

FAIR USE FACE-OFF: WARHOL VS. GOLDSMITH – UNPACKING THE UNEXPECTED RULING

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Yesterday morning the Supreme Court issued its long-awaited ruling in one of the most closely-watched copyright cases in a long time – [Andy Warhol Foundation v. Goldsmith](#). This case raised the question of whether pop artist Andy Warhol's silkscreen painting of rock star Prince infringed on a photograph of Prince on which it was based, or was instead a Fair Use under Copyright law because it was "transformative" of the original. In a ruling that was frankly a surprise to me at first, the Court found no Fair Use, and in the process provided some important clarification to the "transformative use" prong of the Fair Use analysis.

There is a lot to unpack in the Court's 87-page opinion, which includes a separate concurrence and a dissent. I look forward to digging in more in the future – particularly about how this ruling will impact various creative industries (and inform further thinking about copyright and AI-generated content), but I think there are some valuable initial takeaways.

First, some background.

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In 1981, trailblazing rock-n-roll photographer Lynn Goldsmith photographed young, up and coming rocker Prince Rogers Nelson for a Newsweek magazine story about him, which included Goldsmith's black and white photographic portrait. She retained the copyright in her photograph.



Figure 1. A black and white portrait photograph of Prince taken in 1981 by Lynn Goldsmith.

In 1984, Goldsmith licensed that same photograph to Vanity Fair magazine to serve as an "artist reference for an illustration" in an article about Prince. Vanity Fair commissioned Andy Warhol, who created a primarily purple silkscreen painting, and published Warhol's image in an article titled "Purple Fame." Importantly, Goldsmith's license to Vanity Fair was for a one-time use in only the November 1984 issue of the magazine. Goldsmith was credited for the "source photograph" of the Warhol painting and was paid \$400.



Figure 2. A purple silkscreen portrait of Prince

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created in 1984 by Andy Warhol to illustrate an article in Vanity Fair.

But unbeknownst to Goldsmith, Warhol also created 15 other works based on her original photograph, which became known as the "Prince Series", many of which now reside in private galleries and museums around the world. When Warhol died, the copyright in those images passed to the Andy Warhol Foundation for the Visual Arts ("AWF").

Fast forward to 2016. After Prince died unexpectedly, Condé Nast magazine contacted AWF to request a license to the same Purple Prince image that had been published in Vanity Fair for a retrospective issue about Prince. When AWF disclosed the existence of the entire Prince Series, Condé Nast instead -licensed a different work, known as "Orange Prince," and paid AWF \$10,000. Goldsmith was not credited for providing the source work and was not paid anything by Condé Nast. By contrast, several other publications, including People, Time, and Rolling Stone, all licensed photographs of Prince taken by Goldsmith.



Figure 3. An orange silkscreen portrait of Prince on the cover of a special edition magazine published in 2016 by Condé Nast.

When she saw the Condé Nast cover with Orange Prince, she notified AWF of her belief that it had infringed her copyright. AWF responded by suing for a declaratory judgement of non-infringement, arguing that Warhol's creation was a "Fair Use" of her original photograph, and thus no license was needed.

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The trial court agreed with AWF and found Fair Use. The Court of Appeals for the 2nd Circuit reversed, finding that Warhol's painting was not transformative because it served essentially the same purpose as Goldsmith's original photograph.

Many commenters, including me, thought the 2nd Circuit opinion seriously undercut the Supreme Court's 1984 ruling in [Campbell v. Acuff-Rose Music, Inc.](#), 510 U.S. 569, which had held that a new work could be "transformative" of an original work, and thus a Fair Use, if it added "something new, with a further purpose or different character." Id. at 579.

Indeed, AWF argued that the Warhol images presented a much different picture of Prince than the original photograph – instead of a vulnerable artist at the start of his career (the Goldsmith photograph), the Warhol images showed the highly sexualized and commoditized nature of late stage Prince (and others like him). This, it seemed, would satisfy Campbell's requirement for a different purpose.

However, in a 7-2 opinion that is interesting in part because of the makeup of the Justices on various sides of the issue, the Supreme Court held that Warhol's Orange Prince — as licensed to Condé Nast — was not transformative, and thus not a Fair Use. In so doing, it provided some important clarification to the concept of a "different purpose" in the Campbell transformative use test.

While it may seem like it at first blush, this is NOT a refutation of Campbell. In fact, today's opinion quotes extensively from Campbell in order to explain its rationale – that a new work is not automatically transformative simply by appearing to be used to convey a different meaning than the original. Each Fair Use factor must be weighed with the other factors, and in this case, the Court found virtually identical commercial uses of the two images, and that militated against a finding of Fair Use.

It's important to note, however, that the Court made clear that its ruling is limited to the **particular use** that was alleged to be infringing in the case itself - ***the Warhol Foundation's licensing of one image to Condé Nast for use in a retrospective magazine issue about Prince*** after he died. In that sense, the "purpose" of each work was identical - it was licensed to a magazine for a story about Prince. The Court expressly declined to opine on the rest of the Warhol Prince series or any other possible uses one might make of those paintings.

Make no mistake - this is a transformational ruling (sorry for the pun), and it will have an impact on creative industries. And I'll admit that I was pretty confident in predicting a different outcome. But it doesn't upset the whole apple cart as I initially feared. As has always been the case, we still must continue to focus on the actual "use" of the new work, not the user's intent.

I'm still processing the whole thing (and will be for a while), but that's my first take. Creators and Copyright lawyers will have to pay close attention to this opinion when conducting future Fair Use analyses.

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