

# Art & Cultural Heritage Law Newsletter

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## Appropriation Art in France: OK but Not Unlimited

By: Anne-Sophie Nardon<sup>1</sup>

In two recent decisions, French courts have ruled in favor of appropriation artists in such a way that the appropriation movement has reasons to feel recognized as a respected art movement. The first decision, *Marabout vs. Moulinsart Company*<sup>2</sup>, allows a series of art works reproducing characters from the Adventures of Tintin in settings inspired by Edward Hopper's paintings. The second, *Dooble Pics vs Sifra*<sup>3</sup>, recognizes an appropriation artist's copyright in a work showing a playmobil Mona Lisa, and decides that an unauthorized reproduction of it that does not fall into the exception of parody constitutes an infringement of that work.

1. *Marabout vs. Moulinsart Company*

In 2014, the French parodist artist Xavier Marabout showed a series of



paintings staging characters from "The adventures of Tintin" comic books in situations inspired by the paintings of Edward Hopper, with the intent of asking questions about Tintin's love life. In May 2015, the Moulinsart company, copyright holder of the Belgian cartoonist Hergé, discovered the series on sale on Marabout's website. Considering that the paintings were unauthorized adaptations of different characters taken from Hergé's work, the Moulinsart company demanded that Marabout withdraw the works from sale. Marabout refused on the grounds that his works were protected as parodies.

Parody is one of the exceptions to the author's monopoly on derivative works provided by article L.122-5 of the French Intellectual Property Code, by transposition of article 5.3 k) of the European di-

rective 2001/29<sup>4</sup>. The exception of parody derives from the principle of freedom of expression protected by article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms which, as the French supreme court regularly recalls, “may be subject to restrictions provided for by law, as long as those restrictions constitutes measures that are necessary, in a democratic society, to achieve legitimate aims and in particular the protection of the rights of others.”<sup>5</sup>

In the Deckmyn case<sup>6</sup>, the Court of Justice of the European Union had reminded European jurists that the concept of parody was to be understood as an “autonomous concept of Union law”, meaning that the exception had to be interpreted in a uniform manner, binding all member states’ courts. According to the Court, “the essential characteristics of parody are, on the one hand, that it evokes an existing work, while presenting perceptible differences from it, and, on the other hand, that it constitutes an expression of humor or mockery”.

This reasoning is scrupulously followed by the Marabout court.

Firstly, the court notes that the Tintin characters are easily identified, and perceptibly different from the original work as Marabout has chosen a medium (acrylic painting) different from the comic strip medium. Moreover, the Tintin characters are found in situations that are usually unknown to them and where they appear visibly out of place. The disputed paintings bear the artist’s signature, so that “even a very moderately attentive observer cannot misunderstand”, when looking at a work by Marabout, who is the author. Furthermore, Hergé’s album have been known for decades and have enjoyed considerable worldwide diffusion (230 million copies), so that his work is perfectly identified: Tintin is “as well known as Jesus Christ and the Beatles combined” (L’Express magazine) adds the court. The risk of confusion is thus null.

Secondly, the humorous intention of Marabout is judged sufficiently illustrated by the evidence given by the defendant, but is also “felt by the court” which proceeds to analyze each disputed painting, judging that the humorous effect is constituted by the incongruity of the situations created in the paintings, taking into account “the usual sadness” of Edward Hopper’s works on the one hand, and on the other hand the absence of female pres-

ence at Tintin’s side in Hergé’s works. Citing a previous case about the Snoopy character<sup>7</sup>, the court judges that the disputed works are neither vulgar nor pornographic and may be understood as a criticism of the absence of sex and women in the works of Hergé.

The court concludes that the humorous intention is exemplified by the juxtaposition of Hergé’s and Edward Hopper’s universes, immediately informing the viewer of the author’s desire to disguise and divert the images with the intention of constituting a work “in the manner of Hopper” where Tintin and other characters from Hergé are transported. Humour

is interpreted by the court not only as what can provoke laughter, but also, as a Belgian court of appeal had explained in a previous dispute, “a form of wit that consists in presenting things in such a way as to bring out their pleasant and unusual aspects”.<sup>8</sup>

## 2. Dooble Pics v. Sifra

This case concerns the works of the artist Pierre-Adrien Sollier, who adapts famous paintings from the past by replacing the characters with Playmobil figurines. In an ironic twist, Sollier found out in 2018 that another artist had integrated his work “Mona Lisa Playmobil” into another work, without his authorisation. Sollier’s company sued the second artist and the gallery representing him for copyright infringement.

In the first instance, the court rejected the infringement claim on the grounds that the Playmobil Mona Lisa itself was not an original work protected by copyright. On appeal, however, the Paris Court first notes that, although Sollier has used pre-existing elements (the Mona Lisa and the Playmobil figurine), he had combined them in a work whose final rendering “shows an aesthetic choice that reflects the personality of its author”. The Court therefore recognized the original character of the Playmobil Mona Lisa as entitled to copyright protection.

On the exception of parody brought up by the defendants to dismiss the infringement claim, the court found that the criteria for parody were not met. In the court’s view, the work of the second artist simply incorporated the Playmobil Mona Lisa without modifying it, and the expressed intent of the second artist was to parody Leonar-

do da Vinci’s “Mona Lisa” and not Sollier’s Playmobil adaptation. This argument is the same as the one used by the same court to dismiss the claim of another appropriation artist, Jeff Koons in two recent decisions<sup>9</sup>.

These cases show that French courts will recognize parodies as lawful appropriations of original works, and will also recognize a parodists’ own right to protect those works against infringement. In every case, however, the court must find that the challenged artwork is a true parody, which may require individualized analyses of the artist’s intent.

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<sup>1</sup> Avocat, Borghese et Associates, Paris, France.

<sup>2</sup> First instance court of Rennes, 10 May 2021, n°17/04478

<sup>3</sup> Paris Court of appeal, 30 September 2022, n° 20/18194

<sup>4</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society



<sup>5</sup> Cour de cassation, 16 February 2022 - n° 20-13.542

<sup>6</sup> CJUE, gde ch., 3 sept. 2014, aff. C-201/13,

Deckmyn, pt 15, cited by André Lucas in *JurisClasseur Civil Annexes V° Literary and artistic property - Fasc. 1249 : AUTHORS' RIGHTS. - Economic rights. - Exceptions to the exclusive right.*

<sup>7</sup> TGI Paris, 1re ch., 19 janv. 1977, Peanuts :

RIDA 2/1977

<sup>8</sup> CA Brussels, 9th ch., June 14, 2007: *Propr. intell.* 2008, n° 28, p. 347, obs. V.-L. Benabou; *A&M* 2008/1, p. 23, note D. Voorhoof, cited by André Lucas.

<sup>9</sup> Paris Court of appeal, 17 December 2019, no. 152/2019 and 23 February 2021, n° 19/09059

## Anti-Money Laundering Regulations for Art Market Participants in the United Kingdom

By: Lauren Burse<sup>1</sup>

Contrary to the halting pace of introducing anti-money laundering regulations for the art market in the United States, the art market in the United Kingdom has been subject to the Money Laundering and Terrorist Financing (Amendment) Regulations (the "Regulation") since 2019.

For the American reader, this information is worth knowing because the Regulations do not only apply to U.K. based art market participants ("AMP"s).<sup>2</sup> Dealers from outside the U.K. but who sell in the U.K. must register with HMRC (Revenue and Customs), as would be required of domestic AMPs. Additionally, a similar regulation was applied in 2021, when Congress mandated that the Bank Secrecy Act would apply to U.S. "dealers in antiquities", necessitating that these dealers report transactions in cash greater than \$10,000. The proposed ENABLERS Act is another attempt to mandate this reporting by the rest of the U.S. art market. Thus, it is worth evaluating how the parallel standard has been dealt with and implemented in the U.K., before they are likely required in the U.S.

There have been two notable events concerning the U.K. regulation in 2022. First, the main difference between the U.K. and U.S. approaches to anti-money laundering in the art market is the U.K. requirement that art market participants register with HMRC, regardless of the value of their transactions, and to do so by June 10, 2021. This registration must be updated every 12 months. However, those who did not register are subject to fines, which were imposed for the first time and announced this past spring. The standard penalty is £5,000.00

per quarter, capped at £100,000 for 20 quarters. However, HMRC may elect to reduce the fine by as much as 50% if an AMP voluntarily declares that they were trading while unregistered, and by 25% if the fine is paid promptly (i.e. within 30 days). In the interest of encouraging compliance, HMRC publishes the names of those whom it fines on its website.<sup>3</sup> As of October 2022, the highest fine issued to an AMP was £52,000. Additionally, HMRC is systematically conducting audits (termed "interventions") of AMPs, even of those who registered in time, and will continue to review AMPs throughout the program. These audits will "test and challenge" AMPs to ensure they understand the risks of their

business and the requirements of AML compliance. Secondly, the British Art Market Foundation ("BAMF") released its updated Guidance on Anti Money Laundering for UK Art Market Participants on June 30, 2022, to elucidate ambiguities in the Regulation. There are clarifications to which it is worth drawing attention, the first of which concerns the understanding of "intermediary" that is used in the definition of AMP. The Guidance now explains that an intermediary would be "someone who, by way of business, actively transacts in the sale or purchase of works of art on behalf of a seller or buyer under whose authority they act."<sup>4</sup> Thus, an intermediary could be an agent or an art dealer, or an online sales platform, but framers, shippers, and those who do not actively participate in

transactions are not intermediaries. The Guidance does acknowledge that there is a 'spectrum' of involvement in a transaction, from a mere introducer to an agent acting with the transactor(s)' authority, demonstrating that a fact-specific analysis is necessary. Moreover, the Guidance clarified that a "customer" of an AMP depends on the AMP's role in the transaction, or, where the AMP is selling or acting as an intermediary, the customer will be whoever is paying the AMP for the art or for services in relation to the transaction.<sup>5</sup> Again, a fact specific analysis is required. To help everyone understand how these rules may work in practice, the BAMF has helpfully provided some situational examples throughout its Guidance.

In any event, there are financial, trade, and crime laws in the U.K. which are applicable despite the relevant party meeting the requirements for art AML regulation, which only reinforces the need for all those involved in art transactions to be aware of with whom they are dealing and to follow a "risk-based approach." While controversy remains on both sides of the ocean as to how much terrorist financing and money laundering risk is present in the art market,<sup>6</sup> nevertheless the regulations continue apace, and we must all learn to adapt and comply. ♦

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<sup>1</sup> Lauren Burse is a PhD Candidate in Law at the London School of Economics and Political

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Science, focusing on the illicit trade in cultural heritage and public international law. She is admitted to practice in Illinois and New York.

<sup>2</sup> Defined as:

a firm or sole practitioner who (i) by way of business trades in, or acts as an intermediary in the sale or purchase of, works of art and the value of the transaction, or a series of linked transactions, amounts to 10,000 euros or more; or (ii) is the operator of a freeport when it, or any other firm or sole practitioner, by way of business stores works of art in the freeport and the value of the works of art so stored for a person, or a series of linked persons, amounts to 10,000 euros or more.

2019 No. 1511, Part II, 14(1)(d).

<sup>3</sup> *Corporate Report: Businesses that have not complied with the regulations (2021 to 2022)*, HM REVENUE & CUSTOMS (Oct. 2, 2022), <https://www.gov.uk/government/publications/businesses-not-complying-with-money-laundering-regulations-in-2018-to-2019/list-of-businesses-for-tax-year-2019-to-2020-that-have-not-complied-with-the-2017-money-laundering-regulations>.

<sup>4</sup> BAMF AML Guidelines, para. 13, pg. 8.

<sup>5</sup> *Id.* at para. 56, pg. 14.

<sup>6</sup> See the Treasury report on illicit finance in the art market released in February 2022, which

concluded that there was limited evidence of terrorist financing risk, although three factors unique to the art market made it attractive to criminal money laundering: (1) the high dollar value of transactions; (2) the transportability of goods; (3) the longstanding culture of privacy and use of intermediaries; (4) the increasing use of high-value art as an investment class. *Study of the Facilitation of Money Laundering and Terror Finance Through the Trade in Works of Art*, DEPT. OF THE TREASURY (2022), [https://home.treasury.gov/system/files/136/Treasury\\_Study\\_WoA.pdf](https://home.treasury.gov/system/files/136/Treasury_Study_WoA.pdf).

## UNESCO Model Provisions, will if adopted, end most international trade in cultural goods

By: Kate FitzGibbon and Peter K. Tompa<sup>1</sup>

UNESCO has released proposed draft model provisions “modifying” the 1970 UNESCO Convention. The changes are major; they resemble the harsh provisions of the 1995 UNIDROIT Convention – which have been rejected by most Western and collecting nations. UNESCO accepted comments on this proposal until November 30, 2022. Once these rules are finalized, UNESCO expects member states to pass them into domestic law. If the Model Provisions are implemented into the national laws of countries where much art now circulates freely, as it does in the EU, the UK and in the United States, most of the legal international trade in ancient and ethnographic art would end.

Despite the draconian nature of what has been proposed, the model rules were crafted by a small Committee made exclusively of academics, law enforcement, and government cultural heritage officials. There was little advance notice of this proposal. There appears to have been little outreach to those who would be most impacted by these rules – museums, collectors and dealers in market countries. Instead, those that commented learned from sources outside of UNESCO about the draft proposals

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just weeks before comments were due, forcing them to rush to provide meaningful insight.

The model rules are seriously flawed and should be redrafted to reflect the public’s interest in a lawful global circulation of art and artifacts and to address the legitimate concerns of the lawful art trade, museums, educational institutions, and private owners.

The rules call for extra-territorial enforcement of foreign nationalizing laws and return of objects to countries where they were created thousands of years before, without requiring actual evidence that they were illicitly acquired.

The model rules reiterate the 1970 UNESCO Convention’s erroneous assumption that the State is always the best steward for the protection of cultural heritage. This assumption is demonstrably false for “failed states” or those which are expected to “protect” the cultural heritage of repressed or displaced ethnic and religious minority populations. This assumption is also demonstrably false for cultural goods that exist in many multiples or are of low monetary value, like historical coins.

The Model Provisions endorse state ownership

of all cultural objects, including private and religious property, damaging fundamental human, cultural, and religious rights of minorities. As such, they may conflict with national and

international laws protecting private property rights, including Article 17 of the 1948 Universal Declaration of Human Rights.

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The Model Provisions mandate government licensing and supervision of all businesses and persons trading in cultural property, contrary to established regulatory regimes in many State Parties. For example, in the United States, licensure of professions is typically a state function, not one for federal authorities. Indeed, when the United States Senate gave its advice and consent to the 1970 UNESCO Convention, one of the reservations the Senate made indicated that any such regulation would be decided on a local or state level. See S. Res. 129, 92d Cong., 2d Sess., 118 CONG. REC. 27,925 (1972).

The Model Provisions establish unattainable provenance requirements, since few countries ever established export permitting systems. When permits existed, they were not retained by State Parties to provide a record of lawful exports or by exporters because there was no obli-

gation to do so at the time. After decades or even centuries in circulation, provenance records do not exist for the majority of ethnographic and ancient objects. The model rules would therefore make items which have been traded legally for generations, illicit overnight.

There is a threshold question whether UNESCO can require a country that allows exports without an export certificate to issue them. Certain countries, like the United States, have explicitly reserved their rights on this issue. See S. Res. 129, 92d Cong., 2d Sess., 118 CONG. Rec. 27,924-25 (1972). An export certificate mandate is completely unrealistic. Blanket prohibitions of exports of cultural property of “national interest” also preclude State Parties from exercising their own discretion. Certain countries (including the US) do not currently issue export permits but allow these cultural goods within their jurisdiction to be exported.

***The Model Provisions endorse state ownership of all cultural objects, including private and religious property, damaging fundamental human, cultural, and religious rights of minorities.***

history, or science. The Model Provisions would inappropriately apply severe restrictions to trade in objects duplicated in the millions and limit the circulation of common ethnological objects as well as items mass produced for commerce.

Others do not require export permits for common items like historical coins. Still other countries technically issue export permits, but they cannot keep up with demand for such export permits so there are extensive attendant delays. Still others do not issue export permits at all, even though the 1970 UNESCO Convention assumes such permits will be issued.

This problem is exacerbated given the scope of what is covered. The Model Provisions are so broad that they will apply to objects regardless of their importance to national identity, Model Provisions were published after Prince’s death by *Vanity Fair*’s parent company Conde Nast on license from the Warhol Foundation. Goldsmith sued for copyright infringement, the federal district judge dismissed the lawsuit on fair use grounds, and the Court of Appeals reversed, finding no fair use and ruling in favor of Goldsmith.

All in all, the proposed changes appear geared

to expanding the reach of foreign state governments’ control over U.S., European, UK, Japanese, Singaporean, and other global ownership of art and cultural property, whether it belongs to private citizens, museums or is circulating in the art trade, not to fulfilling the express statement in the preamble of the 1970 UNESCO Convention, that “the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations.” ♦

<sup>1</sup> Kate FitzGibbon and Peter K. Tompa have written extensively about cultural heritage issues. Kate edited and Peter was a contributor to *Who Owns the Past?* (K. Fitz Gibbon, ed, Rutgers 2005). Kate is the Executive Director of the Committee for Cultural Policy and Peter is the outgoing Executive Director of its sister advocacy organization, the Global Heritage Alliance. Both are members of the Art & Cultural Heritage Committee’s Steering Committee and Peter previously served as the Committee’s co-chair.

## Different Perspectives on Andy Warhol Foundation v. Goldsmith

By: Armen R. Vartian<sup>1</sup>

The rare occasions that the U.S. Supreme Court considers matters relating to fine art are always of great interest. In recent years, such cases have tended to focus on claims for restitution of artworks seized during the Nazi era. But currently pending before the Court is a case which may resolve a wide-ranging dispute with great significance for 21<sup>st</sup> century artists and art institutions – the scope of “fair use” protections for derivative works under U.S. copyright law. The case is *Andy Warhol Foundation v. Goldsmith*, which the *Newsletter* analyzed 18 months ago at the Court of Appeals level.<sup>2</sup> The case has been briefed fully, and the Court heard oral arguments on October 12, 2022. While the art world – and the art *business* world – await the Court’s decision, we thought we could review the main themes of the case, as presented by some of the numerous *amici curiae* who filed briefs in support of one or the other party, or neither of the parties. Hopefully our review and recapitulation of the *amici*’s arguments is “fair”....

The facts are simple. The publication *Vanity Fair* licensed Goldsmith’s photograph of Prince on a one-time basis, to be used as a reference by an artist *Vanity Fair* was hiring to illustrate an article about Prince. That artist

turned out to be Andy Warhol who, in addition to his project for *Vanity Fair*, used Goldsmith’s photograph to create the “Prince Series” of silk-screen prints, which eventually were published after Prince’s death by *Vanity Fair*’s parent company Conde Nast on license from the Warhol Foundation. Goldsmith sued for copyright infringement, the federal district judge dismissed the lawsuit on fair use grounds, and the Court of Appeals reversed, finding no fair use and ruling in favor of Goldsmith.

Shown on the second page of this article is Goldsmith’s black-and-white photo and one of Warhol’s silkscreen prints.

The legal issues before the Supreme Court are not so simple. Fair use has been part of U.S. law for a very long time, though codified by statute only since 1976. The jurisprudence is clear that fair use excuses copyright infringement, and that there are four factors involved: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; (4) the effect of the use on the market for or value of the copyrighted work. Here the clarity ends, because those factors are applied according to

precedents that differ in each federal circuit and district, and somewhat subjectively by individual judges in any case. And courts have had difficulty reconciling the fair use privilege with the copyright owner’s right to create derivative works, which is fundamental to the very idea of copyright.

So it’s not surprising that the prospect of the Supreme Court defining the limits of fair use once and for all has aroused energetic advocacy from many stakeholders in the art world, from established artists to less-established “creators” who wish to sample and comment upon those artists’ works, to art institutions, and even the U.S. Government, i.e., the Copyright Office which processes applications for copyright registration and reports to Congress on copyright matters. What is surprising, however, is that when examining the *amici* briefs, these stakeholders seem to be speaking different languages. One group of copyright law professors says that “meaning matters”, and that if the infringing work is “transformative”, i.e., if the world sees Warhol’s work differently from Goldsmith’s, that’s enough for fair use:

“If the meaning of artistic works were objective, an art appreciation class

would be like a standard math class: It would have only right and wrong answers. But the skills of interpretation are not calculation skills. Much art would be at risk if fair use inquiries ignored reasonable audiences' views about when a new creation based on an existing work has a new meaning and message".

Another group of copyright law professors says that the focus on "transformativeness" in infringing works has taken courts "off the legislative rails", and that cases like Goldsmith's

"[involve] well-heeled appropriation artists making extensive, highly commercial uses of copyrighted photographs that adversely affected the actual and potential markets for appropriated works; and [who did not] comment on the appropriated copyrighted works. Nonetheless, the uses were found to be 'transformative' and consequently fair based on the post-hoc statements of hired 'experts'".



The primary disagreement concerns the extent to which courts should rely on transformativeness in making fair use determinations. One camp says that it should be dispositive – a work with a different meaning or message from the original is a fair use, period. The recent jurisprudence, other than the Court of Appeals decision in this case, seems to be headed that way – according to one *amicus*, statistics show that courts that determined that an infringing work was transformative also found it to be a fair use 94% of the time. The other camp rejects the dominance of transformativeness, allowing only that it is relevant, but much less so for infringing works that are very visibly similar to the originals. The reader can make his or her own determinations with respect to the images presented above, and to some extent this is the point. The pro-Warhol side says they are more different than alike because of meaning and message, and the pro-Goldsmith side says they are more alike than different based on physical resemblance.

The extent to which readers assume that any work by Andy Warhol must have artistic merit in its own right also comes into play, as one *amicus* points out: "Such hyperbole may wow undergraduates taking a class on Pop Art, but it has no place in federal court as a way to decide whether fair use exists or not." As the Court of Appeals noted, Warhol should not enjoy a "celebrity-plagiarist privilege" just because the Prince Series works exhibit the style and characteristics typical of Warhol's work. The Unit-

ed States' *amicus* brief weighs in on this, saying "neither conversion of a photograph to a silk-screen, nor 'imposition' of Warhol's distinctive style on the Prince Series image, sufficed to make the second use transformative absent some justification for copying."

But this disagreement between the *amici* highlights a more fundamental difference in outlook. The pro-Warhol advocates seem to view fair use as a constitutional (First Amendment) right overriding statutory copyright law, and "transformativeness" to be interpreted broadly to ensure the artistic creativity the Constitution protects. The pro-Goldsmith side views fair use as an exception to the copyright owner's right to make derivative works from the original, and as an exception it should be construed narrowly, especially respecting the impact of "transformativeness" in the context of the four statutory fair use factors. And the courts, by mostly issuing vague opinions avoiding any principled resolution of these issues, have not helped at all. One *amicus*'s conclusion is persuasive, that the waywardness of fair use jurisprudence is demonstrated by the fact that *Vanity Fair* felt it needed to license the photograph from Goldsmith in 1984, but by 2016 felt no such obligation. Hopefully the Supreme Court resolves the current uncertainties in the law clearly and authoritatively – principles are im-

portant but certainty is necessary.

And please take note of the relative simplicity of the French courts' approach, as explained in the front-page article by my colleague and Committee Co-Chair. While limited to derivative works offered as parodies, the cases seem to very straightforwardly look for clear indicia of parodic intent (humorous or otherwise), without focus on "transformativeness". Maybe this approach that would chill works such as Warhol's, where the artist's intent is subtle and meant to be inferred rather than read explicitly. But it might have the advantage of being much easier to apply. We'll see where the Supreme Court lands. ♦

<sup>1</sup> Armen R. Vartian is principal of Law Offices of Armen R. Vartian, and co-author of *Buying and Selling Art and Collectibles – A Legal Guide* (2022 ABA Publishing).

<sup>2</sup> Tiemstra, "Second Circuit Fair Use Cases – Case Specific or Just Confusing?", *ABA Art & Cultural Heritage Law Committee Newsletter* (Spring 2021), at 6.

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