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Does copyright law protect graffiti and street art?

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Does copyright law protect graffiti and street art?

Danwill D. Schwender

Introduction

Mainstream culture’s recent embrace of graffiti and street art has raised some of these artists’ awareness of copyright law. For example, when Fiat ran a television commercial featuring Jennifer Lopez driving past a Bronx wall containing a mural by TATS Cru (a group of former illicit taggers who now create art for such well-known names as Coca-Cola, Nike, and Beyoncé), the artists sought to stop the advertisement based on copyright infringement and, ultimately, settled the dispute (Kaplan, 2011). Similarly, artists whose works adorned New York’s international graffiti mecca “5 Pointz” initiated a copyright lawsuit against the warehouse owner in an attempt to prevent its demolition (Holpuch, 2013). Additionally, as art galleries and museums continue to collect graffiti and street art, artists have found themselves targeted by forgers, such as the graffiti artist John Perello (aka JonOne) who recently sued a Paris gallery for selling forgeries (Childs, 2014). Copyright law provides these artists a mechanism to profit from, and protect, their works by granting limited, exclusive rights to reproduce, distribute, publicly display, and create derivative works and, for certain works, the rights to attribution and integrity.

This chapter focuses on the application of United States’ copyright law to public art, street art, and graffiti art. Definition of these art forms has varied over the years (Lewisohn, 2008; Danysz & Dana, 2010) and may have special legal definitions for criminal enforcement.1 For purposes of this chapter, the following definitions apply: Public art includes an assortment of commissioned or authorized art forms, including paintings, murals, architecture, sculpture, and performance art that is free for the public to observe, and this chapter focuses only on paintings and murals (Waclawek, 2011: p. 65). Street art encompasses stencils, stickers, and posters affixed to surfaces and objects without the property owner’s permission (Ross, 2013: p. 392). Graffiti art refers to words, figures, and images drawn on surfaces without the property owner’s authorization (Ross, 2013: pp. 180–181).

The public has constantly struggled with the boundaries of art and the privileges offered to artists and, therefore, the above definitions are important. Few people question the application of copyright to works produced by artists for museum and gallery display. As such, the publishers of any art reproductions in books, movies, or posters, must obtain permission from...
the copyright owner or risk a lawsuit for copyright infringement. This includes works by renowned artists Keith Harring, Jean-Michel Basquiat, Barry McGee, and Banksy, who all obtained fame through graffiti and street art. Application of copyright to street art and graffiti, however, remains inconclusive, largely due to the illegality of the art’s creation. But, whether vandalism or art, many of these artists have gained acceptance in galleries and museums and found their works commercialized by others without permission. The pressing question, therefore, is whether the illegality involved in creating these works should prohibit an artist from obtaining or enforcing copyright for that work.

What is copyright?

Art by its very nature is intangible. A mural can exist in only one place, but anyone can relatively easily reproduce its expression in books, posters, advertisements, and films for mass distribution. To protect this form of intellectual property, most countries grant limited, exclusive rights to artists, known as copyrights.

Copyright emerged from the protection for publishers upon the invention of the printing press. Prior to the printing press, an elaborate system of censorship and control over scribes existed in England (from whom the U.S. based much of its law). To maintain control and censorship over the mass publication of literature with the printing press, England created a publishing monopoly under the Licensing Act of 1662. After this law lapsed, England granted authors of books the exclusive right to copy their literature for a fixed term under the Statute of Anne in 1710. Upon expiration of the copyright term, a work would fall into the “public domain” – for all to use freely. The underlying theory for copyright assumes creators require an economic incentive to create, absent which culture and society would suffer from a lack of production of cultural works (Landes & Posner, 1989; Nimmer, 2014).

Although England’s law only protected the copying of books in 1710, other uses such as translations and derivative works were later added. Eventually, copyright expanded to protect other types of creations, including maps, musical compositions, and paintings. There is no “international copyright” that will automatically protect an author’s works throughout the world. But, international trade brought about intellectual property treaties, such as the Berne Convention for the Protection of Literary and Artistic Works (1886), which requires that a member country extend the same treatment to the works of nationals of other member countries as are enjoyed by its own citizens. The Berne Convention also obligates member countries to adopt minimum standards for copyright protection. Today, approximately 170 countries have joined the Berne Convention, including the U.S.

In the U.S., the United States’ Constitution provides Congress authority “to promote the Progress of Science and useful Arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries” (U.S. Constitution, art. 1, § 8, cl. 8). Congress utilized this power to enact copyright law and, as with England, it expanded slowly. It now encompasses all “original works of authorship fixed in any tangible medium of expression” (Copyright Act, §102(a)). For works that meet this definition, the Copyright Act grants: (1) The right to reproduce the work; (2) The right to prepare derivative works; (3) The right to distribute duplicates of the work to the public; and (4) For certain works, the right to display or perform the work publicly (Copyright Act, §106). Only the artist, or those deriving their rights through the artist, can rightfully claim ownership of copyright in a work and the rights are limited in time, generally life of the author plus seventy years. The copyright owner may exclusively, or non-exclusively, transfer or license these rights in bulk, or separately, as desired.
The U.S. also grants certain works of “visual art” created after June 1, 1991 two “moral rights” (often referred to as droit moral): (1) The right to attribution, and (2) The right to integrity (VARA, 1990). These rights support “society’s interest in the preservation of works of artistic merit; and the artist’s economic self-interest in preservation of his or her own works so as to enhance his or her reputation as an artist” (Pollara, 2003). VARA specifically defines “visual art” to include a painting, drawing, print, or sculpture, existing in a single copy or in a limited edition of 200 copies or fewer. VARA specifically excludes works made-for-hire and “any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture, or other audiovisual work.” An artist’s moral rights only last for the life of the author and they cannot be transferred or licensed, though they may be waived.

The right of attribution includes: (1) The right to demand the artist’s name be used in conjunction with a display of the artist’s work; (2) The right to prevent use of an artist’s name as the author of a work that she did not create; and (3) The right to prevent use of the artist’s name as the author of her own work “in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation” (VARA, 1990).

The right of integrity includes: (1) The right to prevent intentional distortion or other modification of a work that would prejudice the artist’s honor or reputation; and (2) The right to prevent destruction of a work of “recognized stature.” An integrity violation does not result from modifications due to “the passage of time or the inherent nature of the materials.” Nor does a violation occur due to “modification of a work of visual art which is the result of conservation, or of the public presentation” unless caused by gross negligence (VARA, 1990). Therefore, a museum may choose how to light, frame, and place a work, but may not physically modify it.

Recognizing the potential conflict between an artist’s moral rights and the rights of real property owners, exceptions to VARA exist for works incorporated in a building. For works that can be removed without destroying or modifying the art, the building owner must make a good faith effort to notify the artist of the intended removal and allow the artist ninety days to either remove the work on his own or pay for its removal. When a work cannot be removed without damaging the art, however, the artist has no right to integrity and no right to prevent use of his name with the damaged work if the artist consented in writing to the possible modification of the work due to removal (Copyright Act, §113(d)).

In the U.S., the fact that graffiti and street art are publicly displayed does not relegate the works to the public domain or provide others a license to make use of the art, other than by viewing it.7 For example, Peter Rosenstein authored a book of photographs of graffiti entitled “Tattooed Walls” (Rosenstein, 2006). Neither Rosenstein nor his publisher obtained authorization from the artists prior to publication of the book. As a result, they had to settle with numerous artists who complained of the unauthorized use, including TATS Cru (Gonzalez, 2007).

However, as discussed below, these art forms face three potential hurdles in obtaining and enforcing copyright: (1) They must contain the requisite originality; (2) Their moral rights may be limited due to their irremovable nature; and (3) Their illegality may limit or prevent their protection entirely.

Does U.S. copyright law encompass public art, street art, and graffiti?

To enjoy the benefits of copyright, an artistic work must be an (1) original (2) work of authorship (3) fixed in a tangible medium. Public art, street art, and graffiti easily meet the latter element
as the works are normally affixed to building walls, subway cars, billboards, or some other tangible object within the public’s view. The temporary nature of the works due to removal or destruction does not negate this because a work need only be sufficiently permanent to permit it to be perceived for a period of more than a transitory duration either directly or with the aid of a machine (Nimmer, 2014, §2.03[B]).

Additionally, most public art, street art, and graffiti fall within the definition of “work of authorship,” which includes pictorial, graphic, and sculptural works among its non-exhaustive list. The statute’s definition, however, expressly excludes “words and short phrases such as names, titles, and slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering or coloring . . .” (Copyright Act, §202.1). Therefore, tags and simple throw-ups are likely excluded from protection. For example, New York graffiti artist Michael Tracy painted a roller-skate and the graffiti-styled words of “Skate Key” on a roller-skating rink at the owner’s request. Upon Tracy’s application for copyright registration, the Copyright Office registered the roller-skate drawing (Tracy, 1980), but denied registration to the “Skate Key” work (see Tracy, 1988).

Tags and throw-ups may also lack originality. This element requires that a work be independently created by the author and possess at least a minimal degree of originality (Nimmer, 2014, §2.01). Each individual work need not “promote the arts” to merit protection, but the work must have a scintilla of creativity to meet the low threshold of originality. Similarly, a “work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying” (Feist, 1991: p. 345). Generally, the more elaborate the work, the more likely copyright will protect it. Therefore, tags and throw-ups that simply indicate a name and place with minimal artistic nuances may not contain sufficient creativity. Whereas, works with characters, landscapes, portraits, or written statements, such as graffiti “pieces” and “masterpieces,” likely meet the test of originality.

The U.S. Copyright Office, for example, granted registration to graffiti artist Daniel Reece for his graffiti-styled drawings of the word “Dip” (Reece, 1972). Standing alone, however, each element of Reece’s work would unlikely qualify for copyright protection: (1) The word “dip” is an unprotected word or short phrase; (2) The use of stylized graffiti lettering is an unprotected variation of typographic ornamentation or lettering; (3) The use of certain color schemes is an unprotected variation of color; (4) The use of geometric shapes, such as circles, squares, or stars, to ornament the “i” in “Dip” is an unprotected use of common symbols; and (5) The use of certain background colors and shadowing to the word “Dip” are unprotected variations of color (Reece, 2011). But, when Reece sued Marc Ecko Unlimited for copyright infringement over use of graffiti-styled “Dip” works in the videogame “Getting Up: Contents Under Pressure,” the court recognized that “the form of the lettering at issue is arguably central to the artistic expression of particular words” in graffiti art and, therefore, analyzed these elements for possible copyright infringement. The court reviewed the degree of abstraction, the connectivity, the relative size, and the two- or three-dimensional appearance of the letters (Reece, 2011: p. 28). Notably, the court did not deny Reece’s claims as excluded under the “work of authorship” definition or for lack of originality. Nonetheless, the court ultimately ruled the videogame’s works lacked any substantial similarity to Reece’s works to warrant a finding of infringement due to differences in color, shadowing, letter shapes and styling, use of geometric shapes and backgrounds, and spacing.

In short, public art, street art, and graffiti with sufficient originality should meet the threshold requirements of copyright. However, as discussed in more detail below, VARA adds additional restrictions before an artist can enjoy the benefits of moral rights.
Does VARA protect public, street, and graffiti art?

VARA does not grant rights to all works of art. First, VARA excludes stickers and posters and, therefore, most street art (as defined for this chapter) do not enjoy moral rights.

Second, some artists may have difficulty proving the work has “recognized stature” for the right to prevent destruction (Bougdanos, 2002; Barnett, 2013). VARA does not define “recognized stature,” but the courts hold it requires “(1) that the visual art in question has ‘stature,’ i.e. is viewed as meritorious, and (2) that this stature is ‘recognized’ by art experts, other members of the artistic community, or by some cross-section of society” (Carter, 1994: p. 325; Kwall, 1997).

For example, in Hanrahan v. Ramirez (1998), a group of neighborhood children painted a mural on the side of a liquor store with the owners’ approval. Three years later, the storeowners painted over half of the mural with an advertisement for the store. The artists sued under VARA. The court found the artists to be of “recognized stature” because the piece won a national contest and enjoyed local and national support. Therefore, the court awarded the artists $48,000 and ordered the restoration of the mural.

In contrast, the court in the case of 5Pointz struggled to find recognized stature in many of the artists’ works. The artists highlighted the popularity of 5Pointz as a whole and that certain artists had gained gallery and national attention, but had difficulty illustrating particular works at 5Pointz that had gained national “recognition” (Cohen, 2013). Due to such difficulties, some courts and scholars have called for a lower threshold using community opinion and public interest or removal of the restriction entirely (Martin, 1999; Robinson, 2000; Jones, 2005).

Third, graffiti may be considered “site-specific art” and at least one court has held that VARA does not protect site-specific works (Phillips, 2006). Essentially, for site-specific art, the location of the art is an integral element of the work such that the art is destroyed if moved from its original site (Phillips, 2006; Nordby, 2007; Garson, 2001). Whether incorporation of the “street” in graffiti is essential to the work remains inconclusive among scholars (Riggle, 2010; Bengtsen, 2013). Certainly, some works of graffiti may be site-specific due to placement on a particular building, but this conclusion could differ between viewers and artists.

Moreover, this strict interpretation of VARA to site-specific art has been questioned because VARA does not explicitly, or impliedly, exclude site-specific art. Additionally, relocating site-specific art does not necessarily destroy the work. Further, the “building exception” to VARA suggests that VARA includes site-specific art. Also, an artist’s moral rights can be violated in ways that do not implicate the work’s location or manner of public presentation, such as modification of the work and the right of attribution (Nordby, 2007; Norton, 2008/2009; Cascio, 2009; Spotts, 2009; Kelley, 2011).

Regardless, a tension remains between an artist’s right to use public space and the public’s right to that space. While few would deny an artist the right to paint as he chooses, does an artist have the right to compel the public to accept and display his works by placing them without permission? The next section summarizes the debate on whether street and graffiti artists should enjoy the benefits of copyright given their unauthorized placement.

Does copyright protect illegally created works?

Although many works of street and graffiti art meet the requirements for copyright protection, their illegality creates an equitable and social concern. As a result, the application of copyright to illegally created works remains inconclusive.8

At least one court has raised the issue of illegality in relation to graffiti and copyright. In Villa v. Pearson Education, Inc. (2003), graffiti artist Herman Villa (aka “UNONE”) sued the
publisher of a Tony Hawk skateboarding videogame strategy guide. Villa claimed the guide infringed his rights to reproduce and distribute his work. The court avoided ruling directly on whether Villa could copyright an illegally created work, but stated in dicta that whether copyright protects graffiti "require[s] a determination of the legality of the circumstances under which the mural was created" (Villa, 2003: p. 3). This statement caused some commentators to highlight illegality as a potential defense to copyright infringement (Keller & Cunard, 2005; Smith, 2005; Schwender, 2008).

In contrast, the court in Reece v. Marc Ecko Unlimited (2011), described earlier, did not address the issue of illegality in ruling on Reece’s copyright infringement claims. A similar ruling came in Mager v. Brand New School (2004) concerning street art. Damian Mager’s stylized eyeball stickers adorned many of New York’s billboards before covering the eyes of Carson Daly in a television commercial without authorization. Mager sued and the court noted the stickers placed across the city may have been without authorization and by people other than Mager, but did not weigh that potential illegality in its ruling.

Landowners’ strong real property rights also complicate the application of moral rights to graffiti and street art. Again, the courts’ guidance is contradictory. In English v. B.F.C. & R. East 11th Street LLC (1997), a group of artists turned an empty city lot into a garden and public art space with a number of outdoor murals. When the city sold the lot to a private developer who intended to demolish the building, the artists sought to prevent the destruction of their works under VARA. The court held that VARA does not apply to artwork illegally placed on the property of others when such artwork cannot be removed from the site in question. The court reasoned that enforcing artists’ rights in irremovable art placed on a building without consent “could effectively freeze development of vacant lots by placing artwork there without permission” and would contradict the property rights of owners under the Constitution. A number of other cases have reached the same conclusion in applying state moral rights (see, e.g. Botello, 1991).

In Pollara v. Seymour (2003), the court noted that the decision in English (1997) only applied to works that could not be removed without destruction. In Pollara, artists illegally placed a banner constructed on an individual frame on the property of the Empire State building in preparation for a protest by a public interest group. The banner was easily removed without harm to the art. Although the court found VARA did not apply in this situation because it considered the banner an advertisement excluded from VARA, the court did state: “[T]here is no basis in the statute to find a general right to destroy works of art that are on property without the permission of the owner” (Pollara, 2003: p. 396 n.4).

With limited and varied court decisions on the issue, whether illegality of creation prevents application of copyright to street art and graffiti altogether or limits artists’ moral rights remains unclear. Perhaps as a result of the lack of precedent, many copyright treatises fail to mention graffiti at all (Brown & Denicola, 2002; Nimmer et al., 2006; Demarsin et al., 2009; Stokes, 2011; Goldstein, 2014; Nimmer, 2014) or simply mention its status as criminal without a discussion of the effect of illegality on copyright (Feldman et al., 1986; Lerner & Bresler, 2005).

Yet, some scholars have addressed the issue (Smith, 2005; Morgan, 2006; Rychlicki, 2008; Schwender, 2008; Sandifer, 2009; Davies, 2012; Grant, 2012; Seay, 2012; Lerman, 2013; Roundtree, 2013). Several of these academics have analogized illegality of creation to copyright cases regarding illegality of content (Schwender, 2008; Davies, 2012; Grant, 2012; Lerman, 2013), such as works of obscenity, where the courts have also struggled to find uniformity (compare Mitchell, 1979; Jartech, 1982 with Devil Films, 1998). These commentators argue that copyright should protect illegally created works because: (1) The Copyright Act remains neutral and nothing in the Act renders these works any less worthy of copyright; (2) The courts have historically
disapproved of copyright restrictions; (3) Judges should not be determining public morality and artistic merit; (4) Congress did not authorize an “unclean hands” defense (i.e., a plaintiff may not use the court to benefit from his wrongdoing) to copyright infringement claims; (5) Application of an unclean hands defense could fragment application of copyright to street art and graffiti based on the varying laws and morals of the individual states; and (6) Denying copyright would add little to the existing arsenal of weapons against street art and graffiti (Schwender, 2008; Lerman, 2013).

Granting street art and graffiti the benefits of copyright also raises a number of unanswered questions. Would granting copyright protection increase vandalism or possibly incentivize artists to create more legal works rather than illegal ones? Would the Copyright Office be able to distinguish between commissioned, legal murals and illegally placed works when determining whether to register a work? Should VARA exclude unauthorized works or limit the moral rights offered to such works? Would protection under VARA cause graffiti artists to sue other graffiti artists for damages? (Schwender, 2008; Lerman, 2013).

A number of scholars also argue against copyright in its entirety, as to all forms of art (for a review of arguments see Vaidhyanathan, 2001 and DeLong, 2002) and a few commentators argue that graffiti’s cultural norms and natural rights sufficiently protect their work (Davies, 2012; Roundtree, 2013). Roundtree (2013) particularly notes the similarity of graffiti norms to copyright in that “getting up” acts as registration, a custom against copying exists but allows for fair use, pseudonyms are a right to attribution, and prohibition of partial paint-overs and preservation of recognized works are similar to a right to integrity. In this sense, copyright may be unnecessary in the world of graffiti, but does this adequately protect street artists and graffiti artists in the commercial world?

To this end, a few commentators highlight that these artists create their works not for financial reward, but as acts of rebellion against the law for street credibility, fame, and recognition (Morgan, 2006; Davies, 2012; Grant, 2012; Roundtree, 2013). Additionally, some academics theorize application of copyright to street art and graffiti could stifle creativity and note that graffiti culture flourished and evolved on its own without assistance of copyright. Davies (2012) also fears that copyright enforcement could rob graffiti of its transgressive power and political significance.

On the other hand, merely providing the opportunity for copyright protection and financial gain does not mean that every artist will enforce the protection or solicit their works. But, should an artist wish to enforce his copyright, he should be aware that others are entitled to certain fair uses of his work. A short discussion of fair use and appropriation art follows.

**Infringement, fair use, and appropriation art**

To prove copyright infringement requires proof of (1) ownership of a valid copyright, and (2) copying of original elements of the work. Copying contains two components: (1) Copying, and (2) Unauthorized appropriation (Feist, 1991; Nimmer, 2014, §13.01). But, the Copyright Act grants limited rights in works of art— not an absolute monopoly. Artists’ rights are balanced in two important ways with the freedom of speech, the ability to build on another’s work, and the public’s interest in a vast culture of the arts to use and explore.

First, copyright only protects the “expression” of a work of authorship, not its “idea”—this is known as the idea/expression dichotomy (Copyright Act, §102(b); Nimmer, 2014, §2.03). For example, copyright does not protect the idea to paint a woman sitting in a chair, but it does protect the particular expression in an actual painting of a woman sitting in a chair.

Second, the Copyright Act expressly permits “fair use” of copyrighted works for news, teaching, criticism, and the transformation of another’s work into something new and different.
Does copyright law protect graffiti and street art?

(Copyright Act, §107). Such an opportunity for fair use “has been thought necessary to fulfill copyright’s very purpose, ‘to promote the Progress of Science and useful Arts’ ” (Campbell, 1994: p. 575; McEneaney, 2013). Thus, the “fair use doctrine” prevents the rigid application of copyright law in such a manner that creativity is stifled and it prevents encroachment upon the freedom of expression protected by the First Amendment.

In making a fair use determination, the courts weigh: (1) The purpose and character of the use, including whether such use is of a commercial nature or for nonprofit educational purposes; (2) The nature of the copyrighted work; (3) Whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole is reasonable in relation to the purpose of the copying; and (4) The effect of the use upon the potential market for, or value of, the copyrighted work (Campbell, 1994).

Direct copying for such purposes as art criticism, education, and news, therefore, does not normally violate copyright. However, the line between an infringing derivative work and fair use in the arts can be tricky9 and the difference between wrongful appropriation and legal appropriation often turns on the transformative nature of the subsequent work under the first fair use factor (Fisher et al., 2012). A work is transformative if it alters the original piece sufficiently to create a new expression, meaning, or message. The more transformative the new work, the less significant are the other fair use factors (Campbell, 1994).

For example, Derek Seltzer created a poster called “Scream Icon” and placed it on a wall in Los Angeles. The music group Green Day incorporated the image, without permission, into a collage of other posters and graffiti in a video backdrop used at live concerts. In Seltzer’s copyright lawsuit, the Court found the changed use and placement conveyed “new information, new aesthetics, new insights, and understandings that are plainly distinct from those of the original piece.” As such, the court held Green Day’s “new” work was transformative and not infringing (Seltzer, 2013).

On the other hand, street artist Thierry Guetta (aka Mr. Brainwash), featured in the Banksy produced movie, Exit Through the Gift Shop, used a photograph of the music group Run DMC by Glen Friedman without authorization in four separate works, including a simplified stencil depicting the three members of Run DMC. Friedman sued and the court found Guetta copied almost all of the photograph without significant transformation except use of a different medium. Therefore, the court ruled Guetta’s use infringed on Friedman’s copyrighted photograph (Friedman, 2011).

As these cases suggest, appropriation art has flourished in the street art and graffiti worlds. The public, art critics, and academics have enjoyed a great narrative over appropriation art, which has expanded greatly due to technological advances and the Internet. But, the basic point here is that street and graffiti artists should analyze the transformative nature of any new work that appropriates another’s art as its base and that simply copying works into a new medium is likely insufficient transformation to avoid copyright infringement.

Conclusion

Copyright law provides a mechanism for artists to seek compensation for their artistic endeavors by providing the right to reproduce, distribute, display, and make derivative works. Without considering illegality, original works of street art and graffiti generally meet the threshold requirements of copyright eligibility and copyright owners may enforce these rights. Under VARA, copyright also grants artists of particular works of “visual art” the ability to demand attribution for their works and to prevent their works from modification or destruction. VARA, however, likely excludes most street art from these benefits because street art (as defined
for this book) includes the expressly excluded works of stickers and posters. And, many graffiti artists may have difficulty showing their works have obtained the “recognized stature” required to prevent destruction. But, all of these rights may be unenforceable or severely limited due to the illegal nature of the art’s creation. The case law on this issue, however, is limited, contradictory, and provides minimal guidance to artists of these genres.

Additionally, street and graffiti artists must weigh the risk of losing anonymity, possible criminal prosecution, and potential civil lawsuits before deciding to enforce their copyrights. Although seeking compensation from commercial infringers may prove profitable (e.g. Tracy won $65,000 for Skate Key, Inc.’s unauthorized uses), street culture and the norms of graffiti provide an arena that may be ill-suited to copyright. Imagine well known and respected graffiti and street artists King Robbo and Banksy fighting in the courts over monetary damages rather than reputations and street credibility in their recent graffiti war (Fuertes-Knight, 2013).

In the end, graffiti artist Eye Six probably said it succinctly:

This graffiti art is vulnerable to direct public response in ways that city administered ‘public’ art is not . . . [G]raffiti writers make no claims as to protecting, preserving, or profiting from their public art. They own and control their throw ups and pieces less than they simply expose them to public appreciation (or condemnation).

(Ferrell, 1996: pp. 174–175)

Notes

1 For example, California Penal Code section 594 defines graffiti as “any unauthorized inscription, word, figure, mark, or design that is written, marked, etched, scratched, drawn, or painted on real or personal property.”

2 For example, California criminalizes the act of graffiti, the possession of materials used for graffiti artwork with the intent of defacing property, and the sale of spray-paint to anyone under eighteen (California Penal Code §§594-594.2, 640.6-640.7). States without specific anti-graffiti laws may still prosecute graffiti artists under laws prohibiting trespass, destruction of private property, nuisance, or mischief.

3 The U.S. passed a resolution in 1783 recommending the several states to enact protections to authors or publishers of books. The first federal copyright act in 1790 protected authors of books, maps, and charts. Congress expanded copyright to include paintings, drawings, chromolithographs, and statues in 1870. The Copyright Act of 1909 expanded protection to “all the writings” of an author.

4 Many countries grant similar rights, although some do not confer a display right and many grant stronger moral rights (droit moral) and offer resale rights (droit de suite) (Nimmer, 2014, §17.09). In the U.S., only California offers a resale right (California Civil Code, §986).

5 In the U.S., copyright in a work becomes the property of the artist immediately upon creation. When multiple artists jointly create a work, all of the co-artists own the copyright unless there is an agreement to the contrary. For works created as part of a periodical or other collective work, the copyright in each particular work falls first to each separate contributor and is distinct from the copyright for the collective work as a whole. Under the work-for-hire doctrine, however, copyright ownership starts with the person who hired the artist and the employer, not the employee, holds the copyright. Registration is not necessary to own these rights, but registration provides the court jurisdiction over an infringement lawsuit and the right to statutory damages, attorneys’ fees, and costs of suit if the owner prevails at trial (Copyright Act, §113(3)).

6 For works created after January 1, 1978, the term of protection continues for the artist’s lifetime (or the last surviving artist of a co-authored work) plus seventy years. For works done anonymously or under a pseudonym, the term extends for the lesser of ninety-five years from first publication (i.e. the distribution, or offer of distribution, of copies of a work to the public) or 120 years from the date of its creation unless the artist identifies herself in the registration records of the Copyright Office. Moral rights last for the life of the author only. All of these rights end upon expiration of the term and the work then falls into the public domain for all to use.
An exception is made for the photographing of architectural works in buildings, but not for art (Copyright Act, §120(a)). Some countries, however, allow the photographing and commercial use of photographs of publicly displayed art (see, e.g. Copyright, Designs and Patents Act, 1988, c. 48, sec. 62 (U.K.)).

For example, Alexandre Veilleux, aka Alex Scaner, seeks $45,000 in damages in a recent lawsuit he filed against the television station Radio-Canada and the production company Production Aetios Inc. for use of his graffiti in the opening scenes and advertisements for the show “30 Vies.” Sébastien Pigeon, vice-president of legal affairs for Aetios, stated:

The judge will have to decide whether someone who creates a work illegally like that can then benefit from the protection of the Copyright Act to demand payment . . . Everyone knows the adage that crime doesn’t pay; he committed an act that is not permitted by the law and is trying to profit from it afterwards.

(Hamilton, 2014)

Compare artist Jeff Koons’ mixed-media artwork using images from an advertisement that the court found not infringing (Blanch, 2006) with Koons’ painting based on an everyday couple’s family portrait where the court found infringement (Rogers, 1992). In the recent case of Cariou vs. Prince (2013), the court found placing purple guitars and eyes on photographs of Rastafarians sufficiently transformed the works such that fair use precluded copyright infringement. For further reading, Fisher et al. (2012) analyze the litigation between street artist Shepard Fairey and the Associated Press over the Obama Hope poster and provide a fine primer on fair use, appropriation art, and copyright.

References


Does copyright law protect graffiti and street art?


**Legal citations**


Blanch vs. Koons, 467 F.3d 244 (2006).


California Civil Code (Lexis 2014).

California Penal Code (Lexis 2014).


Cariou vs. Prince, 714 F.3d 694 (2013).


United States Constitution.


**Copyright registrations**
