“APPROPRIATION ART” is art that incorporates images or objects that already exist. Throughout the twentieth century, artists have appropriated existing images to create new art and as a method of social criticism. By the middle of the twentieth century, it had become commonplace for artists to incorporate images from popular culture and prior art into new artistic works. The idea behind certain contemporary appropriation art is to challenge the idea that all art must be created entirely by the artist and to shift the focus of artistic creation from the craftsmanship of the artist toward the artist’s ability to juxtapose disparate elements in a way that creates new meaning.

As the number of artists engaging in appropriation art has increased, so too have the number of lawsuits claiming infringement of the original works appropriated. Central to these cases is one of the thorniest issues in intellectual property: whether the appropriation artist is entitled to a fair use defense. Although the Copyright Act sets forth four nonexclusive factors to consider in this determination, numerous courts and commentators have noted that determining fair use is an “open-ended and context-sensitive inquiry.”

This issue came to a head in Cariou v. Prince, which the Second Circuit took nearly a year to decide. The case presented complicated legal issues and a fascinating set of facts, pitting a professional but largely unknown photographer, Patrick Cariou, against Richard Prince, one of the contemporary art world’s most celebrated stars. Cariou sued Prince and the Gagosian Gallery for infringement arising from Prince’s undisputed use of Cariou’s photographs of Rastafarians in Prince’s series titled Canal Zone. In the end, the fair use analysis of the lower court and the Second Circuit centered primarily on one factor: whether Prince’s works were transformative as a matter of law.

**Earlier Cases**

Prior to Cariou, courts within the Second and Ninth Circuits considered whether appropriation art qualified as fair use. In Rogers v. Koons, photographer Art Rogers sued artist Jeff Koons after Koons allegedly took a photograph taken by Rogers of a man and his wife holding puppies that Koons had found in a gift shop, tore off the copyright symbol, and instructed the image to be turned into a...
sulpture “as per photo.”8 In response to Koons’s defense that his work constituted a parody or satire of society at large, the Second Circuit considered whether Koons’s sculpture commented on the underlying photograph.9 Deciding against Koons, the court held that Koons’s work did not constitute a parody because the claimed object of the par-}

ody was not the photograph of the puppies itself but rather society at large.10

Over a decade later, however, Koons escaped liability when he was sued in *Blanch v. Koons* after creating a collage painting consisting of fragmented images of four pairs of women’s legs dangling over images of desserts and set against the background of Niagara Falls.11 One of the pairs of legs came from an advertisement in *Allure* magazine.12

Koons made several changes to the photograph before incorporating it into his collaged work, including cropping, inverting, and modifying the image in ways the court found to be significant.13 Koons articulated that his objective in using the photo was to comment “on the social and aesthetic con-sequences of mass media,” thus using it “in the creation of new information, new aesthet-ics, new insights and understandings.”14

Characterizing Koons’s use of the image as satire, the court found that the use was transforma-tive because Koons had a “sharply distin ct objective” in using the photograph than the plaintiff had in creating it.15

Another instance of appropriation art giving rise to a lawsuit is *Mattel Inc. v. Walking Mountain Productions*. Photographer Thomas Forsythe was sued by Mattel after he developed a series of photographs depicting Mattel’s Barbie doll in various sexualized positions juxtaposed with vintage kitchen appliances.16

The Ninth Circuit held that the series of photo-graphs was a transformative fair use because it could reasonably be perceived as a parody of Barbie.17 Although the court did discuss whether the photographs commented on the doll, it did so only in its threshold determina-tion of parody, not as a requirement for the use to be transformative.18

In yet another case, the Ninth Circuit held that the defendant’s use of video clips in a biography of Elvis Presley was transformative when “the clips play only for a few seconds after creating a collage painting consisting of fragmented images of four pairs of women’s legs dangling over images of desserts and set against the background of Niagara Falls.”

The court stated that “all of the precedent [it] referred to the historical context of, or critically refer back to the original works.” In the Second Circuit’s view, whether a work is transformative does not depend on whether it “comments” on the original work but rather whether it has altered the original work with “new expression, meaning or message.”

THE SECOND CIRCUIT rejected the district court’s determination that Prince’s art pieces could only qualify for a fair use defense if they “comment on, relate to the historical context of, or critically refer back to the original works.” In the Second Circuit’s view, whether a work is transformative does not depend on whether it “comments” on the original work but rather whether it has altered the original work with “new expression, meaning or message.”

Prince’s argument was rooted in one of the central purposes of copyright law: to foster creativity. Indeed, copyright law recognizes that not all copying is copyright infringement and allows some opportunity for fair use of copyrighted materials in order to fulfill the purpose of copyright law, “[t]o promote the Progress of Science and useful Arts….”26

The fair use defense is codified in Section 107 of the Copyright Act, which identifies four nonexclusive factors for assessing fair use, the first of which is the purpose and char-acter of the use.27 The heart of an analysis of the first factor is whether and to what extent the challenged use is transformative. Does the use add “something new, with a further purpose or different character, alter-ing the first with new expression, meaning or message”?28 Alternatively, does it merely supersede the objects of the original cre-ation?28

The district court in *Cariou* held that transformative use requires the secondary use to comment on the original work.28 In doing so, the court referred to the nonexhaus-tive list of examples provided in the pre-amble to Section 107, which exempts use of a copyrighted work for purposes of “com-ment,” and then considered the case law.29

The court stated that “all of the precedent [it] can identify 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.”31 Against this backdrop, the court concluded in no uncer-tain terms that Prince’s paintings “are trans-formative only to the extent they comment on
1. The first factor of a fair use analysis is whether and to what extent the challenged use is transformative.
   True. False.

2. The second factor is the economic value of the copyrighted work.
   True. False.

3. In Cariou v. Prince, the Second Circuit ruled that the third factor—the amount and substantiality of the portion used in relation to the original work as a whole—weighed in Prince's favor.
   True. False.

4. In Cariou, the court noted that the more transformative the use, the less significant the fourth factor is.
   True. False.

5. There are six statutory fair use factors for courts to consider.
   True. False.

6. The title of the Richard Prince series at issue in Cariou is:
   A. Jamaica.
   B. Canal Zone.
   C. No Rasta.
   D. None of the above.

7. Prince was the sole defendant in Cariou.
   True. False.

8. Prince testified at his deposition that his work was not intended to communicate a message.
   True. False.

9. The district court held in Cariou that transformative fair use requires the secondary use to comment on the original work.
   True. False.

10. The Second Circuit held that 25 of Prince's artworks in the series constituted fair use.
    True. False.

11. The Second Circuit remanded the case to the district court for further consideration.
    True. False.

12. Cariou has made more than $1 million from sales of his works at issue in the case.
    True. False.

13. Cariou characterized the Second Circuit's approach to fair use as "I know it when I see it."
    True. False.

14. Prince petitioned to have certain aspects of the case decided by a panel of three judges.
    True. False.

15. Scholars have observed little or no correlation between judicial findings of transformativeness and fair use.
    True. False.

16. In Seltzer v. Green Day, Inc., the Ninth Circuit held that the band Green Day's use of the plaintiff's illustration was entitled to a fair use defense.
    True. False.

17. In Rogers v. Koons, the court concluded that artist Jeff Koons's work was a parody.
    True. False.

18. The photograph at issue in Blanch v. Koons first appeared in which magazine?
    A. Cosmopolitan.
    B. Vogue.
    C. Vanity Fair.
    D. Allure.

19. In Mattel v. Walking Mountain Productions, the Ninth Circuit held that a series of photographs of Mattel's famous Barbie doll was not transformative fair use because they could not reasonably be perceived as a parody.
    True. False.

20. The photograph at issue in Morris v. Guetta was of which musician?
    A. Sid Vicious.
    B. Johnny Rotten.
    C. Iggy Pop.
    D. Joey Ramone.

INSTRUCTIONS FOR OBTAINING MCLE CREDITS
1. Study the MCLE article in this issue.
2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
3. Mail the answer sheet and the $20 testing fee ($25 for non-LACBA members) to:
   Los Angeles Lawyer
   MCLE Test
   P.O. Box 55020
   Los Angeles, CA 90055

Make checks payable to Los Angeles Lawyer.
4. Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a certificate verifying the MCLE credit you earned through this self-assessment activity.
5. For future reference, please retain the MCLE test materials returned to you.

ANSWERS
Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

<table>
<thead>
<tr>
<th></th>
<th>True</th>
<th>False</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10</td>
<td></td>
<td></td>
</tr>
<tr>
<td>11</td>
<td></td>
<td></td>
</tr>
<tr>
<td>12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>13</td>
<td></td>
<td></td>
</tr>
<tr>
<td>14</td>
<td></td>
<td></td>
</tr>
<tr>
<td>15</td>
<td></td>
<td></td>
</tr>
<tr>
<td>16</td>
<td></td>
<td></td>
</tr>
<tr>
<td>17</td>
<td></td>
<td></td>
</tr>
<tr>
<td>18</td>
<td></td>
<td></td>
</tr>
<tr>
<td>19</td>
<td></td>
<td></td>
</tr>
<tr>
<td>20</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Los Angeles Lawyer March 2014
[Cariou's] Photos.”32 Notably, Prince's deposition disclaimed the possibility that the paintings qualified as commentary on Cariou's art. Prince testified that he did not "really have a message" in his work, nor did his art. Prince immediately appealed.33 As a result, the district court ordered Prince's works to be turned over and impounded, destroyed, or otherwise disposed.34 Prince testified that he did not have a particular interest in the original meaning of the photographs he uses.33 As a result, the district court ordered Prince's works to be turned over and impounded, destroyed, or otherwise disposed.34 Prince immediately appealed.35

In his appeal to the Second Circuit, Prince specifically took issue with the aspect of the district court's ruling imposing a requirement that a work must comment on the original in order to be deemed "transformative."36 Disagreeing with the trial court's emphasis on Prince's deposition testimony, Prince argued that his reluctance to articulate a specific artistic intent "is consonant with the core post-modern belief that an artist's intent is irrelevant because an artwork's meaning is manifold, malleable, and does not have one single meaning in the eye of the viewer."37

The Second Circuit Rules

Nearly a year after hearing oral argument on the case, the Second Circuit issued its opinion reversing the district court in part.38 In a 2-1 decision, the Second Circuit rejected the district court's determination that Prince's art pieces could only qualify for a fair use defense if they "comment on, relate to the historical context of, or critically refer back to the original works."39 In the Second Circuit's view, whether a work is transformative does not depend on whether it "comments" on the original work but rather whether it has altered the original work with "new expression, meaning or message."40 With this in mind, the Second Circuit pronounced itself "convinced" of the transformativeness of 25 of the works. In its view, these 25 works featured an "entirely different aesthetic than Cariou's photographs," and as such, were "fundamentally different and new."41

Unlike the district court, the Second Circuit was unmoved by Prince's deposition testimony that he was not "trying to create anything with a new meaning or a new message" and that he didn't have any interest in Cariou's original intent. The court held that the transformativeness analysis turns on how the works "may reasonably be perceived," rather than on an artist's subjective views of his or her work and its meaning.42

The court quickly dispensed with the other fair use factors. As for the first factor, the purpose and character of the use, the court acknowledged that Prince's works are commercial but expressly stated that this factor was relatively insignificant given its ruling regarding the works' transformativeness.43 Similarly, the court also diminished the import of the second factor, the nature of the copyrighted work, under which published, expressive, creative works merit greater fair use protection than unpublished, factual works. Although Cariou's work was creative and published, the court noted that this factor is of limited usefulness when transformativeness is established.44 The court held that the third factor, the amount and substantiality of the portion used in relation to Cariou's works as a whole, should be interpreted in conjunction with transformativeness. Specifically, the court concluded that in 25 pieces, Prince used key portions of Cariou's photographs but did so in the service of transforming those portions "into something new and different." That factor also weighed in Prince's favor.45 With respect to the fourth factor, the effect of Prince's use upon the potential market for Cariou's photographs, the court similarly noted that the more transformative the use, the less significant this factor.46

Moreover, the court noted the markedly different markets for the two artists' works. Although Cariou has earned just $8,000 in royalties from the photographs at issue and has only sold four prints from the book, the court noted that Prince's Canal Zone series was unveiled at a celebrity-studded affair hosted by the Gagosian Gallery and that Prince's works from the series have sold for over $10 million. Accordingly, the court concluded that this factor weighed in Prince's favor as well.47 The Second Circuit's analysis of each of the Copyright Act's four fair use factors appears to have been guided directly by its conclusion that 25 of the works were transformative.48 Transformativeness was indisputably the central focus of the analysis and was critical to the court's ultimate determination of fair use.

In dissent, J. Clifford Wallace, a senior circuit judge of the U.S. Court of Appeal for the Ninth Circuit sitting by designation, agreed with the majority that the district court improperly held that only works that "commented" on the original works were entitled to the fair use defense.49 Judge Wallace strayed from his colleagues, however, in arguing that the Second Circuit should have remanded the case to the district court (and potentially, to a jury) to apply the correct legal standard to the facts.50 Furthermore, Judge Wallace noted that although Prince's testimony need not be deemed dispositive of the fair use issue, it could be at least considered relevant to the transformativeness analysis.51 Acknowledging his own lack of expertise with art, Judge Wallace was puzzled by the majority's conclusion that 25 of the works were fair use while five were not. In his view, the district court should have been called upon to apply the analysis to the entire series.52 If after remand the correct legal standard were applied, additional facts or testimony could have become relevant that might have further affected the analysis and results.53

Other Recent Cases

Although the Second Circuit's decision in Cariou may be widely discussed, a survey of other notable recent cases reveals that the Second Circuit's approach, in which transformativeness was seemingly elevated above all other factors in the fair use analysis, is typical.

Over the past few years, scholars have observed a "high correlation between judicial findings of transformativeness and fair use."54 In a 2011 empirical analysis updating prior, similar studies, for example, Professor Neil Netanel analyzed decisions during 2006-2010 and found that the correlation was striking. In 20 out of the 22 opinions he analyzed, courts that found the defendant's use was transformative further determined that the defendant had engaged in fair use.55 In all but three of the cases Netanel analyzed in which the court found that the use was not transformative, the court likewise found no fair use.56

A review of opinions in 2013 produces an even more striking result. In all 15 cases (including Cariou) decided in 2013, if the court found the work transformative it likewise found fair use, and if it found the use was not transformative it found that fair use had not been established as a matter of law.57

For example, in Seltzer v. Green Day, Inc.,58 the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the band Green Day for the band's unauthorized use of the plaintiff's illustration of a man's screaming face in a video projected behind the band during a concert tour. In determining that the use was transformative, the Ninth Circuit explained that the illustration was used merely as "raw material" for the creation of a new work that featured the illustration as "not simply a quotation or republication."60 Although the band had used the plaintiff's entire work, the court concluded that the other three fair use factors weighed in Green Day's favor. Accordingly, summary judgment was proper.61

On the other hand, in Morris v. Guetta, another "appropriation art" case involving Thierry Guetta (also known as Mr. Brainwash), photographer Dennis Morris alleged that Guetta infringed Morris's copyright in a photograph of the Sex Pistols bass player Sid Vicious by incorporating the photograph into artworks.62 Both parties filed motions for summary judgment—Guetta on his fair use defense, and Morris on his copyright claim—and the district court denied Guetta's motion and granted Morris's.63 Analyzing the trans-
formativeness of the works, the court noted that Guetta’s works showed Sid Vicious making the same facial expression he was making in Morris’s photograph, and although the works added certain new elements, “the overall effect of each is not transformative; [Guetta’s] works remain at their core pictures of Sid Vicious.”64 As a result, the court held that the works were not sufficiently transformative. After addressing the other three factors, the court concluded that Guetta could not establish a fair use defense.65 In short, Cariou epitomizes a trend in recent case law elevating transformativeness as the most determinative factor in the fair use analysis.

The Five Remaining Paintings

On June 10, 2013, the Second Circuit denied Cariou’s petition to have the case reheard by the panel, or in the alternative, for a rehearing of the case en banc.66 Cariou filed a petition for writ of certiorari to the U.S. Supreme Court.67 He argued in his petition that the Court should immediately review the case, because “the ‘I know it when I see it’ approach to fair use is untenable and ‘[d]etermining whether a secondary use is transformative based solely upon judicial ‘observation’ rather than upon the testimony of the secondary user, is necessarily subjective and unworkable.’”68 The Court denied the petition.69

Cariou was left to fight Prince in the district court over the remaining five paintings. Cariou filed a memorandum of law applying the Second Circuit’s test for fair use to the remaining five paintings, arguing that Prince’s use of his photos was not transformative.70 Prince recently filed a memorandum of law in opposition, arguing that summary judgment with respect to the remaining five paintings should not be granted, because a reasonable jury could find that the remaining paintings did make fair use of Cariou’s photographs.71 In support of his opposition, Prince has submitted two expert declarations that opine on the “artistic and creative purpose” of the remaining paintings and how that purpose contrasts with Cariou’s book Yes Rasta.72

Whatever the final result of Cariou and Prince’s dispute, one thing is clear. For now, the most important inquiry in assessing a potential fair use defense is to analyze whether or not the allegedly infringing work is transformative as a matter of law. If not, a fair use defense will likely fail. But reaching a determination of transformativeness remains easier said than done, with courts taking a variety of approaches. Although the Supreme Court has declined the opportunity to further delineate a cogent legal test for determining transformativeness, appropriation art that undeniably adds something new to an underlying work will likely be protected under existing copyright law.

---


2 Ames, supra note 1, at 1477.

3 Id. at 1478.

4 Id. at 1479.

5 Cariou v. Prince, 714 F. 3d 694, 705 (2d Cir. 2013).

6 Id. at 694.

7 Id. at 698.

8 Rogers v. Koons, 960 F. 2d 301, 305 (2d Cir. 1992).


10 Koons, 960 F. 2d at 310. The court also found that Koons had used the “identical expression of the idea that Rogers created.” Id. at 308.

11 Blanch v. Koons, 467 F. 3d 244, 247-48 (2d Cir. 2006).

12 Id.

13 Id. at 248.

14 Id. at 253 (internal citations omitted).

15 Id. at 252-53.

16 Mattel Inc. v. Walking Mountain Prods., 353 F. 3d 792, 796, 806 (9th Cir. 2003).

17 Id. at 806.

18 Id. at 801-02.

19 Elvis Presley Enters., Inc. v. Passport Video, 349 F. 3d 622, 628-29 (9th Cir. 2003).

20 Id. at 629 (emphasis added).

21 Cariou v. Prince, 784 F. Supp. 2d 337, 344 (S.D.N.Y. 2011). Prince was able to sell his works for millions of dollars, but Cariou’s show based on the photographs in Yes Rasta was canceled when the gallery owner determined that the exhibition of Cariou’s work could be perceived as an attempt to capitalize on Prince’s success. The gallery owner did not want to exhibit work that had been “done already” at another gallery. Id. at 353.

22 Id. at 344.

23 Id. at 350-51.

24 Id. at 342-43. The court likewise found that Gagosian and his gallery were liable for direct, contributory, and vicarious infringement. Id. at 354. The court permanently enjoined defendants from infringing Cariou’s works and ordered delivery of all infringing copies within 10 days, explaining that owners of the appropriated art must be advised the art violates Cariou’s copyrights. Id. at 355-56.


26 Cariou, 784 F. Supp. 2d at 347.

27 Id. at 348.

28 Id. at 348-49.

29 Id. at 348.

30 Id. at 349.

31 Id.

32 Id. at 355-56.
