ART LAW

The Guide for Collectors, Investors, Dealers, and Artists

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that amounted to a tasteless French other example of Duchamp’s “bore- tonte Carlo Bond. Duchamp estab- bonds to finance his playing. The y photograph of Duchamp with a into the winged head of Mercury, iron of thieves.\textsuperscript{625}
of pop art, which developed in En- ged in the United States in the early ly not satirical: Essentially, such art-objects and images of their world e the viewer uniquely conscious of images. To that end, pop art, even ages disseminated by the mass me- tal art, and such mundane items as d goods. Famous examples of pop with benday dots by Roy Lichten- repetitive depictions on canvas of

ment, which emerged in the 1980s, Many artists who achieved partic- a postmodernist belief that West- turated cultures that promote Such artists frequently express that ing images from the mass media, iss culture and recontextualizing often by the use of photography, niques. The boldness of these bor- ve use of reproductive techniques tion art.”\textsuperscript{628} The artist Barbara ally, in much of her work, she ap- tograph from a magazine or a sired image, blows it up to such e viewer cannot escape, and then dated feminist text.\textsuperscript{629} One highly Intitled (Your gaze hits the side of my face), depicts a close-up of a female image in profile, with the caption juxtaposed in vertical fashion and the unmistakable implication that a (male) stare directed at the subject is violative (Fig. 11). In another well-known piece, Untitled (Your body is a battleground), the image is a close-up frontal view of a female face, bisected so that the left side of the image is in normal black and white, and the right side of the image appears as a black-and-white negative. The resulting image is a female face ravaged by all manner of (sexist) tensions.

Artistic Borrowings As Addressed by Copyright Law

The tradition of image appropriation must be examined in the context of copyright law. Under current U.S. law, a copyright proprie- tor of a pictorial, graphic, or sculptural work can generally assert the following exclusive rights: to reproduce, adapt, distribute, and publicly display such a work.\textsuperscript{630} As noted earlier in this chapter, the post-modernist Jeff Koons, in appropriating a photograph by a pro- fessional photographer for use as the basis of the creation of a limit- ed-edition sculpture, was found liable of copyright infringement in the famous Second Circuit case of Rogers v. Koons.\textsuperscript{631}

While the 1994 watershed case of Campbell v. Acuff-Rose Music, Inc.\textsuperscript{632} discussed earlier, altered some primary lines of inquiry under a traditional fair use analysis, one of Campbell’s far-reaching developments—the Supreme Court’s distinction between parody and satire—has led to some paradoxical results. For example, a photograph commissioned by Paramount Pictures to advertise the slapstick comedy movie Naked Gun 33\(\frac{1}{2}\) was found to be a fair use parody of an image created by the photographer Annie Leibovitz: a nude and pregnant Demi Moore, which appeared on the cover of the August 1991 issue of Vanity Fair magazine. The fact that virtually the only visual difference between the two photographs was that the later photograph was graced with the head of a smirking Leslie Nielsen (starring in the motion picture) rather than a serious Demi Nielsen seemed to bother the courts not at all. The Second Circuit, in af- firming a New York federal district court’s dismissal of Liebovitz’s copyright infringement suit, found that Nielsen’s smirk was a com-
ment on the seriousness of Liebovitz's work, and did not interfere with any of Liebovitz's potential markets.\textsuperscript{633} On the other hand, the Ninth Circuit, in 1997, affirming a California federal district court, held that a book written by Katz and Wrinn entitled \textit{The Cat NOT in the Hat}, satirizing the O.J. Simpson double-murder trial in rhyming verse, could not claim a parodic fair use of Dr. Seuss's earlier book, \textit{The Cat in the Hat}. Never mind that the third page, for example, in Katz and Wrinn's work reads, in describing the murder of Simpson's wife Nicole Brown, "One Knife?/Two Knife?/Red Knife/Dead Wife," evoking the first part of the first poem in Seuss's book \textit{One Fish Two Fish Red Fish Blue Fish}. The Ninth Circuit noted that

\begin{quote}
[\textit{a}lthough \textit{The Cat NOT in the Hat} does broadly mimic Dr. Seuss['s] characteristic style, it does not hold up his style to ridicule.]\textsuperscript{634}
\end{quote}

In addition, the Ninth Circuit found that in view of

\begin{quote}
[t]he good will and reputation associated with Dr. Seuss['s] work. . . . Penguin['s] . . . nontransformative, and admittedly commercial [use permits the conclusion] that market substitution is at least more certain and market harm may be more readily inferred.\textsuperscript{635}
\end{quote}

It seems fair to call into question the Ninth Circuit's perception that a versified recounting of the O.J. Simpson double-murder trial would undercut the market for the typical reader of Dr. Seuss. It also seems fair to question the Ninth Circuit's finding that Katz and Wrinn's piece lacked transformativeness because "the substance and content of \textit{The Cat in the Hat} is not conjured up by the focus on the Brown-Goldman murders or the O.J. Simpson trial."\textsuperscript{636}

A second far-reaching development in \textit{Campbell}—the Supreme Court's reconfiguration of the first fair use factor to focus on the concept of transformativeness—raises the following question: Does the transformative requirement in a fair use defense threaten the historical (and creative) tradition of image appropriation?
617. Id.
619. Id. at 146.
620. Id.
621. Id. at 147.
622. Id.
624. "Elle a chaud au cul." Roughly translated, the pun is "She has a hot ass."
625. JANIS MINK TASCHEN, MARCEL DUCHAMP 73 (Koln 2000).
630. 17 U.S.C. § 106. A "work of visual art" as defined in 17 U.S.C. § 101 includes some but not all "pictorial, graphic and sculptural works" as also defined in 17 U.S.C. § 101. The author of a work of visual art, whether or not she remains the copyright proprietor of such a work, may exercise the rights of paternity and integrity, as defined in 17 U.S.C. § 106A in and to that work.
635. Id. at 1403.
636. Id. at 1401.
638. Id. at 343.
639. Id.
640. Id.
641. Id.
642. Id.
643. Id.
644. Id.
645. Id. at 344.
647. When Hoepker’s photograph in 1960, its term of copyright protection was subsequently revised to an author plus seventy years. See Hoep
648. 17 U.S.C. § 104a(d)(1)–
649. Actually, the effective date as adopted by the Copyright Office is that adopted by the Copyright Office and that of the Congress. See the proclamation adopting the principles of the current Act and the Act as amended by the Copyright Office and the Congress.
651. Hoepker, 200 F. Supp. 2d which sets forth the requirements for protection against a reliance party.
652. Greenfield v. Loeb, 99 complaint, 2/20/01. The pleadings an agreement were made available to the Providence County Superior Court of Gloria C. Phares, Esq., of Patent attorneys for plaintiff.
653. Id. at 4.
654. Id.
655. Id. at 5.
656. Id.
657. Id. at 7.
658. Id. at 6, 7.
659. Id. at 6.
660. Id. at 8, 9.
661. Settlement agreement in Greenfield v. Loeb, Man Mary Boone Gallery.
662. In a conversation dated March 24, 2000, the painting h Greenfield credit in the painting’s new
663. The agent referred to Boone Gallery.
664. Eldred v. Ashcroft, 537 1
665. Royalty rate is based on TERSBY & C.W. GRIMES, LICENSING RIGHTS 2000), an excellent treatise on the