



JANUARY 29, 2009, 1:06 A.M. ET

# Color This Area of the Law Gray

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By DANIEL GRANT

Beauty, it is often said, is in the eye of the beholder, and so might be copyright infringement. Artist Richard Prince never denied that he made use of some photographic images he found in a 2000 book by Patrick Cariou called "Yes Rasta," documenting the community of Rastafarians the French photographer encountered in the mountains of Jamaica, for collage paintings that were exhibited last fall at New York's Gagosian Gallery and reproduced in a book published by Rizzoli. The question is whether Mr. Prince's use of these images was "transformative" -- borrowing in the process of creating something entirely new -- or just stealing. A lawsuit filed by Mr. Cariou in New York District Court in late December against the appropriationist Mr. Prince -- as such artists are known -- likely will be one more front in the battle over what constitutes copyright infringement in these days of "sampling" and point-and-click downloading.

## 'Inquisition'

Artist Richard Prince's 2008 work "Inquisition" (below) was part of a series that brought on an inquisition, about whether the use of certain images was copyright infringement.



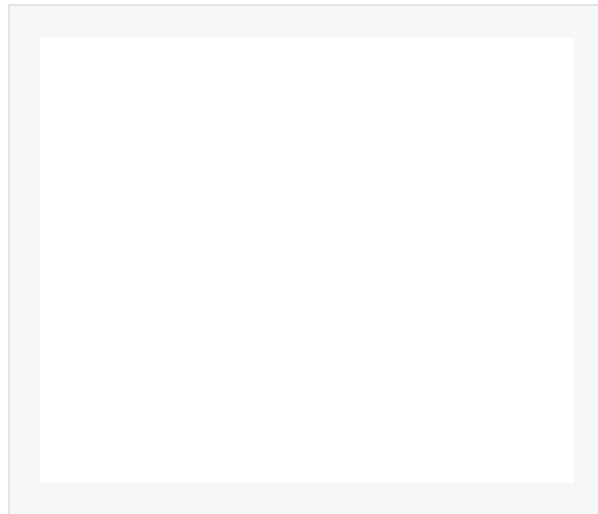
Richard Prince

## 'Yes Rasta'

Here are some of the original photos from the 2000 book "Yes Rasta" by French photographer Patrick Cariou:

According to Mr. Cariou's lawyer, Daniel Brooks, Mr. Prince scanned several of Mr. Cariou's images of people and landscapes into his computer and printed them directly onto his canvases. He then defaced them in limited ways (placing an electric guitar in one Rastafarian's hands and daubing paint onto the face, for instance), as well as adding other elements to the paintings. Mr. Prince "didn't transform these photographs -- he just used them," said Mr. Brooks. But it is Mr. Prince's contention that he took the photographer's images as raw material -- the way an assemblage sculptor uses "found objects" -- in order to create something that not only comments on the photographs' previous meaning but also gives them new meaning. Mr. Brooks noted that Mr. Prince could have avoided the problem altogether by traveling to Jamaica to take his own photographs for his canvases, but the entire point of Mr. Prince's art is commentary on images that already exist in the world.

Other artists have stumbled into this gray area of the law. "It's meant to be a gray area, because the copyright law is designed to be flexible," said John Koegel, a lawyer who successfully represented artist Jeff Koons in an infringement lawsuit by a commercial photographer, Andrea Blanch, in 2005. "The law states that the use of a copyrighted image is transformative based



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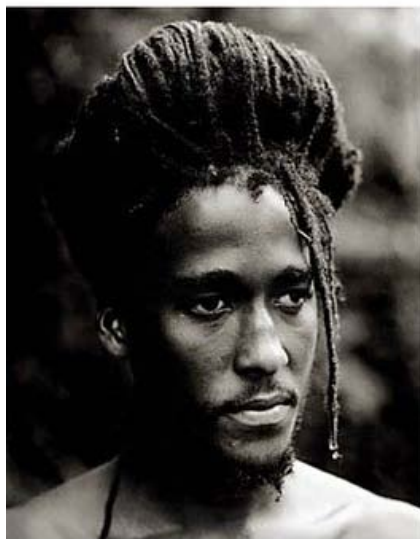


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Patrick Cariou



Patrick Cariou

on the ordinary lay observer's sense of if the new work is different and how different it is. It is very much of a visual thing, and there is no bright line that artists can go by."

In fact, Mr. Koons has been sued twice by photographers for copyright infringement, the first time in 1989 in a case that he lost and the second time where he prevailed. In the 1989 case, a photographer, Art Rogers, had created a line of notecards with an image of a man and woman holding a litter of puppies, entitling the picture "Puppies." According to various accounts of the case, Mr. Koons purchased one of these cards, tore off Mr. Rogers's name and copyright notice, and sent the card to Italian fabricators with the instruction that they should copy the image as a sculpture, which was entitled "String of Puppies."

In court papers and interviews, Mr. Koons claimed that artistic freedom would be abrogated if artists could not make parodies or create work that somehow showed the influence of other artists. The court's reading of the copyright law, however, did not support him. In his decision, the judge found that the artist had not parodied but simply copied the photographic image and "that Koons' copying of the photograph 'Puppies' was done in bad faith, primarily for profit-making motives, and did not constitute a parody of the original work."

In the second case, Ms. Blanch's photograph, "Silk Sandals by Gucci," shows the lower part of a woman's bare legs crossed at the ankles and resting on a man's knee. The woman is wearing Gucci sandals, one of which dangles from her toes. The photograph appeared in the August 2000 issue of Allure magazine. Mr. Koons acknowledged that his painting "Niagara" copied the woman's legs, feet and sandals, but the artist noted that he omitted

background elements in Ms. Blanch's photograph; inverted the image so that the legs are vertical, feet down, rather than horizontal; and added three other pairs of women's legs and feet. The judge in that case labeled Mr. Koons's use of Ms. Blanch's imagery "transformational," and thus fair use.

Working against artists, Mr. Koegel claimed, is the fact that "the law hasn't accepted two principles that are well understood in the art world. The first is that a change in medium is transformative. If you go from two to three dimensions, you are transforming something and it is experienced very differently than it had been. The second is that re-presentation is transformative; when you are taking something and making a comment on it, even when the thing you are commenting on is relatively unknown, that comment makes it protected as a fair use of a copyrighted image."

Like so much in the field of copyright law, those two principles are not absolute. Shifting from one medium to another is not a way of avoiding a lawsuit. For instance, turning a novel into a film is a shift in medium, but without the permission of --

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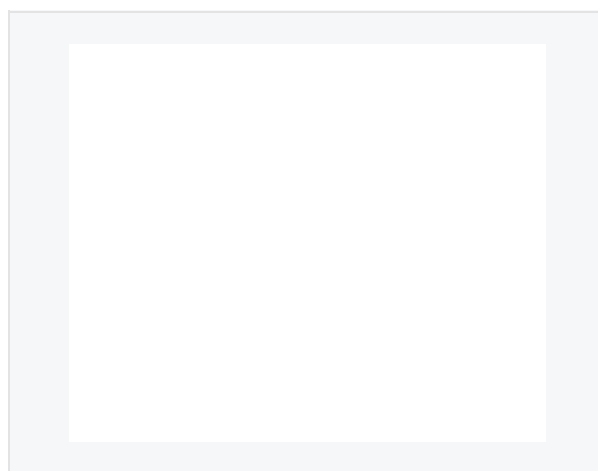
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Jeff Koons

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A judge ruled that the use of a photograph of a woman's feet (second from left in painting above) was "transformative" in the work "Niagara" by artist Jeff Koons.

and, probably, a payment to -- the author, the filmmaker would be in violation of the writer's copyright, because the author has the exclusive right to make "derivative" works or license the making of a film.

"Where derivativeness ends and transformative begins is not at all clear," said Robert J. Kasunic, principal legal adviser at the U.S. Copyright Office in

Washington. Also, he noted, a commentary or parody works only "if the average person can see" that some comment is being made.

The average person may not be familiar with the customs and logic of the art world, taking what he sees at face value rather than as irony. Jessica Litman, a professor at the University of Michigan Law School, claimed that part of the reason Mr. Koons lost the first case but won the second was that "the first time he came into court with a lot of art-world attitude about 'I'm the artist, I can do whatever I want,' and the second time he made a more reasonable statement about the kind of message that appropriation art sends. That goes a long way." The nature of the infringement was also different in the two instances, but the overall trend of court decisions between 1989 and 2005 (and the present) is to allow greater latitude for the claim of the new artwork being transformative. "There is more sympathy in the legal environment -- maybe it has gone too far," Mr. Kasunic said.

**Mr. Grant is the author of "The Business of Being an Artist" (Allworth).**

Printed in The Wall Street Journal, page D7

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