

# **XII CODAIP** Congresso de Direito de Autor e Interesse Público

## **PAINEL III**

### **Considerações sobre a proteção do grafite ilegal pelo direito autoral**

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**Brunel University London**  
**5 de novembro de 2018**





[https://www.tripadvisor.com.sg/LocationPhotoDirectLink-g186338-d4555667-i185685037-Shoreditch\\_Street\\_Art\\_Tours-London\\_England.html](https://www.tripadvisor.com.sg/LocationPhotoDirectLink-g186338-d4555667-i185685037-Shoreditch_Street_Art_Tours-London_England.html)



<https://www.shoreditchstreetarttours.co.uk/tours/shoreditch-street-art-tour-afternoon-3-2014-01-30/>



<https://www.shoreditchstreetarttours.co.uk>





<https://www.heatheronhertravels.com/graffiti-tourism-in-bristol/>



<http://uk.businessinsider.com/banksy-posts-video-showing-what-should-have-happened-to-self-shredding-painting-2018-10>

<http://g-addy1417-cop.blogspot.com/2016/10/examples-of-commercialised-graffiti.html>

# Observações

- **Ilegalidade do grafite: assunto ilegal v forma ilegal (grafites feitos de forma não autorizada)**
- Forma de rejeição da proteção: matéria protegida v exercício do direito
- Bem intangível v objeto em que obra se materializa
- Os sujeitos envolvidos
  - Donos da propriedade (do muro) ou prefeituras etc.
  - Usuários comerciais (e.g. fins publicitários)
  - Outros artistas inclusive na subcultura do grafite
  - Usuários incidentais ou privados

# Villa v Pearson Education (2003)

- Artist UNONE v book publisher
- “In particular, the court stated that whether copyright would protect graffiti “require[s] a **determination of the legality of the circumstances under which the mural was created.**” This statement has caused some commentators to conclude that illegality is a defense to copyright infringement. Although the courts have had little opportunity to consider the defense of illegal conduct in relation to copyright, they have thoroughly discussed the similar defense of unclean hands.”
  - Danwill Schwender, ‘Promotion of the Arts: An Argument for Limited Copyright Protection of Illegal Graffiti’ 55 J. Copyright Soc'y U.S.A. 257 (2008)

# *English v. B.F.C. & R. East 11th Street, LLC (1997)*

- VARA = Visual Artists Rights Act, direitos morais EUA
- “VARA does not apply to artwork that is illegally placed on the property of others, without their consent, when such artwork cannot be removed from the site in question.”
- Se der pra remover a obra, talvez tenha proteção?



# '5 Pointz' graffiti



<https://www.artsy.net/article/artsy-editorial-5-pointz-graffiti-artists-score-major-win-suit-developers>

<https://www.nytimes.com/2017/10/17/nyregion/at-core-of-5pointz-trial-is-graffiti-art-protected-by-law.html>

# '5 Pointz' recent decision Cohen v G&M Realty (2018)

- “Though [Judge] Block acknowledged there wasn’t a proven market for these works, he still awarded the artists the maximum statutory damages (\$150,000 per destroyed work), because Wolkoff whitewashed the building without giving them the opportunity to document or remove the murals. It’s a landmark ruling for graffiti artists.”
  - Sarah Cascone, “‘Appalled’ by 5Pointz Developer, a Judge Upholds the Massive \$6.75 Million in Damages Awarded to Graffiti Artists” <https://news.artnet.com/art-world/judge-landmark-5pointz-ruling-1302872>

# '5 Pointz' recent decision Cohen v G&M Realty (2018)

- “The Court awarded the owner to pay the maximum statutory damages under VARA for each works for the whole sum of USD 6,750,000. The decision was greeted with enthusiasm by the artistic community as a further validation of street art. For the future, more real estate owners will probably give artists the time to remove their works. On the other side, this decision could also hinder street art as many real estate owners could be reluctant in the future to authorize artists to use their walls as Wolkoff did in 5Pointz.”
  - ‘5Pointz: a stronger legal protection for street art ... or not?’ by Angela Saltarelli: <http://the1709blog.blogspot.co.uk/2018/02/5pointz-stronger-legal-protection-for.html>



# H&M v Revok



## Boycott @hm

This week, fashion retailer H&M filed a lawsuit in Federal Court in New York, allegedly asking the court to essentially rule that any and all unsanctioned or illegal artwork, such as street art and graffiti, should be devoid of copyright protection and can be used by any brand or corporation, without any payment or even needing the artist's permission. This action taken by H&M is a full out assault on artists' rights and we must raise our voices. This could render millions of murals and important pieces of artwork worldwide completely unprotected and available for corporate use, without any payment or permission needed whatsoever.

I ❤️ ihatestencils • Follow

ihatestencils A class act right here. @hm @concretehumanity same goes for you trash bags. @\_revok\_ 🙄

Load more comments

dariomeli Fuck H&M. Boycott in full muthafukkin-fizect

valeauvent @nostra\_signora\_della\_dinamite Nini credo sia una fake news un po' imbastita su una vicenda passata dove durante un photoshoot davanti a un murales famoso non è stato pagato il copyright per la distribuzione :) sarebbe più da boicottare Zara per gli scopiazzamenti :)

myself.and.i @serotka

jamie00040 Wait till you see the art work that graffiti artists will come up with now if their art isn't "there's" anymore. All gloves off and get ready to see some works of art .....



3,579 likes

1 DAY AGO

Add a comment...

H&M respects the creativity and uniqueness of artists, no matter the medium. We should have acted differently in our approach to this matter. It was never our intention to set a precedent concerning public art or to influence the debate on the legality of street art. As a result, we are withdrawing the complaint filed in court. We are currently reaching out directly to the artist in question to come up with a solution. We thank you for your comments and concerns, as always, your voice matters to us.



20:37 - 15 mar 2018

508 280 utenti ne stanno parlando

<https://www.nssmag.com/en/fashion/14226/h-m-vs-jason-revok-williams-and-the-problem-of-copyright-in-street-art/image:128523>



# Re Pictures on the Berlin Wall

## [1997] ECC 553

“It is not in principle relevant to the possibility of copyright protection by statute for the creation of a work that the way in which it was produced is evidently unlawful – in this case by virtue of an act of damage to property subject to civil and criminal sanctions... The property rights in objects embodying a work subject to copyright protection may only be exercised without prejudice to the copyright”

Marta Iljadica, citando Stirling: “Private property rights take precedence over the author’s rights, but with an important limitation: the property owner does have rights over his/her property but not the right to sell the work” (Iljadica “Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture, Hart 2016)

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- Ilegalidade do grafite: “assunto” v forma criação
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*O direito autoral como  
âmbito de proteção*

# O problema dos usos comerciais

- Jeanne Fromer: “I’d be shocked if one graffiti artist sued another graffiti artist for painting over their work, perhaps, or for making an identical copy somewhere else,” she said. “But what they don’t like is their work being used commercially, and that’s without them getting paid.”

[https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/03/16/hms-battle-with-the-artist-revok-shows-how-street-art-is-being-taken-seriously/?noredirect=on&utm\\_term=.6cc119e4cb88](https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/03/16/hms-battle-with-the-artist-revok-shows-how-street-art-is-being-taken-seriously/?noredirect=on&utm_term=.6cc119e4cb88)

- Danwill Schwender: “Congress should explicitly extend copyright protection to illegal graffiti prohibiting persons other than the copyright owner from profiting from the works; however, the protection should limit moral rights to protect real property.” Promotion of the Arts: An Argument for Limited Copyright Protection of Illegal Graffiti, 55 J. Copyright Soc’y U.S.A. 257 (2008)

# O problema dos usos comerciais

- Enrico Bonadio: “If I steal a pen which I then use to draw a wonderful piece of art, why should I be denied the right to enforce my copyright and tolerate that someone else copies and takes economic advantage of my work? ... That copyright enforcement should not be denied when artworks are illegally placed in the street is confirmed – I believe - by a fairness related argument. It would indeed be unfair to allow persons other than the artist to rely on the illegal nature of a street artwork to copy and exploit it for their own commercial purposes, for example by using it in advertising messages or as a decoration element of fashion products. It seems to me this result would be absurd as it would basically legitimise blatant imitations by individuals or corporations that have nothing to do with either the perpetrator of the illegal act (the artist) or the victim (the owner of the property). ... Denying street artists that illegally place their pieces a resale right might also be perceived unfair, particularly if we accept that street artworks that are created without the consent of the property owner can be protected by copyright. It would be unjust, for example, to allow the removal and subsequent sales of illegally created murals without recognising the artists a participation to the profits made by those who have commodified and extracted value out of their creations.” Bonadio, Enrico, Copyright Protection of Street Art and Graffiti under UK Law (April 4, 2017). Intellectual Property Quarterly, Issue 2, 2017.

*Problemas*

*&*

*Alternativas ao direito autoral*



*Muito obrigada*

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