

COPYRIGHT AND STREET ART

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I Introduction

It may seem like an odd proposition, the idea that copyright subsists in street art.

For the purposes of this paper, street art and graffiti will be distinguished with a focus on stencilled and painted artworks as ‘street art’. Street art is an artistic practice that has always been at the forefront of teasing the limits of the law and the conception of art. To the elitist art world, street art is an ‘alternative’ art form. Even then, street artists have been shunned for being too progressive as a legal grey-area practice.¹ From a legal perspective, street art is indistinguishable from its close twin, graffiti which is a criminal offence.

It may come as a surprise then that by the provisions of the Copyright Act 1994², there is “no reason why a graffiti work could not qualify”.³ They are artistic and usually original works of sufficient permanence. However in New Zealand, section 73 is a defence excusing copying of works in public spaces. It has yet to be determined whether it applies to street artworks as well.

Without a definitive defence prohibiting copyright in street artworks then, the policy concerns on the issue are relevant considerations. There are strong arguments against copyright in street artworks namely the conflict with property owner’s rights, the restriction of the public domain, illegality and availability of alternative avenues of protection.

The matter of copyright in street art though must be considered in light of the current perspective on the art form. There has been a new era of street art, owing largely to the success of street artists like Banksy and Shephard Fairey. Street art has become a very trendy and appealing artistic style as reflected in their economic and artistic value. There is a correlating increased need and desire for formal copyright protection in order to protect the street artists’ against mainly commercial entities wishing to benefit from their ‘street cred’. Further, an historical analysis of the development of copyright demonstrates that the traditional intended recipients of legislative protection were creators like artists and writers. Copyright law has arguably expanded away from this original intention to become more commercialised which is ironic when these entities are preying on creators.

It is the view of the author that although copyright in street art in New Zealand has yet to be established, there ought to be protection.

¹ Jeff Ferrell *Crimes of Style: Urban Graffiti and the Politics of Criminality* (Northeastern University Press, New Hampshire, 1996) at 40.

² Subsequently referred to as the Copyright Act.

³ Paul Sumpter *Intellectual Property Law – Principles in Practice* (2nd ed, CCH New Zealand Limited, Auckland, 2013) at 29.

II What is Street Art?

Graffiti

Graffiti as we know it emerged out of the urban Latino and Africa American neighbourhoods and street gang cultures of 1970s New York. It was the ‘paint’ expression of hip hop culture and has been described as the visual parallel to rap.⁴ Graffiti started out simple with names sprayed or marked onto public walls and streets. The aim for early writers was to ‘get up’ as much as possible. After a while this led to new innovations of redesigning and decorating tags.⁵ Arguably this is the point in which graffiti took on more characteristics as an ‘art’ as opposed to ‘writing’.⁶ Graffiti developed in distinct styles in different places.

Street Art

Street art is an alternative art form which up until recently did not receive an enthusiastic response from the ‘conventional’ schools of art. Denver based artist Eye Six recollected his experience when trying to host an art show for graffiti artists. “I felt like my integrity was being questioned...I never went to college...A lot of those people had Masters in whatever they do...it’s like these alternative arts are snubbing me for whatever I want to do as alternative.”⁷

There are some defining characteristics of street art. The works tend to be ephemeral due to the public nature of their display. They are deteriorated by the natural elements or destroyed by anti-graffiti organisations.⁸ Street art is art that is accessible without having to seek it. For example, Spanish street artist Pejac apparently creates works for those who cannot or will not visit museums.⁹ Lastly, street artists are generally motivated to ‘gift’ the community with their artwork¹⁰ and to make “the world a better looking place”.¹¹

Street Art vs Graffiti

It is difficult and contentious to try and distinguish between street art and graffiti. Some believe that street art is an offshoot of graffiti specialising in more stencilled and drawing. Others believe that street art is “all the art on the street that’s not graffiti.”¹² At any rate, it is

⁴ Ferrell, above n 1, at 9.

⁵ At 7.

⁶ Lee Bofkin *Concrete Canvas: How Street Art is Changing the Way Our Cities Look* (Cassell, London, 2014), at 13.

⁷ Ferrell, above n 1, at 40.

⁸ Bofkin, above n 6, at 263.

⁹ “Spanish Artist Pejac Spreads Poetic Street Art Around European Cities” Bored Panda

<www.boredpanda.com>.

¹⁰ Alison Young *Street Art, Public City: Law, Crime and the Urban Imagination* (Routledge, New York, 2014), at 27.

¹¹ Banksy *Wall and Piece* (Random House, London, 2005) at 9.

¹² Bofkin, above n 6, at 159.

undeniable that the two art forms are very closely related. For instance the pioneer of street art, Blek le Rat, was influenced by the graffiti of New York when he visited in 1972.¹³

It is the author's belief that there is a distinction between street art and graffiti and there are at least two distinguishing characteristics. Firstly, street art tends to utilise stencils or pasted posters as opposed to lettered tags associated with graffiti.¹⁴ Secondly, a tag tends to address itself or to other insiders within the graffiti culture, "we [write graffiti] so we can get respect from other graf writers".¹⁵ Tags have often been condemned for being illegible 'scrawls', akin to dogs urinating on lampposts.¹⁶ In contrast, street artworks are more accessible to the spectator as a communicative method.¹⁷ Often these works bear a political or anti-commercialist message.

There is recognition that there is a burgeoning art form in New Zealand, distinguishable from 'traditional graffiti'. In the Second Reading of the Hutt City Council (Graffiti Removal) Bill,¹⁸ Hon. Trevor Mallard stated that there was a desire to ensure a clear distinction between art and graffiti as "we are very aware that there is a whole new genre of graffiti art."¹⁹

A clear example of the type of artist that the author has in mind for this paper is Banksy. Although most of his works are illegally created, they are incredibly valued. When Banksy created a painting of a small boy at a sewing machine, it became a great tourist attraction and consciously protected by placing a plexiglass cover.²⁰ Another example clearly demonstrates a distinction between street art and graffiti. When Banksy painted a girl on a swing on the side of a Los Angeles building he was celebrated. When another graffiti artist painted over the work, that artist was arrested and charged with felony vandalism.²¹

¹³ At 24.

¹⁴ Young, above n 10, at 20.

¹⁵ Susan Farrell "Graffiti Q and A" (1994) Art Crimes <<http://sunsite.icm.edu>>.

¹⁶ Young, above n 10, at 22.

¹⁷ At 10.

¹⁸ (15 August, 2012) 682 NZPD 4407.

¹⁹ (15 August, 2012) 682 NZPD 4407.

²⁰ Young, above n 10, at 149.

²¹"When It Comes to Graffiti and Copyright, the Writing Is Not Always On the Wall" Columbia Law School (7 November, 2014) <www.law.columbia.edu>.

III The Street Artists' Right to Copyright

A Copyright Act 1994

1. Legislative History

The catalyst for the Copyright Act 1994 was New Zealand becoming a committed member of the GATT Trade-Related Aspects of Intellectual Property Agreement (TRIPS)²² in December 1993. The TRIPS Agreement required New Zealand to adhere to the 1971 revision of the Berne Convention.²³ Up until this time, New Zealand's commitment to the Berne Convention had been severely lacking. It would have required revision of about 50 provisions of the 1962 Copyright Act in order for New Zealand to meet the standards of the TRIPS Agreement.²⁴ As a result there was a requirement to create an entirely new copyright legislation.

The primary issue was time constraint as New Zealand and other GATT members interpreted the TRIPS Agreement to require formalised legislation by 1 January, 1995.²⁵ This gave New Zealand approximately a year to introduce, draft and pass the 1994 Copyright Act. This resulted in little opportunity for public submissions or other critique on development of copyright law in New Zealand.

2. Interpretation

The copyright law in New Zealand has been heavily influenced by the English counterparts and so it is appropriate to consider the English Copyright, Designs and Patents Act 1988 (CDPA) in order to interpret the Copyright Act in its applicability to novel situations.²⁶ This is especially because the Act was passed into law very quickly. There is no Select Committee Report for guidance in regards to the Copyright Act. Hence reference will be made to the United Kingdom Whitford Report²⁷ which precluded the CDPA.

In regards to moral rights, they were introduced into New Zealand law with the Copyright Act. The TRIPS Agreement did not specifically require the introduction of moral rights. However in the Second Reading of the Copyright Bill, the Minister of Justice, Hon. Graham stated that it was appropriate for New Zealand to reflect current international thinking on moral rights.²⁸ These are primarily derived from the Berne Convention.²⁹ Again, due to the

²² This was negotiated at the General Agreement on Tariffs and Trade (GATT). It is an international agreement administered by the World Trade Organisation.

²³ Berne Convention for the Protection of Literary and Artistic Works 828 UNTS 221 (entered into force 5 December, 1887, revised 24 July, 1971).

²⁴ Trade-Related Aspects of Intellectual Property Rights L/336, 15 December 1993 (Negotiations completed).

²⁵ Andrew Brown and Julian Miles "Update on Intellectual Property Reforms" (paper presented to New Zealand Law Society Seminar, Wellington, April 1995) at 1.

²⁶ "Intellectual Property: Copyright Act 1994 and GATT Legislation 1994" (papers presented at a seminar held by the Legal Research Foundation at The University of Auckland, 28 February 1995) at 51.

²⁷ Copyright Committee *Copyright and Design Law* (White Paper, Cmnd R6732, 1977) [Whitford Report].

²⁸ (29 November, 1994) 545 NZPD 5270.

²⁹ Berne Convention, above n 23.

lack of guidance from the legislature, the Whitford Report³⁰ will be referenced as a guide in determining the scope and practical application of moral rights in New Zealand.

B An Exercise in the Copyright Act 1994

The following will be an exercise in copyright and moral rights in relation to street art to determine whether there is a viable case for protection.

In order to fulfil the purposes of this exercise, the following components of the test for copyright shall be considered.³¹

Is the work protected by copyright?

Who owns the copyright?

Does the intended use infringe?

Are there any defences?

1 Copyright

(a) Is the Work Protected by Copyright?

Under s14(1) of the Copyright Act, copyright exists in original artistic works.

(i) Artistic Works

Section 2 defines ‘artistic works’ as covering ‘graphic works’ which is further defined to include any painting, drawing, print.³² There is no statutory definition for painting and so the ordinary and natural meaning of the term should be referred to.³³ In the Concise Oxford English Dictionary it is defined as “painting 1. The action or process of painting 2. A painted picture.”³⁴ The ordinary meaning of the word would include street art as the location of the painting is not an inherent feature of the term.

There are some qualifying characteristics emphasised by the Courts. Firstly, the painting must be on a surface of some kind as a painting is an object.³⁵ This is easily fulfilled by all street art. A second common law qualification is that the work must have sufficient ‘permanence’ to qualify as a painting. The leading authority on this is *Merchandising Corporation v Harpbond Ltd*.³⁶ The Court rejected the argument that the make up on Adam’s face was sufficiently permanent to qualify as a painting. This test has disqualified a range of artistic

³⁰ (White Paper, Cmnd R6732, 1977).

³¹ Stuart Lockyear “Copyright and the Visual Arts: Questions and Answers” in Daniel McLean and Karsten Schubert (ed) *Dear Images: Art, Copyright and Culture* (Institute of Contemporary Arts and Ridinghouse, London, 2002) at 167.

³² Copyright Act 1994, s2 (1)(a)-(b) ‘graphic work’.

³³ Andrew Brown and Anthony Grant *The Law of Intellectual Property in New Zealand* (Butterworths, Wellington, 1989) at 243.

³⁴ Catherine Soanes and Angus Stevenson (contributors) *Concise Oxford English Dictionary* (11th ed, Oxford University Press, Oxford, 2006) at [423 098c].

³⁵ *Merchandising Corporation of America Inc v Harpbond Ltd* [1983] FSR 32 at 46.

³⁶ *Merchandising Corp v Harpond*.

works such as sand and ice sculptures.³⁷ Although ephemerality is a common feature of street art, street art has sufficient permanence to qualify for copyright protection. The surface upon which the works are created are permanent. The paint used cannot be washed off like the make up in *Merchandising Corp v Harpond*.

Street art is subject to the elements but more often it is destroyed by anti-graffiti campaigners³⁸ or diehard fans who wish to take a ‘souvenir’.³⁹ It is not fatal to the cause of action for copyright protection if the original work no longer exists.⁴⁰ If the claimant can prove that the work once existed and can demonstrate the configuration of the original work then the courts can determine from this the claim of copyright protection.⁴¹ The practical reality is that with the internet, there is a virtual record of seemingly everything in the world. If the artist has not documented a record of their own work then there are various websites such as Art.com⁴² which are dedicated to the documentation of works across the world.

After establishing that street art qualifies as an ‘artistic work’ under s14(1) of the Act, it is worth noting that copyright subsists in these works ‘irrespective of artistic quality’. This phrase has been a part of New Zealand copyright law since 1962 and was the result of the United Kingdom Gregory Report.⁴³ At [255], the committee recommended that any work should be protected in order to acknowledge the difference of opinion over artistic aesthetic.⁴⁴

(ii) ‘original’

The test for originality has traditionally had a very low qualifying threshold. Firstly the work should originate from the author.

Secondly, the work must not have been copied from another work.⁴⁵ Those street works which appropriated other artists’ works would likely be denied copyright protection from further copying by the defendant. This is based on the doctrine of unclean hands which equitably prevents a claim from a wrongdoer.⁴⁶

Based on the assumption that the work is not a copy of another work, the third step is to determine whether there was sufficient skill, labour, talent, taste or judgment involved in its creation. This is dependent on the special facts of the case.⁴⁷ The judges are likely to look to

³⁷ Fiona Macmillan “Artistic Practice and the Integrity of Copyright Law” in Morten Rosenmeier and Stina Teilmann (ed) *Art and Law: The Copyright Debate* (DJOF Publishing, Denmark, 2005) at 56-7.

³⁸ Bofkin, above n 6, at 263.

³⁹ Young, above n 10, at 149.

⁴⁰ Brown, above n 33, at 254.

⁴¹ *PS Johnson & Associates Ltd v Bucko* [1975] 1 NZLR 311.

⁴² Marc Schiller “A Major Step in the Fight for Street Artists to Protect Their Copyrights” Wooster Collective (31 March, 2013) <<http://woostercollective.com>>.

⁴³ Copyright Committee *Copyright* (White Paper, Cmd R8662, 1951) [Gregory Report] at [256].

⁴⁴ Brown, above n 33, at 243.

⁴⁵ Copyright Act 1994, section 14(2).

⁴⁶ Michael A. Carrier “Limiting copyright through property” in Helena R. Hoew and Jonathan Griffiths (ed) *Concepts of Property in Intellectual Property Law* (Cambridge University Press, New York, 2013) at 202.

⁴⁷ *MacMillan & Co Ltd v K & J Cooper* (1923) 93 LJPC 113, 117-8 per Lord Atkinson.

the process of making street art as an indication of degree of labour and skill involved in the creation. In fact if there can be debate as to whether a comprehensive alphabetical list has sufficient 'skill, labour, and judgment' to qualify,⁴⁸ then there is no reason why street artworks should be denied copyright protection on the basis of 'originality'.

(b) Who Owns the Copyright?

Copyright in a work is created without formal registration and so it is important to determine who in fact 'owns' the copyright.⁴⁹ The prima facie assumption is that the copyright belongs to the person who actually expends the effort, labour and skill in creating the work.⁵⁰ In this case the street artist would be the natural author of the work.

(c) Does the Intended Use Infringe?

Copyright in a work may be infringed by:

- o Copying;⁵¹
- o Issuing copies to the public;⁵²
- o Performing or playing or showing in public;⁵³
- o Communicating to public;⁵⁴
- o Making adaptation or act done in relation to adaptation⁵⁵

Copying of the work may be as a whole or a substantial part of the work,⁵⁶ directly or indirectly.⁵⁷ Substantial is in reference to the quality of the work rather than the quantity of the work copied.⁵⁸

The following are some examples of breach of copyright in artistic works:

*Hanfstaengl v WH Smith & Sons*⁵⁹ - an oil painting showed the goddess Psyche leaning on a rock whilst gazing into a pool of water with a reflection of the forest background.⁶⁰ The defendant published an advertisement showing a figure leaning on a rock by a pool but without the reflection or the background.

⁴⁸ *Feist Publication Inc v Rural Telephone Service Company Inc*, 499 U.S. 340, (1991) at 1287; *Warlow Directories Ltd v Reed Information Services Ltd* [1992] FSR 409 (Ch).

⁴⁹ Robin Jacob, Daniel Alexander and Matthew Fisher *Guidebook to Intellectual Property* (6th ed, Hart Publishing, Oxford, 2013) at 23.

⁵⁰ Copyright Act 1994, section 21(1) and section 5(1).

⁵¹ Copyright Act 1994, section 30.

⁵² Copyright Act 1994, section 31.

⁵³ Copyright Act 1994, section 32.

⁵⁴ Copyright Act 1994, section 33.

⁵⁵ Copyright Act 1994, section 34.

⁵⁶ Copyright Act 1994, section 29(2)(a).

⁵⁷ Copyright Act 1994, section 29 (2)(b).

⁵⁸ *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL) at 273, 277 per Lord Reid.

⁵⁹ *Hanfstaengl v WH Smith & Sons* [1905] 1 Ch 519.

⁶⁰ J. F. Burrows and Ursula Cheer *Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015) at [4.3.1(b)].

*Williams v. Roberto Cavalli*⁶¹ – This is a case currently on trial in California. The Plaintiffs created a mural in San Francisco which contained the stylised signatures of the pseudonyms of the artists, ‘Revok’ and ‘Steel’. The Defendants obtained images of the mural and placed on a collection of Just Cavalli known as ‘Cavalli Graffiti Girls’.⁶² In some of the collection pieces the ‘Just Cavalli’ signature was digitally superimposed on the signatures of the artist on the original. The District Court denied the defence’s motion to dismiss as the “plaintiffs adequately plead their California statutory and common law claims”.⁶³ The case is proceeding on six causes of action for copyright infringement, removal and alteration of copyright information, unfair competition and negligence.⁶⁴

(d) Defences – Section 73: Representations of certain artistic works on public display

This is the main defence concerning the street artist’s claim for copyright and will be the only one considered in this paper.

This section applies to:

- a. Buildings;
 - b. Works (being sculptures, models for buildings, or works of artistic craftsmanship) that are permanently situated in a public place or in premises open to the public.
- 2) Copyright in a work to which this section applies is not infringed by –
- a. Copying the work by making a graphic work representing it; or
 - b. Copying the work by making a photograph or film of it; or
 - c. Communicating to the public a visual image of the work.
- 3) Copyright is not infringed by the issue to the public of copies, or the communication to the public, of anything the making of which was, under this section, not an infringement of copyright.

In interpreting the application of s 73 to street art, “the meaning of an enactment must be ascertained from its text and in the light of its purpose.”⁶⁵ Reference will be made to s62 of the CDPA and the New Zealand case *Radford v Hallensteins Bros Ltd*. There is one High Court⁶⁶ and two District Court decisions. The first concerned copyright and was presided over by Judge Hubble⁶⁷. The second was presided over by Judge Joyce and concerned moral rights which will be considered later in this paper.⁶⁸

Section 62

⁶¹ *Williams v Cavalli*, 2015 US Dist. LEXIS 34722 (Decided February 12, 2015).

⁶² Julie Zerbo “Graffiti Artists Fight Copying by Fashion Brands” *The Business of Fashion* (26 February, 2015)

<www.businessoffashion.com>.

⁶³ *Williams v Cavalli*, above n 61, at 6.

⁶⁴ At 6.

⁶⁵ Copyright Act 1994, s5(1).

⁶⁶ *Radford v Hallensteins Bros Ltd* HC Auckland CIV-2006-404-004881, 15 November 2006.

⁶⁷ *Radford v Hallensteins Bros Ltd* DC Auckland CIV-2005-004-003008, 17 July 2006.

⁶⁸ *Radford v Hallensteins Bros Ltd* [2009] DCR 907.

It appears that the New Zealand legislature adopted s 62 of the CDPA near verbatim for section 73 of the Copyright Act. According to *Modern Law of Copyright and Design*,⁶⁹ s 62 was not really thought out properly and contains several anomalies.⁷⁰ New Zealand has therefore adopted these issues of interpreting this exception to copyright infringement in publicly displayed artistic works.

Radford v Hallensteins Bros Ltd

In 2005 Hallensteins printed T-shirts featuring photographs of two sculptures in Western Park. The sculptor, John Radford, took objection to this and filed a claim in the Courts. His claim in the District Court was that his economic and importing copyright in the sculptures had been breached. Further his moral rights had been breached in a derogatory manner.⁷¹

In this case it was held that Mr Radford was the author and copyright owner of the works.⁷² Further there was a prima facie claim for copying the sculptures.⁷³ However, the case fell squarely in the scope of s73(1)(b) as a sculpture permanently situated in a public space.

Following *Radford v Hallensteins*,⁷⁴ it seems clear that New Zealand sculptural and three-dimensional street artworks are denied copyright status.

- (i) Section 73(1)(a) - is an artwork featured on a wall of a building encompassed under 'building'?

The definition of 'building' under s 2 provides that:

Building includes –

- (a) Any fixed structure; and
- (b) A part of a building or fixed structure

Section 73(1)(b) explicitly lists the artistic forms the exception was intended to apply to. Hence there is strong legislative intent demonstrated against interpreting 'part of building' as encompassing a featured artwork.

However, the implications that would follow from this logic weakens the argument. It would mean that buildings with two-dimensional artwork on their walls would not be able to be photographed. Such an interpretation would lead to an absurdity,⁷⁵ frustrating the purpose of s 73.

⁶⁹ H I L Laddie, Peter Prescott and Mary Vitoria *The Modern Law of Copyright and Designs* (4th ed, LexisNexis 2011).

⁷⁰ At [21.95].

⁷¹ *Radford v Hallensteins*, above at n 66, at [1].

⁷² Copyright Act 1994, s 2 and s 14(1)(a).

⁷³ Section 29(1), 30, 31.

⁷⁴ *Radford v Hallensteins*, above n 66.

⁷⁵ At [28].

- (ii) Section 73(1)(b) – is a street artwork incorporated in the particular criteria?

In the event that the s 73(1)(a) interpretation of ‘building’ does not include two-dimensional artwork featured on walls, then s 73(1)(b) may apply.

- o Textual analysis

The title of s 73 is ‘representation of *certain* artistic works on public display’. The use of ‘certain’ indicates that the provision is limited to the specific types of artistic works listed. This is further supported in s73(1)(b) which defines works ‘*being* sculptures, models for buildings, or works or artistic craftsmanship’. Legal commentators come to similar conclusions as to the meaning of ‘in such works’ in s62(2) of the CDPA.⁷⁶ Justice Keane in the High Court stated that “the text of s73...is explicit as to what it excludes from the protection of copyright: works like sculptures, as long as they are permanently in a public place, or in premises open to the public.”⁷⁷ As street art murals are arguably not ‘like’ sculptures, they may be implicitly excluded from the application of the s73 exception.

Section 73(1)(b) only applies to permanently exhibited works so a graffiti artist may argue that the temporal nature of their work excludes them from this exception. This is further supported by the nature of the works specified, namely sculptures and buildings. Justice Keane in the High Court stated that “it only exempts copies of three-dimensional works that are permanently in the public domain...the work itself cannot be replicated in three-dimensions, whether directly or *as a copy of one made in two-dimensions*.”⁷⁸

- o Purposive analysis

The purposive analysis of s73(1)(b) seems to counter the established textual interpretation.

In making exceptions to copyright protection, the New Zealand legislature must take heed of the international standards to which New Zealand subscribes to. For instance Art 9(2) of the 1886 Berne Convention⁷⁹ allows for the reproduction of works in ‘special’ cases, provided that it does not conflict with or prejudice the artist’s ability to exploit his copyright in the work. This is reiterated in Art 13 of TRIPS Agreement.⁸⁰

Justice Keane pointed out that this test is very vague and altogether unhelpful in determining the right scope of section 73,⁸¹ It may be argued that section 73 is not automatically discounted simply because the legislature did not specify ‘painted artworks in public display’.

⁷⁶ K M Garnett, Gillian Davies, Gwilym Harbottle, E.P. Skone James (eds) *Copinger & Skone James on Copyright* (16th ed, Sweet & Maxwell, London 2012) at [9-189].

⁷⁷ *Radford v Hallensteins*, above n 66, at [11].

⁷⁸ (Emphasis added) At [39].

⁷⁹ Berne Convention for the Protection of Literary and Artistic Works 828 UNTS 221 (opened for signature 9 September 1886, entered into force 5 December, 1887).

⁸⁰ Trade-Related Aspects of Intellectual Property Rights L/336, 15 December 1993 (Negotiations completed).

⁸¹ *Radford v Hallensteins*, above n 66, at [19].

Judge Hubble indicates that the general approach to public artistic works is not in favour of copyright protection. "...In practice it seems to be recognised that if an artist creates a sculpture or building which is permanently in public, their one opportunity of obtaining a reward is for creating the work in the first place."⁸²

Comment:

The analysis on the potential effect of section 73 to street artworks demonstrates that it is ambiguous. This is hypothetical though until a relevant factual scenario is before the Courts.

2. *Moral Rights*

Moral Rights are an invention of the French courts⁸³ as they intended to give creators a sense of artistic control over their works. They are distinct from copyright as they subsist in the artist rather than in the work.⁸⁴ Therefore moral rights and copyright are two distinct statutory actions.

The moral rights protected in Part IV of the Copyright Act are modelled upon the CDPA. Moral rights may only be waived expressly in writing⁸⁵ and so continue to be enforceable regardless of the copyright in the work. The available remedies for infringement of moral rights are damages and injunction.⁸⁶ In relation to the right to object to derogatory treatment of work,⁸⁷ an injunction may be granted unless if an appropriate disclaimer is made, dissociating the artist from the treated work.⁸⁸

(a) Section 94 – Right to be Identified as Author or Director⁸⁹

This moral right parallels copyright infringement claims where the alleged infringer has appropriated the work of the creator and has presented it as their own. In *Anasgasti v American Eagle Outfitters Ltd*,⁹⁰ the claimant's work had been appropriated and in various manners represented as the original work of the defendant.⁹¹

The issue of section 94 for the street artist is that it requires the author to assert this right by way of identifiability.⁹² The author believes that this should not be limited to the traditional signature as this may not be appropriate to the aesthetic of modern artworks. In *Anasgasti v American Eagle*,⁹³ the work incorporated the signature 'droopy eyes' character such that it

⁸² *Radford v Hallensteins*, above n 67, at [33].

⁸³ *Simon Stokes Art and Copyright* (2nd ed, Hart Publishing Ltd, United Kingdom, 2012) at 84.

⁸⁴ Jacob, above n 49, at 141.

⁸⁵ Copyright Act 1994, s 107(2).

⁸⁶ Copyright Act 1994, s 125(1).

⁸⁷ Copyright Act 1994, s 98.

⁸⁸ Copyright Act 1994, s 125 (3).

⁸⁹ Copyright Act 1994, s 94(6)(a)-(e).

⁹⁰ *Anasgasti v American Eagle Outfitters, Inc*, No 1:14-cv-05618 (D. Mass. filed July 23, 2014).

⁹¹ At [5]-[6].

⁹² Copyright Act 1994, s 96(3)(a)-(b).

⁹³ *Anasgasti v American Eagle*, above n 90.

was immediately recognisable as the claimant's design.⁹⁴ The need to assert the right of identity as author frustrates the purpose of such a provision. Identification is a fundamental right as a creator to which copyright dedicates itself in protecting.

(b) Section 98 – Right to Object to Defamatory Treatment of Work

This right protects artistic works from being distorted or mutilated in a manner that is prejudicial to the honour or reputation of the author or director⁹⁵.

In a strike-out application in *Radford v Hallensteins*,⁹⁶ the District Court considered section 98. This is helpful as there is a scarcity of case law on moral rights in New Zealand. There are two elements that may be taken from the judgment.

Firstly, Judge Joyce noted that the case law on the appropriate approach to determining 'derogatory treatment prejudicial to the honour or reputation' of the author was not unanimous. Some favoured the subjective belief of the author of what was prejudicial⁹⁷ whilst others proposed that this be objectively evaluated.⁹⁸

Secondly, *Radford v Hallensteins* is an example of what an artist might understand as derogatory treatment. The claimant provided evidence that the intent of the sculptures was to have them 'haunting' the people responsible for demolishing aesthetic structures during the 1980s building boom in Auckland.⁹⁹ Hallensteins' representation of the claimant's work with a screen print of the Sky Tower protruding out of the sculpture contravened this intent.¹⁰⁰ The Sky Tower is a prime example of the very type of building the claimant was critiquing.

Another, often cited example is *Snow v The Eaton Centre Ltd*.¹⁰¹ The claimant successfully sued the commercial mall for whom the artist had created a commissioned work of geese. The defendant had placed ribbons on the necks of the geese for the Christmas holiday period.¹⁰² The claimant likened this to putting "earrings on the Venus de Milo"¹⁰³ and the defendant was obliged to remove these ribbons.¹⁰⁴

The moral right against destruction is a related right to derogatory treatment. This right probably does not exist in New Zealand. It has been severely doubted by academics in the United Kingdom with the equivalent s80.¹⁰⁵ This right has been adopted in civil law countries

⁹⁴ Gabe Friedman "Can Graffiti Be Copyrighted?" The Atlantic (online ed, Washington DC, 21 Sep 2014).

⁹⁵ Copyright Act 1994, s 98(1)(a)-(b).

⁹⁶ *Radford v Hallensteins*, above n 68.

⁹⁷ *Prise de Parole Inc. c. Guérin Éditeur ltée* (1995), 66 CPR (3d) 257 (Can FCTD).

⁹⁸ Laddie, above n 69, at [13.30]; *Pasterfield v Denham* [1999] FSR 168 (Plymouth Co. Ct.).

⁹⁹ *Radford v Hallensteins*, above n 68, at [46].

¹⁰⁰ At [45].

¹⁰¹ *Snow v Eaton Centre Ltd* (1982), 70 CPR (2d) 105 (Ont H Ct J).

¹⁰² At [2].

¹⁰³ At [6].

¹⁰⁴ At [9].

¹⁰⁵ Laddie, above n 69, at [13.28].

such as France¹⁰⁶ and Germany.¹⁰⁷ It also has restricted equivalents in the United States¹⁰⁸ and Australia.¹⁰⁹

(c) Section 104 – False Representation as to Artistic works¹¹⁰

This right entitles an artist not to have a work falsely represented as an unaltered work. This is a valuable moral right as aesthetic and artistic reputation are important to a street artist. It is therefore necessary for them to have a certain extent of control over their works to ensure an accurate representation of their artistic identity.

C. *Policy Arguments*

In extending copyright law to a novel art form, there is a need to consider the relevant policy considerations. These issues are unique to the consideration of copyright in street art.

1. *Against*

(a) Property Owner's Rights versus the Street Artist's Copyright

Street art is usually located on walls and usually these walls are owned by someone else. These may be anywhere in the public space such as the fences of houses or the sides of buildings. The issue then is whether there should be copyright in street art considering the medium it is created on.

This is essentially a conflict with existing law of two equally valued principles. The first is the copyright owner's exclusive right to the 'fruit of his own labour'.¹¹¹ The second is the property owner's right to do as he pleases upon his property.¹¹² If copyright were denied in the street artwork then this could be unjustifiably benefitting the property owner to the profits of a work that they did not produce.¹¹³ On the other hand, copyright in street art may be argued as an extreme imposition upon a property owner's exclusive rights to his property.¹¹⁴ Neither outcome seems to be legally desirable. The task then is to attempt to balance the competing interests of the property owner and the copyright owner.

¹⁰⁶ Stokes, above n 83, at 84.

¹⁰⁷ Act on Copyright and Related Rights 1965, s 4(2) (12)-(14).

¹⁰⁸ Visual Artists Rights Act 1991.

¹⁰⁹ Copyright Amendment (Moral Rights) Act 2000, s195AT.

¹¹⁰ Copyright Act 1994, s (104)(2)(a)-(c).

¹¹¹ John Locke *Second Treatise of Government*, Richard Howard Cox (ed) (Harlan Davidson Inc, Illinois, 1982) at s 27.

¹¹² Stokes, above n 83, at 96.

¹¹³ Michael Spence *Intellectual Property* (Oxford University Press, New York, 2007) at 61.

¹¹⁴ John Henry Merryman, Albert E. Elsen and Stephen K. Urice *Law, Ethics and the Visual Arts* (5th ed, Kluwer Law International, The Netherlands, 2007) at 439.

Those who do not believe in the street artists' rights may derive support from German philosopher Immanuel Kant. Firstly, Kant established that there is a distinction between the 'authorial speech' in the work and the actual physical embodiment of this.

The author and someone who owns a copy can both, with equal right, say of the same book, 'it is my book', but in different senses. The former takes the book as writing or speech, the second merely as the mute instrument of delivering speech to him or the public, as a copy.¹¹⁵

Despite supporting a distinction between copyright and property rights, Kant was dismissive of applying copyright to artistic works.¹¹⁶ Unlike written works, Kant believed that the 'personal contribution' of the artist is indistinguishable from the artwork's material carrier.¹¹⁷ So for Kant the street artist's painting and the property owner's wall would be indistinguishable. Kant described art as "a work, which anyone who possesses it can alienate without ever having to mention the name of the originator."¹¹⁸

Copyright law has developed beyond Kant's strict distinction between creative practices. It has been recognised in England since at least 1735 that artistic works are worthy of copyright protection.¹¹⁹ Paintings, drawings and photographs have been granted copyright protection in New Zealand since 1862.¹²⁰ They are not mere 'tangible things'¹²¹ but representations of an intangible part of the artist's personality. With this conception of artistic works then, copyright law has clearly developed a distinction between ownership of copyright in a work and ownership of the actual work.¹²² In fact, the property owner and copyright owner's rights are not strictly conflicting. They merely subsist in the same physical medium of the wall.

In a balancing exercise between the rights of the street artist and the property owner, the author proposes that the street artist's rights be simply another application of the *sic utere tuo ut alienum non laedas* principle.¹²³ The street artist's copyright in the street artwork would not be an unreasonable qualification to the property owner's exclusive rights to their property. The property owner is merely required to respect the artistic integrity in the work by not copying and preventing others copying the work.¹²⁴

The street artist's copyright claim is particularly reasonable because there is no moral right to prevent destruction in New Zealand. This moral right very obviously impacts the property

¹¹⁵ Immanuel Kant, 'On the Wrongfulness of Unauthorised Publication Books' in Mary J. Gregor (ed) *Kant's Practical Philosophy* (Cambridge: Cambridge University Press, 1998) at 29-35.

¹¹⁶ Marko Karo "The Art of Giving and Taking: A Figurative Approach to Copyright Law" in Morten Rosenmeier and Stina Teilmann (ed) *Art and Law: The Copyright Debate* (DJOF Publishing, Denmark, 2005) at 90.

¹¹⁷ At 90.

¹¹⁸ Immanuel Kant, 'On the Wrongfulness of Unauthorised Publication Books' in Mary J. Gregor (ed) *Kant's Practical Philosophy* (Cambridge: Cambridge University Press, 1998), at 34.

¹¹⁹ Tad Crawford *Legal Guide for the Visual Artist* (5th ed, Allworth Press, New York, 2010) at 15.

¹²⁰ Brown, above n 33, at [4.42].

¹²¹ Karo, above n 116, at 90.

¹²² Crawford, above n 119, at 11.

¹²³ 'So use your own as not to injure another's property' - Merryman, above n 114, at 424.

¹²⁴ Kathryn Dachille "Vandals or Van Gogh's? Copyright and Graffiti Art" *Creative Arts Advocate* <<http://creativeartsadvocate.com>>.

owner's rights and would probably have critically crippled this policy argument for copyright in street artworks in New Zealand. Therefore the New Zealand property owner is not required to maintain the artwork.

(b) Legal Public Domain versus Public Space

In considering copyright in street artworks, it is integral to differentiate between the public space and the legal public domain.

The public space refers to the physical location. The legal public domain is the where the public have equal access to copyright-free works as 'inspiration' or just blatant reproduction.¹²⁵ With Copyright law there are two general means by which this can occur.¹²⁶ Copyright may be denied in that particular art form. For instance it has been discussed that ice sculptures, sand sculptures¹²⁷ and makeup¹²⁸ lacked sufficient permanence to qualify for copyright. Otherwise works may lose copyright as copyright is not indefinite. In New Zealand, copyright in published artistic works is the lifetime of the author plus 50 years from the end of the calendar year the author died.¹²⁹

The issue then is whether there is a distinction between the legal public domain and the public space in the case of publically featured artworks. Legal disputes arise as the appropriators assumed that there was no copyright in such works. It can be argued that the artist has effectively abandoned the copyright in the work.¹³⁰ This doctrine of abandonment is a common law creation traditionally applied to tangible property such as sunken treasure.¹³¹ The application of the doctrine to copyright is accepted in the United States¹³² and potentially in India¹³³, with academic support for it in Australia.¹³⁴ The argument is that property rights are capable of abandonment as a "thing external by nature".¹³⁵

The justification for abandonment is that copyright law has developed too extensively.¹³⁶ The legal public domain has become restricted with increasingly long terms of copyright and the

¹²⁵ Séverine Dusollier "The Commons as a Reverse Intellectual Property" in Helena R. Hoew and Jonathan Griffiths (ed) *Concepts of Property in Intellectual Property Law* (Cambridge University Press, New York, 2013).

¹²⁶ At 267.

¹²⁷ Macmillan, above n 37, at 56-7.

¹²⁸ *Merchandising v Harpbond*, above n 35.

¹²⁹ Copyright Act 1994, s 22(1).

¹³⁰ Robert Burrell and Emily Hudson "Property concepts in European copyright law: the case of abandonment" in Helena R. Hoew and Jonathan Griffiths (ed) *Concepts of Property in Intellectual Property Law* (Cambridge University Press, New York, 2013).

¹³¹ *Arrow Shipping Co Ltd v Tyne Improvement Commissioners, The Crystal* [1891-1894] All ER Rep 804 (HL); *AG v Trustees of the British Museum* [1903] 2 Ch 598 (Ch).

¹³² *National Comics Publications, Inc. v Fawcett Publications, Inc. et al*, 191 F.2d 594 (2nd Cir. 1951).

¹³³ Indian Copyright Act 1957, s21(1).

¹³⁴ Burrell, above n 130, at 206.

¹³⁵ George W.F. Hegel *Elements of the Philosophy of Right* Thomas M. Knox (trans) (Oxford: Clarendon Press, 1952) section 65.

¹³⁶ Carrier, above n 46.

extension of copyright to new practices.¹³⁷ A restricted legal public domain will lead to restricted future creative growth as artists work off of their predecessors as ‘inspiration’.¹³⁸ As a solution, Robert Burrell and Emily Hudson argue that allowing copyright to be abandoned is a way of reconciling the automacity of copyright protection.¹³⁹ “A refusal to recognise a doctrine of abandonment might have a chilling effect on the circulation of works that have been dedicated to the public domain.”¹⁴⁰

Street art seems to be an ideal example where copyright ought to be considered abandoned. Some known street artists such as Banksy have demonstrated an overt intention to abandon copyright.¹⁴¹ Not only has he expressed the view that ‘copyright is for losers’,¹⁴² he has not legally pursued any unauthorised use of his works. Further he has created some works where the circumstances make it obvious that copyright was not a concern. For instance Banksy created a series of works in war-torn Gaza in highly dangerous and ephemeral locations.¹⁴³

However, intellectual property is about exclusivity and not about exclusion – the terms not being synonymous¹⁴⁴. Exercising exclusive rights in copyright does not necessarily exclude the general public and they may be included in the use of the works.¹⁴⁵ Therefore awarding copyright in street art will not have the severe consequential effect that Burrell and Hudson suggest.

(c) Illegality

One of the more prominent reason against copyright protection is that graffiti is a criminal offence in New Zealand. It is defined in s11A of the Summary Offences Act 1981 as something that damages or defaces “any building, structure, road, tree, property, or other thing by writing, drawing, painting, spraying, etching, or otherwise marking it.” There are two qualifications to this definition, namely that the work is done “(a) without lawful authority; and (b) without the consent of the occupier or the owner...” A person is liable to a community sentence, a monetary fine not exceeding \$2000 or both.¹⁴⁶

In the United Kingdom the courts have indicated that illegal, immoral or indecent works are a common law exception to the general rules of copyright.¹⁴⁷ This is derived from the equitable ‘clean hands’ maxim preventing those guilty by the law from relying on the law.¹⁴⁸ Further in

¹³⁷ *Eldred v Ashcroft*, 538 U.S. 916 (2003) per Justice Poreyer.

¹³⁸ Carrier, above n 46, at 197.

¹³⁹ Burrell, above n 130, at 209.

¹⁴⁰ At 209.

¹⁴¹ At 206.

¹⁴² “Copyright is for Losers? The Turbulent World of Modern Graffiti” (27 May, 2014)

<<http://blogs.sps.ed.ac.uk/copyrightandcreators/>>.

¹⁴³ Majd Al Wehedi and Isabel Kershner “Banksy Finds a Canvas and a New Fanbase in Gaza’s Ruins” NY Times (online ed, New York, April 30 2015) <www.nytimes.com>.

¹⁴⁴ Dusollier, above n 125, at 271.

¹⁴⁵ At 271.

¹⁴⁶ Summary Offences Act 1981, s 11A.

¹⁴⁷ Jacob, above n 49, at 152.

¹⁴⁸ Laddie, above n 69, at [21.27].

English v BFC & R East,¹⁴⁹ the court held that the American Visual Artists Rights Act 1991 does not apply to artwork illegally placed on the property of others without their consent and so denies moral rights in the work.¹⁵⁰

It should be stated that graffiti as a crime is not especially serious. Graffiti writers paint on property and not people. Any claim that graffiti is akin to assault must distort the social order in a manner that confuses people with property.¹⁵¹ Further it has been queried as to whether illegality is still a relevant consideration in regards to copyright.¹⁵² There is no express statutory provision and the common law doctrine may be outdated.¹⁵³ In *Cohen v G&M Realty LP*,¹⁵⁴ direct reference was made to Banksy whose works would qualify for the United States Visual Rights Act (VARA)¹⁵⁵ standard of ‘recognised stature’.¹⁵⁶ The judge seemed to make this observation without regard to the illegality of Banksy’s works.

(d) Other Avenues for Protecting Artistic Works

A final policy argument against the extension of copyright to street art is that there are other legal actions covering the same grounds as a copyright action. In *Williams v Cavalli*¹⁵⁷ the claims were not just for copyright infringement but also passing off, unfair competition and negligence.¹⁵⁸ The claim for passing off concerned the allegation that Cavalli digitally superimposed the ‘Just Cavalli’ signature over those of the artists.¹⁵⁹ This claim is quite similar to that of the moral right to identification as the author.¹⁶⁰ The tort of defamation¹⁶¹ is arguably viable for preventing false representation of artistic works where the artistic work misrepresents the artist’s creative aesthetic.¹⁶²

It is preferable to ensure that the most directly relevant means is explored instead of awkwardly developing alternative legal remedies. The Copyright Act 1994 concerns the economic and personal rights of a creator and directly addresses artistic works. In contrast the doctrine of passing off was established as a means for traders to protect their goodwill and reputation in their trade name.¹⁶³ This doctrine is certainly a viable alternative claim to

¹⁴⁹ *English v BFC & R East* 11th Street LLC (1997 WL 746444).

¹⁵⁰ Crawford, above n 119, at 79.

¹⁵¹ Ferrell, above n 1, at 174.

¹⁵² “Selling the Writing on the Wall: Does Copyright Protect the Work of Graffiti Artists?” Law, Technology & Arts Blog (12 May, 2011) <<https://wjta.wordpress.com>>.

¹⁵³ Jacob, above n 49, at 152.

¹⁵⁴ *Cohen et al v G&M Realty LP et al*, No 1:13-cv-05612 (FB) (JMA).

¹⁵⁵ Visual Rights Act 1991.

¹⁵⁶ At 221.

¹⁵⁷ *Williams v Cavalli*, above n 61.

¹⁵⁸ At 1.

¹⁵⁹ At 1.

¹⁶⁰ Copyright Act 1994, s 94.

¹⁶¹ Ruth Redmond-Cooper “Moral Rights” in Daniel McLean and Karsten Schubert (ed) *Dear Images: Art, Copyright and Culture* (Institute of Contemporary Arts and Ridinghouse, London, 2002) at 74.

¹⁶² Copyright Act 1994, s 104.

¹⁶³ Stephen Todd, J.F. Burrows, W R Atkin, Cynthia Hawes and Ursula Cheer *The Law of Torts in New Zealand* (6th ed, Brookers Ltd, Wellington: 2013) at 717-747.

copyright but it cannot act as a satisfactory substitute. Similarly, the Whitford Report stated that defamation cannot substitute the moral right of false attribution of authorship.¹⁶⁴ An action in defamation dies with the person defamed whereas copyright law grants periods of protection extending beyond the copyright owner.¹⁶⁵

Alternatively, academic Al Roundtree argued that the informal customary system existing within the graffiti world was sufficient to protect the interests of the street artists.¹⁶⁶ There are positive incentives for respecting other's copyright such as gaining respect and praise from others.¹⁶⁷ There are also negative remedial norms such as gossip, ostracism and violence which maintains the pseudo copyright system¹⁶⁸. However, Roundtree recognises that "graffiti norms, while effective, do not protect graffiti[s] original expression and artists' moral rights as to the full extent that copyright law and VARA do for similar works"¹⁶⁹. Further, this informal system is ineffective against those individuals outside the graffiti community.¹⁷⁰

2. *In Favour*

(a) Dispelling the Myths Associated with Street Art

(i) 'Artists do not Want Protection'

There seems to be a belief that street artists do not want legal protection. This makes it seem that street art is a practice completely divorced from the copyright system as the copyright is effectively abandoned by the artist.¹⁷¹ It is true that street artists dedicate their works to the community and seem to accept their works being written over, removed or photographed by passerbys.¹⁷² It becomes an issue though when a commercial enterprise appropriates the work in a manner which affects the artist's reputation. Street art is predominately a critique of the conventional art world where art is traded for economic benefit.¹⁷³ Hence there has been an influx of street art cases in recent years against commercial appropriation of works such as *Anasgasti v American Eagle*¹⁷⁴ and *Williams v Cavalli*.¹⁷⁵

¹⁶⁴ Whitford Report, above n 27, at [53].

¹⁶⁵ At [53].

¹⁶⁶ Al Roundtree "Graffiti Artists "Get Up" In Intellectual Property's Negative Space" (2013) 31 *Cardozo Arts & Ent.L.J* 959.

¹⁶⁷ At 984.

¹⁶⁸ At 984-985.

¹⁶⁹ 982.

¹⁷⁰ 985.

¹⁷¹ This has been argued under Legal vs Public Space.

¹⁷² *Wooster Collective*, above n 42.

¹⁷³ Sara Bauer and Elizabeth Brenckman "Graffiti Artists Seek IP Credentials: 4 Recent Cases" *Law360* (14 January, 2015) <www.law360.com>.

¹⁷⁴ *Anasgasti v American Eagle*, above n 90.

¹⁷⁵ *Williams v Cavalli*, above n 61.

Further, in Jeff Ferrell's social investigation into the 'graffiti world',¹⁷⁶ he discovered that there is a pseudo copyright system which governs the conduct of its artists. Ferrell described the concept of 'biting' as the inappropriate use of distinct images or stylistic touches either from other writers or popular culture.¹⁷⁷ An accusation of 'biting' questions the graffiti writer's ability to innovate¹⁷⁸ in much the same way as formal concepts such as copyright violation or forgery.¹⁷⁹

This pseudo protection system is limited to the community of street artists and so has no force on outsiders who may appropriate their work. This 'biting' concept is evidence of the street artist's desire for copyright. A legal reflection of this then is not necessarily the antithesis of the street art tradition.

(ii) Street Art does not Need Copyright Protection

There are various practices which do not have legal copyright protection and so demonstrate the lack of necessity to extend copyright to new developments.

The most relevant is the fashion industry. This industry thrives off of the inspiration and often complete appropriation of other's designs. This practice allows for cheaper versions of the fashion elite works to be recreated by stores such as H&M, Forever 21 and most infamously Top Shop.¹⁸⁰ It is argued that this culture of copying forces the designers to be more innovative in order not to be copied so easily.¹⁸¹ There is a democratisation of the fashion industry meaning that there is so much more 'inspiration' available from other designers.¹⁸² This seems to counter the traditional belief that copyright is necessary in order to encourage creators to innovate without fear of losing rights in their works.¹⁸³ It is an added concern that if copyright protection were awarded to street art that this would implicitly indicate that the law valued street art more than fashion.¹⁸⁴

A comparison between street art and fashion reveals important some crucial differences. Fashion is a multi-billion dollar commercial industry where designing is inevitably in exchange for an economic profit.¹⁸⁵ Street artists generally dedicate their work to the community with no charge.¹⁸⁶ There are exceptions of course but in general street art is underground and anti-commercialist.¹⁸⁷ Further there are limited examples where the art of

¹⁷⁶ Ferrell, above n 1.

¹⁷⁷ At 85.

¹⁷⁸ At 86.

¹⁷⁹ At 87.

¹⁸⁰ Jenna Sauers "How Forever 21 Keeps Getting Away with Designer Knockoffs" Jezebel (20 July, 2011). <<http://jezebel.com>>.

¹⁸¹ Blakely.

¹⁸² Blakely.

¹⁸³ Spence, above n 113, at 63-64.

¹⁸⁴ Zerbo, above n 62.

¹⁸⁵ Jeniffer Mencken "A Design for the Copyright of Fashion" Boston College Intellectual Property & Technology Forum (1997) <<http://bciptf.org>>.

¹⁸⁶ Young, above n 10, at 27.

¹⁸⁷ Friedman, above n 94.

fashion has been recognised. In Japan there is protection for works which meet the incredibly high standard of being ‘one of a kind’.¹⁸⁸ This is almost comparable to the standard required by VARA’s right against destruction for works of ‘recognised stature’.¹⁸⁹ This demonstrates that there are works worthy of protection even in fields where copyright does not seem to be in practice.

The above have been arguments about the effect copyright may have on the economic interests of a work. For a street artist what may be more important is the right to manage their reputation as an artist. In *Anasgasti v American Eagle*,¹⁹⁰ the plaintiff objected to the use of his work as it made him seem like a “sell out” to large corporate interests.¹⁹¹ In *Williams v Cavalli*,¹⁹² it was said that “Nothing is more antithetical to the outsider ‘street cred’...than association with European chic, luxury and glamour – of which Cavalli is the epitome.”¹⁹³ As such the availability of copyright and moral rights is valuable to a street artist in order to ensure that their work is accurately representative of their artistic ethos.¹⁹⁴

(iii) “No matter how good it looks, graffiti is ugly”¹⁹⁵

There has traditionally been a negative view on the artistic merit of graffiti and street art. Graffiti is seen as an ‘attack’ on the private property of others which clashes with accepted notions of beauty in public spaces.¹⁹⁶ In the second reading of the Hutt City (Graffiti Removal) Bill in 2012, there seemed to be agreement that having a lot of graffiti and tagging in a community “gives a perception of danger...and it has the detrimental effect on the image of a city...”¹⁹⁷ In order to protect their walls, Hutt City Council was reportedly spending up to \$500,000 a year¹⁹⁸ and Auckland City Council \$2 million a year.¹⁹⁹

This negative view of graffiti art has the potential to cloud judgments from acknowledging the value of the street art work. For instance in 1989, the Colorado Department of Health and Project Safety commissioned local Denver graffiti writers to paint AIDS prevention murals targeting IV drug users.²⁰⁰ Apparently the murals had a positive effect with a ‘sharp increase’

¹⁸⁸ Japan External Trade Organization “Investing in Japan” <www.jetro.go.jp> section 5.7.1.

¹⁸⁹ Visual Artists Rights Act 1990, s 106A(a)(3)(B).

¹⁹⁰ *Anasgasti v American Eagle*, above n 90.

¹⁹¹ At [17].

¹⁹² *Williams v Cavalli*, above n 61.

¹⁹³ Bill Donahue “Graffiti Artists Sue Roberto Cavalli For Copying Mural” Law360 (26 August, 2014)

<www.law360.com>.

¹⁹⁴ Donahue.

¹⁹⁵ Ferrell, above n 1, at 178.

¹⁹⁶ At 184.

¹⁹⁷ Hutt City Council Bill, above n 18, per Hon Trevor Mallard.

¹⁹⁸ Will Harvie and Lauren Mann “Fine Line Between Art and Graffiti” Stuff.co.nz (13 January, 2014)

<www.stuff.co.nz>.

¹⁹⁹ David Farrier “Graffiti vs Art Debate Reignited Following Court Case” 3 News (9 March, 2010)

<www.3news.co.nz>.

²⁰⁰ Ferrell, above n 1, at 182.

in calls to the AIDS outreach hotline.²⁰¹ However the local anti-graffiti campaign 'Keep Denver Beautiful', objected to this mural as it sent a 'double message' in regard to graffiti prevention.²⁰² Project Safe worker Ted Hayes is quoted in *Crimes of Style*. "Two ladies from Keep Denver Beautiful came into the store...they told me, we're trying to save walls here. I told them they could keep on trying to save walls, and we'll keep on trying to save lives."²⁰³

This argument raises an interesting point of the 'common sense' appreciation of clean, orderly, well-planned living environments.²⁰⁴ The assumption that a 'clean' wall is more aesthetically pleasing than one with a painting on it is puzzling.²⁰⁵ Denver based graffiti artist 'Eye Six' responded to the accusation that graffiti 'attacks' the aesthetic of the public space. "Your average person is just subservient to whatever is thrown up. Whatever building, whatever billboard is put up...They just sit on their asses; they pretty much go with the flow like all sheep do...At least we act on our feelings..."²⁰⁶ It is interesting to realise that in its resistance to the cultural domination of the public sphere, street art brings to attention that there is a cultural domination.²⁰⁷ It then becomes a test as to how a graffiti work is any less pleasing than a billboard advertisement for cat litter or a street illuminated in neon store signs.²⁰⁸ Graffiti art disrupts the monotony of these sights with its spontaneous apparition and sometimes imagery or messages.²⁰⁹

Recently the views of street art have been evolving to become more appreciative of the art form.²¹⁰ Despite being labelled a vandal at times, Banksy's works are commercially and artistically valued.²¹¹ In April 2007, a Banksy sold for almost 300,000 pounds.²¹² "A modern art collection was not complete without a Banksy."²¹³ Also Shephard Fairey's portrayal of Obama became prolific and iconic of the campaign.²¹⁴ Another artist, Mr Brainwash, designed the cover of Madonna's greatest hits Album.²¹⁵

²⁰¹ Tamara Jones "Writing's on the wall as officials get the word out about AIDS risk" *Los Angeles Times* (August 14, 1989) <<http://articles.latimes.com/>>.

²⁰² Robin Chotzinoff (1989) "Up Against the Wall." *Westword* (August 23-29, 1989) <<http://www.westword.com/>>.

²⁰³ Chotzinoff.

²⁰⁴ Ferrell, above n 1, at 180.

²⁰⁵ At 180.

²⁰⁶ Jeff Ferrell "Bombers' Confidential: Interview with Eye Six and Rasta 68." Part Two (1990) at 10.

²⁰⁷ Ferrell, above n 1, at 179.

²⁰⁸ At 180.

²⁰⁹ At 83.

²¹⁰ Bofkin, above n 6, at 261.

²¹¹ Claire Foggo and Raymond Scott "Your Street Art is My Street Art" *Idealog* (3 May, 2013)

<<http://idealog.co.nz>>.

²¹² Bofkin, above n 6, at 26.

²¹³ Banksy "Exit Through the Gift Shop" (Film, 5 March 2010) Paranoid Pictures.

²¹⁴ Brett Zongker "Obama's 'Hope' Portrait Headed To Smithsonian" *The Huffington Post* (online ed, London, 2 July 2009).

²¹⁵ "Madonna 'Celebration' artwork by Mr Brainwash, details revealed" *Art Republic* (23 November, 2009) <www.artrepublic.com>.

In New Zealand there is a more accepting and positive response to street art. For instance Canterbury Museum was one of the organisers of the ‘Oi You, Rise!’ street art festival and they were well aware of the risk that the museum might be seen as glorifying graffiti.²¹⁶ In spite of these concerns, the Canterbury Museum director was ‘flabbergasted’ by the overwhelmingly positive feedback.²¹⁷ In 2010, Auckland Art Gallery held an exhibit featuring the graffiti art of six Auckland taggers and it was one of the gallery’s most popular exhibits.²¹⁸

(2) Intention of Copyright Protection

The original intention of the copyright legislation from its inception was to protect creativity and innovation. It is said that William Hogarth and other artists petitioned Parliament to extend copyright protection to artistic works after being repeatedly preyed upon by plagiarists who undersold their prints.²¹⁹

However it seems that the law on copyright has been ‘hijacked’ by commercial enterprises and inventions with little creative merit.

The whole system of copyright is effectively based on a fundamental lie, in which fine words are used to conjure up the illusion that copyright protects literary and artistic works and serves the higher interests of the fine arts etc. But the truth is that today the law is primarily there to protect the commercial interests of the providers of various products and services, and has no regard either for the quality of these products or services or their social justification.²²⁰

This has occurred potentially to the detriment of practices that are true to the concept of ‘art’. The protection of creative exploits is perhaps because these people generally do not have the economic resources to privately enforce their rights to their works.²²¹ Street artists are an ideal example of the power imbalance between them and often commercial appropriators.

²¹⁶ Harvie, above n 198.

²¹⁷ Harvie.

²¹⁸ Farrier, above n 199.

²¹⁹ Crawford, above n 119, at 15.

²²⁰ MacMillan, above at 37, at 28.

²²¹ Wooster Collective, above n 42.

IV Conclusion

The purpose of this paper was to determine whether there is copyright in street art. An exercise in applying the Copyright Act 1994 draws the dissatisfactory conclusion that it is uncertain. This is because it is a rather novel area of copyright law that has yet to be considered by the judiciary in New Zealand. The primary concern for a street artist would be how s 73 would apply to their artworks. This is entirely to the discretion of the judicial interpretation of this provision. The author's hypothetical analysis resulted in equally plausible arguments in favour and against its applicability to street art.

At such time the judiciary consider the potential for copyright in street art, their decision and interpretation shall be heavily influenced by the relevant policy considerations. There are again equally strong policy arguments in favour and against copyright in street art.

The view of the author is that there ought to be copyright protection for street artists. Even the famously anti-copyright street artist Banksy has recently stated that "Graffiti is an important and valid art form, it would be a shame if it was killed by venture capitalism."²²² Street artists are vulnerable to commercial appropriation of their works and so they need formal protection to prevent these opportunists. Even the commercial appropriators in recent legal cases have admitted that they ought to have consulted the artist as to the use of their works.²²³

The Copyright Act ought to be revised from a twenty-first century perspective on street art. Street art used to be generally perceived as distasteful acts of vandalism. Nowadays it is celebrated as an innovative part of the public urban space.²²⁴ The change in social perception of street art from 'vandalism' to 'art' demonstrates the many changes that have occurred since the Copyright Act 1994.

Further street art is an art form worthy of legal protection. The economic and social value of some of these works deserve to be formally recognised. Earlier this year it was revealed that Banksy entered into war-torn Gaza and created a collection of artworks. He posted a short video clip on his website which brought considerable media attention to the lived reality in Gaza.²²⁵ In particular, Banksy explained to a local that an artwork of a kitten playing with a ball of yarn represented that people would rather watch cute cat videos than to address the destruction in Gaza.²²⁶ Such a work and many others like it ought to be protected as recognition of the modern day value of street art.

²²² "Banksy: 'I think a museum is a bad place to look at art'" The Guardian (online ed, London, 21 August 2015).

²²³ Kim Knight "Surreal Estate" Sunday Star Times (online ed, Wellington, 19 June 2011) <www.stuff.co.nz/sunday-star-times>.

²²⁴ Bofkin, above n 6, at 261.

²²⁵ Al Weheidi, above n 143.

²²⁶ Al Weheidi.

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