The Scope of Copyrights in Spontaneous Photographs

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What rights attach to photos of unscripted scenes that have unanticipated significance?

Justice Holmes, speaking of copyrights in images of circus performers, famously opined, "Others are free to copy the original. They are not free to copy the copy." Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249 (1903). It is nevertheless well established that works can be copied despite lack of mechanical reproduction, and interesting boundaries are set in Harney v. Sony Pictures Television, Inc., 2013 WL 68568 (1st Cir.).

As the First Circuit recounts, "[I]n 2007, freelancer Donald Harney snapped a photograph… of a blond girl in a pink coat riding piggyback on her father's shoulders as they emerged from [church]. Just over a year later, the pair in the Photo became a national media sensation." *Id*. at *1. Indeed, the photo proved useful in finding the girl who had been abducted. *Id*.

A Sony movie later depicted an image of actors who portrayed the pair. The image differed in more than the subjects, but Harney nevertheless sued for infringement. *Id*. The case is interesting because no other case seems to be quite on point.

Consider, e.g., Gross v. Seligman, 212 F. 930 (2d Cir. 1914). After a photographer later used the same young model to produce a second nude photo, he was found to infringe a prepubescent version. The opinion wryly concludes, "The backgrounds are not identical, the model in one case is sedate, in the other smiling; moreover the young woman was two years

older when the later photograph was taken, and some slight changes in the contours of her figure are discoverable. [I]t seems to us that the artist was careful to introduce only enough differences to argue about, while undertaking to make what would seem to be a copy to the ordinary purchaser who did not have both photographs before him at the same time. In this undertaking we think he succeeded." *Id*. at 931-32.

In Kisch v. Ammirati & Puris Inc., 657 F.Supp. 380 (S.D.N.Y. 1987), differences were substantial but not enough to avoid trial. The copy, in color, depicted John Lurie holding a saxophone whereas the original, in black and white, depicted a woman holding a concertina. Yet both subjects were sitting in front of a "striking mural" in the same corner of a nightclub. "In addition, the lighting, camera angle, and camera position appear to be similar…. The Court concludes that a rational trier of fact could find sufficient similarities to prove 'copying.'" *Id*. at 384.

Harney relies directly on Leigh v. Warner Bros., Inc., 212 F.3d 1210 (11th Cir. 2000), involving alleged infringement of a photo used as the cover for the novel, *Midnight in the Garden of Good and Evil*. Featuring a cemetery statue known as the Bird Girl, the photo became famous. Although the book does not mention the statue, the photo's fame may explain its appearance in a later film and in still-shot promotional materials. *Leigh* finds, "the district court correctly identified the elements of artistic craft protected by Leigh's copyright…." *Id*. at 1215. The appeals court refuses, however, to extend protection to "mood" lest that "erode the line between what is and is not protectable. This danger is especially acute in a case… in which

the unprotected elements of the plaintiff's work — the haunting pose and expression of the Bird Girl and the cemetery setting — are so significant." *Id*. (citation omitted).

The court affirms summary judgment in favor of Warner Bros. with regard to "film sequences [that] have nothing substantial in common with Leigh's photograph except the statue itself." *Id*. at 1215-16. But expressive elements found to make both Leigh's photo and defendant's still shots more effective are sufficiently similar to warrant submitting infringement to a jury. *Id*. at 1216.

Harney also relies directly on Mannion v. Coors Brewing Co. 377 F.Supp.2d 444 (S.D.N.Y. 2005). The first of two photos, in color, featured Kevin Garnett. The second depicted, but "in black-and-white, the torso of a muscular black man, albeit a model other than Garnett, shot against a [similar] backdrop." *Id*. at 448. The pose and view are also similar. Moreover, Garnett and the model are similarly clothed and wear considerable amounts of similar jewelry. *Id*. The court concludes by saying, "The parties have catalogued at length and in depth the similarities and differences…. …. As in *Kisch*…, which presents facts as close to this case as can be imagined, the images are such that infringement cannot be ruled out — or in — as a matter of law." *Id*. at 463 (citation omitted).

Mannion mentions "being at the right place at the right time" as contributing to the worth of a photo. *Id*. at 452-53. Fortuitous circumstances play no apparent role there or in the other aforementioned cases, but, in *Harney,* timing is uniquely central. Not only was the photographer in the right place at the right time, his work grew in value as a complex story

developed. Besides apparently facilitating the daughter's return and her father's arrest, his photo may also have contributed to exposing the same man as a fraud who long masqueraded as a Rockefeller. It may also have led to his now being prosecuted for a 1985 murder. *Harney* at *1 n.1.

The court is sympathetic to Harney's arguing, "we cannot penalize authors who are fortunate enough to have once obscure works suddenly become important due to their relevance to changing circumstances." *Id*. at *10. Yet, despite agreeing that he "should benefit…, as he did through the payments from *Vanity Fair* and other publications, such newfound interest does not… change Harney's creative contributions to the Photo. Moreover, recalibrating a work's originality based on a new idea of what it expresses would undermine the distinction that remains between ideas and expression in visual works. In short, we do not see how subsequent events can fortuitously transform unoriginal elements of a visual work into protectable subject matter." *Id*. With such matters off the table, the court finds the photos sufficiently distinct to merit affirming Sony's award of summary judgment. *Id*. at 12.