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## Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture, by Marta Iljadica

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Book Review



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# Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture, by Marta Iljadica

## **Abstract**

Write letters, choose good spots, don't "bite," be original, don't go over, and "get up." Those six ideas constitute the commandments according to which graffiti writers self-govern their creative output. "Graffiti breaks every rule, but within itself still has rules." Graffiti is outside the law, but is bound by its unique creative processes' attendant norms: a sophisticated body of de facto artistic regulation borne of a set of fundamental principles concerning works' subject matter, placement, and creativity; communities' prohibitions on copying; and authors' moral rights.

## Book Review

## *Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture*, by Marta Iljadica<sup>1</sup>

JAMES A. HAYES<sup>2</sup>

WRITE LETTERS, CHOOSE GOOD SPOTS, don't "bite," be original, don't go over, and "get up." Those six ideas constitute the commandments according to which graffiti writers self-govern their creative output.<sup>3</sup> "Graffiti breaks every rule, but within itself still has rules."<sup>4</sup> Graffiti is outside the law, but is bound by its unique

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1. (Oxford: Hart, 2016) 324 pages.
  2. MusBacPerf (2013), University of Toronto; JD Candidate (2017), Osgoode Hall Law School.
  3. "Write letters" refers to the subcultural requirement of graffiti writers to create works solely using stylized letters (and sometimes numbers). "Choose good spots" refers to: (1) choosing visible locations on which to write; (2) choosing challenging or dangerous locations, because more respect is granted to writers who create more challenging or dangerous works; and (3) avoiding writing on certain surfaces including homes, personal cars, schools, and churches. "Don't bite" translates to "don't copy," and refers to prohibitions against copying another graffiti writer's preferred letter combination or stylistic signifiers, including letter shape and painting technique, unless as an homage to a highly respected graffiti writer. "Be original" ties into the commandment not to "bite"; respect is given to innovative writers. "Don't go over" is the prohibition against painting over another artist's work, except where a highly respected artist "goes over" the work of a less respected artist or where the work covered is of lesser artistic value than the covering work. "Going over" is strictly prohibited if the underlying work is of historical significance to the subculture. "Lastly, "get up" is essentially the suggestion to create graffiti works as prolifically as possible, either by creating works at a high frequency throughout the urban environment or by creating fewer works that are in more prominent, challenging, or dangerous locations. "Get up" can be roughly translated as "be noticed." See Iljadica, *supra* note 1 at 2, 109-141, 175-211, 235-257.
  4. Anon29 (Personal Interview), cited in Iljadica, *supra* note 1 at 1.

creative processes' attendant norms: a sophisticated body of *de facto* artistic regulation borne of a set of fundamental principles concerning works' subject matter, placement, and creativity; communities' prohibitions on copying; and authors' moral rights.

The rules of the graffiti subculture therefore echo concerns formally addressed within statutory and jurisprudential copyright law and are supplemented by informally codified regulation tailored to the specific circumstances distinctive of graffiti works' form, including, most prominently, the physical placement of graffiti writing in urban space.<sup>5</sup> Graffiti writing, being in most instances an act of criminal damage, is likely unprotected by the same copyright law that is meant to protect, among other things, original literary and artistic works.<sup>6</sup> Instead, graffiti writing's subcultural norms exist apart from the official, legal rules—and the normatively thinner conception of creativity on which they are based—to give rise to a self-governed, “bounded” creative commons.<sup>7</sup> This bounded commons fills gaps left by the forbearance of copyright protection and guards the normatively richer conception of graffiti creativity and culture.<sup>8</sup>

So goes the argument at the heart of Marta Iljadica's *Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture*, a work of comparative legal scholarship that contributes to the ongoing debate about copyright reform by seeking to demonstrate that much of creativity and many of the pleasures of creation and community exceed copyright's bounds.<sup>9</sup> The book accordingly suggests a need for the tolerance of a multitude of bounded commons as a means of promoting an attractive, plural culture.<sup>10</sup> “[T]he [graffiti] rules might not be ‘law,’” argues Iljadica, “but [they] have an immediacy and relevance to graffiti writers' experience that simply does not exist in relation to...copyright law.”<sup>11</sup>

*Copyright Beyond Law* therefore draws upon and contributes to the small body of literature on non-legal intellectual property norms within specific communities, which asks how and why some creative communities develop their own rules when their creative output is perceived as insufficiently protected by

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5. Iljadica, *supra* note 1 at 54.

6. *Ibid* at 102-106.

7. *Ibid* at 250.

8. *Ibid*.

9. *Ibid*, “A Note on Pictures”.

10. *Ibid* at 300.

11. *Ibid* at 57.

copyright or where copyright law is ignored even though it may apply.<sup>12</sup> The graffiti subculture has in common with other creative communities a general concern with retribution, attribution, community belonging,<sup>13</sup> and, importantly, a rejection of the law of copyright in favour of other unwritten rules. But the book's study of the graffiti subculture is differentiated from previous literature because graffiti writing is distinctive in a number of specific ways. The first distinction is the tenuous relationship between graffiti writers and the law. While certain creativity within similarly bounded commons may, regardless of the subculture's tendency to eschew formalized protection, fall under the purview of copyright law, graffiti likely does not, for reasons of public policy.<sup>14</sup> Pragmatically speaking, even if copyright law protected graffiti, the very idea of commencing legal action as a means of resolving issues of alleged copying runs contrary to graffiti writers' goal of maintaining anonymity in order to avoid sanction for their mostly illegal activity. As Iljadica observes, "The [graffiti] rules appear to exist at least in part as a response to the designation of the practice as illegal and serve to structure, even temper, illegal behaviour."<sup>15</sup> The graffiti subculture is uniquely compelled to forbear copyright protection if it hopes to govern the interactions between its participants.

The second distinguishing factor is the role of the graffiti rules in the protection of solely reputational, non-monetary interests. This is the point on which the book turns and the point that will drive my examination of Iljadica's argument below. The graffiti subculture is a living test case of a self-governing creative community wherein the measures used to protect against and to dissuade prohibited copying are not driven by any market reason. In fact, the book argues

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12. *Ibid* at 3. That body of literature includes studies of stand-up comedy, cooking, typography, and Irish traditional music. See e.g. Dotan Oliar & Christopher Sprigman, "There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy" (2009) 94:8 Va L Rev 1787; Emmanuelle Fauchart & Eric von Hippel, "Norms-Based Intellectual Property Systems: The Case of French Chefs" (2008) 19:2 Org Sci 187; Jacob Loshin, "Secrets Revealed: Protecting Magicians' Intellectual Property without Law" in Christine A Corcos, ed *Law and Magic: A Collection of Essays* (Durham, NC: Carolina Academic Press, 2009) 123; Blake Fry, "Why Typefaces Proliferate Without Copyright Protection" (2009), online: <ssrn.com/abstract=1443491>; Luke Thomas McDonagh, *Does the Law on Copyright in the UK and Ireland Conflict with the Creative Practices of Irish Traditional Musicians? A Study of the Impact of Law on a Traditional Music Network* (PhD Thesis, Queen Mary University of London School of Law, 2011), online: <ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.535764>.
  13. Iljadica, *supra* note 1 at 60.
  14. *Ibid* at 30-31, 102-108.
  15. Iljadica, *supra* note 1 at 31.

that graffiti writing is an activity borne of resistance to commercialization.<sup>16</sup> In the graffiti subculture, the only currencies traded between participants—and the only interests protected, therefore—are those of internal recognition and respect.<sup>17</sup> The book uses that fact to highlight the shortcomings both of a strictly economic model of copyright law and of a bounded commons so isolated that exploitation of participants' work by the general public goes totally unchecked.<sup>18</sup> Iljadica argues that while a normative framework exists within the graffiti subculture that mirrors and in some ways exceeds the potential of copyright to regulate creativity within artistic subcultures, it also falls short of addressing the issue of use by non-writers outside of it.<sup>19</sup>

The third distinguishing factor is that graffiti writing and its attendant processes do not fit squarely into any individual bucket of copyright subject matter. Specifically, the book's analysis of graffiti through the lens of copyright law is affected by the inability of the law to address two particular circumstances distinctive of graffiti works' form. Firstly, graffiti, unlike other copyright subject matter, is concerned with the physical placement of artistic production in urban space.<sup>20</sup> The place in which the work is created is uniquely determinative within the graffiti subculture of the work's artistic legitimacy. Secondly, graffiti writing combines aspects of literary writing, artistic creation, branding, and indicia of source in a way not contemplated by copyright law.<sup>21</sup>

Iljadica ultimately decides that copyright is the most appropriate legal forum for the discussion of the graffiti subculture. I will examine that decision and put forth the idea that looking at graffiti writing solely through the lens of copyright law ignores some quasi-commercial aspects of the graffiti rules. I suggest that approaching the graffiti rules from the perspective of an alternative conglomerate of different intellectual property interests could complement the book's argument by compensating for what are identified as some of copyright's shortcomings. In doing so, I argue that the graffiti subculture is most distinguished from other artistic bounded commons in that it is systematically focused on the commercial value of works and the benefits conferred onto graffiti writers therefrom, even if the mode of commerce—recognition and respect—is transitory.

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16. *Ibid* at 55.

17. Anon4, "The currency of graffiti is fame" (Personal Interview), cited in Iljadica, *supra* note 1 at 23, n 100.

18. Iljadica, *supra* note 1 at 265-72.

19. *Ibid* at 1.

20. *Ibid* at 54.

21. *Ibid* at 88-99.

Organizationally, the book is divided into ten chapters comprising five “panels.” The first four panels dive into the subculture in order to contrast the existing law of copyright with the subcultural normative framework. Panel I is largely descriptive, providing a brief history of graffiti writing; explaining the structure of the subculture and its conceptions of respect, hierarchy, visibility, and style; and offering an overview of the justifications for copyright protection in the context of the relationship between intellectual property, creativity, and the public domain.<sup>22</sup> The book’s second, third, and fourth panels identify a set of graffiti rules and examine them in relation to the analogous copyright rules.<sup>23</sup> Panel V moves outside the subculture to consider the regulation of the use of graffiti creativity by non-writers.<sup>24</sup>

In selecting the law of copyright as a legal framework by which to analyze the graffiti subculture, the book uses the graffiti subculture’s bounded commons to critique, among other things, the widely held viewpoint that copyright law is a means through which to provide economic incentives to content creators in exchange for the value they and their creations put forth into the culture. I will address those ideas in Part I.

## I. THE GRAFFITI RULES REVEAL SOME LIMITATIONS OF THE INCENTIVE-BASED VIEW OF COPYRIGHT LAW

A classic way of justifying copyright law is to say that it provides incentives to create by enabling economic rewards to flow from an exclusive right to control one’s work and by exploiting the propagation of a protected work for a fixed term.<sup>25</sup> Copyright supposedly gives creators an incentive to produce works because it empowers them to collect payment in exchange for their works’ dissemination in the marketplace.<sup>26</sup> Reflexively, the argument goes that without copyright incentives “a socially optimal output of intellectual products would not exist.”<sup>27</sup> The economic incentive therefore purportedly encourages cultural activity while fostering broader economic growth through the monetization of artistic works that, without copyright, could be distributed, copied, and consumed

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22. *Ibid* at 4.

23. *Ibid* at 4-5.

24. *Ibid* at 5-6.

25. *Ibid* at 33.

26. Lior Zemer, “On the Value of Copyright Theory” (2006) 1 IPQ 55.

27. Edwin C. Hettinger, “Justifying Intellectual Property” (1989) 18:1 Phil & Pub Aff 31 at 48.

freely by anyone in the public.<sup>28</sup> This conception of an economic incentive has been restated and critiqued countless times throughout the literature, but it is treated in *Copyright Beyond Law* as a point upon which to ground original critical analyses of both traditional and unconventional conceptions of creative commons through a tangible, real-life example.<sup>29</sup>

Firstly, the book implies that the economic incentive of copyright law privileges the support of particular creative cultures and does not provide support to cultures whose creative media necessitate collective experiences that take into account both intellectual and physical space in the production and consumption of works.<sup>30</sup> Graffiti writing is an example of such a creative commons because its culture is contingent on *ex ante* regulation of both physical and intellectual space in order to legitimize its form of creativity as a justifiable artistic practice. The book argues that graffiti writing's value is dependent on a multi-dimensional regulatory framework in order to enable the requisite collective determination that a given piece of writing meets community standards and thus is worthy of respect or recognition.

Such a regulatory framework is absent from the statutory and common law of copyright. While graffiti writers are outside the bounds of the law by reason of graffiti's illegality, copyright law pushes them further outside the bounds of the law by failing to address the unique creative processes graffiti writers undertake. "Indeed it is this combination of the material work and the movement to produce it that places graffiti writing *beyond copyright* insofar as copyright law can protect neither the creative process which results in the material work nor the space in which the process occurs."<sup>31</sup> Iljadica's study of graffiti creativity paints

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28. Ian Hargreaves, "Digital Opportunity: A Review of Intellectual Property and Growth" (18 May 2011), online: UK Intellectual Property Office <[webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-finalreport.pdf](http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-finalreport.pdf)>; UK Andrew Gowers, "Gowers Review of Intellectual Property" (December 2006), online: Intellectual Property Office <[webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/media/6/E/pbr06\\_gowers\\_report\\_755.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf)> at 58.
29. See e.g. William M Landes & Richard A Posner, *The Economic Structure of Intellectual Property Law* (Cambridge, Mass: Harvard University Press, 2003) at 20-21; Mark A Lemley, "Property, Intellectual Property, and Free Riding" (2005) 83:4 Tex L Rev 1031; Anne Barron, "Copyright infringement, 'free-riding' and the lifeworld" in Lionel Bently, Jennifer Davis & Jane C Ginsburg, eds, *Copyright and Piracy: An Interdisciplinary Critique* (Cambridge, UK: Cambridge University Press, 2010) 93; Dan L Burk, "Law and Economics of Intellectual Property: In Search of First Principles" (2012) 8 Ann Rev L & Soc Sci 397; Abraham Drassinower, *What's Wrong With Copying?* (Cambridge, Mass: Harvard University Press, 2015); Iljadica, *supra* note 1 at 34.
30. *Ibid* at 46.
31. *Ibid* at 54 [emphasis in the original].



an alternative and complex picture of an intellectual commons by examining a subculture comprising multifaceted relationships between creators who each contribute works, act as gatekeepers to admit or remit individuals from the subculture, and critically evaluate others' works so as to enforce a hierarchical member structure.

Iljadica's structured interviews with graffiti writers—the occasional quotes from which are insightful and entertaining—are vital in arguing for the insufficiency of the economic incentive to describe the subculture's broader goal of using graffiti as a mechanism to reclaim urban space at risk of corporatization or commercialization.<sup>32</sup> That is to say, Iljadica's study reveals that graffiti writing gives voice to the economically voiceless by enabling those without the resources to pay for commercial space the ability simultaneously to declare their presence within the city and to resist the economic exploitation of the "physical commons."<sup>33</sup>

The graffiti rules are "not merely alternatives to copyright or suggestions for how copyright law might be different," but are also a means of challenging the commodification of the city and imposing an alternative creativity on public space.<sup>34</sup> Visibility is the prime motivation for graffiti writers to create, because visibility is rewarded in the graffiti subculture with respect and recognition.<sup>35</sup> The reason for the graffiti rules, therefore, is to offer protection to the indicia of individual identities and to enable control over one's speech and reputation.<sup>36</sup> The graffiti rules, in offering the possibility of different visions of the city, constitute counter-regulation of real property and copyright. The graffiti rules represent a wholesale rejection of the traditional conception of copyright law and a rejection of any economic incentive put upon it. Graffiti writers are "inhabitants of the uncommissioned city, occupying the same space as the legislated city, embody[ing] the possibility of both another life and another mode of legality."<sup>37</sup> The existence of a graffiti subculture—unlike any other bounded commons—points to a multitude of overlapping cultural spaces commensurate with the existence of numerous publics.

Towards the end of the book, Iljadica considers the regulation of the use of graffiti creativity by non-writers. Iljadica broadens the scope of her inquiry (relating both to the graffiti rules and to copyright law) to encompass the

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32. *Ibid* at 51-52, 126-127.

33. *Ibid*.

34. *Ibid* at 55.

35. *Ibid* at 23-30.

36. *Ibid* at 28.

37. Alison Young, "Cities in the City: Street Art, Enchantment, and the Urban Commons" (2014) 26:2 *Law & Lit* 145 at 156.

reproduction, dissemination, and destruction of graffiti writing by individuals outside the subculture.<sup>38</sup> Her analysis keeps with the existing literature on alternative normative frameworks by concluding that the graffiti rules highlight some of copyright's shortcomings and suggesting particular reforms for the copyright system as a whole.<sup>39</sup> The book emphasizes, however, graffiti writers' inability to challenge the commercial exploitation of their speech by outsiders.<sup>40</sup> The suggested reforms include the development of copyright exceptions that make the public placement of works a key factor in determining the acceptability of their reproduction or modification.<sup>41</sup>

## II. INTERDISCIPLINARY ANALYSIS COULD SUPPLEMENT ILJADICA'S EXAMINATION OF HOW GRAFFITI IMPACTS THE PHYSICAL COMMONS

*Copyright Beyond Law* proceeds from the foundational question of how the rules of the graffiti subculture mirror, differ from, and contribute to a conversation about copyright reform. Iljadica's findings to that end follow logically from the clear and thorough description of the graffiti subculture provided earlier on in the book. The subject matter requirement within copyright law is mirrored by a subcultural requirement to write letters and choose appropriate public-facing spots, including subway trains and commercial buildings.<sup>42</sup> The standard of originality by which works are determined to be protectable and non-infringing is mirrored by a requirement of graffiti writers to write combinations of letters not used by other local graffiti artists and to do so in a style that does not impinge on another writer's specific method of expression.<sup>43</sup> The moral right by which the integrity of authors' works is protected within copyright law is mirrored by a rule against altering or painting over graffiti works except in certain specific instances.<sup>44</sup> And lastly, as in the law of copyright, infringement of the graffiti rules may result in sanctions against infringers.<sup>45</sup>

While the graffiti subculture has no means through which to issue monetary remedies, the subculture responds to infringement by imposing measures to limit

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38. Iljadica, *supra* note 1 at 257-86.

39. *Ibid* at 299.

40. *Ibid* at 271-72.

41. *Ibid* at 5.

42. *Ibid* at 110-14, 118-38.

43. *Ibid* at 175-94.

44. *Ibid* at 235-43.

45. *Ibid* at 247-53.

the infringers' ability to increase their public profile, thus affecting infringers' level of subcultural currency.<sup>46</sup> I use the word "currency" here not because respect or recognition is used as a mechanism of trade within the graffiti subculture. Rather the amount of respect afforded to writers impacts their baseline ability to create by affecting their ability to pick certain spots or to use certain stylistic signifiers and increasing the risk that their work will be destroyed or painted over. With greater respect comes a greater ability to write more freely and thereby to more easily increase one's public profile.

The fact that there is no formal monetary interest at play within the graffiti subculture contributes, ironically, to the fact that graffiti writing as a creative process is more clearly positioned at the nexus of artistic expression and personal brand promotion than any form of copyright subject matter. A "tag"—the letters comprising graffiti works—is in essence a writer's pseudonym. Thus, the content of a work is in itself necessarily indicative of its source. The practice of graffiti writing is effectively an exercise in displaying one's name throughout the urban environment.<sup>47</sup> The graffiti rules, in addition to protecting artistic originality, have developed as a means of ensuring that a piece of graffiti writing is traceable to its writer in order to prevent attempts by writers to pass off others' creativity as their own or to appropriate another writer's fame.<sup>48</sup> In other words, copying a graffiti work is "unlawful" because it risks damage to the reputation of the original proprietors.

Looking at graffiti writing solely through the lens of copyright law thus underplays a tendency within the graffiti subculture towards a quasi-commercial prioritization of visibility over creativity. One example of that is the incentive given to prolific tagging by the communal agreement that a large volume of highly visible tagging is worthy of respect and recognition regardless of the works' stylistic shortcomings.<sup>49</sup> Another example is the way in which the graffiti subculture performs its version of an infringement analysis. Instead of questioning the quantity or quality of appropriation—the more artistically substantive question that underlies infringement analyses within copyright law—the graffiti

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46. There is no respect afforded to writers who copy or attempt to pass off their work as the work of more famous writers, because the copying writer refuses to develop his or her own original style. In doing so, the writer risks damaging the reputation of the original writer—a practice that harms the development of graffiti culture as a whole. Dialogue or gossip can play an important part in the subculture as a means of shaming wrongdoers and reducing the amount of respect afforded to them. *Ibid* at 249.

47. *Ibid* at 225.

48. *Ibid* at 219.

49. *Ibid* at 24.

subculture ponders the likelihood that an alleged infringer's tag would be confused for the work of other writers and thus compromise their fame.<sup>50</sup> Iljadica's highly advanced analysis of the graffiti rules through the lens of copyright is compelling and informative, but an examination of the rules from the perspective of an alternative conglomerate of different intellectual property interests could complement her work by addressing some of her analogy's shortcomings.

The suggested interdisciplinary approach would lastly help to elucidate *Copyright Beyond Law's* foray into the relationship between the physical and intellectual commons by enabling deeper discussion of the impact of both graffiti writing and trademark law on the "physical public domain."<sup>51</sup> This connection is referenced within the book in a brief allusion to an existing argument that the branding and labelling of buildings with the names of corporations, commercial products, and individuals imputes social meaning to the physical commons and infuses public facilities with strong associative values that entrench social privilege.<sup>52</sup> It is in the context of the commercialization of public space that the graffiti rules may be more deeply viewed as specifically interconnected to the privatization of physical space in addition to being viewed as a method of regulating creativity (analogous to copyright law) within a bounded commons.

I have suggested that Iljadica's book could benefit from further interdisciplinary analysis in order to inquire more deeply into the relationship of intellectual property law and creative processes that impact and are impacted by the physical commons. My suggestions are meant only to supplement what is an expertly crafted and exhaustively researched treatise on an under examined creative phenomenon. *Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture* makes a strong contribution to the intellectual property scholarship by offering a highly illuminating and compulsively readable legal discussion that dares to move outside the boundaries of the law and ask what lessons we could learn from self-governed, outlaw communities compelled to forbear copyright protection. The legal academy stands to benefit greatly from engagement with this study, which provides a novel addition to the literature on the legal and political justifications of copyright law by highlighting that it is the role of the law, and not of creators, to take accommodative action in furthering culture.

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50. *Ibid* at 196.

51. Ann Bartow, "Trademarks of Privilege: Naming Rights and the Physical Public Domain" (2007) 40:3 UC Davis L Rev 919.

52. *Ibid* at 932-34.