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Blog Post | 107 KY. L. J. ONLINE | August 6, 2018

Mark Edward Blankenship Jr.^[1]

A strong spirit transcends rules.^[2]

Richard Prince is back at it once again, litigating another copyright infringement lawsuit. This time, however, it may not go so well for him.

In 2015, photographer Donald Graham brought the claim against Prince in the U.S. District Court for the Southern District of New York after he incorporated Graham’s photograph entitled “Rastafarian Smoking a Joint” into his own artwork without Graham’s permission.^[3] In his artwork, *Untitled*, Prince downloaded Graham’s image on Instagram, reprinted it on canvas, and framed it as an Instagram post containing extremely ridiculous and politically incorrect comments made by Prince’s username. This reprint, as well as various different reprints, were made for his series entitled “New Portraits.” Prince went from having “New Portraits” exhibited at the Gagosian Gallery to being commissioned by celebrities to have similar reprints done of themselves.^[4]

For years, Prince and other artists have been notorious in the realm of copyright law infringement for “appropriation art,” a genre that not only attempts to recontextualize famous (or not-so-famous) images by juxtaposing them with new material.^[5] In response to such infringement suits, artists have heavily relied on the fair use defense as a safety hatch, claiming that their artwork was sufficiently transformative.^[6] This ultimately led critics to debate on what should truly be defined as “art,” as well as copyright’s role in it.^[7]



Contact Us

620 S. Limestone
40508 Lexington, Kentucky

editors@kentuckylawjournal.org

(859) 257-1678



Fair use is considered a “mixed question of law and fact” based upon four factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.^[8] In particular, the first factor of the fair use defense asks whether the use is “transformative,” or in other words, “whether the new work merely ‘supersedes the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message[.]”^[9] If “the secondary use adds value to the original — if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”^[10] In determining whether a work is transformative, courts may look to the manner in which the images were displayed, the expressive value of the reproduced images in combination with textual material and original graphical artwork, and the extent to which unlicensed material is used in the challenged work.^[11]

It is no surprise that *Graham* would be reminiscent of *Cariou v. Prince*, a case in 2013 where the very same Richard Prince was able to successfully claim that his artwork, involving another appropriated image of a Rastafarian man, was fair use.^[12] And indeed, Prince tried relying on the outcome of *Cariou* by filing a motion to dismiss, claiming that his work *Untitled* was transformative. His reason was that the use of Graham’s image was “raw material” in conveying numerous potential messages, including “a commentary on the power of social media to broadly disseminate others’ work,” an endorsement of social media’s ability to “generate[] discussion of art,” or a “condemnation of the vanity of social media.”^[13] The Court, however, was not compelled and denied the motion to dismiss. They believed that *Untitled* was merely just a screenshot with insubstantial aesthetic alterations, such as *de minimis* cropping, an Instagram frame, and a cryptic comment, and “[was] certainly no more transformative than the five works in *Cariou* that the Court of Appeals remanded to the district court.”^[14] The Court also found that *Untitled* “reproduce[d] [Graham’s work] in its entirety, in a size that enable[d] the original to retain its full aesthetic appeal” without establishing a transformative purpose.^[15] In addition, they believed that *Untitled* could potentially serve as a potential substitute for the original, since the market and audience for both Prince’s and Graham’s works were the same.^[16] Finally, the court rejected Prince’s request to convert the motion into one for summary judgment, since they believed that more evidence—for example, about the purpose of Prince’s works, and the market for each artist’s work—was needed.^[17]

Discovery should have already been completed, and a pretrial conference for *Graham v. Prince* has been set for mid-August of this year. From there, the court will need to consider whether a trial is necessary or whether summary judgment would be proper. Furthermore, the case will be proceeding in tandem with another “New Portraits” case involving photographer Eric McNatt’s image of musician Kim Gordon.^[18]

Yet it remains uncertain as to the what will happen to appropriation art in the future. Just last year, a French High Court held that Jeff Koons, another notoriously sued appropriation artist, had infringed photographer Jean-Francois Bauret’s copyright regarding his image *Enfants*.^[19] In 1988, Koons created his appropriation sculpture, *Naked*, in the United States.^[20] Bauret’s widow, Claude Bauret-Allard, filed the infringement claim against Koons and against the Centre Pompidou in Paris for using an image of *Naked* in the advertising material for their Koons retrospective in 2014.^[21] Unlike Prince, Koons had lost in almost the same way as he did in his previous court battles in the United States.^[22] It can be argued that Koon’s recent case, if filed in a U.S. court, would have had a different outcome due to his fair use defense being broader and more lenient than the defenses French and European copyright law have to offer. However, what is crucial here are the consequences for appropriation artworks made in the United States that happen to travel (even digitally) to France.^[23]

In sum, this French case and *Graham v. Prince*, together could be detrimental to appropriation art’s thriving nature, leaving such works no safe haven in art hubs around the globe. However, *Graham* would have such a major impact on U.S. copyright law that appropriation art may be an entity of the past. And the only thing that could possibly keep it alive would be a new analysis of the fair use doctrine in regards to transformative uses.^[24] Yet some may believe this to be exaggerative, and may suggest that a victory for Richard Prince would instead be detrimental for appropriated artists like Graham.^[25] Regardless, a trial for *Graham* would be crucial to the interpretation of the fair use doctrine.

^[1] Operations Manager, *Kentucky Law Journal*, Volume 107; J.D. Candidate, The University of Kentucky College of Law (2019); B.A., Georgia Southern University (2015).

^[2] See Prince Rogers Nelson, *THE GUARDIAN* (2006).

^[3] Kate Lucas, *Photographer's Infringement Claims Against Richard Prince Clear Motion-to-Dismiss Hurdle; Two "New Portraits" Lawsuits Will Move On To Discovery*, GROSSMAN LLP (Oct. 9, 2017), <https://www.grossmanllp.com/infringement-claims-against-prince>; Ayesha Syed, *Exploring the Bounds of Fair Use: Graham v. Prince*, COPYRIGHT ALLIANCE (Mar. 3, 2018), https://copyrightalliance.org/ca_post/fair-use-graham-v-prince/.

^[4] Lucas, *supra* note 3; Robin Ridless, *Richard Prince's Loss Over Appropriated Art Gives Copyright Law A Chance*, THE FEDERALIST (Aug. 3, 2017), <http://thefederalist.com/2017/08/03/richard-princes-loss-appropriated-art-gives-copyright-law-chance/>.

^[5] David E. Shipley, *A Transformative Use Taxonomy: Making Sense of The Transformative Use Standard*, 63 WAYNE L. REV. 267, 304 (2018); Amy Adler, *Fair Use and The Future of Art*, 91 N.Y.U.L. REV. 559, 565–66, 571 (2016); Esther Zuccaro, *Artist Richard Prince Faces Copyright Infringement Lawsuit Over His Portrait Series of Instagram Photographs*, N.C. J. L. & TECH., (Mar. 4, 2016): <http://ncjolt.org/artist-richard-prince-faces-copyright-infringement-lawsuit-over-his-portrait-series-of-instagram-photographs/>.

^[6] Syed, *supra* note 3.

^[7] Compare Robin Ridless, *For Postmodernists Like Richard Prince, Art Is Theft*, THE FEDERALIST (Feb. 19, 2017): <http://thefederalist.com/2017/02/09/postmodernists-like-richard-prince-art-theft/> and Venkat Balasubramani, *Appropriation Artist Can't Win Fair Use Defense on Motion to Dismiss—Graham v. Prince*, TECH. & MARKETING BLOG (July 24, 2017), <https://blog.ericgoldman.org/archives/2017/07/appropriation-artist-cant-win-fair-use-defense-on-motion-to-dismiss-graham-v-prince.htm> with Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 369–74 (2018) and Brian L. Frye, *Graham v. Prince & the Purpose of Copyright*, THE FACULTY LOUNGE (July 29, 2017 2:35 AM): <http://www.thefacultylounge.org/2017/07/in-1996-photographer-donald-graham-created-a-photograph-titled-rastafarian-smoking-a-joint-left-image-graham-published-th.html>. The author additionally points out that appropriation art “challenges the implicit normative claim that authorship justifies control” while “posit[ing] the viewer as an author as well.” *Id.*

^[8] See 26 U.S.C. § 107; *Cariou v. Prince*, 714 F.3d 694, 704–705 (2d Cir. 2013).

^[9] *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006).

^[10] *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998); See *Cariou*, 714 F.3d at 707–08 (2d Cir. 2013).

^[11] *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 610–11 (2d Cir. 2006).

^[12] Nicholas O'Donnell, *Here We Go Again? Richard Prince Sued By Photographer Over Images of Rastafarian in Instagram Show*, SULLIVAN & WORCESTER (Jan. 4, 2016 10:27 AM) <https://blog.sandw.com/artlawreport/here-we-go-again-richard-prince-sued-by-photographer-over-images-of-rastafarian-in-instagram-show>. But see Zuccaro, *supra* note 5 (“[O]n appeal, Prince successfully argued for the fair use defense, resulting in the court finding that twenty-five out of thirty paintings were transformative. *Cariou v. Prince* ultimately ended in settlement, leaving no precedent or guidance for future copyright cases.”).

^[13] Opinion & Order at 17, *Graham v. Prince*, 15-Cv-10160(SHS) (S.D.N.Y. July, 18, 2017); Syed, *supra* note 3.

^[14] Opinion & Order, *supra* note 13, at 17–19; Syed, *supra* note 3.

^[15] Opinion & Order, *supra* note 13, at 22; Syed, *supra* note 3.

^[16] Opinion & Order, *supra* note 13, at 23–24; Syed, *supra* note 3.