

Supreme Court Rules Andy Warhol's Prince Portraits Not Fair Use

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On May 18, 2023, the US Supreme Court, in a much-anticipated decision, held that portraits of the musician Prince by Andy Warhol do not constitute fair use under copyright law. The 7 – 2 decision in *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith* affirmed the US Court of Appeals for the Second Circuit's decision, finding that the first fair use factor – the “purpose and character” of the work – did not favor the Andy Warhol Foundation's (AWF) fair use defense to copyright infringement, because AWF's works shared the same commercial purpose as the original photograph of Prince taken by photographer Lynn Goldsmith.

Background of the dispute

The works in question consist of silkscreen portraits of Prince derived from Goldsmith's original photograph of the musician. Although Goldsmith granted a limited, one-time license to Vanity Fair in 1984 to enable Warhol to use it as an “artist reference” for an illustration in the magazine, Warhol proceeded to create a series of such images (unknown to Goldsmith), which AWF later licensed to Condé Nast in 2016. An orange silkscreen portrait from the series (“Orange Prince”) appeared on the cover of a special edition magazine released by the publisher following Prince's death, triggering the dispute.

Goldsmith argued that the silkscreen portraits constitute unauthorized derivative works of her original photograph and therefore constitute copyright infringement. AWF argued that the works in question are transformative and fall within the scope of the fair use defense. A district court agreed with AWF, finding fair use, and the Second Circuit reversed, siding with Goldsmith – setting the stage for the Supreme Court to weigh in on fair use of a creative work for the first time since its 1994 opinion in *Campbell v. Acuff-Rose Music*.

The fair use defense to copyright infringement

The defense of fair use is codified in Section 107 of the Copyright Act. It provides that “fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching ... scholarship, or research is **not** an infringement of copyright.” (emphasis added) The statute outlines four factors courts must analyze to determine whether the use of a work is fair:

1. The purpose and character of the use, including whether the use is commercial in nature.
2. The nature of the copyrighted work.
3. The amount and substantiality of the portion used in relation to the copyrighted work.
4. The effect upon the potential market for or value of the copyrighted work.

In *AWF v. Goldsmith*, the Supreme Court considered only the first factor. It explained that the first fair use factor “relates to the problem of substitution,” or “whether the new work merely supersedes the objects of the original creation.” A use that shares the purpose of a copyrighted work is more likely to provide the public with a substitute for the copyrighted work. Whether the use is commercial in nature also is an additional element of the first factor that must be weighed against the degree to which the use has a further purpose or different character.

The decision

Siding with Goldsmith, the Supreme Court held that, in the context of Condé Nast's special edition magazine commemorating Prince, the purpose of the “Orange Prince” image is substantially the same as Goldsmith's original photograph. The Supreme Court observed that both images are “portraits of Prince used in magazines to illustrate stories about Prince,” and that both uses are commercial in nature.

The Supreme Court rejected AWF’s argument that Warhol’s series portrays Prince as a larger-than-life iconic figure, thus conveying a meaning and message that is different from the photorealistic, vulnerable portrayal of Prince in Goldsmith’s photograph. Whatever new impression or meaning a viewer – or Warhol himself – may have intended, the purpose of “Orange Prince” was “still, to illustrate a magazine about Prince with a portrait of Prince,” and a “somewhat different” portrayal did not suffice to tip the first fair use factor in AWF’s favor. The Supreme Court distinguished the Prince portraits from Warhol’s “Soup Cans” series, depicting cans of Campbell’s soup. There, the copyrighted Campbell’s logo is used to advertise soup, whereas Warhol’s canvases use the copyrighted work for an artistic commentary on consumerism – “a purpose that is orthogonal to advertising soup.”

The Supreme Court also discussed the commercial nature of AWF’s use, namely AWF’s licensing of the image to Condé Nast. It found that this use was “so similar to the photograph’s typical use” that a particularly compelling justification for copying the image was needed to find fair use.

Significance

This was the US Supreme Court’s first decision relating to whether a creative work constitutes fair use in nearly 30 years. The Supreme Court was careful to limit its decision to the specific works and specific context of the use at issue in the case. The decision provides further guidance as to how courts should analyze “transformation” in the context of fair use, indicating that a use of a copyrighted work that arguably conveys a different meaning or message from the original is not enough to determine that a use is fair, particularly where both works are used for the same commercial purpose. Ultimately, the decision underscores that the fair use defense is not an impenetrable shield, as well as the need to consider obtaining appropriate licenses when using copyrighted works for commercial purposes untethered to traditional fair use contexts, such as criticism, commentary and parody.

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