Against the Grain

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Cases of Note- Appropriation Art

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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 TwitPic. 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 loss 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.

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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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I can just throw that out knowing you can Google it with ease and arrive at your own conclusion.

At any rate, there are a slew of appropriators out there. **Richard Petibone** makes miniatures of works from **Brancusi** to **Warhol**. **Deborah Kass** is said to "walk the line between respectful homage and brazen copying." **Shepard Fairey** modifies Chinese communist propaganda. He was famous for the **Obama** "Hope" poster for which **Fairey** was sued by the AP photog who snapped the original.

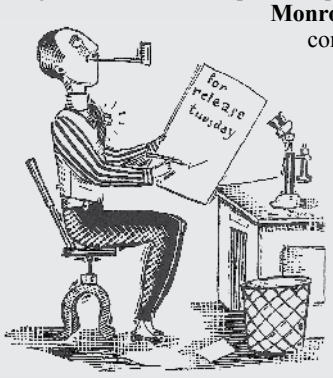
And **Richard Prince** is a major player in the field. There is big money in it, and his work is in famous museums — **Guggenheim**, **Whitney**, **Rotterdam's Museum Boijmans van Beuningen**, and **Basel's Museum fur Gegenwartskunst**.

And like all reasonable people scuffling for a living, you're asking yourself why don't I have the necessary gall to do this?

Anyhoo, **Prince** put together a series of paintings and collages called *Canal Zone* and exhibited them at the **Eden Rock Hotel** in Saint Barthémy and the **Gagosian Gallery** in NYC. He had ripped pages out of *Yes Rasta,* enlarged them, pinned them to a piece of plywood and altered them mainly by painting green "lozenges" over facial features.

Prince's works are ten times larger than **Cariou's** book photos and use inkjet printing and acrylic paint along with the torn out photo pieces. In the least altered one, he painted lozenges on the eyes of a rasta and pasted a picture of a guitar in his hands.

And no, of course **Prince** did not ask **Cariou's** permission. And meanwhile *Yes Rasta* has gone out of print and **Cariou** only made $8,000. Several of the *Canal Zone* works have sold for $2 million. A total of eight went for $10 million.



And then there's the glitteratti lifestyle of an appropriation artist. The **Gagosian** opening dinner hosted **Jay-Z** and **Beyoncé Knowles**, **Tom Brady** and **Gisele Bundchen**, editors **Graydon Carter** and **Anna Wintour**, author **Jonathan Franzen**, actor **Robert DeNiro**.

Cariou sued for copyright infringement and won summary judgment and a permanent injunction at the district court in NY.

The Appeal

Prince asserted a fair use defense and argued that his works are transformative and therefore not a copyright violation. *See, e.g.,* ***Campbell v. Acuff-Rose Music, Inc.,*** 510 U.S. 569, 578-79 (1994).

The district court had imposed a requirement that the new work "comment on, relate to the historical contest of, or critically refer back to the original works" to qualify for fair use. ***Cariou v. Prince,*** 784 F.Supp. 2d 337, 348-49 (S.D.N.Y. 2011). And it found this was not met.

If I painted a big 'X' through a picture, would that be a comment?

The Second Circuit asked if the original work is used as "raw material, transformed in the creation of new information, new aesthetics, new insights and understandings." *Campbell,* 510 U.S. at 579.

Green lozenge eyes as new aesthetic.

Satire and parody comment on the original work and/or popular culture. **Andy Warhol** incorporated appropriated images of **Marilyn Monroe** or **Campbell's** soup cans for comment on consumer culture.

But there is no requirement that the second work comment on the original, only that the second employ the first for a different purpose or in a different manner. It must alter it with "new expression, meaning, or message." *Id.*

The 2d Cir. held the two works had entirely different aesthetics. **Cariou** did "serene and deliberately composed portraits" while **Prince's** work was "crude and jarring." **Cariou** did black-and-white photos while **Prince** used color and much bigger scale.

The district court got hung up on **Prince's** deposition where he flatly stated he didn't have a message and he wasn't "trying to create anything with a new meaning or a new message." *Cariou,* 784 F. Supp. 2d at 349.

On appeal, **Cariou** quite reasonably argued that **Prince** should be taken at his word.

But Google Prince's work, and you see he's transformed Cariou despite his wacky explanation for his existence.

And the 2d Cir. said we should examine how **Prince's** work may "reasonably be perceived." ***Campbell,*** 510 U.S. at 582.

Well, it's certainly different, as people like to say when confronting distasteful art.

Questions & Answers — Copyright Column

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QUESTION: A public librarian asks why libraries are allowing publishers to determine the reproduction parameters for eBooks. Why cannot a user print a copy for purposes of reading it in a more comfortable environment than at a computer station?

ANSWER: Publishers own the rights to the eBooks that they make available to libraries through license agreements. A license agreement is a contract that the library signs to acquire access to eBooks for its users, and libraries are bound by the contracts they sign. (*See* 17 U.S.C. § 108(f)(4) (2012). It is critical to publishers that eBooks not be copied and shared since publishers' income depends on selling licenses.

Some licenses may permit printing of a single copy for a single use, but it depends on the license agreement. If the right to print a reading copy for a single use is important to a library's users, librarians should negotiate with publishers to have the right included in the next license agreement. Most libraries lend eBooks to read and enjoy at the users' home or office.

QUESTION: A university librarian asks why there have been so many articles concerning copyrighted works entering the public domain on January 1, 2019, and why it is important.

ANSWER: When the ***Copyright Act of 1976*** was enacted, one change was to make all works for which the copyright term expired in a particular year to enter the public domain on January 1 of that year. In 1998, the ***Sonny Bono Term Extension Act***, an amendment to the ***Copyright Act***, extended the copyright term for works published between 1923 and 1964 from 75 to 95 years. These works received an initial term of 28 years and could be renewed for an additional 47 years. If not renewed for copyright, these works entered the public domain. The ***Term Extension Act*** added another 19 years to the renewal term, giving them a total of 67 years renewal plus the initial 28 years for a total of 95 years. The works from 1923 for which the copyright was not renewed expired at the end of 2018 and entered the public domain on January 1, 2019.

Because the **Disney Company** lobbied so hard for the ***Term Extension Act***, it is often referred to as the Mickey Mouse act. Why copyright protection in the **Disney** characters is so important is somewhat of a mystery since these

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