

# Kelley Drye Wins "Fair Use" Case for PED with Green Day Concert

August 23, 2011

Kelley Drye, along with his co-defendants' counsel, convinced U.S. District Court, Central District of California Judge Philip S. Gutierrez to dismiss in its entirety a lawsuit filed against Performance Environment Design ("PED") relating to concerts by the popular rock band, Green Day. The complaint filed by an "up-and-coming" artist, Derek Seltzer, alleged that the defendants violated the Copyright Act, Lanham Act, and state unfair competition and dilution and business injury laws. On August 18, 2011, the judge granted the defendants' motion for summary judgment, awarding a complete defense victory.

The plaintiff, Mr. Seltzer, had created a drawing of a contorted human face, referred to as the "Scream Icon." Images of the "Scream Icon" appeared on posters and stickers in public spaces in L.A., including on a wall at Sunset Boulevard and Gardner Avenue. The Green Day defendants hired PED, who in turn coordinated with Roger Staub, a photographer and set designer, to create the video backdrop for Green Day's 2009-2010 "21<sup>st</sup> Century Breakdown" concert.

For one of the concert songs, "East Jesus Nowhere," Mr. Staub created a four-minute video backdrop that included a composite image, which contained his photo of the Sunset/Gardner Wall that had an image of a Seltzer's "Scream Icon" poster. Staub also added graphic elements to the image of plaintiff's work.

On summary judgment, the defendants did not dispute that Seltzer had a valid copyright and that they did not pay to use the "Scream Icon" image. However, **Kelley Drye** argued the Fair Use doctrine created a limited privilege to use the copyrighted material in a reasonable manner, without the owner's consent. The federal court held that Kelley Drye's defense of fair use was correct under Section 107 of the Copyright Act.

In so holding, the court noted

1. The doctrine of fair use applied even though defendants essentially engaged in the unauthorized copying of plaintiff's work.
2. Defendants altered plaintiff's artwork by adding color and contrast, adding a brick background, and superimposing a red spray-painted cross over the modified image.

Defendants' use of plaintiff's art was transformative in that it altered the plaintiff's work with a new expression, meaning or message. The defendants' addition of a large red cross transformed the plaintiff's work into a comment on religion, used in connection with a Green Day song about religion. The court held that this use was "highly transformative" (i.e. plaintiff's work was transformed into a brand new creation used in a different context than the plaintiff's original work).

3. Defendants made no money by using plaintiff's work. The plaintiff's artwork did not appear on any merchandise, concert tickets or any advertisements. Even though defendants used the work in a commercial setting (background in Green Day's live concerts), the judge deemed the commercial use insignificant, because there was no evidence that defendants used the image on any tour merchandise, advertisements or promotional material. In other words, no one buys a ticket for a concert in order to see the background art.

4. The defendants' use had no effect upon the potential market for or value of the plaintiff's work. Copies of the plaintiff's artwork were already displayed around L.A., and the defendants obtained the work by taking a photograph of street art and graffiti (which included plaintiff's work).

In making this ruling, the court confirmed that even making a substantially similar or even an exact copy of a plaintiff's work may be fair use, even in a commercial setting, where the defendants altered the plaintiff's work to make a different statement and there was no reason to believe that the plaintiff's ability to sell his work was harmed.

In addition, the judge tossed out Mr. Seltzer's Lanham Act claims, which alleged unfair competition, false designation of origin and false representation of affiliation. Kelley Drye pointed out the "Scream Icon" was not a valid, protected trademark. "Scream Icon" was not a mark used in the sale of goods or services, and did not identify the source of goods as Mr. Seltzer. It was artwork, not an image for trademark purposes.

As to Mr. Seltzer's allegations under state law of "unlawful, unfair or fraudulent business acts or practices," the court again noted there was no evidence that the "Scream Icon" was ever used as a trademark, so there lacked the likelihood of consumer confusion or potential for deception. Finally, Mr. Seltzer's claims for dilution and business injury pled under state statutes failed, as those statutes cited had been repealed.

Kelley Drye represented PED in this matter, securing dismissal of the complaint.

Performance Environment Design is a team of creative professionals who design concepts and orchestrate structural, scenic, lighting, video, motion and compositional details. Defendants represented by co-counsel included Billie Joe Armstrong, Frank Edwin Wright III, Michael Pritchard (together "Green Day" or "the band"), Green Day, Inc., Green Day Touring, Inc., Green Day (a partnership), Green Day (a business entity), Warner Bros. Records Inc., Infect Productions and Roger Staub.

For a copy of the order granting defendants' motion for summary judgment click on the document below.