Does Art Need Copyright After All?

Amelia K. Brankov*

As part of my law practice, I am often asked to counsel clients concerning the purchase and sale of works of art, and questions about the copyrightability of these artworks come up in various ways. Unlike some other forms of cultural production, the main way visual artists benefit economically from the production of their work is not from royalties from the sale of copies of the work, but rather is from the sale of the physical artwork itself. Perhaps that is why, putting aside photographers, visual artists do not commonly register their works in a routine manner. Registration certainly occurs, but it is not an artist's everyday practice to register a work after she creates it. This can be frustrating because when considering whether and how a work is protected by the copyright law, one of the first things lawyers do is look to see whether there is a copyright registration for the work.

So, when you are counseling a client about whether a particular artwork is subject to the copyright law, you typically have to go back to first principles. We know from § 102 of the Copyright Act that copyright covers "original works of authorship fixed in any tangible medium of expression."[1] So, from that we know that we need the work to be (1) original, (2) have an author, and (3) be fixed in a tangible medium of expression.

Some artworks that our clients are creating and selling easily will satisfy this test. Traditional paintings and sculptures generally are easy cases. There seems to be little question, for example, that a painting by Norman Rockwell or by Jean-Michel Basquiat would satisfy this test. But this doesn't really describe the totality of the works in the marketplace today. Many of the works that have six-, seven-, and even eight-figure values today do not look like a portrait, landscape, or sculpture. Consider a rope piece by Richard Tuttle, an abstract work with geometric shapes by

* Amelia K. Brankov leads the fine art practice at Frankfurt Kurnit Klein & Selz PC. She advises modern and contemporary art galleries, collectors, artist studios, artist estates and foundations, curators, antiquities dealers, art advisors, appraisers and conservators. She represents clients in disputes concerning the title, authenticity and copyright interests of artwork, as well as business disputes among various players in the art world. In addition to her fine art practice, Ms. Brankov is a seasoned commercial litigator who is noted for her extensive and successful work in the advertising, fashion, film, television and media industries. This is an edited transcript of remarks given on October 4, 2019, at the Kernochan Center Symposium, "Exploring Copyrightability and Scope of Protection." This article does not constitute legal advice nor represent the views of Frankfurt Kurnit Klein & Selz PC.

1. 17 U.S.C. § 102(a) (2020).

Ellsworth Kelly, or a work with one word or short phrases, such as the works by Christopher Wool. Consider works based on interactive experiences, such as Random International's *Rain Room*, which allows visitors to experience walking through rain without getting wet. Consider also light installation works, such as *Aten Reign* by James Turrell, which was on display at the Guggenheim Museum in 2013.

As practitioners, we appreciate that copyright law has limits. Ideas, basic phrases, shapes—those are not copyrightable, and that is for good reason because nobody should have a monopoly on these basic building blocks of expression. Our artists and gallery clients understand that not all artwork can be copyrightable, but, when it comes to their own work, artists tend to assume that the law will cover their work even if they have never sought to register it.

So, when artists are at the point of talking to me as a lawyer about this, it is either because someone has infringed on their work or their intellectual property is somehow otherwise at issue, such as in the context of the negotiation of a commission agreement. As a copyright lawyer analyzing these issues, we can look to reported cases from the past year to show that courts generally hold that the level of originality required is a very low bar. We can look at *Pohl v. MH Sub I LLC*, a recent case from the Eleventh Circuit, holding that before-and-after photos of dental patients' teeth can be sufficiently original to merit protection under the Copyright Act.[2] We can also look to *Silvertop Associates Inc. v. Kangaroo Manufacturing Inc.*, a Third Circuit case, to see that a banana costume is sufficiently original to warrant copyright protection.[3]

So far, so good, right? It would seem that we would be on good ground to tell our artist clients that their iconic works would receive the same treatment as a picture of teeth taken by a dentist or a banana costume, right? Well, not so fast. Under the copyright law, the issue of a work's artistic merit is irrelevant to the issue of whether the work is sufficiently original. Rather, the Copyright Office is to look only at the appearance of the work to determine whether it is sufficiently original.

Two examples of refusals to register works by significant artists teach us to proceed cautiously when counseling clients. The first is *Log Cabin* by Cady Noland, which you've already heard about and probably will hear more about later this afternoon.[4] The second is the well-known *OY/YO* by Deborah Kass,[5] which initially was refused registration on the grounds that it was not sufficiently original (but was eventually registered as visual material). Some think that the issue of whether art is subject to copyright protection is outmoded and that market forces can effectively address these issues.[6] But that, of course, can only occur when the market works efficiently. Without copyright protection, an artist does not enjoy the exclusive right

2. Pohl v. MH Sub I LLC, 770 F. App'x 482 (11th Cir. 2019).

3. Silvertop Assocs. Inc. v. Kangaroo Mfg. Inc., 931 F.3d 215 (3d Cir. 2019).

4. *See* Regan A. Smith, *Curious Cases of Copyrightability Before the Copyright Office*, 43 COLUM. J.L. & ARTS 343, 347 (2020); Megan E. Noh, *U.S. Law's Artificial Cabining of Moral Rights: The Copyrightability Prerequisite and Cady Noland's* Log Cabin, 43 COLUM. J.L. & ARTS 353, 353–57 (2020).

5. *See OY/YO*, DEBORAH KASS, https://perma.cc/BEL9-BNQH (last visited Mar. 8, 2020) (artist's professional website).

6. *See, e.g.*, Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313 (2018).

to reproduce the work or prepare derivative works. Although artists do earn money primarily from the sale of their work, some artists have significant streams of income from licensing.

Furthermore, artists need the copyright law to police infringement. Apart from economic damages for infringement, artists care deeply about their legacy and do not want their artwork to be used in ways that are not in line with their views. There are two recent high-profile examples of this. The first is the lawsuit that Anish Kapoor brought against the National Rifle Association for its use of his artwork *Cloud Gate*, which is known in Chicago as "The Bean," in a pro-gun advertisement.[7] The second is a lawsuit filed in Denmark by artist Ai Weiwei against a car distributor for featuring his artwork *Soleil Levant*, comprised of thousands of bright orange life jackets worn by refugees and migrants, in a car advertisement.[8] Furthermore, the Visual Artists Rights Act, which affords certain moral rights to authors of works of visual art, applies only to works that are copyrightable.[9]

From all of this, there clearly is a tension between the rights of artists and the law, and sometimes we cannot clearly counsel clients one way or the other on their rights under the Copyright Act. Even without having all the answers as to copyrightability, though, we can do some things to protect artists. For artworks where it is not obvious that copyright law would apply, artists can protect themselves through contracts. They can prepare commission agreements and purchase agreements restricting the purchasers' right to publicly display works and reproduce images of the works. They can also specify in their contracts what the purchaser can do in the event the work needs to be restored or moved. Finally, perhaps artists can be encouraged to seek registrations for their works. That way, they will know what their rights are and there will be a more robust sense of how future cases will be determined. Thank you.

7. Kapoor v Nat'l Rifle Assoc. of Am., 343 F. Supp. 3d 745 (N.D. Ill. 2018).

8. Retten i Glostrup [county court in Glostrup] July 17, 2019, Ai Weiwei v. Skandinavisk Motor Co. A/S, No. BS-38220/2018-GLO (Den.).

9. *See* 17 U.S.C. § 106A (2020) (recognizing certain moral rights for authors of "work[s] of visual art"); 17 U.S.C. § 101 (2020) (specifying that "a work of visual art does not include . . . any work not subject to copyright protection under this title").