



What the Supreme Court's Decision in *Warhol* Could Mean for the Future of Fair Use

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In a case that pitted Andy Warhol's legacy foundation against rock portraitist Lynn Goldsmith, Supreme Court Justices Sonya Sotomayor and Elena Kagan split on an issue central to the ideals of copyright law: how the law should encourage artists to produce original work. With the majority siding with Sotomayor, the case, *Andy Warhol Foundation for the Visual Arts v. Goldsmith*, may signal a reigning in of the fair use doctrine, a defense to copyright infringement that is often central to disputes over one artist's use of another's creation.

The opinion comes as art created by artificial intelligence (AI) — using databases of existing works to generate new ones — raises urgent questions about authorship and how to weigh each factor in the fair use doctrine.

As always, resolution of this dispute centered on the court's analysis of a unique set of facts. In 1981, Newsweek commissioned well-known rock photographer Goldsmith to photograph an up-and-coming musician named Prince. The photos were intended to portray a pared-down, vulnerable artist. While the photos never ran, Goldsmith owned the copyright. Three years later, in 1984, Vanity Fair commissioned Andy Warhol to illustrate an article celebrating Prince's skyrocketing celebrity. The magazine paid Goldsmith a \$400 one-time license so that Warhol could use her photo as an artist reference. Warhol's resulting illustrations soon became iconic. The cropped illustration of Prince's bust rendered him in colorful idolatry, no longer Goldsmith's vulnerable up-and-comer.

When Prince died in 2016, Conde Nast published a special commemoration of the artist, paying the Andy Warhol Foundation for the Visual Arts \$10,250 to license the illustrations for the cover. Goldsmith, who had often licensed her photos for magazine use, received no licensing fee and no

accreditation. Litigation soon followed, with Goldsmith arguing that Warhol's "Prince series" infringed on her copyright.

The fair use doctrine creates limited exceptions to copyright law. Section 107 of the Copyright Act defines "fair use" as a defense to claims of infringement, allowing creators to use the original works of others without licenses in limited circumstances. To determine what constitutes "fair use," the act instructs the courts to consider the purpose and character of the use, the nature of the copyrighted work, the amount of the copyrighted work used in the new work, and the effect of the new work on the market for the original copyrighted work. Despite these explicit factors, modern Supreme Court jurisprudence has decided cases almost solely based on whether the secondary work is "transformative," though exactly what counts as transformative has been the subject of debate.¹ For example, when collage artist Richard Prince used another artist's photos in his work, the Second Circuit Court of Appeals found that 16 of the collages crossed the line into "transformative," while five of them did not.² Thus, some critics have argued that the fair use analysis requires too much aesthetic expertise for generalist courts — how can a judge create a bright line rule about something as subjective as art?

In *Warhol*, the Supreme Court mostly sidestepped the discussion of "transformativeness," and held that Warhol's work wasn't protected by fair use, largely because of the work's commercial character. Both Warhol's illustration and Goldsmith's photograph sought to portray the artist Prince, per the majority. Warhol's secondary work therefore usurped the market for Goldsmith's original work, in a way that Warhol's famous use of Campbell's soup cans in art did not displace the market for soup.

The majority seemed to leave the door open for a sufficiently-transformative yet commercial work to be fair use, though it remains unclear what kind of work would rise to that standard. Had Warhol morphed Prince's figure or altered his expression, would the illustration be transformative enough to overcome the similar purpose of the two works? The court did not say.

Both the majority and the dissent claimed to be doing what's best for artists. With the ubiquity of artistic sampling and collages, Kagan asserted that requiring licenses might be cost-prohibitive for many artists, and fear of infringement may lead to self-censorship. Sotomayor countered that "it will not impoverish our world to require [the Warhol Foundation] to pay Goldsmith a fraction of the proceeds from its reuse of her copyrighted work. Recall, payments like these are incentives for artists to create original works in the first place."

In general, this decision signals that a higher level of transformation is needed for a creative work that incorporates elements of another work to be considered fair use — especially if the new work competes with the original in the marketplace.

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¹ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994).

² *Id.*

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