

GRACEN v. The BRADFORD EXCHANGE
698 F.2d 300 (1983)
United States Court of Appeals, Seventh Circuit.
Argued December 7, 1982.
Decided January 12, 1983.

POSNER, Circuit Judge.

This appeal brings up to us questions of some novelty, at least in this circuit, regarding implied copyright licenses and the required originality for copyrighting a...work.

In 1939 MGM produced and copyrighted the movie "The Wizard of Oz." The central character in the movie, Dorothy, was played by Judy Garland. The copyright was renewed by MGM in 1966 and is conceded, at least for purposes of this case, to be valid and in effect today. In 1976 MGM licensed Bradford Exchange to use characters and scenes from the movie in a series of collectors' plates. Bradford invited several artists to submit paintings of Dorothy as played by Judy Garland, with the understanding that the artist who submitted the best painting would be offered a contract for the entire series. Bradford supplied each artist with photographs from the movie and with instructions for the painting that included the following: "We do want *your* interpretation of these images, but your interpretation must evoke all the warm feeling the people have for the film and its actors. So, *your* Judy/Dorothy must be very recognizable as everybody's Judy/Dorothy."

Jorie Gracen, an employee in Bradford's order-processing department, was permitted to join the competition. From photographs and her recollections of the movie (which she had seen several times) she made a painting of Dorothy as played by Judy Garland; Figure 1 at the end of this opinion is a reproduction of a photograph of Miss Gracen's painting (an inadequate one, because the original is in color). Bradford exhibited it along with the other contestants' paintings in a shopping center. The passersby liked Miss Gracen's the best, and Bradford pronounced her the winner of the competition and offered her a contract to do the series, as well as paying her, as apparently it paid each of the other contestants, \$200. But she did not like the contract terms and refused to sign, and Bradford turned to another artist, James Auckland, who had not been one of the original contestants. He signed a contract to do the series and Bradford gave him Miss Gracen's painting to help him in doing his painting of Dorothy. The record does not indicate who has her painting now.

Gracen's counsel describes Auckland's painting of Dorothy as a "piratical copy" of her painting. Bradford could easily have refuted this charge, if it is false, by attaching to its motion for summary judgment a photograph of its Dorothy plate, but it did not, and for purposes of this appeal we must assume that the plate is a copy of Miss Gracen's painting. This is not an absurd supposition. Bradford, at least at first, was rapturous about Miss Gracen's painting of Dorothy. It called Miss Gracen "a true prodigy." It said that hers "was the one painting that conveyed the essence of Judy's character in the film ... the painting that left everybody saying, 'That's Judy in Oz.'" Auckland's deposition states

that Bradford gave him her painting with directions to "clean it up," which he understood to mean: do the same thing but make it "a little more professional." Miss Gracen also made five drawings of other characters in the movie, for example the Scarecrow as played by Ray Bolger. Auckland's affidavit states without contradiction that he had not seen any of the drawings when he made his paintings of those characters. Pictures of the plates that were made from his paintings are attached to the motion for summary judgment filed by MGM and Bradford, but there is no picture of his Dorothy plate, lending some support to the charge that it is a "piratical copy." But apparently the other plates are not copies at all.

Auckland completed the series, and the plates were manufactured and sold. But Miss Gracen meanwhile had obtained copyright registrations on her painting and drawings, and in 1978 she brought this action for copyright infringement against MGM, Bradford, Auckland, and the manufacturer of the plates. MGM and Bradford counterclaimed, alleging among other things that Miss Gracen had infringed the copyright on the movie by showing her drawings and a photograph of her painting to people whom she was soliciting for artistic commissions.

The district court...held that she could not copyright her painting and drawings because they were not original and that she had infringed MGM's copyright.

Suppose Artist A produces a reproduction of the Mona Lisa, a painting in the public domain, which differs slightly from the original. B also makes a reproduction of the Mona Lisa. A, who has copyrighted his derivative work, sues B for infringement. B's defense is that he was copying the original, not A's reproduction. But if the difference between the original and A's reproduction is slight, the difference between A's and B's reproductions will also be slight, so that if B had access to A's reproductions the trier of fact will be hard-pressed to decide whether B was copying A or copying the Mona Lisa itself. Miss Gracen's drawings illustrate the problem. They are very similar both to the photographs from the movie and to the plates designed by Auckland. Auckland's affidavit establishes that he did not copy or even see her drawings. But suppose he had seen them. Then it would be very hard to determine whether he had been copying the movie stills, as he was authorized to do, or copying her drawings.

The painting of Dorothy presents a harder question. A comparison of Figures 1 and 2 reveals perceptible differences. A painting (except, perhaps, one by a member of the Super Realist school mentioned earlier) is never identical to the subject painted, whether the subject is a photograph, a still life, a landscape, or a model, because most painters cannot and do not want to achieve a photographic likeness of their subject. Nevertheless, if the differences between Miss Gracen's painting of Dorothy and the photograph of Judy Garland as Dorothy were sufficient to make the painting original in the eyes of the law, then a painting by an Auckland also striving, as per his commission, to produce something "very recognizable as everybody's Judy/Dorothy" would look like the Gracen painting, to which he had access; and it would be difficult for the trier of fact to decide whether Auckland had copied her painting or the original movie stills. True, the background in Miss Gracen's painting differs from that in Figure 2, but it is drawn from the movie set. We do not consider a picture

created by superimposing one copyrighted photographic image on another to be "original" — always bearing in mind that the purpose of the term in copyright law is not to guide aesthetic judgments but to assure a sufficiently gross difference between the underlying and the derivative work to avoid entangling subsequent artists depicting the underlying work in copyright problems.



Miss Gracen's painting

