

Me, as stolen by Richard Prince

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Artist and alleged thief, Richard Prince, reminded us that what you post is public. It can be shared for anyone to see and, apparently, use. As a part of the Frieze Art Fair in New York, Prince displayed giant screenshots of other people's Instagram photos without warning or permission. He then sold these prints for \$90,000 apiece. Is copyright law so very flexible?

Let me start by saying my picture was not, in fact, stolen by Richard Prince as I do not have an Instagram account. However, if I had been one of the many whose photo was stolen, printed, and sold for \$90,000, I would definitely be one of those who would be suing. This is not art. This is theft.

Both the meaning and value of intellectual property occurs at the interface of production and consumption. This article deals with the complex problem of protecting intangible property interests in what transpires online. Image Rights are the suggested solution.

So, who is Richard Prince? How can he get away with this?

He is an American painter and photographer who began appropriating photographs in 1975. His image, *Untitled (Cowboy)*, a re-photograph of a photograph taken originally by Sam Abell and appropriated from a Marlboro advert, was the first re-photograph to raise more than \$1 million at auction when it was sold at Christie's New York in 2005.

In 2011, Prince was hit with a lawsuit for using images from Patrick Cariou's book *Yes Rasta* without permission in a series of collages. One of those collages sold for around \$2.5 million, according to *The New York Times*. Judge Deborah A. Batts ruled Prince was breaking fair use laws with his appropriation of Cariou's images. Batts said Prince's work did not transform or "add value" to the originals. But Prince appealed, and, with the exception of five paintings that needed to be re-evaluated, the ruling was overturned in 2013.

What is Art?

The Oxford Dictionary defines it as: “The expression or application of human creative skill and imagination, typically in a visual form such as painting or sculpture, producing works to be appreciated primarily for their beauty or emotional power.”

How is it protected?

“Copyright law delineates our linguistic and artistic palettes by subjecting creative expression to monopolization and by restricting the reproduction and manipulation of cultural content.” (Tehrani, 2011) The 1976 U.S. Copyright Act provides that copyright protection “subsists ... in original works of authorship fixed in any tangible medium of expression, now known or later developed” (17 U.S.C.A. § 102(a)). So three things must be present for a work of art to be copyrightable: originality, a fixed medium and authorship.

Originality is the most important quality. Originality is not dependent on the work's meeting any standard of aesthetic or artistic quality. Thus, a work need not be fine art to be copyrightable.

A fixed medium means virtually any form of fixed recording is protected, no matter how new the technology.

Authorship is not a simple concept and is greatly debated. Authorship, they argue, is a cultural construction. What makes an author? Do not some “authors” (even Shakespeare) stitch together texts from pre-existing plots? Or even borrow characters and scenes whole cloth from other narratives? Why should certain kinds of expression, like literary production, be privileged above other types? (Jaszi, 1988).

What is a Derivative Work?

A derivative work is a work based on or derived from one or more already existing works. Common derivative works include translations, musical arrangements, and art reproductions. To be copyrightable, a derivative work must incorporate some or all of a pre-existing “work” and add new original copyrightable authorship to that work. (17 U.S.C. § 101) This is where Richard Prince hides.

How can I protect myself from becoming someone's Derivative Work?

The new Guernsey Image Right is established simply by existing and registering that particular existence.

Image rights can be asserted when a person's identity and associated images linked to that person have been commercially appropriated or exploited by another without their permission. They are related to the distinctive expressions, characteristics or attributes of, or associated with, a personality made available to public perception (Adrian, 2013). Image rights are an integral part of artistic expression and a product of not only celebrities, but ordinary people. The value of image rights is such that they are already being actively managed and traded, despite the lack of clear legal recognition and the lack of clarity as to the extent of the rights. Image rights are commercially valuable and build upon the international standards for intellectual property discussed earlier.

According to s 2(1) of the Guernsey Image Rights Ordinance (GIRO), "A registered personality is a property right obtained by the registration of a personality in the Register in accordance with the provisions of this Ordinance". "Personality" refers to the personality of the following types of person or subject, which is described in the Image Rights Ordinance as the "personnage". Section 1(1) IRO describes a "personnage" as follows:

- a. a natural person,
- b. a legal person,
- c. two or more natural persons or legal persons who are or who are publicly perceived to be
- d. intrinsically linked and who together have a joint personality ('joint personality'),
- e. two or more natural persons or legal persons who are or who are publicly perceived to be linked in common purpose and who together form a collective group or team ('group'), or
- f. a fictional character of a human or non-human ('fictional character'), whose personality—
 - is registered under this Ordinance (and is accordingly a 'registered personality' for the purposes of this Ordinance),or

- is the subject of an application to be so registered."

"Personality" is defined in s 1(2) IRO as "the personality of the person, two or more persons or character referred to in subsections (1)(a) to (e)". Section 1(5) IRO defines a "natural person" as a human being who "(a) is alive, or (b) has died within the period of 100 years preceding the date of filing the application for the registration of the personality". So, Robert Downey Jr or the author, Angela Adrian, would be considered natural persons, likewise so would the deceased Charlie Chaplin or the author's deceased father.

"Image rights" are defined in s5(1) IRO as "exclusive rights in the images associated with or registered against the registered personality". Section 3(1) IRO defines "image" as:

- a. the name of a personage or any other name by which a personage is known,
- b. the voice, signature, likeness, appearance, silhouette, feature, face, expressions (verbal or facial), gestures, mannerisms, and any other distinctive characteristic or personal attribute of a personage, or
- c. any photograph, illustration, image, picture, moving image or electronic or other representation ('picture') of a personage and of no other person, except to the extent that the other person is not identified or singled out in or in connection with the use of the picture.

Note that there is no requirement to register specific images associated with the registered personality beyond the personality's name itself. However, for there to be a benefit in registering and for easier enforcement, specific images are useful. A registered image is presumed to be distinctive and of value, which are requirements for infringement, whereas these qualities must be specifically proven in order to enforce rights in an unregistered image (Adrian, 2013).

Private intellectual property rights in your digital persona and digital goods are a simple result of changes in economic value that stem from the development of new technology and the opening of new markets. As one victim of Richard Prince pointed out: "In some ways I feel powerless in this situation because I am

a young woman. It is difficult for me to reclaim what is mine,” Collins said. “Just because a woman puts an image out publicly on her own forum, a man of power taking women’s photos and creating a profit off of it is in no way ‘fair game.’” It is time to change the game.

References

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