

ALERT

Copyright Fair Use *Purpose and Character*: SCOTUS Says Transformation Alone Isn't Enough

May 19, 2023

On May 18, 2023, the U.S. Supreme Court issued a long-awaited ruling clarifying one element of the Copyright Act's fair use doctrine. The 7-2 opinion came in a case involving Andy Warhol's transformation of a photograph of Prince. The Court held that because both Warhol's art and the Petitioner's photograph were used with magazine articles about Prince, the purpose and character of both works were the same. So despite Warhol's transformation of the original photograph, his Foundation could not use the first factor of the Copyright Act's fair use doctrine to justify commercial use of the photo for derivative works.

Background

Federal copyright law provides four factors that courts consider when deciding whether a work constitutes fair use: the purpose and character of the use; the nature of the copyrighted work; how much of the work is used in relation to the whole; and the effect on the potential market for or value of the copyrighted work. 17 U.S.C. § 107. *Andy Warhol Foundation For Visual Arts v. Goldsmith* focused analyzed the first factor.

The case generated a great deal of interest, including among organizations such as the Screen Actors Guild and the Recording Industry Association of America. The Court's ruling agreed with the result Wiley advocated for in a brief filed on behalf of U.S. Senator Marsha Blackburn. The senator's brief emphasized the history of copyright law as well as the text and structure of the modern Copyright Act.

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Justice Sotomayor authored the majority opinion. Justice Gorsuch, joined by Justice Jackson, concurred. And Justice Kagan, joined by Chief Justice Roberts, dissented.

What Does The Supreme Court's Decision Do?

The Court concluded that a new expression is relevant to the purpose or character inquiry. But that alone is not enough for the first fair use factor to favor the accused infringer. After all, the Court said, "an overbroad concept of transformative use . . . would narrow the copyright owner's exclusive right to create derivative works." Thus, the Court left open the possibility that transformation can weigh in favor of a subsequent creator. But for that to happen, the Court said the transformation "must go beyond that required to qualify as a derivative."

Rather than focusing on whether the Warhol art was a new expression, the Court noted that Goldsmith's photo and Warhol's art were used for the same commercial purpose: magazine art accompanying stories about Prince. When works are used for similar purposes, the Court said that the purpose or use factor weighs in favor of the original creator because the new work is likely a mere substitute for the original.

The Court also rejected invitations to give special treatment to the Warhol art merely because of his fame because a "court should not attempt to evaluate the artistic significance of a particular work."

"In sum," the Court said, "[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."

How This Affects Creators

The Court's conclusion that transformation alone is not dispositive of copyright fair use comes as no surprise to those who have monitored the Court's copyright case law. The Court has previously explained the dangers of "bright-line rules" in the fair use context. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

In *Andy Warhol Foundation*, the Court continued that theme, emphasizing that context matters, and whether a new work has a different character is a matter of degree and balancing. Each copyright case should be evaluated on its merits. For more information on our Copyright practice, please [click here](#), or contact the authors listed on this Alert.