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Copyright and art work in South Africa

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COPYRIGHT AND ART WORK IN SOUTH AFRICA

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ABSTRACT

It is in the nature and tradition of artists to use the works and ideas of other artists within the context of their own work. Artists find copyright law restrictive and experience difficulty in determining where to draw the line between using other artistic works as inspiration and exploiting the skill and labour of others. In addition, the maxim that there is no copyright in ideas, only in the expression of ideas, is not as simple as it appears. This report is aimed at assisting the visual artist in aspects of copyright law, specifically in relation to the distinction between ideas and the expression of ideas in a material form.

The method used in the research is an analysis of South African legislation and cases that illustrate the law in relation to ideas and the expression of ideas in an artistic work. As a result of the dearth of case law and literature in South Africa dealing with copyright and visual art, reference is made to American case law and the defence of fair use of an artistic work, with reference to artist Jeff Koons.

The findings of the study are that the South African Courts are not in favour of allowing artists to monopolise ideas or combinations of ideas and the definitive threshold of originality is low. To constitute an infringement of an artistic work it is the artistic features or attributes of the work that have to be transformed or adapted, not some concept, that it conveys. An artist is therefore free to use the ideas of other artists, provided that such ideas are expressed in a material form and they do not form a substantial part of the work of another.

INTRODUCTION

The leading authority on copyright law in South Africa, Dr Owen Dean (2006, p.1-42) warns that copyright is both a restrictive and a technical subject. The exclusive rights of an artist are couched in the negative - that is in the form of restricted activities - and there is no actual definition of copying. In South Africa limited guidelines are available to visual artists to determine just how much visual citation is legally allowed.

When assessing a case of copyright infringement in an artistic work attention must be given to whether the similarity between two works is attributable to common ideas and concepts embodied in them, or to similarity of material expression of ideas. Dean (2006, p.1-42B) points sharply to the fact that:

> Copyright, which is concerned with copying the outwardly perceptible form, must not be confused with the rights conferred by a patent in respect of the conception that is its subject matter, or the idea that is conveyed by a work. It is often difficult to decide in a particular case whether the idea or its expression has been copied.

For the purposes of this report, the legislation referred to is the Copyright Act 98 of 1978, as amended, and is hereinafter referred to as 'the Act'. The Act defines an artistic work irrespective of the artistic quality thereof as paintings, drawings, sculptures, engravings, photographs and works of architecture being buildings or models of buildings (Section 1(1)) of the Act. This report is concerned with visual art only.

In Chapter 1 of this report I discuss copyright and the notion of authorship and originality in the art historical context, particularly in the context of Postmodernism. In so doing I refer to artists such as Roy Lichtenstein (1923-1997), Candice Breitz (born 1972), Sherrie Levine (born 1947) and Jeff Koons (born 1955) as examples. These artists appropriate images and have been criticised for infringing the copyright of others.

In Chapter 2 I deal with copyright infringement, with reference to the case of South African artist Gerhard Marx who instituted legal proceedings against BMW South Africa (Pty) Ltd and advertising agency, Ireland Davenport (Pty) Ltd, in 2006. The case was settled out of Court in 2008. It highlights the difficulty artists have in distinguishing between ideas and the expression of ideas; the meaning of concepts such as originality; authorship and copying in the context of copyright law.

In order for an infringement of copyright to take place an infringer must have performed a restrictive activity that relates to a substantial part of the work (Section 1(2A). In this regard I discuss two important cases: *Galago Publishers (Pty) Ltd* v *Erasmus* 1989(1) SA 276A (hereinafter referred to as the *Galago Publishers* case), which established the test for determining whether a substantial part of a work has been copied, and the case of Rapid Phase *Entertainment CC v SABC* 1997 JOL 393 W *(*hereinafter referred to as the *Rapid Phase Entertainment case)* which confirmed the current state of the law insofar as the dichotomy between ideas and the expression of ideas is concerned. This case incorporates the position taken in the important case of *Natal Picture Framing Co v Levin* 1920 WLD 35 hereinafter referred to as the *Natal Picture Framing case.*

In chapter 3 of the report I deal with the Postmodern artist Koons, to illustrate parody and pastiche as part of Postmodern strategy and the way in which the American Courts have dealt with the issues of copying ideas. In particular Koons' work brings into sharp focus what constitutes a 'substantial part' of a work in the context of the defence of fair use.

Chapter 4 is a summary of the findings of the report. Inter alia, I have ascertained that on closer inspection of the tests applied to the facts in cases of copyright infringement, that the terms 'originality' and 'author' are given defined meanings and have been interpreted in case law. For example, depending on the medium used by an artist in the making of an artistic work, the Act stipulates who the author is. In the case of photographic works it is the composer of the photograph who is the author (Section 1(1)).

Freedom of expression and parody have not been established as defences to copyright infringement in South Africa. The Constitutional Court decision in the case of *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Pty) and another*[1] is an example of how the Constitutional Court has intervened in the arena of intellectual property law and should be read in the context of trademark law.

Although the South African law makes provision for a number of statutory exceptions to direct infringements of copyright, the doctrine of fair use is not applicable in South

[1] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and another 2006(1)SA 144(CC)*

African copyright law. Instead there are exceptions to infringement of copyright limited to specific activities and instances.

In conclusion, it is self evident that artists draw inspiration from other works of art. By claiming that 'there is nothing new under the sun' artists who appropriate work of others (which for the purposes of this report are hereinafter referred to as 'appropriation artists') and Pop artists have subverted the concepts of authorship and originality as they are understood in the art historical context.

Although artists need to be cautious when incorporating copyright images in their work, in the context of South African law they have a great deal of latitude and freedom to use other works of art as inspiration. First, there is no definition of 'original' in the Act. 'Original' in the context of copyright does not mean that the work must in any way be inventive. The characteristics of novelty and creativity do not appear in the context of copyright law. Originality relates to the degree of skill and labour involved in the making of a work.

Second, in support of this contention, the *Rapid Phase Entertainment case* confirms the decision of our Courts when it comes to guarding against the monopolization of ideas by an artist. Based on this authority, artists have a great deal of latitude. To constitute an infringement of copyright, the artistic features or attributes of a copyright work must be transformed or adapted, not some concept or idea that it conveys. The amount copied needs to be compatible with fair practice and must not exceed the extent justified by the purpose.

An infringement of copyright may be justified. In South Africa the exceptions to infringement are referred to by copyright lawyers as 'fair dealing'. Under American law there is a well developed doctrine of fair use of a copyright work and in terms of which the Courts support the appropriation of copyright images if the new work produced is transformative (i.e. whether the work containing the appropriated images adds something new, thereby furthering the purpose of the original and giving it new meaning and expression).

CHAPTER 1 - THE CONCEPTS OF ORIGINALITY, AUTHORSHIP AND COPYING IN THE ART HISTORICAL CONTEXT

The main part of this research report deals with the difficulty that artists encounter when making the distinction between the copying of an idea and the copying of an idea that has been expressed in a material form. Where visual art is concerned it is the confluence of art history and copyright law that highlights why such difficulties arise. Art history and modern literary cultural criticism, together with their adoption of concepts from literary theory, have given rise to confusion for artists who are not familiar with the definitions in copyright law. Concepts such as originality, authorship and copying in the art historical/ art critical writing have acquired meanings that do not equate with the definitions for these concepts in the Act, or the meaning the terms have acquired in case law.

It is to be expected that artists find copyright laws restrictive. American Copyright lawyer, Emily Meyers (2007, p.219), remarks that 'throughout history artists have imitated the work of others to learn their craft and pay homage to previous masters. A pupil cultivated his own artistic skill and sensibility by emulating his teacher's technique and rendering precise copies of his works'. This emulation did not have a stigma attached to it because it was part of a learning process.

According to art theorist Moshe Barasch (1990, p.285) the 'position of the artist in society and the fascination with creativity and productive inspiration has occupied the thoughts of philosophers and poets for centuries'. Tracing the history of views concerning the purposes of art and the methods of production is a research report on its own, therefore I will deal briefly with the position of the artist in the modern and Postmodern periods and theoretical movements such as Structuralism, Post-structuralism and deconstruction that have influenced the ideas of artists and art history. The main focus of this report is the legal position of the artist.

Laurie Schneider Adams (1996, p.102) makes the assertion that in the history of Western art, artists were equated with gods, the 'former making life like figures and the latter creating life itself'. As an example Adams singles out an illustration in the 13th century manuscripts where God as the supreme artist is shown as drawing the universe with a compass.

Frascina and Harrison (1982, p.1) remind us that 'the history of art is not simply a history of works of art; it is also a history of ideas and interpretations. The works of

critics and theorists have been influential in deciding how modern art is to be seen and understood, they have also influenced the course it has taken.'

Art writer and theorist Anne D'Alleva (2005, p.154) traces the origins of the distinction between an original and a copy to Plato, who considered the latter inferior to the former. The concept of binary oppositions such as light/dark, original/copy can be attributed to the linguist Ferdinand Saussure (1857-1913) and his successor French anthropologist Levi-Strauss (b.1908). This theoretical movement known as Structuralism emerged in France in the 1950s and 60s. Saussure emphasized that language is a system or structure that pre-exists the individual speaker. Communication therefore always employs pre-existing concepts; patterns and conventions. D'Alleva (2005, p.154) says that 'one of the ideas of Structuralism is that the concept of authorship – the idea that individual genius and expression determine the work of art - is itself a cultural construct a legacy of the Renaissance'. This idea reached its peak in the Romantic era.

Post-structuralism and Deconstruction emerged as a critique of Structuralism in the 1960, and coincided with the emergence of Pop Art (D'Alleva p.136). Post-structuralism and Deconstruction theory challenged the concept of binary opposites and reject concepts such as originality and authorship. D'Alleva remarks that (2005, p.137) 'Post-structuralists argue that structures are not some kind of universal, timeless truth, just waiting to be uncovered. Rather, structures are fictions we create in order to be able to interpret the world around us.

D'Alleva (2005, p135) explains that French cultural critic, Roland Barthes (1930-1980) dramatically declared 'the birth of the reader and the death of the author' when he moved away from rigid Structuralism and abandoned Saussure's emphasis on language as a system of structure that pre-exists the individual speaker. This explains how artists have come to understand the concept of an author. These theories influenced both literary and visual artists.

These theories and the Modernist and Postmodernist periods to which they are linked, with their ideas on originality and authorship have influenced artists. This helps to explain why artists have misunderstood the meaning of these terms in the context of copyright law.

Modernism and Marcel Duchamp (1887-1968)

D'Alleva (2005, p.149) argues that during the Modernist period there was a deliberate rejection of the idea that artists should look to past academic teaching traditions. This break with the past meant that artists had to invent forms compositions, media and signs that would be adequate to express the novelty and pace of the modern world. D'Alleva (2005, p.149) discusses further the notion of the *avant-garde* and 'the idea of self consciously being at the cutting edge of creating and seeking out the new, of attacking established institutions of art and culture'.

In the tradition of rebellion during this modern period, Marcel Duchamp paved the way for appropriation artists such as Jeff Koons' (1955), Candice Breitz (1972) and Sherrie Levine (1947). In 1914, Duchamp (1887-1968) placed a Bottle–Rack on a pedestal. Critical questions as to the conditions under which art is created were raised. In the words of art writer Manfred Schneckenberger, (2005, p.320) 'by stripping an object of its utilitarian function putting a label on it and placing it in a gallery – the object becomes art'.

In 1917, Duchamp, who was associated with New York Dada, pushed the limits of acceptability by signing a urinal *R Mutt* and placing it in a gallery.

The Dada group revolted against art and everything that paved the way to the First World War. In 1919 Duchamp's rebellion was, according to Schneckenberger (1998, p.320), 'prompted by the fact that art had become an industry, a buttress for a social system that ignited the War. Unlike his successors Koons and Andy Warhol (1928-1987), Duchamp revolted against art as a commodity.

During the period from 1905 -1920 the pioneers of the Cubist movement namely Georges Braque (1882-1963) and Pablo Picasso (1881-1973) had begun to build compositions out of abstract forms. In 1912 they began producing collages, pasting pre-existing materials such as pieces of newspaper, textiles and wallpaper onto a painted composition. Klaus Richter (2001, p.46) explains this method of working as a radical departure from traditional style, since 'these fragments of everyday life removed from their normal function, became integral parts of the picture and thus were raised to the level of art'.

In 1943, Pablo Picasso appropriated a bicycle saddle and handlebars for a sculpture he named *Head of a Bull*.

Structuralism Assemblage and New Realism

Richter (2001, p.107) connects the literary theory of Structuralism and Post-structuralism from approximately 1950-1959 to the New Realism movement. Artists such as Robert Rauschenberg (1925-1980), Jasper Johns (b.1930-) set out to build the link between art and life. Two of the key techniques adopted were collage and assemblage in which concrete objects were appropriated and included into painting. This combination process gave rise in America to the term 'combine painting' and in France' assemblage (Richter 2001, p. 110).

The combination of existing objects within a painting transcended the traditional borderlines of art. Richter (2001, p.110) explains that 'although the movement was of brief duration, lasting only from about 1955-1960, it led without transition to Pop Art '.

Richter says that 'Myths and the visionary world have always attracted both visual and literary artists and they turned to themes of the bizarre and marvellous because of the influence of literary theorists and perhaps as an escape from the polarized politics of the Cold War.'

The reference to theory and myths can be traced to Saussure and Levi-Strauss' theory on language systems and the explanation that cultural practices are made of underlying structures. D'Alleva explains that (2005, p.131) Structuralism views cultural practices as being made of a system of underlying structures. According to Saussure a sign is composed of two parts (a) signifier – the form the sign takes (b) signified –the concept it represents. She remarks that Semioticians rather than art historians recognized that semiotics might be a useful tool in the interpretation of art. For example French philosopher Merleu Ponty (1908-1961) connected painting and language because paintings are composed of signs assembled according to syntax or logic in a similar way language is structured (D'Alleva 2005, p.36).

Levi-Strauss analyzed kinship, myths, totems and other cultural phenomenon as if they were language systems. He argued that such phenomenon were built according to structures inherent in the human mind, structures that cut across

cultural differences. Levi-Strauss explains that myths, like language, are created from units that are assembled according to known rules. French cultural critic Roland Barthes applied structural analysis to contemporary Western culture, noting that such structures were applicable to all societies, primitive and developed. Myths are read as true and non-ideological as if their representations, the relationships between their signifiers and signified are natural instead of constructed In this regard D'Alleva (2005, p.133) says that for Barthes this meant that myths can be used to justify dominant beliefs, values and ideas (D'Alleva 2005, p.132).

D'Alleva (2005, p.134) says that in this manner Levi–Strauss introduced the idea of binary oppositions. She uses examples such as beauty and ugliness selfishness / altruism, public / private, violence / peace. These binary opposites were the logical models found in myths. D'Alleva summarizes the ideas of Structuralism by saying that the binary oppositions derive from Saussure's basic idea of how signs are defined in relation to each other. The paired antonyms are useful in explaining the world and human experience. The binary opposites are not always equal in that one term may be valued more highly than the other – she uses the example of sick and healthy, raw and cooked.

Pop Art Post-structuralism Deconstruction and Postmodernism

Post-structuralism that grew out of Structuralist theories in the 1960s and 1970s. For D'Alleva (2005, p.136), Post-structuralism occurred because of the problems with Structuralism. D'Alleva says (2005, p.135) that Barthes moved away from rigid Structuralism by going so far as to say that it is language that speaks and not the author 'simply put, when writing, the author does not work from signified to signifier instead writing meant working with signifiers and letting signifiers take care of themselves'. This explains how artists have come to understand and question the concept of an author.

D'Alleva says (2005, p.135) that the rejection of the author was part of a larger rejection of the Humanist idea of the autonomous thinking, coherent integrated human subject. In the art historical context, D'Alleva says that Barthes interprets a work of art or literature as an artefact that brings together any number of codes available in the artist's or author's culture.

Post-structuralism coincided with the emergence of Pop Art. The theorists were arguing that the meaning of texts and structures are dependent on the conventions of writers. For Post-structuralism meaning is a lot less stable than Structuralism would suggest. D'Alleva says that Post-structuralism (2005, p.136) emphasizes' the constant slippage in the play of signs, in relations between signifies and signifier'.

Lippard traces (1966, p .80) the term Pop Art to British art critic Lawrence Alloway who explains the source of the images created to the comics, billboards and cowboy movies rather than 'their fine art progeny'. In the words of Lippard. (1966, p.82) 'The broad and instant appeal of Pop Art in America may indeed have been because the exposure to popular images is an experience shared by all Americans'.

Jesse Wilder (1998, p.339) establishes the emergence of Pop Art as a reaction against the Cold War and Abstract Expressionism. Artists reacted by reviving realism and returning to stability. Unlike Duchamp, the Pop Artists turned to popular culture for inspiration embracing, commercialization rather than reacting against it.

Karl Ruhrberg (1998, p.270) casts Ed Ruscha (1937-) 'as the first Pop artist to appropriate the comic strip with Lichtenstein and Warhol following shortly afterwards'. In the mid sixties Ruscha began to combine words with images. His work added to the debate about what art can and cannot represent. He also questions its role in society. Much like Duchamp, Ruscha had an affinity for conceptual art.

Ruhrberg (1998, p.322) succinctly extracts the characteristics of Pop Art by quoting the words of art writer Hans Richter:

> The purest and most radical elements of Pop Art are reflected in the conformist work of Andy Warhol, namely: the blow up, the isolation or serial presentation of motifs, a waiver of expressiveness and individual touch in favour of an impersonal style; a limitation of subject matter to actual commercial commodities and mass media imagery; a congruity of motif and style a preference as in advertising for brand new objects (as opposed to the worn and used ones employed by Johns and Rauschenberg; a waiver of all ideology; critique and metaphorical reference and finally a favouring of technical reproduction process.

Ruhrberg links Lichtenstein's famous use of the cartoon with the recycling of found objects and common household items typical of Pop of Art in the sixties.

Ruhrberg (1998 p.322) raises Lichtenstein to the level of one of his comic book heroes when he says 'Lichtenstein monumentalized the comic strip and yet also turned the tables on high art, stripping the mythical trappings from the sublime and sacred icons of Western culture by dissolving them into the sterile dot patterns of commercial printing methods'.

Ruhrberg (1998, p.322) quotes art writer Hans Richter as stating that 'Pop Art' was not about art or an art of protest like Dada but a record of artists' acceptance of and conformity with cotemporary consumerism'. Ruhrberg (1998, p.98) interprets Richter's view when he logically represents Richter's words by saying that 'Pop Art was nothing but a derivative of a neo Dada Style that did not seek to protest against social and political conditions'. I agree with Ruhrberg, the common link between Pop Art and Dada being the appropriation of existing images and objects and re-contextualizing them without emphasizing the intention of the artist in doing so.

Concepts of originality and authenticity became less significant in the works of artists such as Andy Warhol and Roy Lichtenstein. Meyers (2007, p.225) attributes this to the speed and ease of production of images in the Pop Art era. In 1961 Lichtenstein began his first Pop paintings using cartoon images and techniques derived from the appearance of commercial printing. Lichtenstein's work Drowning *Girl* (1963) was appropriated from the lead story in DC Comics' *Secret Hearts* #83. Lippard (1966, p.90) says that 'for Lichtenstein, copying and appropriation of images was justified by the manner in which he transformed objects and changed the viewer's perception of everyday objects'.

Figure 1



Roy Lichtenstein, *Drowning Girl,* (1963)[2]

Oil on canvas

172.7 x 172.7cm

Figure 2



Roy Lichtenstein,

Roy Lichtenstein clipping from resort section of the Sunday *New York Times* 1961 to be compared with *Girl with Ball* I [figure 3]

(Lippard 1966, p.86)

[2] Moma the Museum of Modern Art (2011) [online] Available at http://www.moma.org/modernteachers/large_image.php?id=200 [9 February 2011]

Figure 3



Roy Lichtenstein, *Girl with Ball* (1963)
Oil on Canvas 65x 36 inches
(Lippard 1966, p. 87)

Figure 4



Whaam! (1963)
Acrylic and oil on Canvas
diptych measuring 1.7 x 4.0 m

Lichtenstein's painting [4] *Whaam!* (1963), is an early example of Pop Art and is a direct appropriation from a comic-book panel from a 1962 issue of DC Comics' *All-American Men of War*. (Tate (2004) Roy Lichtenstein work [online], available at: http://www.tate.org.UK/serviet/viewwork?workid=8782 [9 February 2011]) The painting depicts a fighter aircraft firing a rocket with a colourful red-and-yellow explosion. The cartoon style is heightened by the inclusion of the text 'Whaam*!*' and 'I pressed the fire control... and ahead of me rockets blazed through the sky...' Although the images were changed in scale, the examples above illustrate how Lichtenstein appropriated substantial parts of images.[3]

[3] http://www.tate.org.UK/serviet/viewwork?workid=8782

Figure 5



Andy Warhol *Flowers* 1964
Silkscreen on canvas 24x24 cm[4]

Andy Warhol (1928-1987) appropriated objects and images from his surrounding visual culture for use in his art . Lippard (1966, p.87) explains that the concept used by the Pop artists was to isolate the subject and present it in an unforeseen way so that the viewer has the chance to see it through new eyes. By appropriating copyright objects into their art both Warhol and Lichtenstein defied notions of authorship and originality. Meyers (2007, p.227) points out that the appropriation of images is in conflict with copyright law even though 'prior to 1960 very few cases of copyright infringement were brought before the judiciary. The Dadaists appropriated images as far back as 1916, however Warhol and Rauschenberg were the first artists to be sued for unauthorised use of privately owned images'.

Meyers (2007, p.228) observes that such a dearth could either mean that artists whose work has been appropriated cannot sue because of the strict requirements or proving a case of copyright infringement against an offender or because of the inadequacy of the law and legal system to protect artists.

More recently artist Koons has become embroiled in copyright law litigation. Although there is no reported case law on Breitz and Levine (amongst many other contemporary artists), they have also departed from the traditional use of images

[4] Lippard, 1966, p.128

and use existing images and objects both from other artists and advertisements. As Meyers remarks (2007, p.228) 'they challenge the viewer's conceptions of art and iconography by freely borrowing and rework existing images in an attempt to reshape their audience's perception of these images'. In my opinion this is what Lichtenstein endeavoured to achieve by isolating certain snapshots from the comics and changing the scale, colour of the original copyright image. Jesse Wilder (1998, p.372) describes the *modus operandi* of Postmodern artists when he says that they 'thrive on mixing things and creating hybrids that remind viewers of originals while adding something distinctly contemporary'.

Postmodernism, Deconstruction, Koons and Breitz

In art making, Postmodernism is associated with a rejection of the rigid truths and hierarchies of Modernism, an interest in past traditions that Modernism rejected, pastiche, the varied mixture of elements and motifs and a return to figurative imagery (D'Alleva 2005, p.150). Postmodern critics such as Jurgen Habermas, Jean Baudrillard, Frederic Jamieson, Rosalind Krauss explore the Postmodernist critique of the central truths of Modernism. They challenge dichotomies such as culture/nature; image/reality; innovation/tradition; high art/low art.

D'Alleva says (2005, p.150) that the key challenge of Postmodernism is the idea of a single unified whole subject speaking from one place with a sense of authority. Instead the Postmodern subject is decentred, speaking from a particular place with only his or her viewpoint. Postmodernism does not argue for the death of the subject, like Post-structuralism, so much as work towards new theories and practices of speaking, writing and acting subjects. Instead of negating or celebrating the individual subject, the emphasis is on how codes, texts, images and other cultural practices and artefacts shape subjectivity.

Postmodernism is also associated with pluralistic thought, that is, the idea that there is no correct way of seeing the world. The fragmentation of the subject replaces the alienation of the subject that characterizes Modernism. According to Frederic Jamieson the fragmentation of the subject develops because of the new ways of living in the world and occupying space that have developed in late capitalism (2005, p.153).

D'Alleva says that 'late capitalism has transcended the ability of the individual human body to locate itself, to organize its immediate surroundings perceptually and to map its position in the vast, multinational network of communication and capital in which we are all caught'.

Late capitalism aspires to this hyperspace, and unprecedented vastness of scale. Koons responds to this in his oversized sculptures of inflatable objects such as flowers and animals.

Ruhrberg says that Koons is a media star that introduced the iconography of kitsch into sculpture (2001, p.572) with or without breaks and ambivalence. He implies that Koons is a product of late capitalism when he says 'Koons is very much a figure of his time an artist who rose with the art boom that continued in the late eighties'.

Jamieson cites the artist Andy Warhol's work as a prime example of a world transformed into images of itself. French philosopher Jean Baudrillard (b.1929) explores the simulacrum, the copy without an original. Baudrillard points out that in mass media there is no signified attached to a signifier, there is no reality, no thing that the signifier reproduces or represents. In this way the simulacrum, the image, becomes the reality.

The emergence of the simulacrum threatens the very foundations of Western thought, which since the time of Plato has made a distinction between original and a copy, the latter being inferior and of less value (D'Alleva 2005, p.154).

Marcella Beccaria (2006, p.25) says Breitz has been criticised for her appropriation from Hollywood movies and the use of photographs as still images. She has reacted to criticism of her infringement of copyright by stating that 'we buy our rights every time we go to the movies, every time we buy a CD, every time we switch on the television or read a glossy magazine'. The purchasing of images in a magazine or from a DVD however does not entitle an artist to use such images in his / her work and cannot be equated with paying a royalty to the artist whose skill and labour is appropriated by such use.

Childers and Hentzi, (1995, p.279) remark that:

> In much modern art, the simulacrum refers not to some objective truth against which it can be judged, but only to other simulacra. While this condition is necessarily disorientating, it is also liberating in that it renders absolute the hierarchies assumed by the Platonic tradition. Recognising the special application of this line of thought to the culture of our era, Jean Baudrillard has made the concept of the simulacrum central to his analysis of postmodern consumer society. According to Baudrillard, the media with its endless networks and advertising images precede any reality to which they might be said to refer.

Following this line of argument American copyright lawyer Willajeanne McLean (1993, p.390) says that the techniques employed by Postmodern artists to create multiple editions often fabricated by others also strain the idea of authorship and originality. In the hands of certain Postmodernist artists, therefore, the concept of an author is questioned and derivative works are abundant. For Mclean (1993, p.391) 'it is not surprising that the underlying and incompatible notions of appropriation and copyright would lead to litigation'. She is more surprised that there have been few reported cases concerning the infringement of an artistic work. Like Meyer, Mclean also remarks that the cases against Warhol never went to trial and were settled out of court. Amicable settlements and the high costs of litigation are deterring factors which have resulted in few reported cases.

American artist Sherrie Levine (1947) rejects any belief in the concept of the original. For her (in McLean, 1993, p.383),

> The world is filled to suffocating. Man has placed his token on every stone. Every work, every image is leased and mortgaged. We know a picture is but a space in which a variety of images, none of them original, blend and clash. A picture is a tissue of quotations drawn from the innumerable centres of culture. We can only imitate a gesture that is always anterior, never original. Succeeding the painter, the plagiarist no longer bears within him passions, feelings, impressions, but rather this immense encyclopaedia from which he draws.

Mclean (1993, p.384) interprets this quote by adopting an essentially Baudrillardean position. Levine's work reflects the ethos of the prevailing climate of artists working within the Postmodern paradigm, they have no alternative but to draw from the immense volumes of images that constantly bombard society. She

goes on to state that 'artists must create, in circumstances where they claim there is truly nothing new under the sun'. (1993, p.383)

Figure 6



Sherrie Levine, *After Walker Evans*: 2 (1981)
Gelatin silver print 9.6 x 12.8cm[5]

In the rebellious Postmodern spirit of focusing on the recycling of commodities and images, Sherrie Levine (b194 7-) [Figure 6] re-photographed photographs by modernist photographer Walker Evans (1903-1975). According to Phaidon's *Photo Book* (1997, p.143) Evans was hailed as 'one of photography's outstanding artists, a perfectionist whose unselfconscious works are honoured in his very own very attentive compositions'. The photographs by Evans were taken in 1935 and re-photographed by Levine in 1981. The period of copyright on photographs in South Africa is fifty years from the end of the year in which the photograph is made available to the public with the consent of the owner of the copyright or is first published; whichever term is longer (Section 3(2)(b)). Art critic Peter Plagens (2009, p.67) interprets Sherrie Levine's *After* Walker Evans: *2* (1981) as questioning the very possibility of whether a photograph can be an original work of art. Levine defends her position by arguing that if all Evans did was to take a picture, and develop it, then any print from the negative of a photograph of that print is equally a work of art (Plagens, 2009, p.67). Although it could be argued that Levine's work is not original, for the series *After Walker Evans:2*, Levine

[5] The Metropolitan Museum of Art (2011) After Walker Evans:2 [online], available at http://www.metmuseum.org/toah/works-of-art/1995.266.2 [9 February 2011]

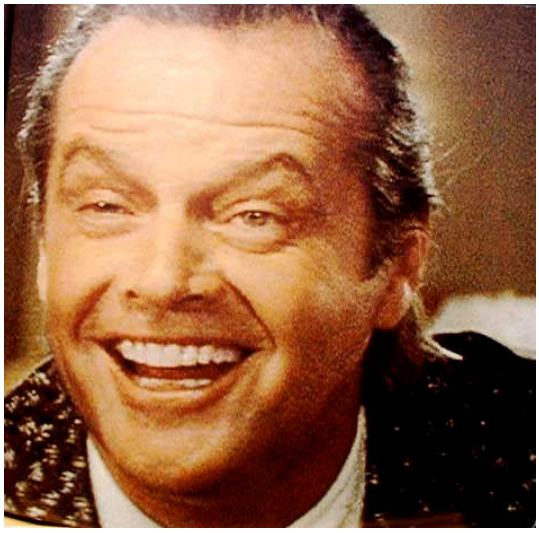
avoided any threat of litigation by using images that were no longer subject to copyright and have fallen into the public domain[6].

Candice Breitz

Nadine Rubin (2009, p77), a New York based art critic remarks that 'films have been more than just an inspiration for the Berlin based South African artist Candice Breitz born (1972), they are the raw material that she slices, dices, manipulates and reshapes'. To produce the work *Her* Rubin remarks that 'Breitz sifted through three decades of films starring Meryl Streep while / and for *Him* she went through movies headlined by Jack Nicolson'. According to Rubin (p.77) Breitz's 'brilliant editing', or, in copyright terms, her skill and labour in editing the films, has created interest in her work. Rubin, implies that Breitz's use of these films is an 'opportunistic attempt to cash in on the notoriety of their famous subjects.' Rubin (2009, p.77) says, ' Breitz defends her position by claiming that Nicholas and Streep are not the true subjects of *Him* and *Her.* Rather, she insists that her focus lies instead on the unconscious mainstream cinema; the values of meaning that slowly start to make themselves legible when the big plots are stripped away.

[6] The photographs by Walker Evans were published in the United States of America, in 1935, prior to the commencement of the 1976 Copyright Act. The writer is not aware of the actual date of expiry of the copyright in the Walker Evans photographs.

Figure 7



Candice Breitz, *Him* (2008)
Still photograph from a seven-channel video installation[7]

Rubin (2009, p.77) quotes Breitz as saying that: she (Breitz) 'shapes her borrowings enough for her work to achieve autonomy and induce deep reflection on the gender biases that Hollywood has perpetrated for close to half a century. Rubin (2009, p.77) questions Breitz's ability to pay for the rights to the film material she appropriates - or how she gets away with not paying. In my opinion although there appear to be direct appropriations of portions of copyright movies, there are no reported cases in which Breitz has been sued and it could be argued that her work, although it infringes copyright, would be interpreted as original in the context of the Act.

[7] (Beccario 2006, p.57)

Figure 8



Candice Breitz, *Her* (2008)
Still photograph from a seven-channel video installation[8]

Breitz also exhibits still photographs from the video installations as part of her exhibitions. This in itself is an infringement of Section 8 of the Act. The owner of copyright in a cinematograph film has the exclusive right to make still photographs from the film or to reproduce it in any manner or form. Breitz reproduces parts of cinematograph art and exhibits these parts as video installations.

Jeff Koons

In the *Andrea Blanch and Jeff Koons* case, Judge Sack remarked (2005, p.3) that: 'Artist Koons is known for incorporating objects and images taken from popular media and consumer advertising, a practice that has been referred to as neo pop art or, unfortunately in a legal context, appropriation art'.

[8] (Beccario 2006, p.70)

Figure 9



Jeff Koons (1988)
Lithograph 114.3 x 94.6cm[9]
Edition of 50 plus 10 Artist's Proofs

Koons has been the target subject of litigation involving the infringement of copyright. The high profile reported cases of *Art Rogers v Koons* and *Blanch v Koons* have had an influence on the thinking of visual artists both locally and abroad[10]. They are important for visual artists because they highlight the idea / expression dichotomy, the defence of fair use in the United states of America and the exceptions to copyright infringement in South Africa (also known as fair dealing). They also raise the question of parody as a defence to copyright infringement (as opposed to trademark infringement) and the applicability of the constitution to the intellectual property rights and the moral rights of an artist.

Art critics have identified both Breitz and Koons as appropriation artists. Emily Meyers (2007, p.220) says that the definition of appropriation art as it appears in the *Oxford English Dictionary*, namely the practice or technique of reworking the images or styles contained in earlier works of art, especially in later use in order to provoke critical re-evaluation of well known pieces by presenting them in new contexts, or to challenge notions of individual creativity or authenticity in art,

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9 Jeff Koons (2011) Art Magazine Ads (Art) [online] available at http://www.jeffkoons.com/site/index.html [9 February 2011]

10 *Rogers v Koons* 751 F. Supp. 474 S.D.N.Y. 1990, *Blanch v Koons* No 03CIV.8026(LLS), S.D.N.Y., Nov.1, 2005 affirmed by the Second Circuit in October 2006, brought over Koons' use of a photographic advertisement as source material for legs and feet in a painting, *Niagara* (2000). The Court ruled that Koons had sufficiently transformed the original advertisement so as to qualify as a fair use.

accurately describes a significant aspect of 20th and 21st century art in which the referenced work is an undisguised, blatant and recognisable portion of the new composition. For Meyers (2007 p.220) this is justified because 'by using the appropriated image as the subject rather than merely referring to its form, style or composition, it challenges and invites the viewer to participate in discovering the genesis of the new work'.

Meyers (2007, p.221) says that the practice of appropriation is so ubiquitous that in 1978 the Whitney Museum of American Art mounted an exhibition entitled *Art about Art* that displayed a variety of examples of artistic appropriation through time. She quotes Leo Steinberg, art critic and writer of the introduction to the catalogue that accompanied the exhibition as saying:

> Basically, art is always about art, and art history is a cumulative progression of what has come before. Artists, because of their obvious interest in and knowledge of art, draw on this knowledge and familiarity as readily as they draw on other experience. An artist may reuse existing images, along with other elements, because they are available and sustainable; and because they may give the borrower and the newly formed work a place within the ongoing history of art. The history of art is a continuum in which new art consistently builds upon old, either by absorbing or rejecting styles and forms.

Meyers (2007, p.243) favours appropriation art as she is of the view that the way in which artists have appropriated the works of art of others has fundamentally altered aesthetic conventions and challenges the concept of what works of art represent; what unifies a work of art. She opens the door to the application of literary theory to art theory by adding that appropriation art 'opens up to debate the more recent romantic definition of what constitutes originality and authenticity in a work of art'.

Meyers (2007, p.219) generalises when she says that 'because many artists and scholars of art history lack the specialised legal knowledge required to understand their rights under the existing copyright system they fear legal prosecution for their use of existing images and works'. Artists gain inspiration from other art and whether the thought of copyright infringement is in the forefront of their minds when a work of art is created is debatable. Artists have not stopped creating art because they fear prosecution in terms of the Act. The question as to whether artists are justified in using the skill and labour of a third party without consent, compensation or the payment of any royalty is the aim of copyright law. In the case

of *Rapid Phase Entertainment,* Wunsch J concluded his judgement by remarking that that the degree of appropriation of an idea or concept is wrongful if the community would treat it as unfair, dishonest or contrary to morality.

When the term of copyright in a work has expired it falls into the public domain and the former restrictions on its use and exploitation cease to have any effect. The work becomes free for all to use (Dean, 2006, p.1-31). As referred to in Chapter 1, D'Alleva (2005, p154) links the focus of capitalism with the recycling of old images and commodities. She says that 'Postmodern art and theory challenge the very idea of originality, the very notions of progress and the continual remaking of civilisation'. Postmodern South African artist Penny Siopis (1953 -), appropriates and copies the artistic features of the work Fuseli's *Nightmare* (1781) [figure 10] for use in her work *Blush Scarlet* [figure 11] to comment on the Postmodern trend of recycling old images the reinventing of the past. In South Africa, the duration of copyright in an artistic work (other than photographs) is the life of the author and 50 years from the end of the year in which the artist dies[11].

It could be argued that the duration of copyright in an artistic work is over generous and this inhibits artists in creating new works that are transformative in nature. In this regard the interests of the parties require balancing. In the following chapter I discuss infringement and what this entails for the artist. The importance of recognising transformative works is dealt with in chapter 3.

[11] Provided that if before the death of the author none of the following acts had been done in respect of such works or an adaptation thereof, namely-
(i) the publication thereof;
(ii) the performance thereof in public;
(iii) the offer for sale to the public of records thereof;
(iv) the broadcasting thereof;
The term of copyright then continues to subsist for a period of fifty years from the end of the year in which the first of the said acts is done (Section 3(2)).

Figure 10



Henry Fuseli, *Fuseli's Nightmare* (1781)[12]

Figure 11



Penny Siopis, *Blush Scarlet* (2005)[13]

Oil mixed media and found object on paper

100 x 140cm

[12] Johnson 2003, p.451
[13] The South African Art Times, July 2010, p.9

CHAPTER 2 - INFRINGEMENT

In the introduction to this report I remarked that throughout art history artists have copied the art of others as a learning process. Artists draw inspiration from other art and in certain instances an artist may appropriate an image or copy the work of other artists as a social commentary or to reject the modernist characteristics of originality and authorship.

It is not a breach of copyright to either borrow an idea or to translate that idea into a new work. The difficulty is distinguishing between permissible borrowing and exploitation the skill, labour and the rights of another artist[14].

In this chapter I discuss infringement of copyright in an artistic work. This entails an examination of:

(a) What entitles an artistic work to copyright protection?
(b) What are the rights of the artist?
(c) What constitutes infringement of another artist's copyright right and what does copying mean?

In assessing the issues identified in (a), (b) and (c) above, there is an added difficulty, which relates to whether the ideas of an artist, even when expressed in a material form are or should be protected, especially if such protection would lead to one artist having a monopoly over common techniques or combinations of ideas.

I use the case of South African artist Gerhard Marx in this report as an example to illustrate the difficulty that artists have with the dichotomy of separating ideas from the expression of those ideas in the context of copying. (This case was settled_out of court confidentially between the parties). Marx's case also introduces the reader to the interface between copyright law and the common law delictual remedy of passing off. Lastly in this chapter there is an extensive discussion on the *Rapid Phase Entertainment* case also known as the *Madam & Eve* case, where the Court dismissed both a copyright infringement claim and delictual claim of passing off.

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[14] This principle is discussed by Lord Foscote in the case of *Designer Guild Limited v Russell Williams (Textiles) Limited (trading as Washington DC)* 2000 UKHL 58, (2001), All ER 700.

(a) What Entitles an Artistic Work to Copyright Protection?

For copyright to subsist in a work, the work relied on must fall within the category of an artistic work (defined in Section 1). It must be original (Section 2) and must exist in a material form (i.e. other than as a concept in the mind of the artist). In addition an artist who wishes to sue for copyright infringement must be a qualified person: i.e. a citizen, resident or domiciled in the Republic of South Africa[15]. These are the technical requirements of the Act and without any sufficient proof of these requirements an action will fail. Each of these requirements is dealt with in more detail.

An artistic work defined in terms of the Act (Section 1(1)) means –Irrespective of the artistic quality thereof –_ (a) paintings, sculptures, drawings, engravings and photographs; _ (b) works of architecture, being either buildings or models of buildings; or (c) works of craftsmanship not falling within either paragraph (a) or (b).

Originality

Section 2 of the Act provides that an artistic work is eligible for protection, if it is original. There is no definition of 'original' in the Act. The Oxford English Dictionary defines original as: 'unique, innovative, inventive or creative'. However the word 'original' in relation to an artistic work has developed a meaning through case law.

The concept of what constitutes an artistic work within the Act and the concept of originality are intertwined, since without a sufficient degree of originality a work will not come into existence[16]. In the leading *Waylite Diary* case[17] it was held that original does not mean that the work must be in any way unique or

[15] If the artist is a juristic person such as a company or a corporation then such entity must be incorporated in accordance with the laws of the Republic of South Africa (Section 3). The works of international artists or companies will be protected in terms of South African law. The Minister of Trade and Industry (Section 1) has promulgated regulations (Section 37) whereby the Act applies to works of foreign original (Regulation GN136/1989, Dean, p.1-88E). If the work does not fall within the provisions of Section 3 will be protected by work that is first published in the Republic of South Africa (Section 4).

[16] Blakeney and Mc Keough Intellectual property: Commentary and Materials (1987) at 27 quoted in Waylite *Diary CC* v *First National Bank Ltd* 1995 (1) SA645 (A) at p.649

[17] *Waylite Diary CC v First National Bank Ltd 1995 (1) S.A. 645(A)*

inventive, but merely that it should not be commonplace, trite or trivial. On the authority of the *Accesio Allforms* Case[18] Dean (2006, p.1-15) says that:

> Originality is a matter of degree, depending on the amount of skill, judgment or labour involved in the making of the work. A work can still be original notwithstanding that it has been copied from a previous work, provided sufficient skill and effort has been embodied in creating the subsequent work. Where a work embodies existing subject matter, the Court must decide whether the artist has expended sufficient independent effort to justify a claim that the work is original.

The Appeal Court's decision in the *Appleton and Another v Harnischfeger Corporation* case*,* (p.262) confirms that the test for originality does not require that the work should embody a new expressive thought in a new and inventive form, but refers to original skill and labour (Dean, 2006, p.1-16). This test is an interesting contrast to the definition of original in the Oxford dictionary.

In the earlier *Kalamazoo Division (Pty) Ltd v Gray* case de Kock J, stated that:

> Originality refers to original skill and labour in execution, not to original thought or expression of thought. What is required is not that the expression or thought must be in an original or novel form but that the work must emanate from the author.

The author of an artistic work is the person by whom the arrangements necessary for the creation of the work are undertaken (Section 1). Dean aptly points out that 'since novelty is not a requirement, this test is essentially a subjective one and will focus on how the artist went about creating his work, albeit similar to others' (Dean, 13, 2006, p.1-18).

Existence in a Material Form: Ideas and the Expression of the Idea

In the leading case of *Galago Publishers*[19] *t*he Court confirmed that there is no copyright in ideas. It is the material form of expression of the idea that is subject to copyright (Dean p1-18). In the later *Rapid Phase Entertainment*

[18] *Waylite Diary CC v First National Bank Ltd 1995 (1) SA 645A*
[19] *Galago Publishers (Pty) Ltd* v *Erasmus 1989(1) SA 276A*

case[20] the Court again confirmed that the artistic features or attributes of the work are the subject of protection not some concept it conveys. The distinction between expression and ideas is also mentioned in the Agreement on Trade-Related Aspects of Intellectual Property Rights to which South Africa became a party in 1994 (TRIPS article 9.2). TRIPS has influenced South African copyright law in that it aims at a reasonable degree of standardization of forms and levels and the granting of protection to foreign works on a reciprocal basis (Dean 2006, p.1-91). 'Copyright protection shall extend to expressions and not to ideas…. it all depends on what you mean by ideas.' This remark by Lord Hailsham in the English case of *Designer Guild Ltd v Russell Williams (Textiles) Ltd*[21] points to the difficulty in ascertaining in any particular case whether the idea or the expression has been copied. In the South African case of *Jacana Education (Pty) Ltd* v *Frandsen Publishers* case[22] the Court held that -

> It is the way in which information is arranged that will attract copyright. An idea, no matter how original, cannot be protected. It is the embodiment of that idea that is the subject of the protection.

Dean (2006, p.1-18) also cautions that the maxim that there is no copyright in ideas, only in the expression of ideas is too simplistic. He states that whilst it is true that no copyright can subsist in ideas alone, once they have been expressed in a material form they become integral to the work. In my opinion however this raises another difficulty as to whether common ideas and concepts even if expressed in a material form and are integral to a work can be protected. This conundrum (as Dean p. 1-18 refers to it) is known as the idea /expression dichotomy and it manifests itself in cases dealing with copyright infringement.

The authority for the maxim that there is no copyright in ideas was established in the early case of *Natal Picture Framing v Levin* (1920) WLD 35. (hereinafter referred to as the *Natal Picture Framing* case) I have quoted the facts and judgement in this case extensively as they provide a clear example of how

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[20] *Rapid Phase Entertainment CC v SABC 1997 JOL 393 W at 606-7*

[21] Lord Hailsham of St. Marylebone said in *L.B. (Plastics) Ltd v. Swish Products Ltd.* [1979] R.P.C. 551, 629. And quoted in *Designer Guild Ltd v. Russell Williams (Textiles) Ltd (Trading As Washington Dc) [2000] UKHL 58; [2001] 1 All ER 700; [2000] 1 WLR 2416 (23rd November 2000)*

[22] *Jacana Education (Pty) Ltd* v *Frandsen Publishers* 1998(2) SA 965 (SCA)

ideas can be copied and expressed in a different way and yet still infringe copyright in another artist's work. In this case it was held that:

> Although there is no copyright in ideas, but merely in the representation of idea, an idea once represented has an important bearing on the question of whether one artistic work is a copy or colourable imitation of another. Where an original combination of ideas is represented, any other representation of the same combination, even with variations in detail, may in fact be an infringing copy or colourable imitation.

The facts in the Natal Picture Framing v Levin case

Natal Picture Framing Company applied to Court for an order restraining the alleged infringement by Levin of copyright in a certain picture entitled *Vrijheids Deputatie* reproduced in lithograph and sold in the form of prints. Mr. Levin had a picture entitled *Republiek Deputatie* reproduced and sold in the same way. In the court papers Levin argued that he had made use of an idea first used by the Natal Picture Framing Company but that there is no copyright in ideas, and furthermore there was no similarity between the two works. Levin asserted that 'the treatment of the idea is quite different in his picture'.

The Court rejected Levin's argument and came to the conclusion that Levin adopted Natal Picture Framing Company's combination of ideas, reproducing them with slight differences of detail. This made the second picture, in the Court's opinion, a colourable imitation, calculated to deceive any person who had a general recollection of the Natal Picture Framing Company's picture. In the next Section of the judgement the Court extended the simple maxim that there is no copyright in the ideas only in the expression of ideas, to a *combination* (my emphasis) of ideas:

> It has been pointed out that there is no copyright in ideas, but merely in the representation of ideas (*Hollinrake v Truswel*l, 1894, 3 Ch. at p.427, per LINDLEY, L.J.). Still the idea represented may have an important bearing on the question whether one picture is a copy or colourable imitation of another. A commonplace idea may be represented; for example, A tea caddy, or a boy and a girl making love at a stile. All representations of such an idea must necessarily have much in common, and unless there is an exact copy it may be impossible to say that one is a copy or imitation of another. But where an original combination of ideas is represented, any representation of that combination, even though there may be

> many variations of detail, can easily be a copy or colourable imitation of the original representation. Here the respondent's picture is a fancy combination. It shows the deputation sailing from Cape Town, a cheering crowd at the docks, medallions containing portraits of the members of the deputation and a title 'Vryheid's Deputatie.' It contains within it all that is in the applicant's picture, with slight variations. For instance, in the respondent's picture the ship has just been put out to sea, instead of being still alongside the quay as in the applicant's picture. The cheering crowd is on the left of the picture instead of the right and the figures are larger. The medallions containing the portraits are identical but arranged in a somewhat different order. And the title is 'Republiek Deputatie' instead of 'Vrijheids Deputatie.' There are also other minor differences of detail. As I have said, the respondent's artist had the plaintiff's picture in his possession, whether it was actually before him when he drew his own or not.

The basic principle of the law set out in *Natal Picture Framing* case raises 3 difficulties: First, does the law protect common or trivial ideas or combinations of ideas? Second, should the law allow ideas even expressed in a material form to be monopolised by an artist? Third, in assessing whether a substantial part of a work has been copied would common ideas be eliminated from the test when a comparison of the works is done? I will return to this debate in more detail under the heading of infringement and when considering the test for copying of a substantial part of a work as set out in the cases of *Galago Publishers and Rapid Phase Entertainment*.[23] First it is necessary to discuss the rights of the artist.

[23] *Galago Publishers (Pty) Ltd* v *Erasmus* 1989(1) SA 276A and *Rapid Phase Entertainment CC v SABC 1997 JOL 393 W*

Figure 12



Candice Breitz *Ex Libris* (2009)[24]

Cibachrome photograph

Figure 13



Colin Richards *Library of Lies* (2009)[25]

Digital Print on Paper

The work of the artists Richards and Breitz in figures 12 and 13 respectively is an example of how artists working independently of one another can produce similar works based on similar ideas and or concepts. The books stand as a metaphor for knowledge and the titles, text allude to the concept of contrived truths. Colin Richards alludes to Roland Barthes' theory (as explained by D'Alleva 2005, p136) that 'the author does not endow the text with organic

[24] South African Art Times August 2010, p.43

unity. Instead the work of art or literature is an artefact that brings together any number of codes available in the artist's culture'. As articulated by Barthes and Julia Kristeva, the concept of intertextuality reminds us that each text exists in relation to other texts, to cultural expressions – texts owe more to other texts and to their own makers. Breitz' work alludes to truth in a text and the construction of knowledge. According to South African copyright author AJC Copeling, in each instance, the respective artist will obtain protection accorded to an original copyright work (Copeling, 1998, p.14).

(b) The Rights of the Artist

Dean (2006, p.1-33) says: 'In essence, copyright is the right to do or authorise others to do, or prevent others from doing, the restricted acts which are designated to the artist, and over which he/she has a monopoly'. The restricted acts (Section 7) in respect of an artistic work are: reproducing the work in any manner or form; publishing the work if it was not previously published; including the work in a film or a television broadcast. This includes making an adaptation of the work for broadcast purposes, which includes the work, to be transmitted in a diffusion service[26].

Dean, (p.1-71) remarks that copyright is a prohibitive right when he says that 'Copyright is in essence a negative right, i.e. the right to prevent others from performing certain acts in relation to a work. This right of prohibition is given effect to, or enforced by and through the Court'

(c) What Acts infringe the copyright right of the artists and what does copying mean ?

The Act refers to two forms of infringement: direct /primary infringement and indirect/secondary. (Section 23(2). The latter type of infringement takes two forms: unauthorised dealing with infringing copies of a work and permitting an infringing public performance of a work to take place (Dean 2006,1-44). In this research report I am only dealing with primary infringement.

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[25] Photograph of image taken by Renee Johannes with permission from Art on Paper Gallery, 44 Stanley, Millpark, and Johannesburg.

[26] Unless such service transmits a lawful television broadcast including the work and is operated by the original broadcaster) (Section 7(d)) (Dean, p.1-34).

As I referred to above an artist seeking to sue for copyright infringement must firstly establish the subsistence of copyright in the work (i.e. originality and existence in a material form) that is the subject of the proceedings, and whether he/she is entitled to such copyright or the right to enforce it. Secondly, the artist must show that rights under the copyright in the work have been infringed by the performance of one or more of the restricted acts, without the authority of the copyright owner (Section 23).

Direct acts of infringement are the inverse of the rights of the artist as stated in Section 7, namely unauthorised reproductions and adaptations, publications, including the work in a film broadcast or television programme. To copy in relation to an artistic work is defined as a reproduction or adaptation (Section 1). An adaptation of an artistic work includes reproduction of the works so that the original substantial features thereof remain recognisable (Section 1). A reproduction in relation to an artistic work is in turn defined to include a conversion of the art work into a three dimensional form or if it is in three dimensions by converting it to two dimensions. This latter form of reproduction is important in the context of the discussion in the *Rapid Phase Entertainment* case where there was an alleged infringement of a cartoon strip in the form of a television broadcast

It is not only misusing or misappropriating the whole of the work that infringes copyright. The Act specifically states that misusing or appropriating a *substantial* part of the work also constitutes infringement. (Section 1(2A)) (Dean, 2006, p.1-37). The term substantial is open for interpretation by the Court, as it has not defined in the Act. The interpretation of the term is both subjective and relative and gives rise to problems.

Does the unauthorised copying of a small but essential part of a work constitute copyright infringement? In practical terms, Dean states (2006, p.1-38) that:

> The question of whether or not a substantial part of a work has been reproduced, amounts to the degree of similarity between the original work and the alleged infringing copy. The Court must determine what constitutes originality in the copyrighted work and then view the alleged infringing copy from this perspective.

Dean explains (p.1-38A) this to mean that:

> As long as what is taken has substance in the original work (and is not *de minimis* (insignificant) and has sufficient pith to constitute the embodiment of original intellectual activity in a material form, copyright infringement could arise. The criterion hinges on what has been taken from the artist whose work has been infringed, and not what portion the infringing material makes up quantitatively of the contentious work. The artist must identify those parts of his work that he / she alleges has been copied. The Court's attention must be directed to the part of the work that is claimed to have been reproduced, and not to those parts which have not. The Court also has regard to dissimilarities between the contentious materials.

The Test for substantial copying was established in the leading case of *Galago Publishers v Erasmus*. In this case the Court rationalised the assessment as to whether a substantial part had been reproduced in a two-stage process. The first consists of an objective comparison as to whether the two works are substantially similar. Followed secondly by an analysis of whether a causal connection exists between the infringed work and the alleged infringing copy. If either of these tests is not met, namely that there is no objective similarity between the two articles, or if a causal connection between them cannot be established, then no copying of a substantial part of the copyrighted work has taken place and therefore there has been no infringement (Dean, 2004, p.1-42A).

Although the test put forward by the Court appears fairly straightforward there are other logistical problems. Dean argues (2004, p.1-42B) that:

> It is not sufficient merely to show that there is a similarity between two articles and that the defendant had access to the plaintiff's work; but that an inference must be drawn from all the facts of the particular case. On the other hand, it would be unreasonable to require a party claiming copyright infringement to produce direct evidence that the alleged infringer was actually caught in the act of copying the work that is the subject of the claim. The absence of a cogent explanation for the similarity between two works can create a strong inference that there has been copying.

Dean (2006, p.1-42B) reminds us that:

> It is essential to appreciate that copyright in a work is only infringed by unauthorised reproduction or adaptation if there is copying. Due attention must be given to whether

> the similarity between two items is attributable to common ideas or concepts embodied in them, or to similarity of material expression of ideas.

As stated in the introduction to this research report, copyright is concerned with copying the outwardly perceptible form and must not be confused with the rights conferred by a patent in respect of a concept that is its subject matter or the idea that is conveyed by a work (Dean, 2006, p.1-42B).

Earlier in this chapter I raised the issue of whether common ideas and concepts should be excluded from the test that has been established by the Court to determine whether a substantial part of a work has been copied. The case of *Gerhard Marx v Ireland Davenport and BMW S.A. (Pty) Ltd* illustrates the difficulty that artists encounter with the monopolisation of styles and common concepts.

Figure 14



Gerhard Marx *Sheet2 Horizontal Figure 2* (2006)[27]
Cut and reconstructed map fragments
38x14cm

In the official summons issued by Marx, he alleges that from 2001 he created original artworks by arranging fragments of road maps (for ease of reference this is referred to as the 'map style'), which depicted aspects of the human form or anatomy. Marx claims that BMW and Ireland Davenport, without his consent and with flagrant disregard for his rights and reputation, made an adaptation of his work and published the reproduction (in either electronic or hard copy form in the *Sunday Times* of 19 February 2006). In a second claim based on the delictual claim of passing off, Marx claimed that Ireland Davenport had copied his style; alternatively they had failed to distinguish the style of human form and anatomy

derived from road maps from Marx's own style. Marx alleges that he had acquired a reputation for using the map style in his work, was the originator thereof and that the style was unique to him and no other person. Marx claimed damages in the sum of R1 000 000,00 a royalty amount that would be determined at a judicial enquiry and in addition the sum of R1 500 000,00 in respect of the damage to his reputation (Summons case No. 16543/2006, p.8). Marx's second claim of passing off is not based on copyright and is generally an alternative to a claim of copyright or trademark infringement where the claim does not fit strictly within the requirements of Section 34 of the Trademarks Act[28].

In this Section I focus on Marx's copyright claim. However, it is important from the artist's perspective to know the difference between the statutory remedies afforded to an owner of an intellectual property right, such as copyright, a trademark, a patents and the common law remedy of passing off, which in the legal discipline is known as an Aquilian action. Dean explains (2006,1-68) that the remedy of passing off is derived from common law. Passing off is considered a to be a species of unlawful competition. He gives the example of a situation where an author associates himself with the renown or reputation of another author or his work through similarity between the two works or aspects or characteristics of them. The essence of a passing off claim is the protection of goodwill that a person has built upon his own name or in his works from being misused by others.

[27] Art South Africa 2006 volume 4 issue 03 Autumn p.10
[28] Trademarks Act, No. 194 of 1993 (as amended)

Figure 15



The Advertisement prepared by Ireland /Davenport (Pty) Ltd for BMW South Africa (Pty) Ltd as it appeared in *Sunday Times* dated 19 February 2006.

Local journalist Matthew Krouse reported in the September issue of the *Mail and Guardian* that just prior to the hearing of the Court case (on 9 October 2008) a press statement was released by Dean, Marx's attorney, in which it was reported that Marx, Ireland – Davenport and BMW South Africa had amicably settled the case. In the report, the agency said it had no intention of associating its campaign with Marx's work, adding that it fully supports the arts and regrets if any impression to the contrary was given. According to Krouse the apology contradicted a report in the *Star* earlier that week in which BMW spokesperson Benedict Malaga said the company contests the assertion that it has infringed the rights of the artist, Gerhard Marx, or plagiarised his work.

Regrettably for both artists and copyright lawyers, the allegations made by Marx were allowed to stand unopposed and undecided by our Courts. There is a dearth of cases dealing the infringement of copyright in an artistic work. The last such case was that of *Rapid Phase Entertainment* where the Court took a firm position against the monopolisation of ideas and concepts. It would have been interesting to see whether the Court in Marx's case would have taken the same approach.

The similarities in the adopted style and the combination of the human anatomy are striking even though the main subject matter is different. They go far beyond the similarities that would be expected simply from both being used in a composition

based on such a combination. Each work consists of a background of road maps, a line drawing to depict the outline of the human figure and the method and technique of depicting form, tone and depth have been copied. Although the overall impression is very similar there has not been copying of any specific artistic feature in the work.

The Court would look at the effect of the (a) many and obvious similarities; (b) the combination of the road maps and the anatomy to the appearance of the work; however both of these effects may not be sufficient to discharge the burden of proving that Ireland Davenport had copied Marx's work because his work incorporates features that, by themselves, are not original and the actual artistic features of the work had not been copied. There is nothing original about using maps and anatomy in an artwork. As referred to above, certain ideas expressed by a copyright work may not be protected because, although they are ideas of an artistic nature, they are not original, or so commonplace as not to form a substantial part of the work. *Waylite Diary CC v First National Bank Ltd 1995 (1) S.A. 645A at p.649 and Klep Valves v Saunders Valve Co Ltd 1987(2) SA (A)*. It is on this ground that it is submitted that the notion of combining anatomy and maps would not have amounted to a substantial part of Marx's work. The idea, though expressed in the composition, would not have represented sufficient of the author's skill and labour as to attract copyright protection (*Kalamazoo Division (Pty) Ltd v Gay* 1978(1) SA 184(c) at p.192).

In respect of the second leg of the test it could be argued that if there had been no direct evidence of copying and the finding of copying was based on the extensive similarities between the works then these similarities, coupled with the opportunity to copy and in the absence of any acceptable evidence from Ireland -Davenport as to the derivation of the work, may have led a judge to conclude, on a balance of probabilities, that Ireland Davenport had copied from Marx. As referred to previously the burden of proof rests on Marx and not on Ireland Davenport. Although the advert is not an exact copy of any particular work executed by Marx, it could be argued that there was intentional altered copying. The expressed ideas which were represented by Marx in a material form i.e. the anatomy, maps, line drawing technique, modus of using the density in the maps to give the impression of shadow and tone /idea has been extracted and purposely altered. Ireland-Davenport put together a number of artistic ideas derived from Marx's work in order

to produce the advert. They copied Marx composition /combination of ideas in their advert but did so with intentional modifications.

It is my contention that based on the decision in *Rapid Phase Entertainment CC and others v SABC* [1997] JOL 393 (W) Marx's claim for copyright infringement would not have succeeded. The reasons for this conclusion will become clear in the light of the facts and the judgement set out below.

The facts in the Rapid Phase Entertainment v SABC case

This case involved a dispute arising out of alleged infringement of copyright. A person infringes the copyright of the owner if, without the owner's consent (Section 23), he/she does any act, which the owner has the exclusive rights to do or to authorize. For ease of reference to the discussion of this case, the plaintiff is referred to as *Rapid Phase* and the defendant as *SABC.* Rapid Phase argued that SABC had wrongfully and unlawfully exploited characters in its cartoon strip and its reputation, goodwill and the marketing power of the comic to advance its own advertising campaign.

Rapid Phase Entertainment applied to Court, on the basis of urgency, for an order interdicting the SABC from actively screening an advertisement of its own services on its television channels, which Rapid Phase Entertainment alleged to be a breach of its copyright, or, alternatively, to be a delictual infringement of its common law rights.

The cartoon strip features as its main characters from the well-known cartoon strip 'Madam and Eve' by the members of Rapid Phase Entertainment CC. Madam, a white housewife, Eve, her black maid, and her mother, Mother Anderson. Each is obviously recognisable by their consistent physical features, dress and general appearance. They are reflected in a residence, participating in domestic activities, such as preparing food, eating, relaxing, cleaning the house and watching television. Apart from a description of its characters, the special and distinctive quality of the cartoon strip is that it seeks to reflect contemporary South African reality. It satirizes the relationship between South Africans who are separated by race, ethnicity and class and it looks at how those South Africans are attempting to come together in terms of the new South Africa. The cartoon strip depicts relationships between a 'madam' and a

maid, which is unusual in its closeness and in the muted nature of the antagonism between them. The cartoon strip takes as its subject matter the intimate, but difficult and often tension-ridden, relationship between employer and domestic employee and turns this into a warm interaction, which is popular with both black and white readership. The fictionalized relationship between 'madam' and maid is closer and more intimate, and possibly more humane, than the reality in South Africa. (Rapid Phase Entertainment CC and others *v* SABC 1997 JOL 393 W P.4)

Rapid Phase presented a lengthy list of the following distinctive and original features of Madam & Eve that they alleged had been copied:

(a) The peculiarly South African relationship between employer and employee in the domestic environment. In no other employment environment is the employer known as 'Madam' and the employee by her first name. Both the employer and employee are almost always women and this is the relationship captured in the cartoon strip. (p.5 of [1997] JOL 393(W))

(b) It is not a typical relationship of this type. Eve has unusual latitude in the relationship; she is often shown coming out on top and much of the humour derives from this inversion of the norm. The same may be said for the 'Mielie Lady'.

(c) It is also untypical in the warmth and relative equality between 'Madam' and 'Eve'. This is something not accepted by 'Mother Anderson'. The equality is shown by 'Eve' sharing the sofa when the three watch television. In this, she always sits next to 'Madam', but never next to 'Mother Anderson'. This represents the cauterisation of the values of different generations of white people, not just South Africans ('Mother Anderson' is from England, not South Africa).

(d) The main characters are all women.... There are no male characters of any significance. (p.6 of [1997] JOL 393 (W))

(e) 'Madam and Eve' is a satirical concept. Each cartoon strip, as its primary object, seeks to make its audience laugh. Herein lies the seed of its popularity and attraction. In this genre, it is the only mainstream cartoon strip that is South African in conception and execution.

(f) The characters are all given very distinctive, immutable features and characteristics. This is a feature of cartoons:

(i) 'Madam's' features are her odd cartoon hairstyle, earrings and large round eyes.

(ii) 'Eve's' features are her unusual hairstyle, earrings, maid's uniforms, duster and slimness in comparison with 'Madam'.

(iii) 'Mother Anderson's' features are her diminutive size, receding white hair, pearls (or beads) around her neck and a variety of facial grimaces.

In addition to the physical characteristics the following defining characteristics were relevant: The relationship between 'Madam' and 'Eve' is far more equal than the traditional norm; 'Eve' is obviously aware, and approves of the new rights and equalities in South Africa; 'Mother Anderson' embodies many old colonial values. She has a rather more traditional and authoritarian attitude to 'Eve's' role in the household.

The 'Mielie lady' is largely a catalyst for interaction between the main characters. However she is normally depicted selling her mielies by crying, 'mielies, and mielies'. Sometimes she is seen trudging up a road.

The setting, situation and arrangement of the cartoons is unique in that It is that of a domestic home; It shows the interaction of a 'madam', a maid and the 'madam's' mother; It often takes place around a television set. (p.7 [1997] JOL 393 (W))

The alleged infringement was based on the broadcast of an advert by SABC in 1997 soliciting support for small business enterprises to advertise on its television programmes at a discounted price. The advertisement has one set of particularly important sequences that is described in the court records (Page 10 of [1997] JOL 393 (W)) as follows:

(a) A robust black lady bearing mielies on her head trudges up a hill calling 'mielies, mielies'.

(b) Three women are sitting on a sofa in a living room. A large white woman with a blonde bouffant wig wearing gold earrings is sitting in the centre of the sofa with her feet up. She is obviously the 'madam'. On her right is a black woman dressed in a maid's uniform

carrying a feather duster and whose hair is held back in a ponytail with a ribbon and she is wearing earrings. On the left of the 'madam' is an elderly white woman with receding white hair, wearing pearls and with a scrunched up face.

(c)They watch the closing frames of a popular soap opera and then they see the Mielie lady advertising her wares on television. The response of the maid is amazement; of the 'madam' firstly surprise then irritation and finally warmth. The aged mother appears furious.

(d) The scene turns to the exterior of the house where the 'madam' and her maid are purchasing mielies from the Mielie lady that the maid carries away.

(e) The Mielie lady departs the scene in one of three vans indicating that they are the Mielie Lady's commercial transport. (p.9 of [1997] JOL 393 (W))

Rapid Phase claimed that the cartoon strip is an artistic work, (there was a dispute as to whether the cartoon strip was a literary work the SABC later admitted that it was an artistic work), and that SABC has copied it by reproducing and adapting it or has broadcast it. As referred to earlier in this chapter, a person infringes the copyright of the owner if, without the owner's license, he or she carries out any act which the owner has the exclusive rights to do or to authorize (Section 23(1) of the Act).

As an alternative to copyright infringement *Rapid Phase* contended that the SABC's action constituted a common law delictual claim of appropriating or diluting its incorporeal property. A full discussion of this second claim does not fall within the scope of this paper save to say that Rapid Phase were not successful on this alternative claim. The Court held that the common law claim of passing off is generally confined to trademarks or claims which identify a person's goods or services and the reputation of a mark or name and its resulting selling power.

The Court based its decision on the current status of the law already established in the *Galago Publishers* case [29]in so far as the difficulty of the dichotomy between ideas and the expression of ideas is concerned by confirming that:

> It is only partially correct to say that ideas are not the subject of copyright ….
> '... Given that there exists a good copyright in a work, the law does not protect a general idea or concept that underlies the work, nor any one fact or piece of information contained therein. However, a more detailed collection of ideas, or pattern of incidents, or compilation of information may amount to such a substantial part of the work that to take it would be an infringement of the copyright, although expressed in different language or other form, it being a matter of fact and degree whether the dividing line has been impermissibly crossed.

On the basis of this authority, the Court came to the conclusion that there is no recognizable copying of any situation or incident in Rapid Phase's cartoons in the television advertisement.[30] The question, that remained to be considered, was, therefore, whether there was an 'adaptation' of the work, defined to include a transformation of the work in such a manner that the original or substantial features thereof remain recognizable or whether the SABC has exercised some other right, which the copyright owner has in law. The Court's reasoning was that:

> On the basis of the artistic character or attributes of the cartoon strip in the present case, the presentation of an incident in dramatic form with live characters who do not bear the names of those portrayed in the artistic work, even if they do have broadly similar physical characteristics or expressions, cannot amount to a broadcast of 'the work' or a transformation thereof in which the original or substantial features of the work remain recognizable. In this regard the function of an artistic work is crucial. To constitute an infringement it is the artistic

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[29] *In the case of Galago Publishers (Pty) Ltd and another v Erasmus*, 1989 1 SA 276(A) at 284 C–D Corbett JA quoted, with apparent approval, a passage from Laddie, Prescott and Vitoria in The Modern Law of Copyright at 33

[30] It is important for the reader to bear in mind that the conversion of a two dimensional work to a three dimensional work, is irrelevant for the purposes of determining whether there has been an infringement of copyright. In this regard the Court said that: Even though Section 1 of the Act refers to the 'reproduction' in relation to an artistic work, as including a version produced by converting the work into a three-dimensional form or, if it is in three dimensions, by converting it into two-dimensional form the SABC did not reproduce the cartoon on its television screens.

> features or attributes of the artistic work, which have to be transformed, or adapted, not some concept, which it conveys.

The Court had to differentiate this case from the *Natal Picture Framing case (*which was discussed in detail above in chapter I) where the lawyers for Rapid Phase argued that the SABC'S advertisement was a 'colourable' imitation of the cartoon strip. The Court differentiated the cases on the following grounds:

(a) *Natal Picture Framing Co Ltd v Levin* was a case where a picture contained a combination of ideas that formed part of a picture produced by Levin, which, despite differences in details, was a colourable imitation of the original (Page 19 of [1997] JOL 393 (W)).

(b) Levin's picture was clearly a copy of the Natal Picture Framing Company's picture. Nothing similar had happened in this case.

The Court summed up its final reasons by stating that the relationship between *Rapid Phase's* cartoon strips and the SABC's television advertisement is completely different in that:

> Whilst the cartoon characters and those in the television advertisement are personifications of the same prototypes, they are different characters. The persons portrayed in the advertisement are not called by name nor do they purport to be Madam, Eve and Mother Anderson.

Although Rapid Phase identified what it regarded as clearly similar distinctive characteristics of the characters, they did not persuade the Court that the characters were the same or that they could be confused with each other or that the human personifications in the television advertisement are colourable imitations of the cartoon characters. Rapid Phase's application was therefore dismissed with costs and it had to pay the costs of the entire court proceedings.

The *Rapid Phase Entertainment* case establishes the authority that it is the artistic features or attributes of an artistic work that have to be transformed and not some concept it conveys. When applied to Marx's case, the reasons his case may not have succeeded are as follows:

(a) The actual artistic features of any of Marx's specific works were not copied.

(b) One artist should not be entitled to a monopoly over certain ideas and combinations, styles and techniques.

(c) The advert was not a colourable imitation of any existing work produced by Marx

(d) There is no authority in our law that establishes altered copying as an infringement of copyright.

(e) The combination of anatomy and maps as Marx's distinct style is easily equated with trademark characteristics. The purpose of a trademark is to protect consumers from deception in the market place by prohibiting the use of source identifying marks if such use is likely to confuse consumers as to the source of the product. American copyright lawyer Laura Heymann (2007, p.65) states that 'the gist of an action for passing off is deceptive resemblance. In such a case the offender is charged with deceiving the public into taking his goods and passing off the goods as the plaintiffs. A visual comparison of the competing articles is often all that is required. If the overall impression is that 'they just do not look sufficiently similar' then the action will fail'. South African authorities on Trademarks, Webster and Morley (2007, p.10), make it clear that 'an action for infringement of artistic copyright, is very different from an action for trademark infringement. Copyright is not concerned with the overall appearance of the other persons work but with its derivation.'

The core of the judgement in the *Rapid phase Entertainment* case confirms the attitude of the Courts not to allow the monopolisation of adapted or transformed concepts. I concur with Dean's support of the decision. He takes the point further by saying that: (p.1-42)

> Where the idea and its expression are indistinguishable, the Courts should be slow to find that copyright infringement has occurred as there is a danger that a monopoly can be conferred upon an idea free of the conditions and limitations imposed by patent law.

Based on the interpretation of the law in this case, artists have wide latitude to explore the ideas and concepts of other artists provided caution is exercised in ensuring that the new work is not a colourable imitation of a copyright work, or that there is no copying of the artistic features of another artist's work.

CHAPTER 3 - COPYRIGHT INFRINGEMENT: FAIR USE (UNITED STATES) AND THE EXCEPTIONS TO COPYRIGHT INFRINGEMENT IN SOUTH AFRICA, ALSO KNOWN AS FAIR DEALING

In this chapter I discuss the exceptions to an infringement of copyright also known as 'fair dealing' - and compare it to the defence of fair use that forms part of the law in the United States of America (USA). I examine the four factors that a Court considers when deciding whether copying in a particular case is justified. To illustrate these factors, the reasoning of the Court in the two reported cases concerning infringement of copyright in an artistic work involving Koons will be used to show the limitations of the South African exceptions of fair dealing. For ease of reference the case *of Art Rogers v Koons, Sonnabend Gallery Inc* (1992)[31] will also be referred to as *String of Puppies. Andrea Blanch v Jeff Koons, The Solomon R. Guggenheim Foundation, Deutsche Bank*[32], (2005) is also referred to as *Niagara.* Both the cases of *String of Puppies* and *Niagara* highlight the idea expression dichotomy, parody and the way in which the American Court deals with the issue of whether a substantial part of a work has been copied.

In the *Blanch v Koons* case Judge Sack (*Blanch v Koons* 2006, p.12) set out the universal principle of the law of copyright which is 'to motivate the creative activity of authors and deemed inventors by the provision of a special reward. The monopoly created by copyright thus rewards the individual author in order to benefit the public'. Judge Sack, however acknowledges that artists use other art as inspiration in the creative process and gives a fair and balanced idea of copyright by stating that: 'excessively broad protection would stifle, rather than advance, the law's objective. Monopoly protection of intellectual property that impedes referential analysis, would strangle the creative processes'.

In order for the law to achieve its objectives Judge Sack remarks (*Blanch v Koons*, 2006, P.13) that:

> in terms of the 'fair use' doctrine 'a balance must be struck between the property rights it establishes in creative works. Creative works must be protected up to a point, but so too, the ability of artists to express themselves by reference to the works of others. The fair use doctrine mediates between these two sets of interests'.

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31 *Art Rogers v Koons, Sonnabend Gallery Inc*[31] *United* States Court of Appeals Second Circuit 1992
32 *Andrea Blanch v Jeff Koons, United States Court of Appeals, Second Circuit, 2005*

There are certain understandable instances when it is in the public interest for the work to be reproduced or used without requiring the agreement of the copyright holder. In South Africa the Copyright Act recognises these instances and provides for statutory exceptions to copyright infringement. These exceptions are limited to certain acts and can only be invoked on the assumption that an act of infringement has occurred. Dean (2006, p. 51) gives the reason for this as 'substantiated on the basis that it is considered to be in the public interest that the copyright owner should not have a monopoly in the performance of particular acts in relation to his work'. Section 12 of the Act makes provision for a limited number of statutory exceptions to direct infringements of copyright. Any fair dealing with an artistic work or an adaptation of that work does not infringe that copyright when *the source* (my emphasis) is mentioned and it is –

(a) For the purposes of research or private study, or the personal private use of the person using the work;

(b) For the purposes of criticism or review of that work or of another work; or

(c) For the purposes of reporting current events in a newspaper, magazine or similar periodical (Section 12 (1) (a), (b), and (c)).

Furthermore the copyright in an artistic work or an adaptation thereof is not infringed if it is for use in Judicial proceedings (Section 12 (2) or to the extent justified for the purpose by way of illustration in any publication, broadcast, sound or visual record for teaching. In addition there is a proviso which says that the use must be compatible with fair practice and the source is mentioned, as well as the name of the author if it appears on the work (Section 12 (4) or where such reproduction is intended exclusively for a lawful broadcast and it is destroyed within a 6-month expiration period longer periods of use may be agreed by the owner of the relevant part of the copyright work.

A reproduction of an artistic work will be permitted provided that the reproduction is not in conflict with the normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the copyright owner (Section 13)[33].

[33] The copyright in an artistic work shall not be infringed by its inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such inclusion is merely by way of background or incidental to the principal matters represented in the film, broadcast or transmission (Section 15(1)).

Copyright of artworks situated permanently in a street, square or a similar public place shall not be infringed by its reproduction if it is included in a cinematograph film television broadcast or transmission in a diffusion service (Section 15).

The position in the United States of America – the fair use doctrine

The exceptions in South Africa are referred to as 'fair dealing' and should not be confused with the doctrine of 'fair use', which is a general defence to copyright infringement in America and is not applicable in South African law. The basic premise of both fair dealing and fair use is that it should not be prejudicial to, or in conflict with, the legitimate interests of the copyright owner. Section 15 of the Act specifically provides that a reproduction of an artistic work will be permitted provided that the reproduction is not in conflict with the normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the copyright owner

In America criteria have been laid down for assessing what constitutes fair use of a work under American law. In the case of *Blanch v Koons* Judge Sack (*Blanch v Koons* 2006, p.13) confirms the four factors that are considered by the Court in determining whether the use made of a work in any particular case is fair use:

(a) The purpose and character of the use, including whether such use is of a commercial nature or is for non profit educational purposes i.e. whether the work is transformative;

(b) The nature of the copyrighted work, i.e. factual or creative;

(c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(d) The effects upon the plaintiff's potential market for or value of the copyrighted work.

Each of these factors is discussed and considered with reference to the two copyright infringement cases relating to artistic works and Koons. Briefly the facts of the two cases are as follows:

String of Puppies:

Figure 16



Jeff Koons, *String of Puppies* (1988)[34] (R) Art Rogers (L)
Porcelain
42 x 62 x 37 inches

The Facts

In 1980 Art Rogers, a 43-year-old professional artist-photographer from California, was commissioned by Mr and Mrs Scanlon to photograph their eight new German Shepherd puppies. After the Scanlons purchased their prints for $200, *Puppies* was incorporated in Rogers' catalogue of photographs.

Puppies had been used and exhibited on several occasions. In 1989 it was licensed for use in an anthology called *Dog Days*. In 1984 Rogers licensed *Puppies*, along with other works, to Museum Graphics, a company that produces and sells note cards and postcards with high quality reproductions of photographs. Museum Graphics produced and distributed the *Puppies* note card. The first edition was of 5,000 copies and a second edition of the same

[34] Jeff Koons (2010) [online], available at *http://wwwjeffkoons.com/site/index.html [17 December 2010]*

number has been printed (ie when artists such as Duchamp (1919), Braque (1912) and Picasso elevated banal objects into the art forum). [35]

In 1986, Koons began creating a group of 20 sculptures for a 1988 exhibition at the Sonnabend Gallery that he called the *Banality Show*. Koons claims to work in an art tradition dating back to the beginning of the twentieth century (ie when artists such as Duchamp (1919), Braque (1912) and Picasso elevated banal objects into the art forum). This tradition defines its intentions as altering the meaning of the original object that has been appropriated and an entirely new meaning set in its place. The Court remarked that Andy Warhol used the same means of reproduction of multiple images of Campbell's soup cans.

Koons acknowledged that the source for *String of Puppies* was the Museum Graphics note card of *Puppies* which he purchased. After buying it, he tore off that portion showing Rogers' copyright of *Puppies*. Koons claims he saw certain criteria in the note card that he wanted to incorporate in his work. Koons gave his artisans one of Rogers' note cards and told them to copy it. He guided the creation of a three-dimensional sculptural piece from the two-dimensional photograph. When it was finished, *String of Puppies* was displayed at the Sonnabend Gallery, which opened the *Banality Show* on November 19, 1988. Three of the four copies made were sold to collectors for a total of $367,000; the fourth or artist's copy was kept by Koons. Koons' use of *Puppies* to create *String of Puppies* was not authorized by Rogers. A friend of Scanlon's, who was familiar with the photograph, called Rogers to tell him that he had seen a 'colorized' version of *Puppies*. Rogers successfully sued Koons for copyright infringement[36]

[35] The facts in this case have been summarised from the reported judgement obtained at: National Coalition Against Censorship : Art Law Library (2011) [online], available at: (http://www.ncac.org/art-law/op-rogcfm) [9 February 2011]

[36] National Coalition Against Censorship *Rogers v Koons* (2011) [online], available at (http://www.ncac.org/art-law/op-rogcfm) [8 February 2011]

Based on the following significant factors the Court found Koons infringed Rogers' copyright, concluding that –

- Rogers' photo was original and qualified for protection in terms of the copyright law;
- Koons had copied the photograph without consent from Rogers. He admitted having access to the image. This direct evidence of copying and the substantial similarity between the two works was sufficient to infer copying; and
- Koons had not just copied Rogers' idea, but also the expression of it, rendering the copying contrary to the law.
- Although Koons raised a fair use defence, claiming his work was a permissible parody of *Puppies*. Koons suggested *String of Puppies* satirized society at large by criticizing the social deterioration the mass production of commodities has caused. The Court was not convinced that parody was applicable as a justification. Koons' had parodied society at large and not Rogers' photograph as the object of the parody. Instead they found *String of Puppies* to be a 'satirical critique of material society', and not a parody of the photograph itself. The Court was also concerned about the effect that Koons' work would have on demand for the original photograph and authorised derivative works.[37] The Court determined in my opinion incorrectly that Koons had produced String of Puppies for monetary gain, and therefore that it prejudiced the market for the licensing of the reproductions and derivative works of the original work by decreasing demand for similar works. In evaluating his defence of fair use, the alleged bad faith clouded the issue of whether the work was transformative in nature. Furthermore the sculpture did not replace the demand for Rogers' original photograph.

[37] National Coalition Against Censorship 2011. Significance of Rogers v Koons.

Niagara:

The Facts

The second case involving Koons which sheds light on the doctrine of fair use, arose seven years later. Judge Sack colourfully summarised the facts of the case as follows (2006 p.4-8)[38]

> This case arose in 2001 in connection with a series of Koons' work entitled *Easy Fun – Ethereal*. Deutsche Bank commissioned the works in collaboration with the Guggenheim Museum, Berlin in 2000. To create the *Easy Fun – Ethereal* paintings, Koons appropriated images from advertisements and from his own photographs, scanning them into a computer, and digitally superimposing the scanned images against backgrounds of pastoral landscapes. He then printed colour images of the resulting collages for his assistants to use as templates for applying paint to billboard sized canvasses. The *Easy Fun – Ethereal* paintings, seven in all, were exhibited at the Deutsche Guggenheim Berlin from October 2000 to January 2001.

The painting in question, namely, *Niagara,* consists of fragmentary images collaged against the backdrop of a landscape. The painting depicts four pairs of women's feet and lower legs dangling prominently over images of confectionary – a large chocolate fudge brownie topped with ice cream, a tray of doughnuts and a tray of apple Danish pastries – with green fields and the Niagara Falls in the background.

[38] National Coalition Against Censorship (2011) *Blanch v Koons* [online] available at http://www.nac.org/art-law/op-bla.ctm [8 February 2011] Facts taken from the Judgement in the case of Andrea Blanch v Jeff Koons, The Solomon R. Guggenheim Foundation, Deutsche Bank, United States Court of Appeals, Second Circuit, 2005

Figure 17



Jeff Koons, *Niagara* (2000) [39]

Oil on canvas

1187 x 170 inches299.7 x 4318cm

One of the pairs of legs in the painting was adapted from a photograph by fashion photographer, Andrea Blanch.

Figure 18



Andrea Blanch, *Silk Sandals by Gucci* (2000) in *Allure* magazine[40]

[39] Jeff Koons' (2011) *Artwork Easy Fund Ethereal : Niagara* [online], available at http://www.jeffkoons.com/site/index.htmlImage taken from the annexure to the judgment of the United States Court of Appeals

[40] Figure 18 taken from the annexure to the Judgement in the case of *Blanch v Koons*

Koons scanned the image of *Silk Sandals* and saved it with the other images that form part of the composition of the paining, *Niagara*. Only the legs and feet were used from Blanch's photograph. The background was discarded. Koons inverted the orientation of the legs so that they dangled downwards together with other components of *Niagara* rather than slanting upwards at a 45-degree angle as they appear in the original composition of the photograph. A high heel was added to one of the feet and the original colours were modified. Koons did not seek permission from anyone before using the image. Blanch saw the painting at the Guggenheim Museum in New York during the exhibition in 2002, and on 10th October, 2003, she issued summons against Koons for copyright infringement.

The District Court concluded that the painting, *Niagara* did not infringe Blanch's *Silk Sandals* as its use of the image from *Silk Sandals* constituted fair use. Blanch appealed against this decision. However, on Appeal the Appeal Court affirmed the finding on 26th October 2006.[41]

Judge Katzman distinguished the finding in the case of *String of Puppies*, stating that: (*Blanch v Koons,* 2006, p.33)

> The facts in *Niagara* are quite distinguishable from those in *String of Puppies*[42] in which it was alleged that Koons had slavishly recreated a copyrighted work in a different medium without any objective *indicia* of transforming it or for commenting on the copyrighted work.

What follows is a discussion of the four fair use factors that the Court considers when making a decision on whether the use of a work is fair. The four factors are not given equal weighting by the Court in its conclusion as to whether fair use is a justifiable defence.

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41 Facts taken from the written judgment issued by the United States Court of Appeals for the Second Circuit, dated 26th October 2006.

42 *Rogers v Koons*, 160, F 2ed 301 (2nd Circuit 1992)

FACTOR 1: THE PURPOSE AND CHARACTER OF THE USE

Under this main factor, the Court considers sub factors such as commercial and non-commercial uses, parody, satire and transformative value. The sub factors are considered in the discussion.

(a) Transformative uses

Judge Sack (Blanch v Koons 2006, p.15) quoted the leading authorities on the application of this factor saying 'the way in which the Court addresses the issue of transformative use is whether the new 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. In other words, whether and to what extent the new work is transformative'.

Sack qualifies the position (p.15) by stating that transformative use is not a prerequisite:

> Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science in the arts, is generally furthered by the creation of transformative works. Such transformative works thus lie at the heart of the fair use doctrine's guarantee of breathing space... if the secondary use adds value to the original … if copyrightable expression in the original work is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings … this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society (*Blanch v Koons,* 2006, p.15).

The Court held that (*Blanch v Koons* 2006, p.21) the test for whether Koons' use of *Silk Sandals* was transformative was based on whether it merely superseded the object of the original creation, or instead added something new, with a further purpose or different character, altering the first with new expression, meaning, or message. This test adequately described Koons' transformative adaptation of Blanch's photograph. Koons had used a fashion photograph created for publication in a glossy American lifestyles magazine, changed its colours, background, the

medium, the size of the objects pictured, their details and significantly altered the purpose and meaning of the photograph, combining it in a painting commissioned for exhibition in a gallery space'. The Court therefore concluded that the use in question was transformative.

(b) Commercial use

There is a perception that where a user makes a profit from the unauthorized use of a copyrighted work that the use is unfair. In the case of *Niagara*, (*Blanch v Koons* 2005, p.20) the Court found that commercial benefit flowing to the user is not a dispositive factor. The reasoning behind this is based on fairness. The Court held that:

> The commercial / non-profits dichotomy concerns the unfairness that arises when a secondary user makes unauthorised use of a copyrighted material to capture significant revenues as a direct consequence of copying the original work. Consistent with these principles, Courts will not sustain a claimed defence of fair use when a secondary use can fairly be characterised as a form of commercial exploitation, i.e. when the copier directly and exclusively acquires financial rewards from its use of the copyrighted material. Conversely, Courts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest. The greater the prize of economic rewards reaped by the secondary user (to the exclusion of broader public benefits), the more likely the first factor will favour the copyright holder and the less likely the use will be considered fair (*Blanch v Koons* 2005, p.20).

Koons' Lawyer successfully argued (*Blanch v Koons*, 2005, p.20) that the commercial nature of a use could in itself not be seen as a negative consideration as uses which are exempt from copyright infringement (Section 107) of other copyright works, including news reporting, comment, criticism, teaching, scholarship and research are generally conducted for profit. Therefore, the legislature could not have intended a rule that commercial uses are presumptively unfair.

The Court then adopted a flexible approach by stating that (*Blanch v Koons* 2005, p.21) 'the commercial objective of the secondary work is only a sub factor within the first factor (i.e. the purpose and character of

the work). The more transformative the new work, the less important such factors as commercialism become in a finding of fair use. A finding that a work is substantially transformative will discount the secondary commercial nature of fair use'.

The preamble to Section 107 of the United States Copyright Act contains exceptions to infringement, which are similar to the exceptions in Section (12) of the South African Act.[43] In *Niagara* (p22) it was argued that when balancing the interests of the parties, 'transformative art is of greater relevance than market harm'.

The Court emphasized that it considers whether a commercial use amounts to mere duplication of the entirety of an original and it clearly supersedes the object of the original and serves, as a market replacement for it, making it likely that cognisable actionable market harm to the original will occur. When the second use is transformative, market substitution is less likely and market harm not readily inferred. In the case of *Niagara*, it was found that the work was substantially transformative, and therefore the significance of the other factors including commercialism was lower. Referring to Koons', the Courts attitude was that 'it could hardly be said that Koons' economic gains from *Niagara* were to the exclusion of broader public benefit, the public exhibition of art is widely considered to have value that benefits the broader public interest' (*Blanch v Koons,* 2005, p.22). The success of this argument was crucial to Koons' case. It is reported in the judgement (Blanch v Koons 2005, p.22) that Deutsche Bank paid Koons $2 million for the seven paintings. Koons reported that his net compensation attributable to *Niagara* was $126,877

[43] Section (12) (a) For the purposes of research or private study, or the personal private use of the person using the work; (b) For the purposes of criticism or review of that work or of another work; or (c) For the purposes of reporting current events in a newspaper, magazine or similar periodical (Section 12 (1) (a), (b), and (c)).Furthermore the copyright in an artistic work or an adaptation thereof is not infringed if it is for use in: Judicial proceedings (Section 12 (2) or to the extent justified for the purpose by way of illustration in any publication, broadcast, sound or visual record for teaching: provided that such use is compatible with fair practice and the source is mentioned, as well as the name of the author if it appears on the work (Section 12(4))

(c) Parodies, satire and justification for copying

In the case of *Koons v Rogers,* the Court defined the term parody as being 'when one artist, for comedy or social commentary, closely imitates the style of another thereby creating a new art work that makes ridiculous the style and expression of the original'. The target of parodist criticism is primarily another creative work, whilst satire criticises the subject matter of the original (McLean, 1993, p.6). Koons' argument that parody was the target of *String of Puppies* failed. However, in the Niagara case the Court held (*Blanch v Koons* 2005, p.22) that: *'Niagara* may be characterised as satire. Its message appears to target the genre of which *Silk Sandals* is typical, rather than the individual photograph'.

Koons explained (*Blanch v Koons* 2005, p.24) why he used Blanch's image:

> Although the legs in the *Allure* magazine photograph *Silk Sandals* might seem prosaic, I considered them to be necessary for inclusion in my painting rather than legs I might have photographed myself. The ubiquity of the photograph is essential to my message. The photograph is typical of a certain style of mass communication. Images almost identical to them can be found in almost any glossy magazine, as well as in other media. To me, the legs depicted in the *Allure* photograph are a fact in the world, something that everyone experiences constantly; they are not anyone's legs in particular'. By using a fragment of the *Allure* photograph in his painting, Koons commented on the culture and attitudes promoted and embodied in Allure magazine. 'By using an existing image, I also ensure the certain authenticity or veracity that enhances my commentary … it is the difference between quoting and paraphrasing and ensures that the viewer will understand what I am referring to'.

The Court therefore concluded (*Blanch v Koons* 2005, p.24) that Koons had established a justification for the appropriation of parts of Blanch's photograph and were satisfied that the use of an existing image 'advanced Koons' artistic purposes'.

Fair dealing with an artistic work in South African copyright law requires that use of the original is confined to the acts referred to in Section 12

and in addition the use must be accompanied by an appropriate acknowledgement of the source. Dean says (2006, p.52) that:

> When an artistic work is used for the purposes of criticism or review of that work, or for the purposes of reporting on current events in a newspaper, use without permission or an acknowledgement would be regarded as bad faith'.

In the *Niagara* case, the Court *(Blanch v Koons* 2005, p.25) came to the conclusion that Koons had used the photograph without first asking Blanch's permission. However, as there was no authority to the effect that failure to seek permission for copying, in itself, constitutes bad faith, the Court adopted its flexible approach and held that being denied permission to use a work does not weigh against a finding of fair use.

FACTOR 2: NATURE OF THE COPYRIGHTED WORK

Judge Sack (*Blanch v Koons* p.27) rationalised that two distinctions as to the nature of the copyrighted work have emerged in the evaluation of the second factor namely: 'whether the work is expressive or creative, i.e. is the work fiction, or more factual? Greater leeway is allowed to a claim of fair use where the work is factual or informational'. The Court concluded (p.28) that although Blanch's photograph could have been said to be creative, the nature of the work did not have any significant implications for an overall fair use analysis. Although the creative nature of artistic images typically weighs in favour of the copyright holder, the nature of the work may be of limited usefulness where the creative work of art is being used for a transformative purpose. The second fair use factor (i.e. the nature of the copyright work factual or creative) was found to have limited weight in the analysis because Koons used Blanch's work in a transformative manner to comment on her image's social and aesthetic meaning, rather than to exploit its creative elements such as lightning, angle and composition.

FACTOR 3: AMOUNT AND SUBSTANTIALITY OF THE PORTION USED

In considering the amount and substantiality of the portion copied, the Court pointed out that (*Blanch v Koons* 2005, p.28) 'the question is whether the quantity and value of the materials used are reasonable in relation to the

purposes of the copying'. Like South African law, the analysis into substantiality calls for thought not only about the quantity of the materials used, but also about their quality and importance. Koons asserted that his artistic goals led him to incorporate pre-existing images such as Blanch's photograph into his paintings in order to reference certain facts in the world. The main question the Court had to decide is whether, once Koons chose to copy *Silk Sandals*, he did so excessively, beyond his justified purpose?

The test is to ascertain whether the use is reasonable in relation to the purpose of the copying. The Court (Blanch *v Koons* 2005, p.28) concluded that Koons' copying *of Silk Sandals* was indeed reasonable when viewed against his goal; to convey the fact of the photograph to viewers of the painting, and in light of the quantity, quality and importance of the material used. He did not copy the aspects of *Silk Sandals* that related to Blanch's individualised expression. In light of Koons' choice to extract only the legs, feet and sandals in *Silk Sandals* from their background, the Court found Koons' statement that he copied only that portion of the image necessary to evoke a certain style of mass communication', to be persuasive. The Court concluded (p.29) that the amount and substantiality of Koons' copying was reasonable in relation to the purpose of the copying, and this factor definitely favoured Koons.

FACTOR 4: MARKET EFFECTS

(*Blanch v Koons* 2005, p.30) The Court remarked that this factor was initially considered to be the most important element of fair use but it recognised instead that all the factors are to be explored and the results weighed together. In considering this final factor the Court considered the market value of Blanch's photograph when Sack, J said that:

> Consideration is not whether the secondary use suppresses or even destroys the market for the original work, or its potential derivatives, but also to whether the secondary use usurps the market of the original work. The market for potential derivative uses includes only those that creators of original works would in general develop or licence others to develop. Blanch acknowledges that she had not published or licensed *Silk Sandals* subsequent to its appearance in *Allure* and that she had never licensed any of her photographs for use in works of graphic or other visual art. She also admitted that Koons' use of her photograph did not cause any harm to her career or upset any plans she had for *Silk Sandals* or any

> other photograph, and that the value of *Silk Sandals* had not decreased as the result of Koons' alleged infringement'

In light of these submissions, the Court found (p.31) that it was plain that *Niagara* had no adverse effect upon the potential market for, or value of, the copyrighted work. Furthermore it concluded that the aim and purpose of the law would be better served by allowing Koons' use of *Silk Sandals* than by preventing it. The case against Koons was therefore dismissed.

Judge Katzman (p.33) in his concurring judgement was scathing of Blanch's intentions in pursuing the claim for copyright infringement against Koons in his remark that: 'Not only has Blanch failed to show that use of Koons' work actually harmed her in any way, but she did not seek copyright protection for her work until after viewing Koons' picture, suggesting that she is more interested in a windfall recovery than in policing her rights to any foreseeable derivative uses'.

Dean (2006, p.52) asserts that while the American Act refers to fair use and the South African Act to fair dealing, the two terms are synonymous and should be taken into account.

These factors [the factors in Section 107 of the US Copyright Act] should be taken into consideration and be given due weight in Court when determining whether, in any given situation, a potentially infringing act constitutes a fair dealing with regard to the work in question.

Whilst Dean says (2006, p.1-52) that the terms are synonymous Coenraad Visser (2009, p.595) of the University of South Africa criticises Deans' oversimplification and fundamental misstatement of the law when he says:

> The view has been expressed that fair dealing and fair use are synonymous. This is not merely an oversimplification but a fundamental misstatement. In American Law, fair use is a general defence to copyright infringement. Fair dealing in Section 12 is a limited exception for certain stated purposes only (research or private study, criticism or review, own reporting or current events). In the United Kingdom too, fair dealing is permitted only for the purposes stated above. It is irrelevant that the use is fair generally, or fair for the purposes stated in the Act.

> In this way then fair dealing in English law is, as in South African law more restricted than fair use in American Law

In 2008, the Shuttleworth foundation and the Canadian International Development Research Centre commissioned the University of the Witwatersrand to conduct research on the relations between copyright and education. The aim of the research and the ensuing report focused on the exceptions to copyright infringement and the limitations and regulations relating to eh use of learning materials in teaching, research and learning. Although the report is based in favour of open access to copyright materials for the purposes of research and education (http:itweb.co.za 26 May 2006). The ideas and attitude to the concept of fair dealing and fair use provide a contrasting opinion to Dean.

The Shuttleworth Report (p.14) criticises fair dealing as 'an idea that is enshrined in the copyright laws of many countries that are, or have been, members of the British Commonwealth, or that were once British Colonies'. The report states that the Copyright Act does not give a specific definition of what fair dealing means and does not specify how much of a work may be reproduced without asking permission of the copyright holder (p.14). The Act merely states that 'the amount copied needs to be compatible with fair practice [and] shall not exceed the extent justified by the purpose.

According to Shuttleworth, Section 12(1), Article 9(2) of the Berne Convention also deals with the reproduction of copyright protected works in much the same vague manner. It allows for reproduction in certain special cases provided that the reproduction does not conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the author. As a signatory to the Berne Convention, the exception is applicable in South Africa.

Contrary to Shuttleworth's opinion, Dean (2006, p.52) argues that, 'the concept of fair dealing is deliberately vague in order to enable the Court to take all the circumstances of a potentially infringing act into account'. He remarks that Australian law has adopted the principles of fair use for the purposes of interpreting the term fair dealing under the Australian Copyright Act, 1968, the American criteria has been used, with the addition of a further one, namely whether the work can be obtained within a reasonable time at a

normal commercial price. Dean argues that the American and Australian approaches are commonsensical and reasonable and should be followed by the South African Court. All the mentioned factors should be taken into consideration and be given due weight in the Court in determining whether, in any given situation, a potentially infringing act constitutes a fair dealing of the work in question.

Although Dean says that the term fair use is synonymous with fair dealing and the rationale and purpose may also be synonymous he does not go as far as proposing that the law be amended to include the broader statutory doctrine contained in the American Statute. It is my submission that the South African Courts are however acutely aware of all the factors considered by the American Courts. The method of applying them to a case of copyright infringement is less formal and gives greater latitude to the Court in the decision-making process.

Indeterminable factors and vagueness create a disadvantage for artists who fear being sued. If Dean is correct in his submission that fair dealing and fair use can be equated then, the door is wide open for artists to use copyright images if the use is transformative in nature. It is my submission that fair dealing in South Africa should be read in the context of both Sections 12 and 15 of the Act the Act. The latter Section gives latitude to artists to reproduce works provided such reproduction is not in conflict with the normal exploitation of the work and is not unreasonably prejudicial to the interests of the copyright owner. The phrase 'normal exploitation of the work' is open to interpretation in the court and in deciding a case a Court would take account of the principles in the doctrine of fair use.

Copyright and the Constitution: Ralph Borland

In South Africa (unlike the United States) intellectual property (which would include the rights granted to an artist under the Copyright Act) does not enjoy special status under the Constitution.

South African artist Ralph Borland (born 1974), argues that[44]:

> 'The notion of fair dealing in the general exemption provided by Section 12 of the Copyright Act should be interpreted in accordance with the constitutional right to freedom of expression, particularly the right to artistic creativity, analogous to the concurring judgment in *Laugh It Off Promotions CC v (Finance) B.V. CC* … Intellectual Property Law, generally, and Copyright Laws especially, have been overzealously extended and enforced worldwide as well as in the South African legal system … Intellectual Property Laws should be limited in accordance with the constitutional right to freedom of expression and for the benefit of long standing processes of cultural and artistic development.

In 2005, South African Breweries International *(*hereinafter referred to as SAB), owners of the Black Label trademark, sued Laugh It Off Promotions CC for trademark infringement in terms of Section 34(1)(c) of the Trade Marks Act[45]: Section 34(1) (c) recognises a trademark as a valuable commercial asset which requires protection against dilution by blurring and tarnishment. Dilution by tarnishment occurs when the trademark is parodied or used in an offensive or given a negative connotation (Webster and Morley 2007, p.12-44). In this case Laugh It Off Promotions had produced and sold T-shirts employing the layout and colours of SAB'S registered marks for a beer label but with a different message. The Trademark *Black Label* was replaced with *Black Labour*, while the slogan *America's lusty, lively beer* was replaced with *Africa's lusty lively exploitation since 1652 no regard given world wide* (Webster and Morley p.12-44). It is imperative for the reader to comprehend that unlike copyright, where the artwork is protected against unauthorised acts, it is not the mark per se that is protected but the selling power or advertising value which it has acquired as a result of expensive advertising. (Webster and Morley p.12-46).

[44] Ralph Borland.net (2007) [online], available at (http://ralphborland.net)/sos/index.html25/05/2007)

[45] 34. Infringement of registered trade mark -
(1) The rights acquired by registration of a trade mark shall be infringed by:
(c) the unauthorised use in the course of trade in relation to any goods or services of a mark which is identical or similar to a trade mark registered, if such trade mark is well known in the Republic and the use of the said mark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of confusion or deception.

Figure 19

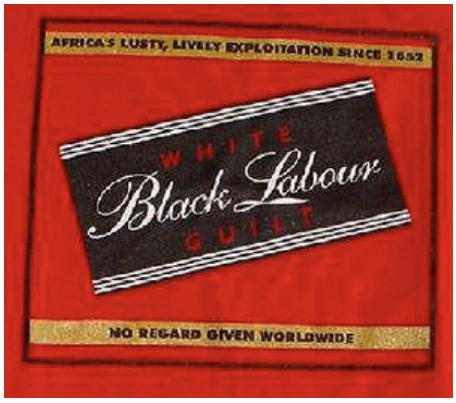
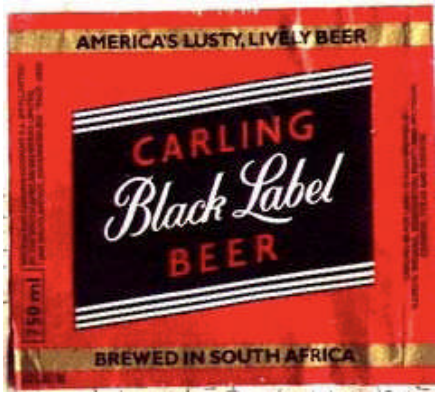


Figure [19] shows how the general layout and colours of the registered mark were appropriated. However, the words 'Black Label' were replaced with 'Black Labour' and 'Carling Beer' with 'White Guilt'. The laudatory part on the label was replaced by 'Africa's lusty, lively exploitation since 1652' and 'No regard given worldwide'. (Judgement SCA Paragraph 5][46]. [1] Currie 2010: Notes on the Laugh It Off Decision).

Figure 20[47]



The Court held that a finding of unfair use or likelihood of detriment to the repute of the marks hinges on whether the offending expression is protected under Section 16(1) of the Constitution or not. If the expression is constitutionally protected, what is unfair or detrimental, or not, in the context of Section 34(1)(c) must then be mediated against the competing claim for free expression. The case was decided in favour of Laugh It Off Promotions CC

[46] (Currie 2010: Notes on the Laugh It Off Decision).
[47] Figure taken from notes on the Laugh It Off decision compiled by Iain Currie

as SAB could not prove substantial harm or detriment which, seen in the context of the case, amounts to fairness.

In interpreting Section 34(1) (C), the Constitutional Court put heavy emphasis the notion of 'fairness'. For the purposes of this research report, this case is important, in the context of how the Constitution Court has intervened in the area of intellectual property law. The case concerns the dilution provisions of Section 34(c) of the Trade Marks Act and does not establish freedom of speech or parody as a defence to copyright infringement. Borland argues that Section 12 of the act should also be interpreted on the same basis as Section 34 of the Trademarks Act i.e. the acknowledgement of freedom of expression and then whether the infringement of copyright is unfair and is materially harmful to the work an or the author. Although this argument has merit it has not been applied by the Courts to a copyright infringement case.

CHAPTER 4 – CONCLUSIONS

Originality And Authorship

Lawyer, Owen Dean (2006, p.22) elevates the author or maker of a work as 'the cornerstone of copyright law'. The Act uses the term author to designate the maker of a type of work, which can be the subject of copyright. The person who arranges for an artistic work to be made is the author (Section 1). Depending on the medium used by the artist to create the work, the law stipulates who the author is. For example the author of a photograph is the person who composes the photograph not the person who physically takes the photograph, unless the composer and the person who takes the photo are the same person.

United States Attorney, Willajeanne McLean (1993, p.389) argues that the trend in Postmodern movements in art, such as appropriation, has been to remove the author from the text, therefore allowing the reader or viewer to determine what is intended. McLean's misguided argument is adopted from an essay by the French literary critic and theorist Roland Barthes titled *The Death of the Author* (1965). The subject of his essay is the determination of meaning of a text. It is my contention that McLean's application of Barthes theory on the determination of meaning is not applicable in the context of copyright law. As argued in detail in Chapter 1, Roland Barthes (1930-1980), who moved away from rigid Structuralism, dramatically declared the birth of the reader and the death of the author when he abandoned Saussure's emphasis on language as a system of structure that pre-exists the individual speaker. D'Alleva (2005, p.135) says that the notion that language pre-exists the individual speaker was part of a larger structuralist rejection of the humanist idea of the autonomous, thinking, coherent, integrated human subject. In her words 'the humanist tradition holds that the human beings are rational thinkers who know the world through language that is fixed and conveys fixed meanings'. D'Alleva explains that in art history this leads to an emphasis on the artistic genius as the centre figure in cultural production, so that the scholar's primary goal is to uncover the artist's intentions. D'Alleva (2005, p.135) takes the argument further when she says 'the artist's intentions to communication what is intended may be important to him or her as individual however meaning on a larger cultural sense, cannot be reduced to her intentions'. An artist may communicate ideas without intending to do so. D'Alleva (2005, p.135) links the application of Barthes theory to art history when she says 'in this spirit, Roland Barthes dramatically declared that the birth of the reader must be at the cost of the death of the Author'. In my opinion this explains how artists have come to

understand the concept of an author and therefore the rejection of the notion of an author as a creative and original thinking genius. It is evident that both Postmodern literary and visual artists were influenced by these theories. Mclean alludes to theory of Structuralism and Post -structuralism which Adams says (1997, p.134) is generally traced to the linguist Ferdinand Saussure (1857-1913). It was followed by Post-structuralism, which de emphasises the author even more and casts authorship as a nineteenth century *'Romantic Myth'* imbued with patriarchy and elitism (Adams 1997, p.134). Adams (1997, p.101) acknowledges that although these theories of Structuralism and Post-structuralism were applied to art, they contradict the biographical method of art history which approaches art history in relation to aspects of the artist's life and personality and hence the legal personality of the artist. Copyright law is concerned with the legal interest of the artist as author.

I agree with Heymann's (2007, p.64) argument that in terms of copyright law, the author has a different 'personality' and one which is not related to the trope of romantic author as espoused in literary and art critical writing. For Heymann 'market based interests are at the heart of copyright law.' Copyright law appeals to creators' interest to monetize their cultural production' Adams (1997, p.101) correctly points out that 'we have come a long way from the mythic associations of artists with the gods. Technological developments and transparency as to techniques and methods of production have softened traditional conventions about the nature of genius (Adams 1997, p.116). Adams puts the argument squarely into context when she says 'there is a direct connection between an artist and his or her art and it takes seriously the notion of authorship'. it is my contention that this notion is narrower than that postulated by Structuralism and Post-structuralism and fits more securely with the notion of author as envisaged in the legal life of the artist as an author or maker of a work.

This line of thinking was famously taken by Marxist critic, Walter Benjamin in his essay, the *Work of Art in the Age of Mechanical Reproduction,* which was written in the context of the threat that photography made to traditional and avant-garde art. Appagnesi and Garratt 2007, p.18) point out that:

> For Benjamin the authority or autonomy of original works of art derives from their irreproducibility, which gives them a magical aura, a charismatic halo that surrounds authentic art objects because they are uniquely irreplaceable and hence priceless. Benjamin was concerned that the aura / fetish of scared uniqueness would be eliminated by mass reproduction essentially by photographic printing of original work of art in widely distributed books, posters, postcards and even postage stamps.

Contrary to McLean Appignanesi and Garrett (2007, p.40) are of the opinion that the autonomy and aura of an original work of art has survived but is transferred to the artist. They say that :

> The artist becomes the aura itself, as in the case of London artists Gilbert and George who displayed themselves as living sculptures in 1970. Duchamp had already led the way by focusing publicity on himself as the enigma who renounced art to play chess instead. It is also argued that Warhol's reproductions are not about art but the ultimate commodity. The aura of the artist is reduced to fame and celebrity.

In the context of copyright, art writer, Jesse Wilder (1998, p.373) claims that:

> Postmodern artists express doubts about progress, post industrial capitalism and grand arts movements they do not put any significance on the concept of true. Morphed images and the meanings they create are more significant and true to Postmodern artists than claiming to understand the essence of the original. They believe modern life is in flux, everything blends and blurs nothing is stable and there are no absolutes.

To contextualize Wilder in the theoretical perspective she says (1998, p.373) that Postmodern artists predict that the Simulacrum (a fake version of the original) would become more powerful and useful than the authentic object. The same can be said of Koons. According to copyright lawyer, Steven Shonack (1993, p.281), 'Koons' supporters depict him as a Wunderkind whose Postmodernism descends from the best in American and European Art. However it is my contention that one must not lose sight of the relevance of such arguments to copyright law, which defines the term author and is concerned with the protection of the author from unauthorised copying.

There is no definition of 'original' in the Act. 'Original' in the context of copyright does not mean that the work must in any way be inventive. The characteristics of avant-gardism, novelty and creativity do not appear in the context of copyright law. Originality relates to the degree of skill and labour involved in the making of a work.[48] Originality should not be equated with the meaning of 'authentic', which is defined in the Oxford English Dictionary (ninth edition) as: 'of undisputed origin or genuine'.

[48] *Saunders v Klep Valves (Pty) Ltd 1987(2)(A)*

Monopolisation of Ideas

The *Rapid Phase Entertainment case* confirms the decision of our Courts when it comes to guarding against the monopolisation of ideas by an artist. On the facts of the case set out in chapter 2 above, it is my contention that the SABC relied heavily on the nature of the characters in the comic strip to convey the message of its advertisement. Anyone who is familiar with the cartoon characters seeing the advert would have been under the distinct impression that the characters were Madam and Eve. Although, on the surface the decision appears to be unfair, Judge Wunsch in his conclusion to the case makes the important observation regarding fairness when he says:

> Relevant to the decision were the criteria of fairness, honesty and the sense of justice of the community in assessing the importance of free market and competition in an economic system. And further, that, the degree of appropriation of a concept would substantially determine whether the community would regard it as unfair, dishonest or contrary to morality.

This attitude of the Courts in turn gives artists latitude and the freedom to use other works of art as inspiration thereby encouraging creativity.

I support Dean's view (2006, p.42C) that where the idea and its expression are indistinguishable, the Courts should be slow the find that copyright infringement has occurred as there is a danger that a monopoly can be conferred upon an idea free of the conditions and limitations imposed by patent law. To constitute an infringement of copyright, it is the artistic features or attributes of a work that must be transformed or adapted, not some concept that it conveys (*Rapid Phase Entertainment* quoted in Dean, 2004, p. 42C). Essentially, if an idea has been expressed in a material form and has become an integral part of a work it may still not be protected if there is doubt as to whether the idea and its expression are indistinguishable there is no copying of the artistic features and or attributes. However, in a case where an idea and its expression are indistinguishable the Court may come to a different conclusion where there is direct evidence of copying. In the *Natal Picture framing* case it was easier to prove copying as Natal Picture Framing Company had proof that Levin had its picture in his possession.

Marx has gained a reputation in the art community and was concerned that his style / combination of ideas had been copied. In support of Marx, his style is a

signature of his work, however whether he is or should be entitled to a monopoly in respect of the style of combining maps with human anatomy is debatable.

South African art critic Alexandra Dodd (2006, p.72) comments on Marx's unique style and ideas when he says that 'For the past five years Gerhard Marx has been creating works composed of map fragments … figures emerge from the lines of the maps…skulls, heads, reclining figures, feet are superimposed on the landscape … map transformation as poetic gesture'.

Figure 21



William Kentridge, *Small Atlas Procession* (2000)[49]
Etching
43.6 x 35.5cm

Other South African artists such as Fiona Pool, Mute Tshabalala and William Kentridge have also adopted this combination of map fragments and anatomy in their work. Pool figure [22] uses maps, grids in a series of etchings the strength of the decision in *Rapid Phase Entertainment CC* it is unlikely that Marx would have succeeded in the infringement of copyright claim as the actual artistic features of Marx's work had not been copied by Ireland Davenport, merely the ideas or combination of ideas that represent his style. Whether he would have succeeded on the basis of the second claim of passing off is uncertain.

[49] Photograph by Renee Johannes from the Caversham Press Collection Exhibition held a the Johannesburg Art Gallery with permission from the Standard Bank Gallery. Printed by Malcolm Christian, The Caversham Press. Published by William Kentridge and Malcolm Christian.

Figure 22

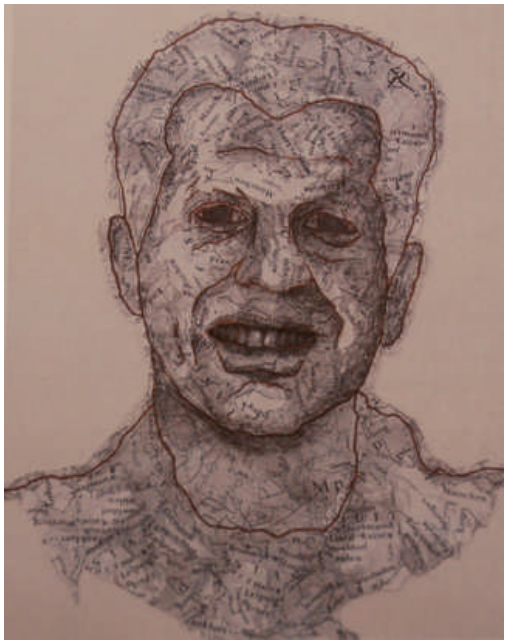


Fiona Pool *Packing up Waiting* (2009)[50]

Sugar lift on Japanese paper edition of 15

210 x 29 cm

Figure 23



Tshabalala, Josiah *Friends Like This* (2005).[51]

Collage mixed media (size unknown)

[50] Pool 2009, p.1
[51] *Creative Expressions* Sasol New signatures Catalogue of Finalists 2005

Without commenting on or discussing the merits of the case artist and art critic Paul Edmonds (2008) balances the scales in favour of the poor artist against the luxury German car manufacturer when he says:

> The appearance in several of last week's national newspapers of a BMW ad featuring drawings made or cut out and reconstructed maps may just have demoted young Johannesburg artist Gerhard Marx to the 'artists' whose work looks like the BMW ad. When I saw it, the likeness to Marx's work was so unmistakable that I thought (a little disappointedly) he must surely have sanctioned this use of his methodology. I was never under the impression that Marx had done the work himself – the drawing is, in short, 'piss poor'.

According to Edmonds, artists are not strangers to the issues of copyright. However in his opinion, the advert draws too heavily on Marx's work, 'a young artist just establishing himself in a fickle and treacherous, underfunded industry'.

The interface between trademarks, copyright and passing off

In South Africa our Courts have demarcated the boundary between trademark and copyright protection. In the case of *Verimark v BMW* it was held that trademark protection does not give copyright protection[52] Likewise our Courts have demarcated the boundary between the statutory rights created in the Copyright Act and passing off, which is a common law action based on the law of delict. It is similar to misrepresentation.

The Courts have become wary of entertaining claims of copyright infringement under the guise of trademark infringement or passing off. In the *Payen Components SA v Bovic and Others* case, Judge Corbett cautioned against the blurring of the boundaries between these two are as of the law. When he says :

> Court should be wary of allowing the sharp outlines of the two established branches of the law of unlawful competition, namely copyright and passing off, to be fudged by allowing a vague penumbra around the outline. Unlawful competition should not be added as a ragbag and often-forlorn final alternative to

[52] *Verimark (Pty) Ltd v BMW* 2007 (6) SA 263 (SCA)

> every trademark, copyright, design or passing off action. In most of the cases it is one of the established categories or nothing (At 453F/G-H).[53]

The nature and aims of the rights protected in terms of the Copyright Act, the Trademarks Act and the common law right of passing off are complex and easily confused. Heymann (p.65) argues that the Courts should pay more attention when 'content owners attempt to use an overbroad notion of copyright law to assert trademark-based claims'. She clarifies (p.64) the aim of trademarks as protecting the source of goods and the consumer from deception in the market in contrast to copyright law, the aim of which is to induce creativity for economic reward:

> Trademark law is concerned with the source or sponsorship of goods or services and the way in which they are presented to the public. The goals of trademark and copyright law differ in that copyright concerns are about incentives for the artist. … Trademark law although it can also be explained in economic terms is by contrast not justified in terms of promoting creativity. Unlike copyright and patent law, trademark law is not designed to offer the trademark holder incentives to create; the prevailing view is that creativity is not the aim of a trademark. Rather trademark law is typically justified in terms of the public interest of protecting consumers from deception in the market place.

It is within the context of this interface between copyright and trademarks that I return to address the case of *Laugh It Off Promotions CC*[54] This case is quoted by South African artist Ralph Borland (born 1974) as a blanket of protection of freedom of expression in the face of intellectual property laws (i.e. copyright, patents and trademarks). He argues that:

> (First) '… The notion of fair dealing in the general exemption provided by Section 12 (i.e. the provision relating to Fair dealing) of the Copyright Act should be interpreted in accordance with the constitutional right to freedom of expression, particularly the right to artistic creativity, analogous to the concurring judgment in *Laugh It Off Promotions CC v South African Breweries International (Finance) B.V. CC*'
>
> (Second) 'that Intellectual Property law, generally and copyright laws specifically have been overzealously extended and enforced worldwide as well as in the South African legal system'.

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53 *Payen Components SA v Bovic and Others 1995 (4) SA 441(A)*
54 *Laugh It Off Promotions CC v South African Breweries International (Finance) B.V. CC*.

> (Third) 'Intellectual Property laws should be limited in accordance with the constitutional right to freedom of expression and for the benefit of long standing processes of cultural and artistic development.'

Each of the arguments raised by Borland is discussed in the order in which they are raised followed by a discussion on the case of *Laugh It Off Promotions.* This discussion will bring us back to the interaction between trademark law, copyright and passing off.

First, fair dealing is not a general exemption in our law.[55] It is an exception to copyright infringement confined to certain acts (Section 12 of the Act). In the United States of America it is a general defence to copyright infringement. As referred to above in chapter 3 the defences and exceptions in South African and American law are different. The South African exception of fair dealing is much narrower. Fair use in the United States of America was distilled from case law and later codified in the federal legislation.

Second, the duration of copyright has not been extended in South Africa since the first promulgation of the Patents, Trademarks Act no.9 1916 Act.[56] Borland does not specifically refer to the Berne Convention or *TRIPS* (Trade Related Aspects of Intellectual Property Rights).In an artistic work the duration of copyright is for the life of the author plus fifty years from the end of the year in which the author dies (Dean, Service 13, 2006, p.1-2 and Section 3(2)(a) of the Act). Dean, (2006, p.88E) points out that South Africa's copyright law is influenced by and is part of an international network of copyright protection which is aimed at a reasonable degree of standardisation of forms and levels of protection and the granting of protection to foreign works on a reciprocal basis. The situation is brought about by the Berne convention on copyright and latterly by TRIPS.[57]

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[55] Visser, C p.596

[56] This Act was repealed in 1965 and was very closely based on the British at of 1956

[57] *TRIPS* has influenced South African law in that foreign persons and corporate bodies are qualified persons for the purposes of 3(1) of the Act (Dean, 2006, p.1-89). The other major international copyright convention is the Universal copyright convention, which dates from 1952 and was revised in 1971. South Africa is not a signatory to this convention (Dean, p.1-92). In South African cinematograph The Registration of Copyright protects films and performance in Cinematograph films No 62 of 1977 and The Performers Protection Act 11 of 1967. A performance and a cinematograph film may qualify as an artistic Act and may also be protected in terms of the copyright Act. The right in terms of these two Acts are not copyright but are analogous to (Dean, 2006, p.1-111).

TRIPS however does not detract from the National treatment of a copyright infringement case. There is a misperception amongst artists such as Borland that there is a uniform protection of copyright throughout the world. There is no universal or international copyright that automatically protects an author's work throughout the world. Protection in a particular country depends on the national laws of that country and international treaties that it has signed.

Third, this case of Laugh it Off Promotions concerned the interface between the guarantee of free expression enshrined in Section 16(1) of the Constitution and the protection of intellectual property rights attaching to registered trademarks as envisaged by Section 34 of the Trademark Act and consequently to related marketing brands more particularly the tarnishment of a trademark

The case of *Laugh It Off Promotions* falls squarely within the domain of trademark law and involved the infringement of a trademark. Constitutional Court Judge, Moseneke refrained from making any finding on any of the submissions by Laugh It Off Promotions CC on the findings of the Supreme Court of Appeal on fair use of a mark under Section 34(1)(c) of the Trademarks Act and freedom of expression. He reached the conclusion that the claim of infringement of the SABC's trademarks marks stood to be dismissed because no likelihood of economic prejudice had been established. Secondly, where no economic harm had been shown, the fairness of parody or satire or lampooning did not come into consideration.

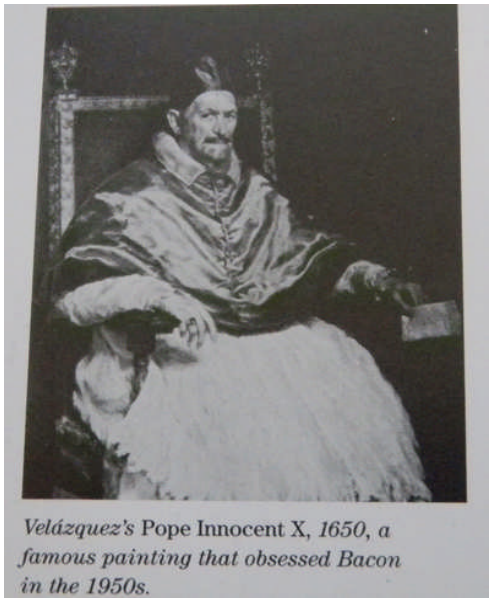
In the dissenting judgment, Sachs, J confirmed that, unlike in the United States (p.68) there are no enclaves of protected expression in parody or satire. Therefore the mere characterization of an expression as such would not be decisive in what constitutes fair use under the anti-dilution protection of Section 34(1)(c). Ordinarily all categories of expression, save those excluded by the Constitution itself, enjoy constitutional protection and may be restricted only in a way that is constitutionally authorized. Artists should therefore not interpret the case as authority to appropriate or adapt a copyright image on the grounds of freedom of expression.

Copyright is a Technical Subject

Copyright is a technical subject and it should be offered as a subsidiary course for students in all disciplines covered in terms of the Act for example literary, musical artistic architecture, photography, film, broadcasts computer

programming and dramatic works. The dearth in case law concerning visual art and copyright could indicate that the law is doing its job and this strength in our law lies in its effective balancing of the interests of the parties concerned. Legal costs are major contributing factors to the dearth of case law in South Africa. In South Africa, the art fraternity came together in support of Marx and held an auction to raise funds for his legal expenses.According to a report in the Mail & Guardian dated 28th October 2008, the auction raised approximately R450 000,00. It was further reported that legal fees were estimated to be R300 000, and that the balance of the funds would be used to set up a David and Goliath Fund, the aim of which is to assist artists in future copyright infringement cases.

Figure 24



Velázquez's Pope Innocent X, *1650, a famous painting that obsessed Bacon in the 1950s.*

Velazquez's *Pope Innocent X* 1650[58]
Medium and measurement unknown

Copyright is a valuable commercial asset and it should be given recognition as such. Copyright laws do not appear to have had a curtailing effect on artists who still use other art as inspiration for their work. Artists such as Siopis and Francis Bacon draw from art that is part of the public domain perhaps out of fear of prosecution or else as a respect for the proprietary rights of other artists. The duration of copyright is generous, perhaps over generous. As a

[58] Francis Bacon Edicionis Polographis original Spanish edition 1994 S. 54 Barcelona Balmes p.6

further incentive for artists and in order to minimise the threat of litigation, it is my contention that the interests of the parties would be better served if the duration of copyright were shortened to a maximum of ten years. Artists should confine themselves to using images that have fallen into the public domain so as to avoid litigation. This would also alleviate the exploitation of the skill and labour of an artist.

Figure 25



Bacon, F *Study after Velazquez's portrait of Pope Innocent X* 1953[59]

> Vanity of vanities! Says the preacher. All is vanity. What do people gain from all the toil at which they toil under the sun? A generation goes, and a generation comes, but the earth remains forever. The sun rises and the sun goes down, and hurries to the place where it rises. The wind blows to the south, and goes around to the north; round and round goes the wind, and on its circuits the wind returns. All streams run to the sea, but the sea is not full; to the place where the streams flow, there they continue to flow. All things are wearisome, more than one can express; the eye is not satisfied with the seeing, or the ear filled with hearing. What has been is what will be, and what has been done is what will be done; there is nothing new under the sun. Is there a thing of which it is said, 'see, this is new'? It has already been, in the ages before us. The people of long ago are not remembered, nor will there be any remembrance of people yet to come by those that come after them. (Ecclesiastes 1: 2-11)

[59] Francis Bacon Edicionis Polographis original Spanish edition 1994 S. 54 Barcelona Balmes p.6

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