

7-15-2022

Engaging With Outlaw Art

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Recommended Citation

Jonathan Barrett, *Engaging With Outlaw Art*, 21 Chi.-Kent J. Intell. Prop. 34 (2022).

Available at: <https://scholarship.kentlaw.iit.edu/ckjip/vol21/iss2/8>

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ENGAGING WITH OUTLAW ART

BY DR. JONATHAN BARRETT

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INTRODUCTION

Artists may infringe the law in pursuit of their artistic practice. Historically, some artworks have, for example, breached blasphemy,¹ obscenity,² sedition³ or public order laws.⁴ While such or similar breaches may still represent a quotidian issue for artists in authoritarian states,⁵ they tend to be a marginal concern in contemporary liberal democracies in which freedom of expression is a paramount value.⁶ Nevertheless, some contraventions of the law committed in the creation of artworks, such as arsonism, are likely to be unacceptable in any society.⁷ Art may, therefore, be created in numerous illegal ways, but this Article is principally concerned with commonplace and minor crimes against property, namely committing trespass in order to paint or write graffiti, and breaching road and other transport ordinances to create forms of tire art (smoke clouds and tire markings). Because affected artists work outside the law and typically have no practicable way of directly profiting from their practice in the market or preventing others from freeriding on their efforts, this Article refers to them as “outlaw artists” and to their creative practice as “outlaw art”.⁸

Frederick Pollack and Frederic Maitland identified outlaws as “certain classes of men who for their offences or their contumacy are deprived of some of those rights which their ‘lawful’ neighbours enjoy” and observed “[t]he outlaw’s life is very insecure ... Of every proprietary, possessory, contractual rights he is deprived.”⁹ It would constitute hyperbole to claim

1. For a discussion of blasphemy in liberal democracies, see Reid Mortensen, *Blasphemy in a Secular State: A Pardonable Sin?* 17(2) U.N.S.W.L.J. 409 (1994). New Zealand did not abolish the crime of blasphemous libel until 2019.

2. See JOHN HENRY MERRYMAN, ALBERT E. ELSEN & STEPHEN K. URICE, *LAW, ETHICS AND THE VISUAL ARTS* 679-80 (5 ed, 2007).

3. *Id.* at 706.

4. In 2015, “[a] Singapore court sentenced two Germans to nine months in prison and three strokes of the cane on Thursday after they pleaded guilty to breaking into a depot and spray-painting graffiti on a commuter train carriage.” See Rujun Shen, *Two Germans to be caned, jailed for Singapore train graffiti*, REUTERS (Mar. 5, 2015), <https://www.reuters.com/article/us-singapore-graffiti-sentence-idUSKBN0M10DK20150305>.

5. See e.g. Sophia Kishkovsky, *Pussy Riot members jailed over social media posts*, ART NEWSPAPER (Dec. 18, 2021), <https://www.theartnewspaper.com/2021/12/17/pussy-riot-members-jailed-for-social-media-posts>.

6. But cf. the tribulations of Robert Mapplethorpe, Andres Serrano, and other transgressive artists in the U.S. See e.g. KERSTIN MEY, *ART AND OBSCENITY* (2007).

7. Pyotr Pavlensky, whose artistic exploits include arsonism, has been prosecuted in both authoritarian Russia and liberal France. See e.g. Fernanda Eberstadt, *The Dangerous Art of Pyotr Pavlensky*, N.Y. TIMES (Jul. 11, 2019), <https://www.nytimes.com/2019/07/11/magazine/pyotr-pavlensky-art.html>.

8. “Outlaw art” is not synonymous with “outsider art”. Both sets of practitioners may be socially marginalized, but outsider art is not usually created illegally, even if some proponents are convicted criminals, and, to some extent, it has found a place in the market. See e.g. DAVID MACLAGAN, *OUTSIDER ART FROM THE MARGINS TO THE MARKETPLACE* (2009); DANIEL WOJCIK, *OUTSIDER ART: VISIONARY WORLDS AND TRAUMA* (2016).

9. See SIR FREDERICK POLLACK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* VOL 1 459-60 (1895).

that, say, a graffiti artist is an outlaw in the sense described by Pollack and Maitland.¹⁰ (In all other areas of their lives, they should enjoy the full rights of citizenship.) Nevertheless, graffiti artists are risk-takers in an age of health and safety, in which we are expected to engage in individualized risk management.¹¹ Relative permanence for graffiti artworks, for example, is only likely to be achieved when they are painted in the most inaccessible of places. Inaccessibility implies danger. Graffiti artists may also be exposed to other extraordinary hazards;¹² arrest;¹³ state-sanctioned violence;¹⁴ and, in extreme circumstances, vigilante killing.¹⁵ Furthermore, in practice, they are unable to enforce any legal interest that may hypothetically subsist in the artefacts they envisage and create. “Outlaw artist” is, then, a plausible identifier.

In a highly commodified and financialized art ecosphere, graffiti artists stand out as practitioners who engage in an illegal and commonly dangerous creative activity but rarely receive reward for their work, despite their contribution to the contemporary cityscape. In contrast to overtly entrepreneurial artists, such as Andy Warhol, Jeff Koons and Damien Hirst, graffiti artists, who are mostly anonymous, appear to engage in an artistic practice that lies beyond the influence of the market. Their ostensible gifting

10. Caravaggio presents as the prime example of an artist-outlaw. However, having been exiled from Rome for his involvement in homicide, he was able to pursue a lucrative practice in Naples and elsewhere. See SEBASTIAN SCHÜTZE, *CARAVAGGIO: THE COMPLETE WORKS* 239 (2017).

Arguably, so-called economic refugees, who are often detained in camps, are the closest contemporary comparator to the ancient outlaw. See GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 104-11 (1998).

11. See generally ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* (1992).

12. See Matthew Weaver & Kevin Rawlinson, *Tributes Paid to Three Graffiti Artists Killed by Train in South London* GUARDIAN, (Jun. 19, 2018), <https://www.theguardian.com/uk-news/2018/jun/19/tributes-graffiti-artists-killed-loughborough-junction-train-london> [<https://perma.cc/6N5Z-L9V2>]. Brian Cooke, a former board member of Transport for London, objected to the B.B.C.’s describing the killed men as “graffiti artists”, instead he called them “common scum and criminals who cost the railways millions and keep fares high”. *Id.*

13. Renown as an artist is no bar to arrest. See e.g. *Revok Arrested at LAX for Graffiti Vandalism*, HUFFINGTON POST, (Apr. 2, 2011), http://www.huffingtonpost.com/2011/04/25/revok-arrested-at-lax-for_n_853474.html [<https://perma.cc/B2HG-JEJC>].

14. On the police killing of graffiti artist Michael Stewart, see Peter Schjeldahl, *Basquiat’s Memorial to a Young Artist Killed by Police*, NEW YORKER (Jul. 1, 2019), <https://www.newyorker.com/magazine/2019/07/08/basquiats-memorial-to-a-young-artist-killed-by-police> [<https://perma.cc/25NV-LS42>].

15. In Auckland, Bruce Emery “caught two teenagers tagging his property ... and chased them armed with a knife. It ended with 15-year-old Pihema Cameron dead from a single stab wound to the chest.” See Kim Ruscoe, *Emery Jailed for Killing Tagger*, STUFF (Feb. 22, 2009), <http://www.stuff.co.nz/national/1399650/Emery-jailed-for-killing-tagger> [<https://perma.cc/BK5Q-UTJC>].

of works to the public and their apparent outlaw status invite Romanticizing,¹⁶ and they are commonly said to practice art for art's sake.¹⁷

As a class of worker, artists generally earn incomes below the median wage.¹⁸ Whether or not subnormal reward for artists is attributable to market failure,¹⁹ the fact that artists typically do not achieve sufficient financial reward and yet continue their practice might imply that they are less interested in earning money than other professionals.²⁰ Linked to this presumption about artists' motivations is the idea of art for art's sake,²¹ whose origins lie in Romanticism, and later flourished among members of the Aesthetic movement.²² While its circularity lends itself to multiple interpretations and contradictions, certain ideas are commonly associated with the aphorism. These include: money corrupts art;²³ artworks should have no utilitarian function;²⁴ artworks are created by special members of

16. "Romanticism" is notoriously difficult to pin down either as an artistic movement or as an era. Nevertheless, a key feature of disparate Romantic outputs in the late eighteenth and early nineteenth centuries lies with a "reaction against the reason of the Enlightenment and the order of Neoclassicism". See MICHAEL CLARKE, *THE CONCISE OXFORD DICTIONARY OF ART TERMS* 215 (2d. ed. 2010).

17. See e.g. JAMES MURRAY & KARLA MURRAY, *BROKEN WINDOWS: GRAFFITI NYC* unpagged (2002).

18. On the U.S. and U.K. experience of artists' earnings, see *Occupational Employment Statistics*, U.S. BUREAU OF LABOR STATISTICS (Mar. 29, 2019), <https://www.bls.gov/oes/2019/may/oes271013.htm> [<https://perma.cc/L2SQ-YMU8>] and Martin Kretschmer et al, *Copyright Contracts and Earnings of Visual Creators: A Survey of 5,800 British Designers, Fine Artists, Illustrators and Photographers*, CENTRE FOR INTELLECTUAL PROPERTY POLICY AND MANAGEMENT (2011), <http://eprints.gla.ac.uk/71445/> [<https://perma.cc/8NJX-6MUY>].

19. The art market can be seen as economically inefficient if consumers can free-ride on artist's efforts. For contrasting views on the subject, see William Grampp, *Should the Arts Support Themselves*, 7(2) *ECON. AFF.* 41 (1986) and BRUNO S. FREY, *ART & ECONOMICS: ANALYSIS & CULTURAL POLICY* 112 (2d. ed., 2003).

20. It is not suggested that all professionals are motivated by earning money. Even among the much-maligned legal profession, *pro bono* work is normal. Nevertheless, a partner in a law firm, who, for example, uses their skills and expertise to protect an indigent artist's interests, typically does so after their own economic situation is secure. An artist, however, may be presumed to relegate their own – and their dependents' economic interests in the interests of Art. Jean-François Millet is invariably cited as the *cause célèbre* of exploited artists, and the alleged poverty of his children was instrumental in the creation of the *droit de suite*. See generally LILIANE DE PIERREDON-FAWCETT, *THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY* (1991). However, despite early years of struggle, when he died, Millet was comfortably off and left a sizeable estate. See RICHARD MUTHER, *JEAN FRANÇOIS MILLET* 66 (1910).

21. The slogan "l'art pour l'art" is commonly attributed to the French poet Charles Baudelaire (1821-67). It may be an anachronism to describe Baudelaire as a Romantic, but his poetry and critical writing were strongly influenced by the Romantic thought. See Jonathan Culler, *Baudelaire and Romanticism*, 30(3) *EUR. ROMANT. REV.* 341 (2019).

22. The defining beliefs of the Aesthetic Movement (1870s and 1880s) "were in the supremacy of the beautiful and the autonomy of a work of art". CLARKE, *supra* note 16 at 5.

23. Money, or the need to acquire it, is a common theme in Romantic literature. See Jill Rappoport, *Real Money and Romanticism by Matthew Rowlinson, and: The Vulgar Question of Money: Heiresses, Materialism, and the Novel of Manners from Jane Austen to Henry James by Elsie B. Michie*, 55(3) *VIC. STUD.* 539 (2013). Edward Said excavated the connections between the gentility of Jane Austen's novels and the slave trade. See generally EDWARD W. SAID, *CULTURE AND IMPERIALISM* (1993).

24. James McNeil Whistler's *Peacock Room*, which includes painted window shutters, is arguably the acme of the Aesthetic Movement. See Owen Edwards, *The Story Behind the Peacock Room's Princess*, *SMITHSONIAN MAGAZINE* (Jun. 2011), <https://www.smithsonianmag.com/arts-culture/the-story-behind-the-peacock-rooms-princess-159271229/>. However exquisite they may be, in their original

society;²⁵ and true artists do not seek enrichment through their artistic practice.²⁶

This Article opposes such notions and argues that artistic practice and money are intertwined and inextricable. A Romantic idealization of the true artist starving in a garret was always an implausible construct. Likewise, contemporary lionization of some outlaw artists masks social marginalization, market exclusion and failure, and exploitation; it also obviates rational and pragmatic engagement with significant forms of public art.

Outlaw art may be dismissed as simple hooliganism, and lawmakers may respond disproportionately to such minor offences, despite freedom of expression being a paramount value in liberal democracies. This Article argues that government and fellow members of society should not unreasonably impede such creative expression, a consideration that is particularly important in relation to marginalized or non-hegemonic groups.

This Article does not condone unreasonable disruption of people's peace and quiet. Graffiti created outside an appropriate context, and some infringing driving may, indeed, cause considerable nuisance, particularly in the case of tire art, to those in peri-urban areas.²⁷ While violence is atypical in the creation of outlaw art, it is not unknown,²⁸ and is indefensible. Nevertheless, considering the artefacts produced by graffiti artists and infringing driver activity is an appropriate area for legal academic research.²⁹

After this Introduction, the remainder of the Article is structured as follows:

Part I considers whether some of the artefacts created by graffiti writers and infringing drivers can plausibly be characterized as works of art. This

setting, the paintings on the shutters adorn utilitarian objects and therefore were not created purely for art's sake.

25. See *infra* on the Renaissance era schism between artisan and artist. In the contemporary era, Warhol's Factory exemplified the distinction between the artist, who conceives an artwork, and artisanal amanuenses, who realize the authorial vision. See generally CATHERINE O'SULLIVAN SHORR, ANDY WARHOL'S "FACTORY PEOPLE": INSIDE THE 60'S SILVER FACTORY . . . AN ORAL HISTORY (2013).

26. See Mark Brown, *Tracey Emin: 'Being an artist is about making art, not money'*, GUARDIAN (May 28, 2017), <https://www.theguardian.com/artanddesign/2017/may/28/tracey-emin-being-artist-about-making-art-not-money-hay-festival>.

27. See e.g. R. Falconer & S. Kingham, "Driving people crazy": *A geography of boy racers in Christchurch, New Zealand*, 63(3) NEW ZEALAND GEOGRAPHER 181 (2007). See *infra* note 66 on neutral terminology.

28. See e.g. Matthew Tso, *Boy racers allegedly punch local resident in New Year's Eve altercation*, STUFF (Jan. 2, 2022), <https://www.stuff.co.nz/national/127419527/boy-racers-allegedly-punch-local-resident-in-new-years-eve-altercation> [<https://perma.cc/44SN-DBDU>]. However, a follow-up report indicates that the victim threw bottles at the cars of the infringing drivers. A witness to the event said: "When I go out, I am not there to have a fight, I am not there to go drink . . . I am just there to drive my car and enjoy my money well spent." See Piers Fuller and Matthew Tso, *Confrontation with car hoons leads to assault and surgery*, DOMINION POST (Jan. 4, 2022), pp. 2-3.

29. This Article is intended to have supra-jurisdictional application but focuses on U.S. and New Zealand law. The latter can be seen as representative of British-heritage law.

inquiry entails establishing a working definition of “art”, and then measuring the activities of graffiti writers and infringing drivers against that benchmark.

Part II briefly considers whether outlaw artefacts may constitute property under common law doctrine. This Part also considers whether outlaw art may qualify for copyright protection. Arguments for and against the inclusion of graffiti within the copyright net are well-rehearsed. These points are summarized, rather than relitigated. The fixation requirement and the copyright status of evanescent artefacts, such as fog or smoke works, are also reasonably clear. Focus, therefore, lies with blacktop markings and copyright. This Part also sketches certain features of Hegel’s theory of property, in particular, property as a means of expressing personhood, and as a way of anchoring a person within society.

Part III considers appropriate engagement with outlaw art. The temptation to Romanticize outlaw art is rejected. Rather, it is argued that the art ecosphere is predominantly market-driven, although market and ecosphere are not coterminous. A defense of entrepreneurial artists is presented. If artists cannot profit from their creative activities but others can gain financial advantage, they are excluded from the market and a market failure exists. Reprising broadly Hegelian concepts of personhood and anchoring, this Part also considers how outlaw artists may, to some extent, become “in-lawed”. Conclusions are then drawn in Part IV.

I. Outlaw Artefacts as Works of Art

This Part of the Article considers some basic aesthetic issues in relation to outlaw art. In the Introduction, it was implied that outlaw creativity may constitute art – is this a plausible implication?

A. *A Working Definition of Art*

It is generally accepted today that, when Marcel Duchamp exhibited *Fountain* (1917),³⁰ a pseudonymously autographed urinal, he presented a work of art,³¹ or, at least, performed an act of art. Duchamp claimed that an ordinary, readymade object could be “elevated to the dignity of a work of art by the mere choice of an artist”.³² Recast as a pleonasm, it may be said that an artist creates art. But who is an artist, and when does a person act as an artist? It seems that an artist and an artwork, and the doing of art is dependent on social recognition – from curators, gallerists, commentators, collectors, indeed, the art ecosphere.³³

30. See *Marcel Duchamp Fountain 1917, replica 1964* TATE, <https://www.tate.org.uk/art/artworks/duchamp-fountain-t07573>.

31. See e.g. ROBERT HUGHES, *ART AND THE CENTURY OF CHANGE* 66 (1991).

32. See LOIS FICHER-RATHUS, *UNDERSTANDING ART* 188 (2012)

33. Cf. Arthur Danto’s conception of the Artworld and George Dickie’s Institutional theory of art. See Arthur C. Danto, *The Artworld*, 7; George Dickie, *The New Institutional Theory of Art*, 15, in

Presenting an example of what Joes Segal describes as “more or less (un)inspiring attempts to define [art]”,³⁴ Stuart Culver argues “anything is art if it is found in an art gallery”.³⁵ This proposition is clearly deficient since traditional statuary is often situated *en plein air*. Land artworks are necessarily out of doors,³⁶ and, of course, street art murals, by definition, are in public view.

While *The Emperor’s New Clothes* may be suggested,³⁷ Maurizio Cattelan’s *Comedian* (2019) (a banana duct taped to a wall) is also accepted as art because it was, firstly, created by a recognized artist and, secondly, exhibited in a commercial gallery. Furthermore, the artefact sold for \$150,000,³⁸ and was anonymously gifted to the Guggenheim Museum.³⁹

Since, a significant sale price was obtained for *Comedian*, in a capitalist economy, it might be ventured that an artist is someone who can attract buyers for their creations, but, while this Article presumes the art world can be seen as a predominantly market-driven ecosphere, this approach must be rejected due to the numerous anomalies and exceptions that may be adduced. Gustave Caillebotte, for example, was sufficiently wealthy to be able to withhold his artworks from the market.⁴⁰ More generally, many talented artists may remain amateurs or are unable to pursue a professional career, whereas peddlers of kitsch, might amass a fortune.⁴¹ Traditionally, the market has shunned the works of women and minorities.⁴² Furthermore,

AESTHETICS AND THE PHILOSOPHY OF ART, THE ANALYTIC TRADITION: AN ANTHOLOGY (2nd ed, Pater Lamarque and Stein Hougon Olson, eds., 2019).

34. See JOES SEGAL, *ART AND POLITICS: BETWEEN PURITY AND PROPAGANDA* 11 (2016).

35. See Stuart Culver, *Whistler v. Ruskin: The Courts, the Public and Modern Art*, in *ADMINISTRATION OF AESTHETICS: CENSORSHIP, POLITICAL CRITICISM, AND THE PUBLIC SPHERE* 151 (Richard Burt, ed., 1994).

36. See CLARKE, *supra* note 16 at 141.

37. See HANS CHRISTIAN ANDERSON, *KEJSERENS NYE KLÆDER* [THE EMPEROR’S NEW CLOTHES] (1837).

38. See e.g. Sarah Cascone, *Maurizio Cattelan’s Much Adored (and Maligned) Banana Artwork Is Now in the Guggenheim’s Collection Thanks to an Anonymous Donor* ARTNET NEWS (Sept. 18, 2020), <https://news.artnet.com/art-world/guggenheim-banana-cattelan-1909179>.

39. In fact, “‘Comedian,’ as sold, does not include a banana or tape. What one buys is a ‘certificate of authenticity,’ a surprisingly detailed, 14-page list of instructions, with diagrams, on how the banana should be installed and displayed.” See Graham Bowlet, *It’s a Banana. It’s Art. And Now It’s the Guggenheim’s Problem*, N.Y. TIMES (Sept. 18, 2020), <https://www.nytimes.com/2020/09/18/arts/design/banana-art-guggenheim.html>.

40. See IAN CHILVERS, *THE OXFORD DICTIONARY OF ART AND ARTISTS* (5 ed online, 2015).

41. See e.g. Kenneth Baker, *Thomas Kinkade: A Case Study In Kitsch*, SFGATE (4 Feb., 2001), <https://www.sfgate.com/entertainment/article/Thomas-Kinkade-A-Case-Study-In-Kitsch-2955480.php>.

42. See Linda Nochlin, *Why Have There Been No Great Women Artists?* ARTNEWS (Jan. 1971), http://www.writing.upenn.edu/library/Nochlin-Linda_Why-Have-There-Been-No-Great-Women-Artists.pdf.

Despite a lifetime of painting, Carmen Herrera, who became celebrated late in her life, sold her first painting at the age of 89. A gallerist in New York told Herrera, “Carmen, you can paint circles around the men artists that I have, but I’m not going to give you a show because you’re a woman.” See Emily Langer, *Carmen Herrera, minimalist artist who found fame late in life, dies at 106*, WASHINGTON POST (Feb. 14, 2022), <https://www.washingtonpost.com/obituaries/2022/02/14/carmen-herrera-minimalist-cuban-painter-dead/>.

certain types of artworks because of their characteristics, such as evanescence, defy commoditization. The current mania for non-fungible tokens has only become possible through the relatively recent development of reliable digital ledger technology.⁴³ Before the emergence of blockchain and related technology, digital artworks were infinitely replicable and therefore unsuited to a market based on scarcity of traded goods and services, and individual property rights, including the fundamental right to exclude others from one's property.

This Article does not presume to conclusively define art, rather it principally seeks to draw analogies between outlaw artworks and artefacts that are generally accepted to be works of art. Nevertheless, borrowing W.H. Auden's definition of poetry as "memorable speech",⁴⁴ "memorable images" may be used as a working definition for visual art. (Intentionality on the part of the creators is implicit in both definitions.) This working definition is compatible with traditional aesthetic and legal perspectives, whereby artworks are artefacts that appeal to the eye but have no utilitarian function.⁴⁵ Graffiti artworks serve no useful function, beyond the aesthetic. Indeed, they are not simply non-utilitarian, they may be seen as *dis-utilitarian* because they are painted on other people's property and typically diminish the owner's utility.⁴⁶ Likewise, while road painters may demonstrate remarkable skill in producing utilitarian artefacts,⁴⁷ blacktop markings have no useful function but may constitute memorable images.

B. Graffiti Art

We normally consider the form or style of an artwork in order to categorize it, for example, as Realist, Abstract, and so forth. However, when considering spray can murals,⁴⁸ we tend to use a criminal law distinction drawn between commissioned (legal) and non-commissioned (illegal)

43. See Kevin Roose, *Buy This Column on the Blockchain!* N.Y. TIMES (Apr. 13, 2021), <https://www.nytimes.com/2021/03/24/technology/nft-column-blockchain.html>.

44. See *W H Auden*, BRITISH LIBRARY, <https://www.bl.uk/people/w-h-auden#>.

45. See e.g. *Mazer v. Stein*, 347 U.S. 201 (1954). It is submitted that, after Duchamp, appeal to the eye, in the sense of being conventionally beautiful, is no longer sufficient. Artefacts that would be considered "ugly" under traditional aesthetic criteria (see generally UMBERTO ECO, ON UGLINESS (2011)) may also be considered artworks. This Article, therefore, uses the neutral criterion of memorability of the image or object; in other words, *striking* to the eye, rather than appealing to the eye.

46. This statement is a generalization. Properties "vandalized" by famous graffiti artists, notably Banksy, typically increase significantly in value. See Hattie Garlick, *Graffiti for Grown-Ups: How Street Art Is Pushing up House Values*, FINANCIAL TIMES (Jun. 12, 2020), <https://www.ft.com/content/0f2d2e7c-78b4-11ea-bd25-7fd923850377>. Furthermore, see DOVEY *infra* note 203 on gentrification.

47. See e.g. *Satisfying Road Painting*, YOU TUBE (Jul. 15, 2020), https://www.youtube.com/watch?v=YKg_w1_WNH4.

48. Use of "spray can mural" in an attempt to provide an identifier that is not tainted by the criminal law is also unsatisfactory. Firstly, not all forms of art contemplated are created using spray cans; and, secondly, identifying artworks by the medium used in their creation fails to indicate the huge variety in outputs. See e.g. ETHEL SENO, TRESPASS: A HISTORY OF UNCOMMISSIONED URBAN ART (2010).

artworks; the former being identified as street art, and the latter as graffiti.⁴⁹ From a perspective of aesthetics, rather than property and criminal law, this distinction is unsatisfactory, and can lead to arbitrary results. For example, illegal artworks of the highest quality and originality (pieces) may be buffed,⁵⁰ while commissioned hackwork may remain in the public space.⁵¹ As Banksy's formally illegal artistic practice amply demonstrates, compliance with the law is a poor indicator of cultural significance.⁵² Nevertheless, while noting the unsatisfactory distinction drawn between street art and graffiti, this bifurcation has been normalized.

It would be implausible to claim that all tags constitute artworks but, as seen in the remarkable differences between signature commonly seen alongside railways in cities around the world, many manifest creativity, the application of imagination, and the judicious use of font and colors. They are intentionally created and are often memorable images. Generally, then, hip hop graffiti should be considered art.

C. Tire Art

To reiterate, this Article considers two forms of tire art: first, smoke clouds; and, second, blacktop markings. Emphasis lies with the latter form.

1. Smoke Clouds

Pedesis or Brownian movement is “the irregular oscillatory movement observed in microscopic particles or ‘molecules’ of all kinds suspended in a limpid fluid”.⁵³ According to Thomas Nail:

There is a long, albeit minor, tradition in Western art of emphasizing pedesis and feedback to varying degrees. In *A Deluge, with a Falling Mountain and Collapsing Town* (1515), for example, Leonardo da Vinci states that he used the appearance of humidity and condensation on windows and walls as an inspiration for painting landscapes, rocks, and rivers or unstable phenomena like fluids, smoke, or clouds.⁵⁴

49. See Susan Hansen, *Foreword*, in *THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI* xv (Enrico Bonadio, ed., 2020). See also Tatiana Flessas & Linda Mulcahy, *Limiting Law: Art in the Street and Street in the Art*, 14 *LAW CULT. HUMANIT.* 219 (2018) (offering a nuanced discussion of this bright line rule).

50. A “piece” is “a graffiti painting, short for masterpiece”, whereas a “tag” is “[a] writer’s personal logo or signature in marker or paint. The most elemental form of graffiti.” A “writer” is “[a] practitioner of the art of graffiti”. “Buffing” means “[t]o remove painted graffiti with chemicals or to paint over with a flat colour”. See RAFAEL SCHACTER, *THE WORLD ATLAS OF STREET ART AND GRAFFITI* 394 (2013).

51. Cf. the intrusion into the public space of billboards and other commercial messaging situated on private land as visual pollution. See e.g. Kevin E. Fry, *Don’t accept billboard blight*, *L.A. TIMES* (Nov. 30, 2006), <https://www.latimes.com/news/la-oe-fry30nov30-story.html>.

52. See e.g. Will Ellsworth-Jones, *The Story Behind Banksy*, *SMITHSONIAN MAGAZINE* (Feb. 2013), <https://www.smithsonianmag.com/arts-culture/the-story-behind-banksy-4310304>.

53. See *Brownian*, *adj.*, *OED ONLINE* (Dec. 2021), <https://www.oed-com.helicon.vuw.ac.nz/view/Entry/23857?redirectedFrom=Brownian>.

54. See THOMAS NAIL, *THEORY OF THE IMAGE* 343 (OXFORD UNIVERSITY PRESS, 2019).

Unpredictable patterns may emerge from the pedesis of the bristles of a brush roughly applying paint to a canvas or a pencil rubbed on paper, pressed against an object (*frottage*).⁵⁵ Aeropedetic art can be achieved by paint or other media being dropped through an airstream.⁵⁶ The unpredictability pedesis causes is particularly relevant to firework, dry ice or smoke art created out of doors where atmospheric conditions, including wind and humidity, can greatly affect outcomes.

Judy Chicago first started to use fireworks to create smoke clouds “in the late 1960s in an effort to feminize the atmosphere at a time when the southern California art scene was almost entirely male dominated”.⁵⁷ Her *Atmospheres* “were intended to transform and soften the landscape, introducing a feminine impulse into the environment”.⁵⁸ The black, acrid clouds of vaporizing rubber that mark N.A.S.C.A.R. and other testosterone-fueled motor racing victory celebrations could not be more different in character than Chicago’s pacific, pastel creations.⁵⁹ Nevertheless, they are both created through envisioning and the intentional application of skill, and are memorable images.

Following Chicago’s pioneering work, there can be no doubt that smoke can be an incorporeal medium for aleatory artistic expression. Evanescent smoke, vapor or synthetic fog creations are, indeed, an increasingly common art form.⁶⁰

According to Queensland’s Institute of Modern Art (I.M.A.),

Rev-heads have great set pieces to show off the power of their machines and their driving prowess. They do burnouts, doughnuts and hand-breakies causing their tyres to vaporise in clouds of smoke to the rapturous applause of their peers . . . Melbourne artist Ben Morieson’s video *Burnout 2004—Overhead* combines such events and fine art. A car performs choreographed manoeuvres under instructions from the artist for an enthusiastic audience. It is filmed from on high, from a camera suspended

55. *Id.* at 344.

56. *Id.*

57. See *Atmospheres/Fireworks/Dry Ice*, JUDY CHICAGO (2022), <https://www.judychicago.com/gallery/atmospheresfireworks/artwork/>.

58. *Id.*

59. It is not suggested that celebrating N.A.S.C.A.R. drivers infringe any law. However, they provide the most obvious and most recorded examples of smoke clouds being produced by vaporizing tire rubber. See Dave Caldwell, *How the Donut Became Auto Racing’s Favorite Celebration*, N.Y. TIMES (Feb. 16, 2019), <https://www.nytimes.com/2019/02/16/sports/nascar-daytona-victory-donuts.html>. Infringing drivers may emulate these maneuvers.

60. See e.g. Sam Thorne, *Fog, Vapour and the Occasional Importance of Not Seeing Clearly*, FRIEZE (Mar. 12, 2018), <https://www.frieze.com/article/fog-vapour-and-occasional-importance-not-seeing-clearly>.

from a cherrypicker. From this godly vantage point we can appreciate burnouts and doughnuts as a spectacular kind of drawing.⁶¹

I.M.A. identifies Morieson's choreographed video as the artwork (analogous to a photograph of a statue) but there appears to be no reason why infringing drivers might not envisage a smoke cloud (pedetic unpredictability noted), and, using their skills, create evanescent works of smoke art themselves. Evanescence is a problem for communicating and marketing such creations, and for copyright purposes, which is why artists usually photograph or video such works, but these problems should not stand in the way of a smoke cloud being considered an aleatory artwork on its own merits.

A. Blacktop Markings

Anyone who has driven the backroads of New Zealand will be familiar with intentional blacktop markings. These patterns are inscribed by deposits of rubber being left when tires lose traction for a sustained period. Loss of traction may be facilitated by the application of a lubricant to the road surface. Such inscribed patterns are commonplace around the developed world,⁶² but have particular relevance in New Zealand due to the hazardous road conditions and the scenic places in where they are commonly inscribed.

New Zealand's population of five million occupies a land mass roughly equivalent to the United Kingdom, whose population exceeds sixty-seven million. Consequently, the length of road per person is one of the highest in the world.⁶³ Many roads are curving and undulating, frequently precipitous, single lanes. People can drive legally once they reach the age of sixteen. The legal driving age was raised from fifteen in 2011 in order to reduce the death rate among young drivers.⁶⁴ Nevertheless, young New Zealanders are far more likely to die in car crashes than their peers in many other countries; the death rate for fifteen to twenty-four-year-olds in New Zealand is around twice that of Australia – the most obvious comparator.⁶⁵ Because imported

61. See *Ben Morieson Burnout 14 October–18 November 2005*, INSTITUTE OF MODERN ART, <https://ima.org.au/exhibitions/ben-morieson-burnout/>.

62. On the Californian “sideshow” phenomenon, see e.g. Ariana Bindman, *Tracing the origins of Oakland's sideshow culture*, SFGATE (Sept. 1, 2020), <https://www.sfgate.com/characters/article/oakland-sideshow-history-15410777.php>.

63. *State highway frequently asked questions*, WAKA KOTAHI (N.Z.T.A.) (2021), <https://www.nzta.govt.nz/roads-and-rail/research-and-data/state-highway-frequently-asked-questions/#:~:text=The%20state%20highway%20network%20has,the%20highest%20in%20the%20world.>

64. See INTERNATIONAL TRANSPORT FORUM, NEW ZEALAND, OECD, <https://www.itf-oecd.org/sites/default/files/new-zealand-road-safety.pdf> [<https://perma.cc/EJ4F-CL88>] (showing road safety data and safety initiatives).

65. See International Transport Forum, *By Age and Road User*, OECD, https://stats.oecd.org/Index.aspx?DataSetCode=IRTAD_CASUAL_BY_AGE [<https://perma.cc/6G3D-9KXC>] (last visited Apr. 28, 2022).

second-hand Japanese vehicles are cheap, young people have access to powerful cars – archetypically the Subaru Impreza.⁶⁶ These factors contribute to what is colloquially known as a “hoon” or “boy racer” culture,⁶⁷ whereby young people assert their identity through acts of automotive bravado – challenges to land transport laws and driving conventions.

A person who causes a motor vehicle to undergo the sustained loss of traction required to inscribe a tire mark on the road surface may be imprisoned for up to three months or fined up to \$4,500 NZD (roughly \$3,050 USD).⁶⁸ Penalties are much harsher if a person is injured or killed because of loss of traction.⁶⁹ Furthermore, in terms of section 129A of the Sentencing Act 2000 (NZ), if an offender breaches section 22A of the Land Transport Act three times within a four-year period, their car may be confiscated and destroyed. The Minister of Justice, who championed this penalty, earned the soubriquet “Crusher”,⁷⁰ perhaps indicating a gulf between the aspirations of populist politicians and judges’ conceptions of proportionate punishment. In practice, the sanction has rarely been imposed – just three times in the first eight years after introduction.⁷¹ Like taggers, infringing drivers attract considerable social opprobrium.⁷²

Michael Clarke defines “land art” as:

66. See Michael McAleer, *The Car That Screams Boy Racer*, IRISH TIMES (Mar. 19, 2003), <https://www.irishtimes.com/life-and-style/motors/the-car-that-screams-boy-racer-1.352699> [<https://perma.cc/KU3L-ZVX7>].

67. See, e.g. Sam Sherwood, *Police Ramp up Efforts to Tackle Boy Racers as Christchurch Hoons Leave Residents Fuming*, STUFF (Mar. 13, 2021), <https://www.stuff.co.nz/national/crime/124523336/police-ramp-up-efforts-to-tackle-boy-racers-as-christchurch-hoos-leave-residents-fuming> [<https://perma.cc/Z6V5-62AA>] (rejecting the gendered and derogatory terminology used by the mainstream media, and using “infringing driver” as an identifier.)

68. Land Transport Act 1998, s 22A (N.Z.) provides:
A person must not operate a motor vehicle in a race, or in an unnecessary exhibition of speed or acceleration, on a road ...
(2) A person must not, without reasonable excuse, intentionally pour onto, place on, or allow to spill onto a road –
(a) any petrol, oil, or diesel fuel; or
(b) any other substance likely to cause a vehicle to undergo loss of traction.
(3) A person must not, without reasonable excuse, operate a motor vehicle on a road in a manner that causes the vehicle to undergo sustained loss of traction unless the operation of the vehicle in that manner is authorised by law.

69. *Id.* at s 36A(2)-(3).

70. Maddison Northcott, *Judith “Crusher” Collins Wants to Crush Boy Racers’ Cars After Weekend Rampage*, STUFF (Sept. 12, 2018), <https://www.stuff.co.nz/national/crime/107030404/judith-crusher-collins-wants-to-crush-boy-racers-cars-after-weekend-rampage> [<https://perma.cc/C8EQ-NYQC>].

71. Laura Walters, *Just Three Cars Destroyed Under “Crusher” Collins’ Law*, STUFF (Nov. 3, 2017), <https://www.stuff.co.nz/national/politics/98513231/just-three-cars-destroyed-under-crusher-collins-law> [<https://perma.cc/G4UW-NP6P>].

72. See, e.g., Chloe Blommerde, *Driver Shot at by Angry Resident Tells Racers – ‘Be Safe Out There’*, STUFF (Apr. 8, 2021), <https://www.stuff.co.nz/national/crime/124776563/driver-shot-at-by-angry-resident-tells-racers-be-safe-out-there> [<https://perma.cc/A275-D8QF>].

A form of art practised ... in remote parts of the world ... Protesting against what they perceived as the utilitarianism of much contemporary art, they used the land itself as their raw material, digging trenches in it, drawing lines by spreading lime on the earth, or making mounds of rocks.⁷³

Because blacktop markings are inscribed on the *built*, rather than natural, environment, they cannot plausibly be described as manifestations of land. Nevertheless, tire art and land art share some features in common. An important commonality is that, while photographs and videos of the artistic act may be exhibited in galleries, the underlying artworks remain in situ.⁷⁴

Land art and public artworks are invariably created by or under the direction of recognized artists and therefore comply with Duchamp's definition of art. Following this rationale, if a recognized artist – however that status should be decided (perhaps, training, exhibitions, or conferral of prizes) – were to create blacktop markings, those artefacts should be considered artworks if the artist claims they are. What if the recognized artist is an incompetent driver and is unable to produce images as memorable as the outputs of the practiced and skillful infringing driver? If the professional standing of the creator is the determining consideration, we would need to accept that the former's creation, despite its inferiority, is an artwork, while the latter's superior output is not an artwork because of the status of the creator. The idea that only professional artists, accredited in some way akin to certified engineers or licensed public accountants, should be able to create art is extraordinarily elitist and would wrongly exclude many practitioners of folk, outsider and street art from the realm of artistic practice.⁷⁵

Despite their rudimentary nature, blacktop markings can be analogized to established artforms. Freshly laid rubber etchings on sun-bleached tarmac, for example, recall charcoal chiaroscuro. The markings are dynamic because they are both made and encountered at speed. As such, they evoke the espousal of machinery and energy of the Vorticists⁷⁶ and the Futurists' adulation of velocity and disruption.⁷⁷ They also suggest certain examples of abstract Action Painting, particularly those of Franz Kline,⁷⁸ and

73. See CLARKE, *supra* note 16 at 141.

74. A mega exhibition space, such as the Tate Modern's Turbine Hall in London, might plausibly host the creation of artefacts created by blacktop marking.

75. See G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 8, 1948) (declaring the right to enjoy and to participate in the arts is an affirmed universal human right).

76. See CLARKE *supra* note 16 at 259-60.

77. See e.g. *Futurism Movement Overview and Analysis*, THE ART STORY (2021), <https://www.theartstory.org/movement/futurism/> [<https://perma.cc/Q5LQ-UYCF>].

78. See Ivan Savvine, *Franz Kline Artist Overview and Analysis*, THE ART STORY (Nov. 21, 2011), <https://www.theartstory.org/artist/kline-franz/> [<https://perma.cc/PQS9-HNF5>].

more generally support the idea that art is doing.⁷⁹ While the self-obliterating, N.A.S.C.A.R. donut of victory may symbolize rejection of progressive sensibilities, blacktop markings may also be minimalist, sinuous and serpentine; some evoke the less cluttered works of Cy Twombly.⁸⁰

D. Concluding comments

Blacktop markings evoke the emergence of graffiti art. First dismissed as the scrawls of a feral under-class, the artefacts soon became recognized as a vibrant form of vulgate public art that was far more accessible and visually appealing than the abstruse conceptual art that tended to dominate contemporary art galleries. A 2021 retrospective of The Most Determined (T.M.D.), a crew formed in Auckland in 1997, at the Dowse Art Museum in Hutt City, near Wellington, demonstrated how rudimentary their first attempts started, but how accomplished their work became. Indeed, most of the T.M.D. collective members “have now channeled their creativity into professional art careers in New Zealand, Australia and Germany”.⁸¹ It is not suggested that creating smoke clouds or blacktop marking might evolve into an artform as complex and varied as street art, but some of the infringing drivers who make blacktop markings could migrate into other creative activities or assume greater agency over their practice.

II. Outlaw Artefacts as Items of Property

This Part considers whether graffiti or tire art artefacts may be considered property under common law doctrine, and whether they may be eligible for copyright protection.

A. Working Definition of “Property”

Akin to the institutional theory of art,⁸² suggesting property could be anything that the legal ecosphere recognizes as such, at a particular point in time, is reasonable. Change in the common law governing property may be glacial, but that does not mean the common law is static. For example, the once widely-held belief that a human being could be owned as a chattel is now considered repugnant, if not preposterous. New property-like items, such as C.C.T.V. recordings⁸³ and cryptocurrency tokens⁸⁴ may be devised

79. See JEAN YOON, *THE YOKO ONO PROJECT*, Preface (2002) (observing “art [is] a verb rather than a noun”).

80. See, e.g., Cy Twombly, *Untitled (Bacchus)* (painting), 2008, TATE, <https://www.tate.org.uk/art/artworks/twombly-untitled-bacchus-t14081> [<https://perma.cc/K2FG-5FMQ>].

81. See Karl Chitham, *The Most Dedicated: An Aotearoa Graffiti Story* (2021).

82. See Danto and Dickie, *supra* note 33.

83. Following U.S. precedent, the New Zealand Supreme Court in *Dixon v. R.* [2015] NZSC 147 held that C.C.T.V. footage constituted property for the purposes of criminal provisions prohibiting access to a computer system for dishonest purposes.

84. See, e.g., *Ruscoe & Moore v. Cryptopia Ltd.* [2020] NZHC 728 (N.Z.).

that have a demonstrable economic value but still require formal recognition by a competent lawmaker before they can be properly considered property. When a common law court is the lawmaker, the verification process is likely to include benchmarking against traditional indicators⁸⁵ and account being taken of public policy concerns.⁸⁶

B. *Outlaw Artefacts as Property*

This Section briefly explains why outlaw artefacts cannot be considered property under basic common law principles.

1. Graffiti

The archetypal graffiti artefact is a mural or signature spray-painted, without permission, on a wall owned by a person other than the artist. Akin to oils applied to a canvas, the spray paint becomes inseparable from the wall.⁸⁷ Since the wall belongs to someone other than the artist, the mural become the property of the wall owner.⁸⁸ The common law on fixtures seems sufficiently settled to obviate any claim that a mural is an item of property separable from the host wall.⁸⁹

2. Smoke Clouds

It seems trite that the common law distinguishes between *choses* in possession and *choses* in action; while the former may be broadly identified as corporeal things and the latter as incorporeal things, the radical distinction between the two classes of property lies in how the claims may be enforced.⁹⁰ While a deposit of natural gas may not possess physicality, it may be considered corporeal property when it is contained within land. If there is a fissure in the land and the gas escapes, the law must follow nature and cannot

85. Lord Wilberforce's opinion in the House of Lords in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) is commonly considered to constitute the classic statement on the characteristics of "property." He said: "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability." *Id.* At 1247–8

86. See, e.g., *Cryptopia Ltd.*, *supra* note 84 at [129]–[132].

87. In common law countries, a mural painted on a wall usually constitutes a fixture and, therefore, property of the owner of the wall. See generally Marta Iljadica, *Works and Walls: Graffiti Writing and Street Art at the Intersection of Copyright and Land Law*, in *THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI* 81–100 (Enrico Bonadio, ed., 2019).

88. Wes Anderson amusingly demonstrated this principle in *FRENCH DISPATCH* (American Empirical Pictures 2021).

89. See e.g. *The Creative Foundation v. Dreamland Leisure Ltd.* [2015] EWHC 2556 (Ch). With regard to a commissioned mural, the parties may agree to the artwork being treated differently from the default rule e.g., if a piece is commissioned for a garage door, the door and the mural might usually be considered fixtures but the intention of the parties may be shown to be that the door should be removed on sale of the main property.

90. See generally W.S. Holdsworth, *The History of the Treatment of Choses in Action by the Common Law* 33 HARV. L. REV. 997 (1920).

entertain a proposition that the dissipated gas can be traced in some way; the property interest in the gas is lost.⁹¹ Analogously, an artist, such as Chicago, may own the pyrotechnics that cause a smoke cloud but, once the cloud has been released into the air, she has no common law property rights in her creation. A cloud of smoke produced by sustained lack of traction might be connected to the spinning tires of an automobile, akin to a thing affixed to land but, under the common law, there is no way of enforcing any hypothetical property interest in the evanescent smoke cloud.

3. Blacktop Markings

Whether applied to a private or public road, blacktop markings are analogous to a mural painted on another's wall. Such an etching is impossible to remove without destroying the markings or damaging the road surface, and so coalesces with the road-owner's property. The blacktop marking ceases to exist separately in a way that might give rise to a traditional property claim.

C. *Outlaw Art and Copyright*

Members of the Berne Union, including New Zealand and the U.S, must protect authors' rights in literary and artistic works.⁹² Therefore, while outlaw art may not give rise to any traditional property rights, an artistic work fixed in an artefact may qualify for statutory copyright protection. In broad brushstroke, qualifying for copyright protection in common law jurisdictions requires for a work to fall within a particular category,⁹³ be original,⁹⁴ and be fixed in a physical form.⁹⁵ The statutorily-defined category of "pictorial,

91. See John Stokes Adams, *The Right of a Landowner to Oil and Gas in His Land*, U. PA. L. REV 471, 476 (1915) (referring to *Westmoreland N. Gas Co. v. DeWitt*, 130 Pa. 235 (1889)).

92. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986). Article 2 provides:

The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression ...

It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.

93. Cf. Article L122-1 of the French Intellectual Property Code, (providing the Code "shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose").

See SIMON STOKES, *ART AND COPYRIGHT* 183 (2nd ed., 2012) (discussing it is arguable that restricting copyright protected works is incompatible with the U.K.'s obligations under the European Union's InfoSoc Directive (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society)).

94. See, e.g. *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.* [1964] 1 WLR 273 (HL) (following U.K. precedent, New Zealand courts have set a low benchmark for originality. In *Henkel KgaA v. Holdfast New Zealand Ltd* [2007] 1 NZLR 577 at [37], the Supreme Court held: "To be original for copyright purposes the work must originate from its author and must be the product of more than minimal skill and labour".) Cf. InfoSoc Directive (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 (defining originality as the author's own intellectual creation). See, e.g. *Infopaq International A/S v. Danske Dagblades Forening* [2010] FSR 20.

95. See 17 U.S. CODE TITLE 17, § 101 (defining "copies").

graphic, and sculptural works” under U.S. law broadly corresponds with “artistic works” under British heritage copyright law, of which the New Zealand copyright legislation is a paradigm example.⁹⁶ According to Kevin Garnett et al.,⁹⁷

Provided that the subject matter can be fairly said to fall within one of the categories of protected subject matter (drawing, diagram, etc.) it will in principle be protectable, even though it is elementary or commonplace, the issue in the case of simple works being one rather of originality.

In *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*,⁹⁸

U.S. Supreme Court Justice O’Connor explained the originality requirement:

Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity ... To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, “no matter how crude, humble or obvious” it might be ... Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.⁹⁹

Justice Holmes famously observed in *Bleistein v. Donaldson Lithographing Co.*¹⁰⁰

Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible which is one man’s alone. That something he may copyright unless there is a restriction in the words of the act.¹⁰¹

Can graffiti and works of tire art qualify as original works under these categories?

96. Under section 2 of the Copyright Act 1994 (N.Z.), an “artistic work” means “(i) a graphic work, photograph, sculpture, collage, or model, irrespective of artistic quality ...”. In turn, “graphic work” includes “(a) any painting, drawing ... (b) any engraving, etching, lithograph, woodcut, print, or similar work. On N.Z.’s enduring loyalty to U.K. copyright law, see Geoff McLay, *New Zealand and the Imperial copyright tradition*, A SHIFTING EMPIRE: 100 YEARS OF THE COPYRIGHT ACT 1911, 30 (Uma Suthersanen & Ysolde Gendreau, eds., 2013).

97. See K. GARNETT, G. DAVIES & G. HARBOTTLE, *COPINGER AND SKONE JAMES ON COPYRIGHT* [3-135] (18 ed, 2020).

98. 499 U.S. 340 (1991).

99. *Id.* at 345.

100. 188 U.S. 239, 250 (1903).

101. *Id.* at 250.

1. Graffiti

Some tags may be too rudimentary or trivial to attract copyright, but others are commonly well designed, distinctive, calligraphic, and incorporate two or more colors. Those well designed, distinctive tags should therefore constitute graphic (artistic) works that manifest a spark of creativity. The works are fixed in a physical form, and originate from a particular author or group of authors. In terms of basic copyright principles, tags should, in general, constitute copyright-protected works. The acceptance in *5 Pointz*¹⁰² of spray can murals as a *form* of art capable of gaining recognition under V.A.R.A.¹⁰³ should not have been in doubt. Spray can art is often representational or stylishly calligraphic, and, in an appropriate context, may be more easily appreciated by the general population than avant-garde contemporary art.

It is not, therefore, the *form* of illegal graffiti that might stand in the way of copyright protection; the key barrier lies with the *practicalities of enforcement*. While there is some old common law precedent to claim that copyright does not subsist in an inherently immoral work,¹⁰⁴ a more likely bar lies with a court refusing to enforce a copyright claim on the grounds of *ex turpi causa*,¹⁰⁵ the equitable doctrine of unclean hands,¹⁰⁶ or public policy.¹⁰⁷ Judicial decisions in favor of commissioned or permitted street artists,¹⁰⁸ notably *5Pointz*, are diversionary in this regard because they may

102. Cohen v. G. & M. Realty L.P., 320 F. Supp. 3d 421, 439 (E.D.N.Y. 2018). For a discussion of the case, see Aislinn O’Connell, *The 5Pointz Case: Damages Awarded against Property Owner for Whitewashing Street Art*, 13(7) J.I.P.L.P. 529 (2018). See also Helen Stoilas, *New York Developer Who Whitewashed 5Pointz Graffiti – and Owes Artists \$6.75m in Damages – Appeals to Supreme Court*, ART NEWSPAPER (Jul. 22, 2020), <https://www.theartnewspaper.com/2020/07/22/new-york-developer-who-whitewashed-5pointz-graffitiand-owes-artists-dollar675m-in-damagesappeals-to-supreme-court> [<https://perma.cc/8PJS-V5KC>].

103. Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2018).

104. See *Stockdale v. Onwhyn* (1826) 5 B. & C. 173; *Glyn v. Weston Feature Film Co.* [1916] 1 Ch 261; *Goie Hoop Uitgewers (Edms.) Bpk. v. Central News Agency* (1953) (2) S.A. 843 (discussed in GARNETT ET AL., *supra* 97 at [3-261]).

105. *Ex turpi causa* “applies if, in all the circumstances, it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts”. See *Euro-Dian Ltd v. Bathurst* [1988] 2 All ER 23, 28-29 (per Lord Justice Kerr).

106. For a discussion of the contemporary relevance of the doctrine, see e.g. T. Leigh Anenson, *Announcing the “Clean Hands” Doctrine* 51 U.C. DAVIS L. REV. 1827 (2018).

107. See e.g. the discussion of morality in *Mak Hau-Shing v. Oriental Press Group Ltd.* [1996] 1 HKLR 245.

108. Claims for infringement of the putative copyright of graffiti artists are commonly settled out of court. See e.g. Chrysler’s notorious advertisement featuring Jennifer Lopez that appropriated street art. (The artists were identifiable and had created the mural legally.) See Zach Bowman, *Chrysler settles with graffiti artists over J.Lo’s Fiat 500 ad*, AUTOBLOG, (Dec. 3, 2011), <https://www.autoblog.com/2011/12/03/chrysler-settles-with-graffiti-artists-over-j-los-fiat-500-ad/> [<https://perma.cc/T78B-LDTD>]. (It seems that a corporation that appropriates graffiti art to indicate its street credibility, having been exposed, is likely to damage its reputation far more by defending an action than by making a confidential settlement.)

lead to the dubious assumption that such decisions also apply to non-commissioned graffiti art.¹⁰⁹

2. Smoke clouds

Smoke clouds may be considered sculptures and are original but they are evanescent and, unlike photographs and videos of the clouds, cannot be fixed in a physical form. They do not, therefore, attract copyright protection.¹¹⁰

3. Blacktop markings

A blacktop marking that constitutes a graphic work potentially qualifies for copyright protection. Whether blacktop markings are considered “paintings” or “drawings” depends on whether narrow and conservative or expansive and liberal interpretations are placed on the terms. The meaning of a “painting” could be as broad as “that which is painted” or as narrow as “representing of a subject on a surface by the application of paint or colours”.¹¹¹ The latter approach would not only appear to exclude abstract works, it would also exclude a significant group of works that use bodily fluids, in particular, blood, as a coloring method.¹¹² While blacktop markings add monochrome color to a surface, analogous to paint sprayed on a wall to create a mural, it is suggested that it is unlikely a court would recognize them as paintings.

Dictionaries provide numerous definitions for “draw” and its correlatives.¹¹³ On drawing, Garnett et al. observe: “it appears that it does not even require production by means of a pen or pencil or similar means, but that it denotes that the work is a product of an artist who represents his ideas by use of line or delineation.”¹¹⁴ The authors’ use of the word “artist” seems casual here since, under United Kingdom heritage copyright law—unlike a work of artistic craftsmanship—there is no requirement for a graphic work to be created by a person possessing artistic skill or for the work to manifest artistic quality.¹¹⁵ Given the polysemous nature of “drawing,” it is

109. See e.g. Enrico Bonadio, *Graffiti Gets VARA Protection: The 5Pointz Case*, 40(6) E.I.P.R. 409 (2018) (Graffiti did not get protection, legal street art did).

110. See 17 U.S.C. § 101.

111. See *painting*, n., OED ONLINE (Mar. 2022), <https://www.oed.com/view/Entry/136092?rskey=oNcoH8&result=3&isAdvanced=false> (accessed May 28, 2022) [<https://perma.cc/2E2H-W43W>].

112. See Jonathan Jones, *Blood, semen and tears: Why artists are obsessed with using their bodily fluids*, GUARDIAN (May 14, 2012), <https://www.theguardian.com/artanddesign/jonathanjonesblog/2014/may/14/lood-semen-tears-artists-bodily-fluids-rose-lynn-fisher> [<https://perma.cc/H99L-8PQY>].

113. THE OXFORD ENGLISH DICTIONARY provides more than 50 definitions of “draw,” excluding compound phrases.

114. See GARNETT ET AL. *supra* note 97 at [3-138].

115. See Copyright, Designs and Patents Act 1988 s 4 (U.K.).

tentatively submitted that a blacktop marking may qualify as a drawing and, therefore, a graphic work for copyright purposes.

There is no obvious reason why rubber applied to tarmacadam should any less constitute the fixture of a graphic work than, say, oils on canvas. Furthermore, whereas graffiti may have a brief existence due to buffing by authorities, it seems that while blacktop markings are left to attenuate over time they nonetheless cannot be considered evanescent.¹¹⁶

A degree of uniformity for blacktop markings is indicated by the parallel lines determined by axles but each marking is subtly different and depends on multiple factors, including: the shape and condition of the road; the degree of traction and torque of the car; and the audacity of the infringing driver. This Article assumes intentionality on the part of the infringing drivers, the application of driving skill, an understanding of cause and effect, and some creative spark. The numerous variables that inform the creation of a particular blacktop marking indicate that it may be difficult to be copied in the same way as it was created. Copying would be more readily achieved by photographing or filming a blacktop marking.

As with graffiti, the practical barriers to an infringing driver asserting copyright in their blacktop markings appear to lie with the possibility of inviting criminal prosecution and the courts denying a remedy for breach of copyright on public policy or other grounds. Courts in New Zealand are unlikely to uphold a graffiti artist's copyright or moral rights claim in order to maintain coherence between criminal and property law.¹¹⁷ Similarly, illegal creators of blacktop markings might face criminal prosecution if they sought to enforce copyright claims. However, as with graffiti artists, creators of blacktop markings can exploit their works to some extent by filming their creation or photographing the output. The films and photographs would then attract copyright protection, although the risk of prosecution would remain.

D. Personhood as "Property"

Following Georg Hegel,¹¹⁸ "individuals have a right to possess some minimal amount of property in order to express their freedom by embodying their will in external objects".¹¹⁹ Tagging can be interpreted through a lens

116. Cf. the fading of many of Mark Rothko's paintings. While Rothko's paintings have degraded over time, there is no question as to their fixation and permanence. See e.g. Michael Kimmelman, *Mark Rothko's Harvard Murals Are Irreparably Faded by Sun*, N.Y. TIMES (Aug. 8, 1988), <https://www.nytimes.com/1988/08/08/arts/mark-rothko-s-harvard-murals-are-irreparably-faded-by-sun.html> [<https://perma.cc/8BZ2-MFZ2>].

117. See Jonathan Barrett, *Copyright, Graffiti, and Street Art in Aotearoa New Zealand*, THE CAMBRIDGE HANDBOOK IN COPYRIGHT IN STREET ART AND GRAFFITI 299, 310 (Enrico Bonadio, ed., 2020).

118. See generally G.W.F. HEGEL, PHILOSOPHY OF MIND (trans W. Wallace & A.V. Miller, 1807, 2007).

119. See LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 45 (2002).

of Hegelian property expectations and personhood assertions by young people.¹²⁰ In a nutshell, taggers—who are frequently members of dispossessed or marginalized communities—claim some quasi-property or belonging stake in public spaces, whether or not those places are formally owned by the state, corporations, or individuals. A tagger who sprays their signature on the stanchions of a highway overpass makes a statement about the tagger’s existence, belonging and personhood. However fleeting that statement may be, taggers mark and claim a right to be in that space. This proposition applies similarly to the blacktop tire inscriptions of infringing drivers, who may come from a socio-economic background similar to that of taggers.

Alan Ryan pertinently observes: “Hegel’s concern is less with owners and non-owners than with the anchored and the non-anchored; because property is an anchor but not the only anchor.”¹²¹ We can therefore see blacktop markings inscribed on remote country roads as an assertion-of-self and an anchoring in society, notwithstanding the illegality of the act. No recognizable property claim arises or should arise from such markings, but the drivers do assert their existence in society and those assertions are recognized by others.¹²²

In creating blacktop markings, drivers may move beyond merely anchoring their own self-expressions to unjustifiable nuisance: not in committing a recognizable tort but in failing to respect another’s personhood. Hegel also argued that having a claim to personal property “works to inculcate individuals with the self-discipline required for them to be properly functioning persons”.¹²³ Such a person respects the reasonable expectations of others.

Broadly following Hegel, Margaret Radin distinguishes between “property that is bound up with a person and property that is held purely instrumentally”,¹²⁴ categorizing the former as “personal” (personhood)

120. See generally Jonathan Barrett, *Expression, Exclusion, and Property Expectations: An Analysis of Graffiti Using Three New Zealand Artefacts*, 10 J.A.L.T.A. 16, 21 (2017) (“Hegelian” is used here loosely. Following classical philosophers, who commonly distinguish between “Platonic” and “platonian”, it might be more accurate to use “hegelian” because the ideas expressed originate with Hegel but do not rigorously follow Hegelian theory).

121. See ALAN RYAN, *PROPERTY AND POLITICAL THEORY* 131 (1984).

122. On the importance of mutual recognition in Hegelian property theory, see JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 375 (1988).

123. See Alan Patten, *Hegel’s Justification of Private Property*, 16(4) HIST. POLIT. THOUGHT 576, 578-9 (1995). Cf. Universal Declaration of Human Rights, *supra* note 75 at art. 29 which affirms:

Everyone has duties to the community in which alone the free and full development of his personality is possible.

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

124. See MARGARET J. RADIN, *REINTERPRETING PROPERTY* 37 (1993).

property and the latter as “fungible” property. Tagging may be considered acceptable when it is applied to fungible property, such as the walls of a condemned building, but is unacceptable when it unjustifiably imposes on another’s personhood property, such as a grandmother’s fence. A further category might be property that is constitutive of a community. Therefore, tagging a war memorial or a mosque should be considered anathema. Likewise, performing burnouts in order to create smoke clouds and blacktop markings outside an aged care facility must lie beyond the pale.

Hegelian conceptions of property and anchoring allow us to see tire art artefacts as both products of creative self-expression and as a means for marginalized members of the community to assert their membership. Furthermore, an emphasis on personhood—the core of rights affirmations¹²⁵—and a consideration of all rights together¹²⁶ implies balancing conventional property claims like title recorded on a land registry with non-traditional forms of expression.

To reiterate, this Article denies that an outlaw artist has any common law property rights or settled intellectual property rights in the illegal artefacts they create, but Hegelian conceptions of property provide useful analogies for thinking about other ways of belonging, exercising self-discipline, and respecting the interests of others.

III. Engagement with Outlaw Art

This Part discusses proportionate and pragmatic ways of engaging with outlaw art. A key aim here is to resist the temptation to Romanticize or otherwise project onto outlaw artists. There is a tendency to Romanticize artists in general but, when their creativity takes place outside the law and the market, idealization may be amplified. This tendency should be resisted in relation to all artists because it masks market failure and sub-optimal reward. When the artist is an outlaw, Romanticization takes attention away from, on the one hand, practices of exclusion and exploitation, and, on the other hand, possibilities for anchoring and responsibility-taking on the part of outlaw artists.

A. *Exclusion from the Market*

Jean-Michel Basquiat (1960-88) presents as the paradigm example of a graffiti artist who became a feted gallery artist.¹²⁷ Basquiat’s and Al Diaz’s

125. See Universal Declaration of Human Rights, *supra* note 75 at preamble.

126. U.N. General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23 (para. 5 begins: “All human rights are universal, indivisible and interdependent and interrelated”).

127. See e.g. ARTHUR MARWICK, THE ARTS IN THE WEST SINCE 1945 296 (2002).

tagging the signature “SAMO©” around New York,¹²⁸ and Basquiat’s Neo-Expressionist gallery works¹²⁹ are, of course, substantively different forms of artistic output, despite both involving the application of paint to a surface.¹³⁰ A further distinction between the two types of artefacts is the eminent commercial exploitability of discrete, movable artworks. Whereas Basquiat and, later, his estate could sell artworks in the market and profit handsomely,¹³¹ despite eventually being officially recognized for his contribution to the culture of New York City,¹³² Diaz’s success in exploiting the SAMO© signature, notably marketing it as a brand for clothing and producing enamel badges,¹³³ has been far more modest.¹³⁴

Certain types of artworks, which have traditionally been excluded from the market (or have been immune to commoditization), may become included with changes in technology. For example, Bruno Frey notes it was once thought improbable that land artists might be able to commercially exploit their practice, yet Christo,¹³⁵ in particular, proved able to do so.¹³⁶ As noted, more recently, digital art has similarly been characterized as a manifestation of art for art’s sake since artists have created outputs without any expectation of reward due to the inherently replicable nature of digital

128. “In the late 1970s, high school friends Jean-Michel Basquiat and Al Diaz sprayed the capitalized letters ‘SAMO’ – an abbreviation for ‘same old shit’ – on walls across New York.” See Caroline Goldstein, *Basquiat, the Teenage Years? His Onetime Collaborator Releases a Trove of Unpublished Photos and Prints*, ARTNET NEWS (Jun. 1, 2017), <https://news.artnet.com/art-world/basquiat-samo-al-diaz-977438>. Basquiat later became the United States most expensive artist when his work *Untitled* (1982) sold for \$110.5 million. See Rob Davies, *What \$110m for a Basquiat painting tells us about the art market*, GUARDIAN (May 19, 2017), <https://www.theguardian.com/artanddesign/2017/may/19/basquiat-110m-dollar-sale-proof-of-art-growing-attraction-to-super-rich>. See Caroline Goldstein, *Basquiat, the Teenage Years? His Onetime Collaborator Releases a Trove of Unpublished Photos and Prints*, ARTNET NEWS (Jun. 1, 2017), <https://news.artnet.com/art-world/basquiat-samo-al-diaz-977438>.

129. See *Neo-Expressionism*, THE ART STORY (2020), <https://www.theartstory.org/movement/neo-expressionism>.

130. The cost of labor, paint and canvas for a painting that sells for more than \$100 million is clearly negligible.

131. Robin Pogrebin & Scott Reyburn, *A Basquiat Sells for “Mind-Blowing” \$110.5 Million at Auction*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/2017/05/18/arts/jean-michel-basquiat-painting-is-sold-for-110-million-at-auction.html>.

132. See e.g. Molly Gallentine, *A Graffiti Legend Wins Praise From Unlikely Admirers*, WALL STREET JOURNAL (Mar. 10, 2019), <https://www.wsj.com/articles/a-graffiti-legend-wins-praise-from-unlikely-admirers-11552237314>.

133. Goldstein, *supra* note 128.

134. “In a partnership with House of Roulz, Diaz is unleashing a trove of previously unpublished photographs featuring a teenage Basquiat, along with limited-edition prints, enamel pins, and embroidered patches celebrating the iconic logo”. *Id.* Diaz’s right to exploit the SAMO tag will be shared with Basquiat’s litigious estate which is currently administered by the late artist’s sisters, Jeanine Heriveaux and Lisane Basquiat.” See *Frequently Asked Questions*, BASQUIAT, <http://basquiat.com/faq-faqs.htm>.

135. See e.g. GERMANO CELANT, CHRISTO AND JEANNE-CLAUDE: WATER PROJECTS (2016).

136. Bruno S. Frey, *Art Markets and Economics: Introduction*, 21 J. CULT. ECON. 165 (1997).

works.¹³⁷ However, digital ledger technology may extend to digital artworks the quality of scarcity and permit owners control over reproduction.¹³⁸ Consequently, non-fungible tokens have been eagerly embraced by the market.¹³⁹ Some digital artists, who are committed to open access as a matter of principle, will continue to produce art for art's sake but others, such as Beeple,¹⁴⁰ having been presented with the opportunity to earn an income from their previously non-remunerative artistic practice, have taken advantage of the emerging technology.

There is no obvious way for creators of tire art to move from the street into the white cube gallery in the way of Basquiat. Perhaps, like Diaz, they could become sufficiently well-known to have their own brand for clothing, but this possibility seems remote at present. Blacktop markings may therefore present the possibility of a form of street art that defies creators' profiting, even more than graffiti does, and may therefore be prone to Romanticizing.

B. Romanticizing Artists

Pre-modern artists were typically anonymous artisans,¹⁴¹ who practiced their vocation as members of a guild.¹⁴² During the Renaissance, autographing paintings became normal,¹⁴³ whereas artisanal works remained mostly anonymous.¹⁴⁴ The aesthetic and vocational bifurcation between

137. See Matthew Mirapaul, *ARTS ONLINE; Driven by a Higher Calling, Not Dot-Com Dollars*, N.Y. TIMES, (Dec. 24, 2001), <https://www.nytimes.com/2001/12/24/arts/arts-online-driven-by-a-higher-calling-not-dot-com-dollars.html>.

138. See Artie Vierkant, *Issues and Commentary: The New Property Regime*, ART IN AMERICA, (Sept. 1, 2018), <https://www.artnews.com/art-in-america/features/issues-commentary-new-property-regime-63550/#fn13>.

139. See e.g. Yvonne Lau, *Sotheby's posted its highest-grossing year ever, boosted by millennials and NFTs*, FORTUNE (Dec. 16, 2021), <https://fortune.com/2021/12/16/sothebys-highest-grossing-year-nfts-auctions-millennial-sales/>. Acceptance by the market does not make tokens artworks but perhaps provides greater credence to claims that they are indeed artworks.

140. See e.g. Angelica Villa, *Beeple NFT Fetches Unprecedented \$69.3 M. at Christie's*, ARTNEWS (Mar. 11, 2021), <https://www.artnews.com/art-news/market/beeple-makes-69-million-1234586424/>.

141. However, ERNST KRIS & OTTO KURZ, *LEGEND, MYTH AND MAGIC IN THE IMAGE OF THE ARTIST: A HISTORICAL EXPERIMENT 5* (1979) note that the biographies of ancient Greek artists Zeuxis and Apelles are known, although their works are no longer stand.

142. *Id.* at 18.

143. Albrecht Dürer (1471-1528) is generally credited with creating the first artist brand through his distinctive "AD" monogram. See *Albrecht Dürer: Portrait of the artist as an entrepreneur*, ECONOMIST (Dec. 17, 2011), <https://www.economist.com/christmas-specials/2011/12/17/portrait-of-the-artist-as-an-entrepreneur>.

144. Artists, such as Koons and Hirst, commonly employ or engage mostly anonymous (and fungible) artisans to give effect to their artistic concepts. See, e.g., Julia Halperin & Brian Boucher, *Jeff Koons Radically Downsizes His Studio, Laying Off Half His Painting Staff*, ARTNETNEWS (Jun. 20, 2017), <https://news.artnet.com/art-world/jeff-koons-radically-downsizes-his-studio-laying-off-half-his-painting-staff-998666>.

Erin Campbell observes "the elevation of the visual arts from mere mechanical labour to the status of a liberal art is central not only to the development of Renaissance art, but also to the values of Western culture". See Erin J. Campbell, *Artisans, Artists and Intellectuals*, 23(4) ART HISTORY 622, 626 (2000).

artisans and artists continues to be reflected in modern copyright law,¹⁴⁵ tax law,¹⁴⁶ and some aesthetic theory.¹⁴⁷ Renaissance artisans were able to maintain their incomes through membership of monopolistic guilds, whereas individual fine artists, dependent on their popularity, self-marketing and financial wits, might prosper or they might suffer penury. Successful artists negotiated the economics and politics of their times, and some, including Michelangelo,¹⁴⁸ became very wealthy. In the vipers' pit of Medici-era Florence, where modern banking emerged, artists and artisans produced for their venal patrons some of the finest artworks and architecture the world has ever seen.¹⁴⁹

In the early nineteenth century,¹⁵⁰ the Romantic myth of the Byronic outsider displaced the Visarian model of the Renaissance artist as an exemplar of perfectible man. Geraldine Pelles observes “[t]he many strands of the image of the artist met during the first half of the nineteenth century in that fulcrum for myths, the romantic artist, that storied rebel, martyr, and implacable opponent of the bourgeoisie.”¹⁵¹ As Woodmansee explains, “[w]e owe our modern idea of an author to the reconceptualization ... [that] represents a mystification of an activity that is of necessity rooted in tradition.”¹⁵²

Despite its plausible debunking,¹⁵³ the Romantic image of the artist, who creates aesthetic works beyond the corruption of the market, is a persistent myth,¹⁵⁴ and this fancy partly informs French *droit moral* (moral

145. See *supra* note 115.

146. See, in particular, *U.S. v. Perry*, 146 U.S. 71 (1892); *U.S. v. Olivotti & Co*, 7 Ct. Cust. App. 46 (C.C.P.A. 1916); *Brancusi v. U.S.* 1928 Cust. Ct. LEXIS 3 (Cust. Ct. Nov. 26, 1928); and *O.O. Friedlaender Co. v. U.S.*, 19 C.C.P.A. 198 (C.C.P.A. 1931). These cases determined that, to constitute an artwork, an object must be created by or under the instruction of an artist and must have no utilitarian function. See Leonard D. DuBoff, *What Is Art – Toward a Legal Definition*, 12 HASTINGS COMM. & ENT. L.J. 303 (1990).

147. See in particular R.G. COLLINGWOOD, *THE PRINCIPLES OF ART* (1938).

148. See generally RAB HATFIELD, *THE WEALTH OF MICHELANGELO* (2002).

149. See generally TIM PARKS, *MEDICI MONEY: BANKING, METAPHYSICS, AND ART IN FIFTEENTH-CENTURY FLORENCE* (2005).

150. See M.H. ABRAMS, *THE MIRROR AND THE LAMP: ROMANTIC THEORY AND THE CRITICAL TRADITION* (1953) and MAURICE Z. SHRODER, *ICARUS: THE IMAGE OF THE ARTIST IN FRENCH ROMANTICISM* (1961).

151. See Geraldine Pelles, *The Image of the Artist*, 21(2) J. AESTHET. ART CRIT. 119, 121 (1962).

152. See Martha Woodmansee, *The ‘Romantic’ Author*, in RESEARCH HANDBOOK ON THE HISTORY OF COPYRIGHT LAW 54 (Isabella Alexander & H. Tomás Gómez-Arostegui eds., 2016). In copyright law, the term “author” refers to all qualifying creators. See 17 U.S. CODE TITLE 17, § 102.

153. See in particular MARTHA WOODMANSEE, *THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS* (1994); Mark Rose, *The Author in Court: Pope v. Curll (1741)*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* (Martha Woodmansee and Peter Jaszi, eds., 1994); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in *The Construction of Authorship*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* (Martha Woodmansee & Peter Jaszi, eds., 1994).

154. Frey, for example, observes “[i]n some countries, namely those influenced by German Romanticism ... there is a strong tradition suggesting that a “true artist” is poor ... this tradition proposes a negative relationship between the quality of art and its marketability. However, this view is purely idealistic and has little to do with reality.” See FREY, *supra* note 19 at 29–30.

rights) and German *Persönlichkeitsrechts* (personal rights).¹⁵⁵ We may also encounter claims that artists are in some ways hardwired to disdain financial reward.¹⁵⁶ While he is alert to the Germanic tradition of Romanticizing the artist,¹⁵⁷ Frey argues “strong evidence exists that (successful) artists had a strongly developed intrinsic motivation, i.e. they pursue art for art’s sake.”¹⁵⁸ Yet, he writes elsewhere “top artists are not only creative in their art, but also in merchandising it – though many of them would violently oppose this statement”.¹⁵⁹ Another paradox is present here: despite classical economics telling us that productive activity is stifled if the incomes of workers and entrepreneurs are taxed too highly,¹⁶⁰ Frey cautions about the crowding out effects if artists receive too much reward.¹⁶¹ Conversely, the proposition that creativity is incentivized by material reward¹⁶² is one of the grounds usually put forward to justify intellectual property rights, including copyright.¹⁶³

Perpetuation of Romantic myths excuse the subnormal earnings of most artists.¹⁶⁴ The vestigial idealization of the true artist, who is uninterested in money, partly explains the hostility that entrepreneurial artists, notably Hirst, Koons and Warhol, commonly attracts.¹⁶⁵ Simon Critchley notes contemporary art’s “negotiation of its own relentless commodification, the

155. See ELIZABETH ADENEY, *THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS* [1.44] (2006).

156. See e.g. Roberto Goya-Maldonado, Maria Keil, Katja Brodmann and Oliver Gruber, *Reactivity of the Reward System in Artists During Acceptance and Rejection of Monetary Rewards*, 30(2) *CREAT. RES. J.* 172 (2018). Using C.A.T. scans to demonstrate artists’ aversion to financial reward recalls the use of phrenology, in a different scientific paradigm, to prove criminal proclivity. See N. Rafter, *The Murderous Dutch Fiddler: Criminology, History, and the Problem of Phrenology*, 9 *THEOR. CRIMINOL.* 65 (2005). Also compare with Linda Nochlin’s revelation of the institutional barriers historically faced by women artists which have been disguised by claims about women’s innate qualities and motivations. See Nochlin *supra* note 42.

157. See FREY, *supra* note 19 at 7.

158. *Id.*

159. See Frey, *supra* note 136 at 167.

160. See Joel Slemrod, *A General Model of the Behavioral Response to Taxation*, 8(2) *INT. TAX AND PUBLIC FIN.* 119, 119 (2001).

161. See FREY, *supra* note 19 at 149 (“There are relevant conditions under which an increase in price (or in monetary rewards) *decreases* effort (work input). This is the case when the crowding-out effect dominates the relative price effect.” Conducting such research using artists, as research subjects, and not, say, football players, indicates that the former, as a class, are presumed to behave differently from the latter.)

162. For a discussion of this proposition, see Robert Eisenberger & Linda Shanock, *Rewards, Intrinsic Motivation, and Creativity: A Case Study of Conceptual and Methodological Isolation*, 15(2&3) *CREATIVITY RES. J.* 121 (2003).

163. See e.g. Seana Valentine Shiffrin, *The Incentives Argument for Intellectual Property Protection*, *INTELLECTUAL PROPERTY AND THEORIES OF JUSTICE* 94, 94-105 (Axel Gosseries, Alain Marciano & Alain Strowel eds., 2008).

164. See Copyright Alliance, *It’s Time We Stop Romanticizing the Myth of the Starving Artist*, MEDIUM, (Dec. 7, 2016) <https://medium.com/@copyright4u/its-time-we-stop-romanticizing-the-myth-of-the-starving-artist-5d49abde4f5f> [<https://perma.cc/GC4G-64K3>].

165. See Roberta Smith, *Stop Hating Jeff Koons*, N.Y. TIMES (May 17, 2019), <https://www.nytimes.com/2019/05/17/arts/jeff-koons-auction-christies.html> [<https://perma.cc/969P-5XDV>].

consciousness of its capture by the circuits of casino capitalism”.¹⁶⁶ Koons, whose \$80 million *Rabbit* sculpture arguably epitomizes the spirit of the contemporary art market,¹⁶⁷ is the master of commodification.¹⁶⁸ In contrast to Koons, who is exceptional in being able to benefit from the financial mechanisms of the contemporary art market,¹⁶⁹ graffiti artists typically earn nothing from their artistic practice, and, therefore, suggest a counter-model to the commoditization of art. Consequently, graffiti and other outlaw artist present as alluring subjects for Romantic projections.

Why do we expect successful actors, composers and musicians to be extraordinarily well-rewarded in a market-based economy,¹⁷⁰ but not artists? Some people, who skillfully kick or throw leather spheres or ellipses,¹⁷¹ may

166. See Simon Critchley, *Absolutely-Too-Much*, BROOKLYN RAIL, (Jul.-Aug. 2012), <http://www.brooklynrail.org/2012/08/art/absolutely-too-much> [https://perma.cc/2E27-RX2C].

167. See Jed Perl, *The Cult of Jeff Koons*, N.Y. REVIEW OF BOOKS (Sep. 25, 2014), <https://www.nybooks.com/articles/2014/09/25/cult-jeff-koons/?insrc=toc>. [https://perma.cc/26B3-9APV].

168. Kelly Thomas observes “[w]hile artists typically separate art and money, Koons’s art addresses market forces head on”. See Kelly Devine Thomas, *The Selling of Jeff Koons*, ARTNEWS (May 1, 2019), <https://www.artnews.com/art-news/news/the-selling-of-jeff-koons-116/> [https://perma.cc/HS6S-UTAW] [https://perma.cc/26A3-5PK5] (According to Robert Pincus-Witten, Koons “recognizes that works of art in a capitalist culture inevitably are reduced to the condition of commodity. What Jeff did was say, ‘Let’s short-circuit the process. Let’s begin with the commodity.’” Cited by DONALD N. THOMPSON, *THE \$12 MILLION STUFFED SHARK: THE CURIOUS ECONOMICS OF CONTEMPORARY ART* 81 (Toronto: Doubleday Canada, 2008)).

169. Koons not only seeks super-profits for peddling kitsch commodities, but he does so in a way analogous to hedge fund capitalism. As hedge funds are parasitic on the business of making things and providing services (see James Moore, *Hedge funds aren’t casino capitalists. They’re parasite capitalists*, INDEPENDENT (May 7, 2015), <https://www.independent.co.uk/news/business/comment/hedge-funds-arent-casino-capitalists-theyre-parasite-capitalists-10230801.html> [https://perma.cc/325H-ZRTA]), so Koons’s artistic practice includes occasionally infringing others’ copyright (see *Rogers v. Koons* 960 F.2d 301, 312 (2d. Cir. 1992); *French Court Upholds Plagiarism Ruling against Jeff Koons*, A.F.P. (Dec. 21, 2019), <https://www.france24.com/en/20191221-french-court-upholds-plagiarism-ruling-against-jeff-koons> [https://perma.cc/NA5W-U67U].) and exploiting workers (Dan Piepenbring, *Jeff Koons the Union Buster, and Other News*, PARIS REVIEW, (Jul. 19, 2016) <https://www.theparisreview.org/blog/2016/07/19/jeff-koons-the-union-buster-and-other-news/> [https://perma.cc/2YK4-5U44].), while generating inordinate profits for himself and (some of) his investors.

170. See Zack O’Malley Greenburg, *Hip-Hop’s Next Billionaires: Richest Rappers 2019*, FORBES, (Aug. 27, 2019), <https://www.forbes.com/sites/zackomalleygreenburg/2019/06/13/hip-hops-next-billionaires-richest-rappers-2019/?sh=6719cd0c2edd> [https://perma.cc/K3KT-QKTX].

171. Sports, such as rugby, which originated in the British private school system, long maintained a distinction between (vulgar) professionals and (gentleman) amateurs. Rugby Union did not become a professional sport until the mid-1990s. Rugby League, a breakaway version of the game, which was mostly played in blue collar communities, allowed payments to players from the late nineteenth century. Even in ostensibly egalitarian countries, notably Australia and New Zealand, social divisions lie between traditional League and Union communities. See John Morgan, *The Split between Rugby League and Rugby Union Is the Story of National Class Division*, NEW STATESMAN (Oct. 11, 2019), <https://www.newstatesman.com/politics/sport/2019/10/split-between-rugby-league-and-rugby-union-story-national-class-division> [https://perma.cc/4S2S-95NV].

also earn astronomical amounts of money,¹⁷² and yet, artists with similar ambitions for financial reward may be demonized.¹⁷³

Tracey Emin, one of the world's most expensive female artists,¹⁷⁴ has criticized other artists—Hirst implied—whose artistic practice is overtly implicated in earning money.¹⁷⁵ Emin expressly excuses from her critique Pablo Picasso,¹⁷⁶ whose estate was conservatively thought to be worth \$50 million at the time of his death in 1973.¹⁷⁷ According to Milton Esterow, “[i]n 1980, the Picasso estate was appraised at \$250 million, but experts have said that the true value was in the billions.”¹⁷⁸

172. See ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 161-63 (1974). (For a libertarian justification of the market reward earned by Wilt Chamberlain, a highly skilled basketball player, who attracted a large income in his time but a pittance by today's standards. Perhaps, agents' intermediation masks sports stars' acquisitiveness.)

173. Peter Schjeldahl corrects the apparently common perception of Koons being the Devil: “he is really only a subaltern demon: Beelzebub, Satan's minister without portfolio at large. Koons attends to details of the Evil One's plan” (see Peter Schjeldahl, *Jeff Koons: Sympathy for the Devil*, in HOT, COLD, HEAVY, LIGHT, 100 ART WRITINGS, 1988-2018 286 (Jarrett Earnest, ed. 2019)). Why does Koons attract such opprobrium, however ironic its expression? Holding the title of the world's most expensive living artist (see Scott Reyburn, *Jeff Koons 'Rabbit' Sets Auction Record for Most Expensive Work by Living Artist*, N.Y. TIMES (May 15, 2019), <https://www.nytimes.com/2019/05/15/arts/jeff-koons-rabbit-auction.html> [<https://perma.cc/RV7V-QG5Q>].) is sure to attract envious detraction but, despite his paintings garnering similar prices (see Nate Freeman, *The 20 Most Expensive Artworks Sold at Auction in 2018*, ARTSY (Dec. 24, 2018), <https://www.artsy.net/article/artsy-editorial-20-expensive-artworks-sold-2018> [<https://perma.cc/8CWP-PVGR>].) David Hockney faces no such opprobrium. Indeed, in the United Kingdom, Hockney is considered to be a “national treasure” (see *David Hockney, National Treasure*, ECONOMIST (Jan. 7, 2012), <https://www.economist.com/bagehots-notebook/2012/01/17/david-hockney-national-treasure>).

In fact, both the Hockney's painting, *Portrait of an Artist (Pool with Two Figures)* (1972), and Koons's sculpture, *Rabbit* (1986), both sold for \$80 million but the auctioneer's fees increased between sales. See Smith, *supra* note 165.

174. See Rain Embuscado, *The Most Expensive Living Female Artists in 2016*, ARTNET NEWS (Apr. 8, 2016), <https://news.artnet.com/market/most-expensive-living-female-artists-2016-462770>.

175. See Brown, *supra* note 26. Such condemnation of the mercenary motives of contemporaries is not new. André Breton memorably coined the anagram “Avida Dollars” to highlight Salvador Dali's famous avidity; see Sarah Gottesman, *A Brief History of Surrealist Master Salvador Dali*, ARTSY (Jun. 30, 2016), <https://www.artsy.net/article/the-art-genome-project-what-you-need-to-know-about-salvador-dali>.

176. In her memoirs, Françoise Gilot, a painter who bore two of Picasso's children, indicates that he was far from uninterested in the business side of his artistic practice. See Lili Owen Rowlands, *The Scene on the Bridge*, 42(6) L.R.B. (Mar. 19, 2020), <https://www.lrb.co.uk/the-paper/v42/n06/lili-owen-rowlands/the-scene-on-the-bridge> [<https://perma.cc/AUG3-U446>].

177. See *1973: Art Master Picasso dies*, B.B.C. (Apr. 8, 2008), http://news.bbc.co.uk/onthisday/hi/dates/stories/april/8/newsid_2523000/2523469.stm [<https://perma.cc/N8DC-HBFS>].

178. See Milton Esterow, *The Battle for Picasso's Multi-Billion-Dollar Empire*, VANITY FAIR (Mar. 7, 2016), <https://www.vanityfair.com/culture/2016/03/picasso-multi-billion-dollar-empire-battle> [<https://perma.cc/KW2R-KA8B>]. Esterow cites Marc Blondeau, former head of Sotheby's France, who claims that, if Picasso were alive today, “he would be one of the 10 wealthiest men in the world”. See *id.* Having been born in 1881, Picasso would also be the world's oldest man. Picasso's death led to a massive intergenerational transfer of wealth and income-earning capacity. His heirs inherited 45,000 works, including 1,885 paintings and 1,228 sculptures. See *id.* They also succeeded to his intellectual property rights (copyright in Picasso's works will not expire before 2043) and so can, say, license his signature for the brand of a car, or permit reproductions of his works in any form. *Id.* Picasso's estate is also the largest beneficiary of *droit de suite* in Europe. *Id.*

Hirst and Koons may be extraordinarily well-off relative to most other living artists, but their wealth is overshadowed by the value of the deceased estates of artists, such as Picasso, Robert Rauschenberg or Basquiat, whose reputations seem to be untainted by acquisitiveness. Emin's objection does not appear to lie against artists being or becoming wealthy but to artists, who profess a desire to use their artistic practice to become wealthy and use contemporary financial technology to achieve this outcome.¹⁷⁹ Contrary to the Romantic ideal of the genius starving in a garret, Hirst has said:

I think money is a huge part of our lives. I've always thought it's as important as love, or death, or something to come to terms with, something to understand. It's a key and it's something you need to respect.¹⁸⁰

Along with breakdancing and rap, graffiti emerged as an element of a hip-hop triad of artistic practices.¹⁸¹ While acquisitiveness and conspicuous consumption are often celebrated and sometimes realized in rap culture,¹⁸² graffiti artists are commonly presumed to have chosen to practice their art for free. Why should graffiti artists or break dancers, any less than rappers, not hold aspirations for accumulating shiny personal property and wealth, when practitioners of each of the art forms often come from similar socially deprived backgrounds? The migration of some artists from the street to the gallery—or, at least, to commissioned work—indicates that graffiti artists may, indeed, be willing to embrace the financial benefits the contemporary art market may offer. However, like the opportunities for break dancers,¹⁸³ the opportunities graffiti artists enjoy for earning an income are severely limited.¹⁸⁴ Copyright, despite its value having been practically diminished in the digital era, still provides composers of rap music with a potentially lucrative income stream and a degree of exposure that is not available to other hip hop artists.

179. See generally THOMPSON, *supra* note 168; See also Felix Salmon, *Jeff Koons: a master innovator turning money into art*, GUARDIAN (Jul. 3, 2014), <https://www.theguardian.com/artanddesign/2014/jul/03/jeff-koons-master-innovator-whitney-money-art> [<https://perma.cc/P94M-QE4Y>].

180. See Henri Neuendorf, *According to Damien Hirst, You Can't Make Art Without Money*, ARTNET NEWS, (May 19, 2016), <https://news.artnet.com/exhibitions/damien-hirst-money-art-500810>.

181. See, e.g., Reebee Garofalo, *Hop: the Illustrated History of Break Dancing, Rap Music, and Graffiti; The Rap Attack: African Jive to New York Hip Hop*, 5 POPULAR MUSIC 264, 266 (1985).

182. See Nigel Lezama, *Mo' Money Mo' Problems: Hip Hop and Luxury's Uneasy Partnership*, in THE OXFORD HANDBOOK OF HIP HOP MUSIC (Justin D. Burton & Jason Lee Oakes eds., 2018).

183. See, e.g., John Otis, *Break Dancer Finds Footing While Trying To Heal a Rift*, N.Y. TIMES, Jan. 22, 2016, at A23. Since breakdancing has been admitted as an Olympic sport, no doubt marketers will find ways to commodify the artistic practice. See Rick Maese, *How break dancing made the leap from '80s pop culture to the Olympic stage*, THE WASHINGTON POST (Feb. 9, 2021), <https://www.washingtonpost.com/sports/2021/02/09/break-dancing-olympic-sport-paris-2024> [<https://perma.cc/R82H-GAZM>].

184. Some ex-graffiti artists have been able to use their skills as “wall dogs” who paint giant advertising murals. See Jamie Lauren Keiles, *Hipster Culture and Instagram Are Responsible for a Good Thing*, N.Y. TIMES (Jan. 29, 2018), <https://www.nytimes.com/2018/01/29/style/paint-the-walls.html> [<https://perma.cc/UW7B-2ERF>].

C. Ideological Projection

Graffiti artistic practice is a convenient anti-image to the market-oriented operations of Hirst and Koons on to which we (commentators, academics, art lovers, and others) can project our ideological preferences. Ivor Miller, for example, argues that “[m]any subway paintings were created in the spirit of a public gift, a rare thing in a society where even the earth, the water, and time itself are being bought and sold”.¹⁸⁵ Similarly, for James and Karla Murray, graffiti artists “are still driven by a passion to create. They create art. Art for art’s sake”.¹⁸⁶ No doubt, all artists have a passion to create, whether or not they are commercially successful.¹⁸⁷ The critical distinction between graffiti artists and other artists is that the former, despite public recognition, may not receive any direct reward; hence, the presumption of art for art’s sake. But simply because something has not been paid for,¹⁸⁸ and can be viewed and copied for free, does not mean it is a gift from the artist.¹⁸⁹ For sure, examples can be adduced of well-known artists, such as Banksy and Keith Haring, donating an artwork to a particular institution or community, but tags are more plausibly seen as manifestations of self-expression and social anchoring, and messages to other members of the tagging community, rather than gifts to society in general. Criminal considerations aside, surely there is nothing wrong with that – why should graffiti artists be imputed with motives more noble than anyone else?

Doug Harvey argues that, notwithstanding “institutional attempts to portray street art as merely a culturally disenfranchised subgenre of contemporary art making, unauthorized graffiti art is, at its root, a direct challenge to the central tenet of capitalism ... private property”.¹⁹⁰ Is Harvey’s claim a projection by a radical commentator of his own beliefs on to others? Graffiti artists invariably encroach upon private property but that

185. See IVOR L. MILLER, AEROSOL KINGDOM: SUBWAY PAINTERS OF NEW YORK CITY 153 (2002); see also Ted Gioia, *Gratuity: Who Gets Paid When Art Is Free*, IMAGE, <https://imagejournal.org/article/gratuity-who-gets-paid-when-art-is-free> [<https://perma.cc/FB8C-RNLK>].

186. See MURRAY & MURRAY, *supra* note 17 [unpaged].

187. Whether or not one appreciates his work and tactics, there can be little doubt that Koons is passionate about art and his own artistic practice. See e.g. HANS ULRICH OBRIST, JEFF KOONS: THE CONVERSATION SERIES (2012).

188. Commercialization and commodification do not necessarily negate the gift element of art. Marilynne Robinson characterizes generosity as “a casting off of the constraints of prudence and self-interest” and suggests “it is so like an art that I think it may actually be the impulse behind art.” See Casey Cep, *Book of Revelation*, NEW YORKER 44, 49 (Oct. 5, 2020). The fundamental impulse to create art may survive significant market reward.

189. Gifting is thought to be particularly important among traditional Indigenous communities. See generally MARCEL MAUSS, THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES (1954). The community needs to expect or welcome the gift. For a contemporary, generalized application of Mauss, see generally LEWIS HYDE, THE GIFT: HOW THE CREATIVE SPIRIT TRANSFORMS THE WORLD (1983).

190. See Doug Harvey, *The Return of the Culture Wars*, NATION (Feb. 14, 2011), <https://www.thenation.com/article/return-culture-wars/>.

behavior is a matter of necessity, rather than an ideological challenge to the institution of private property and the capitalist economic system. Harvey's proposal is not wholly implausible because some disdain for others' property expectations is inherent in graffiti, but his argument appears to be freighted with ideological projection. The 5Pointz artists did not challenge property law; rather they asserted their own special intellectual property rights.

D. *Free-riding and Exploitation*

For Norman Mailer, “the best of the graffiti writers, those mountains of heavy masterpiece production ... get the respect, call it the glory, that they are known, famous and luminous as a rock star”.¹⁹¹ Kudos may stand in proxy for property rights *among* graffiti artists, who, in general, appear to have few expectations of their work enjoying permanence. Painting over by other writers is normal; although respect, translated into immunity from desecration for certain works – or, at least, negative reactions to those who do desecrate – is imaginable.¹⁹² But what of commercially motivated outsiders, such as advertisers, who might seek to benefit from illegal works and their outlaw status?¹⁹³ Without a conception of creators' right, an outlaw work falls into a property no man's land that anyone can exploit. As Ronald Kramer observes, graffiti and street art are commonly commercialized but not by the artists who create the artworks, rather they are appropriated by commercial interests.¹⁹⁴ Mailer's comparison of the creator of illegal pieces and a rock star does not bear deep scrutiny. Even, in the age of pirated digital downloads and Spotify-style micro-royalties, rock stars may still be paid handsomely to perform at concerts and may also earn money from sales of merchandise.¹⁹⁵

Much has been written on whether graffiti art does or should attract copyright protection.¹⁹⁶ Enrico Bonadio observes that graffiti artists are not motivated “to create art by the possibility of claiming copyright”.¹⁹⁷ This is

191. See NORMAN MAILER & JOHN NAAR, *THE FAITH OF GRAFFITI* 12 (1973, 2009).

192. *Id.* at 30. Mailer and Naar quote Chairman Martinez: “Super Strut is very good but he is not recognized as a master because he's written over a mess of masterpieces people took big chances to make.” Hugo “Chairman” Martinez was the organizer of the United Graffiti Artists which sought the legitimization of graffiti. See also *Banksy Graffiti Feud Given a Fresh Coat*, *GUARDIAN* (Apr. 23, 2010), <http://www.guardian.co.uk/uk/2010/apr/23/banksy-graffiti-world-feud>.

193. See Ronald Kramer, *Graffiti and Street Art: Creative Practices Amid 'Corporatization' and 'Corporate Appropriation'*, in *THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI* 26-40 (Enrico Bonadio, ed. 2019).

194. *Id.*

195. See Amy X. Wang, *How Musicians Make Money — Or Don't at All — in 2018*, *ROLLING STONE*, (Aug. 8, 2018), <https://www.rollingstone.com/pro/features/how-musicians-make-money-or-dont-at-all-in-2018-706745/>.

196. See e.g. Celia Lerman, *Protecting Artistic Vandalism: Graffiti and Copyright Law*, 2(2) *J.I.P.E.L.* (2013), <http://jipel.law.nyu.edu/vol-2-no-2-2-lerman/>. For a summary of the arguments for and against copyright in graffiti art, see Enrico Bonadio, *Introduction*, in *THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI* 3-5 (Enrico Bonadio, ed., 2019).

197. *Id.* at 5.

a plausible observation but overlooks the fact that graffiti artists (unlike street artists) have no reason to be motivated by copyright since there is no clear precedent to establish that copyright subsists in the works they produce, and, if it does subsist, they can enforce their intellectual property rights without inviting criminal prosecution. More pertinently, Bonadio considers other groups, whose members unambiguously enjoy copyright protections, and asks: “What about ... academics? Do we spend years of our life researching and writing books or papers because we are excited by the idea of enforcing copyright? Not at all.”¹⁹⁸ Bonadio is plausible: academics writing about graffiti and other outlaw art are typically unconcerned about copyright but we can afford this insouciance because we have a guaranteed income from other blue-chip sources, typically a university salary.

I am, then, blushing aware of the irony of a tenured academic writing about outlaw art practice.¹⁹⁹ Perhaps, like much academic writing on graffiti art, this Article itself is parasitic on the lived experience, including dangerous and criminal undertakings, of people less fortunate than those who record or comment on their actions.

Street art and graffiti can also lead to gentrification and attendant rent increases that drive out long-term residents.²⁰⁰ Kim Dovey,²⁰¹ an urbanist based in Melbourne, a city that has become well-known for its graffiti and street art,²⁰² argues that tagging is an indicator of urban decline, whereas street art signals gentrification and rising property prices.²⁰³ The spray can murals he contemplates could be legal street art or illegal graffiti art, although both may share similar formal qualities. Particularly, if the artefacts are illegal, property developers and real estate owners effectively freeride on graffiti artists’ risks and efforts.²⁰⁴

198. *Id.*

199. See Barrett, *supra* note 118 at 299-312.

200. See e.g. Daisy Alioto, *How Graffiti Became Gentrified*, NEW REPUBLIC, (Jun. 19, 2019), <https://newrepublic.com/article/154220/graffiti-became-gentrified>.

201. See KIM DOVEY, URBAN DESIGN THINKING: A CONCEPTUAL TOOLKIT 208 (2016).

202. See generally ALISON YOUNG, STREET ART WORLD (2016). Melbourne’s Hosier Lane is the city’s most photographed tourist attraction. Its graffiti artists are commonly homeless and may risk prosecution for vagrancy, despite making a significant economic contribution to the city. See Hannah Francis, *Street Artists Snub Hosier Lane over Homeless Eviction*, SYDNEY MORNING HERALD, (Jul. 18, 2017), <https://www.smh.com.au/entertainment/art-and-design/archibald-prize-entry-highlights- plight-of-melbournes-homeless-street-artists-20170718-gxdejo.html>.

203. DOVEY, *supra* note 202 at 204. See also C.I. Seresinhe, T. Preis T and H.S. Moat, *Quantifying the Link between Art and Property Prices in Urban Neighbourhoods*, R. SOC. OPEN SCI. 3: 160146 (2016), <http://dx.doi.org/10.1098/rsos.160146>.

204. The development of the High Line park in the west side of Manhattan is a well-known example of contiguous property owners gaining an unearned windfall from other people’s activities. In a less dramatic way, street art or graffiti art may have a similar effect in gentrifying districts.

E. “In-lawing” Outlaw Art

Alison Young identifies the challenge for accommodating outlaw works within the property-law system, and indicates discursive solutions; she writes:

I do not mean to suggest that we should simply flip categories of discourse such that all illicit words and images in urban space automatically are to be categorized as ‘art’, or that non-one should be prosecuted for engaging in street art or graffiti. Such an inversion would smack of an oppositional ideology and risk no real social change. Instead, I suggest that we seek as conversation between those who wish to ‘protect’ their property and those who experiences a sense of entitlement to add to it; between those who want to adapt city spaces to their own ends and those who believe that the authority to do so is vested only in government agencies and through property ownership.²⁰⁵

Consonant with Young’s challenge, this Article has argued that outlaw artists should have space for expression and anchoring, which requires a mature, inclusive and nuanced approach from authorities.

Tagging can intimidate members of vulnerable groups, notably the elderly, and may cause disproportionate costs for small business owners who work hard to create and maintain a trade dress, and do not appreciate the “gift” of a tagged store front.²⁰⁶ Nevertheless, graffiti artists generally make unusual criminals. Their words and images are rarely racist, sexist, homophobic or otherwise offensive. Indeed, their illegal murals may promote justice, and celebrate diversity and community: for example, the Black Lives Matter movement has been progressed by graffiti artists around the world,²⁰⁷ and, in France, illegal billsticking has highlighted domestic violence.²⁰⁸ Typically, graffiti artists do not harm people in committing their crimes; conversely, they may be victims of heavy-handed policing or vigilantism. Their canvasses are often the blighted walls of neglected buildings or government-owned infrastructure that is genuinely ameliorated by illegal painting.

205. ALISON YOUNG, *STREET ART, PUBLIC CITY: LAW, CRIME AND THE URBAN IMAGINATION* 163 (2014).

206. Gifts are usually made in context of reciprocity, such as family. A tagger, who decides to “gift” their signature to the premises of a small businesses or private homeowner, is probably acting outside an appropriate context for gifting.

207. See Rani Boyer, *How Graffiti Artists Are Propelling the Vision of the Black Lives Matter Movement*, ARTSY, (Jul. 20, 2020), https://www.artsy.net/article/artsy-editorial-graffiti-artists-propelling-vision-black-lives-matter-movement?utm_medium=email&utm_source=20971760-newsletter-editorial-daily-07-21-20&utm_campaign=editorial&utm_content=st-A.

208. See Constant Méheut, *Feminists Paper Paris With Stark Posters Decrying Domestic Abuse*, N.Y. TIMES (Sept. 13, 2020), https://www.nytimes.com/2020/09/13/world/europe/paris-france-feminist-posters.html?campaign_id=2&emc=edit_th_20200914&instance_id=22166&nl=todaysheadlines®i_id=52727791&segment_id=37997&user_id=70e19358e81b117d61cf533599ebb6fa.

Street art has become normalized and is, of course, legal. In New Zealand, cities, such as Dunedin,²⁰⁹ have commissioned numerous pieces, while seeking to buff illegal graffiti works, whatever their aesthetic appeal. Christchurch, which, post-earthquakes,²¹⁰ still has endless tagging opportunities on the walls of condemned or exposed buildings, has a particularly ambivalent approach to, on the one hand, commissioning street art but, on the other hand, claiming to eradicate graffiti.²¹¹ In practice, graffiti can be seen all around the inner city – it seems that city authorities have tacitly accepted that graffiti adds vitality to buildings waiting to be remediated or demolished.²¹² Regional galleries have gone further than celebrating street art to embrace graffiti, including the most mundane tags, as a form of artistic practice.²¹³

If graffiti has, over decades, been incrementally “in-lawed”,²¹⁴ albeit ambiguously, can the same happen for tire art? In the context of N.A.S.C.A.R. motor events, smoke clouds and blacktop marking have indeed been normalized, but these are strictly controlled demonstrations of the automobile skills of an elite group of drivers. But for infringing drivers, “police will confiscate cars if they catch their drivers attempting such stunts”.²¹⁵ However, every year Canberra hosts Summernats,²¹⁶ “a pageant for hot-rods, street machines and ‘sleepers’, where this activity is legitimised and commodified as a spectacle”.²¹⁷ Summernats presents a spatially and temporally limited opportunity for tire art practitioners and aficionados to engage in an otherwise illegal activity. Other cities could follow this example.

209. See *Dunedin Street Art*, DUNEDIN STREET ART (2017), <http://dunedinstreetart.co.nz/>.

210. See *Christchurch and Canterbury earthquakes*, CHRISTCHURCH CITY COUNCIL LIBRARIES (2022), <https://my.christchurchcitylibraries.com/christchurch-and-canterbury-earthquakes/>.

211. See *The Graffiti Programme*, CHRISTCHURCH CITY COUNCIL, <https://ccc.govt.nz/services/graffiti/the-graffiti-programme>.

212. The audacious “TOGO” tag on the Rydges hotel has, for example, dominated the central city for more than five years. See e.g. Charlie Gates, *Tower tagger smashed locks and caused more than \$25,000 of damage*, STUFF (Jun. 10, 2016), <https://www.stuff.co.nz/the-press/news/80923663/tower-tagger-smashed-locks-and-caused-more-than-25000-of-damage>.

213. The first gallery exhibition of street art and graffiti art was held in 1999. Other seminal events and exhibitions that contributed to mainstream acceptance include: DISRUPT THE SYSTEM (Aotea Square, Auckland 2000); OI YOU! (Nelson 2010); GRAFFIATO (Taupō 2011); ALL FRESCO (Auckland 2013); FROM THE GROUND UP (Christchurch 2013); and STREET LEGAL (Kawerau 2014). See Kerryn Pollock, *Public and street art - Street art*, TE ARA - THE ENCYCLOPEDIA OF NEW ZEALAND, <http://www.TeAra.govt.nz/en/public-and-street-art/page-4>.

214. See e.g. Goldstein *supra* note 134 on New York City’s formal recognition of Diaz’s contribution to the culture of the city.

215. See *Ben Morieson Burnout*, *supra* note 61.

216. See *FAQ*, SUMMERNATS, <https://summernats.com.au/faq/>.

217. *Id.*

IV. Conclusion

New Zealanders, as residents of one of the world's most geographically isolated countries, tend to be inveterate overseas travelers. The Covid-19 pandemic, on the one hand, prevented most travel abroad but, on the other hand, because of the lack of internal constraints, prompted many people to travel far more extensively in their own country. My road trips, particularly around the backroads of the hinterland, led to the observation of blacktop markings and prompted the question why these tarmac etchings, which are clearly intentional, and present memorable images created through the application of skill and daring, should not be considered a form of street art (ignoring here the specious and legalistic distinction between graffiti and street art); indeed, a creative practice in which an artefact is literally inscribed onto the fabric of the street.

Headlights panning on the nocturnal road surface is a recurring cinematic trope – to drive and observe the inscribed blacktop is to imagine the vehicles and their infringing drivers that have passed before us.²¹⁸ As law-abiding, careful drivers, we can observe, imagine, and vicariously experience the braggadocio of infringing drivers in creating their blacktop markings in much the same way as Mailer was awed by the feats of the early spray can graffiti artists in transforming the dull metro trains of New York City. It is, perhaps, a manifestation of my pareidolia to perceive art in the everyday, and, rather than the creation of artworks, infringing drivers are simply engaging in the thrill of breaking the law and losing traction. Nevertheless, consistent with this Article's working definition of "art", infringing drivers intentionally create these inscriptions, and many are memorable images.

This Article is exploratory, and speculative in nature and intent. Arguments have been presented for tire art, like graffiti, to be considered a vulgate artistic practice comparable to forms of folk, outsider, street, and even fine art. It has been argued that the practice of tire art does not give rise to any property rights in artefacts created. Furthermore, while copyright may theoretically subsist in blacktop inscriptions (smoke clouds cannot themselves be fixed in a physical form), courts may refuse to enforce any such rights, and the authors would run the risk of criminal prosecution. Unlike the social benefits of seeking to preserve a landmark paragon of street art and punishing its destroyer through moral rights legislation, as seen in *5 Pointz*, there is no obvious social advantage to be gained from extending copyright and moral rights to blacktop markings.

In a world of commoditization, an attraction of outlaw artistic practice lies with its apparent incapacity for direct commercial exploitation.

218. See e.g. *FARGO* (Nomadic Pictures 1996).

Woodmansee, among others, has demonstrated how the original construct of the Romantic artist, who creates arts for art's sake, was economically motivated. Similarly, this Article asserts that a Romanticized image of the outlaw artist is implausible, and may act as a mask for social exclusion, market exclusion and failure, and exploitation. However, assertion of personhood and anchoring in society, derived from Hegelian property theory, suggest that ways of recognizing creative activity, without radically reconfiguring existing law and property expectations, may be sought.

Chris Filippone's *How to Breathe in Kern County* documents agricultural laborers in California's Bakersfield region expressing their personhood in late night burnouts.²¹⁹ Against the revving of engines and burning of vulcanized rubber, the narrator observes: "The noise is frightening/It forms/It carves/The song of a world without work/For a moment we breathe." Filippone's cinematography is artful; the sparse narrative is poetic and affective; and the experience provides a concrete example of Hegelian assertion of personhood and anchoring in an otherwise alienating space. It is implausible to claim that property rights are created for or by the drivers whose brief respite from relentless labor Filippone depicts but this Article argues they too may be engaging in a creative practice. This act of creation may be accompanied by an unpleasant multisensorial experience – dizzying, cacophonous, smelly, even choking – but blacktop markings themselves, because they are inscribed on the horizontal plane, are, in general, relatively inobtrusive. Indeed, many share the natural beauty of shadows cast on the road by loosely slung utility lines.

219. See *How to Breathe in Kern County*, CHRIS FILIPPONE (2019), <http://www.chrisfilippone.com/how-to-breathe-in-kern-county> [<https://perma.cc/C2DW-BKH9>].