Legal questions about illegal art
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lifestyle trends through such products as special paint, clothes, movies, magazines,\(^5\) and, most recently, computer games.\(^6\) Graffiti is a form of art that has existed for at least 2000 years,\(^7\) but there has been little legal literature to date concerning copyright law, trade mark law, and suchlike (Figure 4).

\(^5\) Spray paints: Montana, MTN, Belton, Moletov. Magazines: Backjump in Germany, Explicit Grafix in France, Brain Damage and Concrete in Poland. Movies: Dirty Handz from France (parts 1, 2, and 3), and Men in Black from Poland (parts 1, 2, and 3)—some available on YouTube and Google video. Finally, a feature movie Wholetrain, which was awarded a number of prizes at various movie festivals—see http://www.wholetrain.com (last visited 20 May 2007).

\(^6\) See Marc Ecko’s Getting Up published by Atari in 2006, and http://www.bombtheworld.net (last visited 12 June 2007), a website allowing its visitors to paint various subway and commuter trains virtually.

\(^7\) R Reisner, Graffiti: Two Thousand Years of Wall Writing (1971), V Pritchard, English Medieval Graffiti (1967).
Figure 2. A panel colour piece by chink, HB crew.

Figure 3. A wholecar (part of a wholetrain) by chink, HB crew and dair, EWC crew.
The graffiti as a work

A lawyer must address two basic questions when considering copyright protection for graffiti. First, is every expression of creativity referred to as graffiti a ‘work’ in the sense of copyright law? Secondly, can graffiti attract legal protection? Polish law accords legal protection to ‘any expression of creative activity that bears individual features that was established in any form, regardless of its value, purpose and manner of expression’. A work is also recognized as a legal asset that constitutes intangible goods. The notion of a work was defined, in an order of the Supreme Administrative Court in Lublin, Poland on 8 March 2000, as follows:

a work is a result of creative and original activity, characterized by individuality. Legal protection provided in the copyright law does not extend to the creative process itself, the creative method or technique applied when creating a work.

In the USA, the Congress has the prerogative to adopt a law ‘to promote the progress of ... useful arts, by securing for limited times to authors ... the exclusive right to their respective writings’ and has exercised this prerogative in the form of the Copyright Act 1976:

copyright protection subsists, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

In the UK, copyright is a property right which subsists in artistic works, irrespective of artistic quality, including paintings or drawings.

Each of these jurisdictions defines an object liable for copyright protection quite broadly. It may thus be assumed that, if a piece of graffiti features individual, creative, and materialized characteristics, it is protected by copyright law. Additionally, neither moral nor public order circumstances, which might potentially determine whether a graffiti work is recognized as a protected work, are mentioned in them. However, an argument that, since it was illegal to place a mural graffiti work, it should be excluded from the copyright protection, was raised by the defendants in English v BFC&E-R E. 11th St LLC. It is only in the legal doctrines of the USA and the UK that the obscenity of a work has been taken into consideration when claiming validity of protection and copyright infringement. US Court of Appeals for the Second Circuit also had to examine the First Amendment’s right to freedom of speech within the context of selling clothing goods painted with graffiti.

A tangential question arises in the case of the increasingly popular trips abroad taken by graffiti writers (so-called interrails). It seems that, due to the territorial character of copyright law protection and both bilateral and multilateral international provisions, every work is subject to the law of a country on the territory of which it was created. Questions about the territorial nature of copyright law will also apply to a case when the painted train is travelling across Europe and photos of graffiti works might be taken and exploited in different countries/jurisdiction.

A further question is that of how to categorize graffiti in terms of works protected by copyright law. Usually colourful works are considered artistic works, so this is where regular graffiti pieces fit. The classification of tags, however, is more difficult. This author considers them as artistic works, since the tagger did not intend to convey any idea nor deeper meaning but wanted solely to present his signature in the most compelling and graphically refined manner. Under US
law, graffiti should be categorized as a ‘work of visual art’ (a painting or a drawing).21 The conclusion that the ‘simplest’ form of modern graffiti, a tag, should be excluded from copyright protection because of its unoriginal features is false, since styles of handwriting used in tags can be easily discerned and linked to individual writers. It is a most simple task for a professional graphologist. An original and graphically attractive style of lettering is often copied by other writers (biters, individuals who ‘bite’, or copy, an original style). An analogy may also be drawn between original handwriting and original typefaces, which in the EU are protected by copyright and industrial property law.22 In the USA, the typeface (‘typeface as typeface’) is not afforded copyright protection.23 However, this author considers two-colour throwups (letters which resemble bubbles) to be original and creative works. An unarguable question concerns ‘normal’ works created only with two colours, in which the writer imubes the letters with original features. As one of the most creative Polish writers once stated, ‘only by the shape of letters and not by the number of colours and effects can a true style be recognized’.24 Finally, undoubtedly multi-colour pieces can be categorized as...

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24 Daur, a writer from the EWC crew in the interview for Uwaga 2 (an underground graffiti magazine published in 2000). ‘Style is an individual thing, it’s a special mark. It is something that makes writers different. A piece has style when everything sits in its place, letters go well together, interact with each other, transcend each other. A style is the harmony of
works covered by copyright protection. Both the style of letters and the choice of colours are testimony to the creative and individual character of those works.

**Authorship**

In the case of works created under contracts for specific work or performed in lawful places (Halls of Fame), the creator usually discloses his identity, and simultaneously identifies himself with that work. The situation is, however, different in the case of works resulting from illegal activities since the risk of penal and/or civil legal action against the creator encourages him to remain anonymous. His name can be guessed on the basis of a tag or the content/style of his lettering. The right of authorship of a work stems from the French moral law doctrine of droit de paternité. This doctrine protects incorporeal rights of creators and functions in almost every continental legal system. In international law, it is reflected in Article 6 bis of the Berne Convention, which provides that the author, regardless of whether he remains a holder of property rights, retains his rights to claim authorship of the work.

The Polish Act on Author’s right and Neighbouring Rights states that the creator is an individual whose name was for that purpose placed on copies of the work, or the authorship of whom was revealed to public in any other way in connection with the publication/distribution of the work. This is a normal rebuttable presumption of law (praesumptio iuris tantum). Polish law also deals extensively with the presentation of one’s authorship. The creator has the right to choose whether he wants to make his authorship public by placing his name or a pseudonym or to distribute the work anonymously. In other words, copyright law does not force authors, publishers, or anyone else to reveal the authorship of a work: this is the decision of the creator. Concealment of authorship under a pseudonym and refusal to divulge authorship are treated as forms of exercising one’s rights.

An interesting proposition concerning concealed authorship, although only slightly relevant to graffiti art, is offered by the Polish Act on Author’s right and Neighbouring Rights: ‘until the creator reveals his authorship, in the exercise of the authorship rights he is replaced by a producer or a publisher and if there exist no such persons, a proper collective copyright management organization’. No organization to manage graffiti has yet been founded and it is improbable that one will be founded in the future. No currently active organization would be permitted to assume responsibility without previous agreement, relying only on presumptive agency (negotiorum gestio doctrine).

In 2005, the US Copyright Office studied issues of so-called ‘orphan works’, i.e., copyright works whose owners may be impossible to identify and locate. Concerns had been raised that the uncertainty surrounding ownership of such works might needlessly discourage subsequent creators and users from incorporating such works in new, creative efforts, or from making such works available to the public. Under US law on anonymous works a pseudonymous work, or a work made for hire (if such works were created on or after 1 January 1978), copyright endures for a term of 95 years from the year of its first publication, or for 120 years from the year of its creation, whichever expires first. Under UK law, if the work is of unknown authorship, copyright expires at the end of the period of 70 years from the end of the calendar year in which it was first made available to the public.

**Various and contradictory rights**

The Republic of Poland has adopted a dual approach to rights to which an author of a work is entitled. These intangible, personal rights are divided into economic rights which can be transferred to anyone (by a licence agreement, donation, inheritance etc.) and moral (personal) rights which are connected only with the author. Moral rights were also introduced under UK law.

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26 See J Barta and R Markiewicz, Prawo..., 42.
28 Art 16(2), ARNR.
29 Art 8(3), ARNR.
30 Such solution was proposed in J Barta and R Markiewicz, Prawo..., 118.
32 17 USC §302(c).
33 CDPA, s 12(2).
34 J Sobaczak, Prawo autorskie i prawa pokrewny (2000) 103.
35 Art 16 of the Polish Act on Author’s right and Neighbouring Rights reads that if the act itself does not say otherwise, personal rights protect the bond between the creator and the work that is unwaivable, unsellable.
law in the 1988 Act. In the USA, moral rights are protected mainly under the Visual Artists Rights Act 1990.

The basic problem in the case of illegal graffiti is the conflict between the rights of the owner of the object (e.g., a wall, a car, and a train) and the creator himself. The physical carrier on which an intangible work of human intellect was created is called corpus mechanicum. Under Polish author’s rights legal doctrine, corpus mechanicum is a subject of ownership right and of other property rights (possibly also relative rights such as a mortgage). Those are general civil law regulations that apply to corpus mechanicum.

All legal claims resulting from unauthorized ‘placement’ of a graffiti work on an object to which the creator of graffiti does not hold property rights should therefore be judged under these regulations. This issue lies beyond the scope of this article. The crucial aspect of graffiti, from the point of view of copyright protection, is the removal of graffiti by the owner of its tangible carrier, the owner being someone other than the creator himself. Under the Polish legal system, the creator of graffiti can bring legal action against the owner of the carrier on account of the infringement of the right to the integrity of the work.

In Polish law, when the owner of the carrier decides to destroy the original work of art that has been situated in a public place, the conflict must be resolved on the basis of special regulations. The owner of the carrier is obliged to invite the creator or his next of kin to buy the work. The ceiling price is the value of materials used for creation. If such a transaction is impossible, the owner is obliged to allow the creator to make a copy or, depending on the type of the work, to make a proper documentary record of it.

US law also provides for the right to protect the integrity of a work of visual art, especially the right to prevent any intentional distortion, mutilation, or other modification of a work which would be prejudicial to an author’s honour or reputation. There is also a right to

prevent destruction of a work of recognized stature, and any intentional or grossly negligent destruction. If these rights are infringed, one may claim appropriate sanctions and compensation. Also, if the owner of a building (sic) wishes to remove a work of visual art which is a part of such building, and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work, he may do so if he has made a diligent and good faith unsuccessful attempt to notify the author of the owner’s intended action affecting the work of visual art. English v BFC & R E. 11th St LLC was the case that tested the VARA enforcement in respect of graffiti art. Six artists created artwork including five graffiti murals, in a community garden. BFC&R E, 11th Street LLC, commissioned by the New York City Partnership Housing Development Fund, planned to erect a building on the land where the art was located. The plaintiffs sought a preliminary injunction, pursuant to 17 USCS §106A, that restrained the defendants from initiating construction works. The Court agreed with the defendant’s argument that the VARA was inapplicable to the plaintiffs’ artwork because it was illegally placed on the property without their consent. There are moral rights that might be applied to graffiti works in the UK copyright law. Those are the right of attribution (paternity) and the right of integrity, which protects the copyright work from distortion or mutilation. It gives the author the right to object to derogatory treatment of a work or any part of it. Where there are no exemptions or defences and infringement of moral rights arises, it is actionable as a breach of statutory duty. An injured party may be awarded damages.

A potential conflict between the interest of the creator of the illegal graffiti and the owner of the carrier of the graffiti may be found also in the legal institution of droit de suite (resale royalties). What if
the owner of the physical carrier is selling the carrier? Under Polish law 'the creator and his inheritors are entitled to the remuneration amounting to 5% of the sum from professional sales of copies of the work of art. The amount is paid by the seller of the work and, if he acts on behalf of a third party, the seller is jointly and severally liable with that party. Remuneration is paid via a proper collective management organization. The seller is obliged to reveal the identity of the third party. He can be released from this obligation if he pays appropriate remuneration.'

In the US, the author of a work of visual art has the right to prevent the use of his name as the author of any work of visual art which he did not create.

In the UK, the law of reverse passing-off might be used to prevent another person from falsely claiming the authorship of a graffiti work.

**Authorization**

When the creator of graffiti remains unknown or anonymous, people interested in using that graffiti must address the issue of securing an appropriate licence. It cannot be assumed that graffiti cannot be recognized as a work to which the author waived his rights on the sole basis that it is illegal and such works do not enter the public domain immediately. Nor is there any presumption that the author agrees to any licence in the absence of clear evidence of his consent.

This author does not share the view of M.J. Owen, who claims that 'persons who wish to exploit their works could then be required to register them'. This is a pragmatic opinion based on US solutions that registration is prerequisite to an infringement suit, but is contrary to the basic idea of copyright protection, developed in civil law countries, in the absence of any kind of registration formalities for copyright protection. In any event, registration is not a prerequisite to the initiation of an infringement action for non-United States works under the Berne implementation legislation.

In Poland, the correct and valid licensing of a work include the fair use doctrine and its four factor under the Berne implementation legislation. Registration is prerequisite to an infringement suit, but is contrary to the basic idea of copyright protection, developed in civil law countries, in the absence of any kind of registration formalities for copyright protection. In any event, registration is not a prerequisite to the initiation of an infringement action for non-United States works under the Berne implementation legislation.

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50 US federal law contains no similar regulation; under state law, only California has adopted such legislation. In the UK legal system, the institution of resale royalties met with strong opposition but eventually was adopted.

Another problem in establishing authorship, this time regarding plagiarism, arises when a style has been copied or a writer has used another writer’s name. The notion of plagiarism has not been defined in any Polish legislation, but only by legal doctrine. Plagiarism is understood as a form of infringement of a personal right that is performed through the appropriation of authorship of the entirety of another individual’s work or of elements of another individual’s work without naming the author and the source. In the US law, the author of a work of visual art has the right to prevent the use of his name as the author of any work of visual art which he did not create. In the UK, the law of reverse passing-off might be used to prevent another person from falsely claiming the authorship of a graffiti work.

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54 17 USC §106A(a)(1)(2).

55 By a study, such acts as translation, remake, and adaptation are understood. A study of that nature functions under copyright law and has no adverse consequences for rights to the original work. Art 2 para 1 of the Polish Act on Author’s right and Neighbouring Rights.

56 17 USC §113(3).


61 17 USC §107.

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63 The seller is obliged to reveal the identity of the third party. He can be released from this obligation if he pays appropriate remuneration. US federal law contains no similar regulation; under state law, only California has adopted such legislation. In the UK legal system, the institution of resale royalties met with strong opposition but eventually was adopted.

64 Art 32 para 1 of ARNR.

65 The amount is paid by the seller of the work and, in the event, registration is not a prerequisite to the initiation of an infringement action for non-United States works under the Berne implementation legislation.

66 Legitimate personal use (a type of a statutory licence) includes the distribution of works displayed permanently in public roads, streets, squares, and gardens. The question one needs to ask is whether a graffiti artist intends to display his work as it is understood under this regulation. The answer seems to be positive since graffiti, as a type of activity, is intended to be displayed for unspecified people (ie whoever takes notice of it). It should be stressed, however, that permitted use cannot infringe normal use of the work or limit fair interest of the author. Additionally, legitimate personal use allows the owner of a copy of a work of art to display it publicly if no financial gain arises.

67 Limitations to exclusive rights in the US copyright law include the fair use doctrine and its four factor...
test (the applicability of which depends on each individual case), exceptions to the modification of a work of visual art,\textsuperscript{67} and the scope of exclusive rights in pictorial and graphic works.\textsuperscript{68} In the UK, some exceptions to copyright monopoly on works made according to the graffiti style are provided in regulations describing permissible acts performed on copyright works.\textsuperscript{69} The fair dealing defence may apply to a person who can prove that the copyright work is used for publication of criticism, review, and news reporting\textsuperscript{70} in which incidental inclusion of copyright material can be observed. Fair dealing in each case depends on how the copyright work was obtained, the amount of the work taken, the use made of the work, motives and consequences of the fair dealing and on whether there was another way to achieve the desired purpose by the use of copyright work. Fair dealing in some circumstances must be also accompanied by a \textit{sufficient acknowledgment} of the author and the work.\textsuperscript{71}

Finally, some limitations and exceptions to exclusive rights under national copyright laws are provided under Article 9(2) of the Berne Convention. The so-called ‘Berne three-step test clause’ was also incorporated in Article 13 of TRIPs.\textsuperscript{72}

**Graffiti and trade mark law**

Trade mark law provides for a refusal to register a trade mark if it is contrary to public policy or to accepted principles of morality. The grounds for such a refusal were introduced to European Union legal system by the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks.\textsuperscript{73} The same provision applies to Community trade marks under Council Regulation 40/94 of 20 December 1993 on the Community trade mark.\textsuperscript{74} In the USA, such a refusal may be caused by immoral, deceptive, or scandalous matter of the trade mark.\textsuperscript{75}

There currently exist ball-less spray cans and spray cans labelled ‘hardcore’ (by Montana) or ‘terror schwarz’ (by Molotov); these are designed mainly for illegal activity because of their ‘fat caps’ and high paint quality.\textsuperscript{76} There are also hard-to-remove inks and long-tip markers using graffiti-style trade marks and slogans like ‘hard 2 buff’, none of which is designed to paint a bicycle or furniture. An attempt to trade mark registration for such products might face legal objection.

**More direction needed**

As has been argued, apart from the controversial aura that surrounds graffiti art, it also spawns a number of copyright and trade mark questions for which statutory law struggles to find answers. The US judicial system provides us with only a couple of judgments that deal with graffiti and copyright law issues. All interested readers therefore await a more thorough theoretical analysis of graffiti art regarding copyright and trade mark law, perhaps followed by some more focused legislation.

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\textsuperscript{67} 17 USC §106A(c)(1)(2)(3).
\textsuperscript{68} 17 USC §113.
\textsuperscript{69} CDPA ss 28–76.
\textsuperscript{70} CDPA s 30.
\textsuperscript{72} ‘Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder’.
\textsuperscript{73} Of EC No. L 40 of 11 February 1989, p. 1, Art 3(f). In the UK, it was implemented in the Arts 3(3)(a) of the Trade Marks Act 1994, c. 28. In Poland, a similar regulation is included in Art 131 (1) (2) of the Act on Industrial Property Law.
\textsuperscript{74} Of L 011 of 14 January 1994, p. 1, Art 7(f).
\textsuperscript{75} 15 USC §1052(a).
\textsuperscript{76} See CTMs no.: 005095021, 005095013, 002424752, 002511954.