

## GRAFFITI ARTISTS “GET UP” IN INTELLECTUAL PROPERTY’S NEGATIVE SPACE<sup>♦1</sup>

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<sup>1</sup> “Getting up” refers to “the process of tagging repeatedly to spread your name.” Chad & Schmoo, *The Words: A Graffiti Glossary*, ART CRIMES, <http://www.graffiti.org/faq/graffiti.glossary.html> (last visited March 3, 2013).

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#### INTRODUCTION

At the 2008 Beijing Olympic Games, the Spanish synchronized swimming team competed in brightly colored swimsuits emblazoned with a character of unmistakable graffiti aesthetic.<sup>2</sup> An example of graffiti incorporated into popular culture—the image gracing the uniform of the eight-woman team, displayed prominently on the sporting world’s biggest stage, became the subject of a copyright infringement suit. According to *The Wall Street Journal Law Blog*, the artist, a German graffiti artist named Cantwo, claimed he painted the character in 2001, and upon learning of the synchronized swimmer’s unlicensed use, initiated legal action.<sup>3</sup> The artist lamented, “people think that because our work is public and it is sometimes illegally painted, they could use it any way they want.”<sup>4</sup> The comments section of the article displays a common sentiment regarding graffiti and copyright. For example, an anonymous comment states, “if some guy vandalizes public or private property with his graffiti, literally creating these images on someone else’s wall against their will, how can he later claim copyright protection? Copyright exists to promote the arts; graffiti is, by definition, illegal.”<sup>5</sup> Another reader, Herb Spencer agrees, “no one should profit from his own wrongdoing. . . . How does one enforce protection of an image conveyed in an . . . illegal act?”<sup>6</sup>

These commenters were misinformed about the circumstances surrounding Cantwo’s work, however, as Cantwo’s creation was not an act of vandalism: Cantwo painted his character with permission.<sup>7</sup> In

<sup>2</sup> See Markus Balser, *Cantwo Says “Can Not!” to Spanish Swimmers*, WALL ST. J. L. BLOG (Sept. 9, 2008, 4:44 PM), <http://blogs.wsj.com/law/2008/09/09/cantwo-says-can-not-to-spanish-swimwear/>. The character was a scowling fellow of cartoonish proportions, with a red baseball cap worn jauntily backward.

<sup>3</sup> See *id.*

<sup>4</sup> *Id.*

<sup>5</sup> Anon, Comment to *Cantwo Says “Can Not!” to Spanish Swimmers*, WALL ST. J. L. BLOG (Sept. 9, 2008, 4:55 PM), <http://blogs.wsj.com/law/2008/09/09/cantwo-says-can-not-to-spanish-swimwear/tab/comments/>.

<sup>6</sup> Herb Spencer, Comment to *Cantwo Says “Can Not!” to Spanish Swimmers*, WALL ST. J. L. BLOG (Sept. 9, 2008, 7:10 PM), <http://blogs.wsj.com/law/2008/09/09/cantwo-says-can-not-to-spanish-swimwear/tab/comments/>.

<sup>7</sup> According to the artist, “the cartoon-style character was clearly taken from an artwork I sprayed

other words, the painting was *legal*, and Cantwo's legal claims could continue as a straightforward copyright infringement suit. It is curious, though, that the commenters assumed that the underlying work was painted illegally and therefore beyond the purview of copyright protection. Cantwo's infringement suit and readers' reaction to his claim raise the question: what legal rights would Cantwo have if he had painted the character in 2001 *illegally*? Or, more generally, what legal rights do illegal graffiti artists have in their work?

If Cantwo's work which later adorned the Spanish swimmers' suits, had in fact been an illegal act of vandalism, then his claims would be diminished, if not nonexistent.<sup>8</sup> In both legal and illegal graffiti, however, the elemental copyright requirements—that the work be an “original work[] of authorship fixed in any tangible medium of expression”<sup>9</sup>—appear to be met, suggesting that illegal graffiti should receive the same copyright protection as legal graffiti. And yet, the commenters' intuitions seem sound in pointing out that “no one should profit from his own wrongdoing.”<sup>10</sup>

This anecdote highlights a problem in the law: illegal graffiti artists—in seeking protection for their art, or relief from its unauthorized use—are foreclosed from legal remedies because of the illegal nature of their work.<sup>11</sup> Illegal graffiti art is excluded from traditional intellectual property (“IP”) protections because illegal works are, in practice, precluded from copyright status and moral rights protection under the Visual Artists Rights Act.<sup>12</sup>

Graffiti, both legal and illegal, inhabits what Professors Kal Raustiala and Christopher Sprigman call IP's “negative space”, which refers to areas and industries unregulated, or only partially regulated, by de jure IP law.<sup>13</sup> Groups that operate in IP's negative space often rely on informal norms-based IP systems of their own creation.<sup>14</sup>

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on a wall *legally* in Muenster in 2001.” Balseer, *supra* note 2 (emphasis added).

<sup>8</sup> See *infra* Part IB.

<sup>9</sup> 17 U.S.C. § 102(a) (2006).

<sup>10</sup> Spencer, *supra* note 6.

<sup>11</sup> Some readers, echoing the sentiment of the Cantwo article commenters, will fail to see the problem with barring illegal artworks from legal protection. This note discusses the economic rationale behind copyright protection and finds that even illegal graffiti has commercial and artistic value deserving of legal protection. See *infra* Part IA.

<sup>12</sup> See *infra* Part IB .

<sup>13</sup> See Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1764 (2006) (developing the term “IP's ‘negative space’”); Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317 (2011) (developing the terms “Low-IP” and “No-IP”).

<sup>14</sup> See generally Raustiala & Sprigman, *supra* note 13. See also Kal Raustiala & Christopher Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201 (2009). Informal norms in creative industries have sparked a discussion on the use of custom in IP law, with strong arguments for and against such use. Compare Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007) (arguing against formal recognition of custom), with Richard A. Epstein, *Some Reflections on Custom in the IP Universe*, 93 VA. L.

Illegal graffiti is precluded from formal copyright law, yet in IP's negative space, graffiti artists are not without IP protection. This Note argues that a norms-based IP system—animated by custom and currently in operation among graffiti artists—fills in the gaps left by de jure IP law. And, while graffiti customs are generally less restrictive than de jure IP laws, this Note argues that graffiti norms provide more incentives for the creation of graffiti artworks by granting access than de jure law does by granting exclusivity. The existence of a functioning informal IP system among graffiti artists suggests that the legal community need not expand or modify formal IP law to include illegal graffiti art. Rather, the legal community should clarify the rules that currently do apply to graffiti artists and should take note of graffiti customs given the revolutionary effect that illegal and community-based practices can have on property law.<sup>15</sup>

Part I tracks a brief history of graffiti and highlights the artistic and commercial merits of graffiti as an art form, arguing that while many of the rationales for protecting cultural production through IP regimes are also present in the context of graffiti,<sup>16</sup> graffiti artists, for various reasons, do not use formal avenues of IP protection. Part II considers possible solutions to the problem that graffiti artists either cannot, or do not, use the legal system to protect their IP and concludes that informal solutions are preferable to formal ones. Part III describes how graffiti customs emulate formal IP protections, arguing that, although graffiti norms are less protective than IP law, graffiti thrives in IP's negative space where access transcends exclusivity. Finally, part IV discusses the effect of graffiti norms on the legal system and posits that by appreciating the ways in which the graffiti community meets its own IP protection needs, the legal community can address what should be done to promote incentives for the creation of graffiti art.

## I. THE ODD COUPLE: GRAFFITI ART, AND IP LAW

### A. *A Crash-Course in Graffiti History*

The word graffiti,<sup>17</sup> depending on context, can refer to gang-related turf demarcations, simple acts of vandalism, and full-scale mural

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REV. IN BRIEF 223 (2008) (arguing for formal recognition of custom).

<sup>15</sup> See generally EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP* (2010).

<sup>16</sup> Establishing the worth of graffiti as a form of art is crucial to this Note. If graffiti is, as some have argued, merely vandalism and visual assault, then any legal scholarly attention to graffiti—other than criminal law scholarship—is unwarranted. I make the argument that graffiti is a commercially lucrative and culturally meritorious art form, and therefore, worthy of the attention of this Note.

<sup>17</sup> “‘Graffiti’ refers to an inscription, drawing or design, scratched, painted, sprayed or placed on a surface, without the consent of the owner, so as to be seen by the public.” *Sherwin-Williams Co. v. City & Cnty. of S.F.*, 857 F.Supp. 1355, 1359 (N.D. Cal. 1994).

“masterpieces” (“pieces”).<sup>18</sup> Such full murals are often referred to as graffiti art, spray-can art, street art, or urban art. Graffiti can also refer to the distinctive lettering style associated with Hip-Hop culture, as seen on hats, tee shirts, album covers, and other commercial products. Finally, graffiti may refer to a growing form of gallery art that incorporates the aesthetic, materials, and techniques of street art. In this Note—unless specified otherwise—the term graffiti refers to that of the highest quality, i.e. graffiti art.

Graffiti has been around for millennia, but not until the 1970s did it gain widespread popularity as one of the four pillars of hip-hop culture, which include rapping, DJ-ing, break dancing, and graffiti writing. Thus, some correlate graffiti with youth, urban counter-culture, and crime.<sup>19</sup> Nevertheless, in the 1980s, graffiti evolved away from pure vandalism or mere gang demarcation and grew into an artistic endeavor complete with a core of values. The core values of graffiti are fame, artistic expression, power, and rebellion.<sup>20</sup> Fame refers to renown and respect within the graffiti community and is competitively achieved through quality and quantity of work factored with the risks involved in painting that work.<sup>21</sup> Artistic expression is displayed through style and originality and stems from the lack of alternative creative or expressive outlets available to graffiti artists (largely underprivileged inner-city youth).<sup>22</sup> Additionally, many graffiti artists paint for the purpose of urban beautification.<sup>23</sup> The core value of power is created through competition among peers, aesthetic dominance over the urban landscape, and the strength in numbers provided by membership in a subculture.<sup>24</sup> Finally, rebellion refers to the value in violating social norms, clashing with authority, and “bucking the establishment.”<sup>25</sup> As will be shown throughout this Note, these core values provide incentives for creation and form the basis of customary practices among graffiti artists.

Graffiti as an art form is engendered by the core value of artistic expression (referred to colloquially among graffiti artists as “style”). Graffiti centers around the pseudonym of the artist (the “tag”), yet, as graffiti developed, the artistic style of writing became more important than the pseudonym itself.<sup>26</sup> The unique graffiti aesthetic, familiar

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<sup>18</sup> Susan A. Phillips, *Graffiti Definition: The Dictionary of Art*, ART CRIMES (1996), <http://www.graffiti.org/faq/graf.def.html>.

<sup>19</sup> See ROGER GASTMAN & CALEB NEELON, *THE HISTORY OF AMERICAN GRAFFITI* (2011).

<sup>20</sup> See *Sherwin-Williams*, 857 F.Supp. at 1360–61.

<sup>21</sup> See *id.* at 1360.

<sup>22</sup> See *id.*

<sup>23</sup> See George C. Stowers, *Graffiti Art: An Essay Concerning the Recognition of Some Forms of Graffiti as Art*, ART CRIMES (1997), <http://www.graffiti.org/faq/stowers.html>.

<sup>24</sup> See *Sherwin-Williams*, 857 F.Supp. at 1361.

<sup>25</sup> See Rosenblatt, *supra* note 13 at 345.

<sup>26</sup> “[In] graffiti art, the form of the lettering at issue is arguably central to the artistic expression

today, developed out of the necessity for artists to develop a unique style that would distinguish their work from another's work. Says one writer, "[s]tyle is the most important thing! It defines who you are."<sup>27</sup> Because of this emphasis on style, graffiti has developed into an art form known for its creative merit.<sup>28</sup>

Graffiti is an inherently impermanent art form. Creative merit aside, graffiti is considered a form of vandalism by most municipalities and is systematically removed from public walls because "[t]he spread of graffiti is [an] accurate . . . barometer of the decline of urban civility . . ."<sup>29</sup> Additionally, graffiti artists often paint over each other's work because of scarcity of wall space, as a sign of disrespect, or in retaliation for being painted over themselves.<sup>30</sup>

Graffiti is commonly associated with vandalism; however, not all graffiti is illegal—much graffiti is painted with permission. Select municipalities, in addition to vandalism laws and buffing operations, have adopted a more embracing approach to curbing illegal graffiti, where the city provides certain public spaces for street artists to paint legally.<sup>31</sup> Such "free walls" can be official, where the city or other land owner formally grants a wall or space for the free use of graffiti artists but retains control over content and paint-overs. Alternatively, free walls can be unofficial, where the city simply does not enforce anti-graffiti measures in a particular area.<sup>32</sup> Currently, there exists much confusion<sup>33</sup> as to the locations of, and permission associated with, free

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of particular words." *Reece v. Marc Ecko Unltd.*, No. 10 Civ. 02901, 2011 WL 4112071, at \*9 (S.D.N.Y. 2011).

<sup>27</sup> IGTIMES, *STYLE: WRITING FROM THE UNDERGROUND* 5 (1998) (quoting graffiti writer Vulcan). However, individual style is only part of the picture: "style don't mean nothing if you don't get up. If people don't see your pieces, how are they gonna know if you've got style?" CRAIG CASTLEMAN, *GETTING UP: SUBWAY GRAFFITI IN NEW YORK* 20 (1982) (quoting graffiti artist TRACY 168).

<sup>28</sup> See Lisa N. Howorth, *Graffiti*, in *HANDBOOK OF AMERICAN POPULAR CULTURE* 549 (M. Thomas Inge ed., 2d ed. 1989). According to Howorth, graffiti has both "a strong and identifiable aesthetic theory," a characteristic of high art, and a similarity to recognized art movements such as abstract expressionism, pop art, conceptual art, and new realism. *Id.* at 556. Some see graffiti as urban beautification: "The graffiti artist whose work brightens a drab area and adds color to the mind-dulling blandness of the inner city, whose designs enliven the sterile concrete jungles, is considered by some to be upgrading his environment: . . . [T]he graffiti 'artist,' so the argument goes, is a public benefactor." Ernest L. Abel & Barbara E. Buckley, *THE HANDWRITING ON THE WALL: TOWARD A SOCIOLOGY AND PSYCHOLOGY OF GRAFFITI* 139 (1977).

<sup>29</sup> Leonard Kriegel, *Graffiti: Tunnel Notes of a New Yorker*, 62 *AM. SCHOLAR* 431, 432 (1993).

<sup>30</sup> See *People v. Osegueda*, No. B213246, 2010 WL 1444638, at \*1 (Cal. Ct. App. 2010) (Sometimes one gang's graffiti is "crossed out" in a sign of disrespect).

<sup>31</sup> See *LEGAL WALLS*, <http://www.legal-walls.net> (a website listing locations where graffiti artists can paint with permission) (last visited Mar. 3, 2013).

<sup>32</sup> See *English v. BFC & R E. 11th St. LLC*, No. 97 Civ. 7446, 1997 WL 746444 (S.D.N.Y. 1997) (East Village artists created an installation art community garden complete with murals, which was not with permission, but which was never disallowed).

<sup>33</sup> Mistakes about which free walls are truly "free" and which free walls are actually private property can lead to serious consequences. "Even painting legal walls can get you put in jail—

walls.<sup>34</sup>

Lately, graffiti has moved into fine art galleries and museums and has become a lucrative and popular form of art and design. Starting in the early 1980s with Keith Haring and Jean-Michel Basquiat, some graffiti artists have become art-world names.<sup>35</sup> Many artists, including Barry McGee, Blek la Rat, Os Gemeos, Banksy, and Shepard Fairey continue to paint illegally despite their financial and critical success in galleries and museums.<sup>36</sup> Today, works by the elusive British artist Banksy command hundreds of thousands of dollars.<sup>37</sup> Shepard Fairey's art emblazes Obey brand apparel and was part of Barack Obama's 2008 presidential campaign.<sup>38</sup> David Choe, the graffiti artist responsible for the Facebook office murals, is now one of the richest artists in the world.<sup>39</sup>

Because of such mainstream success, the monetary and cultural values of these artists' illegal street works have dramatically increased. In fact, art poachers have systematically stolen, and sold, Banksy's illegally painted works.<sup>40</sup> Photographs of illegal graffiti are often published in art books and magazines—garnering a profit—without the permission from, recognition of, or remuneration to the artists.<sup>41</sup>

Commercial success is in high tension with the temporal nature of

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it's crazy." *Dorms*, ART CRIMES (2007), <http://www.graffiti.org/dorms/index.html> (reprinting an interview with graffiti artist DORMS).

<sup>34</sup> For example, a graffiti work painted on an unofficial free wall might still be illegal for purposes of analyzing the copyrightability of that work. See *infra* Parts IB(1) and IV(B).

<sup>35</sup> Both Haring and Basquiat painted illegally. For example, Haring illegally painted his iconic *Crack is Wack* mural, which has been subsequently restored with city funds. See Sewell Chan, *Haring's 'Crack Is Wack' Mural Is Being Restored*, N.Y. TIMES, Sept. 5, 2007, <http://cityroom.blogs.nytimes.com/2007/09/05/harings-crack-is-wack-mural-is-being-restored>.

Basquiat, ironically, would often paint copyright symbols into his illegally painted works. See LEONHARD EMMERLING, *BASQUIAT (BASIC ART)* 38 (2003).

<sup>36</sup> Interestingly, a recent graffiti art museum show has, in fact, spurred illegal graffiti in the area. See Randy Kennedy, *Street Art Show in Los Angeles Attracts Graffiti Nearby*, N.Y. TIMES, Apr. 15, 2011, <http://artsbeat.blogs.nytimes.com/2011/04/15/street-art-show-at-l-a-s-moca-attracts-graffiti-nearby>.

<sup>37</sup> See Alan Bamberger, *Art, Money, Shepard Fairey, Banksy and the Quest for Clarity*, ART BUSINESS, <http://www.artbusiness.com/osoqfairbank.html> (last visited Mar. 3, 2013). See also Jo Roberts, *Could Laneway Graffiti be Worth More than Your Average House?*, AGE, Jan. 16, 2008, [www.theage.com.au/articles/2008/01/15/1200159449775.html](http://www.theage.com.au/articles/2008/01/15/1200159449775.html).

<sup>38</sup> Fairey's "Hope" poster is quite valuable, see Laura Barton, *Hope - the Image That is Already an American Classic*, GUARDIAN, Nov. 9, 2008, <http://www.guardian.co.uk/artanddesign/2008/nov/10/barackobama-usa>, and is also the subject of a copyright suit, see Shelly Rosenfeld, *A Photo Finish? Copyright and Shepard Fairey's Use of a News Photo Image of the President*, 36 VT. L. REV. 355 (2011).

<sup>39</sup> See Robin Wilkey, *David Choe, Graffiti Artist, Set to Make \$200 Million in Facebook IPO*, HUFFINGTON POST, Feb. 3, 2012, [http://www.huffingtonpost.com/2012/02/02/david-choe-artist-facebook-stock\\_n\\_1251021.html](http://www.huffingtonpost.com/2012/02/02/david-choe-artist-facebook-stock_n_1251021.html).

<sup>40</sup> See Jo Roberts, *supra* note 37.

<sup>41</sup> See *Villa v. Pearson Educ., Inc.*, No. 03 C 3717, 2003 WL 22922178 (N.D. Ill. Dec. 9, 2003). See also David Gonzalez, *Walls of Art for Everyone, but Made by Not Just Anyone*, N.Y. TIMES, June 4, 2007, <http://www.nytimes.com/2007/06/04/nyregion/04citywide.html> (describing various disputes between graffiti artists and book authors, magazine publishers, and film crews).

graffiti and the core value of rebellion,<sup>42</sup> yet graffiti artists generally have a sense of ownership in their work, be it legally based or otherwise.<sup>43</sup> With increased profitability of graffiti as an art form has come increased appropriation, and graffiti artists have increasingly turned to IP laws for protection of ownership rights in their works.<sup>44</sup> Like Cantwo, in his swimsuit suit against the Spanish Synchronized Swimming team, the graffiti artists who bring legal action against appropriation of their work seek protection of *legally* painted works. IP infringement suits where the underlying material is *illegal* in nature do not exist in the American courts. Hence, illegal graffiti “i[s] probably the dumbest crime you can get involved in. Not only are you in danger of getting . . . fined and such, you don’t get any money out of it at all.”<sup>45</sup>

The dearth of graffiti infringement cases in American courts seems to go to the underlying nature and purposes of graffiti. Primary among the graffiti community is the core value of rebellion. Many illegal graffiti artists consider themselves apart from mainstream culture, especially the legal system that, pursuant to various local vandalism laws and graffiti eradication programs, is the nemesis of illegal graffiti. The same core value of rebellion may similarly discourage legal graffiti artists from seeking legal remedies. While legal graffiti artists do appear to have a full array of IP protections available for their work, graffiti-related copyright litigation barely exists on the books.<sup>46</sup> However, news reports and articles of graffiti-related copying or infringement can be found with a basic web search.<sup>47</sup> The takeaway is that legal graffiti artists do object to the copying and unauthorized use of their work, but do not, in large numbers, turn to the legal system for relief. Why do legal graffiti artists, even when legal remedies are available to them, choose not to use the legal system for the IP controversies that arise in the industry?<sup>48</sup> Again, the reasons probably

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<sup>42</sup> “[T]he artform loses it’s [sic] vitality when taken out of an illegal context.” *Shok1 Interview*, AMMO CITY (Feb. 21, 2005, 7:20 PM), [http://www.ammocity.com/artman/publish/article\\_202.shtml](http://www.ammocity.com/artman/publish/article_202.shtml) (showing questions and answers from an interview with graffiti artist SHOK1).

<sup>43</sup> Kent L. Norman, *Graffiti as Interface Objects*, UNIV. OF MD., <http://lap.umd.edu/graffiti> (last visited Mar. 3, 2013) (“*Intellectual Property Rights*: Graffiti artists have a sense of ownership of their work, though they rarely receive recognition or royalties for their work. However, there is no doubt a sense of pride and limited appreciation from a small group of friends who know the artist.”).

<sup>44</sup> See Gonzalez, *supra* note 41 (“Tats Cru and a dozen other similarly aggrieved artists have joined to seek a settlement from . . . a photographer who spent more than a decade shooting pictures of their work and included the photos in his book.”).

<sup>45</sup> Jeff Ferrell, *Crimes of Style: Urban Graffiti and the Politics of Criminality* 175 (1996) (quoting graffiti artist EYE SIX).

<sup>46</sup> For example, a Westlaw search through all state and federal cases for the term “graffiti” within 100 words of the term “copyright” only produces five relevant documents.

<sup>47</sup> For example, a Google search for “Graffiti Copyright” produces numerous articles and blogs describing disputes between graffiti artists and alleged infringers.

<sup>48</sup> For example, the aggrieved artists discussed by Gonzalez, *supra* note 41, do not seem to have submitted a legal complaint, and certainly never proceeded to trial. However, “[a]s a result of the

go to the rebellious nature and origins of graffiti culture as a whole.

B. *Intellectual Property Law's Uncertain Purview as Applied to Graffiti*

1. Copyright

Copyright is a form of legal protection available to authors of original works fixed in a tangible medium, and it conveys exclusive rights to reproduction, distribution, display, and preparation of derivative works.<sup>49</sup> Copyright protects the expression of ideas, not ideas alone.<sup>50</sup> Extending ownership to expressions of ideas grants rights to intangible things, or “ideal objects”, that are “distinguished from the material substrata in which they are instantiated.”<sup>51</sup> Thus, while a person may own a book, they do not necessarily own the writing within the book.<sup>52</sup> This creates a tension between tangible and intangible property where the owner of tangible property, a book, is limited in their ownership of that book—they can use, sell, or destroy the tangible property, but they cannot reproduce the writing within.

Some tension exists also in the underlying theory of copyright versus tangible property rights. Fundamentally, tangible property rights are rooted both in scarcity and in an owner's ability to benefit from the positive externalities associated with a scarce resource.<sup>53</sup> Intellectual property rights, on the other hand, do not arise out of the scarcity of “ideal objects” (which are non-rivalrous and can be consumed by many users simultaneously and reproduced at a nominal cost); instead, they are a creation of law.<sup>54</sup> So, by restricting the use of original expressions, copyright artificially creates a scarcity of the intangible property thus protected.<sup>55</sup> Despite this legal fiction of scarcity,

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artists' complaints, the University Press of Mississippi, the publisher, removed the book from its catalog a month after its release last year.” *Id.*

<sup>49</sup> See 17 U.S.C. §§ 101, 106 (2006).

<sup>50</sup> See *id.* § 102(b).

<sup>51</sup> Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817, 818 (1990). Also, “[IP] may be defined as embracing rights to novel ideas as contained in tangible products of cognitive effort.” Dale A. Nance, *Foreword: Owning Ideas*, 13 HARV. J.L. & PUB. POL'Y 757, 757 (1990).

<sup>52</sup> “Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.” 17 U.S.C. § 202. Thus, while a building owner may own a wall, they do not necessarily own the copyright to a mural on that wall.

<sup>53</sup> See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

<sup>54</sup> See N. Stephan Kinsella, *Against Intellectual Property*, 15 J. LIBERTARIAN STUD. 1, 22–25 (2001).

<sup>55</sup> See *id.* IP consists of essentially free goods, “as their ability to produce definite effects is unlimited. They can become economic goods only if they are monopolized and their use is restricted. Any price paid for [a piece of IP] is always a monopoly price. It is immaterial whether the restriction of a [piece of IP's] use is made possible by institutional conditions—such as patents and copyright laws—or by the fact that [the IP] is kept secret and other people fail to

intellectual property can be simultaneously used by an unauthorized appropriator and the true owner.<sup>56</sup> Some products, such as computer software, in fact increase in value with additional users.<sup>57</sup> Increases in value commensurate with increases in use are called “network effects.”<sup>58</sup>

A copyright automatically comes into existence when the work is “fixed” in a “tangible medium of expression.”<sup>59</sup> Thus, while a copyright may be registered with the U.S. Copyright Office<sup>60</sup> to obtain legal advantages—such as evidentiary proof of copyright ownership, giving constructive notice of such ownership, and increased damage awards for unauthorized uses—a copyright need not be registered to exist. To accommodate public policy, copyright protection is somewhat compromised by the fair use doctrine, which allows copying for a narrow set of publicly beneficial uses.<sup>61</sup>

Legal graffiti art meets the above requirements and is copyrightable.<sup>62</sup> Illegal graffiti, however, is not copyrightable because, in common law, illegality precludes copyright protection.<sup>63</sup> The U.S. copyright statute does not say explicitly that illegal work is uncopyrightable, but it does foreclose copyright protection of compilations and derivative works that utilize copyrighted material unlawfully.<sup>64</sup> Additionally, courts and commentators have posited that illegal work is not subject to copyright protection because a work must be “original, meritorious, and *free from illegality* or immorality” to be fit for

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guess it.” Ludwig von Mises, *Human Action: A Treatise on Economics* 364 (4th rev. ed. 1996).

<sup>56</sup> For example, the copyright owner of a Damien Hirst original—that is the owner of the IP rights—can enjoy her artwork hanging on the mantle, while at the same time an appropriator can also enjoy the copyrighted image if he bought an identical, however unauthorized, print in Chinatown. The interloper’s unauthorized use of the property has not denied the Hirst’s owner of her own use, but has merely infringed on her *exclusive* use. Antithetically, the owner of the physical artwork itself—the tangible property—cannot admire the artwork if the physical piece itself hangs on another wall!

<sup>57</sup> For a comprehensive discussion of products and activities that increase in value with the increase in use and users, see S. J. Liebowitz & Stephen E. Margolis, *Network Externality: An Uncommon Tragedy*, 8 J. ECON. PERSPECTIVES 133 (1994).

<sup>58</sup> *Id.* at 135.

<sup>59</sup> 17 U.S.C. § 102(a) (2006).

<sup>60</sup> See *Copyright*, U.S. COPYRIGHT OFF., www.copyright.gov (last visited Mar. 3, 2013).

<sup>61</sup> The Fair Use Doctrine permits reproduction of works for criticism, comment, news reporting, teaching, scholarship, or research, and, to some extent, parody. See 17 U.S.C. § 107.

<sup>62</sup> Courts have recognized copyright in legally painted graffiti. See, e.g., *Murray Hill Publ’ns, Inc. v. ABC Commc’ns, Inc.*, 264 F.3d 622 (6th Cir. 2001); *Mager v. Brand New Sch.*, 78 U.S.P.Q. 2d 1389 (S.D.N.Y. 2004); *Tracy v. Skate Key, Inc.*, 697 F.Supp. 748 (S.D.N.Y. 1988).

<sup>63</sup> However, reasonable minds may disagree. Compare *Stacie Sandifer, Unauthorized and Unsolicited: Is Graffiti Copyrightable Visual Communication?*, 12 J.F.K. U. L. Rev. 141 (2009) (finding that copyright protection exists for illegal graffiti) with *Danwill Schwender, Promotion of the Arts: An Argument for Limited Copyright Protection of Illegal Graffiti*, 55 J. Copyright Soc’y U.S.A. 257 (2008) (finding that illegality precludes copyright).

<sup>64</sup> See 17 U.S.C. § 103. Section 103 is the only place in the copyright statute that mentions illegality. Unlawful use of preexisting work bars copyright protection of a derivative work.

copyright.<sup>65</sup> The basis for this requirement, beyond the requirements provided in the copyright statute, is that no one should profit from her wrongs.<sup>66</sup> However, the assertion that illegal graffiti is barred from copyright protection is an untested one, as no court has held directly on the legality requirement vis-à-vis graffiti art.<sup>67</sup> The assertion may remain untested because illegal graffiti artists do not pursue—and are unlikely to pursue—copyright infringement actions.<sup>68</sup>

## 2. Visual Artists Rights Act

Copyright ownership can be conveyed from the creator of the work to another, the result being that an author may not always own the copyrights in their own work. However, the Visual Artists Rights Act (“VARA”) grants moral rights to visual artists, independent of copyright ownership.<sup>69</sup> Moral rights grant artists limited rights to prevent others from treating their works in ways that could adversely affect the artists’ reputation.

Through VARA, the United States recognizes two moral rights: first, the right of “paternity” or “attribution” by which an artist may insist that her work be properly attributed to her.<sup>70</sup> Second, the right of “integrity” of the work of art, which grants an artist “the right . . . to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation,” and to prevent any destruction of the work, provided the work is of “recognized stature.”<sup>71</sup>

IP law’s tension with tangible property law is exemplified by the rights afforded by the Visual Artists Rights Act, which are, at times,

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<sup>65</sup> *Hoffman v. Le Traunik*, 209 F. 375, 379 (N.D.N.Y. 1913) (emphasis added); *accord Villa v. Pearson Educ., Inc.*, No. 03 C 3717, 2003 WL 22922178 (N.D. Ill. Dec. 9, 2003) (stating that copyright protection of graffiti “require[s] a determination of the legality of the circumstances under which the mural was created.”); *see also* Sherrese M. Smith, *Copyright Ownership and Transfer*, in PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES NO. 830, ADVANCED SEMINAR ON COPYRIGHT LAW 2005 at 29 (Practising Law Inst. (2005) (declaring “[w]orks created under illegal circumstances are not subject to copyright protection”). *But see Can Intellectual Property Law Regulate Behavior? A “Modest Proposal” for Weakening Unclean Hands*, 113 Harv. L. Rev. 1503, 1505–07 (2000) [hereinafter *Can Intellectual Property Law Regulate Behavior?*].

<sup>66</sup> *See Playboy Enters., Inc. v. Chuckleberry Publ’g, Inc.*, 486 F. Supp. 414, 435 (S.D.N.Y. 1980) (indicating that unclean hands doctrine applies “when a plaintiff . . . has acted so improperly with respect to the controversy at bar that the public interest in punishing the plaintiff outweighs the need to prevent defendant’s . . . conduct”).

<sup>67</sup> In *Villa*, 2003 WL 22922178, the court articulates that legality is determinative in copyright protection of graffiti; however, the court’s assertion is incidental to the holding, and thus is dicta.

<sup>68</sup> *See supra* Part IA.

<sup>69</sup> *See* Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2006).

<sup>70</sup> *See id.* § 106A(a)(1).

<sup>71</sup> *Id.* § 106A(a)(3)(A)–(B). “Recognized stature” is not defined by the statute, a fact that has led to litigation. *See, e.g., Pollara v. Seymour*, 344 F.3d 265 (2d Cir. 2003); *English v. BFC & R E. 11th St. LLC*, No. 97 Civ. 7446, 1997 WL 746444 (S.D.N.Y. 1997); *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994), *rev’d on other grounds*, 71 F.3d 77 (2d Cir. 1995).

antithetical to the basic tenets of property law. For example, artists of corporate artworks—such as murals and sculptures attached to corporate office buildings—have brought suits when remodeling plans of those buildings threaten the integrity of their work. This litigation is especially typical of murals, which are generally painted directly on a building wall in such a way that removal of the mural is impossible without complete destruction. VARA expressly provides that its protections are “subject to the limitations set forth in section 113(d),”<sup>72</sup> which protects a real property owner’s rights to improve, renovate, or raze their property by declining copyright protection for any “work of visual art [that] has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work.”<sup>73</sup> In this way, VARA defers to the traditional destruction rights of real property owners. A building owner can still restore, renovate, or raze her building even if murals cover its walls.

Legal graffiti artists are protected by VARA, subject to the § 113(d) limitations mentioned above.<sup>74</sup> Illegal graffiti artists, however, are not protected by VARA because illegality precludes VARA protection.<sup>75</sup> In *English v. BFC & R E. 11th St. LLC*,<sup>76</sup> the District Court for the Southern District of New York considered the issue of whether a community garden could be a work of “recognized stature” and therefore protected from destruction under VARA.<sup>77</sup> The court never reached a decision on the issue, however. Instead, the court dismissed the complaint, holding that VARA’s moral rights did not pertain because the garden was created without the owner’s consent and was therefore illegal.<sup>78</sup> The *English* court relied on *Botello v. Shell Oil Co.*,<sup>79</sup> wherein a California court noted, in dicta, that California’s moral rights statute applies only to art that is placed with the permission of the building owner, which “obviously does not apply to graffiti.”<sup>80</sup> Fearing that street artists could freeze development of vacant lots by placing artwork there without permission, an outcome that would undercut VARA’s deference to the traditional interests of real property owners, the *English* court declined to extend moral rights to illegally placed

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<sup>72</sup> 17 U.S.C. § 106A(a)(3).

<sup>73</sup> See *id.* § 113(d)(1)(A).

<sup>74</sup> See Michelle Bougdanos, *The Visual Artists Rights Act and Its Application to Graffiti Murals: Whose Wall Is It Anyway?*, 18 N.Y.L. SCH. J. HUM. RTS. 549 (2002).

<sup>75</sup> The same unclean hands argument—that one should not benefit from his crimes—could apply here, although the limited doctrine of unclean hands, at the time of this writing, has not been raised as a defense in VARA litigation.

<sup>76</sup> 1997 WL 746444.

<sup>77</sup> See *id.*

<sup>78</sup> See *id.*

<sup>79</sup> 280 Cal. Rptr. 535 (Ct. App. 1991).

<sup>80</sup> *Id.* at 537 n.2.

artwork.

## II. IN THE PENUMBRA OF IP LAW, WHAT IS GRAFFITI TO DO?

Since graffiti art is marketable and culturally valuable, yet vulnerable to unauthorized appropriation and destruction, graffiti art requires protection in the vein of that offered by copyright law and VARA. However, for the reasons mentioned above, illegal graffiti art is precluded from those protections. What incentive generating solutions, then, could ensure the continued creation of graffiti and other street art? Of the three proposals that follow, the first two are formal solutions; the third, and the most preferable, is an informal solution.

### A. *Common Law Solution:*

One solution would be for courts, taking a cue from obscenity jurisprudence, to adjust their presumptions when ruling on illegal graffiti. American courts have displayed a spectrum of approaches when adjudging IP actions regarding obscene or immoral works. One approach has been to deny IP protections in obscene or immoral works, even if the statutory requirements are met.<sup>81</sup> The opposite approach is to allow IP protections despite immoral or obscene content because the content of the work is not a requirement or consideration enumerated in the copyright statute.<sup>82</sup> A middle approach is to recognize *thin* IP protections for immoral or obscene works where an IP right is recognized, but where enforcement of those rights is restricted by public policy.<sup>83</sup>

The first approach in the obscenity spectrum, as applied to illegal graffiti art, would mean that illegal graffiti art would be excluded from IP protections regardless of whether the statutory requirements are met. This is, in fact, how courts currently approach illegal graffiti.<sup>84</sup>

The opposite, fully permissive approach would recognize IP rights in all illegal graffiti that meets statutory requirements. Such a permissive approach would undermine expectations of real property owners and might create perverse incentives to paint illegally, thus collaterally undermining municipal trespass and vandalism laws. For

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<sup>81</sup> See, e.g., *Hoffman v. Le Traunik*, 209 F. 375, 379 (N.D.N.Y. 1913).

<sup>82</sup> See *Mitchell Bros. Film Grp. v. Cinema Adult Theater*, 604 F.2d 852, 855 (5th Cir. 1979) (“Congress has concluded that the constitutional purpose of its copyright power . . . is best served by allowing all creative works (in a copyrightable format) to be accorded copyright protection regardless of subject matter or content.”).

<sup>83</sup> See *Devils Films, Inc. v. Nectar Video*, 29 F. Supp. 2d 174, 176 (S.D.N.Y. 1998) (“[T]he strong public policy against the distribution of obscene material compels the conclusion that the Court should not exercise its equitable powers to benefit plaintiff.”).

<sup>84</sup> See *Villa v. Pearson Educ., Inc.*, No. 03 C 3717, 2003 WL 22922178 (N.D. Ill. Dec. 9, 2003); *supra* Part IB (discussing *English v. BFC & R E. 11th St. LLC*, No. 97 Civ. 7446, 1997 WL 746444 (S.D.N.Y. 1997)).

these reasons, courts are unlikely to extend full panoply of IP protections to illegal graffiti art.

The middle approach would recognize some IP rights in illegally painted works but would limit enforcement of those rights for public policy reasons. This reasonable approach seems the most tenable: It would provide some incentive for graffiti artists to continue their creative expression, but it would defer to the rights of property owners and real estate developers and would maintain vandalism laws' deterrent effect. However, courts are not likely to extend this middle approach to illegal graffiti because of a general judicial distaste for vandalism<sup>85</sup> and the weight of precedent holding otherwise.<sup>86</sup>

#### B. Legislative Solutions and Informal Alternatives:

Another solution would be to extend statutory IP protections to all graffiti, despite legality issues, thus enlarging mainstream copyright law to cover illegal graffiti.<sup>87</sup> One scholar advocates, "illegal graffiti is an important form of art deserving the same copyright protection as similar artistic formats," and thus the Copyright Act should be amended to provide "graffiti artists with limited copyright protection."<sup>88</sup> This amendment to the Copyright Act would make explicit that legality is *not* a prerequisite to copyright protection.<sup>89</sup> Such an amendment would prevent unauthorized users of illegal graffiti from calling illegality as a defense to their appropriations, but should not limit the rights of real property owners and should not collaterally invalidate criminal trespass and vandalism laws that prohibit graffiti.

Under VARA, such an amendment to the copyright statute would also extend some "limited" moral rights of authorship and integrity to artists of illegally painted work.<sup>90</sup> "Such a statute would allow graffiti artists to begin gaining recognition for their work as well as financial

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<sup>85</sup> Graffiti is consistently identified with gang activity, violence, and anti-social criminal behavior. *See, e.g.*, *Bd. of Educ. of Oak Park v. Nathan R. ex rel. Richard R.*, 199 F.3d 377 (7th Cir. 2000); *People v. Lugo*, No. G044200, 2012 WL 268536 (Cal. Ct. App. 2012); *Pahno v. Commonwealth*, No. 2308-06-4, 2008 WL 1782370 (Va. Ct. App. 2008); *Sherwin-Williams Co. v. City & Cnty. of S.F.*, 857 F.Supp. 1355, 1359 (N.D. Cal. 1994).

<sup>86</sup> The few American courts that have discussed illegal graffiti and copyright have all held that IP protections are barred by illegality. *See Villa*, 2003 WL 22922178; *English*, 1997 WL 746444.

<sup>87</sup> *See Schwender*, *supra* note 63. For a method offered to extend VARA protections to graffiti artists see Bougdanos, *supra* note 74 at 573 (advocating that the communal importance of graffiti murals should fulfill VARA's "recognized stature" requirement, but without any discussion of the legal/illegal distinction).

<sup>88</sup> Schwender, *supra* note 63, at 257, 277.

<sup>89</sup> *See id.* at 277.

<sup>90</sup> *Id.* These moral rights would be "limited" because the interests of property owners—who in these illegal graffiti cases are victims of criminal vandalism—would trump. Additionally, since graffiti is often created anonymously, or under a pseudonym, there would need to be some exception for a good-faith, but ultimately unsuccessful, search for the author of a piece of illegal graffiti. A party should not be held liable for infringing the moral rights of an artist who cannot be found. *See id.*

rewards.”<sup>91</sup> Ultimately, this solution calls for Congress to “explicitly extend copyright protection to illegal graffiti,” while still “limit[ing] moral rights to protect real property.”<sup>92</sup>

This straightforward solution, in terms of practicality, is inadequate. First, it primarily offers economic protection, yet of all the concerns of illegal graffiti artists, protection of moral rights is paramount. Graffiti artists, animated by the core values of fame and artistic expression, are interested in protecting their image, making sure their pieces are credited to them, and protecting their work from premature destruction, and are less troubled with profiting from their work.<sup>93</sup>

Second, extending IP to illegal graffiti is unlikely to pass muster among federal, state, and local legislators. A bill enlarging copyright protections to include illegal graffiti would be unpopular among voting (and vandalism-adverse) property owners, and hence, among legislators. A legitimate fear exists that such an IP bill would promote illegal graffiti, spurning acts of vandalism, and therefore be collaterally in tension with trespass, nuisance, and vandalism laws already in place.

Finally, this solution fails to consider the desires of the illegal graffiti community and their amenability to mainstream protections and enforcement.<sup>94</sup> One of the core values of graffiti is rebellion. Rebellion counsels an illegal graffiti artist, regardless of de jure entitlements, against seeking registration of IP rights or relief from infringement from

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<sup>91</sup> *Id.* at 278.

<sup>92</sup> *Id.* at 282.

<sup>93</sup> See Gonzalez, *supra* note 41 (graffiti artist upset over a book featuring unauthorized photographs of their work because, among other reasons, the photos were “misidentified, misinterpreted or misattributed”); see also Jen Graves, *Amazon, Please Do Right by These Artists*, STRANGER, June 10, 2010, <http://www.thestranger.com/seattle/in-art-news/Content?oid=4234325> (impeaching Amazon to credit the street artists responsible for a number of artworks displayed, without the permission of the artists, at Amazon’s corporate headquarters). This is not to suggest that illegal graffiti artists have *no* interest in financial compensation. On the contrary, nearly all artists would like to profit from their work and are especially incensed when others profit from their work while they cannot. The point here is that protection of financial interests, combined however with mere limited protection of attribution rights, is an insufficient solution for illegal graffiti artists.

<sup>94</sup> For a compelling argument that the legal system should recognize the artistic and societal value of graffiti art, see Lori L. Hanesworth, *Are They Graffiti Artists or Vandals? Should They Be Able or Caned?: A Look at the Latest Legislative Attempts to Eradicate Graffiti*, 6 DEPAUL-LCA J. ART & ENT. L. 225, 235 (1996) (“No program or law will provide an effective solution to unwanted graffiti unless it accounts for [the fact that murals and pieces are a form of artistic expression].”). Hanesworth writes about criminal law, however, not IP law. Her argument is that criminal trespass and vandalism can be more effectively deterred if the legal system recognizes the value of graffiti art and enacts laws with this value in mind—for example, relaxing prohibitions against painting on public and abandoned property. The wisdom of Hanesworth’s inclusive solution does not extend to the IP context because criminal law is not IP law. While criminal vandalism laws are laws that are applied *against* graffiti artists, despite their desire or interest in the legal system, IP law requires interested parties to seek out its protections, to initiate its procedures, and to participate in its proceedings.

a governmental agency or a court of law. Another core value of graffiti is power (power over competing artists, over the urban landscape, and over society in general), which suggests that illegal graffiti artists are more likely to engage in self-help practices to resolve their “beefs” than they are to engage legal procedures.

Amending the copyright statute to apply to illegal graffiti is an inadequate solution on theoretical grounds as well. The American copyright regime is based on economic incentives—the grant of copyright is a form of economic inducement for works to be created and distributed to the public where the creator is assured that they, if anyone, will profit from the work and control the work.<sup>95</sup> However, graffiti writers do not generally paint for economic reasons: “You don’t get into graffiti to make money, in fact you know you are going to lose money in the long run (through paint, supplies and fines).”<sup>96</sup> To some extent, the economic incentives prescribed by the copyright statute would be lost on illegal graffiti artists who create, instead, for non-monetary benefits, artistic expression, and recognition and respect of their peers. The latter is a reward controlled by the group, and thus the mechanisms within graffiti culture for issuing and withholding recognition and respect are powerfully normative.<sup>97</sup>

The alternative solution—one outside de jure law—is that graffiti artists can use community norms, or custom, to protect their IP.<sup>98</sup> Unlike the legal-based solutions discussed above, custom-based solutions are simple, affordable and accessible, and are, in fact, currently practiced by members of the graffiti community, as shown in the next part. As the storied law and norms scholar Robert Ellickson found in rural California, so too in urban New York, we will find “order without law,”<sup>99</sup> or as Robert Merges found in the public domain of the Internet, “order despite law.”<sup>100</sup>

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<sup>95</sup> See, e.g., William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989); Ejan Mackaay, *Economic Incentives in Markets for Information and Innovation*, 13 HARV. J.L. & PUB. POL’Y 867 (1990).

<sup>96</sup> Susan Farrell, *Graffiti Q & A, ART CRIMES* (1994), [http://www.graffiti.org/faq/graffiti\\_questions.html](http://www.graffiti.org/faq/graffiti_questions.html) (showing a questions and answers session with Graffiti artist SCHMOO).

<sup>97</sup> See *infra* Part IIIB.

<sup>98</sup> See generally ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (extolling the preference and appropriateness of custom-based enforcement in some communities).

<sup>99</sup> See *id.*

<sup>100</sup> Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183, 203 (2004).

### III. BOOTS ON THE GROUND: IN THE ABSENCE OF DE JURE IP PROTECTIONS, CUSTOM RULES!

*There are set rules, standards, and practices which have been followed and customized since [graffiti's] birth.*

– TASAR 32<sup>101</sup>

#### A. *Graffiti Through the Lens of Law and Norms Methodology*

First, some taxonomy: the difference between laws and norms is that laws refer to mandates that are government-based (or formal), while norms refer to mandates that are community-based (or informal). Both are rules, in that a rule is an accepted standard that determines behavior. Rules can be substantive—dictating primary behavior and distributing entitlements and rights—or can be remedial—determining the consequences for deviation from the substantive rules.<sup>102</sup>

Laws and norms often exist concurrently, both applying to the same specific behavior, situation, or eventuality.<sup>103</sup> Sometimes community members are aware of the distinction between the applicable law and related community norms, but often, community members are mistaken about, or ignorant of, formal laws.<sup>104</sup> One thing is constant, however: When facing problems, people generally prefer simple, affordable, and accessible solutions over complex, expensive, and restricted ones.<sup>105</sup>

Cooperation among a group with loosely similar objectives and values should be expected. Game theory predicts that, given repeated plays, cooperation will be the most profitable long-term strategy for groups whose members are engaged in similar pursuits.<sup>106</sup> Empirically based law and norms literature bolsters the game theory hypothesis and finds that close-knit groups, in an attempt to efficiently maximize

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<sup>101</sup> Article by Graffiti artist TASAR 32, ART CRIMES (Feb. 1998), <http://www.graffiti.org/faq/tilt.html>.

<sup>102</sup> See Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67 (1987). Although this Note only discusses substantive and remedial rules, Ellickson's taxonomy actually consists of five types of rules: (1) substantive rules; (2) remedial rules; (3) procedural rules; (4) constitutive rules; and (5) controller-selecting rules. See *id.* at 77–80.

<sup>103</sup> “[L]aw and norms do not generally operate in separate spheres. Rather, they typically operate either to reinforce or to subvert each other.” Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77, 84 (1999).

<sup>104</sup> See Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, *supra* note 102.

<sup>105</sup> See *id.* The deterrent effect of the high cost of litigation cannot be downplayed. Many groups rely on community norms because transaction costs—namely legal fees—are just too high. “[C]ustom is really a proxy for the creation of voluntary markets in a low transaction-costs environment.” Epstein, *supra* note 14, at 230.

<sup>106</sup> See ROBERT M. AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

general welfare, develop informal rules either overriding, or in the absence of, formal laws.<sup>107</sup> Thus, among a disparate array of communities—among them ranchers, lobstermen, woodsmen, and biomedical researchers—informal property regimes have evolved to allocate resources and coordinate activities where formal property rights are nonexistent or ineffective.<sup>108</sup> The law and norms methodology also applies to creative, IP-oriented communities, such as fashion design.<sup>109</sup>

The creative, IP-oriented groups in the law and norms literature exhibit some common traits: within these groups, for example, creation may be driven by something other than the exclusivity granted by copyright law; granting exclusivity may deter other creation; the benefits of free access and appropriation may exceed the burdens of diminished exclusivity; or creators may prefer to invest resources in creation rather than protection or enforcement.<sup>110</sup> These traits, which emphasize free access over exclusivity, are found in fashion, high cuisine, comedy, tattooing, and much user-created online content, all of which have been shown to thrive in the absence of de jure IP laws.<sup>111</sup>

Fashion designers, high cuisine chefs, comedians, and online user-generated content creators inhabit what Professors Kal Raustiala and Christopher Sprigman call intellectual property's "negative space",

<sup>107</sup> See generally ELLICKSON, *supra* note 98 (discussing ranchmen, whalers, and academics). Communities are "close-knit" when "informal power is broadly distributed among group members and the information pertinent to informal control circulates easily among them." *Id.* at 177. Therefore, in communities where individuals' dependence on one another makes reputation especially valuable, and talk of reputation (gossip) spreads easily, norms tend to promote efficient results. See *id.* at 180.

<sup>108</sup> See *id.* (documenting the activities of cattlemen in Shasta County, California); JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* (1988) (documenting cooperative activities of Maine lobstermen); Björn Vollan & Elinor Ostrom, *Cooperation and the Commons*, 330 *Science* 923 (Nov. 12, 2010) (documenting wood gatherers in sub-Saharan Africa); JOHN P. WALSH, CHARLENE CHO & WESLEY M. COHEN, *PATENTS, MATERIAL TRANSFERS AND ACCESS TO RESEARCH INPUTS IN BIOMEDICAL RESEARCH*, FINAL REPORT TO THE NATIONAL ACADEMY OF SCIENCES' COMMITTEE INTELLECTUAL PROPERTY RIGHTS IN GENOMIC AND PROTEIN-RELATED INVENTIONS (2005) (documenting the custom-based practices in bio-medical researchers).

<sup>109</sup> Fashion design is one of the most studied examples of a creative industry operating beyond the purview of de jure IP law. See, e.g., Lisa J. Hedrick, *Tearing Fashion Design Protection Apart at the Seams*, 65 *WASH. & LEE L. REV.* 215 (2008) (arguing *against* extending copyright protection to fashion design); C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 *STAN. L. REV.* 1147 (arguing for a limited right against design copying); Raustiala & Sprigman, *supra* note 13

<sup>110</sup> Rosenblatt, *supra* note 13, at 322. Furthermore, "IP's negative space encompasses those creative endeavors that do not require state-sanctioned monopolies . . . precisely because they exhibit positionality sufficiently strong that it provokes a constant stream of new innovation." Raustiala & Sprigman, *supra* note 13, at 1777.

<sup>111</sup> See Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 *ORG. SCI.* 187 (2008) (high cuisine); Merges, *supra* note 100 (online content); Raustiala & Sprigman, *supra* note 13 (fashion); Jennifer E. Rothman, *Custom, Comedy, and the Value of Dissent*, 95 *VA. L. REV. IN BRIEF* 19 (2009) (comedy); Aaron Perzanowski, *Intellectual Property Norms in the Tattoo Industry*, 98 *MINN. L. REV.* (forthcoming Feb. 2014)(tattoos).

which refers to areas and industries unregulated, or only partially regulated, by de jure IP law.<sup>112</sup> A spectrum of negative spaces exists where some industries rely on “extra-legal norms that echo intellectual property protection,” while other industries create “contractual schemes that alter the terms of intellectual property protection,” and still others “thrive without *any* intellectual property protection.”<sup>113</sup>

Groups dwell in IP's negative space either because IP law does not protect the creative activity of the industry or because applicable de jure IP law is poorly tailored or too expensive. For example, fashion designers operate in IP's negative space because copyright does not protect fashion designs.<sup>114</sup> Meanwhile, comedians, who can copyright their jokes, prefer their own tailor-made and inexpensive customs to de jure law.<sup>115</sup> Groups in IP's negative space generally evince a “culture of IP forbearance”<sup>116</sup> in that they value access over exclusivity, and engage in creative activity on account of first mover advantages, network effects, and positionality rather than economic incentives. The graffiti community displays many of the forgoing traits, values, and incentives, and is thus another industry that operates in IP law's “negative space.”<sup>117</sup>

The value of free access over exclusivity resonates with the core values of graffiti (fame, artistic expression, power, and rebellion).<sup>118</sup> Exclusivity, the economic incentive provided by copyright law, is less important among the group because graffiti artists create for fame, power, and rebellion,<sup>119</sup> all reasons other than the financial gain

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<sup>112</sup> See *supra* note 13.

<sup>113</sup> Rosenblatt, *supra* note 13, at 321. Rosenblatt outlines the taxonomy of IP's negative space: “This taxonomy includes three categories: (1) doctrinal no man's land, where creations fall through the cracks of IP protection; (2) areas of IP forbearance, in which creators could receive protection, but elect either not to seek protection or not to pursue infringers; and (3) use-based carve outs, in which lawmakers have exempted certain types of intellectual property use from liability.” *Id.* at 321–22. Illegal graffiti art falls within the first and second categories and legal graffiti falls within the second.

<sup>114</sup> See *id.* at 323–24.

<sup>115</sup> See Rothman, *Custom, Comedy, and the Value of Dissent*, *supra* note 111, at 20 (comedy is “a field where copyright law actually does apply . . . but is generally not utilized.”).

<sup>116</sup> Rosenblatt writes: “A culture of IP forbearance arises when influential creators (or intellectual property owners or controllers) would benefit more from leaving their works vulnerable to copying than they would from seeking license fees.” Rosenblatt, *supra* note 13 at 341–42.

<sup>117</sup> See *id.* Graffiti art seems at home in its IP negative space. A work is well suited to remain in IP's negative space where its “creators . . . operate without the assurance of traditional protection, but also they see themselves as benefitting in some way from the lack.” *Id.* at 336.

<sup>118</sup> See *Sherwin-Williams Co. v. City & Cnty. of S.F.*, 857 F.Supp. 1355, 1360–61 (N.D. Cal. 1994) (finding that the core values of graffiti are fame, artistic expression, power, and rebellion. Rebellion, specifically, “is achieved by writing graffiti because, in doing so, the writer violates conventional societal norms.”).

<sup>119</sup> Among graffiti artists, the impetus to paint comes from community forces rather than market forces. See Joshua Errett, *Street art battle; The fight to keep graffiti mural on Queen W.*, NOW TORONTO, Feb 6, 2011, <http://www.nowtoronto.com/art/story.cfm?content=179050> (Quoting graffiti artist MOTEL, “I paint for not only myself but for others to see”); MTN-World, *GRIS*:

provided by exclusivity.

Furthermore, granting exclusivity can undermine fame—if protecting a work means putting that work beyond the reach of potential copiers, many of who are members of the graffiti community<sup>120</sup>—and can undermine expression since graffiti style develops out of, and on top of, previous work.<sup>121</sup> Free access is more important to the group because gaining fame, by “getting up”,<sup>122</sup> requires putting work within free access of the public (graffiti is, by definition, public art). Furthermore, creative expression among graffiti artists requires constant reinvestment in innovation, pulling energy and resources away from protection and enforcement.<sup>123</sup> The core value of rebellion furthers graffiti’s culture of IP forbearance in that enlisting the legal system to settle a “beef” would be “selling out to the man.”<sup>124</sup>

Additionally, when there are strong network effects<sup>125</sup> or other first mover advantages, de jure IP protection may not only be superfluous, but may in fact hinder innovation.<sup>126</sup> Graffiti is an art form driven by first mover advantages: artists who first paint a hard-to-reach location, use a new medium, color, or technique, or innovate a new style or subject matter are rewarded with the fame of being first and the power and street-credit that comes from others’ emulation. In other words, graffiti artists seek first mover advantages and enjoy network effects when their work is widely received. Limiting imitation, or appropriation, of first-mover developments would, reciprocally, cut down on the advantage of being a first mover and would limit graffiti community incentives in innovation.

A high value given to positionality can further supplant de jure

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*Conversations Over A Bottle Of Wine*, Mar. 25, 2013 (quoting graffiti artist GRIS, “I paint for personal pleasure, and I like sharing it with my friends”).

<sup>120</sup> In graffiti, “imitation is the highest form of flattery.” *DirtyPilot.com Presents TKID170, CES & EAZ, WHATYOUWRITE*, June 20, 2011, <http://whatyouwrite.com/2011/06/20/dirtypilot-com-presents-tkid170-ces-eaz/> (extolling graffiti artist CES ONE as an innovator who has been “relentlessly knocked off by his peers and [has] influenced the new generation of graffiti writers”).

<sup>121</sup> Style is plastic and vertically collaborative. Sharing ideas furthers community, if not commercial interests, because “[i]nstead of cash, creators are rewarded with such intangibles as recognition, personal pride and the superior product that tends to result from collaborative creation.” Rosenblatt, *supra* note 13, at 330 (citing Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 *YALE L.J.* 273, 321–30 (2004)).

<sup>122</sup> Graffiti is based on recognition—on “getting up.” See *Sherwin-Williams*, 857 F.Supp. 1355.

<sup>123</sup> Protection of originality and enforcement against deviants is prominent in graffiti culture but is ultimately less important than creative expression and the evolution of one’s own personal style.

<sup>124</sup> As do other creative industries in IP’s negative space, graffiti artists “share an ethos of independence and even mild transgression: ‘We are bucking the establishment.’” Yet, “[i]mplicit is the assumption that the creator will not break stride with the norms of the community.” Rosenblatt, *supra* note 13, at 345–46.

<sup>125</sup> See *supra* Part IB(1).

<sup>126</sup> See Rosenblatt, *supra* note 13, at 348.

economic incentives. IP's negative space encapsulates industries that "exhibit positionality sufficiently strong that it provokes a constant stream of new innovation."<sup>127</sup> Graffiti, typified in the core values of fame and power (over the competition), gives high value to positionality, such that no other incentive-creating factors are needed to inspire creation and innovation. Graffiti artists "tag their name[s] upon the city streets in hopes of being recognized, respected,"<sup>128</sup> in order to "conquer and take over"<sup>129</sup> their urban environment.

Finally, graffiti inhabits IP's negative space because it must. Foreclosure from formal IP protections, due to illegality, has forced graffiti artists to develop an informal IP regime, one that has the benefit of being inexpensive and tailored to the needs and amenities of the graffiti community but with the limitation of not being enforceable with the weight of law.

B. *The Shape of Things: Custom-Based IP Norms Within the Graffiti Community*

A functioning norms-based IP system exists among illegal graffiti artists. Not only do graffiti artists speak explicitly about substantive "rules of graffiti," but graffiti artists conform their behavior to community expectations in accordance with remedial norms—for want of rewards or for fear of sanctions.<sup>130</sup>

1. *Behave: Informal Substantive Rules Within the Graffiti Community*

A number of community practices among graffiti artists, in the stead of de jure copyright law, serve to protect original and fixed graffiti works. Specifically, graffiti norms exist that limit copying, allow for fair use, and provide for a kind of notice or registration of work within the group. Other customs within the community protect the moral rights of graffiti artists. To the extent that these practices fall short of the protections offered by copyright law, graffiti art seems behooved by the creation-spurring effect of free appropriation.

i. Copyright-like Substantive Norms

Graffiti norms include a "no copying" custom that includes an originality requirement similar to that required in de jure copyright. An explicit tenant of graffiti art is that to gain respect and renown within the community, an artist must develop the artist's own individual style.

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<sup>127</sup> Raustiala & Sprigman, *supra* note 13, at 1777.

<sup>128</sup> Article by Graffiti artist TASAR 32, *supra* note 101.

<sup>129</sup> Aimstar, *EL SEXTO: Cuba's Next Graf King*, STARK LIFE (2011), <http://www.thestarklife.com/2011/11/03/el-sexto-cubas-graf-king>.

<sup>130</sup> However, the evidence here is of a limited, local, and anecdotal nature. A more in-depth, empirical study would help confirm the findings in this writing.

“[C]reating your own style is essential. . . . It is your own voice, your own look and it also says ‘I exist. . . check me out.’”<sup>131</sup>

This norm has the same effect as a copyright: when a graffiti artist fixes an original idea in a tangible form of expression—by painting a piece on a wall, for instance—that artist automatically gains rights to the expression. The graffiti artist has notified the world “I exist,” and has staked claim to the specific expression. Graffiti artists gain worth within the community by developing an individual style all their own, and “[t]he more original stiles [sic] you have the better you are.”<sup>132</sup> Artists may only utilize another’s style within prescribed, permissible limits. Those who exceed this limit make themselves vulnerable to community-based enforcement, as discussed below.

Graffiti custom also has a mechanism similar to the fair use doctrine in copyright law. Graffiti, as a vertically integrated art form, encourages “creating new ideas [by] expanding on [old ideas] while paying homage to the old [ideas].”<sup>133</sup> Graffiti artists recognize that new forms of expression evolve out of older forms of expression. This evolution is natural and necessary, and modest or non-harmful appropriation is, far from usurpation of another’s work, actually homage to the older work. Here, imitation, within reason, is a sincere form of flattery.<sup>134</sup> Hence, like the policy considerations animating the fair use doctrine in copyright law, graffiti custom allows some copying of otherwise protected work for the benefit of the community as a whole.<sup>135</sup>

The graffiti custom of “*getting up*” has a similar effect as registration in copyright law. By painting pieces that reflect his individual style and regularly placing these pieces in prominent locations, a graffiti artist puts the graffiti world on notice of his ownership in his style of original expression. “Style don’t mean nothing if you don’t get up. If people don’t see your pieces, how are they gonna know if you’ve got style?”<sup>136</sup> As registration in copyright law provides constructive notice (a proof function) of copyright

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<sup>131</sup> *Priz and Stan*, ART CRIMES (2007), [http://www.graffiti.org/priz\\_stan/index.html](http://www.graffiti.org/priz_stan/index.html) (reprinting an interview with graffiti artist PRIZ).

<sup>132</sup> *Syte*, ART CRIMES (2005), <http://www.graffiti.org/syte/index.html> (reprinting an interview with graffiti artist SYTE).

<sup>133</sup> *Priz and Stan*, *supra* note 131.

<sup>134</sup> When asked to give advice to neophytes, one veteran artist replied, “learn the history, and hierarchy of your city . . . [but] don’t be afraid to take chances and do something different.” *Dorms*, *supra* note 33.

<sup>135</sup> This fair use analogue in graffiti custom also harkens copyright’s *de minimis* doctrine. *De minimis* doctrine holds that copyrighted material can be used in an unauthorized derivative work if a minimal amount of the original work is used. See 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 9:60 (2012).

<sup>136</sup> CASTLEMAN, *supra* note 27 (quoting graffiti artist TRACY 168).

ownership,<sup>137</sup> so too can registration (by “getting up”) provide an informal proof function in infringement matters among graffiti artists.

For example, a graffiti artist who only ever draws in a notebook may have some rights to the original expression contained therein, but infringement will be harder to prove since infringement requires proof of access, and access to artwork in a personal notebook will be less than access to artwork on a public wall.<sup>138</sup>

## ii. VARA-like Substantive Norms

Certain mechanisms within the graffiti community serve the same moral rights-preserving function for graffiti artists, as does VARA for mainstream artists. First, the right to attribution is inherent in the nature of graffiti. Graffiti artists, for the most part, paint their pseudonyms, albeit in a wildly abstract style. To clear any confusion as to the author of a piece, however, artists generally sign their work in a more legible tag style. Through this double signature of graffiti pieces—the piece itself and the tag—the author of the piece is assured attribution of her work.

Second, graffiti artists have certain customs that ensure the integrity of their work. All graffiti art is, to some extent, transitory and nearly every graffiti piece will eventually be painted over or buffed. Nevertheless, graffiti artists follow a community norm that prohibits partial paint overs. If an artist wants to paint over another's work, she may do so if certain criteria are met (see directly below), but that artist may not simply add to the other's work;<sup>139</sup> they must paint over the existing piece entirely because “[i]f you are going over someone, you show some respect by covering their piece completely, don't leave parts of it hanging out.”<sup>140</sup> Thus, while a piece may be vulnerable to oversight destruction, it is safe from “distortion, mutilation, or other modification of that work which would be prejudicial to [the artist's] honor or reputation.”<sup>141</sup>

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<sup>137</sup> See 17 U.S.C. § 205(c) (2006) (“Recordation of a document in the Copyright Office gives all persons constructive notice.”).

<sup>138</sup> A copyright holder seeking relief can prove copying by showing both access to the work and substantial similarity of the allegedly infringing work to the copyrighted work. One of the benefits of registration is that registration makes proof of access a presumption that must be rebutted by the alleged infringer. See generally 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT Ch. 9 (2012).

<sup>139</sup> Although tagging on pieces is often deliberate disrespect, sometimes one can see a respectful tag, that is, one that is done neatly between the lines, usually near an outer edge, in an attempt to be part of this piece without disturbing the work.

<sup>140</sup> SteveWP, 6) *The Social Element, Comments on Gangs and Crew Dynamics of Graffiti (Text Cuts)*, GRAFFITI LA (Mar. 9, 2007), <http://graffitila.com/the-social-element-comments-on-gangs-and-crew-dynamics> (quoting graffiti artist SINER).

<sup>141</sup> 17 U.S.C. § 106A(a)(3)(A). The integrity custom is used as a sign of respect to other writers and avoids “beefs” between individual artists and graffiti crews. For example, Dash, the leader of a graffiti crew, describes a potential “beef,” where one of the relatively new graffiti crew

Finally, graffiti artists tend to preserve their peers' work from destruction if that work is of a "recognized stature."<sup>142</sup> Conforming graffiti artists do not arbitrarily paint over others' work, especially if that work is of high quality or the artist is well respected.<sup>143</sup> This "no write-over rule" gives a modicum of security in what is, by nature, a volatile and destructible art-form: graffiti artists know that if their work is of high enough quality and if their reputations are well regarded, the chances of their work being painted over are reduced. The existence of this no write-over rule protects works of "recognized stature" within the community. At the same time, the rule creates incentives for individual artists to work on the style, quality, and originality of their art and to adhere to the rule themselves, lest they invite destruction of their own work by gaining a bad reputation.

### iii. The Limitations of Substantive Norms

Graffiti norms, while effective, do not protect graffiti original expression and artists' moral rights to the full extent that copyright law and VARA do for similar works (legal murals, for example). Deviation from graffiti norms within the community is unavoidable given the size of the group, the relative youth of its members, and the high turnover rate among graffiti artists. Unauthorized copying abounds as "there will always be biters [infringers] at a ferocious rate."<sup>144</sup> And even the most luminary artists in the community must suffer infringement of their moral rights to attribution and integrity because "toys [disrespectful newcomers] will be toys."<sup>145</sup> Even so, unauthorized use operates to energize creation, rather than stifle new work. In the face of copying without permission, instead of pursuing sanctions against the copiers, "you have to bend and stretch the letters into different shapes and sizes to achieve [a new] expression."<sup>146</sup> Thus, when a graffiti artist suffers

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members went over another artist's piece, "and he burned it [did a superior piece], but left some of it hanging out . . . so then we had to make it up to [the other artist] by buffing a wall space for him to paint so there wouldn't be beef between our crews." By following community etiquette, in this example, Dash and his crew avoided conflict. SteveWP, *supra* note 140 (quoting graffiti artist ALOY).

<sup>142</sup> 17 U.S.C. § 106A(a)(3)(B).

<sup>143</sup> "It's toys only that bomb over a good piece, but, if it's a really fresh tag over a lame bubble throw-up or a fresh throw-up over a lame piece, that doesn't bother me." SteveWP, *supra* note 140 (quoting ALOY, a graffiti artist). Graffiti artists defer to a hierarchy of skill where a more proficient artist can paint over inferior work, but anyone who deviates from this custom is a "toy"—a demeaning term for phony, interloper, or neophyte. Additionally, there is a permissive hierarchy of graffiti styles: "There's these 'rules' in graffiti. They're pretty well known in the culture. A throwup can go over a signature, a piece over a throwup, etc." *Interview with OMEN, YVES LAROCHE GALERIE D'ART* (June 18, 2008), [http://www.yveslaroche.com/en/news\\_details.php?id=33&page=1#news](http://www.yveslaroche.com/en/news_details.php?id=33&page=1#news).

<sup>144</sup> *Priz and Stan*, *supra* note 131.

<sup>145</sup> *Interview with OMEN*, *supra* note 143.

<sup>146</sup> *Id.* SYTE puts it another way—when asked if beefs (in this context copying) are detrimental to the culture, he responded, "I think [beef] definitely pushes writers to get better because you

unauthorized copying of her work, she may “prefer to reinvest in creation and innovation rather than investing in protection.”<sup>147</sup>

## 2. *Or Else: Informal Remedial Rules Within the Graffiti Community*

Deviants from these established norms are faced with punishment administered by the other members in the community. Punishment can entail a community-wide withholding of rewards that the transgressor desires (such as camaraderie, information sharing, reputation, and “props”), ostracism, negative gossip within the community,<sup>148</sup> and/or violence.

The potency of remedial norms depends on the individual deviant. The more an individual needs a social reward controlled by the group, or fears a remedial action, the more that individual conforms. Community members who are unconcerned with social rewards—such as very high-status members (in graffiti, “kings”) or very low-status members (“toys”)—often conform less than other group members.<sup>149</sup>

Putting aside individuals at the far ends of the graffiti community spectrum, remedial norms—such as withholding rewards, gossip, and violence—generally seem to work. As a threshold issue, remedial norms work well because they are well known. A rule can be only as effective as it is certain.<sup>150</sup> Customs among graffiti artists vary by location; however, the most elemental norm—“[d]on’t cross anyone out unless you have a serious disagreement”<sup>151</sup>—is universally known as the “cardinal rule of graffiti.”<sup>152</sup> The customary rules of graffiti are so common that they exist online.<sup>153</sup>

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know heads are always checking your shit. Competition. . . . I think that beef here and there is healthy for the movement.” *Syte*, *supra* note 132.

<sup>147</sup> Rosenblatt, *supra* note 13, at 322.

<sup>148</sup> Negative gossip is a common enforcement technique among many groups in IP’s negative space. See ELLICKSON, *supra* note 98 (ranching); Fauchart & Hippel, *supra* note 111 (high cuisine); Dotan Oliar & Christopher Sprigman, *From Corn to Norms: How IP Entitlements Affect What Stand-Up Comedians Create*, 95 VA. L. REV. IN BRIEF 57 (2009) (comedy); Raustiala & Sprigman, *supra* note 13 (fashion).

<sup>149</sup> See J. Richard Hackman, *Group Influences on Individuals in Organizations*, in 3 HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY 199 (Marvin D. Dunnette & Leaetta M. Hough eds., 2d ed. 1992).

<sup>150</sup> See Rothman, *The Questionable Use of Custom*, *supra* note 14, at 1908 (“To have any value, a custom must be certain. To determine whether there is a clear custom, it must be determined that [1] the custom is uniformly recognized and supported, and that there are no contradictory or competing customs.”).

<sup>151</sup> *How to Get Respect as a Graffiti Artist*, WIKIHOW, <http://www.wikihow.com/Get-Respect-As-a-Graffiti-Artist> (last visited Mar. 3, 2013).

<sup>152</sup> JEFF CHANG, CAN’T STOP, WON’T STOP: A HISTORY OF THE HIP-HOP GENERATION 181 (Picador 2006) (quoting graffiti artist IZ).

<sup>153</sup> See *How to Get Respect as a Graffiti Artist*, *supra* note 151 (enumerating such core rules as “Don’t cross someone else’s art out. It’s disrespectful.” And “always use your own style. Don’t ever copy or even imitate.”).

### i. Positive Remedial Norms—“Props”

Part of the effectiveness of positive remedial norms—such as acceptance within the community—comes from the graffiti core value of fame. Graffiti artists seek renown among their peers. Thus, the group controls the allocation of positive rewards, and here those rewards are praise, respect, or “props.” “We [write graffiti] so we can get respect from other graf writers.”<sup>154</sup> If an artist deviates from accepted norms—for instance by “biting” another artist’s style—the community as a whole will withhold the reward of “props,” which, in turn, means that the deviant suffers a lack of respect from other graffiti artists, and this undermines one of the key reasons to paint in the first place. Granting respect is the main reward-based, or positive, remedial custom. The following customs are sanction-based.

### ii. Negative Remedial Norms – Gossip, Ostracism, and Violence

Negative gossip as a remedial norm derives power from the same core value of fame and has a similar effect to withholding rewards. If withholding rewards is a passive remedy, negative gossip is its active counterpart. If an artist deviates from customary norms—by painting over a respected artist’s work, for example—the group will gossip negatively about the deviant. Again, the deviant suffers a decrease in reputation, but here the decrease is more acute. “Obviously there’s gossipy drama and all that . . . I try to let it roll off my back, but you spend all that money and time piecing just to get dissed, it’s like ‘what the fuck?’”<sup>155</sup>

Ostracism as a remedial norm derives power because graffiti is a communal pursuit, and to that effect, many graffiti artists form groups or “crews.”<sup>156</sup> Membership in an elite graffiti crew is highly competitive. Besides the fame that may come from membership in a graffiti crew, such membership also provides style and technique mentoring, access to paint and other material resources, and safety in numbers from threats from police or rival artists. However, breaking the substantive rules may lead to the remedial norm of ostracism, where a deviant graffiti artist is rejected from their crew and excluded from the benefits of belonging to the group.

Violence is the most extreme remedial norm. If an artist deviates egregiously from the accepted norm or less severe remedies have proven ineffectual, the deviant will be subject to escalating amounts of

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<sup>154</sup> Susan Farrell, *Graffiti Q & A*, *supra* note 96 (showing a questions and answers session with graffiti artist CELTIC).

<sup>155</sup> *Syte*, *supra* note 132.

<sup>156</sup> A crew, according to graffiti artist T-KID, “is a unit of dudes who work together to achieve a goal: to get up and go all city.” MARTHA COOPER & HENRY CHALFANT, *SUBWAY ART* 50 (1984).

violence.<sup>157</sup> This violence may come as systematic destruction of the artist's work, vandalism of the artist's house or car, physical intimidation and beating, and, rarely, serious harm and even death. "NOWADAYS THEY EVEN WANT TO PULL OUT GUNS AND SHOOT U [sic]. . . . NEW YORK IS VERY DANGEROUS WHEN IT COMES TO BEEF SO I'M ALWAYS AWARE AND ALERT."<sup>158</sup> Threat of violence, unlike gossip and ostracism, evinces an effective punishment and deterrent from all potential deviants—even those at the ends of the status spectrum. To some extent, violence is an effective remedial norm against transgressors outside the graffiti community as well.

*C. Custom-Based Enforcement Against Transgressors Outside the Community*

In some ways, graffiti is economically exploited and artistically neutered in transactions with the outside community. Graffiti artist PRIZ opines, "[c]ommericalized graff is a generic, watered down, nonflammable art form . . . the rawness is lacking and is no longer highly toxic or lawless."<sup>159</sup> Moreover, "[i]f graff appears . . . in a nonthreatening manner, it is . . . questioned and discarded because the graffitist is docile and creates legal works," but when graffiti appears in a threatening manner, "the liberal majority demands an immediate lynching."<sup>160</sup>

Illegal graffiti artists face unauthorized use of their original expression and destruction of their pieces at the hands of transgressors within and without the graffiti community. However, enforcement against outsiders is a tougher order because norms-based IP systems are most effective in controlling behaviors when substantive and remedial norms "are valued (or disvalued) by the target person."<sup>161</sup> Individuals outside the graffiti community are less concerned with, and ultimately less affected by, graffiti norms. Thus, while an illegal graffiti artist may have custom-based recourse if his original work is copied or destroyed by a peer, if his work is used without permission by a corporation, not only does he have no legal remedy,<sup>162</sup> but the custom-based recourse may prove powerless against the latter threat. However, illegal graffiti artists do engage in some customary practices that are effective against unauthorized use from outside the community. And, where these

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<sup>157</sup> Violence, while rare, is a remedial norm among other groups as well. See *ACHESON*, *supra* note 111.

<sup>158</sup> *OvieOne*, *ART CRIMES* (2007), <http://www.graffiti.org/ovie/index.html> (reprinting an interview with graffiti artist OVIE).

<sup>159</sup> *Priz and Stan*, *supra* note 131.

<sup>160</sup> *Id.*

<sup>161</sup> *Hackman*, *supra* note 149.

<sup>162</sup> See *supra* Part IB.

customary practices fail, illegal graffiti art is not always harmed by, and may in fact benefit from, the unauthorized use.

As an example of grass-roots norms effective outside of the community, consider the Sony PSP marketing fiasco: In November 2005, Sony embarked on a guerilla ad campaign for its hand-held gaming system, the Sony PSP, by commissioning chalk drawings and posters in Philadelphia, New York, Chicago, and San Francisco. The chalk drawings and posters showed graffiti-style characters playing with oversized PSPs, and, notably, displayed no Sony or PSP logo or website. The campaign was met with near unanimous animosity by commentators: “corporate graffiti sucks . . . it’s exploitive . . . it’s fake . . . it’s deceptive . . . it is not positive brand association . . . neighborhoods don’t like it . . . it’s illegal.”<sup>163</sup> Members of the graffiti community also took poorly to Sony’s appropriation of the “authenticity of street art to promote a product”<sup>164</sup> and initiated a counter-campaign by painting over the ads and adding commentary, such as “advertising directed at your counter-culture,” “get out of my city,” and by changing Sony to “Fony.”<sup>165</sup> Ultimately, Sony’s ads drew a cease-and-desist letter from the city of Philadelphia, and Sony abandoned the campaign, seemingly with egg on its face.

To curb corporate appropriation, graffiti artists can also extend themselves, and the art form, into the mainstream on their own behalf. One graffiti artist, KAWS, published a mainstream book on graffiti that other artists found “exciting . . . as an example of the movement empowering itself rather than leaving its portrayal in the hands of insiders.”<sup>166</sup> Mainstream offerings made by (or with input from) graffiti artists often have more commercial appeal than similar offerings produced by outsiders.<sup>167</sup> This comes from the inherent “aura of authenticity” that comes with graffiti related merchandise produced by

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<sup>163</sup> Jake Dobkin, *Opinionist: Corporate Graffiti Sucks Balls*, GOTHAMIST (Nov. 20, 2005, 10:10 AM), [http://gothamist.com/2005/11/20/opinionist\\_corp.php](http://gothamist.com/2005/11/20/opinionist_corp.php); see also Ryan Singel, *Sony Draws Ire with PSP Graffiti*, WIRED, Dec. 5, 2005, <http://www.wired.com/culture/lifestyle/news/2005/12/69741> (“the guerrilla marketing gambit appears to be drawing scorn from some of the street-savvy hipsters it’s striving to win over.”). In comparison, Piers Fawks, a marketing blogger, was quoted in the article: “It’s a cheeky wink toward a savvy audience who are already familiar with the product. . . . It’s reflective of modern approach to marketing. The creative classes are sick of marketing when done badly or blandly, but when it’s done in (an) intelligent manner, we appreciate it.”).

<sup>164</sup> Dobkin, *supra* note 163.

<sup>165</sup> Singel, *supra* note 163. And my favorite: “I’ll ride a broompton bicycle / Or I’ll teabag a mime / Before I’ll give the Sony Corp / Another fucking dime. FU ~~Fats Crew~~ XLII.” Photo in *San Fran folks miffed at Sony graffiti advertising*, Adland (Dec. 5, 2005, 6:42 PM), <http://adland.tv/content/san-fran-folks-miffed-sony-graffiti-advertising>.

<sup>166</sup> *Shokl Interview*, *supra* note 42.

<sup>167</sup> See *Priz and Stan*, *supra* note 131 (when used by outsiders, graffiti is “almost comical in commercials and on the side of buses”).

actual graffiti artists.<sup>168</sup> Thus, graffiti artists can limit outside appropriation of their subculture by offering superior, or more authentic, graffiti related products—apparel, books, and videos.<sup>169</sup> The value in authenticity also encourages would-be appropriators from outside the graffiti community to seek input from graffiti artists in developing graffiti informed products—advertisements, video games, and album covers, for example—and to compensate those graffiti artists for their input.

Furthermore, and despite the grass-roots recourses illustrated above, graffiti art is not always harmed, but is in fact sometimes behooved, by mainstream appropriations in the same way that the art form is benefited by competition within the community.<sup>170</sup> Such unauthorized appropriation, to a certain extent, promotes creative expression because graffiti artists are more likely to invest in creation than protection and will endeavor to stay stylistically ahead of the appropriators.<sup>171</sup>

Also, in light of graffiti's core value of fame and power, "all publicity is good publicity." Publicity, or recognition, which is associated with the core value of fame, cuts against IP protective restrictions that limit the use of an artist's work. Graffiti is a community that is concerned with attribution—like chefs, software engineers, and fan fiction writers—rather than prohibition, and is therefore furthered by a fair amount of permissive, as long as attributed, use.

Finally, there may be no better way for a graffiti artist to wield power over her environment—one of the core pursuits of graffiti—than to have her artwork *taken in* by the mainstream. The allusion is to a Trojan Horse, of sorts, where the mainstream appropriates graffiti art for its own purposes, but, unwittingly, advances the interests of the graffiti artist and the art form. For example, consider a writer who has spent time, effort, and creative energy and risked physical harm and criminal consequences to "get up" all over their city. Imagine that one of her pieces was photographed, digitized, and incorporated into the

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<sup>168</sup> For example, Banksy's *Exit Through the Gift Shop* is the most successful graffiti film since *Wildstyle*. *Wildstyle* was created by outsiders but with close collaboration with the most prominent graffiti artists of the day.

<sup>169</sup> Note the financial success and graffiti community acceptance of the OBEY apparel brand, which incorporates graffiti aesthetics into much of its offering. The label was created by graffiti artist Shepard Fairey and has retained an element of authenticity and implied permission because of that fact.

<sup>170</sup> See *supra* Part III(B)(iii).

<sup>171</sup> This is the "piracy paradox" where free appropriation in a low-IP environment can actually increase creativity by imposing an appropriation curve, which producers must stay in front of. See Raustiala & Sprigman, *supra* note 13, at 1733 (finding that free copying in the fashion industry allows trends to develop, diffuse, and die quickly, leaving room for the "next new thing").

virtual world of the latest Tony Hawk video game. Suddenly that artist's work, through no additional work or risk of her own, is injected into the homes of millions of suburban families and into the common experience of their children. Such distribution would be a remarkable success in "*getting up*."<sup>172</sup>

Grass-roots action by those outside the law can have a normative, if not revolutionary, effect on mainstream law. For example, groups that violate legal property entitlements—through actions such as conversion, infringement, and trespass—may not always harm society with their actions, but may in fact spur legal innovation.<sup>173</sup> Ossification of property laws can cause property law to “fall out of step with the values of the community it serves.”<sup>174</sup> Property law, in allotting tangible and intangible entitlements, creates a status quo. By breaking those laws, or by developing and following customs outside of those laws, “property outlaws” offer a “concrete vision of their alternative conception of the law.”<sup>175</sup> The property outlaw therefore provides the legal system with a method to ascertain public commitment to the status quo, and can, by non-observance of the law, communicate how the status quo should be changed.<sup>176</sup>

It seems clear that the graffiti artists' retaliatory actions (such as in the case of the Sony ad campaign) can, to some extent, change the behavior of would-be unauthorized appropriators. But beyond these examples, what normative function should graffiti customs provide to mainstream IP law? Should the legal system formally recognize these practices of graffiti “property outlaws”?

#### IV. SO WHAT? TO WHAT EXTENT SHOULD GRAFFITI NORMS AFFECT MAINSTREAM LAW?

Illegal graffiti artists, as shown above, are not always harmed by their exclusion from the legal system and have developed various customary mechanisms to provide some amount of IP protection within the IP negative space in which they operate. The use of custom among

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<sup>172</sup> TATS Cru got into a beef with Jennifer Lopez over her Fiat commercial. See David Gonzalez, *Graffiti Muralists Reach Settlement in Case of Contentious Fiat 500 Commercial*, N.Y. Times, Dec. 2, 2011, <http://wheels.blogs.nytimes.com/2011/12/02/graffiti-muralists-reach-settlement-in-case-of-contentious-fiat-500-commercial/>. Yet despite the unauthorized use of their work, or more correctly *because* of that use, TATS Cru won the congratulations of their peers for being flashed all over television. See Tanyanika Samuels, *J.Lo Hits Another Speed Bump After Bronx Graffiti Legends TATS Cru Say Fiat Ad Uses Art Without Permission*, N.Y. Daily News, Nov. 29, 2011, [http://articles.nydailynews.com/2011-11-29/news/30456564\\_1\\_tats-cru-bronx-artists-doner](http://articles.nydailynews.com/2011-11-29/news/30456564_1_tats-cru-bronx-artists-doner).

<sup>173</sup> See PEÑALVER & KATYAL, *supra* note 15.

<sup>174</sup> *Id.* at 32.

<sup>175</sup> *Id.* at 33.

<sup>176</sup> *Id.* at 34 (“The importance of being able to conjure a concrete vision of alternative legal possibilities through the violation of property laws should not be underestimated.”).

graffiti artists should inform lawyers, judges, legislators, and legal scholars, not only in regards to the little graffiti-based litigation that already exists, but also in future litigation that deals with graffiti, street art, and outsider art in general. But to what extent should the legal community formally recognize graffiti artists' customary IP practices? To be clear, this is a similar, but importantly different, question than that asked in *supra* Part IIA (whether mainstream law should be *broadened* to cover illegal graffiti); here, the question is whether mainstream law should be *modified* to reflect graffiti artists' normative customs.

A. *Too Much: The Legal System Should Not Formally Incorporate Graffiti Norms*

Law and norms theory holds that social norms emerge and evolve to maximize welfare in the community that develops those norms. A practical extension of the law and norms theory asks how, and to what extent, de jure law should respond to social norms.<sup>177</sup> To that end, the legitimacy of community norms can be weighed on a number of factors: certainty of the norm; motivation behind the norm; applicability of the custom against the world; and policy implications of such an application.<sup>178</sup> In the case of illegal graffiti art, these factors balance against mainstream incorporation of graffiti norms.

“To have any value, a custom must be certain.”<sup>179</sup> This Note's description of graffiti norms, in *supra* Part III, suggests that there is some consistent application of norms within the graffiti community.<sup>180</sup> However, the examples of graffiti artists at the ends of the spectrum (“kings” and “toys,” respectively) who reject community norms, specifically those at the bottom of the spectrum who infringe “at a ferocious rate,”<sup>181</sup> are evidence that graffiti customs are not certain.<sup>182</sup> Moreover, “such power inequities in the . . . application of the norms raise red flags about the value of those customs.”<sup>183</sup> Thus, graffiti norms may be prevalent, but are hardly unanimously accepted or followed.

Additionally, the motivation and manner of development of graffiti norms cuts against mainstream recognition of those norms. Customary practices or norms that develop “with the express purpose of

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<sup>177</sup> See Henry E. Smith, *Ellickson's Extraordinary Look at the Ordinary*, 18 WILLIAM & MARY BILL OF RTS. LAW J. 207, 212 (2009).

<sup>178</sup> See Rothman, *Custom, Comedy, and the Value of Dissent*, *supra* note 111, at 22.

<sup>179</sup> *Id.*

<sup>180</sup> Although, admittedly, the empirical evidence in this Note is local and anecdotal in scope.

<sup>181</sup> *Priz and Stan*, *supra* note 131.

<sup>182</sup> See Rothman, *Custom, Comedy, and the Value of Dissent*, *supra* note 111, at 23 (finding that high profile rejections of community norms is evidence that the norms are not certain).

<sup>183</sup> *Id.*

formulating an aspirational set of practices” should be more readily accepted by the legal system than norms that develop for self-interested reasons. Graffiti norms are based, largely, in the pursuit of the core values of fame and rebellion. While artistic expression is also a basis for graffiti norms, and while the ultimate effect of graffiti norms is to increase creativity and peaceful productivity, graffiti norms can hardly be described as “aspirational”, and as such, “have little to offer courts or legislative bodies in interpreting or developing IP.”<sup>184</sup> Also, a custom generally should apply only against parties involved or represented in its development.<sup>185</sup> Graffiti norms seem to have developed entirely within the graffiti community and would thus be inequitable if recognized by the legal system and applied to infringers outside the graffiti community.

Moreover, graffiti norms would be awkward as applied to the world because of the substantive differences between graffiti customs and current IP laws and the negative policy implications of such an application. “There should always be an independent analysis of what the adoption of a particular custom would mean for IP owners and users going forward.”<sup>186</sup>

Mainstream adoption of graffiti customs would mean that illegal graffiti art would receive *de jure* protection although that protection would be adapted somewhat to reflect the customary practices of graffiti artists (i.e., allowing for more permissive copying, especially if the copy was by a party within the community or was used in a way that increased the fame of or respect for the underlying rights holder). The IP users who would be most affected, besides the graffiti artists themselves, would be producers of advertising, apparel, video games, and music. If graffiti norms were formally recognized, those mainstream industries would be burdened with conforming to a new, and uncertain, legal regime. While some amount of sensitivity and accommodation to the different IP needs of different media is legally efficient,<sup>187</sup> the *sui generis* jurisprudence that would result from mainstream incorporation of graffiti custom is antithetical to the intent of the copyright statute, which endeavors to protect all “writings” of “authors” without specifically legislating for every form of original expression.<sup>188</sup>

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<sup>184</sup> *Id.*

<sup>185</sup> *See id.*

<sup>186</sup> Rothman, *The Questionable Use of Custom*, *supra* note 14, at 1908.

<sup>187</sup> For example, originality standards in literature are different from those in photography, and for good reason.

<sup>188</sup> *See* 17 U.S.C. § 102 (2006) (which includes technology and media neutral language for the purpose of applying to all types of original expression uniformly). *But see* Kristin L. Black, *Crimes of Fashion: Is Imitation Truly the Sincerest Form of Flattery?*, 19 KAN. J.L. & PUB. POL’Y 505, 516–18 (2010) (nicely articulating the benefits of extending *sui generis* ‘copyright-

Perhaps the most persuasive argument against mainstream incorporation of graffiti customs is the same argument that (in *supra* Part IIA) made equivocal the solution of extending existing copyright protection to illegal graffiti. Namely, it is unlikely that courts or legislatures would modify existing copyright law to reflect graffiti norms due to graffiti's ties to vandalism, and it is also unlikely that a significant number of illegal graffiti artists would turn to the legal system—even if graffiti norms were formally recognized—due to the core value of rebellion. If *broadening* mainstream law seemed impracticable in Part IIA, certainly *modifying* mainstream law is impracticable here.

Given the unclear legitimacy of graffiti norms and graffiti's relatively comfortable existence in IP's negative space, formal incorporation of graffiti customs into mainstream law is not preferable or practicable. The existence of graffiti norms should not be dismissed, however.

B. *Just Right: The Legal System Should Acknowledge Graffiti Norms with Respect to Graffiti-Related Legislation and Litigation*

Graffiti art is a cultural and commercially valuable art form, and, as such, incentives should be developed to promote the continued creativity of graffiti artists. To that end, graffiti norms should be acknowledged and considered when graffiti-related IP legislation is passed or when a court considers a graffiti-related copyright claim. Such acknowledgement by the legal community, while well short of formal incorporation of graffiti custom, would increase incentives for graffiti artists to create. "Rather than denigrate custom, the wiser strategy is to develop clear rules that aid in the emergence and enforcement of voluntary markets."<sup>189</sup> Such a strategy would cut down confusion within the graffiti community regarding an artist's legal rights, could cut down on the instance of illegal graffiti, and would enable those graffiti artists who do pursue copyright actions via the legal system to bring more meritorious and efficient claims.

For example, since the legality of a graffiti work directly affects the copyrightability of that work, legislatures and courts could elucidate graffiti-related IP laws by clarifying the criminal laws that dictate which graffiti is legal versus which graffiti is illegal. Much confusion exists as to the location of, and permission associated with, "free walls."<sup>190</sup> Such confusion in the criminal law produces confusion in IP law and makes

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like" protection to fashion designs, as the Vessel Hull Act has done for boat hulls). As the copyright statute becomes increasingly befuddled by rapidly changing internet technology, could *sui generis* copyright protection be a trend of the future?

<sup>189</sup> Epstein, *supra* note 14, at 230.

<sup>190</sup> See *supra* Part IA.

lawful conformity difficult for would-be law abiding graffiti artists who wish to hold copyrights in their work. Unclear criminal laws—that cause unclear IP laws—produce a chilling effect on creativity (because risk-adverse artists will simply not paint if permission is unclear) and create a vacuum wherein informal rules fill in the blanks. But “clearer rules” about what property may and may not be painted and clearer de jure IP implications of those rules would allow graffiti artists to paint legally or illegally, as they choose, and to be confident that they hold a copyright in their legally painted work.<sup>191</sup> With clearer laws, those few graffiti artists who do choose to seek legal copyright protections could bring more effective infringement claims.

#### CONCLUSION

Some are skeptical of the use of custom in IP law.<sup>192</sup> Opponents of the use of custom in IP law suggest that the mainstream legal community should not recognize customary practices, and that industries that rely on the use of custom do so to the detriment of efficiency, productivity, and contrary to congress’ intentions.<sup>193</sup> However, existing graffiti norms demonstrate that norms-based IP systems necessarily and benevolently exist alongside de jure IP systems.

While law and norms scholarship is broad and deep, the discourse on IP’s negative space, especially regarding illegal, or quasi-legal industries, is at an early stage. Within illegal and quasi-legal IP concerned areas—including graffiti, DJ mash-ups, and online fan fiction<sup>194</sup>—custom may be more normative than mainstream law.

Many of the industries that follow informal rules in IP’s negative space, including graffiti, are culturally and commercially valid. To the extent that these industries’ informal rules promote creation and protect the interests of those who create, informal rules, customs, and norms should be appreciated by the mainstream legal community.

Whether, and to what extent, de jure IP law should formally recognize these community norms will be an important question going forward. How these “new property outlaws” will come to affect the legal system is still unclear,<sup>195</sup> but the presence of informal community

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<sup>191</sup> For example, a city government could set up a website that lists the free walls in the city, their locations, and any limitations to their use. Such a strategy would grant graffiti artists a voluntary choice to paint legally, and thus, secure copyright in their work.

<sup>192</sup> See Thomas G. Field, Jr., *From Custom to Law in Copyright*, 49 IDEA 125 (2008); see generally Rothman, *The Questionable Use Of Custom*, *supra* note 14.

<sup>193</sup> See Rothman, *The Questionable Use of Custom*, *supra* note 14.

<sup>194</sup> See Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869 (2009).

<sup>195</sup> See, e.g., Field, Jr., *supra* note 192; Merges, *supra* note 100; Horace E. Anderson, Jr., “Criminal Minded?”: *Mixtape DJs, the Piracy Paradox, and Lessons for the Recording Industry*, 76 TENN. L. REV. 111 (2008); Raustiala & Sprigman, *The Piracy Paradox Revisited*, *supra* note 14; Hetcher, *supra* note 194; Edward Lee, *Warming up to User-Generated Content*, 2008 U. ILL.

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norms continues to be significant to mainstream law. Thus, continued study of informal IP systems will further the aspirational goals enunciated in the IP clause: “to promote the Progress of Science and useful Arts.”<sup>196</sup>

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L. REV. 1459 (2008).

<sup>196</sup> U.S. Const. art. I, § 8, cl. 8.

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