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CARIOU V. PRINCE: TOWARD A THEORY OF AESTHETIC-JUDICIAL JUDGMENTS

*By: Sergio Muñoz Sarmiento and Lauren van Haaften-Schick**

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I. INTRODUCTION

> Ernest: "Why should the artist be troubled by the shrill clamour of criticism? Why should those who cannot create take upon themselves to estimate the value of creative work? What can they know about it? If a man's work is easy to understand, an explanation is unnecessary . . . ."
>
> Gilbert: "And if his work is incomprehensible, an explanation is wicked."[1]

In the winter of 2008, Richard Prince had a major exhibition of new and controversial paintings at Gagosian Gallery in New York titled *Canal Zone*.[2] For the exhibition, Prince, an early member of the appropriationist art group known as The Pictures Generation,[3] presented a body of artworks that incorporated reproductions of published photographs protected by the United States Copyright Act of

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1. OSCAR WILDE, The Critic As Artist, in INTENTIONS 105, 113 (1909).

2. Cariou v. Prince, 714 F.3d 694, 698 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013).

3. The appropriation artists, or The Pictures Generation, grew to notoriety not simply through exhibitions but by having a strong following of critics and curators who wrote extensively about the work. The *Pictures* exhibition at Artists Space in New York in 1978 was the first cohesive presentation of this work and was deftly designed to promote it through touring the show to multiple venues and through extensive accompanying critical texts produced by its curator Douglas Crimp. The show was also uniquely sponsored by corporate funding, an anomaly at the time for an exhibition at a small-scale venue.

1976.[4] The original published photographs were taken by the artist Patrick Cariou for his book, *Yes Rasta*, which consisted of a series of portraits of Rastafarians in Jamaica.[5]

Upon learning of Prince's exhibition from a New York art dealer who was interested in exhibiting Cariou's *Yes Rasta* photographs, Cariou promptly sent a cease-and-desist notice to Gagosian.[6] After his requests were ignored, Cariou filed a lawsuit against Prince and Gagosian Gallery in the United States District Court for the Southern District of New York, claiming that his photographic works had been infringed.[7] In the initial decision, Judge Deborah A. Batts ruled strongly in favor of Patrick Cariou, finding that all thirty of Prince's paintings were infringing Cariou's copyrighted photographs.[8] Additionally, Judge Batts granted Cariou full control over the material fate of the works, ordering the defendants to deliver all infringing copies of the photographs, the paintings, and unsold copies of the *Canal Zone* exhibition book to Cariou for impounding, destruction, or any other disposition Cariou saw fit.[9] Judge Batts also ordered the defendants to send written notices to any current or future owners of the paintings informing them that Prince's paintings were not lawfully made under the Copyright Act of 1976, and therefore these artworks could not be publicly displayed.[10]

Prince appealed to the United States Court of Appeals for the Second Circuit.[11] In a spectacular turnaround, the Second Circuit found that twenty-five of the thirty works by Prince were fair use, vacating and reversing the initial ruling in part, and remanding the remaining five works to Judge Batts for re-evaluation.[12]

This highly controversial event has become the defining case of copyright infringement and appropriation art of our time, and it leaves us with difficult questions regarding (1) the elusive definition of that which is "transformative," (2) the role judges play as arbiters of taste when deciding whether the appropriation of copyrighted artistic content is fair use, (3) what artistic mediums we grant the privileged status of high art, and which creators we grant the superior title of artist, and (4) issues regarding the use and exploitation of artistic intellectual and material labor. Although the question of artistic medium might seem outside of the purview of a legal journal, we believe that the

4. *Id.*

5. *Id.* at 699. *See also Yes Rasta, Photographs by Patrick Cariou*, http://www.patrickcariou.com/rasbook.html (last visited Apr. 24, 2014).

6. Amended Complaint at 8, Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (No. 08 Civ. 11327).

7. *Id.* at 3.

8. *Cariou*, 784 F. Supp. 2d at 342.

9. *Id.* at 355–56.

10. *Id.* at 356.

11. Defendant's Notice of Appeal at 1, *Cariou*, 784 F. Supp. 2d at 342.

12. *Cariou*, 714 F.3d at 699.

Second Circuit's opinion in *Cariou* highlights the increasing role judges play as art critics and how such aesthetic-judicial judgments unfairly and negatively impact cultural production by relegating certain artists and media, such as photographers and photography respectively, and artists who have not attained great recognition within the art market, to second-class status.

Cariou is unique in the history of copyright cases involving visual art for many reasons. First, the case concerns two entire bodies of work, as opposed to a single sculpture or single photograph as in other landmark cases such as *Rogers v. Koons*[13] and *Blanch v. Koons*.[14] In these cases, the specific visual content appropriated could be analyzed and considered in isolated detail, allowing for closer, more focused, and more reasoned scrutiny. In *Cariou*, thirty paintings created by Prince containing at least forty-one of Cariou's photographs were in question and also required the same level of analysis with the same level of exacting detail, despite the fact that the visual information of both parties' artworks is highly varied.

Second, the two parties are both contemporary artists who are actively exhibiting and selling their work to an art audience. With the exception of *Rogers*, most prior copyright infringement cases concerning contemporary visual art involve an artist and a commercial entity, such as an advertising firm or commercial photographer, whose product has an obvious commercial purpose, allowing for a clearer determination of the first and fourth fair-use factors, which respectively consider the purpose and character of the appropriating work as well as the market harm to the copyright holder.[15]

Third, the Second Circuit's descriptions of the two artists and their respective practices, as stated in the written opinion, reveal a clear favoritism for the traditionally privileged genre of painting as well as designating monetary value as the prime measure of cultural value.

13. Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

14. Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).

15. This is not to say that contemporary art and all its machinations is not a commercial enterprise—far from it. Art schools, private and public museums, art galleries, art fairs, art journals and magazines, and artists largely aim for and see success in the art world as being intricately tied to commercial and financial success. For more on art and its imbrication with celebrity life, fashion, and its increasing growth as a commercial business enterprise, see MARTHA BUSKIRK, CREATIVE ENTERPRISE: CONTEMPORARY ART BETWEEN MUSEUM AND MARKETPLACE 201–62 (2012). "That system of social and professional activity has continued to expand in proportion to contemporary art's economic significance, as the idea that there might be money to be made investing in recent work is linked to expanded professional support systems and the increased importance of high-profile celebrity artists." *Id. See also* ISABELLE GRAW, HIGH PRICE: ART BETWEEN THE MARKET AND CELEBRITY CULTURE 65 (2009). "In comparison to other markets, the art market is obviously special, being defined as it is by the sale of *specific* goods. The distinctive quality of this market is thus founded on the specificity of its product ('art'). In the compound concept 'art market,' 'art' and 'market' are directly related to one another in a way that pushes the aspect of art's marketability into the foreground." *Id.* (emphasis in original).

This flawed logic employed by the Second Circuit raises crucial questions concerning the definitions of transformative use, and the exclusion of certain mediums and socio-economic classes of artists from being granted a legitimate participation in the construction of art, or art history, and the application of law to contemporary art practices.

Lastly, the Second Circuit's strong privileging of Prince, the artist with celebrity status and a higher financial position, raises concerns regarding the implied and greater right to copy that this position grants him. Artists, curators, and art critics have largely sided with Prince and have cheered the Second Circuit decision, despite the fact that their professional and economic positions are more akin to that of Cariou. The case is therefore also exemplary of the dangerous cultural turn towards the blurring of celebrity culture and contemporary art, a shared disregard of copyright law and its enforcement, and of the abandonment of intellectual property rights as a labor issue for artists within a platform in favor of artists' rights.

II. Spectacle as Fair Use

In the appellate court's decision, Cariou is described as a professional photographer who spent over six years traveling to Jamaica developing friendships with and photographing a Rastafarian community.[16] His works are self-described as "extreme classical photography [and] portraiture" not resembling or referencing pop culture.[17] In 2000, Power House Books published *Yes Rasta*, a comprehensive book of the photographs.[18] The Second Circuit's details of Cariou's publication are quite misleading, articulating that "[l]ike many, if not most, such works, the book enjoyed limited commercial success," and stating that although over three-quarters of the publication's first print run of 7,000 had sold to date, "over sixty percent . . . sold below the suggested retail price of sixty dollars."[19] The Second Circuit adds that Cariou received "just over $8,000" from the royalties of this book, and had sold only four photographic prints from the series, all to friends and relatives.[20] The Second Circuit's description is not that of an established artist or a culturally respected artist, but rather an unfounded and prejudicial description of a failed artist

16. *Cariou*, 714 F.3d at 699.
17. *Id.*
18. *Id.*
19. *Id.* The Authors question what factual evidence was reviewed by the Second Circuit when assessing and opining that "many, if not most," books "like" Cariou's enjoy limited commercial success. The Authors also wonder why commercial success in the field of art is seen as *sine qua non* to determining whether the copyrighted underlying work is "successful" or worthy of copyright protection.
20. *Id.* It is of import to note that such figures are in fact typical, if not on the higher end of sales, of photography books in general and for documentary art works in particular. This observation has been stated in numerous conversations between the Authors and professionals in the art book publishing industry.

or successful hobbyist, perhaps producing images, but not of a stature that the Second Circuit recognizes as high art.

In profound contrast, the Second Circuit introduces Prince as a "well-known appropriation artist."[21] His work "has involved taking photographs and other images that others have produced and incorporating them into paintings and collages that he then presents, in a different context, as his own."[22] Prince is described as a leading figure within appropriation and has exhibited his work in museums around the world.[23] The Second Circuit adds that Prince's work is owned by major collections and that guests at the dinner for the exhibit hosted by Gagosian Gallery included celebrities and famous musicians such as Jay-Z, Beyonce Knowles, Brad Pitt, Angelina Jolie, and Robert DeNiro, as well as professional football player Tom Brady and Vogue editor Anna Wintour.[24] Prince sold eight artworks from the *Canal Zone* series for a total of $10,480,000 and exchanged seven others for works by canonical artists such as painter Larry Rivers and sculptor Richard Serra.[25] With this collection of selective facts, the Second Circuit positions Prince—and the spectacle of Prince—as the epitome of success in contemporary art.[26]

The distinctions drawn by this comparison are crucial in an analysis of Cariou's claim against Prince, and of the appellate court's decision. By invoking a certain type of institutional recognition[27], monetary worth of the art works, and the celebrity allure and lifestyle associated with contemporary art, the Second Circuit traces an image of commercial, elitist culture, and pop-cultural value and, therefore, legitimizing, through the application of U.S. Copyright Law, Richard Prince and his appropriative practices while painting Patrick Cariou as a lower-class amateur. With these class and categorical distinctions of the artist and amateur in place, the Second Circuit has not only dismissed Cariou's claim as a legitimate author and artist, but more perniciously, the court does not address Cariou's well-founded copyright infringement claims in a serious, objective, and rational manner. Furthermore, the Second Circuit lays down a disturbing foundation and premise that artists who do not obtain—or even seek—commercial or spectacular successes at the hands of the art market and Hollywood-style celebrity culture should resign themselves to becoming feeders of ideas and creative content for affluent and upper-class artists and art institu-

21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 709.
25. *Id.*
26. *See generally* BUSKIRK, *supra* note 15.
27. *See Cariou*, 714 F.3d at 699. The Second Circuit, *sua sponte*, elevates Prince's art historical value and status by proclaiming that Prince is "a leading exponent of [appropriation] and his work has been displayed in museums around the world[,]" and then continuing on to list several national and international museums. *Id.*

tions. In effect, the Second Circuit confirms and validates that Prince's financial success within the art establishment grants him a greater and more valid claim to a fair use defense, original authorship status,[28] as well as preferential treatment by a federal court.

III. Judges as Art Critics

The Second Circuit continued by comparing the aesthetic, material and physical specifics of each artist's body of work. The court details the physical make-up of the respective artists' art works: Cariou's *Yes Rasta* is a book of photographs measuring approximately 9.5'' x 12''.[29] Prince's artworks, in contrast, "comprise inkjet printing and acrylic paint, as well as pasted-on elements, and are several times that size . . . . The smallest of the Prince artworks measures 40'' x 30'', or approximately ten times as large as each page of *Yes Rasta*."[30] Prince's works are visually compelling, "hectic and provocative," the court writes, while Cariou's are "serene and deliberately composed."[31] Prince's works are gestural, colorful, and thick in their use of painterly material. Cariou's photographs are small, intimate, and contemplative. In the Second Circuit opinion, Prince's physical technique is described, but importantly, Cariou's is not. His method was, however, discussed by Judge Batts in the district court opinion, where she explained that Cariou's use of photography is specific and learned, executed using a medium format camera and requiring a mastery of darkroom technique.[32] Why does the Second Circuit ignore the required knowledge and application of photographic techniques?

Other issues of import raised by Judge Batts include Prince's lack of artistic intent and justification for his use of Cariou's copyrighted photographs of Rastafarians.[33] In his testimony, Prince repeatedly evaded the questions of Cariou's lawyers. The primary reason given by Prince for using the *Yes Rasta* images was that he simply wanted to change them and make them look "new."[34] This was the key factor of the

28. *See* Douglas Eklund, The Pictures Generation: 1974-1984, at 111, 166 (2009). This is ironic given that The Pictures Generation group, of which Prince is considered a seminal figure, articulated a position based on dismantling the romanticized notion of the author and single-author figure. This group helped propel certain French thinkers who argued against authorship and artistic intent.

29. *Cariou*, 714 F.3d at 700.

30. *Id.*

31. *Id.* at 706.

32. *Cariou*, 784 F. Supp. 2d at 343.

33. *Id.* at 349. Section 107(1) of the U.S. Copyright Act prescribes that the purpose and character of the secondary use should be assessed. Copyright Act, 17 U.S.C. § 107(1) (2012). Under this Section, the basic question for an appropriation artist is "Why are you using the copyrighted work and how are you using it?" Under the "why" and "how" of this question, artistic intent is patently obvious, and the need to have the appropriating artist articulate answers, or an answer, to the "why" and "how" is extremely important in analyzing a fair use defense.

34. *Id.*

district court's opinion in favor of Cariou, arguing that in order to be considered fair use, a secondary work must directly comment upon the work(s) appropriated.[35] The Second Circuit found this a false assumption and determined that a transformative work need not refer to the original copyrighted work, but may instead be transformative to the "reasonable observer" who determines transformativeness on the basis of visual similarities and differences:[36] in other words, a work may qualify as transformative on the basis of perceived aesthetics. As such, the Second Circuit's opinion is dependent on size and look, aspects of the artwork that are favored over concept, artistic intent, execution, and content. The Second Circuit does not detail who this "reasonable observer" is and, given that in the Authors' experiences most copyright claims are resolved at the summary judgment stage or at trial by a district court judge, the Second Circuit eviscerated the United States Supreme Court's ruling in *Bleistein v. Donaldson Lithographing Co.*[37] by mandating that trial and appellate judges under their jurisdiction approach visual-art copyright lawsuits as art critics and arbiters of taste, and not necessarily as judges in a court of law. However, there is some highly relevant criticism in the dissent's opinion that correctly counters the majority's erroneous opinion.

In his dissent of the Second Circuit's majority opinion, Judge Clifford Wallace, sitting by designation from the United States Court of Appeals for the Ninth Circuit, rightly argues that "after correcting an erroneous legal standard employed by the district court, we would remand for reconsideration."[38] However, he goes on to note, "the majority short-circuits this time-tested search for a just result under the law."[39] Furthermore, Judge Wallace questions the majority's insistence on analyzing only the visual similarities and differences between Cariou's and Prince's art works, "Unlike the majority, I would allow

35. *Id.* at 349–50.

36. *Cariou*, 714 F.3d at 707.

37. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903). In this seminal case for the visual arts, Justice Holmes articulates:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.

Id. at 251–52.

38. *Cariou*, 714 F.3d at 712.

39. *Id.*

the district court to consider Prince's statements reviewing fair use. . . . I see no reason to discount Prince's statements as the majority does."[40] In fact, Judge Wallace remarks that he views Prince's statements as "relevant to the transformativeness analysis."[41] Judge Wallace does not believe that a simple visual side-by-side analysis is enough because this would call for judges to "employ [their] own artistic judgment[s]."[42]

Judge Wallace cites *Bleistein* and agrees that judges should not employ their own artistic judgments but rather allow for more evidentiary material in order to best assess a fair use defense.[43] In fact, Wallace adds that the additional evidentiary material should not be assessed by an appellate court but rather should be remanded to the district court: "I, for one, do not believe that I am in a position to make these fact- and opinion-intensive decisions on the twenty-five works that passed the majority's judicial observation. . . . nor am I trained to make art opinions ab initio."[44] Why then does the Second Circuit decide to make artistic judgments and how does it decide that only twenty-five of thirty paintings are fair use? Why not remand the entire thirty paintings to the lower court and let a trier of fact decide?

IV. Privileged Mediums

This reliance on purely visual information leads us to trace the history of the cultural value that has been granted or denied to photographic images. Photographs, though recognized as being capable of serving as both primary and secondary information and as both expressive and documentary, are still at times given second-tier-status to other forms of art (primarily painting), both within the art world and courts of law.

In analyzing fair use, the nature of the source material and purpose of the appropriated use are key determinants, and photography, as both a technical and artistic medium, has a complicated history with regard to copyright. At the foundation of copyright law, an idea cannot be copyrighted, only certain physical manifestations that meet the requirements of the Copyright Act 1976.[45] The copyright to a photograph, and all other protected forms, also protects the right of the original author to produce derivative works. As legal scholar Rebecca Tushnet notes, in order to find that photographs are copyrightable, courts had to determine and allow for the possibility that photographs could be authored, thereby emphasizing expression rather than mere

40. *Id.* at 713.
41. *Id.*
42. *Id.*
43. *Id.* at 714.
44. *Id.*
45. *See* Copyright Act, 17 U.S.C. § 102(b) (2012): "In no case does copyright protection for an original work of authorship extend to any idea . . . ."

re-presentation of the world.[46] In a court of law, Tushnet writes, photographs appear in two roles.[47] In one capacity, they must be interpreted as possessing factual evidence.[48] In their other role, they must be read as the product of an artistic act.[49] Photographs must always be capable of either function.

Within the history of art, photography's inherent capability as a tool for recording the factual world has resulted in persistent debate over its (high) status as art or (low) status as documentation.[50] As John Szarkowski, former director of the Department of Photography at the Museum of Modern Art in New York has explained, the difference between painting and photography was a basic one: "Paintings were made . . . but photographs, as the man on the street puts it, were taken."[51] Art historian Douglas Crimp has paired this assertion by Szarkowski with modernist photographer Ansel Adams's claim: "The common term 'taking a picture' is more than just an idiom; it is a symbol of exploitation. 'Making a picture' implies a creative resonance which is essential to profound expression."[52] Crimp explains that these statements are not in opposition to one another, but serve as evidence of the ontological shift that occurred with regard to photography that allowed for it to be viewed as "a medium of [an artist's] subjectivity," enabling it to duplicate the "theories of modernist autonomy articulated earlier in [the twentieth] century for painting." This shift also allowed for photographs to circulate and participate within an art market and to be held in an art museum as the creative work of an artist, rather than as a document or record.[53] In the late 1960s and early 1970s, collecting libraries and museums began re-categorizing, or cross-categorizing, items that beforehand had only been indexed as documentation under the classification of

46. Rebecca Tushnet, Worth a Thousand Words: The Images of Copyright, 125 HARV. L. REV. 684, 714 (2012).

47. *See id.* at 714–715.

48. *See id.* at 715.

49. *Id.*

50. ALLAN SEKULA, ON THE INVENTION OF PHOTOGRAPHIC MEANING 5–6 (1974). Writing on the relationship between photography and high art, Sekula explains: "The problem at hand is one of sign emergence; only by developing a historical understanding of the emergence of photographic sign systems can we apprehend the truly conventional nature of photographic communication. We need historically grounded sociology of the image, both in the valorized realm of high art and in the culture at large. What follows is an attempt to define, in historical terms, the relationship between photography and high art." *Id.*

51. John Szarkowski, *Introduction to the Photographer's Eye*, *in* PENINAH R. PETRUCK, THE CAMERA VIEWED: WRITINGS ON TWENTIETH-CENTURV PHOTOGRAPHY 203 (New York, E. R Dutton, 1979).

52. Ansel Adams, *A Personal Credo*, *in* AMERICAN ANNUAL OF PHOTOGRAPHY 58, at 16 (1948).

53. DOUGLAS CRIMP, ON THE MUSEUM'S RUINS 72 (1993).

fine art.[54] For example, images by the early expeditionary photographers Francis Frith[55] and Maxime du Camp[56] that had previously been contained within books as visual documentation of travel and urban subjects were now catalogued as individual images, naming the photographer as the author, and elevating their status not only to that of an author, but more so, to that of an artist.[57] According to Crimp, this shift reduced photography from its inherent plurality to instead be viewed as an aesthetic, singular medium, subsumed by its new status as art, a process that denied the potential and history of photographs to exist as either record or as expression.[58] However, this elevation of photography to the status of art also enabled it to disrupt the strict formal categories of modernism, the very ethos of which was built in part upon defining the boundaries between original, as opposed to reproductive media: painting, sculpture, drawing, ceramics, and so forth. As such, we might see this new acceptance of photography as art as allowing for an elevation of an artwork's documentary function as well, an outcome Crimp does not recognize, but which is evident in the contemporary art landscape. It is precisely because they fulfill the crucially pluralistic capacity within the photographic medium that Patrick Cariou's photographs of Rastafarians fall within the paradigm of art, as do the equally documentary and fine art photographs of artists Catherine Opie, Larry Clark, Allan Sekula, LaToya Ruby Frazier, and Robert Mapplethorpe, whose images are well regarded for their technical ability, aesthetic value, and documentation of social, political, cultural, and economic dynamics.

At the same time that photography was gaining credibility by institutions as an art form, it was also employed heavily by conceptual artists as a tool for documenting their temporal or immaterial works, presenting a further complication between the relationship of the artistic or expressionistic versus documentary functions of photography. Art historian Alexander Alberro has argued that this documentation, or secondary information, came to supplant the artworks themselves, as the photograph, both a promotional and documentary tool, often served as the only record that a temporary, multi-part and scattered, or site-specific performative work had ever been perceptibly real-

54. Importantly, this new categorization was a shift in access point, though their cataloguing information expanded to include both information on the author and on the subject, so that they might be found as both works of art and as documentary images. *See* Susan Pinson, *Recollection: A Note from the Curator*, N.Y. PUB. LIBR. (2010), http://exhibitions.nypl.org/recollection/curator_note.html. Pinson was Assistant Director and The Miriam and Ira D. Wallach Librarian for Art, Prints and Photographs, and The Robert B. Menschel Curator of Photography. *Id.*

55. *See, e.g.*, FRANCIS FRITH, EGYPT AND PALESTINE (1858).

56. *See, e.g.*, MAXIME DU CAMP, ÉGYPTE, NUBIE, PALESTINE ET SYRIE (1852).

57. *See* Pinson, *supra* note 54.

58. CRIMP, *supra* note 53, at 72–73. While Crimp fails to explore the full implications of this cross-categorization, he is right to assess that the category of greater privilege subsumed others.

ized.[59] Famously built on such dictums as Lawrence Weiner's "The piece need not be built,"[60] or Sol Lewitt's declaration "The idea is the machine that creates the art,"[61] conceptual art strived to create a more "democratic" form of art that would circulate more freely and that would be able to be comprised of any material, including the immaterial.[62] For these artists, the idea was privileged over material and manifestation, for the former was necessary in determining the latter, and a tangible or visible realization was perhaps irrelevant. While the concept remained at the core of each of these works, their accompanying photographs are required for exhibition and circulation; the choice of how and what to photograph for memory and record is an artistic one. As a result, this documentary material as secondary information became inseparable from and therefore elevated to the status of primary information, or the art itself. In other words, these photographic documents became synonymous with the artwork, once again collapsing the documentary and artistic role of the photograph, and merging the positions of artist and photographer.[63]

However, it was not until the end of the twentieth century that photographs would begin to fetch the high auction prices of other contemporary artworks. Andreas Gursky's 99 cent II and Rhine II set auction records for photographs in both 2006 and again in 2011, respectively,

59. ALEXANDER ALBERRO, CONCEPTUAL ART AND THE POLITICS OF PUBLICITY 73 (2003).

60. *See id.* at 97.

61. *Id.* at 35.

62. For example, Robert Barry's *Inert Gas Series* of 1969 exists today as a nearly blank poster announcing one of the events, and a photograph of the outdoor locations to which various tanks of gasses were transported and their contents released into the atmosphere. *Id.* at 118. Douglas Huebler's many Location Pieces of the late 1960s–70s consist of points where the artist had left various objects around urban spaces or along roads, or collected and displaced found material, and are recorded primarily through photographs of each spot or marker, with accompanying text identifying the location. *Id.* at 77.

63. Both modernist photography and conceptual art made few attempts at engaging images in popular culture or the use of photography by the media, where an authorial or artist role is less pronounced and seldom asserted. Beginning in the mid-to-late 1970s, there emerged an academic discourse of critical theory and visual culture and with it a generation of artists creating works using familiar images from popular culture and the history of art, or mimicking their tropes, often to the effect of inserting one's own name and status as author on top of a known or already publicly available image. The terms of original authorship were further complicated by flattening hierarchical divides between high and low cultural products, for, considered as a whole, these artists gave equal treatment to Hollywood films, advertisements, and fine art photography, as in Sherrie Levine's re-photographing of modernist photography masters Walker Evans, Karl Blossfeldt, and others, or Douglas Gordon's 24 hour Psycho, in which the infamous Hitchcock film is slowed down to fill the duration of an entire day. Richard Prince's first acclaimed body of work, known as the *Marlboro Men*, also displayed this strategy, as they consisted of cropped and enlarged images of the cowboys depicted in the eponymous cigarette company's then well-known advertisements.

the second selling for over $4 million at Christie's in New York.[64] Pictures Generation artist Cindy Sherman held the previous highest auction record for a photograph, selling for $3.9 million, and one of Prince's Marlboro Men is close behind.[65] These record prices for photography have been interpreted as the ultimate confirmation that the medium is now taken seriously by the art world.[66] It should be clear by now that an artistic act incorporating the photographic medium and technology should no longer be seen as subservient, either aesthetically or commercially, to the medium of painting. In fact, the Second Circuit does a major disservice to Patrick Cariou by assuming that Cariou's photographs could never sell at similar levels as that of Gursky and Sherman.

The reinforcement of the hierarchy of mediums outlined in the Second Circuit's decision leaves us no better off than Crimp's initial discomfort with the potential loss of photography's inherent and crucial plurality. Under this assessment, in the process of adopting postmodernism's inclusive "and" with regard to the media, sources, and topics referenced and used in art, we have abandoned what might have been valuable within modernism's exclusionary "or," or singularity of media, that has made possible the new privileging of mediums, like photography, that have in the past been relegated to a second-tier status, giving them at least the same status granted to anything else we call art. However, the Second Circuit's reliance on outdated and unfortunate assumptions regarding the hierarchy of mediums might lead us to believe that sociologist Howard Becker's pessimistic posit holds true, that "some members of a society can control the application of the honorific term art, so not everyone is in a position to have the advantages associated with it."[67]

V. Celebrity Fetish and Artistic Labor

The district court ruling in favor of Cariou was feared by many in the art world as having a "chilling effect" over artists and art institutions.[68] Museums worried that the ruling would prevent them from being able to acquire or exhibit any works that might contain infring-

64. *See Contemporary Art Part I 16 Nov. 2006, 7pm New York*, Phillips http://www.phillips.com/auctions/auction/NY010506 (last visited Mar. 26, 2014); *Sale 2480, Lot 44*, Christie's http://www.christies.com/lotfinder/photographs/andreas-gursky-rhein-ii-5496716-details.aspx (last visited Mar. 26, 2014). Auction results are noted as art market indices because they provide the only publicly available sales figures.

65. *Sale 2440, Lot 6*, Christie's (last visited Mar. 27, 2014); *Sale 1834, Lot 71*, Christie's (last visited Mar. 27, 2014).

66. Olav Velthuis, Talking Prices 169 (2005).

67. *See* Howard Becker, Art Worlds 34, 37 (1982).

68. *See* Julia Halperin, *Is Prince v. Cariou Already Having a Chilling Effect? Contemporary Artists Speak*, Artinfo.com (Jan. 2, 2012), http://www.blouinartinfo.com/print/node/758352.

ing material.[69] Artists, many of whom regularly use appropriated imagery, became concerned that Judge Batts's decision could place restrictions on their artistic practices.[70] This chilling-effect "red scare" was fomented not only by art bloggers and art critics lacking any legal knowledge, but also by art lawyers with inadequate knowledge of modern and contemporary art.

Yet these fears and concerns failed to take into account what Judge Batts clearly described: Prince's works were "commercial" due to their aggressive marketing and high price.[71] In addition, Judge Batts's initial district court ruling did not make any claim that a justification of fair use was impossible—the decision simply noted that the use must be done with intent, purpose, and reason, or in other words, that the appropriator must have a strong conceptual reason for using the underlying copyrighted work.[72] It is clear that meeting the requirements of fair use under Judge Batts's "test," in both its strict and loose interpretations, is feasible. Given the above, why was the artistic community so overwhelmingly in support of Richard Prince?

Over the course of the six years since the *Cariou* case began, it would be safe to say that the majority of artists and art critics have sided with Richard Prince, despite the fact that their own actual social and economic positions within this milieu more closely resemble that of Patrick Cariou. By identifying with Prince, there is a desire to associate oneself as participating within and belonging to the same upper tier of the art world hierarchy and its accompanying connotations of wealth, success, power and celebrity.[73] As Isabel Graw has noted, while in the 1970s Warhol found his artistic reputation damaged by appearing in fashion glossies alongside the high-fashion jet set, today artists are quite at home and encouraged to participate in these settings.[74] Art has, in fact, permeated and been permeated by celebrity culture. As with the privileging of the role of the (successful) artist, celebrities tend to be treated as special beings who operate on the periphery of society and are viewed as ideals, throwing their life on

69. *Id.*

70. A recent College Art Association report notes, albeit with a high-degree of selectivity and fear-mongering: "This issues report reveals a situation in which uncertainty about copyright law and the availability of fair use, particularly in the digital era, has made many practitioners risk-averse, too often abandoning or distorting projects due to real or perceived challenges in using copyrighted materials." *See* Janet Landay, *CAA Publishes Fair Use* Issues Report, CAA (Jan. 29, 2014), http://www.collegeart.org/news/2014/01/29/caa-publishes-fair-use-issues-report/, (Full report: College Art Association, Copyright, Permissions, and Fair Use among Visual Artists and the Academic and Museum Arts Communities: An Issue Report, February 2014).

71. Cariou v. Prince, 784 F. Supp. 2d 337, 351 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013). The Appellate Court agrees that Prince's works are "no doubt" commercial in nature.

72. *Cariou*, 784 F. Supp. 2d at 349.

73. *See generally* BECKER, *supra* note 67, at 28–39.

74. GRAW, *supra* note 15, at 94.

the market, and at all moments, performing their role. As Graw continues, the celebrity figure is also an allegory for the sort of competitive environment embodied by the art world.[75] While The Pictures Generation was at one point seen as the antidote to the celebrity stylings of Neo-Expressionist Julian Schnabel, and the pop Warhol, today the complete absorption of the art market into celebrity fetish and culture—and vice versa—has rendered the most successful artists of this era complicit with this turn.[76]

Today, it is commonplace, encouraged even, for participants within the professional art world to receive acknowledgement as important public figures, but not necessarily for the weight of their ideas, critiques or concepts, but rather for the value of their social networks and for the cultural value they have acquired.[77] As Pierre Bourdieu has famously explained, such "cultural capital" is capable of bringing monetary capital, but this equation is not a given.[78] An increasingly stratified art economy has unsurprisingly resulted in a rise in precarious cultural labor. At the same time, the importance of one's "networks" becomes ever important, as exposure and affiliation may lead to the opportunities so desperately sought after. The ascendency of art in the social and mainstream media, and its grouping with celebrity, may be linked in large part to the myth of inclusion it promotes. According to Graw, herein lies the appeal of art in the popular press and explains the privileging of artists and artworks that leave us wanting for critical content. In this view of the artist, they appear as someone who has "won it all" simply by knowing where to be at the right

75. *Id.* at 75.

76. Kira Cochrane, *Cindy Sherman Models for MAC, the Makeup Company of Outsiders*, THE GUARDIAN, July 31, 2011, *available at* http://www.theguardian.com/lifeandstyle/2011/jul/31/cindy-sherman-mac-makeup-fashion. *See also* Leigh Silver, *Jay-Z Is Rapping to Marina Abramovic at Pace Gallery*, COMPLEX (July 10, 2013), http://www.complex.com/art-design/2013/07/jay-z-is-rapping-to-marina-abramovic-at-pace-gallery/ (feminist performance artist Marina Abramovic's collaboration with rapper, Jay-Z); Robert Johnson, *Louis Vuitton: The Art of Art*, GQ BRITISH (July 12, 2011), http://www.gq-magazine.co.uk/entertainment/articles/2012-07/11/louis-vuitton-art-fashion-takashi-murakami-grayson-perry (Takashi Murakami's, Jeff Koons's, and Damien Hirst's collaborations with Louis Vuitton).

77. With this, the art market has learned to utilize art criticism as a tool for creating the appearance of intellectual value in an artwork where there is, in fact, very little. As noted by Diana Crane, the over-production of critical texts around an artwork and an art movement can grant it a historic weight that is not necessarily equivalent to the intellectual value of its concepts. DIANA CRANE, THE TRANSFORMATION OF THE AVANT-GARDE: THE NEW YORK ART WORLD 1940–1985, at 37 (1989). Isabelle Graw has noted that Gagosian Gallery in particular is no stranger to this, as they routinely produce monographs on newly represented artists that feature writing by some of the most prominent art historians and critics of the time, regardless of whether the work has been held in high intellectual regard prior to these efforts, thereby instrumentalizing the critic and the art historian in the marketing of art. *See* GRAW, *supra* note 74. It should come as no surprise that, in the contemporary art world, writers are often in the most precarious of labor positions.

78. Pierre Bourdieu, *The Forms of Capital*, *in* HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241–58 (J. Richardson ed., 1986).

time.[79] This is an everyman tale, but it is also a dangerous fantasy. This association with celebrity fables divorces our conception of the artist from their real labor and leads us to believe that any success obtained is the product of luck, charm, or myth as opposed to real struggle, and therefore, that the labor of art is really not very much work at all.

The other side of this support in favor of Prince is the discourse of "free culture" that seeks to defend the free dissemination and access to cultural products by any means possible. The principles of free culture rooted in the open access to non-copyrighted works, educative, government, and publicly funded materials are, of course, worthy of defense. However, the unfortunate oversight in an argument of entirely unrestricted access to all cultural production ignores the fact that under this system, cultural producers are not paid for their work. Arguments in favor of complete free culture are most troubling when expressed by artists themselves, as in doing so they fail to identify themselves as potentially vulnerable to any unwanted taking of their own work and do not consider the personal financial loss that results from the denial of reproduction or licensing fees. The benefit of licensing fees is that they enable artists to monetize their intellectual and creative production as any other actual or tangible property, thereby allowing artists to profit, though often modestly, from their work. David Lowery, member of the indie rock band Camper Van Beethoven, has written extensively on the lack of licensing fees paid to contemporary musicians and on the shift in our shared ethics that now lead us to expect to own cultural production, such as art and music, without paying for it.[80] Lowery writes, "The accepted norm for hundreds of years of western civilization is that the artist exclusively has the right to exploit and control his/her work for a period of time. . . . Now we are being asked to undo this not because we think this is a bad or unfair way to compensate artists but simply because it is technologically possible for corporations or individuals to exploit artists' work without their permission . . . ."[81] Today, Lowery argues, there has been a shift in our principles and morality regarding the question of who gets to exploit and control the work of an artist.[82] As a result, the ideal previously held highly among artists, and the general

79. GRAW, *supra* note 15. Such images of ascendency to a high social class from working class upbringings, and of gaining a voice in forming cultural or national identity are things to which we generally aspire. The appeal of these narratives has also proven easy to exploit.

80. Scott Timberg, *David Lowery: Silicon Valley Must be Stopped, or Creativity Will be Destroyed*, SALON (Dec. 3, 2013), http://www.salon.com/2013/12/04/david_lowery_silicon_valley_must_be_stopped_or_creativity_will_be_destroyed/.

81. David Lowery, *Letter to Emily White at NPR All Songs Considered*, THE TRICHORDIST (June 18, 2012), http://thetrichordist.com/2012/06/18/letter-to-emily-white-at-npr-all-songs-considered/.

82. *Id.*

public, that artists should have the rights to control the use and monetization of their work have largely been abandoned.[83]

An important historic observation to note is that the current Copyright Act of 1976 appeared soon after the emergence of conceptual art and that in the preceding decade, many artist activists included copyrights within a platform of improved labor rights for artists.[84] Such reproduction rights, and the fees they provided to artists, were once viewed as a crucial labor issues among artists, as exemplified in the protests of the Art Workers Coalition (AWC) and affiliated groups, who placed the enforcement of copyrights and reproduction rights as central to a platform of activism in favor of improved labor conditions for art workers.[85] During the AWC's Open Hearing of April 1969, Sol Lewitt demanded that "the museum, collector, or publication . . . compensate the artist for use of his art," a point that was echoed in numerous other statements.[86] A flyer for a subsequent protest at the Museum of Modern Art called for the institution to pay artists a residual on all reproductions of the artists' works.[87] Notably, these demands were addressed to art institutions and not to fellow artists. However, given Prince and Gagosian's stature as institutions within the commercial art world, as both Judge Batts and the Second Circuit admitted,[88] we might reconsider Lewitt and the AWC's arguments as applicable to these high-status actors as well.

Many of these activists were also conceptual artists, Lewitt and Weiner prominently among them. These artists' use of certificates of authenticity and resale rights contracts[89] served to impart a level of authorship above and beyond that of a signature on a page or in the corner of a painting, yet did not negate any attempts to formulate a more "democratic" notion of art. Rather, their logic and reasoning speaks to the original (or ideal) purpose of copyright law in the United States: to encourage the creation of art and culture by rewarding authors and artists with a set of exclusive rights. These rights over the reproduction of one's work are fundamental to a conception of labor rights for artists. As conceptual art's mission lay in the production of ideas recorded in easily transmitted and often reproducible

83. *Id.*

84. *See, e.g.*, Art Workers' Coalition, Open Hearing (1969), *available at* http://primaryinformation.org/files/FOH.pdf.

85. *See id.*; Art Workers' Coalition, Documents 1 (1969), *available at* http://primaryinformation.org/files/FDoc.pdf.

86. Art Workers' Coalition, *supra* note 84, at 59.

87. Art Workers' Coalition Flyer, 1969, ARCHIVES AM. ART, http://www.aaa.si.edu/collections/images/detail/art-workers-coalition-flyer-10136 (last visited Mar. 29, 2014).

88. Cariou v. Prince, 784 F. Supp. 2d 337, 350 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694, 709 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013).

89. *See generally* ROBERT PROJANSKY & SETH SIEGELAUB, THE ARTIST'S RESERVED RIGHTS TRANSFER AND SALE AGREEMENT (1971).

formats—such as photography—we can understand why conceptual art's concern regarding copyright as a labor right was paramount.[90]

Similar to art exhibition or performance fees, image reproduction fees are a means of compensating artists at a small but potentially steady pace, and in addition to the benefit of financial recognition of labor, the fees serve to treat artistic labor as equivalent to any other legitimate form of work. In the case of Cariou, the abusive use of Cariou's images by Richard Prince can be equated with any other instance of the exploitation of artistic labor.

VI. Conclusion

Considering the above, we can conclude that the Second Circuit's decision in *Cariou* is indicative of the pernicious continued stratification of the mediums and producers of art, and the enforcement of hierarchies of economic class and cultural value. The upper tiers of the art world cater to celebrity culture to an unprecedented extent, creating a condition where the most visible venues of art are no longer beholden to their critics, but vie instead for attention by the popular media and sales of admission tickets or works of art.[91] With this lack of any popular basis for critical consideration, it is almost no surprise that the judicial evaluation of fair use would be reduced to a formalist analysis of pure image, merely considering what comprises the surface, rather than paying heed to the facts as they stand. Patrick Cariou's plight is no different than that of the artist who must spend months chasing a token exhibition fee; a writer who is continually asked to write criticism for zero or little compensation;[92] or an artist whose painting is appropriated as a textile design and then produced and sold by a major fashion brand;[93] these are all unfortunately typical scenarios, as is the position argued by Patrick Cariou.

90. A current equivalent to the positions of the Art Workers Coalition is found in the New York based artist-activist group Working Artists for the Greater Economy, who have proposed a schedule of artist fees that should be paid by organizations hosting art exhibitions.

91. Note Tilda Swinton's performance, *The Maybe*, at the Museum of Modern Art, NY, 2013; James Franco exhibition at Pace Gallery, NY, 2014; Bob Dylan exhibition at Gagosian Gallery, NY, 2013; and the Shia LaBeouf exhibition at the Cohen Gallery in Los Angeles, CA, 2014.

92. Tim Kreider, *Slaves of the Internet—Unite!*, N.Y. Times, Oct. 23, 2013, at SR1.

93. *Did Delia's Rip Off Andrew Jeffrey Wright?*, Philebrity.com (Apr. 2, 2009), http://www.philebrity.com/2009/04/02/did-delias-rip-off-andrew-jeffrey-wright/.