

960 F.2d 301, 60 USLW 2682, 1992 Copr.L.Dec. P 26,893, 22 U.S.P.Q.2d 1492, 20 Media L. Rep. 1201
(Cite as: **960 F.2d 301**)



United States Court of Appeals,
Second Circuit.
Art ROGERS, Plaintiff-Appellee-Cross-Appellant,
v.
Jeff KOONS; Sonnabend Gallery, Inc., Defendants-
Appellants-Cross-Appellees.
**Nos. 234, 388 and 235, Dockets 91-7396, 91-7442
and 91-7540.**

Argued Oct. 3, 1991.
Decided April 2, 1992.

CARDAMONE, Circuit Judge:

The key to this copyright infringement suit, brought by a plaintiff photographer against a defendant sculptor and the gallery representing him, is defendants' borrowing of plaintiff's expression of a typical American scene—a smiling husband and wife holding a litter of charming puppies. The copying was so deliberate as to suggest that defendants resolved so long as they were significant players in the art business, and the copies they produced bettered the price of the copied work by a thousand to one, their piracy of a less well-known artist's work would escape being sullied by an accusation of plagiarism.

BACKGROUND FACTS

A. Rogers

We think it helpful to understanding this appeal to set forth the principals' professional backgrounds. Plaintiff, Art Rogers, a 43-year-old professional artist-photographer, has a studio and home at Point Reyes, California, where he makes his living by creating, exhibiting, publishing and otherwise making use of his rights in his photographic works. Exhibitions of his photographs have been held in California and as far away as Maine, Florida and New York. His work has been described in French (“Le Monde”), British (“The Photo”) and numerous American publications, including the Journal of American Photography, Po-

laroid's Close-Up Magazine and the Popular Photography Annual. Rogers' photographs are part of the permanent collection of the San Francisco Museum of Modern Art, the Center for Creative Photography at the University of Arizona and Joseph E. Seagrams and Sons in New York City. He has taught photography at the San Francisco Museum of Modern Art.

B. *Creating The Photograph “Puppies”*

In 1980 an acquaintance, Jim Scanlon, commissioned Rogers to photograph his eight new German Shepherd puppies. When Rogers went to his home on September 21, 1980 he decided that taking a picture of the puppies alone would not work successfully, and chose instead to include Scanlon and his wife holding them. Substantial creative effort went into both the composition and production of “Puppies,” a black and white photograph. At the photo session, and later in his lab, Rogers drew on his years of artistic development. He selected the light, the location, the bench on which the Scanlons are seated and the arrangement of the small dogs. He also made creative judgments concerning technical matters with his camera and the use of natural light. He prepared a set of “contact sheets,” containing 50 different images, from which one was selected.

After the Scanlons purchased their prints for \$200, “Puppies” became part of Rogers' catalogue of images available for further use, from which he, like many professional photographers, makes his living. “Puppies” has been used and exhibited a number of times. A signed print of it has been sold to a private collector, and in 1989 it was licensed for use in an anthology called “Dog Days.” Rogers also planned to use the picture in a series of hand-tinted prints of his works. In 1984 Rogers had licensed “Puppies”, along with other works, to Museum Graphics, a company that produces and sells notecards and postcards with high quality reproductions of photographs by well-respected American photographers including, for example, Ansel Adams. Museum Graphics has produced and distributed the “Puppies” notecard since 1984. The first printing was of 5,000 copies and there has been a second similar size printing.

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C. Koons

Defendant Jeff Koons is a 37-year-old artist and sculptor residing in New York City. After receiving a Bachelor of Fine Arts degree from Maryland Institute College of Art in 1976, he worked at a number of jobs, principally membership development at the Museum of Modern Art in New York. While pursuing his career as an artist, he also worked until 1984 as a mutual funds salesman, a registered commodities salesman and broker, and a commodities futures broker. In the ten years from 1980 to 1990 Koons has exhibited his works in approximately 100 Group Exhibitions and in eleven one-man shows. His bibliography is extensive. Koons is represented by Sonnabend Gallery, New York, Donald Young Gallery, Chicago, and Galerie Max Hetzler, Cologne, Germany. His works sell at very substantial prices, over \$100,000. He is a controversial artist hailed by some as a “modern Michelangelo,” while others find his art “truly offensive.” A New York Times critic complained that “Koons is pushing the relationship between art and money so far that everyone involved comes out looking slightly absurd.”

D. Creating the Sculpture “String of Puppies”

After a successful Sonnabend show in 1986, Koons began creating a group of 20 sculptures for a 1988 exhibition at the same gallery that he called the “Banality Show.” He works in an art tradition dating back to the beginning of the twentieth century. This tradition defines its efforts as follows: when the artist finishes his work, the meaning of the original object has been extracted and an entirely new meaning set in its place. An example is Andy Warhol's reproduction of multiple images of Campbell's soup cans. Koons' most famous work in this genre is a stainless steel casting of an inflatable rabbit holding a carrot. During 1986 and 1987 the sculptor traveled widely in Europe looking at materials and workshops where he might fabricate materials for the Banality Show. ...

Koons acknowledges that the source for “String of Puppies” was a Museum Graphics notecard of “Puppies” which he purchased in a “very commercial, tourist-like card shop” in 1987. After buying the card, he tore off that portion showing Rogers' copyright of

“Puppies.” Koons saw certain criteria in the notecard that he thought made it a workable source. He believed it to be typical, commonplace and familiar. The notecard was also similar to other images of people holding animals that Koons had collected. Thus, he viewed the picture as part of the mass culture—“resting in the collective sub-consciousness of people regardless of whether the card had actually ever been seen by such people.”

Appellant gave his artisans one of Rogers' notecards and told them to copy it. But in order to guide the creation of a three-dimensional sculptural piece from the two-dimensional photograph, Koons communicated extensively with the Demetz Studio. He visited it once a week during the period the piece was being carved by the workers and gave them written instructions. In his “production notes” Koons stressed that he wanted “Puppies” copied faithfully in the sculpture. For example, he told his artisans the “*work must be just like photo*-features of photo must be captured;” later, “*puppies need detail in fur*. Details-Just Like *Photo!*;” other notes instruct the artisans to “*keep man in angle of photo*-mild lean to side & mildly forward-same for woman,” to “keep woman's big smile,” and to “keep [the sculpture] very, very realistic;” others state, “*Girl's nose is too small. Please make larger as per photo*;” another reminds the artisans that “The puppies must have variation in fur *as per photo*-not just large area of paint-variation *as per photo*.” (emphasis supplied).

To paint the polychromed wood “String of Puppies” sculptures, Koons provided a chart with an enlarged photocopy of “Puppies” in the center; painting directions were noted in the margin with arrows drawn to various areas of the photograph. The chart noted, “Puppies, painted in shades of blue. Variation of light-to-dark *as per photo*. Paint realistic *as per photo*, but in blues.” and “Man's hair, white with shades of grey *as per black and white photo!*” (emphasis supplied).

When it was finished, “String of Puppies” was displayed at the Sonnabend Gallery, which opened the Banality Show on November 19, 1988. Three of the four copies made were sold to collectors for a total of \$367,000; the fourth or artist's copy was kept by Koons. Defendant Koons' use of “Puppies” to create

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“String of Puppies” was not authorized by plaintiff. Rogers learned of Koons' unauthorized use of his work through Jim Scanlon, the man who had commissioned Rogers to create “Puppies.” A friend of Scanlon's, who was familiar with the photograph, called to tell him that what she took to be a “colorized” version of “Puppies” was on the front page of the calendar section of the May 7, 1989 Sunday *Los Angeles Times*. In fact, as she and Scanlon later learned, the newspaper actually depicted Koons' “String of Puppies” in connection with an article about its exhibition at the Los Angeles Museum of Contemporary Art.

PRIOR PROCEEDINGS

Rogers brought this action against Koons and Sonnabend Gallery on October 11, 1989, alleging copyright infringement ... After completion of discovery, both sides moved for [summary judgment]....

... In a December 10, 1990 decision, described more fully below, it found that Koons copied “Puppies” in “String of Puppies” and that this copying was not a fair use. It therefore found infringement, [751 F.Supp. 474](#). ... As to Sonnabend Gallery, the district court concluded on February 22, 1991 that the record showed Sonnabend's as well as Koons' liability for infringing profits. On March 27, 1991 it entered a permanent injunction enjoining Koons and Sonnabend Gallery from making, selling, lending or displaying any copies of, or derivative works based on, “Puppies,” and, pursuant to [17 U.S.C. § 503](#), requiring defendants to deliver all infringing articles to plaintiff within 20 days, including the fourth or artist's copy of “String of Puppies.”

When defendants failed to comply with the turn-over order, Rogers moved to hold defendant Koons in contempt. The proceedings on that motion revealed that nine days after the injunction was issued, Koons had loaned the fourth copy of “String of Puppies” to a museum in Germany and arranged for its shipment out of the United States. After a hearing on May 8, 1991 the district court held Koons in contempt, directed him to do whatever was necessary to effect the sculpture's return from Germany, and imposed a daily fine for continued non-compliance to commence eight days later.

On May 28, 1991 we denied Koons' motion to stay the injunction and the contempt penalty pending appeal, but delayed the commencement of the daily fine until June 7, 1991. From the finding of copyright infringement, the granting of a permanent injunction, and the turn-over order appellants Koons and Sonnabend appeal. Rogers cross-appeals from the denial of an award prior to trial for infringing profits. We affirm.

DISCUSSION

I Ownership of Copyright in an Original Work of Art

One of the powers given Congress under Art. I, § 8 of the United States Constitution is: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries.”... As a result, Congress enacted a copyright law, [17 U.S.C. § 101 et seq. \(1976\)](#), under which the instant litigation was instituted.

[1] To establish an infringement of a copyright, a plaintiff must show both ownership of a copyright and that defendant copied the protected material without authorization. The Copyright Act makes a certificate of registration from the U.S. Register of Copyrights *prima facie* evidence of the valid ownership of a copyright, *see* [17 U.S.C. § 410\(c\)](#), though that presumption of ownership may be rebutted. Protection under the copyright statute extends to pictorial works, [17 U.S.C. § 102\(a\)\(5\)](#). For more than a century photographs have been held to be copyrightable “writings” under [Article I, § 8 of the Constitution](#). ...

[2] Of the several issues before us, the first concerns the originality of “Puppies.” Defendants do not challenge plaintiff's ownership of a valid copyright, but assert instead that the portion of Rogers' work allegedly infringed was not an original work of authorship protected under the 1976 Copyright Act. Since the law protects authors' exclusive rights to their works, the cornerstone of that law is that the work protected must be original. ... Thus, that a whole work is copyrighted does not mean that every element of it is copyrighted; copyright protection extends only to

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those components of the work that are original to the creator. *Id.* 111 S.Ct. at 1289. But the quantity of originality that need be shown is modest-only a dash of it will do. *Id.* at 1287; .

[3] Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved. ... To the extent that these factors are involved, “Puppies” is the product of plaintiff’s artistic creation. Rogers’ inventive efforts in posing the group for the photograph, taking the picture, and printing “Puppies” suffices to meet the original work of art criteria. Thus, in terms of his unique expression of the subject matter captured in the photograph, plaintiff has established valid ownership of a copyright in an original work of art.

II Unauthorized Copying by Defendant

[4] Plaintiff next must demonstrate that defendant Koons copied his protected work without authorization. The district court granted summary judgment to Rogers on this issue, finding Koons’ sculpture “String of Puppies” an unauthorized copy of Rogers’ photograph. Summary judgment may be an appropriate remedy in copyright infringement suits. ... Yet, such relief will be denied when the question of substantial similarity is one on which reasonable minds could differ.

Here, the trial court found original elements of creative expression in the copyrighted work were copied and that the copying was so blatantly apparent as not to require a trial. We agree that no reasonable juror could find that copying did not occur in this case. First, this case presents the rare scenario where there is direct evidence of copying. Koons admittedly gave a copy of the photograph to the Italian artisans with the explicit instruction that the work be copied. Moreover, the importance of copying the very details of the photograph that embodied plaintiff’s original contribution—the poses, the shading, the expressions—was stressed by Koons throughout the creation of the sculpture. His instructions invariably implored that the creation must be designed “as per photo.” This undisputed direct evidence of copying is sufficient to support the district court’s granting of summary judgment.

[5] Further, even were such direct evidence of copying unavailable, the district court’s decision could be upheld in this case on the basis that defendant Koons’ access to the copyrighted work is conceded, and the accused work is so substantially similar to the copyrighted work that reasonable jurors could not differ on this issue.

Substantial similarity does not require literally identical copying of every detail. Such similarity is determined by the ordinary observer test: the inquiry is “whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.” *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir.1966). Or, stated another way, whether “the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.” Thus, Koons’ allegation that a trial judge uneducated in art is not an appropriate decision-maker misses the mark; the decision-maker, whether it be a judge or a jury, need not have any special skills other than to be a reasonable and average lay person.

[6] We recognize that ideas, concepts, and the like found in the common domain are the inheritance of everyone. What is protected is the original or unique way that an author expresses those ideas, concepts, principles or processes. Hence, in looking at these two works of art to determine whether they are substantially similar, focus must be on the similarity of the *expression* of an idea or fact, not on the similarity of the facts, ideas or concepts themselves. See *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 912 (2d Cir.1980). It is not therefore the idea of a couple with eight small puppies seated on a bench that is protected, but rather Roger’s *expression* of this idea—as caught in the placement, in the particular light, and in the expressions of the subjects—that gives the photograph its charming and unique character, that is to say, makes it original and copyrightable.

Thus, had appellant simply used the *idea* presented by the photo, there would not have been infringing copying. But here Koons used the identical expression of the idea that Rogers created; the composition, the poses, and the expressions were all incorporated into the sculpture to the extent that, under the ordi-

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nary observer test, we conclude that no reasonable jury could have differed on the issue of substantial similarity. For this reason, the district court properly held that Koons “copied” the original.

[\[7\]\[8\]](#) Moreover, no copier may defend the act of plagiarism by pointing out how much of the copy he has not pirated. Thus, where substantial similarity is found, small changes here and there made by the copier are unavailing. It is only where the points of dissimilarity exceed those that are similar and those similar are—when compared to the original work—of small import quantitatively or qualitatively that a finding of no infringement is appropriate. *See* 3 Nimmer § 13.03[B][1][a]. This is not the case here. Koons' additions, such as the flowers in the hair of the couple and the bulbous noses of the puppies, are insufficient to raise a genuine issue of material fact with regard to copying in light of the overwhelming similarity to the protected expression of the original work.

Because of Koons' extensive use of the same expression of the idea that Rogers' created, it was properly held that he “copied” the protected features of the original. No genuine issue of material fact exists with respect to this finding; “String of Puppies” was copied from the photograph “Puppies” based either on the direct evidence of copying or on proof of access and substantial similarity. In light of this summary judgment was properly granted on this issue.

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