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## Assignment 2: Fair Use in the News

### Part 1

#### **Richard Prince's *New Portraits* uses appropriated Instagram Images**

Richard Prince is a widely known, if not infamously known appropriation artist who uses other's images in his own works under the claim of fair use and has done so for the majority of his career. His first large-scale appropriation was the in the 1970s with a collage of works by Jackson Pollack. He has since sustained his notoriety on the ability to take other works from artists and add his own commentary to transform the original work. His most recent set of works that has caused controversy is from a 2014 showing, *New Portraits*, at the Gagosian Gallery in New York City. Prince printed and posted on large canvas images taken by others on Instagram that included his own lude comments at the bottom of the print. He did not alter or retouch the images in any way and did not alter the Instagram interface.

The sale of these images has gone for \$100,000. This has caused huge amounts of controversy from those in and out of the art world pertaining to originality, credit to the actual image's photographer, and the lack of fee that the creators of the image are allowed to receive because they posted their images on a public platform.

Many of these images were taken by a group of model/photographers known as the SuicideGirls who have very distinct aesthetics to their images. The artists that originally took and posed for the images (mainly young women struggling to sell their works) have had mixed responses to the sale of their work and in certain cases have actively protested the sale. One of the photographers, Karley Sciortino said "I don't really understand the uproar over it. Personally I feel like it's an honor to be incorporated in a

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piece of his artwork." Others, like the founder of SuicideGirls, Missy Suicide said

Prince's works were "a violation by someone who doesn't get it." She later would sell her Instagram images in the same ink printed canvas style that he did for \$90 a work.

Prince has been successfully sued before for his appropriation of works – though he has won on appeal. This use however is disputed for being more in bad taste than a violation of fair use factors. The images in the show were very hyper sexualized with young females, and his comments on the work (within the Instagram user interface) were lurid and nonsensical.

To examine the dispute we need to look at the four-factor test of fair use:

- 1) The purpose of the use
- 2) The nature of the copyrighted work
- 3) The amount of the work taken
- 4) The effect on the potential market

1) Yes, Prince's work is transformative on a superficial level. His prints, though unaltered from the Instagram feed, show that he added his own comments, which many have categorized as a trolling of sorts. Rather, the comments shed light on the fact that the picture is meant to illicit a sexual arousal in response and when it does, the only way to confirm this is to comment below the picture, amongst hundreds of other comments that are soon lost in the feed. Because his comments are included in his canvas, he changed the way the viewer was meant to look and appreciate the image.

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2) There is no question that the work is published, and not only that but it is published on a public platform that does not charge for its service. If the works had been unpublished then access and fair use standards would be a different matter. Also, Prince did not have to notify these people that he would take their works. Though Instagram has said, "People in the Instagram community own their photos, period. On the platform, if someone feels that their copyright has been violated, they can report it to us and we will take appropriate action. Off the platform, content owners can enforce their legal rights."

3) There is room for argument in favor of SuicideGirls and their pictures in relation to this factor. Prince took the entire image, the amount of likes received at the time, and other's comments that were above his own in that section and then directly copied them onto canvas. He did not use a small section of their works, but did take all of it. But again, these works were put on a public service that encourages appropriation, sharing, commenting – all things that the user agrees to before signing up for the service.

4) There was no effect on the potential market value because the SuicideGirls themselves put up the images for free on Instagram. And Instagram reserves the right to use the images posted to its site as it sees fit. So Prince's sale of his works did not effect the market negatively because there was no sale happening of the works to begin with, and the images had been distributed on free sharing, public platform. In fact, after Prince sold his works, the SuicideGirls sold their prints in the same large canvas fashion (mocking

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Prince) and sold them for \$90 a piece. In this way Prince drew attention to their images and actually increased their market value.

By all accounts Prince's work is a fair use, an argument he has become intimately familiar with.

## **Part 2**

Within a film archive there are many ways that fair uses claims can be used during the cycle of workflow or distribution. In the case of documentary films that capture copyrighted music there are normally significant music rights clearances that occur in order to protect the filmmakers from lawsuits or copyright infringement. In many cases now, because of a wealth of case law as examples, if small amounts of copyrighted music are captured at the moment of action that the film cannot do away with or uses the work to transform the situation at hand, a fair use claim is more reasonable.

For example, let's say a documentary explored the failing relationship between a father and his son, but at the moment of recording a touching conversation the television in the background was playing *Jeopardy* and the jingle could be heard for a few seconds. There is an argument that use of the song in that scene is a fair use under at least three of the factors in determining fair use (i.e. market effect, transformation, and amount taken). In the case of a film archive, a work may have had music clearances to cover its use of copyrighted music, but could probably get away with posing the documentaries' use of the work as a fair use in the present and not have to renew its clearance rights.

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