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U.S. Supreme Court Rules Against Andy Warhol Foundation For the Visual Arts, Inc. in Copyright Infringement Case

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Last week, the U.S. Supreme Court ("SCOTUS") held, in a 7-2 decision, that the Andy Warhol Foundation For the Visual Arts, Inc.[i] ("AWF") infringed upon the copyright owned by photographer Lynn Goldsmith when AWF licensed an orange silkscreen portrait of the musician Prince, known as "Orange Prince," to Condé Nast, the parent company of Vanity Fair.[ii] The "Orange Prince" portrait was based upon Goldsmith's photograph. The Court's decision limits the scope of the "fair use" defense to copyright infringement in the realm of visual art.[iii]

In 1981, Goldsmith was commissioned by Newsweek to photograph then "up and coming" musician Prince. Several years later, Goldsmith granted Vanity Fair a limited license to use one of her photographs as an "artist reference for illustration." Artist Any Warhol was hired by Vanity Fair to create a purple silkscreen portrait of Prince, known as "Purple Prince," which appeared in Vanity Fair's November 1984 issue. Vanity Fair credited Goldsmith as the "source photograph" and paid her only $400.00. Warhol had, in fact, created 16 works based on Goldsmith's photograph, which collectively became known as the "Prince Series." After Prince's death in 2016, AWF licensed "Orange Prince," which is part of the "Prince Series," to Condé Nast, for $10,000.00. Goldsmith was not given any credit or payment and in fact did not know about the "Prince Series" until Vanity Fair published the commemorative issue. AWF sought a declaratory judgment of noninfringement, and Goldsmith counterclaimed for infringement. The district court granted AWF summary judgment, but the Second Circuit subsequently reversed.

The case centered around the "fair use" doctrine[iv] which permits certain uses of unlicensed copyrighted works. Factors to consider in determining whether a use is "fair use" include "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."

AWF argued that the "Prince Series" is "transformative" and that the first fair use factor weighs in its favor because the works convey a different meaning or message than Goldsmith's photograph. SCOTUS rejected this argument, stating the first fair use factor "focuses on whether an allegedly infringing use has a further purpose or different character, which is a matter of degree, and the degree of difference must be weighed against other considerations, like commercialism," citing *Campbell v. Acuff-Rose Music, Inc.,* 510 U. S. 569, 579 (1994). SCOTUS stated that although the "new expression may be relevant to whether a copying use has a sufficiently distinct

purpose or character, it is not, without more, dispositive" of the first fair use factor.

Writing the Court's majority opinion, Justice Sotomayor stated, "Goldsmith's original works, like those of other photographers, are entitled to copyright protection, even against famous artists. . . AWF's copying use of that photograph in an image licensed to a special edition magazine devoted to Prince, share substantially the same purpose, and the use is of a commercial nature. AWF has offered no other persuasive justification for its unauthorized use of the photograph." Therefore, the Court found that AWF's use of Goldsmith's photograph did not constitute "fair use."

Through her dissent, Justice Kagan expressed concerns about the consequences of the majority's holding for artists, specifically, in that the ruling would "[inhibit] subsequent writers and artists from 'improving upon works'...[and] will 'frustrate the very ends sought to be attained' by copyright law." Justice Kagan bluntly stated, "It will stifle creativity of every sort."

SCOTUS' decision may impact exactly what is considered "transformative fair use" in the context of visual art. Changing the image in some way may not be enough to constitute "fair use" but, rather, the purpose and character of that use will weigh heavily in a court's analysis of whether a party may be liable for copyright infringement.

Cullen and Dykman's Intellectual Property team continues to monitor important developments in trademark and copyright law. Should you have any questions about this legal alert, please feel free to contact Karen Levin (**klevin@cullenllp.com**) at (516) 296-9110 or Ariel Ronneburger (**aronneburger@cullenllp.com**) at (516) 296-9182.

This advisory provides a brief overview of the most significant changes in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

Footnotes

[i] The Andy Warhol Foundation for the Visual Arts was established "in accordance with Andy Warhol's will which directed the vast majority of his estate be used to establish a charitable organization to advance the visual arts." https://warholfoundation.org/about/faq/.

[ii] *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith,* No. 21-869, 2023 WL 3511534 (U.S. May 18, 2023).

[iii] Adam Liptak, *Supreme Court Rules Against Any Warhol in Copyright Case,* N.Y. Times, May 18, 2023, https://www.nytimes.com/2023/05/18/us/supreme-court-warhol-copyright.html.

[iv] 17 U.S.C.A. § 107 Limitations on Exclusive Use.

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