litigants are still challenging the copyrightability of obscene works, and given that there are only two leading cases on the issue, it is far from settled. Especially with the proliferation of infringement suits premised on defendants' peer-to-peer or BitTorrent sharing of pornographic materials, the issue will continue to crop up. For example, in a case challenging the subpoena of an Internet Service Provider for information to identify an alleged downloader of a pornographic film, Judge Young for the District Court of the District of Massachusetts noted that "it is a matter of first impression in the First Circuit, and indeed is unsettled in many circuits, whether pornography is in fact entitled to protection against copyright infringement."[49] Though the court concluded that the issue was "not presently before the Court and the Court expresses no opinion on it here,"[50] it is notable that the court decided to raise it of its own accord and engage in a brief discussion of the relevant case law.

In another file-sharing case, the plaintiff sought a declaration that obscenity is not copyrightable by arguing that obscenity cannot constitutionally receive copyright protection and that the Ninth Circuit's holding to the contrary in *Jartech* is invalid because it effectively overruled a previous panel decision in the same circuit without convening *en banc*.[51] Indeed, in *Martinetti v. Maguire*,[52] the former

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unclean hands is 'recognized only rarely, when the plaintiff's transgression is of serious proportions and relates directly to the subject matter of the infringement action. For instance, the defense has been recognized when plaintiff misused the process of the courts by falsifying a court order or evidence, or by misrepresenting the scope of his copyright to the court and opposing party.'" (quoting MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.09[B] (Mathew Bender, rev. ed. 2012)).

45. No. 02 Civ. 3850 (HB), 02 Civ. 6277 (HB), 03 Civ. 3379 (HB), 2004 WL 2754685 (S.D.N.Y. Dec. 1, 2004).

46. *Id.* at *2.

47. *Id.* at *3.

48. *See id.* ("In short, even if the videos were ultimately proven to be obscene, following the Fifth and Ninth Circuits' holdings, this would not be a defense to copyright infringement.").

49. Liberty Media Holdings, LLC v. Swarm Sharing Hash File AE340D0560129AFEE8D78CE 07F2394C7 B5BC9C05, 821 F. Supp. 2d 444, 447 n.2 (D. Mass. 2011).

50. *Id.*

51. *See* Plaintiff's Complaint and Demand for Jury Trial at 9-10, Wong v. Hard Drive Prods., Inc., No. 12 CV 0469 (N.D. Cal. Jan. 30, 2012) (citing Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001), for the proposition that only an en banc court can overrule a prior panel decision in the same circuit). The case ultimately settled after the defendant's motion to dismiss was denied, though the parties did not argue the copyrightability of obscenity in their motions. *See generally* Order Denying

Circuit Court for the District of California ruled that obscene material was not subject to copyright, and further, that Congress lacked the constitutional power to extend copyright to that material.[53] The *Jartech* court does not cite to *Martinetti* or discuss why that precedent may not have been binding on it,[54] so the issue is ripe for additional discussion.

Though there was a period after *Jartech* and *Mitchell Bros.* where the copyrightability of obscene works appeared to be settled, new cases suggest that the issue is ripe for reevaluation. Inertia and precedent suggests that obscene and pornographic works will continue to receive copyright protection, but given that only two courts have discussed the matter in detail, there is plenty of room for reconsideration and debate, and the cases are likely to continue to arise as copyright owners combat diminutions in revenue due to widespread file-sharing over the internet.

2. Fraud and Other Illegality

In the context of fraud, early courts found that there could be no copyright in fraudulent materials.[55] Early decisions accepted the argument that it was against public policy to allow a plaintiff to profit from his fraud, and that the remedies of copyright were thus unavailable under the unclean hands doctrine.[56] The Ninth Circuit, in *Belcher v. Tarbox*,[57] found that reasoning to be unsound, arguing that "[t]here is nothing in the Copyright Act to suggest that the courts are to pass upon the truth or falsity, the soundness or unsoundness, of the views embodied in a copyrighted work."[58] If the court did take the view that it was required to look into the public injury caused by a fraudulent work, it found "[t]he gravity and immensity of the problems, theological, philosophical, economic and scientific,

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Motion to Dismiss, Wong v. Hard Drive Prods., Inc., No. 12 CV 0469 (N.D. Cal. April 13, 2012). The defendant agreed to a stipulated that the plaintiff was not liable for any copyright infringement. Stipulated Judgment at 1, Wong v. Hard Drive Prods., Inc., No. 12 CV 0469 (N.D. Cal. May 31, 2012).

52. 16 F. Cas. 920, 922 (C.C.D. Cal. 1867).

53. *Id.* (holding that "a dramatic composition which is grossly indecent, and calculated to corrupt the morals of the people . . . neither 'promotes the progress of science or useful arts,' but the contrary" and thus was not subject to copyright). The court's holding is indeed broad, because its consequence is not just that Congress did not intend to extend copyright protection to obscene or indecent works, but also that Congress could not do so within the bound of the Constitution. In a testament to evolving community standards, the offending work contained scenes "'of women lying about loose'- a sort of Mohammedan paradise . . . with imitation grottos and unmaidenly houris," and the court found the plaintiff's attempt to seek protection as a dramatic work "an insult to the genius of the English drama." *Id.*

54. *See generally* Jartech, Inc. v. Clancy, 666 F.2d 403 (9th Cir. 1982).

55. *See*, *e.g.*, Stone & McCarrick v. Dugan Piano Co., 220 F. 837, 843 (5th Cir. 1915) ("[W]e have reached the conclusion that the particular [fraudulent] advertising forms of the appellant, although covered by the copyright of the manual of instruction, are (1) not copyrightable, and (2) they are not entitled to the protection of a court of equity.").

56. *See* Mitchell Bros. Film Grp. v. Cinema Adult Theater, 604 F.2d 852, 864 (5th Cir. 1979) ("*Stone & McCarrick* does not simply apply a traditional equitable doctrine; it goes further and extends the doctrine of unclean hands to a situation not covered by the doctrine at common law and thus subverts a statutory purpose.").

57. 486 F.2d 1087 (9th Cir. 1973).

58. *Id.* at 1088.

that would confront a court . . . are staggering to contemplate."[59] The court also noted that, if copyright protection were denied, there would be no restriction on the reprinting of the fraudulent material and it could be distributed freely by anyone,[60] thus leading to a net increase in the amount of fraudulent material.

The dissent, however, makes the other side of the deterrence argument: "Persons who heretofore have never composed fraudulent literature can do so and seek solace in the law as the protector of their copyrighted fraud."[61] In other words, the ruling creates an additional incentive for fraudulent behavior. The majority and the dissent thus take sharply contrasting views on the empirical question of whether the ruling would lead to a net increase or decrease in the amount of fraudulent works in existence, examining the incentives that run in both directions. The dissent also makes the normative argument that federal copyright protection is a privilege, and that the majority places the government's "power, endorsement and support behind fraudulent works."[62]

Similarly, in *Dream Games of Arizona, Inc. v. PC Onsite*,[63] the court held that a work, in that case an electronic bingo game, did not lose copyright protection when it was used in violation of state gaming laws.[64] The fact that the work was being used in violation of those laws did not affect the plaintiff's right to traditional copyright remedies, including statutory damages. The *Dream Games* court reiterated the opinion that the Copyright Act does not demand, and common sense precludes, a wide-ranging inquiry into the public harms that may result from enforcing copyright protection on works that may violate other, unrelated, laws.

It is important not to overstate the analogy between copyright in obscene or fraudulent materials, which have illicit *content*, and copyright in graffiti, which is created by an illicit *process*.[65] Still, the cases show a general evolution of courts' attitudes toward copyright in materials that are in violation of a non-copyright public policy. Over time, courts have shown an increased willingness to isolate the copyrightability question from other public concerns, for both doctrinal and prudential reasons. This indicates that, though the outcome is not by any means certain, graffiti would likely receive copyright protection upon full consideration. But should it?

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59. *Id.*

60. *See id.* at 1088 n.3.

61. *Id.* at 1090 (Wallace, J., concurring and dissenting)

62. *Id.*

63. 561 F.3d 983 (9th Cir. 2009).

64. *Id*. at 991 ("[I]llegal operation of a copyrightable work neither deprives the work of copyright protection nor precludes generally available remedies.").

65. For the argument that courts should look to the process of a work's creation to determine whether it should be granted copyright, *see* Note, *supra* note 17; *see also* MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2.17 (Mathew Bender, rev. ed. 2012) ("[T]he currently prevailing view" is that "no works are excluded from copyright by reason of their *content*.") (emphasis added).

III. THEORIES OF PRODUCTION AND PROTECTION

A. Economic Theories

The standard economic account of why creators create is a theory of incentives, both monetary[66] and non-monetary.[67] It assumes that authors require incentives to create, and that the function of copyright law is to induce the optimal level of creative activity.[68] The standard analysis assumes that the production of cultural works is a social good, and explains how copyright protection helps to ensure that the market produces the optimal amount of creative expression by giving the creator certain exclusive rights with respect to a work.[69] There is a wrinkle, however, in intellectual property as distinct from other forms of production. Creative works are both an input and the output of their own production functions. That is, "[c]reating a new work typically involves borrowing or building on material from a prior body of works . . . ."[70] Thus, a higher level of copyright protection can, paradoxically, raise the cost of creating new works, lower the total number of works created, and increase the price of creative works.[71] Furthermore, recent scholarship discussing intellectual property's "negative space" has demonstrated that "exclusivity is only part of the incentive puzzle."[72]

Assuming that authors require incentives to create, and that the public goods nature of intellectual property would otherwise prevent them from recouping the costs of their intellectual investments,[73] authors require additional incentives to produce. Intellectual property law and economics literature takes this essential insight about incentives and focuses on developing it to determine what level of copyright protection maximizes the total utility derived from the production of cultural goods.[74]

The economic account of copyright protection, then, raises two questions for the intersection of graffiti and copyright. The first is whether the traditional incentive theory is a good fit for the actual production of graffiti, i.e. whether it predicts the actual level of production that occurs. The second is what effect different sets of intellectual property rights, and thus different incentive structures,

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66. *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 328–29 (1989).

67. *See id.* at 331–32.

68. *See* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 994 (1997) ("[I]ndividuals will not invest in invention or creation unless the expected return from doing so exceeds the cost of doing so--that is, unless they can reasonably expect to make a profit from the endeavor."); *see also* Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that [it] is the best way to advance public welfare . . . .").

69. Landes & Posner, *supra* note 66, at 341–43 (optimizing a mathematical model of idealized copyright protection).

70. *Id.* at 332.

71. *Id.*

72. Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 321 (2011).

73. *See* Lemley, *supra* note 68, at 995–96 (explaining the nature of intellectual property as a public good).

74. *See id.* at 997–1000 (discussing the dynamic optimization problem in intellectual property law).

would have on the production of this class of works.

1. EXPLAINING INDIVIDUAL PRODUCTION

On the first question, the production of graffiti art seems to call into question the necessity of legally-created incentives posited by standard economic models of intellectual property production. Graffiti art has a good, but as yet untested, claim to copyright protection.[75] Even if graffiti had an unquestioned claim to copyright, publicly-displayed illegal graffiti art is not easily commoditized.[76] The art itself is, of course, not salable. Derivative works, such as Dr. Rosenstein's book of photos,[77] represent perhaps the best option for making money on graffiti, but the market for such works is small, and illegal graffiti artists would have to compete in that market with legal creators. There may also be a small licensing market for publicly displayed art.[78] In addition, the association of money often causes graffiti artists to lose legitimacy in the eyes of their peers, imposing reputational costs that may equal or outweigh potential monetary gains from distribution.[79] It seems that copyright incentives are, at best, a weak and limited explanation of the creative production of graffiti artists.

Yet many millions of square feet of illegal graffiti are produced every year, much to the chagrin of municipal authorities and property owners.[80] Thus, if we are to draw on an economic model for an adequate explanation of the proliferation of graffiti, incentives must exist outside the exclusive rights conferred by copyright law. Not only must these incentives be extrinsic to copyright, they must also be

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75. *See supra* Section II.

76. *See* JEFF FERRELL, CRIMES OF STYLE: URBAN GRAFFITI AND THE POLITICS OF CRIMINALITY 175 (1993) ("Not only are you in danger of getting thrown in jail and fined and such, you don't get any money out of it at all.") (quoting graffiti artist Eye Six).

77. ROSENSTEIN, s*upra* note 2.

78. The location scouts for the television show Law and Order, for example, seek licenses from graffiti artists whose works appear in the background of the show. Gonzalez, *supra* note 3. It is not clear if these licenses are sought for illegal works as well as legal works.

79. *See* Reply Memorandum in Support of Defendant's Motion to Dismiss the Complaint at 6, Villa v. Pearson Educ., Inc., No. 03 C 3717, 2003 WL 23801408 (N.D. Ill. Dec. 2, 2003) ("Plaintiff has claimed that his damages are that it appeared that he had 'sold out to the man.'"); *From graffiti to galleries: Urban artist brings street style to another level*, CNN.COM (Nov. 4, 2005, 4:49 PM), http://www.cnn.com/2005/US/03/21/otr.green/index.html ("[Working with corporations] destroys your legitimacy in the art world sometimes -- like people look at you like you're selling out.") (quoting artist Doze Green); Ryan Singel, *Sony Draws Ire With PSP Graffiti*, WIRED (Dec. 5, 2005), http://www.wired.com/culture/lifestyle/news/2005/12/69741 (describing artists' negative reaction to Sony's use of graffiti as an advertising medium).

80. *See, e.g.,* Steve Hymon, *Graffiti Removal Tallied*, L.A. TIMES, March 07, 2009, at A8, *available at* http://articles.latimes.com/2009/mar/07/local/me-graffiti7 (more than 7 million square feet if outside counties are included); Sewell Chan, *Taking Aim at Graffiti Tools*, N.Y. TIMES CITY ROOM (Aug. 2, 2007, 5:15 PM), http://cityroom.blogs.nytimes.com/2007/08/02/with-graffiti-on-the-rise-city-adopts-a-new-law/ (City Council estimating that, between 2002 and 2007, the City had removed more than 77 million square feet of graffiti);
W. Texas Cmty Supervision and Corrs Dep't, *Graffiti Wipe Out Q & A*, http://www.co.el-paso.tx.us/WTC/gwop.htm (1.5 million square feet removed in El Paso, Texas in 2008)

powerful enough to overcome the costs, in time, materials,[81] and, most importantly, the risk of criminal prosecution that graffiti artists incur in creating their works.[82]

The most commonly cited incentive for the production of graffiti is the desire for fame and recognition, especially among other artists.[83] If this is correct, the graffiti writers' desires for fame must be substantial in order to overcome the heavy costs incurred in creating their pieces. This incentive structure can be usefully analogized to advertising, where a company distributes a (copyrightable) work for no cost in the hopes of recouping its investment through the positive external effects of the advertising. Even for profit-driven firms, "zero-price copyright production is not beyond the pale when it can be justified by some other important benefit."[84] The advertiser, like the graffiti artist, must "engage viewers (sometimes against their will) while conveying a particular message . . . ."[85] Thus, "[w]hen the reputation benefits that come from creating and distributing information to the public outweigh the costs of doing so, there can be a positive return" on distributing the works for free.[86] The distribution of a writer's tag can itself be an

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81. Though many artists do not pay the monetary costs of their materials, instead stealing or "racking" them, this merely transforms the dollar cost of materials to an increased risk of criminal penalty. *See* MARTHA COOPER & HENRY CHALFANT, SUBWAY ART 27 (1984).

82. These punishments can range from minor to quite severe, though there is little evidence of the application of the most severe punishments. *See, e.g.,* CAL. PENAL CODE § 640.6 (West 2012) (under California state law first offenders can be fined up to $1000 and serve 48-200 hours community service; second offenders receive up to six months jail time, fines up to $2000, and 96-400 hours community service; third offenders receive up to a year in jail, fines up to $3000 and up to 600 hours community service. Parents can be liable for fines incurred by juvenile offenders); N.Y. PENAL LAW § 145.60 (McKinney 2012) (under New York state law "making graffiti" is a class A misdemeanor, punishable by up to a year in jail); Doug MacCash, *Vandalism or art? Struggle between graffiti producers and those who seek to prevent it has flared again*, THE TIMES-PICAYUNE (July 13, 2008, 10:08 AM), http://blog.nola.com/doughmaccash/2008/07/vandalism_or_art.html (under Louisiana state law "the maximum fine increase[d] to $10,000 with a prison term of up to 10 years."). Artists can also be punished under criminal mischief statutes, which are often felonies. *See*, *e.g.*, N.Y. PENAL LAW § 145.05 (McKinney 2012) (under New York state law, criminal mischief in the third degree, involving damage to property greater than $250, is a class E felony).

83. *See* Nat'l Paint & Coatings Ass'n v. City of Chi., 835 F. Supp. 421, 427 (N.D. Ill. 1993), *rev'd* 45 F.3d 1124 (7th Cir. 1995) ("achieving fame is a significant driving force for writers, as they compete with each other to obtain status among their peers"); FERRELL, *supra* note 76 at 12; STEPHEN POWERS, THE ART OF GETTING OVER: GRAFFITI AT THE MILLENNIUM 6 (1999); B. Drummond Ayres, *In a City of Graffiti, Gangs Turn to Violence to Protect Their Art*, N.Y. TIMES, Mar. 13, 1994, at A20 (quoting a graffiti artist saying "I write my name up there and then maybe paint a little extra picture around it . . . and -- KA-POW! -- I'm famous. It's a real rush."); E.A. Hanks, *An IMtimate Conversation With: Moustache Man*, IMPRUDENT WAYS: BUSY NOTHINGS FROM EA HANKS, (Mar. 4, 2011), http://impudentways.blogspot.com/2011/03/imtimate-conversation-with-moustache.html ("Tagging is putting your name up in as many places as possible. . . . Tagging is definitely more of an ego thing.").

84. Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 63 (2007); *see also* Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet*, 12 BERKELEY TECH. L.J. 15, 30 (1997) (explaining how attribution is necessary for cross-subsidization).

85. Lastowka, *supra* note 84, at 65.

86. *Id.* Lastowka ends the sentence as a "positive return on zero *investment*," but I think that cannot be what he means. Advertisers make substantial investments in getting their message out to the public; it is the *price* of the informational good that is zero. *See also* Rosenblatt, *supra* note 72 at 321 ("[S]ome creators may create out of a desire for recognition, an interest in community or an ability to avail themselves of first mover advantages

incentive to production.[87] Artists may write for fame only, even if they do not plan to leverage that fame into other benefits in the future. The recognition of this sort of non-monetary utility certainly complicates traditional economic analysis of production, but also provides a deeper explanation of activities that are inadequately explained purely by the motive for profit.

The analogy is not just theoretical. "Like advertising, its only rival for breadth and brashness in the urban landscape, graffiti is the form of visual expression we see and share all the time."[88] Artists themselves note the similarities between their work and the advertising that surrounds them.[89] Graffiti, in "seek[ing] to leave 'dissonant tags' on the slick face of advertising,"[90] implicitly recognizes the power of the advertisements themselves and attempts to appropriate that power to serve the ends of the graffiti artist. The advertisers, as well, have come to recognize the power of graffiti-as-advertising.[91] And, in an ironic twist, the subways and buses that were once used to propel an artist to "all-city"[92] status now ferry corporations' advertising to the far ends of those same cities.[93]

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or network effects.").

87. *See* Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 56 (2006) ("Attribution is, first, a reward and incentive for future creativity."). For a broader discussion of non-copyright incentives to advertise, *see* Lisa P. Ramsey, *Intellectual Property Rights in Advertising,* 12 MICH. TELECOMM. & TECH. L. REV. 189, 217–23 (2006).

88. Steven Winn, *Vandalism or Art?*, S.F. GATE, Mar. 7, 2005, at C1, *available at* http://www.sfgate.com/entertainment/article/VANDALISM-OR-ART-PART-ONE-The-urge-to-express-2693657.php.

89. *See* Susan Farrell, *Graffiti Q & A*, http://www.artcrimes.com/faq/graffiti_questions.html (last visited Apr. 19, 2011) ("Another influence on graf[fiti], because it's in the city, is billboards and store fronts. In many ways graffiti is just like advertising, and what do you see in advertising?... [sic] [B]ig words.").

90. Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 514 (2006) (quoting NAOMI KLEIN, NO LOGO: TAKING AIM AT THE BRAND BULLIES 285 (1999). In an example of actually leaving dissonant tags directly on the "face" of advertising, Joseph Patrick Waldo for some time wrote the word "moustache" in a "distinctive cursive flourish beneath the noses of clean-shaven celebs and models in various advertisements. Mr. Waldo said that he tagged the ads because "[w]e're getting these ridiculous images and dumb catchphrases shoved down our throats, why shouldn't we be able to talk back? So many ads are so laughably stupid that a cartoonish moustache just seems to fit." He was charged with felony criminal mischief for allegedly causing $1,500 in damages. David Gianatasio, *NYC's 'Moustache Man' Subway Ad Vandal Finally Captured*, ADWEEK, June 27 2011, http://www.adweek.com/adfreak/nycs-moustache-man-subway-ad-vandal-finally-captured-132950.

91. Singel, *supra* note 79; *The Mural Kings*, http://www.themuralkings.com/tatscru.php, (last visited Apr. 20, 2011) ("The TATS CRU commercial client list includes Coca Cola, McDonalds, Reebok, Tommy Hilfiger, Foot Locker, MTV Labs, The House of Seagram's, Becks, Snapple, FYE, Chiclets, M&M, Dodge, Comedy Central, Cartoon Network: Adult Swim, Crunch Gym, ABC Carpet & Home, Firestone, Avirex, MSG, WWF, WNBA's New York Liberty Team, Victory Outreach, Variety - The Children's Charity, JobDirect, Davis & Warshaw, LUGZ, Ritmo Latino, Affinity Health Plan, AmeriGroup, Urban Health Plan, and EAB Bank.").

92. A "title of reverence reserved for the graffiti artist that gained visual prominence throughout all five boroughs of New York City." Amos Klausner, *Bombing Modernism: Graffiti and its Relationship to the (Built) Environment*, http://www.core77.com/development/reactor/04.07_klausner.asp (last visited Apr. 19, 2011).

93. *See*, *e.g., Advertising & Telecommunications*, METROPOLITAN TRANSIT AUTHORITY, http://www.mta.info/mta/realestate/ad_tele.html (last visited Feb. 13, 2012) ("Direct your message to the millions of people each day who use the MTA system."); *Rail and Subway Advertising*, CBS OUTDOOR, https://www.cbsoutdoor.com/media/transit/railsubway/ (last visited Feb. 13, 2012) (selling

There is good anecdotal evidence that the investment in prolific "advertising" by graffiti artists pays dividends. The most well-known artists have gone on to careers in the fine arts,[94] graphic design, or have transitioned to commissioned, legal graffiti.[95] Artists attempting to make the transition to legal artistic careers, however, often draw the ire of the authorities they previously avoided through anonymity. For example, in 2003, Blake Lethem was hired by then-Presidential candidate Howard Dean to paint a mural background for a speech. Once his picture made it into the newspaper in an article about the speech and the mural, a New York detective recognized him and had him arrested for tagging subway trains more than four years prior.[96] Alain Maridueña, an artist who had been invited to speak at several universities and whose art had been exhibited in galleries, and who claimed to have stopped producing illegal works in 1994, was arrested in 2006 after his KET tag started reappearing on illegal subway graffiti.[97] Still, at least some artists seem to be willing to bear these costs in order to make the transition to legitimate careers.

What does all this tell us about our incentive theory of copyright? As Lastowka argues, perhaps "our legal attitude toward information goods distributed at zero price to promote reputations is substantially different than our attitude toward information goods distributed for sale."[98] When dealing with zero price information goods, the role of the law "shifts from the copyright model of creating property-based creation incentives to the communication model of protecting reputation and preventing deception."[99] While the dearth of legal claims brought by graffiti artists prevents testing whether this claim applies as a matter of doctrine, as a theory of production it fits nicely with the facts. Graffiti artists create without the incentive provided by copyright and with limited ability to monetize their work. Thus, the fact that the standard monetary incentives assumed under the traditional economic production model for informational goods are not present in the creation

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subway advertising including "Rail & Subway Exterior" and "Station Domination" which "are sure to be remembered . . . [w]hether in the stations or rolling near highways . . .").

94. Examples include Keith Haring, Jean-Michel Basquiat, Banksy, Dondi and Futura.

95. *See* Nat'l Paint & Coatings Ass'n v. City of Chi., 835 F. Supp. 421, 426 (N.D. Ill. 1993) ("[Artists] in their 20s and 30s . . . tend to be involved in larger and legal projects."); Schwender, *supra* note 13, at 263 (describing commercial and artistic success of graffiti artists); Marisa A. Gómez, Note, *The Writing on Our Walls: Finding Solutions Through Distinguishing Graffiti Art from Graffiti Vandalism*, 26 U. MICH. J.L. REFORM 633, 641 (1993) (describing display and sale of graffiti in galleries, art exhibitions, etc.); Sewell Chan, *A Sociologist's Look at Graffiti*, N.Y. TIMES CITY ROOM BLOG (Feb. 17, 2009, 7:15 AM), http://cityroom.blogs.nytimes.com/2009/02/17/a-new-look-at-graffiti-writers-lives/ ("Many writers have taken their illegal youthful pursuits and turned them into legal adult careers.") (quoting Professor Gregory Snyder). *See also* Hanks, *supra* note 83 ("People say street artists these days are only in it to eventually get gallery shows and make money, and that might be true for some people.").

96. Tina Kelley, *Graffiti Artist Who Created Dean Mural Is Held*, N.Y. TIMES, Oct. 8, 2003, at B2, *available at* http://www.nytimes.com/2003/10/08/nyregion/graffiti-artist-who-created-dean-mural-is-held.html.

97. Thomas J. Lueck, *Graffiti Figure Admired as Artist Now Faces Vandalism Charges*, N.Y. TIMES, Apr. 19, 2007, at B1, *available at* http://www.nytimes.com/2007/04/19/nyregion/19grafitti.html. Maridueña claimed it was the work of copycats trading in on his fame. *Id.*

98. Lastowka, *supra* note 84, at 66.

99. *Id.*

of copyright is perhaps less troubling for the theory than it first seems. We can instead construct a theory of production that revolves around maximizing dissemination of the artist's work and minimizing false attribution. It does seem as though the major concerns of the artists are attribution and distribution.[100]

A psychic reward for artistic expression itself could constitute another incentive that drives graffiti artists to create,[101] but as Rebecca Tushnet points out, one must be careful not to conflate incentives and preferences, otherwise the economic model of production loses its explanatory power.[102] Preferences for artistic creation, endogenous to individual creators, are not necessarily responsive to the incentive system set up by copyright. Incentives may skew which of a diverse set of preferences people choose to act on or aggregate preferences in order to shape behavior,[103] but the incentive model requires that preferences be endogenous to creators. Otherwise, the theory becomes circular and the models of behavior become true, but trivial.

2. Optimizing the Societal Level of Production

Having traced a plausible economic account of why these works are created largely outside of the incentive structure of copyright, the second question is what level of intellectual property protection would optimize the level of production of these works. The first difficulty in answering this question is that the optimal level of production of graffiti art involves a normative judgment, and the two sides of the debate are in deep opposition. Many do not think even legally created graffiti is acceptable.[104] Others advocate for the legalization of graffiti entirely.

Due to these conflicting preferences, it is difficult to develop a model of the social welfare function as it relates to graffiti art. The creation of graffiti in public places generates both positive externalities for those who enjoy it and negative externalities for those who dislike it.[105] Even with good data, these externalities

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100. *See* sources cited *supra* note 83. Indeed the vast majority of pieces consist solely of the artist's pseudonym, though painted intricately.

101. *See* Nat'l Paint & Coatings Ass'n v. City of Chi., 835 F. Supp. 421, 427 (N.D. Ill. 1993); Hanks, *supra* note 83 ("But there's still a good population in New York putting art on the street for no commercial gain- for the sole purpose of beautifying the city.").

102. Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 520–22 (2009).

103. For example, if someone has a preference for both creation and money, adding a monetary incentive to creation may induce that person to create where they otherwise would not (i.e. where just the utility in creation did not outweigh its costs).

104. Tracy v. Skate Key, Inc., No. 86 CIV. 3439 (MBM), 1990 WL 9855, at *1 (S.D.N.Y. Feb. 2, 1990) (Defendant removed paid-for mural from its wall after complaints from a local civic organization "condemned [the] plaintiff's genre as graffiti . . . ."); Lueck, *supra* note 97 (City of New York revoked a party permit upon learning artists had been hired to paint graffiti at the party on metal sheets that looked like subway cars); Rob Wildeboer, *Mural Artist Mulling Legal Action*, WBEZ (May 18, 2009), http://www.wbez.org/story/news/mural-artist-mulling-legal-action (describing how a City of Chicago alderman ordered the city's graffiti cleanup crew to remove a mural created on private property).

105. The model can be complicated further still by considering wider societal effects extrinsic to personal preferences. For example, graffiti's public nature and prevalence "increases the likelihood that someone will see, hear, or think the world differently," contributing positively to the overall culture. *See* Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1190 (2007). It may also create a generalized and diffuse sense of disrepair and disorder and thus harm the

would be difficult to quantify in a meaningful way. Graffiti also imposes significant monetary costs on property owners and municipalities,[106] who are forced to pay for cleanup. None of these costs are internalized by the creators of the works. Thus, the optimum level of graffiti is more difficult to determine than in other intellectual property contexts, where maximizing some relevant metric, such as the production of creative work or the pace of innovation, can serve as a useful proxy for maximizing the social welfare function. As a matter of pure theory, it is impossible to determine whether it would be better for the incidence of graffiti to rise or fall. With this in mind, I examine what the likely effects of extending and denying copyright protection to graffiti would be.

If we imagine that graffiti had full and well-known copyright protection, the result would likely not be much different from the status quo. Taking the graffiti-as-advertising model discussed above, there is only a shallow market for licensing illegally created works for profit. Instead, the works are created in order to promote the artist and create reputational equity. In this context, the most important aspect of intellectual property law for the "advertiser" is attribution.[107] The Copyright Act only provides limited rights of attribution under the Visual Artists Rights Act (VARA),[108] which requires the work to be of "recognized stature" to receive protection. For a variety of reasons, graffiti art is unlikely to be protected under VARA.[109] Thus, copyright recognition is unlikely significantly to

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sense of safety and well-being of community members, and perhaps even lead to an increase in more serious crime, as argued by the influential (and controversial) "broken windows" theory of crime. *See* George L. Kelling & James Q. Wilson, *Broken Windows,* ATLANTIC MONTHLY (Mar. 1982), http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/.

106. The money that municipalities spend on cleaning up graffiti may actually be a useful way to quantify the negative externalities created by graffiti art. To posit a simplistic model, if we assume that citizens elect city officials who are perfect agents, then the money spent on eliminating graffiti and prosecuting or otherwise penalizing graffiti producers would be at the point where the marginal costs of additional cleanup equal the marginal value. The model would work less well for property owners, who are often fined for failing to clean up graffiti, which distorts the value they place on cleanup expressed as their willingness to do so. In practice, a two-level principal-agent problem likely causes a significant overstatement of how much the public values less graffiti. Legislators can promise to prosecute writers and clean up graffiti and the costs of those promises are well hidden, especially the costs of prosecutions, which are subsumed in the general budget for local district attorneys. To the extent they can displace those costs further onto private property owners by forcing them to clean up graffiti with the threat of fines or penalties they are likely to do so to an inefficient extent because the costs are further hidden from the voting public.

107. *See* Schlachter, *supra* note 84, at 30 ("[F]or cross-subsidization to work, buyers impressed with product X (freely given away) must be led to product Y (for sale). In most cases, this will mean that product X must give proper attribution to the seller of product Y so that buyers can make the connection.").

108. 17 U.S.C. § 106A (2008).

109. *See* Botello v. Shell Oil Co., 229 Cal. App. 3d 1130, 1134 n.2 (Cal. Ct. App. 1991) (analyzing a similar California statute and stating, in dicta, that the statute "obviously does not apply to graffiti, which . . . is hardly classifiable as 'fine art,' and which is the subject of several criminal laws.") (internal citations omitted); Michelle Bougdanos, Note*, The Visual Artists Rights Act and Its Application to Graffiti Murals: Whose Wall Is It Anyway?*, 18 N.Y.L. SCH. J. HUM. RTS. 549, 550–51 (2002) (discussing why graffiti is unlikely to meet the recognized stature requirement).

interact with artists' reputational motivations to produce graffiti.[110]

The deterrent effects of extending or denying copyright protection to graffiti are similarly insubstantial. The difficulty of monetizing graffiti production indicates that the exclusive rights given by copyright are not likely to be strong incentives for the production of works. Assuming that graffiti is currently protected by copyright, one might argue that formally removing protection might aid efforts to curb the incidence of graffiti, but since writers do not get much of an affirmative benefit from copyright protection, explicitly denying protection is unlikely to be a significant additional deterrent.

Advancing copyright protection could paradoxically decrease the overall production of graffiti. "[I]f a sufficient incentive exists without an intellectual property entitlement, the addition of that entitlement can actually retard production."[111] Withholding protection in this context leads to increased piracy and copying, and thus increased dissemination. Therefore, adding well-known protection might limit overall production—a counter-intuitive positive outcome for graffiti's opponents.[112] However, this explanation depends on whether or not infringers are likely to be sued.[113] Given the difficulty of finding them, the costs of federal court, and the limited resources of most graffiti artists to sue on their own behalf, the additional disincentive from granting protection to graffiti would likely be marginal.[114] Nevertheless, automatic propertization of a work will necessarily impede "otherwise frictionless proliferation," even if the magnitude of that effect is small.[115]

This leads to an interesting conclusion, namely, that the incentives created by copyright are likely to have relatively little impact on this form of creative production, whether given or withheld. Given most of the literature's treatment of the incentive structure created by the copyright law as the primary source of explanatory power in the economic model of intellectual property, finding an example that seems to operate independently of the law casts at least some doubt on the emphasis given to the traditional economic explanation of copyright law.[116]

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110. This is a good example of a case where intellectual property protection is not the exclusive driver of innovation because other effects predominate the production of a given good. *See* Rosenblatt, *supra* note 72 at 321.

111. Christopher A. Cotropia & James Gibson, *The Upside of Intellectual Property's Downside*, 57 UCLA L. REV. 921, 962 (2010); *see also* Belcher v. Tarbox, 486 F.2d 1087, 1088 n.3 (9th Cir. 1973) ("Copyright protection restricts permissible publication. We fail to see what public policy would be served by eliminating this restriction in the case of fraudulent matter and permitting it to be reprinted and circulated freely.").

112. *See* Cotropia & Gibson, *supra* note 111, at 965 ("[G]iving intellectual property rights to an industry that has little need for an incentive can be counterproductive because the negative effects of the entitlement predominate--such as the deadweight loss that results from higher prices and lower production. When dealing with a disfavored industry, however, counterproductive is good.").

113. *See id.* at 965–66 (explaining that producers who care little about the incentive effects of copyright are unlikely to exercise it).

114. *See id.*

115. *Id.* at 966.

116. This insight has been noted with increasing frequency in recent scholarship, however. *See generally* Rosenblatt, *supra* note 72 and sources cited therein.

B. Non-Economic Theories

Though economic theories of intellectual property protection are traditionally favored in the American legal framework,[117] other authors have explored the non-economic interests that bound up with property generally,[118] and with intellectual property in particular.[119] This section will examine whether these theories can help to explain the creation of graffiti, and whether they give a justification for intellectual property protection for graffiti. All of these theories speak to a similar set of interests; however, non-economic interests of graffiti artists are at cross-purposes within the current structure of the copyright law. As such, I will provide a brief description of the interests at issue, and then discuss with more particularity the values that each theory promotes and why they may or may not justify a grant of intellectual property rights.

The two major interests of graffiti artists that come into conflict are control and transgression. Artists would like to be able to control their work, and prevent it from being used without their permission, either through someone else making money through the use of their work or using it in such a way as to dilute or alter its meaning. Failing to recognize copyright means that the work can be exploited by others for commercial gain without the consent of the artists.[120] Inasmuch as many graffiti writers have strong non-commercial and anti-corporate ideologies, allowing others to use their works to make their own money or fame would deprive the artists of both potential revenue and their personhood interests in their creations.[121] Either they must rely on the apparatus of the state they critique to protect their interests, or they cede the rights to their works to the public domain, and thus to commercial entities who are in the best position to exploit the works.[122]

Reliance on the state to protect their interests in not being exploited is antagonistic to their other major interest, transgression. Many artists believe that the value of their work derives, in part, from its illegal nature.[123] Inasmuch as the

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117. *See* Tushnet, *supra* note 102, at 517.

118. *See generally* Margaret Jane Radin, *Property and Personhood,* 34 STAN. L. REV. 957 (1982).

119. *See generally* Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81 (1998); Tushnet, *supra* note 102.

120. *Cf.* Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1334–35 (2004) (arguing that the public domain can be a tool for appropriating the "labor and bodies of the disempowered").

121. Reply Memorandum in Support of Defendant's Motion to Dismiss the Complaint at 6, Villa v. Pearson Educ., Inc., No. 03 C 3717, 2003 WL 23801408 (N.D. Ill. Dec. 2, 2003) ("Plaintiff has claimed that his damages are that it appeared that he had 'sold out to the man.'").

122. *See* Chander & Sunder, *supra* note 120, at 1341 (noting that the public domain is preferentially exploited by those who have the resources to do so).

123. *See, e.g.,* Matthew Shaer, *Pixnit Was Here*, BOS. GLOBE, Jan. 3, 2007, at D1, *available at* http://www.boston.com/ae/theater_arts/articles/2007/01/03/pixnit_was_here/ ("'My work is illegal. . . . [T]he illegality is what gives it its bite.'") (quoting Pixnit); Nina Siegal, *From the Subways to the Streets*, N.Y. TIMES, Aug. 22, 1999, at 1, *available at* http://www.nytimes.com/1999/08/22/nyregion/from-the-subways-to-the-streets.html ("[T]he adventurers among the young graffiti writers . . . say legal walls and city-sponsored art programs are about as enticing as a trip to a suburban mall."); Farrell, *supra* note 89 ("I don't personally consider legal murals pieces of graffiti."); Jowy Romano, *The Man Behind the Moustache*, SUBWAY ART BLOG (May 5, 2011), http://subwayartblog.com/2011/05/05/the-man-behind-the-moustache/ ("[I]t's evolved into part of this broader movement of subverting advertisements.").

recognition of a copyright puts the government's "power, endorsement and support"[124] behind a work, the personality interests of artists who intentionally put themselves outside of the legal system would be diminished by legal recognition. Conduct against property which is "clearly and self-consciously illegal . . . represent[s] a . . . direct and serious challenge to the legal order . . . ."[125] Some graffiti has explicit political content,[126] but even graffiti that is not directly political makes a species of political statement.[127] It represents an opposition to the boundaries of property and to the political system that criminalizes it. People who Eduardo Peñalver and Sonia Katyal term "expressive outlaws" are implicitly suggesting a challenge to the legal status quo.[128] Assuming that recognizing copyrightability in a work lends it some degree of government-sponsored legitimacy,[129] the difficulty is that "legitimiz[ing], *ex ante*, the lawbreaker's activity would radically undermine the expressive message itself. . . . [T]o legitimize the disobedience would therefore dilute, and even counteract, the message's vitality."[130]

1. Personhood/Personality

For the personhood theory, the question of whether and to what extent to grant intellectual property rights hinges on whether or not the grant would assist the creator in his or her autonomous personal development. Margaret Jane Radin argues "to achieve proper self-development — to be a *person* — an individual needs some control over resources in the external environment."[131] Furthermore, "public exhibition of such control permits us to communicate that autonomy to our fellow citizens."[132] For the graffiti artist, each piece that is created is imbued, to an extent, with the personhood of that artist. A piece also represents control, not over the piece itself, but over the property on which it is placed.[133] It is a reaction to the control of physical property by established property-owners, which "systemically prevent[s] *prospective* personhood interests from *developing*."[134]

This is a normative claim, but also has positive implications. It predicts that

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124. Belcher v. Tarbox, 486 F.2d 1087, 1090 (9th Cir. 1973) (Wallace, J., concurring and dissenting).

125. EDUARDO MOISÉ PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 87 (2010).

126. *See*, *e.g.*, *Making Fun of Qaddafi*, FOREIGN POL'Y (Apr. 7, 2011), http://www.foreignpolicy.com/articles/2011/04/07/style_wars; A1ONE, *We Hide Atom Bomb: Urban Communication in the Way of an Iranian*, http://tehranwalls.blogspot.com/ (last visited Apr. 19, 2011).

127. *See* Peter Applebome, *How Graffiti Goats Became a Symbol of . . . Something*, N.Y. TIMES (March 2, 2012), https://www.nytimes.com/2012/03/03/nyregion/graffiti-goats-in-kingston-ny-find-a-following.html (noting "how fast images can spread in the digital world and how quickly they can come to stand for many different things, even if they began as standing for nothing . . . ."); Farrell, *supra* note 89 ("When it is illegal it is a political statement, whether the kid knows it who's doing it or not.").

128. *See* PEÑALVER & KATYAL, *supra* note 125, at 138-140.

129. *See* Belcher v. Tarbox, 486 F.2d at 1090.

130. PEÑALVER & KATYAL, *supra* note 125, at 139

131. Radin, *supra* note 118, at 957.

132. PEÑALVER & KATYAL, *supra* note 125, at 26.

133. Nat'l Paint & Coatings Ass'n v. City of Chi., 835 F. Supp. 421, 427 (N.D. Ill. 1993) (noting that one of the "values" that graffiti writers pursue is the "sense of individual power a writer obtains by *controlling* various surfaces with his name.") (emphasis added).

134. Hughes, *supra* note 119, at 87.

when individuals lack control over resources in their environment, they are likely to attempt to gain some sort of control over those resources, assuming that people desire to achieve self-development. Indeed, this is what we see in graffiti art. To the graffiti artists "a blank wall in the city represents many more bad things than any writing on it could."[135] It represents the control of the owners of property that the writer lacks, so the writer symbolically "takes" the property by putting his/her mark on it. As one court put it, one of the "values" that graffiti writers pursue is the "sense of individual power a writer obtains by *controlling* various surfaces with his name."[136]

The power relations endemic to graffiti art help to explain why it arouses such deep opposition on the part of property owners and law enforcement. It is not necessarily that the content of graffiti itself is distasteful to the property owner. It is rather the symbolic content, the idea that the owners' assertions of property rights are much less secure and stable than they would like to believe. Since property ownership is perhaps the most common indicator of relative status,[137] the writer's tag on a building creates status insecurity for owners, who then react strongly in order to preserve the status-signaling effects of property. The graffiti is "a symbolic expression of social disorder, and relatedly, a failure of the promise of the order of law."[138] It suggests that the absolute ability to exclude that is the foundation of a property right is not as absolute as the legal and social system suggests, and thus creates a profound sense of unease and insecurity. As one artist insightfully notes, people who paint over the graffiti "don't understand is that they are *expressing themselves just as much* as we are . . . ."[139] By cleaning up graffiti, owners are publicly and self-consciously re-asserting their own control and, thus, their own property-related autonomy.

Personhood-type analysis fits well with the actual practice of graffiti. The desire to put one's name on any available surface is a means of asserting symbolic control over the visible aspects of property, and of forcing the public to recognize the "failure of the promise of the order of law."[140] By making property owners and the broader public uncomfortable in their own sense of the inviolability of property, the writer takes some of the incidents of property for herself, and thus exerts "some control over resources in the external environment."[141] Thus, the graffiti artist gives voice to her discontent with the overall system of law, even if the message is not self-consciously a critique of the political or social system.

Under this conception, then, writers create as a symbolic act, to show that, like

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135. Farrell, *supra* note 89; *see also* Simon Romero, *At War With São Paulo's Establishment, Black Paint in Hand*, N.Y. TIMES (Jan. 28, 2012), http://www.nytimes.com/2012/01/29/world/americas/at-war-with-sao-paulos-establishment-black-paint-in-hand.html (quoting a São Paulo's pichação artist as saying, "[w]e take our risks to remind society that this city is a visual aggression to begin with, and hostile to anyone who is not rich.").

136. Nat'l Paint & Coatings Ass'n, 835 F. Supp. at 427 (emphasis added).

137. *See* Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 761 (2009) ("[P]roperty serves as an important locus for symbolic meaning."). Indeed, ownership may be the most primordial means of status signaling.

138. Katyal, *supra* note 90, at 500.

139. Farrell, *supra* note 89 (emphasis added).

140. Katyal, *supra* note 90, at 500.

141. Radin, *supra* note 118, at 957.

Kilroy,[142] they too were there, not just the property owners. In Katyal's terminology, they "recode"[143] the symbolic message of the property they write on, dispelling the hegemonic notion of perfectly excludable property[144] that the blank wall represents to them. Does this present a justification for granting intellectual property rights? Recall that recognizing that personhood is bound up with property "does not compel the conclusion that property for personhood deserves moral recognition or legal protection . . . ."[145] Though at first blush, it seems like granting a privilege to graffiti artists might be a way to, in some sense, even the playing field between established property owners and symbolic dissenters, the recognition of a copyright in illegally created works may actually blunt the dialectic between property and subversion in an unproductive way.

To see why, it is first important to note that granting a copyright to illegally created work also entails a fundamental legal recognition of the work as a work. Thus, the recognition that a work created illegally is copyrightable also necessarily entails recognition of potential liability for infringement.[146] As graffiti art "has been mainstreamed to a large degree[,]"[147] an intellectual property right may inure to the benefit of established artists, who have the resources and legal legitimacy to sue illegal artists for infringement, and their contacts in the community might allow them to find such artists even more easily than the police. Functionally, a copyright for illegal graffiti might only entail the right to be sued.

The recognition of a copyright might also, paradoxically, reduce the artist's personhood interests. As will be discussed further below,[148] many artists believe that the value of their work derives, wholly or in part, from its illegality.[149] Inasmuch as granting a copyright puts the government's "power, endorsement and support"[150] behind a work, the personality interests of artists who intentionally put themselves outside of the legal system would be diminished by legal recognition.

It is also important to consider the effects of graffiti on the personhood interests of the property owners. While it is tempting to caricature property owners as an undifferentiated mass representing the "establishment" in the abstract, a full

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142. *See* ERIC PARTRIDGE, A DICTIONARY OF CATCH PHRASES 132 (1977); *Kilroy was here*, WIKIPEDIA, http://en.wikipedia.org/wiki/Kilroy_was_here (last visited Feb. 13, 2011).

143. Katyal, *supra* note 90, at 501.

144. Randall Bezanson & Andrew Finkelman, *Trespassory Art*, 43 U. MICH. J.L. REFORM 245, 269–73 (2010) (describing the centrality of control and possession of land to the historical development of property law); *see also* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (arguing that the right to exclude is the "*sine qua non*" of property).

145. Radin, *supra* note 118, at 961.

146. This presents an unusual, if interesting, solution to the problem of insufficient penalties for art vandalism presented by M.J. Williams in his Note, *Framing Art Vandalism: A Proposal to Address Violence Against Art*, 74 BROOK. L. REV. 581 (2009). If copyrights in illegally created works are recognized, the creator of a vandalized work could sue the vandal for creating an unauthorized derivative work, and seek statutory damages.

147. Bezanson & Finkelman, *supra* note 144, at 257; *see also* Romero, *supra* note 135 (noting that São Paulo's pichação artists practice their unique form of graffiti in part because "colorful graffiti — in their view at least — is a lesser form of expression, easy to do on street level and often co-opted by the commercial art scene.").

148. *See infra* Section III.B.ii.

149. *See* sources cited *supra* note 123.

150. Belcher v. Tarbox, 486 F.2d 1087, 1090 (9th Cir. 1973) (Wallace, J., concurring and dissenting).

theory must recognize that they also have legitimate personhood interests in their property which are violated by illegal graffiti art. Academic works on graffiti art tend to mythologize the artists, and "in marked contrast to the multidimensional and sympathetic interpretation of the graffiti writers' activities, assertions, and arguments, anti-graffiti campaigners and 'average persons' amount to one-dimensional ciphers of a one-dimensional culture."[151] "If the perpetration of the graffiti warrants such detailed and celebratory empirical attention . . . why does not the same requirement apply to those who resist the writers and motivate themselves to produce alternative aesthetic motifs in the same urban environment?"[152] Legitimizing illegal graffiti through the copyright system would subvert to some extent the interest that property owners have in developing their own personhood, reducing their perceived control of something to which they believe they have a legitimate right and undermining their own sense of self. This concern is magnified by the fact that the incidence of graffiti is likely higher in poorer neighborhoods with less access to police and other services, and thus its burdens may fall disproportionately on owners who are themselves poor.[153] Local property owners' efforts to eliminate graffiti reflect their desire to live in a particular aesthetic environment and develop their own sense of personhood through the use and development of their property, and those interests are as relevant and important as the interests of the graffiti artists themselves.

2. Democracy and Dissent

Many academic accounts of urban graffiti have noted its role as a vehicle for self-expression of disadvantaged groups and outward expression of political dissent.[154] Conduct against property which is "clearly and self-consciously illegal . . . represent[s] a . . . direct and serious challenge to the legal order . . . ."[155] Graffiti has explicit and implicit political content.[156] It represents an opposition to the boundaries of property and to the political system that criminalizes it. These "expressive outlaws" mount a challenge to the legal status quo through the transgression of traditional notions of property.[157] Although Katyal and Penalver are speaking of individuals who self-consciously express an opposition to a particular legal norm, such as institutionalized race discrimination, by challenging directly the law they oppose,[158] the analysis also applies to expressions of more generalized political dissent or discontent.

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151. Martin O'Brien, *What Is Cultural About Cultural Criminology?*, 45 BRIT. J. CRIMINOLOGY 599, 603 (2005) (referring to FERRELL, *supra* note 76).

152. *Id.* at 603–04; *see also* Farrell, *supra* note 89 (noting that painting over graffiti is its own type of self-expression).

153. *See* PEÑALVER & KATYAL, *supra* note 125, at 146 ("Because outlaws typically operate in their own neighborhoods, the result might be actions that perversely make the situation of the poor as a whole even worse.").

154. *See generally* FERRELL, *supra* note 76.

155. PEÑALVER & KATYAL, *supra* note 125, at 87.

156. *See* sources cited *supra* note126; Farrell, *supra* note 89 ("When it is illegal it is a political statement, whether the kid knows it who's doing it or not.").

157. *See* PEÑALVER & KATYAL, *supra* note 125, at 139.

158. *Id.*

Katyal notes that the enhanced protection of intellectual property rights creates space for individuals to engage in cultural production "past the boundaries of cultural dissent and into the boundaries of asserted illegality."[159] The expansion of property control necessarily creates its own doppelganger; the realm of prohibited content expands in linear relation to the protection of content. In the context of graffiti art, the situation is further complicated. Graffiti is labeled as vandalism, a label which "suggests an important choice . . . between tangible property and intangible expression."[160] The fact that graffiti exists on the privately owned property of another "is yet another emblem of its transgressive potential, a tabula rasa that both enables, and creates, its intended message of subversion."[161]

Katyal and Penalver, in creating a taxonomy of dissent through property violation, note that one of the values of property transgressions is their informational quality.[162] They illustrate the depth of dissatisfaction with the current political or legal system,[163] though in the case of property transgressions that are not targeted as a specific legal edifice, the message is muddled by the variety of motivations that people have for engaging in the transgressive behavior. In comparison to the lunch counter sit-ins, where the transgressive behavior was clearly targeted at the regime of segregation in the American South,[164] graffiti expresses only generalized discontent. As discussed above, some graffiti artists may not be dissenting at all, but rather making a risky investment in a future artistic career.[165] Without a coherent theory of why individuals engage in graffiti art, it is difficult to tell what the proper societal response would be.

Nonetheless, the existence and prevalence of graffiti gives us, to an extent, information about the depth and breadth of a particular group's dissatisfaction with the current scheme of property distribution. The goal, then, should be to "preserve the expressive and communicative value of the disobedience in such a way that the law (1) reduces spillover effects and (2) avoids diluting the message . . . ."[166] In this context, the criminal sanctions against graffiti should be preserved. That mitigates the negative effect the transgression has on property owners while preserving the message by maintaining its transgressive content. The power of the message comes, in part, from the willingness of the writer to risk criminal sanction to create it.

If, as this suggests, graffiti is a vector of dissent among a particular subgroup of society and that even graffiti with no overt political message still contains an implicit social-political critique, the implication for recognizing it as copyrightable may be to rob it of its transgressive power and political or semiotic significance. Assuming that recognizing copyrightability in a work lends it some degree of

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159. Katyal, *supra* note 90, at 492.

160. *Id.* at 520.

161. *Id.*

162. PEÑALVER & KATYAL, *supra* note 125, at 159-160.

163. For instance, the startling prevalence of pichação in Brazilian cities suggests a deep discontent with the class system and the division of property in the society. *See* Romero, *supra* note135.

164. *See* PEÑALVER & KATYAL, *supra* note 125, at 64–70.

165. *See supra* notes 80-81.

166. PEÑALVER & KATYAL, *supra* note 125, at 159.

government-sponsored legitimacy,[167] the difficulty is that "legitimiz[ing], *ex ante*, the lawbreaker's activity would radically undermine the expressive message itself. . . . [T]o legitimize the disobedience would therefore dilute, and even counteract, the message's vitality."[168] It is important to keep in mind that here that the issue is not legalizing or decriminalizing the creation of graffiti itself, which would likely have substantial effects on its perceived transgressive nature, but rather granting exclusive rights in the work separate from the conditions of its creation. It is not self-evident that copyright recognition involves a significant legitimizing effect on the work in question. As the cases demonstrating the copyrightability of fraudulent and obscene materials show,[169] the government's grant of a copyright does not necessarily put the imprimatur of the state on a given work. With the elimination of copyright formalities,[170] copyright now vests immediately on the creation of any work with a modicum of creativity and there is simply no way that is intended to suggest that the government endorses every copyrightable work created in the country.[171]

There are also significant political concerns if the copyright in graffiti is not recognized. As the cases from the introduction demonstrate, if graffiti does not have copyright then it is easier for others to co-opt the expression of the graffiti artist and use it as their own without any compensation, or even attribution, to the artist. Failing to recognize a copyright in graffiti could then have the effect of legitimizing its co-option but not its creation. While there would remain significant obstacles to artists enforcing their rights as against corporations or others who seek to use their art without permission—most significantly the criminal penalties which could attach when an author identifies him or herself—recognition of such a right could at least blunt the potential for the co-option of graffiti by the interests it is meant to critique. There could be positive side effects, though, if companies did not have to worry about copyrightability. The art could be disseminated to a much larger audience, and we would expect that disseminators would be able to charge much less for it if they did not have to procure licenses or risk infringement liability.

Graffiti, or at least the graffiti style, has already been significantly co-opted,[172] so it is an open question how great this effect would be. People's encounters with graffiti writing in advertising, as well as simply having been exposed to it for more than four decades, may have blunted its symbolic message.[173] On the other hand,

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167. Belcher v. Tarbox, 486 F.2d 1087, 1090 (9th Cir. 1973) (Wallace, J., concurring and dissenting).

168. PEÑALVER & KATYAL, *supra* note 125, at 139.

169. *See supra* Section II.B.

170. *See* 17 U.S.C. § 102(a) (2008) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

171. And in other countries as well. *See generally* 17 U.S.C. §§ 104–104A (detailing copyright protection for works created in other nations).

172. *See supra* notes 81 and 104.

173. We are now to the point where graffiti can get a forty year retrospective in a major art museum, though not without some controversy. *See* Adam Nagourney, *Admirers Call It Art, But the Police Call It a Problem*, N.Y. TIMES, Apr. 23, 2011, at A9 ("[G]raffiti is so yesterday.") (quoting Los Angeles Police Officer Jack Richter).

the breadth of current anti-graffiti cleanup campaigns, as well as the depth of continued opposition to graffiti seems to demonstrate that it retains a great deal of its transgressive force.

3. Economies of Desire

Rebecca Tushnet's distinctive conception of the urge to create comports very well with the lived experience of graffiti artists. She explores a wide variety of authors' descriptions of why they write to arrive at a "thick" description of creativity.[174] Many have the feel of addiction or other forms of involuntary action,[175] and many others share a sense of needing to make a lasting impression on the world.[176] In a nice bit of circularity, one of the sources Tushnet quotes references some of the earliest graffiti to explain that authors create out of "vanity – the 'Kilroy was here' pleasure of changing something in the world, just to see my imprint on it. Making a mark on the world is a common human desire."[177]

The twin explanations of involuntary desire and the need to leave a lasting mark on the world are common among graffiti artists who explain why they write. That graffiti artists share with authors and other creators the desire to leave a mark is obvious; it is no accident that Shirky's quote mentions the early "Kilroy was here" graffiti. Oddly enough, because of the likelihood that it will be painted over, graffiti is perhaps less suited for leaving one's mark than these other forms of creativity.[178]

The feeling that graffiti writers *need* to write, that it is a type of addiction or possession, is even more common in accounts they give of why they create. "You go out on the street at night, and you feel like the city is singing your name . . . You're out there tagging your name, boom, boom, boom, and you get it, the fever. Everyone who does graffiti gets the fever at some point."[179] "It's an addiction. I get out of the shower and I'm tagging the fogged up mirror. I find myself tracing tags without thinking on the train, at school, wherever. I get antsy if I don't write for awhile."[180] Graffiti writers' motivations for creating works, like those of many other authors, seem to exist outside of the traditional story of incentives in the copyright.

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174. Tushnet, *supra* note 102, at 522–27.

175. *See id.* at 523–24 ("I had to keep writing or else I would die. . . I was driven to it by some force outside my control. . . . Because I was possessed.") (quoting MARGARET ATWOOD, NEGOTIATING WITH THE DEAD: A WRITER ON WRITING xx–xxii (2002)).

176. *See id.* ("To thumb my nose at Death. . . . To make a name that would survive death. . . ." (quoting MARGARET ATWOOD, NEGOTIATING WITH THE DEAD: A WRITER ON WRITING xx–xxii (2002); "It provides some sort of primal verification: you are in print; therefore you exist." (quoting ANNE LAMOTT, BIRD BY BIRD: SOME INSTRUCTIONS ON WRITING AND LIFE, xiv (1994))

177. *Id.* at 525 n.36 (quoting CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS 132 (2008).

178. *See* Farrell, *supra* note 89 ("[G]raffiti is a temporary art form, like improvisational theatre. You take pictures of your pieces to remember them, and share them with other writers, but you know that your piece soon will be gone.").

179. Siegal, *supra* note 123 .

180. Interview with J.R., Graffiti Artist, in N.Y., N.Y. (Mar. 15, 2010); *see also* Ayres, *supra* note 83, at A20 ("Sometimes when I'm walking down the street and I see this bare wall, the urge hits me and, like, I just can't control it.") (quoting graffiti artist Alex Alvarez).

Indeed, the rhetorical question that Tushnet asks about the motivation of fan fiction writers applies, with only slight alteration, to graffiti writers; "[w]hy would [graffiti writers] spend . . . so much time, energy, and even money on endeavors that cannot bring monetary return, and often invite scorn from outsiders?"[181] Though there is perhaps a greater likelihood of monetary return for graffiti writers than writers of fan fiction,[182] Tushnet's creative desire framework of artistic creation comports much better with artists' actual reported reasons for creation than does the economic account.

In the case of graffiti art, like fan fiction, the implication is that "[c]opyright law, even in its own economic terms, plays a minor role, and not necessarily a positive one."[183] In this sense, the economies of desire are a story of production, not of justification. These narratives explain why artists create, but not why they should be afforded protection. If anything, the role of copyright in graffiti art is even more minor than in fan fiction, whose authors of necessity draw on copyrighted works. Graffiti artist's creative inputs are either not copyrighted, or are copyrighted but very unlikely to have those copyrights enforced. In this case, where there is a vast supply of creative energy, injecting copyright into the realm does not seem likely to have positive effects, and could work to undermine the communality of the writers[184] by creating the possibility of disputes over ownership.[185]

IV. IMPLICATIONS FOR COPYRIGHT DOCTRINE

Overall, it seems the interests of the creators of graffiti art would not be well-served by the structure of the copyright system. Their main interests, namely attribution and dissemination, operate mostly outside of, and often in opposition to, the current scheme of copyright protection. Still, copyright could protect significant personhood and political interests by allowing artists to stop unauthorized reproduction and dissemination of their works, if their desire to do so was sufficient to overcome the natural impediments to initiating litigation.[186]

The doctrine should, on balance, recognize the copyrightability of illegally-created works of graffiti art. Given the current state of the copyright doctrine in otherwise illegal works, it would be anomalous not to recognize graffiti. Works that are obscene or fraudulent, or used for an illegal purpose are no less protected

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181. Tushnet, *supra* note 102, at 531. Graffiti artists add the risk of criminal prosecution.

182. *See supra* notes 80–81.

183. Tushnet, *supra* note 102, at 537.

184. *See id.* at 536 n.77 and sources cited therein.

185. *See* Rosenblatt, *supra* note 72, at 330–34 (describing "IP forbearance" in certain realms of creative production).

186. These impediments may not be particularly high, given that most contemporaneous copyright disputes are solved through issuance of cease and desist letters or other informal means without significant challenge to the copyright by the alleged infringer. *See* Lauren McBrayer, *The DirecTV Cases: Applying Anti-SLAPP Laws to Copyright Protection Cease-and-Desist Letters,* 20 BERKELEY TECH. L.J. 603, 605 (2005) ("[S]ending cease-and-desist letters can be an effective way to avoid litigation[.]"); Marjorie Heins & Tricia Beckles, *Will Fair Use Survive? Free Expression in the Age of Copyright Control*, BRENNAN CTR. FOR JUSTICE, 33–36 (2005) (assessing the speech-suppressing effects of cease-and-desist letters); Gonzalez, *supra* note 3, at B1 (Rosenstein case settled and book taken out of print without litigation).

by the copyright law than great works of art. Judges who have considered the issue in detail have wisely concluded that importing other legal concerns in the threshold consideration of copyrightability would create "theological, philosophical, economic and scientific" difficulties that are "staggering to contemplate."[187] Moreover, if the question of copyrightability could turn not on a works *content* but on the circumstances of its *production*, as would have to be the case if graffiti were denied copyright protection, then courts would be required to make a detailed factual inquiry into every work's provenance to ensure that no illegality tainted any step in its production. Such an inquiry would drastically unsettle copyright law and provide copyright defendants ample opportunity to prolong the time and cost of proceedings, increasing the difficulty of protecting copyrighted works through an extrinsic inquiry into the circumstances of its production.[188]

Furthermore, recognition of copyright protection would protect the interests of artists whose works were used without their permission in a way that was so inimical to their interests or preferences that they would sue, even with the threat of criminal sanction as an added obstacle to the usual high costs of litigation. To motivate an artist to pursue his or her rights, the costs to inaction would have to be unusually high, so it makes sense to have a remedy available to those whose interests are so harmed by an infringing work they are willing to spend the time and money to bring suit, as well as risk prosecution. The costs of the system would ensure that it would be self-regulating and only the most unusual or severe cases would actually come to court. The vast majority of infringement would remain outside the copyright system. Copyright protection would, most likely, have relatively little effect on the rate of production, which is driven almost entirely by incentives and preferences that fall outside of the intellectual property scheme.[189] The simple fact that in forty years of modern graffiti production there is only one unreported case[190] that deals with copyright in graffiti is a significant testament to its ability to exist outside of the bounds of copyright law.

V. CONCLUSION

The story of graffiti is an interesting one for what it tells us about the limits of the intellectual property laws. Graffiti represents cultural production on a massive scale that operates almost entirely without regard to copyright law. Thus, it is one among a growing number of counterpoints to the traditional notion that the incentives created by copyright are the primary drivers of creative activity.[191] While it may seem strange to conclude a paper on intellectual property by concluding that intellectual property does not much matter, it is important to

187. Belcher v. Tarbox, 486 F.2d 1087, 1088 (9th Cir. 1973).

188. This is not to say that it may not be a good idea to limit copyright protection in meaningful ways. If copyright protections should be limited, it would be best to do so directly through reforms of the copyright law, not by allowing defendants to raise extrinsic arguments about the circumstances of a work's production.

189. *See supra* Section III.

190. Villa v. Pearson Educ., Inc., No. 03 C 3717, 2003 WL 23801408, (N.D. Ill. Dec. 2, 2003).

191. For a discussion of other types of socially productive creation that track poorly onto traditional legally-centered explanations of copyright, *see generally* Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799 (2000); Rosenblatt, *supra* note 72.

recognize the boundaries of our theories of intellectual property protection, and the well of creativity and creation that exists outside of the legal system.