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BOOK REVIEW: “COPYRIGHT BEYOND LAW – REGULATING CREATIVITY IN THE GRAFFITI SUBCULTURE” (2016) HART PUBLISHING, by Marta Iljadica

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Copyright Beyond Law by Marta Iljadica provide readers with an in-depth analysis of how creative processes are managed and regulated within the graffiti subculture. It is based on empirical and ethnographic research the author recently carried out within the London graffiti scene; the work benefits from insider information obtained through semi-structured interviews conducted by the author with both writers and street artists.

Iljadica distinguishes between graffiti and street art. Graffiti consists of a technique of painting names and letters on various urban surfaces, such as tube and railway trains as well as walls (practitioners of graffiti are indeed named *writers* as they basically write stylish version of their names on various locations). As described in the introductory part of the book (pp. 9-21), the graffiti movement first developed in Philadelphia and New York City in the early 70s, and then spread to other cities and countries, including Britain. On the other hand, street art consists of more elaborated forms of urban creativity, which have evolved from the early graffiti movement and focus on images rather than letters.¹

By building upon previous academic works and analysing legal provisions and case law on various areas of copyright law, Iljadica wonders whether graffiti writing could be protected by copyright under UK law and more in general whether the copyright system is fit to regulate it. While the author stresses that most graffiti (which include tags,² throw-ups³ and pieces⁴) would be in principle eligible for protection,⁵ even where it is illegally placed (i.e. without the authorization of the property owner),⁶ she

¹ Yet, forms of street art also mushroomed independently from graffiti writing, especially in New York in the late-70's through early 80's. As often reminded by Iljadica in several parts of the book, the line which distinguishes graffiti and street art has become quite blurry as nowadays graffiti writers often also paint works which are usually attributed to street artists, and viceversa.

² Tags are painted or drawn on walls and other urban surfaces, and are usually executed in condensed calligraphic form. They frequently represent the taggers' chosen name and sometimes that of the crew with whom they paint, and epitomise a strong desire to be recognised and appreciated within the community.

³ The term “throw-up” in graffiti language usually refers to a one color outline and one layer of fill-color, often painted in bubble style letters.

⁴ Pieces are larger and more complex paintings, which also frequently incorporate several colours and various effects including 3-D. They are often created by experienced writers.

⁵ Iljadica notes that most graffiti should be considered as works in which copyright subsists. I agree with her analysis, even where she claims that tags, disliked by many people outside the scene, should also be deemed copyrightable. Many taggers indeed develop and perfect over the years their own lettering style: a style which derives from countless hours of perfecting the image, even if the final image may appear less than perfect. I truly believe that even tags which to an untrained eye happen to seem as banal, meaningless and always similar may be considered sufficiently original instead, and therefore copyrightable (see also Iljadica's book, p. 236).

⁶ Illegality is another delicate issue. Iljadica basically believes that even illegal graffiti should be deemed copyrightable (pp. 106-107). I agree on that for reasons highlighted in E. Bonadio “Copyright

casts doubts about whether copyright law is fully capable of incentivising and regulating the production of this subcultural creativity.

The book is divided in four different parts, which Iljadica interestingly has named “panels”, referring to the train carriages often used by writers as their canvases. The first panel introduces the reader into the graffiti subculture, its history and structural elements. It highlights relevant aspects of the movement, such as the importance for writers to get and consolidate style and acquire notoriety.

In the second, third and fourth panels the author identifies and comments on the social norms which regulate the creative processes within the graffiti community, rules which – as Iljadica notes - crystallise the practice of early graffiti writers in New York (p. 10).

The first rule is the one mandating writers to paint letters, and to do so on appropriate surfaces (p. 109). Indeed, graffiti has historically been an art movement that revolves around letter formation and calligraphy. The second rule analysed in the book regards placement. Graffiti must be placed in highly visible places such as trains, tracksides and rooftops (the more difficult to reach the spot is, higher will be the writer’s place in the community’s hierarchy), but never on personal property such as private houses and cars or places of worship (Chapter 5).

Thirdly, and perhaps more importantly, graffiti writing should be original (Chapter 7), which means that writers should add something to the existing styles (the author reminds us of the London writers’ “rough style” as well as the Paris’ writers “pretty style”, p. 19). Indeed, over the decades many original ways of drawing letters have been created and consolidated, starting from the famous *wild style*, a complicated and intricate form of lettering developed in New York through the 70’s and 80’s, and duly mentioned in Iljadica’s book. And new lettering styles that seek to re-interpret, reconstruct and deconstruct the alphabet are still regularly created nowadays within graffiti communities. A corollary to the “be original” rule is the “don’t copy” norm. As explained in the book (Chapter 7), writers are expected not to copy from each other. Copying - or *biting*, as the phenomenon is known in graffiti jargon, is perceived negatively in the subculture as it lowers the esteem writers have within the scene.

Finally, Iljadica examines the “don’t go over” rule, which requires writers not to destroy or damage the work of other writers (Chapter 9).

The author examines such norms in parallel with analogous UK copyright rules. Some norms of the subculture are indeed similar to the corresponding copyright provisions. Take the originality rule and the norm against *biting* which echo the legal provisions on subsistence of copyright and infringement, respectively; or the “don’t go over” rule that reminds the moral right of integrity in copyright law (p. 287), which, as is known, allows authors and artists to oppose treatments of their works that are prejudicial to their reputation or honour. Iljadica also interestingly comments on an exception to the “don’t bite” rule, i.e. the accepted practice of copying other writers’ works in their sketchbooks for training and learning purposes. The author compares such subcultural

practice to Section 28(b) of the Copyright Designs and Patents Act which exempts from copyright infringement the making of copies for personal use (p. 205).

Iljadica does not only draw analogies between the subculture's social norms and the copyright system. She also highlights important differences. For instance, the "don't go over" rule – which as mentioned requires writers not to cross out others' works - appears to be more protective to writers (in terms of discouraging such destructive practices) than the corresponding provision in copyright law. Indeed, the moral right of integrity may not be really useful to graffiti writers in this regard. The main obstacle – as stressed by the author (p. 229) - is the "objective" way the prejudice to the artist's reputation or honour has been interpreted by British judges. This basically means that it is not sufficient the artists feel their reputation or honour are harmed by the treatment of the work; and that treatments that are capable to affect them are only those that have an impact on the public instead. In other words, it is the viewpoint of the general public and the way the treatment is perceived by the public which matters, not the opinion of the artist whose work has been treated.⁷ It follows that, as graffiti is often negatively perceived by many sectors of society (which often label it as "visual pollution"), showing that a certain treatment such as the destruction of the work prejudices an artist's reputation or honour is quite difficult, even more so when the work has been illegally placed.

Iljadica moreover notes that unlike copyright law, which does not take into account aesthetic quality for copyright subsistence purposes, graffiti creativity is often judged within the community in terms of its aesthetic quality and merit, whether in terms of technique or "can control", i.e. the ability to use spraycans to produce clean lines without dripping (p. 238). This entails – the author argues – that destruction of a writer's work by another practitioner is acceptable in certain circumstances such as where one places a bigger and more stylish work over it: for example, a piece can go over a throw-up; and a throw-up can go over tag (p. 287).

In light of the above differences, Iljadica argues that the social norms observed within the graffiti scene are *beyond* copyright (p. 287) and are capable of providing writers with a protection stronger than the one offered by the copyright system. The author thus looks at the graffiti subculture, and its social normative substratum, as a model to be followed and borrowed from. In particular, in chapter 10 Iljadica considers to what extent the graffiti subculture's approach may contribute to the potential reform of copyright law. Copyright – the author stresses - should mirror some of the graffiti social norms, which would not just be sensible, but necessary for the development of an attractive and diverse culture (p. 208). For this purpose, the author proposes to insert into copyright law the following modifications: (i) the introduction of a public placement exception, which would mean that any publicly placed work such as graffiti can freely be used for non-commercial purposes; (ii) the adoption of a US-style fair use exception, which for example would allow the sharing of graffiti pictures by non-writers on social media such as Facebook, Instagram or Flickr (a phenomenon which is widely widespread within the scene); (iii) strengthening writers' moral rights, especially the integrity right.

⁷ This is what was held in *Confetti Records Ltd* [2003] EWHC 1274 (Ch) where the judge put emphasis on the public association of the author with the treatment complained of; and in *Tidy v Trustees of the Natural History Museum* (1995) 39 I.P.R. 501, where it was stressed that the evidence of the prejudice to reputation or honour must come from an objective test by cross-examination of witnesses.

The first and second proposals are particularly interesting, and draw upon a specific feature of the graffiti subculture, that Iljadica analyses in the book, i.e. the existence of a graffiti-specific “bounded commons” within the broader intellectual commons as it is understood in copyright literature (pp. 49-55): in other words, an intellectual space which contains its own internal “graffiti public domain” where certain creative elements are free for all writers to borrow from and use. Such a pool of free-to-use elements includes arrows, crowns and other decorative elements, such as the famous halo (a ring of light that surrounds a person’s head), pioneered by New York graffiti legend Stay High, who used it in the 70’s in his re-interpretation of *The Saint* figure.⁸

Iljadica thus argues that the graffiti subculture is very much about sharing and appropriating images and styles from fellow writers. As writers interviewed by Iljadica confirm, “authors create while they borrow” (p. 191) and “for graffiti writers, the ability to copy and learn from each other is central to the creative process, especially when they are starting out” (p. 206). And this is a feature which characterizes street art more broadly: the most famous street artist in the world, Banksy, has also heavily borrowed from previous (street and fine) artists, and has expressly admitted it.⁹

It is by focusing on such “sharing” and “appropriation” nature of graffiti (amongst other issues) that Iljadica pushes the argument that the copyright system as it now stands, particularly in UK, is to some extent ill-suited to regulate graffiti. In other words, the fact that writers do not pursue, but tolerate instead, what appear to be clear copyright infringement cases would make this subcultural creativity incompatible with the copyright system.¹⁰

This line of argument, however, is not totally convincing. Other artistic movements have been based on borrowing images and other elements from other artists (as well as from popular culture). For example, pop art has challenged the traditional concept of fine art by incorporating elements from the news and advertising world, where material is often taken from its initial context and transposed into a completely opposite artistic location. And what about the “appropriation art” movement, which is exactly based on the use and arrangement of pre-existing objects or images? Although cases of copyright infringement may be brought (and possibly won) by artists whose works have been borrowed or appropriated, it could be argued that the copyright system is still fit to regulate creativity within those artistic movements.

It thus seems that the “sharing” and “appropriation” nature of graffiti cannot be relied to claim that the latter is incompatible with copyright. What writers do when tolerating the taking of elements from their works by fellow graffiti practitioners is basically a waiver of their rights. They simply choose not to enforce the exclusive rights the law has offered them. This happens frequently in fields other than street or fine art. For instance, creators of characters rarely take legal action against fans (individuals or organisations) that make derivative works and distribute them (so-called fan fiction). Likewise, music labels and software houses frequently tolerate on-

⁸ *The Saint* figure in turn had been borrowed from the famous mystery spy thriller television series, as also reminded by the author in the book.

⁹ See Bonadio, cited above fn. 6.

¹⁰ Hence, the need to modify some copyright law provisions, as mentioned above.

line piracy of their products; they even sometimes exploit data from piracy activities with a view to planning investment strategies and thus increasing market shares, for example by organising events (eg, musicians' live concerts) and related marketing activities in countries particularly hit by on-line infringements.¹¹

The same is true of the common practice of sharing and disseminating digital pictures of graffiti in social networks, duly highlighted in Iljadica's book (p. 169). Such practice is accepted, and even encouraged by writers. Again, this feature of graffiti cannot be emphasised to argue that copyright is unfit to regulate this artistic movement. Other creators also tolerate and cheer the unauthorized reproduction and dissemination of their works, especially in Internet. Take for example young music bands that increasingly accept the uploading and sharing of their songs or performances in social media to maximise visibility; or academics that cheer the idea of their works circulating online to reach a wider audience. Graffiti writers exactly share the same feeling and aim: as one of Iljadica's interviewees says, "... if someone else is out there taking photos of your work 'cause they like it, you go 'wicked they like my work'" (p. 268). In all these cases it could be argued that writers, academics and musicians grant an implied licence to the people and organisations that reproduce and share their works.¹²

Skepticism towards the role of the copyright system in regulating graffiti creativity pervades several parts of the book. What emerges from the interviews conducted by Iljadica (and from previous ethnographic researches) is that the possibility of relying on exclusive rights is irrelevant to the motivations of many graffiti writers: copyright and more in general financial motivations are not the trigger which pushes many practitioners within this subculture to create works (pp. 58-59, 291). The author also - and inevitably - refers to the well-known literature on the IP negative space theory,¹³ which argues that certain creative activities - such as fashion, stand-up comedies, magic tricks, tattooing, food making - flourish in the absence of copyright protection (pp. 58-61). This theory, as applied to graffiti,¹⁴ pushes the argument that the social norms of the graffiti community are sufficient to regulate the subculture, copyright being totally irrelevant. As Iljadica notes, "graffiti writers, through their own system of rules and sanctions create their own commons in order to fill the gap left by their forbearance of copyright protection but also to protect the normatively richer conception of graffiti creativity and culture" (p. 250).

That several graffiti writers, especially those at the beginning of their career and who create works illegally, are not pushed by the possibility of claiming copyright is quite understandable:¹⁵ they are instead mainly driven by passion and the desire to leave a

¹¹ See "Look for the silver lining", an article in *The Economist* of 17th July 2016, available at <http://www.economist.com/node/11750492?zid=317&ah=8a47fc455a44945580198768fad0fa41> (last accessed on 12th December 2016).

¹² Iljadica does not believe a licence is here given by writers. Rather, she argues that "the *space* of the creativity determines that the public may reproduce and share the work virtually" (p. 270).

¹³ See E. Rosenblatt, "A Theory of IP's Negative Space" (2011) 34(3) *Columbia Journal of Law and the Arts*, pp. 317-365; K. Raustiala - C. Sprigman, "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design" (2006) 92(8) *Virginia Law Review*, pp. 1687-1778.

¹⁴ For example, as far as street art is concerned, see Smith, "Street Art: An Analysis Under U.S. Intellectual Property Law and Intellectual Property's 'Negative Space' Theory" (2013) 24 *DePaul J. Art & Intell. Prop.*, pp. 259-293.

¹⁵ I have recently had conversations with several graffiti writers confirming that.

mark in the city. But this is not limited to subcultural creativity. In many other fields copyright does not constitute a trigger. For example, many young fine artists as well as musicians are not really bothered about copyright when producing paintings or composing songs, being driven more by desire than calculation.¹⁶ This should make us reflect on whether copyright systems should instead be justified by relying on approaches different from motivation-related and utilitarian theories:¹⁷ as has been noted, a natural right approach for justifying copyright protection of graffiti writing seems more appropriate.¹⁸

In any case, it should be noted that nowadays graffiti writers increasingly place legally works in the urban environment, and often get paid to do that. Ethnographic research has demonstrated that since the 90's a portion of graffiti practitioners have not only operated within the boundaries of the law, but have looked for integration within the society at large.¹⁹ Many writers exhibit and sell canvases and prints in galleries and privately and thus accept to operate in the professional art market, as also reminded by Iljadica (p. 12) and stressed by one writer mentioned in her book: "Ok, he's made his money. I don't blame him, I'd do the same" (p. 252).

It thus seems that also economic motivations already permeate sectors of the graffiti community. Copyright provisions – which accommodate creators' economic needs – could then start fitting into the subculture and complementing the social norms that undoubtedly keep on regulating certain aspects of these communities. Yes, I said "complementing". I see the two systems – copyright and social norms (such as the "don't bite" and "don't go over" rules) as complementary to the legal provisions of copyright law, rather than mutually exclusive. Obviously, when a writer copies a tag from another, the one that has been copied does not take legal action. Likewise, when Banksy first went over and partially destroyed Robbo's piece on the Regent's canal in London (the famous row has been narrated in Iljadica's book, pp. 251-252), the latter evidently was not interested in a legal action against the former for a violation of the moral right of integrity.²⁰ In these case – I believe – writers (or street artists) waive the legal rights offered by copyright laws. It is then up to them to decide to resort to social norms to regulate disputes.²¹ In other terms, certain aspects of graffiti creativity, in particular those which have commercial overtones – can be regulated by copyright, the others being instead governed by what can be defined as "street justice".

¹⁶ R. Tushnet, "Economies of Desire: Fair Use and Marketplace Assumptions" (2009) 51 Wm & Mary L. Rev. 513, p. 516.

¹⁷ Evidently, should the utilitarian approach lose ground, the IP negative theory would also lose momentum.

¹⁸ Grant, *Outlawed Art: Finding a Home for Graffiti in Copyright Law* (March 2, 2012), p.13, available at SSRN: <http://ssrn.com/abstract=2030514> (last accessed on 12th December 2016).

¹⁹ R. Kramer, "Painting with permission: Legal Graffiti in New York City" (2010) *Ethnography* 11(2) 235-253 (also noting that graffiti writers often leave business cards and, sometimes, portfolios of their work with property owners, at p. 243)

²⁰ D. Schwender, "Does Copyright Law Protect Graffiti and Street Art?", in Ross (ed.) *Routledge Handbook of Graffiti and Street Art* (Routledge, 2016), p. 460

²¹ Sanctions provided by the set of graffiti social norms include (i) painting over the piece which has glaringly imitated the artwork of the artist who complains; (ii) publicising the imitation within the street art scene through social media with a view to causing an aura of disapproval amongst the public and triggering shame-provoking feelings in the imitating writer; (iii) violence or threat of violence towards the latter. See also Iljadica's book at pp. 248-250.

* * *

All in all, Iljadica's book manages to brilliantly narrate how the graffiti creativity works and is regulated from inside. It does so by relying on first-hand opinions from writers. While highlighting that copyright may be able to regulate some aspects of the subculture's artistic life, the book argues that the dynamics of graffiti creativity to large extent are also "beyond law": borrowing Iljadica's own words, "much of creativity and many of the pleasures of creation and belonging exist beyond copyright. Copyright does not reach, and cannot speak to these pleasures".²²

Yet, as mentioned, the copyright system does not appear useless to many within the graffiti communities, not least because writing is increasingly seen by writers as a possible career path to pay the bills as well as to make profits:²³ and the possibility of relying on copyright as a way to extract value out of tags, throw-ups and pieces may be considered ancillary to those goals. Also, judging from a recent spike in legal actions taken by graffiti practitioners (and street artists) against corporations appropriating their art for commercial and advertising purposes, it seems many writers' attitude towards copyright is slowly changing. Possibly, future ethnographic research on graffiti creativity and copyright will help in understanding whether the latter can really play a major role in regulating this subculture.

²² See the book's introductory pages "A Note on Pictures".

²³ On graffiti as an opportunity for career opportunities, see G. Snyder, "Graffiti Lives – Beyond the Tag in New York's Urban Underground" (2009) New York University Press.