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## Chicago landmark will pose test of First Amendment, copyright law

There is a compelling clash of cultures looming in the U.S. District Court in Chicago. On one side is Anish Kapoor, recipient of the Lennon Ono Grant for Peace in 2016 and knighted by Queen Elizabeth for his services to the visual arts.

He is better known as the artist who created the monumental sculpture called Cloud Gate, affectionately known to Chicagoans as The Bean in Millennium Park.

On the other side is the National Rifle Association.

One might wonder what could bring these two antipodal forces into the same sphere. It is this: Sir Anish has filed a lawsuit alleging that the NRA has violated his copyright in The Bean by incorporating an image of it into a video advertisement without his permission.

The one-minute video, titled "The Clenched Fist of Truth," has been broadcast on television and the internet. It features the deadly serious countenance and narration of NRA's spokesperson, Dana Loesch.

Kapoor alleges in the lawsuit that the video "warns of civil unrest and violence, and states that the only way to save 'our' country from the 'lies' of the liberal media and the 'liberal agenda' is with the 'clenched fist of truth.'"

The video can be easily found by entering the phrase "clenched fist of truth" into your search engine.

At the 17-second mark of the video, a black-and-white image of The Bean appears in its entirety, with several downtown skyscrapers as a backdrop. The image appears for only one second and is used to illustrate the sentence "And then they [the liberals] use their ex-president to endorse the resistance."

Presumably, NRA used an

image of Cloud Gate at this point to make it crystal clear that it was referring to Barack Obama, not George W. Bush. At the end of the video there is a solicitation to join the NRA.

Kapoor owns the copyright in the Cloud Gate sculpture and has registered it with the U.S. Copyright Office. It might come as a surprise that public art such as The Bean is protected by copyright, but it is. Nothing in the Copyright Act deprives a publicly displayed sculpture or mural from copyright protection unless it is created by an employee of the U.S. government as part of his or her job.

The NRA has not yet filed an answer to the complaint. Instead, the NRA has moved to transfer the case to the Eastern District of Virginia, where it is headquartered.

The altercation raises fascinating issues of the interplay between copyright law and the First Amendment. When, if ever, is the First Amendment right to free expression a defense to copyright infringement? How does copyright law accommodate First Amendment principles in an infringement dispute?

*Kapoor alleges that he was outraged to learn that this sculpture had been used by the NRA to support its platform of "promoting violence ... and using its money and political power to block any kind of meaningful gun control."*

At first glance, these fundamental rights appear to be in conflict. The First Amendment is designed to protect free expression, while copyright law enables an author to restrict others from reproducing or publishing copyrighted works without consent. But courts generally do not view copyright as a limitation on free speech principles.

### INSIDE IP LAW



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There are two important safeguards built into the copyright law that accommodate freedom of expression — the doctrine of fair use and the tenet that copyright does not prevent the copying of ideas, only the copying of the particular expression of an idea.

The First Amendment does not provide categorical protec-

tion, and many courts have held that First Amendment concerns are protected by and coextensive with the fair use doctrine. If a defendant's use is an infringement and not a fair use, the right to free speech will not provide a safe harbor.

Even newsworthy expression does not give rise to an absolute First Amendment defense. This

was seen in the Supreme Court decision in *Harper & Row v. Nation Enterprises* (1985), where the court found that unauthorized copying in a news magazine article of passages from President Gerald Ford's memoir about his pardon of Richard Nixon were not fair use.

The First Amendment concerns were adequately accommodated by the copyright principles which allow unfettered use of ideas and facts. The magazine's First Amendment rights did not compel a finding of fair use.

While the First Amendment does not per se relieve parties of their obligation to obey copyright laws, courts sometimes take free speech principles into account when deciding fair use issues. See, e.g., *Suntrust Bank v. Houghton Mifflin* (11th Cir. 2001).

The question then turns to whether NRA will be able to successfully assert a fair use defense. Numerous pages of legal briefs will be submitted on this issue, but our journalistic coverage must be succinct. Like many fair use cases, this is a close case. Some fair-use factors favor Kapoor; some favor NRA.

From Kapoor's perspective, the video is overtly commercial, used by NRA to increase its new membership and bolster its existing members.

The inclusion of the image in the video is not particularly transformative. An image of the entire sculpture is shown in its actual setting in Millennium Park. The appearance of the sculpture itself is not modified in any apparent way. The video is not commenting on or critiquing the sculpture itself, so it was not necessary for the NRA to use the image to make its point that guns are a necessary antidote to the depraved society all around us.

It could have made the visual

connection to the “ex-president” in any number of ways, such as using a public domain image of the ex-president himself or a licensed image of the Chicago skyline or some iconic Chicago building.

Instead, the NRA appears to use the image for attention-grabbing purposes, free-riding on the fame of The Bean. Kapoor requested that the NRA to remove the image from the video, but the NRA refused.

From NRA’s perspective, the image appears so briefly it would

be missed in a blink. The brief appearance of the image is arguably for a different purpose than The Bean is normally used. Importantly for the NRA, its inclusion of the image is unlikely to have any material effect on the market for or value of the work, unless Kapoor could show some noticeable drop in commercial licensing of the image as a result of its use in the video.

With factors on both sides, we are drawn back to First Amendment concerns.

Though it is the NRA who will

be claiming the right to use the copyrighted image as an exercise of free speech, theirs is not the only First Amendment right at stake. The Harper & Row case reminds us that the First Amendment also embraces “the right to refrain from speaking.”

Kapoor alleges that he was outraged to learn that this sculpture had been used by the NRA to support its platform of “promoting violence, private ownership of all manner of firearms ... and using its money and political power to block any kind of

meaningful gun control.”

When informed of Kapoor’s suit, Dana Loesch, NRA’s spokesperson in the video, tweeted “LOL.”

It’s not quite that simple.

As the Supreme Court said in *Eldred v. Ashcroft* (2003), “The First Amendment ... bears less heavily when speakers assert the right to make other people’s speeches.” Or, to paraphrase Judge Richard A. Posner, to copy other people’s sculptural works. *In re Aimster* (7th Cir. 2003).