

Second Circuit Decision Finds Transformative Use Does Not Require Comment

Alexandra Wald, Partner

On April 25, 2013, the Second Circuit issued its decision in *Cariou v. Prince*, agreeing with the artist Richard Prince and his gallery, Gagosian, that “the law does not require that a secondary use comment on the original artist or work, or popular culture.” The Second Circuit disagreed with the district court’s holding that secondary use must “comment on, relate to the historical context of, or critically refer back to the original works.” Instead, said the Second Circuit, any use that “alter[s] the original with new expression, meaning or message” is transformative, regardless of express commentary or even the author’s stated intent.

Prince is an “appropriation artist” whose work plays with concepts of aesthetics and originality, as well as tropes of identity and reality. His body of work includes reproductions (“rephotographs”) of photographs of cowboys reminiscent of cigarette ads, pulp-fiction inspired photographs of nurses, and a series of “jokes” on paper that overtly mock the idea of collecting when hung on a gallery wall. The works at issue in the *Prince v. Cariou* appeal appropriated, substantially for the most part, photographs of Rastafarians taken by Patrick Cariou during six years of living in Jamaica. Prince superimposed brushstrokes on some of Cariou’s images and created collages with elements taken from others.

Based on the “entirely different aesthetic” of Prince’s “crude, jarring, hectic and provocative” images, as compared to Cariou’s “serene” portraits, the Second Circuit found that Prince’s works were sufficiently transformative to avoid liability for copyright infringement. This was true even though other factors did not favor Prince, in that his works were highly commercial, and for the most part they appropriated large portions of Cariou’s work.

By endorsing aesthetics as a medium of commentary, the *Cariou* decision offers some helpful – though not entirely bright-line – guidance for artists who seek to riff off the works of past masters or take source material from what they see around them, and the museums and galleries that show their work. The briefs of amici in the case frame the main question the Second Circuit confronted: can changing the look of an artwork, without more, give it new meaning and expression?

Museums and art associations that filed as *amici* contended that Prince’s work fell into a long Western tradition of “appropriation art,” with roots in reverence for the faithful copying of nature, and evolving through artists such as Manet and Picasso, who reinvented tropes and appropriated aspects of their predecessors, all the way to Duchamp’s painting a moustache on a copy of da Vinci’s “Mona Lisa.” Importantly, the revolutionary nature of at least some of these cited instances – Manet’s bold nude

painting *Olympia* as contrasted with the idealized nudes of the French Academy, for example – was at least as much, if not more, a matter of artistic form as compared to subject matter or explicit comment.

Rival amici fired back on behalf of photography associations that “Prince’s copies were not ‘transformative’ in any sense relevant to the fair use inquiry. . . Prince expressly disclaimed that he was commenting upon or satirizing Cariou’s works or techniques, admitting that he simply wanted to create his own ‘balls out, unbelievably great looking painting.’”¹ Cariou and these amici asked that Prince be estopped from claiming fair use, based on what they interpreted as a disavowal of intent to add meaning.

Prince’s stance vis-à-vis the content of the challenged artworks makes the *Prince v. Cariou* decision a major departure from another appropriation case, *Blanch v. Koons*, decided in 2006. In that case, which followed several copyright infringement rulings finding against the appropriation artist Jeff Koons, the Second Circuit found transformative use mainly as a result of the artist’s intent. Where the original photographer of a pair of stockinged legs shown in a fashion magazine intended them to be alluring, Koons argued that he intended his work based on the image of the legs, shown in a larger group, to be a social commentary on the ubiquity of such images in commerce. Koons testified that the use of a pre-existing image was necessary to ensure that the viewer would understand the familiar reference point. The Second Circuit was convinced that Koons’ intent to critique justified his use of a fashion photograph, as did their determination that he had used only the element of the work – stockinged legs – that was necessary to establish the reference point he desired.

In *Cariou v. Prince*, by focusing instead on Prince’s works themselves as opposed to his stated intent, the Second Circuit’s decision rightly puts aesthetic transformation on equal footing with critique and parody. The Second Circuit balked, however, at the premise that “rephotographing,” as practiced by Prince, Sherrie Levine, and others, is transformative merely by virtue of – to call a copy a copy – rephotographing. Thus, the Second Circuit remanded to the district court to determine whether five of Prince’s works have sufficiently new “meaning or message” to qualify as fair use.

The lesson for appropriation artists seems to be that either express comment, or aesthetic transformation may suffice as transformative use. Though the act of copying itself has significant meaning from the perspective of art and theory, it remains too ambiguous a form of “commentary” to avoid liability for copyright infringement. In the words of the philosopher Walter Benjamin, “that which withers in the age of mechanical reproduction is the aura of the work of art.” Thus far, however, the law of copyright remains

¹ Of course, denial of authorial intent is itself meaningful in this context. The famous art critic Clement Greenberg posited that it was the defining concept of Modernism, as opposed to postmodernism: “that art doesn’t have to teach, doesn’t have to celebrate or glorify anybody or anything, doesn’t have to advance causes; that it has become free to distance itself from religion, politics, and even morality. All it has to do is be good as art.” By mimicking the aesthetic integrity of Modern art (often non-representational and highly individual, as in the case of Jackson Pollock, an artist Prince has cited as highly influential), in the context of postmodern copies, Prince again made a statement about artists and originality.

wedded to the “aura” of originality, authorship, and individuality, and continues to reject the notion of commentary solely by means of the act of copying.

About the Author

Alexandra Wald is a partner at Cohen & Gresser LLP, with a practice focusing on general commercial litigation and intellectual property litigation. She has substantial experience litigating trade secret, copyright, art law, and employment cases and frequently counsels lawyers and other professionals regarding ethical matters. Ms. Wald is a graduate of Columbia Law School, where she was a James Kent Scholar and a Harlan Fiske Stone Scholar, Harvard University, and Yale College. Prior to joining Cohen & Gresser, Ms. Wald practiced at Cravath, Swaine & Moore..

About Cohen & Gresser

Recently named to *The National Law Journal's* annual “Midsize Hot List,” Cohen & Gresser is a 2013 *Chambers USA*-ranked law firm with offices in New York and Seoul. We represent clients in complex litigation and corporate transactions throughout the world. Founded in 2002, the firm has grown to over fifty lawyers in four practice groups: Litigation and Arbitration; Corporate Law; Intellectual Property and Licensing; and White Collar Defense, Regulatory Enforcement and Internal Investigations. Our attorneys are graduates of the nation's best law schools and have exceptional credentials. We are committed to providing the efficiency and personal service of a boutique firm and the superb quality and attention to detail that are hallmarks of the top firms where we received our training.

NEW YORK | SEOUL

www.cohengresser.com

info@cohengresser.com

PH: +1 212 957 7600

This information may constitute attorney advertising in certain jurisdictions