i-call working paper

No. 2020/01

Barely legal:
Interactions between Street Art and Law

Giulia Walter*

NOVEMBER 2020

ABSTRACT

In the following text, a case study is used as a litmus test to scrutinize the relationship between art and law. If an illegal street art piece is detached from its material support and sold without the consent of its creator, how does the law react? Criminal law normally categorizes graffiti as criminal damage, copyright law does not exclude illegal forms of art from its scope, so that Civil law, which establishes who is the owner of the graffiti, cannot resolve the conflict between material and immaterial rights. The Constitution anchors artistic freedom without knowing what art is. Unsanctioned street art challenges law probably more than any other artistic form. With the help of Luhmann's systems theory, the obtained results will be reformulated as an interaction between social systems and thus observed from a sociological perspective.

KEY WORDS

Graffiti, criminal damage, copyright, private property, systems theory.

* Giulia Walter, Mlaw, is an academic assistant at the chair of Prof. Dr. iur. Christoph Beat Graber at the University of Zurich. Comments are appreciated and welcome at: giulia.walter@rwi.uzh.ch

I-CALL WORKING PAPERS are the result of research that takes place at the Chair for Legal Sociology and Media Law (Professor C.B. Graber) at the University of Zurich. The papers have been peer-reviewed.

SUGGESTED CITATION: Walter, Giulia, 'Barely Legal: Interactions between Street Art and Law', *i-call Working Paper No. 01 (2020)*, Zurich, Switzerland: University of Zurich.

Published by:
i-call, Information • Communication • Art • Law Lab at the University of Zurich
Professor Christoph B. Graber, PhD
Chair for Legal Sociology and Media Law
University of Zurich, Faculty of Law
Universitätsstrasse 84
8006 Zurich
Switzerland

ISSN 1664-0144

BARELY LEGAL: INTERACTIONS BETWEEN STREET ART AND LAW

L'arte, più che conoscere il mondo, produce dei complementi del mondo, delle forme autonome che s'aggiungono a quelle esistenti esibendo leggi proprie e vita personale.

Umberto Eco, Opera Aperta (1962)

1. INTRODUCTION*

Barely Legal is not only the title of an exhibition organised by Banksy in Los Angeles back in 2006, but also a particularly fitting caption to describe the judicial status of unsanctioned street art.[1]

From simple tags, through the so-called throw-ups, until the more elaborate pieces or murals,[2] the lowest common denominator of street art practices is that they happen outside of commercial art venues. Street art grows and proliferates instead on walls, being a form of quiet resistance[3] and a status-quo-challenging phenomenon.[4] Similar to the top of an iceberg, exposed is only its smallest part. Like a hidden art performance,[5] the rest takes place under the moonlight.

---

* In the following text, pronouns of both genders will be used alternatively in order to avoid bias and provide a gender-neutral language. If it is not specified otherwise, both genders are implicitly addressed.

1 Many authors further differentiate between graffiti and street art in terms of techniques and reception. In this work the two terms will be used alternatively, meaning the same phenomenon. "*Law does not distinguish between aesthetic styles, artistic media, and the subcultural groupings of practitioners. Instead, all that matters is whether or not the image's presence is authorized*", Alison Young, 'Criminal images: The affective judgment of graffiti and street art' (2012) *Crime Media Culture*, 8 (3), pp. 297-314, at p. 299.Similar statements: Margaret L. Mettler, 'Graffiti Museum: A First Amendment Argument for Protecting Uncommissioned Art on Private Property' (2012) *Michigan Law Review*, 111 (2), pp. 249-282, at p. 254.

2 Marisa Gomez, 'The Writing on Our Walls: Finding Solutions through Distinguishing Graffiti Art from Graffiti Vandalism' (1993) *University of Michigan Journal of Law Reform*, 26 (3), pp. 633-707, at p. 647.

3 Jeff Ferrel, *Crimes of Style*, in Greer Chris (ed.), *Crime and Media: A Reader*, Abingdon: Routledge, 2010, at p. 389.

4 Ibid., at p. 371 notes how graffiti writing will always escape conventional channels of authority and aesthetics simply because of it naturally taking place outside of routinized daily work and classical art structures.

5 See Young, supra note 1, at p. 298 and Rémi Jaccard, 'Die Umgebung seiner Kunst ist nie Zufall. Interview by Sandra Hohendahl-Tech' (2019) *reformiert*, 1, at p. 3. On understanding street art as a performance, see Tatiana Flessas and Linda Mulcahy, 'Limiting Law: Art in the Street and Street in the Art' (2018) *Law Culture and the Humanities*, 14 (2), pp. 219-241, at p. 235 and 239.

Its outsider and unprivileged position in both the artistic and legal realms, makes street art interesting to be looked at from both perspectives. As Luhmann would put it, illegal street art makes the systems of art and law irritate each other, creating tensions that are to be analysed in the following.

In order to do so, I am approaching the problem with a case study, solved as if it happened under the Swiss jurisdiction. The case is about a stencil by Banksy, which was detached from the material support on which the graffiti was painted and sold by the latter's owner.[6] Similar circumstances happened recently in England, where an artwork called "Seasons Greetings", which had appeared just before Christmas 2018 on a garage in Wales, was sold by the corresponding property owner just after having been confirmed being a "Banksy".[7] To consider in the resolution picture is also Banksy's categorically disapproving attitude towards the removal and sale of his (street) art.[8] The trade in artworks taken from the street is generally seen as problematic and antithetical to the ethos of graffiti and street art,[9] but is nonetheless a growing phenomenon[10] which has not only concerned Banksy.[11]

In this first, exclusively legal part, my aim is not to provide a perfect and ready-to-use juridical resolution, but rather to apply norms in order to highlight what I could define as a "malfunctioning" of the legal response to illegal graffiti. While doing so though, I will often try to adopt the perspective of what Luhmann defines as an observer of second order, that is, I will observe how law observes the described case. In the second part of this work I will try to describe what is happening between the art and the law systems by using Luhmann's theory of autopoietic social systems.[12]

2. THE UNGRASPABLE FREEDOM OF ARTISTIC EXPRESSION

Back in 1917, when Marcel Duchamp took the later-to-be "Fountain" from its original context (a restroom) and signed it, the Executive Committee of the Society of Independent Artists denied its character of "art". They described it instead as a "gross and indecent object, which should not be exhibited due to its basic association with

---

6 'La petite fille au ballon rouge de Banksy arrachée et vendue', available at https://www.konbini.com/fr/tendances-2/oeuvre-banksy-arrachee-vendue/ (all websites were last accessed on the 30th June 2019).

7 'Banksy's "Seasons greetings" transfer date announced', available at https://www.brandler-galleries.com/banksys-seasons-greetings-transfer-date-to-newly-established-street-art-museum-in-port-talbot-announced/.

8 When the "*Stealing Banksy?*" exhibition took place in London in 2014, not without irony he wrote on his website: "*This show has nothing to do with me and I think it's disgusting people are allowed to go displaying art on walls without getting permission*". See also https://www.instagram.com/p/BmgWWO9BvwT/: In this Instagram post, Banksy underlines that he "*does not charge people to see his work*". In another artwork, he explicitly calls street art buyers "morons", see: https://www.wikiart.org/en/banksy/i-can-t-believe-you-morons-actually-buy-this-shit-2007.

9 Peter Bengsten, *Stealing from the public. The value of street art taken from the street*, in Ross Jeffrey Ian (ed.), *Routledge Handbook of Graffiti and Street Art*, Abingdon: Routledge, 2016, at p. 422.

10 Other artists such as French "*Invader*" or "*Blu*" have also been affected by this trend. Some even talk about the so-called "*Banksy effect*", see Heike Derwanz, *Street Art-Karrieren. Neue Wege in den Kunst- und Designmarkt*, Bielefield: Transcript, 2013, at p. 59.

11 'Street works by Banksy, Kenny Scharf and more at auction', available at https://blog.vandalog.com/2014/02/street-works-by-banksy-and-more-at-auction/.

12 Margot Berghaus, *Luhmann leicht gemacht*, Stuttgart: utb GmbH, 2012, at p. 62.

bathrooms and excreta". It took 87 years for the "Fountain" to be recognized as the most influential piece of art of all time and be awarded with the Turner Prize.[13] Eleven years later, "Bird in Space" by sculptor Constantin Brancusi, was about to enter the customs of the United States. The Custom Court classified it as a "manufacture of metal", excluding it from the tax exemption reserved to art objects because it did not look like a bird in its true proportions. It took an appeal and the intervention of the art world for the courts to acknowledge that abstract sculptures deserved to be called art too.[14] To this day, mosaics may find legal protection in some legal orders while in others not, because they would not be classified as works of art.[15] Both cases concerned fine art pieces and their already renowned creators. Nonetheless, they did not escape the yoke of a too narrow legal definition of art.

Since January 1st, 2000, Article 21 of the Federal Constitution of the Swiss Confederation (from now on, BV) consecrates the freedom of artistic expression, asserting on one hand the personal freedom of the individual and on the other, the fundamental role artistic freedom plays in a democracy.[16] To have a glance at the description of art made by constitutional commentaries can provide us with an insight of what law thinks about art. One of the most important legal commentaries in Switzerland opens by stating that the constitutional notion of art should be "wide", and its content not defined by courts.[17] Judges should abstain from becoming art critics.[18] Reaching out for the approval of the artistic community presents nonetheless the risk of jeopardizing less established or controversial forms of art.[19] Public recognition shows the same problem, as it often appreciates something as art only with a certain delay.[20] In fact, the intrinsic capability that art has to mutate, disrupt norms and challenge the *status quo*, makes an open notion of art propitious to its thriving, or

---

13 Eltjo J.H. Schrage, *Die Regeln der Kunst, juristische Abenteuer um Kunst und Kultur*, Baden-Baden: Dike Verlag, 2009, at p. 32.

14 Peter Mosimann and Marc-André Renold in Marc-André Renold et al. (eds), *Kultur Kunst Recht*, Basel: Schulthess, 2020, at N 47 ff. ad § 1.

15 Bert Demarsin et al. (eds), *Art & Law*, Brugge: Hart, 2008, at p. 33 and 45: In the United States, a mosaic does not qualify as a work of art under the definition of section 101 of the Visual Artists' Rights Act of 1990 (VARA).

16 Judith Wyttenbach, *Art. 21 BV*, in Bernhard Waldmann et al. (eds), *Basler Kommentar der Schweizerischen Bundesverfassung*, Basel: Schulthess, 2015, N 4 *ad* Art. 21 BV.

17 Ibid., at N 6 *ad* Art. 21 BV.

18 As "ugliness", since around the middle of the 19th century, is sometimes explicitly at display in works of art, for judges to deal with the definition of art has become increasingly difficult. See Haimo Schack, 'Schönheit als Gegenstand richterlicher Beurteilung' (2008) *Zeitschrift für Literaturwissenschaft und Linguistik*, 152, pp. 84-100. This is also true for US courts, for example in Cohen v. California, 403 U.S. 15, 25 (1971) it is stated: "*One man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual*".

19 Peter Mosimann and Felix Uhlmann in Marc-André Renold et al. (eds), *Kultur Kunst Recht*, Basel: Schulthess, 2020, at N 12 ad § 2.

20 See Wyttenbach, supra note 16, at N 6 *ad* Art. 21 BV,Schrage, supra note 13, at p. 31, Renold and Uhlmann, supra note 19, at N 8 ff. *ad* § 2. The recognition should only be classified as an indication, not as proof for the presence of art: Martina Merker , 'Der Mensch im Zentrum der Schöpfung – Können Menschen Kunstwerke sein?' (2017) *KUR*, 2, pp. 35-38.

suitable to describe it.[21] The doctrine seems to recognize this.[22] Maybe this ungraspability resides right at the core of artistic freedom, so that art is best outlined by the absence of a proper description. And yet, if the State is to protect and support art (so Article 69 para. 2 and Article 71 BV, but also through copyright law), it must first understand what it is.[23] The conflict between systems – art and law – incarnates itself in a paradox: on one side, the autonomy of art; on the other, its hetero-determination by state law.[24]

As possible limits to artistic freedom, the commentary mentions the protection of personality, the offence of defamation, the criminal damage, the representation of acts of violence and of pornography, and copyright law.[25] The case of criminal damage is particular, as to be limited is not the artistic content, but its *spatiality*.[26] This limitation can thus emerge into a conflict between the fundamental guarantee of ownership (Article 26 BV) and freedom of art (Article 21 BV), where normally the first prevails on the latter.[27] Although freedom of art provides no all-round protection against penal sanction, the criminal code is to be interpreted in consistency with the BV.[28] To do so, the judge should adopt the perspective of neither an artist, nor of a random, average man, but rather of an "artistically broad-minded observer". According to the Swiss Federal Court, this should work out even without resorting to the opinion of an expert.[29] If the cultural value of the artwork is held to be high, it is possible under certain circumstances for the judge to favour the freedom of artistic expression vis-à-vis the suffered disadvantage, be this a damage to one's property, faith, integrity, etc.[30]

---

21 Meyer Christoph and Hafner Felix, *Art. 21 BV*, in Bernhard Ehrenzeller et al. (eds), *Die Schweizerische Bundesverfassung, St. Galler Kommentar*, Zürich: Dike, 2014, N 3 *ad* Art. 21 BV, also stated in BGE 131 IV 64 ff. E. 10.1.3 S. 68.

22 Haimo Schack, *Kunst und Recht, Bildende Kunst, Architektur, Design und Fotografie im deutschen und internationalen Recht*, Tübingen: Mohr Siebeck, 2009, at N 2, Andreas Auer, *La liberté de l'art ou l'art de libérer la conscience : un essai* and Christoph Beat Graber, *Der Kunstbegriff des Rechts im Kontext der Gesellschaft*, in Institut suisse de droit comparé, Lausanne et Centre du droit de l'art, Genève (ed.), *Liberté de l'art et indépendance de l'artiste*, Zürich: Schulthess, 2004.

23 See Graber, supra note 22, at p. 111: Thesis nr. 4 declaims: *"The legal definition of art is flawed with imperfections, but it is unavoidable, for what cannot be defined, cannot be protected"*.

24 See Graber, supra note 22, at p. 94.

25 See Meyer and Hafner, supra note 21, at N 11-15 *ad* Art. 21 BV.

26 See Young, supra note 1, at p. 310 f.: Street artwork challenges notions of the *place* of art. In a legal context, *spatiality* summons the entanglement of the city and the law in the so-called "*lawscape*", at times in symbiotic interplay, at others in a quest for visibility, see Andreas Philippopoulos-Mihalopoulos and Sharron FitzGerald, 'From Space Immaterial' (2008) *Griffith Law Review*, 17, pp. 438-453, at p. 439 ff..

27 See Meyer and Hafner, supra note 21, at N 14 *ad* Art. 21 BV. To note (Noteworthy?) is that the fundamental guarantee of ownership anchored in Art. 26 BV covers per se intellectual property, understood as the absolute proprietary control on an immaterial object, too. The guarantee of ownership branches out in various protected aspects, among which is the marketability of copyright. Such specific protections are concretized in the Copyright Act (URG). For a comparison between conferred powers on the material and on the immaterial thing, see Herbert Zech and Christian Anger, *Die Zerstörung urheberrechtlich geschützter Werke*, in Roland Fankhauser et al. (eds), *Das Zivilrecht und seine Durchsetzung: Festschrift für Professor Thomas Sutter-Somm*, Zürich: Schulthess, 2016, at p. 1154 ff.

28 Giovanni Biaggini, *Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft*, Zürich: Orell Füssli, 2018, at N 9 *ad* Art. 21 BV.

29 BGE 131 IV 64 E. 10.1.3 S. 68 f.

30 Regina Kiener, Walter Kälin and Judith Wyttenbach, *Grundrechte*, Bern: Stämpfli, 2018, at N 16 *ad* § 25.

Keeping in mind the depicted constitutional frame, which without any doubt covers Banksy's stencils,[31] as well as the extent of its scope for the entire legal order,[32] we will now move towards the actual resolution.

3. THE BANKSY-CASE

As previously mentioned, I will start to approach the topic with what a law scholar can do best – solve a case. In the following chapter, I will propose a legal resolution of the case presented in the introduction. Parallels and confrontations with other legal systems other than the Swiss one will be drawn. The purpose is to look for frictions and not for a rigid, black and white legal frame. *Argumenta ad absurdum*, rather than convenient juridical motivations will be used here in order to stretch the legal "comfort zone" to its critical point. The hope is that by doubting and discussing the standardized solutions proposed by commentaries and jurisprudence, the hidden tensions characterising this case will arise.

3.1 CRIMINAL LAW: ART OR VANDALISM?

In Switzerland as well as in many other countries, there is no graffiti-specific offence.[33] The act of painting unsanctioned graffiti on someone's property is therefore punishable on complaint under Article 144 of the Swiss Criminal Code (from now on, StGB).[34] The protection purpose of the so called "criminal damage" is the factual and unaffected proprietary control over the thing.[35] The most important aspect of this proprietary control is the ability of the owner to determine her property's condition and that of other rights holders to undisturbedly exercise their rights on it.[36]

The punishable act can be summed up in the formula of "causing a not so easily reversible change of the condition of the thing which undermines a legitimate interest",[37] and while trivial changes are not enough to establish liability, every other significant intervention aiming to change, impair or reduce the sightliness of the thing

---

31 For the constitutional frame for graffiti in the United States, see Mettler, supra note 1, at p. 264 ff. As she emphasizes, graffiti neither qualify *per se* for a reduced protection under the 1st Amendment because of their content, nor fail the *Brandenburg* test for inciting violence or crime.

32 Jacques Dubey, *Droits fondamentaux,* Basel: Schulthess, 2018, at p. 39.

33 Ian Edwards, 'Banksy's Graffiti: A Not-so simple Case of Criminal Damage?' (2009) *The Journal of Criminal Law*, 73, pp. 345-361: United Kingdom has a similar legal frame. Australia however passed the Graffiti Control Act in 2001 which criminalizes writers who "*mark graffiti*" without authorization.

34 Reinhard Moos, 'Die Strafbarkeit von Graffiti-Sprayern in Österreich und in der Schweiz' (2001) *Juristische Rundschau*, 3, pp. 93-99.

35 Philippe Weissenberger, *Art. 144 StGB*, in Marcel Alexander Niggli and Hans Wiprächtiger (eds..), *Strafgesetzbuch II*, Basel: Schulthess, 2019, at N 2 *ad* Art. 144 StGB.

36 Andreas Donatsch, *Strafrecht III - Delikte gegen den Einzelnen,* Zürich: Schulthess, 2018, p. 209. Marcel Niggli, *Das Verhältnis von Eigentum, Vermögen und Schaden nach schweizerischem Strafgesetz*, Diss., Zürich, 1992, at N 42 and N 127 clarifies that the property *right* itself is not the object of protection, for this persists undisturbed after every intervention. The protected good is described as the actual *relation* between owner and property. Hence, it is a functional definition and it describes the accreditation of a degree of freedom ("*Freiheitsermächtigung*") to the right holder by the law. This freedom is the real object of protection in Art. 144 StGB.

37 Michel Dupuis et al., *Petit Commentaire du Code Pénal,* Basel: Helbing, 2017, at N 11 *ad* Art. 144 CP.

is considered a damage.[38] Theoretically, this includes artistically significant interventions too, such as graffiti – at least this is what is stated in the classical example of the "Zurich Sprayer" judgement[39] – and even the spraying of a new graffiti on a previously damaged wall.[40] So, in Switzerland, the purpose of the norm is to protect the owner's right to freely dispose of his property, which expresses itself in the power to determine its destiny.[41] Interestingly, in the United Kingdom juries apply a different conception of damage, where the focus is on the objective condition of property rather than on its owner's subjective will. Crucial are the tests, developed in order to decide if property was damaged or not based on its value and use, and on whether these had been impaired.[42] Another possibility, less common, is to verify whether the owner would incur expense should he opt for the removal. In *Hardman* though, the Court found that painting water-soluble graffiti on a public street constituted damage because of the expenses to the detriment of the local authority for cleaning the pavements.[43] The verdict was controversial, as the graffiti, painted on behalf of the Campaign for Nuclear Disarmament, would have been washed away with the first rains.[44] Switzerland instead classifies the criminal damage as an offence against ownership ("Eigentumsdelikt").[45] To classify an act as criminal damage only because cleaning the wall led to expenses causes – according to the Swiss – an erosion of the institution of ownership.[46]

Because at stake is a work by a renowned artist, the already thin line between what is considered as vandalism and what as art is particularly permeable.[47] Even the Basler Commentary dedicates a paragraph to this uncomfortable situation where, by applying the legal frame word-by-word, a work by Banksy could be prosecuted as a damage while it is actually an episode of extreme good luck.[48]

In such a situation, expedients to avoid the culpability of the author, are available. First of all, by acting on the procedural side one could opt for a liberal application of

---

38 See Weissenberger, supra note 35, at N 22 and 66 *ad* Art. 144 StGB.

39 See Weissenberger, supra note 35, at N 67 *ad* Art. 144 StGB. See also: 'Kein Urteil gegen den «Sprayer von Zürich', available at https://www.nzz.ch/zuerich/kein-urteil-gegen-den-sprayer-von-zuerich-ld.1320027. Worth pointing out is the sudden change of assessment around Naegeli's works: Whilst in 1981 he had been condemned unconditionally to nine months of prison, in 2004 and 2009 his graffiti have been restored (see Biaggini, supra note 28, at N 10 *ad* Art. 21 BV).

40 BGE 120 IV 319 E. 1 S. 320, E. 2 S. 321: Central is the will of the rights holder, which is equally impaired if the thing had previously been painted.

41 See Moos, supra note 34, at p. 98.

42 See Edwards, supra note 33, at p. 348 f., who lists different versions of the "*value or usefulness*" test used from different judges in the United Kingdom.

43 See Edwards, supra note 33, at p. 349.

44 *Hardman v. Chief Constable of Avon and Somerset* [1986] Crim LR, p. 330.

45 As opposed to the more general term "*Vermögensdelikte*", that is, "*offences against property*".

46 See Niggli, supra note 36, at N 273 and 474.

47 Not only with Banksy, but also with the notorious Harald Naegeli, the "*Sprayer von Zürich*". Whilst in the 80s, a court in Zürich condemned him for criminal damage, in a more recent quarrel the judge desisted from a sentence altogether, see: 'Kein Urteil im Prozess von Harald Nägeli', available at https://www.srf.ch/news/regional/zuerich-schaffhausen/vorwurf-der-sachbeschaedigung-kein-urteil-im-prozess-von-harald-naegeli.

48 See Weissenberger, supra note 35, at N 68 *ad* Art. 144 StGB: Sometimes, and surely in the case of the brick garage in Wales, the work of art is clearly more valuable than the building on which it was painted.

the principle of opportunity.[49] This would allow the authorities to exceptionally not prosecute a crime by reasons of insufficient or missing interest of the damaged party (or of the community) in the prosecution of the author. According to Article 8 para. 1 of the Swiss Criminal Procedure Code and to Article 52 StGB, prosecution can be waived when there is no need for a penalty, that is, when the culpability and the consequences of the act are, cumulatively, negligible.[50] A similar path, opened by case law, as prosecution authorities should not endorse the chicane,[51] is the abuse of the right to submit complaint.[52] This shall be applied when the person insisting on the prosecution is only motivated by a "whim" and is thus abusing her rights. In our case, the owner actually gained from the sudden appearance of a Banksy on his building; to comply with the request of punishing his benefactor would be inappropriate.

Other possible *escamotages* are arguing that a legitimate interest on the unaltered condition of the property is missing, or that the intervention was not intense enough to justify a complaint, so by doubting that the conditions of the article have actually been met.[53] On the subjective side, it can be argued that there was no intention to cause a damage, meaning that a mistake of fact occurred. The artist must have been honestly convinced that her work constituted art rather than damage.[54] If Banksy is convinced to have created art rather than tort, his error cannot be used to his disadvantage. A not irrelevant burden of proof and the necessity in Switzerland of a high degree of mistake intensity make this last solution virtually impracticable.[55]

Bypassing a rigid application of Article 144 StGB is possible and even suggested by the dominant doctrine but means whittling the thin line between art and damage. One isolated case of tolerance will not delete the existing blurriness of artistic vandalism in law. Graffiti *can* be art: art and crime are not mutually exclusive, but in law the only way to escape one category is to be adjudicated to the other one.[56]

And what should be the guidance for judges or deciding whether a graffiti can be called art or not? As the jurisprudence and the doctrine allow courts the discretion to at least potentially prevent some *writers*[57] from prosecution using this or that loophole,[58] it is important to have criteria based on which drawing the line would not appear arbitrary. But what are these? Is it possible for judges, who have a legal education (!),[59] to autonomously decide a complex question of the art system? The

---

49 See Weissenberger, supra note 35, at N 68 *ad* Art. 144 StGB.

50 Gerhard Fiolka and Christof Riedo, *Art. 8 StPO*, in Marcel Alexander Niggli et al. (eds.), *Schweizerische Strafprozessordnung*, Basel: Schulthess, 2014, N 28 *ad* Art. 8 StPO.

51 See Dupuis et al., supra note 37, at N 15 *ad* Art. 144 CP.

52 Ibid., N 15 *ad* Art. 144 CP and BGE 120 IV 319 E. 2 S. 322.

53 See Weissenberger, supra note 35, at N 68 *ad* Art. 144 StGB.

54 See Edwards, supra note 33, at p. 348 ff.

55 The "*Sprayer von Zürich*" tried arguing in that direction and failed, see sentence Naegeli v. Switzerland of the 13th October 1983 (EuGRZ 1984 p. 259 ff.).

56 See Edwards, supra note 33, at p. 346.

57 Graffiti artists are called writers.

58 Ibid., 350.

59 See Young, supra note 1, at p. 308 depicts the elucubrations of Australian judges who see graffiti and street art merely as a problem to be erased, without dwelling upon the various motivations behind the phenomenon, the differentiated artistic value of it and even without considering whether an elaborated street art piece or a rougher graffiti is at stake.

Federal Court answers affirmatively.[60] For judges to simply rely on the elucubrations of the art market appears too rushed: writers who are "credited" by the art market escape a prosecution, those who are not will be considered at best as daubers. This is not acceptable as it results in a factual and unjustifiable privilege-building.[61]

3.2 CIVIL LAW OR WHO OWNS A WORK OF STREET ART?

Banksy painted the graffiti on the surface of a house owned by a stranger. The house is a building, and thus according to Article 655 para. 2 s. 1 of the Swiss Civil Code (from now on, ZGB) object of material property. In the general provisions about ownership we find consecrated, in Article 642 para. 2 ZGB, the so called principle of accession ("Akzessionsprinzip").[62] According to this basic tenet, the owner of a thing automatically owns its integral parts, so that these end up sharing the juridical fate of the main thing.[63] Integral parts in the abovementioned sense are – among others – those which have been fixedly and permanently attached to the main object of ownership with the use of construction materials.[64] The owner of the integral part loses her ownership rights from the moment in which the conditions mentioned above verify.[65]

In our case, Banksy is indeed the owner of the "construction materials" (i.e. the spray cans). But the graffiti has been fixedly and permanently bonded with the property of a third-party. In this case intellectual property has been attached to material property. A "classic" loss of ownership is therefore not in sight (exception made for the amount of spray paint used for the graffiti), as Article 671 ZGB describes rather the union of two material rights. The principle of accession can thus only find application through an analogy, STRAUB argues.[66]

---

60 See above, p. 5.

61 See Niggli, supra note 36, at N 477. For the art history perspective, see Wolfgang Ullrich, *Die Kunst der Preise. Wie der Markt die Kunst macht*, in Matthias Weller et al. (eds), *Kunst im Markt – Kunst im Recht*, Baden-Baden: Nomos, 2010, at p. 17 f.: He suggests that the art market could damage art as it has a conservative stance towards it. He then suggests that the price paid for art serves as "*value postulate*" and is constitutive for the artwork quality of certain pieces.

62 Wolfgang Wiegand, *Art. 642 ZGB*, in Thomas Geiser et al. (eds), *Zivilgesetzbuch II*, Basel: Schulthess, 2015, N 1 *ad* Art. 642 ZGB. Peter N. Salib, 'The Law of Banksy: Who Owns Street Art?' (2015) *The University of Chicago Law Review*, 82, pp. 2293-2329: Similarly, in the United States' common law of accession, the principle signifies "*the acquisition of title to personal property by its conversion into an entirely different thing by labor bestowed on it or by its incorporation into a union with other property*". The question becomes then, when does property become so incorporated into another, so that it triggers accession. There is no consistent doctrine on the matter. However, courts in the USA should adopt a pragmatic approach and resort to the principle only when it represents the optimal solution to assign ownership.

63 Stephanie Hrubesch-Millauer, Barbara Graham-Siegenthaler and Roberto Vito, *Sachenrecht*, Bern: Stämpfli, 2017, at N 92 *ad* § 4, Paul-Henri Steinauer, *Les droits réels*, Bern: Stämpfli, 2012, at N 1060 f.

64 The intensity of the physical tie between things is an indication of the presence of an integral part, see Stephan Wolf, *Art. 642 ZGB*, in Jolanta Kren Kostkiewicz et al. (eds), *Kommentar zum Zivilgesetzbuch*, Zürich: Orell Füssli, 2016, at N 4 *ad* Art. 642 ZGB.

65 See Hrubesch-Millauer et al., supra note 63, at N 94 *ad* § 4.

66 P.C. Straub, 'Gedanken zum Widerstreit zwischen "*geistigem Eigentum*" und sachenrechtlichem Eigentum – Eine Erwiderung auf den Aufsatz von Oberrichter Dr. Richard Frank' (1980) *SJZ*, 76, pp. 44-50. Dissenting: Horst Böttcher, *Die urheberrechtliche Erschöpfung und ihre Bedeutung im digitalen Umfeld*, Diss., Bern: Stämpfli,

STRAUB'S opinion enlightens what would otherwise be dulled. As long as the artist owns his own artwork, that is, as long as intellectual *and* material property coincide, frictions are impossible.[67] The minute material property is transferred to a third person, an invisible and exclusively legal division within the thing is created.[68] If the copyright holder and material owner happen to disagree, conflicts are inevitable.[69]

The fact that the graffiti was then detached and sold against the will of its creator raises an irritating question: to what extent can the copyright owner actually forbid the destruction or the removal of his publicly accessible artworks? Usually, although such an automatic primacy is stated nowhere in the law,[70] this division loosens up with the property right prevailing over copyright.[71] Of course in our case the unsanctioned birth of the artwork does not help its author in obtaining what he wants. But around this, disagreement still prevails.[72]

3.3 COPYRIGHT LAW: BALANCING INTERESTS

In this section I will deal with the question, if – by removing and selling the stencil – the property owner somehow violated Banksy's immaterial property rights.

As a preliminary question, we must verify if Banksy's graffiti is copyrightable. Article 2 of the Federal Act on Copyright and Related Rights (from now on, URG) contains a definition of a work, which is "any literary and artistic intellectual creation with an individual character, irrespective of its value or purpose".[73] The protection starts in the moment of the creation of the work (Article 29 URG). The (two) elements of the legal definition of a work are the perceptible expression of intellectual content and its individuality, meaning unicity, originality. Illegality does not constitute an obstacle for the constitution of copyright.[74] Both elements can unproblematically be affirmed for Banksy's stencil.

2013, p. 67, who says that the principle of accession is not applicable, and Richard Frank (1979), *Der Wandbesprayer*, p. 224, who says the principle is applicable without any problems.

67 Magda Streuli-Youssef, *Warum ein Urhebervertragsrecht?*, in Magda Streuli-Youssef (ed.), *Urhebervertragsrecht*, Zürich: Schulthess, 2006, p. 6 f. and Sandra Sykora, *Kunsturheberrecht. Ein Praxisleitfaden für Sammler, Kunstexperten, Kuratoren, Restauratoren und Juristen*, Zürich: Dike Verlag, 2011, at p. 99.

68 Florian Schmidt-Gabain, *Kaufvertrag*, in Andrea F.G. Raschèr and Mischa Senn (eds), *Kulturrecht – Kulturmarkt*, Zürich: Dike Verlag, 2012, p. 227, Streuli-Youssef (2006), 7 and Zech and Anger, supra note 27, at p. 1150.

69 See Schack, supra note 22, at N 156. Similarly in German law, where the corporeal work is covered by the rules of the BGB, while the intellectual work is covered by the rules of Copyright law, because as immaterial entity it does not qualify as a thing under § 90 BGB, see Alexander Jänecke, *Das urheberrechtliche Zerstörungsverbot gegenüber dem Sacheigentumer*, Diss., Berlin: Peter Lang, 2003, p. 37.

70 See Straub, supra note 66, at p. 44 and Böttcher, supra note 66, at p. 65. For Germany see Jänecke, supra note 69, at p. 26. Art. 641 ZGB as well as § 903 BGB, which similarly state that the owner can *ad libitum* dispose of his property, however only within the limits set by law and by the rights of others. Commentaries of Art. 641 ZGB do not envisage the possibility of a limit set by copyright, but this view is sometimes upheld by minor doctrines. Additionally, the Federal Supreme Court states in BGE 117 II 466 E. 4 S. 471 that the collision between material and immaterial property is regulated nowhere.

71 For the case of architecture, see: BGE 117 II 466 E. 5a S. 474. Today anchored in Art. 12 para. 3 URG.

72 See Jänecke, supra note 69, at p. 26.

73 Manfred Rehbinder and Adriano Viganò, *Kommentar zum Urheberrecht*, Zürich: Orell Füssli, 2008, at N 1 *ad* Art. 2 URG.

74 Denis Barrelet and Willi Egloff, *Das neue Urheberrecht. Kommentar zum Bundesgesetz über das Urheberrecht und verwandte Schutzrechte*, Bern: Stämpfli, 2020, at N 18 *ad* Art. 2 URG and Alois Troller, *Immaterialgüterrecht Vol. 1: Patentrecht, Markenrecht, Muster- und Modellrecht, Urheberrecht, Wettbewerbsrecht*, Basel: Helbing

Ascertained the quality as "work", we are now to understand if a violation of his rights took place. In order to do this, it is necessary to define the scope of his rights. Article 9 URG states that the author has an exclusive right on her work. This *erga omnes* exclusivity makes it similar to a material property right and includes economic as well as moral rights.[75] Economic rights are anchored in Article 10 URG, which contains an exemplary list of possible uses of the work,[76] while moral rights can be found in Article 11 URG, as well as in other provisions.[77]

Banksy never wished to economically exploit the piece. BARRELET/EGLOFF recognize nonetheless what they call an "ideal component" of Article 10 URG.[78] This should enable the author to rule out the buyers he dislikes, and the uses that he feels are not compatible with his work's nature.[79] It seems these rights could have been impaired: Banksy was against the commercial use of his work, that he wanted to stay freely visible. The fact that the graffiti became a commodity is also very incongruous: is there a more incompatible use than to expose it in a gallery or in a private house?

Moral rights include the right of the author to oppose violations of the work's integrity.[80] Interventions increasing the work's value can be contrary to the author's will, and thus be subsumed under Article 11 URG.[81] While a mere technical modification of the work (like its displacement) shall not be considered as a breach, using the work for a purpose other than the one intended by the artist, can be considered one.[82] The work's site specificity is to take into account, as contemporary art often deploys its meaning only through the context in which it is exposed or it has been created.[83] Banksy's stencil was site-specific,[84] and this aspect constituted such an important part of the work, that without it, it is impoverished from its meaning.

Anyway, to be considered are obviously also those conflicting but legitimate interests of the building owner.[85] Some of the criteria to take account of are, i.a., the value of the work and its specific function or purpose, the kind of intrusion in the

Lichtenhanhn, 1993, p. 368 and Frank, supra note 66, at p. 223. This outcome might be different in France, see Shane Burke, *Graffiti, Street Art and Copyright in France*, in: Enrico Bonadio (ed.), *Graffiti Street Art and Copyright in France*, Cambridge:Cambridge University Press, 2019, p. 175 ff., where illegality might play a role in the eligibility for copyright.

75 BGE 117 II 466 E. 3 S. 470.

76 Herbert Pförtmüller, *Art. 10 URG*, in Barbara K. Müller and Reinhard Oertli (eds), *Stämpflis Handkommentar Urheberrechtsgesetz (URG)*, Bern: Stämpfli, 2012, N 1 *ad* Art. 10 URG.

77 Ibid., N 1 *ad* Art. 11 URG.

78 For how exactly Art. 11 URG and the moral rights anchored therein imply an economical character as well, see Barrelet and Egloff, supra note 74, at N 1 *ad* Art. 11 URG.

79 See Barrelet and Egloff, supra note 74, at N 2 *ad* Art. 10 URG.

80 See Barrelet and Egloff, supra note 74, at N 2 *ad* Art. 9 URG.

81 Gitti Hug, in Barbara K. Müller and Reinhard Oertli (eds), *Stämpflis Handkommentar Urheberrechtsgesetz (URG)*, Bern: Stämpfli, 2012, N 1 *ad* Art. 11 URG. Here, the similarity with the property owner's interests on her thing is striking (see p. 6).

82 See Barrelet and Egloff, supra note 74, at N 5 and at 6a *ad* Art. 11 URG.

83 See Sykora, supra note 67, at p. 109 f.

84 Graffiti are often site specific. This was particularly evident in the case of Banksy's "*Season Greetings*", denouncing pollution in the area of Port Talbot.

85 BGE 117 II 466, E. 4 S. 471 f. lists the views of different authors on the matter of modifications of architectural works. All share the importance of the appreciation of the interests at stake. See Sykora, supra note 67, at p. 100 f. pleads for such an appreciation too.

property and its intensity, the extent to which the intrusion is publicly perceptible[86] and the necessity of the intervention (in this case, the removal), where also aesthetically motivated interventions, according to BACHMANN, shall not be excluded *a priori*.[87] For works of the visual arts that escape a logic of "purpose" this margin of change is conspicuously reduced.[88] In our case, the owner might have not liked the sudden mundane attention, coupled with the flow of tourists the graffiti garnered around his property. He could have not agreed with the message of the graffiti, which is often political, or polemic. He could have not liked its aspect, or the fact that it was almost like a *souvenir* of a trespass. So, he might actually have had good reasons to get rid of the graffiti besides the rather evident economic interests.

Following the above, the interests of the copyright owner run contrary to the ones of the owner of the material support. As previously mentioned, this is exactly when the ownership "splitting" becomes problematic, becoming what BONADIO calls a "strong tension".[89] The only stances in which the URG pronounces itself on this conflict are Article 12 para. 3 and Article 15 URG. In the legislative materials to the 1989 amendment of the URG, the modification right of the owner of a building has been reinforced. The architect can only oppose herself to defacements, disfigurations and severe impairments upon the condition that these actually harm her personality rights under Article 11 para. 2 URG.[90] This stance was also confirmed in the already cited BGE 117 II 466 that provided no extracontractual personality right for the architect to an undiminished integrity of her work.[91] Copyright law only protects from extreme changes; the rest has to be forbidden via contractual agreement. In the same decision the Court devoted much importance to the use orientation of architectural works. Legitimate interests of the architect find a dead end at the adaptability of the building to its (new) function, where the blunt augmentation of its profitability is included.[92] For what concerns a work of the visual arts, the Swiss Federal Court stated in an antecedent decision that personality rights grant the author the right to file for injunctive relief against who causes an unauthorized modification of the work, even if thereby the work is improved or valuably completed.[93] Hereby, the fundamental difference between architecture and visual art was stated. At this point, to decide is whether a graffiti painted on a building qualifies for being treated as architecture (because the building has a purpose) or as a general work of art (because the graffiti itself has no purpose). If we opt for the first qualification, the owner will probably prevail in the balancing of interests, as the court will give importance to the

---

86 Jens Felix Müller, *Religiöse Kunst im Konflikt zwischen Urheberrecht und Sacheigentum. Unter besonderer Berücksichtigung von Kirchenbauten*, Diss., Tübingen: Mohr Siebeck, 2011, at p. 241 f.

87 BGE 117 II 466, E. 4 S. 471 f. for the case of modifications of architectural works. Markus Bachmann, *Architektur und Urheberrecht*, Diss., Freiburg, 1979, at p. 338 f.

88 See Sykora, supra note 67, at p. 100.

89 Enrico Bonadio, 'Graffiti Gets VARA Protection: The 5Pointz Case' (2018), available at: https://ssrn.com/abstract=3135118, at p. 20.

90 Botschaft zu einem Bundesgesetz über das Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz, URG), zu einem Bundesgesetz über den Schutz von Topographien von integrierten Schaltungen (Topographiengesetz, ToG) sowie zu einem Bundesbeschluss über verschiedene völkerrechtliche Verträge auf dem Gebiete des Urheberrechts und der verwandten Schutzrechte vom 19. Juni 1989, BBl 1989 477 ff., p. 531 f.

91 BGE 117 II 466 E. 5 S. 474.

92 BGE 117 II 466 E. 5 S. 475.

93 BGE 114 II 368 E. 2 S. 370.

maintenance of the building's purpose, or to the gradual modification of it. If we treat the graffiti as a work of the visual arts, it should enjoy absolute protection. DE WERRA comes to the conclusion that on such works the rules for architectural works should not be applicable, as a purpose is lacking.[94] As unfair as it may seem, that an illegal graffiti could be protected by the law, let us remember the findings under the criminal law chapter: in exceptional cases, courts could actually *undo* the wrong and consider it as plain art. The unsanctioned nature would therefore play no role other than in the balancing of the interests at stake.

4. LUHMANN'S SYSTEMS THEORY

The following part's *leitmotif* will be Luhmann's systems theory, which by design is a universal theory.[95] As we saw, the street art phenomenon particularly highlights existing irritations between the systems of art and law. By sketching the characteristics of the two systems involved, my aim is now to better understand why the above happens.

Systems theory is based upon the theorization of systems, which in Luhmann's words are "organized complexities", that "operate" through the "selection of an order". Every social system fulfils a function: law, education, art, economy, etc. These systems are unlike, but comparable,[96] a feature which makes the systems theory useful in this context. Common coordinates to every social system are their autopoiesis, their operative closeness[97] and the fact that what they do is essentially to operate through observations and communications.[98] Once systems created themselves out of their own operations, they become operatively closed, but are still open to the environment. This openness materializes itself in a variety of influences – in Luhmann's jargon "irritations" – between the system and its environment (to a system, every other system is part of the environment).[99]

This theory is also useful for another reason: as it is interested in questions about *function* and not about *quiddity*, it allows to talk about art while avoiding a normative stance. The question "is graffiti art?" for example, can be answered without having to decide about graffiti's artsy value, expressive power, aesthetic quality and the like, but referring to the *function* they fulfil in society and if this conforms to that of the system.[100] The next two sections deal with this aspect.

4.1 WHAT IS ART? WHY IS IT ART?

94 Jacques De Werra and Yaniv Benhamou (2009), *Kunst und geistiges Eigentum*, in Marc-André Renold et al. (eds), *Kultur Kunst Recht*, Basel: Schulthess, 2020, N 69 *ad* § 7.

95 Michael King, 'The Construction and Demolition of the Luhmann Heresy' (2001) *Law and Critique*, 12 (1), pp. 1-32, at p. 4.

96 Markus Koller, *Die Grenzen der Kunst. Luhmanns gelehrte Poesie,* Wiesbaden: Springer, 2007, at p. 139.

97 Niklas Luhmann, *Die Gesellschaft der Gesellschaft,* Frankfurt am Main: Suhrkamp, 1998, at p. 12.

98 Ibid., at p. 82.

99 See Berghaus, supra note 12, at p. 58.

100 Niklas Luhmann, *Die Kunst der Gesellschaft*, Frankfurt a.M.: Suhrkamp, 1997, at p. 393 and Pierangelo Maset, *Die «Kunst der Gesellschaft» in Gesellschaft der Kunst*, in Gunter Runkel and Günter Burkart (eds), Funktionssysteme der Gesellschaft, Wiesbaden: VS Verlag für Sozialwissenschaften, 2005.

Modern art is operatively autonomous: no other system in society does what art does,[101] and what art creates today is not useful for other social contexts anymore. The fact that sometimes art can be used for certain purposes (like selling it to earn money) is an external use: it neither helps to realize the work of art, nor impedes its realization.[102] But art *per se* is not useful, it is an "extension of reality".[103] Art's *function* resides in the creation of an own version of fictional and imaginary reality, that distinguishes from the habitual one, suggesting that another one is possible and thus creating an ordered contingency.[104] Art ultimately demonstrates how order can be possible within the realms of possibility.[105] This is visible in each artwork and each other operation of the art system, with which the system repeats itself:[106] art's own observations fixed in forms.[107] The system's code is the structure that regulates the belonging of an operation to the system and makes the differentiation of the system possible.[108] For what concerns art, this code cannot be *beautiful/ugly*. This binarity is not practical for the level of second order observation because observations of art's observations are neither beautiful nor ugly, but still belong to the system. Luhmann reinterprets the code of art into the pair *fitting/not-fitting*: failed artworks are comprehended in the system, as the code is merely a method of self-control.[109]

With the autonomisation of art, the self-description of the system is performed by artworks. This description is at the same time the attribution of something to its own realm: *only art can decide what art is*, and that through the description of self-description.[110]

4.2 IS STREET ART ART?

Graffiti, along with other forms of street art, is a typical and complex form of urban subculture[111] that uses public space as a tool and reconverts it into an alternative communication.[112] Painted public space is not the space we are used to see anymore, and it also not perceived as such by passers-by.[113] It is an inherently subversive artistic

101 See Luhmann, supra note 100, at p. 218.

102 Ibid., at p. 246 f.

103 Ibid., at p. 401.

104 See Koller, supra note 96, at p. 147.

105 Ibid., p. 149 and Luhmann, supra note 100, at p. 237 f.

106 See Luhmann, supra note 100, at p. 292.

107 See Koller, supra note 96, at p. 141.

108 Christoph Beat Graber, *Zwischen Geist und Geld: Interferenzen von Kunst und Wirtschaft aus rechtlicher Sicht*, Baden-Baden: Nomos, 1994, p. 78: Artworks do not have to display common attributes to fit into the art system.

109 See Koller, supra note 96, at p. 38 f.

110 See Koller, supra note 96, at p. 221. Through self-description, the system makes itself its own theme of itself. For art to decide what art is and is not means to re-describe (observe) the self-description (its own observations). See also See Luhmann, supra note 100, at p. 393.

111 Jacob Kimvall, *The G-Word: Virtuosity and Violation, Negotiating and Transforming Graffiti*, Årsta: Dokument Press, 2014, at p. 11.

112 Akin Canan and Kipçak Sezin N., 'Art in the Age of Digital Reproduction: Reconsidering Benjamin's Aura in "Art of Banksy"' (2016) *Journal of Communication and Computer*, 13, pp. 153-158, at p. 155.

113 However, street art is not about annihilating space, but rather about repurposing it: Justin Armstrong, 'The Contested Gallery: Street Art, Ethnography, and the Search for Urban Understandings' (2006), available at https://www.researchgate.net/publication/305285287_The_Contested_Gallery_street_art_ethnography_and_the_search_for_urban_understandings, p. 1.

expression; not only because of its content – which can be political as well as simply aesthetical – but also and already because of its location. In the words of Deleuze and Guattari, the relationship between urban space and "urban" art can be described as the interfacing of striated space (the city) together with smooth space (the art). Whereas striated space is fixed, sedentary, ordered, stratified in a hierarchically layered order which displays perpendicular intersections, closed spaces and finite movements, smooth space is fluid, multiple, nomadic and rhizomatic,[114] without top or bottom or centre.[115] Smooth space intervenes on urban rigidity,[116] softening predetermined realities and making them enter a process of evolving that they alone would have never initiated. With street art, urban space gets the chance to turn itself in a state of constant becoming.[117] Street art's *raison d'être* seems having to do with showing the unseen, dissenting, re-shaping, contesting boundaries, regulations, norms.[118] With no violence, but rather a stoic and resisting attitude.[119] Besides, these effects on the urban space have been proven beneficent for the communities who inhabit it,[120] despite not being concordantly and indiscriminately applauded.[121] Another aspect that deserves our attention is the self-regulating capacity of the milieu. Street art feeds itself through dedicated blogs and websites, where *amateurs* and writers share articles, pictures, advices, as well as comments on each other's creations in a big process of self-description.[122] Far from being chaotic, street artists and writers adhere to an unwritten yet precise set of rules whose common ground is respect for each other's art. These social norms aim to manage scarcity as well as regulate competition.[123]

If we now look back at the previously depicted theoretical characterization of the art system, the features of street art of creating and displaying an alterity make street art fit into the art system. To the question whether street art *is* or can be considered as art, we can therefore answer affirmatively, at least if we remain in the described

114 When one "*root*" is cut, it propagates ten times more, see Armstrong, supra note 113, at p. 6.

115 Lucia Mulherin Palmer, 'Rhizomatic Writings on the Wall: Graffiti and Street Art in Cochabamba, Bolivia, as Nomadic Visual Politics' (2017) *International Journal of Communication*, 11, pp. 3655-3684 mentions concepts from Gilles Deleuze and Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia*, Paris, 1980.

116 Alison Young, 'Cities in the City: Street Art, Enchantment, and the Urban Commons' (2014) *Law & Literature*, 26, 145-161, at p. 146.

117 See Mulherin Palmer, supra note 115, at p. 3682.

118 Petr Agha, 'Un-doing Law – Public Art as Contest over Meanings' (2017) *Prague Law Working Papers Series No. 2017/III/4*, p. 3; Banksy, *Wall and Piece*, London: Century, 2005, at p. 97 invites us to imagine "*a city that felt like a party where everyone was invited*".

119 See Armstrong, supra note 113, at p. 7.

120 Jan C. Semenza, 'The Intersection of Urban Planning, Art, and Public Health: The Sunnyside Piazza' (2009) *American Journal of Public Health*, 93 (9), pp. 1439-1441, Claire M. Tunnacliffe, 'The power of urban street art in re-naturing urban imaginations and experiences' (2016) *DPU Working Paper No. 182*, London, at p. 7 f. and 17 ff. and CCNC, 'Arts and positive change in communities', available at https://www.creativecity.ca/publications/making-the-case/arts-and-positive-change-in-communities.php.

121 Michael Rowe and Fiona Hutton, '„Is your city pretty anyway?" Perspectives on graffiti and the urban landscape' (2012) *Australian & New Zealand Journal of Criminology*, 45 (1), pp. 66-86, at p. 81 ff., Young, supra note 1, at p. 298.

122 On the web see for example "*Spray Daily*" (https://www.spraydaily.com), "System Boys" (https://systemboys.net) and "Drips" (http://www.drips.fr). Since the Instagram era, much has been transferred on profiles such as @roeschlijeanclaude and @zh_colors for the Swiss scene.

123 Marta Iljadica, *Painting on Walls. Street Art without Copyright?*, in Kate Darling and Aaron Perzanowski (eds), *Creativity without Law. Challenging the Assumptions of Intellectual Property*, New York: NYU Press, 2017, p. 130 f. for a detailed description.

theoretical frame.[124] Even the incompatible dichotomy art *versus* vandalism can be considered, as KIMVALL puts it, as one discursive formation based on two practices which despite being apparently opposed to one another, are interdependent. At the end of the day, two different readings of the same phenomenon produce knowledge in and of the same discourse.[125]

Like BENGSTEN/ARVIDSSON suggest, focusing the phenomenon's time and spatiality, street art alludes to the creation of space within a pre-existing space, to an art-scape in a public space. In this sense, street art ephemerally appropriates itself of, and at the same time dispossess public space.[126] In the very moment a graffiti is discovered by a passer-by, it discloses its hic et nunc, its temporality[127] and reflects all of a sudden the history of shadows, spontaneity, trespass and peril that precedes the tangible result. In the only possible *milieu* for this purpose, by actively renouncing to its commodification, street art reclaims another possible meaning; beyond the utilitarian ones of the current capitalist city-machine.

If selling an artwork for money remains an external use of art that does not change anything to the autonomy of the system, the risk is that such interdependencies become institutionalized in a way that the code of art – the expression of the discourse autonomy – is replaced by the code of economy.[128] When graffiti are exhibited in museums or galleries, or even worse, in private houses, they lose their temperament forever and become commodities just like something else. Despite having tried so hard, before this happened, to exist as art in an alternative form,[129] they have lost the battle. Only if street art remains unsolicited[130] and appreciated without being *possessed*, its authentic autonomy is not endangered.

4.3 WHAT IS LAW? WHAT DOES IT WANT?

Exactly as art, law constitutes a system of communications. As such it can distinguish which communications are part of itself and which are not.[131] What these operations have in common is their relation to the issue of legality and illegality, which is also an exclusively internal, and therefore paradoxical, reference. The code of law is therefore "legal/illegal".[132] Historically, within the net of communicative and

---

124 Sporadic criticism of street art like the one by the British art critic Jonathan Jones ('Dim, cloned conservatives', available at https://www.theguardian.com/politics/2004/aug/07/arts.ourcritics). In systems theoretical terminology a critic such as "this is not art" can be classified as the "*not fitting*" part of the code of the art system.

125 See Kimvall, supra note 111, at p. 13 f. For a comparative lecture on the foucaultian discourse analysis and the systems theory see Jasmin Siri and Tanja Robnik, *Systemtheorie und Diskursanalyse*, in Kolja Möller and Jasmin Siri (eds), *Systemtheorie und Gesellschaftskritik*, Bielefeld: Transcript, 2016, pp. 115-132.

126 Peter Bengsten and Matilda Arvidsson, 'Spacial Justice and Street Art' (2014) *Nordic Journal of Law and Social Research*, 5, pp. 117-130, at p. 121.

127 Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, 1935, translated by Harry Zohn, New York: Schocken Books, 1969, p. 6, note 5.

128 Christoph Beat Graber and Gunther Teubner, 'Art and Money: Constitutional Rights in the Private Sphere?' (1998) *Oxford Journal of Legal Studies*, 18, pp. 61-73, p. 71 f.

129 See Akin and Kipçak, supra note 112, at p. 153.

130 See Armstrong, supra note 113, at p. 1.

131 Michael King and Chris Thornhill, *Niklas Luhmann's Theory of Politics and Law*, London: Palgrave Macmillan, 2003, p. 36.

132 Ibid., at p. 36.

functional systems of society, law acquired the function to stabilize normative expectations over time. Law's concern is therefore a temporal, because it attempts to anticipate the unknown future.[133] In law, conflicts are named before knowing who will be party to it.[134] Explained with the help of our case study, where "Banksy painted and the owner removed", only in the moment where somebody protests we would notice how law had it provisory regulated from the very beginning. The system then introduces additional differences to its basic code "legal/illegal". In law, for example, it cannot be said that a damage to property is illegal in every case, as necessity might, in some cases, justify the breach.[135] The principles of justice and equity give the whole legal structure a cohesive identity while steering contingency.[136] Another scheme to control "what could be otherwise" is the introduction of the concept of legal security:[137] like cases must be treated alike, and different cases must be treated differently.

The fact that Banksy would escape a prosecution while others would not, made us pull a face. Law considers those circumstances different. But are they *really*? According to which internal operative difference is law seeing a difference? How can the criteria of "celebrity" and "art market value", clearly external references, be legalized, i.e. made internal to the law system? Whether the perpetrator of a crime is famous, or highly quoted, is to law a third value, not explicitly held in a norm.[138] In our case, law seems to incorporate third values into its own code. Even if it "works", it remains problematic as it is virtually equivalent to a pollution of law with external references.

5. ON THE INTERACTIONS BETWEEN (STREET) ART AND LAW

Wittingly simplifying, this case's complexity can be reduced – in law's own operational language – to a conflict between fundamental rights. More precisely, between the freedom of artistic expression (Article 21 BV) on one side and the guarantee of ownership (Article 26 BV), supported by economic freedom (Article 27 BV), on the other. Despite not being explicitly portrayed as such neither by the legal resolution that precedes this part nor by any other court dealing with a case of graffiti on private property,[139] the pulsating forces behind the norms are art, economy and ownership. By anchoring them in the Constitution, the system of law is formally recognizing their autonomy.[140] But fundamental rights are – before being anchored in the Constitution – already existing as symbolic ideals, as descriptions of the status of autonomous discourses of our society.[141] The equation of these rights with *human*

133 Niklas Luhmann, *Das Recht der Gesellschaft*, Frankfurt am Main: Suhrkamp, 1993, p. 130 f.

134 Ibid., at p. 129.

135 Ibid., at p. 11 and 171.

136 See King/Thornhill, supra note 131, at p. 67.

137 See Luhmann, supra note 133, at p. 237.

138 See King/Thornhill, supra note 131, at p. 58.

139 See, however, the verdict Naegeli v. Switzerland of the 13th October 1983 (EuGRZ 1984 p. 259 ff.). After Naegeli was convicted by the Swiss Federal Court for criminal damage, he filed an appeal to the ECHR which, after framing the case as a conflict between freedom of art and guarantee of ownership, ruled in favor of the latter.

140 See Graber and Teubner, supra note 128, at p. 65.

141 Ibid., at p. 65.

rights, protective of individuals against the intrusive power of the State, risks to be reductive. Pursuant to this theory,[142] subject to the protection of constitutional rights would be not only the individual, but the intactness of whole discourses and the equilibrium among them, too.[143] Freedom of art is primarily related to the social construction of alternative realities, to the extension of utilitarian communication and to imagination. In the centre of all this is not the individual artist, but the art discourse as a whole.[144] This would explain the difficulty to define freedom of art with legal instruments, given its status of a dynamic communicative system, as well as the complexity to create a protective frame for the single artist. According to this theory, at stake in our case is not only a quarrel between individuals: art is irritating the institution of ownership as component of our economic system, and this is irritating art back as the graffiti becomes a commodity against the will of its creator.

Individuals cannot be the personification of just one discourse: Banksy represents the conflict between art on one side and economy and ownership of the other.[145] On one side he is rejecting the art market, on the other a collective instituted by him releases certificates of authenticity,[146] nothing more than legal means to enforce economical rights or to prevent third parties to do so.[147] On one side he is defeating law, on the other he demands his art to be left in the streets and sometimes even succeeds in obtaining legal protection (when municipalities install Plexiglas panels on his stencils, or when he avoids investigations). When Banksy demands an *ad hoc* treatment, he is speaking an economic-judicial language, but the fact that he gets this treatment is a problem of the legal system. Banksy's behaviour and work underline an existing tension, even if he might be seen as hypocrite, we are grateful to him at least for this.

In systems theoretical terms, to describe the relation between street art and law as a mere opposition would be inexact.[148] Their interaction[149] is much more nuanced: street art provokes a concentrate of partially contradictory legal assertions, as if law was overstimulated and reacted with an allergic shock. Despite all this unsolicited activity, the performance of street art endures and proliferates.[150] As there is no reason to use law to legitimate art,[151] the question whether a graffiti is art or rather criminal

142 Called the "*structural effect of constitutional rights*" by Graber, supra note 108, at p. 156.

143 See Graber, supra note 108, at p. 157.

144 See Graber and Teubner, supra note 128, at p. 68.

145 See Banksy, supra note 118: He does not appreciate the intellectualization of street art, but at the same time he brings the whole discourse to another, higher level through his public statements. For Luhmann, human beings are structural couplings of different social systems, see Luhmann, supra note 133, at p. 48, Hans-Georg Moeller, *The radical Luhmann*, New York: Columbia University Press, 2012, p. 23.

146 Banksy's authentications office available at https://pestcontroloffice.com/auth1.asp.

147 Lucy Finchett-Maddock, *In Vacuums of Law we find: Outsider Poiesis in Street Art and Graffiti* (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3066309, p. 4.

148 See Flessas and Mulcahy, supra note 5, at p. 221.

149 Interactions are systems too; the communication involved can only be understood in the context of the system: Christoph Beat Graber, 'Freedom and Affordances of the Net' (2018) *Washington University Jurisprudence Review,* 10, pp. 221-256, at p. 232.

150 See Finchett-Maddock, supra note 147, at p. 3.

151 See Flessas and Mulcahy, supra note 5, at p. 240.

damage is superfluous, and law shows precisely that these concepts are *not* mutually exclusive.[152]

A painting painted in an atelier, exhibited in a gallery and then sold in an auction fits legal categories like a glove.[153] By law, it is considered as a contract, as a passage of property and as a protected work. Law does not distinguish between different aesthetic styles, media, or groupings. The painting is considered "art" indeed, but not without precautions: the lie of condescension is unveiled when law finds out that the painting does not "comply" (an obscene content, a copy or an illegal support are enough). Law has no answers but must provide one. Despite not being able to grasp street art's peculiarity,[154] it answers by processing it into its obsolete terms, by freezing it in its own categories: a work, chattel, a criminal damage. An object that it does not understand but must have foreseen.[155] Despite being only able to define the outlines of a void, despite these types of art create "vacuums of law",[156] law is there and its echo *in absentia* is even louder. Illegal art is not the enemy of law, rather a nuisance which irritates the legal system but ends up underlining its existence. Because urban space is not "unconquered" – it had been dominated by law – illicit images represent a threat to law's valorisation of property.[157] That is why graffiti's illegality is *spatial*. When law returns, it does exactly as street art; their oscillation ultimately produces the cityscape.[158]

The interaction between a graffiti and the legal response produces therefore a microcosm of the relation between art and law.[159] The aesthetics of a city reflect its regulation: city cleaning, signage, advertising, commemorative statuary and public art are all decided in a top-down approach. Even commissioned street art confirms the necessity of an administrative process made of sordid authorizations. That is why the cartography of the legislated city tends to coincide with the layers of laws that shaped it.[160] When street art appears, the possibility of an alternative reality is shown. Another space with other laws,[161] other logics, has broken into the rigidity of the metropolitan body. Seen this way, street art may appear to be adopting violent ways. And that is also why law experiences it as an outrage and often makes the individual defendant a synecdoche of an entire population of illicit writers, with exemplar processes and

---

152 See Edwards, supra note 33, at p. 347.

153 Ibid., p. 225 f.: when street artists produce art for private sale, the illicit becomes suddenly legitimate ("*when art is taken out of the street and street is taken out of the art*").

154 See Young, supra note 1, at p. 307.

155 See Luhmann, supra note 133, at p. 129.

156 Exact words of Finchett-Maddock, supra note 147, at p. 1.

157 See Young, supra note 1, at p. 310, Silvio Blatter, *Was wäre das für ein Land, das keine Künstler hätte?*, in Michael Müller (ed.), *Der Sprayer von Zürich. Solidarität mit Harald Naegeli*, Reinbek bei Hamburg: Rowohlt, 1984, at p. 18.

158 See Bengsten and Arvidsson, supra note 126, at p. 127 f. In this context, the term "lawscape" is useful; coined by Andreas Philippopoulos-Mihalopoulos , *Law and the City*, New York: Routledge-Cavendish, 2007, it is defined as the paradoxical, circular influence that city and law have on each other, as the entanglement of the city and the law in a state of co-presence and absence. It cannot be observed as a whole, but only in its wounded one-sidedness. See also: Sharron FitzGerald and Andreas Philippopoulos-Mihalopoulos (2008), 'Invisible Laws, Visible Cities' (2008) *Griffith Law Review,* 17, pp. 435-437.

159 See also: See Graber, supra note 22, at p. 80.

160 See Young, supra note 116, at p. 146 f.

161 See Iljadica, supra note 123, at p. 130 and Marta Iljadica, *Copyright Beyond Law*, Portland: Bloomsbury, 2016, at p. 109 ff.

punishments.[162] Until law comes back with its great authority, unsanctioned artworks are like portals to another possible dimension.

To conclude, I would like to spend some words on more punctual questions that still relate to the relationship between street art and law.

5.1 DOES COPYRIGHT LAW CONTRIBUTE TO (STREET) ART?

The first question regards copyright and the widespread opinion that introducing an economical return to authors' intellectual performances is necessary to stimulate their creativity. Yet, even in those artistic or creative fields where copyright is not to find, products of the inventive mind flourish. It is the case of cocktails, haute cuisine, tattoos, pornography. Oh, and street art of course![163] The prospect of copyright protection does not seem to motivate many creators, among them street artists. What matters is to be seen and recognized as well as to participate and enrich the (sub)culture. What spurs them is the adrenaline rush and not a hypothetical profit.[164] However, at least theoretically, copyright could grant them protection.[165] There are isolated cases in which copyright actually helped street artists and writers enforce their rights.[166] Normally though, writers prefer reinvest resources in further creation than in the expensive enforcement of IP.[167] Street art is actually well-suited to a "copyleft" room:[168] copying between peers is well seen as it fosters new pieces and impairments are regulated according to the scene's own rules. Even if the commercial use of street art works is disdained and unacceptable,[169] a higher IP-protection is generally deemed unnecessary.[170]

5.2 IS ILLEGALITY A *CONDITIO SINE QUA NON* OF STREET ART?[171]

After all it has been said, one could easily think that, because of its inherent rebellious attitude, graffiti and unsanctioned street art *need* to be illegal to flourish. We

---

162 Alison Young, 'From object to encounter: Aesthetic politics and visual criminology' (2014) *Theoretical Criminology*, 18, pp. 159-175, at p. 164.

163 See Kate Darling and Aaron Perzanowski, *Creativity without law: challenging the assumptions of intellectual property*, New York: NYU Press, 2017.

164 See Iljadica, supra note 123, at p. 121 and 123.

165 See Finchett-Maddock, supra note 147, at p. 5.

166 To cite are, among others, the quarrel that involved McDonald's for having used without permission the tag of the deceased writer Dash Snow ('McDonald's accused of copying graffiti logo – here's why we should protect street artists' original tags', available at http://theconversation.com/mcdonalds-accused-of-copying-graffiti-logo-heres-why-we-should-protect-street-artists-original-tags-66855) and when Moschino's creative director Jeremy Scott copied a graffiti by Rime for his designs ('Jeremy Scott Sued for Stealing Graffiti Art Designs, Says Graffiti Should Not Be Recognized by the Law', available at: "https://edition.cnn.com/2015/08/09/us/moschino-lawsuit").

167 Cathay Y.N. Smith (2014), 'Street Art: An Analysis under U.S. Intellectual property Law and Intellectual property's Negative Space Theory' (2014) *De Paul J. Art & Intell. Prop*., 24, pp. 259-293, at p. 290.

168 Ibid., at 285.

169 See Iljadica, supra note 123, at p. 132.

170 See Smith, supra note 167, at p. 293.

171 Many of the statements below are based on informal interviews with friends who have been in the graffiti scene for years. I later found confirmations of these testimonies in the works of Ferrel/Weide, Young and Iljadica.

saw how street artists try to place their work in opposition to legal regimes and outside traditional conceptions of ownership and rights,[172] but this does not mean their behaviour is directly intentional to breaking the law. A city's traditional regimes are not only made of hard laws, but also of habits, aesthetical norms, soft regulations, social hierarchies and the crowds' anonymity in its metropolitan landscapes.[173] So, is it really going against the legal system what feeds writers into creeping out at night? Generally speaking, it has been proven that writers decide about placement prevailingly according to the internal norms of graffiti culture, which encourage placement of work in spots that respect the hierarchy of writers/artists as well as satisfy the own need of visibility. These rules concern the management of scarcity as well as the self-administration of quarrels. For example, going over another piece, or "line", is highly disapproved, unless it is a sanction for the same behaviour.[174] Also skills, style and respect to other artists rule the subculture, and often writers assemble in "crews" that tag in the same or similar, recognizable manner and are highly loyal to each other. Regarding placement, we mentioned already that the main rule street artists follow is based on visibility. Visible spots are coveted spots. Some unwritten rules exist though: "Personal" private properties such as cars and houses are normally untouchable, and so are public places of worship (like churches and cemeteries) as well as culturally significant public art. This does not mean, as everybody knows, that these rules are never trampled on. Apparently though, such episodes are to consider exceptions explainable with "toys"[175] or a tedious drunkenness of the author.[176]

It follows that, to the eyes of a writer, the city has a different aspect: it is not divided into rigid schemes of public and private property, but rather into layers of visible and less visible spots as well as coverable and not coverable artworks. For writers who are trying to convey a political or provocative message, the spatial-institutional context might also be important.

It seems that writers do not "function" following the same patterns of law: they do not actively seek to commit crimes,[177] but rather to put in a place of uncomfortable self-observation a series of much softer regulations. This is also demonstrated by the fact that when city councils give permission to paint on some public walls, graffiti thrive on them as well, albeit with some criticism from the hard core of the subculture.[178]

5.3 WHAT IS THE PURPOSE OF FREEDOM OF ART?

If the constitutional content of freedom of art is not clear and the right is never mentioned in cases that concern artistic works, is this fundamental right even *benign*

---

172 See Flessas and Mulcahy, supra note 5, at p. 220 f.

173 Rachel A. Wortman, 'Street level: Intersections of Art and the Law Philip-Lorca diCorcia's "Heads" Project and Nussenzweig v. diCorcia' (2010), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599289, p. 5.

174 See Iljadica, supra note 161, at p. 248. See also the feud between King Robbo and Banksy: https://twistedsifter.com/2012/01/banksy-vs-robbo-war-in-pictures/.

175 Novices in the graffiti "*game*" are called "*toys*".

176 Jeff Ferrel and Robert D. Weide, 'Spot theory' (2010) *City*, 14 (1-2), pp. 48-62, at p. 55.

177 See Young, supra note 1, at p. 311.

178 'Kunstwissenschaftlerin: "Illegale Graffiti finde ich spannender"', available at https://www.srf.ch/news/schweiz/graffiti-in-den-staedten-kunstwissenschaftlerin-illegale-graffiti-finde-ich-spannender.

to art? During the 20th Century, totalitarian regimes governing in Europe have pulverized art's self-determination and made it into a political tool. Back then, art was either propaganda, or it was called degenerate. This thus might be a good point to start. LUHMANN describes the events as political attacks to the system of art, but he also says that, in contrast to the 16th Century when art was still stabilizing its autonomy, in the 20th Century it had already completed the process. Art was already reiterating its own rhetoric of self-description, it was already able to live its own history and to turn it upside down at will. During those dark times, art was playing what politics wanted in some sort of a big *mise-en-scène*, but was not too impressed by it.[179] Today, many Constitutions formally guarantee that such influences will not be tolerated and provide legal tools to enforce what would otherwise be an empty statement. But also, according to the already mentioned theory of the structural effect of constitutional rights, describes a situation that is already present in society.[180] Following this theory, the Constitution is like a tinier, law-internal reproduction of the outer world, which has been re-formulated in legal words.[181] But as we saw, there is absolutely no need to legitimate art through law,[182] and in the quarrel with other fundamental rights, freedom of art will likely be the one to succumb.[183] A good example for art's autopoiesis is Harald Naegeli's conviction for criminal damage. The events that had the "Sprayer von Zürich" receive an exemplary punishment[184] underline art's autonomy in so far as the reaction of Swiss tribunals was perceived by the art world as some sort of "Gesamtkunstwerk".[185]

6. CONCLUSIONS

The purpose of this work has been to use law's relationship with illegal street art as a litmus paper to highlight its actual relation with art. While other disciplines like art history, sociology or anthropology understand,[186] law is still numb to the peculiarity of the phenomenon. Only by commodifying or criminalizing it, law can see its existence. This response ultimately underlines the misunderstandings between law and art, the impossibility to define a common ground. While the cityscape and its interaction with street art can be compared to what happens between the two systems – rigidity *versus* flexibility, conservatism *versus* constant change – what would happen if law's response changes? How would the cartography of a futuristic city look like?

179 See Luhmann, supra note 100, at p. 300.

180 See Graber, supra note 108, at p. 156.

181 Ibid.

182 See Flessas and Mulcahy, supra note 5, at p. 240.

183 See Mosimann and Renold, supra note 14, at N 70 ad § 1.

184 Nine months custody and CHF 101'534.60.- in damages, see Christine Fuchs, *Avantgarde und Erweiterter Kunstbegriff. Eine Aktualisierung des Kunst- und Werkbegriffs im Verfassungs- und Urheberrecht*, Baden-Baden: Nomos, 2000, at p. 29.

185 See Graber, supra note 22, at p. 100 f. and Michael Müller, *Der Sprayer von Zürich. Solidarität mit Harald Naegeli*, Reinbek bei Hamburg: Rowohlt, 1984, with contributions of Joseph Beuys, Willy Brandt and others.

186 See Flessas and Mulcahy, supra note 5, at p. 239.

A creative exercise for a hypothetical next paper would be to list the alternatives to traditional regimes law offers and imagine how a resolution according to these new conceptions would look like, if they were applied to the case at stake in this text.

For example, a small change which would probably hugely affect the relationship between art and law is to conceive property the UK way, that is, to see a criminal damage only there, where a tangible loss of value is in sight.[187]

Another question is what would happen if street art were decriminalized? While the complete legalization is some sort of *chimera*, we saw how treating writers and street artists as criminals until they become famous is just as contradicting as discriminating. Law's confusion about the phenomenon manifests itself in dividing what is vandalism from what is art, but to enter this path inevitably brings to draw moody and aleatory lines. On the other side, it should be made clear that also the removal and private sale of appraised street art pieces represents an unfair behaviour, if not against the individual author then against the general public, who is deprived of a gratuitous form of art.

Another interesting path is the regime of cultural heritage.[188] To be noted is though, that street art cannot be understood as a "finished work",[189] but rather as a fluctuating, collaborative performance, or as a living organism. So, if heritage instruments can become relevant to this form of art, it has to be through a form that celebrates rather than impedes alteration.[190] What is also problematic is the cherry-picky stance of the heritage protection. To select artworks eligible for enhanced protection means to reproduce the same elitist flaw of criminal law.

Alternatively, street art could be treated as an open-source phenomenon. The "keeping while giving"-approach seems to be tailored to the subculture already, as many have indeed access to walls and choose not to cover them completely with their own.[191]

However visionary or superfluous it may seem, there is much potential in a more contemporary consideration of graffiti, for both law and art.[192] Street art, just as other art forms, represents a challenge for law.[193] As the relation between the two systems seems to cause inevitable and periodical clashes, but most of all to enlighten an existing incomprehension, it is the time to revise law's rigid understanding of art.

---

187 See above, p. 6 f.

188 See Susan Hansen, 'Heritage protection for street art? The case of Banksy's Spybooth' (2018) *Nuart Journal*, 1, pp. 31-35, p. 31 ff.

189 Which is also the problem when removing portions of walls and treat them as completed artworks with a clear authorship.

190 See Flessas and Mulcahy, supra note 5, at p. 233.

191 See John Carman, *Against Cultural Property: Archeology, Heritage and Ownership*, London: Bristol Classical Press, 2005, p. 115.

192 In the words of Andreas Philippopoulos-Mihalopoulos, 'Beauty and the Beast: Art and Law in the Hall of Mirrors' (2003) *Entertainment Law*, 2 (3), pp. 1 – 34, law (the Beast) can become more beautiful through its encounter with the Beauty (art).

193 See Haimo Schack, 'Kunst als Herausforderung für das Recht (und umgekehrt)' (2016) *KUR*, 6, pp. 181-183.