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Supreme Court to Re-Examine Fair Use: Warhol Foundation v. Goldsmith

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On March 28th, the Supreme Court granted certiorari in *Warhol Foundation v. Goldsmith*, a case involving the core issues around copyright fair use. The case involves a series of Warhol drawings and silkscreen prints adapted from an original photograph of Prince taken by Lynn Goldsmith. Likely to interplay with the recent fair use decision in *Google v. Oracle*, the Supreme Court's decision in this case has the potential to reshape the contours of fair use and the fate of the transformative use test. The outcome of the decision will have a widespread impact on how artists, particularly appropriation artists and creators of "fan art," draw from other works.

Procedural History

In March of last year, in a decision we previously covered, the Second Circuit overturned the district court's decision in *Warhol Foundation v. Goldsmith*. The Second Circuit disagreed with the lower court's finding that the work was transformative, and with its ultimate finding of fair use. While the district court believed Warhol had transformed the work into one with a new and distinct message that was instantly recognizable as a Warhol, the Second Circuit disagreed with the district court's approach. Specifically, it found the district court's application of fair use too broad and noted that the lower court relied too heavily on its interpretation of the artistic intent behind the creations. It also argued that the artist's ubiquity should not factor into the Court's assessment, since this would create a "celebrity plagiarist" privilege. Instead, the Court held that a reviewing court must examine how the works may "reasonably be perceived," and must determine whether the secondary work's use of its source material is in service of a "fundamentally different and new" artistic purpose. To create a "fundamentally different" work, the Second Circuit said, an artist must do more than simply impose their style on the primary work.

Interplay with The Supreme Court's Decision in *Google v. Oracle*

Subsequently, the Second Circuit issued a revised opinion in light of *Google v. Oracle*, which interpreted fair use broadly in the context of software code. In *Google*, the Supreme Court held that Google's use of portions of Oracle's Java programming code was fair use, because Google "provided a new collection of tasks operating in a distinct and different computing environment," and Java's code accounted for less than one half of one percent of the code employed by Google. (See our prior coverage). Despite the Supreme Court's seemingly broad application of fair use in that case, the Second Circuit was unpersuaded that it should be expanded beyond the software context, observing that the Supreme Court "expressly noted that copyright's protection may be stronger where the copyrighted material serves an artistic rather than a utilitarian function."

Potential Impact on the Fair Use Inquiry

In granting certiorari, the Supreme Court now has the opportunity to further shape copyright's fair use doctrine, this time considering artistic works (having last considered fair use in such a context in 1994's *Campbell* case involving a commercial parody of a well-known song). In doing so, it may take the same broad approach in *Google v. Oracle*, or it may more explicitly limit its previous decision to software code. Considering, as the Second Circuit noted, that the Supreme Court distinguished artistic and utilitarian works in *Google*, it is very possible that the Supreme Court will limit its previous broad interpretation of fair use to software and create a more distinct split in fair use law between artistic and computer code. Of course, the "nature of the work" is already one of the four fair use factors, but with *Warhol*, we will have a Supreme Court pronouncement on both sides of the artistic-utilitarian work divide.

The Supreme Court will have the opportunity to address whether, as the Warhol Foundation put it, "a work of art is 'transformative' when it conveys a different meaning or message from its source material (as this Court, the Ninth Circuit, and other courts of appeals have held), or whether a court is forbidden from considering the meaning of the challenged work where it 'recognizably deriv[es] from' its source material (as the Second Circuit has held)." Warhol Foundation Petition for Writ of Certiorari, at 1. Put differently, the Supreme Court is being asked to clarify whether and how much to weigh the intent or message of the artist or if instead, seemingly in contrast to prior precedent, the inquiry should focus on the degree of visual similarity between the two works. Warhol Foundation Brief for Petitioner at 2.

Implications for Artists

The Supreme Court's decision will impact how fair use is applied to artistic works across the board. However, it will likely have the most significant impact on the work of appropriation artists. Appropriation art is the "intentional borrowing, copying and alteration of existing images and objects."[1] In creating their works, appropriation artists generally want viewers to recognize the underlying works, objects, and ideas. Warhol is widely recognized for his appropriation art, including his Campbell's Soup Can series, among many others. If the Supreme Court's holding in the *Warhol* case narrows the way courts should determine "transformative use" cases involving artistic works, appropriation artists may have to reframe how they borrow from existing works. Specifically, a narrow application may require appropriation artists to seek licenses in the future or add more unique elements and make more significant changes.

Many creators of "fan art" also await this decision with bated breath. "Fan artists" include cosplayers,[2] fanfiction writers, and painters, drawers, and sculptors who make works based on their favorite fictional characters and stories. This is no small group. Amici, The Royal Manticoran Navy: The Official Honor Harrington Fan Association, Inc., estimate that "millions" of fans are noncommercial creators of such works.[3] These creators rely on the fair use exception to feel comfortable creating and sharing their works, which are often disseminated widely on the Internet or at fan conventions. The amici argue that, if the Supreme Court adopts the Second Circuit's conception of fair use, fan art creators will become vulnerable to suit and will be discouraged from making these works.

Regardless of which side the Supreme Court lands on, its decision will have lasting impact on how fair use will be considered for artistic works moving forward. For those interested in following this case, the Andy Warhol Foundation filed its brief on the merits on June 10, 2022. Goldsmith's brief is due August 8, and oral argument has been set for October 12.

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[1] MoMA Learning, Pop Art, www.moma.org/learn/momalearning/these/pop-art/appropration, last visited May 15, 2022.

[2] “Cosplay” is short for “costume play,” and describes the practice of dressing up and acting as a fictional character.

[3] Brief of Amicus Curiae The Royal Manticoran Navy: The Official Honor Harrington Fan Association, Inc. in Support of Petitioner, at 8-9.

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