Legalities 30: Jeff Koons and Copyright Infringement

For those who are not familiar with Jeff Koons, he is an American contemporary artist noted for his use of kitsch imagery, especially in oversized works. See, e.g., http://en.wikipedia.org/wiki/Jeff_Koons; http://www.jeffkoons.com.
Koons is an appropriation artist—he uses pre-existing images to comment on contemporary culture. See generally, http://en.wikipedia.org/wiki/Appropriation_art.

Mr. Koons has been sued several times for copyright infringement. Here are some lessons to be gleaned from some of those litigations (all of these suits happened in the federal courts of New York):

Lesson 1: Rogers v. Koons—Photographs are protected by copyright

Rogers v. Koons

Art Rogers - "Puppies"

Jeff Koons - "String of Puppies"

The first published litigation against Jeff Koons was filed by photographer Art Rogers. Mr. Rogers' black and white photograph, entitled "Puppies," had been sold on inexpensive consumer merchandise such as greeting cards and postcards.

Koons found Rogers' "Puppies" on a postcard. He was inspired to make a sculpture based on the image for a show called "The Banality Show." Koons did not make any of the sculptures for this show himself. Rather, he had Italian artisans create them to his specifications. Koons removed Rogers' copyright notice from the card, and then gave it to

his Italian assistants, with instructions to duplicate it as closely as possible in sculptural form. Koons' notes on a blown-up photocopy of the postcard instructed the artisans to use particular colors, including making the puppies blue, and to add flowers to the couple's hair.

The *Rogers* case is usually cited for the failure of Jeff Koons' "fair use" defense. Indeed, the court found that Koons' use of the Rogers photograph did not qualify as fair use (see below). But first, the court had to determine whether there was a basic case of copyright infringement (fair use is a defense to what would otherwise be copyright infringement. So courts must first determine if the plaintiff has proven that his work was copied without permission).

To evaluate the basic copyright infringement claim, the court must decide whether (a) the plaintiff has a valid copyright and (b) the defendant's work is "substantially similar" to the plaintiff's work."Substantially similar" means that an average person viewing the two works would recognize that the "artistic expression" in one was copied from the other. "Artistic expression" means the specific artistic choices and details that go into a work, such as composition, rendering and colors.

In *Rogers v. Koons*, the court had no trouble holding that Mr. Rogers' photograph qualified as copyrighted subject matter. Indeed, since 1884 courts have consistently held that photographs are copyrightable forms of artistic expression. Photographs reflect artistic choices of the photographer, including posing, lighting, perspective, and composition. In my experience, many visual artists are not clear on this. They think photographs are available for anyone to copy. This is not the law, however, and as this case demonstrates, it can be very risky to copy a photograph without permission.

Lesson 2: Rogers v. Koons – Changing the media or varying details will not avoid infringement

Next, the *Rogers v. Koons* court had do decide if Koons' "String of Puppies" sculpture infringed Roger's copyright in his "Puppies" photograph. The court readily found that the sculpture was a "substantially similar" copy of the photograph. The court reiterated the established legal standard that copyright infringement does not require "literal identical copying of every detail" and that "small changes here and there are unavailing." Such "unavailing" changes include a change in media, the change from black and white to color, the addition of flowers in the couple's hair, or the more bulbous noses of the puppies. These were not enough to avoid infringement.

This is an important lesson, and one that, in my experience, many visual artists do not understand. I have often heard, for example, about a mythical "20% rule" – the assertion that you can avoid infringement by making at least 20% changes from the original. This is not true. Infringement is not a mathematical formula. Even a quantitatively small amount of copying can be infringement if it copies a qualitatively important part of the original work.

Lesson 3: Rogers v. Koons and United Features Syndicate v. Koons—Parody isn't always fair use

United Features Syndicate v. Koons

Jim Davis - "Odie"

Jeff Koons - "Wild Boy and Puppy"

United Features Syndicate v. Koons involved another one of Koons' sculptures for The Banality Show, "Wild Boy and Puppy." This sculpture featured a large, three-dimensional version of "Odie" from the Garfield comic strip, combined with the figure of a "wild boy" and a bumblebee. Koons did not remember where he got the Odie image, but he admitted providing a two-dimensional clipping of Odie to the Italian artisans, along with instructions to copy it as closely as possible.

The court found that the plaintiff had a valid copyright in Odie and that Koons' sculpture "Wild Boy and Puppy" copied its artistic expression (again, additional elements

did not avoid infringement.) Then, as in the Rogers v. Koons case, the court turned to Koons' asserted fair use defense.

The fair use defense is evaluated by considering at least 4 factors. SeeLegalities 5. Both cases discussed all of those factors. However, for the purposes of this discussion I will focus on the parody issue, which falls under the first fair use factor: the "purpose and character" of the defendant's use. In both cases, Koons claimed that he was using the underlying images to comment on contemporary kitsch culture. In keeping with his theme for The Banality Show – the banality of everyday objects—Koons argued that the "String of Puppies" sculpture was a satire or parody of society at large which showed that mass production of commodities and images had led to a deterioration of the quality of society. Similarly, in "Wild Boy and Puppy," "Odie" was used to symbolize the cynical and empty nature of society. Koons explained that he was using the Odie image as an object of modern mass culture to emphasize that modern culture has become dangerously empty and cynical. Koons also relied on the history of appropriation art and his standing within that genre to support these explanations.

The court opinions in both cases emphatically rejected these rationales as grounds for a parody defense. They repeated the controlling doctrine of prior cases that, while it is fine for a satirical work to mock modern society, the original work must also be, at least in part, an object of the parody. Applying this rule, the courts made a legal distinction between "parody" as a critique of a specific work, and a more general concept of "satire." The court in *Rogers* found that "even given that 'String of Puppies' is a satirical critique of our materialistic society, it is difficult to discern any parody of the photograph 'Puppies' itself." The court noted that viewers would not be aware of the original "Puppies" photograph, stating: "If an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer's claim to a higher or different artistic use-without insuring public awareness of the original work-there would be no practicable boundary to the fair use defense. Koons' claim that his infringement of Rogers' work is fair use solely because he is acting within an artistic tradition of commenting upon the commonplace thus cannot be accepted."

In the *Odie* case, the "Wild Boy and Puppy" sculpture also did not qualify as a parody because, "the sculpture is, at best, a parody of society at large, rather than a parody of the copyrighted 'Odie' character." Odie, of course, is a famously recognizable character, so the rationale for rejecting the parody defense for "String of Puppies" did not necessarily apply. However, Koons had admitted that "Wild Boy and Puppy" sculpture was not intended to be a parody of the comic strip character "Odie." Indeed Koons had testified that he was not even aware of the identity of the "Puppy" when he chose it as a source for his sculpture. Koons also conceded that he could have used other figures to make the same point. The court said this made it obvious that the sculpture cannot be a comment, criticism, or parody directed at "Odie" specifically. Thus, the parody defense failed in this case as well.

The take-away lesson from these parody rulings is this: if you use someone else's artwork

for parody, make sure your work makes an obvious and specific comment on that underlying original work. The courts are not good at understanding subtle artistic messages.

However, the most recent Koons litigation offers a broader theory for protecting satirical art as fair use. Rather than parody, such works may be considered "transformative."

Lesson 4: Blanch v. Koons – Appropriation art may be protected as "transformative"

Blanch v. Koons

Andrea Blanch - "Silk Sandals by Gucci"

Jeff Koons - "Niagara"

Last year, yet another infringement lawsuit was filed against Jeff Koons. This time, Koons prevailed: his work was found to be fair use. In *Blanch v. Koons*, fashion photographer Andrea Blanch sued Koons for his copying of part of her photograph, "Silk Sandals by Gucci" in his painting called "Niagara." "Niagara" was part of a series of seven billboard-sized paintings for a Koons show called "Easyfun-Ethereal." To create the "Easyfun-Ethereal" paintings, Koons culled images from advertisements or his own photographs, scanned them into a computer, then cropped, arranged, and digitally superimposed the

scanned images against backgrounds of pastoral landscapes. He then printed color images of the resulting collages for his assistants to use as templates for applying paint to the canvases. The "Niagara" collage used a clipping of Blanch's "Silk Sandals" from Allure magazine.

The courts focused on the first fair use factor: "the purpose and character" of Koons' work. This time, Koons did not argue that his painting "Niagara" was parody. Rather, he argued that the purpose and character of the work was "transformative."

The test for whether a work is "transformative" is whether it "merely supersedes the objects of the original creation, or instead uses the original work as "raw material," and "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." Koons argued that his painting had a completely different purpose and character from Blanch's fashion photograph. Blanch said she wanted her photograph to have an erotic character. In contrast, Koons said he wanted the viewer "to think about his/her personal experience with these objects, products, and images and at the same time gain new insight into how these affect our lives." The court was persuaded that Koons used Blanch's image as fodder for his commentary on the social and aesthetic consequences of mass media. Thus, the "Niagara"painting qualified as transformative.

It was important that Koons did not argue merely that Blanch's work is a photograph while his was a painting, or that Blanch's photograph was in a fashion magazine while Koons' painting was displayed in museums. Such arguments would not be persuasive. As the court said, "we have declined to find a transformative use when the defendant has done no more than find a new way to exploit the creative virtues of the original work." Koons did not just repackage Blanch's "Silk Sandals," but rather used it "'in the creation of new information, new aesthetics, new insights and understandings."

How is the *Blanch* decision consistent with the *Rogers* and *Odie*decisions? I believe there are two basic reasons *Blanch v. Koons* was decided in Koons' favor.

First, this case was not presented as a matter of parody. The court was persuaded that instead of a "parody," "Niagara" was better characterized as a more general "satire": "its message appears to target the genre of which 'Silk Sandals' is typical, rather than the individual photograph itself." Under the line of cases that deal with "transformative" fair use, the question then became not whether Koons was commenting specifically on Blanch's work, but whether Koons had sufficient "justification" for using Blanch's particular work to achieve his transformative or satirical purpose. Koons articulated his justification for using Blanch's photograph as follows:

"The ubiquity of the photograph is central to my message. The photograph is typical of a certain style of mass communication. Images almost identical to them can be found in almost any glossy magazine, as well as in other media. To me, the legs depicted in the Allure photograph are a fact in the world, something that everyone experiences constantly; they are not anyone's legs in particular. By using a fragment of the Allure

photograph in my painting, I thus comment upon the culture and attitudes promoted and embodied in Allure Magazine. By using an existing image, I also ensure a certain authenticity or veracity that enhances my commentary—it is the difference between quoting and paraphrasing—and ensure that the viewer will understand what I am referring to."

The court accepted this explanation, even though it was very similar to the reasons Koons had given for using "Puppies" and "Odie" in the previous cases. But in this "transformative use" context, the court gave the explanation much more deference.

Another important consideration was the third fair use factor: "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." Under this factor, the court asked whether Koons copied "Silk Sandals" excessively, or whether his use was "reasonable in relation to the purpose of the copying."

The court decided that Koons' copying of "Silk Sandals" was indeed reasonable when viewed in light of his stated purpose. Koons' choice to extract the legs, feet, and sandals from the background of "Silk Sandals" was critical. Blanch had testified that the background reflected her key creative decisions in the shoot: the choice of an airplane cabin as a setting and her placement of the female model's legs on the male model's lap. Thus, Koons had not taken the creative heart of her work, and he had used only what was necessary to achieve his own creative purpose—the typical glossy magazine depiction of women's legs—to exemplify a certain style of mass communication.

Thus, unlike the "String of Puppies" and "Wild Boy and Puppy" sculptures, the "Niagara" painting did not copy the plaintiff's entire work. Also, "Niagara" was essentially a collage—it combined the legs from "Silk Sandals" with several other image fragments. "Wild Boy and Puppy" also combined several figures, but apparently that work was defended only as a parody. Perhaps Koons subsequently learned that transformative fair use is a better defense for appropriation artworks. Or perhaps his multiple litigations have ultimately helped the courts to better appreciate the creative purpose of satirical art in our culture.

Lesson 5: Have a clearly articulated and appropriate "fair use" rationale for using someone else's work

Despite the positive ruling for Koons in the Blanch case, visual artists need to be very cautious about incorporating someone else's images into their own work. Graphic artists should be particularly careful, because the parody and transformative fair use defenses are less likely to prevail when the art was created for commercial, rather than "fine art" purposes. (It wouldn't be very persuasive to argue that your image is a comment on the banality of mass media if it is part of an advertising campaign for shoes.) If you absolutely cannot do your work without copying someone else's image, consider asking permission from the copyright owner. Or, seek guidance from a copyright attorney to ensure that you have a solid basis for claiming fair use.