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When Art and Fashion Collide: Is It Art Or Infringement?

Enforcing Intellectual Property Rights In Light
of The Growing Confluence of Art and
Fashion

Presented By
Theodore C. Max
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Appropriation: Then and Now

- Appropriation in art history and criticism refers to the direct taking of a real object or even an existing work of art into another work of art.
- The practice originated with the Cubist collages of Picasso (e.g., Glass and Bottle of Suze) and Braque in which real objects were included as part of the artwork itself.



Marcel Duchamp



- Marcel Duchamp's iconic work entitled "Fountain" -- a men's urinal marked with the inscription "R. Mutt 1917" and placed upon a pedestal -- was an early example of "readymade" appropriation.
- This artistic movement continues today. The ability to instantaneously copy electronically on the Internet and with a scanner has altered the relationship between art and commerce for decades to come. These technological changes also have revolutionized fashion.

Surrealism and Appropriation

- Salvador Dali's Lobster Telephone is another use of appropriation as part of Surrealism.



Johns and Rauschenberg

- In the 1950s, Pop Art featured appropriated images and objects as in this untitled work by Rauschenberg from 1955.



Andy Warhol



- Andy Warhol is perhaps one of the most famous Pop Artists who utilized appropriation of popular images, including trademarks, copyrights and celebrity personae to create works of art that have become famous.

Jeff Koons: Neo-Geo

- Jeff Koons is one of the Neo-Geometric Conceptualists, who employed a variety of styles and media in moving appropriation forward but were linked by the fact that their paintings, sculpture, or other products were predominantly cool and impersonal, a response to the emotionalism of Neo-Expressionism. His Three Ball Total Equilibrium Tank (Two Dr J Silver Series, Spalding NBA Tip-Off) appears to the right.
- Koons's artwork has been the subject of several legal actions, which decisions help explain and underscore the conflict between appropriation as an artistic movement and intellectual property law.



Appropriating Appropriation



- Banksy's artistic rendition of Kate Moss pays homage to Andy Warhol's rendition of Marilyn Monroe
- Sherrie Levine's gold-plated urinal pays homage to Duchamp's "Fountain"

Intellectual Property Protection: Key Terms and Concepts

- **Copyright:** Title 17 of the United States Code protects against unauthorized copying, distribution, and/or sale of “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”
- **Trademark:** A trademark is a word, symbol, design or expression used to identify the creator of an article. Trademarks are protected from misappropriation under both statute and common law. The Lanham Act protects against the unauthorized use of someone else’s trademark. To ensure protection under the law, trademarks should be registered with the United States Patent and Trademark Office.

Intellectual Property Protection: Key Terms and Concepts

- Moral Rights: Pursuant to 17 U.S.C. § 106A, the author of a work of visual art is protected against:
 - Intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and
 - Intentional or grossly negligent destruction of a work of recognized stature.
- The following modifications of a work of art do not violate 17 U.S.C. § 106A:
 - The passage of time or the inherent nature of materials,
 - Conservation efforts
 - Public presentation, including lighting and placement

Intellectual Property Protection: Key Terms and Concepts

Infringement:

- (a) **Copyright:** Must show ownership of valid copyright and that defendant had access to the work and substantial similarity between the works;
- (b) **Trademark:** Must demonstrate mark is inherently distinctive or has secondary meaning and likelihood of confusion. Factors: (a) strength of the mark; (b) degree of similarity between marks; (c) proximity of the products; (d) likelihood that senior user will bridge the gap between the goods; (e) actual confusion; (f) junior user's bad faith; (g) quality of the junior user's product; and (h) sophistication of the relevant consumers.

Counterfeiting:

- (a) **Copyright:** Copying and distributing/selling a copyrightable work without authorization from the copyright owner.
- (b) **Trademark:** Distributing/selling goods bearing trademarks or trade dress that are identical or substantially indistinguishable from a registered trade dress or trademark.

Intellectual Property Protection: Key Terms and Concepts

Trademark Dilution:

- **Dilution by Blurring:** An “association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark.” 15 U.S.C. §1125(c)(2). In determining whether a mark or trade name is likely to cause dilution by blurring, the court may consider all relevant factors, including the following:
 - (i) The degree of similarity between the mark or trade name and the famous mark;
 - (ii) The degree of inherent or acquired distinctiveness of the famous mark;
 - (iii) The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark;
 - (iv) The degree of recognition of the famous mark;
 - (v) Whether the user of the mark or trade name intended to create an association with the famous mark; and
 - (vi) Any actual association between the mark or trade name and the famous mark.
- **Dilution by Tarnishment:** An “association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.” 15 U.S.C. §1125(c)(2).

Intellectual Property Protection: Key Terms and Concepts

- **Fair Use as a Defense To Copyright Infringement (17 U.S.C. Section 107):**
 - Criticism, comment, news reporting, teaching, scholarship, or research
 - Factors courts must consider:
 - The purpose and character of the use (*i.e.*, is the use of a commercial nature or for nonprofit educational purposes? Is the use transformative?);
 - The nature of the copyrighted work;
 - The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - The effect of the use upon the potential market for or value of the copyrighted work.
- **Fair Use as a Defense to Trademark Infringement:**
 - Descriptive and nominative use of the trademark (Only makes limited use of trademark); and
 - Parody

Intellectual Property Protection: Key Terms and Concepts

Transformative Use: Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003).

- Photographer Thomas Forsythe developed a photograph series entitled “Food Chain Barbie,” which depicted Barbie in various absurd and often sexualized positions. Forsythe used the word “Barbie” in several of his works.
- The photographer stated his work attempted to “critique [] the objectification of women associated with [Barbie],” and to “lambast [] the conventional beauty myth and the societal acceptance of women as objects because this is what Barbie embodies.”
- Forsythe’s use of the Barbie constituted fair use as it was transformative: “A work must ‘add something new, with a further purpose or different character, altering the first with new expression, meaning, or message.’”
- The Ninth Circuit stated that “when marks ‘transcend their identifying purpose’ and ‘enter public discourse and become an integral part of our vocabulary,’ they ‘assume[] a role outside the bounds of trademark law.’ Where a mark assumes such cultural significance, first amendment protections come into play: ‘[T]he trademark owner does not have the right to control public discourse whenever the public imbues his mark with a meaning beyond its source-identifying function.’”



Jeff Koons: Litigation as an Art Form



- Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992). Changing medium from photograph to sculpture does not constitute transformative use.
- The Second Circuit had no trouble holding that Rogers' photograph of two persons holding puppies qualified as copyrighted subject matter because photographs reflect artistic choices, including posing, lighting, perspective, and composition.
- To be successful, the parody defense must be directed at subject matter specifically:
"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."

Jeff Koons: Litigation as an Art Form

- United Feature Syndicate v. Koons, 817 F. Supp. 370 (S.D.N.Y. 1993): Parody is not a defense where it is parody of society instead of parody of copyrighted work.
- The “Wild Boy and Puppy” sculpture 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, but Koons 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. As a result, the parody defense was not successful.



Jim Davis - "Odie"



Jeff Koons - "Wild Boy and Puppy"

Jeff Koons: Litigation as an Art Form



- Campbell v. Koons, No. 91 Civ. 6055 (RO), 1993 WL 98381 (S.D.N.Y. 1993). “Fair use may not be found in cases where there has been extensive verbatim copying . . . of another’s material.”
- Koons had his artisans create a sculpture replicating Barbara Campbell’s photograph of boy pushing a pig without obtaining Campbell’s permission.
- The Court held in favor of the plaintiff, finding that Koons’s infringement was willful and went to the “heart” of the photograph.

Jeff Koons: Litigation as an Art Form

- Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006): Courts will not 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.”
- Although “Silk Sandals” from *Allure* depicts a woman’s lower legs and feet, with nail polish and Gucci sandals resting on a man’s lap within the space of an airplane cabin, Koons only appropriated the legs and feet from the photograph and omitted the airplane context and the man’s lap.
- Koons also inverted the orientation of the legs so that they dangled vertically downward rather than upward at an angle. Koons also added other feet and modified the color of the photograph and added a heel to one of the feet.
- The Court found that “Niagara” passed the transformative test “almost perfectly” because Koons changed the “colors, background against which it is portrayed, the medium, the size of the objects pictured, their details.”
- It was “crucial” to the Court’s decision that Koons’s painting had an “entirely different purpose and meaning – as part of a massive painting commissioned for exhibition in a German art-gallery space.”



Andrea Blanch - “Silk Sandals by Gucci”



Jeff Koons - “Niagara”

Jeff Koons: Are Balloon Dogs Protectable?

- On December 20, 2011, Koons sent a cease and desist letter to a San Francisco gallery owner selling balloon dog book ends similar to Koon's sculpture.
- The cease and desist letter prompted the Gallery Owner to file an action for declaratory judgment that the book ends do not constitute infringement of Koons's intellectual property.
- "As virtually any clown can attest, no one owns the idea of making a balloon dog, and the shape created by twisting a balloon into a dog-like form is part of the public domain. . . . Any similarities between the Balloon Dog Bookend compared with the Balloon Dog Structure are driven by the wholly unprotectable idea of depicting the shape of a balloon dog in a solid form."



Fairey et al. v. The Associated Press

- Fairey et al. v. The Associated Press, No. 1:09-cv-01123 (S.D.N.Y. 2010).
- Shepard Fairey created an illustration of President Obama, called “Hope,” based on an AP news photograph. Obey Clothing, a t-shirt company, sold t-shirts bearing the “Hope” image.
- The Associated Press brought suit against Fairey, Fairey’s company Obey Giant Art, Inc., and Obey Company. Fairey has since settled the copyright infringement claim against him, but the claims are still pending as against the two companies.
- Judge Alvin K. Hellerstein in the Southern District of New York ruled that trial on copyright infringement would proceed without a fair use defense, finding that the illustration was “exploitation of the image.”



How Does One Draw the Line?

A Gallery of Problematic Artists

- A review of both art and fashion make plain that the challenges facing an artist or designer when vetting designs or creations can be vexing.
- How does one deal with dilution by blurring or tarnishment? Is it social commentary? Where does one draw the line?
- By taking action, is it better for the brand owner to stop the infringement or hope it will die and go away?
- If the goal of the artist is readymade appropriation, then how can it be transformative?

Wim Delvoye



- Belgian artist Wim Delvoye caused a tremendous stir in the art and trademark world when he tattooed pigs with Walt Disney characters and other famous registered marks such as Chanel and Louis Vuitton.
- The pigs formed part of an exhibit called “Art Farm,” and were ultimately banned from the Shanghai Contemporary Art Fair in September of 2008 because live animals were not permitted as part of the exhibition.

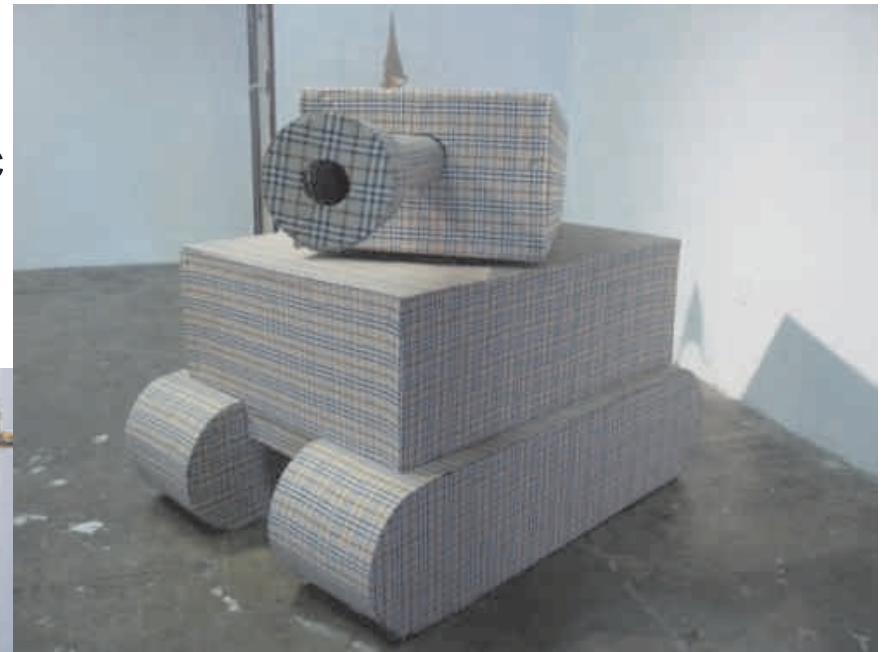
Mike Leavitt

- In 2009, the artist Mike Leavitt took trademark misappropriation to the third dimension with these cardboard copies of Puma, Converse and Crocs shoes.



Peter Gronquist

Gronquist is known for implementing trademark logos and prints into artistic renditions of deadly weapons and instruments of warfare.



Kristofer Paeteau



These accessories not only appropriate the Chanel trademark, but they do so with the help of a few rodents.

Appropriation knows no bounds.



Diddo Velema

- The artist explains: “Fear stems from our extreme desire for authenticity and manifests itself in our collectively insatiable culture of consumption.”

Banksy and Disney



Other Examples of the Influence of Fashion On Art

“Mao Jordan” Print



ZEVS' “Liquidated Logos”



Laura Keeble's Chanel Gravestone

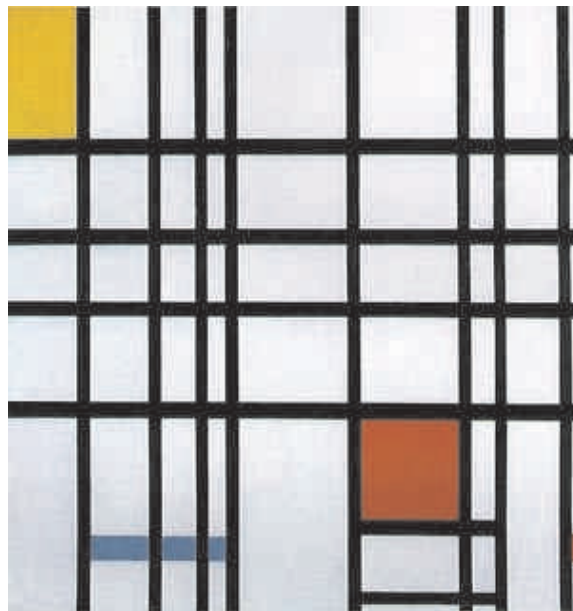


Does Fashion Imitate Art?

- Fashion is largely inspired by art – is there a risk of artists suing fashion designers?
- What is the difference between inspiration and infringement?
- What steps should a designer take to protect against lawsuits?

Does Fashion Imitate Art?

- Yves Saint Laurent, Christian Louboutin and Nike have all been influenced by Piet Mondrian:

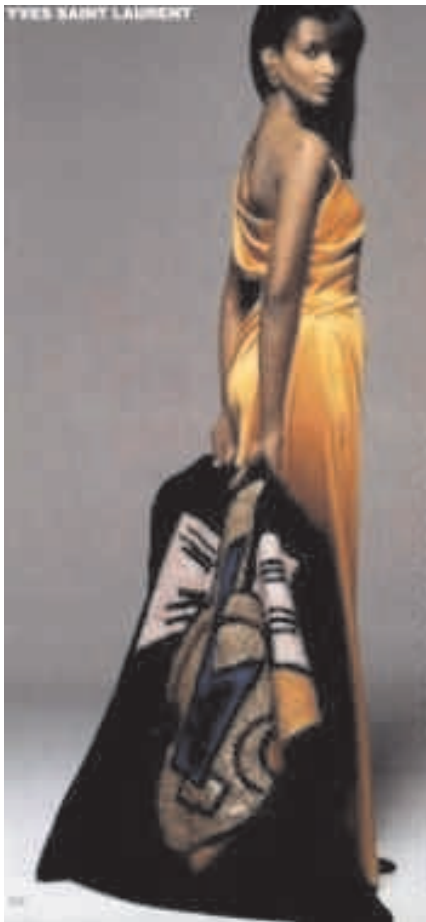


Does Fashion Imitate Art?

- Gianni Versace designed this gown in 1991, inspired by - and appropriating - iconic Andy Warhol works of art.



Does Fashion Imitate Art?



- Yves Saint Laurent was inspired by cubism and Vincent Van Gogh.

Does Fashion Imitate Art?

- Christian Cota was influenced by Surrealism:



Relevant Case Law

Cases Concerning Copyright Infringement:

- Campbell v. Acuff Rose Music, Inc., 510 U.S. 569 (1994).
- Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).
- Hoepker v. Kruger, 200 F. Supp. 2d 340 (S.D.N.Y. 2002).
- Sandoval v. New Line Cinema Corp., 147 F.3d 215 (2d Cir. 1998).
- United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370 (S.D.N.Y. 1993).
- Franklin Mint Corporation v. National Wildlife Art Exchange, Inc., 575 F.2d 62 (3d Cir. 1978).
- Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).

Cases Concerning Trademark Infringement :

- Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC, 221 F.Supp.2d 410 (S.D.N.Y. 2002).
- Mattel, Inc. v. MCA Records, Inc., 28 F. Supp. 2d 1120 (C.D. Cal. 1998).
- Schieffelin & Co. v. Jack Company of Boca, Inc., 850 F.Supp. 232 (S.D.N.Y. 1994).

Cases Concerning Both Copyright and Trademark Infringement

- Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252 (4th Cir. 2007).
- Mattel Inc. v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003).
- Dr. Seuss Enterprise, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997).