

U.S. Supreme Court Finds Andy Warhol's Use of Prince Photograph Infringing, Provides Guidance On First Fair Use Factor

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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” —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. 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. 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.” 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.

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.” 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.

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