



## **GRAFFITI- A NON CONVENTIONAL COPYRIGHT?**

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### **ABSTRACT**

Art is a tool to promote creativity- a form of expressing one's self and one's identity. Looking through the window of time, art has undergone a series of transformation- from painting on cave walls to painting on any walls, all for the cause making the city a colourful and pleasant place to reside in. Modern art of walls of buildings or on posts are termed as graffiti. Graffiti can also serve as a source of information on various pressing social concerns which the society is conveniently ignorant about. While most of the graffiti artworks in India are illegal, there are a few which are approbated and thereby, legal. But can an illegal work be entitled to a copyright protection under our existing laws of copyright?

This paper aims at providing a discourse on the copyrightability of illegal and legal graffiti artwork in India. Furthermore, it shall examine whether entitling an illegal graffiti to copyright protection defeats the objectives upon which the foundation of the Copyright Act rests.

### **INTRODUCTION**

“Some people become cops because they want to make the world a better place. Some people become vandals because they want to make the world a better looking place.”

- Banksy

Satirical graffiti artist Banksy, who has adorned city walls, bridges and streets all across England with dark humour, firmly believes that graffiti art is a medium of disseminating awareness amongst the masses; therefore, he vehemently advocates its promotion as a form of art. Graffiti wasn't always considered as a form of art and expression, in fact the evolution of graffiti as a form of art was absent until the 1980s. It is only in the recent years that its presence has been felt in the pop culture and contemporary art form. However, graffiti art in India is a nascent concept which is primarily regarded as a work of vandalism and therefore, illegal.

The Oxford Dictionary defines 'graffiti' as "writing or drawings scribbled, scratched or sprayed illicitly on a wall or other surface in a public place." It can be befittingly insinuated from the definition that graffiti is mostly an artwork that is produced illegally. Nonetheless, nowadays, most of the graffiti works are produced legally under due authorization of the Government or other city authorities or companies with the aim of spreading a significant message and beautifying the city. Since graffiti art is proliferating rapidly, works of renowned graffiti artists are being offered for sale in galleries and are put to both commercial and non-commercial use by various companies with or without the authorization of such artists. The cascading effect of such proliferation is that the original author of most of the graffiti arts is unknown to the public; consequently their work is prone to unauthorized exploitation, such as being used as a background in tv series or commercial advertisements for product promotion. This is a flagrant violation of the requisites of copyright protection that is granted to a work. But the question that surfaces addressing this



issue is- whether graffiti qualifies as ‘work’ in which copyright protection subsist? To best argue the copyrightability of graffiti, the primary focus of the authors will be on illegal graffiti (graffiti that has been fixated upon a surface without permission from the owner of such surface).

The pivotal ambiguity that will be highlighted in the paper is the conflicting interests of the graffiti artist and owner of the surface upon which such art has been fixated. A juxtaposed reading of the conflicting provisions of Section 14(c) and Section 52(t) of the Copyrights Act, 1957 will be adopted to interpret the true legislative intent behind inclusion of the two provisions. Furthermore, it is imperative to understand whether an illegal work (illegal graffiti) is entitled to a copyright protection at all, given to the fact that copyright is a strategic legal tool that is granted to creative literary, musical or artistic work for further development of such work in the pursuit of protecting the economic and moral rights of the author of such work. In addition, if such copyright protection is granted to illegal graffiti, it will not only be different from the conventional subject-matters of copyright protection, thereby giving it the status of a non-conventional copyright, but will also broaden the horizon of subject matter governed by copyright laws.

### **REQUISITES FOR COPYRIGHT PROTECTION**

Graffiti will fall under the subject matter of copyright protection if it qualifies as ‘work’ under Section 2 (y)<sup>1</sup> of the Copyright Act, 1957. The section reads, as follows:

“work means any of the following works, namely-

- i. A literary, dramatic, musical or artistic work;
- ii. A cinematograph film;
- iii. A sound recording;”

Graffiti is defined in Cambridge Dictionary as “words or drawings, especially humorous, rude, or political, on walls, doors, etc. in public places.” It is evidential from the definition of ‘graffiti’ that it qualifies as an artistic work under the definition of ‘work’ so provided by Section 2 (y) of the Act. Since it has been established that graffiti is an artistic work, the meaning of artistic work has to be looked into. Section 2 (c)<sup>2</sup> of the Copyright Act defines ‘artistic work’ as-

Artistic work means-

- i. A painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possess artistic quality;
- ii. A work of architecture; and
- iii. Any other work of artistic craftsmanship.”

A literal interpretation of the wordings of the aforementioned provision delineates that graffiti qualifies as ‘artistic work’ under sub-clause (i) of the Section. Graffiti is made using spray paint, wall paint or ink, and requires sense of creativity which is brought to fruition by artistic skills. Thus, it is best suited to qualify under sub-clause (i) of Section 2 (c) because as per the definition of ‘Painting’ provided by the Cambridge

<sup>1</sup> Section 2(y), The Copyrights Act 1957, Legal manual Intellectual Property Laws 2017, Universal Law Publication, Pg. 181

<sup>2</sup> Section 2(c), The Copyrights Act 1957, Legal manual Intellectual Property Laws 2017, Universal Law Publication, Pg. 179



Dictionary; it says “the skill or activity of making a picture or putting paint on a wall”. It has been established that graffiti qualifies as an artistic work under Section 2 (c) of the Act. Now it is essential to prove if the basic requirements for copyright protection are fulfilled by it. The requisites are:

- i. An original work of authorship; and
- ii. Fixed in a tangible medium.

#### Original work of authorship

The definition for ‘Original’ is not expressly provided for in the Copyright Act, 1957, but *Section 13<sup>3</sup>* of the Act mentions the term- “subject to the provisions of this section and other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say- **Original** literary, dramatic, musical and artistic work, cinematographic films, and sound recordings.” The word original in the context of the provision alludes that idea cannot be copyrighted but the expression of an idea in a particular way is what is entitled to a copyright protection.

Judiciary has taken a keen interest in setting the boundaries of what work qualifies as original in a myriad of cases, primarily instrumentalizing three distinct rules, such as-

- The Sweat of the Brow,
- The Modicum of Creativity, and
- The Skill and Judgement.

*University of London Press Ltd. v Tutorial Press Ltd.*<sup>4</sup> is an exemplary case that relied on the rule of the ‘Sweat of the Brow’. The

Court observed that originality does not mean that the work has to be original, but it only means that some effort has to be put in for it to be deemed as original.

In the case of *Fiest Publications Inc. v. Rural Telephone Service Co.*<sup>5</sup> the necessity for the ‘modicum of creativity’ was emphasised upon. The Court held that there should be at least “minimal creativity in the work for it to warrant copyright protection.” Therefore, the contents of a telephone directory would not amount to an original work since there exists no creativity at all.

*Eastern Book Co.v. D.B. Modak*<sup>6</sup>, altered the dimension of determining originality of a work. The Court held that mere application of labour will not suffice for a copyright protection. Thus, it adopted the “Skill and Judgement” requirement where application of certain set of skills and ability to discern shall determine the originality of a work.

It is evident from the aforecited cases that for a work to be copyrightable it has to be original work of authorship. Graffiti will undoubtedly qualify as an original work if it is creative and contrived with a set of skills attained for over years. But the problem rests with the copyrightability of tags or throw-ups, which are primarily words that already exist in the common parlance, therefore, aren’t original. So the question that ensues is whether tags or throw-ups will be entitled to copyright if created in a unique style? The case of *Jade Berreau v. McDonald’s Corporation*<sup>7</sup> sheds light on the issue. The primary contention of the complainants was

<sup>3</sup> The Copyrights Act 1957, Legal manual Intellectual Property Laws 2017, Universal Law Publication.

<sup>4</sup> [1916] 2 Ch 601

<sup>5</sup> 499 U.S. 340

<sup>6</sup> (2008) 1 SCC 1

<sup>7</sup> Jade Berreau v. Mc Donalds Corporation (2:16-cv-07394) District Court, C.D. California



that an outlet of McDonald's Corporation in London that used graffiti artist Dash Snow's stylized signature of his pseudonym 'SACE', were clearly infringing upon his copyright over the name and work with its unauthorized use.

US Court dealt with the issue of copyrightability of tags in the case of *Reece v. Mark Ecko Unlimited*<sup>8</sup>. In this case the Court was of the opinion that, although words 'Dip' and 'Dipism' are not themselves subject to copyright protection, the original manner in which the word 'Dip' was expressed by plaintiff Reece, should be protectable.

Thus, it can be adduced from the aforementioned cases that the words in the common parlance is not the subject of copyright protection but its lettering rendition or style if original shall be entitled to copyright protection.

#### Fixed in a tangible medium

The second criterion for a work to be entitled to copyright protection is that the work should be fixed in a 'tangible medium of expression'. On a cursory look graffiti seems to qualify the fixation requirement because graffiti artwork is generally painted on walls or posts, etc. The problem, however, arises when such illegal graffiti artwork is removed by the owner of the property- can work which is ephemeral in nature be entitled to a copyright protection? *Section 2 (2)* of the Berne Convention for Protection of Literary and Artistic Works, 1886 (India is a signatory to the Convention) provides that "works shall

not be liable to be protected unless they have been fixed in some material form." The objection to this provision in the context of ephemeral work is that it demands the work to be "sufficiently permanent or stable to allow it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration",<sup>9</sup> and graffiti which is ephemeral in nature appears to be sufficient to satisfy the fixation requirement under the Convention.

#### MORAL RIGHTS

Grffiti artwork qualifies the basic requirements to be entitled to copyright protection. If a work of original authorship is entitled to copyright protection, *Section 57* of the Copyright Act, 1957, confers upon such author a wide amplitude of power which puts the 'work' produced on a higher pedestal and not the object of copyright. *Section 57* of the Act safeguards the special rights of the author which extend beyond his economic rights. These rights which are commonly referred to as moral rights of an author, enable the author to claim authorship over his work and also allows him to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to his said work if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation.<sup>10</sup>

There is a close bond that an author shares with his work; the author strongly identifies himself with his work. It is as Hegel formulated in his *Personhood Theory*- there is a normative connection between property

<sup>8</sup> 10 Civ. 02901 (JSR) (DF) (S.D.N.Y. Aug. 19, 2011)

<sup>9</sup> Enrico Bonadio, Street art, graffiti and copyright, Non-Conventional Copyright Do New and Atypical Works Deserve Protection?, ISBN: 978 1 78643 406 7, published in 2018, pg. no. 86

<sup>10</sup> Section 57, The Copyrights Act 1957, Legal manual Intellectual Property Laws 2017, Universal Law Publication, pg no. 226D – 226E



and personality and such property is a notional extension of one's personality.<sup>11</sup> Hughes famously argued that intellectual property are comparatively more 'receptacle for personality.'

The paternity rights and integrity rights which are imbibed in the aforementioned provision give rise to a conflict between the rights of the author and rights of the property owners in disposing of the tangible object they have become owner of against their will. A myriad of US case laws are precedent to this conflict. "In *Hanrahan v Ramirez*<sup>12</sup> a group of young artists had painted a mural carrying an anti-drug message on the side of a liquor store with the authorization of the property owner. After the store owner whitewashed half of the mural three years later, the artists took legal action. The court held in 1998 that the piece had recognized stature because it had won a national prize, received the local community's support and had been displayed in a government building as a photograph. The judge awarded the artists £48,000 as compensation and ordered the restoration of the mural." This underscores that if graffiti attains a 'recognised stature' and the content of art is not illegal then such graffiti should be entitled to protection as against the interest of the property owner.

The author strongly feels that if a work is authorised then claiming copyright protection over it is justified, but if a work is illegally created, a claim of copyright protection over it is not justified irrespective of how creative the work is. Property owners' interest should be given paramount attention

because no one should be harassed by destruction or mutilation of their property without their consent. The same can be substantiated with John Locke's Labour theory where he argues that "all persons have a duty not to harm others."<sup>13</sup> However, it is also unjustified if a property owner removes or has someone remove the graffiti on his property for the purpose of exhibiting it or offering it for sale. This would amount to unjust enrichment of the property owner at the cost of the author of the graffiti artwork. Therefore, where property owners' interest to protect their property from destruction or mutilation should be safeguarded, they should be strictly disallowed from cashing upon such graffiti artwork.

### COPYRIGHT PROTECTION TO ILLEGAL WORK

Copyright protection demands two requirements- it has to be an original work of authorship and it should be fixed in a tangible medium. These requirements fail to address the nature of work which could be immoral or illegal. For instance, if a person steals a page from another person's notebook and creates a drawing, or if he steals a camera and clicks an impeccably beautiful photo, for which he then demands copyright protection, should his work actually be entitled to such protection despite of it being a consequent product of theft? The Copyright Act, 1957 is not clear on whether illegal or immoral work can be registered for copyright protection. Before delving into the issue of copyrighting illegal work, a distinction between illegal and

<sup>11</sup> William Fisher, Theories of Intellectual Property, pg no. 6

<sup>12</sup> *Hanrahan v. Ramirez*, No. 2:97-CV-7470, 1998

<sup>13</sup> Lior Zemer, On the Value of Copyright Theory, pg no. 11

<http://ssrn.com/abstract=1657855>

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immoral work is of utmost importance. “Illegal work essentially consists of works whose content is illegal or work that directly relates to a crime or an individual convicted of a criminal offence.”<sup>14</sup> On the other hand, what might be immoral doesn’t necessarily have to be illegal. Morality is an ever-changing standard of conduct which differs from person to person. Graffiti artwork isn’t immoral but an illegal act since it’s an act of vandalism. Whether illegal graffiti artworks are entitled to copyright protection can be substantiated after examining the broader question of whether copyright law should examine the content of a work as a prerequisite to granting copyright protection? Creative work may stagnate due to the consequence of content reviewing which would in turn defeat the idea of free speech and expression. To mitigate this issue the court in the case of *Jartech, Inc. v. Clancy*<sup>15</sup> held that illegal work cannot be a defence to copyright infringement, thereby propounding a content-neutral approach. The content-neutral approach doesn’t resolve the problem either. This is because what constitutes as immoral work would vary from jurisdiction to jurisdiction, thus, giving extra power to the registrars of copyright or courts to decide which work ought to be protected and which do not. Certain standards should be prescribed to determine what content should be copyrightable and such standard should be internationally implemented so as to avoid discrepancies amongst jurisdictions.

Another pressing concern about copyrighting of illegal work is whether such work will prove to be instrumental in benefiting the society by promoting the progress of knowledge which is indeed the main objective of copyright laws. The dilemma of deciding upon this concern assertively is that while works of Adolf Hitler, Mahatma Gandhi, Nelson Mandela, and Martin Luther King Jr, who wrote inspirational books while serving their sentences in prisons absolutely benefit the society despite of being illegal, work such as child pornography doesn’t benefit the society at all. Graffiti artwork befittingly falls in the grey area where the work might not necessarily benefit the society, nor is it as illegal as child pornography.<sup>16</sup> Despite of being an illegal act the content of the act cannot be said to be illegal.

In the author’s opinion content whose very creation is illegal or the content of it is illegal shall be elided or not be entitled to copyright protection. Jeremy Bentham’s Utilitarian theory focuses on protecting the happiness of the majority as against the minority. On the basis of this theory, authors of illegal graffiti artwork shall not be entitled to copyright protection because it is against the public interest. Graffiti is an act of vandalism which is constitutes the offence of mischief under Section 425<sup>17</sup> of the Indian Penal Code. Granting copyright protection to such work would be implicitly condoning work that harms the society instead of benefitting them.

<sup>14</sup> Eldar Haber, Copyright protection of illegal works, , Non-Conventional Copyright Do New and Atypical Works Deserve Protection?, ISBN: 978 1 78643 406 7, published in 2018, pg no. 404

<sup>15</sup> *Jartech, Inc. v. Clancy*, 666 F.2d 403,408 (9<sup>th</sup> Circuit, 1982)

<sup>16</sup> Eldar Haber, Copyright protection of illegal works, Non-Conventional Copyright Do New and Atypical Works Deserve Protection?, ISBN: 978 1 78643 406 7, published in 2018, pg no. 411

<sup>17</sup> Section 425, The Indian Penal Code 1860, By Ram Jethmalani and D.S. Chopra, Thomson Reuters



The golden rule in English Law is one of the rules of interpretation adopted by the English Courts. A wider approach of this rule is applied by Courts to avoid the defeat of principles of public policy. As opportunely held by the Court in the case of *In Re Sigsworth*<sup>18</sup>, a particular law should not be literally interpreted if it doesn't not serve the purpose of public good, it should only be made applicable when it is in sync with the tenets of public policy, which is why illegal graffiti shall be disentitled to a copyright protection as it would prove to be against public good.

### FAIR USE AND LEGALLY AUTHORISED GRAFFITI

The paper primarily deals with the impediments in granting copyright protection to illegal graffiti artwork, but this segment of the paper focuses on the impediments of granting copyright protection to legally authorised graffiti artwork. This issue surfaces due to the conflicting provisions of Section 14 (c) (ii) and Section 52 (1) (t)<sup>19</sup> of the Copyrights Act, 1957. The prior mentioned Section confers upon the author of a legally authorised graffiti artwork the power to communicate his work to the public, whereas the later section deals with the provision of fair dealing that states, "the making or publishing of a painting, drawing, engraving or photograph of a sculpture, or other artistic work falling under sub-clause (iii) of clause (c) of section 2, if such work is permanently situate in a public place or any

premises to which the public has access." As has been previously established in the paper, graffiti artwork qualifies as artistic work under Section 2 (c) (i) of the Act, by the virtue of which it falls under the ambit of Section 52 (1) (t) which takes away from the authors of graffiti artwork to "make or publish" their work as against the exclusive right granted to such authors under Section 14 (c) (ii) to communicate their work to the public.

To deconstruct the provision of Section 52 (1) (t) in lieu of Section 14 (c) (ii), the term "public place" has to be construed. Section 52(1) (t) states "if a work is permanently situate in a public place or any premises to which the public has access".

As the Copyrights Act, 1957 does not provide a definition for "public place", let us consider an example where a person has made an authorised graffiti in an art gallery where public has access to.

Does the gallery qualify a public place? If yes, then will the author of the graffiti be entitled to a copyright protection? To answer these questions interpretation of 'public place' imperative. Public must be delineated as the 'general public'; performance before a 'closed group,' however, large in number, does not constitute performance in public.<sup>20</sup>

In *Harms v Martans Club*<sup>21</sup> it was decided by the Court of Appeal that performance in a club provided on payment of necessary membership fee is considered a public performance.

<sup>18</sup> [1935] 1 CH 98

<sup>19</sup> Section 52(1) (t), The Copyrights Act 1957, Legal manual Intellectual Property Laws 2017, Universal Law Publication, Pg. no. 226D-226E

<sup>20</sup> Narayanan P, Copyright and Industrial Designs, 2nd edition (Eastern Law House, Calcutta and New Delhi), 1995, p. 69, 137-38, 280.

<sup>21</sup> *Harms (Inc) Ltd and Chappell and Co Ltd v Martans Club* (1927) 1Ch 526 at p. 532, 533



Furthermore, in *Performing Right Society Ltd v Rangers R C Supporters Club*<sup>22</sup> the court observed that the relationship of owner of the copyright is a primary consideration and if the audience was one which owner of the copyright could consider as part of public, then the performance is in public.

Therefore, in the light of the judgements aforesaid, an Art gallery should be considered as a “public place” since it is available to the general public.

### CONCLUSION

The objective of Copyright, whether conventional or non-conventional, is to ensure that there is encouragement of learning and dissemination of knowledge. Granting copyright protection to graffiti would mean widening the scope of copyright under non-conventional subject-matter that can be copyrighted, but is promotion and protection of illegal act that constitutes a crime under the IPC, the objective of Copyright Act? The very intent of having a legal mechanism in place is to ensure that interests of a victim are upheld. Therefore it is apposite to state that one seeking relief before the court should enter the court with “clean hands”. The “Clean hand doctrine” gives the defendant the upper-hand by arguing that plaintiff is not entitled to equitable remedy because the plaintiff has himself acted unethically or in bad faith. Thus, the author of an illegal graffiti artwork cannot bring about a claim that his work has been destroyed or mutilated unjustly and demand compensation from the property owner, because he himself has committed an offence. Jeremy Bentham’s Utilitarian theory focuses on protecting the happiness of the

majority as against the minority. On the basis of this theory, authors of illegal graffiti artwork shall not be entitled to copyright protection because it is against the public interest as it promotes commission of an offence.

Now looking into the fair dealing scenario, the conflict between Section 52 (1) (t) and Section 14 (c) (ii), which deprives an author of an authorised graffiti from communicating his work to the public and claiming copyright protection over it, should be done away with, because according to this arbitrary and vague provision of Section 52 (1) (t), not only graffiti, but making and publishing of any artwork in a public place will not be protected by Copyright Act, thereby going against the objective of Copyright Act to promote and encourage creative and original work. If this provision is not done away with, how do we propose an artist communicates his work to the public, which also happens to be a flagrant attack on the Freedom of Speech and Expression granted to the citizens of India under Article 19 (1) (a) ?

Further if graffiti work is authorised then by applying four factor tests established as provided for in the case of *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*,<sup>23</sup> it could be determined whether the reproduction of the work amounts to fair use or not. The four factors which judges consider are the Purpose, the Nature, the Amount of the work taken and the Effect of such copying on the potential market. By applying this test most of the infringers of copyright work on graffiti, who copy such graffiti without the

<sup>22</sup> *Performing Rights Society Ltd v Rangers RC Supporters Club* (1975) RPC 626.

<sup>23</sup> 2012 SCC 37



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author's permission in their movies or advertisements, won't be able to claim the defence of fair use since the reproduction of these work are mostly for commercial benefits and the substantial amount is copied.

After careful examination of legal and illegal graffiti artworks, the author opinionates that graffiti artwork shall only be entitled to copyright protection when it is legally created under proper authorisation. If the graffiti is produced illegally, irrespective of its beauty or originality, it should not be entitled to a copyright protection as it would be violative of the very tenets on which our society is founded.

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