BROTHERS IN LAW

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At last year's Art Basel Miami Beach, we learned an important lesson: In the game of conceptual art, it pays to listen to the dealer's pitch. This point was brought home to us at Jeffrey's booth, where the dealer was exhibiting Fair Ball, a pale green baseball resting on a simple plywood plinth. Jeffrey and his rookie artist, Barnaby "Babe" Woof, wanted to know if the work could be copyrighted, since they planned to make millions by selling thousands of balls. Or was it thousands selling millions of balls?

Because of the short shrift copyright law gives to contemporary art, we thought their plans wouldn't fly. On the one hand, the law protects original works that demonstrate even a slight amount of originality. According to the Supreme Court in a case that denied copyright protection to a telephone directory, "The vast majority of works make the grade quite easily, as they possess some creative spark." On the other hand, we questioned whether Fair Ball met even this low standard.

The dealer was indignant, insisting that Babe's work was a commentary on the leisure class's mindless flocking to Miami and that its color referred to the huge sums of money spent by big-league collectors. The catch, we explained, is that the law distinguishes between ideas, which no one can copyright, and expressions of ideas, which are copyrightable if they are original. The law's intent is to encourage people to make original works without unreasonably restricting those who want to build on the creations of others.

In our case, we feared that the expression of the artist's idea—a green ball—was not sufficiently original to be copyrightable. Similarly, an abstract piece, such as Kazimir Malevich's *White on White*, 1918, a monochromatic white canvas, might not be copyrightable, even though the idea behind it—absolute purity of form and color—is creative. Minimalist art often fails the law's idea/expression test, since typically it is

the concept, rather than the creation, that is original.

American courts routinely deny copyright to simple shapes and colors. For instance, in the 1958 decision Bailie v. Fisher, the U.S. Court of Appeals for the District of Columbia denied copyright protection to a cardboard star that had been devised by two artists who considered it a true work of art. Although they sought to register only the star shape, it was actually part of a larger device: The star had a circular center showing the photograph of an entertainer. A transparent phonograph record was superimposed over the photograph and played the pictured person's voice.

In a 1985 case, Arthur v. American Broadcasting Companies**,** Inc., an artist claimed that abc's logo showing the Olympics' interlocking rings imposed over the letters A, B and C was copied from images he had sent to the broadcaster. The court sitting in the Southern District of New York dismissed his claim on the grounds that conjoined circles are noncopyrightable ideas: "These bare outlines of five interlocking rings, the upper three of which have been modified to a lower case A, B and C, contain no more than the bare idea or concept of superimposing the two logos." The court also noted that the International Olympic Committee has "exclusive rights to the interlocking rings."

Artists may nonetheless copyright geometric shapes that are combined in a unique fashion. In Runstadler Studios, Inc. v. MCM Ltd. Partnership, the District Court for the Northern District of Illinois held in 1991 that *Spiral Motion*, which Runstadler Studios built of 39 glass rectangles arranged in a spiral, qualified as an original work that could be legally protected: "The choice of location, orientation and dimensions of the glass panes, and the degree of arc of the spiral, show far more than a trivial amount of intellectual labor and artistic expression."

"Is the sculpture less copyrightable because it can be used as an ordinary ball?" Jeffrey asked smartly.

The answer is yes. If a court viewed the sculpture as a useful article, it would likely grant copyright protection only to the nonuseful elements of the design. This occurred in OddzOn Products, Inc. v. Oman, a 1991 decision in which the D.C. Circuit Court upheld the U.S. Copyright Office's refusal to copyright a soft-sculpture ball called the Koosh. The court classified the ball as a useful article and determined that its artistic feature—its tactile quality—could not exist independently from its utilitarian aspects, so the ball itself was ineligible for copyright.

In our view, the green ball would have had a better chance of copyright protection if the artist had added some further expression of creativity. In a famous 1992 U.S. Court of Appeals decision, Atari Games Corp. v. Oman, Judge (later Supreme Court Justice) Ruth Bader Ginsburg reversed a lower court's refusal to require copyright registration of the early video game Breakout, which involved a virtual paddle, ball and wall designed of simple, colored geometric shapes. Although Judge Ginsburg faulted the copyright

office's conclusions, she did seem to accept its position that if it were to examine "a painting consisting entirely of rectangles and find it copyrightable, it is important to understand that this decision would be based on creative elements such as depth, perspective, shading, texture of brushstroke, et cetera and not on the geometric shapes per se" and that "recalling the creativity of the work of Mondrian and Malevich, . . . the arrangement itself may be indicative of authorship."

We observed that, even if Babe managed to register a copyright for Fair Ball, he would have difficulty right off the bat preventing others from making similar works, because his copyright would be very "thin," existing only in the use of the particular shade of green applied to the ball.

According to the intellectual property attorney David S. Korzenik, of Miller Korzenik Sommers LLP, in New York City, "While minimalist art may well receive minimalist protection, the concept of copyrightability was never intended to double as a definition of art."

Babe, who had been nervously pacing the booth, suddenly spat out his wad of chewing tobacco, scooped up Fair Ball and sidearmed it to Jeffrey. "If you ask me," he griped, "all this legal gibberish is just an excuse for judges to deny protection to art that they don't like or can't understand."

He wasn't entirely out in left field. Although judges are not supposed to decide what is art and what merits protection (see the May 2006 Brothers in Law column), aesthetic prejudices inevitably play a role in their decision making. Contrast, for example, the 1976 Second Circuit case L. Batlin & Son**,** Inc. v. Snyder with the 1959 Southern District of New York case Alva Studios, Inc. v. Winninger. In the former, the court refused to protect a plastic copy of a cast-iron piggy bank in the public domain on the grounds that the plastic version showed only trivial variations from the original. In the latter case, involving a copy of Rodin's famous *Hand of God*, the court found that an exact copy of the Rodin work satisfied copyright's originality standard even though the only distinguishable difference was in size. The court did, however, note that the work must be "original in the sense that the author has created it by his own skill, labor and judgment without directly copying or evasively imitating the work of another."

We advised Jeffrey and Babe to abandon their plans for Fair Ball, but, as it happened, our concerns were baseless. The dealer turned out to be a savvy marketer, and by the end of Art Basel he had hit a home run—selling Fair Ball, and the concept behind it, to a Scandinavian design chain for a mint.

As the lawyer and art consultant Virginia Rutledge points out, "Art and copyright are different games. A thin copyright isn't worth much, but some highly original art has been made out of very minimal gestures. The value of Duchamp's *Fountain* has nothing to do with its copyright."

We're keeping our day jobs. Clearly, we'd strike out as art dealers.

"The Shape of Things" originally appeared in the December 2008 issue of Art+Auction.