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### Copyright Fair Use: More Complex than Ever?

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On Nov. 12, 2013, the U.S. Supreme Court declined to grant a writ of certiorari in *Cariou v. Prince*, leaving intact the decision by the U.S. Court of Appeals for the Second Circuit on copyright fair use in the context of appropriation art. The Second Circuit's adoption of a "reasonable observer" standard to decide if allegedly infringing works are transformative enough to qualify as fair use may add more ambiguity to an important and already difficult area of copyright law. And it does so at a time when content creators and users need more, not less, predictability in assessing and protecting their respective risks and interests. This article provides a synopsis of *Cariou* and suggests ways to assess risk given the current state of the fair use defense.

Patrick Cariou is a professional photographer. Over a six-year period, he created and published "Yes Rasta," a book of original, classically styled black-and-white portraits of Rastafarians and landscapes in Jamaica. Richard Prince is a well-known appropriation artist. He bought three "Yes Rasta" books and used multiple photos from them to create a series of paintings entitled "Canal Zone." Some 30 of these resulting paintings incorporated photos from "Yes Rasta," modified in varying degrees, including painting opaque forms on faces, transposing head shots onto body images from other sources, enlarging and tinting the photos, and adding other elements, such as settings and images of nude women. In some of the paintings, Cariou's photos were "readily apparent." In others, they were "almost entirely obscured." *Cariou v. Prince* (2013). Fifteen of Prince's paintings were sold or traded for between \$16 and \$18 million.

Cariou sued Prince for copyright infringement in the Southern District of New York. The district court granted Cariou summary judgment. Rejecting Prince's fair use defense, the court relied heavily on Prince's admitted lack of interest in commenting on the photos or on popular culture. To the extent the paintings "merely recast, transform, or adapt the Photos," the district court said, they are "infringing derivative works." *Cariou v. Prince* (2011). The court's formulation seemed to reduce the chance that an artist who uses another artist's work merely as raw material for subsequent works can establish fair use. The court granted injunctive relief and entered an order allowing for the destruction of Prince's paintings.

The Second Circuit reversed. It held that an allegedly infringing work need not comment on the original to be transformative, and may be a fair use "even if it serves some purpose other than those (criticism, comment, news reporting, teaching, scholarship and research) identified in the

preamble to the [fair use] statute [17 U.S.C. Section 107].” *Cariou v. Prince* (2013). It went on to make clear that, to qualify as fair use, “a new work generally must alter the original with ‘new expression, meaning, or message’” (quoting *Campbell v Acuff-Rose Music Inc.* [1994]). “What is critical” for that determination, noted the court, is “how the work . . . appears to the reasonable observer.”

The court then compared Cariou’s photographs to Prince’s paintings side by side, concluding that 25 of them “have a different character, give Cariou’s photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou’s,” and are hence transformative. For the five remaining Prince paintings, the court remanded for further consideration under the reasonable observer test.

The Second Circuit’s *Cariou* opinion may raise more questions than it answers, and may result in greater uncertainty for content creators and users alike. In broad terms, these questions are: Is the scope of fair use expanding and eroding the exclusive rights granted by the Copyright Act? Are uses that fall within the preamble of Section 107—criticism, comment, news reporting, teaching, scholarship or research—more likely to be deemed fair than other uses? For example, is art that appropriates an existing work in order to criticize a presidential candidate entitled to greater fair use protection than art that appropriates the same work without the purpose of criticism or comment? Who is the “reasonable observer” for purposes of determining whether a work is sufficiently transformative to qualify as fair use? In that connection, is expert testimony, a survey or other extrinsic evidence on the question of transformation relevant or admissible? Finally, does the “reasonable observer” standard extend beyond appropriation art to other types of works (e.g., texts, computer software, audiovisual works), and if so, how should it be applied in those fields?

Ambiguity makes risk analysis less precise and resulting disputes more time-consuming and expensive. In many instances, it also inhibits creativity and innovation, frustrating the constitutional rationale for copyright protection itself. How should fair use risk analysis be done in the wake of *Cariou*?

Although the Second Circuit does not state this explicitly, it appears that uses of others’ copyrighted works generally fall into one of four categories, from those most likely to be found fair use to those least likely to be found fair use:

1. Uses that fall within the illustrative categories listed in Section 107’s preamble (e.g., criticism, comment, scholarship).
2. Uses that are not in the preamble, but where the second work clearly parodies the original work (e.g., the rap song in *Campbell* that parodied the original Roy Orbison song).
3. Uses that do not respond directly to the original work or its author but are more or less transformative (e.g., Prince’s paintings in *Cariou*).
4. Uses that the courts have identified as examples of non-transformative and non-fair use (e.g., movies based on novels, works of visual art transposed to posters, coffee mugs, or other “merchandise,” translations of written works).

In advising as to which uses of original works may or may not be defensible as fair use, counsel should consider which of the four categories the second work may fall into, and how the creator of the second work, experts in the field or reasonable observers might justify or explain both the need to use the original work and the ways in which the second work “transforms” the original work.

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