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Fletcher v. Doig: *An Unlikely Case of Coincidence, Correlation or Consent*

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Who has the onus of establishing whether or not a license has been granted? If the license is oral, how is the "applicable law" established and under which jurisdiction? The simplicity with which licenses can be created offers opportunity for mistaken perceptions of consent, because an agreement need not be in writing. Vigilance is therefore critical for a global brand owner to preserve and maintain identity, exclusivity, differentiation even when, or especially when, the brand is a personal name.

Sometimes, this means that a brand owner is forced to seize counterfeit items at the border to prevent entry into a jurisdiction under trademark legislation. Concurrently, an Internet service provider (ISP) may be required to provide notification and/or require takedown of infringing or disparaging content, by resort to online dispute resolution procedures. As a last resort, there may be no choice but to differentiate oneself from the offensive activities through litigation, whether as a plaintiff or a defendant. Litigation is not an attractive last resort. Rarely is it the preferred solution in an international market, whether a brand is large or small. All the more so when the property is a personal name, and the enforcer, through no desire of their own, is cast into the role of defendant.

This is but one of the important reminders for businesses of all types and sizes about the need to manage their brands in disciplined and systematic ways in order to protect what they own and sustain their viability. It is also a call for increased awareness of mediation and alternate forms of dispute resolution in an international context. Cost, consistency, certainty, and conclusion in an expedited timeframe are drivers for consideration of mediation as an alternative to litigation when the stakes are highest, as they are undoubtedly within the global market for brands.

The reminders, explicit and implicit, can be found, interestingly enough, in a story about the fine art market. The story emerges from a recent court case in the United States concerning a painting, *who* really made it and, therefore, what its value was, or wasn't.

By all media reports the case, *Fletcher v. Doig,*[1] is one of the first of its kind, a case in a US court arising from refutation of "authorship" of a painting that was created in Canada. When an internationally renowned artist, Peter Doig, denied authorship of a painting, he was sued for damages for interfering with the market for a painting which was "his."

At the time of this writing, the decision had been widely reported in Canadian media based on the oral remarks of District Judge Gary Scott Feinerman of Northern Illinois. The written reasons for the decision had not yet become available.

Names, Branding, and Reputation Management

To understand the implications of refutation of authorship, it is helpful to understand the commercial value of a good name.

Take the case of an old violin (a work of artistic craftsmanship). Place the violin in the hands of a musician on King Street in Toronto, Sherbrooke Street in Montreal, or 56th Street in Manhattan.

Watch the passersby move along with barely a glance or a pause. Listen to the same violinist on the stage of Roy Thomson Hall in Toronto or Lincoln Centre in Manhattan. When program notes identify the lineage of the rare instrument and the name of the celebrity performer, box office sales make the point: Reputation matters.

The visual arts market rises and falls with artist identification (as do other markets in relation to product identity). Depending on whose signature appears on a canvas, the price of a work can rise or fall dramatically. Authorship affects market prices. This is a truism that correlates to production, reproduction, and licensing of works that are protected by copyright and moral rights. Within the market for content, which is international, reasonable minds may differ, and applicable laws may clash over the approach to valuation. Few would disagree that the identification of authorship is critical.

The Parties and the Story

Well known artist Peter Doig was sued for damages because he denied he had painted a canvas signed "Pete Doige 76." He was believed, first by the market, which sank the sale price, and then by the US trial court, which dismissed the claim for damages on August 23, 2016. An appeal is expected.

Peter Doig was born in Scotland. He went to high school in Ontario, Canada. Over time, his reputation grew. His paintings have sold for millions. Upon learning that a canvas signed *Doig*e was offered for sale as one of his works, he refuted that connection. The effect on the sale price of the canvas was dramatic and immediate, allegedly dropping by some $7 million.

Pete Doige, the signatory of the disputed canvas, was deceased at the time of trial. He was born in Scotland. He spent some time during his high school years, in Thunder Bay, Canada. Although incarcerated in Thunder Bay for possession of LSD, he took art classes and completed a canvas which he sold to his correctional officer. Authorship of this painting is the subject of this litigation.

Fletcher, a co-plaintiff, is a former correctional officer and the alleged owner of the canvas. He purchased the disputed painting from Pete Doige who, he alleges, is the very same person as the defendant, Peter Doig. Fletcher claims he has suffered damages because Peter Doig has refuted the assertion that he, Peter Doig, is "Pete Doige." Peter Doig says he never created the painting, never met Fletcher, and never went to prison while in Canada. Fletcher finds motive in Peter Doig's refutation of authorship: A desire to distance himself with the venue of creation and the context of the initial sale.

Fletcher and his co-plaintiff, the gallery that was retained to sell the painting, allege financial harm arising from Peter Doig's refutation of authorship. The co-plaintiffs, Fletcher, and the gallery, dispute Peter Doig's refutation, vigorously maintaining that "Pete Doige" and Peter Doig are one and the same.

Obviously, there is no word to be had from the alleged artist, Pete Doige, who has since died. Similarities in style between the Pete Doige canvas and the corpus of artwork in circulation by the well-known artist Peter Doig were drawn by experts retained by the co-plaintiffs. Pete Doige's sister filed statements on behalf of the defendant, Peter Doig, rather than on behalf of her late brother, Pete Doige, recalling that her late brother told her of a landscape that he completed while in a Canadian prison.

Peter Doig, whose artwork actually sells for millions, has the resources to mount a solid defense to the claims for damages. More resources could be necessary as reports of an anticipated appeal continue to surface.

Conclusion

The value of a reputation can be analyzed from many perspectives, each of which affects authors (and other producers of other goods), buyers, and sellers. When an artist denies that he has created a work, the dip in market value that follows can be rapid and irreversible. Refutation of authorship highlights the uncertainties that inform and plague artists, creators, valuators, buyers, and sellers of their works.

The art market is taking careful note of the clear linkage between artist identification and value. The impact extends beyond the visual arts market. A personal name can acquire recognition as a brand whether associated with a product or a service, and can be protected as such through the trademark registration infrastructure. This is recognized under existing trademark laws throughout the world. Extraterritorial application is the exception rather than the rule. This means that a court that takes jurisdiction will apply local laws and render a decision of local application. Multiple causes of action may require analysis of different laws, which are inconsistent in result. Lack of consistency and certainty of outcome diminish the attractiveness of litigation. Alternative forms of dispute resolution, particularly through the mediation process, are surely more attractive.

Reputation is the currency of the artist or any brand owner. Registration, licensing, and enforcement of goodwill through contracts and litigation can be critical strategic elements in brand management. These steps maintain the integrity of the work product, the reputation of the artist as a brand owner, and the stability in the market on which investors depend.

Fletcher v. Doig highlights the nexus between trademark rights and moral rights. While an artist or other brand owner may choose to refrain from litigation, a defendant swept involuntarily into litigation may well have overlapping rights on which to rely, depending on the jurisdiction of enforcement. As an involuntary defendant, Doig was thrust into litigation in the United States for having refuted authorship of a work that he allegedly created in Canada. It was necessary to preserve the global market value of his artwork. For Doig, his name and signature are his brand—in multiple jurisdictions. As an artist, he knows that key components of reputation/brand management are monitoring and enforcement, and that precedents set in one jurisdiction may well affect marketability in another.

Fletcher v. Doig sets a new benchmark for the high stakes in global reputation management. Artists and others have no choice but to preserve the market value of their brands through carefully crafted license agreements. In the world of branding and reputation management, marketing entails monitoring and the preservation of value requires detailed attention to the terms of a license or to the absence of one.

1. Fletcher v. Doig, No. 13 C 3270, U.S. Dist. Court, N.D. Ill., Eastern Div., July 21, 2016.