

Copyright Might Be for Banksy

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INTRODUCTION

When it comes to anonymous, world-renowned street artists, Banksy is in a world of his own. Plenty of prominent artists, from Jean-Michel Basquiat to Blek le Rat, have gotten their starts on the streets, and plenty of street artists have created works under pseudonyms, but none has painted as prolifically, in as many countries, over as many years, all while retaining their anonymity, as Banksy.

What sets Banksy apart in this regard is somewhat of a double-edged sword. While on the one hand Banksy’s anonymity is core to his mystique, many of the tools available to artists who aren’t concerned with their anonymity are not necessarily available to him. And even when they are, utilizing them can be more complex and uncertain.

This Article explores the ways in which Banksy and his work interact with trademark and copyright law, two tools typically available to artists to protect and control their work. Banksy’s history with trademark law in the EU presupposes that he can’t use copyright law without sacrificing his anonymity, but this Article suggests that may not actually be the case.

This Article also speculates upon how Banksy might utilize these tools in the future. Banksy’s history with trademark law is consistent with an artist whose grand strategy is less concerned with people copying his images for their own gain and more concerned with people using his images in ways that might impact his control over his narrative and legacy. If Banksy does utilize copyright law to

protect his work in the future, it will likely be consistent with this history.

I. WHAT HAPPENED IN THE COURTS?

In September 2020, the European Union Intellectual Property Office’s (EU IPO’s) Cancellation Division granted a declaration of invalidity filed by British greeting card company Full Colour Black against Banksy’s trademark for his *Flower Thrower* piece. It ruled the trademark “invalid in its entirety” because Banksy applied for trademark protection in bad faith.¹



Essentially, the EU IPO found that Banksy’s purpose in filing this trademark did not align with the underlying commercial purpose of trademark law, which is to help customers “identify products” and distinguish between competing brands,² and thus his *Flower Thrower* trademark was deemed invalid.

The ruling came after Pest Control Office Limited, “the office that handles the paperwork for the graffiti artist Banksy” and “the sole point of contact for the artist,”³ filed a trademark in the EU for *Flower Thrower* in 2014⁴ and Full Colour Black applied to have it invalidated in March 2019.⁵

In response to Full Colour Black’s application, Banksy opened a pop-up homewares shop a few months later called “Gross Domestic Product,” highlighting in a statement that “the motivation behind the venture was ‘possibly

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¹ Full Colour Black Ltd. v. Pest Control Off. Ltd. (*Full Colour Black I*), No. 33843C, at 1 (EUIPO Cancellation Div., Sept. 14, 2020), https://euipo.europa.eu/copla/trademark/data/012575155/download/CLW/CCL/2020/EN/20200914_000033843.doc (*Flower Thrower*).

² *Trade Mark Definition*, EUR. UNION INTELL. PROP. OFF., <https://euipo.europa.eu/ohimportal/en/trade-mark-definition> (last visited Mar. 5, 2024).

³ *FAQ*, PEST CONTROL, <https://pestcontroloffice.com/faq.asp> (last visited May 9, 2023).

⁴ *EUTM File Information: (Trade Mark Without Text) 012575115*, EUR. UNION INTELL. PROP. OFF., <https://euipo.europa.eu/eSearch/#details/trademarks/012575115> (last visited Feb. 13, 2024) [hereinafter *Flower Thrower Trade Mark Information*].

⁵ *Full Colour Black I*, No. 33843C, at 3–4.

the least poetic reason to ever make some art’ – a trademark dispute.”⁶ On the advice of arts lawyer Mark Stephens, Banksy opened the shop in an attempt to comply with trademark law, which Stephens described as “quite clear – if the trademark holder is not using the mark, then it can be transferred to someone who will.”⁷

Among the homewares for sale during Gross Domestic Product’s brief run was a triptych of the *Flower Thrower* image:

Gross Domestic Product

The homewares brand from Banksy™

Banksy™ Thrower

Currently Out of Stock

This is Banksy’s first experiment with a new technique for making prints - spray the stencil onto processing film and expose the result directly onto a silk screen. This avoids photography or computer manipulation and creates a super accurate analogue representation of gestural mark making. In other words - looks pretty dope.

Comes as set of three signed and numbered.

A black and white hand finished edition will be available at some point.

Notes: Shipping is not included. We'll make contact with you to arrange shipping options when your order is ready to dispatch. Framing not included.

We also accept payment in Euros.



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The reason for selling the *Flower Thrower* triptych in the shop was simple: if Banksy is actively using his trademark to sell a product, then his trademark is valid.

While using the mark is a necessary condition to comply with trademark law, the EU was not persuaded it is sufficient on its own. Good faith is required, too.

Banksy described the shop’s artistic significance: “Sometimes you go to work and it’s hard to know what to paint, but for the past few months I’ve been making stuff for the sole purpose of fulfilling trademark categories under EU law.”⁹ Everything for sale, he said, “has been created specifically to fulfil a particular trademark category under EU law. I had the legal sheet pinned up in the studio like a muse.”¹⁰ The EU didn’t like this.

⁶ Lanre Bakare, *Banksy Launches Homewares Shop in Dispute Over Trademark*, GUARDIAN (Oct. 1, 2019), <https://www.theguardian.com/artanddesign/2019/oct/01/banksy-launches-homewares-shop-in-dispute-over-trademark>.

⁷ *Id.*

⁸ *Banksy™ Thrower*, GROSS DOMESTIC PROD., <https://shop.grossdomesticproduct.com/collections/frontpage/products/banksy-thrower> (last visited May 9, 2023).

⁹ Bakare, *supra* note 6.

¹⁰ Anny Shaw, *The Full Story Behind Banksy’s Pop-up Shop in Croydon*, ART NEWSPAPER (Oct. 1, 2019), <https://www.theartnewspaper.com/2019/10/01/the-full-story-behind-banksys-pop-up-shop-in-croydon>.

In its ruling, the EU highlighted that a determination of bad faith may be made:

if it transpires that the EUTM [European Union Trade Mark] proprietor never had any intention to use the contested EUTM, for example, a trade mark application made without any intention to use the trade mark in relation to the goods and services covered by the registration constitutes bad faith if the applicant for registration of that mark had the intention either of undermining, in a manner inconsistent with honest practices, the interests of third parties, or of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark.¹¹

In addition to evidence that “Banksy had not manufactured, sold or provided any goods or services under the contested sign or sought to create a commercial market for his goods until after the filing of the present application,” the EU pointed to Banksy’s public statements as evidence of bad faith:

Only then, in October of 2019, he opened an online store (and had a physical shop but which was not opened to the public) but by his own words, reported in a number of different publications in the UK, he was not trying to carve out a portion of the commercial market by selling his goods, he was merely trying to fulfil the trade mark class categories to show use for these goods to circumvent the non-use of the sign requirement under EU law. Both Banksy and Mr. [Mark Stephens], who is a Director of the proprietor, made statements that the goods were created and being sold solely for this cause. Therefore, by their own words they admit that the use made of the sign was not genuine trade mark use in order to create or maintain a share of the market by commercialising goods, but only to circumvent the law.¹²

The EU ruling against Banksy seemingly answered an important part of a larger question: trademark law can’t be used to protect an anonymous artist’s images if they have no intention to sell them. How, then, if at all, can an anonymous artist protect the intellectual property rights to their images while retaining their anonymity?

II. WHY NOT COPYRIGHT?

Copyright law, whose constitutionally mandated purpose is “[t]o promote the Progress of Science and useful Arts,”¹³ is the body of law typically used to protect artwork, but Banksy’s reason for not using copyright law to protect his images is straightforward. According to Enrico Bonadio, a senior lecturer in law

¹¹ Full Colour Black I, No. 33843C, at 15 (EUIPO Cancellation Div., Sept. 14, 2020), https://euipo.europa.eu/copla/trademark/data/012575155/download/CLW/CCL/2020/EN/20200914_000033843.doc (*Flower Thrower*).

¹² *Id.* at 11.

¹³ U.S. CONST. Art. I, § 8, cl. 8.

at City University in London, “If you want to take a copyright action, you have to disclose your identity.”¹⁴

Banksy’s stature in the art world is built on his anonymity, both because it adds to his mystique, and because much of his street art is installed illegally. If Banksy’s identity were to be definitively discovered (e.g., if he were to be caught installing one of his pieces), much of the mystique surrounding his name would be lost. Further, if a name were to be attached to any of his illegally installed pieces, he could potentially face criminal liability. Anonymity is paramount to how Banksy operates, and his legal pursuits indicate that, as of yet, he’s unwilling to give it up to protect his intellectual property rights.

This point was brought up in the EU’s ruling as well: “The predicament of Banksy’s right to the work ‘Flower Thrower’ is clear. To protect the right under copyright law would require him to lose his anonymity, which would undermine his persona.”¹⁵

Copyright protection is available now to Banksy if he was not concerned with protecting his anonymity. In the United States, the EU, and every country that is a signatory to the Berne Convention,¹⁶ an author has a copyright to their work from the moment it’s created and fixed in a tangible medium, regardless of whether they’ve registered it with a copyright office.¹⁷ This applies to all who are considered authors under copyright law, regardless of anonymity, including Banksy. The EU illustrates a possible exception to this in its ruling:

There is an argument that street graffiti, which is not carried out with the express permission of the owner of the property on which it is placed, is carried out in commission of a criminal act. To such extent, no copyright rights might accrue from such a work (or there is an argument that the copyright may be assumed to be gifted to the owner of the property).¹⁸

Assuming, *arguendo*, that criminal considerations do not apply to at least some of Banksy’s works, Banksy currently has, and has had, the copyrights to these works from the moments they were created. However, simply having a copyright is only part of the story. In many jurisdictions, enforcing a copyright requires registration with a copyright office, for example, and this is where Banksy’s anonymity is jeopardized.

In its assessment of bad faith in the *Flower Thrower* case, the EU declined to consider copyright issues because they fell outside the scope of the proceedings. But it did opine that “it would be quite difficult for Banksy though [*sic*] his representatives, the proprietor [Pest Control], to actually enforce copyright rights against third parties,” because while “the evidence submitted by the applicant shows that there is a connection between Banksy and the proprietor,

¹⁴ Scott Reyburn, *Banksy Is a Control Freak. But He Can’t Control His Legacy*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/arts/design/banksy-legacy.html>.

¹⁵ *Full Colour Black I*, No. 33843C, at 12.

¹⁶ *Summary of the Berne Convention for the Protection of Literary and Artistic Works* (1886), WIPO, https://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited May 9, 2023).

¹⁷ *Copyright in General*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-general.html> (last visited May 9, 2023).

¹⁸ *Full Colour Black I*, No. 33843C, at 8.

who would appear to be the legal representatives of Banksy . . . the evidence is not exhaustive in this regard as the identity of Banksy cannot be legally determined.”¹⁹

With copyright enforcement seemingly out of the question without “exhaustive” evidence to legally determine Banksy’s identity, Banksy and Pest Control have turned to other avenues.

III. WHY TRADEMARK?

Scott Reyburn suggested in a February 2020 *New York Times* article that Banksy’s position in the art world has not “happened by accident.”²⁰ “Banksy’s rise and rise,” he says, “is the result of years of meticulous control of his message, his market and, most importantly, his mystique.”²¹ Banksy and Pest Control, which he set up in 2008, are no strangers to using the power of the law to maintain this “meticulous control.”²²

A large part of this control comes through nondisclosure agreements (NDAs)—legal contracts which don’t require Banksy to reveal his identity and actually serve to protect it. Banksy “employs a lot of lawyers,” according to Bonadio.²³ “He gets everyone who works on projects like ‘Dismaland’ to sign N.D.A.s so that everything is kept confidential.”²⁴

Another part of this control comes through copyright law, even if Banksy doesn’t actively use it to enforce his copyrights. The “Use of Images” page on Pest Control’s website is only two paragraphs long and serves as Banksy’s copyright notice:



You are welcome to use Banksy’s images for non-commercial, personal amusement. Print them out in a colour that matches your curtains, make a card for your gran, submit them as your own homework, whatever.

But neither Banksy or Pest Control licence the artist’s images to third parties. Please do not use Banksy’s images for any commercial purpose,

¹⁹ *Id.* at 8–9.

²⁰ Reyburn, *supra* note 14.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

including launching a range of merchandise or tricking people into thinking something is made or endorsed by the artist when it isn't. Saying "*Banksy wrote **copyright is for losers** in his book*" doesn't give you free rein to misrepresent the artist and commit fraud. We checked.²⁵

Even if Banksy has yet to prevail in any copyright enforcement actions, this notice serves to a) communicate how Banksy would like his images to be used, b) communicate how he would not like his images to be used, and c) suggest in what instances he might use other legal avenues to protect his copyrights.

This is where trademark law comes into play. If Banksy's images are registered as trademarks, they can be enforced by Banksy's representatives at Pest Control rather than Banksy himself, allowing Banksy to retain his anonymity and at least some of his intellectual property rights. Presumably, under this theory, Pest Control began registering Banksy's trademarks with the EU in 2014, including the *Flower Thrower* image.²⁶

In January 2019, shortly before Full Colour Black began its proceedings, Pest Control partially prevailed in a trademark suit it brought against the organizers of an exhibition in Italy called *A Visual Protest: The Art of Banksy*. Specifically, Pest Control alleged infringement of "the denominative trademark 'Banksy', together with the figurative trademarks representing his 'Girl with Balloon' and 'Flower Bomber,'" and objected to "undue exploitation of the appeal and reputation of the artist's distinctive signs."²⁷

Pest Control also alleged copyright infringement in this suit, but the copyright claim was rejected because the Court of Milan found that there was no evidence Pest Control "was the holder of the relevant economic rights, or whether – instead – the artist had reserved them to him/herself."²⁸ Without such evidence, and because Banksy was "not a party to the proceedings (since he insist[ed] on preserving his anonymity)," Pest Control "lacked legal standing."²⁹

Pest Control prevailed in its objection to Banksy's trademarks being used for commercial products even though the Court did not allow Pest Control to use Banksy's trademarks to "prevent his name from being used to inform the public of the content of an exhibition including his works."³⁰ This ruling is consistent with Banksy's copyright notice, which asks that his images not be used "for any commercial purpose, including launching a range of merchandise or tricking people into thinking something is made or endorsed by the artist when it isn't."³¹

A couple months later, it wasn't Banksy or Pest Control that instigated the trademark proceedings with Full Colour Black. Rather, Full Colour Black

²⁵ *Use of Images*, PEST CONTROL, <https://pestcontroloffice.com/use.asp> (last visited May 9, 2023) (emphasis in original).

²⁶ *Flower Thrower Trade Mark Information*, *supra* note 4.

²⁷ Francesca Barra & Pierre Valentin, *Banksy's (Visual) Protest Brought to Court in Italy*, Art@Law (Mar. 22, 2019), <https://www.artatlaw.com/banksys-visual-protest-brought-court-italy/>.

²⁸ Eleonora Rosati, *Milan Court Partly Sides with Banksy in Interim Proceedings for TradeMark and Copyright Infringement*, IPKAT (Mar. 2, 2019), <https://ipkitten.blogspot.com/2019/03/milan-court-sides-with-banksy-in.html>.

²⁹ Barra & Valentin, *supra* note 27.

³⁰ *Id.*

³¹ *Use of Images*, *supra* note 25.

applied for a declaration of invalidity against Banksy's *Flower Thrower* trademark after having "written to Banksy, his team and his lawyers 'many times since 2010 to say that [they] want to pay royalties to him' but that he 'doesn't want it,'" according to a statement.³²

Banksy's rejection of these requests is, again, consistent with his copyright notice, which expresses that "neither Banksy or Pest Control licence the artist's images to third parties."³³ "A greetings card company is contesting the trademark I hold to my art," Banksy said in a statement, "[a]nd attempting to take custody of my name so they can sell their fake Banksy merchandise legally."³⁴ To Full Colour Black, this case may have been about protecting their ability to sell and disseminate artwork from an artist they like, but to Banksy, it was about defending against a threat to one of the only means available to him to anonymously protect his intellectual property rights.

Had Banksy been able to enforce the rights of his images anonymously through copyright, the *Flower Thrower* trademark would have never been necessary in the first place; Banksy would have been able to control and enforce the reproduction and derivative rights of his copyrighted work. With copyright out of the question, though, Banksy was compelled to defend a trademark he filed years earlier.

Because he hadn't been marketing any products with his trademarks when Full Colour Black instigated trademark proceedings, opening Gross Domestic Product and selling a small number of consumer goods with his trademarked logos offered Banksy one of his best chances at prevailing in a case for a valid trademark. At the very least, it gave him an interesting reason to sell some artwork to a few fans who otherwise wouldn't have a chance at owning a real Banksy.

Full Colour Black, the employees of which "all love [Banksy's] graffiti,"³⁵ prevailed in invalidating one of the artist's trademarks. Against his wishes, they carved out a way to legally sell greeting cards with Banksy's once-trademarked artwork on them. As a result, the arsenal of tools available to the artist to anonymously protect his intellectual property rights, and, in turn, control "his message, his market and . . . his mystique,"³⁶ became one tool smaller.

IV. WHAT DOES THIS MEAN FOR BANKSY, AND WHERE CAN HE GO FROM HERE?

Banksy, Pest Control, and their legal team seem to have started building their trademark strategy long before their 2019 disputes with the Italian exhibition and Full Colour Black. Banksy hinted at legal troubles with Full Colour Black beyond the scope of the *Flower Thrower* trademark when he said

³² Ellie Harrison, *Banksy Attacked for 'Tricking Fans' in Ferocious Statement by Company at Centre of Trademark Row*, INDEPENDENT (Oct. 5, 2019), <https://www.independent.co.uk/arts-entertainment/art/news/banksy-full-colour-black-custody-claim-trademark-merchandise-london-store-a9144231.html>.

³³ *Use of Images*, *supra* note 25.

³⁴ Bakare, *supra* note 6.

³⁵ Harrison, *supra* note 32.

³⁶ Reyburn, *supra* note 14.

they were “attempting to take custody of [his] name.”³⁷ Art lawyer Adam Jomeen explained:

FCB’s [Full Colour Black’s] application to invalidate Banksy’s *Flower Thrower* mark is rather curious on its face. Why would a small company poke the bear? FCB’s application provides a clue: They applied to invalidate Pest Control’s *UK registration* for the word mark “BANKSY” in 2012, so had already been on the Banksy radar for over 7 years

Having applied to invalidate Banksy’s UK word mark on 6 February 2012, UK IPO records indicate that FCB withdrew their application on 20 August 2012. No information is available regarding the application or FCB’s reasons for withdrawal

Companies House filings show that the Banksy team incorporated a new UK company whilst FCB’s 2012 application was pending. What was the name given to that company, in June 2012? *Gross Domestic Product Limited*. The Banksy team tends to incorporate new vehicles with a specific project in mind. Could the recently launched GDP homewares concept have been conceived over 7 years ago, in response to the first FCB application? Records at the UK IPO also show that in February 2019, Pest Control surrendered two of the 20 categories for which the “BANKSY” UK mark was originally registered. Although it is unclear which categories were surrendered, it seems the BANKSY trade mark [*sic*] house was being put in order before FCB’s application to the EU IPO in March 2019.³⁸

In the aftermath of the *Flower Thrower* decision, more of Banksy’s trademarks were targeted by Full Colour Black. In May 2021, the EU IPO’s Cancellation Division ruled that the trademark for *Laugh Now*, one of Banksy’s monkey images, was invalid for nearly identical reasons.³⁹ It did the same for four more the following month:⁴⁰

³⁷ Bakare, *supra* note 6.

³⁸ Adam Jomeen, “*May Result In Legal Action*” ©TM : *The New Banksy?*, INST. ART & L. (Nov. 21, 2019), <https://ial.uk.com/may-result-in-legal-action-tm-the-new-banksy/>.

³⁹ Full Colour Black Ltd. v. Pest Control Off. Ltd. (*Full Colour Black II*), No. 39873C, at 1 (EUIPO Cancellation Div., May 18, 2021), [https://files.lbr.cloud/public/2021-05/banksy%20monkey%20trademark%20cancellation.pdf?PjOCw7xOfeyRISa6qorTXr9hkL4QcK1Y=\(Laugh Now\)](https://files.lbr.cloud/public/2021-05/banksy%20monkey%20trademark%20cancellation.pdf?PjOCw7xOfeyRISa6qorTXr9hkL4QcK1Y=(Laugh%20Now)).

⁴⁰ See *Flower Thrower Trade Mark Information*, *supra* note 4.

Trademark	Cancellation Decision Issued
	<p>14 Sep 2020</p>
	<p>18 May 2021 (reversed 25 Oct 2022)⁴¹</p>
	<p>18 Jun 2021</p>

⁴¹ Full Colour Black Ltd. v. Pest Control Off. Ltd. (*Full Colour Black III*), No. 39873C (EUIPO 5th Bd. App., Oct. 25, 2022), <https://euiipo.europa.eu/copla/document/336nzd> (relating to *Laugh Now* cancellation proceedings).

	18 Jun 2021
	19 Jun 2021
	19 Jun 2021

Even with these five cancellations (six, if a pending cancellation for a re-submission of *Flower Thrower* is included), Banksy still retains twelve EU trademarks through Pest Control, including two word trademarks for BANKSY, one word trademark for PEST CONTROL OFFICE, and the following nine figurative trademarks (one of which, like one of the word trademarks for BANKSY, is repetitive):⁴²

⁴² *Flower Thrower Trade Mark Information*, supra note 4.



Because courts like the Court of Milan assume the validity of trademarks until the EU IPO's Cancellation Division rules otherwise, Banksy is still able to use his remaining trademarks to protect his intellectual property rights for these images.

A bit of good news came Banksy's way in October 2022, when the EU IPO reinstated his *Laugh Now* trademark. Upon reviewing the evidence provided by Full Colour Black, the Office's Fifth Board of Appeal found the record "cannot justify or explain clearly a dishonest behaviour from [Banksy] when he filed the contested mark and consequently, the presumption of good faith is still valid and the Cancellation applicant failed to prove [*sic*] the contrary."⁴³

Despite this good news and his remaining EU trademarks, the legal footing for Banksy's trademark regime is unstable. As of this writing, none of the artist's

⁴³ *Full Colour Black III*, No. 39873C, at 29.

other trademark cancellations have been reversed, and Full Colour Black remains on the offensive, having instigated proceedings in early 2023 to invalidate the word trademark for “BANKSY.”⁴⁴ Should Banksy’s trademark arsenal continue to be whittled down, will the anonymous artist have any tools remaining to protect his intellectual property rights?

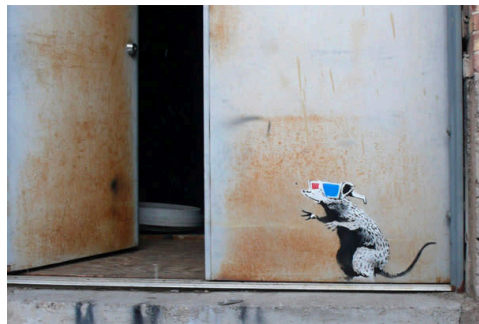
V. REVISITING COPYRIGHT

Copyright law is an option, but as noted, the two primary hurdles Banksy must overcome are criminality and anonymity.

As summarized in the EU’s *Flower Thrower* ruling, the criminality issue arises because Banksy is a street artist who often creates works “in commission of a criminal act,” and because of this, it can be argued that either a) “no copyright rights might accrue from such a work,” or b) “the copyright may be assumed to be gifted to the owner of the property.”⁴⁵

In either case, this issue seems surmountable because of the way in which Banksy creates his works. Banksy’s style of street art utilizes stencils, and in several instances, he has used presumably the same stencil (or stencils, depending on how many colors are needed) to create the same piece multiple times.

For example, Banksy created several new pieces in Utah ahead of the premier of his *Exit Through the Gift Shop* documentary at the 2010 Sundance Film Festival in Park City.⁴⁶ Several of his pieces were unique, but at least one of them, a rat struggling with a pair of 3D glasses, was created twice—once on the door of Park City’s Egyptian Theatre, and once on Park City’s Main Street:



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⁴⁴ *Flower Thrower Trade Mark Information*, *supra* note 4.

⁴⁵ Full Colour Black I, No. 33843C, at 9 (EUIPO Cancellation Div., Sept. 14, 2020), https://euiipo.europa.eu/copla/trademark/data/012575155/download/CLW/CCL/2020/EN/20200914_000033843.doc (*Flower Thrower*).

⁴⁶ Sean P. Means, *Famous ‘Tagger’ Banksy Strikes in Utah*, SALT LAKE TRIB. (Jan. 21, 2010), https://archive.sltrib.com/story.php?ref=/ci_14232591.

⁴⁷ Photograph of Rat with 3D Glasses on Egyptian Theatre, in *SOB – Save Our Banksy*, HOLD MY TICKET (Aug. 4, 2019), <https://holdmyticket.com/event/320181-sob-save-our-banksy>.



It appears that Banksy reversed the sides of the stencils he used, reversing the direction the rat is facing in each instance. One way to look at these would be as two separate works, each created by Banksy, and, because of the criminality issues implicated in the creation of them, vulnerable to claims of uncopyrightability. Another way to look at them is as derivative works of one or more original works—in this case, the stencils Banksy used to create them.

An author has a copyright to their work from the moment it's created and fixed in a tangible medium, regardless of whether they've registered it with a copyright office. Because stencils fall comfortably under the “pictorial, graphic, and sculptural works” umbrella, Banksy has owned the copyrights to his stencils from the moments they were created; this does not depend upon whether any derivative works were later created “in commission of a criminal act.”

Defining “derivative works” is notoriously difficult. In her 2012 paper, “The Quest for a Sound Conception of Copyright’s Derivative Work Right,” Professor Pamela Samuelson offers a working framework of three categories of works that are typically considered derivative: 1) shorter versions, 2) faithful renditions, and 3) transformations of expression from one medium or genre to another.⁴⁹

Banksy’s rat with 3D glasses is not a “shorter” version of his stencils, nor is it a faithful rendition—a faithful rendition would be a recreation of the stencil itself. Instead, the final product after Banksy’s spray paint has dried is a transformation from one medium of expression—the stencils—to another—a spray-painted image.

With the creation of stencils highly unlikely to be done “in commission of a criminal act,” the criminality issue is surmountable if the copyrights Banksy seeks to protect are those for his stencils, rather than his derivative street art pieces.

That still leaves the anonymity issue.

The general consensus is that if Banksy wants to use copyright law to enforce his intellectual property rights, he will be required to reveal his identity. In the words of the EU IPO’s Cancellation Division, “To protect the right under

⁴⁸ Photograph of Rat with 3D Glasses on Main Street, in *Banksy, Park City, UT, I TOOK THE OTHER*. (Nov. 21, 2012), <https://itooktheother.wordpress.com/2012/11/21/banksy-park-city-ut/>.

⁴⁹ Pamela Samuelson, *The Quest for a Sound Conception of Copyright’s Derivative Work Right*, GEO. L. J. (forthcoming) (manuscript at 12–13), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138479#.

copyright law would require him to lose his anonymity.”⁵⁰ This sentiment was echoed by *The New York Times*⁵¹ and the American Bar Association⁵² after the EU’s ruling.

Difficult for Banksy to use copyright law to anonymously enforce his intellectual property rights? Certainly. Impossible because revealing his identity is “required”? Perhaps not.

In theory, under U.S. copyright law, Banksy can anonymously transfer ownership of his copyrights by a “duly authorized agent” to Pest Control, who can then register the copyrights with the U.S. Copyright Office, granting Pest Control standing for infringement cases.

A. Transferring Ownership

Section 201(d) of the U.S. Copyright Act allows for the transfer of ownership of a copyright, in whole or in part, “by any means of conveyance or by operation of law.”⁵³ Section 204(a) designates the specifics: “A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent.”⁵⁴

Notice that the statute lists only three requirements for a valid transfer:

(1) a writing, (2) signed, (3) by the owner or the owner’s duly authorized agent. The writing need not be signed by the transferee. Nor need it contain any magic words; it is necessary only that the writing give evidence of the transferor’s intent to transfer the copyright interest.⁵⁵

Because the statute explicitly allows for the note or memorandum of transfer to be signed by the “owner’s duly authorized agent,”⁵⁶ Banksy can designate an agent to transfer the ownership of his copyrights to Pest Control without compromising his anonymity.

Regarding “authorized agents,” the *Compendium of Copyright Practices* highlights as a general rule that the U.S. Copyright Office “will accept the statement on the application certifying that the person who signs the application is an authorized agent of the author or an owner of the exclusive rights in the work,” although “in some circumstances, the Office may ask an alleged agent to

⁵⁰ *Full Colour Black I*, No. 33843C, at 12.

⁵¹ Scott Reyburn, *Banksy’s Attempt to Trademark a Graffiti Image Is Thrown Out*, N.Y. TIMES (Sept. 17, 2020), <https://www.nytimes.com/2020/09/17/arts/design/banksy-trademark-lawsuit.html> (“[C]opyright action would have required the British graffiti artist to reveal his long-concealed identity.”).

⁵² Anne M. Long, *The Artist Banksy*, AM. BAR ASS’N (June 30, 2021), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide-extra/banksy-bad-faith/ (“To enforce copyright Banksy would be required to reveal his identity to establish that he qualifies for protection and owns the right.”).

⁵³ 17 U.S.C. § 201(d) (2022).

⁵⁴ *Id.* § 204(a).

⁵⁵ JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, *COPYRIGHT LAW: CASES AND MATERIALS* 642 (3d ed. 2021).

⁵⁶ 17 U.S.C. § 204(a).

submit documentation showing that he or she is in fact authorized to act for one or more of those parties.”⁵⁷ Banksy’s case is one in which the Office may require documentation. Robert Kasunic—Director of Registration Policy and Practice for the Copyright Office—further highlights that “presumptive validity of ownership may be rebutted in litigation (and it would seem that the identity of the author could arise as an issue in litigation).”⁵⁸

In that sense, it is an open question as to what documentation a court may require to establish someone as Banksy’s “authorized agent,” but it is not difficult to imagine ways in which Banksy could document this using one of his formally established distribution channels without sacrificing his anonymity. For example, he could create a piece communicating the authorization of his duly authorized agent and post photos of the piece to his official website or Instagram account—two channels that have historically been used to determine whether new street pieces that pop up around the world are, in fact, authentic Banksys.

B. Registration

Even though registration is becoming less important under U.S. copyright law, it is still a prerequisite to bring infringement lawsuits “for ‘any United States work’ made after March 1, 1989.”⁵⁹ For any works Banksy has created in the United States since 1989, registration is a prerequisite to any suit for infringement, and for any other works, it can serve at the very least as a written record of copyright ownership.

Fortunately for Banksy, there do not appear to be any barriers keeping his works from being anonymously registered with the U.S. Copyright Office under Pest Control’s ownership.

Even though Banksy is presumably a British citizen, the Copyright Office highlights that “[w]orks that are first published in the United States or in a country with which we have a copyright treaty or that are created by a citizen or domiciliary of a country with which we have a copyright treaty are also protected and may therefore be registered with the U.S. Copyright Office.”⁶⁰ Because the United States and the United Kingdom are both signatories to the Berne Convention,⁶¹ works created in or by citizens or domiciliaries of the United Kingdom are eligible for copyright registration in the United States.⁶²

An application for registration must include the following:

- (1) the name and address of the copyright claimant;

⁵⁷ U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 409 (3d ed. 2017).

⁵⁸ Email from Robert Kasunic, Dir. of Registration Pol’y, U.S. Copyright Off., to Dallin Johnson (Oct. 28, 2022) (on file with author) (“Re: Question from a law student on copyright registration”).

⁵⁹ FROMER & SPRIGMAN, *supra* note 55, at 172.

⁶⁰ *Who Can Register?*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-who.html> (last visited May 9, 2023).

⁶¹ 3. *Berne Convention for the Protection of Literary and Artistic Works: Status on August 1, 2023*, WIPO, <https://www.wipo.int/export/sites/www/treaties/en/docs/pdf/berne.pdf> (last visited Mar. 5, 2024).

⁶² *Summary of the Berne Convention*, *supra* note 16.

- (2) in the case of a work other than an anonymous or pseudonymous work, the name and nationality or domicile of the author or authors, and, if one or more of the authors is dead, the dates of their deaths;
- (3) if the work is anonymous or pseudonymous, the nationality or domicile of the author or authors;
- (4) in the case of a work made for hire, a statement to this effect;
- (5) if the copyright claimant is not the author, a brief statement of how the claimant obtained ownership of the copyright;
- (6) the title of the work, together with any previous or alternative titles under which the work can be identified;
- (7) the year in which creation of the work was completed;
- (8) if the work has been published, the date and nation of its first publication;
- (9) in the case of a compilation or derivative work, an identification of any preexisting work or works that it is based on or incorporates, and a brief, general statement of the additional material covered by the copyright claim being registered; and
- (10) any other information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright.⁶³

In the case of Banksy's works, (1) is Pest Control, assuming transfer of ownership; (2) doesn't apply; (3) can be submitted without sacrificing Banksy's anonymity; (4) doesn't apply; (5) can be submitted without sacrificing Banksy's anonymity because he can transfer ownership of his copyrights through a "duly authorized agent"; and (6) through (10) can also be submitted without sacrificing Banksy's anonymity. In none of these requirements is Banksy required to reveal his identity.

Indeed, Form VA, which is used by the Copyright Office for registration, provides specific instructions for completing the "Author(s)" section for pseudonymous works:

If the work is "pseudonymous" you may: (1) leave the line blank; or (2) give the pseudonym and identify it as such (for example: "Huntley Haverstock, pseudonym"); or (3) reveal the author's name, making clear which is the real name and which is the pseudonym (for example: "Henry Leek, whose pseudonym is Priam Farrel"). However, the citizenship or domicile of the author *must* be given in all cases.⁶⁴

Banksy's real name may be submitted with a registration application if the applicant so chooses, but it is explicitly not required. The only identifying information required of the author is their citizenship or domicile.

⁶³ 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.18 (rev. ed. 2022).

⁶⁴ *Form VA*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/forms/formva.pdf> (last visited May 9, 2023).

C. Standing

The U.S. Copyright Act grants standing solely to the “legal and beneficial owner of an exclusive right” for infringements occurring during their ownership.⁶⁵ A legal owner can be either “the person or entity in which ownership of the copyright originally vested,” or “a person to whom, or an entity to which, a copyright has been assigned or exclusively licensed.”⁶⁶

In the case of Banksy’s works, the legal owner of his copyrights is himself, or, if he transfers ownership of his copyrights pursuant to § 204(a), Pest Control. Once Pest Control has ownership of Banksy’s registered copyrights, and is thus the legal owner of these exclusive rights, it has standing to bring copyright infringement cases for these copyrights without sacrificing Banksy’s anonymity.

At least in the United States, Banksy seems to have a viable route to anonymously enforcing his copyrights. If this strategy proves effective, it will likely serve Banksy well. First, if this strategy is effective in cases where U.S. courts have jurisdiction, this will likely serve as evidence in other jurisdictions of Pest Control’s ownership of Banksy’s copyrights, allowing Banksy to enforce his copyrights in other jurisdictions as well.

Second, although the EU’s decisions allow for the potential use of Banksy’s trademarks, trademark law is not ideally suited for safeguarding creative works. Rather than “promote the Progress of Science and Useful Arts,”⁶⁷ trademark law is intended to help consumers recognize the origins of the products they purchase. This has never been what Banksy has intended to do with his images.

Copyright law, on the other hand, has been shaped explicitly to “promote the Progress of Science and useful Arts.”⁶⁸ If Banksy, Pest Control, and their lawyers can find a viable route to using copyright law to protect Banksy’s rights, as they may have here, it is likely to serve his artistic interests much better than trademark law.

VI. WHERE *WILL* BANKSY GO FROM HERE?

Banksy’s website hints at the types of commercial enterprises that may remain the target of his legal ire:

PRODUCT RECALL - Art of Banksy

Members of the public should be aware there has been a recent spate of Banksy exhibitions none of which are consensual. They’ve been organised entirely without the artist’s knowledge or involvement. Please treat them accordingly.

⁶⁵ 17 U.S.C. § 501(b).

⁶⁶ FROMER & SPRIGMAN, *supra* note 55, at 577.

⁶⁷ U.S. CONST. art. I, § 8, cl. 8.

⁶⁸ *Id.*



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This warning, which in May 2023 listed twenty-seven exhibitions around the world that used Banksy’s name and images in their promotional materials,⁷⁰ is consistent with a few things.

First, this warning is consistent with Banksy’s copyright notice. While expressly allowing the use of Banksy’s images for personal amusement, the notice asks that his images not be used “for any commercial purpose, including . . . tricking people into thinking something is made or endorsed by the artist when it isn’t.”⁷¹ Using Banksy’s name and images to promote commercial ventures that have “been organised entirely without [his] knowledge or involvement” is exactly the type of activity Banksy seeks to prevent with his “tricking people into thinking something is made or endorsed by the artist when it isn’t” language.⁷²

Second, the warning is consistent with who Banksy has proactively targeted with trademark suits. At the time of this writing, the only prominent trademark suit Pest Control has brought is the 2019 suit against the organizers of an exhibition in Milan,⁷³ which was included in the list of twenty-seven exhibitions on Banksy’s website.⁷⁴

Third, the warning is consistent with who Banksy has *not* proactively targeted with trademark suits. Even though Banksy lists “launching a range of merchandise” alongside “tricking people into thinking something is made or endorsed by the artist when it isn’t” as purposes for which he prefers his images not be used,⁷⁵ Banksy’s actions reveal he is far more concerned with the latter.

⁶⁹ *PRODUCT RECALL - Art of Banksy*, BANKSY, <https://www.banksy.co.uk/shows.html> (last visited May 9, 2023) [<http://web.archive.org/web/20230613050403/https://www.banksy.co.uk/shows.html>].

⁷⁰ *Id.*

⁷¹ *Use of Images*, *supra* note 25.

⁷² *Product Recall*, *supra* note 69.

⁷³ Barra & Valentin, *supra* note 24.

⁷⁴ *Product Recall*, *supra* note 69.

⁷⁵ *Use of Images*, *supra* note 25.

A quick Google search at the time of this writing reveals many T-shirts and other memorabilia featuring Banksy's currently trademarked images for sale from retailers on Etsy and other U.K. and American sites. Banksy, however, has not made much of a fuss to stop these, nor have these retailers drawn a similar warning on Banksy's website. One 2019 article hinted at "rumours that Banksy's lawyers have sent letters to complain about his artworks being exploited," but the Milan exhibition was the first time these objections "made their way into courtrooms."⁷⁶

Even though Banksy did become embroiled in a trademark dispute with Full Colour Black, the dispute was instigated by the greeting card company rather than Banksy. Full Colour Black applied to have Banksy's trademark canceled, and Banksy acted defensively to protect his images from being used to promote exhibitions that have "been organised entirely without the artist's knowledge or involvement."⁷⁷ Had Full Colour Black simply sold its cards with Banksy's artwork on it, in violation of his trademark, but without challenging it in court, they may have never heard a word from Banksy's legal team.

As Scott Reyburn highlighted during Banksy's initial legal troubles with Full Colour Black, "Banksy's rise and rise is the result of years of meticulous control of his message, his market and, most importantly, his mystique."⁷⁸ This framing is consistent with an artist who will go after exhibitions who exploit his name and likeness, but who won't bother with retailers who are selling merchandise with his images on it. Exhibitions are an opportunity to change the narrative about Banksy's legacy, while merchandise merely capitalizes on a legacy he's already built.

⁷⁶ Enrico Bonadio, *Banksy Finally Goes to Court to Stop Unauthorised Merchandising, Despite Saying Copyright Is For Losers*, CONVERSATION (Feb. 25, 2019), <https://theconversation.com/banksy-finally-goes-to-court-to-stop-unauthorised-merchandising-despite-saying-copyright-is-for-losers-112390>.

⁷⁷ *Use of Images*, *supra* note 25.

⁷⁸ Reyburn, *supra* note 14.



When I made the above piece, I didn't bother thinking through fair use considerations because I figured it fit comfortably within what Banksy expressly welcomes in his copyright notice: "You are welcome to use Banksy's images for non-commercial, personal amusement. Print them out in a colour that matches your curtains, make a card for your gran, submit them as your own homework, whatever."⁷⁹ Even the narrowest framing of "whatever" surely includes "add some colour to your living room."

Hypothetically, even if I were to commercialize this piece and sell it for a cool £18.6 million, I don't know that I'd ever hear from Banksy's legal team, much like the current retailers selling merchandise with Banksy's images. I'm not pretending that this is an authentic Banksy piece—the front of each of the tiles clearly identifies Banksy as the creator of the original and myself as the spray painter of these renditions. Nor am I saying he endorsed, or was in any way involved with, this piece's creation. None of my actions are an attempt to impact Banksy's narrative, legacy, or mystique.

Although, I suppose £18.6 million is £0.1 million more than the record £18.5 million Banksy's *Love is in the Bin* sold for at auction in 2021,⁸⁰ and I wonder

⁷⁹ *Use of Images*, *supra* note 25.

⁸⁰ Benjamin Sutton, *Banksy's "Love Is in the Bin," Explained*, ARTSY (Oct. 14, 2021), <https://www.artsy.net/article/artsy-editorial-banksys-love-bin-explained>.

how the artist would feel about an unauthorized derivative of one of his works selling for a higher price than any of his originals. Would that impact his mystique enough for Pest Control to instigate legal proceedings? On its own, probably not. But if I started exhibiting the piece in a way that implies its place in Banksy's broader body of work, that may be a different story, in which case I should probably lawyer up.