

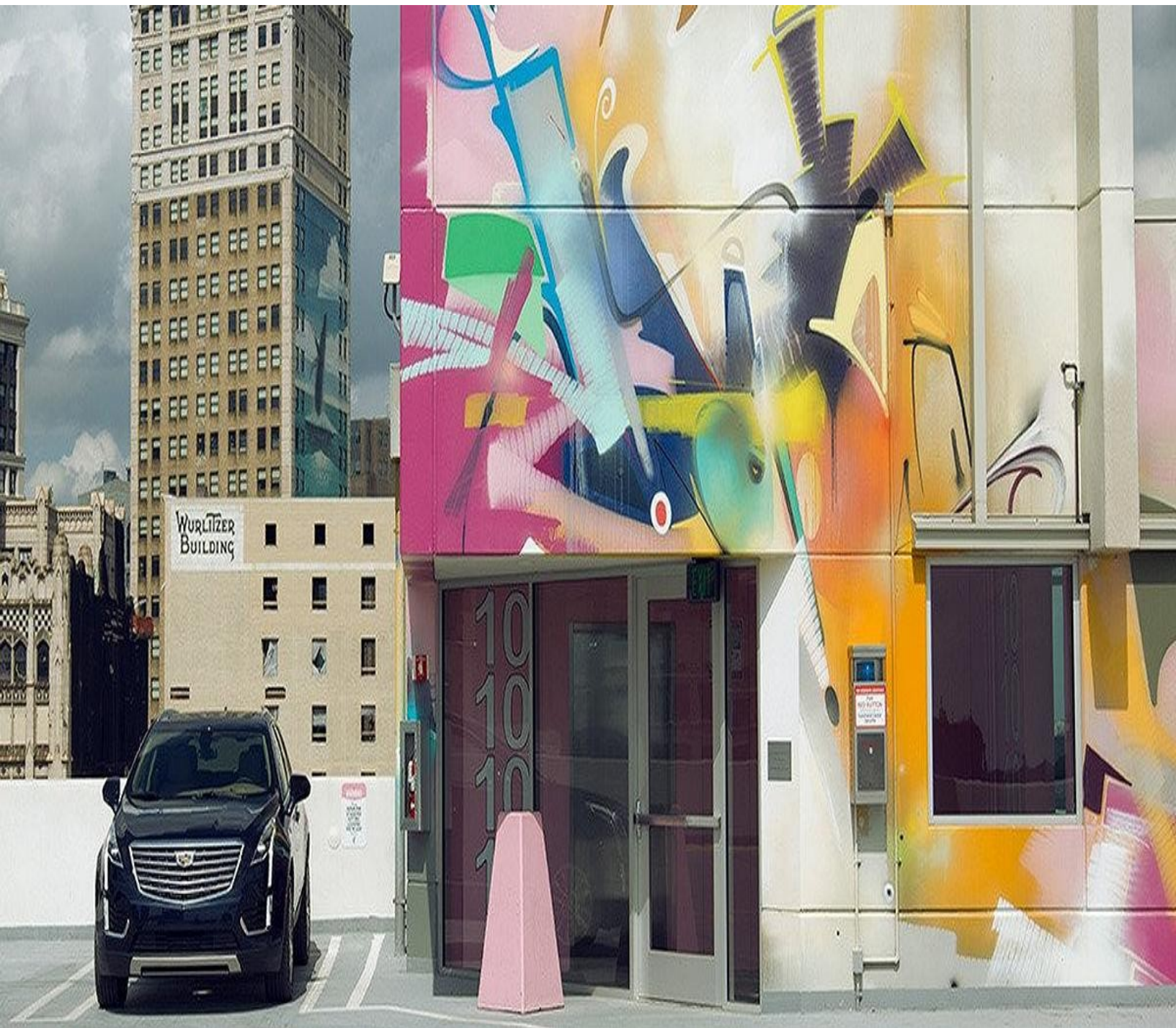
UPDATE #2: Graffiti is Art, But Can Street Artists Sue to Protect It from Infringing Photographs?

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On September 17, 2018, Judge Steven V. Wilson of the federal court of the Central District of California ruled on General Motors' motion for summary judgment in *Falkner v. GM*, a copyright action concerning graffiti artists' ability to protect their work from infringement by photographers. In short, although the court's decision makes it unlikely that we'll see quick resolution of graffiti artists' copyright infringement claims, it left open whether the Architectural Works Copyright Protection Act's ("AWCPA") pictorial

representation exemption can be invoked by defendants at trial.

For detailed background on this story, see our [original post](#) and [update #1](#).

Legal Issues

We previously reported that, based on the briefs submitted by the parties, whether or not the AWCPA's pictorial representation exemption bars Falkner's copyright claim against GM hinged on two questions: (1) whether the public parking garage is an architectural work, and (2) whether *Leicester v. Warner Brothers* held that the AWCPA's pictorial representation exemption applies to all pictorial, sculptural, or graphic ("PSG") elements of an architectural work, including those that are "conceptually separable" from the architectural work.

On the first question, the court easily found that the garage is an architectural work, and thus subject to the AWCPA. As expected, the second question proved far more complicated.

Analysis

The Court's Treatment of *Leicester v. Warner Brothers*

Both parties primarily relied on a single Ninth Circuit opinion—*Leicester v. Warner Brothers*—which proved difficult for both the parties and the court to parse. In fact, during oral argument the court stated that "it's somewhat difficult to discern what the holding is from the case," and struggled with the same issue that emerged as unresolved in the parties' briefing: did the doctrine of conceptual separability—discussed in detail in our original post—survive the 1990 enactment of the AWCPA and, if so, is it relevant here? The court's treatment of *Leicester*, however, meaningfully departed from the parties' briefing and its own questioning during oral argument.

Specifically, rather than resolve the ambiguities inherent in *Leicester*'s split decision on conceptual separability, the court instead read *Leicester* to have articulated a separate, implicit threshold requirement to the AWCPA's pictorial representation exemption's applicability—i.e., is the PSG element (e.g., the graffiti) "part of" the architectural work? The court reached this unexpected result by finding that "[a]ll three judges on the Ninth Circuit panel unambiguously agreed" that for the AWCPA's pictorial exemption to apply to a PSG element, the PSG element must be "part of" an architectural work." Further, per the court's reading of *Leicester*, unless it can be shown that—as a matter of law—the PSG element is "part of" the architectural work, the question of the exemption's applicability cannot be decided on summary judgment.

The court's reasoning here is striking for a few reasons.

First, neither party argued that whether Falkner's mural was "part of" the garage raised a distinct legal question under the AWCPA. GM appears to have assumed—without expressly stating—that to the extent it raised a legal question at all, whether the graffiti is

“part of” the garage is folded into the conceptual separability analysis. And although *Falkner* argued that the mural was not an “integral part of” the garage, he treated the question of whether a PSG element embedded in a work is “part of” that work as largely interchangeable with whether it is conceptually separable from said work.

Second, the *Leicester* panel did not expressly treat the “part of” analysis as distinct from conceptual separability, and the judges were not uniform in their treatment of the issue. Writing in dissent, Judge Fisher stated that a finding that the PSG element in question is “part of” an architectural work does not preclude a finding that it is conceptually separate. But as Judge Fisher noted, Judge Rymer’s majority opinion did not address whether a PSG element could be both “part of” and conceptually separate from an architectural work. Similarly, despite acknowledging in passing that the PSG element must be part of an architectural work for the exemption to apply, Judge Tashima directed his concurrence to the view that the AWCPA extinguished the doctrine of conceptual separability. Thus, although all three *Leicester* judges arguably *assumed* that for the exemption to apply the PSG work must be “part of” an architectural work, this was not the question before the court, and any agreement among them on the issue must be inferred.

“Part Of” Factors

Despite the Ninth Circuit’s lack of express focus on the issue, the *Falkner* court determined that *Leicester* implicitly articulated a set of factors that courts must evaluate to determine whether a PSG element is “part of” an architectural work before it can apply the AWCPA’s pictorial representation exemption.

Specifically, the court acknowledged that *Leicester* did not define a single, determinative test for what renders a PSG work “part of” an architectural work, but found that it described “factors.” The factors include whether the PSG work had a “concept that integrated it into the underlying work,” or whether the PSG work itself “could be considered an architectural feature.” Other factors include whether the PSG work is “designed to appear as part of the building” or when it serves a “functional purpose that is related to the building.” These factors are not clearly stated in *Leicester*, and are never even described as factors in that decision. The *Falkner* court’s decision to treat these factors as probative of whether or not a PSG element is “part of” an architectural work appears to be a novel interpretation of both the AWCPA and *Leicester*.

In its summary judgment ruling, the court found that the mural itself is not an architectural feature. The court also found that because the mural was not designed to appear as part of the building or serve a functional purpose related to the building, it could not on the record before it be found to be “part of” the building.

Policy Considerations: Does “Conceptual Separability” Raise Different Questions than the Court’s “Part Of” Analysis?

An important policy question raised by *Falkner v. GM* is whether Congress intended the AWCPA to allow photography of publicly viewable buildings irrespective of whether or

not those buildings contain PSG elements that might otherwise be independently protectable by copyright. As GM argued in its reply brief, “Joe Public should not be required to research the history of the building and hire architectural experts before he snaps a photograph.” GM made this argument in response to Falkner’s interpretation of the conceptual separability doctrine—i.e., GM argued that if *Leicester* is read to hold that PSG elements are not covered by the AWCPA’s pictorial representation exemption if they are conceptually separable from the underlying architectural work, then this will create uncertainty for photographers because they will risk costly litigation each time they take photographs outdoors. To avoid this result, GM argued for a bright-line rule: any and all photographs of publicly viewable buildings should be covered by the AWCPA’s pictorial representation exemption, regardless of whether or not the PSG elements are conceptually separable from the underlying architectural work.

Although the court did not reach the question of conceptual separability, the court’s holding arguably exacerbated the policy concern identified by GM. By ruling that a set of amorphous factors determines whether a PSG element is “part of” an architectural work—and treating this determination as a threshold question for whether or not the AWCPA’s pictorial representation exemption can apply—the court increased the likelihood that ambiguity and drawn-out litigation will result from Joe Public snapping photographs.

Is GM’s AWCPA Defense Still Viable?

Finally, the court’s decision is somewhat ambiguous on a key question: is GM’s AWCPA defense still viable in light of the court’s ruling?

Although the court noted that it “cannot conclude as a matter of law that the mural is part of the parking garage”—suggesting that whether the mural is part of the parking garage is a factual question that cannot yet be decided—it ultimately held that “Because the Court cannot conclude at this stage that Section 120(a) applies to the mural, **as the mural is not part of an architectural work as a matter of law**, it cannot reach the issue of whether Section 120(a) permits photographs of the mural” (emphasis added). It is thus not entirely clear (a) whether the court ruled that the pictorial representation exemption does not—as a matter of law—apply to the mural, and thus that Falkner’s copyright infringement can proceed to the merits without further invocation of the AWCPA’s pictorial representation exemption, or (b) whether the court merely observed that although it cannot find—as a matter of law—that the mural is part of the building, GM can nonetheless attempt to establish at trial that the mural is “part of” the garage. Despite the ambiguity, the overall context of the court’s decision suggests that the correct interpretation is (b), and that GM can still assert its AWCPA defense if it can show that the mural is “part of” the garage.

But this brings us to a second question: even assuming (b) is the correct interpretation, it is not clear what facts—if any—GM could cite to establish that the mural is “part of” the garage, as the court has construed the question. As described above, the court identified factors that can be relied on to show that a PSG element is “part of” an architectural work. The court then proceeded to find that “undisputed facts” render Falkner’s mural

“wholly unlike” the PSG elements in *Leicester*. In light of the court’s findings, it is not clear what—if anything—GM could do to show that the mural is “part of” the garage. Given the current record, GM’s AWCPA defense appears to have only a modest chance of success.

Conclusion

The court’s denial of GM’s motion for summary judgment as to Falkner’s copyright infringement claim gives graffiti artists reason to be optimistic that they have the continued right to control images of their work, even when those works appear on publicly viewable buildings. At the same time, by holding that whether or not the AWCPA’s pictorial representation exemption applies to graffiti is a factual matter, the court has made it more likely that disputes involving photographs of graffiti may be long, costly, and uncertain.