

**The New York Times** : 'Court Rules in Artist's Favor', by Randy Kennedy, April 25th 2013

## Court Rules in Artist's Favor



Robert McKeever, Courtesy of Richard Prince and Gagosian Gallery

"Ile de France," one of the works in the "Canal Zone" series by Richard Prince that was in dispute.

IN a closely watched copyright [case](#) with broad implications for the contemporary-art world, the United States Court of Appeals for the Second Circuit on Thursday decided largely in favor of the artist Richard Prince, who was found by a federal court in 2011 to have illegally used photographs from a book about Rastafarians to create a series of collages and paintings.

The original decision, by Judge Deborah A. Batts, sided with Patrick Cariou, whose 2000 book, "Yes Rasta," featured portraits he took in Jamaica. Mr. Prince used dozens of the pictures as the basis for a

series of dystopian works called “Canal Zone,” which were exhibited at the Gagosian Gallery in 2008 and generated more than \$10 million in sales.

Mr. Prince argued that his appropriation of the photographs should be allowed under the fair-use exceptions to federal copyright protections, which permit limited borrowing of protected material for purposes like commentary, criticism, news reporting and scholarship. But Judge Batts wrote that for fair use to apply, a new work of art must be transformative — that it must “in some way comment on, relate to the historical context of, or critically refer back to the original work.”

That reading of the law was viewed as unusual by many copyright experts, galleries and leading art museums, who warned that it could have a chilling effect on art that relies on appropriation, a controversial but longstanding postmodern artistic strategy.

The appeals court, which heard the case last May, ruled that Judge Batts’s interpretation was incorrect and that “the law does not require that a secondary use comment on the original artist or work, or popular culture,” but only that a reasonable observer find the work to be transformative.

In its decision, the appeals court wrote that a majority of Mr. Prince’s work manifested “an entirely different aesthetic” from Mr. Cariou’s pictures.

“Where Cariou’s serene and deliberately composed portraits and landscape photographs depict the natural beauty of the Rastafarians and their surrounding environs,” the decision stated, “Prince’s crude and jarring works, on the other hand, are hectic and provocative.” In her decision in 2011, Judge Batts gave Mr. Cariou the right to destroy the “Canal Zone” paintings that had not been sold to collectors, a remedy that was criticized by Judge Barrington D. Parker Jr. of the Second Circuit during oral arguments last year.

The court found that most of the works by Mr. Prince under consideration were permissible under fair use because they “have a different character” from Mr. Cariou’s work, give it a “new expression” and employ “new aesthetics with creative and

communicative results distinct” from the work that Mr. Prince borrowed. But five other works, the court said, were so minimally altered by Mr. Prince that they might not be considered fair use by a reasonable observer. Those were sent back to the lower court for a determination using the appeals court standard.

Judge Batts based her decision in part on the fact that Mr. Prince, under oath, said that his works based on Mr. Cariou’s were not intended “to create anything with a new meaning or a new message.” But a majority of the appeals panel said that Mr. Prince’s intentions were not the only determining factor.

In a partially dissenting opinion, one of the judges, John Clifford Wallace, wrote that he saw “no reason to discount” Mr. Prince’s statements as part of the overall body of the evidence. Judge Wallace also added that he disagreed with the court’s reliance on its own judgment to decide which of Mr. Prince’s works were transformative and which were not, a job that he said should be left to the lower court, where new evidence might be presented.

“It would be extremely uncomfortable for me to do so in my appellate capacity,” Mr. Wallace wrote of the division of the works by the appeals court, “let alone my limited art experience.”

Joshua Schiller, a lawyer for Mr. Prince, said he was grateful for the court’s decision, which he said removed the onus from artists for defending their work as transformative under copyright law.

Daniel Brooks, a lawyer for Mr. Cariou, said that he believed that the decision might only further muddy an already confusing terrain for determining fair use. “I think that this decision doesn’t offer much guidance or predictability for the future, either to artists or courts that are going to have to deal with these decisions,” he said.

Donn Zaretsky, a lawyer who blogs about art-law cases and has closely followed the Prince case, agreed with Mr. Brooks. “To me it’s a missed opportunity to really bring some clarity to this issue,” he said. “How do you decide whether something is transformative or just not quite transformative enough?”