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Can Artists Enforce Copyright while Remaining Anonymous? Some Reflections from a Street Art and Graffiti Perspective

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ABSTRACT

The article considers the issue of whether anonymous artists can enforce copyright in courts while keeping their real identity confidential. This question is addressed by looking specifically at the street art and graffiti scenarios. Anonymity (and pseudonymity) are indeed common in these artistic communities where pieces such as murals are often created illegally. After underlining the importance of anonymity for artists (as well as other categories of authors like journalists, novelists and musicians), the article briefly highlights the arguments against and in favour of giving anonymous authors copyright enforcement rights. The focus then shifts to the Berne Convention provisions on anonymous and pseudonymous works and the role of publishers and other entities when it comes to managing and enforcing the relevant rights. Then, in its second part, the article addresses the legal issue in question in selected jurisdictions.

Introduction

Can anonymous or pseudonymous artists enforce copyright in courts while keeping their true identity hidden?¹ The article considers this question in key jurisdictions, including the U.S., Canada, Australia, the United Kingdom and France—all countries with thriving art markets. The street art and graffiti contexts are relevant as anonymity and pseudonymity are common in these communities. Artists and graffiti writers frequently create their pieces in the public environment illegally, that is without the authorisation of the property owner, whether it a private individual or corporation (e.g., the owner of the wall on which a mural is painted) or a public entity (e.g. a council's billboard). The risk of criminal prosecution is one of the main reasons why practitioners of these forms of art choose anonymity or pseudonymity.

There are differences between anonymity or pseudonymity. The term 'anonymity' describes scenarios where the identity of the person in question is not known. A similar situation is where persons use identifiers which are not their real name; these are usually known as 'pseudonyms'. But pseudonymity is often a near-anonymous state, a sort of sub-set of anonymity, as they enable persons to hide their true identity. In other words, pseudonymity is frequently a form of anonymity which employs a name² and therefore an artist can claim ownership of a work while remaining anonymous. So, in this discussion the terms 'anonymity', 'anonymous artists' or 'anonymous works' are used to refer to both concepts, i.e. anonymity and pseudonymity. There are also scenarios where the pseudonym is used as an artist's brand while the true identity is known.³ It should also be remembered that in street art and graffiti communities, artists and writers often fail to include any identifying marks close to the piece (e.g. a mural), but most people nevertheless realise it is their work. This is because either the artwork's style is recognisable or the pseudonymous artists publishes photographs of the piece on their website or

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¹ Technically, it is the copyright owner who enforces copyright, which may or may not be the author. In this article, for the sake of consistency, we often refer to the anonymous artist or author as the one who enforces copyright.

² Robert J. Griffin, 'Anonymity and Authorship' (1999) 30 *Case Studies* 877 at 891.

³ Notable examples of this include the artist KAWS whose real name is publicly known, i.e. Brian Donnelly, see the Street Art Bio Website: <www.streetartbio.com/artists/kaws/>. For another, perhaps more famous, example, the author J.K. Rowling who also writes under the pseudonym Robert Galbraith: <<https://robertgalbraith.com/about/>>.

social media pages. This is true of acclaimed artists like the world-famous Banksy, London-based Stik, French mosaic artist Invader and many others.

Against this background, the article will underline the importance of anonymity for artists (as well as other categories of authors like journalists, novelists and musicians). This is followed by an exploration of the arguments against and in favour of allowing anonymous authors to enforce their copyright. The focus then shifts to the provisions of the Berne Convention for the Protection of Literary and Artistic Works concerning anonymous and pseudonymous works and the role of publishers and other entities when it comes to managing and enforcing the relevant rights. The discussion then looks at the approach in several jurisdictions.

It will be seen that various international and national instruments protect the copyright of anonymous authors. Yet, this *substantive* protection is not expressly accompanied by a *procedural* protection. Indeed, there is no clarity in copyright laws over whether this category of authors can enforce their exclusive rights in court without having to disclose their true identity. Yet, rules and principles of civil procedure may be relied on in specific circumstances to safeguard anonymity. There is also a dearth of specific case law on whether practitioners of these forms of art can enforce their copyright and at the same time keep their true identity confidential. That is why the analysis often (and inevitably) draws upon disputes which have involved other categories of anonymous authors or otherwise anonymous plaintiffs and defendants.

The importance of anonymity for authors and artists

Anonymous authors and artists have always existed. Homer, the famous Greek poet, who reportedly wrote the *Iliad* and the *Odyssey* was probably a constructed name. As M.L. West points out:

“Homer was not the name of a historical poet, but a fictitious or constructed name ... for a century or more after the composition of the *Iliad* and *Odyssey* there was little interest in the identity or the person of their author or authors. This interest only arose in the last decades of the sixth century; but once it did, 'Homer' very quickly became an object of admiration, criticism, and biographical construction”.⁴

This trend continued throughout the centuries. Artists from the Renaissance and Baroque⁵ periods and from the fifteenth and sixteenth centuries often remained anonymous.⁶ As noted by Robert J. Griffin:

“anonymity ... was at least as much a norm as signed authenticity. ... If more examples are needed, over half of what Shelley published during his lifetime appeared either anonymously or pseudonymously, under such rubrics as ‘By a Gentleman at Oxford,’ or ‘Edited by John Fitzvictor,’ or ‘By Philopatria, Jun. ... It was anonymity that guaranteed integrity because it freed writers from social and political pressure. ... The motivations for publishing anonymously have varied widely with circumstances, but they have included an aristocratic or a gendered reticence, religious self-effacement, anxiety over public exposure, fear of prosecution, hope of an unprejudiced reception. ... by not disallowing authorial anonymity ... society recognized that people had a right to speak their minds without fear of retaliation, or in circumstances that made retaliation difficult”.⁷

Another striking example of anonymity is to be found in *The Economist*, which since its first publication in 1843, have only published articles anonymously. As Ángel Arrese points out:

“anonymity ... has helped to shape a unique and valuable editorial and commercial identity ... Anonymous journalism was the norm in most European countries during the nineteenth century ... The Economist was born anonymous because that was the usual way to manage the

⁴ M.L. West, ‘The Invention of Homer’ (1999) 49 *The Classical Quarterly* 364 at 364.

⁵ See the research project launched by Ashmolean Museum (<www.ashmolean.org/the-anonymous-drawing-values-and-identities>): “[t]his research project is innovative in taking anonymity as an active value, as a site of presence rather than absence. ‘Anonymity’ has immense cross-disciplinary resonance in examining areas such as collaboration, palimpsests, authorship, strategies of reticence, and the creation or the suppression of identity”.

⁶ Anne-Sophie V. Radermecker, ‘What’s in anonymity?’, 26 April 2021 <www.nicholashall.art/journal/the-market-for-anonymous-old-master-paintings/>.

⁷ Robert J. Griffin, ‘Anonymity and Authorship’ (1999) 30 *Case Studies* 877 at 882, 890, 884, 885 and 891.

authorship of newspaper articles in 1843, but also because from the beginning the weekly argued that *what was said is more important than who said it*. ... Finally, because of the anonymous system, almost any personality from the political and business world could collaborate from time to time with the magazine without the need to identify themselves publicly with the ideas that they wanted to disseminate”.⁸

Protecting writers’ freedom of speech⁹ and ensuring that “egos do not get in the way of objectivity”¹⁰ are the main reasons why *The Economist* has always maintained anonymity. Thus, pushing for a sort of ‘objectification of authorship’. In other words, the message is more important than the messenger.¹¹

Specifically, these excerpts show that the decision of writers and novelists to hide their identity has also been justified on the grounds of protecting them from “public exposure” or “prosecution”.¹² There are therefore parallels between the harsh conditions under which those authors had to live (and produce books and novels) and the street artists and graffiti writers of our generation. New York street artist Adam Lucas explains, “there are obvious legal reasons. The majority of their [artists’] work is done without permission and most larger cities have specialized units whose sole purpose is to track these artists down”.¹³ Several other artists expressed the same view during ethnographic research on the legal aspects of creative processes in these artistic subcultures.¹⁴

There are also more personal reasons to justify anonymity. Another New York artist, Jerkface, said that he has “always preferred to operate in the shadows”,¹⁵ and that “privacy is important to me. I enjoy my success without the personal attention”.¹⁶ This anonymity allows:

“viewers the complete freedom to interpret his artwork any way they wish. With no biography or known author to set limits on the viewers’ imagination, his artwork becomes instantly personable, evoking a sense of nostalgia and sentimentality, becoming embraced by all”.¹⁷

Drawing on these experiences, anonymity seems to give art, especially when it is created and placed in the street, a sense of purity which would not be reached where authors reveal themselves.¹⁸

⁸ Ángel Arrese, ‘It’s Anonymous. It’s *The Economist*’ (2021) 15 *Journalistic and Business Value of Anonymity* 471 at 473, 476, 477 and 479 (emphasis added). See also Ángel Arrese, ‘The evolution of anonymity in *The Economist*’ (2022) 28 *Media History* 111.

⁹ On the ability of anonymity to guarantee freedom in general, see Götz Bachmann, Michi Knecht and Andreas Wittel, ‘The Social Productivity of Anonymity’ (2017) 17 *Ephemera – Theory & Politics in Organization* 242 at 244, (noting, while also referring to the famous online *Anonymous* collective, that anonymity “can also enable particular forms of equality or certain forms of speaking out and speaking up”).

¹⁰ Ángel Arrese, ‘It’s Anonymous. It’s *The Economist*’ (2021) 15 *Journalistic and Business Value of Anonymity* 471 at 479 (reminding *The Economist*’s ad campaign of 1991).

¹¹ Some writers may also have more personal reasons to remain anonymous. One of these is the Italian novelist Elena Ferrante. See Ruth Spencer, ‘Elena Ferrante in her own words: “To relinquish my anonymity would be very painful”’, *The Guardian*, 3 October 2016.

¹² Across the centuries, the choice of anonymity has often aimed at avoiding the negative social impact of revealing the true identity, which would have caused loss of reputation or honor: see Richard Wrigley, ‘Censorship and Anonymity in Eighteenth-Century French Art Criticism’ (1983) 6 *Oxford Art Journal* 17 at 17, where literary anonymity as a consequence of the censorship originating in the Reformation is discussed.

¹³ Keith Estiler, ‘Why Anonymous Artists Never Reveal Their Identity’, 11 January 2018 <<https://hypebeast.com/2018/1/anonymous-artists-interview>>.

¹⁴ Enrico Bonadio, *Copyright in the Street – An Oral History of Creative Processes in Street Art and Graffiti Subculture* (Cambridge University Press 2023).

¹⁵ Maddox Gallery, ‘Why Do So Many Artists Operate Anonymously?’, 27 July 2021 <<https://maddoxgallery.com/news/222-why-do-so-many-artists-operate-anonymously-from-banksys-unknown-identity-to-the-connor-brothers/>>.

¹⁶ Millie Walton, ‘Meet the Anonymous Street Artist Jerkface’, 5 July 2021 <www.trebuchet-magazine.com/anonymous-street-artist-jerkface/>

¹⁷ Millie Walton, ‘Meet the Anonymous Street Artist Jerkface’, 5 July 2021.

¹⁸ It has been noted that “anonymous [visual] art is often hailed as purer. Its intentions meant to serve art itself rather than the artist’s ego, or feed the celebrity machine that society seems to love so much”: see Marina Azcárate, ‘Does Identity In Art Matter? The Case Of The Anonymous Artist’, 15 August 2022 <<https://thenextcartel.com/observatory/does-identity-in-art-matter-the-case-of-the-anonymous-artist/>> (when it comes to visual art, the reasons for artists to remain anonymous vary from creative freedom to separation of personal and professional lives). See also Keith Estiler, ‘Why Anonymous Artists Never Reveal Their Identity’,

There is also a vanity component in being anonymous. This status may indeed serve as a way of adding to artists' appeal and can paradoxically give them 'notoriety' and power;¹⁹ a sort of "anonymous notoriety".²⁰ This is true of many artists who place art in the public environment.²¹ Moreover, while practitioners may rely on anonymity to increase interest in their art, they may also choose such a status (including a pseudonymous identifier) because their true identity no longer suits or represents them. Several artists prefer to be identified with their 'art name' only. For example, when he first talked to Stik in his studio in East London, Bonadio naively used the artist's real name, just to find out that he was more comfortable with being called 'Stik'. Moreover, most graffiti writers do paint and draw their name on urban surfaces because they want to 'get up' and get visibility within the subculture. In this sense, graffiti is a powerful and complex assertion of a personal and self identity, which is different from the one shown on their birth certificates. A sort of alternative ego.²²

The principle of 'open justice' and the 2007 French case involving the artist Invader

So, what happens where anonymous artists want to enforce their copyright against imitators or unauthorised exploitations of their art? An obstacle they may face, which makes it difficult to remain anonymous in a court case, comes from the principle of 'open justice' - that means that court actions and records should be open to the public. The discussion in this article will show how this principle plays out in various countries and how its operation could prevent artists from hiding their true identity when bringing copyright claims. But, as will also be shown, there are derogations from the open justice principle.²³

The issue whether artists could sue anonymously has also been raised in a string of cases before the European Intellectual Property Office (EUIPO). Pest Control Office Ltd, Banksy's handling service which also takes care of his popular website and Instagram account, had registered a number of EU trade marks which included Banksy's art. A company which make greeting cards reproducing Banksy's art, Full Colour Black, applied to cancel several of Pest Control's trade marks on the grounds that the applications had been filed in "bad faith".²⁴ Full Colour Black won the first of these cases and so the 'Flower Thrower' EU trade mark was invalidated.²⁵ One of the arguments put forth was that by registering trade marks which incorporated Banksy's art, Pest Control would enable Banksy to protect his art through trade mark law and so free him from the evidential difficulties should he enforce his copyright to the underlying image. Specifically, the EUIPO Cancellation Division described the problem this way:

"The predicament of Banksy's right to the work 'Flower Thrower' is clear. To protect the right under copyright law would require him to lose his anonymity which would undermine his persona."

11 January 2018 <<https://hypebeast.com/2018/1/anonymous-artists-interview>> (anonymous art requires viewers to develop their own opinions around a piece without obsessing over whether a famous or less known artist created it or not.)

¹⁹ Cedar Lewisohn, *Street Art: The Graffiti Revolution* (Tate Publishing 2008), p. 100.

²⁰ Steve Wright, *Home Sweet Home – Banksy's Bristol* (Tangent Books 2008), p. 70.

²¹ See also Breanna M. Moe, 'When Copyright Law Meet Anonymous Street Art' (2022) 26 Marq. Intell. Prop. & Innovation L. Rev 84.

²² See Jessica Pabòn, 'Ways of Being Seen – Gender and the Writing on the Wall' in Jeffrey Ian Ross (ed.), *Routledge Handbook of Graffiti and Street Art* (Routledge 2016), p. 78. The "different identity" issue often emerges in the graffiti literature: for example, the book by Janice Rhan, *Painting without Permission: Hip-hop Graffiti Subculture* (Praeger 2002), pp. 65-66, highlights the opinion of Canadian writer Seaz: "My parents gave my name. I didn't choose it. This [graffiti] allows me to choose my identity". Similarly, the book by Felix Braun, *Children of the Can: Bristol Graffiti and Street Art* (Tangent Books 2012), p. 310, includes an interview with Bristol writer Turo: "... the tag is me now, people know me as Turo, there's a lot of people that don't even know my real name".

²³ See for example German Courts Constitution Act (Gerichtsverfassungsgesetz GVG), §169; Japanese Constitution, art 82.

²⁴ *Full Colour Black Ltd. v. Pest Control Office Ltd* (No C 39, 921), 14 Sep 2020 (Flower Thrower); (No C 39 873), 18 May 2021 (Laugh Now); (No C 39 872), 18 June 2021 (Girl with Umbrella), (No C 40 001), 18 June 2021 (Radar rat), (No C 40 000), 19 June 2021 (Love Rat) and (No C 39 921), 19 June 2021 (Bomb Hugger).

²⁵ *Full Colour Black Ltd. v. Pest Control Office Ltd* (No C 39 921), 14. Sep 2020 (Flower Thrower); see Enrico Bonadio and Olivia Jean-Baptiste, 'Banksy's battle with trademark law' (2021) 3 Nuart Journal 22.

This was also echoed in the other cases, including the later “Laugh Now” dispute.²⁶ But on appeal the Board of Appeal expanded on Banksy’s need to stay anonymous, and held that:

“[...] it must be stated that in proceedings a party may request to a certain extent be treated in a confidential way in order to limit, to the extent that it is possible, the dissemination of his personal data, in case this is justified”.²⁷

Thus, the EUIPO accepted that under specific circumstances an artist should be able to bring a copyright claim against infringers while keeping anonymity. While this finding comes from an EU administrative agency which predominantly deals with trade marks and designs, the importance of this statement should not be underestimated.²⁸

In 2007, a French dispute involving the artist Invader confirmed the same point.²⁹ Invader is well known for creating and placing in the street ceramic tiles modelled on the pixelated art based on eight-bit video games of the 1970s and 1980s. A French car maker, Peugeot, organised a showroom in Paris where plexiglass reproductions of the Invader’s pieces were displayed. The artist anonymously sued both Peugeot and the owners of the showroom for copyright infringement. The defendants argued that they had reproduced the original figures from the videogame, and not Invader’s artwork. The Court found that Invader’s ceramic tile mosaics were original and therefore protected by copyright. But Peugeot had not infringed his copyright because the reproductions exhibited at the showroom were in plexiglass. The showroom was condemned for economic parasitism instead on the grounds it had unfairly taken advantage of the artist’s reputation.

While the Court did not explicitly consider Invader’s *locus standi* as an anonymous plaintiff, the artist’s identity was not revealed in the ruling. Specifically, the court noted that “Mr. Franck X. ... is a contemporary artist. Wishing to preserve his anonymity, he creates his artworks under the “Space Invader” pseudonym”.³⁰ Indeed, as the French Intellectual Property Code reminds us “[a]uthors of pseudonymous and anonymous works shall enjoy the rights” offered by copyright law.³¹

Thus, one may argue that anonymity is not an insurmountable obstacle when it comes to enforcing artists’ copyright. In the absence of cases in other jurisdictions where an artist has been allowed to bring a copyright claim while remaining anonymous, the analysis that follows is speculative. But before moving to the discussion in other selected countries (i.e. US, Canada, Australia and United Kingdom), the provisions of the Berne Convention on anonymous and pseudonymous works will be considered.

The Berne Convention

The Berne Convention explicitly mentions works created by anonymous authors and gives guidelines on enforcement of rights, including a presumption on proof of fact in article 7(3):

²⁶ See *Full Color Black Ltd. v. Pest Control Office Ltd.*, (No C 39 873), 18 May 2021 (Laugh Now) p. 12-13 (also see cases above). On these cases, see Enrico Bonadio, Siri Egeland, Olivia Jean-Baptiste, ‘From the Flower Thrower to the Monkey and Beyond: Banksy’s Trademarks Battle Continues’ [2023] E.I.P.R. 487.

²⁷ R 1246/2021-5 *Full Color Black Ltd. v. Pest Control Office Ltd.*, 25 Oct 2022, [65]; *Full Color Black Ltd. v. Pest Control Office Ltd.* (No C 47 807), 21 Dec 2023, p. 13.

²⁸ Administrative agencies like trade mark and patent offices seem more open to anonymous claims. For instance, challenging the validity of a European patent anonymously by relying on third parties - known as “straw man oppositions” - is robustly supported by the case law of the European Patent Office (EPO): G 4/97 Opposition on behalf of a third party [1999] OJ EPO 270. This allows opponents to keep their identity secret from the patent owner and any other interested parties. In these circumstances it is customary for a law firm to function as both the opponent and representative to safeguard the client’s anonymity.

²⁹ *Monsieur Franck X v S.A. Automobiles Peugeot*, Tribunal de grande instance de Paris, No 6/12982, Chambre civile 3, 14 Nov 2007.

³⁰ “M. Franck X... est un artiste contemporain. Souhaitant préserver son anonymat il exerce sous le pseudonyme de “Space invader”. In recent years Invader’s identity has been revealed, with several sources identifying him as Franck Slama: see Yves Jaegle, ‘50% des informations sur lui sont fausses’: qui est vraiment Invader, street artist et star secrète?, Le Parisien, 17 Feb 2024.

³¹ French Intellectual Property Code, art. L. 113-6.

“in the case of anonymous or pseudonymous works, the term of protection ... shall expire fifty years after the work has been lawfully made available to the public”.

This Convention includes another relevant provision at article 15(3), which introduces presumptions that assist in establishing authorship:

“In the case of anonymous and pseudonymous works ... the publisher whose name appears on the work shall, in the absence of proof to the contrary, be deemed to represent the author, and in this capacity, he shall be entitled to protect and enforce the author's rights”.

The Berne Convention therefore takes it for granted that anonymous and pseudonymous works can be protected by copyright. And more importantly, it identifies the associated publisher as the person able to represent authors and be entitled to safeguard and enforce their rights in courts. In other words, publishers whose names are incorporated in the work, are vested with substantive and enforcement rights. Let us call this rule as the ‘Berne presumption’. This presumption is given effect in statute in many countries, including the United Kingdom,³² Canada,³³ Australia,³⁴ Germany,³⁵ and Japan.³⁶

It may be noted that the Berne presumption fits literary and musical works best. Authors, writers and novelists have existing relationships with book or newspaper publishers. Likewise, songwriters traditionally need music publishers to exploit their compositions. In both cases, publishers often do take care of copyright enforcement. But what about anonymous visual artists, especially those who place works in the street and other urban settings? In general, visual artists do not have on-going relationships with publishers. What some of them do instead is to rely on some form of ‘handler services’, such as Banksy’s Pest Control.

It is possible the Berne presumption could be broadly interpreted to treat these handler services in the same way as publishers. For example, Italian and Spanish laws broadly provide that anyone who “has represented, performed or otherwise published”³⁷ or brings the anonymous or pseudonymous work “to light with the author’s consent”³⁸ can assert and enforce the relevant rights. Also, the law in the United Kingdom (s 169 Copyright, Designs and Patents Act 1988) does not just mention publishers, rather it more generally refers to any “body” which takes care of authors’ copyright. It specifically provides that where a body is appointed to protect and enforce copyright on behalf of the anonymous or pseudonymous artist, that body shall be recognised as having the authority of the copyright owner and that it may bring proceedings in its own name. While this provision is limited to folklore, its broad relevance cannot be underestimated. It acknowledges the fact that authors do not just rely on publishers when it comes to managing their rights, and that they do have relationship with other entities.

This is even more so in the current Internet and social media era. The notion of bodies representing anonymous or pseudonymous artists could be expanded to include associations or companies which manage their art and keep constant contact with audiences online. This is particularly true of street and graffiti art, which is predominantly documented and preserved online. While this goes beyond the text of the Berne Convention itself, the purpose of that provision can only be maintained, it is argued, if authors and artists without a ‘traditional’ publishers are able to lawfully manage (and enforce) their rights while keeping their true identity confidential.

³² Copyright, Design, Patent Act 1988, s. 104 (4).

³³ Canadian Copyright Act, s. 34.1(2)(b).

³⁴ Australian Copyright Act 1968 (Cth), s 128. In Australia, the publisher is presumed to own the copyright at the time of publication for works first published in Australia, so long as a name purporting to be the publisher appears on the copies of the work.

³⁵ German Copyright Act, art 10(2).

³⁶ Japanese Copyright Act, art 118. Here the publisher of anonymous or pseudonymous works may file a number of claims, the right to demand an injunction, to take measures to restore infringements on moral rights and to take such measures posthumously, to claim damages and to claim return of unjust benefit, as long as the author is not commonly known under a pseudonym or the true name of the author has been registered in the Copyright Register: see also arts 75 and 78.

³⁷ Italian Copyright Act, art. 9.

³⁸ Spanish Copyright Act, art. 6.

Anonymous works: a view across the jurisdictions

United States

Works created by anonymous and pseudonymous artists can be registered at the Copyright Office. There are no statutory provisions for enforcing copyright anonymously in the U.S.,³⁹ and the Federal Rule of Civil Procedure requires that the pleadings name all the parties and the action must be prosecuted in the name of the real party in interest.⁴⁰ It is then up to each individual court to grant or deny a request to proceed pseudonymously, and thus maintaining anonymity.⁴¹ In each case, however, the identity of the author will be revealed to at least the court and opposing counsel. There is no mechanism for a “strawman” to enforce an anonymous author’s copyright.

The test to proceed anonymously balances a party’s privacy against the presumption of openness in judicial proceedings, but the approach is not uniform. Each of the Federal Circuits has provided a slightly different list of factors to consider; although they all agree that their list of factors is not exhaustive.⁴² Generally speaking, when “a litigant sufficiently alleges that he or she has a reasonable fear of severe harm from litigating without a pseudonym, courts of appeals are in agreement that district courts should balance a plaintiff’s interest and fear against the public’s strong interest in an open litigation process.”⁴³

The US Supreme Court has had the opportunity to unify the various tests but has declined to do so.⁴⁴ Some of the factors that have been considered by Courts of Appeal are as follows: first, whether the litigation involves matters that are highly sensitive and of a personal nature;⁴⁵ secondly, whether identification poses a risk of retaliatory physical or mental harm to the party seeking to proceed anonymously or even more critically, to innocent non-parties;⁴⁶ thirdly, whether identification presents other harms and the likely severity of those harms, including whether the injury litigated against would be incurred as a result of the disclosure of the plaintiff’s identity;⁴⁷ fourthly, whether the plaintiff is particularly vulnerable to the possible harms of disclosure, particularly in light of his or her age;⁴⁸ fifthly, whether the suit is challenging the actions of the government or that of private parties;⁴⁹ sixthly, whether the defendant is prejudiced by allowing the plaintiff to press his claims anonymously, whether the nature of that prejudice (if any) differs at any particular stage of the litigation, and whether any prejudice can be mitigated by the court;⁵⁰ seventhly, whether the plaintiff’s identity has thus far been kept confidential;⁵¹ eighthly, whether the public’s interest in the litigation is furthered by requiring the plaintiff to disclose his identity;⁵² ninthly, whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigants’ identities;⁵³ tenthly, whether there are

³⁹ 17 U.S.C. § 501; see generally, Eugene Volokh, ‘The Law of Pseudonymous Litigation’ (2022) 73 *Hastings LJ* 1353.

⁴⁰ Federal Rules of Civil Procedure, r 10(a) and 17(a)(1).

⁴¹ Ressler, ‘Privacy, Plaintiff and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age’ (2004-2005) 53 *U. Kan. L. Rev.* 195 at 214-215; *Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981).

⁴² *Doe v. Megless*, 654 F.3d 404, 408-409 (3d Cir. 2011).

⁴³ *Doe v. Megless*, 654 F.3d 404, 408 (3d Cir. 2011).

⁴⁴ US Supreme Court Order 11-643 *Doe*, *John v Megless*, *Thomas et al.* denying certiorari.

⁴⁵ *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189–90 (2d Cir.2008); *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir.2004); *Does I Thru XXIII v Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2012); *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992).

⁴⁶ *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189–90 (2d Cir.2008); *Does I Thru XXIII v Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2012).

⁴⁷ *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189–90 (2d Cir.2008).

⁴⁸ *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189–90 (2d Cir.2008); *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir.2004).

⁴⁹ *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189–90 (2d Cir.2008); *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir.2004); *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992).

⁵⁰ *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189–90 (2d Cir.2008); *James v. Jacobson*, 6 F.3d 233, 242 (4th Cir.1993).

⁵¹ *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189–90 (2d Cir.2008).

⁵² *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189–90 (2d Cir.2008).

⁵³ *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189–90 (2d Cir.2008).

any alternative mechanisms for protecting the confidentiality of the plaintiff,⁵⁴ eleventhly, whether the litigation compels plaintiffs to disclose an intention to violate the law, thereby risking criminal prosecution,⁵⁵ and, finally, whether the plaintiff will refuse to pursue the case at the price of being publicly identified.⁵⁶

There are thus several reasons why a court might allow plaintiffs, including artists, to remain anonymous. For instance, their work may disclose matters the author wishes to keep private because it is highly sensitive and personal or is critical of government actions (the first point); or the disclosure may create a risk of retaliatory physical or mental harm (the second point). This could also happen in relation to street art and graffiti where artists often criticise governments' actions or in general further a political or social agenda. Also, some of them may even risk being physically targeted,⁵⁷ and street artworks, especially those created by famed artists, are frequently attacked by graffiti writers who vandalise them with tags. 10Foot, for instance, is known for painting over murals created by Banksy.⁵⁸ Disputes between writers and street artists that end up in the erasure or mutilation of murals are not uncommon. In 2006 and 2007 in New York, the vandalising acts of a street artist (or a collective of artists) named Splasher were notorious with several works of other famous artists, like Faile, being attacked.⁵⁹ Bonadio's ethnographic research found a street artist who described how one of his murals had been vandalised by a writer. The expression he used when referring to the perpetrator of this act epitomises the sometimes tense relationship between these artistic two subcultures: 'fucking writers!'.⁶⁰

The seventh point is also relevant when it comes to street and graffiti artists. Indeed, as mentioned, many of them create art without revealing their names and jealously defend their anonymity, which is often a structural element of their art and the message it conveys. But it is the eleventh and twelfth points that are probably the most relevant factors to these creative subcultures. Many of these artists, especially those who create their pieces illegally, avoid going to court to enforce their copyright. This is precisely because they do not want to 'remove the mask' and risk criminal prosecution. In a conversation between Bonadio and Linus Coraggio, a New York artist known for his abstract sculptures and sculptural furniture (which he leaves in the street), the artist commented: "I'd like more to be protected from the police rather than copyright!".⁶¹ Similar opinions were expressed to Bonadio by another New York artist, Al Diaz. In the late 1970s and early 1980s, Al Diaz partnered with Jean-Michel Basquiat and together they created and painted in New York, especially in lower Manhattan, the tag SAMO©.⁶² As to the copying of his works Al Diaz said: "perhaps I'd just have to swallow that and maybe not do anything, unfortunately".⁶³ Likewise, Lady Pink, the first well-known woman practicing graffiti in New York in the late 1970s and 1980s, commented to Bonadio: "it's very difficult to start a legal action for

⁵⁴ *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189–90 (2d Cir.2008).

⁵⁵ *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189–90 (2d Cir.2008); *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir.2004); *Does I Thru XXIII v Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2012); *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992).

⁵⁶ *Doe v. Megless*, 654 F.3d 404, 409 (3d Cir. 2011).

⁵⁷ Xan Brooks, Diminic Rushe, 'Shepard Fairey beaten up after spat over controversial Danish mural', *The Guardian*, 12 August 2011; Sarah Osei, '50 Cent Denies Responsibility in Mural Artist Attack after Calling for 'Ass Whoopin'' (2020) (available at <https://www.highsnobiety.com/p/50-cent-murals/>).

⁵⁸ '10Foot goes to work on Banksy', 3 March 2009, UK Street Art Blog (available at <http://www.ukstreetart.co.uk/10-foot-goes-to-work-on-banksy/>).

⁵⁹ Rafael Shacter, 'Graffiti and Street Art as Ornament', in Jeffrey Ian Ross (ed.), *Routledge Handbook of Graffiti and Street Art* (Routledge 2016), p. 124.

⁶⁰ Enrico Bonadio, *Copyright in the Street – An Oral History of Creative Processes in Street Art and Graffiti Subculture* (Cambridge University Press 2023), p. 7.

⁶¹ Enrico Bonadio, *Copyright in the Street – An Oral History of Creative Processes in Street Art and Graffiti Subculture* (Cambridge University Press 2023), p. 57.

⁶² During the interview in Brooklyn, Al Diaz told Bonadio that Basquiat and he had decided to add the © symbol to their tag because "we wanted to give a message that SAMO was a kind of product that you could buy. That was our purpose. It was our brand": See Enrico Bonadio, *Copyright in the Street – An Oral History of Creative Processes in Street Art and Graffiti Subculture* (Cambridge University Press 2023), p. 51.

⁶³ See Enrico Bonadio, *Copyright in the Street – An Oral History of Creative Processes in Street Art and Graffiti Subculture* (Cambridge University Press 2023), p. 57; he was aware that the Statute of Limitations would not be beneficial to him in relation to illegal pieces placed in the street more recently.

the appropriation of an illegal graffiti work, the risk of being arrested is high, it's not worth it".⁶⁴ And former New York writer Dejer made a similar point telling Bonadio in an interview in Long Island: "In principle, I'd be ready to take legal action, my concern would be that they may catch me for all the bombing [illegal graffiti painting] I've done in the past".⁶⁵

From these interviews it is clear that artists who break the law while creating their pieces could make the decision to enforce their copyright against infringers provided their real name is not disclosed to the public. While shielding illegal activity may appear a weak argument for keeping a party's identity secret, there is some precedent in support doing. Anonymity in copyright engages the First and Fourteenth Amendments of the U.S. Constitution (free speech and the denial of civil rights by a state).⁶⁶

For example, in *Signature Management Team*, a pseudonymous blogger was sued for making copyrighted material available for download. The court allowed the John Doe defendant to remain anonymous during litigation, but her identity had to be revealed to the court and to the plaintiff's attorneys, subject to a protective order preventing the plaintiff from personally learning John Doe's identity.⁶⁷ When the defendant was found to have infringed copyright, the plaintiff moved again to reveal the defendant's true identity. But the judge only required the infringing works to be deleted.⁶⁸ On appeal, the court agreed that while there is "a presumption in favor of unmasking anonymous defendants when judgment has been entered for a plaintiff", it is not absolute. Even though the infringing speech was not itself entitled to anonymity, it occurred in the context of other anonymous blogging activities that are entitled to such protection. And unmasking John Doe might hinder his ability to engage in anonymous speech in the future.⁶⁹ The Court of Appeals remanded the anonymity issue back to the trial judge and provided guidance to reconsider certain issues, including the public interest, the need to enforce rights against the defendant, and whether Doe can show unmasking will chill other protected speech.⁷⁰ The anonymity was maintained to protect speech and because unmasking is an irreversible act.⁷¹

That being said, when considering anonymous street and graffiti artists it is also necessary to weigh the consequences between revealing their identity with the public's rights to know who has broken the law. Free speech and civil rights could also be criteria in such a balancing exercise. Therefore, it is arguable that an U.S. court may allow anonymous artists who place their pieces in the street illegally to enforce their copyright without publicly revealing their identity. As a compromise, a court may follow *Signature Management Team* and order anonymous artists to reveal their identity to the opposing attorneys and the court while taking measures to prevent the public from accessing such information.

Canada

The Canadian Copyright Act does not provide any mechanism for authors and artists to enforce their economic rights anonymously. On the other hand, the Act explicitly provides anonymous authors with the moral right to protect the integrity of the work "where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous".⁷² The Copyright Act provides legal presumptions regarding ownership where the work is signed, where it is published with the name of the publisher, or by registering the work.⁷³ Specifically, registering copyright in Canada gives the author the rebuttable presumption that copyright subsists in the work and that the person registered is the owner of the copyright.⁷⁴ However, an author does not

⁶⁴ Enrico Bonadio, *Copyright in the Street – An Oral History of Creative Processes in Street Art and Graffiti Subculture* (Cambridge University Press 2023), p 57.

⁶⁵ Enrico Bonadio, *Copyright in the Street – An Oral History of Creative Processes in Street Art and Graffiti Subculture* (Cambridge University Press 2023), p 57.

⁶⁶ *Talley v California*, 362 US 60 (1960).

⁶⁷ *Signature Mgmt. Team, LLC v. Doe*, 876 F.3d 831, 834 (6th Cir. 2017).

⁶⁸ *Signature Mgmt. Team, LLC v. Doe*, 876 F.3d 831, 835 (6th Cir. 2017).

⁶⁹ *Signature Mgmt. Team, LLC v. Doe*, 876 F.3d 831, 839 (6th Cir. 2017).

⁷⁰ *Signature Mgmt. Team, LLC v. Doe*, 876 F.3d 831, 837 (6th Cir. 2017).

⁷¹ *Signature Mgmt. Team, LLC v. Doe*, 323 F. Supp. 3d 954 (E.D. Mich. 2018).

⁷² Copyright Act, RSC 1985, s. 14.1(1). A similar provision for anonymity and pseudonymity applies to performers, s.17.1(1).

⁷³ Copyright Act, RSC 1985, , s. 34.1.

⁷⁴ Copyright Act, RSC 1985, s. 53(2). It remains an open question whether registration must occur before contemplating litigation, otherwise the registration may have diminished persuasiveness and may not constitute

have to include personal information in a copyright registration, it is permissible to use a lawyer's address for correspondence to maintain their privacy.⁷⁵ This latter provision may benefit street and graffiti artists who create their pieces illegally and want their ownership recorded in some way.

The specific question of whether anonymous authors may successfully assert their rights in court does not appear to have ever been litigated in Canada, but some guidance can be found in the jurisprudence.⁷⁶ Although the Copyright Act provides certain evidentiary presumptions, anonymous authors would likely need to rely on procedural rules and the common law to enforce their rights.⁷⁷ Like in the U.S., a party's anonymity is weighed against the principle of open justice. This balance was recently considered by the Canadian Supreme Court where it held that while privacy in and of itself may not be a sufficiently important public interest:

“protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test”.⁷⁸

One may thus go as far as arguing that street and graffiti artists also deserve to be protected from a threat to their dignity when their true identity is revealed. The Supreme Court has even said moral rights “treat the artist's œuvre as an extension of his or her personality, possessing a dignity which is deserving of protection”.⁷⁹ The comments of these artists narrated to Bonadio, mentioned in the previous section, are equally relevant here.

Visual artists enforcing their rights also engage issues surrounding freedom of expression and privacy under Canada's Charter of Rights and Freedoms. These issues have been explored in the context of the so-called *Norwich* orders⁸⁰ where a litigant seeks to obtain the identity of an anonymous, often online, wrongdoer. It has been said that the identification of anonymous individuals:

“should not be automatic upon the issuance of a Statement of Claim. If such were to be the case, the fact of the anonymity of the Internet could be shattered for the price of the issuance of a spurious Statement of Claim and the benefits obtained by the anonymity lost in inappropriate circumstances.”⁸¹

Canadian courts have, for example, refused to identify a commenter on the internet who was critical of local politicians or to identify protestors against logging operations to avoid chilling their expressive and associational activities in support of their political and social aims.⁸² This may equally apply to street art and graffiti where practitioners often speak truth to power and—one may argue—protecting their anonymity in copyright infringement proceedings also protects their right to (artistic) free speech. This is particularly true of the British artist Banksy who, as noted by art collector Acoris Andipa:

“[v]eiled behind the mask of anonymity, Banksy is able to freely and openly produce whatever he wants to. Unbound to ego, he is able to confront and challenge societal norms without fear of judgement or a negative perception”.

particularly compelling evidence, see *Canadian Standards Association v. P.S. Knight Co. Ltd.*, 2016 FC 294, [29], overturned, 2018 FCA 222, [150]. See also *Patterned Concrete Mississauga Inc. v. Bomanite Toronto Ltd.*, 2021 FC 314, [9], [12-14].

⁷⁵ *Suttie v. Canada (Attorney General)*, 2011 FC 119, [7].

⁷⁶ *Copyright Act*, RSC 1985, s. 41.24 provides concurrent jurisdiction for copyright enforcement to the provincial and federal courts.

⁷⁷ See, for example Federal Courts Rules, r. 151(2); Ontario (Courts of Justice Act, RSO 1990, s.135, 137(2); Rules of Civil Procedure, r. 30.11); Alberta (Alberta Rules of Court, r. 6.29); Manitoba (Court of King's Bench Rules, r. 30.11); Nova Scotia (Nova Scotia Civil Procedure Rules, r. 85.04). Other provinces have similar provisions.

⁷⁸ *Sherman Estate v. Donovan* 2021 SCC 25, [73].

⁷⁹ *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [15].

⁸⁰ This is the Canadian version of order approved by the House of Lords in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 and first adopted in Canada in *Glaxo Welcome plc v Canada (Minister of National Revenue)* (1988) 162 D.L.R. (4th) 433.

⁸¹ *Irwin Toy Inc. v. Doe* [2000] O.J. No. 3318, [17] (ON SC).

⁸² *Olsen v Facebook*, 2016 NSSC 155, [30]; *Cooper Creek Cedar Ltd. v Ogden*, 2023 BCSC 465, [81, 84].

Protecting artists' anonymity goes to the very dignity of their person and the mantra being "their anonymity has to be protected, otherwise the author would not engage the court process".⁸³ In other words, the lack of this protection could silence their thoughts, contrary to their freedom of expression rights. This itself could justify a departure from the open court principle.

While the Copyright Act may not expressly provide for artists to remain anonymous while enforcing their rights, it may be possible to do so. The scope of any such anonymity is also unclear. It may be possible for authors to maintain their anonymity against the world at large, but it could be revealed to the defendant or their counsel. For instance, in an application for judicial review where the plaintiff alleged her personal information was published by the Public Service Commission of Canada, the Federal Court permitted the applicants to file and prosecute the case anonymously. The public versions of the documents referring only to Mr. X, Monsieur A and Madame B. But the applicants were also required to file a confidential version of the pleading in which their full names were provided.⁸⁴ Everyone involved in the litigation already knew each other and so it does not address a situation where the plaintiff and defendant may be strangers.⁸⁵ Nevertheless, the court noted that confidentiality orders can be used to prevent the disclosure of the very information which is sought to be protected, and provide a roadmap for doing so.⁸⁶ This outcome could be beneficial to street and graffiti artists who want to remain anonymous while enforcing rights over their creations. For many of them, indeed, it would be enough to avoid revealing their real name to the public and they may not be bothered by the alleged infringer knowing their identity as the latter would be bound to confidentiality.

Australia

While the Copyright Act in Australia protects anonymous and pseudonymous works for a 70-year term after publication,⁸⁷ it does not offer authors any specific mechanism to enforce their rights anonymously. However, it is indeed possible to restrict a party's identity in proceedings before the Federal Court of Australia⁸⁸ where most (although not all) copyright claims are litigated. The general rule being that the court's jurisdiction must be exercised in open court, except where it is otherwise authorised by statute.⁸⁹ More specifically, the court may protect an author's anonymity by issuing a suppression order or a non-publication order.⁹⁰ These orders can be made on several grounds, including when the order is necessary to prevent prejudice to the proper administration of justice.⁹¹ In other words, such an order must be necessary to enable the court to do justice meaning the court must determine that justice will not be done if the proceedings are heard in open court or without the use of a pseudonym.⁹² A particularly interesting case is *Jenkins v Northern Territory of Australia (No 4)*, where the Federal Court noted that not all litigation should be public and gave some examples, such as to prevent publication of confidential information or a trade secret, or disputes relating to privilege, or where future applicants will be deterred from coming forward.⁹³ The last case is relevant to street art and graffiti where, as has been seen, artists who place their pieces illegally may be discouraged to bring a copyright action if they need to disclose their real names.

⁸³ Acoris Andipa, 'Why is Banksy Anonymous', 21 August 2023 <<https://andipagallery.com/blog/111-why-is-banksy-anonymous/>>.

⁸⁴ *A v. Canada (Attorney General)*, 2008 FC 1115.

⁸⁵ See, for example, *A.B. c. Google Inc.*, 2016 QCCS 4913, [13] in contrast to *JLD v. Vallée*, 1996 CanLII 5846 (QC CA).

⁸⁶ *A v. Canada (Attorney General)*, 2008 FC 1115, [20].

⁸⁷ Copyright Act 1968 (Cth), ss 34 and 81.

⁸⁸ Federal Court of Australia Act 1976 (Cth), ss 133A(1), 131C and 195AZGH.

⁸⁹ Federal Court of Australia Act 1976 (Cth), s 17.

⁹⁰ Federal Court of Australia Act 1976 (Cth), ss 37AA and 37AF.

⁹¹ Federal Court of Australia Act 1976 (Cth), s 37AF & 37AG. There are other grounds one being protecting the safety of any person, which has been interpreted to mean physical safety as well as psychological safety, including aggravation of a pre-existing mental health condition, and avoiding an increased risk of suicide or other self-harm *AB v R (No 3)* [2019] NSWCCA 46, [59].

⁹² *Ogawa (formerly Ms PD) v President of the Australian Human Rights Commission (Pseudonym)* [2022] FCAFC 160, [29-31].

⁹³ *Jenkins v Northern Territory of Australia (No 4)* [2021] FCA 839, [27].

United Kingdom

Under the Copyright, Designs and Patents Act 1988 works are considered to be of unknown authorship where the author's identity cannot be identified by a reasonable enquiry.⁹⁴ These works, which include anonymous and pseudonymous works,⁹⁵ are thus protected by copyright.⁹⁶ Arnold J indirectly confirmed this protection in *Creative Foundation v Dreamland*.⁹⁷ This was the first British case to consider the ownership of the walls and the artworks which are placed upon them. It involved a claim by a landlord against a tenant who removed the Banksy work *Art Buff* from a wall of a building. Arnold J did not accept the tenant's argument that it had acquired property in the artwork as it was discharging its repairing obligation. He held that when the section of the wall containing the artwork was removed, it became the landlord's chattel.⁹⁸ But, more importantly, he noted that "I am not concerned with the copyright in the artistic work, which prima facie belongs to Banksy." This was not a copyright dispute, but the statement clearly acknowledges that copyright law does protect pseudonymous authors.⁹⁹

Yet there is nothing in the Copyright, Designs and Patents Act 1988 which clarifies whether anonymous and pseudonymous authors can enforce their rights in courts (but as we will see below, the Civil Procedure Rules (CPR) may assist such artists). The general principle is once more that of open justice.¹⁰⁰ In addition, a claimant must show "a sufficient interest in the matter to which the application relates"¹⁰¹ and demonstrating this—one may argue—may imply the need to disclose her real name. In the recent case of *Persons Unknown (inc Cobra) v Wright*,¹⁰² which considered an allegation of copyright infringement in a White Paper entitled 'Bitcoin: A Peer to Peer Electronic Cash System', the defendant tried to protect his anonymity in court. But the court held:

"... the common law principle of open justice, and the rules seeking to give effect to it, contain no right to, or presumption of, anonymity. To the contrary, the derogation from this aspect of the open justice principle in CPR, Part 39.2(4) is narrowly circumscribed."¹⁰³

The court also made it clear that that if "a party was not prepared to name itself, it cannot participate in proceedings".¹⁰⁴ Thus, while clearly affirming the principle of open justice, the court acknowledged the derogation in CPR, r 39.2(4) which focuses on anonymity (although it found it could not apply in the case at issue). It provides that courts:

⁹⁴ Copyright, Designs and Patents Act 1988, ss.9(4), 9(5). It is not clear who undertakes this enquiry, however. It seems logical to presume that the person or entity which wants to use and exploit the work should undertake the enquiry and trace the author.

⁹⁵ Charlotte Waelde and others, *Contemporary Intellectual Property - Law and Policy* (6th edn, Oxford 2023), pp. 103-104

⁹⁶ This is also confirmed by Copyright, Designs and Patents Act 1988, s.12 which regulates copyright's duration of works of unknown authorship.

⁹⁷ *Creative Foundation v Dreamland* [2015] EWHC 2556 (Ch). For comments on this case, see Marta Iljadica, 'Street art belongs to the freeholder' (2016) 11 J.I.P.L.P. 90; Steephane Wickenden, 'Graffiti Art: the Rights of Landlords, Tenants and Artists: *Creative Foundation v Dreamland Leisure Ltd*' [2016] E.I.P.R. 119.

⁹⁸ *Art Buff* had been painted by Banksy in September 2014 during the Folkestone Triennial, an art event organised by Creative Foundation. The mural was subsequently removed by the tenant (Dreamland) and shipped to New York and then on to Miami to be sold at art auctions. It was little wonder that Creative Foundation (that in the meantime had acquired the rights on the mural from the landlord) was unhappy about this and sued the tenant with a view to getting back the mural.

⁹⁹ On this case, see also Enrico Bonadio, 'Copyright Protection of Street Art under UK Law' [2017] I.P.Q. 1.

¹⁰⁰ CPR, r 39.2(1).

¹⁰¹ See Senior Courts Act 1981, section 31(3).

¹⁰² [2023] EWHC 2292 (Ch).

¹⁰³ *Persons Unknown (inc Cobra) v Wright* [2023] EWHC 2292 (Ch), [34].

¹⁰⁴ *Persons Unknown (inc Cobra) v Wright* [2023] EWHC 2292 (Ch), [34]; also see *The Author of a Blog v Times Newspapers Limited* [2009] EWHC 1358 (QB), [2009] E.M.L.R. 22 (unsuccessful application to prevent the identity of a blog author being disclosed); see also Jean Seaton, 'NightJack blog: How the Times silenced the voice of valuable frontline reporter', 17 Jun 2009, *The Guardian* (17 Jun 2009) <www.theguardian.com/media/organgrinder/2009/jun/17/nightjack-blog-times-silenced>.

“must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that person.”¹⁰⁵

In *Cobra v Dr Craig Steven Wright*, the High Court expanded on this derogation and when it can be invoked. Specifically, it held that the court must order that the identity of any person shall not be disclosed if, and only if, the court considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that person.¹⁰⁶ The High Court suggesting minors and incapacitated adults as those deserving anonymity protection.¹⁰⁷ And if a party has some interest requiring protection by anonymity, it must persuade the court that the balance of its rights outweighs those of the public.¹⁰⁸ Indeed, the court also mentioned that parties may invoke the need to remain anonymous by relying on fundamental rights protected under the European Convention on Human Rights (ECHR), including the right to privacy (article 8), the right to life under (article 2) (for example, where identifying parties might expose them to the risk of serious violence), right to free speech (article 10) and the right to a fair process (article 6).¹⁰⁹

Importantly, a judge in a pending defamation claim against Banksy, i.e. *Full Colour Black v The artist known as “BANKSY”*,¹¹⁰ has allowed the artist to hide his identity, at least temporarily. Proceedings were brought by Full Colour Black, the company which makes greeting cards reproducing Banksy’s art and also trades under the name Brandalised (and as we have seen, has challenged several EU trademarks owned by Pest Control).¹¹¹ The defamation claim stems from a post on Instagram in which Banksy complained about a Guess shop window offering for sale a clothing collection and used the advertising claim “Guess x Brandalised – with graffiti by Banksy”. As the British artist had not authorized them to exploit his art, he posted that image on his Instagram account with the caption “Alerting all shoplifters. Please go to GUESS on Regent Street. They’ve helped themselves to my artwork without asking, how can it be wrong for you to do the same to their clothes?”¹¹² The provocative post has since been removed. This post provoked the defamation claim and the question of whether Banksy would have to expose his true identity in court.

Relying on CPR, r 39.2(4), Nicklin J ordered that only the name “Banksy” be used in the proceedings and so he gave at least temporarily protection to the artist’s true identity. The court was thus satisfied that an anonymity order was necessary to protect the legitimate interests of Banksy. In his application for anonymity the British artist has invoked several fundamental rights, including freedom of speech (article 10 ECHR) and privacy (article 8 ECHR) and these were explicitly mentioned in Nicklin J’s order. Interestingly, the order also refers to the provisions in the Berne Convention on anonymous works which were explored above.¹¹³

But even more interestingly, at least for our purposes, Banksy also focused on the need to protect his true identity as a trade secret in accordance with the EU Trade Secrets Directive¹¹⁴ and the Trade Secrets (Enforcement, etc) Regulations 2018.¹¹⁵ Again this was mentioned in the order. This means the artist is arguing that his identity falls within the definition of a ‘trade secret’.¹¹⁶ This is probably based on the fact his identity is notoriously secret; second, such lack of information is commercially valuable,

¹⁰⁵ CPR r 39.2 (4).

¹⁰⁶ *Persons Unknown (inc Cobra) v Wright* [2023] EWHC 2292 (Ch), [33].

¹⁰⁷ *Persons Unknown (inc Cobra) v Wright* [2023] EWHC 2292 (Ch), [34].

¹⁰⁸ *Persons Unknown (inc Cobra) v Wright* [2023] EWHC 2292 (Ch), [35].

¹⁰⁹ *Persons Unknown (inc Cobra) v Wright* [2023] EWHC 2292 (Ch), [35].

¹¹⁰ *Full Colour Black v The artist known as “BANKSY”*, Claim Number: KB-2023-003469; anonymity order of 12 March 2024.

¹¹¹ *Full Colour Black v The artist known as “BANKSY”*, Claim Number: KB-2023-003469, 12 March 2024.

¹¹² Tristan Kirk, ‘Banksy sued for £1.3m over ‘grave damage’ of Instagram post about fashion store’ *The Standard*, 6 Oct 2023 <www.standard.co.uk/news/uk/banksy-sued-instagram-post-guess-full-colour-black-b1111802.html>

¹¹³ It has also been noted that denying artists’ rights to protect their anonymity in court would violate the spirit of the Berne Convention; also see Emma Byrd, ‘Anonymity is not for losers: Examining the United Kingdom’s Adherence to Intellectual Property Conventions’ (2022) 53 *Geo. Wash. Int’l L. Rev.* 104.

¹¹⁴ EU Directive 2016/ 943 (Articles 2(1) and 9).

¹¹⁵ SI 2018/597, regs 2, 3 and 10.

¹¹⁶ Trade Secrets (Enforcement, etc) Regulations 2018, reg 2.

as the aura of secret around his name makes his art all the more captivating and eventually commercially valuable;¹¹⁷ and lastly, he has taken all reasonable steps to keep his true name confidential: indeed, he and his organisation Pest Control are quite diligent when it comes to protecting this name, including having people who enter in contact with them sign non-disclosure agreements.¹¹⁸

Conclusion

This discussion has shown that while international and national copyright laws do not explicitly give anonymous authors, particularly street and graffiti artists, the right to enforce their copyright, such enforcement might be possible under the general law. Also, the Berne Convention could be interpreted to allow entities (other than publishers) to represent anonymous artists and to enforce their rights while keeping the author or artist's true identity secret.

The order in the Banksy defamation case is particularly interesting as it highlights how anonymity protects not only fundamental rights, such as free speech and privacy, but also the fact that Banksy's real name is a trade secret. This approach is encouraging. It may enable street and graffiti art, who constantly get ripped off by corporations in search of 'street creed', to protect their identity, their copyright and their wider commercial interests.¹¹⁹ This approach respects a central feature of much street art and graffiti, anonymity, and this is even more important when street artworks are created illegally.¹²⁰

It is also suggested that to guarantee legal certainty, the substantive protection offered to anonymous and pseudonymous works in national and international copyright laws should be matched by explicit procedural mechanisms to hide these author's true identity when they litigate. This is especially true in relation to street and graffiti art where anonymity is a often a predominant characterising feature. It is moreover worth noting that that substantive protection without adequate enforcement creates a hollow, a sort of phantom right, as was acknowledged by a WTO Dispute Resolution Panel in *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights* where it was said there was an "inextricable link" between substantive protection and legal capacity to protect and enforce those rights.¹²¹

Finally it is accepted that there will be circumstances where a court could deny orders aimed at keeping artists' names confidential within copyright legal actions. Each case at the end of the day will turn on its facts. Time will tell when courts are faced with such copyright claims relating to successful and commercially valuable graffiti and street art. It will be interesting, and intriguing, to see the outcome and check whether the *Invader* case addressed by the Paris Court in 2007 will not remain an isolated case.

¹¹⁷ Erin-Atlanta Argun, 'Why is Banksy Anonymous?', 8 May 2024 <www.myartbroker.com/artist-banksy/articles/why-is-banksy-anonymous>.

¹¹⁸ Angela Davic, 'James Peak: The Understanding of Banksy', 17 Jul 2023, *The Collector* <www.thecollector.com/james-peak-the-understanding-of-banksy/>; Emma Saunders, 'Banksy: What it was like to work for anonymous superstar artist', *B.B.C.*, 17 Jul 2023 <www.bbc.com/news/entertainment-arts-66174327>; Jessica Taylor Price, 'How far can British street artist Banksy take his anonymity?', *Northeastern Global News*, 2 December 2022; Seth Doane, 'The Art of Banksy's Secrets', *CBS News*, 23 Aug 2023 <www.cbsnews.com/news/banksy-cut-and-run/>; Acoris Andipa, 'Why is Banksy Anonymous', 21 August 2023 <<https://andipagallery.com/blog/111-why-is-banksy-anonymous/>>.

¹¹⁹ For some of the cases (started however by artists who did reveal their identity in the proceedings) see Enrico Bonadio, 'Copyright War: Street Artists Accuse Big Corporations of Stealing Their Artworks', *The Independent*, 17 Oct 2016; Enrico Bonadio, 'McDonald's Accused of Copying Graffiti Logo – Here's Why We Should Protect Street Artists' Original Tags', *The Conversation*, 12 Oct 2016; Enrico Bonadio, 'Graffiti Copyright Battles Pitch Artists against Advertisers', *The Conversation*, 9 Aug 2014.

¹²⁰ Enrico Bonadio, 'Big Brands Ripping Off Street Art is not Cool: Why Illegal Graffiti Should be Protected by Copyright', *The Conversation*, 16 Mar 2018.

¹²¹ WTO Panel Decision, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (WT/DS362/R).