

Moral Rights, Graffiti Art and Real Estate Investments

by Sharon Hecker and Giuseppe Calabi

What is the relationship between graffiti art, real estate investments and moral rights? A dialogue between an art historian and a lawyer on an American story involving some street artists and a well-known entrepreneur.

Prologue

Imagine that you are a real estate entrepreneur, that you have purchased a disused industrial complex and, while waiting to decide what to do with it, you have granted it in use (no matter if for free or with a favorable rent) to a group of street artists who, under the guidance of a curator, have created works on the walls of the building, partly destined to remain and partly destined to be replaced by more recent ones created over the pre-existing ones. All this with great public success and considerable media resonance. Imagine that at a certain point you have found a financial partner who proposed to make a development of the area and turn it into a luxury residential complex. Despite the worries and protests of the artists and the public about the operation (news travels quickly on the net), one night you decided to whitewash all the walls of the site, irreparably compromising the works existing at that time: after all, you are the owner and you will be free to do what you want of the property you own. Or not? A very recent judgment of the American Federal Court of Appeals for the Second Circuit (*Castillo v. G&M Realty*) has confirmed the conviction of a well-known real estate entrepreneur in New York to pay compensation for the damage suffered by many street artists, quantified in total USD 6,750,000, following the destruction of 45 murals made on a site owned by the entrepreneur.

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The U.S. judge faced a number of sensitive legal issues, the first of which was whether by painting the property the owner of the property had violated moral copyright under the Visual Arts Rights Act (VARA) of 1990, 17 U.S.C. § 107. Those rules grant artists, in addition to the right to be recognized as authors of a work or to disown a work that others have attributed to them, the right to prevent the destruction of a work of "recognized stature" or any moderation, deformation or mutilation that may harm their honor or reputation, even regardless of "recognized stature". In the United States moral rights, introduced in 1990 following the accession to the Berne Convention, cannot be ceded, but the artist can renounce them. The federal judge recognized that as many as 45 works had reached a level of "recognized stature" and since the entrepreneur had voluntarily painted them, he condemned him to the maximum damage allowed (even in the absence of proof: USD 150,000 for each work). In the judge's reasoning, what makes a work of "recognized stature" is its quality, which must be evaluated by the artistic community, made up of art historians, critics, museum curators, galleries and the most important artists, to whose judgment the judge must rely. In the present case, the artists who brought the case have produced a plethora of testimonies at first instance in favour of the "recognised standing" of their works. The judgment does not go into the reasons why each of the 45 works was considered to be of "recognised stature", but found them convincing. The discussion focused mainly on the fact that a "temporary" work, such as one typically associated with street art or "aerosol art", may exceed the threshold of the recognized standing required by law and the conclusion was very clear: a temporary work (for example, Christo's "The Gates" that covered the gates of Central Park in New York for two weeks) or ephemeral (think of Banksy's "The Girl with a balloon", self-destructed at the time of its sale) can certainly exceed that threshold. And with reference to street art, which began as a youthful gesture of rebellion in the urban suburbs limited to acronyms sprayed on the walls, the ruling acknowledged

that such gestures have subsequently blossomed into “elevated forms of artistic creation”. Finally, the recognised standing of a work can also be traced back to the place where it is located: in an interesting passage of the judgment it is stated that the fact that the work is exhibited in a place, be it a museum, such as the Prado or the Louvre, or a disused industrial site, under the guidance of a respected and recognised curator, is certainly an indication of “recognised standing”. The decision recalls the wise words that Justice Oliver Wendell Holmes, judge of the American Supreme Court, wrote in 1903 in a memorable judgment (*Bleistein v. Donaldson Lithographing Co.*): “it would be hazardous for anyone with an exclusively legal background to make a definitive judgment on the value of a work”. In that case it was not a work of art but a public poster.

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Graffiti is a recognized genre of art: art history traces the human gesture of drawing on walls from the Lascaux caves to the Greek and Roman inscriptions, to the birth of the urban phenomenon in the 1970s. This does not mean, however, that the recent graffiti art phenomenon is now univocally crossing over to the traditional art world and art market, or that it receives its affirmation and “recognized stature” only from the art world audience.

Graffiti’s identity is its fluidity: it constantly moves between the street and the gallery/museum/auction house and back to the street. This fluidity is both aesthetic and conceptual, for graffiti art appropriates and remixes known artistic styles and images. The gesture can be an ephemeral performance, but it can also have lasting importance. Its impact moves inside and outside the institutional art world: Picasso said, “I have always paid a lot of attention to what happens on the walls. When I was young, I also often copied graffiti.”

Despite its fluidity, the 5Pointz project established some rules that went beyond an artist’s tag or quick “throw-up.” The project was organized by a curator, “Meres One” (Jonathan Cohen), who presented a proposal to the building owner and gave a name to the project: 5Pointz, representing the 5 boroughs of New York that gather here symbolically in a single focal point. Each image had to be seen and approved before it was painted, no gang symbols were allowed, and if an artist’s tag was found in the neighborhood the work of the artist in question was immediately removed from the building. The curator’s idea was to lift the veil of illegality and crime from this art form and give it legitimacy by providing graffiti artists space to work. Meres One’s dream was to convert the building into a museum dedicated to graffiti.

The 5Pointz project gained world recognition and had great public impact. For 9 years, it welcomed tourists on foot, by bus, of all ages. It was used as a set for TV series, movies, hiphop and R & B music videos. Artists from all over the world, from Canada to Switzerland to the Netherlands, Japan and Brazil and all parts of the United States came to spray paint on the walls of the building. For the artists who worked there, it created a sense of community. They would come together to paint or celebrate a new added image, which is rare for an art form that often was a solitary gesture. 5Pointz became more than just a graffiti zone. As Lexi Bella, one of the artists, said, “it was a living, breathing museum.”

Thus, beyond the legal question of “recognized stature,” we can see how a creative gesture became a “work of art” and the ultimate confirmation of this came from the world at large. The decorated building became part of the history and urban fabric of New York culture, enjoyed by anyone who passed by on a train or came to visit it. Above all, graffiti represents a desire and a competition for visibility in a city that may seem huge, inhuman and anonymous. Does the legal and economic

decision in favour of the artists truly compensate for the grief over the permanent destruction of the art itself?

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