Street art and fashion in Italy: Who owns the rights to anonymous public artworks?

20 MAY 2019
By: Elena Varese | Fulvia Cosattini

Return to Law à la Mode: Issue 28

Undoubtedly, street art and fashion have always been in a controversial relationship. In Italy, we are seeing the latest upwelling of relationship problems, in the use by fashion designers of street art. Should murals or graffiti by anonymous creators be defined as works of art, and therefore be granted the protection provided by Italian Copyright Law (L. 633/1941)? Or should they be considered assets in the public domain, freely exploitable by fashion designers?

Let us go deeper and explore what are the legal consequences of the unauthorized use of anonymously created street artworks.

Urban culture and street art have long been a source of inspiration for many fashion designers. One example that comes to mind: Moschino’s Fall/Winter 2015 pieces, featuring an image from a 2012 mural in Detroit.

Fashion houses that copy anonymously created street art need to walk a very fine line between inspiration and violation of copyright. One example is the recent case of a high street retailer which, almost one year ago, was strongly criticized by the street artist Revok, supported by the whole street artists' community, who alleged that the fashion retailer had used one of his street artworks for commercial purposes, without permission or payment. That case was ultimately was settled when the retailer agreed to fund a number of Detroit art institutions and charities.

At issue, is not simply whether a fashion retailer has the right to copy street art, but a larger concern: whether an anonymous artist’s creation of an artwork displayed in public places implies limitations in light of the applicability and extent of the freedom of panorama doctrine.

This topic was recently addressed by the Court of Milan in a lawsuit brought by the street artist Banksy against the Mudec Museum in Milan, which, Banksy charged, was selling unauthorized merchandise, as well as displaying unauthorized images of the artist's works during an exhibition of Banksy artworks. Acting on Banksy’s behalf was the authentication service Pest Control Office Ltd., deemed the owner of the “Banksy” trademark.

In this lawsuit – the first time Banksy has ever taken legal action against any entity for profiting from the Banksy name and work – the museum’s use of the artist’s name and well-known images - the girl with the balloon and the flower thrower- was challenged.

First, the Court of Milan established that the use of the trademark Banksy trademark for agendas, bookmarks, erasers and other merchandising objects amounted to a violation of Art. 20 of the Italian Intellectual Property Code (Legislative Decree No. 30/2005), since it was not authorized by the owner of the trademark (i.e. Pest Control
Office). Moreover, the images of Banksy's artworks displayed in the exhibition catalogue have been recognized as works of art; therefore, their economic exploitation (via merchandising objects as well as art catalogues) could theoretically amount to copyright infringement, as well as an act of unfair competition, despite the fact that the graffiti concerned is made available in public spaces.

In this regard, the Court stated that the relevant rights could be granted in license under Art. 109 of the Italian Copyright Law, according to which the transfer of one or more copies of the work in exhibitions does not imply, unless otherwise agreed, the assignment of the related rights of economic exploitation. Reproducing Banksy's works of art in a catalogue is a form of economic exploitation; therefore, it is the prerogative of the artist to authorize its use.

Regarding the unauthorized use of the word trademark Banksy trademark, the Court required the defendant – the Mudec Museum - to recall from the market all the merchandising items bearing the artist's name. However, a recall of the exhibition catalogues was not issued.

In fact, while it was demonstrated that Pest Control Office Ltd. is the owner of the trademark “Banksy,” no documents were shown to prove that it is also the assignee of the rights of economic exploitation of Banksy's artworks. Therefore, the Court declared that Pest Control Office Ltd. lacks of standing to sue for copyright infringement and unfair competition regarding the unauthorized use of Banksy's artworks.

In summary, this decision, recognizing that Banksy's street art may be protected by Copyright Law, seems to leave the door open for a de facto exploitation of anonymous artists’ works in Italy, unless they are able to provide evidence of the transfer of the economic rights related to such works (with consequent prejudice for their anonymity).

Return to Law à la Mode: Issue 28

AUTHORS

Elena Varese
Lead Lawyer
Milan | T: +39 02 806181
elena.varese@dlapiper.com