

Graffiti, Street Art, Walls, and the Public in Canadian Copyright Law

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8.1 INTRODUCTION: A CASE STUDY OF CANADA'S COPYRIGHT LAW BALANCING ACT

Like other parts of the world, graffiti in Canada is vilified, and at the same time is increasingly revered and celebrated. This ambivalence is reflected in the general legal landscape that surrounds graffiti and other forms of street art at the criminal, civil, and municipal law levels. Within this general legal framework, the application of copyright law to graffiti and street art reveals a complex web of interwoven issues about protection of the graffiti artist's economic and moral rights, questions of illegality and public policy, the rights of the property owner of the "wall" on which the art resides, and the public.

Through legislative and jurisprudential developments of the last decades, Canadian copyright law has moved away from the more traditional copyright-holder-centric regime.¹ In *Théberge v Galerie d'Art du Petit Champlain inc.*² and in subsequent judgements,³ the Supreme Court of Canada has repeatedly emphasized that the Copyright Act⁴ reflects a "balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator."⁵ While the concept of balance was not new to Canadian copyright law and policy,⁶ its articulation in the reasons for judgment in *Théberge* has influenced

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¹ *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* 2012 SCC 36 at para 9 (unanimous judgement, Abella J.) [*Bell Canada*].

² 2002 SCC 34 [*Théberge*].

³ *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers*, 2004 SCC 45, para 40; *Euro-Excellence Inc. v Kraft Canada Inc.*, 2007 SCC 37, para 76; *Bell Canada*, (n 1) para 9; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 3, para 7[ESA]; *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, para 40; Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68, para 64 [CRTC]; *Cinar Corporation v Robinson*, 2013 SCC 73 at para 23; *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57 at paras 47,66,74,145, 170,179,180 (both the majority and dissenting opinions) [SODRAC].

⁴ R.S.C., 1985, c. C-42.

⁵ *Théberge*, para 30.

⁶ See e.g., Canada, Department of Consumer and Corporate Affairs, *Copyright in Canada – Proposals for a Revision of the Law* by A.A. Kayes & C. Brunet, Ottawa: Government of Canada, 144, 235 (1977); From Gutenberg to Telidon: A White Paper on Copyright: Proposals for the Revision of the Canadian Copyright Act, Ottawa: Supply and Services Canada, 1, 87 (1984); Canada, Culture and Communications, Standing Committee on Communications and

the trajectory of later jurisprudential developments. The need to balance the public interest and obtain a just reward for the creator guided the court in articulating Canada's test for the requirement of originality, and to recognize "users' rights."⁷ The balancing act discourse has been center stage in the legislative reform process,⁸ leading to major amendments of the Copyright Act in 2012,⁹ among which is the addition of new exceptions to copyright infringement.¹⁰

Whether the "balancing act" discourse in Canadian copyright law is more than rhetorical and may truly steer copyright law away from its copyright-holder centrism has caused many to wonder.¹¹ In light of this "balance seeking" movement of Canadian courts and legislature, the application of copyright law to graffiti and street art is a field of study of choice. To what extent should copyright law protect graffiti and street artists, who by the essence of their work voluntarily (sometimes illegally) make their work accessible to the public in open spaces? How does the law mediate between the rights of graffiti and street artists, the rights of the property owner on which the art resides, and members of the public? Cutting across the very physical world of concrete, bricks and mortar, public spaces, as well as intangible property rights, and virtual worlds where public art is shared by members of the public, the application of copyright law to graffiti and street art provides a unique opportunity to push our understanding as to where the balance so dear to Canada's copyright ethos should lie.

In this chapter, I argue that while the scope of copyright protection of graffiti and street art may be, on the whole, fairly easily ascertainable and may offer a desirable level of protection to their authors, the rights of the public with respect to graffiti and street art remain fragmented, somewhat unclear and likely too limited. This finding gives a sobering account of the extent to which Canadian copyright law succeeds in adequately addressing competing interests, in a context where voluntarily making the work accessible in public spaces, is what defines this art form to a large extent.

I refer to "graffiti" for writings depicted in public spaces and to "street art" as a more general term encompassing graffiti and any other form of visual art (drawing, painting, sculpture, structure, object) located in public spaces. I refer to neither graffiti or street art with a connotation of legality or illegality and I will specifically refer to their (il)legality as the context may dictate from time to time. Given the purpose of this chapter, I have intentionally and as much as possible limited my analysis to the Canadian context, in an effort to avoid redundancy with other chapters in this book discussing other jurisdictions.

In Section 8.2, I present the tensions that reside within the general Canadian artistic and legal landscape of graffiti and street art. In Section 8.3, I look at how copyright law may apply to graffiti and street art, starting with the eligibility requirements for graffiti and street art to be protected, the scope of the exclusive rights that copyright and moral rights may confer on graffiti

Culture, The ties that bind, Ottawa: The Committee, 66 (1992); Canada, Intellectual Property Policy Directorate Industry Canada, Copyright Policy Branch, Canadian Heritage, Consultation Paper on Digital Copyright Issues, 6–7, 22–24 (June 21, 2001).

⁷ *CCH Canadian Ltd. v Law Society of Upper Canada* 2004 SCC 13 at paras 10, 14–36 (in particular 23–24), 48 [CCH].

⁸ See Government of Canada official website archives on Bill C-32, An Act to amend the Copyright Act, 3rd Session, 40th Parl., 2010, Copyright Modernization Act Background, (2010); see also Government of Canada official website on the adoption of Bill C-11, An Act to Amend the Copyright Act, 1st Sess, 41th Parl, 2011 (assented to June 29, 2012): Copyright Modernization Act Background.

⁹ Copyright Modernization Act, S.C. 2012, c. 20.

¹⁰ *Ibid.*

¹¹ See e.g. Theresa Scassa, "Users' Rights in the Balance: Recent Developments in Copyright Law at the Supreme Court of Canada" (2005) 22 *CIPJ* 133, 135; for a discussion on the difficulties around the application of the concept of balance in copyright law, see also: Abraham Drassinower, "From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law" (2009) 34 *The Journal of Corporation Law* 991.

and street artists, and the effect of illegality on copyright and moral rights. In Section 8.4, I look at the rights and privileges of property owners and of the public to graffiti and street art, as owners of the tangible embodiment of the artistic work, through exceptions to copyright infringement or user rights, and through the doctrines of implied license and abandonment of rights. I conclude briefly in Section 8.5 by reflecting on the many more questions and areas of research not addressed in this chapter.

8.2 GENERAL CANADIAN ARTISTIC AND LEGAL LANDSCAPE: TENSIONS AND CONTRADICTIONS

In Canada, the regulation of graffiti and street art reflects a duality and to some extent conflict towards this form of expression in public spaces. This is particularly the case of major Canadian cities' relation to graffiti and street art. On the one hand, there is a growing gentrification trend of graffiti and street art in cities such as Montréal, Toronto, and Vancouver that is similar to other cities worldwide. Graffiti and street art have increasingly become an urban phenomenon of curiosity and interest, and a source of local pride for their distinct visual landscapes and narratives. Montréal, Toronto, and Vancouver boast about their local graffiti and street artists, even promoting guided walking tours.¹² Each of these three cities has hosted mural festivals, some of which have become an annual gathering.¹³ Canadian Indigenous artists (First Nations, Métis, and Inuit peoples) resort to street art often to convey a specific political message, reappropriating public spaces, and bypassing traditional art and exhibit networks inherited from a colonial past.¹⁴ Street art is going indoors with art galleries and museums showcasing the talent of local graffiti and street artists.¹⁵ CBC National TV popular show *Rick Mercer Report* has given visibility to Graffiti Alley in downtown Toronto, where the host did his weekly political rant.¹⁶

Municipal regulations and city programs reflect a willingness to invest in street artists and promote their art. In Toronto, StART (Street Art Toronto) invites street artist collectives annually to submit proposals that go through a competitive selection process and allocation of public funds.¹⁷ This and other graffiti commissioning programs promote graffiti and street art as creating opportunities for community building and the revitalization of parts of the city.¹⁸

¹² Toronto, the official website of Tourism Toronto, Toronto's street art, www.seetorontonow.com/my-toronto/toronto-street-art/#/sm.00001mpzeebeded21oteh5b61572x accessed August 25, 2018.

¹³ In 2017, Mural Routes hosted its nineteenth symposium on street art in Toronto: <https://muralroutes.ca/symposium-2017/> accessed August 25, 2018.

¹⁴ See Laurence Desmarais & Camille Larivee, "Take Back the Streets" (*Canadian Art*, October 30, 2017) <https://canadianart.ca/features/take-back-the-streets/>; Mark Ambrose Harris, "'Listen to the Walls': These Indigenous Street Artists Are Converging to Decolonize Montreal" (*CBC News*, August 14, 2017) www.cbc.ca/arts/listen-to-the-walls-these-indigenous-street-artists-are-converging-to-decolonize-montreal-1.4246376; Luke Ottenhof, "Artist Jay Soule Uses Toronto as a Canvas for his Indigenous Art and Activism," *The Globe and Mail* (May 21, 2018) www.theglobeandmail.com/canada/toronto/article-artist-jay-soule-uses-toronto-as-a-canvas-for-his-indigenous-art-and/; Jody Freeman, "Indigenous Street Artists Create Holy Alliances," *Montreal Serai* (October 17, 2017) <https://montrealserai.com/article/indigenous-street-artists-create-holy-alliances/> accessed 30 Sept 2018.

¹⁵ See, e.g., an exhibit organized in a Vancouver art gallery in 2014, Hot Art Wet City Gallery on Main Street <http://hotartwetcity.com/street-art-show/> accessed August 25, 2018.

¹⁶ Host of the humorous weekly show the *Rick Mercer Report* (which ran for fifteen seasons, until 2018) www.cbc.ca/mercerreport/ accessed August 25, 2018; Tourism Toronto (n 12).

¹⁷ Street Art Toronto – City sponsored program of public murals (StART), <https://www.toronto.ca/services-payments/streets-parking-transportation/enhancing-our-streets-and-public-realm/streetartoronto/> accessed May 8, 2018.

¹⁸ *Ibid.*

On the other hand, graffiti is still largely prohibited. In Canada, the making of graffiti or street art without the consent of the property owner where it is situated may constitute mischief¹⁹ and in some cases the public incitement or wilful promotion of hatred, all of which are indictable offenses liable for imprisonment under the Criminal Code.²⁰ Graffiti art may give rise to offenses related to public road safety, as was the case with renowned Montréal artist “Roadsworth” (Peter Gibson) who in 2004 was charged (and later conditionally discharged) with fifty-three counts of public mischief for his stencils developed from street signage (e.g. a pedestrian crossing becoming a giant row of candles).²¹ In some cases, the making of graffiti or street art will involve the tort of trespass, which may also constitute a criminal offense.²² The making of graffiti or street art may also constitute a statutory offense liable to a fine under municipal by-laws.²³

Municipality by-laws prohibit graffiti, not only from public spaces, but from any space that is visually accessible to the public. The interdictions against graffiti extend to private dwelling property owners, who have an obligation to keep their premises free of graffiti and to remove it once notified by the municipality (most often at their own cost).²⁴ Failure to comply with municipality orders may lead to clean-up costs or fines.

The underlying premise of city graffiti management plans is that with some exceptions, graffiti is a plague that should be contained and that this endeavor is a collaborative effort between the city, the public, and private property owners.²⁵ Citizens are encouraged to report graffiti to city officials.²⁶ Advice is given to private property owners on how to keep their property free of graffiti and, in some cases, municipalities offer supplies to facilitate this.²⁷

In some cities, property owners may ask that the graffiti or art mural (as opposed to graffiti vandalism) be exempt from any city order of removal.²⁸ Local associations or individual property owners may also request that graffiti or art murals of a designated area be “regularized.” Such permission, if granted, is subject to the graffiti or street art being maintained in good repair.²⁹

Within the dictates of criminal and civil law, Canadian cities’ regulations of graffiti and street art prohibit graffiti, treating it as a problem to eradicate, while at the same time encouraging local groups to revitalize neighborhoods through graffiti and mural art, and through competitions commissioning their creation. While the line between the distasteful and the wonderful,

¹⁹ Criminal Code, RSC 1985, c C-46, s 430: referring to different forms of mischief in relation to property, including mischief in relation to specific forms of property e.g. religious property, educational institutions, public community buildings, war memorials, and cultural property.

²⁰ *Ibid.*, ss 319, 430. See e.g.: *R v Lelas*, [1990] O.J. No. 1587, 58 C.C.C. (3d) 568 (WL) (Ont C.A.); *R v Speed*, 2003 SKPC 164 (CanLII); *R v Akin*, 2011 ABPC 201 (CanLII).

²¹ Karen Crawley, “Seeing Double: Ironic Encounters between Art and Law” (Doctorate in Civil Laws Thesis, McGill University Faculty of Law 2012) 243.

²² I.e., trespassing at night: Criminal Code (n 19), s 177.

²³ See, e.g., Toronto Municipal Code, § 485–8.

²⁴ *Ibid.* Ch. 485, §485-3, §485–7, §485–8; Ville de Montréal, RCA11 17196, Règlement interdisant les graffiti et exigeant que toute propriété soit gardée exempte de graffiti, arts 3, 4, 6, 10, 13–14, 19 (applicable to the Côte des Neiges and Notre-Dame-de-Grâce arrondissements); City of Vancouver, By-law no. 7343, By-law to prevent unsightliness of property by prohibiting the placement of graffiti and requiring that property be kept free of graffiti, ss 3-7, 11; Graffiti Management (By-law No. 2008-01), a by-law of the City of Ottawa to prohibit the placement of graffiti on property and to require property be kept free of graffiti.

²⁵ See e.g. City of Toronto, By-law enforcement, Graffiti, www.toronto.ca/wps/portal/contentonly?vgnextoid=097ae9b6ef721410VgnVCM10000071d60f89RCRD&vgnextchannel=2f5b19f155cbo410VgnVCM10000071d60f89RCR accessed August 25, 2018; Ville de Montréal, Graffitis – Enlèvement des graffitis, http://ville.montreal.qc.ca/portal/page?_pageid=9257,130605572&_dad=portal&_schema=PORTAL accessed August 25, 2018.

²⁶ See e.g. City of Toronto, By-law enforcement (n 25).

²⁷ Ville de Montréal, Trucs et astuces, graffitis et affiches, http://ville.montreal.qc.ca/pls/portal/docs/page/arrond_cdn_fr/media/documents/depliant_graffiti.pdf accessed August 25, 2018.

²⁸ See e.g. Toronto Municipal Code (n 23) §485–4 E.

²⁹ *Ibid.* §485–6. Ville de Montréal (n 24) arts 15–17; on the regulation of murals by municipal district ordinances.

let alone any criteria of artistic merit, may not be enunciated, some parameters are discernible as to what graffiti is allowed or not: whether the marking was made with the property owner's consent, whether the marking is a tag,³⁰ whether it may incite hatred or violence, or contains profane, vulgar, or offensive language.³¹ And while what is deemed unacceptable graffiti at the municipal level may provide some insights into how copyright law protects, or should protect, graffiti and street art, municipal graffiti by-laws seem oblivious to the fact that this visual form of expression may be protected by copyright law, which is what we explore next.

8.3 COPYRIGHT LAW

8.3.1 Requirements for Graffiti or Street Art to be Protected by Copyright

Graffiti and street art, as visual forms of expression, will be protected as a work under the Copyright Act (in most instances as "artistic work," in some cases as "literary work")³² to the extent that they are original and meet the requirement of fixation.³³ In *CCH Canadian Ltd. v Law Society of Upper Canada*,³⁴ the Supreme Court laid out the relatively low threshold of originality required for copyright to protect the expression of an idea as "an exercise of skill and judgment."³⁵ As such, the work should not be the copy of another work, while the work need not be creative (i.e., novel or unique).³⁶ Yet skill and judgment in producing the work necessarily involve intellectual effort, effort that is not so trivial as to amount to a purely mechanical exercise.³⁷ The court gave the example of changing the font of a work to produce "another" work as being too trivial an exercise to warrant protection of a new work.³⁸ In subsequent judgments applying the Supreme Court of Canada's test for skill and judgment, courts have held among others that website metatags are not original works,³⁹ while photographs of cars on an online listing website for new and used cars are.⁴⁰

For the most part, graffiti and street art will likely easily meet the requirement of originality. One need only take a look at how street artists use spray paint or work with gravity or the elements to realize the level of craftsmanship and creativity that goes into such works. This would place them above and beyond mere "skill and judgment." Much graffiti and street art displays artistic creativity in varying degrees which will meet the requirement of originality set out in *CCH*.⁴¹

Graffiti consisting exclusively of words or phrases may not meet the requirement of originality. Copyright law generally does not protect words or phrases as literary works.⁴² However, words or phrases depicted in a stylized manner, such as "tags" or "throw-ups," could be protected as an artistic work, provided that they display the level of skill and judgment set out in *CCH*. Here, it is the stylized manner by which the artist produces the letters that may meet the requirement of

³⁰ Toronto Municipal Code (n 23) §485-1 defines a tag as "a stylized signature or logo that is intended to identify an individual or group or any other marking used for a like purpose or effect."

³¹ Toronto By-law 485-1, Definitions "Graffiti vandalism."

³² Copyright Act, s 2, which defines artistic work as including paintings, drawings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works.

³³ *Ibid.* s 5.

³⁴ *CCH* (n 7).

³⁵ *Ibid.* para 16.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Red Label Vacations Inc. v 411 Travel Buys Ltd.*, 2015 FCA 290 (Fed.CA).

⁴⁰ *Trader Corp v CarGurus, Inc.*, 2017 ONSC 1841.

⁴¹ *CCH* (n 7) paras 16, 25.

⁴² *Exxon Corp v Exxon Insurance Consultants International Ltd.* [1981] 1 WLR 624 (Ch D); *aff'd on appeal: Exxon Corporation v Exxon Insurance Ltd.* [1982] 1 Ch. 119 (C.A.).

originality, not the words themselves, which would remain free to be used by the public. The similarity between the graphic styles used by graffiti artists to depict letters or words should not per se be a bar to copyright protection. As stated in *CCH*, originality does not require novelty.⁴³ Therefore, two similar graffiti produced with skill and judgment could equally meet the threshold of originality provided that each work originated from its author and was not copied from the other.⁴⁴

Although the Copyright Act does not explicitly require fixation for a work to be protected, with two exceptions,⁴⁵ the prevailing view is that a work must be fixed in some material form to be protected by copyright. In *Théberge v Galerie d'Art du Petit Champlain inc.*⁴⁶ the Supreme Court endorsed the requirement of fixation in Canadian copyright law, stating that fixation is what distinguishes works capable of copyright protection from general ideas that are in the public domain.⁴⁷ The requirement of fixation signifies that not all expressions of intellectual effort may be protected: only those that find some permanence through material form are. A predilection among street artists for the use of permanent paint, either with brushes or spray cans, or markers, will easily fulfill the requirement of fixation. Chalk drawings on a sidewalk could fulfill this requirement of permanence, which may be supplemented by fixation in another material form, such as a photograph of the chalk drawing.

8.3.2 *Scope of Copyright and Moral Rights Conferred to Graffiti or Street Artists*

Graffiti or street art that fulfills the requirement of originality and fixation, that is made by a treaty country member person under the conditions prescribed by the Copyright Act,⁴⁸ will be protected as an artistic work and will confer on its author copyright and moral rights.⁴⁹ “Copyright” means the exclusive economic rights of the author to “produce or reproduce the work or any substantial part thereof in any material form whatever” and “to perform the work or any substantial part thereof in public.”⁵⁰ The Copyright Act further enumerates a non-exhaustive list of acts involving productions and reproductions in other material forms, communications to the public, and specific types of derivative work that are reserved to the copyright holder. The wording of the Act is conducive to a technologically neutral interpretation.⁵¹ Authors shall enjoy copyright for a period of fifty years after their death⁵² and for a shorter period of time for anonymous works.⁵³ The same term applies to moral rights.⁵⁴

⁴³ *CCH* (n 7) paras 16, 25.

⁴⁴ *Ibid.* para 16.

⁴⁵ Copyright Act, s 2; “computer programs”, some “dramatic works”, and “sound recordings” require fixation to be protected.

⁴⁶ 2002 SCC 34.

⁴⁷ *Ibid.* para 25. See also *Gould Estate v Stoddart Publishing Co.* (1996) 30 O.R. (3d) 520 (Ont. Ct. Gen. Div.) aff'd *Glen Gould Estate v Stoddart Publishing Co.* (1998), 39 OR (3d) 555; 80 CPR (3d) 161 (CA); where the court held that an interview did not meet the requirement of expression in a material form and as such was not recognized as literary work.

⁴⁸ Copyright Act, s 2; treaty country means a Berne Convention country, Universal Copyright Convention country, WIPO Copyright Treaty country or World Trade Organization member, s 5.

⁴⁹ Copyright Act, ss 3, 5, 14.1.

⁵⁰ Copyright Act, s 3, which also includes the exclusive right to publish unpublished works.

⁵¹ See Pascale Chapdelaine, *Copyright User Rights, Contracts and the Erosion of Property* (Oxford University Press 2017), 184–87.

⁵² The term of copyright will be extended to the life of the author plus seventy years if Canada ratifies the United States–Mexico–Canada Agreement, s. 20.63, <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng> accessed May 8, 2019, the negotiations of which were completed on September 30, 2018. See Government of Canada, A New United States Mexico Canada Agreement <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/usmca-aeumc/index.aspx?lang=eng> accessed October 30, 2018.

⁵³ Copyright Act, ss 6–6.2.

⁵⁴ *Ibid.* s 14.2(1).

To the extent that the graffiti or street art qualifies as “work”, the Copyright Act confers moral rights to the graffiti artist, i.e., a right to the integrity of the work and a right to be associated with the work (including under a pseudonym and the right to remain anonymous).⁵⁵ Moral rights are personal to the author and may be waived but may not be assigned.⁵⁶ Unlike copyright, there are no statutory exceptions (e.g. fair dealing) that apply to the infringement of moral rights.⁵⁷ Canadian jurisprudence on moral rights tends to be more sparse and hence reference often needs to be made to the relevant provisions in the Copyright Act.

A graffiti or street artist’s right to integrity will be infringed only if their honor or reputation is prejudiced by the street art being distorted, mutilated, or otherwise modified.⁵⁸ Particularly relevant to street artists is the presumption that such prejudice to their honor or reputation has occurred if the work that has been distorted, mutilated, or modified is a painting, sculpture, or engraving.⁵⁹ The intention behind this specific protection for certain visual works seems to recognize the unique, single-copy nature of these types of work of art which are not easily replaceable.⁶⁰ The Copyright Act further clarifies that “a change in the location of a work, the physical means by which a work is exposed or the physical structure containing a work, or steps taken in good faith to restore or preserve the work shall not, *by that act alone*, constitute a distortion, mutilation or other modification of the work.”⁶¹ The right to the integrity of the work may also be infringed if it has been used in association with a product, service, cause or institution to the prejudice of the street artist’s honor or reputation.⁶²

If the graffiti or street art was performed legally (e.g. it does not involve trespass or vandalism) and is lawful as to its content and substance, and if the artist has not waived their moral rights to the work (either expressly or impliedly), one can think of various situations where the street artist may seek to enforce their moral right to the integrity of their work whether with respect to (i) the physical aspects of the work or (ii) any association made with their work, or (iii) the right of attribution. I will deal with the effect that illegality, either in the substance of the work or in how it was produced, may have on the protection of moral rights further in Section 8.3.3.

With respect to the physical aspects surrounding a work, i.e. its location and embodiment, or preservation procedures (maintenance) that may come in conflict with the moral right to the integrity of the work, the law grants flexibility and discretion to the owner of the physical copy of the work (here most often the property owner of the land or premises where the graffiti or street art is located) by keeping such physical considerations *on their own* out of the artist’s right of integrity.⁶³ At the same time, the property owner or any other person could be liable to moral right infringement if they make changes to the street art or graffiti without the consent of the artist falling outside those physical considerations surrounding graffiti or street art. Attaching

⁵⁵ Ibid. s 14.1(1) provides: “The author of a work has ... the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.”

⁵⁶ Ibid. s 14.1(2) provides that moral rights may be waived in whole or in part.

⁵⁷ Ibid. ss 29 ff fair dealing and other exceptions provisions state that certain acts do not infringe “copyright” and do not refer to “moral rights”; see, however, *Wiseau Studio et al. v Richard Harper*, 2017 ONSC 6535, para 120 [*Wiseau*] where the Ontario Superior Court held in *obiter* that moral rights were also subject to the fair dealing exception.

⁵⁸ Ibid. s 28.2(1) and (2).

⁵⁹ Ibid. s 28.2(2).

⁶⁰ Elizabeth Adeney, *The Moral Rights of Authors and Performers* (Oxford University Press 2006) para 12.64, citing Ms Wanda Noel (Expert Consultant, Copyright, Department of Communications), Committee Proceedings, Bill C-60 9:50 (December 10, 1987).

⁶¹ Copyright Act, s 28.2(3) (emphasis added).

⁶² Ibid. s 28.2(1)(b).

⁶³ Ibid. s 28.2(3).

ribbons to an art structure of sixty geese made by Canadian artist Michael Snow, and displayed at the Toronto Eaton Centre shopping mall, was held to infringe the moral rights of integrity of the artist in *Snow v Eaton Centre Ltd.*⁶⁴ On the basis of this judgment, a change in colour or redrawing over the graffiti or street art could infringe the moral right of integrity of the artist.

It is unclear whether the right of integrity would allow a street artist to enforce their moral rights against the destruction of their work, a question particularly relevant in the context of the impermanence that may be associated with graffiti and some forms of street art, and the exigencies of maintenance and transformation of public spaces. Preparatory works leading to the current provision in the Copyright Act on the right of integrity viewed “destruction” as antithetical to the right to the integrity of the work.⁶⁵ In that view, once the work is destroyed, there is no longer the possibility of “prejudice to the honour or reputation of the author.”⁶⁶ However, when the artwork is in the public eye, its voluntary destruction, it seems, could in some cases prejudice the honor and reputation of the author by publicly signalling that the work is not worth keeping.

Artists might successfully enforce their moral rights against the destruction of their graffiti or street art by assimilating destruction into “mutilation.”⁶⁷ This is what the Cour Supérieure du Québec did in *Vaillancourt c Carbone 14*,⁶⁸ awarding \$150,000 in damages to plaintiff Armand Vaillancourt, an artist of international renown, against the property owner and its agent for the near-complete destruction⁶⁹ of a sculpture consisting of ten totem poles that was on the defendant’s property under a contract of deposit.⁷⁰ The court assimilated near-complete destruction into “mutilation,” against which an author may enforce their moral rights,⁷¹ without discussing whether destruction was effectively part of the moral right of attribution.⁷² The court did not have to discuss the prejudice to the author’s honor and reputation, such prejudice being presumed for a sculpture.⁷³

It seems that mutilation of a work implies that at least some portion of the work remains whereas destruction does not.⁷⁴ The discomfort around extending the right of integrity to prevent the destruction of a work may be explained in part because it would impinge too much on the powers and privileges of the property owner of the tangible embodiment of the artwork to ultimately dispose of it if they so choose. At the same time, the need to mediate between the conflicting interests of the artist and of the property owner of the tangible copy of the work may be addressed at the enforcement level where courts have discretion on the remedies to be awarded, rather than denying that artists would have any right to prevent the destruction

⁶⁴ 1982 CarswellOnt 1336, 70 C.P.R. (2d) 105 (Ont. H.C.J.).

⁶⁵ Adeney (n 60), para 12.55, citing Mr Edwards (Member for the Committee): Committee Proceedings, Bill C-60 9:49 (December 10, 1987): “to include destruction might in a perverse way offend the principle of preserving a moral right.”

⁶⁶ As required by the Copyright Act, s 28.2. See also *Gnass v Cité d’Alma* (June 3, 1977) (Que C.A.) [unreported: doc no. 200-09-00032-745], where the Court rejected sculptors’ claims that their moral rights had been infringed when the municipality threw the public sculptures in the river after they had deteriorated through neglect and vandalism; discussed in David Vaver, “Authors’ Moral Rights in Canada” (1983) 14 *IIC* 329 at 341 ff.

⁶⁷ Copyright Act, ss 14.1(1), 28.2(1).

⁶⁸ 1998 CarswellQue 2379, [1999] R.J.Q. 490, J.E. 99-403.

⁶⁹ *Ibid.* at para 55, referring to 80 percent destruction.

⁷⁰ Civil Code of Québec, Art 2280.

⁷¹ Copyright Act, s 28.2(1)(a).

⁷² *Vaillancourt c Carbone 14* (n 68), para 25.

⁷³ Copyright Act, s 28.2(2).

⁷⁴ Oxford Living Dictionaries, <https://en.oxforddictionaries.com/definition/destruction> accessed August 25, 2018; defining “destruction: The action or process of causing so much damage to something that it no longer exists or cannot be repaired.” and “mutilation: The infliction of serious damage on something.”

of their work. Recognizing those competing interests could for instance allow a court using its discretionary powers to order, where possible, removal of the work before its destruction. Under the current language of the right of attribution under the Copyright Act, it would perhaps not go as far as allowing the court to grant injunctive relief to stop the complete destruction of the painting or sculpture.

A graffiti or street artist may have a claim against the use of his art in association with a product, service, cause, or institution, if such use is made to the prejudice of their honor or reputation.⁷⁵ For instance, a street artist may succeed in enforcing their right of integrity against a fashion designer using his graffiti art on his latest collection, or a television producer or advertisement firm reproducing conspicuously their art on their show or an advert.⁷⁶ Courts seem to be willing to defer to the views of the artist in establishing a prejudice to their honor or reputation, as long as the prejudice can be established with some level of objectivity.⁷⁷

A declared purpose of street artists is often to reappropriate public spaces through their graffiti or murals, in response to commercialism and increased privatization of public spaces.⁷⁸ In that light, the repulsion of a street artist to their art being associated with consumerism and commercialization may be sufficient for a finding of infringement of their moral rights.⁷⁹ This would be in addition to any remedies a street artist may have for copyright infringement (e.g. reproduction, communication to the public, etc.).

Last but not least, street artist moral rights could be infringed if in performing any of the acts reserved to copyright holders (e.g., reproduction or communication to the public by telecommunication of their work) a person fails to attribute the work to the artist by name or pseudonym (where reasonable to do so) or fails to maintain the artist's right to remain anonymous.⁸⁰ The right of attribution of the street artist could be infringed, for instance, in the news reporting of local street art, or when a publisher reproduces their work in a tourist guide book on street art without acknowledging the author of the graffiti or street art, or, on the contrary, disclosing their identity where the street artist has chosen to remain anonymous.

Graffiti or street artists may waive their moral rights (in whole or in part) for instance in a contract with a property owner commissioning mural art on their wall. Unlike the assignment of copyright, the Copyright Act does not explicitly require the waiver to be in writing to be valid.⁸¹ At the same time the Act is unequivocal that an assignment of copyright does not on its own give rise to a waiver of moral rights.⁸² However, when the copyright of a work is assigned or licensed by the author to another party and moral rights are waived, the Act extends the benefit of the waiver of moral rights to anyone authorized to use the work by the assignee or licensee of the

⁷⁵ Copyright Act, ss 14.1(1) and 28.2(1)(b).

⁷⁶ Graeme Hamilton, "Artist Sues after TV Show Films Montreal Building that he had Tagged with Graffiti" (*The National Post*, July 28, 2014) <http://news.nationalpost.com/news/canada/artist-sues-after-tv-show-films-montreal-building-that-he-had-tagged-with-graffiti> accessed August 25, 2018, referring to a petition filed by Montréal artist Alexandre Veilleux against Radio-Canada Productions Aetios Inc. (producer of the popular television show *30 Vies*) claiming infringement of his moral right of integrity for featuring the artist's spray-painted graffiti tags without his consent (alleging damage to his artistic reputation by associating his art with the show).

⁷⁷ *Snow v Eaton Centre Ltd.* (n 64), paras 5,6,8; *Prise De Parole Inc. v Guérin, Éditeur Ltée*, [1995] F.C.J. No. 1583 (FC), paras 24–26.

⁷⁸ See e.g.: Jeff Ferrell, "Urban Graffiti: Crime, Control, and Resistance" (1995) 27(1) *Youth and Society* 73, 79; Andrea Mubi Brighenti, "At the Wall: Graffiti Writers, Urban Territoriality, and the Public Domain" (2010) 13(3) *Space and Culture* 315, 318.

⁷⁹ See David Vaver, *Intellectual Property Law, Copyright Patents, Trade-Marks* (2nd edn, Irwin Law 2011) 211.

⁸⁰ Copyright Act, s 14.1(1).

⁸¹ *Ibid.* ss 13(4), 14.1(2), (3), (4).

⁸² *Ibid.* s 14.1(3).

copyright.⁸³ Courts have held that a waiver of moral rights may be implied.⁸⁴ For instance, could we construe that graffiti that was created on a wall without the property owner's permission carries with it an implied waiver of the author's moral rights (assuming that copyright would subsist in such work)?

All the situations discussed so far have been analyzed on the premise that the graffiti or street art is lawful. May a street artist invoke moral rights when their work is unlawful in how it was produced or in its substance? I discuss this question next together with the right to enforce copyright for works that are connected to some form of illegality.

8.3.3 *Illegality, Copyright, and Moral Rights Protection*

The question arises as to whether copyright protects or should protect graffiti or street art that involves some form of illegality, for example mischief or vandalism, wilful promotion of hatred, or the tort of trespass. The effect of illegality on the copyright protection of graffiti or any other work is not entirely clear. Unlike other jurisdictions, Canada's Copyright Act is silent on that question.⁸⁵ The general legal framework that regulates graffiti and the few cases that have dealt with illegality and copyright suggest that the question may be best addressed by first looking at the effects of illegality on the eligibility for copyright protection and second, on its enforcement. It may also be helpful to consider whether the illegality pertains to the subject matter of the work itself, e.g. graffiti that wilfully promotes hatred, or whether the illegality pertains to how the work was produced, e.g. an act of vandalism or through trespass, without the work containing illegal material per se. The difference between the intangible intellectual property right of the author in the graffiti or street art, and the tangible embodiment in which their copyright may materialize should also be borne in mind.

In one older case, *Aldrich v One Stop Video Ltd*,⁸⁶ the British Columbia Superior Court held that copyright subsisted in the plaintiff's films as dramatic works, which both parties had conceded were obscene works under the Criminal Code.⁸⁷ Pointing to earlier versions of the Copyright Act that banned works from copyright protection that were "immoral or licentious, treasonable or seditious", the court noted that such restrictions had been removed since the Copyright Act of 1921.⁸⁸ The court found there was nothing in the Act that precluded obscene works from receiving protection.⁸⁹ The court considered the public policy doctrine in light of the "encouragement of creativity, international protection of copyright and the flexibility in moral values,"⁹⁰ and was not convinced that the refusal of copyright protection was the proper way to restrain the dissemination of obscenity, and questioned whether banning copyright protection would serve public policy interests.⁹¹ In *Pasickniak v Dojacek*,⁹² the Manitoba Court of

⁸³ Ibid. s 14.1(4). See Mira T. Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (Oxford University Press 2011) 129–30.

⁸⁴ See *Ta-Ha v Centre hospitalier de l'Université Laval* [1999] J.Q. no 181 (C.S. Qué) para 22; see Normand Tamaro, *The 2016 Annotated Copyright Act* (Thomson Reuters Canada 2015) 514.

⁸⁵ See e.g. Copyright, Designs and Patents Act 1988, c.48 (UK), s 171(3), allowing the application of public policy to copyright at the enforcement stage of copyright.

⁸⁶ *Aldrich v One Stop Video Ltd*, [1987] BCJ No 1035, 39 DLR (4th) 362 (BCSC).

⁸⁷ Criminal Code, R.S.C. 1970, C-34, s. 159, as it was then in force: Ibid, para 7.

⁸⁸ *Aldrich v One Stop Video Ltd*, (n 86), paras 28–31.

⁸⁹ Ibid. para 114.

⁹⁰ Ibid. para 100.

⁹¹ Ibid.

⁹² 1928 CarswellMan 29, [1928] 1 W.W.R. 865, [1928] 2 D.L.R. 545, 37 Man. R. 265.

Appeal had also come to the conclusion in an *obiter dictum* that the Act did not preclude the protection of obscene works, having otherwise held that books on dream interpretation were not obscene.⁹³

While the court in *Aldrich* was not prepared to refuse copyright protection to the plaintiff's films as dramatic works on the basis that they were obscene, the court limited the plaintiff's remedies to injunctive relief and delivery up and denied damages and account for profits.⁹⁴ Because the distribution of the plaintiff's obscene materials by the defendant was a criminal act, the plaintiff could claim no compensable loss where the "copyright owner's anticipated gain would flow from an illegal act."⁹⁵ At the same time, an injunction (which prevented the infringement of the plaintiff's copyright) as well as delivery up of infringing copies (the possession of obscene materials not being illegal) did not offend fundamental principles of law and were consequently awarded.⁹⁶

Granting remedies as the court did in *Aldrich*, so long as they do not allow the successful party to benefit from its own or the other party's illegality, accords with the doctrine of clean hands,⁹⁷ a defense in equity that may be invoked against the grant of an equitable remedy e.g. an injunction.⁹⁸ In *City of Toronto v Polai*,⁹⁹ a leading case on the doctrine of clean hands, the Ontario Court of Appeal emphasized that the defense was available to the extent that the wrongful conduct of the plaintiff pertains to "the very matter at which was the subject of the suit in equity" and that the doctrine should not be applied too broadly.¹⁰⁰

On the one hand, in Canada there seems to be little appetite or ground to refuse copyright protection of a work on the basis of illegality, even if the subject matter of the work is illegal as such (e.g. obscene). Courts may refuse to grant protection, e.g. for graffiti that promotes hatred on the basis of the doctrine of public policy. Even there, it seems that courts will weigh the effects of illegality of the work and public policy at the enforcement stage rather than by refusing to grant copyright protection. For instance, awarding an injunction to the author of graffiti that promotes hatred, against the owner of the physical embodiment of the graffiti, to prevent a reproduction that would further publicly incite hatred (hence recognizing copyright in the graffiti) would not go against public policy. However, awarding account for profits to the author of such work as a result of a third party selling reproductions of the graffiti wilfully promoting hatred against a targeted group would.¹⁰¹

For cases where the illegality surrounds the production of the graffiti or street art (e.g. vandalism or trespass), refusing to grant protection on the ground of illegality seems even less likely than when illegality pertains to the subject matter of the work. In my view, it would also be misguided, given that the illegality would pertain to the manner in which the physical copy of

⁹³ *Ibid.* para 61.

⁹⁴ *Aldrich v One Stop Video Ltd* (n 86), paras 117–24.

⁹⁵ *Ibid.* paras 117–18.

⁹⁶ *Ibid.* paras 119, 122.

⁹⁷ From the maxim he who comes into equity must come with clean hands.

⁹⁸ *City of Toronto v Polai* [1970] 1 OR 48 (Ont CA); John S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (Carswell 2013) ch 24, 13(b).

⁹⁹ [1970] 1 OR 48 (Ont CA).

¹⁰⁰ *Ibid.* Cases invoking the doctrine of clean hands against a claim of copyright infringement often involve possible exploitation of copyright in contravention of the Competition Act, R.S.C., 1985, c. C-34. See e.g. *Volkswagen Canada Inc. v Access International Automotive Ltd.* (C.A.), 2001 FCA 79.

¹⁰¹ An indictable offense under the Criminal Code (n 19), ss 319, 430.

the work was produced, which should be dissociated from the intangible intellectual property rights conferred in the work. Other laws would deal more aptly with this form of illegality than copyright law.

On the other hand, the illegality of how the graffiti or street artwork was produced may limit the remedies to which the graffiti artist would be normally entitled, to the extent that awarding such remedies would further the illegality or rely on it, or under the doctrine of clean hands, that it would pertain to the very subject matter for which the graffiti artist seeks redress.

If an artist who had produced graffiti through trespass and an act of vandalism (mischief) sought to enforce their copyright against a designer or publisher who had reproduced the graffiti on dresses or in a book, courts may be inclined to grant injunctive relief to stop the infringement (and stop the designer or publisher from indirectly profiting from a criminal act) while refusing damages or account for profit to be granted to the artist, to the extent that it would allow the artist to recover a loss which should not be subject to compensation, as it would amount to indirectly profiting from an illegal act of vandalism. The assumption under this scenario would be that the illegality was established for it to possibly play a role in the award of remedies (i.e. the graffiti artist was found guilty of a criminal act or held civilly liable).

Alternatively, courts could view the sale of dresses or books with the graffiti art as not an illegal act per se and allow the graffiti artist to recover damages or account for profit as well, unlike in *Aldrich*, where the sale of obscene material as such was illegal.¹⁰²

For the sake of argument (although somewhat implausible) if the same artist (having produced graffiti through trespass and vandalism) seeks an injunction against the property owner where trespass and vandalism were committed to enforce their moral rights of integrity of the work against the property owner who is about to erase the graffiti, would it go against public policy and the doctrine of clean hands to award injunctive or other relief in such a case? By doing so, would the court not be denying the property owner's right (and even preclude them from performing their obligation in some cases) to remove graffiti and other acts of vandalism from their property?

Another difficulty in this scenario is that it is less than certain that the artist's moral rights to the integrity of her graffiti include the right to prevent its erasing or destruction.¹⁰³

The scenario of enforcement of an artist's moral rights against a property owner where the graffiti or street art was made without the owner's consent also illustrates the particular balancing act involved where there is only one copy of the copyright work that is owned by someone else than the artist, here by the property owner where the graffiti or street art resides. A closer look at the rights of the owner of the tangible copy of the copyright work may help further elucidate how this balancing act between competing interests could be best addressed.

8.4 RIGHTS AND PRIVILEGES OF PROPERTY OWNERS AND THE PUBLIC TO GRAFFITI AND STREET ART

In light of recent Supreme Court jurisprudence seeking to move away from a more copyright-holder-centric approach to copyright,¹⁰⁴ graffiti and street art are a great case study in how we may bring the mediating exercise of competing interests between artists, property owners, other users, and the public to the streets and other public spaces. At the heart of this endeavor, we need to query the significance of graffiti and street art as a form of expression made voluntarily

¹⁰² *Aldrich v One Stop Video Ltd* (n 86), paras 117–18.

¹⁰³ See Section 8.3.2 above.

¹⁰⁴ See discussion above in Section 8.1.

accessible in public spaces, while considering the effects that illegality may have on balancing competing interests around this form of art.

8.4.1 *Rights of Owners of the Tangible Embodiment of Graffiti or Street Art*

The property owner of the premises where the graffiti or street art is painted or located enjoys distinct powers and privileges on the physical embodiment of the work from the ones of the artist and from members of the public who may come across the work. Property law will dictate to a large extent the rights of the property owner where the graffiti or street art is painted or located, as supplemented by contract law where the work is commissioned under a contract between the property owner and the artist. Unless the copyright in the artistic work has been assigned in writing to the property owner, the artist retains copyright in the work.¹⁰⁵

There are various scenarios under which the owner of the property on which the graffiti or street art resides would own the physical copy of the graffiti or street art. In the case of a commissioned mural, or standalone structure or sculpture, the property owner having commissioned the artistic work would normally be the owner of the physical embodiment or copy of the work. In the case of a non-commissioned artistic work on a wall or other structure, the property owner could become the owner of the physical copy of the graffiti or street art through the property law doctrines of fixtures, accession, or alteration, depending on whether the graffiti or street art is attached or affixed to personal or real property.¹⁰⁶

In the case of a non-commissioned standalone work of art or structure (akin to a sculpture) left on public or private property, the doctrine of abandonment might apply to the extent there would be an intention of the artist to renounce title to the physical object embodying the copyright work.¹⁰⁷ The public or private property owner where the work of art was abandoned may thereafter become the owner of the physical embodiment of the artistic work. Abandonment of the physical object does not entail assignment of the copyright in the artistic work (as this needs to be expressly done in writing)¹⁰⁸ and would not necessarily result in an implied license to the copyright.¹⁰⁹

There may be other instances when the artist and not the property owner of the premises where the work of art resides is the owner of the physical embodiment, e.g. where there is a specific agreement under which the artist leases or leaves in consignment the work of art to the property owner where the work of art resides.

The right of the property owner to subsequently sell the physical object embodying the graffiti or street art calls into question the exclusive distribution right of the artist and whether such right has been exhausted.¹¹⁰ Introduced in the Copyright Act in 2012, the distribution right gives the artist the exclusive right with respect to “a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object” only with respect to the first ownership transfer of the tangible object, after which the distribution right is exhausted.¹¹¹

¹⁰⁵ Copyright Act, s. 13(4), which provides that such assignment must be in writing to be valid.

¹⁰⁶ See Bruce H. Ziff, *Principles of Property Law* (7th edn, Carswell 2018) at 136–39, 146–52. In Québec, see arts 954–64; 971–75 Civil Code of Québec.

¹⁰⁷ Ziff (n 106), 160–61.

¹⁰⁸ Copyright Act, s 13(4).

¹⁰⁹ See Section 8.4.2.4.

¹¹⁰ Copyright Act, s 3(1)j. For a discussion of the application of exhaustion of the distribution right to graffiti on walls subsequently cut out from the wall for sale in a UK and EU context, see Marta Iljadica, *Copyright Beyond Law, Regulating Creativity in the Graffiti Subculture* (Hart 2016) 258–62.

¹¹¹ Copyright Act, s.3(1)j (emphasis added).

In instances where ownership of the physical object of the artistic work was transferred from the artist to the property owner upon delivery of the artistic work, the property owner of that object is thereafter free to sell it with no duty to account to the artist as in such case the distribution right is exhausted (also called the first sale doctrine).¹¹²

What if there was no transfer of ownership per se of a tangible object by the artist to the property owner? For example, what if the property owner became in physical possession and control of the artistic work as displayed on their property – real or personal – through the property law doctrine of fixtures, accession or alteration? In such instances, unless it can be held that upon completion of the work, the artist would be deemed to have *otherwise transferred* ownership to the tangible object as per the meaning of the Copyright Act, then exhaustion of the artist's distribution right would not yet have taken place at that time. While a literal interpretation of the exclusive distribution right provision would likely favor the artist by reserving their distribution right, an argument based on the general spirit of that provision could be made in favor of the property owner.¹¹³

In parallel to the copyright regime prescribing when exhaustion of the artist's distribution right applies, the next question is from a property law perspective: what happens upon the physical transformation of the embodiment of the artistic work, e.g. when the contribution of the artist on the wall is cut out from it? Does the relevant property doctrine that may have conferred to the property owner of e.g. the wall, physical control and powers over the physical embodiment of the artistic work as found on their wall, still confer the same privileges and powers to the property owner after the artistic work is voluntarily removed from their wall for sale?¹¹⁴ For instance, the graffiti or other graphic work is taken from the wall either through a substrate method or a cut-out of the wall, converting the piece of wall into a chattel, as it has often been the case with works by Banksy, including in Toronto.¹¹⁵ Or the artistic work that was attached to real or personal property is detached from it.

If the property owner is deemed the owner of the detached embodiment of the artistic work after this transformation, this may satisfy the requirements of the Copyright Act that ownership in the tangible object in which the artistic work is embedded has been "otherwise transferred" to the property owner.¹¹⁶ Thus to the extent that exhaustion of the distribution right may not have yet taken place, it would support an argument that it ought to apply from the moment that the standalone tangible object is deemed to be owned by the property owner. If on the other

¹¹² Ibid.

¹¹³ Under one interpretation of the Copyright Act, s. 3(1)j, favorable to the artist, while the artist may relinquish privileges and powers over the copy of their street art painted e.g. on the property owner's wall, they do so only to the extent that the work remains on the wall; if the property owner cuts out a piece of the wall or transposes the artistic work from the wall to e.g. a canvas, the transfer of ownership of this standalone tangible object would require the authorization of the artist as it is only then that it would trigger the application of the exclusive distribution right to authorize the first sale or other transfer of ownership of their work in the form of a tangible object. Under another interpretation of the Act, favorable to the property owner, if the author voluntarily relinquishes privileges and powers over the physical embodiment of their work (e.g. by painting their work on someone else's wall), the requirement of Copyright Act, s. 3(1)j would have been met and it is thereafter, for all intents and purposes, up to the property owner of the physical embodiment (e.g. the wall) to decide what happens to that physical embodiment of the work with no duty to account to the artist. The landmark judgment by the Supreme Court, *Théberge* (n 2), in particular para 31, could lend some support to that interpretation.

¹¹⁴ It is difficult to predict what may apply in such cases under the property law doctrine of fixtures, alteration, or accession. The application of these doctrines seem to be incumbent upon the specific facts in each case, and courts have discretion in the award of remedies. See Ziff (n 106), 136–39, 146–52.

¹¹⁵ Adrian Cheung, "Banksy Artwork Restored as Public Art in Pedestrian Walkway" *CBC News* (February 13, 2017) www.cbc.ca/news/canada/toronto/banksy-art-path-pedestrian-walkway-1.3980193 accessed August 25, 2018.

¹¹⁶ Copyright Act, s. 3(1)j.

hand the transformation of the physical embodiment would result in some ownership interest or claim in the embodiment of the work being conferred to the artist, then the property owner would be precluded from selling the standalone physical object embedding the artistic work, or could otherwise be liable to the artist.

The application of various property law doctrines that mediate competing ownership interests in the case of mixed labor, materials, chattels, or real property, and exhaustion of the exclusive distribution right in the artistic work reveal a complex interaction of competing interests in property law juxtaposed over competing interests in copyright law that may not fit squarely. The evolution of the property doctrines of fixtures, accession, and alteration leans toward a nuanced approach to the treatment of competing ownership interests in one object that favors a contextual analysis in lieu of the application of rigid rules.¹¹⁷ Equity, the good faith of the artist and of the property owner of the physical embodiment (e.g., whether the work was created without the authorization of the property owner, or by committing trespass or mischief) would play a role in determining whether the artist could have any claim on the sale of the physical object embodying their work once transformed from a confining embodiment of the property owner to a standalone sellable object.¹¹⁸

It is unlikely that the sale of a cut-out piece of a wall or fence would constitute a violation of moral rights. In Canada, moral rights do not extend to preventing a change in the location of the work, the physical means by which the work is exposed, or physical structure containing the work.¹¹⁹

The subsequent transfer of ownership of the physical object embodying the artistic work does not involve a *droit de suite* or similar right that in other jurisdictions allows the artist to recoup some of the benefits made from the resale of their work subsequent to the first transfer of ownership.¹²⁰ Authors do not enjoy such rights in Canada.

While the property owner may be able to sell the copy of the graffiti or street art residing on their property under some of the scenarios contemplated above, with no duty to account to the graffiti or street artist, the property owner would be precluded from selling the copy of the graffiti or street art in their possession where that sale would be illegal (e.g. the sale of an obscene work or a sale which would amount to wilful promotion of hatred).¹²¹ However, the illegality surrounding the production of the graffiti or street art (e.g. trespass or vandalism (mischief)) would not in my view preclude the property owner from selling the artwork. Although one may argue that permitting the sale would allow the property owner to benefit indirectly from an unlawful act, such unlawful act would need to have been established through a criminal conviction or successful civil action against the graffiti artist initiated by the property owner who afterward seeks to sell the embodiment of the graffiti, structure, or sculpture. This would seem very unlikely. And even if the illegality is established, the sale itself would not be illegal, and could hardly be said to perpetrate the illegality of trespass or mischief.

The rights of the property owner of the physical embodiment of the graffiti or street art are subject to the exclusive copyright of the artist (e.g. to produce or reproduce the work, to communicate it by telecommunication) unless they have been assigned in writing,¹²² and to their moral rights unless they have been waived.¹²³ The property owner of the physical embodiment

¹¹⁷ Ziff (n 106), at 136–39, 146–52.

¹¹⁸ Ibid.

¹¹⁹ Copyright Act, s 28.2(3)(a).

¹²⁰ See e.g. French Code de propriété intellectuelle, art L122-8.

¹²¹ See Section 8.3.3 above.

¹²² Copyright Act, ss 3, 13(4).

¹²³ Ibid. s. 14.1(2).

of the art would have the right to maintain or repair the work, and likely the right to dispose of (destroy) the work as previously discussed in this chapter.¹²⁴ The property owner may also benefit from user rights or exceptions to the exclusive copyright of the artist, which I will address next.

8.4.2 *Exceptions to Copyright Infringement or “User Rights”*

Exceptions to copyright infringement allow users or the public to perform acts on a work (e.g. graffiti or mural art) normally reserved to their author (e.g. the exclusive right to reproduce the work) without having to ask permission or grant remuneration to the street artist. Users freely performing such acts still need to respect the moral rights of the artist as these exceptions only apply to copyright, not to the artist’s moral rights.¹²⁵

The rights that property owners or the public may have to graffiti or street art raises particularly interesting questions in Canada given jurisprudential and legislative developments of the last decades affirming the place of users in copyright law. In the landmark judgment *CCH*,¹²⁶ the Supreme Court of Canada interpreted the fair dealing and other exceptions to copyright infringement as integral to the Copyright Act.¹²⁷ The Court qualified exceptions as “users’ rights” that required a broad interpretation.¹²⁸

Through *CCH* and subsequent judgments by the Supreme Court,¹²⁹ “user rights” has become a rule of interpretation that gives increased prominence to the role of exceptions in balancing competing interests in copyright law.¹³⁰ In addition to stating that the allowed purposes under the fair dealing provisions called for a “large and liberal interpretation,”¹³¹ the Supreme Court held that the purpose of “research” included research for commercial purposes,¹³² and that “private research” could be conducted in a classroom in the presence of others.¹³³ Treating exceptions as users’ rights also led the Supreme Court to interpret exceptions from the perspective of the user, not copyright holders.¹³⁴

Further, the Copyright Act was significantly amended in 2012, introducing new exceptions to copyright infringement (or user rights), some of which are of particular interest to the rights the public may have to graffiti or street art.¹³⁵ It is in the light of these jurisprudential and legislative developments that I will look at the various exceptions to copyright infringement or user rights that may apply to property owners or the public in relation to graffiti or street art.

8.4.2.1 *Right of Panorama*

The Copyright Act provides a limited “right of panorama,” i.e., the right to reproduce sculptures or works of artistic craftsmanship situated permanently in a public place or building in another form (i.e., a painting, drawing, engraving, photograph, or cinematographic work).¹³⁶ The right of

¹²⁴ See Section 8.3.2.

¹²⁵ Copyright Act, ss 29ff; see however *Wiseau* (n 57).

¹²⁶ *CCH* (n 7).

¹²⁷ *Ibid.* at para 48, citing David Vaver.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*; *Bell Canada* (n 1); *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 [*Alberta*]; *CRTC* (n 3).

¹³⁰ *CCH* (n 7), para 48; *Bell Canada* (n 1) paras 9–11, 49; see Chapdelaine (n 51), 48–49.

¹³¹ *CCH* (n 7), para 51; *Bell Canada* (n 1) para 15; *Alberta* (n 129), para 19.

¹³² *CCH* (n 7), para 51.

¹³³ *Alberta* (n 129), paras 19, 27.

¹³⁴ *Ibid.* para 22; *Bell Canada* (n 1), paras 29, 30, 34.

¹³⁵ Copyright Modernization Act (n 9); see discussion on the non-commercial user-generated content user immediately below.

¹³⁶ Copyright Act, s 32.2(1)(b)(ii).

panorama applies to specific types of artistic work only. Although not defined in the Copyright Act, “works of artistic craftsmanship” suggests an art form that is distinct from paintings and drawings.¹³⁷ The mechanics of the right of panorama suggest that it applies only to tri-dimensional works, allowing their reproduction into bi-dimensional derivative works only. That could be an explanation for the exclusion of painting and drawings as two-dimensional works from the right of panorama.¹³⁸

What the right of panorama entitles members of the public to do is unclear and there is little case law on this provision and its predecessors. Some authors are of the view that it is limited to a reproduction right of, say, the sculpture or work of artistic craftsmanship in a photograph or cinematographic work that does not extend to the right to publish such film or photograph.¹³⁹ The 1921 Act¹⁴⁰ included a similar provision that explicitly extended to the right to publish such photographs (or other derivative works) embedding the sculpture or work of artistic craftsmanship in a public space, unlike the current Act.¹⁴¹ As one of the objectives of the right of panorama is to address the practical reality of the public interacting with works of art in public spaces, a right that is limited to two forms of artistic works fails in an important way to address this practical reality by not including paintings and drawings, an increasingly prevailing form of street art. This represents a narrow view of the forms of art that are expected to appear in public spaces.¹⁴²

Further, a right of panorama that is strictly limited to reproduction in one of the listed material forms would fail to address the evolution of the public’s interaction with artistic works in public spaces through new technologies and prevailing social norms. For instance, a right of panorama strictly limited to the reproduction in one of the listed material forms would not allow widespread practices of people documenting online their daily lives, sharing photos and videos of their travels on social media and YouTube, etc. by not allowing the reproduction of the work to be communicated to the public by telecommunication. As we will see next, the communication to the public of the photograph or video as well as other acts reserved to copyright holders may be allowed under the non-commercial user-generated content exception to copyright infringement, provided that the photograph or video would qualify as a new original work (as opposed to a purely mechanical exercise lacking necessary skill or judgment) and would be for non-commercial purposes and fulfill the other requirements of that exception.¹⁴³

While one would think the right of panorama and its explicit reference to works situated in public spaces would be most relevant and directly applicable to graffiti and street art, a closer look reveals a narrow scope that is of little avail to members of the public interacting with

¹³⁷ Ibid. s 2: “artistic work includes paintings, drawings, ... sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works”. The enumeration of works under that definition suggests that “works of artistic craftsmanship” is something distinct from a painting or a drawing. See Iljadica (n 110), at 263 on the interpretation of a similar provision in the UK: Copyright Designs and Patents Act 1988, c.48, s. 62 [UKCDPA].

¹³⁸ See Iljadica (n 110) at 264, suggesting that the exclusion of graphic works from UKCDPA, s.62 would be a deliberate limitation on the application of the exception, by not allowing a reproduction of the art in public spaces in a similar form (e.g. does not allow the reproduction of a sculpture in another sculpture).

¹³⁹ Tamaro (n 84) 724.

¹⁴⁰ An Act to amend and consolidate the Law relating to Copyright, SC 1921, c. 24, considered the first comprehensive act dealing with copyright in Canada.

¹⁴¹ Ibid. s 16(1)(iii), allowed “the making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship.”

¹⁴² Iljadica (n 110) 263.

¹⁴³ See Section 8.4.2.2 below.

various art forms in public spaces. The public needs to look elsewhere to compensate for the shortcomings of this limited exception to copyright infringement.

8.4.2.2 *Non-Commercial User-Generated Content*

Introduced in 2012 and coined the “YouTube exception,” the non-commercial user-generated content exception to copyright infringement [UGC exception]¹⁴⁴ allows the use of a published work (or otherwise made available) in the creation of a new original work, and to perform any of the reserved acts with respect to this new original work provided that any such acts are for non-commercial purposes, and that such use “does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work.”¹⁴⁵ The UGC exception takes an innovative approach that has been praised and criticized, consonant with evolving technological environments and social norms, that gives more room to the powers and privileges users should have with respect to published works (or otherwise made available to the public).¹⁴⁶

While there is no case law on the interpretation of the UGC exception to copyright infringement at the time of completion of this chapter, this user right would allow a passerby to take a photo or shoot a video in front of a street mural and post it on their favourite social media, provided that the photo or video qualifies as a distinct original work from the street mural, and that it would be used or disseminated solely for non-commercial purposes (and if the source of the street mural is mentioned, if reasonable in the circumstances to do so).¹⁴⁷ The requirement that the underlying work has been published “or otherwise made available” would grant enough flexibility for this user right to apply to a broad range of situations involving graffiti or street art: the requirement of publication would be met to the extent that the graffiti or street art is incorporated into an architectural work,¹⁴⁸ and depending on the interpretation of “otherwise made available,” would cover other instances where falling short of a publication under the Copyright Act, the work is publicly accessible with the authorization of the artist.¹⁴⁹ By giving room to the public to interact, comment, incorporate, and communicate images of graffiti and street art on various media (so long as such use is not for commercial purposes) the user-generated-content right facilitates a dialogue between artists and the public that is at the heart of graffiti and street art’s purpose, and should satisfy artists’ rights and interests. As with all other user rights, the user-generated-content exception does not extend to moral rights which continue to apply.

8.4.2.3 *Fair Dealing and Other Exceptions to Copyright Infringement*

In addition to the right of panorama and the user-generated-content exceptions to copyright infringement, the public may benefit from other relevant exceptions to copyright infringement. Without doing an exhaustive review of those exceptions, members of the public could, for example, where applicable and based on their interaction with graffiti or street art, invoke fair dealing, rights of educational institutions, and the right to incidental inclusion.

¹⁴⁴ Copyright Act, s 29.21.

¹⁴⁵ *Ibid.*

¹⁴⁶ On the UGC exception to copyright infringement, see Peter K. Yu, “Can the Canadian UGC Exception Be Transplanted Abroad?” (2014) 26 *I.P.J.* 175; Rebecca Katz, “Fan Fiction and Canadian Copyright Law: Defending Fan Narratives in the Wake of Canada’s Copyright Reforms” (2014) 12 *Can. J. L. & Tech.* 73. For a critique of the UGC exception to copyright infringement, arguing that it is too broad, see: Marian Hebb, “UGC and Fan Fiction: Rethinking Section 29.21” (2014) 26 *I.P.J.* 237.

¹⁴⁷ Copyright Act, s 29.21.

¹⁴⁸ *Ibid.* s. 2.2(1)(a)(iii).

¹⁴⁹ E.g., the exhibition of a work in public does not amount to publication under the Act: *ibid.* s. 2.2(1)(d), but may be considered to have been “made otherwise available” under the UGC exception, *ibid.* s. 29.21.

Like other jurisdictions of the English copyright tradition, the fair dealing provisions allow users to perform acts with respect to a copyright work if such acts are made for one of their enumerated purposes and if the dealing is fair.¹⁵⁰ In Canada, fair dealing may be invoked for the purpose of research, private study, criticism, review, news reporting, and the more recently introduced purposes of education, parody, or satire.¹⁵¹ As stated in the leading case *CCH*, fair dealing provisions need to be interpreted largely and liberally.¹⁵² The Supreme Court has also confirmed that the enumerated purposes could fall within a commercial activity.¹⁵³ The assessment of the fairness of the dealing is subject to a non-exhaustive list of six factors,¹⁵⁴ among which the effect of the dealing on the work (e.g. on the market of the author or copyright holder) may be considered along with the relevant other factors, without being given more prominence than the others.¹⁵⁵ Filming graffiti and murals for the purpose of a documentary on the evolution of street art in Canadian cities could be a fair dealing for the purpose of criticism, review, or news reporting, provided it complied with the source referencing requirements.¹⁵⁶ Fair dealing for the purpose of criticism or review may possibly be invoked for an illustrated book analyzing various genres of graffiti as well as graffiti communities in Montréal.¹⁵⁷ Photos of murals taken for an art project could fall under the purpose of research or private study,¹⁵⁸ and when taken by a school-teacher for her students, under the educational purpose.¹⁵⁹ In all of these scenarios, the graffiti or street art would be reproduced in another material form with various purposes linked to the dissemination of education, knowledge, and culture, and would align well with the objectives of copyright to balance the interests of the author with those of the public.¹⁶⁰

A work, e.g. a filmed advertisement that would incidentally and not deliberately include graffiti or other street art in one of its scenes or background, or around which any reserved act would be performed would be allowed to the extent that it falls under the incidental inclusion exception to copyright infringement.¹⁶¹

As with other user rights, all exceptions to copyright infringement mentioned above do not extend to moral rights, which continue to apply. In addition, user rights may overlap and the same person may invoke more than one exception such as fair dealing and exceptions applying to educational institutions¹⁶² or to persons with perceptual disabilities.¹⁶³

8.4.2.4 Implied License

Could an author's deliberate choice to display their work in free and open spaces accessible to all, as is the case with graffiti and street art, call for the application of an implied license to the members of the public to perform certain acts with the art piece that would be otherwise reserved to copyright holders? Implied licenses or some sort of abandonment of rights are in

¹⁵⁰ *Ibid.* ss 29–29.2.

¹⁵¹ *Ibid.*

¹⁵² *CCH* (n 7), paras 48, 51.

¹⁵³ *Ibid.* para 51.

¹⁵⁴ *Ibid.* paras 53–60. The factors are: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.

¹⁵⁵ *Ibid.* para 59.

¹⁵⁶ Copyright Act, ss 29.1–29.2.

¹⁵⁷ *Ibid.* s 29.1.

¹⁵⁸ *Ibid.* s. 29.

¹⁵⁹ *Ibid.* ss 29; 29.4–30.04 (exceptions applicable to educational institutions).

¹⁶⁰ See Section 8.1.

¹⁶¹ Copyright Act, s 30.7.

¹⁶² *Ibid.* ss 29.4–30.04.

¹⁶³ *Ibid.* ss 32–32.02.

some ways similar in effect to a waiver of moral rights discussed earlier.¹⁶⁴ In Canada, the doctrine of implied license has been typically successfully invoked by users who have a contract with a copyright holder (e.g. architect, software developer, or musical composer). In those cases, courts have implied a license under the contract allowing the user of the copyright work to perform certain acts (such as to make modifications to the work) that were not in the contract and are restricted by the Copyright Act, to bring efficacy to the transaction by recognizing what the user had in fact contracted for.¹⁶⁵ While a license may be implied in some cases between a street artist and the person who commissioned a mural (and owns the physical embodiment), the current body of case law of implied license would be of little use to members of the public who interact with street art, but have no contractual relationship with the author of the art piece.

Outside the contractual sphere, it is unclear whether by their conduct, graffiti or street artists could be deemed to have granted an authorization to the public or to have (partially) abandoned their rights.

Courts are reluctant to imply by an author's conduct that an authorization was granted in favor of users or that some sort of abandonment to the public took place.¹⁶⁶ Unlike other forms of intellectual property¹⁶⁷ authors and copyright holders are generally free to not use or enforce their rights without impacting the existence or scope of their exclusive rights. To read in an implicit relinquishment of some sort through authors' (in)actions would depart from that general principle.

In the earlier judgment *International Press Ltd. v Tunnell*,¹⁶⁸ the Ontario Court of Appeal rejected the argument that a third party was authorized to reproduce and publish a work that had been left out of print for a number of years.¹⁶⁹

Commentators have argued that the property doctrine of abandonment should apply to copyright in limited circumstances, so long as the artist or copyright holder explicitly intended such abandonment or that such intent can be inferred by their conduct and surrounding circumstances.¹⁷⁰ If courts were to recognize that by their conduct and surrounding circumstances, graffiti and street artists abandoned their right (in whole or in part) for the benefit of the public to perform certain acts with their art, what would be the parameters to assess such intent and what would be the scope of such relinquishment? How much weight should be given to the purposeful availability of the artistic work in public spaces? How is this different from other published works? Should any weight be given to an artistic work produced illegally without the authorization of the property owner? Would relinquishment of control of the physical embodiment of the work also indicate an intent of some (limited) form of abandonment in the underlying copyright work? Would it allow members of the public to use the street art for commercial purposes? I have made a normative argument elsewhere that in such cases of works

¹⁶⁴ See Section 8.3.2.

¹⁶⁵ See e.g. *Tremblay v Orio Canada Inc.*, 2013 FCA 225, para 25, citing *Netupsky v Dominion Bridge*, [1972] S.C.R. 368; *Pinto v Bronfman Jewish Education Centre*, 2013 FC 945; *Crochetière-Brousseau c. 9107-0235 Québec Inc.*, 2015 FC 1219.

¹⁶⁶ McKeown (n 98) at para 16:11 pointing to the question of implied license or abandonment to the public as a contentious issue.

¹⁶⁷ Trade-Marks Act (R.S.C., 1985, c. T-13), s 45(3) allows for expungement of a trademark from the registry upon evidence that it was not used in the last three years preceding relevant notice by the Registrar.

¹⁶⁸ 1937 CarswellOnt 303, [1938] 1 D.L.R. 393(Ont. Ct. Appeal)

¹⁶⁹ *Ibid.*: "it is clear that a proprietor of a copyright does not lose his right of publication by permitting his book to remain out of print and obsolete for any number of years."

¹⁷⁰ Emily Hudson and Robert Burrell, "Abandonment, Copyright and Orphaned Works: What Does it Mean to Take the Proprietary Nature of Intellectual Property Rights Seriously?" (2011) 35 *Melbourne University Law Review* 971, 996–1003.

made available by the author in public spaces as in the case of public street art, there should be a rebuttable presumption of an implied license (or partial abandonment) allowing the use of the work in any manner that does not conflict with the commercial exploitation of the copyright work and that does not infringe the moral rights of the author.¹⁷¹ Thus while a photo of graffiti art to be shared on social media for non-commercial purposes could fall under such presumed implied license (or partial abandonment), the reproduction of graffiti on T-shirts or prints for sale may not as that potentially interferes with the commercial exploitation of the work and moral rights of the author.

8.5 CONCLUSION

While the scope of copyright protection of graffiti and street art may be, on the whole, fairly easily ascertainable and may offer a desirable level of protection to their authors, the rights of the public with respect to graffiti and street art remain fragmented, somewhat unclear, and likely too limited. This finding gives a sobering account of the extent to which Canadian copyright law succeeds in adequately addressing competing interests, such as where allowances for communication and access between the graffiti or street artist, their work of art, and the public should be at their highest.

Many questions are left unexplored in this chapter. Among those, the social movement and specific issues related to the legal protection of graffiti and street art made by Canada's Indigenous artists.¹⁷² The insights that ethnographic, anthropological, and other studies of graffiti artist communities may bring to the regulation of street art have not been brought into the present analysis.¹⁷³ Last but not least, reassessing the very purpose and effects of the criminalization of graffiti and street art for graffiti artists, private owners, and the public interest has been left for another day.

¹⁷¹ Chapdelaine (n 51), 201–02.

¹⁷² E.g., issues surrounding the protection of traditional cultural expressions, including the sacredness of certain symbols and art forms.

¹⁷³ A sample of recent works includes: George J. Snyder, *Graffiti Lives: Beyond the Tag in New York's Urban Underground* (New York University Press 2009); Brighenti (n 78); Ricardo Campos, "Youth, Graffiti, and the Aestheticization of Transgression" (2015) 59(3) *Social Analysis* 17; Jeffrey Ian Ross (ed.), *Routledge Handbook of Graffiti and Street Art* (Routledge 2016).