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1. [Gross v. Seligman, 212 F. 930](#)

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Gross v. Seligman

Circuit Court of Appeals, Second Circuit

March 10, 1914

No. 224

Reporter

212 F. 930 *; 1914 U.S. App. LEXIS 2151 **

GROSS et al. v. SELIGMAN et al.

Prior History: **[**1]** Appeal from the District Court of the United States for the Southern District of New York.

Core Terms

picture, artist, photograph, young woman, infringement, shade, reproduction, identities, permanent, purchaser, produces, camera, canvas

Case Summary

Procedural Posture

Appellant sought review of an order from the United States District Court for the Southern District of New York, which found appellant copyrighted appellee's work.

Overview

Appellant sought review of an order from the district court finding appellant copyrighted appellee's work. The appeals court affirmed the district court's findings. The appeals court held that an artist who used the camera to produce his picture was entitled to copyright just as he would have been had he produced it with a brush on canvas. The appeals court held that if the copyrighted picture were produced with colors on canvas, and were then copyrighted and sold by the artist, he would infringe the purchaser's rights if thereafter the same artist, using the same model, repainted the same picture with only trivial variations of detail and offered it for sale. According to the appeals court, although the photographs were not identical, appellant infringed the copyright.

Outcome

The appeals court affirmed the district court's findings, holding that an artist who used the camera to produce his picture was entitled to copyright just as he would

have been had he produced it with a brush on canvas.

LexisNexis® Headnotes

Copyright Law > ... > Protected Subject Matter > Graphic, Pictorial & Sculptural Works > Photographs

Copyright Law > ... > Protected Subject Matter > Graphic, Pictorial & Sculptural Works > General Overview

[HN1](#) [↓] **Graphic, Pictorial & Sculptural Works, Photographs**

An artist who used the camera to produce his picture was entitled to copyright just as he would have been had he produced it with a brush on canvas.

Copyright Law > ... > Civil Infringement Actions > Presumptions > General Overview

[HN2](#) [↓] **Civil Infringement Actions, Presumptions**

If the copyrighted picture were produced with colors on canvas, and were then copyrighted and sold by the artist, he would infringe the purchaser's rights if thereafter the same artist, using the same model, repainted the same picture with only trivial variations of detail and offered it for sale.

Opinion by: LACOMBE

Opinion

[*930] Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. This is not simply the case of taking two separate photographs of the same young woman.

[*931] When the Grace of Youth was produced a distinctly artistic conception was formed, and was made permanent as a picture in the very method which the Supreme Court indicated in the Oscar Wilde Case (*Burrow-Giles Company v. Sarony*, 111 U.S. 53, *4 Sup. Ct.* 279, *28 L. Ed.* 349) would entitle the person producing such a picture to a copyright to protect it. It was there held that [HN1](#)[↑] the artist who used the camera to produce his picture was entitled to copyright just as he would have been had he produced it with a brush on canvas. [HN2](#)[↑] If the copyrighted picture were produced with colors on canvas, and were then copyrighted and sold by the artist, he would infringe the purchaser's rights if thereafter the same artist, using the same model, repainted the same picture with only trivial variations of detail and offered it for sale.

Of course when the first picture has been produced and copyrighted every **[**2]** other artist is entirely free to form his own conception of the Grace of Youth, or anything else, and to avail of the same young woman's services in making it permanent, whether he works with pigments or a camera. If, by chance, the pose, background, light, and shade, etc., of this new picture were strikingly similar, and if, by reason of the circumstance that the same young woman was the prominent feature in both compositions, it might be very difficult to distinguish the new picture from the old one, the new would still not be an infringement of the old because it is in no true sense a copy of the old. This is a risk which the original artist takes when he merely produces a likeness of an existing face and figure, instead of supplementing its features by the exercise of his own imagination.

It seems to us, however, that we have no such new photograph of the same model. The identity of the artist and the many close identities of pose, light, and shade, etc., indicate very strongly that the first picture was used to produce the second. Whether the model in the second case was posed, and light and shade, etc., arranged with a copy of the first photograph physically present before **[**3]** the artist's eyes, or whether his mental reproduction of the exact combination he had already once effected was so clear and vivid that he did not need the physical reproduction of it, seems to us

immaterial. The one thing, viz., the exercise of artistic talent, which made the first photographic picture a subject of copyright, has been used not to produce another picture, but to duplicate the original.

The case is quite similar to those where indirect copying, through the use of living pictures, was held to be an infringement of copyright. *Hanfstaengle v. Baines & Co.* (L.R. 1894) A.C. 20, 30; *Turner v. Robinson*, 10 Irish Chancery 121, 510.

The eye of an artist or a connoisseur will, no doubt, find differences between these two photographs. The backgrounds are not identical, the model in one case is sedate, in the other smiling; moreover the young woman was two years older when the later photograph was taken, and some slight changes in the contours of her figure are discoverable. But the identities are much greater than the differences, and it seems to us that the artist was careful to introduce only enough differences to argue about, while undertaking to make what would **[*932]** **[**4]** seem to be a copy to the ordinary purchaser who did not have both photographs before him at the same time. In this undertaking we think he succeeded.

The order is affirmed.

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