

**University of Massachusetts Amherst**

---

**From the Selected Works of Laura Quilter**

---

June 29, 2013

# (Visual) Art and Copyright : Copyright in Nonprint Media

Laura Quilter, *University of Massachusetts - Amherst*



Available at: [https://works.bepress.com/laura\\_quilter/29/](https://works.bepress.com/laura_quilter/29/)

(visual) art & copyright

laura quilter  
ala annual, 2013, chicago

# outline for visual arts

- “public display right” (106(5)) and 109(c)
  - *dist. b/w ownership of (a) the work, and (b) the copyright*
  - museums in *Kirtsaeng*
- recent fair use cases
- “moral rights” in the US
  - VARA (106A)
  - resale royalty / *droit de suite*
  - *various alternate theories*

*Note: Artists, owners, agents, etc., have contract and tort rights, work-for-hire, etc., but we focus here on copyright & related rights.*

# recent cases: “appropriation art”

- *Prince v. Cariou* (2d Cir 2013) – Various edits to blown-up photographs. Dist. Ct. ordered impoundment/destruction, outraging art world; 2d Cir. On appeal found 25 out of 30 works were “transformative”; 5 were bounced back to District Court for review. *En banc* hearing denied; Cariou plans to petition for *cert.* 2d Circuit: It is not necessary to comment *on* the original work to transform the work; the author’s intent to comment is also not the final word. Lots of art criticism in this opinion!
- *Morris v. Young* (CD Cal 2013) – 2 out of 3 retouched/tinted photos were *not* fair use; 1 may have been.

# recent cases: photography

- *Harney v. Sony* (1st Cir 2013) – Oft-reprinted documentary photograph depicting a father/daughter in a notorious legal case was re-created for a TV show; fair use, because the position & general appearance of the subjects were non-copyrightable factual elements.

# copies of public domain works

*Bridgeman Art Library v. Corel Corp.*, 36 F.Supp.2d 191 (SDNY 1999)

- Facts: Corel sold CD of public domain artworks; Bridgeman owned library of transparencies/slides. Bridgeman said Corel must have used Bridgeman's digitizations of those works.
- holding: exact ("slavish") copies of public domain works are not uniquely copyrightable; no original creativity added, notwithstanding expertise of photographer. The expertise might be more akin to "sweat of the brow"; see *Feist*.
- Lots of interesting choice of law issues & discussion of UK law on originality, also
- Not binding; but highly influential on other courts.

# Visual Arts Rights Act of 1990 (VARA)

- Visual Artists Rights Act of 1990 (VARA); 17 USC 106A
  - Berne Article 6bis
  - Various state implementations of artist moral rights, theories of contract, tort; not entirely preempted by VARA
- Works of visual art
- Rights to attribution & integrity
  - Attribution & non-attribution (distortion, mutilation “prejudicial to his or her honor or reputation”)
  - Destructions or mutilations prejudicial to honor or reputation
  - Prevent destruction or mutilation of “work of recognized stature”
    - e.g., California murals!
- Provisions can be waived; applies only to single or limited (<200) editions; does not apply to works for hire; excludes technical illustrations, posters, etc.

# resale royalty right (droit de suite)

- *droit de suite* intro'd France 1920s; Berne Art. 14
- 1992 Copyright Office report; not now, but maybe later if the whole EU adopts
- 2001 EU adopted Resale Rights Dir, 2001/84/EC
- 2011 - HR 3688 (Nadler) & S.2000 (Kohl)
- California Resale Royalty Act of 1976;
  - *Estate of Graham v. Sotheby's* (CD Cal 2012)  
invalidated on Comm. Cl.; appeal to 9<sup>th</sup> Cir pending
- Copyright Office Notice of Inquiry (2012, 2013)



# moral rights in the US: various theories

- *Vargas v. Esquire* (7<sup>th</sup> Cir.) – no credit for illustrations in *Esquire*; contract governed & did not require signature
- *Granz v. Harris* (2d Cir.) – jazz performance 8 mins edited; breach of contract & unfair competition
- *Gilliam v. ABC* (2d Cir.) - Monty Python 24 mins edited; Lanham Act (TM), copyright, contract
- *Wojnarowicz v. Am Fam Assn* (SDNY) art reproduced in AFA pamphlets; NY Artists' Authorship Rights Act, but not Copyright or Lanham

# 17 USC 101 – definitions

- “Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

## 17 USC 106(5) – public display

- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly;

## 17 USC 109(c) – public display

- (c) Notwithstanding the provisions of section 106 (5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.