

## **FUMUS BONI JURIS**

### **(III) On freedom of display of the works**

40. As noted in terms of lack of legal standing of the Foundation, it is undisputed that the challenged Work has been created exclusively by the Artist Kambalu, without any intervention of the Foundation.

41. As the Foundation had no role in the alleged illegal reproduction and / or reworking of the Situationist Archive of the Plaintiff, we should determine whether the Foundation has committed some unlawful behavior by merely publicly displaying the alleged reproductions or "detourned" reworking made by the Artist Kambalu of some of Plaintiff's works within its own critical work / satirical work, being clear of the total absence of any commercial exploitation of the works of the Plaintiff by the Foundation (see above).

42. The answer is necessarily negative.

43. Among many copyrights reserving exclusive uses to the author of an artwork according to Copyright law (see Art . 12 and following, Law 633/1941 ), there is not therefore included the right of public display, as already explained above.

44. Then, once the work is out of the author's availability - and in this case one can hardly speak of unpublished works, as with the willing transfer of the same to the Beinecke Library then Sanguinetti made them available to the public, it is clear that none of the works of Sanguinetti's Situationist Archive may be considered unpublished – then they may legitimately be exposed by anyone.

45. Then the request to the Foundation, of not exhibiting works which reproduce Plaintiff's works (which are no longer unpublished) lacks of any legal basis.

### **(IV) On the attitude of the Situationist movement against the détournement and the general license of use of its own materials**

46. As already seen, Kambalu's Work is a critical and satirical application of the basic principles of Situationism, of which the Plaintiff was one of the ideologues and strong exponents (but then he betrayed them with the aforementioned sale to Beinecke Library).

47. It is therefore important to verify if, according to the logic of the Situationism, that Work is unlawful. It would be paradoxical if Situationists supported and encouraged for years the use, appropriation and the détournement of works by third parties - as well as of their own ones - and then suddenly file a lawsuit against those who accepted these suggestions and put into practice these theses ....

48. The issue is not only moral or ethical (preach one thing and then practice another), but strictly legal.

49. By inviting third parties to appropriate their own works in order to overcome the concept of art commercialization and barriers to the diffusion of ideas, legally speaking they offer everyone a free and non-exclusive license for the reproduction of the works themselves (according to the scheme of public offering pursuant to art. 1336 of the Italian Civil Code)

50. After making such offer - and Sanguinetti's writings (see below) are the best evidence of that - it is not possible to challenge someone to have adhered to it, usually through implied acceptance by using these works. Indeed, through the implied acceptance by use, the license has become valid and effective.

51. Now we examine how the proposal to license the Situationists' works was made to the public.

52. As already noted, the artistic strategies promoted by the Situationists consisted in the rejection of copyright, in the détournement of third parties' works and in mockery.

53. First of all, the Situationist Movement strenuously professed the rejection of all forms of copyright for the creation of "an art of subversion", as mentioned also by the Plaintiff ( see Complaint, p. 3).

54. Moreover, even the magazine " Internationale Situationniste" - the official organ of the Situationist Movement - denies any copyright on situationist works stating "*tous les textes publiés Situationist Internationale peuvent être librement reproduits, traduits ou adaptés, même sans indication d'origine*" (translator's note": all texts published in the International Situationniste may be freely reproduced, translated or adapted, even without reference to the source ") (Doc. 16).

55. As for the détournement, as explained by the same magazine "Internationale Situationniste " (see Doc. 16, p. 10), it consisted in reusing previous artistic elements in a new unity. The two fundamental elements of détournement are the loss of importance of any détourned independent element and, at the same time, the organization of another meaningful ensemble which confers on each element its new capacity.

56. More specifically, and coming to a fundamental aspect of this case, as briefly explained on the website Anarchopedia (Doc. 17) "**The détournement represents the Situationist denial of the intellectual property and it is the re-appropriation of discursive fragments of other authors and their reconversion, also in a deformed way, in other contexts of meaning.** (...) Debord and Wolman textually write in their essay "Methods of Détournement": "*During the civil war in which we are, art and creation in general should serve exclusively for partisan reasons, and that is needed to put an end to any notion of private property in these areas. **Détournement is the free appropriation of other people's creations.** Détournement is decontextualization. It goes without saying that anyone is not limited to correct existing works or integrate different pieces of expired*

*works in a new work: you can also alter the meaning of these fragments in any way, leaving idiots to their efforts in maintaining quotation marks".*

57. In few cases where the Situationists wanted to deny their "no copyright" principle, they did so for paradoxical purposes and, in any case, in such a way that did not prevent anyone from reproducing their works. In this regard, the exchange of correspondence between the Situationists - including Mr Sanguinetti and Feltrinelli (remembered by the Plaintiff's attorney in the letter of 26 May 2015: Doc. 18) - upon request of this publishing house to translate the magazine *Internazionale Situazionista* is emblematic. The Situationists's refusal did not derive, as Mr Sanguinetti clearly explains in such correspondence, from the denial of the "no-copyright" principle, but from a conflict against Giangiacomo Feltrinelli, since he was considered, as expressed in the correspondence, "bourgeois "and" Stalinist ". Here are some passages of a letter from Mr Sanguinetti to a Feltrinelli's agent, from which it is absolutely clear: "You talk against copyright and bourgeois usages - you, you policeman! But it was your publishing house which played, as usual, that bourgeois juridical game, asking for translation rights. (Doc. 18, p. 4).

58. And even more unequivocal in this regard could be considered the sentences contained in the public circular of the International Situationism where the Situationists, in answering to the Giangiacomo Feltrinelli's request of translation, have well-defined instructions, in accordance with the Situationist philosophy, for using situational works : the request of copyright license is considered by them a bourgeois act, therefore , the Situationists deny that license to those who require it , in this case the publishing house Feltrinelli , but do not challenge any appropriation when this occurs in a " pirate" or " revolutionary " way . Here are some passages of such correspondences *"It is your publishing house that has played, according to its custom, this bourgeois legal game, by asking us for the translation rights. And rightly we refuse them to you, because of everything you are. If our contempt is immaterial to you, [...], you should not have asked us for anything. Revolutionaries, on their part, have always been able to reproduce every SI (Internationale Situationniste, Editor's note) text they have wanted to, and we were never opposed in any way to the multiple pirate editions of our texts and our books in a good number of countries. But the firm of Feltrinelli is not even worthy of pirate editions"*... *"In any case, even if you ignored our refusal, you can be sure that we would not protest by any juridical and bourgeois route."*

59. It is precisely such reasoning on the disregard of copyright by the Situationists and the fact that they preferred the "pirate" use to the authorized ones to have been perfectly and impeccably implemented by the Artist in this Work.

60. The Work of Kambalu, just on the basis of the surrender to copyright expressed and preached by the Situationist movement, exasperates, in an intentionally provocative and satirical way, this concept by combining it with that of the "gift", of *détournement* and of the maximum flow of ideas. Indeed, in the presentation of the Work exhibited at the Venice Biennale (see Doc. 6) is explicitly explained the mission of conceptual destabilization of the Work, aimed to be a real performance of the Situationist philosophy. The presentation states "In December 2013, the sale by Sanguinetti of its records to the Beinecke Rare Book and Manuscript Library of Yale has caused a furious protest letter from Bill Brown, his former English translator and web host. Kambalu presents a Brown's letter at the Venice Biennale, reproducing it on a large mural made with the stencil, as a "gift" to the Situationist project and as its own extension. The Kambalu's wall will be accompanied by a series of photographs "altered" with images and texts found in the Sanguinetti's collection, modified and re-contextualized through the frame of the picture, the destabilization of their archival importance and the invite to new types of interaction with the past. "

61. The principles of the Situationists are indeed clearly respected - even by the artist with an invitation to the public to spread the "detourned" images on display, which are defined by the Artist in the exposed captions (v. Doc. 5) as " Sanguinetti's 'detourned' documents ", explicitly recalling the strategy of situationist "*détournement*" and replicating - thanks to the installation and later to the online reproduction by the viewers of the Work - the scheme of this method commonly referred to, as already described, "*the integration of current or past productions of the arts in a higher construction of the environment*" (Doc. 19).

62. Moreover, the fact that the documents on display are reproduced along with the hand – clearly visible - of the Artist of African origin (Doc. 20) adds “extraneous” elements to the objects portrayed in the photographs themselves (that is, the materials of Sanguinetti's Situationist Archive today sold to the Beinecke Library), highlighting the access of new non-Western cultures to the Situationist thought (remembering that the Situationist movement was especially a European and North-American movement) and it is another example of artistic representation of *détournement* and of its broader cultural implications.

63. From an artistic point of view, Kambalu's work is, therefore, a **philologically rigorous implementation** of Situationist thought, using all elements of the same thought: the rejection of copyright and of private property in general, the widest possible spread of thought and works and decontextualization ("*détournement*") of reproduced works, as extrapolated from their place of origin and re-proposed in another space and in another time. The fact that the materials have been photographed at the Beinecke Library is not all casual and is, indeed, an essential element to understand Kambalu's work. Indeed, as explained in the same description of the Work, the sale of

Sanguinetti's Situationist Archive at the Beinecke Library has been the subject of strong protests (considering that Mr Sanguinetti, after decades spent on criticizing the commercialization of art, did not donate his Situationist archive to some library or archive, but sold it at high price - 650,000 Euros (see Complaint, p. 6) - and even through the very bourgeois Christie's: the unsurprising critics of inconsistency (to say the less) were very numerous. Therefore, the Artist Kambalu has deliberately decided to join and deepen the criticism on the sale of Mr Sanguinetti's Situationist Archive at the Beinecke Library inside another situationist expression: namely, his Work exhibited at the Venice Biennale.

64. From the legal point of view, the situation is very consistent:

- Situationist exponents, among which the Complainant, invited all artists to make free use of any material or work of third parties, including the materials of the same Situationists, as demonstrated by the express invitation contained in the magazine / Bible of the movement, that is Internationale Situationniste;
- legally speaking, such invitation - direct or detoured – of Situationist materials is a public offer for a free and non-exclusive license to reproduce or elaborate such materials;
- thanks to his behavior (by the way strongly recommended by the Situationists, inviting to 'hack' their works without asking any "bourgeois" authorization - see correspondence with Feltrinelli mentioned above), i.e. by using the materials and reworking the Situationist material of Sanguinetti's Situationist Archive, the Artist Kambalu accepted this public offering, agreeing upon the above license;
- as a **valid license** exists, the Complainant has no element to challenge the detoured use of such materials.

**(V) On a subsidiary basis, on the lawfulness of satire and freedom of expression and criticism**

65. On a subsidiary basis, the Work of Kambalu would still be considered lawful in terms of the right of satire and freedom of expression and criticism.

66. With a refined conceptual operation, typical of the Situationist's style, the Artist has indeed **let the same Situationism mirror itself**- in person of one of its leading exponents, Mr Sanguinetti - reworking an entire archive and highlighting the contradiction between having supported the fight of commodification of art for decades and the freedom of copying and dissemination of ideas, only to commercialize the whole Situationist Archive of Mr Sanguinetti, selling it to 650,000 euro – through Christie's - to a Public Library. This contradiction is so obvious that taking pictures of what happened is the best and most sarcastic satire to the contradictions of Sanguinetti's behavior. Moreover, the title of the work is "Sanguinetti's Breakout Area" and the meaning of the word "breakout" is both a "counterattack" (of Kambalu to Sanguinetti, with the same means of the

Situationism) and an "escape / avoidance" ( of Sanguinetti from the consistency of the uncommercial Situationist thought).

67. In this regard, we recall what the Complainant has already highlighted, i.e. the fact that the situationist practices have used different means, from cinema, to television, to artistic actions always based "on **scandal** and détournement, the correction or the fraud of identity, the imposture and **mockery**"(see Complaint, p. 3), all elements which characterize- intentionally, given the critical/ parodist purpose- Kambalu's Work which assumes in this circumstance **the features of a true Situationist Work** or, more generally, of a *satirical critic through sarcasm*.

68. Indeed, what is better than to criticize and make fun in a satirical way on Sanguinetti's inconsistency and on his betrayal of the principles of anti-mercantilist Situationism that simply show to the public that Sanguinetti's **whole Situationist Archive** (which, however, also contains many materials which do not belong to Sanguinetti but to other authors) is at the Beinecke Library to which he himself has sold it for more than 650,000 Euros? For this purpose the Artist Kambalu uses:

(i) the countless photographs taken by the artist Kambalu to the Situationist Archive of Mr Sanguinetti at the Beinecke Library ("altered / detoured" by the presence Kambalu's hand in the photograph itself, to represent the "signature" of its intervention); and (ii) the anthology "Theses" - curated by the artist Kambalu, as indicated on the front of the same, showing both the name of Samson Kambalu that the date of 2015 (see Doc. 3) - that collects texts and materials of Mr Sanguinetti - or at least part of Sanguinetti's Situationist Archive - found at the Beinecke Library in order to demonstrate that Mr Sanguinetti has sold his **entire** Situationist Archive (although it contained works made by third parties) and not few scattered pieces; as well as,

(iii) the open letter from Mr. Bill Brown to Mr Sanguinetti, in order to demonstrate what was the reaction of other members of the Situationism (including, of course, Mr. Brown) to that sale, considered as a betrayal to the anti-mercantilist philosophy of the Situationism (then the betrayal was perpetrated again by Mr Sanguinetti through this - and really paradoxical - proceedings in which he accuses the Artist Kambalu - but he do not sue him ... - to have done what Sanguinetti has always suggested to all artists to do ....).

69. The exhibited Work, with reference to the (alleged) works of the Plaintiffs for which he claims copyright infringement, has a critical and satirical nature - using sarcasm - against Mr. Sanguinetti and his "escape / avoidance" ("Breakout") from the same principles sustained by Sanguinetti himself, escape realized through the sale of its Situationist Archive to the Beinecke Library. For the purposes of satire and sarcasm, and to make clear what his goal was, the Artist Kambalu expressly appointed Mr Sanguinetti (and his escape / avoidance - "Breakout") in the title of the Work , he

reproduced the open letter of Mr Bill Brown which criticized the sale to the Beinecke Library and then exposed photographs of the largest number of materials that are part of Sanguinetti's Situationist Archive today contained in the Beinecke Library, which was also expressly named in the captions of the Work (see Doc. 5). So, not a free appropriation of someone else's works, **but a precise criticism and satire to the contradictions in the behavior of Mr Sanguinetti, showing where his anti-capitalist revolutionary works went - paid at such high price - and what other members of the Situationism thought of that.**

70. The **provocative** and **satirical** content of Kambalu's Work, was also **recognized** by Plaintiff's attorney, that in the letter of 14 May 2015 states: "To say that the Work is a tribute ( besides to be appreciated) make me think at the black humor of Swift "(see Doc. 9). Although it deals with "black humor", it deals always with humour.

71. Moreover, it would be paradoxical to prevent from using satire ( itself lawful in general terms: see above) against a movement (the Situationism) and an author (Sanguinetti) which have always used satire and, even, the sneer, as guiding principles of their own artistic activity. How can Mr Sanguinetti ask not to be the subject of satire, having joked and mocked everything and everyone?

72. With regard to the lawfulness of satire, it is sufficient to remember as follows.

73. In Italian copyright law, exceptions to reproduce a work divide between codified exceptions and uncodified ones and among the latter, satire and parody have a prominent place, finding their normative basis in the **constitutional principle** of freedom of expression pursuant to of art. 21, as well as art. 33 of the Italian Constitution concerning the freedom of art.

74. On the other hand, if art. 5, II paragraph, letter. k) of EC Directive 01/29 provided the possibility for Member States to allow free reproduction, distribution and communication to the public of a work when this happens for the purpose of mockery, parody or pastiche, Italy did not consider necessary to incorporate this principle into Italian law as it was clear in our system the principle of lawfulness of the right to satire and parody, and that "*the case-law is so consistent on this point*" that "*an express provision would have been useless*" (see Short Commentary on Intellectual Property and Competition, Fourth Edition, CEDAM, 1512). Parody and satire are, therefore, a constant and ancient theme in the art world, whose lawfulness was confirmed in Italy since at least 1908 (Scarpetta proceedings, Naples Court May 27, 1908, about the work " The son of Iorio ").

Already in 1934, on parody an Author (Alfredo Sandulli, Criminal Art, Naples Guide Publisher, pp. 85 et ff.) wrote that "(...) *The parody does not imitate the parodied work. At least the adjective is not chosen on purpose and it should indicate another one because the parodist must keep in mind the original - that is the plot on which new work is embroidered - but it is presented under another*

aspect and shape. You can more properly speak of transformed imitation. The parodist does not imitate, but alters; do not copy, but turns and puts in ridiculous and the British once again use a word that easily suggests the true content of parody. They say it is the disguise of a serious work. The parody - is said in the ruling by the Court of Naples, in the Scarpetta case - is not a true imitation of the parodied work; but under the same shape (the greater is the identity, the more is the value) you can see a substantial and deep difference: a new individuality. No imitation, since from the contrast, the resemblances, humor appears spontaneous and irresistible and parody would be monotonous and cold if it did not show the humorous side of the same ideas, images, characters, passions and situations, that are found in the serious work, and if the new work does not refer to it to show his different nature and attitude. In parody, imitation disappears and the grimace, the mockery remain (...). It is not a copy and cannot be confused with plagiarism because it is just the **opposite** (...). 'Plagiarism is a copy, parody is a satire' shrewdly observed Giurati and adds: 'The parody always keeps his physiognomy, either if it alters the most moving and tragic episodes, and if it that preserves the voices, rhythms, to use them for a different purpose, that is, imitating the style of others and amplifying the judgments, highlighting the defects'. (...), Parody can be considered as a counterfeit, if this word is used for a different meaning from a legal one. A writer can call parody counterfeiting parody, not the lawyer. On the other hand, admitting the existence of the transformation, implicitly excludes counterfeiting under a legal point of view, the more it is recognized that there is alteration of the spirit of the work. (...) The parody cannot be confused with counterfeiting, primarily because in counterfeiting the true paternity of the author is not altered, as in parody there is always the the author's name of the new production. On the other hand, the counterfeit is a masked, camouflaged imitation, a forgery, and instead the parody is a transformation because the character, the tone, the attitudes, the characters themselves and their situations differ from the original. The parody is the mockery of falsification (...). Arcoleo said: 'Counterfeiting means to replace; person remains identical, that is the creator of the work under the mask, same happens to the sign under the variety, the color, same happens also to the lines under the manifold decorations. Spirit, harmony, the germ, the artistic creation is the subject, in that picture, in that line. The counterfeited work has no existence on its own, it did not have, I would say, a civil status; it is a body, even better, a moral and artistic deformation that does not have precise profiles, it is an apocryphal figure, a subspecies that has no place in the categories of art, but in criminal matters. It requires deception, fraud, it is a work under false pretences; instead than an exercise of freedom by the counterfeiter it is violation of the freedom and of the right of the main author.

‘Counterfeiting can also change the outward shapes in certain ways, but it remains the seed, the spirit, the creativity that is the mark of counterfeited work. Parody instead has its own content, a relative **independence** in his own aim, which is different through shapes and means that can be more or less similar to the original. Then it has its own existence because of the tone, gender, different, or better opposite emotion, it makes laughing instead of crying: it replaces a marriage to a murder, the joyful solution to a catastrophe '. (...) The parodist shall have a complete freedom of action for conducting their work and you cannot impose limits or restrictions, because art has its own strict laws and it does not admit the possibility of impositions or fixed and unmovable charges. The author of the parodied work neither receives pecuniary damages - because, indeed, as has been said before, the fame of his name spreads, while the notoriety of his work increases – nor material damage because the two works are distinct artistic productions which cannot be confused: one calls the other " .

75. In addition, case-law specified that "*parody is an **independent work** with respect to the parodied one as there is appropriation of the ideological core of the parodied work and between the two works there is no identity of representation; indeed parody when compared to the original work realizes the reversal of its substantive meaning. Therefore, on the one hand, **no consent is required by the holder of the moral or economic right on the parodied work**, on the other hand, the publication of a parody can never constitute a violation of the moral rights recognized by art. 20 Law 22/04/1941 n. 633 to the author of the parodied work*" (Court of Naples, February 15, 2000, in *Giurisprudenza Napoletana* 2000, 184; ex multis: the Court of Milan, January 29, 1996, in *Giurisprudenza Italiana* 1996 1,2,749; Court of Milan, November 15, 1995, in *Giurisprudenza Italiana* 1996 1,2,749; District Court of Rome, August 29, 1978, in *Diritto d'Autore* 1979, 967).

76. Also, the Court of Milan , with the decision of 7 September 2004 ( in *Rivista Internet* of 2005 , 1 , 27 ) , said that ( i ) "*parody, as technique used to reach a satirical effect, though finding his basis in the pre-existence of a previous work, has an **autonomous nature** and **therefore it does not need the consent of the author of the parodied work***", and ( ii ) the right to satire as "*right to criticism exercised **in a satirical and ironic way** recognized under the freedom of thought protected by art. 21 of the Constitution*" ( ex multis , the Court of Turin , June 1, 2010 , n . 3775 , in *Responsabilità Civile e Previdenza* 2010 , 9 1807 ; Court of Piacenza , May 26, 2009 , No. 375 , *Redazione Giuffrè* , 2009) .

77. Finally, the Court of Milan in its decision of 15 November 1995 (*Dir. Industriale* 1996 407) further specifies that "*although the parodist work characterized by its derivation from an existing work and by a comic effect - a burlesque act aimed to reverse the sense of the parodied work, it should be considered as an **independent work** and as such subject to an independent protection. In*

*order to ascertain the existence of the elements of parody it is not relevant a greater or lesser imitation of the parodied work, as the critical examination of the parodied text - for the purpose of proper considering it as independently protectable in relation copyright - should be conducted not by highlighting and cutting out the identities and similarities with the original text, but rather considering the work of parody as a whole, in order to determine whether, despite seemingly reproducing in part the parodied work, departs from it for its meaning and expression; that is sufficient to attribute the parodist work originality and creativity, that make it independent from the parodied work.*

*Once recognized independent value to a work as a true parody, it follows that there is no alleged breach either of Article 70 of Italian Copyright law – considering the lawfulness of the quotes of the original work from the parodist work - and of the alleged damage to the honor and reputation of the author of the original work set out in Art. 20 of the same law. The title of parody is lawful even when involving a coupling to the parodied work, so far as is intimately connected with the intent of parody, so that the substantial result of the total opposition of the content of the two works - that parodied and the parody - determines their destination to different categories of users. "*

78. In addition the unanimous case-law confirms that to create a parody there is no need of the author's consent of the parodied work (or its successors), as it is completely irrelevant his dissent.

79. Finally, it is very useful to remember a recent Italian decision, concerning a similar case, namely the creation of an installation by the artist John Baldessari entitled "The Giacometti Variations", which was an express appropriationist parody of Alberto Giacometti's works, who induced the Giacometti Foundation to file a lawsuit for preliminary injunction before the Court of Milan.

80. The artist Baldessari, in fact, used as model the famous *Grandes Femmes* by Giacometti, then he dresses his statues with clothes and objects taken from collective imagination, or from the cinema and art itself, to create an imaginary fashion show.

81. In order to clarify the case, here is a comparison of the works:



Alberto Giacometti

“Grande Femme”



John Baldessari

“Giacometti Variations”

82. The Court of Milan (order of 13 July 2011, *Rivista di diritto industriale* in 2011 , 6 , p . 347 et ff. - Doc . 21), considering the absolutely legitimate artistic operation of Baldessari, and revoking its order issued *inaudita altera parte*, affirms that there is a “*distinction between revisitation of an artist’s work for the purpose of paying it homage and following, and implementing his teachings (creation of a school, a movement, a trend), or performing a re-elaboration (for critical purposes, parody and the like), and the case of actual plagiarism of the work. In the first two cases, we can speak of a creative, original and independent elaboration, but not in the last case. Creative elaboration differs from falsification insofar as, while the latter consists substantially of a reproduction of the original work, with differences in mere details that are the product not of a creative contribution by of an attempt to mask the falsification, the creative elaboration is characterized by a revisitation, a variation, a transformation of the original work by means of a recognizable creative contribution. The extent of this contribution has to be appreciated in the light of the observation that the creative act receives protection, if susceptible to being exhibited in the outside world, with the consequence that the creativity cannot be excluded only because the work consists of simple ideas and notions included in the intellectual legacy of people having experience of the subject. What matters is not so much the possibility of confusion between two works, as in the case of the judgment of impression used in cases regarding distinctive business signage, but the illicit reproduction of a work of art by another, albeit camouflaged so as not to make the original work immediately recognizable (in this sense we can refer to Supreme Court decision no. 2345 of 10.3.1994; no. 20925 of 27/10/2005; no. 581 of 12/01/2007). In this case, while there is no question of the creative work of Giacometti’s sculpture, there is a strong disagreement on the part of the*

*plaintiff that Baldessari's work can be recognized as having the value of a creative, new work of art, and not a case of plagiarism, both from the standpoint of its complete expressive content and from that of its originality, as the ability to represent an independent and original creative contribution to the art world (according to the teaching of the Supreme Court in decision no. 24594 del 23/11/2005).*

*This creative contribution is abstractly apparent even if the work derives from an existing work of art, possibly by another author for whom the right of protection still exists. Works of parody, burlesque or humor, but more in general any works that revisit the work of another (without necessarily inspiring irony or laughter, as they may just as well suggest different, even tragic or dramatic messages), are such in the measure to which they alter the sense of the work parodied, in such a way as to attain the role of an independent work of art, worthy, as such, of independent protection. In this view no final significance can be attributed to the greater or lesser imitation of the work parodied (see Court of Milan, 15.11.1995 in the case of Susanna Tamaro), even if that fact can contribute to the evaluation and may be one of the indices of the creative contribution achieved by the second author. It is true, however, that for the purpose of consideration of the derivative work (this term seems preferable to the rather limiting term of parody) the examination has to be carried out without so much emphasizing the similarity and resemblance with the original work, but considering whether the derivative work, as a whole, though reproducing – to a greater or lesser extent – the original work and in any case inspired by it (in the case in point it has been said that Baldessari wanted to reproduce a "Grand femme" as interpreted by Giacometti and not specifically one or the other of the Master's sculptures), deviates from it to transmit a different artistic message. In this sphere, we must therefore distinguish the person who copies, and thus illicitly reproduces the work of another from the person who reinterprets this work for the purpose of translating it into a different artistic expression, creative in its own right and capable of transmitting its own message. This case has clear precedents in the American case law mentioned by the parties, and in particular in the Mattel case (Mattel vs. Walking Productions, 353 F.3d 792, of 29.12.2003), in the Jeff Koons case (Rogers vs. Koons, 960 F.2d 301 - 2nd Cir. 1992 and Blanch vs. Koons, Docket No. 05-6433-CV of October 26, 2006)."*

83. Furthermore, in Mattel vs. Walking Mountain Productions, also invoked by the Court of Milan and attached as Doc 22, the US Court of Appeals considered perfectly legitimate, as satirical - critical, the work of photographer Thomas Forsythe, aka "Walking Mountain Productions", the evocative title of "Food Chain Barbie" (again, the name of the subject is parodied in the title), consisting of a series of 78 photographs of the famous doll often naked, flanked by electrical

appliances or foods ( now the head of Barbie in a saucepan for fondue, or Barbie is wrapped in tortillas and covered with sauces) , to be ironic on the American Dream represented by it .

84. It should be noted that the US Court also highlighted how Mattel undoubtedly would never have granted permission to use the Barbie to an artist who would have use the doll to create a critical work which reflects negatively on the image of Barbie (see § 50 of the decision).

85. It is clear that, in this case, the Work of the Artist Kambalu hosted at the Venice Biennale is perfectly legitimate in the light of the principles mentioned before.

86. The installation in question, in fact:

- it is obviously far from being a mere plagiarism of the works of Sanguinetti, being an obvious "reinterpretation" of the same in order of criticism, satire and parody (as highlighted before, the Artist Kambalu "pays Situationist artist Sanguinetti back with the same coin,"
- expressly mentions in the same title (as is the case decided by the Court of Milan or in US "Food Chain Barbie" case) the fact that the work is a satirical and critical review of the works of Mr Sanguinetti ("Sanguinetti Breakout Area") ;
- is not usurpation or masking of counterfeiting, but rather a **clear satirical and sarcastic comment** on the overall work of the Situationist Mr Sanguinetti and its contradictions;
- clearly rises to the role of **autonomous work of art**, because it totally changes the meaning of the original works and conveys a very different artistic message (it is not necessary that the next work inspires irony or induces laughter, it well could suggest different messages, even tragic or dramatic critics: see order of 13/14 July 2011, see. Doc. 21), which is a sarcastic and provocative critic to the sale at high price of the Plaintiff's Situationist Archive to the Beinecke Library, after years of revolutionary preaching against the commodification of art;
- moreover, revisits some existing works of the Plaintiff to make a satirical criticism - applying the same theory of détournement professed for decades by Mr Sanguinetti.

87. The Work of the Artist Kambalu finally meets all the elements outlined by the recent judgment of the European Court of Justice (C-201/2013), according to **which a parody should not have its**

**own original character, different from the presence of perceptible differences compared to the original parodied work.** In the current case, the union of the title of the Work, of the captions, of Mr Kambalu's hand in altered reproductions of materials of Mr Sanguinetti's Situationist Archive, Mr Brown's critical letter and the critical writings accompanying the Work are well perceptible difference compared to the materials contained in Mr Sanguinetti's Situationist Archive and they do not really leave any doubt as to the satirical and sarcastic aim of the Work towards the Plaintiff.

88. The same judgment of the European Court of Justice C-201/2013 recalls, in compliance with the provisions of art. 5 of Directive 2001/29 / EC, that parody is a form of **freedom of expression** marked by mocking and humorous purposes and constitutes an **exception to the protection of copyright**.

89. It is also to highlight the cultural value of the Work of the Artist and its purpose of stimulating with satire and a critical discussion on a topic of current interest such as Situationism, it seems quite obvious why he chose to display during an exhibition of such a high level such as the Venice Biennale, just to highlight the purpose of criticism and discussion of general interest that this work promotes, so preventing its display would constitute censorship contrary to the aim and purposes of the Foundation, which guarantee the greatest freedom and autonomy of artistic expression to the curator and to the artists invited by him .

90. The function of the Kambalu's Work to stimulate a public and living cultural debate is in full compliance with the principles clearly stated by the European Court of Human Rights, in case Donald Ashby et autres c. France n. 36769/08, concerning the **predominance of the protection of freedom of expression on the copyright when the first one is necessary to contribute to a debate of general interest, as it is clearly in the current case.** The same judgment also points out that, with reference to the protection of freedom of expression you should not take into account the commercial nature of the expression but, rather, the **participation in a discussion of general interest**. In this case, recalling that the Foundation does not participate in any way to the commercialization of the Work (as indeed also admits the Plaintiff: see above), is clear that the Work is precisely aimed to stimulate an artistic debate of general interest on the Situationism and on Mr Sanguinetti, sarcastically emphasizing the contradictions. Therefore, it is **perfectly legal**.