

UPDATE #1: Graffiti is Art, But Can Street Artists Sue to Protect It from Infringing Photographs?

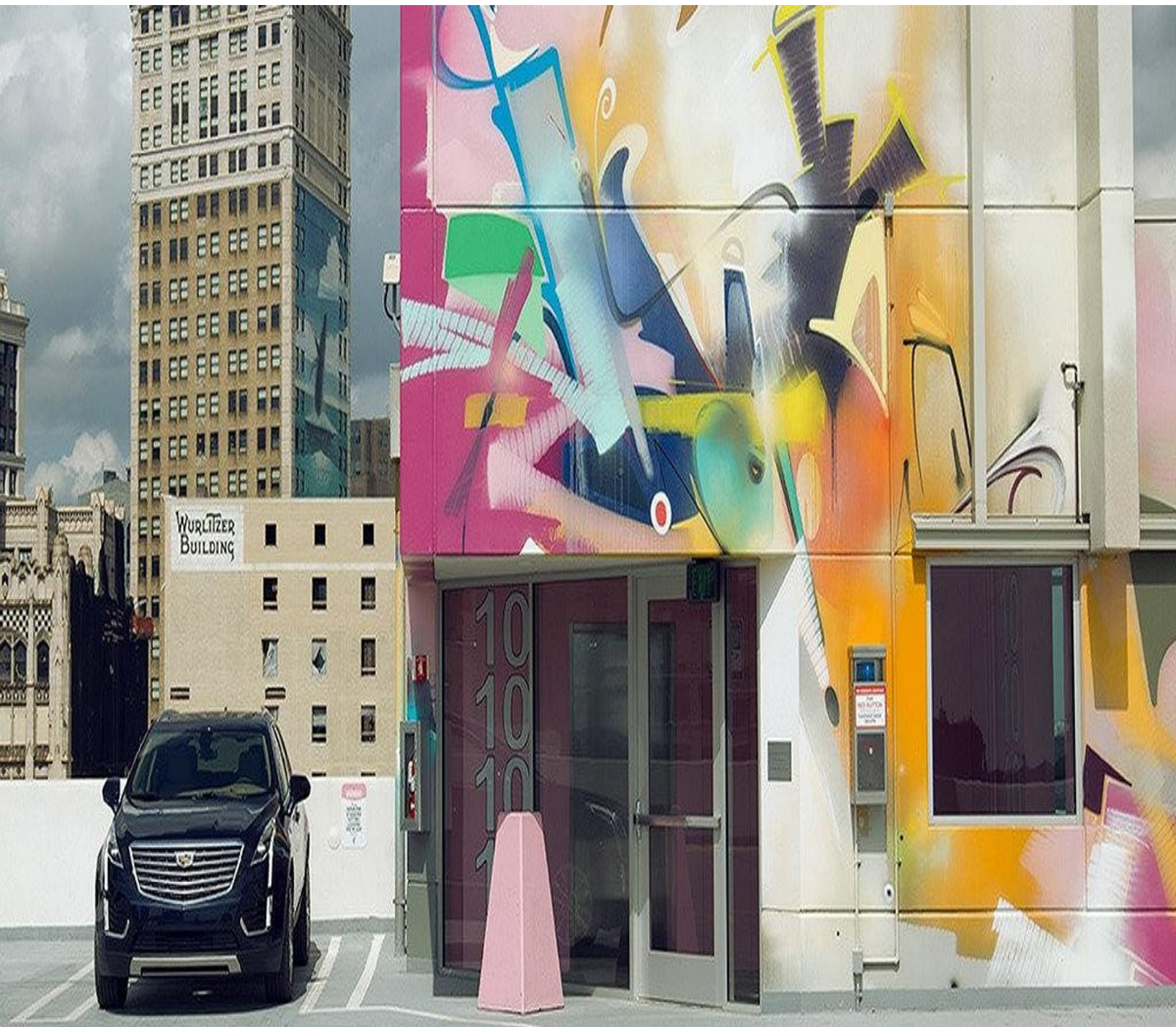
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by Stefan Szpajda

Last month we blogged about *Falkner v. General Motors Co.*—a federal court action filed earlier this year that may decide whether graffiti artists can enforce their copyrights in graffiti appearing on publicly-viewable buildings when photographed and distributed without their consent. As we detailed in our [post](#), this issue raises novel and complex legal questions. On August 27, 2018, Judge Wilson of the Central District of California heard oral arguments on GM's motion for summary judgment. As we wait for the court to rule, we bring you up to speed on the current state of play.

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The parties' summary judgment briefing highlighted a key ambiguity at the center of the dispute: neither the Architectural Works Copyright Protection Act ("AWCPA") nor the Ninth Circuit decision interpreting it clearly resolve whether pictorial, graphic, or sculptural ("PSG") elements can be freely photographed after they are incorporated into architectural works. Consistent with that ambiguity, the court's questions at oral argument were primarily directed to *Leicester v. Warner Bros.*—the Ninth Circuit opinion that both Falkner and GM cite for competing propositions regarding the status of PSG elements like the graffiti at issue. In fact, the court stated that "it's somewhat difficult to discern what the holding is from the case" before openly grappling with whether or not it

resulted in binding precedent. The court struggled with the same issue that emerged as unresolved in the parties' briefing: did the doctrine of conceptual separability survive the 1990 enactment of the AWCPA and, if so, is it relevant here?

GM's counsel attempted to resolve the issue by arguing that regardless of *Leicester's* holding, conceptual separability is irrelevant because the graffiti in question cannot be separated from the building. Instead, he focused on the AWCPA's intent, characterizing the statute's exemption allowing photographs of architectural works and any incorporated PSG elements as a "rule of practicability." He thus hinged GM's position on what amounts to a policy argument, insisting that "the person taking the picture shouldn't need a copyright expert standing next to them to decide whether they can do that." GM's counsel maintained that the AWCPA and *Leicester* require the court to grant GM's motion for summary judgment as a matter of law and policy, and implied that all photographs of buildings that depict PSG elements are exempt from copyright infringement suits because it would be impracticable to find otherwise.

But when the court pressed GM's counsel on the AWCPA's impact on pre-AWCPA copyright protections and *Leicester's* failure to clearly resolve whether conceptual separability survived the statute's enactment, GM's counsel softened his position. Instead of arguing that a bright-line rule exempts all photographs of architectural works without exception, he proposed a novel interpretation by arguing that conceptual separability survives "only to the point that if you can find a way to isolate the mural and take a picture of the mural, then Mr. Falkner can get his copyright, and he can be protected against people just selling copies of the mural by themselves." The court appeared skeptical of this interpretation, noting its absence from the Ninth Circuit's analysis in *Leicester*: "I mean, why didn't they just say what you said and call it a day?" Undeterred, GM's counsel argued that "two of them did," adding that "it's not our position that conceptual separability is dead" if graffiti can "literally" be separated from the architectural work. GM's counsel did not offer a framework for putting this proposal into practice, and his efforts to ground it in *Leicester* only served to underscore that decision's ambiguity.

Further advancing the view that *Leicester* may be too ambiguous on the question of conceptual separability to act as binding precedent, Falkner's counsel agreed that *Leicester* may be binding on the court, only to argue that its holding is the opposite of the one identified by GM's counsel.

In short, neither the parties' arguments nor the court's questions suggest which way the court will rule on GM's pending motion for summary judgment. The only thing that is clear at this point is that *Leicester's* status as binding precedent on the question of conceptual separability is in doubt. And regardless of the outcome, the court's ruling in *Falkner v. General Motors Co.* may well give the Ninth Circuit a chance to clarify the scope of the AWCPA's photography exemption as it applies to separately copyrightable works embedded in architectural works.