



IP BULLETIN

Vol. V Issue II, JULY-DEC., 2024, Pg. 112-120



BRICK AND BRUSH: LEGAL EXPLORATION OF STREET ART IN INDIA

Harshita Agrawal³⁵

ABSTRACT

Having garnered the worthy acclamation of being seen as the “next big thing” in the contemporary social discourse, Street Art has only recently stirred recognition and attained mainstream consciousness. A discernible trend has been witnessed wherein street art has undergone a process of reproduction and adaptation, finding its way into items of commercial utility ranging from clothing to posters. Oftentimes the medium of expression for a street artist is someone else’s property. In fact the most unadulterated version of street art depicts dissonance against the authority and the prevailing law and hence finds expression without the permission or knowledge of the owner of the concerned public or private property – implying that the creator of the unsanctioned street art may have committed trespass, committed a tort against the original owner and also violated vandalism laws of the state in the process of curating his art. Hence, the transition in the perception of street art from delinquent behaviour and vandalism to finding its way into admiration of artistic skills has spawned in complex legal considerations about its ownership, moral rights and IP protection. This has led to the cyclical visitation of a legal grey area – whether the street art can or cannot claim protection under copyright provision considering the constant tussle between the inherent illegality of the act and the requirement of shielding an artist’s particular expression of intellectual effort. This paper seeks to explore the intersection between illegality and appreciation of street art.

KEYWORDS: Copyright, Constitution of India, Craftsmanship, Artistic work, de minimis.

³⁵ Final Year Law student (BBA LLB (Hons.)), University – O.P. Jindal Global University

ECHOES ON THE ANCESTRAL CANVASES

The coruscating mosaic created by the Indian culture unfolds not only on its pristine canvases but is also remarkably storied on its walls. With its earliest tracing to the Ajanta Caves of Maharashtra, street art forms a testament to the human desire for artistic expressions³⁶. The Maharashtrian caves display street art not as a rebellion but as a conduit for established artistic traditions wherein tribal and folk art not only find a permanent home but also serve as silent, aesthetic deterrents to public defacement.

The expression of human artisan in the vehicle of street art, finds convergence in the bold graffiti strokes of the populace of United States. However, the origin of the art diverges from its arrival in the Indian spectrum as street art in the United States arose from the embers of counter-cultural movements, a defiant roar against societal inequities of race, gender, and political oppression. Today, both India and the United States witness a vibrant tapestry of artistic voices of dissent, social critique, and the exploration of issues that hold deep societal and cultural significance taking root on urban walls.

While the artistic merit of street art finds undeniable recognition, its legal status remains a complex legal conundrum. While some view street art as vandalism, others recognize it as a legitimate form of public art. This ongoing discourse necessitates a nuanced approach, one that acknowledges the artistic value of street art while safeguarding private and public property rights. Perhaps, through the collaborative efforts of artists, legal minds, and urban planners, a framework can be established that fosters artistic expression while preserving the urban aesthetic.

TAGGING THE LAW FOR STREET ART IN INDIA

With the bricks of legal uncertainty serving foundations for international chaos around street art, the boundaries between the creativity and regulation behind street art stand blurred. In this section of the paper, we understand the prism of India's legal framework, in an attempt to piece everything together, and decipher the protection offered by intellectual property rights to street art especially in context of the vitality of artistic expression and the reality of its illegal medium.

Before venturing into the Copyright Act of 1957, it is significant to first understand the relevance of expression and the scope of such expression allowed, in one of the most important pillars of Indian democracy – **Article 19 (1) (a) of the Constitution of India**³⁷. Protecting the very essence

³⁶ Kumbhar, Avilash. "Art Meets Law: The Uneasy Tussle of Street Art and Intellectual Property Law." *Fox Mandal*, available at: www.foxmandal.in/art-meets-law-the-uneasy-tussle-of-street-art-and-intellectual-property-law/ (last visited on July 23, 2024).

³⁷ Article 19 (1) (a) of the Constitution of India – all citizens shall have the right to freedom of speech and expression;
IP Bulletin Volume V Issue I Jan- June 2024

of civil liberties, the Article empowers individuals to express their thoughts and views through channels like media, article writing, newspapers, without the whip of censorship³⁸. While this agility is subject to restrictions involving but not limited to threats to integrity and sovereignty of the nation³⁹, it is pertinent to note that expression of thoughts and ideas can range from printing to visual representations, or any other form of publication which appeals to the public eye and plays in the public domain.

In other words, a street art, which is essentially an artistic representation of a thought or idea, not necessarily rebellious, on a property defaced by such art, but in nature of a public display or a conveying a message to the larger public, irrespective of its execution, remains a valuable form of expression which must be protected by intellectual property rights. Additionally, one cannot forego the cultural enhancement which is almost complimentary to the act of producing street art as it enhances urban environments. In context of these factors, safeguarding the artist's rights becomes crucial for acknowledging her social contributions, especially when her expression does not fall within the reasonable categories of restrictions enshrined under Article 19 (2)⁴⁰.

In light of a more specialised statute, the Indian Copyright Act of 1957, it can be inferred that under its section 2 (c)⁴¹, a mural could be unequivocally categorised as an 'artistic work' irrespective of whether it possesses an artistic or rebellious quality. Whether the defacement happens on a wall privately owned or on walls which constitute a part of public infrastructure, so long as it is original and its intrinsic component is legal, street art would stand to meet the criteria of being a work of artistic craftsmanship under section 2 (c)(iii). Therefore, any claim of copyright protection by an artist in regard to a mural curated by them should be fully aligned with the Indian copyright regime. In context of the reproduction or execution of the murals, the Act in its section 2 (ff)⁴² outlines its inherent attribute of being a communication to the public. In this provision, the statute hints at those works which are available for being seen or heard or enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it⁴³. Hence, irrespective of whether the public actually sees, hears or otherwise interacts with street art, so long as it is available for such interaction, street art would be considered an artistic work open

³⁸ Karan Bedi, 'Navigating Copyright and Ownership Complexities in Street Art: An In-Depth Analysis' (2023) *Mondaq* <https://www.mondaq.com/india/copyright/1415796/navigating-copyright-and-ownership-complexities-in-street-art-an-in-depth-analysis> accessed 14 January 2025.

³⁹ Article 19 (2) of the Constitution of India

⁴⁰ Ibid

⁴¹ Section 2 (c) of the Indian Copyright act 1957.

⁴² Section 2 (ff) of the Indian Copyright act 1957.

⁴³ Id at 3.

to communication to the public.

PITCHING THE DEFENCE OF ILLEGALITY AGAINST INHERENT ARTISTIC RIGHTS

While the '*dirty hands doctrine*' denies such possibility, multiple interpretations advocate that the enjoyment of copyright protection must be a consequence of a creative effort, simultaneously highlighting the lack of original requirement of 'legality' of the purpose (considering that the laws do not acknowledge those artistic productions which may be conflicted with the rules)⁴⁴.

The issue in consideration finds its genesis in the fact that the rawest version of street art depicts dissonance against the authority and the prevailing law and hence finds expression without the permission or knowledge of the owner of the concerned public or private property – implying that the creator of the unsanctioned street art may have committed civil and criminal wrongs both against the state and the concerned private party. Additionally, the extension of the shield of copyright laws could lead to a situation where the claim for copyright infringement would end up restricting the right of the property owners to absolutely enjoy the property in the form and structure they want to⁴⁵. Contradictorily, despite the possible illegality associated with the art, the need for extending legal insulation for such artists keeps intensifying as general public and stakeholders are often found appropriating the concerned work without the curator's permission⁴⁶. The latter reasoning is substantiated by the fact that irrespective of the medium, the artist employs skill and labour, the art still continues to depict creativity and artistic value and the medium remains a tangible building surface. Despite the medium being the rightful property with absolute rights alluding to someone else, the creative utilization of that medium would not have been possible without the application of the concerned artist's specialized knowledge and skills.

The duality of this situation wherein an infringement is countered with another violation of law leads to the invocation of the doctrine of unclean hands – a relief in equity that one cannot benefit from one's crimes hence indicating that if they have engaged in wrongful action with respect to the matter in concern, they cannot seek simultaneous protection under a law for the infringement suffered by them⁴⁷. Thus, in the aforesaid factual matrix, on account of the violations caused by him, the street artist stands disqualified to file for infringement since his approach to the court was

⁴⁴ Id at 1.

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Nandrekar, Saurabh. "Illegal Street Graffiti Deserves Copyright Protection. Here's Why." *Medium*, IP Bloke, available at: <https://medium.com/ipbloke/illegal-street-graffiti-deserves-copyright-protection-heres-why-e2c3425719a8>, (last visited on July 20, 2024).

marked with unclean hands. However, multiple precedents have upheld that the *defence of unclean hands* is essentially a defence in equity⁴⁸ indicating that it can be available only to a party who acts fairly and honestly in the commencement of litigation. In *Tekla Corporation & Anr v Survo Ghosh & Anr*⁴⁹, the court analyzed whether a defendant who is in violation of the plaintiff's right can be permitted to negate the entitlement of the plaintiff to take an action against him merely because the plaintiff is also in violation of some other law. It was held that the party seeking relief should approach the court with clean hands and such defence of unclean hands would succumb if the street art is found to be worthy of copyright and the defendant is found to be in violation of such copyright.

The aforesaid discussion thereby leads to the conundrum of whether such artistic expression should be classified as merely immoral or should it be categorized as illegal – it interrogates what would happen if someone stole a paper and drew a captivating portrait on it; would Intellectual Property Rights' protection be extended to it by virtue of its increase in utility by the application of the artist's personalized skill or should the illegality of the medium exclude it from such applicability because law should not impede social justice⁵⁰. The exploration of pure statutory requirements without acknowledgement of the illegality of creation concerned would suggest that such graffiti or street art would qualify for Copyright protection as “painting, graphic or sculptural works”⁵¹ and since the creative ideas and facts have been fixated in a medium (irrespective of whether the medium is illegally procured), this sufficiently permanent or stable conception of ideas would be considered eligible to be perceived, reproduced or communicated for more than a transient duration – thus insulating it with copyright protection. The defence of illegality of the work was brought up in *Villa v Pearson Education Inc.*⁵², wherein the graffiti artist brought an action against Pearson for publishing a book featuring his murals however, Pearson sought dismissal on the grounds that the murals were illegal graffiti and therefore not protected via copyright laws. The court finding this argument unpersuasive held that it is presumed that the work was copyrightable and was at some point fixed in tangible form.

In addition to the grounds of illegality, the lack of a legal precedent expressly recognizing the magnitude of copyrightability attributable to a street art has pushed defendants to appeal to exceptions of copyright liability – the doctrine of fair use. In a dispute that involved *Peter*

⁴⁸ Id at 1.

⁴⁹ AIR 2014 DELHI 121

⁵⁰ Id at 12.

⁵¹ Ibid

⁵² *Villa v. Pearson Educ., Inc.*, No. 03 C 3717, 2003 WL 22922178 (N.D. Ill. Dec. 9, 2003).

*Rosenstein's book Tattooed Walla*⁵³ which included over a hundred murals found in New York City, Rosenstein argued to his defence that the permission of the curators of such street art was not required because the murals were displayed in public spaces and his usage was shielded by the doctrine of fair use. The usage of an exception to a copyright infringement thereby implied that Rosenstein accepted that a copyright existed in the first place, a consequent infringement occurred and hence an exception could be triggered to the same. A corresponding fair use exception can be located in the Indian Copyright Act of 1957 which can be interpreted as an exception to infringement of copyright wherein the “*work is permanently situated in a public place or any premise to which the public has access*”⁵⁴, thereby meaning that the work itself enjoys copyright but the disputed conduct is not an infringement of the copyrighted work.

MORAL RIGHTS – A SILENT GUARDIAN OF STREET ARTISTS' INTEGRITY?

The confluence of street art with copyright protection, still remains an exercise in monumental complexity. The unique aspects of street art - its transient or fleeting nature, anonymous authorship and the flexibility of the *de minimis* doctrine introduce immense complexities to the street art copyright regime⁵⁵. For instance, in case a legal dispute arises, determining the rightful owner can become an intricate puzzle because unlike traditional art forms, street artists often operate under pseudonyms or remain completely anonymous. Hence, notwithstanding the various flaws that plague the operability of intellectual property rights on street art, one can lean on the interpretation of moral rights within the copyright regime in India⁵⁶.

Emerging from the profound recognition that a work of art is not a mere economic commodity but an extension of the creator's personal expression, moral rights advocate that an artist's dignified connection to their art transcend monetary concerns⁵⁷. As rights of attribution and integrity, moral rights acknowledge that creativity is not merely a commercial transaction but a sacred act of personal, artistic representation that demands protection from misattribution or distortion. Guaranteed under *Section 57 of the Indian Copyright Act*⁵⁸, these exclusive rights of the author thrive independently of copyrights preserving both the rights to paternity and integrity of the artist. Through a cascade of precedents, the Indian judicial landscape has been successful in moulding the contours of moral rights⁵⁹.

⁵³ Id at 12.

⁵⁴ Section 52(1) of the Indian Copyright Act 1957.

⁵⁵ Id at 3.

⁵⁶ Ibid

⁵⁷ K&S Partners, 'Street Art and Copyright in India' (2023) *K&S Partners* <https://ksandk.com/intellectual-property-rights/street-art-and-copyright-in-india/> accessed 14 January 2025.

⁵⁸ Section 57 of the Indian Copyright Act 1957.

⁵⁹ Id at 3.

The scope of moral rights was primitively restricted to only literary works, however, post the *Mannu Bhandari v Kala Vikas Pictures Pvt. Ltd*⁶⁰ case, a critical interpretation of section 57 expanded its applicability to a spectrum of works which were not in nature of literature or derived from literature. Here, the appellant's argument that a film based on her novel, deviated her creative rights, thereby mutilating her work's essence was accepted by the court, and it was ruled that the movie could be released only if the adaptations did not alter the novel's core narrative. Furthermore, another landmark judgment in *Amar Nath Sehgal v Union of India*⁶¹, emphasised on the pertinence of moral rights for protecting an artist's work by clarifying that moral rights could continue to exist even when the work concerned has been sold. Here, a renowned sculptor when embroiled in a dispute with the state claimed that his piece suffered damage when his mural was removed and consequently placed in another building. The court while granting compensation to the artist held that mutilation of artwork was a clear violation of the author's rights guaranteed under section 57, and due compensation was granted to him⁶².

While courts have deliberated upon progressive judgments which protect moral rights, there are cases like *Raj Rewal v Union of India*⁶³, in which the judiciary has noted a contradiction between the plaintiff's moral rights and the defendant's property rights. The court here ruling favour of the defendant, stated that constitutional right to property overruled moral rights and that Copyright laws could not override Constitutional provisions⁶⁴. With such conundrum between the plaintiff's moral rights and the defendant's property rights being eligible to be extended to street art, a fresh obstacle arises⁶⁵ – whether the individual rights to property by virtue of being in nature of constitutional rights, can undermine the inalienable moral rights of an artist?

IN A NUTSHELL

In the midst of ongoing dialogue between art, ownership and the law, troubles commensurate when the illegality of such art is taken into account, while courts have not explicitly held such works to be holding valid copyrights, they continue to analyse cases of unsanctioned street arts on the premise that they are copyrightable thus dismissing cases not on the basis of defence of illegality but on the basis of copyright defences. However, in the opinion of the author of this

⁶⁰ AIR1987DELHI13

⁶¹ 117(2005)DLT717

⁶² Aumirah, 'Is Street Art Protected by the Copyright Act?' (2023) *Aumirah* <https://aumirah.com/is-street-art-protected-by-the-copyright-act/> accessed 14 January 2025.

⁶³ AIRONLINE 2019 DEL 911

⁶⁴ Id at 27.

⁶⁵ Id at 3.

paper, the act of painting on a wall without sanction from the owner *is not tied* to the issue of adjudicating regarding the nature and extent of intellectual property of the concerned work as long as the content of the work in itself is not illegal. The content of the artwork must be disassociated and viewed in disconnection to the criminal activity of trespass or vandalization, for instance, if the ‘moral and non-obscene’ art was instead painted on a canvas it would have been insulated by copyright provisions but if the act was in itself immoral or obscene or impermissible in law (child pornography) it would be illegal irrespective of the medium utilized. This line of argument also stands substantiated in the principle of distinction of the work and its material carrier. Copyright infringement concerns itself with the intangible work which should stand protected irrespective of its physical embodiment hence, the wrongdoing and its negative consequences should be addressed under civil and criminal sanctions while simultaneously being irrelevant to the copyrightability of the work concerned.

Additionally, the extension of copyright (including the Indian IP regime) to street art has been primarily justified under *incentive based theory*⁶⁶ of Intellectual property which deems it necessary to curate an incentive for authors and artists to “*create and disseminate works of social value*”. In *Sony Corp. of America v. Universal City Studios, Inc*⁶⁷, it was held that the monopoly privileges of a copyright are intended to motivate the author’s creative activity and stimulate their artistic creativity for the good of the general public because if free-riders are permitted to appropriate their work, artists will cease to create⁶⁸. However, the disadvantage with this theory is its inherent ability to incentivize and illegal activities of trespass. Additionally, the author of this paper perceives that the mere concern that the lack of a formal Intellectual Property Right protection will discourage street art’s creation is a defunct justification for extending Copyright protection to the same. This finds reason in the fact that economic incentives are not always necessary to motivate the continued output of street art because street artists create artwork to express themselves or send a message to the public (if not, then why would they not publicize their art in private, closed room exhibits). Their lack of concern for exclusivity and requirement of freedom of being rebellious and creative is fuelled by the public display of their dissonance, and not driven by monetary or financial incentives⁶⁹.

⁶⁶Id at 1.

⁶⁷ 464 U.S. 417 (1984)

⁶⁸ Id at 3.

⁶⁹ Smith, Cathay Y. N. "Street Art: An Analysis under U.S. Intellectual Property Law and Intellectual Property's Negative Space Theory ." DePaul Journal of Art, Technology and Intellectual Property Law, vol. 24, no. 2, Spring 2014, pp. 259-294.