

**FAIR USE in Transformation:
Is the Art a New Enough Message?**

At its most basic, copyright law is economic public policy. It incents creation by rewarding creators with exclusive rights to their works and by protecting public interest in access to and fair use of prior works to create new works.

In application, copyright addresses, what has been called, “the inevitable tension between the property rights it establishes in creative works...and the ability of authors, artists, and the rest of us to express them – or ourselves by reference to the works of others.” In theory, the fair use doctrine balances these sets of interests, determining when a later creator can use prior work to introduce new ideas and expression without authorization from the owner of the original. Lofty policy underpinnings notwithstanding, fair use has neither a generally accepted definition nor a bright-line to aid a would-be later creator; every case must be decided on its own facts. And, though ruled as the “most troublesome [issue] in the whole of copyright law,” fair use is invoked in cases involving all manner of art, literature, music and media.

The Copyright Act and volumes of judge-made precedent provide some guidance. The Act provides examples of uses that are not an infringement: criticism, commentary, news reporting, teaching, scholarship, research. It recites factors to explore:

1. *The purpose and character of the use, whether it is commercial or for nonprofit educational purposes, and whether the use is “transformative” in that it comments on the prior work and adds new expression, meaning or message*
2. *The nature of the prior work, whether it is creative expression or factual, whether it is published or unpublished,*
3. *Whether the amount and substance of appropriation are reasonable given its purpose*
4. *Whether the new work is a market substitute for the prior work*

When the Supreme Court considered whether 2 Live Crew’s sampling of Roy Orbison’s *Oh, Pretty Woman* was fair use in *Campbell v. Acuff-Rose*, it found the hip-hop version added something new and valuable in the form of parody, comment and criticism, and placed new emphasis on transformation.

Emblematic of transformation’s ascendancy as the all-but determinative factor are the legal travails of artist Jeff

Koons, unabashed borrower of copyrighted works; after twice unsuccessfully asserting fair use, in his third foray, *Blanch v. Koons*, Koons prevailed by showing that his use of the photograph at issue in a collage was a parody that commented on mass media and was used with a transformative purpose.



Blanch v. Koons

Since the 1970’s the popularity of appropriation art has sky-rocketed. In 2007, appropriation artist Richard Prince showed collages at a gallery in New York. Eight works sold for in excess of \$10 million; another seven were exchanged for art valued in excess of \$6 million. Prince’s collages incorporated photos of Rastafarians and Jamaica by Patrick Cariou. Cariou sued Prince for copyright infringement; Prince claimed fair use. Prince lost. The case is on appeal.

Defined in the Dictionary of Modern and Contemporary Art, appropriation art is “the use of pre-existing objects or images with little or no transformation applied to them,” a definition essentially tracked by Prince when he explained the purpose of his collages was not to give new meaning, its message was “to make great art that makes people feel good.” Courts have routinely noted that allowing copyright to be infringed solely on the claim of a “higher artistic use” would, for practical purposes, eliminate copyright altogether. Appropriation art advocates focus on the policy purpose of copyright law to stimulate creativity and support the First Amendment value of freedom of speech; they disagree with the necessity of comment or criticism, countering that the transformation requirement is satisfied if the new work has a message, meaning or purpose that is “separate and distinct from the original.” If, however, explicit comment and criticism – a new message, other than the art itself – is necessary, appropriation art may not be shielded by fair use.



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FOUND: Janet sent in this photo of the side of a garage off Preston Highway. Artist? Band? Rehearsal Space?

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