



## HEY PHOTOGRAPHERS: WHAT DOES YOUR COPYRIGHT PROTECT?

So [I've made the case](#) for why artists should copyright their creative works, the next question is: once it's copyrighted, what's protected, and what can others take for themselves? Since the types of works that are subject to copyright protection are so diverse - from sculptures to songs to dance steps - the protectable elements of each type of work all have their own quirks and nuances. In the end though, it all comes back to originality. For photographers, courts have set up a system to describe the various ways a photograph can be original and therefore the various ways in which it's protected by copyright. Who's the pivotal figure in the whole thing? You guessed it... ~~Frank Stallone~~ Kevin Garnett.

In the 2005 case of [Mannion v. Coors Brewing Company](#), a freelance photographer was suing Coors for copyright infringement, claiming that a Coors billboard was basically a ripoff of a photograph he had taken of Garnett for SLAM magazine. The original photo showed Kevin Garnett dressed all in white, wearing some distinctive chains and jewelery (ice? bling? are the kids still saying bling?), and with his hands resting on his, ahem, waist-band area. The Coors billboard essentially recreated the exact shot with another model and another photographer, and displayed only the model's torso. That it was wholesale copying wasn't really in dispute, the only dispute was whether the Coors billboard had copied anything protected by copyright.

To understand the outcome of the case, the Court's reasoning, and the system that it set up, it's important to understand what a copyright covers. We've got to go back to first principles.

### **Originality**

Contrary to popular belief (ie. what I used to think), copyright doesn't protect an idea, it only protects your particular expression of an idea. That is, you can't get copyright protection for the idea of a love story, and then stop others from writing love stories. You can only get protection for your particular version of a love story, the one you actually create with its own characters, dialogue, events, and happy ending. The idea, of course, is to prevent someone from getting copyright protection on something that is so generic that it prevents people from making their own artwork revolving around that same generic theme. In the context of the visual arts, this means that by painting, filming, or shooting something like an apple, you can't then prevent everyone else from also working with apples. In other words, this idea/expression dichotomy is set up to prevent people from monopolizing ideas and stifling creativity.

The thing that separates an idea from an individual's expression of that idea is originality. It's what you, as the creative person that you are, add to the idea to make it your own. It's what makes your work art and not just a recitation of the generic past. Most important for copyright, it's that originality that's protected.

So what does this mean for photographers? The Court in *Mannion* took years of case law and distilled it into a pretty simple system. There are three ways in which photographs can be original, and they offer differing levels of protection. They are:

### **Timing**

Originality as to timing is the most basic and therefore least protectable way in which a photograph can be original. Originality as to timing really just means that you were in the right place at the right time. This frequently applies to sports or editorial photography, where you're out there shooting and the value of what you capture is in the fact that you captured it at a precise moment. The classic example is a picture of a bear catching a salmon as it jumps out of the stream. What's protectable is only the photographer's *actual photograph*, since the photographer didn't have any hand in setting up the scene. As such, the photographer can't stop anyone else from going and recreating that exact shot, let alone taking similar pictures.

### **Rendition**

Photographs can be original in their rendition as well. That is, the lens that you use, the angle that you shoot from, the post-processing effects you employ, can all make your photograph original. In other words, the artistic choices you make, the stuff that really makes your work valuable, is also what makes it original and therefore protectable. For example, a basic straight-on picture by a tourist of the State House is pretty generic, so all that photographer will be able to protect against is the use of *their actual picture*. On the other hand, if you take a shot from a skewed angle with a fish-eye lens and then throw it into Photoshop and add a film grain texture and sepia tone, then you've added a lot of originality (if not artistry). You could then not only protect against someone using your actual picture, you could protect against someone going out and *recreating your shot*.

### **Creation of the Subject**

The final way in which a photograph can be original is in the creation of the subject. What this means is that the photographer set the scene of the photo, whether that is having a model stand just so, arranging a bowl of fruit in a particular way, or setting particular lighting effects. A photo that's original in creation of the subject is probably also original to an extent in timing and rendition as well, but a big part of the photographer's creative efforts go into the scene itself, and that scene is therefore protectable as an original element. So whereas timing and rendition allow you only to

protect *your particular photograph*, and *your particular view of a subject*, originality in creation of the subject allows a photographer to protect *the subject itself*. In other words, you can prevent another photographer from not just recreating your shot, but from recreating what it is you're shooting.

So what does all this mean? Well, in Mannion it meant that the Court gave the photographer credit for his *all* of his originality and gave him the chance to have a jury determine whether that originality had been copied or not. I haven't followed up on the parties in the case, but I'd imagine that meant a pretty nice settlement for a freelance photographer. What this means for all photographers though is that the Courts recognize what it is that makes your photographs unique and give you recourse for protecting that, even if someone hasn't lifted your actual photo.

As long as you've registered your copyright that is.