

# **Spy fought the law: and the law won. Property Law v Art, Banksy's Spy Booth**

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### Abstract

*Abstract: In April 2014, a work of art, titled Spy Booth, by the artist Banksy, was painted on the outside wall of a house in Cheltenham. For several months, the conundrum of its ownership evolved in the media until it was eventually granted listed building status by the local planning authority, Cheltenham Borough Council. Despite this apparent resolution, the situation gives rise to a number of important questions concerning the nature of ownership and its limitations, which will be considered in this article. Ultimately, it transpires that property law necessarily fails in the protection of public art, but that a retrospective condoning of transgressive behaviour is nevertheless an important aspect of the law's role in controlling behaviour.*

**KEYWORDS:** Land Law; Property; Planning; Ownership; Transgression; Graffiti; Banksy; Street art

Banksy is a graffiti artist whose stencilled artworks have appeared in a number of locations across the world. Many of Banksy's works have become landmarks in themselves, with the images of two male police officers kissing each other (Kissing Cops, Brighton), and a naked man dangling from a window ledge while a man and a woman look out of the

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window above him (Naked Man, Bristol) have become recognisable motifs in popular culture. Owning an artwork by Banksy has developed a certain cachet. Paintings have been sold to collectors, prices have increased, but so too have acts of vandalism.

The law then becomes involved, as appeals are made to it to protect the work from the acts of vandals (through the use of criminal law and torts, and also through the use of planning law) and from the rival claims made by others (using the law of contract and public and private property law). The question for the academic lawyer therefore is what type of protection is offered and whether it is adequate, especially in the context of street art where the artist retains little or no control over the work once it is exposed to the weather and the intervention of vandals, at the same time as being made with a view to generating a public response. Although much has been written (particularly in the US) on graffiti art as freedom of expression (Gee,<sup>2</sup> Welch<sup>3</sup>), copyright and the reproduction of public art (Rychlicki<sup>4</sup> Roundtree<sup>5</sup>) and the cultural biases in determining something is art or vandalism (Bird<sup>6</sup>), what this article posits is that the disputes that arose as a result of a recent work by Banksy, titled Spy Booth, emphasize that the law's response is predicated upon the notion of art as a commodity and that the law's emphasis on classifying things of value as property means that the public good is lost. Furthermore, the measures that are available within the law in order to protect Spy Booth from damage or removal are ultimately passive and insufficiently interventionist in character, but that the law also creates the space for graffiti art to be made,

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<sup>2</sup> E.G.Gee 'City walls can speak: the street art movement and graffiti's place in First Amendment jurisprudence.' (2013) 20(1) *The Jeffrey S. Moorad Sports Law Journal* 209

<sup>3</sup> K. Welch 'Graffiti and the constitution: a first amendment analysis of the Los Angeles tagging crew injunction' (2011) 85(1) *Southern California Law Review* 205.

<sup>4</sup> T. Rychlick. 'Legal questions about illegal art.' (2008) 3(6) *Journal of Intellectual Property Law and Practice* 393.

<sup>5</sup> A. Roundtree 'Graffiti artists "get up" in intellectual property's negative space 1 (2013) 31 *Cardozo Arts and Entertainments Law Journal* 959.

<sup>6</sup> S. Bird. 'Aesthetics, Authority and the Outlaw of the Streets.' (2009) 3(3) *Public Space: the Journal of Law and Social Justice* 1 .

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and that despite the mismatch between an artistic and a legal evaluation of art, they are ultimately mutually sustaining.

This article considers the problematic and incomplete nature of the law's response to a recent and controversial example of street art made by Banksy and compares this with how street art is justified from an artistic point of view, which is often at odds with the law's approach. It then addresses how law and art interplay and to consider the extent to which this tumultuous relationship invigorates both disciplines.

### 1. Spy Booth – outline of a painting

Spy Booth appeared on a wall in Cheltenham in April 2014 – the side wall of 159 Fairview Road. It depicted three people dressed as archetypal spies. They have been stencilled onto the wall in such a way that they surround a public telephone kiosk situated in front of the wall. The composite image therefore is one of three spies intercepting a telephone call. One stands to the left of the telephone kiosk with recording equipment; another is placing a satellite on the roof of the kiosk, while the third kneels, listening through headphones to the conversation taking place in the telephone kiosk. Two problems arose following the appearance of the painting. The first was whether it could remain where it had been painted and the second was how it could be protected from weather and from vandalism.

These disputes arose because soon after the work first appeared, a collector expressed an interest in buying the work and removing it to his home in the United States. Meanwhile, people of Cheltenham wanted the work to remain in its original location, and a fund-raising campaign was set up to allow for the painting to be bought for the people of Cheltenham.

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Thereafter, two local authorities, Cheltenham Borough Council and Gloucestershire County Council became involved in the dispute, and it was also suggested that the Department of Transport could have a claim over it.

Throughout the summer of 2014, the disputes continued, until in August, the work was defaced by being partially covered in spray paint. After that, there were discussions concerning whether it is possible to repair the work, and also whether the wall upon which it has been painted is safe. Ultimately, in March 2015, Spy Booth was listed by Cheltenham Borough Council as a listed building, with work now underway to restore it to its original state. In this situation, the appeal to the law is twofold. Firstly, any decision regarding the future location of Spy Booth depends on a decision as to its ownership, and once that is resolved, there is an appeal to the law to resolve the question of stewardship – in other words, the protection of Spy Booth from damage. In both cases, as will be demonstrated, the law's response has been somewhat problematic, and *prima facie*, unsatisfactory.

### 2. Spy Booth and the question of ownership

In law, the question of where an object is placed and whether it remains there depends largely on who owns the object and who owns the place. Thus, the surface upon which the artwork is painted is privileged over the artwork itself, and ownership of real property is privileged over ownership of chattels. The concepts of possession and control in law indicate that it is the owner who has the best right to determine this because the person in possession of a thing is entitled to '*to exclude strangers from interfering with the property*'.<sup>7</sup> In the Spy

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<sup>7</sup> Per Sir Henry Duke, *The Tubantia* [1924] P 78.

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Booth scenario however, the difficulty was that five different entities could lay claim to ownership, but each claimant would have a different objective regarding the future location of Spy Booth, with those with the greatest claim to ownership having the least interest in preserving the public character of the work because they are able to imbue it with a financial value and a privately motivated cachet of being able to exclude all others. On the other hand, those with only a moral claim over it, having the most to gain from it being allowed to remain in its original location. What follows therefore is an analysis of these competing claims and an explanation of why the law privileges commodification over appreciation.

### 3. Banksy's claim to Spy Booth

#### a. copyright

The first possible claimant is of course Banksy, who claims ownership as the maker of the artwork. In intellectual property law, there is no doubt that Banksy owns the moral claim to Spy Booth, that is, the right to be identified as its originator. Although Davies<sup>8</sup> and Rychlicki<sup>9</sup> emphasize the role of copyright law in relation to the scope for others to reproduce the work, the issue for the purposes of this article is rather, whether Banksy is able to use the law of copyright to prevent the work from being damaged or removed. Banksy is entitled under the Copyright Designs and Patents Act 1988 both to be identified as the author of the work (s77) and to object to any derogatory treatment of the work (s80). Banksy's authorship of Spy Booth has never been in dispute – nobody else has claimed to have been the artist who painted Spy Booth. However, the claim of the artist does not suffice to enable Banksy

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<sup>8</sup> J. Davies. 'Art Crimes? Theoretical perspectives on copyright protection for illegally created graffiti art.' (2012-13) 65(1) *Maine Law Review* 28.

<sup>9</sup> T. Rychlicki, 'Legal questions about illegal art.' (2008) 3(6) *Journal of Intellectual Property Law and Practice* 393.

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prevent the removal of Spy Booth from the public space. A case could be made however for arguing that the removal of Spy Booth could constitute derogatory treatment.

Banksy may argue for example that that interfering with the work damages its artistic integrity. Firstly, it may be argued, very cogently, that Spy Booth is context specific. A stencilled picture of three spies is not in itself a work of art. The artistry comes from the context in which the work has been done because its impact depends on its location – Banksy has made this artwork in Cheltenham precisely because Cheltenham is where GCHQ's headquarters is situated. Accordingly removing Spy Booth from its current location could be said to damage the artistic statement and interferes with the integrity of the work contrary to s80, which provides that the author is entitled to object to '*any addition to, deletion from, or alteration to or adaptation of the work*'.

Banksy would therefore have to demonstrate that removal constitutes a distortion or mutilation of the artwork – or that it is subject to conduct that '*is otherwise prejudicial to the honour or reputation of the author.*' In the case of *Delves Broughton v House of Harlot Ltd [2012] EWPC 29*, simply cropping a photograph that had been taken by the claimant so as to exclude the background was enough of a distortion to class as derogatory treatment, although it was material in this case that the claimant had not consented to the use of the photograph of the defendant's website. In the case of *Confetti Records v Warner Music UK Ltd [2003] EWHC 1274 (Ch)* on the other hand, it was made clear that the distortion or mutilation itself had to be prejudicial to the claimant, and not merely a distortion or a mutilation per se. This case concerned a music track composed by the claimant, which was overlaid by another artist with lyrics that made reference to violence and drug use. Lewison J concluded that the lack of evidence regarding the prejudicial effect of the treatment on the

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composer of the track, was indicative of the fact that although the original track had been used, its use was not prejudicial to the honour of the claimant. He states (at para 150):

*I hold that the mere fact that a work has been distorted or mutilated gives rise to no claim, unless the distortion or mutilation prejudices the author's honour or reputation.*

If the latter case is followed therefore, it would appear that Banksy's best claim is to argue that any attempt to sell Spy Booth is prejudicial to the artist's reputation as an egalitarian artist or secondly that measures taken to protect Spy Booth contradict the emphasis the artist places on the accessibility of art. Yet, there are problems with this argument because the fact that others may later sell the work and remove it may be seen to emphasize, rather than detract, from Banksy's significance in terms of making art in publicly accessible spaces. The commodification and sale of a work such as Spy Booth means that Banksy is able to highlight the injustice that arises from the fact that the artist derives no financial benefit from the sale, and that a public work of art has been privatized by the greed of others. Furthermore, the fact – or at least the likelihood - that Spy Booth was made on the wall of 159 Fairview Road without the consent of the owners means that Banksy should have at least some expectation that the painting could be removed by overpainting if the owners of the house objected to it – there should therefore be an expectation by Banksy that the work will be deleted. To argue therefore that a removal of Spy Booth constitutes a derogatory treatment for the purposes of copyright law is not therefore a particularly strong justification for it to be maintained in public view.

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Another difficulty in terms of Banksy's entitlement to control future access to Spy Booth by the public is that where derogatory treatment is proved, the appropriate remedy is an injunction. In the Spy Booth situation, there is nothing to which the injunction can attach because Banksy cannot prohibit the use of another's land. Damages in lieu of an injunction are often also nominal in most cases – the claimant in *Delves-Broughton v House of Harlot Ltd* was only awarded £50 in respect of the derogatory treatment of her work. Accordingly, the law of copyright does not protect it adequately as a public work of art,<sup>10</sup> and neither does it give the artist sufficient control of the artwork to ensure that it remains in its original location.

### b. Trespass, conversion and theft

The law's inability to protect Banksy's entitlement to maintain the integrity of the artistic statement of the artwork is also manifested by the fact that Banksy is also prevented from using other forms of legal action aimed at the protection of goods. Banksy cannot sue under the torts of trespass or conversion, and neither is the artist the victim of the crime of theft because the artist does not own something whose integrity has been infringed, by the fact that the artist is no longer in possession of the artwork.<sup>11</sup> The analogy here is the hotel guest who is unable to argue that he or she has been the victim of burglary or trespass because a licensee does not have a sufficient interest in the land to be a victim of trespass by virtue of not being in possession of the land.<sup>12</sup> By the same principle, Banksy does not have a sufficient entitlement in the surface upon which Spy Booth was painted to argue that the removal

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<sup>10</sup> G.M. Barnett 'Recognized stature: protecting street art as cultural property.' (2013) 12(2) *Chicago Kent Journal of Intellectual Property* 204.

<sup>11</sup> *Smith v Miles* (1786) 1 Term Rep 475

<sup>12</sup> *Roberts v Swangrove Estates* [2008] EWCA Civ 98.



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constitutes trespass, conversion, or theft. Furthermore, although the act of selling the painting would ordinarily constitute theft or conversion, for neither of these actions is Banksy the victim. No property owned by the artist has been damaged, and therefore the artist lacks the appropriate proximity to the property to be able to be involved in legal proceedings of this nature, because the law of property defends the place of the offence in this context but fails to protect the thing that is stolen.

Therefore, although one might instinctively defend Banksy's entitlement to ensure that Spy Booth remains true to the original artistic intention, thus indicating one key failure of the law is that an artist cannot defend his or her work when it is made in a public space.

### 4. The owners of 159 Fairview Road's claim to Spy Booth

The second possible claimants to the ownership of Spy Booth are the owners of 159 Fairview Road. In relation to their claim to ownership, the law's involvement depends heavily on the foreknowledge or otherwise of the fact that Spy Booth would be painted on the wall of their house. If they consented to the work being painted on their wall, there is no difficulty in concluding that Spy Booth has become affixed to the land<sup>13</sup> and accrues to the owners of that land as a fixture.

The difficulty with Spy Booth of course is that although Banksy intended for the work to become part of the land, the landowner may have had no such intention, and is unlikely to have consented to Banksy's intervention. The owners are therefore entitled to object to Spy

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<sup>13</sup> *Holland v Hodgson* (1872) LR 7 CP 328

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Booth and bring actions in trespass or to complain of criminal damage contrary to s1 of the Criminal Damage Act 1971.<sup>14</sup>

In reality, the enhanced value of their property means that the owners of 159 Fairview Road are unlikely to complain in this way and are likely to form a retrospective intention that the artwork has become part of the land. The analogy would be here would be with the homeowner who pays a professional plumber or builder to install a fixture onto the land, or the homeowner who acquires a plot of land and decides to retain some of the fixtures installed by a previous owner or tenant. Thus, the recent case of *The Creative Foundation v Dreamland Leisure Limited* [2015] EWHC 2556 (Ch) also involving an artwork by Banksy, this time in Folkestone, concluded that the artwork by Banksy belonged to the landlord, and that the tenant of the land upon which the work was painted could not remove it from its location. They themselves may not have been instrumental in the decision to attach the fixture, but may nevertheless decide to acquire ownership of the fixture once it has been attached and they have made the decision not to have it removed.

Nevertheless, if the owners of 159 Fairview Road allow Spy Booth to remain, a number of consequences, both positive and negative arise. As owners, they may derive the benefit of the commodity value of Spy Booth - their home's value being increased, and they are able to sell Spy Booth if they wish. Their entitlement to the commodity value of a work such as Spy Booth therefore exceeds the entitlement of the artist. They are also entitled to conclude that they do not like the painting and thus to have the wall painted over. Accordingly, they have a significant entitlement in property law to Spy Booth, but this entitlement conflicts both with the artist's entitlement (not to have the work damaged or

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<sup>14</sup> I. Edwards "Banksy's graffiti: a not so simple case of criminal damage?" (2009) 73 *Journal of Criminal Law* 345.

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mutilated), and the public interest in Spy Booth, discussed below. The owners of 159 Fairview Road have the benefits of ownership, but they do not acquire any responsibility over Spy Booth, and acquire no obligation to protect its character as a work of public art. This therefore is the second failure of the law – an owner may benefit from the work but may also destroy it or prevent access to it by others.

The third failure is manifested by the fact that even if the owners of 159 Fairview Road wished to maintain its public character, this may be curtailed by the law in a situation analogous to that described by Mettler<sup>15</sup> where a landowner may like the artwork but the prosecuting authorities in the United States do not. In the Spy Booth scenario, the owners of 159 Fairview Road will be liable for making alterations to the building without having obtained the necessary consents under the Planning (Listed Buildings and Conservation) Act 1990. 159 Fairview Road is a Grade II listed building for the purposes of s9 of this Act, and therefore any alteration to the building requires permission under s7 of that Act, which states that authorisation is required in respect of any work, alteration or extension to a listed building. According to the cases of *Windsor and Maidenhead Royal Borough Council v Secretary of State for the Environment* (1987) 86 LGR 402 and *Newport Borough Council* [2003] JPL 267, repainting (which in a sense is what Spy Booth is) could class as an alteration, and therefore a criminal offence under s9 unless it can be established that works to the building were urgently necessary in the interests of safety or health or for the preservation of the building, something that is of course unlikely to be demonstrated in relation to the painting of a trio of spies.

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<sup>15</sup> M. Mettler. Graffiti museum: a First Amendment argument for protecting uncommissioned art on private property (2012) 111(2) *Michigan Law Review* 249.

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The third failure of the law is therefore that although our instinctive response is that art should be for all to enjoy, and that Spy Booth is an art work of considerable merit, the owners of 159 Fairview Road may be punished for recognising this because their home's listed building status results in Spy booth being categorized an unauthorized and criminal alteration, rather than as a work of art, and an unplanned but positive enhancement to a building and a locality is criminalised rather than commended. Indeed if the approach taken in *The Creative Foundation v Dreamland Leisure Limited* [2015] EWHC 2556 (Ch) is adopted more widely, there may be increasing calls for the owners of land upon which an artwork is painted to remove the work, because of fears that it may attract further graffiti. The Spy Booth scenario is an example of this in operation – after the work had been made, it was then damaged by being painted over with spray paint.

### 5. Gloucestershire County Council's and the Department of Transport's claims to Spy Booth

Gloucestershire County Council also became involved in the dispute because the wall upon which Spy Booth was painted adjoins two streets - Fairview Road and Hewlett Road. The address of the house is 159 Fairview Road, but Spy Booth has been painted on the side wall, which is in Hewlett Road. Two local authorities were involved because it was alleged that the wall was, until the 1960s, a party wall between two properties – 159 Fairview Road, and another property, 64 Hewlett Road, which was bought by, and demolished by Gloucestershire County Council in the 1960s. If Gloucestershire County Council still owns the land in Hewlett Road, then it may be argued that the boundary between 159 Fairview Road and its former neighbour is the middle line of the wall according to the common law the ad medium

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filium rule. If so, then Spy Booth is not in Fairview Road at all – it is in Hewlett Road, and on Gloucestershire County Council's side of the boundary line. In a news report, Gloucestershire County Council denied having any claim to the party wall<sup>16</sup> but some weeks later, it was alleged that the party wall belongs not to Gloucestershire County Council, but to the Department of Transport<sup>17</sup> who may wish to assert its claim to ownership over the wall – especially given its recently enhanced value.

There may be many advantages to Spy Booth being identified as belonging to the local authority, as they may be in a strong position to ensure that the painting remains in Cheltenham, as well as ensuring that the artwork is not damaged – either through litigation in private law, being a complainant in prosecutions for criminal damage, or by using public law to ensure that the artwork is protected as a listed building. However, the commodification of Spy Booth by the state may be regarded as objectionable – for fifty years, the relevant public authorities have not expressed any claim to ownership of the wall, and therefore to assert ownership now that the wall has acquired additional value may be viewed as extremely unfair to the owners of 159 Fairview Road, and an objectionable use of a local authority powers, as it is the owners of 159 Fairview Road who have borne the burden of maintaining the wall for 50 years, and who should therefore derive the benefit of the wall now that its value has been enhanced. It is conceded however that the local authority and the Department of Transport's claims are weak. It is probable that any determination either by a court or by the Land Registrar using the s60 procedure under the Land Registration Act 2002<sup>18</sup> regarding where the boundary should now be would conclude that the wall belongs in its entirety to the

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<sup>16</sup> BBC "Banksy's Spy Booth: Stop notice could be issued." <http://www.bbc.co.uk/news/uk-england-gloucestershire-28070553> 28 June, 2014. Site accessed 5 June 2015.

<sup>17</sup> BBC "Cheltenham Banksy Artwork 'Belongs to the Government.'" <http://www.bbc.co.uk/news/uk-england-gloucestershire-28449693> 25 July, 2014. Site accessed 5 June 2015.

<sup>18</sup> Land Registration Act 2002.

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owners of 159 Fairview Road both through long use and in terms of the practicality for them of maintaining the wall. However, the fourth failure of the law arises from the possible entitlement of an unexpected party to Spy Booth, and the fact that this could be upheld over and above the entitlement of those with a more immediate claim to the land. The fact that the law could entertain new claims to ownership once a benefit has been identified, while allowing a putative owner to ignore responsibility when ownership is solely a burden creates a system that fosters disputes over financial worth rather than facilitating the adoption and protection of something that was created as being for the benefit of the public and recognized by the public as such.

### 6. The art collector

The fourth person laying a claim to Spy Booth is the art collector who wished to buy the artwork. If a buyer purchased it, the question of what they acquire then becomes pertinent. If the work may be removed while leaving the wall intact, then there should be no difficulty in transferring ownership of the painting from the seller to the buyer, much as one could transfer ownership of a painting made on canvas -indeed ownership of some of Banksy's other works have been transferred in this way.<sup>19</sup> This means however that an art collector is well placed to remove Spy Booth from public view, and the art collector's entitlement, in the event that removing Spy Booth from its current location is possible and/or desired defeats both the claim of the public and the claim of the artist to the integrity of the artwork. Nevertheless, the weakness of these parties in law, whatever the strength of their moral claim means that the art

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<sup>19</sup> A. Topping "Brighton kisses goodbye to Brighton's kissing coppers." 21 April, 2011  
'<http://www.theguardian.com/artanddesign/2011/apr/21/banksy-kissing-coppers-sold-america>  
Site accessed 5 June 2015.

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collector who is able to pay money acquires possession of an artwork and is therefore entitled to exclude all others from the enjoyment of the work. The law's framing of the concept of ownership in monetary terms, based on the contractual acquisition of goods for financial consideration means that those who are able to frame their entitlement in this way are better protected by the law than those whose claim makes no appeal to quantifiable gain.

It is possible however that Spy Booth cannot be removed, and in this situation, its ownership will depend upon who is responsible for the maintenance of the wall and where the boundary will lie. Three possibilities arise here. Firstly, the wall may belong in its entirety either to 159 Fairview Road or to the buyer of Spy Booth, and whoever owns the wall owns the painting. If the buyer acquires the wall, then his situation mirrors that of the owners of 159 Fairview Road, discussed above, as the buyer is entitled to paint over the artwork or leave it in situ as he or she chooses, but being subject to the obligations imposed by the local authority in terms of listed building consents.

If title to the wall is retained by the owners of 159 Fairview Road, their acts may damage the artwork, and they have no obligation to undertake repairs unless an action may be sustained in trespass or nuisance.<sup>20</sup> However, the neighbour is not liable for the natural wear and tear to the wall. This may be problematic for the buyer of Spy Booth if he or she acquires the painting, but not the wall because it means that there will be no liability on the part of the owners of 159 Fairview Road if the wall is damaged through no fault on their part.

This may be mitigated to some extent by the imposition of an obligation to repair. For example, an obligation to maintain may be included within the contract of sale, but it is well

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<sup>20</sup> *Jones v Pritchard* [1908] 1 Ch. 630

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accepted that the burden of positive covenants cannot run,<sup>21</sup> and therefore when the wall is sold on, unless a chain of covenants can be agreed, there can be no obligation to repair once 159 Fairview Road is sold. Accordingly, Spy Booth is extremely vulnerable to damage by neglect in the situation where ownership of the wall and ownership of the artwork are divided.

The third possibility is that, if ownership of the wall is shared between the owner of 159 Fairview Road and the owner of Spy Booth, then the wall in this situation is a party wall for the purposes of the Party Wall Act 1996 and the cost of effecting such repairs is to be borne by both parties. This has the advantage of ensuring that Spy Booth is maintained, although the enforcement of such obligations is often problematic in practice if one part cannot- or will not – fulfil their obligations. Again the law's intervention is well-intentioned, but ultimately unsuited to a situation such as Spy Booth. On the one hand it defends the rights of the person whose claim to ownership is based on acquisition pursuant to contract, and the consequent privatisation of the commodity, but simultaneously, the law fails to protect the notion that the maintenance of Spy Booth rests on the responsibility of neighbours to maintain the adjacent space.

The buyer's entitlement to a work such as Spy Booth is ultimately extremely problematic. The buyer who is able to afford to buy the painting is able to undermine the value of Spy Booth as art. By removing the piece from its location in Cheltenham, the buyer is able to decontextualize the piece from the political comment it makes – and the public statement about the extent to which communications are monitored is therefore lost – the statement becomes one that is made behind closed doors. Purchasing Spy Booth also

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<sup>21</sup> *Rhone v Stephens* [1994] 2 Ac 310



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undermines Banksy's artistic purpose which was initially to make artwork that everyone could see rather than restricting it to the people who wish to visit art galleries – an artwork that makes a public statement ceases to be art if the opportunity for the public to respond to it is lost. Even if Spy Booth remains in situ, the buyer's capacity to protect it from damage even by the current owners of 159 Fairview Road is limited, and is lost completely when the land is sold. Yet the law privileges the buyer's entitlement – he is entitled to buy the artwork, and, having done so, is entitled to assert the owner's right to remove, neglect or destroy without sanction. Again the apparent failure of the law is demonstrated.

### 7. The local community

The final group with a claim over Spy Booth are those who regard the painting as art, and who wish to enjoy it as such. Most immediately among these of course are the people who live and work in and around Cheltenham. Yet, although Spy Booth has very quickly become a local landmark, the social entitlement to Spy Booth is extremely limited. The options available to the local people therefore were either to acquire Spy Booth themselves in order to decide, as owners, that it could remain where it was painted, or to use the mechanisms of public law in order to oppose its removal. The former objective was fulfilled by the establishment of a campaign group, which hoped to be able to buy Spy Booth. The objective of the campaign has been to ensure that Spy Booth was not removed, by outbidding the intended buyer.<sup>22</sup> However, such an approach does not in reality allow Spy Booth to be owned by the community collectively. Instead, the aim of the campaign group was that Spy

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<sup>22</sup> BBC "Cheltenham Banksy 'Spy Booth' artwork damaged again." <http://www.bbc.co.uk/news/uk-england-gloucestershire-28753564> Site accessed 5 June 2015

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Booth would be acquired by a group of local people, rather than by the town or the locality as a whole. Even though the outcome may have been the same in the short term, in the longer term, Spy Booth would have been under just as much risk of concealment or removal to another location because the new owners could have decided to exclude non-owners from being able to access the painting. Another failure of the law here therefore is that the law defends ownership by an individual or a small group rather than by a community collectively.

Furthermore, although a higher bid for Spy Booth may be attractive to the owners of 159 Fairview Road, the mere fact that there is another willing buyer does not mean that the sellers will be willing to sell to them, even if a higher price is offered – gazumping may be a perfectly legitimate practice, but for some sellers it carries the taint of moral repugnance.<sup>23</sup> This aspect of Spy Booth therefore depends on the law of contract and the identity of the eventual buyer. If the seller sells Spy Booth to the intended buyer, then the fact that there is an alternative buyer who is willing to buy Spy Booth with a view to ensuring that it remains in Cheltenham, is immaterial. In this case, any interest the local community has in relation to the painting is lost. Furthermore, the extent to which the public is able to oppose the removal of Spy Booth is limited to its ability to make representations to the local planning authority. Such representations will however be a. balanced against other material considerations – including the desire to protect a listed building; and b. will need to be framed with reference to material planning considerations as opposed to an instinctive appeal to emotion and an expression of a view that it is popular and well-liked, which irrespective of their truth, will not be permitted to influence the local planning authority's decision.

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<sup>23</sup> G. Lightman "Trustees: moral duties and equitable accounting." (2008) 1 *Trusts Law International* 11.

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### 8. The dissatisfaction with ownership

The fact that these competing entitlements to Spy Booth exist indicate that art is difficult to classify within existing concepts of ownership. There is not one clear owner, who is able to demonstrate that his or her claim trumps all others. Furthermore, the entitlements of an owner do not correlate with the perceived public benefit, because an owner of property is perfectly entitled to exclude all others from it, and to sell it for the highest price. On the other hand, those that have the strongest desire to maintain it as a public artwork, cannot prevent its removal from the public space.

Also, what is seen in the Spy Booth situation is that the law does not provide a clear solution to the issue of ownership – the question of who owns Spy Booth receives a different response depending on whether the appeal is made to copyright (Banksy), to the law of contract (the Buyer) or to the principles of priority (the owners of 159 Fairview Road and the local authority). The law's emphasis on property serves only the commodity status of art, while the preservation and public access imperative are greeted with little more than confusion. The concept of ownership, with its reliance on quantifying art in monetary terms and protecting it through the mechanisms of private responsibility is not therefore appropriate for a public work of art where a community benefit, coupled with a community responsibility is required. An individual owner is able to protect an artwork from criminal damage, but has a less clear motivation to maintain it for the public benefit because there is very little personal gain to be made from protecting the work from the inaction of adjoining landowners. Private notions of land ownership do not correlate therefore with the public character of the art.

### 9. Spy Booth and planning law

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A similar concern regarding the failure of the law arises when the law's stewardship function is invoked in relation to the Spy Booth situation. Again the law is seen to intervene but in a way that has limited efficacy.

Although the public may respond to public consultation to any planning application made in respect of graffiti art, and, as in the case of Spy Booth, the importance of the artwork to the local community may be a factor<sup>24</sup> in any decision made by the local authority in relation to work undertaken on Spy Booth.<sup>25</sup> Graffiti art polarizes opinion and therefore the public response to planning consultations could also serve as just as much of a justification for the removal of Spy Booth as for its preservation. Furthermore, the response of the public to art in the context of planning law is expressed in terms of visual amenity and the character of the area<sup>26</sup> rather than on the appreciation of Spy Booth as art. In essence, the public may acknowledge the artistry of Spy Booth, but not as an adornment for their street.

Furthermore, the use of planning law as a means of protecting an art work suffers from being reactive rather than proactive. In March 2015, Spy Booth was listed under the Planning (Listed Buildings and Conservation Areas) Act 1990, and although this ensures that it must remain on the wall of 159 Fairview Road rather than being sold, two key problems arise in relation to the use of listed building status as a means of protecting an artwork.

Firstly, the circumstances in which Spy Booth was painted demonstrate the ineffectiveness of the planning regime in the face of a situation where the law is disregarded. It must not be forgotten that prior to Spy Booth being painted, 159 Fairview Road was

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<sup>24</sup> *R (on the application of Bizzy B Management Ltd) v Stockton-On-Tees Borough Council* [2012] EWCA Civ 228

<sup>25</sup> *Stringer v Minister of Housing and Local Government* [1971] 1 All ER 65 at 77

<sup>26</sup> Department for Communities and Local Government (2014) FQs Application Process <http://www.planningportal.gov.uk/general/faq/faqapplyprocess>  
Site accessed 5 June 2015.

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already a listed building. Listed status did not protect the building from what could be regarded as an alteration, and it is probable that listed status will be equally ineffective in protecting Spy Booth from later acts that cause damage to it. Secondly, the fact that Spy Booth remained in its current location at all relied not on the local authority adopting positive measures to preserve it, but rather from a decision not to enforce the breach occasioned by the painting of Spy Booth, and the owners of 159 Fairview Road's decision to accept the artwork as a form of enhancement of the house.

Thirdly, the result of listing means that the responsibility for preserving Spy Booth as a form of public art is imposed on the owners of 159 Fairview Road, who may not necessarily be able to prevent the work from being damaged by weather or by vandalism. Agamben conceptualizes this as a situation of non-law where the absence of legal regulation legitimates the assertion of power<sup>27</sup> by the legal system. In other words the law apportions responsibility on the individual in order to absolve social or collective responsibility, but once that responsibility has been attached, the law cannot, and does not ensure that the artwork is maintained. The individual cannot be forced to protect the artwork from its environment and cannot be forced to effect repairs to it unless its condition causes damage or nuisance. The law's intervention is therefore limited in that the effectiveness of requiring someone to take responsibility is limited, and is only achieved at all by ascribing private responsibility for what is in reality a public benefit.

Again therefore, the law's intervention is characterised by its failure rather than its success, and given that Spy Booth was damaged by vandalism, when a response was made by the law, it was too late to be effective. In light of this therefore, it becomes

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<sup>27</sup> G. Agamben. *Homo-Sacer: Sovereign Power and Bare Life*. Redwood city, Stanford University Press, 1998.

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necessary to consider whether the law has any other weapons in its armoury which will serve to protect a work such as Spy Booth as a form of public art. However, although concepts of gift, trust, and commonality could be used more extensively to achieve the balance between protecting a work of art from being lost to public view or damaged and preserving its status as a public benefit, all of these factors have the flavour of property to them, and rely on art being a commodity.

### 10. The law's alternatives to ownership

#### a. A public gift

Let us first consider the possibility that Spy Booth could be regarded as a public gift. An artist may make the artwork but once made, it belongs to the public, who may decide on its fate. This has the advantage of ensuring that no-one is able to claim ownership of it, and therefore its sale or removal will be prevented. Nevertheless, the concept of a gift requires acceptance by the donee, and therefore the risk this creates is that any person may create such a gift, even though no recipient wishes to receive it. Also, the lack of an owner also means that no-one has a sufficient interest in preserving the artwork to give them the necessary impetus to object to any removal or damage to the artwork. It is also possible to argue that although the artwork was a public gift, the wall upon which it is painted was not, and therefore, the owners of 159 Fairview Road have a continued entitlement to object to the deployment of their wall for a purpose that they did not instigate.

Furthermore, public gifts are most commonly conferred through the medium of a charitable trust – a mechanism that tempers but does not entirely remove the notion of ownership, in that no one person derives the absolute benefits of ownership and the

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commodity value cannot be accessed by an individual. However, the law of charities and trusts is problematic here again because the settlor (e.g. Banksy) has no title over the surface upon which the painting is made, while the owners of 159 Fairview Road have no intention that their wall, once it has been painted on should be maintained for the public benefit.

Also, it would be undesirable if art – or more specifically the adjudication that something it art could be used as a catalyst for the transfer of an object such as a wall from private to public ownership. It is also anathematic to the concept of trusteeship that the office of a trust should be imposed without acceptance – or at least acquiescence on the part of the trustee.

### **b. A gift to the owner**

An alternative possibility is that an artwork may be treated as a gift to the owner of the property for the time being. They cannot sell the artwork, although the artwork would increase the value of the property upon which the work has been painted. This was the approach adopted by another artist, Damien Hirst, whose spot paintings are accompanied by a certificate of ownership. Hirst's painting, titled Bombay Mix was, like Spy Booth, also painted onto the wall of a house. Unlike Spy Booth however, Bombay Mix was painted onto the internal wall of the house, and the work was undertaken with the then owner's consent. The house has since been sold, and, in 2014, the current owner of the house wished to sell the painting, but was prevented from doing so by Damien Hirst's company, which alleged that the work may only be sold by the person who possessed the certificate of authenticity issued with the art work. The company, Science Ltd. is quoted as stating "*The ownership of a wall*

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*painting in the series titled Wall Spots always resides with the owner of the Wall Spots signed certificate, which accompanies the art work*<sup>28</sup>

Here the certificate certifies ownership. Someone being in possession of the painted wall surface without the certificate does not have any entitlement to the work.<sup>29</sup> In Hirst's case therefore, ownership is characterized not by the elements of possession and control that are usually the markers of ownership, but rather by documentation, thus emulating the approach taken in land law, where, as a result of the Land Registration Act 2002 in particular, ownership is evidenced more by registration than conduct. The validity of such an approach in relation to things other than land, vehicles and shares (where ownership by registration has already been legitimated by law) will depend on how buyers respond to Science Ltd.'s approach. Some buyers will choose not to buy the wall without the certificate on the basis that that which is acquired is worthless – especially if, as Science Ltd alleges, without the certificate, the work cannot be authenticated as a genuine Hirst.<sup>30</sup> Without a buyer of course, the painting cannot be sold, and therefore the requirement for a certificate of authenticity does restrict the transfer ownership and the owner's opportunity for commercial gain. Such an approach would prevent a work such as Spy Booth from being removed from its location, but would not prevent the owner from painting over it. Furthermore if a painting at a particular address is known to be by a well-known artist such as Hirst or Banksy, a buyer may choose to pay for that value-added irrespective of whether the certificate of authenticity is

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<sup>28</sup> BBC "Row over sale of Hirst spot painting in London house." <http://www.bbc.co.uk/news/entertainment-arts-28291036> 14 July, 2014. Site accessed June 5 2015.

<sup>29</sup> *Ibid.*

<sup>30</sup> The Daily Telegraph "Spot of bother over Damien Hirst wall art painting." June 5, 2015. <http://www.telegraph.co.uk/culture/art/10963754/Spot-of-bother-over-Damien-Hirst-wall-art-painting.html> Site accessed 5 June 2015.



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transferred, because he or she is able to adduce other evidence to confirm whether or not the work is by a well-known artist.

### Common wealth

A third possibility is that public art could accrue to the common wealth – not belonging to any one person but being equivalent to a public space or part of the environment. Again this is problematic in terms of the fact that a transfer of ownership of the wall is imposed on the owners of 159 Fairview Road without the owners' consent. Furthermore, in relation to the notion of common property (common land, public highways and access to the countryside) the dominant approach has been to use the concept of licence whereby the public user is expressly or impliedly given permission to access the space. The notion of commonality is therefore superimposed on the title of the owner, and thus the concept of ownership remains core to the regulation of the space.

What we see therefore is that the law's approach to street art relies on privatisation. The private owner's rights are the most important both in order to ensure the protection and the preservation of street art, and even where public law intervenes it does so in order to identify the roles and responsibilities of the owner of the surface upon which the art is painted. This approach would seem to differ very significantly from the attitudes expressed by makers of street art, who often consider that the law's responsible owner approach misunderstands in a fundamental way the purpose of street art. Scholars such as Sherwin<sup>31</sup> would argue that this failure arises because of the law's failure to understand visual art, and

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<sup>31</sup> R K Sherwin. 'Visual jurisprudence.' (2012) 57 *New York Law School Law Review* 11.

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that it is the law's lack of visual literacy that causes this disjuncture. If lawyers had a better understanding of art, he argues, art would be better protected. What follows therefore is an analysis of how street artists view street art and why this differs from the legal approach.

### 11. Graffiti artists and law

The attitudes of artists towards graffiti art are rather more nuanced than the approach taken by the law. The views of graffiti and street artists towards the law are as diverse as the work they create. Therefore, although the law's relationship with art is characterized in terms of ownership – the artist owns the idea, and its physical manifestation becomes something that is owned by a landowner, and which may be sold, street artists have more diverse views regarding the nature of their work and whether the law ought to protect it. Although some artists express no strong view as to the destination of their work once it has been made, perceiving it to be something that may be claimed by whoever wishes to have it,<sup>32</sup> others view mural art as being a way of challenging accepted concepts of ownership. In other words, to highlight that by trying to fit art into the law's constraints, the law's narrowness of approach and its maintenance of social order predicated on monetary wealth as its catalyst is emphasized. Their response to the law therefore is to object to their work being used by others for financial gain, and to object to the fact that once their work has been reduced to ownership it ceases to be for the public good. Writing in 2006 for example, Banksy explains that;

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<sup>32</sup> LW Rabine, "These walls belong to everybody." The graffiti art movement in Dakar. (2014) 14(3) *African Studies Quarterly* 89.

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*Graffiti art is not the lowest form of art...it's actually one of the most honest forms of art available. There is no elitism or hype, it exhibits on the best walls a town has to offer and nobody is put off by the price of admission.*<sup>33</sup>

Other street artists<sup>34</sup> argue that the law's approach is overly individualistic – it emphasises the rights of the individual, and therefore perceive graffiti art to be a way of re-emphasising the collective ownership of public space. People are part of that place, and therefore by creating something that everyone can experience, they are seeking to draw attention to the fact that they are part of a wider community of diverse people. Accordingly, by challenging the homogeneity<sup>35</sup> that the law enforces, some graffeurs artists argue that they are increasing the acceptance of diversity. Others on the other hand point to a lack of diversity in the attitudes of graffiti artists – there may be diversity in terms of culture, but the rebelliousness required to make street art often means that those who find themselves more likely to be condemned and punished for their work find that there is less encouragement for them to become graffeurs.<sup>36</sup> The difference between the legal approach and the artistic approach is therefore one where the law emphasizes the notion of community as being an obligation not to offend against other people and their property, the notion of graffiti art among some graffeurs is to make people feel part of the community. Artists therefore argue that it is an intrinsic part of their work to challenge the notion that something that was made without permission can enhance rather than damage an area.

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<sup>33</sup> Banksy *Wall and Peace*. (Century, London, 2006).

<sup>34</sup> LM Visconti, JF Sherry, S Borghini and L Anderson 'Street Art, Sweet art? Reclaiming the public in public place. (2010) 37(3) *Journal of Consumer Research* 511.

<sup>35</sup> A Moors. 'Niqabitch and Princess Hijab: Niqab activism, satire and street art.' (2011) *Islam in Europe* 128.

<sup>36</sup> LW Rabine, "'These walls belong to everybody.'" The graffiti art movement in Dakar. (2014) 14(3) *African Studies Quarterly* 89.

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Graffiti art is also said to blur the distinction between public and private spaces, and argue that the public has a greater interest in the outside wall of a building than the person who occupies the inside. Despite these noble assertions by graffiti artists, it must be remembered that graffiti artists may have as much of an exclusive world view as lawyers, and the objectives of graffiti art may alienate outsiders just as much as the law is perceived to do – it is for example felt to be an aspect of youth culture and hiphop culture that others may feel excluded from.<sup>37</sup> Graffiti art may be emblematic of values such as a person's right to damage something that another has tended and cared for, and therefore, what may be touted as a challenge to restrictive norms may mask a more individualistic intention to assert that the painter's right to paint is more valued than the wall owner's right to own an undecorated expanse of wall. Watson<sup>38</sup> explains:

*Most graffiti involves damage to privately owned buildings and vehicles. It can lead to increased insurance premiums. Expenditure on wall coatings, cleaning and security is likely to rise. It should also be noted that the removal of graffiti from stone, brick and wood is often a difficult process. It can cause more damage to historical buildings than the graffiti itself. This is a major (and growing) problem in tourist centres such as London and Bath.*

*The indirect costs of graffiti are more difficult to assess. If property owners are unwilling to remove graffiti from their homes and business premises, property values will tend to fall.*

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<sup>37</sup> Watson, M. (2004) 'Graffiti: popular art, anti-social behaviour or criminal damage?' 168 *Justice of the Peace* 668.

<sup>38</sup> Watson, M. (2004) 'Graffiti: popular art, anti-social behaviour or criminal damage?' 168 *Justice of the Peace* 668.

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This is particularly relevant when we distinguish artistic murals from forms of graffiti that are less acceptable, either because the graffiti comprises political or offensive slogans, tagging one's person's property with the name of another, or even advertising.<sup>39</sup>

Secondly, street art is often made precisely because it is transgressive. It is the dangerous and ephemeral character of the law that makes it valuable – street art acquires its status precisely because there is a real danger that it will be defaced or removed, or that the maker will be caught and punished. The risk that the artist will be caught, or, alternatively that the artwork is removed is integral to its artistry, as Bengtson and Arvidsson emphasize – it is the ephemerality that makes the art.<sup>40</sup>

Street art therefore needs the law in order to exist, because, without the law's objection, there would be no impetus to create the artwork. Also despite the communitarian and edifying objectives of graffiti art, an appeal to the law is nevertheless likely to be made in order to protect the artwork as a matter of intellectual property. Furthermore, it is the intervention of the law in terms of protecting the work that often serves to validate its credentials as art, and whatever the protestations to the contrary, the artist is unlikely to be able to state that this is not a positive thing for their practice as an artist.

Also, the law responds to art. Street art shows us the gaps in the law, such as the law's inability to delineate the distinction between the public and the private that Dahlberg<sup>41</sup> identifies. In order to class as art therefore artists such as Banksy must break the law, and

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<sup>39</sup> Watson, M. (2005) 'Dealing with organized environmental crime.' 169 *Justice of the Peace* 931.

<sup>40</sup> P. Bengtson and M. Arvidsson. 'Spatial Justice and Street Art.' (2014) 15 *Navein Reet: Nordic Journal of Law and Social Research* 117.

<sup>41</sup> L Dahlberg. 'On the Open and Closed Spaces of Public Discourse. (2006) 27(2) *Nordicom Review* 35.

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take the risk that their work may be removed, and they may be punished for making it.

Regulation and protection by the law therefore diminishes the artistic value because there is no longer any risk that it could disappear as quickly as it appeared. As Young<sup>42</sup> explains if the law protects graffiti art, graffiti artists will no longer wish to make graffiti art because it is no longer transgressive – it is art with permission, whereupon the artist may as well commit his or her work to canvas. The law must fail to appreciate art therefore in order for art to exist.

However, art must also challenge the law. Manderson for example argues that law and art approach the world from fundamentally different directions:

*Images have a density to them...their non-linearity makes them a particularly appropriate means of communicating paradoxical, ambiguous, or double-edged ideas. Writing, particularly academic or legal writing privileges and perhaps demands the communication of a single well-organized logic.<sup>43</sup>*

Bengtson and Arvidsson<sup>44</sup> therefore argue that graffiti and other forms of street art do not simply break the law, they serve to remind the law that it needs to intervene. Graffiti art may therefore be seen as a call to law rather than a rejection of the law.

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<sup>42</sup> A. Young, 'Criminal images: the affective judgment of graffiti and street art.' (2009) 8(3) *Crime Media Culture* 297-314.

<sup>43</sup> Manderson, D. 'Law of the Image and Image of the Law.' (2012) 57 *New York Law School Law Review* 153 at p155

<sup>44</sup> P. Bengtson and M. Arvisson. 'Spatial Justice and Street Art.' (2014) 15 *Navein Reet: Nordic Journal of Law and Social Research* 117 at p123.

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### 12. Conclusion

The starting point for this article was that the law has failed to prevent the commodification of Spy Booth and that it has failed to protect it from damage. Yet as we have seen, the threat of the law and the failure of the law provides the impetus for the artwork. Can the law then be said to fail? The fact that Spy Booth has been allowed to remain in public view on a wall in Cheltenham is precisely because it has received the approval and the endorsement of the law. It has remained where it is because the owners of 159 Fairview Road have not objected to their wall being used as a surface upon which to make a work of art. It has remained where it is because the local authority chose to accept, and not to take enforcement action in relation to what clearly amounts to an unauthorized alteration of an already listed building. It also remains in its current location because Cheltenham Borough Council have chosen to list Spy Booth as a protected location. Accordingly, we conclude that law not only regulates by also has a valuable role in retrospectively endorsing transgression. Bengtsen and Arvisson characterise this not as a failure of the law, but the law consciously withdrawing from involvement.<sup>45</sup> This has important implications in terms of the law's status. Although '...graffiti threatens...the sense of ordered style, the aesthetic of authority that is intertwined with them.' the law feels the need to reassert authority, and it does so by the retrospective endorsement of legal art – as Ehrenfeucht<sup>46</sup> explains:

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<sup>45</sup> P. Bengtsen and M. Arvisson. 'Spatial Justice and Street Art.' (2014) 15 *Navein Reet: Nordic Journal of Law and Social Research* 117 at p124.

<sup>46</sup> Ehrenfeucht, R. (2014) 'Art, public spaces and private property along the streets of New Orleans.' 35(7) *Urban Geography* 965.

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*Bringing graffiti into galleries nevertheless displaced and transformed the work, while the process of gaining legitimacy also served to control the artists.*

Once it does so, the law wins. It is in control, not the graffiti artists and the graffiti lovers. The law asserts its authority and transgressive art is tamed. Ultimately the law does therefore succeed, but this success is a qualified success. It succeeds because its narrowness provides a *raison d'être* for graffiti art to be made. It succeeds because it allows graffiti art to be ephemeral, precious. It succeeds because it allows that which is recognized as art to inhabit the public space. It endorses the status of paintwork as art. For some, it may be said to be successful because it controls behaviour – deterring many from becoming graffeurs, and threatening those that do undertake the practice with punishment and the eradication of their work. It may be said to be successful because it undermines the countercultural artistic statement by endorsing the mainstreaming of the artwork, thus again reiterating the fact that the law's aim is ultimately control. Yet by the same measures, the law does not succeed. Its protection of art is inadequate, and few are able to defend it from privatisation and damage. It deters many artists and silences the viewpoint that does not receive popular endorsement. It encourages a dialogue with those who have little to lose and much to gain from transgression.