

## Legally Speaking: Street Art

Intellectual property lawyer, [Sharon Givoni](#), spends a vast amount of time working with professional photographers. While most cases involve the photographer taking legal action, they can also easily find themselves as the defendant. One example is when photographing street art, and Sharon has kindly taken the time to discuss this area of law.

Street art has gained credibility as a legitimate way for artists to communicate their works to the public outside of the confines of the mainstream art world.

The art takes various forms, ranging from bright alleyways to large-scale murals, sanctioned and unsanctioned alike.

‘More than ever before, photographers are an essential part of this scene,’ Lou Chamberlin wrote in her book, *Street Art Melbourne*. ‘Known as paint spotters, they spend their spare time chasing and documenting new pieces as soon as they go up.’



*This photograph taken by Chris Scott shows graffiti in an incidental fashion*

A consequence of this, however, is the raft of legal issues that could potentially arise for photographers of street art.

### Imagine the following scenarios:

- You photograph street art and reproduce it on a canvas with other images that you superimposed to create ‘art’ which you sell at a gallery. You are then surprised to receive a letter of demand from the street artist’s lawyer claiming a share of the sale.
- You conduct a shoot for a magazine in an alleyway in Melbourne. In the background of the shot is some street art. Will publishing the photographs be an infringement of copyright? What if it is impossible to determine who created the art?
- You take photographs of street art, frame and sell them. An artist calls you and complains that he or she should have a right to be named as the artist or author of the work, as you have infringed their moral rights.



*Photo: Mallory Holley  
Photography. Artwork: Cujo*

### So what are moral rights anyway?

Many artists have heard of the concept of moral rights but there is some confusion as to what the phrase actually means. First, it must be pointed out that moral rights are separate to copyright.

While copyright law is essentially economic in nature, in that they recognize the right of the copyright owner to be remunerated for uses of their work, moral rights are personal in nature as they recognize the connection between a creator and his or her work and to an extent protect that connection. Put in other terms, they recognize that art is or can be seen as an extension or the artist’s personality.

Therefore, it is important to note that just because the artworks are in a public place; it does not mean that you will escape any potential risk of infringing someone else's copyright or moral rights.

### **Another brick in the copyright wall**

Chamberlin is also a photographer and artist herself. She describes street art as 'colourful, raw, controversial or witty – because of its transient nature, street art is best recorded through photographs.'

While the term 'street art' brings to mind graffiti artists spraying on walls in the dead of night, it also encompasses paintings, stencils, paste-ups, stickers, installations, eco-graffiti, commissioned murals, and 'tags' – which involve stylised representations of the artist's name or pseudonym.

It doesn't stop there, either. Some street artists even create structures out of plastic crates or perform what is called 'yarn bombing' – where items in public, such as trees or bike racks, are covered in colourful crochet.



*Illustration 1: A classic collaborative mural in Hosier Lane, Melbourne. Photo: Chris Scott. Artwork: Ha Ha, Blek Le Rat, Drew Funk, Stormie Mills, Reko Rennie, Vexta, and others*

### **Walls are the new canvas but what does this mean for photographers?**

Australian copyright law permits you to photograph buildings and sculptures if they are permanently situated in a public place.

However, this exception does not extend to photographing artistic works such as street art, and for photographers.

If someone paints something on a wall, it's protected by copyright law like any other painting or artwork. Under the *Copyright Act 1968 (Cth)*, artists have the exclusive right to reproduce the artwork (whether on a canvas, on the internet or otherwise) no matter what surface that artwork is painted on.

When you photograph street art, you are potentially reproducing the artwork and this could be infringing the copyright in the work. True that the art is on a wall. True that you may not be trespassing. But that does not matter. Even if the street art is not legal, someone still owns copyright in it and that is all there is to it. Copyright laws generally define all two-dimensional art as artistic works.

The street art could be the prominent feature of the photo, or captured incidentally in the background. While the risk of infringement is lessened if the art is in the background or merely incidental, both may become problematic to the photographer if the original artist believes that the photograph has infringed his or her copyright or moral rights.

It's far more likely that an artist would have an issue with a photograph that features their street art being reproduced and exploited for commercial purposes. (More on this shortly)

The Copyright Act prevents photographers from making a 'substantial reproduction' without the artist's permission. Contrary to popular belief, there is no black and white definition of 'substantial reproduction' – there is no such thing as 'the 10% rule'. This is because the legal test for copyright infringement is based on the quality rather than the quantity of what has been copied.



Another copyright issue that is pertinent to street art is that it can often be difficult – if not virtually impossible – to identify and/or contact the author. Sometimes an artist creates their artwork under a pseudonym to protect their identity. The important thing to note here is that copyright will still subsist in the work, even if the author cannot be identified.

*Despite being legal, it could be difficult to identify which artist created this piece, as there is no initials or 'tag'. Source: Supplied*

### **A case on point**

While you may not think photographing street art is a pertinent legal issue (after all, it's on the streets and publicly displayed!), it was recently the basis of two law suits in a District Court.

In August 2014, artist Maya Hayuk applied to separately sue two companies, a luxury handbag and accessory label and the a major music label, for copyright infringement of her art.

In both cases, Hayuk stated the defendant companies had prominently displayed her work in their promotional material without her permission.

Hayuk had originally painted her street mural, titled Chem Trails on a wall in New York as part of a 50th birthday tribute to another artist. The wall was apparently privately owned, and the owner often invites artists to paint on it, with the murals only lasting for a short time before being replaced by another artist's work.

The painting featured patterns of diamonds with bright intersecting lines and dripping paint. In her legal action against the handbag label, the artist complained that her mural was used as a backdrop for a number of model shoots which were then reproduced on the Internet to promote the fashion label's products.

Similarly, in her law suit against the music label, she complained that one of the record company's musicians had used her street mural to promote her upcoming album and tour.



Much like Hayuk, Rowena Martinich and Geoffrey Carran rely on their artwork to pay the bills. This 50 metre long mural 'To Sile with Love' was commissioned by the local government of Sile, Turkey. Photo: Rowena Martinich

### Her artwork pays for rent...

Aaron Silverstein, Hayuk's attorney, commented that 'Maya is an extremely prolific and hard-working artist... [Her artwork] is how she pays for rent and feeds herself, so when there's a misappropriation of her work, it's a big deal for her.'

In both cases, Hayuk was suing the companies for, amongst other things, profits gained from the use of her work, as well as seeking an injunction order to stop all use of her mural.

On the basis that Hayuk allegedly licenses her artwork for use in circumstances such as those it was actually used for, she argued that that those uses had caused the artist to suffer a loss of licensing revenue.

Another potentially pertinent issue for the court to consider was the fact that the mural (which has since been replaced) was only meant to be a short-lived piece of artwork, but has now been immortalised without the artist's consent.



*These photos feature street art in an incidental fashion rather than as the main feature of the photograph itself. Photo: Sharon Givoni*

The two defendants are hardly the first big corporations that got themselves in legal trouble for using photos of street art without authorisation. In 2014, an American clothing chain was sued by Miami-based street artist who goes by the name of Ahol Sniffs Glue for incorporating Ahol's signature 'droopy eyes' murals in their promotional campaign.

Amongst other things, one of the images that the company used on its billboards featured a male model standing in front of a mural created by Ahol whilst holding a spraying can, as if to imply that the model had created the artwork himself.

Similarly, in 2007, a group of Bronx-based graffiti artists brought actions against a photographer who published a graffiti book featuring their art.

### What's the message?

If you are taking photos of street art as a dominant feature of

your photographs you should generally get permission from the copyright owner. The risks are usually heightened if you then go on to sell or use the photograph featuring the artwork commercially.

### **What about other artworks?**

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 street art. Source: Supplied*

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 on one occasion when 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 the 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.

### **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**



*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.*

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.

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' (*Meskenas v ACP Publishing Pty Ltd*).

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

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.



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

## 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 can be contacted on (03) 9527 1334 or 0410 557 907 or email: [sharon@iplegal.com.au](mailto:sharon@iplegal.com.au). W: [www.sharongivoni.com.au](http://www.sharongivoni.com.au)

Sharon Givoni's upcoming book, *'Owning It: A Creative's Guide to Copyright, Contracts and the Law'*, is due for release in April 2015. Packed with case studies, *Owning It* aims to demystify the law for creatives and small business owners regarding the protection of

designs, trade marks, copyright, reputation, confidential information and other intellectual property with an extensive chapter on photography. For more information about *Owning It*, and to sign up to the book launch visit [www.creativemindshq.com/owningit](http://www.creativemindshq.com/owningit) or [www.sharongivoni.com.au](http://www.sharongivoni.com.au)

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