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Court signs off on 'appropriation art'

INSIDE IP LAW

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An important case, *Cariou v. Prince* (2d Cir.), was decided last month. It deals with "appropriation art" and copyright. To fully appreciate the importance of the case, we must look back 20 years to litigation involving a controversial appropriation artist named Jeff Koons.

I had never heard of the term "appropriation art" until I learned about it in a copyright law context. It was at issue in the case of *Rogers v. Koons* (2d Cir. 1992). In the late 1980s, Jeff Koons was a hot property in the New York and European art scene. Koons, a commodities-broker-turned-artist, was an adherent of the post-modern or neo-pop school of art.

This type of art, which sometimes incorporates other objects and even other art into a new work, can be seen in the work of artists such as Marcel Duchamp, Roy Lichtenstein and Andy Warhol.

The New Yorker reported in 1989 that "the most shocking art in America is being made by young New Yorker Jeffrey Koons." His sculptures sold for outrageously high prices. The New York Times commented that "Koons is pushing the relationship between art and money so far that everyone involved comes out looking slightly absurd." Koons' cachet was only enhanced by the fact that he was for a while married to a buxom Italian porn star known as Cicciolina.

He created works incorporating commonplace objects and images as a comment on the "commodification" or "banality" of society. He felt that the mass production of commodities and media images caused a deterioration of society. By incorporating these images into works of art he intended to "comment critically both on the object and the political and economic system that created it."

The image that landed him in federal court was a cute photograph by Art Rogers of a smiling man and woman seated with eight adorable puppies on their laps. Koons created a sculpture that obviously copied the photo, rendering the couple and the puppies in a weird and mocking way.

The three copies of the sculpture sold for $367,000. Rogers, apparently not an enthusiast of Koons' "appropriation art," sued for copyright infringement. Koons claimed that he copied from Rogers' photo to comment on society and that it was fair use and, thus, not infringement.

Koons' case was doomed from the start. The word thievery in the first paragraph of the decision makes clear that the court did not take Koons or the post-modern art movement seriously.

The court viewed Koons not as a real artist, but as a con artist — making a substantial amount of money by intentionally copying someone else's copyrighted work. In rejecting the fair-use defense, the court ruled that Koons' sculpture could not be considered a parody because Koons' purported commentary was on modern society in general and was not really commenting on Rogers' work specifically. By requiring that the copied work "must be, at least in part, an object of the parody," the court effectively cast an entire artistic tradition into a legal netherworld.

In the following decade, the winds of change began to blow more favorably for appropriation artists. In *Mattel v. Walking Mountain* (9th Cir. 2003), the court held that a series of fine art photographs of naked Barbie dolls in precarious relationships with various kitchen gadgets was a fair use, as a critique on the objectification of women.

A few years later, in 2006, Koons himself was vindicated when he was again sued by a photographer whose image he had incorporated into a painting. *Blanch v. Koons* (2d Cir.). As before, Koons had used the image "as fodder for his commentary on the social and aesthetic consequences of mass media."

Unlike the *Rogers* case, this time the 2nd U.S. Circuit Court of Appeals felt that Koons had established a proper justification for his borrowing, stating that there was "no reason to question his statement that the use of an existing image advanced his artistic purposes." While the Rogers court was appalled that Koons profited from using another artist's work, the *Blanch* court was not troubled by it because the new work was "substantially transformative."

Where the earlier decision painted Koons as a con artist, the later decision found a public benefit from his art ("the public exhibition of art is widely and we think properly considered to have value that benefits the broader public interests"). This time, Koons' appropriation was a fair use.

In light of the *Blanch* case, it comes as no surprise that the same court recently upheld, in large part, the legal validity of appropriation art in the case of *Cariou v. Prince*, mentioned in the opening. Patrick Cariou spent six years living among and photographing Rastafarians in Jamaica.

His photos were published in an art book titled "Yes Rasta," which was not a commercial success. One person who liked Cariou's photos was Richard Prince, an appropriation artist whose works are shown in museums around the world. Prince made a series of paintings and collages that incorporated 35 images from "Yes Rasta."

Most of Prince's works substantially altered Cariou's photos and manifested "an entirely different aesthetic." Prince relied on the fair-use doctrine to justify his appropriation art, and the court agreed, finding that 30 of the 35 works were highly transformative and entitled to summary judgment of fair use (the other five raised a question of fact and were remanded).

Like Koons, Richard Prince was a favorite of the rich and famous — some of his Rastafarian works sold for more than $1 million, and he collected more than $10 million total. (In attendance at Prince's gallery opening were Jay-Z and Beyonce, Tom Brady and Gisele Bundchen, Brad Pitt and Angelina Jolie and, of course, Jeff Koons).

Where the *Rogers* court was outraged at the money Koons made using the work of others, the *Cariou* court was not troubled at all, finding instead that the staggering prices of Prince's works showed that they would not interfere with the market for Cariou's photos, thus supporting a fair-use finding.

Perhaps the most significant point in the court's fair-use analysis is the statement that "the law imposes no requirement that a work comment on the original or its author in order to be considered transformative." This will be a death knell for the contrary analysis in *Rogers* and a boon for appropriation art.

This is as it should be. The goals of copyright law are not well served by squelching legitimate, even if unpopular, modes of artistic expression.