

Does painting a bag constitute infringement?



Freedom of expression or an infringement of design rights? That is the question that arises in the case of Louis Vuitton versus the artist Nadia Plesner.

Background

Nadia Plesner is a Danish artist studying at the Rietveld Academy in the Netherlands. In an attempt to draw attention to the humanitarian situation in places such as Darfur, she created a painting named “Darfurnica”. In creating that painting, she was attempting to express her amazement at the substantial amount of attention being paid to celebrities such as Paris Hilton, whilst so little attention is devoted to the hardships that exist in Darfur.

In order to amplify her message, the painting includes an image of a young African child with a Chihuahua on one arm and a bag on the other. The bag itself bears a strong resemblance to the “Audra” bag by Louis Vuitton.

Louis Vuitton responded by initiating ex parte interlocutory proceedings, in order to obtain an injunction preventing the use of the image. The characteristic feature of ex parte interlocutory proceedings is that a decision will be made without the respondent being heard.

Ex parte interlocutory proceedings

During the course of those ex parte interlocutory proceedings, Louis Vuitton submitted that Plesner was infringing the design rights belonging to Louis Vuitton. The “Audra” bag and the pattern of the bag depicted in the image is protected in the form of design rights. According to Louis Vuitton, Plesner is exploiting the intellectual property rights of Louis Vuitton in an attempt to bring her

own products to the attention of the public and is therefore surreptitiously benefiting from the familiarity of the Louis Vuitton name.

The judge in the interlocutory proceedings handed down a decision based solely on the claim submitted by Louis Vuitton. In the view of the judge, Louis Vuitton had sufficiently demonstrated that Plesner was infringing the registered Community design of Louis Vuitton. The image used by Plesner closely resembles the design by Louis Vuitton and therefore creates the same overall impression.

In the judge’s opinion and in view of the use that Plesner made of the image, it is implausible that any justification could exist for the promotion and merchandising of her own work. As a result of these ex parte interlocutory proceedings, the court handed down an order prohibiting the use that gave rise to the infringement. Plesner was therefore required to desist using the image of the “Audra” bag.

Setting aside of the interim injunction

Plesner, however, decided not to let matters rest at that point and launched interlocutory proceedings of her own, based upon the judgment referred to above. During those proceedings and in contradiction to its previous assertions, Louis Vuitton stated that it did not wish the injunction to include the painting, but that it only wished to prohibit the T-shirts and the posters and other similar products.

Unfortunately for Louis Vuitton, the judge in these final interlocutory proceedings ruled that the previous order should be set aside, not only with regard to the use of the bag in “Darfurnica”, but that the entire order should be rendered null and void with retroactive effect. In the provisional judgment handed down by the court and in these particular circumstances, the interests of Plesner, in other words her (ongoing) freedom to express her (artistic) opinion through her work, outweighed the interests of Louis Vuitton to be able to enjoy its property undisturbed. In the opinion of the court, the fact that Plesner has increasingly used the image of the African child with the “Audra” bag as a means of drawing attention to her activities is not unlawful.

In short, the freedom of expression has prevailed and Plesner is allowed to continue using the image of the African child, including the bag, as before, for the purpose of artistic expression.



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