

Appropriation Art: An International Divide

The art market is growing. Vertically—the prices have soared over the last few decades. And horizontally—we now count New York, London, and Hong Kong as art-market hubs, and the market’s geographic reach expands every day. This combustible combination has impacted collectors and galleries for years: if you increase the number and price of transactions, then expect a corresponding increase in litigation. Within the last year, the art market’s expansion has also increasingly impacted the creation of art itself: artists who sell their works both domestically and abroad are subject to a patchwork quilt of legal regimes, appropriation art is often in the cross-hairs, and the cost of a mistake is higher than ever. Three recent cases serve as an important reminder that artists must assess the copyright and related intellectual property laws of the countries in which their works are shown and sold. What’s at stake? Substantial fines, the seizure of artwork, criminal penalties, and the imposition of secondary liability on the galleries that exhibit the artist’s work. Add intense media coverage to fuel the controversy, and you have the recipe for a full-blown crisis.

I. Background

A. Jeff Koons In France

In 1985, Franck Davidovici designed an advertising campaign for the French clothing brand Naf Naf called “Fait d’Hiver.” The campaign included an advertisement depicting a woman lying down in snow, seemingly being rescued by a pig—the brand’s mascot.¹ In 1988, American artist Jeff Koons made a porcelain sculpture by the same name as part of his “Banality” series, which depicted his ex-wife, Italian porn star Ilona Staller, in a similar pose with a pig and two penguins.² Here are the two works:

Davidovici’s advertisement



Koons’ sculpture



After seeing *Fait D’Hiver* at an exhibition at Le Centre Pompidou in 2014, Davidovici sued Koons for copyright infringement in a Paris court. Davidovici sought €300,000 in damages and seizure of Koons’ sculpture.³ Davidovici’s lawyer called Koons’ work a “servile copy” of “the same work in three dimensions”; he claimed that Koons “complete[d] the plagiarism by giving his work the same title as the advert.”⁴

¹ Naomi Rea, *Jeff Koons Is Found Guilty of Plagiarism in Paris and Ordered to Pay \$168,000 to the Creator of an Ad He Appropriated*, ARTNET (Nov. 9, 2018), <https://news.artnet.com/art-world/jeff-koons-plagiarism-lawsuit-1354876>; see also Decision of the Tribunal de Grande Instance de Paris, November 8, 2018.

² Rea, *supra* note 1.

³ *Id.*

⁴ *Id.*

Although the Pompidou's president supported Koons' work, the sculpture's owner had the work removed from the museum.⁵

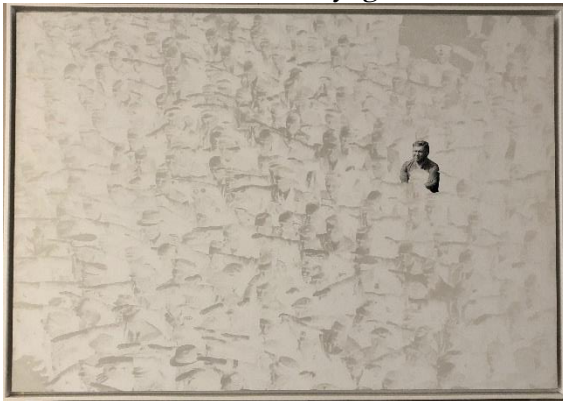
At the end of last year, the court ruled that Koons infringed Davidovici's copyright. The court concluded that the differences between the works were minimal and that Koons had incorporated all of the original elements of the advertisement into his sculpture.⁶ The court rejected Koons' argument that his work was a parody of the source and was protected artistic expression under Article 10 of the European Convention of Human Rights. It also rejected the fair-use defense that Koons had successfully invoked in *Blanch v. Koons*, a 2006 copyright-infringement case that Koons won in the United States Court of Appeals for the Second Circuit.⁷ The court ordered Koons, his company, and the Pompidou to pay Davidovici €135,000.⁸ Koons' company was fined an additional €11,000 for displaying an image of the sculpture on its website. The publisher of a book that contained a reproduction of the sculpture was fined €2,000.⁹

That was Koons' second loss in a copyright case in the French courts within two years. In March 2017, Paris's High Court found against Koons and in favor of the estate of French photographer Jean-François Bauret, whose photograph was used by Koons in creating a sculpture entitled, *Naked*.¹⁰ In that case, the court fined Koons' company and the Pompidou €40,000 and then fined Koons' company an additional €4,000 for using the image on its website.¹¹

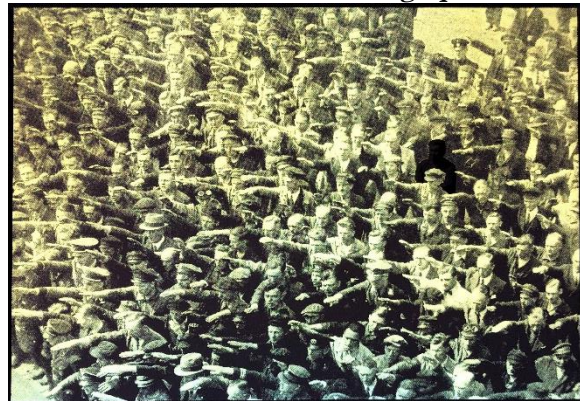
B. Hank Willis Thomas in South Africa

Hank Willis Thomas describes himself as “a conceptual artist working primarily with themes related to perspective, identity, commodity, media, and popular culture.” For a recent exhibition named “What We Ask Is Simple,” Thomas selected images of people protesting around the world during the 20th Century. He screenprinted the images on retroreflective material so that they appeared white, with minimal and ambiguous shading, when viewed in daylight. But when the viewer sees the work in specific lighting, such as a flash photograph, the image inverts and specific subjects from the photograph change materially in shape, color, and meaning. Here's a side-by-side comparison of Thomas's work entitled *Refusal* that is shown in daylight on the left side and in a flash photograph of the work on the right.

Refusal in Daylight



Refusal in Flash Photograph



⁵ *Id.*

⁶ See Decision of the Tribunal de Grande Instance, *supra* note 1, at 18-19.

⁷ *Id.* at 22-23.

⁸ Rea, *supra* note 1.

⁹ *Id.*

¹⁰ Amah-Rose Abrams, *Jeff Koons and Centre Pompidou Lose Copyright Infringement Case*, ARTNET (Mar. 10, 2017), <https://news.artnet.com/art-world/jeff-koons-pompidou-lose-copyright-infringement-case-887324>

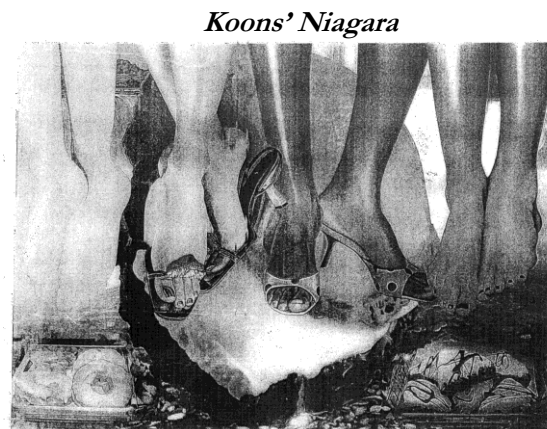
¹¹ *Id.*

The image on the left shows a man with his arms crossed—highlighting an act of protest—in a ghostly field of white paint. When you shine light on the work, as seen on the right, the context reveals itself: it is a 1936 image of a German man refusing to salute Hitler; he appears as a black silhouette in a crowd of Nazi sympathizers. The message is powerful and multi-faceted: “[t]hroughout history people have always had to fight for human rights. Human rights are never given,” Thomas has explained. This work enables the viewer to become the image-maker, through the use of photography and lighting, and to visualize what the photographer confronted and how he interpreted the event. It also teaches us about historical context: we each approach imagery—and life—from our unique experiences, biases, and beliefs. The work forces us to engage with the historic and moral elements of the man’s refusal, as well as the living conversation between the artists who saw, documented, and interpreted the event in their own ways.

If subject to a challenge in the United States, the retroreflective works should be protected under the fair-use test. They have a different message and aesthetic from the source photographs, sell in different markets through different galleries for different prices, and remove several of the copyrightable elements of the photographs. Notwithstanding, one work from Thomas’s retroreflective series was subject to intense public criticism in South Africa, where the law does not recognize a fair-use defense. The gallery that exhibited the work was also dragged into the controversy.¹² Creating a work that should receive protection in the United States did not prevent a firestorm in South Africa.

C. Koons and Warhol in the U.S.

Koons’ works have received better legal reception in the United States than in France. In *Blanch v. Koons*,¹³ fashion photographer Andrea Blanch accused Koons of copying her close-up fashion photograph of a woman’s lower legs and feet, wearing Gucci sandals, resting on a man’s lap.¹⁴ Koons used a portion of Blanch’s photograph in his collage of women’s legs and feet over the background of Niagara Falls, titled *Niagara*.¹⁵



¹² Eileen Kinsella, *Artist Hank Willis Thomas Pulls Work From a South African Art Fair After a Photographer Levels Plagiarism Charges*, ARTNET (Sep. 13, 2018), <https://news.artnet.com/art-world/artist-hank-willis-thomas-pulls-work-from-art-fair-after-photographer-levels-plagiarism-charges-1347710>.

¹³ 467 F.3d 244 (2d Cir. 2006).

¹⁴ *Id.* at 248.

¹⁵ *Id.*

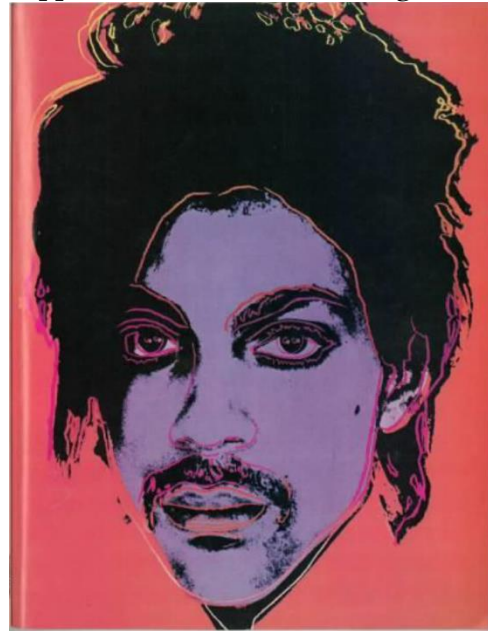
The Second Circuit ruled that Koons' work made fair use of Blanch's photograph.¹⁶ The key question, as explained by the Second Circuit, was whether the allegedly infringing work "merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."¹⁷ The court found the test "almost perfectly describe[d]" Koons' transformative collage and weighed strongly in favor of fair use.¹⁸

Similarly, in July 2019, in a case successfully litigated by our firm, the United States District Court for the Southern District of New York ruled that Andy Warhol had made fair-use of a photograph that he referenced when creating sixteen portraits of the music artist Prince.¹⁹ Here's the alleged source photograph and one of Warhol's sixteen works:

Alleged Source Photograph



Warhol's Prince Work As It Appeared in Condé Nast's Magazine



The court explained that Warhol's works "may reasonably be perceived to be transformative," because "[t]hey 'have a different character, give [the photographer's] photograph a new expression, and employ new aesthetics with creative and communicative results distinct from [the photographer's].'"²⁰ The court also explained, among other things, that Warhol's works "are not market substitutes that have harmed—or have the potential to harm—[the photographer]."²¹

Courts in the United States have been increasingly willing to extend protection to appropriation art and analogous creations.²²

¹⁶ *Id.* at 259.

¹⁷ *Id.* at 253 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

¹⁸ *Id.*

¹⁹ *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 331 (S.D.N.Y. 2019).

²⁰ *Id.* at 326.

²¹ *Id.* at 331.

²² See, e.g., *Carion v. Prince*, 714 F.3d 694 (2d Cir. 2013); *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014); *Rentmeester v. Nike, Inc.*, 883 F.3d 1111 (9th Cir. 2018).

II. Significance

As we wrote in a previous memorandum, copyright cases often raise complex questions of comparative artistry: “How do you compare and contrast the elements of a photograph with the elements of a painting or mixed-media work? Do the light and dark of the two works matter? How about the colors? What about the texture of the work? Do we identify which features of each medium comprise artistic value and then compare those? What makes a work qualitatively valuable? Quantitatively valuable? Do we care the same about both? . . . Courts have struggled to create uniform standards to govern an unconventional world, which often sees artistic value in dislocation and non-conformity.”²³ The law in the United States is complicated enough for artists and galleries to navigate. These questions arise even when the dispute is based solely in the United States—where all artists and galleries, in all states, are governed by the same federal copyright statute. Crossing the border adds an entirely new dimension. It is not the facts of the *Fait d’Hiver* and *Blanch* cases that led to such radically different outcomes. The works in both cases are typical of Koons’ appropriation art, as are the works he borrowed from. So, too, with Hank Willis Thomas’s retroreflective series. The dividing fact was not the art—it was the country in which the dispute arose.

Artists and galleries that sell works across international boundaries face risks that vary from jurisdiction-to-jurisdiction. The international reach of the art market has made a uniform strategy unwise. Do you know how the particular country in which you’re selling works evaluates appropriation art? Is it important that the new work be a parody of the original (as in France) or do the courts protect transformative works regardless of whether they comment on the source (as in the United States)? What are the consequences of copyright infringement in the jurisdiction? Can they seize the art? Can they seize assets unrelated to the art? Can they destroy the art? Are there criminal penalties? Will *everyone* involved be subject to liability for the artist’s infringement—galleries, book publishers, and museums exhibiting the infringing work? What is the political and media environment where you’re doing business: is appropriation art accepted or seen as a form of plagiarism?

It has always been important for U.S.-based artists and galleries to follow the ongoing dialogue and legal decisions about the contours of fair use. But now it is more important than ever for artists, dealers, and galleries to keep their eyes focused on several places at once. The ability to create, promote, and sell art without interference will depend on how well the art-market players integrate the divergent legal, political, and media vectors into a comprehensive and coherent plan.

* * *

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

Luke Nikas

Email: lukenikas@quinnemanuel.com

Phone: 212-849-7228

Maaren Shah

Email: maarensah@quinnemanuel.com

Phone: 212-849-7452

To view more memoranda, please visit www.quinnemanuel.com/the-firm/publications

²³ Luke Nikas and Maaren Shah, *Rentmeester v. Nike*: Copyright Protection for Photography, Quinn Emanuel Urquhart & Sullivan, LLP (Jan. 2019), <https://www.quinnemanuel.com/media/1419204/rentmeester-v-nike-alert-192019.pdf>.