

11-1197-CV

IN THE
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

**REPLY BRIEF OF AMICUS CURIAE THE ANDY WARHOL FOUNDATION FOR
THE VISUAL ARTS, INC. IN SUPPORT OF DEFENDANTS-APPELLANTS AND
URGING REVERSAL**

Anthony T. Falzone
Julie A. Ahrens
Daniel K. Nazer
Stanford Law School
Center for Internet and Society
559 Nathan Abbott Way
Stanford, CA 94305
(650) 736-9050

Virginia Rutledge
414 W. 145th Street
New York, NY 10031
(212) 368-2949

Zachary J. Alinder
John A. Polito
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2000

TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	2
I. The Fair Use Analysis Advanced By Cariou And His Amici Is Contrary To Controlling Law And Would Establish An Unduly Restrictive Standard	2
A. First Factor And Transformative Use	2
1. Transformative Use Is Not Limited To Overt Comment Or Criticism	3
2. Articulated Intent Is Not The Sine Qua Non Of Transformative Use	5
B. Fourth Factor And Market Effect	8
II. The Fair Use Analysis Advanced By Cariou And His Amici Will Impede Creativity Rather Than Promote It.....	9

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Bill Graham Archives v. Dorling Kindersley Ltd.</i> , 448 F.3d 605 (2d Cir. 2006)	passim
<i>Blanch v. Koons</i> , 467 F.3d 244 (2d Cir. 2006)	2, 7, 9
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994)	passim
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003)	5
<i>Golan v. Holder</i> , 132 S.Ct. 873 (2012)	10
<i>Leibovitz v. Paramount Pictures Corp.</i> , 137 F.3d 109 (2d Cir. 1998)	6
<i>Núñez v. Caribbean Int’l News Corp.</i> , 235 F.3d 18 (1st Cir. 2000)	7
<i>Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.</i> , 475 U.S. 1 (1986)	8
<i>Perfect 10, Inc. v. Amazon.com, Inc.</i> , 508 F.3d 1146 (9th Cir. 2007)	4
<i>Pleasant Grove City v. Summum</i> , 555 U.S. 460 (2009)	6
<i>Red Lion Broad. v. FCC</i> , 395 U.S. 367 (1969)	8
<i>Salinger v. Colting</i> , 607 F.3d 68 (2010)	8
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984)	4
<i>Suntrust Bank v. Houghton Mifflin Co.</i> , 268 F.3d 1257 (11th Cir. 2001)	7

STATUTES

17 U.S.C. § 107..... 8

OTHER AUTHORITIES

Hal Foster, Rosalind Krauss, Yve-Alain Bois, and
Benjamin H.D. Buchloh, *Art Since 1900: Modernism,
Antimodernism, Postmodernism* (2004)..... 6

INTRODUCTION

Amicus curiae The Andy Warhol Foundation for the Visual Arts, Inc. (“The Warhol Foundation”) submits this short reply to emphasize what is at stake here.¹ In their rush to condemn Richard Prince, Patrick Cariou and his amici Rhapsody International Inc. urge the Court to adopt a radically narrowed fair use standard that would protect little more than overt comment and criticism. If adopted, this standard would jeopardize important and well-established modes of artistic expression, raise serious First Amendment concerns, and ultimately impede far more creativity than it would promote, both in the visual arts and beyond.

The Warhol Foundation has no interest in undermining copyright or “kill[ing] the golden goose.” ASMP Br. at 4. It generates substantial revenue from the copyrights it owns and uses that revenue to help fund its non-profit mission of supporting contemporary art, including the work of many photographers. The Warhol Foundation’s interest in this case is the same as that of the public at large: a balanced copyright system that recognizes the

¹ Counsel for Defendants-Appellants consented to the filing of this brief; counsel for Plaintiff-Appellee did not. No party’s counsel authored this brief in whole or in part, and no party or its counsel contributed money that was intended to fund preparing or submitting this brief. Nor did any other person (besides the Warhol Foundation or its counsel) contribute money that was intended to fund preparing or submitting this brief.

need to provide strong economic incentives and the need to provide plenty of breathing room for artists who use existing images to create new art.

ARGUMENT

I. The Fair Use Analysis Advanced By Cariou And His Amici Is Contrary To Controlling Law And Would Establish An Unduly Restrictive Standard

A. First Factor And Transformative Use

Whether a work is transformative or not depends on whether it “supersedes the objects of the original . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning *or* message.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (emphasis added). The test is disjunctive and the fundamental question is simple: Does Prince’s work contain new expression, new meaning, or a new message that is “separate and distinct” from Cariou’s? *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 610 (2d Cir. 2006); *see also Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006).

Here, the answer is plainly yes. A simple comparison of Cariou’s “classic” portraiture (A-1550 at 187:8-15) and the “post-apocalyptic” (A-747 at ¶ 16; A-750 at ¶ 22) world in which Prince has placed the Rasta make it evident that Prince has changed the expressive content of Cariou’s work

and added substantial new expression through his composition, presentation, juxtaposition, alteration, exaggeration of scale, and application of color and dramatic brushwork. This alone satisfies *Campbell*. Insofar as new meaning or a new message is also required, it may be inferred by the same comparison. The dramatic contrast in expression creates an equally dramatic contrast in message and meaning. There is simply no escaping the fact that Prince's work is dramatically different than Cariou's in expression, meaning and message.

That is why Cariou and his amici struggle to avoid any comparison of the expression, meaning or message of Prince's work with Cariou's. Instead, they urge the Court to make two radical departures from existing law.

1. Transformative Use Is Not Limited To Overt Comment Or Criticism

First, Cariou urges the Court to restrict transformative meaning to comment and criticism. *See* Cariou Br. at 53-55 (contending Prince had no "justification" for using Cariou's photographs because those photographs were not the "subject" of Prince's work and because Prince was "not commenting on Cariou's photographs"); *see also* ASMP Br. at 12 (arguing that transformation is limited to works that "criticize a quoted work, expose the character of the original author, prove a fact, or summarize an idea from the original work in order to defend or rebut that idea").

That limitation has been expressly rejected by this Court and others. *See, e.g., Bill Graham*, 448 F.3d at 609 (rejecting appellant’s “limited interpretation” of transformative use that demanded “comment or criticism related to the artistic nature of the [original] image”); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); Google Br. at 4-9.² That is because rigid limitations like the one Cariou proposes are contrary to the flexibility that defines fair use. *See Campbell*, 510 U.S. at 577 (fair use analysis “is not to be simplified with bright-line rules”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 n.31 (1984) (fair use doctrine is an “equitable rule of reason” and “the courts must be free to adapt the doctrine to particular situations on a case-by-case basis”) (quoting H.R. Rep. No. 94-1476, at 65-66 (1976)). There are many uses beyond commentary or criticism that deliver new meaning and expression and provide important “social benefit[s]” that equal or exceed those provided by parody or direct commentary. *Campbell*, 510 U.S. at 579; *see Perfect 10* at 1165 (use of images is transformative where they are used “in a new context

² Cariou himself abandons this limitation by conceding fair use would protect a museum’s right to display Prince’s work for “non-profit educational purposes.” *See Cariou Br.* at 76. If fair use protects the museum but not Prince or Gagosian, then commercial purpose would seem to be dispositive, but that is not the law either. *See Campbell*, 510 U.S. at 584-85 (holding it was error to give “virtually dispositive weight” to commercial nature of the use).

to serve a different purpose”). It is the flexibility of fair use that makes it an effective First Amendment safeguard, *see Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003), and enables it to prevent copyright from stifling the creativity it is supposed to encourage. *Campbell*, 510 U.S. at 577. If fair use is to fulfill those purposes, it must remain flexible enough to recognize all forms of creativity and new meaning, not just a few narrow categories.

Whether or not Prince’s work says anything about Cariou’s photographs or the genre of documentary photography, it is highly expressive and conveys loads of new meaning. The fact that meaning is difficult to verbalize, label, categorize or explain does not mean Prince’s work is not transformative. It simply reflects the fact that the meaning of *visual art* does not always translate neatly into *written words*.

2. Articulated Intent Is Not The Sine Qua Non Of Transformative Use

Second, Cariou and his amici contend the meaning of Prince’s work should be determined solely by the artistic intent Prince articulated, without reference to Prince’s work itself. *See Cariou Br.* at 44-56; *ASMP Br.* at 13-17. But it is folly to pretend the meaning of art can be defined by the intentions of the artist alone. Meaning is a function of the work itself, and the viewer’s reaction to it:

[N]othing inside the author—his or her intentions or feelings—is now believed to serve as a guarantee of the work’s meaning; rather, that meaning is dependent on the interchange that occurs in the public space of the work’s connection to its viewers.

Hal Foster, Rosalind Krauss, Yve-Alain Bois, and Benjamin H.D. Buchloh, *Art Since 1900: Modernism, Antimodernism, Postmodernism* 494 (2004); accord *Pleasant Grove City v. Summum*, 555 U.S. 460, 476 (2009).

Nor is there any legal basis to ignore the radically different “expression, meaning [and] message” that is evident on the face of Prince’s work. *Campbell*, 510 U.S. at 579. Courts routinely assess transformative meaning based on the content of the defendant’s work, and the perceptions of an ordinary observer. In *Campbell*, the Supreme Court asked whether parody “may reasonably be perceived” from the defendant’s work. *Id.* at 582. It found parody based on the content of that work and without reference to the subjective intentions of the defendants, or any testimony about the work from defendants or anyone else. *Id.* at 581-82.

Cariou’s amici try to dismiss *Campbell*’s objective approach by suggesting that testimony about intent is always essential, and transformation cannot be based on perception alone. See ASMP Br. at 15. Yet case after case from this court and others finds transformation based on perception alone. See, e.g., *Bill Graham*, 448 F.3d at 609-10 (transformative use was “readily apparent” on the face of defendant’s book); *Leibovitz v.*

Paramount Pictures Corp., 137 F.3d 109, 114-15 (2d Cir. 1998) (assessing transformation based on the contents of defendant’s photograph); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269-71 (11th Cir. 2001) (novel’s text demonstrated it was transformative); *Núñez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 21-23 (1st Cir. 2000) (content of defendant’s newspaper showed its use of modeling photograph was transformative).

The Warhol Foundation is not suggesting the Court should ignore Prince’s testimony, or that his intentions are irrelevant.³ An artist’s stated purpose and intentions may help identify transformative meaning. *See Blanch*, 467 F.3d at 255. But this Court has already explained those intentions are not the sine qua non. *See id.* at 255 n.5. Transformative meaning may also be established on the face of a defendant’s work, and the perceptions of an ordinary observer. That does not require expert testimony or survey evidence. It just requires the Court to ask the same question *Campbell* asked: is new expression or meaning reasonably perceived from the defendant’s work?

³ Indeed, Prince’s testimony confirms his intention to create new expression, and new meaning, using Cariou’s photographs. He explained that Cariou’s images were one part of “a recipe of ingredients” he used to create the Canal Zone series. (A-1181 at 30:6-7) He attempted to turn Cariou’s images into “something that’s completely different” (A-1258 at 338:4-8) by creating works that both depict the post-apocalyptic world Prince imagined (A-747, A-750) and evoke the work of other artists like Picasso, De Kooning and Cezanne. (A-1215 at 166-67)

B. Fourth Factor And Market Effect

Assessing “the effect of the use upon the potential market for or value of the copyrighted work” (17 U.S.C. § 107(4)) requires the Court to “balanc[e] . . . the benefit the public will derive if the use is permitted” versus “the personal gain the copyright owner will receive if the use is denied.” *Bill Graham*, 448 F.3d at 613. Cariou and his amici ignore the public interest altogether, despite the recognized importance of the public’s First Amendment interest in receiving artistic expression. *See Salinger v. Colting*, 607 F.3d 68, 82 (2010) (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 8 (1986)); *see also Red Lion Broad. v. FCC*, 395 U.S. 367, 390 (1969) (recognizing “the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas”).

While the public benefits of permitting the expressive artistic use of visual images in new works of art are obvious and substantial, the impact on the market for Cariou’s work is speculative. Cariou contends he lost an opportunity to exhibit his *Yes, Rasta* photographs at Christiane Celle’s gallery in 2008. *See Cariou Br.* at 38-40. Even if that is so, there is no evidence that affected the value of his work, or the market for selling it. There is no evidence that Cariou ever sold prints of his work to the public, and even if he chose to start doing so tomorrow, there is no evidence the

value of his prints was diminished as a result of Prince's work. *See Blanch*, 467 F.3d at 258.

Although Cariou insists that Prince's use is a derivative market he should be entitled to control, that begs the question. Not all derivative markets are reserved to copyright owners. *Campbell*, 510 U.S. at 592-93; *Bill Graham*, 448 F.3d at 614-15. Prince's use of Cariou's photographs to create highly expressive works of art falls squarely within a "transformative market" that copyright owners like Cariou are not permitted to control via licensing. *Bill Graham*, 448 F.3d at 615. That is especially so given the risk of censorship where a copyright owner happens not to like a defendant's work, and refuses to license at any price.

II. The Fair Use Analysis Advanced By Cariou And His Amici Will Impede Creativity Rather Than Promote It

Cariou's amici invoke the Constitution, and suggest that permitting expressive artistic uses like this one will result in less creativity by jeopardizing the incentive for Cariou and others like him to create new photographs in the first place. *See ASMP Br.* at 20-21. But there is no support for that suggestion, and there is every reason to believe that permitting uses like this one will maximize net creativity.

First, no evidence suggests that Cariou's decision to create, collect, and distribute his photographs would be influenced by the bare possibility that another artist might happen upon his book years later and license those images to create other works of art. That possibility is simply too remote to have any plausible effect on the decision of Cariou (or anyone else) to create or not create.

Second, focusing on the marginal reduction in Cariou's economic incentive misses the point. Even if the magnitude of the incentive is decreased, it may remain more than sufficient to induce the creation of new photographs by Cariou and others. The question is not whether permitting expressive artistic uses like this one might reduce the incentive to create photographs, it is whether the reduction is likely to be so substantial as to render the incentive insufficient to induce the creation it is supposed to stimulate. Here, there is no reason to believe that is so. Cariou's core incentives to create his portraiture remain intact. No evidence suggests that Prince's work affected the sales of Cariou's book, or even reduced the value of individual prints, should Cariou decide to sell them one day.

The purpose of copyright is to promote the creation and dissemination of original expression. *See, e.g., Golan v. Holder*, 132 S.Ct. 873, 888-89 (2012). While it is understandable that Cariou would like a cut of the

substantial revenue generated by Prince's work, there is no reason to conclude that giving artists in his position exclusive control over expressive artistic uses like Prince's will promote the creation or dissemination of anything new. It will only restrict the creativity of those who use existing visual images to create new expression, and stop them from sharing their imagination. That would be a step backward for copyright, creativity and free expression.

DATED: February 22, 2012

/s/ Anthony T. Falzone
Anthony T. Falzone
Julie A. Ahrens
Daniel K. Nazer
Stanford Law School
Center for Internet and Society
559 Nathan Abbott Way
Stanford, CA 94305
(650) 736-9050

Virginia Rutledge
414 W. 145th Street
New York, NY 10031
(212) 368-2949

Zachary J. Alinder
John A. Polito
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2000

*Attorneys for Amicus Curiae
The Andy Warhol Foundation
for the Visual Arts, Inc.*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the typeface requirements of Rule 32(a)(5)(A), because it is written in 14-pt Times New Roman font, and with the type-volume limitations of Rule 32(a)(7)(B), because it contains 2,402 words, excluding the portions excluded under Rule 32(a)(7)(A)(iii). This count is based on the word-count feature of Microsoft Word.

DATED: February 22, 2012

/s/ Anthony T. Falzone

Anthony T. Falzone

Julie A. Ahrens

Daniel K. Nazer

Stanford Law School

Center for Internet and Society

559 Nathan Abbott Way

Stanford, CA 94305

(650) 736-9050

Virginia Rutledge

414 W. 145th Street

New York, NY 10031

(212) 368-2949

Zachary J. Alinder

John A. Polito

Bingham McCutchen LLP

Three Embarcadero Center

San Francisco, CA 94111

(415) 393-2000

*Attorneys for Amicus Curiae
The Andy Warhol Foundation
for the Visual Arts, Inc.*