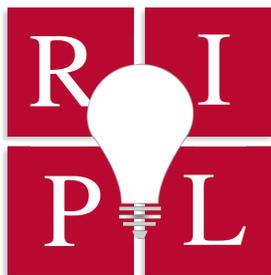


UIC

REVIEW OF INTELLECTUAL PROPERTY LAW



MURAL MURAL ON THE WALL: REVISITING FAIR USE OF STREET ART

MADYLAN YARC

ABSTRACT

Mural mural on the wall, what's the fairest use of them all? Many corporations have taken advantage of public art to promote their own brand. Corporations commission graffiti advertising campaigns because they create a spectacle that gains traction on social media. The battle rages on between the independent artists who wish to protect the exclusive rights over their art, against the corporations who argue that the public art is fair game and digital advertising is fair use of art. The Eastern Market district of Detroit is home to the Murals in the Market Festival. In January 2018, Mercedes Benz obtained a permit from the City of Detroit to photograph its G 500 SUV in specific downtown areas. On January 26, 2018, Mercedes posted six of these photographs on its Instagram account. When Defendant-artists threatened to file suit, Mercedes removed the photos from Instagram as a courtesy. In March 2019, Mercedes filed three declaratory judgment actions against the artists for non-infringement. This Comment will analyze the claims for relief put forth in Mercedes' complaint and evaluate Defendant-artists' arguments. Ultimately, this Comment will propose how the court should rule in the pending litigation of *MBUSA LLC v. Lewis*.

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MURAL MURAL ON THE WALL: REVISITING FAIR USE OF STREET ART

MADYLAN YARC

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MURAL MURAL ON THE WALL: REVISITING FAIR USE OF STREET ART

MADYLAN YARC*

I. INTRODUCTION

“Hopefully street art will stop being trendy. They say the quickest way to kill a man’s ideas is to make him fashionable.”¹ This commentary comes from Banksy, a well-known graffiti artist and activist, about the trend and publicity of street art.²

The battle rages on between independent artists who are fighting to protect exclusive rights over their public art, against corporations who argue that the public art³ is fair game and digital advertising is fair use of art. Many companies use graffiti advertising campaigns because they create a “spectacle” that gains traction on social media.⁴ In 2018 Zippo Manufacturing Co. commissioned a 188,368 square-foot mural that gained “over 11.5 million views across all web platforms.”⁵

Meanwhile many cities have begun mural projects to help revitalize their urban downtown landscapes.⁶ The artists avoid criminal charges⁷ for graffiti⁸ and benefit

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¹ David Fear, *Street (il)Legal: Q&A with Banksy*, TIMEOUT.COM (Apr. 12, 2010), <https://www.timeout.com/newyork/film/street-il-legal-q-a-with-banksy>.

² Will Ellsworth-Jones, *The Story Behind Banksy*, SMITHSONIAN.COM (Feb. 2013), <https://www.smithsonianmag.com/arts-culture/the-story-behind-banksy-4310304/> (reporting that Banksy is a “graffiti master, painter, activist, filmmaker and all-purpose *provocateur*—for its list of the world’s 100 most influential people in 2010”).

³ *Art*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining the word “art” as “[c]reative expression, or the product of creative expression”).

⁴ Greg Ritchie, *Luxury Brands Are Taking Over the Street Art Scene*, BLOOMBERG (Jul. 22, 2019, 11:00 PM), <https://www.bloomberg.com/news/features/2019-07-23/luxury-brands-gucci-louboutin-graffiti-ads-take-over-street-art> (noting that “[c]ompanies that were previously put off by graffiti’s association with trespassing and criminal damage have realized the best street art can go viral on social media, giving an image splashed on the wall of a back-street office block global impact”).

⁵ Ritchie, *supra* note 4.

⁶ Katherine Brooks, *The 19 Best Cities To See Street Art In The United States*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/street-art-american-cities_n_7594180 (noting that large corporations aren’t the only ones taking advantage of the street art trend, many cities including “Miami, Philadelphia, Seattle, St. Louis . . . and Detroit” have commissioned large murals for those “vacationers who want to see some good art”).

⁷ Most states criminalize graffiti as vandalism under criminal mischief, intentional destruction of property, or criminal trespass statutes. *See, e.g.*, 720 ILL. COMP. STAT. 5/21-1 (2020); 720 ILL. COMP. STAT. 5/21-1.3 (2020) (“A person commits criminal defacement of property when the person knowingly damages the property of another by defacing, deforming, or otherwise damaging the property by the use of paint or any other similar substance.”); CAL. PENAL CODE §§ 594, 594.1, 594.5 (Deering 2020) (“(a) [e]very person who maliciously commits any of the following acts with respect to any real or personal property not his or her own . . . is guilty of vandalism: (1) Defaces with graffiti or other inscribed material”). Some cities have also adopted graffiti ordinances. *See generally* Wayne County, Mich., CODE OF ORDINANCES § 158-3 (2020) (making graffiti a civil offense with fines starting at \$100.00).

⁸ Black’s Law Dictionary provides no definitions for the terms “graffiti,” “street art,” or “mural.” Yet many of these terms are used interchangeably when discussing artwork on outdoor structures in a spray-paint medium. Artist Paul Walsh explains that graffiti “involves letter-based tags and pieces,

from the large-scale public display of their artwork, while the cities benefit from the tourism with the added benefit of containing the aerosol artwork.

A. Factual History

In 2015 artists Jeff Soto and Maxx Gramajo created a mural as part of the annual art festival, “Murals in the Market” (“Festival”).⁹ The Festival aims at revitalizing the Eastern Market district of Detroit by increasing tourism, traffic, and economic development.¹⁰ The Eastern Market district is a year-round public market that began in the 1800s.¹¹ The Soto-Gramajo mural was painted near the Gratiot Central Market on the “façade of a building” and became a “permanent fixture of the Eastern Market's cityscape.”¹²

In 2016 during the second year of the Festival, artist James Lewis created a mural painted on the façade of a building near 2001 Wilkins Street.¹³ And in 2017 artist Daniel Bombardier created a mural for the Festival painted in front of Mike's Coney Island Restaurant.¹⁴



Image 1. Lewis Mural in downtown Detroit.

sometimes with characters / backgrounds as well” and “is usually created without permission.” In contrast, murals are usually commissioned and the painting “typically cover[s] the entire wall.” Whereas the term street art describes a style of anonymous artwork “rendered in public spaces using stencils, spray[-]paint, acrylic paint, stickers and a range of other appropriated mediums.” Paul Walsh, *Mural’ vs. ‘Graffiti’ vs. ‘Street Art’: my definitions.*, PAUL X WALSH (Feb. 21, 2018), <https://paulwalsh.co.nz/mural-vs-graffiti-vs-street-art-my-definitions/>.

⁹ Mercedes Benz, USA, LLC v. Lewis, No. 19-10948, 2019 U.S. Dist. LEXIS 154818, at *5 (E.D. Mich. Sept. 11, 2019).

¹⁰ See *About*, MURALS IN THE MARKET, <https://www.muralsinthemarket.com/about> (last visited Oct. 2019).

¹¹ See *Building the Market*, EASTERN MARKET, <https://www.easternmarket.org/district/building-the-market> (last visited Oct. 2019).

¹² *Lewis*, 2019 U.S. Dist. LEXIS 154818, at *4.

¹³ *Id.*

¹⁴ *Id.*

In January 2018, Mercedes Benz USA, LLC (“Mercedes”) obtained a permit from the City of Detroit to photograph its G 500 SUV in specific downtown areas.¹⁵ On



Image 2. Mercedes Benz Instagram Post.

January 26, 2018, Mercedes posted six of those photos on its Instagram account, @mercedesbenz.¹⁶ After the mural-artists threatened to file suit, Mercedes removed the photos from Instagram as a courtesy.¹⁷ In March 2019, Mercedes filed three declaratory judgment actions against the artists for non-infringement.¹⁸

B. Procedural History

In its complaint, Mercedes sought the following declaratory judgments: (1) the Instagram post depicting Defendants’ murals do not infringe Defendants’ alleged copyright; (2) Mercedes made fair use of the murals; (3) the murals are exempt from protection under the Architectural Works Copyright Protection Act (“AWCPA”); and (4) Mercedes did not violate the prohibition under the Digital Millennium Copyright Act (“DMCA”) for intentionally removing or altering copyright management information.¹⁹

¹⁵ *Id.* at *3-4 (explaining that the permit “authorized Mercedes to photograph its G 500 in several locations, including the area between the Eastern Market and 1314 Gratiot Avenue, where defendants’ murals are located”).

¹⁶ *Id.*

¹⁷ Complaint at ¶ 6; Mercedes Benz, USA, LLC v. Lewis, No. 19-10948, 2019 U.S. Dist. LEXIS 154818, at *3 (E.D. Mich. Sep. 11, 2019).

¹⁸ Kyle Jahner, *Mercedes Fight With Muralists Tests Building Copyright Bounds*, BLOOMBERG (Apr. 23, 2019, 11:35 AM), <https://news.bloomberglaw.com/ip-law/mercedes-fight-with-muralists-tests-building-copyright-bounds>.

¹⁹ Complaint, *supra* note 17, at ¶ 9.

In response, Defendant-artists argued that Mercedes failed to state a claim.²⁰ Specifically, Defendants argued that because the murals have not been registered for copyright yet, the case was not ripe, the AWCPA does not provide exemption for the photographs of the murals, and finally that the Court lacks personal jurisdiction.²¹

The court denied Defendants' motions to dismiss, holding that Mercedes has a plausible claim for relief and the Court has jurisdiction over all the defendants.²² The Court was certain to point out that it was not yet ruling on whether Mercedes would prevail under the AWCPA.²³ The Court later ordered all of the proceedings to be consolidated.²⁴

Part II of this Comment provides background information on the fair use doctrine and the scope of the Copyright Act; the Architectural Works Copyright Protection Act; and the Digital Millennium Copyright Act. Part III will analyze the claims for relief put forth in Mercedes' complaint and evaluate Defendant-artists' arguments. Finally, Part IV proposes how the court should rule in the pending litigation of *MBUSA LLC v. Lewis*.

II. BACKGROUND

A. *The Scope of Fair Use and Copyright Protection*

The Copyright Act provides that anyone who violates any of the exclusive rights of the copyright owner is an infringer of copyright.²⁵ Copyright protection is afforded to "original works of authorship fixed in any tangible medium of expression."²⁶ Works of authorship include, though are not limited to: literary works, musicals works, pictorial, graphic, and sculptural works ("PGS"), and architectural works.²⁷ Any work that qualifies under one of these categories is afforded copyright protection as soon as it is produced.²⁸

The author of the original work is the initial copyright owner.²⁹ As such, the author controls the exclusive rights to reproduce the work in copies, prepare derivative works, distribute copies, and in the case of artwork, display the work publicly.³⁰

²⁰ Defendant's Motion to Dismiss at 4, *Mercedes Benz USA LLC v. Bombardier*, 2:19-CV-10951-AC-EAS, (E.D. Mich. Apr. 24, 2019).

²¹ *Lewis*, 2019 U.S. Dist. LEXIS 154818, at *3.

²² *Id.*

²³ *Id.* at *18.

²⁴ *Mercedes Benz, USA, LLC v. Lewis*, No. 19-10948, 2019 U.S. Dist. LEXIS 166073, at *2-3 (E.D. Mich. Sep. 26, 2019).

²⁵ 17 U.S.C. § 106 (2018).

²⁶ 17 U.S.C. § 102 (2018).

²⁷ *Id.* ("(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music;(4) pantomimes and choreographic works;(5) pictorial, graphic, and sculptural works;(6) motion pictures and other audiovisual works;(7) sound recordings; and (8) architectural works").

²⁸ 17 U.S.C. § 102.

²⁹ 17 U.S.C. § 201 (2018) (the ownership of the copyright "vests initially in the author(s) of the work" unless or until ownership is transferred).

³⁰ 17 U.S.C. § 106.

However, Section 107 of the Copyright Act limits the exclusive rights that a copyright owner may claim to their copyrighted work.³¹ The legal doctrine of fair use permits unlicensed use of copyright-protected works in “certain circumstances.”³²

The question of fair use was long ago dubbed “the most troublesome in the whole law of copyright.”³³ The Copyright Act does not define fair use.³⁴ However, Section 107 sets forth four factors that courts take into consideration:³⁵

- (1) the purpose and character of the use, including whether such use is of a commercial³⁶ nature or is for nonprofit educational purposes;³⁷ (2) the nature of the copyrighted work;³⁸ (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;³⁹ and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁴⁰

³¹ 17 U.S.C. § 107 (2018).

³² U.S. COPYRIGHT OFF., *More Information On Fair Use*, <https://www.copyright.gov/fair-use/more-info.html> (last visited Sept. 2019).

³³ *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939); WILLIAM T. MCGRATH, COPYRIGHT INFRINGEMENT, FAIR USE, AND REMEDIES, ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION § 11.16 (2017) (explaining that “[e]ach case involving a question of fair use requires a difficult case-by-case balancing of complex factors”).

³⁴ 17 U.S.C. § 107.

³⁵ *Id.*

³⁶ Commercial use can be rather broad; and sometimes the result is to deny fair use. *See, e.g.*, *World Wrestling Fed’n Entm’t, Inc. v. Bozell*, 142 F. Supp. 2d 514, 531 (S.D.N.Y. 2001) (copyright of fundraising video for financial gains and notoriety held as commercial use); *Rubin v. Boston Magazine Co.*, 645 F.2d 80, 84 (1st Cir. 1981) (reproduction of scientific material to “entertain readers of a magazine of general circulation” held a commercial use); *but see Italian Book Corp. v. American Broad. Cos.*, 458 F. Supp. 65, 70 (S.D.N.Y. 1978) (fair use sustained for television news broadcast containing portion of plaintiff’s song); *Keep Thomson Governor Comm. v. Citizens For Gallen Comm.*, 457 F. Supp. 957, 961 (D.N.H. 1978) (held fair use for political commercial on television containing portion of plaintiff’s song).

³⁷ 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[1][a] (2019). “Under the first factor, the inquiry in itself does not specify which purposes—beyond the ‘nonprofit educational’—will tend to render a given use ‘fair,’ and which will not . . . [although Section 107 lists] certain purposes that are most appropriate for a finding of fair use: ‘criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research.’” *Id.*

³⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (explaining that this factor refers to “‘the value of the materials used’ . . . [and it] calls for recognition that some works are closer to the core of intended copyright protection than others” and holding that the rock ballad’s creative expression for “public dissemination falls within the core of the copyright’s protective purposes”); *see, e.g.*, *Stewart v. Abend*, 495 U.S. 207, 237-238 (1990) (distinguishing fictional short story with factual works); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 563-564 (1985) (distinguishing soon-to-be-published memoir with published speech); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454-455 (1984) (distinguishing motion pictures with news broadcasts).

³⁹ 4 NIMMER, *supra* note 37, § 13.05[3] (noting the factor of amount of substantiality relates to the matter of substantial similarity, however, “[th]e proper analysis [] includes a determination of not just quantitative, but also qualitative substantiality”).

⁴⁰ 4 NIMMER, *supra* note 37, § 13.05[4]; The effect on Plaintiff’s potential market is “the most important, and indeed, central fair use factor . . . [because it] poses the issue of whether unrestricted and widespread conduct of the sort engaged in by the defendant (whether in fact engaged in by the defendant or by others) would result in a substantially adverse impact on the potential market for, or value of, the plaintiff’s present work.” *Id.* (citing *Wall Data Inc. v. Los Angeles County Sheriff’s Dept.*, 447 F.3d 769, 781 (9th Cir. 2006)).

It follows that the “amount” under the third factor and the extent of permissible copying varies with the purpose and character of use.⁴¹

The problem is that Section 107 does not define the difference between wrongful and permissible copying or deriving.⁴² A “derivative work” is a work based upon one or more preexisting works.⁴³ A common type of derivative work is a “new edition” which constitutes an original work because of its revisions, annotations, and or modifications.⁴⁴ However, for a derivative work to receive copyright protection, it “must incorporate some or all of a preexisting ‘work’ and add new original copyrightable authorship to that work.”⁴⁵

When it comes to works that are classified as public domain,⁴⁶ the work still contains underlying material that may become derivative work; and “the use of the public domain material in a derivative work will not prevent anyone else from using the same public domain work for another derivative work.”⁴⁷

B. Digital Millennium Copyright Act

Due to “[c]oncerns about direct and contributory copyright infringement liability for Internet service providers” Congress enacted The Digital Millennium Copyright Act (“DMCA”) in 1998⁴⁸ to create “certain limitations on liability for ISPs.”⁴⁹ The DMCA establishes safe harbors for four types of activities that service providers frequently engage in, that would otherwise be subject to copyright liability: (a) transitory digital network communications, (b) system caching, (c) information residing on systems or networks at the direction of users, and (d) information location tools.⁵⁰

⁴¹ 4 NIMMER, *supra* note 37, § 13.05[3].

⁴² 4 NIMMER, *supra* note 37, § 13.05[5].

⁴³ 17 U.S.C. § 101 (2018) (examples of derivative works include: “a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted”).

⁴⁴ U.S. COPYRIGHT OFF., *Copyright in Derivative Works and Compilations*, COPYRIGHT.GOV, <https://www.copyright.gov/circs/circ14.pdf>. (last visited Oct. 2019) [hereinafter *Copyright in Derivative Works*].

⁴⁵ *Id.* Copyright protection for derivative works “does not extend to any preexisting material, that is, previously published or previously registered works or works in the public domain or owned by a third party. As a result, it is not possible to extend the length of protection for a copyrighted work by creating a derivative work.”

⁴⁶ *Public Domain*, BLACK’S LAW DICTIONARY, (11th ed. 2019). The Black’s Law Dictionary defines the word “public domain” as “[t]he universe of inventions and creative works that are not protected by intellectual-property rights and are therefore available for anyone to use without charge. When copyright, trademark, patent, or trade-secret rights are lost or expire, the intellectual property they had protected becomes part of the public domain and can be appropriated by anyone without liability for infringement.” *Id.*

⁴⁷ *Copyright in Derivative Works*, *supra* note 44.

⁴⁸ Digital Millennium Copyright Act, PUB. L. NO. 105-304, 112 STAT. 2860 (1998).

⁴⁹ MCGRATH, *supra* note 33, § 11.15; see 17 U.S.C. §§ 107, 512, 1201 (2018).

⁵⁰ 17 U.S.C. §§ 512(a)-(d) (2018).

As a preliminary matter, to qualify for the safe harbor provisions, Internet service providers (“ISP”) must “(a) adopt a policy that provides for the termination of service access for repeat infringers in appropriate circumstances, (b) implement that policy in a reasonable manner, and (c) inform its subscribers of that policy.”⁵¹

The first issue plaguing independent artists concerns user-generated content.⁵² Popular Internet service providers, such as Facebook, YouTube, and Instagram, may avoid liability for infringing material posted by their users.⁵³ To avoid liability, the ISP must first show it does not have actual knowledge of the infringing material or activity, or is not aware of “facts or circumstances from which infringing activity is apparent.”⁵⁴

If the ISP obtains knowledge or awareness of infringement, it must act “expeditiously to remove, or disable access to, the material.”⁵⁵ Next, the ISP must show that it does not receive a financial benefit for the infringing activity, where “the service provider has the right and ability to control such activity.”⁵⁶

If the ISP receives a notification of infringement it must respond “expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”⁵⁷ Facts or circumstances suggesting there is obvious infringement have been coined “red-flag[s].”⁵⁸ Courts have held that an ISP’s general knowledge that its services could be used for infringement is insufficient to meet the red-flag requirement.⁵⁹

The second issue plaguing independent artists concerns removal or alteration of copyright management information (“CMI”).⁶⁰ CMI may include information such as the title, the author, the copyright owner, the terms and conditions for use of the work, and other identifying information set forth in a copyright notice or conveyed in the work.⁶¹ Courts have interpreted two requirements under this provision: first, the removal or alteration of the CMI, and second, that the defendant removed or altered the CMI knowingly or intentionally.⁶² While the DMCA clearly prohibits intentional

⁵¹ 17 U.S.C. § 512(i)(1)(A) (2018); *see, e.g.*, *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007) (discussing reasonable implementation as a threshold matter); *Ellison v. Robertson*, 357 F.3d 1072, 1080 (9th Cir. 2004) (determining ISP’s eligibility for safe harbor limitations of liability).

⁵² 17 U.S.C. § 512(c) (2018).

⁵³ *Id.*

⁵⁴ *Id.* § 512(c)(1)(A)(i)-(ii).

⁵⁵ *Id.* § 512(c)(1)(A)(iii).

⁵⁶ *Id.* § 512(c)(1)(B).

⁵⁷ *Id.* § 512(c)(1)(C); *see also* *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 620-625 (4th Cir. 2001) (holding that take-down notice in the cease and desist order was sufficient); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004) (holding that third-party notices were not sufficient to show defendant’s apparent knowledge).

⁵⁸ *Corbis*, 351 F. Supp. 2d at 1108 (noting that “Congress described the advertisement of illegal copyright activity through such slang words as a ‘red flag’ of obvious infringement, and indicated that the infringing nature of sites containing such red flags would be apparent from even a ‘brief and casual viewing’”).

⁵⁹ Instead, plaintiffs must show that the ISP’s had knowledge of specific and identifiable infringements. *See, e.g.*, *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1021 (9th Cir. 2013); *Viacom International, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012).

⁶⁰ 17 U.S.C. § 1202(b)(1) (2018).

⁶¹ *See* 17 U.S.C. § 1202(b)-(c) (2018).

⁶² *See* *GC2 Inc. v. International Game Technology*, 391 F. Supp. 3d 828, 840 (N.D. Ill. 2019) (citing *Stevens v. CoreLogic, Inc.*, 899 F.3d 666, 674 (9th Cir. 2018)).

removal or alteration of CMI, the framing and cropping of a photograph presents a more novel and nuanced issue.⁶³

C. Architectural Works Copyright Protection Act

In 1990, the Copyright Act was amended by the Architectural Works Copyright Protection Act (“AWCPA”).⁶⁴ The AWCPA effectively created a new category of copyrightable work known as “architectural works”⁶⁵ which includes the design of a building itself, as embodied in any tangible medium of expression, including plans and drawings, and design elements.⁶⁶

However, protection offered under the AWCPA is limited. Section 120(a) addresses pictorial representations of architectural works.⁶⁷ When the work is located in a public place, or visible from a public place, anyone may make, distribute, or publicly display “pictures, paintings, photographs, or other pictorial representations of the work.”⁶⁸ While Section 120(b) limits alterations that can be made to the structure itself,⁶⁹ the danger is, if murals and other artworks fall under exemption from the AWCPA, it could incentivize owners to exploit the property.⁷⁰

III. ANALYSIS

A. Whether Mercedes’ Use of the Murals Satisfies Fair Use

To determine whether Mercedes satisfied the fair use test, the Court will consider: (1) the purpose and character of the use, including whether such use is of a commercial

⁶³ See 17 U.S.C. § 1202(b)(3) (prohibiting an actor from distributing copyrighted works “knowing that copyright management information has been *removed or altered* without authority of the copyright owner or the law”) (emphasis added).

⁶⁴ Architectural Works Copyright Protection Act, Pub. L. No. 101-650, §§ 701-706, 104 Stat. 5089, 5133-34 (1990). The law is also codified in sections of title seventeen of the United States Code. See, e.g., 17 U.S.C. §§ 101, 102(a)(8), 301.

⁶⁵ 17 U.S.C. § 101 (defining “architectural work” as “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features”).

⁶⁶ See 17 U.S.C. § 101.

⁶⁷ 17 U.S.C. § 120(a) (2018).

⁶⁸ *Id.*

⁶⁹ 17 U.S.C. § 120(b) (stating that the owners of the building where the work is embodied, “may, without the consent of the author or copyright owner of the architectural work, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building”). Not all works of art that are architectural, are covered under the AWCPA. Namely, the AWCPA does not apply to landscape design. Even though “is true that both architecture and landscape design concern the making of a place, [] it is the use of that place at which the line is drawn . . . [a]rchitecture results in a structure; landscape design results in an image.” John Nivala, *The Landscape Art of Daniel Urban Kiley*, 29 WM. & MARY ENVTL. L. & POL’Y REV. 267, 291-292 (2005).

⁷⁰ Jahner, *supra* note 18.

nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁷¹

1. Is the Purpose and Character of Mercedes' Use of the Murals Fair?

In its declaratory judgment action, Mercedes admits that its Instagram post featured six photographs which depicted, in part, “partially obstructed and blurred image[s] of graffiti art”⁷² created by the Defendants.⁷³ However, Mercedes argues that the Instagram post⁷⁴ “fundamentally transformed the visual aesthetic and meaning of Defendant[s] mural[s].”⁷⁵ To advance this argument, Mercedes contends that the photographs are action shots that were (i) blurred to highlight the vehicle’s speed, (ii) depicted at a “steep, oblique angle,” to draw focus to the vehicle and (iii) cropped so that one-third of the mural is out of frame.⁷⁶

The meaning behind the post, according to Mercedes, is to showcase the G 500 vehicle as an “off-road vehicle that is always ready for some ‘urban exploration.’”⁷⁷ In contrast, the meaning behind the Lewis mural focuses on identity and African culture.⁷⁸ Whereas, the Bombardier mural features themes of consumerism and the human condition.⁷⁹ Finally, the Gramajo-Soto mural showcases graffiti culture and “youthful nostalgia.”⁸⁰

On the other hand, Defendants should focus on the Instagram post as a whole, and argue that Mercedes did not adequately transform the artists’ original work because the murals remain instantly recognizable in the post.⁸¹ In addition, Defendants should point out that Mercedes strategically chose the locations for the promotional photographs for its ad, and chose to photograph its vehicle in front the murals to add to its theme of “urban exploration.”⁸²

⁷¹ 17 U.S.C. § 107.

⁷² See Image 1, *supra* part I.

⁷³ Complaint, *supra* note 17, at ¶ 22.

⁷⁴ See Image 2, *supra* part I.

⁷⁵ Complaint, *supra* note 17, at ¶ 25.

⁷⁶ Complaint, *supra* note 17, at ¶ 26(a)-(e).

⁷⁷ Complaint, *supra* note 17 at ¶ 28.

⁷⁸ Lindsay Samson, *Meet the artist behind America's only museum dedicated to African beads*, DESIGN INDABA (October 25, 2019), <https://www.designindaba.com/articles/creative-work/meet-artist-behind-americas-only-museum-dedicated-african-beads> (reporting that Lewis’ artwork “tell[s] a story about black identity and history that connects communities across the world—like his in Detroit—to the African continent”).

⁷⁹ See *Artists*, MURALS IN THE MARKET, <https://www.muralsinthemarket.com/denial> (last visited Oct. 2019).

⁸⁰ See *Artists*, MURALS IN THE MARKET, <https://www.muralsinthemarket.com/jeffsoto> (last visited Oct. 2019).

⁸¹ See *Graham v. Prince*, 265 F. Supp. 3d 366, 381 (S.D.N.Y. 2017) (holding that there was no transformative use where the infringing work simply reproduces the original work with “some de *minimis* cropping” and the reasonable observer would recognize the original work in a “side-by-side comparison”).

⁸² See *id.*; *but cf.* *Blanch v. Koons*, 467 F.3d 244, 247 (2d Cir. 2006)(finding that artist had made fair use of a photograph of a woman's legs by overlaying the legs on a collage featuring three other

The Court must also determine whether Mercedes' use of the murals qualifies as commercial use. In January 2018, Mercedes unveiled the new G 500 truck at the 2019 North American International Auto Show.⁸³ Mercedes published the Instagram post at issue in this case on January 26, 2018, in conjunction with the unveiling at the Auto Show.⁸⁴ Defendant-artists should argue that the Instagram post is an advertisement and clearly commercial.⁸⁵

The primary concern under this sub-factor is unauthorized use by a secondary user to reap significant revenues as a direct result of copying the original work.⁸⁶ Mercedes and companies like it undoubtedly make significant revenue from Instagram advertisement posts featuring their vehicles.⁸⁷ Yet Mercedes will contend that the exact revenue obtained from one published post can be difficult to calculate,⁸⁸ let alone the revenue resulting from the direct use of an original work.⁸⁹

2. Does the Natural of the Murals Warrant Copyright Protection?

The second factor focuses on the original work, rather than the alleged infringement.⁹⁰ This factor recognizes that some works are closer to the core of intended copyright protection than others.⁹¹ Generally speaking, fair use is more likely to be found in factual works than fictional works.⁹² This is because the law recognizes

pairs of women's legs, trays of pastries and ice-cream, "with a grassy field and Niagara Falls in the background"); Complaint, *supra* note 17, at ¶ 28.

⁸³ Complaint, *supra* note 17, at ¶ 17.

⁸⁴ Complaint, *supra* note 17, at ¶ 21.

⁸⁵ See *Balsley v. LFP, Inc.*, 691 F.3d 747, 759 (6th Cir. 2012) (holding defendant's reproduction of plaintiff's photograph was "clearly for commercial purposes" where editors admitted the photo was a part of a section of the magazine "[that] was added to generate interest, sales, and profits").

⁸⁶ *Blanch*, 467 F.3d at 253 (quoting *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 922 (2d Cir. 1994)).

⁸⁷ Mediakix, *Influencer Marketing Channels Where US Marketers Plan To Spend The Most, Jan 2019 (% of respondents)*, EMARKETER (Feb. 14, 2019), <https://www.emarketer.com/chart/226713/influencer-marketing-channels-where-us-marketers-plan-spend-most-jan-2019-of-respondents> (reporting that U.S. marketers spend sixty-nine percent of their influencer budgets on Instagram); *Advertising*, Instagram Business, <https://business.instagram.com/advertising/> (last visited Oct. 2019) (explaining the ways to purchase and use "Stories Ads," "Photo Ads," "Video Ads," "Carousel Ads," "Collection Ads," and "Ads in Explore"); Christina Newberry, *Thirty-Seven Instagram Stats That Matter To Marketers In 2020*, HOOTSUITE (October 22, 2019), <https://blog.hootsuite.com/instagram-statistics/> (reporting that "Instagram's potential advertising reach is \$849.3 million users").

⁸⁸ Paige Cooper, *The Six Best Instagram Analytics Tools (And Metrics You Need To Track)*, Hootsuite (May 1, 2019), <https://blog.hootsuite.com/instagram-analytics-tools-business/> (reporting that Instagram eliminated its application programming interface in December 2018 forcing marketers to rely on third-party analytics tools).

⁸⁹ Sarah Dowley, Michael Aynsley, *How to Prove and Improve Social Media ROI*, HOOTSUITE (Nov. 6, 2018), <https://blog.hootsuite.com/measure-social-media-roi-business/#tools> (explaining that social media return on investment "is the sum of all social media actions that create value" and there is no "catch-all formula for proving ROI").

⁹⁰ See 17 U.S.C. § 107(2).

⁹¹ *Campbell*, 510 U.S. 569, 586 (explaining "[t]his factor calls for recognition that some works are closer to the core of intended copyright protection than others").

⁹² *Stewart*, 495 U.S. at 237.

a greater need to disseminate factual works to the public.⁹³ The murals are a “creative” work of art, which Defendant-artists can argue fits squarely within the core of intended copyright protection and merits strong protection from a fair use defense.⁹⁴ This factor will likely be uncontested.⁹⁵

3. *What is the Amount and Substantiality of Mercedes’ Use?*

Mercedes argues that the Instagram post incorporates only a minimal amount of the murals, in the background of the photographs.⁹⁶ Furthermore, Mercedes contends that the murals are incidental because they “are not the centerpiece of the photograph or the series of six photographs” and the murals appear in the photograph “only because [they were] integrated into the cityscape that [Mercedes] included as part of the background.”⁹⁷

However, Defendant-artists can challenge Mercedes’ argument for transformative use alongside the amount and substantiality.⁹⁸ Defendants should argue that this factor weighs in their favor because the photographs in the Instagram post⁹⁹ feature two-thirds of the murals;¹⁰⁰ and Mercedes retained the full aesthetic appeal of the murals to promote its theme of “urban exploration.”¹⁰¹

4. *Whether Mercedes’ Use of the Murals Effects the Potential Market*

Finally, Mercedes argues that the Instagram post does not target the same audience or the same commercial markets.¹⁰² The murals, Mercedes contends, were created as part of a greater effort to increase tourism and economic development in the

⁹³ *Harper & Row*, 471 U.S. at 563.

⁹⁴ *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013) (holding that where there is no dispute that a work is creative and published, “this factor weighs against a fair use determination”).

⁹⁵ 4 NIMMER, *supra* note 37, § 13.05[2][a] (explaining that this factor “typically recedes into insignificance in the greater fair use calculus”).

⁹⁶ Complaint, *supra* note 17, at ¶ 25.

⁹⁷ Complaint, *supra* note 17, at ¶ 26(e).

⁹⁸ *Campbell*, 510 U.S. 569, 586 (1994) (explaining that quantity and quality of the copyrighted material are “reasonable in relation to purpose of the copying”); *see also Graham*, 265 F. Supp. 3d 366, 383 (S.D.N.Y. 2017) (clarifying that this factor necessarily relates to the degree of which the use was transformative).

⁹⁹ *See Image 2*, *supra* part I.

¹⁰⁰ *Cariou*, 714 F.3d 694, 710 (2d Cir. 2013) (holding that courts must “consider the proportion of the original work used, and not how much of the secondary work comprises the original”).

¹⁰¹ *See Id.* at 711 (evaluating whether the quantity and quality were reasonable where the infringing reproductions superimposed “cartoonish” images onto the original, but were “still similar in key aesthetic ways”); *Blanch*, 467 F.3d at 257-258 (holding that the amount of copying was reasonable in light of defendant’s creative decisions to use the airplane background and to “extract the legs, feet, and sandals” from the original); *Kelly v. Arriba Soft. Corp.*, 336 F.3d at 821 (9th Cir. 2003) (holding that the factor of amount and substantiality weighs in favor of neither party when defendant copied the original image as a whole, though the amount was necessary to allow users to identify the original in the thumbnail).

¹⁰² Complaint, *supra* note 17, at ¶ 32-33.

Eastern Market district of Detroit.¹⁰³ Mercedes does not usurp the potential markets for the Defendant-artists because the murals were created for the Murals in the Market Festival.¹⁰⁴ Therefore this factor ultimately weighs in favor of Mercedes.

B. Whether Mercedes Violated the DMCA

In support of its argument for non-violation under DMCA, Mercedes alleges that it did not remove or alter any of Defendants' copyright management information ("CMI") when it published the Instagram post in 2018.¹⁰⁵ Alternatively, Mercedes claims that to any extent that it did remove any CMI, it was not intentional.¹⁰⁶ Moreover, Mercedes will point out that despite its intent, where there is no removal or alteration of CMI, a DMCA claim must fail.¹⁰⁷

Mercedes admits that in the published post the photographs were blurred and one-third of the murals were cropped out of frame.¹⁰⁸ While the DMCA clearly prohibits intentional removal or alteration of CMI, the framing and cropping of a photograph presents a more novel and complex question.¹⁰⁹ Black's Law Dictionary defines "alteration" as a "change" in something.¹¹⁰ It defines "removal" as "the transfer or moving of a person or thing from one location, position, or residence to another."¹¹¹ As it stands, failure to include or omit CMI does not constitute removal or alteration.¹¹²

C. Are the Murals Exempt Under AWCPA?

In the Court's order denying the defendants' Motion to Dismiss, the Court held that Mercedes has alleged a plausible claim for exemption under section 120(a) of the AWCPA.¹¹³ The question remains, whether or not Mercedes has the right to

¹⁰³ *About*, MURALS IN THE MARKET, *supra* note 10.

¹⁰⁴ *Mercedes*, No. 19-10948, 2019 U.S. Dist. LEXIS 154818, at *4 (E.D. Mich. Sep. 11, 2019).

¹⁰⁵ Complaint, *supra* note 17, at ¶ 66.

¹⁰⁶ Complaint, *supra* note 17, at ¶ 67.

¹⁰⁷ See 17 U.S.C. § 1202.

¹⁰⁸ Complaint, *supra* note 17, at ¶ 26(a)-(d).

¹⁰⁹ See 17 U.S.C. § 1202(b)(3) (prohibiting an actor from distributing copyrighted works "knowing that copyright management information has been *removed or altered* without authority of the copyright owner or the law") (emphasis added).

¹¹⁰ *Alteration*, BLACK'S LAW DICTIONARY, (11th ed. 2019) (defining the word "immaterial alteration" as "[a] minor change in something" and "material alteration" as "[a] significant change in something").

¹¹¹ *Removal*, BLACK'S LAW DICTIONARY, (11th ed. 2019); see *Falkner v. GM, LLC*, 393 F. Supp. 3d 927, 938 (C.D. Cal. 2018) (holding that defendant did not remove or alter "Plaintiff's signature from the photograph; rather, [defendant] simply chose not to include the perpendicular mural wall in his photograph").

¹¹² *Falkner*, 393 F. Supp. 3d at 938 (explaining that the purpose of the DMCA was "to prevent the 'defac[ing] or deform[ing]' of protected works, such as 'defacing or altering the title page of a book' or 'delet[ing] . . . the electronic information that may accompany a computer file containing a copyrightable composition.'" (quoting 4 NIMMER ON COPYRIGHT § 12A.10[B][1][a])).

¹¹³ *Mercedes*, No. 19-10948, 2019 U.S. Dist. LEXIS 154818, at *13-15 (E.D. Mich. Sep. 11, 2019) (holding that Mercedes properly alleged that the murals were a part of the "architectural work" under

photograph the public buildings showcasing defendants' murals.¹¹⁴ Mercedes' alleges that the defendants' murals are "a part of an architectural work."¹¹⁵ In support of its argument, Mercedes contends that each mural was "integrated into the façade of [the] building and the Detroit cityscape" and "created for a functional purpose."¹¹⁶

Admittedly, there is no "determinative test" to decide what qualifies a PGS work as a "part of" an architectural work.¹¹⁷ Courts thus far have considered four factors: (i) whether the artwork was conceptually integrated into the "underlying architecture," (ii) whether the artwork is itself an "architectural feature," (iii) whether the artwork is designed to appear as it were a part of the building, or (iv) whether the artwork serves a functional purpose related to the building.¹¹⁸

The *Murals in the Market* festival "invites artists from all over the world to showcase their art style."¹¹⁹ Defendant-artists will point out that at the end of the 10 days, their artwork becomes a *semi-permanent* feature of the buildings and the Eastern Market cityscape of Detroit.¹²⁰ Defendants will compare Mercedes' argument to those raised in *Falkner v. General Motors*.¹²¹ The *Falkner* court held that murals painted on the walls of a Detroit parking garage were not a part of the architecture because they were not a functional feature of the garage, nor were they integrated into the design of the garage.¹²² Much like the *Falkner* murals, Defendants should argue that their murals serve no functional purpose related to the building, and the murals in fact were designed to create a "significant visual impact" and the buildings simply serve as a "platform."¹²³

120(a); rejecting defendant-artists' policy argument that 120(a) wiped out all copyright protection for street art murals; and ruling that defendants' reliance on *Star Athletica* was misplaced).

¹¹⁴ *Id.* at *16.

¹¹⁵ Complaint, *supra* note 17, at ¶ 64.

¹¹⁶ Complaint, *supra* note 17, at ¶ 61-62.

¹¹⁷ *Falkner*, 393 F. Supp. 3d 927, 937 (C.D. Cal. 2018) (relying on the factors set forth by the Ninth Circuit decision in *Leicester v. Warner Bros.* to determine the "part of" standard for an architectural work).

¹¹⁸ *Id.* (citing *Leicester v. Warner Bros.*, 232 F.3d 1212, 1217 (9th Cir. 2000)).

¹¹⁹ Complaint, *supra* note 17, at ¶ 44.

¹²⁰ See Emily Sullivan, *New York Judge Awards \$6.7 Million To 21 Graffiti Artists For Destroyed Murals*, NPR (Feb. 13, 2018, 10:35 PM), <https://www.npr.org/sections/thetwo-way/2018/02/13/585416520/new-york-judge-awards-6-7-million-to-21-graffiti-artists-for-destroyed-murals> (quoting the real estate developer in the infamous 5Pointz graffiti case where dozens of graffiti murals were whitewashed overnight: "[the artists] knew it wasn't a permanent thing...[t]hey knew it was temporary").

¹²¹ *Falkner*, 393 F. Supp. 3d at 937.

¹²² *Id.* The Court here made a strong factual distinction between the murals in the case at bar, and the towers in *Leicester*: "The undisputed facts are wholly unlike those in *Leicester* that led that court to determine that the street wall towers were part of the 801 Tower, such as: the matching decorative design elements, materials, and spacing; the presence of an architectural purpose for the street wall; and the functional role played by the street wall in serving as a gate to channel foot traffic into the courtyard. Because the relevant facts in *Leicester* are entirely distinguishable from those here, and because the facts in the record tend to establish—if anything—the lack of a relevant connection between the mural and the parking garage." *Id.*

¹²³ *About, Murals in the Market*, *supra* note 10.

IV. PROPOSAL

A. Mercedes' Use of the Murals was not a Fair Use

Ultimately, Mercedes' use of murals does not satisfy the four-factor test because: (i) the purpose and character of Mercedes' use of the murals is not fair use; (ii) the nature of the murals warrants copyright protection; (iii) the amount of Mercedes' use of the murals is substantial; and (iv) Mercedes' use of the murals affects the potential market.

1. The Purpose and Character of Mercedes' Use of the Murals is Not Fair Use

The Court should find that Mercedes did not adequately transform the artists' original work either through blurring and cropping, or by changing the meaning or message.¹²⁴ The Sixth Circuit should adopt and apply the "reasonable viewer" test to determine whether Mercedes' Instagram post is truly a transformative use of Defendant-artists' murals.¹²⁵ After performing a side-by-side comparison of the murals and Mercedes' Instagram post, the Court should find that the photographs in the Instagram post do not obscure or alter the murals such that murals are "barely recognizable."¹²⁶

The Court should also find that Mercedes did not truly transform the meaning or message in the published post.¹²⁷ In fact, Mercedes strategically chose the locations for the promotional photographs for its ad, and chose to photograph its vehicle in front of the murals to add to its theme of "urban exploration."¹²⁸ Thus, Mercedes relied upon the urban setting of the murals, capitalized on the success of the murals, and exploited the *Murals In the Market* festival to promote its new vehicle.¹²⁹

Moreover, the Court should find that Mercedes' use of the murals qualifies as commercial use. The point here "is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material

¹²⁴ See *Graham*, 265 F. Supp. 3d at 381 (holding that there was no transformative use where the infringing photograph simply reproduces the entirety of the original artwork with "some de *minimis* cropping").

¹²⁵ *Id.* at 380 (citing *Cariou*, 714 F.3d at 706).

¹²⁶ *Id.* (quoting *Cariou*, 714 F.3d at 710).

¹²⁷ *Campbell*, 510 U.S. 569, 579 (explaining that transformative use may "add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message"); see also *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 177 (2d Cir. 2018) (noting that "use of copyrighted material that 'merely repackages or republishes the original' is unlikely to be deemed a fair use" (quoting *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998)); *Calibrated Success, Inc. v. Charters*, 72 F. Supp. 3d 763, 771 (E.D. Mich. 2014) (holding defendant's work not transformative where defendant downloaded and sold copies of plaintiff's entire instructional car video and did not communicate a new message to the viewer).

¹²⁸ Complaint, *supra* note 17, at ¶ 28.

¹²⁹ Complaint, *supra* note 17, at ¶ 4 (Mercedes commissioned the series of photographs of the G 500 driving through the streets of Detroit with the caption: "This off-road legend is always ready for some urban exploration to mix things up").

without paying the customary price.”¹³⁰ In the case at bar, Mercedes’ sole motivation was to use the murals, depicted in the photographs of the published Instagram post, to advertise its new vehicles.¹³¹ The published post did not use the murals for educational purposes, nor did it add commentary.

2. *The Natural of the Murals Warrants Copyright Protection*

The court should find in favor of Defendant-artists on this factor. The purpose of protection under the Copyright Act is to protect science and the arts.¹³² The original works at issue here are murals painted onto the façade of several buildings in Detroit.¹³³ The murals are “creative” works of art that fit squarely within the core of intended copyright protection.¹³⁴ Therefore, the Court should find that the nature of the work merits strong protection from a fair use defense.

3. *The Amount of Mercedes’ Use of the Mural is Substantial*

Mercedes would have the Court believe that the murals depicted in the Instagram photos are merely featured as background of the “cityscape” which is secondary to the main focal point, the vehicle.¹³⁵ However, the Court should find that Mercedes’ argument under amount and substantiality fails.¹³⁶ This factor should weigh in favor of the artists because the photographs in the Instagram post¹³⁷ feature two-thirds of the murals;¹³⁸ and Mercedes retained the full aesthetic appeal of the murals to promote its theme of “urban exploration.”¹³⁹

¹³⁰ Princeton University Press v. Michigan Document Services, 99 F.3d 1381, 1400 (6th Cir. 1996) (quoting Harper & Row, Publrs. v. Nation Enterprises, 471 U.S. 539, 562 (1985)).

¹³¹ See Complaint, *supra* note 17, at ¶ 21; see Image 2, *supra* part I.

¹³² *Campbell*, 510 U.S. 569, 575 (1994) (recognizing that the purpose of copyright is to “to promote the Progress of Science and useful Arts” which includes “some opportunity for fair use of copyrighted materials”) (quoting U.S. CONST., art. I, § 8, cl. 8).

¹³³ *Mercedes*, No. 19-10948, 2019 U.S. Dist. LEXIS 154818, at *4-5 (E.D. Mich. Sep. 11, 2019).

¹³⁴ *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013) (holding that where there is no dispute that the series of portraits and landscape photographs were creative and published, and thus “this factor weighs against a fair use determination”).

¹³⁵ Complaint, *supra* note 17, at ¶ 26(e).

¹³⁶ *Campbell*, 510 U.S. 569, 586 (1994) (explaining that quantity and quality of the copyrighted material are “reasonable in relation to purpose of the copying”); see also *Ringgold v. Black Entertainment TV, Inc.*, 126 F.3d 70, 77 (2d Cir. 1997) (holding that defendant’s use was not *de minimis* copying where plaintiff’s poster was visible to the “average lay observer” in the background of a television program for 26.75 seconds); *Graham*, 265 F. Supp. 3d 366, 383 (S.D.N.Y. 2017) (clarifying that this factor necessarily relates to the degree of which the use was transformative).

¹³⁷ See Image 2, *supra* part I.

¹³⁸ *Cariou*, 714 F.3d 694, 710 (2d Cir. 2013) (holding that courts must “consider the proportion of the original work used, and not how much of the secondary work comprises the original”).

¹³⁹ See *id.* at 711 (evaluating whether the quantity and quality were reasonable where the infringing reproductions superimposed “cartoonish” images onto the original, but were “still similar in key aesthetic ways”); *Blanch*, 467 F.3d at 257 (holding that the amount of copying was reasonable in light of defendant’s creative decisions to use the airplane background and to “extract the legs, feet, and sandals” from the original); *Kelly*, 336 F.3d at 821 (holding that the factor of amount and

4. Mercedes' Use of the Murals Affects the Potential Market

Finally, the Court should find that Mercedes' use of the murals in the Instagram post affects the Defendant-artists' potential market. Mercedes claims it did not usurp the potential markets for the Defendant-artists because the murals were created for the *Murals in the Market* festival.¹⁴⁰ However, the Sixth Circuit has recognized that a copyright owner's current desire or ability to profit from the market is immaterial to the court's analysis for a potential effect on the market.¹⁴¹

Defendant-artists' potential markets include, and are not limited to, selling or licensing photographs of the murals for advertising, or selling photographs to other websites, such as a stock-photo database.¹⁴² The Court should recognize that in the prosperous age of digital advertising, once the original work has been reproduced online it can be difficult if not impossible to control; and to permit Mercedes' use of the murals incentivizes widespread piracy of an artist's original work.¹⁴³

B. Mercedes Did Not Violate DMCA

The Court should find here that Mercedes did not violate the DMCA. Mercedes admits that in the published post the photographs were blurred and one-third of the murals were cropped out of frame.¹⁴⁴ While the DMCA clearly prohibits intentional removal or alteration of CMI, the framing and cropping of a photograph presents a

substantiality weighs in favor of neither party when defendant copied the original image as a whole, though the amount was necessary to allow users to identify the original in the thumbnail).

¹⁴⁰ *Mercedes*, No. 19-10948, 2019 U.S. Dist. LEXIS 154818, at *5 (E.D. Mich. Sep. 11, 2019).

¹⁴¹ *Balsley*, 691 F.3d at 761 (holding defendant's use of copyrighted photograph had potential effect on market even when plaintiffs had no intention of accessing the market); *see also* *Ashley Furniture Industries v. American Signature, Inc.*, No. 2:11-cv-427, 2014 U.S. Dist. LEXIS 197503, at *35 (holding that plaintiff's market was solely to sell furniture, not photographs of furniture, therefore it had no potential market).

¹⁴² *Kelly*, 336 F.3d at 821 (explaining that artist "could sell or license his photographs to other web sites or to a stock photo data-base, which then could offer the images to its customers"); *see e.g.*, *What We Do*, CREATIVE COMMONS, <https://creativecommons.org/about/> (last visited Mar. 19, 2020)(providing licenses and public domain tools to users to "ensure proper attribution; and allow others to copy, distribute, and make use of those works").

¹⁴³ *See* *FameFlynet, Inc. v. Jasmine Enterprises*, 344 F. Supp. 3d 906, 913 (N.D. Ill. 2018) (noting that photojournalism company "loses the ability to control [a] photograph's exclusivity, and that the value of a photograph is usually diminished when a photo is leaked" and aggregate use creates a "major inroad on copyright"); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1182 (9th Cir. 2012) (holding that "[u]nrestricted and widespread reproduction of [the couple's] [wedding] would not only undermine the ability of celebrities to market images of themselves, but would also create incentives to pirate intellectual property").

¹⁴⁴ Complaint at ¶ 26(a)-(d), *Mercedes Benz, USA, LLC v. Lewis*, No. 19-10948, 2019 U.S. Dist. LEXIS 154818 (E.D. Mich. Sep. 11, 2019).

more novel and nuanced issue.¹⁴⁵ However, as it stands, failure to include or omit CMI does not constitute removal or alteration.¹⁴⁶

C. The Murals Are Not Exempt Under the AWCPA

Lastly, the Court should find that the murals are not exempt under the AWCPA. To determine whether artwork can be a part of a building's architecture, courts consider: (i) whether the artwork was conceptually integrated into the "underlying architecture;" (ii) whether the artwork is itself an "architectural feature;" (iii) whether the artwork is designed to appear as it were a part of the building; and (iv) whether the artworks serves a functional purpose related to the building.¹⁴⁷

Mercedes' argument is nearly identical to those raised in *Falkner v. General Motors LLC*.¹⁴⁸ The court held that the murals painted on the walls of the Detroit parking garage were not a part of the architecture because they were not a functional feature of the garage, nor were they integrated into the design of the garage.¹⁴⁹ In fact, the artists were granted "complete creative freedom with respect to the mural."¹⁵⁰ Not to mention, "the architecture of the parking garage and accompanying building were already complete before Plaintiff started painting."¹⁵¹

Turning to the case at bar, while it is true that the murals were created to "improve the visual appearance of the city and enhance the appeal of the Eastern Market to tourists,"¹⁵² there is no evidence to suggest that the murals hold a functional purpose related to the building itself.¹⁵³ Granting Mercedes relief under the AWCPA would set a dangerous precedent that would allow companies to exploit the commercial value of street art.¹⁵⁴

V. CONCLUSION

The controversy before the Court stems from an Instagram post published by Mercedes, depicting in whole or in part, Defendant-artists' murals.¹⁵⁵ After Defendant-

¹⁴⁵ See 17 U.S.C. § 1202(b)(3) (prohibiting an actor from distributing copyrighted works "knowing that copyright management information has been *removed or altered* without authority of the copyright owner or the law") (emphasis added).

¹⁴⁶ *Falkner v. GM, LLC*, 393 F. Supp. 3d 927, 938 (C.D. Cal. 2018) (holding that CMI was not sufficiently "removed or altered" when Defendant took the photograph from an angle that rendered the artist's signature not visible).

¹⁴⁷ *Id.* (citing *Leicester*, 232 F.3d at 1217)).

¹⁴⁸ *Id.* at 937.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Complaint, *supra* note 17, at ¶ 48.

¹⁵³ See *Leicester*, 232 F.3d at 1218 (holding in part that the streetwall towers at issue "serv[ed] the functional purpose of channeling traffic into the courtyard, as metal gates, which open and close for control, latch onto the lantern towers).

¹⁵⁴ Jahner, *supra* note 18 (quoting defendant-artists' attorney Jeff Gluck: "If companies could go outside and pick and choose artwork to sell their product without asking, it would discourage creating outdoor art, and we stand to lose an important and beautiful part of their culture").

¹⁵⁵ *Lewis*, 2019 U.S. Dist. LEXIS 154818, at *4-5.

artists threatened to file suit, Mercedes removed the photos from Instagram as a “courtesy.”¹⁵⁶ Now Mercedes seeks judgments declaring that their photographs of the G 500 truck in front of the buildings featuring the murals do not infringe the artists’ rights.¹⁵⁷ In its complaint, Mercedes asserts (1) non-infringement, (2) fair use, (3) exemption under the AWCPA, (4) and non-violation of the DMCA.¹⁵⁸

The Court should find that Mercedes’ use of Defendant-artists’ murals do not qualify as fair use. Mercedes’ use of the murals is not transformative and is undoubtedly commercial in nature.¹⁵⁹ Mercedes’ use is substantial and affects the artists’ potential market.¹⁶⁰ Next, the Court should find in favor of Mercedes for non-violation of the DMCA. Defendant-artists have not offered sufficient evidence to show that Mercedes intentionally removed or altered copyright management material.¹⁶¹

Lastly, the Court should hold that the murals are not a part of the architecture, thus the exemption under the AWCPA does not apply.¹⁶² Taken together, this decision primarily favors Defendant-artists in order to discourage future, widespread exploitation of artwork created by independent artists by large corporations. Judgment for the artists in this case will hopefully force companies like Mercedes to ask permission before reproducing an artist’s work to promote their brand.¹⁶³

¹⁵⁶ Complaint, *supra* note 17 at ¶ 6.

¹⁵⁷ *Lewis*, 2019 U.S. Dist. LEXIS 154818, at *2.

¹⁵⁸ Complaint, *supra* note 17, at ¶ 9.

¹⁵⁹ See *Graham*, 265 F. Supp. 3d 366, 381 (S.D.N.Y. 2017); see also *Ashley Furniture*, 2014 U.S. Dist. LEXIS 197503, at *27-28 (holding that use of photos of a competing product for comparative advertising was transformative); *Gordon v. Nextel Communs.*, No. 00-73201, 2001 U.S. Dist. LEXIS 25048, at *8 (E.D. Mich. Aug. 13, 2001) (holding that defendant’s television ad was commercial but plaintiff’s illustrations were not the focus of the ad, which was sending and receiving messages while using defendant’s service).

¹⁶⁰ See *Cariou*, 714 F.3d 694, 710 (2d Cir. 2013); *Audio Visual Productions v. Perini Building Co.*, 91 F. Supp. 2d 1075, 1086 (E.D. Mich. 2000) (holding that if “photographs intended for use in litigation could be freely copied without payment to or permission from the copyright holder, there soon would cease to be any viable marketplace for such works”); *Kelly*, 336 F.3d at 821 (explaining that artist’s potential market includes attracting “internet users to his web site, where he sells advertising space as well as books and travel packages . . . [and] sell[ing] or licens[ing] his photographs to other web sites or to a stock photo data-base, which then could offer the images to its customers”).

¹⁶¹ *Falkner v. GM, LLC*, 393 F. Supp. 3d 927, 938 (C.D. Cal. 2018) (holding no DMCA violation when Defendant took the photograph from an angle that rendered the artist’s signature not visible because CMI was not sufficiently “removed or altered”).

¹⁶² See *Id.*; *Leicester*, 232 F.3d at 1217-1218.

¹⁶³ Keith Estiler, Mercedes Benz Calls Detroit Artists "Desperate" In Ongoing Copyright Battle, Hypebeast (Sept. 6, 2019), <https://hypebeast.com/2019/9/mercedes-benz-calls-detroit-artists-desperate-copyright-battle> (quoting defendant-artists’ attorney Jeff Gluck: “The artists are desperate to defend their rights, protect their livelihoods, and prevent their artwork from being used by Mercedes against their will. These artists are a group of blue-collar hard-working people . . . [i]f courts were to adopt Mercedes’ argument, all outdoor works of art could lose protection”).