

## THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI

In recent years, the number of conflicts related to the misuse of street art and graffiti has been on the rise around the world. Some cases involve claims of misappropriation related to corporate advertising campaigns, while others entail the destruction or ‘surgical’ removal of street art from the walls on which they were created. In this work, Enrico Bonadio brings together a group of experts to provide the first comprehensive analysis of issues related to copyright in street art and graffiti. Chapter authors shed light not only on the legal tools available in thirteen key jurisdictions for street and graffiti artists to object to unauthorized exploitations and unwanted treatments of their works, but also offer policy and sociological insights designed to spur further debate on whether and to what extent the street art and graffiti subcultures can benefit from copyright and moral rights protection.

ENRICO BONADIO is Senior Lecturer in Intellectual Property Law at City, University of London and Visiting Professor in IP Law at Catholic University of Lyon as well as visiting lecturer at the LLMs in Intellectual Property offered by the World Intellectual Property Organization in Turin and Ankara. His current research focuses on copyright protection of unconventional forms of expression, including graffiti and street art. He is the co-editor of *Non-Conventional Copyright: Do New and Non-Traditional Works Deserve Protection?* (2018) and *Beyond Plain Packaging: The New Intellectual Property of Health* (2016).

# The Cambridge Handbook of Copyright in Street Art and Graffiti

Edited by

**ENRICO BONADIO**

City, University of London



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## Contributors

**Heitor Alvelos** is Professor of Design and New Media at the University of Porto, Director of the PhD Program in Design (University of Porto/University of Aveiro/UPTEC/ID+), and Director, on behalf of University of Porto, of the Institute for Research in Design, Media and Culture/Unexpected Media Lab. He is Chair of the Scientific Board (HSS) at the Foundation for Science and Technology (2016 to present, and a member since 2010). He is a member of Academia Europaea and Executive Board member of the European Academy of Design. He has been Curator, FuturePlaces medialab for citizenship since 2008 (UT Austin Portugal Program for Digital Media). He holds a PhD from the Royal College of Art (2003) and an MFA from the School of Art Institute of Chicago (1992). Current research interests include the lexical implications of new media, the ecology of perception, and cultural criminology.

**Andrea Baldini** is Associate Professor of Aesthetics and Art Theory at the School of Arts of Nanjing University and Director of the NJU Center for Sino-Italian Cultural Studies. Since 2015, he has also been the coordinator of the Jinling Artist-in-Residence Program, whose aim is to promote cultural exchange between China and Italy. He holds a PhD from Temple University (2014) and his main research interest lies at the intersection of aesthetics, cultural studies, urban communication, and visual culture. He focuses on questions dealing with how creativity can influence our everyday lives and practices, and in particular the nature, uses, and functions of public spaces. He has published articles in English, French, Chinese, and Italian. His work has appeared in many journals including *Contemporary Aesthetics*, *Journal of Visual Culture*, and *The Journal of Aesthetics and Art Criticism*. His monograph entitled *A Philosophy Guide to Street Art and the Law* has been recently published by Brill Research Perspectives in Art and Law.

**Jonathan Barrett** teaches commercial law and taxation at the Victoria Business School, Wellington, New Zealand. His PhD studies concerned human dignity, distributive justice, and proportionality. He is developing a body of research that applies those concepts to the arts and intellectual property rights.

**Peter Bengtsen** is Associate Professor of Art History and Visual Studies at Lund University, Sweden. He has written about street art since 2006. In 2014 he published his first book entitled *The Street Art World*. His most recent book, *Street Art and the Environment*, discusses how art may influence the relationship between humans and nature. The book was independently published by Almendros de Granada Press in June 2018. From October 2018 to May 2019



Bengtson co-coordinated the Urban Creativity research theme at the Pufendorf Institute for Advanced Studies at Lund University.

**Enrico Bonadio** is Senior Lecturer in Intellectual Property Law at City, University of London and Visiting Professor in IP Law at Catholic University of Lyon as well as visiting lecturer at the LLMs in Intellectual Property offered by the World Intellectual Property Organization in Turin and Ankara. His current research focuses on copyright protection of unconventional forms of expression, including graffiti and street art. He is the co-editor of *Non-Conventional Copyright: Do New and Non-Traditional Works Deserve Protection?* (2018) and *Beyond Plain Packaging: The New Intellectual Property of Health* (2016).

**Shane Burke** is a lecturer in intellectual property law at Cardiff University. His research interests lie in the area of intellectual property and the legal regulation of the arts. His doctoral research, undertaken at Queen Mary University of London, was entitled “Dematerialisation and Dissonance: Conceptual Art Practices, Art World Strategies and the Role of Copyright Law.” This inter-disciplinary study examines the nature of conceptual art and considers the issues associated with the privileging of ideas over form, judicial strategies for the definition of art, and the role of documentation in the artistic process with a focus on the UK and US legal regimes. This research also involved interviews with artists, gallerists, legal practitioners, collecting societies, and archivists in both London and New York conducted throughout 2014–2015. The awarding of the Modern Law Review Scholarship supported this research in 2014–2015 and 2015–2016. Shane has also graduated from Queen Mary University of London with an LLM in Intellectual Property, from the National University of Galway Ireland with an LLB, and Trinity College Dublin with an MSc in Multimedia Systems.

**Gilberto Cavagna di Gualdana** leads the Intellectual Property Department at Negri-Clementi law firm, focusing on intellectual property and copyright matters. He was previously in charge of Expo 2015 IP and sponsorships and has worked in the IP department of leading national and international law firms. He holds law degrees from the University of Milan and is admitted to the Italian Bar (Court of Milan) and to the Italian Industrial Property Consultants Institute as Trademark Attorney. As lecturer at master’s and postgraduate level, he regularly holds conferences, seminars, and workshops and is author of several articles and essays mainly concerning copyright and art laws.

**Pascale Chapdelaine** is Associate Professor at the University of Windsor, Faculty of Law. Her research looks at the interaction between intellectual property, property, and contracts, as well as how new technologies and automated business processes shape consumers’ rights and expectations. Her book *Copyright User Rights, Contracts and the Erosion of Property* (Oxford University Press, 2017) explores the rights users and the public have to works protected by copyright both in the physical and intangible world. Prior to joining academia, Professor Chapdelaine practiced law for over fourteen years in commercial and intellectual property law. Professor Chapdelaine holds an LLB & BCL from Mc Gill University Faculty of Law, an LLM from the K.U. Leuven Faculty of Law, and a PhD from Osgoode Hall Law School. She is called to the Bar of Ontario and le Barreau du Québec.

**Mark Davison** is the author of several works relating to intellectual property and competition law and is a special counsel with Knightsbridge Lawyers. He has written *The Legal Protection of Databases* and is the first author of all online and hard copy editions of *Shanahan’s Australian Law of Trade Mark and Passing Off* to be published since the Trade Marks Act 1995(Cth) came

into effect. He is a co-author of the three editions of *Australian Intellectual Property Law*, *The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights: A Commentary*, two casebooks dealing with competition law and consumer protection, and the 4th and 5th editions of *Intellectual Property: Cases, Materials and Commentary*. He has been a Chief Investigator on five Australian Research Council grants and won the Vice-Chancellor's Award for Distinguished Teaching at Monash University. He has taught in a number of overseas programs to judges and other government officials. He was a member of the Advisory Council on Intellectual Property from 2013 until 2015 and has been a member of the Intellectual Property Committee of the Law Council of Australia for some years. His work has been cited and quoted in over 50 international arbitration and Australian court decisions as well as a large number of decisions of the Australian Trade Marks Office.

**Marta Iljadica** is Lecturer in Intellectual Property at the University of Glasgow. She is the author of *Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture* (Hart 2016) on the copyright protection for graffiti and the copyright-like social norms adopted by graffiti writers. She has also authored contributions to journals and edited collections on copyright and moral rights for graffiti writers and street artists, freedom of panorama, and the intersection between intellectual property and land law.

**Stavroula Karapapa** is Professor of Intellectual Property and Information Law and Director of the Centre for Commercial Law and Financial Regulation at the University of Reading. She has published extensively on copyright law and policy, trade mark law, and the protection of digital rights.

**Ronald Kramer's** research focuses on how power asymmetries impact our thinking about crime and deviance, and how they shape everyday practices within criminal justice systems. The relationship between power, deviance, and control has been explored through empirical studies on graffiti writing culture, fieldwork conducted in Rikers Island, and an institutional ethnography of district courts. Dr. Kramer's current project revolves around the misguided faith we place in science and technology to curtail criminalized behavior.

**Marc Mimler** is a senior lecturer at Bournemouth University and faculty member of the Centre for Intellectual Property Policy & Management (CIPPM). After obtaining his undergraduate degree in law from the Ludwig Maximilian University of Munich, he completed his bar school (Referendariat) at the Higher District Court of Munich. He then obtained a master's degree in intellectual property law and a PhD in patent law from Queen Mary Intellectual Property Research Institute in London. He has been teaching and presenting on all fields of intellectual property at conferences and higher education institutions in the United Kingdom and abroad. Marc was founding General Editor of the *Queen Mary Journal of Intellectual Property* and currently acts as Editor-in-Chief of the *Interactive Entertainment Law Review*, which was launched in 2018. Marc's research interests cover intellectual property law in general with its interfaces with human rights and international trade law, information technology law, and competition law. Marc has a particular interest in exceptions to intellectual property rights from a doctrinal, sociological, and practical perspective and is currently developing a monograph on this issue with Edward Elgar.

**Anke Moerland** is Assistant Professor of Intellectual Property Law in the European and International Law Department, Maastricht University. She holds a PhD on intellectual property protection in EU bilateral trade agreements from Maastricht University. She also holds

a bachelor's degree in international relations from Technical University Dresden, Germany (2005), a bachelor's degree (cum laude) in Dutch Law from Maastricht University (2011), and an LLM degree (cum laude) from the Magister Juris Communis Programme from Maastricht University (2006).

**Marcela Palacio Puerta**, Doctor of Juridical Science (SJD) and LLM in International Legal Studies from American University Washington College of Law, is Researcher at Universidad Santo Tomás, Tunja, Columbia.

**Stéphanie de Potter** is a lawyer supporting clients in intellectual property and commercial law matters. Stéphanie holds a law degree from the University of Antwerp and an advanced master's in intellectual property law and knowledge management from Maastricht University. Stéphanie joined Inteo in September 2018 and is a member of the Benelux Association for Trademark and Design Law (BMM).

**Nandita Saikia** graduated from Indian Law Society's Law College in Pune, India. Her work focuses on intellectual property, publishing, eCommerce, software, media, and Internet laws in relation to policy issues, dispute resolution, and litigation strategy. She has worked at the Office of the Additional Solicitor General of India, independently, as counsel for a company, and, since 2009, with a Delhi-based law firm. Nandita has been extensively published on socio-legal issues over the years. Her primary interests are copyright, free speech, human rights, and textiles.

**Tobias Schonwetter** is Director of the Intellectual Property (IP) Unit ([www.ip-unit.org](http://www.ip-unit.org)) and an associate professor at the University of Cape Town's law faculty. He is a principal investigator for various intellectual property-related research and capacity-building projects, including Open AIR ([www.openair.africa](http://www.openair.africa)). Previously, Tobias was a Senior Manager – Technology and Innovation Law – at PwC South Africa as well as the Regional Coordinator for Africa and Legal Lead South Africa for Creative Commons. He also served as an editor for the *African Journal of Information and Communication* and *Thematic Issues on Knowledge Governance*, and was a postdoctoral fellow at the University of Cape Town's IP Unit. Tobias specializes in and teaches intellectual property, particularly the relationship between intellectual property, innovation and development. Tobias studied and practiced law in Germany and holds PhD and LLM degrees from the University of Cape Town. Since 2017, Tobias has been an associate member of the Centre for Law, Technology and Society at the University of Ottawa, Canada. Tobias has written numerous articles on intellectual property law and has spoken at various national and international conferences.

**Paula Westenberger** is a lecturer in intellectual property law at Brunel University London, as well as Assistant Editor for the European Copyright and Design Reports (ECDR). Paula holds a PhD (thesis title: “Cultural Palimpsests: Artistic Reuses in Brazil in the Context of Copyright and Human Rights”) and an LLM in intellectual property law, both from Queen Mary University of London. Paula's research interests cover the intersection between copyright law, human rights, and culture.

**Bram Van Wiele** is a Postdoctoral Research Fellow at the University of Cape Town. He holds an LLM and LLB from the University of Antwerp, and a PhD and LLM from the University of Cape Town.

## Foreword

Although I have been teaching copyright law to US law students for more than a decade, I haven't had many opportunities to consider how copyright law intersects with street art and graffiti. But having read this book and taught the *5Pointz* case for the first time, it's now clear to me that street art and graffiti offer a perfect lens to view so many of the issues that contemporary copyright law raises, both as a matter of legal doctrine and with respect to broader sociolegal principles.

Copyright law, like most legal doctrines, is an attempt to regulate people when their interests conflict. In the field covered by this book, these conflicts are stark. One artist may want to paint over another artist's work. A department store wants to use an artist's signature style for its ad campaign, but the artist doesn't want to look like she's "selling out." Or a building owner wants to demolish the walls that house some of the most important aerosol art in the world. In each of these conflicts, copyright law may have something to say about whose interests win out.

But this is a book that does more than just apply copyright doctrine to particular legal disputes. In addition, it uses street art and graffiti to open up a range of further issues that both go to the heart of copyright law and that push beyond its formal boundaries. Consider a few of these that appear repeatedly throughout the chapters that follow.

The most foundational contestation in copyright law concerns whether the law should be used to solve an economic problem about the undersupply of public goods or whether the law should represent and protect the moral claims that artists have with respect to their creations. Initially, the economic justification for granting copyright protection to street art and graffiti is very weak indeed. There seems to be no shortage of incentives to create street art, so copyright law's exclusive rights appear to be pure costs for consumers and other creators. But might copyright protection enable street artists to obtain some economic benefits, including control of the distribution and use of their works, that might justify legal intervention? From the moral rights perspective, we might think that graffiti artists are no less ethically or spiritually connected with their work than studio painters, but we might wonder whether their moral claims to ownership are diminished by their illegal use of another person's property as the site of their creations. While thinking about graffiti is unlikely to affect a scholar's views about which of these different philosophical approaches is the correct one, these cases help reflect the tensions that each one presents.

Street art and graffiti also help foreground other serious contestations in copyright doctrine. In the United States, at least, courts are admonished against judging the aesthetic qualities of works of art, but the chapters that follow ask us to consider both whether this strategy is appropriate and whether it's even possible. These challenges arise at both ends of the artistic spectrum. Graffiti

“tags” may seem like fancy versions of typefaces that could fall below copyright law’s minimum originality and creativity thresholds for protectability. And if the law grants copyright to graffiti artists, it may seem like the law is protecting mere “style” rather than a particularized expression of an idea. At the opposite extreme, some works of aerosol art may produce disputes about whether they are important enough to have achieved “recognized stature” and thus cannot be destroyed without the artist’s consent. Other doctrinal issues, including fixation, scope, joint authorship, and fair use also appear through the book. It seems as if one could teach an entire copyright class using only examples from graffiti and street art.

In many respects, however, the most interesting issues raised by these conflicts are those that are more tangentially related to legal doctrine. Through disputes between artists and between artists and landowners we witness a range of other sociocultural and sociolegal contestations. For example, we see contests over authenticity in many of its forms. There are, of course, disputes over whether a particular piece is a real or a fake Banksy, but there are also contests over which voices can authentically speak for street art and graffiti and which aesthetic features authentic street art must have. These contests raise further anxieties about (mis)appropriation, especially when countercultural artworks or styles are used by corporations.

Further, disputes over street art and graffiti highlight the roles of groups and norms in shaping creative behavior. Social norms govern relationships between street artists, including when it’s acceptable to paint over others’ work, how similar one’s work can be to others’, and how violators are to be punished. But these norms may not apply to outsiders. Thus, copying that might count as tolerable homage when done by another street artist could be seen as misappropriation when done by a corporation.

Finally, the disputes about copyright and street art also raise challenging questions about the nature of public art and the relationships it creates between artists and others. Most obviously, this will include the relationships between artists and the property owners where street art may be located. More deeply, though, these disputes should encourage us to think about street artists and their relationships with the public. To what extent should public art be deemed donated to the public (domain)? Does it not, at some point, belong to everyone? The authors of this book ask and begin to answer these and other provocative questions.

Christopher Buccafusco  
Cardozo School of Law, New York

## Foreword

Street art and graffiti are commonly defined with reference to the art/crime nexus. Older understandings of illicit work on the street defined these works in criminological terms, often with reference to the now discredited broken windows theory.<sup>1</sup> However, as Ferrell notes, this older understanding now coexists with a newer understanding grounded in an appreciation of street art and graffiti as an “artistic undertaking”:

Street art and graffiti can be defined as criminal threat, or as artistic undertaking and commercial opportunity ... they can lead some of their practitioners to prison, and others to the gallery ... with the first more likely to seek a good defense attorney, and the second a skilled copyright lawyer.<sup>2</sup>

It is of note that here Ferrell links artistic undertaking to commercial opportunity – rather than to creative endeavor per se. In doing so, he positions the application of copyright law as something that follows logically from the acceptance of graffiti and street art as legitimate art forms, which, as such, will naturally acquire a commercial value potentially vulnerable to appropriation and worthy of protection. However defined, it seems that street artists and graffiti writers are still likely to require legal assistance!

*The Cambridge Handbook of Copyright in Street Art and Graffiti* marks a pivot point in the complex and unpredictable historical journey of graffiti and street art. While they are now certainly recognized as art forms, this is not primarily an art historical narrative. Indeed, exponentially increasing levels of interest in graffiti and street art have generated a radically interdisciplinary and rapidly expanding field of scholarship and practice, reflecting street art and graffiti’s status as socio-legal-artistic phenomena that exceed the purview of any one discipline. There are now peer-reviewed journals and academic conferences devoted to graffiti and street art, which bring together art historians, architects, cultural geographers, archaeologists, psychologists, criminologists, sociologists, and heritage and legal scholars to debate and define this emerging field.

This handbook is timely in that it squarely addresses a now pressing issue facing street art and graffiti practitioners and their allies – the use of, or removal of, artists’ work without permission. As such, it is likely to prove an invaluable resource for artists, writers, scholars, and legal

<sup>1</sup> J. Wilson and G. Kelling, “Broken Windows” (1982) 249(3) *The Atlantic Monthly* 29–38.

<sup>2</sup> J. Ferrell, “Graffiti, Street Art and the Politics of Complexity” in J. Ross (ed.), *Routledge Handbook of Graffiti and Street Art* (Routledge 2016) xxxii.



practitioners, as it contains both a discussion of the considerable legal, socio-moral, and philosophical matters at stake and also a series of detailed legal analyses of the potential application of copyright law, by jurisdiction.

Encouragingly, there is also a healthy level of debate and divergence of opinion within this volume – which to some extent echoes some of the points of contestation evident within these subcultures, and indeed the general community. It is a credit to the editor of this handbook that this level of divergence in opinion has been actively solicited, rather than diluted – indeed, this is in keeping with the radical subcultural ethos of street art and graffiti.

Thus, while Westerberger, in this volume, frames copyright as a benevolent form of protection, fundamentally based on universally applicable principles of human rights and justice, and as an incentivizing reward for creativity, this is not without counterpoint. Westerberger argues in Chapter 4 that “it would go against the purpose and ethos of copyright law to leave graffiti works unprotected.” It is surely an unthinkable task to refuse the extension of such munificent protection, but Baldini’s final critical chapter does precisely this. Indeed, Baldini’s rejection of copyright as a solution is grounded in an alternative set of subcultural (rather than universal) principles. He argues that copyright is fundamentally incompatible with the subversiveness that is a defining element of the ethos and subcultural identity of street art and graffiti, and that this may even pose a threat to the survival of this art form. Perhaps, as classical behavioral psychology has taught us, the offer of an extrinsic reward may come at the cost of extinguishing once previously satisfying intrinsic rewards.<sup>3</sup>

This conflict in universal versus subcultural ethos reflects the disjuncture between top-down versus bottom-up approaches to copyright – should practices (or “copynorms”) inform the law, or should law inform the practice? The importance of interdisciplinary scholarship – such as that brought together in this volume – is that we can critically appreciate and respect the contributions, worth, and impact of both top-down and bottom-up approaches.

Also in this handbook, Bengtsen considers, and ultimately rejects, the application of copyright law to combat the acquisitive removal of street art from its in-situ location for private auction – without the consent of either the artist or the community in which the street art is located. The tension at the basis of this ostensibly lawful yet morally problematic practice is grounded in the clash between the rights of property owners, the rights of street artists, and the rights of communities – who increasingly regard street art as a form of public art intended for their enjoyment. Of course, this tension is compounded by the fact that the creation of unauthorized public works may constitute criminal damage, and thus some street artists may not be willing to publicly acknowledge authorship for fear of prosecution.<sup>4</sup>

As Bengtsen and others note, these are not just issues debated by scholars and legal practitioners; there is also a significant level of community debate on the value (and commodification) of street art.<sup>5</sup> Indeed, contemporary street art poses challenges to existing aesthetic, legal, and heritage frameworks, and has provided the conditions of possibility for recent shifts in socio-moral urban codes, towards a more positive appreciation of street art and graffiti as genuine art forms worthy of recognition and protection.

As several authors in this volume point out, contemporary works of street art are commonly received by communities as a “gift.” This reflects an increasingly established socio-moral urban

<sup>3</sup> R. Eisenberger and J. Cameron, “Detrimental Effects of Reward: Reality or Myth?” (1996) 51(11) *American Psychologist* 1153–66.

<sup>4</sup> A. Young, *Street Art, Public City: Law, Crime and the Urban Imagination* (Routledge 2014).

<sup>5</sup> See, for example S. Hansen, “Pleasure Stolen from the Poor’: Community Discourse on the ‘Theft’ of a Banksy” (2016) 12(3) *Crime, Media, Culture*. doi:10.1177/1741659015612880.

norm regarding the value of street art to communities, which in turn sets parameters for the actions perceived as being appropriate responses to its discovery. However, it should be noted that this is a historically recent understanding that is still contested. The extent to which graffiti is normatively received as a “gift” is also debatable. Graffiti is often regarded as less aesthetically palatable than street art, and as something which diminishes, rather than enhances, the value and social capital of a community.<sup>6</sup>

Perceived as a “gift,” street art is accorded with a self-evident socio-moral purpose – which locates it both within and outwith the aesthetic regime that, according to Jacques Rancière, characterizes what we consider as art today. Rancière argued that the social purpose of art from the aesthetic regime is its very purposelessness;<sup>7</sup> however, he also noted that a defining element of this regime is its incorporation of remnants of other regimes, which may “co-exist and intermingle.”<sup>8</sup> At the level of both production and reception, street art provides a link to an earlier, ethical regime of images evaluated in terms of their utility, or worth, to society.

These are issues of significant local relevance for contemporary urban communities, who have adopted a persuasive set of urban moral codes that construes illicit art in public space as a prosocial “gift” – and morally problematic, yet liminally legal actions (such as removing street art for private auction, or appropriating street art and graffiti to sell products) as forms of “criminal” activity. These are interesting and rapidly changing times in the journey of street art and graffiti. *The Cambridge Handbook of Copyright in Street Art and Graffiti* represents an invaluable navigational resource, giving the reader a critical appreciation of the breadth and complexity of contemporary scholarship, legal opinion, and subcultural stance(s) towards the application of copyright law to street art and graffiti, with sensitivity to the rights, concerns, and interests of a range of actors.

Susan Hansen  
Middlesex University London

<sup>6</sup> Young (n 4).

<sup>7</sup> B. Highmore, “Out of Place: Unprofessional Painting, Jacques Rancière and the Distribution of the Sensible” in P. Bowman and R. Stamp (eds), *Critical Dissensus: Reading Rancière* (Continuum 2011).

<sup>8</sup> J. Rancière, *The Politics of Aesthetics* (Continuum 2004) 50.