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## Copyright Protection of Graffiti Art in Brazil: The Limitation of a Copyright Limitation?

Pedro Henrique D. Batista

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In August 2020, the Brazilian Superior Court of Justice rendered a decision on a case of great relevance for authors of works of graffiti art and for users of images which contain them. A major national publisher used the image of a work of graffiti art located in a public place in an editorial of the fashion section of one of its famous magazines, *Revista VIP*, in the context of an advertisement for clothing products. With the artwork in the background, these products were not only worn by professional models, but also accompanied by their respective brands and prices. The publisher made no reference to the authorship of the artwork, nor did it obtain authorization for the reproduction of the work in the magazine.

In addition to the possibility of identifying the author and the occurrence of moral damages – both confirmed by the Superior Court of Justice – the main issue of litigation was the occurrence of copyright infringement and the need to compensate the author for material damages resulting from the unauthorized use of the artwork. Brazilian law expressly provides for a limitation of copyright related to works located in public places. According to Art. 48 of Law No. 9,610/96 (Copyright Act), “[t]he works permanently located in public places can be freely represented through paintings, drawings, photographs and audiovisual procedures”. The Superior Court of Justice confirmed an infringement of copyright and ordered the magazine to pay compensation for damages to the author. However, the grounds of the decision are questionable.

A preliminary controversial question concerning Art. 48 of the Copyright Act is whether this limitation is restricted to the mere representation of the work located in a public place by the means indicated in the provision or whether it also

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For a translation into English of the Brazilian Superior Court of Justice’s decision *Brazilian Graffiti*, see this issue of IIC at doi: <https://doi.org/10.1007/s40319-021-01091-5>.

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encompasses the reproduction of these representations, which is not expressly mentioned in the provision. Some Brazilian scholars understand that this limitation has to be narrowly interpreted, since the term “reproduced” used in the previous copyright law was replaced by “represented” in the Copyright Act of 1996.<sup>1</sup> The reproduction of representations, in turn, should fall under the Art. 46 II of the Copyright Act, which allows reproduction for private use and non-profit purposes, and by Art. 46 VIII, which allows unauthorized reproduction of works of plastic arts under the requirements of the three-step test.<sup>2</sup> Other authors explain that the substitution of the term “reproduced” by “represented” in Art. 48 of the Copyright Act aims only to clarify that third parties cannot without authorization reproduce works located in a public place *in the form they were conceived*.<sup>3</sup> Thus, only the unauthorized construction of a replica of a sculpture, an architectural work or a work of graffiti art would be prohibited by law. In turn, the representations of these works and the reproductions of these representations – whether for commercial purposes or not – would be covered by this limitation.<sup>4</sup> This (extensive) interpretation is more convincing. If Art. 48 of the Copyright Act was only intended to allow the representation of works located in public places but not their reproduction or communication to the public, its existence would be superfluous, since this right could be mostly derived from the limitations related to private use or even from fundamental rights. Through this provision, the Brazilian legislator aimed rather at a broader protection of the public interest in using works located in a public place.

In its decision, the Superior Court of Justice did not elaborate on this issue. It only assumed that the limitation in Art. 48 also covers the reproductions of the representations without making further considerations on this topic and, thus, implicitly adopted the extensive interpretation of this provision. However, based on some precedents<sup>5</sup> it determined that this limitation does not apply when the work is reproduced for commercial purposes, except when it comes to promoting tourist and cultural activities. This “limitation of the limitation” is not expressly laid out in the Copyright Act.

It is worth noting that in the mid-1990s, at the time of elaboration and approval of the Copyright Act, works of graffiti art were not strongly recognized as a type of artistic and cultural expression, and that the authors’ interests may not have been duly considered by the legislator in drafting the Copyright Act. Thus, the decision of the Superior Court of Justice may aim to fill a legal gap in the copyright protection of works of graffiti art, which are typically located in public places and whose

<sup>1</sup> Costa Netto, José Carlos *Direito Autoral no Brasil* (3rd edn. São Paulo: Saraiva, 2019) pp. 299–300; Cabral, Plínio A *Nova Lei de Direitos Autorais – Comentários* (4th edn. São Paulo: Harbra, 2003) p. 75.

<sup>2</sup> Abrão, Eliane Y. *Comentário à Lei de Direitos Autorais e Conexos* (Rio de Janeiro: Lumen Juris, 2017) p. 184.

<sup>3</sup> Dias Menezes, Elisângela *Curso de Direito Autoral* (Belo Horizonte: Del Rey, 2007) p. 108.

<sup>4</sup> *Ibid.*; see also Pimenta, Eduardo S. *Código de Direitos Autorais ante aos Tribunais e Acordos Internacionais* (São Paulo: Lejus, 1998) p. 172.

<sup>5</sup> Superior Court of Justice, Special Appeal No. 1.343.961/RJ. Rap. Min. Luis Felipe Salomão, 4th Chamber, date of judgment 6 October 2015 (OJ 9 Nov 2015); Special Appeal No. 951.521/MA. Rap. Min. Aldir Passarinho Junior, 4th Chamber, date of judgment: 22 March 2011 (OJ 11 May 2011).

production, unlike sculptures and architectural works, are not usually accompanied by a prior remuneration of the authors' service. However, instead of recognizing this gap and justifying its decision *contra legem* through a well-reasoned teleological reduction and by promoting an adequate development of the law in specific cases, the decision basically rests on three generalized arguments that are questionable from a dogmatic point of view.

First, the Superior Court of Justice refers to legal and constitutional provisions that guarantee certain rights to authors, such as the exclusive right to use, publish or reproduce their works (Art. 5 XXVII, of the Federal Constitution and Art. 28 of the Copyright Act) and the right to a prior and express authorization for the use of the protected work (Art. 29 of the Copyright Act). Additionally, it indirectly refers to Arts. 77 and 78 of the Copyright Act, which deal with the presumption that copyright licenses are granted in return for payment and, in the case of visual artworks, restricted to the right to exhibit (and not to reproduce). These references are not merely informative but, in the words of the Court, should be considered when exercising the rules of hermeneutics for the interpretation of the limitation concerning works permanently located in public places.

The observation of general rules that guarantee copyright to the authors for the interpretation of the scope of Art. 48 of the Copyright Act is questionable. Regardless of the question as to the adequacy of the extensive or narrow interpretation, the *exceptions* and *limitations* of copyright aim by definition to establish a limit to the scope of copyright and define the extent to which unauthorized use is permitted. The consideration of existing copyrights in the hermeneutic exercise related to their exceptions and limitations may lead not only to an overly narrow interpretation, but also to the erosion of the material scope of the freedom of use intended by the legislator.

Second, to justify the restriction of the limitation, the Superior Court of Justice curiously quotes an author who advocates a narrow interpretation of Art. 48 of the Copyright Act,<sup>6</sup> which – as explained above – would then only apply to representations of works located in a public place. This argument contradicts the Court's own assumption that this limitation also covers the reproductions of these representations and makes the Court's reasoning even less transparent and understandable.

Third, the Superior Court of Justice refers to Art. 9 Nos. 1 and 2 of the Berne Convention for the Protection of Literary and Artistic Works (1886) to justify the application of the three-step test when interpreting the exceptions and limitations of the Copyright Act. Regarding the case under analysis, it argues that the lower courts found that advertisements were typical in magazines like *Revista VIP* – and therefore not a required “special case” – and that the reproduction of the graffiti art for commercial purposes affected its normal exploitation, therefore harming the legitimate interests of its author. Thus, the unauthorized use of graffiti art in this case would not meet any of the requirements of the three-step test. Since a revision of the lower courts' decisions on this issue would necessarily require a reanalysis of the facts, which does not fall under the competence of the Superior Court of

<sup>6</sup> Costa Netto, José Carlos *Direito Autoral no Brasil* (3rd edn. São Paulo: Saraiva, 2019) pp. 299–300.

Justice,<sup>7</sup> it followed the understanding of the lower courts that copyright limitation in this case was not justified, so that the material damages incurred by the author should be compensated by the publisher.

A reference to the principles and values expressed in the Berne Convention and other international treaties could be an adequate starting point for the Superior Court of Justice to fill a specific legal gap in cases related to works of graffiti art through a teleological reduction of the norm. However, it opted to simply recognize the application of the three-step test by lower courts and its incompetence for reassessing the issue, which is questionable from different perspectives.

According to the Art. 9 No. 2 of the Berne Convention, it is a matter for *legislation* in the countries to permit the reproduction of protected works in certain cases through the proper application of the three-step test. Thus, this rule is addressed primarily to the national legislator, which has to consider the authors' due interests when introducing exceptions and limitations in the legal order. In addition, according to the prevailing opinion in Brazilian scholarship and the current case law of the Superior Court of Justice, the application of IP-related international treaties, as a rule, requires their implementation through an act of the legislative branch,<sup>8</sup> such as the Copyright Act in the case of copyright. Therefore, the courts should not directly apply the rules of international law, such as the three-step test of the Berne Convention and even the TRIPS Agreement.

In fact, there are cases in which copyright exceptions and limitations are flexibly regulated by the legislature, giving scope for valuation by the court. For example, according to Art. 46 VIII of the Copyright Act, the reproduction in any works of small parts of pre-existing works does not constitute copyright infringement if the reproduction: (i) is not the main objective of the new work, (ii) does not prejudice the normal exploitation of the work, and (iii) does not unduly harm the legitimate interests of the authors. In such case, the determination of the scope of the limitation requires the application of criteria similar to those of the three-step test, which shall be duly observed by the courts.

If the Superior Court of Justice followed the abovementioned narrow interpretation of Art. 48 of the Copyright Act and, therefore, considered that it does not cover reproductions of representations of works located in a public place, which would then fall under Art. 46 VIII, the application of the three-step test in the decision under analysis would be correct. However, as explained above, this is not the case. Thus, the copyright limitation regarding works located in a public place should not be conditional on the fulfillment of criteria applicable to other exceptions and limitations, such as the three-step test. Otherwise, the scope of all legal provisions that set exceptions and limitations to copyright (including parody,

<sup>7</sup> See Superior Court of Justice Official Precedent No. 7. Available at [https://www.stj.jus.br/docs\\_internet/VerbetesSTJ\\_asc.pdf](https://www.stj.jus.br/docs_internet/VerbetesSTJ_asc.pdf) (last accessed 6 May 2021).

<sup>8</sup> Regarding the TRIPS Agreement, see Superior Court of Justice Special Appeal No. 960.728/RJ. Rap. Min. Nancy Andrighi, 3rd Chamber, date of judgment 17 March 2009 (OJ 15 April 2009); Special Appeal No. 642.213 / 2004. Rap. Min. João Otávio de Noronha, 2nd Chamber, date of judgment 28 April 2010 (OJ 2 August 2010); see also Barbosa, Denis Borges *Propriedade intelectual: a aplicação do Acordo TRIPS* (2nd edn. Rio de Janeiro: Lumen Juris, 2005) p. 18 f.; Basso, Maristela "A data de aplicação do TRIPS no Brasil" vol. 8 *Revista de Direito Constitucional e Internacional* (2000) pp. 13–22.

citation, private copies, use for journalistic purposes, etc.) could be relativized and only determined in the specific case, which would result in great legal uncertainty that could de facto inhibit the free use of the work to the extent envisaged by the legislator.

Furthermore, in ruling that the revision of this point would necessarily require a reanalysis of the facts, which goes beyond the limits of its competence, the Superior Court of Justice ignored its competence to determine the legal contours of the three-step test in cases involving copyright exceptions and limitations. For instance, in the case under analysis, the lower courts argued that advertisements are typical in editorials of the fashion section of magazines like *Revista VIP*, from which they implicitly conclude that this is not a “special case” for the purposes of the three-step test. This subsumption is questionable. The special case mentioned in Art. 9 No. 2 of the Berne Convention refers to subjects included in the scope of copyright exceptions and limitations, which do not necessarily coincide with the form or medium in which a reproduced work is published. In the case under analysis, the specialty requirement should be analyzed in view of the fact that the work is permanently located in a public place – which is not common for all protectable works – and not in view of the publication of the reproduced work in a magazine with a high circulation. This issue, as well as the question of the direct applicability of the provisions of international treaties, covers matters of law and is not a reanalysis of facts, and therefore could have been properly analyzed by the Superior Court of Justice.

In a nutshell, according to the Court’s opinion, the non-authorized reproduction of representations of works located in a public place for commercial purposes (except in cases of tourist and cultural activities) is generally prohibited, including when related to sculptures and architectural works. This restriction is not expressly stated in the Copyright Act and was hardly envisaged by lawmakers when drafting its Art. 48 in view of the relevant public interest. The dogmatic construction of the Superior Court of Justice’s decision presents some relevant flaws. Although it correctly avoids adopting a narrow interpretation of Art. 48 that could justify the application of the three-step test in certain circumstances, but would not necessarily guarantee to third parties the right to an unauthorized reproduction of the works for non-commercial purposes, it restricts the scope of the norm without a statutory basis and in an inconsistent way.

In order to avoid the risk of arbitrary decisions and legal uncertainty regarding copyright limitations, such a restriction of the limitation provided by Art. 48 of the Copyright Act should primarily occur through the amendment of the law by the legislature. If the judicial power identifies an unbearable legal gap to the detriment of the authors of works of graffiti art, it should fill it by restricting the limitation in specific cases based on a well-reasoned teleological interpretation of the norm, but not by means of a generic and abstract reduction of its scope.

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