

Cautionary Tale: Commercializing 'Street Cred'

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Over the past year, I've carefully followed the increase in litigation brought by artists against retailers — clothing brands, automotive brands, and food and beverage chains — for the alleged copying of their distinctive artwork in fashion designs and marketing campaigns. So-called "street artists" — many of whom started out illegally "tagging" subway cars, bridges and overpasses but have since acquired a level of legitimacy — are largely responsible for this recent trend.

A growing list of retailers have found themselves ensnared in disputes with street artists. The list includes American Eagle Outfitters, Coach, Fiat, General Motors, H&M, Epic Records, McDonald's, MercedesBenz, Moschino, Roberto Cavali and Starbucks.

More often than not, the artists assert claims of copyright infringement, either because their works allegedly were incorporated into the design of apparel or other merchandise, or because photographs of their publicly viewable works were included in advertising materials.

One notable case involves Christophe Roberts, an established artist who also possesses a great deal of street credibility. In March, he filed suit against Puma North America claiming Puma infringed on his registered trademark.

Before an undisclosed settlement, Roberts claimed Puma used his distinctive "Roar" mark "in large national ad campaigns targeting its products to National Basketball League consumers." *Roberts v. Puma North America, Inc.*, Case No. 21-cv-2559 (S.D.N.Y. Filed March 25, 2021).

The Puma case is distinctive for two reasons. First, Roberts is not merely a tagger known only for street art. Rather, he is widely recognized as a "multidisciplinary" artist who works in sculpture, graphic design and painting. He has received commissions from a number of high-profile clients, and his works have been exhibited at numerous venues and events, including Lyons Wier Gallery in New York, NBA Allstar Week in Chicago, NBA Art Week in Vancouver, Widen+Kennedy in Portland, New

Gallery of Modern Art in Charlotte, Long View Gallery in Washington, DC, Mocada Museum in Brooklyn, and Royal Ontario Museum in Toronto.

Roberts is particularly well-known for a series of sculptures he created using recycled Nike shoeboxes. He is featured on Nike's website and at the retailer's flagship store in New York City, as well as at Staples Center in Los Angeles. Because of this, Roberts is also renowned among "sneakerheads," or individuals who collect and trade sneakers as a hobby and who, typically, are knowledgeable about the history of athletic shoes. (For more information, visit https://en.wikipedia.org/wiki/Sneaker_collecting.)

Second, the Puma case is distinctive because Roberts did not assert a claim for copyright infringement of his work. Instead, he sued for trademark infringement.

Roberts maintained he uses his "Roar" mark as his "brand image" and "calling card." His mark consists of a hand-drawn outline of a set of jagged teeth and is registered with the United States Patent and Trademark Office. Roberts alleged that he uses this mark widely, not only in connection with his artwork and art installations but also on social media and in connection with the sale of branded t-shirts, jackets, hats, posters and pins.

According to Roberts, beginning on or around June 2018, Puma started publicly using the Roar mark on merchandise and in the marketing and promotion of Puma merchandise. Specifically, Puma was alleged to have wrongfully appropriated Roberts' "Roar" mark by extensively incorporating a similar calligraphic ink outline and contoured depiction of teeth in various lines of its apparel and other goods.

Roberts sought, among other relief, a permanent injunction prohibiting Puma's use of the "Roar" mark, a court order that all of Puma's merchandise, signage, advertising, labels and packaging that bear the "Roar" mark be destroyed and unspecified damages, including the disgorgement by Puma of any profits attributable to its use of the "Roar" mark.

In April, Roberts filed a motion for a temporary restraining order and preliminary injunction to prohibit Puma's continued use of its allegedly infringing design on apparel and in marketing and advertising during the pendency of the litigation. Puma opposed the motion, arguing, among other things, that it developed its teeth designs as part of "a continued focus on feline imagery, which has become closely associated with the brand known by its world-famous leaping cat logo." According to Puma, the "designers involved in this project did not know Roberts, did not know of his art, and did not copy his work, but instead developed their own different and unique take on feline teeth."

Following arguments, the court on May 12 denied Roberts' request for a temporary restraining order and a preliminary injunction. It found that Roberts failed to demonstrate a likelihood of succeeding on the merits of his claims because Puma's use of its own teeth designs was unlikely to confuse consumers into believing that Puma's designs were produced by or affiliated with Roberts.

For all intents and purposes, the denial of a TRO and preliminary injunction took all of the air out of Roberts' lawsuit. Puma filed an answer and a counterclaim to Roberts' complaint, but shortly thereafter, the parties negotiated a confidential settlement agreement and stipulated to the dismissal of Roberts' action.

Without knowing the terms of settlement, it is difficult to assess how positive the outcome was for Puma. Nevertheless, the lawsuit is a reminder to all businesses that seek to generate "street cred" by incorporating contemporary imagery (such as graffiti-like elements) into their fashions and advertising campaigns that they should proceed with caution and have experienced counsel assess the legal risks before proceeding.

Also see:

["Gambling With Graffiti: Using Street Art on Goods in Advertising Comes With Significant Risks," Kattison Avenue, Summer 2020](#)

["The North Face's 'FUTURELIGHT' Apparel Line is Alleged to Infringe Upon Graffiti Artist's Name and Distinctive 'Atom Design,'" Kattison Avenue, Spring 2021](#)

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