

## The Giacometti Foundation Steps Up to the Plate

By **Jessica Giraud** (translated by **Lauren Hasty**)

**Since 1 December 2011, we now know that the zinc plates used for the realization of Giacometti's lithographs are not works of authorship, since the artist did not personally create them, nor did he aspire to raise them to that rank. They therefore should not invoke the artist's foundation, or permit its copyright monopoly to prevent the sale of the said plates.**

Supreme Court, First Civil Chamber, Case No. 1172 of December 1, 2011, Alberto and Annette Giacometti Foundation c / Oggi Corporation BV and others

The facts: a printer acquired the business assets from a liquidated former competitor specializing in the manufacture of lithography. Among the capital items included two zinc plates used in 1954 to create thirty copies of two lithographs from the famous Giacometti entitled "Bust in the Studio" and "Coffee".

Ecstatic over its new acquisition, the printer sold the two plates to a gallery in 2005 for the sum of 70,000 Euros each, which in turn the gallery resold to an art dealer, at a unitary price of 150,000 Euros.

The resale however was prevented.

The Giacometti Foundation, cross about the possible transaction (anguish over the loss of rights to follow?), seized, through the courts, the two plates in order to have them returned or alternatively to obtain their destruction or graining. The Giacometti Foundation also sought damage compensation.

This being argued, first, in terms of civil law and the theory of accession\* "due to the fact that the incorporation of the work is considered to be the intellectual work of the artist, because the support blank, which was the zinc plate, "was blended with the intellectual work and therefore confers ownership of the whole, not to the owner of the material object but to that of the intangible object, i.e. the author of the artistic work, or the owner of all intellectual property", hence the Giacometti Foundation.

In other words, the foundation argued, since the lithographic plate was engraved, and thus made an inseparable whole with the drawing, i.e. the intellectual work, the intellectual value outweighed the physical support. Therefore, the owner of a work that is immaterial should also be considered the owner of all material.

The first argument was not upheld on appeal; an error, according to the Foundation, who thus leaned on the Supreme Court to identify and repair the ruling in this regard.

No more reckless than its counterparts in the first degree, the Supreme Court hid behind the position (useful sovereign) of the appellate judges to decide and not merely uphold the

prevailing decision on the argument of accession...

Secondly, the Foundation relied on provisions of the Code of intellectual property.

The reason for using this set of rules was simple and ingenious: not having the **physical** property of the plates ("*the printer being by custom, the owner ab initio of the zinc plates*") and failing to provide proof of their acquisition by contract (the appellate court stressed that "it was not shown that the plates were acquired by the artist"), the Giacometti Foundation had no choice but to claim intangible property, or in other words, intellectual property of the plates to control the sale.

Not allowing the war to take place in the field of substantive law, the only one left was that of intellectual, immaterial, and intangible law: so be it.

But it was still necessary that the zinc plates fall under the definition of intellectual works under copyright, so the Giacometti Foundation had to invoke the violation of various copyright prerogatives to counteract the sale (and especially: the violation of disclosure, the right of respect for the integrity of the work and the right of destination).

The Supreme Court had to decide on the nature of the zinc plates or "intermediary works" of lithography, as stated by Robert Francois Duret.

The answer is final.

The zinc plates used in lithography are not creative works protected by copyright.

It is worth mentioning here that intellectual property is not everything. Only the recognition of something as intellectual work, a prerequisite, allows the application of the copyright.

The door to this juridical Eden is found in number L111-1 and L112-1 of the Code of Intellectual Property and the key is originality, understood as "*the imprint of the personality of the author*" in a minimum of form.

In this case, the difficulty in considering the zinc plates as works of Giacometti's mind was not so much in their lack of form, or a lack of originality.

On the one hand, the plates were made of zinc, so they had a form, which is both concrete and tangible.

On the other hand, they included the imprint of Giacometti's personality as they were marked with a drawing by the artist, something that the Foundation did not cease to argue. However, they must be considered as original works, in order to fall under the protection of the law.

The whole problem was the fact that the zinc plates had not been made by the hand of Giacometti or, more accurately, his hand only.

"But given that the appellate court noted that the process of drawing with reference to zinc plate

required the presence of the technician, and possibly that of the author if he wanted to follow the different steps for the realization of the lithography, the transition from a drawing made by the artist onto transfer paper, and then the transfer onto the zinc plate and printing, was a purely technical act that brought into play the expertise and skill of the printer, upon which the quality of lithography depends. These findings and sovereign assessments of the Court of Appeals had correctly deduced that, although it kept a trace of the artwork, the zinc plate was simply a technical means used to enable the production of lithographs which are themselves original works, but could not itself be described as an intellectual work. "

The Supreme Court therefore concluded that the plates were not works of the mind, but rather a technical creation not subject to copyright protection.

The answer sets precedent. This is the first ruling by the Supreme Court concerning "intermediate works" used towards the realization of lithography.

Still, we believe the value of this decision goes far beyond the zinc plates. The judgment is richer than it seems.

First of all the ruling reinforces the personal aspect of the work by the artist needed to class it among the works of the mind, which is unfortunate. However, the court does not forget that the artwork exists because the creator wanted it, or not, and that this element of intent is not to be forgotten. Finally, the court points to the beneficiaries of all royalties, and reminds them that they are no substitute for the artist to say in his place if it's a work of art or not, and can not then divert profits in their interest while under the protection of copyright law.

The artwork must originate from the hand of the artist to be legally recognized and this is unfortunate and potentially harmful.

The interim works in lithography were, on December 1, removed from underneath the copyright umbrella because they were part of a technical process in which Giacometti had not physically and personally taken part, says the court.

Supreme Court Justices and Judges from the Court of Appeals have agreed: "But whereas the appellate court noted that the process of drawing by transfer onto a zinc plate **required the presence of the technician, and possibly that of the author** if he wanted to follow the different steps for the realization of lithography ... ".

Does this mean that when a technician takes part, the work of art escapes the code of intellectual property ?

The solution, if surprising, unfortunately, is not unprecedented.

The first civil chamber of The Supreme Court has already denied the quality of intellectual work in the creation of an artist who did not realize the works with his own hand, in the Spoerri case.

In this case, the purchaser of the work "My breakfast 1972, Table Trap", a work authenticated

by an auction house as Spoerri, claimed to have learned three years after its purchase, that the work had been done by a child, under the direction and instructions of Spoerri.

The buyer thus obtained refund of the purchase, by defect of consent, on the basis that the authenticity of the work was errored! The Supreme Court on this occasion affirmed, "the author is the person who actually realizes and executes the work or object."

At the time, The Supreme Court overtly disagreed with the reasoning of the Parisian courts which was indifferent to the identity of the person who had done the work physically, considering the author of an original work the one who had wished the execution of the work and thus authenticated the works he had chosen...

This case is part of this movement and asks once again: is personal accomplishment a condition criterion of the legal description of the artwork?

The question is strongly disturbing when one considers that the personal execution of the work is not a criterion required by the law.

Indeed, nothing in the Code of intellectual property imposes this or foresees doing so.

On the contrary, Article L 111-2 of the CIP allows the consideration that the ownership of a work be attributed to an author who would not have materially participated in its realization: "The work is deemed to be created independently of any public disclosure, and realized, even if incomplete, because of the design by the author. "

The legislature has never felt obliged to add that the realization of a work must necessarily be "by the hand of the author"...

It is indeed the case law, which requires the reading of the text in this context, a act which is not without risk.

This criteria, if it spreads to all aspects of the visual arts, could negate the quality of an artwork for any form which involves the intermediary of a technician (i.e. photography, but this is an old quarrel) or that involves a third party for the creation (performance, ready made...) and would marginalize all figures of any new realism and many contemporary artists.

Such a criterion can therefore not be accepted without a counterweight. One must, in our opinion (and according to others, including Nadia Walravens and Agnes Tricoire), moderate it with another decisive factor, for example, that of the creative intention of the artist, which is exactly what the Supreme Court does.

### **The creative intention of the author makes or breaks the artwork.**

The Supreme Court subtly reveals the inclusion of the criterion of "the creative intention" in a short paragraph of its judgment, which is relative to the rejection it opposes for the second part of the plea raised by the Foundation:

"Considering that the sale of the zinc plates marked with Giacometti's work would not affect the artist's right of disclosure **on the grounds that he authorized the duplication of his work by lithographic reproduction**, and that the original lithographs were accepted by the artist, who has not requested that these plates be deleted or forbid that they can be shown to the public, and it would not be shown that the sale of this tangible property would have a purpose contrary to that intended by the artist. "

Note the right of disclosure recognizes that it is the right of the artist to show or not his work for public viewing. In principle, this right is exhausted after the first presentation of the work.

The foundation alleged here, that disclosure by the artist's drawing to the lithographer was made in an original sense.

It claimed that selling the plate reproduces the drawing, and thus a disclosure contrary to the will of the artist.

The argument, dismissed at the appeal, did not interest the judges of the Supreme Court.

What is particularly interesting to note here is the motivation of judges: the Supreme Court considers that the artist was not violated on the grounds that Giacometti never expressed an **intention to oppose the permanent drawing on the plates, nor of the sale of plates with this drawing**.

The Court specifically stated that the Giacometti Foundation has failed to prove otherwise, which legally is the same.

Saying this, the Court relies on the artist's lack of interest in the zinc plates to derive a total lack of intention on his part to give them a special status.

In other words, if Giacometti gave no indication one way or another on what he planned to do with these plates after their function was performed, it is considered that they are not as important as the lithographs.

Comparing the reasoning in this case with that used in the case Spoerri is complicated, to put it lightly.

The creative intention of the author, so vilely despised in the Spoerri case serves here as a touchstone towards the disqualification of any artwork done by a hand other than its creator.

The advanced course is limited because the idea of "artistic intent" is used here not to place the work of the artist physically created by a third party into the category of intellectual works (as would have liked Spoerri in his trial) but to disqualify the plates from this coveted category.

One may nevertheless be delighted to see a little more criteria concerning artistic intention break into the courtroom...

The creative intention of the author limits the prerogatives of right holders

Meaning, if the artist himself did not consider the plates as the fruit of his work as an artist, then why would the heir to the foundation be allowed to make that decision, along with the help of the judge, and give them this quality?

The foundation cannot prevent a sale that would probably not have bothered Giacometti (not the artist anyway, the heir perhaps..).

So we can only welcome the decision, made in the case of the Giacometti Foundation, not to award more powers to an heir than the artist himself would have had.

Hopefully the foundation listened!

Having brought no less than a dozen lawsuits in defence of the deceased's copyrights before The Superior Court in the last 5 years, The Giacometti Foundation should have taken note..

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