

{FEATURE ARTICLE}



Street Art: Another Brick in the Copyright Wall

“A visual conversation between many voices”, street art is “colourful, raw, witty”¹ and thought-provoking... however perhaps most importantly, a potential new source of income for illustrators. Here, Melbourne-based copyright lawyer, Sharon Givoni, considers how the laws relating to street art may be relevant to illustrators. She tries to make you “street smart” in an environment where increasingly such creations are not only tolerated, but even celebrated.

1 *Street Art Melbourne*, Lou Chamberlin, Explore Australia Publishing Pty Ltd, 2013, Comments made on the back cover.

It canvasses:

1. copyright issues;
2. moral rights laws; and
3. the conflict between intellectual property and real property.

Why this topic?

One only needs to drive down the streets of Melbourne to realise that urban art is so ubiquitous that the city has been unofficially dubbed the stencil graffiti capital.

Street art has rapidly gained momentum as an art form in its own right. So much so that Melbourne-based street artist Luke Cornish (aka E.L.K.) was an Archibald finalist in 2012 with his street art inspired stencilled portrait.¹ The work, according to Bonham’s Auction House, was recently sold at auction for AUD \$34,160.00.²

It is therefore becoming increasingly important that illustrators working within the street art scene understand how the law (particularly copyright law) may apply.

Colour in our streets

Bars, cafes, hotels and even local councils are formally commissioning works for indoor and outdoor surfaces, bus stops, walls, bridges and the like. Basically, any surface that can be painted on is a potential “canvas”.

The corps get creative

Some companies have tried to embrace this new art form, and are hiring street artists to paint advertisements for them on the streets in an attempt to appeal to a younger audience. Companies such as Coca Cola, Smirnoff Vodka and Domino’s Pizza have all utilised street art as a part of their advertising campaigns.³

1 <http://www.artshub.com.au/news-article/news-article/news/visual-arts/father-bob-goes-under-the-hammer-197288>.

2 <http://www.bonhams.com/auctions/21294/lot/32/>.

3 <http://www.brandmarketers.com/archives/street-art-goes-cor>



Stencil seen in the London suburb of Shoreditch. Photo Credit: Chris Scott Artist: Unknown

In fact, as these campaigns follow the route of some traditional street art, and are often done without the permission of the relevant council, there can be legal issues for the company involved. This was the result for IBM’s “peace, love and Linux” campaign which resulted in the company reportedly agreeing to pay a USD \$100,000.00 fine (leaving the legalities aside, this does lead one to wonder whether “all publicity is good publicity”?).⁴

Justin Beiber’s fancy work

Emphasising the impact street art is having on modern day culture, a Gold Coast hotel recently went to war with a local council over street art produced by pop-sensation Justin Beiber on the outside walls of the hotel. While the hotel was thrilled with the art featuring cartoon faces in fluorescent paint, a colourful addition to the Queensland arts scene, the

porate <http://inhabitat.com/coca-colas-graffiti-hits-historic-new-orleans-neighborhoods-ahead-of-final-four/>.

4 <http://www.zdnet.com/ibm-gets-100000-fine-for-peace-love-and-linux-campaign-3002099980/>.



Collaborative mural in Hosier Lane, Melbourne. Photo Credit: Chris Scott. Artwork by: Ha Ha, Blek Le Rat, Drew Funk, Stormie Mills, Reko Rennie, and Vexta, and others

council took quite a different view and ordered Bieber to return to remove the graffiti.⁵ The case is an example of how a council can insist on removal of graffiti in private spaces if it's visible from public spaces.

Working the street

However, unlike the above case study, the majority of art created by visual artists (not musical artists!) is being created legally and can be an additional and quite legitimate source of potential income.

Illustrators specifically might be involved in the planning or design stage, or even doing the painting themselves.

Melbourne-based artist, Rowena Martinich⁶, who refers to herself as a “public artist”, says that there is work out there for illustrators on a commission basis. This can be from community groups, local government or from private clients. While it is a viable way of creating an income stream, Rowena warns that as a general rule, it cannot be relied upon solely to make a living.

Street myth busters

Having said this, it is valuable and just as creative as any other art and for this reason, street art is generally protected in the same way as other art under Australian copyright law, provided it is original and substantial enough.

Moral rights laws also apply (which protect the artists' rights in their personality) as well as the laws relating to the legality of painting on walls in the first place (even if you own the building - more about this below).⁷

⁵ <http://www.news.com.au/entertainment/celebrity-life/gold-coast-hotel-proud-of-its-justin-bieber-graffiti/story-fnk-822dn-1226771041188>.

⁶ <http://www.martinich.com.au>

⁷ Various Councils around Australia may require you to obtain permits for any street art or paintings that can be seen by the public.

Types of street art ...

What we are looking at is graffiti, aerosol art and even street installations such as sculptural art.

Types of street art

Examples of street art include:

Murals – Large, usually planned works, often created by several artists working together.

Stencils – Pre-cut stencils used with aerosol paint to quickly apply designs to a surface.

Paste-ups – A pre-prepared work on paper applied to the surface and held in place with glue.

Bombing and Tagging – Usually stylised versions of the artist's name, often painted without permission.

Stickers – Pre-made stickers applied to surfaces to convey a message, or simply showing the artist's name.

Yarn bombing – covering objects with crocheted or knitted wool.

Installation art – Covering objects installed or created within an environment such as crocheted or knitted wool (yarn bombing) or sculptures made from a range of materials.

Owning the wall, but not the work

So we know what street art is – what about owning it?

It is important to note that if you paint on someone else's wall you will not own the physical painting on that wall as this remains with the property owner.

However, the owner of the building will not necessarily own the copyright of the painting on the wall as that often remains with the artist.

Illustrators may already know this, but it is an important concept to continuously bear in mind particularly if you see that work being reproduced in further contexts.

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Pictured above is artwork painted on the outside of Follow the Leader café in Ripponlea, Melbourne. Taken with kind permission from café owner, Michael Dunne. Photo Credit: Chris Scott. Artwork by: Mike Angliss

Carving up permissions

If an illustrator is involved with a piece of street art they may spend hours, if not days, working on it, so on this basis should be able to control its future use.

Therefore street artists who paint walls on a commissioned basis should clearly stipulate the terms on which their art can be reproduced if they have been paid to paint the wall (and do not want their art used for other purposes).

For instance, the owner of a wall may only be permitted by the artist or illustrator to reproduce images of the art in relation to promoting the venue, but not for other purposes such as selling the image to a surf wear company to print on t-shirts. Sometimes, the building owner will provide the contract, however the terms can be negotiated – you don't need to agree to everything. Think it through before signing.

Bringing the street home

Leaving aside copyright, another question that is asked is whether you can legally brighten up your own property with street art?

Strange as it may sound, the answer is not a straight yes. If you live in Melbourne, for example, you may need a permit to prevent the site potentially being cleaned up by the council.⁸

Also, on this point, bear in mind that if an illustrator designs the art for the wall, but someone else paints it, there may be a situation of joint copyright ownership.

In Melbourne for example, legal street art can sometimes be identified by a permit number publicly displayed on the

⁸ <http://www.melbourne.vic.gov.au/ForResidents/StreetCleaningandGraffiti/GraffitiStreetArt/Pages/Whatisstreetart.aspx>.

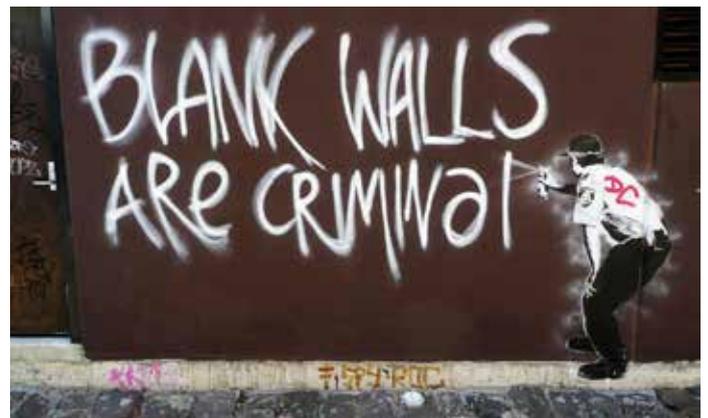


Mural in alley off Inkerman Street, St Kilda East. Photo Credit: Chris Scott. Artwork by: Rase and others. (Other artists involved in this work may include Mayo, DVATE, Proxela and Aves.)

site of the artwork or under a street art register (however, somewhat ironically they often get painted over by other artists).⁹

Change is on the horizon

For artworks within the Melbourne central business district, the future may be looking good. The City of Melbourne recently released a draft graffiti management plan which is aiming to remove street art from the definition of graffiti¹⁰ reflecting an “if you can't beat 'em, join 'em” attitude by city councils who have woken up to the fact that more rate payers' money is going toward cleaning up illegal graffiti such as tagging.



A stencil/aerosol artwork seen in an alley off Kerr Street, Fitzroy, Melbourne. Photo Credit: Chris Scott. Artwork by: Form. Note: There is debate online as to whether this piece is by Form or Banksy, though the prevailing view is that it is by Form.

⁹ The City of Melbourne has established a street art register to help people locate legal sites that have a street art permit. See <http://www.melbourne.vic.gov.au/ForResidents/StreetCleaningandGraffiti/GraffitiStreetArt/Pages/Registeredstreetartapplications.aspx>.

¹⁰ <http://participate.melbourne.vic.gov.au/projects/keeping-our-streets-clean>.



Interesting Trivia

It seems that surprising things happen at the weirdest of times for creative people. For example, Banksy apparently stumbled on one of his best ideas when he was hiding from police after being chased for attempting to paint “Late Again” in silver bubble writing on the side of a passenger train. To escape capture, he hid under a truck and thought about how he needed to find a way to paint more quickly to avoid such situations. Looking up at a stencilled plate on the bottom of the fuel tank, he found the solution he was looking for. From there, his well-known stencilling style evolved.

- *Banksy Book, Wall and Piece*, p 13, 2005; Banksy realised that to get away with this kind of graffiti, he needed to cut his graffiti time in half.

“Nobody listened to me until they didn’t know who I was”

–Banksy

Above: Banksy stencil in “Revolver”, a bar in Prahran, Melbourne. Photo Credit: Chris Scott. Artwork by: Banksy

When talking street art, no article on this topic would be complete without reference to the king of stencil art, Banksy – the world’s most famous street artist.

Incredibly, despite having done thousands of paintings (some on quite a large scale and most in prominent public spaces), it is said that no one knows his true identity (not even Google!).

Banksy’s art which revolves around political and social themes such as anti-war, anti-authoritarianism, anarchism, greed and poverty has become highly valuable over time.¹¹ So much so in fact that in 2012, one building owner in the UK ripped out a chunk of his wall on which Banksy had painted a young boy sewing Union Jack bunting on an old-fashioned sewing machine to sell it as a stand-alone piece of art. This left a rectangle of exposed brick, much to the locals’ dismay (many people had become so fond of the piece that they felt part of the community had been taken away).

The media has reported that the piece was ultimately sold at an auction house for USD \$1.1 million.¹²

Laughing all the way to the Bank(sy)

The UK example above was not the first time Banksy’s work has sold for an astronomical sum. Several years earlier, three of Banksy’s paintings sold at a Sotheby’s London auction, all reportedly for over six figures. Banksy responded with his usual dry wit by posting an image on his own website¹³ with the caption “I Can’t Believe You Morons Actually Buy This Shit”.¹⁴

Public viewing – private buying

Banksy’s sentiment is not uncommon amongst street artists. Melbourne-based street artist, Ross Thomasson, states that “art on the street is created for everyone out there to consume, whether they love it or hate it. Once you take it off the street and out of the public eye, it loses its edge and its worth diminishes (even if its monetary value may increase)”.

Adding further weight to this point, Banksy has himself apparently commented in a rare interview that “commercial success is a mark of failure for a graffiti artist.”¹⁵

The moral rights of street artists

Despite the fact that aerosol artists may thrive on the mystique that arises out of remaining anonymous, professional artists who paint street art for a living, may take the view that being recognised and attributed for their work is all important, particularly as this is what could lead to them getting their next job.

This is where moral rights fit in.

Moral rights are, however, very distinct from copyright.

¹³ <http://www.banksy.com/>.

¹⁴ <http://www.forbes.com/sites/daniellerahm/2013/10/22/banksy-the-20-million-graffiti-artist-who-doesn't-want-his-art-to-be-worth-anything/>.

¹⁵ <http://www.villagevoice.com/2013-10-09/art/banksy-better-out-than-in-new-york-residency-street-art-graffiti/full/>

¹¹ <http://www.forbes.com/sites/daniellerahm/2013/10/22/banksy-the-20-million-graffiti-artist-who-doesnt-want-his-art-to-be-worth-anything/>.

¹² <http://hypebeast.com/2013/6/banksys-union-jack-slave-labour-mural-sells-for-1-1-million-usd-at-private-auction>.

Rather than having an economic focus, they protect the artist's integrity. You can't sell or licence your moral rights (as you can with copyright). They stay with you as the creator.

On a practical level, moral rights can be difficult to enforce without going to the extent of taking legal action. Even if you do win such an action, there is a question mark as to what the damages may be. For this reason, it is advisable for illustrators to remind the commissioning party that you have moral rights and the need to be properly attributed, if this is important to you.

The two moral rights that are most relevant to illustrators are the right to be attributed and the right to prevent derogatory treatment (right of integrity) of their works. So the message is, if you do see postcards or other reproductions that feature your art, remember that your name should appear on them as the artist. Interestingly enough, strictly speaking, it also means that if another artist was to paint over your work, or part thereof, that would potentially amount to a breach of your right of integrity. Let's examine a case on point...

Historic graffiti monument in New York gets destroyed

In a first of its kind case, a famous building called 5Pointz based in New York which featured hundreds of beautiful art works on the walls was simply painted over one night.

It all started back in 1992 when the property owner and local artists conceived a project called 5Pointz Aerosol Arts Center, Inc.¹⁶

The building became so prestigious that it attracted aerosol artists from around the world from as far away as Kazakhstan, Australia, Japan and Brazil who were honoured to be asked to add their own masterpieces to the venue.¹⁷

5Pointz has apparently been listed in every major guidebook covering New York City and has been included in hundreds of travel guides, and hundreds of tourists have travelled there every week.

The legal dispute has been waging since 2010 when the building owner decided to pull down the building only to replace it with a high rise apartment complex.

What happened?

Seventeen artists took legal proceedings in the United

¹⁶ View website at 5pts.com. 5Pointz concerned an application for an injunction by a group of artists whose work appeared on the 5Pointz building, against the owner, Gerald Wolkoff, to prevent the destruction of 24 works of art. Judge Frederic Block decided not to grant a preliminary injunction.

¹⁷ Complaint at page 9, paragraph 57, *Cohen and Ors v G & M Realty L.P. and Ors*, Case No. 13-CV-5612 (FB) (JMA) ([United States District Court, Eastern District Of New York] [2013]).

States District Court to save their works from destruction.¹⁸

Ultimately, despite protests and legal action from the street artists, and a temporary halt to the building being pulled down, the Judge found that he had no choice under the law other than to give a brutal ruling that the building owners had a right to take down the works and build on their own property, however the media said that he was also quoted as saying:

I love the work and it's going to tear my heart out to see it torn down, but as a judge I have to apply the law... The building, unfortunately, is going to have to come down.¹⁹

What has happened since?

On 18 November 2013, this whole part of history was lost, when the 5Pointz building was unceremoniously white-washed through the dark of the night, with police standing guard over the whole process. The emotional saga has waged on with people being arrested for tagging over the newly white walls.²⁰

What does Australia's Copyright Act have to say on the matter?

It's interesting to note that the moral rights provisions of the Copyright Act specifically address the issue of art on buildings.

A building owner is required to give notice to the artist before the building is relocated, demolished or destroyed. However, so long as the notice rules set out in the Act are specifically complied with, this can be a defence to infringing an artists' right of integrity.²¹

The copyright symbol

On a final note, a word about the copyright symbol. You do not need to display it to be protected but it does serve as a reminder to others that you are asserting your rights and it is maybe for this reason that street artists are increasingly displaying it such as the work by Drew Funk located on a wall located in St Kilda East:



Photo Credit: Chris Scott. Artwork by: Drew Funk.

¹⁸ Complaint at page 1, *Cohen and Ors v G & M Realty L.P. and Ors*, Case No. 13-CV-5612 (FB) (JMA) ([United States District Court, Eastern District Of New York] [2013]).

¹⁹ <http://www.nydailynews.com/new-york/queens/judge-set-demolition-5pointz-article-1.1511120>.

²⁰ <http://www.timeout.com/newyork/things-to-do/five-people-arrested-for-tagging-white-washed-5-pointz-building>.

²¹ Copyright Act 1968, Section 195AT



An example of a successful project

In June 2013, the owners of the Eureka Hotel in Geelong were looking to give a makeover to their venue with street art and through Alleycat Creative, ultimately, a team of some eighteen street artists were commissioned to install their works directly upon the walls and room interiors. A white, bland space was suddenly transformed to a colorful venue full of life and energy which continues to provoke curiosity and dialogue amongst patrons of the hotel.

Left: Commissioned art work painted by Melbourne Street Artists Kaffeine and Lucy Lucy for the Eureka Hotel, Geelong. Photo Credit: Romy Paltoglou alleycat.creative@bigpond.com . Artwork by: Kaffeine and Lucy Lucy

Lending a helping hand – Alleycat Creative

There are consultants that can help illustrators get commissions for proper remuneration.

One such business is the “Alleycat Creative” based in Melbourne. Founder, Romy Paltoglou, established the business in 2010 after noticing the reduction of hand-made elements in interior design and architecture. “I wanted to inject something raw and hand crafted back into the design aesthetic and bridge the gap between architects and designers and the underground art scene” she says.

Alleycat Creative matches artists to clients and curates commissioned street art works to complement and transform spaces. Each stage of the artistic process is clearly defined and properly remunerated to ensure utmost respect to the creative process and output.

Conclusion

Just like any other profession, illustrators need to adapt to current trends. While in the early days, street art may have been viewed as illegal and unsavoury, and associated with vandalism, this new form of “open-air exhibition space”²² now has a solid place of its own.

Perhaps, most relevantly, illustrators need to be aware that the output of their creativity can translate itself into this ever-expanding art form on a paid basis. However, it is equally important that they are aware of their rights.

Take away tips:

- If you create or design artwork in public spaces, you generally own the copyright unless there is a contrary agreement
- Illustrators have certain moral rights such as the right to integrity and attribution which attach to their artworks
- Consider engaging consultants who can assist you in obtaining commissions

About the writer



Sharon Givoni is a Melbourne-based intellectual property lawyer with clients in the illustration and graphic design industry. She has run her own legal practise for some 20 years and has made several television interview appearances and spoken at the Illustrator’s Australia annual conference. Sharon can be contacted by email (sharon@iplegal.com.au) or called on 0410 557 907 or 03 9527 1334. Her website is located at www.sharongivoni.com.au.

sharongivoni.com.au.

Profile Image Photo Credit: Martina Gemmola, Photographer.

IMPORTANT DISCLAIMER: *This article is of a general nature only and must not be relied upon as a substitute for tailored legal advice. Attribution of street artists: While all attempts have been made to properly attribute the artists of artwork featured in this article, due to the nature of street art, this is not a fool proof process.*

The writer wishes to thank Chris Scott and Nicholas McConnell for their assistance with this article. **1**