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Graffiti, street art and Copyright

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Abstract

This short note examines whether street and graffiti art can and should be protected by copyright. Indeed, cases where corporations have used these forms of art to promote their products are increasingly common, which shows that these artworks are particularly vulnerable to misappropriation. In addition to expanding on whether tags and throw-ups can be considered original enough to attract copyright, I will focus on whether unsanctioned street and graffiti art deserve such legal protection and in general on artists and writers' attitude towards copyright. The note also draws from semi-structured interviews I've recently conducted with several street artists and writers.

Keywords: graffiti, street art, copyright

1. Is it worth it?

The interviews I've done so far reveal that more and more street artists and writers are potentially interested in taking legal action against individuals or corporations that try to commercially exploit their works. Many artists and writers I have talked to have confirmed they may try to rely on copyright laws to react against whoever uses their art for economic advantage and recover damages wherever it's possible, especially if they had money and time to invest in a lawsuit.

But would it be convenient for street artists and writers to sue appropriators of their art when the pieces have been created illegally, namely without the authorisation of the owner of the surface upon which they are placed? One indeed may note that coming out for a legal action would put street artists and writers at risk as it would mean revealing their identity and being exposed to serious legal consequences, including jail. Yet, it would be much less risky if a copyright suit was brought after the piece has been created, especially after the statute of limitations expires: in these circumstances, artists or even their heirs could be determined to sue infringers who try to free-ride on their creativity. This is exactly what the partner of the deceased New York writer Dash Snow (who used to write SACE with the IRAK crew) did when the fast

food giant McDonald's reproduced Snow's lettering art on the walls of some of its restaurants.¹

On the other hand, what emerges from my interviews is that street artists and writers have no interest whatsoever in suing other artists that "bite" their pieces with no economic motivation. In these cases, if there is a reaction by the artist whose piece has been copied, it remains outside the courtrooms and lawyers' offices. It is a non-judicial, self-defense based form of complaint, that may take different shapes. It could consist of painting over the piece which has glaringly imitated the piece of the artist who complains; or publicising the imitation through social media platforms with a view to causing an aura of disapproval amongst the public and triggering shame-provoking feelings in the imitating artist or writer.

2. Tags and throw-ups

To be copyrightable, works must be original. While most street and graffiti artworks are without any doubt original,

¹ - *Jade Berreau v McDonald's Corporation*, complaint filed on 3 October 2016 at the US District Court Central District of California, Western Division. The legal action, however, was not successful on procedural grounds.

members of the public may note that tags and throw-ups lack sufficient level of originality, and in general are too trivial to attract copyright protection. Often considered to be mere scrawling that visually pollute our cities and require expensive cleaning by local councils, tags and throw-ups are also disliked by many because they are ubiquitous, sometimes associated with gangsterism, and (to the eyes of people outside the subculture) indecipherable. Such a belief is reinforced by the assumption that tags and throw-ups seem easy to paint, or are the product of mischievousness rather than artistic ability. It does not come as a big surprise that in the 80s the graffiti-style words *Skate Key* devised by Bronx legend Tracy 168 were denied registration by the US copyright office.²

But if originality is assessed by people inside the graffiti subculture, it is likely that many tags and throw-ups may eventually be considered original for copyright purposes. As is known, writers 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 to members of the general public less than perfect.³ Even tags and throw-ups that to an untrained eye and outside the graffiti scene happen to seem as banal, meaningless and always similar may be considered sufficiently original instead. And in copyright law originality should be assessed considering a specialized audience,⁴ namely the graffiti communities whose members are able to distinguish and appreciate differences and peculiarities, what people outside these circles and without knowledge of subcultural artistic processes cannot do.

Also, the support on which tags and throw-ups are inserted and viewed (for example, a shop shutter or a rubbish bin) may influence the assessment of their originality. Instinctively,

2 - As reminded by Judge Mukasey in *Tracy v. Skate Key, Inc.*, 697 F. Supp. 748 (S.D.N.Y. 1988).

3 - Mark Halsey & Alison Young, "Our Desires Are Ungovernable": Writing Graffiti in Urban Space, 10 *Theoretical Criminology* 275, 294 (2006).

4 - Marta Iljadica, *Copyright Beyond Law – Regulating Creativity in the Graffiti Subculture* (2016) Hart Publishing, p. 152.

and perhaps wrongly, one may be more inclined to recognize the same graffiti signature as being artistic if he or she sees it on a canvas or a print. Yet, such an assessment would be biased as it would be based on a prejudice, namely because only certain objects can be the support of artistic outputs. This is not correct also taking into consideration that the medium on which works are placed is not, and should not be, conclusive for the purposes of copyright subsistence.

The famous Banksy's tag – which has been painted by the British artist on many urban surfaces - could also be brought as an example. One may arguably claim it is very unique, and therefore eligible for copyright protection (even though Banksy would not probably assert it as he believes that "copyright is for losers").⁵ The upright back of the capital letter "B" is missing; the letter "k" needs the "n" for a support; the top of the letter "s" is slightly disappearing and the final "y" looks semi-dwarf.⁶ Tags are clearly far from simply written words they are also images.



Fig. 1 - Anthony Devlin/PA Archive

Invoking copyright to protect tags and throw-ups therefore does not seem so unthinkable. After all, when taking legal action against McDonald's, Dash Snow's partner tried to rely in copyright to stop the food chain giant to commercially exploit the artist's throw-up, and also registered it with the US Copyright Office.⁷

5 - Banksy, *Wall and Piece* (London: Century, The Random House Group, 1996).

6 - Will Ellsworth-Jones, *Banksy: The Man Behind the Wall* (New York: Aurum Press Ltd, 2013), p. 60.

7 - Registration No VAu001269764, filed on 17 September 2016.

3. Unsanctioned street and graffiti art and the “unclean hands” doctrine

As mentioned, creating artworks in the street without authorization from the property owner can expose artists to grave legal consequences. Although nowadays artists increasingly seek and obtain permission to place their pieces in urban environments, much street art and graffiti are still created illegally.

Whether illegally produced artworks can be considered copyrightable, or whether any existing copyright could be enforced in court, is not entirely clear. This is still a grey area of the (copyright) law in several jurisdictions, including US and UK. Having said that, in some cases related to street and graffiti art judges did not really bother to enquire whether the work had been produced without the property owner’s consent. In *Reece v Marc Ecko Unlimited*, for example, the court did not refer to any illegality-related issue when rejecting the copyright infringement case brought by Reece against the producer of a graffiti-inspired game which had incorporated some bits of his graffiti art. Another interesting case is *Mager v Brand New School*.⁸ Stylish eyeball stickers had been placed by an artist named Damien Mager of billboards of New York City. The stickers also appeared on a TV commercial for a few seconds, without the authorisation of the artist. Mager took action and asked for compensation, with the court accepting that the stickers could have been placed on the streets without authorisation. Although damages were not awarded as the copyright had been registered after the alleged infringement occurred, the judge did not focus on, nor was interested in, any illegality-related aspect of the artworks when deciding the case.⁹

It is also worthwhile mentioning the British case *Creative Foundation v Dreamland*,¹⁰ the first decision by a British

8 - *Mager v Brand New School*, 78 USPQ 2d 1389 (2004).

9 - See also Danwill D. Schwender, Does Copyright Law Protect Graffiti and Street Art?, in *Routledge Handbook of Graffiti and Street Art* 456 (Jeffrey Ian Ross ed., 2016).

10 - *Creative Foundation v Dreamland & Others* [2015] EWCH 2556 (Ch), 11 September 2015.

judge to expressly consider ownership of walls on which artworks are placed. The judge held that the mural “Art Buff” painted by Banksy in the English town of Folkestone and cut from the wall by a tenant was a chattel that belonged to the landlord. Yet, he also noted obiter that there is no doubt the copyright belongs to Banksy. The judge stressed this point despite recognizing that the artwork had been created without the prior knowledge nor the consent of the leaseholder and tenant (although Creative Foundation, that in the meantime had acquired the rights into the piece, later impliedly approved the work). It thus seems that the judge was not bothered with whether the work had been created legally or not.

The issue of copyright protection of illegally produced street artworks was also tangentially dealt with by a US court in *Villa v. Pearson Education*.¹¹ Hiram Villa, a Chicago-based artist known by its pseudonym Unone, took legal action against a publisher for publishing a picture of his mural in its strategy guide for a videogame without the artist’s permission. The defendant asked to dismiss the complaint, arguing that the work could not be protected by copyright because the piece had been placed illegally. The court denied the motion, yet it also noted that the claim that the work was not copyrightable due to its illicit origin would require investigating the circumstances under which the work was created (the case was then settled out of court). This obiter led some commentators to argue that judges may value an argument based on the artwork’s illegality as a defense to copyright infringement or anyway as a factor which affects its copyrightability.

This defense may be considered as a specific application of the so-called *unclean hands* doctrine, an equitable defense in which the defendant claims that the plaintiff should not obtain a remedy and profit when the latter has acted unethically or in bad faith, or has anyway carried out an illegal activity. This doctrine is quite popular amongst defendants accused to appropriate and profit from street artworks that have been created without the authorization of the property owner. It was recently raised by H&M against graffiti writer Revok after the lawyer for the latter issued a

11 - *Villa v Pearson Educ., Inc.*, 2003 WL 22922178 (N.D. Ill. Dec. 9, 2003).

cease-and-desist letter asking the Swedish fashion retailer to remove an advertising campaign for its latest sportswear line which used imagery and videos that incorporated one of Revok's artworks. The campaign featured a model on a handball court posing in front of the Revok piece. Revok maintained this was a case of copyright infringement, unfair competition and negligence – and that the association with the H&M brand was causing him reputational damage.¹² The case was later abandoned.

The same defense was also raised by the fashion company Moschino in *Joseph Tierney v. Moschino*, a copyright infringement case started by the graffiti artist Rime as he claimed that various elements of his Detroit mural *Vandal Eyes* had been copied on to a Moschino dress which was subsequently worn by the pop-star Katy Perry at a 2015 glamorous event.¹³

I'm not a fan of the 'unclean hands' doctrine. What makes this doctrine particularly unsuitable to govern cases of misappropriation of street and graffiti art is the lack of connection between the illegal act committed by the artist (e.g., painting an unauthorised mural on a wall) and the merit of these disputes, namely the reproduction, adaptation and (often) communication and making available to the public of the work by third parties, frequently for commercial purposes. In simpler words, the illegal behaviour of the street or graffiti artist does not have a negative impact on the individual or organisation which has misappropriated the illegally placed art (it instead negatively affects the owner of the property upon which the work is placed, who however is not party to the proceeding).

Another reason why copyright should be available for unsanctioned street and graffiti artworks lies in the fact that here the illegal aspects do not even concern the content of the work - they regard the processes of creation of the piece instead. Yet, the way (legal or illegal) art is created should

12 - Enrico Bonadio, Big brands ripping off street art is not cool: why illegal graffiti should be protected by copyright (16 March 2018) *The Conversation*.

13 - *Joseph Tierney v. Moschino S.p.A. et al*, Docket No. 2:15-cv-05900 (C.D. Cal. Aug 05, 2015), Court Docket. The case was later settled out of court.

not affect the analysis related to copyright subsistence and enforceability. The copyright system should be neutral towards,¹⁴ and blind about,¹⁵ the way eligible subject matter is produced. After all, this is what a German court found in a copyright-related case involving an artwork painted on the Berlin Wall: it is not in principle relevant that the way in which it [the artwork] was produced is evidently unlawful. In this case by virtue of an act of damage to property subject to civil and criminal sanctions.¹⁶ This argument sounds logic to me. If I steal a pen which I then use to draw a wonderful piece of art, why should I be denied the right to enforce the copyright and tolerate that someone else copies and takes economic advantage of my work? It is simply unfair to allow persons other than the artist to rely on the illegal nature of a street artwork to copy and exploit it for their own commercial purposes, for example by using it in advertising messages or as a decoration element of fashion products. Denying copyright to illegal street and graffiti art would have the effect of making the misappropriating of it legal, but not its very creation.¹⁷ This result would also be absurd as it would reward blatant imitations by individuals or corporations that have nothing to do with either the perpetrator of the illegal act (the artist) or the victim (the owner of the property).

14 - Celia Lerman, Protecting Artistic Vandalism: Graffiti and Copyright Law, 2 *NYU J. Intell. Prop. & Ent. L.* 295, 316 (2013).

15 - Owen Morgan, Graffiti—Who Owns the Rights?, *Univ. of Auckland Bus. Sch. Working Paper* 5, 16, 21 (2006).

16 - *Re Pictures on the Berlin Wall* (Case I ZR 68/93) [1997] *ECC* 553.

17 - Jamison Davies, Art Crimes?: Theoretical Perspectives on Copyright Protection for Illegally-Created Graffiti Art, 65 *Me. L. Rev.* 27, 51 (2013).

4 . Concluding remarks

The prospect of relying on copyright is never the motivation pushing artists to place works in the street, as has also been confirmed to me in almost all interviews I have conducted thus far. While copyright does not play any role in triggering the decision to create art in the public environment, many street and graffiti artists develop an interest in some forms of legal protection after creating their pieces, and even more strongly after someone commercially exploits them. The growing number of legal actions and objections by street and graffiti artists against corporations that appropriate their artworks reinforce this point.

It seems to me that making copyright protection and enforcement available for street artists and writers makes sense. What marketing and communication experts from these companies may think is: “these murals are placed on the streets, are also often illegal and therefore can be freely reproduced”. That is wrong. The fact that artworks are placed in the public environment for everybody to enjoy does not entail that they can be exploited by anyone without the artists’ consent. And the fact that a piece has been created illegally should not be relied on by third parties to exploit it without the artist’s authorisation. I hope judges will explicitly clarify soon this issue as it would be just and fair *vis-à-vis* artists who put efforts in creating artworks and at the same time send a warning signal to whoever may feel it’s acceptable to misappropriate them.

It has also been argued that as graffiti and street artists are often anti-establishment and driven by non-economic purposes (for example, wanting to leave a mark on the city; or to give a gift to the local community), they would not be interested in copyright protection. This argument is unconvincing. The (often) anti-establishment and anti-consumerist nature of these forms of art does not mean that street artists aren’t annoyed by others commercially exploiting their work. Actually, when their artworks are misused for commercial purposes, most of them are really unhappy. On the contrary, copyright could exactly be the tool to keep the message that artists want to convey an anti-establishment and anti-consumerist one, if they so wish. Indeed, copyright allows them to object to (and try to prevent) uses of their works that they do not approve. Copyright laws, by making available injunctions and other

effective remedies against unauthorized exploitations of the works (for example, in connection with fashion products or in advertising messages), could be the right instrument of reaction. After all, this is the legal tool Revok, Dash Snow, Rime as well as Reyes, Steel and (again) Revok¹⁸ have invoked to try to stop their art being associated with a kind of commercial world they didn’t want to be linked to.

Yet, copyright may also serve as a means of commercial exploitation should artists and writers decide to extract profits out of their activity and passion, for example by allowing galleries that represent them or other entities to show and sell screen prints derived from their street artworks (these products have been labelled “street art souvenirs” or “street art flavored” works),¹⁹ or licensing out their creations for merchandising purposes. Many have actually done and do so. Also, differently from selling out and making profits, several street and graffiti artists may decide to authorize charities organizations or other public bodies to use their works for social purposes, and keep control over the way their pieces are used. This is for example what London artist Stik does when authorizing the British National Health Service or other public interest focused entities to use his iconic figures in connection with awareness campaigns. It is the copyright regime which allows artists to do all the above.

The copyright system is therefore flexible enough to allow street artists and writers to pursue their own artistic, cultural and (why not?) commercial agenda, if they so wish.

As copyright is capable of regulating, and indeed already regulates, street and graffiti art, artists within these communities obviously need to accept all the rules of the game. That means they may lose the copyright infringement cases they bring against alleged infringers. This happened for example in 2011 in *Seltzer v Green Day, Inc.*,²⁰ where the

18 - *Jason Williams et al v. Roberto Cavalli, S.p.A. et al*, Docket No. 2:14-cv-06659 (C.D. Cal. Aug 25, 2014). The case was then settled out of court.

19 - Jim Carey’s interview with Banksy, “Creative Vandalism”, Squall Magazine (30 May 2002).

20 - *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1173-74 (9th Cir. 2013).

artist Seltzer took legal action against the pop band Green Day as the latter had incorporated in a video backdrop (used at live concerts) an adapted version of a Seltzer poster placed on a Los Angeles wall. The Californian federal district and Circuit judges rejected the artist's claims as the use of the artwork was found to be transformative and not overly commercial and therefore fair.

Street and graffiti artists may also be condemned for copyright infringement. This occurred for instance in *Morris v. Guetta*, where the judge ruled that seven of Guetta's works (including a mural), based on photographer Dennis Morris' iconic 1977 picture of Sid Vicious, deceased lead singer of punk band The Sex Pistols, was not protected by fair use as it was not transformative.²¹ A similar fate would have probably awaited Shepard Fairey, if he had not reached a settlement agreement with Associated Press, which he sued as it had accused him of copyright infringement. Fairey had argued that his use of imagery depicting Barack Obama (that resulted in the iconic poster Hope which came to represent the former US president presidential campaign) was fair use and did not constitute copyright infringement. an argument which would have been probably be rejected by the judge.

21 - *Dennis Morris v. Thierry Guetta, et al.* - No. LA CV12-00684. See also *Friedman v. Guetta*, No. CV 10-00014 DDP (C.D. Cal. May 27, 2011), a case started in 2011 by photographer Glen Friedman against Thierry Guetta. The Central District of California granted summary judgment for Friedman, finding that Guetta's work (in this case, not a street artwork, but a canvas) was substantially similar to Friedman's famous photograph of the rap group Run DMC, and that Guetta's use of the photograph could not be considered fair use.