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Who Owns This

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WHO OWNS THIS?

J.S.G. BOGGS*

I am not a writer, scholar, lawyer, or professor. I'm an artist. What you find here are my personal thoughts and feelings about creative and intellectual property. If it helps me clarify any of my own thoughts and conceptions, then perhaps it is "worth" the time I "spend" writing this. If it helps you see things from a different perspective, then perhaps it is "worth" your time in reading this. If I've done a really "good job," it might be "worth" a bit more than anyone might have imagined. In that case, ownership becomes an issue.

It strikes me that the areas of law devoted to protecting intellectual property confront a strange dilemma. On the one hand, protection stimulates individual creative productivity. On the other hand, it can stifle the advances of a collective effort in a specific arena of human interest, or the "additive" refinements of an individual breaking new ground on an existing body of work.

Being a visual artist, I see much in the nature of the laws sadly lacking in any real understanding of the creative process. Now, as science and technology grow ever more "artistic," and the financial stakes involved have been raised to "interesting" levels, it would be nice to see some deeply intrinsic changes in the law's view of the creative person. Since I am not a lawyer, I'd like to share a little about the creative process from my own point of view. I'm an all-over-the-road type, so fasten your seat belt, and hang on for the ride.

Creative people are prisoners. That is to say that they get "captured," and the only way out is to beat a path away from the point of captivity. If my attention is "captured," it is impossible to simply get away. The bars are not physical. They are produced by the intellectual, the emotional, or, more usually, a combination of the two. But, they are as functional as any jail cell ever constructed in the material world. This

* Fine artist, Fellow of Art and Ethics at the Center for Advancement of Applied Ethics and Studio for Creative Inquiry at Carnegie Mellon University. I have to thank Wendy Gordon for calling me to talk about these issues. That, in conjunction with my relationship to The Brew House (an artists' co-operative) and my difficulties with the United States government, has given me a new understanding of the creative act undertaken by lawyers. I have gained a greater appreciation (valuation) through a deeper understanding of the function inherent in legal documents. There has never been a doubt in my mind that law is an art. Now I find myself more well-equipped to appreciate the creativity involved in a contract. The relationship to painting is much closer than I ever imagined. Thanks, WG.

experience of being captive seems to be tied to some personal sense of perfection or imperfection.

In the case of perfection, I am given to feeling "connected," i.e., not alone. This almost always inspires me to reach out, through my work, in an attempt to create more perfection and share this wonderful feeling. This is more a process of re-interpretation in the case of those who, for some inexplicable reason, are unable to perceive perfection in that which I have encountered. Great things make me feel optimistic about the possibility of creating great things. But this is not an act of mere reproduction. Most creative people find the act of reproduction *boring*. I certainly do.

In the case of imperfection, frustration leads me to feel either "disconnected," i.e., lonely, or just plain disappointed. In this case, I am driven to make corrections, so that I may feel good again. It makes no difference whether the imperfect is the product of another person's efforts, or of natural occurrence. It demands to be changed, or refined, so that I can feel good again.

Feeling good again can be its own reward. It is often described by many creative people as an "orgasm" of solution. This is an experience with which I am intimately familiar. If you have ever struggled to understand some concept or to solve a problem, perhaps you know that joyous moment when you "get it." You have to expand that by cubic proportions when you "get" something that wasn't there before.

Something new can also come out of just setting about creative work without having any plan or destination in mind. I just simply begin to work, and something will transpire that is not just another re-creation of something I've done before. When this happens, I sometimes have to step back and figure out just exactly what it is that I have made. It's the very image of the researcher in the laboratory who, through trial and error, stumbles upon a discovery.

Many times, though, an idea will come out of nowhere. It strikes like a bolt of lightning in the night. A blinding flash that leaves an after-image in my head. These are often the most brilliant creations. The trick is to "get it" quickly, because it fades fast. You could say I have been captured by it, and it has been captured by me. And, at that point, it is mine. *But do I own it?*

When I hear the words, *intellectual property*, they make me think of the things inside me, the things I know, either in thought, emotion, or some combination. If I know them, they are mine. But that is more to say that I possess them, not so much that I own them. For if it is some-

thing I have learned, it might not in fact be my property to do with what I wish. I think the best example is a poem. Who owns a poem?

I have a book of poems. I own the individual book which contains the poems. I have possession of it, and I may sell it as a self-contained object. The ownership is of the physical object, which grants me access to the poems printed in the book. If I do more than simply read, and actually consume one of the poems, I possess the poem.

But, in my mind, the poem now belongs to two people, to the poet and to me. A strange thing is taking place here. I do not own half the poem. The poem exists twice. Its value has been doubled. Equally, if a third person consumes the poem, its value has been tripled.

The artist, Caroline Sykora, supports this by pointing out that the construction of the words is an organization which helps me to identify and understand something which already exists inside me.¹ The poem is a method-ritual that helps me bring into view those things with which the poem is concerned. Where the book grants me access to the poem, the poem grants me access to myself and limited access to the poet. This is where the sense of connectedness occurs. I know that I am not alone, because someone else thinks and feels the same way I do, or very similarly. If you see the poem as an intellectual tool, I now own the tool.

If the poet sold the entire copyright in the poem, you might think that the poem now belongs to the publisher. The publisher may in fact own all the "rights" in the work of poetry, but the publisher does not "own" the poem. I have not just read, but consumed the poem so intimately that it is part of me. I no longer need the book to enjoy that poem. I have possession that cannot be taken away from me, and for which I need pay no further.

But what if I compose my own poem, a unique creation, not previously existing in any form anywhere? Suppose it is an organization of words which addresses the relationship between desire and destruction. Does this mean I own it *more*?

My answer is that it means I own something in addition to the poem, and quite separate from it—the copyright. This has nothing to do with ownership of the poem itself. Suppose I forget the poem, and all records of it are destroyed, except for the record that documents my ownership of the rights to it. I no longer own the poem in the sense discussed previously. I own the rights to something which no longer exists.

This is the interesting point where conceptual art, *trompe l'oeil* and expression often converge. Each addresses the shifting paradigm, the

ever evolving reality in which we believe, and it is impossible not to make some commentary on mythology for this is the thrust of fine art (and law), to scare away the crow-documents that support the false.

I must confess that I hate my voice, and, I have no acting ability. Also I am dyslexic. All of this is true. Because of my dyslexia, I get people to read to me. The greatness of this particular poem I hypothetically wrote rests not in its written form, but in its spoken form. I want to hear it, not as a thought in my head, but as an auditory sensation. So I have someone recite the poem, with powerful interpretation, into a cassette recorder. The performer is gifted with a unique tonality and has a talent for interpretation. We make the recording, and we make a copy for the performer. Who owns what?

There has been something "creative" added to my poem, so now there are more rights. The law so far has no problem with all this. A few questions asked, and the answer is simple. But the poem is in hot demand, and the audience is not happy with anything less than a "live" performance. Only, the performer thinks the poem is incomplete, and adds third and fourth verses. The audience likes the additions very much, and the new version is in even greater demand.

There is no doubt that I deserve a stake in all the value that has been created. The question is, is it fair of me to deprive the audience of what has been, in the public's view, improved upon?

As a creative person, I feel I should have absolute control over my creations. If it were one of my drawings and another artist drew onto it without my consent, I'd go crazy! But that involves physical property. If another artist drew on top of a print of my drawing, adding to the intellectual property, I could accept that as a creative act. The original would remain, after all, unaltered.

This is difficult for me. I might not like the additional verses, or the additional drawing, but I could accept the addition as valid where *my* creative contribution was significant under three conditions:

1. My original work must be acknowledged.
2. The new work must be properly identified as an additive work.
3. I must receive my fair share of the proceeds.

I deeply relate to other artists who feel that their absolute right over their work should extend to protect them from unwilling collaboration. There is nothing quite so sad as a work which is "perfect" that gets cheapened by untalented interpretation of or addition to it. It makes me sick just thinking about it. But creative freedom must allow just that. I wonder what da Vinci would have thought of Duchamp's additions to the Mona Lisa?

More important to this exploration, though, is what entitlement would da Vinci have in the proceeds? How much of the "new" creation belongs to "Leo-baby," and how much to "Marcello-darling." In this particular case the two works were created centuries apart. But what if they had originated days apart?

The problem in these situations is that both artists usually are convinced their individual contribution is more important. If a legal claim ensues, the court has a tough decision to make. But does anyone consult with any other artists in this matter, or museum curators, critics, or collectors? Who would be the experts in such a matter? The decision is often up to a judge whose visual development extends only to the 19th century hunting prints which decorate his chambers.

These are difficult issues to be sure. Were I in the position that my work was taken further, and a dispute arose, I would want a jury of my peers. Wouldn't it make some sense to designate special interest jurors? Why have an art critic sitting in judgment over a case involving pick-up trucks, said to explode on impact due to negligent design, while in the next court room there is a mechanical engineer hearing arguments about visual creations? Peers should mean peers.

There must be many situations that occur in the art world that really confuse the legal system. I know that a great many cases concerning works of art really confuse me. When Andy Warhol cut a small section of a photograph of flowers from a magazine, rotated it, and made it his own, he was sued for copyright violation.² I don't know if the case was settled in or out of court, but I do know that Andy paid a settlement. I remember thinking that he must have had a bad lawyer, for the new work bore so little relationship to the source work. I actually got angry at the artist who brought the suit. But that didn't bring me to comfort. The thought hung in the hallway of my head like a puzzle painting out of place. Each time I passed it, on the way to another thought, it revealed another piece. Finally, while passing slowly by, I stopped to consider it with a bit more care. It just sort of fell into place.

Since the source material was an "ingredient," the supplier should be paid. Andy surely paid for the ink, the screens, the canvas, and the stretchers. Why shouldn't he pay for the source image as well, since it was produced by someone, somewhere, with a degree of work involved? Now, how should we approach the problem of quantification?

I could look at the value of the new work, and working from that formulate a percentage contribution of the source work to the entire new work. But this would encourage frivolous suits against any artist whose

work came to be highly valued. Instead, why not view the source material as a material, and base its value on a percentage of the going rate for work by the source material artist? If the source artist were a photographer, whose work was selling for \$2000 per work, and the selecting artist used one quarter of one photograph, why not make the payment \$500? Or, it could be more generous, say, the full \$2000.

But let's remember that the source Warhol used was *not* an original photograph. It was a representation of the photograph, printed in a magazine. If Warhol had selected the image for his magazine, *Interview*, what would he have paid for its publication? Perhaps a few hundred dollars. And if the magazine was to crop the image down in size, he would still have had to pay the same amount. This would support the notion of paying for the use of the entire work, even if only one quarter was used. It also supports the idea that payment should be based on the going rate for the source artist, because the photographer is not selling the work, rather a license for use. The license for use is not closely related to the price of the magazine, or the total price of all copies of that issue sold that month. So why should the source artist expect a bonanza when the work plays a minor role in the creation of a new work by another artist?

There is quite a different issue of damages, which I do not wish to explore in any depth on this occasion, except to say that they played no role in this case. If anything, the photographer damaged himself in my view. By bringing suit, he shed an unflattering light upon himself, as an artist whose own work was of minor import. I do not recall his name, and none of the artists, photographing artists included, can remember his name or his work (although some remembered "that - - - - -"). Were I a curator, the suit would have inspired me to view his other works. If they were, in fact, any good, I am sure we would all have his name close to hand. Obviously, there was damage to his reputation. This is not to say that his work is, in fact, poor. Nor is it to say that he is, in fact, an " - - - - -," but the suspicion and the opinion are held against him by some, and that forms part of his reputation.

Personally, I thought that the photographer in the Warhol "Flowers" case was entitled to \$13.47, which is just my estimation of the photograph's contribution to the new work. The selection by Warhol was not based on any major element of the photograph, and what struck Warhol as interesting was not the specific focus of the photographer. Further, I thought the photographer's claim to composition was meritless. The flowers were composed by nature, not the photographer, and Warhol changed that composition by turning one of the flowers.

If any artist were to cut out a piece of some magazine representation of my work and use it as part of some other composition, I cannot imagine myself being concerned, unless the part used was of central importance to the new work (in which case I'd want to know about the artist who exercised such good taste). Of course if I see this paragraph in your next essay, and you do not give me credit for having written it, you'll be hearing from my lawyers!

The last line is just a joke of course. If you included the last paragraph in one of your essays, unaltered and as your own, you would be guilty of plagiarism. But would I be justly entitled to royalties in your essay, especially if the other 1450 words were entirely of your own selection and arrangement? What if you just took the ideas of my Essay and restated them in your "own" words? You certainly do not "own" the individual words, and I do not "own" the general opinions I have formed. Once you have consumed my opinions, you may "hold" them yourself—they may become "your" opinions. At any rate, this seems to point out the various differences between creative disciplinary activities.

Nothing gets me quite so angry as seeing a visual artist whose style is copied and, in effect, stolen. And it bewilders me that people can get away with it. It happens most often with artists who gain a certain degree of recognition, gained in large part by their style. All the pop artists suffered this, and it is an entirely different situation than using a small part of some other artist's work. In fact, this is a very big problem, for there are not even two distinct common words for what I mean by style, and what I mean by "STYLE." It is no wonder non-artists have difficulty with the concepts.

The STYLE of Roy Lichtenstein is in the style of comic books.³ The former is a "distinctive style," while the latter is a general one. Lots of other artists of the Pop scene worked in the latter, though only a few *created* a distinctive style. Musicians call it a "sound," as opposed to a "style." The Beatles and the Stones both played in the style of rock 'n' roll, but each had their individual "sound," man. (Just a little joke to acknowledge the creative input of the producers and sound engineers, some of whom receive royalties in recognition of their creative contributions.)

Most accountants would not be able to tell the difference between a blown up comic strip and a Roy Lichtenstein, and most artists wouldn't know the difference between an expense and a capital investment. But when I see an advertisement done in the STYLE of Lichtenstein, I know it is done in *his* STYLE, not the style of a comic strip. The accountant

might award the artist no damages or royalties, owing to a lack of visual sensitivity. I would give Lichtenstein more than royalties. I would award him every last cent of revenue produced by such imitations, and compensation for other damages as well, for I think they exist expansively. His STYLE was employed to sell other products that aroused interest through the exploitation of that STYLE. It is *his* and *his* alone. If such imitations were prohibited, he would be able to ensure that the revenues received from each use were in proper scale. Where a "schlock" artist cheats Lichtenstein is not just in the fee he does not pay to use the image. The "schlock" sells the copyright cheaply, and usually never looks back for royalties. Lichtenstein is thus victimized twice.

I am told that *Newsweek* magazine recently published an image and, somewhere inside, gave credit to Barbara Kruger, the artist whose STYLE it used.⁴ This is a step in the right direction, and I compliment *Newsweek* on their gesture. Kruger gets copied left, right, and center. I cringe each time I see her STYLE in magazines and newspapers, on television, billboards, and T-shirts. I think it should be her right to allow such uses if she so chooses, for free or for fee, at her discretion. I do not think that others have the right to steal something that is *hers*. I've talked with some graphic artists who contend that the style existed already, and that she just made it recognizable. I believe this is totally unsupportable *rubbish*!

There are major elements in Kruger's STYLE that, I agree, did exist previously, as styles. But what she does in her combinations and compositions is an entirely unique creation, deserving appreciation and credit—in the form of a *copyright*! She created something that did not exist before, and that creation has a value of which she is being unfairly deprived. And all because, I believe, those who judge such things are visually insensitive. They simply cannot see the difference between style and STYLE.

Before I appear too condemnatory, I would not have you believe this is a judgment that the person with such problems is a failure. It is not to say that someone is just ignorant, lazy, or uncultured. As I said, I'm dyslexic. I can barely read, and then only a short length of text at a snail's pace for a short period of time. That does not make me stupid, as they believed me to be in school. It means I have no talent or sensitivity for consuming literature. I am therefore ill-equipped to sit in judgment of literary matters.

In fact, if you were to reprint my entire Essay under your own name, I most likely would never know about it unless someone told me.

Even though it might be brought up in discussion within the circles I travel, its content would be related to me by way of synopsis. I'd probably feel good that someone shared my opinions, not realizing just how much more than just my opinions you truly "shared."

Recognition of STYLE is not only a matter of sensitivity. Interest, ability, and exposure must be followed by some form of serious study. Consider Alfred Frankenstein, an art historian, who set out to catalogue the work of William Michael Harnett, a 19th century American painter who worked in the style of *trompe l'oeil* (*tromp loy*). Harnett seemed to have painted a great number of images of currency, presented flat, as if pasted to the canvas or a board. Except, through study, Frankenstein discovered that there were very few images actually painted by Harnett, perhaps four in existence. There were, however, a large number of painters of the period who shared his interest.

Each had his own STYLE, subtly different from each other, and Frankenstein was able to identify each of them. Even to the talented and trained eye, the paintings appeared to be all Harnett's, because they were in the same style. Yet, each artist had his own STYLE, more pronounced with the greater degree of creativity. Only through scholarship did Frankenstein come to see the difference.

In his book, *After the Hunt*,⁵ which preserves his intriguing search, Frankenstein so successfully chronicles his hunt, that others can understand how one comes to discern STYLE. Frankenstein has passed, but Bruce Chambers and Edward Nygren, both experts on the subject of 19th century American *trompe l'oeil* money painters, have dedicated themselves to its study. I could no more pass off a John Haberle in place of a Victor DuBreuil⁶ to either of them than I could give you coffee in place of tea.

You see, STYLE is not just a matter of one thing. It is not just brush-work, material, subject matter, scale, intent, composition, context, textuality, or statement. It is the unique "flavor" of them all. The paintings all looked the same, even to art people of the day, in large part due to their subject matter, *paper money* (itself a work of art). Presented in the style of the period, often depicting the same bills, the paintings were easily confused. Not least significant was that the artists were fascinated by the philosophic investigation of abstract representations and the confusion that exists between the image and the thing itself.

But artists have painted money for centuries. The Pop period brought us many works by almost all artists working in that style. Yet, it would be improbable that someone with an interest in art would confuse

19th century trompe l'oeil and 20th century Pop, even though the subject matter is basically the same.

This reminds me of a recent situation, known to most as the "string of puppies" case,⁷ involving a sculptor and a photographer. The photographer, on commission, captured an image of a woman with seven puppies in her arms. The sculptor responded to the two-dimensional image in a three-dimensional ceramic work. Legal suits followed, and the judgments so far are for the plaintiff. *Wrong!*

Please note that I did not say that the sculptor "translated" the image. What was an image in two dimensions became something quite new when the sculptor was inspired by the image. The court's dependence on visual recognition and comparable composition never took into account the differences in style and subject matter. Even more troubling is the lack of understanding of visual speech. The two works expressed such extremely different statements that, in my mind, visual literacy becomes the focus. More than most, this case proves that the system of justice has no real understanding of art. If you try to boil it all down to one or two technical points, you miss what art is in the first place.

John Koegel, the attorney representing the sculptor, points out that artists "implant subtle communication which requires a deeper investigation to receive. A glance at mere surface is no more effective than judging a book by its cover." Further, his frustration at courts' refusal to base their decisions on anything beyond the very obvious (an infringement has occurred as a matter of law) is shared by almost every visual arts person who has ever had occasion to go to court. This is especially true when Fine Art, whose interests pertain to truth and beauty, addresses commercial art, whose interests lie much more in the collection and protection of cash. Though the two employ the same techniques and materials, they appear to me as similar as cats and donkeys. (To you the similarity may be closer, such as that between cats and dogs, but I still couldn't sell you a puppy and make you believe it was a kitten. Unless, of course, you were an imbecile. But, law is supposed to be based on the standard of a reasonable person, not a moron in a hurry.)

Nevertheless, I have friends with no interest in visual art, and I know firsthand that they cannot tell the difference between Fine Art and commercial art. Their interpretive skills just are not aligned in any manner to perceive it. Again, I do not say this in a negative fashion, but merely as a statement of neutral fact—they have no "taste" in this area.

Taste is a word I hate, because it has come to carry connotations of negative judgment based on socioeconomic enculturation. I use it here in

its original connotation. I know what it *meant* . . .⁸ I once complimented a hostess on a truly great steak, with much enthusiasm and volume. Everyone broke out laughing. Seeing my puzzlement, my date leaned over to whisper in my ear, "It's lamb, Boggs." I looked at her, looked down at the meat, and then up to the eyes of the guests, who, now realizing it was not an intended joke, were choking to stifle their laughter. I burst into laughter, not tears, and the table exploded with me. Not *at me*, but *with me*.

I don't feel defensive about my shortcomings in such instances. Why should a judge, juror, or lawyer, when faced with matters for which they similarly lack "taste"? I'd be the first to remove myself from a panel faced with the task of deciding "who owns this steak." It might very well be lamb.

Expert witnesses, I hear you say. Well, yes, this is a very important part of our legal system; one which works very well up to a point. Unfortunately, most people outside the world of art view it with a degree of suspicion. Art has an elitist air about it, and it is only human nature to feel condescended to when the issues begin to get confusing. The frustration of an expert witness, struggling to translate into a few minutes of words that which is visual and has taken years to understand, too often is taken as snootiness. The judge and juror are asked to do the impossible, and they should not be blamed for misinterpreting all that is presented, work of art as well as testimony.

You might know that I make drawings, paintings and prints of money. I have been arrested twice for counterfeiting, once in England in 1986, and again in Australia in 1989. On the first occasion, I did everything I possibly could to explain my work to the Bank of England and to Scotland Yard. I really felt I was speaking a different language, and to some degree, I was. I was talking a mixture of art and common sense. I thought the "art-speak" alone would only serve to convince them I was making fun of them with language they didn't understand. My miscalculation was that they couldn't understand common sense either. The reason, I believe, is that they were making visual judgments based on no proper foundation. What to me seemed a specific series of reference points, based on both visual and conceptual experience, to them was but one simple concept—visual resemblance.

During the year while waiting for trial, I became friendly with the detective-inspector who led the arrest team. He had in fact come to understand that I was neither a counterfeiter nor a threat to the currency, but he still could not *see* the difference as far as my drawings and conduct

were concerned. I would go in to see him on official business and show him some items I had purchased that week with my drawings of money. (Did I mention that is what I do with the drawings, spend them?) He would squint, as a child who believes that what he cannot see does not exist, and say, "Don't show me that! For Christ's sake, I don't want to have to arrest you again."

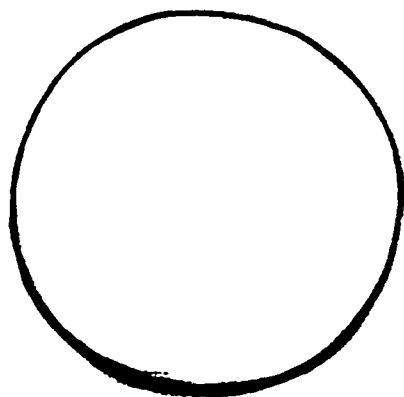
In truth, he really didn't want to. But he felt he would *have to*, because he could not make any distinction between my activities—making images of money on paper and then "spending" them—and those of a counterfeiter. I admit it sounds on the face of it . . . well, . . . the same. But that's just it. It "sounds" the same when you translate the two into brief written or spoken descriptions. If you are ill-equipped to see the difference, your description of both activities will be the same. Equally, if you approach both activities with the same description already formed in verbal conception in your head, you are disadvantaged in your attempt to *see* the difference.

Go back for a moment to the woman with the armful of puppies, the photographer, and the sculptor. Consider the following:

There is a woman with long, straight, brown hair. She is fair and attractive, and smiling with the joy of puppies. Her aviator glasses glint with the late afternoon summer sun, and her arms are held wide as she embraces seven adorable little puppies. She somewhat awkwardly clutches them to her chest as they wiggle in the suspended position that heightens their own sense of stability and gravity. Each little puppy's face hints at personality: two seem to be enjoying this feeling, two seem afraid, two are confused, and the other is just plain annoyed at the whole affair. The woman's face reveals the difficulty of her task, that of holding all seven puppies while trying to look into the camera, which makes it impossible to see what she should do next with her arms to contain the bunch. Her beige cotton shirt has been pulled off center by all this motion and friction.

Is this a violation of the photographer's copyright? It is a description of the image and composition. Is it an interpretation of the image, or a translation? Is this an acceptable use of image because words are a different discipline? Sculpture is a different discipline from photography.

I can draw the following image:



"MY CIRCLE (DRAWN
BY HAND)"

© J.S.G. BOGGS
1993

J.S.G. Boggs

Now, as you can see, I have placed the copyright information at the bottom, complete with my signature. I can claim copyright, and I would win in court if you published the drawing on a post-card. But that doesn't give me the copyright in a circle, only this specific drawing of a circle. If you removed my information and signature, I'd have a very tough time proving it was mine. But I could, if you produced the image by means of some high fidelity technique, for there are edges to this drawing that can be identified with the aid of a magnifying glass. What is more important here is your motive. Are you saying something through your production, or are you just exploiting through reproduction?

Lichtenstein, in some of his later works, made many quotations of Picasso's work. Some of Lichtenstein's works are paintings of Picasso's paintings. Yet, if you look at them, that is clearly what they are. The **STYLE** is obvious, visually, because the difference between their **STYLES** is vast. At the other extreme is an artist like Elaine Sturtevant,⁹ whose work was to depict another's painting and **STYLE** so precisely that you wouldn't recognize a difference if you didn't know any better. This **STYLE** isn't something you just *see* with your eyes. You have to study it on an intellectual or conceptual level. To call her a mere copyist is to miss *her* **STYLE** completely, and all the rich and rewarding communication it yields.

I would want points if I were betting on a copyright case filed by the Picasso estate against Lichtenstein. I would want a very healthy spread. But there's no way I'd gamble on the outcome of a case against Sturtevant. My faith in my fellow man is tempered by the knowledge of my own grappling with these differences. Where and how I came to see and

understand the dynamic tension that makes Sturtevant's works so powerful was lost in the journey of my curiosity. Hers is a case where the difference is dependent upon all things other than visual resemblance. And I'd roll my eyes into my head, the victim of some mental implosion, if I ever had to explain this to the police.

"Have you ever heard of Arthur Danto?"¹⁰ I can hear myself saying to the police. Inside I would know I finally made my way to hell: an eternity of identifying something by what it isn't, in some vain hope that I might describe everything in existence, save for the remaining thing itself. I'd keep reaching points of expectation, that any moment now, that spark in the police officer's eye would glimmer into the bright light of understanding, only to see it as an after-image of something that was there, I could swear, just a split second ago.

Maybe I would be surprised. The police officer might turn to me and begin to explain his experiences on the combat-course of the firing range. While training for quick, correct responses to high stress situations, an intimate understanding of instinct and intuition, as it relates to seeing, might occur. He might, for example, begin to explain the rapid recognition process whereby he knows which target is a bad guy based on some identification of an abstract part of the image, before either full visual recognition or mental cognition have been fully processed. He might even go on to describe how he did the same thing, in reverse, in the process of identifying a good guy, through the *absence* of the same piece of abstracted visual information.

This sort of happened once. A city police officer once tried to explain to me how he had saved himself from a new and unwanted orifice. He dropped to the ground out of reflex response, at which time a bullet whistled by, followed by a flash of yellow light, and then, a blast. His recall of the experience was a result of tachy-psychia, but he is sure he fell to the ground out of reflex. He had no conscious awareness of anything out of place. He summed it up this way, "I guess I knew what it was, before I knew what it was."

This was a veteran police officer, and his years of experience had brought to him powers of recognition in a particular area that we civilians rarely possess. The powers need not be visual. Another police officer, a state trooper, wrote of an experience where, by the letter of the law, he shot a man illegally. Having stopped a suspicious hitchhiker, he made the mistake of turning his back on the man, standing behind the car, to return to his radio. The trooper pulled his gun, turned, and fired a single fatal shot. He was instantly frozen in fear that he may have just

killed an innocent man, but he somehow knew the hitchhiker had a Colt .45 Government Model pistol. It was almost as if the trooper had a clairvoyant vision. Sure enough, he found the cocked pistol he had seen in his mind while his back was turned. What had happened, which he cared not to enter into his official report, was that the *sound* of the chambering of a cartridge, one he had heard a zillion times, was proof positive recognition for his subconscious mind to expedite protective action.

I'd bet on his chances, were the case ever to come to court. In this case, expert witnesses could shed a great deal of light on such things, and that is good and great and right. And, the existence of the hitchhiker's pistol, brought into a state of readiness for immediate use in a situation where there could be no other logical conclusion than that the trooper was about to be the victim of grave bodily harm or death, would vindicate his actions. Yet, in his writing, the trooper states his belief that he broke the letter of the law for the simple reason that he never *saw* the hitchhiker's gun. He believes that conscious physical visual recognition is a requirement according to the letter of the law. Though he is willing to share his cognitive experience for the benefit of other peacekeepers, and he knows he was in the right "spiritually," he finds himself in error based on a very narrow band of sensory perception: he did not see the gun.

I offer these stories to illustrate that recognition of creative property has to be approached in a manner appropriate to the discipline. The simplistic view that exists in visual copyright decisions leads me to suspect that other areas are equally bound in precedents ill-equipped to fairly address an ever more complicated world.

At this time, I am suffering from all of this, though it is not copyright, exactly, that is at issue in my case. I have been identified as a "counterfeiter" yet again. This time, by the United States Secret Service, its General Counsel, and the U.S. Attorney in Pittsburgh. Though I have not yet been arrested, my live-work studio and my office at Carnegie Mellon University have been ransacked. Nearly 1300 items were seized as contraband, and I just received a certified letter that presents itself as an immediate threat of arrest.

The whole thing seems quite insane to me, and my frustration is at a fever pitch. I can show my work to reasonable people who agree that the actions taken against me are beyond any credible concerns regarding protection of the currency. Moreover, it has been said to me that this is a "pornography" case, and I well understand why, having been told by representatives of the federal government, on more than one occasion,

that my work is "sacrilegious," "subversive," "anti-social," and "an attempt to undermine the economic structure of America." (*Get real!*)

Part of the problem has been generated by the performance element of my work, "spending" the works of art for their face value. This caught the attention of a great number of people, including the news media. Newspapers were writing about my work, and articles appeared describing the fact that I was buying almost everything with these works, and getting the receipt and change—in legal tender. Needless to say, some very interesting imagery was generated in the form of newspaper photographs of my work.¹¹

Sounds like counterfeiting! Looks like money! Must be illegal! Never mind any questions or serious investigation, this is an open and shut case. Or is it?

There are very few people, even in the art-world proper, who understand that the images generated in the media are an intentional extension of my work. Where in my "transactions" I attempt to bring complex dialogue to an uninitiated audience by going outside the gallery or museum and confronting an individual who does not frequent such oases, I also try to export the images and issues to society through the conduit of mass media. This is part of the very form itself—late 20th century American *trompe l'oeil*.

The kinship that exists between this and past movements employing the style is very close, having much to do with the perceptual nature of reality. In particular, the kinship with 19th century American *trompe l'oeil* is that both contain a great deal of human response to socio-economic and political issues. I could ramble on for pages about the philosophical nature of the form, but there are two germane points I wish to highlight.

First, the images created and disseminated through the mass media are primarily mine, but they are produced in collaboration with the media. When *XYZ* broadcasts, or *Mag-News* publishes, a "story" about my work, they are in fact participating in and helping to create "the" work. Yet, they own the copyright, because they own the tape or the issue. I can do little else under current practice, if I want the work to exist. There is no equivalent of the ASCAP for the visual arts. If I want to work in this form, I must accept that the work gets "published" in this fashion, and that there is little to be done to protect my financial interests. The system has no precedent to understand the nature of this form, and in the absence of standard practice, if I asked for compensation, it would not be forthcoming.

Second, although I understand the confusion that will surround the creation of a new and unique form of expression, the confusion of *trompe l'oeil* is at the heart of its power to clarify the conceptual understanding of the world around us. Translated from French, *trompe l'oeil* means "trick of the eye." This is not the same as trick of the mind, which is the foundation of fraud. Trickery is in play in all this, but it is employed with care. The fact that escapes the authorities is that everyone knew the pictures were works of art. No one was fooled into believing these "pictures" were actual currency. Rather, people accepted them, at the very "face-value" portrayed on each bill, as an act of appreciation for, and (to some degree, I hope) understanding of, the work itself.

Freedom of speech, as protected under the First Amendment, extends only so far. The example of "yelling *'Fire!'* in a crowded theater" is a case in point. But to my knowledge, this does not extend to the playwright's script nor the enthusiastic vocal performance of the word by actors and actresses, on stage or off! If reasonable people can discern that it is part of the performance, no matter how successful the suspension-of-disbelief may be (which is, after all, a great part of the point in art), then this is a protected expression.

Fire marshals, of course, do have some say over the extent of use of actual fire on the stage, and the means which must be immediately available to deal with any unforeseen lack of containment. But, to the credit of almost every fire department in the world, theater companies routinely are given exemptions from local fire codes. This is not done as a matter of free speech nor constitutional right. It is based on a very ingrained appreciation for the delights of theater. Unfortunately, the visual arts have not fared as well in societies born of the English aesthetic, where literature is the supreme form of expression.

If you think about it, in theater even consumption of the auditory sensation is predominantly based on the written word. Even music sustains its economic validity from a theatrical supporting role (very few musical works make it to the top ten if they have no vocal track). Visual communication has historically been relied on as a matter of "fact" as opposed to "expression."

"*Baloney!*" as my Grand-Mom Irene used to say. And she wasn't talking about lunch meat, or she would have said, "*Bologna.*" You say "*tomāto,*" and I say "*tomāto,*" and with that, Frank Sinatra hit the counter-point nail on the head. There is inflection beyond the written word, which, although having the same meaning—or not!—leads us to understanding. If you base all of your conclusions on mere visual resem-

blance, the English are eating some round red vegetable which does not exist in American society, and we could end world hunger by printing the word—*food*.



FOOD FOR THOUGHT
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All these problems exist in the visual, as well as all other sensory experience. If you are going to make judgments based on a simplistic, single perspective viewpoint, then you are never going to see the full picture, and by extension, your conception will always be misinformed.

I understand that you, the reader, are more than likely a student of law. And I make this appeal—the world is enduring yet another revolution. Precedent is only a good thing if it is still able to accommodate the reality of the changing paradigm. If it fails to do that, then it has failed altogether. The world is not flat, no matter how many books or maps exist in support of the concept. This is not to say that you throw the maps out. You just have to wrap them around a more complex structure—a sphere, instead of a plane.

When rap artists started making “scratch” (excuse the pun), using turntables and records as musical instruments—*Wow!* That was creativity. But when the owners of the copyright in the little bits of samplings the rappers employed started suing for royalties—the cry was “*Same o’*,”

same o'." In the visual arts, neglected as they are by the flow of economic support, collage never attracted such bean-vision.

When is something a creation, as opposed to a discovery? What is the true motive of securing property? When does the creation of "ownership" occur? When is *value* an issue at all? When money is made.

All the senses, as well as emotions, lead back to what we attempt to refer to as "intellectual property." But above all, this has more to do with the right of exploitation and the protection of productivity. It doesn't really matter, particularly in this brief moment in history, whether the materials employed are synthetic or organic, physical or intangible, created or discovered, or even "functional" in any sense of the word. The important point is ascertaining who contributed what to that which enhances our understanding and appreciation, and hence the quality, of life. This is a big job, if ever there was one, and all the more difficult under the burden of ensuring that still more wealth created or value-added isn't unduly restricted!

In response to the U.S. Attorney's threatening letter, I created a new work—"The Magic Money Machine." Though I was to use an actual color laser copier on stage, both Canon and Xerox backed out at the last minute, fearing confiscation of their very expensive machines. One of them did make available an advanced model capable of actual counterfeiting. I placed a genuine U.S. \$100 Federal Reserve Note into the machine and began printing. What I produced on that machine came out of "The Magic Money Machine" (which I had constructed from bits and pieces in my studio) the following night.

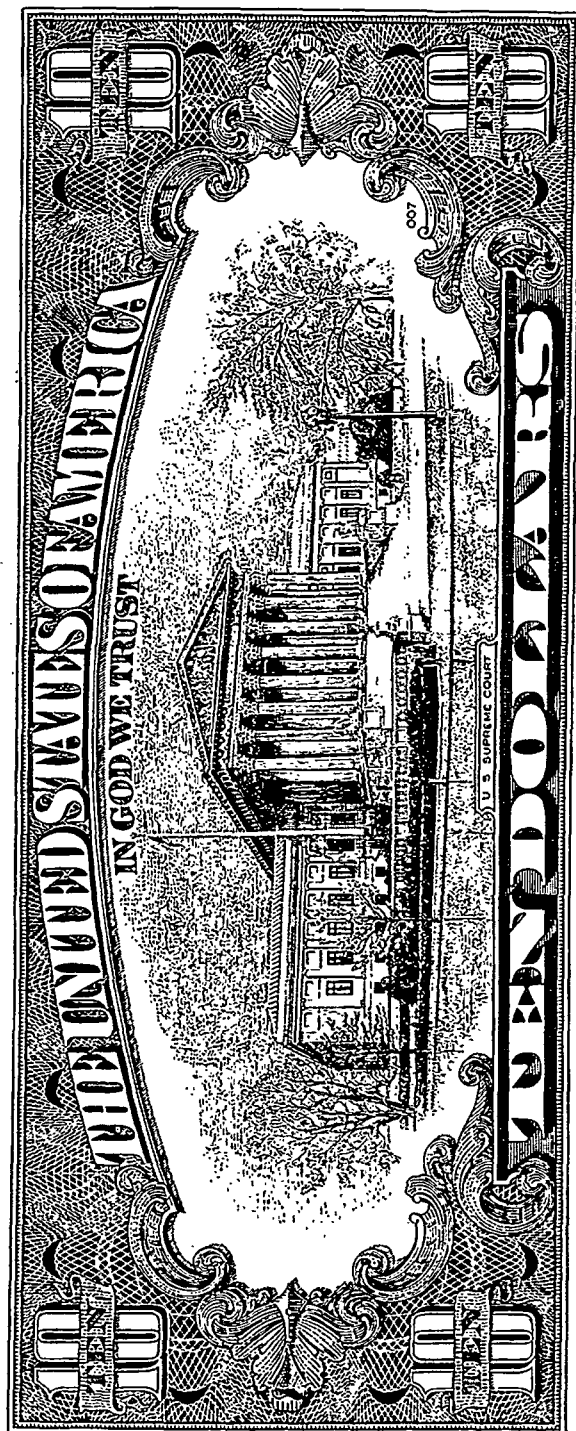
I had announced, including to the Secret Service, my intention to color photocopy a genuine \$100 bill, and that the finale would be subtitled "The Perfect Counterfeit!" Photocopies of the \$100 bill poured forth. The first were digitized beyond recognition. The next were perfectly recognizable, though somewhat rearranged, like a child's square block puzzle. Then followed whole bills, with a coherent image, in the correct size, *in color*: red, pink, purple, blue, yellow, orange, and even green . . . *lime green!* (yech!). Where someone else may have merely copied the bill, I had made interpretations containing obvious, visually expressive statements.

To take things a step farther, I produced a two-sided \$100 bill work of art in the correct color, size, shape, image and image quality appropriately entitled "The Perfect Counterfeit!" The right of first option to purchase this work was promptly put at auction. Though it was perfect in every detail, without discernable *visual* difference from the \$100 bill I

had used to create it, I had not *copied* a \$100 bill. I had created a work of art that contained something new and in addition to the bill. There is a difference. And I wasn't the only one who could *see* the addition. The hammer fell at \$275.

I work very hard, and I think it is only fair that, when society gains some benefit from that productivity, I should be supported in my efforts. But the creative response is not a job. I don't (can't) do commissions. I can't make myself respond to someone else's specifications. My work just happens. It is no good for the law to demand that people be human according to the law if the law is not based on human activity. Things change, in part because we change them. Sometimes it's not the things themselves we change, but the way we see them. This is as good as change.

Art sometimes attempts this through approach. If you want to understand a thing through total conception, you have to understand the back of the thing. Since you can't see through the thing, you approach it from the rear. You walk around it. You turn it upside down. You view it in different lights. This is as true for the conceptual as it is for the physical. The law could well use a little re-examination. Everything else in the world is undergoing this evolutionary process. Who knows, there might just be a great deal of new intellectual property created. Perhaps, there will even be enough to answer the question I have about this Essay. If I've *spent* time and *made sense* which gains *interest*, "Who owns this?"



REFERENCES

1. The author discussed this point personally with Caroline Sykora (conversation on Jan. 25, 1993).
2. There is no published opinion since the case was quickly settled out of court.
3. In the 1960's Lichtenstein became the preeminent painter of comic and advertising-derived images. JACK COWART, ROY LICHTENSTEIN 1970-1980, 15 (1981).
4. Joe Klein, *Whose Values?*, NEWSWEEK, Jun. 8, 1992, at 18, 19.
5. ALFRED FRANKENSTEIN, AFTER THE HUNT: WILLIAM HARNETT AND OTHER AMERICAN STILL LIFE PAINTERS 1870-1900 (rev. ed. 1969).
6. Haberle and DuBreil are prominent trompe l'oeil painters. *Id.* at 115-22, 151.
7. Rogers v. Koons, 751 F. Supp. 474 (S.D.N.Y. 1990), *aff'd*, 960 F.2d 301 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).
8. The author is referring to *taste* as "discernment, perception, or judgement" rather than as it has commonly come to be understood in modern times: "the ideas of aesthetic excellence or of aesthetically valid forms prevailing in a culture or personal to the individual." See WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1455 (1989).
9. For Elaine Sturtevant's work, see *Guide to Museums, Galleries and Artists, 1992-93*, ART IN AMERICA, Aug. 1992, at 93, 240.
10. Danto is a philosopher who has explored the role of style in the arts. For his excellent discussion, see ARTHUR C. DANTO, THE TRANSFIGURATION OF THE COMMONPLACE (1981). In the Author's view, the fact that his readers may need this reference illustrates his point that appreciation of artistic style depends on prior study and knowledge.
11. See, e.g., Catherine Dressler, *Boggs' Bogus Bills are their Weight in Gold*, CALGARY HERALD, Oct. 4, 1992, at C2; Roxanne Roberts, *The Fine Art of Making Money: How Painter J.S.G. Boggs is Bucking the System*, WASH. POST, Nov. 17, 1991, at F1; Wes Smith, *Drawing Interest: Don't Take a Boggs Bill at Face Value: Creativity Can Lend it Added Value*, CHI. TRIB., Oct. 18, 1988, § Tempo, at 1; Paul Dean, *A Tough Way to Make a Buck on Rodeo Drive*, L.A. TIMES, Dec. 16, 1987, § 5, at 1.