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CINE-GT 1804
Assignment 2 - Fair Use in the News

Part 1

Richard Prince's newest exhibition "New Portraits" debuted at the Gagosian Gallery in New York on September 19, 2014. The works displayed were large-scale canvas versions of Instagram pictures taken by other people, with comments from Richard Prince's personal Instagram profile. The nature of the work may give off the appearance that Prince is attempting to take credit for the pictures in question, especially to those unfamiliar with Prince's work as an appropriation artist. Copyright disputes regarding Prince's work are not new, but the public uproar and debate surrounding these works is unique. Fears about social media privacy and ownership were likely stoked by the rumors of Prince's works selling for \$100,000 apiece.¹ Although it does not appear that any lawsuits are likely to emerge, there have been many calls (primarily by members of the public) for Prince to be sued for copyright infringement, if not theft.

There are several arguments against Prince. One is that he is attempting to take credit for the work of others. Although there are comments from his personal Instagram page below each photo, the majority of the canvas is taken up by the original (other person's) picture. These works are also personal pictures that are being commercialized and sold with no significant attempt made to edit or alter the original works (and the original author's profile name is even visible). Although the original works may not have been "fine art," they are creative expressions that copyright should protect. Even if many would not have entered into any marketplace, in at

¹ Hannah Jane Parkinson, "Instagram, an artist and the \$100,000 selfies – appropriation in the digital age," *The Guardian*, July 18, 2015, <http://www.theguardian.com/technology/2015/jul/18/instagram-artist-richard-prince-selfies>.

least one case Prince took the image from a young (and much less successful) artist, diminishing his ability to capitalize on his work.² The argument from Richard Prince is likely that these are public images, and that no attempt was going to be made to sell them as works independent of Instagram. If pressed to explain it in court he would likely claim that this collection of images of “celebrities, bloggers, and internet ‘personalities’” constitutes a satire of internet and social media culture.³ Accordingly, he uses the entire image and framing of an Instagram post, along with the comments, to illustrate his point. It would not be effective enough to simply state that Instagram posts are the “new portraits,” without displaying why. The tongue-in-cheek, often lewd comments from Prince’s personal profile would likely be claimed as evidence of the satirical nature of the works, a reflection of the internet’s rampant id.

Determining whether or not this is fair use is difficult, because Prince’s supposed thesis is that Instagram acts as a site of new (self-) portraiture, and what better way to illustrate this point than to use actual posts from the app. Of course, this is an oversimplification of Prince’s intent, but it is nearly impossible to determine exactly what he intends; artist statements by Prince are notoriously unreliable, and are often part of the work itself. Therefore it is difficult to come to the conclusion that this is a satirical work, because it is unclear what exactly Prince is looking to accomplish. The comments from his Instagram profile, on each canvas below the image of the other person, are incomprehensible. Nonetheless, the act of taking these pictures from Instagram and placing them on a large canvas in an art gallery is transformative, as it makes a statement about the role, function, and worth of portraiture today. It is clearly for a different purpose than

² Benjamin Sutton, “A Young Artist Debuts at Gagosian, Thanks to Richard Prince,” *Hyperallergic*, October 23, 2014, <http://hyperallergic.com/157548/a-young-artist-debuts-at-gagosian-thanks-to-richard-prince/>.

³ Tiernan Morgan, “Richard Prince, Inc.,” *Hyperallergic*, October 9, 2014, <http://hyperallergic.com/152762/richard-prince-inc/>.

the original posting of the picture on Instagram by the other person, although it is unclear if this purpose is satire. This is slightly in Prince's favor, but only just. The nature of the original Instagram posts is clearly creative, if not "fine art" as such. Although many were posted to popular and public profiles, Instagram is often personal and intimate. These are self-portraits, creative expressions of personal identity, so their use is not in Prince's favor. The amount used is also not in Prince's favor, as the full images and profile names are clearly (and largely) displayed. The effect upon the potential market is negligible. Although it is understandable why someone whose image is in the exhibition would be upset that Prince is able to monetize their original image without permission, these were not intended to be sold. Many use Instagram as a marketing tool, but the individual posts and images are generally not sold. Therefore, Prince's exhibition has no real effect on the market value. Given these considerations, were this to go to court it could reasonably be decided either way, but it is slightly more likely that this would not fall under a fair use argument. One could argue that the same point could have been made without Prince using people's actual posts (without permission). Effectively, Prince is making a statement not just about portraiture but also about rights and ownership in the digital space; however, he may be making this point by intentionally obfuscating allowances made by fair use and user agreements.

Part 2

It is not uncommon for archives to contain items with little to no historical documentation. These may have been part of a larger collection, and kept to retain the sense of original order. Instead of deaccessioning these materials, an archive may choose to make them accessible in the hopes that a researcher will be able to use or even identify them. In the case of

audiovisual materials, this may mean putting them online. Although putting an entire video online, even for free, could put an archive at risk of a copyright infringement, if there are multiple unidentified videos in such a collection the archive may be able to make a fair use argument by taking small clips of each (ones that do not represent the heart of each item) and posting them online for free viewing with as accurate of a description as possible, and then making them accessible to researchers on the premises. Perhaps a medley of clips from a single collection could also be made, in order to encourage a viewer to consider the breadth of materials in attempting to identify any one item. It seems to me that these would qualify as fair use; however, it is probably not a feasible way for most archives to promote their content. Free online clips of a certain size, are more realistic in terms of man-hours and processing times. If an attempt was made to identify the rights of the materials prior with no success, it could be argued that 1) it is transformative to put these in an archival context and consider them as fodder for historical research 2) these are not creative works but rather historical documents, by virtue of being considered in an archival context, 3) if indeed these are posted as sections or clips, the it is unlikely that the heart of the work has been included, especially for research purposes, and 4) it is unlikely that these materials have retained any market value, and a clip would have no tangible effect regardless.

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