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Blog Post

If Warhol Isn't Transformative, Redux, In The Supreme Court

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On March 25, 2022, the Supreme Court agreed to consider whether Andy Warhol's "Prince Series" sufficiently transforms Lynn Goldsmith's 1981 photograph of Prince (the Photograph) to qualify for the Copyright Act's fair use defense.

As discussed in detail in our prior blog, at issue in this case is a series of silkscreen prints created by Andy Warhol based on Lynn Goldsmith's Photograph, in which she holds a registered copyright. In 2017, The Andy Warhol Foundation for the Visual Arts, Inc. (AWF) sued Goldsmith for a declaratory judgment that the Prince Series works were non-infringing or, in the alternative, that they made fair use of the Photograph. The district court ruled in favor of the AWF on its assertion of fair use. In 2021, the Second Circuit reversed the district court's ruling and held that the Prince Series was not transformative (and thus not fair use) because the Photograph "remain[ed] the recognizable foundation upon which the Prince Series is built." The Second Circuit further explained that "the secondary work's transformative purpose and character must, at a bare minimum, comprise something more than the imposition of another artist's style on the primary work such that the secondary remains both recognizably deriving from, and retaining the essential elements of, its source material."

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In late 2021, the AWF filed a Petition for Writ of Certiorari with the Supreme Court. The AWF argues that the Second Circuit's decision conflicts with Supreme Court precedent on copyright law, under which the "fair use" test merely requires that a new work has a meaning or message different from the original.[1]

The AWF contends that the Second Circuit's decision forbids that inquiry and, instead, turns on the visual and aesthetic differences between two works and, therefore, it collapses the transformativeness inquiry into a substantial similarity analysis. Thus, the AWF concludes, the Second Circuit's ruling eviscerated application of the fair use doctrine for works that rely on earlier pieces for artistic purposes.

The AWF further argues that the Second Circuit's decision creates a circuit split, which will result in inconsistent results and forum shopping. Finally, the AWF argues that the Second Circuit's decision "will chill artistic expression and undermine First Amendment values," because it will discourage artists from creating new works and museums from displaying artwork because they cannot easily predict whether a work will be deemed transformative.

Goldsmith opposed the Petition. Goldsmith argues that the AWF mischaracterizes the Supreme Court's precedent. Goldsmith explains that the Second Circuit simply "faithfully applied the Supreme Court's test for transformativeness," which requires that "the work must have a new purpose or character, to such an extent that the new work alters the original." Based on the foregoing, Goldsmith concludes, the Second Circuit determined that the "Prince Series" shared the same purpose as the Photograph and retained its essential artistic elements.

Goldsmith, thus, contends that the Second Circuit's transformative use analysis did not rely solely on

"visual similarity", but also examined the "purpose and function" of the work. Goldsmith further argues that the AWF manufactures a circuit split that does not exist. Instead, she claims that the Second Circuit's decision was fact and context-specific, just like similar decisions in other circuits.

Goldsmith also argues that the AWF "take[s] a Chicken-Little approach to the decision below, but the sky is not remotely close to falling." In fact, she reasons, the Second Circuit limited its ruling to "AWF's commercial licensing of images from the Prince Series" and specifically rejected the notion that its decision would cast doubt upon "art that employs pre-existing imagery."

The case will likely be argued in late 2022, with a decision by June 2023.

We will follow this case as it proceeds, and blog further.

[1] *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1202-03 (2021).
