

# **“Don’t Paint on My Wall:” Reexamining Physical Property Rights Concerning Street Art**

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## **Abstract**

Street art has experienced rapid growth in abundance and popularity over the past few years. Very little legal doctrine currently exists to establish physical property ownership rights over pieces of street art. This paper examines the difference between graffiti and street art and touches on intellectual property concerns before delving into the current state of physical property rights. I propose the legal doctrine of equitable division and explain several nuances and concerns surrounding both this approach and the legal treatment of street art in general.

## **Introduction**



One May morning a few years back, residents of London's Haringey neighborhood woke up to find new graffiti on the side of a local discount store. It was different than the rest though – not a tag, but a portrait of a young boy at a sewing machine, stenciled by famed street artist Banksy. CNN reporter Brad Lendon wrote that many residents saw it as a “commentary on sweatshop labor, something that hit home in the working class neighborhood.” “Slave Labour,” as the work became known, became a popular attraction in the following months, leading residents to grow fond of it. One resident told the BBC that “it represents the struggle of the community in general,” while another wrote that it “brought much needed positive attention to Wood Green instead of the ugly image often spread” (Lendon). The following February, however, blogger Michael Zhang wrote that the work was “abruptly cut out of the wall . . . in order to ‘preserve’ the work.” Banksy's work, known as “Slave Labour,” was auctioned off for \$1.1 million a few weeks later (Kopstein). The residents were outraged and upset, but there was little they could do. After all, as the auction's dealer said, “the work was painted on a private wall and the owner of a private wall can do whatever he wants with his own wall” (Zhang).

The sale of “Slave Labour” went through, but not without raising debate among the wider art community. At its heart was a dispute over how to handle street art, a mixture of graffiti, traditional gallery art, and public expression. Graffiti cases of the past were often cut-and-dry, with loopy tags clearly bringing property values down. Street art is a different beast. It is an increasingly important form of political and social expression, and few deny the artistic abilities of Banksy and Shepard Fairey. But on the other hand, it is clearly illegal – a work painted on a public or private wall without the owner's permission. While artists'

intellectual property rights are protected by copyright law, the dispute over “Slave Labour” highlighted the variety of opinions over physical property rights. Who is able to lay claim to this piece of art? Is it merely a dispute between the artist and the property owner, or should community and government claims be considered too? This debate is complicated by the lack of a legally enforceable definition of what constitutes street art. As the popularity and abundance of street art grows, these questions need to be answered in order to provide a fair and structured means of resolving conflict over newly created works.

This paper will examine these questions from a scholarly and legal viewpoint, while taking popular cases into consideration. I will start by offering a brief description of street art and its distinction from graffiti, in order to better inform conversations over property rights. Next, I will briefly touch on copyright protections over an artist’s intellectual property, before moving into a discussion of the current state of physical property rights. Lastly, I will outline a possible solution for questions over property rights and touch on several concerns over its implementation. When it comes to street art, many take property laws at face value – you, a street artist, illegally painted on my wall, and now I own the rights to that physical piece of work. While some would argue that the property owner should hold unanimous rights, I propose that courts should decide cases based on equitable decision doctrine, taking the claims of all parties involved into account.

### **Street Art, Defined**

A discussion on the physical property rights afforded a piece of street artwork is incomplete without a definition of what constitutes such a work. Tony Chackal, a Ph.D. candidate at the University of Georgia,

provides an excellent definition in *The Journal of Aesthetics and Art Criticism*, which adds to of New York University professor Nicholas Riggle's classification of street art. Chackal defines street art as "an art form that entails creating public works incorporating the street physically and in their meaning" and emphasizes two points: that "street artwork must be in the street" and that "illegality is a prototypical and paradigmatic feature" (359). He further writes that this illegality shapes the "materiality" of artworks, part of which is its "ephemerality: the artist accepts that works may be short-lived if they are removed, destroyed, painted over, or appropriated into another's work" (Chackal). This likely leads many to think that ownership of the artwork should automatically fall to the property owner, as the artist has accepted he is creating something both illegal and ephemeral. I believe this is a valid argument, and it warrants consideration in any decision. However, other factors show that only awarding ownership to the property owner would be an oversimplification.

It can be easy to confuse street art with graffiti. Consider a wider definition of graffiti. British scholars Alan M. Forster, Samantha Vettese-Forster, and John Borland Forster recently published a paper on the cultural significance of historic graffiti, defining such work as "inscribed or surface applied media, forming writing or illustration, produced without expressed or implied consent" (62). Street artwork at face value clearly fits this definition. However, I believe there is still a noticeable distinction. Street art typically has a much higher quality than your run-of-the-mill tag or blockbuster. This, coupled with a specific message street artists are trying to convey, makes it a more positive work of art, often bettering the community. Resident reaction to the removal of "Slave Labour" is a perfect example of this, as is the widespread popularity of

Shepard Fairey's stencil of a younger Barack Obama with the word "Hope" inscribed underneath. Contrast this with graffiti's relation to broken windows theory, a criminological theory that links "disorder and incivility within a community to subsequent occurrences of serious crime" (McKee). That's not to say that street art doesn't have its negatives – some believe that street art that raises awareness of gentrification actually contributes to a neighborhood's gentrification by making it trendy and popular (Arlandis). But as a whole, street art can be differentiated from graffiti by its positive effect on the community (or its lack of a clear negative effect).

Perhaps the best test to differentiate between graffiti and street art comes from a Supreme Court case regarding pornography. *Jacobellis v. Ohio* (1964) involved a suit against a theater for playing a film containing a sexual scene that some deemed obscene. In his decision, Judge Potter Stewart famously said, "I know it when I see it." There will never be a clear line between graffiti and street art due to their nature. Using Potter's test (guided by the definition of street art proposed above) would be better than trying to force street art into a strict box. Some would argue that judges naturally hold opinions on the act of spray-painting a building itself (whether as graffiti or art) and would rule more or less strictly as a result. However, a judge's general opinion would likely be shaped by the community he or she works in, and likewise would reflect the community's values and what they wish to happen.

### **A Brief Note on Intellectual Property Rights**

Just like conflicts over physical property rights, intellectual property cases are still being decided in the courts and on the streets. However, this fight comes from the necessary transitory period as street

art becomes more commonplace in society. Legally, street artists have the same protections as more traditional artists do. California lawyer Christoffer Gaddini recently noted that “copyright law is neutral towards the legality of how a work was created.” British copyright laws make a similar case. Jessica Bent, a partner at the law firm Royds Withy King, writes that the “first owner of an ‘artistic work’ . . . will always be the creator or artist”. Bent writes that under U.S. law, these copyright protections ensure that the holder has the right to reproduce, produce derivatives, and publicly display the copyrighted work (Bent). These are fairly standard rights that all artists hold. However, the intensely public nature of street art challenges the extent to which these rights can be enforced.

While all displayed artwork can be considered at least semi-public, street art is more public than a sculpture in a museum. A museum or gallery can charge admission and limit photography if it wishes, but it’s almost impossible to enact this for a work of art stenciled on a city building. This typically means the public has almost unlimited access to the work, allowing them to freely take photographs. For most people, posting a picture of a Banksy work on Instagram isn’t enough to get you in trouble. British law (and similar statutes in the United States) cover “copying for the purposes of ‘criticism or review,’” as well as “‘incidental inclusion’” (Bent). However, artists are legally protected from the more entrepreneurial members of society. In 2013, Banksy revealed that a booth struggling to sell stenciled canvases had actually been set up by himself to sell Banksy originals, not copies. A week later, the New York Post reported that a clever businessman set up a stand advertising completely fake prints, who said: “All 40 sold out in one hour. Including the price sign” (MacIntosh). Personally, I remember walking down the

streets of Florence a few summers ago on a class trip and seeing booths set up with fake prints of work by L'arte Sa Nuotare and Exit/Enter, two notable Florentine street artists. These illegal operations will typically be shut down (or at least limited in their ability), but sometimes street artists are hesitant to the most egregious offenders to court out of fear of revealing their true identity and compromising their ability to create artwork. There is still work to be done to ensure that artists receive the protection due to them, but so far the law has been clear on what protections they deserve.

### **The Current State of Affairs**

Decisions concerning the right to ownership of a physical street artwork can become highly contentious. This stems from the wide variety of actors who hold legitimate claims. Typically, the battle is between the artist and the property owner. To side with the artist is to ignore the illegal aspect of painting on someone's property, while siding with the property owner strips the artist of the rights to a work they created. Often, the neighbors, the general community, and the government hold a stake in the issue as well. As street art increasingly becomes the target of criminal and civil suits, most decisions result in one actor gaining complete ownership. In the case of "Slave Labour," that ownership went to the building's owner, who decided to auction the piece. It is important to remember that most street artwork doesn't fall to the courts, as many artists cede control to the property owner, but in the cases that do make it to court, the decision often falls strongly in favor with the property owner.

Intellectual property cases have dominated legal cases over pieces of street art so far, leaving few real physical property case studies to

examine. However, Banksy's work has been involved in several disputes, including "Slave Labour" and another work titled "Mobile Lovers," which a local boys club wished to auction off to raise funds for the club. The city objected, wishing to keep the work in the community, but Banksy himself ultimately intervened, giving the club permission to auction the work off (which the city then accepted) (Salib 2293). While there is a historical lack of physical property right cases, the disputes that have happened show there is no clear legal doctrine concerning the physical ownership of street art.



### **Changes in Legal Doctrine**

The proposed parameters of street art emphasize its illegal nature. Mr. Chackal noted that "an artist commits an illegal act and consequently has no claim over the work," which often means an artist won't take legal action out of concerns for personal freedom (364). Peter Salib, a law student at the University of Chicago, writes in *The University of Chicago Law Review* that this results in most disputes "[arising] between finders



of street art and owners of the property on which the art is found” (2295). A modification of this can be seen in the cases of both “Slave Labour” and “Mobile Lovers,” where the finder is equivalent to the community at large. If the street artist does decide to pursue legal action, this can lead to multiple competing claims for ownership. Thus, it is important to create legal doctrine that weighs competing claims against each other in order to determine the fairest (if not most equal or satisfying) solution.

Before proposing a legal approach, I would like to take a moment to briefly examine possible claims in a case. Earlier, I touched on the dispute between the artist and the property owner. This debate can be summed up as one between the illegality of painting on someone else’s property and the personal nature of creating a work of art. However, the artist and the property owner aren’t always the only claimants. Street art often plays one of two roles in a community – it can increase the value of a community, or it can decrease it. Consider one potentially challenging situation. Just a few months ago, cultural blogger Mick Hartley wrote that “gigantic drawings of penises and sex scenes have appeared on the walls of the capital” in Brussels. If the building owner happens to like these works (perhaps they’re a commentary on the area being a red-light district) and decides to keep them, what is the community to do? It is important to have a workable approach that deconstructs all possible claims carefully, without a knee-jerk reaction. Community claims can also extend past the neighborhood the work resides in. Writer Jonathan Lethem introduces the concept of a “usemonopoly” in *The Ecstasy of Influence*, an essay on plagiarism. He writes that the “rapacious expansion of monopoly rights has always been counter to the public interest” (Lethem 64). While most claims revolve around clear positives and

negatives, there will likely be cases centered on the work's philosophical contribution to society.

After considering a number of possible recommendations, I believe Mr. Salib's proposal of an equitable division approach to street art would function best. Equitable division "refers to a court's ability to divide ownership rights in a single piece of property among those with competing claims [of ownership]" (Salib 2305). Salib notes that equitable division is extremely flexible, writing that "it can determine ownership rights in a variety of contexts and apportion those rights via the consideration of any relevant factor" (2306). This would work for street art quite well, as different interests from a number of actors must be fairly equated. Critics argue this approach would increase the subjectivity of each decision (as a judge must make a decision between apples and oranges, so to speak). This is a clear consequence, but using a unified approach would actually lead to greater consistency in decision. Any subjective differences would quickly be normalized as judges learn how to decide between competing, non-comparable claims.

### **Other Concerns**

While the most prominent cases concerning street art typically involve only a few of the most prolific, well-known street artists, it is important to remember that disputes come in all shapes and sizes. It is imperative to treat every case equally, whether it is a million-dollar issue or a hundred-dollar one. Consistent, just application of laws and legal precedents ensures that all cases are resolved in a fair and proper manner. Lower profile cases shouldn't just be "rubber-stamped" through the system. Second, it is important to remember that one's stance on how to divide rights among the property owner, the artist, and others often

comes down to one's personal preference, or is at least indirectly. New laws and legal precedents must be straightforward, applicable to a majority of cases, and as objective as possible. While some subjectivity remains necessary in any decision (such as in deciding whether to treat a work as street art or graffiti), this must be limited when possible. This problem is partially solved by the judge's accountability to their community's values. A liberal jurisdiction will likely have a more liberal judge, meaning any subjective decisions made by this judge will likely reflect the community's interests. This raises an important point: identical cases tried in different communities will likely turn out differently under an equitable division approach. This should be considered as an advantage to the system, as it accounts for community norms, rather than taking a hard stance on each case.

In addition, some would argue that equitable division could lead to abuse by the street artist. Let's say an artist decides to stencil on a New Jersey highway sign as commentary on the Fort Lee lane closure scandal, and later submits a claim for the right to keep the work there. Perhaps the community agrees. However, the government would submit a claim stating that it is a distraction to drivers, leading the judge to likely rule in their favor, rather than blindly siding with the artist. It is also important to remember that equitable division doesn't exempt artists from criminal suits. Even if equitable division leads to a proliferation of street art in the community, any increase would be partially dampened by existing criminal sanctions.

## **Conclusion**

As social media changes how we see the world, forms of artistic expression are changing as well. Street art has seen a recent rise in

popularity, prominence, and abundance in our society and is becoming more accepted by the month. Thus, it is imperative to determine from the start how to decide ownership of each work of street art. Recent social and political movements have shown that people around the world are yearning to express themselves in new and powerful ways, and street art can be that outlet. Impassioned speeches on the steps of the Lincoln Memorial can only be made by a few and a single tweet is often lost among billions. But a stencil can be wielded by all. To quote Banksy: “Speak softly, but carry a big can of paint.”

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