Inspiration or infringement?

Kristen McCallion of Fish & Richardson PC examines the *Janine Gordon v Ryan McGinley* photography case

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In August, Judge Richard J Sullivan in the Southern District of New York dismissed a copyright infringement lawsuit filed against the well-known artist Ryan McGinley[1]. The lawsuit, filed by photographer Janine "Jah-Jah" Gordon, alleged that 150 images comprised of still photographs and video clips, attributable to Mr McGinley, were infringing derivative works of approximately 135 of Ms Gordon's photographs.

Ms Gordon's allegations

In pleading her case, Ms Gordon cast a wide net. She alleged serial copying of her photographs by McGinley that spanned nearly a decade, asserting that Mr McGinley has been producing works over the past nine years that are based on her "preceding unique works", and "consciously appropriating and deliberately deriving his works from those originating with" her[2]. Ms Gordon also sued Levi Strauss & Company, Christopher Perez, Ratio 3 Gallery, Team Gallery Inc, Peter Halpert, Peter Hay Halpert Fine Art, Jose Friere, Agnes Andre Marguerite Trouble, and Agnes B Worldwide[3]. All had worked with Mr McGinley in some capacity over the years, with Gordon alleging contributory and vicarious copyright infringement. As described by the court, Ms Gordon's amended complaint set forth "a sprawling history of 'surreptitious' copyright infringement[4]".

The art community reacts

Ms Gordon's case, and the extensive scope of her copyright infringement claims, was the talk of the art community. It was described as far fetched by some and ridiculous by others. It even prompted one of the defendants, Team Gallery owner José Friere to issue a personal statement against Ms Gordon, stating that her "claims for originality are extraordinary: she claims to have invented, among other things: visible grain and other errors in the image; the injection of the monochromatic into photography; the depiction of chaos; the use of smoke; the documentation of sub-cultures; and certain types of rudimentary composition (such as placing figures in the center of the page; or in a dynamic relationship to the edge of the image). She even appears to lay claim to 'the kiss' as a 'concept'[5]".

But Ms Gordon was not without her supporters. One of her more prominent backers was Dan Cameron, former curator at New York City's New Museum, who stated that, "Ms Gordon's work is completely original, in concept, colour, composition and content, and that Ryan McGinley has derived much of his work from her creations[6]."

Analysis

In order to establish a copyright infringement claim, a plaintiff with a valid copyright must demonstrate that the defendant has actually copied the plaintiff's work, and the copying is illegal because a substantial similarity exists between the defendant's work and the protectable elements of the plaintiff's work. Defendants moved to dismiss Ms Gordon's copyright claims based primarily on the latter, arguing that there is no substantial similarity between Mr McGinley's visual works and the protectable, copyrightable expression in Ms Gordon's photographs.

The factors a copyright plaintiff must prove lead to at least two inquiries. In the context of visual works of art such as pictorial works, what are the protectable elements that constitute copyrightable expression? Because substantial similarity is a question of fact, in a copyright case where the plaintiff has requested a jury trial, who is the appropriate party to resolve the question of whether there is a substantial similarity between the works at issue?

In response to the first inquiry, while Ms Gordon's claims of infringement focused on the alleged substantial similarities between the content, colour, composition, technique, texture, perspective, and lighting displayed in her and Mr McGinley's works, the court avoided having to determine which of these elements, if any, were copyrightable expression.

In response to the second, the court very quickly determined that because Ms Gordon attached the works at issue to her complaint, it was "entirely appropriate" for the court to assess the alleged similarities between the works, having "before it all that is necessary in order to make such an evaluation[7]". Leaving this assessment to a jury, in the court's opinion, was an unnecessary waste of time.

The process by which a court evaluates substantial similarity, however, is not always crystal clear. Stated generally, the inquiry is whether an ordinary observer looking at the works, unless she set out to detect any disparities, would be disposed to overlook them, and regard the aesthetic appeal of the works as the same[8]. This "ordinary observer test" seeks to determine whether "an average lay observer would recognise the alleged copy as having been appropriated from the copyrighted work[9]". Where a court is faced with works

that have both protectable (eg, copyrightable) and unprotectable elements, however, the analysis may be "more discerning[10]". This more discerning analysis requires a court to extract the unprotectable elements embodied in the works from its consideration and ask whether the protectable elements in the works, standing alone, are substantially similar. As the court noted, there is an "apparent tension between a copyright test that embraces the holistic impression of the lay observer and one that imposes the partial filter of the 'more discerning' observer[11]".

In deciding just how discerning it was required to be, the court explained that the Second Circuit Court of Appeals has rejected the notion that dissection, and a comparison analysis conducted only on those elements that are, per se, copyrightable, is always required[12]. Accordingly, the court declined to adopt the more discerning test and instead relied upon its "good eyes and common sense" to compare the "total concept and feel" of the visual works of Ms Gordon and Mr McGinley[13].

In analysing the alleged substantial similarity between two photographs that depict "young men suspended before a cloudy sky, each with his right arm extended and bent at an approximate right angle[14]", the court found a vast array of differences in colour, clothing, and the overall appearance of the men depicted in the photos. The court concluded that the overall feel of the photographs differed measurably such that no dissection of the images was necessary to discern the "utter lack of similarity" between the two[15]. In reviewing other allegedly similar photographs, the court found their total concept and feel to "wildly diverge[16]". While comparing Ms Gordon's photographs to allegedly infringing "screen grabs" of videos, the court noted that Ms Gordon offered "little authority" to support her argument that a single frame from an audiovisual work containing more than 1,700 discrete images could support a claim for copyright infringement of a still photograph. While courts have entertained infringement claims resting on photograph/video comparisons, judge Sullivan declined to do so here, explaining that the copyrightable aspects of photographic works include "originality in the rendition, timing, and creation of the subject[17]". In this case, "neither the timing nor the creation of the subject" (an interracial couple kissing) was deemed original to Ms Gordon[18]. Her "static rendition", the court reasoned, bore "no likeness to the pace and pulse" of Mr McGinley's visualisation of the same subject matter[19].

Ms Gordon supported her allegations by altering some of her images to highlight the alleged similarities between the works. These efforts were not well-received by the court. Ms Gordon also supported her case with a series of affidavits by various artists, curators, and critics. She argued that the "consensus" of her proposed experts concluded that Mr McGinley's works were not original and were "overtly and repeatedly derived" from Gordon's photographs[20]. But Ms Gordon's reliance on her supporters was also not well-received. Given that the Second Circuit has limited the use of expert opinions to determine substantial similarity, the court was not inclined to "disturb the traditional role of lay observers in judging substantial similarity in copyright cases that involve the aesthetic arts, such as music, visual works or literature[21]". "Despite the prestigious credentials of the artists and aficionados who have rallied to plaintiff's side", the court wrote, "their testimony bears no relevance[22]".

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"Good eyes and common sense" ultimately led the court to conclude that there was no substantial similarity between any of Ms Gordon's photographs and the allegedly infringing compositions of Mr McGinley[23].

Not all copying results in copyright infringement

In closing, the court explained that Ms Gordon's theories of copyright infringement "would assert copyright interests in virtually any figure with outstretched arms, any interracial kiss, or any nude female torso. Such a conception of copyright law has no basis in statute, case law, or common sense, and its application would serve to undermine rather than promote the most basic forms of artistic expression[24]".

There are indeed limits to copyright law and this case exemplifies them. The line drawn between unprotectable ideas, unoriginal subject matter, and copyrightable expression is at times difficult to see. While copying the expression of an artist is prohibited by law, pure inspiration, depicted as a result of copying unprotectable ideas and concepts, standing alone, is not infringement.

Ms Gordon is appealing the court dismissal of her suit to the Second Circuit Court of Appeals.

Footnotes

1. *Gordon v McGinley*, 2011 US Dist LEXIS 92470 (SDNY 18 Aug 2011).
2. Memorandum of Law in Opposition to Defendants' Motion to Dismiss, 37[Dkt No 28].
3. Jose Friere, Agnes Andre Marguerite Trouble, and Agnes B Worldwide, Inc, were named in the pleadings but were thereafter voluntarily dismissed.
4. *Gordon*, at *3.
5. http://www.artnet.com/magazineus/news/corbett/team-gallery-responds-to-gordon-vs-mcginley.asp.
6. Affidavit of Dan Cameron, 4 [Dkt No 28-4]
7. *Gordon*, at *7 (quoting *Peter F Gaito Architecture, LLC v Simone Dev. Corp*, 602 F3d 57, 64 (2d Cir 2010).
8. *Gordon*, at *7.
9. *Gordon*, at *8 (citing *Knitwaves, Inc v Lollytogs Ltd*, 71 F3d 996, 1002 (2d Cir 1995).
10. *Gordon*,at *8 (citing *Gaito*, 602 F3d at 66).
11. *Gordon*, at *8.
12. *Gordon*, at *8-9.
13. *Gordon*, at *9.
14. *Gordon*, at *9-10.
15. *Gordon*, at *11.
16. *Gordon*, at *14.
17. *Gordon*, at *16 (quoting *Mannion v Coors Brewing Co*, 377 F Supp 2d 444, 458 (SDNY 2005).
18. *Gordon*, at *17.
19. *Gordon*, at *17.
20. *Gordon*, at *17-18.
21. *Gordon*, at *18 (citing *Computer Assocs Int'l, Inc v Altai, Inc*, 982 F2d 693, 713-714 (2d Cir 1992).
22. *Gordon*, at *18.
23. *Gordon*, at *19-20. As the court explained, it declined to conduct an exhaustive inventory of the 150 allegedly infringing images, but was of the opinion that a "representative sample illustrates and confirms this result". id
24. *Gordon*, at *20-21.

Author

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