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Swipe No More

by John Stamets

Seattle photographer Mel Curtis has won a major copyright infringement case against the General Dynamics Corporation of St. Louis and Wyse Advertising of Cleveland. On September 29 a U.S. District Court judge in Seattle awarded Curtis $60,108 in damages and about $80,000 for legal fees in a judgment that may have broad implications for the advertising industry (Case #C89-566S).

Curtis charged that in 1987 Wyse had illegally copied his photograph of a wheelchair from a 1985 issue of *Communication Arts*, then used that image in a comp to help develop a corporate image ad campaign for its client, General Dynamics. Wyse then hired a different photographer to shoot FDR's wheelchair in Hyde Park, New York, using the comp with Curtis' image as a guide for creating the final photo. In late summer and fall of 1987, that photo of FDR's wheelchair appeared in $660,000 worth of national print advertising with the purpose of improving the corporate image of General Dynamics, a major defense contractor.

Although the wheelchairs were different, U.S. District Court Judge Philip Sweigert ruled that the final photo was substantially similar in expression to Curtis' original, and that "the copyright infringements by Wyse and General Dynamics are willful." The judge noted that three separate copyright violations occurred: copying the Curtis photograph from a magazine with a copyright notice, use of that image in a comp "to develop and promote an advertising campaign"; and using "another photographer to copy the creative expression of Curtis' wheelchair image for the FDR wheelchair advertisement."

The case is considered significant because it went all the way to trial; other similar disputes have been settled out of court, leaving behind very little

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© John Holt

In Praise Of Golden Light

by David I. Walker

When Mullen Advertising art directors wanted to woo the Timberland Shoe Company with a fantasy, photographer John Holt delivered it . . . along with The Golden Light.

He set a pair of moccasins, along with a fly fishing rod, across the cane seat of an antique canoe and made a tight shot from overhead. Water droplets on the shoes simulated morning dew. A complex series of strobes and fill lamps gave the shot the look of sunset on a pristine mountain lake.

"He gave it a golden hue. It had a look, a feel and tone that were absolutely beautiful," says Mullen's Ann Dakin.

ADs there took to calling it The Golden Light. The agency won the Timberland account, and used Holt's technique in several subsequent ads and catalogues. The agency also started cleaning up at award shows with Timberland ads. (Clint Clemens, Eric Meola, Harry

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case law by which future cases can be measured. "This case is important because any photographer can now point to the *Curtis v. General Dynamics* decision and say [to ad agencies] 'You cannot copy my work without compensation,' " says Rex Stratton, the copyright attorney who represented Curtis. "We now have a case that says exactly that."

Curtis pressed the suit because of the similarities between his photograph and the final image used in the ads. Although the judge agreed that the final ad was a clear case of intentional copying, the case's most important impact may stem from his rulings on the two "lesser" violations that were swept in the door with the major infraction. Namely, the decision establishes the illegality of the widespread practice of copying images out of copyrighted magazines and reference books for use in preparing advertising comps. Agencies rarely inform photographers beforehand (or even afterward) that their image has been comped, let alone pay a $100 or $200 comp fee, a typical range for such usage.

"What concerns me most is the precedent that it sets," says Chuck DeMund, the corporate director of advertising and promotion at General Dynamics. "Print ads are always comped up. If you can't do that anymore, agencies will have to hire a lot more artists. From our point of view, that is the only real issue."

At co-defendent Wyse Advertising, senior vice-president Bob Amer voices a similar concern. "The decision will have an impact on how we do things [comps] in the future. Exactly how, I'm not sure. We're discussing it with the art directors now. We're certainly not going to copy anything out of *Communication Arts*."

Says *CA*'s executive editor Jean A. Coyne, "I don't see that there is anything wrong with using [a photo from the magazine] for a comp, if they are not trying to beat anybody out of their fee."

In greater detail, here's what happened, according to court records and interviews with the parties involved: Curtis took the original photograph with a Widelux camera in 1982 in Athens, Ohio. Two years later he handprinted the wheelchair image and five other Widelux photographs for a limited edition of self-promotion calendars. He submitted those calendars to *Communication Arts*, which printed three of the images in 1985.

Curtis didn't register a copyright for the wheelchair image until October, 1987, after he discovered that the defendants had used it. In fact, Curtis did not even indicate a proper copyright notice on his self-promotion calendars. Nevertheless, Judge Sweigert ruled that since *Communication Arts* had registered a collective copyright and since the artist's name was published in the magazine, then the Curtis wheelchair image was legally copyrighted in his name at the time *CA* was published—before Wyse had copied it. Attorney Stratton says that Sweigert's decision strengthens the law allowing magazines to collectively copyright works in this manner.

In 1986 General Dynamics decided to embark on a public relations campaign to try to improve a poor public image caused by a series of defense contract procurement scandals. The company solicited bids from four advertising agencies, including Wyse. For one of their proposed ads, Wyse associate creative directors Tom Smith and Mike Marino suggested photographing FDR's wheelchair with the headline: "His legs were crippled, but he carried the weight of the free world on his shoulders." In their initial presentation to General Dynamics, Wyse used a rough layout with an in-house sketch of a wheelchair. Wyse won the contract.

In developing the comp for the FDR wheelchair ad, Smith and an assistant searched through about 15 stock books, magazines and other publications before finding the Curtis wheelchair photograph in *CA*. Without informing the magazine or Curtis, Smith had that image enlarged using a stat camera, and then cropped it to fit the comp. That comp was then used in focus-group studies to help Wyse and General Dynamics fine-tune the campaign. That ad later became the finished campaign's lead-off ad.

In June 1987, Wyse solicited bids from four photographers, including Curtis, to shoot FDR's wheelchair. In the bidding process, Curtis says he was "shocked" when they sent him the comp with his photo in it, but he didn't complain at that time because he figured he must have the inside track on getting the job. He didn't.

Wyse gave the job to Cleveland photographer Martin Reuben whose total bid was only $260 less than the $4,750 bid submitted by Curtis. (The other two photographers quoted amounts two and three times that amount.) Wyse, in statements to the court, implied that they chose Reuben over Curtis because they had worked with Reuben before, and because they knew that General Dynamics' DeMund, who was once a company photographer, would be present at the shoot. It was important to Wyse that the job go smoothly, and for them, Curtis was an unknown.

On June 24, 1987, Reuben, Smith and DeMund spent the day shooting FDR's wheelchair at the Roosevelts' Hyde Park home, which is now a museum run by the National Parks Service. They brought with them Wyse's comp with the Curtis image. Using a 4 x 5 Toyo field camera, Reuben took a total of 47 photographs in black and white and ten in color (plus Polaroids). Plaintiff Curtis argued, and the judge agreed, that Wyse selected the one photograph, of the 57 available, that most resembled Curtis'.

Reuben's photographs from the Hyde Park shoot can be classified into three distinct categories. In the morning the sunlight was on the front veranda, so they started the shoot there. None of the images from this first set, shot mostly from above the chair and making extensive use of shadows cast by the wheels, resemble Curtis' image. Curtis says he wouldn't have sued if they had used a "front veranda" image in the final ad.

In the afternoon, the sun shifted to the back porch, which was much more similar to the porch in the Athens, Ohio, photograph. The second set of Reuben's photographs were taken on the back porch with the wheelchair facing left. This set of images resembles the Curtis image with minor variations. One of these images was selected by

© Mel Curtis

© General Dynamics/photo by Martin Reuben

Left: Curtis' photo as it appeared in *CA*. Right: The final ad.

Smth for the final ad. The third set of FDR wheelchair photos, also taken on the back porch, mimics the second set except that the wheelchair is facing right.

Although DeMund and Reuben admit that they consulted the comp during the shoot, both deny that they consciously tried to copy the Curtis photograph. (Tom Smith of Wyse did not return *PDN*'s calls.) "The layout was there," says Reuben. "Once we started shooting, we referred to it only to see how [the image] related to the headlines and text." As to the "substantial similarity" between his photograph and Curtis', Reuben explained: "All perspectives are going to be similar, based on the height of the camera and the distance from the chair. Chair heights are standard and railing heights are standard, so you're going to come up with a photo that appears the same." It was "strictly a freak," he says. "It was not my intention to duplicate another person's photograph. That is not the way we operate here."

The judge, however, did not believe it was an innocent coincidence. In his decision, he wrote, "Of the 57 images taken by Mr. Reuben, the core of the images are simply representative of the efforts of the photographer, Tom Smith and Chuck DeMund to move the wheelchair into the juxtaposition where the identical elements of expression found in the Curtis photograph are copied exactly.

"At the trial," Judge Sweigert continues, "the defendants failed to produce credible evidence of any prior photographic images showing independent creation . . . That the photographer may not have intended to copy the Curtis image is immaterial . . . The substantial similarity of the result is clearly evident."

Key testimony on the substantial similarities came from the plaintiff's expert witness, Rodney Slemmons, curator of photography at the Seattle Art Museum. Slemmons testified that there were three critical proportions in the disputed images that were virtually identical: the height of the large wheels relative to their width (i.e. their elliptical shapes); the heights of the large wheels relative to the heights of the balustrades; and the heights of the balustrades relative to the heights of the wheelchairs above the balustrades. Slemmons testified that if two of these proportions had come out the same, then it could be argued that it was a plausible coincidence. But for all three proportions to be identical would be virtually impossible without a conscious effort by the photographer and AD.

Other similarities include the positioning of the small back wheel, the perspective line of the balustrade and its intersection with the chair, and the low camera angle which "places the viewer in the position of looking up, with respect or awe, at the person who once sat in the chair."

In copying cases, there are two key points that the plaintiff needs to prove: "access" to the original image and "substantial similarity" between the images. Because access to Curtis' original image was readily admitted by the defendants in this case (they had even sent him the evidence in the form of the comp), Stratton says there was less of a burden to show the "substantial similarities" between the disputed photographs. Differences between the two pictures, which the defendants were quick to point out, became less important than the similarities. That worked in Curtis' favor during the trial. In cases where plaintiffs can't prove "access" directly, then they must try to prove access by showing virtually 100 percent similarity between the images in question.

While Reuben, DeMund and Smith were photographing FDR's wheelchair in Hyde Park, New York, Curtis was back in Seattle wondering if he was going to get the job. Curtis says that despite repeated inquiries to Wyse about the status of the job, he never got a straight answer. Later that summer Curtis happened to be in Washington, D.C., during the week that General Dynamics' launched its new corporate image campaign. While reading the *Washington Post*, he came upon its full-page ad with the FDR wheelchair photo. "My immediate gut reaction was, 'That's my photo,' " Curtis says. Then he realized that the wheelchairs were different, but he still felt "ripped off."

In late summer of 1987 Curtis contacted a lawyer and began pressing Wyse and General Dynamics for compensation. Twice before the case went to trial the defendants offered out-of-court settlements; first for $7,000 and then later $20,000. But each time the amounts were barely enough to cover Curtis' accumulating legal fees. After the second offer, Curtis asked instead for $35,000 to be split roughly between himself and his attorney. Wyse's insurance company refused and the case went to court.

Stratton, Curtis' attorney, says that the defendants made a major strategic error by treating the case as an "insurance liability" issue rather than a copyright issue. Instead of retaining a copyright lawyer, Stratton says, they sought out a general counsel firm in Seattle that typically handles insurance cases. Stratton says a copyright specialist would have advised them to settle out of court. Instead the case went to trial and *Curtis v. General Dynamics* is now a part of case law directly applicable to the way ad agencies copy and comp photographs from copyrighted sourcebooks.

Curtis says he was reluctant at first to press the suit because he knew that copying images for comps was common practice, and that he might upset an apple cart. In fact, when he approached three of Seattle's top commercial shooters to be expert witnesses at his trial, all three turned him down, and even scolded him for pressing the case. "Then I was afraid of getting blacklisted," says Curtis. But still he pressed on. "What really drove me to do it was the way the agency used me," Curtis says. "They had a very arrogant attitude all along."

Summarizing the implications of the case, expert witness Slemmons notes: "It's a two-edged sword. On one edge it protects photographers from ad agencies playing fast and loose with imagery by xerography and all the various copy methods available. But on the other edge, those fast and loose uses in many cases lead to jobs." ■