

The Supreme Court released an opinion in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* on May 18th, 2023. This is the Supreme Court's first foray into copyright fair use this century. The opinion addresses the first factor in the copyright fair use analysis, that being, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." The case appeals a decision by the Court of Appeals for the Second Circuit in which the Second Circuit reversed a grant of summary judgment to the Andy Warhol Foundation for fair use. The Supreme Court affirmed, holding that the first fair use factor weighed in Goldsmith's favor.

In the 1980s, Lynn Goldsmith licensed a photograph of the artist Prince to *Vanity Fair* for use as an artist reference. *Vanity Fair* hired Andy Warhol to create an illustration based on Goldsmith's photograph. However, instead of creating a single illustration, Warhol created several works, referred to herein as the Prince Series works. The Andy Warhol Foundation, holding the copyrights to these Prince Series works, licensed one of the works for use in a magazine. A dispute arose, and the Andy Warhol Foundation brought an action for declaratory judgment of noninfringement or, in the alternative, fair use against Goldsmith.

The District Court for the Southern District of New York granted summary judgment for the Andy Warhol Foundation, finding that all four fair use factors favored fair use. Importantly, with regard to the first fair use factor, the district court found that Warhol's works were "transformative" because they had a different character, provide new expression, and employ new aesthetics with creative and communicative results distinct from Goldsmith's original work. The Second Circuit reversed, holding that all four fair use factors favored Goldsmith. Rejecting the district court's assertion that any secondary work that adds new aesthetic or expression to its source material is transformative, the Second Circuit shifted the focus to whether the secondary work's use of its source material is in service of a fundamentally different and new artistic purpose and character.

The Supreme Court held, as had the Second Circuit, that in the context of the challenged use, the first fair use factor favored Goldsmith. The Court noted that the first factor asks whether *and to what extent* the use at issue has a purpose or character different from the original work. Generally, if the original and secondary uses share the same purpose, and the secondary use is commercial, the first fair use factor will likely weigh against fair use. Moreover, the Court noted that the degree of transformation required to make "transformative" use of an original work must go beyond that required to qualify as a derivative. In this way, the copyright act protects the rights of the original work's author. Here, the Court found that Goldsmith's original work, that being the Prince photograph, and the Andy Warhol Foundation's use of the photograph in the Prince Series work that was licensed to a magazine, share substantially the same commercial purpose. Thus, the first fair use factor weighs in favor of Goldsmith.

While the holding was substantially limited to the facts at issue, this case does offer a

few insights into the analysis under the first fair use factor. Namely, the Court reiterated that each of the four fair use factors are to be considered independent of one another. Thus, the Court appeared to be reigning in the transformative use test that previously dominated. Further, the Court reiterated that true transformative use is needed to qualify as a fair use, thus protecting the original author's right to create derivative works. Finally, the Court instructed that analysis of the first fair use factor should focus on whether the new work supersedes the objects of the original work, or instead adds some new aspect with a further purpose or different character.



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