

Court of Venice

Division specialized in Business matters

Docket Number 5668/2015 – Judge Luca Boccuni

DEFENSIVE BRIEF

On Behalf of

Mr Samson Kambalu (hereinafter also the “Artists”) resident in London Londra, represented and defended, by a special power of attorney attached to this brief (Att. A), by the Attorney at law Mr Paolo De Santis of the Milan Bar and domiciled for the current proceeding at the office of Mrs Marianna De’ Giudici in Venice Santa Croce ...

Third jointed in the proceeding

Against

Mr Gianfranco Sanguinetti ... represented by Mr Gianfranco Giovannelli, Mr Alberto Pojaghi and Mr Antonio Gennari (hereinafter, “Sanguinetti” or the “Plaintiff”)

Plaintiff

In the proceeding against

FONDAZIONE LA BIENNALE DI VENEZIA (hereinafter the “Foundation Fondazione” or the “Defendant”), represented and defended by Mr Massimo Sterpi, Mrs Angela Saltarelli, Mrs Debora Rossi

Defendant

INTRODUCTION

1. With a complaint dated July 7, 2015, the Plaintiff sued the Foundation affirming the following:

- Mr Sanguinetti is a famous Italian artist, member of a Movement called International Situationism (“ Situationist Movement”), which was born in Italy in 1957;
- Situationist Movement is founded mainly on scandal, on détournement, identity usurpation, joke, besides anonymous collective art opposed to institutional art, which is subject to commercial practices. Such principles were sustained by Guy Debord, Asger Jorn, Giuseppe Pinot-Gallizio, besides the Plaintiff himself, who played an important role in the Movement;
- In October 2013, the Plaintiff appointed Christie’s to sell his situationist archives (hereinafter also “Situationist Archive”), including texts, documents, photographs, drawings and letters exchanged between Mr Sanguinetti and Mr Debord and others, that is a mix of materials which were “donated” to him or provided by third parties, as Situationists were used to;
- Plaintiff’s Situationist Archive was then sold for the considerable amount of euro 650,000 in 2013 to the Beinecke Library Rare Book & Manuscript Library at Yale University (herereinafter also “Beinecke Library”); such sale did not transfer Plaintiff’s copyright;
- On May 7, 2015 the Plaintiff was informed by Kevin Repp, Beinecke Library’s curator (doc. 23 Ricorrente), that at the *pre-ouverture* of Venice, which started from May 5, 2015 there was an installation called “Sanguinetti Breakout Area” where Mr Kambalu, a Malawi artist, displayed around 3,000 photographs

portraying material contained in Sanguinetti's Situationist Archive, with the express information that it dealt with all documents coming from such Archive, today at the Beinecke Library;

- in such installation there was a warning which specified that "*the Photographs can be handled, photographed and shared online*" (docc. 25-26 Plaintiff).
- the Plaintiff, claimed to the Foundation through Mr Giovannelli that the exhibition infringed his rights, (doc. 31 Plaintiff), immediately claiming an infringement of his privacy rights and afterwards – after a reply of the Foundation's attorneys in this regard – a copyright infringement;
- after an exchange of letters between the parties (doc. 32 Plaintiff) and between the parties' lawyers (docc. 36-36-37 Plaintiff), Plaintiff sued the Foundation requesting to this Court to accept the following conclusions:

"The honourable Court is requested, by the issuance of a decree ex parte to be confirmed by order at the subsequent hearing under Article 669 sexies, paragraph 2 of the Code of Civil Procedure or, alternatively, by order and upon hearing the parties under Article 669 sexies, paragraph 1 of the Code of Civil Procedure, dismissing any claims, pleas and arguments to the contrary and subject to all necessary and appropriate declaratory judgements, to thus decide:

1) To inhibit the display of the installation entitled "Sanguinetti

Breakout Area" by the Venice Biennale Foundation as part of the 56th International Art Exhibition named "All the worlds future", and any other use of the material exhibited in that installation and of any material that causes damage to the Plaintiff's copyrights as described in the documents;

2) To establish a penalty for each subsequent violation found or for delay in carrying out the order, of no less than 5,000.00 euros for each violation and 20,000.00 euros for each day of delay;

3) In any case, to condemn the Defendant to reimburse the expenses and professional fees for the lawsuit."

2. The Judge, deeming better to decide after the hearing, scheduled an hearing on September 16, 2015, giving the term of August 15, 2015 to serve the writ to the Foundation, which can appear in the proceeding until August 31, 2015.
3. The Foundation filed a responsive brief on August 28, 2015 firmly rejecting the Plaintiff's claims and requesting to accept the following conclusions:

Procedurally:

- *Preliminarily, to declare the Defendant's lack of legal standing;*
- *On a subsidiary basis, that the joinder of Mr Kambalu shall be considered necessary pursuant to article of 102 of the Italian Code of Civil Proceeding;*
- *In further alternative, that an order be issued – at the request of the current Defendant – requiring the appearance in the proceedings of the Artist Kambalu pursuant to art. 106 of the Italian Code of Civil*

Proceeding, as the action is common also to him or as the Foundation shall be held harmless by him;

- in extreme alternati, to order the joinder of Artist Kambalu in the proceedings pursuant to art. 107 of the Italian Code of Civil Proceeding, for obvious reasons or joinder of case and connection;

On the merits:

- to dismiss the Complaint because of the lack of *fumus boni iuris*;*
- on a subsidiary basis to dismiss the Complaint for total lack of the risk of irreparable damages;*
- in any event to dismiss the Complaints on the grounds of balancing the interests in favour to the Foundation.*

4. At the end of the hearing on September 16, 2015, the Judge reserved to pronounce. On September 21, 2015 the Judge admitting one of the Foundation's requests, ordered the Plaintiff to proceed with the joinder of Mr Kambalu to the proceeding. Such join was ordered since *"asking for an injunction inevitably affects the legal position of Samson Kambalu, and at least on his copyright to publish the work, having acknowledged that the effects of the injunction seem more severe as against the author of "Sanguinetti Breakout Area" when considering that the court injunction is directed against the Biennial, a foundation designed to provide the displayed artworks with international importance; observing that with regard to the requested orders and their effects, Samson Kambalu cannot be considered as a third party extraneous to the proceedings"*.

5. Provided that, with this responsive brief the Artist **SAMSON KAMBALU**, rejecting all Plaintiff's requests, exposes the following

FACT

6. Before demonstrating the total lack of legal basis of the Plaintiff's requests, it is necessary to underline the circumstances of the current proceedings, in order to offer to this honorable court the information and the necessary references in order to decide the current proceedings.
7. It seems appropriate to provide some preliminary considerations, in order to correctly contextualize the fact and overcome some misunderstandings in which the Court can incur by following the reconstruction of facts provided by the Plaintiff.

a. The Artist Kambalu e the culture of gift in Malawi: Nyau

8. The Artist Samson Kambalu is born and grown up in Malawi (see doc. 1 Foundation), a country where he graduated in art and ethnomusicology before specializing at Nottingham University and then with a PHD at Chelsea College of Art and Design, where he started exploring artistically the theme of the gift in a research project on psychogeography in William Blake and British Romantic art (doc. 1).
9. Starting from 2000, the Artist Kambalu - thanks to his appreciated and sophisticated artistic research- was included in many solo and group exhibitions, which took place in many important institutions and during cultural events (Barbican Centre, London; Tokyo

International Art Festival; Liverpool Biennial; Dakar Biennial; Museum of Modern Art, Warsaw, just to name a few). Similarly, he was awarded with several awards, prizes and grants (see Doc, 1, p. 2)

10. In 2014 the Artist won a Research Fellowship for a PHD at Yale University where he e such theme within his artistic research.
11. The Artist, in all his artworks, deals with the problems related to the **gift**, which characterizes both the culture and the economy of the country from which he comes from: Malawi. Such culture and economy of gift is called in Malawi with the term ‘Nyau’ (hereinafter “Nyau Culture”). Nyau Culture is based essentially on the gift, opposed to the market and commodity of resources. In Chewa tribe, to which the Artist belongs, free time and surplus resources do not constitute on sale goods, but rather they are used for activities, which are not subject to commercialization, such as festival, artistic practices, initiations, funerals. The distribution of gifts between the tribe members occurs, according to Chewa rituality, thanks to Nyau masks. The role of such masks is to distribute gifts – such as free time and surplus resources – through a play called “Gule Wamkulu” which literally means “The great play” or “The great dance”. Such dance is aimed to create “Situations”, where a gift is given, without creating a debt for the donee, who does not feel guilty.
12. Since 2006 *Gule Wamkulu* is classified by Unesco among the **ninety masterpieces of the oral intangible heritage of humanity** and around 400 masks are currently displayed at Chamare Museum in the district of Dezda Malawi (Doc. 2)

13. The invitation to the Artist to participate to the 56th International Esposition of Art curated by Mr Okwui Enwezor, is born thanks to the curator's interest towards the Artist's work after having assisted in Johannesburg to some artistic performances realized by the Artist, inspired to the Nyau Culture (doc. 3).

14. Nyau Culture constituted, then, the ideological basis to realize either the previously mentioned performances, and the installation called "Sanguinetti Breakout Area" (hereinafter also the "Work"), which opened on May 5, 2015 inside the Venice Biennial.

b. Nyau Culture in Malawi and its similarities with Situationism

15. The Artist in his artistic research at Yale approached to Situationism. for its **exceptional conceptual likeness** of the principles underlying this Movement compared to the Nyau Culture. Indeed, also Situationism as Nyau Culture is based on the gift and on the refusal of commodity of resources and their transmission through the creation of "Situations", from which the Movement itself took its name.

16. This constituted ideological basis of the challenged Work, as the Artist clarified in a well-structured declaration attached to this responsive brief (Doc. 4) "*Why Situationism? Why Sanguinetti Breakout Area? Nyau Because of the gift. This is the economy I grew up with in Malawi. Malawi is the poorest country on earth. I don't see that as a negative. Malawi remains prestation. The country is naturally placed to resist capital. We have Nyau in Malawi, a whole culture set around not the commodity but the gift. Philosophers and anthropologists, from Emerson to Derrida, have explored how*

difficult it is to give a gift. Nietzsche muses, in Thus Spake Zarathustra, that one needs tremendous skill to give a gift. Emerson has observed that the gift has an effect of leaving the donee feeling inferior, and that an unreciprocated gift breeds resentment. But what is a gift? It's more than a present for sure. Bataille regards the gift as 'excess' – the squandering of excess time and resources. To give a gift is to be like a God - the generous selfless sun above. For Bataille, that is why the gift giver has an air of superiority before the donee. Hyde observes how the gift has an effect of connecting people in contrast to the commodity that separates. The gift will make society breathe and create intimacies. A society that does not give a gift is a bloated society. In my tribe, the Chewa, excess time and resources are not sold, instead it is squandered in 'useless' activities, such as the arts, funerals, initiations etc – all led by Nyau masks. The role of the Nyau mask is thus to orchestrate the giving of gifts – the squandering of surplus time and wealth – in play –Gule Wamkulu, literally the 'Great Play'. Gule Wamkulu is really the creation of 'Situations', where a gift can be given, without incurring a debt. Play mitigates petty exchanges that the giving of gift may inspire in sober situations. At a Nyau festival, and in play, one might give and receive a gift without guilt or feeling indebted. In the frenzy of the Nyau festival one might give as generously as the sun – indifferently. Nyau is what took me to the Situationists. It appeared to me that this movement had understood the meaning of the gift. From the onset of the group's founding in 1957 it embraced an unrestricted economic

model in open defiance to prevailing capital and values of accumulation. The Situationists advocated the potlatch as the best way of approaching creativity and indeed life itself. Everything was to be given away indifferently, and they shared everything. They developed different playful creative devices in which the gift could be given without incurring a debt – detournment, psychogeography and unitary urbanism. The Situationists spoke in a language familiar to me growing up in the gift giving societies of Malawi such as my tribe the Chewa. My PhD since 2011 has explored how the problematic of the gift animates various aspects of my art practice. I have employed Situationism as a model to translate the gift giving aspects of my tribe into aspects of my contemporary art practice. Unitary Urbanism, where a city is designed for play rather than utility is akin to the Chewa Nyau City, mzinda; detournment is really the Chewa mdulo, a ritual transgression of canon and normal order to open up new perspectives and passions in life...but in my search for Situationist material within the university's library I came across Sanguinetti – first one photograph then a whole archive”.

17. Such Artist’s declaration (see doc. 4) continues explaining that while examining the Situationist Archive of the Plaintiff “*The controversial circumstances of how the work was purchased inspired my approach to the archive.*”. Indeed, by examining the Situationist Archive it seemed that “*Sanguinetti it appeared had capitulated in his later years. Here was one of the staunch advocates of the gift economy selling his papers at Christies to the highest bidder – Yale*

University's Beinecke Library. I set about detourning the archive. I still believe in the gift. I employed the Situationist detourning technique of the 'graffiti photo' (which consist in the practice of adding on the photographs some tags or images of extraneous elements PLEASE CONFIRM) to detourne not only Sanguinetti's papers, through creative play, but also the academic architecture of the Beinecke Library. Sanguinetti's papers were lifted up and photographed. I was not the first one to approach academia as a form of play and gift giving through this act of detournment. The Dutch philosopher Huizinga has traced the origin of the academy in play, citing the playful attitude of the Sophists towards knowledge as prototype.". And then the Artist explains how the Work was not conceived before the Enzewor's invitation to exhibit in Italy an artwork based on the concept of Nya, but that he decided to realized the Work in order to "take Sanguinetti's papers back to Italy. It was a conceptual taking of the archive back to Italy –an extension of the detourning of the archive that I had begun in the Beinecke Library. I had remembered how the French government had to intervene to stop Yale from taking Guy Debord's archive to America – before the University finally succeeded in acquiring Situationist material though one of the last members of Situationists International, Sanguinetti. Maybe Sanguinetti had needed the money. **Taking the archive back to Italy would be my gift to Sanguinetti**".

c. The Artist's Work "Sanguinetti Breakout Area"

18. In other terms, the Artist after discovering Sanguinetti's

inconsistency – who for years supported an economy and an artistic practice based on gift and on refusal of copyright, as property right, but then he sold his archives (which included also several materials created by other people who donated them to him) for an high price to the Beinecke Library - wanted thanks to his displayed Work at the Biennial to ironically show such ideological inconsistency, using to such purpose the same situationist practice, which Sanguinetti used for decades.

The Artist wanted to criticize using parody the betrayal of the Movement from one of the founder of the Situationist Movement not through an academic paper, but rather through a situationist artwork, which constituted a parody, but at the same time, a gift to the Plaintiff, taking back to Italy Sanguinetti's Situationist Archive. This is clear in the presentation text of the Artwork published in Biennial Catalogue "In December 201, the sale by Sanguinetti of his archives to the Beinecke Rare Book and Manuscript Library to Yale caused a furious letter of protest by Bill Brown, his ex-English translator and web host. Kambalu presents the letter of Brown to the Venice Biennial reproducing on a big wall thanks to a stencil, **as "gift" to the situationist project and as its extension.** Kambalu's wall will be displayed with some **"detourned" photographs** with some images and texts found in the Sanguinetti's collection, modified and re -contextualized thanks to the photo framing, the **destabilization** of their archival importance and the invite to a new kind of interaction with the past". We underline that in the same

catalogue of the Biennial, which was not written by Mr Kambalu, the word “gift” is put in quotes to underline the ironic paradox, typical of Situationism, which was perfectly understood by the Curator.

19. The Artist – using the détournement technique and the “graffiti photo” which are typical of Situationism – re-photographed the materials of Sanguinetti’s Situationist Archive together with his hand hanging them (doc. 5), and the such “detourned” materials were showed together to the furious letter of Mr Bill Brown after Sanguinetti’s sale of his archive (doc. 6), a letter in which Mr Brown accuses Sanguinetti to be a “liar”, a “sell-out” and where he said “*selling off your rat-eaten papers is certainly not something that a true revolutionary would do, especially if he is already rich enough to own vineyard and collections of art*” (see Doc. 6).

20. The Artist then installed on the walls, in some shrines such elaboration *detourned* of the documents belonging to the Situationist Archive of the Plaintiff, besides an anthology curated by the Artist including letters and images belonging to such Sanguinetti’s Situationist Archive. Such anthology is named “*Theses*” and on the cover there is the name of the Artist Kambalu (as curator of this anthology), the year of creation of the anthology i.e. 2015 and the name of the Plaintiff (doc. 7), to underline that all material was taken by the Artist from the Situationist Archive of Sanguinetti currently at Beinecke Library, besides to emphasize that the mere inclusion of such document in the Archive was – according to the Situationist Archive – a way for Sanguinetti to impliedly adhere to the

Situationist theses PLEASE CONFIRM

21. Thanks to such activity of situationist *détournement* of Sanguinetti's Situationist Archive, the Artist showed in a critical and satirical way:

- the Plaintiff's sale of his archive to Beinecke;
- the subject of the sale., that is the content of the Situationist Archive that Mr Sanguinetti had sold (reproducing almost the whole archive in the anthology "*Theses*");
- the price to which the Archive was sold;
- the livid criticism that the other members of the Situationist Movement expressed because of the sale, considered as a betrayal of the principles founding Situationism as it was not due to a real state of need of the seller.

In addition, as confirmed in the declaration of the Artist himself (see Doc. 4), he installed the Work at the Biennial using some aspect of a little known strategical board game, called "The Game of War", created by Guy Debord after disbanding the Internationale Situationniste. Inside this new war game, the Artist did not show only the materials coming from Sanguinetti, but even the furious and angry letter of Bill Brown after Sanguinetti's sale of his Archive to the Beinecke Library.

22. In addition, thanks to the use of materials included in the archive which were created by third parties, the Artist wanted to underline as the Archive - sold for an high price – was mainly constituted by materials which were donated by other Situationist.

23. Indeed, the ironical and satirical purpose of the Artist emerges also

from the title of the Work “Sanguinetti Breakout Area”, where the Artist used playfully and situationistically several meaning of the word “Breakout”: “Escape” (of Sanguinetti from the consistency of the Situationist principles); “counterattack” (of Kambalu towards Sanguinetti, with the same conceptual weapons of the Situationism); and finally, “Relax Area” to indicate to the playful spirit which characterized the Situationist practice and that the Artist realized, besides the fact that Kambalu was inspired by the situationist game created by Guy Debord, in installing the Work in the Biennial (see above)

24. Furthermore, by adhering to the Situationist principles of the gift, of collective sharing of art, of right of criticism, the Artist (i) used and elaborated – thanks to Situationist *détournement* – the preexisting materials and available to the public – i.e. Sanguinetti’s Situationist Archive now at the Beinecke Library and the open letter of Bill Brown (see Doc. 6) published on the Internet – (ii) decided to make his Work public and shareable in its turn, thanks to his invitation to the public to take pictures and share them on the internet for the purpose of sharing and criticizing the Work itself, updating the concept of diffusion of ideas without any limit – which constitute the conceptual basis of Situationism – in the social network and sharing economy era (doc. 8).

25. Such concepts were clearly explained in the Artist’s “*Sanguinetti Breakout Area is made up of disagreeing parties but within the heat of exchange and betrayals the Situationist gift could be passed on –*

from Guy Debord to Sanguinetti, from Sanguinetti to Bill Brown, from Bill Brown to Samson Kambalu, from Samson Kambalu to Venice and to the world” (see Doc. 4).

26. Moreover, the Artist concluded that his ironic and parodist playful approach to Sanguinetti’s Situationist Archive includes perfectly also the economy of gift, either the one that the Situationists wanted to give to the worlds, and also the Artist’s gift to Sanguinetti taking back the archive in Italy at the Biennial “*Thus although within the detournement of Sanguinetti’s archive there is critical satire and parody with respect to the apparent betrayal by Sanguinetti of the principles of Situationism he contributed to create and diffuse for many years, Sanguinetti Breakout Area is actually also an optimistic work that seeks to sustain ideas of living the real life through the economy of the gift which the Situationists advocated and which I certainly would like to support coming from prestation societies of Malawi” (see Doc. 4).*
27. To summarize, it appears clear beyond any reasonable doubt the the use of “*detourned*” materials of Sanguinetti’s Situationist Archive (which includes artworks and creations realized by third parties and not by Sanguinetti) and of Bill Brown’s letter, is not a comfortable way to use such materials and arrogate the paternity of them, avoiding any creative effort, but rather the result of an extremely complex and structured creative efforts in which, starting from the economy of gift (which inspired not only Nyau in Malawi, but even theories and practices of Situationism), the Artist studied the practice

of Situationism and (through the sale of Sanguinetti's Situationist Archive) its contradictions, then deciding to realize a parodist and critical work which is realized down to the smallest details (title, way of installation, detourned photography, graphic of the anthology which makes it resemble to a "bible", the invitation to share it on social network as in the bulletins of the International Situationniste, etc), using the Situationist practice, showing its contradictions, but updating it to the times of social network and sharing economy. Such creative effort and the Artist' will to create a debate and discussion around a very topical themes such as the gift economy and the sharing economy shall be protected by the fundamental principles of the right of free expression.

* * * * *

On the lack of Fumus boni Juris

d. Preliminarily, on the voidance or inadmissibility of the Plaintiff's act of joinder of the Artist to the action

28. Preliminarily, we underline that in the act of joinder of the Artist to action, which was ordered by this honorable Court, the Plaintiff did not extend or formulate any request towards the Artist (but he merely reported the same requests contained in the original Complaint, in which only the Foundation was the recipient of his requests). Therefore, such Plaintiff's act of joinder a part to the action shall be considered void, or on a subsidiary basis inadmissible, since it lacks completely the subject matter of Plaintiff's request towards Kambalu,

so infringing artt. 125, 156(2), 163 and/or 164 of the Italian Code of Civil Procedure.

e. On the general licence of the Situationist Movement to use its materials

29. As already exposed, the Work constitutes a punctual application either of the principles of the Nyau Culture - typical of the Artist's Country - and of Situationism: the gift, the creation of situations, the public sharing of art, **détournement**. Such last concept was defined starting from the first number of the magazine of the Situationist Movement "*International Situationiste*" as "*détournement d'éléments estétiques préfabriqués. Intégration de productions actuelles ou passées des arts dans une construction supérieure*" (reusing estetical prefabricated elements. Integration of current or past productions of art in a higher construction). (doc. 9). The Situationists Guy Debord and Gil Wolman wrote in their essay "Methods of détournement" "*In the period of civil war that we are living, the art and creation in general should be used only for partisan reasons, and then it is necessary to stop with any notion of private property in such areas. **Détournement is the free appropriation of someone else's works** Detournement means decontextualizing. Therefore, you are not limited to amend preexisting works or integrate several fragments of expired works in a new work: you can also alter the meaning of such fragementes in any way, leaving idiots to mantain quotation marks" (doc. 10).*

30. Given the above, the Foundation has already correctly underlined in

its responsive brief that “ *inviting third part to appropriate of your own works in order to overcome the concept of commodity of art and of the barriers to the diffusion of ideas, means legally speaking to offer to anyone a free and not exclusive licence to reproduce such works (according to the scheme to the public offering pursuant to art. 1336 of the Civil Code)*(see page 17 of the Foundation’s brief). According to art. 1336 of the Civil Code “offering to the public, when the offer contains all essential elements of the contract, can be considered as a proposal, except for it means otherwise with regard to circumstances and uses”.

Such public offer was proposed by Sanguinetti and by other members of Situationism also through the magazine “Internationale Situationiste” which starting from the third number of this magazine in 1959 and till the 12th and last number in 1969 stated that “*tous les textes publiés dans Internationale Situationniste peuvent être librement reproduits, traduits ou adaptés, même sans indication d’origine*” (“all texts published in Internationale Situationniste can be freely reproduced, translated and adapted also without the indication of the source). The paradox of this proceeding was also underlined by the press, quite surprised of his lawsuit. In an article published by Le Monde, the journalist affirms “*Après avoir prôné des années durant l’appropriation et la satire, il attaque un artiste qui pratique le détournement dans la droite lignée des situationnistes... L’arroseur n’aime pas être arrosé.* (N.d. After supporting for years appropriation and satire, he attacks

an artist which uses détournement in the same line of situationist...The sprinkler does not like to be watered.) (doc. 12).

31. The Artist then accepted such offer and acted as a licensee, legitimately reproducing the Plaintiff's works in a "detourned" way. In this regard, as already underlined by the Foundation (see pag. 20 Foundation's Brief) requesting a copyright licence is considered by situationist as "*a bourgeois act, therefore the Situationist deny such license to those who require it...but they do not challenge any appropriation if it occurs in a "pirate" or "revolutionary" way*".
32. Indeed, Situationists had always refused – or better despised – copyright. A clear example can be what the situationist Raoul Vaneigem said in one of his works "*as we insist in our **hostility towards the rules of property, also intellectual property, this text is not subject to copyright, as it can be reproduced wherever, also without mentioning the source***" (v. doc. 10 Anarchopedia).
33. Therefore, the Artist – who well knew - thanks to his studies on this matter – the express refusal to any copyright from the members of the Situationist Movement – had legitimately used the Plaintiff's Situationist Archive in order to (i) criticize in a parodist way Sanguinetti's betrayal of situationist through the sale instead of the gift of his situationist archives, besides to (ii) reaffirm the gift on commodification of artistic practices, as the gift is a concept which characterizes both Situationism and Nyau Culture.
34. In light of the above, as the Artist adhered to the public offer of a free license for reproducing and elaborating the situationist materials, the

Plaintiff cannot then deny his thesis and principles as needed.

35. To declare the freedom of expression and to invite the artists to practice it with no limits, cannot become a **trap** for who – in good faith – accepted such invitation.

e. On the lawfulness of parody and right of expression

36. In addition, the Artist's Work shall be considered lawful as it is a parodist Work, then it is the expression of the satire right and the right of expression protected by art. 21 of the Italian Constitution. The right of satire and parody constitute a non-codified copyright exception, which is recognized in the abovementioned disposition, besides in art. 33 of the Italian constitution on the freedom of art. is
37. Such copyright exception is recognized also under the European law according to art. 5 (3), lett K) of 01/29 Ce Directive, which allows member states to introduce copyright exception "*use for the purpose of caricature, parody or pastiche*". Such exception is impliedly included in the Italian Constitution and is constantly recognized by the caselaw (in this regard we make reference to the Foundation's Brief, which reports it, besides what is said further on), so that Italian legislator did not create an express provision on that.
38. As to Parody, the European Court of Justice in the decision C-201/2013 affirmed "*the essential characteristics of parody are, first, to evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humour or mockery*". The European Judge clarified that the notion of parody is not subject to any condition, then parody shall: neither show an original nature

different from the presence of some perceptible differences, nor being reasonably attributed to anyone different from the author of the original work or being focused on that work; finally, it shall not indicate the author of the original work.

In addition, in such decision the Court underlines that the fundamental value of such exception was to balance the intellectual property rights of the artists on one side, and the freedom of expression of the users of the protected materials, on the other side. In this regard, the Court of Justice “it is evident that parody constitutes an appropriate mean to express an opinion”.

- 39.** In this regard, as already explained, Italian case-law recognized parody as an autonomous work, which does not need of any consent from the moral or economic right holders (Naples Court, 15 February 2000, in *Giurisprudenza Napoletana* 2000, 184; Milan Court, 29 January 1996, in *Giurisprudenza Italiana* 1996, 1,2,749; Milan Court, 15 November 1995, in *Giurisprudenza Italiana* 1996, 1,2,749; Rome Court, 29 August 1978, in *Diritto d’Autore* 1979, 967).
- 40.** In light of such case-law principles, it is clear as the challenged Work constitutes a parodist work compared to the Sanguinetti’s one. Indeed, as already explained, the Work constitutes a satirical criticism to Sanguinetti’s work and of his inconsistency towards the artistic values that he had supported for a long time, but then betraying them, before with the sale (and not the gift) of his Situationist archive to the Beinecke Library and now with this current proceedings where the “sprinkler hates to be watered”. Indeed, in his complaint, Sanguinetti

– denying the situationist refusal towards the intellectual property rights and the universally mocking attitude of the Situationist Movement (which sustained the mockery and the complete freedom of expression through piracy acts) – requests to prohibit the prosecution of the display of the Work reaffirming his copyrights against the freedom of expression and of criticism. Hardly Mr Sanguinetti could contradict more: **the success of his complaint would be the failure of his artistic thoughts.**

41. Then, it derives that the Artist's Work constitute an autonomous work for the meaning and the purposes compared to the Plaintiff's one and the Artist was not obliged to ask any authorization to use the materials included in Sanguinetti's Situationist Archive.
42. Moreover, it is adequate to precise that the Work cannot be considered an appropriationist artwork (in any case considered lawful when the meaning of the final artwork is well different from the original one: see Milan Court, order issued on 13 July 2011, *Rivista di diritto industriale* 2011, 6, pag. 347 e ss; *Giacometti vs. Baldessari*), but essentially a parodist and critical work. Indeed, whereas in appropriation art – as in the abovementioned *Giacometti* case decided by the Milan Court – the new artwork differs from the original work “*to transmit a different artistic message*” (Milan Court, order issued on 13 July 2011, *Rivista di diritto industriale* 2011, 6, pag. 347 e ss; *Giacometti vs. Baldessari*; in **parody**, the parodist work is addressed towards the original work, from which it is different only because of “perceptible differences”. As to the

Work, it differs from the materials contained in the Plaintiff's Situationist Archive for the detourned element – absolutely perceptible – that is the Artist's hand hanging the materials of the Situationist Archive, besides for the context in which such materials are displayed in the installation *Sanguinetti Breakout Area* (see doc. 5)

43. To summarize, as the Foundation correctly pointed out, the Artist thanks to his Work **puts the Situationist Movement at the mirror**, realizing the “*détournement*” of a whole archive – the Plaintiff's one – lighting Sanguinetti's contradictions and then the Movement's contradictions. In this way the Artist wishes to underline the difference between what Sanguinetti conceptually advocated - free appropriation of someone else's works, refusal of intellectual property, and more generically of any property right, public sharing of knowledge – and what he did in practice, that is the sale for an high price of his archives.

In this way, the Artist legitimately uses his freedom of expression and criticism, in order to encourage a critical debate either on the theme of Situationism and on its members, and on the very current theme of the gift and sharing, on which both Situationism and Nyau Culture are based on. Such intention to stimulate a discussion on this cultural movement is very clear where the Artist declares that the Work can be freely reproduced and shared (see Doc. 8).

Such exercise of his constitutional right of freedom of expression and criticism (the European Court of Human Rights said that the freedom

of expression – when address to encourage a public debate on themes of public interest - prevails on the mere protection of intellectual property rights, see further on) is lawful and shall be protected. Plaintiff's request to prevent the prosecution of the exposition would constitute an illicit artistic censorship, besides being groundless under a legal point of view.

ON THE LACK OF PERICULUM IN MORA

44. Besides lacking of *fumus boni juris*, Plaintiff's requests lacks of any risk of imminent and irreparable damage that shall exist a precautionary proceeding. In this regard, the existence of *periculum in mora* shall be considered according to the leading case-law and doctrine, which the Plaintiff omitted to mention.

It is well known that the most current case law deems that *periculum in mora* cannot be presumed (*in re ipsa*), but rather, as Foundation had already demonstrated in his brief (see page 40 Foundation's brief) *periculum in mora* shall be proved from the Plaintiff according to the leading case law (Milan Court, Sez. Proprietà Industriale e Intellettuale, 15 giugno 2011, causa tra RING s.r.l. vs. AIRON s.r.l.).

45. That said, the Complainant has the burden of proving the existence of a risk of a serious and irreparable damage and he did not satisfy it. In fact, the alleged damage cannot possibly be created by the availability for Biennial's visitors to see the parodist Work and, consequently, from making the reproductions of the same and share them online, realizing a mere diffusion of Sanguinetti's Situationist Archive.

In addition, as already underlined by the Foundation (p. 42 of the

Foundation's brief), Biennial's visitors are without any doubt the best public to examine and differentiate the Artist's Work from Plaintiff's materials. The Artist has always diversified his Work from Sanguinetti's one and from the authors of the main part of the material contained in Plaintiff's Situationist Archive. Therefore, there is not any risk of confusion.

Likely, exposition visitors are able to understand the critical and parodist purpose of the Artist's Work, which is already clear in the presentation of the Work, which can be ready online for free and in the Biennial's catalogue.

The Work is then lawful for all aforesaid reasons and it cannot damage the Plaintiff.

46. Anyway, and in any case, there is another aspect that shall be considered, that is that the Plaintiff's request to stop the display of the Work has concretely lost relevance, as the Biennial will end on next November 22, 2015. With reference to the actuality of the risk, case law stated that *periculum in mora* shall exist not only when filing a complaint, but also during the proceeding (Ivrea Court, 12 ottobre 2005, in www.giurisprudenzapiemontese.it; (Naples Court 5.7.2002, RDI, 2003, 131). Even in the absurd hypothesis that the injunction was accepted, such injunction would be useless.
47. Finally, in the unlikely event, that the Work was considered unlawful, this would entail only that the Plaintiff had suffered some damages, which can be easily assessed by the Judge. Indeed, the damage can be assessed according to art. 158 of law 633/1941 on the basis of sulla

base “ *the fees that would be recognized if the infringer had asked the owner to use his right*”. That said, as the damage can be assessed, there is not any irreparable damage. This concept is confirmed also by caselaw that had recognized that a precautionary order “ *implies that both the requisite of *fumus boni juris* and *periculum in mora* exist; therefore if any of the requisite lacks, then the request cannot be accepted; therefore there is not any *periculum in mora* (which consists of the well-founded fear that during the time needed to enforce a right, this right is threatened by an imminent and irreparable prejudice) if the damage consists in the loss of a amount of money, which can be restored with an equivalent amount (Milan Court 28 febbraio 1996, in Orient. Giur. lav. 1996, I, 519).*

ON THE BALANCE OF INTERESTS

48. Finally, as underlined also by the Foundation, the prerequisite of the balance of interests constitute a third requirement, beside *fumus boni iuris* e al *periculum in mora*, to grant a precautionary order (see p. 44 Foundation’s brief).
49. Therefore, this honorable court - at the moment of choosing whether granting or not the precautionary measures – shall make a balance between the concurring interests: the Plaintiff’s copyright on one side, and the Artist’s freedom of expression.

In this regard, the fundamental decisions of the European Court of Human Rights in the case **Ashby Donald et autres c. France**, complaint n. 36769/08 and decision on 10 January 2013 and **Neij e Sunde Kolmisoppi c. Sweden**, complaint n. 40397/12 and decision

on 19 February 2013 decided that the protection of the freedom of expression shall **prevail** on the protection of copyright, when the freedom of expression wants to encourage a debate of public interest.

To this purpose, we had already demonstrated that the Artist's parodist Work is aimed to criticize and make a parody of what Sanguinetti did with the sale of his Situationist Archive, beside promoting a wider debate on the gift economy and on sharing economy, which were supported for decades by the Situationist Movement and that are today two topical issues in the era of social networks and sharing economy,

Therefore, striking a balance, the freedom of artistic expression of the Artist shall be considered as prevailing on the mere protection of Plaintiff's copyright.

50. Therefore, Plaintiff's request cannot be accepted for lack of all requirements of a precautionary proceedings: *fumus boni juris*, *periculum in mora*, besides after making a correct balance of all interests nonché dopo aver operato un corretto bilanciamento degli interessi in causa.

For all this reason, Mr Samson Kambalu, as represented, defended and domiciled, appears in the current proceedings and it confident in the acceptance of the following

CONCLUSIONS

Preliminarily:

- Considering that the Plaintiff in his act served to the Artist to join him to the action does not make any requests towards him and, then, such act shall be considered void, or at least, inadmissible for the reasons explained above;

On a subsidiary basis and in any case,

On the merits:

- dismiss the complaint for total lack of *fumus boni juris* and/or for total lack of *periculum in mora*;
- In any case, dismiss the complaint for the balance of interest in favour of Mr Samson Kambalu.

Documents

- a) Special Power of Attorney;
- b) Mediation Info Form;
- c) Act of joinder of Kambalu to the action;
- 1) Curriculum Vitae of Samson Kambalu;
- 2) Wikipedia Excerpts on “Nyau”;
- 3) Excerpt on the Stevenson gallery’s website;
- 4) Artist’s declaration and its Italian translation;
- 5) Photographs of the Artist’s exhibition;
- 6) Bill Brown’s letter to Sanguinetti;
- 7) Cover of the book “Theses”;
- 8) Dida of the Work;
- 9) Excerpt of Bulletin n°1 June 1958 of Internationale Situationniste;
- 10) Excerpt of Anarchopedia;

11) Excerpt of Bulletins n°3, 4, 5, 6, 7, 8, 9, 10, 11, 12 of
Internationale Situationniste;

12) Article of the Le Monde newspaper of 19 October 2015

Milan/Venice, 29 October 2015

Avv. Paolo De Santis