

# Rastaman Vibration

**February 29, 2012 by Sheppard Mullin**

The appeal in the case of *Cariou v. Prince* is shaping up to be the biggest visual arts copyright case in many years. It will likely result in guidance on what qualifies as a transformative use for appropriation art under the doctrine of fair use. Appropriation art "borrows" pre-existing works or images of the creative work of another artist in order to create something new and original. While this alone may seem packed with copyright issues, it is generally not an appropriation artist's intent to "rip off" another artist's work. Usually, the success of the new work depends on the viewer's recognition of the underlying work; the "aha" moment is the connection between the old and the new as the viewer recognizes the original work or that another work has been taken, and differentiates the creative changes that have been made in the new work.

Patrick Cariou, a professional photographer, spent six years photographing Rastafarians in Jamaica. He then compiled those photographs as a book titled *Yes, Rasta*, released in 2000 by PowerHouse Press. Several years later, in 2007, well-know appropriation artist, Richard Prince, showed his work titled "Canal Zone" at an exhibit in St. Barths. "Canal Zone" depicted a collage of photographs of the Rastafarian people overlaid with brightly colored paints and other images such as guitars, enlarged hands and naked women. Some people depicted in Prince's collages were from the photographs taken from Cariou's *Yes, Rasta*. Following the success of "Canal Zone," Prince created an entire show consisting of 29 painting, 28 of which had photos taken from the Cariou book. The works were shown at the Gagosian Gallery which heavily marketed the exhibition and the interest resulted in the sale of 8 works.

Cariou sued Prince and Gagosian Gallery for copyright infringement. Prince, in reply, claimed fair use. Fair use is an exception to infringement, built into the Copyright Act. It allows use of the work of another for certain public policy purposes. The New York trial court found that fair use was not available to Prince for these works because, said the court, the use was for a commercial purpose and "Canal Zone" was more of a derivative work of Cariou's photographs than a new and transformative work because Prince changed little from Cariou's underlying work. When asked the meaning behind the work, Prince stated that it doesn't "really have a message" and that his intent in creating the work was to pay homage to other artists. The court found Prince liable for copyright infringement and ordered him to deliver all of his paintings

containing Cariou's photographs for impoundment or destruction. Gagosian Gallery was found to be acting in bad faith by not confirming that Prince had a license to use the photos because, reasoned the court, Prince was well known for using the works of others without their permission.

Both Prince and Gagosian Gallery appealed the decision. The Prince brief argues that the artist is not responsible for explaining the meaning or message of his work. While Prince may not have articulated it, there is social and political commentary in the work and, more importantly, the viewer, and not the artist, determines the message of a piece. Gagosian Gallery argues that this ruling would have an immediate chilling effect throughout the art world because showing appropriation art will come to a halt if galleries and museums must check the licensing agreement on each work an appropriation artist creates. The Cariou brief responds that it was Prince's responsibility to prove fair use and he failed, while the court should view the art in the context of its overall message, it must be the message the artist intended and, by this standard, Prince's work fails the fair use test. Several major museums, the Andy Warhol Foundation, as well as Google and licensing services Getty Images and Corbis, have all submitted individual amicus briefs in order to weigh in on the decision.

Beyond this, the larger question is how much must the underlying work be changed in order to constitute a transformation for the purposes of fair use? In considering whether the fair use exception applied, the trial court looked at all 29 of Prince's "Canal Zone" paintings as a whole. Some paintings only used small portions of Cariou's originals while others were effectively the entire photograph, changed only slightly. Prince argues that the court should consider each painting individually to determine if it has been "transformed" enough to fit the fair use requirement. This is important because it would likely allow some of Prince's paintings not to be destroyed.

We will continue to follow this case as it progresses through the appeal. At this writing, the parties are submitting their second round of briefs and it can be expected that both will garner wide interest.