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Andrea Sobolewski

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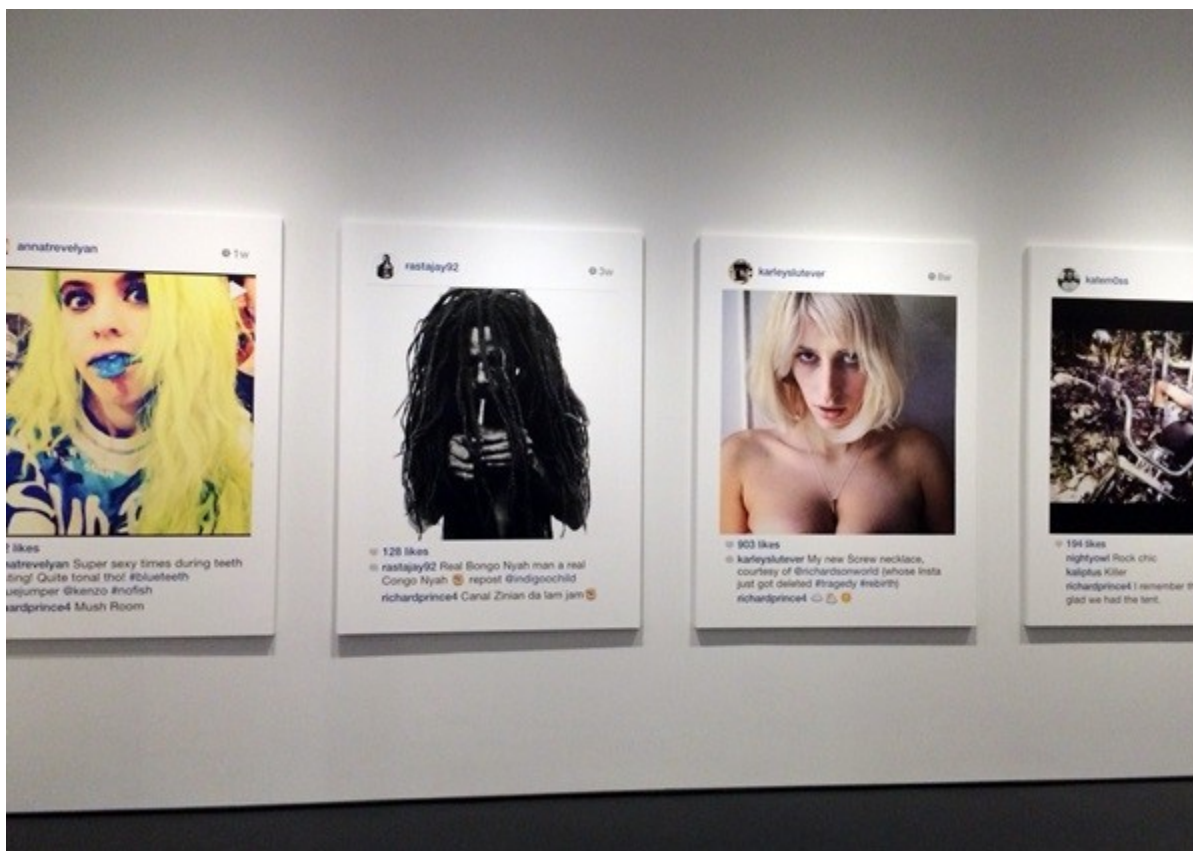
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Richard Prince Finds Himself in Another Lawsuit

BY [ANDREA SOBOLEWSKI](#) / ON FEBRUARY 9, 2016

Appropriation is commonplace in today's art world. But what happens when the appropriator appropriates too much? Richard Prince has made a name for himself as a well-known appropriation artist. Naturally the use of a copyrighted image without permission of the copyright owner leads to disputes, and Prince's art has once again created controversy.

Photographer Donald Graham filed a complaint on December 30th against the Gagosian Gallery, Larry Gagosian, and Richard Prince alleging unauthorized use of his image, *Rastafarian Smoking a Joint*. [1] The dispute arises out of Prince's use of the image in his 2014 show, "New Portraits." [2]



Installation view of Richard Prince, "New Portraits," at the Gagosian Gallery. Photo: Paddy Johnson

Image available at: <https://news.artnet.com/market/donald-graham-sues-gagosian-richard-prince-401498>

Prince used Graham's black-and-white photograph of a Rastafarian man lighting a marijuana cigarette (subject of the lawsuit), along with several other images that had been taken from

Instagram posts.[3] Prince enlarged the images and added commentary under his own Instagram username.[4] Below Graham's image Prince added the text, "Canal Zinian da lam jam." [5] The pieces from "New Portraits" sold for up to \$100,000 per photo at Frieze Art Fair New York.[6]

Graham's complaint alleges that the infringing work included a reproduction of Graham's copyrighted photograph with only trivial modifications. The foremost modification was a "minor cropping of the bottom and top portions" of the image, which left most of the image "fully intact," and "framing the Copyrighted Photograph with elements of the Instagram graphic user interface" including a line of text above the photograph with a "thumbnail" image and the username of the Instagram account holder.[7] Additionally, the complaint alleges that the dimensions were virtually the same. Graham has a limited edition print available at 4 ft. by 5 ft., while Prince's piece is 4 ft. $\frac{3}{4}$ inches by 5 ft. $\frac{3}{4}$ inches.[8]



The copyrighted photograph by Donald Graham, "Rastafarian Smoking a Joint."
Image available at: <https://news.artnet.com/market/donald-graham-sues-gagosian-richard-prince-401498>

Those familiar with Richard Prince might recall his 2013 dispute with Patrick Cariou over Cariou's *Yes, Rasta* photographs, which Prince altered and rearranged for his Canal Zone collage.[9] Canal Zone comprised 35 photographs from *Yes, Rasta*, torn and pasted on a wooden board.[10] Prince used color to paint over the black-and-white photographs, added elements such as guitars, and his works were significantly larger than Cariou's.[11] The Second Circuit held that Prince's appropriation of the Cariou photographs constituted fair use, focusing on the "purpose and character" factor under § 107 of the Copyright Act (17 U.S.C. §107).[12] This factor is also known as the "transformative" test. The Second Circuit found as a matter of law that 25 of Prince's works were "clearly transformative" contrasting Prince's "crude and jarring" images with Cariou's "'serene' photographs of 'natural beauty'".[13]

Prince will likely have a more difficult time establishing fair use than he did in the Cariou lawsuit. To start, Prince's lawyers will have to make some creative arguments in order to prove that Prince's use of Graham's photograph satisfies the transformative test under the Copyright Act. Even the average gallery show attendee could see that the differences between Prince's work and Graham's are minimal. At least with the Cariou photographs, Prince added new elements and tore the photographs into pieces. But here, it appears that Prince just reprinted a copyrighted work.

The other factors used by courts in fair use analysis include the nature of the copyrighted work, the amount and substantiality of the amount taken, and the effect of the use upon the potential market. The Cariou court determined that Prince's work did not affect Cariou's market because the two had very different audiences.[14] The court stated that where Prince's works sold in the millions, Cariou did not "aggressively" market his work and only sold four prints to individuals he knew.[15] Graham on the other hand, is arguably more renowned than Cariou. Graham's photographs have been exhibited at the Metropolitan Museum of Art, and his work has appeared in *Vogue* and other publications.[16] Thus Prince's work may have a greater effect on Graham's market. Without delving into deeper fair use analysis, failure to meet the transformative and market effect factors already does not bode well for Prince.

Graham's lawsuit could be the tip of the iceberg as the other artists whose images Prince used in "New Portraits" may come forward and file similar lawsuits. Finally, what role, if any, does Instagram play in all of this? And will this lawsuit deter Prince from future appropriations of this nature? Whatever the result, this case is sure to be closely monitored by both copyright experts and appropriation artists.[17]

Andrea Sobolewski is a second-year law student at Benjamin N. Cardozo School of Law and a Staff Editor of the Cardozo Arts & Entertainment Law Journal. She is an executive board member of Cardozo's Art Law Society and is pursuing a career in art law.

[1] Eileen Kinsella, *Outraged Photographer Sues Gagosian Gallery and Richard Prince for Copyright Infringement*, Artnet (Jan. 4, 2016), <https://news.artnet.com/market/donald-graham-sues-gagosian-richard-prince-401498>.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Richard Prince And Larry Gagosian Sued In New Plagiarism Case*, Artlyst (Jan. 4, 2016), <http://www.artlyst.com/articles/richard-prince-and-larry-gagosian-sued-in-new-plagiarism-case>.

[6] Michael Epstein, *At Least One Photographer Has Sued Instagram Artist Richard Prince for Stealing a Photo*, Flavorwire (Jan. 4, 2016), <http://flavorwire.com/554204/at-least-one-photographer-has-sued-instagram-artist-richard-prince-for-stealing-a-photo>.

[7] Kinsella, *supra* note 1.

[8] Laura Gilbert, *LA Photographer takes on Richard Prince in new lawsuit*, The Art Newspaper (Jan. 4, 2016), <http://theartnewspaper.com/news/la-photographer-takes-on-richard-prince-in-new-lawsuit/>.

[9] *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

[10] Nicholas O'Donnell, *No Infringement in Cariou v. Prince — Second Circuit Plays Art Critic and Finds Fair Use*, Art Law Report (Apr. 25, 2013), <http://www.artlawreport.com/2013/04/25/no-infringement-in-cariou-v-prince-second-circuit-plays-critic-and-finds-fair-use/>.

[11] Gilbert, *supra* note 8.

[12] Nicholas O'Donnell, *Here We Go Again? Richard Prince Sued By Photographer Over Images of Rastafarian in Instagram Show*, Art Law Report (Jan. 4, 2016), <http://www.artlawreport.com>.

[13] *Cariou v. Prince*, 714 F.3d at 706.

[14] Gilbert, *supra* note 8.

[15] *Id.*

[16] *Id.*

[17] See Brian Boucher, *Why Experts Say the Latest Copyright Lawsuit Against Richard Prince Matters*, Artnet (Jan. 5, 2016), <https://news.artnet.com/art-world/richard-prince-lawsuit-expert-opinions-402173>.