When Your Art Becomes My Art

By Alan Behr

If there are lessons to be learned from the important and potentially playbook-altering decision by the Second Circuit in its recent decision in *Cariou v. Prince*,[1] they would be:

1. As changes in the law follow changes in morality, someone has to lose.
2. Facts are open to interpretation, even on appeal.
3. Fame and fortune matter.
4. Art criticism is easier than it looks.

To backtrack a bit: for about six years, the photographer Patrick Cariou lived among Rastafarians in Jamaica, and in the year 2000, he published a book of photographs from that experience under the title *Yes Rasta*. In 2005, the appropriation artist Richard Prince saw a copy of *Yes Rasta* in a bookstore on the French Caribbean island of Saint Barthélemy. Two years later, Prince had an art show at the island's Eden Rock hotel.[2] Included among the exhibits was *Canal Zone* (2007), which consisted of thirty-five of Cariou's photographs torn from his book and variously cropped and painted over, the results pinned to plywood board. Prince continued to use photographs from the Cariou book for a *Canal Zone* series of what the district court called the "Paintings." The works clearly incorporated Cariou's photographs, altered and combined to varying degrees with photographs by others, including erotic female nudes; Prince added dollops of paint to obscure facial features.

Prince had already made a name for himself from so "appropriating" the works of other photographers without asking permission, most famously when he photographically duplicated and then displayed whole a photograph taken by Garry Gross of the prepubescent, nude Brooke Shields as she stood in a bathtub in full make up, covered in oil. Gross cried foul when Prince appropriated his photograph, but he did not sue for infringement when he had his chance. It was Gross who was hit with a lawsuit—an action by his model to disaffirm parental permission (Gross won).[3] Prince's unaltered version, *Spiritual America*, helped launch his career and gave its name to his retrospective at the Guggenheim Museum, where it was a centerpiece.

In 2008, Cariou commenced an action in federal court against Prince, Prince's gallery, Gagosian, and the gallery's owner, Larry Gagosian, for the *Yes Rasta* appropriation.[4] Both sides filed motions for summary judgment. In a decision issued on March 18, 2011, Judge Deborah A. Batts granted summary judgment to Cariou on his claims of copyright infringement by the defendants and for vicarious and contributory infringement by Larry Gagosian and his gallery. The remedy was severe: the defendants were ordered to surrender all the Prince artworks and exhibition catalogues to Cariou and to require the defendants to notify purchasers of the Prince works already sold that those works could not be displayed.[5]

The district court reached its conclusion by rejecting the defendants' defense based on the doctrine of fair use, which is codified at Section 107 of the Copyright Act.[6] Very generally speaking (because everyone in authority on the topic seems to have a different opinion about this), under the fair use doctrine, a copy is not infringing if it is significantly different from the work it references and it does not interfere with the exploitation of commercial opportunities for the original work. The often-used word is *transformation*: if the second work transforms the original in a meaningful way, variously as to content, purpose and result, the fair use doctrine applies. There are four endlessly debated and reassessed statutory factors to be used in determining if fair use may be found; although they are expressly not inclusive, courts typically apply those factors to the exclusion of nearly all other considerations, which is what the district court did in the *Cariou* case. The court concluded that, for transformative fair use to be found, the second work must "in some way comment on, relate to the historical context of, or critically refer back to the original works."[7] Prince clearly made the judge suspicious by his inability to articulate during discovery what exactly his artistic purpose might have been and why it needed to rely so heavily on Cariou's work. In any event, she had no trouble concluding that he was not making any such commentary.[8]

On appeal, the Second Circuit reversed and remanded, holding that the district court's commentary requirement was wrong as a matter of law. That is entirely correct. You do not necessarily need to comment on an earlier work to transform it, and the holding that comment is an essential element is error. So far so good, and even Judge J. Clifford Wallace, who wrote the clear and succinct dissent to the Second Circuit opinion, concurred on that point. Then the appellate court concluded, solely on the materials submitted on the cross-motions for summary judgment, that twenty-five of the thirty Prince works under review were not infringing under the doctrine of fair use; it remanded to the district court for further proceedings

on the remaining five. As we used to observe back in Louisiana about such proclamations, "Say what?"

A few lessons to be drawn from the *Cariou* decision:

If I Can, You Really Should Let Me

The case is important because what seems like a cavalier attitude by the appellate court about photography is actually quite indicative of the *Zeitgeist*: with digital technology making it possible for nearly everyone to copy professionally made visual, audio and audiovisual works with little or no diminution in quality, it is becoming harder by the day to convince anyone, even federal judges, to voice an unkind word about unauthorized copying. Law follows morality, and the morality of the day provides that, if I can make for myself a copy of what you did, rework it and call it my own, I should be allowed to do that. Back when these copyright cat fights were between professionals, courts were relatively sparing in the finding of fair use; now that all can participate, it is getting harder to say no to the kind of mash-ups Richard Prince sells as art and children do for schoolwork and on social media.

The Facts Are in the Telling, Even on Appeal

The fourth fair use factor, which loosely can be called the "money factor," is "the effect of the use upon the potential market for or value of the copyrighted work."[9] The district court in *Cariou* examined not only the harm to the original *Yes Rasta* photographs but to potential derivative works and other opportunities, with licensing opportunities explicitly mentioned. The district court noted that Christiane Celle, a gallery owner, planned to exhibit and sell between thirty to forty images from *Yes Rasta* at her Manhattan gallery at prices ranging from $3,000 to $20,000 but cancelled the show "because she did not want to seem to be capitalizing on Prince's success and notoriety."[10] The district court concluded that Prince's infringement caused Celle's professional deference, damaging Cariou.

Reviewing the same evidence, the appellate court said that "Celle did not decide against putting on a *Yes Rasta* show because it had already been done at Gagosian, but rather because she mistakenly believed that Cariou had collaborated with Prince on the Gagosian show."[11] That was because, when she called Cariou to tell him she had heard about the Prince show, he did not get back to her. The appellate court's review of the facts puts quite a different color to the story of the failed Celle exhibition, but it breezes right by what seems to be an obvious point: if even another New York art dealer believed that the Prince works so heavily made use of Cariou's photographs that the two must be collaborating, would that not be evidence in favor of a finding of infringement? And it relates to another curious point raised by the decision, which is:

Fame and Fortune Really Do Matter

In correcting the district court's interpretation of the law, the Second Circuit stated that it made no difference if the secondary use suppressed or even destroyed the market for the original work, only whether it usurped that market.[12] The court made it clear that Prince sold to a different, which is to say, much finer market. The court took note of Prince's Guggenheim retrospective. It also reported that Cariou's book sold only 5,791 copies, and most of those at below the sixty dollar suggested retail price, earning Cariou just over $8,000. Only a handful of the photographs themselves had sold, and only to people Cariou already knew. Against Celle's expectation of selling Cariou's photographs at her Manhattan gallery for thousands, Gagosian, a renowned international dealer in contemporary art, sold eight of the Prince appropriations for a total of $10,480,000 and exchanged seven others for works by Larry Rivers and Richard Serra valued at about $6 to $8 million. To make the point about what a different market Richard Prince serves and inhabits, the Second Circuit named celebrities who attended the opening night party.[13] Said the court, "Cariou on the other hand has not actively marketed his work or sold work for significant sums, and nothing on the record suggests that anyone will not now purchase Cariou's work...as a result of the market space that Prince's work has taken up."[14] The fourth fair use factor, therefore, correctly belonged to Prince, held the court, reversing the district court's conclusion to the contrary.

What that tells Cariou and artists like him is that the class struggle (rich artist, poor artist) has at last found its way into copyright law. It also says that you sit on your marketing opportunities at your peril and that, in any event, if a better-known artist appropriates or infringes upon your art (pick your preferred concept here), you might be well advised to spare the legal fees and instead send a thank-you note.[15] Perhaps the court is right in that implication: as Richard Prince has proven in his own career, nothing quite helps an artist as much as notoriety. Cariou's photographs could potentially sell for more now (a) due to the controversy and (b) because they will give people who cannot afford an original Richard Prince a backwards way to own a piece of one, as it were. So perhaps this was all an upside down way to get to a win-win result.

Even so, this brave new world of reward for creativity cannot be what Congress intended by expressly admit-

ting fair use into our Copyright Act. There is just something about wealth being generated so seamlessly by the wealthy from the laboriously made work of a man who earned little from it that does not quite seem in harmony with what we would expect from the fair administration of the law of copyright. This is not to say that Prince does not deserve his success. If people will buy it, whatever it is, he would be a fool not to sell it. It just seems equitable, not to say good manners, for him to give Cariou credit and a piece of the action.

Everyone Is a Critic

The new egalitarianism in copyright appears to extend to art criticism. Although the record on appeal was empty of expert testimony, and although it would be understandable if a judge seeking to comprehend contemporary art were to cry out for professional guidance, the appellate court felt it could draw its own conclusions from examining the works at issue. Stated Judge Wallace in his dissent on that portion of the holding:

> Indeed, while I admit freely that I am not an art critic or expert, I fail to see how the majority in its appellate role can "confidently" draw a distinction between the twenty-five works that it has identified as constituting fair use and the five works that do not readily lend themselves to a fair use determination.... Certainly we are not merely to use our personal art views to make the new legal application to the facts of this case.... It would be extremely uncomfortable for me to do so in my appellate capacity, let alone my limited art experience.[16]

Those are true words but offered to no avail when you are outvoted two-to-one. What it means is that, henceforth, at least in the Second Circuit, you can do quite a bit of scanning of photographs that do not belong to you and, with changes no greater than those made by Richard Prince to the fateful Cariou twenty-five, build yourself a pretty good career, or at least keep yourself out of litigation. As a copyright lawyer who works to protect the rights of photographers and other artists, and as both a working photographer and as an art critic, I will endeavor not to take it all personally. I can only hope that brave judges everywhere will put the brakes on fair use's twenty-first century slide—before photographs become little more in the eyes of artists than found objects, each considered as freely useable in the works of others as Marcel Duchamp's urinal[17] and Robert Rauschenberg's bald eagle.[18] Meanwhile, we will all just have to prepare ourselves for the fact that, at least for now, much copying that we previously had thought was infringing may well have become acceptable.

Endnotes

1. 714 F.3d 694 (2d Cir. 2013), *cert. denied*, Nov. 12, 2013 (No. 13-261).
2. Whatever you may think of Richard Prince or his art, anyone who has stayed at the Eden Rock can only admire his taste in venues.
3. *Shields v. Gross*, 88 A.D.2d 846 (1st Dep't 1982).
4. Another defendant was voluntarily dismissed from the action by stipulation.
5. *Cariou v. Prince, et al.*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011).
6. 17 U.S.C. §§ 107 *et seq.*
7. 784 F. Supp. 2d at 348.
8. There is much thematic opacity to Prince's work, to the point of what can read as randomness; the only obvious connection of the Canal Zone to Prince's series is that the artist was born there.
9. 17 U.S.C. § 107(4).
10. 784 F. Supp. 2d at 344.
11. 714 F.3d at 709.
12. *Id.* at 708.
13. In alphabetical order: Tom Brady, Gisele Bündchen, Candace Bushnell, Graydon Carter, Robert DeNiro, Jonathan Franzen, Damien Hirst, Jay-Z, Angelina Jolie, Beyonce Knowles, Jeff Koons, Brad Pitt and Anna Wintour
14. 714 F.3d at 709.
15. Not stated by the court was that, in contrast to Prince's good fortune to be represented by Gagosian, Cariou quite possibly had to pay his publisher a subsidy to print and bring the *Yes Rasta* book to market.
16. *Id.* at 713-714.
17. *Fountain* (1917).
18. In *Canyon* (1959).

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