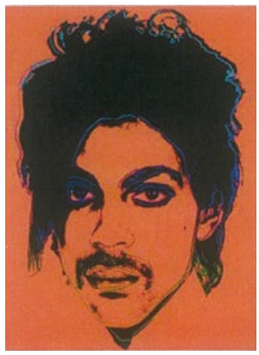
Judges in the **US Supreme Court** turn feral in a battle over copyright

Readers who want to see the results of disinhibition in a judicial setting – when judges speak openly about each other without the constraints and conventions that politeness and propriety impose upon them – will find the judgments of Justice Sotomayor and Justice Kagan revealing



Left: A black and white portrait photograph of Prince taken in 1981 by Lynn Goldsmith. Right: An orange silkscreen portrait of Prince on the cover of a special edition magazine published in 2016 by Condé Nast.

Anthony Grant

I usually write about trusts and estates for *LawNews* but this week I am writing about a decision the US Supreme Court has delivered on the law of copyright.

As I think most readers know, I have an art tourism project in Matakana called Sculptureum which, incidentally, is ranked by Tripadvisor as one of the top four attractions in Auckland and one of the top five attractions in New Zealand. Among the many works currently on display is a portrait by Andy Warhol of the musician, Prince.

Andy Warhol made 16 different portraits of Prince, all of which were based on a photograph taken by Lynn Goldsmith. One of the works – the version I have on display – is known as *Orange Prince*.

On 18 May 2023, the US Supreme Court held by a majority that *Orange Prince* infringes copyright in Lynn Goldsmith's photograph.

Andy Warhol was probably the greatest portrait artist of the late 20th century and most of his portraits were based on photographs taken by others. The genre of art is called "appropriation art".

After Prince died, Condé Nast wanted a picture of him for the cover of one of its magazines. It chose *Orange Prince* and didn't pay Lynn Goldsmith for her photograph. When she complained, Condé Nast sued her, saying it was entitled to use the Warhol image as it constituted "fair use" of the photograph. We don't have the doctrine of "fair use" in New Zealand but the analogous doctrine of "fair dealing."

While the work has been held to infringe copyright, it can be publicly displayed

A copy of the Goldsmith photograph and of the cover of the Condé Nast magazine are shown left.

The District Court judge in the USA said the Warhol image "can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure". Readers can form their own conclusion but I suspect most would agree with that assessment.

In the same way, Warhol modified photographs of Marilyn Monroe and others and turned them into some of the most expensive artworks of all time.

But the majority Supreme Court decision says Warhol made only "modest alterations" to the photograph, suggesting anyone could have "cropped, flattened, traced and coloured the photo" as Warhol did. As a consequence, the claim of fair use failed.

This assessment shows no understanding of the transformative powers that Warhol had with

Continued on page 09

Continued from page 08

portraiture. To take a few examples, in inflation-adjusted terms a *Blue Marilyn* sold recently for US$195 million, a *Turquoise Marilyn* sold for US$113m, an *Eight Elvis* sold for US$136m and a *Triple Elvis* sold for US$101m. These are some of the highest prices ever paid for works of art.

The highest price Goldsmith is likely to get for her photograph can be measured in thousands of dollars – not millions. The highest price ever paid for a photograph was US$12m and few photographs have sold for more than US$1m.

Trenchant criticism

The case is interesting for the criticism the judges levelled at each other. Writing for the majority, Justice Sotomayor said Justice Kagan had "chosen to ignore" various facts; that her dissent was "stumped" and "mistaken"; it was "odd"; it was based on a "logical fallacy"; it was also based on "an interpretative error"; and it "misses the forest for a tree". She said Kagan's reasoning was so extreme as to suggest that the majority decision would "snuff out the light of Western civilisation, returning us to the Dark Ages".

Justice Kagan – a former Dean of the Harvard Law School – was having none of this. Many of Justice Sotomayor's criticisms of her were contained in footnotes. Kagan referred to the "fistfuls of comeback footnotes" and said "from top to bottom the [Sotomayor] analysis fails". She said it "misconstrues the law [and] misunderstands and threatens the creative process". She said sarcastically that "It is a good thing the majority isn't in the magazine business" since they are unable to identify a compelling image from an uncompelling one.

Kagan then launched into a lengthy diatribe on the majority's ignorance of the way most artists in the visual arts and music world have been inspired by and/or copied the works of others. She illustrated her thesis by referring to (among others) Irving Berlin, George Gershwin, Stephen Sondheim, 2 Life Crew, Mark Twain, Shakespeare, Vladimir Nabokov, Robert Louis Stevenson, Chuck Berry, Bill Haley, Jimi Hendrix, Eric Clapton, Haydn, Mozart, Beethoven, Stravinsky, Charlie Parker, Bob Dylan, Titian, Manet and Francis Bacon.

Psychologists use the term "disinhibition" to describe the actions of a person who behaves without the constraints and conventions that politeness and propriety impose upon us.

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The outcome

Does the judgment mean I should take my *Orange Prince* off display at Sculptureum? The answer is "no." Oddly, the majority decision states that "The court expresses no opinion as to the … display … of any of the original Prince Series works", so while the work has been held to infringe copyright, it can be publicly displayed. The majority gave no explanation for this statement.

> **it is a good thing the majority isn't in the magazine business**

The majority decision appears to be based on the assumption that the photographer will be entitled to a modest sum for the use of her image but as I understand US copyright law, there is no compulsory licensing regime for artistic works.

As one commentator on the decision has written, "What if Goldsmith were to insist on being paid a billion dollars for a licence…? All of a sudden Goldsmith would have close to a veto over someone else's artistic expression, or at the very least its media reproduction."

The judges in the majority appear to have had no understanding of the significance of the absence of a compulsory licensing regime and how it could destroy appropriation art. As a commentator in *The New York Times* has said, the majority's decision "may turn out to be the latest case where a Supreme Court judgment has effects far beyond what the justices had in mind".

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