

The Pictures Generation, the Copyright Act of 1976, and the Reassertion of Authorship in Postmodernity

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In the three decades since artists Sherrie Levine and Richard Prince first exhibited their provocatively infringing appropriated photographs, inexpensive reproduction technologies and distribution systems have further thrown established conventions of authorial control into disarray, and at a seemingly exponential rate. Reactionary focus, then, to both the legal regulation of image production and the prosecution of violators has been rigorous. “Intellectual property” now figures significantly as a cross-over category between legal and cultural discourse.¹ Within the domain of art, appropriation since the Pictures generation might have been determined by artists to be a very risky endeavor. But while there has been the occasional lawsuit, there is nonetheless no doubt that the practice of appropriation in contemporary art is alive and well. There is a lot of copying going on, with, as scholar Martha Buskirk describes, “The types of copies that appear in contemporary art...as varied as the materials artists have employed.”²

Some initial observations might help account for this. An obvious one is that most artists, after all, are not legislators, lawyers or judges; they are arbiters not of law but of *culture*, historically tasked with interrogating its significance, even as the sign has become inextricably linked with its regulation through the legal apparatus.³ Disregard for the rule of copyright law is thus perhaps an anti-establishment refusal, feeding the notion that for artists, *the law does not apply*. And while that isn’t true, it might often appear that way. As Richard Prince himself has stated in justifying his use of various Marlboro Men, “I never associated advertisements with having an author.”⁴

So who evades the law, who doesn’t, and why? To understand how appropriation art slips in and out of the grasp of intellectual property regimes, inquiry should be carried out at the level of praxis: what sort of content have artists been appropriating? How, if at all, are they transforming it? And where in the cultural and economic structures of society are the appropriated, the “violated,” located, and what bearing does this location have on the potency of appropriation?

My analysis begins with initially setting the discourse of appropriation art within a historical shift that occurred on two registers, beginning approximately in the late 1970s. The first shift marks a period during which artists, art critics and cultural theorists in the West were coming to terms with an emergent but elusive “postmodernism.” Among others, scholar Frederic Jameson diagnosed the phenomenon by stating that its modes of production differed from those of previous decades in that they increasingly blurred the boundaries between high culture and more

overtly commercial, “low” cultural forms, problematizing, as artist Barbara Kruger wryly observed, the newspaper category “Arts and Leisure.”⁵

One effect generated by this blurring was contemporary art’s return to figural representation across a variety of media, beyond the indexing/archiving photographic tendencies of conceptual art. Appropriation art especially reclaimed the figure. Moreover, appropriation based practices triggered a shift in the mode of interpretation of the work of art, from a modernist approach that had privileged the formal and original qualities of a subjective totality to a postmodernist one that emphasized the discursive and allegorical qualities of fragmentation and desire. The use of appropriated photography seemed particularly suited to the allegorical, precisely because of its status as the always-already- seen, with readings thus premised upon some recognition of deferring authentic determination.⁶ Such deferment does have negative political consequences, however.

Robert Rauschenberg, *Perssimon*, 1964

Postmodernist allegory can, through a multiplicity of contents (or what Baudrillard might have termed “floating signifiers”), frustrate a sense of historicity and therefore any critical artistic pursuit that depends on historical consciousness. Hal Foster described this allegorical multiplicity as “eclectic historicism,” a cherry-picking of the cultural past and present that reduces the work of art to stylistic pluralism.⁷

Countering such a neoconservative postmodernist art, critics theorized a poststructuralist variant, a type of practice linked to French theory’s rhetoric of “the death of man” as the “centered subject of representation and history.”⁸ Opposed to the embrace of a new pluralist humanism, poststructuralist art was tasked with exposing its own cultural encoding. The appropriation of an indexical (i.e., “natural”) image supplemented any originary meanings it might have connoted with critical reevaluation of, to cite Craig Owens, “the degree to which “nature” is always already implicated in a system of cultural values which assigns it a specific, culturally determined position.”⁹ A certain version of appropriation practices thus often depended on an unmitigated poaching of photographic cultural symbols in order to voice their criticisms.

Those practitioners affiliated with early appropriation art are often referred to as “Pictures” artists, after the exhibition *Pictures*, curated by Douglas Crimp at Soho, New York’s Artists Space in the Fall of 1977.¹⁰ Rather than maintain the exhibition as a founding moment however, I would like instead to situate the beginnings of postmodernist appropriation within the context of the second historical shift mentioned earlier; that is, within the history of law. A new context emerges when reframing appropriation practices through an event that preceded *Pictures* by a year: the passing of the Copyright Act of 1976. Analyzing appropriation through legal developments at that time can assist in a better understanding of the wider postmodern moment within which appropriation art has been historicized.



On October 19, 1976, President Ford signed into law the first major revision of United States copyright since 1909.¹¹ The Copyright Act of 1976 confronted a number of author's rights issues relating to the myriad technological advances (e.g., film, radio, television, etc.) that had occurred in the first three-quarters of the twentieth century. Addressing the accelerated manner in which cultural works could be reproduced, both enhanced legal definitions, as well as measures not previously codified, were included in the new legislation, all of which attempted to maintain the balance between author's rights and fundamental freedom of speech rights. In other words, the 1976 Act attempted to protect new types of authors and the works they produced from would-be counterfeiters or pirates, while avoiding overreach that might foreclose certain artistic possibilities and thus have a "chilling effect" on cultural production as a whole.

However, the new law seemed to expand authorial rights in several ways. One fundamental change was redefining what sorts of expression qualified for copyright protection. An all-encompassing definition, "original works of authorship fixed in any tangible medium of expression," was introduced.¹² Yet language that defined copyright qualitatively was avoided, granting authorship to new generations whose only requirement was that their creations be "original."¹³ Another change to the Act included the authorial control over derivative works, those that are "recast, transformed, or adapted" from the original, in both the present and the future.¹⁴

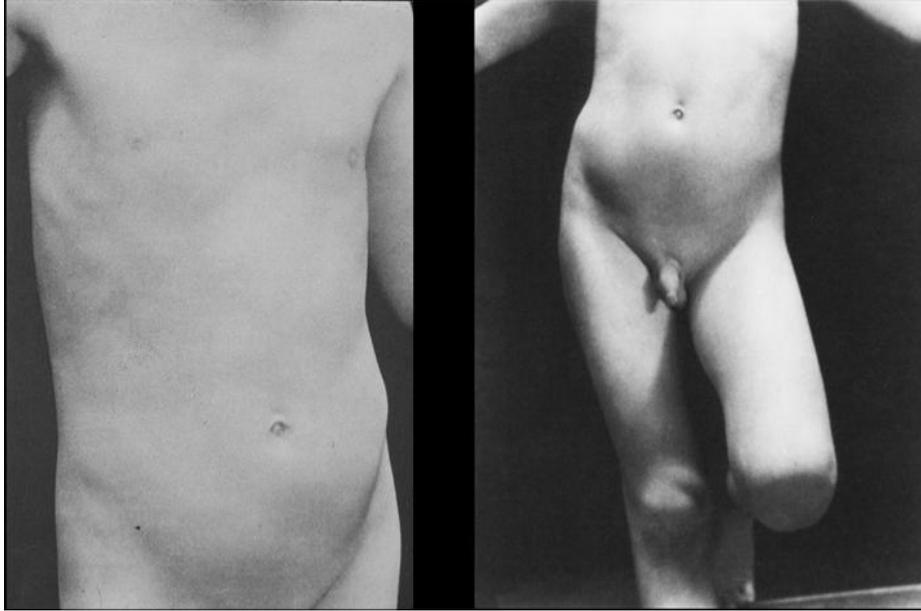
These apparent expansions of authorial rights stem from what legal scholars such as James Boyle identify as copyright's deferential treatment of the "romantic author," a figure constructed towards the end of the eighteenth century when new European social and economic orders were being born, and "art" was separating from mere "craft."¹⁵ However, through a series of court rulings both in England and the United States crossing over the eighteenth and into the nineteenth centuries, the change in scope over what constituted an author's "work" had the long-term consequence of shifting copyright's emphasis away from authorial intentionality and towards formalist analyses. Even as copyright law uncritically embraced a rhetoric of authorial originality, it nevertheless mitigated its novel or innovative aspects in favor of recognizing the author merely as the work's point of origin. Meanwhile, the components that made up the work were disaggregated and subjected to judicial interrogation in order to determine their degree of derivation—which elements of the romantic author's "total vision" were in fact "original," and which elements were not. In the modern era *the work* displaced the author as the central determining character in copyright doctrine.¹⁶

If subordination of the author to the work is acknowledged, then the expansion of rights in the 1976 Copyright Act indicates, as Marci Hamilton suggests, not deference to but disdain for the romantic image of the author.¹⁷ Expanded author's rights in the 1976 Act, then, while appearing to champion an antiquated figure from the cultural past, seemingly acted more as a foil for copyright's actual purpose: providing the means for an expanding intellectual property market in a post-industrial economy. One of the Act's clauses in particular suggests an effacement of the romantic author, perhaps more than any other: that is "work-made-for-hire." Mentioned only in passing in the 1909 Act, work-made-for-hire was given a thorough treatment in the 1976

revision, providing legal buttressing for a twentieth century economic structure already dependent on the division of labor.¹⁸ Far from facilitating a romantic conception of authorship, copyright's work-made-for-hire doctrine seized control of individual agency, returning the author to his or her place as a "just another cog in the wheel" in the fabrication processes of a postmodern culture industry. Work-made-for-hire had essentially become corporate copyright.

Interpreting copyright in this way provides an alternative theoretical space from which to assess the poststructuralist variant of appropriation art appearing in the late 1970s. In some respects, the "death of the author" proclaimed by post-structuralism and allegorized in appropriation art had already become a reality in American copyright law. Let us now return to the early careers of Richard Prince and Sherrie Levine, in light of the 1976 Act's degradation of the romantic author.

Appropriation art's critique of the ideology of the original and authentic author was premised upon an assumption that such a figure, esteemed in bourgeois culture practically since the advent of modernity, continued to undergird contemporary production. And to some extent this was (and still is) accurate; yet appropriation art challenged a discourse of the transcendent, autonomous subject that had begun with nineteenth century romanticism and persisted within several areas of modern art, particularly modernist photography, abstract expressionism in the 1940s and '50s, and neo-expressionism in the 1980s. As mentioned earlier, such a discourse became increasingly problematic with art's infiltration by the mechanical image, as exemplified in Pop Art. Appropriation Art continued the offensive, denying the very possibilities of originality and authenticity through re-presentation as art images pilfered from an industrially built environment glutted with a mass-circulation of signs. It is important to recall that both Levine's and Prince's early appropriations were lifted from what were already reproductions—reproductions that had until then performed the meaning-making role the two artists were simply rendering transparent. Levine's appropriation of reproductions of Edward Weston photographs pointed to the fact that they, despite being "unoriginal" halftone copies, were nonetheless mass circulating as representative of Weston's original vision, reaffirming his place, and the patriarchal gaze in general, within the canon of modernist photography in the process. And Prince's appropriation of reproductions of cowboy images from Marlboro advertising campaigns made plain the notion that images many times removed from their source were being employed in the service of reifying an authentic western subject essential to American identity. In short, Levine's and Prince's use of appropriated material starkly asserted that within a postmodern condition, the author had become irrelevant because the original gesture had become unimportant; the copy adequately stood in its place and performed its legitimizing function.



Sherrie Levine, from *Untitled (After Edward Weston)* series, 1980-1981

Critics interpreted Levine's and Prince's unabashed usurpations of images as radical interrogations of the categories of originality and authenticity within the social construction of authorship. Writing at the outset of the 1980s, Hal Foster heralded (poststructuralist) appropriation art as critical to the "recoding" process within postmodernity's contests of meaning.¹⁹ Setting appropriation art in relation not only to the construction of the social codes of representation but also to the actual United States Code and its then newly amended copyright clause, perhaps Foster's characterization can be taken quite literally.

Now, while it is very doubtful Sherrie Levine and Richard Prince intended their early works as rebuttals to the 1976 Copyright Act, they can nonetheless be read as "preemptive strikes" against the *legal* construction of authorship. More than pointing to the loss of determinate social meaning, the works allegorized the impossibility of authorship outside the paradigm of the derivative sanctioned through copyright law. Perhaps Benjamin Buchloh comes closest in acknowledging appropriation art's allegorization of the derivative nature of cultural production. "In the splintering of signifier and signified," he writes, "the allegorist subjects the sign to the same division of functions that the object has undergone in its transformation into a commodity. The repetition of the original act of depletion and the new attribution of meaning redeems the object."²⁰

Levine's and Prince's appropriations thus seemingly problematize the author-subject both within a humanities-based discourse of original genius and within a legal-economic one that assigns authority to originality. Yet for the latter critique to retain purchase, it must assume a centered author-subject under the law. Here Buchloh's "division of functions" subtly points to the opposite, for implied in the sign's initial fragmentation is a productive apparatus premised on a

division of labor, the very process legitimized by copyright law through its work-made-for-hire clause. The object is “redeemed” precisely by a reclamation of authorial agency.

Read through the lens of copyright’s de-individuation of the author then, Levine’s and Prince’s gestures invite a reading at odds with a poststructuralist “death of the author” critique. Rather than undermining any romantic notion of authorial originality in a culture of the copy, the works reasserted the very productive core of the romantic authorial mode—one premised on private ownership through labor. In Lockean terms, Levine and Prince acted upon the “media” environment around them, defiantly re-centering themselves as possessive individuals, as the authorities over their expressions amidst an impersonal productive apparatus churning out derivatives whose actual creators can not be readily traced.²¹ Here any aesthetic novelty almost becomes superfluous; Levine and Prince merely employed those processes familiar to the nameless technicians working in the creative industries: cutting, cropping, enlarging, editing, printing.²² What is novel is that, through mixing their labor with their surroundings “in the radical formulation that [the artists preferred]” as Martha Woodmansee asserts, Levine and Prince took individual control of the mass-authored image, and in so doing, reaffirmed the ground upon which the romantic author stands.²³

In this authority over the image thus lies the contested core of Levine’s and Prince’s gestures. For with control comes the ability to insert and thereby manage meaning, creating discourse—what Foucault termed the “author-function.”²⁴ Any potential that Levine’s and Prince’s appropriated photographs had as fomenters of a counter-hegemonic discourse would have been underscored by their status as copyright infringements. In the eyes of the law, their work would almost certainly not have constituted “original works of authorship,” which, from the perspective of a critique of the legal construction of authorship, is no doubt part of their reason for being. Consequently, Levine’s and Prince’s provocations should have invoked the wrath of the appropriated images’ copyright holders. And yet exhibition (and collection) of their “rephotographs” was permitted, even encouraged, much to each artist’s benefit. Eventually, Levine and Prince, whose works appeared the most antagonistic towards prevailing social and legal conventions of authorship, were to be validated as authors par excellence by an institution of art that had never been entirely convinced of the so-called death of the author, and could even provide a “second tier” of lax copyright regulation in the name of cultural progressivism.

Fast-forwarding thirty years to Prince’s retrospective *Spiritual America* at New York’s Guggenheim Museum, his celebration as a romantic author is evident. In the exhibition’s catalog, he is described as an artist who:

makes it new by making it again. Although his [work is] primarily appropriated...from popular culture, [it] convey[s] a deeply personal vision. His selection of mediums and subject matter...suggest a uniquely individual logic...with wit and an idiosyncratic eye, Richard Prince has that rare ability to analyze and translate contemporary experience in new and unexpected ways.²⁵

Noteworthy is that this introduction was penned by a chief executive of Deutsche Bank, the show’s major sponsor, for corporate interest in the arts has played a pivotal role in maintaining the artist as a romantic figure. Corporations have used the artist as a public relations tool to both

align themselves with the progressive values associated with art and reach new consumer groups.²⁶ The romantic artist is naturally attractive for the corporation, because he or she embodies the same ethos that drives free market commerce—what Richard Bolton, following Marcuse, has termed “enlightened self-interest.”²⁷



Jim Krantz, *Stretchin' Out*, 1997. and Guggenheim promotional banner

Recognizing the motives corporations have in aligning themselves with art that appears to conflict with their interests may at least partly explain how Prince was able to evade any legal skirmishes over his Untitled (cowboy) prints. Phillip Morris USA owns the Marlboro brand, and, of course, the copyrights to the cowboy images from which Prince appropriated. Their tacit approval of Prince's work might contradict the maximum control logic characteristic of intellectual property regulation, but perhaps Phillip Morris' desire to associate itself with artistic innovation has outweighed its commitment to brand management. Or perhaps allowing Prince free reign is precisely part of its branding strategy; aligning with art enhances Phillip Morris' image, something important for a tobacco company with a less than stellar public reputation.²⁸

Yet still left unaccounted for is photographer Jim Krantz who, as a work- made-for-hire employee, actually took some of those photos for Marlboro. With Prince's singular authorial control, he becomes Krantz's surrogate, the self-possessive author Krantz cannot be. This however can only provide cold comfort, for Prince has never acknowledged Krantz, who has been replaced now twice over as the author of the photographs. And finally, under Prince's

authority, the images travelled full-circle; advertising-became-art-became-advertising, when Krantz's images lined Manhattan streets in posters and banners that promoted Prince's exhibit.²⁹

Levine's *Untitled (After Edward Weston)* series has had no less help from institutional para-regulation. Her appropriation of Weston's 1925 images was perhaps riskier, for she was taking from a canonized figure in modernist photography; any legal skirmish would be artist versus artist. The exhibition of the work in 1980 did catch the attention of the Weston estate, and while the details are vague, by 1981 Levine had moved on to appropriating the FSA work of Walker Evans, whose government commissions remain in the public domain.³⁰

This same year, 1981, was also the year that Weston's archive and copyrights were sold to the Center for Creative Photography at the University of Arizona, which spends "a lot of time encouraging fair use, discouraging censorship, and preserving the work of artists...so that they can be appreciated by generations to come."³¹ The Center is aware of Levine's practice, but has, like Phillip Morris with its Marlboro images, given tacit approval to it; in addressing the limits of appropriation, Amy Rule, Head Archivist at the Center, states, "We might go after someone using [Weston's] images to sell laundry soap, but I doubt that we would try to stop an artist's exploration of legitimate aesthetic issues."³² Yet it is not that appropriation art can't be used to sell, as Prince's street banners demonstrate. It is that it is, within the institution of art, limited to selling itself as a concept of art, as a concept of resistance that can only ultimately be experienced in the imaginary realm provided by what Marcuse might have called "affirmative culture." "To pose real trouble for the author in copyright doctrine," scholar Jane Gaines concludes, "Sherrie Levine would have to reproduce her own copies of Edward Weston as postcards and then sell them—the stiffest test of "free commercial speech."³³

I end with another quote from Jane Gaines. Writing in 1991, she states, "As yet, we have too few ethnographies of the use of popular icons in their travel from the avant-garde to the popular and back again...it would be a mistake...to look to the law instead of to use and custom as the primary indication of how ideological domains are configured."³⁴ This text, however preliminary, has been an attempt at just such a study. In it, I have tried to look to custom, use and the law, analyzing the parallel histories of appropriation strategies in art and copyright law's transformation since the late 1970s and the ways each approached the construction of authorship. Setting Richard Prince's and Sherrie Levine's early work against the revisions of the Copyright Act of 1976, I have attempted to link the postmodern avant-garde to a reassertion of the author-subject, even as the discourse that enveloped the Pictures movement at

the time nurtured a critique of originality and authenticity. What I find remarkable in examining the period's criticism is its insistence upon the superiority of the "poststructuralist" variant of appropriation, given the fact that much of it was ultimately recuperated within the institution of art while today, in the age of YouTube, the "remix" collage format—what Hal Foster might label "neoconservative"—has become one of the flash points in the struggle over the reins of meaning-making, as new generations of technologically savvy producers enter (at their own legal risk) the domain of cut/paste culture (or what might be called a now wide-spread "aesthetics deregulation").