

BANKSY'S BATTLE WITH TRADE MARK LAW:



Figure 1. 'Flower Thrower'. Image of the cancelled European Union Trademark.

THE 'FLOWER THROWER' CASE

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Figure 2. 'Flower Thrower'. Banksy. West Bank, Palestine, August, 2020. Photograph @ZaBanker via Wikimedia Commons.

BACKGROUND

At one point in time Banksy was fiercely critical of intellectual property rights openly encouraging a culture of appropriation. Even though it appears his initial disdain has faded, his turn to the law has not been smooth. Indeed, the prominent and enigmatic artist has recently lost the EU trademark registration representing his artwork 'Flower Thrower' (Figure 1) following a cancellation action brought at the European Intellectual Property Office (EUIPO).¹

The decision – released on September 14, 2020 – marks the end of a two-year and increasingly bitter fight between Banksy and Full Colour Black, a UK-based greeting card company known to sell merchandise featuring the artist's creations. The company made a filing for invalidity against the trademark registration owned by Pest Control, the official body which authenticates Banksy's art (the trademark had been filed at the EUIPO in February 2014). Full Colour Black brought two key claims: lack of distinctiveness of the brand and bad faith. It was the latter that was to be Banksy's downfall.

The trademark incorporated Banksy's iconic artwork 'Flower Thrower', created by the artist in the 1990s² and also painted on a wall in the Palestinian town of Bethlehem in 2005 (Figure 2). It may be described as one of the artist's most iconic works and has been reproduced widely on all sorts of merchandise by countless people and companies, including Full Colour Black.

The row between the two companies hit a fever pitch in the autumn of 2019 when Banksy opened a store named Gross Domestic Product in Croydon, South London. At the time, Banksy stated: 'A greetings card company is contesting the trademark I hold to my art and is attempting to take custody of my name, so they can sell their fake Banksy merchandise legally.'³

Banksy described the legal battle from his perspective as a fight for the right to his art. Yet upon examination of the evidence that the artist himself provided, he had made little (legitimate) effort to defend his trademark – certainly not in the way expected of a serious entrepreneur. As we will see, Banksy's actions were closer to those of someone seeking to circumvent the stipulations of copyright law in order to protect his artworks via trademarks. This made for murky waters in the assessment of bad faith and was duly noted by the EUIPO's Cancellation Division hearing the case.

Moreover, the artist's anti-intellectual property stance was a hot topic for discussion. On various occasions Banksy claimed that the public had a moral and legal right to reproduce any copyrighted works.⁴ While this could not be held against him as the reason for cancellation of the 'Flower Thrower' trademark, Banksy's misguided, yet at times candid statements and actions created a cumulative effect in his disfavour. The EUIPO panel found sufficient evidence for the cancellation of the mark within the assessment of bad faith and did not find it necessary to explore the claim for lack of distinctiveness of the brand.

BAD FAITH

Bad faith in trademark law is found where the right holder acts without the aim of engaging in fair competition, instead acting with the intention of undermining the interests of third parties.⁵ Banksy's actions were found to fall within such a realm of 'dishonest practices'.

Firstly, Banksy had acknowledged from at least 2007 on his webpages that he was aware of the widespread use of the 'Flower Thrower' trademark by third parties. Although he denied that this was done with his permission, he took

little action against unauthorised use, thus lacking evidence that he fought for his artworks within the territory that trademark law covers. The EUIPO panel added that in some of his own works, Banksy incorporated works made by others⁶, thus suggesting that Banksy himself might have violated other people's copyright.

The EUIPO panel also noted that Banksy had never actually marketed or sold any goods under the contested sign. In fact, on the artist's own website it was previously stated that: 'Banksy does not endorse or profit from the sale of greeting cards, mugs, t-shirts, photo canvases etc.'⁷

Massive use of the 'Flower Thrower' picture by third parties (rarely objected by Pest Control) coupled with the artist's statement that he does not truly seek to use his mark in relation to goods had a rather damning and cumulative effect on Banksy's trademark registration. Also, when Banksy opened his store Gross Domestic Product in the autumn of 2019, it opened after the cancellation proceedings were launched at the EUIPO and therefore just in time to support the artist's trademark claims. Banksy himself frequently referred to the shop as basically a defensive strategy. The artist described the opening of the shop as 'possibly the least poetic reason to ever make some art'.⁸ While the store consisted of an outer displayer by which patrons could then purchase items online, no evidence of sale invoices related to the 'Flower Thrower' was provided by Pest Control during the proceedings. Other comments made by the artist and his legal advisor did not really help, including the following statement by Banksy: 'I've been making stuff for the sole purpose of fulfilling trademark categories under EU law – not a very sexy muse.'⁹ His lawyer also confirmed this approach publicly stating that 'because he doesn't produce his own range of shoddy merchandise and the law is quite clear – if the trademark holder is not using the mark then it can be registered to someone who will'.¹⁰

Against this background, the EUIPO held that the artist acted just to fulfil the minimum requirements laid down by trademark law. The emphasis on the construction of a legal argument being the main reason for the shop's construction was a significant factor in the finding of bad faith. In other words, Banksy himself and his advisor unequivocally stated that the artist made use of the picture to circumvent trademark law – and that he sold products bearing the 'Flower Thrower' not out of genuine use, but as result of a calculated legal strategy, namely only to show that he had an intention of using the picture.¹¹

TRADEMARKS AND COPYRIGHT

The case raises issues across the spectrum of intellectual property. Can artworks be monopolised by registering them as trademarks? Copyright and trademarks are different intellectual property rights. While copyright aims to protect artistic works such as paintings, trademarks protect, *inter alia*, logos, and signs that help consumers to make informed purchase choices when it comes to buying products.

Banksy – who has clearly expressed his dislike of copyright in the past – has tried to rely here on trademark law to protect his artworks. Banksy's aversion to copyright can be explained by his need to preserve anonymity. A copyright suit would require Pest Control to show that it has acquired the copyright from the artist. But this would reveal Banksy's real name, which the famously anonymous artist wants to avoid, as it would remove his aura of mystery and affect the commercial value of his art. The point that the artist has merely acted to register the 'Flower Thrower'

brand to avoid the stipulations and procedures of copyright law had been highlighted by Full Colour Black in the EUIPO proceedings.¹²

Also, copyright is limited in time, while trademarks can be continuously renewed. Protecting an artwork by trademarks therefore potentially gives the artist a perpetual monopoly over it. This may offend a basic copyright law principle, namely that after a specific period of time everyone should be able to use, and build upon, artworks that have fallen into the public domain. Of course, there are artworks which are registered and enforced as trademarks, such as Walt Disney's iconic characters, and the fact that they are already protected by copyright does not preclude them from also being registered as trademarks: the EUIPO accepted this. In most cases a work of art registered as a trademark is used in a genuine way, with merchandise regularly produced and sold by the right holder. But as soon as trademarks are aimed just at getting around the law, there is reason for concern. More so in cases like Banksy's: namely, when an artist does not want to claim copyright but at the same time seeks potentially perpetual trademark rights over his art.

ILLEGAL GRAFFITI

The EUIPO also acknowledged that there is an argument that illegal graffiti may not be protected by copyright because it is produced through the commission of a criminal act; and that as graffiti is normally placed in public places for all to view and photograph, no copyright might be claimed.

These statements are not accurate, though. In several countries the process of creating an artwork, whether legal or illegal, is not conclusive when it comes to determining whether copyright comes into existence.¹³ For example, if we steal a pencil and create a wonderful drawing, we may face the legal consequences of such stealing, but why should we be denied copyright and be forced to tolerate someone else cashing in on our work? It would be unfair. The same could be said of illegal street art. Also, the fact that graffiti is placed in public locations does not assume that artists waive or are deprived of the rights copyright law offers them. That is simply mistaken.

After all, the fact that illegally created artworks should be protected by copyright was also confirmed in *Creative Foundation v Dreamland*¹⁴, the first UK legal dispute to expressly consider ownership of walls on which artworks are placed. In that case, a tenant (a company called Dreamland) removed the Banksy piece *Art Buff* from a wall of a building in the English town of Folkestone and the landlord wanted it back. The judge, Arnold J., refused to accept the company's argument that it had acquired property of the piece of work as it was discharging its repairing obligation. He instead held that when the section of the wall was removed it became a chattel, which belonged to the landlord.¹⁵

OUTLOOK FOR THE FUTURE

Banksy (via Pest Control) may now choose to appeal the Cancellation Division's decision of September 2020. Thus, there is the chance for the EUIPO to deal with and consider these issues again.

Remarkably, despite the lengthy discussion surrounding the issue of bad faith in the 'Flower Thrower' case, Pest Control successfully obtained the registration, as EU trademark, of an almost identical sign earlier this year.¹⁶ Importantly, this occurred despite opposition from Full Colour Black which had pointed out that the artist's action to register the mark was undermining the (at the time) pending invalidity proceedings with regard to the other (almost identical) 'Flower Thrower' picture.¹⁷

Also, further complications may loom for Pest Control as five additional EU trademarks incorporating Banksy's artworks (depicted in Figures 3, 4, 5, 6, 7) are now at risk of being cancelled on similar grounds.

Each of these five marks were filed by Pest Control in 2018 and registered in June 2019. If Banksy had envisioned that the registration of these trademarks would be unattackable, he was woefully mistaken. Full Colour Black has indeed started proceedings before the EUIPO to invalidate all said registrations¹⁸ – by relying on the same arguments as the ones put forward in the 'Flower Thrower' cancellation proceedings, i.e., lack of distinctiveness and bad faith. Time will tell how these proceedings will end up.

CONCLUSION

All in all, apart from the point on illegal graffiti, the decision by the EUIPO is well-reasoned and fair. If Banksy wants to own, keep, and enforce registered trademarks, he needs to act in good faith, and start using them seriously by regularly selling merchandise, as all entrepreneurs do. The artist may also run the risk of losing other trademarks incorporating his art, in Europe and beyond, on the same grounds.

What certainly did not help Banksy in this dispute is his old statement that 'copyright is for losers'.¹⁹ This has now come back to bite him. His negative stance about an important intellectual property right clearly jeopardises his position in proceedings where proprietary rights are debated, as the EU Intellectual Property Office suggested in the 'Flower Thrower' decision. Certainly, a valid point could be made that an anti-establishment viewpoint does not prevent artists from relying on 'establishment' legal tools (such as those offered by intellectual property laws) to protect the very rights they criticise. To allow otherwise would unduly restrict freedom of expression. As explained by the EUIPO, a trademark owner cannot lose the right to a mark because he has once said that copyright is for losers. Ultimately, you can still be anti-establishment and take legal action to protect your intellectual property. But what you cannot do is to behave as Banksy did when he created his shop to simply get around the law and try to keep perpetual monopolies over his art.



Figure 3. 'Laugh Now'. Image of the European Union Trademark pending cancellation proceedings.



Figure 6. 'Bomb Hugger'. Image of the European Union Trademark pending cancellation proceedings.



Figure 4. 'Nola'. Image of the European Union Trademark pending cancellation proceedings.



Figure 5. 'Radar Rat'. Image of the European Union Trademark pending cancellation proceedings.



Figure 7. 'Love Rat'. Image of the European Union Trademark pending cancellation proceedings.

- 1 See Bonadio (2020).
- 2 On the history of the 'Flower Thrower' artwork, see Blanché (2020).
- 3 Statement made by Banksy in 2019, see Bakare (2019).
- 4 See page 3 of the decision in which the applicant's argument for invalidity is summarised and page 11 of the decision in which the Cancellation Division quotes the artist noting: 'I still encourage anyone to copy, borrow, steal and amend my art'.
- 5 See page 8 of the decision which outlines the requirements for 'bad faith' under EU trademark law.
- 6 See page 9 of the decision where the EUIPO Cancellation Division notes Banksy's statements against copyright.
- 7 See page 10 of the decision where it is stated that upon the examination of the submitted evidence Banksy had never actually marketed or sold goods under the contested sign.
- 8 See page 10 of the decision which comments on the applicant's evidence: publications in which Banksy is quoted as saying the sole reason for creating the GDP shop was to fulfil trademark categories under EU law.
- 9 See page 10 of the decision where the EUIPO Cancellation Division quotes an article submitted as evidence by the applicant in which Banksy states he started selling merchandise as a solution to the trademark dispute.
- 10 See Lance (2019).
- 11 See page 11 of the decision where the EUIPO Cancellation Division refers to a Mr. S. (legal advisor to Banksy) who made the quoted statement.
- 12 See page 3 of the decision.
- 13 Yet, in some jurisdictions, even where copyright subsists in a work, there may be restrictions as to the possibility to enforce it in court. See for example Sec. 171(3) of the UK Copyright Act.
- 14 *Creative Foundation v Dreamland & Others* [2015] EMCH 2556 (Ch), September 11, 2015. For comments on this case, see Wickenden (2016: 119).
- 15 *Art Buff* had been painted by Banksy in September 2014 during the Folkestone Triennial, an art event organised by the Creative Foundation. The artwork quickly became popular and attracted a lot of visitors. It was subsequently removed by the tenant (the company Dreamland). The Creative Foundation (which in the meantime had acquired the rights to the piece from the landlord) was unhappy about this, successfully sued the tenant, and got back the artwork.
- 16 See the EUTM filing information at the EUIPO website (<https://euipo.europa.eu/eSearch/#details/trademarks/018118853>), showing that the trademark has been registered and that no cancellation proceedings are currently in progress.
- 17 See page 4 of the decision.
- 18 See EUTM file information for the artworks 'Love Rat' <https://euipo.europa.eu/eSearch/#details/trademarks/017981624>, 'Laugh Now' <https://euipo.europa.eu/eSearch/#details/trademarks/017981629>, 'Nola' <https://euipo.europa.eu/eSearch/#details/trademarks/017981633>, 'Radar Rat' <https://euipo.europa.eu/eSearch/#details/trademarks/017981636>, and 'Bomb Hugger' <https://euipo.europa.eu/eSearch/#details/trademarks/017981637>.
- 19 See for example the second page of his 2005 book *Wall and Piece*.

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