

LITIGATION

INTELLECTUAL PROPERTY >> ALERT

WHEN DOES “COPYING” A PHOTOGRAPH OF A BUILDING CONSTITUTE COPYRIGHT INFRINGEMENT?

A recent decision from a Pennsylvania federal court underscores that there is generally no copyright protection in an actual building or a skyline of buildings; instead, the protection is in the particular photograph or rendering of the building.

Creating an original depiction of a building or skyline that is not substantially similar to the photograph or rendering may provide protection from liability for copyright infringement. Other federal courts, however, have held that actual use of a pre-existing photograph of a skyline of buildings, or a portion of such a photograph, without the copyright owner's authorization, may constitute copyright infringement.

Although this alert will discuss copyright issues implicated by use of a photograph of a building or skyline, please note that building owners have also argued that the façade or other distinctive aspect of their building may qualify for trademark protection such that the unauthorized depiction of the building in advertising materials may constitute trademark infringement. This Alert focuses not on potential trademark protection for buildings but, rather, the potential for photographers or artists to seek copyright protection for their photographs or other renderings of a building or buildings together in a skyline.

THE BOTTOM LINE

Companies that use pre-existing photographs of buildings for reference in advertising or other materials may subject themselves to copyright infringement lawsuits. Even though there is generally no copyright protection for a building itself, there may be protection for a rendering of a building in the form of a photograph or illustration, and the use of that rendering for inspiration to create a new work, without obtaining authorization from the copyright owner, may lead to copyright infringement claims. Whenever a company seeks to use a pre-existing photograph or other rendering of a building or skyline as reference material, or an actual photograph, it should consult with legal counsel to help identify and avoid potential copyright, trademark and related issues.

BACKGROUND

Bradley Maule, a photographer, sued Anheuser Busch, LLC and sign manufacturer Everbrite, LLC for copyright infringement, alleging that a sign advertising Budweiser beer (the Sign) infringed on Maule's copyright in a photograph that he had taken (the Photograph).

Maule's Photograph showed the buildings in the Philadelphia skyline as the sun was setting, with a background of the sky with clouds, the light and shadows on the buildings, and a particular sense of depth and scale. Maule also digitally altered the Photograph by adding images of two buildings to the skyline

that were not constructed at the time he took the Photograph—the Comcast Center, which was ultimately built, and Mandeville Place, which was never built.

In contrast, the Sign, which also included the Comcast Center and the nonexistent Mandeville Place, used a condensed, less realistic version of the Philadelphia skyline. The Sign showed the buildings in a bright red color with black lines outlining the buildings, floors, and windows but did not include background scenery, did not feature any contrast in light or shadow, and did not show any sense of depth or scale.

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Anheuser Busch and Everbrite moved to dismiss the complaint, arguing that, even if they had access to the Photograph and used it for reference when creating the Sign, there was no substantial similarity between the Sign and the protected elements of the Photograph. Maule opposed the motion on the grounds that there was, in fact, substantial similarity, arguing that the Sign copied the following two aspects of his Photograph: (1) the buildings in the Philadelphia skyline, and (2) the depiction of the nonexistent Mandeville Place.

THE DECISION

The Pennsylvania federal court in Philadelphia agreed with Anheuser Busch and Everbrite and dismissed Maule's complaint. The court held that the Sign was not substantially similar to the protected elements of Maule's Photograph because copying the buildings in the Philadelphia skyline was not actionable infringement, given that the skyline was not original to Maule and existed independently of any photograph (with the exception of Mandeville Place).

The court found that the Sign's depiction of Mandeville Place was a shared similarity but that the differences between the Photograph and the Sign overwhelmed any similarity, particularly because the Photograph's depiction of Mandeville Place (like all of the buildings in the Photograph) was detailed and realistic

while the Sign showed Mandeville Place (like all of the buildings in the Sign) as a cartoon-like illustration in a bright red color.

OTHER SKYLINE PHOTOGRAPH DECISIONS

Other federal courts have held, under different circumstances, that a defendant's use in an advertisement of an actual photograph of a building taken by another party may constitute copyright infringement.

For example, in another case brought by Maule about the same Photograph, the Pennsylvania federal court found that Maule's copyright infringement claim survived the defendants' motion to dismiss. In that case, Maule alleged that the defendants, without his authorization, cropped his actual Photograph including his depictions of the Comcast Center and Mandeville Place, and then used an identical image of that cropped portion in their campaign.

Likewise, the New York federal court in Manhattan found defendants liable for infringement of the copyright in a photograph of the Manhattan skyline and the Brooklyn Bridge where the defendants, without authorization, scanned the central portion of the photograph, enlarged the image, and then put that image on marketing materials. While the court held that the underlying idea of a skyline photograph cannot be copyrighted, it found

that use of the actual image shot by the plaintiff constituted copyright infringement.

TAKEAWAY

When companies use a photograph of a building or skyline in any content, including advertising and marketing campaigns, copyright and trademark issues may arise. To reduce the risk of liability for copyright infringement, companies should consider: (1) taking their own photograph of the buildings without reproducing a pre-existing photograph; (2) obtaining authorization from the copyright owner of a pre-existing photograph; or (3) creating their own unique depiction of the buildings, as Anheuser Busch and Everbrite did when they created a Budweiser sign with red, cartoon-like buildings.

FOR MORE INFORMATION

Neal H. Klausner
Partner/Co-Chair, Litigation
212.468.4992
nklausner@dglaw.com

Howard R. Weingrad
Partner, Advertising, Marketing & Promotions
212.468.4829
hweingrad@dglaw.com

Claudia G. Cohen
Associate, Litigation
212.468.4838
ccohen@dglaw.com

or the D&G attorney with whom you have regular contact.