

Fair Use/Fair Game: Intellectual Property and the Visual Arts [Session]

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Untangling the Law & Ethics of Appropriation

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I would like to use my presentation to take a different perspective on image use and appropriation. We've talked a lot about copyright that is essentially the power the image creators have over image users. But there is also a power that flows in the opposite direction, the power that image users have by taking an image, any image and reinterpreting, transforming, or recontextualizing it, in doing so they participate in a new power dynamic between the image user and both the image creator and the subject of the image.

It's the resonance of images can make them especially powerful. The ethical implications of the power of the image user are not always directly connected to the law. Nor should it necessarily be bound with the law. Appropriation art and other forms of image use are a kind of speech, and we should defend the legality of appropriation that may be morally repellent. But when appropriation cases play out in courtroom as well as in the court of public opinion the feeling of moral opprobrium can supplant the actual legality of the image use.

This ethical judgment and the legal case can become entangled in the minds of casual observers. The idea that my use is ethical and thus must be legal or their use is unethical and must be illegal is a deleterious consequence of this confusion and represents a major gap in image users' visual literacy. Constructing a fair use analysis and an understanding of ethical issues of image use are two separate skills. But both are necessarily for image users to understand the breadth of implications that appropriation can have.

I want to start with the infamous case of Koons v. Rogers. Although it has been superseded in terms of fair use case law, it still retains an interesting interplay between the law and ethics. Koons took Rogers postcard, sent it to his workshop to have it created, and placed it in his Banality Show. Rogers sued and won. I'd like to set aside the legal results of this case and try to tease out the many ethical complications of Koons's work

Koons essentially selects the image as readymade, and through his artistic genius but not his own craftsmanship, transforms the work and holds it up as the poster child for banality & kitsch. At issue is satire & parody. Koons's use of a relative unknown image to satire the banality of society changes the nature of the parody. In the court case, Koons was faulted for

not commenting on the image itself. That is the picture wasn't really the target of his satire. And this dichotomy forms the basis of two types of parody. The first is target parody, where the work being appropriated is the target of that parody. Example: Forsythe and Barbie. The work being appropriated here is already iconic, integrated in our culture, and part of the public discourse

The other is weapon parody, where the work being appropriated is instead, simply representative or typical of some greater idea which the artist is intending to satirize. In weapon parody, the appropriated work is often relatively unknown and not necessarily recognizable to the audience. The original work then is introduced against the will of the creator into the public discourse on the terms of the appropriator. The image is compelled to become part of a larger conversation that its creator or subjects may not want. Indeed the Koons sculpture was placed in exhibition titled "Banality Show" stated would be critical commentary on conspicuous consumption, greed, and self-indulgence." It can certainly be seen as exploitative for this particular image, no matter how kitsch to be held up for ridicule and presented as the one object chosen to symbolize some societal ill. It could certainly be painful or upsetting to the creator or the subject of such images.

Embedded in the ethical implications of parody was the relative fame of the artists or the works of art. But this essentially socio-economic differential has broader implications on our moral reaction to appropriation. When art students think of appropriation, they often think of their own right to appropriate, to lampoon the famous, rich, or powerful. But it is quite different when it is your work which is appropriated, and then sold for millions by Jeff Koons or Richard Prince without attribution. The use of one's art as the raw material for the major artist often triggers outrage and anger. This outrage can stem from the "emotional urge to be recognized as the creator or to protect a creation from perceived disfigurement." It's an intimate, emotional involvement between an artists and his or her creation

Well-known artists are not immune to their work, or at least the copyrightable idea behind their work being appropriated for purposes they do not approve. Often Advertising makes use of artists' works. Examples: Gillian Wearing & Spencer Turk.

Implicit in the appropriation that Koons carries out is the idea that painting and sculpture or whatever it is that Koons is doing is an interpretative step beyond photography. This is a repeated pattern of appropriation which follows and may partially construct a hierarchy of media. It seems not coincidental that almost all cases of lawsuits brought against artists for copyright infringement have been levelled by photographers. There are many other examples; Warhol & Caulfield, Prince & Cariou, Fairey & Rauschenberg & Beebe

This hierarchy in which some fine arts are more fine than others, lets us classify photography as a document, a simple and faithful representation of the world without additional meaning imbued by its creator. In this problematic construction, photography is the base upon which artists start and the raw material which they elevate into works of high art. Appropriation reinforces this hierarchy, and in a vicious cycle, the hierarchy is the lens with which we view photography that justifies this appropriation. Photographers become upset because artists "think it's *just* a photograph" without considering that there is a person behind the photograph,

as Morris writes, "just as there is a person behind a painting." That a photograph is never a neutral artifact; there are always visual choices and efforts that go into crafting just the right image. Photographers seeing their work used without attribution triggers a sense of theft and moral outrage. Many of the photographers here discovered the appropriation of their work in the pages of time magazines in glowing articles about the artists who used their work. And then to have their work denigrated as without the deep meaning imbued by the artist.

This tendency of the dissociation of photos from their authors has only been exacerbated by the web, where images without attribution run rampant. Illustrator Lisa Congdon's use of reference images got her in hot water in the blogosphere, where the entry comparing her images to their sources got over 500 comments. Regardless of her fair use case, the condemnation on the web was swift and fierce. Tools like Google images make it easy to never even see the original context of an image on the web. This makes it difficult for artists to self-evaluate their use of photography and when a reference becomes unacceptable copying.

If anything then, Digital Art is even more vulnerable to challenges of inappropriate appropriation. Because Digital Art so closely mirrors the mass media it appropriates. The handcrafted quality of traditional art appropriation: collage, printmaking builds in transformation, while there is no such change of medium in digital art. Examples: Christian Marclay & Cory Archangel. Video games, movies, and music have all been the basis of digital art projects. Hacked video games, movies spliced together, musical remixes all are staples of digital art. Are digital artists contributing to a new digital hierarchy? The question to which they give rise is: are the appropriated works, since they are generally meant for popular consumption, less artful? But now appropriation has begun to move the other way. When more famous artist, in these cases musicians, are using digital arts in their performances.

As we have seen there are many power dynamics at play in appropriation. When that differential reflects race and gender, appropriation treads into extremely fraught ethical territory. In an image like Richard Prince's there are several layers. There is the power differential between Prince and the photographer, Patrick Cariou, and between Cariou and the subject of the picture. Indeed, it is the man in the image who has the least agency or say over how his image is used. Both Prince's and Cariou's images can be seen in part as a kind of ethnographic photograph:

The "ethnographic" photograph is perhaps the paradigmatic appropriative object, born ... of an aggressive technology in contexts of political and cultural domination. Such photographs present a fixed point, literally, figurally, and metaphorically, of dispossession and appropriation. They render the bodies of the powerless through the intellectual and ideological categories of the powerful in relation to a series of dynamic axes—race, gender, subjugation, and their social classifications.

When you appropriate images of "the other" or of those who do not or cannot consent to your use of their image, as the subject of new work, what are your ethical obligations? The multiple levels of appropriation complicate the ethical implications. When Richard Prince adds guitars and bug eyes to images of Rastafarian, what are the racial implications? It is unclear if he

commenting on the original photographer's use of Jamaicans as object, or if he is doing this himself. Is it an example of minstrelism, or a satiric send-up of the same?

Power dynamics between creators also affect the way images are appropriated -- we've already seen these dynamics in terms of medium or fame. Even more problematic are power differentials created by race or gender. Andy Warhol's and his supporters' defense of using of Patricia Caulfield's image marks a particularly ugly episode of sexism in appropriation. "Warhol had found the original photo in a women's magazine; it had won second prize in a contest for the best snapshot taken by a housewife." Warhol "was very innocent of doing a disservice to this photographer because this is not what you might call a 'remarkable photograph.' It was not an earthshaking photograph, but Warhol made a remarkable series of painting out of it." When she was in fact executive editor of *Modern Photography*, the picture appeared on the cover. In these cases we can see clearly the power that the image user can have over the image creator or the subject of the image. In these cases it is all the more clear because the dynamic falls along the well-trod axes of race, gender, or socio-economic status.

I want to end by saying there is no right answer to some of these questions I've raised. Nor do I think that they necessitate legal changes —the use of images has more implications than can or necessarily should be covered under the law. Indeed in many of these cases, I would strongly defend an artist's right to appropriate, while condemning their content. Creative freedom is essential, even freedom for the art we hate. I contend we must teach image users to recognize and understand the ethical issues and that result from appropriation. To strive to be more conscientious and thoughtful but also daring and innovative image users and creators.