

Legal Alert

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QUESTION: WHY WAS THE UNITED STATES POSTAL SERVICE ORDERED TO PAY OVER \$3.5 MILLION FOR USING A PICTURE OF LADY LIBERTY ON A STAMP?

ANSWER: THE POST OFFICE USED A PICTURE OF A COPYRIGHT PROTECTED STATUE OF LIBERTY AT A CASINO IN LAS VEGAS!

Robert S. Davidson (the "sculptor") sued the United States acting as the U.S. Postal Service ("Postal Service") for copyright infringement. *Davidson v. United States* (U.S.Ct. Federal Claims, No. 13-942 C (filed: June 29, 2018)). The court of claims awarded the sculptor \$3,554,946.95 plus interest as compensation for the copyright infringement by the Postal Service for putting a picture of Lady Liberty on a stamp.

But doesn't the United States own the Statue of Liberty?

In 2008 the Postal Service wanted to create new Forever Stamps. It chose the U. S. flag for one and Lady Liberty for the other. The "manager of stamp development" wanted a Lady Liberty image that was "different and unique." The Postal Service had used 23 different images of the original Statue of Liberty on stamps over the years. In June 2010 the Postal Service bought a non-exclusive license from Getty Images to use a photograph of Lady Liberty. The Postal Service paid Getty Images \$1,500 for the three-year license.

About three and one-half months after the Lady Liberty stamp was issued, the Postal Service learned that its stamp was not based on a picture of government property, but was based on the Lady Liberty statue in front of the New York – New York Hotel and Casino in Las Vegas, Nevada. By that point 3 billion of the new Forever Stamps had been printed.

The sculptor of the Las Vegas casino's Statue of Liberty learned of the infringement when his wife came home from the local Post Office with a book of Forever Stamps. She was excited to announce that "our statue is on the stamp!"

After learning of the error, the Postal Service stated "that it would have selected the image even if the facts had been known in 2010." The Postal Service "still love[s] the stamp design and would have selected this photograph anyway."

Why not use a picture of the Statue of Liberty that you already own and maintain in a National Park in New York Harbor? The Postal Service obviously overlooked her "lamp beside the golden door!"

Copyright infringement?

The Postal Service said the sculptor wasn't entitled to copyright protection for his design of the Statue in Las Vegas. The Copyright Act protects "pictorial, graphic and sculptural works." So the sculpture could be protected by copyright.

But the sculptor did not register his copyright until more than five years after the

statue was publically available at the casino in Las Vegas. Thus, he was not entitled to a statutory presumption of eligibility for copyright protection. He had to prove that his work was "original."

The Postal Service said the statue in Las Vegas was merely a replica of the Statue of Liberty in New York Harbor and was not original. The sculptor testified, however, said that he made his statue with "a little more modern, a little more contemporary face, definitely more feminine...." He said "That he looked for guidance at a picture of his mother-in-law every day and that her face was a large influence in the final form of the his Lady Liberty's visage." (The things artists will endure for the sake of their art!)

The court of claims "determined that the face of plaintiff's sculpture is distinct, original, and protected...." The Postal Service had clearly copied the original design of the Las Vegas statue on "the offending stamp."

But was the use for nonprofit or educational purposes?

The Postal Service argued that the use of the picture on the stamp was within the "fair use" exception to copyright infringement. To determine whether the stamp qualified for the fair use exception, the court considered whether the use of the picture of the Las Vegas statue was "of a commercial nature or is for nonprofit or educational purposes."

The Lady Liberty Forever Stamp was released for public sale around December 1, 2010. When the Lady Liberty stamp was retired in January 2014, 4.9 billion of the stamps had been sold amounting to just over \$2.1 billion in sales. The court didn't think that showed a nonprofit purpose.

Even though the Postal Service has lost money every year since at least 2006, its annual revenues still exceed \$60 billion and if it "were a private firm, it would be a Fortune 500 company." Consistently losing millions of dollars over a dozen years doesn't make the enterprise a charity – just a branch of the federal government! The use was not for nonprofit or educational purposes.

Your taxes hard at work?

Typically, the Postal Service spends about \$1,000 to \$5,000 for images to use on stamps. Because it infringed on the sculptor's copyright, this time the court says it will pay \$3,554,946.95 plus interest!

If you as a prudent business person would like to be smarter than the United States government about copyright issues, please call me in advance before you copy someone else's work.

