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The Intersection of Art and Copyright

The recent live shredding of a Banksy painting by its frame at a Sotheby’s auction served as a strong reminder of the interplay between art and copyright. Shortly after the Banksy print entitled “Girl with Balloon” was sold, the frame in which it was housed proceeded to shred half the work in front of the auction attendees. This event raised numerous questions. Would the buyer still want the piece? Was Banksy entitled to destroy his work after it had been sold? Is the purchaser of a work of art allowed to do whatever they want with it, including mutilate or destroy the work? As the first installment in a planned series of articles discussing issues arising from art law, this article will provide a short introduction to how copyright protects art and artists.

Right of Reproduction

Art represents one of the primary types of works protected by copyright, providing artists with several exclusive rights related to the reproduction and dissemination of their works. The right to control the reproduction or performance of a protected work allows a copyright owner to derive income from their creations. Authors, musicians, and photographers (among others) make a living by licensing the right of reproduction granted by copyright to others for profit. By purchasing a work protected by copyright, the buyer obtains the right to possess and re-sell the work, but does not obtain the copyright for the work, which remains with the artist unless assigned in writing.

Fine art is unique among copyright works in that, sometimes, only a single copy of a work exists. If an artist does not license the copyright in their work to merchandisers, then under the first sale doctrine, the original sale of the work may be the only time the artist is compensated, despite the fact that works by famous artists often significantly increase in value after their first sale. While some countries recognize a resale royalty or “*droit de suite*” right for artists, the Berne Convention does not require member countries to adopt legislation to implement this principle. For this reason, artists will often further commercialize their works through licenses to merchandisers who will reproduce the works on prints, postcards, clothing, and other media.

The strong potential for art to increase in value over time has led to a robust art market wherein collectors often purchase art merely for its value as a financial investment without appreciation for its aesthetic value. Such collectors may buy art merely to store it away in climate-controlled warehouses where no one can view and appreciate the work. This frustrates the purpose of art and copyright by denying the public access to art and preventing art from fulfilling its commentary role.

Moral Rights

Many jurisdictions also recognize moral rights of artists. Section 18 of Thailand’s Copyright Act specifically grants artists the rights of (i) attribution and (ii) integrity. The right of attribution grants the artist the right to be recognized as the creator of a work whenever it is reproduced. The right of integrity grants the artist the right to prevent detrimental acts to a work that would harm the reputation or dignity of the artist. These rights stay with the artist and may be enforced by the artist’s heirs for the term of copyright protection regardless of who owns the copyright in the work, unless agreed otherwise in writing.

Apart from Thailand, similar provisions protecting the moral rights of artists are also enshrined in the copyright legislation of jurisdictions across Southeast Asia. Article 20 of Cambodia’s Law on Copyright and Related Rights recognizes an artist’s exclusive right to decide on the manner and timing of the disclosure of their work, as well as their right to attribution and integrity by opposing all forms of distortion, mutilation, or modification of the content of their work which would be prejudicial to their reputation. In Vietnam, moral rights are protected under Article 19 of the Law on Intellectual Property, which recognizes artists’ rights to name their works, to attach real names or pseudonyms to their works and be attributed when such works are published by others, and to protect the integrity of their works. Myanmar has also included the protection of moral rights in Section 17 of its Copyright Bill, which is currently in the process of being finalized by the Houses of Parliament to replace the archaic 1911 Act currently in force.

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The United States—which provides limited recognition of moral rights—has enacted the Visual Artists Rights Act (17 U.S.C. § 106A) to specifically grant the moral rights of attribution and integrity for works of visual art. This also includes the right to prevent the destruction of works of “recognized stature,” a term which has not been clearly defined, but which an examining court recently found included much of the graffiti in the 5 Pointz area of Queens, New York due to its fame as a tourist destination.

Continued on page 10



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An Update on Sound Mark Protection in Thailand

Applications for registration of sound marks have been accepted by Thailand's Department of Intellectual Property (DIP) since September 1, 2017, in accordance with recent amendments to the Trademark Act B.E. 2534 (1991) and Ministerial Regulation No. 5 B.E. 2560 (2017), as reported in previous issues of this publication (see *Informed Counsel* Vol. 8 No. 4 and Vol. 9 No. 1). As of the end of January 2019, 39 sound mark applications had been filed by IP owners, including the first Thailand sound mark application—filed by Tilleke & Gibbins on behalf of Unicharm Corporation—for SOFY and MAMY POKO. Those two marks are also the first two to have successfully matured into registrations.

Generally speaking, eligibility for trademark registration depends on distinctiveness, not being confusingly similar to a previously registered or filed mark, and not being specifically prohibited by legislation. The bar is raised slightly for sound marks, which must also be shown not to be descriptive of, associated with, or directly caused by the goods or services in question. They must also be no more than 30 seconds long.

The Intersection of Art and Law (from page 9)

Under the principle of moral rights enshrined in the above statutes, no one other than the artist may deface or mutilate a copyright work. Thus, the purchaser of a work of art may be liable to the artist for any acts that harm the reputation or dignity of the artist, which likely includes destruction of the work. In the 5 Pointz case mentioned above, the court awarded significant damages to the artists when a developer unilaterally painted over their graffiti murals.

The Banksy Work

In the case of the Banksy work described earlier, the art was almost certainly protected by copyright as a work of visual art. The work was a framed print of one of Banksy's most recognizable works displaying a girl watching a heart-shaped balloon float away, out of her reach. The image was originally created by Banksy as a work of graffiti which he reproduced in several places throughout London, and subsequently released in several sets of limited edition prints. Banksy would therefore be entitled to enforce his copyright and moral rights as the artist of a protected work.

It was later disclosed that Banksy himself was responsible for shredding the painting and had intended to completely destroy the work, perhaps as a commentary on the commodification of art by the art world. Had he been

The protection of a sound trademark is a relatively new concept in Thailand, and is another option for trademark protection that IP owners from around the world should take great interest in. A full list of sound trademark applications that have been filed with the Department of Intellectual Property so far, and their countries of origin, is detailed below.

Country	Pending	Published	Registered	Total
Thailand	27	1		28
Japan	3		2	5
Finland	2			2
U.S.A.	2			2
Germany	1			1
Korea		1		1

Applicants seeking to avail themselves of these protections should be mindful of a number of unique considerations, including the additional criteria that sound marks must meet to be registered, the specific requirements of the application process, the potential conflicts between different types of mark if a sound mark bears certain similarities to an existing word mark, and the potential copyright implications of using certain sounds. Given the number of applications in the first year, and the interest that this new form of protection has received, it is certain that these considerations will not prevent IP owners from protecting their audio brand assets, and this number will only continue to grow as the concept of sound trademark protection in Thailand continues to expand. 🎧

successful, he may have been liable to the buyer for the value of the painting, for which the buyer had just bid approximately GBP 860,000. It is debatable whether such an action to recover the value of the painting from Banksy would have been successful, as the buyer had not yet transferred the payment sum for the work and the work had been valued prior to auction at approximately GBP 200,000-300,000. Unfortunately, an analysis of the above issue and the exact timing of when ownership of a piece of art sold at auction shifts to the bidder is outside the scope of this article.

Ironically, Banksy's failure to completely destroy the work had the opposite of his intended effect. The half-shredded work is now entitled "Love is in the Bin," and has been valued at double what the buyer paid for the original work. The work has increased in value due to its notoriety as first a live performance piece, and now a conceptual piece on the inherent value of art.

The buyer is happy to own a "piece" of art history as the only work to date to have been live-shredded by the artist at auction. However, in light of rumors that owners of other Banksy works have attempted similar feats by shredding their own prints, it is highly recommended to refrain from such actions. Doing so would expose the owners to legal claims by Banksy for mutilation of his work without authorization—a violation of his moral rights—and would most likely render the prints worthless.

Just as the artist is responsible for creation of the original work, only the artist may simultaneously destroy the work and increase its value. 🎨