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Orange Prince, Warhol, and Fair Use: Supreme Court Sides with Copyright Owners in Landmark Fair Use Case

Last month, the Supreme Court issued an impactful decision in *Andy Warhol Foundation for the Visual Arts v. Goldsmith*, a high-profile case involving celebrities and the abstract boundaries surrounding fair use. See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023). The opinion, authored by Justice Sotomayor, characterizes fair use as the balancing of two competing policies: the protection from infringement versus the ability of others to extrapolate from existing works. In a 7-2 vote, the Supreme Court sided with Lynn Goldsmith, the creator of the original work and photographer whose 1981 photograph of the "up and coming" musician Prince was at issue. *Id.*

In 1984, Goldsmith licensed her photograph to Vanity Fair for $400 and a source credit to serve as an "artist reference for an illustration" which would be published in the magazine "one time" only. *Id.* at 1267. Artist Andy Warhol was commissioned for this task. *Id*. Warhol used the photograph to create a colorized print screen version of Goldsmith's photograph along with fifteen other works based on the photograph (the "Prince Series"). *Id.* at 1268-1270. Warhol's purple silk screen of Goldsmith's photograph, titled "Purple Prince," ran alongside an article about Prince in Vanity Fair's November 1984 issue. *Id.* at 1269. After Prince's death in 2016, the Andy Warhol Foundation for the Visual Arts (AWF) licensed one of these additional pieces, the conceptually similar and aptly titled "Orange Prince" from the Warhol Prince Series to Condé Nast, Vanity Fair's parent company, for $10,000. *Id.* at 1269. Goldsmith did not know about the Prince Series until she saw Orange Prince on the cover of Condé Nast magazine. From there, Goldsmith notified AWF of her belief that it had infringed her copyright. *Id.* at 1270-1271. In turn, AWF sued for a declaratory judgment of noninfringement or, in the alternative, fair use. *Id.* at 1271. Goldsmith counterclaimed for infringement. Id. The district court granted AWF summary judgment, but the Second Circuit reversed, holding that all four fair-use factors weigh in favor of Goldsmith. *Id.* at 1268.

Fair use is a copyright law doctrine that allows one work to use another copyrighted work without infringing upon the first work for a limited and "transformative" purpose. *Id.* Fair use is what protects scholarly, educational, critical, and all otherwise "fair" use of a copyrighted work. A statutorily defined factor test is used to assess whether a work is fair use. The factors are: 1) the character of the later use; 2) the nature of the work; 3) the substantiality of the copying; and 4) the effect of the later use on the market for the original work. 17 U.S.C. § 107.

In this case, the Supreme Court did not determine whether Orange Prince or any of the fifteen other works infringed or constituted fair use, granting review instead to assess the applicability of the first fair-use factor (the "character" of the later use). *Id*. at 1278. In assessing this factor, courts must consider to what extent the use of another work is transformative. Works that serve a similar purpose are more insidious as they may "supplant" the original work. *Id.* at 1274. Justice Sotomayor asserted this factor

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favors Goldsmith largely because the purposes of the works shared "substantially the same purpose"—licensure of a print to a magazine. *Id.* at 1272, 1280 (stating both Goldsmith's photograph and Orange Prince "are portraits of Prince used in magazines to illustrate stories about Prince.").

In its analysis, the Court turned to its most recent in-depth treatment of fair use in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). In that case, the Court sided with the creators of a rap parody of "Oh, Pretty Woman," deeming that the song in question was fair use because it was a parody. *Id.* The *Campbell* Court asserted "parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's…imagination." *Id.* Likewise, Justice Sotomayor noted "commentary or criticism that targets an original work may have compelling reason to…borro[w] from it." *Goldsmith* at 1276. However, the same cannot be said when "an original work and a secondary use share the same or highly similar purposes," especially when that secondary use is of a commercial nature. *Id.* at 1277.

While the whole Court acknowledged that Warhol made expressive changes to the photograph, the majority emphasized the purpose of the secondary work (e.g., its commercial licensure to a magazine). However, the dissent, authored by Justice Kagan, focused on the artistic motivation that generated the later work. *Id.* at 1278 n. 10 ("the dissent assumes that any and all uses of an original work entail the same first factor analysis based solely on the content of a secondary work."). The dissent feared the majority's de-emphasis of artistic expression in its analysis will stifle art and creativity. *Id.* at 1291-1312 (Kagan, J., dissenting).

The boundaries of fair use are still hazy and will likely continue to be until the Supreme Court takes up another case addressing the matter. For now, due to the relative weakening of the fair use doctrine, producers of original work have greater power to pursue copyright infringement claims.