

Meeting of the Minds

Street Art: The Everlasting Divide Between Graffiti Art and Intellectual Property Protection

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Does intellectual property law protect unsanctioned graffiti art? With the rising appreciation for street art, this is a question of growing importance in today's art market. Graffiti is perhaps one of the fastest growing artistic movements. Street art embraces metropolitan walls and streets, gifting the public with innovative imagery that becomes a part of the city as much as the wall it rests on.

In its purest form, street art breaks boundaries and defies law. It is art typically made without consent and illegally created on either private or public property. While this form of artwork was once condemned as a social nuisance and even vandalism, graffiti work has become not only a respectable form of art in the past several years, but also a hot commodity among art collectors and connoisseurs. Communities are even beginning to embrace and value street art in their neighborhoods. Consequently, street art is often ripped from its creators, copied and reprinted on merchandise, and even exhibited and sold at auction and in galleries without the artist's consent. As graffiti art becomes the next big art market, the question arises: Do street artists have *intellectual property* protection for unsanctioned artwork, and should they be able to prevent the unauthorized copying, removal, sale, and destruction of their work?

A History of Graffiti Art

While many may associate graffiti art with spray paint on a city wall, "graffiti" in some form has arguably existed for thousands of years, appearing as early as prehistoric cave paintings in the French Lascaux Caves dating back to 18,000 BC.¹ Egyptians plastered their ancient walls with hieroglyphs and artistic imagery, while the inhabitants of Pompeii left murals on city walls dating back as far as 2,000

years. Against this backdrop, it is curious that modern-day graffiti has been so hastily condemned as vandalism when history has viewed it as a form of artistic expression and a part of society's cultural capital.

During the past decade, graffiti art has continued to gain credibility within the artistic communities of the world. A genre of art once ignored, it now holds a prominent role in the modern art market. Many attribute the recent marketability of graffiti art to the famous British artist, Banksy, whose art often encompasses political and social commentary and has been consistently admired on buildings and city walls throughout the world. In fact, his works have been replicated in books and on t-shirts, mugs, and bags and have even been carved off their original surfaces for sale in American and British galleries and auction houses. Banksy is one street artist who without question has witnessed the minimal protection granted to unsanctioned street art in what Professors Kal Raustiala and Christopher Sprigman consider IP's "negative space"—industries involving substantial creativity that are unregulated or only partially regulated by de jure IP law.² In other words, it deals with the "territory where IP Law may regulate, but ... does not."³

A recent controversy involved Banksy's work, *Slave Labour*, in Wood Green, North London, which was etched on the side of a Poundland retail shop and mysteriously transported to a Miami, Florida, auction house. Street art admirers in London successfully protested and ceased the sale, condemning the auctioneer for unjustly stripping the art from its proper home. The piece was transported back to London, but eventually sold at another auction for an astounding \$1.1 million in June 2013.⁴ Of course, Banksy did not profit from this \$1.1 million sale, as the ownership of such unsanctioned "public" street art remains in question for the reasons discussed below.

The Great Divide: Illegal Street Art vs. IP Law

With the rise of public appreciation for graffiti artwork, several conflicts have emerged with respect to graffiti artists and their rights. Street art is consistently copied and reprinted on clothing, posters, and merchandise. It is used in other artistic works such as television, film, books, and music videos and is even excavated from its surface for exhibition and sale in auction houses and galleries. In some parts of the world, graffiti has even become a tourist attraction. Bristol, Bethlehem, and Taichung all offer guided street art tours.⁵ As street art becomes a valuable commodity in the modern art market, questions arise as to who owns unsanctioned graffiti art and whether artists should retain IP entitlements that can prevent the copying, removal, sale, and destruction of these works without the artist's consent.

To the dismay of many street artists, it is unclear whether current U.S. intellectual property law protects unsanctioned street art from unauthorized copying, removal, sale, or destruction of the work.⁶ Many street artists attempt to assert copyright or moral rights to safeguard their works, but scholars have consistently questioned the validity of copyrights obtained for these works and have carved out moral rights protection for street art that is created illegally.⁷ The reality is that illegal graffiti art is inherently at conflict with the law. While many graffiti artists have their own identifying tags or a particular style that is easily identifiable as theirs, street artists generally remain anonymous. In fact, Banksy has never allowed the public to see the man behind the spray can, consistently shadowing his face from film footage and photographs.

Why the obscurity? Because graffiti art encompasses a bit of danger. An integral aspect of the art is to mark highly visible public spaces with the artist's imagery. In most circumstances, it would prove nearly impossible to secure the property owner's permission beforehand. For instance, it is doubtful that the former U.S. Bank Tower in downtown Los Angeles would give an up-and-coming street artist free rein to spray paint its walls. The reality is that street artists must consistently mask their identities to avoid conflicts with the law, including trespass and vandalism. As illegality and anonymity are integral components of graffiti, the majority of street art fits into the category of unsanctioned art, consequently falling into the "negative space" of IP law.

Protecting Street Art from Copying

Under current copyright law in the United States, a work immediately receives protection if it is an "original work of authorship fixed in any tangible medium of expression."⁸ Along with this protection, an artist has a bundle of exclusive rights to reproduce the work, prepare derivative works, distribute copies, and display the work publicly. These rights were traditionally understood as belonging exclusively to the artist, but this view has evolved with respect to unsanctioned street art. Some argue that the illegality of unsanctioned graffiti art bars copyrightability, while others argue that copyright entitlements must instead be split between the artist and the owner of the property where the work was illegally created.

Although the copyright statute does not expressly state that illegality effects copyrightability, scholars have emphasized Section 103 of the Copyright Act—excluding copyright protection for derivative works made illegally—to justify the argument that illegal works are similarly not entitled to copyright protection.⁹ Likewise, courts and scholars have argued that illegal works are not copyrightable because they fail to "promote the progress of science and useful arts" as set forth in the U.S. Constitution.¹⁰ While this topic draws substantial debate, courts have been afforded few opportunities to address this issue and remain unclear with respect to the copyrightability of unsanctioned street art.

Villa v. Pearson Education was one of the first cases to cast doubt on any notion that unsanctioned street artists are entitled to the full scope of their exclusive rights. Although the case was decided in 2003, it created a presumption (still relevant today) that illegality may be used as a defense to copyright infringement, similar to the concept of unclean hands.¹¹ In that case, famous street artist Hiram Villa, otherwise known as UNONE, brought a copyright infringement suit among other claims against Brady Publishing for the unconsented reproduction and publication of his unsanctioned art in a book.¹² At the time he did not hold a valid copyright in his works, and the copyright action was dismissed based on the conclusion that the court lacked subject matter jurisdiction without proof of a valid copyright registration. The court further declined to exercise supplemental jurisdiction over his state law claims.¹³

Following this decision, Villa moved to vacate the judgment with respect to the state law claims, arguing that the parties were diverse and jurisdiction was present despite the lack of a federal copyright claim.¹⁴ The court granted the motion to vacate but denied Villa's request to amend the complaint, holding that to do so would be futile because the Copyright Act preempted the claim.¹⁵ Following this decision, Villa obtained a valid copyright registration from the U.S. Copyright Office and subsequently filed a new

complaint alleging copyright infringement.¹⁶ Brady then moved to dismiss the complaint, arguing that the court's previous rulings in the case barred Villa from asserting the copyright claim. Brady also argued, "the mural in question is not protected by copyright . . . because it is illegal graffiti. . . ."¹⁷

In response to Brady's motion to dismiss, the court held that the claim failed because claim preclusion is "not a proper basis for the motion to dismiss."¹⁸ Instead, "claim preclusion is an affirmative defense" having "no effect on the legal sufficiency of the allegations of the complaint."¹⁹ Additionally, the court emphasized that Brady's argument regarding the un-copyrightability of the work failed in the context of a motion to dismiss because it relied on a question of fact, specifically "a determination of the legality of the circumstances under which the mural was created," an issue that could not be resolved during that stage of the proceeding.²⁰ Accordingly, the court denied the motion.²¹ However, the court's language, acknowledging a need to assess illegality with respect to a work's copyrightability, led scholars to speculate that courts are willing to consider the artwork's illegality as a defense to copyright infringement or a factor affecting copyrightability generally. Unfortunately, the case settled out of court, leaving little guidance on this important issue.

More recently, famous Miami street artist AholSniffsGlue (a.k.a. David Anasagasti) filed suit against American Eagle Outfitters for "blatant, unlawful, and pervasive infringement," seeking infringement-related profits, an injunction to prohibit further use of the underlying work, and actual damages.²² Anasagasti is best known for his droopy eyeballs that keep watch over Wynwood at NW 27th Street in Miami.²³ For the past decade, his droopy eyes have gazed down I-95 traffic, embedding themselves into Miami's cultural identity. Rising to fame, Anasagasti has been featured in the Wynwood Art District, a world-renowned outdoor museum housing a collection of murals created by local and international artists.²⁴ Through the years, the works have attracted hundreds of filmmakers and photographers, all of whom understand the unspoken etiquette—you ask for permission and always credit the artist with a licensing fee if you use it.²⁵ American Eagle failed to do so.

In 2014, American Eagle sought a new, urban-themed image for its spring campaign.²⁶ Wanting to market the collection and set up production in the Wynwood Art District, the company shot photographs of models in front of two Anasagasti murals and instructed a model to pose in front of his *Ocean Grown* mural with a can of blue spray paint. Anasagasti alleges that doing so created a false impression that the model was the creator of the work.²⁷ Furthermore, the lawsuit alleges that the murals were utilized "at the heart of the efforts to promote [American Eagle] products and shape its brand's identity." In fact, the campaign was utilized both domestically and internationally, reaching as far as Colombia, Panama, and Japan.²⁸ During the opening of an American Eagle store in Medellín, Colombia, American Eagle also hired local street artists to recreate one of the artist's eyeball murals in an indoor mall, and the company put a large American Eagle logo across it.²⁹

Much like the artwork in *Villa*, Anasagasti's murals were entitled to copyright protection upon the point of fixation. However, in contrast to *Villa*, Anasagasti was commissioned to create his murals in the Wynwood Art District, meaning the works were created legally. As such, this case had the potential to force the court to confront the issue of whether legal street art is entitled to the same list of exclusive

rights and the same scope of protection as private artworks. It likewise could have compelled the court to distinguish between legal and illegal artworks with respect to their copyright entitlements. Unfortunately, the case settled shortly after it was filed, once again leaving no closure on this issue.³⁰

A similar issue arose in August 2014 when a group of California graffiti artists sued fashion mogul Roberto Cavalli and several retailers for copyright infringement due to unauthorized use of their San Francisco mural on clothing, bags, backpacks, and shoes.³¹ The artists also asserted Lanham Act violations, arguing false designation of origin, due to the Cavalli signature implemented on the artwork and for falsely connecting the artists to a commercial enterprise, which runs contrary to their ethos.³² Although unlikely to survive settlement discussions, we can only hope that this case will see through to litigation for the opportunity to better define the rights of graffiti artists.

Protecting Street Art from Removal and Sale

As previously mentioned, where a piece of graffiti art comports with the requirements for copyrightability, it is protectable under U.S. copyright law. However, if a street artist creates an unauthorized or illegal work on another person's property, the copyrightability of the work is put into question. With respect to both legal and illegal works, the property owner retains ownership of the tangible medium, meaning the physical structure on which the work appears.³³ As such, even in the context of legal, copyrightable works, a split of ownership in the otherwise "exclusive" rights associated with copyright arises: The artist retains the right to reproduce the work and prepare derivatives, whereas the property owner retains the right to display the work and sell the original piece. Thus, there is an inherent conflict between property law and copyright law, giving the property owner essential rights that would otherwise belong exclusively to the artist.

This splitting of rights can often lead to situations where the property owner, not the artist, engages in legal action concerning the underlying graffiti work. Consider the 2010 case involving a dispute over a Banksy mural in Detroit, Michigan. Bioresource Inc., claiming ownership of the Packard plant in Detroit, sued 555 Nonprofit Studio/Gallery over the removal of an 8-foot, 1,500-pound cinderblock containing a Banksy mural.³⁴ The company filed suit in Wayne County Circuit Court, asserting that the gallery stole a piece of work potentially exceeding \$100,000 in value.³⁵ The parties went to dispute resolution and finally reached a settlement in April 2012, resulting in the return of the work to the property owner.³⁶ Oddly enough, Banksy took no apparent part in this lawsuit.

Protecting Street Art from Destruction

Unfortunately, graffiti art not only falls into a gray area of copyright law, but also the moral rights granted to such artists. If graffiti is categorized as a work of visual art, it is possible to extend the protection granted under the Visual Artists Rights Act (VARA) to the artist.³⁷ VARA was enacted in 1990 to protect the moral rights of artists, otherwise understood as protecting the artist's personality and the work's spirit and integrity through preservation of the art.³⁸ Thus, it grants artists the right to attribution, the right of integrity, and the right to prevent destruction of their work.³⁹ Unlike copyright rights, an artist's moral rights survive whether or not he owns the copyright to the work.⁴⁰ Thus, in the context

of graffiti art, VARA requires the real property owner to make a good-faith attempt to notify the artist of his or her intent to destroy the work. If the artist fails to remove the work or pay for removal of the work within 90 days, the property owner may proceed to destroy the work.⁴¹

However, artists experience the same difficulties addressed above with respect to copyright entitlements if the artwork in question is illegal. In *English v. BFC & R East 11th Street LLC*, a group of six artists attempted to use VARA to prevent the unauthorized destruction of their unsanctioned murals in a community garden in New York City.⁴² The property owners intended to develop the garden into a building as part of the city's affordable housing program, requiring the removal and destruction of a portion of the work.⁴³ In 1997, the artists brought suit under VARA, seeking a permanent injunction to prevent the destruction of the murals.⁴⁴ The court reasoned that as a matter of public policy, it was inappropriate to allow artists to assert VARA for the purpose of preventing the development of a property.⁴⁵ Specifically, the court emphasized that "parties could effectively freeze development of vacant lots by placing artwork there without permission. [That] would defy rationality and cannot be what Congress intended in passing VARA."⁴⁶ Ultimately, the court held that VARA does not apply to works of art illegally placed on the property of others without the property owner's consent, if the works are permanently affixed to the structure.⁴⁷ Thus, the court affirmed the statutory distinction between removable and non-removable art.⁴⁸

In 2001, another court emphasized a similar distinction in *Pollara v. Symour*.⁴⁹ In this case, a public interest group, Gideon Coalition, commissioned Pollara to create a 10-foot-by-30-foot mural on a long scroll of paper affixed to a large metal frame.⁵⁰ Although Pollara believed that Gideon had obtained permission from Empire State Plaza to display the work, the mural was placed in the plaza without the property owner's consent and the appropriate permits.⁵¹ Plaza employees removed it from its frame and significantly damaged the work in the process.⁵² The artist subsequently filed suit against the plaza owners under VARA. Although the property owners filed a motion for summary judgment on the ground that the work was illegally placed in the public plaza, the court ultimately denied the motion, holding that there was "no basis in the VARA statute to find a general right to destroy works of art that are on property without the permission of the owner."⁵³

The court further emphasized that the question of whether the work was removable was a debatable issue. Pursuant to 17 U.S.C. § 113(d)(1)(A), if the art is "incorporated in or made a part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation or other modification of the work," the artwork is not removable and the property owner has the right to remove or destroy the unsanctioned work.⁵⁴ Thus, although murals are often considered removable pieces of work, and a number of street art pieces have been removed from their sources successfully without damage, it appears that at least this particular court would likely consider murals or paintings created directly on the surface of a building or structure to be non-removable and thus not subject to protection under VARA.

Is There a Need to Establish Rights for Street Artists?

As described throughout this article, street artists have very few options for protecting their works under U.S. intellectual property law. Artists of illegal or unsanctioned works face even more limiting exclusions and carve-outs, leaving their works with little to no protection under both the Copyright Act and VARA. In this respect, street art stands among industries such as fashion and stand-up comedy that embody and represent thriving creative industries but rest in intellectual property's "negative space."⁵⁵

Some commentators argue for expanding traditional IP protection to include unsanctioned street art. They emphasize that illegality should not preclude copyright protection or establish a defense to infringement. On the other hand, opponents argue that street art has thrived throughout the past decade irrespective of the "negative space" IP leaves for unsanctioned street art. Still, others argue for the legalization of graffiti art. In fact, cities that have legalized graffiti include Hosier Lane, Melbourne, Australia; Warsaw, Poland; Tesnov, Prague; and Paris, France.⁵⁶ France attempts to limit such legalization by distinguishing between true works of art and mere vandalism.⁵⁷ However, the issue still arises: If all "true" graffiti art is legal, could any single artist assert moral rights and prevent the development of a building or structure? This was the exact public policy concern emphasized by the court in *English*.

Perhaps there is a need to aim for a healthy balance. While artists of illegal works may not be entitled to prevent the copying, removal, sale, or destruction of the original work, they should be entitled to copyrightability and the full scope of their exclusive rights. For example, under current U.K. law, although artists experience the same difficulties as American artists with respect to asserting moral rights, they are entitled to the full scope of copyright entitlements, irrespective of the illegality of their work.⁵⁸ In other words, they can prevent the copying and reproduction of their illegal works, although the property owner still retains certain rights with respect to the original work such as displaying and selling the work.⁵⁹ As such, recognizing copyright protection for illegal graffiti does not necessarily need to conflict with the public policy of protecting the property owner's interest.

Additionally, under the U.K. Artist's Resale Right, graffiti may be subject to a royalty on the net purchase price of the work sold.⁶⁰ Although there are some restrictions on the applicability of the right, including exemptions on works valued under €10,000 and statutory caps of €12,500 on any resale exceeding €2 million, artists are afforded the opportunity to receive compensation upon the resale of their street art.⁶¹ Implementing rights for graffiti artists under the Artist's Resale Royalties Act could further acknowledge the rights of artists and compensate artists for the lack of copyright protection currently afforded to unsanctioned street art. However, difficulties do arise in this scenario. Most notably, graffiti artists would not be able to remain anonymous and may be hesitant to reveal their identities for fear of incarceration under criminal statutes, not to mention the possibility of subjecting themselves to civil claims from property owners.⁶²

While a revised copyright scheme seems desirable, does traditional intellectual property protection of street art truly fulfill intellectual property law's purpose of promoting creativity? Would it incentivize the creation of more street art? It seems unlikely. In fact, street art has flourished during the past 10 years despite public resistance and the little protection afforded to artists under current law. This alone demonstrates that the lack of stringent intellectual property entitlements does not destroy the preva-

lence of street art. Street artists should continue to attempt to exercise U.S. copyright entitlements and depend on VARA to protect their works from unauthorized copying, removal, sale, and destruction. It may even be beneficial for the U.S. to consider following the U.K. model for the copyrightability of illegal graffiti art and resale rights. However, it seems unlikely that the nature of street art will ever necessitate a robust dependence on traditional intellectual property entitlements. n

Endnotes

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