

Where does graffiti stand when it comes to copyright?

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Once considered vandalism and destruction of public property, graffiti has been embraced by fashion houses and major corporations in their advertising campaigns. There are three terms commonly used to describe this kind of art - street art, graffiti and vandalism.



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Street art is an umbrella term for most public art (legal and illegal), and includes commissioned murals, graffiti and public art displays.

Graffiti is merely illicit public art, generally spray-painted murals, writings or drawings, which does not have the prior permission of the property owner, whereas vandalism is any wilful destruction of property, which is how many people perceive graffiti.

Overall, these art forms have now become a marketable commodity, although their legal status as art has not been established. Can graffiti be protected by copyright? And what about the commercial use of the artists' work?

US case study

The question of copyright protection may be settled in the USA this month (August 2018), when the lawsuit brought by graffiti artist, Adrian Falkner against General Motors (GM) is heard before a federal judge in California.

Falkner, known by his tagline SMASH 137, filed a lawsuit against GM in January this year, after a mural he had been commissioned to paint on the outdoor elevator shed of a 10-storey parking garage in Detroit in 2014 featured prominently in GM's Cadillac XT5 advertising campaign across most of its social media platforms.

Falkner alleged copyright infringement, as well as damage to his reputation, because he has “carefully and selectively approached any association with corporate culture and mass-market consumerism”.

GM, however, claimed that the graffiti mural painted on the Detroit parking garage is “architectural work”, and therefore use of the work does not constitute copyright infringement. The court filing states: “This right to photograph an architectural work extends to those portions of the work containing pictorial, graphic or sculptural elements. Because [Falkner's] mural is painted onto an architectural work it falls squarely within the ‘pictorial representation’ exemption, and his copyright infringement claim should be dismissed.”

GM also stated that the photographer who took the image in question was part of a programme in which Cadillac loans cars to a variety of artists to use in their work, and the photographer had provided Cadillac with the images with written permission to use in social media.

Copyright in SA

Although the Falkner/GM decision will be based on US copyright law, the decision in this case could impact on copyright protection for graffiti in South Africa.

To qualify for copyright protection, a work needs to be original and reduced to material form. Originality refers to the fact that the author or creator created the work through his or her own skill and efforts (and without copying another work).

Graffiti, then, meets both of these requirements. It is creative and is a tangible medium of expression. There are no formalities required, and copyright subsists in an artistic work as soon as it is created. The Copyright Act 98 of 1978 grants the creator or owner of the work the exclusive right to do or authorise, amongst other things, the reproduction of the work, the publishing of the work or the inclusion of the work in a cinematograph film or television broadcast.

Public spaces

So, does this mean that a graffiti artist can claim copyright protection when his or her graffiti is applied to statues and buildings (legal or otherwise) and appears in a video/film or photograph of the Johannesburg skyline or any other public space? Public art may be defined as visual artwork that has been planned and executed with the intention of being displayed in public spaces, and includes works of architecture.

The man in the street or average person has the expectation that he or she can photograph or film whatever he or she sees in a public space, which includes public art. This expectation can and does conflict with the exclusive rights of the creator or owner of the copyright in such work. Although some public artwork has entered the public domain, such as the Union Buildings in Pretoria, due to the expiry of the work's copyright term which, for artistic works, is 50 years from the end of the year in which the creator died, many other works are still under copyright protection, and the (mostly incidental) use of these works create a potential risk for photographers and videographers in public spaces.

The Copyright Act 98 of 1978 (“the Act”) contains several exclusions to copyright infringement, such as fair dealing and freedom of panorama. Section 12 of the Act deals with fair dealing, and is not discussed here.

Freedom of panorama

Section 15(1) of the Act provides a general exception from the protection of artistic works, and states that the copyright in

an artistic work will not be infringed by its inclusion in a cinematograph film or television broadcast providing the inclusion is merely by way of background, or is incidental to the principal matters represented in the film or broadcast.

This exception can and does lead to ambiguity, as it is not always clear what constitutes the principal matter of a work. An example would be the wide shot of a public square, as all of the elements of the square could constitute principal matter. The use, however, needs to be “by way of background, or incidental” thereto, and case law in South Africa does not provide guidance on the interpretation of the concept of “incidental inclusion”.

Freedom of panorama generally allows for the creation of images such as photographs, films, paintings, etc, that predominantly include three-dimensional copyright-protected works such as buildings, sculptures, etc which are permanently or ordinarily located in the public space, without permission.

Section 15(3) of the Act further provides that the copyright in an artistic work shall not be infringed by its reproduction or inclusion in a cinematograph film or television broadcast if the work is permanently situated in a street, square or similar public place. Although a public gallery may also qualify as a public space, these often restrict photography and videography on their premises, leading to additional ambiguity.

Further ambiguity appears in the meaning of the phrase “permanently situated”, and the Act does not provide any guidance with regard to the interpretation of this concept. This means that artistic works which are temporarily displayed in the public space would not qualify.

Amendment Bill

The Portfolio Committee on Trade and Industry recently published specific clauses of the Copyright Amendment Bill [B13-2017] for public comment. The draft Bill seeks to substitute subsection (1) of Section 15 with a new clause relating to the incidental and/or background use (previously inclusion) of an artistic work within another work.

In seeking to address the limits of the current Section (which does not include photographers and other visual artists in the exception, which is restricted to inclusion in cinematograph films, television broadcasts or transmission in a diffusion service), the legislator has attempted to broaden the general exception relating to incidental /background use of an artistic work to apply to all types of works.

It is difficult to see how the exception can apply to use of an artistic work in, for example, a sound recording or a literary work, and perhaps the Bill should rather specify the additional types of works to which this exception will apply, such as cinematographic films, television broadcasts, transmissions in a diffusion service, photographs, drawings, engravings or paintings.

Furthermore, the application of this exception has been extended to cover background or incidental use of an artistic work that is situated in a public space, leading to the concern that it may be open to abuse. The mere fact that the artistic work happens to be located in a public place means that its use would not constitute an infringement, providing the infringer could show that its inclusion was of a background or incidental manner.

A knock-on effect of this amendment is that artists may not want to display their artistic works in public places for fear that other parties could use these (normally copyrighted) works in their own works under this general exception.

The South African Institute of Intellectual Property Law (SAIIPL), amongst other parties, has submitted its comments to the Portfolio Committee, to address issues in the Bill, and it remains to be seen in what form the final Bill will emerge.

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