
When the wet paint is protected by copyright

Sharon Givoni SHARON GIVONI CONSULTING

Imagine a city where graffiti wasn't illegal, a city where everybody could draw whatever they liked. Where every street was awash with a million colours and little phrases. Where standing at a bus stop was never boring. A city that felt like a party where everyone was invited, not just the estate agents and barons of big business. Imagine a city like that and stop leaning against the wall — it's wet.

— Banksy, *Wall and Piece*¹

One cannot help but agree with street artist "Banksy" and his (or her) idealistic vision of a city awash with colour. The popularity and success of street artists such as Banksy has not only glorified illegal street art but has (somewhat controversially) contributed to its commercialisation and commodification.²

In recent times, street art has gained a great deal of commercial value. An increasing number of businesses are effectively using this distinct and exciting art form in their promotional material and branding. To name but a few:

- **Hennessy** — This iconic cognac distillery, a big name in American hip-hop culture, is no stranger to utilising street art to promote its product. In

2014, it collaborated with world-famous street artist Shepard Fairey, launching a limited edition label design. The company also recently launched a guerrilla marketing campaign, stencilling street art style advertisements on walls outside select liquor stores throughout the United States.

- **Coca-Cola** — Known as the world's most popular brand, this soft drink giant collaborated with Brazilian street artist Speto in designing its 2014 FIFA branding.
- **Puma** — Since 2008, the German shoe and sportswear company has been hosting the Puma Urban Art Festival in Buenos Aires, Argentina. Puma's affiliation with urban culture is integral to its brand identity.
- **Microsoft** — Earlier this year, computer giant Microsoft partnered with international street artists to exhibit large-scale murals on the streets of 17 cities around the world.



Figure 1: Mural created by street artist Rone in Adelaide, South Australia. (This photograph has been reproduced with the artist's permission.)



Figure 2: Rone's iconic mural pictured above was featured prominently in the South Australian Tourism Commission's advertising campaign "Adelaide. Breath."

Take away tips

- Regardless of the legality of the circumstances surrounding its creation, street art is considered an "artistic work" and is entitled to copyright protection.
- Even if a piece of work is painted over or destroyed, copyright in the artwork will still subsist.
- If street artists use an original sketch to work off, they would own copyright in that sketch and therefore have the exclusive right to reproduce it.
- If businesses want to feature street art in their promotional work, they should always seek permission from the artists. Practically, this can be difficult when the artists paint anonymously or under a pseudonym.
- Advise your clients to take care when conducting promotional photo shoots in public places — someone may own the copyright in the artwork in the background.

What is street art?

Since its origins in 1960s New York, street art has been steadily thrust into the mainstream art world. Despite its prevalence, the distinction between the term "graffiti" and "street art" can still be difficult to define. This is perhaps attributable to its history of illegality and underground practices, coupled with a heightened appreciation for its cultural and aesthetic value. For the purposes of this article, the author will use Jamie Griffin's method of classifying street art, dividing it into two broad categories — "tags" and "pieces".³

Tags are small and simple stylised wordings of the artist's chosen pseudonym.⁴ These are mainly depicted using ink markers or aerosol cans and are commonly

found on public transit property.⁵ Larger works, known as pieces, are mainly created using aerosol paint on a larger scale with more detailed designs.⁶

The City of Melbourne defines street art as "artistic work done with the permission of the person who owns the wall ... and with permission of the local council".⁷ Of course, this definition is unlikely to satisfy many street artists who might take issue with the requirement of permission. Accordingly, this article includes both sanctioned and unsanctioned tags and pieces within its definition of street art.

How does the copyright regime apply to street art?

It is well known that a person who creates an artistic work owns the copyright in that work unless he or she is an employee or was commissioned to carry out the work.⁸ Under s 10 of the Copyright Act 1968 (Cth) (the Act), artistic works include "a painting, sculpture, drawing, engraving or photograph".

The criteria for artistic work are:

- it has resulted from "some skill and effort";⁹
- it is "original" and "not simply copied from somewhere else";¹⁰ and
- it has been "reduced to material form".¹¹

Section 10 also provides that paintings, sculptures or drawings do not need to have artistic quality in order for copyright to subsist.¹²

But what about a simple tag? The answer is not as clear and would depend very much on the amount of effort or skill that went into it. Some tags are skilfully designed, intricately executed and are arguably pieces in their own right, while others are nothing more than the mindless scribble of a vandal. Each situation would depend on its own facts and ultimately, the discretion of the judge deciding the case.

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What about the originality of the work? Well, copyright law is not concerned with the “expression of original or inventive thought”.¹³ It merely requires that the work “originate with the author and be more than a copy of other material”.¹⁴

Further, it is inconsequential if another person owns the wall on which street art is placed. The copyright owner of the art is the author of the work, not the owner of the material form on which it is placed. Likewise, copyright subsistence does not rely on the legality of the circumstances in which a work was created, an issue which will be discussed in greater detail further below.

So, based on our guiding principles of copyright law, while very simple tags may fall short of copyright protection, anything more complex is likely to be covered, regardless of the location or legality of its creation. This analysis is consistent with Jamie Griffin’s conclusion that copyright protection should encompass street art larger than tags.¹⁵

Infringement

Given the prevalence of corporations using street art in their promotional materials,¹⁶ it is relevant to discuss the potential legal implications of reproducing street art

and exploiting it for commercial gain. To discuss this issue, we need to first understand what rights copyright owners have under the Act.

According to the Act, a copyright owner has the right to do the following:

- Reproduce the work.¹⁷
- Publish the work.¹⁸
- Communicate the work to the public.¹⁹

If someone who is not the copyright owner does any of the above actions without seeking permission from the owner, they will have committed an infringement and are liable to pay damages.²⁰ Infringement also includes any unauthorised dealing with a “substantial part” of a protected work.²¹ While what is deemed to be substantial will depend on the facts of each case,²² it usually refers to the quality that was taken from the protected work rather than the quantity.²³

While Australian case law regarding copyright infringement of street art is underdeveloped, the following case studies from the United States can be used to illustrate this issue.



Figure 3: An example of a mural. Regardless of whether this artwork is legal or not, if someone appropriates this image without permission, they could be liable for copyright infringement. (This photograph has been reproduced with the artist’s permission.)



Figure 4: Example of a mural created by the street artist, Rone. (This photograph has been reproduced with the artist's permission.)

Photographing the street art

In 2015, street artist Craig Anthony Miller sued real estate developer Toll Brothers for using what Miller described as a “very recognisable portion” of a large mural which he and members of the 303 Collective painted in Dumbo, Brooklyn, for their promotional material.²⁴

The mural in question no longer exists — the building it was on was demolished in 2013 to make way for the Toll Brothers’ development called the “DUMBO Townhouses”.²⁵ According to a report by Benjamin Sutton for Hyperallergic, the mural featured “a memory of stylized robot elephants and a pair of fluttering cherubs gallivanting in a futuristic forest”.²⁶

According to the report, Miller had met with officials from Toll Brothers after discovering that images of his mural were being used in advertising. As it turns out, he had offered to let them use his new work in advertisements, but “no projects ever materialized”. Significantly, Toll Brothers did not pay him for using images of his mural in their advertisement.²⁷

Had the case been heard in Australia, the test of substantial part would have been easily satisfied since a recognisable part of Miller’s mural (the elephant portion of the mural) formed the backdrop of those materials.²⁸

Not surprisingly, it was argued that copyright subsisted in the work even after the wall it was on was demolished. This is indeed the case in Australia, where copyright in a work is not lost if the original material form is destroyed.

Using street art in a film

Renowned director Terry Gilliam found himself a defendant in a copyright infringement proceeding when three street artists, Ever, Jaz and “other”, filed a suit against him in the Illinois federal court for allegedly misappropriating their mural *Castillo* for the film *The Zero Theorem*.²⁹ The elements of this mural contained Jaz’s “human-animal hybrid figures”, other’s “portrait of a person with patterned clothing and hair” and Ever’s “lines streaming from the eyes of two people’s faces”.³⁰ The mural had been registered with the Argentinian Copyright Office.³¹

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Figure 5: Artists Ever, Jaz and other working on their mural, *Castillo*, which was the subject of the law suit against director, Terry Gilliam. (This picture has been reproduced with permission from the artists through their lawyer.)
Source: US court documents

According to a report by Jillian Steinhauer for *Hyperallergic*, the film's protagonist lived in a burnt-out chapel which had a facade containing a colourful mural.³² This mural featured all three elements of the infringing work, though they are broken up and rearranged.³³ In their complaint, Ever, Jaz and other stated that the screen time devoted to the mural did not matter. Instead, what mattered was "the amount taken without authorization from the infringed work".³⁴

Again, because the three elements of the mural were used in the mural in Gilliam's film, this satisfied the test of substantial part. Hence, if this case had been heard in Australia, the three artists would have succeeded in their claim.

Should illegal street art enjoy copyright protection?

Many of these kinds of issues could have been avoided if the infringing party had simply asked permission from the artists themselves. However, this can be difficult because artists often paint under a pseudonym or their work may have been created illegally.³⁵ This article will now consider if illegal street art should enjoy copyright protection.

In the Australian context, Griffin points out that none of the provisions in the Act suggest that illegality should be a bar to the subsistence of copyright.³⁶ He argues that the natural rights theory would justify the existence of copyright in those pieces — legal or not.³⁷ However, it should be noted that Griffin was confining his argument to the issue of removing works without permission from the artist.³⁸

The topic has received much more detailed academic debate in the United States. Commentators such as Schwender and Lerman are proponents of copyright protection for illegal art.³⁹ Lerman's argument is similar to Griffin's — "wrongdoing is not relevant to the copyrightability of the work itself".⁴⁰ In her view, given that vandalism already attracts both "civil and criminal penalties", it is unnecessary to add copyright exclusion into the mix.⁴¹

Lerman also justifies this protection by examining the structure of the United States Copyright Act. She notes that as long as "there is a physical means by which the work is fixed", it does not matter what physical means is used to create or fix the work.⁴² After all, copyright has been attached to other works that infringe other people's rights — for example, photographs which violate privacy rights.⁴³ The only circumstance where copyright protection is denied is if the work itself violates copyright.⁴⁴

Schwender puts forward similar arguments in favour of copyright protection for illegal street art, two of which will be discussed here.⁴⁵ First, he argues that the Copyright Office should not be expected to distinguish between legal and illegal street art — this is a matter for determination by the court.⁴⁶ However, he concedes that this would create a question of fact for the jury and prolong a trial.⁴⁷

In relation to this argument, Schwender also points out that most graffiti artists create smaller versions of their pieces before reproducing it on the wall.⁴⁸ These smaller versions are legal and would be protected by

copyright.⁴⁹ It does not make sense that the larger pieces on the wall would not attract copyright protection.⁵⁰ The author agrees with this view since s 21(1A) of the Australian Copyright Act allows a copyright owner to reproduce their artistic work — this must include the reproduction of the work on a blank wall.

Second, Schwender argues that courts and society should consider the many benefits of graffiti, namely that these underground artists are bringing art to the masses.⁵¹ Much of this art is a critique on current social and political issues that could spur discussion and debate.⁵² In the author's view, this is certainly a benefit to society if democracy is to thrive. Schwender is concerned that if there is no copyright protection for these works, it could "preclude a great artist from further development or deny the public of a wonderful artist".⁵³ Furthermore, he argues that extending copyright protection "does not mean that the artist will enforce the protection or solicit the works".⁵⁴

Commentator Cathay Smith offers an alternative view. In a 2014 paper, Smith argues that street art is well suited to "low-IP treatment".⁵⁵ Using a theory put forward by Rosenblatt for industries which are well suited to low-IP treatment,⁵⁶ she argues that street art fits the bill for the following reasons:⁵⁷

- Its creation is driven by rewards that do not depend on creativity.
- This is an area where there is a high interest in free access without harm to creativity.
- Exclusivity could harm further creation of street art.

Perhaps, Smith's most persuasive reason against copyright protection for street art is the second point. Citing Walmsley, she argues that the appropriation of street art is "a sign of its power and its endurance".⁵⁸ She argues that street artists themselves recognise that their work is transient.⁵⁹ Consequently, the reproduction and distribution of the art, even without the artist's permission, makes the work permanent.⁶⁰

While these arguments are persuasive, they do not address the issue of corporations misappropriating street art for promotional materials. Not only would the copying and distribution of street art make it permanent, but it would be the corporation, not the artist who is benefiting from the appropriation. If the artists of illegal murals are not entitled to copyright protection, then corporations would have free reign to exploit illegal, "rights-infringing work" for commercial gain.

Orphan works

There is one more thing to address and that is the topic of "orphan works"; basically, as the name suggests, works whereby the author cannot be identified or located. A lot of street art is made *anonymously* or under a pseudonym such as aliases or tags. The question then arises: If someone wants to get rights to use the work, is it an excuse if they cannot locate the artist despite all due efforts? The short answer is no. Use of orphan works on the face of it would constitute copyright infringement (unless they come under the fair use defences). Take Banksy for example; he is perhaps the most famous illicit artist in the world, yet this won't mean that one can freely reproduce his street art for commercial gain. His identity may remain hidden but this does not mean his works are free for the taking.

Conclusion

This article has considered the application of Australian copyright laws to street art. Copyright subsists in any street art more complex than a very simple tag; regardless of the legality of its creation, the owner of the wall it is on or whether it was made anonymously. If your client wishes to commercially exploit street art, permission from the artist should be sought first to avoid copyright infringement. This is especially so in Australia where it is not a defence to copyright infringement that the work is an orphan work. While misleading or deceptive conduct under the Australian Consumer Law or the common law tort of passing off may be relevant, they are beyond the scope of this article.

This article also considered the merits of amending Australian law to exclude illegal street art from having copyright protection, drawing on academic scholarship from the United States. While the author found the arguments in favour of amending the law interesting, ultimately, they do not adequately address the issue of corporations appropriating street art for commercial gain.

Street art has and deserves to continue to have copyright protection. This is consistent with the predominant purpose of the copyright legislation in Australia — namely the protection of a creator's exclusive rights to reproduce, publish and communicate their work with the public. Such protection is vital to the preservation of the value of artistic expression in light of commercial exploitation. The cases mentioned above, particularly those relating to copyright subsisting even after the platform on which it first originated is demolished, simply reiterate this point.

On a final note, walking through Melbourne's iconic laneways filled with ever-changing street art, the author feels that Banksy's utopian vision is not beyond our reach. Indeed, if street art is properly respected and

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encouraged, it can transform any city into a colourful and vibrant place to be, a place where culture and ideas are celebrated and waiting for a tram is never boring.

But if your corporate clients wish to join the party, make sure they don't forget to invite the artist.



Figure 6: Contemporary Melbourne-based artist Marty Brazell has taken on street art on a commission basis in the past and is open to receiving commissions for street art. His style is adaptable and edgy and he currently displays his work at trendy cafes on Chapel Street.



Sharon Givoni
Principal
Sharon Givoni Consulting
Sharon@iplegal.com.au
www.sharongivoni.com.au

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Footnotes

1. Banksy *Wall and Piece* Random House, UK 2005 p 93.
2. S Givoni *Owning It: A Creative's Guide to Copyright, Contracts and the Law* Creative Minds Publishing 2015 p 177.
3. J Griffin "Illegal graffiti: a copyright perspective" (2010) 22(7) *Australian Intellectual Property Law Bulletin* 123; See also, C Lerman "Protecting artistic vandalism: graffiti and copyright law" (2013) 2(2) *New York University Journal of Intellectual Property & Entertainment Law* 295 at 298.
4. J Griffin, above n 3.
5. C Lerman, above n 3.
6. Above n 3.
7. City of Melbourne, *Graffiti*, 12 August 2016, at www.melbourne.vic.gov.au.
8. Copyright Act 1968 (Cth), ss 32 and 35.
9. See especially *Macmillan & Co Ltd v Cooper* (1923) 1B IPR 204 at 209 (Lord Atkinson).
10. Above n 8, s 32; See for example, *Acofs Pty Ltd v Ucorp Pty Ltd* (2012) 201 FCR 173; [2012] FCAFC 16; BC201201060 at [78], [79], and [81].
11. Above n 8, s 22(1).
12. Above n 8, s 10.
13. *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 at 608-9 (Peterson J).
14. *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 511 (Dixon J).
15. J Griffin, above n 3.
16. See for example, B Sutton, *Street Artist Sues Developer for Using His Mural to Sell Condos*, 22 January 2015, at <http://hyperallergic.com>; J Zerbo, *Graffiti Artists Fight Copying by Fashion Brands*, 26 February 2015, at www.businessof-fashion.com.
17. Above n 8, s 21(1A).
18. Above n 8, s 29(1).
19. Above n 8, s 10(1).
20. Above n 8, s 36(1).
21. Above n 8, s 14(1).
22. See for example, *SW Hart & Co Pty Ltd v Edwards Hot Water Systems* (1985) 159 CLR 466; [1985] HCA 59; BC8501068.
23. See for example, *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465 at 469 and 481.
24. B Sutton, above n 16.
25. B Sutton, above n 16.
26. B Sutton, above n 16.
27. B Sutton, above n 16.
28. C Munro, *Street Artist Sues Real Estate Developer for Using Mural in Ads*, 22 January 2015, at <https://news.artnet.com>.
29. J Steinhauer, *Street Artists Sue Terry Gilliam for Copyright Infringement*, 14 August 2014, at <http://hyperallergic.com>; E Gardner, *Terry Gilliam Sued Over Street Artist Graffiti in 'Zero Theorem'*, 13 August 2014, at www.hollywoodreporter.com.
30. J Steinhauer, above n 29.
31. J Steinhauer, above n 29. It should be noted that there are no formal requirements for copyright in Australia.
32. J Steinhauer, above n 29.
33. J Steinhauer, above n 29.

34. J Steinhauer, above n 29.
35. The most famous example is Banksy who has glorified illegal street art. See above n 2.
36. J Griffin, above n 3, at 123–24. Note that his article has received support from other practitioners in Australia; See D Yates “Protecting street art: an update” (2014) 27(8) *Australian Intellectual Property Law Bulletin* 177. At the time of writing, there has not been a copyright case involving illegal street art in Australia.
37. J Griffin, above n 3.
38. J Griffin, above n 3. See also D Yates and C Fiddian “Now you see me: protecting visual art” (2014) 27(1) *Australian Intellectual Property Law Bulletin* 9.
39. C Lerman, above n 3, at 298–99; D Schwender “Promotion of the arts: an argument for limited copyright protection of illegal graffiti” (2008) 55 *Journal of Copyright Society of USA* 257 at 269–72.
40. C Lerman, above n 3, at 316.
41. C Lerman, above n 3, at 316.
42. C Lerman, above n 3, at 317.
43. C Lerman, above n 3, at 317.
44. C Lerman, above n 3, at 318.
45. D Schwender, above n 39, at 279.
46. D Schwender, above n 39, at 279.
47. D Schwender, above n 39, at 279.
48. D Schwender, above n 39, at 279.
49. D Schwender, above n 39, at 279.
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52. D Schwender, above n 39, at 280.
53. D Schwender, above n 39, at 280.
54. D Schwender, above n 39, at 280.
55. C Smith “Street art: an analysis under U.S. intellectual property law and intellectual property’s ‘negative space’ theory” (2014) 24(259) *DePaul Journal of Art, Technology and Intellectual Property Law* 259 at 285.
56. E Rosenblatt “A theory of IP’s negative space” (2011) 34(3) *Columbia Journal of Law & the Arts* 317 at 342.
57. C Smith, above n 55, at 285–89.
58. C Smith, above n 55, at 287.
59. C Smith, above n 55, at 287.
60. C Smith, above n 55, at 287.