

# Against the Grain

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## Legally Speaking- Combating Copyrights for Artists

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# LEGAL ISSUES



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## Legally Speaking — Combating Copyrights for Artists

by **Anthony Paganelli** (Western Kentucky University) <Anthony.Paganelli@wku.edu>

In the United States, copyright laws were established in 1790 by the constitution. Since the U.S. Constitution has allowed Congress to enact copyright laws, music publishers and industry leaders have been strong public advocates for musicians, songwriters, and performers, which is noted by the efforts of the performing rights organizations **American Society of Composers, Authors, and Publishers (ASCAP)**, **Broadcast Music, Inc. (BMI)**, and **Society of European Stage Authors and Composers (SESAC)**. Further contribution towards assisting musicians was the recently passed *Music Modernization Act* that provides better financial support for artists, an open accessible database of copyrighted works, and updates to the copyright laws for streaming digital works. Yet, visual artists; especially those that have images online, have very little assistance available for them to hinder copyright infringement and recoup lost income.

Visual artists such as photographers, painters, sculptors, etc. struggle with obtaining legal support and assistance with protecting their works and securing finances. While this reason for a lack of outside support could be mainly stated in terms that art work sales can be commissioned or through direct sales. Also, art can also be licensed, which has recently become a major trend for manufacturers to license images for their products to increase revenue. In order to license their work, artists have the option to license their own work themselves or obtain an agent or publisher to assist with licensing agreements with manufacturers, which U.S. artists have the **Licensing Industry Merchandisers Association** to provide a directory of resources. In addition, artists can secure financial support and the protection of their works is through copyright protection.

In regards to art and copyright, the U.S. Copyright Office states loosely that “pictorial, graphic, and sculptural works are considered art that can be copyrighted.” According to the U.S. Copyright Office, an original work is copyrighted “the moment it is created and fixed in a tangible form that is perceptible

either directly or with the aid of a machine or device.” Therefore, artists have control over how the work is reproduced, adapted, distributed, displayed, licensed, or sold. Overall, the artist has ownership of the work as the work is being created and once the work is completed. The only exceptions to ownership is whether the work was a “work for hire” by an artist that works within an organization or as an independent artist working for a commission.

Even though the artist’s work is basically copyrighted from the process of creation to the completion, artists have the option to register their copyright with the U.S. Copyright Office in order to obtain the full protection of the copyright law. Of course, this can be costly with fees and time, but it does give the artist full protection should an issue of copyright infringement occur and enter the legal system.

Artists may also struggle to understand the concept of copyright laws regarding their works that includes several issues that constitute copyright and copyright infringement. Further struggles for artists can include locating an attorney to represent their works and interests, not to mention expensive legal fees. Not only obtaining an attorney to represent an artist can be difficult, but securing an attorney that is knowledgeable of art. While law schools have recently begun to offer art law within their curriculum, artists will have limitations and access to an attorney that would be able to understand the complexities of art business.

As images continue to be reproduced and distributed electronically, artists have to contend with their works being altered or changed to misrepresent the original creation of the work. This is an issue that has become very common since the 1980s as technology has given the ability to easily copy and alter artworks, which mainly includes images. In regards to this misuse of copyrighted images in terms of fair use, works can be copied for four reasons that includes “purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; nature of the copyrighted work; amount and substantiality used in relation to

the copyrighted work as a whole; and “effect of the use on the potential for the market for or value of the copyrighted work.”

Two examples for fair use in art include parodies and appropriations. Parody is a work that can make use of some original artwork “for comic effect or ridicule.” This fair use is difficult because it does contain a portion of the original, yet it is not a derivative of the work. A common example of an original artwork used for parody is **Grant Wood’s** 1930 painting *America Gothic*, which pop culture icons have replaced the faces of the iconic farmer and his daughter to represent a parody. Appropriations have become common due to the technology available to take an original image and use it to create other works of art.

A recent account of appropriations and copyright infringement is the case *Cariou v. Prince* 714 F.3d 694 (2d Cir. 2013). Author and photographer, **Patrick Cariou** published the book *Yes Rasta* in 2000, that included photographs of people and landscape in Jamaica. In 2008, artist **Richard Prince** utilized several of **Cariou’s** photographs to create a series of paintings and collages for a gallery exhibit at the **Gagosian Gallery** in New York City titled *Canal Zone*. **Cariou** sued **Prince** for copyright infringement in 2009 against, as well as **Gagosian Gallery, Inc.**, **Lawrence Gagosian**, and the **Rizzoli International Publications, Inc.**

In 2011, the U.S. District Court for the Southern District of New York determined that **Prince** infringed on **Cariou’s** work. The court first decided that **Cariou’s** work qualified for copyright protection, **Prince’s** works were not transformative nor parody, the gallery acted on bad faith by knowing that the works utilized **Cariou’s** photographs, and **Prince** used a large portion of **Cariou’s** work. The fourth aspect of fair use that the court examined was the potential for market value. **Cariou** was denied an opportunity to place an exhibit at the **Gagosian Gallery** because **Prince’s** exhibit had preceded it, thus the court decided that the **Cariou’s** potential market was damaged.

The court also ordered **Prince** to discontinue any use of **Cariou’s** works. **Prince** and the **Gallery** also had ten days of the order to destroy any works that had **Cariou’s** photographs, which included the gallery’s exhibition catalog books. **Cariou** opposed the destruction and the term was reserved for litigation. In

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addition, **Prince** had to notify in writing of current and future owners of his works relating to **Cariou** were infringed.

However, the U.S. Court of Appeals, Second District in 2013 overruled the decision based on the determination that **Prince's** works were transformative and meet the requirements of fair use. Although, the appeals court noted that of the thirty works determined to be infringed, the appeals court decided that five of the thirty works would be reexamined in the lower courts. Despite the final appeals decision, both parties announced a settlement in 2014.

While the *Cariou v. Prince* case is an example of the appropriations art and the courts' decision based on the four elements of copyright and fair use, more recent court cases regarding the illegal use of digital images have become prevalent towards the fair use practice. For example, photojournalist **Daniel Morel** filed a copyright infringement case in the U.S. District Court for the Southern District of New York in 2013 against **Agence France-Presse** and **Getty Images**. **Morel** claimed the two companies used photographs of the aftermath following the 2010 Haiti earthquake that he had posted to his Twitter account.

Of course, the *Morel* case is more complicated than a company using images found on a Twitter account. In fact, **Morel** posted the images following the earthquake to **TwitterPic**. Later, **Lisandro Suero** reposted the pics and claimed the photos as his. An editor for **Agence France-Presse** located the photographs on a Twitter account and sent them to **Getty Images**, which were released to several television networks and the *Washington Post*. Despite the defendant's claim that they did not violate the copyright laws, Federal District Judge **Alison Nathan** ruled in favor of **Morel**, who was awarded \$1.2 million.

The *Morel* case is significant for artists whose images are frequently used for other purposes, mostly because the case has been

spoken publicly about the seriousness of using other persons' images from the Internet. Furthermore, the case advocates a need for artists to have a stronger representation for copyright infringement cases that have previously been noted with previous copyright cases. General counsel to the **National Press Photographers Association**, **Mickey Oosterreicher** reiterated the need for advocacy towards artists' rights, "This ruling is important because far too often we find that photographers don't have the power to stand up to those that infringe with impunity. I hope that this sends a message, but in reality we need a cultural change so that once again photographs are valued."

A current advocate for artists and copyright infringement issues is **COPYTRACK's** CEO, **Marcus Schmitt**. He founded the company **COPYTRACK** in 2015 to assist artists who post images online that may have encountered issues with copyright infringement. The company's website states, "Millions of images are stolen and illegally used on the Internet every day. Especially for photographers, publishers, and picture agencies, this causes significant financial damage. So far, authors have been largely helpless in the fight against copyright infringement, as it is still considered a trivial offense."

In order to combat copyright infringement online, the company utilizes an image search engine and an image matching search engine to locate possible accounts of infringement. The company also provides their services for free, with stipulations regarding legal fees. The stipulation is noted on the company's website, "Our service is free of charge and we bear all legal costs. Only if we succeed, do we retain a commission."

The company is creating opportunities for artists to better secure their work and reclaim lost revenue. **Schmitt** noted, "Irrespective of whether it is a photographer, a publisher or a library that owns the rights to photographs, **COPYTRACK** can check how they are used online. In case of illegal use, **COPYTRACK** will take care of fair post-licensing or legal enforcement." In addition, libraries will be able to monitor companies, such as **COPYSTOCK**

that tackle copyright legal cases for artists. Especially, cases relevant to academic libraries and online copyright issues. For numerous years, artists have contended with copyright infringement issues, hopefully the same technology that has created these major problems for artists will eventually assist with protecting their works and rights.

### Bibliography

**Ax, Joseph.** "Photographer Wins \$1.2 Million from Companies that Took Pictures off Twitter." *Reuters*. <https://www.reuters.com/article/us-media-copyright-twitter/photographer-wins-1-2-million-from-companies-that-took-pictures-off-twitter-idUSBRE9AL16F20131122>

**Barbour, Adrienne.** "Yes, Rasta 2.0: Cariou V. Prince and the Fair Use Test of Transformative Use in Appropriation Art Cases." *Tulane Journal of Technology and Intellectual Property*, Fall 2011.

"Circular 1A." *United States Copyright Office*. (January 8, 2019): <https://www.copyright.gov/circs/circ1a.html>.

**Copy Track.** "About Us." *COPYTRACK*. <https://www.copytrack.com/about-us/>

**Estrin, James.** "Haitian Photographer Wins Major U.S. Copyright Victory." *New York Times*. <https://lens.blogs.nytimes.com/2013/11/23/haitian-photographer-wins-major-u-s-copyright-victory/>

**Grant, Daniel.** *The Fine Artist's Career Guide*, 2nd ed. New York: Allworth Press, 2004.

**Larzzari, Margaret.** *The Practical Handbook for the Emerging Artist*, 2nd ed. Boston: Wadsworth Cengage Learning, 2010.

U.S. Copyright Office. *Cariou v Prince*. <https://www.copyright.gov/fair-use/summaries/cariou-prince-2dcir.2013.pdf>

**Wojak, Angie and Stacy Miller.** *Starting Your Career as an Artist*. New York: Allworth Press, 2011. 🐾

## Cases of Note — Copyright

### Appropriation Art

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**PATRICK CARIOU v. RICHARD PRINCE** 714 F.3d 694 (2d Cir. 2013)

Our superb new legal intellect **Anthony Paganelli** cites this case in his current article, so let's go deeper.

**Patrick Cariou** spent six years among the Rastafarians of Jamaica and in 2000 published *Yes Rasta*, a book of portraits and landscape photographs. He considered it "extreme classical photography and portraiture" and did not want it turned into pop culture.

Enter **Richard Prince** who did precisely that. **Prince** is an "appropriation artist," which just kind of cries out copyright piracy but isn't necessarily. These "artists" use existing images and objects with little to no alteration. London's **Tate Gallery** defines it as "the more or less direct taking over into a work of art a real object or even an existing work of art."

One might say it began with **Marcel Duchamp's** 1915 *Fountain* — a men's urinal he had signed. **Salvador Dali** did a lobster

telephone. **Jasper Johns** and **Robert Rauschenberg** made use of *objets trouvés* which is to say rubbish found while dumpster diving.

But it became much more like copying in the 1980s particularly with **Jeff Koons** and his reproduction of banal objects. **Koons** has paid some fairly hefty damages in three French lawsuits. To me, the most recent, *Fait d'Hiver*, seems awfully transformational which is key to our **Cariou** case.

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