



Arts Brief

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Left-Brain Support for Right-Brain People

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Illegal Copies at Issue in Murakami, Johns Suits

by Marcia Semmes, MLA Executive Director

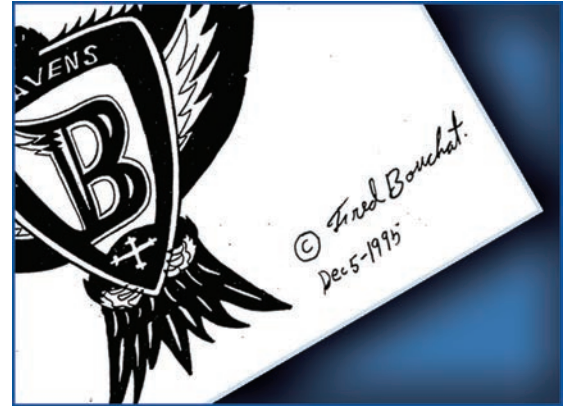
What do Takashi Murakami and Jasper Johns have in common? Both artists are at the center of pending lawsuits, one civil and one criminal, over copies of their works made without their permission.

Brian Ramnarine, the owner of a well-known and well-regarded foundry in Long Island City, was charged Nov. 15 with attempting to sell a bronze sculpture that he falsely represented to be a genuine work of art by Jasper Johns.

According to the U.S. Attorney's Office in Manhattan, Johns created the sculpture titled "Flag" in 1960. In 1990, he asked Ramnarine to make a wax cast of the Flag Mold. Ramnarine did so and gave Johns the wax cast but never returned the original mold.

Some 20 years later, Ramnarine used the original Flag Mold to make a bronze sculpture, dated it "1989," and forged Johns' signature on the back of the work. The foundry owner, who was convicted 10 years ago on state charges that he made unauthorized copies of sculptures and sold them as originals, then began offering the work for sale, asking \$11 million for it. When an art collector questioned the work's authenticity, he forged a letter from Johns and other documents showing that it was genuine and that Johns had given it to him.

According to the indictment, Ramnarine went so far as to take the art collector's representative to a storage facility in Manhattan, where



Plaintiff's exhibit Bouchat v. NFL Properties

Use of Ravens Logo Fair in Photos, Film

by Marcia Semmes

A federal trial court in Maryland decided Nov. 19 that team photos and documentary films incorporating a former stadium guard's original design for the Baltimore Ravens logo made fair use of his copyrighted work.

In contrast, the court said, the use of Frederick Bouchat's copyrighted work in a video football game named "Madden NFL" infringed Bouchat's copyright.

The ruling is the latest in Bouchat's 16-year legal saga to get credit and payment for his work.

Bouchat first sued the team and the NFL in 1998, alleging that the Ravens copied a logo he faxed to the Maryland Stadium Authority in 1995 and used it for two years. Bouchat's "shield drawing" depicted a raven with wings extended upward clutching a shield with a stylized "B" and a botany cross.

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Founded in 1985, Maryland Volunteer Lawyers for the Arts provides pro bono legal assistance to income-eligible artists and arts organizations, and educational workshops and seminars on topics affecting artists. MdVLA is funded by the Harry L. Gladding Foundation; the Holofcener Foundation; PNC Bank; the William G. Baker, Jr. Memorial Fund, creator of the Baker Artist Awards (BakerArtistAwards.org), and by an operating grant from the Maryland State Arts Council, an agency dedicated to cultivating a vibrant cultural community where the arts thrive.

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MdVLA Arts Brief aims to educate and inform Maryland artists about legal issues affecting them. It is not intended as a substitute for legal advice. Artists with legal issues should seek legal counsel to address specific questions.

Executive Editor: Marcia Semmes
Design Director: Gina Eliadis

Maryland Volunteer Lawyers for the Arts
1500 Union Ave., Suite 1330 | Baltimore, MD 21211
410-752-1633 | info@mdvla.org | www.mdvla.org

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(*Murakami and Johns Suits from page 1*)

he showed him the fake and provided additional documents that purported to show the sculpture's authenticity and provenance. Ramnarine also claimed that he could arrange for a meeting between Johns and the art collector, despite the fact that he didn't have an ongoing relationship with Johns and had no intention or ability to arrange for such a meeting.

The foundry owner is charged with one count of wire fraud, which carries a maximum potential penalty of 20 years in prison.

Renowned Japanese artist Takashi Murakami sued his former dealer in state court in Manhattan Nov. 8, alleging that Marianne Boesky printed unauthorized copies of his "Cosmos" silkscreen wallpaper after he left her gallery.

According to Murakami's complaint, he was represented by Marianne Boesky (daughter of infamous inside trader Ivan Boesky) and the Marianne Boesky Gallery until he ended the relationship more than six years ago.

In September 2012, Murakami discovered that Boesky had agreed to lend "Cosmos" to the Metropolitan Museum of Art for an exhibition titled "Regarding Warhol: Sixty Artists, Fifty Years."

The artist learned that despite the fact that the wallpaper had been produced in a limited edition of 15, Boesky "considered herself authorized to create new rolls of *Cosmos* wallpaper — apparently forever and without limitation — using a digital file she retained after she ceased to represent Murakami as his gallery."

Murakami vigorously disputes Boesky's claim that Murakami orally authorized her to create new rolls of wallpaper at the request of any collector who purchased an edition of the work. The 2003 Certificate of Authenticity for "Cosmos" supports his claim, with stringent requirements for purchasers who want to move the location of the wallpaper at a later date. In that situation, the certificate states, "new rolls can be purchased as long as the original wallpaper is returned to Marianne Boesky Gallery for destruction."

Murakami is seeking a declaration that Boesky has no right to reproduce his original art, an injunction prohibiting any further reproduction or distribution of the work, and the return of all copies of the digital file containing the "Cosmos" design or any other original design he created. ■

(Ravens Logo from page 1)

A federal jury agreed with Bouchat, but found that none of the defendants' profits were attributable to the infringement. The Ravens thereafter adopted a new "Flying B" logo and Bouchat appealed the "no damages" judgment all the way to the U.S. Supreme Court, but never received a nickel of the \$10 million in compensation he was seeking.

After Bouchat filed earlier suits challenging the use of his "Flying B" logo in NFL highlight films, films shown at the stadium, and photos displayed at team headquarters, the district court found that each of the uses was fair.

The Fourth Circuit Court of Appeals reversed in part, agreeing that the photo display was a fair use, but not the sale of highlight films or the display of film clips at the stadium. On remand, the district court found that "the public interest in the 'historical' aspect of the films at issue, albeit not great," outweighed the public interest in granting a monopoly to Bouchat, provided that he received reasonable compensation. That compensation has not been determined.

The Nov. 19 opinion analyzed separately Bouchat's challenges to three additional uses — documentary videos, pictures on stadium walls, and the Madden NFL video game.

The court found that the facts relating to the fair use analysis of the stadium picture displays are essentially the same as those presented by the headquarters lobby displays held to constitute fair use in the earlier ruling. The sole material difference was that the stadium picture displays are in the stadium, so the general public must purchase a ticket to obtain entry.

The court decided that the difference was immaterial, finding no doubt that the purpose of the stadium displays is, like the headquarters lobby displays, "consistent with the fair use of copyrighted material in a museum."

Bouchat also alleged that the NFL infringed his copyright in his shield drawing by showing the Flying B Logo on the helmets of players in three documentary videos: "Top Ten Series: Draft Classes Episode," "Top Ten Series: Draft Busts Episode," and "Sound FX Series: Ray Lewis Episode."

The court found that unlike the stadium videos at issue in the earlier case, which only showed a few plays from a prior game against the same team, the documentaries here used pictures and film clips that showed the Flying B Logo selectively as necessary to portray "history" in biographical and comparative presentations.

Finally, the court said that the video game infringed Bouchat's copyright. According to the court the 2010, 2011, and 2012 versions of Madden NFL for Xbox 360 and PlayStation 3 and 2012 for Wii included a "throwback uniform" feature that allowed users to dress the players on a virtual team in uniforms that had been used by that team in the past, including the Baltimore Ravens' original uniforms with the Flying B Logo.

"There certainly can be a debate, and no doubt will be, as to the amount of commercial value of the throwback uniform feature and the portion of such value attributable to the use of the Flying B Logo," the court said, adding: "Nevertheless, it is fair to conclude that the throwback uniform feature would not have been added to the Game without a determination by [manufacturer Electronic Arts Inc.] that here was commercial value (even if a small one) to the addition of a feature that included the use of the Flying B Logo." ■



Shepard Fairey Sentenced in Obama Hope Poster Case

A federal trial court sentenced artist Shepard Fairey to two years of probation Sept. 7 for tampering with the evidence in his copyright battle with Associated Press over the iconic “Hope” poster used in Barack Obama’s 2008 presidential campaign. The court also fined Fairey \$25,000 for his criminal misbehavior.



The artist sued AP in February 2009, seeking a declaration that his use of the photo did not infringe any copyrights held by AP and was protected by the fair use doctrine, a defense to copyright infringement that allows works to be reproduced without payment or penalty in some situations — criticism, comment, news reporting, teaching, scholarship, and research. AP countersued in March

(2009), calling Fairey hypocritical for repeatedly copying the works of other artists and photographers without paying or crediting them.

Fairey admitted in October 2009 he lied, submitted false images, and deleted other images in an attempt to mislead the defendants about which source photo he used for his iconic Obama “Hope” poster (See *MLA Arts Brief* Fall 2009). Fairey conceded that he “discovered early on in the case” that he was wrong and AP was right about which source photo he used — a Mannie Garcia close-up of Obama and not a photo of the then-candidate with actor George Clooney — and that he deliberately attempted to conceal that mistake.

In a statement on his web site, Fairey said he accepted full responsibility for violating the court’s trust. “My wrong-headed actions, born out of a moment of fear and embarrassment, have not only been financially and psychologically costly to myself and my family, but also helped to obscure what I was fighting for in the first place — the ability of artists everywhere to be inspired and freely create art without reprisal.”

Fairey emphasized that he entered into litigation with the AP because he believes in fair use and wanted to protect the rights of all artists. “The ability for an artist to creatively and conceptually transform references from reality is essential to their artistic commentary on the

realities of the world. If artists find that freedom curtailed, it is not just artists, but all of us, who will lose something critically important.”

Fairey said that even worse than the damage to his own reputation was the regret he feels for clouding the issues of his fair use case: “I let down artists and advocates for artist’s rights by distracting from the core Fair Use discussion with my misdeeds. The decision today will, I hope, mark an ending to what, for me, has been a deeply regrettable chapter. But the larger principles at stake — Fair Use and Artists’ Freedom — are still in jeopardy, and I hope we will remain vigilant in depending on the Freedom of Expression.” ■

Simpsons Actor Sues Over Character Rights

Copyright disputes involving actors are relatively rare. That’s because in most cases, they’re speaking someone else’s copyrighted words. But actor Hank Azaria, best-known as the voice of a half dozen characters on the long-running animated hit, “The Simpsons,” recently sued another actor over a baseball announcer’s voice they both claim to have created.

The voice belongs to fictional baseball announcer Jim Brockmire, whose malapropisms and obscure cultural references were captured in a 2010 video for the web site “Funny or Die.” Sample commentary: “You can put me in some time of Italian boat because that one is gone-do-la.”

In a suit filed in federal court in California Nov. 15, Azaria claims to have been doing the voice since 1983, on the quadrangle of his college.

Defendant Craig Bierko claims that he and Azaria have been collaborating on the voice since they met in 1990, leaving each other voice messages using their respective versions of the character for years. Bierko, an actor in his own right, contacted Azaria after the “Funny or Die” video came out and claimed ownership over the voice, either independently or in collaboration with Azaria.

Azaria, on the other hand, says that he and his production company, How to Pictures, produced the video without any input from Bierko, and retained the rights to the video and the underlying character after the video was shown.

Since the hit video came out, Azaria has developed a script for a movie based on the character, the suit says, but

Bierko's claim "has created a cloud over the ownership of the proprietary rights in the Jim Brockmire Character and the Azaria Voice," making it difficult for him to exploit the valuable copyrighted asset of the character.

According to the complaint, Azaria portrays the Jim Brockmire character in the video, which depicts his character in his typical attire of a plaid jacket with a fresh rose in his lapel, and presents a host of famous admirers (real life sportscasters such as Dan Patrick, Rich Eisen, and Joe Buck), Brockmire's penchant for making obscure and off the wall cultural references when commenting on a baseball game, and a backstory about how he caught his wife cheating on him, had an on-air breakdown, and was subsequently fired.

Azaria is asking the court for a declaration that his production company is the sole copyright owner of the Jim Brockmire character and that there was no implied contract to share ownership with Bierko.

Unless and until Azaria gets that declaration, you won't be seeing Jim Brockmire at the movies. ■

'Innocence of Muslims' Actress Sues Filmmaker Over Copyright

The actress who appeared to accuse Mohammed of being a child molester in the video that allegedly ignited anti-American protests throughout the Muslim world sued the movie's writer and producer, Nakoula Nakoula, in federal court in California Sept. 26, following the dismissal of her state suit.

Non-union actress (and ordained minister) Cindy Lee Garcia says she believed she was appearing in a film titled "Desert Warrior," not "Innocence of Muslims," that she never spoke the words "child molester" and that at no time during the filming was she aware of any religious or sexual content.

The federal suit adds copyright claims to the state suit's allegations of fraud, libel, unfair business practices, and intentional infliction of emotional distress. And what's interesting about the copyright claims is that there isn't a whole lot of precedent on whether an actor's performance can be copyrighted.

According to Garcia, the innocuous lines that she delivered on set were overdubbed to give the appearance that she was accusing Mohammed of being a sexual deviant and child molester. She alleges that she has a copyright claim in the dramatic performance that she delivered and that it was "fixed"

in tangible form when it was filmed during the production.

According to the complaint, because Garcia "did not assign her rights in her dramatic performance, or her copyright interests, nor was the Film a 'work for hire,' her copyright interests in her own dramatic performance remain intact." Garcia has since filed an expedited application for copyright registration for the rights in her dramatic performance.

In an ordinary production, Garcia would have signed over those rights to the film, but that didn't happen here. She says the only document she signed was a contract guaranteeing that she would receive IMDB credit for her performance.

Garcia is also suing Google Inc. and YouTube LLC for running the film trailer online. After the film was published on YouTube, Garcia received death threats, was denied permission to see her grandchildren, whose parents feared for their safety, and was declared part of a fatwa issued by an Egyptian cleric.

Despite the danger and the five takedown notices issued under the Digital Millennium Copyright Act, YouTube and Google refused to take down the video, Garcia alleged. Garcia contends that each and every viewing of the video by YouTube users infringes her copyright and that YouTube and Google are liable for inducing the infringing acts. ■

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To find out if you qualify for pro bono legal services, visit www.mdvla.org or call 410.752.1633.

Copyright Office Asks Artists to Comment on Resale Royalties

The U.S. Copyright Office is asking artists for their opinions on how a federal resale royalty right for visual artists would affect current and future practices of groups or individuals involved in the creation, licensing, sale, exhibition, dissemination, and preservation of works of visual art.



As the Copyright Office explained in a Federal Register notice published Sept. 19, an artist resale royalty provides artists with an opportunity to benefit from the increased value of their works over time by granting them a percentage of the proceeds from the resale of their original works of art.

The royalty originated in France in the 1920s and is in general practice throughout Europe, but is not part of current U.S. copyright law. California has such a law, but it was struck down by a federal district court last year (*Arts Brief* Spring 2012, Volume 5, Issue 1, p. 1).

The Copyright Office is conducting the inquiry at the request of Congress, which is currently considering the Equity for Visual Artist Act of 2011, introduced late last year (*Arts Brief* Spring 2012, Volume 5, Issue 1, p. 2).

The proposed legislation called for a 7 percent royalty on works resold for more than \$10,000 at auction houses with revenues of more than \$25 million per year. The royalty would be split equally between the artist and nonprofit art museums, and the bill only applies to works by living artists and dead artists whose work is in the public domain.

By way of background, the Copyright Office noted that currently only the initial sale of artworks inures to the benefit of the actual creator. Over time, downstream entities derive the most financial benefit.

Those buyers, including collectors, galleries and auction houses, frequently purchase artworks as investments, the Copyright Office noted, acting as important catalysts to

increase the value of certain artworks through exhibitions and additional sales. The question thus becomes one of perceived fairness under the law, the agency said, asking: "Should these agents and investors benefit exclusively, or should they be compelled to provide some additional compensation to the artists who made the buyers' profits possible?"

This isn't the first time the Copyright office has considered the question of resale royalties. In 1992, a Copyright Office Report concluded that there was insufficient economic and copyright policy justification for enacting resale royalty right legislation in the United States.

The Office expressed concern that implementing a resale royalty right could harm visual artists who lack a viable resale market because primary market prices might decline as a result of factoring in the future royalty.

Explaining that imposing a federal resale royalty on sales transactions could conflict with the traditional United States concept of free alienability of property, the Office proposed alternatives to a resale royalty right, including compulsory licenses, broader display rights, rental rights and federal grants for public works of art.

Comments must be received no later than 5 p.m. Eastern Daylight Time (EDT) on Dec. 5, 2012. ■

GET EDUCATED!

In addition to offering pro bono legal referrals, Md|VLA empowers Maryland artists with the skills and knowledge to protect their work themselves through regularly scheduled workshops. Watch mdvla.org for upcoming programs.

Artist Settles Suit Against Homegoods

North Carolina artist Tom Fleming settled his suit alleging that Homegoods Inc. infringed his copyright in two paintings for an undisclosed amount in August.

According to Fleming, painting wholesaler ATI Industries approached him through a representative in 2010 about licensing two of his paintings, “Depths of Love” and “Spirit & Life.” Unbeknownst to Fleming, the ultimate destination for the works was Homegoods Inc. Homegoods, a division of TJX that also owns TJ Maxx and Marshalls, sells furniture and home décor in more than 330 U.S. stores.

Despite the fact that Fleming ultimately decided not to sign the license agreement, ATI reproduced 120 copies of the paintings and sold them to HomeGoods, which then sold them to the public without Fleming’s permission or consent.

According to Fleming, at no point did he “either expressly or by implication, grant ATI a license to reproduce, manufacture, sell, distribute, or copy his artwork.”

ATI nonetheless entered into a contract with HomeGoods to purchase 60 copies of each of the paintings for \$45 apiece. Homegoods sold the paintings for \$99 each.

Fleming sells his own work on his web site (www.flemart.com) and the specific pieces copied by ATI are featured in a special collection at www.chakraartanddesign.com) in two different sizes: six inches by 36 inches for \$175 and 11 inches by 44 inches, at price ranging from \$150 to \$800.

Fleming calculated his actual damages from the Homegoods pieces at \$60,000, approximately \$500 on each of the infringing works. He was unable to collect statutory damages of up to \$150,000 per work because he had not registered his copyright in the works at the time the infringement began.

At trial, ATI argued that Fleming’s representative, Jonnie Chardon, authorized it to sell his artwork to Homegoods. He argued, on the other hand, that she was never authorized to enter into contracts on his behalf and that all she was permitted to do was to field offers for his paintings. ■



“Depths of Love” (left) and “Spirit & Life” - Images courtesy of Tom Fleming

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