

A Murality Play

Law360, New York (May 14, 2012, 1:15 PM ET) -- Public wall murals have been the subject of much attention recently. Legislators for Los Angeles, which is considered the “mural capital of the world,” are reviewing a proposed city ordinance to preserve vintage art murals and to repeal an existing ban on private murals (enacted as an overzealous attempt to stem graffiti). Wall murals are the focus of attention in other cities as well. Murals are visible and public “public art,” presenting social, political and aesthetic ideas in and on everyday media.

There are few cases involving art murals but recently, Maya Hayuk, a Brooklyn-based muralist and painter, filed suit against RCA Records Inc. and Sony Music Entertainment over the music video “I Only Wanna Give It To You.” The video by recording artist and musician Elle Varner features one of Hayuk’s murals, titled “Sunshine,” which was originally created by the muralist for the music video of the same name by artists Rye Rye and M.I.A. Although Hayuk voluntarily dismissed the action on April 14, 2012, the complaint touched on some interesting issues.

Hayuk’s complaint, which was filed in the United States District Court for the District of Massachusetts on Feb. 12, 2012, alleged copyright infringement in that RCA and Sony incorporated the mural into the video without Hayuk’s authorization. Specifically, Hayuk alleged that the video includes numerous scenes that incorporate videographic reproductions of the mural and that such use “adds greatly to the mise-en-scene.”

Hayuk, whose art has appeared in numerous gallery shows, installations and publications, previously licensed her artwork for use on apparel, consumer electronics, and sporting goods, commanding “premium fees and royalties for the use of her work in commercial settings.” Hayuk alleged that the video has been a huge financial success for RCA and Sony, noting that “extensive pre-roll, pop-up, overlay, and other display advertising appears in connection with online streams of the Video,” which had been viewed more than 2.7 million times on YouTube at the time she filed the suit.

This case posed a more interesting query than a typical copyright infringement claim because, notably, the “Sunshine” mural appears only for an aggregate of 24 seconds in the four-minute video — and it does not appear in its entirety, with only portions of the mural on display at any one time.

Courts have routinely dismissed infringement claims based on de minimis use of a copyrighted work (i.e., that the use was so slight that it did not rise to the level of copyright infringement). See, e.g., *Dereck Seltzer v. Green Day*, (a recent California case discussing fair use of public art as part of a concert backdrop); *Forlenzo v. AT&T*, (a 2004 California case dismissing an infringement claim as de minimis where small portions of plaintiff’s mural appeared for no more than three seconds, and a larger fragment appeared for one second). However, here, Hayuk alleged that the mural added greatly to the mise-en-scene. An argument that the video was aesthetically based upon the mural could have had enough traction to overcome a dismissal based on de minimis use.

In a recent case involving Rihanna's "S&M" music video, for example, Judge Shira Sheindlin of the New York federal district court allowed copyright infringement claims brought by photographer David LaChapelle to survive a motion to dismiss. *David LaChapelle v. Robyn Rihanna Fenty*. In that case, LaChapelle alleged that the "S&M" video used protected expressions from his photographs.

The judge found that while the common theme of S&M and elements like leather, whips, ball gags, etc. were not protectable, LaChapelle's selection and orchestration of props and the way he controlled "angles, poses and lighting" were copyrightable. The judge noted that "an ordinary observer may well overlook any difference and regard the aesthetic appeal [of the video and the photographs] ... as the same." To that end, although the mural in "I Only Wanna Give It To You" appears in the background for only a portion of the video, often fragmented, one may argue that the mural informs the colors worn by the performers and the general "look and feel" of the video.

Perhaps even more intriguing to the Hayuk complaint was the tension between copyright and public space. Despite having been created for use in another music video, the mural is painted on the side of an abandoned building, easily viewable from the sidewalk, street, etc. As such, it would be difficult, albeit not impossible, to film the building without incidentally reproducing the mural. Would anyone taking a photograph containing a portion of this publicly viewable mural have to pay royalties to the artist? If it had gone to trial, a decision in this case could have proven an interesting analysis of the interplay between copyright law and the public space — for now, there is no handwriting on the wall.

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