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Rendering Art and Law

GIULIA WALTER*

Two artworks from the U.S. copyright case Cariou v. Prince provide examples for an inquiry into the definition of work according to Swiss copyright law and its compatibility with appropriation artworks. Under the existing copyright, it is difficult to defend appropriation artworks if they present little to no modification of the appropriated original. Such an outcome can be seen as a short-sightedness of copyright toward certain forms of art. It is therefore interesting to move away from the legal framework and look at law from an external perspective.

Table of contents

I. Introduction

In 2013, the United States Court of Appeals for the 2nd Circuit was confronted with a copyright infringement claim filed by photographer Patrick Cariou against Richard Prince. Prince had appropriated several photographs from Cariou's book «Yes Rasta», which he subsequently used for an own series of artworks, later exposed at the Gagosian gallery in New York.[1] In its decision, the Court applied the four steps of the «fair use test», a doctrine permitting derivative and unlicensed use of copyrighted works under certain circumstances.[2] First of all, the

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1 Patrick Cariou v. Richard Prince, 714 F.3d 694 (2nd Cir. 2013).

2 The fair use test was developed as a common law doctrine and is now codified in 17 U.S.C. § 107 (2012), see: Copyright Law – Fair Use – Second Circuit Holds that Appropriation Artwork Need Not Comment on the Original to Be

Court looked at the «heart of the fair use inquiry», i.e. the question whether – and to what extent – the new work of Richard Prince is transformative.[3] The court ultimately held that in the series of thirty appropriation artworks, twenty-five *were*, and five others *could* constitute fair use.[4] The Court stated that for a use to be fair it «must be productive and must employ the quoted matter in a different manner or for a different purpose from the original», and that a new work «must alter the original with new expression, meaning, or message».[5] After having stated that, the whole decision seems a quest to determine if the appropriated works had sufficiently been changed by means of tangible – meaning visible – interventions.[6] So, even if the tenor of the latter five pieces had «unarguably been changed», the Court held that it was unclear whether the alterations amounted to a sufficient transformation of the original – or not.[7]

As mentioned, Richard Prince's work can be categorized as appropriation art, a widespread accepted and acclaimed artistic practice[8] that involves the reproduction of already existing artworks not in order to create plagiarisms but independent and original artworks.[9] The lowest common denominator is the recontextualization of the appropriated artistical forms in another time and space, where the recognizability of repetition works as originator of novelty and surprise.[10] However, law is unable to register the sole recontextualization as novelty or as difference, with the result that appropriation – when it is judged not transformative enough – is treated as a copyright infringement.[11]

One of the basic rationales of copyright is to incentivize the creation and dissemination of new works, in respect to which the regime of exclusive rights might represent a burden.[12] The U.S. legal system solves the arising clashes between the copyright holder and the potential infringer by balancing the rights at stake on a case-by-case basis, where

Transformative. – Cariou v. Prince, 714 F.3d 694 (2nd Cir. 2013), in: Harvard Law Review 2014/4, p. 1228 et seqq., p. 1228, Fn. 1, 3. Its four steps are: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used and the effect of the use upon the potential market for the original.

3 Patrick Cariou v. Richard Prince, 714 F.3d 694 (2nd Cir. 2013), para. 49. The transformative use theory was developed in 1990 by PIERRE LEVAL in his paper: Toward a Fair Use Standard, in: Harvard Law Review 1990/2, p. 1105 et seqq. and first adopted in Campbell, see: FRANCIS JONATHAN, On Appropriation: Cariou v. Prince and Measuring Contextual Transformation in Fair Use, in: Berkeley Technology Law Journal 2014/29, p. 681 et seqq., p. 682.

4 Patrick Cariou v. Richard Prince, 714 F.3d 694 (2nd Cir. 2013), para. 58.

5 Patrick Cariou v. Richard Prince, 714 F.3d 694 (2nd Cir. 2013), para. 50.

6 Patrick Cariou v. Richard Prince, 714 F.3d 694 (2nd Cir. 2013), para. 71: «We have the same concerns [of Graduation] with Meditation, Canal Zone (2007), Canal Zone (2008) and Charlie Company. Each of those artworks differs from, but is still similar in key aesthetic ways, to Cariou's photographs». See also FRANCIS (Fn. 3), p. 682.

7 Patrick Cariou v. Richard Prince, 714 F.3d 694 (2nd Cir. 2013), para. 71.

8 For example: CROW THOMAS, The Return of Hank Herron, in: Bois Yve-Alain/Crow Thomas/Foster Hal/Joselit David/Riley Bob/Sussmann Elisabeth (eds.), Endgame, Reference and Simulation in Recent Painting and Sculpture, Boston 1986, p. 11 et seqq.

9 ZUSCHLAG CHRISTOPH, «Die Kopie ist das Original», Über Appropriation Art, in: Mensger Ariane (Hrsg.), Déjà-vu?, Die Kunst der Wiederholung von Dürer bis Youtube, Bielefeld/Berlin 2012, p. 126 et seqq.

10 LUHMANN NIKLAS, Die Kunst der Gesellschaft, Frankfurt a.M. 1997, p. 205 and 210.

11 For example in Graham v. Prince, 265 F. Supp. 3d 366 (S.D.N.Y. 2017); Rogers v. Koons, 960 F.2d 301 (2nd Cir. 1992). In Switzerland, a summary judgment of the Zurich court of appeal forced the gallery Bischofberger to remove appropriation artist Mike Bidlo's artworks in 1992, see: GLAUS BRUNO/STUDER PETER, Kunstrecht, Zürich 2003, p. 34.

12 MENDIS SUNIMAL, Copyright, the Freedom of Expression and the Right to Information, Exploring a Potential Public Interest Exception to Copyright in Europe, Baden-Baden 2011, p. 32.

the result is always open.[13] Continental legal systems, instead, have enacted statutory limitations to the exclusive rights of copyright.[14] Nevertheless, a way to escape the rigidity and narrow scope of these limitations has been through the opening of copyright toward exceptions based on fundamental rights.[15] The irritations caused by a copyright case involving appropriation art can be reformulated into an opposition of the constitutional artistic freedom and the guarantee of ownership,[16] that is then decided with a balancing of rights. By doing so though, law eludes itself and merely dissimulates, or postpones, the underlying conflict.[17] In other words, by naming higher but ultimately flexible values it answers without answering and decides without deciding.[18]

In the following, the U.S. case depicted in the opening will be solved according to copyright law in Switzerland (II.). The case is used as an example – due to the lack of actual court proceedings on the matter in Switzerland – for analyzing the subsumption that law makes of the «creative copy» in the visual arts. The aim is therefore not to confront the solutions of the same legal problem according to the U.S. and Swiss system.[19] To the solution-oriented imperative in law, a close reading of the applicable norms and of their interpretation, focused on potential contradictions and unclarities, is preferred. Appropriation artworks are treated as occurrences on the evolutionary timeline of the art system toward its self-defined directions,[20] and therefore as neither inherently good nor bad. It is also not argued here that the desired situation for appropriation artworks is that of being eligible for copyright. Rather, the results obtained by searching the legal framework for creative copies are reformulated into questions concerning copyright and freedom of art (under III.). Last, the interdisciplinary strategy of drawing from art theory and sociology exposed in IV. is used for producing an adequate rendering of law while it copes with copying.

II. The Legal Case

As mentioned in the opening, only two artworks from the case study Cariou v. Prince will be closely analyzed, namely «Graduation» by Richard Prince and the photograph taken by Patrick Cariou which served as starting point for this particular appropriation. «Graduation» was part of the group of five pictures of which the Court

13 MENDIS (Fn. 12), p. 32 et seq.; on the problem of uncertainty caused by the Fair Use doctrine, see ADLER AMY, Why Art Does Not Need Copyright, in: George Washington Law Review, 2018/2, p. 313 et seqq., p. 374; LUHMANN NIKLAS, Das Recht der Gesellschaft, Frankfurt a.M. 1993, p. 539.

14 MENDIS (Fn. 12), p. 34.

15 RIGAMONTI CYRILL P., Urheberrecht und Grundrechte, in: ZBJV 2017/153, p. 394.

16 SCHULZE GERNOT, Die Aneignung fremder Werke für eigenes Werkschaffen, Kunst & Recht 2016, Bern 2016, p. 41; EGLOFF WILLI, in: Barrelet Denis/Egloff Willi, Das neue Urheberrecht, 4. ed., Bern 2020, N 16 ad art. 11 CopA, mentioning artistic freedom as possible justification ground for a copyright breach.

17 LUHMANN NIKLAS, Gibt es in unserer Gesellschaft noch unverzichtbare Normen?, Tele-Akademie des SWF/SWR 1993, from minute 4; LUHMANN (Fn. 13), p. 392; PHILIPPOPOULOS-MIHALOPOULOS ANDREAS, Dealing (with) Paradoxes: On law, justice and cheating, in: King Michael/Thornhill Chris (eds.), Luhmann on Law and Politics: Critical Appraisals and Applications, Oxford 2005, p. 115 et seqq., p. 119 et seq.

18 DERRIDA JACQUES, The Gift of Death, Chicago 1995 (translated by David Wills), p. 65 et seq.; LUHMANN (Fn. 13), p. 539, describes the balancing of interests or rights as «flexible, even meaningless».

19 KUNZ PETER V., Einführung zur Rechtsvergleichung in der Schweiz, in: recht 2006/2, p. 37 et seqq., p. 41, differentiates between descriptive and functional comparative analysis. Here, the step to a functional analysis is not made.

20 LUHMANN (Fn. 10), p. 91; FUCHS STEPHAN, Kinds of Observers and Types of Distinctions, in: John René/Henkel Anna/Rückert-John Jana (eds.), Die Methodologien des Systems: Wie kommt man zum Fall und wie dahinter?, Wiesbaden 2010, p. 81 et seqq., p. 86 et seq.

was not sure they could amount to fair use.

Leaving the U.S. American handling of the case aside, in the following, the Swiss copyright rules will be applied on the original picture first (II.A) and then on the appropriated one as well (II.B). Even though comparable in some respects, the two copyright systems present deep differences.[21] The fair use doctrine, used by U.S. American courts in cases involving derivative works, has no direct parallel in civil law copyright systems, which instead function on the basis of the concept of originality and of statutory exceptions.[22]

A. The Copyrightable Work

a. An Intellectual Creation of Literary and Artistic Quality

Art. 2 para. 1 CopA contains the definition of individual work which is tied to three elements: the presence of an «intellectual creation» (1) of «literary and artistic» quality (2) that manifests an «individual character» (3). A work is deemed to be an intellectual creation when it is the result of human thought and when it is based on human will.[23] The bar is not set too high for this requirement: even a low degree of autonomous intellectual activity can find copyright protection.[24] It is enough if the work is the expression of a statement of human thoughts, in the sense that the result must have been decided by human will,[25] so that the deliberate selection of found objects[26] is eligible for copyright.[27] The requisite of human thought and will does not originate a sort of hierarchization between the works based on how much intellectual sharpness flowed into the work.[28] A certain, albeit low, degree of novelty is also required. The novelty can also result from recourse to previously used styles and from the recombination of already known forms without the requirement of intellectual creation going lost.[29] The requirement of intellectual creation is sometimes seen as in direct contrast to the copyrightability of the copy.[30] With respect to the requirement of novelty, Prince's artwork could already pose problems: can it be considered new enough under this understanding of novelty?

In addition, the intellectual creation must belong to the domains of «literature and art», which however have to be interpreted in an extremely broad sense[31] in order to exclude aesthetical rationales.[32] The formulation «literature and art» is not to understand as negative criterium with which a protectable work can be differentiated from a not protectable one.[33] Rather, the protectability is verified by means of the other two elements of the legal

21 For a quick overview of the differences, see STUTZ ROBERT MIRKO/BEUTLER STEPHAN, Copyright v. droit d'auteur, in: recht 1998/1, p. 1 et seqq.

22 MENDIS (Fn. 12), p. 34.

23 BGE 130 III 168 (Marley), c. 4.5 p. 172.

24 EGLOFF (Fn. 16), N 9 ad art. 2 CopA.

25 Bundesblatt 1989 III 477, p. 521. This criterium excludes matter generated by nature from copyrightability.

26 A good example thereof are the works of Dutch artist Herman De Vries.

27 EGLOFF (Fn. 16), N 8 ad art. 2 CopA; BGer 4C.86/2000 of June 13, 2000 (Vaca lechera), in: sic! 2001/8, p. 729 et seqq., though: «He who limits himself in choosing existing objects and exposing them as artworks does not fulfil the criterion of intellectual creation».

28 EGLOFF (Fn. 16), N 9 ad art. 2 CopA. In BGE 105 II 297 (Montre «Monsieur Pierre»), c. 3 p. 299 with this tenor: «L'oeuvre doit avoir son cachet propre, porter la marque de l'activité créatrice et de la personnalité de l'auteur. A cet égard, il importe peu que la création corresponde au sentiment esthétique de quelques-uns ou du grand nombre, qu'elle soit un chef-d'oeuvre ou appartienne aux productions de second ordre». This aspect seems similar to the one explicitly held in Art. 2 para. 1 CopA under the formulation that works are protected «irrespective of their value or their purpose».

29 EGLOFF (Fn. 16), N 9 ad art. 2 CopA.

30 CHERPILLOD IVAN, Kommentar zu art. 2 URG, in: Müller Barbara K./Oertli Reinhard (eds.), Stämpflis Handkommentar zum Urheberrechtsgesetz, 2. ed., Bern 2012, N 9 ad art. 2 CopA.

31 EGLOFF (Fn. 16), N 11 ad art. 2 CopA.

32 CHERPILLOD (Fn. 30), N 10 ad art. 2 CopA.

33 EGLOFF (Fn. 16), N 13 ad art. 2 CopA.

definition, that is, if the object is an intellectual creation that has an individual character.[34]

It is precisely this criterion of individual character to be the most difficult to determine in practice.[35] The CopA lacks a legal definition of it,[36] and because of this absence, the doctrine approached the problem essentially in two ways: some tried to define what individuality is (b.); others instead tried to elaborate methods for detecting it, thus circumnavigating the problem of a definition (c.).

b. The Definition of Individual Character

Those who tried to define individuality came up with positive and negative paraphrases. Individuality has been positively paraphrased into uniqueness, singularity, novelty,[37] peculiarity, aesthetics.[38] Among the many similar concepts into which the individual character was paraphrased,[39] that of «originality» seems to be the most popular.[40] It is not clear though, what the relationship between «individuality» and «originality» is: are they completely equivalent, and therefore interchangeable?[41] According to KUMMER's standard work, individuality is easier to reach compared to originality.[42] TROLLER pleaded instead for the contrary opinion, according to which individuality stands for an «enhanced originality».[43] RENOLD and MOSIMANN still assert that originality and individuality are narrowly related.[44] As mentioned above, the individual character has been negatively circumscribed as well, that is, defined through what it is not. What is banal, simple, obvious, artisanal, previously known and usual belongs to the category of the opposite of individuality.[45] The same can be said for what belongs to the public domain and what indicates a routinely or mechanical work.[46]

c. The Methods for Detecting Individuality

At least since Marley, the work has to prove its own individuality.[47] The methods for detecting individuality of the «statistical unicity» and of the adaptation of the degree of individuality to the margin of maneuver

34 EGLOFF (Fn. 16), N 11 ad art. 2 CopA.

35 CHERPILLOD (Fn. 30), N 2 ad art. 2 CopA.

36 SOMMER BRIGITTE I./GORDON CLARA-ANN, Individualität im Urheberrecht – einheitlicher Begriff oder Rechtsunsicherheit?, in: sic! 2001, p. 287 et seqq., p. 287.

37 EGLOFF (Fn. 16), N 13 ad art. 2 CopA; STUTZ ROBERT MIRKO, Das originelle Design: Eigenartig genug, um individuell zu sein?, in: sic! 2004/1, p. 3 et seqq., p. 11.

38 SOMMER/GORDON (Fn. 36), p. 288.

39 MIJATOVIC IVAN, Ein Werk erfüllt die Schutzvoraussetzungen, wenn es vogelig genug ist, in: sic! 2006/6, p. 435 et seqq., p. 435.

40 MIJATOVIC (Fn. 39), p. 435.

41 This seems to be suggested by the Italian wording of the legal definition of work, which reads «carattere originale» instead of «individual character». Interestingly, STUTZ (Fn. 37), p. 4 and 11, asserts that the concept of «originality», which is used in courts' decisions in order to concretize the blurry criterium of «individuality» (see more below) never made it into the copyright act's legal definition as condition for the protection of works and should therefore be abandoned. The use of originality in the Italian version is instead recognized, but ultimately rejected, by SENN MISCHA, Die urheberrechtliche Individualität – eine methodische Annäherung, in: sic! 2017/10, p. 521 et seqq., p. 523.

42 KUMMER MAX, Das urheberrechtlich geschützte Werk, Bern 1968, p. 35 and 38.

43 TROLLER ALOIS, Immaterialgüterrecht, Basel 1968, p. 362.

44 RENOLD MARC-ANDRÉ/MOSIMANN PETER, Kunst, in: Mosimann Peter/Renold Marc-André/Raschèr Andrea F.G. (eds.), Kultur Kunst Recht, 2. ed. Basel 2020, N 65 ad § 2.

45 BGE 105 II 297 (Montre «Monsieur Pierre»); BGer C 273/1986 of January 26, 1987 (Genossenschaftsapotheke), in: SMI 1989/1, p. 68 et seqq. when speaking about art. 25 para. 5 oCopA; BGE 134 III 166 (Arzneimittel); 130 III 714 (Meili).

46 BGE 134 III 166 (Arzneimittel), c. 2.3.1; 113 II 196 (Le Corbusier); 110 IV 104 (Zierpuppen), c. 2. See also: CHERPILLOD (Fn. 30), N 32 ad art. 2 CopA.

47 BGE 130 III 168 first established the formula: «decisive is the individuality of the work, not of the author».

must therefore elaborate criteria that do not attend to external elements and look for the individual character in the work only. The success of the work, for example,[48] or the personality of the author[49] cannot be considered.

According to KUMMER, an individual work is a unique, improbable work. The theory is based on a double comparison: first, the work must be compared with already existing works to establish the novelty of the work. In a second step, the «statistical» probability of an identical creation is determined based on a hypothetical comparison.[50] The theory aims at being more objective and less a matter of a discretionary decision. Because of the lack of statistical information about existing works and the degree of their similarity though, the exactitude of statistical unicity is a chimera.[51] This theory was also criticized for being inherently biased in favor of more complex works, which could still be recognized as unique even if composed of trivial elements. KUMMER saw no contradiction in that, since for him copyright was not about the quality of the creation, but about its diversity.[52] The Swiss Supreme Court used the theory of statistical unicity only selectively and always combined with other criteria for defining individuality.[53]

With the method of the degree of individuality, established by a constant jurisprudence,[54] it is possible to establish *how much* individuality is required for copyright eligibility. To consider are the type of work, its purpose and the margin of maneuver for configuration («Gestaltungsspielraum») of which the author disposed.[55] The formula reads: the smaller the margin of maneuver was in the moment of the work's conception and its realization, the easier it becomes for the author to be awarded with a copyright for an accordingly low independent creative activity.[56] However, the jurisprudence of the Swiss Supreme Court shows a certain incoherence.[57] This formula was sharply criticized.[58] For example, it was maintained that the rounding down of individuality makes the criterion itself a farce. If the room for maneuver is so narrow that a creative activity is virtually impossible, then the definition of work cannot be held as fulfilled and a copyright protection should not be granted.[59]

In the field of photography (Art. 2 para. 2

48 CHERPILLOD IVAN/BERGER MATHIS, Urteil des Kantonsgerichts SG of June 19, 2002 (Mummenschanz) with comment, in: sic! 2003/2, p. 116 et seqq., the reaction of the public was considered. Obergericht Luzern of June 24, 1998 (Watch Flemming I), in: sic! 1998/6, p. 567 et seqq., the court spoke about the prizes the watch won and that it had been exposed in museums.

49 Bundesblatt 1989 III 477, p. 521.

50 KUMMER (Fn. 42), p. 30.

51 CHERPILLOD (Fn. 30), N 25 ad art. 2 CopA.

52 CHERPILLOD (Fn. 30), N 30 ad art. 2 CopA.

53 HUG GITTI, Bob Marley vs. Christoph Meili: ein Schnappschuss, in: sic! 2005/1, p. 57 et seqq., p. 61.

54 BGE 100 II 167 (Späti Laden), c. 7; 106 II 71 (Kasperlifiguren), c. 2; 113 II 196 (Le Corbusier); BGer C_273/1986 of January 26, 1987 (Genossenschaftsapotheke), in: SMI 1989/1, p. 78 et seqq.; BGE 117 II 466 (Sekundarschulanlage); Arrêt de la cour de cassation pénale (VD) of March 2, 1993 (Zeitungsartikel), in: JdT 1996/I, p. 242 et seqq.; BGE 125 III 328 (Niederhauser), c. 4; BGer 4C.448/1997 of August 25, 1998 (Clown), in: sic! 1999/2, p. 119 et seq.; BGer 4C.86/2000 of June 13, 2000 (Vaca lechera), in: sic! 2001/8, p. 729 et seqq.; BGer 4C.120/2002 of August 19, 2002 (Hobby Kalender), in: sic! 2003/1; p. 29 et seq.; BGE 130 III 168 (Marley), c. 4.1; 130 III 714 (Meili), c. 2.3; 143 III 373 (Max Bill HfG Hocker), c. 2.1.

55 DE WERRA JACQUES/BENHAMOU YANIV, in: Mosimann Peter/Renold Marc-André/Raschèr Andrea F.G. (eds.), Kultur Kunst Recht, 2. ed. Basel 2020, N 9 ad § 7.

56 CHERPILLOD (Fn. 30), N 17 ad art. 2 CopA.

57 For example, a different degree of individuality is required by the Swiss Federal Supreme Court for architectural works (art. 2 para. 2 lit. e CopA) and for works of the applied art (art. 2 para. 2 lit. f CopA), even if both categories serve purposes and must adhere to technical imperatives.

58 SENN (Fn. 41), p. 524; SENN MISCHA, Wie aus einer Fotografie ein Bild wird, in: sic! 2015/3, p. 137 et seqq., p. 148 et seq.

59 HILTY RETO M., Comment on BGer 4C.120/2002 of August 19, 2002 (Hobby Kalender), in: sic! 2003/1, p. 28 et seqq., p. 29 et seq.

lit. g CopA),[60] the required individuality is described as «slightly over the average»[61] and not be set «too high».[62] In a different manner, a picture can be considered individual if the photographer exerts a creative influence on the otherwise mere mechanical procedure of photography.[63] This last approach, albeit with opposite results, seems to have been followed in both Marley[64] and in Meili.[65] The Swiss Supreme Court did not substantiate the decisions with the individuality degree, but rather by stating that the possibility to impart individual character to a photographic work depends on its concrete configuration («Gestaltung»). The choice of elements such as the cut of the picture, the concrete composition and all the photo-technical instruments adopted to achieve a determined result (exposure time, flash, filters, etc.) can, but do not necessarily, play a role.[66] Most of all though, it was stated that the moment, even if it is a «once-in-a-life-time» event, is not decisive for the copyright eligibility of a photograph.[67]

Because works of the visual art[68] (art. 2 para. 2 let. c CopA) do not serve a purpose,[69] the margin of maneuver in configurating artworks is virtually infinite. If the rule exposed so far was applied to visual artworks, the required individuality degree should be the highest among all work categories. However, SOMMER and GORDON identify a tendency of the doctrine to expand the notion of art and lessen the requirements of individuality in the interest of the applicability of copyright to new art forms.[70] They too argue for the necessity to protect these artworks, namely on grounds of the author's legal personality protection, interests of economic exploitation and cultural policy.[71] Such generous approach to works of the visual art seems to have been followed by the Zurich Court of appeals in a 2010 decision. The quarrel concerned the artwork «Love» by Robert Indiana, to which the Court granted a copyright arguing that in the field of minimal contemporary art the way of «presenting the object» is sometimes enough to express individuality.[72]

To conclude the displaying of the legal materials, three final notes on the variability of the required degree of individuality can be maintained: First, for this criterion to be applied, it ultimately must be determined to which category the work belongs, even if – as mentioned above – the «literary and artistic quality» should not be decisive. Secondly, it is not applied coherently and sometimes it is not mentioned despite a rich jurisprudential tradition, which applied it in practically all work categories. Lastly, for what concerns press photography (in apparent contrast to journalistic works[73]), the fact that the margin

60 Patrick Cariou's work is undoubtedly a photograph. Photography was described as the «problematic child of copyright» in BGE 130 III 168 (Marley), c. 4.5.

61 DE WERRA/BENHAMOU (Fn. 55), N 12 ad § 7.

62 VON BÜREN ROLAND/MARBACH EUGEN/DUCREY PATRICK, Immaterialgüter- und Wettbewerbsrecht, 3. ed., Bern 2008, N 262.

63 SOMMER/GORDON (Fn. 36), p. 297.

64 BGE 130 III 168 (Marley), c. 5.2.

65 BGE 130 III 714 (Meili), c. 2.3

66 DE WERRA/BENHAMOU (Fn. 55), N 12 ad § 7.

67 Dissenting: VON BÜREN ROLAND/MEER MICHAEL, SIWR II/1 – Urheberrecht und verwandte Schutzrechte, 3. ed., Basel 2014, p. 124.

68 Richard Prince's appropriation, even if it was probably taken with a camera (or a scan), belongs to the category of the works of the visual art, as it was later modified. The final form presents an increased blurriness of the background, a slightly bluer tone and the addition of lozenges on the eyes and mouth and of an electric guitar, see Patrick Cariou v. Richard Prince, 714 F.3d 694 (2d Cir. 2013).

69 VON BÜREN/MEER (Fn. 67), p. 101; SOMMER/GORDON (Fn. 36), p. 292.

70 SOMMER/GORDON (Fn. 36), p. 292.

71 SOMMER/GORDON (Fn. 36), p. 292.

72 THOUVENIN FLORENT, Obergericht Zürich of July 7, 2009 (Love), in: sic! 2010/12, p. 889 et seqq.

73 Arrêt de la cour de cassation pénale (VD) of March 2, 1993 (Zeitungsartikel), in: JdT 1996/I, p. 242 et seqq.

of maneuver is restricted because of the necessity to depict the object in an accurate and objective way is not considered.

d. Subsumption: Is Cariou's Photograph Individual?

By applying the different definitions of individuality on Cariou's original, his work can be described as simple (which indicates no individual character), but also as aesthetical and unique (which both signal individuality). These different definitions of individual character do not bring much further, as they are merely paraphrases of individuality with little independent meaning.[74] If we compare Cariou's picture with Christoph Meili's portrait though, which was judged as «too obvious» and therefore as lacking an individual character, we indeed note some differences. Cariou's picture does not use an automatic flash and is not portrayed frontally;[75] the solitary man seems lost, looking in the void and therefore contributing to the rather mystical atmosphere of the picture, which is also induced by the gloomy forest all around him and by the overall dark tones. If one proceeds to subsume from these premises, the conclusion can be drawn that Cariou's picture amounts to an individual work, eligible for copyright under art. 2 para. 1 lit. g CopA, insofar as it is different from Meili's portrait. A closer look at Meili's portrait, however, shows a man with an imperceptibly satisfied and determined look, holding two big and probably heavy registers in front of him as if they were two trophies. The photographer Gisela Blau might have chosen the white wall behind him as to signal the historical importance of the subject, or to mimic a police mugshot which would have Meili as the convicted felon.[76] The question is therefore why certain configuration elements should weigh more than others, or why the court did not consider certain configuration elements as creative, but rather as banal choices. Or even: why did the court not *see* certain configuration elements as such.

Even if individuality was denied to Cariou's picture, it would not be completely unprotected. Since April 1st, 2020, not-individual photographic depictions of three-dimensional objects are eligible for copyright under art. 2 para. 3bis CopA.[77]

B. The Derivative Work

Since according to art. 29 CopA the protection expires 70 years after the death of the author and since Cariou is still alive, Prince's «Graduation» makes use of an existing, individual and undoubtedly still copyrighted picture. The work definition exposed so far is resumed in art. 3 para. 1 CopA, which handles the question of derivative works. A derivative work is eligible for copyright only if it fulfils the requirements of the work definition.[78] Most probably, following the legal premises exposed so far, «Graduation» could not be deemed an individual work under the Swiss Copyright Act, but rather a so-called minor alteration («geringfügige Änderung» or «Umgestaltung»). Both derivative works and minor alterations require the previous consent of the author of the original (see art. 3 para. 4 and art. 11 para. 1 CopA). The only difference is that minor alterations are not eligible for copyright, whereas derivative works enjoy an independent protection. A third category, not regulated by law, is that of the free utilization («freie Benutzung »).[79]

74 MIJATOVIC (Fn. 39), p. 436.

75 Two configurative elements that seemed to disturb the Swiss Federal Supreme Court in BGE 130 III 714 (Meili).

76 MOSIMANN PETER/HOSTETTLER YANNICK, Zur Revision des Urheberrechtsgesetzes, in: recht 2018/3, p. 123 et seqq., p. 126; see in Blau's picture an allegory of Moses' Ten Commandments or a portrait in the style of photographer August Sander.

77 EGLOFF (Fn. 16), N 2 ad art. 2 CopA.

78 EGLOFF (Fn. 16), N 3 ad art. 3 CopA.

79 This category has been established by the Swiss Federal Supreme Court in BGE 85 II 120 (Sherlock Holmes). For a critique of this «unwritten norm», see: EGLOFF WILLI, Von der «freien Benutzung» zum «künstlerischen Zitat», in: sic! 2020/7 & 8, p. 399 et seqq.

This utilization is insofar «free», as the individual character of the work used is almost not discernible anymore, i.e. scoots in the background, behind the original creation of the second author. Works in this last category do not need the previous consent of the author and are eligible for copyright if they fulfil the definition at art. 2 para. 1 CopA.[80] In BGE 125 III 328, where the three categories of use of a previous work are exposed, it is also stated that the consequences of creating an artwork that amounts to a «minor alteration» without having previously asked for consent are the liability for plagiarism.[81]

If Cariou's original was to be subsumed under the new art. 2 para. 3bis CopA as a not-individual picture, unclarity still prevails on the subject of applicability of art. 3, and 11 para. 2 CopA. On one side, it is argued that these articles, built on the individuality of the original work, are not applicable on works that explicitly lack this individuality.[82] On the other, it is argued that these articles are applicable precisely because no individual character opposes to the use of a previously existing work.[83]

III. Copyright vs. Freedom of Artistic Expression

So Cariou could bring an action in damages against Prince and – unless a very liberal interpretation of the exception of quotation (art. 25 CopA) or of parody (art. 11 para. 3 CopA) was made – Prince's «Graduation» would probably not be protected under Swiss copyright. The jurisprudence of Germany,[84] Austria[85] and France[86] showed that courts are ready to stretch copyright limitations with a recourse to fundamental rights as a reaction to copyright limitations that are too narrow in scope. Whereas in Switzerland, this approach has explicitly been avoided so far,[87] it is not excluded that this will not change.[88]

Faced with this impasse, the juridical question is not if it is desirable to resort to the freedom of artistic expression of art. 21 of the Swiss Federal Constitution to defend Prince's artistic practice. One should rather flip the coin and ask if this configuration of copyright, that limits artistic copying almost a priori, could be considered as a chilling effect to the constitutional artistic freedom. And even before, if we stay within copyright, i.e. close to the source of the «problem», the following question may arise: why is it so difficult, under the existing copyright, to state the difference between plagiarism and appropriation art?

80 EGLOFF (Fn. 16), N 8 ad art. 3 CopA.

81 BGE 125 III 328 (Niederhauser), c. 4.

82 EGLOFF WILLI, Neues im neuen Urheberrecht, in: Anwaltsrevue 2020, p. 273 et seqq., p. 276.

83 MOSIMANN PETER, Die nicht-individuelle Fotografie, in: Mosimann Peter (ed.), Das Revidierte Urheberrecht, Die wesentlichen Neuerungen – eine Standortbestimmung, Basel 2020, p. 8 et seqq., N 32.

84 BVerfG, Beschluss of June 29, 2000, 1 BvR 825/98 (Germania 3), in: ZUM 2000, p. 867 et seqq. and BVerfG, Urteil of May 31, 2016, 1 BvR 1585/13 (Metall auf Metall), in: ZUM 2016, p. 626 et seqq.; in the meantime contradicted by EuGH, Urteil of July 29, 2019, C-476/17, in: MMR 2019, p. 596 et seqq.

85 Beschluss des Österreichischen Obersten Gerichtshofs of July 13, 2010 – 4 Ob 66/10z, in: ZUM 2011, p. 275 et seqq.

86 Cour de Cassation, 1re chambre civile, Arrêt no 519 of May 15, 2015.

87 BGE 131 III 480, c. 3.1 et seqq.; RIGAMONTI (Fn. 15), p. 389 positively salutes the rejection of the Swiss Federal Supreme Court to correct the CopA by means of constitutional rights. EGLOFF (Fn. 79), p. 399 et seqq. agrees, albeit with different arguments.

88 RIGAMONTI (Fn. 15), p. 394 shares the same concerns; DE WERRA JACQUES, Liberté de l'art et droit d'auteur, Medialex 2001, p. 143 et seqq. sees artistic freedom as a means to establish balance between exclusivity and freedom to use.

IV. A Change of Perspective

This difficulty for copyright law to differentiate between appropriation art and plagiarism can be looked at from an outside, non-legal perspective. This is the second-order observation, which asks how, not what, is observed.[89] As mentioned above, in this article, an appropriation artwork is used as a means to look at law while it handles with art, which means that I am not solely interested in the legal reasoning of formulating a better copyright norm. This has already been done extensively, if not primarily for attaining the protection of appropriationist practices, always with the intention of formulating a «better» functioning definition of (or method for detecting) the individual character[90] or simply for criticizing the existing for causing a lack of legal certainty.[91] These attempts suggest changes to the existing practices, but they do so by modifying something that was already there.[92]

In the following, three different perspectives are exposed. Their common feature – the externality to law – converts them in this context to tools for observing law from afar, potentially capable of creating room for irritation.[93]

A. Art Theory

Artists who use copying as an artistic practice are not «programmatically» criticizing copyright.[94] Instead, individuality, originality, and authenticity are also art-historical and art-theoretical concepts, rooted as much in Romanticism[95] as in formalist Modernism.[96] The aesthetic and the judicial norms seem to have resembled. Both pre-romantic and post-modern thinking and artistic practices, as well as other aesthetic cultures such as the Chinese,[97] make this modern conception of Copyright and its distinction between original and copy vacillate. These readings of the act of copying – one of the necessary steps toward appropriation – effectively challenge the hierarchical dichotomy between original and copy, showing that copies are worth existing not as a mere immaterial theft.[98]

Drawing from art historical and art theoretical writings has not only the potential of making the reproduction of an image appear valuable as well, and thus to declare copyright as obsolete,[99] or even manage to show

89 LUHMANN (Fn. 10), p. 103; MOELLER HANS-GEORG, On second-order observation and genuine pretending: Coming to terms with society, Thesis Eleven 2017/143, p. 28 et seqq., p. 31.

90 For example SENN (Fn. 58), p. 137 et seqq.; SENN (Fn. 41), passim; STUTZ (Fn. 37), passim; WILD GREGOR, Urheberrechtsschutz der Fotografie, in: sic! 2005/2, p. 87 et seqq.; WILD GREGOR, Von der statistischen Einmaligkeit zum soziologischen Werkbegriff, Zum 35-jährigen Publikationsjubiläum von Max Kummers «Das urheberrechtlich schützbare Werk», in: sic! 2004/1, p. 61 et seqq.

91 SOMMER/GORDON (Fn. 36), p. 299 et seq.

92 LUHMANN (Fn. 13), p. 9 et seq.

93 LUHMANN (Fn. 10), p. 9.

94 As argued instead by HUTTENLAUCH BLUME ANNA, Appropriation Art – Kunst an den Grenzen des Urheberrechts, Baden-Baden 2010.

95 CRAIG CARYS J., Symposium: Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law, in: American University Journal of Gender, Social Policy & the Law 2007/15, p. 207 et seqq.

96 BARRON ANNE, Copyright Law and the Claims of Art, in: IPQ 2002/4, p. 368 et seqq.; CROW (Fn. 8), p. 12 and 20: «The new art may recycle old forms but only to do away with old attitudes».

97 BOSKER BIANCA, Original Copies. Architectural Mimicries in Contemporary China, Honolulu 2013; HAN BYUNG-CHUL, Shanzai, Deconstruction in Chinese, Cambridge 2017.

98 On the importance of copying in art history, see SWARZENSKI HANNS, The role of copies in the formation of styles of the eleventh century, in: Meiss Millard (ed.), Romanesque and Gothic art, Studies in Western Art Vol. I, Princeton 1963, p. 7 et seqq. For a critique of the conception of appropriation as «theft», see JAEGGI RAHEL, Aneignung braucht Fremdheit, in: Texte zur Kunst 46/2002, p. 60 et seqq.

99 For example, this is the conclusion to which comes GREENBERG LYNNE A., The Art of Appropriation: Puppies, Piracy, and Post-Modernism, in: Cardozo Arts & Entertainment Law Journal 1992/1, p. 1 et seqq., p. 33.

an inherent bias.[100] It also has a much revelatory potential, that of allowing a deeper reflection on art forms' recurrence and mutability from an internal perspective, not mediated by legal norms.[101] For Sherrie Levine, a renowned artist, to appropriate existing artworks meant to reproduce the difference of original and copy in the form of an artistical experience.[102] To enter in this artistical experience, to adopt it as observation modus, will allow to open another perspective on Law's observations. This aims at being a process of «reciprocal capture», i.e. an encounter of transformation, not absorption, in which new, immanent modes of existence are produced and no supposedly more powerful interest forces other divergent interests to bow down. Reciprocal capture refers to a symbiotic, dual process of identity construction, where the reference to the other is integrated by the system for its own benefit.[103]

B. Systems Theory

The last words of the previous paragraph and the question: «How can law benefit from art?» bring us to the next external perspective; the one provided by systems theoretical description of art. As LUHMANN explains, art guides us into the observation of ourselves as observers, and stumbles upon inscrutability.[104] What if this observer, guided by art into the observation of itself, was the law?

Systems art theory is also useful for its reflection on the relationship between medium and form. What is a form in a medium can become a medium to other forms as soon as it gains an informational value[105] and this is particularly clear in the art system.[106] This systems theoretical element outdates the typically ontological difference – thing vs. its properties – by replacing it.[107] The fact that the difference between original and copy is reformulated into a form (which requires its medium)[108] allows to universalize, i.e. to describe all works of (appropriation) art as a peculiar relation between medium and form without getting lost in the judgment of the «reasonable observer»[109] or of the «artistically broad-minded observer».[110]

Finally, yet importantly, LUHMANN describes the artwork as an «improbable circumstance».[111] It is difficult not to notice the striking resemblance with the abovementioned theory of the statistical unicity.[112] Indeed, the improbability of the emergence of an artwork in its form could have become a «structural drift» in the art system, before one began to experiment with the possibility to declare everything as art, provided it could be effectively claimed it was. The improbability then begun to lie in the credibility of the statement. LUHMANN also individuates an improbability in the decontextualization of historical references, obtainable by randomly accessing the supply of already existent forms.[113]

100 CRAIG (Fn. 95), p. 207 et seqq.; HATHCOCK APRIL M., Confining Cultural Expression: How the Historical Principles Behind Modern Copyright Law Perpetuate Cultural Exclusion, in: American University Journal of Gender, Social Policy & the Law 2017/25, p. 239 et seqq.

101 LUHMANN (Fn. 10), p. 176. See also RÖSCH PERDITA, Aby Warburg, Paderborn 2010, p. 97: Aby Warburg created a new method for a visual art history with his «Bilderatlas Mnemosyne», where he organized images by dividing them into recurring forms, or *Pathosformeln*.

102 Sherrie Levine in a conversation with Noemi Smolik, in: Betriebssystem Kunst, Kunstforum International 1994/125, p. 286 et seqq., p. 287.

103 STENGERS ISABELLE, Cosmopolitics I, Minneapolis 2010, p. 35 et seq.

104 LUHMANN (Fn. 10), p. 428.

105 LUHMANN (Fn. 10), p. 166, 168, 172.

106 LUHMANN (Fn. 10), p. 176.

107 LUHMANN (Fn. 10), p. 165 et seq.

108 LUHMANN (Fn. 10), p. 198.

109 As held in Patrick Cariou v. Richard Prince, 714 F.3d 694 (2nd Cir. 2013), para. 56.

110 BGE 131 IV 64 (Pornographie), c. 10.1.3.

111 LUHMANN (Fn. 10), p. 205 and 248.

112 See above at section II.A.c.

113 LUHMANN (Fn. 10), p. 205.

C. A Line of Morphing Forms

For establishing whether a new individual character has been founded or whether the use is fair, law relies on the physical alteration of the image.[114] By doing so though, it misunderstands appropriation art. The impossibility to establish the transformative use expressed by the «could» of the United States Court of Appeals and the difficulties of the Swiss doctrine with the definition of individual work can be visually rendered with a line of morphing forms.[115] This line connects the original artwork to its repetition in time, be this modified or not, and stands therefore for both time and space between them. The imaginary arrow that connects Cariou's picture to Prince's appropriation symbolizes precisely a state of becoming where what is own and what is alien is blurry and intertwined. It is also not necessary that all the variations in between (and beyond) exist in a perceptible state: the very existence of every «creative copy» recalls every other slightly different variation on this imaginary line of virtually infinite similar forms, so that the future and the mere potential emergence of an image are encompassed as well.[116]

When speaking about freedom of art, law recognizes that it is «the nature of art to be constantly adopting new forms».[117] What if law did really accept this manifoldness and constant change? What if it did not focus on the finite object, but on its hidden potentiality?

V. Conclusion

The jurisprudence of the Swiss Federal Court in the field of photography seems to suggest that Cariou's picture is likely to be eligible for copyright as an individual work. Yet, while it can be speculated that under the exposed rules Cariou's picture is eligible for copyright, it remains unclear what else can be considered individual or not and why exactly it is so. With regard to the considered appropriation artwork, this translates in a copyright law that fails to protect it as such and demands from it that it presents a new individuality with tangible modifications. It seems that law has to *see* a change in order to grant copyright protection. The subtle, yet striking novelty that appropriation art reveals behind the repetition of a known form is therefore missed.

The three external perspectives exposed in section IV can be understood as tools for escaping law's narrow sight of art and of appropriation artworks in particular. By adding dimensions to the interaction between art and law, they create a rendering thereof that can be used for a more complex and therefore more adequate analysis.

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114 FRANCIS (Fn. 3), p. 682.

115 The continuous deferring of meaning can be theoretically described with DERRIDA's concept of *différance*, i.e., the simultaneous convergence of temporality – contained in *defer* – and of space – contained in *differentiate* which reveals copyright's the polysemy underlying copyright's opposition of terms: DERRIDA JACQUES, Margins of Philosophy, Chicago 1984 (translated by Alan Bass), p. 3, p. 7.

116 Law considers this potentiality as well, for example in the «second step» of the statistical unicity test, when it compares the work at stake with what «could exist». More in general, even when it puts the individual character bar higher than where mere novelty is, it is in a sense anticipating future creations. To be a work, a creation has to be novel for some time to come. In Urteil OGer ZH, I. ZivK of June 30, 1983, in: SMI 1985/1, p. 221 et seqq., p. 223 both elements are contained and formulated as reservations towards the statistical unicity.

117 BGE 131 IV 64 (Pornographie), c. 10.1.3.