



# Arts Brief

A Publication of Maryland Volunteer Lawyers for the Arts:  
Left-Brain Support for Right-Brain People

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## Court Says Photo Recreation Did Not Infringe Original Work

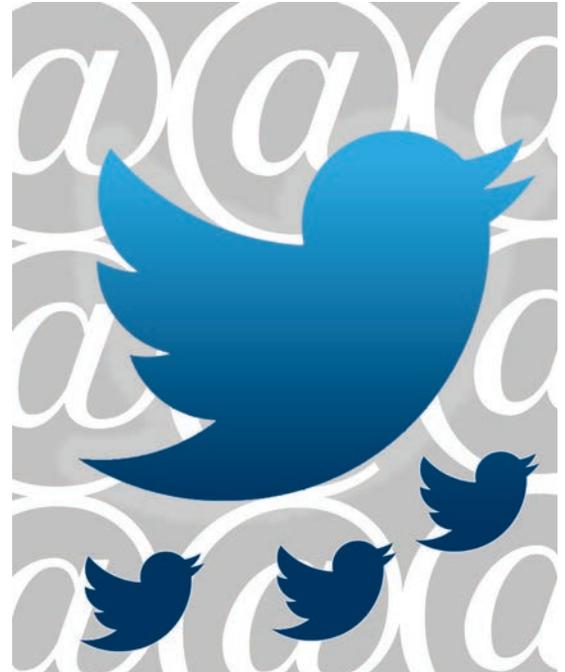
Shepard Fairey's use of a photograph of Obama to make art generated lots of heat but shed no light on the legal parameters of such a use because it settled out of court. But a recent decision by the First Circuit Court of Appeals seemed to open the gates wide, finding that a virtually identical recreation of a famous photograph did not infringe the original photographer's copyright.

Plaintiff Donald A. Harney was on assignment for the Beacon Hill Times in April 2007 when he took a photograph of a blond girl in a pink coat riding on her father's shoulders as they emerged from a Palm Sunday service.

A year later, the father and daughter in the photo became a media sensation when it was discovered that the father, a German citizen using the name Clark Rockefeller, had kidnapped his daughter and was wanted by the FBI. Harney's image was used in the bureau's poster and the news media during the hunt for Christian Karl Gerhardsreiter, a professional imposter who had previously posed as a descendent of British royalty, a Wall Street investment advisor, and a rocket scientist.

Defendant Sony Pictures Television Inc. later turned Gerhartsreiter's story into a made-for-television movie, and used a photo of the actors in a virtually identical pose in several scenes in the movie — as the image in the

(continued on page 2)



## License Not Created By Retweeted Photos

A photographer who posted photos of the 2010 Haitian earthquake to his TwitPic account won the first battle in a suit involving the French news agency that picked up the photos after they were retweeted and the newspaper that posted them on its web site.

The U.S. District Court for the Southern District of New York granted photographer Daniel Morel summary judgment on his direct copyright infringement claim against Agence France-Presse (AFP) and the Washington Post Jan. 14, rejecting AFP's argument that by posting the photos on TwitPic/Twitter, Morel granted it license to use them.

(continued on page 4)

Founded in 1985, Maryland Volunteer Lawyers for the Arts provides pro bono legal assistance to income-eligible artists and arts organizations, and educational workshops and seminars on topics affecting artists. MdVLA is funded by the Harry L. Gladding Foundation; the Holofcener Foundation; PNC Bank; the William G. Baker, Jr. Memorial Fund, creator of the Baker Artist Awards ([BakerArtistAwards.org](http://BakerArtistAwards.org)), and by an operating grant from the Maryland State Arts Council, an agency dedicated to cultivating a vibrant cultural community where the arts thrive.

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MdVLA Arts Brief aims to educate and inform Maryland artists about legal issues affecting them. It is not intended as a substitute for legal advice. Artists with legal issues should seek legal counsel to address specific questions.

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*(Photo Recreation from page 1)*

Wanted poster, in a law enforcement briefing room, and in television news reports about the abduction.

Harney sued Sony for copyright infringement, and the trial court dismissed the case, finding that the movie image was not “substantially similar” to the photo, a necessary element of a copyright violation. The trial court said that the two images shared the “factual content” of the scene, but not Harney’s expressive elements. The trial court also found it significant that Harney did not prearrange the subject matter of the photo, but simply captured the moment.

The appeals court agreed with the trial court. Noting that it is permissible to mimic the noncopyrightable elements of a copyrighted work, the First Circuit found that courts ruling on substantial similarity first have to dissect the original work to separate the original expressive elements from the unprotected content, and then compare the two works “holistically” to make the determination.

Applying these principles to news photography is especially challenging, the court said, since artists ordinarily have no copyright in the “reality of their subject matter,” while the news photographer’s stock-in-trade is depicting “reality.”

Courts have typically found that the photographer’s original conception of his subject is copyrightable, the First Circuit said as is the photographer’s selection of lighting, timing, positioning, angle, and focus. Additional elements of originality may also include posing the subjects and evoking the desired expression from them.

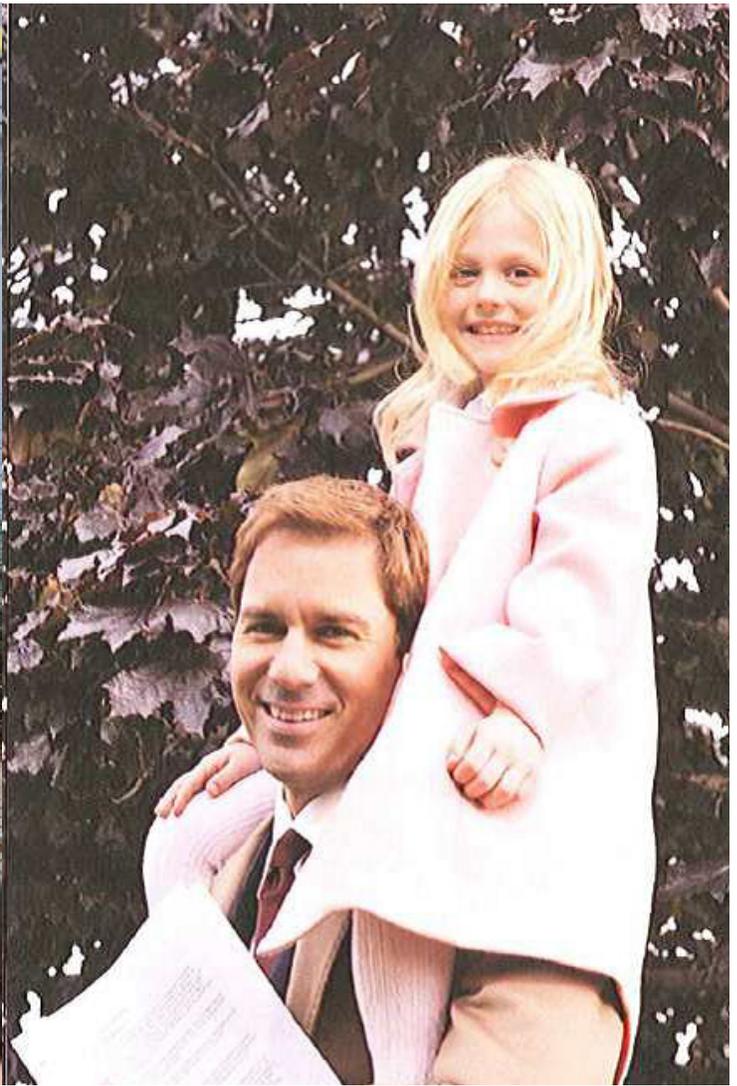
Dissecting the original photo, the First Circuit said Harney cannot claim exclusive rights to the subjects’ piggyback pose, their clothing, the items they carried, or the church behind them with the bright blue sky behind it.

Harney held the copyright on the framing of subjects against the background of the church and blue sky, with each holding a symbol of Palm Sunday, the court said, as well as the tones of the photo and the placement of the father and daughter in the center of the frame.

The appeals court concluded that almost none of the protectable elements in Harney’s photo were replicated in Sony’s



Image courtesy of Donald A. Harney



Court document

image. Without the Palm Sunday symbols, and without the church in the background, the Sony photo does not recreate the original combination of father-daughter, Beacon Hill, and Palm Sunday, the court said.

Although the two photographs may appear similar at first glance, that impression of similarity is due largely to the piggyback pose, which was not Harney's creation and is arguably so common that it would not be protected even if he had placed his subjects in the pose.

"Significantly," the court said, "the two photographs are notably different in lighting and coloring, giving them aesthetically dissimilar impacts. Harney's features vivid colors and distinct shadows while the [Sony] Image is washed out and is far less attractive or evocative."

The court expressed empathy for Harney's frustration at the unauthorized use of his work, but concluded that allowing other artists and authors to build freely upon the ideas and information conveyed by a work is "the essence of copyright."

Plaintiff Don Harvey told Arts Brief Feb. 19 that he believes the decision is "undeniably wrong" and that he will seek review by the full court of appeals. Sony "definitely made a derivative work," he added.

After the kidnapping story came out, Harvey said, he contacted the police and FBI and gave permission for his photo to be used in an Amber Alert. The story spread from there, however, and it "got published everywhere," without his permission and without compensation to him. ■

(Twitter from page 1)

According to the opinion, shortly after Morel posted his photos online, they were reposted to the Twitter account of Lisandro Suero, who tweeted that he had exclusive photographs of the earthquakes.

Vincent Amalvy, AFP's Director of Photography for North America and South America, sent eight of Morel's photos, credited to Suero, to the AFP photo desk, which transmitted them to Getty Images. AFP and Getty have a reciprocal license agreement for their images. Getty sent the images on to the Post, which published four of them.

AFP claimed that it was a third-party beneficiary of the license agreement between Morel and Twitter and that the Twitter Terms of Service (TOS) intended to confer a benefit in the form of a license on Twitter's "other users."

The court disagreed, noting that AFP wholly ignored portions of the Twitter TOS that were directly contrary to its position, particularly the statement that "[y]ou retain your rights to any Content you submit, post or display" and "what's yours is yours – you own your content."

"These statements would have no meaning if the Twitter TOS allowed third parties to remove the content from Twitter and license it to others without the consent of the copyright holder," the court said.

The TOS reference to use of content by "other users," and a statement that the license authorizes Twitter to "make your Tweets available to the rest of the world and to let others do the same" occur in a paragraph of the TOS addressing the user's responsibility for the content they post, not the paragraphs discussing the licenses granted by the TOS, the court said.

Moreover, even assuming that these statements grant some form of license to third parties to retweet content posted on Twitter, "they do not suggest an intent to grant a license covering the activities at issue here," the court added.

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Twitter's *Guidelines for Third Party Use of Tweets in Broadcast or Other Offline Media* further underscore that the Twitter TOS were not intended to confer a benefit on the world-at-large to remove content from Twitter and commercially distribute it, the court said, noting that the Guidelines are replete with suggestions that content should not be disassociated from the Tweets in which they occur.

The court rejected Morel's arguments that he was entitled to an award in the tens or hundreds of millions of dollars for the infringement, agreeing with the defendants that they are each liable only for a single award of statutory damages per work infringed rather than a multiplication of damages based on the number of infringements.

The court refused to dismiss a number of other claims against the defendants, finding the evidence still too disputed for it to make a ruling. ■

## Split Decision in Suit Over Sex Pistols Photo

A federal judge in California issued a split decision Jan. 28 on an appropriation artist's use of a photo of the Sex Pistols to make three works of art. The judge ruled that two of the art works infringed photographer Dennis Morris's copyright while a third work transformed the original photo enough that the use might be considered fair.

Artist Russell Young found Morris' photo of Sid Vicious and Johnny Rotten on the Internet and used it to create "Sex Pistols in Red," with Morris's photo cropped and tinted in a deep red color; "Sex Pistols," a print of the subject photo in black enamel on an acrylic background; and "White Riot + Sex Pistols" showing two images of the subject photo side-by-side.

Under the Copyright Act, the "fair use" of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright." The exception allows courts to avoid rigid application of the copyright statute when it would stifle the creativity the law is designed to foster.

Courts ruling on fair use look at four factors: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. Works that fail to transform the original can "supersede" it in the marketplace, the theory goes, while a transformative work is less likely to have an adverse impact on the market for the original work.

In this case, the court found the fourth factor determinative. Finding that “Sex Pistols” and “Sex Pistols in Red” are not transformative because they do not invoke new expression, meaning, or message distinct from that of the subject photograph, the court concluded that no trier of fact could find a fair use of the photo.

The two infringing works are “little more than reproductions of the Subject Photograph with minor alterations,” the court said, noting that Young admitted that his only modifications to the subject photograph were adding tint, minor cropping, and changing the medium, changes that added “only marginal artistic innovation to the Subject Photograph.”

“White Riot + Sex Pistols,” on the other hand “bears certain aesthetic characteristics that raise the question of transformation, and, by extension, fair use,” the court said.

Denying Morris summary judgment on the third work, the court noted that it incorporates three distinct elements: a Union Pacific logo, the words “White Riot” in graffiti with red stars, and two images of the subject photograph positioned side-by-side. The original images are distorted by the graffiti and the Union Pacific Logo looms above them. “Thus, unlike the other two Accused Works, ‘White Riot + Sex Pistols’ incorporates images beyond the band itself and arranges them such that the composition may convey a new message, meaning, or purpose beyond that of the Subject Photograph,” the court concluded. ■

## Trial Court Dismisses Suit Claiming ‘Avatar’ Idea Stolen

A federal trial court in California Jan. 31 threw out a visual effects consultant’s lawsuit alleging that James Cameron stole his idea for the movie *Avatar*, finding clear and undisputed evidence that Cameron independently created the blockbuster.

Plaintiff Gerald Morawski sold four pieces of art to Cameron in 1991. Shortly after, he was asked to sign a Confidentiality and Non-Disclosure Agreement with Cameron’s production company, Lightstorm Entertainment Inc., stating that “All Material and other information furnished by Lightstorm to you, as well as any ideas and responses furnished by you, shall be the sole and exclusive property of Lightstorm, which may freely exploit same in any manner or kind, without any restriction whatsoever and without payment or any other obligation or liability to you. . . . Notwithstanding the foregoing, Lightstorm shall not own, and you shall retain as your

exclusive property, all original ideas and artwork created by you which are not derived from Lightstorm’s Material, and should Lightstorm wish to acquire your property, the parties will negotiate therefore.”

Later that same year, Morawski had two meetings with Cameron during which he pitched his idea for a film called *Guardians of Eden*. Lightstorm passed on the idea, as did another filmmaker, and it was never made.



Cameron began developing *Avatar* in 1995, the court said, but ultimately decided not to move forward with it because the necessary technology was not sufficiently developed. A decade later that changed and in December 2009 the film was released.

As the court recounted, *Avatar* takes place in 2154 A.D. on Pandora, a distant moon inhabited by humans affiliated with the Resources Development Administration, which mines unobtainium, and the Na’vi, 10-foot tall, blue-skinned, long-tailed, preternaturally strong humanoids who live in a gigantic tree called Hometree. Avatars are genetically engineered hybrid bodies that look like Na’vi, but are controlled by humans via a mental link.

The film tells the story of Jake Sully, a 22-year-old paraplegic ex-marine, who travels to Pandora to work in the Avatar program only to fall in love with a Na’vi female, Neytiri. As a result, he transfers his allegiance from the humans to the Na’vi in the battle to take a huge deposit of unobtainium buried beneath Hometree.

Morawski identified 19 alleged similarities between *Guardians of Eden* and *Avatar*, including an epic struggle between evil mining interests that destroyed a planet to satisfy their greed, an indigenous tribe that lives at one with its rainforest environment, and the hero’s background as a disabled military veteran.

Morawski alleged that Cameron’s purportedly unauthorized use of these characters, plot points, and themes breached the confidentiality agreement.

(Avatar from from page 5)

In order to demonstrate a breach of the agreement, the court said, Morawski must prove that the defendants used his intellectual property without his authority. However, it added, evidence that defendants independently created Avatar can rebut an inference of use as a matter of law.

The court concluded that Cameron sufficiently established his independent creation defense with proof about his creative process and the sources of his ideas. Each element of Avatar that was allegedly taken from *Guardians of Eden* was independently created by Cameron before his meetings with Morawski and used in his prior works, the court found.

Ultimately, the court found, “it is clear upon reviewing Cameron’s notes and testimony that *Guardians of Eden* was not the ‘vehicle’ he utilized in developing the story of *Avatar*; *Avatar* is simply a retelling of the familiar story of European colonization and the love story between Pocahontas and John Smith. It is the story of indigenous people fighting for their home against a stronger, encroaching enemy, and of an unlikely romance between two people on opposing sides. These ideas form the basis for countless works dating back centuries.”

The court also dismissed Morawski’s claims alleging breach of an implied-in-fact agreement, fraud, and negligent misrepresentation. ■

## Court Tosses Dealer’s Suit Against ‘Love’ Artist Indiana

A federal trial court in New York dismissed an art dealer’s suit against Love artist Robert Indiana Jan. 17, rejecting his argument that he was a third-party beneficiary of a license agreement between Indiana and artist John Gilbert to make a Hindi version of the iconic statue.

Gilbert agreed to pay Indiana \$100,000 and 10 percent of all his sales on an Indian version of the Love statue. However, while Indiana licensed Gilbert to make what the court called the “Indian Prem” with script designs of the Hindi word for Love, the “lesser artist” went beyond the scope of the license agreement to create a design with block capital letters in English (the “English Prem”). He attributed those works to Indiana.

Dealer Joao Tovar alleged that he bought multiple copies of the English Prem for \$481,625, and that he resold many

of them, but lost any value in the remaining pieces when Indiana disavowed the works in a June 2009 letter. According to Tovar, the works were accompanied by a certificate of authenticity, signed by Gilbert, with Indiana’s signature and the words “For Tovar” on the side.

The court said Tovar’s claim failed because he didn’t adequately plead damages. He earned \$228,375 on sales of the Indian Prem, putting to rest his tort claims for disparagement and misrepresentation. Tovar’s claim that he was owed damages for any unsold works failed, the court said, because resale would require Tovar’s perpetration of the very fraud he complains of. “It rings of hypocrisy to claim victimhood due to both a fraud being perpetrated upon you and your inability to perpetrate that fraud yourself.”

Tovar was not a third party beneficiary of the contract between Indiana and Gilbert, the court said, because in Maine (where Indiana lives) the circumstances must indicate that the promisee intended to give the beneficiary the benefit of the promised performance. Nothing in the contract illustrates that either party to the contract intended to grant rights in any other party, the court said, and the mere fact that the licensing agreement contemplates third parties buying the art in question does not create such a relationship.

The court also rejected the dealer’s “product disparagement” claim, which alleged that Indiana’s renunciation of the authenticity of the English Prem sculptures destroyed their value. Such claims require a false statement, the court noted, and nothing in the complaint alleges that Indiana’s statement was false.

Tovar’s claim for breach of the New York arts and cultural affairs law on artists and certificates of authenticity fails because Maine law applies, the court said, and even if it didn’t, the New York law applies only to sales by art merchants to non-art merchants. Given that Tovar bought 10 English Prem sculptures and resold many of them at a substantial profit, he is clearly in the business of dealing in art.

The court also rejected Tovar’s claim that the certificate of authenticity (COA) for the work he bought constituted a contract between him and Indiana, which Indiana breached by renouncing his authorship of English Prem.

The COA fails to meet any of Maine’s requirements for an enforceable contract, the court found, noting that it was not negotiated between Tovar and Indiana but was something Tovar demanded of Gilbert, which Gilbert then had endorsed by Indiana.

Rejecting Tovar's request for \$1 million in punitive damages, the court found no evidence that the "great artist" acted outrageously. Indeed the court said, it was Gilbert who acted outrageously by selling sculptures Indiana never agreed to put his name on, and then suing Indiana in an attempt to force him to do so (Arts Brief Vol. 2, Issue 2, Spring 2010, p. 7). That suit ended with a judgment for Indiana in March 2012. ■

## Trump Sues Maher Over Orangutan Joke

Donald Trump asked a federal court in California Feb. 4 to put Bill Maher's money where his mouth is, filing a breach of contract suit against the comedian for not paying him the \$5 million he says he is owed for proving that his father was not an orangutan.

Maher responded on his late-night television show that he was joining the growing chorus of patriotic Americans known as "Apers" and that Trump should stop flinging his feces.

The suit arose on the *Tonight Show* with Jay Leno in January, when Maher called Trump a racist for his webcast offering President Barack Obama \$5 million to disclose his college and passport applications and records.

Calling Trump's Tweets the work of "a syphilitic monkey," Maher suggested that the tycoon was the "spawn of his mother having sex with an orangutan" and said he would pay \$5 million to the charity of Trump's choice if he proved otherwise.

The next day Trump's attorney wrote Maher enclosing his short-form birth certificate and formally accepting the offer.

According to the lawsuit, a contract was formed between Maher and Trump as of the moment the acceptance letter was sent. Trump has been injured, the suit says, by not receiving payment of the promised sums, as have the five worthy charities that would have received the money from Trump.

Trump contends that because Maher's show is political commentary and not a comedy broadcast, he was entitled to take the offer seriously. But while oral contracts can be upheld, observers agree that Maher's "offer" was clearly parody and the court is likely to end up spanking this monkey. ■

## Artists with Legal Questions Wanted!

MdVLA is hosting four more FREE legal clinics this winter/spring.

Drop by for a 25-minute sessions with one of MdVLA's volunteer attorneys for answers to those pesky legal questions like: How do I read a contract? What is "fair use"? Do I need to incorporate to sell my art?

### Want in? Two ways:

1. Make an appointment! e-mail [info@mdvla](mailto:info@mdvla) to reserve a slot
2. Drop by! stop by from 1 to 4:00 pm at Maryland Art Place(8 Power Plant Live) on March 9 or at City Arts Building (440 E. Oliver St.) on March 23, April 6 and 28

GET EDUCATED

In addition to offering pro bono legal referrals, MdVLA empowers Maryland artists with the skills and knowledge to protect their work themselves through regularly scheduled workshops. Watch [mdvla.org](http://mdvla.org) for upcoming programs.

# EASTERN SHORE ARTISTS:

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on Monday, May 6 at  
**Mind Your Business: Legal and Financial Workshop for Artists**  
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