

COURT OF VENICE

Division specializing in business matters

The Judge, Mr Luca Boccuni, in the proceeding n° 5688/2015 filed, according to art. 156 and ff. of law n. 633/1941 and to art. 669 bis and ff. of the Code of Civil Procedure, by Gianfranco Sanguinetti, defended by the Attorneys Giovanni Giovannelli, Alberto Pojaghi and Antonio Gennari, against Fondazione La Biennale di Venezia with the attorneys Massimo Sterpi, Angela Saltarelli and Debora Rossi, besides Samson Kambalu, defended by the attorney Paolo De Santis, deciding after the hearing of 5.11.2015, issued the following

ORDER

With the complaint filed on July, 14 2015, Gianfranco Sanguinetti claimed to be one of the main Italian exponent of the Situationist movement and a member of “International Situationism” - an artistic movement developed between 1960 and 1970, aimed to overcome art when conceived as commodification, which reached also social, economic, political and work criticism thanks to scandal, *détournement*, theft identity, deceit, joke having subversive purposes. The claimant affirmed to be the author of several situationist works such as “*Rapporto Veridico sulle ultime possibilità di salvare il capitalism in Italia*”, published in 1975 with the pseudonym of Censor “*Prove dell’inesistenza di Censor enunciate dal suo Autore*”, published in 1976, “*Rimedio a tutto*”, unpublished, “*Del terrorismo e dello Stato*” published in 1979 and “*Miroslav Tichy – Les Formes du Vrai- Forms of Truth*” published in 2011. He declared that in October 2013 he appointed the auction house Christie’s to sell his own situationist archives including many of his literary, photographic works, besides drawings and letters, which were unpublished for the most part. The Yale University purchased such archive at the price of 650,000 euro, without purchasing his intellectual property rights, prohibiting any reproduction.

According to the claimant, during the exhibition at the Venice Biennial, the installation entitled “Sanguinetti Breakout Area” was displayed. In such installation Samson Kambalu, a Malawi artist, would have been showed, besides some photographs and drawings not created by the claimant, around three thousand photographs, all reproducing documents, writings, drawings and photographs included in the Sanguinetti’s archive existing at Beinecke library, with the warning that such material can be handled, photographed and shared on line by the exhibition visitors.

Gianfranco Sanguinetti complained the infringement by Samson Kambalu and by the Biennial of the right of reproduction pursuant to art. 13 of copyright law, lacking any authorization for their behavior; the infringement of the right of exposition and distribution according to art. 17 of copyright law; the economic exploitation of the copies prohibited by art. 68(6) Copyright law; the violation of his right of publication for unpublished works, according to art. 12 copyright law. As to the correspondence constituted by some personal letters, which were reproduced, the claimant complained the violation of his privacy rights.

In addition, the claimant declared that the Biennial offered on sale at the price of 8,500 English pounds the book entitled “Theses” and attributed to him, containing the collection of all displayed reproductions. This behavior would constitute counterfeiting, representing an unauthorized reproduction of Sanguinetti’s works without any paternity usurpation, besides constituting the abovementioned infringements.

Given the *periculum in mora*, the claimant requested to La Biennale Foundation to inhibit the prosecution of the installation entitled “Sanguinetti Breakout area”

After ordering to serve the act to joinder Samson Kambalu to the action for the reasons specified in the order of 21.09.2015, the defendants appeared before the Court.

La Biennale Foundation preliminarily raised the exception of its lack of legal standing, as it merely exposed Kambalu’s artistic work and did not perform any commercial activity through the alleged sale of the book “Theses”, that shall be considered attributable to the Stevenson Gallery established in South Africa. On the merits, the Foundation affirmed also that, once the challenged documents were transferred to the Beinecke Library, then they went out from author’s disposal, they were not unpublished works, which none can prevent from being publicly displayed. In addition, the Foundation raised the exception that intellectual work can be appropriated according to situationist theory, in order to make the same work freely available and not commoditized, with the consequence that Sanguinetti, sustaining these theories, would have offered a free and non-exclusive license to reproduce his works, so representing *détournement*, the situationist denial of intellectual property and consisting in the reappropriation of discursive fragments of other authors, reconverting them, also in a deformed way, in other contexts of meaning.

In any case, the Foundation underlined how, just being inspired by the Sanguinetti’s transfer of his own archive, the displayed work had forced Situationism to look in the mirror by reworking the whole situationist archive and highlighting the contradictions of the commodification of its work through the *détournement* practice, as Kambalu appropriated the work in terms of satirical and mocking criticism. This was clear from the title of the installation “Sanguinetti Breakout Area”, where the term *breakout* has both the meaning of “counterattack”, as to underline the author’s fight with Sanguinetti with the same situationist weapons, and the meaning of “escape”, in order to underline the Sanguinetti’s abandonment of the situationist theories.

As the challenged work has the full status of provocative, satirical, parodistic work, no copyright infringement would have been committed, taking into account the protection of parody provided by art. 21 and 33 of the Constitution.

Considering the lack of *fumus boni juris*, but also of *periculum in mora*, La Biennale Foundation requested the dismissal of all claimant’s precautionary request.

Likely, Samson Kambalu appeared before the Court highlighting, preliminarily, the voidance and inadmissibility of the act of joinder to the action, as Sanguinetti did not make any direct request towards him, as the claimant had exclusively reiterated the requests towards La Biennale Foundation.

On the merits, Samson Kambalu proposed the same defensive reasoning of the other defendant, requesting the dismissal of the counterpart’s request.

Preliminarily, we shall consider the objections raised by La Biennale Foundation and by the third party Kambalu concerning the alleged lack of legal standing and the alleged voidance and inadmissibility of the act of joinder to the action.

As to the first exception, we should consider that the legal standing is affirmed taking into account the reconstruction of facts provided by the claimant, who, in this case, claims the infringement of

his copyrights because of the exposition by the Venice Biennial of Samson Kambalu's installation, which would determine the violation of Gianfranco Sanguinetti's rights. The exhibition contributes to the alleged illicit behavior, and then, the organizing foundation shall be deemed liable of the same exhibition, together with the author of the work, alleged to be a counterfeiting. Therefore, La Biennale Foundation shall be considered to have legal standing, with reference to the injunction request, concerning the exhibition of the challenged installation, demanded by Gianfranco Sanguinetti.

As to Samson Kambalu's claim that the act of joinder to the action is void and inadmissible, since the claimant did not make any direct request towards him, considering that Sanguinetti maintained his injunction request concerning the foundation dealing with the prosecution of the installation entitled "Sanguinetti Breakout Area", it shall be reaffirmed what already said in the order of 21.09.2015, where I ordered to joinder to the action. Indeed, the injunction necessarily affects the legal sphere of the author, Samson Kambalu, and, more particularly, on the coessential power related to copyright to publish the work. The publication in this specific case takes on particular importance, considering the international relevance of the art exhibition organized by La Biennale Foundation, so that the request to inhibit the exhibition of the installation is a claim itself, which has importance also towards Kambalu, without being necessary to clarify that the urgent removal of the installation is requested by Sanguinetti even towards the author to which the complaint is served.

As to the merits of the proceeding, we shall underline that the installation "Sanguinetti Breakout Area" cannot be deemed a counterfeiting against the claimant, though it refers to writings, drawings, photographs or parts of his works through their photographic reproductions and display, besides to other works or writings, which, though included in Sanguinetti's archive, are not attributed to him.

Indeed, the counterfeiting consists in the substantial reproduction of the original work, with differences of mere detail, which are not the result of a creative contribution, but rather of the dissimulation of the counterfeiting itself, so we should reject the existence of the illicit behaviors complained by the claimant, as the challenged installation having critical or parodist purposes, is an original and autonomous elaboration, which can certainly be also the revisiting or variation or transformation of the original work, through a recognizable creative contribution showed in the external world.

It is relevant to underline that Samson Kambalu realized an articulated and complex installation which cannot be considered as a mere display without authorization of Sanguinetti's works or part of his works, taking into account that the installation conveys a creative, original, autonomous, clearly perceptible message. As a whole, using the language of the situationist movement thanks to the use of the *détournement*, of scandal, mockery, he underlined the contradiction between the theorized fight to commodification of the claimant's intellectual work and the sale by Sanguinetti of his works.

More particularly, the creative language of the installation is clearly perceptible in the fact that, if not all, but most part of the displayed photographic reproductions show what is handed in the hands of Samson Kambalu, who, by way of mockery, seems to physically take back the work itself to put it at free disposal of the visitors of the art exhibition, in sarcastic harmony with the claimant's situationist ideal. Moreover, the same warning underlined by the claimant according to which the photographs constituting the installation and exposition "can be handled, photographed and shared

online” expresses this concept of free availability of the same Kambalu’s work, which, in its turn, can be “handled” “photographed” and “shared”, so that the sarcastic criticism to the “situation” targeted by the author can be understood thanks to the reaffirmed conception, expressed in a concrete and physical way, that he conceives art as a gift, a concept which is typical of his national culture, as recognized by the critics who dealt with his artistic production.

The sarcastic and creative message previously mentioned appears to be suggestively stated by the title of the installation “Sanguinetti Breakout Area”, considering its double meaning of installation devoted to the critical “counterattack” to Sanguinetti or also of installation committed to the “escape” of Sanguinetti from his situationist ideal. More explicitly, the meaning of the installation is more clear to the visitor from the fact that - together with the display of his photographic reproductions - Kambalu uses as a mural on which the same reproductions are displayed, the open letter of Bill Brown, Sanguinetti’s former English translator and web host, with which Bill Brown made a resolute criticism to the claimant, considering the commodification of his archive. Such circumstance is clearly indicated also in the description of the work provided by the organization (doc. 6 of the defendant), so that we cannot understand the reason why the article on the online magazine Artspace raises doubt on the non-intelligibility of the installation for the lack of explicative comments (doc. 44 of claimant).

Also the way the installation was exposed confers creative value to the work, as it is accompanied, taking into account the presentation made by the Biennial, by the presence of some furniture for a relax area based on the “Game of War” of Guy Debord, theorist of Situationism, according to Samson Kambalu’s reinterpretation.

The whole installation has its creative consistency and is a message of sarcastic criticism clearly coming from Kambalu, thus it cannot be considered a mere counterfeiting or a plagiarism of Sanguinetti’s works or of part of them, as the presence of the aforesaid creativity constitutes the parody exception, according to the principles stated in the decision of the European Court of Justice n. 201 of 3.9.2014 (C-201/2013), being parody clearly recognized as a constitutional right according to art. 21 and 33 of the Constitution.

In addition, the exam of the Work, which is challenged to be a counterfeiting, shall be conducted neither taking into account the quantity, wider or not, of Sanguinetti’s material which was photographically reproduced; nor considering that only some Kambalu’s photographic reproductions portray the gesture to be held in the author’s hand with the clear message previously underlined; but rather questioning if “Sanguinetti Breakout Area” distances from the alleged counterfeited work, bringing a different creative message because of perceptible differences compared with what previously represented. The message has a meaning of sarcastic criticism, aimed to open a discussion on an intellectual issue of collective interest, a discussion already urged by Bill Brown’s open letter, considering that the criticized person is a recognized exponent of Situationism.

In other words, it is doubtful that Samson Kambalu plagiarized or counterfeited Sanguinetti’s work, in any case already available to the public at the library that purchased the material, since the abovementioned work is simply represented as a image, without any appropriationist purpose of his conceptual content: the photographic image, in the described context, is simply the tool thanks to which the new, creative and iconographic work of the author of the installation is expressed perceptibly and in a recognizable way to the visitor. The work conveys the situationist message of sarcastic criticism.

To conclude, it does not seem that the complaint has an adequate *fumus boni juris*, as it shall be dismissed taking into account all previous considerations, regardless of the requirement of the *periculum in mora*.

The expenses of the proceeding shall be paid by the claimant Gianfranco Sanguinetti, which is then condemned to reimburse what the plaintiff and Samson Kambalu previously paid.

FOR THESE REASONS

The Judge

dismisses all precautionary claims proposed by the claimant Gianfranco Sanguinetti

condemns the claimant to pay to the Venice Biennial and to Samson Kambalu the proceeding expenses, which amount to 3,000 euro each, for professional expenses and other legal expenses.

Venice, 7 November 2015

The Judge
Dott. Luca Boccuni