

## **Moral Rights and Charging Bulls!**

The recent dispute involving the *Charging Bull* and the *Fearless Girl* sculptures raises interesting issues relating to the protection available to an author for infringement of moral rights.

### **Charging Bull**

The *Charging Bull* is a bronze sculpture displayed in the financial district of Manhattan, New York City. According to Wikipedia, the bull was cast in Brooklyn and its author Arturo Di Modica spent some \$360,000 to create the cast. The sculpture was an act of guerilla art unilaterally installed in the middle of Broad Street in front of the New York Stock Exchange (“Exchange”) as a Christmas gift to New Yorkers. The New York police seized the sculpture and impounded it but the ensuing public outcry led the New York City Department of Parks and Recreation to reinstall the sculpture two blocks south of the Exchange. These events occurred shortly after the 1987 stock market crash and the *Charging Bull* was said to be a symbol of the “strength and power of the American people”

Since its placement, the *Charging Bull* has become a symbol of aggressive financial optimism and prosperity. The sculpture is very popular with tourists and thousands of people a day visit it.

### **Fearless Girl**

In early March, the night before International Women’s Day, another bronze sculpture entitled *Fearless Girl* was placed directly in front of the *Charging Bull*. The sculpture was commissioned by State Street Global Advisers (SSgA) as part of a marketing campaign developed by McCann New York for SSgA’s gender-diverse index fund. The girl depicted in the sculpture seems to stare down the bull. The City of New York apparently allowed

for an extension of the cobblestones around the *Charging Bull* to accommodate the *Fearless Girl* sculpture.

### **The Demand**

Lawyers acting for Mr. Di Modica have formally complained to the city of New York. They assert that SSgA and McCann New York constructed a marketing campaign around the image of the *Fearless Girl* facing down the *Charging Bull*. The sculpture was placed in direct opposition to the *Charging Bull* and uses key design elements to associate the *Fearless Girl* with the *Charging Bull*. They say that the *Charging Bull* was appropriated and forced to become a necessary element of a new derivative work *Fearless Girl* confronts *Charging Bull*.

In addition, it is alleged that the placement of the *Fearless Girl* in opposition to the *Charging Bull* has undermined the integrity of and modified the *Charging Bull*. The *Charging Bull* no longer carries a positive optimistic message and instead has been transformed into a negative force and threat. What was intended as a symbol of strength by the artist has taken on a menacing air in relation to the *Fearless Girl*.

It is alleged this alteration of the *Charging Bull* and damage to its integrity are prejudicial to Mr. Di Modica's honour and reputation and violate his rights under the U.S. *Visual Artists Rights Act* of 1990. The *Act* confers upon authors of visual works, the right to prevent any intentional distortion, mutilation or other modification of a work which would be prejudicial to the author's reputation. It was requested that the *Fearless Girl* sculpture be removed and be placed elsewhere. The City has not yet publically responded.

### **The Canadian Copyright Act**

We do not comment on merits of this dispute that may shortly be before the courts but it seems appropriate to review the moral rights provisions of the Canadian *Copyright Act*.

The *Act* provides that an author of a work has the right to the integrity of the work, among other rights. The author's right to the integrity of a work is infringed only if the work is, to the prejudice to the honour or reputation of the author, distorted, mutilated, or otherwise modified or used in association with a product, service, cause or institution. In the case of a sculpture such prejudice is deemed to have occurred as a result of any distortion, mutilation, or other modification of the work. The use of the work in the association with a specific product, service, cause or institution by itself is actionable.

The scope of the right of integrity is controlled by the requirement that an author alleging infringement of the right must show prejudice to his or her honour or reputation.

The *Act* does not state directly on what basis the determination of the prejudice or the honour or reputation of the owner is to be made. There is support for the position that the determination should be made on an objective basis based on public or expert opinion. On the other-hand, there is also support for the view that the author's judgement, as long as it is reasonably exercised, should be considered. No appellate court has ruled on this issue

### **Comment**

It will be interesting to see how this dispute is resolved. On facts publically available the claim is not without merit. In many cases involving the potential application of moral rights, waivers can be obtained to avoid problems.

**John McKeown**

**Goldman Sloan Nash & Haber LLP**  
480 University Avenue, Suite 1600  
Toronto, Ontario M5G 1V2  
Direct Line: (416) 597-3371  
Fax: (416) 597-3370

Email: [mckeown@gsnh.com](mailto:mckeown@gsnh.com)

*These comments are of a general nature and not intended to provide legal advice as individual situations will differ and should be discussed with a lawyer.*