

ART & DESIGN

Apropos Appropriation

By RANDY KENNEDY DEC. 28, 2011

ONE recent afternoon in the offices of the Midtown law firm run by David Boies and his powerful litigation partners, a large black clamshell box sat on a conference table. Inside were raucous, sometimes wildly funny collages of photographs and magazine pages handmade by the artist Richard Prince, works of art that have become the ur-texts of one of the most closely watched copyright cases ever to rattle the world of fine art.

In March a federal district court judge in Manhattan ruled that Mr. Prince — whose career was built on appropriating imagery created by others — broke the law by taking photographs from a book about Rastafarians and using them without permission to create the collages and a series of paintings based on them, which quickly sold for serious money even by today's gilded art-world standards: almost \$2.5 million for one of the works. ("Wow — yeah," Mr. Prince said when a lawyer asked him under oath in the district court case if that figure was correct.)

The decision, by Judge Deborah A. Batts, set off alarm bells throughout Chelsea and in museums across America that show contemporary art. At the heart of the case, which Mr. Prince is now appealing, is the principle called fair use, a kind of door in the bulwark of copyright protections. It gives artists (or anyone for that matter) the ability to use someone else's material for certain purposes, especially if the result transforms the thing used — or as Judge Pierre N. Leval described it in an influential 1990 law review article, if the new thing "adds value to the original" so that society as a whole is culturally enriched by it. In the most famous test of the principle, the Supreme Court in 1994 found a possibility of fair use by the group 2

Live Crew in its sampling of parts of Roy Orbison's "Oh Pretty Woman" for the sake of one form of added value, parody.

In the Prince case the notoriously slippery standard for transformation was defined so narrowly that artists and museums warned it would leave the fair-use door barely open, threatening the robust tradition of appropriation that goes back at least to Picasso and underpins much of the art of the last half-century. Several museums, including the Museum of Modern Art and the Metropolitan, rallied to the cause, filing papers supporting Mr. Prince and calling the decision a blow to "the strong public interest in the free flow of creative expression." Scholars and lawyers on the other side of the debate hailed it instead as a welcome corrective in an art world too long in thrall to the Pictures Generation — artists like Mr. Prince who used appropriation beginning in the 1970s to burrow beneath the surface of media culture.

But if the case has had any effect so far, it has been to drag into the public arena a fundamental truth hovering somewhere just outside the legal debate: that today's flow of creative expression, riding a tide of billions of instantly accessible digital images and clips, is rapidly becoming so free and recycling so reflexive that it is hard to imagine it being slowed, much less stanching, whatever happens in court. It is a phenomenon that makes Mr. Prince's artful thefts — those collages in the law firm's office — look almost Victorian by comparison, and makes the copyright battle and its attendant fears feel as if they are playing out in another era as well, perhaps not Victorian but certainly pre-Internet.

In many ways the art world is a latecomer to the kinds of copyright tensions that have already played out in fields like music and movies, where extensive systems of policing, permission and licensing have evolved. But art lawyers say that legal challenges are now coming at a faster pace, perhaps in part because the art market has become a much bigger business and because of the extent of the borrowing ethos.

Dip almost anywhere into contemporary art over the last couple of years to see the extent. The group show "Free" at the New Museum in 2010 was built partly around the very idea of the borrowing culture, the way the Web is radically

reordering the concept of appropriation, with works that “lift, borrow and reframe digital images — not in a rebellious act of stealing or a deconstructive act of critique — but as a way to participate thoughtfully and actively in a culture that is highly circulated, hybridized, internationalized,” as its curator, Lauren Cornell, wrote.

Christian Marclay’s wildly popular video “The Clock” from 2010 was 24 hours of appropriation, made from thousands of stitched-together fragments from films and television shows. Rob Pruitt’s show “Pattern and Degradation” at the Gavin Brown and Maccarone galleries in 2010 lifted designs from Lilly Pulitzer, from Web photo memes and from a couple of T-shirt designers, whose angry supporters staged a flash-mob demonstration to protest the use of the design without attribution.

Mr. Marclay and Mr. Pruitt were both born before the 1980s. But to look at the work of younger artists, especially of those who don’t remember a time before the Web, is to get a true sense of the velocity, and changing nature, of appropriation.

“For the generation that I spend my days with, there’s not even any ideological baggage that comes along with appropriation anymore,” said Stephen Frailey, an artist whose work has used appropriation and who runs the undergraduate photography program at the School of Visual Arts in Manhattan. “They feel that once an image goes into a shared digital space, it’s just there for them to change, to elaborate on, to add to, to improve, to do whatever they want with it. They don’t see this as a subversive act. They see the Internet as a collaborative community and everything on it as raw material.”

At the same time the tools for mining and remolding those mountains of raw material are proliferating. In November a developer and a designer introduced an iPad art app called Mixel, aimed at amateurs but certain to end up in artists’ studios. It allows users to grab images from the Web or elsewhere, collage them almost effortlessly and then pass them around, social media style, for appreciation or re-mixing.

One of its creators, Khoi Vinh, a former design director of NYTimes.com, has been surprisingly frank when asked about the tsunami of copyright problems such an idea stirs up. “This is really a case of, you have to do it, try it and ask for

forgiveness later,” he said to an interviewer. “Otherwise it would never get out there.”

In a homage-to-old-“Sesame Street” video that was made to promote the app, the friendly narrator urges, “Pick anything that inspires you.” And, in a sense, that simple exhortation goes to the heart of the issues raised by the Prince case and Web-driven reuse culture in general.

American copyright law has always performed a complicated balancing act involving both commerce and culture. It tries to protect products of creativity so that people have economic incentive to keep on creating, so that a new movie, for example, is not immediately copied and resold on Canal Street, depriving the moviemaker of the possibility of income. But the law has also evolved ways to allow for creative uses of copying: the fair use exemption, which allows some copying for things like criticism, comment or news reporting.

Over the last couple of decades part of the equation for deciding whether fair use is indeed fair is how much the thing copied has been transformed. In other words, even if we are long past making anything completely new under the sun, as Ecclesiastes declared a couple of millenniums ago, copying should be allowed only to the degree to which it adds to or builds on what came before.

Deciding what is sufficiently transformative and what is not has often been tough enough in other cultural realms, like music and literature. But as copyright tensions mount and the courts increasingly confront the issue in contemporary art, the question becomes ever trickier. In large part this is because the questions turns on artistic intent, often a much grayer area in the visual arts than in other arts, and especially so over the last three decades as art movements have fragmented.

What were Mr. Prince’s intentions in re-using the Rastafarian pictures taken by the French photographer Patrick Cariou and why did he choose them? For the sake of parody? For criticism? Or did he just pick something that inspired him, for reasons as difficult to plumb as any those of many postmodern artists?

In a deposition in the case that was recently published as part of an unlikely art book by the writer and director Greg Allen, lawyers for Mr. Cariou follow Mr. Prince

deep into the strange and often trackless territory of artistic intention. About as close as they get to pinning him down is that he wanted to use the borrowed pictures to explore his fascination with the painting of Willem de Kooning and also thought of his collages and paintings as part of an idea for a movie about a post-apocalyptic world in which Rastafarians, famous literary lesbians and others commandeer hotels on St. Bart's.

“So what are four lesbians from the early 20th century doing on St. Bart's in, now, when there's a nuclear war, like why are they there?” a lawyer asked Mr. Prince, who responded: “Your guess is as good as mine. That's what I do, I make things up.”

At another point in the transcript of the deposition, a lawyer asked, “What is the message?”

Mr. Prince replied, “The message is to make great art that makes people feel good.”

He also made it clear that he was not making art that commented on Mr. Cariou's work itself. (Judge Batts ruled that for a work to be transformative it must “in some way comment on, relate to the historical context of, or critically refer back to the original works” it borrows from, a test she said Mr. Prince's work failed.)

In an interview Daniel Brooks, Mr. Cariou's lawyer, said that if such a subjective principle for borrowing as Mr. Prince's were to become the legal standard — and in parts of the art world it is already much more subjective in practice — there would be no way to protect copyright.

“It can't just be random, that he ‘liked it,’ because there's no practical boundary to that,” he said.

But Joshua Schiller, Mr. Prince's appeals lawyer from the firm Boies, Schiller & Flexner, said the boundary is whether a new work of art results from the borrowing. And he argued that it was clear that Mr. Prince had made parts of Mr. Cariou's pictures into distinctive Richard Prince works, not just copy them to pass them off as his own and deprive Mr. Cariou of his livelihood. Whether the work was successful

and whether Mr. Prince's intentions were interesting or even explainable can be left to debate. But the primary intention was to create a work of art, Mr. Schiller said, and that is the kind of creativity the law seeks to encourage.

"This is not piracy," he said. "These are not handbags."

Mr. Prince's appeal will probably be heard in the next few months. But the decision will not answer the larger questions about how copyright should evolve to deal with the reality of artists in a digital world or how the art world should deal with such questions morally and ethically. The possibility has often been raised of establishing an extensive system of licensing and permissions for images and other artistic material, akin to the one that operates in the music industry, but even many advocates of stricter copyright standards do not seem optimistic that such a system could work in the art world.

At a debate about the Prince case at the New York City Bar Association last month Virginia Rutledge, an art lawyer and former general counsel for Creative Commons, a nonprofit group that advocates for more open copyright standards, said she believed that the problem facing the art world was as much a "cultural attribution crisis" as a legal crisis and that the problem could be at least partly addressed by cultivating a stronger climate of simple acknowledgement and credit.

But Hank Willis Thomas, one of the artists taking part in the debate, said that the recycle and remix culture was gaining speed so rapidly that trying to bring order to it was, even now, like trying to hit a moving target.

"Whatever's after this," he added, "is going to be pretty crazy."

Correction: January 1, 2012

A cover article this weekend about the legality of visual artists' appropriating the images of others misstates the action the Supreme Court took in a 1994 case regarding the group 2 Live Crew's sampling of a Roy Orbison song. The court referred the case back to a lower court and, in the process, clarified the legal standard to be applied; the court did not find fair use in the case.

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