

Anti-Racist Graffiti and Public Art Statues



Figure 1: A statue of Robert Towns located in Townsville's city centre with red paint on its hands. Sofie Wainwright © 2020 ABC. Reproduced by permission of the Australian Broadcasting Corporation – Library Sales.

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Legal Regulation of Anti-Racist Graffiti on Public Statues

This briefing paper considers the legal status and nature of anti-racist graffiti in Australia, as practised on public statues within the copyright term.

When painted on a statue that celebrates a coloniser or slaver or other oppressive historical moments, anti-racist graffiti creates a counter-monument that stands in opposition to the original work and challenges its memory work. Considering the legal regulation of anti-racist graffiti provides an opportunity to examine the racial implications of law, and how it can shape or constrain discourse around previous and continuing colonial injustice.

Criminal law and intellectual property law perspectives are discussed in this paper. Graffiti has long been associated with criminal acts of “vandalism”. The turn to intellectual property law is a unique intervention. At the time of writing, there have been no cases that directly deal with anti-racist graffiti as an intellectual property issue. Nevertheless, intellectual property law presents an important lens through which to investigate the legality of anti-racist graffiti as a protest activity carried out in public spaces, due to the private rights held by artists and copyright owners. Given the contemporary prominence of anti-racist graffiti as a de-colonial strategy, it is important to consider the broad range of public and private interests and concerns implicated by this activity and the signals that are sent by how law prioritises them.

Material in this briefing paper draws upon Dr Hadley’s research with intellectual property academic Dr Sarah Hook (Senior Lecturer, School of Law, Western Sydney University) and art history and transnational history scholar Mr Nikolas Orr (PhD Candidate, Centre for Studies of Violence, University of Newcastle). For further reading see Marie Hadley, Sarah Hook, Nikolas Orr, ‘Ideological vandalism of public art statues: copyright, the moral right of integrity and racial justice’ (2022) 9(2) *Griffith Journal of Law and Human Dignity* pp 1-34 <<https://griffithlawjournal.org/index.php/gjlhd/article/view/1226>>. This briefing paper also forms part of a broader project on art, intellectual property law, and justice. For more information about the project see: <<https://www.newcastle.edu.au/research/centre/law-and-social-justice/strengths-and-expertise/research-projects>>

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Table of Contents

Summary 3

Introduction 4

Anti- Racist Graffiti and the Criminal Law..... 5

Copyright & Public Art Regulation 6

Moral Rights & Engagement with Public Art 7

Conclusion 8

References.....8

1. Summary

June 2020 was a watershed moment for public memory in nations with a history of colonialism or slavery. Several statues of historical figures were graffitied, toppled, beheaded and set on fire in the wake of Black Lives Matter protests, prompted by the killing of George Floyd. This Briefing Paper discusses two areas of law that regulate the politically motivated graffiti of such works: criminal law and intellectual property law, namely copyright law and moral rights law. The aim is to provide an overview of how these laws approach anti-racist graffiti and value or devalue its contribution to discourse around racial injustice.

It is put forward that:

- There is a public interest in viewing, confronting, and understanding anti-racist graffiti of public statues
- Anti-racist graffiti raises intellectual property law issues as well as a criminal law issues
- Through its symbolic as well as direct effects, law can de-prioritise the discourse around racial injustice that anti-racist graffiti contributes to
- Law reform of the moral rights regime is desirable to support the democratisation of public spaces occupied by contested statues

2. Introduction

The purpose of this Briefing Paper is to consider the legal status of painting anti-racist graffiti on public art statues linked to oppression in Australia. The term “anti-racist graffiti” is used to capture other forms of politically-motivated graffiti such as anti-colonial and anti-slavery graffiti.

Both the criminal law and intellectual property law regulate engagements with publicly-placed artworks.

Thinking critically about the way in which different laws receive anti-racist graffiti and regulate public space, prompts consideration of how law can – directly, indirectly, and symbolically – uphold the legacy of contested statues.

In Australia, and other nations with a history of colonialism or slavery, there have been increasingly vocal calls for the removal of statues of historical figures perceived to have links to historical and continuing injustice. Some activists have taken matters literally into their own hands and defaced these statues. In Australia, defacement has primarily involved the painting on or over statues of public figures with anti-racist or anti-colonial slogans and/or symbolic interventions suggestive of violence or oppression. Some of these defaced statues, such as the statue of Robert Towns in Townsville created by sculptor Jane Hawkins in 2004 (see fig 1), the statue of Captain James Stirling in Perth designed by Clement P Somers in 1979, and the bronze busts of former Prime Ministers Tony Abbott and John Howard in Ballarat created by sculptor Linda Klarfield and cartoonist and sculptor Peter Nicholson, respectively, are within the copyright term. All were defaced with anti-racist graffiti during the Black Lives Matter (BLM) protests of 2020 following the killing of George Floyd by Minneapolis police.

The defacement of contested public statues of historical figures casts a spotlight on the place of these monuments in contemporary society. Debate on whether statues like the

Confederate statues in the United States, Cecil Rhodes statues in South Africa and the statue of Edward Colston in Bristol in the United Kingdom should be removed (Frowe, 2019; Timmerman, 2020), left in situ, recontextualised, or subject to “creative destruction” (Adler, 2009: p 9) through the application of graffiti (Bell, 2021; Lim, 2020), continues. This paper aims to contribute to this debate by considering how law – both directly and indirectly through its prioritisation of different interests – regulates the anti-racist graffiti of public artworks and its contribution to discourse on racial injustice.

Anti-racist graffiti is a form of protest activity. Known as *ideological vandalism* to sociologist Stanley Cohen (1973), this activity uses ‘property destruction as a conscious tactic,’ to ‘draw attention to specific grievance to gain publicity for a general cause or challenge symbolically’ (Cohen 1973: p 39). When practised on statues of historical figures, anti-racist graffiti is powerful because it rewrites public memory. It effectively creates a ‘counter-monument’ by modifying the original statue’s meaning, for example, as a celebration of a conquest, battle, or colonial project (Hadley, Hook, Orr, 2022: p 6–7). The counter-monument contributes to discourse around racial justice not only through its critique of the past but also through its democratisation of public spaces. In their current form, monuments do racist work (Lim, 2020: pp 185–216). By comparison, the anti-racist counter-monument amplifies ‘truth-telling’ about the injustices of the past and the present, showing and allowing more nuanced narratives to define a city and its public spaces.

When practised on a publicly placed artwork, graffiti is regulated by a number of intersecting public and private laws. This briefing paper will explore two of these laws: criminal law and intellectual property law. Criminal law perspectives on graffiti will firstly be outlined, before an examination of statues as copyright works, and the protection of their integrity through the moral rights regime. It is identified that:

- The criminal law frame presents a narrow view of anti-racist graffiti as criminal damage
- Painting anti-racist graffiti on a statue within the copyright duration is not a copyright infringing act; but
- Anti-racist graffiti infringes the statue author's moral right of integrity.

3. Anti-Racist Graffiti and The Criminal Law

Under the criminal law, graffiti is approached as “vandalism” that causes criminal damage to property owned by a third party. As criminal damage, the act is framed as a violation against the community and a signal of disorder and disrespect for the rule of law. This is a narrow reading of anti-racist graffiti and disregards the significance of the counter-monument that it produces when painted on contested statues.

As an unauthorised painting on an object or surface, graffiti is a form of criminal damage to property. Around Australia, graffiti offences can result in punishments including fines and/or imprisonment. For example, in Queensland, wilful damage to property in a public place caused by the ‘spraying, writing, drawing, marking or otherwise applying paint or another marking substance’ carries a maximum penalty of seven years’ imprisonment, and the court can order compensation to be paid to any person (*Criminal Code Act 1899* (Qld) ch 469, s 9(1)(2)). In New South Wales, ‘marking premises or property’ is an offence under the *Graffiti Control Act 2008* (NSW) ss 4(1), 4(2) carries 20 penalty units and 12 months imprisonment for aggravated offences. In Western Australia, ‘Damaging property by graffiti’ carries a \$24,000 fine and 2 years imprisonment under the *Graffiti Vandalism Act 2016* (WA) s 5(1). In South Australia, the graffiti of public memorials is an aggravated offence, resulting in a \$7,500 fine or 18 months imprisonment per the *Graffiti Control Act 2001* s 9(1a). These penalties are 1.5x the maximum penalty of the regular graffiti

offence (s 9(1)). In all Australian states and territories, graffiti is a public order offence that attracts criminal penalties.

In Australia in 2020, a handful of activists were prosecuted for painting anti-racist graffiti on public statues as part of BLM protests. Peter John Wright, who painted the hands of the statue of Robert Towns red and wrote ‘slave trader’ on an accompanying plaque, was convicted and fined \$500. He also agreed to pay \$404.45 to Townsville City Council as a compensation for the costs of cleaning the statute (Chomicki, 2020). Similarly, Xiaoran Shi, who tagged a statue of James Cook in Sydney with slogans such as ‘no pride in genocide’ and ‘sovereignty never ceded’, pled guilty to possessing graffiti implements and wilfully defacing the statute. She was fined \$1760. In neither case was the nature or purpose of the graffiti a mitigating factor. Indeed, in Shi’s case, the magistrate’s sentencing comments suggest that the primary purpose of her fine was deterrence to other would-be offenders: ‘there is no place –even in a liberal democracy such as ours – for people who are prepared to cross the line from lawful conduct to illegal conduct’ (Magistrate Michael Allen quoted in Duncan, 2020).

The alignment of graffiti with criminal damage presents a very narrow view of the nature of graffiti. Even if graffiti is destructive and the state has a legitimate interest in its regulation, graffiti also has generative qualities and organising potential. Moreover, the value of the counter-monument’s contribution to public discourse on the harms caused by statues of slavers, colonisers and other public figures is, outside of any effect on a jury (Barrett, 2022), ignored in the criminal law frame. Whether this situation is reiterated in the regulation of the statue as an intellectual property concern will now be considered.

4. Copyright and Public Art Regulation

As a sculpture, statues fall within the definition of ‘artistic works’ that are protected subject matter under the *Copyright Act*. Where the threshold criteria for copyright subsistence is satisfied, certain exclusive rights will be held by the statue’s copyright owner.

Anti-racist graffiti does not infringe any of these rights. It is irrelevant that the public art exceptions in ss 65-68 of the Act that prioritise the right to enjoy the physical commons by permitting certain dealings with public, do not permit direct interventions with three-dimensional works of art. Copyright is neutral in its treatment of anti-racist graffiti and the counter-monument.

When a statue meets the copyright subsistence criteria — that is, it is “original” in the sense of not being copied, created by an author with sufficient connection to Australia (i.e. an Australian resident or citizen), and it has been fixed in a material form, it will subsist in copyright. As a form of sculpture, statues fall squarely within the definition of ‘artistic work’ under s 10(1) of the *Copyright Act*. Copyright works enjoy protection for 70 years after the author’s death (s 33(2)). The potential existence of copyright in public statues raises the question of whether applying anti-racist graffiti to an in-copyright work violates the exclusive rights of the copyright owner.

In Australia, it is only an infringement of copyright to do or authorise the doing of any of the exclusive rights comprised in the owner’s copyright (*Copyright Act* s 36). This means that painting on or over a public statue will not be copyright-infringing behaviour, unless one of the rights specified in s 31(1)(b) of the *Copyright Act* are also infringed. Section 31(1)(b) provides copyright owners of artistic works with the exclusive rights to reproduce, publish and communicate a copyright work to the public. There is an adaptation right in the *Copyright Act* but it is only applied in the case of

literary, dramatic or musical work, not an artistic one (*Copyright Act* s 31 (1)).

Where copyright infringement is found, the public art exceptions in ss 65-68 should be considered, as they excuse violations of the copyright owner’s exclusive rights. The public art exceptions seek to ensure freedom in reproducing art in the physical commons by permitting the making of ‘two dimensional copies of three dimensional works of art that are situated in a public place.’ (Copyright Law Review Committee, 1959 p 43). *Copyright Act* s 65(2) provides that ‘the copyright in a work to which this section applies that is situated, otherwise than temporarily, in a public place, or in premises open to the public, is not infringed by the making of a painting, drawing, engraving or photograph of the work or by the inclusion of the work in cinematograph film in a television broadcast.’

The public art exceptions appear to value passive public engagements with artworks in public spaces, but not transformative engagements like the production of counter-monuments through anti-racist graffiti. Nevertheless, this is not definitive of the copyright regulatory position because *none of the copyright owner’s exclusive rights provide for the right to modify or alter the material form of the three-dimensional artistic work*. The public art exceptions are not relevant where there has been no copyright infringement.

The transformation of a statue into a counter-monument through anti-racist graffiti does not amount to the copying, first publication, or the communication of a work online. A statue may be encountered and enhanced by being given a new purpose through a direct intervention but this does not, of itself, create an independent infringing work. The fact that the copyright regime protects intangible property and not the physical object itself, allows for direct interventions with statues, leaving space for the counter-monumental to flourish.

Nevertheless, while this suggests that copyright law effects a different prioritisation of interests in anti-racist graffiti to the

criminal law, the subsistence of copyright in a public statue simultaneously enlivens the moral rights regime, which is problematic as will now be discussed.

5. Moral Rights & Engagements with Art

When copyright subsists in a statue in Australia, the moral rights regime is enlivened. Moral rights provide for creators the right of attribution, the right against false attribution, and the right of integrity, with respect to certain works, including artistic works.

The author's right of integrity is problematic for the counter-monument. Irrespective of any political content, graffiti is a form of 'derogatory treatment' that infringes the author's right of integrity. The message of anti-racism inherent in the graffiti is also irrelevant to the reasonable use defence.

While copyright subsists in an artwork, the moral rights regime will be enlivened per s 195AZE of the *Copyright Act*. Moral rights in respect of the work, including the right of integrity, will continue in force and be held by the author (*Copyright Act* s 195AM(2)). Underpinning the doctrine of moral rights, and especially the right of integrity, is the assumption that an author and their work have an integral bond that is to be protected. This close relationship between the artist and their work, encapsulates the Romantic theory of authorship which privileges the personal bond existing between artist and work (Aide 1990: p 211). Under this theory, an artist's work is positioned as an extension of their personality.

The right of integrity is the most relevant of the artist's moral rights to the anti-racist graffiti of public statues. The right of integrity protects against derogatory treatments that harm the reputation and honour of the particular artist. Derogatory treatment means the doing of 'anything' in relationship to the work, no matter how trifling. Graffiti is a derogatory treatment as it 'does

something' to the work. It physically affects the integrity of the statue's appearance and changes its meaning through the production of the counter-monument.

To sustain the finding of moral rights infringement, the graffiti must also be considered prejudicial to a statue artist's honour or reputation. This does not require that the activist's actions caused actual harm, only the *capacity* for harm. As cases such as *Boomerang Investments Pty Ltd v Padgett (Liability)* (2020) and *Perez & Ors v Fernandez* (2012) suggest, 'prejudicial to the author's honour' and 'reputation' are distinct concepts. This means that even if statue vandalism does not hurt the reputation of the sculptor as an artist, their injured feelings alone can satisfy the test for infringement (Hadley, Hook, Orr: p 22)

The relevance of the self-perception of an author in the work and not simply their reputational standing in the eyes of others, means that the author has substantial control over direct physical interventions in the work. This privileges the author's private interests and concerns in the work over the public interest in viewing, confronting, and understanding the counter-monument.

This hierarchisation of interests is exacerbated by the operation of the one defence to moral rights infringement that exists in Australia – reasonable use (*Copyright Act* s 195AS). When considering whether a moral rights infringement constitutes reasonable use, the court will focus on the nature, purpose, manner, and context in which the work is used by the infringer as well as any industry practice or any voluntary code of practice (s 195AS(2)). There is no specific mention of free speech, political expression, or public comment.

While the nature and context of a work appears broad enough to capture perspectives of a statue as oppressive, these considerations, like the other factors in s 195AS(2), are in practice narrowly framed. The assessment of reasonableness occurs on the basis of private interests only, relevant to the artist's experience (Hadley, Hook, Orr, 2022: p 23). This focus on private

interests ‘ignores the rhythm of protest, the performance of the spectator’ (Gibson, 2020: 279) and the meaning and significance of anti-racist graffiti and the counter-monument it produces. It also dispels the opportunity for a diverse public to integrate messages of justice and other accounts of truth in public spaces. In turn, this erodes access to and enjoyment of public spaces (Gibson, 2020: p 279).

There can be public value in modifying, defacing and even destroying unique works of art. Reform options, such as broadening the factors relevant to the reasonable use assessment or investigating whether the moral rights regime unduly burdens the implied freedom of political communication, should be considered (Hadley, Hook, Orr, 2022: p 25). The state may have a legitimate interest in public order through criminal law regulation, but the underlying private rights in public statues affect how individuals navigate and experience public spaces and deserve closer scrutiny.

6. Conclusion

In June 2020, a spate of statue vandalism occurred around the world during the BLM protests: powerful, visible acts of resistance to racial injustice that disrupted art spaces and challenged the narratives that the statues authorise and embody. In Australia, as in other settler colonies, the defacement of statues involved the application of anti-racist graffiti as part of grassroots decolonial strategies. Some protestors were ultimately prosecuted for criminal damage.

This paper examined the legal status of painting anti-racist graffiti on public statues. What signals does law send around protest activity that challenges the legacies of previous and continuing racial injustice?

It was identified that the criminal law interprets graffiti narrowly as criminal damage, rendering its generative qualities, along with the activist’s intentions, irrelevant. Moreover, while the copyright regime does not render graffiti an infringing act, the moral rights regime that copyright enlivens, is

problematic. The moral right of integrity in combination with the reasonable use defence, privileges the relationship between the author and their work over the work performed by the counter-monument. It was argued that reform pathways should be investigated. Serious attention should be paid to the transformative and subversive nature of the counter-monument when determining moral rights infringement.

There is a public interest in viewing, confronting and understanding why activists graffiti public statues as part of their anti-racist protests. Copyright privatises public space, enabling moral rights to constrain agonistic encounters in public art. Given the oppressive memory-work of many publicly placed statues of historical figures, it is timely to query whose interests are prioritised in the formal legal frame.

References

A Articles/Books/Reports

Aide, Christopher, ‘A More Comprehensive Soul: Romantic Conceptions of Authorship and the Common Law Doctrine of Moral Right’ (1990) 48(2) *University of Toronto Faculty of Law Review* 211

Adler, Amy, ‘Against Moral Rights’ (2009) 97(263) *California Law Review* 263

Bell, Macalester, ‘Against Simple Removal: A Defence of Defacement as a Response to Racist Monuments’ (2021) *Journal of Applied Philosophy* 1
<<https://doi.org/10.1111/japp.12525>>

Cohen, Stanley, ‘Property Destruction: Motives and Meanings’ in Colin Ward (ed), *Vandalism* (Architectural Press, 1973) 23

Copyright Law Review Committee, *Report to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (Report, Attorney General’s Department, 1959)

Frowe, Helen, 'The Duty to Remove Statues of Wrongdoers' (2019) 7(3) *Journal of Practical Ethics* 1

Gibson, Johanna No, 'No More' (2020) 10 *Queen Mary Journal of Intellectual Property* 271

Gibson, Johanna, 'No More' (2020) 10(3) *Queen Mary Journal of Intellectual Property* 271

Hadley, Marie, Hook, Sarah and Nikolas Orr 'Ideological Vandalism of Public Art Statues: Copyright, the Moral Right of Integrity and Racial Justice' (2022) 9(2) *Griffith Journal of Law and Human Dignity* 1

Lim, Chong-Ming 'Vandalizing Tainted Commemorations' (2020) 48(2) *Philosophy & Public Affairs* 185

Timmerman, Travis, 'A Case for Removing Confederate Monuments' in Bob Fischer (ed) *Ethics, Left and Right: The Moral Issues that Divide Us* (Oxford University Press, 2020) 513

B Cases

Boomerang Investments Pty Ltd v Padgett (Liability) [2020] FCA 535

Perez & Ors v Fernandez [2012] FMCA 2

C Legislation

Copyright Act 1968 (Cth)

Criminal Code Act 1899 (Qld)

Graffiti Control Act 2008 (NSW)

Graffiti Control Act 2001

Graffiti Vandalism Act 2016 (WA)

E Other

Barrett, Steven, 'The Colston Verdict is the Triumph of Values, not Law', *Spectator* (online, 6 January 2022) <<https://www.spectator.com.au/2022/01/the-colston-verdict-is-the-triumph-of-values-not-law/>>

Chomicki, Chloe, 'Townsville Man Fined for Vandalising Statue of Colonist Robert Towns by Painting "Blood on his Hands"', *ABC News* (online, 18 September 2020) <<https://www.abc.net.au/news/2020-09-18/robert-towns-statue-townsville-vandal-fined/12677876>>

Further reading

Habib, Sadia Chloe Peacock, Ruth Ramsden-Karelse and Meghan Tinsely, 'The Changing Shape of Cultural Activism: Legislating Statues in the Context of the Black Lives Matter Movement' (2021) *Runnymede Intelligence for a Multi-ethnic Britain* 1

Rees, Sebastian, 'Statue of Robert Towns Australia' (2020) *A Contested Histories Occasional Paper* 1

Scarborough, Elizabeth, 'Burying the Dead Monuments' *Aesthetics for Birds* (Blog Post, 18 June 2020) <<https://aestheticsforbirds.com/2020/06/18/burying-the-dead-monuments/>>

Vats, Anjali and Deidre Keller, 'Critical Race Intellectual Property' (2018) *Cardozo Arts and Entertainment Law Journal* 735