

Supreme Court Rules Against Andy Warhol Foundation in Question About Fair Use

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For the first time in almost 20 years, the United States Supreme Court has **issued a ruling** that has prompted vigorous debate over the future of the fair use doctrine under the Copyright Act. On May 18, 2023, in *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith*, the Supreme Court issued a 7-2 decision and held that Andy Warhol's Prince series containing silkscreen renditions of preexisting photographs was not "transformative" under the first fair use factor. Although the Court acknowledged that Warhol's work added new expression or meaning to the original photographs, the Court ultimately held that Warhol's work served the same purpose as the original work and thus was not protected by fair use.

In 1984, photographer Lynn Goldsmith licensed her photograph of the musical artist known as Prince to *Vanity Fair* to "serve as an artist reference for illustration in the magazine." The magazine hired Warhol to create the illustration. The license granted to *Vanity Fair* was for a one-time use of the photograph but, unbeknownst to Goldsmith, Warhol created an entire silkscreen series using her photograph. Goldsmith became aware of the Warhol series in 2016, after Prince had died and after the Andy Warhol Foundation ("AWF") had licensed the series to be used in a magazine article about Prince. Goldsmith then sued AWF for copyright infringement. There was no dispute that Warhol's work was substantially similar to Goldsmith's. The question, instead, was whether Warhol's work was protected as fair use.

Photographer Lynn Goldsmith's work is on the left. Andy Warhol's rendition is on the right.

Whether a work is protected as fair use depends on multiple factors laid out in the Copyright Act. In *Goldsmith*, however, only the first fair use factor, which focuses on the purpose and character of the use, was at issue: "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." [1] When considering the purpose and character of the use, courts will look at whether the use is transformative—that is, whether the new work merely supersedes the objects of the original creation or adds something new. Critical reviews and parodies are quintessential examples of transformative works. As the Court acknowledged, determining the "purpose and character of the use" is often not clear-cut.

The Court also acknowledged that celebrity photographs are typically used "to accompany stories about the celebrity, often in magazines," and that this was how Goldsmith used her photographs of Prince. But, the Court noted, Warhol's copied work was used for the same purpose—it was licensed to a magazine to use alongside an article about Prince following his death. This, according to the Court, was instrumental in its determination that the "purpose and character" of the works were the same.

AWF argued that Warhol's painting conveys a different, and thus transformative, "meaning or message" from Goldsmith's photographs. The Court disagreed, finding that the work's purpose must be analyzed by how it is used rather than subjective artistic interpretation. Because one could make any minor change to a photograph and then argue that the change creates a different meaning, message, or aesthetic, the Court reasoned that adopting AWF's argument would "potentially authorize a range of commercial copying of photographs, to be used for purposes that are substantially the same as those of the originals." Therefore, even though Warhol's work "adds new expression to Goldsmith's photograph. . . [the Court found] the first fair use factor still favors Goldsmith." It remains to be seen how

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broadly this decision may be applied to other creative works that are based on a source work such as the use of samples in music.

If you have any questions about fair use, how this decision may impact your own intellectual property rights or would like guidance on other matters involving intellectual property, contact your Miller Canfield attorney or the authors of this article.

[1] 17 USC §107(1).