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The “State of the Arts” after Andy Warhol Foundation v. Goldsmith

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It has been eight months since the Supreme Court’s landmark copyright fair use decision in *Andy Warhol Foundation for the Visual Art, Inc. v. Goldsmith*. Much has been written on the subject, including in this forum, but in many ways it was a narrow decision. The Court held that the commercial licensing of *Orange Prince*, a work in Andy Warhol’s Prince series based on a photograph by Lynn Goldsmith, was not protected under the first factor of the four-factor fair use test under 17 U.S.C. § 107. Its discussion of the transformative use test emphasized the similarity of the uses the works were put to (depicting Prince on magazine covers), rather than the characteristics of the works themselves. This, the Court said, prevents judges from acting as art critics to determine the aesthetic differences between, or meanings behind, artistic works.

This ruling places heightened importance on judges’ perceptions of what constitutes the “use” of a work. Two recent decisions applying *Warhol* demonstrate this:

- *Larson v. Perry* was a dispute between two authors that stoked passionate online discourse as the subject of a viral New York Times article, “Who is the Bad Art Friend?” Author Dawn Dorland posted a letter in a Facebook group, where she wrote about her decision to donate a kidney to a stranger. Fellow author Sonya Larson wrote a short story inspired by Dorland’s actions, depicting the fictional donor as a narcissist. The story contained excerpts from Dorland’s letter, initially published verbatim but later modified so that none of Dorland’s words appeared. Dorland sued Larson for copyright infringement, and Larson claimed fair use.

  The court held that Larson’s use of the letter – in both its verbatim and modified forms – was fair. Applying *Warhol*, the court “took its analysis down to the very end of the contextual chain, starting with the medium of the work . . . but ending with the broader framework in which the work ultimately appeared.” It found that Larson’s use of Dorland’s letter was sufficiently transformative because even when they used the same words, the letters served distinct purposes in context: Dorland’s informed her kidney recipient, family, and friends about her actions; Larson’s was a character development and criticism device in her story. The court rejected Dorland’s argument that the letter itself served the same purposes in real

life and the short story: informing a recipient of a kidney donation.

- Contrast this outcome with the latest development in *Sedlik v. Drachenberg*. This case involves well-known tattoo artist Katherine Von Drachenberg ("Kat Von D"). Von D tattooed a photograph of Miles Davis onto a friend, free of charge, and posted images on social media. She was sued by photographer Jeffrey Sedlik, whose photograph was used as a reference for the tattoo. After a summary judgment ruling, Sedlik moved for reconsideration in light of *Warhol*.

  In its initial summary judgment decision, the Court found that the tattoo was transformative because "Kat Von D changed [Davis'] appearance to create what she characterizes as adding movement and a more melancholy aesthetic." But after *Warhol*, the court held that this no longer constituted evidence of transformative use. Instead, the court found that the tattoo was merely a derivative work, similar to Koons' use of a photo to create a sculpture in *Rogers v. Koons*. Notably, the court did *not* credit Von D's argument that the photo's uses had distinct purposes in context: "[Sedlick's] photograph was used to illustrate an article about Miles Davis in a jazz magazine. Kat Von D hand-inked a tattoo on the arm of her friend."

These cases show the implications of how broadly or narrowly a court defines a work's "purpose" or "use." The court in *Larson* determined the relevant "use" by looking beyond the work itself to the context it appeared in. The court in *Sedlik* defined the "use" by what was depicted, regardless of the context in which it was displayed. The question of the most relevant "uses" will become especially important in disputes involving the use of copyrighted works to train generative AI programs. Courts deciding these cases will have to determine whether the relevant "use" of a work is the training of AI (a purpose not likely to be replicated by the authors or artists whose works are used), or something broader, like the creation of art or works of authorship generally. So, while *Warhol* may have been a narrow decision on its face, its impact on the transformative use inquiry will be significant in the uncharted copyright disputes on the horizon.

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