

Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-13138

TAMARA LANIER, Appellant

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE & others,
Appellees

On Appeal From The Judgment Of The Superior Court

**BRIEF OF AMICUS CURIAE,
MASSACHUSETTS NEWSPAPER PUBLISHERS ASSOCIATION
and NEW ENGLAND FIRST AMENDMENT COALITION
IN SUPPORT OF APPELLEE HARVARD COLLEGE**

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Massachusetts Newspaper Publishers Association (MNPA) is a voluntary association composed of newspapers published throughout the Commonwealth. Its membership includes virtually all Massachusetts daily and weekly general-circulation newspapers and it represents those newspapers on legal and legislative matters of common concern. On numerous occasions over its more than 40-year history, MNPA has filed briefs as amicus curiae in Massachusetts appellate courts in matters affecting the interests of Massachusetts newspapers.

The MNPA's bylaws define its purposes as follows:

- a. To support a free, vigorous and diverse press, economically sound and independent of government control, in which each newspaper has the right to serve the public interest as it sees the public interest.
- b. To obtain the views of members of the association and of informed non-members on public issues relating to the publishing of newspapers, and to formulate association policy on such issues.
- c. To inform governmental bodies and agencies of the policies and positions of the association.
- d. To participate in legal proceedings when that is an appropriate way to support a free and effective press.
- e. Such other related and appropriate purposes as the executive committee, by a two-thirds vote of

its membership, may from time to time determine to be in the interests of the membership of the Massachusetts Newspaper Publishers Association.

The New England First Amendment Coalition (NEFAC) is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians, librarians, and academics, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. The coalition aspires to advance and protect the five freedoms of the First Amendment, and the principle of the public's right to know, in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

At issue in this case is whether the subject of a photograph has a property interest in that photograph and, if so, what rights that interest may confer. Insofar as photography is a fundamental form and element of news reporting, this appeal addresses issues of direct interest to all members of the news media in Massachusetts and to all those who have an interest in protecting the First Amendment rights of reporters and citizens. Any ruling by this Court granting ownership rights in a photograph to the subject of that photograph would severely inhibit the

ability of the news media to cover the news using its own still and video photography, as well as to report on events depicted in photographs taken by others. Accordingly, the decision by this Court could restrict the newsgathering and reporting ability of every newspaper and news organization in the Commonwealth.

DECLARATION PURSUANT TO MASS. R. APP. P. 17(c) (5)

Amicus curiae hereby declares:

- No party or party's counsel authored this brief in whole or in part.
- No party or party's counsel contributed money that was intended to fund preparing or submitting this brief.
- No person or entity – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.
- Amicus curiae and its counsel do not represent and have not represented one of the parties to the present appeal in another proceeding involving similar issues, nor were they a party or did they represent a party in a proceeding or legal transaction that is at issue in the present appeal.

STATEMENT OF THE CASE

Amicus curiae hereby adopts and incorporates by reference the statement of the case as set forth in the brief of the Defendants-Appellees.

STATEMENT OF THE FACTS

Amicus curiae hereby adopts and incorporates by reference the statement of the facts as set forth in the brief of the Defendants-Appellees.

ARGUMENT

I. GRANTING THE SUBJECT OF A PHOTOGRAPH AN OWNERSHIP INTEREST IN THAT PHOTOGRAPH WOULD CHILL THE FIRST AMENDMENT RIGHTS OF THE MEDIA TO COVER THE NEWS.

A. Granting Photographic Subjects Property Rights Would Chill a Fundamental Form of Journalism.

The central issue in this case is whether the subject of a photograph has any ownership interest in that photograph. Appellants state that they do not “argue that Renty acquired a possessory interest in the daguerreotypes simply because he was their subject,” but rather that the circumstances in which the photographs were taken were so objectionable as to give Renty a possessory interest based on the “bundle of sticks” totality of his rights. Accepting either interpretation of the issue – that the subject of a photograph always has an ownership interest or

acquires one only in objectionable circumstances - would severely chill the ability of the media to cover the news.

As the Superior Court judge correctly held in allowing Harvard's motion to dismiss, it is a well-settled tenet of common law that the subject of a photograph has no property interest in the photograph. *Thayer v. Worcester Post Co.*, 284 Mass. 160, 163-64 (1933); see also *Press Publ'g Co. v. Falk*, 59 F. 324, 326 (S.D.N.Y. 1894) ("That she was the subject of the picture would not, alone make it hers."); *Cont'l Optical Co. v. Reed*, 119 Ind. App. 643, 652 (1949) ("the subject of a photograph does not own the negative or have any property rights therein"). Equally well settled is that a photograph is "the property of the photographer, not of [the subject]." *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 883 (9th Cir. 1988).

It is in reliance on this basic tenet that journalists employ still and video photography as essential tools in their coverage of and reporting on the news, as they have done so for more than 150 years.

Using images to communicate the news, photojournalism has shaped the way we view the world since the mid-19th century. What began as war photography has slowly spread to other newsworthy events, including sports, and even long-form storytelling through photo essays.

Stewart, "The History of Photojournalism: How Photography Changed the Way We Receive News," *My Modern Met* (June 20, 2017), <https://mymodernmet.com/photojournalism-history>. The roots of photojournalism extend as far back as the Crimean War from 1853 to 1856, when the *Illustrated London News* began printing the war photographs of Roger Fenton. "Photojournalism," Wikipedia, <https://en.wikipedia.org/wiki/Photojournalism>. During the Civil War, Matthew Brady established his place as the grandfather of American war photographers, spending nearly \$100,000 of his own money to cover the brutality of that war. Library of Congress, "Pictorial Journalism," <https://www.loc.gov/rr/print/guide/port-2.html>. So important were Brady's daguerreotypes to our understanding of the Civil War that Congress later passed an act authorizing the purchase of his images to preserve for the nation. *Id.*

As Appellees argue forcefully in their brief, the rule that the subject of a photograph has no ownership

interest - and, conversely, that the photographer does - furthers important public policy goals, goals reflected in the First Amendment's protection of the freedom of expression, and which encompasses "pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures." *ETW Corp. v. Jireh Publ'g Inc.*, 332 F.3d 915, 924 (6th Cir. 2003); see also *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) (recognizing First Amendment protection afforded "pictures, films, paintings, drawings and engravings").

The fact that photojournalists (or the media entities that employ them) know that they will own the photographs that they take gives them the incentive and the confidence to take those photographs and publish them as part of their reporting. As Appellees observe, "without that protection, 'there would be little incentive' for photographers to capture images, 'and the public would be denied an important source of . . . information' and expression." Brief of Appellees at 29, citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 557 (1985).

"[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable

right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."

Id. at 558.

For a news organization or news photographer, ownership matters not merely for its financial incentive, but also for reasons of editorial control. Photojournalists and news organizations take far more images than they publish, and their decisions about which images to publish - or even about whether to publish any - are matters of professional editorial judgment. Were subjects to somehow have an ownership interest, editorial discretion could be lost to a free-for-all of competing interests and agendas.

B. Granting Photographic Subjects Property Rights Would Chill Reporting Based on Photographs Taken by Others.

As explained above, the rule sought by Appellants would chill journalists and news organizations from taking photographs and videos to use in their reporting. But such a rule would further chill reporting in another way, inhibiting news organizations from reporting on important events based on photographs taken by individuals outside their organizations.

Many of the most important stories that the media have covered have had their genesis in photographs and videos taken by people who were not journalists or employees of the media. One need look no further than the video by a 17-year-old bystander of the brutal murder of George Floyd by former Minneapolis police officer Derek Chauvin. The media's publication of that video galvanized the nation around issues of racial injustice and police reform.

Another recent horrific and galvanizing example were the photographs of U.S. soldiers' torture and abuse of prisoners at Abu Ghraib Prison taken by former U.S. Army Reservist Joseph M. Darby, including one of a hooded detainee standing on a box with electrical wires attached to his fingers. The news media's publication of these photos provided graphic proof of alleged abuse and had immediate repercussions within the United States and worldwide.

In some cases, photographs such as these are provided to the media directly by the photographer, giving the media full rights to reproduce them. In other cases, the media's use of such photographs is

protected by copyright law principles of fair use. 17
U.S. Code § 107.1

That means that, before using photographs taken by outside photographers, news organizations must determine, first, the ownership of those photographs and, secondly, the news organizations' rights to republish those photographs through licensing, fair use or other authority.

Imagine, then, the impact of a rule that gave the subjects of photographs ownership interests in those photographs. In photographs of battlefields, or of mass gatherings, or of the Jan. 6, 2021, assault on the U.S. Capitol, how would an editor even begin to sort out the "bundle of sticks" implicated in the multiplicity of claims of ownership by both the photographer and the photographer's subjects? Often, it would be virtually, if not literally, impossible.

¹ Fair use does not protect the media's use of a photograph in all cases. Rather, the law requires that the use be "transformative" by providing some new expression or meaning to the photograph. See, e.g., *Philpot v. Media Research Ctr. Inc.*, 279 F. Supp. 3d 708 (E.D. Va. 2018) (use of plaintiff's photographs of celebrities was "transformative" where defendant used the images for purposes of news reporting and commentary).

The end result would be a news media that would be reluctant to use newsworthy photographs - photographs of events about which the public should know - because the news organizations would have to constantly weigh the uncertainty of the photographs' ownership and the possibility of lawsuits by undetermined - and undeterminable - "owners" depicted in those photographs.

C. Photojournalism Must Be Protected Even When It Involves "Objectionable" Circumstances.

Appellants claim to disavow any argument that Renty acquired a property interest in the daguerreotypes "simply because he was their subject." Rather, they assert that the circumstances in which the photographs were taken were so objectionable as to give Renty a possessory interest based on the "bundle of sticks" totality of his rights.

It is beyond dispute that the daguerreotypes underlying this case were made under egregiously objectionable circumstances. As Appellants state, the circumstances under which these images were created were "beyond all bounds of decency and ... utterly intolerable in a civilized community." Brief for

Plaintiffs-Appellants at 37, citing *Sena v. Commonwealth*, 417 Mass. 250, 263-64 (1994).

But this statement is true of so much of what photojournalism has captured over the last 150 years, from those earliest battlefield images of the Crimean War to the photographs of torture at Abu Ghraib to the 2019 video of George Floyd's murder to the 2021 violent assault on the Capitol.

So many iconic images have been taken under objectionable and shocking circumstances and yet changed the course of history. In fact, it has often been the shocking nature of what these photographs depicted that made them so impactful. Just mentioning them is enough to conjure the image in our minds: Eddie Adams' photograph during the Vietnam War of Gen. Nguyen Ngoc Loan, a South Vietnamese police chief, shooting a suspected member of the Viet Cong at point-blank range; the image of 14-year-old Mary Ann Vecchio crying out over the body of Jeffrey Miller moments after he was shot by the Ohio National Guard at Kent State in 1970; Stanley Forman's Pulitzer Prize winning photograph of busing protestors attacking Ted Landsmark at Boston City Hall with an American flag.

Time after time in our nation's history, it has been the reporting of objectionable and outrageous conduct that has ignited reform of that conduct or an end to the circumstances in which it occurred. Appellant asks this court to establish a precedent that would undermine the future of such photojournalism. We respectfully urge this Court not to let that happen.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Superior Court.

Respectfully submitted,

MASSACHUSETTS NEWSPAPER
PUBLISHERS ASSOCIATION and
NEW ENGLAND FIRST AMENDMENT COALITION,

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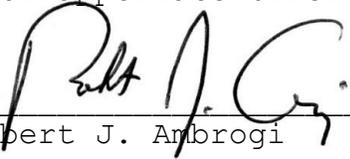
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MASS. R. APP. P. 16(k) CERTIFICATION

Pursuant to Mass. Rule App. P. 16(k), I certify that this document complies with the rules of court that pertain to the filing of appellate briefs.



Robert J. Ambrogi

MASS. R. APP. P. 13(d) CERTIFICATE OF SERVICE

I certify under the penalties of perjury that on October 12, 2021, I caused a true and correct copy of the foregoing document to be served by priority mail, postage prepaid and electronic mail upon:

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