

**ART AND ANONYMITY: CAN BANKSY BANK ON COPYRIGHT TO PROTECT HIS
CANCELLED TRADEMARKED WORKS?**

DHRUVI AGARWAL*

“Copyright is for Losers”

~ Wall and Piece (2005)

Bank\$y

ABSTRACT

When the right of a brand to use publicly available artistic works clashes with the rights deemed to be held by an artist, it is the form of art that matters. The world’s most famous street artist, Bank\$y, was deprived of the right to hold a trademark over one of his most prominent works, “The Flower Thrower.” Earlier, Bank\$y had mentioned in his book that “copyright is for losers.” However this disdain for intellectual property laws was not taken by the court to be a reason strong enough to revoke trademark protection, rather, what led to the revocation of his trademark was improper usage of the trademark, and the court declared it to be a case of “bad faith” filing. As a result of this revocation, companies like ‘Guess’ capitalized on well-known Bank\$y pieces like ‘Flower Thrower’ and launched a comprehensive campaign in partnership with ‘Brandalised’, a group notorious for commercially exploiting Bank\$y’s artwork. This campaign featured merchandise adorned with Bank\$y’s murals, all without obtaining permission from the artist himself. In response, Bank\$y called for shoplifting at the Regent Street store of Guess which led the brand to partially close down the store. This paper traces the background of the Bank\$y-Guess dispute, highlights the issues in protecting an artistic work under trademark as opposed to copyright in various jurisdictions, and analyses the reasoning given by the court in the case relating to ownership over Bank\$y’s iconic ‘Flower Thrower’ mural. In conclusion, the author discusses how Bank\$y, a pseudonym for an anonymous artist, can protect his artistic work under a trademark even though he does not support the commercial use of such work.

I. INTRODUCTION

The advent of street art across the globe has sparked many conversations, one of which relates to the ownership of artistic works created on streets, over the property of others, without taking their permission. While the method of creating such art is considered illegal, brands capitalize on this

* Dhruvi Agarwal is a fourth-year student pursuing B.A. LLB (Hons.) at Hidayatullah National Law University, Raipur.

illegality, to commercially exploit the work of anonymous street artists, who struggle to protect their work under intellectual property laws. The world-famous anonymous street artist, Banksy, recently failed to protect one of his most iconic murals, ‘The Flower Thrower’, in a trademark battle. The questions that the author has attempted to answer in this paper are (i) whether an artistic work that gets cancelled as a trademark, can be protected under copyright, even when the origins of such work remain illegal, and (ii) how far can the anonymity of a street artist hinder his ability to protect his artistic work, and does that allow for commercial exploitation of his murals without taking his permission? These issues have arisen on account of commercial exploitation of the work of street artists by brands, without taking permission from the artist to use such work.

II. WHAT IS STREET ART?

Street art is a form of artistic expression in which the artists create the artwork without any authorization, wherein illegal use of public or private property is made for such artistic expression.¹ Street art provides a character and life to the spaces that surround us, reimagining bleak and impersonal environments that stand unrelated to the events of the world.² This re-conceiving of the public realm and making everyday streets enjoyable and thought-provoking is the objective with which street artists undertake such projects. Street art can be differentiated from graffiti, which is usually done when there is “gang-related territorial marking” in urban spaces and it normally lacks any significant meaning.³ Graffiti is not made with the object of spreading awareness, nor does it convey any social message, and its target audience is limited to those who understand the marking conveyed via the graffiti, that is the members of the groups for whom the graffiti is made. However, as opposed to graffiti, there are certain characteristic features of street art, since it is usually made with an object and a purpose, which have been identified by Nicole Riggle as, “the material and the immaterial requirement.”⁴ The material requirement is fulfilled when the street itself is used as an artistic resource, and the immaterial requirement is fulfilled when the street plays a role in the making of the art.⁵ The line between the two often gets blurred when murals are observed in countries like India, where street art ranges from political messaging to the promotion of upcoming Bollywood movies.⁶ However, since globally, street art is

¹ Cathay Y.N. Smith, *Street Art: An Analysis Under U.S. Intellectual Property Law and Intellectual Property’s “Negative Space” Theory*, 24 DEPAUL J. ART TECH & INTELL. PROP. L. 259 (2014).

² Sondra Bacharach, *Street Art and Consent*, 55 BRIT. J. AESTHET. 481-95 (2016).

³ Stephano Bloch, *Graffiti has undergone a massive shift in a few quick decades as street art gains social acceptance*, THE CONVERSATION (Aug. 31, 2024) <https://theconversation.com/graffiti-has-undergone-a-massive-shift-in-a-few-quick-decades-as-street-art-gains-social-acceptance-196995>.

⁴ Nicholas Alden Riggle, *Street Art: The Transfiguration of the Commonplace*, 68 J. AESTHET. & ART CRIT. 243-57, 246 (2010).

⁵ Sondra Bacharach, *supra* note 2.

⁶ Aparajita Bhasin, *The Evolution of Street art and Graffiti in India* 4 SAUC JOURNAL (2018).

recognized as a form of artistic expression that conveys a deeper message about the state of affairs in that area or the world, its perception stands in marked contrast to bare posters or symbols that lack a profound meaning. Thus, consequently, with the globalization of street art, and the recognition of it by members of the public, the artists involved in this form of art have also started gaining popularity in the art circles, and cities like London, New York, Rio, and Bethlehem now routinely attract tourists for their unique and vibrant street art culture. At the same time, street art has begun to be sold in galleries, giving it recognition alongside formal art and fetching millions.

However, one artist whose work gets recognized instantly is a Bristol-based artist named, Banksy. His simple yet aesthetically innovative stencil-based murals and sketches have created what is known as “The Banksy Effect” since innumerable copies of his style have been seen in streets around the world.⁷ It is in this context that the author has used Banksy’s works to drive home the point that street art today is a global phenomenon, whose biggest star is Banksy. When he loses the copyright over his work, it changes the perception of the public regarding street art, which has largely been one where it enhances the cultural landscape of the communities in which it stands located, and with such adverse rulings now gets shifted to the question of ownership over the street art on account of its illegal nature.

III. WHEN ART IS IN ANONYMITY: CAN AN ANONYMOUS PERSON ASK FOR ENFORCEMENT OF THEIR COPYRIGHT?

The charm that surrounds Banksy is in his anonymity. He has successfully managed to keep his identity private, even when his artworks are being sold for record prices at galleries around the world.⁸ His work is often a sardonic take on the social, political, and cultural events taking place around the world, which have led to several conversations and attempts at preserving the sites where the original Banksy mural was painted. Some of his most famous works are ‘Mobile Lovers’ and ‘Flower Thrower’. However, two issues have highlighted Banksy’s troubles in getting his work protected from commercial exploitation under Intellectual Property laws. These are: (1) Banksy is a pseudonym for an artist whose identity is unknown. He has an office that deals with his official communication and verifies his artwork known as “Pest Control Office Ltd.” [“**Pest Control**”]. However, the office has only claimed protection of Banksy’s work under a trademark that they hold on behalf of Banksy. This has led observers to comment that Pest Control has been holding

⁷ Mary Elizabeth Williams, *Part I: Who Owns Street Art?*, CENTRE FOR ART LAW (2013), <https://itsartlaw.org/2013/03/25/part-i-who-owns-%20street-art/>.

⁸ Katherine Brooks, *Banksy Mural Sells: ‘Slave Labour’ Fetches \$1.1 Million at Private London Auction*, HUFFINGTON POST (Feb. 7, 2024), https://www.huffpost.com/entry/banksy-mural-sells-slave-labour-fetches-millions-at-london-auction_n_3378755.

on to trademarks over Banksy's works when they should have been protected via copyright, and therefore such trademarks have been filed in "bad faith," and (2) Banksy's anonymity acts as a hindrance in protecting his work under copyright, since even though copyright vests with the author the moment the work is created, if the identity of the author is itself in question, then such copyright cannot subsist.

IV. REQUIREMENTS FOR PROTECTING ARTISTIC WORKS UNDER TRADEMARK

Trademarks act as a protection against counterfeits of the original work and give assurance to the consumer that they have access to the original work of the author, and there are both registered and unregistered trademarks available in the market. Trademarks, across jurisdictions, are granted based on various indices such as multiple levels of mark distinctiveness and categories of what may be considered a mark in the first place.¹⁰ The author has analyzed the protection of trademarks to artistic works in three major jurisdictions, namely, the US, EU, and India.

A. Trademark Protection in the US

Trademark protection for artistic works in the US has a constitutional basis under the Commerce Clause.¹¹ This is because a trademark is distinct from copyrights and patents, as its objective is to promote "fair and efficient competition" and is more consumer-centric than the other two protections, which fall under the Intellectual Property Clauses of the US Constitution.¹² Thus, trademarks assist not in the promotion of progress, but in the promotion of fair "competition, trade, and commerce." The Lanham Act of the US provides guidelines for applying for registration of trademarks.¹³ The requirement for acceptance of an application for the protection of an artistic work under trademark is that there must be "bona fide" use of the work that is protected under trademark, and it should not be protected under this category, merely to reserve a right in a mark.¹⁴ This is a crucial component in deciding whether an artistic work that has been protected under a trademark by the office of an artist, such as in the present case, wherein Pest Control claimed to hold the trademark over Flower Thrower on behalf of Banksy, will continue to enjoy such protection depending on the level of use they have made of the mark. Further, it is also seen whether such protection was sought merely to reserve a right or if any actual commercial use of

⁹ Enrico Bonadio et. al., *From the Flower Thrower to the Monkey, and beyond; Banksy's trademarks' battle continues*, 45(3) E.I.P.R. (June 5, 2023).

¹⁰ BARTON BEEBE TRADEMARK LAW, AN OPEN-SOURCE CASEBOOK 34-35 (Barton Beebe 2020).

¹¹ U.S CONST. Art. I, § 8, cl. 3.

¹² Shelly Kurland, *Trademark Thrower: Using Banksy's Recent EU Trademark Misadventures to Assess Why Copyright is Not "For Losers"*, 36 EMORY INT'L L. REV. 585 (2022).

¹³ The Lanham Act of 1946, 15 U.S.C. § 1051 (1946).

¹⁴ The Lanham Act of 1946 § 1127, 15 U.S.C. § 1051 (1946).

such a mark has been made. Thus, had this case been filed in the US, the trademark would likely have been cancelled due to a lack of “bona fide” use of the mark by Pest Control.

B. Trademark protection in the EU

The European Union follows a first-to-file system wherein whoever applies for registration of a trademark first, will get the right over it irrespective of whether it has been in use by other players in the market or not. The impact that a first-to-file system has when it comes to protecting artistic works under trademarks is that brands and organizations that do not intend to make commercial use of the works that they seek to protect can get the trademark over it simply on account of being the first movers. This aspect is significant when it comes to understanding how Pest Control, which is the office that communicates on behalf of Banksy, secures his works by applying for trademark protection for them instead of copyright with the European Union Intellectual Property Office [“**EUIPO**”]. Ultimately, the reason for cancellation of Pest Control’s trademark over Flower Thrower by EUIPO was due to a concept known as “bad faith” filing in trademarks, which has been explained in detail in Chapter VI of the paper.

C. Trademark Protection in India

In India, artistic works are protected under the Copyright Act, 1957.¹⁵ However, copyright exists as soon as the work is created by the author of the work. Here, to claim copyright over a work, it is not essential to get it registered; however, it is necessary to claim authorship, in which case identity plays a crucial role. However, a trademark needs to be registered in India under Section 23 of the Trademarks Act, 1999 for it to be legally protected.¹⁶ Further, trademark holders are given certain rights concerning commercial exploitation and rights against unauthorized use and infringement under Section 28¹⁷, which may help artists prevent brands from using their artistic works for commercial purposes without their permission. In the case of *St+Art India v. Acko General Insurance* [“**St+Art case**”]¹⁸, the Delhi High Court directed Acko General Insurance to take down all hoardings and social media posts that contained the use of a wall mural by Mexican artist Paola Delfin Gaytan without her permission. This mural titled “humanity” was painted on a wall in Mumbai’s Sassoon Dock as part of the initiative taken by The St+Art India Foundation, the

¹⁵ The Copyright Act No. 14 of 1957, Acts of Parliament (Ind.).

¹⁶ The Trade Marks Act No. 47 of 1999, Acts of Parliament, §23 (Ind.).

¹⁷ The Trade Marks Act No. 47 of 1999, Acts of Parliament, §28 (Ind.).

¹⁸ *St+Art India Foundation v. Acko General Insurance*, (2023) SCC Online Del 7277.

Mumbai Port Authority, and Asian Paints.¹⁹ This order has been seen as a significant step in protecting the rights of street artists in India, however, the Court did not comment on whether the wall mural was a protected work, which has left ambiguity regarding the status of protection accorded to street art in India.

V. BANKSY V. GUESS: WHO WAS IN THE WRONG?

Banksy's recent dispute with the global fashion giant Guess has cast a spotlight on the question of ownership over Banksy's work in light of him claiming trademark over his work, used by Guess without his permission.²⁰ In November 2022, Guess announced a new collection titled "Brandalised," based on Banksy's stencil-based murals, which were universally recognizable by street art lovers. However, Guess did not take permission from Banksy or his office, Pest Control, before launching this campaign, which led Banksy to post the following message via Instagram on his account: "*Attention all shoplifters. Please go to Guess on Regent Street. They've helped themselves to my artwork without asking, how can it be wrong for you to do the same to their clothes?*"

The world-famous artist had incited shoplifting at the Regent Street store of Guess, which led the concerned authorities at the brand to cover their signboards and partially close the doors of their Regent Street store. Interestingly, Banksy did not file an infringement suit, but this incident presented several unique challenges before the world of art, which were, (A) whether Banksy had the right to stop Guess from infringing his trademark, which he did not hold as it had already been previously revoked by the court; (B) whether he simultaneously held a copyright over his work, despite being anonymous; and (C) whether his previous statements showing disdain for copyright protection for his work and his desire for the public to have free access over it allow for commercial reproduction of the same without his permission. In the subsequent chapters, the author has examined the requirements for trademark and copyright protection in light of Banksy's anonymous status, particularly referring to the EUIPO's ruling in the dispute with Full Color Black, the company that supplied Guess with images of his artwork. Moreover, the author has also assessed whether statements such as "*copyright is for losers*" by authors of artistic works should be considered by courts while pronouncing judgements in disputes regarding ownership over such works, and can disdain for intellectual property protection by artists lead to their work being commercially exploited by brands without taking permission from the artists themselves?

¹⁹ Vandana Menon, *IP Rights over street art? Mexican artist's mural sets off a legal battle in India*, THE PRINT (Aug. 31, 2024) <https://theprint.in/ground-reports/ip-rights-over-street-art-mexican-artists-mural-sets-off-a-legal-battle-in-india/1882214/>.

²⁰ Sam Dillon, *Banksy's Complicated Relationship with Intellectual Property*, HARPER MACLEOD LLP (Jan. 9, 2023) <https://www.harpermacleod.co.uk/insights/banksy-ip/>.

VI. EUIPO RULING ON BANKSY'S TRADEMARK

The intriguing aspect of the present case, where Banksy incited shoplifting at the Regent Street store of Guess, was why then did Banksy not file an infringement suit against Guess for using his artistic work without his permission? It was because the EUIPO had already cancelled Banksy's iconic mural *Flower Thrower*'s trademark in 2020 on account of "bad faith" filing.²¹ *Flower Thrower* is one of Banksy's most famous works²² which he has personally also used in the past on merchandise released by him, and it was the same picture displayed by Guess on their store hoarding, featuring the Brandalised campaign. This ruling by EUIPO was on account of a suit previously filed by a photograph company named, "Full Colour Black", against Pest Control Ltd., also known as Banksy, to get the trademark over Flower Thrower revoked. Full Colour Black was also the company that supplied Guess with the images for their "Brandalised" campaign. After Banksy's call for shoplifting and the subsequent partial shutting down of the Guess store, Full Colour Black proceeded to sue Banksy for £ 1.3 million for defamation, since they claimed that Banksy had given the false impression on his post that he owned the artwork that was used in the present campaign by Guess, even though his trademark for the same had been revoked by the EUIPO.²³

A. "Bad Faith" filing in Trademarks

The Banksy-Guess dispute is a fine example of the limits that the courts impose on artistic freedom of expression, especially if it involves being nonchalant or dismissive of the need to protect works under Intellectual Property laws. Banksy has always promoted the free expression and use of his works to ignite conversations and develop artistic points by followers of his work; however, his popularity has led brands to capitalize on this open-ended freedom he had given to the public to use his work the way they liked. In the suit previously filed by Full Colour Black against him, his trademark over *Flower Thrower* was challenged on four grounds namely: (A) that he had never made use of it for commercial purposes and that there was no commercial exploitation that was made of the registered trademark; (B) that even though Pest Control Ltd, which is Banksy's office, had opened a store named "Gross Domestic Product" containing his merchandise, it was not open to public and Banksy himself cited the reason for opening of the store as the "least poetic reason to

²¹ Case Cancell. No. 33 834 C, Full Colour Black Ltd. v. Pest Control Off. Ltd., EUIPO (Sept. 14, 2020).

²² Cecile Martet, *Artwork in the Spotlight: Rage, The Flower Thrower, Banksy*, RISE ART (Aug. 31, 2024), <https://www.riseart.com/article/2571/artwork-in-the-spotlight-rage-the-flower-thrower-banksy#:~:text=Rage%2C%20the%20Flower%20Thrower%2C%20by,poetic%20as%20it%20is%20political.>

²³ Tirstan Kirk, *Banksy sued for £1.3m over 'grave damage' of Instagram post about fashion store*, THE STANDARD (Oct. 6, 2023) <https://www.standard.co.uk/news/uk/banksy-sued-instagram-post-guess-full-colour-black-b1111802.html>

open a store” which was to protect his trademark²⁴; (C) that Banksy is an artist and that the work that he creates should be protected under copyright and not trademark and by authorizing his office to hold the trademark on his behalf, so that he can successfully conceal his identity, he is using trademark to do copyright’s job and lastly; (D) Banksy had himself stated in his book that, “copyright is for losers” and such statements were reflective of the artists’ desire to allow his work to be used by the public and that he could not later stop entities from using his work without his permission. The court ruled in favor of Full Colour Black, which had challenged the trademark of the *Flower Thrower* and highlighted the problem with affording protection to Banksy’s office on behalf of Banksy when he sought to remain anonymous.²⁵

B. Bad Faith in EUTMR

Article 59(1)(b) of EUTMR²⁶ deals with “bad faith” filing and is an “autonomous concept” in the EU law, and it is to be uniformly applied in all cases, notwithstanding the complication that it has nowhere been defined or described in any way.²⁷ It was proposed that it may be defined in terms of the conduct that the party that files for recognition of their trademark exhibits, and if it stands departed from “accepted principles of ethical behavior” or is a breach of “honest commercial and business practices,” then it may amount to “bad faith” filing. The idea behind prohibiting a trader from filing for a trademark in “bad faith” is to prevent him from defeating the objective of the legislation itself. which is to promote “ethical commercial and business practices.” Further, the EUIPO, while ruling in favor of Full Colour Black also held that “bad faith” filing would not be attracted only when the rights of a third party have been breached by an entity that has filed for trademark protection in a competitive market where it does not intend to use that mark, it would also be attracted when the objective of the proprietor is not to target a specific third party but to obtain an exclusive right for purposes other than those that fall within the objectives of a trademark.

²⁴ Rebecca Anderson-Smith, *Banksy’s ‘Flower Thrower’ trademark cancelled for bad faith*, MEWBURN ELLIS (Sep. 18, 2020) <https://www.mewburn.com/news-insights/banksys-flower-thrower-trade-mark-cancelled-for-bad-faith>.

²⁵ Vandana Menon, *supra* note 19.

²⁶ *Regulation (EU) 2017/1001 of the European Parliament and of the Council, 2017, art. 59(1)(b)* 2017 O.J. (L 154) 1 (June 14, 2017).

²⁷ Vandana Menon, *supra* note 19 at page 12.

C. Can a trademark do copyright's job?

Artistic works are protected under copyright, which exists the moment the artist creates an artistic work.²⁸ However, the dilemma that the EUIPO grappled with in the present dispute is whether it would be fair to ask Banksy to seek protection of his artistic work under copyright, as Banksy's persona right, along with a major portion of the charm that surrounds him, which generates more business interest in his work, is in his ability to maintain anonymity. The EUIPO did not go into the need for him to do so to protect *Flower Thrower* but made a general observation that "to protect the right under copyright law would require him to lose his anonymity, which would undermine his persona rights. The author argues that to ask him to reveal himself so that he can protect his work from commercial exploitation does not appear to justify the principles of fairness, especially when he has allowed the public to use his work for academic, research, and activism purposes with the caveat that they may not use it for commercial exploitation. This is the entire philosophy behind the global street art movement, wherein street artists do not seek to earn great profits by selling their work, rather, they seek to inspire and promote greater artistic discourse over social, cultural, and political problems plaguing society. But such moral considerations stem from a shaky pedestal when the very basis of street art is using another person's property without their permission to make the desired artwork.

In this case, if an artist chooses to stay anonymous, then ownership over such artwork becomes questionable, even though a Banksy mural today is worth millions and could potentially raise the value of the street in which such art stands located. What the EUIPO said with regards to whether Banksy could seek protection under EUTM was that taking into account the existing legal position taken by Banksy, which was that he did not want to protect his work under copyright as it would be at the cost of him losing his anonymity in the present case, the filing of a trade mark cannot be upheld when the function that is served is not being fulfilled by the proprietor, and it cannot simply be reduced to a protection that may be sought when one cannot get their work protected under copyright laws.

VII. "COPYRIGHT IS FOR LOSERS": HOW MUCH HAS THE STATEMENT COST BANKSY?

Banksy's anti-establishment stance was more pronounced at the beginning of his career, and the same can be gauged by going back to some of his earliest works. He published a book titled *Wall and Piece*²⁹ in which the opening line reads, "Copyright is for losers." While this book was published

²⁸ Dr. Sunanda Bharti, *Copyright in Unpublished Works: What Constitutes Publication?*, SPICYIP (April 10, 2021), <https://spicyip.com/2020/04/copyright-in-unpublished-works-what-constitutes-publication.html>.

²⁹ BANKSY, *WALL AND PIECE* 3 (Century 2005).

in 2005, since then, Banksy has grown tremendously. With every move of his being tracked by art observers, a statement that he made almost twenty years ago comes back to haunt him every time he seeks to protect his work under Intellectual Property laws.³⁰ The interplay between freedom of expression and the right to claim copyright protection can be understood by observing three factors: (A) aversion to Intellectual Property Laws does not take away any validly acquired rights, irrespective of whether it is a copyright or a trademark³¹, (B) although freedom of expression is one of the most protected rights and finds backing in the founding documents of nations, however, whenever there exists, a legitimate legal interest in another statute, such a freedom can be restricted³² and (C) Freedom of expression would require access to and use of some copyrighted material however, the allowances made in copyright law are sufficient for the protection of free speech.³³

When these three factors are applied in the case of Banksy and his statements, it becomes clear that there cannot be a reliance on such statements to nullify an existing right of the author in his artistic work. However, when an applicant challenges the protection of works by artists who have earlier shown disdain for intellectual property law enforcement, it creates a “negative space” for that artist to seek the protection of his work from commercial exploitation as (1) the competent authority will have to see evidence of whether the artist has allowed for his work to be used by the public, before and after filing for protection, and to what extent and (2) in most cases, it would lead to the result that the authorities would be able to determine if the artist has sought protection under copyright, then if commercial exploitation of the same with his knowledge has taken place with no measures taken by the artist to prevent it, for example in the case of Banksy where the applicant was able to show commercial use of his work which was in his knowledge, his copyright claim over the derivative would fail since the new work would be a derivative work authored by another artist³⁴ and if the protection has been granted under the trademark, then it would stand at the threshold of being revoked on account of “bad faith” filing.

³⁰ Enrico Bonadio, *Banksy's copyright battle with Guess- anonymity shouldn't compromise his legal rights*, THE CONVERSATION (Nov. 25, 2022), <https://theconversation.com/banksys-copyright-battle-with-guess-anonymity-shouldnt-compromise-his-legal-rights-195233>.

³¹ Vandana Menon, *supra* note 19 at pg 14.

³² Branka Marusic, *Limitations on Copyrights Based on Freedom of Expression and Information*, 69 GRUR INT'L 768-72 (2020).

³³ ALEXANDRA COUTO COPYRIGHT AND FREEDOM OF EXPRESSION: A PHILOSOPHICAL MAP (Palgrave Macmillan 2008).

³⁴ Rich Stim, *Copyright Ownership: Who Owns What?*, STANFORD COPYRIGHT AND FAIR USE (April 4, 2013), <https://fairuse.stanford.edu/overview/faqs/copyright-ownership/>.

VIII. CLAIMING COPYRIGHT PROTECTION AFTER LOSING A TRADEMARK: CAN IT BE DONE?

In Banksy's own words, he believed that "Copyright is for Losers" and subsequently proceeded to lose the trademark to some of his most famous and iconic murals. Thus, ideally, he should now be seeking protection under copyright laws. However, a work that is sought to be protected as a trademark by an artist also has to be used for commercial purposes, which is not the intention or the objective of Banksy. He wants to create street art, on the property of others, without seeking their permission, but wishes to remain anonymous and also does not want to commercially exploit his work, nor does he want brands to do it. In such a scenario, a trademark will most likely get cancelled since it cannot be used as a replacement for a copyright. Therefore, if the work created by the artist automatically vests the copyright in him, then the copyright of Banksy's works should vest with him irrespective of whether they are protected via a trademark or not. However, if Banksy continues with his anonymity, it will not be possible to determine who the author of the work is and even copyright protection might not be available.

One way in which such protection can be sought is by entering into a "work made for hire" contract. Banksy already has an office that communicates on his behalf, The Pest Control Office Ltd., and he could claim for it to be an employer under whose instructions his work was created. For a work to qualify as a work made for hire under EU laws, only two requirements need to be met, namely, (1) that the work was created in the course of employment by an employee and (2) that the work was created by an independent contractor on the specific commissioning by a client.³⁵ Here, it could be easily asserted by Pest Control that Banksy was an employee who created work on their behalf during the course of employment, in which case, the copyright would vest with the owner of such work, which would happen to be Banksy's employers, i.e., Pest Control. This would also be taken affirmatively since Pest Control already holds the trademarks on behalf of Banksy, and once copyright protection is afforded to his works, then protecting them under trademark laws would also get easier as the question of Banksy's identity would no longer need to be the focal point while deciding whether he should be acknowledged for his works or not.

³⁵ Dunlap Bennett and Ludwig *Copyright Law: The "Works Made for Hire" Doctrine*, DUNLAP BENNETT & LUDWIG PLC (March 12, 2021), <https://www.dblawyers.com/copyright-law-the-works-made-for-hire-doctrine/#:~:text=Once%20a%20work%20is%20considered,work%20of%20the%20independent%20contractor.>

IX. CONCLUSION

While there are several differing opinions on whether ownership over street art that is made illegally should be with the artist or the property owner, no one has denied that when it comes to the application of copyright laws, the universal rule will always vest the right to claim authorship and ownership of such work in the artist. The protection accorded to street art in countries like India has been limited to the passing of injunctive orders, as seen in the St+Art case, as the courts are reluctant to grant ownership over wall murals to artists even when the work has been commissioned by government authorities. This problem gets exacerbated when the artist is himself an anonymous entity, as it becomes difficult to grant protection, since it cannot be verified who the real artist is. In such a scenario, a trademark cannot do the job of a copyright, as it is not an additional protection under Intellectual Property laws but is rather used to promote “fair and efficient” competition in the market by making marks distinguishable. When an artist does not commercially exploit the work over which he has claimed a trademark, then such trademark is liable to be cancelled on account of “bad faith” filing. But when a trademark gets cancelled, it does not mean that such work will not be afforded protection under copyright laws. The only difficulty in the present case against Guess is that Banksy’s persona is in his anonymity, and he vehemently protects his right to continue to remain anonymous. Therefore, even though copyright does subsist in the artist over the artistic work that they have created, it does not extend over the property on which it is created when permission for such work is not taken, and consequently, enforcement of it seems improbable, especially in light of Banksy’s previous statements showing disdain for copyright itself. A probable solution suggested by the author is that Banksy could enter a “work made for hire” agreement with his own office, The Pest Control Office Ltd., and allow Pest Control to claim copyright over such work as being the owners, when they have already been defending Banksy’s trademarks all over the world.