

Donald Graham v. Richard Prince, et al.
No. 15-CV-10160 (S.D.N.Y. July 18, 2017)

Year	2017
Court	United States District Court for the Southern District of New York
Key Facts	Plaintiff Donald Graham is a professional photographer who specializes in portraits. Defendant Richard Prince is a well-known “appropriation artist,” whose work has subjected him to litigation in the past. Prince used Graham’s photograph, <i>Rastafarian Smoking a Joint</i> (“ <i>Rastafarian</i> ”), to create an artwork known as <i>Untitled (Portrait)</i> (“ <i>Untitled</i> ”), which was featured by Prince and the other defendants, Gagosian Gallery, Inc. and the gallery’s controlling shareholder Lawrence Gagosian, in an exhibition called <i>New Portraits</i> , as well as in the catalog for that exhibition, a billboard displayed in New York, and in a post by Prince on Twitter. <i>Rastafarian</i> depicts a Rastafarian man with long dreadlocks, shirtless against a white background, smoking a marijuana cigarette; <i>Untitled</i> is a large inkjet print of a screenshot taken by Prince that captures a post made by a third-party user named “rastajay92” on Instagram. The post consists of a slightly cropped copy of <i>Rastafarian</i> . Prince added a comment from his Instagram account (username “richardprince4”), after which he took the screenshot; as such, the work depicts the number of “likes” the post received, Prince’s comment, the original caption by “rastajay92,” and the number of weeks that elapsed between the post and Prince’s screenshot. Graham learned about <i>Untitled</i> in October 2014; several months later, he sent a cease and desist letter, and ultimately filed a complaint in December 2015 alleging willful copyright infringement against Prince for all of his uses of <i>Rastafarian</i> ; and against Gagosian Gallery and Lawrence Gagosian on the basis of <i>Untitled</i> and the catalog. The defendants asserted a fair use defense and moved to dismiss the complaint, or to convert that motion into a motion for summary judgment.
Issue	Whether Defendants’ near-verbatim use of photograph in appropriation art piece constitutes fair use.
Holding	After conducting the four-step analysis, and beginning that analysis by noting that it is “highly unlikely . . . that a fair use affirmative defense can be addressed on a motion to dismiss,” the court could not find that the Defendants’ use was fair as a matter of law, and denied their motion. The court concluded that the first factor, purpose and character of the infringing work, did not weigh in Defendants’ favor because <i>Untitled</i> “does not make any substantial aesthetic alterations” to <i>Rastafarian</i> , and as such “does not belong to a class of secondary works that are so aesthetically different from the originals that they can pass the Second Circuit’s ‘reasonable viewer’ test” to be found transformative as a matter of law.” The second factor, nature of the copyrighted work, favored Plaintiff because the work “was both creative and published.” The third factor, amount and substantiality of the portion used, “cannot weigh . . . in favor of defendants at the motion to dismiss stage” because defendants “reproduce[d] [<i>Rastafarian</i>] in its entirety, in a size that enables the original to retain its full aesthetic appeal,” and “only a determination that Prince’s use of the photograph was transformative could enable this factor to weigh in their favor.” The final factor, effect of the use upon the potential market, could not weigh in favor of Defendants “because plaintiff has adequately pled that the target audience and the nature of Prince’s <i>Untitled</i> work and the <i>New Portraits</i> Catalog is the same as Graham’s original,” as well as “facts that allow the Court to draw a reasonable inference that Prince’s work can serve as a substitute for Graham’s original work, notwithstanding Prince’s alterations.” Accordingly, the court found the complaint stated a claim entitling Plaintiff to relief.
Tags	Second Circuit, Photograph
Outcome	Preliminary ruling, fair use not found

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