

ARTnews

Your Thievin' Art? At Play in the Field of Fair Use

Your mug shot. Your profile picture. Your breakfast table. Is anything safe from appropriation artists?

By Robin Cembalest
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On Saturday Julie Saul opens a show of work by Arne Svenson, an artist with a telephoto lens, a formalist's eye, and a somewhat unsettling obsession with his neighbors in the glass-walled apartment building across the street.

You can meet them, too, in the color pictures in "The Neighbors."

Obscured yet often recognizable, the figures lounge around as one does at home when no one is looking, half awake or half dressed. Yet aided by curtains and window frames, they resolve themselves into ordered compositions, their mysterious narratives coalescing where Vermeer meets Rear Window via the Pictures Generation.

According to the artist, the neighbors are fair game because they're making public art: "performing behind a transparent scrim on a stage of their own creation with the curtain raised high," as his statement puts it.

Assuming that the Neighbors really are neighbors—and not conjured in the studio, or the computer—the work falls into one of those gray areas of Fair Use, the legal doctrine that allows artists to use images of or by others under certain circumstances. Even if this is legal, is it ethical? Isn't any place safe from prying cameras? Are there times when Fair Use just isn't fair?

As Barbara Pollack reported in our pages last year, these questions reverberate through contemporary art, particularly since the rise of the internet culture of sampling. There is no short answer, except that people who live in glass houses might want to draw the shades—if they don't want to turn up in a Chelsea gallery.

Around the corner, Nicole Klagsbrun has more portraits of people who didn't ask to be art.

Ben Durham based these enormous drawings on the mug shots of classmates and friends from childhood, images he'd found in an online database of arrests for violations ranging from unpaid fines to murder. He drew them entirely with words—everything he can remember about the subject, writing texts on top of texts until they're almost illegible.

This Saturday, Durham will dictate his texts at the gallery as the artist and musician Robert Beatty creates a live processed sound improvisation that samples the artist reciting the texts on

tape. Of course, none of the words will be intelligible. His memory can speak all it wants, but we won't be able to hear it.

Another dialogue on memory, commentary, and Fair Use is underway at The Jewish Museum, which just posted a forum in response to an emotional controversy over a work by Marc Adelman that unfolded last summer. The piece, *Stelen*, features photos of men posing in Berlin's Holocaust memorial. The artist had downloaded them from profiles on a gay online dating site.

For Adelman, the photos spoke volumes about memory, minorities, and persecution. "The fact that several hundred men (and likely many more) posed for casual, flirtatious snapshots in the Holocaust Memorial cannot be reduced to sheer coincidence," he explains.

Some of the men saw it otherwise, saying their privacy, and safety, was compromised. When they threatened legal action, the museum took the piece down.

"We say we want artists to be provocative, but as the controversy around *Stelen* makes clear, there are lines we are not comfortable stepping over," comments Marvin Heiferman, one of seven contributors to the forum, among them Rabbi Daniel Nevins and artists Penelope Umbrico and Oliver Wasow. Paddy Johnson, the Art F City blogger, had the most conflicted response to *Stelen*. "Ultimately," she wrote, "the decision to collect those images for public display wasn't respectful."

Patricia J. Williams, a Columbia law professor, suggested a creative way to approach some of the Fair Use issues the case raises. She wondered if online profile photos could be considered "one's 'own' artistic rendering"—in other words, less about privacy than about copyright.

Not that copyright law would help clarify the issue, as the recent rulings in *Cariou v. Prince* make clear. First a federal judge argued that Richard Prince pretty much disqualified himself from the Fair Use defense on the stand, by declining to offer sufficient reasons for using Patrick Cariou's photos of Rastas into his own mixed-media works, "*Canal Zone*." So, she said, the 30 works must be destroyed.

Late last month, an Appeals Court reversed the decision—up to a point. It switched the Fair Use focus from the artist's intention to the perception, of a reasonable observer, that a work is transformative. Appropriation fans, which is just about the whole art world, cheered the court's decision to therefore free 25 "*Canal Zone*" pictures from an impending death sentence.

But the battle for "*Canal Zone*" isn't over. Five other Prince works—the ones the court says most resemble Cariou's—were sent back to the lower court, which was instructed to reconsider the original copyright claim with more nuanced instructions. A loss could mean questions for Sherrie Levine, Mike Bidlo, Sturtevant, Deborah Kass, and lots of others who make high-concept copies.

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So the question of when appropriation is legally appropriate will wait for another day. Meanwhile, *Cariou v. Prince* has already inspired some more appropriations. Greg Allen, the writer and director who can't resist a Richard Prince rabbit hole, released his newest: YES RASTA 2, an edited and annotated version of the recent court proceedings.

And Richard Prince announced a new work, a composite of *Seinfeld's* sitcom girlfriends. The piece, an edition from Two Palms press, may or may not slyly reference the Appeals Court's *Seinfeld* reference, and it may or may not have been created with the two Rasta rulings in mind. But it dutifully follows their conditions by melding 57 attractive faces into one. Clearly, it's transformative.

One day when this is all over, maybe all 30 "Canal Zone" pictures can be reunited in a museum or a gallery. But don't try and take pictures of them and send them to your friends. It may be fair, but it might not be Fair Use.