

# PROTECTION OF STREET ART (GRAFFITI) FROM THE PERSPECTIVE OF LATVIAN AUTHORS' LAW

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## **Abstract**

Street art (covering all street art types including graffiti) is considered as one of expressions of urban life and, simultaneously, one of peculiar intellectual creations. For years, street art was not recognised as a type of art and was usually subject to public condemnation, but street artists were (and still are) subject to liability arising from vandalism (hooliganism) acts. However, attitude against street art and its different expressions has been changing in recent years becoming recognised and valued as a specific type of modern art. This shift has been influenced by visual attractiveness of different creations of street art mainly murals containing graffiti; commencement of commercialisation of street art including sale of murals embodying graffiti at auctions; and court disputes over protection of street art expressions. Street art including graffiti may be subject to legal protection, yet it depends on a particular jurisdiction. The aim of the present article is to consider possibility of protection of street art in Latvia from the perspective of authors' law (i.e. copyright) law. This paper discusses specific issues in relation to street art for its protection within Latvian authors' law such as authorship as street artists usually create street art expressions anonymously; the concept of work by discussing compliance with criteria put forward to a work under authors' law; integrity of a work as street art expressions such as graffiti are usually murals involving a clash between property law and authors' law; distinction of street art from pure vandalism; and necessity for specific rules addressing specific nature of street art. The paper provides conclusions for identifying proper place of street art within legal framework of Latvian authors' law.

**Keywords:** *street art, graffiti, street artist, authors' law (copyright), vandalism (hooliganism).*

## Introduction

Art and artistic expressions in contemporary world have become so much sophisticated and elaborated as no one could imagine in the previous decades or even centuries. Street art and its different expressions is one of such examples. Street art has occupied the place of a specific type of creative activity in the modern world in urban areas being itself an urban phenomenon. Undoubtedly street art existed for centuries already in ancient times which demonstrate different examples of different paintings, writings and murals [Smith 2013: 260; Latviešu konversācijas vārdnīca 1931: 10401]. However, the difference of street art in the modern sense from that which existed in ancient times relates to acquiring a special place in modern art and culture in urban areas with a set of specific issues discussed below.

Initially street art in urban areas was considered as an act of pure vandalism (or hooliganism as it is perceived in some jurisdictions) as street art expressions were and still are usually carried out without permission of the owner of that thing on which these expressions are embodied (this reflects one of specific features of street art). However, the understanding of street art changed gradually by being currently recognised as a specific branch of art. Such recognition allowed for street art to acquire its (and depending on a street artist – even significant) economic value (even an asset) which is demonstrated by commercialisation of street art, especially by sale of street art expressions at auctions. The most famous purchases relate to murals created by the famous street artist *Banksy*: the mural *Wet dog* was sold in 2008 for 1.8 million US dollars; *Slave labour* in 2013 for 1.1 million US dollars; and *Kissing coppers* in 2014 for 575,000 US dollars. In this regard one may notice that street art becomes art when the street artist becomes famous.

Considering this shift in the understanding of the public concerning street art, the issue of street art cannot be discussed in isolation as it involves a set of interdisciplinary aspects such as legal, artistic, economic and others. Therefore, from the modern point of view, street art as an urban phenomenon and a specific branch of art is not possible anymore to consider just an act of pure vandalism, an activity undertaken by a socially irresponsible society member or just a type of social protest. Likewise, street art cannot be solely viewed from the position of prejudice and disparage. Street art has become a specific type of artistic creation which involves economic value and, therefore, deserves a special approach even in law.

From the legal point of view, street art involves a bundle of conflicts involving different rights and interests. This situation raises an issue whether street art could be or even already is subject to legal protection. In this regard, street art could be characterised as “legal grey area”.

The legal perspective in relation to street art depends on available legal forms as there is no *sui generis* regulation for street art. Therefore, the aim of this article is to

consider street art from the perspective of its protection within authors' law<sup>1</sup> in the Latvian situation. Authors' law has been chosen as it could be currently considered as the most appropriate legal form for protection of street art<sup>2</sup>. At the same time, this article argues that a street art expression should be perceived as a special type of author's work which requires *sui generis* legal regime in authors' law.

Discussion of protection of street art has been more and more attracting the interest of legal commentators. Generally legal commentators of intellectual property or specifically authors' law (i.e. copyright) are not so much interested to consider the issue of street art which is characteristic both at the European level [e. g., Bently, Sherman, Gangjee & Johnson 2014] and the Latvian national level [Rozenfelds 2008, Grudulis 2006]. Therefore, legal discussion surrounding street art is left for specific studies. If initially this issue seemed to be interesting to legal commentators from common law countries such as the United States [Smith 2013] and the United Kingdom [Bonadio 2017] who considered protecting possibility of street art from the point of view of copyright, such interest has been demonstrated more and more in recent years also by European legal commentators by conducting studies concerning the situation in different European countries including Latvia [Mantrov 2017].

The area of street art employs different specific concepts which could be defined differently by different authors; therefore, these concepts should be discussed at the beginning of the article. The term "street art" could be understood as "art placed in public places as well as for various forms of acceptable or tacitly tolerated graffiti" [Bloch 2015: 2500]. Thus, it would be necessary to perceive this concept in the broader meaning covering murals, paintings, texts and other expressions while the concept of graffiti, which is sometimes inaccurately used in that meaning, as one of expressions of street art [Bonadio 2018]. As it is characterised in legal literature concerning street art, "[t]he word *graffiti* comes from the Italian verb *graffiare* which means *to scratch* (the Italian word deriving in turn from the ancient Greek verb *grafein*, which means *to write*" [Bonadio 2017]. From this position, this term refers to "writings or drawings" on different types of objects in public places. Vandalism (or "hooliganism" as it is understood in certain jurisdictions including Latvia) in the similar meaning [Kraštinš 1997: 80] generally refers to "mindless and malicious harm and injury to another's property" [Black's Law dictionary 2008].

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<sup>1</sup> Within this article, the term "authors' law" is exploited instead of the more common term "copyright" as the former better reflects the understanding of protection of works and rights of authors from the perspective of continental European countries including Latvia. This issue is discussed in Latvian legal literature [Grudulis 2006: 57–58].

<sup>2</sup> Though the author of these lines does not limit protection of street art only to authors' law, yet further studies in this regard are needed.

### **The concepts of author and work**

If recognition of street art including its protection is viewed from the perspective of authors' law, one should refer to the issue of authorship and criteria for protection under authors' law (the so-called copyrightability criteria).

As regards Latvia, regulation on authors' law including criteria for protection under authors' law is provided by the Berne Convention for the Protection of Literary and Artistic Works (initially entered into force in the territory of Latvia on 15 May 1937, after the restoration of independence of Latvia – on 11 August 1995 [WIPO, Contracting Parties, Berne Convention, Latvia]) and the Copyright Act<sup>1</sup> (adopted on 6 April 2000, entered into force on 11 May 2000).

### **Authorship**

The Copyright Act contains regulation on subjects of authors' law, i.e. authorship. A specific feature of street art relates to the issue of authorship. The author of a street art expression is covered by a special term "street artist". As street art expressions are usually (but not always) made without permission, a necessary feature of a street artist usually is his or her anonymity. The Copyright Act allows that an author remains anonymous (Article 8 Copyright Act) which could be attributed also to street artists. If a street artist is considered as an author, he or she has personal rights (explicitly envisaged in Article 14 of the Copyright Act) and material rights (also directly provided by the Copyright Act in its Article 15). However, the anonymous character of a street artist may lead to a difficulty to establish authorship as the street artist should prove that it was him or her who created a particular street art expression.

Exploitation of personal or material author's rights by a street artist should be viewed in conjuncture with the concept of the occasion of the work, i.e. a street art expression. It has been already identified in legal literature concerning legal status of street art that it is necessary to establish *causa* for creation of a street art expression. Possible answers to this question could involve such situations as creation of street art in order to acquire authors' law which further deals with the situation of exploitation of material rights of an author; perhaps street art expression was created as a part of public domain which could assume that material rights of an author are transferred to a particular community, i.e. municipality; or it is a donation to community which has the same consequences as in the previous situation; it also may be considered outside of authors' law being a social, political or other protest; commentary; or finally, it could be a pure act of vandalism.

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<sup>1</sup> If the term "Copyright Act" is used in this article, it refers to the Copyright Act adopted in Latvia.

### *Work*

Furthermore, the Copyright Act understands the concept of the work and recognition of authors and their rights as much as possible. The doctrinal principle behind this protection is that the work is the continuation of the personality of the author [Grudulis 1996: 57].

As regards the concept of **work**, Article 2(1) of the Berne Convention provides that the expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression [..] The Copyright Act proceeds with the same approach. Specifically, Article 1(2) of the Latvian Copyright Act provides the legal definition of the term “work” which is defined as the result of an author’s creative activities in the literary, scientific or artistic domain, irrespective of the mode or form of its expression and its value. Likewise, Article 2(2) of the Latvian Copyright Act envisages that authors’ rights shall apply to works of literature, science, art and other works referred to in Section 4 of this Law, also unfinished works, regardless of the purpose of the work and the value, form or type of expression.

As one may observe from these provisions concerning the legal definition of the term “work”, street art expressions may be generally covered by that term and, therefore, protected under authors’ law.

The Copyright Act envisages non-exhaustive list of types of works (Article 4 Copyright Act) including artistic works in non-exhaustive listing (Article 4(6) Copyright Act) and in such a capacity they have been discussed in Latvian intellectual property literature [Rozenfelds 2008, Grudulis 2006:67]. Street art expressions are usually perceived as artistic works as envisaged by Article 2(1) of the Latvian Copyright Act and Article 4(6) of the Berne Convention. The former provision envisages that the objects of copyright, regardless of the manner or form of expression, shall comprise the following works of authors: drawings, paintings, sculptures and graphic art and other works of art.

Furthermore, similarly like such legal acts in other jurisdictions, the Copyright Act envisages a set of specific criteria that should be satisfied for such a work to enjoy protection within authors’ law. One may establish that artistic expressions may correspond to the requirement of **originality** which is explicitly mentioned in the legal definitions of the terms “author” (Article 1(1) Copyright Act) and “work” (Article 1(1) Copyright Act) (as referred to above as well as in other provisions of the Copyright Act). A work must also satisfy the requirement for being embodied in **materialised form** explicitly required by the Copyright Act (Article 3(1) Copyright Act). At the same time, there is no requirement in authors’ law for **permanency** of the work as walls of buildings or other objects located in public places embodying street art expressions could be destroyed. However, neither the Berne Convention nor

the Copyright Act requires that an author's work should be created on a permanent basis. For instance, if a particular street artist or any other person has fixed the mural containing a street art expression (for instance, by taking a photo) as already suggested by legal literature [Smith 2013: 281] and later the wall of the building where the mural was created is destroyed, still this street art expression satisfies the criteria put forward for the work under authors' law.

Street art expressions are generally of such a nature which meet the above criteria as provided by both the Berne Convention and the Copyright Act irrespective of the technique used in creation of street art expressions.

At the same time, it is not possible to identify a single case in Latvian court practice (as far as the anonymised Latvian court practice data base is concerned) where a street art expression was tested for compliance with the above criteria. However, Latvian court practice is familiar with street art expressions which were recognised as an act of vandalism (i.e. hooliganism in Latvian legal terminology).

This issue involves a debate whether authors' law may protect such street art expressions which do not correspond to public moral, for instance, rude or offensive paintings or writings without conveying artistic meaning. Such a situation creates a clash between authors' law, the right of expression protected under constitutional law and public order. This issue is recognised and dealt with in Latvian court practice, for instance, in one of cases a Latvian court made such a conclusion:

“[a]s a graffiti, the drawing is a depicted octopus-like creature that, in the opinion of the Administrative Commission, cannot be regarded as abusive, since it does not convey a violation of immorality or moral norms. In turn, the inscriptions are made up of different types of abridgements and abbreviations whose meaning is unknown (perhaps it is known to a specific, narrow circle of people). Considering that the inscriptions are not endowed with a certain meaning, i.e. any kind of calls or statements, and they do not use rude, indecent or offensive words and expressions, they cannot essentially express disrespect” [Judgement of Latgale Regional Court (appeal instance court) of 19 December 2014 in administrative offence case No 126011614].

### **Relation with material object and integrity**

Another specific feature of street art relates to tight relationship between a street art expression and a material object which embodies that expression. For a street art expression (i.e. a work in the terminology of the Copyright Act), the issue of separation of a work from a material object where it is embodied acquires significant meaning. Authors' law is based on the principle that a work should be distinguished from the material object on which it is embodied. This principle is explicitly recognised in Latvian Authors' law. Indeed, Article 2(1) of the Latvian

Copyright Act provides that authors' rights shall **belong to the author** [emphasis added – author's remark] as soon as a work is created, regardless of whether it has been completed. Furthermore, Article 16(3) of the Copyright Act envisages that

authors' law is **not linked with property rights** [emphasis added – author's remark] to the material object in which the work is expressed. Copyright to a work expressed in a material object shall be **dissociated** [emphasis added – author's remark] from possession of such work. **Transfer** of possession of a material object (also a copy of the first fixation of the work) **shall not of itself** [emphasis added – author's remark] result in the transfer of copyright to the work.

Therefore, a street art expression if it corresponds to the term "work" shall be distinguished from a particular place which embodies a street art expression. This discussion immediately leads to the issue whether a street art expression was created with or without permission. This issue is discussed in the next chapter of this article.

### Permission

Existence of personal and material rights of an author in respect of street artists in relation to their created expressions of street art is contrasted with ownership rights in relation to the thing embodying a street art expression. The concept of permission to create a street art expression on the thing (for instance, the wall of a building) may be provided either by a permit (being a unilateral legal transaction) or on the basis of a contract (being a bilateral legal transaction) with the owner of that thing (see Article 1427 Civil Act). It is possible to distinguish two situations in this regard: a street art expression which is created **with** the permission of the owner of that thing (for instance, the building) and a street art expression which is created **without** the permission of the owner.

If a street art expression is created **without permission**, which is a common scenario for creation of street art, a street artist does not have any legal right to oppose destruction of that thing and, therefore, destruction of the street art expression. The Copyright Act provides that an author has both a personal right for inviolability of a work (i.e. the right to permit or prohibit making of any transformations, changes or additions either to the work itself or to its title) as provided by Article 14(5) of that Act and the personal right to oppose any distortion, modification, or other transformation of his or her work as envisaged by Article 14(6) of this Act. However, both these personal rights of an author are **outweighed** by a right to property to the thing which embodies a street art expression created without permission. In this regard, the Civil Act provides that a right to property means the full right of control over property (Article 927 Civil Act).

The situation might be different if there was such a permission which could raise an issue of the integrity of work and a right of a street artist to oppose destruction of his or her work. This issue has been already raised in Latvian intellectual property literature [Grudulis 2006: 50]. Latvian courts are unfamiliar with a dispute over an expression of street art which was created with permission considering its protection against destruction (as far as the anonymised Latvian court practice data base is concerned).

However, the mere fact that a street art expression has been created without permission does not mean that this expression cannot qualify to be considered as a work in the meaning of authors' law. Neither the Berne Convention nor the Copyright Act envisages that protection is granted to such works which are created within a legal activity only, i.e. with permission of the owner of a thing. Therefore, every author's work should be protected **irrespective** whether its creation was carried out during **illegal activity**, i.e. during vandalism (hooliganism) as already suggested by legal literature [Lerman 2013: 316]. Such an attitude reflects difference for perceiving author's works in comparison with the American approach as discussed below.

This conclusion, however, is **distinct** from the issue of liability under either criminal or administrative penal law for vandalism (i.e. hooliganism in Latvian legal terminology). Latvian court practice is familiar with the situation when a street art expression is created without permission which leads to qualification of creation of a street art expression as an act of hooliganism.

Foreign court practice, especially in the United States, demonstrates examples of such disputes. Court practice of the United States contains different examples of such disputes which could provide a useful guide for problems that could be faced by European courts in the future. However, these cases are usually accomplished with a settlement preventing to analyse the court's reasoning.

In **Villa v. Pearson Education** (2003), the subject matter of the dispute related to the street artist Hiram Villa ("Unone") who brought a copyright infringement claim for reproduction and publication of his mural in a book. An American court held in this case that whether a mural "is not protected by copyright [...] because it is illegal graffiti [...] turns on questions of fact," i.e. "the legality of the circumstances under which the mural was created."

As this case finished with settlement, it is unknown (yet it could be assumed) the final conclusion of the court on the basis of the federal copyright law concerning existence of a copyright in an expression of street art which was created without permission.

Likewise, in **Rime vs. Jeremy Scott and Moschino** (2016) the reproduction of the mural *Vandal eyes* was involved which was created without permission. In this case, an American court acknowledged its attitude on the discussed issue:



“Tierney’s graffiti is the product of illegal trespass and vandalism and, therefore, does not enjoy the privilege of federal copyright protection.”

Finally, foreign, especially American, courts have dealt with cases involving street art expressions created with permission by applying US copyright law [Bonadio 2018]. For instance, a Miami street artist *AbolSniffsGlue’s* brought a claim against a retailer, the legal basis of the claim related to the use of his mural which was commissioned by a local community. The case ended with the settlement so ultimate attitude of the court remained unknown [Elias and Ghajar 2005: 4].

### Conclusion

By summarising discussion reflected in the article, street art has occupied its own place in the contemporary world of art and, by acquiring such a place, street art should be subject to appropriate legal regulation by searching for a proper place of street art in modern law. However, the specifics of street art – such as an author covered by the special term “street artist” and specific circumstances of creation of expressions of street art – demonstrates that it is not suitable to regulate street art with the currently effective regulation of intellectual property rights, especially authors’ law (copyright). Such a situation calls for a *sui generis* regime for street art by taking into account specifics of street art. Such *sui generis* regimes for specific situations are not unfamiliar in authors’ law in Latvia as they were already introduced in such specific situations as *droit de suite* (Article 17 Copyright Act), orphan works (Chapter IX<sup>1</sup> Copyright Act), data base *sui generis* rights (Chapter IX Copyright Act).

The *sui generis* regulation of street art should reflect conditions for protection of street art and its scope giving full protection within regulation of authors’ law (i.e. copyright). This regulation should also address several specific issues like physical integrity of the work, right of remuneration, protection from destruction/removal and sale. There could be also interrelation with other objects of intellectual property rights such as design right as well as interrelation between an object of intellectual property rights and a property right in relation to a public place embodying street art expression. Adoption of street art orientated legal regulation is more and more carried out in different jurisdictions. For instance, regulation for street art was recently adopted in the city of Moscow (adopted on 17 May 2018 and entered into force on 2 June 2018) [Act of the city of Moscow of 17 May 2018 No 10].

If the approach of *sui generis* regulation is undertaken, another question for further research arises concerning necessity for a European-wide measure. Street art has acquired its global dimension early enough. Therefore, *sui generis* regulation in relation to street art could be more appropriately addressed at the European Union level by adoption of a special directive on *sui generis* legal regime of street art.

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