

mla

# Arts Brief

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## Prince's Use of Photos of Rastas Not Fair Use

by Marcia Semmes, MLA Executive Director

Richard Prince's infringing use of Patrick Cariou's copyrighted photographs of Rastafarians was not fair use, a federal trial court in New York ruled March 18.

The court refused to find that appropriation art is a per se fair use, holding that "Prince's works are transformative only to the extent that they comment on the photos; to the extent they merely recast, transform, or adapt the photos, Prince's paintings are instead infringing derivative works."

The court gave the defendants 10 days to deliver the infringing works — including the paintings and unsold catalogs — to Cariou for impounding, destruction, or other disposition, as he sees fit. The court also ordered the defendants to notify any current or future owners in writing that the paintings infringe Cariou's copyright, were not lawfully made, and cannot be lawfully displayed..

Cariou sued Prince and Gagosian Gallery in December 2008, alleging that Prince appropriated photos from Cariou's book, *Yes Rasta*, for an exhibition of collaged paintings at Gagosian Gallery titled "Canal Zone" (*MLA Arts Brief* Winter 2009, p. 7). The suit alleged that at least 20 of the 22 paintings in the exhibition reproduced and were derived from Cariou's photos.

Rejecting the defense argument that the photos were not protectable because they were mere compilations of facts concerning Rastafarians



## Wildflower Garden Cannot Be Copyrighted, Appeals Court Says

by Marcia Semmes

Not all conceptual art can be copyrighted, the U.S. Court of Appeals for the Seventh Circuit said Feb. 25 in rejecting artist Chapman Kelley's claims seeking damages for changes to a wildflower garden planted in Chicago's Grant Park.

"Wildflower Works" comprised two enormous elliptical flower beds, each nearly as big as a football field, featuring a variety of native wildflowers and edged with borders of gravel and steel.

Kelley, an artist known for his representational paintings of landscapes and flowers, installed the work in 1984. Some 20 years later, the

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Founded in 1985, Maryland Lawyers for the Arts provides pro bono legal assistance to income-eligible artists and arts organizations, and educational workshops and seminars on topics affecting artists.

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Executive Editor: Marcia Semmes  
Design Director: Gina Eliadis  
Board of Editors:  
Cynthia Sanders, Esq., Ober|Kaler;  
Jennifer Stearman, Esq., McGuire Woods;  
Michael S. Yang, Esq.  
Law Student Liaison: Adam Holofcener

Maryland Lawyers for the Arts  
113 West North Avenue | Baltimore, MD 21201  
Phone: 410-752-1633 | Fax: 410-752-1090  
Email: [info@mdartslaw.org](mailto:info@mdartslaw.org) / [www.mdartslaw.org](http://www.mdartslaw.org)  
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*(Rasta from page 1)*

and the Jamaican landscape, Judge Deborah A. Batts said that it has been well-settled law since an 1884 case involving a photo of Oscar Wilde that creative photographs are worthy of copyright protection even when they depict real people and natural environments.

Batts next turned to the Copyright Act's four factors for determining whether there is a fair use defense to infringement, examining 1) the purpose and character of the use and whether it transformed the original, 2) the nature of the copyrighted work, 3) the amount and substantiality of the portion used and 4) the effect of the use upon the potential market for, or value of, the copyrighted work.

Batts rejected the defense argument that Prince's use of copyrighted material as raw materials in creating appropriation art that does not comment on the copyrighted original is similar to the examples of fair use cited in the Copyright Act. Those examples — criticism, comment, news reporting, teaching, scholarship, and research — all comment on, critically refer back to, or relate to the historical context of the original work, she said. Finding that the transformative content of Prince's paintings was minimal at best, Batts concluded that the "transformative use prong" of the four-factor test weighed heavily in Cariou's favor.

Batts also found that the second prong of the first factor — commerciality — weighed in Cariou's favor. Gagorian Gallery sold eight of the "Canal Zone" paintings for \$10.5 million, the court noted, split 60/40 between Prince and the gallery. Seven other "Canal Zone" paintings were exchanged for art with a value of between \$6 million and \$8 million. While there is an inherent public interest and cultural value of public exhibition of art, the court said, the defendants' use and exploitation of the photos was also substantially commercial. Batts concluded that given the low transformative content and the high commercial use, the first factor of the copyright law's four-part test weighs against a finding of fair use.

The court also found that the second factor — the nature of the copyrighted work — weighed in Cariou's favor. His photos are highly original and creative artistic works that constitute creative expression for public dissemination and fall squarely under the copyright law's protective umbrella, Batts said.

Looking at the amount and substantiality of the work used, the court found that in the majority of the paintings at issue, Prince appropriated the central figures in Cariou's photos. Those figures "are of overwhelming quality and importance to Cariou's photos, going to the very heart of his work,"



Image courtesy of Patrick Cariou

(*Wildflowers* page 1)

garden had deteriorated, so the Chicago Park District reduced its size, reconfigured the oval flower beds into rectangles, and changed some of the planting material.

Kelley sued the Park District for violating his “right of integrity” under the Visual Artists Rights Act of 1990. VARA gives the “authors” of certain types of visual art — paintings, drawings, prints, sculptures, and exhibition photographs — the lifetime right to prevent any modification of the work that would be prejudicial to their honor or reputation and to recover for any such intentional modification undertaken without consent. Kelley valued the plants at \$1.5 million and his damages for the VARA violation at \$25 million.

The lower court held that “Wildflower Works” was both a painting and sculpture, but the appeals court disagreed, finding that a living garden lacks the kind of authorship and stable fixation normally required to support copyright, a prerequisite for protection under VARA.

Gardens are planted and cultivated, not authored, the court said, and a garden’s constituent elements are alive and inherently changeable, not fixed. “Most of what we see in a garden originates in nature and not in the mind of the gardener, and at any given moment in time, a garden owes most of its form and appearance to natural forces, not the gardener,” the court wrote.

The court said it was not suggesting that copyright attaches only to works that are or static or fully permanent or that artists who incorporate natural or living elements in their work can never claim copyright. Jeff Koons’ “Puppy,” for example — a huge metal frame in the shape of a puppy, covered with thousands of blooming flowers — may be sufficiently fixed for copyright protection. But *Wildflower Works* is quite different, the court said. “It is quintessentially a garden; ‘Puppy’ is not.”

The appeals court called the Park’s District’s failure to challenge the applicability of VARA “an astonishing omission.” While copyright’s broad general coverage extends to “original works of authorship,” including “pictorial, graphic, and sculptural works,” VARA uses the specific nouns “painting” and “sculpture.”

This means, the court said, that “To qualify for moral-rights protection under VARA, *Wildflower Works* cannot just be ‘pictorial’ or ‘sculptural’ in some aspect or effect, it must actually be a ‘painting’ or a ‘sculpture.’ Not metaphorically or by analogy, but *really*.” ■

Batts said in concluding that the amount of Prince’s taking was substantially greater than necessary given the slight transformative value of his secondary use, again weighing heavily against a finding of fair use.

Finally, the court found it clear that the defendants usurped the market for Cariou’s works. She noted that another New York gallery owner cancelled a planned show of Cariou’s photos because she didn’t want to show works that had already been shown, or to appear to be capitalizing on the Prince show at Gagosian. Additionally, the court said, licensing original works for secondary use by other artists is the kind of derivative use that creator of original works would generally develop, and widespread unlicensed use in new artworks would destroy the market for such licenses.

The court dismissed a conspiracy claim against the defendants, finding no such claim in the Copyright Act.

The court also ordered the defendant to permanently refrain from infringing Cariou’s copyright and from reproducing, adapting, displaying, publishing, advertising, promoting, selling or offering for sale, or in any way disposing of Cariou’s photos. ■

# Koons Settles Suit Over Balloon Dog Bookends

by Marcia Semmes



Image courtesy of Park Life

San Francisco gallery Park Life is once again selling its Balloon Dog bookends, following a settlement with artist Jeff Koons, who had claimed that the bookends infringed his copyright in his massive mirrored sculpture “Balloon Dog.”

Koons’s lawyers wrote the gallery a cease and desist letter in December 2010, demanding that they stop selling the 10.5 inch, matte-finish bookends. The gallery’s blog wrote about the situation under a headline reading “Jeff Koons Sends in His Goons.”

The gallery didn’t roll over. Instead, it took preemptive legal action, filing suit in federal court for a declaratory judgment “that the Balloon Dog Bookend does not infringe on any copyrights or other purported intellectual property owned by Koons, because any similarities between the Balloon Dog Bookend compared with the Balloon Dog Structure are driven by the wholly unprotectable idea of depicting the shape of a balloon dog in a solid form.”

“As virtually any clown can attest, no one owns the idea of making a balloon dog, and the shape created by twisting a balloon into a dog-like form is part of the public domain,” the complaint stated.

The complaint pointed out that the Balloon Dog Bookends manufactured by imm Living and sold by Park Life are painted resin statues based on the classic art of twisting balloons into the shape of animals, commonly practiced by clowns, magicians, and street performers, in contrast to Koons’s sculpture, a highly reflective metal reproduction measuring over 10 feet tall.

According to the plaintiff, “The art of twisting balloons into the shape of animals, or ‘balloon modeling’ long predates Koons’s work. While the origin of balloon modeling is unknown, upon information and belief, balloon modeling has been traced back as far as 1939 when H.J. Bonnert of Scranton, Pennsylvania performed a balloon modeling act at the Pittsburgh Magicians’ Convention.”

The parties’ settlement provides that Jeff Koons won’t pursue the gallery for the sale of the bookends, and the gallery won’t attribute the bookends to him.

Koons’s career has been based on the appropriation of pop culture and he has been on the receiving end of copyright infringement claims more than once. In 1992, the Second Circuit Court of Appeals held that Koons’s sculpture depicting Art Rogers’s photo of a couple holding a pile of puppies was not a fair use. In 2006, the same court ruled that Koons’s use of a fashion photograph depicting feet and lower legs had been sufficiently transformed from the original to make the use fair. ■

# AP, Fairey, Obey Settle Claims Over Obama ‘Hope’

by Marcia Semmes

The Associated Press settled the last of its claims over the Barack Obama “Hope” poster March 16, agreeing to drop its copyright infringement suit against Obey Clothing, Shepard Fairey’s merchandising arm.

Financial terms were not disclosed, but the settlement called for AP and Obey Clothing to collaborate on the future sale of apparel using Fairey’s graphics based on AP photographs. According to the AP press release, neither side surrendered its view of the law though Obey Clothing has agreed it will not use another AP photo without obtaining a license.

“This settlement marks the final resolution of the disputes over our rights in the AP’s photograph of Barack Obama,” AP’s president and chief executive officer Tom Curley said in a joint statement. “While it was a long road with many twists and turns along the way, the AP is proud of the result and will continue to vigorously defend its copyrighted photographs against wholesale copying and commercialization where there is no legitimate basis for asserting fair use.”

Don Juncal, president of Obey Clothing, said the company had collaborated with other photographers and artists in the past and looks forward to working with AP’s talented photographers in the future. AP “has an impressive archive of work provided by talented photographers. We look forward to working with those photographers as part of our long-standing relationship with Shepard Fairey to produce and market apparel with the new images that will be created,” he said.

AP settled its claims against Fairey in January, with Fairey agreeing not to use another AP photograph in his work without obtaining a license, and both sides agreeing to share profits of posters and merchandise bearing the “Hope” image. The financial terms of that settlement were not disclosed either.

Fairey said at the time that he was pleased to have resolved the dispute with AP, adding “I respect the work of photographers, as well as recognize the need to preserve opportunities for other artists to make fair use of photographic images. I often collaborate with photographers in my work, and I look forward to working with photos provided by the AP’s talented photographers.”

As Curley said, the suit was full of twists and turns. Fairey sued AP in February 2009, seeking a declaration that his use of Mannie Garcia’s photograph of Barack Obama did not infringe any copyrights held by AP and was protected by the Fair Use Doctrine (*MLA Arts Brief* Spring 2009, p. 6). In March 2009, AP filed a countersuit against Fairey, calling him “hypocritical” for repeatedly copying the works of other artists and photographers without paying or crediting them.

In October 2009, Fairey admitted that he lied, submitted false images, and deleted other images in an attempt to mislead the defendants about which source photo he used for the poster (*MLA Arts Brief* Fall 2009, p. 4). Some observers expected criminal charges against Fairey to follow, but while the U.S. Attorney’s Office for the Southern District of New York opened a criminal investigation, no charges resulted.

Photographer Mannie Garcia also sued AP, alleging that as the photographer who took the shot on which Fairey based the poster, he owned the copyright. AP argued, however that because Garcia was an AP staff photographer at the time he took the shot that it was the copyright owner. Garcia withdrew his suit against AP in August 2010. ■

## Catfish Makers Sued Over Film’s Use of Song

Trial is set for Dec. 13 in Threshold Media’s suit alleging the makers and distributors of the film *Catfish* infringed its copyright in the song “All Downhill From Here.” The suit may turn on whether the Sundance hit is a documentary or a mockumentary.

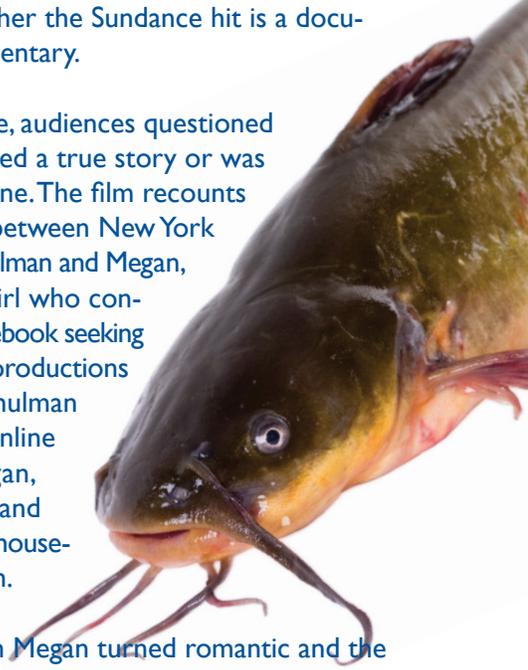
Straight out of the gate, audiences questioned whether *Catfish* depicted a true story or was a clever depiction of one. The film recounts a Facebook romance between New York photographer Nev Schulman and Megan, the sister of a young girl who contacted Schulman on Facebook seeking permission to paint reproductions of his photographs. Schulman agreed and began an online relationship with Megan, 8-year-old artist Abby, and their mother, Michigan housewife Angela Wesselman.

Nev’s relationship with Megan turned romantic and the two exchanged pictures, songs, and increasingly intimate messages. The fantasy unraveled like a cheap sweater after Nev discovered that the songs Megan claimed to have written and recorded were by other artists, including Threshold recording artist Amy Kuney’s “All Downhill From Here.” **SPOILER ALERT:** That discovery led to the revelation that Megan and Abby were actually fictional characters created by Angela.

Threshold’s suit claims that the defendants used both YouTube and iTunes versions of the song, significantly enhancing the film as a commercial media property that grossed more than \$3 million on a cost of just \$30,000.

The filmmakers continue to claim that the film is a documentary and raised a fair use defense to Threshold’s copyright claims in their answer to the suit, a defense likely to be successful only if they’re telling the truth.

Fair use allows the limited use of copyrighted material without acquiring permission from the rights holders. As the Center for Social Media noted in its “Documentary Filmmakers Statement of Best Practices in Fair Use,” judges generally have honored documentarians’ claims of fair use in the rare instances where they have been challenged in court. That’s because the copyrighted material is typically used in a context different from that in which it originally appeared and because only short and isolated portions of copyrighted works are used. ■



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# Code for Best Practices In Fair Use for Poetry Issued

by Marcia Semmes

American University's Center for Social Media issued the latest in its series of best practices documents in January, the "Code of Best Practices in Fair Use for Poetry."

The code is aimed at helping poets understand when they have the right to excerpt, quote and use copyrighted material in poetry. It was developed by a group of poets, editors, publishers, and experts in copyright law and new media, facilitated by CSM Director Patricia Aufderheide; Katharine Coles, director of the Harriet Monroe Poetry Institute at the Poetry Foundation; Peter Jaszi, Professor of Law at American University; and Jennifer Urban, Professor of Law at the University of California Berkeley.

As the introduction explains, "Poetry, as a highly allusive art form, fundamentally relies on the poet's ability to quote, to copy, and to "play" with others' language, and poetry scholars and commentators equally rely on their ability to quote the poetry they are discussing." Participating poets felt constrained, however, by their own lack of certainty about what uses are and are not fair within the practices of poetry.

"While they certainly wish to appropriately control their own work, and to make money where money is to be made, poets also expressed a strong wish to affirm the importance of their ability to make reasonable unlicensed uses of copyrighted material and their support for such uses by others of their own works. In this, the poets both exemplified the tensions inherent in copyright law and the fair use doctrine and heartily endorsed the values undergirding fair use."

The code identifies seven sets of common current practices, or principles, to which the doctrine of fair use clearly applies. The code notes, however, that the principles are all subject to certain limitations, as well as a "rule of proportionality," limiting fair use to the portions of copyrighted works needed to accomplish the poet's goals. The Code's principles follow. For a complete description, including limitations on the principles, see [www.centerforsocialmedia.org/sites/default/files/documents/pages/fairusepoetry-booklet\\_singlepg\\_3.pdf](http://www.centerforsocialmedia.org/sites/default/files/documents/pages/fairusepoetry-booklet_singlepg_3.pdf).

1. Parody and Satire: Under fair use, a poet may adapt a poem or a portion of a poem in order to (1) offer a direct or indirect critique of that poem, its author, or its genre; (2) present a genuine *homage* to a poet or genre; or (3) hold up to ridicule a social, political, or cultural trend or phenomenon.

2. New Works "Remixed" From Other Material: Under fair use, a poet may make use of quotations from existing poetry, literary prose, and non-literary material, if these quotations are re-presented in poetic forms that add value through significant imaginative or intellectual transformation, whether direct or (as in the case of poetry-generating software) indirect.

3. Education: Under fair use, instructors at all levels who devote class time to teaching examples of published poetry may reproduce those poems fully or partially in their teaching materials and make them available to students using the conventional educational technologies most appropriate for their instructional purposes.

4. Criticism, Comment, Illustration: Under fair use, a critic discussing a published poem or body of poetry may quote freely as justified by the critical purpose; likewise, a commentator may quote to exemplify or illuminate a cultural/historical phenomenon, and a visual artist may incorporate relevant quotations into his or her work.

5. Epigraphs: The use of quotations from poems to introduce chapters or sections of other works is a time-honored literary practice. Generally speaking, these quotations are selected for the connection to the text in question, although occasionally they may be introduced for merely frivolous or decorative purposes. Members of the poetry community generally found this practice to be non-controversial.

6. Poetry Online: Under fair use, an online resource (such as a blog or web site) may make examples of selected published poetry electronically available to the public, provided that the site also includes substantial additional cultural resources, including but not limited to critique or commentary, that contextualize or otherwise add value to the selections.

7. Literary Performance: Under fair use, a person other than the poet may read a poem to a live audience, even in circumstances where the doctrine otherwise would not apply, if the context is (1) a reading in which the reader's own work also is included, or (2) a reading primarily intended to celebrate the poet in question. ■

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## Judge Strikes Down Google Book Settlement

A federal judge in New York struck down the Google book settlement March 22, finding that it would reward the company for engaging in wholesale copying of copyrighted works without permission and give it a significant advantage over competitors.

In 2004, Google announced that it had entered into agreements with several libraries to digitize books, including books protected by U.S. copyright law, in those libraries' collections. To date, some 12 million books have been scanned and digitized. Several authors and publishers filed a class action against Google in 2005, claiming the digitization infringed their copyrights.

Google argued that its digitization of the books and display of snippets of text is permitted under the U.S. copyright law's doctrine of "fair use." Instead of litigating the issue, the parties negotiated a \$125 million settlement.

Hundreds of class members objected to the settlement, particularly its opt-out mechanism, which required authors to take affirmative action to get out of the class. Works were included by default if authors didn't opt out (*MLA Arts Brief* Winter 2010, p. 5).

Judge Denny Chin found that the settlement would grant Google control over the digital commercialization of millions of books, including orphan books and other unclaimed works. "And it would do so even though Google engaged in wholesale, blatant copying, without first obtaining copyright permissions. While its competitors went through the 'painstaking' and 'costly' process of obtaining permissions before scanning copyrighted books, Google by comparison took a shortcut by copying anything and everything regardless of copyright status," the court said, quoting submissions from objectors.

"[T]he notion that a court-approved settlement agreement can release the copyright interests of individual rights owners who have not voluntarily consented to transfer is a troubling one," the judge wrote. Further, he added, "it is incongruous with the purpose of the copyright laws to place the onus on copyright owners to come forward to protect their rights when Google copied their works without first seeking their permission."

Chin urged the parties to consider amending the settlement so that authors are required to opt in to participate rather than opt out to avoid coverage. ■

THANK YOU!

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**April 4, 12:30 to 5:00 pm**  
**Money Matters with PNC Bank at AVAM,**  
**800 Key Highway, Baltimore MD 21236**

Please attend a free symposium with tasty treats and a tour of AVAM's "What Makes Us Smile?" exhibition. Presentations and group sessions with PNC community bankers, MLA Vice President Cynthia Sanders Esq., of Ober|Kaler and Bob Middleton, director of the Arts Insurance Program at Maury Donnelly & Parr. Free, but space is limited. RSVP to whitney@avam.org, 410.244.1900 x 247.

**April 23, 2 – 4 pm**  
**Legal & Business Issues for Filmmakers**  
**at Creative Alliance, 3134 Eastern Ave.,**  
**Baltimore, MD 21224**

From permissions and copyrights, to getting the deal you want, straight talk from folks who know: entertainment attorney Scott Johnson of Ober|Kaler and Jack Gerbes and Kathi Ash of the Maryland Film Office. Advance registration \$15, \$10 Creative Alliance members. Walk-in \$20, \$15 members.

**May 21, 10:00 am to noon**  
**Estate Planning for Artists at Creative Alliance**  
**3134 Eastern Ave., Baltimore, MD 21224**

Join attorney Meredith Blake Martin and Colleen McCloskey, PNC Vice President and Senior Trust Advisor, on Saturday, May 21, for "Estate Planning for Artists." Artists and collectors face unique estate planning issues due to the unique nature of their creative assets, which may be illiquid and difficult to value. An estate plan for an artist must ensure that the art is properly valued, maintained, distributed, and/or sold in the best interest of the estate and/or beneficiaries. Get tips from the experts. Advance registration \$15, \$10 Creative Alliance members. Walk-in \$20, \$15 members.