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Supreme Court's Andy Warhol "Fair Use" Decision Favors Judicial Modesty and Copyrights in Derivative Works

by

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On May 18, the U.S. Supreme Court issued an important decision in [Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith](#). The decision sharpened key aspects of the Court's legal analysis involving claims of "fair use" of copyrighted works. The Justices clarified that its job is to objectively examine whether the purpose of secondary use of a copyrighted work is substantially similar to the copyright owner's use of the original work – and *not* to become judicial art critics examining the subjective meanings of secondary users. Also, the Court emphasized that more modifications or repurposing of original works do not, by themselves, amount to "transformative" uses deserving of protection. And its decision vindicated the exclusive rights of copyright owners to prepare derivative works.

The case involves a series of prints and illustrations by the late Andy Warhol that are based on a copyrighted 1981 photo of the late music artist Prince. The Andy Warhol Foundation (AWF) licensed a portrait from that series for publication on a magazine cover in May 2016, receiving \$10,000 from a magazine publisher. But photographer and copyright owner Lynne Goldsmith received no compensation or source credit for that commercial licensed use. Litigation involving a claim for copyright infringement followed soon after the magazine's publication of the portrait.

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The District Court ruled that AWF made "fair use" of Goldsmith's photograph. But the Second Circuit reversed and held that all four "fair use" factors favored Goldsmith. The Supreme Court granted certiorari on the issue of whether the first of those "fair use" factors favored AWF's commercial licensing of the copyrighted photo. And with a 7-2 majority, the Court affirmed the Second Circuit.

"Fair use" is an affirmative defense to copyright infringement. It reflects the understanding that there are circumstances in which restrictions on copying can stifle creativity and speech on matters of public importance. Section 107 contains four non-exclusive factors that are to be considered in evaluating whether the use of a copyrighted work is "fair": (1) "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"; (2) "the nature of the copyrighted work"; (3) "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"; and (4) "the effect of the use upon the potential market for or value of the copyrighted work."¹ Determination of whether there is a fair use of a copyrighted work depends upon judicial balancing in applying the four factors to the specific circumstances of each case.

Importantly, the decision in *AWF v. Goldsmith* clarified that the judicial task in applying the first fair use factor – regarding the purpose and character of the use of a copyrighted work – is a modest one. The Court concluded that the first factor involves an "an objective inquiry into what use was made, *i.e.*, what the user does with the original work."² It elaborated that "the meaning of a secondary work, as reasonably can be perceived, should be considered to the extent necessary to determine whether the purpose of the use is distinct from the original, for instance, because the use comments on, criticizes, or provides otherwise unavailable information about the original."³

Justice Gorsuch's concurring opinion offered a straightforward description of the first factor drawn from the statute. He wrote that Section 107(1) of the Copyright Act asks the Court to assess "whether the purpose and character of that use is different from (and thus complements) or is the same as (and thus substitutes for) a copyrighted work."⁴ According to Justice Gorsuch, "[i]t's a comparatively modest inquiry focused on how and for what reason a person is using a copyrighted work in the world, not on the moods of any artist or the aesthetic quality of any creation."⁵

The Court's interpretation of the first fair use factor reflected a conception of the judicial function as being limited. Rejecting the idea that the first factor involves an inquiry about the "subjective intent of the user" or the "subjective determination of a Court" to ascertain the

¹ 17 U.S.C. § 107.

² *Andy Warhol Foundation for the Visual Arts, Inc. v. Lynn Goldsmith*, No. 21-869 (May 18, 2023), Slip Opinion, at 39.

³ *Id.* at 38.

⁴ *Id.* at 47 (Gorsuch, J., concurring).

⁵ *Id.* at 47 (Gorsuch, J., concurring).

purpose of the use,⁶ the Court forthrightly stated that "[a] court should not attempt to evaluate the artistic significance of a particular work."⁷

Conversely, the Court recognized potential negative consequences to copyright owners if it had based the first factor analysis on the subjective intent of secondary users of copyrighted works. It observed that a subjective intent standard would broaden the scope of commercial copying of copyrighted photos by users for purposes that are similar to the purposes of the copyright owners. The Court stated: "As long as the user somehow portrays the subject of the photograph differently, he could make modest alterations to the original, sell it to an outlet to accompany a story about the subject, and claim transformative use."⁸

In undertaking that modest objective inquiry, the Court held that any reasonably perceived degree of difference between the copyright owner's photographic portrayal of the late artist Prince and AWF's portrayal of him in commercially licensing the photograph's use for illustrating a magazine cover was not enough for the first factor to favor AWF in view of the specific context of the use.⁹

The decision in *AWF v. Goldsmith* also is important because it clarified the import of "transformativeness" in the first factor analysis, emphasizing that the addition of new creative inputs by a user of a copyright work is not, by itself, sufficient to establish a "transformative" use. The "transformative" nature of a secondary use of a copyrighted work is one element of the first factor, and the "commercial nature" of the use is the second element. In *AWF v. Goldsmith*, the Court cited its fair use precedents holding that the more that the use of a copyrighted work that has a further or different character from the original, the more likely it is that the first factor will favor fair use. The Court added that "[i]f 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."¹⁰

Notably, the Court's analysis in *AWF v. Goldsmith* confirmed that the 2021 *Google, LLC v. Oracle America, Inc.*, decision did *not* establish expansive interpretation of "transformativeness" under which any secondary use of a copyrighted work that is in some way innovative or creative would be favored as a "transformative use" under the first factor.¹¹ In its 2021 decision, the Court held that Google's copying of a portion of Sun Microsystems' copyrighted software code was a fair use. According to the Court, the *Google* decision is characterized by contextual factors, including the primarily functional nature of computer programs, as well as specific facts regarding Google's copying of shared interfaces necessary for programs to communicate "only insofar as needed to include tasks useful in smartphone[s]," using its Android platform.¹²

⁶ *Id.* at 37-38

⁷ *Id.* at 37 (citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits"))

⁸ *Id.* at 40.

⁹ *See id.* at 40.

¹⁰ *Id.* at 30.

¹¹ *See id.* at 36, fn 18.

¹² *See id.* at 26, fn 8.

Moreover, the Court's interpretation of "transformativeness" in fair use analysis rightly avoids undermining exclusive rights of copyright owners under Section 106(2) "to prepare derivative works based upon the copyrighted work." The Court concluded that its decision in *Campbell v. Acuff-Rose Music, Inc.*, (1994) "cannot be read to mean that §107(1) weighs in favor of *any* use that adds some expression, meaning, or message."¹³ "Otherwise," wrote the Court, "'transformative use' would swallow the copyright owner's exclusive right to prepare derivative works," because many works in music, movies, and theater based on original works add new expression, meaning, or message. Indeed, the Court recognized that third-party licensing revenues from the production of derivative works constitute "incentives for artists to create original works in the first place."¹⁴ And it criticized the dissent for putting the value of copying above the value of original works and copyrights in derivative works.¹⁵

As Free State Foundation President Randolph May and I recounted in chapter 6 of our book [*Modernizing Copyright Law for the Digital Age: Constitutional Foundations for Reform*](#) (Carolina Academic Press, 2020), American copyright law has secured the rights of copyright holders to prepare works based on their original creations since the Copyright Act of 1909. And copyright protections for derivative works in the form of translations and dramatizations date back decades earlier. In *AWF v. Goldsmith*, the Court recognized that Congress ultimately is responsible for determining the scope of exclusive rights in derivatives and setting the balance between creativity and availability for use in new works.¹⁶ And the Court refused to accept a loose interpretation of "transformative use" that would upset that balance.

Justice Kagan's dissent in *AWF v. Goldsmith* is an indicator that the Court's opinion will draw criticism during the years ahead. But that should not be surprising or cause one to question the soundness of the Court's decision. Fair use doctrine and cases have long been the source of vigorous dispute among legal academics and commentators. And as the Committee for Justice observed in its [amicus curiae brief](#) to the Court in *AWF v. Goldsmith*, Justice Joseph Story's landmark "fair use" opinion in *Folsom v. Marsh* (1841) emphasized that "it is not... easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases" involving "fair use" claims.¹⁷

Yet the conclusion in *AWF v. Goldsmith* and the principles espoused by the Court followed reasonably enough from the Copyright Act. The Court's decision directs lower courts to assume a modest role in objectively identifying secondary uses of copyrighted works for "transformativeness." And it upholds the integrity of copyright owners' control over the production of derivatives, thereby preserving financial incentives for creating original works.

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¹³ *Id.* at 3.

¹⁴ *Id.* at 42.

¹⁵ *See id.* at 43.

¹⁶ *Id.* at 19. *See also id.* at 50 (Gorsuch, J., concurring).

¹⁷ 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (Story, J.).

Further Readings

Seth L. Cooper, "[World IP Day 2023: Strengthen Copyrights for American Music Recordings](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 18 (April 26, 2023).

Seth L. Cooper, "[Copyright Ruling Reinforces Copyright Owners' Anti-Circumvention Rights](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 55 (October 31, 2022).

Seth L. Cooper, "[Copyright Owners Should Be Protected From Digital First Sale Schemes](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 54 (October 27, 2022).

Seth L. Cooper, "[State Restrictions on Ebook Licensing Prices Are Preempted by Federal Law](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 26 (May 20, 2022).

Seth L. Cooper, "[World IP Day 2022: Strengthen Copyright Protections for Creative Works](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 22 (April 26, 2022).

Seth L. Cooper, "[SMART Act Would Help Prevent Online Copyright Infringement](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 18 (April 6, 2022).

Randolph J. May and Seth L. Cooper, "[State Laws Forcing Publishers to License Ebooks to Libraries Are Unlawful](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 14 (March 21, 2022).

Seth L. Cooper, "[American Music Fairness Act Would Secure Copyrights in Sound Recordings](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 11 (February 24, 2022).

Seth L. Cooper, "[States Should Not Take Intellectual Property Without Just Compensation: The Constitution's Fifth and Fourteenth Amendments Protect Copyrights](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 65 (December 13, 2021).

Seth L. Cooper, "[Online Ads Supporting Copyright Piracy Need to be Stopped](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 46 (August 32, 2021).

Seth L. Cooper, "[Congress Should Secure Fully Copyright Protections for Music Sound Recordings](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 43 (August 11, 2021).