

# Not all is fair in the art of borrowing

US court case puts spotlight on Warhol's conceptual use of images

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For *The Straits Times*

A dispute before the United States Supreme Court involving artwork by the late pop art icon Andy Warhol and issues of copyright is attracting attention around the world.

The dispute concerns whether Warhol's depiction of pop musician Prince based on a picture by celebrity photographer Lynn Goldsmith is "fair use".

Artists and galleries around the world are justifiably nervous, as a ruling of no fair use could have dire ramifications for the collection of artworks owned and displayed by museums around the world, as well as for the future creation of new works by artists who rely on the evocation of popular iconography.

For example, one of Warhol's most famous artworks involves using the image of actress Marilyn Monroe. Before this US court case, there was tacit judicial unanimity that Warhol's multiple silkscreen renditions that appropriate the image of Monroe are an example of transformation in contemporary art that would qualify as fair use.

Such transformation or "appropriation art" is identified closely with the practice of "recoding" or "a shift in meaning" which occurs purely due to the fact that an original word, image or object has been appropriated and represented in a different context.

However, copyright law often protects the original artwork – which includes photographs and paintings – from being

reproduced by other artists without permission or the payment of a licence fee to the original creator, unless this borrowing is considered fair use.

In both the United States and Singapore, an unauthorised reproduction is fair use and hence not copyright infringement if the balancing of at least four factors comes out in favour of the appropriation artist.

These factors include: the purpose and character of the use; the nature of the work; the amount and substantiality of the portion used in relation to the whole work; and the effect of the use on the potential market for, or the value of, the original work.

Generally, when one creates a work of parody, it is deemed to be fair use, because it is of a significantly different character from the original work as it mocks the original, and it also exists in a different commercial market from the original work.

The seminal case decided by the US Supreme Court, which was also cited by the Singapore Court of Appeal, found hip-hop group 2 Live Crew's rap parody of musician Roy Orbison's *Oh, Pretty Woman* to be fair use because it was transformative in the manner that it added "something new, with a further purpose or different character, altering the first with new expression, meaning, or message".

## THAT PRINCE PHOTOGRAPH

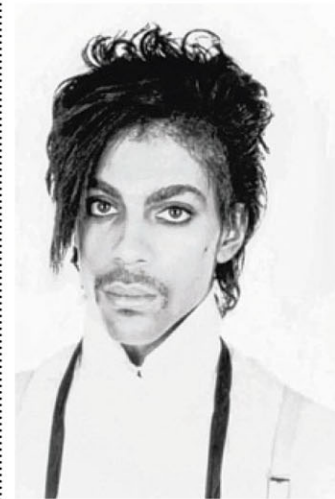
In 1984, Goldsmith licensed the photograph she had taken of Prince to *Vanity Fair* magazine for use as an artist reference, to which Warhol then imposed his signature silkscreen treatment.

Unbeknown to Goldsmith, Warhol created 15 additional works based on the photograph, known collectively, and together with the *Vanity Fair* image, as the Prince Series.

In 2016, the day after Prince died, *Conde Nast*, *Vanity Fair*'s parent company, contacted the



Left: An employee poses with 10 screen prints of Marilyn Monroe by Andy Warhol at a museum in London in 2017. Below: The artwork "Prince" by Lynn Goldsmith (left), created in 1981, and Andy Warhol's "Prince Series" (1984). PHOTOS: REUTERS, US SUPREME COURT



Andy Warhol Foundation, which holds the copyrights to Warhol's works, to obtain a commercial licence for a different Prince Series image for the cover of the planned tribute magazine. It was at this point that Goldsmith first became aware of the Prince Series and subsequently sued for copyright infringement.

If this was a parody, it would



clearly be fair use under current legal principles. But it is not.

The critical question before the Supreme Court, which heard oral arguments from both parties on Oct 12, is how much change to the original artwork is required before it is found to be fair use.

Appropriation artists who rely on the public's familiarity with particular personalities, popular

works or common consumer products to create art that comments on the zeitgeist, play with cultural symbols or criticise social mores should be allowed to do so without fear of being sued. Closer to home are the irreverent works of Andre Tan (Singapore) and R. Sumantri MS (Indonesia) who invoke well-known cartoon character superheroes in their paintings without the permission of the copyright owners.

The Goldsmith-Warhol dispute is a hard case. I have been writing about copyright fair use for more than a decade, and yet I cannot confidently predict the outcome.

While Warhol's silkscreens of Monroe and Elvis Presley comment on the endless iterations of the movie star by the media, or the famous prints of Campbell's Soup Cans as the edification of a cheap yet popular staple of American daily consumption, this particular depiction of Prince does not seem to bear the commentaries present in the other works.

It may not be sufficiently

transformative under the first factor of fair use. Under the fourth factor, the court may also find that the unrestricted and widespread conduct of the sort engaged in by Warhol would result in a substantially adverse impact on the potential licensing market for the original.

Indeed, there is a swell of public sentiment against a celebrity artist-plagiarist privilege, such that the fame of an artist like Warhol would allow them to simply take the work of a lesser-known artist and make millions of dollars without the payment of a licence fee.

However, separate amicus briefs submitted to the Supreme Court by the Robert Rauschenberg and Roy Lichtenstein foundations, the Brooklyn Museum, copyright law professors and art law professors all urge a finding of fair use based on how when a reasonable observer can perceive new meaning even in the face of substantial similarity, the use is transformative.

The Supreme Court needs to clarify the fair use test that will strike the right balance between enabling creators to monetise their works and encouraging new art to flourish in a dialogue with existing art.

If it finds against fair use, it should be careful to more narrowly confine its decision to the facts of the present case.

A more sweeping decision that an artist needs to do more than to impose a new aesthetic will not only render most of Warhol's celebrity silkscreens to be infringing copyright, but it will also chill artistic expression by requiring artists to seek permission from rights holders when creating art that is ironical, satirical or paradoxical.

Fair use allows artists to further the generation of new meaning through repurposing pre-existing works. One does not need to like what Warhol does, but it is quintessential to the progress of the arts that one learns to appreciate the fine art of borrowing.

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