

# The Law of Banksy: Who Owns Street Art?

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## INTRODUCTION

In April of 2014, Dennis Stinchcombe found a painting.<sup>1</sup> The background was solid black, and it featured a spray-paint stencil of a man and a woman locked in an embrace while simultaneously looking over one another's shoulders at their respective cell phones.<sup>2</sup> Stinchcombe, a lifelong resident of Bristol, England, ran the Broad Plain Boys' Club, a 120-year-old community institution that provides after-school programming to Bristol's youth.<sup>3</sup> The Boys' Club was, at the time, facing financial difficulties.<sup>4</sup> The painting, now known to be titled *Mobile Lovers*, was the work of a street artist called Banksy, who, without anyone's permission and in violation of trespass and vandalism laws, had surreptitiously painted the work on a piece of plywood covering a doorway beside a public sidewalk. Luckily, Stinchcombe was a fan of Banksy, and he immediately recognized *Mobile Lovers* as the work of one of the international art world's current superstars.<sup>5</sup> Stinchcombe removed the piece of plywood on which *Mobile Lovers* was painted from the public doorway, planning to auction off the work and use any proceeds to fund the Boys' Club's financial recovery.<sup>6</sup>

Almost immediately after Stinchcombe's possession of the piece became public, the Bristol City Council intervened, confiscating *Mobile Lovers* and placing it on display in a municipally

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<sup>1</sup> Alice Vincent, *Banksy's Mobile Lovers Located in Bristol* (Telegraph, Apr 15, 2014), archived at <http://perma.cc/V94Z-YS5A>.

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> See Vincent, *Banksy's Mobile Lovers Located in Bristol* (cited in note 1).

<sup>6</sup> See Ian Johnston, *Banksy Breaks Cover to Join Debate over 'Mobile Lovers' Artwork* (Independent, May 8, 2014), archived at <http://perma.cc/YS7W-NCEK>.

owned museum.<sup>7</sup> Its claim was that, because Banksy painted *Mobile Lovers* directly onto a piece of public property, the painting belonged to the city.<sup>8</sup> Then Banksy himself stepped in. Eschewing his usual silence on matters of ownership interest in his works, Banksy—a Bristol native and possible former patron of the Boys’ Club—wrote Stinchcombe a letter purporting to give ownership rights of *Mobile Lovers* to the club.<sup>9</sup> As far as the city was concerned, Banksy’s letter brought the question of ownership to a “proper resolution,” and the city returned *Mobile Lovers* to Stinchcombe.<sup>10</sup>

Other Banksy works have been subject to ownership disputes as well. Consider the saga of *Slave Labour*, a work depicting a young, downtrodden boy sitting behind a sewing machine and manufacturing a series of miniature Union Jacks.<sup>11</sup> Banksy painted the piece—again, without anyone’s permission—on the side of an “everything-costs-a-pound” store in Haringey, London.<sup>12</sup> The piece, which is a commentary on discount stores’ labor practices, eventually became an important attraction in Haringey, drawing so many visitors to the neighborhood from London and beyond that the local subway station posted a sign reading “This way to our Banksy.”<sup>13</sup> In February 2013, the piece vanished, ripped out of the wall on which it was painted roughly a year after it had first appeared.<sup>14</sup> *Slave Labour* later resurfaced at an auction house in Miami; the owner of the pound store’s building intended to sell it.<sup>15</sup> Though the citizens of Haringey were initially able to block the auction in Miami,<sup>16</sup> the painting was nevertheless later sold at a different auction.<sup>17</sup>

Who owns a given work of street art? A comment clarifying this question will be of particular interest to the parties who might claim such ownership rights. This Comment focuses on private disputes, which, as in the above illustrations, generally

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<sup>7</sup> See *id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Johnston, *Banksy Breaks Cover* (cited in note 6).

<sup>11</sup> Sarah Lyall, *Borough Searches for Missing Boy, Last Seen on Wall* (NY Times, Feb 28, 2013), archived at <http://perma.cc/CLV5-4YEQ>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See *id.*

<sup>15</sup> See Lyall, *Borough Searches for Missing Boy* (cited in note 11).

<sup>16</sup> *Id.*

<sup>17</sup> Jamie Wetherbe, *‘Missing’ Banksy Mural Fetches \$1.1 Million at Auction* (LA Times, June 4, 2013), archived at <http://perma.cc/85FF-HUGS>.

arise between finders of street art and owners of the property on which the art is found. Artists themselves might attempt to claim ownership rights, as Banksy seems to have implicitly done with his letter granting his rights in *Mobile Lovers* to the Boys' Club. But because street artists generally break the law to produce their art, such subsequent appearances to take ownership of and, therefore, responsibility for such art will be rare. Additionally, as in the *Slave Labour* controversy, the public sometimes attempts to assert property rights of some kind over publicly displayed works, preventing their removal or destruction. While it is an interesting question how a group of concerned citizens might band together to exercise rights over street art, this Comment focuses on private disputes; the question of public powers to control street art is beyond its scope.

This Comment will proceed in three stages. Part I will briefly explain what street art is and why anyone should care about who owns it. Part II will then ask what doctrinal arguments from American property law can be made about the ownership of street art. Part II also attempts to determine which, if any, doctrinal argument most clearly resolves ownership disputes. The doctrinal areas surveyed will range broadly and will include the law of finders and abandonment, the law of gift, the law of accession, and, notably, equitable division. As will be shown, the factual patterns presented by these disputes over street-art ownership are so unusual as to render the doctrinal landscape highly ambiguous. Finally, this Comment will make a recommendation as to what the law *ought* to say about ownership of street art. Part III will argue that the traditional doctrines of property law are ill equipped to decide questions of street-art ownership. Hence, this Comment contends that courts should employ their equitable powers to divide street-art ownership, thereby overcoming all relevant doctrinal and policy problems.

#### I. WHAT IS STREET ART AND WHY SHOULD ANYONE CARE ABOUT IT?

It may be impossible to say with any kind of precision what "street art" is. The term is amorphous, encompassing a wide range of mediums and contexts.<sup>18</sup> It is worth noting that, for legal purposes, litigants will do the work of deciding what is and is

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<sup>18</sup> See Eric Wooters Yip, *What Is Street Art? Vandalism, Graffiti or Public Art – Part I* (Art Radar, Jan 21, 2010), archived at <http://perma.cc/ETH6-F785>.

not street art. When someone cares enough to file suit over ownership of some visual work, that work will likely be valuable art. Nevertheless, works of street art tend to share a few common traits: as the *Mobile Lovers* and *Slave Labour* disputes illustrate, street art is generally produced in urban settings, placed on property without the property owner's permission, and displayed where the public can see it.

Though Banksy's work—which consists mostly of spray-paint murals—may currently be the world's most recognizable street art, street artists produce a diverse array of work. For example, Shepard Fairey, the artist behind President Barack Obama's *Hope* posters, has worked in many mediums; during one period, he repeatedly pasted posters of Andre the Giant to the sides of buildings.<sup>19</sup> The artist known as Invader creates tile mosaics that look like characters from his Atari-game namesake and affixes them to walls with grout.<sup>20</sup> The artist TEJN uses bike locks to fasten sculptures to other people's property.<sup>21</sup> Banksy may be the hot street artist of the moment, but there are many others, working in many styles and mediums and placing their art in locations of all kinds.<sup>22</sup>

If street art was already ubiquitous, it has recently also become extremely valuable. Street art has entered the art world's mainstream, with Banksy pieces regularly selling for more than \$1 million.<sup>23</sup> After its return to Mr. Stinchcombe, *Mobile Lovers* sold, bringing in \$670,000 for the Boys' Club.<sup>24</sup> Similarly, *Slave Labour* ultimately sold at a London auction for approximately \$1.1 million.<sup>25</sup> Other works have sold for even more, with one Jean-Michel Basquiat piece going for over \$16 million in a 2012 auction.<sup>26</sup> Though neither the *Mobile Lovers* nor the *Slave Labour*

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<sup>19</sup> See Dale Eisinger, *The Art Evolution of Shepard Fairey* (Complex, Sept 30, 2013), archived at <http://perma.cc/Q2EA-2CJ5>.

<sup>20</sup> See Jaime Rojo and Steven Harrington, *Street Art Tile 'Invasion' of New York Cut Short* (Huffington Post, Nov 6, 2013), archived at <http://perma.cc/JSN6-KFSW>.

<sup>21</sup> See TEJN, *TEJN: Art*, archived at <http://perma.cc/ZZ2W-V3HL>.

<sup>22</sup> See, for example, Sebastian Buck, *The 50 Greatest Street Artists Right Now* (Complex, Mar 22, 2011), archived at <http://perma.cc/W7ZT-8TAM>.

<sup>23</sup> See lowpro, *Viewpoints: Top 25 Most Expensive Banksy Works Ever* (Arrested Motion, Sept 21, 2011), archived at <http://perma.cc/38EU-E3ZW>.

<sup>24</sup> Benjamin Sutton, *Sale of Banksy's Mobile Lovers for \$670,000 Saves Youth Club* (Artnet News, Aug 26, 2014), archived at <http://perma.cc/HP45-MP3X>.

<sup>25</sup> See Allan Kozinn, *Disputed Banksy Work Brings \$1.1 Million at Auction* (NY Times, June 3, 2013), archived at <http://perma.cc/4KFS-7L6T>.

<sup>26</sup> Mila Pantovich, *The Most Expensive Street Art: From Basquiat to Banksy* (JustLuxe, Jan 9, 2013), archived at <http://perma.cc/8UFL-SYM7>.

controversies escalated into full-blown lawsuits, the stakes are becoming too high for interested parties to ignore the question of street-art ownership. Thus, American law will eventually have to determine who owns a given artwork.<sup>27</sup>

## II. POSSIBLE DOCTRINAL SOLUTIONS

A number of doctrinal solutions suggest themselves in answering the question of who owns a work of street art. Each traditional doctrinal area presents at least one of two different kinds of difficulties. First, a given doctrine might be too narrow to handle the broad range of fact patterns that disputes over street art present. Second, some doctrinal solutions would demand impossible findings of fact about artists' subjective intentions. As Part III demonstrates, only the more flexible judicial exercise of equitable power avoids both challenges.

### A. The Law of Finders

The area of law most obviously implicated by the *Mobile Lovers* controversy is the law of finders. Stinchcombe found *Mobile Lovers*, moved it inside to shield it from the harsh elements, and intended to sell it. Initially, the city of Bristol claimed that it was irrelevant that Stinchcombe found the painting; it was found on city property, so it was, likewise, city property. Who was right? Perhaps surprisingly, the answer depends on how the property ended up wherever it was found.

#### 1. Lost and mislaid property.

“Lost property’ is property which the owner has involuntarily parted with through neglect, carelessness, or inadvertence, that is, property which the owner has unwittingly suffered to pass out of his possession and of whose whereabouts he has no knowledge.”<sup>28</sup> At common law, if the true owner never appears to claim her property, the finder of the property becomes its owner.<sup>29</sup> By contrast, mislaid property belongs to the owner of the

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<sup>27</sup> Much street art is produced in the United States. See Joe Coscarelli, *The Banksy Tour of New York City: Interactive Map* (NY Media, Oct 31, 2013), archived at <http://perma.cc/9SUR-L9TD>.

<sup>28</sup> *Terry v Lock*, 37 SW3d 202, 206 (Ark 2001). See also 1 Am Jur 2d Abandoned, Lost, and Unclaimed Property § 12 at 20 (2005).

<sup>29</sup> 1 Am Jur 2d Abandoned, Lost, and Unclaimed Property § 27 at 37 (cited in note 28). See also, for example, *Smith v Purvis*, 474 S2d 1131, 1132 (Ala App 1985).

real estate on which the mislaid property was found.<sup>30</sup> “‘Mislaid property’ is that which is intentionally put into a certain place and later forgotten.”<sup>31</sup> However, street art is almost certainly neither lost nor mislaid. It is not lost, because artists know where they have left their work and there is nothing inadvertent or careless about the placement of most street art. The artist, often through considerable effort, trespasses on the property of another and labors to create an entire artwork from scratch. It is not mislaid, because street artists do not generally “forget” their work under any plausible interpretation of the word. They know where they put it but have no intention of returning to retrieve it. This makes sense, given that street artists prefer not to be arrested and, therefore, prefer not to be caught red-handed at their own crime scenes.

## 2. Abandoned property.

Doctrinally, “[p]roperty is said to be ‘abandoned’ when it is thrown away, or its possession is voluntarily forsaken by the owner, in which case it will become the property of the first occupant.”<sup>32</sup> The primary doctrinal difficulty in applying the law of abandonment to street art is determining whether street artists voluntarily forsake their work in the required manner. Professor Lior Strahilevitz argues that abandonment has two elements.<sup>33</sup> First, there must be a transfer of the property in question.<sup>34</sup> Second, that transfer must be unilateral.<sup>35</sup>

Street artists’ general behavior toward their work indicates intent to transfer. As discussed above, it seems exceedingly unlikely that most street artists leave their work on other people’s property with the intention of reclaiming it.<sup>36</sup> Prohibitions on trespass and vandalism give them strong incentives not to do so. Hence, street artists probably expect their art to end up in someone else’s hands, either to be displayed, sold at auction, or destroyed. Legal authority links such behavior with abandonment,

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<sup>30</sup> *Terry*, 37 SW3d at 207. See also 1 Am Jur 2d Abandoned, Lost, and Unclaimed Property § 14 at 22 (cited in note 28).

<sup>31</sup> 1 Am Jur 2d Abandoned, Lost, and Unclaimed Property § 14 at 22 (cited in note 28).

<sup>32</sup> *Terry*, 37 SW3d at 206. See also 1 Am Jur 2d Abandoned, Lost, and Unclaimed Property § 24 at 32 (cited in note 28).

<sup>33</sup> Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U Pa L Rev 355, 360 (2010).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See Part II.A.1.

treating intentional, prolonged physical separation from one's property as evidence that one has abandoned it.<sup>37</sup>

However, for property to be abandoned, it must be not merely transferred, but unilaterally transferred. It is an interesting and contentious question precisely what unilateral transfer entails.<sup>38</sup> Nevertheless, the leading scholars agree on one sense in which abandonment transfers are unilateral. Conveyances other than abandonment identify in advance the person to whom the property is to be transferred.<sup>39</sup> This is true with gifts, sales, and other conveyances, which can pick out the recipient either by name or by using some definite description (for example, "to my brother's oldest son"). Abandonment, by contrast, is characterized by indifference on the part of the original owner as to who will take subsequent ownership.<sup>40</sup> The transfer is unilateral in the sense that, when it is initiated, only one party to the transfer is identified.

Are conveyances of street art unilateral in this sense? Are street artists indifferent regarding the future owners of their work? It is extremely difficult to say. Banksy's *Mobile Lovers* letter is as close to a direct statement of an artist's intent regarding subsequent ownership as any court is likely to get. And that letter is probably legally useless, given that it likely reveals an intention that arose only after the city of Bristol's confiscation rather than the intention Banksy had when he left the painting in the doorway.

In most cases, courts will be unable to ask the anonymous artist about her intent and will be forced to surmise intent solely from the objective facts surrounding the artwork itself.<sup>41</sup> But facts surrounding an artwork's placement will generally not be

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<sup>37</sup> See *Routh Wrecker Service, Inc v Wins*, 847 SW2d 707, 709 (Ark 1993).

<sup>38</sup> Scholars debate whether one must obtain the transferee's consent in order to abandon property. See, for example, Strahilevitz, 158 U Pa L Rev at 360 (cited in note 33) (arguing that abandonment does not "require that a third party assume ownership of the property or agree to do so"); Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 Mich L Rev 191, 200 (2010) (contending that the common law disallows the abandonment of land interests without the consent of a transferee).

<sup>39</sup> Peñalver, 109 Mich L Rev at 198 (cited in note 38). See also Strahilevitz, 158 U Pa L Rev at 370–71 (cited in note 33) (noting that gift giving, unlike abandonment, carries the decision cost of determining the recipient).

<sup>40</sup> See Strahilevitz, 158 U Pa L Rev at 376–77 (cited in note 33).

<sup>41</sup> Courts have long made such determinations of ownership in contexts other than street art. See, for example, *Haslem v Lockwood*, 37 Conn 500, 506 (1871) (considering who owned animal manure that had been abandoned by the animals' owners); *Eads v Brazelton*, 22 Ark 499, 499 (1861) (deciding, years after a shipwreck, which claimant owned cargo submerged in the Mississippi River).

elucidatory. An artist's failure to reclaim her work points only toward an intent to alienate. It does not speak to the artist's intent regarding future owners. Facts about the art itself can point toward indifference and abandonment, away from them, or in no particular direction. In some cases, it is clear that the artist cares from the outset where her work ends up. *Slave Labour*, for example, was intentionally placed on a pound store as a criticism of the labor practices of such low-price retailers.<sup>42</sup> The piece's placement was integral to its meaning. Thus, it seems likely that Banksy, from the outset, would have preferred that the piece stay where he put it. But even when such intent regarding an artwork's placement is evident, the artist's intent with regard to future owners will be difficult to determine. Perhaps Banksy wished to give *Slave Labour* as a gift to the building owner in hopes that it would remain on display at that location.<sup>43</sup> On the other hand, *Slave Labour* overtly criticizes the practices of the dollar store to which it was affixed, undermining the idea that Banksy intended to give the building owner a million-dollar gift.

More commonly, the artwork itself will yield few clues to the artist's intent. For example, in his early work, Fairey mass-produced single images, placing them indiscriminately and ubiquitously.<sup>44</sup> Art that is entirely non-site specific in this way might evince either a positive intention on the part of the artist to give his work to the first finder or, alternatively, a total lack of conscious intent regarding future ownership.

Street artists' intentions are nearly impossible to reliably discover. It is therefore difficult to say whether street artists transfer their work unilaterally, as required for abandonment. Most cases will exist in a murky gray area, in which the facts could be read to point toward abandonment, away from it, or in no direction at all. Thus, as they stand, the doctrinal rules of abandonment are not equipped to adjudicate more than a small minority of likely disputes over street-art ownership.

## B. The Law of Gift

For someone to successfully make a gift, the following elements must be established: "(1) intent on the part of the donor to

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<sup>42</sup> See notes 11–13 and accompanying text.

<sup>43</sup> For a detailed discussion on gifts, see Part II.B.

<sup>44</sup> See, for example, Ian Noble, *Picture Perfect: Fusions of Illustration and Design* 130 (RotoVision 2003) (discussing Fairey's early works and his *Obey Giant* project).



make a present transfer of the property; (2) actual or constructive delivery of the gift to the donee; and (3) acceptance of the gift by the donee.”<sup>45</sup> Delivery and acceptance of street art are relatively straightforward. An artist’s placement of a work on a donee’s property is actual delivery, the gold standard in gift law.<sup>46</sup> When the intended donee is someone other than the person on whose property the art was placed, the law allows for constructive or symbolic delivery.<sup>47</sup> Hence, as with the law of abandonment, the primary difficulty in determining whether the law of gift applies to cases like the *Mobile Lovers* dispute will be in divining artist intent.

What kind of intent must the street artist have in order to make a gift of her artwork? The language above is somewhat loose. It simply requires intent to make a transfer. But there are many kinds of transfers. This Comment considers abandonment to be a kind of transfer, but there are also sales, bequests, leases (a limited transfer of rights), and many others. Thus, the salient difference between gift and, say, abandonment, cannot be a generalized intent to make just *any* kind of transfer. What makes gifts distinct is that they require a more specific intent that picks out some individual or a class of future owners.<sup>48</sup> That is to say, one cannot give a gift to no one; one must give it to someone in particular.

As already discussed, courts will rarely have direct evidence of artists’ intentions. They will thus have to infer intent from the artwork itself and the facts surrounding its placement. Some works, like *Slave Labour*, demonstrate a special connection to the property on which they are placed. This can cut both for and against the idea that the artist intended to make a gift to a particular person. On the one hand, when the meaning of the art depends in some way on its context, the artist would likely prefer that the art remain where it was placed. One might think that this points toward the artist’s intent to give a gift to the

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<sup>45</sup> *Bader v Digney*, 864 NYS2d 606, 608 (NY App 2008). See also, for example, *Schenker v Moodhe*, 200 A 727, 728 (Md 1938); *Thomas v Houston*, 106 SE 466, 467 (NC 1921). See also 38 Am Jur 2d Gifts § 14 at 771 (2010).

<sup>46</sup> See, for example, *In re Estate of Lamplough*, 708 NW2d 645, 651–52 (Neb 2006) (“Ordinarily, actual delivery is necessary where the subject of the gift is capable of manual delivery.”).

<sup>47</sup> See, for example, *Anagnostou v Stifel*, 562 NYS2d 490, 491 (NY App 1990); *Estate of Bridges v Mosebrook*, 662 SW2d 116, 121 (Tex App 1983).

<sup>48</sup> See 2 Restatement (Third) of Property: Wills and Other Donative Transfers § 6.2 (2003) (discussing the legal rules surrounding the various types of people to whom one might give a gift).

building owner, who may have less incentive than others to remove it. On the other hand, building owners who do not recognize street art as valuable may be the people most likely to destroy it by power washing, tearing down, or painting over the work. Furthermore, in cases like *Slave Labour*—in which the work in question is overtly critical of the person on whose property it is placed—a gift intent seems unlikely.

Unfortunately, the conceptual content of art is rarely perfectly clear. It will often be difficult or impossible to tell whether an artist has a positive attitude, a critical attitude, or no attitude at all toward the building owners on whose property she places her work. Indeed, for pieces like Fairey's once-ubiquitous *Obey Giant* decals,<sup>49</sup> it seems unlikely that the artist had any attitude at all toward the buildings on which he placed his work. It is entirely plausible to think that street artists' primary focus is *making* art, rather than transferring it. Thus, they may have no intent at all regarding who should own their work.

The question of artist intent as it relates to the law of gift is just as difficult a problem as it is under the law of abandonment. The vast majority of cases will present insufficient evidence of artist intent to clearly implicate the law of gift. Because of this, the doctrine of gift as it currently stands is, at best, only a partial solution to the problem of street-art ownership.

### C. The Law of Accession

Of all the factual and legal difficulties particular to street-art ownership, perhaps the most unusual is street art's stickiness. Though there are many exceptions, street art is often literally stuck quite firmly to the buildings on which it is placed. This stickiness admits of degrees, with wheat-pasted posters and textiles being moderately sticky, grouted tile being fairly sticky, and spray paint applied directly to the side of a building being nearly intractably sticky. Because of this, when parties like the building owner in the *Slave Labour* dispute wish to sell original street art that has been painted on walls, they must cut the brick on which it is painted out from the wall entirely.<sup>50</sup>

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<sup>49</sup> See Victoria Carrington, *I Write, Therefore I Am: Texts in the City*, 8 Visual Commun 409, 416 (2009). See also Eisinger, *The Art Evolution of Shepard Fairey* (cited in note 19).

<sup>50</sup> See Etan Smallman, *How Do You Remove a Banksy Mural?* (Independent, Feb 20, 2014), archived at <http://perma.cc/4PUY-DN2R>.

What should the law say about this? If, for example, a spray-paint mural has been clearly abandoned on someone's wall and someone other than the building owner finds it, does the finder become the owner of the artwork *and* part of the underlying building? If not, what does the finder's ownership amount to, assuming the landowner would prefer not to have his building used as the finder's permanent gallery space?

The law of accession might be used to resolve some of these ambiguities. Doctrinally, "[a]ccession generally 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."<sup>51</sup> So, if accession governed ownership of some artwork, that work and the property to which it was attached would be treated as a new unitary property. In order to avoid stickiness problems, the new unitary property might then be allocated to the owner of the property on which the art was placed. The only other party who would be a plausible candidate for ownership under the accession regime is the artist. However, "[a] willful trespasser generally acquires no rights in the property of another by any change made in such property due to the trespasser's labor or skill . . . as a party can obtain no right nor derive any advantage from his or her own wrong."<sup>52</sup> Thus, if no one other than the building owner ever has a chance to take title to the art, then no transfer of any portion of the underlying building can be at issue.

But when does one property become so incorporated into another that it triggers accession? As the case law reveals, the distinction is difficult to parse. For example, the law of accession is implicated when a new radiator is installed into a car<sup>53</sup> but not by the installation of a new set of tires.<sup>54</sup> Similarly, the law of accession applies when rain and sun combine to form plants, with ownership of those plants falling to the landowner.<sup>55</sup> By contrast, when nature conspires such that privately held land produces wild animals, ownership of those animals is governed

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<sup>51</sup> 1 Am Jur 2d Accession and Confusion § 1 at 497 (2005). See also *Omaha Standard, Inc v Nissen*, 187 NW2d 721, 724 (Iowa 1971).

<sup>52</sup> 1 Am Jur 2d Accession and Confusion § 5 at 502 (cited in note 51). See also, for example, *Kirby Lumber Co v Temple Lumber Co*, 83 SW2d 638, 646 (Tex 1935).

<sup>53</sup> See *Lincoln Bank & Trust Co v Netter*, 253 SW2d 260, 261 (Ky 1952).

<sup>54</sup> See *Austrian Motors, Ltd v Travelers Insurance Co*, 275 SE2d 702, 706 (Ga App 1980).

<sup>55</sup> See Thomas W. Merrill, *Accession and Original Ownership*, 1 J Legal Analysis 459, 465 (2009).

by the rule of first possession, rather than by accession.<sup>56</sup> What factual differences do these doctrinal distinctions track? Is a car with a new radiator really more of a new unitary property than one with new tires? Aren't both easily disassembled by a skilled mechanic? And why is accession triggered by wild plants but not by animals? Neither is readily disassembled into its constituent carbon and water.

Because of this lack of doctrinal clarity, it is hard to say precisely which works of street art could be subject to accession. Easily removed pieces like freestanding sculptures obviously fail to implicate the doctrine. But what about moderately sticky pieces? Is tile grouted to a wall more like a set of tires or more like a radiator? Doctrine could point either way. What about spray-paint murals applied directly to walls? Generally such works can be moved only by simultaneously moving the walls on which they were painted.<sup>57</sup> Spray-paint murals seem quite unitary, but are they really more unitary than wild animals, whose ownership is assigned by first possession? If not, does doctrine offer any clear guidance as to whether any street art should be governed by accession?

Perhaps the best indicators as to when accession will assign ownership are not the characteristics of the property itself but rather the problems that assignment by accession will solve. Indeed, Professor Thomas Merrill, in *Accession and Original Ownership*, characterizes accession as a regime that competes with the doctrine of first possession for assignation of new property, with accession stepping in when doing so would resolve specific kinds of legal or policy problems.<sup>58</sup> For example, accession can be used to assign ownership when other regimes would create inefficient expenditures in races to possess, tragedies of the commons, inefficient investment incentives, or collective action problems.<sup>59</sup> Thus, when accession doctrine is unclear, courts must resort to policy considerations to determine whether the doctrine should apply.

Given these considerations, there are two reasons why accession alone cannot assign street-art ownership. First, some kinds of street art, like removable sculptures, obviously do not

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<sup>56</sup> See *Pierson v Post*, 3 Cai R 175, 177–78 (NY 1805). See also Merrill, 1 J Legal Analysis at 470 n 12 (cited in note 55).

<sup>57</sup> See Smallman, *How Do You Remove a Banksy Mural?* (cited in note 50).

<sup>58</sup> Merrill, 1 J Legal Analysis at 460–61, 493 (cited in note 55).

<sup>59</sup> See *id.* at 461.

combine with the underlying property to create something new and unitary. Such works cannot implicate accession. Thus, like the doctrines of abandonment and gift, the doctrine of accession is currently equipped to resolve, at most, a minority of disputes over street-art ownership. Second, for a whole range of street art that is more firmly attached to the underlying property, doctrine offers little guidance as to when accession should apply. For such stickier art, the best measure for deciding whether accession determines ownership will be whether its doing so represents the optimal resolution of difficult legal or policy problems.

#### D. Equitable Division

Like accession, equitable division is a doctrine best applied when doing so will resolve some legal, factual, or policy problem. Unlike accession, however, a court's power to exercise equitable division is not limited by confusing doctrinal tests. Equitable division refers to a court's ability to divide ownership rights in a single piece of property among those with competing claims.<sup>60</sup> Perhaps the most famous case in which a court chose to exercise its power of equitable division is *Popov v Hayashi*.<sup>61</sup> That case arose out of a dispute over Barry Bonds's record-setting seventy-third home run ball of the 2001 Major League Baseball season.<sup>62</sup> Bonds clobbered the ball into the stadium's arcade and Alex Popov reached up to catch it.<sup>63</sup> The ball hit Popov's baseball glove, and Popov may or may not have had full control of it when he was tackled by the surrounding crowd.<sup>64</sup> During the ensuing struggle, Patrick Hayashi was able—without engaging in any wrongful assaults—to recover and walk away with the ball.<sup>65</sup> The court treated the ball as having been abandoned upon being hit, thus becoming the property of whoever possessed it first.<sup>66</sup> Faced with ambiguous facts surrounding first possession, the court found Popov and Hayashi to have equally plausible claims of ownership, writing that it would be “unfair” to either party if the ball were awarded to just one person.<sup>67</sup> To overcome both factual

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<sup>60</sup> See Dan Carvalho, *Dividing Community Property in an Equitable Division Jurisdiction—Nevada's Confusion after McNabney v. McNabney*, 30 Idaho L. Rev. 755, 755 (1994).

<sup>61</sup> 2002 WL 31833731 (Cal Super).

<sup>62</sup> *Id.* at \*1.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at \*2.

<sup>65</sup> *Popov*, 2002 WL 31833731 at \*2.

<sup>66</sup> *Id.* at \*3.

<sup>67</sup> *Id.* at \*7.

ambiguity and possible unfairness, the court chose to exercise its power of equitable division, awarding Popov and Hayashi “equal and undivided interest[s] in the ball.”<sup>68</sup>

Courts’ historical applications of equitable division are not limited to abandoned home run baseballs. The doctrine is ancient, dating to Roman times.<sup>69</sup> Since then, it has been used in a number of factual situations to overcome a wide array of difficulties. For example, a New Jersey court has used it to divide up \$775 in cash contained in an old sock when it was ambiguous which of the five boys who had been playing with sock was the true finder.<sup>70</sup> Indeed, the general trend in American law toward recognizing equal property rights for so-called joint finders can be thought of as an informal exercise of the power of equitable division in cases in which it is impossible to say who took first possession of the property in question.<sup>71</sup> Outside the context of the law of finders, a California court has equitably divided an interest in a common stock of prunes among those who had contributed their own prunes to that common stock, overcoming the impossibility of determining which prunes belonged to which farmer.<sup>72</sup> Equitable division can apply to real estate, as well as to chattels. For example, in some states, “when two or more littoral owners have rights to simultaneously formed accretions, the rights of the owners in the accretions are to be determined by the doctrine of equitable division.”<sup>73</sup> Finally, in *Ghen v Rich*,<sup>74</sup> a federal court in Massachusetts implicitly upheld whalers’ custom of awarding ownership of a slain whale to whoever killed it, while awarding a limited “salvage” or finder’s interest to the whale’s subsequent finder.<sup>75</sup> These cases illustrate the doctrine’s extreme flexibility; it can determine ownership rights in a variety of contexts and apportion those rights via the consideration of any relevant factor.

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<sup>68</sup> Id at \*8.

<sup>69</sup> See R.H. Helmholz, *Equitable Division and the Law of Finders*, 52 Fordham L Rev 313, 315 (1983).

<sup>70</sup> *Keron v Cashman*, 33 A 1055, 1056–57 (NJ Chanc 1896).

<sup>71</sup> See Helmholz, 52 Fordham L Rev at 324–25 (cited in note 69). See also 1 Am Jur 2d Abandoned, Lost, and Unclaimed Property § 30 at 39 (cited in note 28).

<sup>72</sup> *Arnold v Producers’ Fruit Co*, 61 P 283, 284–85 (Cal 1900).

<sup>73</sup> *Lorusso v Acapesket Improvement Association, Inc*, 564 NE2d 360, 367 (Mass 1990). See also *Burke v Commonwealth*, 186 NE 277, 279 (Mass 1933); *Allen v Wood*, 152 NE 617, 620–21 (Mass 1926).

<sup>74</sup> 8 F 159 (D Mass 1881).

<sup>75</sup> Id at 159–60.

In a paper titled *Equitable Division and the Law of Finders*, Professor Richard Helmholz argues that, doctrinally, courts can apply equitable division whenever facts or law gives rise to competing plausible claims of ownership.<sup>76</sup> Helmholz focuses specifically on the ways in which disputes over lost or mislaid property can generate such claims.<sup>77</sup> As discussed above in Part II.A.1, property is traditionally said to be lost when the owner has parted with her property involuntarily and does not know where it is.<sup>78</sup> Property is mislaid when the owner has voluntarily placed it somewhere, only to forget it there.<sup>79</sup> The finder has a right to lost property against anyone but the true owner, whereas for mislaid property, that right vests with whoever owns the real estate on which the property was found.<sup>80</sup> Given that there is often little to no evidence regarding the owner's state of mind at the time she was separated from the lost or mislaid property, this distinction is famously slippery.<sup>81</sup> In fact, when the location in which the lost or mislaid property was found fails to clearly implicate one doctrine over another, Helmholz argues that "[t]he distinction is built on sand."<sup>82</sup> For example, it is nearly impossible to determine whether a wallet found on the floor of a barber-shop was lost or mislaid. Was the wallet taken out intentionally for payment, set down, forgotten, and then knocked to the ground? Or did it accidentally fall out of the customer's pocket as he settled into the barber's chair? If there is no way of determining whether the wallet was lost or mislaid, its finder and the barber-shop owner have competing plausible claims to ownership.<sup>83</sup>

Equitable division can be applied whenever such competing claims arise. Helmholz argues that, among those cases in which it can be applied, equitable division should be applied when doing

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<sup>76</sup> Helmholz, 52 *Fordham L Rev* at 322–25 (cited in note 69). See also, for example, *Popov*, 2002 WL 31833731 at \*8 (applying equitable division to property that had been abandoned, rather than lost or mislaid).

<sup>77</sup> See Helmholz, 52 *Fordham L Rev* at 314 (cited in note 69).

<sup>78</sup> See notes 28–29 and accompanying text.

<sup>79</sup> See notes 30–31 and accompanying text.

<sup>80</sup> See notes 29–30 and accompanying text.

<sup>81</sup> See Helmholz, 52 *Fordham L Rev* at 313 (cited in note 69).

<sup>82</sup> *Id.* at 317. See also Edward R. Cohen, *The Finders Cases Revisited*, 48 *Tex L Rev* 1001, 1006 (1970) (“[T]here is no fundamental difference between deliberately placing an object on a surface and unintentionally forgetting and leaving it there, and deliberately placing an object in your pocket and unintentionally having it leave your possession through a hole.”).

<sup>83</sup> This example was modified from the facts of *McAvoy v Medina*, 11 *Allen* 548 (Mass 1866).

so would solve some set of legal or policy problems. In cases like the wallet in the barbershop, the law's goal is returning the property to the true owner.<sup>84</sup> It was long thought that the lost/mislaid distinction achieved this goal because mislaid property would be held where the owner could remember having left it.<sup>85</sup> However, the law of mislaid property strips finders of any possible claims to their findings, thereby incentivizing them to conceal whatever they find.<sup>86</sup> This makes recovery by the owner less likely.<sup>87</sup> Thus, applying equitable division to cases in which lost or mislaid property gives rise to competing claims solves three problems: First and foremost, it removes the incentive for finders to secrete their findings and allows the property to be held where the true owner will most likely come looking.<sup>88</sup> Second, the equitable division of lost or mislaid property between the finder and the owner of the premises on which it was found may comport with a general instinct for fairness.<sup>89</sup> After all, both parties had something of a hand in the story of the lost item. Finally, the uniform application of equitable division creates clarity and predictability in an otherwise-unpredictable legal space, reducing the opportunity for disputes between and manipulation by the parties.<sup>90</sup> Hence, such instances of ambiguous loss or mislaying are good candidates for the application of equitable division.

Disputes over street-art ownership are likely to arise in contexts in which equitable division *can* apply. Indeed, as argued above, the facts surrounding street-art production and placement are so unusual that, for any given case, there will likely be equally strong arguments that the art was abandoned and that it was a gift.<sup>91</sup> Certainly, the objective facts surrounding street art point both ways. This means that—as with lost and mislaid property—finders of street art and owners of the underlying property will generally have competing plausible claims of ownership. As such, a court could justifiably apply equitable division of ownership to a great number of disputes over street-art ownership.

The question, then, becomes whether courts *should* apply equitable division when adjudicating disputes over street art.

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<sup>84</sup> See Helmholz, 52 *Fordham L Rev* at 313 (cited in note 69).

<sup>85</sup> See *id.*

<sup>86</sup> See *id.* at 314.

<sup>87</sup> See *id.*

<sup>88</sup> See Helmholz, 52 *Fordham L Rev* at 314–15 (cited in note 69).

<sup>89</sup> See *id.* at 315.

<sup>90</sup> See *id.*

<sup>91</sup> See Parts II.A.2, II.B, II.D.



The answer to that question depends on whether doing so would create an optimal solution to some set of difficult legal, factual, or policy problems. Certainly, applying equitable division to street art could solve some of the same problems it solves for lost and mislaid property. Equitable division of street art between the finder and the underlying-property owner might comport with some notion of fairness. It might also create uniformity in a currently murky and manipulable area of the law. However, as discussed in the following Part, questions of street-art ownership implicate a dizzying array of policy questions. Other plausible solutions to the problem of street-art ownership exist, and each one could, to some extent, solve the relevant policy problems. Nevertheless, as argued below, equitable division of street art represents the best outcome for all interested parties.

### III. RECOMMENDATION: COURTS SHOULD EQUITABLY DIVIDE STREET ART BETWEEN FINDERS AND OWNERS OF THE UNDERLYING PROPERTY ON WHICH THE ART IS FOUND

The previous Parts describe how courts might adjudicate disputes over street-art ownership. This Part argues for a single, optimal approach. The ideal legal regime for allocating private ownership will be one that both fits within existing case law and balances the relevant policy considerations in such a way as to produce the best possible outcomes.

In considering which legal doctrine or doctrines *could* be used to adjudicate such disputes, the above considerations leave open a number of approaches. As argued above, the traditional doctrinal categories—loss, mislaying, abandonment, gift, and accession—are insufficiently developed to be able to govern all likely disputes. Nevertheless, a court might choose to stretch one of these existing doctrines, expanding its scope in such a way that it governs a majority of cases. Alternatively, courts could leave the doctrinal concepts as they lie, applying one traditional doctrinal regime or another on an ad hoc basis. Finally, courts could, as this Comment advocates, apply none of the traditional doctrinal categories and instead exercise their equitable powers. This Comment argues that a uniform application of courts' flexible equitable powers is both legally defensible and, from a policy standpoint, far superior to the alternative regimes.

### A. Pure Abandonment: Pros and Cons

A pure abandonment regime has many advantages; considering it first will bring into focus the policy questions at stake in determining how to allocate street-art ownership. However, a pure abandonment regime would ultimately prove untenable because it would create a bizarre power of private eminent domain held by the very artists who trespass on private land to produce their work.

#### 1. Doctrinal fit.

As discussed above, the main doctrinal difficulty in applying the law of abandonment to disputes over street-art ownership springs from the ambiguity surrounding artist intent. Doctrinally, for the law of abandonment to apply, the artist must be indifferent to the identity of any subsequent owner of her work. Because of the manner in which street art is usually produced, it is usually difficult or impossible to discern whether artists act with such indifference.

Courts, however, could elect to stretch the current doctrine, treating all street art as presumptively abandoned unless some other intention is clearly demonstrated. A rebuttable presumption of indifference is plausible, though perhaps not more plausible than other conceivable presumptions about artist intent. Street artists continually place their work in public, where it may be defaced by graffiti taggers, destroyed by property owners or municipalities, or auctioned to the highest bidder. Despite these risks, street artists choose to continue producing work. This behavior could suggest that, if artists do care about who owns their work, they do not care very much. Furthermore, if artists did wish to produce art for a particular person, they could do so by creating art in the traditional manner and selling it directly to that person.

#### 2. Public policy: street-art preservation and highest-value use.

Street art can be extremely valuable. Pieces like *Mobile Lovers* and *Slave Labour* can easily sell for hundreds of thousands of dollars, and prices regularly climb into the millions.<sup>92</sup> Clearly, many people care a lot about street art. Hence, the destruction or defacement of a valuable work of street art amounts

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<sup>92</sup> See Johnston, *Banksy Breaks Cover* (cited in note 6).

to a substantial net social loss. Unfortunately, street art is under constant threat of being defaced or destroyed. Destruction generally occurs at the hands of building owners, including governments, or government entities acting on building owners' behalf.<sup>93</sup> Even when street art is extremely valuable, property owners, especially institutional and corporate owners, often fail to recognize the value of the relevant street art and may destroy the piece.<sup>94</sup> This practice is so common that Banksy satirized it in a piece called *Cave Painting*, which depicts a worker using a power washer to "clean up" priceless prehistoric cave paintings.<sup>95</sup>

Aside from property owners, the other significant threat to street art is, perhaps ironically, graffiti. It is outside the scope of this Comment to differentiate street art from graffiti, but if one were to do so, one would do well to consider that street artists, by and large, intend to improve or beautify property, while graffiti writers often intend to deface it.<sup>96</sup> Graffiti writers deface property indiscriminately, targeting the work of street artists just as readily as subway cars, street signs, and building walls. For example, during Banksy's unauthorized 2013 New York City residency, the artist created over thirty works across the city; of those works, at least twelve have now been defaced or destroyed by graffiti taggers.<sup>97</sup>

One possible reason that street art is regularly destroyed is that it often lands in the possession of someone—perhaps a building owner—who does not value it very highly. A building owner may not have much of an interest in art, may not visit the building regularly enough to enjoy the piece, or may not see any viable commercial advantage to continuing to possess such a piece. An art collector or a community in which art is placed might value the work significantly more. The art collector may reap significant personal enjoyment from owning a given piece, or she may add the piece to a large portfolio, collecting for commercial

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<sup>93</sup> For example, the city of Chicago runs a program whereby citizens can request removal of "graffiti," and the city will send a "blast truck" to power wash the area on which the "graffiti" has been placed. *Graffiti Removal Program* (City of Chicago), archived at <http://perma.cc/Y6D4-JT6Y>.

<sup>94</sup> See, for example, Post Staff Report, *City 'Cleans Up' after Banksy Art* (NY Post, Oct 17, 2013), archived at <http://perma.cc/7SZ2-CUA8>.

<sup>95</sup> *Cave Painting by Banksy* (Stencil Revolution), archived at <http://perma.cc/JXW9-PPYU>.

<sup>96</sup> Lindsay Bates, *Bombing, Tagging, Writing: An Analysis of the Significance of Graffiti and Street Art* \*79 (unpublished master's thesis, University of Pennsylvania, Jan 1, 2014), archived at <http://perma.cc/ZXE9-628J>.

<sup>97</sup> See Coscarelli, *The Banksy Tour of New York City* (cited in note 27).

purposes. A community might have a very high valuation of a piece, given that the aggregate pleasure its members derive from interacting with it is likely to be higher than most individuals' enjoyment.<sup>98</sup> Furthermore, truly notable works of street art may draw tourists, leading to commercial growth. To promote the general welfare, it is in the public interest to promote the highest and best use of any given property. Rather than forcing it to languish with a relatively low-valuation owner, the law should open avenues for property to flow continuously toward its highest-value use.<sup>99</sup>

One efficient way to promote the highest-value use of property is through sales. When a relatively low-value owner owns property, it is often efficient to sell that property to a higher-value user. The high-value user will make an offer that is equivalent to or less than the total value the user expects to extract from the property, and, if that price is indeed higher than the valuation of the low-value owner, the owner will be happy to sell. Given its clandestine and unsolicited production, street art may be more likely than other property to languish with a low-value owner. Unlike most commercial products, street art is generally not produced either in contractual relationships for buyers who are readily able to value them or by producers who are willing and motivated to find such buyers. When an artist places a work on another person's property, the property owner has no relationship with the artist, contractual or otherwise. The owner has not requested the art, and she may be both uninterested in determining its value *ex ante* and ill equipped to do so. Furthermore, since street artists generally prefer to remain anonymous, they are constrained in their ability to alert potential high-value users<sup>100</sup> to the existence of their work. And even if they could, they have little incentive to do so since they are unlikely to reap the rewards of such actions. Street art, especially when it is produced by artists less famous than Banksy, faces

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<sup>98</sup> See, for example, Lyall, *Borough Searches for Missing Boy* (cited in note 11) (documenting the efforts of the Haringey citizens to keep *Slave Labour* in their neighborhood).

<sup>99</sup> See Strahilevitz, 158 U Pa L Rev at 416–17 (cited in note 33) (suggesting that abandonment may be a more effective doctrinal mechanism than adverse possession to cause land to flow to the highest-value user in situations in which a property owner wishes to lose her property interest in land).

<sup>100</sup> A high-value user need not be willing to pay millions for an artist's work. Rather, the relevant high-value user here is merely someone who values a work more highly than the sum of the underlying-property owner's subjective valuation and the transaction costs of any sale.

significant barriers to market entry. If no one has any incentive to alert high-value users to the existence of street art, then the art is as likely to languish and be destroyed as it is to become the subject of an efficient market transaction. Hence, it is in the public interest to define legal rules such that they help overcome these barriers.

Bargaining cannot resolve these difficulties. Motivated finders of street art are unlikely to be able to sell their knowledge about valuable artwork to property owners. Property owners who have no idea what finders wish to sell them are unlikely to pay for unknown information. Likewise, if finders tell owners that they are selling information about valuable artwork on the owners' property, owners are likely to investigate the art themselves, discover its value, and avoid paying the finder.

A pure abandonment regime would go some distance toward preserving street art's value and encouraging its highest-value use. Professor Strahilevitz praises the law of abandonment for its ability to overcome high transaction costs.<sup>101</sup> Abandonment lacks the marketing costs of a sale and the decision costs of a gift.<sup>102</sup> And indeed, governing street-art ownership under a *per se* abandonment rule is a relatively efficient way to overcome the special informational transaction costs associated with street art.

An abandonment regime gives those with special knowledge of street art's value an incentive to reveal that knowledge and protect the work before it is defaced or destroyed. Under the abandonment regime, finders of street art will be awarded ownership rights. Knowing this, those with a special love for, or skill in identifying, street art will have good reason to either actively search for it or at least keep their eyes open for it as they go about their daily business. Consequently, rather than languishing, being defaced, or being destroyed while sitting on the property of a street-art philistine or an absentee landlord, street art will be claimed, protected, and presumably placed into the stream of commerce relatively soon after it is created. An abandonment regime thus helps to avoid the net social loss of street-art destruction and also encourages the transfer of a work toward its highest-value use.

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<sup>101</sup> Strahilevitz, 158 U Pa L Rev at 386 (cited in note 33).

<sup>102</sup> See *id.* at 386–87.

One objection to the use of an abandonment regime to allocate street-art ownership is that the regime's incentivization of finders to search for street art might have negative effects. One might argue that it is wasteful to push a number of people to devote time and energy to acquiring art when another regime would assign ownership with no such search. While it is true that the incentivization of finders to look for art implies a social cost, that cost should never rise above what is reasonable. For each individual searcher, the expected value of searching is the value (subjective or market) of the art to be found multiplied by the probability of that individual being the first finder. This latter factor depends in part on the number of other active searchers. Taking these considerations into account, it is clear that the abandonment regime does not incentivize total searching expenditures above the total value of the art to be found and does not incentivize individual searchers whose expected value of searching is lower than their next-best alternatives.

### 3. Public policy: protecting the right to exclude.

Property owners' rights of exclusion are fundamentally expressed in the law of trespass. Though the right to exclude is not always absolute, it is deeply enshrined in American law.<sup>103</sup> Any solution to the question of street-art ownership must then take proper account of this right. The major source of possible trespasses on private land in relation to street art is by the artists themselves. One might worry that a given rule for resolving ownership disputes might incentivize more trespasses by street artists for the purpose of producing more art. This result, however, seems unlikely. First, trespass and vandalism remain illegal everywhere, so no matter the ownership regime, artists will have strong incentives to refrain from trespassing. Second, none of the live doctrinal resolutions would strengthen street artists' incentives to produce work. In most cases, the laws of abandonment, gift, and accession, or the application of equitable division, would vest ownership rights directly with someone other than the artist. And even when these doctrines might vest ownership in the artist—as with a revoked abandonment or a rejected gift—the artist will presumably continue to prefer anonymity

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<sup>103</sup> See, for example, *State v Shack*, 277 A2d 369, 373–74 (NJ 1971) (recognizing that “[a] man’s right in his real property of course is not absolute” and “find[ing] it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker’s well-being”).

and freedom from criminal penalty to the exercise of those rights. All of this is to say that the benefits that might flow from any proposed solution, including profits from sales of street art, are unlikely to flow to street artists.

Under an abandonment regime, one could perhaps imagine a clever artist who would produce work, tell a friend where it was, and have the friend immediately claim it. They could then conspire to sell the work for a profit. This outcome seems unlikely for two reasons. First, for street artists like Banksy or Fairey, whose work is likely to sell for substantial sums, the option of legitimate production<sup>104</sup> and sales is a much simpler avenue to financial gain. Second, such a scheme would create a kind of Peter Parker/Spider-Man problem. Just as it is somewhat suspicious that, in the fictional Marvel universe, Peter Parker is the only photographer able to capture images of the elusive Spider-Man,<sup>105</sup> it would eventually become suspicious that a single person or small group of people was so consistently able to immediately discover the location of valuable street art. Hence, whatever street artists' current incentives are to trespass and produce work, no ownership regime is likely to alter those incentives.<sup>106</sup>

A second category of possible trespassers onto private land, however, might be aspiring collectors of street art. Under the abandonment regime—in which works of street art become the property of whoever discovers them first—there is an incentive for potential finders to search for art wherever it might be found. Indeed, such “lawless races” may be a generalized objection to assigning ownership via the law of abandonment.<sup>107</sup> Strahilevitz argues that lawless races are of the greatest concern when they are truly lawless—that is, when they involve violence or other serious illegal acts.<sup>108</sup> There is no *ex ante* reason to think that a regime incentivizing finders to search for street art will engender violence any more than existing regimes incentivizing, for example, searches for buried treasure.<sup>109</sup>

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<sup>104</sup> Fairey's contract to produce the President Obama's now-iconic *Hope* images is an example of a legitimate production. See William Booth, *Obama's On-the-Wall Endorsement* (Wash Post, May 18, 2008), archived at <http://perma.cc/6K86-7H5C>.

<sup>105</sup> See *Spider-Man (Peter Parker)* (Marvel), archived at <http://perma.cc/KDZ9-VPT5>.

<sup>106</sup> It is worth noting that these considerations apply with equal strength to the effects of possible ownership regimes on rates of vandalism.

<sup>107</sup> Strahilevitz, 158 U Pa L Rev at 374–75 (cited in note 33).

<sup>108</sup> See *id.*

<sup>109</sup> See, for example, *Benjamin v Lindner Aviation, Inc*, 534 NW2d 400, 406 (Iowa 1995).

Nevertheless, an abandonment regime incentivizes members of the public to seek out street art, and street art is often found on private land.<sup>110</sup> But it is not clear that these facts alone imply that the employment of an abandonment regime will significantly increase the rate of trespass. First, one of street artists' goals is for their work to be seen, so they are likely to place works such that they can be viewed without trespassing into the darkest recesses of private property. Hence, finders will likely be able to discover street art without any trespass at all. Second, trespass remains a civil and sometimes criminal offense in most jurisdictions. If finders of street art hope to recover and, perhaps, legitimately sell the work that they find, they will face the additional challenge of simultaneously maintaining their anonymity for the purposes of avoiding prosecution. This problem will be especially difficult for potential sellers of very sticky street art. For example, it would be nearly impossible to excise a spray-paint mural from a wall without alerting the building owner. Therefore, finders of street art are likely to be more deterred by legal prohibitions against trespass than are street artists. These considerations give little reason to think that the governance of street-art ownership by any regime that incentivizes finders to search for valuable art will have a significant effect on trespass rates.

#### 4. Public policy: free alienation and fragmentation.

American law disfavors limitations on the freedom of alienation. For example, though governments may exercise their rights of eminent domain by taking a citizen's property and compensating her for it,<sup>111</sup> no corresponding private right of eminent domain exists. Thus, while the law allows the government to force landowners to alienate their property, it strictly limits the parties who have that power and the contexts in which that power can be employed. Similarly, most states have eliminated the ancient fee tail, a legal method for tightly restricting future

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<sup>110</sup> Consider the placement of *Slave Labour*. See Lyall, *Borough Searches for Missing Boy* (cited in note 11) (describing how *Slave Labour* was stenciled on the wall of a store). Also consider the placement of the various works that Banksy produced during his New York City residency. See note 97 and accompanying text; Alice Vincent, et al, *Banksy Better Out Than In Map: See Where the Street Artist Has Painted* (Telegraph, July 1, 2015), archived at <http://perma.cc/AM6M-7G7U>.

<sup>111</sup> See US Const Amend V.



sales of real property in an estate.<sup>112</sup> Suspicion of intrusions on property owners' right of free alienation probably springs from a number of considerations, one of which is economic efficiency.<sup>113</sup> As discussed above, it is in the general public interest that property be put to its highest-value use, and sales are a reasonably good way of serving that goal. Hence, restrictions on alienation impede economic efficiency.

American law and public policy also disfavor property fragmentation. Public policy favors the easy identification of the owners of real property. Among other things, readily identifiable real property interests lower transaction costs and help to ensure that buyers actually get what they think they are paying for.<sup>114</sup> To this effect, most developed countries employ some official system for tracking ownership of real property and quieting disputes over titles.<sup>115</sup> When property interests are highly complex and not easily recordable, such a system is thus subject to increased transaction costs.

A pure abandonment regime fares poorly with respect to these considerations. Under such a system, no matter the character of the street art in question, a finder of a given work of art becomes its owner. However, as discussed in Part II.C, some kinds of street art are extremely sticky. Spray-paint murals, especially, are so firmly attached to the underlying wall that the two are inseparable. Hence, under a pure abandonment regime, for a finder's full ownership of a spray-paint mural to be meaningful, the finder would have to take some rights over a portion of the underlying wall. At the very least, these rights would include a right to prohibit the demolition of the wall to which the art was attached. Furthermore, one might think that a finder's ownership of a spray-paint mural would be meaningless without the included right to remove the work from its current location. Such a removal right would give a finder even more power over the underlying property. This presents either a significant freedom-of-

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<sup>112</sup> See John A. Borron Jr, 1 *Simes & Smith: The Law of Future Interests* § 313 (Thomson/West 3d ed 2002).

<sup>113</sup> See Max Gibbons, Comment, *Of Windfalls and Property Rights: Palazzolo and the Regulatory Takings Notice Debate*, 50 *UCLA L Rev* 1259, 1283 (2003) (arguing that "free alienation of property is efficient most of the time").

<sup>114</sup> See Gerald Korngold, *For Unifying Servitudes and Defeasible Fees: Property Law's Functional Equivalents*, 66 *Tex L Rev* 533, 570 (1988) (arguing that recording systems "minimize transaction costs by keeping ownership information current").

<sup>115</sup> See 66 *Am Jur 2d Records and Recording Laws* § 40 at 102-03 (2011) (outlining the purpose of recording statutes in the American system).

alienation problem or a significant fragmentation problem. If finders possess exclusive rights to works that remain attached to the underlying property, that property becomes fragmented. Furthermore, insofar as the finder gains rights to some portion of the underlying wall, this option forces the landowner to alienate some portion of her property. Even if the finder were forced to compensate the landowner for that portion of the wall, such a solution would look like a kind of private eminent domain power, with the initial power exercised by lawbreaking street artists.

The policy considerations stemming from free alienation and fragmentation weigh against adopting a pure abandonment regime to assign ownership of street art. Even if they did not, such a solution just seems wrong: it cannot be the case that, when an artist trespasses on private land to produce—in violation of local vandalism ordinances—an unsolicited spray-paint mural, the law grants that artist the power to force the property owner to alienate some portion of her property. There are many advantages to an abandonment regime. Chiefly, it overcomes the significant policy problem of street-art defacement and destruction, and it promotes street art's highest-value use. However, given the bizarre effects of such a regime for alienation and fragmentation, a pure abandonment regime should not govern street-art ownership.

#### B. Abandonment Modified by Accession: Close, but No Cigar

As discussed above, the doctrine of accession is brought to bear exactly when doing so will resolve difficult legal, factual, or policy problems.<sup>116</sup> If accession can be brought to bear in avoiding poor investment incentives, inefficient races, and tragedies of the commons, why not bring it to bear in avoiding a pure abandonment regime's perverse effects for alienation and fragmentation?

Since governance of street-art ownership by an abandonment regime carries so many virtues, the goal of a hybrid abandonment/accession system would be to preserve those effects whenever possible. That is to say, abandonment would govern whenever no serious alienation or fragmentation problems arise. However, when the street art in question would pose such problems under the abandonment regime, accession would step in to govern. Such works would automatically become the sole property of whoever owns the property to which they were

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<sup>116</sup> See Part II.C.

attached. Recall that this seems to be more or less how accession works in the case law. While the doctrinal question of when two properties have been combined into a new unitary whole is extremely difficult, courts' inconsistencies on the question might well be explained by asking whether the application of accession would solve the relevant difficulties.<sup>117</sup>

What kinds of street art would be governed by accession under such a system? Likely only the stickiest kinds. Spray-paint murals applied directly to brick would almost certainly be subject to accession. As discussed above, such work strongly implicates problems for alienation and fragmentation.<sup>118</sup> But what about other, moderately sticky mediums like tile grouted to walls or posters pasted to buildings? Insofar as these kinds of work are, albeit with difficulty, removable, they pose no serious problems for free alienation or fragmentation. As such, they and all other moderately sticky to nonsticky works of street art would, under this proposal, be governed by abandonment. This outcome maximizes the portion of street art that would be subject to the serious benefits of governance by the abandonment regime.

The problem with the hybrid approach is the popularity of spray paint as a street-art medium. Though street art can range across an incredibly diverse spectrum of mediums, paint applied directly to private property has been and remains by far the movement's most popular.<sup>119</sup> Furthermore, pieces like *Mobile Lovers* and *Slave Labour*, both spray-paint murals, are some of the street-art world's most valuable works.<sup>120</sup> Hence, while the hybrid abandonment/accession approach solves the alienation and fragmentation problems, it largely undercuts the original benefits of the pure abandonment regime. A great number of street-art works are left without incentives for protection or vehicles to highest-value use, including many of the works that are—because of their high value—most worth protecting. The combination of abandonment with accession is then, at best, an imperfect answer to the question of street-art ownership.

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<sup>117</sup> See Part II.C.

<sup>118</sup> See Part III.A.

<sup>119</sup> Consider RJ Rushmore and Caroline Caldwell, *The 50 Most Influential Street Artists of All Time* (Complex, Oct 11, 2013), archived at <http://perma.cc/N54H-KQ2A> (listing the most influential street artists and noting that several of them work mostly in paint).

<sup>120</sup> See Introduction.

C. Ad Hoc Adjudication or the Law of Gift: The Worst of All Possible Worlds

While the other traditional doctrinal regimes are not entirely implausible as choices for governing street-art ownership, they fare either no better or worse than the hybrid abandonment/accession regime in all important respects. More importantly, no system fares as well as governance by equitable division. As will be demonstrated below, neither ad hoc adjudication nor the law of gift creates very good incentives for street-art discovery and preservation. An ad hoc system provides insufficient certainty with regard to ownership rights to incentivize investment in such activities. The law of gift provides such incentives only to underlying-property owners—the parties least likely to be well positioned to discover and preserve artwork.

1. Doctrinal fit.

Rather than creating a per se regime that would govern most cases, courts could allow the various legal doctrines to lie as they are, applying whichever one seems most appropriate in a given case. However, such an ad hoc solution would be doctrinally untenable. As discussed above, no single regime is implicated by the relevant case law as the most appropriate for governing the majority of street-art disputes.<sup>121</sup> Hence, in the absence of a per se rule, courts' choices in future cases among these various doctrines would be totally arbitrary. Arbitrariness infuses significant uncertainty into the law, making it difficult for citizens to plan their activities around settled expectations.<sup>122</sup>

But what about the alternative per se regimes? Courts might try to eliminate such arbitrariness by instituting a per se regime favoring either the law of gift or the law of accession. A regime governed by a per se gift assumption would assume, unless the artist clearly demonstrated some other intention, that any given work of street art was a gift to the owner of the underlying property. As discussed above, the evidence in favor of such an assumption is generally no stronger than the evidence in favor of the artist's intent to abandon.<sup>123</sup> Some works, like *Slave*

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<sup>121</sup> See Introduction.

<sup>122</sup> See, for example, R. George Wright, *Arbitrariness: Why the Most Important Idea in Administrative Law Can't Be Defined, and What This Means for the Law in General*, 44 U Richmond L Rev 839, 840–41 (2010) (“Arbitrariness . . . is seemingly linked with uncertainty, variability, and unpredictability.”).

<sup>123</sup> See Part II.B.

*Labour*, might themselves point away from a gift intention. Some might point toward it. The majority of street art offers no clues as to artist intent. As such, a per se gift assumption is about equally doctrinally plausible as a per se abandonment assumption.

A per se accession assumption fares much worse. Doctrinally, accession governs only when two pieces of old property have combined to create something entirely new. Many pieces of street art—for example, sculptures—exhibit no such pattern. Insofar as street art continues to evolve and broaden beyond its earliest paint-on-brick days, accession will continue to be a worse and worse doctrinal fit for ownership determinations of a vast array of works.

## 2. Public policy: street-art preservation and highest-value use.

Both the pure abandonment regime and, as will be demonstrated, the use of equitable division serve the important policy functions of preserving street art and promoting its highest-value use. An ad hoc regime presents little incentive for anyone to invest in claiming, preserving, or marketing street art. Insofar as a regime is arbitrary and unpredictable, anyone—including underlying-property owners and members of the general public—who might wish to discover, preserve, or otherwise invest in street art will be discouraged from doing so by the looming possibility that the law will ultimately grant ownership to someone else.

Both a per se gift regime and a per se accession regime would, more or less automatically, vest street-art ownership with owners of property on which street art has been placed. Such regimes likewise do little to encourage street-art discovery, preservation, and highest-value use. As discussed above, there is no reason to expect that any given property owner is particularly likely to be a patron of the arts, and a property owner is thus likely to deface or destroy street art or to let it languish with a low-value owner.<sup>124</sup> Hence, neither a gift regime nor an accession regime serves the policy goals of preserving street art and promoting its highest-value use.

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<sup>124</sup> See Part III.A.2.

### 3. Public policy: protecting the right to exclude.

As discussed above, an abandonment regime might increase marginal incentives for potential finders of street art to trespass onto private land.<sup>125</sup> None of the other candidate regimes faces this difficulty. An ad hoc regime creates little incentive for finders to search for street art, since they will have no assurance that, should they discover anything, their efforts will be rewarded with ownership rights. Likewise, the per se gift and per se accession regimes create no incentives for finders because they allocate ownership of street art to property owners more or less automatically. When there is no incentive to search for street art, there is no marginal incentive to trespass.

However, as argued above, regimes that incentivize finders of street art create, at most, a weak incentive for those finders to trespass.<sup>126</sup> Hence, if there is any benefit to the alternative regimes' lack of a marginal incentive to trespass, it is a small one, weighing only minutely in favor of such regimes.

### 4. Public policy: free alienation and fragmentation.

A per se gift regime assumes that any work of street art was a gift to the underlying-property owner. Therefore, no problems concerning free alienation or fragmentation generally arise under such a regime. One could imagine scenarios in which, for example, the artist manifests a clear intention to abandon a spray-paint mural. Then, the per se gift regime would give way to abandonment, and alienation and fragmentation problems might arise. Courts could remedy such problems by applying the law of accession in such cases, which, by granting ownership of the art to the property owner, would raise no alienation or fragmentation concerns. Such a system would fare no worse than other regimes on alienation and fragmentation grounds, but it would include no policy benefits regarding art preservation and highest-value use.

## C. Equitable Division: The Best of All Possible Worlds

When faced with factual ambiguity in a custody dispute over a baby boy, King Solomon called for his sword.<sup>127</sup> He decreed

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<sup>125</sup> See Part III.A.3.

<sup>126</sup> See Part III.A.3.

<sup>127</sup> 1 Kings 3:24 (New English Bible).

that the child would be sliced in half and divided between the women making claims of motherhood.<sup>128</sup> Solomon's decree of equitable division was an information-forcing bluff,<sup>129</sup> but even in ancient times, the doctrine was used to overcome ambiguity in service of the public good. The question of street-art ownership remains beset by legal, factual, and policy problems. It is in precisely such a situation that courts can and should exercise their equitable powers to divide property ownership, thereby solving such problems in a manner that is reasonable and predictable. The equitable division of street-art ownership between the finder and the property owner fares much better than all other solutions on every relevant metric, resolving all serious difficulties without any of the downsides that encumber other regimes.

### 1. Doctrinal fit.

As discussed above, equitable division is not a narrow doctrinal area that applies only to certain kinds of property or only when parties exhibit certain kinds of intent.<sup>130</sup> Rather, courts can apply equitable division whenever multiple parties have competing plausible claims to a given property.<sup>131</sup> Such application can span across doctrinal areas, resolving disputes over property that could be considered lost, mislaid, or abandoned, or even disputes over accreted waterfront real estate.<sup>132</sup> When disputes arise over street-art ownership, the kinds of competing plausible claims that normally trigger equitable division are likely to be present. This is because the primary doctrinal regimes that might govern street-art ownership—abandonment and gift—do not map easily onto the unique facts of street-art production. Both regimes turn on artist intent, but artist intent will generally be unknowable. This makes disputes over street art look very much like difficult disputes over lost or mislaid property. Here, as there, competing legal regimes, combined with a paucity of relevant facts, generate competing plausible claims of ownership between the finder of street art and the underlying-property owner. Thus, doctrinally, equitable division can be applied to determine street-art ownership.

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<sup>128</sup> *Id.* at 3:25.

<sup>129</sup> *See id.* at 3:26.

<sup>130</sup> *See* Part II.D.

<sup>131</sup> *See* Part II.D.

<sup>132</sup> *See* Part II.D.

## 2. Public policy.

As should be clear by this point, the public policy concerns surrounding street-art ownership are varied and complex. However, as the above discussions illustrate, the real difficulty in this area is finding a balance between two kinds of values. First, given that street art is continuously under the threat of defacement and destruction, it is vitally important that any ownership regime promote street art's preservation and, thus, its eventual movement toward its highest-value use. This means ensuring that there are incentives for those who are able to readily identify and protect valuable street art to do so. A pure abandonment regime serves this purpose well by giving full ownership of valuable street art to whoever finds and preserves it. However, a pure abandonment regime fares very poorly with regard to the second set of values. For very sticky street art like spray-paint murals, value preservation comes into direct conflict with the goals of promoting free alienation and preventing fragmentation. If finders take full ownership of street art, they force alienation and fragmentation for any sufficiently sticky street art. Accession can step in to ameliorate this problem, but it, in turn, does so only at the expense of street-art preservation and highest-value use. Thus, the primary policy goal of the law becomes reconciling preservation and highest-value use on the one hand with alienation and fragmentation problems on the other.

Resolving private disputes over street art with equitable division allows courts to have their cake and eat it too. By awarding finders a share of any street art they discover, equitable division, like abandonment, creates incentives that promote street-art preservation and highest-value use. Moreover, equitable division, unlike the hybrid abandonment/accession regime, can apply to *all* street art.

But doesn't equitable division create the same alienation and fragmentation problems as abandonment? If a finder takes partial ownership of a very sticky artwork attached to private property and that ownership necessarily includes some right to the underlying property, it looks as if that underlying property has been fragmented. Furthermore, if the finder has some say as to whether the art should remain where it was placed, be moved, or be sold, it looks as if the underlying-property owner's right of free alienation might be impinged.

Equitable division can avoid these problems by functioning in the following manner: A court would *not* divide ownership of street



art equally with each party holding equal rights over the artwork in all respects. Rather, it would grant the finder something less than full co-ownership, unbundling the various rights that art ownership usually implies. It would treat the finder as a minority shareholder in the piece, granting her only some percentage of the *value* of the work. Courts should attempt to coalesce around a more or less uniform percentage divide in order to avoid the unpredictability of an ad hoc regime.<sup>133</sup> Under such a system, the finder's only right with regard to the street art would be the right to collect some percentage of the work's sale price should the property owner ever choose to sell it. That right would vest only upon a work's sale, so the finder would collect nothing if the work never sold or was destroyed. The underlying-property owner would retain the power to make all other decisions regarding the artwork and its underlying property, including decisions about artwork placement, alienation, and even destruction.

Such an arrangement eliminates any problem of free alienation. Under equitable division, it is *not* the case that by, for example, spray-painting a mural on someone's wall, a street artist thereby makes a portion of that wall fair game for partial ownership by finders. This Comment proposes that courts equitably divide *only* the artwork and *never* the underlying property to which it is attached. Thus, a finder never takes ownership of anything that belonged to the property owner prior to the artwork's placement. There is no reason here to invoke the doctrine of accession to treat any artwork as having merged with the underlying property into a new, unitary property. Doing so solves no problems, because the finder's right to a portion of some sale value has nothing to do with the underlying property. Unlike under the pure abandonment regime, the finder does not require rights to the underlying property to make her interest in the artwork meaningful.

Because the finder does not take rights to anything other than a portion of the net sale value of the artwork itself, disposition of the artwork and the underlying property would be entirely within the purview of the property owner. If the owner wished to excise the artwork from her building and sell it at auction,

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<sup>133</sup> This Comment takes no position on what the proper percentage would be. It is noteworthy, however, that under the German system, finders of lost property are usually entitled to a finder's fee of just 5 percent of the found property's value. Bürgerliches Gesetzbuch [BGB] (the German Civil Code, as amended Jan 2, 2002) § 971. This amount has presumably proved to be enough to incentivize finders.

she could do so. She would merely owe the finder his due share of the sale's net revenues. If the owner wished to destroy the artwork, she could do so with impunity. It would likely be foolish of her to make such a decision, given that she would know that at least one party—the finder—might be willing to buy the work. But the property owner would remain free to be foolish; the finder's right would not place a duty on the property owner to either prevent the artwork's destruction or to abstain from destroying it herself.

The only duty that the property owner would owe to the finder would be a duty not to fraudulently deprive the finder of her fair share of a sale, should such a sale take place. For example, such an artwork could be attached to a home, and the property owner might wish to sell the entire home, including the artwork. The property owner would then have to pay the finder the latter's share of the home's sale price that was driven by the artwork. Such an amount could be easily calculated by having the artwork appraised. Better still, the homeowner could simply sell the home and the artwork separately, even if to a single buyer. But the property owner could not collude with the buyer to inflate the home price and sell the art at a nominal price for the purpose of avoiding payment of the finder's fair share. Such fraud would constitute a legal cause of action for the finder. While such possibilities of fraud may seem to imply complicated, unadministrable duties between finder and property owner, nothing could be further from the truth. The property owner's duties are simple: pay a portion of the artwork's sale price and do not commit fraud. Courts routinely adjudicate disputes arising out of fiduciary relationships orders of magnitude more complex than this.

There is only one other manner in which the finder's right to a portion of the sale value and the property owner's rights to the underlying property might interact. Some sales of street art will require the sale of some portion of the underlying property. Removal and sale of a spray-paint mural from a wall requires the removal and sale of some portion of the underlying wall. The finder, again, has no interest in the underlying wall. Hence, if an artwork's sale price reflects, to some extent, the excised wall's value, that value is not included in the net revenue of which the finder is owed a share. However, such a situation is unlikely, as small portions of excised brick or drywall are essentially valueless. Either way, at no time does equitable division

grant anyone but the underlying-property owner any interest in the underlying property. Thus, equitable division of street art poses no serious threats to free alienation.

Fragmentation would also cease to be a problem under equitable division. Potential buyers of property to which street art was attached would not have to worry that the property might remain subject to some third-party interest. The finder's interest in the art would terminate with any sale, and the finder's subsequent claim for payment would be against her former co-owner alone.

### 3. Legality of the proposed division.

Doctrinally speaking, it is entirely plausible that courts could arrange the terms of equitable division in the manner proposed above. First, courts are not required to equitably divide any property evenly among its claimants, so they could split street art's value unevenly. For example, when equitably dividing accreted waterfront land between two littoral landowners, courts do not divide the new property equally, but rather in such a way that the new proportions of waterfront-land ownership reflect those that existed prior to the accretion.<sup>134</sup>

Nor must courts grant any party the full suite of rights that usually accompanies ownership of chattels. Owners of chattels are generally free to alienate or not alienate as they please.<sup>135</sup> Nevertheless, in *Popov*, after awarding equal shares of the Barry Bonds home run ball to Popov and Hayashi, the court ordered the ball to be sold, stripping both parties of that common property right.<sup>136</sup> Thus, there is no reason to think that a court could not award finders of street art solely the right to a percentage of the art's sale price.

Finally, courts could stipulate that the finder's right vests only upon an artwork's sale, allowing the underlying-property owner to destroy the work if necessary. The law allows equitably divided interests to be temporally limited; for example, Popov and Hayashi were forced to terminate their ownership rights as

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<sup>134</sup> See, for example, *Lorusso v Acapesket Improvement Association, Inc.*, 564 NE2d 360, 367–68 (Mass 1990).

<sup>135</sup> See Merrill I. Schnebly, *Restraints upon the Alienation of Legal Interests: I*, 44 Yale L J 961, 961 (1935) (“Since an early date in the history of the English common law, it has been thought socially and economically desirable that the owner of a present fee simple in land, or of a corresponding absolute interest in chattels, should have the power to transfer his interest.”).

<sup>136</sup> *Popov*, 2002 WL 31833731 at \*8.

soon as practicable.<sup>137</sup> Furthermore, courts regularly award future interests in other equitable contexts. For example, a court of equity may assign a future interest as part of a contract, even when that contract mentions no such interest.<sup>138</sup> Thus, it is entirely plausible that courts could likewise grant finders of street art a future interest in a given artwork that would vest only upon the sale of that piece.

In summation, the application of equitable division serves each relevant policy goal at least as well as any other regime and implies none of the other regimes' ill effects. Most importantly, it incentivizes finders to locate valuable street art, promoting the artwork's preservation and highest-value use. Unlike the hybrid abandonment/accession regime, it does so for *all* works of street art; unlike the pure abandonment regime, it does not present problems for free alienation or fragmentation. Furthermore, equitable division is at least as doctrinally plausible as any other regime. Disputes over street-art ownership are likely to arise primarily between finders and owners of property on which the art was placed. In such situations, the laws of abandonment and gift interact in much the same way as the laws of loss and mislaying might, generating competing plausible claims. Such situations are exactly those in which equitable division is permitted. Thus, equitable division both can and should govern disputes over street-art ownership.

#### CONCLUSION

The law of ownership, as it relates to street art, implicates well-worn doctrines but unprecedented fact patterns. While it is clear that a number of doctrinal areas could resolve such disputes, the factual difficulties surrounding street art render the relevant doctrinal tests impotent. As episodes like the *Mobile Lovers* and *Slave Labour* controversies demonstrate, the stories surrounding the production, discovery, and ownership of street art are not quite like anything else in property law. Doctrinally, equitable division avoids such ineffectual tests, allowing courts to resolve disputes sensibly. From a policy perspective, the application of equitable division is, by a great margin, socially optimal. Such a regime does little or nothing to incentivize bad public effects like trespass and fragmentation. Most important-

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<sup>137</sup> See id at \*8–9.

<sup>138</sup> See 6 Am Jur 2d Assignments §§ 5, 12, 88 (2008).

ly, it does much better than the alternatives at producing two desirable results: the prevention of street-art destruction and the movement of street art toward its highest-value use. Under such a regime, many culturally significant works of art that would otherwise perish will live on for future generations to enjoy. Such preservation creates a significant benefit for artists, collectors, art lovers, and, arguably, society at large.