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Celebrities, Art, and the Law: When Celebrities Get What They Want and When They Don't

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When Celebrities Get What They Want . . .

Have you seen Kanye West's latest sculpture? If not, it's from his new music video entitled Famous (https://www.google.com/imgres?imgurl=http%3A%2F%2Fhypebeast.com%2Fimage%2F2016%2F07%2Fkanye-west-famous-video-100.jpg&imgrefurl=http%3A%2F%2Fhypebeast.com%2F2016%2F8%2Fkanye-west-famous-sculpture-exhibit&docid=vq9NrXMk_uR_wM&tbid=4qBnu4YYk9aR1M%3A&w=1437&h=958&bih=619&biw=1280&ved=0ahUKEwiwrPvP9IDPAhVUHGMMKHV5wC5wQMwgfKAewAQ&iact=mrc&uact=8) and is now on exhibition at the Los Angeles' Blum & Poe gallery. The sculpture, created from wax, is the realistic, nude likeness of: George W. Bush, Anna Wintour, Donald Trump, Rihanna, Chris Brown, Taylor Swift, Kanye West, Kim Kardashian, Ray J, Amber Rose, Caitlyn Jenner, and Bill Cosby. Understandably, after the video was released on June 24, 2016 it caused quite the controversy. Kanye even tweeted (<https://www.accesshollywood.com/articles/kanye-west-tweets-can-somebody-sue-me-already-day-after-releasing-his-famous-video/>), "Can somebody sue me already #i'llwait." But while it seems unlikely that anyone *will* sue, the question posed here is—if they did, could they win? The answer: probably not (<http://www.billboard.com/articles/news/7423175/kanye-west-famous-legal-analysis>).

When a celebrity attempts to control the exploitation of their name, likeness, and fame, this falls under a claim of misappropriation. Some states have adopted the action under a separate common law remedy, however, most have developed it as an offshoot of the common law right of privacy. Restatement of the Law, Second, Torts § 652(c) ("one who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."). Under Cal. Civ. Code § 3344 (<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=civ&group=03001-04000&file=3344-3346>), the person's likeness has to be pretty detailed and "readily identifiable." The likeness must also be used for commercial purposes.

For example, Vanna White lost a claim of misappropriation under the California statute, but won under the common law when a Samsung commercial (<http://www.smithsonianmag.com/history/robot-vanna-trashy-presidents-and-steak-as-health-food-samsung-sells-tomorrow-22348926/?no-ist>) contained a robot with her likeness. Thus, a claim for misappropriation under the common law is much broader than in California. For instance, "likeness" could encompass not only a picture of you, but also other items that would make one think of you. And, this "likeness" could be used for both commercial purposes or for non-commercial purposes (such as impersonating someone to induce others to disclose confidential information).

But, when the value of a work of art comes principally from some source other than the fame of the celebrity, this is not misappropriation. In the iconic case Winter v. D.C. Comics (http://www.leagle.com/decision/2003768134CalRptr2d634_1704/WINTER%20v.%20DC%20COMICS), the Winter Brothers (<https://selvedgeyard.com/2010/04/13/winter-whites-johnny-edgar-legendary-winter-brothers/>) filed suit against DC Comics for misappropriation of their likeness. In the comic series, the "Autumn Brothers (<http://www.sfgate.com/news/article/Celebrities-image-rights-vs-First-Amendment-2648361.php>)," half-worm-half-humans are killed by an anti-hero. However, the court found that the value of the work contained sufficiently transformative elements to warrant First Amendment protection. The "inquiry is whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized or whether the depiction or imitation of the celebrity is in sum and substance of the work in question (<http://scocal.stanford.edu/opinion/winter-v-dc-comics-33304>)."

In other words, the question becomes whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness. Here, Kanye's sculpture has enough transformative elements to be protected under the First Amendment (https://www.law.cornell.edu/constitution/first_amendment). While it is clear that the nude figures are indeed the celebrities identified above, Kanye is using them to personify "fame" and what it means to be "famous." And, the idea of a boudoir including all of the nude celebrities is, indeed, fanciful.

And When They Don't . . .

In case you don't remember, "Left Shark" made its appearance at Super Bowl XLIX (<https://www.youtube.com/watch?v=WmcWZ2Bzoho>). But few thought about who owned the rights to the costume of this infamous back-up dancer. Left Shark was one of Katy Perry's costumed half-time dancers, who became an internet sensation for dancing slightly off beat. However, after Perry's legal team sent Etsy-based 3D-printer, Fernando Sosa (<http://www.nydailynews.com/entertainment/gossip/artist-fight-katy-perry-sell-shark-toys-article-1.2109843>), a cease and desist letter, the question arose—can Katy Perry copyright Left Shark? The answer: most likely no (<https://www.techdirt.com/articles/20150211/12073529990/cant-make-this-up-katy-perrys-lawyers-use-left-shark-photo-taken-guy-theyre-threatening-trademark-application.shtml>).

The extent that clothing is copyrightable is a question that lawyers as well as judges still grapple with today. Article I, Section 8, Clause 8 of the Constitution (<https://www.law.cornell.edu/constitution/articlei>) states that Congress has the power 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." Therefore, cultivating creativity is the general concept behind copyright law. Copyright law exists to balance the creator's entitlement to compensation, and the public's desire to benefit from creations. This balance means giving the creators enough rights to have an incentive to create, and the public the benefits of advancing technology and culture.

Courts have concluded that clothing is non-copyrightable because it serves a utilitarian purpose. 17 U.S.C. § 101 (<http://www.copyright.gov/title17/92chap1.html#101>) defines "useful article" as one having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is also considered a useful article. For example, even Halloween costumes are seen as utilitarian and thus, in the eyes of the law, are not copyrightable.

While this may seem strange in light of fashion weeks filled with grand designs from Chanel to Valentino, there are, understandably, exceptions to § 101's general rule. In the quintessential case Brandir International, Inc. v. Cascade Pacific Lumber Co (<https://h2o.law.harvard.edu/cases/4621>), the court held that "if design elements reflect a merger of aesthetic and functional considerations, the artistic aspects of a work cannot be said to be conceptually separable from the utilitarian elements." Contrariwise, when design elements are identifiable because they reflect the designer's "artistic judgment," they may be seen independently of functional influences, and thus conceptual separability (<http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1650&context=lawreview>) exists. When features can be identified separately and are capable of existing independently from the utilitarian aspects of clothing, those items may be protected by copyright.

Courts often rely on the Denicola Test (http://www.law.nyu.edu/sites/default/files/upload_documents/Brandir%20Intl%20v.%20Cascade%20Pac%20Lumber%20Co_0.pdf), which highlights whether the designer was significantly influenced by functional considerations. In writing for *Brandir*, Judge Oakes (<http://blogs.wsj.com/law/2007/10/16/law-blog-obituary-second-circuit-judge-james-oakes/>) stated, "copyrightability ultimately should depend on the extent to which the work reflects artistic expression uninhibited by functional considerations." But, what constitutes "artistic expression" is disputed. For example, in Kieselstein-Cord v. Accessories by Pearl Inc., (http://coolcopyright.com/application/files/9514/3983/4331/3e_Kielstein-Cord.pdf) the central issue was

whether a designer belt buckle was copyrightable. Under the Denicola Test, the court had to decide whether a designer belt buckle had a visual function that was not tied directly to its utilitarian function of holding a belt together. The court held that the [buckles \(http://coolcopyright.com/contents/chapter-4/kieselstein-cord-v-accessories-pearl\)](http://coolcopyright.com/contents/chapter-4/kieselstein-cord-v-accessories-pearl) were “sculptured designs cast in precious metals – decorative in nature and used as jewelry is, principally for ornamentation.” Therefore, the buckles were separate enough to be protected by copyright, although belts in general receive no such protection.

Costumes, on the other hand, are their own entity in the land of copyright, with protection that is different from that of general clothing. Costumes present different copyright issues because they are not only function as apparel that covers the body, but they can also be decorative and whimsical (http://www.newmediarights.org/business_models/artist/can_you_copyright_clothing_designs). Therefore, the question for costumes is where to draw the lines in copyright law. While copyright law does not allow for protection of useful articles, this does not mean that costumes are left without any copyright protection at all.

Copyright law explicitly does not allow for useful articles to be eligible for copyright protection. In defining “pictorial, graphic, and sculptural” works, the Copyright Act (<https://www.law.cornell.edu/uscode/text/17/101>) states that:

[s]uch 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.



But, courts have concluded that *some* elements of clothing, and therefore costumes, are indeed eligible for copyright protection. Elements that are works of art, fitting into the pictorial, graphic and sculptural category, are eligible for copyright protection. For example, *Kieselstein-Cord's* ornamental belt-buckle was found to be conceptually separate from its utilitarian function. Likewise, for costumes (<http://www.copyright.gov/history/mls/ML-435.pdf>), this has come to mean that masks, headpieces and tails are generally suitable subjects for copyright.

Here, the costume of Left Shark may be seen as solely utilitarian. Its design is not separate from its function, regardless of whether Perry's team of attorneys believes there are "separable" components. Moreover, it takes a stretch to conceive what these separable components would be. The fins, the eyes, the tail? This costume takes every feature for it to equate to a shark, which indeed is what this costume is. As a generic shark costume, it contains no whimsical or decorative additions. Unfortunately for Perry (<http://www.hollywoodreporter.com/thr-esq/katy-perrys-left-shark-design-790542>), it looks as though the Left Shark is a costume that will be enjoyed, replicated, and worn by the masses.

In sum, whether it be a nude sculpture or a shark costume, there will always be questions regarding celebrities, art and the law.

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