

Autres gens, autres meurs

Regarding the Right to Creative Freedom in the Context of Conflict with Property Rights as Exemplified by Street Art

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This article discusses the issue of evaluation of the street artists' rights to their work from the point of view of the owner and the architect of the building through the prism of the rights of the latter. After all, upon the appearance of a graffiti, mural, or another street art work on someone's property, the conflict of rights and interests between the aforesaid persons is inevitable. It is argued that a street artist cannot always claim the copyright holder status. And when they can, their copyright ranks last in the hierarchy of the rights of the concerned rights holders.

Keywords: copyright, graffiti, property rights, architect.

Dėl teisės į kūrybos laisvę ir turtinių teisių konflikto gatvės meno kontekste

Šiame straipsnyje aptariama gatvės menininkų teisė į meninės išraiškos rezultatą pastato savininko ir architekto atžvilgiu, įvertinant gatvės menininko teisių padėtį, palyginti su pastarųjų subjektų teisėmis. Gatvės kultūroje įsitvirtinus grafičiams ar kitiems gatvės meno išraiškams, neatsiejamai susijusiems su kitų asmenų teise į nekilnojamąjį turtą, minėtų asmenų teisių ir interesų konfliktas – neišvengiamas. Tvirtinama, kad gatvės menininkas ne visada gali reikalauti autoriaus teisių turėtojo statuso, tačiau hierarchijoje dažnu atveju jo teisės yra viršesnės už atitinkamų subjektų teises.

Pagrindiniai žodžiai: autorių teisės, grafičiai, nuosavybės teisės, architektas.

Introduction

The human desire to draw or scratch something on a wall has been known since ancient times, as evidenced by the various cave paintings of prehistoric and ancient times found around the globe. It is clear that those drawings carried certain information in memory of something, such as a successful hunt, or were used as part of a ritual supposed to increase the success of such hunt.

Received: 05/05/2022. **Accepted:** 22/06/2022

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In fact, the modern wall painting, commonly known as street art, or graffiti, or muralism – although the three of them are considered separate styles of painting in the modern art world – is no different in terms of its purpose. That is, it also contains a message that its creator is trying to convey to the world.

The history of the modern street art is believed to have begun in the late 60s in the United States. At the same time, it is worth noting that graffiti on train cars and building walls was used in the 1920s and 1930s by the gangs of New York to mark their territories.

Anyway, in the 1970s and 1980s, it was already viewed as a cultural movement – a movement challenging the official government, political and legal traditions, and protesting against any kind of oppression (racial, religious, cultural, etc.), which later gained the attention and respect of the world and spread to all continents of the globe. And now on the walls, fences, and even the surfaces of the roads in almost every city one can see stylized inscriptions – graffiti artists' signatures (“tags”), original slogans, long colorful names (“throw ups”), or even whole color paintings (“pieces”). Some of them can even be seen from space.¹

However, street art is not limited to wall drawings made with spray cans. It can also come as sculptural interventions. For example, artist Dan Witz puts gloves on sewer grills to create the impression that a person is down in the sewer and trying to escape.²

Or creating graffiti with dirt and dust that usually cover the surface, which allows one to draw on a wall by simply cleaning it: the so-called “reverse graffiti”.³ Often such drawings would be made with a fingertip. For example, a drawing of a heart pierced by Cupid's arrow on the rear window of a car can also technically be considered a reverse graffiti. Natural materials are also used to decorate urban spaces. For example, in 2005, Shannon Spanhake planted flowers in the potholes in the streets of Tijuana (Mexico).⁴

Thus, the ideas for murals are brought into life by street artists on any surface of private, state, or communal property that is part of the living space. The form of ownership of such property chosen as the base for the future artwork makes absolutely no difference. After all, the main goal of the street artist is to convey their (protest) message to as many people as possible. And it doesn't even matter whether there is any protest in the message itself. The very fact of using someone else's property without permission, mostly under cover of night, already constitutes a protest. And, first and foremost, it is a protest against the property rights.

Apart from the protest spirit, an important factor is the spirit of freedom of a street artist, which consists in the artist's independence from the tastes of the customers and the likings of the gallery owners. According to one of the co-authors of the article who is a street artist himself, it is the creative freedom, which, by the way, exists at the artist's own expense, that is the main stimulus for the adepts of this art. Whereas the protest component is not that important in terms of this cultural movement. Thus, if a dirty wall or a rusty gate turns into a certain sight that a number of people like, this is indeed the true manifestation of the street art culture. That is, if yesterday a person would turn away from a wall because it looked like a dump, and today, thanks to the creative efforts of the street artist, the same wall becomes a background for photos, the fact that at least a tiniest change for the better has occurred turns protest into art. Therefore, turning dirt into something spiritually attractive is the main concept of street art.

In fact, it was the protest spirit of the street murals that gave rise to the conflict in the society, which divided the people into the supporters, opponents, and of course, those who are indifferent to the said

¹ See: [https://en.wikipedia.org/wiki/Saber_\(artist\)](https://en.wikipedia.org/wiki/Saber_(artist))

² <https://www.wired.com/2007/01/the-third-man/>

³ <https://www.streetadvertisingservices.com/blog/article/everything-you-need-to-know-about-reverse-graffiti>

⁴ <https://finalbossform.com/post/33063964/planting-potholes-artist-shannon-spanhake-planted>

manifestations of culture. Actually, this proves the contradictory socio-cultural and legal perception of the modern street art in the society.

Building owners in most cases view street artists as vandals and hooligans who, without permission and neglecting the owners' will, illegally spoil the facades of their buildings by drawing all sorts of signs, paintings, images, usually with spray cans – an invention probably adored by graffiti artists.

The economic damage caused by such cultural protests, according to the German Bundestag, reaches about 500 million euros a year, and 50 million euros – in Berlin alone.⁵ Furthermore, landlords are forced to reduce rents to attract tenants to the vacant premises because graffiti usually has a significant impact on the overall atmosphere and quality of life in the area and is seen as a sign of social decline.⁶

Due to the above, building owners tend to advocate prosecution of the so-called vandals for intentional damage (destruction) of property, which can also come by way of such property's partial or total depreciation (*Scientific and practical commentary...*, 2017, p. 440–441). To their satisfaction, such prosecution is possible under the laws of many countries of the world, Ukraine included (Art. 194 of the Criminal Code), of course provided that the damage is significant. Moreover, in Ukraine, Art. 194 of the Criminal Code is in certain cases applied in conjunction with Art. 296 of the Criminal Code (hooliganism). Prosecution increases the chances of damages being recovered in a civil action.

Vandalism issue raises the debate that street art works should not be protected by copyright in any case without exception, meaning they are not subject to legal regulation at all, because otherwise it would be perceived as support by the state, making hooligans hold out hope for understanding with the authorities (Brittany, Ghajar, 2016).

Furthermore, it should not be forgotten that another copyrighted work sustains damage, because the building itself is a work of architecture, which is legally protected by copyright.

Opponents of street art also point out that it has a negative impact on the environment and can damage parks and spoil the air. As for spray cans, the extremely harmful substances contained in them damage the planet's ozone layer.⁷

Advocates of street art, however, consider it more than art,⁸ arguing that it is an independent form of culture and communication. A whole Institute of Graffiti Research was even established in Vienna, Austria.⁹

According to the street art advocates, graffiti is the bearer of innovative social thoughts and civic stances. And if the society cannot or will not hear the voices of social protest, it certainly cannot help seeing the drawings on the walls. It is an art form that can only exist outside of classic art galleries.

In addition, as an argument, it is not least thanks to street art that the paint sprays market is developing. The paint industry meets the demand for the necessary paint understanding that it is bought mostly for graffiti. Therefore, it is unacceptable to consider the activities of street artists from the legal point of view only in terms of the punitive aspect. And as long as the paint industry sells the demanded spray paint for graffiti and there is no threat to public safety, the creative efforts of graffiti artists should be recognized as the right to creative freedom.

Furthermore, it is noteworthy that global brands are increasingly ordering murals to advertise their products aimed at young audiences, thereby promoting creative intervention in the urban landscape.

And according to a recent study by the University of Warwick, UK, in the areas with the most murals, the market value of real estate is – contrary to the broken windows theory – increasing.

⁵ <https://www.bundestag.de/resource/blob/513726/cc446cebd64d8047d47ec0f68b246107/Graffiti-data.pdf>

⁶ <https://www.palomar.edu/telescope/2018/05/19/graffiti-destruction-of-public-property-or-art/>

⁷ <https://www.greenecoservices.com/taxpayer-and-environmental-cost-of-graffiti-in-los-angeles/>

⁸ Aerosol art is taught at some art academies.

⁹ <https://www.graffitieuropa.org/>

It is known that in the United States, certain city districts that cannot boast of high incomes encourage street artists to create new graffiti, as the landlords expect to thus ensure gentrification by attracting richer tenants.

For example, at one time, the market value of a building in Chelsea (UK) with two drawings made by Eduardo Kobra in 2012 grew from \$880 thousand to \$2.075 million.¹⁰

The fact that the society can be rather well-disposed to street art as a whole is illustrated by the so-called “legal” walls – the walls officially designated in a number of cities around the world for street art paintings. Such cities include Melbourne, Paris, Montreal, Los Angeles, etc. And that’s apart from the private orders made by homeowners for paintings by some, usually well-known, artists. City tours around the world to see interesting murals are commonplace today. For example, in Kharkiv (Ukraine), activists arrange tours of the murals created by the famous Kharkiv street artist Hamlet.

Given the polarity of the views on street art, it can be asserted that there exist legal collisions born of socio-legal conflicts, which can be represented by the following models: “Building owner’s property rights v. street artist’s copyright”; “Building architect/author’s copyright v. street artist’s copyright”.

Property Rights v. Copyright. As is known, legal control over a thing consists in the right of the owner of the said thing to decide its fate through possession, use and disposal thereof (Articles 316 and 319 of the Civil Code of Ukraine). The exercise of the right of ownership of real property as a subjective right is determined by various needs and interests of persons, including financial ones, the need to satisfy which motivates the persons engaged in social relations to undertake or refrain from certain actions. At the same time, implementation of the constitutional rights of imperative nature in terms of exercising the right of ownership of a thing (Art. 41 of the Constitution of Ukraine) should be aimed not only at ensuring the use of a thing to meet the vital and financial needs and interests of the persons engaged in social relations, but also at respecting the rights and freedoms of other persons, public interests, etc. (Art. 41 of the Constitution of Ukraine, Art. 319(5) of the Civil Code of Ukraine).

This means that the freedom that arises from the subjective right is not unlimited, which follows from the very essence of legal regulation. At the level of civil law, this is stipulated by the general rule of Art. 13 of the Civil Code of Ukraine. That is, the limits of the owner’s possible actions are relatively clear and determined by the body of statutory requirements and prohibitions, as well as objective circumstances that restrict the freedom of the owner and prevent them from exercising their powers in whole or in part. At the same time, limitation of the owner’s freedom in the event of restriction of their property rights does not mean deprivation of certain powers or infringement on their property rights (Sklovskiy, 2000, p. 157).

It appears that the argument about the subjective rights not being unlimited, as well as the legal prohibition to use property rights to the detriment of the rights and freedoms of citizens make street artists convinced that no one can prevent them from realizing their creative inspiration on other people’s walls. Therefore, since Art. 54 of the Constitution of Ukraine guarantees freedom, including creative freedom, and protection of intellectual property, the right of ownership of real estate seems to be justifiably opposed by the copyright in a drawing created on the facade of such real estate.

In real life, this may look as follows. The building owner has restored the facade and painted it in one deep color. For a street artist, it is just the perfect surface to create something extraordinary. And thus, a drawing appears overnight on the wall of the building, to the complete surprise of the building owner. The question that now arises before the owner is whether they can remove the drawing from the wall since Art. 13(2) of the Civil Code of Ukraine prescribes that actions that could violate the rights

¹⁰ <https://www.widewalls.ch/artists/eduardo-kobra>

of others must be refrained from, which provision applies to artists thus making their actions illegal, or whether the owner must now look at the drawing on their wall every day while being unable to do anything about it because the drawing is protected by copyright and the owner cannot exercise their right to the detriment of the rights and freedoms of the artist.

Of course, these questions arise in a situation where artists do not consider it necessary to obtain permission from the owners to create something on their property. In fact, historically, the philosophy of street art has been opposed to obtaining any permits.

At the same time, in the modern world of street art, there are artists who are trying to reach an agreement with the property owner before painting anything on its walls. However, this approach only applies to the buildings that are in decent condition, painted, and show no signs of destruction. Drawing anything on such surfaces is considered vandalism.

On the other hand, if the building is in disrepair, dirty and unkempt, then no artists would consider it necessary to ask permission to use it for their creative purposes, explaining that the result of their creative efforts would be in any case better than the original state of things, which would at least be turned into some kind of a neat space.

Let's start with the fact that copyright law, by the concept of it, is not designed to protect street art in its original manifestation for the following reasons.

Since copyright is based on the assumption that any creative work is aimed at obtaining a commensurate reward through the exercise of property rights,¹¹ as well as creative recognition of the artist, due to the lack of these two components, copyright has almost nothing to do with street art. After all, as mentioned above, street art was born as a protest phenomenon, and because of that most street artists remain unknown to the general public to this day. Not to mention any positive economic effect of their creative work.

By the way, the author being unknown is what hinders the protection of their copyright. For example, the Supreme Court of Germany once rejected a copyright infringement lawsuit filed by the author of a Berlin Wall graffiti on the grounds that – inter alia – he had not signed his painting.¹² In another case also related to the paintings on the Berlin Wall, the German Supreme Court, on the other hand, ruled in favor of the graffiti artists because the latter had not remained anonymous and had openly signed their works.¹³

At the same time, the street artists' reluctance to sign their works makes sense, because in the event of recognition they might face prosecution.

In general, one should agree that recognition and fame in this art are directly related to the risk of being put behind bars. It is a tightrope-walk art. A well-known fact: in 2011, graffiti artist Revoke was sentenced to 180 days in prison for vandalism. And while he was serving his sentence, his works were on display at the Museum of Contemporary Art in Los Angeles (Young, 2012, p. 307–308).

Thus, copyright protection can only be enjoyed by the street artists who have departed from the original philosophy of street art – anonymous protest, which by the way provokes criticism from the rest of the artists because, in their opinion, compliance with law defies street art as an art form.

In general, understanding the spirit of mural painting as a cultural phenomenon is very important in resolving disputes over the protection of the rights of both the author of the painting and the owner of

¹¹ Here, for example, provisions of Art. 441 of the Civil Code of Ukraine (use of the work) can be cited in compilation with the norm of Art. 444(1) of the Civil Code of Ukraine (cases of lawful use of work without consent of the author): “The work can be used freely... and *free of charge*...”, which definitely means that in all other cases, the author (copyright holder) *must* receive a commensurate reward.

¹² BGH GRUR 2007, 691, 693 – Bemalung von Teilen der Berliner Mauer.

¹³ BGH GRUR 1995, 673, 675 – Mauer-Bilder.

the property. In this context, the German lawsuits related to the Berlin Wall paintings made by graffiti artists in the 1980s are very illustrative.

Thus, after the unification of East and West Germany in October 1990, the state sold parts of the wall with graffiti paintings. Some parts of the wall were presented as gifts. Some fragments are still presented as gifts.¹⁴ And certain parts of the wall were repaired, which led to the destruction of certain paintings. Such actions provoked outrage from street artists resulting in a number of copyright infringement lawsuits, as a result of which the German judiciary faced a number of issues that were challenging in terms of the modern understanding of law. For example, the one related to the exhaustion doctrine.

Initially, the panel of the Berlin court ruled that painting in a public place was tantamount to the introduction into civil circulation, as self-promotion was the main goal of the artists. At the same time, the artists did not have the right to expect a reward, because at the time they had been creating the paintings, they could not have possibly expected to receive any profit.¹⁵ However, the German Supreme Court disagreed with this interpretation and pointed out that the sale of the paintings became possible only after the wall (including those parts of it that had paintings on them) had been broken into fragments. And since the paintings had a strong influence on the price of the fragments of the wall, i.e., added value to the tangible historical artifacts, the artists are entitled to a monetary compensation.¹⁶

The following case¹⁷ became another test for the German judiciary. The plaintiff, a graphic artist, painted three connected elements of the Berlin Wall on Leipzig Square in Mitte, Berlin, in 1995. He titled his work “East-West Dialogue” but did not sign it. The property, with which parts of the wall were firmly connected, belonged to the federal state of Berlin that had never authorized the respective creative act. On July 12, 2001, a ceremony took place in Leipzig Square during which the federal state of Berlin donated fragments of the wall painted by the plaintiff to the German Bundestag. After that, the President of Germany presented these fragments as a gift to the UN whose Secretary-General (then Kofi Annan) was present at the ceremony. On that day, the respective wall elements remained in place and were only transferred symbolically. They were handed over to the UN on April 4, 2002 in New York. A 55 cm x 55 cm plaque was attached to them citing the history of the Berlin Wall. The final line on it read: “This graffiti was created after the fall of the wall. Artist: K.”

The lawsuit brought against the Federal Republic of Germany alleged that the author’s right to distribution, as well as his right to a name had been violated because the defendant had introduced his work into civil circulation without his consent, and the plaintiff’s right to be named author had been violated during the 2001 ceremony. In addition, there was no mention of him as the author on the plaque.

The defendant’s stance was that the mural as a work of art had been foisted on the defendant, and in any case, the plaintiff had agreed to distribution thereof by his own conduct. After all, the text on the plaque had been substantively discussed between him and the Bundestag, and the plaintiff had not expressed any additional wishes at that time.

The Federal Court of Germany dismissed the claim for the following reasons:

- The plaintiff’s right to distribution was lost when the painting was made on the parts of the wall. In addition, already during the creation of the painting it was clear that it would not be approved by the owner and the painting would be perceived as a foisted work. Furthermore, in this case, the wall as a historical artifact can be used all by itself, and it is not the painting that makes it fit for civil circulation. Therefore, the owner is free to dispose of the wall as he wishes, because

¹⁴ <https://tsn.ua/ru/glamur/haydi-klum-podarila-muzhu-na-yubiley-kusok-berlinskoy-steny-1405470.html>

¹⁵ KG GRUR 1994, 212, 214

¹⁶ BGH GRUR 1995, 673, 675 - *Mauer-Bilder*

¹⁷ <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=40219&pos=0&anz=1>

otherwise he would be unacceptably limited in his fundamental right to dispose of his property at his discretion.

- The absence of the plaintiff's name does not violate his rights as he himself neither signed his work, nor stated that he wanted to be named author, although he had such an opportunity.

As can be seen from the German legal precedents, today's controversy over graffiti (street art) is a search for a golden mean that could equally satisfy both the supporters and the opponents of this art form.

At the same time, this search is taking place not only on the continent, but also overseas. A bright example of that is the lawsuit brought by 5Pointz in the United States. And despite the fact that the victory of the street artists should be admitted, as the US Supreme Court upheld the ruling of the appellate court awarding almost \$7 million in damages to the street artists whose graffiti paintings had been destroyed by the developer who had demolished the building, the path to such a result was extremely difficult and sometimes contradictory.¹⁸ And it's far from a given that in another situation the American Themis, for whatever reason, doesn't make exactly the opposite decision.

Anyway, in light of the fact that the vast majority of modern society misunderstands the nature of street art, graffiti, etc., coupled with the simultaneous spread of murals on all continents, the problem of legal certainty at both legislative and practical levels needs to be resolved since it is clear that the classic understanding of the priority of property rights as absolute rights does not always work in favor of the owner.

In between the thoughts on stiffening criminal responsibility and denying graffiti the right to be called copyright protected works of art, quite noteworthy is the stance expressed by Katya Assaf-Zakharov and Tim Schnetgöke (Assaf-Zakharov, Schnetgöke, 2021). The authors point out that both the opponents and the advocates of graffiti focus on its appearance, perceiving it as either desirable or undesirable. Therefore, they proposed to reconsider the boundaries of property rights to tangible objects in order to gain control over the surfaces that form the urban landscape, so they could be used as a place for exchanging views, with the consideration of the general curbs on free speech (slander, insult, etc.).

Speaking of public space, the authors point out that it is formed from a large number of outside surfaces of the walls. And for that matter, society and the building owner are like neighbors who live on different sides of the same wall, which calls into question the right of the building owner to determine the appearance of the city walls. As for such owners as the state, local communities, and legal entities, their right to control the appearance of the walls seems even less obvious, because these entities do not live in the buildings. Furthermore, the appearance of the building facades is often regulated by various city rules,¹⁹ and therefore the ownership of the building may already be quite limited in terms of deciding on what the facade walls may look like.

In other words, Katya Assaf-Zakharov and Tim Schnetgöke, recalling that property rights are a set of statutory privileges, call for a review of the powers and limits of the rights of the owner. And this, in principle, is nothing special, because such reviews happen from time to time. After all, "ownership – like all technologies – evolves according to the amount of resources, market opportunities, and changing values" (Heller, Salzman, 2021, p. 106).

However, it is unlikely that the relationship between property rights and copyright in the context of street art will ever be reviewed in favor of the latter since both opposing groups are trying to defend

¹⁸ <https://lawandcrime.com/supreme-court/supreme-court-allows-5pointz-graffiti-artists-6-7m-victory-over-nyc-developer-to-stand-huge-win-for-street-art/>

Justice Frederic Bloc. *Cohen v. G & M Realty L.P.*, 320 F. Supp. 3d 421 (E.D.N.Y. 2018). Available at: <https://case-text.com/case/cohen-v-g-m-realty-lp>

¹⁹ In Ukraine, there are the so-called facade passports that are approved by local authorities.

their own and, most importantly, diametrically opposed interests. Given that the number of property owners is immeasurably greater than that of street artists, it can be assumed that their interests will be prioritized at the legislative level. Although it should be admitted that the judiciary has a greater responsibility to society in such cases since the resolution of the case is directly dependent on the judge's view of justice, which certainly depends on the facts established during the trial. Moreover, both scenarios of dispute resolution – in favor of the owner and in favor of the author – may lie in the “zone of formal legality”.²⁰ Therefore, judicial lawmaking is not only possible, but also necessary here.

Thus, despite the presumption of priority of property rights, Ulpian's axiom of civil law that “property comes with obligations” must serve as a prism through which all existing circumstances must be evaluated. After all, if we consider a dilapidated building that has been in a poor condition for a long time, and this building (its appearance) has become a source of inspiration for the street artist, the owner's rights can hardly be prioritized over those of the mural author because the attitude of the owner has in fact decided the fate of the property not in favor of the latter. Provided, of course, that the creation of the street artist forms an emotional connection between them and (random) observers of their work, and that the creation is signed. In fact, a “painting protest” can only be considered as such in the case of openness, to a certain degree, of the person who created the painting (expressed the protest message on the wall). It seems that such an argument in favor of copyright as “remember how messy it was – look how neat it is now” may be decisive. And the category of damage in its civil law sense can hardly be applied here because it is impossible to do damage to what is already damaged.

And conversely, if a mural is painted on a neat facade, such a vandalistic drawing should be compared with an obscene, immoral work. Although it will be recognized as a copyrighted work,²¹ since it is an encroachment on the property in the form of classic damage, its author will not be able to count on any protection and, consequently, preservation of their work. Creative freedom, like any other freedom, is limited by the rights and freedoms of others, as stipulated, inter alia, by Art. 23 of the Constitution of Ukraine.

Removal of Graffiti Due to Destruction of the Building. Naturally, if a written contract exists between the owner of the building and the author of the mural, it must contain provisions regarding possible destruction of the physical carrier of the painting. However, in the absence of such provisions or the contract itself, or if the mural that has existed for so long that everyone got accustomed to it had been created without the permission of the building owner, the search for the correct answer appears extremely difficult.

From the legal standpoint, the most interesting is the situation where the painting was created without permission. Therefore, it is to this situation that we are going to turn first in our considerations.

On the one hand, the muralist must be aware that the surface they have chosen is one that was not intended to be painted on from the beginning. Therefore, from the very moment of creating the graffiti, they must assume it is temporary. In addition, in real life, the paintings created on walls cannot boast of longevity. External factors – rain, snow, etc. – do their job. And even if one assumes the owner has tacitly consented to having the mural simply by leaving it be, all subsequent objections by the artist to the destruction of their work should be considered as copyright abuse.

It seems that this is exactly the reason why the city of Paris hires whole teams of painters whose task is to move around the city and paint out new graffiti, bringing the facades to their original state

²⁰ More on the zone of formal legality: Barak, 2021, p. 141.

²¹ Although globally, cases are known where courts denied protection to immoral, obscene, blasphemous works, as well as works that infringe on others' copyrights. See: Bently, Sherman, 2004, p. 148, 193–196.

but leaving certain drawings that deserve attention. However, if the graffiti is signed by its author, it will be painted out .

On the other hand, we cannot but mention a number of “imposed” obligations arising from copyright, because within the meaning of copyright law, a work qualifies as a work of art subject to compliance with the criteria of originality. Therefore, the application of the norm of Art. 12(2) of the Law of Ukraine “On Copyright and Related Rights” appears totally justified. According to this norm, the owner of the tangible object in which the original work of art or architecture is embodied is not allowed to destroy such object without first offering it to the author at a price not exceeding the cost of the materials spent to create it. If it is impossible to preserve the tangible object in which the original work is embodied, the owner of such object must allow the author to make a copy of the work in the appropriate form or, in the case of architectural structures, a photograph of the work.

Interestingly, certain street artists perceive the destruction of a house with a mural on the wall as a real-life story that shows how rapidly everything is changing. Therefore, in the vast majority of cases, they do not strive to preserve their work because it is much easier and less expensive to create something new.

It should be noted that copyright law does not prohibit the destruction of the tangible object, given the above condition is complied with.

At the same time, the owner is faced with the question of how they should notify the author of the mural of the anticipated destruction of the building, especially given the fact that street artists are not public figures. In this case, it appears reasonable that a banner should be placed on the facade of the building for a reasonable period of time. If the author responds, they will be allowed, for example, to take a photograph. Otherwise, the owner will be free to destroy the building, and the author will not be entitled to claim anything in this regard.

In other words, copyright will always be immanent in property rights.

Thus, the answers to the following questions are important for resolving the conflict between the building owner and the street artist:

- What was the condition of the building at the time the mural was created?
- Was the owner’s consent to the creation of the mural obtained?
- Does the mural qualify as a work of art within the meaning of copyright law?
- Does the mural allow its author to be identified?

Copyright of Architect v. Copyright of Street Artist. Given that the building itself can be a work of architecture protected by copyright, conflicts of “creative” interests between the architect and the muralist can be expected.

As is known, architectural works are protected by copyright as such when we speak about the works of architectural art, which include, in principle, all types of architectural works, such as a variety of residential buildings (both private and apartment ones), commercial buildings, hotels, schools, factories, squares, railway stations, museums, etc. Even an engineering structure can be an architectural work if it is not merely a technical structure, but rather a spatial solution (for example, a bridge). These may also include works of garden and landscape art. Even space design can be protected by copyright, which, however, is more related to interior architecture.

Copyright protection also encompasses sketches and drawings, which are parts of the project documentation related to architectural solutions.²²

In order for an architectural work to be perceived as an individual creation, it should not be a handi-craft, routine achievement, but possess features that would distinguish it from everyday developments

²² Art. 8 of the Law of Ukraine “On Copyright and Related Rights”, Art. 433 of the Civil Code of Ukraine.

or make it stand out from the average buildings. Architectural achievement must go beyond merely solving a technical problem using proper technical means. This means that if an architectural solution merely satisfies utilitarian needs, it will not be protected by copyright.

The function of the architectural work (for example, housing or production) makes no difference.

Neither can the architect's creative result be influenced by such factors as the size of the land plot or the budget of the customer. Therefore, neither of them can be considered a limitation to architectural solutions in terms of creative latitude. In other words, stiff construction terms do not affect architectural creativity.

Copyright protection may apply to architectural work as a whole, as well as parts thereof if they are the result of individual creative work. For example, facades, stairwells, building structures, entrances, and even frescoes. This also applies to the buildings that are not protected as a whole. An original element is enough to prove that the building has an original creative achievement in it. It is not required that such individual original elements form a significant component of the building.

Copyright protection extends to not only the artistic design of the building *per se*. It may also apply to an architectural ensemble formed by either a number of buildings or a number of their individual architectural elements. Therefore, a work of architecture can be viewed as a creative achievement through the prism of a single architectural complex of buildings, of which it is a part, as it will have its impact on the formation of the general impression created by the complex. However, in this case it should be borne in mind that it is the architectural ensemble as a whole that is going to be protected,²³ and not a single building.

The architect, as well as any (primary) copyright holder, enjoys property and personal nonproperty rights to the work created by them. As regards the conflict of rights, the rights encroached upon by the author of the mural are the personal nonproperty rights, of which the most interesting in terms of the present discussion is the right to preserve the integrity of the work and prevent any perversion, distortion, or other alteration of the work.

In fact, the only element of the building touched by the hand of a street artist is the facade, which is subject to copyright protection only if it is original. Therefore, it is safe to assume that moral suffering of the architect whose work was spoiled by the painting (that changed the appearance of the facade), and, as a consequence, violation of the architect's personal nonproperty rights might take place. Furthermore, such a violation would take place both in the case of the building owner's tacit consent to the graffiti on the facade, and in the case the owner would order such graffiti himself. In other words, any interference in the appearance of the facade requires the consent of the author of the architectural work.

However, we note that violation of the rights of the architect can only be discussed where the respective building is in a proper condition.

Changes to Facade at the Owner's Initiative. Meanwhile, the question of changes made to the architectural work at the initiative of the building owner requires special attention, because the relationship between the owner and the architect is connected with the conflict of interests, which is natural for this relationship.

On the one hand, based on their property rights, the owner of the building wants to dispose of the property at their discretion, including making changes to it. On the other hand, the architect, based on copyright, wants to protect their work from any interference.

²³ See Art. 1 of the Law of Ukraine "On Architectural Activity" that defines the objects of architectural activity: objects of architectural activity (architectural objects) are: civil, residential, communal, industrial, and other houses and buildings, *their complexes*, items of garden and landscape architecture, monumental and monumental-decorative art, territory (parts of territories) of administrative units and settlements.

This state of things is perhaps most relevant for the field of construction, engineering, and architecture, because under any circumstances, an architectural work always pursues two goals at the same time, of which one can often be achieved only at the expense of the other: the aesthetic purpose and the purpose for which the building was erected (its intended use). Therefore, the question of who should give up their rights is extremely important.

Copyright protects the author's interest in the integrity and inviolability of their work. Upon publication, the author presents to society a particular form of their work, which they deem aesthetically perfect. It is the author who decides what their creation should look like and in what form it should be revealed to the public. After all, this is the essence of the philosophy of copyright. Therefore, a work for the architect is a creation in a particular form, and its "consumption" is only possible without any alterations. Hence, no divergent use, transformation (reconstruction) of the work, or distortion of its form is acceptable, which is stipulated by copyright law as an imperative.

Whereas the interests of the owner of the building as an architectural work are opposed to the interests of the architect insofar as the absolute nature of property rights implies the right of the owner to do with their property as they please.

Still, it appears that the right to "inviolability" of a copyrighted work is not an absolute one, and therefore it is not necessarily subject to protection because for a property in the material coordinate system an important role is played by external factors, such as market indicators, condition of the property, its function being relevant to its location, and other factors that determine its fate.

Generally, in granting a developer the right to use the architectural work (to construct the respective building), the architect involuntarily agrees that their creation will be subject to circumstances that may force the building owner to alter it or interfere with its form for the reasons of public safety (e.g., installation of lightning protection), or change the original function of the building (for example, from an office building to a kindergarten), or have a street art work created on the facade for the sake of gentrification.

In other words, the extent to which an architect can demand protection of their right to the integrity of the work depends on the balance of interests of both parties.

At the same time, from the point of view of copyright, the use of an architectural work transferred by the architect to the developer implies primarily the right to reproduce the work in a real-life building. Since changing the building facade by adding a painting to it in a certain way reshapes its image, one could argue that the street artist creates a work that is, albeit original, still derivative (remake), the right to which is a separate proprietary copyright. Given that the contracts between the developer and the architect do not always contain a clause regarding other proprietary copyrights, in certain cases, in addition to personal nonproperty rights, one could argue that the architect's property rights are also violated by the building owner.

In view of the above, the balance of interests between the owner of the building and its architect can be established using the following test, where positive answers to all questions will indicate encroachment on the personal nonproperty rights of the author (architect) through a civil offense:

1. Objectively, has any distortion or encroachment on the integrity of the work been recognized as a copyrighted work taken place (establishing whether the facade is a copyrighted work)?
2. Can such distortion or encroachment on integrity harm the interests of the architect? Which ones?
3. From the building owner's perspective, are the interests of the architect that are threatened justified (legally and morally) to such an extent that they deserve priority?

The above test will allow for at least an initial analysis of not only disputes involving conflicts of interest between the architect and the building owner due to graffiti on the facade, but also all disputes

where rights to architectural work (except for cultural heritage sites) are encroached upon. For example, the situation with the House of Flowers²⁴ in Kyiv could also be resolved with the help of this test.

Conclusions

It should be admitted that street art culture has become an integral part of everyday life on all continents. And it became so deeply rooted that, with rare exceptions, it inevitably catches the eye of the passers-by. If the eye clings to a painting on the wall, one can be sure – what halted the passer-by is real art, because only real art makes you pause, take your mind off the everyday routine, hold your breath, and get emotional while looking at the mural in the open air.

The idea of street art is alien to the classical notion of art, and therefore it will never be able to become one with art galleries. Apart from that, it is freedom-loving, as it creates connections between objects in public space. The desire for freedom is what to some extent causes rejection of this culture, because the idea of street art is based on the infinity of creative freedom, which is usually not perceived by the majority of society because infinite freedom does not exist. Creative freedom collides with property rights, within which freedom is more formalized and regulated at the level of law. It is the conflict of these two freedoms that requires a balance of interests where property rights would at times give way to creative freedom and street art would in return show respect for other people's property.

As for the rights of the property owners and copyright holders, the aforesaid makes it possible to build the following hierarchy: (1) the right of the building owner; (2) the right of the building architect; (3) the right of the street artist.

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²⁴ <https://suspilne.media/148047-sevcenkivskij-sud-zaboroniv-demontaz-kvitiv-ukraini/>

Regarding the Right to Creative Freedom in the Context of Conflict with Property Rights as Exemplified by Street Art

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S u m m a r y

It should be admitted that street art culture has become an integral part of everyday life on all continents. And it became so deeply rooted that, with rare exceptions, it inevitably catches the eye of the passers-by. If the eye clings to a painting on the wall, one can be sure – what halted the passer-by is real art, because only real art makes you pause, take your mind off the everyday routine, hold your breath, and get emotional while looking at the mural in the open air.

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As for the rights of the property owners and copyright holders, the aforesaid makes it possible to build the following hierarchy: (1) the right of the building owner; (2) the right of the building architect; (3) the right of the street artist.

Dėl teisės į kūrybos laisvę ir turtinių teisių konflikto gatvės meno kontekste

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S a n t r a u k a

Reikia pripažinti, kad gatvės meno kultūra tapo neatsiejama kasdienio gyvenimo visuose žemynuose dalimi. Ši kultūra taip giliai įsišaknijusi miestų gatvėse, kad neišvengiamai „pagauna“ praeivių akis. Jei tapyba ant sienos yra pastebima, galima nedvejoti, kad tai – menas, nes tik tikrasis menas priverčia praeivius sustoti, atspūsti ir išgyventi emociją žvelgiant į freską atvirame ore.

Vis dėlto gatvės meno idėja yra svetima klasikinei meno sąvokai, todėl ji niekada negalės atsidurti meno galerijose. Be kita ko, gatvės menas geriausiai tarpsta laisvėje, nes sukuria objektų atviroje erdvėje ryšį. Laisvės troškimas yra tam tikra šios kultūros atmetimo priežastis, nes gatvės meno idėja pagrįsta kūrybinės laisvės begalybe, kuri ne visiems yra paprastai suvokiama. Reikia pažymėti, kad kūrybos laisvė susikerta su nuosavybės teisėmis, kai laisvė yra formalizuojama ir reguliuojama teisinėmis priemonėmis. Būtent šių dviejų fenomenų konfliktui spręsti reikia rasti interesų pusiausvyrą: kad nuosavybės teisės institutas būtų pajėgus suteikti kūrybos laisvės plėtotės galimybę, o gatvės menas savo ruožtu užtikrintų pagarbą kitų žmonių nuosavybei.

Kalbant apie nuosavybės ir autorių teises, atsiranda nuosekli hierarchija: 1) pastato savininko teisės; 2) pastato architekto teisės; 3) gatvės menininko teisės.

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