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United States Court of Appeals
for the
Second Circuit

PATRICK CARIOU,

Plaintiff-Appellee,

– v. –

RICHARD PRINCE,

Defendant-Appellant,

GAGOSIAN GALLERY, INC., LAWRENCE GAGOSIAN,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* THE ASSOCIATION OF ART MUSEUM DIRECTORS, THE ART INSTITUTE OF CHICAGO, THE INDIANAPOLIS MUSEUM OF ART, THE METROPOLITAN MUSEUM OF ART, THE MUSEUM OF MODERN ART, MUSEUM ASSOCIATES, DBA LOS ANGELES COUNTY MUSEUM OF ART, THE NEW MUSEUM, THE SOLOMON R. GUGGENHEIM FOUNDATION, THE WALKER ART CENTER, AND THE WHITNEY MUSEUM OF AMERICAN ART IN SUPPORT OF APPELLANTS AND REVERSAL

CLIFFORD M. SLOAN
BRADLEY A. KLEIN
SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP
1440 New York Avenue N.W.
Washington, DC 20005
(202) 371-7000

Attorneys for Amici Curiae

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amici include nonprofit corporations, none of which has any parent corporation nor stock held by any publicly held corporation.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF CONSENT TO FILE 1

STATEMENT OF THE IDENTITY AND INTEREST OF *AMICI CURIAE* 1

STATEMENT OF ISSUES ADDRESSED BY *AMICI CURIAE* 5

INTRODUCTION AND SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. APPROPRIATION ART HAS A LONG AND DISTINGUISHED PEDIGREE 7

II. THE DISTRICT COURT'S RULING ON LIABILITY THREATENS TO FRUSTRATE THE EDUCATIONAL MISSION OF MUSEUMS TO MAKE ART ACCESSIBLE TO THE PUBLIC. 11

A. The District Court's Analysis Of Direct Liability Raises Troubling Questions For Art Museums 12

B. The District Court's Analysis Of Secondary Liability Raises Troubling Questions For Art Museums 19

III. THE DISTRICT COURT'S EXTREME REMEDY WOULD DEPRIVE THE PUBLIC OF EXPOSURE TO IMPORTANT ARTISTIC WORKS 23

CONCLUSION 27

TABLE OF AUTHORITIES

FEDERAL CASES

Arista Records LLC v. Doe,
604 F.3d 110 (2d Cir. 2010)..21

Blanch v. Koons,
467 F.3d 244 (2d Cir. 2006)...15, 17-18

Bouchat v. Baltimore Ravens Ltd. P'ship,
619 F.3d 301 (4th Cir. 2010)..18

Campbell v. Acuff-Rose Music, Inc.,
510 U.S. 569 (1994) 12-13, 24

City of New York v. Mickalis Pawn Shop, LLC,
645 F.3d 114 (2d Cir. 2011)..24

Davis v. The Gap, Inc.,
246 F.3d 152 (2d Cir. 2001)..13

eBay Inc. v. MercExchange, L.L.C.,
547 U.S. 388 (2006) 24

Gershwin Publ'g Corp. v. Columbia Artists Mgmt, Inc.,
443 F.2d 1159 (2d Cir. 1971)...20-21

Lipton v. Nature Co.,
71 F.3d 464 (2d Cir. 1995)...24-25

MGM, Inc. v. Grokster, Ltd.,
545 U.S. 913 (2005) 20

New York Times Co., Inc. v. Tasini,
533 U.S. 483 (2001) 24-25

NXIVM Corp. v. Ross Inst.,
364 F.3d 471 (2d Cir. 2004)..14

Salinger v. Colting,
607 F.3d 68 (2d Cir. 2010)..24

Softel, Inc. v. Dragon Med. & Scientific Commc'ns.,
118 F.3d 955 (2d Cir. 1997)..20-21

Sony Corp. of Am. v. Universal City Studios, Inc.,
464 U.S. 417 (1984) 20

TVT Records v. Island Def Jam Music Grp.,
279 F. Supp. 2d 366 (S.D.N.Y. 2003), *rev'd on other grounds*,
412 F.3d 82 (2d Cir. 2005)..25-26

STATE CASE

Comedy III Productions, Inc. v. Gary Saderup, Inc.,
21 P.3d 797 (Cal. 2001) 9-10

FEDERAL STATUTES AND LEGISLATIVE MATERIALS

17 U.S.C. § 107(1) 13, 19

17 U.S.C. §§ 502-505 24

H.R. Rep. No. 94-1476 (1976) 25

OTHER AUTHORITY

E. Kenly Ames, *Note: Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 Colum. L. Rev. 1473 (Oct. 1993).................................... 8-9

Douglas Crimp, *Pictures*, 8 October 75 (Spring 1979), *as reprinted in Art After Modernism: Rethinking Representation* (Brian Wallis ed., 1984)..........10

Douglas Eklund, *The Pictures Generation, 1974-1984* (2009).........................10-11

William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 Geo. Mason L. Rev. 1 (2000)............................ 7-8

Ann Lee, *Appropriation, A Very Short Introduction* (2008) 8, 10

Pierre N. Leval, *Toward A Fair Use Standard*, 103 Harv. L. Rev. 1105 (1990) 14-15

David Nimmer, 4-14 Nimmer on Copyright § 14.06 (2011) 24

Abigail Solomon-Godeau, *Photography After Art Photography*, in *Art After Modernism: Rethinking Representation* (Brian Wallis ed., 1984) 11

STATEMENT OF CONSENT TO FILE

All parties to this appeal have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a).[1]

STATEMENT OF THE IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are art museums and an organization of art museum directors. The mission of art museums is to provide artistic and educational experiences for the public. The district court decision in this case threatens to undermine the ability of art museums to fulfill their important role as exhibitors, curators, and custodians of artworks held in public trust. If upheld, the district court decision could prevent art museums from exercising their best professional judgment about the works of art that they acquire and display. Such a result would have a distorting effect on public access to art, and would harm the strong public interest in the free flow of creative expression.

The Association of Art Museum Directors – The Association of Art Museum Directors ("AAMD") is a non-profit professional association organized under the

[1] No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person, other than *amici,* their members and their counsel, contributed money that was intended to fund preparing or submitting this brief. Record references are to the Special Appendix ("SPA___") attached to Appellants' Opening Brief (Docket No. 100).

laws of Washington, D.C. The AAMD's general nature and purpose is to support its members, consisting of approximately 200 directors of art museums located throughout the United States, Canada, and Mexico, in the contribution of art museums to society.

The Art Institute of Chicago – Founded in 1879, the Art Institute of Chicago is one of the largest encyclopedic art museums in the country. Its mission is to collect, preserve, and interpret works of art from the world's diverse artistic traditions for the inspiration and education of the public and for the advancement of research in visual culture.

The Indianapolis Museum of Art – Founded in 1883, the Indianapolis Museum of Art serves the creative interests of its communities by fostering exploration of art, design, and the natural environment. The IMA promotes these interests through the collection, presentation, interpretation, and conservation of its artistic, historic, and environmental assets.

The Metropolitan Museum of Art – The Metropolitan Museum of Art was founded in 1870 and is located in New York city. Its mission is to collect, preserve, study, exhibit, and stimulate appreciation for and advance knowledge of works of art that collectively represent the broadest spectrum of human achievement at the highest level of quality, all in the service of the public and in accordance with the highest professional standards.

The Museum of Modern Art – Founded in 1929 as an educational institution, the Museum of Modern Art in New York is dedicated to being the foremost museum of modern art in the world and manifests this commitment by establishing, preserving, and documenting a permanent collection of the highest order that reflects the vitality, complexity, and unfolding patterns of modern and contemporary art; by presenting exhibitions and educational programs of unparalleled significance; by sustaining a library, archives, and conservation laboratory that are recognized as international centers of research; and by supporting scholarship and publications of preeminent intellectual merit.

Museum Associates, dba Los Angeles County Museum of Art – The mission of the Los Angeles County Museum of Art, founded in 1965, is to serve the public through the collection, conservation, exhibition, and interpretation of significant works of art from a broad range of cultures and historical periods, and through the translation of these collections into meaningful educational, aesthetic, intellectual, and cultural experiences for the widest array of audiences. Museum Associates is a nonprofit public benefit corporation organized under the laws of California, which operates the Los Angeles County Museum of Art.

The New Museum – Founded in 1977, the New Museum in New York is exclusively devoted to contemporary art. With a mission of new art and new ideas,

the Museum has a global scope and exhibits a broad range of leading edge contemporary art in diverse media.

The Solomon R. Guggenheim Foundation – The Solomon R. Guggenheim Foundation, founded in 1937, is a non-profit education corporation chartered by the New York State Board of Regents, which operates the Solomon R. Guggenheim Museum in New York city, and maintains an international network of museums comprised of the Peggy Guggenheim Collection in Venice, Italy, the Guggenheim Museum Bilbao in Bilbao, Spain and the Deutsche Guggenheim in Berlin, Germany.

The Walker Art Center – The Walker Art Center in Minneapolis, Minnesota was founded in 1879 and is a catalyst for the creative expression of artists and the active engagement of audiences that examines the questions that shape and inspire us as individuals, cultures, and communities.

The Whitney Museum of American Art – The Whitney was incorporated in 1936, and is a New York not-for-profit educational corporation. The Whitney collects, exhibits, preserves, researches, and interprets art of the United States in the broadest global, historical, and interdisciplinary contexts.

STATEMENT OF ISSUES ADDRESSED BY AMICI CURIAE

Amici will address elements of the district court's decision that are of great concern because they threaten unwarranted interference with the ability of non-profit art museums to make important works of art available to the public.

INTRODUCTION AND SUMMARY OF ARGUMENT

The goal of art museums is to serve the public by presenting wide-ranging exhibitions of art and by obtaining significant works of art for public benefit. *Amici* are concerned that the district court's sweeping view of liability threatens to inhibit the beneficial work of non-profit art museums, and that the district court's excessive remedy authorizes the unnecessary destruction of artworks.

Appropriation Art—the inclusion of pre-existing images and content in an artwork— is well-recognized and widely appreciated. Its history includes the use of existing objects by Pablo Picasso and Marcel Duchamp in the early twentieth century. It evolved through Dadaism after World War I and the work of Andy Warhol and "Pop" artists in the 1960s, and it continues to be a prominent component of the art that museums display and acquire today.

The district court's decision holds an artist and the gallery displaying and selling his works liable for copyright infringement based on the artist's practice of incorporating parts of copyrighted photographs into one-of-a-kind artistic works. The district court's analysis—replete with errors such as failing to conduct a work-

by-work analysis, failing to consider adequately all fair use factors, and failing to apply correct standards regarding whether the works are transformative—itself raises serious concern among art museums as custodians of Appropriation Art, particularly because the district court relies heavily on the perceived failure of the artist, working in a non-verbal medium, to articulate and explicate the precise "message" and "comment" of his creative work. The district court's ruling, however, goes much further in its reach and raises especially troubling issues for art museums.

The district court holds the art gallery directly and vicariously liable for the artist's use of copyrighted material based on the gallery's failure to ensure that the artist obtained permission to use these materials; on the gallery's asserted knowledge of the artist's reputation for incorporating copyrighted materials into his works; on the gallery's reproduction of the artist's work in brochures and exhibition catalogues; and on the gallery's control of its holdings and exhibits. If broadly applied, these liability standards could threaten non-profit art museums that hold or display works of Appropriation Art. Basing liability simply on an artist's reputation, or the failure to inquire about the materials used in an artwork, would place a severe burden on art museums and could deter them from displaying or acquiring an important body of art. Such a result contravenes both Second Circuit precedent and the public policy interests served by the Copyright Act. It

could punish cultural institutions and censure educational activities that pose no threat to the original copyright holder, and it could harm the public by limiting access to significant creative works.

The district court, moreover, imposed an extreme, destructive remedy, ordering that the artworks at issue be impounded or destroyed at *plaintiff's* option. *Amici* oppose the destruction of any original artworks, particularly where less extreme remedies are readily available. At a minimum, a district court should consider more moderate alternatives before imposing the ultimate remedy of impoundment or destruction.

ARGUMENT

I. APPROPRIATION ART HAS A LONG AND DISTINGUISHED PEDIGREE.

In order to understand the implications of the district court's decision for art museums, it is helpful to understand the origin, development, and significant contributions of Appropriation Art.

The term "Appropriation Art" generally refers to any form of art, regardless of medium, that "borrows images from popular culture, advertising, the mass media, other artists and elsewhere, and incorporates them into new works of art. Often, the artist's technical skills are less important than his [or her] conceptual ability to place images in different settings and, thereby, change their meaning."

William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 Geo. Mason L. Rev. 1, 1 (2000). Appropriation Art has been important and influential in the development of modern and post-modern art. Ann Lee, *Appropriation, A Very Short Introduction* 1 (2008).

Although Appropriation Art is commonly associated with contemporary artists and relatively new media, it actually has a much longer pedigree. Indeed, one commentator has observed that "[t]he most far-reaching account would have it that the practice of art, as an activity that requires copying from models and imitating prototypes, has incorporated appropriation from its inception. . . . An example could be made of the studio, where students of art develop their art through copying a sketch by an old master." *Id.* at 3. Well-known examples of appropriation include paintings by Edouard Manet, which often contained provocative presentations of figures and motifs from past art. *See id.* at 4-5; E. Kenly Ames, *Note: Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 Colum. L. Rev. 1473, 1478 (Oct. 1993).

Appropriative techniques can be seen in the early collages of Pablo Picasso. In 1912, Picasso began combining found objects—including newspaper clippings, fragments of musical scores, bottle labels, and discarded drawings—with schematic line drawings and other original elements. Ames, *supra*, at 1478-80.

After World War I, Dadaists adopted collage techniques and used photomontages to critique various social and political trends in Europe. *Id.*

Some of the most influential examples of early twentieth-century Appropriation Art were created by Marcel Duchamp. In one famous piece, Duchamp drew a moustache and goatee on a postcard-sized reproduction of Leonardo da Vinci's *Mona Lisa* and wrote the initials L.H.O.O.Q. along the bottom border. Ames, *supra*, at 1483-84. Duchamp's playful and subversive works differed from Manet's and Picasso's in that they consciously eschewed aesthetic appeal in favor of conceptual insight and perspective. They sought primarily to provide a new context and meaning for a pre-existing object or image.

Appropriation Art gained new visibility in American culture with the emergence of Andy Warhol and "Pop Art" in the 1960s. Warhol offered a perspective on the mass market economy and American pop culture by reproducing existing images of celebrities and mass-produced products such as Campbell's Soup cans and Coca-Cola bottles. As the Supreme Court of California observed:

> The silkscreens of Andy Warhol . . . have as their subjects the images of such celebrities as Marilyn Monroe, Elizabeth Taylor, and Elvis Presley. Through distortion and the careful manipulation of context, Warhol was able to convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself.

Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797, 811 (Cal. 2001). Warhol's use of pop culture images to celebrate and critique American consumer culture set the stage for the more comprehensive critique of representation that characterized postmodernism. *See* Lee, *supra*, at 6.

Pop Art served as a major influence for a group of young artists that emerged in New York in the late 1970s and came to be known as the "Pictures Generation." The first generation of artists "born into the media culture of post-war America," the Pictures Generation "created seminal and influential works whose overarching subject was imagery itself—how pictures of all kinds not only depict but also shape reality. These artists' achievements have contributed to photography's central position as the defining medium of contemporary art." Thomas P. Campbell, "Foreword" in Douglas Eklund, *The Pictures Generation, 1974-1984* 6 (2009).

The Pictures Generation derived its name and much of its fame from a groundbreaking 1977 exhibition of works by several artists at Artists Space and a companion essay titled "Pictures" by critic Douglas Crimp. *See* Douglas Crimp, *Pictures*, 8 October 75, 75-88 (Spring 1979), *as reprinted in Art After Modernism: Rethinking Representation* 175, 185 (Brian Wallis ed., 1984). Influenced by the academic cultural criticism of the period, as well as the works of prior Appropriation Artists, the Pictures Generation sought to explore and expose the

ways in which culture and identity were constructed and subverted by mass-produced images in advertising, movies, and other elements of pop culture. Eklund, *supra*, at 17-18.

Some of these artists expanded upon prior uses of existing photography by producing works through "re-photography," or taking pictures of photographs created by others, often with limited modification. *See* Abigail Solomon-Godeau, *Photography After Art Photography*, in *Art After Modernism: Rethinking Representation* 80 (Brian Wallis ed., 1984). In 2009, a Metropolitan Museum of Art exhibition book described the Pictures movement as "the last movement in contemporary art to date." Eklund, *supra*, at 18.

In short, while evaluations of the artistic merit of individual works and artists can and do differ, Appropriation Art has a distinguished history, and its importance as a means of creative expression is widely understood and accepted.

II. THE DISTRICT COURT'S RULING ON LIABILITY THREATENS TO FRUSTRATE THE EDUCATIONAL MISSION OF MUSEUMS TO MAKE ART ACCESSIBLE TO THE PUBLIC.

The district court's broad ruling on liability threatens to frustrate the educational mission of museums to make art accessible to the public, and to undermine the purpose of the Copyright Act to stimulate creativity. Among the most disturbing aspects of the district court's decision is that it bases *direct* liability

of the art gallery on such factors as its purported "bad faith" because of the gallery's knowledge of the artist's works; likewise, the district court bases *secondary* liability on such factors as the gallery's failure to conduct what the court viewed as an adequate "inquiry" into the artist's creative process. While non-profit art museums differ from commercial art galleries in important respects, the district court's analysis threatens, at the very least, harmful confusion for art museums as they seek to perform their core mission.[2]

A. The District Court's Analysis Of Direct Liability Raises Troubling Questions For Art Museums.

Just as robust protection of intellectual property is vitally important to the copyright regime provided by statute and the Constitution, so too fair use is an essential element of that regime as well. The Supreme Court has emphasized that, "[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts . . . .'" *Campbell v.*

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[2] *Amici* believe that the district court's opinion is erroneous and troubling on many grounds, including its unfounded conclusion that the artist must articulate the way in which his or her work comments on the appropriated work, and the district court's failure to examine each work individually and evaluate the extent to which each work makes transformative use of the original photographs. Because art museums serve as custodians of art (rather than creators of art), *amici* focus in this brief on elements of the district court's decision that directly apply to those who curate art collections and present art to the public.

Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (quoting U.S. Const. art. I, sec. 8, cl. 8). The first of the four fair use factors delineated in the Copyright Act is the "purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," 17 U.S.C. § 107(1). This factor embodies the goal of stimulating creativity and is at "[t]he heart of the fair use inquiry." *Davis v. The Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001).

In a deeply troubling analysis, the district court rested its conclusion that the first fair use factor supports liability for the art gallery in this case on the gallery's perceived "bad faith," as well as on the gallery's publication of a catalogue and exhibition invitations and its display of the artworks.

The district court concluded that the Gagosian Defendants acted in bad faith because they "were aware that Prince is an habitual user of other artists' copyrighted work, without permission, and because . . . the Gagosian Defendants neither inquired into whether Prince had obtained permission to use the Photos contained in the Canal Zone Paintings nor ceased their commercial exploitation of the Paintings after receiving Cariou's cease-and-desist notice." SPA-25. Based in part on this finding of bad faith, the court concluded that the first fair use factor weighed "heavily in favor of Plaintiff," *id.*, and that defendants were "not entitled to the defense of fair use," *id.* at 31. The district court then concluded that the Gagosian Defendants violated Cariou's rights when they exhibited Prince's

paintings, published the Canal Zone exhibition catalog, created invitation cards, and sold the artwork. *Id.* at 31-32. If allowed to stand, the district court's ruling would raise the specter that museums might feel obligated to presume that all works of Appropriation Art violate the Copyright Act—and restrict their exhibitions accordingly—at least until an authoritative ruling is made regarding the application of a fair use analysis. Such a rule would place an onerous, harmful, and unwarranted burden on museums that display and own works of Appropriation Art.

This ruling contravenes established precedent and poses a serious potential threat to non-profit art museums that acquire or display Appropriation Art. As a threshold matter, it is not clear that the district court's focus on the question of bad faith itself was appropriate. This Court has discounted the importance of bad faith in the fair use analysis, stating that "a finding of bad faith is not to be weighed very heavily within the first fair use factor and cannot be made central to fair use analysis." *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 479 n.2 (2d Cir. 2004); *see also id.* at 483 (Jacobs, J., concurring) (rejecting bad faith subfactor and explaining that "[c]opyright itself would be distorted if its contours were made to depend on the morality and good behavior of secondary users"). In his seminal article on fair use, Judge Leval observed that "[n]o justification exists for adding a morality test" to the fair use analysis, which should focus only "on whether [the] creation

claiming the benefits of the doctrine is of the type that should receive those benefits." Pierre N. Leval, *Toward A Fair Use Standard*, 103 Harv. L. Rev. 1105, 1126 (1990). Copyright is "not a reward for goodness but a protection for the profits of activity that is useful to the public education." *Id.* The district court gave inappropriate weight to its determination that the gallery defendants had acted in bad faith.

More fundamentally, even if the court's focus on bad faith were appropriate, the district court made an error of law when it premised its bad faith finding on the Gagosian Defendants' failure to "inquire[] into whether Prince had obtained permission" to use Cariou's photographs. SPA-25. In *Blanch v. Koons*, this Court stated that "[w]e are aware of no controlling authority to the effect that the failure to seek permission for copying, in itself, constitutes bad faith," 467 F.3d 244, 256 (2d Cir. 2006); *see also id.* (noting that "'[i]f the use is otherwise fair, then no permission need be sought or granted'" (quoting *Campell*, 510 U.S. at 585 n.18)). Thus, Prince's failure to obtain permission for his use of the subject photographs should have been largely irrelevant to the fair use analysis. But the district court's opinion went even further, holding that the Gagosian Defendants, as gallery owners who displayed and marketed Prince's works, had acted in bad faith due to their failure to inquire whether *another party*—Prince—had obtained permission to use the photographs. SPA-25.

This expansive ruling not only lacks foundation in Second Circuit precedent; it also opens troubling new vistas of possible liability for non-profit museums and other custodians of Appropriation Art. To avoid potential liability under the district court's standard, before displaying any work in their collection, museums might first have to identify whether a given piece of art appropriates another work outside the public domain, assess whether the new artwork constitutes fair use (and perhaps secure a legal opinion to that effect), and finally determine whether permission was obtained by the artists to use the original work in the new piece. The district court's opinion thus may establish a rule that museums must presume every work of Appropriation Art is infringing by its very nature, and that they have an absolute duty to investigate each such work in their collections.[3] Yet the district court's opinion offers no guidance regarding how permission is to be verified or what type of proof of permission must be obtained. If affirmed, this rule of law would impose an onerous and unwarranted burden on art museums. This new burden would interfere with the educational mission of non-profit museums in presenting art based on an evaluation of artistic merit; it is not required or envisioned by the Copyright Act; and it often would be difficult, if not impossible,

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[3] The district court evidently employed the same sweeping presumption that Appropriation Art generally is non-transformative and violates the Copyright Act, as it refused to evaluate each of the disputed works individually.

to meet. Indeed, such a rule would fall most heavily on museums and other art custodians with large, broad collections encompassing many artists from different countries and time periods, where obtaining confirmation of the artist's activities regarding each piece may be especially difficult if not impossible.

The inherent uncertainty and enormous problems in applying the district court's fair use analysis to selected artworks, which often involves fine legal distinctions, could effectively deter museums from obtaining or displaying Appropriation Art, even though the curators' professional judgment of artistic value and educational significance would lead to a different conclusion. Such a result is contrary to the fundamental goal of the Copyright Act to stimulate creative expression and the dissemination of creative works.

Equally troubling is the district court's imposition of direct liability on the Gagosian Defendants for, among other things, exhibiting paintings, publishing the Canal Zone works in an exhibition catalog, and creating invitation cards. SPA-31 to 32. Even if expansive imposition of liability on this basis could in some circumstances be appropriate for companies that sell artworks commercially (and the record in this case presents no apparent basis for reliance on such exceptional circumstances), *amici* submit that imposition of liability on this ground plainly would not be appropriate for non-profit museums that serve important public educational functions. As this Court has noted, "[n]otwithstanding the fact that

artists are sometimes paid and museums sometimes earn money, the public exhibition of art is widely and we think properly considered to have value that benefits the broader public interest." *Blanch*, 467 F.3d at 254 (internal quotation marks omitted).

The display of art at art museums itself is transformative, and warrants fair use protection. The Fourth Circuit, for example, has held that placing an otherwise infringing logo for the Baltimore Ravens football team in the lobby of the team's corporate headquarters "in a museum-like setting" to document the history of the franchise is "consistent with the fair use display of copyrighted material in a museum." *Bouchat v. Baltimore Ravens Ltd. P'ship*, 619 F.3d 301, 314 (4th Cir. 2010). The court explained that the display of the logo "'adds something new' to its original purpose as a symbol identifying the Ravens." *Id.* The court thus determined that use of the commercial logo was protected fair use when displayed in a museum-like setting, even though use of the same logo in highlight films sold by the NFL and played during football games constituted copyright infringement. *Id.* at 317. The case for fair use is especially compelling when art museums display art selected by curators for its merit and contextualized for public educational purposes, not simply in "a museum-like setting," but in actual museums—institutions that are devoted to furthering public understanding of a wide range of genres and methods.

A non-profit museum's exhibition of art selected for its artistic significance, moreover, fits comfortably and unambiguously in the category of "nonprofit educational purposes" that are afforded explicit protection under the first fair use factor of the Copyright Act, 17 U.S.C. § 107(1). Providing educational experiences for the public is a central goal, and a daily activity, for art museums. If applied broadly, however, the district court's opinion could suggest that any institution's distribution of exhibition catalogues and invitation cards containing images of works found to be infringing, or its exhibition of works found to be infringing, might be a sufficient basis to trigger direct liability. The district court's opinion would unjustifiably interfere with socially beneficial activities by art museums. *Amici* respectfully submit that this Court should reject the district court's sweeping imposition of direct liability, and, at the very least, clarify that the district court's analysis cannot apply to the display of artworks for educational purposes by museums.

B. The District Court's Analysis Of Secondary Liability Raises Troubling Questions For Art Museums.

The district court's analysis of secondary liability is at least as troubling as its analysis of direct liability.

The district court found the Gagosian Defendants vicariously liable because they had the "right and ability to supervise Prince's work, or at the very least the

right and ability (and perhaps responsibility) to ensure that Prince obtained licenses to use the Photos" and derived financial benefit from the infringing use. SPA-33. The district court also held the Gagosian Defendants liable for contributory infringement because they knew of "Prince's reputation as an appropriation artist who rejects the constricts of copyright law, but they never inquired into the propriety of Prince's use of the Photos." *Id.* at 34. Like the ruling on direct liability, the district court's imposition of secondary liability would create serious burdens and risks for art museums and reflects an erroneous interpretation of important copyright principles.

Although "the Copyright Act does not expressly render anyone liable for infringement committed by another," *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984), it is settled that vicarious and contributory liability may lie. This Court has explained that, for vicarious liability to attach, the secondary infringer must have a "right and ability to supervise that coalesce[s] with an obvious and direct financial interest in the exploitation of copyrighted materials." *Softel, Inc. v. Dragon Med. & Scientific Commc'ns.*, 118 F.3d 955, 971 (2d Cir. 1997) (alterations omitted); *see also MGM, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). Although vicarious liability has its origins in the agency principles of *respondeat superior*, an employer-employee relationship is not required. *Gershwin Publ'g Corp. v. Columbia Artists Mgmt, Inc.*, 443 F.2d 1159,

1162 (2d Cir. 1971). Similarly, "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a contributory infringer." *Arista Records LLC v. Doe*, 604 F.3d 110, 117 (2d Cir. 2010) (alterations and quotation marks omitted). "The knowledge standard is an objective one; contributory infringement liability is imposed on persons who know or have reason to know of the direct infringement." *Id.* at 118 (alterations and quotation marks omitted).

The district court's decision on secondary liability would have serious adverse consequences if applied to non-profit art museums. Rather than commissioning works, museums generally purchase (or borrow) works for public display and thus neither have a "right and ability to supervise" the work of appropriation artists, *Softel,* 118 F.3d at 971, nor "induce[], cause[] or materially contribute[] to the infringing conduct" of an artist on any particular piece, *Arista Records*, 604 F.3d at 117 (alterations omitted). Even when museums commission particular works, they generally have limited influence over the creative process. And while non-profit museums ordinarily may receive incidental monetary benefits from displaying works of art (through the sale of admission tickets, catalogues, brochures, postcards, and other retail items), they lack the "obvious and direct financial interest in the exploitation of copyrighted materials" required for secondary liability. *Softel,* 118 F.3d at 971. Yet, by its terms, the district court's

opinion may threaten liability for any institution that has the "right and ability . . . to ensure that [an artist] obtained licenses to use" appropriated material, or that is aware of an artist's "reputation as an appropriation artist who rejects the constricts of copyright law" and fails to ensure that the artist's appropriation is permissible. SPA-33 to 34. Almost any institution that displays Appropriation Art potentially could be snared by these expansive standards.

Read broadly, the district court's ruling implies that art museums displaying Appropriation Art might be presumptively liable for vicarious or contributory infringement simply due to the nature of Appropriation Art and the reputation of its artists. Under this approach, prior to displaying any works of Appropriation Art in current or future collections or exhibitions, museums might have to conduct significant due diligence, including seeking documentation that permission was obtained, requesting indemnification from the artist, seeking expensive legal opinions, or purchasing liability insurance. Rather than judging and acquiring works on their perceived artistic merit, museums might be forced to limit their offerings if they cannot determine a work's precise legal status under the Copyright Act, particularly under the sweeping and ill-defined standard in the district court's approach. The specter of legal liability might well compromise museums' missions of preserving and promoting the arts. Correlatively, artists

aspiring to have their works displayed in museums might engage in self-censorship, further chilling artistic expression in this important contemporary movement.

Museums should not be punished for exercising their professional judgment about the merit of art. For the reasons set forth above, the district court's analysis is contrary to law and would have harmful effects. *Amici* respectfully submit that, if it finds it necessary to reach the issue, this Court should make clear that the factors emphasized by the district court in this case are not sufficient to justify secondary liability.

III. THE DISTRICT COURT'S EXTREME REMEDY WOULD DEPRIVE THE PUBLIC OF EXPOSURE TO IMPORTANT ARTISTIC WORKS.

The district court's remedy—the prompt impoundment and possible destruction of the artworks in question—is, from *amici*'s perspective, truly shocking. The district court ordered that Prince and the Gagosian Defendants, within ten days of the date of the Order:

> deliver up for impounding, destruction, or other disposition, as Plaintiff determines, all infringing copies of [Cariou's photographs], including the Paintings and unsold copies of the Canal Zone exhibition book, in their possession, custody, or control and all transparencies, plates, masters, tapes, film negatives, discs, and other articles for making such infringing copies.

SPA-37. The district court also ordered that the Defendants notify in writing current or future owners of the Paintings that they infringe and that they cannot be

lawfully displayed. *Id.* This draconian remedy transforms "copyright into an engine of suppression, in contravention of its goal to promote the progress of science and threatening to encroach on First Amendment values." David Nimmer, 4-14 Nimmer on Copyright § 14.06 (2011).

Although the Copyright Act provides for various forms of relief, including actual and statutory damages, injunctive relief, and the impoundment or destruction of infringing articles, *see* 17 U.S.C. §§ 502-505, remedies must be narrowly tailored and consistent with the goals of the Act. The Supreme Court has emphasized that injunctive relief does not automatically follow a finding of copyright infringement, and that courts have the equitable discretion to fashion appropriate remedies. *See, e.g., New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 504-05 (2001); *Campbell*, 510 U.S. at 578 n.10; *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391-94 (2006); *Salinger v. Colting*, 607 F.3d 68, 78 (2d Cir. 2010).

This Court similarly has instructed that, as a general matter, "injunctive relief should be narrowly tailored to fit specific legal violations, and . . . the court must mould each decree to the necessities of the particular case." *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 144 (2d Cir. 2011) (internal quotation marks and citations omitted). In the copyright context, this Court has further explained that a "court's authority to issue an injunction . . . should be limited in

scope to that part of the work that is protectible." *Lipton v. Nature Co.*, 71 F.3d 464, 475 (2d Cir. 1995). This approach is consistent with the legislative history of the Copyright Act, in which Congress explained that the Act's provisions governing remedies would give courts the flexibility to order "the infringing articles sold, delivered to the plaintiff, or disposed of in some other way *that would avoid needless waste and best serve the ends of justice*." H.R. Rep. No. 94-1476, at 160 (1976) (emphasis added).

Amici strongly oppose the needless destruction of art, even when a court has found copyright infringement. In the present case, less extreme remedies are readily available (if there is a conclusion of infringement at all, *see* note 2, *supra*). The district court, for example, could have explored the possibility of the parties negotiating a licensing arrangement, as contemplated by the Supreme Court in *New York Times Co. v. Tasini*. *See* 533 U.S. at 504-05 ("The parties (Authors and Publishers) may enter into an agreement allowing continued electronic reproduction of the Authors' works; they, and if necessary the courts and Congress, may draw on numerous models for distributing copyrighted works and remunerating authors for their distribution."). *Cf. TVT Records v. Island Def Jam Music Grp.*, 279 F. Supp. 2d 366, 408 (S.D.N.Y. 2003) (refusing to order the destruction of CDs containing both infringing and non-infringing songs and recognizing that the artists "obviously expended their own time and energy in

creating these works, and the impact of recall and destruction warrants some consideration insofar as it may affect them"), *rev'd on other grounds*, 412 F.3d 82 (2d Cir. 2005). A wide range of other equitable remedies also is possible. It does not appear that the district court even considered such alternatives.[4]

The district court's drastic remedy is unnecessary and would cause irreparable harm, chilling artistic expression and depriving the public of socially valuable artworks, both now and in the future. This consequence would be a great disservice to the artistic community and to the public at large.

* * * * *

Amici recognize that the artistic merit of Appropriation Art may be subject to vigorous debate and disagreement. That is as it should be. Such an exchange of views and criticism is at the core of *amici*'s mission of stimulating public reflection, discourse, and education. What should not happen, however, is for inappropriately expansive theories of direct and secondary copyright liability to cause art curators and custodians to ignore or steer clear of this important body of art. What also should not happen is for a judicial finding of infringement in a part of a work (or

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[4] The district court's ruling on remedy is excessive in other respects as well. For example, the district court applied a blanket notice-of-illegality requirement to *all* current and future owners, regardless of whether an owner is a museum or other educational institution. SPA-37.

some works) to become an automatic order wresting the artwork from public access and ordering its impoundment or destruction. Far from compelling these adverse results, sound principles of copyright law lead instead to an approach that appropriately safeguards the rights of art museums, curators, custodians, and artists, and the public interest in robust creative expression.

CONCLUSION

Amici respectfully submit that the district court's Order should be reversed.

Dated: November 2, 2011 Respectfully submitted,

By: /s/ Clifford M. Sloan

Clifford M. Sloan
Bradley A. Klein
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue N.W.
Washington, DC 20005
Phone: 202.371.7000
cliff.sloan@skadden.com

Attorneys for *Amici Curiae* The Association of Art Museum Directors, The Art Institute of Chicago, The Indianapolis Museum of Art, The Metropolitan Museum of Art, The Museum of Modern Art, Museum Associates, dba Los Angeles County Museum of Art, The New Museum, The Solomon R. Guggenheim Foundation, The Walker Art Center, and The Whitney Museum of American Art

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Dated: November 2, 2011

/s/ Clifford M. Sloan

Clifford M. Sloan
Bradley A. Klein
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue N.W.
Washington, DC 20005
Phone: 202.371.7000
cliff.sloan@skadden.com

Attorneys for Amici Curiae

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I, Natasha S. Johnson, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

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upon:

Jonathan D. Schiller
George F. Carpinello
Joshua I. Schiller
Boies, Schiller & Flexner LLP
Attorneys for Defendant-Appellant Richard Prince
575 Lexington Avenue, 7th Floor
New York, New York 10022
(212) 446-2300

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