

THE APPROPRIATENESS OF APPROPRIATING APPROPRIATION ART

Institute of Museum Ethics, Seton Hall University
First Biennial Graduate Student Conference
Walter G. Lehmann, George Washington University

PRESENTATION

Thank you for the opportunity to present as part of the Institute of Museum Ethics Graduate Student Conference.

[SLIDE 1] I've come up with a catchy new title for my presentation "The Appropriateness of Appropriating Appropriation Art" – I think that nifty bit of alliteration about sums it up. The acquisition of works of appropriation art raise puzzling legal and ethical questions for collecting museums. [SLIDE 2] Works such as Shepard Fairey's campaign portrait of President Barack Obama, a version of which was acquired by the Smithsonian's National Portrait Gallery in January [SLIDE 3] and is now on public display [SLIDE 4], may violate the intellectual property rights of others. In fact, Fairey recently admitted that he misled his own attorneys about the source of the underlying image – a photograph taken by AP photographer Mannie Garcia.

Now, a great deal of attention – hand-wringing some might say – has been devoted to the appropriateness of acquiring and displaying works with a questionable past –

artworks with Nazi-era provenance, illicit antiquities, and works of national cultural heritage. In fact some of the speakers here today have touched on these concerns. However, judging from the reaction to the acquisition and display of works like Fairey's HOPE portrait, it appears that the museum profession may not fully appreciate the implications of dealing in works which may infringe on the intellectual property rights of others. This is particularly troubling since, as I will argue, the acquisition and loan policies of most major American museums clearly prohibit dealing in works which are entangled in intellectual property disputes.

Okay, so consciously incorporating existing work into a new work is part of the post-modern art form known as "appropriation art". Appropriation art borrows images and ideas from popular culture, advertising, mass media, and other artists, and incorporates them into new works of art. From the artists perspective this is an essential part of the artistic process – something that has gone on since the dawn of time – and legal constraints are a threat to artistic freedom. But from the perspective of intellectual property law, the appropriation of protected works without permission from the owner is – quite simply – a form of theft.

Now unfortunately – or perhaps fortunately, depending on your point of view – we don't have time to delve into the intricacies of intellectual property law today.

Suffice it to say that intellectual property laws govern rights in a wide variety of creative works. In addition to copyrights, trademarks, patents and trade secrets, personal property rights such as the right of publicity and the right to privacy, can conceivably be subject to appropriation in a work of art.

The legal protection afforded to these intellectual property rights vary from country to country. To the extent that the rights to the appropriated material are not subject to protection under applicable law, legal concerns about infringement are not at issue. But the law does not give artists any special privilege to use protected works without first seeking permission from the copyright owner. Let me repeat that – the artist must ask permission to use a work that is protected by intellectual property law.

Not surprisingly then, of the four major schools of postmodern art, Appropriation Art has proven to be the most problematic from an intellectual property perspective. Works by Warhol, Rauschenberg and Koons have all been the subject of intellectual property disputes. Newer artists such as Sherri Levine, David Salle, Susan Pitt, and most recently Shepard Fairey, have made the incorporation of protected works in their own work – without first seeking permission – a central element of their artistic statement.

As I mentioned in opening, the National Portrait Gallery acquired a version of Fairey's HOPE portrait in January. It was a gift to the Museum from Washington art collectors Heather and Tony Podesta. The work – a stencil and hand-drawn illustration over a collage of newspaper clippings, is one of three original fine art pieces created by Fairey based on the print version circulated during the 2008 campaign.

In a National Portrait Gallery podcast, Fairey explains that he got permission from the Obama campaign to use Barack Obama's image but that the campaign had expressed concerns about using the underlying photograph without permission. In another Gallery podcast, Deputy Director, Carolyn Carr says that the image was “[quote] originally appropriated from a photograph [unquote]” and likened the work to a Matthew Brady photograph of Abraham Lincoln also in the Gallery's collection.

Since the end of the campaign, Fairey's work has attracted more and more attention. A retrospective of Fairey's work, including another version of the HOPE portrait, opened at Boston's Institute of Contemporary Art in February --

which is where I saw it and first framed the topic of this presentation. The portrait is now on display at the Andy Warhol Museum in Pittsburgh.

Acquisitions by the National Portrait Gallery are determined by a commission based on staff recommendations. Deputy Director Carr explained to me in an email that “[quote] significance of the object is of paramount importance [unquote]” and that from the Gallery’s collecting point of view “[quote] this was THE campaign image. It was ubiquitous. [unquote]” When I pressed her on whether the Gallery had considered the implications of this acquisition from an intellectual property perspective, however, Deputy Director Carr noted that the case was in litigation and that the Gallery would not comment until the case is settled.

It is presumed that, as public institutions, museums operate in a world that is as much, perhaps even more so, governed by the court of public opinion as opposed to the court of law. Museums are a reflection of the societies in which they exist. Their reputations depend on maintaining the highest ethical standards. As a result, museums must weigh the ethical implications of their actions to a far greater extent than their private counterparts – dealers, collectors and donors.

Chief among the issues debated under the rubric of acquisition ethics are questions pertaining to the provenance of Nazi-era loot, antiquities, and objects of cultural heritage. The ethical issues surrounding these types of collections are familiar to students of museum studies. They involve situations where the objects in question have been – or are susceptible of being – looted, stolen or otherwise taken without permission of the presumptive owner.

While they may have been acquired on technically legal grounds, it is the way in which they become available for acquisition that raises ethical concerns. The nature of the evidence and the degree of proof necessary to demonstrate that the provenance of a given object is clouded by suspicious circumstances is subject to debate. However, there is general agreement that museums should not condone or promote illegal or unethical behavior, and that by acquiring, exhibiting or otherwise trafficking in works that may have been improperly acquired, museums are perpetuating the wrongful acts associated with these works. Some even argue that by doing so, museums contribute to or encourage further illicit activities.

In response to these concerns, the principal museum organizations, including ICOM, AAM and AAMD, have provided general guidance with respect to museum acquisition practices and have issued specific policies to address

collecting in the areas of Nazi-era provenance, antiquities and cultural heritage.

These policies reflect the ethical principles on which there is general agreement by museum professionals.

Most major museums have institutionalized these ethical guidelines as part of their own policies. The acquisition and loan policies of most major museums now contain general guidance on conducting provenance research. Often this general guidance is presented along with specific guidance regarding particular collecting areas.

Some major museums go as far as to profess a “clear title” standard for acquisitions. Broadly defined, “clear title” means that the object is free from all claims and disputed interests. For example, MOMA’s collections management policy, adopted in March of this year, requires that among other things the curator recommending an acquisition or loan must “[quote] make all reasonable inquiries to determine (a) that the Museum can obtain clear title if a purchase or gift is contemplated or (b) that a proposed lender has clear title at the time that the loan is made [unquote].” The J. Paul Getty Museum policy, adopted in 2008, is even more direct: “[quote] No object will be acquired without assurance that valid and legal title can be transferred [unquote].” Similarly, the Metropolitan Museum’s

policy states: “[quote] The Museum shall rigorously research the provenance of a work of art prior to acquisition to determine that the Museum can acquire clear title [unquote].”

Clearing intellectual property rights is standard practice in the media world.

Content providers are routinely required to provide proof that they have acquired all necessary intellectual property rights in a work and to provide both warranties and errors and omissions insurance to protect the entity acquiring the work. In museums on the other hand, rights clearance has traditionally been limited to the licensing of photographic reproductions of museum collections. However, the “clear title” requirements contained in major museum acquisitions policies suggest that museum’s are obligated under their own policies to consider the ownership of intellectual property rights as part of their acquisition and loan decisions.

Would a dispute over intellectual property rights in a work – such as a dispute over copyright ownership – be sufficient to prevent the acquisition or loan of the work under the clear title requirements contained in these major museum acquisition policies? Since the more extreme types of appropriation art such as Fairey’s HOPE portrait involve the admitted use of copyright-protected images without permission, it would appear that these clear title provisions prohibit, *prima facie*,

the acquisition or display of such works until legal disputes involving copyright infringement are settled.

There are those who dismiss concerns about the infringement of intellectual property rights by appropriation artists such as Fairey as excessive moralizing.

These apologists are quick to point out the long history of the relationship between the creative process and the appropriation of images and ideas created by others.

However there is a clear legal and ethical distinction between permitted and impermissible appropriation.

Is there a double standard being applied by museums to works which may violate the intellectual property rights of others – a perception, perhaps, that such intangible rights are somehow different and less important than other forms of property rights? Does the “significance” of a work outweighs the circumstances under which it is created, and the legal and ethical responsibilities of the acquiring museum? Are museums that knowingly acquire or display such works accomplices of the appropriation artist? [Slide 5].

If it is okay for museums to acquire and exhibit works that infringe on the intellectual property rights of others, where does this lead? Although I am no

artist, I can easily imagine a work of art that violates private rights – a work which invades a person’s privacy perhaps, or, even more troubling, one that exploits children. Should such works be acquired or displayed by museums? I certainly hope not.

Museums need to take seriously their legal and ethical obligation to thoroughly investigate provenance regardless of the type or origin of the work, to investigate the legal and ethical implications of acquiring each work, and, wherever possible, to ensure that acquisition or exhibition of the work does not come at the expense of another’s rights. In situations such as Fairey’s HOPE portrait, the solution would seem quite simple –acquisition and display should be deferred until pending claims are resolved. Once they are, then it is entirely appropriate for a museum to acquire or exhibit the work.