Supreme Court Clarifies 'Transformative' Art in the Context of Copyright 'Fair Use'

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Authors:

W. Michael Hensley
Thomas F. Allen, Jr.

Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258 (May 18, 2023)

In *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*—a case highly anticipated by the creative community—the U.S. Supreme Court held that the copyright concept of "transformative use" does not give the Andy Warhol Foundation a "fair use" defense for Warhol's silk screen print of the musician Prince based on a copyrighted photograph. While the application of "transformative use" is taken on a case-by-case basis, *Andy Warhol Foundation* provides some clarification of the legal test.

This case centers around an orange silkscreen portrait of Prince by pop artist Andy Warhol, called "Orange Prince." Warhol's silkscreen was derived from a 1981 copyrighted photograph taken by professional photographer Lynn Goldsmith. In 2016, the Warhol Foundation licensed "Orange Prince" to Condé Nast for the cover of a special edition magazine in honor of Prince after his death. Condé Nast paid the Warhol Foundation $10,000 for the use of the image, but Goldsmith received no payment or source credit. In 1984, however, Goldsmith had been paid and credited for the use of Warhol's almost identical "Purple Prince" in an issue of *Vanity Fair* magazine (also owned by Condé Nast).

Upon discovering that the "Orange Prince" silkscreen was on the cover of the 2016 special edition magazine, Goldsmith notified the Warhol Foundation that it had infringed her copyright. The foundation then sued Goldsmith for declaratory judgement of noninfringement or (alternatively) fair use; Goldsmith counterclaimed for copyright infringement. The district court granted summary judgment for the foundation on its fair use defense, but the Second Circuit reversed.

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The narrow question before the Supreme Court concerned the first factor in the "fair use" analysis, codified in 17 U.S.C. § 107(1): "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." The Foundation contended that Warhol's work was "transformative" and thus had a different "purpose and character" than the original photograph. A majority of the Supreme Court disagreed. In an opinion authored by Justice Sotomayor, the Court held that this factor favored Goldsmith. "Even though Orange Prince adds new expression to Goldsmith's photograph," the majority concluded that the "degree of transformation" was not great enough to transform "the purpose and character" of the use of the Warhol work in this context. The Court remanded the case for consideration of the other three factors, which it did not address in its opinion.

The majority clarified the applicable test for the first "fair use" factor: "If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying." Applying that clarified test, the majority noted that both the original photograph and the Warhol silkscreen were used for the same or highly similar purposes: "[b]oth are portraits of Prince used in magazines to illustrate stories about Prince." And the Warhol silkscreen's use of the photograph was "of a commercial nature"—it was licensed to Condé Nast to sell magazines. The commercial nature of this "secondary use" therefore weighed against a "fair use" defense.

The majority also rejected the Foundation's argument that the "Orange Prince" silkscreen created "a new meaning or message" from the original photograph, such as commenting on the "dehumanizing nature of celebrity." Even if such a meaning were "perceptible" from the 2016 magazine cover, the "commercial use" of the original photograph in this context—on the cover of a magazine for sale—outweighed that meaning, particularly because it is "so similar to the photograph's typical use."

In contrast, the majority noted that Warhol's famous "Soup Can" series is far more likely to be "transformative." The purpose of the actual Campbell's soup logo is to advertise soup, while the "Soup

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Can" series' purpose is to "target" the original logo and "comment on consumerism."

The majority further rejected the notion that Warhol's subjective purpose had any relevance to the first fair use factor. If new expression and meaning or a subjective purpose were all that is needed to make a work "transformative," that concept "would swallow the copyright owner's exclusive right to prepare derivative works"—one of the "bundle of rights" held by copyright owners.

Dissenting, Justice Kagan (joined by Chief Justice Roberts) argued pointedly that the majority had failed to recognize the transformational nature of Warhol's work. The dissent described Warhol's "laborious and painstaking work" to change the original photograph so profoundly—e.g., cropping the photograph, tracing "differently colored, out-of-kilter lines around Prince's face and hair," using "unnatural, lurid hues"—that a "gulf in both aesthetics and meaning" emerged between the silkscreen and original photograph. In the dissent's view, such a change "should push toward (although not dictate) a finding of fair use," an outcome in keeping with the copyright statute and underlying policy, as well as the Court's precedent.

Key Takeaways

- The addition of new expression and meaning alone does not make the secondary use of a copyrighted work "transformative." Rather, the analysis focuses on the degree to which the secondary use has a different purpose and character, and if that use is "commercial" in nature.
- A "commercial" secondary use is less likely to be "transformative" and less likely to constitute a "fair use." But nonprofit and educational uses still weigh in favor of fair use under the first factor.
- If the secondary use targets or otherwise needs the original work, such as in Warhol's "Soup Cans," that weighs in favor of fair use.
- When in doubt, arrive at a licensing arrangement with the copyright holder. As the facts in the case show, both Warhol

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and Condé Nast had obtained licenses from Goldsmith in the past for quite reasonable sums.

**Caleb Long contributed to this article while working as a summer associate at Frost Brown Todd.*

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