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356. THE CASE OF THE HORROR MONSTERS: ART AS LAW, ART AS FACT*

By JOHN F. WHICHER**

Once upon a time, children collected little pasteboard pictures, often in color, of famous baseball and football players, which were called "trading cards." The children got such cards as bonuses with their every purchase of bubble gum, and they made the cards so acquired objects of frequent barter and exchange among themselves. Happy was he who first completed a full set of pictures of the Yankee batting order! *Eheu, fugaces*: that innocent time is with us no more. Today's trading cards, sad to relate, are more likely to exhibit the dreadful features of Dracula or the Wolf Man than to display the pleasant smiles of Roger Maris or Mickey Mantle. This regrettable alteration in the objects of our juvenile commerce was brought to judicial attention not long ago by an unreported copyright suit heard in the United States District Court for the Eastern District of New York: *Universal Pictures Co., Inc. v. Nu-Cards, Inc.*¹

Nu-Cards, the defendant, was a small manufacturer of trading cards. It put out, in 1960, a series of "horror monster" cards, using (in most cases) miniature reproductions of publicity "stills" from motion pictures featuring these ghastly creatures of Gothic romance. Unfortunately, nearly a third of the cards in the series were unauthorized miniature reproductions of the publicity "stills" which the plaintiff, Universal, had originally created (and copyrighted) in connection with such chilling cinematic fare as "Blood of the Vampire," "The Return of the Creature," "The Thing That Couldn't Die," and the like.

While still unaware of Nu-Card's activities in this field, Universal had been dicker with a chewing gum firm which sought an exclusive license to reproduce all of Universal's "horror" stills on trading cards. The gum company's ardor for the deal, however, markedly cooled on the day it discovered that Nu-Cards was already forestalling the market for this novelty. Universal, thus suddenly apprised of Nu-Cards' activities, and faced thereby with the imminent loss of a profitable license of its copyrighted photographs, brought suit against Nu-Cards for infringement of its copyrights. At the outset of the case, of course, Universal moved for a preliminary injunction forbidding Nu-Cards to use the stills in question; and it obtained an *ex parte* temporary restraining order to that effect, pending a hearing on its motion.

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** Member, New York Bar. A.B., Amherst, 1941; LL.B., Columbia, 1947.

1. Civil Action No. 61-C-144, U.S.D.C., E.D.N.Y.

Opposing that motion, Nu-Cards submitted affidavits and a very skillful brief in support of a wide variety of asserted affirmative defenses: license, forfeiture, estoppel, laches, and a claimed balance of equities in defendant's favor. In the event, however, none of its contentions proved persuasive. The plaintiff's motion was granted. Shortly after the order of preliminary injunction was entered, the parties settled their differences and a permanent injunction, coupled with a judgment for damages, was entered against the defendant on consent.

In all the preliminary argument over Nu-Cards' various defenses, however, one important question raised by Universal's motion passed almost without discussion. Universal had asked that the preliminary injunction restrain defendant not only from reproducing the particular photographs involved, but also from reproducing the "horror monsters" depicted in those photographs in *any* form or manner. In the brief submitted with its motion for such an injunction, plaintiff justified this request by reference to a line of cases which have held that the author of a series of cartoons is protected, by his copyrights, not only against copies of his particular cartoons, but also against reproduction of his original cartoon characters either by three-dimensional dolls,² or by performing actors on the stage.³ It was argued that Universal's "horror monsters" were entitled to the same broad protection as were the cartoon figures in those cases. When the court announced its decision to grant plaintiff's motion for a preliminary injunction, therefore, plaintiff naturally submitted a proposed order granting the broad restraint which it had demanded. Defendant thereupon submitted a counter-order which sought to confine the preliminary injunction to a prohibition against reproduction only of the particular photographs in suit.

It is not at all certain, however, that the Court was ever truly made aware of the question defendant thus meant to raise. Neither party filed a brief in support of its respective contentions on the proposed orders. It may well have seemed, to a busy Court, that the major apparent difference between the two orders submitted to it lay in the fact that defendant's counter-order contained no findings of fact and conclusions of law, as required by the Federal Rules,⁴ while plaintiff's proposed order conformed, at some length, to the procedural technicalities in this respect. Consequently, the Court's decision to sign and enter the plaintiff's order cannot be taken as a clear precedent for granting the broad relief which plaintiff had demanded (and secured) in this situation.

2. *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F.2d 276, 278 (2d Cir. 1934), cert. denied 294 U.S. 717 (1935); *King Features Syndicate v. Fleischer*, 299 Fed. 533 (2d Cir. 1924).

3. *Hill v. Whalen & Martell, Inc.*, 220 Fed. 359 (S.D.N.Y. 1914).

4. Fed. R. Civ. P., Rules 52(a) and 65(d).

Had the point been argued, defendant's counsel might well have contended that the cartoon decisions were not in point. After all, a cartoon is not a photograph. When I direct the lens of my camera at a scene in the Adirondacks and click the shutter, I may copyright the resulting photograph, but I acquire no right thereby to forbid you to take another picture of the same scene. If I make and copyright a camera portrait of President Kennedy, I cannot prevent you from taking a picture of him as well. The cartoonist gets broad protection for the appearance and form of the characters presented by his comic strips because he *creates* them; but the photographer does not create the objects he photographs.

But such a contention, it might be answered, overlooks a key fact: though Universal's photographers do not create the horror monsters they photograph, Universal's make-up artists do. By molding foam rubber, nose putty, and false hair on an actor's face and body, they create a three-dimensional work, comparable in all respects to a sculptor's clay model molded upon a wooden or wire framework. The fact that a make-up artist builds his creature upon a *living* framework can hardly justify denying to him the same protection accorded to the sculptor; both realize, in the end, a three-dimensional figure which had its origins in the imaginative artistry of a human creator. In this view, the make-up artist's creation, like the sculptor's, is protectible by the Copyright Law as a "work of art."⁵

It cannot, in submission, be validly argued against this thesis that the monster make-ups are too ephemeral to be independently copyrightable. Some text-book authorities, to be sure, may be found to support such a contention;⁶ but the cases on which they rely to maintain the proposition that permanence of form is an essential prerequisite of copyright are all distinguishable.⁷ True, to be subject to copyright, an author's creation must necessarily be reduced to a form that may be copied; and this, in turn, implies *some* element of duration

5. 17 U.S.C. §5(g) and (h).

6. Warner, *Radio and Television Rights*, §104, pp. 280-82 (1953), citing *inter alia* Weil, *American Copyright Law*, 406 (1917).

7. Warner, *supra* note 6, fails to perceive that what Weil, *ubi supra* note 6, is talking about is not the permanence which a work must have to be copyrightable, but the permanence which an infringing copy must have if the infringement is not to be regarded as *de minimis*. See, on this distinguishable question, *Hanfstaengl v. Empire Theatre*, 2 Ch. 1 (1894); but cf. *Patterson v. Century Productions*, 93 F.2d 489 (2d Cir. 1937), cert. denied, 303 U.S. 655 (1938). Other cases which seem to support the notion that permanence is a prerequisite of copyrightability are: *Victoria Park Racing & Recreation Grounds Co. Ltd.*, 37 NSW 322, 38 NSW 33 (1937), denying copyright to information posted on a "tote" board; *Clayton v. Stone*, 5 Fed. Cas. 999, No. 2,872 (C.C.S.D.N.Y. 1829), denying protection to a daily publication of market price quotations. But as Weil points out, concerning the latter case, such decisions are "sustainable on the ground of lack of originality." Weil, *op. cit. supra*, at 226,

in the form. But, by hypothesis, our horror monster make-ups meet that test, for they survive long enough to be copied by photography. It may also, perhaps, be argued that ephemeral works, because of their rapid mortality, are intrinsically incapable of promoting the progress of human knowledge, and are therefore beyond the constitutional scope of American copyright protection.⁸ But the premise of such an argument does not withstand analysis. Jonah's gourd, which came up in a night and perished in a night, still managed, in the brief course of its existence, to teach Jonah and all mankind an imperishable lesson.⁹ Short-lived creations, we may conclude, can impart knowledge quite as effectively as permanent ones. The ephemeral character of the horror monster make-ups, therefore, would not deprive them of copyrightability.

Since both the make-up artist and the photographer work for Universal as employees for hire, Universal is the author, in the eyes of our Copyright Law, of the resulting product of their combined efforts.¹⁰ Consequently, Universal is just as much the creator of these monsters as cartoonists are the creators of the figures in their comic strips. Accordingly, the motion picture company should have the same broad protection for its photographs of such works as cartoonists have for their cartoon figures.

But how far may we carry this principle? Where do we stop, and why? If a theatrical make-up, embodied in a copyrighted photograph, is subject to collateral protection of this order, may the designers of high-fashion coiffures, on like logic, protect their original creations by photographing them and copyrighting the photographs? We cannot urge a valid distinction here based on the absence, from the fashionable hair-sets, of the kind of emotive force which produces a reaction of "horror" in the viewers of the theatrical make-ups, or of "humor" in the readers of cartoons. One has only to observe what passes for a coiffure with the avant-garde girls of the beatnik set to realize that "the Charles Addams hair-do" (so to name it) bids fair to become "the wave of the future" (in several senses, not excluding the Pickwickian).

It may, perhaps, be suggested that we can cut this Gordian knot by asserting that the coiffures, unlike the quasi-sculptured horror monsters, are not, even conceivably, independently copyrightable as "works of art." They are merely the products of skill in a trade. But a cloud of literary witnesses has testified, for centuries, to the fact that a lady's make-up is "art." Thus "rare Ben Jonson":¹¹

8. U.S. Constitution, Art. I, §8, cl. 8. And see *Clayton v. Stone*, *supra* note 7.

9. Jonah, 4, *passim*.

10. 17 U.S.C. §26.

11. *Epicene*, Act I (emphasis added).

"Still to be powdered, still perfumed:
 Lady, it is to be presumed,
 Though *Art's* hid causes are not found,
 All is not sweet, all is not sound."

Or, in a more gracious vein, W. S. Gilbert:¹²

"Paint the pretty face—
 Die the coral lip—
 Emphasize the grace
 Of her ladyship!
Art and nature, thus allied
 Go to make a pretty bride."

It will not do to sweep away this difficulty by saying that what was "art" for Jonson and Gilbert is not "art" for us of the copyright bar: Humpty-Dumpty could make a word mean "just what I choose it to mean—neither more nor less," but lawyers have to use words with more sense of responsibility to their hearers than that. If we refine the meanings of the terms we use, we must at least have a reason for doing so. We have such a reason here; there is a critical distinction to be drawn between the photographed product of the hairdresser's skill and the photographed creation of a theatrical make-up artist. In the case of the horror monster, the make-up is created as the outward form of the particular imagined creature depicted in the photograph; but in the case of the fancy hair-do of our hypothesis, the make-up is not similarly intended to be applied solely to the particular photographed lady. In the former case, the make-up is created for the sake of the picture, and what is protected by copyright is the *expression* of an artist—"this is how I conceive the appearance of this particular imaginary ghoul or werewolf." In the latter case, however, the picture is created for the sake of the make-up, and what the copyright seeks (improperly) to protect is an *idea*—"this is a good, or interesting, way for any lady to dress her hair." The distinction so drawn may well prove helpful in resolving many aspects of the familiar modern problem of distinguishing designs which are essentially "ideas," intended for repeated and practically useful application in a skilled trade, from designs which are imaginative expressions created for their own sakes, but which are found to be, incidentally, subject to one or more practical uses.¹³

12. The Mikado, Act II (emphasis added).

13. Cf., e.g., *Mazer v. Stein*, 347 U.S. 201 (1954); *Vacheron & Constantin-LeCoultre Watches, Inc. v. Benrus Watch Co., Inc.*, 260 F.2d 637, 642 (2d Cir. 1958); Report of the Register of Copyrights on the General Revision of the Copyright Law, House Committee Print, 87th Congress, 1st Session, at pp. 12-15 (1961).

Looking back at the course by which our imaginary argument has reached this point, however, is it not striking to observe how much both sides have relied on the old poetic device of metaphor? The horror monsters' make-ups, we have said, are *like* cartoons—*like* clay sculptures—and *like* fashionable coiffures. And, finally, we have compared both the make-ups and the coiffures to useful designs. We seem to be illustrating, in the field of copyright lawyering, the truth of Robert Frost's suggestion that "all thinking . . . is metaphorical."¹⁴ If so, we must also bear in mind his warning about this kind of thinking:¹⁵

"What I am pointing out is that unless you are at home in the metaphor, unless you have had your proper poetical education in the metaphor, you are not safe anywhere. Because you are not at ease with figurative values: You don't know the metaphor in its strength and its weakness. You don't know how far you may expect to ride it and when it may break down with you . . .

"All metaphor breaks down somewhere. That is the beauty of it. It is touch and go with the metaphor, and unless you have lived with it long enough you don't know when it is going. You don't know how much you can get out of it and when it will cease to yield. It is a very living thing. It is as life itself."

It is not the writer's purpose here to urge that all lawyers and judges should be poets (though the idea has much to commend it). But we certainly may and should profit by observing the poet's caution in using this mode of thought. By setting up opposing sets of "metaphors," we have tried to do so here. We can see, from their conflict, that none of them wholly disposes of our problem. They each come more or less close; but none of them so exactly fits the case before us as to leave our minds wholly at rest. As already noted, what we're really trying to do here, behind the screen of all our precedential metaphors, is to trace a segment of the line that separates "ideas" from "expressions"—more particularly, that part of the line which divides the product of mere skill in a trade from a "work of art."

The statute gives us some aid in this matter by referring to some of the more universally accepted forms or categories of art explicitly: books, maps, dramas, music, motion pictures, photographs, etc.¹⁶ But the inclusion of a

14. Robert Frost, "Education by Poetry," which first appeared in *Amherst Graduates' Quarterly*, and is here quoted as reprinted in Greenberg & Hepburn, *Robert Frost: An Introduction*, 79, 80 (Holt, Rinehart and Winston, 1961). Copyright 1931 by Robert Frost. Reprinted by permission of the Author and Holt, Rinehart and Winston, Inc.

15. *Id.*, 82-83.

16. 17 U.S.C. §5.

particular work in one or more of these categories is not always free of doubt, and in any case the protection which the statute affords is broader than these categories.¹⁷ It is in the penumbra of arguably uncopyrightable pictorial or three-dimensional "works of art," not otherwise categorized by the statute, that the question of skill vs. art presses.

The distinction between skill and art is easier to apprehend by intuition than it is to define. When we read Mr. Frost's poetry, we feel, somehow, that we have met Mr. Frost. But when we see a stylish coiffure on a lady's head, we may admire the lady, but we certainly do *not* feel that we have met her hairdresser. Art is, we may generally conclude, in some sense revelatory (however dimly) of an artist's personality (however colorless); but a tradesman's skill is not similarly revelatory of the personality of the tradesman. Having said this, we must also say that it does not help us lawyers much: how is a court to apply such a distinction? When do we call a designer of glassware a mere tradesman and when do we hail him as a true artist like Sidney Waugh? We can well sympathize with Justice Holmes's dictum in *Bleistein v. Donaldson Lithographing Co.*¹⁸

"It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations [or of *any* work of art], outside of the narrowest and most obvious limits."

However, it is one thing to judge the *worth* of a piece of art; it is another thing to judge whether it is "art" at all. The latter question may be equally dangerous for judges to try to solve; but if the presence of art, however humble, is essential to the validity of a copyright in a new, or arguably unprotectible, form of pictorial or three-dimensional creation, *somebody* has to take the risk. Holmes himself seems, in fact, to have done so in the *Bleistein* case, for he there felt obliged to declare:¹⁹

"... The [artist's] copy [of life] is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it *something irreducible*, which is one man's alone. *That something* he may copyright unless there is a restriction in the words of the act." (Emphasis added.)

17. 17 U.S.C. §4, and cf. the concluding paragraph of 17 U.S.C. §5. Essentially, however, our problem centers on the term "work of art" in subdivisions (g) and (h) of §5, which is conveniently indefinite in scope.

18. 188 U.S. 239, 251 (1903).

19. *Id.* at 250.

But are our judges *capable* of knowing whether or not "that something" is there? How is its presence to be known? In *Bleistein*, Holmes used "the interest of any public" as the test, and declared that such interest was proved "by the desire to reproduce them [the artistic works in question] without regard to the plaintiffs' rights."²⁰ The trouble with this becomes apparent when we summarize his argument: (1) A copyright for a pictorial creation may be obtained if the pictorial creation is art. (2) It is art if it commands the interest of *any* public. (3) The interest of *a* public is proved by the fact that one person is willing to take the legal risk of reproducing the pictorial creation without regard to the creator's rights. (4) Those rights exist under the copyright in the pictorial creation. (5) *or* (1) A copyright for the pictorial creation may be obtained if the pictorial creation is art—and so back around the wheel again, for as long as we may wish to take the ride.

But despite the obvious circularity of Holmes's reasoning, one important idea emerges: the necessary presence of "art" in an arguably uncopyrightable creation of this kind is a matter *subject to proof by evidence*. This suggests that we ought to treat it as a question of fact.²¹ And this, in turn, means that the task too dangerous for judges to attempt would, in some cases at least, be shifted to juries. But if we had justifiable qualms about a judge's fitness for such a task, with how much more doubt and anguish will we confront the horrid thought that this question should be decided by twelve stolid citizens chosen from among their fellows in the manner that juries are chosen!

Unfortunately, no matter how we may try to duck or dodge the point, we shall find that there is no way of determining, in any case not clearly covered by the statute, whether a particular pictorial or three-dimensional creation is the product of art, as opposed to mere skill, save by its capacity to produce in us some recognition of a creator's personality inherent in the created work. We do not (at least not yet) recognize the coiffeur in the lady's hair-do. But, in submission, we seem to sense *a* creator's personality in a horror monster make-up. If you doubt this, ask any ten people, chosen at random, to name the role that made Boris Karloff famous. Chances are that almost all of them will answer, "Frankenstein." (Wouldn't you?) Only the very acute will answer (correctly), "*Frankenstein's monster*." This confusion between the created monster and Dr. Frankenstein, his fictional creator, evidences, in submission, how completely *a* creator's personality was felt, in this instance, to infuse the created object.²²

20. *Id.* at 252.

21. Compare the treatment given to the not dissimilar problem of "invention" as opposed to "mere mechanical skill" in patent cases. E.g., *Thomson Spot Welder Co. v. Ford Motor Co.*, 265 U.S. 445 (1924); *Keyes v. Grant*, 118 U.S. 25 (1886).

22. The difference here suggested between "art" and "skill" is that a work of art suggests, to the viewer, the personality of *a* creator, not (necessarily) of its *real* creator.

It may, perhaps, be argued that "Frankenstein" is a special case, attributable to the publicity attending the "Frankenstein" pictures rather than to any natural confusion in the public mind. If so, only a judge's or jury's *intuitive* perceptions can solve our problem. This is not necessarily cause for regret or alarm. How else, save by intuition, do judges or juries determine such seemingly insoluble problems as the compensable value of pain? Our common law tradition would be a poor thing indeed if our metaphorical use of precedents to solve novel problems were not, at some point, illuminated by, and subjected to, an intuitive, common sense determination by the community of the right—the fair—answers to such problems. Indeed (and oddly enough), that seems to be just what juries are for in our legal system. Wisely or not, it is they who are expected to supply (but only in the particular case) the intuitive answers of a cross-section of the community to those ultimate disputed questions of life which legal logic cannot be trusted to supply in the form of rules for all cases in general. If we accept this basic premise, then the "horrid thought" will not seem so horrid after all.

And there is some balm in Gilead for those who prefer to see judges decide the point rather than juries: since most copyright cases involve an application for a preliminary injunction, the initial job of fact-finding will have to be done by judges. But let's not allow this happenstance to confuse us. The essential point is that when and if a judge *or* a jury shall decide that a particular creation (like a horror monster make-up) is a "work of art,"²³ rather than of mere skill, he (or they) will be determining a fact, not laying down a law.²⁴

New forms of art cannot be defined and limited in advance by legal rules. Art changes ever, grows ever, by its own self-discovered principles. Its presence in any created work is a living fact. When that presence is recog-

It is thus not quite the same thing as the problem of "secondary meaning," familiar to trademark lawyers: that of determining whether a particular mark suggests, to the public, a *particular* manufacturer or distributor of the product to which it is attached. Moreover, the kind of inchoate "secondary meaning" we're after here flows from the inherent nature of the work, and is not the product of investment or advertising.

23. 17 U.S.C. §5(g) and (h).

24. *Mazer v. Stein*, *supra* note 13, *aff'g Stein v. Mazer*, 204 F.2d 472 (4th Cir. 1953), *rev'g* 111 F. Supp. 359 (D. Md. 1953) is not to the contrary. The question there presented was not whether or not the statuettes involved were works of "art," but whether their utilitarian use as lamp bases took them out of the scope of protection of the copyright statute and into the field of "designs" protected by the Patent Law. The error of the district court lay in supposing that the fact that protection for the lamp bases might be sought under the design patent law necessarily precluded protection of the statuettes by the Copyright Act—a proposition of law with which the Supreme Court was not in accord: 347 U.S. at 217-218.

nized in a new form with sufficient universality for the legislature to expand its statutory categories to include that new form explicitly in the coverage of the copyright statute, the fact has ceased to be debatable. It then becomes a mere rule of law to treat works that clearly fall in that category as works of art. But until then, in any doubtful case, the question should be regarded as one of fact. It is so, in submission, that the law ought to deal with it.
