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In addition to accusing the agency of breach of fiduciary respons-ibilities, Penny Gentieu alleged that Getty had infringed her copyrighted photos of babies (far left) by directing photographers to make copies (near left and below). The court ruled that the similarities in the photos were inherent in the subject matter.

THE TROUBLE WITH COPYCAT CLAIMS

RECENT COPYRIGHT RULINGS AGAINST PHOTOGRAPHERS UNDERSCORE THE DIFFICULTY OF DISTINGUISHING BETWEEN WHAT IS AND ISN'T PROTECTED BY COPYRIGHT.
BY DAVID WALKER

IF THERE ARE ANY LESSONS to be drawn from the summary dismissal of some recent copyright lawsuits, it is that proving someone infringed your rights by shooting copycat pictures can be a tough battle, indeed.

In March, federal courts dismissed two infringement claims against alleged copycats. In one of them, New York photographer Penny Gentieu had claimed that her agency—Getty Images—conspired with several London photographers to imitate some of her best-selling pictures of babies. A federal district court judge in Chicago threw the case out before trial, accusing Gentieu of trying to claim a monopoly on baby photographs.

Less than two weeks earlier, the federal appeals court in San Francisco threw out *Ets-Hokin v. Skyy Spirits*, a case kicking around in various courts since 1996. Ets-Hokin had photographed Skyy's blue vodka bottle for a marketing campaign. The company later hired two other photographers to shoot new images of the bottle for its ads. The court said there were so few ways to photograph the bottle that only pictures virtually identical to Ets-Hokin's would be infringing.

Other photographers have lost similar claims. Photographer Peter B. Kaplan sued The Stock Market agency for infringement in 1999, alleging that one of its photographers copied Kaplan's photo of a businessman standing on the edge of a tall building, contemplating a suicidal leap to the street below. A federal judge threw out the claim on the grounds that the similarities—including the positioning and clothing of the subjects, their viewpoints, and the angles of the pictures—"naturally flow from the photograph's unprotectible subject matter," namely, a distraught businessman about to leap off a building.

While that pattern of decisions may alarm photographers and leave the impression that courts are raising the bar for copyright claims, that isn't the case, according to intellectual property attorneys. They say the problem lies with the claims themselves—and possibly the attorneys behind them.

"*Greenberg v. National Geographic Society* and *Tasini v. The New York Times* show that copyrights are being protected," says attorney Joel Hecker of New York. Greenberg recently won a $400,000 jury award against *National Geographic* for unauthorized use of a number of his images. The *Tasini* ruling barred publishers from re-using freelancers' articles (and by extension, presumably, photographs)

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Copyright protects the expression of an idea, not the idea itself. A district court judge ruled that Gentieu could not claim a copyright to the idea of photographing babies, nor to "any elements of expression of that unprotected idea" such as lighting, styling, composition or camera angle. She is appealing the ruling.

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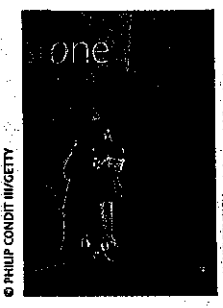

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So why did the copycat claims fail?

Hecker believes high-profile victories such as the Greenberg and Tasini cases "has led some photographers to expect more than they should" when they take their own infringement claims to court. And, he says, the high-profile victories may be attracting attorneys who don't fully understand copyright law.

The result is that judges are being forced to issue rulings on marginal claims that probably wouldn't have gone to court before, Hecker says. He explains, "In the past, the attorney might have been more aware of the law and refused to take the case, or the claims might have been settled out of court, or the clients weren't pushing for so much money."

The Gentieu, Ets-Hokin and Kaplan cases all failed on the issue of protectible versus nonprotectible elements. Copyright protects only the unique elements of a photographic work, including elements such as lighting, camera angle, composition, film choice and other factors, Hecker explains.

What copyright doesn't protect are the elements of a work that naturally flow from the subject itself and are unavoidably part of just about any photograph of that subject.

In the Ets-Hokin case, for example, the federal appeals court in San Francisco ruled that the allegedly infringing images were "indeed similar." But the court went on to say, "their similarity is inevitable, given the shared concept, or idea, of photographing the Skyy bottle." In such situations, the court said, "the appropriate standard for illicit copying is virtual identity."

In his ruling against Gentieu, the judge wrote, "[Gentieu] cannot claim a copyright in the idea of photographing naked or diapered babies or in any elements of expression that are intrinsic to that unprotected idea."

The judge also noted that some ideas "can be expressed only in a limited number of ways." When "the idea of a work and its expression merge so the two become nearly inseparable," the judge added, "copyright protection must likewise narrow to avoid granting an effective monopoly of the idea itself." (See this month's *PDN* column for more details about the Gentieu ruling.)

San Francisco attorney Curt Karnow observes, "You have to look at [these rulings] from the judge's viewpoint. They're thinking, 'If I rule for the plaintiff, then I'm taking this [subject] out of the public domain forever.' That's a burden. They're reluctant to take things like babies photographed against white backgrounds out of the public domain."

Moreover, says Karnow, copyright claims fail all the time, so he doesn't see any ominous pattern in the recent rulings. "What's going on is that a lot of cases are badly litigated," he says.

Some of the errors are basic. A claim based on unauthorized use was recently thrown out of the U.S. District Court in Maine because the images weren't properly registered—the first requirement for bringing a copyright claim to court. Many other claims have also been eviscerated or thrown out on technicalities.

In copycat cases, defendants are always going to argue that any similarity between two images arises from the subject matter, Karnow explains. Attorneys for plaintiffs simply fail in some instances to bring the unique, protectible elements of their clients' images to the court's attention. "You have to be able to say the similarities are A, B and C," Karnow says.

In case after case involving alleged copycats, federal courts have carefully reiterated the protectible elements of copyrighted photographs. "Courts go out of their way to say lots of things photographers can do to make pictures unique, and we'll protect them," Karnow says.

And indeed, they do, but then another problem arises: judges don't always agree on what elements are intrinsic and which are protectible.

A case in point is *Jack Leigh v. Warner Brothers*. Leigh shot a moody image of a statue in a Georgia cemetery that appeared on the cover of the best-selling book *Midnight in the Garden of Good and Evil*. When Warner Brothers began filming a movie based on the book, Leigh offered to license his image to promote the film. Warner Brothers declined, hiring another photographer instead to create a similarly moody photograph of the statue.

Leigh sued for infringement. At first, a U.S. District Court threw out his claim on the grounds that the mood of the Warner Brothers picture was inherent in the subject matter and not the result of imitating Leigh's technique.

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But an appeals court overturned that ruling and ordered the case to trial, saying Leigh's camera angle, film choice, lighting and other elements contributed to the mood of the picture. Warner ended up settling with Leigh for an undisclosed sum.

Gentieu also plans to appeal her case with hopes that a panel of appeals court judges disagrees with the district court judge who ruled against her.

For other photographers contemplating claims of their own, Hecker's advice is this: Hire a lawyer who specializes in copyright law, and check his or her record thoroughly. Even good lawyers don't always win, he says, "But you're asking for trouble if you get someone who doesn't have a good track record." □