

Ina Archer
Copyright In the News
Cariou v. Prince,
714 F.3d 694 (2d Cir. 2013)
cert.

In 2000, Patrick Cariou, published a book of his photographs of Rastafarians living in Jamaica titled *Yes Rasta*. Cariou worked on the project over the course of six years establishing relationships within the community which allowed him to do formal individual and group portraits of various members of the sect. The portraits are large format black-and-white images, with the subject foregrounded in front of atmospheric local landscapes. Some of the photos are organized in grid of six shots with close-ups of faces or mid-body shots also with backgrounds that are softly lit by daylight.

In 2007-2008, appropriation artist, Richard Prince did a series of collages and paintings. He showed the works at New York's Gagosian Gallery which included a published catalog. Prince's collages and paintings used images from Cariou's book blown up to a large size with painted additions like circles and ovals ("lozenges" according to Prince) over the eyes and mouths of the figures or with other paper materials, some of which are sexually explicit, collaged over the top of the images.

According to the circuit court documents, Richard Prince mounted an exhibit called *Canal Zone* that included 35 paintings and collages that originated from images that were torn out of Cariou's *Yes Rasta* book. In 2007 and 2008 Prince showed the artworks at the Eden Roc Hotel in Saint Barths (where he first encountered Cariou's book) and in the Gagosian Gallery in NYC. Gagosian Gallery further published a catalogue to accompany the Prince show.

Cariou sued Prince as well as Gagosian (as a "vicarious and contributory infringers") for copyright infringement over the images Prince in the *Canal Zone* exhibit and catalogue. Prince

and Gagosian, however, claimed that his manipulation of the original photographs was defensible citing fair use.

The United States District Court for the Southern District of New York ruled in favor of Cariou, requiring that in order to benefit from fair use, Prince's resulting artworks must critically comment upon Cariou's works or the historical and cultural context of the photographs and delivered an injunction for Prince to destroy, sell or dispose of the remaining unsold works.

Prince and Gagosian appealed, claiming that Prince's interventions on Cariou's copyrighted photographs were transformative and that the district court used "an incorrect legal standard when it concluded that, in order to qualify for a fair use defense...Prince's work must "comment on Cariou, on Cariou's Photos, or on aspects of popular culture closely associated with Cariou or the Photos." *Cariou v. Prince*, 784 F. Supp. 2d 337, 3493(S.D.N.Y. 2011)." adding, "What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work."

Further the Second Circuit's ruling declared the works sufficiently transformative asserting that Prince's copies of and his additions to Cariou's photographs were not merely representing the same material but constituted a creation of works with a "new expression, meaning, or message." and "presented images with a fundamentally different aesthetic. *Leibovitz*, 13712F.3d at 114". The summary continues, giving detailed descriptions of the collage and painting techniques that Prince employed to alter the torn out photographs.

The court also concluded that Prince's work did not negatively affect Cariou's market for his *Yes Rasta* photographs, explaining that Prince and Cariou's audiences did not overlap and that there was no evidence that Cariou would reuse or develop his Rastafarian photos in a manner similar to the way Prince manipulated them. Additionally, Cariou's market was not hurt

since he had not “aggressively marketed his work”, and had earned just over \$8,000 in royalties from *Yes Rasta* since its publication, selling just four prints from the book, and only to personal acquaintances.

In contrast, Prince’s work sells for millions of dollars and the court document seems to be rubbing Cariou’s lack of marketing and art world success in his face, revealing “an invitation

list for dinner that Gagosian hosted in conjunction with the opening of the Canal Zone show (that) included a number of the wealthy and famous such as the musicians Jay-Z and Beyonce Knowles, artists Damien Hirst and Jeff Koons, professional football player Tom Brady, model Gisele Bundchen, Vanity Fair editor Graydon Carter, Vogue editor Anna Wintour, authors Jonathan Franzen and Candace Bushnell, and actors Robert DeNiro, Angelina Jolie, and Brad Pitt...”

They concluded that twenty-five of Prince’s artworks were a fair use of Cariou’s copyrighted photographs. However, the court had questions about five of Prince’s works which also use significant portions of the photographs as deemed permissibly transformed in the prior twenty-five. However, these five entitled *Graduation*, *Meditation*, *Canal Zone (2007)*, *Canal Zone (2008)*, and *Charlie Company* appeared to have minimal alterations and the court was concerned that these were more aesthetically similar to Cariou’s originals and therefore could not determine if these works represented a “new expression, meaning, or message”. The court remanded the to the District Court to decide if Prince was entitled to a fair use defense.

I will consider these five collages/paintings that the court remanded.

The purpose and character of your use: While there are minimal changes superficially to the images with Prince merely adding lozenges, ovals, drawing and applying collaged hands and guitars, and reducing, extracting altogether or multiplying the backgrounds of Cariou’s various pictured Rastafarians, these changes are hugely and significantly transformative. The court summary points out key elements in their observation of Prince’s retooling:

“Lozenges painted over the subject’s eyes and mouth – an alteration that appears frequently throughout the Canal Zone artworks – make the subject appear anonymous, rather

than as the strong individual who appears in the original. Along with the enlarged hands and electric guitar that Prince pasted onto his canvas, those alterations create the impression that the subject is not quite human. Cariou's photograph, on the other hand, presents a human being in his natural habitat, looking intently ahead. Where the photograph presents someone comfortably at home in nature, *Graduation* combines divergent elements to create a sense of discomfort."

I would support this visual interpretation between the artworks. Cariou's portraits are indeed serene and "deliberately composed" and display their subjects, for instance, the dreadlocked Rastafarian reused repeatedly in Prince's appropriations--pictured with a the straight-forward look and with shoulders squared, facing the camera and distinct from the background; or in *Canal Zone* (2008), Prince's grid contains a collection of Cariou's headshots that utilizes the same distinguished portraiture style.

Cariou's likenesses display a sense of respect for his sitters garnered from his commitment to familiarizing himself with the the members of the community. However, Prince's applications of white and blue circles and ovals placed over the eyes and mouths of the Rastafarians, give these primarily dark-skinned Jamaican people the caricatured look of blackface minstrels, "golliwogs", or other cartoonish depictions of Africans, African-Americans and people of color in the African diaspora. So they are indeed, transformed.

Further, in regards to *the nature of the copyrighted work* as the Supreme court has emphasized, to be considered a fair use, the appropriated, secondary work should endow the earlier one with "new expression, meaning, or message."Campbell, 510 U.S. at 579;see also *Blanch*, 46715F.3d at 253 (original must be employed "in the creation of new information, new aesthetics, new insights and understandings" (quotation marks omitted));*Castle Rock*, 150 F.3d at 142.

Prince's added information, insights and aesthetics, are completely new and utterly abhorrent transforming respectful humane portraiture into a visual mode of racial ridicule that is

exoticizing, sexualizing, and opposite to any imparting of Rastafarian beliefs, history or lifestyle. Prince misses, ignores or is uncomprehending of the “heart” of Cariou’s work which is the deferential revealing of a misunderstood, afro-centric social group and religious set. Prince’s collaging process of immersing the figures in the foliage until they seem to grow from it, applying x-rated cutouts of women on the surface, also with their eyes and mouths lozenged is “jarring” as is his intention to portray male and female relationships and a “contemporary take on the music scene” by defacing images of an impoverished, post-colonial, community. The transformation of the five images like the other twenty-five is dehumanizing, and “discomforting” as the court surmises, but in my opinion, they are not infringing however confused and unprincipled.

In regards to the *the effect of the use upon the potential market*, I believe that Cariou’s marketing strategy (that is subtly disparaged in the judgement in favor of Prince) of offering the books for a nominal cost and selling few prints and only to friends, is in keeping with Cariou’s aesthetic goals and practice based on establishing interpersonal relationship with his chosen subjects. Cariou’s audience is likely interested in the human and cultural significance of Rastafarians and photographic portraiture of people of color and would be drawn to his book and I would like to imagine, repelled by the exploitative depictions of impoverished people and the exorbitant dollar figures that Prince demands and received for his *Canal Zone* images.

While Richard Prince’s works are unfortunate and unethical, in my view, I cannot make a case that that they represent an infringement on Patrick Cariou’s copyright. This case seems a troubling precedent for artists like myself whose practices employ collage, appropriation, reuse and remixing and who seek an expansion of copyright law in order to freely create expressive secondary works hopefully less specious and cynical than Prince’s .

References:

Cariou v Prince Summary:

https://www.law.berkeley.edu/files/Cariou_v_Prince_-_2d_Cir_2013.pdf

A fascinating websight that grew form the case: <http://aftercariou.tumblr.com/>



Casriou was supposed ot have a show with Carre

Celle abandoned his promised show at here galleray Yes Rastashow at hergalleryo after she found out about the show at The Canal Zone showGagosian. However the court listened to Celles claim that she didnot show yes rasta because she thought the show was a collaboration bewtween Prince and Cariou.

Noting Carious photography as “serene and deliberately composed,” Prince’s collages however are as “crude and jarring.”

(http://www.lawupdates.com/commentary/icariou_v._prince_i_court_finds_appropriated_but_altered_photos_prote/)