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No Flash Photography Please: An Analysis of Corporate Use of Street Art Under Section 120(a) of the AWCPA

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No Flash Photography Please: An Analysis of Corporate Use of Street Art Under Section 120(a) of the AWCPA

SIERRA EPKE*

Street art and graffiti are pervasive artforms found throughout the world and throughout history. While the artforms have been associated with crime and vandalism in the past, they have increasingly been featured in different capacities from art galleries to corporate marketing campaigns. With street art's growing recognition and popularity, corporations have begun to use the medium to target new customer bases. In some situations, the use of artwork in marketing campaigns is unsanctioned by the artist. Therefore, courts have now begun to examine the balance between copyright protection for street artists and the corporate use of street art. Section 120(a) of the Architectural Works Copyright Act of 1990 (AWCPA) provides a limited panorama right to take pictorial representations of architectural works that are visible to the public without fear of copyright infringement. Specifically, the Central District of California and the Eastern District of Michigan have grappled with the copyright protections for street art appearing on buildings in the background of ad campaigns and Section 120(a).

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This Note argues that the exemption found under Section 120(a) should be limited to noncommercial uses of street art in order to balance street artists' copyright interests with the relative resources of companies that wish to use the artwork. Limiting Section 120(a) to noncommercial uses would also align with the congressional intent behind the exemption and would be analogous with other Berne Convention signatory countries who also provide a limited panorama right for noncommercial uses. Courts and the general public have recognized the valuableness of street art and graffiti. Therefore, street art should receive increased copyright protection similar to other artforms.

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INTRODUCTION

As Banksy once said, “A wall is a very big weapon. It’s one of the nastiest things you can hit someone with,”¹ and street artists have begun to hit back against corporate use of their work, albeit through the legal system.² While not generally created for exhibition in a gallery or to be hung on a wall, graffiti and street art have exploded in popularity over the past few decades.³ Corporations have noticed this growing trend and have sought to align with this consumer base, using street art in various advertising and social media campaigns to further connections with potential customers.⁴ With the growing use of street art in this commercial aspect, street artists lack the necessary protections to stop others from profiting off their work, especially under Section 120(a) of the Architectural Works Copyright Act of 1990 (AWCPA).⁵ However, courts have increasingly showed more interest in the rights afforded to street artists and the public perception of street art as a valid and protectable artform.⁶

Castillo v. G & M Realty L.P. introduced a growing recognition that street art is worth protecting.⁷ Under the Visual Artists Rights Act of 1990 (VARA), visual artists have a “moral right” that “prevents modifications of artwork that are harmful to artists’ reputations.”⁸ Further, if a work achieves “recognized stature,” the artist

¹ BANKSY, BANGING YOUR HEAD AGAINST A BRICK WALL 28 (2001).

² See discussion *infra* Section II.C–D.

³ See discussion *infra* Part I.

⁴ See Eileen Kinsella, ‘They Had No One in Their Corner:’ Meet the Lawyer Who is Battling Big Corporations on Behalf of Street Artists, ARTNET (Nov. 7, 2019), <https://news.artnet.com/art-world/jeff-gluck-street-art-1697589> (“Over the past decade, as streetwear brands like Supreme have become billion-dollar business, corporations have become eager to align themselves with the edgy and hip spirit of street art.”).

⁵ 17 U.S.C. § 120(a).

⁶ See, e.g., *Castillo v. G & M Realty L.P.*, 950 F.3d 155, 155 (2d Cir. 2020).

⁷ *Id.*

⁸ *Id.* at 163.

can prevent the work's destruction.⁹ When Gerald Wolkoff attempted to redevelop a warehouse site featuring almost 10,650 separate works of aerosol art throughout the site's lifetime, known as 5 Pointz, into a luxury apartment site, a group of artists challenged the redevelopment plans under VARA.¹⁰ The artists prevailed on their VARA claim, as the Second Circuit Court of Appeals found the trial court's determination that the works at the 5 Pointz site were recognized stature "of high quality, status, or caliber that has been acknowledged as such by a relevant community" was not clearly erroneous.¹¹ As the court stated, "'street art,' much of which is 'temporary,' has emerged as a major category of contemporary art."¹²

One glaring issue that may be solved with the increased positive reaction to street art is the Architectural Exemption found in Section 120(a) of the AWCPA.¹³ However, federal courts have split in their decisions determining whether street art attached to architectural works are exempt from copyright protection.¹⁴ Considering the growing street art support, Section 120(a) of the Copyright Act should be interpreted within legislative intent and in line with increased copyright protections as corporate entities look to take advantage of the Architectural Exemption.¹⁵ Therefore, the proper application of Section 120(a) should include limitations on commercial use of street art to better protect street artist rights.¹⁶

Part I of this Note discusses the history of graffiti and street art from ancient to contemporary times.¹⁷ Part II examines the current copyright scheme applicable to street art, including Section 120(a), the Architectural Exemption, cases interpreting these protections, as well as the lack of street art cases addressing the topic.¹⁸ Part III explores artist arguments beyond statutory arguments for the interpretation of street art under Section 120(a).¹⁹ Finally, Part IV argues

⁹ *Id.*

¹⁰ *Id.* at 162–63.

¹¹ *Id.* at 166–67.

¹² *Castillo*, 950 F.3d at 167.

¹³ See discussion *infra* Part IV.

¹⁴ See discussion *infra* Section II.D.

¹⁵ See discussion *infra* Part IV.

¹⁶ See discussion *infra* Part IV.

¹⁷ See discussion *infra* Part I.

¹⁸ See discussion *infra* Part II.

¹⁹ See discussion *infra* Part III.

limiting Section 120(a) to noncommercial uses would better embody the Architectural Exemption's spirit as evidenced by the legislative intent and similar restrictions to noncommercial uses in other Berne signatory countries.²⁰

I. THE DEVELOPMENT OF STREET ART TO CONTEMPORARY TIMES

Despite the present-day idea of street art with spray paint as the medium, street art and graffiti are old art forms that have existed for thousands of years.²¹ Discovered in the 1940s, the Lascaux Caves in southern France feature paintings dating to 15,000 B.C. depicting animals like deer and bison.²² Other forms of ancient street art include Egyptian hieroglyphs from 1800 B.C. and Pompeian murals created 2,000 years ago.²³ Pompeian art may have also been the first documented form of unsanctioned street art, and the works depicted various subjects like gladiators, love, homosexuality, obscenities, and political sentiments.²⁴ Ancient Greeks were also prolific graffiti artists and left crude, sexual, and insulting messages on anything from natural rock formations to temple walls as early as 800 B.C.²⁵

In the United States, street art and graffiti were present throughout the country's history but exploded in popularity in the twentieth century.²⁶ Starting in the 1920s and 30s, New York City experienced an increase in gang graffiti that marked territory with the gang's

²⁰ See discussion *infra* Part IV.

²¹ Brittany M. Elias & Bobby Ghajar, *Street Art: The Everlasting Divide Between Art and Intellectual Property Protection*, LANDSLIDE, May/June 2015, at 1, 1 (2015), www.pillsburylaw.com/images/content/1/1/v2/1125/ABALandslide-Ghajar-MayJune2015.pdf.

²² Vithória Konzen Dill, *All You Need to Know About the Lascaux Cave*, DAILYART MAG. (Sept. 12, 2023), <https://www.dailyartmagazine.com/lascaux-cave-2>.

²³ Michaela S. Morrissey, *Copyright Takes to the Streets: Protecting Graffiti Under the Visual Artists Rights Act*, 56 U. RICH. L. REV. 735, 736 (2022).

²⁴ Lindsay Bates, *Bombing, Tagging, Writing: An Analysis of the Significance of Graffiti and Street Art*, 24 (Jan. 2014) (Master's thesis, University of Pennsylvania) (ScholarlyCommons).

²⁵ FIONA McDONALD, *THE POPULAR HISTORY OF GRAFFITI FROM THE ANCIENT WORLD TO THE PRESENT* 63 (2013).

²⁶ Morrissey, *supra* note 23 (detailing historical aspects of graffiti and explaining graffiti was present even during the colonial period).

“tag.”²⁷ Moving forward in time, one of the most prolific American forms of graffiti was introduced in the 1940s during World War II with the war doodle Kilroy.²⁸ The Kilroy character, depicted by a bald head and large nose peering over a wall and accompanied by the message “Kilroy was here,” emerged on surfaces like ship bulkheads, and the doodle was considered a morale booster and sign that soldiers were in familiar territory.²⁹ Kilroy spawned into different variations throughout the world and was also known by Mr. Chad in Britain, Foo in Australia, and as Smoe, Clem, Herbie, Private Snoops, Overby, and Sapo depending on where the doodle was found.³⁰

The use of graffiti in urban areas increased in the middle of the twentieth century.³¹ By the 1950s, graffiti became a way for immigrants in the United States to exercise their identity and pride.³² Further, gangs began using graffiti as a way of marking their territory in cities with multiple cultural groups.³³ In the 1960s, graffiti became more individualistic with the creation of artist “tagging.”³⁴ During this period, politicians and the upper-class viewed graffiti negatively and associated the artform with gang culture.³⁵ For the artists, graffiti was a way of voicing frustrations with society, commercialism, and the government.³⁶ The increasing graffiti trend continued in this era with works ranging from simple tags to large-scale murals found on subway cars.³⁷

In the 1970s and 80s, graffiti activity erupted in the United States, and historians consider this era as the golden age of graffiti

²⁷ Adam Hencz, *Street Art: History of the Art Movement and the Artists That Turned Cities into Open Sky Museums*, ARTLAND MAG., <https://magazine.artland.com/street-art> (last visited Feb. 24, 2024). A tag, generally a name painted on a wall, is a letter formation or “moniker” expressing identity and showing the artist’s or group’s presence. Bates, *supra* note 24, at 3.

²⁸ Bates, *supra* note 24, at 25.

²⁹ *Id.* at 25–26.

³⁰ MCDONALD, *supra* note 25, at 130.

³¹ See Morrissey, *supra* note 23, at 736–37.

³² *Id.*

³³ *Id.* at 737.

³⁴ *Id.* Tagging, where the artist writes or paints their street artist name, has become one of the most prevalent forms of graffiti. *Id.*

³⁵ *Id.*

³⁶ Morrissey, *supra* note 23, at 737.

³⁷ Hencz, *supra* note 27.

in New York City.³⁸ During this period, New York City was rife with corruption and social issues.³⁹ In conjunction with this corruption, graffiti rates skyrocketed and covered bridges, buses, walls, and subway trains.⁴⁰ Furthering the connotation of vandalism and crime, street artists searched for blank canvases regardless of private property or public infrastructure obstacles.⁴¹ Despite the negative connotation of graffiti, during the 1980s, art galleries and museums began to feature works from street artists like Keith Haring and Jean-Michel Basquiat, giving street art and graffiti more credibility in the art world.⁴²

By the 1990s, New York City officials responded to the graffiti movement by creating the Anti-Graffiti Task Force, charged with strengthening anti-graffiti legislation.⁴³ Therefore, anti-graffiti enforcement increased, and graffiti was treated as a “gateway to violent crimes and punish[ed] accordingly.”⁴⁴ Due to this graffiti artist treatment, the term graffiti became synonymous with vandalism.⁴⁵ Despite the general disdain for graffiti, the artform proliferated to other parts of the country throughout the next two decades.⁴⁶ In these later decades, street art and graffiti gained traction in the middle and upper classes, and major cities began creating their own graffiti subculture.⁴⁷ The medium has transitioned into fine art and is featured in museums, art galleries, and other forms of media like magazines and advertisements.⁴⁸ Today, many cities and neighborhoods embrace graffiti and street art because it can encourage community and revitalize neighborhoods.⁴⁹

Despite the meshing of graffiti and street art styles, not all art found in public spaces is categorized as graffiti. Murals, tags, and

³⁸ *Id.*; Morrissey, *supra* note 23, at 738.

³⁹ Morrissey, *supra* note 23, at 738.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Hencz, *supra* note 27.

⁴³ Morrissey, *supra* note 23, at 738.

⁴⁴ *Id.*

⁴⁵ *Id.* at 738–39.

⁴⁶ *Id.* at 739.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Morrissey, *supra* note 23, at 739.

other artforms can be classified as public art, street art, or graffiti.⁵⁰ Public art is generally created for mass consumption and placed in the public's view, but the works are normally commissioned by the government, a corporation, or another type of organization.⁵¹ On the other hand, street art and graffiti, while viewable in a public space, is usually not commissioned by an organization, corporation, or the government.⁵² However, street art can be distinguished from graffiti because street art generally tries to convey some sort of message to the viewer.⁵³ The conveyed message is likely political or social in nature and attempts to make an impact on the viewer.⁵⁴ Street art acts as a protest voice, and "when the historical narrative is created by those in power due to media control, the people sometimes take to the streets to create their own narrative in order to level the playing field."⁵⁵ In contrast, graffiti is characterized by its stylized writing and is mainly reserved to tags with no message other than to declare territory.⁵⁶ While street art and graffiti may be considered illegal depending on the circumstances, it appears in different forms like murals, wall paintings, and posters and is often featured on t-shirts, billboards, banners, and other forms of media.⁵⁷ Despite the differences between each of form of artwork that adorns public structures or is visible by the public, the increasing acceptance and valuableness of this type of artwork has prompted new questions into whether or how these works should be protected by intellectual property rights.⁵⁸

⁵⁰ Carmen Cowick, *Preserving Street Art: Uncovering the Challenges and Obstacles*, 34 ART DOCUMENTATION: J. ART LIBRS. SOC'Y N. AM. 29, 30 (2015).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 30–31.

⁵⁵ *Id.* at 31.

⁵⁶ Cowick, *supra* note 50.

⁵⁷ *Id.*; Whether street art or graffiti is illegal generally depends on the applicable property and vandalism laws. *See id.* Societal views on graffiti and street art therefore influence whether and to what extent works are found illegal and unsanctioned. *See id.* at 30–31.

⁵⁸ Morrissey, *supra* note 23, at 740.

II. STREET AND GRAFFITI ART AND COPYRIGHT PROTECTION

Street art and graffiti has extended much farther than its home space in urban city centers. Street artists have been featured in galleries and museums like the Bristol Museum and Art Gallery in the United Kingdom, the Los Angeles Museum of Contemporary Art, the Corcoran Gallery of Art in Washington, D.C., and the Palazzo Cipolla in Italy.⁵⁹ Further, auction houses have sold street artist works for stunning amounts of money.⁶⁰ At auction, well-known street artist Banksy's work "Love is in the Bin" resold for \$25.4 million despite being partially shredded.⁶¹ The street art and graffiti style has further leaked into the corporate sphere as major fashion labels now incorporate the art style into their clothing and footwear, and corporations in various industries use street art in advertising campaigns.⁶² Companies like American Eagle Outfitters, Coach, Fiat, General Motors, H&M, Epic Records, McDonald's, Mercedes Benz, Moschino, Roberto Cavalli, and Starbucks headline the list of companies embroiled in copyright disputes regarding the unauthorized use of street art.⁶³ Although the nature of street is ephemeral and can be created or destroyed within seconds, current copyright law and legislative intention support the idea the street art should be considered a copyrightable work.⁶⁴

A. *General Copyright Protection Under 17 U.S.C. § 102*

Section 102 of Title 17 in the United States Code relays the general nature of copyright law in the United States. In relation to street art and graffiti, Section 102 states:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any

⁵⁹ David Halberstadter, *Gambling with Graffiti: Using Street Art on Goods or in Advertising Comes with Significant Risks*, NAT'L L. REV. (Aug. 4, 2020), <https://www.natlawreview.com/article/gambling-graffiti-using-street-art-goods-or-advertising-comes-significant-risks>.

⁶⁰ *Id.*

⁶¹ Scott Reyburn, *Banksy's Shredding Artwork is Auctioned for \$25.4 Million at Sotheby's*, N.Y. TIMES (Oct. 18, 2021), <https://www.nytimes.com/2021/10/14/arts/design/banksy-art-sothebys-auction.html>.

⁶² Halberstadter, *supra* note 59.

⁶³ *Id.*

⁶⁴ Morrissey, *supra* note 23, at 740.

tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories . . . (5) pictorial, graphic, and sculptural works.⁶⁵

Therefore, copyright law requires an original work “fixed in any tangible medium.”⁶⁶ The U.S. Supreme Court has interpreted the original work requirement as (1) a work created independently by an artist and (2) that has a degree of creativity.⁶⁷ The independence prong is fulfilled when the artist does not copy the work from some other artistic work.⁶⁸ This means that “even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying,” it is an independent work.⁶⁹ Therefore, titles, names, common symbols, and typographic elements like fonts, letterings, and color choices are not protected by copyright law.⁷⁰ If parts of the street art or graffiti work embody these elements, even if painted legally, the work does not fulfill the originality requirement.⁷¹ The degree of creativity required is minimal and “‘even a slight amount’ of creative expression will suffice,” and “[t]he vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”⁷²

The “fixed tangible medium” prong requires the work to have an established or “sufficiently permanent” form.⁷³ Examples of works that are not “fixed” include “improvisational speech, sketch, dance, or other performance that is not recorded in a tangible medium of expression.”⁷⁴ “Sufficiently permanent” does not preclude

⁶⁵ 17 U.S.C. § 102.

⁶⁶ *Id.*

⁶⁷ *Morrissey, supra* note 23, at 740–41 (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)).

⁶⁸ *Id.* at 741.

⁶⁹ *Id.* (quoting *Feist*, 499 U.S. at 345).

⁷⁰ Halberstadter, *supra* note 59.

⁷¹ *Id.*

⁷² *Feist*, 499 U.S. at 345 (citing 1 MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.08(c)(1) (2021)).

⁷³ 17 U.S.C. § 101.

⁷⁴ *Morrissey, supra* note 23, at 741 n.53.

works that may be covered or destroyed later.⁷⁵ All that is required is a work that is sufficiently permanent to “be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁷⁶ Therefore, whether painted over or removed, street art and graffiti meet the “fixed tangible medium” prong.⁷⁷

Generally, a copyright owner has the exclusive right to make reproductions of a work, distribute copies of the work, and make derivative works, but in certain circumstances, others may use a copyrighted work under the legal doctrine of “fair use.”⁷⁸ 17 U.S.C. § 107 lays out the basic premise for fair use and gives various examples as to when the doctrine could be dispositive in a dispute.⁷⁹ Section 107 specifically lists “criticism, comment, news reporting, teaching . . . scholarship, or research” as instances where the use of a work would not infringe a copyright.⁸⁰ When deciding whether the fair use doctrine applies, Section 107 lists four factors for courts to use to make this determination:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit education purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copy-righted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copy-righted work.⁸¹

When analyzing the first factor, courts are more likely to deny a fair use defense where the copyrighted work is being used for commercial purposes.⁸² The second factor analyzes how much the work

⁷⁵ *Id.* at 742.

⁷⁶ 17 U.S.C. § 101.

⁷⁷ Morrissey, *supra* note 23, at 742.

⁷⁸ 17 U.S.C. § 106; *U.S. Copyright Office Fair Use Index*, COPYRIGHT.GOV, <https://www.copyright.gov/fair-use/#:~:text=Fair%20use%20is%20a%20legal,protected%20works%20in%20certain%20circumstances> (last updated Nov. 2023).

⁷⁹ 17 U.S.C. § 107.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *U.S. Copyright Office Fair Use Index*, *supra* note 78.

promotes creative expression.⁸³ The more creative the original work, the less likely a court will find fair use.⁸⁴ Under the third factor, a court will look to how much of a work was used and its quality level.⁸⁵ The more an original work is used, the less likely a court will find fair use.⁸⁶ However, if the amount of an original work used is relatively small, but at the “heart” of a work, the court may or may not find fair use.⁸⁷ In the fourth factor, a court will examine the extent of harm to the market of the copyright owner’s work.⁸⁸ The court will look to whether the use is harming the market through issues like displacing sales for the original work or whether there could be substantial harm if the use was widespread.⁸⁹ When taking these factors into consideration, a fair use determination is made on a case-by-case basis.⁹⁰

B. 17 U.S.C. § 120(a): *The Architectural Exemption*

In 1990, Congress enacted the AWCPA to amend the Copyright Act of 1976 and comply with the Berne Convention.⁹¹ The AWCPA provides copyright protection to architectural works.⁹² 17 U.S.C. § 101, created by the Copyright Act of 1976, defines architectural

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *U.S. Copyright Office Fair Use Index, supra note 78.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Christopher C. Dremann, *Copyright Protection for Architectural Works*, 23 AIPLA Q. J. 325, 326 (1995); Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1996, S. TREATY DOC. NO. 99-27 (1986). The Berne Convention is an international copyright treaty providing substantive copyright protections for artists in signatory countries. Samuel Jacobs, *The Effect of the 1886 Berne Convention on the U.S. Copyright System’s Treatment of Moral Rights and Copyright Term, and Where that Leaves Us Today*, 23 MICH. TELECOMM. & TECH. L. REV. 169, 170 (2016). The *National Treatment* provision requires signatory countries to provide the same protections they provide to their own citizens to nationals from other signatory countries. *Id.* at 170 n.3. The United States signed on to the treaty in 1988, 102 years after its creation in 1886. *Id.* at 170.

⁹² 17 U.S.C. § 102(a)(8).

works as “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings . . . the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.”⁹³ The AWCPA was spurred by worry that architectural works and buildings did not receive adequate protections under existing copyright law.⁹⁴ Plans, blueprints, and models were copyrightable under the Copyright Act of 1976, but these protections did not extend to the building itself.⁹⁵ Further, artistic features that were capable of being works separate from the building could be protected, but again, the building itself was not protected under copyright law.⁹⁶ Therefore, works like the Gateway Arch in St. Louis could be protected as a sculptural work, but other works like apartment buildings were not protected.⁹⁷ By creating an additional category within Section 102, the AWCPA sought to extend copyright protection to buildings and mitigate these concerns.

Despite the extra protections given to architectural works through the AWCPA, Congress instituted certain exemptions to architectural works in pictorial representations.⁹⁸ Specifically, the exemption states:

The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.⁹⁹

⁹³ 17 U.S.C. § 101.

⁹⁴ David E. Shipley, *The Architectural Works Copyright Protection Act at Twenty: Has Full Protection Made a Difference?*, 18 J. INTELL. PROP. L. 1, 3 (2010).

⁹⁵ *Id.*

⁹⁶ *Id.* at 3–4.

⁹⁷ *Id.* at 4.

⁹⁸ Llewellyn Kittredge Shamamian, Note, *PGS, I Love You: Rebuilding Copyright for Architecturally-Situated Pictorial, Graphic, and Sculptural Works*, 77 WASH. & LEE L. REV. ONLINE 271, 295 (2021).

⁹⁹ 17 U.S.C. § 120(a).

Therefore, subsection (a) of Section 120 permits people to make pictorial representations of architectural works that are visible to the public without fear of copyright infringement.

When enacting the AWCPA, Congress justified the exemption found in Section 120(a) for several reasons.¹⁰⁰ First, Congress justified the Architectural Exemption by arguing that other Berne signatory countries instituted similar exceptions.¹⁰¹ As House Report 735 was created in 1990, it referenced the following countries that had instituted similar exceptions: the Central African Republic, Chile, Colombia, Congo, Costa Rica, Czechoslovakia, Denmark, Finland, Germany, India, Ireland, Israel, Luxembourg, Mexico, Morocco, New Zealand, Norway, Pakistan, Peru, Poland, Rwanda, Senegal, South Africa, Sweden, Switzerland, Yugoslavia, Belgium, Iceland, Japan, the Netherlands, and France.¹⁰²

Additionally, House Report 735 argued that “architecture is a public art form” and “[m]illions of people visit our cities every year and take back home photographs, posters, and other pictorial representations of prominent works of architecture as a memory of their trip.”¹⁰³ Further, House Report 735 cited the use of pictorial representations of architecture in scholarly works and argued this use should be permitted.¹⁰⁴ In these cases, House Report 735 found that these uses did not exploit the architectural works, and instead, the exemption preserved the architectural works’ public purpose.¹⁰⁵ House Report 735 specifically stated that, “[g]iven the important public purpose served by these uses and the lack of harm to the copyright owner’s market, the Committee chose to provide an exemption, rather than rely on the doctrine of fair use”¹⁰⁶ With this public use rationale, House Report 735’s view leaves open the idea that courts or legislatures could limit the scope of the AWCPA.

¹⁰⁰ H.R. REP. NO. 101-735, at 22 (1990).

¹⁰¹ *Id.*

¹⁰² *Id.* at 22 n.49.

¹⁰³ *Id.* at 22.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ H.R. REP. NO. 101-735, at 22 (1990).

C. *Panorama Right Granted Under the AWCPA and Other Berne Country Signatories*

Through the AWCPA and Section 120(a), the United States employs a very limited form of a panorama right to architectural works.¹⁰⁷ A “freedom of panorama” creates “the right to make and distribute copies of artwork located in public places.”¹⁰⁸ Therefore, the AWCPA creates a panorama right for publicly viewable architectural works because Section 120(a) of the AWCPA allows the public to take pictures of public architectural works.¹⁰⁹ The use of panorama rights is clearly established in other countries, but they apply different variations that change the scope and content of the right.¹¹⁰ Generally, the right applies to works in or visible from public spaces, but the right can be expanded past public displays into public interior spaces.¹¹¹ Legislatures can also manipulate the right to include or exclude temporary displays or permanent works, and the right can be reserved to reproductions of only three-dimensional works or only two-dimensional works.¹¹² There are many other examples of how countries have fashioned their versions of a panorama work, but significant differences between countries is whether a country recognizes a panorama right for commercial uses of street art.¹¹³

Several countries that are Berne Convention signatories have limited panorama rights affecting noncommercial and commercial uses. In 2016, Belgium enacted legislation providing for a panorama right.¹¹⁴ The Belgian Parliament added article XI.190 of the Code on Economic Law allowing for a panorama right for buildings. The article “allows reproduction and communication to the public of

¹⁰⁷ Mary LaFrance, *Public Art, Public Space, and the Panorama Right*, 55 WAKE FOREST L. REV. 597, 598–99 (2020).

¹⁰⁸ *Id.* at 598.

¹⁰⁹ 17 U.S.C. § 120(a) (2021).

¹¹⁰ LaFrance, *supra* note 107, at 598, 618.

¹¹¹ *Id.* at 618.

¹¹² *Id.*

¹¹³ *See id.*

¹¹⁴ *Id.* at 621–23; Loi du 27 juin 2016 modifiant le code de droit économique en vue de l’introduction de la liberté de panorama [Amendments to the Code of Economic Law for the Introduction of Freedom of Panorama], M.B., July 5, 2016, art. 2 [hereinafter Amendments to the Code of Economic Law for the Introduction of Freedom of Panorama].

works of visual, graphic, and architectural art permanently situated in public places, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”¹¹⁵ While the law does not expressly prohibit commercial uses under the panorama right, commercial use could conflict with the language of “normal exploitation.”¹¹⁶

France also instituted a panorama right in 2016, but France implemented clearer restrictions on commercial use. The French panorama right is limited to “representations of architectural works and sculptures located permanently on public roads, and made by natural persons, but exclude[s] all commercial uses.”¹¹⁷ However, L122-5(11), which states this exception, does not definitively define what constitutes commercial use, thus likely leading to future discussions over when the exception applies.¹¹⁸

Sweden also limits the applicability of panorama rights to commercial uses.¹¹⁹ Anyone may reproduce any artistic work in film or television if the use is incidental, and artwork may be in pictures if the artwork is background content or a small part of the film or television frame.¹²⁰ If a work is in an outdoor public area and permanently displayed there, Swedish law allows unlimited use of the work.¹²¹ However, a Swedish Supreme Court decision narrowed the applicability of this panorama right by refusing to apply the right to

¹¹⁵ *Belgium: Act of June 27, 2016, Amending the Code of Economic Law for the Introduction of Freedom of Panorama*, WIPO LEX (July 15, 2016), https://www.wipo.int/news/en/wipolex/2016/article_0015.html; *see also* Amendments to the Code of Economic Law for the Introduction of Freedom of Panorama, *supra* note 114.

¹¹⁶ LaFrance, *supra* note 107, at 623.

¹¹⁷ *Id.* at 624; CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROP. INTELL.] [INTELLECTUAL PROPERTY CODE] art. L122-5(11) (Fr.).

¹¹⁸ Mélanie Dulong de Rosnay & Pierre-Carl Langlais, *Public Artworks and the Freedom of Panorama Controversy: A Case of Wikimedia Influence*, 6 INTERNET POL’Y REV. (Feb. 16, 2017), https://policyreview.info/articles/analysis/public-artworks-and-freedom-panorama-controversy-case-wikimedia-influence#footnoteref23_4ch3lmk.

¹¹⁹ LaFrance, *supra* note 107, at 625 (referencing 2 ch. 20a § LAG OM UPPHOVSRÄTT TILL LITTERÄRA OCH KONSTNÄRLIGA VERK (Svensk författningssamling [SFS] 1960:729 (Swed.)).

¹²⁰ LaFrance, *supra* note 107, at 625.

¹²¹ *Id.*

online reproductions of the work.¹²² In its ruling, the Swedish Supreme Court reasoned that print reproductions like postcards do not threaten an author's market and financial interests like commercial internet uses can.¹²³ The varied treatment of panorama rights in other Berne Convention signatory countries shows the feasibility of modifying panorama rights in the United States.

D. *Cases Interpreting Section 120(a) and the Architectural Exemption*

At present, a person may take a photo of a building without infringing any copyrights.¹²⁴ However, two federal court cases have analyzed whether the Architectural Exemption under Section 120(a) applies to murals, paintings, or street art found on the exterior of the architectural work.¹²⁵ Before the AWCPA enacted Section 120(a) and the Architectural Exemption, a doctrine called "conceptual separability" determined whether a PGS work found in an architectural work was copyrightable.¹²⁶ Under this doctrine, artistic works that were a part of a building that did not have a functional, utilitarian, or useful role could receive copyright protection.¹²⁷ *Leicester v. Warner Bros.*,¹²⁸ in the Ninth Circuit, opened the discussion on Section 120(a) and the applicability of conceptual separability to archi-

¹²² Högsta Domstolen [HD] [Supreme Court] 2016-04-04 Ö 849-15 (Swed.), <https://www.domstol.se/hogsta-domstolen/avgoranden/2016/36003>; *Swedish Supreme Court Rules Against Freedom of Panorama*, EDRI (Apr. 6, 2016), <https://edri.org/our-work/swedish-supreme-court-rules-against-freedom-of-panorama> (referencing *Visual Arts Copyright Society in Sweden v. Wikimedia Sweden*, 2016-04-04 Ö 849-15 (Swed.)).

¹²³ *Swedish Supreme Court Rules Against Freedom of Panorama*, *supra* note 122 (describing the Swedish Supreme Court's ruling).

¹²⁴ Bobby Ghajar et al., *2 Copyright Rulings Reveal Evolving Protection for Street Art*, LAW360 (May 12, 2020, 5:08 PM), <https://www.cooley.com/-/media/cooley/pdf/reprints/2020/2-copyright-rulings-reveal-evolving-protection-for-street-art.ashx>; *Mercedes Benz, USA, LLC v. Lewis*, No. 19-10948, 2019 WL 4302769, at *1 (E.D. Mich. Sept. 11, 2019); *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927, 928–29 (C.D. Cal. 2018).

¹²⁵ Ghajar et al., *supra* note 124.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Leicester v. Warner Bros.*, 232 F.3d 1212, 1213–14, 1216 (9th Cir. 2000).

tectural works under Section 120(a), while *Falkner v. General Motors LLC*,¹²⁹ in the Central District of California, and *Mercedes Benz, USA, LLC v. Lewis*,¹³⁰ in the Eastern District of Michigan, came to differing outcomes after grappling with Section 120(a)'s applicability to street art.

1. *LEICESTER V. WARNER BROS.*

In *Leicester v. Warner Bros.*, Andrew Leicester, an artist specializing in large-scale public art, filed a suit for copyright protection for a courtyard space called the Zanja Madre.¹³¹ Leicester was commissioned by R & T Development Corporation to create a courtyard space, which consisted of artistic works depicting the history of Los Angeles for a twenty-four-story office building called 801 Tower.¹³² The contract between Leicester and R & T stated R & T had a “perpetual irrevocable license” for reproductions of the courtyard area.¹³³ Leicester also relinquished the opportunity to recreate any aspect of the courtyard area or allow anyone else to recreate aspects of the courtyard area.¹³⁴

In 1994, Warner Bros. received permission from R & T to use 801 Tower as the Gotham Bank in *Batman Forever*.¹³⁵ Parts of Leicester's work appear in the background of a few scenes in *Batman Forever*.¹³⁶ Warner Bros. created a miniature version of the 801 Tower with the courtyard area for special effect shots, and two towers from the courtyard appeared in a video taken from the movie and in promotional items.¹³⁷ In 1995, Leicester filed for copyright protection for the Zanja Madre courtyard area and brought a copyright infringement suit against Warner Bros.¹³⁸ The trial court held that Warner Bros. did not infringe the copyright on the Zanja Madre and

¹²⁹ *Falkner*, 393 F. Supp. 3d at 937.

¹³⁰ *Mercedes Benz, USA, LLC v. Lewis*, No. 19-10948, 2019 WL 4302769, at *7 (E.D. Mich. Sept. 11, 2019).

¹³¹ *Leicester*, 232 F.3d at 1213.

¹³² *Id.* at 1214.

¹³³ *Id.* at 1215.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Leicester*, 232 F.3d at 1215.

¹³⁸ *Id.*

towers in the courtyard because “17 U.S.C. § 120(a) exempts pictorial representations of architectural works from copyright infringement.”¹³⁹ The court held that Congressional intent behind the exemption was to create a new protection for architectural works and move away from the conceptual separability test.¹⁴⁰ Leicester then appealed the trial court’s decision.¹⁴¹

On appeal, Leicester argued that the Zanja Madre courtyard area was a unitary sculptural work protectable by copyright even after the Copyright Act of 1990 instituted the Architectural Exemption under Section 120(a).¹⁴² The Ninth Circuit began its opinion by explaining the difference between architectural works and PGS works under Section 102(a).¹⁴³ The court stated architectural works did not enjoy full copyright protection as evidenced by House Report 735 on the AWCPA.¹⁴⁴ Thus, the trial court’s finding that the towers were not only artistic but also architectural and therefore a part of the building’s plan was not in error.¹⁴⁵

The Ninth Circuit discussed several of the artistic work’s characteristics that lent themselves to being architectural.¹⁴⁶ First, four towers that were a part of the Zanja Madre formed a street wall that was mandated by the Los Angeles Community Redevelopment Agency.¹⁴⁷ The Ninth Circuit also held that the street wall was designed to match the building, and the towers were a joint project between the building architect and Leicester.¹⁴⁸ The street wall also had a functional aspect by funneling traffic into the courtyard.¹⁴⁹ Further, the Ninth Circuit disagreed with the notion that the Zanja Madre was not a “building.”¹⁵⁰ The courtyard area was an architectural work as part of the “overall form as well as the arrangement

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 1216.

¹⁴³ *Leicester*, 232 F.3d at 1216.

¹⁴⁴ *Id.* at 1217.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1218–19.

¹⁴⁷ *Id.* at 1218.

¹⁴⁸ *Id.*

¹⁴⁹ *Leicester*, 232 F.3d at 1218.

¹⁵⁰ *Id.*

and composition of spaces and elements in the design.”¹⁵¹ Therefore, the Ninth Circuit found that the tower’s artistic aspects did not preclude the trial court’s finding that they should be construed as part of the 801 Tower.¹⁵²

The Ninth Circuit also found that the street wall towers were a part of the building, and, therefore, Section 120(a) applied to pictorial representations of the building.¹⁵³ The court held that Leicester’s position that Congress did not take away copyright for PGS works under the AWCPA was incorrect, stating, “Whether or not Leicester may have some *other* claim for a *different* infringement of his copyright in the Zanja Madre towers as a sculptural work, we believe he has none for a pictorial representation of the 801 Tower and its street wall embodying a protected architectural work.”¹⁵⁴ The court explained that it would be counterintuitive to have Section 120(a) apply only to certain parts of an architectural work and not to the work as a whole.¹⁵⁵ Judge Tashima’s concurrence succinctly stated the idea that the AWCPA did not allow for applying the conceptual separability test when the architectural work and artistic work were closely related.¹⁵⁶

2. *MERCEDES BENZ, USA, LLC v. LEWIS*

In *Mercedes Benz, USA, LLC v. Lewis*, Mercedes Benz filed for declaratory judgments against three artists in relation to the company using the artists’ street art in a series of advertisements.¹⁵⁷ In January 2018, Mercedes Benz obtained a permit from the City of Detroit, Michigan, to photograph the G 500 Series vehicle.¹⁵⁸ On January 26, 2018, Mercedes Benz posted six photographs of the G 500 in locations featuring James Lewis’s, Daniel Bombardier’s, Jeff

¹⁵¹ *Id.* (quoting 17 U.S.C. § 101).

¹⁵² *Id.* at 1218–19.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Leicester*, 232 F.3d at 1220.

¹⁵⁶ *Id.* at 1222 (Tashima, J., concurring) (explaining the AWCPA “reject[ed] application of the conceptual separability test where the architectural work and the artistic work are so closely and functionally intertwined as in this case”).

¹⁵⁷ *Mercedes Benz, USA, LLC v. Lewis*, No. 19-10948, 2019 WL 4302769, at *1 (E.D. Mich. Sept. 11, 2019).

¹⁵⁸ *Id.*

Soto's, and Maxx Gramajo's murals.¹⁵⁹ The Instagram post depicting the artists' murals included the caption, "[t]his off-road legend is always ready for some urban exploration to mix things up," and was created to "highlight the G 500's versatility."¹⁶⁰ The artists hired an attorney and sent a letter to Mercedes Benz threatening to file a copyright infringement suit a year after Mercedes Benz posted the photos on Instagram.¹⁶¹

According to Mercedes Benz's complaint, the company removed the photos but continued to receive communications from the artists threatening to "expose" Mercedes Benz.¹⁶² In response, Mercedes Benz filed for declaratory judgment on whether "(1) Mercedes made fair use of defendants' murals, (2) defendants' murals [were] exempt from protection under the AWCPA, (3) Mercedes did not violate the Digital Millennium Copyright Act, 17 U.S.C. § 1201 et seq., (4) Mercedes did not violate any of defendants' alleged rights."¹⁶³ The artists then filed a motion to dismiss Mercedes Benz's declaratory relief motion.¹⁶⁴

Analyzing the AWCPA claim, the court rejected the artists' argument that Mercedes Benz failed to state a claim under Section 120(a).¹⁶⁵ First, although the artists cited *Leicester* for support of their claim, the court found that Mercedes Benz was essentially making the same claim as Warner Bros.¹⁶⁶ Here, as in *Leicester*,

Section 120(a) 'allows the public the right to photograph public buildings including' any work that is 'part of the architectural work.' This is because the term 'architectural work' extends to 'the overall form as well as the arrangement and composition of spaces and elements in the design of the building.'¹⁶⁷

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at *2.

¹⁶² *Id.*

¹⁶³ *Mercedes Benz*, 2019 WL 4302769, at *2.

¹⁶⁴ *Id.* at *1.

¹⁶⁵ *Id.* at *5.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* (quoting *Leicester v. Warner Bros.*, 232 F.3d 1212, 1218 (9th Cir. 2000)).

Second, the court denied the artists' policy argument that it was unjust to allow pictorial representations of the artists' PGS works.¹⁶⁸ Again citing *Leicester*, the court stated:

[T]he plaintiff might have an infringement claim where, for example, someone created a reproduction of his sculpture divorced from the context of the building in which it was embodied, i.e. on a poster, t-shirt, or other print media. However, plaintiff did not have an infringement claim based on a photograph of the building that included the sculpture as a design element of the building.¹⁶⁹

Therefore, the court held that nothing in *Leicester* supported the artists' claim that "Mercedes does not have a claim under the ACWPA."¹⁷⁰

The court also rejected other claims related to the AWCPA.¹⁷¹ For pleading requirements under Section 120(a), the court found that claims under Section 120(a) did not require the building at issue to be original, as an "originality" aspect is not found in the definition of "architectural work."¹⁷² Second, the artists' contention that Mercedes Benz had to claim the buildings as "utilitarian" had no cited support, and the artists' contention that "utilitarian structures" were not exempt under Section 120(a) was also unsupported.¹⁷³ Third, the court rejected the argument that buildings built before December 1, 1990, did not receive the exemption under Section 120(a), as it was not an issue in the case.¹⁷⁴ Fourth, the artists' argument that humans must actually occupy the building was incorrect, as a building must only be "capable of being occupied, even if they are not actually inhabited."¹⁷⁵ Finally, the artists' reliance on Federal Circuit case

¹⁶⁸ *Id.* at *5.

¹⁶⁹ *Mercedes Benz*, 2019 WL 4302769, at *5 (citing *Leicester*, 232 F.3d at 1219).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at *6.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Mercedes Benz*, 2019 WL 4302769, at *6 (citing *Leicester v. Warner Bros.*, 232 F.3d 1212, 1218 (9th Cir. 2000)).

*Gaylord v. United States*¹⁷⁶ for the proposition that Section 120(a) requires humans to occupy and not simply access the structure was misplaced, because Gaylord's holding focused on structures not intended for occupancy, like bridges and walkways.¹⁷⁷ In conclusion on the AWCPA-related claims, the court summed up its opinion by explaining that Mercedes Benz had a "plausible claim" for copyright protection under Section 120(a) of the AWCPA.¹⁷⁸

3. *FALKNER V. GENERAL MOTORS LLC*

In *Falkner v. General Motors LLC*, Adrian Falkner, an artist, filed a civil action for copyright infringement against General Motors.¹⁷⁹ General Motors filed a motion for summary judgment or partial summary judgment for two of Falkner's claims and for Falkner's claim for punitive damages against General Motors.¹⁸⁰ The major issue in front of the court was whether a parking garage was an architectural work and, if so, whether a mural painted on the garage was a part of the architectural work and therefore exempt from copyright protection under Section 120(a) of the AWCPA.¹⁸¹

The suit arose from General Motors' use of Falkner's mural in a social media advertising post.¹⁸² Falkner, using the name "Smash 137," created a mural for a Detroit art gallery as part of a project featuring murals on parking garages.¹⁸³ Falkner had full creative control over the mural's design and where it was placed in the parking garage.¹⁸⁴ Further, the parking garage and coinciding building were complete when Falkner began painting the mural.¹⁸⁵ In August

¹⁷⁶ *Gaylord v. United States*, 595 F.3d 1364, 1381 (Fed. Cir. 2010).

¹⁷⁷ *Mercedes Benz*, 2019 WL 4302769, at *7 (citing *Gaylord*, 595 F.3d at 1391).

¹⁷⁸ *Id.* ("Overall, Mercedes has alleged a plausible claim that section 120(a) of the AWCPA protects Mercedes' right to photograph publicly visible buildings which contained defendants' murals. Whether they will prevail on this claim is not before the Court at this time.")

¹⁷⁹ *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927, 928–29 (C.D. Cal. 2018).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 936–37.

¹⁸² *Id.* at 929–30.

¹⁸³ *Id.* at 929.

¹⁸⁴ *Id.*

¹⁸⁵ *Falkner*, 393 F. Supp. 3d at 929.

2016, a professional automotive photographer obtained a car from Cadillac and photographed it in front of Falkner's mural.¹⁸⁶ The photographer, Alex Bernstein, claimed he was unaware of Falkner's pseudonym, Smash 137, found on one of the mural's walls, and that he chose the angle of the photograph, omitting the pseudonym, based on photo composition.¹⁸⁷ Bernstein then sent the photos to General Motors, whose advertising agency then posted on social media.¹⁸⁸

The court first began its analysis by reiterating the relevant copyright protections for PGS works found under § 102(a)(5) and § 102(a)(8) for architectural works, explaining the general applicability of Section 120(a) to architectural works.¹⁸⁹ In the court's words, the issue confronted in this case "present[ed] a more complex issue; whether Section 120(a) applies to (and this limits the copyright protection of) a PGS work that is physically connected to an architectural work."¹⁹⁰

The court then conducted a thorough reading of the decision in *Leicester* and interpreted four factors to help decide whether a PGS work is a part of an architectural work.¹⁹¹ The court stated that PGS works are considered architectural works, falling under the exemption in Section 120(a), when the PGS work is an independent architectural work or "part of" an architectural work.¹⁹² Further, the court reiterated the factors the *Leicester* court used when deciding whether a PGS work was an architectural work.¹⁹³ These factors included whether (1) "the PGS work had an 'integrated concept' that 'includ[ed] both architectural and artistic portions,'" (2) whether "certain PGS works may independently be 'traditionally considered as architectural features' or 'one of the basics of architectural vocabulary,' such as columns and doors;" (3) whether the PGS work was designed to be a part of the building; and (4) whether the PGS

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 930.

¹⁸⁹ *Id.* at 930–31.

¹⁹⁰ *Id.* at 931.

¹⁹¹ *Falkner*, 393 F. Supp. 3d at 934.

¹⁹² *Id.*

¹⁹³ *Id.*

work has a functional purpose in relation to the building.¹⁹⁴ Further, the court found that *Leicester* left open the question on the applicability of the conceptual separability in the architectural work context based on the *Leicester*'s majority, concurring, and dissenting opinions.¹⁹⁵

Applying its understanding of the *Leicester* decision, the court addressed whether a parking garage was an architectural work, and then whether Falkner's mural was a part of the architectural work.¹⁹⁶ In this case, the court found that parking garages were "buildings" under the definition given in 17 U.S.C. § 101.¹⁹⁷ Here, the court found parking garages were clearly used by humans and "fit for human occupancy," therefore fulfilling the definition of "building" and qualifying as an architectural work under Section 102(a)(8).¹⁹⁸

With the parking garage qualifying as an architectural work, the court then held that Falkner's mural was not "part of" the parking garage to induce the pictorial exemption under Section 120(a).¹⁹⁹ The court determined that the factors iterated in *Leicester* were not present in the case.²⁰⁰ The mural was not planned as part of the parking garage and did not have a functional purpose related to the building.²⁰¹ Falkner had full creative control over the mural and it did not match the parking garage's design features.²⁰² Further, the parking garage and corresponding building were completely finished when Falkner created the mural.²⁰³ Effectively, the court here fully distinguished the case from *Leicester* because the mural had no connection with the parking garage's design and construction.²⁰⁴ As the court found that the mural was not part of the parking garage, it could not address whether Section 120(a) would apply to the mural

¹⁹⁴ *Id.* (quoting *Leicester v. Warner Bros.*, 232 F.3d 1212, 1217–18 (9th Cir. 2000)).

¹⁹⁵ *Id.* at 935–36.

¹⁹⁶ *Id.* at 936–37.

¹⁹⁷ *Falkner*, 393 F. Supp. 3d at 936.

¹⁹⁸ *Id.* at 936–37.

¹⁹⁹ *Id.* at 937.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Falkner*, 393 F. Supp. 3d at 937.

²⁰⁴ *Id.*

allowing pictorial representations; therefore, the court denied General Motors' motion for partial summary judgment on the copyright infringement claim.²⁰⁵ However, the parties settled shortly after this ruling.²⁰⁶

E. *Settled and Pending Street Art Cases*

Despite the three cases outlined above that discuss Section 120(a) and the applicability of the AWCPA, there remains a shortage of cases dealing with street art copyright issues.²⁰⁷ Many street artists settle potential copyright infringement cases before going to court and litigating important copyright issues because of the public relations issues that these cases present.²⁰⁸ Companies are generally hesitant to pursue copyright infringement claims because of the public perception that companies are infringing on street artists' work even if the company has not actually infringed on an artist's copyright.²⁰⁹ The continuous cycle of unauthorized street art use, filing a copyright infringement claim, and subsequent settlement between the parties perpetuates the lack of answers for important street art copyright questions.²¹⁰ This Section details several cases following the decisions in *Falkner v. General Motors LLC* and *Mercedes Benz, USA, LLC v. Lewis* that implicate corporate use of street art and potential copyright infringement claims. If litigated, these cases could have cleared the murky waters surrounding street artist copyright protections potentially under the AWCPA and Section 120(a), but

²⁰⁵ *Id.*

²⁰⁶ Guy R. Cohen et al., *American Graffiti*, INTEL. PROP. MAG., Sept. 2019 at 42, 43, https://www.dglaw.com/wp-content/uploads/2021/09/IP-Magazine_American-Graffiti_PDF-for-Internal-Distribution.pdf. As an important note to the cases discussed above, each of the decisions occurred at different procedural phases. Ghajar et al., *supra* note 124. The *Falkner* court decided a motion for summary judgment, while the *Mercedes Benz* court decided a motion to dismiss related to a declaratory action "rather than the merits of a developed factual record relating to the circumstances surrounding the creation of the artwork." *Id.* With a more developed factual record, there remain questions as to how a court would rule on Section 120(a) in relation to street art. *Id.*

²⁰⁷ Ghajar et al., *supra* note 124.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

the cases concluded without providing answers to how courts might respond in corporate street art use scenarios.²¹¹

In 2019, Curtis Kulig, an artist, photographer, and illustrator, filed a copyright infringement suit against Aldo, a corporation that sells shoes and handbags.²¹² Kulig created a mural on the outside of a building located in Culver City, California, featuring the word “love” in a stylistic form.²¹³ The mural became very popular with the general public and art world, who attributed the work to Kulig even without a signature or tag.²¹⁴ Kulig alleged that Aldo used the mural to advertise their products on social media sites.²¹⁵ Among the claims brought against Aldo, Kulig filed a claim for relief for copyright infringement.²¹⁶ Kulig alleged his mural was an “original work of authorship” on a “fixed tangible medium of expression” and was therefore copyrightable.²¹⁷ Further, Kulig had filed a copyright application for the mural with the Registrar of Copyrights.²¹⁸ Kulig claimed “all rights, title, and interest in and to the copyright in the graphic expression.”²¹⁹ Therefore, Kulig claimed that Aldo had knowingly infringed the mural’s copyright and used the mural in its advertisements without Kulig’s permission.²²⁰ When asked about the use of the mural, one of Kulig’s attorneys responded, “It is of-

²¹¹ *Id.*; Clark Kauffman, *Hy-Vee Sued by Artist for Using His Street Mural in a Super Bowl Commercial*, IOWA CAP. DISPATCH (Feb. 17, 2022, 5:02 PM), <https://iowacapitaldispatch.com/2022/02/17/hy-vee-sued-by-artist-for-using-his-street-mural-in-a-super-bowl-commercial>; Williams v. Hy-Vee, Inc., WESTLAW, [https://1.next.westlaw.com/Document/IBBC874C7851011ECB9ADE794D9CE2D20/View/FullText.html?originationContext=riFilings&transitionType=Document&contextData=\(sc.RelatedInfo\)&docSource=ecf673ae284e4a1c8199d729e8cba023&rank=1&rulebookMode=false&ppcid=69853bf7452b4e2595371431019d6cce](https://1.next.westlaw.com/Document/IBBC874C7851011ECB9ADE794D9CE2D20/View/FullText.html?originationContext=riFilings&transitionType=Document&contextData=(sc.RelatedInfo)&docSource=ecf673ae284e4a1c8199d729e8cba023&rank=1&rulebookMode=false&ppcid=69853bf7452b4e2595371431019d6cce) (last visited Mar. 7, 2024).

²¹² Complaint at ¶¶ 5–6, 11, *Kulig v. Aldo Grp., Inc.*, No. 19-cv-01181 (C.D. Cal. May 21, 2019).

²¹³ *Id.* ¶ 9.

²¹⁴ *Id.* ¶ 10.

²¹⁵ *Id.* ¶¶ 6, 11.

²¹⁶ *Id.* ¶ 15.

²¹⁷ *Id.*

²¹⁸ Complaint at ¶ 15, *Kulig v. Aldo Grp., Inc.*, No. 19-cv-01181 (C.D. Cal. May 21, 2019).

²¹⁹ *Id.* ¶ 16.

²²⁰ *Id.* ¶¶ 17, 18.

fensive that Aldo would find nothing ‘improper’ about allegedly using an artist’s original work without permission in advertisements The artist community will not stand for this type of corporate culture.”²²¹ However, Kulig filed to voluntarily dismiss the case without prejudice, facilitating the continuing gap of case law interpreting street artists copyright protections.²²²

In California, in 2020, Hueman LLC, owned by muralist and street artist Allison Tinati, filed for copyright infringement against Alaska Airlines.²²³ Tinati created a mural entitled “Bloom” on the exterior of a building in the Arts District of Los Angeles, which she had previously registered for federal copyright protection.²²⁴ Hueman alleged that Alaska Airlines used the mural in marketing and advertising materials for flight sale promotions without Tinati’s permission.²²⁵ The complaint alleged, “Defendant knew or should have known that Plaintiff required a licensing fee for its works, including the Mural” and that Alaska Airlines had “been willful, intentional, purposeful, and in reckless disregard of and with indifference to the rights of Plaintiff.”²²⁶ However, the dispute was settled out of court in March 2021.²²⁷ Again, if fully litigated, Hueman’s claim could have helped clear the discourse of how courts would treat corporate use of murals found in public places.

In Iowa, in 2022, Chris A. Williams, an artist and muralist, refiled a civil suit against Hy-Vee, a retail grocery business, alleging copyright infringement as one of the included claims.²²⁸ In 2018, Williams created a mural in Des Moines, Iowa, as part of the 6th Avenue Corridor Revitalization Plan.²²⁹ However, Williams alleged he retained all intellectual property rights under the Copyright Act

²²¹ Benjamin Sutton, *Street Artists are Suing Shoemaker Aldo for Copyright Infringement*, ARTSY (Feb. 20, 2019, 11:59 AM), <https://www.artsy.net/article/artsy-editorial-street-artists-suing-shoemaker-aldo-copyright-infringement>.

²²² Ghajar et al., *supra* note 124.

²²³ Complaint at ¶ 23, *Hueman LLC v. Alaska Airlines, Inc.*, No. 20-cv-06539 (C.D. Cal. Dec. 16, 2020).

²²⁴ *Id.* ¶¶ 9, 11.

²²⁵ *Id.* ¶ 13.

²²⁶ *Id.* ¶¶ 14, 24.

²²⁷ Kauffman, *supra* note 211.

²²⁸ Complaint at ¶¶ 8–9, 60, *Williams v. Hy-Vee, Inc.*, No. 22-cv-00025 (S.D. Iowa Feb. 3, 2022).

²²⁹ *Id.* ¶ 16.

for the mural.²³⁰ In 2019, Hy-Vee created a commercial, which aired during the 2019 Super Bowl, showing the mural in different scenes.²³¹ The commercial was also posted online in places like Hy-Vee's Facebook, YouTube, and other social media accounts.²³² Specifically, the mural appeared at the commercial's 1:10–1:16 and 2:59–3:08 time spots.²³³ The commercial depicted the entire mural, and the camera panned across the full length of the mural but did not show William's copyright information.²³⁴ Other media outlets aired the commercial, and it remained available to the public three years after its airing.²³⁵

After seeing the commercial featuring his mural during the 2019 Superbowl, Williams notified Hy-Vee of the copyright infringement.²³⁶ Hy-Vee did not remove the content with the mural or compensate Williams for using the mural in the commercial.²³⁷ Instead, Hy-Vee denied the claims brought by Williams.²³⁸ The complaint specifically alleged that the “mural is an original work of visual art fixed in a tangible medium of expression that is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”²³⁹ Therefore, the complaint alleged the mural was entitled to copyright protection, and Hy-Vee was liable for copyright infringement under 17 U.S.C. § 501 as it “copied, displayed, distributed, and made derivative works of the Mural without Mr. Williams's authorization.”²⁴⁰ The Southern District of Iowa rendered judgment against Williams on August 18, 2023, likely on the theory that Williams did

²³⁰ *Id.* ¶ 17.

²³¹ *Id.* ¶¶ 22, 29–30.

²³² *Id.* ¶¶ 40–41.

²³³ *Id.* ¶¶ 30–31.

²³⁴ Complaint at ¶¶ 35–37, *Williams v. Hy-Vee, Inc.*, No. 22-cv-00025 (S.D. Iowa Feb. 3, 2022).

²³⁵ *Id.* ¶¶ 43–44.

²³⁶ *Id.* ¶ 46.

²³⁷ *Id.* ¶ 47.

²³⁸ *Id.*

²³⁹ *Id.* ¶ 57.

²⁴⁰ Complaint at ¶¶ 58–60, *Williams v. Hy-Vee, Inc.*, No. 22-cv-00025 (S.D. Iowa Feb. 3, 2022).

not own the copyright to his work when he filed for copyright protection.²⁴¹

Despite the potential ramifications of *Falkner v. General Motors LLC*, the settled cases discussed in this Section show the continued corporate use of street art despite the potential for courts to limit the applicability of the Architectural Exemption found in Section 120(a) of the AWCPA—if the cases had presented this defense and had the parties fully litigated this issue.²⁴² Each of the fact patterns lend themselves to an in-depth discussion of copyright protections for street artists in general.²⁴³ However, because parties settled or did not touch issues related to Section 120(a), there remains a potential opportunity for judicial interpretation to clarify the reach of copyright protections in street artist copyright cases.²⁴⁴

III. OTHER POLICY ARGUMENTS FOR ARTISTS CHALLENGING THE AWCPA

Both artists and corporations have varying arguments as to how and when courts should apply the Architectural Exemption under Section 120(a). But within the past few years, street artists have taken a more proactive approach in asserting their copyright protections.²⁴⁵ Despite the counterculture atmosphere of street art, street artists have sought help from the legal system to protect their interests.²⁴⁶ Besides the substantive legal arguments made for protecting

²⁴¹ *Williams v. Hy-Vee, Inc.*, *supra* note 211; *see also Williams v. Hy-Vee, Inc.*, 661 F. Supp. 3d 871, 891 (S.D. Iowa 2023); Tyler Jett, *Hy-Vee Claims Artist Can't Sue Over Use of His Mural in Super Bowl Ad. Here's Why.*, DES MOINES REG. (May 6, 2022, 11:30 AM), <https://www.desmoinesregister.com/story/money/business/2022/05/06/hyvee-hy-vee-artist-mural-sue-super-bowl-ad-oprah-winfrey/9646363002>.

²⁴² *See* discussion *supra* Sections II.D, II.E.

²⁴³ *See generally* Complaint, *Kulig v. Aldo Grp., Inc.*, No. 19-cv-01181 (C.D. Cal. May 21, 2019); Complaint, *Hueman LLC v. Alaska Airlines, Inc.*, No. 20-cv-06539 (C.D. Cal. Dec. 16, 2020); Complaint, *Williams v. Hy-Vee, Inc.*, No. 22-cv-00025 (S.D. Iowa Feb. 3, 2022).

²⁴⁴ *See Ghajar et al.*, *supra* note 124; *Kauffman*, *supra* note 211.

²⁴⁵ *Sutton*, *supra* note 221.

²⁴⁶ Gabe Friedman, *Can Graffiti Be Copyrighted?*, ATL. (Sept. 21, 2014), <https://www.theatlantic.com/business/archive/2014/09/can-graffiti-be-copyrighted/380323>.

street art under 17 U.S.C. § 101, artists make a variety of policy arguments for increasing street artist protections, like the potential erosion of street artists' copyright protection to large corporations and the perception of "selling out" by diminishing the artist's reputation in light of corporations using works in public campaigns.²⁴⁷

Artists have attempted to make the policy argument that Section 120(a) erodes copyright protections that PGS works normally enjoy in a street art scenario, especially in situations where the potential infringer is a large corporation.²⁴⁸ The artists in *Mercedes Benz* argued that Section 120(a) was "unjust" and would wipe out street artist copyright protections by allowing anyone to make copies of PGS works found on buildings viewable by the public.²⁴⁹ However, the court rejected this argument, finding that the artists would have a claim where the artistic work was reproduced without reference to the building, not where the depiction was of the building.²⁵⁰ Allison Tinati's complaint argued the underlying idea that corporations should not be allowed to freely use street art in ad campaigns.²⁵¹ The Hy-Vee commercial in which Chris Williams's work appeared featured Oprah Winfrey's "O, That's Good!" brand, to which Williams commented, "It felt ironic listening to Oprah talk about hopes and dreams while watching her seemingly exploit my own creative energy, my own hopes and dreams, without even recognizing me."²⁵²

Further, when corporations use street art in their media campaigns, even without the artist's permission, the artist may face a loss of reputation within the community for "selling out."²⁵³ The reputational damage premise stems from the idea that graffiti and

²⁴⁷ *Id.*; Henri Neuendorf, *Graffiti Artists Face Off Against Corporate America*, ARTNET (Sept. 25, 2014), <https://news.artnet.com/art-world/graffiti-artists-face-off-against-corporate-america-113464>.

²⁴⁸ *Mercedes Benz, USA, LLC v. Lewis*, No. 19-10948, 2019 WL 4302769, at *5 (E.D. Mich. Sept. 11, 2019).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ Complaint at ¶ 14, *Hueman LLC v. Alaska Airlines, Inc.*, No. 20-cv-06539 (C.D. Cal. Dec. 16, 2020).

²⁵² Linh Ta, *Who Owns Public Art? Des Moines Artist Sues Hy-Vee for Using His Mural in Super Bowl Ad*, DES MOINES REG. (Aug. 25, 2019, 9:59 PM), <https://www.desmoinesregister.com/story/money/business/2019/08/26/des-moines-artist-sues-hy-vee-using-his-mural-super-bowl-ad-copyright-infringement-hyvee-commercial/2008639001>.

²⁵³ Friedman, *supra* note 246.

street art was an underground movement which was prompted by social issues and operated as a protest voice, from which corporations now attempt to profit.²⁵⁴ When a group of San Francisco artists sued fashion designer Roberto Cavalli for using their mural in some of his products, the artists made the following statement in their complaint, “Nothing is more antithetical to the outsider ‘street cred’ that is essential to graffiti artists than European chic, luxury and glamour.”²⁵⁵ Miami-based street artist David Anasagasti made a similar argument when challenging American Eagle’s use of his mural in advertising media, stating his reputation relied on opposing corporate entities.²⁵⁶ In particular, American Eagle’s use of Anasagasti’s mural “distort[ed] the meaning of the images, which represent the working-class grind.”²⁵⁷ Further, a 2019 complaint filed by Julian Rivera alleged Walmart had infringed on Rivera’s stylistic design of the word “love.”²⁵⁸ As part of the complaint, Rivera argued “nothing is more antithetical to a street artist’s credibility than association with mass-market consumerism—of which Walmart is the epitome.”²⁵⁹ Mark Kulig made a similar claim, stating in his complaint, “Plaintiff’s reputation and career has been irreparably tarnished, diminishing the value of Plaintiff’s works, and decreasing revenue derived from his work.”²⁶⁰ Chris Williams’s complaint also specifically cited reputational damage that resulted from Hy-Vee using his mural in their commercial.²⁶¹

The use of street art by corporations in terms of copyright erosion is further highlighted by the fact that many artists live in financial uncertainty, and when corporations purposefully use and take advantage of street art, the logical argument is that the artist should

²⁵⁴ *Id.*; Neuendorf, *supra* note 247; Cowick, *supra* note 50, at 31.

²⁵⁵ Friedman, *supra* note 246.

²⁵⁶ Neuendorf, *supra* note 247.

²⁵⁷ Friedman, *supra* note 246.

²⁵⁸ Taylor Dafoe, *A Street Artist is Suing Walmart and Ellen DeGeneres for Allegedly Stealing His Signature Heart Logo*, ARTNET (July 31, 2019), <https://news.artnet.com/art-world/street-artist-suing-walmart-ellen-degeneres-stealing-signature-logo-1614190>.

²⁵⁹ *Id.*

²⁶⁰ Complaint at ¶ 19, *Kulig v. Aldo Grp., Inc.*, No. 19-cv-01181 (C.D. Cal. May 21, 2019).

²⁶¹ Complaint at ¶ 54, *Williams v. Hy-Vee, Inc.*, No. 22-cv-00025 (S.D. Iowa Feb. 3, 2022).

be compensated.²⁶² The cost of litigating is a further barrier to protecting artist's rights, as litigating the unclear issues surrounding street art copyrights can cost hundreds of thousands of dollars, beyond what most street artists can afford in an effort to protect their work from unwanted commercialization and use by corporations.²⁶³ This monetary argument, along with the other policy arguments discussed in this Section, highlight artists' worries when dealing with instances of corporate use of street art that courts could alleviate when interpreting the applicability of the AWCPA.

IV. LIMITING THE ARCHITECTURAL EXEMPTION TO NONCOMMERCIAL USES WOULD BETTER EMBODY THE EXEMPTION'S SPIRIT

To adequately balance both street artists' copyright protections and legislative intent behind the Architectural Exemption in Section 120(a), the exemption should be limited to noncommercial uses of the artwork. Legislative intent hints at this premise, and other Berne Convention signatories, which House Report 735 cited, have similar commercial and noncommercial restrictions for public art.²⁶⁴

A. *Legislative Intent Hints at the Notion of Noncommercial Use Allowed Under the Exemption*

Currently, Section 120(a) applies to both commercial and non-commercial uses of an architectural work and potentially the subsequent PGS work, but Section 120(a)'s application could be limited to noncommercial uses.²⁶⁵ As explained in Part II, Congress enacted

²⁶² See Friedman, *supra* note 246.

²⁶³ Daniel Grant, *Artist Sues Grocery Store Chain for Unauthorised Use of His Mural in Super Bowl Commercial Narrated by Oprah Winfrey*, ART NEWSPAPER (Mar. 17, 2022), <https://www.theartnewspaper.com/2022/03/17/chris-williams-hy-vee-lawsuit-oprah-winfrey-super-bowl>.

²⁶⁴ H.R. REP. NO. 101-735, at 22 (1990); see also Amendments to the Code of Economic Law for the Introduction of Freedom of Panorama, *supra* note 114; CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROP. INTELL.] [INTELLECTUAL PROPERTY CODE] art. L122-5(11) (Fr.); LaFrance, *supra* note 107, at 625 (referencing 2 ch. 20a § LAG OM UPPHOVSRÄTT TILL LITTERÄRA OCH KONSTNÄRLIGA VERK (Svensk författningssamling [SFS] 1960:729 (Swed.)).

²⁶⁵ LaFrance, *supra* note 107, at 606.

Section 120(a) under the idea that architecture is a public art form.²⁶⁶ House Report 735 referenced tourists and scholarly works as explicit examples of when the exemption could apply.²⁶⁷ Further, House Report 735 stated that “[t]hese uses do not interfere with the normal exploitation of architectural works,” and “[g]iven the important public purpose served by these uses and the lack of harm to the copyright owner’s market, the Committee chose to provide an exemption, rather than rely on the doctrine of fair use.”²⁶⁸ Despite specifically disbanding the application of fair use determinations to copyright infringement cases involving architectural works, the examples given by Congress as to when the Architectural Exemption applies would suggest such an idea on a limitation to commercial uses.²⁶⁹

The doctrine of fair use implicates the idea of a limitation on using copyrightable works for commercial purposes.²⁷⁰ Section 107 gives specific examples, like scholarship and research, as instances of where copyright infringement might not have occurred.²⁷¹ These uses have the connotation of noncommercial use as they are generally not made with the intent of turning a profit.²⁷² The uses listed under the fair use doctrine closely resemble the examples given in House Report 735 of where Section 120(a) should apply.²⁷³ Both the stated examples of scholarly works and tourist uses in House Report 735 are generally not thought to be made with the intent of making a profit.²⁷⁴ House Report 735 makes an analogous conclusion, stating, “Millions of people visit our cities every year and take back home photographs, posters, and other pictorial representations of prominent works of architecture as a memory of their trip.”²⁷⁵ In the scenario given by House Report 735, taking pictures of architectural works featuring PGS works would seem to implicate situations

²⁶⁶ H.R. REP. NO. 101-735, at 22.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *See id.*

²⁷⁰ 17 U.S.C. § 107.

²⁷¹ *Id.*

²⁷² *See id.*; *U.S. Copyright Office Fair Use Index*, *supra* note 78.

²⁷³ *U.S. Copyright Office Fair Use Index*, *supra* note 78; H.R. REP. NO. 101-735, at 22.

²⁷⁴ *See* H.R. REP. NO. 101-735, at 22.

²⁷⁵ *Id.*

where the pictorial representations are kept by the maker—not disseminated for profit—and would not include disseminating the pictorial representations to mass audiences like in commercial uses.²⁷⁶

The anti-commercial nature of street art also implicates market concerns where commercial use of the architectural work including PGS works could negatively affect the original PGS copyright owner and push against congressional intent.²⁷⁷ In relation to the noncommercial uses mentioned in House Report 735, the Report stated Congress’s belief that the uses would not harm the original copyright owner’s market.²⁷⁸ However, when street art is at issue, commercial use directly affects the original PGS copyright owner’s market based on the idea of “selling out” and the work’s loss in value.²⁷⁹ Williams claimed he had lost licensing opportunities and reputational damage due to Hy-Vee’s commercial.²⁸⁰ Kulig made similar claims, stating Aldo’s use of his mural tarnished his reputation and career, as well as diminished the value of and decreased the revenue from his other works.²⁸¹ The reputational and art value damages are all in relation to the fact that artists must carefully choose who they work with and what the work is for.²⁸² When corporations use street art for commercial uses without artist consent, they upset the artist’s carefully curated portfolio, and, therefore, their street art market.²⁸³ Artist Jordan Nickel expressed this sentiment by explaining that unauthorized use of an artwork “burn[s] me up to work with other brands . . . your livelihood is your image.”²⁸⁴

Further, congressional intent indicates a concern with exploitation, but allowing Section 120(a) to apply in commercial scenarios

²⁷⁶ *See id.*

²⁷⁷ *Id.*; *see also* Friedman, *supra* note 246; Neuendorf, *supra* note 247; Cowick, *supra* note 50, at 31.

²⁷⁸ H.R. REP. NO. 101-735, at 22.

²⁷⁹ Friedman, *supra* note 246.

²⁸⁰ Complaint at ¶ 54, Williams v. Hy-Vee, Inc., No. 22-cv-00025 (S.D. Iowa Feb. 3, 2022).

²⁸¹ Complaint at ¶ 19, Kulig v. Aldo Grp., Inc., No. 19-cv-01181 (C.D. Cal. May 21, 2019).

²⁸² *See* Kinsella, *supra* note 4.

²⁸³ *See id.*

²⁸⁴ *Id.*

creates the real fear of exploitation in street art scenarios.²⁸⁵ House Report 735 stated the given uses of scholarly works and tourist pictorial representations did not interfere with the buildings’ “normal exploitation,” and in this scenario, the word “exploitation” could indicate either that something is being unfairly taken advantage of or that the uses would not interfere with the use of the building.²⁸⁶ If interpreting exploitation to mean taking unfair advantage of something, corporations have likely worked against congressional intent in this respect for making commercial gains on the unauthorized use of street art.²⁸⁷ Jeff Gluck, an attorney largely known for working with artists, argues that corporations “would just take their work, and try to intimidate them and push them around.”²⁸⁸ Williams alleged Hy-Vee increased its brand value by including his mural in its commercial, and he would need to calculate damages based on the revenue gained by Hy-Vee through the copyright infringement.²⁸⁹ Tinati succinctly stated the same idea, arguing, “Massive multi-billion dollar companies like Alaska Airlines should not be stealing from independent artists.”²⁹⁰ With Hy-Vee pulling in over \$12 billion in annual revenue and Alaska Airlines making over \$6 billion in annual revenue in 2021, it may be that the unauthorized use of street art by corporations exemplifies the exploitation of authors iterated in House Report 735.²⁹¹

²⁸⁵ H.R. REP. NO. 101-735, at 22; *see also* Kinsella, *supra* note 4 (explaining corporations use street art in commercials and fashion lines and quoting artist’s reaction to feeling “powerless.”).

²⁸⁶ *Exploit*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/exploit> (last visited Jan. 23, 2024); *see also* H.R. REP. NO. 101-735, at 22.

²⁸⁷ *See* H.R. REP. NO. 101-735, at 22; Kinsella, *supra* note 4 (“[S]ometimes, Gluck argues, companies take advantage of this gray area to willfully avoid getting permission from artists who create the murals or designs on which their commercials and fashion lines rely.”).

²⁸⁸ Kinsella, *supra* note 4.

²⁸⁹ Kauffman, *supra* note 211.

²⁹⁰ Complaint at ¶ 14, *Hueman LLC v. Alaska Airlines, Inc.*, No. 20-cv-06539 (C.D. Cal. Dec. 16, 2020).

²⁹¹ *Alaska Air Group Inc.*, MARKETWATCH, <https://www.marketwatch.com/investing/stock/alk/financials> (last visited Dec. 25, 2022) (select “Financials” tab under stock performance chart); *About Hy-Vee*, HY-VEE, <https://hy-vee.com/corporate/our-company> (last visited Feb. 24, 2022); *see also* H.R. REP. NO. 101-735, at 22.

B. *The United States Should Implement Limits on the Panorama Right Given to the Public Under the AWCPA like Similar Restrictions in Other Berne Signatory Countries*

Because the legislative intent behind the AWCPA implicates a plausible argument that courts should narrow the Architectural Exemption to noncommercial uses, the United States should implement a narrower panorama right under the Architectural Exemption. Implementing a narrower panorama right would not only protect street artists' copyright interests and alleviate some of the policy arguments discussed in Part III but would also be commensurate with commercial restrictions found in other Berne signatory countries.²⁹²

While narrowing the panorama right provided under Section 120(a) of the AWCPA could invoke fears of potential copyright "trolls" and unnecessary lawsuits with weak copyright infringement claims, a noncommercial limit on the right could "strike an appropriate balance" between copyright protection and public use, especially in the corporate street art use scenario.²⁹³ Defining a line between noncommercial and commercial use in situations involving both characteristics presents challenges to such a bright-line rule,²⁹⁴ but, in the context of corporate advertising campaigns using street art, these actions are undoubtedly commercial.²⁹⁵ Mercedes Benz, General Motors, Aldo, Alaska Airlines, and Hy-Vee created materials for commercial use by explicitly creating promotional social media posts and advertising campaigns inviting consumers to view their products or services.²⁹⁶ Mercedes Benz, General Motors, and Aldo purposefully marketed their products through social media postings by highlighting their products and including promotional

²⁹² See discussion *supra* Section II.C, Part III.

²⁹³ LaFrance, *supra* note 107, at 641–42.

²⁹⁴ *Id.* at 644.

²⁹⁵ See Bas van den Putte, *What Matters Most in Advertising Campaigns? The Relative Effect of Media Expenditure and Message Content Strategy*, 28 INT'L J. ADVERT. 669, 669–70 (2009) (explaining the amount of money invested in advertising and whether the expenditures on advertising were effective in gaining new consumers).

²⁹⁶ See cases cited *supra* Sections II.D, E.

captions.²⁹⁷ Alaska Airlines and Hy-Vee both created explicit advertisement materials like commercials and promotional offers.²⁹⁸ Therefore, these actions would sit squarely within commercial aspects of advertising like brand recognition, brand trust, and fulfilling consumer needs.²⁹⁹

Because the actions taken by the companies discussed above would be patently commercial, deciding whether copyright infringement occurred under a narrower noncommercial panorama right in street art scenarios with analogous facts would be relatively manageable, especially when considering the limitations already instituted by other Berne Convention signatory countries.³⁰⁰ If the United States decided to adopt the narrowest approach illustrated by France and its ban on any commercial use, even with a fuzzy line on the meaning of commercial,³⁰¹ the marketing displayed by the companies discussed above would result in a clear copyright infringement claim because of the commercial virtue of advertising.³⁰² If the United States opted for a limit on commercial internet uses like Sweden,³⁰³ the outcome would likely remain the same. Companies like

²⁹⁷ Mercedes Benz, USA, LLC v. Lewis, No. 19-10948, 2019 WL 4302769, at *1 (E.D. Mich. Sept. 11, 2019) (stating the caption of the social media post at issue with “[t]his off-road legend is always ready for some urban exploration to mix things up”); Sarah Cascone, *Who Owns Graffiti? A Judge Allows a Street Artist’s Lawsuit Against General Motors to Move Forward*, ARTNET (Sept. 21, 2018), <https://news.artnet.com/art-world/judge-greenlights-street-artists-copy-right-lawsuit-against-gm-1352788> (stating General Motors’ caption as “The Art of the Drive”); Complaint at ¶ 11, Kulig v. Aldo Grp., Inc., No. 19-cv-01181 (C.D. Cal. May 21, 2019).

²⁹⁸ Complaint at ¶ 13, Huelman LLC v. Alaska Airlines, Inc., No. 20-cv-06539 (C.D. Cal. Dec. 16, 2020) (providing example of advertising materials used featuring Tinati’s work); Complaint at ¶ 28, Williams v. Hy-Vee, Inc., No. 22-cv-00025 (S.D. Iowa Feb. 3, 2022) (alleging Hy-Vee’s commercial promoted Oprah Winfrey’s “O, That’s Good!” brand).

²⁹⁹ van den Putte, *supra* note 295, at 670 (explaining how advertising and marketing can positively affect commercial sales).

³⁰⁰ See generally LaFrance, *supra* note 107, at 641–47 (explaining the ramifications and issues with modifying the panorama right under Section 120(a) of the AWCPA).

³⁰¹ See *id.* at 624; CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROP. INTELL.] [INTELLECTUAL PROPERTY CODE] art. L122-5(11) (Fr.).

³⁰² See van den Putte, *supra* note 295, at 672.

³⁰³ *Swedish Supreme Court Rules Against Freedom of Panorama*, *supra* note 122 (describing the Swedish Supreme Court’s ruling).

Mercedes Benz and General Motors who choose to use street art in social media posts would engage in commercial internet use by virtue of advertising their products on an online platform.³⁰⁴ Therefore, the companies would likely have committed copyright infringement.³⁰⁵ Finally, if the United States took the broadest approach of noncommercial use, such as the approach in Belgium, a company's actions would violate copyright law if they "conflict with normal exploitation of the work," or unjustifiably "prejudice the legitimate interests of the author."³⁰⁶ However, this scenario would be the most laborious as a court would have to determine if the company's commercial use of street art conflicted with the work's "normal exploitation" and whether the use prejudiced the author's interests.³⁰⁷

Depending on whether a narrowed panorama right under Section 120(a) contemplated a total ban on commercial uses or provided certain carve-outs for allowable commercial uses,³⁰⁸ a narrower panorama right would balance the policy concerns discussed in Part III while also allowing for application of the congressional intent behind Section 120(a). The first concern referenced in Part III related to companies unjustly using street art without compensating artists.³⁰⁹ By narrowing the panorama right under Section 120(a) to noncommercial use, corporations would have a more difficult time using street art in advertising campaigns due to advertising's commercial nature.³¹⁰ However, the general public's ability to make pictorial representations of a work for personal or scholarly use would remain as Congress intended, as those uses would likely not be commercial.³¹¹

³⁰⁴ *See id.* (explaining how the court reasoned that commercial print uses like post cards do not commercially exploit artwork like commercial internet uses can).

³⁰⁵ *See id.*

³⁰⁶ *Belgium: Act of June 27, 2016, Amending the Code of Economic Law for the Introduction of Freedom of Panorama, supra* note 115; *see also* Amendments to the Code of Economic Law for the Introduction of Freedom of Panorama, *supra* note 114.

³⁰⁷ *See* LaFrance, *supra* note 107, at 623.

³⁰⁸ *See id.* at 644.

³⁰⁹ *See* discussion *supra* Part III.

³¹⁰ *See* van den Putte, *supra* note 295, at 670.

³¹¹ *See* H.R. REP. NO. 101-735, at 22.

Next, artists may avoid a loss in reputation for selling out if they have a mechanism to challenge commercial uses of their work.³¹² Artists may be able to repair any reputational damage that occurs if they can openly challenge corporate use of the work and show they are not aligned with the company's message or values.³¹³ By challenging a company's use of their artwork, an artist can potentially remain a protest voice and avoid the connotation of selling out.³¹⁴

Finally, by having a mechanism in place that limits commercial uses of street art without artist permission, corporations can fairly compensate the artist if they would like to feature artwork in commercial materials.³¹⁵ Further, artists could avoid some of the monetary restrictions related to bringing uncertain copyright infringement claims because the outcome of litigation would be relatively clear if the unauthorized street art use is commercial.³¹⁶ In all, a narrower panorama right under Section 120(a) could remedy some of the issues artists face under the current interpretation of Section 120(a) while still maintaining the underlying values and goals Congress identified when enacting Section 120(a).

CONCLUSION

Congress implemented the AWCPA and Section 120(a) with the intent to give architectural works increased copyright protection while still maintaining public interests in architecture; however, when expanding copyright protections for one type of work, Congress potentially endangered the copyright interests of another type of work—street art. Because of the expansive exemption found under Section 120(a), corporations may continue to look to the exemption and use street art found on buildings, viewable by the public,

³¹² See Friedman, *supra* note 246; Neuendorf, *supra* note 247.

³¹³ See generally Friedman, *supra* note 246 (explaining corporate use of street art “distorts” meaning of work); Dafoe, *supra* note 258 (stating mass-market consumerism was “antithetical” to street artist credibility); Complaint at ¶ 19, Kulig v. Aldo Grp., Inc., No. 19-cv-01181 (C.D. Cal. May 21, 2019) (arguing corporate use of work decreased artist revenue and damaged artist's reputation); Complaint at ¶ 54, Williams v. Hy-Vee, Inc., No. 22-cv-00025 (S.D. Iowa Feb. 3, 2022) (making reputation damage claim).

³¹⁴ See Friedman, *supra* note 246; Neuendorf, *supra* note 247.

³¹⁵ See Friedman, *supra* note 246.

³¹⁶ See Grant, *supra* note 263.

without authorization from the creator. While works of this type would generally receive copyright protections, the cases interpreting Section 120(a) and its applicability to street art have taken different approaches to this issue.³¹⁷ Further, many of the disputes and suits concerning unauthorized street art use settle before a court can interpret and apply any substantive answers on street art copyright protections.³¹⁸

Therefore, to balance artists' interests in maintaining control over their works and public policy, Section 120(a) of the AWCPA should be interpreted within the inferred ideas and legislative intent in Congress's House Report 735 and limited to noncommercial uses as seen in other Berne Convention signatory countries. In interpreting Section 120(a) this way or limiting the panorama right under Section 120(a) to noncommercial uses, artists retain the copyright protections that a regular painting would receive in cases where corporations who can compensate for and intend to use a work, while the general public and nonprofit motivated endeavors can continue to photograph architectural works as Congress intended. Although street art may have been born with the attitude that "[c]opyright is for losers,"³¹⁹ street artists have increasingly looked to the legal system to preserve the use of their works³²⁰— an issue especially prevalent under Section 120(a) of the AWCPA.

³¹⁷ Falkner v. Gen. Motors LLC, 393 F. Supp. 3d 927, 937 (C.D. Cal. 2018); Mercedes Benz, USA, LLC v. Lewis, No. 19-10948, 2019 WL 4302769, at *1 (E.D. Mich. Sept. 11, 2019).

³¹⁸ Ghajar et al., *supra* note 124.

³¹⁹ BANKSY, WALL AND PIECE Copyright Page (2006).

³²⁰ Friedman, *supra* note 246.