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# You Look Complicated Today: Representing an Illegal Graffiti Artist in a Copyright Infringement Case Against a Major International Retailer

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## PRACTICE POINT

# **YOU LOOK COMPLICATED TODAY: REPRESENTING AN ILLEGAL GRAFFITI ARTIST IN A COPYRIGHT INFRINGEMENT CASE AGAINST A MAJOR INTERNATIONAL RETAILER**

*John Eric Seay\**

### TABLE OF CONTENTS

I.	INTRODUCTION: WE'RE SO GLAD YOU'RE HERE.....	76
II.	COPYRIGHT INFRINGEMENT AND GRAFFITI: EVERYTHING WILL BE OKAY .....	78
	A. ILLEGAL GRAFFITI IS SUBJECT TO COPYRIGHT .....	79
	B. THE DESIGN MET THE ELEMENTS OF COPYRIGHT .....	83
III.	CONCLUSION: YOU LOOK NICE TODAY .....	85

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I. INTRODUCTION: WE'RE SO GLAD YOU'RE HERE

On the evening of December 14, 2008, designer Jennifer Lewis<sup>1</sup> painted two love letters to the East Atlanta Village (EAV) neighborhood, one on either side of an old signboard located on Flat Shoals Avenue, the main thoroughfare in EAV. The sign was located behind a local business but situated on a vacant strip of land. Years before, the sign had featured an image of a clock without hands and a message stating, EVERYTHING WILL BE OK. The sign and its message were popular among EAV residents, and the community was disappointed when a series of banal graffiti tags<sup>2</sup> obscured it.

In an effort to reclaim the sign as a message board for positive thought, Lewis—armed with cans of paint and encouragement from her friends—painted the aforementioned love letters. On one side of the sign, the side residents of EAV would see when leaving the neighborhood, she painted the phrase YOU LOOK NICE TODAY<sup>3</sup> in crooked lettering, followed by a cartoonish red heart. On the other side of the sign, the side residents of—and visitors to—EAV would see when entering the neighborhood, she wrote I'M SO HAPPY YOU'RE HERE, also in crooked lettering and followed by another cartoonish red heart.

As Lewis later stated in an open letter posted on a popular consumer rights website, the messages were “a small gesture that I genuinely hoped would make my neighbors and EAV visitors feel good.” The sign was loved by EAV residents. Several residents posed with Lewis in photographs that were inevitably posted online. Although the property owner eventually removed the sign to make room for additional development, Lewis’s original design

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<sup>1</sup> “Jennifer Lewis” is a fictional name constructed in order to obscure the identity of the designer in this case. In order to protect the interests of the designer, some source material, such as Facebook posts, have not been directly cited.

<sup>2</sup> A “tag” is the most common form of graffiti and usually features only the artist’s street name in one color of paint. See GREGORY J. SNYDER, *GRAFFITI LIVES: BEYOND THE TAG IN NEW YORK’S URBAN UNDERGROUND* 41 (N.Y. Univ. Press 2009).

<sup>3</sup>



remained popular. Over the years, some friends of Lewis asked for her permission to use the design, and Lewis always happily consented.

Then in January 2012, Lewis received a startling email from a friend containing links to some items for sale from the website of a major international retailer (MIR).<sup>4</sup> Those items included hand towels, pillowcases, and doormats, all of them featuring the familiar phrase YOU LOOK NICE TODAY in crooked lettering, followed by a cartoonish red heart. At first, Lewis was amused and flattered, although also a little confused, by the MIR design. She posted the following status update on her Facebook page: “So, I guess [MIR] thought enough of something I did a few years ago to use it for floormats and pillowcases. I’m feeling flattered and disoriented, I guess?”

The reaction from Lewis’s friends was not nearly as ambivalent. They were angry that MIR had apparently produced a copy of Lewis’s design—a design that meant so much to the community—and then tried to profit from it, all without making any effort to contact Lewis. In droves, those friends posted their thoughts on the MIR Facebook page. At first, MIR ignored the comments, presumably hoping the outrage would subside. When it did not, MIR posted a message on its Facebook page in which it appeared to admit that its designers had been inspired by Lewis’s design and had adapted that design for use on MIR products, but MIR also implied that it had altered the typeface and the placement of the heart just enough to create a new, distinct work. That Facebook post was subsequently deleted.

Lewis herself attempted to contact MIR but received no response. MIR’s failure to respond irked Lewis, who at that point was only seeking an apology. Because she was unable to address her concerns directly with MIR, she wrote the aforementioned open letter detailing the story and posted it on the aforementioned popular consumer rights website. Nearly as soon as the letter was posted, the story went viral. National and international news outlets flooded Lewis with interview requests. She began to wonder what her rights were and whether she had any recourse against MIR.

When I first met with Lewis, I realized that there were at least two interesting legal issues in the case.<sup>5</sup> The first was whether the design—which

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<sup>4</sup> “MIR” is a fictional name constructed in order to obscure the identity of the defendant in this case.

<sup>5</sup> As it turned out, the most important issue in the case was whether Lewis could bring suit in the United States. The alleged act of infringement had apparently occurred overseas, and the products had—according to MIR—only been sold internationally. Although I did unearth some creative arguments that might have provided us with domestic jurisdiction in this case, we were able to settle the matter before we needed to use them. Nevertheless, the subject of international copyright law is very interesting and is certainly worthy of its own lengthy article. However, this

she painted without permission on a sign on private property—was barred from copyright protection due to its status as illegal graffiti. The second issue was whether her design possessed a sufficient amount of creativity to warrant copyright protection. Both of these legal issues are discussed in this Article. After providing a summary of the law, this Article argues that graffiti, even if written illegally, is subject to copyright and that Lewis's design, while simple, was nevertheless sufficiently original to warrant copyright protection. However, this Article begins with a brief overview of the case assessment process.

## II. COPYRIGHT INFRINGEMENT AND GRAFFITI: EVERYTHING WILL BE OKAY

The first step in any potential litigation is to evaluate the strength of the case. That evaluation typically begins with identifying the legal issues at play and the elements required to state a case for those legal issues. Lewis clearly had a potential copyright infringement claim on her hands. In order to prevail in a copyright infringement action, Lewis would need to demonstrate: (1) that she owned a valid copyright in the work and (2) that MIR impermissibly copied original elements of that work.<sup>6</sup> With regard to the second element, if a plaintiff lacks direct evidence of such copying, then she may present indirect evidence, i.e., circumstantial proof, of the impermissible copying.<sup>7</sup>

To prevail while using such indirect evidence, a plaintiff must demonstrate that the defendant had *access* to the work and that the allegedly infringing work is *substantially similar* to the copyrighted work.<sup>8</sup> If a plaintiff cannot even provide circumstantial evidence of access to the work, then she may still prevail, if she shows that the works are so *strikingly similar* as to render the idea of independent creation implausible.<sup>9</sup> Fortunately for Lewis, we did not have to resort to indirect evidence, having already in our possession a copy of the Facebook message that MIR posted online in which the company apparently admitted to being inspired by Lewis's work but claimed that it changed some of the elements of the design in an attempt to create a totally distinct work.

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Article chooses to focus only on the two issues stated herein.

<sup>6</sup> Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

<sup>7</sup> See Folio Impressions v. Byer Cal., 937 F.2d 759, 765 (2d Cir. 1991).

<sup>8</sup> 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01 (Matthew Bender, Rev. Ed.) (“Legions of cases promulgate the twin requirements of access plus substantial similarity.”).

<sup>9</sup> Ty Inc. v. GMA Accessories, 132 F.3d 1167 (7th Cir. 1997). Note that the “strikingly similar” standard is much higher—the works must be very nearly identical.

Not only had MIR arguably admitted access, but also its design and Lewis's design were more than substantially similar—they were very nearly identical.<sup>10</sup> The MIR design featured the same crooked lettering, with only one letter changed from capital to lowercase. The red heart was also nearly identical across the designs, although the heart in the MIR design was pink instead of red and was placed immediately next to the phrase instead of, as it was in Lewis's design, slightly beneath it. Nevertheless, in the context of the overall design, those alterations were fairly insignificant and not even immediately obvious.

Feeling confident in our analysis of the impermissible copying and substantial similarity issues, we next turned our attention to the first element cited above, that is, whether Lewis owned a valid copyright in the work. In order to address that question, we needed to dive deeper into the issues of whether graffiti is a proper subject of copyright law in the first place, and if so, whether Lewis's design was sufficiently original enough to warrant copyright protection.

#### A. ILLEGAL GRAFFITI IS SUBJECT TO COPYRIGHT

Since the 1980s, no other artistic movement has garnered more press—and certainly not more censure—than the graffiti<sup>11</sup> art movement,<sup>12</sup> and no other form of art is more prevalent. Although graffiti artists face legal penalties for—among other violations—trespassing and damaging personal property, graffiti, especially when referenced by its more innocuous name of “street art,” has many fans. Those fans appreciate the dialogue that transpires on city walls, courtesy of artists armed with cans of spray paint.<sup>13</sup>

But just because an artist spray-paints the side of a building does not mean that the resulting design is—or should be—copyrightable. In order to receive

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<sup>10</sup> Here, the use of the phrase “substantial similarity” is meant to address the strength of the infringement rather than to indicate access when direct evidence of access is lacking.

<sup>11</sup> The *Oxford Dictionaries* define graffiti as “writing or drawings scribbled, scratched, or sprayed illicitly on a wall or other surface in a public place.” *Definition of Graffiti-drawing*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/english/graffiti> (last visited Oct. 1, 2012). However, the graffiti art movement also encompasses non-illicit graffiti, such as commissioned murals. This Article, however, concerns itself only with illicit graffiti; thus references to “graffiti” in this Article should be understood to exclude non-illicit graffiti.

<sup>12</sup> See Marc Schiller & Sara Schiller, *City View*, in *TRESPASS: A HISTORY OF UNCOMMISSIONED URBAN ART* 10, 10 (Ethel Seno ed., 2010) (“Never before have we seen public art reach such a scale as we now see with the works of Blu, or become so pervasive as we see with Shepard Fairey’s, or so copied as that of Banksy, or so delicate as that of Swoon.”).

<sup>13</sup> In Atlanta, a non-profit organization called Living Walls (<http://livingwallsconference.com/index>) “seeks to promote, educate, and change perspectives toward public space in our communities via street art.”

protection under federal copyright law, the design must qualify as an (1) original (2) work of authorship (3) fixed in a tangible medium of expression from which it can be perceived.<sup>14</sup> A more basic question, however, involves whether graffiti should merit copyright protection in the first place. The purpose of the Copyright Act is to “promote the Progress of Science and useful Arts.”<sup>15</sup> Graffiti is illegal, and its creation arguably damages personal or public property. When a graffiti artist illegally writes a design on a wall, should society protect the artist’s rights in the design? Is the artist engaging in a useful art worthy of promotion?

Traditionally, courts in copyright infringement actions have been hesitant to delve into the question of the merit or legal status of the underlying work. In *Jartech Inc. v. Clancy*, the defendant argued that the plaintiff’s copyright was not valid because the subject of his work was obscene.<sup>16</sup> The Court stated:

There is nothing in the Copyright Act to suggest that the courts are to pass upon the truth or falsity, the soundness or unsoundness, of the views embodied in a copyrighted work. The gravity and immensity of the problems . . . that would confront a court if this view were adopted are staggering to contemplate. It is surely not a task lightly assumed to be, and we decline the invitation to assume it.<sup>17</sup>

Admittedly, the above excerpt from *Jartech* concerns the *views* expressed in a given work, whereas the issue with graffiti is its illegal nature.

The question of the legality of the underlying work was raised by the defendant in *Villa v. Pearson Education, Inc.*<sup>18</sup> In *Villa*, the plaintiff brought suit against the defendant for the defendant’s use of a reproduction of one of the plaintiff’s graffiti works in a book without permission.<sup>19</sup> Ruling on a motion to dismiss pursuant to Fed. R. Civ. Proc. 12(b)(6), the District Court determined that the question regarding the work’s illegality hinged on questions of fact and was therefore inappropriate for the court to answer.<sup>20</sup> Therefore, the court

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<sup>14</sup> 17 U.S.C. § 102(a) (2006). These elements will be discussed below *infra* Part II.B.

<sup>15</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>16</sup> 666 F.2d 403 (9th Cir. 1982).

<sup>17</sup> *Id.* at 406 (quoting *Belcher v. Tarbox*, 486 F.2d 1087, 1088 (9th Cir. 1973)). *But cf.* *Devils Films, Inc. v. Nectar Video*, 29 F. Supp. 2d 174 (S.D.N.Y. 1998) (declining to grant equitable relief when the subject of a copyright claim is deemed obscene).

<sup>18</sup> No. 03 C 3717, 2003 WL 22922178, at \*1 (N.D. Ill. Dec. 9, 2003).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at \*3.

refused to dismiss the Complaint.<sup>21</sup> Although it is unclear how a court would ultimately rule on this issue, *Villa* strongly suggests that, at least absent a conviction from a separate criminal court, an allegation of illegality of the underlying work is not enough for a defendant to prevail on a motion for summary judgment, as the answer to that allegation necessarily involves questions of fact.

A slightly different argument is that even if graffiti is a proper subject of copyright law, copyright protection should not apply against the defendant by operation of the Unclean Hands Doctrine. The Unclean Hands Doctrine is a defense available for defendants involved in litigation against unethical plaintiffs.<sup>22</sup> For example, if I fraudulently induce you to sign a contract, then you may use that fact as an affirmative defense to my claim against you for breach of that contract.<sup>23</sup> In a case involving graffiti, the argument would be that the unethical conduct was the creation of the graffiti and that the graffiti artist therefore cannot seek to enforce her rights in her work against a defendant who has exploited the work without permission.<sup>24</sup>

However, courts are unlikely to be persuaded by an Unclean Hands Doctrine defense in the context of copyright infringement for all of the reasons stated in *Jartech* and *Villa*.<sup>25</sup> Namely, until an artist is actually found guilty of a graffiti crime, she is innocent in the eyes of the law. Also, a civil court is not a criminal court; therefore, it is not competent to make a determination as to the illegality of the underlying work. Moreover, in the context of the Unclean Hands Doctrine, the unethical conduct must be related to the subject matter of the lawsuit.<sup>26</sup> As stated above, graffiti artist's act of vandalism is not the issue in an infringement case. The subject matter of an infringement case is the use of the work without permission. Finally, as noted above, even if the Unclean Hands Doctrine is deemed a proper defense, then per *Villa*, it is not a proper

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<sup>21</sup> *Id.*

<sup>22</sup> See DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 2.4(2) (2d ed. 1993).

<sup>23</sup> *Id.*

<sup>24</sup> Even if the defendant were the owner of the property on which the design was written, I do not think the Unclean Hands Doctrine would be applicable because the issue is the *use* of the design, which is different than the issue of who owns the *object* on which the design was written. The Unclean Hands Doctrine would, however, be successful in preventing a graffiti artist from claiming ownership of the physical embodiment of the work because then, the issue of the illegal nature of the work is more closely related to the subject matter of the lawsuit.

<sup>25</sup> See *supra* notes 16–19 and accompanying text.

<sup>26</sup> Cf. *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 815 (1945) (“Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim.”).

basis for awarding summary judgment in favor of a defendant because its applicability to the given case necessarily involves questions of fact.

Admittedly, Lewis did not have permission to place her design on the billboard. In Georgia, where Lewis's work was created, the definition of graffiti includes:

[A]ny inscriptions, words, figures, paintings, or other defacements that are written, marked, etched, scratched, sprayed, drawn, painted, or engraved on or otherwise affixed to any surface of real property or improvements thereon without prior authorization of the owner or occupant of the property by means of any aerosol paint container, broad-tipped marker, gum label, paint stick, graffiti stick, etching equipment, brush, or other device capable of scarring or leaving a visible mark on any surface.<sup>27</sup>

Unlike some states, Georgia does not have a statute specifically and exclusively addressing graffiti. However, graffiti is included in the categories of criminal trespass, if the damage is less than or equal to \$500,<sup>28</sup> and it is potentially criminal damage to property in the second degree if the damage exceeds \$500.<sup>29</sup>

In working through this aspect of Lewis's case, my concerns were that (1) MIR might wage an Unclean Hands defense, even though my sense was that such a defense would be highly unlikely to prevail; and (2) representing Lewis in such a public disagreement would draw attention to the graffiti, including the attention of the police, who might decide to prosecute her for criminal trespass and criminal damage to property.

Even though I considered both concerns unlikely to occur given the circumstances, I nevertheless sought out the owner of the signboard on which Lewis's design was placed in an attempt to gauge whether or not he viewed the design as vandalism of his property.<sup>30</sup> He was helpful and appreciative of the design and, in fact, had kept the sign in a warehouse instead of destroying it.<sup>31</sup>

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<sup>27</sup> O.C.G.A. § 17-15A-2 (2012).

<sup>28</sup> *Id.* § 16-7-21.

<sup>29</sup> *Id.* § 16-7-23.

<sup>30</sup> Before contacting the property owner, I asked my client whether she knew him. She did and said that he appreciated the sign. Therefore, I did not think that approaching him would raise any red flags in his eyes and potentially inspire him to pursue Lewis for damages to the sign.

<sup>31</sup> Note that Lewis had no property right to the sign. While she retained all rights in the design, the property owner owned the physical embodiment of the design and was free to sell it, even though he would not be permitted to reproduce the design. See *infra* notes 36–39 and accompanying text.

He offered to retroactively authorize the graffiti so that it would not be considered illegal and subject to criminal penalty or the Unclean Hands Doctrine.<sup>32</sup> The willingness of the property owner to cooperate with Lewis removed the issue of the illegality of the design from the case assessment process and strengthened Lewis's case.

#### B. THE DESIGN MET THE ELEMENTS OF COPYRIGHT

Having at least provisionally determined that graffiti, even when written illegally, is subject to copyright law and, moreover, having obtained retroactive permission from the landowner in an effort to mitigate certain other defenses, I next turned my attention to whether Lewis's design itself was sufficiently original to justify copyright protection. As stated above, in order to receive protection under federal copyright law, the design must qualify as an (1) original (2) work of authorship (3) fixed in a tangible medium of expression from which it can be perceived.<sup>33</sup> Starting with the second element, among the "works of authorship" categories listed in the Copyright Act are "pictorial, graphic, and sculptural works."<sup>34</sup> As a two-dimensional design, Lewis's work clearly qualified as a "graphic" work.<sup>35</sup>

As for the third element, the phrase "fixed in a tangible medium of expression" merely requires that the work be "sufficiently permanent or stable" in order to permit an individual to observe it for "a period of more than transitory duration."<sup>36</sup> Admittedly, works of graffiti are often short-lived because they are painted over or the structures on which they were painted are destroyed. However, the graffiti work itself is protectable, even if the physical embodiment of the graffiti is destroyed.<sup>37</sup> Copyright law clearly distinguishes between the work and the physical embodiment of the work, only extending protection to the former.<sup>38</sup> So long as the work is observable for longer than a

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<sup>32</sup> When analyzing claims based on ownership rights in graffiti, the Visual Artists Rights Act (VARA), codified at 17 U.S.C. § 106A (2012), may also provide artists with some additional rights. However, because VARA did not play a role in the settlement of Lewis's case, I will not discuss it here.

<sup>33</sup> 17 U.S.C. § 102(a) (2012).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* § 101 (defining pictorial works to "include two-dimensional and three dimensional works of fine, graphic, and applied art").

<sup>36</sup> A work is "fixed . . . when its embodiment [. . .], by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.* § 102.

<sup>37</sup> *Pacific & S. Co. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984).

<sup>38</sup> 1 NIMMER & NIMMER, *supra* note 8, § 2.03[c].

period of transitory duration, then the work is fixed.<sup>39</sup> In Lewis's case, several pictures were taken of the graffiti, and the graffiti greeted EAV visitors and residents for a period of over a year. Clearly, the work was "fixed" and capable of "perception."

The first element of copyright, whether the work was sufficiently original, was the closest call in this case. Federal copyright law requires that a work be original to qualify for copyright protection.<sup>40</sup> In one especially famous case from 1991 involving the copyrighting of telephone white page listings, the U.S. Supreme Court held that the level of originality required to receive copyright protection is more than mere "sweat of the brow"<sup>41</sup> but that meeting the bar of originality requires only "independent creation plus a modicum of creativity."<sup>42</sup>

While the bar is set low, not every scribble on every wall is copyrightable. In fact, there are many forms of graffiti that are arguably not copyrightable. The simplest form of graffiti, tags, may fall outside of copyright protection. First, tags typically are simply the artist's name, and copyright generally prohibits the copyrighting of names (including pseudonyms), titles, short words, and phrases.<sup>43</sup> Tags and other simple graffiti are likely too basic to warrant copyright protection, possibly even where the tag exhibits a particular style.<sup>44</sup> Moreover, in the graffiti world, tags are viewed as signatures. In that respect, many tags would be considered too utilitarian to warrant copyright protection.<sup>45</sup> It is important to note, however, that any given individual tag may warrant copyright protection, depending on the design's elaborateness. Even where the individual signature or name might not be copyrightable, the entire design taken as a whole might be, and certainly, that is the argument one would make as the artist or the artist's attorney. However, the design as a whole must surpass the originality threshold.<sup>46</sup>

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<sup>39</sup> 17 U.S.C. § 101 (2012).

<sup>40</sup> *Id.* § 102(a).

<sup>41</sup> *Feist Publ'n, Inc. v. Rural Tel. Serv.*, 499 U.S. 340, 359–60 (1991).

<sup>42</sup> *Id.* at 346 (citing *The Trademark Cases*, 100 U.S. 82, 94 (1879)).

<sup>43</sup> See *Copyright Protection Not Available for Names, Titles, or Short Phrases*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ34.pdf> (last visited Oct. 19, 2012); *Pseudonyms Factsheet*, U.S. COPYRIGHT OFFICE, <http://copyright.gov/fls/fl101.html> (last visited Oct. 19, 2012) ("Nicknames and other diminutive forms of legal names are not considered fictitious. Copyright does not protect pseudonyms or other names.").

<sup>44</sup> SNYDER, *supra* note 2, at 41.

<sup>45</sup> Note that tags are also analogous to typefaces, which have historically been denied copyright protection. See *Eltra Corp. v. Ringer*, 579 F.2d 294 (4th Cir. 1978); see also 37 C.F.R. § 202.1(e) (2012).

<sup>46</sup> Trademark law may come into play as well in analyzing an artist's right to even a simple graffiti tag. However, those issues are beyond the scope of this Article.

As for Lewis's design, admittedly the phrase YOU LOOK NICE TODAY is short, possibly short enough to qualify for the ban on short phrases. YOU LOOK NICE TODAY is a somewhat generic phrase—the kind of statement that is uttered countless times a day and that has probably been used on countless other designs. Adding a heart next to the phrase does add another thin layer of originality, creating a short phrase coupled with an image. Still, a heart is a fairly common way of signing certain kinds of notes. The phrase, the heart, and nothing more might pose more of a risk of uncopyrightability.

However, in my opinion, here the *design* of the phrase and the heart is what lifts this design over the copyright turnstile, if only barely. Lewis's design features crooked, almost childlike, lettering. The design of the letters conveys a playful and complimentary meaning to the words. Again, the lettering itself might fail to qualify for copyright protection, due to the ban on the copyrightability of typefaces. Had Lewis only sought to protect the typeface, her claim might not have been valid. However, Lewis combined a unique typeface with a short phrase and a heart.

I believe that the overall design, including all of its elements—any one of which might have been uncopyrightable—nevertheless, when taken as a whole, is sufficiently original. However, because this case was not litigated, it is unclear how a court would have ruled on the issue of copyrightability. At the very least, the issue of whether the design was sufficiently original was a close enough call, I think, to survive a defendant's motion for summary judgment. The opinion of an aggressive defendant might be that the design was not copyrightable. Even though I disagree, the fact that the copyright is thin, or at the very least not an absolute slam-dunk, does affect how a lawyer pursues a client's claim.<sup>47</sup>

### III. CONCLUSION: YOU LOOK NICE TODAY

Any attorney will tell you that almost no case is perfect. In Lewis's case, there were particularly difficult hurdles. In addition to the federal copyright questions, she also faced the issue of jurisdiction where the act of infringement occurred in a foreign country and where no sales or marketing efforts were directed at the United States.<sup>48</sup> Another issue in the case involved the damages available. Because Lewis had not registered the copyright in her design before the alleged act of infringement, she would have only been entitled to actual

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<sup>47</sup> While the Copyright Office does not thoroughly investigate copyright claims to ensure originality, I will note that the Office did eventually issue a copyright in this case, although not until after we had settled it.

<sup>48</sup> See *supra* note 5.

damages, usually interpreted as the loss of the licensing fee plus those profits of the defendant that were attributable to the infringement.<sup>49</sup>

Although those additional issues influenced how we approached the case, at the very least, we knew or strongly suspected that Lewis's work was protected by copyright. That belief, along with the mountain of bad press that was heaped onto MIR in the weeks leading up to the settlement, gave us enough leverage to negotiate a fair settlement for Lewis.<sup>50</sup> After the case settled, Lewis returned to the medium that had helped instigate the media firestorm surrounding this case. In her statement which she posted via social media, Lewis thanked her supporters and noted that thanks to the settlement, MIR finally looked nice today.

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<sup>49</sup> Registration of the copyright with the U.S. Copyright Office is not required to obtain copyright protection, but it is a prerequisite to filing a lawsuit. If a registration is filed before the act of infringement (or less than three months after the initial publication of the work, regardless of registration status, if the infringement occurred during that narrow window), then certain additional damages are available to the plaintiff. 3-12 NIMMER ON COPYRIGHT § 12.08. Specifically, a plaintiff may elect to recover statutory damages. 17 U.S.C. § 412 (2006). The statute provides: “[T]he copyright owner may elect . . . to recover, instead of actual damages and profits, an award of statutory damages . . . in a sum of not less than \$750 or more than \$30,000 as the court considers just.” *Id.* § 504(c)(1). Additionally, if the infringement is shown to be “willful,” i.e., the defendant knew he was violating a copyright and yet still persisted, then damages may be raised to \$150,000. *Id.* § 504(c)(2). Correspondingly, where the infringement can be shown as “innocent,” e.g., the defendant had good reason to believe that the work was in the public domain when in fact it was not, then the damages may be lowered to \$200. *Id.*

<sup>50</sup> The exact terms of the settlement agreement are confidential, but in addition to agreeing to a cash settlement for Lewis, MIR also agreed to donate the remaining infringing items to charity and to pay for the surgery of a dog belonging to one of Lewis's friends.