

Flash! Don't Smile: Legal Issues Related to Photography as an Art Form and Beyond

By: Barbara T. Hoffman

IBA Boston, October 9, 2013
Art and Cultural Institutions on Heritage Law Committee

The Hoffman Law Firm
330 W 72 Street
New York, NY 10023
artlaw@hoffmanlaw.org
www.hoffmanlawfirm.org

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The introduction to this session presents a wide-ranging set of intellectual property issues that pertain to the medium of photography, the artist incorporating photography in her work, and photo collections and archives seeking to exploit the content of their collections.

Volumes could be written or spoken on each of the issues raised by the deceptively simple questions posed. Time does not permit such an approach. Rather, my presentation will focus on primarily on the four cases *Cariou v. Prince*, 784 F. Supp. 2d (S.D.N.Y. 2011), No. 11-

¹ Barbara T Hoffman, Principal, The Hoffman Law Firm

Barbara T. Hoffman is a prominent art and intellectual property lawyer. She litigates and counsels on art, intellectual property, film, publishing and internet law, including copyright, right of publicity and privacy, defamation and commercial matters including cross border art transactions, sales of archives and collections and film production. She represents a wide array of creative clients – authors, artists, photographers, including Magnum, and the estates of prominent photographers as well as artist's foundations and museums and internet content producers.

Her most recent books include *Art and Cultural Heritage: Law, Policy and Practice*, Cambridge University Press, 2007 (reissue paperback 2010); *Visual Artists' Guide to Estate Planning* (1998 and 2008) and *Exploiting Digital Image Archives in the New Media*, Kluwer Law, 1997.

She is a former chair of the International Bar Association Committee on Art, Cultural Institutions and Heritage Law and the Chair of the City Bar Association Committee on Art Law.

Hoffman has been selected to Best Lawyers in America, Best Lawyers in New York and Super Lawyers in the areas of intellectual property and intellectual property and art law litigation. She has represented Richard Hamilton in *George Barris v Richard Hamilton, Tate Gallery and D'Offay Gallery*, 1999, U.S. Dist. LEXIS 7225 (S.D.N.Y. May 17, 1999), Faith Ringgold in *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997) and Daniel Morel in *Agence France Presse v. Morel*, 769 F. Supp. 2d (S.D.N.Y. 2011).

1197-cv (2d Cir. Apr. 25, 2013), *Agence France Presse v. Morel*, 769 F. Supp. 2d (S.D.N.Y. 2011) and *George Barris v Richard Hamilton, Tate Gallery, D'Offay Gallery*, 1999, U.S. Dist. LEXIS 7225 (S.D.N.Y. May 17, 1999) and *Seltzer v. Green Day, Inc.*, Nos. 11-56573, 11-57160, 2013 U.S. App. LEXIS 16322 (9th Cir. Aug. 7, 2013). My aim (i) to discuss the lessons learned and practical implications of each and (ii) to provide a legal structure to permit debate and discussion both on the panel and with the audience.

I. Foul as Fair? Evolving Standards of Fair Use

A. *Cariou v Prince*

The *Cariou v Prince* case addresses and purports to resolve issues of concern to photographers, collage artists, artists who use appropriated images and computer based technology particularly with respect to copyright and evolving principals of fair use. The *Cariou* case transforms the fair use inquiry under 17 U.S.C §107, particularly as applied to appropriation art. The decision removes the artists' intention as an element of the analysis, yet, the Second Circuit articulation of the fair use standard provides little guidance for future cases. The Second Circuit stated that "what is critical is how the work in question appears to the reasonable observer, not what an artist might say about a particular body of work."



In light of the Second Circuit decision in *Cariou v. Prince*, the remarks of then District Court Judge Pierre N. Leval on a panel on fair use and appropriation art which I organized for the College Art Association ("CAA") in January of 1994, are prescient². The remarks were made just prior to the United States Supreme Court's most recent fair use decision in *Campbell v. Acuff-Rose Music*, 510 U.S. 569 577-78 (1994)²:

² In *Campbell*, the Supreme Court cited more than a dozen times to Leval's article in 103 Harvard Law Review 1105 (1990) and set forth the "transformative use" standard in holding parody was protected, in my view.

The Supreme Court did not hold as the Second Circuit said it did, that it is sufficient under the first factor for a new work to merely "alter the original with new expression, meaning or message" with no commentary. Instead, the Court said in holding that parody transformative value. "If on the contrary, the commentary has no critical bearing on the substance or style of the original composition, the claim to fairness in borrowing from another's work diminishes."

In my view (which is not necessarily shared by other judges and copyright scholars), a study of the pattern of decisions reveal that courts have placed great importance on the first factor – the purpose of character of the secondary use. An important question has been: Does this appropriation fulfill the objective of the Copyright Law to stimulate creativity for public instruction? Is the appropriation transformative?

Many other types of critique and commentary also fairly require quotation to communicate their message. An art historian or critic who seeks to make a point about an artist's work cannot effectively do so without showing illustrations.

In *Cariou*, the Second Circuit significantly transformed and expanded the scope of fair use 180° while nevertheless purporting to fit the decision within *Campbell*. The majority reversed the District Court's summary judgment in favor of Cariou, the plaintiff photographer and entered summary judgment in favor of defendant with respect to 25 of the 30 works at issue, remanding to the District Court to determine with respect to the other five whether the use was fair in accordance with the Second Circuit's criteria. The twenty-five works were transformative (as a matter of law) because they "manifest an entirely different aesthetic from Cariou's photographs, notwithstanding Prince's deposition testimony as to his intent.



With respect to the fourth factor of market harm, the District Court stated that licensing original works for secondary use by other artist's is the kind of derivative use that "creators of original works would generally develop."

The Second Circuit disagreed with the District Court's analysis of the fourth factor of market harm and found persuasive the lack of testimony or evidence regarding the potential market for Cariou's works again in agreement with Judge Leval's analysis. Judge Leval in his 1994 remarks also discussed the fourth factor, as follows:

That factor has been seen as particularly important. It stresses the commercial nature of the copyright, which seeks to protect the

ability of authors and artists to make a living from their work. Copying that interferes with that ability is disfavored; if the copies furnish the public with a substitute for the original artist's work, so that the public will buy the appropriation rather than the original, such copying is unlikely to be found fair use.

Key to the Second Circuit's analysis was that there was no evidence that Prince's artworks had "usurped" the market space that otherwise would have belonged to Cariou. There was nothing in the record to suggest Cariou would ever develop or license secondary uses of his work similar to Prince's artworks, nor was there any evidence that the target audience of Prince's work was the same as Cariou's.

A. *Dereck Seltzer v Green Day, Inc. et al*, No. 2-10cv-02103 (9th Cir. Aug 7 2013)

In *Seltzer*, the Ninth Circuit was confronted with the issue of whether a rock band's unauthorized use of an artist's illustration in the video backdrop of its stage show was "fair use" under the copyright law. The Court begins with the Supreme Court's justification and underlying rationale of the copyright law. The fair use doctrine permits and requires courts to avoid rigid application of the copyright statute when on occasion, it would stifle the very creativity which that law is designed to foster. *Campbell v Acuff-Rose Music, Inc.* 510 U.S. 569, 577 (1994).

Significantly, although fair use is a mixed question of fact and law, the Court, as in *Cariou*, decided "fair use" on a motion for summary judgment. With respect to the first factor, the Court employed Judge Leval's amorphous "transformative" clarification [sic].



"Green Days' use of Scream Icon is transformative. Green Day used the original as "raw material" in the construction of the four minute video backdrop."

Applying essentially the same market analysis as the Second Circuit, the Ninth Circuit was able to conclude that there was no market harm. Based on its analysis that the first and fourth factors (the most important) favored the defendant, the Court was able to determine that the use by Green Day was fair on summary judgment.

II. *AFP v. Morel*: A Glimmer of Hope for the Photographer

A. *AFP v. Morel*

The *Morel* case held that you can't sell photographs taken from Twitter and raises emerging issues in the application of the TOS of social media sites, copyright remedies under 17 U.S.C. §504, the application of the Digital Millennium Copyright Act (DCMA) "safe harbor provisions" and copyright remedies for false or altered Copyright Management Information, 17 U.S.C. §1202. In addition, the case provides a window on stock photo companies, their contracts, privacy issues, fair use and evolving ethical issues and aesthetic issues in photography and the media, all of which will be discussed during the presentation.



B. Social Media and the Digital Millennium Copyright Act

In the following articles, a photographer and blogger on photography presents an excellent analysis by a non-lawyer of the developing case law in the area of “steal the photograph first, ask after” business model.

Agence France Presse v Morel: Photo Agency Found Guilty of Theft, Faces Million Dollar Bill

By: Jeremy Nicholl

<http://www.jeremynicholl.com/blog/tag/copyright/?slideshow>

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So, AFP, how’s that “steal the photos & sue the photographer” business plan working out then?

Three years almost to the day since photo agency AFP heisted Haitian photographer Daniel Morel’s award-winning photographs of the 2010 earthquake the first court decision has been handed down in what has evolved into a high-profile and significant copyright case. In a humiliating ruling against the agency, a New York court has upheld Morel’s claim for copyright infringement against AFP. The agency had initially attempted to sue the photographer when he objected to their theft of his images from Twitpic, where he had uploaded them and linked to his Twitter account in an attempt to market his work.

This isn’t the end of the affair though, just the beginning of the end. For one thing, there’s the matter of the bill AFP will face. Morel’s claim against AFP calculated damages based on treating each download of any of his images by an AFP client as a separate infringement. This resulted in a figure so huge that nobody seemed quite sure what it was, but it certainly totaled upwards of 100 million dollars. The judge however threw this calculation out, stating that the law only allowed for one infringement per image, not for each use of that image. But although the court has now set the rules on how the damages should be assessed it declined to make an actual assessment, leaving that for a jury to later decide.

Morel uploaded 13 images, of which 8 were infringed, and the maximum allowed per image is \$150,000. There’s also the matter of AFP’s falsification of Morel’s copyright information, which allows for up to a further \$25,000 in damages per image. So the maximum the jury can award against AFP is \$1,400,000. For their part AFP previously asked in a court memorandum that if found guilty they should pay only \$240,000. Whether that memorandum will even apply when the matter comes before the jury is unclear; what is now clear is that AFP’s final bill will be somewhere between a quarter of a million and one and a half million dollars, plus substantial legal costs.

Exactly how much will be decided by the jury, who will decide partly on the evidence of willfulness in the AFP infringements; but since courtrooms are theatre they will also be swayed

by the performances of the lawyers and witnesses. So far the AFP legal team's performance has not been Oscar material: while outside court they have declared "we shall prevail", inside they have at times been mocked by the judge. There's plenty of evidence of willfulness in AFP internal memos that have already come to light, but it's the agency's director of photography for North and South America Vincent Amalvy who is likely to deliver the killer blow. In addition to his involvement in the Morel fiasco Amalvy was also caught stealing other Haitian images, and has already admitted that when it comes to breaking news AFP toss out the copyright rulebook. Such behaviour is unlikely to play well with the jury, so while the eventual award may not reach the maximum allowable, bet on it getting into six figures.

But the real final total for the Haitian infringements will almost certainly be more, possibly much more. For although AFP and Getty are the headline defendants in the case, their distribution of the images led to many further infringements by end users such as Time, CNN and many others. These have already been settled out of court for undisclosed sums. And the AFP ruling doesn't include co-defendants Getty Images: that will be addressed by a jury trial, and should Getty lose the result will be further substantial damages awarded to Morel.

A press release from Morel's lawyers the Hoffman Law Firm following the AFP ruling both addressed the issue of damages and hinted at the fate that may befall Getty:

"Although Judge Nathan rejected Morel's legal theory entitling him to as much as one hundred twenty million dollars in statutory damages, Morel still hopes to win millions in damages following the trial. The ruling and the case may have implications for users of social media as well as 'service providers'."

That leads directly to the issue of AFP's partner and co-defendant Getty Images. The court didn't rule on Getty's culpability, leaving that decision to a further jury trial, since Getty eventually entered a different defence from AFP. That defence is, to say the least, interesting, since it essentially hinges on Getty throwing their partner under a bus:

"Getty Images requires and relies on the representations AFP makes about its content in the License Agreement. It could not possibly investigate whether the hundreds of thousands of images that AFP transmits to Getty Images' database every year infringe other parties' copyrights, without altering its business model, incurring massive expense."

The law Getty are relying on to back that statement up is the Digital Millennium Copyright Act, specifically the clause that absolves internet service providers from guilt when infringing material is uploaded to their servers by a third party: this is commonly referred to as the safe harbour or Youtube clause.

At first sight that looks like a viable defence: the DMCA is quite specific in its requirements and Getty appear to have been careful comply with at least some of them. But there are at least two potentially fatal flaws in Getty's strategy. For one, the DMCA is specifically intended to protect an internet service provider from the legal consequences of copyright infringement on their servers initiated by a party over whom they have no control: Youtube should not be held responsible for the behaviour of a teenager uploading pop videos is the rationale. But such a

comparison is obviously absurd: Getty and AFP are major media companies who have entered into a legal agreement to syndicate images for big money, not teens sharing ripped vids.

Secondly, the DMCA only protects a provider when the entire process of the infringement is automated. Getty are stressing the automated nature of both the AFP feed and Getty's own distribution system. However this argument is undermined by evidence that Getty staff manually altered metadata attached to the Morel images, and that agency staff licensed some of the images in telephone sales.

And the biggest problem for Getty is that they are relying completely on the DMCA to get them off the hook: they have no other options left. So in the end Getty's reliance on the DMCA may prove to be a sign of desperation rather than clever legal maneuvering.

Away from the courtroom there's also a comic sub-plot to be resolved, starring various figures who either absolved AFP of blame or actively defended the agency's actions. Aside from the usual fretard nutters these included the National Press Photographer Association's Mickey Osterreicher, photo blogger John Harrington and Visa Pour L'Image's J-F Leroy.

Osterreicher – who's only a lawyer after all – managed to read the wrong company Terms of Service, quoting those of Twitter when the ones that mattered were those of Twitpic. Harrington, who posits himself as a business expert, got the company right but the date wrong, relying on ToS that Twitpic had introduced after and in response to the AFP theft: that led him to proclaim “AFP did the right thing”. And Leroy was especially vociferous in his defence of the accused, a stance that most observers concluded was entirely unconnected with the agencies' close association with, and sponsorship of, his Perpignan photo festival.

Curiously, some of these carefully considered expert opinions have now mysteriously disappeared. In the wake of AFP's crushing defeat it would be interesting to hear what Osterreicher, Harrington and Leroy have to say for themselves now. Instead expect only the sound of web pages being deleted.

Agence France Presse vs Morel: “AFP Got Caught With A Hand In The Cookie Jar And Will Have To Pay”

By: Jeremy Nicholl

<http://www.jeremynicholl.com/blog/tag/copyright/?slideshow>

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The headline is hardly a revelation: it's been obvious for a long time that AFP's theft and distribution of Daniel Morel's award-winning Haiti earthquake photos would cost the agency dear. But the voice is a surprise: it belongs to AFP deputy photo editor Eve Hambach, writing in an internal agency email in March 2010.

The Hambach email is contained in opposing memoranda at law from lawyers representing Morel, AFP, Getty Images and the Washington post seeking summary judgement in the two-year-old copyright infringement dispute.

The basic facts of the dispute have been well documented and the memoranda, running to hundreds of pages, broadly confirm the previously published timeline of events. However investigations by the Morel team have unearthed far greater detail than before, and their documents paint a damning picture of AFP and Getty's joint activities, described as "essentially a business model gone wild ". Among the most damaging claims:

- **AFP director of photography for North and South America Vincent Amalvy emailed Morel two hours before downloading Morel's images** – allegedly from the Lisandro Suero TwitPic account – and entering them into the AFP system. It's unlikely that Amalvy could have been unaware of the true provenance of the images on the Suero account having previously approached Morel.
- **Amalvy also stole a number of other images** from websites on the evening of the earthquake, including from the New York Times website.
- **Internal Getty Images emails reveal that senior Getty staff**, including the Director of Photography, knew of Morel, his association with rival agency Corbis, and his ownership of the earthquake images several hours before Getty began distributing those images.
- **AFP ignored their own written rules for using social media content**, rules that specifically warned of the "significant risks" of stolen images and copyright abuse.
- **Amalvy claims that in fast moving news situations guidelines such as those in AFP's rulebook don't apply.** This is in stark contrast to other news agencies, including the Associated Press, who also chased the Morel images but declined to use them when they were unable to contact the photographer.
- **AFP and Getty had no workflow in place** to ensure the removal of AFP images with a Mandatory Kill notice.
- **AFP fed the Morel images to Getty multiple times under different names.** As a result, when a Mandatory Kill notice was issued for the Morel images only those with a Daniel Morel byline were removed from Getty's distribution network. Those with the erroneous bylines David Morel and Lisandro Suero remained available.
- **Both AFP and Getty misled clients** into believing that they represented the Morel images by removing his Copyright Management Information and replacing it with their own.
- **Getty also licensed the images for commercial use**, despite the fact that AFP's Morel feed specified "editorial use only".

The two sides are playing for very high stakes. Morel claims 820 instances of willful copyright infringement and associated offences, each carrying a possible award of up to \$150,000: should the defendants lose they could face a bill of \$123 million plus hefty legal fees.

The memoranda make clear the parties' strategies in the case. The Morel documents – all 237 pages – are forensic, containing a detailed timeline of events, emails from AFP, Getty and Corbis, interviews with AFP and Getty staff, and depositions from Getty clients and subscribers.

In contrast, the AFP and Getty documents are somewhat sparse and surprisingly light on specifics. Rather than address specific Morel claims, the defendants largely restrict themselves to brief generic statements: “AFP does not intentionally sell infringing content”, “Getty Images does not promote or market infringing activity or content on its website”, and so on.

At the heart of the AFP defence is a reliance on the Twitter and TwitPic terms of service in force at the time of the infringement. Essentially this argument claims that the terms allowed AFP – or anyone else – to grab anything they fancied and redistribute it outside the Twitter and TwitPic environments. But this argument was rejected by Judge William Pauley in December 2010 when AFP went to court in an attempt to halt the Morel case: its resurrection now suggests that the AFP defence are running out of ideas.

Getty's defence, meanwhile, attempts to place as much distance as possible between the defending partners. Essentially this amounts to “nothing bad was done, but if it was, it's all AFP's fault”. To support this Getty stress the automated nature of both the AFP feed and Getty's own distribution system. However this argument is undermined by evidence that Getty staff manually altered metadata attached to the Morel images, and that agency staff licensed some of the images in telephone sales.

While the memoranda provide a clear insight into the thinking – or lack of it – at the two agencies as the scandal developed, one fascinating question remains unanswered: just who decided it would be a clever plan to sue Morel for defending his own property? It was this single fateful decision more than any other that escalated what could have been a dispute ending in a quiet out of court settlement into a highly publicised multi-million dollar war zone.

It's unlikely anyone will ever step forward to claim the credit for that particular piece of ingenious public relations, for it's clear that AFP and Getty are already bracing themselves for a crushing defeat. Buried deep in their memorandum is a plea to the court that should it find in Morel's favour, damages should be limited to a maximum of \$240,000. That's a far cry from previous ringing declarations that “in the end, we shall prevail”.

The Case In Quotes:

January 12, 2010 at 9:42 PM, Amalvy emails Morel:

“Hello – I am the AFP Photo Editor- I am searching to contact you – Do you have images of the earthquake – You can send them to me at this address – vincent.amalvy@afp.com – Thank you.”

From the Morel memorandum:

“At 7:48 PM, Amalvy sent an email to wapix@afp.com with the image attachment ‘haiti 2.’ At 9:03 PM, Amalvy sent an email to wapix@afp.com with an image attachment ‘haiti 3.’ At 9:03 PM, Amalvy sent an email to wapix@afp.com with the image attachment ‘haiti 4.’ As set forth in Morel 56.1, there is no genuine dispute that the above images were taken from the Radio Tele Ginen website. At 9:07 PM, Amalvy sent an email to wapix@afp.com with an image attachment ‘haiti 5.’ The image by Tequila Minsky was sent via e-mail at 7:00 PM to The New York Times in exclusive. The image was never posted to Twitpic or social media site. At 9:38 PM, Amalvy sent an email to wapix@afp.com with an image attachment ‘haiti 7.’ This image is Minsky’s and was stolen by AFP from The New York Times website.”

January 12, 2010 at 11:04:19 PM, Andreas Gebhard, Getty Images Manager, Global Picture Desk, emails Francisco Bernasconi Senior Director of Photography News and Sports at Getty Images:

“Not sure if it’s worth contacting twitter.com/photomorel. Name is Daniel Morel. Don’t know anything else. Pix on twitter look very decent.”

Three minutes later Bernasconi responds: “Former AP staff shooter..I don’t want to contact directly now. He normally works for Corbis now.”

January 13, 2010 at 4:36 AM, Benjamin Fathers, Chief of Desk for AFP Paris, emails Amalvy:

“Vincent – I’m not certain Lisandro Suero’s photos are his but they belong to Daniel Morel – Look <http://twitpic.com/xve5d>”.

January 14, 2010 at 9:03 AM, Samantha Dubois, Deputy to the Chief of Desk AFP Paris, emails Amalvy and others:

“Hellooo, Hope you slept well !!! Here is today’s bad news”.

January 14, 2010 at 2:16 PM, Eva Hambach, AFP’s deputy photo editor for North America emails:

“US copyright law requires that the image be pulled and removed.”

From AFP Guidelines For Video And Photo:

“We may on occasion use video and photo used on sites such as Twitter . . .

There are three key questions before publishing:

1. Does the material have a news value that justifies its use given the risks?
2. Have we verified the content, origin and ownership?
3. Have we provided the proper context to our clients?

Verify five basic elements:

3. Source: Is the source’s identity and authorship confirmed?
5. Copyright: Is the image protected and if so what are the specific legal terms?”

Vincent Amalvy testimony:

“When have you have to decide to dive, I took my responsibility . . . As a result . . . was success for AFP during the three next days following the catastrophe. Guideline doesn’t care about this

kind of situation. When there is no picture, no any anything, except a few of them, that's different circumstances.”

March 9, 2010 at 2:20:51 PM, Chris Eisenberg, Getty Images Director of Content Management emails:

“What is our workflow for removing images from our site when AFP send us a Mandatory Kill notice? Are AFP responsible for doing so themselves? We currently have 32 AFP images with ‘Mandatory Kill’ in the caption on the website, and when I spot checked, the original image for at least one of those is still on our website.”

Just over an hour later Andreas Gebhard responds: “At the moment, we have no definitive workflow on this.”

March 16, 2010 at 8:23 AM, Hambach emails Amalvy:

“You realize that it is impossible to clean up the worldwide web of all Daniel Morel AFP entries. There are images on websites, on blogs...they are used in video clips on YouTube. They are everywhere. Anyway, AFP got caught with a hand in the cookie jar and will have to pay. Now that we have a better understanding of the use of these images, shouldn't it be up to the lawyers to negotiate. It is not my futile tries or attempts to clean that will change much to what will have to be paid.”

At 9:20 AM, Amalvy responds: “I agree except on the fact that we have what we – because we are in contact with robbery and we can't – we have to show that this guy put the picture in high definition on the web and that's the reason...”

March 26, 2010 at 4:56 PM, Catherine Calhoun, Senior Director Media Sales at Getty Images, emails Marc Kurschner Getty Images' VP of Sales for North America:

“I just sent you a bit more details, along with the list of clients that downloaded these images. It's a long list.”

At 5:55 PM Kurschner responds: “Oh boy, that's not good.”

Exchange between Morel counsel Barbara Hoffman and CNN witness:

Hoffman: “Did you believe that Mr. Morel had sold those images to Getty Images?”

CNN witness: “At the time from the e-mails that is what we believed yes.”

Hoffman: “What led you to believe that?”

CNN witness: “Because they were available on the Getty Images website that subscribers have access to.”

Exchange between Judge William Pauley and AFP counsel Joshua Kaufman:

Kaufman: “Your Honor, this is not a unique interpretation of AFP for the purposes of this motion. People are re-tweeting and re-Twitpic'ing pictures by the hundreds of thousands a day.”

Pauley: “Is that somebody else on Twitter like Suero?”

Kaufman: “Suero, yeah.”

Pauley: “Right? Suero, a thief, right?”

Kaufman: “Suero took -”

Pauley: “That's your argument?”

Kaufman: “No, other people are allowed to -”

Pauley: “So the multitude is doing it; therefore, it is okay.”
Kaufman: “No, no.”

From the Getty defence:

“Getty Images requires and relies on the representations AFP makes about its content in the License Agreement. It could not possibly investigate whether the hundreds of thousands of images that AFP transmits to Getty Images’ database every year infringe other parties’ copyrights, without altering its business model, incurring massive expense.

III. Pitfalls from the Intersection of US and Foreign Copyright Law: Barris v Hamilton

The *Barris* case illustrates the complications which can arise when domestic and international copyright laws intersect, particularly with regard to publication and renewal formalities. *Barris* involved an action by the photographer of 1962 photographs of Marilyn Monroe first published in the US and then included by Hamilton is a collage entitled “My Marilyn.” Beyond that, *Barris* leads to a discussion of the broader issues faced by estates of photographers, museums and photo archives. Who owns the rights? What is in the public domain? What is due diligence when collections involve multiple layers of authorship; can and how can collections be recaptured from the public domain? Can access be controlled to digital images?