

Warhol v. Goldsmith: Creative Fair Use or Copyright Infringement?

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In 1981, Lynn Goldsmith was commissioned by Newsweek to photograph Prince. Years later, Goldsmith granted a limited one-time use license for Vanity Fair to use one of her photos of Prince as an “artistic reference for an illustration.” The illustration was Andy Warhol’s portrait of Prince known as “Purple Prince.” However, Warhol went further and created a series of artwork based on Goldsmith’s photograph.

After Prince died in 2016, Vanity Fair’s parent company Conde Nast learned about the Prince series created by Warhol and purchased a license from the Andy Warhol Foundation (“AWF”) to publish one of the works from the series known as “Orange Prince.” Goldsmith didn’t know about the additional Prince series until 2016 when she saw Conde Nast’s magazine with Orange Prince on the cover. After she reached out to Conde Nast requesting compensation for the use of her copyrighted material, AWF sued Goldsmith for a declaratory judgment of noninfringement, or alternatively fair use. Goldsmith counterclaimed, stating Orange Prince was copyright infringement.

The Supreme Court Resolved the Dispute in Goldsmith’s Favor, But Not Entirely

The Supreme Court’s decision focuses on the first prong of the fair use test only and emphasizes the importance of the underlying purpose when creating a transformative work. An artwork becomes truly transformative when the purpose of the use is distinct from the original artwork copied, “otherwise, transformative use would swallow a copyright owner’s exclusive right to prepare derivative works.” The purposes listed as fair uses of another’s work of art include criticism, comment, news reporting, and teaching, among others. Copyright law allows these purposes because, as noted by the Court, “they contemplate the use of an original work to serve a manifestly different purpose from the work itself.”

Here, the purposes of the copyrighted photograph and Orange Prince were essentially the same—both present portraits of Prince for commercial purposes in magazines to illustrate stories about Prince. The commercial use of both works was critical to the analysis and weighted heavily against fair use for AWF. Bottom line, the “degree of difference [was] not enough for the first factor to favor AWF, given the specific context and commercial nature of the use.”

Key Takeaways

Copyright law entitles artists to protect their art, including the right to prepare derivative works that transform the original. In order to constitute fair use of another’s copyrighted work, the new work must have a purpose and

character sufficiently distinct from the original artwork's purpose and character. This decision expands protection granted to photographers and prevents other artists from recreating their photographs in slightly altered forms for use in competing commercial purposes.

What did the Supreme Court not address?

The Supreme Court did not express an opinion as to the creation, display, or sale of the remaining works in the Prince Series created by Warhol and not included in Vanity Fair's publication of Orange Prince. They also did not revise the four-pronged fair use test that has been used since 1994. Instead, the Court limited its focus and ruling on AWF's commercial licensing of Orange Prince—a work derived from Goldsmith's photograph. This suggests that if Orange Prince was not used as the cover of a magazine as it was in this case, it may have been considered fair use, but the Court did not conclusively decide this issue.

Future Considerations

In her dissent, Justice Kagan points out that “what matters under [the first] factor, the majority says, is instead a marketing decision: In the majority's view, Warhol's licensing of the silkscreen to a magazine precludes fair use.” Because Goldsmith licensed the photo in the initial instance, Warhol's licensing was “copying” her purpose for the work. But what if the copyrighted image was captured for purely artistic purposes, and then a different artist created something transformative (like Warhol in this case) and licensed that subsequent work for a different purpose? This factual scenario presents two different purposes, and the majority's opinion gives no guidance on how to resolve disputes beyond the unique facts of this case that pit competing commercial purposes against each other.

The Court's decision also begs the question of the original license. The majority may have intended that any subsequent artist who attempts to license a “transformative” work will not be able to argue fair use merely because it is being used for commercial purposes. But the opinion's focus on the first factor as a “matter of degree” will make this opinion challenging to apply to new situations.

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