

Legally Speaking: Street Art (Pt 2)

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For this final part on street photography intellectual property lawyer, Sharon Givoni, has shed some light on instances where photographing art – particularly public art – can land a photographer in hot water. And it's not just copyright that a photographer may be infringing!

[Click here](#) to read part one.

What about other artworks?



'Be Free' paste-up stencil in Degraeves Street, Melbourne. Photo Credit: Chris Scott. Artwork by: Be Free.

Street art is not the only type of art that can be captured by copyright laws and the principles about featuring other people's artwork in your own photographs also apply to ordinary paintings.

For example, you could be infringing copyright in a painting if it features in the background of a photograph which is used for commercial purposes, like publication in a book, newspaper, magazine or online. In this situation, you can own copyright in a photograph whilst simultaneously being in breach of someone else's copyright by using that photo.

Melbourne-based artist, Rowena Martinich, is as familiar with copyright concerns as most photographers. She has enforced her copyright on a number of occasions, including one occasion after her paintings were published in a magazine without her permission. The photographer should have known better!

An important factor is whether the artwork in the photo is the main feature of the shot. If it's incidental, it might not be an issue.

Moral Rights for Street Artists

Attributing street artists and treating work with respect is a separate matter to copyright.

Copyright is an economic right that is associated with reproducing and exploiting work that can be said to have a commercial value. On the other hand, displaying the correct artist's name on or next to the work and treating the work with respect generally comes under the umbrella of moral rights, which are personal rights. The original author always keeps these rights – they cannot be assigned or sold.

The two moral rights that are most relevant to street artists are the right to be attributed and the right to prevent derogatory treatment of works (e.g. painted over, altered, or moved to another place if the art was intended to be site specific when it was created). Notably, there is also a right against false attribution.

The right of attribution is an interesting issue for graffiti artists as many of them wish to remain anonymous, hence the use of pseudonyms.



Melbourne street artist and ex-graphic designer, Rone, sells his artworks commercially so you'd want to be careful about reproducing his images in any context without permission. Artwork by: Rone. Source: supplied.

Reasonableness as a defence

Moral rights laws allow for a general defence of reasonableness, meaning that even if you have infringed someone's moral rights, you may not breach someone's moral rights if your conduct in relation to the work was reasonable. Photographers should be mindful of this

defence when taking photographs, as what is considered to be ‘reasonable’ may be determined by reference to several factors. These include the context, manner and purpose for which the work was created, the nature of the work, and the accepted industry practice.

A case on point

One of the earliest moral rights decisions in Australia is the case of *Meskenas v ACP Publishing Pty Ltd* [2006].

This case shows that publishers as well as photographers can get into legal ‘hot water’ for not attributing the author of paintings which feature in their photos, and demonstrates that photographers need to be mindful of keeping records of the names of the artists whose works may appear in their images.

The dispute involved *Woman’s Day* magazine, which had published a photograph of Princess Mary of Denmark standing beside a portrait of renowned heart surgeon Victor Chang, painted by 89 year old artist, Vladas Meskenas. The caption incorrectly attributed the painting to another artist.

Meskenas was distressed about this wrongful attribution and repeatedly contacted the magazine seeking an apology.

When the magazine did not respond to his calls and legal letters, Meskenas issued legal proceedings claiming that the magazine publisher had infringed his moral rights.



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: Chris Scott. Artwork by: Mike Angliss.

While the magazine had argued that it had not intended to make the error, the artist won the case and the magazine publisher was found to have falsely attributed the artist.

As a result, the magazine publisher (ACP Publishing Pty Ltd) was ordered to pay the artist a sum of \$9,100. Out of this, \$8,000 was to compensate the artist for a breach of his moral rights. The judge was influenced by the evidence that no apology was provided by *Woman’s Day*, despite approximately 90 calls being made by the artist to the magazine. The judge criticised the publisher’s ‘consistent failure to provide the applicant with the apology and retraction that he had requested’, which justified an award of ‘exemplary damages which are punitive in nature’.

‘So far, there have been very few court cases involving moral rights. When moral rights have arisen in court, it is usually in the context of a copyright action,’ Arts Law solicitor, Joanne Teng wrote. ‘The Meskenas case shows that where copyright law fails, artists can still have an action in moral rights.’

Mekenas’ lawyers submitted that the problem could have been avoided with a simple apology and proper attribution, stating ‘if there had been a retraction and apology there would have been no court case’.

One of the lessons from this case is that the publisher can also be liable for infringement of moral rights. Photographers should be mindful that if they feature other people’s artwork in their own photos, they need to keep records relating to who painted them to avoid this legal issue from arising.

Conclusion



An example of classic Melbourne street art. Source: supplied.

Ultimately, intellectual property laws relating to photography of street art are largely untested in Australia. Factors that are likely to be relevant are the prominence of the street art in the photo, whether the photo is used for commercial purposes and whether that artist has been properly attributed.

Street art can look great as a feature in photography, but be wary. Just because it is displayed in a public space does not mean that you can freely take photographs of the work and reproduce it as your own.

Take Away Tips

- Whether street art is illegally created or legally commissioned, the artist will own copyright in what they paint.
- When it comes to reproducing someone’s artwork, there is no set percentage that can be applied to decide whether copyright infringement has taken place. It is generally a question of fact and degree.
- Taking a photograph of a copyrighted work can amount to copyright infringement depending on a number of factors, including the focus of the image.
- If you sell photographs of street art, the artists may expect a fee. Moreover, the law may entitle them to get one.
- Moral rights are personal in nature (you can’t sell them).
- If you decide to use street art as part of your photograph, ensure that you properly and

accurately credit the street artist.

- Be aware that not all artists will be happy with your use of their art.
- The principles that apply to using street art in photography also apply to ordinary paintings.

About the author

Sharon Givoni runs a legal practice based in Melbourne and advises clients in the photography and art industry Australia-wide. She is set to release her book, *'Owning It: A Creatives Guide to Copyright, Contracts and the Law'*, on Thursday April 9. [Click here](#) for more info. Sharon can be contacted on (03) 9527 1334 or 0410 557 907 or email: sharon@iplegal.com.au.

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