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The Joan Mitchell Foundation Claims Louis Vuitton Infringed the American Artist's Copyright by Including Her Paintings in Advertisements

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Earlier this week ARTnews and the New York Times reported that Louis Vuitton was served with a cease and desist letter from the Joan Mitchell Foundation concerning the company's use of at least three works by Joan Mitchell in an advertising campaign for Vuitton's Capucines handbags. The letter demands that the company withdraw the campaign within three days or face legal repercussions.

Mitchell, a world-renowned artist associated with the American abstract expressionist movement who passed away in 1992, is also currently the subject of an exhibition, "Monet - Mitchell" at the Foundation Louis Vuitton, a contemporary art space in Paris owned by Louis Vuitton's parent company, LVMH. According to a statement¹ released by the Joan Mitchell Foundation, the specific Mitchell works used by Louis Vuitton in the ad campaign, namely, *La Grande Vallée XIV (For A Little While)*, 1983, *Quatuor II for Betsy Jolas*, 1976, and *Edrita Fried*, 1981, are all currently on display as part of "Monet - Mitchell," which is on view through next week and which apparently provided the backdrop to shoot the contested campaign.

While as a public relations matter commentators have been quick to point out the aggressive stance Louis Vuitton (and LVMH) have taken with respect to violations of its own intellectual property rights,² as a legal matter, the incident seems so far to be a clear instance of infringement, and possibly willful infringement, given that the company asked for permission to use Mitchell's works for advertising purposes, was denied, and ultimately did not credit Mitchell as the creator of the works in the ads.

Under Section 501(a) of the Copyright Act anyone who violates any of a copyright owner's exclusive rights is liable for infringement. If an infringement is committed willfully, i.e., in knowing violation of an owner's rights, a court may enhance an award of statutory damages.³

A copyright owner's exclusive rights, in turn, are set forth in Section 106 and include the right to control reproductions or copies of the work, the right to distribute the work, the right to make derivative works which incorporate the work, and the right to display the work publicly.⁴

While a copyright owner's exclusive rights are broad, they are not unlimited. Subsequent users of a copyrighted work are permitted to make "fair use" of copyrighted works, and such fair use "is not an infringement of copyright."⁵ Entering American jurisprudence as early as 1845, the fair use doctrine began rather humbly as a judicial acknowledgment that, to a certain degree, all art and literary work borrows from other creators. The doctrine was eventually codified in Section 107 of the Copyright Act and instructs courts to balance the four fair

1. See <https://www.joanmitchellfoundation.org/journal/statement-on-unauthorized-use-of-mitchell-artworks>.

2. See <https://us.louisvuitton.com/eng-us/magazine/articles/brand-protection#fighting-illegality>.

3. 17 U.S.C. § 504(c)(2).

4. 17 U.S.C. § 106.

5. 17 U.S.C. § 107.

5. *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436) ("In truth, in literature, in science and in art, there are, and can be, few, if any things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science, and art, borrows, and must necessarily

use factors set forth in Section 107, which are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for or value of the copyrighted work.⁷ The first fair use factor, namely, the purpose and character of the use, also encompasses consideration of whether the use of the copyrighted work is “transformative,” in particular, whether the new work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁸ The transformative nature of the fair use inquiry will be a significant component of the copyright case *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, No. 21-869*, currently pending before the Supreme Court.

Here, even if judicial interpretation of “transformativeness” changes as a result of the *Goldsmith* case, it still seems unlikely that Louis Vuitton’s uses of Mitchell’s works would qualify as “fair” under Section 107 given that the other fair use factors appear to weigh in favor of the Foundation.

First, the company uses Mitchell’s works in an unabashedly commercial context, which weighs against a finding of fair use. Further, while the advertisements may be superficially transformative in that they recast Mitchell’s works in connection with the promotion of Louis Vuitton’s luxury goods and include actress Léa Seydoux in the foreground, because they do not significantly alter Mitchell’s works with a new meaning or message while apparently capitalizing on the original purpose of Mitchell’s works, they likely do not rise to the level of transformative works.¹⁰

Second, Mitchell’s works are highly expressive creative works, which are “closer to the core of intended copyright protection”¹¹ and thus harder to claim fair use of under Section 107(2). Unlike a fact-based work which is subject only to “thin” copyright protection, expressive creative works created for public dissemination are at the heart of what the copyright clause of the U.S. Constitution sought to protect.

borrow, and use much which was well known and used before.”).

7. 17 U.S.C. § 107.

8. *Campbell v Acuff-Rose Music Inc.*, 510 U.S. 569, 579 (1994).

9. *Harper & Row, Publishers. v. Nation Enterprises et al.*, 471 U.S. 539, 562 (1985) (“Every commercial use of copyrighted material is presumptively an unfair

exploitation of the monopoly privilege that belongs to the owner of the copyright.”) (citations omitted).

10. See *Ringgold v. Black Entertainment TV, Inc.*, 126 F.3d 70, 79 (1997) (“The defendants have used Ringgold’s work for precisely a central purpose for which it was created -- to be decorative.”). It is also worth noting that transformativeness is often found where it appears necessary to incorporate the original (or portions of the original) for optimum treatment of the subject. In *Campbell v Acuff-Rose Music Inc.*, for example, 2 Live Crew’s use of portions of

Roy Orbison’s *Pretty Woman* was necessary in order for their audience to recognize the parody. Similarly, in *Bill Graham Archives v. Dorling Kindersley Ltd.*,

reproduction of the original Grateful Dead concert posters was necessary to optimally address the cultural and biographical history of the band. Here, by

contrast, Louis Vuitton could have used other non-Mitchell paintings in the background of its ad campaign to achieve its aim.

11. *Campbell*, 510 U.S. at 586 (“The second statutory factor, ‘the nature of the copyrighted work,’ § 107(2) . . . calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.”) (citations omitted)

Third, it appears that large swaths of Mitchell's paintings are used in the ads. While the works do not seem to be reproduced in their entirety, the amount of each used appears to be substantial, which tips the third fair use factor to the side of the Foundation.

Fourth, it is clear that there is a market to license reproductions of Mitchell's works, given, among other things, that Louis Vuitton requested a license and was denied because of the Foundation's policy of permitting reproductions of Mitchell's works only for educational purposes and because the Foundation "carefully manages how images of the artist's work are used in accordance with its mission." Moreover, if Louis Vuitton's use of the works was deemed fair use and such use became widespread, not only would the potential licensing market be impacted, but perhaps more importantly, the value of Mitchell's works (and reproductions of them) could be negatively impacted through overexploitation and repeated association with luxury goods.

Finally, while the fair use doctrine is sometimes considered a "safety valve" protecting a speaker's First Amendment rights in the copyright context, the Joan Mitchell Foundation, by being unwittingly compelled into reproducing Mitchell's works in the context of the promotion and sale of luxury handbags, may have its own First Amendment-related argument in connection with Louis Vuitton's advertisements. While not a part of the traditional fair use analysis and perhaps more appropriate for consideration in the realm of trademark law, this issue has potential implications for artists and creators who may not want themselves or their works to be associated with a particular brand or other commercial activity. Permitting fair use in such a context could conceivably be a form of compelled speech.

For now, it remains to be seen whether Louis Vuitton will remove the ad campaign and if it does not, whether the Joan Mitchell Foundation will take legal action to stop it.

12. See <https://www.joanmitchellfoundation.org/journal/statement-on-unauthorized-use-of-mitchell-artworks>.