

## Fight Over NFL Star's Statue Hinges On Who Holds Copyright

By **David Steele**

Law360 (March 20, 2024, 9:07 AM EDT) -- The works of sculptors, like those of other artists, are protected by the fair use doctrine in U.S. copyright law, while photographers also have copyright protection for their work when others try to use it for their own profit. The intersection of those rights complicates a rare copyright infringement suit against the NFL and the Detroit Lions over a statue of Hall of Fame player Barry Sanders, experts say.



This photo of Barry Sanders is at the heart of photographer Allen Kee's lawsuit. (Court Documents)

Statues of famous, popular sports figures are not rare — one of the late NBA superstar Kobe Bryant was just dedicated in February outside the Los Angeles Lakers' downtown arena, and hundreds of others around the U.S. honor Michael Jordan, Jackie Robinson, Bobby Orr and a broad selection of other legends, erected over the last several decades.

What is rare, however, is a suit over the image alleged to have been used to model such a statue, like the one **filed in January** in New York federal court by photographer Allen Kee. The list of defendants is long and renowned — it includes Sanders' former team, the Lions; the NFL; its former licensing arm; media company Getty Images; the sculptor; and several sports memorabilia retailers, including Fanatics and Dick's Sporting Goods.



Kee claims that the defendants violated his copyright by using his photo of Sanders in action during a 1995 game as the model for the pose in the statue, and for Sanders-related items sold by the various companies. Further supporting him is an image he included in the complaint, a screenshot from a promotional video in which Kee's blown-up photo is positioned in front of the sculptor as he shapes the statue.



The statue of Barry Sanders, which now stands outside the Lions' home stadium, while it was being built. (Court Documents)

It is a fairly convincing claim, said Cathay Smith, professor at the University of Montana's Alexander Blewett III School of Law, an expert in intellectual property and art and cultural property law. The photographer is backed up, Smith said, by no less than the 2023 Supreme Court decision in favor of the photographer whose photo of **pop star Prince** was used by the Andy Warhol Foundation for commercial use.

"If someone wanted to create something else from his photograph, that would be violating his derivative work," Smith said, adding that such a photographer and their work is protected by "black-letter U.S. copyright law."

"I can see where the photographer is coming from, saying, 'This is my photo. I have captured this moment. You clearly used my photo, in [two dimensions], to make a [three-dimensional] sculpture, and so therefore, it's a derivative work,'" Smith said.

But, she continued, "I'm not going to say that it's a 100% slam dunk for Mr. Kee." The infringement would have to meet the legal standard of substantial similarity — and that is difficult, she said, because the photo is of "Barry Sanders' signature move" during the course of a game that everybody watching had the opportunity to photograph. "That's his. That's his athleticism that is making that move. It's not the photographer creating it or the photographer posing him, etc."

Figures, particularly athletes, in poses that are instantly familiar to audiences as Sanders' was, are extremely difficult around which to claim copyright infringement, said Darius Gambino, chair of the sports and entertainment practice group at Saul Ewing LLP and a former patent examiner with the U.S. Patent and Trademark Office.

Pointing to instantly identifiable images like the ones replicated in statues of Jordan, Orr and retired basketball star Shaquille O'Neal, Gambino said, "Those are recognizable representations of those people, but they're not directly from a specific photograph."

Referring to a statue of O'Neal hanging off of the rim while dunking, also located in front of the Los Angeles Lakers' arena near the recent sculpture of Bryant, Gambino added, "It's him doing his signature dunk, but there's lots of photographs of him doing that, and maybe what went on behind the scenes was, 'Well, here's 20 reference photographs of Shaquille, taken by NBA photographers, that the NBA owns the rights to, and that's what you'll use as reference, because we don't

have to worry about compensating."



This statue of Shaquille O'Neal doing his signature dunk was unveiled in 2017 outside what is now known as Crypto.com Arena in Los Angeles. (AP Photo/Mark J. Terrill)

In fact, the statues of Jordan, O'Neal and Bryant were created by the same sculptor team commissioned by the Lions for the Sanders statue — Julie Rotblatt-Amrany and Omri Amrany of Illinois-based Timeless Creations Inc. — one of the defendants in Kee's suit.

Orr's statue in front of Boston's TD Garden, meanwhile, commemorating his famous Stanley Cup-winning goal for the Boston Bruins in 1970 and his horizontal leap of celebration, was created by renowned sculptor Harry Weber, creator of more than 150 public works, including several sports figures.

Weber was even more succinct about whether the photographer had grounds to challenge his creation over a single image: "You can't copyright an event."



This statue of Bobby Orr made its debut outside Boston's TD Garden in 2010. (AP Photo/Michael Dwyer)

Elaborating, Weber said that when the Bruins asked him to do the statue, they "commissioned me to depict an event, not a photograph." One of the most memorable images of that goal is a black-and-white photo taken by Boston Record American photographer Ray Lussier. But, Weber said, the very nature of creating a three-dimensional work made it impossible to make something of even substantial similarity to one photo.

Of all his sculptures, he said, "I cannot think of one in which I used a single photograph as the model."

Which entity holds the license to the photo is also in dispute, according to the suit, as Kee claimed that he granted a sublicense for it to NFL Photos, then a subsidiary of the NFL, and never granted an exclusive license to anyone. Besides the Lions and the sculptors, he claimed, NFL Properties, Getty and the retailers named all violated his copyright.

The use of the photo in memorabilia sales, Gambino said, "is a bigger issue than the statue itself," adding, "Kind of the dirty detail behind the scenes here is that there may be some confusion about whether the NFL or the Lions or their licensees were authorized to use this photo."

Yet Kee's own emphasis in the suit, including the insertion of the screenshots of the sculptor working with the photo in the background, centers the argument on the statue and whether it represents one still image or, as Weber said, an event. Depicting an event in another medium, particularly a three-dimensional one, gives a photographer making an infringement claim less stable grounds for his case, said Alexandra Roberts, a professor at Northeastern University's School of Law and its College of Arts, Media and Design.

There would be more "robust protection" for a photo that was more a product of the photographer's creativity and artistic choices, Roberts said — but those aren't the circumstances under which the Sanders photo in question was taken.

"This is Barry Sanders in action, doing what he does and beautifully captured. Maybe there's a little bit thinner protection there, given the context for that photo," she said. "When somebody else comes along and makes a sculpture and does the work in a different medium, that's also Barry Sanders ... but maybe it's harder to infringe on those rights than it would have been."

The rights of a photographer taking a live-action photo, Roberts said, contrasts with those in another famous suit involving an image of Jordan, the **2015 infringement suit** by a photographer who claimed that Nike had copied his magazine photo of Jordan and modeled its "Jumpman" logo after it. The Ninth Circuit eventually ruled in favor of Nike. The Jordan statue, meanwhile, resembles both the logo and the familiar image of Jordan in action.





This statue of Michael Jordan in his famous "Air Jordan" pose was first unveiled outside the United Center in Chicago in 1994 and relocated indoors in 2017. (AP Photo/Charles Rex Arbogast, File)

"What we're talking about is that art builds on other art, and everything takes inspiration from something else," Roberts said, adding that all the images of Jordan, including the logo, surely influenced the sculpture. "The combination of all of those things kind of settled into the set of public images and ideas that we all share. They became embedded in culture, so that it gets a little harder to trace them back."

Sculpture and other transfers to different mediums, particularly from photos, also received a recent endorsement in federal court. In January, a California jury handed tattoo artist Kat von D a victory in an **infringement suit** by a photographer whose image of jazz icon Miles Davis was used for a tattoo on a man's arm, ruling that the tattoo was covered by the fair use doctrine.

In fact, one of the few defeats in court of a sculptor by a photographer took place more than three decades ago, when Jeff Koons was found to have violated the copyright claim of Art Rogers when he made a sculpture in 1988, "String of Puppies," based on Rogers' photo. The case is taught in copyright law classes to this day.

That case stood out, Gambino said, because the district court ruled, and the appeals court confirmed, that Koons' statue was "essentially the same as the photograph." The lesson from that, he added, was "the simple fact of taking something in a photograph and converting it to a sculpture is not going to avoid copyright infringement."

However, Roberts said, with the Sanders statue, "we're talking about transformativeness. It seems more likely to me that something that, you know, goes from a photograph to a tattoo or a photograph to a sculpture could be more likely to add new creative elements that transform the work."

With that in mind, Roberts said, Kee's claim in the complaint that the Lions and others used his photo "for purposes of slavishly recreating all details" for the statue would be difficult to prove. "I don't know that there's such a thing as a 'slavish recreation' of a photo in a sculpture," she said.

Through a spokesperson, the NFL declined to comment for this story. Representatives for Kee and for the other defendants did not reply to requests for comment.

The defendants have until March 22 to file replies to Kee's suit. A settlement isn't out of the question, the legal experts said — and they agreed that some sort of preemptive compensation paid by the NFL or the Lions for the use of the photo might have prevented the suit in the first place.

Companies using a "risk aversion" strategy, however, could send the wrong message, Smith said. "I feel like the more corporations go through the process of licensing things that they didn't ultimately need their license for, the more there's

this expectation that everything needs to be paid a license," she said. "And creativity gets a lot more expensive if you have to license every little use that may or may not have needed a license."

"If the law doesn't require it, then it's kind of a bad practice and a bad thing to incentivize, to make everybody engage in these unnecessary licenses," Roberts said.

Weber, the sculptor who created the Orr statue, prefers not to have to address the photo copyright or licensing issue at either end — and he clearly did not agree with the idea of a sculptor being sued by a photographer over a statue.

"I think it's crazy," he said. "It's absolutely asinine."

--Editing by Karin Roberts.