

**Art Photography Auction**

Contemporary/Modern  
Photography, Print, Paintings &  
more. Bid Online  
[Artnet.com/Auctions](http://Artnet.com/Auctions)

**ArtSlant New York**

NY's comprehensive calendar of art  
openings, events and exhibits  
[NY.ArtSlant.com](http://NY.ArtSlant.com)

**Art Photography Auction**

Online fine print auction featuring  
top US photographers. Bid now!  
[www.viewpointgallery.org](http://www.viewpointgallery.org)

**Photo Art Museum**

Buy and Sell photos and  
Post your items for Free  
[www.photoartmuseum.c](http://www.photoartmuseum.c)



Ads 1

## COPYRIGHT LAW VS. ART AND THE PAPAL CENSOR OF THE KISSING NUN

By Alan Behr

**NEW YORK, 18 APRIL 2008**— Aesthetically and financially, contemporary art has done wonders for gallery owners, serious collectors, dilettantes and the artists themselves. It has rewarded more obliquely the usual gaggle of critics, the restorers and those young art-show mavens who think that the only true way to show connoisseurship is to wear a silly hat to an opening. It should therefore seem absolutely fair that art should at last benefit the lawyers.

Like Warhol before him, **Jeff Koons** incorporates many elements of American popular culture into his artwork, but unlike Warhol, he lives in an age in which copyright holders are trigger happy in enforcing their rights against unauthorized uses in the visual arts. Late in 2006, Koons won in an appeal of a copyright-infringement case concerning his painting *Niagara*. The painting was part of a series called *Easyfun-Ethereal*, commissioned by the Guggenheim Museum in Berlin and exhibited there in the autumn of 2000. It's usually a good sign when a work of art sticks in your mind: I immediately recalled having seen *Niagara* at the exhibition in Berlin when, years later, I found it reproduced in the appellate court's written opinion in *Blanch v. Koons*. Whether art is arresting, controversial or even good is, however, not what a copyright-infringement case is about. It is about whether or not Artist B made an unauthorized and therefore illegal copy of a work by Artist A.

For Artist A to obtain copyright protection for what he has made, he must have done something that is minimally creative, which may not seem so hard until you consider what passes for art these days. Assuming Artist A gets over that threshold, if Artist B makes a copy of the work of Artist A, he had better do something minimally transformative with it for that copy not to be illegal. That is, you can't just take something that somebody else has done and say you did it; you have to alter it in some way so that (and here I'm oversimplifying a bit), at the very least, people who otherwise would have paid for the original work of Artist A or a legitimate copy of it don't buy the work of Artist B instead. Put even more simply: everyone involved has

to show some additive creativity in order to gain protection for what he contributed and to avoid infringing upon the work of anyone else.

In the *Koons* case, the plaintiff, the photographer named Andrea Blanch, had taken a picture of a woman's lower legs and feet in a pair of Gucci sandals, originally for a feature in *Allure* magazine. Koons admitted scanning Blanch's image into a computer, after which the background was removed. Koons then had assistants paint the legs and feet so that, with few alterations, they, along with three other pairs, dangled from the top of the canvas like ducks hanging in the window of a Chinatown butcher. The photographer sued Koons for unauthorized copying, but she lost; the court held, correctly, I believe, that Koons had done enough fiddling with the basic motif—that is, that he had sufficiently transformed it—so that its presentation and meaning were altered. The Blanch image had become, through the metamorphosis of its adaptation by Koons, a commentary on pop culture, to no actionable detriment to Blanch.

At the just-concluded tenth edition of The Armory Show, The International Fair of New Art, such a plucking of pop-culture motifs was so rampant, it presented a common theme. Cosima von Bonin, representing the growing school of borrowers, stuck mass-produced plush toys on a clothesline and called the work *Marathon* (2007). By the time I got to see it, at the booth of Friedrich Petzel Gallery, it had been sold for \$120,000. For all we know, there are copyright registrations covering some or all of the toys used in the von Bonin work, but von Bonin surely purchased the toys rather than copying them. Under what is known as the "first-sale doctrine," she could pretty well do what she wanted with them once they are her property—such as suspend them from a line and charge a huge markup—without interfering with anyone else's rights. (Who said that U.S. law doesn't favor artists?)

Around the corner, **Jenny Holzer** continued her campaign to test the limits of the requirements of the law (but obviously not of the market) for minimal creativity. One of her works on display at Cheim & Read was the ambiguously entitled *Selection from Survival* (2006); it was a marble stool on the seat of which was chiseled, "You have been caught thinking about killing anyone you want." When I saw it, the Holzer, one of an edition of ten, was still available for the relative bargain price of \$75,000.

Simple sentences of the kind favored by Holzer, even if expertly chiseled into lawn furniture, are not all that easy to protect under copyright law. The law requires that protectible expression be a "fixed" in a "tangible medium of expression." No argument here; since the Age of Pericles, nothing in Western art has been more fixed than a carving in stone. The problem is that which is the "soul of wit": brevity. Warns the U.S. Copyright Office, "Even if a . . . short phrase is novel or distinctive . . . , it cannot be protected by copyright." It is theoretically possible, however, for a sentence to prove just complex enough to protect. Were **Damien Hirst** to have seen the Holzer work, then run across the park to brand "You have been caught thinking about killing anyone you want" into the flanks of **his thirteen-foot**

**tiger shark** recently installed at the Metropolitan Museum, Holzer might have a case against him for copyright infringement. It would be the kind of case litigators truly enjoy: one with such close questions of law, it could make reputations and go on for years.

There are different problems when a work of obvious and even exemplary creativity gets taken whole by what gallery owners call appropriation artists and copyright lawyers call defendants. Two dramatic examples are now on display in a single room at the International Center of Photography, also in New York City, as part of the exhibition *Archive Fever: Users of the Document in Contemporary Art*. The artist Sherrie Levine rephotographed twenty-two **photographs by Walker Evans** from the milestone series he did for the **Farm Security Administration** during the 1930s; she then arranged them just so and called them her own. To understand why she can do that, we must look to the wall label, which informs us that,

The issues surrounding postmodernist appropriation, and critiques of authorship and aura, are central to Sherrie Levine's daring, seminal deconstructions of the modernist myths of originality in many of her refabrications of well-known modernist works by a gallery of male artistic eminences. Levine's *After Walker Evans* (1981) is a controversial work because its principal conceptual strategy goes beyond simple appropriation: it bluntly challenges the authenticity of a work of art, the nature of authorship itself, and the sanctity of copyrighted material....



Sherrie Levine: *Untitled from After Walker Evans* (1981)  
Photo courtesy of International Center of Photography

Since its inception in 1974, few art institutions in the world that have given me as much sustained pleasure as the ICP, and I respect ICP curatorial decisions enough not to question them lightly, but what I've reproduced here (legally, under the part of the doctrine of "fair use" that permits limited copies for the purposes of criticism) raises two points I've previously made on these pages that now bear repeating. The first is that I agree with what I

think the author of that commentary is struggling to tell us (in artspeak so wooden, he should have his pencil ceremonially broken and his passport revoked): the meaning of a work can be altered by the context of its display. So it is plausible that Levine has at least tried to make the Walker Evans photographs "her own." The museum, which is quite responsible about these things, has assured me that all necessary rights were cleared as to any works not in the public domain. That would be needed, because those are recognizably Walker Evans photographs on the wall, individually framed, apparently unaltered and therefore probably not "transformed" in any way that would deflect a well-aimed claim of copyright infringement.

The other point is codified as Behr's First Law of Contemporary Art: to be art, a work must be art independent of commentary. Art is here to explain life to us. If the art—the explanation—is itself in need of explanation to a reasonably sophisticated viewer, it probably isn't really art. And if the textual explanation is barely comprehensible, the most we can do is to help it along a bit: perhaps by "postmodern appropriation" the author of the wall label meant "reediting." Editing—that is, selection—can indeed be a creative process sufficient to create copyrightable protection. Indeed, the law recognizes a "compilation copyright" for the way that works and parts of works are compiled (such as the quotations by others selected by **Bartlett's Familiar Quotations** and similar books), as long as the editor has permission to use any part that represents more than a small portion of the work being referenced.

On the other three walls of the same room at the ICP as the Levine appropriation are all ninety-one of the erotically charged photographs that **Robert Mapplethorpe** took of black men and published in his *Black Book* (1986). They form a double row in between which are seventy-eight quotations that, together, call attention to the **racial issues and homoerotic objectification** underlying the Mapplethorpe images. The artist this time isn't Mapplethorpe but Glenn Ligon, who takes credit because he has compiled the words and images into a work he calls **Notes on the Margin of the Black Book (1991-93)**. Ligon makes an important point about Mapplethorpe's intentions and results, one that has and should continue to be made a part of the dialogue about the photographer. By adding the quotations, he has put more of his homework on display than Levine.

Commenting about a book of photographs that you didn't take by displaying its contents along with words that you didn't write is likely not transformative enough to allow you to do that without permission, should you feel moved to do so in the manner of **Richard Prince**. It was one of the most extreme cases of photographic appropriation, and it became the most famous: In 1983, Prince rephotographed a photograph taken in 1975 by Garry Gross, a commercial photographer, of a nude, prepubescent **Brooke Shields** and retitled it **Spiritual America**. His sole addition to the work was a gilt picture frame. After a bit of clever self-installation and self-promotion, his work ended up in the Whitney Museum and, in a retrospective only just concluded, at the Guggenheim in New York. The appropriator not only

avoided getting dragged into the lawsuit filed by Ms. Shields regarding Gross's use of his original photograph, he got the bulk of the fame, and his version earned the real money (\$151,000, at Christie's).

Legal questions surrounding photography are the subject of another exhibition, *Controversies: A Legal And Ethical History of Photography*, now in progress at the Musée de l'Elysée, in Lausanne. Perhaps due to its location in a city known more for tax exiles than for art, the museum has not received the attention it deserves, which is a shame because it is an institution that is not afraid of reaching toward either the obscure or controversial in the exercise of its curatorial voice. The current show centers on problems of copyright, privacy and other legal questions raised by photography. It was curated by a professional curator and a lawyer—a practice that I can only hope starts a trend. Interestingly, the museum has included the Brooke Shields image, not as *Spiritual America* by Richard Prince but as *Untitled* (1975) by Garry Gross, because the legal controversy explored here is not Gross's battle with Prince over who has the right to own and show the image but Shields's battle with Gross over whether, essentially, the image should be seen at all.



Oliviero Toscani: *Kissing-Nun*, 1992

© Copyright 1991 Benetton Group S.p.A

Photo: Oliviero Toscani

Photo courtesy of Musée de l'Elysée, Lausanne

The exhibition's press release addresses one of the coy ironies of the current market: "Most museums demand payment for access to images in their collections even when these pictures are not protected by copyright," making it more difficult for scientific and cultural publications to do their jobs. And so—museums are supporting appropriation art, with its deliberate taunting of the copyright laws, and museums (Wouldn't it be cute to discover they are the same ones?) are demanding money for access to

something that neither they nor anyone can ever own: the intellectual property rights in an image that has fallen into the public domain.

Among its controversies, the museum included *Kissing-Nun* (1992) by **Oliviero Toscani**. Depicting a young, attractive nun kissing a priest, it was made for a Benetton advertisement that was withdrawn in Italy on protest by the Vatican. **Naughty priests** and nuns have been in the literature about as long as there have been **priests and nuns**, but even an image of a simple, albeit ecclesiastic **kiss** can have enough originality to be protected under copyright law. And what better proof is there of originality than getting powerful people of any faith worked up enough to ban what you've done?



Anonymous, Abou Ghraïb, Irak, 2004

© DR

Photo courtesy of Musée de l'Elysée, Lausanne

As a photographer myself, I've defended the medium against claims that it is not an art form that requires skill, selection and raw talent—claims that imply that photography deserves a lesser level of legal protection than other pictorial media. I am also prepared to admit, however, that figurative painting, with its reliance on hand-eye coordination and primitive hand tools to capture in two dimensions a resonating moment of real-world experience, is probably a more difficult art form to master—not only more difficult than photography, but more so than almost any other form of visual art. I'll go as far as to include in that list of overtopped art forms the kind that draws upon all its creator's skills to hang out plush toys. That probably explains why there was almost no figurative painting at the large, well-

attended Armory Show: copyright protects even minimal levels of creativity, both by the maker of an underlying work and by the artist who seeks to adapt that work or simply to appropriate it. It is that minimal standard—that line above utter implausibility to a claim of creativity—that should be the starting point of a journey toward the making of art, not its destination. Every age and every culture gets the art that it deserves; I suppose we should have all seen this one coming.

Alan Behr practices intellectual-property law at the New York office of Alston & Bird LLP. His last photographic exhibition was as part of the "Postcards from Paris" show at Leica Gallery in New York City. Alan Behr contributes regularly to Culturekiosque and last wrote on Eric D. Weitz' new book, *Weimar Germany: Promise and Tragedy* (Princeton University Press).

## Travel Calendar Tips

### New York

**Archive Fever: Uses of the Document in Contemporary Art  
Until 4 May 2008**

**International Center of Photography**  
1133 Avenue of the Americas at 43rd Street  
New York, NY 10036  
Tel: (1) 212 857 00 00

### Lausanne, Switzerland

**Controverses: Une histoire juridique et éthique de la photographie  
Controversies: A Legal And Ethical History of Photography**

**5 April - 1 June 2008**

**Musée de l'Elysée**  
18, avenue de l'Elysée  
1006 Lausanne, Suisse  
(1) 41 21 316 99 11

## Related Culturekiosque Archives

**Smashed Hits: Music and censorship or the tunes you didn't hear...**

**Interview: Steve McCurry: Capturing the Face of Asia**

**Black History in Pictures: The Photographs of Charles "Teenie" Harris**

**Anthony Suau, Beyond The Fall: The Former Soviet Bloc in Transition  
1989 - 1999**

**Comment: Ingar Krauss**

**Kosovar Artist To Out New York Lawyers**

**Exhibition Review: Henry Wessel Photographs**

**Art Market: Photography into Art into Money**

**Exhibition Review: William Hogarth 1697 - 1764**

**Art Without Flashes: How the Louvre Came to Ban Flash Photography**

**Fernando Botero: Abu Ghraib**

**Two-Minute Art: The New Kitsch**

**Jeff Wall at the Art Institute of Chicago**

**War in Iraq: The Coordinates of Conflict-Photographs by VII**

**Book Review: Thomas Struth: 1977 – 2002**

**Diane Arbus: Revelations**

**The Ecstasy of Things: From the Functional Object to the Fetish in  
20th Century Photographs**

**"No Limits" on Mapplethorpe Film and Brit-inspired Gay TV Series on  
Showtime**

**Exhibition Review: Honoré Daumier (1808-1879)**

**Film Review: Erin Brockovich**

[ [Feedback](#) | [Home](#) ]

If you value this page, please **send it to a friend**.

Copyright © 2005 Euromedia Group, Ltd. All Rights Reserved.