



# ARE Copyright Alert: New York Court Finds No Copyright Infringement Or False Endorsement From A Publicly Displayed Mural As Background In The Opening Scene Of A Film

Author(s): Chester Rothstein,

A federal district court in the Eastern District of New York (Brooklyn) granted a Motion to Dismiss a copyright infringement claim and a false endorsement claim by a mural artist and the mural's subject regarding a movie which included the mural in a three-and-a-half second shot in the opening scene.

The Court held the use was either *de minimis* or fair use of the admitted copyright, and that neither the likeness in the mural nor the inclusion of the artist's "tag" (read: signature) leads to a conclusion that the Plaintiffs endorsed the film. *LMNOPI and Ta'kaiya Blaney v. XYZ Films, LLC, Netflix, Inc., Amazon.com, Inc., Apple, Inc., and Google LLC*, No. 18 CV 5610 (E.D.N.Y. March 30, 2020) (order granting motion to dismiss) (D.J. Darcy-Hall).

## **Background**

In *LMNOPI v. XYZ Films*, according to the Complaint, Plaintiff Ta'Kaiya Blaney is an "internationally-known 'indigenous activist,' actress, and singer-songwriter" and Plaintiff LMNOPI is an "artist and activist nationally recognized for producing works that evince her commitment to human rights and social justice." One of LMNOPI's such works is a mural depicting Blaney, located at a street corner in Bushwick, Brooklyn, New York.

Defendants are film makers and their distributors of a 93-minute film in which the mural appears in a three-and-a-half second shot in the opening scene. According to Plaintiffs, the film's "plot is antithetical to the message of peace that forms the bases of both Plaintiffs' work, and neither Plaintiff would have agreed to be associated with it." They both claimed that the film gave a false endorsement, and LMNOPI also claimed that the work infringed her copyright in the mural.

## **Discussion**

After first accepting all of the factual allegations of the Complaint as true (like all Motions to Dismiss), the Court dismissed both the copyright claim and the false endorsement claim on the pleadings for failing to state a cause of action. The Court also dismissed the supplemental state law claim as no longer under federal jurisdiction.

## **The Complaint Failed To State A Claim For Copyright Infringement**



The Court found against copyright infringement because the accused work was not substantially similar since the copying was *de minimis*. The court said the Plaintiffs' description of the mural in the film was "grossly overstated." It was not, as Plaintiffs' alleged, "presented in a full-screen shot, in perfect focus, and unobstructed to the viewer for several seconds," but instead was "at all times in the background," where "obscuring the view of at least one-third of the Mural rests a red pickup truck" and "throughout the entirety of the three-and-a-half-second scene, an actress prominently positioned in the foreground runs about further obscuring the Mural."

The Court also found that even if the use was not *de minimis*, it was fair use because it was "transformative" in that the purpose was to locate the film's viewer at a specific subway station in Brooklyn, not to copy the expressive function of the mural, which Plaintiffs had characterized as "conceived to convey a message of peace."

Additionally, the Court held that the "market effect" fair use factor "weighs heavily in Defendants' favor," holding: "the target audience of the Film is drastically different from that of the Mural."

#### The Complaint Failed To State A Claim for False Endorsement

The Court also found that Plaintiffs failed to state a claim for false endorsement, at least in part because "they have not alleged a single plausible fact that the inclusion of the Mural in the Film would serve to confuse consumers that Plaintiffs sponsored, endorsed, or otherwise associated with the Film."

#### The Court Dismissed The Remaining State Law Claim, By Declining To Consider It Under Supplemental Jurisdiction

The Court also dismissed Plaintiff Blaney's state law claims without a discussion on the merits, holding instead that it declined to exercise supplemental jurisdiction over them since the federal claims were dismissed before trial.

#### **Conclusion**

According to this Court, where the film includes a publicly displayed mural as background in the opening scene to impart location information, such use was either *de minimis* or fair use; it did not falsely imply that the film is endorsed by the mural's author or by the subject depicted in the mural.

We will continue to monitor and report on the use of public works displayed in subsequent works. In the meantime, for more information, feel free to contact us.

\* [Chester Rothstein](#) is a partner at Amster, Rothstein & Ebenstein LLP. This practice focuses on all facets of intellectual property law including copyright, patent, and trademark law. He can be reached at [crothstein@arelaw.com](mailto:crothstein@arelaw.com).