Gaylord v. United States 595 F.3D 1364 (Fed. Cir. 2010)

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In *Gaylord v. United States*, Frank Gaylord filed a copyright infringement suit against the United States in the Court of Federal Claims (CFC). He alleged that the government violated his copyright in a group of sculptures when it issued postage stamps featuring a third party's image of the sculptures. The CFC found the defendant not liable for copyright infringement because it made fair use of the copyrighted work. The court also determined that the sculptures were not a work of joint authorship and that the Architectural Works Copyright Protection Act (AWCPA) did not apply to the copyrighted work.

Gaylord appealed the fair use decision to the United States Court of Appeals for the Federal Circuit (CAFC) and the United States cross-appealed the court's findings concerning joint authorship and the application of the AWCPA. The CAFC reversed the fair use decision, affirmed the determinations regarding joint authorship and the AWCPA exemption, and remanded for a calculation of damages.

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2. *Id.* at 1364.
3. *Id.* at 1371.
4. *Id.*
5. *Id.*
6. *Id.* at 1368.
II. BACKGROUND

A. Factual History

In 1986, Congress authorized the American Battle Monuments Commission ("the Commission") to establish the Korean War Veterans Memorial ("the Memorial") in honor of veterans of that war.7 The Commission sponsored a design contest, eventually selecting a proposal for "38 larger-than-life granite soldiers in formation."8 The Army Corps of Engineers chose Cooper-Lecky Architects, P.C. ("Cooper-Lecky") as the prime contractor to supervise the process that would include creating, constructing, and installing the Memorial.9 In turn, Cooper-Lecky held a competition to find a sculptor and awarded the project to Gaylord.10

Cooper-Lecky and the United States, through the Department of the Army, entered into an Architect-Engineer Contract on April 11, 1990.11 Notwithstanding the contractual terms pertaining to copyright in sections I-28 and I-29, Cooper-Lecky and Gaylord registered several copyrights while the project was underway.12

7. Gaylord, 595 F.3d at 1368.
8. Id.
9. Id.
10. Id. Gaylord was thus a sub-contractor under the prime contract between Cooper-Lecky and the United States.
11. Id. at 1381. The Architect-Engineer Contract stated in section "I-28 Government Rights (Unlimited): "the Government shall have unlimited rights, in all drawings, designs, specifications, notes and other works developed in the performance of this contract, including the right to use same on any other Government design or construction without additional compensation to the Contractor." Id. at 1382. In section "I-29 Drawings and Other Data Become Property of Government," the contract stipulated: "All designs, drawings, specifications, notes and other works developed in the performance of this contract shall become the sole property of the Government." Id. It also stated "the Government shall be considered the ‘person for whom the work was prepared’ for the purpose of authorship in any copyrightable work under 17 U.S.C. § 201(b)," the Copyright Act provision governing works made for hire. Id.
12. Id. at 1383.
The appellate record also noted various debates on the right to profit from “peripheral commercial activity” and items such as coffee mugs. In 1993, Cooper-Lecky informed Gaylord that the Commission had withdrawn its claim for “copyright ownership and/or royalties received from same.” Subsequently, Cooper-Lecky entered into an “Agreement for Copyright Licensing” with Gaylord that allowed the artist to retain sole ownership of the copyright for the sculptures and also acknowledged that Cooper-Lecky was the sole author of the collective work, including the individual soldier sculptures authored by the artist.

Before the final sculptures were cast in 1994, Cooper-Lecky and Gaylord signed an agreement (“1994 Agreement”) stating “the copyright for this work will be held by the Artist Mr. Gaylord” and indicating that the terms of use of the copyright were under a separate contract. In 1995, Gaylord signed an agreement (“1995 Agreement”) with Cooper-Lecky granting the firm royalty-bearing licensing rights in the artist’s copyrighted work. The 1995 Agreement described the Memorial as a collective work to which both Cooper-Lecky and Gaylord separately contributed. Both the 1994 and 1995 Agreements identified Gaylord as “the sole author of the soldier sculptures to become part of the overall Memorial.”

Gaylord worked on the sculptures for five years, incorporating the suggestions of various members of the Korean War Veterans Memorial Advisory Board (VAB) and the Commission on Fine Arts (CFA), among others. Working from the original design of thirty-eight granite soldiers, he ultimately crafted nineteen stainless steel soldiers in formation (“Column”). From 1990 to 1995, Gaylord registered five copyrights for clay models of the

14. *Id.*
15. *Id.* at 1384.
16. *Id.* at 1380.
17. *Id.*
18. *Id.*
19. *Gaylord*, 595 F.3d at 1380.
20. *Id.* at 1368-69.
21. *Id.* at 1368. The Column derives its name from the manner in which the nineteen soldier sculptures represent a platoon in formation. For an image of the Korean War Memorial, see [http://www.nps.gov/kowa/index.htm](http://www.nps.gov/kowa/index.htm).
soldier sculptures in various stages of development, listing himself as the sole author.\textsuperscript{22} After the sculptures were installed, Gaylord filed another copyright registration for the artwork as it appeared before and after casting.\textsuperscript{23}

In January 1996, a photographer named John Alli took multiple photographs of the Column after a snowstorm and decided to sell the prints.\textsuperscript{24} He got permission from William Lecky, a partner of Cooper-Lecky, who presented himself as the “outright” owner of the copyright.\textsuperscript{25} They agreed on a 10\% royalty on net sales.\textsuperscript{26} Lecky did not notify Gaylord of this arrangement.\textsuperscript{27}

In 2002, the Postal Service issued a 37-cent commemorative stamp honoring the 50th anniversary of the Korean War armistice.\textsuperscript{28} It selected one of Alli’s photos of the sculptures as the image that would appear on the stamp and paid him $1,500.\textsuperscript{29} Alli informed the Postal Service it would need to obtain the copyright owner’s permission and referred the Postal Service to Lecky.\textsuperscript{30}

The stamp, featuring the Alli photograph, depicted 14 of the 19 soldiers that made up the Column.\textsuperscript{31} From 2002 until March 31, 2005, the Postal Service printed an estimated 86.8 million stamps, generating over $17 million from the sale of almost 48 million stamps.\textsuperscript{32} The Postal Service also sold various commemorative frames and memorabilia and estimated that the sale of stamps used solely for collecting generated $5.4 million in sales.\textsuperscript{33} The Postal Service did not seek Gaylord’s permission to use the soldier sculptures in the stamps or memorabilia.\textsuperscript{34}

\textsuperscript{22} Gaylord, 595 F.3d at 1369.
\textsuperscript{23} Id. The certificate of registration included photos of the sculptures after they were installed on the National Mall. Id.
\textsuperscript{24} Id. at 1369-70.
\textsuperscript{25} Id. at 1370.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Gaylord, 595 F.3d at 1370. For an image of the postage stamp, see http://en.wikipedia.org/wiki/Korean_War_Veterans_Memorial.
\textsuperscript{29} Gaylord, 595 F.3d at 1370.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id. at 1371.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
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B. Procedural History

Gaylord sued the United States in the CFC for copyright infringement. The government argued that the stamp constituted fair use, that it had rights to the work as a joint author, and that the stamp was included in the exemption for architectural works under AWCPA. The CFC concluded the United States made fair use of the copyrighted work, Gaylord was the sole copyright owner, and the work did not qualify as an architectural work under AWCPA. On appeal, Gaylord challenged the fair use decision and the government challenged the determination regarding ownership and the architectural exemption.

III. LEGAL ANALYSIS

The CAFC reviewed the legal conclusions of the lower court de novo and its factual findings for clear error. Because the United States agreed that Gaylord held a valid copyright in the Column and that the stamp infringed, the issues on appeal focused on the fair use defense, ownership rights through a joint author, and the architectural exemption under AWCPA.

A. Fair Use

The court began its discussion by reiterating that fair use was a mixed question of law and fact that allowed “courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster.”

35. Gaylord, 595 F.3d at 1371. Gaylord also sued Alli for copyright infringement in 2006. Id. The parties settled, with Alli agreeing to pay Gaylord 10% of his net sales. Id. 36. Id. 37. Id. 38. Id. 39. Id. (citing Columbia Gas Sys., Inc. v. United States, 70 F.3d 1244, 1246 (Fed. Cir. 1995) for standards of review). 40. Id at 1372. 41. Gaylord, 595 F.3d at 1372 (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994)).
Fair use is a fact-based analysis of four factors:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 42

1. Purpose and Character of the Use Was Not Sufficiently Transformative

Examining the first factor, the purpose and character of the infringing use, the court explored whether and to what extent the new work was "transformative." 43 The lower court concluded the stamp was transformative because it provided a different expressive character than the Column. 44 It reasoned that the photograph transformed the three-dimensional sculpture by using subdued lighting and snow so as to leave the "viewer unsure whether he is viewing a photograph of statues or actual human beings." 45 The CFC also concluded that the defendant further transformed the photograph by "making it even grayer, creating a nearly monochromatic image," which enhanced the surrealistic effect. 46

The CAFC disagreed, noting that the focus of the inquiry must center on the purpose and character of the stamp, not the

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42. Id. (citing 17 U.S.C. § 107).
43. Id. Generally, the more a new work transforms and alters an original creation, the more likely it will be deemed a fair use. "Transformative use is not absolutely necessary for a finding of fair use," but "such works lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright." Id.
44. Id.
45. Id. at 1373.
46. Id.
photograph.47 The court contrasted this case with Blanch v. Koons, where a secondary use had a “sharply different” purpose than the original work and could be labeled commentary or criticism, a fair use.48 The court also compared the current use to Lennon v. Premise Media Corp. where a secondary use was deemed transformative based on its characterization as criticism.49

Here, the CAFC concluded the stamp did not transform the character of the Column.50 Light and snow may have altered the sculptures’ appearances, but unlike the uses in Blanch and Lennon, these environmental conditions did not “impart a different character to the work.”51 The court found that the stamp’s surreal character derived from the Column itself and cited the original design’s description of “dream-like presence of ghostly figures.”52 The court concluded that “nature’s decision to snow cannot deprive Mr. Gaylord of an otherwise valid right to exclude.”53

The CAFC also found the commercial nature of the use to weigh against a finding of fair use.54 The defendant reported earning $17 million from selling nearly 48 million stamps and an estimated $5.4 million in the sale of collectible stamps.55

47. Gaylord, 595 F.3d at 1373.
48. Id. (citing Blanch v. Koons, 467 F.3d 244 (2d. Cir. 2006) (finding fair use where incorporating a copyrighted photo into a collage as social criticism of commercial images in consumer culture was sufficiently transformative)).
49. Id. See Lennon v. Premise Media Corp. 556 F. Supp. 2d 310 (S.D.N.Y. 2008) (finding fair use where the use of a 15-second clip of John Lennon’s “Imagine” in a film showing images of Stalin and the Cold War was deemed a critique of the naïveté of the song’s message, and thus, sufficiently transformative).
50. Gaylord, 595 F.3d at 1373.
51. Id. at 1374.
52. Id.
53. Id.
54. Id. The CFC did not consider this facet of the purpose and character factor, which inquires whether the “use is of a commercial nature or is for nonprofit educational purposes.” Id. (citing 17 U.S.C. § 107).
55. Id.
For the second factor of the fair use analysis, the court evaluated the nature of the copyrighted work. More specifically, the court examined

(1) whether the work is expressive or creative, such as a work of fiction, or more factual, with a greater leeway being allowed to a claim of fair use where the work is factual or informational, and (2) whether the work is published or unpublished, with the scope for fair use involving unpublished works being considerably narrower.

The lower court recognized that while the expressive or creative nature of the Column would normally weigh against finding fair use, the expressive factor was discounted because the court previously concluded the stamp was a transformative use, following Blanch v. Koons. Because the CAFC previously determined the stamp did not use the Column in a transformative manner, it delegated full weight to the sculpture’s expressive nature. The court also decided the Column’s overall expressive and creative nature outweighed the fact that it was a national monument and clearly published work.

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56. Gaylord, 595 F.3d at 1374.
57. Id. (citing Blanch, 467 F.3d at 256).
58. Id. In Blanch v. Koons the Second Circuit gave less weight to the creative nature because the use was a “transformative manner to comment on her image’s social and aesthetic meaning rather than to exploit its creative virtues.” Blanch v. Koons, 467 F.3d 244, 257 (2d. Cir. 2006).
59. Gaylord, 595 F.3d at 1374. A finding of fair use is generally more difficult where the original work is expressive or creative than where it is factual or informational. Id. The scope for fair use is also greater for original works that are published. Id.
60. Gaylord, 595 F.3d at 1374 (citing Twin Peaks Prods, Inc. v. Publ’ns Int’l Ltd., 996 F.2d 1366, 1376 (2d Cir. 1993)).
3. Amount and Substantiality of Work Used Weighed Against Fair Use

Taking up the third factor of the fair use analysis, the court considered the amount and substantiality of the work used in relation to the work as a whole – both a qualitative and quantitative consideration. The CAFC agreed with the lower court that the stamp’s depiction of fourteen of the nineteen statues used a substantial portion of the original work. It disagreed with the lower court’s finding that the photograph and stamp altered the appearance of the Column so as to lessen the quality and importance of the work in the stamp. Rather, the court concluded, the Column was essentially the entire focus of the stamp, which featured the soldier sculptures and was titled “Korean War Veterans Memorial.” Thus, the court found the third factor weighed against finding fair use.

4. Market Impact Favored Fair Use

The last factor of the fair use analyzed by the court was the market effect, or “the effect of the use upon the potential market for or value of the copyrighted work.” The court found no clear error in the lower court’s decision that the stamp had not and would not adversely affect Gaylord’s subsequent marketing efforts. The stamp was an inadequate substitute for the Column and had not negatively affected plaintiff’s previous endeavors to market derivative works. In fact, Gaylord conceded the stamp had actually increased the Column’s value. Thus, the court determined the fourth factor favored fair use.

61. Id. at 1375.
62. Id.
63. Id.
64. Id.
65. Id.
67. Id.
68. Id.
69. Id.
70. Id.
After considering all four fair use factors, the CAFC concluded the government's use of the Column in the stamp did not qualify as a fair use.\textsuperscript{71} The court stated that allowing defendant to continue to use the original creative work would be inconsistent with the purposes of copyright law.\textsuperscript{72}

**B. Joint Authorship**

The CAFC concluded the CFC correctly decided that the Column was not a joint work.\textsuperscript{73} The Copyright Act provides that "a joint work is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."\textsuperscript{74} Thus, the United States had to prove the co-authors (1) made independently copyrightable contributions to the work and (2) fully intended to be co-authors.\textsuperscript{75}

**I. No Independent Copyrightable Contributions**

The United States claimed joint authorship through the contributions of Cooper-Lecky, the VAB and/or the CFA.\textsuperscript{76} The government argued that since Cooper-Lecky granted it a license to use any work to which Cooper-Lecky held a copyright, if either Cooper-Lecky, the VAB, or the CFA were a joint author, the government would have a right to use the Column.\textsuperscript{77}

The CAFC agreed with the lower court that Gaylord was entitled to a presumption of the validity of his copyright registration because the certificate was made before or within five years after first publication of the work, as mandated by statute.\textsuperscript{78} Despite the

\textsuperscript{71} Id. at 1376.
\textsuperscript{72} Gaylord, 595 F.3d at 1376.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 1377 (citing 17 U.S.C. § 101).
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 1376.
\textsuperscript{77} Id. "[E]ach contributor [to a work of joint authorship] automatically acquires an undivided ownership in the entire work, including all of the contributions contained therein. 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 6.03 (Rev. Ed. 2010).
\textsuperscript{78} Gaylord, 595 F.3d at 1376.
government's contention, the fact that the approval notations of a federal commission appeared in certificate of registration's "Nature of Authorship" rather than "Name of Author" section did not undermine Gaylord's authorship claim. The CAFC found the lower court properly treated the presumption of validity as unrebutted, not unrebuttable. Thus, the CAFC found no clear error in presuming the validity of plaintiff's copyright or in the treatment of the burden.

The CAFC agreed with the lower court's finding that defendant's attempted analogy to the Supreme Court case, CCNV v. Reid, failed. The CAFC noted that Cooper-Lecky's contributions, such as the reflecting pool and landscaping, were significantly absent from both plaintiff's copyright and the stamp, so while the architectural firm may have contributed to the Memorial, it did not contribute to the Column. The government claimed that the CFA, VAB and Cooper-Lecky contributed to the Column by suggesting different ethnicities for the soldiers, altering the uniforms of the soldiers, and changing the soldiers' poses.

The lower court concluded that while Gaylord created the Column

79. Id. The court rejected the government's challenge of the presumption of the validity of the copyright registrations, stating that "approval – much like comment and criticism – does not amount to authorship." Id.

80. Id. at 1376-77. The CAFC determined that the lower court fully discussed the government's evidence before concluding that the defendant had only proved that various groups offered suggestions and criticism, not ownership, thereby leaving the presumption of validity unrebutted. Id. at 1376.

81. Id. at 1376-77.

82. Id. at 1378. In CCNV v. Reid, an organization contested the copyright ownership of an artwork its members planned that was partly created by a sculptor they commissioned orally and not in writing. CCNV v. Reid, 490 U.S. 730 (1989). The Supreme Court held the project was not a work made for hire because the sculptor was an independent contractor and not an employee. Id. at 752. While the art was not a work made for hire, the Supreme Court noted joint authorship was still possible if, on remand, evidence showed the organization and sculptor prepared the work with the intention that their contributions merged. Id. at 753.

83. Gaylord, 595 F.3d at 1378. While copyright law requires a preconcerted common design to find joint authorship, the respective contributions by each joint author need not be equal in quantity or quality. 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright 6.03 (Rev. ed. 2010).

84. Gaylord, 595 F.3d at 1378.
using a VAB member’s proposal to stagger the formation, such claimed contributions evidenced suggestion and criticism rather than joint authorship.\textsuperscript{85}

The CAFC found no clear error regarding these conclusions, explaining that merely commissioning a work did not constitute copyrightable expression.\textsuperscript{86} The CFA, VAB, and Cooper-Lecky may have provided Gaylord with ideas, but ultimately Gaylord alone “transformed those ideas into copyrightable expression.”\textsuperscript{87} Here, the CAFC found no clear error in the lower court’s decision that the plaintiff was the sole author and sole owner of the copyright.\textsuperscript{88}

2. Parties Did Not Fully Intend to Be Co-Authors

Additionally, the CAFC found no clear error with the conclusion that Cooper-Lecky and the plaintiff did not intend the Column to be a joint work.\textsuperscript{89} The lower court specifically noted the history of the project showed an “open and contentious dispute regarding copyright ownership,” with Cooper-Lecky finally conceding that Gaylord was the sole owner.\textsuperscript{90} The 1995 Agreement that addressed the terms of use of the copyright characterized the Memorial as a collective work and recognized contributions from both Cooper-Lecky and Gaylord while repeating the 1994 Agreement’s clause that Gaylord was the sole author of the soldier sculptures.\textsuperscript{91} Though the government contended the 1995 Agreement could not conclusively decide the question of authorship, the CAFC

\begin{footnotes}
\textsuperscript{85} \textit{Id.} at 1379. Joint authorship requires one to make an independently copyrightable contribution to the work, rather than merely participate by contributing ideas or direction. \textit{Id.} at 1377.
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{Id.}
\textsuperscript{89} \textit{Id.} See Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266 (2d Cir. 1944), \textit{modified} 140 F.2d 268 (2d Cir. 1944) (holding that all that is required for a joint authorship is that each author at the time he creates his contribution intend that it shall constitute a part of a total work to which another shall make, or already has made, a contribution).
\textsuperscript{90} \textit{Gaylord,} 595 F.3d at 1379.
\textsuperscript{91} \textit{Id.} at 1380.
\end{footnotes}
nonetheless found it "crystallized" the parties' intentions that were also evident in the 1994 Agreement as well as their actions leading up to the Column's creation. Here, too, the CAFC found no clear error in the lower court's decision that the parties never intended a joint work. The majority took issue with the dissent's argument that the United States could avoid liability for copyright infringement either through its Architect-Engineer Contract with Cooper-Lecky or 28 U.S.C. § 1498 because neither party filed a brief or presented argument on those matters. The majority noted that Gaylord was not a party to the Architect-Engineer Contract used by the dissent to free the government from liability; the sections cited by the dissent concerned works Gaylord did not participate in creating and addressed works for hire, an issue for which the defendant presented no evidence. Neither was the argument based on 28 U.S.C. § 1498 valid because Gaylord did not work with government materials or facilities or use government time. The CAFC concluded this section by stating it found no clear error in the lower court's determination that Gaylord had sole authorship.

3. Architectural Exemption under AWCPA

The final issue before the CAFC was whether the Column was an architectural work subject to the copyright liability exemption for pictorial representations under AWCPA. An architectural...
work, according to the Copyright Act, is "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings.”

The lower court decided the Column was not a building as defined by federal regulation. Consequently, that court reasoned, it was not an architectural work, but rather "an artistic expression intended to convey a message rather than to be occupied by individuals." The CAFC found no clear error with this conclusion.

IV. DISSENT

The dissent disagreed with the majority decision that the United States had no right to use an image of the Memorial for governmental purposes and that Gaylord was entitled to damages for copyright infringement. The Architect-Engineer Contract entered into by the United States and Cooper-Lecky gave the government "unlimited rights in all drawings, designs, specifications, notes... including the right to use same on any other government design or construction without additional compensation to the contractor.” The dissent noted that no written instrument had been presented, as is required in the case of a work for hire, and in fact, the government had consistently declared its copyright ownership of the Memorial.
Furthermore, 28 U.S.C. § 1498, the statute under which Gaylord brought suit, provided that the contractor would not have a right of action "with respect to any copyrighted work prepared by a person while in the employment or service of the United States... or in the preparation of which government time, material, or facilities were used..."107 The dissent argued that even if Gaylord held a valid copyright, the statute prevented him from enforcing it because as a subcontractor of Cooper-Lecky, Gaylord was clearly working in the service of the United States.108

With regard to the agreement between Cooper-Lecky and the plaintiff that gave the artist "sole ownership," the dissent pointed out that because neither the U.S nor any government agency was a party, the agreement could not nullify the government’s rights either under a contract theory or 28 U.S.C. § 1498(b).109 Furthermore, the evidence at trial showed that after Cooper-Lecky and Gaylord asked the government to relinquish its rights, the government explicitly demanded assignment of the "improperly registered copyrights."110

The dissent maintained that the consideration of the government’s rights was proper because these issues were in fact before the lower court and the record reflected all of the contracts.111 The dissent argued that a decision of such significant public concern should not be decided by default.112

The dissent argued, with regard to the transformative character of the fair use evaluation, that clear error had not been

107. Id. at 1383 (citing 28 U.S.C. § 1498(b)).
108. Gaylord, 595 F.3d at 1383.
109. Id. at 1384.
110. Id. Responding to both Cooper-Lecky and Gaylord, the Army’s Contracting Officer sent a Final Decision stating “[T]he contractor and all others who might purport to derive copyrights with respect to work performed under contract ... shall immediately cease and desist any communication or suggestion to the public ... to the effect that there is a copyright on the Memorial or any elements thereof.” Id.
111. Id. In cases when the failure to raise aspects would constitute a miscarriage of justice, a court may raise them sua sponte. Id. at 1385 (citing Dorris v. Absher, 179 F.3d 420, 426 (6th Cir. 1999)).
112. Id. at 1385.
shown in the lower court’s factual findings. Because the government edited the photograph to emphasize the surreal effect of the snow, and because a transformative work is generally deemed a fair use of a copyrighted work, the dissent disagreed that the United States was liable for copyright infringement. Citing the government’s concern that such a result would “unreasonably and unfairly impact the end users of the Memorial” and “produce a chilling effect on the public’s ability to use the Memorial as intended,” the dissent concluded that the majority erred in finding Gaylord was entitled to damages.

V. FUTURE IMPLICATIONS

The result in Gaylord may give some readers pause for seeming somewhat contrary to the policy behind public art. As the Contracting Officer observed, the artist’s ability to assert his copyright would have a chilling effect on the public’s ability to use the Memorial as intended and unfairly impact the Memorial’s end users. After all, the Memorial and Column were built as a result of Congressional initiative, and court records indicate that the United States paid Gaylord $775,000 for his services. One possible alternative is for all government-commissioned art to be in the public domain. Though the U.S. Postal Service made a profit from stamp sales, presumably that revenue would go toward providing mail delivery or other related functions that ultimately benefit the public. Placing all government-commissioned art in the public domain would clarify the identification of rights and produce a more easily administrable rule; it may also better serve the public interest by letting people freely enjoy and interact with the art.

Implementing a policy whereby all government-commissioned art would be in the public domain would remove an artist’s burden to vigilantly patrol the world for infringers and

113. Id.
114. Gaylord, 595 F.3d at 1385.
115. Id. at 1385-86.
116. Id.
117. Id. at 1383.
consistently assert his or her copyright protection through infringement suits. Mackie v. Hipple is a current example of active copyright enforcement.\footnote{Mackie v. Hipple, No. C09-0164RSL, 2010 U.S. Dist. LEXIS 82462 (W.D. Wash. 2010).} Jack Mackie created bronze shoeprints buried in a sidewalk for the city of Seattle through the municipality’s Office of Art and Cultural Affairs.\footnote{Jen Graves, The Case(s) of the Broadway Dance Steps, SLOG, Feb. 3, 2010, http://slog.thestranger.com/slog/archives/2010/02/03/the-cases-of-the-broadway-dance-steps. See also Mike Masnick, Artist Sues Photographer For Transformative Photo Of Public Artwork, Even Though Photographer Took Down The Photo, TECHDIRT, Feb. 4, 2010, http://www.techdirt.com/blog.php?tag=mike+hipple&edition=techdirt.} Years later, Mike Hipple took a photograph of the art with a woman’s foot in the frame and sold it to a stock agency.\footnote{Id.} Mackie discovered this and sent Hipple a cease-and-desist letter, with which Hipple and the company promptly complied.\footnote{Id.} A year later, Mackie sued Hipple for copyright infringement and statutory damages.\footnote{Id.} The case is currently pending in the Western District of Washington after the judge denied the defendant’s motion for summary judgment.\footnote{Mackie, 2010 U.S. Dist. LEXIS 82462 at *6.}

To some, the infringement suit may seem the typical example of an artist properly asserting his rights, but to others, it may seem more akin to overzealous copyright enforcement.\footnote{See Jseattle, Broadway sidewalk dance art causing another legal two-step, CAPITOL HILL SEATTLE, Feb. 3, 2010, http://www.capitolhillseattle.com/2010/02/03/broadway-sidewalk-dance-art-causing-another-legal-two-step.} Hipple promptly complied with Mackie’s request to take down the photograph, yet Mackie filed suit one year later demanding damages.\footnote{See id.} Considering that the alleged infringement was nominal compared to what the pending litigation will ultimately cost in court resources, is this what copyright law should be encouraging?\footnote{Mackie, 2010 U.S. Dist. LEXIS 82462 at *3 (noting that Hipple claims he made $60 from sales of the allegedly infringing photograph).}
Without the extra revenue from copyright licensing fees, maintaining government-commissioned public domain art would be a concern. One possibility is for the National Parks Service to take over the upkeep, as they did with the Korean War Veterans Memorial. Another option is for a local cultural affairs department to assume the responsibilities of maintaining a particular work. These alternatives may ultimately be more successful because relying on the copyright license's royalties to fund maintenance has sometimes interfered with the public's ability to enjoy the artwork. For example, the city of Chicago owns an exclusive license for the Cloud Gate sculpture and, for a period, required all photographers to buy a permit. In 2005, security guards stopped a professional photographer from taking photos of the sculpture without a permit. This policy seemed far from facilitating the public's interaction with "the Bean," even though the city was apparently using the revenue from its exclusive license to fund the sculpture's maintenance. The city of Chicago has since modified its policy and now only requires movie-producers and wedding photographers to purchase permits.

Given the result in Gaylord, the government will likely carefully consider the disposition of all of its ownership rights in future contracts with artists. By dividing rights up front through assignment, the government could avoid the dispute that led to litigation in this case. In one scenario, the government could reserve the right to use derivative works of the art in government-
related works, such as a stamp issued by the Postal Service. The government could separately contract with the prime contractor and the artist to ensure that no rights were overlooked in previous agreements with multiple parties. This direct treatment would allow an artist and the government to tailor the contract so that each party clearly understood the division of rights and felt comfortable with the arrangement.

Such an agreement would not likely affect the quality of artists attracted to public art projects, because while fewer established artists may be willing to relinquish some of their rights, there is no reason "new" artists would be less talented. In fact, this arrangement might even serve to discover new talent. The opportunity for participants to gain name recognition and build their reputations while collaborating on public art projects would be a great incentive for emerging artists.

Ultimately, Gaylord intended to remain loyal to the purpose of copyright law by allowing an artist to assert his copyright. However, taking into consideration the quantity and nature of litigation it has launched, one may wonder whether the purpose of providing an incentive to innovation is truly achieved by current formulations of copyright. Perhaps putting government-commissioned art in the public domain or mandating assignment of rights upfront may ultimately better serve artists and the public.

VI. CONCLUSION

The CAFC in Gaylord v. United States reversed the CFC's fair use finding, affirmed the conclusions that the defendant did not have rights as a joint owner and the Column was not an architectural work governed by the AWCPA, and remanded for a determination of damages.

Placing government-commissioned art in the public domain would be an unambiguous way to avoid future copyright infringement disputes. If parties can agree to divide rights upfront

132. This example supposes the Postal Service is a full as opposed to a quasi-governmental agency, though it is actually organized as an "independent establishment of the executive branch of the government." 39 U.S.C. § 201.
133. Gaylord, 595 F.3d at 1381.
through assignment, such a contract will serve to reassure both an artist and a government agency that their rights will not be challenged in court.

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