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Recommended Citation

Anthony R. Enriquez, *The Destructive Impulse of Fair Use After Cariou v. Prince*, 24 DePaul J. Art, Tech. & Intell. Prop. L. 1 (2013)

Available at: <https://via.library.depaul.edu/jatip/vol24/iss1/2>

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THE DESTRUCTIVE IMPULSE OF FAIR USE AFTER CARIOU V. PRINCE

Anthony R. Enriquez*

ABSTRACT

*In the recent fair use art case *Cariou v. Prince*, many commentators accused the district court of philistinism when it found renowned contemporary artist Richard Prince and his gallerist Larry Gagosian in violation of copyright; almost all condemned the court for authorizing injunctive destruction of Prince's paintings, based largely on his refusal to articulate an artistic intent. A Second Circuit panel reversed the majority of that decision, remanding for reconsideration of select Prince works and forbidding the district court from reissuing a destruction order should it eventually find copyright infringement. But a closer look at the consequences of the district court's destruction order reveals how it may have better served contemporary art than the Second Circuit's reversal. This article explains how the district court's order of destruction as a remedy for copyright infringement in Prince strengthened the market for Prince's infringing images and encouraged their dissemination to a wider audience. It actually led to more infringement—and, arguably, more art.*

Certainly, the district court decision had flaws: it depended too closely on an artist's stated intent, when many contemporary artists lack such a conscious motive, and extended infringement liability to institutions that show art, discouraging support for art from cultural patrons. But the appellate court decision may have been worse: it extended patron liability circuit-wide and unleashed

* J.D. 2013, New York University School of Law; B.A. 2004, New York University. Thanks to Rishi Raithatha and Zoey Orol for their helpful comments and suggestions, as well as to Professors Amy Adler and Donn Zaretsky for sharing their expertise and insights throughout the semester. Thanks as well to the editorial staff of the *Journal of Art, Technology & Intellectual Property Law*, particularly Chris Galligan.

a formless reasonable observer standard that leaves an uncertain legal landscape likely to discourage the creation of certain art. The Second Circuit's new fair use standard breeds confusion likely to lead to more lawsuits and place the work of more artists in danger of destruction. This article's analysis of the perverse effects of destruction makes an argument for why, independent of an artist's renown or subjective notions of the sacredness of art, courts should refrain from issuing destruction orders in future fair use art cases likely to emerge under the Second Circuit's new standard.

I. INTRODUCTION

In 2009, portrait photographer Patrick Cariou sued renowned appropriation artist Richard Prince, accusing Prince of stealing Cariou's copyrighted portraits of Jamaican Rastafarians for use in a series of paintings by Prince collectively titled "Canal Zone."¹ Cariou also sued Manhattan gallery owner Larry Gagosian for showing Prince's work, arguing that Gagosian had breached his duty to ensure that Prince had complied with copyright law.² At trial, Prince admitted to using Cariou's photos without his permission, but claimed fair use under the Copyright Act, which traditionally allows for limited use of a copyrighted work without an author's permission "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research."³ Prince's lawyers argued that the message behind the use of Cariou's photos in "Canal Zone" was so different from Cariou's message in the original portraits that Prince had transformed their meaning and therefore created new art.

Prince and Gagosian lost spectacularly on summary judgment. Relying largely on Prince's inability to communicate to the court an artistic intent distinct from Cariou's, Judge Batts of the Southern District of New York found against Prince and Gagosian

1. Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2011). A Google image search of "Cariou v Prince" provides dozens of images of the series, some side-by-side with Cariou's original photos.

2. Amended Complaint ¶ 31-32, Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. Jan. 14, 2009).

3. 17 U.S.C. § 107 (2012).

on every work of “Canal Zone” and ordered all unsold paintings in the series delivered to Cariou for disposition as he saw fit, including destruction. But under a new fair use standard announced by a divided Second Circuit panel at his appeal, depending not on the artist’s ability to communicate his intent, but rather the reasonable observer’s understanding of that intent,⁴ Prince emerged mostly victorious: all but five of the paintings were declared fair use, with the remaining works remanded to Judge Batts for reconsideration under the new standard. Should Judge Batts once again find infringement, the panel warned her that destruction as a remedy would be “improper and against the public interest.”⁵

To judge from the single footnote it devoted to the issue, the Second Circuit’s opposition to court-ordered destruction of art might be fairly interpreted as *sui generis* to *Prince*. The panel gave no rationale for its position beyond “all parties’ agreement at oral argument that the destruction of *Prince’s* artwork” alone should be forbidden.⁶ Considering the comments at oral argument of Judge Parker of the Second Circuit panel, who observed that destruction “seems like something that would appeal to the Huns or the Taliban,”⁷ the panel may have even felt a certain self-satisfaction for rescuing Prince’s paintings from the furnace’s maws. Yet, the Second Circuit’s decision in *Prince* may have far more destructive impact on art than Judge Batts’s own.

This article explains how Judge Batts’s order of destruction perversely incentivized more copyright infringement—and, arguably, more art. First, it examines the two *Prince* decisions and notes how under either of the fair use standards applied, destruction—either symbolic or literal—contemporary art is the inevitable outcome. The district court’s fair use analysis hinged on Prince’s inability to articulate an artistic intent that would sufficiently distinguish it from Cariou’s such that it would qualify

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

5. *Id.* at n.5.

6. *Id.* (emphasis added).

7. Brian Boucher, *Injunction in Prince V. Cariou Compared to Taliban in Appeal*, ART IN AMERICA (May 21, 2012), <http://www.artinamericamagazine.com/news-opinion/the-market/2012-05-21/price-cariou-oral-arguments/>.

as new expression rather than unauthorized derivative use of a copyrighted image. But in much contemporary art, the artist's refusal to articulate an identifiable intent is the point of the work. The district court's standard therefore forces the artist to choose between symbolic destruction of an intentionally ambiguous work in order to win her case or literal destruction of the work upon losing.

Surprisingly, despite its stated opposition to destruction of art, that very outcome may be even more likely to occur under the Second Circuit's revised fair use standard. At first glance, the Second Circuit's decision appears to pluck the artist from the horns of the dilemma imposed by the district court. It retreats from artistic intent as the *sine qua non* of a fair use defense, an appropriate move in light of contemporary art's skepticism of an artist-dominated, intentional message. But it replaces artistic intent with a reasonable observer standard that is so malleable and subjective that it robs the law of clarity necessary to advise artists of the legality of their work and conditions the outcome of future fair use suits on an individual judge's artistic interpretations. That uncertainty becomes destructive when combined with the Second Circuit's approval of the district court's expansion of liability to patrons that show an artist's work. The lack of a clear standard of infringement combined with pressure from patrons to avoid artistic choices that may incur legal liability provides a powerful incentive for artists to stop creating certain forms of contemporary art—even if that art, once created, would have been found legal in court. The district court's standard would destroy existing art in its completed form, but the Second Circuit's standard would destroy art in its formative stages.

This counterintuitive result stems from the Second Circuit's failure to adequately consider the effects of court-ordered destruction of limited edition works of art challenged in an infringement suit. The aftermath of *Prince* demonstrates how court-ordered destruction, far from protecting the plaintiff's market for his original work by wiping an infringing derivative image from existence, can instead encourage reproduction of infringing images in media, increase the secondary market value of companion works of art from the same infringing series, and provide substantial publicity and artistic cachet to the "outlaw"

defendant. In other words, court-ordered destruction appears to favor the interests not of the victorious plaintiff, but of the losing defendant. This gap in the Second Circuit's analysis should have given the panel greater pause before reshaping fair use in the Second Circuit in such an ambiguous fashion in order to protect the paintings of one critically celebrated artist alone. While Prince's particular panel narrowly sided with him, the vague standard they unleashed in doing so might ultimately condemn the works of less renowned contemporary artists. And with fair use determinations less predictable than ever, lower courts need a principled reason to abstain from issuing destruction orders that is not dependent on artistic renown. This article's investigation of the effects of court-ordered destruction in the *Prince* case gives that reason.

Part II provides a brief introduction to copyright and the fair use exception to copyright infringement. It focuses particularly on the issue of transformativeness under fair use, in light of its centrality to *Prince*. Under the transformativeness standard, courts ask if an accused infringer transformed another artist's work by employing it in a different manner or for a different purpose than the original artist. Part III presents the challenge to the transformativeness standard posed by appropriation artists like Richard Prince. The basic conflict has been noted elsewhere:⁸ appropriation art

8. See, e.g., E. Kenly Ames, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473 (1993) (arguing for a per se exception for appropriation art as a valid form of criticism and comment); Roxana Badin, *An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion from Campbell v. Acuff-Rose Music, Inc.*, 60 BROOK. L. REV. 1653 (1995) (arguing that fair use doctrine leaves appropriation art underprotected); Adrienne Barbour, *Yes, Rasta 2.0: Cariou v. Prince and the Fair Use Test of Transformative Use in Appropriation Art Cases*, 14 TUL. J. TECH. & INTELL. PROP. 365 (2011) (arguing that even if the fair use standard were to make room for recontextualized works, "Canal Zone" should fail that standard); Rachel Isabelle Butt, *Appropriation Art and Fair Use*, 25 OHIO ST. J. ON DISP. RESOL. 1055 (2010) (proposing mandatory arbitration with a panel of art experts to resolve infringement disputes involving appropriation art); Eric D. Gorman, *Appropriate Testing and Resolution: How to Determine Whether Appropriation Art Is Transformative "Fair Use" or Merely an Unauthorized Derivative?*, 43 ST. MARY'S L.J. 289 (2012) (addressing the conflict between appropriation art and copyright law and proposing legislative reform of fair use

frequently depends on taking published images and presenting them with little or no modification and therefore lacks the traditional physical indicia of transformation. It has emerged as a ubiquitous and influential force in contemporary art, even more potent in an age of effortless transfer of online images; but its existence is threatened by copyright law. The facts of *Prince* and the arguments of its parties, summarized in Part III, present the latest iteration of the conflict between appropriation and copyright. These facts undergird the analysis of the two conflicting court decisions that follow. Part IV summarizes relevant portions of the district court's decision in *Cariou v. Prince* and explains why the district court's fair use standard and infringement remedy would leave many contemporary conceptual artists on the horns of a dilemma: destroy your work by defining its meaning or destroy your work by losing the case. Part V then explains how the Second Circuit's decision, while eliminating the district court's impossible choice, nonetheless imposes other destructive outcomes. By muddling the standard for fair use and approving liability for artistic patrons, the Second Circuit greatly increases ex-ante pressure to stop creating certain types of art at all, even if that art would eventually be found perfectly legal. Part VI supplements the Second Circuit's analysis with an investigation of destruction as a remedy for infringement by limited edition works of art. It argues that destruction of limited edition art frustrates copyright's primarily economic-based regulatory scheme. By increasing the value and cachet of forbidden works, destruction as a remedy perversely incentivizes more infringement. It also encourages reproductions of the infringing work by art world

doctrine); William W. Fisher III et al. *Reflection on the Hope Poster Case*, 25 HARV. J.L. & TECH. 243 (2012) (examining allegations of copyright infringement by contemporary artist Shepard Fairey); William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1 (2000) (using a law and economics framework to analyze appropriation art litigation); Liz McKenzie, *Drawing Lines: Addressing Cognitive Bias in Art Appropriation Cases*, 20 UCLA ENT. L. REV. 83 (2013) (identifying cognitive biases that may influence judicial reasoning in art appropriation cases); Debra L. Quentel, "Bad Artists Copy. Good Artists Steal.": *The Ugly Conflict Between Copyright Law and Appropriationism*, 4 UCLA ENT. L. REV. 39 (1996) (addressing the inherent conflict between copyright and appropriation).

sympathizers and legal analysts, who will continue to recreate and look upon the destroyed image as a marker of what fair use is not and what future artists must do to avoid legal liability. Had the Second Circuit more adequately examined the effects of court-ordered destruction, its decision might have used these insights to provide a principled basis to avoid destruction of art in future fair use controversies likely to emerge under a legal standard more ambiguous than ever.

II. COPYRIGHT, FAIR USE, AND TRANSFORMATIVENESS

This section provides a brief overview of copyright law concepts necessary to understand the holdings in the *Prince* cases. It begins with an introduction to copyright and its purposes. It then explains how the fair use doctrine functions as a defense to copyright infringement. It focuses particularly on transformative use, which asks if an alleged infringer has sufficiently transformed the message or meaning of an original work of art such that his use of it in a secondary work qualifies as a fair use exception to copyright infringement.

Copyright's ultimate aim is to "promote the Progress of Science and useful Arts."⁹ To do so, it provides creators of original works with a "special reward" for their labor: a temporary monopoly on the use and reproduction of their creation, which an author may sell to another during the life of the copyright.¹⁰ Copyright law is therefore grounded in the presumption that the economic benefits attached to a monopoly will continuously motivate original creation.¹¹ Similarly, its primary objective is the vindication of an

9. U.S. CONST., art. I, § 8, cl. 8.

10. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("Copyright is based on the belief that by granting authors the exclusive rights to reproduce their works, they are given an incentive to create."). Currently, for works created on or after January 1, 1978, the copyright endures until seventy years after an author's death. 17 U.S.C. § 302(a).

11. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'). In an amicus brief to the Second Circuit appeal of *Cariou v. Prince*, the Warhol Foundation questions the

author's economic rights; until relatively recently,¹² moral rights—entitling an author to object to distortion or mutilation of his work on the basis of personal disagreement with the alteration—fell outside of American copyright's ambit, and in American law they continue to be less robust than those offered in other countries.¹³

The monopoly granted by copyright cannot be absolute, however, because all “original” creation borrows advances made by others and uses them as constituent elements of a new work.¹⁴ Important advances in material and social sciences depend on the ability to explicitly reference past works: scientific theorems build upon one another, historians and anthropologists make use of

utilitarian “conviction” of the Copyright Clause, arguing that “no evidence suggests that Cariou’s decision to create, collect, and distribute his photographs would be influenced by the bare possibility that another artist might happen upon his book years later and license those images to create other works of art.” Reply Brief of the Andy Warhol Foundation for the Visual Arts, Inc. as Amicus Curiae in Support of Defendants-Appellants and Urging Reversal at *10, *Cariou v. Prince*, 11-1197-CV (2d Cir. Feb 29, 2012), 2013 WL 1760521. Although the Foundation’s brief argued solely for a finding of fair use in *Prince*, its assertion “that the possibility [of use of one’s image by another artist] is simply too remote to have any plausible effect on the decision of Cariou (or anyone else) to create or not create” resonates in the larger debate over the validity of copyright’s animating principles. *Id.*; see also *infra* note 177 (contesting the validity of the economic incentive rationale for creation).

12. See Visual Artists Rights Act of 1990 (“VARA”), 17 U.S.C. § 106A (2013). VARA, amended to the Copyright Statue in 1990, provides artists with the moral rights of “integrity” and “paternity” to their works: the right to object to intentional distortion, mutilation, or modification of work, and a right to attribution of that work. See *id.*

13. See *New Era Pubs. Int’l, APS v. Henry Holt & Co.*, 695 F. Supp. 1493, 1526 (S.D.N.Y. 1988) (Leval, J.) (“[T]he justification of the copyright law is the protection of the commercial interest of the artist/author. It is not to coddle artistic vanity or to protect secrecy, but to stimulate creation by protecting its rewards.”) (emphasis in original); *Gilliam v. Am. Broad. Companies, Inc.*, 538 F.2d 14, 24 (2d Cir. 1976) (“American copyright law . . . does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors.”); Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 268 (2009) (explaining that “European moral rights are far more extensive than their U.S. counterparts” and that “the United States has never fully embraced moral rights”).

14. Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990).

others' research to formulate new hypotheses, legal and political philosophers take up questions suggested by their colleagues or predecessors, and artists reference the works of those who preceded them, whether in homage, criticism, or with less identifiable goals.¹⁵ In order to further the utilitarian purpose of copyright, then, a balance is needed between absolute protection of old works and permission to borrow from them in service of new works.

The fair use doctrine embodies this balance. It draws a line between unauthorized infringement of copyright—"stealing" another's work and passing it off as one's own—and legitimate use of another's work to facilitate new, useful creation—"borrowing" another's insights in the name of progress.¹⁶ The doctrine developed symbiotically with copyright in British common law, with copyright making room for the expansion of fair use whenever it was deemed beneficial to progress in science and art.¹⁷ Early fair use questions examined the propriety of publishing abridgments of a pre-existing work.¹⁸ While merely shortening a pre-existing work was said to violate copyright, the "invention, learning, and judgment" shown in abridgements, combined with their "extremely useful"¹⁹ purpose of making scientific and cultural knowledge more accessible,²⁰ could be properly said to qualify abridgements as new works, justifying an exemption from infringement liability.²¹

15. *Id.*

16. *Id.* at 1110. A paradigmatic fair use practice is the reproduction of a copyrighted piece of text or art for the purposes of "criticism, comment, news reporting, teaching[,] . . . scholarship, or research." 17 U.S.C. § 107 (2013).

17. *See, e.g., Cary v. Kearsley*, 170 Eng. Rep. 679, 680 (1803) ("[A] man may fairly adopt part of the work of another: he may so make use of another's labours for the promotion of science, and the benefit of the public: but having done so, the question will be, Was the matter so taken used fairly with that view?").

18. *Gyles v. Wilcox*, 26 Eng. Rep. 489, 490 (1740).

19. *Id.*

20. *See generally* Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1384-87 (2011) (describing the utility of shortened works for dissemination of knowledge in the premodern era).

21. *Gyles*, 26 Eng. Rep. at 490. Notably, the modern copyright statute classifies abridgments as derivative works. 17 U.S.C. § 101. Today, the

Fair use doctrine followed copyright law to the United States, where federal judges continued its development through individual adjudication of copyright infringement disputes. In the mid-nineteenth century, Justice Story articulated a set of factors for fair use analysis²² that remained largely unchanged until Congress, in the 1976 Copyright Act, finally codified fair use as an affirmative defense to copyright infringement.²³ Section 107 of the Copyright Act contains a preamble with a non-exhaustive list of fair uses, including “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”²⁴ It then lists four factors that courts must investigate when deciding fair use claims.²⁵

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

copyright for a derivative work rests with the owner of the original work. *Id.* § 106(2).

22. *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841). Justice Storey wrote: “In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” *Id.*

23. 17 U.S.C. § 107 (2013).

24. *Id.* The “such as” modifier preceding the list of activities could be reasonably interpreted as confining fair use to activities similar to those listed. See Brief of American Society of Media Photographers, Inc. and Picture Archive Council of America, Inc. as Amici Curiae in Support of Plaintiff-Appellee and Affirmance, *Cariou v. Prince*, 11-1197-CV (2d Cir. Feb 29, 2012), 2013 WL 1760521, at *12 (arguing that the list of activities in the preamble “[a]ll have in common a necessary and deliberate relation back to, and dependence on, pre-existing copyrightable works.”) The House Report on the 1976 bill codifying fair use, however, is explicit in its intention that the Section 107 preamble be non-exhaustive and open to continued expansion. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. H.R. REP. 94-1476, at 66 (1976).

25. 17 U.S.C. § 107.

- (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 or value of the copyrighted work.²⁶

As with the preamble's suggested uses, the factors listed are theoretically non-exhaustive, though no court has developed or applied new factors.²⁷

Under the first factor, the nature and purpose of the secondary work of art, modern courts often ask how "transformative" the secondary creator's use was: Did the secondary creator employ the copied material for a different purpose or in a different manner than the original creator?²⁸ Transformative use as a conceptual underpinning of the purpose and character inquiry gained hold after the publication of a 1990 Harvard Law Review Article by then-Southern District of New York, now Second Circuit Judge Pierre Leval.²⁹ Leval considered the first factor to lie "at the heart of the fair user's case,"³⁰ but bemoaned the lack of decisionmaking guidance inherent in open-ended terms such as the "purpose and character" of a work.³¹ He therefore sought to provide "consensus on the meaning of fair use"³² and its prongs, leveraging his considerable experience as a presiding judge in copyright controversies in a New York courtroom.

26. *Id.*

27. See *id.* (stating that the factors "shall include," rather than "shall be limited to"); see also Leval, *supra* note 14, at 1106 ("Although leaving open the possibility that other factors may bear on the question, the statute identifies none.").

28. Leval, *supra* note 14, at 1111; see also *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 478 (1984) (Blackmun, J., dissenting) ("[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.").

29. Leval, *supra* note 14.

30. *Id.* at 1111.

31. *Id.* at 1106 ("[T]he statute tells little about what to look for in the 'purpose and character' of the secondary use.")

32. *Id.* at 1106.

Leval reasoned that analysis of the purpose and character prong “turns primarily on whether, and to what extent, the challenged use is transformative.”³³ A transformative use is one that “adds value to the original”; it uses the primary author’s work “as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings.”³⁴ In contrast, a secondary use that “merely repackages or republishes the original is unlikely to pass the test.”³⁵ Similarly, mere adaptation of a work into a new mode of presentation—say, from a book to a movie—is not enough; that makes the work derivative under copyright rather than transformative under fair use leaving it properly under the copyright of the original author.³⁶

Leval’s article set forth certain paradigmatic examples of transformative use, including critique, parody, symbolism, and aesthetic declaration.³⁷ But already at its origins, transformativeness emerges slippery. As Leval’s list of examples of transformative use progresses, it progressively undermines his quest for clarity: what is transformative symbolism? The exact same photograph of a political candidate, depending on whether it appears on the cover of a left- or right-leaning publication, will symbolize hope to some, despair to others, and perhaps just a paycheck to the photographer. Should use of the photograph therefore be unrestricted, depriving the original photographer of any right to compensation for his work? What is an “aesthetic declaration” and what does it mean to make one that transforms a work? Should the thought “This image would look better with an Instagram filter” suffice to justify copying and disseminating it as

33. *Id.* at 1111.

34. *Id.*

35. Leval, *supra* note 14. Leval’s admission that repackaged or republished material is only *unlikely* to pass the transformativeness test leaves open the possibility that an unaltered reproduction may, in certain circumstances, still create new insights and understandings. *See id.*

36. *See Cariou v. Prince*, 784 F. Supp. 2d 337, 348 (S.D.N.Y. 2011) (“The fact that a work ‘recast[s], transform[s], or adapt[s] an original work into a new mode of presentation,’ thus making it a “derivative work” under 17 U.S.C. § 101, does not make the work ‘transformative’ in the sense of the first fair use factor.”) (quoting *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 143 (2d Cir.1998)).

37. Leval, *supra* note 14, at 1111.

something new, entitling the copier (rather than the photographer) to profits made from sale of the image? Leval neglects to elaborate, and as if recognizing mid-sentence the impossibility of adequately cataloguing fair use, instead caps his list with a vague allusion to “innumerable other uses.”³⁸

Ambiguity notwithstanding, Leval’s formulation of transformative use was formally adopted by the Supreme Court in *Campbell v Acuff-Rose Music, Inc.*³⁹ and is now regularly used as a guiding framework for analysis under fair use’s first prong.⁴⁰ In this framework, “the more transformative the new work, the less will be the significance of other factors,”⁴¹ meaning analysis of the first factor often influences the answer to the entire fair use question. A finding of non-transformative use under the first factor may therefore be decisive in a fair use defense.⁴²

III. THE CHALLENGE TO COPYRIGHT BY APPROPRIATION ART IN *CARIOU V. PRINCE*

Copyright economically incentivizes artistic production by guaranteeing an artist the right to profits from the sale of her original work or copies of it. But what happens when one of the most celebrated innovations in contemporary art is defined by the very act of copying work from another artist, with minimal alteration, and presenting it in a different context? This section presents appropriation art’s challenge to copyright’s centuries-old

38. *Id.*

39. 510 U.S. 569, 579 (1994).

40. *See, e.g., id.* (applying the transformative analysis); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1185 (9th Cir. 2012) (same); *Soc’y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 60 (1st Cir. 2012) (same); *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 307-08 (3d Cir. 2011) (same); *Bouchat v. Baltimore Ravens Ltd. P’ship*, 619 F.3d 301, 311 (4th Cir. 2010) (same); *Gaylord v. United States*, 595 F.3d 1364, 1385 (Fed. Cir. 2010) (same); *Peter Letterese and Associates, Inc. v. World Inst. Of Scientology Enterprises*, 533 F.3d 1287, 1309 (11th Cir. 2008) (same); *Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 582 (6th Cir. 2007) (same); *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006) (same).

41. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

42. *Cariou v Prince*, 784 F. Supp. 2d 337, 350 (“The “transformative use” prong of the first § 107 factor weighs heavily against a finding of fair use.”).

model. The problem is not a new one, and has been discussed extensively.⁴³ The bulk of this section is therefore dedicated to the facts set forth and arguments made in *Cariou v. Prince*, the case under which the Second Circuit issued its newly revised fair use standard.

Appropriation artists,⁴⁴ continuing in the line of conceptual artists whose work heralded the death of the Romantic notion of genius creators,⁴⁵ “do not strive for magical or ‘creative’ transmutations” that would ordinarily guide a court to a finding of transformativeness.⁴⁶ In appropriation art “the creative element virtually disappears”⁴⁷ in favor of a focus “on the notion of recontextualizing an original and on what the original means.”⁴⁸ Changing the context of a work of art elicits and encourages different questions and reactions than those apparent in the original context. When context shapes meaning, each particular viewer, in each particular location, is implicated in the assignment of meaning. Sherrie Levine’s celebrated work “After Walker Evans,” for example, consisted entirely of re-photographs of Evans’s Depression-era photographs of impoverished, rural Americans. Levine presented the photographs without any alterations to the original, save for a change in the artist’s name. Observing a secondary work of art that is a complete replica of the original fairly evokes the reaction: “What’s the point?” But Levine leaves that answer to the viewer herself, and an abundance of rich, personal interpretations have filled that void, making the work

43. See *supra* note 8 (listing secondary literature discussion on the conflict between appropriation art and copyright).

44. “‘Appropriation’ covers a broad array of practices—reworking, sampling, quoting, borrowing, remixing, transforming, adapting—that focus on one person taking something that another has created and embracing it as his or her own.” Barbara Pollack, *Copy Rights*, ARTNEWS (Mar. 22, 2012), <http://www.artnews.com/2012/03/22/copy-rights>.

45. See *infra* notes 106 to 115 and accompanying text (explaining the link between appropriation art and conceptual art’s attack on traditional notions of artistic creativity).

46. Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1, 6-7 (1992).

47. *Id.*

48. Pollack, *supra* note 44.

simultaneously undefinable and universally defined.⁴⁹

Today, consumers of art are hardpressed to enter a contemporary art gallery or museum without its own appropriation art on display⁵⁰ and appropriation itself is a standard tool of a younger generation of Internet-based creators.⁵¹ Overbroad application of copyright law, the argument goes, threatens to stifle what has become a vital and ubiquitous force in contemporary art.

A. The Facts and Arguments in Cariou v. Prince

This threat of creative destruction came to a head once more in *Cariou v. Prince*, when photographer Patrick Cariou sued artist Richard Prince for copyright infringement. In late 2008, Richard Prince exhibited 22 paintings in a Manhattan art gallery owned by millionaire art dealer Larry Gagosian. The series, collectively titled “Canal Zone,” incorporated painting by squeegee,⁵² computer scanning,⁵³ and cut-out collage, including torn or cut photographs of Jamaican Rastafari, naked women, guitars, and musician’s hands.⁵⁴ The gallery also created and sold an exhibition catalogue that contained additional works from “Canal Zone” not shown in the exhibition itself.⁵⁵ During the show’s two-

49. The Metropolitan Museum of Art, in a single paragraph, posits the work as “a feminist hijacking of patriarchal authority, a critique of the commodification of art, . . . an elegy on the death of modernism[,] . . . [and] the story of our perpetually dashed hopes to create meaning, the inability to recapture the past, and our own lost illusions.” *After Walker Evans* 4, METROPOLITAN MUSEUM OF ART, <http://www.metmuseum.org/Collections/search-the-collections/190019034> (last visited May 20, 2013).

50. Pollack, *supra* note 44. (“Today, in almost any gallery or museum you will see artworks that incorporate or allude to press photographs, fine-art masterpieces, video games, Hollywood movies, anime, found objects, and just about anything that can be pulled off the Internet.”)

51. *See id.* (noting the growing ranks “of artists who sample imagery more freely” as technology facilitates the nearly effortless transfer and exchange of visual images).

52. *Prince Dep.* 275-76, *Cariou v Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. June 24, 2010).

53. *Id.* at 169.

54. *Id.*

55. *Prince*, 784 F. Supp. 2d at 344.

month run, the gallery sold eight of the paintings to private buyers for a total of \$10,480,000 and exchanged seven for other artworks valued between \$6 and \$8 million.⁵⁶ Sales of copies of the exhibition catalogue netted an additional \$6,784.⁵⁷ At the exhibition's termination, the unsold paintings were placed in storage, out of public view.⁵⁸

The photos of Rastafari that Prince had used in "Canal Zone" were torn from an out-of-print book of original photography by Patrick Cariou, titled "Yes Rasta."⁵⁹ According to the Second Circuit panel that reviewed "Canal Zone,"

"[t]he portions of *Yes Rasta* photographs used, and the amount of each artwork that they constitute, vary significantly from piece to piece [in the "Canal Zone" series]. In certain works, . . . Cariou's work is almost entirely obscured. . . . In other works . . . Prince did little more than paint blue lozenges over the subject's eyes and mouth, and paste a picture of a guitar over the subject's body."⁶⁰

Cariou had registered the images in "Yes Rasta" with the United States Copyright Office in 2001.⁶¹ Months before the "Canal Zone" exhibition, Cariou had been in talks with a Manhattan gallery to exhibit photos. However, there is conflicting testimony as to whether the photos were from "Yes Rasta" or another Cariou project⁶²—for sale for between \$3,000 and \$20,000 each, and to reprint the book for signing.⁶³ Around that same time, Cariou learned of Prince's show when alerted by a friend who had seen a newspaper advertisement that reproduced some of the paintings.⁶⁴

56. *Id.* at 350-51.

57. *Id.* at 351.

58. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. May 14, 2010).

59. *Prince*, 784 F. Supp. 2d at 343.

60. *Prince*, 714 F.3d at 699-700.

61. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, *Cariou v. Prince*, 784 F. Supp. 2d 337.

62. *Prince*, 714 F.3d at 703-04.

63. *Prince*, 784 F. Supp. 2d at 344.

64. Memorandum of Law in Support of Plaintiff's Motion for Summary

The Manhattan gallery owner in talks with Cariou also took notice of the “Canal Zone” exhibition, and quickly scrapped tentative plans to show Cariou’s work. The gallery owner gave conflicting testimony to both artists’ lawyers as to why she broke off talks: Cariou’s lawyers contend that her decision was motivated out of concerns that she would be seen as “capitalizing on Prince’s success and notoriety” and “exhibit[ing] work which had been ‘done already.’”⁶⁵ Prince’s lawyers allege that she “went with another artist due to timing constraints because Cariou did not respond for months to her attempts to reach him.”⁶⁶

It is undisputed, however, that after Cariou sent Prince and the Gagosian gallery a cease-and-desist letter, the exhibition continued to run. In January 2009, Cariou sued Prince and Gagosian for copyright infringement,⁶⁷ alleging that the “Canal Zone” paintings incorporated images from “Yes Rasta” without his permission and in violation of his copyright. His requested relief included a permanent injunction against displaying, selling, or distributing originals or copies of “Canal Zone,” damages related to violation of the infringement (including all of the profits Prince and Gagosian had made from sale of “Canal Zone” images), delivery to Cariou of all copies of “Canal Zone” paintings for “impounding, destruction, or other disposition” as he determined, and notice to any owners of “Canal Zone” paintings that their works could not lawfully be displayed under the Copyright Act.⁶⁸

At trial, Prince acknowledged incorporating “Yes Rasta” images into “Canal Zone” without Cariou’s permission, but claimed fair use. Banking on a finding of transformativeness, Prince’s lawyers cited his “genuine creative rationale to convey new insights, a different purpose and new meaning” above and beyond Cariou’s in “Yes Rasta.”⁶⁹ They repeatedly referred to Cariou’s photographs

Judgment, *Cariou v. Prince*, 784 F. Supp. 2d 337.

65. *Id.*

66. Memorandum of Law in Support of Defendant’s Motion for Summary Judgment, *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. Jun. 14, 2010).

67. Amended Complaint ¶ 26, *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. Jan. 14, 2009).

68. *Id.* ¶ C.

69. Memorandum of Law in Support of Defendant’s Motion for Summary Judgment at 25, *Cariou v. Prince*, 784 F. Supp. 2d 337.

as “raw elements,”⁷⁰ akin to the paint Prince had applied to some of the images or the canvases to which he had squeegeed them, arguing that Prince transformed the “Yes Rasta” photographs into “a completely new expression and a different message that had nothing to do with” Cariou’s originals.⁷¹

The different message itself varied between three themes, according to Prince’s lawyers. First, they claimed that “Canal Zone” functioned as an homage to artists that Prince admired. They characterized the use of collaged large hands and paint over the faces of Cariou’s photos as artistic choices made in honor of master and modern painters de Kooning, Cezanne, Warhol and Picasso.⁷² Second, they contended that the redemptive power of music was a central focus of the work, as expressed through the addition of guitars to Cariou’s images of Rastafari men in verdant scenery, creating “a fantastical, post-apocalyptical world where all that remained was music and the bands to play it.”⁷³ The message of redemptive music was also generalized to a “contemporary take on the music scene having nothing to do with Rastafarians in their Jamaican landscape.”⁷⁴ Finally, Prince’s “groupings of men and men, men and women, and women and women as musical bands” was intended “to connote equality between the sexes.”⁷⁵

Although not framed explicitly as an argument for fair use, Prince’s lawyers used the “Factual Background” of his Brief in Support of Summary Judgment to place both Prince and the “Canal Zone” paintings within the larger context of appropriation art, invoking artists Marcel Duchamp, Andy Warhol, Pablo Picasso, Georges Braque, Jasper Johns, Robert Rauschenberg, Sherrie Levine, Salvador Dali, and Jeff Koons as progenitors and contemporaries to Prince in the appropriation art movement,⁷⁶ which they characterized as “an established art form that has been

70. *Id.* at 1, 15, 17, 18, 21.

71. *Id.* at 15.

72. *Id.* at 6.

73. *Id.*

74. *Id.*

75. Memorandum of Law in Support of Defendant’s Motion for Summary Judgment at 15, *Cariou v. Prince*, 784 F. Supp. 2d 337.

76. *Id.* at 2-3.

firmly entrenched in society and art history.”⁷⁷ They further assigned a universal meaning to appropriation art: “By reusing a work and removing it from its usual context appropriation art[] . . . aim[s] to give new meaning to the work, questioning the most fundamental perceptions, both literal and symbolic, on which society is based.”⁷⁸ Implicitly, then, they invited the court to find that “Canal Zone” did the same.

Notably, however, Prince contended in a deposition that he “doesn’t ‘really have a message’ he attempts to communicate when making art.”⁷⁹ When questioned for a specific artistic rationale for the use of collaged guitars, Prince resorted to literalism: “[H]e’s playing the guitar now, it looks like he’s playing the guitar, it looks as if he’s always played the guitar, that’s what my message was.”⁸⁰ When pressed on the overall message of the “Canal Zone” paintings, he offered that “[t]he message is to make great art that makes people feel good.”⁸¹ Speaking of his general practice of appropriation, Prince reiterated his desire to move away from overwrought exegesis on the deeper meaning of his art: “appropriating other people’s originals for use in his artwork . . . helps him ‘get as much fact into [his] work and reduce[] the amount of speculation.’⁸² Prince’s own testimony thus undermined the argument that his lawyers had made regarding the messages of “Canal Zone.”

IV. *CARIOU V. PRINCE* AT THE SOUTHERN DISTRICT OF NEW YORK

Part IV of this article analyzes the standard under which the trial court assessed Prince’s fair use defense. It finds that the trial court’s standard for fair use in combination with the threatened remedy of destruction placed Prince on the horns of a dilemma: either “destroy” his intentionally meaningless work by providing

77. *Id.* at 2; see also *id.* at 5 (“To convey his message, Prince, in the tradition of Duchamp, used appropriated imagery.”).

78. *Id.* at 2 (internal citations removed).

79. *Cariou v. Prince*, 784 F. Supp. 2d 337, 349 (S.D.N.Y. 2011).

80. *Id.*

81. Prince Dep. 267, *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. June 24, 2010).

82. *Id.* at 44 (emphasis added).

sworn testimony as to its unitary, intentional meaning or present an honest, losing case and let Cariou destroy the work instead.

A. The District Court Decision

After motion practice, Judge Batts of the Southern District of New York ruled all thirty of the “Canal Zone” images at issue to be infringing works, as assessed under the four-factor test for fair use.⁸³ Devoting the bulk of her analysis to the first prong, purpose and character of the use and applying the transformative framework, Judge Batts held that a transformative purpose or character under fair use “imposes a requirement that the new work in some way comment on, relate to the historical context of, or critically refer back to the original works.”⁸⁴ Citing Prince’s deposition testimony that he didn’t “really have a message” with “Canal Zone,”⁸⁵ Judge Batts had little trouble finding 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,”⁸⁶ and had therefore not engaged in transformative use.

Further supporting the district court’s legal conclusion on tranformativeness was Judge Batts’s impression that Prince had done “vanishingly little” to physically transform Cariou’s work, using entire or unaltered photographs.⁸⁷ Even where Cariou’s photos “played a comparatively minor role” in a “Canal Zone” painting—those in which Prince did not use complete or unaltered Cariou photographs—Judge Batts contended that the Prince paintings still “feature[d], as their central elements, strikingly original Rastafarian portraits taken from *Yes, Rasta Photos*.”⁸⁸ Judge Batts thus relied on both purely visual observation of Prince’s paintings and a more personal interpretation of what she believed to be the “central elements” of Prince’s paintings. Both approaches, however, argued against Prince: either he had used too

83. *Prince*, 784 F. Supp. 2d at 355.

84. *Id.* at 348.

85. *Id.* at 349.

86. *Id.*

87. *Id.* at 350.

88. *Id.* at n. 8.

much *Cariou*, visually speaking, or he had used a *Cariou* image as a central element, interpretively speaking.

Acknowledging that the finding against *Prince* on transformativeness weighed heavily against fair use,⁸⁹ Judge Batts quickly disposed of the other fair use prongs by citing the large sums of money earned by *Prince*,⁹⁰ the use of entire *Cariou* photographs (as opposed to smaller portions),⁹¹ and the cessation of conversations to show *Cariou*'s work.⁹² Finding against *Prince* on all prongs, she accordingly ruled against him on fair use.⁹³

Gagosian, too, was found directly liable for copyright infringement, for two independently sufficient reasons. First, he had prepared and distributed the exhibition catalogue and other marketing materials bearing "Canal Zone" images.⁹⁴ In other words, *Gagosian* himself was an artist who had created the exhibition catalogue by using copyrighted images. In addition, *Gagosian* had exhibited and sold infringing works. Of note here is that Judge Batts would have imposed direct liability even if *Gagosian* had done nothing but provide a space for *Prince* to show his works. Under Judge Batts's theory of direct liability, the patron's guilt proceeds automatically from the artist's.

Second, Judge Batts also found *Gagosian* liable for vicarious and contributory infringement.⁹⁵ Vicarious liability is present where the "defendant has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities."⁹⁶ *Gagosian*'s profits from the sale were sufficient proof of a direct financial interest.⁹⁷ Relying on *Prince*'s testimony that *Gagosian* handled the marketing for his exhibition and on *Gagosian*'s proximity to *Prince* during the early stages of the "Canal Zone" paintings,⁹⁸ Judge Batts held that *Gagosian* had not only the right and ability to supervise *Prince*'s work, but the

89. *Prince*, 784 F. Supp. 2d at 350.

90. *Id.*

91. *Id.* at 352.

92. *Id.* at 352-3.

93. *Id.* at 353-4.

94. *Id.* at 354.

95. *Prince*, 784 F. Supp. 2d at 354.

96. *Id.*

97. *Id.*

98. *Id.*

right and “and perhaps even the responsibility” to assure that Prince complied with copyright law before showing his works.⁹⁹ Contributory liability attaches when “[o]ne who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another;” it subdivides into a requirement of knowledge and a requirement of material contribution.¹⁰⁰ Gagosian’s knowledge, in this case, came from Prince’s well-known “reputation as an appropriation artist who rejects the constricts of copyright law.”¹⁰¹ Given that reputation, Judge Batts found a duty to inquire into Prince’s compliance with copyright law in “Canal Zone” that Gagosian had ignored.¹⁰² He therefore either knew or should have known of the infringement. Material contribution to infringement came from Gagosian’s advertising and marketing of the exhibition.¹⁰³

Finding both defendants liable under copyright law, Judge Batts enjoined Prince and Gagosian from further infringement of Cariou’s copyrights, ordering them to “deliver up for impounding, destruction, or other disposition, as Plaintiff determines,” all unsold works from the “Canal Zone” series.¹⁰⁴

B. The Destructive Outcome of the “Comment on” Standard

Judge Batts’s narrow conception of transformative use offered Prince two options: defend the work as meaning-laden commentary imbued with an intentional message controlled by the artist or lose the case. Those options will present many conceptual contemporary artists with an impossible choice, because in their work the lack of a unitary message imparted by a godlike author may be the entire point. Many contemporary artists seek to escape the constraints of didactic authorship and its duty to impart an identifiable message to a waiting audience. For these artists, the “goal is always to produce disorientation and doubt.”¹⁰⁵

99. *Id.*

100. *Id.*

101. *Prince*, 784 F. Supp. 2d at 354-55.

102. *Id.*

103. *Id.* at 354-55.

104. *Id.* at 355-56.

105. Nick Stillman, *Richard Prince at Gagosian*, BOMBLOG (Dec. 23, 2008), <http://bombsite.com/issues/1000/articles/4313>.

National Gallery of Art curator James Meyer describes the quest to “produce an art devoid of an author” as “the collective fantasy, the grail, of the American neo-avant garde.”¹⁰⁶ The death of the author has been a recurring theme of conceptual art at least since Marcel Duchamp signed a urinal and christened it “Fountain” for an exhibition with the American Society of Independent Artists.¹⁰⁷ Duchamp’s “readymade” sculptures were, in reality, nothing more than manufactured objects that he had selected, devoid of aesthetic criteria, and labeled “art.”¹⁰⁸ The act of creating art in the absence of technical mastery shifted the nature of art from the physical to the conceptual: As Duchamp expressed it, “I wanted to get away from the physical aspect of painting . . . I wanted to put painting once more at the service of the mind.”¹⁰⁹

Duchamp’s conceptual framework was adopted and expanded by later twentieth century artists. Yves Klein’s “The Void” featured his “invisible” paintings, exhibited in a whitewashed gallery, empty of all furniture.¹¹⁰ Thousands lined up to see what one reviewer characterized as “a void to fill with dreams.”¹¹¹ Andy Warhol dubbed his studio the Factory, alluding to the advent of mechanized, industrial reproduction as a legitimate process of artistic creation. The Factory churned out silk-screened images of supermarket soup cans and megawatt celebrities, using the techniques of mass production to transform the ubiquitous imagery of marketing into art. Warhol captured the essence of the modern dismantling of authorship by stating “I think somebody should be able to do all my paintings for me.”¹¹² Later, conceptual photographers like Richard Prince would take photographs of photographs, exhibiting secondary works that were physically indiscernible from the originals, but capable of evoking dramatically different reactions. In the nineteen eighties, Prince

106. James Meyer, *The Minimal Unconscious*, OCTOBER MAGAZINE at 141, 150 (Fall 2009).

107. David W. Galenson, *You Cannot Be Serious: The Conceptual Innovator as Trickster*, in CONCEPTUAL REVOLUTIONS IN TWENTIETH-CENTURY ART 164 (Cambridge Univ. Press, 2009).

108. *Id.* at 163.

109. *Id.*

110. *Id.* at 170.

111. *Id.*

112. *Id.* at 168.

rephotographed magazine ads featuring the Marlboro man, the famous symbol of frontier virility engineered by a Chicago advertising agency.¹¹³ Prince's work defies a unified interpretation: Is it a biting commentary of manufactured machismo? A study on the uncertain division between reproduction and original creation? An attack on the notion that art must be created by a mysteriously doted artist? A reaffirmation that the artist's magical hand can transform the mundane into the majestic?

Diffuse in subject matter and media, these artists all used minimal physical skill to create art in service of the mind, art that demands engagement from the viewer in order to discern its meaning. For the entire history of human art, the physical skill of the creative artist had reduced the viewer to automaton, commanding him to feel whatever the author intended to convey: sadness, terror, jubilation. In contrast, contemporary artists that strive "to erase all authorship from their work radically deny the notion of 'creative authorship' as a principle and as a definitional codification for works of art."¹¹⁴ They seek to replace the old didactic relationship of artist to viewer with a collaborative dialectic. With "[t]he death of the author" comes "'a birth of the viewer' . . . : a [viewer-participant who is no longer constrained to 'look' at the work but is actively involved in its completion."¹¹⁵ At this moment, who is the artist? Whose work gives the art its "true" meaning? What exactly is that meaning? The questions are intentionally unanswerable, precisely because the innumerable, individual meanings that proliferate when viewers aren't constrained by an artist's interpretation of her own work—when they aren't told *the* meaning of what they see—become the artist's own message.¹¹⁶

113. *The Marlboro Man*, NPR RADIO BROADCAST (Oct. 21, 2012), available at <http://www.npr.org/programs/morning/features/patc/marlborman/>.

114. Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1, 6 (1992).

115. See Meyer, *supra* note 106 at 174.

116. See Reply Brief of the Andy Warhol Foundation for the Visual Arts, Inc., *supra* note 11, at 6. "[N]othing inside the author—his or her intentions or feelings—is now believed to serve as a guarantee of the work's meaning; rather, that meaning is dependent on the interchange that occurs in the public space of the work's connection to its viewers." (quoting Hal Foster et al., *ART SINCE*

Asking Prince to assign *the* meaning of his art reifies old notions of the master's touch of technical skill and his authority over the viewer. Asking Prince to assign *the* meaning of his art may therefore very well destroy the art he created.

V. *CARIOU V. PRINCE* AT THE SECOND CIRCUIT

From the moment it was issued, Judge Batts's decision faced tremendous criticism.¹¹⁷ Commentators labeled it “frightening,”¹¹⁸ “Kafkaesque,”¹¹⁹ “untenable,”¹²⁰ and a “massive limiting of fair use.”¹²¹ In contrast, the Second Circuit's decision has been heralded as a “victory for Richard Prince and appropriation art,”¹²² and a decision that leaves “appropriation art alive and well.”¹²³ This section explains why such celebrations may be premature. It argues that although the Second Circuit correctly divorced an artist's intent from fair use, the muddled and formless “reasonable

1900: MODERNISM, ANTIMODERNISM, POSTMODERNISM 494 (2004)).

117. See Joy Garnett, *Cariou v. Prince: The Copyright Bungle*, ARTNET (Mar. 31, 2011), <http://www.artnet.com/magazineus/news/garnett/cariou-v-prince-the-copyright-bungle-3-31-11.asp> (“The news [of the Southern District decision] has prompted heated commentary by almost everyone.”).

118. Edward Winkleman, *Appropriation Prohibition (or Why I Think Judge Batts is Wrong)* EDWARD WINKLEMAN, (Mar. 22, 2013, 8:33 AM), <http://www.edwardwinkleman.com/2011/03/appropriation-prohibition-or-why-i.html>.

119. *Id.*

120. Greg Allen, *Looks Like I Picked the Wrong Week to Give Up Everything*, GREG.ORG: THE MAKING OF (Mar. 22, 2011, 12:22 AM), http://greg.org/archive/2011/03/22/looks_like_i_picked_the_wrong_week_to_give_up_everything.html.

121. Mike Masnick, *Do We Really Want Judges Determining What Art 'Says'?*, TECHDIRT (Mar. 28, 2011, 10:26 AM), <http://www.techdirt.com/articles/20110328/02282913648/do-we-really-want-judges-determining-what-art-says.shtml>.

122. Julie Ahrens, *Second Circuit Victory for Richard Prince and Appropriation Art*, THE CENTER FOR INTERNET AND SOCIETY BLOG (Apr. 25, 2013, 6:12 PM), <http://cyberlaw.stanford.edu/blog/2013/04/second-circuit-victory-richard-prince-and-appropriation-art>.

123. Maryanne Stanganelli, *Appropriation Art Alive and Well after Second Circuit Ruling in Cariou v. Prince*, IP INTELLIGENCE (Apr. 25, 2013), <http://www.ipintelligencereport.com/2013/04/25/appropriation-art-alive-and-well-after-second-circuit-ruling-in-cariou-v-prince/>.

viewer” standard that emerged from *Prince* gives little guidance to lawyers or artists. Further, by endorsing Judge Batts’s expansion of infringement liability to artistic patrons, the Second Circuit places tremendous pressure on artists to stop creating work that will test the limits of fair use—even if that work, like Prince’s, would ultimately have been ruled perfectly legal.

A. *The Second Circuit Decision*

From the beginning of its divided opinion, the Second Circuit demonstrated a reverence both for Prince the artist and his artistic efforts in “Canal Zone” that was noticeably at odds with the district court. While Judge Batts had sardonically referred to Prince as an “appropriation artist”¹²⁴ (quotations included) that had done “vanishingly little” to transform Cariou’s works, the Second Circuit described Prince as “a leading exponent”¹²⁵ of appropriation art (with a definition of the genre provided by the high-minded Tate Gallery)¹²⁶ who had “altered those photographs significantly.”¹²⁷ Scholars elsewhere have written on how the concept of authorship is “strategically deployed to extend copyright protection to new kinds of subject matter.”¹²⁸ This “author effect”¹²⁹ may implicitly award sympathy to artists whose work exhibits the hallmarks of Romantic authorship: technical skill, sublime inspiration, or traditional media.¹³⁰ Yet “Canal

124. *Cariou v. Prince*, 784 F. Supp. 2d 337, 343 (S.D.N.Y. 2011).

125. *Prince*, 714 F.3d at 699.

126. Presumably, the reader of the Second Circuit’s opinion knows what the Tate Gallery is and why it is sufficiently credentialed to define appropriation art, as the opinion itself provides no explanatory context.

127. *Prince*, 714 F.3d at 699.

128. Peter Jaszi, *Toward A Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 DUKE L.J. 455, 480 (1991).

129. See generally Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293 (1992). Jaszi’s scholarship explores the influence of traditional notions of authorship on copyright doctrine and how they may be a barrier to legal development that acknowledges the reality of collective creativity. See *id.*

130. See, e.g., Keith Aoki, *Adrift in the Intertext: Authorship and Audience “Recoding Rights—Comment on the Robert H. Rotstein, “Beyond Metaphor: Copyright Infringement and the Fiction of the Work”*, 68 CHI.-KENT L. REV. 805, 814 (1993) (arguing that artist Jeff Koons was punished by the Second

Zone” arguably lacked any of those indicia. Something more, though related, seems to be at work in the differences between the Southern District and Second Circuit decisions. When a defendant does “vanishingly little,” his claim of artistry is met with skepticism; but when he “alter[s] . . . significantly,” his status as leading proponent of an art movement is both relevant and informative. Notwithstanding the emphatic rejection of “sweat of the brow” as a justifying principle of copyright law,¹³¹ the question of Prince’s effort seem to have played more than a passing role in the two courts’ different outcomes, a troubling trend when considering the decreasing prominence of physical skill in much contemporary art.

With the introductory tone of its opinion already sharply in contrast to the District Court’s, the Second Circuit diverges even farther from Judge Batts in its legal analysis. The panel’s legal discussion began with a focus on the protection of new creation, noting first and foremost that “[t]he purpose of the copyright law is ‘[t]o promote the Progress of Science and useful Arts,’”¹³² and that overbroad application of copyright “protection would stifle, rather than advance” that purpose.¹³³ Grounded in the language of progress, the Second Circuit disagreed with the trial court’s requirement that a secondary work comment on the original or its author in order to be transformative, and held instead that “to

Circuit in *Rogers v. Koons* for “un-authorized” use of plaintiff Rogers photograph); Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL’Y & L. 207, 228-233 (2007) (explaining how the myth of the Romantic author causes courts to value some forms of creation over others); *Jaszi, supra* note 128, at 463 (arguing that it may be “easier to recognize and reward as an ‘author’ one who paints on canvas with inspiration from nature than one who paints on china with inspiration from old movie stills”).

131. See *Feist Publ’n, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 354 (1991) (holding that originality, not effort, is the touchstone of the Copyright Act and that “[w]ithout a doubt, the ‘sweat of the brow’ doctrine flouted basic copyright principles”); *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 451 (S.D.N.Y. 2005) (stating that “[p]rotection derives from the features of the work itself, not the effort that goes into it.”). In Prince’s case, the perception of effort seems to have influenced the courts’ perception of the features of the work.

132. *Prince*, 714 F.3d at 705 (quoting U.S. CONST., ART. I, § 8, cl. 8.).

133. *Prince*, 714 F.3d at 705.

qualify as a fair use, a new work generally must alter the original with new expression, meaning, or message.”¹³⁴ The presence of a new expression, meaning, or message is to be assessed from the viewpoint of the reasonable observer,¹³⁵ and “the only two pieces of evidence *needed* to decide the question of fair use”¹³⁶ are the original artwork and the purported infringement. Accordingly, to the extent that consideration of artistic intent as indicated through testimony is helpful to finding new meaning, a judge may consider it.¹³⁷ But she is also perfectly free to ignore it, as the Second Circuit majority did.¹³⁸

Applying this legal standard to “Canal Zone,” the Second Circuit found that “twenty-five of Prince’s artworks” were transformative because they “manifest an entirely different aesthetic from Cariou’s photographs.”¹³⁹ For the remaining five paintings at issue, the minimal alterations that Prince made merely “moved the work in a different direction from Cariou’s”¹⁴⁰ and “change[d] the tenor of the piece.”¹⁴¹ These paintings were remanded to Judge Batts for a closer assessment of fair use, with the warning that “[i]n the event that Prince and Gagosian are ultimately held liable for copyright infringement . . . destruction of Prince’s artwork would be improper and against the public interest,” and accordingly “the district court should revisit what injunctive relief, if any, is appropriate.”¹⁴² Notably, the Second Circuit left clear that Gagosian was still potentially liable, either “directly or secondarily, as a consequence of [his] actions with

134. *Id.* at 706 (internal citations removed).

135. *Id.* at 707.

136. *Id.* at 707 (quoting *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012)) (emphasis added).

137. *Id.* at 707 (stating that an explanation by Prince of the meaning of his work “might have lent strong support to his defense”).

138. *Id.* “Prince’s work could be transformative even without commenting on Cariou’s work or on culture, and even without Prince’s stated intention to do so.” *Id.*

139. *Prince*, 714 F.3d at 707.

140. *Id.* at 711.

141. *Id.*

142. *Id.* at n. 5.

regard to” the five remanded works.¹⁴³

Visiting Judge Wallace’s partial concurrence sharply criticized the majority for deciding the fair use question on only some of the paintings, accusing them of “short-circuit[ing the] search for a just result under the law.”¹⁴⁴ Judge Wallace failed to find “a principled reason for remanding to the district court only the five works”¹⁴⁵ and would have remanded the entire Canal Zone series for reappraisal under the Second Circuit’s new legal standard. Selectively deciding the fair use question for only some of the paintings amounted to nothing more than the court “employ[ing] its own artistic judgment”¹⁴⁶ of Cariou’s and Prince’s works.

*B. Transformation in the Eye of the Beholding Judge: the
“New Aesthetic” Standard*

The Second Circuit’s reasonable observer, unguided by nothing more than the naked eye, could spot the different aesthetic in twenty-five of Prince’s paintings, making those paintings transformative. But an equally reasonable observer could disagree with the basic notion that a new aesthetic alone falls properly under new expression, meaning, or message. What is the difference in meaning between the Technicolor and black-and-white version of *The Wizard of Oz*? Or for a more contemporary spin on the same question, how about the 2D and 3D versions of *Avatar*? Does placing an Instagram filter on a copyrighted photo transform its message? And for that matter, what is a new aesthetic? Does placing an unaltered, copyrighted image within a series of other aesthetically dissimilar images, as seen on any Tumblr,¹⁴⁷ comparatively alter the original image’s aesthetic?

143. *Id.* at 712.

144. *Id.*

145. *Prince*, 714 F.3d at 713.

146. *Id.*

147. Craig C. Carpenter, *Copyright Infringement and the Second Generation of Social Media: Why Pinterest Users Should Be Protected from Copyright Infringement by the Fair Use Defense*, 16 J. INTERNET L. 1 (2013), offers a brief definition of the Tumblr social media platform:

Tumblr is a blogging platform that allows users to share text, photos, links, videos, and other content. Tumblr users can share information from websites or other Tumblr profiles and

Ignoring these questions, the Second Circuit's reasonable observer takes it for granted that physical transformation to aesthetic is a transformation in meaning.¹⁴⁸ Because Prince's "composition, presentation, scale, color palette, and media"—physical characteristics, all—are fundamentally different and new compared to the photographs" so, too, "is the expressive nature of Prince's work."¹⁴⁹ These additional descriptors of Prince's new aesthetic only muddle the concept further: Does a new expressive nature require changes to all of the physical characteristics mentioned or only some of them? Is a change to one alone enough? For that matter, will changes to all of those characteristics always impart new meaning? Consider a pirated copy of a film recorded by hand on a digital camera in a theater and then sold on the street as a DVD. Undoubtedly the pirated copy changes the presentation (theater to small screen), scale (big to small), color palette (vibrant to muted), and media (film to digital) of the original. Arguably the introduction of the cameraman's choice of angle or the sound of audience reactions introduce new creative elements, altering the composition. Fair use? And what of the court's continued insistence that "a derivative work that merely presents the same material but in a new form, such as a book of synopses of televisions [sic] shows, is

follow their friend's Tumblr profiles. Tumblr mixes original content, such as comments and pictures from the actual Tumblr user, with found content, like photos and videos from the internet, but focuses on the latter. Tumblr shifted the trend in social media websites from primarily original content to primarily found content by making it easy and quick to share things found online.

Id. at 10.

148. Amicus Curiae the Andy Warhol Foundation, arguing in favor of a reversal of the district court decision, similarly begged the form/meaning question. "The dramatic contrast in expression creates an equally dramatic contrast in message and meaning. There is simply no escaping the fact that Prince's work is dramatically different than Cariou's in expression, meaning and message." Reply Brief of the Andy Warhol Foundation for the Visual Arts, Inc. as Amicus Curiae in Support of Defendants-Appellants and Urging Reversal at 3, *Cariou v. Prince* 714 F.3d 694 (2d Cir. 2013), 2013 WL 1760521, at *2. Neither Prince nor the Warhol Foundation attempted to explain why a change in expression must produce a change in meaning. *See id.*

149. *Prince*, 714 F.3d at 706.

not transformative”?¹⁵⁰ What are changes to presentation, scale, color palette, and media but changes in form?

Put differently, what limiting principle exists for the “new aesthetic” test? The court is, after all, quick to warn that “[o]ur conclusion should not be taken to suggest . . . that any cosmetic changes to the photographs would necessarily constitute fair use.”¹⁵¹ In other words, there is a floor to aesthetic change, below which an artist can’t descend without engaging in copyright infringement. Unfortunately, nothing in the opinion states explicitly what that floor is. Instead, it must be teased from the Second Circuit’s decision to remand five of the Canal Zone paintings to Judge Batts for a determination as to whether they are fair or infringing use. Within those five paintings lies some indication of the floor that they barely graze, either from above or below.

Judge Wallace critiqued the remand of the five paintings alone as unprincipled. But depending on Judge Batts’s new determination, the remand could bring deeper complications. The five paintings did not qualify for fair use at the appellate level because the minimal alterations that Prince made to them merely “moved the work in a different direction from *Cariou*’s”¹⁵² and “change[d] the tenor of the piece.”¹⁵³ If Judge Batts does indeed find fair use in the five paintings, it would seem to lower the floor of the majority’s test from “new aesthetic” to “a different direction” or “changed tenor.” At that point, the nomenclature of the various tests—new aesthetic, different direction, changed tenor— inches suspiciously close to what Judge Wallace criticized as “merely . . . us[ing] our personal art views” to decide a case.¹⁵⁴

But Judge Wallace’s solution—a full remand to the district court for assessment under the new legal standard—seems similarly arbitrary. Why should one district court judge be better able to decide the “new aesthetic” question than three circuit court judges? Judge Wallace mentions the possibility of “new evidence or expert

150. *Id.* at 708.

151. *Id.*

152. *Id.* at 711.

153. *Id.*

154. *Id.* at 714.

opinions”¹⁵⁵ that may be relevant to the district court’s decision, though later admitting that “I do not know what additional facts will become relevant under the corrected rule of law.”¹⁵⁶ Beyond the Judge’s own doubt of his recommendation linger the questions: what new evidence? Whose expert opinion? Judge Wallace fails to specify. The one example of “additional evidence” cited by the Judge appeared in a Seventh Circuit fair use decision that analyzed a cartoon’s parody of an Internet viral video.¹⁵⁷ That potential evidence consisted of additional episodes of the same cartoon series. But Judge Wallace had already viewed the entire “Canal Zone” series at the appellate level; by analogy, there were no other “episodes” of “Canal Zone” left to view.

Similarly, what additional experts would have aided the new aesthetic determination? Prince’s appellate brief teemed with expert opinion extolling his importance to contemporary art and the significance of the Canal Zone series.¹⁵⁸ What other experts did the Judge envision? Even more troubling for artists called to defend their work in the future is the suspicion that the Second Circuit’s standard works only for well-known artists.¹⁵⁹ What sort of expert testimony can the unknown or truly avant-garde artist marshal in order to bolster his claim to transformed expression? Only a handful of living artists command the critical attention and commentary Prince has enjoyed now for decades; even fewer may be realistically called the “leading exponent” of an entire genre. Any artist with deep enough pockets could commission an expert appraisal of her work, but would that sort of interested opinion

155. *Prince*, 714 F.3d at 712.

156. *Id.* at 714.

157. *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, n.2 (7th Cir. 2012).

158. Joint Brief and Special Appendix for Defendants-Appellants at 11-20, 35, *Cariou v. Prince* 714 F.3d 694 (2d. Cir. 2013), 2013 WL 1760521, at *6-7. (describing Prince as the exemplar of the appropriation art tradition and quoting reviews of Prince’s work that alternately describe it as “an invitation to think anew of an already accepted reality” and “provocative”).

159. See also Andrew Gilden and Timothy Greene, *Fair Use for the Rich and Famous?*, 80 U. CHI. L. REV. DIALOGUE 88 (2013) (arguing that the Second Circuit’s revised fair use standard may implicitly import concerns of socioeconomic status and distinctions between high and low art into the transformativeness analysis).

testimony be an appropriate basis upon which to decide fair use? To hew too closely to Judge Wallace's emphasis on expert opinion seems to read into the Second Circuit's "reasonable observer" standard an additional qualifier, noticeably absent from the majority opinion: the reasonable art-critic observer. Surely Judge Wallace does not believe it unreasonable to arrive at an aesthetic determination of a work of art absent the insight or extra knowledge that comes with a degree in art history. Yet it seems similarly unsettling to insist too strongly that it is properly a judge's role alone to decide whether a particular piece of art belongs to a new aesthetic movement or expression.¹⁶⁰

C. The Destructive Outcome of Patron Liability

For all the handwringing over the appellate court's unclear fair use standard, a certain amount of ambiguity is inherent in the doctrine, which depends not on bright line rules but individualized, context-specific determinations.¹⁶¹ The less obvious flaw with the Second Circuit's opinion, then, may be approval of infringement liability for not just artists themselves, but artistic patrons. That expansion did not go unnoticed, however, by national contemporary art museums and foundations, who jointly submitted an amicus brief in the appeal signed by the Association of Art Museum Directors, The Metropolitan Museum of Art, The Museum of Modern Art, dba Los Angeles County Museum of Art, The Solomon R. Guggenheim Foundation, and The Whitney

160. For more than a century the Supreme Court has cautioned [i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations . . . At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-252 (1903).

161. *See, e.g., Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985) ("[Since] the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.") (quoting H.R.REP. No. 94-1476, at 65 (1976)).

Museum of American Art, among others. The brief argued that patron liability placed “an onerous, harmful, and unwarranted burden on museums that display and own works of Appropriation Art”¹⁶² and “may establish a rule that museums must presume every work of Appropriation Art is infringing by its very nature, and that they have an absolute duty to investigate each such work in their collections.”¹⁶³

Judge Batts had found Gagosian liable for three types of infringement: direct, contributory, and vicarious.¹⁶⁴ Gagosian’s direct liability stemmed from his marketing activities related to “Canal Zone” combined with the exhibition of the works themselves in both the exhibition catalogue and his gallery.¹⁶⁵ Contributory liability, meanwhile, attached because of Gagosian’s marketing of a renowned appropriation artist.¹⁶⁶ The marketing was the contribution and the renown sufficed to provide actual or constructive knowledge.¹⁶⁷ Finally, vicarious liability attached because Gagosian had the right, ability, “and perhaps even responsibility”¹⁶⁸ to make sure that Prince had complied with copyright law before selling his artwork.

What lessons should museums and gallerists take from the Second Circuit’s opinion? Before showing a work, do museums, gallerists, and other patrons have a duty to confirm that it does not infringe on any other work? What satisfies that duty? A good faith attempt at fair use analysis by a curator? Consultation with a lawyer? Any lawyer or an intellectual property specialist? No guidance is provided by either the Southern District or Second Circuit,¹⁶⁹ though answers to those questions could determine

162. Brief for the Association of Art Museum Directors et al. as Amici Curiae in Support of Appellants and Reversal at *14, *Cariou v. Prince* 714 F.3d 694 (2d Cir. 2013), 2013 WL 1760521, at *7.

163. *Id.* at *16.

164. *Cariou v. Prince*, 784 F. Supp. 2d 337, 354 (S.D.N.Y. 2011).

165. *Id.*

166. *Id.* at 354-55.

167. *Id.* at 355.

168. *Id.* at 354.

169. See Brief for the Association of Art Museum Directors et al. as Amici Curiae in Support of Appellants and Reversal at *16, *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), 2013 WL 1760521, at *7. The amici worried that “[t]he district court’s opinion . . . may establish a rule that museums must presume

whether or not certain contemporary art is exhibited anywhere outside of large-budget, national museums; larger institutions have the funds necessary to hire a lawyer, and likely retain staff counsel, unlike smaller, cash-strapped galleries or individual patrons.

The equally weighty burdens on non-similarly situated institutions isn't just a cause for sympathy for the small gallerist: it is injurious to emerging artists as well, whose work must show somewhere if it is to gain the art world acclaim and attention of millionaires that Richard Prince enjoys. The amicus brief submitted by the museums argued that the district court's direct liability standard "could effectively deter museums from obtaining or displaying Appropriation Art;"¹⁷⁰ how much truer is that for community galleries in mixed-income neighborhoods, where younger, innovative artists typically live, work, and show? How will direct liability for patrons deter the creation and exhibition of avant-garde art that, as a genre, has yet to be tested by any legal standard? What innovations beyond collaged appropriation will the new liability standard squelch?

And even if large museums alone have the money to legally vet all appropriation art acquisitions, why would they? All things being equal, why not acquire other art that is less expensive to exhibit? Why not exclusively market exhibitions that have no chance of bringing infringement liability to the museum? What effect would this have on the culture's acceptance and appreciation of appropriation art? The purpose of copyright, as the Second Circuit's opinion in *Prince* dutifully reminds us, is "[t]o promote the Progress of Science and useful Arts. . . ."¹⁷¹ If we were ex-ante certain that appropriation art—or any avant-garde art that challenges copyright law, for that matter—were only illegal, harmful infringement that retarded progress, we needn't worry about its destruction. But the *Prince* decisions are evocative of how easily that certainty eludes the judiciary and how drastically differently one judge may measure progress of useful arts than

every work of Appropriation Art is infringing by its very nature, and that they have an absolute duty to investigate each such work in their collections. Yet the district court's opinion offers no guidance regarding how permission is to be verified or what type of proof of permission must be obtained." *Id.*

170. *Id.* at *17.

171. *Prince*, 714 F.3d at 705 (quoting U.S. CONST., ART. I, § 8, cl. 8.).

another. Given that inherent uncertainty, does increased liability for patrons automatically tighten copyright law's grip on artistic innovation?

Or imagine, charitably, that museums with the funds for litigation do decide to take a chance on appropriation art. Which artist wins the lottery? The unknown artist creating challenging, often misunderstood work or the celebrity fixture trumpeted as the mainstay of an artistic movement? Who is more likely to be the easier legal case to defend, supported by expert testimony from distinguished art critics and decades of reviews? Who is more likely to attract record attendees willing to pay full-price suggested donations? And who is less likely to recycle work or motifs he has been trotting out for decades? In this sense, even museums whose institutional commitment to art trumps concerns over legal liability may subtly prioritize older, established artists at the expense of avant-garde art.

On appeal, Cariou's lawyers asserted confidently that "[a]s for museums, their display of art 'for nonprofit educational purposes' is explicitly protected by the fair use statute."¹⁷² But the issue is hardly so clear-cut. Do museum gift-shop tchotchkes bearing images of artwork have an educational purpose? Do creator-themed exhibitions intended to attract paying customers qualify as nonprofit? And for that matter, why should museums alone qualify for a nonprofit, educational exception? Gagosian turned a profit from "Canal Zone," true, but he also offered free access to an impressive collection of cutting edge artwork from a world-renowned contemporary artist; the Museum of Modern Art charges \$25 a head¹⁷³ to view its collection of Prince artworks (all of which, at the time of this writing, sit in storage).¹⁷⁴

The vicarious liability standard brings its own set of novel pressures. In finding Gagosian vicariously liable, Judge Batts singled out the unique relationship between Gagosian and Prince,

172. Brief for Plaintiff-Appellee at *76, *Cariou v. Prince*, 714 F.3d 694 (2d Cir, 2013), 2013 WL 1760521, at *23.

173. *Hours and Admission*, MUSEUM OF MODERN ART, <http://www.moma.org/visit/plan/#hours> (last visited May 19, 2013).

174. *The Collection: Richard Prince*, MUSEUM OF MODERN ART, http://www.moma.org/collection/artist.php?artist_id=4741 (last visited May 19, 2013).

which went beyond gallerist-artist to broach patron-artist. Prince's deposition testimony tells of how early versions of the "Canal Zone" paintings were shown at Gagosian's East Hampton residence, "sort of a way of previewing different works that have never been shown before."¹⁷⁵ According to Judge Batts, Gagosian's presence at the incipient stages of "Canal Zone" therefore gave him the right, "and perhaps even the responsibility"¹⁷⁶ to police Prince's use of copyrighted imagery. The nature of presence-related liability is ambiguous yet potentially enormous: Did it attach because Gagosian had privately exhibited early "Canal Zone" paintings? Because he had seen some of the in-progress works? Because he and Prince had simply communicated about "Canal Zone" prior to its completion? The only certainty is that vicarious liability reaches to activities prior to exhibition of a finished work, possibly giving any patron, collector, or advisor who communicates with an artist about his unfinished work and some day stands to profit from the sale of the work the "responsibility" to dictate that artist's aesthetic choices. The vicarious liability duty thus provides the most destructive pressure of all: it affirmatively obligates individuals other than the artist to discourage not just the exhibition, but even the creation of art.

Perhaps no legal doctrine or liability standard will restrain the artist's ineffable creative impulse;¹⁷⁷ perhaps the trouble or cost of bringing a lawsuit in the first place will deter would-be plaintiffs. Both of these arguments are beside the point. Copyright is

175. Prince Dep. 185, *Cariou v Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. June 24, 2010).

176. *Prince*, 784 F. Supp. 2d at 354.

177. The conception of the artist as a purely rational actor aligns with copyright's utilitarian underpinnings as a system that utilizes economic reward as a performance incentive. As others have argued, this "perspective fails to take into account that human enterprise also embodies inspirational or spiritual motivations for creativity." Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1946 (2006). Kwall's insight is substantial, even if an empirical account of the motivation for creation remains unrealized. Nevertheless, the point stands that if the copyright *system* is designed to incentivize creation through economic gain, either mechanisms that thwart that purpose, or the system itself, should be reformed.

designed to incentivize the efficient production of innovative works through economic means alone, absent any higher, intrinsic motivation emanating from the artist herself. If muddled fair use doctrine and expanded liability for patrons negatively affect the economic motivations of artists, they run counter to the copyright system and should be reformed.

Further, the accusation of infringement works its chilling effect before the official commencement of courtroom proceedings. Cariou delivered his cease-and-desist letter to Prince a month before filing his complaint with the Southern District and more than two years before the court would announce a liability standard that increased the number of defendants on the hook for liability.¹⁷⁸ *Post-Prince*, in the Second Circuit, at least, even if an artist is judgment-proof, her gallerist can be held jointly and severally liable. With damages now extractable from double the amount of defendants, how many more cease-and-desist letters will potential plaintiffs take a chance on writing? Contemporary artists have already reported practices of “trolling” by specialized law firms that comb the Internet for possible copyright infringement and send cease-and-desist letters to artists.¹⁷⁹ Again, were it ex-ante certain that these artists had infringed, such behavior would be acceptable, and perhaps even commendable, as a vindication of the rights of the original artist whose works were used without permission. But Cariou was no doubt personally certain that Prince had infringed his copyright when he sent his cease-and-desist letter. Had Prince buckled to that pressure, the world—or at the very least, consumers of Prince’s artwork—would have been deprived of what the Second Circuit panel confidently determined, four years after Cariou’s original letter, to be “jarring works ... [both] hectic and provocative”¹⁸⁰ that transformed Cariou’s photographs into “something new and

178. Cariou’s letter was delivered December 11, 2008; his complaint was filed January 14, 2009; Judge Batts’s decision was issued on March 18, 2011.

179. Julia Halperin, *Is Prince v. Cariou Already Having a Chilling Effect? Contemporary Artists Speak*, BLOUIN ART INFO (Feb. 1, 2012), <http://www.blouinartinfo.com/news/story/758352/is-prince-v-cariou-already-having-a-chilling-effect-contemporary-artists-speak>.

180. *Prince*, 714 F.3d at 706.

different.”¹⁸¹

VI. THE CREATIVE EFFECT OF COURT-ORDERED DESTRUCTION

When Judge Wallace took the Second Circuit majority panel to task for failing to remand the entire “Canal Zone” series to the district court for a fair use determination under the newly announced standard, he struck at a critical flaw in the majority’s opinion: there was no “principled reason” for the selective remand. Judge Wallace’s point hints at a possible ulterior motive behind the panel’s unexplained decision to so “confidently”¹⁸² declare transformative the vast majority of the Prince paintings at the appellate level: anxiety over the public’s perception of the court’s cultural literacy.

The sense that the panel was being watched by a wider-than-normal audience, that it “plainly understood the importance and the artistic significance of this case,” according to Professor Amy Adler,¹⁸³ appeared throughout oral argument and the subsequent opinion. At argument, Judge Parker all but rebuked Judge Batts as a philistine when he declared her injunction “something that would appeal to the Huns or the Taliban”¹⁸⁴ and elicited laughter from the courtroom when he joked amongst a downtown Manhattan public that “Prince was selling to a wealthier crowd, and on this side of the river.”¹⁸⁵ The opinion, meanwhile, references celebrities, public figures, entertainers, and models invited to the “Canal Zone” opening (whether any actually showed up remains uncertain) and takes pains to communicate to the district court and the wider public the panel’s informed understanding of Prince’s significance as a contemporary artist, declaring that no matter what the legal status of the remanded paintings, destruction of Prince’s art particularly “would be improper and against the public interest.”¹⁸⁶

181. *Id.* at 710.

182. *Id.*

183. Boucher, *supra* note 7.

184. *Id.*

185. *Id.* The river in question is New York City’s East River, which separates the boroughs of Manhattan and Brooklyn.

186. *Prince*, 714 F.3d at n. 5.

The unique public attention focused on the Second Circuit may therefore have played a role in prompting the panel's questionably principled decision to reform fair use doctrine in order to save a famous artist's paintings. Haunted by the specter of destruction, of appearing to the public as "uncivilized" as the Huns or the Taliban, the panel chose to immediately save Prince's artwork. Yet had it been more rigorous in its analysis of the actual effects of destruction of unique works of art as a remedy for copyright infringement, the panel might have given greater pause before overturning Judge Batts's order.

This final section examines the unexpected consequences of court-ordered destruction of unique works of art and argues that *Prince* shows how destruction can serve to aggravate the harm done to a victorious infringement plaintiff, principally by increasing the economic value of related images from the same series and encouraging reproduction of destroyed, infringing images in artistic and legal communities. In doing so, it provides a basis for argument against future injunctions demanding destruction of limited edition works of art.

A. *Destruction as a Driver of Economic Value*

Because infringing works whose purchase pre-dates a destruction injunction remain legal to resell on the secondary market, destruction of unsold works in an infringing series is likely to deepen the economic injury to a victorious copyright plaintiff. Although the infringing artist is unlikely to receive personal reimbursement from secondary sales, rather than eliminate the market substitution effect of derivative works, destruction will instead increase the demand for and value of similar, already-sold works from the infringing derivative series. This heightened demand and value may in turn incentivize more infringement by secondary artists.

Despite his last-minute aboutface at the Second Circuit oral argument,¹⁸⁷ Cariou had demanded destruction of the "Canal

187. When questioned about destruction at oral argument, Cariou's lawyer claimed that Cariou did not support destruction of any artwork, a course of action that was to him, the son of a French Resistance fighter, "redolent of Nazi bookburning." Boucher, *supra* note 7. That courtroom position belies an

Zone” exhibition book since his original cease-and-desist letter to Richard Prince.¹⁸⁸ His complaint filed with the Southern District went even farther, requesting destruction of the paintings themselves.¹⁸⁹ Nonetheless, Cariou’s request contained an important qualifier: he sought from Prince and Gagosian destruction only of images “in their possession, custody, or control.”¹⁹⁰ What of the images already sold to or exchanged amongst private collectors prior to the time Cariou filed his suit?

Here, the court’s reach is limited: it may require Prince and Gagosian “to notify in writing any current or future owners of the Paintings . . . [that they] cannot lawfully be displayed under 17 U.S.C. § 109(c).”¹⁹¹ But notably, the Copyright Act restrains the owners of an infringed painting only from *publicly* displaying the work;¹⁹² nothing in the Act prohibits private display and it would be disconcerting, to speak mildly, to construe the statute to authorize intrusion into homes to seize the infringing work. The statute is similarly silent on the right of private resale of an infringing image.¹⁹³ And even if it weren’t, who would be the wiser regarding a private economic exchange between two

interview with Cariou given shortly after his district court victory, in which he takes a more nuanced stance on the question: “I can destroy them if I want to, but that’s also an extremely drastic decision to make. Destroying art if you don’t like it, that’s something you have to think extremely deeply about. We’ll see.” Andrew M. Goldstein, *French Photographer Patrick Cariou on His Copyright Suit Victory Against Richard Prince and Gagosian*, HUFFINGTON POST (Mar. 24, 2011), http://www.huffingtonpost.com/artinfo/french-photographer-patri_b_839619.html.

188. Demand Letter from Patrick Cariou to Richard Prince et al. to Cease and Desist from Unauthorized Use, Exhibition, and Distribution of Copyrighted Work (Dec. 11, 2008) (on file with author). Cariou’s letter asks Prince and Gagosian to “[d]eliver or destroy all remaining copies of the exhibition book.” *Id.*

189. Amended Complaint ¶ A, *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. Jan. 14, 2009).

190. *Id.*

191. *Id.* ¶ D.

192. 17 U.S.C. § 106(5) (2012).

193. See Rachel Corbett, *Cariou v. Prince: A Win for Richard Prince in Copyright Case*, ARTNET, <http://www.artnet.com/magazineus/news/corbett/prince-wins-right-to-appeal-in-cariou-v-prince.asp#> (noting that “[c]ollectors are still free to sell works in a private setting”).

individuals? Certainly neither the seller nor the purchaser would be likely to alert authorities of their trafficking in illegal images. The inability to resell the painting publicly at an auction house to the highest bidder would likely deter some potential buyers, but it could conceivably entice others. Collector Adam Lindemann, who purchased one of the “Canal Zone” paintings, publicly stated: “Did I know about the lawsuit at that time and was I concerned? Yes, it was a perfect Richard Prince scenario: a work that was made under a potential copyright violation, the subject of a lawsuit, by a self-avowed ‘appropriation’ artist.”¹⁹⁴ Lindemann also hints that the painting has a future (of resale?) beyond his living room wall:

“[S]ome have mistakenly interpreted the judge’s decision to read that I need to give it back to the gallery, but possession is 9/10’s of the law, and there is a whole chapter in this story yet to been [sic] told.”¹⁹⁵ Nor are highly exclusive, private economic exchanges in the millions unheard of in the art world. “Canal Zone” paintings originally showed for sale in private at Gagosian’s East Hampton residence.¹⁹⁶

Presuming the secondary market merchantability of the “Canal Zone” paintings, then, what economic effect would destruction of unsold works have on those beyond the court’s reach? The restricted supply of product would likely increase demand for and economic value of the already-sold paintings.¹⁹⁷ Yet if the infringing work is to be destroyed precisely because it usurps an original creator’s market share for his work, artificially increasing the demand for and price of the infringing work would only further injure the victorious plaintiff. In *Prince*, both Cariou and Judge

194. Adam Lindemann, *My Artwork Formerly Known as Prince*, N.Y. OBSERVER (Mar. 29, 2011, 11:49 PM), <http://observer.com/2011/03/my-artwork-formerly-known-as-prince/>.

195. *Id.*

196. *Supra* note 175 and accompanying text.

197. *See id.* (“Yet in the case of Prince, an artist who routinely flouts the law—on principle, it would seem—the argument could be made that the lawsuit raises the works’ cachet.”) (emphasis in original).

Batts evidently believed that Prince's paintings "unfairly damaged the original market for the Photos and, if widespread, would likely destroy an identifiable derivative market" ¹⁹⁸ How, then, would destroying only some of the infringing Prince paintings reduce the derivative market collector's interest in purchasing one? How would it make the collector any more likely to purchase a Cariou photograph? It could conceivably increase the price of the Prince painting to prohibitive heights, thereby increasing the relative attractiveness of the Cariou photo. But judging by the million-dollar gulf between the works, the hypothetical collector interested in both cheaper Cariou originals and more expensive Prince derivatives would remain undeterred—or perhaps even more likely to purchase the Prince painting instead. ¹⁹⁹ Indeed, when interviewed, "Canal Zone" purchaser Adam Lindemann observed that Prince "is an artist who makes a lot of work, but these paintings are rarified, and they have a unique story." The lawsuit, and the destruction order particularly, actually increased the cultural cachet (and presumably economic value) of Lindemann's "Canal Zone" painting.

B. Destruction as a Driver of Reproduction

Court-ordered destruction also favors the losing defendant in other ways. As *Prince* demonstrates, it is likely to encourage the production and distribution of physical and digital copies of an infringing work, both by members of artistic communities in protest over what they perceive to be a culturally illiterate judiciary and by the legal community in preparation for counsel to art world clients on the outer limits of fair use.

At deposition, Prince complained that prior to Cariou's suit "not one review, in any magazine" had been written about "Canal

198. *Prince*, 784 F. Supp. 2d at 353; see also Amended Complaint ¶ 14, *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. Jan. 14, 2009) ("Defendants' conduct has damaged Plaintiff's ability to sell additional copies of Yes Rasta or to earn revenues from derivative works based on the Photographs which Plaintiff could have licensed to others").

199. Rachel Corbett notes "the argument could be made that the lawsuit raises the works' cachet." Corbett, *supra* note 193.

Zone.”²⁰⁰ After Judge Batts issued her order, however, publicity of “Canal Zone” exploded. Art websites posted jpegs of Prince’s paintings and Cariou’s photos side-by-side, usually accompanying editorials in favor of one of the artists.²⁰¹ Newspapers ran stories of the *Prince* verdict, including images of the forbidden paintings condemned to destruction.²⁰² An artist released a book consisting of the parties’ trial submissions, including reproductions of the entire “Canal Zone” series, and offered it for sale on Amazon.com for \$17.99.²⁰³ An Italian art school created two open-source Tumblrs, titled “After Prince” and “After Cariou,” displaying animated gifs based on Cariou’s and Prince’s works, urging contributors to visit the artists’ web sites, download an image, animate it, and submit it for automatic inclusion; hundreds of submissions followed.²⁰⁴ Lawyers and law students with little

200. Prince Dep. 270, *Cariou v Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. June 24, 2010).

201. See, e.g., Charlie Finch, *Richard Prince: Slippery Slope*, ARTNET, (Mar. 21, 2011), <http://www.artnet.com/magazineus/features/finch/richard-prince-copyright-3-21-11.asp#> (calling the Batts decision sweeping and featuring reproductions of the “Canal Zone” paintings and a photograph of the exhibition at Gagosian’s gallery); Paddy Johnson, *Parsing Patrick Cariou v. Richard Prince: The Copyright Infringement Ruling*, ARTFCITY, (Mar. 23, 2011), <http://artfcity.com/2011/03/23/parsing-patrick-cariou-v-richard-prince-the-copyright-infringement-ruling/> (showing a side-by-side comparison of Cariou and Prince images); Sergio Muñoz Sarmiento, *Richard Prince and Gagosian Lose Copyright Battle*, CLANCCO, (Mar. 20, 2011), http://clancco.com/wp/2011/03/fair-use_derivative_transformative_cariou/ (calling the Batts decision “a good decision for visual artists” and showing a side-by-side comparison of Cariou and Prince images).

202. See, e.g., Charlotte Burns, *Patrick Cariou Wins Copyright Case Against Richard Prince and Gagosian*, The Art Newspaper, Mar. 21, 2011, available at <http://www.theartnewspaper.com/articles/Patrick-Cariou-wins-copyright-case-against-Richard-Prince-and-Gagosian/23387> (showing a side-by-side comparison of Cariou and Prince images); Randy Kennedy, *Apropos Appropriation*, N.Y. TIMES, at AR1 (Jan. 1, 2012) (displaying Cariou and Prince images).

203. GREG ALLEN, CANAL ZONE RICHARD PRINCE YES RASTA: SELECTED COURT DOCUMENTS FROM CARIOU V. PRINCE ET AL (2011), available at http://www.amazon.com/Canal-Zone-Richard-Prince-RASTA/dp/0615473857/ref=pd_sxp_f_i.

204. See AFTER CARIOU, <http://aftercariou.tumblr.com> (last visited May 19, 2013) and AFTER PRINCE, <http://afterprince.tumblr.com> (last visited May 19,

interest prior to the decision in either Prince's or Cariou's works scrutinized both "Canal Zone" and "Yes Rasta," in search of the elusive line between fair use and infringement. In short, the order to destroy the "Canal Zone" paintings inspired their even wider dissemination to an audience who had shown little interest in them beforehand.

Given Prince's particular fame as a leading exponent of the appropriation art movement, it is plausible that a similarly perverse outcome would not take place in the case of a lesser-known artist. After all, much of the attention given to the suit no doubt stemmed from the fact that a relatively unknown photographer had taken on a wildly successful contemporary artist whose name would be instantly recognizable to media consumers. On the other hand, it is also plausible that the use of a remedy so draconian as to evoke comparisons with the Huns was itself a root of public attention. In that case, even lesser-known artists would likely benefit from the exponentially increased audience associated with a lawsuit and order of destruction. Court-ordered destruction may therefore increase the probability of market substitution of an original work, offering little-known derivative artists whose work would have escaped attention both a platform for publicity and a means to artificially influence the market demand for and value of their work.

Given the self-defeating economic logic behind remedial destruction of unique works of art by an infringement plaintiff, it may be that Cariou's true motivation in seeking injunctive relief was an improper one, out of line with copyright's purely economic incentive scheme: to eliminate a work that he personally disliked, made by an artist who had offended him by stealing his work and twisting its message into something different. Indeed, in interviews after the trial Cariou accused Prince of exhibiting "arrogance, an overwhelming sense of power, and plain laziness," in the creation of "a racist piece of art"²⁰⁵ and openly pondered the

2013). In contrast to Carpenter's mutually exclusive definition of Tumblr content as either found or original, both aftercariou.tumblr.com and afterprince.tumblr.com urged users to create unique content from found images rather than re-post content found elsewhere.

205. Lindemann, *supra* note 194. The same conclusion is supported by Cariou's summary of his view on the entire episode: "Hell, No. Fuck Prince,

possibility of destruction according to his whim: “Destroying art *if you don’t like it*, that’s something you have to think extremely deeply about. We’ll see.”²⁰⁶

Here too, however, physical destruction of art would fail to carry out a plaintiff’s (improper) aim to eliminate it from the public imagination. In Cariou’s case the litigation and accompanying order fueled widespread dissemination of reproductions of “Canal Zone,” an odd outcome if Cariou’s true desire were to mitigate the personal harm caused to him by what he characterized as racist art. And an examination of the consequences of Judge Batts’s order gives reason to believe that destruction of the paintings ironically granted them a perverse prominence, for at least two reasons. In the art community, Prince’s works were martyred, bestowed exponentially more attention as victims of an unjust copyright regime. The art students who designed the “After Prince” and “After Cariou” Tumblrs in response to Judge Batts’s order expressed a direct and certain view of the law: upon placing a mouse cursor on either of the websites, the words “FUCK COPYRIGHT,” in capital letters and bold, purple font, circle perpetually. In the legal community, meanwhile, the images have become the marker of fair use’s ephemeral boundaries, likely to be reproduced and redistributed in inter-office memos, law reviews, and case reporters.²⁰⁷ The increased visibility took place even prior to actual destruction: it was the order’s mere threat alone that motivated the media’s coverage. And whatever the legal disposition of the remaining five works, “Canal Zone” images now signify to the legal community the thinnest of lines that separate infringement from fair use, one that was responsible for remaking the Second Circuit’s formulation of the doctrine itself.²⁰⁸

Fuck Gagosian.” *Id.*

206. Goldstein, *supra* note 187 (emphasis added). The irony, of course, is that if Cariou truly believed Prince’s work to be racist, it stands to reason that Prince had indeed done something transformative with Cariou’s presumably non-racist originals.

207. These copies likely would fall under fair use’s exception for comment, teaching, scholarship, or research.

208. *Cf.* *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53 (1884). The case, which, in the process of declaring photography suitable for copyright protection, immortalized Saroni’s otherwise unspectacular shot of Oscar Wilde.

In its zeal to save the Prince paintings from physical destruction above all else, the Second Circuit panel failed to adequately examine the actual effects of court-ordered destruction. It also neglected an opportunity to rationally defend against physical destruction of works in future fair use cases, holding in the most minimal of fashions that the destruction of Prince's artwork alone would be against the public interest. Lesser-known artists, whose works have yet to collect the accolades and vigorous defenders Prince enjoys, remain vulnerable to a fair use standard that, more than ever, depends on the eye of the beholding judge.

VII. CONCLUSION

Time will tell if the Second Circuit's new fair use standard and vision of infringement liability for non-artists will accomplish what it prohibited Judge Batts's injunction from doing. Whatever the outcome, fair use in the Second Circuit post-*Prince* has emerged as less of a standard than ever. Yet in the cacophony of online reaction to the district court's opinion, did the division between fair use and infringement even matter? Did the law stop the dissemination of the putatively infringing image? Commentators note that the very idea of buying and selling physical artwork seems to be at its hyperbolic twilight,²⁰⁹ a gauche indicator of status amongst the nouveau riche.²¹⁰ In the age of immediate, free, and limitless transfer of images made possible by

209. See Carol Vogel, *Christie's Contemporary Art Auction Sets Record at \$495 Million*, N.Y. TIMES, at A22 (May 16, 2013) (proclaiming that "We are in a new era of the art market").

210. See, e.g., Felix Salmon, *The Commodification of the Contemporary Art Market*, REUTERS (Mar. 7, 2012). Salmon expresses a thinly-veiled scorn for the idea of art as commodity, writing:

If a certain class of person walks into an apartment and sees a huge Richter, they're going to know pretty much immediately how much that Richter is worth. If they see a medium-sized Old Master, by contrast, the financial value of the piece—not to mention its authorship—is much less obvious. As such, Old Masters are much less good at displaying the wealth of their owner than Warhols and Richters are. Which has to explain at least some of the reason why Warhols and Richters are so incredibly expensive.

Id.

online hubs, how much sense does it make to talk about the “effect of use upon the potential market”²¹¹ for a copyrighted work? When image capture and editing tools on our phones and computers have rendered the idea of appropriation so second-nature and ubiquitous that it has become passé, what does it matter if an image is transformative or not? Should we be so concerned if dinosaur museums and plutocrat gallerists are disincentivized to acquire and show appropriation art when it runs wild and free (literally) online? Could copyright destroy appropriation art, even if we wanted it to?

211. 17 U.S.C. § 107(4) (2012).