



VOLUME 12 ISSUE 1

The International Journal of the

# Arts in Society: Annual Review

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## So, Sue Me

Legal Actions as a New Staging Ground for  
Performance Art

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**THE INTERNATIONAL JOURNAL  
OF THE ARTS IN SOCIETY: ANNUAL REVIEW**

<http://artsinsociety.com>  
ISSN: 1833-1866 (Print)  
<http://doi.org/10.18848/1833-1866/CGP> (Journal)

First published by Common Ground Research Networks in 2018  
University of Illinois Research Park  
2001 South First Street, Suite 202  
Champaign, IL 61820 USA  
Ph: +1-217-328-0405  
<http://cgnetworks.org>

*The International Journal of the Arts in Society: Annual Review*  
is a peer-reviewed, scholarly journal.

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# So, Sue Me: Legal Actions as a New Staging Ground for Performance Art

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*Abstract: The utilization of ready-made content is a powerful current in contemporary art, taking the form of such practices as parody, rephotography, photomontage, simulation, and quotation. Whether used in part or in whole, appropriated imagery is often intended to question meaning and originality in contemporary culture. Yet, despite its ubiquity, the incorporation of pre-existing imagery is not without risk. Since the 1960s, copyright cases have escalated among notable artists, such as Andy Warhol and Jeff Koons. In many such cases, the unlicensed reuse of imagery plays a strong role in the creation of message, particularly with works intended to be a commentary on consumerism or popular culture. Yet, some artists, such as American photographer Richard Prince, seem to create artworks in order to invite legal reprisal, as if ensuing copyright lawsuits are the true subject matter, not the appropriated content itself. The purpose of this article is to explore and introduce a new artistic category, which the author classifies as legal performance art. Participants range from legal counsel and the judiciary to members of the press and the consuming public. Pleadings, exhibits, and press coverage become part of conceptual framework of the performance. This radical shift in venue and scope challenges the traditional definition of the artwork, fragmenting it amongst countless sites, thereby revolutionizing the concepts of production, participation, and viewership.*

*Keywords: Contemporary Art, Copyright, Intellectual Property*

## The Introduction of Legal Performance Art

Recent years have witnessed an upsurge in highly publicized visual arts cases related to copyright, fair use, and artistic originality. For some artists, such as American photographer and painter Richard Prince (b. 1949), legal entanglements seem far from unanticipated; rather, they appear to be an intended outcome of the artwork itself. Whether artists such as Prince seek to test the boundaries of artistic expression or simply hope to remain a fixture in the public eye, the legal implications of their work greatly expand the sites of artistic production, consumption, and display.

The purpose of this article is to introduce and explore a new artistic category based on the work of Richard Prince, which the author classifies as legal performance art. Within this style, underlying artworks, based on the practice of rephotography, may be viewed as an initiation to extend the artwork performance into the legal arena. Participants include not just the artist, but also include legal counsel and the judiciary as well as members of the press and the consuming public. Pleadings, exhibits, and press coverage become part of conceptual framework of the performance, prompting a radical shift in venue and scope that challenges the traditional definition of the artwork, fragmenting it amongst countless sites to be consumed, transmitted, and reconsumed in a nearly endless cycle. In order to understand the implications of these shifts, it is necessary to consider the relationship between appropriation art and intellectual property law, artistic works created to challenge the boundaries of fair use, and the use of appropriation as legal performance.

## Appropriation Art and Intellectual Property Law

Although it is most often associated with the 1980s and 1990s, the artistic practice of appropriation is far from a short-lived, postmodernist trend relegated to decades past. Utilizing ready-made content is a powerful current in contemporary art, from parody to rephotography,

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photomontage to quotation, replication, and even imitation. But yet, from its inception, artistic appropriation has shared an incestuous relationship with conceptual bedfellow intellectual property law. While appropriation artists often seek to draw attention to the derivative nature of their work without deceptively masking their source material, under United States copyright law, the right to prepare derivative or adapted works belongs to the original copyright holder, not an unauthorized third party. Copyright law grants the creator the exclusive rights to reproduce, distribute, display, and create derivative works, or to permit others to engage in the same actions. In this connection, modern copyright law can be described as “a system seeking an appropriate legal balance between the rights of authors and publishers on one hand and the rights of users and consumers on the other” (Abrams 1992, 1). In practical terms, if a creative work is not sufficiently protected, the incentive to create is highly mitigated because of lack of economic value. Without permission from the copyright holder, the use or appropriation of a copyrighted work is considered infringement unless it falls under an exception, such as fair use.

Unfortunately, the boundaries of such exceptions as fair use are far from bright line rules, relying not on objective assessments but rather, upon the balancing of various factors. The standard four-factor test for fair use under 17 U.S.C. § 107 stipulates that:

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

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Evaluations related to such factors as *purpose*, *character*, *nature*, and *substantiality* are highly fact-driven, meaning there are few safe harbors for derivative artists, unless they choose another mode of expression altogether. In an effort to clarify the test, case law adds a fifth factor to the list, that of transformative use. First raised by the United States Supreme Court in *Campbell v. Acuff-Rose Music* (1994), a derivative work is transformative if it uses the original work in completely new or unexpected ways. The transformative factor functions as an indicator of fair use, focusing on two questions: whether the derivative material has been transformed by adding new expression or meaning and whether value was added by creating new information, new aesthetics, new insights, and new understandings (Stim 2016). This test has been applied many times over the past two decades, helping to define the boundaries of fair use. For example, using a seven-second clip from the Ed Sullivan show in the musical history, “The Jersey Boys,” has been held as transformative (*SOFA Entertainment, Inc. v. Dodger Productions, Inc.* 2013), as well as book scanning to create a nonprofit database *Authors Guild, Inc. v. HathiTrust* (2014); whereas *The Harry Potter Encyclopedia*, which included extensive text from the original books, was not (*Warner Bros. Entertainment, Inc. v. RDR Books* 2008).

Copyright law, which is often interpretative, conceptual, and difficult to judge, shares much in common with contemporary art. Fair use has been described as “one of modern law’s most fascinating and troubling doctrines. It is amorphous and vague, as well as notoriously difficult to apply. It is, at the same time, vitally important in copyright and perhaps the most frequently raised and litigated issue in the law of intellectual property” (Bell and Parchomovsky 2016, 1051). It can also result in unexpected outcomes. No art law primer is complete without a reference to *Rogers v. Koons* (1992), in which renowned artist Jeff Koons appropriated a photographic image taken by Art Rogers of a couple whose arms are laden with puppies. Even though Koons transformed the black-and-white postcard image into a painted wooden sculpture

more than five feet in length and made other artistic modifications, the court rejected Koons's fair use defense, asserting that Koons's sculpture was a copy of Roger's photograph, that it did not fall under the domain of fair use, and that Rogers was entitled to a monetary settlement from Koons. To many, it would seem that Koons's sculpture was substantially transformative and that Koons wasn't competing in the same market stream as Rogers: "For some commentators the Koons case provides a clear illustration of the sort of situation in which existing doctrines such as fair use are inadequate and in which a right to reuse or 'recode' a work of art should have been recognized" (Burrell and Coleman 2015, 28). Yet, the court adjudicated otherwise, reminding us that judges make decisions on evidence, not aesthetics.

Koons would be successful, however, in the later case of *Blanch v. Koons*. At issue in this suit was Koons's appropriation of the copyrighted photograph, *Silk Sandals* (2000) taken by Andrea Blanch for the August 2000 edition of *Allure* magazine. Koons appropriated the image, which features a close-up of women's feet clad in Gucci sandals, for his work, *Niagara* (2000). Although Koons rotated the position of the feet and omitted the original background of the image, Blanch filed for copyright infringement. This time, however, the Second Circuit held for the defendant on the basis of fair use, finding that Koons's appropriation was adequately transformative, that it was not commercially exploitative, and that it would not have a deterrent effect on the market value of the original. In comparing the two Koons cases, substantiality and amount of use appears to be the deciding factor: whereas Roger's photograph comprises the majority of Koons's *String of Puppies*, Blanch's image is just one element used in *Niagara*. But just when a reliable test for fair use seemed to be emerging from case law, artists and copyright holders would soon receive another jolt.

### Challenging Fair Use: Richard Prince

Fast forward to 2013 when the United States Second Circuit of Appeals handed down their decision in *Cariou v. Prince*, a case that had put the art community on red alert. Richard Prince, no stranger to the courtroom, rose to fame in the 1980s by rephotographing Marlboro cigarette advertisements (originally shot by Sam Abell). In 2008, he incorporated in his "Canal Zone" series photographic imagery from Patrick Cariou's (2000) book focusing on Rastafarian culture entitled, *Yes Rasta*. Cariou, in response, brought suit against both Richard Prince and New York's Gagosian Gallery, which exhibited the works and published an exhibition catalog. Although the defendants argued fair use, the United States District Court for the Southern District of New York originally entered a permanent injunction and "compelled the defendants to deliver to Cariou all infringing works that had not yet been sold, for him to destroy, sell or otherwise dispose of." Upon appeal, however, the Second Circuit overturned the lower court's decision (*Cariou v. Prince* 2013). Although many felt that *Cariou v. Prince* created more questions than it answered, the US Supreme Court denied certiorari in 2013, foreclosing an appeal from the Second Circuit decision.

Almost as if accepting a challenge, Richard Prince unveiled his "New Portraits" series the next year, which made use of Instagram images that Prince appropriated, uploaded to his own profile, added minimal comments and/or emoji, and then printed as screenshot-style images. The series, comprised of six-foot, inkjet-on-canvas prints, was exhibited in 2014 at New York's Gagosian Gallery and again in 2015 at London's Frieze Art Fair, despite the fact he had not requested or received permission from any of the original photographers, stylists, or models, which included such celebrities as Kate Moss, Pamela Anderson and Taylor Swift.

Lawsuits sprouted quickly, one of the more notable being Donald Graham's suit for Prince's appropriation of his photograph, "Rastafarian Smoking a Joint," which was taken in 1996, first published in 1998, and registered with the US Copyright Office in October 2014. The image was posted and reposted on Instagram, before Prince commented on the work through his own account, and later printed the Instagram screenshot for exhibition. In addition to filing suit, Graham fought back through social media, tagging a post on Twitter dated October 29, 2014 with

#Princeofappropriation and commenting, “Where the Prince found his subjects. I went to Jamaica to find mine; he browsed #Instagram.” In November 2016, notable celebrity photographer Eric McNatt filed a complaint against Prince for the appropriation of a portrait of Sonic Youth’s Kim Gordon, which was taken by McNatt in 2014 to accompany an article for *Paper* magazine, but was appropriated Instagram-style by Prince the day after publication. This lawsuit numbered fifth in the Prince legal repertoire.

Prince’s legal counsel, Josh Schiller from the firm Boies, Schiller, and Flexner, has vigorously opposed each case. In April 2017, he filed a motion to dismiss the Graham case on the grounds that the work is appropriation art, transformative, and therefore permissible as fair use, citing *Cariou v. Prince* as precedence. In response to McNatt’s allegations, Schiller asserted the complaint “fundamentally misunderstands fair use,” and suggests that Prince is fighting for the benefit of “many, many artists,” according to *The Art Newspaper* (2016). Indeed, not all artists cheer the “life + 70 years” or “120 years from publication” monopoly on copyright protection (17 U.S.C. § 302), which is viewed by some as an outmoded restriction on the creative process.

The economic stakes are high, however, with the Duchampian “New Portraits” selling for as much as \$100,000 apiece, offset only by printing costs. This is minimal, however, when compared to the Canal Zone series; eight of the thirty-five works together sold for \$10 million. The prices commanded by Prince’s paintings and photographs compliment his message. His work is the simulacrum: copies of copies, simulated content devoid of originality and meaning, operating within a system based on branding, commodification, and market potential in a media-saturated world. In this connection, Prince’s style of appropriation oddly parallels the age-old practice of flipping: investing in artworks at devalued prices in the hope of turning a profit. His brand name becomes the “added value” to the process that transforms not only intellectual property, but also price tags. At the same time, he exposes the conflicting nature of copyright itself. In the words of attorney Anthony R. Enriquez (2013, 37–38), “Copyright is designed to incentivize the efficient production of innovative works through economic means alone, absent any higher, intrinsic motivation emanating from the artist herself.” The fundamental nature of copyright, in this respect, is both a motivation and a hindrance.

## Appropriation as Legal Performance Art

Despite the obvious economic impact of Prince’s appropriations and accompanying publicity, I propose that the significance of Prince’s work has less to do with branding and post-Warholian commodification than with the artist’s appropriation of fair use as a method of artistic performance. Prince’s work is indeed transformative, using the term not in the legal manner with respect to copyright law, but with regard to artistic production: Prince converts, compounds, and infinitely multiplies the site of artistic production and display by including a performative element. The creation of the traditional artwork, such as the printed images in the “New Portraits” series, is simply an initiation to be followed by a performance phase in which participants—including viewers, collectors, bloggers, reporters, legal counsel, court recorders, and judges—take part in a new viewing space. The photographic invitation is simply one layer in the conceptualization of the legal and artistic performance that Prince has created. Pleadings, exhibits, and even press coverage become part of conceptual framework, radically shifting venue and scope; challenging the traditional definition of the image and fragmenting it amongst countless sites to be consumed, transmitted, and reconsumed.

Yet, Prince’s actions are not without precedence. This reconceptualization strongly echoes the work of Daniel Buren, whose “Affichages Sauvages” (1968) explored the limitless exhibition potential of art outside the gallery space. In these “wild displays,” Buren fly-posted alternating strips of paper of varying sizes in 200 locations around Paris (Rahtz 2012, 94). Created without gaining official permission or public approval, Buren’s work broke free from the constraints of the gallery space, a concept explored by many postminimalists. Buren’s work explored the idea of simultaneity, being impossible to experience as a unified whole. Buren’s work implicated the

dualities of public vs. private and exclusivity vs. banality. Placed within traditional zones of advertising, such as on billboards and around metro stations, Buren's signature stripes appropriated public spaces, functioning like the predigital counterpart to Richard Prince's seizure of imagery.

Indeed, the parallels between Buren and Prince are many: both artists fragment viewership and the exhibition space; neither body of works can be viewed in totality at any given moment. Just as Buren, "the stripe guy," reduces painting to the most fundamental visual elements, such as shape and color, Prince reduces photography to the simple act of appropriation and recreation. Both artists question the value of artistic expression in the public viewing space, and both court danger and even legal reprisal with their work. Indeed, one should not forget the controversy stirred by Buren's *Les Deux Plateaux* in the courtyard of the Palais Royale in Paris (1986), which caused many to question not only the appropriateness of the seventeenth-century Baroque courtyard for Buren's candy-striped columns, but also the politics behind the commission (under the left-wing president, François Mitterand), as well as the artist's more recent comments on the French government's "vandalism," referring to the lack of upkeep of the columns themselves.

Viewed in this context, Richard Prince's appropriation of imagery and courting of legal reprisal appear boorishly outmoded; his lack of innovation hiding behind the guise of social media, hashtags, and emoji. Just as the transformative factor of fair use focuses on the question of whether value was added by creating new information, aesthetics, insights, or understandings, historians and critics must ask: what is the added value of Prince's work within the contemporary art lexicon? What is the contribution of his creations outside of the already-established vocabulary of appropriation art?

I propose that the added value of Prince's appropriations relates less to individual artworks than to the performances they create. As a repeat customer of the judicial system, Prince has created an aesthetic-legal hybrid unparalleled in contemporary art. He has altered the viewing space of his work by appropriating a new legal-based audience. His work is not simply discussed in art magazines, blogs, textbooks, and websites; it is debated in legal journals, law firm websites, intellectual property circulars, and the like. Lawyers, who would probably never attempt to tackle contemporary art theory otherwise write extensively about Prince's exploits, such as Robin Ridless, a New York attorney who has asked the question, "Is Prince Playing the Second Circuit?" (2017). In an astute article written for *The Federalist*, Ridless (2017) discusses Prince's antics, asserting, "The self-proclaimed anti-authoritarian progressive art world eats this up [referring to his criticism of judges and lawyers and mocking of the legal system]. They smirk at his wisecracks and treat his scorn as exemplary. For them, the courts are but the newest venue for Prince's guerilla theater. Indeed, the triumph of the postmodernist ethos has been so complete, where else remains?"

By introducing the judiciary participant into the creative process, Prince dilutes the power of critics and viewers, placing it instead in the hands of judges of law. From an aesthetic viewpoint, Prince transforms copyright law and the judiciary into raw material for his appropriation-performances. But from a legal standpoint, his work poses a much more precarious threat. As lawyers have pointed out, should Prince prevail in the current Instagram suits, there would be little limitation to what "fair use" allows in the Second Circuit—almost any modification could be seen as sufficiently transformative, at least by Richard Prince. And since the Second Circuit covers New York, the US contemporary art capital, it might as well be the Supreme Court.

## Conclusion

For those who support the strong protection of authorship under intellectual property law, there has perhaps never been an artist more dangerous than Richard Prince. In this respect, Prince's work is theoretically cannibalistic: it seeks to destroy what it creates. If Prince is successful in redefining the outermost boundaries of fair use, then what? Without the courtroom performance space and the voluminous conceptual layers of complaints, briefs, memos, and media coverage,

what remains of his work? And what is to stop other artists from appropriating from him? Even though he placed copyright warnings in his “New Portraits” exhibitions, perhaps tongue-in-cheek, his work would be as open to appropriation as any of his source material.

For better or for worse, Prince has infiltrated the corridors of power—as a blue chip contemporary artist he is taking on the system from within, his works not relegated to street venues or fringe art fairs. He doesn’t flypost imagery in the spirit of 1960s Daniel Buren or contemporary street artists like JR, Banksy, or Shepard Fairey. Richard Prince’s performative works unfold in the courtroom, accented by billable hours, legal retainers, and federal judges nominated by the President and confirmed by the United States Senate. The outcomes of his judicial performances are recorded in federal case law, their implications limitless. In this connection, when viewed through the lens of history, Prince, perhaps more than any other artist, has redefined the scope of art production and viewership. Images convert to evidence, artists are transformed into defendants, and viewers become witnesses.

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