

# Artist Stars in Infringement Case Against Publisher, Gallery, and Touchstone Television Productions

Belloni Limited West, Inc. vs. Maria Baggetta, and counterclaim by Baggetta vs. Touchstone Television Productions, Inc., Editions Limited West, Inc., Joanne Chappell, California Court, Inc. aka Hollywood Studio Gallery, and Desi 7-10

© Greg Viscardi, Esq., Attorney for the Artist.

Painter Maria Baggetta cried foul when she discovered that her poster publisher gave permission to customers to use posters of Maria's paintings in commercials, movies, and TV shows without Maria's knowledge, without payment, and without credit to Maria, including use in 6 seasons and 29 episodes of ABC's *Desperate Housewives*. When Maria complained, her publisher sued her in federal court, claiming the TV uses of Maria's images were legally permitted to "promote" sales of posters. Forced to defend herself, Maria embarked on a six-month Kafka-esque *Odyssey* through the federal court system, countering her publisher, the producer of *Desperate Housewives*, and others. When the nightmare ended on March 25, 2010, Maria was vindicated, obtaining a complete dismissal of the publisher's lawsuit, transfer of copyrights, a written promise to stop future uses, and payment of monetary compensation.

## Just the Facts

Maria Baggetta is an award-winning painter, pastel artist, and arts educator. Among her many accomplishments, she is the author of the *Waller Foster* book *Pastel Step by Step*. Based in Oregon, she has won awards for her works in solo and group exhibitions throughout the West and Southwest for over a decade.

In 2005 artist Baggetta entered into a contract with art publisher Editions Limited West, Inc. ("ELW"), granting ELW the exclusive right to publish, distribute, and market posters of Maria's paintings as images printed on paper for use as wall decor. In June, 2005 ELW sold approximately 15 of Maria's posters to Hollywood Studio Gallery ("HSG") and, without Maria's knowledge or consent, gave HSG permission to allow third parties to use Maria's posters as set decorations in nationally broadcast television programs.

In 2008 Maria discovered over a dozen of her paintings were being used as set decorations in 29 episodes of ABC's *Desperate Housewives*, CBS's *The New Adventures of Old Christine* and *Criminal Minds*, and NBC's *Parks and Recreation*.

To document the infringements, Maria purchased DVDs of six seasons of *Desperate Housewives* and scrutinized every frame of every episode. When Maria asked her publisher about the television uses, ELW initially denied any knowledge or involvement in the infringements but later provided copies of contracts signed by ELW in 2008 authorizing HSG to permit Maria's posters to be used in TV programs.

## Publisher Sues Artist

When Maria complained to her publisher that the unauthorized display and reproduction of her images on TV infringed her copyrights, ELW sued her in federal court in Los Angeles for Declaratory Judgment, asking the court to rule that ELW was legally permitted to grant third parties the right to use posters of Maria's copyrighted paintings as set decorations in order to "promote" sales of posters.

Through its attorney, ELW contended that the publishing industry's customary and standard procedures and methods gave ELW the unrestricted right to exhibit posters embodying Maria's paintings in advertising and promotional material created by ELW, consistent with the artist's own business practices and

the posters as set decorations in nationally broadcast television programs.

Through its attorney, ELW further contended that the posters included a copyright notice that ELW said identified ELW as an owner of a copyright in the poster editions. ELW's attorney asserted that as owner of the claims to a copyright in the poster editions, ELW had the right to allow the posters to be used as set decorations in network television programs to promote poster sales.

## Artist Defends

In her defense, Maria, through her counsel, argued that ELW was never authorized to permit posters embodying her paintings to be used as set decorations

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— Maria Baggetta

tions on TV or otherwise, and even if ELW had a right to "promote" posters embodying her paintings, ELW's right to "promote" could not reasonably allow unlimited use of Maria's works on broadcast and syndicated TV, the internet, and on DVD copies without credit or attribution.

Publisher ELW, through its counsel insisted there was "no difference" between *Art Business News* and *Decor Magazine* advertisements featuring Maria and her paintings and the unauthorized uses on TV programs. ELW's counsel asserted that because Maria was in magazine advertisements, this permitted ELW to allow posters of Maria's paintings to be used as set decorations in nationally broadcast television programs.

Maria, through her attorney, argued the seemingly obvious fact that, by definition, any true "promotion" identifies the source of the goods being advertised or promoted. Both magazine advertisements featured her paintings, but unlike the television programs, the magazine advertisements:

- Were created with Maria's advance knowledge and participation;
  - Included titles of Maria's paintings depicted in the ads;
  - Provided authorship credit and attribution to Maria as the painter; and
  - Contained phone numbers, web sites, e-mail addresses, and other contact information for Maria.
- Not a single one of the 29 *Desperate Housewives* episodes or other programs provided Maria with any attribution or credit of any kind. Maria's counsel asserted that, with increasing frequency, television producers provide on-screen credit to artists whose works are used as set decorations. But here, no credit of any kind appeared in any of the 29 *Desperate Housewives* episodes, DVDs, or anywhere else.

notice, titles of paintings, or any other information which could have helped sell the art, Maria's attorney asserted that ELW's "promotion" defense was unconvincing.

## Artist Fights Back

To stop the infringements, enforce her copyrights, and protect her reputation, Maria, within days of being sued, upped the ante by countering her publisher, Editions Limited West, Inc. and its President, Joanne Chappell; suing the producer of *Desperate Housewives*, Disney subsidiary Touchstone Television Productions; and suing Hollywood Studio Gallery, the prep house that bought the posters from ELW and provided them to *Desperate Housewives*.

Maria's claims included direct copyright infringement against Touchstone Television Productions, LLC ("Touchstone"), producers of *Desperate Housewives*; with claims for contributory and vicarious copyright infringement against California Court, Inc., (aka Hollywood Studio Gallery ("HSG"), which supplied Maria's images to Touchstone; and against ELW and its President, Joanne Chappell for allegedly inducing and contributing to Touchstone's direct infringement and because Chappell allegedly had the right and ability to prevent Touchstone's and HSG's infringing activity and allegedly knowingly participated in the infringement. Maria's countersuit also requested preliminary and permanent injunctions against Touchstone and others prohibiting the sale or broadcast of any of the infringing programs during and after the lawsuit.

## Artist's Damages

Maria's claims for damages were supported by Maria's licensing history; her prior settlement with Warner Brothers over *The New Adventures of Old Christine*; invoices for licensing art for TV commercials; suggested licensing rates in the *Graphic Artists Guild Handbook: Pricing & Ethical Guidelines*; licensing practices of stock photo agencies, including Corbis and Getty Images; and illustration licensing rates from thespost.com. Maria calculated total lost license fees for approximately 118 separate uses to be approximately \$403,000. Additional damages were claimed for the portion of Touchstone's profits from broadcast, syndication, DVD, and Internet exhibitions of the infringing programs attributable to the paintings and attorney's fees and \$150,000 statutory damages for each intentional infringement occurring after the October 30, 2009 effective date of Maria's copyright registrations. Since the infringements began in 2008, substantial unauthorized uses occurred prior to the effective date of Maria's copyright registrations. ELW contended that, as a result of its ownership of claims to copyright in the derivative works and its exclusive rights to publish, distribute, and market the posters, no acts of it or the other Counterdefendants constituted copyright infringement. On this basis, ELW contended that Maria was not entitled to recover any damages whatsoever.

## Date of Incidents

Unauthorized uses of Maria's artworks began on September 24, 2006 with the broadcast of Episode 1, season 3 of *Desperate Housewives* and continued through the broadcast of Episode 7, season 6 on November 8, 2009. The offending episode of *The New Adventures of Old Christine* aired on November 18, 2008, the offending episode of *Criminal Minds* aired on December 7, 2005, and the network telecast, *U*

## Infringement Case

*Parks and Recreation* aired on January 14, 2010. ELW filed its lawsuit against Maria on December 17, 2009. Maria filed her counterclaim against ELW, Touchstone, HSG, and others on December 23, 2009. A Settlement Conference was held on March 25, 2010 before the Hon. Carolyn Turchin, U.S. Magistrate Judge, at which time the matter was settled. The complaint and counterclaim were both dismissed with prejudice on May 4, 2010, with the court maintaining jurisdiction over the matter to enforce the terms of settlement.

## A Tale of Two Studios: Warner is Wise; Disney Dithers

Infringement claims may be more common against TV shows than movies because clearance practices are a function of production budgets. Feature film producers have the time and money to clear set decorations, but the pace and budget of TV temp studios to cut corners by using so-called "pre-cleared art." A "don't ask-don't tell" attitude and ignorance of basic copyright law may discourage time-pressed TV art directors from contacting artists, even here, where Maria's signature and printed name and copyright notice appeared on every piece.

As an example of proper clearance practice, months before the lawsuit, a Warner Brothers location unit noticed Maria's name on paintings hanging in the background of a proposed scene in a feature film. Quickly and efficiently, Warner Brothers located and contacted Maria, offering a modest but fair fee to use her paintings in the film. When the parties could not agree on a reasonable fee, Warner Brothers simply removed the paintings from the scene.

Warner Brothers reflected the same efficiency, fairness, and respect for artists' copyrights within hours

## Artist's Perspective

By Maria Baggetta

Was it worth it? Enduring six months of distraction from my usual business and creative work, draining family finances, living through substantial emotional distress, all to take my publisher to task for having approved usage of my posters on TV without my permission? Yes. It was absolutely worth my efforts. Not in terms of the monetary outcome, but in terms of my peace of mind. I didn't let it go unnoticed and unopposed. By standing by the courage of my convictions in what is right and wrong, I sleep much better at night.

Publishers and those who are stewards of our images need to take seriously their responsibility to foster and protect an artist's creative output and career choices. They need to get permission for images and to get those permissions in writing.

What did I learn? Even if you have what you think is a good working relationship with a company or client, make sure that you have everything in writing and I mean everything. Don't make any assumptions. This might make me seem a bit jaded, but really I think I've realized from the experience that it's just business. Think ahead and think about what you want from the relationship and what you don't want; then make sure you communicate that clearly. It's better to be sure than nice when protecting your intellectual assets and livelihood—and thereby avoiding the need for costly litigation.

of receiving Maria's notice of infringement of her work in *The New Adventures of Old Christine*. A seasoned studio lawyer and Vice President in Legal Affairs at Warner Brothers Television was on the phone to

Maria's lawyer, explaining Warner's reasonable reliance on permission from a third party, conceding strict liability under copyright law, and offering fair compensation for the use in accordance with suggested rates in the *Guild's Handbook: Pricing & Ethical Guidelines*. The claim was settled and resolved with a few phone calls.

In stark contrast, when Maria brought the unauthorized uses to the attention of her publisher and *Desperate Housewives* producer (and Disney subsidiary), Touchstone Television, and suggested the parties agree to a telling agreement to discuss settlement, Maria's publisher ELW refused to sign the agreement and slapped Maria with a lawsuit nine days before Christmas. Touchstone stonewalled and refused to negotiate. Despite "hardball" litigation threats and tactics, Maria was not the least bit deterred or intimidated. The ensuing litigation cost thousands of dollars of attorney time to resolve two (2) federal court lawsuits that, in the opinion of Ms. Baggetta's counsel, absent albeit-sighted habeas, could have been avoided altogether and resolved in a few phone calls, as happened with Warner Brothers.

The opposing parties underestimated Maria's preparation and resolve. Maria filed her countersuit six days after being sued by her publisher. 12 weeks later the case was settled. Although the amount of monetary compensation paid or to be paid to Maria is confidential, other terms of the settlement are non-confidential, including Touchstone Television and HSG agreeing not to use Maria's paintings without her permission in the future and ELW transferring ownership of copyrights in poster editions to Maria.

Greg Viscardi is a partner in the Los Angeles law firm, *Notable & Viscardi* ([www.fishbein-notable.com](http://www.fishbein-notable.com)), handling copyright and trademark prosecution and litigation involving fine and graphic art, music, motion pictures, and book publishing. He has been a contributor to the *Guild's Pricing & Ethical Guidelines* and a *Guild* member and panel attorney for longer than he can remember.

DESPERATE HOUSEWIVES SEASON 3 - FRAME CAPTURES WITH MARIA BAGGETTA ARTWORK



Representative scenes from ABC's *Desperate Housewives* showing artist Maria Baggetta's artwork as it was displayed. Source: