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Creative Destruction in *Cariou v. Prince*

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When portrait photographer Patrick Cariou saw that his original photos of Jamaican Rastafarians had been used by renowned appropriation artist Richard Prince in a collage series called “Canal Zone”—sales of which grossed Prince close to \$11 million—Cariou sued for copyright infringement in the Southern District of New York. The decision was held in Cariou’s favor and was blasted by commentators as “frightening,” “[k]afkaesque,” and “untenable.” Much of that criticism wasn’t aimed at the court’s rejection of appropriation as fair use, but rather at its authorized remedy: to “deliver up for impounding, destruction, or other disposition, as Plaintiff determines,” all unsold works from the “Canal Zone” series. The legal status of appropriation art in the Second Circuit has long been a matter of some ambiguity. The Second Circuit subsequently reversed and remanded the majority decision, and in the process unleashed a revised, but largely formless fair use standard: whether the reasonable observer can detect new meaning in the work in question. The public furor surrounding the district court’s remedy may partially explain why the Second Circuit took special pains to clarify that the court-ordered destruction of Richard Prince’s art would be “improper and against the public interest.” But the truth of that statement isn’t exactly self-evident.

The aftermath of the Prince case demonstrates how court-ordered destruction might instead advance the public interest by serving as a creative catalyst and encouraging even more copyright infringement or, depending on the eye of the reasonable observer, more art. The Southern District’s order in Prince encouraged the production and distribution of physical and digital copies of Prince’s work, both by members of artistic communities in protest over what they perceived to be a culturally illiterate judiciary and by the legal community in preparation for counsel to art world clients on the outer limits of fair use. It also inspired other artists to build on Prince’s appropriation and create new art in both physical and digital media.

During depositions, Prince had complained that prior to Cariou’s suit “not one review, in any magazine” had been written about “Canal Zone.” After the district court order, however, publicity of “Canal Zone” exploded. Art websites posted jpegs of Prince’s paintings and Cariou’s photos side-by-side, usually accompanying editorials in favor of one of the artists. Newspapers ran stories of the Prince verdict, including images of the forbidden paintings condemned to destruction. An artist released a book consisting of the parties’ trial submissions, including reproductions of the entire “Canal Zone” series, and offered it for sale on Amazon.com for \$17.99. An Italian art school created two open-source Tumblrs, titled “After Prince” and “After Cariou,” displaying animated GIFs based on Cariou’s and Prince’s works, urging contributors to visit the artists’ websites, download an image, animate it, and

submit it for automatic inclusion. Hundreds of submissions followed. Meanwhile, lawyers and law students previously unfamiliar with either Prince's or Cariou's works scrutinized the elusive line between fair use and infringement. In short, the order to destroy the "Canal Zone" paintings inspired their even wider dissemination to an audience who had shown little interest in them beforehand.

Given Prince's particular fame as a leading exponent of the appropriation art movement, it is possible that a similarly perverse outcome would not take place in the case of a lesser-known artist. After all, much of the attention given to the suit no doubt stemmed from the fact that a relatively unknown photographer had taken on a wildly successful contemporary artist whose name would be instantly recognizable to media consumers. On the other hand, it is also plausible that the root of public attention came not from the artists involved, but instead from the use of a remedy so draconian as to provoke comparisons by the Second Circuit panel with the Huns and the Taliban. In that sense, even lesser-known artists could benefit from the exponentially increased audience associated with an order of destruction. Destruction, by definition, also rarifies the destroyed work or the series it comes from; it means that one less copy or one less piece of the series exists. That restricted supply is in turn likely to increase both demand for and market value of whatever remnants of the work or series remain. That's an odd result for a copyright system whose remedies are intended to cure economic injuries.

Perhaps Cariou's true motivation in seeking injunctive relief was to simply erase from existence a work that he personally disliked, which was made by an artist who had offended him. In interviews after the trial, Cariou accused Prince of exhibiting "arrogance, an overwhelming sense of power, and plain laziness," in the creation of "a racist piece of art" and openly pondered the possibility of destruction according to his whim: "[d]estroying art if you don't like it, that's something you have to think extremely deeply about. We'll see."

Such an aim, of course, falls outside of copyright's presumably economic-based incentive scheme. But more to the point, court-ordered destruction misses the mark. The litigation and accompanying order in Prince fueled even wider dissemination of reproductions of "Canal Zone." In fact, the destruction order seemed to grant Prince's paintings a perverse prominence. In the art community, Prince's works were martyred as victims of an unjust copyright regime. The art students who designed the "After Prince" and "After Cariou" Tumblrs in response to the destruction order expressed a direct and certain view of the law: upon placing a mouse cursor on either of the websites, the words "FUCK COPYRIGHT," in capital letters and bold, purple font, circle perpetually. Meanwhile, in the legal community, the images have become the marker of fair use's ephemeral boundaries, likely to be reproduced and redistributed in inter-office memos, law reviews, and case reporters. The increased visibility took place even without actual destruction: it was the order's mere threat alone that motivated the media's coverage. After being remanded by the Second Circuit, whatever legal disposition results for the Prince works, "Canal Zone" images are sure to survive as signifiers of the thinnest of lines separating infringement from fair use, one that was responsible for remaking the Second Circuit's formulation of the doctrine itself.

In its zeal to save the Prince paintings from physical destruction above all else, the Second Circuit panel failed to adequately examine the actual effects of court-ordered destruction. It also neglected an opportunity to rationally defend against destruction of works in future fair use cases. Instead, it held in the most minimal of fashions that the destruction of Prince's artwork alone would be against the public interest. Emerging artists, whose works have yet to collect the accolades and vigorous defenders Prince enjoys, remain vulnerable to a fair use standard that, more than ever, depends on the eye of the beholding judge. But artists and their defenders should take note: if the trajectory of the Prince case is a reliable indication of future trends, court-ordered destruction of art may actually be a surprisingly effective way to ensure its survival.

For a more in-depth discussion of the interaction between court-ordered destruction of art and artistic production, see "The Destructive Impulse of Fair Use after Cariou v. Prince," forthcoming in the DePaul Journal of Art, Technology & Intellectual Property Law.