

The logo for Astrachan Gunst Thomas features a stylized, swirling blue graphic to the left of the firm's name. The name "astrachan gunst thomas" is written in a lowercase, sans-serif font, with "astrachan" and "thomas" in a darker blue and "gunst" in a lighter blue.

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The Case of the Appropriation Artist

By: Jim Astrachan

I was in Palm Springs speaking before a group of advertising agencies and a question came from the audience. She was a creative director with a large L.A. agency, but she was also a fine artist and had a good following in the galleries of Southern California. "I like to find a provocative photo in a magazine. It could be a still life, or it might be an animal. Whatever. Then, I like to copy that photo but add my own zest to it and use it in something I am creating. You know."

I didn't know and asked if she could elaborate on what she might do to the original photo, the copyright for which we assumed belonged to someone else. "Well, let's see," she replied. "I might colorize a black and white photo. I might enlarge one of the objects or subjects depicted in the photo, well out of proportion to the original, add it to a collage. Things like that."

"I think that what you are asking is whether using another person's photo as a basis or a part of your art, is copyright infringement," I said.

"Uh huh, that's what I'm asking."

"Let's narrow the question to whether your use of someone else's photo for this purpose a fair use under the Copyright Act? If 'yes', you are not an infringer."

"Uh huh. Isn't that what I asked?" she questioned.

"For starters, fair use is found in the Copyright Act as an exception to infringement, but it is not defined; instead non-exclusive factors are listed and a court can accord them the weight it sees fit. The idea behind copyright fair use, I said, is to allow some use of another's copyrighted work to fulfill copyright's very purpose – the

promotion of the progress of science and the useful arts. You see, the monopoly given to an author under the copyright law is really intended to benefit the public. An absolute monopoly on the use of a work would actually stifle, and not advance, the law's objective. People are allowed to draw on an earlier work to create a new work, but this right has limitations.

"Clearly, then, there is a real tension between the property rights granted to an author which, under the Copyright Act, is a virtual monopoly and the ability of artists like you to express themselves by referencing works owned by others. Fair use tries to bridge this gap.

"Ever hear of an appropriation artist named Jeff Koons?", I said, hoping that this discussion was not going so far afield of advertising law so as to bore the audience. "He has been in court for copyright infringement several times. The most recent was federal court in New York for doing something very similar to what you just asked about.

"Koons was commissioned by Deutsche Bank to create an exhibition of paintings. Koons culled images from advertisements and scanned them into a computer, and superimposed the scanned images against pastoral backgrounds. Then he printed color images of the resulting collages. His assistants used the prints as templates for painting 10' x 14' canvases.

"One of these giant canvases was titled 'Niagara' and it consisted of fragmentary images against a pastoral background with four pairs of women's feet and lower legs dangling prominently over images of brownies, donuts and apple pastries. The legs were placed side by side and together occupied the entire horizontal expanse of the 14 foot painting.

"Koons was sued over his use of the legs in this painting, and that," I said, "is pretty much the sort of use you had in mind when you asked your question, wasn't it?"

"Uh huh," she said.

"The leg shots," I said, "were the work of professional photographer Andrea Blanch who shoots for *Vogue*, *Allure*, *Details* and *G.Q.* She is the go-to photographer for advertisers like Revlon, Johnny Walker and the fashion house Valentino, and is the author of a photograph book called Italian Men: Love & Sex. The legs were part of a slick fashion ad shot in the posh cabin of a private jet.

"Koons," I said, "was not about to confess *Mia Culpa* and pay the tariff. He defended the suit on the grounds that his use was fair. He testified that those legs represented a particular type of woman who is frequently depicted in fashion ads, and

by using them in his painting he was commenting on the 'commercial images in our consumer culture."

"Koons," I said, "did not use any of the background of the photos; just the legs and feet. And still, he got sued for infringement."

I explained that the jumping-off point for a fair use analysis is the statutory factor that examined the purpose and character of Koons' use. The central purpose of this inquiry is whether Koons' work merely superseded Blanch's photo, or did Koons' painting add something new? Did Koons' work change the purpose or character of Blanch's photo?

In other words, did Koons use Blanch's legs as raw material and transform them into something new when he created his painting? Were new insights and new aesthetics were added by Koons?

Koons asserted, and Blanch did not deny, that his reason for using Blanch's leg shots was totally different than her purpose. She used the legs in a slick fashion ad to create an erotic sense; he wanted people to examine the legs and consider how like photos effect their lives. Koons used Blanch's legs as fodder for social commentary relating to how the mass media enters our lives and affects us. He wasn't repackaging Blanch's photo or duplicating it and using it for the purpose Blanch created it.

"It used to be," I said, "that all courts were of the mind that if the use was commercial, it could not be fair. But in 1994 the Supreme Court held that commercial use alone can not be dispositive. That was good for Koons because his painting was appraised at \$1 million."

"Blanch appealed the trial court's ruling in Koons' favor, and the appellate court affirmed. It cost a lot of money and although Koons might have been entitled to recover his legal fees he did not try. If you want to use another's work in your work," I continued, "you may be able to. But expect a challenge. If it comes, it won't be cheap."

James B. Astrachan is the author of The Law of Advertising, published by Matthew Bender-Lexis/Nexis.