

19-1162

No. 18-2608

**In the Supreme Court of the United States**

**ADDISON THOMPSON, Pro Se**

**Petitioner**

**v.**

**United States of America,  
United States Postal Service,  
Station Manager**

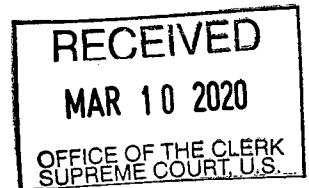
**Respondent**

**On Petition for a Writ of Certiorari to  
the United States Court of Appeals  
for the Second Circuit**

**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

In 2014, a photographic mural project was destroyed during the relocation of the Peter Stuyvesant United States Postal Service (USPS), New York. The USA/USPS was granted sovereign immunity and dismissal of the Visual Artists' Rights (VARA) case by a misinterpretation of the word "State" in the Copyright Law.

At the hearing in 2017, Honorable Judge Katherine Polk Failla, instituted a process for the proper exhaustion of the claim, to allow the artist to recreate and reinstall his murals. The USPS is authorized to enter into an agreement with the copyright owner in full settlement and for the damages accruing to him by reason of such infringement (or destruction) and to settle the claim administratively out of available appropriations.

1. The Constitution mandates Congress to grant artists' the rights to their work. So why is the USA immune from violating an artists' "exclusive rights", when "anyone" who violates these rights, is liable?
2. Is the word "State", in the definitions section of the Copyright Act, limited to the States of the United States, the District of Columbia and Puerto Rico or does it mean any governmental "State"?
3. If this misinterpretation of the word "State" is corrected would Plaintiff pass the two-part test? The legal test to determine whether sovereign immunity applies is (1) "whether there is a waiver of sovereign immunity for actions against the" United States or the agency in question and (2) whether the substantive provisions of the federal statute apply to the United States or the agency in question.
4. Why was there no new hearing, for the USPS to explain why they changed their mind, about permitting the artist to recreate and install his murals at Peter Cooper USPS, NYC, in full settlement of his VARA claim and as a proper exhaustion of the claim?

## **PARTIES TO THE PROCEEDINGS**

Petitioner Addison Thompson was Pro Se Plaintiff and Appellant below.

Respondent was Ms. Rachael L. Doud, Assistant United States Attorney, *on the brief*), for Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York NY, *for Defendants-Appellees*, United States Postal Service, Station Manager below.

## **RULE 29.6 DISCLOSURE**

Not Applicable.

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Crimi v. Rutgers Presbyterian Church, 1949 (included in text of section X. Similar Case of Law, below)

Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303 (S.D.N.Y. 1994) rev'd 71 F. 3d 77 (2d Cir. 1995)

Twitchell v. West Coast General Corp., et. al., Central District of California, Case No. 2:06-cv-04857-(FMC) RZx

Martin v. City of Indianapolis, 192 F. 3d 608, 612 (7th Cir. 1999)

Cohen v. G&M Realty L.P., 2017 U.S. District LEXIS 50943

Haines v. Kerner, Et Al, 404 U.S. 519 (1972)

## STATUTES

ADA, Rehabilitation Act, 1990, Title III: Public Accommodations

ADA, Rehabilitation Act, 1990, Section 504

17 U.S. Code § 106 - Exclusive rights in copyrighted works

17 U.S. Code § 106A - Rights of certain authors to attribution and integrity

17 U.S. Code § 113 - Scope of exclusive rights in pictorial, graphic, and sculptural works

17 U.S. Code § 501 - Infringement of copyright 28  
U.S. Code §171 - Tort Claims Procedure

**28 U.S. Code § 1331 - Federal Question**

28 U.S. Code § 1346 - United States as defendant 28

U.S. Code § 2674 - Liability of United States

FTCA is codified in 28 U.S.C. §1346(b), §1402(b), §2401(b), and §2671-2680.

**PETITION FOR A WRIT OF CERTIORARI**

Addison Thompson, Pro Se Plaintiff, Photographer, respectfully petitions for a writ of certiorari to review the judgement of the U.S. Federal District Court of Appeals, Southern District of New York in this matter.

**OPINIONS BELOW**

The decision of the court of appeals is reported at 18-2608 is reprinted in the Appendix at. The district court's opinion is reported at 17-5017 (KPF)

**JURISDICTION**

The Court of Appeals entered its final judgement on 11/22/2019. This Court has Jurisdiction under 28 USC 1254(1).

**CONSTITUTIONAL & STATUTORY PROVISIONS**

Clause 8, in Section 8, found in Article 1 of the United States Constitution (The Copyright Clause)

## **STATEMENT OF THE CASE**

In 2013, Plaintiff followed the procedure posted in the Peter Stuyvesant USPS and wrote to Joseph Mulvey, USPS East Coast Facilities Manager, about the removal of his mural project. In 2014, Plaintiff wrote a second letter and was finally invited to come get the murals. Without contacting Plaintiff with 90 days notice, the murals had been removed, destroyed with parts missing; from the artwork. Plaintiff refused to take the artwork because the USPS owed him a duty-of-care not to destroy his art of a recognized stature.

In 2015, Plaintiff proposed an alternative artwork for the new 14th Street USPS Service Center. The USPS told Plaintiff they didn't want anymore of his artwork and ceased communication. Plaintiff didn't bring a formal complaint, until 2017, meanwhile continuing communication hoping the USPS would admit their mistake and resolve the issue of the destroyed mural project. Plaintiffs' filing of the complaint, is well within the 3-year Statute of Limitations, for violations of Copyright Law.

At the hearing, in keeping with 28 US Code 1498, Honorable Federal Court Judge, Katherine Polk Failla requested that Rachael Doud, Assistant US Attorney, facilitate communications with the USPS. For artists' fees and expenses, the artist offered to recreate, consolidate and reinstall his mural project in a single location; the Peter Cooper USPS Station NYC. During the following 2 months, the artist communicated his designs and plans with Judge KPF and Ms. Doud, Asst. US Attorney. After 2 months, with no problems and without reason, the USPS rejected the artists' plans to reinstall the murals.

In fact, the word "State", in the Definitions section of the Copyright Law means any governmental entity; including the USA, any State of the United States or any Foreign State. "Anyone" is liable, in violation, of these "exclusive rights", as mandated by (The Copyright Clause) Clause 8, in Section 8, found in Article 1 of the United States Constitution and enacted into legislation by the US Congress.

## **REASON'S FOR GRANTING THIS PETITION**

This Court should grant the petition and reverse the Court below.

### **1. MISINTERPRETATION OF THE MEANING OF THE WORD "STATE" IN THE COPYRIGHT ACT**

#### **A. DEFINITION OF THE WORD "STATE" FROM THE COPYRIGHT ACT.**

The Copyright Act provides that the definition of the word "State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress." 17 U.S.C. § 101, including the District of Columbia and the Commonwealth of Puerto Rico.

The States of the United States are not the only territories, meant to be included in this Act of Congress. The territories specified by this Act use the word, "State", to specify any governmental entity; like the Federal Government, a State of the United States or a foreign state.

The confused meaning of the word "State", continues in the misinterpretation of 17 USC 511. Here again, "State" means all governmental entities, including the USA.

### **17 USC § 511 Liability of States, instrumentalities of States, and State officials for infringement of copyright**

- (a) In General.—Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernment entity, for a violation of any of the exclusive rights of a copyright owner provided by sections 106 through 122, for importing copies of phonorecords in violation of section 602, or for any other violation under this title.
- (b) Remedies.—In a suit described in subsection (a) for a violation described in that subsection, remedies (including remedies both at law and in equity) are available for the violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a State, instrumentality of a State, or officer or employee of a State acting in his or her official capacity. Such remedies include impounding and disposition of infringing articles under section 503, actual damages and profits and statutory damages under section 504, costs and attorney's fees under section 505, and the remedies provided in section 510.

**B. "ANYONE" IS IN VIOLATION OF THESE "EXCLUSIVE RIGHTS"**

"Anyone" violates these exclusive rights. Means everyone; all governmental "states", to the same extent as, non-governmental entities.

**17 USC 501(a)**

Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a).

As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

**C. TWO STEP INQUIRY: DECIDING WHETHER THE USA OR ITS" AGENCIES ARE LIABLE UNDER FEDERAL STAUTE**

In deciding whether the United States or its agencies are liable under a federal statute, courts conduct a two-step inquiry. Quoted below the Appeals Court decision makes the same misinterpretation in its' decision and order:

(1) "whether there is a waiver of sovereign immunity for actions against the" United States or the agency in question and (2) whether the substantive provisions of the federal statute apply to the United States or the agency in question. *USPS v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 743 (2004).

At the first step, the district court correctly determined that the USPS has waived sovereign immunity. *See* 39 U.S.C. § 401(1); *Flamingo*, 540 U.S. at 744. Nevertheless, as the district court determined, VARA does not apply to the government or its agencies by the plain language of its liability provision. *See* 17 U.S.C. § 501(a) (defining "anyone" to include state entities but failing to mention federal entities)."

## **CONCLUSION**

The decision and order suggest that the word means a "State" of the United States, not a governmental "State". This conflicts with the Copyright law definition and Congress' intention. The word "State" means "Any State shall be subject to these provisions of this title in the same manner and [BECAUSE BY CONTRAST] to the same extent as any nongovernmental entity."

### **2. ESTABLISHING PROPER FEDERAL DISTRICT COURT JURISDICTION FOR A VARA CASE**

#### **A. COPYRIGHT INFRINGEMENT VS. DESTRUCTION OF PUBLIC ART**

Destruction of a work of recognized stature is not copyright infringement. Protections under the Visual Artist's Rights Act (VARA) last only during the life of the artist. This is because they are designed to protect the artist's reputation. This contrasts with the rights provided under the Copyright Act, which last for 70 years after the death of the copyright owner.

Copyright infringement is the act of violating any of a copyright owners' exclusive rights granted by the federal Copyright Act. There are three elements that must be in place in order for the infringement to occur.

1. The copyright holder must have a valid copyright.
2. The person who is allegedly infringing must have access to the copyrighted work.
3. The duplication of the copyrighted work must be outside the exceptions.

## B. FEDERAL DISTRICT COURT JURISDICTION

Copyright infringement cases are adjudicated in the U.S. Court of Claims, a court of equity, with strict limits on actual or statutory money damages, which allows no trial by jury. The U.S. Supreme Court holds that the Seventh Amendment preserves the right to a jury trial as to a determination of liability for violating a federal statute and for a determination of statutory damages.

The Federal district court in Twitchell, initiated a mistaken interpretation of the word "State". The Twitchell court allowed the USA's claim for sovereign immunity; but then under California State Law, the USA still had to pay, for the destruction of his public art mural project. This misinterpretation has acted as a legal barrier, to shield all future VARA cases against the USA, by its' sovereign immunity.

## CONCLUSION

Copyright Law guarantees a trial by jury in cases involving statutory damages. A VARA case for destruction of art of a recognized stature is not a copyright infringement case. It involves tort law and a complex legal determination to qualify; as public art of a recognized stature. All VARA cases are adjudicated in Federal District Court.

**3. HONORABLE JUDGE KATHERINE POLK FAILLA,  
FEDERAL DISTRICT COURT JUDGE, INITIATED AN  
ADMINISTRATIVE SOLUTION TO EXHAUST THE  
CLAIM VIA PERMITTING ARTIST TO RECREATE &  
REINSTALL THE MURALS AT PETER COOPER  
USPS, NYC**

**A. REQUEST AND AGREEMENT TO EXHAUST THE  
CLAIM**

At our hearing, Judge KPF asked Rachael Doud, Federal Defense Lawyer, to work with the artist and talk with the USPS to preserve his 9/11 memorial mural project. Judge KPF asked the Defense lawyer if the destruction of his murals might not be injurious to the artists' reputation?

The artist proposed recreating his Peter Stuyvesant USPS murals, reinstalling them at the Peter Cooper, with his existing murals at that location. Plaintiff requested artist fees and materials costs to reconstitute the Peter Stuyvesant murals with his existing murals at the Peter Cooper USPS.

**B. 28 US CODE 1498**

This statute says "And provided further that before such action against the United States has been instituted the appropriate corporation owned or controlled by the United States or the head of the appropriate department or agency of the government, as the case may be, is authorized to enter into an agreement with the copyright owner in full settlement and for the damages accruing to him by reason of such infringement (or destruction) and to settle the claim administratively out of available appropriations."

### **C. AN ADMINISTRATIVE SOLUTION TO RESOLVING THE CLAIM IS INSTITUTED**

In November and December 2017, Ms. Doud worked with the artist to inform the USPS of his plans. The artist's solution allowed for the murals to be installed without any metal frames or lights. Their location was balanced against the existing murals in the interior space of the Peter Cooper USPS.

Meanwhile, the artist communicated with Judge KPF at the court to keep her informed of the process. Plaintiff informed Judge KPF that other public art works were being installed in the East Village community. This included a cross section of corporate, real estate, public space and Plaintiff's artist sponsored, works of public art. Judge KPF facilitated a process for the proper exhaustion of the claim. The artist was affecting a simple solution to recreate and reinstall the murals. The money demand was for artists' fees and materials, to reinstall the work.

### **D. WITHOUT REASON USPS DENYS THE ARTIST REQUEST TO RECREATE & REINSTALL HIS WORK**

After two months without warning and without reason the USPS terminated the new plans and ceased communication. Without a second hearing Judge KPF allowed the governments' claim of sovereign immunity.

### **E. JUDGE KPF ACCEPTS THE FEDERAL CLAIM OF SOVEREIGN IMMUNITY WITH NO NEW HEARING**

She ignored the failure of the USPS, to cease participation in a 2-month-old administrative solution, toward the resolution of the claim. Relying on the legally sanctioned and institutionalized misinterpretation of the word "State", Judge KPF closed the case.

## **CONCLUSION**

Plaintiff's sole concern was for the preservation of his community based, independently sponsored, work of NYC public art. The USA, the USPS and the Federal Courts act blind to the destruction of a public artwork, of recognized stature by an artist, with a mental disability.

### **4. ADA DISCRIMINATION**

#### **A. THE USPS DESTROYED THE ONLY PUBLIC ART BY A COMMUNITY BASED ARTIST WITH A MENTAL DISABILITY**

Plaintiff's complaint was to recreate and reinstall his murals for artists' fees and expenses. The USPS refuses to take responsibility for their mistake. In written communication with Judge KPF, Plaintiff informed her there were no other public art project's, in the East Village NYC community, created by an artist with a mental disability.

#### **B. PLAINTIFF IS ENTITLED TO PARTICIPATE AND NOT BE DENIED THE BENEFITS OF ANY PROGRAM OR ACTIVITY CONDUCTED BY THE USPS**

On the notice in every Post Office in the United States of America is a bulletin that says for any reason and without asking for permission, a person with disabilities can initiate a law suit in Federal District Court and Section 504 states that "no qualified individual with a disability in the United States shall be excluded from, denied the benefits of, or be subjected to discrimination under" any program or activity that either receives Federal financial assistance or is conducted by any Executive agency or the United States Postal Service."

## **CONCLUSION**

If an artist can make it in NYC, she or he, can make it anywhere.

Sincerely,

Addison Thompson

Pro Se

1/10/2020