

June 9, 2023

U.S. SUPREME COURT FINDS ANDY WARHOL'S USE OF PRINCE PHOTOGRAPH INFRINGING, PROVIDES GUIDANCE ON FIRST FAIR USE FACTOR

By [Michael Lambert](#)

In a copyright case closely watched by content creators, the U.S. Supreme Court held, 7-2, that the first fair use factor—"the purpose and character of the use"¹—weighed against Andy Warhol's use of Lynn Goldsmith's black-and-white photograph of Prince to create a colorful silk-screen illustration of the musician that was later licensed to *Vanity Fair* without Goldsmith's consent.² Justice Sonia Sotomayor, writing for the majority, first explained that courts analyzing the first fair use factor should balance "the degree to which the use has a further purpose or different character" against the "nature of the use," whether commercial or nonprofit.³ Under that rubric, the Court next found that even though Warhol's illustration "adds new expression to Goldsmith's photograph," the first fair use factor favored Goldsmith because the works shared "substantially the same commercial purpose"—Goldsmith's photograph and Warhol's illustration were both "portraits of Prince used to depict Prince in magazine stories about Prince."⁴ In essence:

If an original work and secondary use share the same or highly similar purposes, and the secondary use is commercial, the first fair use factor is likely to weigh against fair use, absent some other justification for copying.⁵

The Court emphasized that the "central" question for assessing the first factor is whether the secondary work "supersedes" the original work or "adds something new, with a further purpose or different character."⁶ Thus, the more likely a secondary work serves as a market substitute for the original work, the less likely the first factor will favor fair use.⁷

BACKGROUND

This case began in 1984 when Goldsmith licensed a black-and-white photograph of Prince to *Vanity Fair* to use as an "artist reference for an illustration."⁸

¹ 17 U.S.C. § 107.

² *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023).

³ *Id.* at 1276.

⁴ *Id.* at 1273.

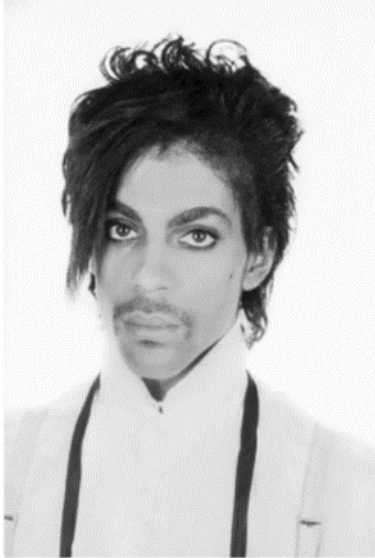
⁵ *Id.* at 1277.

⁶ *Id.* at 1274.

⁷ *Id.*

⁸ *Id.* at 1267.

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Vanity Fair then commissioned Warhol, the famous visual artist, to use Goldsmith's photograph to create a colorful illustration of Prince that was later published in the magazine (known as "Purple Prince").



Warhol also made 15 other illustrations of Prince based on the same photograph (the "Prince Series"). After Prince died in 2016, the Andy Warhol Foundation ("AWF") licensed another piece from the Prince Series, "Orange Prince," to *Vanity Fair* without paying Goldsmith or seeking her permission.⁹

When Goldsmith learned about Orange Prince being on the cover of the magazine, she notified AWF that she believed the Prince Series infringed the copyright in her original photograph. In response, AWF sought a declaratory judgment that the Prince Series was protected under the fair use doctrine, a four-part test that

⁹ *Id.* at 1269.

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permits certain uses of copyrighted works without the creator's consent.¹⁰ Goldsmith then filed a counterclaim against AWF for copyright infringement.¹¹

LOWER COURTS' ANALYSIS

In 2019, the Southern District of New York granted AWF's motion for summary judgment and dismissed Goldsmith's counterclaim, holding that it was "plain" that the Prince Series was protected by fair use because Warhol illustrations were "transformative"—they had a "different character," "new expression, and employ[ed] new aesthetics with creative and communicative results distinct from the original."¹² Two years later, the Second Circuit reversed the District Court's decision, holding that the Prince Series was not a fair use. According to the Second Circuit, the illustrations were not sufficiently transformative because the Prince Series "retains the essential elements of the Goldsmith Photograph without significantly adding to or altering those elements."¹³ After AWF filed a writ of certiorari, the Supreme Court granted review to decide which party the first fair use factor favored.¹⁴

U.S. SUPREME COURT'S ANALYSIS

On May 18, 2023, the Supreme Court affirmed the Second Circuit's decision, albeit for different reasons. The majority focused on three facts in finding that "the purpose and character of the use" factor favored Goldsmith: (1) the use of both works shared the same purpose—they were photographs of Prince licensed to a magazine for articles about him; (2) the use of licensing to a magazine was commercial; and (3) no other justification for copying existed.

In a blistering dissent, Justice Elena Kagan (joined by Chief Justice John Roberts) sharply criticized the majority opinion, accusing Justice Sotomayor, a frequent ally, of having a "lack of appreciation for the way [Warhol's] works differ in both aesthetics and message," "ignoring reams of expert evidence," and seeing Warhol as "an Instagram filter, and a simply one at that."¹⁵ "There is precious little evidence in today's opinion that the majority has actually looked at these images, much less that it has engaged with expert views of their aesthetics and meaning," Justice Kagan wrote.¹⁶ She also expressed concern that the decision "will stifle creativity of every sort" and "thwart the expression of new ideas and the attainment of new knowledge."¹⁷ Justice Kagan asked: "If Warhol does not get credit for transformative copying, who will? And when artists less famous than Warhol cannot benefit from fair use, it will matter even more."¹⁸

Justice Sotomayor, an avid copyright litigator before taking the bench, clarified that the "same copying may be fair when used for one purpose but not another."¹⁹ She explained that the use of a work for a non-commercial

¹⁰ *Id.* U.S.C. § 107.

¹¹ *Goldsmith*, 143 S. Ct. at 1271.

¹² *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019).

¹³ *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 51 (2d Cir. 2021).

¹⁴ Case No. 21-869.

¹⁵ *Goldsmith*, 143 S. Ct. at 12301.

¹⁶ *Id.*

¹⁷ *Id.* at 1312.

¹⁸ *Id.*

¹⁹ *Id.* at 1277.

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purpose, such as “criticism, comment, news reporting, teaching . . . , scholarship, or research,”²⁰ “may guide the first factor inquiry.”²¹ For example, criticism of a work “ordinarily does not supersede the objects of, or supplant, the work. Rather, it uses the work to serve a distinct end.”²² Justice Sotomayor elaborated that Warhol’s famous “Campbell’s Soup Cans Series” is another such example. There, Warhol used Campbell’s copyrighted work to create an artistic commentary on consumerism, “a purpose that is orthogonal to advertising soup” and thus “does not supersede the objects of the advertising logo.”²³ But here, Warhol’s use of Goldsmith’s photograph “does not target the photograph” and has the same purpose—he, like Goldsmith, licensed the photograph to a magazine, which is a commercial use.²⁴ Justice Kagan responded that drawing a distinction between a “commentary on consumerism” and a “commentary on celebrity culture,” which AWF claimed motivated the Prince Series, is “slicing the baloney pretty thin.”²⁵

In a concurring opinion, Justice Neal Gorsuch (joined by Justice Ketanji Brown Jackson) tried to temper the heated rhetoric by arguing that the decision was “narrow” and that the dissent’s concerns about the “fate of artists” building on classic themes were unwarranted.²⁶ “This case does not call on us to strike a balance between rewarding creators and enabling others to build on their work. That is Congress’s job,” Justice Gorsuch wrote.²⁷

Justice Gorsuch, applying textualism, his preferred method of statutory interpretation, explained that “[n]othing in the copyright statute calls on judges to speculate about the purpose an artist may have in mind when working on a particular project.”²⁸ The statute asks judges “to assess whether the purpose and character of that use is different from (and thus complements) or is the same as (and thus substitutes for) a copyrighted work.”²⁹ This “modest inquiry,” according to Justice Gorsuch, is focused on “how and for what reason a person is using a copyrighted work in the world, not on the moods of any artist or the aesthetic quality of any creation.”³⁰

TAKEAWAYS

It’s difficult to predict how this case will change copyright law. Some share Justice Kagan’s concerns that the decision could have a chilling effect on artistic creation.³¹ Others side with Justice Gorsuch’s view that the case

²⁰ 17 U.S.C. § 107.

²¹ *Goldsmith*, 143 S. Ct. at 1289.

²² *Id.* at 1274.

²³ *Id.* at 1281.

²⁴ *Id.*

²⁵ *Id.* at 1300.

²⁶ *Id.* at 1290.

²⁷ *Id.*

²⁸ *Id.* at 1289.

²⁹ *Id.*

³⁰ *Id.*

³¹ See, e.g., Tiffany Hu, [High Court’s Warhol Ruling Poses New Concerns For Artists](#), LAW360, May 18, 2023; Mark Joseph Stern, [The Supreme Court Sleeper Case That Poses an Existential Threat to Artistic Freedom](#), SLATE, June 1, 2023; Mark Avsec, Angela Gott, & Lidia Mowad, [Supreme Court’s 2023 Copyright Fair Use Decision is Not a One-Hit Wonder](#), JD SUPRA, June 6, 2023.

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is “narrow” and does not shed much new light on the fair use doctrine.³² Regardless, the case provides litigants—and courts—some guidance in analyzing the first fair use factor. Under the majority opinion, courts will likely weigh how much the secondary use had a further purpose or different character with whether the secondary use was commercial or for another purpose. If the works share similar purposes and are commercial uses, the first factor is “likely to weigh against fair use.” But the fair use pendulum will swing the other way if the works are not market substitutes and the work is not being used commercially.

It’s worth watching how courts apply the first fair use factor within the context of the other three factors. This is especially true with respect to the fourth factor—“the effect of the use upon the potential market”—because, like the first factor, it also considers commercialism. To that end, Justice Kagan accused the majority of combining the fourth factor with the first by conducting a “market analysis” when analyzing the first factor. According to Justice Kagan, the fact that both AWF and Goldsmith could have licensed the photograph to the same magazine “is the stuff of factor 4: how Warhol’s use affected the ‘value of’ or ‘market for’ Goldsmith’s photo.”

It’s notable that Justices Sotomayor and Kagan stepped into the copyright void left after Justice Stephen Breyer’s retirement and Justice Ruth Bader Ginsburg’s death. Both had been frequent authors and active voices in copyright cases during their years on the bench. In their absence, Justices Sotomayor and Kagan did not disappoint, both writing fiery opinions with conviction. The unexpected crossfire between Justices Sotomayor and Kagan and the unity between Justices Gorsuch and Jackson show that intellectual property cases are not often decided along ideological lines.

The case is also important because it’s the first time the Supreme Court addressed fair use in the context of artistic works since *Campbell v. Acuff-Rose Music, Inc.* in 1994.³³ There, the Court held that 2 Live Crew’s unique rendition of Roy Orbison’s “Pretty Woman” was a parody and thus a fair use. Since then, not only has copyright law doctrine changed dramatically, but the way content is made, used, and shared on the internet has created an entirely new set of challenges. Although this case does not involve online works, its principles will be applied to the digital world, including generative AI.³⁴

Copyright cases involving generative AI have already been working their way through courts.³⁵ They ask important questions, such as: “Are generative AI outputs copyrightable? If so, who owns the copyrights? Does the generative AI training process constitute copyright infringement, or is it fair use? Are generative AI outputs infringing? Does generative AI violate the Digital Millennium Copyright Act?” These are a small sampling of the many questions to come. Although no clear answers exist, the Congressional Research Service attempted to address some of them in a 2023 report.³⁶ The U.S. Copyright Office has also tried to keep up with rapidly changing technology, launching an AI initiative in March 2023 and posting AI updates on its website.³⁷ But because any action from Congress is unlikely, courts will be tasked with writing the first drafts of history in this

³² See, e.g., Blake Brittain, [US Supreme Court’s Andy Warhol decision keeps ‘fair use’ questions alive](#), REUTERS, May 22, 2023.

³³ 510 U.S. 569 (1994).

³⁴ See Isaiah Portiz, [Generative AI Debate Braces for Post-Warhol Fair Use Impact](#), BLOOMBERG LAW, May 30, 2023.

³⁵ See, e.g., Cade Metz, [Lawsuit Takes Aim at the Way A.I. Is Built](#), THE NEW YORK TIMES, November 23, 2022; Riddhi Setty, [AI Art Generators Hit With Copyright Suit Over Artists’ Images](#), BLOOMBERG LAW, January 17, 2023; James Vincent, [Getty Images sues AI art generator Stable Diffusion in the US for copyright infringement](#), THE VERGE, February 6, 2023.

³⁶ See [Generative Artificial Intelligence and Copyright Law](#), CONGRESSIONAL RESEARCH SERVICE, May 11, 2023.

³⁷ See [Copyright Office Launches New Artificial Intelligence Initiative](#), U.S. COPYRIGHT OFFICE, March 16, 2023.

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budding area of copyright law. Although the outcomes of those cases are unknown, one thing is certain—this case will play a critical role in how fair use questions involving generative AI are resolved.