



American Copyright Law and Belgian/EU 'Droit d'Auteur' : Cross-Atlantic Conversations on the Freedom of Artistic Creation

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- Appropriation art >< copyright law
 - Ex: pop art, jazz improvisation, sound sampling, user-generated contents, (...)
- Legal uncertainty
- Comprehensive study (comparative approach)

Artists and Freedom of Creation

- “Regarding the complete creation of one thing, I don’t think it is possible. God himself, when he created man, could not or did not dare to invent, he made him in His own image” (A. Dumas)
- “Good artists copy, great artists steal” (P. Picasso)
- “Anyone can deny you a song, but can anyone prevent you to sing it?” (B. Vian)

Copyright and Freedom of Creation

- Duration
 - Economic issue
 - International law issue
- Subject matter/Scope of protection
- Exceptions/limitations
 - Internal
 - EU : closed list (art. 5, § 3 dir. 2001/29 copyright)
 - US : open one (fair use, 17 USC § 107)
 - External
 - Freedom of expression
 - Misuse of rights
 - (...)

Parody/Fair use ?



Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992)



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Parody/Fair use ?



Court of first instance, Brussels, February 15, 1996

Parody/Fair use denied



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Parody/Fair use ?

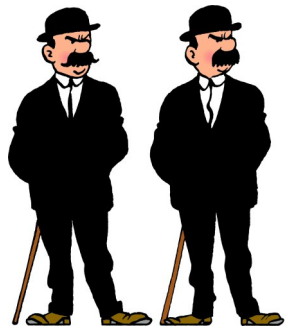
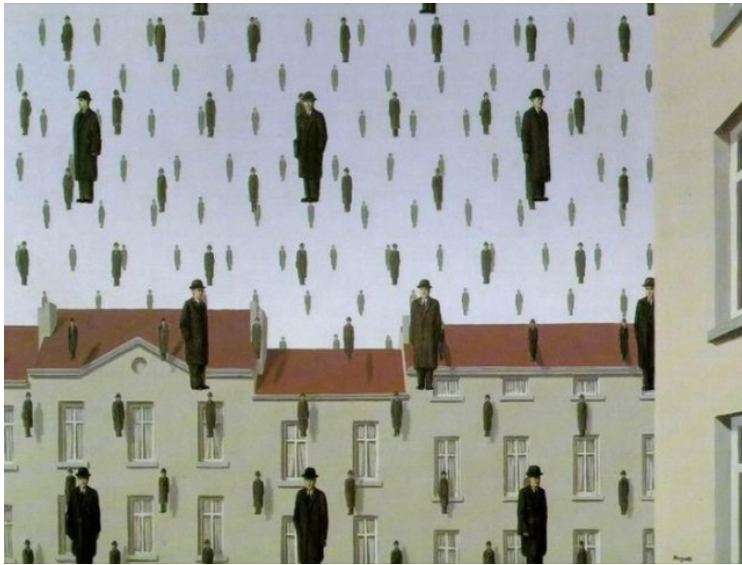


Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)

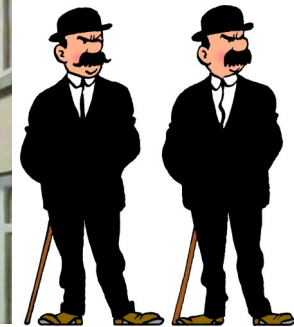


Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)

Parody/Fair use ?



Court of appeal, Brussels, June 14, 2007



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Copyright and Freedom of creation

- **(3)** Defenses
 - (2)** Infringement
 - (1)** Protection
 - a) Originality
 - b) Idea/expression



(1) a) Originality

- EU
 - “High” standard : *mark of the author’s personality*
 - No definition dir. 2001/29 copyright
 - ECJ, *Infopaq*, July 16, 2009 : *author’s own intellectual creation* (§ 37)
 - = “high” ? YES :
 - ECJ, *Painer*, December 1st, 2011 : *intellectual creation of the author reflecting his personality* (§ 94)
 - See also : ECJ, *Football Dataco*, March 1st, 2012 (§ 39)

(1) a) Originality

- USA
 - “Low” standard
 - No definition 17 USC
 - *Feist Publications v. Rural Telephone Service Company*, 499 U.S. 340 (1991) :
 - Rejecting “sweat of the brow”
 - 2 elements :
 - Independent creation (no copy)
 - Minimal degree of creativity

(1) a) Originality



EU

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USA

- “Low” standard
- No definition in the law
- Feist Publications v. Rural Telephone Service Company*, 499 U.S. 340 (1991) :
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 - 2 elements :
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- EU treshold > US ? Go beyond labels

(1) b) Idea/expression

- Ideas not protected
- Idea? Expression ?

(1) b) Idea/expression



- *Nichols v. Universal Pictures Corporation*, 45 F. 2d 119 (2d Cir. 1930):

*“Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this **series of abstractions** where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can.”*

– > **Abstraction test**

- Continuum, no precise limit

(1) b) Idea/expression

- Tools under US dichotomy
 - **(1)** Merger doctrine : one way to express idea => expression = unprotected idea
 - *“When the ‘idea’ and its ‘expression’ are thus inseparable, copying the ‘expression’ will not be barred, since protecting the ‘expression’ in such circumstances would confer a monopoly of the ‘idea’ (...).”* (Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738 (9th Cir. 1971))

(1) b) Idea/expression

- Tools under US dichotomy
 - (2) *Scènes à faire* doctrine :
 - “(...) material that is ‘standard’, ‘stock’ or ‘common’ to a particular topic” (*Autoskill Inc. v. National Educational Support Systems, Inc.*, 994 F.2d 1476 (10th Cir. 1993))
 - “(...) any elements of a work that necessarily result from external factors inherent in the subject matter” (*Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366 (3d Cir. 1997))
 - Point of view of the creator (*F.A. Davis Co. v. Wolters Kluwer Gealth, Inc.*, 413 F. Supp.2d 507, 512-513 (E.D. Pa. 2005) ; *Dun & Bradstreet Software Services, Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 215 (3d Cir. 2002) ; *Control Data Sys., Inc. v. Infoware, Inc.*, 903 F.Supp. 1316, 1323 (D.Minn.1995))

(1) US idea/expression EU originality

- Comparison
 - (1) Merger doctrine
 - Belgium : originality
 - EU : ECJ, *BSA*, December 22, 2010
 - “[W]here the expression of those components is dictated by their technical function, the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression become indissociable” (§ 49)

(1) US idea/expression EU originality

- Comparison
 - (2) *Scènes à faire* doctrine
 - Belgium, France : “standard, stock, common” // “banal” (=opposite of **original**)
 - EU : “*scène à faire* as external factors limiting choices available to the creator” // ECJ case law, no **originality** when expression dictated by:
 - technical function (*BSA*, § 39)
 - rules of the game (*Football Association Premier League*, October 4, 2011, § 98 ; see also *Painer*, § 89)
 - Technical considerations, rules or constraints (*Football Dataco*, § 39)
 - USA, comp. *Dun & Bradstreet Software Services, Inc. v. Grace Consulting, Inc.* :
 - “The rationale [of the *scène à faire doctrine*] is rather straightforward: Because those external factors dictated the creation of the allegedly infringed work, ‘it is lacking the **originality** (...)’”

(1) US idea/expression EU originality

- US originality \neq EU originality ? Maybe
- US originality + US idea/expression // EU originality ? Probably



- Assuming US // EU threshold
 - > same freedom of creation ?
 - > look at infringement standard

(2) Infringement (US)

- *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946)
 - (1) **probative similarities** : *“If there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying. (...) If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result”*
 - (2) **substantial similarities (ordinary observer’s point of view)** : *“If copying is established, then only does there arise the second issue, that of illicit copying (unlawful appropriation). On that issue (...) the test is the response of the ordinary lay hearer”*
- See also : *Sid & Marty Krofft Television Prods, Inc. v. Mc Donald’s Corp.*, 562 F.2d 1157 (9th Cir. 1977) (extrinsic/intrinsic test ; derived from *Arnstein*)

(2) Infringement

- Substantial similarities
- *Quid* in Belgium/EU ?

(2) Infringement (Belgium)

- Cass., September 25, 2003
 - “(...) a partial reproduction is sufficient to establish infringement if the copied elements are original (...)”
-> **similarities must not be substantial, no reference to the ordinary observer**
 - “(...) it should be considered whether the allegedly infringing work presents such a similarity as to the protected characteristics of an earlier work that the overall impressions generated by the two works do not differ enough to admit the originality of the first work”
-> **probative similarities**
- Cass, September 3, 2009
 - “In the case there are sufficient similarities between original elements of the two works, the author of the later work, in order to refute the presumption he copied the first work, shall show evidences that he didn’t know the first work or that he reasonably couldn’t have knowledge of it”
-> **probative similarities**

(2) Infringement (EU)

- ECJ, *Infopaq* :
 - Reproduction (and therefore infringement) “*if the elements thus reproduced are the expression of the intellectual creation of their author*” (§ 51)
 - See also : *Football Association Premier League* (§ 159) ; *Painer* (§ 99) ; *SAS Institute*, May 2, 2012 (§ 70)
- **No** reference to probative similarities
- **No** room for substantial similarities, ordinary observer test

(2) Infringement

- No substantial similarities
- Perspectives in Belgium/EU ?

(2) Infringement (Belgium)

- Case law : reference to substantial similarities and audience (= ordinary observer?)
 - Court of appeal, Brussels, December 6, 2007
 - Comparison from the point of view of the *“intended audience that listen to the songs”*
 - Holding : *“Lacking identity or substantial similarity between the two works, the alleged infringement is not established”*
 - Court of appeal, Brussels, December 18, 2008
 - Overall impressions, comparison from the point of view of the *“average listener”*
 - Holding : infringement since there is *“impression of an advanced substantial similarity”*

(2) Infringement (EU)

- Nothing in the ECJ decisions
- But see Opinion Adv. gen. Y. Bot, *SAS Institute*
 - *“It will be for the national court to examine whether, in reproducing those functionalities in his computer program, the author of the program has reproduced a substantial part of the elements of the first program which are the expression of its author’s own intellectual creation” (§ 76 ; see also § 67)*
 - *Comp. art. 16, § 3, a, UK Copyright Act 1988 : “References (...) to the doing of an act restricted by the copyright in a work are the doing of it (...) in relation to the work as a whole or any substantial part of it”*
 - But see § 70 decision

- Interest of the comparative approach
 - > Conversation
- Common basis originality/limiting doctrines (*merger, scènes à faire*)
 - > EU approach could provide rationale
- Infringement standard, probative/substantial similarities + ordinary observer
 - > US approach could provide rationale



Thank You !