New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 250—NO. 78
MONDAY, OCTOBER 21, 2013

Outside Counsel

Expert Analysis

Rewriting Fair Use In 'Cariou v. Prince'

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In *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), the U.S. Court of Appeals for the Second Circuit has rewritten the fair use doctrine as it applies to artistic appropriation. That decision, built on false assumptions, assures confusion and misdirection for attorneys and judges into the indefinite future.

Background

Patrick Cariou spent six years photographing Rastafarians who lived in the mountains of Jamaica. Cariou's photographs, published in a book (*Yes Rasta*), were incorporated by Richard Prince, a well-known contemporary artist, into a series of paintings and collages. To Cariou's photographs, Prince added, in varying degrees, naked women, guitars, and circles of color. Cariou did not consent to the use of his work.

Cariou sued Prince and was granted summary judgment. Rejecting Prince's defense that the paintings were protected by the fair use doctrine, the district court held that the first fair use factor[1] required that "the new work in some way comment on, relate to the historical context of, or critically refer back to the original works" and that "Prince did not intend to comment on Cariou, on Cariou's Photos, or on aspects of popular culture closely associated with Cariou or the Photos when he appropriated the Photos." In so holding, the district court relied on *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

The Second Circuit reversed.

Decision

Jettisoning *Rogers*, the Second Circuit held that it is no longer necessary for an appropriating work to make reference to the prior work. So long as the messages of the two works were vdistinct, the fair use doctrine applies.

As to whether the messages of Prince and Cariou were distinct, the court was confronted with Prince's testimony that he was not "trying to create anything with a new meaning or a new message." The Second Circuit dismissed these remarks, holding that an artist's testimony as to what their work meant was irrelevant.

"What is critical," the court ruled, "is how the work in question appears to the reasonable observer"; so long as a reasonable observer would consider Prince's work to have a transformative purpose, the first fair use factor is satisfied.[2] Applying that test to the 30 paintings at issue, the court held that all but five were so obviously different in color, dimension, and materials as to give a reasonable observer the impression that the meaning of Prince's work was dissimilar from that of Cariou's.

The court also found that the fourth fair use factor—whether Prince's paintings usurped the market for Cariou's photographs[3]—favored Prince. Collectors of Prince's work, the court observed, included wealthy individuals who were willing to spend hundreds of thousands of dollars; Cariou, by contrast, had earned approximately $8,000 from *Yes Rasta* and sold only four photographic prints. There was no evidence, according to the court, that anyone who had been interested in purchasing a photograph by Cariou had decided not to buy it owing to Prince.

Analysis

In overturning *Rogers*, the Second Circuit greatly broadens fair use protection for artists who employ an appropriationist method—the practice (dating back to Duchamp and Picasso) of using preexisting artistic images and artifacts.

The second change brought about by Prince is the way in which the "purpose" of a work of art is determined under the first fair use factor. The Second Circuit held that the artist's view of the purpose of his or her work is less significant than the meaning which is attributed to the work by a "reasonable observer."[4] An untrained, rural artist from the 1930s may create a crudely carved sculpture with the sole intent that it convey a religious message, but if a "reasonable observer" views the work as Cubist or as a commentary on a vanishing rural society, it is this interpretation that prevails.

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This approach to the meaning of art has its origin in quite recent developments in literary criticism, linguistics and anthropology—including structuralism, post-structuralism, and reader-response theory—and their roots in the writings of Hans-George Gadamer and his teacher Martin Heidegger. For the advocates of this method, the historical and cultural context of the *observer* is all important and comes at the expense of the artist— "the birth of the reader must be at the cost of the death of the Author."[5]

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But in adopting this view, the Second Circuit failed to account for the fact that in 1976, when Congress codified the common law of fair use in the Copyright Act, this manner of interpreting art was nascent, arcane, and disputed, and there is no evidence to suggest that Congress had any familiarity with this view of the meaning of art. For those who adopted the Copyright Act of 1976, it is doubtful that they defined the meaning of a work of art to be anything other than that which was assigned to it by its creator.

Nor did the Second Circuit explain why, among the variety of contemporary interpretations of the meaning of art, it chose the one it did.[6] The importance of this may be illustrated by applying a feminist interpretation to the works in Prince: such an interpretation would yield the conclusion that Cariou and Prince's works (despite their differences in scale, color, and material) have a common meaning—the privileging of men over women and the environment. A reviewer for The New York Times commented that Prince's works "underscore the unfortunate idea of painting as a man's activity and women as artists' models, girlfriends or sex partners."[7] Different methods of interpretation, ergo different conclusions as to meaning.

Given the Second Circuit's view that the meaning of a work of art is dictated by how a "reasonable observer" perceives the work, the nature of the "reasonable observer" also becomes critical. Because the manner in which one views art is affected by the level of education which one has in art history—take, for example, the way in which one perceives a west African fetish figure or the symbols on Noh costumes or a room filled with dirt by the late Walter De Maria—the question arises as to whether the Second Circuit's "reasonable observer" is an art historian or a tourist who stops in at the Metropolitan Museum during a trip to New York.

Erwin Panofsky, in his seminal *Studies in Iconology*,[8] describes three levels at which a work of art is understood. At first, the viewer takes in that which is recognizable without reference to outside sources (human figures, colors, forms). Beyond this are two other levels: the iconographic (involving the narrative or allegorical features of a work of art) and the iconological, which involves an understanding of the way in which the work of art reflects the historical conditions at the time the work was created as well as fundamental themes of human thought. Any analysis—such as the Second Circuit's—which is limited to the first of these levels must be incomplete and thus inadequate as a measure for determining the meaning of a work of art.

Finally, the court, without ever articulating what it believed to be the actual meaning of Prince or Cariou's work, illogically asserts that the works must have different meanings since the scale, color, and materials of the works are dissimilar. The closest the court gets to describing the meaning of the works is in the suggestion that Prince's work is "provocative," while the naturalistic photographs of Cariou's are not. The implication that naturalistic photographs are not provocative is exceptional given that photographs of ethnic, religious and tribal groups are often extremely provocative, both for the content and style of those photographs.[9]

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Applying its new and amorphous standard, the court concluded that 25 of Prince's paintings were clearly "transformative" and thus entitled to summary judgment. Ninth Circuit Judge J. Clifford Wallace, sitting by designation, concurred and argued that all of the paintings should have been remanded to the district court; he could not understand "how the majority in its appellate role can 'confidently' draw a distinction between the 25 works that it has identified as constituting fair use and the five works that do not readily lend themselves to a fair use determination."[10]

As to the fourth fair use factor, the court concluded that the markets for the works of the two artists were different; Prince's collectors, the court noted, spend great sums on his paintings, while Cariou has had relatively little success. This, of course, suggests that so long as successful artists appropriate work from those who have received little or no compensation for their efforts, the appropriating artist increases the likelihood that the fair use doctrine will protect the appropriation.

The better view—one which is less offensive to the intent of the copyright laws and public policy—is that the markets for the works of Prince and Cariou are different because collectors associate Prince's work with a group of artists (commonly known as the "Pictures Generation") who appropriate images from popular culture to comment on the way in which the media and consumer cultures shape our notions of identity, originality, and other fundamental concepts. This group, which includes David Salle, Cindy Sherman, and Prince, are greatly respected by art historians and curators, and, consequently, sought after by collectors.

Cariou's work, as interesting as it may be, is not associated with this group. Cariou falls into the category of artists who take ethnographic photographs. His market and Prince's market are nearly as different as the market for cell phones and portable computers, with a consumer's decision to buy one unaffected by what is occurring in the market for the other.

In the antitrust context, lawyers determine if two products are in the same market by looking at cross elasticity of demand: if an increase in the price of the second good leads to greater demand for the first, it is likely that the products are substitutes in the same market. Applying a similar test to this case, it is clear that none of Prince's collectors would purchase Cariou's work as a substitute for Prince's, and this is true no matter how expensive Prince's work became. Thus, the two products exist in separate markets.

In summary, the Second Circuit has engrafted into the first fair use factor a theory of aesthetics which is not only disputed but contrary to the intent of Congress when it adopted the Copyright Act of 1976. The Second Circuit has also adopted a market approach to the fourth fair use factor that needs to be brought in line with analogous market determinations made in the antitrust context.

1. "[T]he fair use of a copyrighted work…for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for the value of the copyrighted work." 17 U.S.C. §107

2. *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013).

3. Supra, n.1.

4. Id.

5. Roland Barthes, "The Death of the Author" (1968).

6. See Ann D'Alleva, *Methods & Theories of Art History* (Laurence King Publishing, 2nd ed. 2012).

7. Martha Schwendener, "Re-envisioing Pollocl, Paint-Spattered Cowboys," New York Times, Sept. 9, 2011.

8. Erwin Panofsky, *Studies in Iconology*, Oxford University Press, 1939.

9. See Rainer Rother, Leni Riefenstahl: The Seduction of Genius (describing Riefenstahl's photographs of members of the Nuba tribe as "provocative precisely because of their brilliant stylization").

10. *Cariou v. Prince*, 714 F.3d 694, 713 (2d Cir. 2013).