Against the Grain

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Questions and Answers-Copyright Column

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Cases of Note
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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.

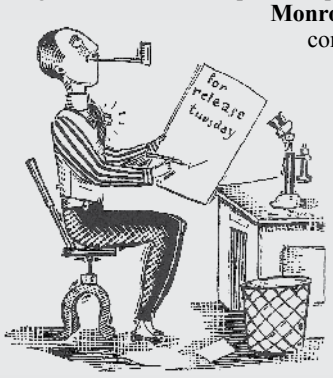
And **Richard Prince** is a major player in the field. There is big money in it, and his work is in famous museums — **Guggenheim**, **Whitney**, **Rotterdam's Museum Boijmans van Beuningen**, and **Basel's Museum fur Gegenwartskunst**.

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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characters also enjoy trademark protection. Further, trademark can be perpetual as long as a company continues using the character as a mark and renews the trademark every ten years. True, the ***Act*** did extend the copyright to 2024 on "Steamboat Willie," the first cartoon in which Mickey Mouse appeared. Nonetheless, in 1998 a 19-year hiatus was placed on works entering the public domain. This resulted in works from the mid-20th century that are still under copyright not being available on the Internet. Many feared as 2019 drew near that the copyright industry would again lobby for term extension. Fortunately, this did not happen. **Congress** and others have recognized that for these works created before 1964, 95 years of protection is enough.

Many of the articles and blogs discussing works entering the public domain in 2019 list many of these important works. **Google Books** will begin to offer full text of the books from 1923. The **HathiTrust** has made over 50,000 titles from 1923 available in its database. Unfortunately, many of these works may have been lost over the years, for example, many silent films. The importance of copyright expiration for works published in 1923 means that anyone might reproduce them, make them available on the Internet, perform them, adapt them, etc., without extensive research to locate the copyright owner and seek permission. It is a boon for scholars everywhere as well as for individuals.

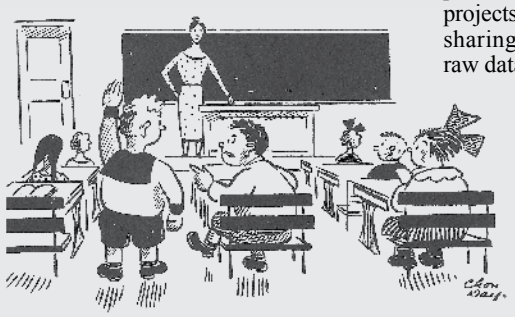
QUESTION: A school library has a film on VHS that has never been published on DVD. Teachers in the school are actually using it in class. Another library has requested the tape via interlibrary loan. The librarian asks if she can copy the tape and send it to the other library.

ANSWER: Unfortunately no. The library may lend the original but not reproduce it. It would be similar to copying an entire book for interlibrary loan. Most librarians would recognize that copying an entire exceeds fair use and the Interlibrary Loan Guidelines.

QUESTION: A publisher asks about an author who wants to use a figure from a white paper published by an Indian company in 2002. The adapted figure is crucial to the author's manuscript. Despite attempting multiple means to reach the company to seek permission, the author has been unsuccessful. The publisher asks if the figure must be removed from her manuscript even though it rather destroys her work to omit it. Is there any "reasonable person" dimension to such efforts?

ANSWER: While there is no formal "reasonable person" standard, a court would likely pay attention to the efforts of the author to obtain permission and be sympathetic. Retaining copies of emails, records of phone calls, etc., is advisable. Further, the author should fully cite the original article and include a note to the effect that she tried repeatedly without success to obtain permission to use the figure.

While there is some risk in publishing the adapted figure, it likely is slight. The white paper is several years old. Using the figure as defined is a type of critique of the figure, which tends to make it a fair use. There is little way to do a critique without reproducing the figure itself. One figure from the white paper is definitely a small amount. Further, the author has done all she can to get permission. The publisher now has to evaluate the importance of publishing the work versus the potential risk of using the figure without permission.



QUESTION: A university librarian asks about the recent suit filed by Elsevier and the American Chemical Society against ResearchGate (RG) over some 3,000 articles. He is concerned because faculty at his institution depend on RG and many of the articles on RG are authored by his faculty members.

ANSWER: The complaint filed in the federal district court in Maryland claims that **RG** provides anyone connected to the Internet with free access to infringing digital copies of peer-reviewed articles published in scholarly journals. Further, the complaint states that **RG** is not a passive host of a forum where infringement just happens to occur but instead it directly engages by reproducing, displaying and distributing unauthorized copies of these journal articles as well as facilitates, supports and lures users into uploading and downloading unauthorized materials. A similar lawsuit was filed in Germany in 2017.

Many librarians may be surprised to learn that **RG** is a for-profit firm located in Germany. It was founded in 2008 as a large social networking site that focuses on the academic community. According to **RG's** website, it has over 15 million members who can upload their papers and meeting presentations. It has been funded by science funders and investors. It has raised more than $87 million from the **Welcome Trust** charity, **Goldman Sachs** and **Bill Gates** personally.

Prior to filing the suit, publishers worked through the **International Association of Scientific Technical and Medical Publishers** and asked **RG** to agree to a voluntary scheme to regulate article sharing, but the company refused. According to the complaint, the suit "is not about researchers and scientists collaborating, asking and answering questions; promoting themselves, their projects, or their findings; or sharing research findings, raw data, or pre-prints of articles." Instead, it focuses on **RG's** "intentional misconduct vis-à-vis online file-sharing / download service, where the dissemination of unauthorized copies … constitutes an enormous infringement of the copyrights owned by **ACS**, **Elsevier** and other journal publishers." The complaint asks the court to order **RG** to cease reproducing or distributing material under copyright by **ACS** or **Elsevier** and to delete all unauthorized infringing copies from its servers. Additionally, publishers seek damages of $150,000 per work infringed.

Critiques of the complaint are many. For example, the complaint makes little mention of the authors of these articles and what rights these authors might have. For example, are any of the author's government employees producing the works within the scope of their employment who had no right to transfer the copyright to a publisher? Were any of the authors subject to university open access policies? Were any authors the subject of an open access mandate from a funder? Or had authors paid for open access for any of these articles?