



---

## Copyright and Watch Duty. Rob Scholte's Work. Part I.

*Author*

ROB VAN GERWEN

*Affiliation*

UTRECHT UNIVERSITY

**Abstract:** Image right is maintained by comparing the outward appearance of pictures, not their meaning. But images are made to make people watch them. Logos are a clear example: people must watch these images, and must answer to their persuasive force. With the right to protect an image from copying, the copyright, comes, therefore a duty to watch. But a duty to watch goes against our freedom of perception. It is unclear how the law protects that freedom. Rob Scholte's works address such issues by making art of pre-existing images.

---

### I. IMAGE RIGHT

Dutch artist, Rob Scholte, admitted his irritations about television. Watching television seems to him synonymous with watching famous personalities—famous, mostly, for being on television so often. In gossip magazines we witness how an industry of novelties is built on episodes from their lives. It was clear to me what Scholte was complaining about: we are coerced into seeing these people as well as into developing an interest in them. I also understood why the issue of image right kept him busy in his works; the image right appealed to by artists, advertisers, branding and logo-makers to protect their work. What exactly does it protect and how is it connected to the media's empty-headed self-advertising?

With image rights, we allow makers of representations (pictorial symbols of all sorts) to prevent others from reproducing and publishing them. Image

rights regulate the secondary use of depictions. ‘Image right’ is standardly treated as a subcategory of copyright, which more nearly seems to aim at the process of writing, which is rather about picking the words for reasons of the way you think through your subject matter, than about the way you write the letters on the paper. But I think this priority should be reversed. Scientific knowledge accumulates, and repeating others’ insights contributes to that development—as long as the repeated text is not word-for-word identical and presented as one’s own.<sup>1</sup> Copyright infringement concerns the way an insight’s formulation is copied, not the insight itself: the ideas are free-floating. But what belongs to the form, what to the contents?



**Figure 1:** Rob Scholte, *Self Portrait*

A few years ago, a student submitted two papers he had taken from the internet, integrally, solely replacing the typical jargon with synonyms. Did he remain within the lines of copyright law—as one could argue because he may not have taken the ideas, but, allegedly, the form? Well, he certainly missed the goal of education, which is to think out an argument on your own. His intention was clearly to not do the work his professor was asking him to do. Interestingly, we currently establish a student’s writing integrity through digital analysis, and plagiarism software is not interested in the meaning of the words in the sentences, but in the sequence of the majority of them. All words belong to the surface of the text, its image. The software singles out the words humans deem unimportant as much as the jargon. The student had copied 92% of all the words in these two texts. Even if he had replaced

all jargon words by meaningless and irrelevant terms, such as “soldier”, “ball” and “squirrel”, and his text would have become completely unintelligible, he would have been guilty plagiarising. So copyright law is a kind of image right, rather than image right a kind of copyright.

## II. MEDIUM AND MEANING

Pierre Menard would not have gotten away with the passages of the Don Quixote that he wrote, even though he did not copy them from Cervantes’ work, or even write them putting himself in Cervantes’ shoes; he wrote the passages struggling from the facts of his own life and time, or so Borges reports it.<sup>2</sup> The morale of Borges’ story is instructive for my argument here. Near the end of the story, Borges compares two passages, one from Cervantes, the other from Menard, word for word identical to each other, and shows the vast difference in meaning of the texts. In terms that I develop in the second part of this essay, Menard has brought an existing text to life—which is, I think, what art is for.<sup>3</sup> The life instilled in a work is due to the maker’s achievement. Borges would disagree with the assessment that Menard plagiarised Cervantes, and so do I.

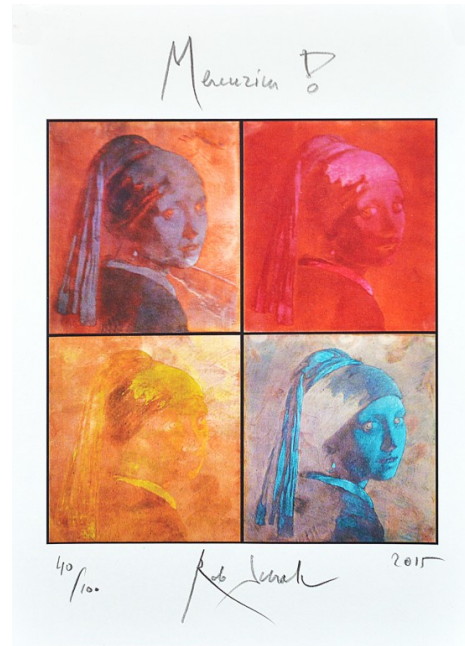
The Pierre Menard-case differs profoundly from mere appropriationism, such as Sherrie Levine’s ‘After Walker Evans’ serie, 1981, which could best be understood as a philosophical move in art, or, perhaps, as conceptual art. Levine photographed Walker Evans’ photos, and exhibited her photos as ‘After Walker Evans #. . .’ How is that adding much? Is a photo of a photo not just the next print or copy of it? Should we distinguish appropriation of famous works which still stand on their own, and are, so to speak, *advertised* by the appropriation; and appropriation of works perhaps forgotten, that are reanimated by the appropriation? In this paper I am merely arguing that the aesthetic values proper to art criticism should have a stake in cases such as these. Appropriationists may have taught us that even two identical copies can have different meanings; the achievement in the appropriationist gesture is of a rather meagre kind, as well as parasitic on another maker’s achievement, and unavailable aesthetically.<sup>4</sup>

But the difference between two objects realised in different art forms, or mediums, certainly is available aesthetically. In artistic processing of a picture in a different medium, what is at stake is the artist’s achievement. Think of Jeff Koons’ *String of Puppies* (1988)—a sculptured rendering of a black and white photograph of Art Rogers, *Puppies* (1985), of German Shepherd puppies in a string on the laps of a man and his wife sitting on a bench. Comparing a photo of the sculpture to Art Rogers’ photo, one could not help but notice how the two resemble each other—of course they do: Koons expressly made the sculpture after the photo. However, when one confronts the two objects—the sculpture and the b/w photo—in perception, the differences are massive. The same holds for the recent—Belgian—court case of photogra-

pher, Katrijn Van Giel, v. painter, Luc Tuymans who made a painting after a photo that Van Giel made of Belgian politician, Jean-Marie DeDecker after his defeat in elections. After initially winning her case, Van Giel later settled with Tuymans. I discuss this at length in another place, but summarise my argument here.<sup>5</sup> The judge made an aesthetic mistake when he held up two photographic reproductions, one of the photo and one of the painting, asking those present rhetorically what were the differences—suggesting he could not see any. Van Giel’s picture was a photograph, published in the papers, of a Belgian politician, the other a painting, in the typical style of Tuymans, of the image in a photo (Van Giel’s). Of course, the images resembled one another, but a real-life—thick—confrontation with either of the two, the photo and the painting, would produce a vastly different phenomenology in the beholder, due to differences between a journalistic photo reporting a political fact, and a painting symptomising a way of treating paint on a canvas.



a. *Blue Period*



b. *Mercurius, 2015*

**Figure 2:** Rob Scholte

Image right is a right of the original image maker, based on their achievement, but what is included in that achievement? The maker may be able to determine the image in full in an objective sense, but they cannot so control the meaning that the image subsequently acquires. One wonders what good is an image right that protects the making of an image, visible in the image’s surface, but not the image’s meaning and its eventual significance? Surely, it is the latter that turns an image into something worthy of protecting? We

don't go about protecting everything and anything someone makes. The crucial bit making something worth protecting, it seems to me, is the realisation in it of personal intentionality—as it shows in the result. I am thinking, centrally, of a picture's expressiveness or other aesthetic value.

Pastiche, a forgery made in the style of another artist, but not a straightforward copy of their work—like Han van Meegeren's *Supper at Emmaus*, in another painter's, Johannes Vermeer's style—we treat as a kind of forgery. Rightly so, I think, albeit for different reasons than theft of originality. We reject Van Meegeren's pastiche because it spoiled something in the spectatorship; *Supper at Emmaus* profoundly confused the spectators' appreciation of all of Vermeer's works. Van Meegeren's crime consisted of signing the painting with "Vermeer", and this was a crime, in my view, for aesthetic reasons only.<sup>6</sup>

In practice, the judge will often be challenged greatly to sort out the intricacies of a forgery case. Yet the biggest issue seems to be that the judge must sometimes assume the role of an art critic, even though law is not equipped for this, at all.<sup>7</sup> The reason why in legal practice judges cannot always reach the right verdict is due, I think, to the fact that law does not square with the philosophy of art. It is the philosophy of the arts that explicates how the relevant concepts of plagiarism, forgery, creativity, originality, image and art are related reciprocally, hence my argument.



**Figure 3:** Rob Scholte, *Utopia*, 1986

### III. SEEING AS MANAGING MEANING

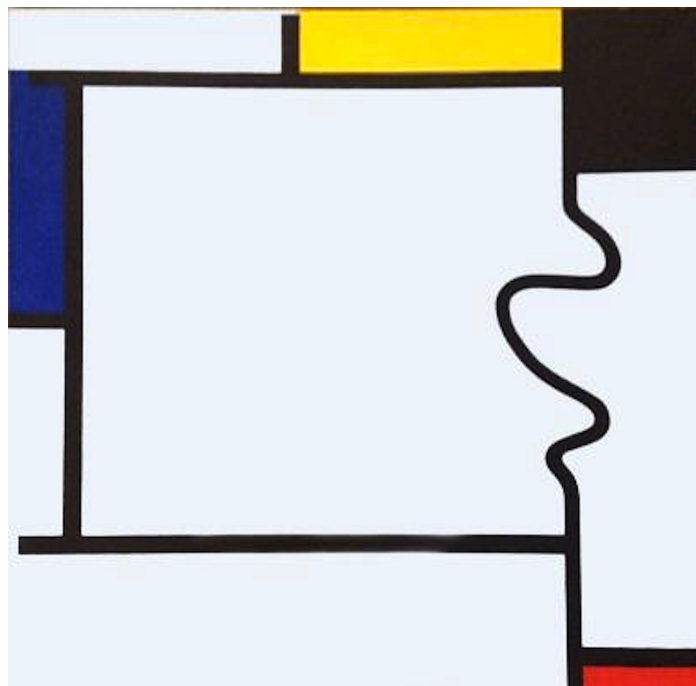
Rob Scholte views his works as recipes and has no problem in having these executed by others. So his interest is not in realising his intentions through the manipulation of materials by his own hands, but there is still a sense of achievement in the nature of his recipes, as well as a conceptual consistency amongst them. Also, once these works are finished, Scholte does not claim that either he or his co-workers are the sole determinants of the works' meanings. Though, in my view, Rob Scholte is clearly the one noticing the artistic interest of his works. Who else is involved in the meaning of his works, apart from the assistants in his workplace? Who determines a work's meaning? I am thinking of the art critics and other professionals interpreting them, but also of any other suitable spectator.<sup>8</sup> Surely, their interpretations derive their justification from the meaning of the work. This meaning can be assessed by everyone and anyone as long as they pay attention to the relevant properties—and do it in a suitable manner.

In advertising, on the internet, and on television, we are bombarded with images. How does this bombardment relate to image right? This question interests Scholte, as much as myself. Should someone depicting something or someone ask permission for doing so, or pay for it? Is this secondary use, as well? Should people also compensate when all they do is look at things and persons? Should they, likewise, ask for permission, or pay for the privilege? Or better: Why not?<sup>9</sup> Apparently, images are at the disposal of people looking around. No, merely watching an image does not count as a copyright infringement. I do not think that we should make it one. But stranger things have happened.

The images of perception are thick—the spectator carries a responsibility towards the perceived, as does the perceived towards the spectator. In perceptual presence to the stuff that we see—thickly—we are as much seen by that stuff as see it.<sup>10</sup> And in this reciprocity we grant each other the permission to watch—or we don't and then the other is supposed to avert their eyes. This is regulated on a personal level—person-to-person. I cannot easily, if at all, *observe* another person in front of me, as we will gaze at each other, address each other in our gazing. Observing a person objectifies them, as feminists have rightly remarked. Pictures, instead, are thin. We could make a photograph of someone and take it somewhere, and observe the person then.<sup>11</sup> Only this time, we are not looking at the person, are not even observing them as the person they are, but are observing a snap shot taken of them. Something, of which Wittgenstein once remarks:

We could easily imagine people who [...], for example, would be repelled by photographs, because a face without colour and even perhaps a face reduced in scale would struck them as inhuman.” (Wittgenstein 1953, 205:f).

I would add that a photograph not only reduces scale and colour, but also removes most sensuous access to the depicted reducing perception to vision, as well as fixing something that is met in real-life as a reciprocal process. Wittgenstein's remark reminds me of the thought that pictures steal an image, and rob it of its life, its processual nature. In the life of an image of perception, the perceiver is present as a person, as a moral agent. So there is no need to devise a law regulating viewing things or persons—we should leave that to the people involved in a situation. The two-way responsivity should prevent us from setting up a one-sided system of protective rules.<sup>12</sup> But it does seem to tell us something about the law that we do have about protecting pictures that people make.



**Figure 4:** Rob Scholte, *Mondriaan Revisited*

Image rights might be defended in cases where secondary use can be said to involve abusing images—when the original images are used for some purpose for which the carrier of the image, the person, the object or the situation, were never intended. Of course, this is very complicated. I think it is defensible for people to protest against such abuse, but such an ‘image right’ is probably unenforceable, and the genie may already be out of the bottle.<sup>13</sup> What could be wrong about turning the tables? Is my outward appearance not in important measure possessed and guarded by all who see me?<sup>14</sup> Then the question becomes: What is the image in and of itself? i.e. irrespective of any depiction or secondary use, and outside of the strictly legal context? Is watching an image and recognising it as the image that it is, not precisely

the way in which the image is possessed? Surely, an image gets its meaning exactly in this experience?

Is it always a clear and shut case when someone makes a new image with an old one, which of the two ought to be protected? Can the image right be applied to protect the rights of a later maker, when they made something of greater aesthetic value than the original maker did?<sup>15</sup> Koons as well as Rogers; Scholte as well as Philips; Tuymans as well as Van Giel. Secondary users should not, of course, be granted the right to hold a claim against the ones who made the first picture. But there might be room for a softened application of the law. (In pop music the covers regularly are deemed better than their originals). An argument for or against this possibility should be based on aesthetic considerations—as, I argued, original image right already is, however tacitly.



a. *Glossy 17*



b. *Glossy 12*

**Figure 5:** Rob Scholte

#### IV. WATCH DUTY

What the Coca-Cola Company wants, I guess, is for people everywhere in the world to see their logo and immediately think of buying a bottle of it—at least, that is what branding looks like from the part of the consumer. I am not concerned here with the persuading force of the logo, or the buying; I am concerned with the convincing, the rhetorical force of the image. A logo is worth little if there are no people recognising it. The audience is as



important for the image's success as are its makers and legal owners. In legal terms, we might want to formulate it as follows: the Coca-Cola Company has the right—the image right—to require of all people that they recognise their logo—a duty to watch and *notice* it. But give a little, take a little. One cannot demand that everybody cooperate with Coca-Cola's watch duty and get nothing in return for their efforts. I wonder why the image right is set up so one-sidedly? Why is there no viewers' right answering the duty to watch, since this duty is the image right's very premise?<sup>16</sup>

Once one thinks about this seriously, one realises that the image-consumer is better served with an anti-image right, a right to be safeguarded from images—but, again, such a prohibition would be hard to maintain. The only way to ward off a duty to watch is by looking the other way, but then the image is already seen, is it not? Would that be the sole reason why we do not have such a law: that perception is free as well as free-floating—like an idea?

I think image right is understood only halfway: the owner of the image manoeuvres other people by demanding that they watch the image only in the manner desired by the maker or their legal representative. But viewers are never credited for the fact that they are so decent as to maintain and endorse these images in this way.

The situation is similar in the media where so-called celebrities pop up at regular intervals; so much so, that it is sometimes impossible to turn on your television and not be confronted with yet another one of them: people with little more interest than the fact that they are on television. The mere occurrence of these images forms a doing, an action to be judged morally.

I am not arguing against pictures—I believe. But I do want to reverse the standard priorities in ethics and law with regard to them. The maker comes up with the image—and, agreed, this is of great value, when done well. Otherwise it means little or nothing—think of the thousands of pictures people make every day nowadays without a second's thought. But it is a picture's spectators who steward it. One person's image right is the other person's watch duty, and this is a breach of everyone's autonomous, moral dedication to perception. The freedom to perceive is so self-evident that we did not even write a law to protect it. Let us water down some laws that are already in our legal code, and start using aesthetics to apply them. Really, something should change.<sup>17</sup>

rob.vangerwen@uu.nl

## NOTES

1. The term of forgery makes little sense in science: repeating another's insight in their words, saying that it is their insight—that is called quoting. A simple attributory footnote suffices to prevent your own writing from being taken as plagiarism. I realise that this situation is rapidly changing, due to the large amounts of money to be earned by keeping your invention to yourself. Other than awaiting infringement, and our retrospect protest against it, we rather patent our research, so as to allow us to milk subsequent use of it whether by scientists or in society at large.
2. I am, of course, referring to a famous fiction story, by Jorge Luis Borges, 'Pierre Menard, author of the Quixote', not a real event. And see the next note.
3. See 'Reanimation and Copyright. Rob Scholte's Work. Part II.' *Aesthetic Investigations*, 2016:2.
4. Sherri Irvin 2005 argues that appropriationists do not so much undermine a core assumption in our concept of art that a work's meaning depends on the original artist's intentions: the appropriations merely add an intended meaning to those original ones. In this, they differ from forgeries, which expressly hide these added intentions. Needless to add that the meaning that appropriationists add to the original one's is rather shallow. They seem to be making a philosophical point mostly, and would fit Danto's mistaken view that art has become philosophy.
5. See van Gerwen 2015.
6. Alfred Lessing 1965 is mistaken about forgery: he thinks that as long as we cannot see the difference with the naked eye, there is no aesthetic difference between two identical canvasses, and that, therefore aesthetics cannot explain what is wrong with forgery. I am not saying *Supper at Emmaus* is a forgery of an original Vermeer—it was a pastiche. I merely point out that it is exactly aesthetics that explains Van Meegeren's misdoing.
7. See van Gerwen 2015, in Dutch.
8. Wollheim 2001, 13: 'A suitable spectator is a spectator who is suitably sensitive, suitably informed, and, if necessary, suitably prompted.'
9. This may sound like silly questions, like asking people to pay for breathing—but are they? On the internet, big players like Google earn money whenever someone reads something, but the writers hardly ever get payed for it. If we could quantify watching we might be able to turn tourism into an industry that would benefit all. Check Lanier 2014 for suggesting something similar about the bits and bytes exchanged on the internet.
10. See Elkins 1997.
11. Though, if the other were in the know about the aim with which the photo is taken, then, taking the photo would be intrusive as well.
12. Obviously, I am not proposing a decency police, as whatever goes by that name, decency, is an aspect of thick perception, and is, hence, a thing for reciprocal adjustment amongst people.
13. On the internet, abused images lead their own lives, unstoppable at that.
14. This suggestion, also, has consequences for the thought that each one of us is sovereign in determining whether or not to apply cosmetic surgery to their face. In Gerwen 2011 I argue that this right is misunderstood and is grounded in property right, but that we do not possess our outward looks in the same manner as a book or car.
15. More on this question in Rob Scholte's Work. Part II, this journal 2016:1
16. With art, things stand differently, though: If one sees the *Supper at Emmaus* as a Vermeer, one appreciates it in light of Vermeer's oeuvre, viewing it in a less fruitful manner than if one were to see it as within the oeuvre of Van Meegeren, a smart and capable man, but not a great artist. What is lost if one views it as a Vermeer is best explained in Wollheim 1993. I am merely pointing out that, I submit, the core of the aesthetic appreciation of art is the search for a way to perceive the maker in the work.<sup>18</sup> And this search can be hindered by a forgery, but need not be hindered by

a later work redoing an original, as in the cases discussed here.

17. This text on Rob Scholte's work, and the one to appear in the next issue of *Aesthetic Investigations*, are based on van Gerwen

2016. Pictures reproduced with the generous permission of the artist.

18. I am not arguing this view, here, though, as it would require more space.

## REFERENCES

- Elkins, James. 1997. *The Object Stares Back: On the Nature of Seeing*. Mariner Books.
- Gerwen, Rob van. 2011. "Gesichter sprechen an. Eine philosophische Betrachtungsweise des Gesichtsausdrucks (und der kosmetischen Chirurgie)." In *Im Dienste der Schönheit? Interdisziplinäre Perspektiven auf die Ästhetische Chirurgie*, edited by Arianna Ferrari, Beate Lüttenberg, and Johann S. Ach, 189–204. Berlin: Lit Verlag.
- Irvin, Sherri. 2005. "Appropriation and Authorship in Contemporary Art." *British Journal of Aesthetics* 45:123–37.
- Lanier, Jaron. 2014. *Who Owns the Future?* London: Simon & Schuster.
- Lessing, Alfred. 1965. "What is Wrong with a Forgery?" *Journal of Aesthetics and Art Criticism* 23 (4): 461–471.
- van Gerwen, Rob. 2015. "Spoort de wet wel helemaal (met de esthetica)? De zaak Van Giel vs. Tuymans." *Filosofie & Praktijk* 36 (3): 54–65.
- . 2016. "Beeld is voor wie het waarneemt. Beeldrecht, kijkplicht en reanimatie in het werk van Rob Scholte." In *Rob Scholte. Embroidery show*, 16–26. Zwolle: Museum de Fundatie, uitgeverij Waanders & de Kunst.
- Wittgenstein, Ludwig. 1953. *Philosophical Investigations*. Translated by G.E.M. Anscombe. Oxford: Blackwell.
- Wollheim, Richard. 1993. "Pictorial Style: Two Views." In *The Mind and its Depths*, 171–184. Cambridge (Mass.), London (England): Harvard University Press.
- . 2001. "On Pictorial Representation." In *Richard Wollheim on the Art of Painting. Art as Representation and Expression*, edited by Rob van Gerwen, 13–27. Cambridge, New York: Cambridge University Press.