Goodmans LLP Update

"Are You an Artist?" L.A. Street Artist Answers Developers' Question by Filing Copyright Infringement Lawsuit

In the Fall of 2019, Los Angeles street artist Tristan Eaton ("**Eaton**") brought a copyright infringement lawsuit in the Federal Court of Canada against seven Ottawa, Ontario real estate developers, including 2592653 Ontario Inc., Constitution Building LP, Katasa Development Inc. and The Constitution Building GP Inc. (the "**Developers**"). Eaton alleges the Developers misappropriated his street art by reproducing it on social media and on a banner hung outside a residence, Theo Ottawa, marketed by the Developers to university students.

Eaton's lawsuit appears to be the first proceeding in which a Canadian court will have the opportunity to determine whether street art is properly the subject of protection under the *Copyright Act.*

Background to *Eaton v. 2592653 Ontario Inc. et al*

The work at the centre of the lawsuit is a colourful, stylized headshot of Audrey Hepburn that Eaton painted on the side of a New York City café for free as part of a public art initiative. He titled the mural *Audrey of Mulberry* and included his distinctive "tag" in the lower left-hand corner of the work to identify himself as the artist.

Eaton claims that real estate owners "typically pay significant fees and commissions" for the creation and/or use his large-scale outdoor murals, but in this case he was not contacted, paid, nor credited for the unauthorized reproduction of his mural on a promotional banner (the "**Banner**") hanging on the side of a seven-story tall Ottawa building.

Adding insult to injury, Eaton claims that the Developers "distorted and mutilated" his work by, among other things, cropping it, resizing it, and overlaying the image with text that asked "*Are you an artist?*". For Eaton, who has worked with clients such as Nike and Versace, created posters for former U.S. President Barack Obama's 2008 presidential campaign, and counts his work in the permanent collections of the Museum of Modern Art and the Smithsonian, the answer is a resounding "*Yes*".

Eaton's Claim

Eaton seeks a declaration that the Developers' actions infringed his copyright in the *Audrey of Mulberry* mural contrary to subsections 27(1) and (2) of the *Copyright Act* and infringed his moral rights provided under sections 14.1, 28.1 and 28.2 of the *Copyright Act*, since the Developers failed to credit him as the creator of the original work (his signature was removed, cropped out, or otherwise obscured in the reproductions of his art), fundamentally altered the aesthetic qualities of his piece, and associated him with their business enterprise without his permission. According to Eaton, these actions prejudiced his honour or reputation, causing the viewing public to *literally question whether he is an artist.*

Eaton seeks CAD$1,000,000 in damages for infringement, CAD$500,000 for exemplary and punitive damages, recovery of all infringing copies of his work in the Developers' possession, and a permanent injunction restraining the Developers from reproducing his work on any of their properties or in social media posts.

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Developers' Defence

The Developers argue that they hired a graphic design agency, Cayenne Creative, to develop, design and produce the Banner on a "turnkey" basis. Based on their contract with Cayenne Creative, the Developers understood they could display the Banner and use it in their advertising materials without restriction. In addition, they claim that since Eaton had not registered his copyright in Canada when they commissioned the Banner, they could not have known that Eaton held copyright in the mural. Once they learned of Eaton's claims, the Developers maintain that they immediately took steps to take down the Banner and remove the artwork from the Theo Ottawa advertising, and therefore should not be held liable for any infringement.

However, since ignorance is not a defence to copyright infringement, the Developers were wise to plead alternative defences. Most notably, they argued that:

a. any use of the mural should be exempt from infringement claims under ss. 32.2(1)(b)(i) and (ii) of the *Copyright Act*, which provide that it is not an infringement of copyright to reproduce in any drawing or photograph an architectural work or a work of artistic craftsmanship that is "permanently situated in a public place or building"; and

b. their use of the mural in social media posts and other advertisements should be exempt from Eaton's infringement claim under s. 30.7 of the *Copyright Act*, which protects those who incidentally and unintentionally include a protected work in another work or subject matter.

Interestingly, the Developers do not argue that the nature of Eaton's mural (street art) could prevent him from asserting his copyright on the basis that the work is not sufficiently durable or "fixed" in some permanent way as required by the common law (since, in theory, outdoor works could be destroyed by natural elements or painted over by other street artists). Instead, the Developers' defence presupposes that the fixation requirement has been met and Eaton holds copyright in the *Audrey of Mulberry* mural, but maintains that his infringement claim should be dismissed based on the defences described above.

Implications

Eaton v. 2592653 Ontario Inc. et al. gives the Federal Court an opportunity to definitively state whether a piece of street art is protected by copyright and consequently worthy of the same protections and defences afforded to other creators of artistic works under the *Copyright Act*.

It is, of course, possible the parties will reach a confidential settlement before the case is decided, in which case artists and legal experts will be left wanting an answer to the intriguing question (from a copyright law perspective) posed by the text of the Banner: "*Are You an Artist?*". We eagerly await the Federal Court's decision.

For further information concerning intellectual property in artistic works, please contact the author or any other member of our Entertainment Law Group.