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Is Art Infringement? (Cariou V. Prince, 2nd cir., April 25, 2013)

Appropriation artist Richard Prince won a big victory in the Second Circuit on Thursday, overturning a trial court decision that had sent chills through some corners of the contemporary art world. But the decision opens up a world of uncertainty in art-world litigation, and the real winners may be the lawyers who fight over that uncertainty.

In a much-watched case, Patrick Cariou, a little-known photographer, sued *au courant* art-world darling Richard Prince, claiming that Prince's famous (and lucrative) *Canal Zone* series infringed Cariou's bucolic photos of Jamaican Rastafarians. Cariou won in the trial court, and Prince appealed. On Thursday, the Second Circuit ruled that twenty-five of Prince's thirty pictures were transformative enough to constitute "fair use," a defense to copyright infringement. The other five were too close to call, and the fight will go on.

In the trial court, Judge Deborah Batts had found none of the thirty pictures sufficiently transformative to constitute fair use. She saw a legal "requirement that the new work in some way comment on, relate to the historical context of, or critically refer back to the original works" in order to qualify as fair use. Prince had admitted at his deposition that he hadn't had any interest in commenting on the unknown photographer's work, or on that work's relation to popular culture. He just wanted to use them to make something different. For Judge Batts, that was a damning admission,

and she rejected Prince's fair use defense. On appeal, the Second Circuit disagreed. The court held that "the law does not require that a secondary use comment on the original artist or work, or popular culture." The fair use test is much looser: "If 'the secondary use adds value to the original – if [the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings – this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.'"

How do judges determine whether a new art work is transformative, i.e., whether it expropriates the original "in the creation of new information, new aesthetics, new insights and understandings"? No Ph.D. in art history? No worries. You can still distinguish between transformative art and derivative art, at least if you're reasonable. "What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work."

The "reasonable man" is one of the law's oldest citizens; it shouldn't be too surprising that he's now an art critic too. What will he think of Prince's thirty Cariou-based pictures? Surprisingly, we won't get to find that out for twenty-five of them. The Second Circuit concluded that for those pieces, the question of transformativeness was so easy that it could do the work itself.

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Here's the Court's analysis of transformativeness in Prince's work: "These twenty-five of Prince's artworks manifest an entirely different aesthetic from Cariou's photographs. Where Cariou's serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince's crude and jarring works, on the other hand, are hectic and provocative. Cariou's black-and-white photographs were printed in a 9 1/2" x 12" book. Prince has created collages on canvas that incorporate color, feature distorted human and other forms and settings, and measure between ten and nearly a hundred times the size of the photographs. Prince's composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs, as is the expressive nature of Prince's work."

Those words accurately describe the physical differences between Prince and Cariou's work. But the court doesn't explain why these differences are enough to render twenty-five of the pictures transformative, when the court also concludes that the differences in the other five pictures are *not* necessarily enough to render the works transformative. (As to those pieces, the Second Circuit asks the trial court to try again.)

Perhaps the Second Circuit is channeling early Potter Stewart, who famously defined hard-core pornography this way: "I know it when I see it." *See Jacobellis v. Ohio* (1964) (Potter, J., concurring). So too transformative art, after *Prince v. Cariou*.

When does an appropriation artist know she's changed an image enough that she doesn't have to fear a copyright suit? The court says it's not saying that "any cosmetic changes to the photographs would necessarily constitute fair use. A secondary work may modify the original without being transformative." Okay – then how much more than "cosmetic" is needed? Enough so that a reasonable observer would conclude that the artist "has 'add[ed] something new' and presented images with a fundamentally different aesthetic."

Raise your hand if you think most lawyers – or judges – can confidently opine as to whether a work of art has "added something new" to a previous artwork, so that the new work presents "a fundamentally different aesthetic." Potter Stewart must be chuckling somewhere.

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