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An Art Case That Shows the Internet Is Not a Copyright Free-For-All

By Ross Todd
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Despite how it might appear on your Instagram feed, the internet is not necessarily a copyright wasteland.

Case in point: Appropriation artist Richard Prince used images taken by photographers Donald Graham and Eric McNatt as part of his "New Portraits" series. By that, I mean Prince found copies of the portraits—Graham's titled "Rastafarian Smoking a Joint" and McNatt's of the musician Kim Gordon—posted them to Instagram, commented on them, and then printed that all out onto canvas and sold the "New Portraits" for tens of thousands of dollars apiece.

The photographers, represented by a team at **Cravath, Swaine & Moore**, sued. Last year, U.S. District Judge Sidney Stein in Manhattan denied summary judgment to Prince on his fair use defense. Last week, Prince and his associated galleries agreed to pay each of the photographers five times the sales price he got for his canvases.

The Litigation Daily reached out last week to **David Marriott** of **Cravath, Swaine & Moore**, part of the team that filed suit on behalf of the photographers in 2015 and 2016, to discuss the outcome. Marriott and his partner **David Kappos** began working on the cases when they were coinstructors for the Copyright Dispute Resolution Externship program that the firm handled in association with Columbia Law School. Marriott said that he hopes the case demonstrates that the internet is not a "copyright free-for-all."

Courtesy photo

David Marriott of Cravath.

"There are protections there to ultimately benefit people in ways that promote the kind of incentive system that actually gave rise to some of the technology behind the internet in the first place," Marriott said.

What follows has been edited for length and clarity.

Lit Daily: What's important about the outcome here?

David Marriott: I think there are a lot of things that are important about this case. The judgments hold the defendants including Mr. Prince and the galleries responsible for willful infringement. Since the cases are over now, they leave in place a summary judgment decision by Judge Stein, which I thought was a very insightful exploration of the contours of fair use. Although money was by no means the driving force behind this litigation, it nonetheless does result in compensation to the plaintiffs. That's nice for them to get after eight or so years of litigation. So those are some immediate impacts.

But I think it has a broader significance. I'm not aware of these particular defendants, including in particular Mr. Prince, having been held responsible under copyright law for his appropriation art in the way that is taking place here. I think the case affirms a bunch of important ideas: There's no celebrity plagiarist privilege. You don't have a different set of fair use rules that apply to you if you happen to be famous and successful than if you're more of a working artist or an unfamous artist.

The defendants made an argument in the case that I thought of as a subjective test for what constitutes fair use in art. I think this case underscores that fair use is going to be about reasonable perceptions of the ordinary observer. It's not going to be some subjective standard where somebody can find new meaning in virtually anything.

Images from court documents

TOP: "Rastafarian Smoking a Joint" photograph by Donald Graham, left, and Richard Prince's work on display featuring the image by Graham along with Prince's comment in an instagram post..BOTTOM: "Kim Gordon I" photograph by Eric McNatt, left, and Richard Prince's Instagram post featuring the image by McNatt along with Prince's comments on his own post.

For me, it's a case that speaks to the value of perseverance and principle. These plaintiffs weren't about money. They got some money, but they weren't about money. They were willing to put those kinds of economic incentives aside and make this about trying to get judgments. In an important sense, those judgments hold people to account for practices that the plaintiffs think are not really in the long-term best interest of all artists and don't do enough to develop intellectual property rights.

One of Prince's lawyers referred to this as a settlement in speaking with the New York

Times and said the amount paid out here was less than the cost of going to trial. I gather that it's important to you that what Judge Stein signed off on here are judgments. Do you want to explain that for me?

Generally, I'm aware that statements have been attributed to representatives of Mr. Prince along the lines you suggest. I'm not sure I've seen all of the statements. But I think what we have from Judge Stein, very importantly, are a set of judgments. We don't have a settlement agreement in each case in which the court simply said, "Well, the parties settled, so I'm dismissing the case without further commentary."

It was very important to the plaintiffs in these cases that they get judgments to do some of the things I said—judgments that hold appropriation artists responsible for willful infringement, that enjoin further infringing activity, that award damages, that dismissed defenses with prejudice.

So I don't think that it's accurate to describe these judgments as mere settlements. I appreciate there's some spin out there that suggests that these are somehow settlements favorable to the defendants. I would say to anybody tempted to think that, they need look no further than the court's orders themselves. They say that the court is entering judgment for plaintiffs and against defendants on the claims in the suit, which were claims for willful infringement. They dismiss all of the defenses and, most important for this purpose, I think, is the fair use defense. But they dismiss *all* of the defenses with prejudice. And, as I said, they enjoin further infringement and they award damages that were five times the sale price of the work.

Put it this way: If the plaintiffs here had wanted to settle, they could have settled. They elected not to put the very significant amounts of money that were offered in their pockets to simply settle, but instead they got judgments that made the broader points that they thought were important to them, and to artists, and to the development of the law.

Well, here, Mr. Prince, your opposing party has been pretty clear about his distaste for lawyers and how the law applies to the art world. Did that make your job any more or less difficult in pursuing claims against him?

I'm aware of statements attributed to Mr. Prince and certainly aware of the things that he said in the context of this litigation. I think it can make it more challenging when people play by different sets of rules because there's less common ground as to how a particular dispute ought to be resolved. But by the same token, I suppose the litigator in me thinks it made it more interesting. But yes, it is challenging. And there were areas in which I thought we would have expected there to be more common ground about the value of certain important principles like copyright. There's a reason I think the founders had copyright in mind when they laid out protections to be given to intellectual property. But not everybody shares that view.

So, did it make it harder? I guess in some ways it made it harder. In some ways it maybe made it a little bit easier—easier in

the sense that it probably put in more stark relief the difference of view about the value of copyrights.

Are there any regrets for you personally on not getting to take this case that you've been handling for so long to trial?

It's a really good question. Put it this way, at least for the litigators and trial lawyers involved, I think it probably would have been a lot more fun to go to trial than it was to have the court enter the judgments. But at the end of the day, I think the way we thought about it was that we got all that we could have reasonably expected to get in a trial through these judgments. As I said, we got a judgment for the plaintiffs and against the defendants on claims of willful infringement. We got injunctive relief. We got five-times damages. We got the dismissal of every single defense with prejudice.

So you have to say at the end of the day: Is there a more efficient way of getting the relief you want? I think here the basic idea was that we were able to get everything in our favor that we had a realistic chance of getting. We were able to get it through these judgments without burdening the court and without burdening two separate juries, because these were going to be done as two separate jury trials. It wasn't as fun a finish as at one point we thought it might be. But at the end of the day, we thought that was in the best interest of the clients. So that's why we did what we did, obviously with their input and them making the final decision.

Well, this case is nearly a decade old and it took this long to resolve. With the pace of technology and how it's used to create—and in many cases appropriate—can copyright law keep up with pace?

Well, that's a great point. I think it can, but it takes a lot of effort—and in cases where oftentimes what's at stake are not particularly significant monetary amounts, right? Cases where you often have a very significant imbalance between the financing on one side and the other—where you have artists who generate work that might be licensed for a couple hundred bucks and it's taken by somebody who because of fame or whatever else can monetize it much more readily. There are often difficult barriers to getting people to bring the kinds of challenges to get the full development of the law.

I think it's a really interesting question. I think it will be interesting to see how the courts and litigants are able to advance cases and see if they can keep up. But it was a challenge here in what was a relatively straightforward case when all is said and done. It can take time in part because there's a bit of effort to wait and see if cases are developing in the Supreme Court—and in part because litigation at times can proceed at a slow pace.