

When the Art of Reproducibility Fights Back: The Case of Rogers v. Koons  
By Sandra Gibson (12-16-08)

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Artist Jeff Koons' sculptural series *The New* employs unaltered Hoover vacuum cleaners and fluorescent lights. *New Shop-Vac Wet/Dry* (1980) and *New Hoover Convertible, Green, Blue, New Hoover Convertibles Green, Blue Doubledecker* (1981-1987) continue the readymade aesthetic trend initiated with Marcel Duchamp's groundbreaking *Bicycle Wheel* (1913) and *Bottle Rack* (1914). A vacuum cleaner propped up by a Plexiglas base with fluorescent lights is an assemblage that follows the aesthetic order of a bicycle wheel on top of a stool: one "sits and spins" while the other "vacuums illumination." For what else are these readymade assemblages good for other than illuminating, spinning, vacuuming metaphors? Like Duchamp, Koons readymades question our ingrained notions of originality and uniqueness in a work of art. The radicality of their questioning is in their preservation of the autonomous object, that is in leaving such objects as a vacuum cleaner and bottle rack intact. The manufactured totality of the work can only be "radical" in its reception in an art context.



[M]y work comes from the history of the ready-made, which for me is [a] position of optimism. Whether I'm casting my Jim Beam decanter or creating a painting from a liquor ad, I receive all the legal rights from everybody – a very optimistic situation. – Jeff Koons

The series *Banality* modifies the question of the readymade artwork in the sphere of kitsch. Can kitsch aspire to the level of “high art”? If the banality of domesticity in *The New* series, with its reference to household cleaning, is recast in the aesthetic mold to which it aspires (even throwing Dan Flavin’s signature fluorescent lighting into the mix), then the aestheticization of kitsch is close at hand. The original source of the sculptures in this series is culled from photographic reproductions, the most notable one being the piece *Michael Jackson and Bubbles* (1988), a life-size porcelain rendering of the superstar with chimpanzee. Less recognizable at the time of its initial exhibition, *String of Puppies* (1988) became the object of a legal battle between the artist and the original photographer from which the sculpture is based. The original source was a postcard titled *Puppies* that the artist had acquired in a souvenir shop in 1987. The copyrighted two-dimensional image showing a man and a woman with eight puppies was sent to an artisan workshop in Italy to be cast into a three-dimensional sculpture. The copyright logo was removed by Koons before sending it to Italy with instructions for reproduction.



The original image, taken by photographer Art Rogers, is in black-and-white whereas the Koons sculpture is in color. Other changes to the photograph were made like the addition of flowers, the exaggeration of the puppies’ noses, and the subtraction of background scenery. But such minor alterations of the photograph were not enough to persuade the court that Koons’ creative act was in fact a unique appropriation. The ironic aspect in these proceedings is that the question of kitsch as a folk art practice – the idiom to which *Banality* aspires – is typically free from questions of authorship. Rogers, in his case

against Koons for copyright infringement, reverses the question of “banality” in the very return and reinscription of legal and protected authorship in the original photographic act.



The image of Michael Jackson is indeed “authored” in the sense that someone (i.e., a professional studio) framed and shot the image. But the effect, in the hands of Koons (or for that matter in the hands of his assistants), tends to redirect the provenance of authorship towards a general or generic iconography “owned” not by anyone in particular but to the community at large. The discourse of kitsch as an expression of folk art is a local cultural form belonging to the community in which it circulates; folk songs exist in order to be handed down to the next generation in the absence of authorship. *Banality* aspires towards this generic circulation of iconography. The banality of the original photograph was no banality for the photographer; for the photograph, according to Rogers, was indeed to be considered as an original work of art with a primary author.

Rogers sued Koons for copyright infringement.<sup>1</sup> Koons defended the work and argued for its status as a parody of the photograph. Moreover, Koons pointed out that most art was derivative to begin with. A "derivative work" is a work based on preexisting works. Using an artwork without a license to create another artwork is an infringement. *String of Puppies* was considered by the courts as an “unauthorized” derivative work and ordered him to pay a large financial settlement to Rogers. The true test for copyright

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<sup>1</sup> *Rogers v. Koons*, 960 F.2d 301 (2<sup>nd</sup> Cir. 1992), <http://www.ncac.org/art-law/op-rog.cfm>; Laws Applied: 17 U.S.C. § 101, et. seq. (Copyright Act of 1976)

infringement is whether or not the two works are "substantially similar." How is this tested? Basically, if an "average" or "lay" person comparing the works clearly recognizes that the "artistic expression" in one of the works has been copied from the other. "Artistic expression" refers to the creative choices that go into a work, in this case the particular posing and expression of the subjects. "Artistic expression" does not refer to content but to form and the general composition of the work. Copyright infringement does not require "literal identical copying of every detail." Furthermore, "small changes here and there are unavailing." Despite the differences, the court found that Koons' sculpture was a "substantially similar" copy of Rogers' photograph.

To me, integrity means unaltered. When I'm working with an object I always have to give the greatest consideration not to alter the object physically or even psychologically. I try to reveal a certain aspect of the object's personality [...] I'm placing the object in a context or material that will enhance a specific personality trait within the object. The soul of the object must be maintained to have confidence in the arena. – Jeff Koons

In arguing for the status of *String of Puppies* as a work of parody, Koons put into motion what is referred to as "fair use defense for parody".<sup>2</sup> The courts found that Koons had no clear need to imitate the photograph for parody. Why? Because Koons could have achieved a concept or idea of parody of a similar type without copying Rogers' photograph. In other words, since Koons was not specifically addressing the particular photograph called *Puppies*, *String of Puppies* was not a parody at all and so was not considered an act of fair use. If Koons would have argued that his sculpture was a direct commentary on Rogers' photograph then perhaps things might have turned out differently. Instead Koons defended his act of appropriation as a general commentary on contemporary society as a whole. By fabricating what he believed to be the original impetus to think through the concept of kitsch, namely the postcard bearing the image

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<sup>2</sup> "Fair use" 17 U.S.C. § 107. The four fair use factor balancing test are 1) purpose and character of use, 2) nature of the copyright work, 3) size and portion used in relation to the copyright work as a whole, 4) the effect of use on the potential market value of the copyrighted work.

called *Puppies*, Koons was parodying the culture at large, that is the *becoming-kitsch* of society. The mass production of commodities, for Koons, was in part responsible for reproducing the ideological undercurrent of a kitsch sensibility among the masses. This is the underlying ground for the constellation of sculptures grouped under the name *Banalities*.

A further distinction was made by the courts between the concept of “parody” and the concept of “satire” in order to make its case. The controlling doctrine for prior cases states that the original work must itself be in some way the object of parody. This, as we have seen, was not the case for Koons as he was not directly attacking Rogers’ photograph. Instead *String of Puppies* was to be thought of as satire (and not parody) of society at large. The courts made a legal distinction between “parody” as a critique of a specific work and a more general concept of “satire”. Viewers would not be aware of the original photograph in the same way, say, they would with the image of *Michael Jackson and Bubbles*. Public discernment of parody is key to its status as “parody.” The United States Court of Appeals for the Second Circuit stated the following:

If an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer’s claim to a higher or different artistic use – without insuring public awareness of the original work – there would be no practicable boundary to the fair use defense. Koons’ claim that his infringement of Rogers’ work is fair use solely because he is acting within an artistic tradition of commenting upon the commonplace thus cannot be accepted.<sup>3</sup>

Was Koons merely being respectful to the “artistic” merits of Rogers by redirecting the source of his attack towards the general and highly abstract cultural critique? If such were the case, the choice of displacing the object of parody to one of satire certainly got him into big trouble with the courts. The generalization of his critical and aesthetic discourse (i.e., “satire” and not “parody”) with the court proceedings was costly for Koons and his gallery Sonnabend. Despite what Koons said about the function of

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<sup>3</sup> *Rogers v. Koons*; [45].

societal satire, one cannot help but view the *String of Puppies* as a direct parody of the photograph itself. The so-called small alterations of the original photograph directly ridicule Rogers' choice of subject matter and composition. Koons' comical arrangement of flowers, the choice of blue as a color for the puppies and the elongation of their noses with a dash of white at the tips – are subtle signifiers which suggest to the viewer that the work is indeed “poking-fun” at something, even if one is not aware of the original source. Perhaps only a miniscule audience of “insiders” (i.e., patrons and curators) had privileged access to this kind of backstory, but in the end it matters not. If initially it was “difficult to discern any parody of the photograph *Puppies* itself”, thus “insuring no public awareness of the original work”, the irony is that now Koons' *String of Puppies* has attained its status as a work of parody that will always circulate with *Puppies* in mind.

I love the gallery, the arena of representation. It's a commercial world, and morality is based generally around economics, and that's taking place in the art gallery. I like the tension of accessibility and inaccessibility, and the morality in the art gallery. I believe that my art gets across the point that I'm in this morality theater trying to help the underdog, and I'm speaking socially here, showing concern and making psychological and philosophical statements for the underdog.  
– Jeff Koons

It is often the case that artists make general claims about society at large via their artwork. It is a method they employ to make their work accessible to all. In shifting the particular to the general, Koons was merely trying to make a connection with his audience. The intentions are democratic and work to offer an alternative to the general conception of the artwork as a mysterious object that only the artist as genius or art critic can decode. But ever so often – or perhaps more often than we think – a viewer will recognize the original source. Somebody did when the *Banalities* exhibition opened at the Los Angeles Museum of Contemporary Art in 1989. A photographic reproduction of *String of Puppies* appeared in the Los Angeles Times, when a friend of the couple depicted in the sculpture, who was familiar with the original photograph, notified the latter who, in turn, notified Rogers. What is interesting to note is that Rogers' so-called

original artwork was originally commissioned by his subjects, the Scanlons who recently acquired eight German Shepard puppies. Moreover, Rogers licensed the image and published it as a postcard in an edition of 10,000. Was Rogers, in marketing his product, making a parody of his subjects? Or was he making a satire about kitsch in general?

If the courts define parody in terms of numbers, then the artist must insure that his or her reference is well-known. But who is to say? Often artists could care less if a source is well-known or else puts way to much emphasis on the fact that it is known. When Duchamp exhibited his readymade urinal, titled *Fountain* (1917), there was no question whatsoever as to whether anyone would be left out of the loop of its recognizability. The same goes for Koons' series *Equilibrium*, with its readymade collection of basketballs displayed like so much sports memorabilia. But is this parody or satire? What is being critiqued in these random acts of aesthetic display? Koons suggests parody *and* satire in speaking about *Equilibrium*: "It's about artists using art for social mobility."



He is referring to the basketball player as "the middle-class artist of our time". In *Encased – Row One* (*Spalding Magic Johnson Basketball, Wilson Aggressor 285 Basketball, Spalding Scottie Pippen Basketball, Spalding Shaq Attaq Basketball, Wilson Aggressor 285 Basketball, Franklin 6036 Soccer Ball*) (1983-1993), limited signed editions of commercially available basketballs refer not only to a brand name item (Spalding, Wilson, Franklin) but also to famous star basketball front men. As "parody" specific individuals are targeted as the source of Koons' commentary on the cult of a

particular star; as “satire” a general statement is being communicated about the cultural deception of cultural equilibrium. “Equilibrium”, Koons states, “is unattainable, it can be sustained for a moment.”

The question for us is whether Koons’ artwork post *Roger v. Koons* is in any way informed by questions of parody versus satire as defined by the legal proceedings. *Encased* gives us a clue that perhaps the case “encased” Koons within the juridical framework. If that is the case it could also be argued that the proceedings equipped Koons and his lawyers with the juridical apparatus to “re-case” the case in a later legal battle: *Blanch v. Koons*.<sup>4</sup> This time Koons prevailed over an infringement lawsuit filed by the photographer for copying part of a Gucci advertisement. This time rather than claiming “fair use defense for parody” he claimed fair use defense on the basis of its being “transformative”. Koons treated the photograph – showing a pair of legs in silk sandals – as “raw material” for his painting *Niagra* (2000). “Transformative” means that the work “adds something new” that was not originally there to begin with; that is, something that effectively alters not only the original context of the image but the original intention, i.e., meaning. Rather than referring to the original image, Koons wanted the viewer “to think about his/her personal experience with these objects, products, and images and at the same time gain new insight into how these affect our lives”. Koons was interested “in the creation of new information, new aesthetics, new insights and understandings”.

I’m basically the idea person. I’m not physically involved in the production. I don’t have the necessary abilities, so I go to the top people...I’m always trying to maintain the integrity of the work. – Jeff Koons

In his earlier series *The New*, Koons challenges this character of the “transformative” in a satirical use of billboard advertisements. The only alteration of the billboard is in its *transformation* into a lithographic artwork. The words “The New” appears on all the original source material. The viewer is surrounded by his/her culture of “new-ness”.

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<sup>4</sup> *Blanch v. Koons*, No. 03 Civ. 8026 (LLS), S.D.N.Y., Nov. 1, 2005.





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What is reproducible has no origin, theoretically speaking. Each reproduction is the origin of its own production. It is a unique act with a birth certificate. A copy of the Mona Lisa acquires value not in reference to some “original” source in the Louvre but through its own unique status as an object. Andy Warhol clearly understood this residual economy of the reproduced object and built his aesthetic empire from its ruins – the ruins out of which emerged Walter Benjamin’s *The Work of Art in an Age of Mechanical Reproduction*. Warhol’s serial silkscreen reproduction, *Jackie (The Week That Was)*



(1963), with Jacqueline Kennedy Onassis suggests the *overdetermination* of the mechanical process and the utter breakdown inherent in processes of mechanized repetition. The silkscreen process shows us its imperfections, its accidents, its failures to produce reproduction. The image of Jackie Onassis bears the accidents and breakdowns of a process. She becomes unhinged from her static place as a cult snapshot and begins to circulate within the traumatic inscription of the artwork.

Aesthetically speaking, reproductive technologies have offered artists the means by which to wrench the image away from its so-called origin. The advertisement industry has incorporated the lessons of the avant-garde into its monolithic marketing campaigns. Even Warhol's co-optation of the mass media has, in turn, been co-opted by the latter. But the power of images goes beyond even the most scientifically oriented attempt to manufacture its effects in an orderly fashion. Images are thoroughly overdetermined. And even more so in their mass proliferation as reproductions. The ambiguousness of an image on a billboard – even with the company's logo – is a case in point. What is *unhinged* in the advertisement is not so much the reproduced image but the way it mobilizes our unconscious "archive" of images. Whether we take account of it or not, images affect the mind. We have no choice but to let the image in and take residence amidst the constellation. What happens between the reception of an extraneous image and the unconscious is not always immediate. Their effects resist calculation.



## BIBLIOGRAPHY

Bamberger, Alan, "Art Copyright Infringement for Artists", *Artbusiness.com* (Retrieved December 2008) <http://www.artbusiness.com/copyprobs.html>

Benjamin, Walter, *Illuminations*, Harcourt, Brace and World, Inc. 1968

Berry, D. M., & Moss, G "Art, creativity, intellectual property and the commons: Can free/libre culture transform art?" *Free Soft Ware Magazine Web Site* (Retrieved December 2008)

[http://www.freesoftwaremagazine.com/articles/focus-art\\_and\\_commons](http://www.freesoftwaremagazine.com/articles/focus-art_and_commons)

Besser, Howard, "The Erosion of Public Protection; Attacks on the concept of Fair Use" 1998, (Retrieved December 2008)

<http://www.studiolo.org/IP/TTM/BESSER.htm>

Cabanne, Pierre, *Dialogues with Marcel Duchamp*, The Viking Press, Inc., New York, N. Y. 1971

Debord, Guy, *The Society of the Spectacle*, Zone Books, New York, 1994

Fergus, Mary Ann "Art & Law: Derivative Works And Copyright – Painting from Another's Photograph", *American Society of Portrait Artists Web Site* (Retrieved December 2008) <http://www.asopa.com/publications/2000winter/law.htm>

Harris, Lesley Ellen, "Licensing Digital Content: A Practical Guide for Librarians", American Library Association Editions, Washington, 2002

Inde, Villis R., Jeff Koons: Piracy or Fair Use? "Art In The Courtroom", Greenwood Publishing Group, 1998

Offenhuber, Dietmar, "Transformative Copy", Masters Thesis , Massachusetts Institute of Technology, February 2008 (Retrieved December 2008)

Price, Seth "Dispersion" (Retrieved December 2008)  
<http://www.distributedhistory.com/Dispersion08.pdf>

Russell, Carrie, "Complete Copyright: An Everyday guide for Librarian", American Library Association, Washington, 2004

Sanouillet, Michel and Peterson, Elmer "The Writings of Marcel Duchamp," Oxford University Press, 1973

## BIBLIOGRAPHY (Continued)

Cornell University Checklist for Conducting Fair Use Analysis. (Retrieved December 2008) [http://www.copyright.cornell.edu/policy/Fair\\_Use\\_Checklist.pdf](http://www.copyright.cornell.edu/policy/Fair_Use_Checklist.pdf)

Journal of Contemporary Art, Jeff Koons Interviewed by Klaus Ottmann, New York City, October 1986 (Retrieved December 2008)  
<http://www.jca-online.com/koons.html>

National Coalition Against Censorship, Rogers v. Koons, 960 F 2d 301 (Retrieved December 2008)  
<http://www.ncac.org/art-law/op-rog.cfm>

The Copyright Clearance Center  
<http://www.copyright.com/>

US Copyright Office Web Site  
<http://www.copyright.gov/>

