

IMAGE RIGHTS AND THE LIMITS OF ART IN THE INFORMATION SOCIETY: AN ANALYSIS OF THE 'RICHARD PRINCE CASE'

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Abstract: This paper examines the complex legal relationship between image rights, terms of use, fair use, and the limits of copyright in the context of contemporary art production, particularly in the information society. The paper focuses on the actions of American artist Richard Prince, who used photographs posted by Instagram users to create canvases that he exhibited and sold for large sums of money. Prince argued that his appropriation of the images and the addition of details, such as comments and likes, represented a creative and transformative innovation that did not violate any rights. This argument sparked a long legal dispute over copyright and fair use limits in American law, which raises important questions about the limits of artistic freedom and the risks of violating rights in the digital age. Drawing on the hermeneutic filter that philosophy can offer, the paper attempts to reconcile the various aspects of this controversy and offers some directions for a more assertive understanding of the problem from a legal standpoint.

Keywords: copyright; image rights; information society; artistic freedom; transformative innovation.

INTRODUCTION

The advent of the internet and new technologies has significantly transformed the way any artistic process is carried out. Globalization further promotes the breaking of physical boundaries, providing access to content produced anywhere, but also increases the possibilities of harmful events and violations of image and copyright holders' rights.

The legal landscape becomes more complex with the role of social media, which creates intricate legal relationships between image rights, terms of use,

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fair use, limits of copyright, and the need to protect these relationships to avoid losses or infringements on rights. These complexities were illustrated in the case of American artist Richard Prince, who claimed that his artistic creations, which were dependent on third-party productions (mainly photographs), were transformative. Prince's enterprise began in 2008 with the release of works that reproduced a vast collection of images made by photographer Patrick Cariou.

A legal dispute over copyright and fair use limits in American law ensued, and despite an agreement being reached between the two parties in 2014, Prince continued his activities. He appropriated images posted by users on Instagram, selling them with subtle added details in canvases exhibited at the Gagosian Gallery in New York for large sums of money. This case highlights the challenges posed by copyright law and fair use in the digital age, as well as the need for clear legal frameworks to govern the use of creative works.

The artist's *modus operandi* exploited photographs posted by users of the aforementioned social network, which were used in their entirety for the composition of the new work, always under the argument that the addition of details such as comments, number of likes, and other similar elements represented a creative and transformative innovation that would remove any degree of violation of rights¹.

The intersection of artistic freedom, image rights, and the potential risks of violating rights in the production of art in the information society has generated significant controversy². To shed more light on this issue, this essay seeks to explore the need to equate copyright and image rights through the lens of philosophy. The research hypothesis suggests that philosophical analysis can offer insights into how to reconcile these aspects.

This essay aims to provide some direction on how to address this complex issue. In the final section, the conclusions drawn will provide a more conclusive understanding of the problem. By examining the philosophical implications of copyright and image rights, this essay hopes to offer a more

¹ For a critical analysis on the limits of creativity, authorship and copyright, cf. Sass, Liz Beatriz. "Autoria na sociedade informacional: fim do gênio criador?" In: *Direito autoral & Marco Civil da Internet*, edited by Marcos Wachowicz. Curitiba: GEDAI/UFPR, 2015, 79-108.

² Regarding the term "art", Lisiane Ody explains that: "(...) even without an express legal concept, art is the subject of Brazilian constitutional norms, which establish (i) creative freedom, (ii) protection of creator's rights, as well as (iii) national interests, in the event that the work is configured as a cultural asset, (iv) defining which entities are responsible for protecting artistic assets, and (v) determining tax immunity, in the case of musical or literary-musical works by Brazilian authors and/or works in general performed by Brazilian artists". The author concludes that it is a relative legal concept, to the extent that the term may have different meanings depending on the norm it is considered in relation to. Cf. Ody, Lisiane Feiten Wingert. *Direito e Arte: o direito da arte brasileiro sistematizado a partir do paradigma alemão*. São Paulo: Marcial Pons, 2018, 39.

nuanced and balanced perspective on how to reconcile artistic freedom with the need to protect intellectual property and image rights in the digital age.

I. ART, ENTERTAINMENT, AND THE LEGAL PROTECTION OF COPYRIGHT

The commercial exploitation of personality does not neatly fit within the categories established by civil liability or intellectual property legislation. While legal systems aim to protect an individual's reputation against defamation and unauthorized use of their name or image, there are many nuances to consider.

It is crucial to understand how legal systems in the West protect human dignity. As such, this essay aims to explore how doctrine positions itself on this issue. In this context, it is important to consider how different legal systems protect an individual's reputation. In the West, legal systems seek to balance the right to privacy with the right to freedom of expression. As such, when it comes to commercial exploitation of personality, legal systems are often called upon to balance competing interests³.

In some cases, commercial exploitation can be seen as an unauthorized use of an individual's name or image, which can damage their reputation. To address this, legal systems may provide remedies for defamation, privacy violations, or misappropriation of an individual's likeness. Overall, there is no easy solution to balancing the competing interests at play in commercial exploitation of personality⁴.

Nevertheless, by exploring the various legal approaches to this issue, a deeper understanding of how to protect individuals' reputations may be assessed while also respecting freedom of expression and commercial interests of all parties involved.

Thus, it is necessary to indicate how the main legal systems of the West protect dignity and, in this sense, doctrine positions itself as follows:

The second main perspective focuses on the injury to personal dignity, be it labelled 'privacy', 'dignity', or 'personality'. The extent and precise form of protection for individual dignity differs markedly between the major civil law and common law systems. Initially, most legal systems used to give priority to claims for physical injury and in earlier times these injuries were the law's primary concern. As societies and modern living conditions change, plaintiffs inevitably claim redress for other kinds of harm. Interests in reputation or personal honour, personal

³ Ruse-Khan, Henning Grosse, "The Protection of Intellectual Property in International Human Rights Law" In: *The Protection of Intellectual Property in International Law*, edited by Henning Grosse Ruse-Khan. Oxford: Oxford University Press, 2016, 211-262.

⁴ Samuelson, Pamela, "Privacy as intellectual property?" *Stanford Law Review*, v. 52(5): 1125-1173, May 2000, 1167.

privacy, and interests in freedom from mental distress become increasingly important. Usually, violations of individual personality are of a non-pecuniary nature, not only because they cannot be assessed in money terms with any mathematical accuracy, but also because they are usually of inherently non-economic value⁵.

It is worth noting in this field that commercial interests are often tangential to issues related to dignity, affronting it in favor of the high profit potential associated with the spectacularization of certain times and spaces in which everything related to daily life is woven and interwoven. Creative and spiritual freedom follows a tradition of expression of thought that, in modern times, has its origins in the works of Michel de Montaigne⁶ in the sixteenth century, and that is responsible for making punctuations about the spectacularization of communication—and art—in a critical-comprehensive effort that aspires to broaden the recipient's field of vision⁷.

Perspectivism⁸ arises from this, as a formula for choosing a particular object on which to produce certain content and as a method for its study and broad understanding. The intention is usually to demonstrate that "life, despite all the chaotic and devastating evidence to the contrary, has value and meaning"⁹.

Various actions related to this objective lead to certain models and patterns that, however, directly affect the traditionally highest sense of culture, lowering the high value historically attributed to it. Thus, "from then on, the futile has cultural value, the era is one of the indistinction of genres, of the confusion of hierarchies that still distinguished, until recently, noble culture from mass culture"¹⁰.

⁵ Beverley-Smith, Huw, Ansgar Ohly, and Agnès Lucas-Schloetter, *Privacy, property and personality*. Cambridge: Cambridge University Press, 2005, 5.

⁶ Cf. Montaigne, Michel de, *Os Ensaios*. Translated by Rosa Freire d'Aguilar. São Paulo: Cia. das Letras, 2010.

⁷ Regarding this, Han comments: "Entertainment rises to a new paradigm, to a new formula of the world and being. To be, to belong to the world, one must be something that entertains. Only what entertains is real or effective. The distinction between the fictional world and the real world is no longer relevant (...)." (freely translated [original excerpt: "*O entretenimento se eleva a um novo paradigma, a uma nova fórmula de mundo e de ser. Para ser, para pertencer ao mundo, é preciso ser algo que entretém. Apenas aquilo que entretém é real ou efetivo. Não é mais relevante a distinção entre mundo fictício e mundo real (...)*"]) Cf. Han, Byung-Chul, *Bom entretenimento*. Translated by Lucas Machado. Petrópolis: Vozes, 2019, 206.

⁸ Cf. Nietzsche, Friedrich, *Genealogy of Morals*. Translated by Walter Kaufmann. New York: Vintage Books, 1989.

⁹ Armstrong, Karen, *Breve história do mito*. Translated by Celso Nogueira. São Paulo: Cia. das Letras, 2005, 8.

¹⁰ Lipovetsky, Gilles, and Jean Serroy. *A cultura-mundo: resposta a uma sociedade desorientada*. Translated by Maria Lúcia Machado. São Paulo: Cia. das Letras, 2011, 102.

Artistic productions, until a few decades ago, were limited to a few social classes, which according to Pierre Bourdieu, generated definitions and manifestations of belonging to a certain class—and segregation from others¹¹. However, this panorama changed with the advent of liquid modernity, giving rise to new movements and new cultural achievements, usually aimed at achieving great impact and high returns, with almost instant obsolescence.

Zygmunt Bauman outlines his considerations on this phenomenon:

In short, the culture of liquid modernity does not have a "populace" to be enlightened and dignified; it has, however, customers to be seduced. Seduction, in contrast to enlightenment and dignification, is not a unique task that is completed one day, but an activity with an open-ended goal. The function of culture is not to satisfy existing needs, but to create others—while maintaining needs that are already entrenched or permanently unrealized. Its main concern is to avoid the feeling of satisfaction in its old objects and responsibilities, now transformed into customers; and, in a very particular way, to neutralize their total, complete, and definitive satisfaction, which would leave no room for other new, as yet unrealized needs and fantasies¹².

From this,

(...) if the cultural issue has taken such prominence, it is also because hypercapitalism continues to create and spread a new ethos of consumption that undermines the ideal of shaping human and citizen formation and that could undermine the virtues necessary for democracy, for a sense of responsibility, for civic sense. (...) In these times, there are increasing warnings, more or less alarmist, due to the scope of the human and cultural damage caused by the escalation of narcissistic and childish hyperconsumption. To what extent can these theses be defended? Does the world-culture fundamentally threaten capitalism and democracy? Is it a real danger or a false fear?¹³

The authors also add that "the experience with art increasingly resembles a touristic activity, the most successful movies target a teenage audience, television programs are designed for spectacle in order to increase audience ratings and sell to advertisers 'the available time of human brains'." (freely translated [original excerpt: "*O convívio com a arte se assemelha cada vez mais a uma atividade turística, os filmes que alcançam os maiores sucessos visam um público adolescente, os programas de televisão são concebidos para o espetáculo, a fim de aumentar os índices de audiência e vender aos anunciantes 'o tempo disponível de cérebros humanos'*")]

¹¹ Bourdieu, Pierre, *Distinction: a social critique of the judgement of taste*. Translated by Richard Nice. Cambridge: Harvard University Press, 1996, 11-12.

¹² Bauman, Zygmunt, *A cultura no mundo líquido moderno*. Translated by Carlos Alberto Medeiros. Rio de Janeiro: Zahar, 2013, 21.

¹³ Lipovetsky, Gilles, and Jean Serroy. *A cultura-mundo: resposta a uma sociedade*

In this field, the 'society of the spectacle'¹⁴ envisioned by Guy Debord would seem like a simple dystopia when compared to the centrality now assumed by the market with the power of digital technologies and with the end of the classical profile of corporations. A cultural base structured around recipes for success that aim for impact has been observed, flogging the natural creative process and propelling ephemeral fun and notoriety that guarantees high profitable returns. The counterpart, as could not be otherwise, is the increase in the risk of collateral damage and unwanted effects—with legal ramifications. The fundamental distinction between civil law in European countries of Roman-Germanic origin and common law of English origin translates into different confrontations for issues of this nature, as in fact the latter does not have a similar institute to the Roman *injuria*, which indicates the notion of 'contumacious disregard of the rights or personality of another person'¹⁵.

In legal systems such as English, Canadian, American, and Australian, the concept of reputation must necessarily be differentiated from the concept of 'goodwill':

Three key elements must be established for a valid cause of action: '(i) a reputation (or goodwill) acquired by the plaintiff in his goods, name, mark etc. (ii) a misrepresentation by the defendant leading to confusion (or deception) causing (iii) damage to the plaintiff'. (...) Three key elements must be established for a valid cause of action: '(i) a reputation (or goodwill) acquired by the plaintiff in his goods, name, mark etc. (ii) a misrepresentation by the defendant leading to confusion (or deception) causing (iii) damage to the plaintiff'. A distinction also needs to be drawn between goodwill and reputation in the different sense of personal reputation, rather than commercial or trading reputation, although achieving such a distinction is difficult, particularly when dealing with professional reputation, which is both an economic asset and an aspect of an individual's dignity. The protection afforded by the common law to these interests differs markedly. Cases of libel, and some cases of slander, are actionable per se, without the need to show special damage. On the other hand, while goodwill is universally regarded as a property right, passing off is not actionable in the absence of damage, or, in a *quia timet* action, the likelihood of damage¹⁶.

desorientada. Translated by Maria Lúcia Machado. São Paulo: Cia. das Letras, 2011, 112.

¹⁴ Cf. Debord, Guy, *Society of the Spectacle*. Translated by Donald Nicholson-Smith. New York: Zone Books, 1994.

¹⁵ Nicholas, Barry N., *An Introduction to Roman Law*. Oxford: Oxford University Press, 1976, 216.

¹⁶ Beverley-Smith, Huw, Ansgar Ohly, and Agnès Lucas-Schloetter, *Privacy, property and personality*. Cambridge: Cambridge University Press, 2005, 15-16.

On the other hand, in civil law, the definition of elements belonging to the field of personality unfolds from the list of items elevated to the constitutional panorama, with the selection of subjective rights, positivized by the State, that would fit into this list. In an effort to systematize the legal goods inherent in personality, including image and copyright, Vincenzo Miceli brings the following enumeration:

1) rights (already named) referring to the recognition of capacity, which constitute the conditions on the basis of which the person can assert themselves in the domain of law as a subject in various life situations; 2) right to life, health, and personal integrity; 3) right to spiritual integrity and balance of the spiritual life; 4) right to freedom; 5) right to individualization and, therefore, to all signs, all means that differentiate and distinguish a person from others; 6) right to honor and the goods associated with it or dependent on it, therefore to fame, credit, good reputation, and public esteem, as external manifestations of honor; 7) right to a sphere of secrecy, which encompasses everything that cannot be communicated to others without harming the person in any way; 8) right to respect for the economic sphere, in which the person operates as a producer of material goods, in a useful way, and develops their economic activity; 9) right to equality¹⁷.

Adriano de Cupis proposes the need for a systematic study of various rights, including life, physical integrity, freedom, honor, respect, and protection of personal identity and name¹⁸. Legal thinking has evolved in civil law systems to consecrate special rights of personality to safeguard specific legal goods, without being limited to a closed list. However, the limits of artistic production present a challenge to formulating legal responses to damages that exceed normality and cause harm to third parties, despite the prevalence of overexposure and hyperconsumption. Thus, the challenge lies in striking a balance between protecting individual rights while encouraging artistic expression.

According to Nelson Rosenthal, breach of contract and the commission of extra-contractual wrongs are well-trodden paths in the doctrine of civil law and common law, while the territory of undue payments and their counterparts has always been poorly mapped. However, precisely because restitution is a multi-causal response, we observe that obligation maps have failed to isolate unjust enrichment, as it is still an open challenge to know what the reasons are—whether they are few or varied—that are not contracts

¹⁷ Miceli, Vincenzo, *I diritti della personalità: la personalità nella Filosofia del Diritto*. Milan: Società Editrice Milanese, 1922, 382-383.

¹⁸ De Cupis, Adriano, *I diritti della personalità: trattato di diritto civile e commerciale*. Milan: Giuffrè, 1973, Vol. 4, Pt. 1, 63 *et seq.*

or wrongs, but nevertheless provide a right to restitution for the enrichment obtained at the expense of the claimant¹⁹.

Precisely because it has an "open" nature, common law moves away from general clauses for the protection of extra-contractual wrongs, which implies a revisiting of the institute of civil liability to delimit contours based on fact-based classification from a new imputational model related to causal identification. Manual Carneiro da Frada, categorically suggests the delineation of causal presumptions: "Another way to overcome the difficulties of proving causation is to establish presumptions of causation, to consider, for example, in those cases where a breach of duty makes it practically impossible to demonstrate causation (...)"²⁰.

In the context of intellectual property law, the importance of establishing a causal connection between behavior and damage is crucial to hold individuals or entities accountable for infringement or violations. The concept of causality, in essence, establishes a logical link between a wrongful act and the resulting harm, without which no legal obligation to compensate can be attributed. Therefore, in the realm of artistic expression and creative production, certain limits must be established to protect the rights of others and avoid causing harm.

Despite the importance of protecting intellectual property rights, some argue that the use of others' creative works without permission has played a pivotal role in the development of the entertainment industry, and that excessive protectionism could hinder artistic innovation and creativity. However, while there may be cases where the use of copyrighted material is legally permissible under the doctrine of fair use or similar principles, it is still necessary to respect the rights of the original creators and ensure that any usage does not cause undue harm or infringement. Therefore, it is essential to strike a balance between the interests of creators, the public, and society as a whole.

Moreover, it is important to note that the advent of new technologies and the proliferation of online content have raised new challenges and questions regarding intellectual property and creativity. With the rise of user-generated content and social media platforms, the boundaries between ownership and usage have become increasingly blurred. It is therefore necessary to develop a nuanced and dynamic legal framework that can adapt to these changes while protecting the interests of all parties involved. In summary, while the causality nexus remains a crucial element in determining legal liability, it is equally important to consider the broader social and cultural implications of

¹⁹ Rosenvald, Nelson, "As fronteiras entre a restituição do lucro e o enriquecimento por intromissão." *Revista de Direito da Responsabilidade*, no. 1 (January 2019): 45-84, 62.

²⁰ Frada, Manuel A. Carneiro da, *Direito civil – responsabilidade civil: o método do caso*. Coimbra: Almedina, 2010, 102.

intellectual property laws and their impact on creativity and innovation.

On this topic, Lessig argues that:

If “piracy” means using the creative property of others without their permission—if “if value, then right” is true—then the history of the content industry is a history of piracy. Every important sector of “big media” today—film, records, radio, and cable TV—was born of a kind of piracy so defined. The consistent story is how last generation’s pirates join this generation’s country club—until now²¹.

The issue of accountability for infringing on third-party rights while claiming to protect creativity leads to many controversies. One such controversy is the Richard Prince case, which occurred in the United States of America and serves as an emblematic paradigm of this issue. In order to have a comprehensive understanding of the controversy, it is important to delve into the nuances of the case. By utilizing the case method, a broader understanding of the limits of civil liability can be achieved in terms of damages caused to personality rights by the violation of image rights. The Richard Prince case, therefore, is a critical example of how the principles of causality and imputation must be examined in order to define the appropriate limits of artistic expression while also safeguarding the rights of the individuals who have contributed to it.

II. THE 'RICHARD PRINCE CASE' AND ART IN TECHNOLOGICAL POSTMODERNITY

Richard Prince is a famous American painter and photographer who, as mentioned in the introduction, has caused controversies over the last few years by using technology to express a creativity aligned with the opportunism that access to digital platforms has enabled²².

His first scandal occurred in December 2008, when photographer Patrick Cariou filed a lawsuit against Prince, the Gagosian Gallery, Lawrence Gagosian, and Rizzoli International Publications in a US federal court for copyright infringement in works shown in the *Canal Zone* exhibition, conceived by Prince, at the Gagosian Gallery in New York. The case, known in US jurisprudence as *Patrick Cariou v. Richard Prince, et al*²³, sparked heated discussions about the limits of the unauthorized appropriation of third-

²¹ Lessig, Lawrence, *Free culture: how big media uses technology and the law to lock down culture and control creativity*. New York: Penguin Press, 2004, 51.

²² Cf. Vaidhyanathan, Siva. *Intellectual property: a very short introduction*. New York/Oxford: Oxford University Press, 2017, especially Chapter 2.

²³ United States Court of Appeals for the Second Circuit. *Patrick Cariou v. Richard Prince, et al. Docket No. 11-1197-cv, decided April 25, 2013*. Available at: <https://bit.ly/2Uk6MUB>

party images, as Prince was accused of deliberately using 35 photographs taken by Cariou. Several of the pieces were barely edited by Prince, who also made 28 paintings that included images from Cariou's book *Yes Rasta*, which contains a series of photographs of Rastafarians that Cariou had taken in Jamaica²⁴—which were altered by Prince by painting objects, large hands, and male torsos, for example²⁵:



Source: <https://copyrightvisualarts.files.wordpress.com/2011/12/richard-prince2.jpg>

Prince's main defense argument was that the exploitation of the works would have been carried out under the concept of fair use²⁶, which, according

²⁴ Mauk, Ben, "Who Owns This Image?" *The New Yorker*, February 12, 2014. Available at: <https://bit.ly/2QOYxxU>

²⁵ Ody, Lisiane Feiten Wingert. *Direito e Arte: o direito da arte brasileiro sistematizado a partir do paradigma alemão*. São Paulo: Marcial Pons, 2018, 133.

²⁶ A typical figure of American law, fair use is defined by Siva Vaidhyathan as follows: "Fair use evolved within American case law throughout the nineteenth and twentieth centuries, and was finally codified in the Copyright Act of 1976. The law specifically allows users to make copies of, quote from, and refer to copyrighted works for the following purposes: in connection with criticism or comment on the work; in the course of news reporting; for teaching or classroom use; or as part of scholarship or research." (Vaidhyathan, Siva, *Copyrights and copywrongs: the rise of intellectual property and how it threatens creativity*. New York: NYU Press, 2001, 27.) Also regarding "fair use" Lessig points out that, "in theory, fair use means you need no permission. The theory therefore supports free culture and insulates against a permission culture. But in practice, fair use functions very differently. The fuzzy lines of the law, tied to the extraordinary liability if lines are crossed, means that the effective fair use for many types of creators is slight. The law has the right aim; practice has defeated the aim. This practice shows just how far the law has come from its eighteenth-century roots. The law was born as a shield to protect publishers' profits against the unfair competition of a pirate. It has matured into a sword that interferes with any use, transformative or not" (Lessig, Lawrence, *Free culture: how big media uses technology and the law to lock down culture and control creativity*. New York:

to Basso, is proven by the so-called three-step test introduced in the Bern Convention in 1967, currently provided in Article 9.2 of the same²⁷ (Paris revision) and Article 13 of the TRIPS²⁸ Agreement of the World Trade Organization. The first provision recognizes the right of countries to establish exceptions and limitations to the exclusive rights of copyright holders, allowing for certain uses of copyrighted works without the need for permission or payment of royalties. However, such exceptions must be carefully balanced to avoid harming the legitimate interests of authors and the potential market for their works. Article 13 of the TRIPS Agreement of the World Trade Organization (WTO) requires member countries to provide adequate protection to copyright and related rights, which includes the right of reproduction, distribution, and public performance. The agreement also requires member countries to provide legal remedies for copyright infringement, such as injunctions and the seizure and destruction of infringing goods. The agreement sets out minimum standards of copyright protection that member countries must follow, but countries are free to provide more extensive protection if they choose. The objective of Article 13 is to provide a framework for the protection of copyright and related rights that encourages innovation and creativity while balancing the interests of rights holders, users, and the public.

Maristela Basso teaches:

In light of the Doctrine of Consistent Interpretation, the Three-Step Test is the guideline that must be employed by the operator, interpreter or applicator of the LDA to define the scope of the limitations and their application, in the specific case, in order not to cause undue harm to the legitimate interests of authors and companies whose activities are closely dependent on copyright, and last but not least, not to infringe on international obligations assumed by Brazil, whose disrespect may subject it to commercial retaliation under the World Trade Organization System²⁹.

Penguin Press, 2004, 111).

²⁷ Article 9.2 of the Bern Convention of 1967: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

²⁸ Article 13 of the TRIPS Agreement: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. Limitations and exceptions to exclusive rights should be construed in a manner consistent with the Bern Convention (1971). Members shall be free to determine the appropriate method of implementing the provisions of this Article within their own legal system and practice".

²⁹ Basso, Maristela, "As exceções e limitações aos direitos do autor e a observância da regra do teste dos três passos (three-step-test)." *Revista da Faculdade de Direito da*

In view of this, Prince would need to justify that the exploitation of third-party works had occurred aiming (i) at an exceptional situation; (ii) without interfering with its commercial exploitation and (iii) without generating undue harm to the legitimate interests of the rights holder. However, this was not the understanding adopted by district judge Deborah Batts, who on March 18, 2011, ruled against Prince, Gagosian Gallery, Inc., and Lawrence Gagosian. It was considered that Prince's use did not fit the concept of fair use, and the compensation claim filed by Cariou regarding all the images used was granted.

The decision cited many precedents, including the *Rogers v. Koons* case from 1992³⁰. On April 25, 2013, however, the US Second Circuit Court of Appeals overturned the lower court's decision, and the understanding prevailed that Prince's use of the photographs in 25 works was transformative and therefore fair (fair use was visualized). Five less transformative works were sent back to the lower court for review. The case was settled by agreement in 2014, and the definitive solution of the jurisprudential concept of fair use in the Prince case remained open³¹⁻³².

But Richard Prince did not stop there.

Universidade de São Paulo, v. 102, p. 493-503, 2007, 500 (freely translated [original excerpt: "À luz da Doutrina da Interpretação Consistente, o Teste dos Três Passos é a diretriz que deve ser empregada pelo operador/intérprete/aplicador da LDA para a definição do escopo das limitações e sua aplicação, no caso concreto, a fim de não se causar um prejuízo injustificado aos interesses legítimos dos autores e empresas cujas atuações sejam intimamente dependentes dos direitos autorais e, por último, mas não menos importante, para não se infringir obrigações internacionais assumidas pelo Brasil cujo desrespeito pode sujeitá-lo a retaliações comerciais no âmbito do Sistema da Organização Mundial do Comércio"])).

³⁰ Miller, Leigh Anne, "Judge Rules Against Richard Prince in Appropriation Case." *Art in America*, March 22, 2011. Available at: <https://bit.ly/3ajogWJ>

³¹ Boucher, Brian, "Richard Prince wins major victory in landmark copyright suit." *Art in America*, April 25, 2013. Available at: <https://bit.ly/2JssAHH> According to the report, "The judges at the Second Circuit court decided that the case would hinge on whether a reasonable observer would find Prince's works to have been transformative, and thus protected under fair use law. The question remains, who is a 'reasonable observer?'"

³² In Brazilian law, the resolution of the case would depend on the analysis of the following factors: "(i) whether Prince's works would be imitations of Cariou's images or whether they would constitute derivative and/or new works; (ii) whether the use of Cariou's images by Prince would constitute a case of quotation or incidental work; (iii) whether the use of Cariou's photos by Prince harms them; (iv) and whether this use offends the reputation or honor of the author in that capacity." (freely translated [original excerpt: (i) se as obras de Prince seriam imitações das imagens de Cariou ou se constituiriam em obra derivada e/ou nova; (ii) se o uso das imagens de Cariou por Prince configurariam hipótese de citação ou de obra incidental; (iii) se a utilização das fotos de Cariou por Prince as prejudica; (iv) e se essa utilização ofende a reputação ou honra do autor nessa condição]). (Ody, Lisiane Feiten Wingert. *Direito e Arte: o direito da arte brasileiro sistematizado a partir do paradigma alemão*. São Paulo: Marcial Pons, 2018, 134).

The victory on appeal gave him the necessary impetus to venture into other controversies, and one of them occurred soon after, still in 2014: Prince held another exhibition at the Gagosian Gallery in New York, titled *New Portraits*, in which each of the 38 images displayed corresponded to a screenshot of a photo posted by a third party on Instagram, with the addition of certain elements (e.g., comments, likes):



Photo: Rob McKeever/Gagosian Gallery

Source: <https://gagosian.com/exhibitions/2014/richard-prince-new-portraits/>

The situation caused a real uproar, since the people displayed on the screens never consented to the use of their images and photographs; many were not even aware of what had happened until the episode was widely propagated in the mainstream media—and, once again, there was a strong debate around the concept of art in postmodernity and its legal implications³³. The fact is that the commotion generated attracted attention, and Prince obtained very high profits with his pieces in sales made in subsequent exhibitions, such as the *Frieze Art Fair* in New York in 2015 (where enlarged versions of his Instagram feed were sold for up to one hundred thousand dollars)!³⁴⁻³⁵

Several lawsuits were filed against the artist, including one by photographer Donald Graham, whose photo (entitled '*Rastafarian Smoking a Joint*') was presented through a print from another user's Instagram account.

³³ Ridless, Robin, "For postmodernists like Richard Prince, art is theft." *The Federalist*, February 9, 2017. Available at: <https://bit.ly/2Jho9iI>

³⁴ Munro, Cait, "Richard Prince Steals More Instagram Photographs and Sells Them for \$100,000." *Artnet News*, May 26, 2015. Available at: <https://bit.ly/2xmv33s>

³⁵ Frid, Natasha, "Richard Prince sells 'stolen' Instagram photos for \$100,000." *Milk.xyz*, May 27, 2015. Available at: <https://bit.ly/3dy5sVJ>

The case became known as *Donald Graham v. Richard Prince, et al*, and the defenses were strongly based on the *Cariou* case³⁶. In view of the repercussion of the fact, the victims of Prince's actions themselves decided to take their own initiatives, such as the owner of the *Suicide Girls* profile (@suicidegirls), Selena Mooney (known by the pseudonym "Missy Suicide"), who decided to sell the same images by Richard Prince for only 90 dollars each and donate all the proceeds to a charity³⁷.

It is inferred that, with his work, Prince not only infringed the image rights of the photographed individuals. The rights, in this case, are personal, but so are the copyrights of the authors of the works³⁸. Transposing the case to the national scenario, including the constitutional protection of copyright³⁹, the analysis of both institutes would be necessary and, despite the particularities of the Brazilian legal system⁴⁰, the case would probably have the same outcome.

The protection of image rights, besides being enshrined in the Constitution of the Republic of 1988 and the Civil Code of 2002 as an autonomous personality right, comes mainly from jurisprudence. In 1922, Otávio Kelly prevented the disclosure of an image without the consent of its

³⁶ Newhoff, David, "Graham v. Prince or Art v. Fair Use". *The Illusion of More: Dissecting the Digital Utopia*, October 17, 2018. Accessed March 26, 2020. <https://bit.ly/3ajQbGh>

³⁷ Needham, Alex, "Richard Prince v Suicide Girls in an Instagram Price War." *The Guardian*, May 27, 2015. Available at: <https://bit.ly/39kuynC>

³⁸ In this regard, REsp No. 1.322.704/SP of the 4th Chamber of the Superior Court of Justice, judged in 2014 under the rapporteurship of Justice Luís Felipe Salomão stated that (...) "when it comes to photography, for the purposes of protecting the copyright of artistic works, the photographer is the author and not the photographed subject, the latter being the holder of other personality rights, such as image, honor and privacy." (freely translated [original excerpt: "*em se tratando de fotografia, para efeitos de proteção do direito autoral das obras artísticas, é autor o fotógrafo e não o fotografado, este último titular de outros direitos da personalidade, como a imagem, a honra e a intimidade*"]).

³⁹ Chinellato, Silmara Juny de Abreu, "Copyright law in the Brazilian Constitution and its repercussions in ordinary laws". *Revista do Instituto dos Advogados de São Paulo*, v. 15: 21-30, 2012.

⁴⁰ Regarding the limitation of artistic freedom by other fundamental rights of equal stature (such as the right to personality, privacy, and image), "there is no established hierarchy of fundamental rights in the Brazilian constitutional order in the abstract, and it is incumbent upon the judiciary to judge the *in concreto* injury or threat to these rights, a duty from which it cannot eschew under penalty of denying the very cause of its existence." Ody, Lisiane Feiten Wingert. *Direito e Arte: o direito da arte brasileiro sistematizado a partir do paradigma alemão*. São Paulo: Marcial Pons, 2018, 63-64 (freely translated [original excerpt: "*na ordem constitucional brasileira não se estabeleceu hierarquia in abstrato de direitos fundamentais, incumbindo ao poder Judiciário julgar lesão ou ameaça in concreto a esses direitos, atribuição da qual não se pode esquivar sob pena de negar a própria causa de sua existência*"])).

owner⁴¹; in 1949, the Sixth Civil Chamber of the Court of Justice of the State of São Paulo stated that the portrait emanates from the person, and that no one can be photographed against their own will. In the same sense, was the understanding in the Superior Court of Justice in 1982, in decisions by Justices Rafael Mayer⁴² and Djaci Falcão⁴³. There is, therefore, a protective inclination towards the holder of the personality right.

In the realm of photography protection under copyright law, despite leaving room for casuistic issues⁴⁴, the Brazilian legal system provides for protection from legislation itself (Law No. 9,610/98), in its Article 7, item VII, and Article 2 of the Berne Convention of 1886, enacted by Decree No. 75,699 of 1975.

Due to so many controversies, there is a great issue to be explored, and its potential answers transcend the legal field, national borders, and the very dynamics of fair use regarding third-party images. In truth, what is being investigated are the ethical limits that the right to image faces in the information society, and some reflections have much more sociological contours, to the point of raising doubts about what art is, essentially, in postmodernity.

The Brazilian Internet Civil Framework (*Marco Civil da Internet*, Law No. 12,965/2014) is a landmark piece of legislation that was enacted in 2014 to establish principles, rights, and duties for the use of the internet in Brazil. One of the key issues addressed by the ICF is copyright and related rights, which are essential to protecting the interests of creators and rights holders in the digital environment. The law seeks to balance the interests of copyright holders with the principles of freedom of expression, privacy, and access to information, which are also enshrined in the Brazilian Constitution.

The ICF establishes several provisions related to copyright and related rights, including provisions that limit liability for internet service providers (ISPs) and establish procedures for the removal of infringing content. Under the ICF, ISPs are not held liable for the infringing activities of their users, provided they comply with certain conditions such as removing infringing content upon notification from rights holders⁴⁵. The ICF also provides for a

⁴¹ This decision, based on the Brazilian Civil Code (Art. 666, X), granted an interdict to prevent the dissemination of an image without the consent of its holder.

⁴² Headnote of the decision rendered on 9/10/1982 by the First Panel of the Brazilian Federal Supreme Court, unanimously, in Extraordinary Appeal 95,872.

⁴³ Headnote of the decision rendered on 10/2/1982 by the Second Panel of the Brazilian Federal Supreme Court, unanimously, in Extraordinary Appeal 91,328.

⁴⁴ This is also the understanding of the 1st Civil Chamber of the Santa Catarina Court of Justice, in civil appeal No. 2002.011163-0, judged in 2006, as "not all photographs are considered works of artistic creation susceptible to be classified and protected as 'copyright'."

⁴⁵ For a critical analysis of that, cf. Longhi, João Victor Rozatti, "Marco Civil da Internet no Brasil: breves considerações sobre seus fundamentos, princípios e análise crítica do

notice-and-takedown system, which allows rights holders to request the removal of infringing content from the internet.

The ICF has been praised for its efforts to strike a balance between the interests of copyright holders and the rights of users. However, some critics have argued that the law does not go far enough to protect the interests of rights holders, particularly in cases of online piracy. They argue that the notice-and-takedown system is not effective in preventing infringement and that stronger enforcement measures are needed to combat piracy in the digital environment⁴⁶.

Despite these criticisms, the ICF has had a significant impact on the regulation of copyright and related rights in Brazil. The law has provided a framework for the development of new business models in the digital environment⁴⁷, such as streaming services and online marketplaces, which have helped to create new opportunities for creators and rights holders. The law has also facilitated greater access to cultural content for Brazilian internet users, while providing mechanisms for the protection of intellectual property rights.

Overall, the Brazilian Internet Civil Framework represents an important step forward in the regulation of copyright and related rights in the digital environment. By striking a balance between the interests of copyright holders and the rights of users, the law has helped to foster innovation and creativity in the Brazilian digital economy. However, the challenges of enforcing copyright in the digital environment are likely to persist, and further developments in this area will be closely watched by stakeholders in Brazil and beyond.

The issue of consent in the context of the exploitation of personality rights is a complex matter that requires further examination. It is not enough to simply rely on data protection laws, such as the European General Data Protection Regulation (2016/679(EU)) and the Brazilian General Law for the Protection of Personal Data (Law No. 13,709/18), to determine the limits and

regime de responsabilidade civil dos provedores" In: *Direito digital: direito privado e internet*, 4th ed., edited by Guilherme Magalhães Martins and João Victor Rozatti Longhi. Indaiatuba: Foco, 2021, 121-152.

⁴⁶ Morato, Antonio Carlos, "Os Direitos Autorais e o Marco Civil da Internet." In: *O Direito na Sociedade da Informação III: a evolução do Direito Digital*, edited by Liliana Minardi Paesani. São Paulo: Atlas, 2013, 175-191.

⁴⁷ Challenging the common belief that copyright law is important to incentivize intellectual production, but comes to a negative conclusion, Ângela Kretschmann and Karin Grau-Kuntz argue that copyright has become an obstacle to the very same intellectual production it seeks to encourage: Kretschmann, Ângela, and Karin Grau-Kuntz. "Quem disse que o direito de autor tem por fim incentivar a produção intelectual?" In: *Sociedade informacional & propriedade intelectual*, edited by Marcos Wachowicz and Marcelle Cortiano. Curitiba: GEDAI/UFPR, 2021, 51-68.

functions of consent. In addition, the fact that each social media platform has its own terms of use, which are often complicated and difficult to understand, further complicates the matter. Therefore, it is necessary to confront this issue with more specific and targeted approaches that take into account the nuances of different situations and the intricacies of each platform's policies. This includes examining the nature of the consent obtained, whether it was freely given or coerced, and whether it was fully informed and understood by the individual. Additionally, it is important to consider the context in which the consent was obtained, including the nature of the content being created or shared, and the intended audience. By taking these factors into account, a more nuanced understanding of the limits of consent can be developed, which can help to protect the rights of individuals while still allowing for the free expression of creativity and culture⁴⁸.

Akash Mishra highlights the existence of a 'Philosophy of Intellectual Property', which encompasses utilitarian and non-utilitarian thoughts in the search for an equation that can answer what (is not) subject to copyright protection on the Internet⁴⁹. However, the complexity of the issue is not limited to the question of copyright protection. It extends to the challenge of controlling and limiting access to data on digital platforms, which is crucial in the context of the digitization of information. The digitization of information has transformed how we create, access, and distribute knowledge. According to Björn Lundqvist's analysis, it has resulted in the emergence of a new kind of knowledge society, characterized by the constant flow and exchange of information⁵⁰. This has led to significant changes in the

⁴⁸ According to Diana Liebenau: "First, a property right can be consented away, and IP [intellectual property] and privacy face similar consent dilemmas. On social media, users routinely grant a worldwide, non-exclusive, royalty-free license—with the right to sublicense—to their copyrighted content by accepting the Terms of Service agreements. Privacy policies that govern if and how a web-site or technology can gather, use, or disclose a user's data are equally diverse, are often far-reaching, and are thus hard for users to discern and calculate costs and benefits holistically. The legal question, of course, is to decide whether these licenses are enforceable. The more a legal analysis is descriptively informed by behavioral research into user expectations and cognitive biases, the less inclined it will be to enforce these terms. However, such an analysis will ultimately fall short if it is normatively driven by an antecedent control theory with individualist, liberal notions of choice and consent. The control theory struggles to explain why people expressly value privacy highly, but easily and consciously give it up." Liebenau, Diana, "What Intellectual Property Can Learn from Informational Privacy, and Vice Versa." *Harvard Journal of Law & Technology* 30, no. 1 (2016): 285-307, 295.

⁴⁹ Mishra, Akash Kamal, *Intellectual Property Rights in Cyberspace*. Indore: Cyberlekh, 2019, 5-16

⁵⁰ The author explains that: "The interface between digitalized information (data), intellectual property, privacy regulations and competition law in the 'Internet of Things' (IoT) scenario is currently triggering the interest of politicians, businessmen, the academic community and even the general public. The groups are interested for different reasons; for

production, distribution, and consumption of intellectual property, which requires a re-evaluation of the philosophy of intellectual property in the digital age.

From that point of view, according to van Dijk:

Digitalization means that every item can be translated into separate bytes consisting of strings of ones and zeros (called bits). This applies to images, sounds, texts and data. They can be produced and consumed in separate pieces and combined in every manner imaginable. From now on, every item can be presented on screens and accompanied by sound. All items can be stored on digital data carriers and retrieved from them in virtually unlimited amounts and at virtually unlimited speed. In the preceding sentences, digital technology and cultural impact have already been linked⁵¹.

The impact of these cultural changes is complex and multifaceted. Firstly, there is both a standardization and differentiation of culture occurring simultaneously, as people all over the world are exposed to the same cultural influences while also retaining unique cultural identities. Secondly, there is a fragmentation of culture, as people are able to seek out and consume niche cultural products that were previously inaccessible. Thirdly, there is a "collage" of diverse cultures, with high levels of informational flow leading to the mixing and merging of cultural influences. Fourthly, there is an acceleration of culture, with new trends and ideas spreading rapidly through social media and other online platforms. Fifthly, the formation of new views and manifestations of culture is occurring, with online communities giving voice to marginalized groups and enabling new forms of artistic expression. Finally, there is an increasing quantity of what can be considered culture, with user-generated content and social media posts contributing to a vast and ever-expanding cultural landscape.

In light of these cultural changes, the "Richard Prince case" highlights the need for a broad reinterpretation of the role of art and the freedoms of artists in the 21st century. The proliferation of data collection and dissemination in the digital age has brought about new challenges for the protection of

example, businessmen see an opportunity for the creation of wealth, researchers see the possibility of gaining, analysing and distributing knowledge efficiently and everyone acknowledges that the collection and distribution of personal data may raise both privacy and data-protection concerns." Lundqvist, Björn, "Big Data, Open Data, Privacy Regulations, Intellectual Property and Competition Law in an Internet-of-Things World: The Issue of Accessing Data." In: *Personal Data in Competition, Consumer Protection and Intellectual Property Law: Towards a Holistic Approach*, edited by Mor Bakhoun, Beatriz Conde Gallego, Mark-Oliver Mackenrodt, and Gintarė Surblytė-Namavičienė, 207-221. Berlin/Heidelberg: Springer-Verlag, 2018, 192.

⁵¹ Van Dijk, Jan. *The network society*. 2nd ed. London: Sage Publications, 2006, 191.

personality rights. It is essential to consider the evolving dynamics of the information society and its implications for artistic expression and individual rights in order to ensure that the law is able to effectively address these issues.

CONCLUSION

Therefore, it is emphasized that the role of art in the information society translates into implications that go beyond legal boundaries, involving ethical reflections that touch on philosophical aspects concerning intellectual property and the sociological impacts of virtually unlimited access to data provided by digital media.

The 'Richard Prince case', which in reality manifests itself in the repetition of the conduct of an American artist who saw a unique opportunity to gain fame and profit from the scandalous use of images of others, taking advantage of loopholes in terms of use and making small alterations that guaranteed him the supposed alibi of fair use, reveals the imperative that ethics guide individual behavior on the Internet.

Concerns about standardization and differentiation of culture, its fragmentation, the influx of different cultural sources onto others, the acceleration of culture, and its new forms of manifestation create great nebulousness around the very concept of art. In a spectacularized society marked by abundant availability of information, this redefines the limits of creativity.

If legislation is inadequate in addressing the contingencies that arise from the gap between innovation and regulation, which is often filled with a blend of creativity, ephemeral and controversial practices, and value judgments, it becomes imperative for every citizen to rely on common sense, balance, and adherence to good practices and metanormative rules of conduct to ensure the desired level of social peace and legal security.

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