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# Copyright Protection of Street Art and Graffiti under UK Law

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## INTRODUCTION

This article aims at analyzing to what extent UK copyright law is capable of regulating various forms of art placed in the streets. Although I have been intrigued by street art for long time, I actually started doing academic research in this field after moving to the Shoreditch area in East London. This part of the British capital is well known for being culturally vibrant and dynamic and for hosting a highly artistic, vast and ever-changing range of street artworks. The encounter with such a creative environment has nurtured my interest in researching on the intersection between copyright law and art displayed in outdoor spaces.

*Graffiti* and *street art* are the main terms used to define these forms of art. The former refers to a technique of painting names and letters on various urban surfaces,<sup>1</sup> such as tube and railway trains as well as walls.<sup>2</sup> *Graffiti* art first developed in New York City in the early 70s,<sup>3</sup> and then spread to other cities and countries in the world, including Britain.<sup>4</sup> The first British graffiti pieces appeared on the streets of London and Bristol in the early 80s.<sup>5</sup> The term *street art* is instead used to define more elaborated forms of art, which have evolved from the early graffiti movement and focus on images rather than letters.<sup>6</sup> Street artists use nowadays a variety of tools to paint and draw: not only spray cans, but also traditional instruments such as brushes, rollers and palettes as well as marker pens, chalks and charcoal. Ways of placing art in the street may also take forms different from

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<sup>1</sup> The word “graffiti” comes from the Italian verb *graffiare*, which means *to scratch* (the Italian work deriving in turn from the ancient Greek verb *grafein*, which means *to write*).

<sup>2</sup> Wall writings has been a form of art for centuries, even millenniums. Amongst the many examples, it is worthwhile to note the graffiti in catacombs in ancient Rome, Pompei and Greece as well as the aboriginal rock art in Australia and the Paleolithic cave paintings of Lascaux: see Mettler, “Graffiti Museum: A First Amendment Argument for Protecting Uncommissioned art on Private Property” (2012) 111 *Michigan Law Review* 249 at p.252; Gomez, “The Writing on Our Walls: Finding Solutions Through Distinguishing Graffiti Art From Graffiti Vandalism” (1993) 26 *University of Michigan Journal of Law Reform* 633 at p.636; Smith, “Street Art: An Analysis Under U.S. Intellectual Property Law and Intellectual Property’s ‘Negative Space’ Theory” (2013) 24 *DePaul J. Art & Intell. Prop* 259 at p.260.

<sup>3</sup> For an iconic photographic book documenting early forms of graffiti art in New York, see Mailer and Naar, *The Faith of Graffiti* (New York: Praeger, 1974).

<sup>4</sup> The rapid diffusion of graffiti culture around the world has been facilitated by the publication and dissemination of two major photographic books: see Cooper and Chalfant, *Subway Art* (London: Thames & Hudson Ltd, 1984); Chalfant and Prigoff, *Spraycan Art* (London: Thames & Hudson Ltd, 1987). The success of two documentary movies were also crucial in the worldwide development of this form of art, namely *Wild Style*, directed by Charlie Ahearn, USA, 1983; and *Style Wars*, directed by Tony Silver and Henry Chalfant, USA, 1983. For a documentary which shows how US graffiti culture made its way over the pound to UK in the 80s, see *Bombin’* (1987) directed by filmmaker Dick Fontaine [available at <https://www.youtube.com/watch?v=uEbh97UblgM>, last accessed on 1<sup>st</sup> August 2016].

<sup>5</sup> See Chalfant and Prigoff, cited above fn.4, at pp.58-65. Britain had already experienced wall writing ever since. Take the practice of London tradespeople of painting directly onto brickworks in order to advertise skills or waves, as mentioned by Young, *Street Art, Public City: Law, Crime and the Urban Imagination* (New York: Routledge, 2013), at p.5; or the political graffiti in Northern Ireland, where murals have been so common for long time that they have become part of the landscape in many cities and villages: see Danysz, *From Style Writing to Art: A Street Art Anthology* (Drago, 2010), at p.304 (noting that “although every community has its specificities, those murals share common issues, from loyal activism supporting the protestant England crown to Republican protest paintings”). For analyses of old practices of wall writing in London see Charoux, *London Graffiti* (London: WH Allen 1980); Perry, *The Writing on the Wall: The Graffiti of London* (London: Elm Tree Books 1976).

<sup>6</sup> I will often use in this article the broader term *street art* to refer to all forms of art displayed in the streets, including graffiti.

painting such as urban knitting,<sup>7</sup> attaching mosaic tiles, stickers,<sup>8</sup> posters<sup>9</sup> and cutouts<sup>10</sup> as well as abandoning artworks.<sup>11</sup>

Street artworks are often produced illegally, namely without the authorisation of the owner of the property where they are placed, which can expose artists to serious legal consequences including jail time. Yet, as opposed to the early days of these artistic movements (especially graffiti) when illegality was the rule, many street artists nowadays produce their works legally,<sup>12</sup> thus seeking social acceptance for their practice and creative outputs.<sup>13</sup> And cities' authorities often make available spaces where street art is tolerated and artworks change regularly, like the famous Leake Street in the London area of Waterloo (known as the *Graffiti Tunnel*)<sup>14</sup> and the DPM Park in Dundee, amongst others. Private property owners and businesses also increasingly give street artists the possibility of expressing themselves in public spaces. The Kelburn Castle project in Scotland is just one of the many examples of how private owners are more and more frequently willing to rely on street art to embellish their properties.<sup>15</sup>

Communities' interest in preserving street artworks is also growing, especially when they are created by famous artists, whose pieces are often protected by perspex glasses. The expanding interest in street art is confirmed by the high number of magazines and websites dedicated to these forms of art;<sup>16</sup> and by the many street art tours<sup>17</sup> offered in several British cities to admire pieces which – it is often noted - beautify and revamp our neighbourhoods.<sup>18</sup>

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<sup>7</sup> This is a type of street art that employs colourful displays of knitted or crocheted yarn or fibre: for an in-depth analysis see Haveri, *Yarn Bombing – The Softer Side of Street Art*, Ross (ed.) *Routledge Handbook of Graffiti and Street Art* (Routledge, 2016), at pp. 103-112 (mentioning the activity of the London-based movement *Knit the City*, established in April 2009 by Lauren O'Farrel).

<sup>8</sup> A well-known pioneer of this form of art is the London-based artist Solo One who started applying pre-tagged stickers in 1999 onto public walls and lamp-posts of the British capital: see Alvelos, *The Desert of Imagination in the City of Signs: Cultural Implications of Sponsored Transgression and Branded Graffiti*, in Ferrell, Hayward, Morrison, Presdee (eds.), *Cultural Criminology Unleashed* (Glasshouse, 2004: London), at p. 187.

<sup>9</sup> The practice of attaching posters on walls and other urban surfaces is also known as *wheatpasting* or *flyposting*.

<sup>10</sup> This technique is a sub-species of posterizing. It consists of cutting out pieces from photocopied papers and stick them on walls and other surfaces. See also Stahl, *Street Art (Art Pocket)* (H.F. Ullmann, 2009) at p.274 (noting that cutouts are fast to create and place).

<sup>11</sup> Examples of abandoned items are the artworks placed by London-based artist Slinkachu, who leaves miniature figures in the streets, where they are then photographed and left in the urban environment: see his photographic books *Little People in the City: The Street Art of Slinkachu* (Boxtree, 2008); *The Global Model Village: The International Street Art of Slinkachu* (Boxtree, 2012). Another well-known British artist who has left hundreds of works in the street for the passer-by to collect is Adam Neate.

<sup>12</sup> Ronald Kramer, "The Thing about Walls is they Become Big Murals": The Rise of Legal Graffiti Writing Cultures, in Pedro Soares Neves - Daniela V. de Freitas Simões (eds.), *Lisbon Street Art & Urban Creativity: 2014 International Conference (Volume 1)*, 2014, at p.35.

<sup>13</sup> Take as an example the London-based street artist Eine. His painting *Twenty First Century City* was among the official gifts to Barack Obama from David Cameron on his first trip to Washington as British prime minister in 2010: see "David Cameron Presents Barack Obama With Graffiti Art" *BBC* (21 July 2010) available at: <http://www.bbc.co.uk/news/uk-politics-10710074> [Accessed 26 June, 2016].

<sup>14</sup> The first artworks were painted in Leake Street during the *Cans Festival* organised by the elusive British street artist Banksy in May 2008.

<sup>15</sup> The Kelburn Castle is a large castle near Fairlie, North Ayrshire. Back in 2007 experts informed the owners that its concrete facing would eventually need to be replaced. The owners then took the decision to invite some famous Brazilian street artists (Os Gemeos, Nunca and Nina Pandolfo) to paint the castle's walls. What resulted is a stunning combination of artworks which has made the castle a big touristic attraction.

<sup>16</sup> See *inter alia* the websites: "UK Street Art" [Online] available at: [ukstreetart.co.uk](http://ukstreetart.co.uk) [Accessed 8 July, 2016]; "Street Art London" [Online] Street Art London 2016, available at: [streetartlondon.co.uk](http://streetartlondon.co.uk) [Accessed 8 July, 2016]; "POW!" [Online] available at: [pictureonwalls.com](http://pictureonwalls.com) [Accessed 8 July, 2016]; "Bristol Street Art" [Online] Bristol Street Art 2016, available at [bristol-street-art.co.uk](http://bristol-street-art.co.uk) [Accessed 8 July, 2016]; "Art of the State" [Online] available at [artofthestate.co.uk](http://artofthestate.co.uk) [Accessed on 24 July 2016].

Street art has also become a hot commodity. Due to their increasing popularity, works from famous street artists such as Banksy are often offered for sale in galleries<sup>19</sup> and reproduced (with or without authorization) on as diverse products as posters, clothes, bags, mugs and home furniture as well as on canvases and prints sold in popular street markets and the Internet. They are also increasingly commissioned and used as a backdrop in TV series, commercial ads and music videos<sup>20</sup> or to promote products<sup>21</sup> and some of them have commanded very high prices at auctions.<sup>22</sup> This street art boom has thus attracted attention from advertisers and marketing gurus in their pursuit of new commercial ideas, and cases of unauthorized exploitation of urban creativity are increasing. Works placed on the street are sometimes even removed from their surface and offered for sale, also on the Internet, often to the dismay of the artists.

In the following paragraphs I will expand on whether UK copyright law is able to accommodate the needs of street artists, and give them the right tool to protect their interests. There has been thus far

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<sup>17</sup> Tours are organised by several individuals and organisations. See *inter alia* the websites: “Shoreditch Street Art Tours” [Online] available at: <http://www.shoreditchstreetarttours.co.uk> [Accessed 5 July, 2016]; “The London Street Art Tour” [Online] East End Tours 2013, available at: <http://www.streetartlondontour.com> [Accessed 5 July, 2016]; “London Street Art Tours” [Online] available at: [londongraffitiitours.com](http://londongraffitiitours.com) [Accessed 5 July, 2016]; “Bristol Street Art Tours” [Online] Wear The Wall Ltd 2016, available at: [wherethewall.com/tours](http://wherethewall.com/tours) [Accessed 5 July, 2016].

<sup>18</sup> While street art, especially where produced legally, is increasingly accepted and appreciated, graffiti (which is often illegal) is perceived negatively by large sectors of society, that consider it as visual pollution and stress their high social costs, for example in terms of wall cleaning: see Young, “Criminal images: The affective judgment of graffiti and street art” (2012) 8 *Crime, Media, Culture* 297, at pp.298-299. I will come back on these issues later in the article.

<sup>19</sup> Examples of galleries focused on, or interested in, street artworks or street art inspired pieces include the London-based Stolen Space, Pure Evil, Pictures on Walls, Lazarides, Black Rat, Lamberty, Andipa, Village Underground, Bankrobber Gallery as well as the Bristol-based Weapon of Choice. Even some British early graffiti artists of the 80s sometimes painted their pieces in galleries or other indoor venues, one of these being the Arnolfini art centre in Bristol, as documented in Braun, *Children of the Can, Bristol Graffiti and Street Art*, Bristol: Tangent Books, 2012, at pp.40-43. See also the more recent graffiti exhibition *Crimes of passion*, organised in Bristol in 2009 by the Royal West of England Academy, which saw 45 well-known street artists painting on the internal walls of a 150 year-old building; and the 2008 street art exhibition organised at the Tate Modern Gallery and sponsored by Japanese carmaker Nissan (which I will mention again later in the article).

<sup>20</sup> Smith, cited above fn.2, at p.262; Hunter, *Street Art: From Around the World* (London: Arcturus Publishing, 2012), p. 80 (noting that Eine’s lettering style has been used by pop group Alphabeat and appeared in music videos for musicians Duffy and Snow Patrol).

<sup>21</sup> The practice to paint street artworks on urban spaces (especially in London) to advertise commercial products and in particular to instil on them an aura of “cool” and street credibility has been analysed by Alvelos, cited above fn.7, pp. 181-191.

<sup>22</sup> Many Banksy’s artworks have fetched high prices. Auctions for the following pieces, most of them created by Banksy in studio and not bound to the streets, are noteworthy: (i) *Keep It Spotless*, sold in 2007 for the record price of \$1,870,000 (household gloss and spray paint on canvas); (ii) *Simple Intelligence Testing*, sold in 2008 for £636,500 (oil on canvas laid onto board, five parts); (iii) *The Rude Lord*, sold in 2006 for \$658,025 (oil on canvas); (iv) *Vandalised Phone Box*, sold in 2005 for \$605,000 (sculpture); (v) *Space girl and bird* sold in 2007 for £288,000 (spray paint on steel); (vi) *Queen Victoria* sold in 2008 for £277,250 (oil on canvas); (vii) *Insane Clown* sold in 2008 for £241,250 (spray paint stencil on Hessian); (viii) *Laugh Now*, sold in 2008 for £228,000 (spray paint on painted board); (ix) *David*, sold in 2007 for £204,500 (sculpture); (x) *Ruined Landscape*, sold in 2008 for \$385,000 (oil and spray paint on canvas); (xi) *Pie Face*, sold in 2007 for £192,000 (oil on canvas); (xii) *Warning Sign*, sold in 2008 for £ 181,250 (spray enamel on composite plastic); (xiii) *Think Tank*, sold in 2008 for £156,000 (stencil and spray paint on steel); (xiv) *Happy Coppers*, sold in 2008 for £144,000 (acrylic and spray paint on cardboard); (xv) *You Told That Joke Twice*, sold in 2010 for £169,250 (acrylic, enamel and oil stick on canvas); (xvi) *Bird with Grenade*, sold in 2011 for £145,250 (oil and spray enamel on canvas); (xvii) *Gas mask boy*, sold in 2011 for \$178,000 (oil on canvas); (xviii) *Bombing Middle England*, sold in 2007 for £102,000 (acrylic and spray paint on canvas); (ix) *Very Little Helps*, sold in 2010 for £82,850 (canvas); (xx) *Balloon Girl*, sold in 2015 for £56,250 (print, originally painted on a wall in East London, Great Eastern Street); (xxi) *Heavy Weaponry*, sold in 2004 for £32,000 (spray paint on canvas); (xxii) *Bomb Hugger*, sold in 2007 for £31,200 (print). For more details about most of these artworks, see the webpage “Viewpoints: Top 25 Most Expensive Banksy Works Ever” [Online] Arrested Motion LTD 2012, available at: <http://arrestedmotion.com/2011/09/banksy-top-25-most-expensive-works-ever/> [Accessed 5 July, 2016].

no reported decision by domestic courts on copyright protection of these forms of art. This is probably due to the fact that disputes are often settled out-of-court before a complaint is filed or a decision is reached. After all, this seems to be the rule in most cases regarding art.<sup>23</sup> The article, in particular, will investigate on whether and to what extent certain copyright law provisions and case law apply to various types of art placed in urban environments, especially paintings on walls. It will focus on the following selected aspects which are relevant to street art: (i) requirements for protection; (ii) authorship and ownership; (iii) tangible embodiment of the work;<sup>24</sup> (iv) moral rights; (v) freedom of panorama exception; (vi) illegal works. It will eventually include some reflections on whether copyright law may be considered unsuitable to govern street art because of its *sharing-based* nature.

## REQUIREMENTS FOR PROTECTION

Various forms of art placed in the streets such as painted works, stickers, posters, cutouts, mosaics, urban knitting and abandoned objects certainly fall within the category of artistic works, as mentioned in Section 4 of the Copyright, Designs and Patents Act (CDPA) 1988.<sup>25</sup> They are therefore within the scope of copyrightable subject matter.

Some street artworks are created relatively quickly. Take stencil art, which is a technique for reproducing designs and patterns by passing spray-paint or ink over holes cut in cardboard or metal onto the surface to be decorated: it allows the preliminary creative activity to be carried out in studio<sup>26</sup> and the actual work to be subsequently placed on the street in a relatively quick way, which also minimises the risk of a possible arrest if the piece is created illegally.<sup>27</sup> Banksy himself noted that the reason why at some point of his career he started focusing on stencils was to drastically reduce the time for placing pieces on the street and thus reduce the risk of being noticed by the police.<sup>28</sup> The fact that some street artworks may be rapidly created and placed in the chosen location (sometimes it is just a matter of a few minutes) does not stand in the way of their copyrightability. Indeed, the time of creation of the work is not relevant for copyright purposes. Many other works such as photographs and simple sketches can be quickly produced, and copyright is still available.<sup>29</sup>

### *Permanency of the work*

Most street artworks are ephemeral as they disappear relatively promptly. For example, they may be removed from the owner of the house upon which they are placed; they may be painted over by local councils that want to keep clean the neighborhood;<sup>30</sup> or they may end up being vandalised;<sup>31</sup>

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<sup>23</sup> See Stech, *Artists' Rights: A Guide to Copyright, Moral Rights and Other Legal Issues in the Visual Art Sphere* (Builth Wells: Institute for Art & Law, 2015), at p.xi.

<sup>24</sup> This aspect is not strictly copyright-related as it refers to the physical support which embodies the copyrighted work.

<sup>25</sup> This provision states that the category of artistic works includes graphic works, photographs, sculptures or collages, irrespective of artistic quality. It also specifies that the category of "graphic works" includes paintings, drawings and other visual artworks.

<sup>26</sup> This preliminary activity may be time-consuming. See Ellsworth-Jones, *Banksy: The Man Behind the Wall* (New York: Aurum Press Ltd, 2013), p.39 (noting that "stencils can take hours at home or in the studio to prepare").

<sup>27</sup> Danysz, cited above fn. 5, p.307.

<sup>28</sup> Banksy, *Wall and Piece* (London: Century, The Random House Group, 1996), at p.13.

<sup>29</sup> Bainbridge, *Intellectual Property*, 9th edn (Harlow: Pearson Education Limited, 2012), at p.48.

<sup>30</sup> Property owners and local councils may not be aware that what has been placed on their wall is an artistic and possibly valuable work. This is what the owner of a Bristol property on which Banksy stencilled the *Gorilla in a pink mask* artwork actually thought before painting over a piece which could have made him very rich: see Bates, "Banksy's Gorilla in a Pink Mask is Painted Over" *The Guardian* (15 July 2011) available at: [www.theguardian.com/artanddesign/2011/jul/15/banksy-gorilla-mask-painted-over](http://www.theguardian.com/artanddesign/2011/jul/15/banksy-gorilla-mask-painted-over) [Accessed 1 July, 2016]. Also, the local council of Essex town Clacton-on-Sea seemed to get it wrong when painting over a Banksy's piece - showing a group of pigeons holding anti-immigration banners - which could have become a major touristic attraction: see

also, artworks may deteriorate and eventually vanish just because of the passing of time and weather elements.<sup>32</sup> Yet, many street artists accept the transient nature of their art. As has been noted, the main factor of street art is the constant physiological turnover of artworks that keeps cities themselves in flux: as new images are created, others vanish<sup>33</sup> and keep on existing just in photographs and videos.

Can the ephemeral nature of street artworks be an obstacle that prevents their copyright protection? One may answer in the affirmative by arguing that artistic works should be fixated permanently in a medium to be considered copyrightable,<sup>34</sup> and pointing to certain case law which seemed to require the permanency of the tangible medium.<sup>35</sup> For instance, in *Merchandising Corporation of America v Harpbond*<sup>36</sup> it was held that the facial make-up of the pop artist Adam Ant did not constitute a painting for the purpose of copyright (“if the marks are taken off the face there cannot be a painting. ... a painting without a surface is not a painting”).<sup>37</sup> A certain degree of permanency seems also to be required for collage of objects: in *Creation Records v News Group Newspapers* it was held that the arrangement of certain objects and props for a photograph of the pop band Oasis for reproduction on their album cover was “intrinsically ephemeral ... less than ephemeral”.<sup>38</sup> Thus, that arrangement was neither a sculpture nor a collage as its continued existence was just in the form of a photograph.<sup>39</sup>

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Schacter, “Banksy mural in Clacton-on-Sea knocked from its perch – but no tears from me” *The Conversation* (3 October 2014) available at: <https://theconversation.com/banksy-mural-in-clacton-on-sea-knocked-from-its-perch-but-no-tears-from-me-32474> [Accessed 1 July, 2016]. Such paradoxical situations have been satirised by Banksy himself with the ironic piece *Cave Painting* (which depicts a worker using a power washer to clean up valuable cave paintings), painted in May 2008 in the above mentioned Leake Street in London: see also Salib, “The Law of Banksy: Who Owns Street Art?” (2016) 83 *University of Chicago Law Review* 2293 at p.2311.

<sup>31</sup> For example, the famous Banksy’s artwork *Spy Booth*, placed in 2014 in the English town of Cheltenham to criticise the global surveillance disclosures of 2013 (it featured three spies tapping a Cheltenham phone booth), was subsequently vandalised by unknown people who painted it over with letters in silver and dark red paint: see Cain, “Banksy’s GCHQ artwork vandalised in Cheltenham” *The Guardian* (30 July 2014) available at: <http://www.theguardian.com/artanddesign/2014/jul/30/banksy-gchq-artwork-vandalised-cheltenham> [Accessed 1 July, 2016]. Banksy’s street artworks are often vandalised by graffiti writers. One of these is Sam Moore, known as *10Foot*, who seems to hate Banksy and his art and shows it by writing across his works: see Ellsworth-Jones, cited above fn.26, p.98. See also Murray and Murray, cited above fn.28, p.161 (noting that street works are sometimes painted over by other writers, especially young ones, seeking fame by taking out other artists’ pieces).

<sup>32</sup> Smith, cited above fn.2, p.284; Murray and Murray, *Broken Windows: Graffiti NYC* (Berkeley: Gingko Press, 2009), p.161 (noting that graffiti is exposed to weather elements, so that the paint can fade, crack, and peel).

<sup>33</sup> Young, cited above fn.5, p.10.

<sup>34</sup> Copyright, Designs and Patents Act 1988 s.3(2) sets forth that literary, dramatic and musical works must have been fixed in a tangible form before copyright can subsist. This provision is in line with Article 2(2) of the Berne Convention, which allows states to provide that works shall not be protected “unless they have been fixed in some material form”. Yet, while literary and musical works need to be recorded in a tangible medium, there is no express statutory fixation requirement for artistic works. This is obvious as the very existence of an artistic work such as a painting or a sculpture entails its fixation in a tangible embodiment. But even if it is accepted that a fixation is required to attract copyright, it could be argued that photographs of street art and graffiti (which is common practice to preserve the relevant artworks) could help in meeting this requirement: see M. Iljadica, *Copyright Beyond Law – Regulating Creativity in the Graffiti Subculture* (2016) Hart Publishing, p. 103.

<sup>35</sup> Aplin and Davis, *Intellectual Property Law - Text, Cases, and Materials*, 2nd edn (Oxford: Oxford University Press, 2013), p.83; see also Barron, “Copyright Law and the Claims of Art” (2002) 4 I.P.Q. 368 at p.383.

<sup>36</sup> *Merchandising Corp. of America Inc. & ors v. Harpbond Ltd & ors* [1983] FSR 32.

<sup>37</sup> See also *Tate v Fullbrook* [1908] 1 KB 821, 822-33 (holding that scenic effects, stage business and the make up of actors are not protectable by copyright); and the Australian case *Komesaroff v Mickle and Others* [1988] RPC 204 (holding that works of kinetic art, sand pictures in particular, were considered as lacking sufficient permanence to be classed as works of craftsmanship because no sand picture was static for any length of time).

<sup>38</sup> *Creation Records v News Group Newspapers* [1997] EMLR 444.

<sup>39</sup> On this case see also Bainbridge, cited above fn.29, p.65; and Aplin and Davis, cited above fn.35, p.85.

Yet, in addition to being criticized by legal scholars,<sup>40</sup> such a case law does not seem to be unanimously accepted by courts. For example, in *Metix Ltd v G.H. Maughan*<sup>41</sup> it was suggested that an ice sculpture, although obviously not permanent, should in principle be protected as a three-dimensional work made by an artist's hand.<sup>42</sup> What *Metix* entails is that not just a permanent materialization, but also an ephemeral fixation, of the tangible medium would suffice for copyright subsistence purposes.<sup>43</sup> I believe what has been suggested in *Metix* could apply to most street art scenarios, even more so in light of the recent judicial developments at European Union (EU) level.<sup>44</sup> Indeed, under EU law and in particular in light of the *Infopaq* decision, anything that constitutes an intellectual creation should be protected by copyright.<sup>45</sup> It could then be argued that such developments have made the transient or permanent fixation of the work on a surface a less important issue.<sup>46</sup>

But even if we accept that a certain degree of permanency is required, it could still be noted that just works that are *intrinsically* impermanent could be denied copyright protection. The adverb *intrinsically* has been used by Lloyd J in *Creation Records* to deny the copyrightability of the above mentioned arrangement of objects which doomed to vanish after the photo session of the band Oasis was completed. Arguing *a contrario*, it could be pointed out that in many cases street artworks are not intrinsically transient as artists, even when accepting the risk that their pieces may fade sooner or later, still do hope they may last as long as possible.<sup>47</sup> It should also be reminded that artworks placed in the streets, especially by famous artists, are increasingly protected and preserved by local councils or private property owners.<sup>48</sup>

Artworks placed in the streets could also be compared to the famous Carl Andre's bricks, the stones circles created by Richard Long, the Rachel Whiteread's house, or even the living sculptures of Gilbert and George: all artistic pieces that were cited by Lloyd J. in *Creations Records*<sup>49</sup> and – that judge noted – may be distinguished from *intrinsically* ephemeral works (such as the objects arranged for the Oasis album cover) because they are designed to last for a reasonable period of time. Carl Andre's bricks and similar ephemeral works were also taken into consideration in *Lucasfilm Limited v Andrew Ainsworth*: Mann J in particular noted that as such pieces are created

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<sup>40</sup> *Merchandising Corporation of America v Harpbond* has for example been criticised by Bentley and Sherman, *Intellectual Property Law*, 4th edn (Oxford: Oxford University Press, 2014) pp.73-74 (noting that it is difficult to see why a pop star's face is less of a surface than a piece of canvas, and could not be protected the same way as a permanent tattoo).

<sup>41</sup> *Metix (UK) Ltd v G.H. Maughan (Plastics)* [1997] FSR 718.

<sup>42</sup> See also Bentley and Sherman, cited above fn.40, p.92.

<sup>43</sup> See also Latreille, *From Idea to Fixation: a View of Protected Works*, in Derclaye (ed.), *Research Handbook on the Future of EU Copyright* (Cheltenham: Edward Elgar Publishing, 2009), p.144.

<sup>44</sup> It is likely that even after the Brexit vote of June 2016 several chunks of EU law, including EU copyright law, may still be applicable in the UK.

<sup>45</sup> *Infopaq v Danske*, C-5/08. It thus seems that the concept of copyrightable work is now linked to whether or not the subject matter constitutes an intellectual creation of the author. As far as literary and artistic works are concerned, such a link is also confirmed by the *travaux préparatoires* for the Brussels Revision Conference of the Berne Convention which indicate that the requirement of *intellectual creation* is implicit in the concept of literary and artistic works (see Ricketson and Ginsburg, *International Copyright and Neighbouring Rights (2 Volumes): The Berne Convention and Beyond*, 2006, para 8.03). See also Aplin and Davis, cited above fn.35, pp.64 and 94 (noting that the recent case law from the Court of Justice of the European Union suggests that where there is an intellectual creation it is not necessary to categorise it as a particular type of work).

<sup>46</sup> See also E. Derclaye "Debunking Some of UK Copyright Law's Longstanding Myths and Misunderstandings" (2013) *Intellectual Property Quarterly*, at p. 12.

<sup>47</sup> Yet, in some cases street artists do not really seem to mind about their works vanishing quickly. See Hunter, cited above fn.20, p.114 (noting that some artists use paints that are designed to wash away in the rain). See also Young, cited above fn.5, p.7 (stressing that some street artworks may only last a few seconds).

<sup>48</sup> See also Stephen Morris, *Off the Wall, A Book of Bristol Graffiti* (Bristol: Recliffé, 2007), at p.5 (noting that graffiti is temporary "unless you ... build a glass atrium to protect it").

<sup>49</sup> See also Barron, cited above fn.35, p.384.

by artists' hands for artistic purposes, they should be considered as sculptures ("a pile of bricks, temporarily on display at the Tate Modern for two weeks, is plainly capable of being a sculpture ...")<sup>50</sup> and arguably copyrightable.

There are also artworks placed in the street which may end up lasting for long period of time. Take the mosaic tiles and sculptures applied on walls and other surfaces by artists such as Invader and Cityzen Kane.<sup>51</sup> These pieces often benefit from a long lifespan as they are attached to walls with extra-strong glues or sometimes even cement.<sup>52</sup> There are little doubts these works are to be considered as fixated permanently in a medium.

### *Originality*

As is known, all copyrightable works must be original.<sup>53</sup> It can be argued that many, if not most, street artworks satisfy the originality requirement, whether we apply the UK "skill, labour and judgment" standard<sup>54</sup> or the EU "intellectual creation" test following *Infopaq*.<sup>55</sup>

Like traditional artists, most street artists do preliminary works such as sketches. The actual street artwork often derives from a drawing prepared in advance by the artist and used as a guide, for example while painting the wall. In such circumstances there exist two different copyrights, one covering the sketch (upstream creation) and the other related to the painted piece (downstream creation). The preliminary sketches do not jeopardise the originality of the final derivative works. This is confirmed by *Biotrading and Financing OY v Biohit Ltd* where it was held that if an author makes preliminary works before coming up with a final piece, the final version does not lack originality just because it was preceded by the preliminary works.<sup>56</sup>

While most street and graffiti artworks are certainly original,<sup>57</sup> one may note that tags lack sufficient level of originality, and in general are too trivial to attract copyright protection. What are tags? Tags are painted or drawn by graffiti writers<sup>58</sup> on walls and other urban surfaces, and may be executed in condensed calligraphic form.<sup>59</sup> They frequently represent the taggers' chosen name and sometimes that of the crew with whom they paint, and epitomise a strong desire to be recognised and appreciated within the subculture. Tags are thus like personal signature and street logos<sup>60</sup> that glorify identity and are mainly addressed to other graffiti writers.<sup>61</sup> They often represent the first step in the career of what may eventually become a street artist.<sup>62</sup>

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<sup>50</sup> *Lucasfilm Limited v Andrew Ainsworth* [2008] EWHC 118, at para 54(viii).

<sup>51</sup> Works by these artists can be seen and appreciated in the Internet at <http://www.space-invaders.com/world> and <http://globalstreetart.com/cityzenkane> [last accessed on 30 July 2016].

<sup>52</sup> Danysz, cited above fn.5, p.311; see also Gavin, *Street Renegades: New Underground Art* (London: Laurence King Publishing Ltd, 2007), p.56 (reporting Invader's opinion: "the material I use (tiles and cement) are made to be permanent").

<sup>53</sup> Copyright, Designs and Patents Act 1988 s.1(1)(a) states that "Copyright is a property right which subsists ... in the following descriptions of work— (a) *original* literary, dramatic, musical or artistic works ..." (emphasis added).

<sup>54</sup> *Ladbroke v William Hill* [1964] 1 All ER 465, 469.

<sup>55</sup> See also Iljadica, "Graffiti and the Moral Right of Integrity" (2015) 3 I.P.Q. 266 at p.268.

<sup>56</sup> *Biotrading and Financing OY v Biohit Ltd* [1996] FSR 393. See also *LA Gear Ltd v Hi-Tec Sports plc* [1992] FSR 121 as well as Brainbridge, cited above fn.26, p.47.

<sup>57</sup> These likely include the so-called "throw-up", which in graffiti jargon usually refers to a one color outline and one layer of fill-color, often painted in bubble style letters. See also Iljadica, cited above fn.34.

<sup>58</sup> The term *writer* is usually used to refer to graffiti artists and taggers, as they *write* their name on walls and other surfaces.

<sup>59</sup> Halsey and Young, "Our desires are ungovernable: Writing graffiti in urban space" (2006) 10 *Theoretical Criminology* 275 at p.301.

<sup>60</sup> Danysz, cited above fn.5, p.410.

<sup>61</sup> This is exactly what distinguishes graffiti writing from the broader concept of street art. By placing tags (as well as other letters-based pieces difficult to read to the everyday public) on walls and other surfaces, graffiti writers aim at

The debate about whether tags are copyrightable could be influenced by the fact that they are perceived negatively by large sectors of society, as opposed to more elaborated pieces of street art which are increasingly accepted and appreciated instead. Often considered as mere scrawling which visually pollutes our cities and requires expensive cleaning by local councils,<sup>63</sup> tags are disliked by many also because they are ubiquitous and (to the eyes of people outside the subculture) indecipherable. Such belief is reinforced by the assumption that tags are easy to execute, or the product of mischievousness<sup>64</sup> rather than intelligence or artistic efforts.<sup>65</sup>

One may also stress that tags are merely functional, like a simple signature (basically meaning: *I was here*)<sup>66</sup> and thus lack a sufficient level of originality as they all seem to be painted or drawn by using similar patterns and just end up being different as to their *content*, namely the tagger's name. It could also be noted that several writers choose their tag for practical reasons, such as the speed with which it can be written,<sup>67</sup> which would confirm their functionality and therefore non-copyrightability.

Yet, if general assumptions and prejudices are set aside, and more knowledge about this subculture's creative processes is acquired, one cannot help to notice that many taggers develop and perfect over the years their own lettering style: a style which derives from countless hours of perfecting the image, even if the final image may appear less than perfect.<sup>68</sup> Even tags which to an untrained eye happen to seem as banal, meaningless and always similar may be considered sufficiently original instead.<sup>69</sup> As has been interestingly noted, "putting up a tag is not mindless. It represents imagination, dedication to an art form, and the willingness to take a risk in a public place to achieve an aesthetic outcome (even if it is one that we don't happen to like)".<sup>70</sup>

That many tags may be considered original is confirmed by the high level of competition between taggers who try to distinguish their lettering style from other taggers, for example by adding arrows, crowns, curves, twists, geometrical or symmetrical elements<sup>71</sup> or in general creating new ways of

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speaking just to other taggers or crews, while street artists want to address a larger audience: see Lewisohn, *Street Art: The Graffiti Revolution* (Tate Publishing, 2008), p.15. See also Ellsworth-Jones, cited above fn.26, p.41 (noting that graffiti is "characterised by the redefinition of the alphabet and its metamorphosis into one of indecipherable chaos. This is to deliberately exclude those who are not part of the sub-culture by making the names and messages indecipherable").

<sup>62</sup> White, "Graffiti, Crime Prevention & Cultural Space" (2001) 12 *Current Issues in Criminal Justice* 253 at p.255.

<sup>63</sup> Clean-up of tags and graffiti pieces in UK is estimated to cost £1 million each year: see Graeme Evans, *Graffiti Art and the City, From Piece-making to Place-making*, in Ross, cited above at fn.7, at p.170.

<sup>64</sup> Often associated to gangsterism and vandalism, tags are perceived by many as showing defiance of the law and the public order. See Gomez, cited above fn.2, p.635.

<sup>65</sup> Young, cited above fn.5, p.23.

<sup>66</sup> Grant, *Outlawed Art: Finding a Home for Graffiti in Copyright Law* (March 2, 2012), p.15, available at SSRN: <http://ssrn.com/abstract=2030514>.

<sup>67</sup> Stern - Stock, *Graffiti: The Plague Years*, *New York Times* magazine, 19 October 1980.

<sup>68</sup> Halsey and Young, cited above fn.59, p.294.

<sup>69</sup> Iljadica, cited above fn.34, p.152 (noting that the assessment of the originality of tags and throw-ups should be carried out by taking into account a specialised audience, i.e. the graffiti community whose members are able to distinguish and appreciate differences and peculiarities, what people outside the scene cannot do. The author makes a comparison between graffiti and engineering drawings: the decision on whether such drawings are to be considered original or not – Iljadica stresses – should depend on their significance to the category of persons to whom such drawings are addressed, namely engineers, as confirmed by *Billhofer Maschinenfabrik GmbH v T H Dixon & Co Ltd* [1990] FSR 105).

<sup>70</sup> Young, cited above fn.5, pp.21-23 (reporting the opinion of a street artist and adding that "tags may be included in the repertory of street art techniques and a motivation for tagging is to contribute something valid to the conversation with the street and to create something that is in its way as image, an icon and an urban text").

<sup>71</sup> See also Iljadica, cited above fn.34, p.150 (noting that taggers carefully choose certain angles and linear shapes).

writing and decorating letters.<sup>72</sup> Accusations of copying tags' styles (what in graffiti jargon is defined as *biting*) as well as remarks about low levels of originality of tags are not uncommon within the graffiti scene,<sup>73</sup> which indirectly confirms that (other) stylish tags may be the result of creative efforts instead. All these factors – together with the fact that tags are sometimes painted on canvases or commissioned to create backdrop for commercial advertisements and thus to make certain trendy products or services more marketable - should militate in favour of considering stylish and original tags as copyrightable.<sup>74</sup> The same holds true with regards to elaborated forms of typo art placed in the street, whose most talented representative in UK is currently the London-based artist Eine.<sup>75</sup>

Graffiti writing has historically been an art movement that revolves much around letter formation and typography.<sup>76</sup> The letters which form a tag, and in general stylish letters painted by graffiti and street artists, could then be compared to stylistic versions of typefaces.<sup>77</sup> The term typeface refers to the design and shape of letters, numbers and other symbols: a creative activity which is the bread and butter of many professionals, such as typesetters and typographers. And typefaces are protected by copyright, as is indirectly confirmed by Sections 54 and 55 of the CDPA which assume and take for granted such protection.<sup>78</sup> It could therefore be argued that stylish tags and letters, if they are original, are to be considered protectable as well.<sup>79</sup> Relevant case law could be relied on to support this argument. For example in *IPC Magazines Ltd v MGN Ltd*<sup>80</sup> it was found that the claimant's stylised version of the word *Woman* in white on a red background was arguably copyrightable.<sup>81</sup> Also, in *Future Publishing v Edge Interactive Media*<sup>82</sup> the judge expanded on the lettering style of the word *Edge* and confirmed that the latter was artistic and original.<sup>83</sup>

The belief that stylish tags and letters are sufficiently original to attract protection is reinforced by the general principle that the quality of a work is not relevant for the purposes of copyright

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<sup>72</sup> Danysz, cited above fn.5, pp.41-42.

<sup>73</sup> In the criminal proceedings against the graffiti writer Tox (see also below fn.242) the judge asked an expert opinion to the famous street artist Eine who used to write tags in the early days of his career. His assessment as expert witness was very clear and straightforward: Tox's tags – he said - were *incredibly basic* and lacked *skill, flair or unique style*. The Public Prosecutor in that proceedings is quoted as saying that there is nothing artistic about Tox's writing: "He is no Banksy. He doesn't have the artistic skills, so he has to get his tag up as much as possible". See the webpage "Graffiti: Tox Could Go To Jail" [Online] Londonist 2016, available at: <http://londonist.com/2011/06/graffiti-tox-could-go-to-jail> [Accessed 14 July, 2016].

<sup>74</sup> Grant, cited above fn.66, p. 23; Rychlicky, "Legal Questions about Illegal Art" (2008) 3 JIPLP 393. For a contrary opinion: see Seay, "You Look Complicated Today: Representing an Illegal Graffiti Artist in a Copyright Infringement Case against a Major International Retailer" (2012) 20 *Journal of Intellectual Property Law* 75 at p.84; Schwender, "Does Copyright Law Protect Graffiti and Street Art?", in Ross, cited above fn.7, p. 453.

<sup>75</sup> Eine is known for his highly artistic, colourful and retro-style letters spray painted on front shutters of shops and walls of London and other cities around the world. See Foulds, *Happy Graffiti: Street Art with Heart* (London: Cassell, 2013), p.14.

<sup>76</sup> Lewisohn, cited above fn.61, p.21. For an overview of the many shapes graffiti letters may take see Walde, *Street Fonts – Graffiti Alphabets from Around the World* (Thames & Hudson: London, 2011).

<sup>77</sup> Lerman, "Protecting Artistic Vandalism: Graffiti and Copyright Law" (2012) 2 *NYU Journal of Intellectual Property and Entertainment Law* 295 at p.309.

<sup>78</sup> Copyright, Designs and Patents Act 1988 s.54 indeed exempts from copyright infringement certain activities in relation to what is defined as "an artistic work consisting of the design of a typeface". Section 55 uses an identical wording. Typefaces are not protected by copyright under US law instead as they are considered to be utilitarian objects.

<sup>79</sup> For example, the stylised way Banksy draws his name, often to sign his street artworks, may be considered as an artistic copyrightable work. See Ellsworth-Jones, cited above fn.26, p.60 (stressing that Banksy's tag is very unique, "with the upright back of the capital B missing, the k relying on the n for support, the s with the top shaved off slightly and the final y that looks almost like a hieroglyphic").

<sup>80</sup> *IPC Magazines Ltd v MGN Ltd* [1998] FSR 431.

<sup>81</sup> See also Bainbridge, cited above fn.29, p.47.

<sup>82</sup> *Future Publishing Ltd v Edge Interactive Media Inc.* [2011] EWHC 1489 (Ch.).

<sup>83</sup> For a similar finding see also *R Griggs Group v Evans* [2003] EWHC 2914 (Ch), paragraph 18.

subsistence. In other words, copyright protects both highly meritorious and (what many people may consider) awful works.<sup>84</sup> It should moreover be noted that the concept of *artistic* work, and more in general of *art*, may be a broad one, also taking into consideration that no definition of art is given in the CDPA.<sup>85</sup> Much stuff depicted visually, by whatever means, may be interpreted as artistic.<sup>86</sup> This has also been stressed by case law. For example, in *Lucasfilm v Ainsworth*, a case concerning the Lucasfilm's Stormtrooper costumes, Mann J suggested that the concept of sculpture can be applicable to things going beyond what one would normally expect to be art in the sense of the sort of things that one would imagine to find in art galleries.<sup>87</sup>

Issues of originality may also be raised by a specific category of street artworks, namely those which consist of just a written word or short phrases. Take East-London artist Mobstr who is specialised in painting funny sentences on walls,<sup>88</sup> often in playful collaboration with city councils as he revisits pieces which are painted over by local authorities.<sup>89</sup> Banksy is also known for stenciling sarcastic and anti-conformist phrases on walls and other surfaces.<sup>90</sup> On the one hand, one may note that such words and sentences could not be protected as literary works. Not only doubts about a sufficient level of originality could be raised. Case law on the *de minimis* rule<sup>91</sup> could also stand in the way of their copyrightability. For example, in *Synamide v La Maison Kosmeo*<sup>92</sup> it was held that to quote the slogan *Beauty is a social necessity, not a luxury* was too small a matter on which to ground a copyright infringement action. And in *Francis Day & Hunter v Fox* it was held that the song title *The Man Who Broke the Bank at Monte Carlo* was not sufficiently substantial for copyright purposes.<sup>93</sup> After all, doubts about whether short sentences or words can be protected by copyright have also been expressed in relation to traditional paintings on canvases.<sup>94</sup> Yet, in light of the more recent *NLA v Meltwater* case<sup>95</sup> (which has found that newspapers' headlines could be considered as original literary works and thus copyrightable), it could now be argued that at least short "artistic" sentences can attract copyright.

## AUTHORSHIP AND OWNERSHIP

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<sup>84</sup> Copyright, Designs and Patents Act 1988 s.4(1)(a) defines an artistic work as a "graphic work, photograph, sculpture or collage, *irrespective of artistic quality*" (italics emphasis added). See also Bainbridge, cited above fn.29, p.61 (noting that the phrase "irrespective of artistic quality" must be intended to prevent challenges to copyright subsistence based on a perceived lack of artistic merit).

<sup>85</sup> Stech, cited above fn.23, p.1 (noting that "art is indefinible").

<sup>86</sup> Colston and Galloway, *Modern Intellectual Property Law*, 3rd edn (Abingdon: Routledge, 2010), p.305.

<sup>87</sup> *Lucasfilm Ltd. And Others v Ainsworth and Another* [2008] EWHC 1878 (Ch.) [2009] FSR 2, para 118(ii).

<sup>88</sup> See the artist's website [Online] available at: [www.mobstr.org](http://www.mobstr.org) [Accessed 5 July, 2016].

<sup>89</sup> Jake (ed.), *The Mammoth Book of Street Art* (Philadelphia: Running Press Book Publishers, 2012), p.18.

<sup>90</sup> Take Banksy's phrase *This is not a photo opportunity*, stencilled on several places such as the Palace of Westminster in London, the Eifel Tower in Paris and the Sydney Opera House. See Banksy, cited above fn.28, pp.122-123.

<sup>91</sup> The principle *de minimis non curat lex* means that the work is so insignificant and trivial to be offered copyright protection, and in general that the law does not concern itself with trifles. In *Exxon Corporation v Exxon Insurance Consultants International Ltd.* 3 All ER 241 it was found that the word *Exxon* cannot be deemed as an original literary work under the *de minimis* rule (thus linking this rule to issues of originality). Similar findings came from *Tavener Rutledge Ltd v Trexapalm Ltd* [1977] RPC 275 (finding that the name of the fictional detective *Kojak* was not protected by copyright) and *Elvis Presley Trade Marks* [1997] RPC 543 (holding the word *Elvis* unprotectable).

<sup>92</sup> *Sinanide v La Maison Kosmeo* (1928) 139 LT 265.

<sup>93</sup> *Francis Day & Hunter Ltd. V Twentieth Century Fox Corporation Ltd* [1940] AC 112.

<sup>94</sup> Barron, cited above fn.35, p.388.

<sup>95</sup> *Newspapers Licensing Agency v Meltwater Holding* [2010] EWHC 3099 (Ch) [72]; *Newspapers Licensing Agency Ltd. v Meltwater Holding BV* [2012] RPC 1 (CA).

I will now analyse specific issues related to authorship and ownership which are relevant to street art scenarios.

### *Collaborative artworks*

Street artists and graffiti writers often work collectively. This has been a feature since the very beginning of these forms of art. Also in the early days of New York City graffiti explosion writing crews were regularly created for the simple purpose of executing collaborative pieces.<sup>96</sup>

In general, when artists create works together, this entails they are joint authors and accordingly copyright owners. Joint authorship occurs where authors' respective parts are distinct and cannot be separated: in other words it is not possible to identify the distinct contributions,<sup>97</sup> and the artists have worked together to create a work of a single kind "in prosecution of a preconcerted joint design".<sup>98</sup> Also, there is no need to have any intention to become joint authors.<sup>99</sup> These scenarios could apply to street art. Take a mural painted by two or more artists which have jointly created all elements and details, so that their contributions merge into a single artistic concept. In such a case, as both artists are joint owners of the copyright covering the whole mural, if someone wants to ask for a licence to exploit the work, both artists would need to agree to such a request.

What also happens in the street art scene is the creation of complex artworks where the elements of the piece are distinct and separable. A look at several collaborations between street artists reveal that they often place their own bit (eg, a character or a symbol) in a way which often allows to conceptually separate the individual contributions: take for instance a mural consisting of two distinct characters painted by different artists and placed at the respective ends of the wall without particular interaction. In this case, as the contributions are separable, each artist is the owner of the copyright on her own part. This entails for example that an artist would be able to autonomously licence out her own character for merchandising purposes or take action against whoever exploits it without authorisation.

### *Anonymity*

Street artists sometimes choose not to sign their works. This may occur, for instance, when pieces are done illegally: the fear of receiving fines or criminal sanctions might indeed convince artists to keep anonymity. What happens in law in these cases? Under the CDPA, works are considered of unknown authorship if the author's identity cannot be identified by a reasonable enquiry.<sup>100</sup> And such works are still protected by copyright even where the relevant artist is unknown,<sup>101</sup> which may turn out to be important from the artist's perspective as the latter might decide to come out at a later stage and be interested in protecting her work.

Yet, Section 57(1)(a) of the CDPA (which provides that copyright in an artistic work is not infringed by an act done at a time when "it is not possible by reasonable inquiry to ascertain the

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<sup>96</sup> Danysz, cited above fn.5, p.41.

<sup>97</sup> *Pamela Dallas Brighton & Dubbelijoint Co. Ltd v. Marie Jones* [2005] FSR 16, 288.

<sup>98</sup> *Levy v Rutley* (1871) L. R. 6 C.P. 523 at 528, 529.

<sup>99</sup> *Beckingham v Hodgens* [2003] EMLR 18 (CA).

<sup>100</sup> Copyright, Designs and Patents Act 1988 ss.9(4), 9(5). It is not clear who undertakes this enquiry, however. It seems logical to presume that the person or entity which wants to use and exploit the work should undertake the enquiry and trace the author.

<sup>101</sup> This can be inferred by the Copyright, Designs and Patents Act 1988 s.12 which regulates copyright's duration: "as long as a literary, dramatic, musical or artistic works remains of unknown authorship, its copyright is measured ...", which indirectly means that anonymous works are protected by copyright. See also Bentley and Sherman, cited above fn.40, p.127.

identity of the author”) could apply in these circumstances: which may make the unauthorised exploitation of anonymous street artworks perfectly lawful. Rules on orphan works may also be relevant in these cases. Works are considered “orphan” when the copyright owner or her location is unknown.<sup>102</sup> The 2014 Regulations establish a procedure under which a non-exclusive licence to use orphan works may be granted by the Intellectual Property Office (IPO) to persons interested in using them.<sup>103</sup> The licence may be obtained where, after a diligent search has been made,<sup>104</sup> the relevant right holders cannot be identified or, if identified, have not been located.

The application of these rules and procedure to street art may make the position of a (formerly anonymous) artist weak as the latter would often have to tolerate the exploitation of her work by third parties, even after she has come out from anonymity. Take for example the publisher of a photographic book on urban art that is interested in using pictures of street artworks whose authors or right holders are unknown.<sup>105</sup> In order to be able to use these pictures such publisher would need to show that the search for the artist or the copyright owner has been reasonable and diligent: in this case no finding of copyright infringement or award of damages could ensue should the artists come out and ask to be compensated for the use of their artworks in the book.

What does the law mean by requiring that the search be diligent and reasonable? It could be argued that these concepts need to be applied taking into account the degree of easiness of the search for the artist. It may thus turn out that in certain circumstances the task of finding out the artist does not prove impossible. For instance, analysing the style of the piece, consulting the many Internet websites devoted to street art as well as posing questions to people interested in these artistic movements may help.<sup>106</sup> The benchmark to be used when assessing the level of reasonableness or diligence should be – I believe – a person expert in the field of street art and graffiti, or anyway an insider of the scene, but not the everyday person outside the subculture.

### *Commissioned artworks*

Street artworks are often commissioned. The reasons why they are requested may vary. Artists may be asked to paint murals to beautify a disadvantaged area, or promote a business<sup>107</sup> or simply embellish a private property. The first London writers in the early 80s also did commissioned works.<sup>108</sup>

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<sup>102</sup> See the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014, which have transposed the Orphan Works Directive (2012/28/EU) into the domestic law. While the CDPA provisions deal with issues of authorship, the Regulations address aspects of ownership: the issues are inevitably related as the unknown *author* will often be the unknown *owner*.

<sup>103</sup> Licences can be obtained provided fees are paid. Fees are retained by the IPO in a specialist fund for a period of eight years, and such funds will be used to compensate the right holder if the latter appears at a later stage.

<sup>104</sup> The Orphan Works Regulations provide that a diligent search comprises a “reasonable search of the relevant sources to identify and locate the right holders of the relevant work” (Regulation 4). Despite guidelines have been adopted with a view to clarifying the tasks to be carried out by potential licensees when undertaking a search, doubts over the concept of “reasonableness” remain.

<sup>105</sup> A quick look at the many photographic books dedicated to the various forms of this art confirm that pictures of orphan street artworks are often used.

<sup>106</sup> Lerman, cited above fn.77, p. 329; Schwender, “Promotion of the Arts: An Argument for Limited Copyright Protection of Illegal Graffiti” (2008) 55 *Copyright Soc’y U.S.A* 257 at p.278.

<sup>107</sup> The practice of hiring street and graffiti artists to decorate the walls or shutters of shops and other commercial premises is established and relatively old. See Byrne, *Hanging Out Down the Council House: Street Art’s Outlaws and the Bristol Establishment*, in Gough (ed.), “Banksy, The Bristol Legacy” (Bristol: Redcliffe, 2012), p. 81 (stressing that “by the 90s a lot of business premises in Bristol started hiring graffiti artists to paint their walls”).

<sup>108</sup> Chalfant and Prigoff, cited above fn.4, p.64.

Under UK law there is no general rule that the person who commissions a work is the owner of the copyright in it. The general rule applies, namely that the author is the original owner of the economic rights. This is stated by Section 11(1) of the CDPA which gives original ownership to authors.<sup>109</sup>

There are however two ways in which the commissioner could become owner of the copyright. The first way is to enter into an agreement under Section 91 of the CDPA. This provision provides that the assignment of a future copyright requires a written agreement. In this case, the copyright vests automatically in the assignee once the work is created. A commissioner who wants to acquire control of the use of the commissioned work may thus be interested in entering into a written agreement that specifies that all relevant rights will be transferred to the latter. Absent any agreement on copyright ownership, the second way the commissioner could become owner of the economic right is for a judge to imply some grant of rights in a commission relationship, either by an assignment of copyright or the grant of a licence (exclusive or non-exclusive).<sup>110</sup> It is therefore possible to have an equitable transfer of copyright from an artist to the commissioner in certain cases, with the result that the copyright would have two owners, one legal and the other beneficial. This may happen, for example, when the author creates the work for the commissioner and is paid a fixed sum rather than a royalty.<sup>111</sup>

If therefore a street artist is paid a fixed sum, for example to paint an artwork on a shop's shutter or a mural to be used in an advertising message, the shop's owner and the advertiser who have commissioned the work could arguably claim beneficial ownership. These scenarios would not be very different from the one in *Durand v Molino*,<sup>112</sup> where the artist was commissioned to make a portrait of a family to be used in their restaurant business, against the payment of a fixed price. It was held that the aim of the commission was merely commercial, even though it was a family portrait. As it was the parties' intention that the portrait should hang on the restaurant's wall, it was held that the commissioner was beneficially entitled to the copyright, with the artist being able to claim moral rights.<sup>113</sup>

The situation would change when an artist is just authorised (not commissioned) to place the artwork on a property by the owner. An authorisation may be given by the property owner both expressly and impliedly, even after the work has been placed. In these circumstances, I believe the general rule on ownership<sup>114</sup> will apply, which means that the artist should be considered as the right owner.

## **THE TANGIBLE EMBODIMENT**

While street artists own the copyright on the intangible asset, the ownership of the tangible medium where the work is placed (a wall, a train car, a litter bin, etc.) will obviously remain with the property owner. This is also the case with traditional works of art, such as paintings: the painter

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<sup>109</sup> Copyright, Designs and Patents Act 1988 s.11(1) provides that "the author of a work is the first owner of any copyright in it".

<sup>110</sup> Colston and Galloway, cited above fn.86, pp.343-345 (citing relevant case law).

<sup>111</sup> See Bainbridge, cited above fn.29, at p.100 (adding that a payment by royalty would be inconsistent with a transfer of ownership).

<sup>112</sup> *Durand v Molino* [2000] ECDR 320.

<sup>113</sup> The amount paid for the commissioned works is one of the factors to be taken into account to imply commissioner's beneficial ownership. Other factors are the impact of the copyright assignment on the contractor; and whether it can sensibly have been intended that the latter should retain any copyright as a separate item of property. See also *R Griggs Group Ltd & Others v Evans and Others* [2005] EWCA Civ 11.

<sup>114</sup> Copyright, Designs and Patents Act 1988 s.11(1).

owns the copyright in the work whereas the buyer of the painting acquires a property title over the object.

How does the property owner become the owner of the tangible embodiment of the (street) artwork? Take the example of a mural. It could be argued that the mural becomes property of the owner of the wall by virtue of accession. Accession is a way of acquiring title that involves the addition of value to property through labor or the addition of new materials.<sup>115</sup> In particular, murals may amount to fixture<sup>116</sup> where their firm attachment to a structure on the land makes separation from the surface impossible without damaging the structure itself or undertaking a laborious process.<sup>117</sup> They may instead turn into chattels if they can be detached without damaging the structure. This is what happened in *Creative Foundation v Dreamland*,<sup>118</sup> the first British case to expressly consider ownership of walls on which artworks are placed. In that case a tenant removed the Banksy piece *Art Buff* from a wall of a building in the English town of Folkestone and the landlord wanted it back. Arnold J. refused to accept the tenant's argument that it had acquired property of the piece of work as it was discharging its repairing obligation. He instead held that when the section of the wall was removed it became a chattel which belonged to the landlord.<sup>119</sup>

One may note that there is little doubt about accession taking place in case of spray painting on walls: indeed, spray paint is applied to bricks or other urban surfaces in a very firm way. Doubts may arise when it comes to forms of street art (other than spray painting) which are less sticky and therefore more easily detachable: take for example stickers, posters and cutouts attached to walls as well as painted chewing gums.<sup>120</sup> Instead of being considered chattels (when detached from the surface), they could be considered – one may note - as abandoned items (*res derelicta*): with the result that whoever finds and takes possession of them would acquire their property.<sup>121</sup> Clearer cases of abandoned items are those involving artists that do not attach, but just leave (artistic) objects in the street, being them paintings (Adam Neate),<sup>122</sup> miniatures (Slinkachu)<sup>123</sup> or something else. Again, as they are literally abandoned in public places, their property is acquired by the first person who comes across and takes them. The encounter of some of these artworks could turn into a lottery for the accidental finder as the value of some of these items may be several thousands of pounds.<sup>124</sup>

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<sup>115</sup> If we accept that accession takes place, what happens if someone removes the piece of wall where the artwork has been placed without the authorisation of the wall owner? In principle, such person may find herself being sued by the owner of the wall for the return of the work, and facing prosecution for handling stolen goods. One may also go as far as arguing that if that person manages to sell the artwork, she could be sued for the proceeds for “conversion”, and prosecuted under the Proceeds of Crime Act.

<sup>116</sup> As is known, fixture means any physical property that is permanently attached (fixed) to real property, usually land.

<sup>117</sup> Mettler, cited above fn.2, p.259.

<sup>118</sup> *Creative Foundation v Dreamland & Others* [2015] EWCH 2556 (Ch), 11 September 2015. For comments on this case, see Iljadica, “Street art belongs to the freeholder” (2016) 11 J.I.P.L.P. 90; Wickenden, “Graffiti Art: the Rights of Landlords, Tenants and Artists: *Creative Foundation v Dreamland Leisure Ltd*” (2016) 38 E.I.P.R. 119.

<sup>119</sup> *Art Buff* had been painted by Banksy in September 2014 during the Folkestone Triennial, an art event organised by Creative Foundation. The artwork quickly became popular and attracted lots of visitors. It was subsequently removed by the tenant (the company Dreamland). Creative Foundation (that in the meantime had acquired the rights on the piece from the landlord) was unhappy about this, successfully sued the tenant and got back the artwork.

<sup>120</sup> An artist who paints pictures on flattened blobs of chewing gum on sidewalks and pavements is the London-based Ben Wilson. He basically makes little miniature paintings out of the chewing gum people drop on the streets.

<sup>121</sup> For an analysis of the possible ways of acquiring property of street art pieces, including accession and abandonment, under US law, see Salib, cited above fn.30.

<sup>122</sup> Ganz, *Graffiti World – Street Art from Five Continents* (Thames & Hudson Ltd, 2004), p.246.

<sup>123</sup> Slinkachu has been crafting, leaving and photographing little figures on the street since 2006: see his photographic books cited above at fn.11; as well as Jake, cited above fn.89, p.80.

<sup>124</sup> For example, the video games inspired mosaic tiles placed by Invader have become very popular with collectors. In 2015 a large piece sold for almost \$350,000 at a Christie's auction in Hong Kong: see Christie's [Online] Christie's

## MORAL RIGHTS

I now proceed to analyse to what extent the provisions and case law on moral rights, in particular the integrity right, may apply to street art scenarios. As is known, moral rights can be invoked by authors if the work is protected by copyright,<sup>125</sup> and have been introduced into British law much later than in other jurisdictions (in 1988), even though previous case law had already recognised certain moral interests of authors.<sup>126</sup>

### *Paternity right*

The paternity right allows authors to claim to be recognised as the creators of their works. It may be relied on by street artists, for instance, to complaint against the publication of their works into a photographic book when their authorship is not acknowledged.<sup>127</sup>

It seems this right fits well into street art scenarios as within this subculture there is a strong bond between the artist and her work: the former strongly identifies herself into the latter. The tag, the character, the sticker, the poster or the whole piece of art created and placed in the street represent a projection of the artist herself. This bond is often confirmed by the inclusion of the artist's name next to, or in, the work. The placement of the name could thus be considered as an instrument of assertion, which is the requirement for the paternity right to spring into action.<sup>128</sup> After all, when it comes to artistic works in general, this condition is met when the artist leaves her signature on the work.<sup>129</sup>

The fact that street and graffiti artists rarely use their real name (they often use pseudonymous) does not prevent them from relying on the paternity right. Sec. 71(8) of the CDPA indeed provides that “if the author or director in asserting his right to be identified specifies a pseudonym, initials or some other particular form of identification, that form shall be used”. The pseudonym is also often placed next to, or in, the artwork.

Artists frequently place works on the street anonymously, often to avoid serious legal consequences. In these circumstances the paternity right cannot be invoked as the assertion requirement is not met, unless and until the artist herself expressly asserts the right in writing.<sup>130</sup>

### *Integrity right*

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2016, available at: <http://www.christies.com/lotfinder/paintings/invader-alias-hk-59-5875653-details.aspx> [Accessed 16 July, 2016].

<sup>125</sup> Copyright, Designs and Patents Act 1988 s.80(1).

<sup>126</sup> McCartney, “Moral Rights under the United Kingdom's Copyright, Designs and Patents Act of 1988” (1991) 15 *Columbia-VLA Journal of Law & Arts* 205 at pp.210-219.

<sup>127</sup> Copyright, Designs and Patents Act 1988 s.77(4) states that “the author of an artistic work has the right to be identified whenever — (a) the work is published commercially or exhibited in public, or a visual image of it is communicated to the public”. See also Bentley and Sherman, cited above fn.40, p.278.

<sup>128</sup> Assertion is required under UK law, as opposed to other jurisdictions which do not envisage such requirement.

<sup>129</sup> Copyright, Designs and Patents Act 1988 s.78(3) states that “the right may also be asserted in relation to the public exhibition of an artistic work — (a) by securing that when the author or other first owner of copyright parts with possession of the original, or of a copy made by him or under his direction or control, the author is identified on the original or copy, or on a frame, mount or other thing to which it is attached”.

<sup>130</sup> See Copyright, Designs and Patents Act 1988 ss 78(2)(b) and 78(3)(b).

As is known, this moral right allows artists and authors to oppose derogatory treatment of their works.<sup>131</sup> I analyse now the extent to which this moral right can be invoked by street artists, by looking in particular into the meaning of “treatment” and when such a treatment may be considered as “derogatory” in street art scenarios.

(i) Meaning of treatment

The concept of “treatment” includes any addition to, deletion from or alteration of the work.<sup>132</sup> In the street art world addition may take place, for example, where some graphic elements are added to a mural, while deletion may occur where parts of a piece, for instance some characters or particular details, are cancelled or removed.<sup>133</sup> Alteration may instead occur when the artwork is recreated by changing its scale or redrawn on another support in such a way that no part of the new work is precisely the same as the original one.<sup>134</sup>

Said that, can the concept of treatment be interpreted so as to include uses of the work outside the context chosen by the street artist or even to prevent destruction of the tangible embodiment? I now delve into these issues.

(a) de-contextualisation

Artists may be interested in preventing their pieces from being removed from the street and brought to galleries or other indoor venues for the purposes of being exhibited and possibly sold. Recent controversial cases involving the removal and relocation of pieces originally placed in the street by famous artists have highlighted these concerns.<sup>135</sup> Indeed street art is often site-specific,<sup>136</sup> which

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<sup>131</sup> Copyright, Designs and Patents Act 1988 s.80(a) provides that “the author of a copyright literary, dramatic, musical or artistic work ... has the right in the circumstances mentioned in this section not to have his work subjected to derogatory treatment”.

<sup>132</sup> Copyright, Designs and Patents Act 1988 s.80(2)(a). This provision also includes adaptation amongst the activities that may amount to treatment.

<sup>133</sup> Bentley and Sherman, cited above fn.40, p.284 note that the concept of treatment “would also cover situations in which a portion of a painting was cut from its original canvas and exhibited”.

<sup>134</sup> See also Davies and Garnett, *Moral Rights* (Sweet & Maxwell, 2010), pp.232-233.

<sup>135</sup> The following are the cases which have attracted media attention (most of them involved Banksy’s artworks).

(i) In 2013 the piece *Slave Labour*, spray-painted by Banksy a year earlier on the side wall of a Poundland store in the London area of Wood Green, was removed and then appeared for sale at the Fine Art Auctions Miami for US\$ 500,000. After protest from the residents of Wood Green the artwork was returned to the UK. It was eventually sold by Bankrobber Gallery London for £750,000 at an auction organised at the London Film Museum by the Sincura Group.

(ii) In 2013 the artwork *No Ball Games*, spray-painted by Banksy in 2009 on the side of a shop at the junction of Tottenham High Road and Philip Lane in North London, was cut out, chopped in three parts and then auctioned at an estimated sale price of £500,000 in the controversial exhibition *Stealing Banksy?*, organised in 2014 by the Sincura Group.

(iii) In 2014 the piece *Girl with a Balloon*, spray-painted by Banksy in 2004 on an East London wall, was removed and offered for sale for £ 450,000 in the *Stealing Banksy?* exhibition.

(iv) In 2008 the piece *Old School*, spray-painted by Banksy in 2006 on an East London garage wall, was removed and offered for sale for £ 350,000 in the *Stealing Banksy?* exhibition.

(v) In 2011 the artwork *Sperm Alarm*, spray-painted by Banksy on the wall of a luxury hotel in the London area of Victoria, was removed by a person (Leon Lawrence) who offered it on the online auction website eBay for £17,000 and then passed in the hands of Sincura Group which offered it for sale at £ 150,000 in the *Stealing Banksy?* exhibition.

(vi) In 2004 the work *Secured*, spray-painted by Banksy on a Liverpool wall in 2003, was removed and offered for sale at £100,000 in the *Stealing Banksy?* exhibition.

(vii) In 2009 the piece *2 Rats*, spray-painted by Banksy during a Berlin local art festival in 2003, was removed and offered for sale at £ 200,000 in the *Stealing Banksy?* exhibition.

(viii) In 2013 the artwork *Liverpool Rat*, created by Banksy as part of the 2004 Liverpool Biennial festival, was removed and offered for sale at £250,000 in the *Stealing Banksy?* exhibition. As mentioned in the exhibition’s website, the piece was removed in multiple sections, with only three pieces having been exhibited: see “Stealing Banksy”

entails that a piece maintains its artistic meaning as long as it is kept in its original environment.<sup>137</sup> Everything around many street artworks is indeed important, if not sometimes even predominant, in the whole settings which originally host the pieces. In other words, the place which surrounds many of these works is specifically chosen by artists and turns out to be part of the artistic concept and representation.<sup>138</sup> Therefore, removing these works from their natural environment and bringing them into galleries or other closed venues would often be, as also stressed by Banksy,<sup>139</sup> akin to locking wild animals in zoos.<sup>140</sup>

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[Online] The Sincura Arts Club 2014, available at: [http://stealingbanksy.com/LIVERPOOL\\_RAT.html](http://stealingbanksy.com/LIVERPOOL_RAT.html) [Accessed 16 July, 2016].

(ix) In 2011 the two pieces *Wet Dog* and *Stop and Search*, spray-painted by Banksy in Bethlehem (Palestine) in 2007, appeared in a New York gallery with an estimated value, respectively, of \$600,000 and \$800,000. The works had been removed from the original location and then brought to UK by Bankrobber Gallery for restoration, before resurfacing in New York.

(x) In 2014 the artwork *Art Buff*, spray-painted by Banksy the very same year in the English town of Folkestone during an art event, was removed, shipped to New York (by the Bankrobber Gallery) and then sent to Miami to be sold at an art fair. The piece was then returned to Folkestone after the High Court decision of September 2015, mentioned below above at fn.106.

(xi) In 2016 the piece *Love Plane*, painted by Banksy on car park wall in Liverpool back in 2011, was removed by the Sincura Group and exhibited in a local gallery specialised in street art.

(xii) In 2011 London-based artist Stik painted many of his iconic Stikman on shipping containers in Gdańsk, Poland. Three years later, the containers disappeared, and in October 2015, ten pieces of such containers reappeared (representing 16 out of the 53 figures originally painted), chopped up and offered for sale at a gallery in West London for £10,000-12,000 per section. See Rushmore, “Another London “art dealer” Chops Up a Mural” [Online] *Vandalog* 2016, available at: <https://blog.vandalog.com/2016/01/another-london-art-dealer-chops-up-a-mural/> [Accessed 16 July, 2016].

Not all artworks removed from the street have been sold for mere profit purposes, though. A few times removals and sales of such pieces have generated revenues that have been used for social purposes. (i) For example, Banksy’s piece *Mobile Lovers* – painted in 2014 on a piece of board stuck to a doorway of a youth club in Bristol – was sold by said club to a private collector for £403,000. The sale saved from closure the youth club which had been operating for 120 years and recently running into financial difficulties. On this case, see Salib, cited above fn.30, pp.2293-2296; Gander, “Banksy’s *Mobile Lovers*: Youth Club Owner Who Sold Artwork in Bristol Receives Death Threats” *Independent* (27 August 2014) available at: <http://www.independent.co.uk/arts-entertainment/art/news/banksy-mobile-lovers-sold-owner-of-youth-club-where-artwork-appeared-in-bristol-received-death-9695327.html> [Accessed 3 July, 2016] (also reporting on a dispute regarding the ownership of the property of the artwork between the local council and the club). (ii) Also, in 2010 the *Gangsta Rat* piece stencilled by Banksy four years earlier on a wall at Moorfields Eye hospital in London was removed and then sold by the latter for £30,000: the money was invested in crucial research into eye disease. See Ellsworth-Jones, cited above fn.26, p.94; Bull, *Banksy Locations & Tours: A Collection of Graffiti Locations & Photographs in London* (Shellshock Publishing, 2007). (iii) Finally, in November 2016 street artist Stik agreed to authenticate and approve, for fund-raising purposes, the sale of a piece entitled “Magpie” he had painted on the front of a social centre in Bristol in 2009: see the artist’s website at <http://stik.org/fundraising/> (last accessed on 2<sup>nd</sup> December 2016).

<sup>136</sup> Not all street art is site-specific, though. Some artists also place their works in the streets indiscriminately and ubiquitously without much attention to a specific location: see Salib, cited above fn.30, p.2300.

<sup>137</sup> Epstein, *London Graffiti and Street Art: Unique Artwork From London’s Streets* (Ebury Press, 2014) (reporting the opinion of the street artist Stik: “I try to make my characters react to the space they are painted in. It’s all about context for me”).

<sup>138</sup> Lewisohn, cited above fn.61, pp.117 and 137.

<sup>139</sup> See the interview with Banksy by Ossian Word, in *Time Out London* (31 March 2010) available at: <http://www.timeout.com/london/art/banksy-interview-art-time-out-london> [Accessed 1st August, 2016]. It is also interesting to highlight what the curators of the website *Graffoto* (an on-line forum dedicated to this form of art) note: “As for it being street art, shifting it indoors has a traumatic effect on the look and feel of these street pieces. Gone is any sense of the relationship they had to their environment. Admiration for the vandal taking risks to create this piece – the ‘Wow, how did he get away with that?’ factor is completely absent. In short, they don’t feel at all like street art. They actually look completely out of place in this situation and one would hazard in any indoor location”, webpage available at <http://graffoto1.blogspot.co.uk/2014/04/stealing-banksy.html> [accessed 20 July, 2016].

<sup>140</sup> Banksy has strongly complained against the removal of his artworks from the street. When the controversial exhibition *Stealing Banksy?* was organised in 2014 (see above fn.135), the following comment appeared on the artist’s website: “The ‘Stealing Banksy?’ exhibition taking place in London this weekend has been organised without the

Yet, it is not certain whether domestic law allows artists to oppose such uses of their works. It seems the CDPA wording precludes the application of the integrity right to prevent uses of the work in contexts different from those chosen by the artist.<sup>141</sup> Section 80(2)(a) of the CDPA just targets addition to, deletion from, alteration and adaptation of works. It does not contain a general clause which expressly authorises artists to also object to any “other derogatory action in relation to a work”, as Article 6-*bis*(1) of the Berne Convention does instead. This part of the provision was added at the Brussels Conference in 1948 with the specific aim of covering uses different from the categories of modifications already mentioned in the provision.<sup>142</sup> It is believed that by adding such general clause this provision of the Berne Convention allows artists, and authors in general, to object to their works being placed and exhibited in different contexts.<sup>143</sup> Yet, as mentioned, the CDPA has not incorporated this bit of Article 6-*bis*, which may cast some doubts on whether the integrity right can be relied on in the UK to oppose a de-contextualisation of site-specific works:<sup>144</sup> with the result that, for example, it may not be possible for a painter to rely on this moral right to prevent the use of her work within a morally deplorable context such a pornographic movie; or for a muralist who wants her artwork just to be displayed in the street to oppose the removal of her piece and its exhibition in a gallery. It has been noted that the failure of the CDPA to expressly address such uses of copyrighted works constitutes a breach of British obligations under the Berne Convention;<sup>145</sup> and even that, despite such omission, UK courts should interpret the statutory provision in question as to allow artists to object to de-contextualised uses of their creations.<sup>146</sup> This would push British copyright law closer to other jurisdictions in which the integrity right can be enforced to prevent the use and display of de-contextualised artworks. Case law from the Netherlands,<sup>147</sup> Greece,<sup>148</sup> Spain,<sup>149</sup> Switzerland<sup>150</sup> and Israel<sup>151</sup> confirms that in these countries such de-contextualisation may infringe this moral right and could thus be opposed.

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involvement or consent of the artist. Banksy would like to make it clear - this show has nothing to do with me and I think it's disgusting people are allowed to go displaying art on walls without getting permission”.

<sup>141</sup> Davies and Garnett, cited above fn.134, pp.238-240; Dworkin, *The moral right of the author: moral rights and the common law countries*, in ALAI (Congress of Antwerp, sept 1993, Paris, 1994), pp. 249-250; Cornish, “Moral Rights under the 1988 Act” (1989) 11 *European Intellectual Property Review* 449 at p.450; Laddie, Prescott, Vitoria, *The Modern Law of Copyright and Design*, Lexis Nexis 2011, para 13.18.

<sup>142</sup> Ricketson and Ginsburg, cited above fn.45, para 10-11. See also the first edition of this book: Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Kluwer, 1987), pp.469-470; Stamatoudi, “Moral rights of authors in England: the missing emphasis on the role of creators” (1997) 4 I.P.Q. 478 at pp.504-505.

<sup>143</sup> Ricketson, cited above fn.131, pp.469-470; Cornish, cited above fn.130, p.450.

<sup>144</sup> McCartney, cited above fn.126, p.236; Colston and Galloway, cited above fn.86, p.460; Dworkin, cited above fn.141, pp.249-250.

<sup>145</sup> See for example Cornish, cited above fn.141, p.449 (also noting that the implementation of the moral rights by UK has been a “timid thing”).

<sup>146</sup> See for example Treiger-Bar-Am, *The Moral Right of Integrity: A Freedom of Expression*, in Fiona Macmillan (ed) *New Directions in Copyright*, Edward Elgar 2006, p. 152 (even stressing that “while the language of section 80 has been interpreted as not necessarily as not protecting the primary author in a situational of contextual distortion, I submit that the provisions should be understood to do so”). The UK Intellectual Property Office seems also to agree, as is confirmed by its report “© the way ahead: A Copyright Strategy for the Digital Age 2009”, p. 27 fn. 57 (noting that the use of a photographic image to promote a product to which the author has ethical objections – which clearly amounts to a de-contextualised use of the work - should be deemed as an example of infringement of the moral right of integrity). For a contrary opinion, see Waisman, “Rethinking the Moral Right to Integrity” (2008) I.P.Q. 268 at p.282 (pointing out that the right to integrity is, by definition, a right to prevent modifications, not a right to prevent undesired uses).

<sup>147</sup> Even a small de-contextualisation of an artwork was considered by a Dutch Court as infringing the integrity right: see Quentin Byrne-Sutton, Byrne-Sutton, “The owner of a work of visual art and the artist: potential conflict of interests” (Interests in Goods, Palmer and McKendrick, ed. 1993), p. 294 (mentioning a court decision mandating that a large mural painting which had been specifically designed to hang in a particular building at a height of 90 centimetres could not be hung at the height of 2.20 metres instead).

<sup>148</sup> The integrity right has been held as infringed in Greece when an artwork was placed in a location which contradicted its purpose and spirit, or where the work was unjustifiably transferred to a venue different from its original one: see Counsel of State, Decision No. 1465/1954, Themis, 1955, p. 174; Court of Appeal, *Dodoni*, Decision No. 47/1956, p.

(b) Destruction of the work

Can street artists rely on the integrity right to prevent the owner of the tangible object incorporating their piece (eg, a wall) from destroying it? Several artists seem indeed increasingly interested in their street works being preserved despite the fact that most of them accept the risk of their pieces vanishing sooner or later. And in countries such as US legal actions have sometimes been taken by street artists against property owners to prevent the destruction of their pieces.<sup>152</sup>

Two conflicting interests are here at stake: the interest of property owners in disposing of the tangible object they have become owner of, and the interest of artists in preserving the existence of their works.<sup>153</sup> As has been noted, there is a strong tension between artists and owners of the surfaces where artworks are placed.<sup>154</sup> Who should the law protect more strongly? A broad interpretation of the integrity right, so as to give street artists the possibility to prevent destruction of their pieces, would strongly protect their interest by preserving the works in the form they wish to present them to the public. Yet, it would take away the power of private property owners to fully control their space.<sup>155</sup>

One may note that the position of property owners should be stronger when the artwork has been illegally placed on their properties. The decision to remove the piece of art indeed seems here reasonable.<sup>156</sup> On the other hand, if the work has been authorised or commissioned by the property owner, it could be argued that such an authorisation in some cases may affect property owners' ability to rely on a defence of reasonableness should they later decide to get rid of the surface incorporating the work.<sup>157</sup>

Yet, there is little doubt that in certain circumstances artists should accept the fact that placing their works on others' properties may carry the risk of losing control over the tangible medium, even when they have been authorised or commissioned to do that. Property owners may, for example, be obliged on safety grounds to remove a wall or other surfaces where artworks are placed.<sup>158</sup> Even in

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861. See also *Antonia-Belika Koubareli v Evangelos Volotas* [2003] ECDR 19, a decision enabling an author to rely on her moral rights to prevent the publication of her work in an offensive environment on the Internet.

<sup>149</sup> In January 2013 the Spanish Supreme Court held that the relocation of a work by the Spanish sculptor Andrés Nagel violated the author's moral right. See Stech, cited above fn.23, p.153.

<sup>150</sup> Swiss case law has confirmed that a violation of the integrity right under Article 119 of the Swiss Copyright Act of 9 October 1992 may occur indirectly, namely when the work itself remains unchanged, but where the surroundings of the work are modified in a way that affects author's interests. See Jaques de Verra, Treatment of moral rights in other jurisdictions - Switzerland, in Davies and Garnett, cited above fn.134, pp.586-587.

<sup>151</sup> Israeli courts have been willing to accept claims against types of use that damaged the author because of the context in which the artwork was placed. See Gadi Oron, Treatment of moral rights in other jurisdictions – Israel, in Davies and Garnett, cited above fn.134, p.754.

<sup>152</sup> Such attempts have often been unsuccessful though. See *Ron English et al. v. BFC&R 11<sup>th</sup> Street LLC*, concerning certain artworks installed in a community garden. It was held in that case that destruction could not be opposed because the works had been placed illegally. A finding in favor of the artists who wanted to avoid destruction – the court added – would have entailed that artists could freeze development by placing artworks to future construction sites, which would have been an undesirable result. See also *Pollara v. Seymours*, 344 F.3d 265 2d Cir. (2003).

<sup>153</sup> Teilmann, "Framing the Law: The Right of Integrity in Britain" (2005) 27 *European Intellectual Property Review* 19 at p.23.

<sup>154</sup> Grant, cited above fn.66, p.4.

<sup>155</sup> Griffin, "Illegal Graffiti: a Copyright Perspective", (2010) 22 *Intellectual Property Law Bulletin* 123 at p.124. See also Teilmann, cited above fn.142, p.23 (noting that courts, faced with such a dilemma, may tend to favour physical ownership over incorporeal ownership).

<sup>156</sup> Griffin, cited above fn.155, p.124.

<sup>157</sup> Griffin, cited above fn.155, p.125.

<sup>158</sup> What cannot be borne by property owners is the burden to preserve the work from deterioration as no duty of repairs is provided under Section 80 of the CDPA: see Dworkin, cited above fn.141, p.250. As has been noted, "it would seem

countries where integrity rights are strongly protected, artists' attempts to prevent the destruction of their artworks have sometimes been rejected by courts on safety grounds. This occurred, for instance, in the case of Paul Mistral Park monument in the French town of Grenoble (a sculpture made from old wooden blocks taken from a railway), which was subsequently deemed to constitute a threat to public safety because of the deterioration of the material.<sup>159</sup>

The argument against the integrity right being interpreted as giving artists the chance to oppose destruction is very much rooted on the distinction between the *intangible* concept of the work and its *tangible* embodiment. One may indeed note that it is not possible to destroy an intangible work such as the artistic output incorporated in a painting.<sup>160</sup> What could be destroyed – the argument goes – is the physical medium (eg, the actual framed painting), which however would not cause prejudice to the artist as it does not involve a publication or exhibition of a (derogatory)<sup>161</sup> treatment.<sup>162</sup> Indeed, when the work does not exist anymore, this cannot be indicative of bad taste, diminished aesthetic value or of distorted messages capable of damaging the artist.<sup>163</sup>

Yet, this line of reasoning could be countered by noting that it would lead to an absurd result. We have seen that a deletion of a part of the work, for example the removal of a character or other elements from a mural, is a form of treatment. Since deletion could be considered as a partial destruction, it would sound logically odd to accept that artists may be able to prevent such a partial destruction, but not the most complete form of deletion (that is, in our case the removal of the whole mural).<sup>164</sup>

More importantly, distinguishing between the *intangible* work and the *tangible* support carries the risk of neglecting the very essence of certain works of visual art, such as paintings, murals and sculptures. This category of artworks are expressed in a form which is unique and cannot be exactly reproduced anymore in the same dimension.<sup>165</sup> The distinction between the work and the embodiment becomes here blurry as the alteration of a physical support inevitably modifies the work understood as immaterial concept. In other words, the concepts of *tangible* and *intangible* seem to converge into a unique entity. It follows that the alteration of the medium could also be considered a modification of the work itself.<sup>166</sup> Once the physical embodiment is destroyed, the intangible creation is also somehow gone. Therefore, as artistic works only exist when their

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unfair to impose on that owner a duty to restore the painting, even if it was badly needed. Every artist has to accept the fact that by disposing of his work, he is taking the risk that the work may not be as well cared of by its successive owners, as it would have been by himself": see Byrne-Sutton, cited above fn.147, p.292.

<sup>159</sup> Trib. Adm. de Grenoble, 18 February 1976, in *Revue trimestrielle de droit comparé*, 1977, pp. 120 et ff. Likewise, in a Dutch case it was found to be unreasonable for an architect to invoke the integrity right to oppose the modification of a building which was material to its preservation: see Byrne-Sutton, cited above fn.147, p.293.

<sup>160</sup> Davies and Garnett, cited above fn.134, p.241.

<sup>161</sup> Here the concept of *treatment* under of Sec. 80(2)(a) CDPA is inevitably linked to the meaning of the term *derogatory*, which is contained in Sec. 80(2)(b) of the CDPA.

<sup>162</sup> Indeed, under Copyright, Designs and Patents Act 1988 s.80(3)(a) what infringes the integrity right is the commercial publication, performance in public and communication to the public of a derogatory treatment of the work. Thus, the only way the destruction of the physical embodiment may constitute a derogatory treatment is when such destruction is made public, for example when it is filmed, or the destroyed piece is exhibited. In other words, it is the relationship of the author with the public which is protected, not the safety of the work. See Wienand, Booy and Fry, *A Guide to Copyright for Museums and Galleries* (Abington: Routledge, 2000), p.69.

<sup>163</sup> Stamatoudi, cited above fn.142, pp.482-483.

<sup>164</sup> Davies and Garnett, cited above fn.134, p.241.

<sup>165</sup> Byrne-Sutton, cited above fn.147, p.284.

<sup>166</sup> See also Waisman, cited above fn.146, pp.270-271 (who however takes the view that the destruction of a support, even the original support, does not amount to the destruction of the work. See also fn.18 of his article where the author argues that destruction not only does not annihilate the work, but also is not capable of modifying anyone's perception of the work either).

physical support exists, this feature should perhaps turn their destruction into a form of treatment,<sup>167</sup> which – it could be argued - may be prevented by artists because of its derogatory effect<sup>168</sup> (I will come back *infra* on the meaning of “derogatory” treatment).

Thus, in the field of visual art the crucial concern revolves around the physical object itself, not its incorporeal elements,<sup>169</sup> as it has also been stressed by Lawton LJ in *Merchandising Corporation of America v Harpbond*: “A painting is not an idea: it is an object”.<sup>170</sup> If an original painting or sculpture is destroyed, there is no more any abstract concept we can refer to for retrieving the artist’s message, which would amount to a huge loss because it deprives the public of something unique, i.e. the original piece<sup>171</sup> (and the preliminary sketches, despite attracting an independent copyright, may often turn out not to be valid substitutes as they could lack the same level of precision, colours’ details and the general “look and feel” of the final piece). The same point cannot be made as far as other categories of works are concerned, such as musical or literary works. If a musical sheet is destroyed, the musical work (the actual tune) remains. Likewise, if the cover and pages of a book are destroyed, the literary (intangible) work remains.<sup>172</sup>

Socio-cultural reasons may also be invoked to justify the opposition to the destruction of certain street artworks. The society at large may indeed be interested in preserving highly artistic works placed in urban environments that are perceived particularly important by local communities. This is confirmed by the recent actions taken by local authorities to protect certain street pieces, especially those created by famous artists. Here the public interest in preserving the piece basically overlaps with the artist’s interest to maintain the work within the spatial environment where it has been created.<sup>173</sup> When deciding to demolish old buildings, for example, conditions have sometimes been imposed to preserve murals. This has occurred with one of the biggest Banksy’s artworks in Britain,<sup>174</sup> as well as with another of his pieces (the above mentioned *Spy Booth*) painted on a building which was subsequently protected with retrospective planning consent, meaning additional permission would have been needed if somebody wanted to remove it.<sup>175</sup> Such actions by local councils may please artists who appreciate their works being adequately protected. A parallel could then be drawn between laws which aim at preserving culturally important (and listed) buildings and a regime on the moral right to integrity interpreted as allowing street artists to prevent in some cases the destruction of their artworks. Insofar as this moral right is designed as a tool to also control and

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<sup>167</sup> Ijadica, cited above fn.55, p.272. See also Teilmann, cited above fn.153, p.23.

<sup>168</sup> Dietz, “The Moral Right of the Author: Moral Rights and the Common Law Countries” (1995) 19 Colum. VLA J.L. & Arts 199 at pp.224 (noting that destruction deprives the author of the authentic means of proof for her artistic and professional skills and self-consciousness); Stamatoudi, cited above fn.142, p.483 (stressing that the destruction of a work may diminish the professional image and standing of the author by eliminating one of her creations; and further noting that, when the reputation of the author depends on a restricted number of works, the destruction of one of them may substantially affect her status).

<sup>169</sup> Ginsburg, “Moral Rights in a Common Law System” (1990) 1 *Entertainment Law Review* 121 at p.126.

<sup>170</sup> Aplin and Davis, cited above fn.35, p.83.

<sup>171</sup> The original piece has been defined as the “aura” of the artwork itself: see Stokes, *Art and Copyright* (Hart Publishing, 2001), Chapter 9, fn. 1.

<sup>172</sup> As has been interestingly noted, a distinction between artworks and literary works is that the former is an end in itself, while the latter is a means to an end: see Teilmann, cited above fn.153, p.20.

<sup>173</sup> Byrne-Sutton, cited above fn.147, p.281.

<sup>174</sup> In February 2010 a Planning Officer report on the demolition of an art venue named “The Foundry” in the London borough of Hackney recommended a condition to be imposed to preserve a Banksy six-metre work. See Webster, “Should the Work of Banksy be Listed?” (2011) 4 J.P.L. 374 at p.374. See also Addley, “Foundry Arts Space Set to Make Way For 18-Storey Hotel” *The Guardian* (4 February 2010) available at: <http://www.theguardian.com/artanddesign/2010/feb/03/foundry-gallery-set-to-close> [Accessed 10 July, 2016].

<sup>175</sup> “Banksy’s Spy Booth Mural in Cheltenham Gets Protection” *BBC* (19 February 2015) available at: <http://www.bbc.com/news/uk-england-gloucestershire-31539767> [Accessed 23 August, 2016]. It seems however the work subsequently disappeared.

limit a bad handling of street artworks by the owners of the tangible support, such regime has similar aims as zoning and historical preservations laws.<sup>176</sup>

But what does UK copyright law state in this specific regard? The right to prevent destruction of artworks is not expressly provided under the CDPA provisions on integrity right.<sup>177</sup> Interestingly, there has not yet been a case where this issue has been dealt with. Most commentators believe this moral right does not include a right to oppose destruction of the physical support:<sup>178</sup> which would distinguish UK legislation from other jurisdictions such as the US, where destruction of works that have recognised stature can be opposed in some circumstances (Visual Artists Rights Act 1990).<sup>179</sup>

Yet, a recent case seems to have left open the possibility of artists being able to oppose destruction of their works in Britain. In *Harrison v Harrison* it was suggested *obiter* that the concept of “treatment” may include the destruction of the work.<sup>180</sup> Treatment was conceptualised by Fysh J. as a “spectrum”: “‘Treatment’ of a work is I think, a broad, general concept; *de minimis* acts apart, it implies a spectrum of possible acts carried out on a work, from the addition of say, a single word to a poem to the destruction of the entire work. ...”.

Extending the integrity right so as to include the possibility for artists to oppose destruction seems to be more in line with the Berne Convention. Even though Article 6-*bis* of this treaty does not expressly mention destruction, as already mentioned it allows artists to object to a broader unspecified “other derogatory action” which may be interpreted as encompassing destruction. After all, at the Brussels Conference in 1948 a resolution was passed recommending Parties to the Berne Convention to allow artists and authors to prevent destruction in specific circumstances as a form of moral rights protection.<sup>181</sup> A recommendation that judicial bodies in several jurisdictions have been keen to follow, including in India,<sup>182</sup> Switzerland,<sup>183</sup> Germany,<sup>184</sup> Italy,<sup>185</sup> Netherlands<sup>186</sup> and Israel.<sup>187</sup>

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<sup>176</sup> Bougdanos, “The Visual Artists Rights Act and Its Application to Graffiti Murals: Whose Wall Is It Anyway?” (2002) 18 N.Y.L. Sch. J. Hum. Rts. 549 at p.570.

<sup>177</sup> Bentley and Sherman, cited above fn.40, p.288; Davies and Garnett, cited above fn.134, p.241.

<sup>178</sup> Davies and Garnett, cited above fn.134, p.241; Bentley and Sherman, cited above fn.40, p.288; Laddie, Prescott and Vitoria, cited above fn.141, para 13.28.

<sup>179</sup> The Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A grants certain moral rights to artists. It has been the first US copyright legislation to grant protection to moral rights at federal level.

<sup>180</sup> *Harrison v Harrison* [2010] FSR 25 (the case regarded literary works, though).

<sup>181</sup> Ricketson and Ginsburg, cited above fn.45, para 8.109; Ricketson, cited above fn.142, p.292.

<sup>182</sup> See *Seghal v Union of India* [2005] FSR 39, stressing the “urgent need to interpret Section 57 of the Copyright Act 1957 in its wider amplitude to include destruction of a work of art, being the extreme form of mutilation, since by reducing the volume of the author’s creative corpus it affects his reputation prejudicially as being actionable under said section” (para 56).

<sup>183</sup> Section 15(1) of the Swiss Copyright Act states that where the owners of an original work has reason to believe that the artist has a justified interest in its preservation, they cannot destroy the work without offering to return it to the author.

<sup>184</sup> Destruction of artworks can be prevented in Germany if it prejudices the author’s personal and intellectual interests. See Stamatoudi, cited above fn.142, p.500.

<sup>185</sup> The scope of the integrity right has been expanded by Italian courts to cover all acts bringing damage to the work, including destruction. See N. Abriani, G. Cottino, M. Ricolfi, *Diritto Industriale*, Cedam, Padova, 2001, p. 480.

<sup>186</sup> Destruction has been deemed derogatory in the Netherlands: see *Bonnemal/SBB*, Court of Appeal of Leeuwarden, 17 March 1999, NJ 1999, 707; AMI 1999, p. 158. In another Dutch case involving a mural displayed on a building, it was held that the author could oppose the whitewashing of the artwork for refurbishing purpose: see District Court of Amsterdam, 16 June 1977, NJ 1978, 218 (*Koetsier v Schiphof*).

<sup>187</sup> The statute being silent on destruction, Israeli courts have recognised authors’ right to oppose it. In *Fabian v City of Ramat Gan* (Tel Aviv Magistrates’ Court 1998, Cf 73028/95) it was held that the destruction of a sculpture publicly displayed was a violation of the sculptor’s moral rights. The court went as far as translating the obligation not to destroy public artworks into a positive duty to preserve them and undertake any necessary works to fix the work and prevent deterioration. On this case, see Gadi Oron, cited above fn.151, pp.755-756.

I believe British courts should follow that path so as to give artists, including those who place their pieces in the street, chances to preserve their artworks in specific circumstances<sup>188</sup>. It would also be recommendable to introduce a VARA-like legislation, and allow all visual artists to be able to oppose destruction of works<sup>189</sup> which are considered of recognised stature.<sup>190</sup> Yet, forms of protection against destruction should also be made available for less famous artworks. One may indeed note that granting protection to just famous pieces may irritate lesser known artists that would thus feel discriminated.<sup>191</sup> Such differential treatment may be defined as hypocrite,<sup>192</sup> and not in line with the copyright law principle that aesthetic or artistic merit of works should not constitute a condition for protection.<sup>193</sup> What type of protection should then be given to less famous artworks? Again, the US VARA regime could be taken as a model. This law allows artists to (try to) avoid destruction of artworks even when they are not of a high stature. In particular, such artists are entitled to a written notice and a 90-day period to remove their artworks before they can be destroyed, provided that the removal takes place without harming the work.<sup>194</sup> A similar protection is provided under Australian,<sup>195</sup> Swiss<sup>196</sup> and Polish laws.<sup>197</sup> Case law in France has also favored this approach.<sup>198</sup>

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<sup>188</sup> See also Ginsburg, cited above fn.169, pp.126-127. Yet, even if destruction of a work were considered as violation of the integrity right, exceptions would be available under UK law, and thus chances for street artists to be able to oppose destruction might still be low in certain circumstances. In particular, Sec. 81(6) CDPA may apply (this provisions states that “the right is not infringed by anything done for the purpose of — (a) avoiding the commission of an offence, (b) complying with a duty imposed by or under an enactment”). This would mean that, in case for example a local council orders a property owner to remove from the wall an artwork which is offensive or detrimental to the amenity of the area, said owner would not be liable for the violation of the artist’s integrity right. Should this defence not be available, the property owner would be legally required to destroy the artwork (non-compliance with this order would be an offence), but he would paradoxically become vulnerable to a claim for violation of the artist’s moral right to integrity. See Iljadica, cited above fn.55, at p. 276-277.

<sup>189</sup> Californian legislation also permits artists to oppose destruction. See Section 987(a) of the Californian Civil Code: “The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist’s personality, is detrimental to the artist’s reputation, and artists therefore have an interest in protecting their works of fine art against any alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations”. This provision was relied on by the English artist David Hockney to oppose the removal of a mural from a hotel swimming pool: see Stokes, cited above fn.160, p.96.

<sup>190</sup> Yet the way VARA has been applied in a recent graffiti-related case seems to suggest that many street artworks would not be protected from destruction. In *Cohen v. G & M Realty L.P.*, Case No. 13-CV-5612 (FB) (JMA) (EDNY 2013) the court denied a preliminary injunction to graffiti artists seeking to prevent destruction of the famous 5Pointz site, a New York City mural space that had become the “Mecca” of graffiti. One of the reasons for the denial of the injunction was that the artworks at issue were not of recognised artistic stature. As it was argued by the defendant in the proceedings, Banksy was indicated as an example of an artist whose work would have recognised stature because there is “consensus of the scholarly community and the art community”. On the “recognised stature” requirement see also *Martin v City of Indianapolis*, US Court of Appeals, 7th Cir 192 F.3d 608 (1999); *Carter v Helmsley-Spear, Inc*, 861 F Supp 303 (SDNY 1994) and 71 F.3D 77 (2nd Cir 1995). In these decisions the courts took the view that the undefined concept of “recognised stature” consists of two elements: merit or intrinsic worth; and a public acknowledgment of that stature by society or the art community. For a street art related case where the work was recognised VARA protection as a piece of “recognized stature” see *Hanrahan v. Ramirez*, No. 97-CV-7470 [C.D. Cal. June 3 1998].

<sup>191</sup> Anger amongst artists is also caused when local councils take the decision of protecting just artworks created by famous street artists. This occurred, for example, when the deputy leader of a Hastings council decided to preserve the Banksy’s *Tesco Sandcastles* piece by covering it with perspex glass and noted: “I know that we have a zero tolerance policy on graffiti, and that is absolutely right. However, we have to be flexible so on this occasion I have agreed that Banksy can be an exception to our rule and can stay”. See Ellsworth-Jones, cited above fn.26, p.101.

<sup>192</sup> See also Young, cited above fn.5, p.142 and 148.

<sup>193</sup> See again Copyright, Designs and Patents Act 1988 s.4(1)(a), cited above fn.84.

<sup>194</sup> See 17 U.S.C. § 113(d)(2)(a-b) (2002), as amended by Section 604 of VARA. Therefore, when removal of the artwork can take place without harming the work, the artist is in a position to prevent destruction and thus shield the work from harm. Yet, if the artwork owner’s attempt to remove the piece is due to harm the work, the removal can take place just under the condition that artists have waived their moral rights.

<sup>195</sup> Copyright Act 1968 (Cth) s. 195AT(2).

<sup>196</sup> See above fn.183.

(ii) derogatory treatment

The treatment of a work is considered derogatory if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the reputation or honour of the author.<sup>199</sup> I should then proceed to verify whether distortion or mutilation may occur in street art scenarios and when they may be considered derogatory. The concept of distortion and mutilation, as well as the meaning of the term “derogatory”, are not entirely clear though, and the few cases that have dealt with the integrity right have not contributed to deliver a clear picture.

What does distortion entail? It seems to refer to a physical modification of the work. Yet some commentators suggested that distortion would also occur when the message the artist tries to convey through his work has been distorted.<sup>200</sup> Should this be the case, removal of artworks from the street for the purposes of exhibition and sale in galleries may be objected by artists who do not accept their pieces to be uprooted from their natural environment<sup>201</sup> and believe instead that their works must be enjoyed where they have been originally placed.<sup>202</sup> This belief seems to be reinforced by the fact that artworks removed from the street and offered for sale at auctions are often neglected by art collectors who actually do not buy them.<sup>203</sup>

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<sup>197</sup> Rychlicky, cited above fn.74, p.399.

<sup>198</sup> TGI Paris, 3rd Ch.,13 October 2000, *Benjamin Aichouba et autres v Francis Lecole*, January 2003, RIDA 378 (in this case the author of a mosaic was able to retrieve the work from a squatted property).

<sup>199</sup> CDPA s.80(2)(b).

<sup>200</sup> Laddie, Prescott and Vitoria, cited above fn.141, para 13.28.

<sup>201</sup> This is on the assumption that the use of works in a context different from those chosen by the artist amounts to treatment. I believe even street and graffiti artists that have occasionally exhibited and sold through galleries should be able to rely on the integrity right to prevent such de-contextualisation (also the anti-establishment Banksy, for example, has agreed to authenticate his piece *Silent Majority*, painted at the 1998 Glastonbury Festival on the side of a festival worker’s trailer, when the artwork was sold at an auction in Paris in 2015 for £445,792: see Pereira, “Banksy’s Silent Majority Goes Under the Hammer” [Online] WideWalls 2016, available at: <http://www.widewalls.ch/banksys-silent-majority-goes-under-the-hammer/> [Accessed 11 July, 2016]). Indeed, the messages sent by placing works in the street and in galleries are quite different, and mixing them would amount to a distortion of such messages.

<sup>202</sup> Susan Hansen – Danny Flynn, “This is not a Banksy!”: Street Art and the Transformation of Public Space, in Soares Neves - de Freitas Simões (eds.), cited above fn.12, at p.109.

Can defences be raised by entities that remove artworks from the street and display them in private venues such as galleries? First, it could be argued that the reason why some street artworks are removed is that they need to be restored and then displayed in appropriate venues to be better appreciated by the public. But the claim that the artwork was not appreciated on the street, and the assertion that proper appreciation could just take place in a gallery or museum, seem inaccurate as the very meaning of most street artworks is often dependent on their *in situ* nature and the on-going dynamic relationship within the community they exist within (see also Ellsworth-Jones, cited above fn.26, p. 238, wondering whether the act of removing and allegedly “saving” a street artwork actually destroys it instead). Also, if the real intention of these removal operations is to bring back the artwork to life because it is on the brink of being lost for ever (it has been argued that perspex glasses which are meant to protect the street piece often do not make the wall breath, which would seriously damage the artwork), a much more acceptable contribution would be to restore the piece *in situ* and make sure that the public is able to appreciate it in its natural environment.

Entities that remove street artworks may also stress that they do so after being approached, and asked, by building owners. The latter may indeed be annoyed by the presence of an artwork on their wall, especially if the artist is very famous, as it would leave property owners with the risk of having a grade 2 listing applied to their premises: which would seriously affect their business operations and resale value. This argument seems also weak. The presence of an artwork, in particular one by a famous artist, on a property may actually not only increase the value of the entire building, but also contribute in embellishing and reinvigorating the whole local community.

<sup>203</sup> Bengtsen, *Stealing from the Public – The Value of Street Art Taken from the Street*, in Ross, cited above at fn.7, at p.423 (noting that in these case establishing good provenance of removed street artworks is frequently perceived insufficient to convince persons to purchase them).

What about mutilation? Mutilating means to “render imperfect by cutting off or destroying a part”.<sup>204</sup> In street art scenarios this may happen where the removal of the artwork from a wall or other surfaces entails the loss of one of its parts, for instance a painted character.<sup>205</sup> Cases from other jurisdictions related to artistic works confirm that such activity amounts to mutilation.<sup>206</sup>

Street artists who want to succeed in an integrity right should also show that the distortion or mutilation is prejudicial to their reputation or honour. This seems to be confirmed by the use of the word “otherwise” in Section 80(2)(b) of the CDPA,<sup>207</sup> courts’ decisions in the *Pasterfield*,<sup>208</sup> *Confetti Records*<sup>209</sup> and *Harrison*<sup>210</sup> cases as well as the Berne Convention.<sup>211</sup> Yet in other domestic cases which have dealt with the integrity right, namely *Delves-Broughton v Lightbond*<sup>212</sup> and *Tidy v Trustees of the Natural History Museum*,<sup>213</sup> it seems judges did not consider the prejudice to the reputation or honour of the author as a necessary requirement. Should this interpretation be preferred, it would certainly be easier for street artists to prove violation of the integrity right, as there would basically be no need to prove that the treatment has prejudiced their reputation or honour.

Indeed, artists in general may encounter difficulties in bringing evidence about their reputation and honour being prejudiced by a treatment of their works. This is also due to the fact that when British courts have interpreted these concepts, they have done so *objectively*. This basically means that it is not sufficient the artists feel their reputation or honour are harmed by the treatment of the work,<sup>214</sup> and that treatments that are capable to affect them are only those that have an impact on the public instead. In other words, it is the viewpoint of the general public and the way the treatment is perceived by the public which matters, not the opinion of the artist whose work has been treated.<sup>215</sup> This is what was held in *Confetti*, where the judge put emphasis on the public association of the author with the treatment complained of, and in *Tidy v Trustees of the Natural History Museum*, where it was stressed that the evidence of the prejudice to reputation or honour must come from an objective test by cross-examination of witnesses. These findings make the concept of reputation

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<sup>204</sup> Webster’s New World College Dictionary, Fifth Edition, 2014.

<sup>205</sup> See also the cases of removal and mutilation mentioned above fn.135, at points (ii), (viii) and (xii).

<sup>206</sup> TGI Seine, 7 June 1960; CA 30 May 1962. In this case the artist Bernard Buffet decorated a refrigerator which was then sold at a fundraising event. The work was subsequently divided in six parts with the purpose of selling each piece separately. It was held that such an activity would be a violation of the artist’s integrity right, and Bernard Buffet obtained an injunction to prevent the sale. On this case see also Byrne-Sutton, cited above fn.147, p.291.

<sup>207</sup> Copyright, Designs and Patents Act 1988 s.80(2)(b) provides that “the treatment of a work is derogatory if it amounts to distortion or mutilation of the work or is *otherwise* prejudicial to the honour or reputation of the author or director” (emphasis added).

<sup>208</sup> *Pasterfield* [1999] F.S.R. 168 Plymouth County Court.

<sup>209</sup> *Confetti Records Ltd* [2003] EWHC 1274 (Ch), para. 150: “the mere fact that a work has been distorted or mutilated gives rise to no claim, unless the distortion or mutilation prejudices the author’s honour or reputation”

<sup>210</sup> *Harrison v Harrison* [2010] FSR 25.

<sup>211</sup> Ricketson and Ginsburg, cited above fn.45, para 10.32 (stressing that the “prejudice” requirement under Article 6-*bis* of the Berne Convention applies to all the acts listed in the article).

<sup>212</sup> *Delves-Broughton, Morrison Leahy Music Ltd v Lightbond Ltd* [1993] E.M.L.R. 144. On an application for interim injunction Morritt J noted: “It is plain that what the defendants have done amount to treatment ... it seems to me that it is arguable that such treatment amounts to distortion or mutilation”. The judge did not expressly consider whether the treatment was also prejudicial to the reputation or honour of the author.

<sup>213</sup> *Tidy v Trustees of the Natural History Museum* (1995) 39 I.P.R. 501, where the artist unsuccessfully objected to his posters of dinosaurs being turned into postcards. The question was dealt with by the court as being whether this was either a distortion *per se* or whether it was prejudicial to his honour or reputation, with the result that the latter was merely deemed as an alternative requirement.

<sup>214</sup> *Tidy v Trustees of the Natural History Museum* (1995) 39 I.P.R. 504. See also *Pasterfield* where the court held that “what the plaintiff must establish is that the treatment accorded to his work is either a distortion or a mutilation that prejudices his honour or reputation *as an artist*. It is not sufficient that the author is himself aggrieved by what has occurred”. It was an *obiter dictum* though, as the court was not concerned directly with this issue.

<sup>215</sup> Waisman, cited above fn.146, p.275.

akin to the interest protected at common law by the tort of defamation, which takes place if it damages the reputation of a person by exposing her to hatred, contempt or ridicule, or tends to lower her in the esteem of right-thinking members of society.<sup>216</sup>

Bringing such evidence of the prejudice would be particularly difficult for street artists. If the reputation and honour are assessed in an objective way, indeed what is relevant would be the opinion that the public at large and a broad category of art experts (not just street art circles) have about the treatment in question.<sup>217</sup> As street art and (to a wider extent) graffiti are not always positively perceived amongst the general public, showing that a certain treatment prejudices an artist's reputation or honour might therefore not be easy, even more so when the work is illegal.<sup>218</sup> If on the other hand the benchmark is the viewpoint (about the treatment of the work) developed within the subculture, namely amongst fellow artists and insiders, it may probably be less difficult for the artist to prove prejudice. This is obviously on the condition that the artist is known. In case of anonymous street artwork, it is difficult to envisage a violation of the integrity right as nobody knows who she is, and thus there is no possibility of damaging her reputation or honour.<sup>219</sup>

But even if the narrower street art community is taken as a benchmark to assess the opinion about the treatment, artists who have a reputation within this subculture may still encounter difficulties in proving prejudice, for instance in case of mutilation. It could indeed be argued that artists often expect that their pieces will sooner or later be damaged, for example because some parts of the artwork are painted over by other artists and taggers or removed by local councils or property owners. Chances to succeed in an integrity right case would therefore be low as the person accused of the treatment could stress that street artists often recognise their form of art as ephemeral and thus would not be excessively disturbed or prejudiced by said treatment.<sup>220</sup>

Chances for street artists to successfully claim violation of the integrity right would be higher instead, should they be allowed to invoke a prejudice to their dignity as human beings, and not just as artists. Yet, such a subjective test has not been accepted by British courts, which have basically ignored, and failed to apply, the term "honour" referred to in Section 80(2)(b) of the CDPA. In other words, the two words "reputation" and "honour" have been interpreted by judges as a composite phrase and synonymous with "reputation",<sup>221</sup> with the result that the subjective concept of "self-esteem" that the notion of honour embodies has not been recognised.<sup>222</sup> This interpretation seems contrary to the spirit of the Berne Convention though. Indeed, when the protection of moral rights was introduced into this international treaty at the Rome Conference in 1928, the general

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<sup>216</sup> Cornish, cited above fn.141, p.450.

<sup>217</sup> It has however been noted that taking into account just the reputation of the artist within the public at large would not be fair. There seems no reason – the argument goes - to give the integrity right a restricted scope in the case of an alteration of the work which is considered to be prejudicial to someone's reputation. Indeed, even when a limited category of persons believes there is prejudice, that would suffice. See Davies and Garnett, cited above fn.134, p.265 (adding that there should be no requirement for most members of the public to believe there is a prejudice).

<sup>218</sup> Iljadica, cited above fn.55, p.275 (stressing that it is hard to think of a court finding that a street artist who has placed a work illegally has a reputation that could be prejudiced; and also noting that a reasonable interpretation of the concept of reputation may be sensitive to context, so that removal of street and graffiti artworks, even where placed legally, could not cause any prejudice while the destruction of more socially accepted canvas could do).

<sup>219</sup> Laddie, Prescott and Vitoria, cited above fn.141, para 13.41.

<sup>220</sup> In the interview Banksy gave to Ossian Ward for *Time Out London* (31 March 2010) available at: <http://www.timeout.com/london/art/banksy-interview-art-time-out-london> [Accessed 1st August, 2016] the artist took a clear position in relation to the feud he had with fellow graffiti artist Robbo, such war having consisted in the two rivals painting over each other's pieces: "if you're the type who gets sentimental about people scribbling over your stuff, I suggest graffiti is probably not the right hobby for you". On the Banksy and Robbo feud see also the 2011 Channel 4 documentary *Graffiti Wars: Banksy v Robbo*.

<sup>221</sup> Jonathan Griffiths, Not Such a 'Timid Thing': The United Kingdom's Integrity Right and Freedom of Expression, in J. Griffiths, U. Suthersanen, eds., *Copyright and Free Speech*, pp. 211-244, OUP 2005, p. 234.

<sup>222</sup> Griffiths, cited above fn.221, p.234.

view amongst negotiators was that the relevant provision (Article 6-bis) had a broad meaning, including not only the reputation or honour of the creator as an author or artist but also “his honour or reputation as a man”.<sup>223</sup>

Other jurisdictions do attach importance to the subjective element. In Germany, for example, authors have the right to prohibit any distortion or other mutilation of their works which would jeopardise their legitimate, intellectual or personal interests in their own works.<sup>224</sup> The meaning of the combined terms “reputation” and “honour” is also a broad one under Italian law, as it includes the author’s moral, artistic, scientific and political ideas and principles.<sup>225</sup> Even in a common law jurisdiction like Canada it was once held that the concept of reputation and honour involves a subjective element on the author’s part.<sup>226</sup>

Also commentators who have pushed for an “objective” interpretation of the concepts of reputation and honour have recognised that the addition of the element “honour” indicates that artists should be able to object to treatment of their works that jeopardise them as human beings.<sup>227</sup> Artistic integrity seems indeed to also have a subjective element which places emphasis on a person’s self-worth or dignity<sup>228</sup>, what Roman law referred to as “dignitas”.<sup>229</sup> Such element entails a consideration of the way authors think about themselves and their artistic integrity,<sup>230</sup> and – it has been noted – could be relied on to oppose treatment of works which are not respectful of the artists’ personal feelings,<sup>231</sup> their intrinsic autonomy of expression and emotions.<sup>232</sup> According to this school of thought therefore, there seems to be no statutory reason why a subjective test should not be expressly recognised into UK moral right law in the attempt to establish treatment that is prejudicial to authors’ honour.<sup>233</sup>

As mentioned, such broader interpretation of prejudice – which shifts the focus of the analysis to the affront to artists’ personality -<sup>234</sup> would make it less difficult for street artists to claim that their integrity right has been infringed. Indeed, if the concept of “honour” is given appropriate relevance, this would mean that street artists would just need to prove that their inherent dignity as a creator of an artwork is violated because of the treatment. This task would be easier where the artwork which has been treated is legal, because it has been either authorised or commissioned. If the treated work is created illegally instead, the artist would be in a weaker position (for example, *vis-à-vis* the wall owner who has mutilated the piece) and probably unable to prove the prejudice to her honour.

## **STREET ART AND THE FREEDOM OF PANORAMA EXCEPTION**

Section 62(1)(b) of the CDPA states that the copyright in sculptures, buildings and works of artistic craftsmanship permanently situated in a public place or in premises open to the public is not infringed by making a graphic work representing them, making a photograph or film of them, or making a broadcast of a visual image of them. Nor is an infringement distributing or

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<sup>223</sup> Ricketson and Ginsburg, cited above fn.45, para.10.27.

<sup>224</sup> See Article 14 of German Copyright Law. See also Dietz, Treatment of moral rights in other jurisdictions - Germany, in Davies and Garnett, cited above fn.134, p.416.

<sup>225</sup> Frabboni, Treatment of moral rights in other jurisdictions – Italy, in Davies and Garnett, cited above fn.123, p.468.

<sup>226</sup> *Snow v Eaton Centre* (1982) 70 CPR (2d) 105.

<sup>227</sup> See for example Laddie, Prescott and Vitoria, cited above fn.141, para 13.30.

<sup>228</sup> Davies and Garnett, cited above fn.134, p.256.

<sup>229</sup> Bentley and Sherman, cited above fn.40, p.288.

<sup>230</sup> Ricketson and Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Sydney: LBC, 1999, updated) para.10-110.

<sup>231</sup> Caddick, Harbottle and Davies (ed.) *Copinger and Skone James on Copyright* (Sweet & Maxwell, 2011) para 11-44.

<sup>232</sup> Treiger, cited above fn.146, pp.127 and 131.

<sup>233</sup> Adeney, “The Moral Rights of Integrity: The Past and Future of ‘Honour’” (2005) I.P.Q. 111 at p.129.

<sup>234</sup> Ilijadica, cited above fn.55, p.276.

communicating to the public such works, photos, films, or broadcasts. This is the so-called “freedom of panorama” exception. It basically limits the right of the copyright owner in sculptures, buildings and works of artistic craftsmanship to take an infringement action against the creators and distributors of such images. It is an exception to the general rule that the copyright owner has the exclusive right to authorize the creation and distribution of derivative works.

This CDPA provision has been echoed by Article 5(3)(h) of the EU Info-Society Directive,<sup>235</sup> which allows EU Member States to provide for an optional exception or limitation to the reproduction, communication to the public and making available right for “use of works, such as works of architecture or sculpture, made to be located permanently in public places”. There is currently a debate within the European Parliament on whether to make the freedom of panorama exception as totally mandatory or restrict it just to non-commercial uses.<sup>236</sup>

What is then the impact of this exception on artworks placed on the street? Street artworks that amount to sculptures and works of artistic craftsmanship may basically be freely photographed, reproduced and communicated by anyone. Making and distributing a photographic book or a video of street art sculptures would therefore not infringe any copyright in those works. Yet, relying on this exception may turn out to be useless because of the availability of copyright protection for the preliminary drawings upon which the sculptures are based (the up-stream creations), which could greatly reduce or even nullify the scope of the defence.<sup>237</sup>

The freedom of panorama exception does not extend to graphic works such as drawings and paintings, though: which means that creating and distributing graphic works, photos (for instance, in a photographic book), videos or broadcasts that incorporate pieces such as murals, stickers, posters and cutouts placed in public places, or in premises open to the public, would amount to copyright infringement if no authorisation is obtained from the copyright owner. What would not constitute copyright infringement instead is the unintended and incidental use of all works placed in the street, be them sculptures, paintings or any other work. In these circumstances the incidental use exception under Section 31 of the CDPA would apply.<sup>238</sup> Thus, if for example a broadcaster includes in a video an image of a mural or a sculpture during its coverage of a cycling race, that would not violate copyright as the use would be merely incidental and involuntary.

## **ILLEGAL ART IN THE STREETS AND ITS CONSEQUENCES**

Although many street artists have since turned to legal walls or locations, many artworks and in particular graffiti are still produced illegally, i.e. without the consent of the property owner. Illegality is often what street artists and graffiti writers want. Many still feel an adrenaline rush and buzz of excitement stemming from doing something considered wrong or deviant.<sup>239</sup> Several British artists such as Eine and Pure Evil have described the illegality aspect of street art as “thrilling” or

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<sup>235</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22/06/2001.

<sup>236</sup> Reda, “Freedom of Panorama Under Threat” [Online] available at: <https://juliareda.eu/2015/06/fop-under-threat/> [Accessed 11 July, 2016].

<sup>237</sup> Bentley and Sherman, cited above fn.40, p.265.

<sup>238</sup> Copyright, Designs and Patents Act 1988 s.31 states that copyright in a work is not infringed by its incidental inclusion in an artistic work, sound recording, film or broadcast. On this exception, see Bentley and Sherman, cited above fn.40, pp.247-248.

<sup>239</sup> White, cited above fn.62, p.257; Halsey and Young, cited above fn.59, p.283 (noting that graffiti artists often obtain a physiologically potent rush of adrenaline from its illegality). See also Gomez, cited above fn.2, p.665 (stressing that “doubtless, this elaborate cops and robbers game contributes to one important incentive for writing graffiti: to enhance the prestige of the writer in the eyes of his peers”).

otherwise “pleasurable”.<sup>240</sup> It comes as no surprise that the Oxford Dictionaries stresses this aspect, as it defines graffiti as “writing or drawings scribbled, scratched, or sprayed *illicitly* on a wall or other surface in a public place” (emphasis added).<sup>241</sup>

In addition to private nuisance and trespass to land, street art may trigger criminal damage under Section 1 of the Criminal Damage Act (CDA) 1971: “A person who without lawful excuse destroy or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence”. Many street and graffiti artists have been, and are still, convicted on these grounds.<sup>242</sup>

Many Antisocial Behaviour Orders (ASBOs) have also been handed down in connection with street art and graffiti related activities under the Crime and Disorder Act 1998 and the subsequent Antisocial Behaviour Act 2003<sup>243</sup>, which specifically targeted, amongst other activities, graffiti writing.<sup>244</sup> ASBOs have then been superseded by the Injunction and the Criminal Behaviour Order introduced by the Anti-Social Behaviour, Crime and Policing Act 2014, which also aims at strengthening the provisions related to graffiti removal.<sup>245</sup>

Said that, there is a general belief amongst street art insiders that the law is too harsh towards artists who place their work on the street without authorization of property owners.<sup>246</sup> In particular, the fact that street artworks often end up embellishing cities and local communities reinforce most

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<sup>240</sup> Young, cited above fn.5, pp.29 and 145.

<sup>241</sup> See Oxford Dictionaries at <http://www.oxforddictionaries.com/definition/english/graffiti> [accessed on 21 July 2016].

<sup>242</sup> One of these rose to fame for having covered trains, buses, bridges and walls of many English cities with his TOX tag, offences for which he was sentenced to 27 months, see “Will This Be the End of Tox? Graffiti Artist Dubbed ‘Scourge of the Underground’ Facing Prison For Scrawling Simplistic Tags Across London” *Daily Mail* (8 June 2011) available at: <http://www.dailymail.co.uk/news/article-2000723/Tox-graffiti-artist-facing-prison-scrawling-simplistic-tags-London.html> [Accessed 11 July, 2016]; and above fn.60. Other convictions which have attracted media coverage have targeted the so-called DPM graffiti crew (“Don’t Push Me”): in July 2008 five members of this crew were jailed by Southwark Crown Court after admitting conspiracy to cause criminal damage costing the community hundreds of thousands of pounds: the conviction was confirmed by the Court of Appeal (*R v Pease and Others* [2008] EWCA Crim 2515). On convictions of British taggers and graffiti artists see also McDonalds, *The Graffiti Subculture - Youth, Masculinity and Identity in London and New York* (New York: Palgrave Macmillan, 2001) pp.54 and 124-125; Steve Wright, “Home Sweet Home – Banksy’s Bristol” (2008, Tangent Books), at pp. 8 and 16 (commenting on the first police anti-graffiti operation, codenamed *Operation Anderson*, who took place in 1989 and brought to the arrest of 72 artists across the UK including the famous artist Tom Bingle (known as Inkie) and John Nation, a youth leader at the Barton Hill Youth Centre in Bristol, who gave young artists wall space at the Centre, thus contributing to the explosion of urban creativity in that town). On *Operation Anderson* see also the BBC documentary “Drawing the line”, which manages to capture the strategies used by the police to find out the works and names of the graffiti artists involved.

<sup>243</sup> In *R v Charan Verdi* [2005] 1 Cr. App. R. (S.) 43, the defendant pleaded guilty to nine counts of criminal damage for spraying graffiti on London tube trains. In addition to being sentenced to 2 years’ detention, he was placed on an ASBO for ten years. In *R. v Micheal Holmes* [2006] EWCA Crim 2510, a person taking pictures of a man writing graffiti was placed on an ASBO for 3 years. See also *R v Austin & Others* [2009] EWCA Crim 394 where it was stressed that graffiti “can be intimidating and it blights the environment”.

<sup>244</sup> ASBOs had been strengthened by the Anti Social Behaviour Act 2003 which *inter alia* gave local councils the power to order the removal of graffiti from private property and banned spray paint sales to people under the age of 16. Under this act, Councils had the power to serve a *graffiti removal notice* on the person in control (usually the owner) of any surface that was considered as street furniture (eg, telephone boxes, letterboxes, bus stops) where graffiti had been applied; yet, this legislation did not apply to private property. There was a right of appeal to the magistrates’ court over such a notice, and one ground for appeal was that “the defacement is neither detrimental to the amenity of the area nor offensive”. The Anti Social Behaviour Act also made illegal the sale of aerosol paint to any person under 16.

<sup>245</sup> See the report of the UK Cabinet of 3 November 2014 on the implementation of the new Act, p. 2 (available at <http://moderngov.dover.gov.uk/documents/s10656/Implementation%20of%20the%20Anti-Social%20Behaviour%20Crime%20and%20Policing%20Act%202014.pdf>, last accessed on 25 July 2016).

<sup>246</sup> Conversely, society’s attitude towards graffiti writers, as opposed to street artists, is less sympathetic. Taggers in particular are perceived, sometimes even within the street art scene, as vandals responsible for visually polluting neighborhoods and tarnishing the reputation of an entire artistic movement.

artists' opinion that what they do does not amount to criminal offence.<sup>247</sup> This is particularly true when artworks increase the value of properties, as has happened with many Banksy's pieces. It does not come as a surprise that the owner of an early Banksy's piece, painted in Easton (Bristol), decided to put it up for sale and as part of the deal included the house upon which the artwork had been painted ("a mural with a house attached").<sup>248</sup>

These considerations reinvigorate a well-known paradox which focuses on the "vandalism or art?" dichotomy (namely: while street artworks may reach high levels of artistic merit, artists themselves often risk to incur serious legal liabilities). In other words, street art is a paradoxical phenomenon which entails both urban aesthetic practice, which may boost tourism and cultural interest in local areas, and criminal activity.<sup>249</sup> This paradox has been epitomised by the timing of the convictions handed down by the Southwark Crown Court in London in 2008 when five members of the graffiti crew DPM were jailed after admitting conspiracy to cause criminal damage.<sup>250</sup> Indeed, the very same days the court was dealing with the case and released the harsh verdict, a few yards far from the court the Tate Modern Gallery was celebrating street art by exhibiting the works of world-wide famous street artists<sup>251</sup> and covering its riverside facade with their giant murals.<sup>252</sup>

There are also cases where street artworks are unauthorised but they may not be illegal, for example when the object incorporating the art has been abandoned.<sup>253</sup> Postering, cutouts, stickering and urban knitting are other forms of art that are perceived as less troublesome than artworks painted on walls or other urban surfaces, mainly because their removal is quicker and cheaper. These forms of street art also constitute an answer to the time constraints faced by many street artists as their placement is quick and permits to minimise the risk of being caught by the police.<sup>254</sup>

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<sup>247</sup> Edwards, "Banksy's Graffiti: A Not-So-Simple Case of Criminal Damage?" (2009) 73 *The Journal of Criminal Law* 345 at p.353. See also Halsey and Young, cited above fn.52, p.296 (noting that frequently street artists, especially those who produce stylish pieces, truly believe that what they make is art, not vandalism).

<sup>248</sup> Edwards, cited above fn.247, p.351; Wright, cited above fn.242, at p.35.

<sup>249</sup> Halsey and Young, cited above fn.59, p.275; Young, cited above fn.5, p.35.

<sup>250</sup> See above fn.242. Another event which shows this paradox was the *See No Evil* street art festival held in Bristol in August 2011: an old police building and the former juvenile courts were amongst the buildings the 72 street artists invited to the event were to work on. As was noted by the lead organiser of the event, the artist Inkie: "Half the early graffiti artists in Bristol must have been through that court at one time or another. Now there's really nice irony that we're going to be painting it!". See Byrne, *Hanging Out Down the Council House: Street Art's Outlaws and the Bristol Establishment*, in Gough (ed.), cited above fn.107, at p.85.

<sup>251</sup> Namely, the New York base artist collective Faile, the artists Os Gemeos and Nunca (Brazil), Blu (Italy), JR (France) and Sixeart (Spain). Exhibitions glorifying street art have become more and more common in recent times. An another important one was the 2009 exhibition of Banksy's artworks at the Bristol Museum & Art Gallery. On this event, visited by 300,000 people, see Gough (ed.), cited above fn.107; Ulrich Blanché, *Banksy v Bristol Museum – Street Art or street "flavoured" art?*, in Neves - de Freitas Simões (eds.), cited above fn.12, pp. 18-20. Banksy's comment on that exhibition was emblematic: "This is the first show I've ever done where taxpayers' money is being used to hung my pictures up rather than scrape them off": see "Banksy at Bristol Museum" *The Guardian* (12 June 2009) available at: <http://www.theguardian.com/artanddesign/gallery/2009/jun/12/banksy-bristol-art-exhibition> [Accessed 14 July, 2016].

<sup>252</sup> In the criminal proceedings before the Southwark Crown Court the DPM crew's lawyers stressed the juxtaposition of the two events by arguing that the crew were just trying to achieve the same fame as those artists starring that day at the Tate Modern, who also sometimes engage or have engaged in illegal street art and graffiti. Judge Christopher Hardy noted that although he admired their artistic skill, their activity should have been considered as a wholesale self-indulgent campaign to damage property on an industrial scale. In support of the crew the Anonymous Gallery in the Soho district of New York City organised an exhibition called *DPM: Exhibit A*, based on the work of the artists convicted in London, displaying large photographs of the convicts' works alongside copies of their charge sheets to ask whether they were criminals or artists: see Akbar - Vallely, "Graffiti: Street Art - or Crime?" *Independent* (15 July 2008) available at: <http://www.independent.co.uk/arts-entertainment/art/features/graffiti-street-art-ndash-or-crime-868736.html> [Accessed 14 July, 2014].

<sup>253</sup> Owen J. Morgan, *Graffiti - Who Owns the Rights?*, Working Paper, 2006, at p.5 [available at SSRN: <http://ssrn.com/abstract=929892> or <http://dx.doi.org/10.2139/ssrn.929892> [last accessed on 21 July 2016].

<sup>254</sup> See also Danysz, cited above fn.5, p.308.

Defences of lawful excuse may also be available for street artists in certain cases, for example where the placement of artworks has not been objected by the property owner for long time or the latter has accepted *ex post* the piece. *Ex post* acceptance of (initially illegal) street artworks is not uncommon:<sup>255</sup> this may happen when property owners appreciate the piece which has been left on their properties and thus decide to keep it. Also, artists who paint in street art and graffiti tolerance zones obviously cannot be prosecuted or suffer other negative legal consequences.

## THE BROKEN WINDOWS THEORY

The criminalisation of illegal street art and graffiti is often justified by invoking the “broken windows” theory.<sup>256</sup> It refers to the idea that if a broken window in the neighbourhood is not fixed, the feeling that nobody is taking care of the area will inevitably lead to more broken windows and then more criminality. By analogy, if graffiti is tolerated, the atmosphere of illegality implied by it will lead to more serious crimes in the area.

This criminological theory has been applied to illegal street art and graffiti in several countries, including UK. It is interesting to note what the House of Commons Environmental Audit Committee Ninth Report stressed in a 2004 report: “While increasing level of litter and graffiti lead at first, through complacency, to more of the same and to augmented levels of general anti-social behaviour and low-level crime, it seems well understood that continuing local degradation of the environment will lead ineluctably to more serious crime. There does indeed appear to be a link between litter and graffiti on the one hand and drug-peddling, muggings and burglary on the other”.<sup>257</sup> Anti-graffiti groups such as Keep Britain Tidy follow and approve this line of reasoning and regularly claim that illegal street art and graffiti damage communities, create a sense of urban decay and undermines processes by which communities maintain social control.<sup>258</sup>

The broken windows theory has been criticised by several commentators, though.<sup>259</sup> It has been noted in particular that the reasons for breaking a window or vandalizing other urban furniture are different from those animating the production of art on the streets. Throwing a stone through a window leaves the smashed glass and destroys the functionality of the window whereas placing an artwork (even a more basic one like a tag) in the street does not cause the same damage.<sup>260</sup> Moreover, most street artists’ and many graffiti writers’ real aim is to adorn and reinvigorate poor

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<sup>255</sup> Yet, sometimes it may not be enough to save a street artwork from removal. Indeed, even if the property owner wishes the piece to remain, a local authority may still serve a notice under Town and Country Planning legislation, which requires the owner to take steps to fix the “decline in amenity”. See Webster, Protection Banský’s Legacy: a Lawyer’s View, in Gough (ed.), cited above fn.107, at p.133.

<sup>256</sup> Wilson – Kelling, “Broken Windows: The police and neighborhood safety” (1982) 29 Atlantic Monthly.

<sup>257</sup> Environmental Crime: Fly-tipping, Fly-posting, Litter, Graffiti and Noise (2004) HC 445, Stationery Office, para 44 (available at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmenvaud/445/445.pdf>, last accessed on 30 August 2016). In her evidence to the committee, Jan Berry, Chairman of the Police Federation, stated: “There has been a huge amount of research over the years that demonstrates that if something looks neat and tidy people will think twice about damaging that. However, once it is damaged it escalates very quickly”, *ibid.*, Q. 197. The Islington council in North London has moreover noted that graffiti can also be “the catalyst for a downward spiral of neglect in an area, and encourage other more serious criminal activity”: see Islington borough’s website at <http://www.islington.gov.uk/services/parks-environment/cleanerislington/Pages/graffiti.aspx?extra=10>, last accessed on 21 September 2016).

<sup>258</sup> See Keep Britain Tidy campaign webpages at <http://www.keeppbritaintidy.org/Graffiti/579>, last accessed on 30 August 2016. See also Kelly, “Banksy and Bristol’s Cultural Development”, in Gough (ed.), cited above fn.107 at p.95 (reminding that Keep Britain Tidy are no fans of street art, even when it is created by the likes of Banksy: “Banksy’s street art glorifies what is essentially vandalism”).

<sup>259</sup> See for example Young, cited above fn.5, p.111 (noting that this theory is being accepted as if it were an “empirically validated fact”).

<sup>260</sup> Young, cited above fn.5, p.111.

and emarginated neighbourhoods. Disadvantaged and dangerous areas may thus actually benefit from a street art boom, as has been confirmed by the gentrification processes experienced by some districts of several British towns (for example the East End of London):<sup>261</sup> indeed, these processes have also been fuelled by the explosion of creativity brought by street art, which therefore does not seem to contribute to the decay of local areas. On the contrary, it often helps to revamp and give added value to neglected areas.

The weakness of the broken windows theory as applied to street art and graffiti is confirmed by the increasing interest of local authorities and private property owners in preserving and valorising these forms of art. Indeed, as already noted, artworks placed in the streets are increasingly protected against damage or destruction. This is for example what occurred in Bristol in 2006 where a local council successfully held an online poll to seek confirmation to keep the *Naked Lover* piece painted by Banksy,<sup>262</sup> thus preventing the street cleaning team from removing it.<sup>263</sup> It even took action to restore it after a night paintball attack had partially covered it, an act which has been curiously labelled as “removing graffiti from graffiti”.<sup>264</sup> Similar action was taken by the Islington council in London<sup>265</sup> in order to repair another Banksy’s piece, entitled *Tate Gallery*, which had been vandalised by unknown writers who added on it the phrase “not approved by the Council”.

Street art tours and festivals are also regularly organised in several British towns,<sup>266</sup> often with the support of local councils, which confirms that these forms of art can be used to broaden cities’ cultural offer<sup>267</sup> and boost local tourism.<sup>268</sup>

## **CAN ILLEGAL STREET ART BE PROTECTED BY COPYRIGHT?**

We have seen that creating artworks in the street without authorisation from the property owner can expose artists to serious legal consequences. Although nowadays artists increasingly seek and

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<sup>261</sup> Braun, cited above fn.19, at p.39 (noting that that street art and graffiti often constitute the first sign of gentrification of a certain area: “Galleries spring up; people with money come; houses price go up ...”).

<sup>262</sup> The piece had been illegally painted on a sexual health clinic and depicted a naked lover hanging out of a window while his mistress’ husband peers out looking for him.

<sup>263</sup> Banksy’s works are not the only street art pieces that are preserved. In 2010 an online petition aimed at preserving an artwork painted by Belgian street artist Roa in the East London area of Hackney gained more than 2,000 signatures in a week, which eventually convinced the local council to abandon its original plan to remove it. See Ellsworth-Jones, cited above fn.26, pp.5-6.

<sup>264</sup> Webster, cited above fn.174, p.374.

<sup>265</sup> The Islington council has sometimes shown interest in preserving Banksy’s street artworks. According to *The Times*, a listing of Banksy’s artworks was given to the Islington Council’s head of environment to avoid his pieces to be painted over: see Ross, *London Calling – Contemporary Graffiti and Street Art in the UK’s Capital*, in Ross, cited above fn.7, at p.278.

<sup>266</sup> See above fn.17.

<sup>267</sup> The presence of artworks on the street is sometimes advertised in order to attract visitors. This has occurred in the Turnpike’s Lane tube station in North London, where the company which operates the capital’s underground service decided to put indications to direct passengers to the Banksy’s piece *Slave Labour* (the artwork had indeed become so popular that an informational placard “if you are looking for a Banksy” was added in the station: see Young, cited above fn.5, p.149).

<sup>268</sup> Rocha, “‘Musealizar por ai’, Graffiti – The Street as Exhibit”, in Soares Neves - de Freitas Simões (eds.), cited above fn.11, p. 12; Byrne, *Hanging Out Down the Council House: Street Art’s Outlaws and the Bristol Establishment*, in Gough (ed.), cited above fn.107, at pp. 79 and 85 (noting that “street art is now part of the package the city offers to everyone from relocating businesses to tourists ...”; and that the exhibition “Banksy vs Bristol Museum”, organised in 2009 in the artist’s hometown, was incredibly successful and had the effect “to make everyone realise that street art in general and Banksy in particular were more potent global marketing tools for the Bristol brand than everyone had previously dared imagine”). See also Sansom, “The Nelson Street Transformation: Bristol Street Art Reaches New Heights: or Does it?”, in Gough (ed.), cited above fn.107, at p.119 (noting that the 2011 street art festival *See No Evil*, which attracted 72 famous artists into a neglected area of Bristol, “made the drabest street in Bristol into the coolest place on the planet for the weekend”).

obtain permission to place their pieces in urban environments, much street art is still created illegally.

Can illegal street art be protected by copyright?

As a general remark, it could be argued that no copyright protection should be offered in these cases as it would be against public policy to allow people to profit from their illegal behaviours. Also known as the “unclean hands” doctrine,<sup>269</sup> this principle has been relied on by certain US lower courts in copyright related cases involving illegally placed street art.<sup>270</sup> What about UK law? Copyright protection has in the past been denied by domestic courts to certain works, in most cases on content-related grounds (and in the 19<sup>th</sup> or early 20<sup>th</sup> century), for example because they were libellous<sup>271</sup> or calculated to do injury to the public,<sup>272</sup> blasphemous or irreligious,<sup>273</sup> obscene,<sup>274</sup> indecent,<sup>275</sup> immoral,<sup>276</sup> deceptive,<sup>277</sup> or causing “turpitude”.<sup>278</sup> While courts had no difficulties in denying copyright protection on public policy grounds, what is less clear is the shape such denial of protection took. In some cases judges seemed to suggest that copyright did not subsist in the work<sup>279</sup> whereas in others it turned out copyright could not be enforced;<sup>280</sup> and in other decisions copyright was recognised and an injunction was granted, but no damages were awarded.<sup>281</sup> Domestic courts have therefore since been wrapped in confusion on this issue.<sup>282</sup>

A systematic interpretation of the CDPA seems to suggest that certain controversial works attract copyright but are unenforceable. Indeed, while the statute clearly provides that copyright subsists in specific categories of work, it does not state that disputable subject matter is not eligible for protection on grounds related to public policy.<sup>283</sup> The CDPA just contains a saving in respect of any rule of law preventing or restricting copyright enforcement on public interests grounds (Section 171(3)).<sup>284</sup> And in *Hyde Park Residence Ltd v Yelland* the court clarified that the aim of this

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<sup>269</sup> The Latin expression *ex turpi causa non oritur action* is also sometimes used. It entails that he who seeks equity must not be tarnished by his own deeds. See Philips, “Copyright in Obscene Works: Some British and American Problems” (1977) 6 *Anglo-American Law Review* 138 at p.143; Dworkin, “Judicial Control of Copyright on Public Policy Grounds”, in Jan Keibel and Gerard Mom (eds) *Intellectual Property and Information Law: Essays in Honour of Herman Cohen Jehoram* (Kluwer Law International, The Hague, 1998), at p.141.

<sup>270</sup> See *Villa v. Pearson Educ., Inc.*, 2003 WL 22922178 (N.D. Ill. Dec. 9, 2003) (noting *in dicta* that whether copyright protects street art “require(s) a determination of the legality of the circumstances under which the mural was created”); *Ron English et al. v. BFC&R 11<sup>th</sup> Street LLC*.

<sup>271</sup> *Walcot v Walker* [1802] 7 Ves. 1; *Hime v Dale* [1803] 11 East 244.

<sup>272</sup> *Southey v Sherwood* [1817] 35 Eng. Rep. 1006. (Ch.); *Dr. Priestley’s Case*, an unreported case which was described in detail by counsel in *Southey v Sherwood*. See Sims, “The Denial of Copyright Protection on Public Policy Grounds” (2008) *European Intellectual Property Review*, at pp.189-198, 191.

<sup>273</sup> *Lawrence v Smith* [1822] Jac. 471.

<sup>274</sup> *Stockdale v Onwhyn* [1826] 5 B & C. 174; *Fores v Johnes* (1801, 1803, 1804) 4 Esp. 97.

<sup>275</sup> *Baschet v London Illustrated Standard Co* [1900] 1 Ch. 73.

<sup>276</sup> *Glyn v Weston Feature Film Co* [1916] 1 Ch. 261.

<sup>277</sup> *Wright v Tallis* [1845] 1 C.B. 893; *Slingsby v Bradford Patent Truck and Trolley Co.* [1905] W.N. 122.

<sup>278</sup> *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 A.C. 109.

<sup>279</sup> See for example *Walcot v Walker* (1802) 7 Ves. 1; 32 E.R. 1070-1071; *Stockdale v Onwhyn* [1826] 5 B & C. 174.

<sup>280</sup> See for example *A. Bloom & Sons Ltd v Black* [1936-1945] M.C.C. 274; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 A.C. 109; *Hyde Park Residence Ltd v Yelland* [1999] R.P.C. 655.

<sup>281</sup> *Hime v Dale* [1803], noted at 2 Camp. 27-28, n (b); 170 E.R. 1070-1071.

<sup>282</sup> For instance, in *Stephens v Avery* [1988] 2 All E.R. 477 Sir Nicolas Browne-Wilkinson V. C. cited *Glyn v Weston Feature Film Co* [1916] 1 Ch 261, for the proposition that “a court of equity will not enforce copyright ... relating to matters which have a grossly immoral tendency”. Yet, it is not clear whether *Glyn v Weston Feature Film* suggested that there was no copyright in the work, or rather that it was not enforceable: see Dworkin, cited above fn.141, pp. 138-139; Sims, cited above fn.272, p. 191.

<sup>283</sup> Laddie, Prescott and Vitoria, cited above fn.141, at para. 21-20.

<sup>284</sup> This provision states that “Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise”.

provision is to allow the courts not to enforce any copyright where the work is immoral, scandalous or contrary to family life; or injurious to public life, public health and safety or the administration of justice.<sup>285</sup>

What about illegal street art? May the lack of authorisation of the property owner affect artists' right to enforce their copyright? This issue - it should be noted first - could be made less relevant by the availability (and protectability) of preliminary sketches. Even where it is accepted that the copyright in illegally created works cannot be enforced, one may nevertheless argue that the copyrightable sketches upon which most street artworks are based give artists enforcement rights: which would indirectly enable them to prevent the commercial exploitation of their (illegally produced) pieces.<sup>286</sup>

Sketches may not always be available and relied on though, because they either may get lost by the artist or differ from the actual work placed in the street: this latter scenario may occur, for example, where the artist has distanced herself from the preliminary drawing and come up with a piece on the street which is different from the sketch prepared in the studio. In these cases, if there is no consent by the property owner, should copyright enforcement be denied to the artist who has placed the work in the street? I believe it should not.<sup>287</sup> I stress that not only to avoid what would seem to me an excessive punishment.<sup>288</sup> Indeed, here the illegal aspects do not concern the content of the work, they regard the processes of creation of the piece instead (there is no reported decision by British courts on copyright protection of illegally created artworks). The way works are created should not affect the analysis related to copyright enforceability.<sup>289</sup> This assertion sounds logical. If I steal a pen which I then use to draw a wonderful piece of art, why should I be denied copyright protection and tolerate that someone else copies and takes economic advantage of my work? The same could be arguably claimed where a person takes a picture of a minor without the parent's permission or where a paparazzo takes photographs of celebrities in private locations without authorisation.<sup>290</sup> And what was found in *Hyde Park Residence Ltd v Yelland*, namely that courts can decide not to enforce any copyright on public interest grounds (for example where the work is injurious to public life), could not be relied on to deny the enforceability of copyright in illegally created works.<sup>291</sup> Indeed, in that case it was also clarified that the illegal aspects upon which the decision by a judge

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<sup>285</sup> *Hyde Park Residence Ltd v Yelland* [2000] 3 W.L.R. 215 [2001] Ch. 143.

<sup>286</sup> Griffin, cited above fn.155, p.124; See also Schwender, cited above fn.106, p.279.

<sup>287</sup> In *Creative Foundation v Dreamland*, cited above fn.118, Arnold J considered and decided on ownership of a wall on which Banksy had painted a piece. The judge noted *obiter* that there is no doubt the copyright belongs to him. I think this is not a minor aspect of the ruling. The judge indeed stressed this point despite recognising that the artwork had been created without the prior knowledge nor the consent of the leaseholder and tenant (although Creative Foundation, that in the meantime had acquired the rights into the piece, later impliedly approved the work). It therefore seems that the judge was not bothered with whether the work had been created legally or not.

<sup>288</sup> It would be too harsh to both give street or graffiti artists a sentence to imprisonment and deny them copyright protection: see Schwender, cited above fn.74.

<sup>289</sup> See also Lerman, cited above fn.77, at p.317. For an opposite opinion, see Markel, "Can Intellectual Property Law Regulate Behaviour? A 'Modest Proposal' for Weakening Unclean Hands" (2000) 113 *Harvard Law Review* 1503 at pp.1503-1520 (suggesting to adopt federal legislation that would invalidate a copyright registration if the author infringed criminal law while producing the work. Markel also proposes to inform authors registering their copyright with the Office that they may lose their exclusive rights in case it is found that they committed a criminal offence when creating the work, at p. 1511). This proposal does not seem convincing, though. I indeed wonder why we should treat violators of criminal law who are also artists worse (in terms of denying them copyright protection) than any other person who does not create anything.

<sup>290</sup> See Lerman, cited above fn.77, at p.317, citing US case *Mavrix Photo Inc. v. Allieiswired.com et al.*, No 10-7591, complaint filed (C.D. Cal. Oct. 12 2010, where a photographer filed for copyright infringement on his picture of pregnant actress Penelope Cruz, which he had taken without permission). See also Schwender, cited above fn.106, p.274.

<sup>291</sup> See also Iljadica, cited above note fn.34, p. 106 (noting that graffiti "relates to an offence against a private property owner not the public at large").

not to enforce copyright is taken should just regard the *work itself* (one might point, for instance, to the unacceptable contents of, or the controversial messages delivered by, a work). This finding seems to suggest that other issues such as the process of creation of the work would be irrelevant instead, and in particular should not influence courts' choices to enforce or not to enforce the right.

That copyright enforcement should not be denied when artworks are illegally placed in the street is confirmed – I believe - by a fairness related argument. It would indeed be unfair to allow persons other than the artist to rely on the illegal nature of a street artwork to copy and exploit it for their own commercial purposes,<sup>292</sup> for example by using it in advertising messages or as a decoration element of fashion products. It seems to me this result would be absurd as it would basically legitimise blatant imitations by individuals or corporations that have nothing to do with either the perpetrator of the illegal act (the artist) or the victim (the owner of the property).

Denying street artists that illegally place their pieces a resale right might also be perceived unfair, of course if we accept that street artworks that are created without the consent of the property owner may be protected by copyright.<sup>293</sup> It would be unjust, for example, to allow the removal and subsequent sales of illegally created murals without recognising the artists a participation to the profits made by those who have commodified and extracted value out of their creations.

Similarly, it could be argued that street artists who create and place their pieces illegally should be able to claim the moral right of paternity, where the requirement for this action (namely, assertion) is met. It would again be unfair to deny artists the right to be recognised as authors of their works just because they have been placed on streets without the authorisation of the property owner. That outcome would once more bring to an absurd result, namely that any member of the public would be able to present himself as the father of the artwork and possibly get recognition and fame for a piece of art that would not actually be his own creation.<sup>294</sup> It would instead be more difficult for street artists who illegally create their pieces to exercise the moral right to integrity, for the reasons mentioned when dealing with this moral right.

## **APPROPRIATION AND SHARING CULTURE**

Before concluding, it is interesting to expand on an important element of street art and graffiti, namely the fact that these forms of art are often based on an appropriation and sharing culture.

Street artists frequently borrow styles, concepts and details not only from popular culture and the everyday world,<sup>295</sup> but also from fellow colleagues, and such spirit of reciprocal appropriation is widely accepted within these communities. Borrowing and taking inspirations from other artworks are indeed structural characteristics of street art and graffiti. Take the iconic *Flower Thrower* piece painted by Banksy on several surfaces, including on a wall in the Palestinian town of Bethlehem. It

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<sup>292</sup> See also Smith, “Tagging the Lanham Act: Protecting Graffiti Art from Wilful Infringement” (2016) 81 *Brooklyn Law Review* 813 at p.834; Grant, cited above fn.66, p.26.

<sup>293</sup> See the Artist’s Resale Right Regulations 2006, in particular Regulation 3(1) which states that authors of “a work in which copyright subsists ...” have such a right. As is known, this right allows artists to claim royalties each time one of their works is resold through an auction house or art market professional (it was introduced by the 2006 Artist’s Resale Right Regulations, which in turn have implemented in UK the Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art). See also Regulation 4(1) which defines the type of works (“any work of graphic or plastic art”) to which the resale right applies, such definition saying nothing about the way (legal or illegal) works are created.

<sup>294</sup> Yet, it is likely that artists who illegally create street artworks want to remain anonymous to avoid criminal prosecution and other adverse legal consequences - and may therefore not be interested in asserting the paternity right. See Grant, cited above fn.66, p.35.

<sup>295</sup> For example, Banksy often appropriates images and logos from the advertising world with a view to criticising the excesses and contradictions of consumeristic societies.

depicts a masked rioter armed with a bouquet of flowers instead of a Molotov cocktail. It has been suggested<sup>296</sup> that this artwork was inspired by a well-known picture known as *Molotov Man*, taken by the photographer Susan Meiselas in 1979 during the Nicaraguan Revolution and considered a symbol of the Sandinista revolution.<sup>297</sup> It is also well-known that Banksy has widely drawn upon the style and ideas of the French artist Blek le Rat, one of the first artists to have pioneered the stencil technique in urban settings.<sup>298</sup> Banksy has expressly admitted it: “Every time I think I’ve painted something slightly original, I find out that Blek Le Rat has done it as well, only twenty years earlier”.<sup>299</sup> He does not seem the French artist has ever openly complained about this.<sup>300</sup>

Many street artists thus accept the idea of their creations being used by peers as a source of inspiration. They often recognise their works are not static, and that they might be borrowed by others within the street art community to create their own pieces.<sup>301</sup> It has interestingly been noted that “documenting, transmitting, sharing, learning and debating are key components to the Movement. In order to improve, one has to see what others do. For all of them, way before the Internet age, sharing images of the work has also been a priority”.<sup>302</sup>

It has been noted that because of such an *appropriation* and *sharing* feature, copyright regimes would not be suitable to govern these artistic movements.<sup>303</sup> This belief would be reinforced by the fact that street artists never take legal actions against peers complaining that the copyright in their works has been infringed. This argument is not convincing though. Such characteristic of street art cannot be used to argue that the copyright system – which allows authors to prevent others from adapting and thus exploiting their works –<sup>304</sup> would be unfit to regulate these forms of artistic expression. If street artists tolerate appropriation of elements of their works (and many actually do) this means they basically waive the right to prevent the adaptation of their work. Yet, copyright law allows such waivers. The fact that artists happen to omit enforcing an exclusive right which is given to them by the law does not entail that such a law is not suitable to govern their artistic activities. Copyright law is flexible and permits authors to decide whether to enforce some rights and waive others, or to waive all of them.<sup>305</sup>

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<sup>296</sup> Schwender, cited above fn.106. p.275.

<sup>297</sup> Information regarding the picture can be found in the photographer’s website, at <http://www.susanmeiselas.com/latin-america/nicaragua/#id=molotov-man> [accessed on 22 July 2017].

<sup>298</sup> Banksy’s stencils have also been influenced by the early graffiti scene of the early 80s in his hometown Bristol, which included talented artists such as Nick Walker: see Steve Wright, cited above fn.242, at p.5. The use of stencil art was also made by the British punk movement of the 70s and 80s, mainly by guerrilla artist Gee Vaucher for the anarchist band Crass: see Braun, cited above fn.19, at p.8.

<sup>299</sup> Hunter, cited above fn.20, p.16.

<sup>300</sup> On the contrary, he has been thankful to Banksy. See Ellsworth-Jones, cited above fn.26, p.65 (reporting Blek Le Rat’s following words: “People say he copies me, but I don’t think so. I’m the old man, he’s the new kid, and if I’m an inspiration to an artist that good, I love it. People want to know me now ... I have a major book deal with the biggest publisher in the world. I have waited thirty years for this. It’s only today that my street art has become big news, and that’s thanks to people saying Banksy is inspired by me”).

<sup>301</sup> Young, cited above fn.5, p.25 (noting that street artists have “described their initial activities as inspired by the work of others and a desire to create something comparable”).

<sup>302</sup> Danysz, cited above fn.5, p.12.

<sup>303</sup> See for example Roundtree, “Graffiti Artists ‘Get Up’ in Intellectual Property’s Negative Space” (2013) 31 *Cardozo Arts & Entertainment Law Journal* 959 at p.978.

<sup>304</sup> Copyright, Designs and Patents Act 1988 s.21(1) provides that “The making of an adaptation of the work is an act restricted by the copyright in a literary, dramatic or musical work”.

<sup>305</sup> Street artists do not always accept an appropriation or incorporation of their works by others, especially where the imitation is so blatant that it cannot be tolerated. Sometimes they react instead. Such reaction often remains outside the courtrooms and lawyers’ offices, though. It is a non-judicial self-defence-based form of complaint, which may take different shapes. It could consist, for example, of painting over the piece which has glaringly imitated the artwork of the artist who complains; or publicising the imitation within the street art scene through social media with a view to causing an aura of disapproval amongst the public and triggering shame-provoking feelings in the imitating artist. I learnt about these insightful aspects of the street art sub-culture during conversations with London-based artist Stik, held in January

## CONCLUSION

Street art and graffiti are considered by several critics as the most important forms of artistic expression in present times.<sup>306</sup> Often stimulated by a competitive environment, more and more artists use urban spaces as raw material and canvas for their creations. It cannot be denied that such artists frequently beautify our cities by basically turning walls and other surfaces into open air galleries open twenty-four hours a day. As has been interestingly noted, what street artists often end up doing is *musealising* and *gallerizing* local areas and neighbourhoods.<sup>307</sup> British cities like London and Bristol are at the forefront of such explosion of urban creativity. Also, these forms of art are frequently site-specific, and better equipped to deliver messages and energy as they are not edited and controlled by anybody.<sup>308</sup>

No British judge has yet considered whether street and graffiti art can be protected by copyright, and the extent of such protection. Yet, given its growing popularity, it is likely that disputes concerning its copyrightability, and the possibility to enforce the exclusive rights, may soon reach a court.

We have seen that certain case law and the wording of some CDPA provisions might make it problematic to consider many street artworks as copyrightable and protect artists via a strong moral right of integrity. I do hope courts clarify in future cases that street art deserves copyright protection and that artists are given the chances to protect their moral rights, also taking in due account the interests of the owners of the property upon which artworks are placed. For this purpose, statutory changes may also be needed, for example to broaden the scope of the integrity right so as to allow artists in specific circumstances to prevent the removal of their works from the street and exhibition in galleries as well as their destruction. A legal system which recognizes street artists' rights would also turn out to do justice to the important role these forms of art are playing in the regeneration of many urban spaces in Britain.

In particular, I hope judges confirm that artworks illegally placed in the street are also capable to attract protection and recognise artists that have produced them enforcement rights. Such clarification would be just and fair *vis-à-vis* artists who put a lot of efforts in creating artistic pieces and at the same time send a warning signal to whoever may be interested in stealing styles and details of street artworks. Indeed, what marketing and communication experts of several companies that walk down the streets of our cities may think is: "these murals are illegally placed on the streets and therefore can be freely reproduced. Let's take a picture and put it on our shirts for the next spring/summer collection!"<sup>309</sup> That is wrong in my opinion, and should not be allowed. The fact that street artworks have been illegally created – I believe - should not be used as a defence to legitimise the theft of creativity for commercial purposes.

It is also known that most street art is anti-establishment. Artworks are often placed in the streets, for example to oppose war, criticise consumerism and question the function of modern media. Would such characteristic suggest that copyright is not suitable to govern these forms of art? In

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2016. See also Morgan, cited above fn.253, p.15 (noting that some street artists whose works have been imitated just may be interested in non-legal support such as media sympathy).

<sup>306</sup> See for example Danysz, cited above fn.5, p.9 (noting that graffiti and street art are the most important artistic movements at the turn of this century).

<sup>307</sup> Rocha, cited above fn.268, p.9.

<sup>308</sup> Lewisohn, cited above fn.61, p.131. Street artists enjoy more freedom when they create their works without the prior consent of the property owner, rather than when they are authorised or commissioned.

<sup>309</sup> See also Lewisohn, cited above fn.61, p.65 (noting that "the street artist in London must build a defence-shield against corporate theft. It's a constant cat-and-mouse game of artists innovating and advertisers assimilating").

other words, would it be paradoxical to allow street artists to ask protection from the very state they want to criticise?<sup>310</sup> I do not think so. Indeed, traditional works of art such as fine art paintings can also be anti-establishment, yet protecting them through copyright certainly does not constitute a paradox. Many fine artists have the same motivations as most street artists: “self-expression, peer recognition, and a desire to strike back at society”.<sup>311</sup>

It should also be noted that copyright could exactly be the tool to keep the message that artists want to convey an anti-establishment one, if they so wish. As a matter of fact, copyright allows artists to object to and (try to) prevent what still several street artists, especially those who stick to the original values of the subculture, do not accept, namely a commercial exploitation of their art which is antithetical to that message.<sup>312</sup> In particular, resorting to copyright laws may protect the reputation of artists that do not want to be associated with marketing and profit-oriented activities and therefore considered as *sellouts*.<sup>313</sup> Such laws, by making available injunctions and other effective remedies against unauthorised exploitations of their artworks (for example, in connection with fashion products or in advertising messages), could be the right instrument of reaction for those artists that want to defend the original values of their community.

Yet, copyright could also serve as a means of commercial exploitation should artists decide to extract profits out of their activity and passion, for example by allowing galleries to show and sell screen prints derived from their street artworks (these products have been labelled “street art souvenirs” or “street art flavored” works),<sup>314</sup> or licensing out their creations for merchandising purposes. Many have actually done and do so. Also, differently from selling out and making profits, several street artists may just get a living out of their activity by basically making their art pay the bills,<sup>315</sup> or even decide to donate part of or all the proceeds to charities and other no-profit organisations.<sup>316</sup> The copyright system allows artists to carry out any of these activities if artists so wish.

Finally, the fact that several street artists eventually decide not to rely on copyright to extract added value out of their art or to object to violations of their moral rights or unauthorised exploitations of their works (for example, by failing to complain about the sale of posters, shirts and other merchandise incorporating their pieces)<sup>317</sup> does not entail that the copyright regime is not suitable to

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<sup>310</sup> Davies, “Art Crimes?: Theoretical Perspectives on Copyright Protection for Illegally-Created Graffiti Art” (2012) 65 *Maine Law Review* 26 at p.45.

<sup>311</sup> Gomez, cited above fn.2, p.652.

<sup>312</sup> See also Lewisohn, cited above fn.61, p.138 (stressing that street artists “put their work in the public realm in a spirit of generosity and to share creativity, so for individuals to come along and profit from this generosity goes against everything these artworks stand for”).

<sup>313</sup> Smith, cited above fn.292, p.816.

<sup>314</sup> Jim Carey’s interview with Banksy, “Creative Vandalism”, *Squall Magazine* (30 May 2002).

<sup>315</sup> Gomez, cited above fn.2, p.648.

<sup>316</sup> London-based street artist Stik, for example, is well-known for channelling the proceeds coming from the sales of his artworks to hospitals, charities or homeless organisations. See his website “Stik” [Online] available at: <http://stik.org/about/> [Accessed 16 July, 2016].

<sup>317</sup> Banksy, for instance, is not bothered about unauthorised merchandising reproducing his artworks. He basically produces art on the street for others to profit from. See Ellsworth-Jones, cited above fn.26, p.200 (reminding what Banksy stated in an interview for the *Sunday Times*: “if you’ve built a reputation on having a casual attitude towards property ownership, it seems a bit bad-mannered to kick off about copyright law”). See also the introductory page of his book *Wall and Piece*, cited above fn.25, in which he claims that “Copyright is for losers”. Yet, despite of not being interested in copyright, Banksy does extract serious money out of his artistic activity: one of his most famous stenciled piece, for example, embellish the cover of the CD *Think Tank*, released by the British pop band Blur in 2004 (see also the high price sales of his artworks, mentioned above at fn. 21). He also once noted: “I tell myself I use art to promote dissent, but maybe I am just using dissent to promote my art. I plead not guilty to selling out. But I plead it from a bigger house than I used to live in”: see the interview with Banksy by Ossian Ward, in *Time Out London* (31 March

govern such forms of art. As mentioned when referring to the appropriation and sharing culture of street art, what basically artists do in these cases is just waiving the rights offered to them by copyright law, which does not contradict the spirit of this body of law. Copyright law is flexible and does allow such waivers.