

Art and advertising – are they compatible?

The advertising world has long drawn inspiration from great works of art. However, advertisers need to ensure that they secure the right permissions to use artworks in ads, including moral rights, which have no equivalent in trademark law

The latest trend in the advertising world is to draw inspiration from or reproduce works of art in order to promote companies' products and services. Recent advertisements have drawn inspiration from paintings such as Manet's *Le Déjeuner sur l'Herbe* (Dior) and *The Milkmaid* by Johannes Vermeer (Nestlé's La Laitière brand). Other advertisers have integrated their products into original works of art, such as French luxury brand Hermès' adaptation of Ingres' *Grande Odalisque* and Bouguereau's *La Vague*. Yet others have created new product showcases by using the style of an instantly recognisable artist. The Malibu ads, for instance, display the drink in the manner of Arcimboldo's human portraits, while Perrier has used the style of Roy Lichtenstein's pop art and Dalí's surrealism as a backdrop for its advertisements.

Works of art have been borrowed by both the luxury goods and mass retailing industries across a wide range of business sectors, including consumer goods (dairy products, mineral water and alcoholic beverages) and fashion (clothing and jewellery). It is useful, therefore, to examine the conditions under which these works are used for advertising purposes.

Authorisation from copyright holders

While ideas can circulate freely, inspiration is bound by the constraints set out in copyright law. Therefore, if an advertisement reproduces the imprint of the author's personality (ie, the original features of his or her work), the advertiser must obtain the permission of both the holder of the economic rights to the original work and the holder of the moral rights, if these are different.

Economic rights are all rights regarding use of the work of art (eg, representation and reproduction), whereas moral rights include the right of attribution, the right to have a work published anonymously or pseudonymously and the right to the integrity of the work, which prevents it from being altered, distorted or mutilated.

Moral rights do not exist in every jurisdiction. Their content varies depending on the legislation of the particular country. Moral rights were first recognised in France and Germany, before being included in the Berne Convention for the Protection of Literary and Artistic Works in 1928.

The Berne Convention provides for a "limited moral right" which grants a minimum protection that countries under the agreement must respect. The minimal protection provided by Article 6bis of the convention is as follows:

Independent of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, modification of, or other derogatory action in relation to the said work, which would be prejudicial to the author's honor or reputation.

The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

Holders of economic and moral rights may differ. For instance, economic rights are usually held by institutions which are duly mandated to manage them, such as collecting societies. It is easier for these institutions to organise the collection of royalties. In France, collecting societies are specialised according to the specific area of art (eg, music, designs, written work and performances).

Advertisers seeking permission to use works of art can therefore ask the relevant collecting society. However, moral rights are the exclusive prerogative of the author. Given that they are perpetual, the author's heirs are usually the guardians of the moral rights.

Collecting societies do not deal with moral rights and are not entitled to grant any permissions regarding them. However, they are usually in direct contact with authors and may act as intermediaries between advertisers and authors. They can also provide advertisers with contact information for authors.

If an advertiser cannot identify the holder of the moral rights of a work of art, but still wants to use and/or exploit the work of art, it should preserve all evidence of its unsuccessful research. Such proof could help to reduce the amount of damages should a counterfeiting action be filed by the author whose moral right has been violated. It could also prove the advertiser's good faith, even if this notion is not effective with regard to copyright.

In the specific case of moral rights, which apply to the author as well as to the work, the fact that a work has entered the public domain

is of little relevance. In fact, unlike economic rights, which ultimately end up in the public domain, moral rights may be exercised throughout the work's existence. Therefore, advertisers must also seek the permission of the person holding the moral rights before using the work in question, even if it is now in the public domain.

A French court has ruled that using a work for advertising purposes is likely to amount to an infringement of moral rights. The ruling in question – issued by the Paris Court of Appeal in 2001 and upheld by the French Court of Cassation in 2005 – concerned the song “*Femme libérée*”, which had been used in an advertisement with the permission of the economic rights holder, but without that of one of the two joint holders of the moral rights.

The song was written by two authors, who therefore both held moral rights in it. A company broadcast a television advertisement with a version of this song, but obtained authorisation from only one of the authors. The other author, who had not granted such authorisation, filed suit for infringement of his moral rights. The court granted his claim.

Exception of parodies or caricatures

To circumvent the restrictions imposed by copyright law, some advertisers attempt to have their creations classified under one of the exceptions provided for by the French IP Code, including the exceptions of parody, pastiche or caricature provided for in Article L122-5 of the code.

The code states that if the use or adaptation for advertising purposes is classified as one of these forms of expression, the author or rights holder cannot oppose it. However, such exceptions are rarely upheld by the courts. For example, if ‘parody’ is defined as the satirical imitation of a text that distorts its end purpose in order to achieve comic effect, it is permitted only if:

- there is a manifestly humorous intention;
- no confusion arises between the parody and parodied work; and
- the former neither detracts from nor harms the latter.

These criteria are applied more or less widely, depending on the courts. The exception of parody is more likely to be accepted when it is not used in a commercial document, such as an advertisement,

but is rather an expression of freedom of speech in, for instance, a satirical press article, comic strip or cartoon.

In this sense, the court refused to classify the reproduction in a magazine of a photograph of a politician portrayed as a monkey wearing a banner bearing the phrase “cultural (r)evolution” as a parody, on the grounds that there was nothing comic about the photo and it was not designed to make people laugh.

On the contrary, the Paris Court of Appeal accepted the parody exception for comic strips that referred to an interpretation by an actor of the commissioner of police character Maigret. First, the court considered that the comic strips in question presented the actor's main physical characteristics. Second, it noted that the authors' intention was in no way to present a negative image of the actor's interpretation, but rather to outline the differences between the fictional investigations of the commissioner as performed by the actor and other actors who had previously performed the role. The court concluded by stating that these comic strips were aimed at “adults who want to laugh”, and that they were full of humour, madness and burlesque. Further, the parody was substantially different from the actor's interpretation and there was no likelihood of confusion between the two works of art.

Parodies dealing with religious issues are not necessary illegal, but are likely to be rejected by readers, consumers, watchers or any recipients of the message who might consider that their beliefs are not being respected. What follows is a good illustration of this tricky topic.

Innovation, but caution

When it comes to parodies that touch on a religious issue, advertisers risk being held liable and must therefore exercise caution. They must therefore try to strike a balance between giving their creativity free rein and respecting the limits to freedom of expression as set out in the French Act of July 29 1881.

The notorious advertisement based on Leonardo da Vinci's *The Last Supper* issued by French fashion house Marithé et François Girbaud is a good illustration of the difficulty of reconciling the creative freedom of advertising with freedom of expression and third-party rights.

The advertisement shows a group of young women in the same positions as the disciples in the da Vinci painting, wearing garments



Manet's *Le Déjeuner sur l'Herbe* was the inspiration for a Dior advertising campaign

Dos and don'ts

Do

- Check the originality of the work of art and/or its constituent features.
- Find out who holds the economic rights.
- Find out who holds the moral rights.
- Obtain permission from all rights holders.
- Agree on the terms and conditions of this permission (eg, rights assigned or granted under licence, scope, purpose, place and length of permission).
- Obtain the permission of the persons featured in the advertisement and specify the terms and conditions of this permission.
- In any event, consult a legal adviser, who will guide you through the process and check the relevant chain of rights.

Don't

- Use an image, a piece of music or any other creative feature downloaded from the Internet without obtaining the rights holder's permission before doing so.
- Alter images, music or any other creative features without the prior permission of the rights holder.
- Exceed the limits of the permission granted regarding the exercise of rights that have been assigned to you (eg, duration, medium or purpose).

made by Marithé and François Girbaud. The person on the right of Christ is a young man standing with his bare back to him, with his trousers hanging loose around the hips.

The organisation *Croyances et Libertés* took the view that the advertisement was offensive to Catholics and was clearly an illegal act of provocation. It petitioned the Paris District Court to ban the public display of the image. The court accepted the claim in a summary ruling of March 10 2005, which was upheld by the Paris Court of Appeal on April 8 2005.

Nevertheless, on November 14 2006 the Court of Cassation overturned the appeal court's ruling on the grounds that the advertisement was not intended to outrage followers of the Catholic faith or to denigrate them as a result of their beliefs, and that the advertisement was therefore not offensive.

This case shows how difficult it is to balance the various interests at stake: freedom of advertising creativity, based on the principle of freedom of expression – which is enshrined in the French Constitution – and third-party rights.

This is an intellectual and creative approach that advertisers must comply with if they are to produce advertisements that are successful from a marketing standpoint and do not infringe third-party rights. [WTR](#)

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