

Fearless Girl Must Stay

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Related Capabilities

- Trademark, Copyright + Advertising
- Intellectual Property Litigation

*We teach girls to shrink themselves
To make themselves smaller
We say to girls
"You can have ambition
But not too much
You should aim to be successful
But not too successful
Otherwise you will threaten the man"*

- Chimamanda Ngozi Adichie

In honor of International Women's Day, State Street Global Advisors installed a statue of a Fearless Girl standing in front of Wall Street's Charging Bull. The statue by artist Kristen Visbal was an overnight sensation, drawing both admiration and outrage. Commissioned by State Street to make a statement about the gender pay gap and the underrepresentation of women in the boardroom, Fearless Girl became an instant icon of modern feminism and predictable target of misogynist attacks. According to a recent

report from [Bloomberg](#), the resulting media coverage and ongoing volley of impassioned Tweets has been worth \$7.4 million in free advertising for State Street.

Among those feeling threatened by the placement of Fearless Girl is sculptor Arturo Di Modica, creator of the Charging Bull. His attorney has demanded that the statue be removed, citing “issues of copyright and trademark” and stating that “damages must be awarded ...” See: [Press Conference](#). Whether a valid copyright or trademark claim has been asserted by Di Modica is still to be determined.

The crux of most trademark claims is that the defendant’s use of a trademark is likely to cause confusion as to the source, sponsorship, or authorization of goods or services. Missing from this case are both a proprietary mark and likelihood of confusion. Neither of the statues, nor their combination, appears to serve a source identifying function (*i.e.*, they are not used as elements of State Street’s brand). Even setting aside this threshold issue, it would be difficult for Di Modica to establish that the public is likely to believe that he is the source of or has authorized or licensed Fearless Girl.

Copyright law at least provides a better fit for this challenge. As an original work of creative authorship, the Charging Bull is protected by copyright and one of the exclusive rights afforded to copyright owners is the right to prepare derivative works. According to the Copyright Office, “[a] derivative work is a work based on or derived from one or more already existing works.” Circular 14. Here, it seems Di Modica’s gripe is that Fearless Girl fully incorporates and changes the intended message of his Charging Bull. This would be an interesting theory of derivative works and one that should strike fear in the hearts of museum curators everywhere. If we accept that Fearless Girl is a derivative work because of its proximity to Charging Bull, then we must also ask whether it is a fair use. The law is clear that “the fair use of a copyrighted work ... for purposes such as criticism [or] comment ... is not an infringement ...” 17 USC § 107. If Fearless Girl is indeed a transformative use, adding new expression and altering the meaning of Charging Bull as Di Modica claims, then this is a classic case of fair use.

That leaves us with VARA, the Visual Artists Rights Act of 1990. VARA is a piece of federal legislation that expands copyright law by providing artists certain “moral rights” in works of visual art. One such right is “the right to prevent any intentional distortion, mutilation, or other modification of [a] work which would be prejudicial to his or her honor or reputation ...” 17 USC § 106A. In order to assert such a claim, Di Modica would first need to establish that he didn’t transfer title to the work prior to the Act’s effective date in 1990 – an uncertain proposition for one who illegally dropped the Charging Bull in front of the New York Stock Exchange in the middle of the night in 1989. See [ChargingBull.com](#). But does Di Modica really want to assert that this statue of a brave little girl is prejudicial to his honor?

Fearless Girl is an inspiration and this author hopes she can stay.