

Goodmans^{LLP} Update

Cartoonist Challenges Banksy's Intellectual Property Rights

After viewing the recent Toronto exhibition, *The Art of Banksy*, Cinders McLeod was surprised to discover that the British graffiti artist, Banksy, may have “pinched her ideas” in certain drawings published in *The Glasgow Herald* in the 1990s.

For instance, Banksy's *Bomb Middle England* (2003) bears an uncanny resemblance to McLeod's *Anarchic Granny* (1999) — both works feature crouching middle-aged ladies, on bended knees, bowling with a lit fuse bomb on a bright green lawn. And if you compare Banksy's *Think Tank* album cover for the English rock band Blur (2003), to McLeod's *Deep Sea Lovers* (published in 1997), you'll notice that both images feature a couple, wearing old-fashioned deep sea diving helmets, with their arms wrapped around each other in a loving embrace. The resemblance is striking. (To see a side-by-side comparison of McLeod's and Banksy's work, [click here](#).)

Since then, McLeod, an ex-*Globe and Mail* art director and political cartoonist, has been debating the issue on social media with Banksy fans who argue that she should be flattered if her work was used and repurposed by Banksy, in much the same way that he used and repurposed the works of Andy Warhol (Kate Moss portrait), Jean-Michel Basquiat (distinctive crown motif), and French graffiti artist Blek Le Rat (stenciled rat symbol), among others, to create new works of graffiti art, reimagined and redesigned to incorporate his own particular brand of political satire.

But McLeod has a question about her unexpected artistic collaboration with Banksy: “Is it possible to hold an anonymous street artist accountable for ripping off ideas?”

She and other artists may be surprised to learn that not all copying is unlawful. In fact, it is a well-established principle that copyright law does not protect ideas — only the *expression* of ideas. Since ideas are part of the public domain and free for all to draw upon, McLeod has no monopoly on crouching lady lawn bowlers or deep sea diver/lovers. Consequently, she has no legal basis to claim idea theft by Banksy, unless of course she protected her ideas by entering into a contract with the famous graffiti artist, which McLeod obviously has not done.

McLeod would be in a better legal position if she argued that Banksy's *Think Tank* album cover, for example, copies a *substantial part* of her unique artistic expression in *Deep Sea Lovers*. Specifically, she could claim that certain elements of her work, for example: *her underwater lover-subjects; their embracing-in-love pose, in combination with their old-fashioned diving masks, and general perspective* are not just ideas but rather, her own unique artistic expression of those ideas, that are worthy of protection under copyright law.

For example, in *Cinar Corporation v. Robinson* [2013] 3 S.C.R. 1168, the Supreme Court of Canada engaged in both a qualitative and holistic assessment of the works in question and found that certain elements in Cinar's TV series, such as the *visual appearance of key characters, visual aspects of the setting, and recurring scenographic elements*, when considered as a whole, constituted a *substantial part* of Robinson's original character sketches and designs that were unlawfully copied by Cinar.

Similarly, in a U.S. case, *Friedman vs. Thierry Guetta, a/k/a/ "Mr Brainwash"*, the central figure in Banksy's street-art documentary entitled *Exit Through the Gift Shop*, was found liable by a California federal court for infringing copyright in a famous photograph of the hip hop music group, Run DMC. Guetta's “fair use” defence failed and the court found Guetta unlawfully copied original elements of the 1985 photograph, including: the selection of the Run DMC subjects, their arrangement, poses, accessories and outfits, and the image's lighting and perspective.

Another legal option for McLeod would be to claim that her “moral rights” were infringed. In Canada, like many other countries (e.g., France, UK, Germany), artists have the right to the integrity of their work, which is infringed if their work is, to the prejudice of their “honour or reputation” (a) distorted, mutilated or otherwise modified; or (b) used in association with a product, service, cause or institution.

But according to McLeod, it's not so much any distortion or modification of her drawings that upsets her (in fact, according to her video *My Life as a Political Cartoon*, she's pro-Banksy's medium and message) — it's really the lack of any credit or compensation that rankles.

If Banksy infringed any copyrights or moral rights in McLeod's artwork, she should receive the credit she deserves, as well as financial damages and any other relief available to her under the *Copyright Act*.

On the other hand, if Banksy's works don't quite meet the legal threshold of "substantial similarity" as discussed above, but he still borrowed her ideas, modified her artwork, and then exhibited and sold it for profit (e.g., *Bomb Middle England* fetched £102,000 at Sotheby's and *Think Tank* sold "for quite a lot of money" according to Banksy), it may be nevertheless worth considering whether street artists who create derivative works, especially as they transition from the street to Sotheby's, should find some way to acknowledge the artists — like Warhol, Basquiat, Blek Le Rat...and maybe now McLeod — who created the original works that inspired them, if only to set the artistic record straight.

While it is debatable and perhaps impossible or undesirable to require such attribution, especially if it would discourage creativity and innovation in the ongoing evolution of street art, giving some kind of acknowledgement, if warranted, to McLeod, who says she's "a largely unknown artist, Scottish, single mother, financially struggling political cartoonist trying to make a living in a man's world," would not only set the artistic record straight, but could also result in a renewed interest in her work and, perhaps even, a chance to return to her political cartooning glory days in the 1990s.

This article originally appeared in the August 13, 2018, issue of *The Lawyer's Daily* published by LexisNexis Canada Inc.

If you have any questions regarding copyright infringement, please contact any member of our [Entertainment Law Group](#).

Author



Tara Parker
tparker@goodmans.ca
416.597.4181

All Updates are available at www.goodmans.ca. This Update is intended to provide general comment only and should not be relied upon as legal advice. © Goodmans LLP, 2018.