

## STREET ART, COPYRIGHT INFRINGEMENT, AND *DE MINIMIS* USE

The legal protections afforded to graffiti and “street art” artists have gained increased visibility in recent months. But while street art may be entitled to certain protections under the law, not every use of street art without permission will violate an artist’s rights. A recent decision from the U.S. District Court for the Southern District of New York highlights this, finding that *de minimis* use of graffiti in a television production without the artist’s permission did not give rise to liability under the Copyright Act.

### LEGAL PROTECTION FOR GRAFFITI AND STREET ART

Graffiti and street art can be protected by the law like any other art form. For example, in a widely publicized decision earlier this year, a federal court in the Eastern District of New York found that street art painted on the famous “5Pointz” in Long Island City, Queens, was entitled to protection under the Visual Artists Rights Act of 1990.

Graffiti and street art may also be protected from infringement under the Copyright Act. The Copyright Act protects “original works of authorship fixed in any tangible medium of expression.” Street art that takes the form of a painted mural can be easily understood to meet this standard. Moreover, even distinctive graffiti-style lettering can, in certain circumstances, be protected under the Copyright Act. Generally, typeface alone will not be entitled to copyright protection. However, at least one court has found that stylized lettering in graffiti art was protectable. Likewise, the court found that a street artist’s choice of

### THE BOTTOM LINE

When considering using graffiti or street art as part of a commercial production, including in advertising, social media or other marketing efforts, the same considerations addressed when clearing the use of other copyrighted or trademarked materials should be taken into account. Even though *de minimis* or fleeting use of graffiti or street art in another work will not give rise to an actionable claim, it is still advisable to seek the advice of counsel to determine whether a *de minimis* use defense is available.

color and background imagery could be protectable elements of a graffiti design.

### *GAYLE V. HBO*

While the 5Pointz case highlighted the risks involved when a protected piece of street art is destroyed with the building on which it was painted, alleged misuse of graffiti or street art also arises with some frequency in the context of other creative and commercial uses, such as television shows or advertising. But as a recent decision in the Southern District of New York makes clear, just because a street artist may have rights in his

or her work does not mean that every unauthorized use of that work will constitute copyright infringement.

In *Gayle v. Home Box Office, Inc.*, a graffiti artist, Itoffee R. Gayle, alleged that HBO had used his graffiti in an episode of the television series *Vinyl* without his permission. In the scene in question, a woman is seen walking down a street in New York City and passes by a dumpster on which “art we all” is written in graffiti. Gayle claimed that this graffiti was his intellectual property and that HBO had infringed his rights therein by using it without his permission. This gave rise to alleged claims for copyright

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infringement, trademark infringement, and unfair competition.

HBO moved to dismiss, arguing, among other things, that its use of Gayle's graffiti was *de minimis* and thus not actionable. As the court explained, "in the copyright arena, *de minimis* can 'mean what it means in most legal contexts: a technical violation of a right so trivial that the law will not impose legal consequences,' or it can mean 'that copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.'" HBO argued that the use of Gayle's graffiti was *de minimis* because it was barely visible, having appeared on screen for just a few seconds, only in the background, and shown out of focus and in low light.

The court agreed, finding that HBO's use of the graffiti was *de minimis* and that Gayle's claim "border[ed] on frivolous." Given its momentary appearance in the background of the episode, without ever being fully visible or legible, the court found that "the graffiti 'was filmed in such a manner and appears so fleetingly that ... there is no plausible claim for copyright infringement here.'" The court was not persuaded by Gayle's argument that because HBO had used the graffiti deliberately, the use could not be *de minimis*. As the court observed, "HBO's motive in depicting the graffiti is irrelevant to the *de minimis* inquiry." The court also found that Gayle's trademark infringement and unfair competition claims could not be sustained, and dismissed the complaint in its entirety.

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