

## Entertainment Law

January 25, 2016

### Illegal Graffiti Capable of Copyright Protection

There is a common misconception by some in the artistic community that graffiti is not protected by copyright and so may be freely reproduced as a matter of public right in our modern “sharing economy.”

Because graffiti typically appears in public places and is often created through acts of vandalism (e.g., by spray painting on public or private property), it is hard for some to understand why the law would permit vandals to profit from their illegal acts to the detriment of the public interest.

In Canada, Section 5(1) of the *Copyright Act* states that copyright subsists “in every original...artistic work...” so long as certain conditions are met.

To be protected by copyright, an artistic work must be sufficiently (1) “original” and (2) “fixed” in some permanent way.

Since the *Copyright Act* does not require that the work must be created “lawfully,” graffiti is capable of copyright protection, even if it is created from an illegal act of vandalism, so long as it meets the originality requirement (a graffiti artist’s short “tag,” signature or catchphrase may fall short of this requirement) and is sufficiently fixed in some permanent way (such as a mural painted on a public subway platform).

Part of the misconception on this issue may have resulted from the fact that graffiti artists themselves have historically had a relaxed attitude regarding copyright. According to famous graffiti artist, Banksy: “copyright is for losers.” This may be changing, however, as recent lawsuits suggest that graffiti artists may be more motivated to object - for publicity, artistic or other reasons - to the unauthorized use and reproduction of their works particularly when the use associates the graffiti art with particular brands or commercial products and productions.

Consider the following pending lawsuits. In August of 2015, a Brooklyn graffiti artist filed a lawsuit in the United States alleging luxury fashion brand Moschino violated federal and California law by featuring a modified version of his graffiti mural “Vandal Eyes” in one of its clothing lines without his permission.

The artist was particularly upset that Moschino had enlisted Katy Perry to wear a dress from this line to events at which she made several “Worst Dressed” lists. He argued that the publicity stunt on the part of Moschino and Perry exploited his art for profit and damaged his “street cred” as an artist.

Canadian graffiti artists apparently feel the same way. Last year for example, graffiti artist Alexandre Veilleux sued Radio-Canada and Productions Aetios Inc., the production company behind the popular television show *30 Vies*, for featuring in the show and on promotional billboards his spray-painted graffiti tag (located on René Lévesque Boulevard in Montreal) and a mural without his permission.

The artist claimed that his moral rights were violated because his artistic reputation was allegedly damaged by the association of his work with the television program.

In Canada, in addition to claiming copyright infringement, graffiti artists can allege that their moral rights have been violated by the prejudicial modification and reproduction of their works or an unauthorized use of their works in association with a product, service, cause or institution.

Section 14.1(1) of the *Copyright Act* provides that an author of a work has a right “to the integrity of the work,” which the Supreme Court (*Théberge v. Galerie d’Art du Petit Champlain Inc.*, [2002] SCC 34) has deemed to be breached if the work is “modified to the prejudice of the honour or reputation of the author.”

To avoid possible infringement claims, it is prudent, where possible, to obtain the artist’s permission before reproducing a work of graffiti in another work.

# Goodman's<sup>LLP</sup> Update

---

However, where this is not possible, which is frequently the case (since graffiti artists are notorious for keeping their identities secret), the following sections of the *Copyright Act* may provide possible defences to an infringement claim:

- (1) **Incidental use:** Section 30.7 may apply if the graffiti is only “incidentally and not deliberately” included in another work;
- (2) **Fair dealing:** Section 29 may apply if the graffiti use falls within one of the allowable “fair dealing” purposes set out in the Act (e.g., research, parody/satire, or news reporting, etc.) and the use is considered “fair” having regard to the factors articulated by the Supreme Court of Canada; or
- (3) **Permitted acts:** Section 32.2(1)(b) may apply if the graffiti constitutes a “work of artistic craftsmanship” that is “permanently situated in a public space or building.”

Of course, it is always an option to try and rely on the old adage that: “*crime doesn't pay*” and argue that those who commit illegal acts should not be permitted to profit from them afterwards. But although this position may have merit (and relevance when it comes to damages), it is not supported by the current Canadian Copyright Act or jurisprudence.

This article originally appeared in the January 22, 2016, issue of *The Lawyers Weekly* published by LexisNexis Canada Inc.

If you have any questions regarding copyright protection, please contact any member of our Entertainment Law Group.