



American Eagle on Wynwood

By *Sharon Ellis Palmer and David Roy Ellis, Attorneys*

Artist Who Created The Droopy Eyes Cannot Look The Other Way

Wynwood, an area just north of downtown Miami, sets the scene for a legal battle between a well-known street artist and a giant clothing retailer. The district is known for its galleries, a monthly art walk, and the Wynwood Walls, the colorful mural art on the walls of buildings.

The area has recently garnered national attention, in part because of the work of a particular street artist, David Anasagasti, a 34-year old Cuban-American who has been part of Miami's art scene for a

As a result, Anasagasti sued American Eagle in Federal District Court in New York for "blatant, unlawful and pervasive infringement" of his copyrighted artwork and intellectual property. According to his complaint, American Eagle illegally used his work to advertise its fashions on its website, social media pages, targeted marketing, a billboard in downtown New York City, and in store displays around the world.

Anasagasti claims that representatives of American Eagle came to the Wynwood

Eagle from using photos containing his work.

Anasagasti's artwork appears to fit the definition of a copyrighted work as an "original work of authorship fixed in any tangible medium of expression," 17 U.S.C. §102, even though he does not own the buildings on which he painted his murals, and presumably the building owners could remove or paint over them at any time. The copyright in a work is separable from the physical object on which it is embodied, so an artist might sell his painting but



long time. He is also known as AholSniff-sgue. Among his works are murals he describes as "fields of sleepy eyes," which he painted on a warehouse along I-95 in Miami and on various other structures in the Wynwood Art District. The giant mainstream clothing retailer, American Eagle Outfitters, set its eyes on the murals and decided to use them in its advertising, without telling the artist or asking his permission.

Art District with a production crew and models to organize a campaign intended to appeal to the young adult audience that the retailer targets. He further alleges that American Eagle did this without crediting or compensating him. He claims that American Eagle took his copyrighted imagery worldwide without asking permission or offering compensation. The suit seeks not only monetary damages but an injunction that would stop American

retain the copyright, meaning the right to make copies and derivative works, while the owner can display the canvas artwork itself.

Under the Copyright Act, the copyright owner is granted a bundle of independent exclusive rights, including reproduction, distribution, public display, public performance, and the right to make derivative works. Violation of any of these rights may

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constitute copyright infringement, unless there is a valid defense. 17 U.S.C. §106.

One of the most important defenses is the fair use doctrine, which provides that the "fair use" of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship or research is not an infringement, and sets out a number of factors for courts to consider. These factors include the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used; and the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. §107.

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Courts analyze these factors on a case-by-case basis, weighing each of the

factors independently. In this case, it is likely that a court would find that the defendant's use of the work was not for any of the enumerated fair use factors, but was strictly for a commercial purpose, to sell more clothing by appealing to a "street" audience. According to Anasagasti, American Eagle's unauthorized use of his artwork hurt his "street cred," which includes his reputation that he won't sell out to corporate interests. "In today's fashion marketplace, affiliation with artists bearing such 'street credibility' is highly sought-after by retail brands for the cultural cachet and access to the profitable youth demographic that it offers," the complaint states.

Moreover, American Eagle's use was not transformative, which courts sometimes consider as possible fair use. In order for something to be transformative, a defendant must create new understandings, new aesthetics, and new meaning. It is hard to see how simply placing a model in front of an unaltered piece of art transforms Anasagasti's work to something new.

As for the nature of the work, Anasagasti's work was unique and highly creative and therefore entitled to a high degree of protection. As far as the amount and substantiality of the use, American Eagle clearly used all of his imagery and did not just take just a small portion or sample of his art. They undoubtedly profited from their unauthorized use of his work, and diminished the likelihood that he could license the use of his artwork to other apparel retailers, or indeed, many

other sellers who might not now want to associate themselves with American Eagle in the minds of the public.

Accordingly, it is likely that the defendant's arguments would fail on all four of the fair use factors. The droopy eyes are watching and will probably ultimately prevail. □

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