

Raw Materials and Creative Works

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In disputes involving creative works, courts increasingly ask whether a preexisting text, image or persona has been used as "raw material" for new authorship. If so, the accused infringer becomes shielded by the fair use doctrine under copyright law or a First Amendment defense under right of publicity law. Some examples of "raw materials" include photographs of Jamaican Rastafarians collaged into a series of paintings by famous artist Richard Prince, street art incorporated into a concert video montage for the band Green Day, and the persona of drug kingpin Ricky Ross adopted by the rapper Rick Ross. By contrast, courts have not recognized such raw materials where a street artist painted over a photograph of Sex Pistols front man Sid Vicious, where a portrait artist made charcoal drawings of the Three Stooges, or where the video game Band Hero includes avatars based on members of the band No Doubt. Although copyright and right of publicity decisions have begun to rely heavily on the concept, neither the case law nor existing scholarship has explored what it actually means to use something as "raw material" or whether this inquiry adequately draws lines between infringing and non-infringing conduct. This paper addresses these questions and reveals serious problems with the raw material inquiry. First, a survey of all decisions invoking the raw material metaphor reveals troubling distributional patterns; in nearly every case the winner is the party in the more privileged class, race or gender position. Notwithstanding courts' assurance that the inquiry is "straightforward," distinctions between raw and "cooked" materials appear to be structured by a range of social hierarchies operating in the background. Second, these cases express ethically troubling messages about the use and reuse of text, image and likeness. The more offensive, callous and objectionable the appropriation, the more visibly "raw" the preexisting material is likely to be. This paper argues that courts should shift away from the raw materials inquiry and adopt approaches to artistic appropriation and transformation that better map onto the expressive values that the fair use doctrine and the First Amendment defense aim to capture. Courts are more likely to fairly and equally distribute the free speech concerns underlying these doctrines through an inquiry that engages more directly with an accused infringer's creative process and relies less on a formal comparison between the two works in dispute.

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