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“Copyright is for losers©™”: Street Art Flourishes in Intellectual Property’s Negative Space

BY [CATHAY Y. N. SMITH](#) / ON JUNE 20, 2014

((“Copyright is for losers©™” is attributed to Banksy))

To exist in intellectual property’s “negative space” is characterized as existing in “the territory where IP law might regulate, but (perhaps for accidental or nonessential reasons) does not.” ((Kal Raustiala and Christopher Sprigman, Response, The Piracy Paradox Revisited, 61 Stan. L. Rev. 1201 (2009))) There are many well-known examples of successful creative industries that exist in intellectual property’s negative space, such as fashion, stand-up comedy, food/cuisine, and American football. This post suggests that “street art” is successfully existing, operating and flourishing in intellectual property’s negative space.

The online encyclopedia Wikipedia.org defines “street art” as “visual art created in public locations, usually unsanctioned artwork executed outside of the context of traditional art venues.”((Street Art, Wikipedia, http://en.wikipedia.org/wiki/Street_art (last visited June 13, 2014))) Street art (or graffiti) has existed since ancient times as evidenced by pre-historic cave paintings in the Lascaux Caves in France, 19th century B.C. carvings by Semitic soldiers on Egyptian cliffs, and 2000-year-old graffiti on the walls of Pompeii. However, in the modern world, street art has long been considered more social nuisance than fine art until the past decade where it has become more accepted by the mainstream as “art.”

For instance, the most well-known street artist of this decade is Banksy. “Banksy” is the pseudonym used by a British street artist whose street art of political, cultural, and social satire have been featured on buildings, walls, and other public spaces throughout the world. Nowadays, Banksy’s works are not only found in public spaces, but also reprinted in books, copied onto t-shirts, postcards, tote bags, and mugs by third-parties and sold in market stalls, over the Internet, and in local shops. Some of Banksy’s street art has also been carved off of their original walls and sold in galleries and auction houses in the United States, United Kingdom, and elsewhere, fetching prices in the millions of dollars. Communities are embracing street art in their neighborhoods by offering guided tours to show off their famous street art. Even renowned art museums, such as the Tate Modern and Victoria Albert Museum in London, have begun to appreciate street art and exhibit it among their collections of Picassos and Rothkos. Google was just the latest to jump on the street art bandwagon when it unveiled its Street Art Project on June 11, 2014. ((Rachel Donadio, Google Adds Graffiti to its Art Portfolio, The New York Times, June 10, 2014, http://www.nytimes.com/2014/06/10/arts/design/google-adds-graffiti-to-its-art-portfolio.html?_r=0 (last visited June 13, 2014)))

Generally, street artists do not have adequate legal remedies to protect their expression from being copied or destroyed. The primary reason for this is pretty straightforward: street art—in its original and purest form—is usually created illegally or without authorization on private or public property not owned by the street artists. By attempting to enforce the street artist’s intellectual property rights in his expression, the street artist could subject himself to civil and criminal liability for trespass, vandalism, destruction of property and other crimes or torts. Courts in the United States have also carved out exceptions for “illegal” street art, and have seemed reluctant to grant such works full protection under intellectual property law. ((See, e.g., *Villa v. Pearson Educ., Inc.*, 2003 WL 22922178 (N.D. Ill. Dec. 9, 2003) (indicating that the question of whether the work was created illegally is a factual inquiry in a copyright infringement claim); *English v. BFC & R East 11th Street LLC*, 1997 WL 74644 (S.D.N.Y. Dec. 3, 1997) (finding that VARA does not apply to artwork that is illegally placed on the property of others, without their consent, when such artwork cannot be removed from the site in question); *Botello v. Shell Oil Co.*, 229 Cal.App.3d 1130 (Ct.App. 1991) (California’s state moral right statute applies only to “art that is affixed or attached by arrangement with the owner. It obviously does not apply to graffiti, which lacks these characteristics.”))) The high costs of civil litigation, as well as street artists’ ethos, also serve as a deterrent to street artists attempting to enforce intellectual property rights, because the expected benefits from litigation often do not justify the monetary, social, or reputational costs. Accordingly, even though “art” and “visual art” are generally protected by copyright law, the Visual Artists Rights Act of 1990 (VARA), and state moral rights laws, these legal remedies are not ideal or practical for street artists to prevent the copying or destruction of their works.

Nevertheless, street artists continue to create art on the streets without the incentive of financial rewards or exclusivity from formal intellectual property law. Street artists have been protecting their work through normative rules developed over the years, and communities are also looking for creative ways to protect street art from being destroyed or removed from their neighborhoods. One may simply walk down the streets of any great city like London, New York, Sao Paulo, Buenos Aires, or Berlin to find evidence that creativity and innovation in street art—despite the lack of intellectual property protection—is actually flourishing, and street artists continue to create masterpieces on city walls, buildings, and bridges throughout the world. This alone is persuasive evidence that the lack of formal intellectual property protection of street artists’ work has not destroyed—and will not destroy—street art. As Raustiala and Sprigman argue, “IP rights are costly monopoly grants that ought to be created only when necessary to foster innovation.” ((Raustiala, “The Piracy Paradox Revisited,” at 1225)) Where—as in the case of street art—intellectual property is not necessary to foster innovation or creativity, stronger “intellectual property” protection may not be warranted.

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For a detailed discussion about street art and intellectual property law, community rights and actions to preserve street art, normative rules of street artists, and street art in IP's negative space, see *Street Art: An Analysis Under U.S. Intellectual Property Law and Intellectual Property's "Negative Space" Theory*, DePaul J. Art. Tech. & IP Law, Vol. XXIV: 259 (2014), available at SSRN: <http://ssrn.com/abstract=2450174>.