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Appropriation art poses challenges for copyright law

The 2d Circuit's forthcoming ruling in 'Cariou v. Prince' likely will be a significant landmark in the debate.

BY LEWIS R. CLAYTON

For decades, artists have created appropriation art—works that place pre-existing photographs, images or objects created by others in new contexts. Examples range from Pablo Picasso's *Bottle of Vieux Marc, Glass, Guitar and Newspaper*, a 1913 collage including newspaper clippings, to Andy Warhol's 1962 work *Gold Marilyn Monroe*, an iconic silkscreened photograph of Monroe on a gold background. Appropriation art poses difficult challenges for copyright law, because copyright rewards the creativity of the appropriation artist, but includes broad prohibitions on the use of creative works made by others.

Those tensions are on display in the recent decision in *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011), now on appeal to the U.S. Court of Appeals for the 2d Circuit. The court issued a sweeping injunction requiring the "impounding, destruction, or other disposition" of works created by Richard Prince, a well-known appropriation artist, rejecting Prince's position that his works are protected under copyright's fair-use doctrine.

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At issue in *Cariou* was Prince's Canal Zone series, described in his appellate brief as a "fantastical account of survivors of a nuclear holocaust who create their own society where music is the surviving, if not redeeming, fact of life." The Canal Zone series incorporated portions of photographs copied from plaintiff Patrick Cariou's book *Yes, Rasta*. Cariou, a professional photographer, spent years living in Jamaica and photographing Rastafarians. Cariou's photographs are classic portraits of Rastafarians in a natural tropical landscape reflecting Cariou's view of the Rastafarians as "a spiritual society living simply…in harmony with nature, apart from the industrialized world." In Prince's work, Cariou's images were cut up, painted over and collaged with various images including nudes, marijuana and electric guitars, plunging Cariou's simple and spiritual Rastafarians into a post-apocalyptic world of drugs and rock music. Some of Prince's works consisted largely of a single modified image in which Cariou's portrait is clearly visible and central to the work, while others used only a portion of Cariou's image, almost entirely obscured by Prince's painting and collage.

The Cariou opinion was written against a background of two 2d Circuit cases that reached opposite conclusions concerning appropriation art—although each of those cases concerned the work of the same appropriation artist, Jeff Koons. The first of those cases, *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), examined Koons' sculptural depiction of the plaintiffs' photograph of a couple with eight puppies. Koons directed that the work be sculpted to look like the photograph, leaving no question as to whether the work had been copied. Koons' additions to the work, including flowers in the couples' hair and bulbous noses on the puppies, were described as minimal.

JEFF KRAVITZ/FILMMAGIC, INC.

ENJOINED: Richard Prince, left, with gallery owner Larry Gagosian. His Canal Zone series was the subject of an injunction now on appeal.

Koons argued that his work was meant to satirize or parody contemporary society and that he incorporated the pre-existing image "to comment critically both on the incorporated object and the political and economic system that created it." He claimed the work was protected as fair use under § 107 of the Copyright Act, which lists four factors used in determining whether a use is fair: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational

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purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." The court rejected Koons' satire defense under the first factor, holding that "though the satire need not be only of the copied work and may…also be a parody of modern society, the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work." Koons' satire was not sufficiently focused on the work it appropriated. The court explained that "[b]y requiring that the copied work be an object of the parody, we merely insist that the audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist."

In 1994, the U.S. Supreme Court considered fair use in the landmark case of *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994), which concerned a parody of the song "Oh, Pretty Woman." The *Campbell* Court described the central purpose of the first fair-use factor as determining whether the use is "transformative," that is, "whether the new work merely 'supersede[s] the objects' of the original creation…('supplanting' the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."

Twelve years after *Campbell*, the 2d Circuit again reviewed a Koons piece, this time construing the transformative-use test and recognizing Koons' appropriation as fair. In *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006), Koons incorporated a photograph of a model's legs taken from an advertisement in a fashion magazine into his work in order, he claimed, to comment on the culture promoted in the magazine. The court emphasized the differences in presentation and meaning between the original work and Koons' work, holding that Koons' use did not supersede the original, but used it as "raw material in the furtherance of distinct creative or communicative objectives." The court declined to "question" Koons' "statement that the use of an existing image advanced his artistic purposes." The *Blanch* court did not question its prior holding in *Rogers*—the different result might be explained by a concern that Koons' meticulous duplication of Rogers' work in a new form was simply too close to the original to add significant new expression. In *Blanch*, the court found that Koons' "purposes in using Blanch's image are sharply different from Blanch's goals in creating it."

Central to the district court's holding in *Cariou* was its determination that Prince's use was not transformative. The court read binding precedent as imposing "a requirement that the new work in some way comment on, relate to the historical context of, or critically refer back to the original works." Therefore, "Prince's Paintings are transformative only to the extent that they comment on the Photos; to the extent they merely, recast, transform, or adapt the Photos, Prince's Paintings are instead infringing derivative works."

Relying on Prince's own testimony, the court had little difficulty finding that this test was not met. "Prince testified that he has no interest in the original meaning of the photographs he uses." He "testified that he doesn't 'really have a message' he attempts to communicate when making art. In creating the Paintings, Prince did not intend to comment on any aspects of the original works or on the broader culture." Prince's intent "was to pay homage or tribute to other painters, including Picasso, Cezanne, Warhol and de Kooning, and to create beautiful artworks which related to musical themes and to a post-apocalyptic screenplay he was writing which featured a reggae band."

The court also found that Prince's use injured the market for Cariou's works, finding that a gallery owner "discontinued plans" to show Cariou's photos because she did not want to appear to be "capitalizing" on Prince's paintings or show work that had been "done already." And the court found that Prince's "bad faith" was "evident" as he had made no attempt to contact Cariou to ask about licensing rights to use the photos.

The Cariou court's focus on whether the infringing work comments on the plaintiff's work—as opposed to providing commentary on broader issues or themes—arguably helps to clarify analysis in what is a notoriously vague area of copyright law. And it confines the infringement of copyrighted works to situations in which copying is necessary, because it is often necessary to copy some of the work in order to comment on it. As the *Campbell* Court said, if "the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly."

But this approach may also have significant drawbacks. As long as appropriation art does not simply exploit the copied work—when the defendant is not simply avoiding "the drudgery in working up something fresh," and is creating a work that does not substitute for the original—it is not clear that fair use should be limited to commentary upon the original work. Such a rule might benefit the owners of appropriated works by stimulating creation of a market for the licensing of their works, in the same way that license fees may be paid to the owners of rights in sound recordings that are sampled by music composers. But that rule is likely to threaten the work of appropriation artists—indeed, many classic works of appropriation art would have difficulty passing muster under the analysis used in *Cariou*.

Moreover, a rule that focuses narrowly on the artist's intent in creating the work may place undue emphasis on the ability of the artist to articulate creative decisions that may be difficult to express or explain. And in the end, the proof of a work's "transformative" nature is arguably in the eye of the beholder as opposed to the mind of the creator.

The 2d Circuit's forthcoming decision in *Cariou* likely will be a significant landmark in the debate over appropriation art.