

De Minimus Copyright Infringement

By: Jim Astrachan

You have the good fortune and talent to be involved in the production of "ROC", a hit HBO television sitcom about a middle-class African-American family living in Baltimore. You even get to exercise your creativity and decide how to decorate each week. This is about a church congregation. One of the scenes, lasting about five minutes, takes place in the church's hall.

You are sort of a collector of art, and on the wall of your home den hangs a poster entitled *Church Picnic Story Quilt*, a reproduction of an original work of art by artist Faith Ringgold who donated the art from which the poster was made to an Atlanta church. Ringgold allowed the church to create posters and sold hundreds at \$20 each, although she retained all other rights in her art.

Your poster will add interest and would be appropriate, so you bring it from home and hang it on the wall of the set. During the shoot, various actors stand to the left and right of the poster and for just a few frames the poster is prominently shown in the center of the screen. It looks great.

The poster is shown nine times in the five minute scene that takes place in the church hall, and nothing in the dialogue, action or camera work particularly calls the viewer's attention to the poster. In each of the nine sequences the poster, or a portion, is within a visible range from 1.86 to 4.16 seconds. The total duration of all exposures of the poster is 26.75 seconds; the entire sitcom is approximately 24 minutes. The poster is nothing more than the backdrop, which is too bad as you surely think the artist would love the exposure of her art on national TV.

The show is popular and it draws a large audience; artist Ringgold is a viewer. The next day she calls and you take it. You are about to say thank you's are not necessary; that you wish there was more exposure for her poster. In the back of your mind you're thinking there might be an signed copy of the poster in it for you.

You pick up the phone and before you can say "hello", she tells you she's going to sue Black Entertainment Network and HBO for copyright infringement. You can't believe your ears. You did nothing wrong -- you did not violate any rights. Heck. You did her a favor. She hangs up and you call your boss in New York. She turns you over to the company's lawyers' and a pregnant pause follows your explanation of what occurred. The lawyers explain the following.

The Copyright Act grants certain exclusive rights to the owner of a copyright including the right to publicly display a copyrighted work. The poster is a copyrighted work, and it's been publicly displayed - even if for only 26.75 seconds. There are certain defenses to infringement claims including the defense of fair use and *de minimis* use, two defenses that are often related.

The basis for the *de minimis* defense is the maxim "*de minimis non curat lex*" (the law does not concern itself with trifles). Those who violate rights in such an insignificant manner as to be meaningless should be insulated from liability. In copyright law, *de minimis* could mean a violation so trivial that the law will impose no consequence because the affect on the copyright owner is so insignificant as to be meaningless.

In the copyright context, *de minimis* can also mean that the use does not involve enough of the quantity of a copied work to constitute substantial similarity, a required element of actionable copying.

How would the court rule? Did you violate the artist's copyright? In short, the court should rule for the artist. The reproduction of the poster on TV is actionable infringement.

Copying did occur. It was the actual poster that was filmed for TV; not a poster that bore some similarity to the original nor some minor portion of the poster. The court will determine whether the copying is quantitatively and qualitatively sufficient to support the legal conclusion that actionable copying has occurred. The qualitative component deals with how many components of the complete expression have been copied, and how important each component is to the complete work. Five notes from a large symphony? The first five notes of Beethoven's Fifth Symphony? The quantitative component deals with how much of the work has been taken. When dealing with a visual work, like the poster, courts will consider the transformative nature of the copying. They'll consider duration, focus, lighting, camera angles and prominence.

A fair use? Whenever fair use defense is considered, an important element is the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and *de minimis* is considered relevant in the application of the fair use defense. This is not so simple an inquiry, for as one judge wrote:

Whether use of a copyrighted work that surpasses the *de minimis* threshold of substantial similarity for purposes of actionable copying can nevertheless be *de minimis* for purpose of the third fair use factor [amount and substantiality of the portion used] is an inquiry in the class of angelic terpsichore on the head of pins.

Your use of the poster was purely decorative. The TV set poster served the same purpose the real poster was intended to serve. The result would have been different if a TV news show on the artist's life showed her work to illustrate her style, this a situation that would likely be a fair use. Here, the public display of the poster, as a poster, without consent has deprived the artist of the royalty she would have received from a license of her work. Sure, HBO may have refused to pay anything for this use of the poster, but at least the artist would have been given a choice and could have offered her art, refused it's use, or agreed to the fee.

As they say, no good deed goes unpunished.

James B. Astrachan is the author of The Law of Advertising, published by Matthew Bender-Lexis/Nexis.