December 2007

Cases of Note -- Kitschy, Kitschy Koons or The Big Banality Boondoggle

Bruce Strauch

The Citadel, strauchb@citadel.edu

Follow this and additional works at: https://docs.lib.purdue.edu/atg

Part of the Library and Information Science Commons

Recommended Citation

Strauch, Bruce (2007) "Cases of Note -- Kitschy, Kitschy Koons or The Big Banality Boondoggle," Against the Grain: Vol. 19: Iss. 6, Article 20.
DOI: https://doi.org/10.7771/2380-176X.5333

This document has been made available through Purdue e-Pubs, a service of the Purdue University Libraries. Please contact epubs@purdue.edu for additional information.
Undeterred, Jeff Soldiers On


In Volume 19-3, your much lauded legal seer found evidence via the 7th Circuit holding in Perfect 10 v. Google that Google Book would be able to continue its merry way digitizing books including those under copyright. And now further evidence appears, this time from the 2nd Circuit.

Deutsche is Deutsche Bank AG, a German corporation and Guggenheim is ... well you know what that is.

But you may not be aware that New York does not have a lock on Guggenheim museums. There’s also one in Berlin and Bilbao, Spain.

Deutsche commissioned a collage by the artist Jeff Koons, said collage later being displayed at the Guggenheim where it was spotted by alert plaintiff Andrea Blanch.

Jeff Koons, York, Pa.’s most famous son, is an artist known for the celebration of kitsch culture. He incorporates images from pop culture and consumer advertising into his pictures. This is called “neo-Pop art” or when Jeff is being sued, “appropriation art.” This is to say that his sculptures and paintings frequently contain recognizable toys, celebrities and iconic cartoon figures.

If you hit Jeff Koons on the net you’ll see a Pink Panther. And then there’s the ... well ... sexual intercourse sculptures he did with his then wife Ilona Stallar, Italian porno starlet who performs under the name “Ciccolina” and for a time was a member of the Italian parliament. Which would certainly seem to qualify her as a celebrity.


Andrea sued, and the district court granted summary judgment to the defendants on the theory of fair use. It went up on appeal to the Second Circuit, which as you know is New York where they presumably have a firm grip on all that copyright stuff.

The court leads off with a Judge Leval quote that the monopoly protection for the individual author is all very well, but “excessively broad protection would stifle, rather than advance, the[law’s] objective.” Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1108 (1990) (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 545-46 (1985)).

Fair Use was codified in the Copyright Act of 1976 with the oh-too familiar four non-exclusive factors. The U.S. Supreme Court has warned that fair use determination has no bright-line rules and the four factors “thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses.” Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577-78 (1994).

So let’s plunge into those factors.

Purpose and Character of the Use

1. First, there’s the transformative issue. Does it supersede the original creation or add something new? Id. 510 U.S. at 579.

It’s not transformative merely because one was a photo and the other a painting or one for a magazine and the other for a museum. See Castle Rock Entm’t Inc. v. Carol Pub’g Group, Inc., 150 F.3d 132, 142-43 (2d Cir. 1998) (“Seinfeld Aptitude Test” quiz book not transformative when purpose was “to repackage [the TV show] Seinfeld to entice Seinfeld viewers”); Ringgold v. Black Entm’t Television, Inc., 126 F.3d 70, 79 (2d Cir. 12997) (copy of plaintiff’s painting used as decoration for a TV program’s set not transformative because it was used for “the same decorative purpose” as the original).

But Koons’ work was indeed transforma-

Can Jeff Get By With This?

Copyright – Fair Use

Column Editor: Bruce Strauch (The Citadel) <strauchb@citadel.edu>
tive. His objective was not to repackaged “Silk Stockings” but to employ it. “I want 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.” Koons Aff. at P4.

While Blanch “wanted to show some sort of erotic sense … to get … more of a sexuality to the photographs.” Blanch Dep. At 112-13.

Which if you can follow that seems to say that Blanch was creating mass media and Koons was commenting on the aesthetic consequences of said media. Hence, Koons wins on the transformative issue.

2. Is it for commerce or for nonprofit educational purposes? 17 U.S.C. § 107(1). Well, Jeff is pretty much into commerce, no matter how you dress it up in ArtSpeak.

American Geophysical Union v. Texaco, 60 F.3d 913 (2d Cir. 1994) dealt with commercial exploitation via photocopying which was not transformative. But Campbell held that commercial use in itself is only a subfactor, and the more transformative, the less commerce will hold weight. Campbell, 510 U.S. at 584.

Koons’ work was not a market replacement for “Silk Stockings.” Koon’s take-home loot did not exclude the broader public benefits of art.

3. Parody and satire justify copying, which was the whole Campbell issue. In satire, “prevalent follies or vices are assailed with ridicule.” 14 Oxford English Dictionary, at 500. If Koons is satirizing anything, it’s the genre of the photo and not the photo itself.

“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 viewers will understand what I am referring to.” Koons Aff. at p.12.

So where are we? “Niagara” is transformative. It’s not truly commercial exploitation, and commerciality is not dispositive anyhow. So Koons wins this one.

Nature of the Copyrighted Work
Expressive or creative works are closer to the core of what copyright law intended to protect than factual works.

Which isn’t to say that non-fiction isn’t protected. It’s just got a whole bunch of facts between two covers, and only the expressive part is protected.

The district court had called “Silk Sandals” “banal rather than creative.”

As opposed to Koons’ ... well, whatever it is he did.

The appeals court disagreed with that, but it doesn’t matter when a creative work is transformed into another creative one.

Amount and Substantiality of the Portion Used
Are the quantity, quality and value of the portion used “reasonable in relation to the purpose of copying”? Campbell, 510 U.S. 586.

Koons has explained his reasons for using preexisting images vis-à-vis his artistic goals. Did he do it excessively? Did he go beyond his justified purpose?

Of importance to Blanch was the first-class airplane cabin and laying the legs across those of a presumed high-roller Alpha-male who paid for the tickets. Koons trimmed all that out, leaving this issue in his favor. But the court says this is not a heavy factor in their final decision.

Which you are breathlessly awaiting. So get to the point, Strauch.

Questions & Answers — Copyright Column

Column Editor: Laura N. Gasaway (Associate Dean for Academic Affairs, University of North Carolina-Chapel Hill School of Law, Chapel Hill, NC 27599; Phone: 919-962-2295; Fax: 919-962-1193) <laura_gasaway@unc.edu>

www.unc.edu/~unclng/gasaway.htm

QUESTION: If an educational institution sponsors a conference with speakers, educational materials and handouts, should the institution ask presenters and speakers to confirm that they are the sole authors of any conference materials or, if not, that they have obtained copyright permission from the owner to distribute their works at the conference? Should speakers be asked for permission to copy their presentations and materials onto a CD for distribution to conference participants or for posting on a Website?

ANSWER: It certainly is a good idea to ask speakers to sign a speakers’ agreement asking them to certify that the material included in handouts, slides, etc., is their own work, or if the speaker has used other people’s works that he or she has permission to distribute it at the conference. This is especially important if the distribution will go beyond the attendees, for example, if the conference proceedings will be published or posted online with the handout material included.

Some institutions ask for a list of materials that speakers want to use and actually seek permission themselves rather than relying on the speaker to have obtained appropriate permissions.

Any planned distribution of speakers’ original conference materials should be listed in the speakers’ agreement. Some speakers will give permission for distribution in handouts but not for any electronic distribution whether on CD or on a Website.

QUESTION: A university produces a series of materials and it owns the copyright for these materials. Later there is litigation (not over the copyright) but in which the defense attorney asks for copies of the material. Must the university comply with the court order?

ANSWER: An institution must comply with a court order or it is guilty of contempt of court. Sometimes legal counsel may challenge the validity of a court order, but absent that, there is no wiggle room on compliance.

QUESTION: A hospital is considering posting on its intranet four articles in PDF format. The library does not have an institutional subscription to the journals either in print or in electronic format. Further, no copyright royalties have been paid or even contemplated for intranet posting. What alternatives does an institution have to be able to post the articles on the intranet without infringing copyright?

ANSWER: The first step is to check to make sure that there is no institutional license through services such as EBSCOHost and or...