



## Green Day Awarded Attorneys' Fees Against Artist After Defeating Copyright Infringement and Unfair Competition Claims With Fair Use Defense

November 29, 2011

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Green Day, a punk band most of us know for the song *Good Riddance*,<sup>1</sup> and others remember for songs like *Basket Case*,<sup>2</sup> was sued by artist Derek Seltzer for copyright infringement and unfair competition over Green Day's use of his work *Scream Icon* in connection with Green Day's song *East Jesus Nowhere*.<sup>3</sup> More precisely, Green Day's co-defendant Roger Staub, a photographer and set designer photographed a torn *Scream Icon* poster he saw on the corner of Sunset Boulevard and Gardner Avenue in Los Angeles, altered the color and contrast, added a brick background, and superimposed a red spray-painted cross over the image. On summary judgment, Green Day defeated the copyright claim with a fair use defense and the unfair competition claim because Green Day did not use *Scream Icon* in a trademark manner.<sup>4</sup> For a thorough discussion of that decision, see Professor Tushnet's post at <http://tushnet.blogspot.com/2011/08/fair-useaesthetic-functionality-save.html>. Seltzer has appealed the ruling and briefing is scheduled to close in April 2012.

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<sup>1</sup> To see the official video (along with the usual YouTube commentary), see <http://www.youtube.com/watch?v=CnQ8N1KacJc>.

<sup>2</sup> Watch the official video here: <http://www.youtube.com/user/greenday#p/u/19/NUTGr5t3MoY>.

<sup>3</sup> See the official video, including one allegedly infringing use of *Scream Icon*, here: <http://www.youtube.com/watch?v=iPu18Wt8e7Y>.

<sup>4</sup> Seltzer did not assert a claim under the Visual Artists Rights Act (VARA), 17 U.S.C. § 106A, likely because his work did not qualify as a "work of visual art" under 17 U.S.C. § 101, which limits such works to those with fewer than 200 copies in existence (among other limitations). Given that fair use applies to VARA claims, it would have been interesting to see the court's analysis if this claim were asserted.



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Just before Thanksgiving, the Court awarded Green Day \$128,000 and its co-defendants an additional \$72,000 in attorneys' fees. *Seltzer v. Green Day, Inc.*, No. 10-2103 (C.D. Cal. Nov. 17, 2011).<sup>5</sup> In an arguably close case that turned on fair use analysis, why did the court grant Green Day its fees? Let's take a closer look.

Under the Copyright Act, a court "may award a reasonable attorneys' fee to the prevailing party . . ." 17 U.S.C. § 505. The court properly referred to the Supreme Court's decision in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), which highlighted that a prevailing defendant must be treated similarly to a prevailing plaintiff in the award of attorneys' fees. The court observed, "The pivotal inquiry is whether the successful defense furthered the goals of the Copyright Act." It then proceeded to analyze the Ninth Circuit's attorneys' fees factors: " (1) the degree of success; (2) frivolousness; (3) motivation; (4) the objective unreasonableness of the losing party's factual and legal arguments; and (5) the need, in particular circumstances, to advance considerations of compensation and deterrence.

Immediately, we see a problem for the plaintiff when, according to the court, plaintiff cited to bad law in the Ninth Circuit, which had established a "dual" standard for attorneys' fees in copyright claims – plaintiffs usually won them, defendants had to show a plaintiff's claim was objectively unreasonable or frivolous. The court was harsh: "Plaintiff's citation to *Hustler*, a case applying the 'dual' standard rejected by the Supreme Court in *Fogerty*, edges close to an affirmative attempt to mislead the Court."

The court then explained how granting attorneys' fees to Green Day would further the goals of the Copyright Act. Staub, the set designer, and Green Day had used Seltzer's work in a transformative manner as part of Green Day's performances of *East Jesus Nowhere*. Specifically, Staub used *Scream Icon* "as part of a four-minute video backdrop composed of numerous other images, graphical elements, and visual effects designed to be displayed during live performances of *East Jesus Nowhere*." Green Day further transformed the work through the performance of its song using the video backdrop that included Seltzer's work. Thus, Green Day's successful defense of this transformative use "secured the public's access to these works and paved the way for . . . others to manipulate and reinterpret street art in the creation of future multimedia compilations."

The court refused to hear plaintiff's "starving artist" protestations, in part, because of a lack of evidence to support that assertion, but also because defendant Staub also was an artist who incurred substantial legal fees defending Seltzer's claims. It also ruled that Seltzer's claims were not objectively reasonable because *Scream Icon* had been published and was available on the Internet (though that is no defense to the underlying copyright infringement claim, see <http://blog.pattishall.com/2011/07/08/copying-a-photograph-openly-available-over-the-internet-constitutes-copyright-infringement-despite-attempted-fair-use-defense-by-appropriation-artist/>). It further ruled that Green Day's use had not affected the potential market for Seltzer's work. Finally, it found informative that the plaintiff himself had conceded that Green Day's use transformative. Thus, Seltzer's claims were "factually unreasonable."

This ruling highlights a number of important points for copyright litigants:

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<sup>5</sup> Available here: [http://www.pattishall.com/pdf/Seltzer\\_v\\_Green\\_Day-Attys\\_Fees\\_Order.pdf](http://www.pattishall.com/pdf/Seltzer_v_Green_Day-Attys_Fees_Order.pdf)

- a corporate defendant (Green Day and Staub are corporate defendants, and this author is not making a normative judgment about it) can win attorneys' fees even when defending copyright claims from a seemingly sympathetic plaintiff if the plaintiff's claims are found unreasonable;
- fee shifting is more likely in a copyright action often than in other types of actions, although it is not automatic;
- misapplying, mischaracterizing, or simply mistaking the governing case law on an attorneys' fees motion will hurt your position in the eyes of the court; and
- careful evaluation of a copyright claim, including potential fair use defenses, is essential before bringing it to court, even where the copying seems obvious.

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