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## **Copyright, the paternity of artistic works and the challenge posed by postmodern artists**

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*This paper is about the way that copyright constructs the relationship between artist and art-work. It is argued that copyright moves from distinctions between art, industry and home to a more fundamental one between mechanical reproduction and familial reproduction. This manoeuvre allows the work to be mass reproduced without imperilling its status as original and authentic art. This claim is made out with reference to a brief historical discussion of the origins of romantic authorship and with reference to case law. The broader consequences of this construction are discussed with reference to the work of two postmodern artists- Sherrie Levine and Jeff Koons. These artists' works controversialise what is taken to be "art" and protected by copyright, with a view to publicising the voices excluded in the modernist vision. It remains to be seen whether copyright is equipped to comprehend the full implications of this challenge.*

The dominant conception of art utilised by the courts is based upon a romantic property right whereby an artistic work is perceived as the natural embodiment of imagination, projecting the personality of its creator. Copyright protects and maintains the original, intimate connection between a work and an author. It determines the significance and essence of a work with reference to its genesis, rather than with reference to its location, function or circulation in the social world. Copyright insists that we pay homage to the forebear of a work before we can interact with it, albeit in the form of a licence to use the work and payment for that privilege.

This paper explores how artistic works came to be valued for their paternity and looks at how copyright is essential to that construction. The paper argues that if patriarchy is understood as the rule of the father, a centralised authority that defines all others with reference to himself, the relationship between the modern artist and the artwork is an exemplary patriarchal creation.<sup>1</sup> The modern artist purports to (re)produce by himself, the legitimate artistic birth being segregated from and elevated above illegitimate creations, which includes both father-less commodities and the products of women's labour, by the copyright regime. Copyright suggests that these products, that lack an assertion of ingenious activity by a male progenitor, are value-less. It appeals to a rigid separation between the "public" space of art and the "private" realms of industry and the home.

When dealing with particular instances of copyright "infringement" however these distinctions take on a new light. Out of concern to protect the economic value of the reproductive right in works the courts appear to collapse the

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<sup>1</sup>It is to underline this point that the male pronoun is often used for the modern artist in this article.

distinction between art and industry. They protect the mass reproduction of the unique with little appreciation of the apparent double-take this involves. But this protection only serves to reinforce the status of the “other” private realm- the production and reproduction of the art work is protected so that he can provide for the home and those who “naturally” reside there. Accordingly women’s reproductive work is what is ultimately rendered value-less by copyright, not the masculinist (re)production embodied in the multiple art work.

These claims will be fleshed out with reference to three cases, *Hanfstaengl v. Baines & Co.*,<sup>2</sup> which considers what it means to “own” a work of art and thereby erect limits to another’s access and use of it; *Walter v. Lane*<sup>3</sup> which considers copyright’s need for originality in order to attribute ownership a work, and where, in the absence of imaginative work, scribal labour was fictionalised as art in order to justify copyright protection of the work; and *Merlet v. Mothercare Plc*<sup>4</sup> which considers the mutual exclusivity of the distinction between art and commodities, and women’s work.

Having established this context I will then consider the way this impacts upon the work of artists, in particular the work of Sherrie Levine and Jeff Koons. Both these artists confront the modernist conception of art, Levine from a feminist position, Koons as a critic of the distinction between art and commodity culture. In doing so their works challenge the distinctions that underlie artistic copyright and provide a critique of it. Further, their artistic practices interrogate, stretch and reinvent the distinctions between art, industry and home and in this context their works help define or identify wider structural transformations in our social, economic and political context.

What is of particular interest here is the way the artists feel that current conceptions of copyright constrain and resist the development of critical artistic practices. To the extent that the law is successful in this role it is complicit in maintaining a function for art that is of questionable contemporary relevance. This underscores the need for law to acknowledge its foundational role in structuring and interacting with social relations and to acknowledge the need for sensitivity to changes in how people perceive, interrogate, and use/abuse artistic works. The legal system cannot generate respect for copyright law by simply resisting, redefining or ignoring changes in the function of art. Copyright law must be responsive to the broader context of these challenges.

### **The importance of the paternity of artistic works**

Whether art was perceived with its basis in ritual<sup>5</sup> or as a reflector of external objects,<sup>6</sup> from Ancient Greece up until the eighteenth century the personage of the artist was, if it mattered at all, but one measure of the value or function of the work of art-

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<sup>2</sup>*Hanfstaengl v. Baines & Co.* [1895] A.C. 20.

<sup>3</sup>*Walter v. Lane* [1899] 2 Ch 749; [1900] A.C. 539.

<sup>4</sup>*Merlet v. Mothercare Plc* (1984) 2 IPR 456.

<sup>5</sup>see W. Benjamin, “The Work of Art in the Age of Mechanical Reproduction”, in *Illuminations*, edited by H. Arendt, (New York: Schocken Books, 1969).

<sup>6</sup>see M.H. Abrams, *The Mirror and the Lamp: Romantic Theory and the Critical Tradition*, (London: Oxford University Press, 1971).

At its core . . . their conception of the public for art was a political one. The very term vision was used in these aesthetic texts in a way that was directly analogous to the 'vision' exercised by the ideal citizen of the commonwealth. Vision in this sense meant to see beyond particular, local contingencies and merely individual interests. . . . a gaze that consistently registered what united rather than what divided the members of the political community was a requirement for participation in public affairs.<sup>7</sup>

Patronage was an appropriate source of funding for the arts to the extent that it guaranteed the production of "good works". As an object of representation the artwork signified the virtue of its patron.<sup>8</sup> That it was this dimension as much as the particular skill or individual talent of the artist that was celebrated is indicated by the expectation that, at times, the artist would adapt a work out of respect for the criticism of the patron, whether or not such criticism was accepted prudentially or willingly by the artist.<sup>9</sup> The value of the work depended upon a public or social reading of its authenticity and authority with regard to its historical testimony. The "greatness" attributed to the artist was based in respect for his/her ability to cipher, record and reflect the spirit of the age.<sup>10</sup> In that sense the artist's role was perceived as an agency in the creation of meaning, rather than as a form of personal commentary upon it.

The printing press was one development that led to a reappraisal of the value and function of cultural works. The ascendancy of the literary work, its reproducibility and mass distribution unsettled established cultural domains. One instance to which it contributed was the relocation of public discourse about "art", in the broader sense of the term, from the court to the coffee houses and salons. As the distribution system for literature became more efficient, a growing and prosperous commercial leisure market was established. The novel, magazine and part books became increasingly important, providing regular income for publishers, booksellers and writers. Gradually the writer's audience became middle-class.<sup>11</sup>

Habermas claims that at this time there "began to emerge, between aristocratic society and bourgeois intellectuals, a certain parity of the educated."<sup>12</sup> But this

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<sup>7</sup>T. Crow, "The Birth and Death of the Viewer", in *Discussions in Contemporary Culture. Number One*, edited by H. Foster, (Seattle: Bay Press, 1987) at 3.

<sup>8</sup>"For example, most statues adorned tombs, from which they peered out over the churches where communities gathered to worship, as visible reminders of the illustrious forebears of leading local families. Similarly, people bought portraits . . . partly to add splashes of color to the long galleries of country houses, but primarily to commemorate themselves, their relatives, friends, ancestors, and patrons." in R. M. Smuts, *Court Culture and the Origins of a Royalist Tradition in Early Stuart England*, (Philadelphia: University of Pennsylvania Press, 1987) at 140.

<sup>9</sup>For an interesting comparison of the freedom of the artist under a system of patronage with the freedom offered by a marketplace see R. Williams, *Culture and Society 1780-1950*, (Middlesex: Penguin Books, 1971) at 50.

<sup>10</sup>For a brief discussion of the intellectual claims of the artist and his/her struggle to be recognised as possessing more than mere manual skill, see R. Parker & G. Pollock, "God's Little Artist", from their book *Old Mistresses. Women, Art and Ideology*, (London: Routledge & Kegan Paul, 1981).

<sup>11</sup>see J. Feather, *A History of British Publishing* (London: Croom Helm, 1988) at Chapter 8 "The Expanding Trade" and Chapter 9 "Periodicals and Part Books".

<sup>12</sup>J. Habermas, *The Structural Transformation of the Public Sphere*, (Massachusetts: The MIT Press, 1991).

“parity” also involved a transformation in the way works were received by their public, and in the values present in such works of "art".

The authority of works continued to involve a questioning of their authenticity, however "authentic art" denoted not only the quality of reflecting history and tradition, but also indicated a source to be mass reproduced and distributed. Artists became more important, not initially as the source of authority for the meaning of works, but for more pragmatic reasons, as an essential component in the production process. Further "authentic art" came to include "traditions" and "virtues" that in previous times would have been considered irrelevant to public life and the ethical ideals of the aristocracy. The soft and hitherto private virtues of amiability, kindness and compassion were elevated to the dignity of public virtues.<sup>13</sup> In 1786 one writer observed that -

“by far the greater share of glory attends upon what are called great actions”-which are in fact “glorious to the individual alone”. . .<sup>14</sup>

That private virtues came to be considered of public significance is perhaps unsurprising in the wake of the rapid social and economic change attendant upon the development of the modern nation state. Nevertheless to some artists, the ascendancy of “subjectivity” was not viewed as an unqualified good. As the poet William Blake wrote-

The Enquiry in England is not whether a Man has Talents & Genius, But whether he is Passive & Polite & a Virtuous Ass & obedient to Noblemen’s Opinions in Art & Science. If he is, he is a Good Man. If not, he must be Starved.<sup>15</sup>

Though by the turn of the nineteenth century patronage was on the decline the alternative, the commercialisation of works, was also viewed with alarm. Adam Smith argued for a re-evaluation of the leadership role of the 'intellectual'-

In opulent and commercial societies to think or to reason comes to be, like every other employment, a particular business, which is carried on by a very few people, who furnish the public with all the thought and reason possessed by the vast multitudes that labour . . . (Knowledge was now in fact to be) purchased, in the same manner as shoes or stockings, from those whose business it is to make up and prepare for the market that particular species of goods.<sup>16</sup>

For the artist market popularity was considered a transitory and indiscriminate valuation of merit. For example Wordsworth said of it-

Away then with the senseless iteration of the word *popular* applied to new works in poetry, as if there were no test of excellence in this first of the fine arts but that all men should run after its productions, as if urged by an appetite, or constrained by a spell.<sup>17</sup>

"Art" was a form that united by transcending daily mundanity, whimsy and antagonisms. If it were to be subject to the judgement of market forces it would lose its significance altogether. As another writer of the time lamented- It has of late become so much the fashion . . . to view every thing through commercial medium, and calculate the claims of utility by the scale of *The Wealth of Nations*, that it is to be feared, the Muses and Graces will shortly be put down

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<sup>13</sup>For a discussion of this see J. Barrell, *The Political Theory of Painting from Reynolds to Hazlitt*, (New Haven: Yale U. P., 1986) at 54f.

<sup>14</sup>*The Microcosm*, No 4 (27 November 1786) as quoted in Barrell, *Ibid.*, at 55.

<sup>15</sup>W. Blake, Annotations to Reynold’s *Discourses*, as cited in M. Foss, *The Age of Patronage*, (London: Hamilton 1971) at 110.

<sup>16</sup>Smith as quoted in Williams, above, note 9 at 52.

<sup>17</sup>Williams, *Ibid.*, at 51.

as unproductive labourers, and the price current of the day considered as the only criterion of merit.<sup>18</sup>

The romantic author feared the social fragmentation and alienation inherent in the adoption of a rational, atomistic perspective of the world where human nature was expressed in the form of commodities manufactured for the marketplace. Such a view was seen as threatening the production of "significant" works. Further-

By the end of the eighteenth century, under the influence of, most notably Rousseau, the metaphor of organic growth had replaced more mechanical, rational images of the processes governing art: ignorant of, or indifferent to, rules and reasons, the artist creates by blind necessity, like Nature itself. Such a view was given added intellectual authority by Kant; against the then prevailing Enlightenment view (derived from Locke) that true knowledge is only gained empirically, via the senses, Kant asserted that knowledge is essentially innate - arising from within the individual, rather than derived from without; for Kant, *Genius* is the name given to the 'innate, productive capacity', a gift of nature, which produces art 'from within'. In a well known statement of 1800, Wordsworth writes : 'all good poetry is the spontaneous overflow of powerful feelings'.<sup>19</sup>

This is the context in which paternity becomes important as the source of meaning and value in artistic works. The classical association of art with history and tradition was rejected because through contemporary artistic practices it had become corrupt. Disdain for the relations of capitalist production meant that art was to be strictly separated from "industry" calculations. The appeal of the romantic position was that in locating the work in the natural self, meaning could be kept safe from "worldly" contamination.

Rejection of history and tradition can be seen in Coleridge's claim of a dichotomy between allegorical and symbolic meaning in art. Allegory had come to be associated with historical painting in which an image of the present was presented *in terms of* the classical past-

This relationship was expressed not only superficially, in details of costume and physiognomy, but also structurally, through a radical condensation of narrative into a single, emblematic instant -significantly, Barthes calls it a hieroglyph- in which the past, present, and future, that is, the *historical* meaning, of the depicted action might be read.<sup>20</sup>

Events were being lifted out of time and place-

Thus to Robespierre ancient Rome was a past charged with the time of the now which he blasted out of the continuum of history. The French Revolution viewed itself as Rome reincarnate. It evoked ancient Rome the way fashion evokes costumes of the past. Fashion has a flair for the topical, no matter where it stirs in the thickets of long ago; it is a tiger's leap into the past.<sup>21</sup>

To rescue art from the weight of this timeless history, it was placed outside of "history". The virtue of art came to rest in its ideological purity, in its symbolic, rather than its allegorical meaning.

Coleridge argued that-

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<sup>18</sup>Martin Archer Shee as cited in Barrell, above, note 13 at 50.

<sup>19</sup>V. Burgin, *The End of Art Theory*, (London: Macmillan, 1986) at 150.

<sup>20</sup>C. Owens, "The Allegorical Impulse: Toward a Theory of Postmodernism" in C. Owens *Beyond Recognition. Representation, Power and Culture*, edited by S. Bryson, B. Kruger, L. Tillman and J. Weinstock (Berkeley: University of California Press, 1992) at 58.

<sup>21</sup>W. Benjamin, as quoted in Owens, *Ibid.*, at 59.

The Symbolical cannot, perhaps be better defined in distinction from the Allegorical, than that it is always itself a part of that, of the whole of which it is the representative.<sup>22</sup>

The shift to symbolic meaning entailed the interpretation of the work in isolation from society and the fragmentation of meaning therein. The art work no longer had to be decoded.<sup>23</sup> The art work embodied a pure essence. It embodied- the ideal of a formally unified, centred, *concentrated* composition whose meaning could be communicated at a glance.<sup>24</sup>

Coleridge explained that

the latter (allegory) cannot be other than spoken consciously; whereas in the former (symbolism) it is very possible that the general truth represented may be working unconsciously in the writer's own mind during the construction of the symbol.<sup>25</sup>

Art lost its public dimension in the sense that a "public" reading of the work was to be distrusted and in Coleridge's terms it was actually redundant. If "the symbol is precisely that part of the whole to which it may be reduced . . . (t)he symbol does not represent essence, it *is* essence".<sup>26</sup> A "public" reading that seeks to find instances of a universal truth in a particular work is not required. The judgement would be nonsensical. In grasping the particular, the universal is implicitly understood along with it.<sup>27</sup> Further if the symbolic is constructed intuitively such "rational" deliberation would simply risk the truth of the work. As Frederic Jameson notes-

Modernism's formulation of the problem of representation . . . [was] borrowed from a religious terminology which defines representation as 'figuration', a dialectic of letter and the spirit, a 'picture language' (Vorstellung) that embodies, expresses and transmits otherwise inexpressible truths.<sup>28</sup>

The rejection of allegory involved the advocacy of a mode of representation derived from within its own pure space, and a mode of understanding radically distinct from verbalisation.<sup>29</sup> The attraction of the "self as origin" of the meaning of art made sense because it housed the potential for continual acts of regeneration-

The self as origin is safe from contamination by tradition because it possesses a kind of original naiveté.<sup>30</sup>

Although romanticism suggested a creative personality in isolation from society, the reality was that it proposed a hierarchy within society, one group that Modernism later branded as the "avant garde" of artists and their critics, and the other, the mass of producers and consumers. The avant garde continued the

<sup>22</sup>as quoted in C. Owens, "The Allegorical Impulse: Toward a Theory of Postmodernism", in Owens, *Ibid.*, at 62.

<sup>23</sup>Burgin notes that such was the complexity and obscurity of allegorism by the Rococo period that it was often felt necessary to produce extensive explanatory pamphlets along with the paintings. Burgin, above, note 19 at 115.

<sup>24</sup>Burgin, *Ibid.*

<sup>25</sup>as quoted in C. Owens, "The Allegorical Impulse: Toward a Theory of Postmodernism" in Owens, above, note 20 at 63.

<sup>26</sup>*Ibid.*, at 62.

<sup>27</sup>*Ibid.*, at 68, note 29.

<sup>28</sup>as quoted in C. Owens, "Representation, Appropriation, and Power", in Owens, above, note 20 at 110.

<sup>29</sup>V. Burgin, "The Absence of Presence", in C. Harrison & P. Wood, *Art in Theory 1900-1990*, (Oxford: Blackwell, 1992) at 1098.

<sup>30</sup>R. Krauss, *The Originality of the Avant Garde and Other Modernist Myths*, (Massachusetts: MIT Press, 1986) at 157.

tradition of constituting a public space for “art”. They presented a “superior consciousness” that “ke(pt) culture *moving* in the midst of ideological confusion and violence” through the pursuit of original, authentic or non-derivative works.<sup>31</sup> And this community existed in contradistinction to the mass who spent their leisure time in consumption. Mass market products were seen to have a parasitic relationship with “genuine culture”- feeding off and appropriating it, transforming the “original work” into “kitsch”.<sup>32</sup>

### **Paternity of the artistic work and (re)production**

Parker and Pollock argue that at the same time that women in the nineteenth century were increasingly locked into a place in the family, with femininity to be realised exclusively in child-bearing and child-raising, the title of "artist" became increasingly associated with everything that was anti-domestic, outsidersness, anti-social behaviour, isolation from other men, disorder and the sublime forces of untamed nature-

As femininity was to be lived out in the fulfilment of socially ordained domestic and reproductive roles, a profound contradiction was established between the identities of artist and of woman.<sup>33</sup>

The key to understanding this sex-based dichotomy rests with a distinction between familial reproduction in the home and the unnatural reproduction process undertaken by the "solitary" artist.

Although he established alternate traditions for art and a new kind of public able to access it, the artist purported to be a solitary man. The work was reputed to posit a self-evident truth, even if a secure understanding relied upon “the monograph- a study of the artist’s life and work, and the catalogue- the collection of the complete oeuvre of the artist whose coherence as an individual creator is produced by assembly of all his work in an expressive totality.”<sup>34</sup> -

Art (was) therefore neither public, social nor a product of work. Art and artist become reflexive, mystically bound into an unbreakable circuit which produces the artist as the subject of the art work and the art work as the means of contemplative access to that subject’s ‘transcendent’ and ‘creative subjectivity’.<sup>35</sup>

In this sense the artist purported to reproduce by himself, his offspring, the artwork, deriving meaning only in relation to him, for what it signified of him. His “raw” material, the world in which he lived, denoted lack, incompleteness, indifference.<sup>36</sup>

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<sup>31</sup>C. Greenberg, “Avant-Garde and Kitsch” in Harrison & Wood, above, note 29 at 531.

<sup>32</sup>Ibid., at 534.

<sup>33</sup>R. Parker & G. Pollock, "God's Little Artist", above, note 10 at 99.

<sup>34</sup>G. Pollock, “Artists, Mythologies, and Media- Genius, Madness, and Art History”, (1980) 21 *Screen*, No 3, 57 at 59.

<sup>35</sup>G. Pollock, Ibid., at 58.

<sup>36</sup>*indifferent*

a) Within the masculine order, the woman is indifferent in the sense of non-different or undifferentiated because she has no right to her own sexual difference but must accept masculine definitions and appropriations of it.

b) As a consequence, she is indifferent in the sense of detached and remote because of the imposture of her position.

c) From a feminine perspective, however, she might experience difference differently, in relation to her resemblance to another woman rather than to a masculine standard.

“Publisher’s Note on Selected Terms” in L. Irigaray *This Sex Which Is Not One*, translated by C. Porter, (Ithaca, N. Y.: Cornell U. P., 1985) at 220.

No artistic endeavour fascinated the Romantics more than the art of portraiture, and Huet argues that through this form-

the work of art breaks the laws of nature . . . . The genesis of art excludes the maternal in favour of a male fecundity, whose progeny, the portrait, discloses both art and the hidden monstrosity behind art: its unnatural birth.<sup>37</sup>

Familial procreation is superseded by the father's quasi-physiological interiorization-

. . . inasmuch as the painter both mirrors his models and internalises them, he never paints anything but himself, that which is already inside him, his specular soul. The art of painting . . . is a process of pregnancy and delivery . . . (and) though it can be described in terms of progeny, (it) nevertheless remains entirely separated from any form of natural conception.<sup>38</sup>

. . . between the model and the painter on the one hand, and between the painter and his canvas on the other, art (techné) imposes a form of opacity that makes it impossible to know or experience nature (physis).<sup>39</sup>

His "progeny" remain marked by their unnatural birth. They can never escape parental authority and exist independently. They are sentenced to an eternal childhood because without his guidance, their existence is confused and uncertain. He speaks for them. It is because of this that the works can be endlessly, mechanically multiplied and circulated, without detracting from the claim that the works are unique. Such processing fails to count as reproduction, a process that gives rise to a new life, and is more a form of (re)production-duplication, and presentation for public consumption. The need to always pay tribute to the genesis of the work provides a unity that denies it's actual multiplicity and guarantees it's ongoing originality. (Re)production also ensures that the work can never be fully consumed so that its mass proliferation remains of a different order to that of the commodity. It is in this sense that-

. . . the fetishism of . . . (art) proceeds by subordinating the social and abstract aspects of artistic labor to its private and concrete aspects.<sup>40</sup>

### Copyright and the construction of paternity

In an offhand reference to law Roland Barthes noted that -

The author is reputed the father and owner of his work: literary science teaches respect for the manuscript and the author's declared intentions, while society asserts the legality of the relation of author to work (the *droit d'auteur* or copyright).<sup>41</sup>

However in the Anglo legal world the received wisdom is that copyright is an economic right rather than a right of personality.<sup>42</sup> Because of this one might not expect to find a concern to protect the paternity of artistic works in Anglo-derived jurisdictions. However it is my intention to show through a discussion of case law that despite assertions to the contrary, Anglo law is also steeped in a concern to

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<sup>37</sup>M. Huet, "The Artist's Studio" from her book *Monstrous Imagination*, (London: Harvard U.P., 1993) at 163.

<sup>38</sup>Huet, *Ibid.*, at 165.

<sup>39</sup>*Ibid.*

<sup>40</sup>C. Owens, "From Work to Frame" in Owens, above, note 20 at 139, note 28.

<sup>41</sup>R. Barthes, "From Work to Text", in *Image, Music, Text*, translated by S. Heath, (New York: Noonday Press, 1977) at 160.

<sup>42</sup>For a brief discussion of this see "The Sources of Australian Copyright Law" in M. Blakeney & J. McKeogh *Intellectual Property Law. Commentary and Materials*, (Sydney: Law Book Company, Second edition, 1992) at 13.



protect the paternity of artistic works. Copyright serves a gatekeeping function that secures the legitimacy of artistic works by segregating these from basic commodity items and from work naturally associated with women's reproductive labour. Copyright is essential for keeping artistic works from intermingling with their social inferiors.

The first two cases date from the late nineteenth century, the third from the 1980's. Despite the span between them, the cases do not reflect a change in perception of the function of the artist. Modern art, despite "moving on" from romantic themes, has also shown little interest in re-evaluating the artist's role and his legal connections. In this sense copyright's desire to protect the paternity of artistic works seems to be firmly entrenched.

### **Hanfstaengl v. Baines & Co.<sup>43</sup>**

This is an unusual case that concerned the reproduction of the design incorporated in a set of German romantic paintings owned by Hanfstaengl. Baines & Co's alleged infringement involved the publication of a set of sketches illustrating an article concerning an exhibition of 'Living Pictures', where the spirit of Hanfstaengl's pictures was evoked by the staging of live models in scenes representing the various titles. It brings to the fore one of the problems surrounding the copyright of romantic works- that of the status of a work that is inspired, in part, by the work of another original author. Is such a work also unique or is it merely "derivative" and hence an unlicensed appropriation?

The court began by acknowledging that copyright was designed to protect private rights in the original work-

. . . the object of the Act of 1862 . . . is to protect the reputation of the artist and to preserve intact the commercial value of the artist's work.<sup>44</sup>

An economic and moral right of the artist were seen as mutually compatible interests. However the "empirical" comparison between Hanfstaengl's and Baines & Co.'s works then proceeded with a view to comparing the *dissimilarity* between the two works, rather than looking to their substantial similarity, the usual test of a copyright infringement.

As the Lord Chancellor put it-

There can only be a copy of such a design if the treatment of the subject be the same. Now, comparing the sketch with the photograph from the painting, I do not think this can be said to be the case. The faces are different; the mode in which the woman's hair is arranged is different; the dress, especially in the case of the woman, is different; the pose is different; the attitudes are different; the background is different, and in the case of the sketch the foreground is wanting . . .

My Lords, it is difficult, if not impossible, to put into words all the reasons which lead to the conclusion arrived at on such a question as that now before your Lordships. I have tried to indicate some of those which have led me to my conclusion; but it depends really on the effect produced upon the mind by a study of the picture, and of that which is alleged to be a copy of it, or at least of its design.<sup>45</sup>

Their Lordships did not consider it relevant to scrutinise the background to the source of the sketches. All works were treated as if they were independent, self-referential works of art. Accordingly they looked to the limits of Hanfstaengl's

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<sup>43</sup>*Hanfstaengl v. Baines & Co.* [1895] A.C. 20.

<sup>44</sup>*Ibid.*, at 29.

<sup>45</sup>*Ibid.*

right in the romantic paintings and disapproved of his attempts to assert private ownership over "universal themes". Lord Watson said-

. . . in cases where copyright is claimed for pictures or drawings which treat an old and common subject, such as love-making behind a stile, the privilege of the author must, in my opinion, be strictly confined to the particular design which he has chosen.<sup>46</sup>

Similarly Lord Ashbourne says-

The subjects dealt with in the pictures are not special or exceptional: they deal with ideas as old as the world, and it would be impossible, as pointed out by the Lord Chancellor, to hold that the plaintiff could claim anything like a monopoly in every treatment of such common subjects.<sup>47</sup>

This disapproval demonstrates the continuance of a tradition whereby "art" embodies the expression of universal values which belong to the "public". At the same time it documents the transformation of the "universal" from its association as a force that unified by transcending particular interests, to a sense of the public as the representation of personal interests, in this case "Courtship", "Charity", "First Love", "Love me, Love me not," and "Pets". *Hanfstaengl v. Baines & Co.* shows that without need for any formal recognition of a right of personality, Anglo courts simply accommodated romantic concerns in the way that they delineated the boundaries to an artistic work.

### **Walter v. Lane<sup>48</sup>**

Whereas *Hanfstaengl v. Baines & Co.* considered the limits to what an artist can claim as his own, *Walter v. Lane* looked to the origins of ownership- the requirement for originality, in this case in a literary work. The question was whether or not the reporter of a public speech could independently hold copyright in his/her written version of the speech.

The lower court found in favour of the reporter's right arguing in a distinctly Lockean vein, that the speech maker had placed his words in the public domain in a non copyrightable form. Words in the public domain were available for private appropriation of them, with the labour involved in reducing the oral to a written form founding the reporter's copyright. Any reporter would independently hold copyright in his/her personal record of the speech. On appeal this decision was reversed because-

The more closely the Act is studied the more clearly it appears that in order that the first publisher of any composition may acquire the copyright in it, he must be the 'author' of what he publishes, or he must derive his right to publish from the author by being the owner of his manuscript or in some other way . . . To hold that every reporter of a speech has copyright in his report would be to stretch the Copyright Act to an extent which its language will not bear, and which the Legislature obviously never contemplated. The Act was passed to protect authors, not reporters.<sup>49</sup>

This decision treated the fact that the Act fails to define an author as evidence in favour of a contemporary romantic reading-

The word occurs constantly throughout the Act, but nowhere is it used in the sense of a mere reporter or publisher of another man's verbal utterances . . . <sup>50</sup>

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<sup>46</sup>Ibid., at 28.

<sup>47</sup>Ibid., at 29.

<sup>48</sup>*Walter v. Lane* [1899] 2 Ch 749, [1900] A.C. 539.

<sup>49</sup>*Walter v. Lane* [1899] Ibid., at 771.

<sup>50</sup>Ibid., at 770.

... The word 'compose' here cannot mean copy or write from dictation; it obviously means compose in the sense of being author of the matter published.<sup>51</sup>

The "obviousness" of this interpretation only appears from the romantic perspective where a property right arises out of the expression of an author's personality, not from bare, undifferentiated labour.

This decision went on appeal to the House of Lords and the romantic argument was rejected based upon a distinction between property rights and copyright- I cannot help thinking that some confusion has been created between two very different things: one, the proprietary right of every man in his own literary composition and the other the copyright, that is to say, the exclusive privilege of making copies created by the statute.<sup>52</sup>

The court suggested that as *Donaldson v. Beckett* (1774)<sup>53</sup> rejected the notion of common law literary property, copyright was merely a limited economic monopoly granted by the state. However this clarity as to the status of romantic property in Anglo law was then very much obscured when Earl Halsbury went on to say-

a reporter's art represents more than mere transcribing or writing a dictation. To follow so as to take down the words of an ordinary speaker, is an art, requiring considerable training, and does not come within the knowledge of ordinary persons.<sup>54</sup>

This defence of the reporter's position qualified the earlier apparent rejection of the romantic right. The reporter's work was characterised in personal terms. It was suggested that the value of the work derived from its source as an expression of personal knowledge and expertise and it is this that warranted the reporter's legal protection. In this way the court rejected the romantic right at the macro level of indicating the jurisdiction of the right but supported it at the micro level of explaining entitlement to the right. The translation of verbal utterances to a written form is treated as a significant artistic act, even though the work lacked imagination in other respects.

This case reveals copyright's desire to locate and name a father for works and pay tribute to his ingenuous, extra-ordinary labour. This attribution protects what would otherwise be an orphan work in its passage through the "hostile" marketplace. And it protects it's progenitor from a "personal" assault-

My Lords, I should very much regret it if I were compelled to come to the conclusion that the state of the law permitted one man to make profit and to appropriate to himself the labour, skill and capital of another.<sup>55</sup>

The work at issue in *Walter v. Lane* is treated as "art " and at law, this status marks it even when the art is also a commodity. Yet again the background and context of the production of the work is hidden by the face of it's author.

## **Merlet v. Mothercare Plc<sup>56</sup>**

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<sup>51</sup>Ibid., at 771.

<sup>52</sup>*Walter v. Lane* [1900], above, note 48 at 547.

<sup>53</sup>*Donaldson v. Beckett* (1774) 4 Burr, 2408, 98 E.R. 257.

<sup>54</sup>*Walter v. Lane* [1900] above, note 48 at 554.

<sup>55</sup>Ibid., at 545.

<sup>56</sup>*Merlet v Mothercare Plc* (1984) 2 IPR 456.

*Merlet v. Mothercare Plc* provides an interesting contrast to the above cases. It involved a work created by a woman. And rather, as with the above, assuming that the work is an independent, self-referential work of art, the case began on another foot. It began with a homily about virtuous motherhood-

One summer, when enjoying the climate in the south of France, she bethought herself that she would shortly be visiting her mother in the Highlands of Scotland, and that it would be very convenient if she was able to shield her son from the rigours of that climatic position by means of a suitable form of cape. So she set to, with materials which she had readily to hand, and produced a suitable garment.<sup>57</sup>

At a later stage she marketed the hooded baby cape she designed, and when it was copied and marketed by the defendant she sued, basing her copyright in the claim that she had produced a work of artistic craftsmanship.

The court rejected this claim. Walton J., defined artistic craftsmanship as “a totally different matter” to the manufacture of “a durable, useful hand made object”.<sup>58</sup> He noted that “artists (have) vocationally an aim and impact that differs from those of the ordinary run of humankind”,<sup>59</sup> and suggested that art was the aesthetic appreciation of the object “in itself”-

the article in question is to be judged on its own merits without any reference to what might be thought to be their natural place in the order of things.<sup>60</sup>

Art is durable, timeless and transcends its functional context. In applying this test to “Mde” Merlet’s cape, he determined-

... a witness of the greatest possible distinction in the field of design of every nature, was terse and to the point: the Raincosy was, he said, a “basic commodity item”, and I certainly agree.<sup>61</sup>

In a very obvious way this case evidences the romantic delineation between worker and artist in the way in which they are perceived to approach their work, the worker making product, the artist making art. Merlet had no copyright in her *Raincosy* because “art” is detached from everyday life- from the relations of social production.

But *Merlet v. Mothercare Plc* protects the paternity of artistic works with a more fundamental range of delineations beyond a distinction between alienated and unalienable labour, as is revealed by Walton J's comments that-

... She was consciously aiming for something which looked nice, because it was for her own use: at that stage she there was no commercial purposes in her mind.<sup>62</sup>

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<sup>57</sup>Ibid., at 457.

<sup>58</sup>Citing *George Hensher Ltd v Restawile Upholstery (Lancs)* [1975] AC 64; 2 All ER 420; [1975] RPC 31 in *Merlet v Mothercare*, Ibid., at 460.

<sup>59</sup>*Hensher*, Ibid., at 464. The romantic distinction between art and industry was most explicitly noted in a reference to *Burke & Margot Burke Ltd v Spicers Dress Designs* [1936] Ch. 400 at 408-409: “It must, however, be borne in mind that the meaning of the term ‘artistic’ as indicated in the Oxford Dictionary is that which pertains to an artist. An artist is defined in the same dictionary as : ‘One who cultivates one of the fine arts in which the object is mainly to gratify the aesthetic emotion by perfection of execution whether in creation or representation’. Does a designer who herself designs and makes a frock cultivate one of the fine arts in which the object is mainly to gratify the aesthetic emotions by perfection of execution whether in creation or representation? A possible view is that what she does is merely to bring a garment as a mere article of commerce. If that is the right view there may be a difficulty in holding that even a lady who designs and executes a beautiful frock is necessarily the author of an original work of artistic craftsmanship.”

<sup>60</sup>Ibid., at 463.

<sup>61</sup>Ibid., at 466.

. . . it appears to me . . . What she had in mind . . . was the utilitarian consideration of creating a barrier between the assumed rigours of a Highland summer and her baby in such a manner as to afford him complete protection, safely cocooned next to her warm body, in a stylish and attractive shape.<sup>63</sup>

Merlet was nurturer of a small child. Her work was only initially dictated by this concern. However in copyright this origin comes to conclusively define the significance of the work. The case not only abstracts and elevates “art” to a pure space above the sphere of social production, treating art and commerce as mutually exclusive pursuits. Beyond this it locates the sphere of private reproduction as “naturally” prior and subordinate to both these spheres. Merlet fails in her action not only because of the status of art, but also because of the status of commerce, when compared with that of “women’s work”.

Whereas the reporter in *Walter v. Lane* “learnt” to be an artist by the application of skill and training, Mde Merlet “naturally” reproduces. Whereas the reporter had a “right” to expect judicial protection of the economic value of his labour and hence art and industry were conveniently reconciled, Mde Merlet had no comparable right and no comparable economic need. The ascription of “wife” and “mother” to Merlet spelt her different treatment by the copyright regime. It meant that she was not and could not be an artist and that she was not and could not be a “real” producer. Presumably her economic interests were “taken care of” by her husband, the father.

Whilst copyright makes an appeal to the essential difference between the art work and the commodity, this is not usually an obstacle to the protection of the reproducibility of the work. That it is a problem for Merlet points to the relative ranking of art, industry and home. Art and industry, though involving separate kinds of labour, share an interest in the status of the father as producer/provider. This mutual interest defines the significance of the home and the contributions of those who “naturally” reside there. Women’s reproductive work is what is ultimately value-less in copyright, not the masculinist (re)production embodied in the multiple art work.

Copyright is essential to the construction of artistic works as a question of paternity because it is through copyright that other contexts for viewing the work are excluded. Copyright celebrates the solitary father and the work as a work in his image. And although copyright generally expires 50 years after the death of the author,<sup>64</sup> by that time he has faded from living memory and with that the work takes on an altogether shadowier light.

### **Copyright and Contemporary Artistic Practices**

Copyright is a part of the “art” world in the sense that it forms part of the milieu in which contemporary artists position themselves. But artists are presented with a choice in how they position themselves in relation to their works. Artists are not bound to construct themselves as fathers of art works, even if this is how artists will be treated if their works come into the focus of our legal institutions.

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<sup>62</sup>Ibid., at 458.

<sup>63</sup>Ibid., at 465.

<sup>64</sup>In Australia by virtue of s 33(2) *Copyright Act* 1968.

In this part I want to discuss the way two artists challenge the modernist construction of the artist, and through a consideration of the critical content of some of their work discuss how the modernist legal position impacts upon contemporary artistic discourses and practices. How does copyright law redefine the significance of their works? How does the law resist changes in artistic practice?

### **Sherrie Levine<sup>65</sup>**

Sherrie Levine is a feminist artist who confronts the ideology of modernism by exposing the historical specificity of the concepts of originality and authorship. Photography is a particularly apt medium for the deconstruction of “art”. Photography as “art” operates with a high degree of fictionality, in terms of the real conditions of its production and in terms of its history.

Mediums that are inherently multiple- like photography- test the notion of authenticity- for to ask for the ‘authentic’ print makes no sense- there are only multiples in the absence of an original.<sup>66</sup>

It is really impossible to locate the genuine authorial moment of the photographic ‘copy’. The vintage print is specified as one made ‘close to the aesthetic moment’- and thus an object made not only by the photographer himself, but produced, as well, contemporaneously with the taking of the image. This is of course a mechanical view of authorship- one that does not acknowledge that some photographers are less good printers than the printers they hire; or that years after the fact photographers re-edit and recrop older images, sometimes vastly improving them; or that it is possible to re-create old papers and old chemical compounds and thus to resurrect the look of the nineteenth century vintage print so that authenticity need not be a function of the history of technology.<sup>67</sup> ‘Photography as art’ must suppress the specific material conditions of its production that distinguish it from painting.

To nineteenth century sensibilities this was not possible.<sup>68</sup> The photograph’s mechanical reproducibility challenged its claim to be art. That it uncontroversially circulates in the twentieth century speaks for the degree to which the issue of production has been subjugated to the question of authorial intention. To re-controversialise photography reminds us of its recent transition from a reproductive technique or craft of value to industry, to its status as original art, and that that status depended upon the elevation of the position of the artist by detaching him from society.

It is not easy to challenge the tradition of Modernism by producing art. The power of the ideology is such that it readily appropriates the work to its own ends- that is

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<sup>65</sup>Levine began exhibiting and performing works in New York in the early 1970’s. Her participation in the 1977 *Pictures* exhibition at the Artist’s Space, New York generated mainstream critical attention and in that sense signified the “arrival” of postmodern artistic practices.

<sup>66</sup>R. Krauss, above, note 30, at 156.

<sup>67</sup>Ibid.

<sup>68</sup>see W. Benjamin “The Work of Art in the Age of Mechanical Reproduction”, above, note 5 and B. Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law*, translated by E. Kingdom, (London: Routledge & Kegan Paul, 1979).

to the logic of 'self-criticism' within the strictures of modernist discourse. As Greenberg notes-

The essence of Modernism lies, as I see it, in the use of characteristic methods of a discipline to criticise the discipline itself, *not in order to subvert it*, but to entrench it more firmly in its area of competence . . . <sup>69</sup>

It should also be understood that the self criticism of Modernist art has never been carried on in any but a spontaneous and subliminal way. It has been altogether a question of practice, immanent to practice and never a topic of theory.<sup>70</sup>

The authority of the work of art is "based on the universality modern aesthetics attribute(s) to the forms utilised for the representation of vision, over and above differences in content due to the production of works in concrete historical circumstances."<sup>71</sup> Criticism that tries to raise issues of content, issues of the politics of art and its history as representation are silenced a priori. Whilst "self-criticism" is the way forward, it purports to be the *only* way forward. As one artist has noted-

The tradition of formalism has left me largely incapable of expressing through 'my art' those very things about which I have the greatest misgivings - and so incapable of changing anything through 'my art'.<sup>72</sup>

In the face of this closure Levine creates a space for her art by an act of subtraction- subtracting the artistic subject from her work by displaying in its place another "original artist".<sup>73</sup> She re-photographs the famous photographs of others, and displays them as original art-

So persuasively did Levine's project insist on the inadequacy of traditional formal and iconographical methods of analysis in deciphering its meaning few people even bothered to look inside the frames to consider what she was rephotographing. Pleasant though it was to be in the room with the photographs that comprised *After Walker Evans* it did seem embarrassing to be caught looking at them too closely. As initiates had concluded, the meaning of Levine's curiously covert art had to lie elsewhere beyond the frames of these pictures, perhaps in the circumstances of their exhibition.<sup>74</sup>

In these works the meaning cannot rest with the creative personality-

To the degree that the various sources and authors of "quoted texts" are left intact and fully identifiable in truly contemporary montage, the viewer encounters a decentralized text that completes itself through his or her reading and comparison of the original and subsequent layers of meaning that the text/image has acquired.<sup>75</sup>

It involves the presentation of an event in such a manner and at such a distance that it is apprehended as representation- representation not as *re*-presentation of that which is prior, but as the unavoidable condition of intelligibility of even that which is present.<sup>76</sup>

Levine's playing with the notion of the original work restores the artist to art history by reminding us that Levine is in fact *after* Walker Evans, *after* Edward

<sup>69</sup>C. Greenberg, "Modernist Painting", in Harrison & Wood, above, note 29, at 755 (my italics).

<sup>70</sup>Ibid., at 759.

<sup>71</sup>C. Owens, "The Discourse of Others: Feminists and Postmodernism", in Owens, above, note 20 at 167.

<sup>72</sup>I. Burns, "The Art Market: Affluence and Degradation", in Harrison & Wood, above, note 29 at 909.

<sup>73</sup>She says "I'm interested in the way that negation implies its own affirmation" as quoted in "The Anxiety of Influence - Head On. A conversation between Sherrie Levine and Jeanne Siegal" in *Sherrie Levine*, (Zurich: Kunsthalle, 1992) at 17.

<sup>74</sup>D. Deitcher, "Sherrie Levine: Rules of the Game", in *Sherrie Levine*, Ibid., at 9.

<sup>75</sup>B. Buchloh, "Allegorical Procedures: Appropriation and Montage in Contemporary Art", in (1982) 21 *Artforum*, No 1, 43 at 52.

<sup>76</sup>D. Crimp, "Pictures", (1978) 8 *October*, 75 at 77.

Weston, *after* Franz Marc and that their “originality” in turn follows other artistic traditions.

This approach places her directly in conflict with copyright law. Copyright law promptly restores the images of the son to its paternal creator. In copyright the way Levine positions herself in relation to “her” work is irrelevant. According to “the” law the images belong to Weston, for example, or rather to his estate. Levine is free to “copy” the ideas present in the work, but she cannot appropriate his very expression of those ideas. In this case she can copy the composition or style of the work derived from the nude male in classical sculpture. But what she cannot appropriate is Weston’s presentation of this style, his photograph of his son.<sup>77</sup>

In this sense copyright’s reliance on “original” representation is a misnomer-

It is only in the *absence* (my italics) of the original that representation may take place. And representation takes place because it is always already there in the world *as* representation . . . The a priori Weston had in mind was not really in his mind at all; it was in the world and Weston only copied it.<sup>78</sup>

The expression is not unique or original, but derives its meaning from the idea or style in which it follows. But if the idea/expression dichotomy is not, as is often thought, a distinction of originality, from where does it derive its meaning? What is it that delineates the idea, free to appropriate, from the expression which is unobtainable?

Krauss suggests that-

the concept of style is a product of the way style is conceived as having been generated: that is, collectively and unconsciously . . .<sup>79</sup>

If this is so, it suggests that copyright’s idea/expression dichotomy derives its meaning from the absence or presence of a private property relation. Its limit derives from an understanding of the relations of production that devalues collective efforts, not from a distinction found within the work itself.

To allow Levine to address Weston's idea but not his expression simply means that the artist is free to investigate the form of the visual representation, but she is prohibited from addressing the relational aspects of the work- its position to its subject, its place in time and history. Accordingly Levine's appropriation of Weston's "son" not only problematizes the construction of artistic paternity as a question about the function of art, it also shows that it is the power, located in copyright and upheld in court, to inscribe the image as Weston’s “property” that closes the possibilities of such an inquiry. It is through the institution of copyright that the personal and subjective aspects of the work are elevated and its collective and intersubjective dimensions are devalued and rendered meaningless.

We are accustomed to saying that the author is the genial creator of a work in which he deposits, with infinite wealth and generosity, an inexhaustible world of significations. We are used to thinking that the author is so different from all other men, and so transcendent with regard to all languages that, as soon as he speaks, meaning begins to proliferate, to proliferate indefinitely.

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<sup>77</sup>The nude subject in the case being both literally and figuratively Weston's son.

<sup>78</sup>D. Crimp, “The Photographic Activity of Postmodernism”, (1980) 15 *October*, 91 at 99.

<sup>79</sup>R. Krauss, above, note 30 at 157.



The truth is quite the contrary: The author is not an indefinite source of significations which fill a work; the author does not precede the works; he is a certain functional principle by which, in our culture, one limits, excludes and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition and recomposition of fiction. In fact, if we are accustomed to presenting the author as genius, as a perpetual surging of invention, it is because, in reality, we make him function in exactly the opposite fashion. One can say that the author is an ideological product, since we represent him as the opposite of his historically real function. The author is therefore the ideological figure by which one marks the manner in which we fear the proliferation of meaning.<sup>80</sup>

If the author is the ideological figure by which one marks the manner in which we fear the proliferation of meaning, copyright enables us to manage that fear. It lights up the author and in that glare renders invisible more fundamental concerns about the custodianship of meaning.

Other imagery appropriated by Levine also attests to her feminist context-

Instead of taking photographs of trees or nudes I take photographs of photographs. I choose pictures that manifest the desire that nature and culture provide us with a sense of order and meaning . . . <sup>81</sup>

Working within feminist critiques of psychoanalytical theory Levine's choice of appropriation points to images created by men, images of male desire.<sup>82</sup> Her "bad girl" appropriation of these images exposes that their display of the Other is based in a concern for order and control over the Other. The representation of difference is also a disavowal of real cultural, social, and sexual difference-

. . . Her purloined images have invariably been emblematic, allegorical; Levine does not represent women, the poor, or landscapes, but Women, Poverty, Nature. She is not, however, primarily interested in these subject per se, but in images of them. This is the primary motive behind her strategy of appropriation: she does not photograph women or landscapes but pictures of them, for we can approach such subjects, Levine believes, only through their cultural representation.<sup>83</sup>

The appropriated images elicit a desire of their own-

Looking at Levine's works, the viewer anticipates a subjective wholeness and communion with tradition that remains as steadfastly elusive in the series as they do in the individual works that comprise them. To confront series after series of such allusive part-objects is to desire a greater knowledge of the implicitly social and historical drama that shaped them.<sup>84</sup>

Her playing with desire moves art from its sacrosanct place, re-connecting it with the social conditions of its production and reception.

Levine acknowledges that, in this sense, she constructs a small, idealised viewer for her works- one that can make the connections by reading the works in the context of art history.<sup>85</sup> However she is also addressing that specialised "art" community at another level- evoking in them an awareness of the values and concerns of the broader "mass" culture and of how these intersect with the concerns of "art"-

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<sup>80</sup>M. Foucault, "What is an author?" in *The Foucault Reader*, edited by P. Rabinow, (New York: Pantheon Books, 1984) at 118.

<sup>81</sup>S. Levine as quoted in D. Deitcher, "Sherrie Levine: Rules of the Game", above, note 74 at 9.

<sup>82</sup>as discussed in P. Taylor, "Sherrie Levine plays with Paul Taylor", (1987)135 *Flash Art*, 55.

<sup>83</sup>C. Owens, "Sherrie Levine at A& M Artworks", in Owens, above, note 20 at 115.

<sup>84</sup>D. Deitcher, "Sherrie Levine: Rules of the Game", above, note 74 at 12.

<sup>85</sup>P. Taylor, above, note 82 at 57.

Levine speaks to the diminished possibilities for originality in an image saturated, image bound culture . . . Levine's posture subverts the privileged status of the original, offering in its place a critique of what some see as the politics of the art market: of the work of art as one more luxury item available for consumption.<sup>86</sup>

Despite the modernist emphasis on the personal aspects of production, the success of the artist is dependent upon his/her social relations with dealers, collectors, and curators. The "space" for art is subject to their control in a similar way to the earlier period's production was dependent upon attachment to a patron. Where the demand is for "authenticity" or "newness" there is not the same privilege to direct the content of the work. But this alone does not free the work from the relations of commodity production-

Regardless of the personal feeling of the artist, it just happens to be a fact that the art which gets *seen* (in galleries or museums, in magazines or books), the art which is counted as 'Art', has been subjected to processes of selection and legitimation which are beyond the control of the artist (albeit some artists are infinitely more attuned to these processes, and skilful at negotiating them, than others).<sup>87</sup>

Levine's appropriation of Walker Evans's photographs of the rural poor involved a play on this economic function of photography- the system effortlessly commodifies the artwork, regardless of the "stand" of the artist-

Evans first took these photographs, as if to illustrate Walter Benjamin's observation. . . . '[Photography] has succeeded in making even abject poverty, by recording it in a fashionably perfect manner, into an object of enjoyment,' ie, a commodity.<sup>88</sup>

Further Levine's reproduction of this work, at this point in time, points to the art world's changed attitude toward the economy. As Cameron summarises-

The first, most apparent and yet least significant of these factors was an unspoken agreement that the neo-expressionists era was suffocating the possibility of meaning in art, and relatedly, that some of the painters of that movement had begun to appear somewhat compromised by their relationship with the international art market. The second factor has been a sharp escalation in that market, particularly as this relates to financial speculation in young artist's careers. A third, and perhaps most pervasive factor in this transition has been a marked shift in the way artists perceive themselves in relation to the social, political and economic superstructure of American society- print and electronic media, so called "consumer" culture, and multinational corporate capitalism.<sup>89</sup>

That today the real agents of art world appropriation are the dealer, the collector and the museum, and not the postmodern artist was underscored by another of her works- a performance *Six Pictures after Franz Marc*. In this performance she purchased and framed high quality reproductions of Marc's expressionist canvasses and exhibited them in the persona of an independent curator.

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<sup>86</sup>P. Marincola, "Stock Situations/Reasonable Facsimiles" in P. Marincola, *Image Scavengers: Photography*, (Philadelphia: Institute of Contemporary Art/University of Pennsylvania, 1982) at 25.

<sup>87</sup>Burgin continues "Thus Pierre Bourdieu writes: 'who is the true producer of the value of the work - the painter or the dealer, the writer or the publisher, the playwright or the theatre manager? The ideology of creation, which makes the author the first and the last source of the value of his work, conceals the fact that the cultural businessman (art dealer, publisher, etc.) is at one and the same time the person who exploits the labour of the 'creator' by trading in the 'sacred' and the person who, by putting it on the market, by exhibiting, publishing or staging it, *consecrates* a product which he has 'discovered' and which would otherwise remain a natural resource. *The art trader is not just the agent who gives the work a commercial value by bringing it into the market*'. Bourdieu consequently makes a necessary distinction between 'cultural value' and 'economic value'." in V. Burgin, "The End of Art Theory", above, note 19 at 189 (Burgin's emphasis).

<sup>88</sup>C. Owens, "Sherrie Levine at A& M Artworks", in Owens, above, note 20 at 115.

<sup>89</sup>D. Cameron, "Art and its Double. A New York Perspective" in (1987) 134 *Flash Art*, 58.

Levine's disrespect for, and challenge to copyright should not be understood as a wanton disregard for the effort and creativity of the artist. Rather it involves an expropriation of the high ground taken by the modernist *and* legal definition of "art". Her appropriation of works is part of a strategy to clear the space for more critical, socially relevant artistic practices- critical artistic practice in the sense that it acknowledges that there is a politics of representation, socially relevant artistic practice in the sense that it acknowledges art's relationship with the sphere of production and reproduction. In this regard her work revitalises a discourse about the role of art and it reveals the way our current law hinders such inquiries.

### Jeff Koons<sup>90</sup>

Koons's appropriation of the work of others offers an interesting point of contrast to Levine's "Pictures" work-

The *Pictures* artist have been involved in questioning their own position as producers of art in relation to the mythic baggage of subjectivity and individuality, of which they have become acutely self-conscious. There has been a shift in the activities of the new group of artist in that there is a renewed interest in locating one's desire, by which I mean one's own taking pleasure in objects and commodities, which includes what we call works of art. There is a stronger sense of being complicit with the production of desire, what we traditionally call beautiful seductive objects, then being positioned somewhere outside of it. In this sense the idea of criticality in art is also changing.<sup>91</sup>

Both Levine and Koons discuss the way the art world uses the art/industry dichotomy. They both recognise the segregation of "art" from the masses. However Levine's ideal viewer is within the sphere of art, in an attempt to implode Modernism's construction of the "art" community. Koons's purported audience is broader than this-

Jeff Koons: For me, the issue of being able to capture a general audience and also have the art stay on the highest orders is of great interest. I think anyone can come to my work from the general culture.<sup>92</sup>

Koons proposes to bring together the sphere of culture and the sphere of production by displaying "kitsch" as "art", and in so doing-

... forcing the patrons of contemporary art to acknowledge the vast reserves of power secreted in goods, colors, shapes, images, textures and texts that comprise the normal, yet unmediated existence of working and middle class citizens of post-industrial societies.<sup>93</sup>

Koons rejects the notion of mass culture as residue- the culture "destined for those who are insensible to the value of *genuine* culture".<sup>94</sup> He expresses concern with the subjective preoccupation of "genuine culture"-

Jeff Koons: I'm totally disillusioned with art. I really am. Art lacks charisma. I try to create *charisma* through materialism and I try to manipulate an audience and I try to control this

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<sup>90</sup>Koons's installations were exhibited in the early 1980's in New York, and in 1986 art critics develop the concept of "Neo-Geo" for his genre of postmodern works. In distinction to the "Pictures" artists, who appropriated imagery questioning their own position as producers of art, the "Neo-Geo" artists utilised objects or commodity sculpture, complicit in a process of producing seductive, bourgeois objects.

<sup>91</sup>H. Steinbach, as quoted in "Flash Art Panel. From Criticism to Complicity", in (1986) 129 *Flash Art*, 46.

<sup>92</sup>Ibid., at 47.

<sup>93</sup>Cameron, above, note 89 at 67.

<sup>94</sup>C. Greenberg, "Avant-Garde and Kitsch" in Harrison & Wood, above, note 29 at 531.

environment and their sensations . . . I'm disillusioned with art. It doesn't have a place. People don't believe in it.<sup>95</sup>

He reverses Modernism's claim that mass culture celebrates the fragmentation of meaning, implying that this evaluation is better levelled at high art's preoccupation with the individuality of the artist. To Koons kitsch better encapsulates the "art needs" of the community.

Charisma: Divinely conferred power or talent; capacity to inspire followers with devotion and enthusiasm.<sup>96</sup>

The suggestion of a "charismatic" function for art points to Koons's attitude to his political and social context. In contrast to Levine, Koons does not so much confront art with its history, but rather attempts to change the current direction of that history, building upon existing traditions-

Jeff Koons: They (his first "appliance" pieces) wanted to deal with the history of the ready-made, and hopefully add to that history.<sup>97</sup>

Whilst "the ready-mades became . . . part of Duchamp's project to make certain kinds of strategic moves- moves that would raise questions about what exactly is the nature of the work in the term 'work of art'",<sup>98</sup> Koons's context is the "objective" vocabulary of desire, as represented by the object.<sup>99</sup>

Jeff Koons: . . . Duchamp showed the ready made with indifference to it, but my personal development has been to maintain the integrity of the object. . . . I'm very interested in transforming its context in order to reveal certain personality traits that have always been within that object, but just have not chosen to show their face to date.<sup>100</sup>

Jeff Koons: Art can, and should, be used to stimulate social mobility. I envisage the formation of a total society where every citizen will be of blue blood. In such a society the individual will exist in a state of entropy, or rest, and will inhabit an environment decorated with object art that is beyond critical dialogue.<sup>101</sup>

Koons's attitude is more a celebration of the art object than a questioning of its function as a work.

To the artist stylistically, technically and iconographical mass culture products can be seen as more sensitive to the variables of individual lives<sup>102</sup> and offer more realistic representations of those lives-

Jeff Koons: *Banality* [1988 exhibition] was about communicating to the bourgeois class. I wanted to remove their guilt and shame about the banality that motivates them and which they respond to.

. . . And I wanted to remove their guilt and shame so that they can embrace what motivates them and what they respond to- to embrace their own history so that they can move on and actually create a new upper class instead of having culture debase them. And they would

<sup>95</sup>"Jeff Koons - Anthony Haden-Guest Interview", in *Jeff Koons*, (Cologne: Muthesius A. Benedikt Taschen, 1992) at 26. (my italics).

<sup>96</sup>*The Oxford Concise Dictionary*, 7th ed., (Oxford: Clarendon Press, 1982).

<sup>97</sup>"Jeff Koons - Anthony Haden-Guest Interview", above, note 95 at 15.

<sup>98</sup>R. Krauss as quoted in C. Owens, "The Allegorical Impulse, Part Two", in Owens, above, note 20 at 86, note 11.

<sup>99</sup>see "Jeff Koons - Anthony Haden-Guest Interview", above, note 95 at 30.

<sup>100</sup>*Ibid.*, at 31.

<sup>101</sup>*The Jeff Koons Handbook*, (London: Thames & Hudson, 1992) at 31.

<sup>102</sup>for a discussion of this idea see L. Alloway, "The Arts and the Mass Media", in Harrison & Wood, above, note 29 at 700.

start to respond to or have beliefs in things that they have truly experienced, what their own history actually is.<sup>103</sup>

It is at this point that Koons's work takes on the issue of the paternity of artistic works. In order to elevate kitsch, an image must be re-presented so it functions as "art", and at the same time remain instantly recognisable as "original kitsch". Recognition of the work's mass proliferation must obliterate the possibility of any sense of the image as "original art". The works must be the kind of object commonly bought by the masses, not as "art" and read intellectually with reference to authorial intention, but purchased as personal mementoes and responded to emotionally. And then they can be "real" art- their facelessness meaning that they are available for a viewer to inscribe whatever personal meaning upon them that they choose.

To do this in his *Banalities* exhibition Koons appropriated images from, amongst other things, gift shop postcards and commissioned life-size sculptures based upon them. He has been, and continues to be, successfully sued by the copyright holders of those images.<sup>104</sup>

His practice problematises the function of copyright because it shows that regardless of how works proliferate in the community and are valued therein, to the courts they involve works of original art, because they are "art". They have an identifiable author, who exercised an authorial intention in creating the work, by signing it, and in the *Koons v. Rogers* case, by putting a © symbol on the back of the postcard. To the courts that is all that matters. To rip off the © symbol and "wantonly" reproduce the work is simply theft.

To Koons the legal position only "takes away" from the public their right to experience meaningful imagery as art-

Jeff Koons: The way I look at it is that all visual imagery should be available to the artist. . . . When visual imagery gets copyrighted, it is taking away a vocabulary not only from the artist but total public.<sup>105</sup>

Even though in the court kitsch again becomes art, this fleeting institutional recognition makes little impact upon how such works actually function in everyday life. Such works continue to circulate in serial form and be bought for their anonymity, and because this means that they are not "real" art, the masses have no "art" to call their own.

Koons's radical copyright stance suggests that the value of the object arises as an innate property of things, severed from any connection with work, in any of its dimensions. From a feminist perspective the problem with this formulation is the way it duplicates and in a sense accentuates, the fetishism of Modernism. If Modernism subordinates the concrete and social aspects of production and reproduction by way of counterpoint to the creative input of the artist,<sup>106</sup> Koons

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<sup>103</sup>“Jeff Koons - Anthony Haden-Guest Interview”, above, note 95 at 28.

<sup>104</sup>see *Rogers v. Koons* 960 F.2d 301 (2nd Cir 1992).

<sup>105</sup>*Ibid.*, at 35.

<sup>106</sup>above, note 40.

proposes an art-society that has no position *of any kind* in real relations of production. There is no reality as something separable from signs of it.<sup>107</sup>

This “shift” in the significance of art, embarked upon in the name of the “public”, is illusory. In the absence of established aesthetic criteria the realism of “anything goes” becomes, as Lyotard puts it, that of money-

... it remains possible and useful to assess the value of works of art according to the profits they yield. Such realism accommodates all tendencies, just as capital accommodates all “needs”, provided that the tendencies and needs have purchasing power.<sup>108</sup>

But his art also trades in an alternate currency- fame.

Fame is integral to the success of Koons’s art, in the sense that his “public” is also *his* audience. They are the passive consumers of spectacles.<sup>109</sup> They have no other role to play-

Jeff Koons: Where I differ is that Warhol believed you could penetrate the mass through distribution and I continue to believe you penetrate the mass with ideas.<sup>110</sup>

... I try to manipulate an audience and I try to control this environment and their sensations.<sup>111</sup>

... I’m interested in putting the bourgeois at my service - trying to help affect their moral beliefs.<sup>112</sup>

... I’m a messenger.<sup>113</sup>

This brings us back to patriarchy. Whilst Koons's no copyright stance is superficially radical, in fact he merely replaces the function of the father of artistic works with a bigger Father. He dispenses with the need to physically assert authorship, in the form of privately crafting the work. The work is executed by employed tradespeople. But he takes on the bigger role of orchestrating the world, creating a world *as* art. In this sense he is The Father deity, with statues fashioned for introspective contemplation so that we can access his and our, inner truth.

## Conclusion

Levine and Koons are two artists out of many that are exploring these areas. They are not isolated examples. For example, the New York “painter” Mark Kostabi also claims authorship over art which is created by other artists whom he pays. Confrontation with issues of copyright seems to be creating new artistic genres. These genres are breaking down the traditional categorisation of painting, photography, sculpture etc., and incorporating many of the “new media” types which rely upon such practices as digital sampling, eg. “computer art” and “sound sculpture”.<sup>114</sup> The new “art” genres are no longer skills and practice specific but

<sup>107</sup>in Baudrillard’s sense of hyper-realism or simulacrum. see J. Baudrillard, “The Hyper-realism of Simulation”, in Harrison & Wood, above, note 29 at 1049.

<sup>108</sup>J. Lyotard, “What is Post-Modernism”, in Harrison & Wood, *Ibid.*, at 1011.

<sup>109</sup>for a brief discussion of the distinction between the functions of the public and of the audience see M. Rosler, “The Birth and Death of the Viewer: On the Public Function of Art”, in Foster, above, note 7 at 14.

<sup>110</sup>“Jeff Koons - Anthony Haden-Guest Interview”, above, note 95 at 24.

<sup>111</sup>*Ibid.*, at 26.

<sup>112</sup>*Ibid.*

<sup>113</sup>*Ibid.*, at 32.

<sup>114</sup>This is one of the most interesting developments in that it involves artists none of whose practice has any relationship with traditional art media.

are delineated by their conceptual positions- one of those taken into consideration being direct confrontation with copyright issues.

Within this context the artwork of Sherrie Levine and Jeff Koons represents two similar, yet distinct, postmodern interventions challenging the protection of the paternity of artistic works by the system of copyright. The approaches are similar in that both acknowledge the foundational role law plays in structuring and interacting with social relations. However they are radically apart in their response to this.

Levine's strategy involves problematising the role of art and its relationship with law by exposing the historical and philosophical specificity of this front. To do this she infringes the copyright of others, even though to date she has been able to negotiate around litigation. By opening the values of "art" and "copyright" for critical appraisal she moves toward restoring a "public" function for art, in the sense that she makes a space for decision-making about "who we are" possible.

Koons, on the other hand, whilst changing the function of art, does not lead to a changing function for law, in the sense that his "no law" stance retains a universalist, timeless, patriarchal position for law in its relationship with society. Koons does not perceive of a difference between his concern for what is good for himself, and what is good for others. His art aspires to dominate others and to the extent it can move beyond critical dialogue into charisma it embodies totalitarianism. Koons's position merely reinforces the existing imperviousness of copyright law to diversity in artistic practice. It reproduces a problem of Modernism- marginalising different conceptions of art and alternative cultural traditions and practices.

The presence of such artists and their mainstream acceptance does not just mean that "art" has changed, it also means that society has changed. For all sorts of reasons many now find that copyright, as the means to protect the paternity of artistic works, hinders the development of socially relevant art. For those involved in the copyright regime this constitutes a real challenge- the law does not exist independently of society, and if it is to be respected as a relevant organising tool, lawyers must be familiar with the nature of critiques about its role and formulate some articulate response to these criticisms. We need to be more creative with our copyright, by listening to our artists.