

Nicole Hyland
(212) 826-5552
nhyland@fkks.com

Photographer's Copyright Infringement Claims Rejected by Second Circuit

In November 2012, the Second Circuit affirmed dismissal of photographer Janine Gordon's copyright infringement claims against photographer Ryan McGinley and several other defendants who allegedly displayed McGinley's work, including Frankfurt Kurnit client Ratio 3 Gallery.

Gordon's claims had been dismissed in August 2011 by United States District Court Judge Richard J. Sullivan on the ground that McGinley's photographs were not "substantially similar" to Gordon's photographs. In his Opinion, Judge Sullivan noted that "the dictates of good eyes and common sense lead inexorably to the conclusion that there is no substantial similarity between [Gordon's] works and the allegedly infringing compositions of McGinley." Judge Sullivan also observed that Gordon had attempted to "manipulate" some of the images and "obscure" their differences by cropping, rotating and altering their color "in order to bolster her infringement claims." Nevertheless, even with those changes, the court held that "no reasonable jury, properly instructed, could find that the two works are substantially similar."

The Second Circuit, which independently reviewed the 150 images submitted by Gordon, agreed with the District Court's conclusion, noting that under either the "ordinary observer" test or the "more discerning observer" test, any similarities between the works were "outweighed by the numerous and significant differences." The *Gordon v. McGinley* decision is significant for creative artists and art galleries, and may signal a growing trend among courts to dismiss copyright infringement cases at an early stage, before parties (who may have limited financial resources) have incurred significant litigation costs.

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