

## The Frustrating Reality of Fair Use: AWF v. Goldsmith

On May 18, 2023, the U.S. Supreme Court released its long-awaited opinion in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*.

In 1981, rock and roll photographer Lynn Goldsmith photographed the then-up-and-coming musical artist Prince for *Newsweek*. Later, Goldsmith granted *Vanity Fair* a limited (one-time use only) license to use one of her photographs of Prince as an “artist reference for an illustration.” *Vanity Fair* then hired Andy Warhol to create a purple silkscreen print based on the photograph, and the print appeared in *Vanity Fair*’s November 1984 issue. Warhol ultimately created 15 additional variations of the Prince silkscreen, including one in the color orange based on Goldsmith’s photograph.

Following Prince’s death in 2016, Condé Nast licensed Warhol’s Orange Prince print from the Andy Warhol Foundation for Visual Arts (AWF) for \$10,000. When Goldsmith notified AWF that she believed it had infringed her copyright, AWF sued Goldsmith claiming that Warhol’s works based on her photograph constituted fair use. The Supreme Court held that Warhol’s Orange Prince did not constitute a fair use of Goldsmith’s photograph of Prince.

Fair use is one of the more challenging concepts in all of intellectual property law. Originally a judicially-created limitation on copyright law, Congress formally recognized fair use when it enacted the Copyright Act of 1976. Codified at 17 U.S.C. § 107, fair use recognizes that copying for certain purposes, such as for criticism, comment, news reporting, teaching, scholarship, or research, does not infringe copyright. The statute also includes four factors to be considered when assessing whether a use is a fair use.

Of the four fair use factors, the first factor—the purpose and character of the use—has been at the forefront of cases expanding the scope of fair use between 1994 and 2021. As the Supreme Court explained in this new decision, the question this factor asks is whether the new work “adds something new, with a further purpose or different character” from the original work. At the risk of oversimplifying matters, courts have framed this issue as one of transformation, finding fair use where a new work was deemed to be transformative of the original work. The problem with this approach is that for just about any use of an existing work, an argument exists that the use is in some way transformative.

One of the things that makes fair use so challenging is there are no bright line rules as to what constitutes fair use. For example, while the statute contemplates “teaching” and “scholarship” as possible fair uses, not all copying for academic purposes constitutes fair use (if such copying was fair use, there would be no incentive for publishers to publish educational textbooks).

In this new decision, the Supreme Court held that Warhol’s Orange Prince and Goldsmith’s photo have essentially the same purpose, with both being portraits of Prince being used in magazines to illustrate stories about Prince. As such, the two works share substantially the same purpose and, therefore, weigh against a finding of fair use.

What will no doubt frustrate many about the decision—it certainly annoyed the dissenting justices—is the notion that similar artwork from the same artist may, in one context, appear to be commentary (as in the case of Warhol’s use of Campbell soup cans as commentary on consumerism) which qualifies as fair use, while in another context (Warhol’s colorization of Goldsmith’s photograph of Prince), the degree of difference between the purpose of the two works is not enough to be dispositive of the first fair use factor.



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