

Fearless Girl Statue Decision Says No Need to Fear Contracts – But Be Cautious Drafting Them!

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A 4-foot tall, bronze girl defiantly stands with her hands on her hips and chin held high. Better known as *Fearless Girl*, the statue was intended to promote the power of women in leadership. The statue has come also to symbolize missteps and the consequences of unthoughtful legal planning.

An advertising agency engaged Kristen Visbal to create the sculpture, apparently without any agreement as to rights, or, according to Visbal, any notice the sculpture was for a corporate sponsorship. State Street Global Advisors, the asset management company sponsoring the project initially placed *Fearless Girl* as a temporary counterpoint to the iconic *Charging Bull* statue:

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Fearless Girl was a tremendous success and had an immense social impact from its unveiling. The response prolonged display of the statute and spawned legal controversies. The first of which involved Arturo Di Modica, *Charging Bull*'s sculptor's claims that the placement of *Fearless Girl* implicated issues of Di Modica's copyright and trademark rights, and further distorted his artistic message as an "advertising trick." We blogged about these claims back in 2017. Although Di Modica ultimately did not sue Visbal or the State of New York regarding the placement of *Fearless Girl*, *Fearless Girl* was eventually relocated to stand outside of the New York Stock Exchange.

Another set of disputes arose from a trio of agreements State Street and Visbal negotiated following the statue's success. The agreements were an attempt to sort out what each party could do with regard to the associated rights around the statue, but, unfortunately, created more problems than they solved.

In 2019, State Street brought a claim in New York state court against Visbal, requesting a temporary restraining order to prevent Visbal from participating in an event in Australia that allegedly violated the agreements. The TRO was denied, but a later preliminary injunction was ultimately upheld. Following various claims and counterclaims, the parties filed motions for summary judgment, which the United States District Court for the Southern District of New York partially granted and partially denied.

Judge Gregory H. Woods' summary judgement opinion grapples for 90+ pages over the numerous breaches of contract, copyright and trademark infringement claims, and questions of preclusion. While nothing in the decision is groundbreaking, the opinion meticulously analyzes several breach of contract claims, offering excellent instruction as to drafting considerations.

For instance, each of Visbal and State Street alleged claims regarding the other party's breach of its obligations to provide attribution, which yielded opposing outcomes based upon the language in the agreements. Visbal's claim stemmed from no attribution being provided when *Fearless Girl* was relocated to the New York Stock Exchange. The relevant agreement required State Street to "give attribution to [Visbal] as the sculptor of [*Fearless Girl*] wherever and whenever practicable, such as, for example, . . . plaques placed with" State Street replicas. The court denied summary judgement on this point, finding questions of fact with regard to whether attribution to Visbal would have been practicable (despite attribution being provided at the prior *Charging Bull* location).

In contrast, Visbal agreed that any reproductions of *Fearless Girl* Visbal provided "as part of any promotional or corporate event, conference, ceremony, banquet, retreat, awards dinner, or the like" would include the attribution "Statute commissioned by SSGA." The court found that Visbal's verbal acknowledgement of State Street's role was insufficient to meet the requirements as it did not include the exact language and did not appear on the reproduction, and granted summary judgement to State Street on this breach of the agreement.

The contrast is a good reminder to use exact language, and avoid subjective considerations, in drafting specific requirements.

Visbal did have a win with regard to State Street's copyright infringement claims. The claim stemmed from Visbal's grant of an exclusive license to State Street in connection with "gender diversity issues in corporate governance and in the financial services sector." Visbal sold a *Fearless Girl* replica to an executive who worked at a financial institution. That executive later displayed the replica at a gender diversity in corporate governance event. Judge Woods denied summary judgment for both direct and vicarious infringement, finding Visbal did not take any action with regard to the executive's use of the replica and did not profit from such use.

The decision is not especially favorable to one party over the other, and Visbal's counsel has already indicated her intention to appeal. The history of the sculpture and various legal disputes *do* serve as a cautionary tale and a necessary reminder of how important it is to carefully draft legal agreements—and just as carefully comply with them.

The TMCA will continue to monitor this case.