

## Litigator of the Week: The Potential \$3B Copyright Headache that Weil Gotshal Erased for Getty Images

Benjamin Marks, who heads the intellectual property & media practice at Weil, Gotshal & Manges, convinced the Second Circuit to uphold his summary judgment win for Getty Images in a case where the company was facing potential statutory damages of \$3 billion.

By Ross Todd  
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Our Litigator of the Week this week is **Benjamin Marks**, who heads the intellectual property & media practice at **Weil, Gotshal & Manges**. Marks this week convinced [the Second Circuit to uphold](#) his summary judgment win for client Getty Images in a case where the company was facing potential statutory damages of \$3 billion on claims that it had intentionally altered the photographer credit information for more than 47,000 photographs allegedly belonging to Zuma Press.

The lawsuit pitted Marks and his team against plaintiffs' counsel, **Richard Liebowitz**, who has filed more than 1,200 copyright infringement suits over the past three years alone.

**Litigation Daily: Who is your client and what was at stake?**

**Benjamin Marks:** I represent Getty Images (US) Inc. Getty Images is one the world's leading licensors of creative and visual content, such as photographic imagery, video, and other digital content. A lot of money was at stake: The plaintiffs asserted claims seeking more than \$3 billion in statutory damages and other damages. They also sought injunctive relief, but Getty Images had already taken down all of their photographs as a courtesy long before they filed suit, even though, as the Second Circuit affirmed, Getty Images had a valid license for each of them.

**Who all is on your team and how have you divvied up the work?**

I was very ably assisted throughout the district court proceedings by **Eliza Cotter**, a Weil associate, and our former colleagues, **Jonathan Bloom** and **Alea Mitchell**. **Aaron Curtis** and **Greg Silbert**, who is the co-head of Weil's appellate

practice, worked with me on the appeal. We worked with a great team of in-house lawyers and executives at Getty Images to unravel what had happened here and to prove our case.

**Who were you up against here? What's it like to litigate a copyright case like this against photographer-turned litigator Richard Liebowitz?**

The lead plaintiff was a photographic licensing agency called Zuma Press. The other plaintiffs were other agencies or individual photographers who distributed their photographs through Zuma Press on a non-exclusive basis. Zuma Press was the decision-maker for the group.

Mr. Liebowitz's issues with candor to the tribunal and to opposing counsel generally are by now well documented, although he did not yet have the same notoriety in the copyright bar at the start of the case that he has today. We experienced many of the same issues that others have in terms of misleading filings, discovery abuses, and the like. This case was never a bona fide effort by Zuma Press to resolve a genuine business dispute. The demands never bore any relationship at all—let alone a rational one—to any actual proclaimed injury. It was a shakedown from Day One.

**Getty Images would seem to be a company that would be on top of its copyright issues. How exactly did your client come to be accused of unlawfully copying, displaying, and**



**Benjamin Marks of Weil, Gotshal & Manges.**

(Photo: Courtesy Photo)

**intentionally altering the photographer credit information for more than 47,000 photographs?**

Getty Images' business is built on respect for copyrights. The accusations against it were rooted in a different scheme by Zuma Press years earlier with respect to a different photographic agency.

Zuma Press used to distribute its photographs through Corbis, a much larger licensing agency. Zuma Press learned that yet another agency, NewSport, had a more favorable royalty rate from Corbis than Zuma Press did. So Zuma Press hired the CEO of NewSport and began submitting its photographs to Corbis under the NewSport contract, rather than its own contract, in order to receive NewSport's higher royalty rate. When Corbis renegotiated its deal with NewSport and there was no longer a royalty rate disparity, Zuma Press resumed submitting photographs under its own contract. But the photographs it had submitted to Corbis under NewSport's contract remained associated in the Corbis system with NewSport.

Years later, Corbis decided to exit the market. Corbis assigned its rights in its repertory to a Chinese company known as VCG and, in turn, VCG licensed those images to Getty Images. Getty Images agreed to migrate the NewSport collection to its distribution platform, and the images that Zuma Press had submitted to Corbis under the NewSport contract came over with the rest of the collection.

The story is convoluted but, by the end of the discovery, we were able to show that none of the chapters could be disputed.

**How did you establish the chain of authorization from Zuma to Getty that helped land summary judgment on the plaintiffs' Section 501 claims?**

We had to rely on third-party discovery. Zuma Press was not forthcoming about its relationship with NewSport and its submission of the photographs at issue to Corbis under the NewSport contract, even though Getty Images told Zuma Press well before the suit was filed that each of the photographs was attributed to NewSport by Corbis. And Zuma Press never produced some of the key documents in the case, such as a "royalty redirection agreement" between Zuma Press, Corbis, and NewSport. We only obtained that through a subpoena to Corbis. A key witness here was Les Walker, NewSport's former CEO. It took us a few months to track him down, because he had changed careers, moved

to Alaska, and was hard to find. We had to subpoena his testimony, too. We ultimately learned the real story of the photographs from him.

**What exactly is the DMCA's double-scienter requirement and how did it play into your win here?**

To prove a claim for falsification or alteration of copyright management information (CMI), the plaintiff must prove two things about the defendant's intent. First, the plaintiff must prove that the defendant falsified, removed or altered CMI, or distributed works with altered CMI "knowingly," without authority. Second, the plaintiff has to show that the defendant intended to "induce, enable, facilitate, or conceal" copyright infringement. We were able to show that the plaintiffs could not establish either prong. The district court agreed with us that Getty Images had not intentionally falsified or altered any CMI and that there was no evidence of any intent to facilitate or conceal infringement. Because the appellate court agreed that no reasonable juror could conclude that Getty Images had knowingly altered or removed CMI without authority, it declined to consider the plaintiffs' argument on the second prong.

Winning on the Section 1202 claims was critical. Those were the claims with statutory damages at issue and overwhelmingly the source of financial exposure.

**How did the argument at the Second Circuit go? Was there anything about what happened before the panel that led you to believe this is where they would end up?**

We were confident going into the argument, because we thought that the district court's analysis of the liability issues was sound and we thought our briefs were compelling. Some of the questions during the argument reflected a deep and accurate understanding of how the various agreements were knit together, and I felt good about those. The opinion described the chain of authority precisely, elegantly, and succinctly.

**What can others accused of copyright infringement take from your client's experience in this case?**

Play offense, not just defense.

**What will you remember most about this matter?**

My first in-depth conversation with Les Walker, in which he laid out the pieces of the puzzle I had been missing. And flying to Alaska to depose him. As the plane took off from Juneau on my trip home, the sun was setting over the mountains. It was a good day and a really nice view.