

PAINT ON ANY OTHER CANVAS: CLOSING A COPYRIGHT LOOPHOLE FOR STREET ART ON THE EXTERIOR OF AN ARCHITECTURAL WORK

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ABSTRACT

Street art is having a moment. Once criminalized and ardently combatted by city governments, street art has become a persistent presence in metropolitan cities, social media feeds, and even art galleries. Often coming in the form of graffiti murals applied to the exterior-facing walls of a building, these works are racking up significant price tags at auction houses and are raising property values in proximate areas. And yet, despite street art's recent legitimization by the Second Circuit in a historic decision allowing the recovery of significant statutory damages upon the destruction of a work of recognized stature, a loophole in U.S. copyright law threatens to jeopardize these strides.

This Note delves into the conflict between the copyright protections of buildings and the copyright protections for the street art painted on them. A relatively underused amendment to the Copyright Act that provides copyright protections for buildings—the Architectural Works Copyright Protection Act (“AWCPA”)—has jeopardized copyright protections for street artists. It has allowed companies to prominently feature and profit off of the artists’ work in advertising campaigns without the artists seeing any financial return for the use.

Two recent cases have tested this legal loophole, with companies weaponizing the AWCPA—to varying degrees of success—as an

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affirmative defense to a copyright infringement claim brought on by the use of street art in their advertisements without permission from the artists themselves. These cases represent a significant threat to the financial interests of street artists—and in a way that was not specifically considered by Congress because street art lacked institutional legitimacy at the time of the AWCPA’s enactment. This Note argues the proper way forward is for Congress to amend the AWCPA to create a level playing field for artists, regardless of the medium on which their work exists.

“Imagine a city where . . . everybody could draw whatever they liked A city that felt like a party where everyone was invited, not just the estate agents and barons of big business. Imagine a city like that and stop leaning against the wall – it’s wet.”

*Banksy, street artist*¹

INTRODUCTION

On a Sunday morning in September 2017, Londoners awoke to a surprise. Outside the Barbican Center, the esteemed British artistic institution, were two fresh graffiti works painted by the street-art renegade Banksy.² The Banksy pieces emerged just days prior to the opening of the Barbican’s exhibit featuring the work of Jean-Michel Basquiat, a street artist turned mainstream darling of the art world,³ and appeared to sample elements of the late artist’s work.⁴

One of the graffiti works featured patrons standing in line for a Ferris wheel, but instead of passenger cars, there were crowns, a signature symbol found in Basquiat’s work.⁵ “Major new Basquiat show opens at the Barbican—a place that is normally very keen to clean

1. Paul Gough, *Introduction*, in *BANKSY: THE BRISTOL LEGACY* 9, 9 (Paul Gough ed., 2012).

2. Roslyn Sulcas, *Banksy Strikes Again, with Nod to Basquiat*, N.Y. TIMES (Sept. 18, 2017), <https://nyti.ms/2jEtjuX> [<https://perma.cc/6MG2-DHKW>]. Banksy, who operates anonymously under this pseudonym, is currently one of the most recognizable street artists and is famous for their political and social commentary. Gough, *supra* note 1, at 9–18 (discussing Banksy in the context of their 2009 takeover of the Bristol Museum & Art Gallery).

3. *Jean-Michel Basquiat: The Life and Work Behind the Legend*, BBC (July 9, 2015), <http://www.bbc.com/culture/story/20150709-jean-michel-basquiat-the-life-and-work-behind-the-legend> [<https://perma.cc/5JXW-3UYS>].

4. Sulcas, *supra* note 2.

5. *Id.*

any graffiti from its walls,” Banksy captioned the photo on their⁶ personal Instagram.⁷

FIGURE 1. BANKSY’S BASQUIAT-INSPIRED STREET ART AT THE



BARBICAN⁸

Banksy’s second work was a spinoff of Basquiat’s famous painting “Boy and Dog in a Johnnypump.”⁹ The original painting contained an almost cartoonish portrait of a boy and a dog standing solitarily on a canvas, surrounded by a fiery explosion of brush strokes and color. In Banksy’s take, the boy is being frisked by the London Metropolitan Police as the dog looks on. “Portrait of Basquiat being welcomed by

6. Many media outlets refer to Banksy with masculine pronouns, but given that Banksy has never revealed their identity, they will be referred to throughout this Note with gender-neutral pronouns. See Gough, *supra* note 1, at 18 n.1 (explaining the choice to use masculine pronouns and the multiple-artists theory). Some in the media have speculated their identity is Robin Guggingham, a Bristol native. E.g., Jennifer Newton, *Artful Dodger: Who Is Banksy?*, U.S. SUN (Sept. 7, 2020, 1:06 PM), <https://www.the-sun.com/news/139073/who-is-banksy> [<https://perma.cc/NH47-LKB3>]. However, others are convinced Banksy is a contingent of street artists rather than a single person. *Id.*

7. Banksy (@banksy), INSTAGRAM (Sept. 17, 2017), <https://www.instagram.com/p/BZJELJiAmb5> [<https://perma.cc/5PP6-5PC4>]. Instagram has become a preferred platform for artists around the world to share photos of their work. The social media app has both raised awareness and the price of the most popular pieces posted on the app. For a discussion of Instagram’s influence on art, see Nina Siegal, *Instagram Takes On Growing Role in the Art Market*, N.Y. TIMES (Aug. 9, 2015), <https://nyti.ms/1Wb8Nw1> [<https://perma.cc/45NU-FZXL>].

8. Banksy, *supra* note 7.

9. Sulcas, *supra* note 2.

the Metropolitan Police – an (unofficial) collaboration with the new Basquiat show,” Banksy wrote on Instagram.¹⁰

FIGURE 2. BANKSY’S BASQUIAT-INSPIRED STREET ART AT THE BARBICAN¹¹



Although, at the time, there was some speculation as to what exactly Banksy meant by their latest artistic statement, what was clear was how much street art has changed between the two artists’ careers. Whereas Basquiat’s street art was often criminalized by the communities in which he worked,¹² Banksy has been lionized.¹³ Banksy’s work exposes an irony about how artistic institutions

10. Banksy (@banksy), INSTAGRAM (Sept. 17, 2017), <https://www.instagram.com/p/BZJETE9AlnS> [<https://perma.cc/P3L2-QSEP>].

11. *Id.*

12. Basquiat explored themes of race, police brutality, and oppression in his work. His piece titled, “Defacement (The Death of Michael Stewart),” was a grief-stricken reaction to the death of Black artist Michael Stewart who was beaten and killed by police after allegedly tagging a New York subway station wall. Erik Nielson, *‘It Could Have Been Me’: The 1983 Death of a NYC Graffiti Artist*, NPR (Sept. 16, 2013, 7:12 PM), <https://www.npr.org/sections/codeswitch/2013/09/16/221821224/it-could-have-been-me-the-1983-death-of-a-nyc-graffiti-artist> [<https://perma.cc/E6MX-LC7Q>]. Basquiat, a young Black artist himself who put his graffiti art up all over the city, was particularly moved by news of Stewart’s death. “It could have been me,” he said, commenting on the criminalization of Black street artists. *Id.*; see also Fox Butterfield, *On New York Walls, the Fading of Graffiti*, N.Y. TIMES (May 6, 1988), <https://nyti.ms/29z990z> [<https://perma.cc/D64B-H8UR>] (detailing efforts by New York City during the ’80s to criminalize or combat graffiti, including measures intended to “deny vandals pleasure in seeing their work”).

13. Though Banksy painted their work at the Barbican without the museum’s permission, the museum actually preserved it and made it a permanent fixture. Julia Gregory, *Barbican’s Banksy Artworks Become Permanent Fixtures*, CITY MATTERS (Nov. 28, 2018), <https://www.citymatters.london/barbicans-banksy-artworks-become-permanent-fixtures> [<https://perma.cc/PYJ2-HQHN>].

recognize and showcase Basquiat's work when he applied paint to canvas, but something existentially changes when he applied paint to building exteriors. Street art, the type Basquiat was originally known for, is markedly *outside* the Barbican. Museums are a place for canvas.

Banksy's work incisively comments on the tension surrounding which mediums are deserving of being called "art." A similar battle rages on in American copyright law. Street art—which, for the purposes of this Note, refers to legally¹⁴ commissioned¹⁵ art that exists on the exterior-facing walls of a building¹⁶—currently finds itself in the crosshairs of this debate over what changes, as a matter of law, when art exists *on* a building rather than *in* one. Currently, copyright law treats the two works differently, and, as a result, there are gaps in copyright protections for street artists based solely on the medium on which their work exists.¹⁷ To put it in legal terms, the copyright protections afforded to street artists depend on the physical embodiment in which the work is fixed.¹⁸

14. This Note does not delve into whether street art that is not legally commissioned by the buildings' owners is copyright eligible, though many legal scholars argue that due to the minimal requirements of copyright law, it is. *See, e.g.,* Celia Lerman, *Protecting Artistic Vandalism: Graffiti and Copyright Law*, 2 N.Y.U. J. INTEL. PROP. & ENT. L. 295, 296, 307–11 (2013) ("At least some pieces of graffiti are suitable for copyright protection, insofar as they are original works, fixed in a tangible medium of expression."). However, a recent case squarely presented this issue. Clothing brand H&M posted an advertisement featuring a street artist's illegally painted work and subsequently sought a declaratory judgment, asking the court to find that illegal street art is not subject to copyright protections. Alan Feuer, *Brooklyn Lawsuit Asks if Illegal Graffiti Is Protected by Copyright Law*, N.Y. TIMES (Mar. 15, 2018), <https://nyti.ms/2GxrOXA> [<https://perma.cc/7CRF-HZYP>]. After extensive public backlash against H&M, it withdrew the lawsuit. *See* Angie Kordic, *UPDATED: H&M Files – Then Withdraws! – A Lawsuit Against Revok over His Own Graffiti*, WIDEWALLS (Mar. 16, 2018), <https://www.widewalls.ch/hm-revok-graffiti-lawsuit> [<https://perma.cc/8V4L-HYK6>] (citing an H&M Instagram story announcing H&M's withdrawal of the complaint, stating it "respects the creativity and uniqueness of artists, no matter the medium" and "should have acted differently").

15. In certain circumstances where an artist is employed to paint on a building, the copyright could belong to the landowner pursuant to the work for hire doctrine, but this is beyond the scope of this Note. *See* 17 U.S.C. § 201(b) (2018) (stating if the work was prepared for an employer, the copyright belongs to them rather than the creator). Assume for the purposes of this Note that the work for hire doctrine does not apply, and thus the street artist in question is the copyright owner.

16. Aside from the Banksy pieces discussed in the Introduction, every artwork discussed in this Note was legally commissioned with the consent of the building's owner. The Banksy pieces highlight the art world's evolving understanding of street art rather than illustrate the copyright arguments this Note makes.

17. Part III describes how street art existing on an exterior-facing wall of a building changes the calculus of its copyrightability.

18. Although § 101 of the Copyright Act defines "fixed" as "embodiment . . . sufficiently permanent or stable to permit [the work] to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration," which would seem to encompass

The purpose of copyright law is to grant creators exclusive control over most commercially valuable activities involving their work.¹⁹ Copyright law applies to a broad swath of subject matters ranging from software code to musical performances.²⁰ In terms of visual art, copyright law grants these rights to authors in two distinct ways. First, the Visual Artists Rights Act (“VARA”)²¹ amended the 1976 Copyright Act to afford creators the ability to prevent the destruction of their work, as well as various other rights including the right to control how their name is associated with the work and the right to prevent modifications to a work that would be detrimental to artists’ reputation.²² To qualify for the protection against destruction, the work must be a “work of recognized stature,”²³ a largely fact-sensitive determination made by the courts.²⁴ Only “authors” may assert these rights, and they are waivable.²⁵ Second, § 106 of the Copyright Act²⁶ grants creators a set of exclusive rights over the work, including the ability to prevent or authorize reproductions of their work.²⁷ To qualify for these protections, a work must meet a minimal burden of originality and be fixed in a tangible medium.²⁸ Unlike VARA, these rights are assignable or transferable.²⁹

Street artists have asserted both types of rights to varying degrees of success.³⁰ However, street artists have had considerably more success under VARA, recently winning a major victory in the Second Circuit. In

street art, *see* 17 U.S.C. § 101, other provisions indicate that no such protection exists for street art fixed on the outside of a building, *see infra* Part II.D.

19. JAY DRATLER, JR., *INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE, AND INDUSTRIAL PROPERTY* § 6.01 (2020).

20. *See, e.g.*, 17 U.S.C. § 1101 (granting artists rights against unauthorized recording of live musical performances); *id.* § 117 (defining limitations on the exclusive rights in computer programs granted in § 106).

21. Visual Artists Rights Act, 17 U.S.C. § 106A.

22. *Id.* § 106A(a) (granting visual-art creators rights to attribution and integrity, to prevent any modification of the work that would be prejudicial to the artist, and “to prevent any destruction of a work of recognized stature”).

23. *Id.*

24. The Second Circuit defined the test for determining whether a work is of “recognized stature” as a “fluid” inquiry into whether the work is of “artistic quality” as defined by the “artistic community.” *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 166 (2d Cir. 2020).

25. 17 U.S.C. § 106A(e).

26. *Id.* § 106.

27. The owner of the copyright has the exclusive rights to reproduce the work, prepare derivative works, distribute copies, and display or perform the work publicly. *Id.*

28. *Id.* § 102.

29. *Id.* § 201(d).

30. *See infra* Part III (discussing various copyright claims made by street artists in recent years).

March 2020, the Second Circuit affirmed a \$6.75 million award of statutory damages for the destruction of street art in Brooklyn.³¹ For the first time, forty-five works of street art were deemed works of “recognized stature” as a matter of law and thus were eligible for VARA’s protection against destruction.³² The problem is that VARA only protects the moral rights of street artists, which often only come into play once a work has been destroyed, altered, or misattributed.³³

Section 106 of the Copyright Act, which provides authors with the rights to control and authorize reproductions of their work, has proved far less successful in protecting street artists as a result of a 1990 amendment to the 1976 Copyright Act titled the Architectural Works Copyright Protection Act (“AWCPA”).³⁴ Though most street art presumably qualifies for copyright protections under § 102—given that it is independently created, possesses originality,³⁵ and is fixed in the inarguably tangible medium of a wall³⁶—the AWCPA creates a

31. *Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421, 447 (E.D.N.Y. 2018), *aff’d sub nom. Castillo*, 950 F.3d at 173.

32. *Castillo*, 950 F.3d at 163, 170.

33. VARA grants artists the rights to prevent the intentional mutilation of their work if it would be prejudicial to their reputation and to enjoin the destruction of their work if the work is of recognized stature. 17 U.S.C. § 106A(a)(3)(A)–(B). This right can be exercised either prospectively through an injunction or retrospectively through damages. *See* H.R. REP. NO. 101-514, at 22 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6915, 6932 (stating damages and injunctive relief are available for VARA violations). However, there are various hurdles involved that make a successful claim for an injunction unlikely. For example, to claim prospective VARA relief for mutilation or destruction, an artist would need advance notice of the intentional mutilation or destruction, which is made more difficult by the fact that VARA rights are not transferable. *See* 17 U.S.C. § 106A(e)(1) (stating VARA rights are not transferable). Therefore, if a work is painted on a building and that building is sold, the new owner may not know who the artist is nor how to get in touch with them to provide this notice. *See* David E. Shipley, *The Empty Promise of VARA: The Restrictive Application of a Narrow Statute*, 83 MISS. L.J. 985, 996–99 (2014) (describing how a pre-VARA case of a fresco being painted over would be litigated post-VARA and the complications involved). Further, works of street art create further difficulties in preliminary injunction hearings due to courts struggling to conceptualize irreparable harm in the street art context, especially when property owners’ rights are at stake. *See* Richard Chused, *Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 COLUM. J.L. & ARTS 583, 596–97 (2018) (describing the preliminary injunction VARA hearings regarding *Cohen v. G&M Realty L.P.* and how the work at issue being street art complicated the analysis).

34. Architectural Works Copyright Protection Act, Pub. L. No. 101-650, §§ 701–06, 104 Stat. 5089, 5133–34 (1990).

35. 17 U.S.C. § 102. As long as a work is “independently created” and contains a “minimal degree of creativity,” it is eligible for copyright protection under § 102. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

36. *See* 17 U.S.C. § 101 (defining a work as fixed in a tangible medium “when its embodiment . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration”).

complication. According to the amendment, architectural-copyright holders do not possess one of the traditional exclusive rights in copyright law: the ability to control pictorial representations of the architectural works. Pictorial representations and reproductions—such as videos or photographs—are explicitly allowed when the subject is an architectural work.³⁷ Whether the street art attached to a side of the building is part of the architectural work itself is a fact-sensitive determination made by the courts.³⁸ Therefore, if the street art is considered part of an architectural work, the creator loses all rights to prevent or authorize reproductions of their work³⁹—protections that they would have had if their work was on any other canvas.⁴⁰

Two recent cases tested whether the AWCPA is a loophole for copyright protections in street art.⁴¹ Both involve car companies that posted advertisements of their cars in front of works of street art. The main issue in the cases was whether the works of street art were extensions of the architectural works—such that their protections were swallowed up by the AWCPA—or whether they existed separately from the buildings.⁴² If the latter, then the artists had a valid copyright infringement claim against the companies. The courts split in these two cases on the question of whether the art existed separately from the architectural work.⁴³ As Part III explains, the lack of litigation surrounding this particular issue has left the courts with largely ad hoc, fact-sensitive factors to make these determinations.

Currently, if an otherwise-copyrightable work is attached to a noncopyrightable object, its creator maintains their copyright protections as long as the work can be *imagined* as existing separately from the

37. *Id.* § 120(a).

38. Part III outlines three cases that take up this issue. First, a Ninth Circuit case which developed the fact-sensitive test for evaluating these claims and then two more recent applications of this test as it relates to street art. *Infra* Part III.

39. *See Leicester v. Warner Bros.*, 232 F.3d 1212, 1219 (9th Cir. 2000) (finding an otherwise-copyrightable tower was legally an extension of the architectural work to which it was attached and thus there could be no separate copyright infringement claim for the tower); *see also infra* Part III (discussing *Leicester* and similar cases in greater detail).

40. *See infra* Part IV (describing another copyright framework as a potential alternative).

41. *See generally Mercedes Benz, USA, LLC v. Lewis*, Nos. 19-10948, 19-10949, 19-10951, 2019 WL 4302769, at *3 (E.D. Mich. Sept. 11, 2019) (rejecting artists' motion to dismiss on grounds that the street art could be legally considered part of the building it exists on); *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927, 934 (C.D. Cal. 2018) (denying motion for summary judgment by declining to find that street art is legally part of the building it exists on). These cases are discussed in greater depth in *infra* Part III.

42. *Infra* notes 184–198 and accompanying text.

43. *Infra* notes 184–202 and accompanying text.

noncopyrightable element.⁴⁴ If not for the AWCPA, street art would fall within this analysis.⁴⁵ Legislative history and case law both reflect that the Copyright Act considered a building a “useful article,” or a noncopyrightable element, prior to the AWCPA.⁴⁶ Thus, copyrightable works, such as street art, that were attached to the exterior walls of buildings would be protected so long as they could be imagined separately from the building. Now that architectural works are governed by the AWCPA, this is no longer the case. This separation of architectural works and useful articles in the Copyright Act creates a situation where an otherwise-copyrightable work, such as a graphic design, would have the full suite of excludability rights when it is emblazoned on a shirt,⁴⁷ but not necessarily when it is applied to a building.⁴⁸

However, as Part II.D illustrates, the AWCPA’s efforts to create copyright protections for architects led to a statutory overcorrection in which copyrightable works fixed on a building exterior were overlooked.⁴⁹ The amendment’s broad language creates a gap in protections for street artists both unintended and contrary to the purpose of the Copyright Act.⁵⁰ Thus, this Note argues that the current statutory scheme—granting economic relief to street artists to compensate for their work’s destruction or detrimental modification while allowing major gaps in street artists’ ability to control reproductions of their work—is both contrary to the legislative history and purpose of the Copyright Act⁵¹ and creates an erroneous result in which various entities have more meaningful opportunities than the artists themselves to profit off of reproductions of their work.

This Note proposes a two-pronged solution to this copyright loophole.⁵² First, Congress should either update the AWCPA to adopt

44. Part IV outlines both the original statutory test and the current test for determining the copyrightability of otherwise-copyrightable elements—referred to as “pictorial, graphic, and sculptural elements” or “PGS”—when incorporated into a noncopyrightable element—referred to as a “useful article.” *Infra* notes 225–240 and accompanying text.

45. See H.R. REP. NO. 101-735, at 20 (1990), as reprinted in 1990 U.S.C.C.A.N. 6935, 6951 (“[T]he copyrightability of architectural works shall not be evaluated under the separability test applicable to pictorial, graphic, or sculptural works embodied in useful articles.”).

46. *Infra* notes 145–147.

47. *Infra* notes 237–240 and accompanying text.

48. *Infra* Part III.

49. *Infra* notes 241–242.

50. *Infra* Part II.B.

51. *Infra* Part II.B.

52. *Infra* Part V.

the separability test currently codified in the Copyright Act for analyzing the copyrightability of works attached to noncopyrightable objects or introduce a definition of “building” within the AWCPA to exclude otherwise-copyrightable elements fixed to the exteriors of buildings. Second, the pictorial representation exception in the AWCPA should be narrowed to better balance protections for street artists with the public nature of architecture. This way, copyright law can still preserve the visual role that buildings play in citizens’ lives,⁵³ as the AWCPA legislative history indicates Congress intended, while also maintaining protections for artists whose work would be worthy of copyright protection had it been on any other canvas.⁵⁴

Though other scholarship has explored the confusing landscape of the copyrightability of art when attached to utilitarian objects⁵⁵ and the copyrightability of architectural works,⁵⁶ very little scholarship has delved into the tension between copyright protections for buildings and the street art attached to them.⁵⁷ This Note builds off the array of existing scholarship about the implications of VARA on street artists’ legal rights⁵⁸ and expands the analysis on the other avenue of copyright protections available to street artists—the ability to control reproductions—and how copyright protections for buildings get in the way.

This Note proceeds in five parts. Part I describes a twentieth century existential split in the art world over what constituted art. It

53. See H.R. REP. NO. 101-735, at 22 (1990), as reprinted in 1990 U.S.C.C.A.N. 6935, 6953 (discussing the balance between protecting architectural works and allowing the public to engage with them).

54. See 17 U.S.C. § 101 (2018) (affording pictorial, graphic, and sculptural works copyright protections when incorporated into useful articles but failing to mention copyright protections for PGS elements incorporated into architectural works).

55. See generally, e.g., Lili Levi, *The New Separability*, 20 VAND. J. ENT. & TECH. L. 709 (2018) (discussing the new landscape of separability between PGS elements and the utilitarian objects to which they are attached after the *Star Athletica* Supreme Court decision).

56. See generally, e.g., Vaughn Drozd, *The Building Blocks of Copyright Protection for Architectural Works: Roadblock or Masterpiece?*, 14 J. MARSHALL REV. INTELL. PROP. L. 607 (2015) (critiquing the courts’ test for determining the copyrightability of architectural works and suggesting solutions).

57. See generally John B. Fowles, *The Utility of a Bright-Line Rule in Copyright Law: Freeing Judges from Aesthetic Controversy and Conceptual Separability in Leicester v. Warner Bros.*, 12 UCLA ENT. L. REV. 301 (2005) (addressing the conflict between PGS elements and the architectural works to which they are attached and how the AWCPA affects this analysis). Attorney John Fowles advocates for the bright-line test that the AWCPA creates by exempting PGS elements from copyright protections when they are attached to a building. *Id.* at 333–44. This Note argues the opposite—namely, that Congress should update the statute to protect these PGS elements, including street art.

58. See generally Timothy Marks, Note, *The Saga of 5Pointz: VARA’s Deficiency in Protecting Notable Collections of Street Art*, 35 LOY. L.A. ENT. L. REV. 281 (2015) (arguing VARA offers insufficient protection for street art).

tracks changes in the art world leading to the popularization and commoditization of street art and introduces the current statutory scheme affording copyright protections to street art. Paralleling this shift in the art world, Part II explores how copyright law evolved to accommodate this evolving definition of art and introduces the AWCPA as an example. Part III details the AWCPA's application as a loophole to street artists' copyright protections. Part IV demonstrates how the history of "useful articles" within copyright law presents a helpful model in addressing copyrightable street art on buildings. Lastly, Part V proposes amending the AWCPA to expressly assert the rights afforded to art incorporated into the exteriors of architectural works.

I. OUTSIDE THE BOX: POSTMODERNISM AND ITS IMPACT ON THE DEFINITION OF ART

Understanding the emergence of artists like Banksy and the unique legal challenges inherent to street art begins with understanding the radical change that occurred in Western society's conception of art in the early twentieth century. Let's paint the scene. The year was 1917, and Marcel Duchamp, already an established artist, shocked the art world by submitting, under a pseudonym, a porcelain urinal titled "Fountain" to an exhibition put on by the Society of Independent Artists.⁵⁹ "Fountain" was one of Duchamp's first "readymades," a term he coined to describe his new artistic concept.⁶⁰ The "readymade" was a utilitarian, mass-produced, often household item that had been given a title and inscription, therefore transforming it into a piece of art.⁶¹ The creation was as simple as it was radical. It bore its name as it was

59. See Mary Wepler, *The Archetype of the Trickster Examined Through the Readymade Art of Marcel Duchamp*, 13 INT'L J. OF ARTS THEORY & HIST. 11, 11–12 (2018) (describing Duchamp's use of everyday objects as sculptures "already made").

60. Though Duchamp is largely credited with the concept of the "readymade," many art historians have argued that his work, and Western modern art itself, cannot be understood without the context of African art's influence, as it was widely collected and displayed in the United States at the turn of the century. See generally Okwui Enwezor, *The Postcolonial Constellation: Contemporary Art in a State of Permanent Transition*, in ANTIMONIES OF ART AND CULTURE: MODERNITY, POSTMODERNITY, CONTEMPORANEITY 207, 207 (2009) (explaining how Western views of African art shaped Western modern art); Thomas Folland, *Readymade Primitivism: Marcel Duchamp, Dada, and African Art*, 43 ART HIST. 670 (2020) (arguing African art inevitably influenced Duchamp's "readymade" work).

61. See Wepler, *supra* note 59, at 12 (describing Duchamp's "readymades" as a concept where "the artist's idea takes precedence over aesthetic consideration of the art object").

made ready for display. It was the artist's mind that made these utilitarian objects art, not their hand.⁶² The institutional art world, however, rejected the idea that a "readymade"—an object made for a solely utilitarian purpose—could constitute art. The Society, of which Duchamp was a member, hid "Fountain" from view at the exhibition, rejecting the idea that it was art befitting of museum display.⁶³

Despite an initially lukewarm welcome from the art world, the surging popularity of the pop art movement in the second half of the twentieth century pushed Duchamp's "readymade" concept into mainstream culture and further reimagined the boundaries of art. This re-envisioning of the "readymade" earned its first notoriety in 1964, when a young and burgeoning commercial artist, Andy Warhol, created an almost identical replica of the soap pad brand Brillo's packaging and displayed it proudly in the Stable Gallery.⁶⁴ At the time, the boxes met mixed reviews.⁶⁵ Museums were for Monet's water lilies,⁶⁶ for Velázquez's depictions of Spanish royalty,⁶⁷ for David's conjuring of the French Revolution,⁶⁸ but *certainly not* for boxes of cleaning pads, especially ones that could be found under the sink in any average household. But to a growing number of critics,⁶⁹ they were proof of Warhol's brilliance, and they would catapult him into a career of creating works that "transfigured" common objects into "pure art."⁷⁰

62. *See id.* (quoting a defense of "Fountain," probably written by Duchamp himself, stating: "Whether Mr. Mutt . . . made the Fountain or not has no importance. He CHOSE it. He took an ordinary article of life, placed it so that its useful significance disappeared under the new title and point of view—created a new thought for that object" (quoting *The Richard Mutt Case*, THE BLIND MAN, no. 2, 1917, at 5, INT'L DADA ARCHIVE, <http://sdrc.lib.uiowa.edu/dada/blindman/2> [<https://perma.cc/RME3-C4EP>])).

63. *See id.* (quoting the president of the society as calling the work "by no definition, a work of art" (citing CALVIN TOMPKINS, DUCHAMP: A BIOGRAPHY 182 (1996))).

64. Paul Mattick, *The Andy Warhol of Philosophy and the Philosophy of Andy Warhol*, CRITICAL INQUIRY, Summer 1998, at 966.

65. Adrian Levy & Cathy Scott-Clark, *Warhol's Box of Tricks*, GUARDIAN (Aug. 20, 2010, 7:03 PM), <https://www.theguardian.com/artanddesign/2010/aug/21/warhol-brillo-boxes-scandal-fraud> [<https://perma.cc/NGM8-2JE9>].

66. *E.g.*, Claude Monet, *Water Lilies*, ART INST. OF CHI. (1906), <https://www.artic.edu/artworks/16568/water-lilies> [<https://perma.cc/HUD7-A4GJ>].

67. *E.g.*, Diego Velázquez, *Las Meninas*, MUSEO DEL PRADO (1656), <https://www.museodelprado.es/en/the-collection/art-work/las-meninas/9fdc7800-9ade-48b0-ab8b-edee94ea877f> [<https://perma.cc/92S3-3GUE>].

68. *E.g.*, Jacques-Louis David, *The Oath of the Horatii*, LOUVRE (1784), <https://www.louvre.fr/en/oeuvre-notices/oath-horatii> [<https://perma.cc/4BKU-5HQL>].

69. Levy & Scott-Clark, *supra* note 65.

70. Arthur Danto, *The Artworld*, 61 J. PHIL. 19, 580 (1964).

Warhol and the pop artists of the 1960s, inspired by Duchamp,⁷¹ reimagined the confines of what was worthy of being called art. The great genius—and perhaps, hypocrisy—of their work was that they could place a box of cleaning supplies, a tire print,⁷² and even cheeseburgers⁷³ into the hallowed halls of the nation’s leading museums, and it was transfigured into something to be oohed and aahed at, something with intrinsic value and worthy of recognition. Something the highbrow would put in their home and the lowbrow would see a piece of themselves in.

Pop art, and the postmodernist movement as a whole, was a largely visceral reaction to modernism.⁷⁴ The modernists called for the complete separation of functional and aesthetic properties. Functionality had no place in visual art to modernists,⁷⁵ whereas postmodernists revered the marriage of the aesthetic and the functional in all mediums of art.⁷⁶ In a sense, the modernist movement was aware of the limitations of art in a way that postmodernists were not.⁷⁷ A modernist, realizing she will never fully be able to recreate a bowl of fruit on a two-dimensional surface, will paint the fruit without attempting to trick the viewer into seeing three dimensionality.⁷⁸ In fact, it may not resemble a bowl of fruit at all. Instead, the title informs the viewer what the series of discrete shapes, lines, and colors depicts. The modernist wants the viewer to know a painting is just paint and

71. See Wepler, *supra* note 59, at 12 (describing “Brillo Box” as an “homage to the readymade”).

72. See Robert Rauschenberg, *Automobile Tire Print*, S.F. MUSEUM OF MOD. ART (July 2013), <https://www.sfmoma.org/essay/automobile-tire-print> [<https://perma.cc/62JV-2FVS>].

73. See Claes Oldenburg, *Two Cheeseburgers, with Everything (Dual Hamburgers)*, MUSEUM OF MOD. ART, <https://www.moma.org/collection/works/81183> [<https://perma.cc/7G7J-VN59>].

74. Nicholas Alden Riggle, *Street Art: The Transfiguration of the Commonplaces*, 68 J. AESTHETICS & ART CRITICISM, no. 3, 2010, at 244.

75. See Megan Gambino, *Ask an Expert: What is the Difference Between Modern and Post-Modern Art?*, SMITHSONIAN MAG. (Sept. 22, 2011), <https://www.smithsonianmag.com/arts-culture/ask-an-expert-what-is-the-difference-between-modern-and-postmodern-art-87883230> [<https://perma.cc/9WED-TNHZ>] (describing modernist art as not “hav[ing] to exist for any kind of utility value other than its own existential reason for being”).

76. See Danto, *supra* note 70, at 580–81 (describing Warhol’s rebellion from modernist ideals).

77. See FRANCIS FRASCINA, MODERN ART AND MODERNISM: A CRITICAL ANTHOLOGY 6 (1982) (describing modernism as “us[ing] art to call attention to art” and all of its limitations).

78. See *id.* (describing modernist painters’ works as “frank[ly] . . . declar[ing] the surfaces on which they were painted” and leaving “no doubt as to the fact that the colors used were made of real paint that came from pots or tubes”).

canvas. A postmodernist dreams bigger. To a postmodernist, art does not have to tell the viewer what it is, because art can be whatever the artist wants it to be.⁷⁹ Therefore, Warhol's extremely realistic recreations of Campbell's soup cans⁸⁰ were a postmodernist reaction to the modernist rendering of Georges Braque's glass of absinthe, which depicts lines and geometric shapes on a canvas rather than realistically depicting what the title claims it to be.⁸¹

This existential shift in the art world brought on by postmodernism, which interrogated not only the subject matter worthy of portrayal but also the mediums on which art can exist, is crucial to understanding the rise and legitimization of street art.⁸² Whereas pop art grappled with whether "everyday objects" could be art, street art grappled with whether "post-museum art" could exist.⁸³ Could art be consumed by the masses where the masses exist?

The graffiti art movement began in the 1970s and 1980s⁸⁴ as largely an exercise in "tagging."⁸⁵ Graffiti artists would create an artistic rendering of their name and place it on subway cars or buildings around New York City.⁸⁶ The city government aggressively combated this practice, and yet graffiti continued to grow in popularity as it

79. See *Postmodernism*, MUSEUM OF MOD. ART, <https://www.moma.org/collection/terms/84> [<https://perma.cc/HL5V-5MGT>] (defining postmodernism as a "refusal to recognize the authority of any single style or definition of what art should be").

80. E.g., Andy Warhol, *Campbell's Soup Cans*, MUSEUM OF MOD. ART (1962), https://www.moma.org/collection/works/79809?include_uncataloged_works=1&locale=en&package_id=WSC&page=1&sov_referrer=package [<https://perma.cc/8Y3V-6PJD>].

81. E.g., Georges Braque, *Glass of Absinthe*, ART GALLERY OF NEW S. WALES (1911), <https://www.artgallery.nsw.gov.au/collection/works/410.1997> [<https://perma.cc/8XCH-LMVD>].

82. See Riggie, *supra* note 74, at 243 (discussing that after Warhol's *Brillo Boxes* "allow[ed] everyday objects and events" into museums, it spawned another reaction—"taking art out of the museum, gallery, and private collection").

83. *Id.* at 243–44.

84. In this instance, the graffiti art movement refers to when artists began spraying aerosol paint messages and symbols on buildings in major metropolitan cities like New York and Los Angeles. However, graffiti art has existed in some form since early cave paintings. Its varied uses became culturally and politically significant in the Victorian era and began to be artistically appropriated in the early nineteenth century. For a more in-depth discussion of the history of graffiti art, see generally PHOEBE HOBAN, *BASQUIAT: A QUICK KILLING IN ART* 36–37 (1998) (describing Basquiat's early street art and the street art culture of the 1980s).

85. See Mitch Sawyer, *Hip Hop, Punk, and the Rise of Graffiti in 1980s New York*, ARTSY (May 8, 2017, 6:24 PM), <https://www.artsy.net/article/artsy-editorial-hip-hop-punk-rise-graffiti-1980s-new-york> [<https://perma.cc/2QDA-7WEK>] (describing early graffiti tags as "[a] name and maybe a street number, slapped down quick to avoid the police").

86. *Id.*

merged with pop culture.⁸⁷ As a result, galleries began to welcome the work of street artists like Basquiat, who previously was a part of a graffiti art collaboration called SAMO, so long as the work was painted on canvas.⁸⁸ Concurrently, as street art expanded past tagging and became more of an artistic form, major urban centers began to welcome graffiti art on their streets.⁸⁹ And as hip hop exploded onto the pop culture scene, graffiti art bled into the mainstream.⁹⁰

Today, street art's prevalence has hit a fever pitch. As street art continues to gain notoriety, museums have taken note, putting on exhibitions to showcase street art.⁹¹ When possible, elite auction houses like Sotheby's even hold auctions for the works.⁹² Recent studies show

87. *Id.*

88. *Jean-Michel Basquiat*, ARTNET, <http://www.artnet.com/artists/jean-michel-basquiat> [<https://perma.cc/JVW7-F4E4>].

89. As it existed in its early stages featuring just names or common phrases scrawled on walls in nonstylized penmanship, tagging was likely not copyrightable. *See* 37 C.F.R. § 202.1(a) (2020) (stating “words and short phrases such as names, titles, and slogans” as well as “mere variations of typographic ornamentation, lettering or coloring” are not copyrightable).

90. In fact, many of the first graffiti artists were hip-hop artists. Graffiti was often used in the '70s and '80s to announce a new breakdancing pose—a “freeze”—or to advertise for “warehouse parties and underground jam sessions” for hip-hop musicians. Robert ‘3D’ Del Naja, *Jean-Michel Basquiat: The Street-Art Inspiration for Massive Attack*, GUARDIAN (Oct. 14, 2013, 11:25 AM), <https://www.theguardian.com/artanddesign/2013/oct/14/jean-michel-basquiat-street-art-massive-attack> [<https://perma.cc/PWW3-EDLE>] (describing use of graffiti to announce gatherings among hip-hop artists in the '80s); *see also* Sally Banes, *Physical Graffiti: Breaking Is Hard To Do*, VILL. VOICE (1981), *reprinted in* AND IT DON'T STOP! THE BEST AMERICAN HIP-HOP JOURNALISM OF THE LAST 25 YEARS 7, 10 (Raquel Cepeda ed., 2004) (spotlighting how graffiti was used within the hip-hop breakdancing community).

91. *See, e.g., Street Art—Exhibition at Tate Modern*, TATE MOD. (2008), <https://www.tate.org.uk/whats-on/tate-modern/exhibition/street-art> [<https://perma.cc/99XE-D4M>] (describing the “first major public museum display of street art in London” inside the museum as well as a “Street Art Walking Tour”); Shelley Leopold, *Street Art at MOCA*, LA WKLY. (Apr. 7, 2017), <https://www.laweekly.com/street-art-at-moca> [<https://perma.cc/CVN4-9GUJ>] (describing the exhibit on street art as “the country’s first major street-art and graffiti retrospective”); Eliot Stein, *The World’s Largest Street Art Museum Is Opening in Berlin*, CONDÉ NAST TRAVELER (Sept. 13, 2017), <https://www.cntraveler.com/story/the-worlds-largest-street-art-museum-is-opening-in-berlin> [<https://perma.cc/GX7G-GUMQ>] (describing the open-air Berlin Museum for Urban Contemporary Art as “the world’s biggest museum devoted entirely to street art”).

92. *See From the Streets: The Rise of Urban Art*, SOTHEBY'S (Nov. 9, 2017), <https://www.sothebys.com/en/articles/from-the-streets-the-rise-of-urban-art> [<https://perma.cc/F7KY-YD6B>] (listing street art auctions or selling exhibitions that occurred at Sotheby's locations in London, Hong Kong, and New York); *see also* *Collecting Guide: 5 Things To Know About Street Art*, CHRISTIE'S (Aug. 28, 2019), <https://www.christies.com/features/Street-Art-Collecting-Guide-9396-1.aspx> [<https://perma.cc/23RG-3WNF>] (providing collectors with tips on how to assess the value of artists who are “finding their way into the home”).

that street art raises the prices of proximate real estate,⁹³ leading to an increase in developers investing in murals to boost property values and bring tourists to cities.⁹⁴ At auctions, physical walls and vans that contain renowned works of street art regularly sell for hundreds of thousands of dollars.⁹⁵ Once seen as outlaws, Basquiat's⁹⁶ and Banksy's⁹⁷ names are now woven into the contemporary zeitgeist.

However, as Part II illustrates, copyright law's attempts to grapple with existential changes in what constitutes art led to the enactment of the AWCPA, which introduced a substantial exception to copyright's usual protections.

II. THE CHANGING STATUTORY SCHEME OF COPYRIGHT AND THE AWCPA

This Part first identifies the two avenues street artists have for recovery within contemporary copyright law. Next, it discusses the history of U.S. copyright law and tracks Congress's attempts to keep pace with a rapidly changing art world, which eventually led to the AWCPA's enactment in 1990. Further, this Part frames how architectural works were treated under the Copyright Act throughout its evolving treatment of functional, rather than historically artistic, works. Lastly, it explores how the AWCPA currently operates as a compromise

93. Kelly Pedro, *As Public Art Goes Up, So Do Nearby Home Prices*, REALTOR (Apr. 25, 2018), <https://www.realtor.com/news/trends/public-art-holds-key-unlocking-real-estate-growth> [<https://perma.cc/8LH8-HYFS>].

94. Diana Hubbell, *Street Art Has Become a Global Business—And Artists Are Worrying Over Its Future*, WASH. POST (Aug. 30, 2018, 10:00 AM), <https://www.washingtonpost.com/news/going-out-guide/wp/2018/08/31/street-art-has-become-a-global-business-now-artists-are-worrying-over-its-future> [<https://perma.cc/W6DN-Q299>] (outlining investments in street art in cities across the United States).

95. Paul Sullivan, *Collecting Street Art: Have Room on Your Wall for a Wall?*, N.Y. TIMES (July 8, 2016), <https://nyti.ms/29DBxfL> [<https://perma.cc/55X9-UY6F>].

96. Seen as one of the pioneers of mainstream hip-hop culture, Basquiat has become a common reference in contemporary hip-hop music. *E.g.*, JAY-Z, MOST KINGZ (Roc Nation 2013) (“Inspired by Basquiat, my chariot’s on fire/Everybody took shots, hit my body up, I’m tired.”); see Andrew Boryga, *Hip-Hop Finds an Artist To Believe In*, N.Y. TIMES (Aug. 31, 2011), <https://www.nytimes.com/2011/09/01/fashion/jean-michel-basquiat-an-artist-the-hip-hop-world-can-believe-in.html> [<https://perma.cc/9UPR-D5L7>] (noting that Jay-Z, Nas, Kanye West, Rick Ross, and others have referenced Basquiat in their tracks).

97. In holding that street art was visual art of recognized stature under VARA and thus eligible for statutory protections, the Second Circuit cited Banksy's work as an example of how street art has become “high art” in many respects. *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 167–68 (2d Cir. 2020) (quoting *Chused*, *supra* note 33, at 597–98).

between protecting a narrow class of architectural works and allowing the masses to engage with the public art form through a broad exception.

A. *Street Art and Copyright Law: A Tale of Two Statutory Schemes*

Today, copyright law protects authors' interest in realizing the commercial value of their work by prohibiting, and providing an opportunity to recover for, the commercial exploitation of the work.⁹⁸ It does this by granting the author exclusive rights to control and authorize certain enumerated commercial activities relating to their work.⁹⁹

For visual art, which encompasses most forms of street art, the copyright law furthers this goal in two main ways. The first, as mentioned previously, is VARA,¹⁰⁰ which affords artists the right to prevent the destruction of visual art of "recognized stature,"¹⁰¹ among other rights including rights of attribution and rights against detrimental modification.¹⁰² Whether a work is of "recognized stature" is a fact-sensitive determination for the courts that is outside the scope of this Note.¹⁰³ VARA only affords economic relief when a work has been damaged, destroyed, or altered.¹⁰⁴ In 2018, and in a major step for expanding legal protections to street art, a federal district court in Brooklyn deemed several works of street art graffiti to be of "recognized stature" for the first time,¹⁰⁵ thus entitling the artists to statutory damages for the destruction of their work.¹⁰⁶ The Second Circuit affirmed the decision in 2020, marking a huge win for street art protections.¹⁰⁷

98. DRATLER, JR., *supra* note 19, § 6.01.

99. *Id.*

100. 17 U.S.C. § 106A (2018).

101. *Id.*

102. *See id.* § 106A(a)(1)–(2) (granting artists rights to "claim authorship of that work," "to prevent the use of his or her name as the author of any work of visual art which he or she did not create" or "in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation").

103. The Second Circuit's determination of whether street art was of "recognized stature" was based on "artistic quality" as defined by the "artistic community, comprising art historians, art critics, museum curators, gallerists, prominent artists, and other experts." *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 166 (2d Cir. 2020).

104. 17 U.S.C. § 106A(a)(3).

105. *Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421, 437–41 (E.D.N.Y. 2018), *aff'd sub nom. Castillo*, 950 F.3d 155.

106. *Castillo*, 950 F.3d at 171.

107. *Id.* at 170.

Parallel to VARA, the second avenue within the Copyright Act allowing for statutory damages during the lifespan of the work is the exclusive rights granted to the creators of pictorial, graphic, or sculptural works.¹⁰⁸ Copyright holders for these works are afforded the exclusive rights to reproduce the work, prepare derivative works based upon the original, and to distribute copies by sale or other transfer of ownership.¹⁰⁹ Copyright holders can sue for infringement if their work is reproduced, adapted, published, or performed without their authorization.¹¹⁰ To receive protection, works must meet minimally burdensome eligibility requirements. Copyright only requires the work be original and be fixed in a tangible medium.¹¹¹ In all cases, it is a fact-sensitive inquiry; however, as long as the work is an independent creation with a slight amount of creativity and is fixed in a tangible medium of expression,¹¹² copyright protection attaches.¹¹³

Divorced from the architectural-works considerations Part II.D discusses, visual art, like murals, generally meets the copyright requirements. Thus, its creators are able to control or authorize reproductions of the image in both photographic and video formats, subject to a few exceptions.¹¹⁴ Walls are inarguably a tangible medium;¹¹⁵ therefore, as long as the street art passes the originality requirement, it should be eligible for copyright protections. The originality inquiry is a low bar, but it will occasionally disqualify works of visual art. For example, a word written in normal penmanship may not pass the originality bar; but, if the word were transcribed in a stylized font, it would most likely pass.¹¹⁶

108. 17 U.S.C. § 106.

109. *Id.*

110. *Id.* §§ 101, 102(a)(5). However, copyright infringement analysis is also subject to fair use limitations, and thus, defendants can assert a fair use defense in certain instances. *Id.* § 107.

111. *Id.* § 102.

112. *Id.* § 101 (“A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”).

113. *See* Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362 (1991) (stating the Copyright Act requires only independent creation and a “minimal degree of creativity”).

114. *See* 17 U.S.C. § 107 (carving out exceptions for fair uses of copyrighted material).

115. *See id.* § 101 (defining a work as “‘fixed’ in a tangible medium of expression when its embodiment . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration”).

116. *See* 37 C.F.R. § 202.1(a) (2020) (stating “words and short phrases such as names, titles, and slogans” as well as “mere variations of typographic ornamentation, lettering or coloring” are not copyrightable).

Regardless of the fact that street art both meets the requirements for copyright law and is well suited to its underlying purpose, copyright law has historically struggled to adapt to the changing world of art. As the remainder of this Part illustrates, copyright law has attempted various solutions to resolve the conflict between addressing the copyrightability of functional objects, like buildings, and the copyrightability of aesthetic works, like murals. Moreover, as Part III demonstrates, this tension has resulted in an overcorrection in the statutory framework that has left street art uniquely vulnerable to infringement.¹¹⁷

B. History of U.S. Copyright Law

The story of the development of U.S. copyright law is inevitably one of push and pull between the art world and the legal world.¹¹⁸ As the art world grappled with the boundaries and limitations of what constitutes art, Congress grappled with how to enact protections for a rapidly changing field,¹¹⁹ and judges struggled with how to make aesthetic judgments when applying copyright law.¹²⁰ The central

117. *Infra* Part III.

118. Nowhere is this tension more famously articulated than in Justice Oliver Wendell Holmes's opinion in *Bleistein v. Donaldson Lithographing*:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change.

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–52 (1903).

119. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.01 (1963) (“In some sense, copyright represents a sustained reaction to developing technology.”). The nineteenth century saw the introduction of copyright protections for photography, musical compositions, and engravings. JANE M. GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW 49 (1991). The twentieth century introduced protections for PGS works applied to useful articles as well as architectural works. See *infra* notes 136–140 & Part II.B.

120. This Note argues that copyright law inevitably involves value judgments and adopting different theories of art as they arise. This assumption has been written about at length by scholars. See generally Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175 (1990) (asserting Congress and judges alike inevitably rely on artistic judgments in copyright law, though they attempt to avoid it); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998) (arguing that though judges do not explicitly adopt aesthetic theories in their copyright decisions, they are necessarily lurking in the backdrop of copyright opinions).

conflict in American copyright law revolves around how to define the boundaries in the inherently subjective field of art and creation.¹²¹ Article I, § 8, clause 8 of the Constitution provides the hook for copyright protections, allocating the power to Congress to “promote the Progress of Science and the useful Arts” by allowing “Authors and Inventors” the “exclusive Right to their respective Writings and Discoveries” for a limited time.¹²² This provision authorizes Congress to grant rights to creators to provide the public benefit of promoting innovation in the arts and sciences.¹²³ Under this authority, Congress enacted the first Copyright Act in 1790.¹²⁴

Throughout the history of copyright law, Congress has frequently updated the Copyright Act to attempt to keep pace with the rapidly evolving definition of art.¹²⁵ One way it achieved this was by updating the list of works eligible for copyright protections to be in vogue with the cultural definition of art at the time.¹²⁶ This has often been driven by judges’ arguably aesthetic judgments¹²⁷ of what constitutes art, and is thus copyrightable.¹²⁸ Another way, and the most relevant for the

121. Many scholars have commented on how American copyright law has evolved and changed based on internalized notions of artistic theory. For example, the romantic movement in the late nineteenth century greatly influenced which writings were protected and the requisite amount of originality necessary for copyrightable works. This artistic theory then gave U.S. copyright law a justification for providing authors with greater property rights over their work, even if they contained very minimal originality, because romanticism saw creations as an extension of the author’s self. Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain*, 18 COLUM.-VLA J.L. & ARTS 1, 32–33 (1994).

122. U.S. CONST. art. I, § 8, cl. 8. “Science” is understood to cover creative works by authors and is the hook for copyright law, whereas “useful [a]rts” has been interpreted to cover inventions and is the hook for patent law. NIMMER, *supra* note 119, § 1.03[A][2].

123. See NIMMER, *supra* note 119, § 1.03 (describing the “dual premises” off of which the grant of congressional power is based).

124. Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124.

125. See NIMMER, *supra* note 119, § 2A.03[A] (discussing Congress grappling with how to designate copyright protections for photography, architecture, and computers).

126. See *Mazer v. Stein*, 347 U.S. 201, 207–12 (1954) (describing additions to copyrightable works of art in successive copyright statutes, including works such as etchings, musical compositions, and sculptures).

127. See *supra* note 120.

128. A classic example of value judgments made in Congress and the courts over what constitutes art occurred in the late-nineteenth century around the idea of whether a photograph was copyrightable. There was an intense debate about whether taking a photograph was a mechanical process or a creative one. Christine Haight Farley, *The Lingering Effects of Copyright’s Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 399–402 (2004). Many believe it was Matthew Brady’s moving Civil War photography that helped shift perceptions of photography from it being a mechanical reproduction to it being a fine arts

purposes of this Note, was by attempting to strike a balance between providing protections for a work that is copyright eligible versus something that is simply functional.¹²⁹ The postmodern movement as a whole, though, made this balance difficult. This movement expanded art past neat distinctions between objects that were simply functional and objects that were simply aesthetic.¹³⁰ Postmodernists created works that were both, and thus copyright law had to grapple with how to fit these changing circumstances.¹³¹ Eventually, the Copyright Act allowed elements of utilitarian objects to be copyrightable if they could be conceptually or physically separated from the functional components of the work.¹³² These copyrightable elements form one part of a broader category of protectable works called “pictorial, graphic, or sculptural works,” or “PGS.”¹³³ The Copyright Act of 1976 codified this new test for eligibility based on separability. When faced with a utilitarian object with potentially copyrightable elements, the test asks: Are there original artistic elements present? If yes, can those elements be separated from the utilitarian aspects of the article?¹³⁴

discipline. GAINES, *supra* note 119, at 49. Nevertheless, the Supreme Court upheld an amendment to the Copyright Act expanding copyright protections to photographs, finding the portrait in question was “useful, new, harmonious, characteristic, and graceful,” but leaving open that other photographs may not meet the requisite originality needed for copyrightability. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884). In other words, the Court used “an elaborate statement of the work’s beauty” to justify the copyrightability of an arguably mechanical, functional medium. Yen, *supra* note 120, at 268.

129. See NIMMER, *supra* note 119, § 2A.03[B] (framing the tension between “artistic creativity deserv[ing] protection at the same time that the evils of monopolizing functional activities must be avoided”).

130. *Supra* Part I.

131. In the twentieth century, various cases demonstrate how courts grappled with the copyrightability of design elements existing in the context of a useful article and often expanded protections for works that seemed to merge the functional and the aesthetic. *Mazer*, 347 U.S. at 214 (finding a statuette acting as a lamp base to be copyrightable); *Brandir Intern v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1146–48 (2d Cir. 1987) (finding a sculptural bike rack that had received recognition from artistic institutions was not copyrightable); *Barnhart v. Econ. Cover Corp.*, 773 F.2d 411, 418–19 (2d Cir. 1985) (holding polystyrene mannequins are not copyrightable); *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993–94 (2d Cir. 1980) (finding belt buckle designs to be copyrightable). It is difficult to find consistency among these decisions, as they were arguably based on aesthetic judgments about what is or is not worthy of being called art. For a discussion of how aesthetic theories played into these decisions, see Yen, *supra* note 120, at 275–84.

132. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (providing protections for pictorial, graphic, and sculptural works that can exist separate from the useful articles into which they are incorporated); *infra* Part IV.

133. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

134. *Id.*; H.R. REP. NO. 94-1476, at 55 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5668.

For example, consider an otherwise-copyrighable photograph printed on the side of a mug. As long as it satisfies the other eligibility requirements, if the photograph can be imagined existing divorced from the mug, the photograph is copyrighable on its own. Thus, a third party could not print the same photograph on a shirt without infringing the mug creator's copyright.¹³⁵ Another way of framing this inquiry is to ask why consumers care about the photograph on the mug and from where does it derive its value. Consumers may care about the photograph because of the way it looks or because of the ideas it expresses. Conversely, if the mug is at issue, consumers care about it because of its utilitarian function, not its appearance. The mug's purpose is to hold coffee in the morning, not express ideas. Therefore, the mug, on its own without the photograph, would not be eligible for copyright protections.¹³⁶

Under the Copyright Act of 1976, the crux of conceptual separability reflected the modernist binary between functional and aesthetic properties.¹³⁷ According to this viewpoint, each element could be neatly divided into serving a functional purpose or an aesthetic purpose, but there was very little middle ground. Similarly, the seminal Supreme Court case defining the standard for aesthetic originality set the bar very low,¹³⁸ while the Copyright Act continued to set the standard for overriding functionality quite high.¹³⁹ However, as the art world melded functional innovation and aesthetic innovation, courts began to engage in ad hoc

135. The Court's recent decision regarding the separability test illustrates this idea by using an example of a painting on a guitar being recreated on an album cover, explaining the painting would be copyrighable "whether it is first drawn on the album cover and then applied to the guitar's surface, or vice versa." *Star Athletica v. Varsity Brand, Inc.*, 137 S. Ct. 1002, 1012–13 (2017).

136. H.R. REP. NO. 94-1476, at 55 ("Unless the shape of an automobile, airplane, ladies' dress, food processor, television set or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighable under bill.").

137. Similar to the modernist movement, which favored the separation of aesthetic and functional components, the 1976 Copyright Act offered copyright protections for PGS elements but not for useful articles. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541; *see supra* notes 74–81 and accompanying text.

138. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (stating that in order to be considered original, "the requisite level of creativity is extremely low; even a slight amount will suffice").

139. *See* 17 U.S.C. § 101 (2018) ("[T]he design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.").

determinations of copyrightability when works fit into the middle ground between their functional and aesthetic properties.¹⁴⁰ Architectural works are one category that occupied this middle ground. Accordingly, the courts' historic treatment of architectural works provides a useful framework for analyzing Congress's evolving views on the copyrightability of objects defined by their functionality.

C. *Architectural Works pre-1990*

Under every version of the Copyright Act prior to 1990, architectural works were not expressly protected.¹⁴¹ However, architectural works were often protected under the “technical drawings, diagrams, and models” provision of the 1976 Copyright Act.¹⁴² Section 101 defines “useful article” as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”¹⁴³ Useful articles were by and large not copyright eligible as they fell on the wrong side of the functional versus aesthetic calculus reflected in the modernist binary.¹⁴⁴

Though architectural works were not an explicitly protected medium within the Copyright Act, they were often protected on an ad hoc basis by courts.¹⁴⁵ In fact, in the lead up to the AWCPA, the Copyright Office

140. See, e.g., *Mazer v. Stein*, 347 U.S. 201, 213–14 (1954) (finding a sculpture of a dancer used as the base of a lamp to be copyrightable); *DeSilva Const. Corp. v. Herral*, 213 F. Supp. 184, 193 (M.D. Fla. 1962) (holding architectural works are copyrightable though they are not explicitly mentioned in the Copyright Act).

141. See Xiyin Tang, *Narrativizing the Architectural Copyright Act: Another View of the Cathedral*, 21 TEX. INTELL. PROP. L.J. 33, 34 (2013) (“Given architecture’s claim on our collective need for stability, shelter, and aesthetic pleasure, perhaps it is both apt and surprising that architecture was not given official status in the United States as a valid, copyrightable art form until just under 20 years ago.”).

142. NIMMER, *supra* note 119, § 1.03; see H.R. REP. NO. 94-1476, at 55 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5668 (stating that within the Act’s treatment of useful articles, architectural works present a “special situation” and their copyright protections “would depend on the circumstances,” but their plans and drawings would “of course” be protected).

143. 17 U.S.C. § 101.

144. See *Mazer*, 347 U.S. at 218 (1954) (“The dichotomy of protection for the aesthetic is not beauty and utility but art for the copyright and the invention of original and ornamental design for design patents.”).

145. See U.S. COPYRIGHT OFF., THE REPORT OF THE REGISTER OF COPYRIGHT ON WORKS OF ARCHITECTURE 199 (1989) [hereinafter ARCHITECTURE REPORT], <https://www.copyright.gov/reports/architecture.pdf> [<https://perma.cc/SR4G-F8NG>] (finding some cases “have enjoined construction of buildings derived from infringing plans” and a few state decisions “can be read as indicating protection would be available for the structure”); see, e.g., *Herral*, 213 F. Supp. at 193

released a report stating that it generally regarded the calculus for architectural works' copyright eligibility to be the same as that for useful articles, or objects defined by their function.¹⁴⁶ As stated previously, for an aspect of a functional work to be copyrightable, original design elements must exist and these elements must be able to be imagined separately from the utilitarian aspects of the work.¹⁴⁷ Simply put, the question was whether a particular feature of an architectural work is “an artistic sculpture or decorative embellishment added to the structure” or whether its purpose was utilitarian—influencing how one moves within the building, how it stores objects, and similar inquiries. According to this definition, consider the Team Disney building in Burbank, California, which has columns that are nineteen-foot carved depictions of the cartoon dwarves from *Snow White*.¹⁴⁸ These columns presumably constitute copyright-eligible building-design elements, whereas columns on a standard apartment building, whose size and shape are determined simply by weight-bearing considerations rather than aesthetic purposes, would not. The former's purpose is tied to its appearance and originality, the latter's purpose is tied to its function or livability.

D. Passage of AWCPA in 1990

To reach compliance with the Berne Convention—an international contingency of countries agreeing to respect each other's copyrights¹⁴⁹—Congress formally granted copyright protections to architectural works by way of the AWCPA.¹⁵⁰ Largely, the AWCPA

(holding architectural plans and drawings are protectable by copyright under the scientific drawings provision of the Copyright Act, though they are not an explicitly protected category).

146. ARCHITECTURE REPORT, *supra* note 145, at 203 (“Nonmonumental works of architecture are, concededly, ‘useful articles,’ and thus the question is whether the structure itself contains any sculptural features that are ‘capable of existing independently of’ the utilitarian aspects of the architectural structure.”).

147. *See supra* note 134 and accompanying text.

148. Architect Michael Graves designed this building. Paul Goldberger, *Architecture View: A New Disney Building Mixes Art with Whimsy*, N.Y. TIMES (May 12, 1991), <https://www.nytimes.com/1991/05/12/arts/architecture-view-a-new-disney-building-mixes-art-with-whimsy.html> [<https://perma.cc/F5L9-SV7N>]. Graves also consulted on the AWCPA. *See infra* notes 156–164 and accompanying text (noting that Congress called Graves to testify as an expert witness on the definition of an “architectural work” for the AWCPA).

149. *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WORLD INTELL. PROP. ORG., https://www.wipo.int/treaties/en/ip/berne/summary_berne.html [<https://perma.cc/9TQC-3LAR>].

150. *See* H.R. REP. NO. 101-735, at 4 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6935, 6936–37 (stating the purpose of the amendment was to reach compliance with the Berne Convention).

acts as a compromise in both its definition of what constitutes an architectural work and in how far the copyright protections extend.

The AWCPA carves out a very narrow class of architectural works that are eligible for copyright protections. Attempting to avoid providing protections for all articles defined by their functionality, the amendment defines protected “architectural works” as including “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings.”¹⁵¹ Notably, “building” is not defined in the Copyright Act, but an architectural work is further defined as the “overall form as well as the arrangement and composition of spaces and elements in the design.”¹⁵² However, standard features like doors and windows are not covered.¹⁵³ The original draft of the amendment included “three-dimensional structures,” such as bridges, in the definition, but that was ultimately removed.¹⁵⁴ In short, Congress sought to create only a narrow protection for buildings and feared extending the protections too far to include all useful articles.¹⁵⁵

To ensure it created only a narrow architectural right, Congress only called one working architect as an expert witness, Michael Graves.¹⁵⁶ Graves’s testimony helped define a very narrow class of architectural works that would be considered copyright eligible.¹⁵⁷ Graves despised the modernist theories of architecture that premised function over form.¹⁵⁸ Where modernist architecture, like that revolutionized by Frank Lloyd Wright, rejected ornamentation and favored minimalist, usually functional elements, postmodern architecture, like that by Graves, revered flourish, ornamentation, and over-the-top forms that did not at all resemble the function for which

151. 17 U.S.C. § 101 (2018).

152. *Id.*

153. *Id.*

154. H.R. REP. NO. 101-735, at 19 (stating that because “three-dimensional structures” could be interpreted too broadly, it was deleted from the amendment).

155. *Id.*; ARCHITECTURE REPORT, *supra* note 145, at ix (discussing Congress’s preference to take a “minimalist approach” to protecting architectural works and its preference to not change underlying law regarding useful articles).

156. *See* H.R. REP. NO. 101-735, at 6 (listing witnesses).

157. *See* Tang, *supra* note 141, at 36 (arguing the House Report “unfairly endorses Graves’s mode of . . . postmodern building”).

158. *Id.* at 57–58 (asserting Graves’s favoring of “anthropomorphic” elements in architecture and rejection of “the Modernist ideal of the machine” codified a binary in the AWCPA where elements determined by function are not copyrightable).

they were intended.¹⁵⁹ With Graves's influence, the AWCPA formalized a bright line between architectural works that are merely functional with those that are original or transformative.¹⁶⁰ The House Report stated the intent of the amendment is to protect only elements that Graves referred to as "responsive to issues external to the building, and incorporates the three-dimensional expression of the myths and rituals of society."¹⁶¹ In other words, the copyrightability requirements became similar to those governing useful articles. To be eligible for copyright protections, the architectural work must contain original design elements, and the design elements must not be functionally required.¹⁶²

The difference between the balancing test used for useful articles in the 1976 Act and the test in the 1990 AWCPA amendment is that the former requires only that the artistic element can be *imagined* separately from the utilitarian component, whereas the latter judges the design element as to whether it *serves* the function of the building.¹⁶³ So, to return to the Team Disney example, copyrightability of buildings under the AWCPA concerns whether the nineteen-foot cartoon-dwarf columns were made to accommodate some function of the building, rather than whether they can be imagined as existing separately from the building. Both inquiries lead to the same conclusion—that the elements are copyrightable—however, the former focuses on whether an object serves a functional purpose rather than if it can just *imaginably* serve a nonfunctional purpose.

Additionally, the AWCPA adopted a "pictorial representation" exception as a compromise to formalizing protections of architectural works.¹⁶⁴ Section 120(a) states that the copyright protections for covered architectural works do not include "the right to prevent the

159. Compare FRANK LLOYD WRIGHT, *In the Cause of Architecture*, in *IN THE CAUSE OF ARCHITECTURE: FRANK LLOYD WRIGHT, ESSAYS* 145, 148 (1975) (commenting on previous architecture's "misfortune to be a non-utilitarian affair"), with MICHAEL GRAVES, *A Case for Figurative Architecture*, in *MICHAEL GRAVES: BUILDINGS AND PROJECTS 1966–1981*, at 11–13 (1995) (encouraging a departure from the modernist movement and that "society's patterns of ritual be registered in the architecture").

160. See H.R. REP. NO. 101-735, at 19 ("The intent of the legislation is to protect only what Mr. Graves calls 'poetic language.'").

161. *Id.*

162. *Id.* at 20–21.

163. See Tang, *supra* note 141, at 39 (distinguishing the AWCPA functionality test with the useful-article separability test).

164. H.R. REP. NO. 101-735, at 22 (describing the pictorial-representation exception as a way to "balance the interests of authors and the public").

making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work” when the architectural work is located where it is visible to the public.¹⁶⁵ Not only was this exception a common practice in Berne-compliant countries, but Congress wanted architectural works to remain a “public art form.”¹⁶⁶ Congress both expressed a desire to protect the public’s ability to commemorate trips to cities through taking photographs or purchasing pictorial representations of city-specific architecture and reasoned that “[t]hese uses do not interfere with the normal exploitation of architectural works.”¹⁶⁷ Given that most harm to the market value of architectural copyrights occurs when the works are infringed by the design of a similar building, Congress noted a “lack of harm” caused by pictorial representations.¹⁶⁸

III. AWCPA’S ACTING AS A LOOPHOLE TO COPYRIGHT PROTECTIONS

More so than any other time in the street art movement, corporate and public interests want to link themselves to street art, oftentimes using photographs to do so.¹⁶⁹ With its pictorial representation exception, the AWCPA provides corporate interests with a lucrative loophole to dodge paying royalties to artists for art the companies feature in their advertisements. The only circuit court to consider the issue decided in favor of including exterior artworks within the pictorial exception to copyright protections for architectural works.¹⁷⁰ And, further, the car cases, introduced above, could signal the beginning of a trend involving various companies weaponizing this precedent as a way to feature street art in advertisements without infringing any copyrights. This Part challenges Congress’s contention

165. 17 U.S.C. § 120(a) (2018). Notably, because this acts as a categorical exception to pictorial representations, the fair use defense does not come into play. The fair use doctrine can be asserted as a defense to excuse an otherwise impermissible reproduction. *Id.* § 107. Here, the statute explicitly states the reproduction is permissible. *Id.*

166. H.R. REP. NO. 101-735, at 22.

167. *Id.*

168. *Id.*; see also ARCHITECTURE REPORT, *supra* note 145, at xi (discussing reasons why architects desire copyright protections for their designs).

169. *Supra* Part I.

170. See *Leicester v. Warner Bros.*, 232 F.3d 1212, 1219 (9th Cir. 2000) (holding that the filming of artistic streetwall towers did not infringe the creator’s copyright because it fell within the pictorial representation exception of the AWCPA).

that the pictorial representation exception does not create harm among copyright holders, illustrating how the overbroad nature of the exception has instead created a gap in copyright protections for PGS elements incorporated into architectural works.

Given the relative newness of the AWCPA, the Ninth Circuit is the only appellate court to have directly addressed the treatment of PGS elements on the exterior of an architectural work. Decided in 2000, *Leicester v. Warner Bros*¹⁷¹ dealt with the depiction of towers in the background of sweeping shots of downtown Los Angeles in the film *Batman Forever*.¹⁷² The towers formed a streetwall to one side of an office building, which allowed Warner Brothers to argue that the towers served as part of the architectural work of the building and thus pictorial representations were permissible pursuant to the AWCPA.¹⁷³ The Ninth Circuit found in favor of Warner Brothers based on a fact-specific inquiry that did not develop a clear test for when PGS elements are swallowed up within the pictorial representation exception.¹⁷⁴

The Ninth Circuit identified factors for justifying that the towers were a part of the building as a matter of law, including that the towers were made from the same material as the building, the structures visually extended the sight line of the building, and the design was intended to make the towers appear to be part of the architectural work.¹⁷⁵ The *Leicester* court emphasized both the architectural and functional purposes that the towers served. As for the former, the towers were designed to match the materials, spacing, and height used for the other pillars in the building, so the towers and the building would appear unified.¹⁷⁶ Regarding the latter, the towers were designed to control street traffic.¹⁷⁷ Taking these two purposes into account, the court found that the towers were “equally integrated” and “serve[d] the same purpose” as towers constructed as part of the office building.¹⁷⁸ Further, the court broadly defined “building” in the

171. *Leicester v. Warner Bros.*, 232 F.3d 1212 (9th Cir. 2000).

172. *Id.* at 1213.

173. *Id.* at 1219.

174. *See id.* at 1217–19 (finding that the streetwall towers are part of the architectural work for purposes of the AWCPA due to factors such as being made with the same material as the building and visually extending the property line).

175. *Id.* at 1218.

176. *Id.*

177. *Id.* at 1218–19.

178. *Id.* at 1219.

AWCPA by pointing to the statute's legislative history, which favors a definition of buildings inclusive of structures "used, but not inhabited by humans."¹⁷⁹ In other words, the towers could still fall within this definition though they are not humanly inhabitable. Therefore, due to the towers' purpose and the expansive definition of "building" the court employed, the towers were found to be a part of the architectural work as a matter of law.¹⁸⁰

The Ninth Circuit recognized that the towers were, in fact, PGS elements in their own right and were perhaps copyrightable on their own,¹⁸¹ however, once attached to the architectural work, they became part of the "overall form" of the building.¹⁸² Once a part of the overall form of the architectural work, the pictorial representation exception applied, and therefore, filming the towers did not infringe the artist's copyright.¹⁸³

Although at the time *Leicester* may have seemed like a niche fact pattern, it has become increasingly more relevant in the copyright legal landscape with the increase in large-scale street art. For example, two recent cases involving car advertisements using street art as a photographic backdrop have largely relied on *Leicester*'s logic in an attempt to avoid copyright infringement claims by street artists. These cases seem split as to whether *Leicester*'s reasoning should apply to claims such as these.

In *Falkner v. General Motors*,¹⁸⁴ street artist Adrian Falkner sued General Motors ("GM") for copyright infringement after GM posted a social media advertisement featuring one of their cars in front of Falkner's mural,¹⁸⁵ which was painted on the walls of a structure attached to the roof of a parking garage.¹⁸⁶ Though the facts are remarkably similar to those in *Leicester*, and both courts use a similarly broad definition of "building,"¹⁸⁷ the *Falkner* court denied GM's

179. *Id.* at 1218 (quoting H.R. REP. NO. 101-735, at 20 (1990), as reprinted in 1990 U.S.C.C.A.N. 6935, 6951).

180. *Id.*

181. *See id.* at 1219 (stating that there is no claim for copyright infringement via the pictorial representation exception "[w]hether or not Leicester may have some other claim for a different infringement of his copyright in the . . . towers as a sculptural work").

182. *Id.* at 1218–19.

183. *Id.* at 1219.

184. *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927 (C.D. Cal. 2018).

185. *Id.* at 928–30.

186. *Id.* at 929; *infra* note 193.

187. *Falkner*, 393 F. Supp. 3d at 936–37 (defining a "building" as a structure that humans use rather than live in).

motion for summary judgment by differentiating it from *Leicester*.¹⁸⁸ Whereas the towers in *Leicester* were “designed to appear as part of the building or to serve a functional purpose that was related to the building,” the creative decisions involved in the mural in *Falkner* were completely unrelated to the functional purpose of the parking garage.¹⁸⁹ Thus, the court declined to find as a matter of law that the mural was “part of” the parking garage because it was factually distinguishable from the factors mentioned in *Leicester*.¹⁹⁰ *Falkner* settled prior to trial.¹⁹¹

FIGURE 3. GENERAL MOTORS ADVERTISEMENT (LEFT)¹⁹² AND FALKNER’S MURAL (RIGHT)¹⁹³



*Mercedes Benz, USA, LLC v. Lewis*¹⁹⁴ took the opposite approach. After three separate street artists threatened to sue Mercedes Benz (“MB”) for copyright infringement after the company posted Instagram advertisements of their cars in front of the artists’ murals,

188. *Id.* at 937.

189. The court noted the towers in *Leicester* were designed to look visually similar to the office building and served a functional purpose in that they served as a gate to foot traffic. *Id.* In this case, the court noted that the decisions made relating to the mural’s appearance were made based on the artist’s previous work rather than with an eye toward acting as an extension of the already constructed office building. *Id.*

190. *Id.*

191. Notice of Settlement at 2, *Falkner*, 393 F. Supp. 3d 927 (No. 2:18-cv-00549-SVW-JPR).

192. Exhibit G-1 to Alex Bernstein Supplemental Declaration at 13, *Falkner*, 393 F. Supp. 3d 927 (No. 2:18-cv-00549-SVW-JPR).

193. Declaration of Adrian Falkner at 10, *Falkner*, 393 F. Supp. 3d 927 (No. 2:18-cv-00549-SVW-JPR).

194. *Mercedes Benz, USA, LLC v. Lewis*, Nos. 19-10948, 19-10949, 19-10951, 2019 WL 4302769 (E.D. Mich. Sept. 11, 2019).

MB filed declaratory judgment suits against each individual artist claiming that, due to the AWCPA pictorial representation exception, no copyright infringement had occurred.¹⁹⁵ The court rejected the defendant artists' motion to dismiss, employing the opposite reasoning of *Falkner*.¹⁹⁶ Unlike *Falkner*, the *Lewis* court did not engage in a fact-sensitive analysis of how and why the mural was designed in relation to the parking garage. Instead, the court briefly noted the similarities between this factual situation and *Leicester*.¹⁹⁷ Namely, both *Leicester* and *Lewis* involved PGS elements attached to an architectural work and thus both warranted the same result.¹⁹⁸ Here, the court similarly adopted a broad definition of "building" to achieve this result,¹⁹⁹ citing a district court case that found that a garage, though not necessarily "humanly habitable" was still a "building" under the AWCPA because the garage was "surely a permanent and stationary structure."²⁰⁰

The court dismissed the policy argument that if MB were able to further this AWCPA argument, it would effectively wipe out any copyright protections available for street artists. Instead, the court left open the possibility that "the plaintiff might have an infringement claim where, for example, someone created a reproduction of his sculpture divorced from the context of the building in which it was embodied, i.e. on a poster, t-shirt, or other print media."²⁰¹ Essentially, the court distinguished cases of infringement involving photographic representations.²⁰²

195. *Id.* at *2–3.

196. Compare *id.* at *5 (analogizing to *Leicester* by saying "[t]hat is precisely the claim Mercedes is asserting here"), with *Falkner*, 393 F. Supp. 3d at 937 ("Very few if any of [the *Leicester*] factors appear to be present in the instant case.").

197. *Lewis*, 2019 WL 4302769, at *5.

198. *Id.*

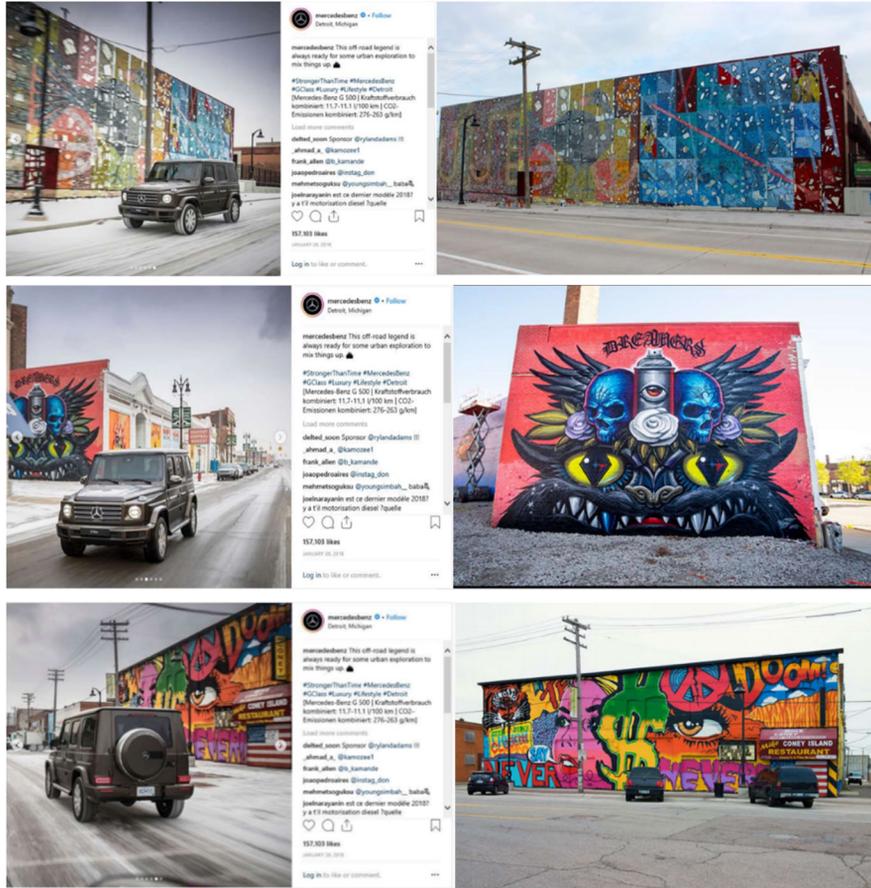
199. *Id.* at *6–7.

200. *Id.* (quoting *Moser Pilon Nelson Architects, LLC v. HNTB Corp.*, No. 05 CV 422 (MRK), 2006 WL 2331013, at *6 (D. Conn. Aug. 8, 2006)).

201. *Id.* at *5.

202. *Id.*

FIGURE 4. MERCEDES-BENZ'S ADVERTISEMENTS (LEFT) AND PLAINTIFFS' MURALS (RIGHT)²⁰³



This line of cases effectively highlights the twin problems with applying the AWCPA in cases concerning the copyrightability of PGS elements incorporated into a building: the lack of statutory guidance on when PGS elements are legally considered “part of” an architectural work and the overbreadth of the pictorial representation exception.

First, the Copyright Act provides courts with no express guidance about how PGS elements incorporated into architectural works may be

203. Complaint at *6–7, *Lewis*, 2019 WL 4302769 (Nos. 19-10948, 19-10949, 19-10951).

legally separated for the purposes of copyright protections.²⁰⁴ Therefore, the courts are given little choice but to rely on the rather artificial, fact-sensitive factors outlined in *Leicester*, or else fashion a test of their own.

Second, both the *Lewis* and *Leicester* courts rejected the policy argument that the exception's overbreadth would essentially wipe out copyright protections for PGS works incorporated into buildings. In doing so, both courts left open the possibility of alternate avenues for artists to recover for copyright infringement if the PGS element is completely divorced from the building.²⁰⁵ But the courts failed to consider how the pictorial representation exception closes off the only avenue of copyright infringement—pictorial representation—which is inextricably tied to street art's purpose and value.²⁰⁶ The unauthorized use of pictorial representations is harmful to street artists in a way that it is not for architects.²⁰⁷ Architectural works have alternate avenues of copyright protections, and their value as original and exclusive works is not jeopardized by pictorial representations.²⁰⁸ The main value of

204. See 17 U.S.C. § 101 (2018) (defining an architectural work without reference to incorporated PGS elements).

205. See *Lewis*, 2019 WL 4302769, at *5 (“[T]he Ninth Circuit recognized that the plaintiff might have an infringement claim where, for example, someone created a reproduction of his sculpture divorced from the context of the building in which it was embodied.”); *Leicester v. Warner Bros.*, 232 F.3d 1212, 1219 (9th Cir. 2000) (stating there was no copyright infringement claim for a pictorial representation “[w]hether or not Leicester may have some *other* claim for a *different* infringement of his copyright”).

206. See Riggle, *supra* note 74, at 249 (describing street art as “an unsolicited aesthetic injection” where “one is forced to reconsider one’s purely practical and rather indifferent relationship to the street”).

207. Journalist Victor Luckerson tells the story of the effect of street art’s meteoric rise on street artists. Victor Luckerson, *The Rise and Risk of the Mural Economy*, RINGER (Oct. 18, 2018), <https://www.theringer.com/2018/10/18/17989192/mural-economy-street-art-detroit-graffiti> [<https://perma.cc/STU8-7CZW>]. For example, Ann Lewis was one of several artists who began to create street art in Bushwick. *Id.* She thought the art would be “a gift to local children,” but instead it became an “economic engine” driving the area’s transformation. *Id.* Building owners began selling walls to brands for mural advertisements, graffiti tours began charging twenty dollars per ticket, and rents rose until Lewis herself was evicted. *Id.* “[B]ecause we were there, developers thought it was a place where they could make money[.] Because we were creating a community and creating accessibility to creativity, that was sellable for them,” she said. *Id.*

208. See, e.g., 17 U.S.C. § 106 (granting copyright holders the exclusive right to “prepare derivative works based upon the copyrighted work” and “to distribute copies” of the work “to the public by sale or other transfer of ownership, or by rental, lease, or lending”); see also H.R. REP. NO. 101-735, at 22 (1990), as reprinted in 1990 U.S.C.C.A.N. 6935, 6953 (describing pictorial representations as “not interfer[ing] with the normal exploitation of architectural works” and resulting in a “lack of harm to the copyright owner’s market”).

having a copyright in architectural works is jeopardized when the works' copyrightable design elements are reproduced in another building.²⁰⁹ In a contemporary society where cities, businesses, and tourists actively seek out the cultural capital offered by street art,²¹⁰ the pictorial representation exception deprives street artists of the one form of copyright protection that is commercially valuable to them. As such, it does not create an exception to existing protections—it repeals them.

Further, the fact that street art exists outside the institutional art market makes the lack of an explicit statutory copyright protection even more glaring. In the traditional world of visual art, dominated by galleries and dealers, the value of each work is an artificial function of the institutional art world.²¹¹ The cost is set by supply and demand factors. The supply comes from the finite number of esteemed works on the market at any given time, and the demand derives from the determination of which works are deemed worthwhile by institutional heavyweights like dealers, collectors, investors, museums, and companies.²¹² In the street art context, there is no price-fixing entity because street art is a public good. The finite nature of works of art—including the opportunities to own them and see them—driving price on the supply-side in the institutional art world—does not exist when street art is open to the public at all times.

Ordinarily, the property owner reaps the benefits of any supply considerations as they own real estate that is unique as a result of the street art fixed to it. The one measure of control a street artist has over the supply of their work is that it is fixed in a certain location so that the only way to see it is to either travel to the location or see a reproduction authorized by the artist themselves. On the demand side, no entity operates as an analog to galleries and dealers, controlling which works collectors and consumers deem valuable enough for their

209. ARCHITECTURE REPORT, *supra* note 145, at xi (listing reasons for “why architects desire to retain rights in their work product” including (1) limiting tort liability if design plans are reproduced in a different environment, (2) allowing architects to profit off of reuse of their plans, and (3) allowing architects to “prohibit alterations in the design that would detract from the desired aesthetic effect”).

210. *Supra* Part I.

211. CLARE MCANDREW, *An Introduction to Art and Finance*, in FINE ART AND HIGH FINANCE: EXPERT ADVICE ON THE ECONOMICS OF OWNERSHIP 17 (Clare McAndrew ed., 2010).

212. *Id.*

investment.²¹³ On the contrary, in the street art context, each work's value is not a product of the institutional art world, but exists in spite of it. Street art's value derives from its visual appearance and its positioning—both historically and physically—as emblematic outsider expressions. If companies are able to mass reproduce street art to an extended audience without the consent of the artist, the demand will not only be diminished but will also be informed by the art's relationship to a commercial, or perhaps political, venture of which the artist does not necessarily approve.²¹⁴

Moreover, appearing in the background of advertisements could be only the tip of the iceberg when it comes to the commercial exploitation of street art. Though the *Leicester* and the *Lewis* courts left open the possibility that there could be a cognizable copyright infringement claim if a PGS element were recreated in a way that was divorced from the building,²¹⁵ this is not guaranteed. As stated previously, copyright protections for PGS elements incorporated into buildings are not expressly within AWCPA's text.²¹⁶ If a work of street art is considered part of the building as a matter of law, there is no textual indication that the pictorial representation exception would be confined to depictions, like in the car cases, that feature the building on which the art is attached.²¹⁷ Absent a limiting principle, it could include reproductions of the art entirely divorced from the actual structure of the building—like recreating the art on shirts or mugs—

213. *Id.* at 18.

214. Often, street artists allege harm in copyright infringement claims springing from their inability to control if and how their work will be associated with various commercial entities. This inability to control their commercial associations impacts an artist's reputation as well as the market value of their work. *See, e.g.*, Corrected First Amended Complaint at 6, *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927 (C.D. Cal. 2018) (No. 2:18-cv-00549-SVW-JPR) (alleging that by featuring plaintiff's work in its advertisements, GM raised revenue for itself but caused reputational damage and a decrease in value to the plaintiff's work); Complaint at 8, *Tierney v. Moschino S.p.A.*, No. 2:15-cv-05900-SVW-PJM, 2016 WL 4942033 (C.D. Cal. Jan. 13, 2016) [hereinafter *Tierney Complaint*] (claiming in a copyright infringement suit against the fashion designer Moschino that “nothing is more antithetical to the outsider ‘street cred’ that is essential to graffiti artists than association with European chic, luxury and glamour—of which Moschino is the epitome”).

215. *See supra* note 205 and accompanying text.

216. *See supra* note 204 and accompanying text.

217. In fact, street artists have sued for copyright infringement over the unauthorized use of their work in other mediums, from Met Gala gowns to coffee cups. *See Hayuk v. Starbucks Corp.*, 157 F. Supp. 3d 285, 293 (2016) (finding no copyright infringement where a street artist claimed their work was reproduced as part of a Starbucks advertising campaign); *Tierney Complaint*, *supra* note 214, at 7–10 (alleging copyright infringement of street art on a gown worn at the Met Gala).

because, legally, the art and the building are one and the same.²¹⁸ Therefore, as it stands, there is a plausible, albeit not the most natural, reading of the AWCPA that neutralizes all copyright protections for street artists—whether divorced from the context of the building or not. This Note is not arguing for or against the current copyright structure. It simply argues that the current legal scheme for protecting creators’ rights²¹⁹ creates a gaping hole for street art that is problematic, especially given the economic and cultural value of street art in modern society.²²⁰

IV. “USEFUL ARTICLES” AS A MODEL FOR COPYRIGHT ELIGIBILITY

Given the problems created by applying the AWCPA and the *Leicester* precedent to uses of contemporary street art, the evolving judicial treatment of “useful articles” and attached PGS elements provides a helpful model for how works of street art can be treated as separate, copyrightable elements under the law. This Part addresses the statutory and jurisprudential framework governing “useful articles” and posits it as an analytical mechanism for understanding and solving the AWCPA’s shortcomings as it relates to the copyrightability of PGS works attached to the exteriors of buildings.

Under § 101 of the Copyright Act, a useful article is defined as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”²²¹ Useful articles are those whose purpose is defined by their

218. The cases mentioned in note 217, *supra*, did not raise the AWCPA defense. However, given they were litigated prior to the car cases, it is plausible that the corporate entities were not aware of the availability of the AWCPA as a defense. Presumably, the AWCPA defense would be attractive to corporate entities, especially compared to the traditionally fact-sensitive determinations of copyright infringement. See *Hayuk*, 157 F. Supp. 3d at 286–93 (making no mention of the AWCPA in the final opinion); Memorandum of Points and Authorities in Support of Defendant Moschino’s Motion to Dismiss at 1–18, *Tierney*, 2016 WL 4942033 (making no mention of the AWCPA in its answer to the complaint); *Tierney* Complaint, *supra* note 214, at 1–20 (making no mention of the AWCPA in the complaint).

219. Scholars have noted the deficiencies in the current copyright scheme and have made suggestions for better legal protections for artists. See, e.g., Olufunmilayo B. Arewa, *The Freedom To Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 482–83 (2007) (arguing that copyright law should allow greater artistic freedom to copy parts of other works).

220. *Supra* Part I.

221. 17 U.S.C. § 101 (2018).

functionality, rather than their aesthetic character,²²² traditional examples being lamps, household appliances, and furniture. As previously discussed, architectural works used to be treated as useful articles prior to the passage of the AWCPA.²²³ However, unlike the AWCPA, there are explicit guidelines within the Copyright Act governing how to define the copyrightability of PGS elements when they are incorporated in useful articles.²²⁴ Section 101 explicitly allows for the protection of PGS elements that are part of the design of a useful article “if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”²²⁵

These explicit protections for PGS elements fixed on useful articles were enacted in the 1976 amendments to the Copyright Act following a Supreme Court case that exposed a copyright loophole for PGS elements when they were incorporated into useful articles.²²⁶ The case, *Mazer v. Stein*,²²⁷ confronted whether a sculpture of a dancing couple that doubled as a lamp base could be copyrightable.²²⁸ Since a lamp is defined by its function, it was not considered a “work of art” under the law and thus was not copyrightable.²²⁹ However, since the sculptural base on its own could meet the criteria for “works of art,” the Court deemed it copyrightable.²³⁰ The Court held that if a PGS object could be copyrightable when divorced from the useful article, it was still copyrightable when incorporated into the useful article.²³¹ This

222. See NIMMER, *supra* note 119, § 2A.08[A][2] (“Even if an article has a distinctive shape, like works of modernistic form sculpture it should still be denied protection if that shape is inseparable from its function.” (internal quotations and citations omitted)).

223. *Supra* Part II.C.

224. See 17 U.S.C. § 113(b)–(c).

225. *Id.* § 101.

226. See H.R. REP. NO. 94-1476, at 50 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5663 (discussing *Mazer v. Stein* as introducing separate protections for artworks that can exist separately from the useful articles in which they are incorporated).

227. *Mazer v. Stein*, 347 U.S. 201 (1954).

228. *Id.* at 202.

229. See *id.* (framing the question presented as whether statuettes “intended for use and used as bases for table lamps, with electric wiring, sockets and lamp shades attached” could be copyrighted as “works of art”).

230. *Id.* at 213–14.

231. *Id.* at 218 (“We find nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars or invalidates its registration.”).

test for parsing out copyrightable and noncopyrightable elements of a unified whole was codified in the Copyright Act in 1976.²³² With the adoption of § 101's so-called separability test, Congress sought "to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design."²³³

Following this change to copyright protections, courts split over how to determine if the PGS element could be conceived as sufficiently separate from the useful article.²³⁴ Some courts held the PGS element must be capable of being physically separated from the useful article, while others held that as long as the two could be conceptually separated, the PGS element remained copyrightable.²³⁵ In 2017, the Supreme Court took up the split in *Star Athletica v. Varsity Brands*,²³⁶ a case involving the design elements of cheerleading uniforms.²³⁷ Clothes have long been considered useful articles, and thus void of copyright protections; however, the design composed of the "arrangements of lines, chevrons, and colorful shapes appearing on the surface of respondents' cheerleading uniforms" was at issue in this case.²³⁸ Writing for the Court, Justice Clarence Thomas adopted the conceptual separability test—and expanded it in various ways that has led to confusion and uncertainty in the current separability analysis.²³⁹ Regardless, in short, the Court held that as long as a PGS element could be "imagined apart" from the useful article—in this case the uniforms—and would qualify for copyright protection on its own, it was copyrightable under § 102(a)(5) as a separate PGS element.²⁴⁰

232. See 17 U.S.C. § 101 (2018) ("[T]he design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.").

233. H.R. REP. NO. 94-1476, at 55 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5668.

234. See Barton R. Keyes, *Alive and Well: The (Still) Ongoing Debate Surrounding Conceptual Separability in American Copyright Law*, 69 OHIO ST. L.J. 109, 125–27 (2008) (listing different separability tests employed by courts to determine the copyright eligibility of PGS elements incorporated into useful articles).

235. *Id.*

236. *Star Athletica v. Varsity Brands*, 137 S. Ct. 1002 (2017).

237. *Id.* at 1007.

238. *Id.* at 1008–09.

239. *Id.* at 1010. For a discussion of the ways in which the new separability test has created confusion, see Levi, *supra* note 55, at 729–34.

240. *Star Athletica*, 137 S. Ct. at 1012.

When enacted, § 101's separability test seemingly governed the copyrightability of PGS elements attached to architectural works because they were construed as "useful articles" at the time.²⁴¹ However, the AWCPA's passage in 1990 divorced architectural works from the § 101 analysis.²⁴² Consequently, the decisions in *Mazer* and *Star Athletica* do not apply to PGS elements that are incorporated into architectural works.²⁴³

More troublingly though, the AWCPA, though removing architectural works from the reach of the § 101 separability test, does not provide a respective test for the treatment of PGS elements incorporated into architectural works. Neither the legislative history nor the report by the Copyright Office discusses the PGS protections that would be stripped when architectural works were no longer considered "useful articles."²⁴⁴ Thus, it seems unlikely that Congress intentionally abrogated the copyrightability of PGS elements on buildings. Instead, it is more probable that this was merely a drafting oversight, occurring against the backdrop of a very young street art movement, which, in 1990, still lacked institutional legitimacy.²⁴⁵

V. CLOSING THE COPYRIGHT LOOPHOLE

The AWCPA's drafting creates a loophole in copyright protections for street artists in the midst of their increasing popularity and commoditization. It fails to address how PGS elements' copyrightability should be addressed when such elements are incorporated into an architectural work,²⁴⁶ and this lack of

241. H.R. REP. NO. 94-1476, at 55 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5668.

242. See H.R. REP. NO. 101-735, at 20 (1990), as reprinted in 1990 U.S.C.C.A.N. 6935, 6951 ("[T]he copyrightability of architectural works shall not be evaluated under the separability test applicable to pictorial, graphic, or sculptural works embodied in useful articles.").

243. See *Mercedes Benz, USA, LLC v. Lewis*, Nos. 19-10948, 19-10949, 19-10951, 2019 WL 4302769, at *6 (E.D. Mich. Sept. 11, 2019) ("[*Star Athletica*] concerns design elements of useful articles, not buildings, and stands for the proposition that design elements of a useful article can be PGS works protected by copyright.").

244. See H.R. REP. NO. 101-735, at 22 (discussing the effects of copyright protections on holders of architectural-works copyrights but not PGS artists' copyrights); ARCHITECTURE REPORT, *supra* note 145, at xi (asserting reasons why those who design architectural works desire copyright protections without mentioning PGS works or artists).

245. See H.R. REP. NO. 101-735, at 22 (making no mention of PGS works or street art); ARCHITECTURE REPORT, *supra* note 145, at xi (making no mention of PGS works or street art).

246. See 17 U.S.C. § 101 (2018) (defining an architectural work without reference to incorporated PGS elements).

consideration leads to an overly broad exception to copyright protections for street artists.²⁴⁷ This Part argues that Congress should amend the AWCPA to close this copyright loophole. The amendment should perform two actions. First, it should either adopt the separability test, codified in § 101, for PGS elements incorporated into architectural works or add a definition of “building” to the AWCPA to exclude PGS elements. Second, it should narrow the pictorial representation exception as it applies to these incorporated elements.

A. Expressly Adopting the § 101 Separability Test as It Applies to Architectural Works

The AWCPA’s failure to account for how to treat PGS works on the exteriors of buildings—most likely a drafting oversight²⁴⁸—is best remedied by congressional action. Congress has expressed no intent to create separate statutory schemes for PGS elements attached to useful articles and those attached to buildings. In fact, the AWCPA was enacted when Congress was expanding protections for artists, such as through VARA.²⁴⁹ Therefore, a legislative amendment to the AWCPA should adopt the separability test outlined in § 101 to assure that street artists are protected, no matter the canvas.

In other words, when a PGS element can be imagined as existing separately from the building to which it is fixed, it would be copyrightable, assuming it met all other copyright requirements.²⁵⁰ If its purpose could not be separated from the functionality of the building, then it would not qualify. This solution would alleviate the problem of similarly situated works being awarded copyright protections when applied to useful articles, like a shirt or a lamp, but not a building.²⁵¹ It would also fulfill the twin aims of the Intellectual Property Clause to incentivize artists to pursue the arts through facilitating a fair return on their labor investment and to ensure those works are published for the public’s benefit.²⁵²

247. *Supra* Part III.

248. *See supra* note 245 and the accompanying text.

249. *See* 17 U.S.C. § 106A(a) (expanding rights of attribution and integrity to visual artists).

250. *Id.* § 101 (stating the design of a useful article is only copyrightable to the extent it “incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article”).

251. *Supra* notes 227–240 and accompanying text.

252. *Supra* notes 122–123 and accompanying text.

This solution would ensure street art would be governed by the same separability analysis as that of other PGS works, without adopting the somewhat convoluted and contradictory reasoning of *Star Athletica*. Since the recent *Star Athletica* decision has confused courts and practitioners alike with regard to how to properly apply its separability analysis,²⁵³ Congress should maintain a consistent approach by adopting the § 101 analysis for both useful articles and architectural works. This way, if *Star Athletica* is tinkered with or altered, the analysis will hold for both street art and PGS works generally.

The car company cases demonstrate that current jurisprudence allows nearly identical factual situations to yield different results solely based on which *Leicester* factor the court decides is determinant.²⁵⁴ A statutory fix would create uniformity and protect artists' expectations. As applied to the car company cases, this proposed statutory solution would have found infringement in both instances as long as the murals met all other copyright eligibility requirements. If each mural could be imagined as existing separately from the building—on canvas, on clothing, or on any other medium—then it would be copyrightable.²⁵⁵ Accordingly, reproductions of the mural, including photographic or video reproductions, would be considered copyright infringement.

B. Introduce a Clear Definition of “Building” to the AWCPA

Currently, courts struggle to determine when street art is a part of the building to which it is fixed or a separate PGS element. In a statutory scheme where the separability analysis differs based on whether a PGS element exists upon a useful article or a building, the definition of what constitutes a “building” matters greatly. How broadly or narrowly courts define the term “building” played a role in the outcomes of *Leicester* and *Lewis*.²⁵⁶ Those cases demonstrate that *how* a building is defined necessarily impacts whether street art is considered a part of the building or its own autonomous work. Therefore, absent reconciling the useful-articles and architectural-

253. *Supra* note 239.

254. *Supra* notes 184–198 and accompanying text.

255. *Supra* Part III.

256. If the courts had not found the respective structures to be buildings, the AWCPA would not have applied and the cases would have come out the other way. *Supra* notes 178–183, 198–200 and accompanying text.

works doctrines, a second option would be to more clearly define what a “building” is for the purposes of the AWCPA.

The Copyright Office currently defines buildings as “permanent and stationary structures designed for human occupancy.”²⁵⁷ However, the legislative history—as well as *Leicester* and the car company cases²⁵⁸—defines a “building” as a structure that humans use rather than a structure that humans live in.²⁵⁹ This broad definition, though expanding the reach of the pictorial representation exception in those cases, actually gives minimal guidance as to how to construe the works’ relationship to the buildings upon which they are fixed. Therefore, relying on this definition, with the caveat that a building is not inclusive of PGS elements fixed to its exterior, would help preserve consistency in the use of this definition of “building” while solidifying copyright protections for street art.

C. Narrow the Pictorial Representation Exception as it Applies to PGS Elements

Regardless of whether Congress adopts the § 101 separability analysis or adds a definition of “building” to the AWCPA, it should narrow the pictorial representation exception to account for street art. The AWCPA’s legislative history cited a “lack of harm” to the architectural-copyright holder’s market to justify the breadth of the pictorial representation exception.²⁶⁰ As mentioned previously, the harm caused by infringement of an architectural work’s copyright does not look the same as the harm caused by infringement of a street artist’s copyright.²⁶¹ In passing the exception, however, Congress expressed clear intent to maintain architecture as a “public art form.”²⁶² Therefore, narrowing the pictorial representation exception to acknowledge street art must be done with this in mind.

Permissible uses should be informed by both the legislative history of the AWCPA, which showed that Congress worried about tourists’ abilities to take pictures of buildings for personal or recreational purposes, and case law regarding fair and de minimis uses of street

257. 37 C.F.R. § 202.11(b)(2) (2020).

258. *Supra* notes 178–180, 187, 198–200 and accompanying text.

259. H.R. REP. NO. 101-735, at 20 (1990), as reprinted in 1990 U.S.C.C.A.N. 6935, 6951.

260. *Supra* note 208 and accompanying text.

261. *Supra* notes 206–213 and accompanying text.

262. *Supra* note 166 and accompanying text.

art.²⁶³ Courts have found *de minimis* pictorial representations of street art when used for only a few seconds in the background of a television show²⁶⁴ and when used as a video backdrop for a single song during a concert.²⁶⁵ When assessing whether a use is *de minimis*, courts looked to factors such as the “observability” of the work in the representation, whether an average observer would recognize the work due to the length of time it is on camera, the nature of the depiction, and the prominence of the work in the pictorial representation.²⁶⁶ In the fair use context, courts looked to factors such as the nature and purpose of the pictorial representation, the extent to which the street art was used, and whether the pictorial representation affected the market of the street art.²⁶⁷

The most workable statutory solution would be to lay out the main factors—inspired by *de minimis* and fair uses—that courts should weigh when discerning whether a work of street art falls within the pictorial representation exception. The approach should balance the AWCPA’s goal of maintaining architecture as a public good while also protecting the exclusive rights of street artists. Borrowing from the fair use and *de minimis* doctrines, the statutory amendment should read as follows:

The applicability of the pictorial representation exception will be determined by a number of factors, including the following:

- (1) whether a PGS element is fixed to the exterior of the building;
- (2) the prominence of the PGS element on the exterior of the building;²⁶⁸
- (3) the prominence of the PGS element in the pictorial representation, including how long it is featured in a video representation;

263. See H.R. REP. NO. 101-735, at 22 (1990), as reprinted in 1990 U.S.C.C.A.N. 6935, 6953 (discussing the balance between protecting architectural works and allowing the public to engage with them).

264. *Gayle v. Home Box Off., Inc.*, No. 17-CV-5867 (JMF), 2018 WL 2059657, at *3 (S.D.N.Y. May 1, 2018).

265. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013).

266. *Gayle*, 2018 WL 2059657, at *2.

267. *Seltzer*, 725 F.3d at 1179.

268. For the purposes of this statutory language, the definition of “building” will be adopted from Part V.B.

- (4) the nature and purpose of the use, including whether it is commercial or transformative;
- (5) the intent of the person creating the pictorial representation to feature the building versus the PGS element;
- (6) the harm caused by the pictorial representation to the market of the PGS element.²⁶⁹

Bearing these factors in mind, pictures of buildings for personal or recreational purposes would still be permissible, but prominent use of the work in advertisements to sell something other than the building to which the PGS works are incorporated would be impermissible under this new statutory scheme. The legislative solution would effectively protect street artists' work from being exploited commercially, while still maintaining the exceptions Congress intended for tourists, as well as other recognized fair uses.²⁷⁰

In the car company cases, this would mean that the photo representations of the murals, made for the purpose of car advertisements without the express authorization of the artist, would be copyright infringement. In a case such as *Leicester*, on the other hand, where street art appears in the background of a movie, it could be permissible depending on the extent it was featured, the intent of the user, and the impact on the artist's market. Further, if someone took a photo in front of the mural for their own personal use—to post on their own Instagram, put in a scrapbook, or email to a friend—it would be permissible.²⁷¹ Likewise, news coverage and advertisements

269. This statutory language borrows and supplements from analogous doctrines to better protect street artists' rights under copyright law. Factors two, three, and four reframe components of the fair use doctrine, outlined in § 107 of the Copyright Act, to more specifically apply to pictorial recreations of street art. 17 U.S.C. § 107 (2018). Factor three borrows from the de minimis use doctrine, which states that a use is not infringement if it takes so little of the copyrighted work the "average audience would not recognize the appropriation." *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004). Factor four borrows from § 113 of the Copyright Act, which outlines a few instances where pictorial representations of useful articles with PGS elements fixed upon them are permissible if the purpose is to advertise, comment, or report on the useful article itself. 17 U.S.C. § 113(c). Factor four is an application of this idea to the street art context.

270. See 17 U.S.C. § 107 (allowing for a fair use defense to copyright infringement "for purposes such as criticism, comment, news reporting, teaching[,] . . . scholarship, or research").

271. Many intellectual property scholars have advanced the idea that a zone exists in copyright law of lawful personal use. For a more in-depth discussion of one scholar's definition of what the zone of lawful personal use should include, see generally Jessica D. Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007).

for the building upon which the street art is fixed would be permissible. Again, this proposal seeks to protect public engagement with the work but balances that engagement with the need to protect street artists from commercial exploitation. Considering street art's public nature and Congress's intent to retain architecture's public form under the AWCPA, this solution aims simply to limit unauthorized uses that are economically harmful to street artists. Ultimately, the purpose of this amendment, like the purpose of copyright law generally, is to prevent commercial exploitation rather than to prohibit all types of engagement with the work.

CONCLUSION

The purpose of copyright law is to promote innovation in the arts,²⁷² the type of innovation that made art of Brillo Boxes and a museum out of public streets. Yet, the law currently provides formalized protections for architectural works at the expense of the very innovation the law was intended to protect. As postmodernists taught the art world, the medium on which art exists is part of its innovation and value as creative work. This is now recognized in some capacity by both the institutional art world and the Supreme Court. The Brillo Boxes are allowed inside the gallery, and art is now copyrightable when emblazoned on the front of cheerleading uniforms. Street art, though, remains on the outside looking in.

Until Congress updates the Copyright Act to account for the rise of the street art movement, street artists will be one of the only parties who are restricted in their ability to profit off of reproductions of their own work. Although property owners and corporate interests alike seem to use street art's cultural capital to their own advantage, the U.S. Code has not caught up. Copyright legislation, by its nature, is subject to change as long as art continues to expand and evolve. Street art shows that this game of catch up is a worthy endeavor. Its financial and cultural value make it worthy of protecting. Or, at least, of having the same protections it would receive if it were paint on any other canvas.

272. *Supra* notes 122–123 and accompanying text.