

## Authoring Contradictions:

### Modern Appropriation Art, Postmodern Copyright Law in *Cariou v. Prince*

*And there was that essay by Roland Barthes called Death of an Author [sic]...and I think I got caught up in it...you know, it's academic...it's something that takes place in October Magazine [sic], which I don't particularly like...I'm much more interested in trying to make art that stands up next to Picasso, De Kooning, and Warhol.*

-Richard Prince, 2009<sup>1</sup>

## Introduction

Perhaps it is simply the case that the “death of the author,” and the general critique of authorial originality belong distinctly, yet solely, to the postmodern moment. Distinctly, in that the incorporation of pre-existing photographs and moving images into works of art would develop as de facto strategies striking at the very heart of modern individualism and the unique artistic gesture. Yet solely, insofar as the initial, critical impulse essential to postmodernist appropriation art has now been overwhelmed by a broader culture of copying. Given examples as far reaching as “post-internet” art, the Google Book Project and pharmaceuticals, an uncritical, “redistributed” authorship abounds. Thus questions surrounding the *purpose* of the copy, and, *who* copies what—become urgent.

Any discourse taking up contemporary approaches to artistic appropriation begins with acknowledgment that alternative formulations of the relationship between authorship and the copy were already addressing the shifts apparent in postmodern practices. Writing at the turn of the millennium, John Welchman would unpack the notion of appropriation both transhistorically and geopolitically, seeking to release it from the clutches of a certain poststructuralist strain of 1980s criticism.<sup>2</sup> Even further back, in an essay less known than Douglas Crimp’s influential

*Pictures* but written at around the same time about another New York exhibition, Leo Steinberg described appropriating artists as those who “clear cobwebs away and impart freshness to things that were moldering in neglect or...had grown banal through false familiarity...a latter-day artist can lend moribund image a new lease on life.”<sup>3</sup> Both Welchman and Steinberg rejuvenate, if indirectly, the centrality of the author-subject, and the importance of artistic intent in the realization of the work of art. Literary theorist Linda Hutcheon, in proposing an expanded notion of parody as the essential embodiment of postmodernism’s preoccupation with copying, would place even greater emphasis on the producer of the cultural text. “The Romantic creator,” stated Hutcheon, “as originating and original source of meaning, may well be dead, as Barthes argued years ago, but the creator’s *position*—a position of discursive authority—remains, and increasingly is the self-conscious focus of much contemporary art.”<sup>4</sup>

Writing in 1985, Hutcheon sought to push back on theories of representation, prevalent at the time, that attenuated authorial intent in the production of meaning. Hutcheon’s description of an artist’s “discursive authority” points to the status and power of an enunciating agent in the act of appropriating primary content. Recognizing not only artistic intent but also an artist’s position with the social and economic regimes of contemporary art take on added dimension when viewed through the prism of recent copyright litigation involving the artist Richard Prince, which is the focus of this essay. Courtroom battles waged over the legal status of appropriated images provide unique windows of opportunity into the creative mind, if for no other reason than they can entail artists having to articulate, for the public record, their philosophies of art. *Cariou v. Prince* (District Court ruling 2011, Appellate Court ruling 2013) is all the more significant insofar as it both set a precedent in U.S. copyright jurisprudence as it applies to so-called

‘appropriation art’, and marked a kind of “official” conclusion to a way of thinking about appropriation art as a critique of the authorial subject.

### ***Cariou v. Prince, Part I***

The legal controversies surrounding appropriation art in the late ‘80s reemerged when, in late 2008, Prince found himself at the center of a copyright infringement lawsuit brought against him by French photographer Patrick Cariou.<sup>5</sup> A month prior, Prince had exhibited a series of paintings, titled *Canal Zone*. He produced the thirty large-scale collage works by applying paint to ink jet enlargements of appropriated photographs that had been scanned and printed directly onto canvas. The photos were culled from “German nudist books, classic erotic magazines, music magazines, [and] anatomy books,” while portraits of Rastafarians amidst leafy Jamaican landscapes comprised the bulk of the collaging.<sup>6</sup> Across twenty-nine of the paintings, Prince reproduced at least forty-one images from Cariou’s 2000 photo book *Yes Rasta*.<sup>7</sup> Several of the paintings in the *Canal Zone* series were heavily abstracted as a result of the artist’s layered painting technique, while others appeared virtually identical to the reproductions in *Yes Rasta*. None of the images were used with Cariou’s permission.

Prince did not attempt a settlement. Rather, he chose to defend his appropriations by claiming they constituted ‘fair use’ according to the ways that U.S. courts have interpreted the legal doctrine over the last two decades. Ever since the Supreme Court’s 1994 ruling in *Campbell v. Acuff-Rose Music*, the central issue determining whether secondary uses of copyrighted materials are legally permissible has come to revolve around the extent to which they are *transformative*, “altering the original with new expression, meaning, or message.”<sup>8</sup> Subsequent rulings significant for appropriation art, *Mattel Inc. v. Walking Mountain Productions* (2003) and

*Blanch v. Koons* (2006), found in favor of the artist-defendants who, judges ruled, sufficiently transformed their source materials towards parodic or other critical purposes.<sup>9</sup> Yet in defending the fair use of his paintings, Prince attempted an altogether different reading of transformative fair use. Rather than argue parody, or a type of commentary that assumes an intertextual and dialogic relationship between primary and secondary works, Prince claimed that it was his unique, creative vision alone, bearing no consideration for the original intent of Cariou's photographs, that signaled the transformative nature of his paintings.

According to Prince, *Canal Zone* evolved principally from two moments between 2005 and 2007: a trip to his birth place, the region of Panama that in 1949 was an unorganized U.S. territory called the Panama Canal Zone, and Prince's work on a film treatment recounting the tale of survivors of a nuclear holocaust stranded in a tropical setting. Drawing from these inspirations as well as his love of punk rock music, "Prince imagined a make-believe, post-apocalyptic enclave, the Canal Zone, in which bands and music are the only things to survive."<sup>10</sup> Additionally, the artist's own recent *de Kooning* paintings—tributes to the abstract expressionist painter—were the sources from which much of *Canal Zone* borrowed stylistically. Prince also aspired to pay homage to past masters such as Picasso and Warhol, by painting "primitive masks" over many of the Rastas' faces, as well as by introducing serial repetition as an aesthetic trope throughout the series. Taking on these artistic techniques and influences, Prince argued that his paintings were undeniably transformative, in that they "create[d] a fictionalized world that transforms the individual raw elements used...into a completely new expression and a different message that has nothing to do with capturing...Rastafarian culture in native landscapes in Jamaica."<sup>11</sup> Prince's "new expression," then, did not supplant Cariou's originals, but instead

endowed them with novel meaning or message, in alignment with the transformative model of fair use.

The rationale behind Prince's appropriations marks a paradigm shift in fair use defenses of appropriation art. For in past cases based on claims to transformative use such as *Campbell*, *Walking Mountain*, and *Blanch*, defendants had sought to meet the burden of justifying their use of specific materials over other, available options. In cases involving parody, this is straightforward. Secondary users appropriate particular images and other cultural materials precisely in order to expose their highfalutin aspects. By definition, parody is not effective without the direct use of an original (and its context); no other is adequate.<sup>12</sup> And even in *Blanch*, although it's arguable that any number of images other than photographer Andrea Blanch's could have achieved an effect similar to the one artist Jeff Koons sought, the picture of sandaled feet Koons ultimately appropriated from Blanch stood as an archetype of glamorous advertising. It was important to Koons's concept that his source material come from the pages of fashion magazines, even if parody in the strict sense was not the objective. This was not the case in *Cariou v. Prince*, where Prince could have chosen from a plethora of available Rastafarian images to realize the *Canal Zone* paintings; commenting on Cariou's images specifically was of no concern.

The tension played out between two modes of authorship in the postmodern copyright infringement drama *Rogers v. Koons* (1992) were echoed in *Cariou v. Prince*: well-known, controversial artist appropriates the imagery of a relatively unknown lifestyle photographer, producing works of art that command high prices; photographer sues the artist for breach of copyright; artist defends his work on the grounds that it falls under copyright's fair use doctrine in part because of its status as art. As in *Rogers*, there was a similar tendency in *Cariou v. Prince*

for the defense to draw the distinction between an “artistic” author and a “mass” author, with the former, because of his stature in the contemporary art world, entitled to a creative license that superseded the authorial agency of the latter. Prince’s defense strategy included belittling Cariou’s artistic credentials, casting him as a second-rate author of cheap and disposable books, valuable only to the extent that they could serve as the “raw ingredients” in the creation of “unbelievably looking great painting.”<sup>13</sup> It is from this elevated platform of the artist that Prince proclaimed his work as transformative. Yet Prince departed from Koons’s defense in one key respect: Prince relied on his avoidance of any critical relationship with his source material; instead, his criteria for choosing certain images over others was simply whether or not he “love[d] the way they looked.”<sup>14</sup> For Prince, it seems his unadulterated creative whims sufficiently justified the transformative claim.

Prince’s court statements detail a view in which the sovereignty of the artist’s disposition is presented as given. Such an individualistic—we might call it neo-modernist—position stands in marked contrast to the ways in which postmodernist theory and criticism had tended to situate the author. Prince himself, as one of the central figures in the Pictures Generation of New York appropriation artists, gained critical and commercial success precisely from a discourse formed out of a rigorous critique of the modernist authorial mode. The epigraph that begins this essay, if it does not indicate a re-centering of the author outright, at least reminds us of the degree to which the figure of the author was reinforced in the 1980s even as it was being deconstructed. Killing the author paradoxically also offered a new lease on authorship’s life.

Yet such a rebirth would come at a price. In spring 2011 District Court Judge Deborah Batts found Prince liable for copyright infringement, ruling that his paintings were not transformative but rather derivative, insofar as they simply “recast, transformed or adapted”

Cariou's original photographs.<sup>15</sup> Noting that the examples listed in the fair use clause's preamble,—“criticism, comment, news reporting, teaching [...] scholarship, [and] research”—contain, at their core, “a focus on the original works or their historical context,” Batts concluded that Prince's paintings could be transformative only if they “in some way comment[ed] on, relate[ed] to the historical context of, or critically refer[red] back” to Cariou's images.<sup>16</sup> Since Prince emphatically rejected his works corresponding with Cariou's images in any way, instead arguing that they conveyed a fantastical, post-apocalyptic tropical setting, the whole *Canal Zone* series therefore constituted copyright infringement.

Prince's neo-modernist brand of appropriation seemed, finally, to have caught up with him. But so did a postmodernist past. “Style,” Hal Foster remarked in the mid 1980s, “is not created of free expression but is spoken through cultural codes.”<sup>17</sup> Written as a polemic against neoconservative postmodernism, Foster's words could just as easily have appeared in Judge Batts's present-day court opinion against Prince. Each in their own way—Foster employing poststructuralist-inspired academic jargon and Batts using the legal language of fair use—are taking the artist to task for an irresponsible approach to the practice of appropriation. What for Foster would mark the difference between neoconservative and critically-engaged appropriation is, for Judge Batts, what distinguishes “transformed” from “transformative” works: a recognition of and critical response to a received system of signification. Yet Prince's use of Cariou's Rasta photos was not made in order to interrogate Cariou's method of representing the Jamaican communities he encountered, or to comment generally on the fetish (particularly ascribable to Western artists since the dawn of modern art) of imaging subaltern groups. Rather, in Prince's amalgam of post-apocalyptic landscapes, nude figures, and expressionist brush strokes, Cariou's “classical” Rastas become Prince's “rock band” Rastas. But “Rasta” as a representational category

is never questioned; it (or at least Cariou's version) is taken "as is."<sup>18</sup> Prince merely re-presents the "code" initially extended by Cariou (the image of the exotic, mysterious, dark-skinned other) making it, in a word, derivative, in the most basic (but also, importantly, legal) sense.

Yet the assumption in Judge Batts's reasoning—that works of art don't carry meanings when their makers don't intend them to (or, conversely, that they carry the meanings their makers intend for them to have)—is problematic, if perhaps understandable, given that artistic intention would be one of the few measures available to a judge otherwise reluctant to employ her own subjective readings of art. At least since U.S. Supreme Court Justice Oliver Wendell Holmes proclaimed in 1903 that "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations," courts have attempted, however imperfectly, to separate legal from aesthetic judgements.<sup>19</sup> However, can determining whether or not a work is sufficiently transformative be accomplished solely through interrogating artistic intention? Aren't the ways in which art is received and interpreted of great, if not equal, importance? This is exactly the line of questioning Prince introduced when he appealed the District Court's decision.

### ***Cariou v. Prince, Part II***

In his 2011 appeal brief, Prince argued that Judge Batts's opinion misinterpreted the fair use doctrine and the general judicial turn toward the transformative. The artist's appeal argument took two approaches: first, that nowhere in the wording of the Copyright Act does it require that authors refer back to the works they appropriate in order for their uses to be considered fair.<sup>20</sup> And second, that even if that were the case, Prince's works would still be fair use insofar as they may indeed comment on Cariou's photos, even if the artist did not intend them to. That is,

commentary or criticism should be measured, Prince stressed, not merely through authorial intention as gathered from an artist's statements, but, in the final analysis, through audience reception.<sup>21</sup> The first point is more technical, while the second, though not without legal precedent, would nonetheless be the more radical.

The Appellate Court concurred with Prince's assertions. "The law imposes no requirement," it opined, "that a work comment on the original or its author in order to be considered transformative."<sup>22</sup> Rather, what qualify are uses that, as the Court's own Judge Pierre Leval theorized at the outset of the transformative fair use discourse in the 1990s, "employ the quoted matter in a different manner or for a different purpose from the original."<sup>23</sup> The opinion established a bright-line rule regarding how productive and different uses are identified. The Court established that while Prince's testimony was important, "*What is critical is how the work ...appears to the reasonable observer*, not simply what an artist might say about a particular...body of work. Prince's work could be transformative even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so."<sup>24</sup> Thus analysis of the work itself, in comparison with its original source, should serve as the primary basis for evaluation. Judges then deemed Cariou's photos to be "serene and deliberately composed portraits and landscape photographs depict[ing] the natural beauty of Rastafarians and their surrounding environs," while Prince's "crude and jarring" paintings were interpreted as "hectic and provocative."<sup>25</sup> Given the comparison of the works, the Court ruled that twenty-five of the *Canal Zone* paintings were transformative. The case was remanded to the District Court for further consideration of the remaining five canvases, and eventually Prince and Cariou settled.<sup>26</sup>

In light of the Appellate Court's decision, I contend that what we encounter in *Cariou v. Prince* is an ascendance of a "postmodern turn" in copyright law. At almost every opportunity,

the Court rescinded prior determinations, acknowledging legally what is increasingly understood across the cultural spectrum today: the derivative nature of creativity, and copying as a legitimate artistic technique. Of great significance in *Cariou v. Prince* is the Appellate Court's equivocal relationship with the romantic authorial mode. On the one hand, the Court validated the romantic author (Prince), who treated the world of mass media as a field of open-ended possibility, extracting images at will in order to subject them to his alchemical "transformation." On the other hand, the court subordinated artistic intent (or, in Prince's case, a professed lack of intent other than satisfying his own creative whims) to formal analysis. However Prince may have been contextualized his work, it was the aesthetic differences between the paintings and Cariou's photos that were of importance, which had the effect, ultimately, of diminishing authorial intent.

Yet, what marked an even more drastic change from the previous fair use rulings was the Court's reliance on the "reasonable viewer" to ascertain the transformative nature of the *Canal Zone* works. This is quite a divergence, given the ruling in *Rogers v. Koons* twenty years prior, in which the same Court rejected Jeff Koons's claim to a "higher" purpose, finding him liable for infringing Art Rogers's puppy image in large part because Koons's stated intent did not match his parody defense. It is even a shift from *Blanch*, in which the court weighted Koons's explanations heavily in its determination in the artist's favor. With the concept of appropriation art's "transformative" nature now given such wide latitude, and furthermore with the assessment performed with lessened regard for artistic intent and increased focus on viewer interpretation, twenty-first century copyright jurisprudence may well be catching up to the sensibilities of late twentieth-century, postmodernist appropriation art.

However, while we can understand the Court's reliance on the "reasonable observer" as indication of the privileging of viewer reception over authorial intention, the final opinion in

*Cariou v. Prince* should not be taken as an unproblematic, wholesale embrace of the agency of the receiver. As legal scholar Laura Heymann has noted, echoing Linda Hutcheon, “A reader-centric mode of interpretation cannot wholly free itself from the influence of the author: an implicit statement by Andy Warhol that ‘this soup can is art’ is likely to be reflected among readers to a greater extent than a similar statement by an unknown artist.”<sup>27</sup> In its explication of fair use, the Circuit Court judges employed the reasonable observer measure to the economic factors in the case by recognizing that Prince’s works catered to a “very different audience” than that of Cariou: celebrities and high-end art collectors—owners of Prince’s art, who have financial interest in the artist’s paintings being understood as transformative. Prince’s reputation as a top-tier contemporary artist would precede any understanding of his work, and have the effect of classing the interpretive process. In the judges’ estimation, Prince’s works constituted fair use less because the artist or other academics well-versed in the history and theory of appropriation art claimed them as such, than because the rich and famous had already validated them.<sup>28</sup>

Additionally, in casting themselves as “reasonable viewers,” the Circuit Court judges mocked the process in which an actual interpretive community might have conceptualized Prince’s transformations, and instead showed their willingness to ventriloquize an imaginary viewer. Restricted not only in their limited awareness of appropriation art’s development, but also to their duty as arbiters of the law—to “objective” evaluations—the judges’ conclusions remained within simplistic, medium-specific aesthetic description (i.e., Prince’s large-scale “crude and jarring” paintings versus Cariou’s smaller “serene” photographs). This had the consequence of draping an otherwise postmodern turn in fair use with a type of analysis akin to formalist art criticism. A more robust assessment process could have involved not only expert testimony taken from museum officials or art collectors, but also from art critics and historians (some of whom

might have described Prince's paintings as utterly banal and derivative in comparison to the history of critically-engaged appropriation art).<sup>29</sup> The participation of a wider range of "reasonable observers" might well have had brought about a different finding.

There is another, related problem with the judges' reliance on 'the reasonable observer' test. Such a test attenuated the thought processes behind Prince's creative approach, instead establishing a precedent that de-intellectualizes appropriation as a mode of artistic practice. On the one hand, such an approach can be understood as consistent with copyright law's reticence to value some forms of creative labor over others. On the other hand, when courts assess a genre of art whose historical importance is so intimately tied into its own discursive formation—to its understanding as a largely conceptual and critical pursuit, in terms of aesthetics, they do a disservice to the very goal of copyright as inscribed in the U.S. Constitution—the promotion of progress in the arts. The advancement of art occurs in tandem with the advancement of communication between artists and public, when works enter into dialogue and debate with one another. Much of that dialogue rides on artistic intent, concept, and criticism. By granting that Prince's paintings were fair use, the court effectively cast appropriation as a type of practice that merely reshuffles the deck of an already glutted mediascape in aesthetically seductive, but ultimately inconsequential ways. The precedent set in *Cariou v. Prince* goes some ways towards absolving cultural producers of their responsibility toward the images they appropriate, which is unfortunate insofar as so much of the force driving appropriation art throughout its history has been precisely the engagement of images through critique. Richard Prince would not be who he is today were it not for that history.

## Conclusion

At the very least, Prince's win is ultimately a loss for the legacy of the Pictures Generation and postmodern appropriation. Any embers of criticality still glowing within the postmodern project of appropriation art have been extinguished. When once Prince's works were heralded as radical commentaries on authorship, originality and commodity fetishism, now they simply parrot both modern and postmodern appropriation art. The artist's paintings have been deemed viable by one of the highest courts in the United States. Their monetary value is now augmented by their status as legally sanctioned art. They are safe. As if to prove this point himself, Prince in essence agreed to pay "licensing fees" for Cariou's images when he settled the case over the five remaining *Canal Zone* paintings, thus submitting to the intellectual property regime he has treated with disdain for so long.

It may be that *Cariou v. Prince* helps forge a new judicial tolerance for artistic appropriation. Slowly but surely, the stigmas attached to it—that it's lazy, uncreative, and unoriginal—are being swept aside in favor of greater appreciation for appropriation and the reality that a culture of copying defines contemporary society. Yet the long term effects on appropriation art as a critical project are uncertain. If *Cariou v. Prince* speaks to the contradictions of authorship in contemporary appropriation art, it is up to future practitioners to set the record straight, and reclaim the critical legacy so important to the genre's historical significance.

## Notes

1. Greg Allen, ed., *The Deposition of Richard Prince* (Zurich: Bookhorse, 2012), 218.
2. See John C. Welchman, *Art After Appropriation: Essays on Art in the 1990s* (Amsterdam: G+B Arts International, 2001).
3. Leo Steinberg, "The Glorious Company," in *Art About Art* (New York: E.P. Dutton, Whitney Museum of American Art, 1978), 25. The essay introduces the catalog for an exhibition of the same name held at the Whitney Museum in 1978. Thank you to Natilee Harren for pointing me to this essay.
4. Linda Hutcheon, *A Theory of Parody: The Teachings of Twentieth-Century Art Forms* (Urbana and Chicago: University of Illinois Press, 1985), 85. Original emphasis.
5. See *Cariou v. Prince*, 784 F Supp 2d 337 (SDNY 2011) at [https://scholar.google.com/scholar\\_case?case=18222445238017802130&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=18222445238017802130&hl=en&as_sdt=6&as_vis=1&oi=scholar); *Cariou v Prince*, 714 F3d 694, 712 (2d Cir 2013) at [https://scholar.google.com/scholar\\_case?case=5845890683658306826&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=5845890683658306826&hl=en&as_sdt=6&as_vis=1&oi=scholar).
6. "Joint Brief and Special Appendix for Defendants-Appellants," <http://docs.justia.com/cases/federal/appellate-courts/ca2/11-1197/100/0.pdf?ts=1350506951>, 24.
7. Patrick Cariou, *Yes Rasta* (New York: powerHouse Books, 2000).

8. *Campbell v. Acuff-Rose Music* (92-1292), 510 U.S. 569 (1994), <https://www.law.cornell.edu/supct/html/92-1292.ZS.html>.
9. See *Mattel Inc. v. Walking Mountain Productions*, 353 F. 3d 792 - Court of Appeals, 9th Circuit 2003, [http://scholar.google.com/scholar\\_case?case=7581792703482092445...ttel+v.+WALKING+MOUNTAIN+PRODUCTIONS&hl=en&as\\_sdt=2,5&as\\_vis=1](http://scholar.google.com/scholar_case?case=7581792703482092445...ttel+v.+WALKING+MOUNTAIN+PRODUCTIONS&hl=en&as_sdt=2,5&as_vis=1); *Blanch v. Koons*, 467 F. 3d 244 - Court of Appeals, 2nd Circuit 2006, [http://scholar.google.com/scholar\\_case?q=ROGERS+v.+KOONS&hl=en&as\\_sdt=2,5&as\\_vis=1&case=3752630071472494999&scilh=0](http://scholar.google.com/scholar_case?q=ROGERS+v.+KOONS&hl=en&as_sdt=2,5&as_vis=1&case=3752630071472494999&scilh=0).
10. "Memorandum of Law in Support of Defendants' Joint Motion for Summary Judgment," <https://ecf.nysd.uscourts.gov/doc1/12717765441>, 5.
11. *Ibid.*, 15.
12. Parody's requirement that an original's source and context be familiar (if only to be ridiculed through an appropriating artistic gesture) is illustrated in the notorious case *Rogers v. Koons*, 960 F.2d 301 (2nd Cir. 1992), <http://copyright.gov/fair-use/summaries/rogers-koons-2dcir1992.pdf>. In their rulings, the courts concluded that Rogers's photo was not well-known enough for viewers to understand Koons's appropriating work as a parody. Instead, they interpreted Koons's sculpture as satire, which is not protected speech.
13. "Memorandum of Law in Support of Defendants' Joint Motion for Summary Judgment," 1-6.
14. Allen, *The Deposition of Richard Prince*, 192.
15. See U.S. Code Title 17, Section 101, <http://www.copyright.gov/title17/circ92.pdf>. U.S. Copyright Law defines "derivative works" as translations, abridgments and other forms that recast, transform, or adapt their sources. The law's use of the word "transform" in this context is problematized by the rhetoric of the "transformative" in fair use defenses. It would seem transformed works infringement copyright, while transformative works do not.
16. *Cariou v. Prince* (2011).
17. Hal Foster, *Recodings: Art, Spectacle, Cultural Politics* (Port Townsend, Wash.: Bay Press, 1985), 128.
18. Here the charge of "appropriator" could be leveled at both Cariou and Prince, insofar as they occupy the cliché position of the privileged, Anglo-European creative subject attempting to represent "the other." Here I would simply, if crudely, state there is something embarrassing about two white men arguing over whose representations of black men are the more sincere or "artistic" expressions.
19. *Bleistein v. Donaldson Lithographing Co.*, 188 US 239 (1903), [http://scholar.google.com/scholar\\_case?case=3277054592305773876&q=bleistein+v.+donaldson&hl=en&as\\_sdt=2,33](http://scholar.google.com/scholar_case?case=3277054592305773876&q=bleistein+v.+donaldson&hl=en&as_sdt=2,33). Of course the ways in which courts have evaluated works of art, parsing the subjective from the objective, have themselves changed over time. Such an historical analysis would require an essay unto itself.
20. "Joint Brief and Special Appendix for Defendants-Appellants," 39-40.
21. *Ibid.*, 41-51.
22. *Cariou v. Prince* (2013).
23. Pierre N. Leval, "Toward a Fair Use Standard," *Harvard Law Review* Vol. 103, No. 5 (March 1990): 1111.
24. *Cariou v. Prince* (2013). My emphasis.

25. Ibid.
26. Randy Kennedy, "Richard Prince Settles Copyright Suit With Patrick Cariou Over Photographs," *The New York Times*, [http://artsbeat.blogs.nytimes.com/2014/03/18/richard-prince-settles-copyright-suit-with-patrick-cariou-over-photographs/?rref=collection%2Ftimestopic%2FPrince%2C%20Richard&action=click&contentCollection=timestopics&region=stream&module=stream\\_unit&version=latest&contentPlacement=10&pgtype=collection&\\_r=0](http://artsbeat.blogs.nytimes.com/2014/03/18/richard-prince-settles-copyright-suit-with-patrick-cariou-over-photographs/?rref=collection%2Ftimestopic%2FPrince%2C%20Richard&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=10&pgtype=collection&_r=0). How the Court arrived at a fair use ruling for all but five of the paintings remains unclear, but highlights one of the difficulties of the "reasonable observer" standard as it relates to subjective judgments of taste.
27. Laura Heymann, "Everything is Transformative: Fair Use and Reader Response," *Columbia Journal of Law & the Arts* Vol. 31 (2008): 449-50.
28. See Andrew Gilden and Timothy Greene, "Fair Use for the Rich and Famous?," *The University of Chicago Law Review*, <http://lawreview.uchicago.edu/page/fair-use-rich-and-fabulous>.
29. I am not aware of any art historian or critic who has explicitly dismissed Prince's recent works as banal or derivative. However, it's not difficult to imagine certain academics and other intellectuals, especially those critical of the collusion between corporate interests, the art market, and spectacle culture generally, who could testify against Prince's brand of appropriation.