

Life in The Fast Lane: How Urban Car Ads Depicting 'Street Art' Can Backfire

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Vehicle manufactures and their ad agencies really love to show off their driving machines in action. Television commercials depict sturdy, reliable trucks hauling tons of cargo; four-wheel drive SUVs navigating perilous terrain in extreme weather conditions; and sleek sedans cruising through cityscapes of gleaming skyscrapers and funky urban streets.

It is on the funky urban streets where car manufacturers can sometimes steer in the wrong direction. Their commercials often feature street scenes that may include recognizable landmarks, historic buildings, public art installations like sculptures and wall murals, and even distinctive graffiti. Carmakers aren't the only retailers entranced by "street art." Makers of athletic shoes and apparel like to incorporate graffiti-like designs into their fashions and ads, as well. Filming other people's art, even when in public view, can result in copyright claims, litigation and attorneys' fees, not to mention potential damages. This article offers a brief roadmap for avoiding such claims.

Over the last decade, at least four automobile manufacturers have found themselves embroiled in copyright litigation as a result of having incorporated public art into their advertisements. (A word of caution to other retailers: American Eagle Outfitters, Coach, H&M, Marriott International, McDonald's, Moschino, North Face and Roberto Cavali, among others, also have found themselves navigating lawsuits over the alleged appropriation of street art.)

In 2011, Fiat released a television commercial featuring Jennifer Lopez, seemingly driving through her old Bronx neighborhood, where she grew up. "Here, this is my world," she says in voice over, as stereotypical Bronx scenes pass by. One of those scenes included an intersection splashed with murals created by the group that calls itself "TATS Cru," which then asserted a claim of copyright infringement. Soon after the car company became aware of the issue, the claim was quickly settled

out of court. (Incidentally, the commercial was also controversial for reasons unrelated to the infringed-upon mural: JLo wasn't actually driving the car around her old neighborhood; rather, it was driven by a double, and JLo did the voice over from Los Angeles.)

In 2018, General Motors launched an advertising campaign for its Cadillac line. Labeled "The Art of the Drive," the campaign featured images of Cadillac vehicles with scenes from Detroit in the background. One of those images included a large mural by a Swiss graffiti artist professionally known as "Smash 137," who had been commissioned by a Detroit art gallery to create an outdoor mural on the outdoor elevator shed of a 10-story parking garage. He sued G.M. for copyright infringement.

The company argued that the lawsuit should be dismissed on the grounds that the parking garage was an "architectural work," the mural was incorporated into that structure and, therefore, it was permissible to use a photograph of the structure in its ads. After the court rejected this argument and it was clear the lawsuit was headed for a jury trial, the lawsuit settled.

And in 2019, Mercedes-Benz USA, LLC was threatened with lawsuits by several artists who claimed that Instagram photos posted by Mercedes-Benz of its G 500 luxury truck in the foreground of colorful Detroit murals infringed upon their copyright rights. Rather than wait to be sued, the automobile company took the initiative and filed federal lawsuits in which it asked the court for a determination of non-infringement. As G.M. had done, Mercedes-Benz argued that the 1990 federal law that extended copyright protection to architectural designs (the Architectural Works Copyright Protection Act, or AWCPA) allowed the company to post photographs of the exteriors of buildings visible from public spaces, notwithstanding the artwork painted on them.

The muralists filed a motion seeking the summary dismissal of the car company's lawsuits on several grounds, including that the AWCPA did not permit the company's copying of their artwork. Soon after the court denied that motion, the parties reached a settlement and the lawsuits were dropped.

Most recently, Volkswagen Group of America, Inc. finds itself in the litigation fast lane. On November 11, another artist who is supposedly known for her work in a variety of media, including murals and street art, sued the car manufacturer, as well as Marvel Entertainment, over a 2018 cross-promotional commercial for Audi vehicles and the motion picture *Avengers: Endgame*. (*Korsen v. Volkswagen Group of America, Inc.*, Case No. 21-cv-08893 (C.D.Cal. 2021).) The plaintiff alleges that her works have been displayed in Los Angeles-area galleries and public spaces and that she has worked with major clients like Red Bull, Whole Foods and the City of Los Angeles. According to her complaint, Korsen created an original mural on 7th and Mateo Streets in downtown Los Angeles (*i.e.* one of those gritty urban landscapes mentioned at the start of this article). The mural can be seen

prominently in the Audi/Marvel commercial, which apparently was featured widely on Audi's official YouTube channel, Facebook Live and at the Los Angeles Auto Show, among other places.

To be sure, this plaintiff's claim may be subject to numerous challenges and defenses. For one thing, the advertisement ran in 2018, and the plaintiff's claim is subject to a three-year statute of limitations. So even if the commercial continued to air within three years of the filing date of the complaint, a substantial portion of any profits that might be attributed to the marketing campaign could well be out of the plaintiff's reach. In addition, it appears that the plaintiff did not actually register her work with the US Copyright Office until November 2019, long after the alleged infringement commenced in 2018. This would mean that the plaintiff may be ineligible for an award of statutory damages (which plaintiffs often elect when their actual damages or the defendant's profits are difficult to establish) and, importantly, the recovery of attorneys' fees. And, even if the plaintiff still might be eligible for statutory damages, she would not be entitled to an award of up to $150,000 for each allegedly infringing photograph of her mural, as she demands. The Copyright Act makes clear that a copyright plaintiff may seek only one award of statutory damages for each *infringed work*, regardless of the number of *infringing works*.

Whether Volkswagen wins, loses or settles this dispute, one thing is certain: It will have to spend time, effort and attorneys' fees to achieve a resolution of this plaintiff's claims. It may also find itself the subject of negative publicity. Automobile manufacturers and other retailers would be prudent to follow some basic steps before releasing this type of advertisement to the public, thereby potentially sparing themselves such costs.

First, a proposed advertisement should be reviewed at the concept and/or script stage for potential third party intellectual property issues. Second, all of the proposed locations for photography or filming should be vetted properly for the presence of copyright-protected artwork, third-party trademarks and the like. Third, the creators of the marketing campaign should discuss with qualified counsel the risks associated with filming or photographing publicly-viewable art and business signage, including: (1) how visible the artwork/signage will be and for what duration; (2) whether the artwork/signage can or should be covered over and/or replaced with approved content prior to filming, or blurred in post-production; (3) whether there is any conceivable fair use or other defense to a potential claim of infringement; and (4) whether it would be prudent to contact the content/signage owner and obtain permission for the proposed use.

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