on it with a Sharpie.

"She actively eluded her escorts. She could have damaged the missile or the aircraft," Childress says. "They had reason to shoot her because what she did was not sanctioned by anyone."

Not wanting to get Getty Images in trouble, Bronstein apologized to military officials after they complained, but she insists they have a strange way of twisting the story to make her look like a criminal.

The photographer admits that she wasn't an ideal candidate for an embedded position, but she also says there were major problems with how the military handled the media at Ali Al Salem. For one, journalists had to share escorts, yet they were expected to seek permission every time they wanted to venture out to report or shoot pictures. Bronstein says she had to hitch rides and make escorts sit around for hours while she waited for shots.

"We had to choose between doing our jobs and following their rules," Bronstein says. "There's no flexibility in the way they think, and that's not the way I work. I think they should have assigned an individual escort to every person in the media." —*Jay DeFoore*

JUDGE PARES C-RIGHT CLAIM, SCOLDS PHOTOGRAPHER

NEW YORK—A photographer seeking $260,000 for unauthorized use of a stock photograph suffered a pretrial setback when the presiding judge put a $3,896 limit on damages and barred the photographer's expert witness.

British photographer Kent Baker was seeking summary judgment for copyright infringement against Urban Outfitters, which used one of Baker's photos on a disposable paper insert for plastic picture frames it was offering for sale. Baker's picture had been published in a 1999 book about U.S. Route 66.

Urban Outfitters admitted using the picture without permission. But the judge refused to issue a summary ruling for copyright infringement because of an ambiguous agreement Baker had signed with the book publisher. At issue is whether Baker transferred copyright to the publisher and therefore has no grounds for a claim. The judge said that issue was up to a jury to decide.

At Urban Outfitters' request, the court also rejected Baker's claim for actual damages of $260,000. The court called the estimate irrelevant and unreliable because it wasn't made by a qualified expert and because it was based on parameters for assignment rather than stock photography.

Noting that the most Baker had ever licensed the disputed picture for was $88, the judge set maximum damages at $3,896—the gross profit Urban Outfitters had earned from the sale of 862 plastic picture frames.

Last year, Baker rejected on offer from Urban Outfitters to settle for $9,096.

Even worse for Baker, his request for sanctions against Urban Outfitters for "vexatious" legal maneuvering backfired. The court had warned Baker and his attorney, Stephen Weingrad of New York City, not to seek those sanctions. They did anyway. The judge ruled that the company's self-defense was "objectively reasonable," and that the motion for sanctions was without merit.

"It is appropriate [that Urban Outfitters] be compensated for their reasonable expenses and attorneys' fees incurred in opposing the motion," for sanctions, the judge ruled.

PHOTOG WINS HOLLOW COPYRIGHT VICTORY

NEW YORK—Henri Silberman has won an infringement claim against a luggage retailer over unauthorized use of a Manhattan skyline image, but a federal judge has ruled him ineligible for statutory damages and rejected several related claims.

Silberman had sued Innovation Luggage in 2001 for unauthorized use of an image he shot in 1982 of the Brooklyn Bridge and Lower Manhattan. Silberman had sold signed, limited-edition prints of the photo and also licensed it to a Swiss publisher for reproduction on posters.

While walking down a New York street in late 2000, he recognized a portion of his photograph in an Innovation store window display. As it turns out, Innovation had scanned Silberman's image from the Swish publisher's catalogue, altered the scan, and reproduced it on promotions for its seven stores.

Innovation's owner admitted copying the image. He argued that the average person wouldn't recognize a similarity between the illegal copies and the original. He also said he'd used such a small portion of Silberman's photo that no harm was done.

The court rejected those arguments on the grounds that the portion copied was "a central and significant element of the copyrighted work." The court also said, "a lay observer...would have little trouble recognizing the source of the copy."

Innovation's owner also tried to argue that Silberman's photo was due little copyright protection because it showed a very familiar cityscape. But the court also rejected that argument, saying Innovation had appropriated not just a concept, but Silberman's expression of it.

Since Silberman had not registered his copyright prior to infringement, however, the court said he was ineligible for statutory damages. Instead, he is entitled to collect actual damages in the form of "a reasonable license fee" for the use of his image, plus any profits he can demonstrate that Innovation earned by using the image, the judge said.

Meanwhile, the judge rejected Silberman's claim that Innovation had violated his moral rights under the Visual Artists Rights Act (VARA) of 1990. The act prohibits the distortion or modification of original works of art. Innovation did not alter one of Silberman's original prints, so VARA didn't apply in this case, the judge explained.

Finally, the judge ordered Silberman's lawyer, Stephen Weingrad of New York, to pay Innovation's legal costs for defending against a claim that Innovation had also violated the Swiss publisher's copyrights under foreign laws.

"[Weingrad's] conduct here is inexcusable, and his failure to present the slightest evidence of the validity of the foreign law claims...compels the conclusion that the Swiss law claim was presented without adequate investigation and in bad faith," the judge said. (See "Attorney Stephen Weingrad, Sanction Magnet.")

The judge also rejected Weingrad's counterclaim for sanctions against Innovation's lawyers as a "frivolous" tit-for-tat legal maneuver.

ATTORNEY STEPHEN WEINGRAD, SANCTION MAGNET

For New York attorney Stephen Weingrad, it was a lousy day. In late March, two judges in two separate federal court cases sanctioned Weingrad on the same day for what amounted to bad lawyering.

In fact, Weingrad has been sanctioned twice before in recent years. And in March 22, 1994, he was disbarred for a year for bad behavior toward clients.

The first of Weingrad's same-day sanctions was for his handling of the *Silberman v. Innovation Luggage* case (see "Photog Wins Hollow Copyright Victory"). Photographer Henri Silberman's copyright infringement claim against a Manhattan retailer had merit, but Weingrad made the mistake of also trying to get Innovation on a violation of Swiss copyright law, since the retailer had copied the photo out of a catalogue published in Switzerland.

Weingrad brought in an expert witness on Swiss law but didn't verse the witness on the details of the case. The witness ended up helping the defense instead of Silberman. The judge ordered Weingrad to reimburse Innovation for some of its legal fees—an order that he is appealing, he says.

The second of Weingrad's recent sanctions was in *Baker v. Urban Outfitters* (see "Judge Pares C-Right Claim, Scolds Photographer"). The judge eviscerated Baker's case before trial. What got Weingrad in trouble, though, was his motion for sanctions against Urban Outfitters' lawyers. The judge had warned Weingrad and Baker against filing that motion. They did anyway. The court found no legal basis for the action and ruled that Baker and Weingrad should reimburse the retailer for some legal expenses.

Weingrad says there will be a rehearing on that ruling, too.

The judges in both the Silberman and Baker cases brought up the mess Weingrad made of a 1996 infringement

case, *Ernst Haas Studio v. Palm Press*. Weingrad, who represented the Ernst Haas Studio, lost the case after the U.S. Copyright Office rejected the studio's copyright registration application for the disputed image. (Under copyright law, you can't sue for infringement without a valid copyright registration.)

Weingrad appealed, but failed to present any coherent legal theory for that appeal, according to the U.S. Court of Appeals for the Second Circuit. The court said Weingrad's brief was "at best an invitation to the court to scour the record, research any legal theory that comes to mind, and serve generally as an advocate for [the Ernst Haas Studio]. We decline the invitation."

Ouch.

Palm Press sought to recover its legal costs—and the court granted them—on the grounds that Weingrad's appeal was frivolous.

Weingrad says the appeals court stayed and withdrew the sanctions several months later.

Weingrad was sanctioned again in February 2001 after losing the *MAI v. ABC News*. On behalf of MAI, Weingrad had sued ABC for copyright infringement and breach of contract over footage that MAI licensed to ABC for a news broadcast about the relationship between the CIA and Saddam Hussein. MAI claimed that ABC used footage beyond the scope of its license by also selling videotapes of the broadcast.

The court dismissed the case at ABC's request on the grounds that the license agreement clearly authorized the videotape use. ABC also sought and won sanctions.

"[Weingrad] has made accusations that lack evidentiary basis, even those contrary to what his client...has admitted to in his deposition," the court said. Even worse, it concluded, "He used his summary judgment opposition papers to change his claims and add new claims, claims that also lack evidentiary support. His briefs, aside from being incoherent and unconvincing, contain purported quotations of portions of defendant's briefs with key words switched around to make the statements support his unfounded position. Furthermore, Mr. Weingrad, in an effort to misconstrue the law, has done the same thing with cases used by plaintiff in its brief and with statements made by this very court during oral argument pertaining to this case. Intentionally mis-citing the law is inexcusable and should be sanctioned."

Weingrad alleges that the court never read MAI's complaint against ABC prior to issuing the ruling. He says MAI appealed, and that MAI and ABC ended up reaching an undisclosed settlement out of court.

Which brings us, finally, to the mother of all sanctions against Weingrad. In 1994, he was disbarred for neglecting a client's case for four years, for lying to that same client about the work he had done on her behalf, and for using money belonging to another client to meet his office payroll expenses.

Weingrad said the misappropriation of funds was an unintentional error that he corrected as soon as he learned of it.

Noting that Weingrad didn't misappropriate client funds with "venal" intent and he's done a lot of pro bono work, the judge disbarred Weingrad for just one year.

Weingrad says, "All cases prosecuted by me were on the basis of a good faith belief that they were meritorious." He adds, "In the past ten years I successfully handled almost 500 cases, most of which were on a contingency basis," meaning he received no fee unless the case succeeded.

Reinstated to the bar in March 1996, Weingrad continues to represent photographers in claims pending against *National Geographic*, McCann-Erickson and others. —*David Walker*

JUDGE SLAMS GENTIEU'S CLAIMS AGAINST GETTY

CHICAGO—Making no effort to hide his contempt for photographer Penny Gentieu and her claims against Getty Images, a federal judge blasted Gentieu's lawsuit out of court March 26.

In dismissing the case, Senior U.S. District Judge Milton I. Shadur accused Gentieu of trying to claim a monopoly on photos of babies. He called her lawsuit a waste of resources and chalked it up to Gentieu's "overexaggerated sense of self-importance."

"Of course it hurts," Gentieu says. "Getty's lawyers went to great lengths to make [me] into somehow being just a greedy woman, selfish, conceited, delusional." She vows to appeal the decision.

Gentieu, who specializes in photographing babies, sued Getty for copyright infringement, breach of contract, breach of fiduciary duty and other claims in January 2000. Last fall, Getty settled some of Gentieu's claims by agreeing to pay approximately $100,000 in overdue license fees.

Unresolved until now, though, were Gentieu's claims that Getty directed several London photographers to copy some of her best-selling baby images—at the same time the agency was telling Gentieu to stop submitting new baby pictures.

The evidence she presented included 15 of her images and the alleged copies produced by other photographers, along with the testimony of those photographers and agency letters and memos regarding photo production.

In his decision, Shadur explained that copyright protects the expression of a subject, not the subject itself. "[P]oses are not copyrightable elements where they follow necessarily from the choice of the subject matter or are otherwise unoriginal," he said.

"[Gentieu] cannot claim a copyright in the idea of photographing naked or diapered babies or in any elements of expression that are intrinsic to that unprotected idea," Shadur continued. "[She] must show that the accused images are substantially similar to particular compositional elements of her expression that do not necessarily flow from the idea of photographing naked babies."

The judge made side-by-side comparisons of all the images and ruled that Getty and its other photographers had not copied the protectible elements of Gentieu's pictures.

Of four headshots of babies, for instance, the judge ruled that Gentieu "has added nothing protectible by copyright to the idea of a baby photograph." Only exact copies of those images would be infringing, he said, and "no reasonable juror could conclude that such exact duplication took place."

Another group of images included various photo composites. The judge allowed that those images warranted more copyright protection since they were more complex than the headshots. But still, the protectible elements in Gentieu's pictures were not copied, Shadur said.

For instance, several of the photos illustrated the concept of growing babies. But the other Getty photographers expressed that concept using different positions, backgrounds, lighting and props, Shadur concluded.

Even if the works of the other photographers were substantially similar to Gentieu's, Shadur asserted, they weren't infringing because they had been created independently.

"Gentieu's argument that Getty's art directors directed unlawful copying of her images is totally unfounded. None of the shoot briefs to other photographers identifies Gentieu's images or directs the copying of her images," Shadur said. He added, "There is no evidence to suggest a reasonable inference of copying."

On those grounds, the judge dismissed not only the infringement claims but also Gentieu's breach of fiduciary duty claims.

He also dismissed as unfounded claims that Getty had violated various terms of Gentieu's 1993 contract with the agency. "None of the conduct about which Gentieu has complained constitutes a breach of the 1993 contract," Shadur declared.

Attorney Victor Perlman of ASMP, which supported Gentieu's claims, says, "I think [the judge] went too far in making himself a trier of facts by assuming on every single issue that no reasonable juror could have felt differently than he did." (By law, juries are supposed to judge the facts of a case unless the judge determines that there is no reasonable dispute over the facts.)

Attorney Joel Hecker says Shadur's "statement of the law is correct. You can only protect elements which are original and copyrightable, and you have to eliminate [from any copyright claims] elements which are not protectible."

But the appeals court could decide Shadur abused his discretion, he says. "They might decide protectible elements are broader, or that the protectible elements were not properly analyzed by [Shadur]."

The risk of an appeal for Gentieu is that she may be forced to pay Getty's legal fees if she loses. "But the prospect of not appealing this decision is unthinkable," she says. "I'll take that chance, in order to recover my rights as a photographer and an individual. I have faith that the appeals court will see my case differently."