

Ask the Artsperts

by Kristine Meek and Juliana Meek
Harmon-Meek Gallery, Naples, FL

Copyrights and Transformative Works

Dear Artsperts:

I noticed in your gallery works by an artist that included images of works by other artists. Does the artist need to get permission from the other artists to use their works?

Signed,
Transformed

Dear Transformed

The artworld has certainly kept lawyers and courts busy with copyright concerns since art often falls in the grey area of the law. Famously, the Obama “Hope” poster by street artist Shephard Fairey used a photo from the associated press without permission. The case was settled out of court, so unfortunately a legal opinion was never rendered to help provide direction for other artists. However, there have been court cases involving the artist Richard Prince, who continues to push the envelope of fair use in the artworld.

The lawsuits against Prince have dealt with the question of whether his work is fair use, meaning would a “reasonable viewer” consider Prince’s work transformative. The court in the most recent case (July 2017) devised a four-factor test to answer this: 1) does the new work make substantial aesthetic alterations to the original work; 2) is the new work creative and published; 3) is the original work reproduced in such a way that it retains its own aesthetic appeal within in the new work; 4) can the new work serve as a substitute for the original work. The new work is deemed transformative and therefore fair use if a “reasonable viewer” would answer these questions yes – yes – no – no. The court found that fair use did not exist for Prince because his work only passed the second factor of the test.

The artist you saw in our gallery is Jenness Cortez who is inspired by the age-old tradition of art within art, which was notably used by the 17th century Dutch artist, Johannes Vermeer. Cortez’s work places an iconic masterwork within a new environment, surrounding it with relevant objects of cultural or historic significance. Cortez intends to challenge the viewers' intellectual curiosity, mixing straightforward cues and obscure allusions, complimented by references to the other artists' lives and times.

Cortez pays homage to many artists throughout history. Copyright applies for the life of the artist plus 70 years. Therefore, no issue arises concerning Cortez’s works of early artists such as Vermeer. However, you ask a good question regarding her homages to recent artists, including Andy Warhol. The recent four-factor test from the Prince case provides additional support that a reasonable viewer would see Cortez’s work as transformative.

Under the first factor Cortez work provides substantial alterations to the aesthetic of the original work by giving new perspectives to the originals. The second factor is also a yes because her work is creative and published, having been exhibited in museums, galleries and addressed in books and art news articles. The third question is a bit tricky for Cortez precisely because she pays homage to other artists and reproduces their works within her own. However, the reasonable viewer is likely to understand that Cortez intention is not to merely copy but to create a new overall aesthetic for the original work within the context of her own creative work. The final

question is a clear no, her work would not substitute for the originals. The answers to this test applied to Cortez would likely be: yes – yes – maybe – no. A court would then draw upon the “reasonable viewer” aspect of the test which certainly favors Cortez and a finding for fair use. Therefore, permission is not needed.

Sincerely,
The Artsperts



“Pop” by Jenness Cortez, Acrylic on panel, 30” by 24”
Homage to Andy Warhol.

This work by Jenness Cortez is transformative of Andy Warhol's works and therefore considered fair use.



"Seeking Balance" by Jenness Cortez, Acrylic on panel,
30” by 24” Homage to: Johannes Vermeer (1632-1675)

Works by Vermeer are now in the public domain,
meaning the copyrights have long since expired.