

VICTORY OR DEFEAT? IMPLICATIONS OF ANDY WARHOL V. GOLDSMITH FOR CREATIVES AND BUSINESS

*Deborah Billy Gillis Harry**

I.	INTRODUCTION	43
II.	THE ANDY WARHOL CASE.....	43
	A. <i>OVERVIEW</i>	43
	B. <i>FACTUAL BACKGROUND</i>	43
	C. <i>THE SUPREME COURT'S DECISION</i>	44
III.	COPYRIGHT ACT AND FAIR USE DEFENSE AGAINST COPYRIGHT INFRINGEMENT	45
IV.	UNDERSTANDING FAIR USE FACTOR ANALYSIS	46
V.	THE ECONOMIC IMPACT OF FAIR USE	47
	A. <i>General Considerations</i>	47
	B. <i>Artists</i>	48
VI.	A BALANCING OF THE POTENTIAL PROS AGAINST THE LIKELY CONS.....	49
	A. <i>What Are The Pros of this Decision?</i>	49
	B. <i>What Are The Cons of This Decision?</i>	50
VII.	CONCLUSION	51

* Deborah Billy Gillis-Harry is a third-year law student at the University of Houston Law Center. She is the current Houston Business and Tax Law Journal Event Editor (Board 25). She obtained her Bachelor of Science in Criminal Justice and Master of Art in Legal Studies from Texas State University. After spending her 1L and 2L summers at the Gibson Dunn Houston office, she will join the firm as an Associate Attorney following graduation and Bar passage. She has received numerous awards and scholarships based on her academic excellence at the Law Center and Nationally. She has been an active student at the Law Center. She has competed and won several Moot Court competition awards, assisted clients in the UHLC Immigration Clinic, and served as a Legal Writing fellow.

I. INTRODUCTION

Writers, artists, and other creators have long argued that inspiration is a key motivator of creativity.¹ The United States Constitution grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited [t]imes to Authors and Inventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries.”² However, there is a thin line between inspiration and encroachment of original work. Accordingly, law plays a significant role in balancing the creation of original work while ensuring creativity across several disciplines by allowing artists to draw inspiration from others.³

II. THE ANDY WARHOL CASE

A. OVERVIEW

After a long-winded battle between photographer, Lynn Goldsmith (Goldsmith) and the Andy Warhol Foundation for Visual Arts, Inc. (AWF),⁴ the Supreme Court held that Warhol did not make fair use of Goldsmith’s photograph because such use was commercial in nature and not “transformative.”⁵

B. FACTUAL BACKGROUND

Before diving into the details of the Supreme Court’s opinion, it is important to provide a summary of the facts as pleaded in the District Court. While copyright law is applied on a case-by-case basis, the *Andy Warhol* case proves to be a unique case because this lawsuit involves two artists.⁶ The first artist is Goldsmith, a photographer who has captured numerous musicians throughout her career,⁷ and the second artist is Andy Warhol, a visual artist and film director.⁸ Goldsmith’s work centers on helping others formulate their identities through her photography.⁹ She specifically engages in learning about her subjects

1. Victoria C. Oleynick et al., *The Scientific Study Of Inspiration In The Creative Process: Challenges And Opportunities*, FRONTIERS HUM. NEUROSCIENCE, 1, 1 (2014), <https://www.frontiersin.org/journals/human-neuroscience/articles/10.3389/fnhum.2014.00436/full>.

2. U.S. CONST. art. I, § 8, cl. 8.

3. *Id.*; see *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 325 (S.D.N.Y. 2019).

4. See *Warhol*, 382 F. Supp. 3d at 317-22.

5. Robert J. Labate et al., *U.S. Supreme Court Holds That First Factor of Fair Use Test Favors Photographer*, HOLLAND & KNIGHT (June 15, 2023), <https://www.hklaw.com/en/insights/publications/2023/06/us-supreme-court-holds-that-first-factor-of-fair-use>.

6. *Warhol*, 382 F. Supp. 3d at 317.

7. *Id.* at 317-18.

8. *Id.* at 317-18.

9. *Id.* at 317.

and positioning them in a way that allows their identities to shine through the photograph.¹⁰

In 1981, Newsweek Magazine commissioned Lynn Goldsmith to take a series of photos of Prince.¹¹ Goldsmith first shot black and white photographs and then switched to color film.¹² Following the initial photoshoot, “[t]he Goldsmith Prince Photograph was licensed¹³ ‘for use as an artist’s reference in connection with an article to be published in Vanity Fair Magazine’ [owned by Condé Nast].”¹⁴ Subsequently, Vanity Fair commissioned Andy Warhol¹⁵ to create a full-color illustration of Prince that ultimately appeared in the “Purple Fame” article¹⁶ and the magazine’s table of contents.¹⁷

In 2016, AWF gave Conde Nast a license to use a different portrait in the series (“Orange Prince”) for use in a special tribute magazine dedicated to Prince after he passed away.¹⁸ Goldsmith demanded compensation, stating that Goldsmith does not recall licensing the Goldsmith Prince Photograph or any other photograph that she took at the December 1981 studio shoot.¹⁹ AWF sought a declaration that Warhol’s portraits constituted fair use of Goldsmith’s photo and, therefore, it had every right to license the resulting work.²⁰

C. THE SUPREME COURT’S DECISION

The Supreme Court held that AWF’s use of the photograph in commercial licensing of screen print illustrations to magazine publishers did not favor AWF’s fair use defense to copyright infringement.²¹ In siding with Goldsmith on the first fair use factor, the Court found that AWF’s use of her work shared substantially the same purpose and was commercial in nature.²² Her work is “ ‘entitled to

10. *Id.*

11. *Id.* at 318.

12. *Id.*

13. *Id.* at 318. Goldsmith’s photography agency, through its staff, submitted the Goldsmith Prince Photograph to Vanity Fair. Goldsmith herself did not know the photograph had been licensed for use as an artist’s reference at that time.

14. *Id.*

15. *Id.* at 317. Referring to Andy Warhol, also known as an “art-world colossus,” who substantially contributed to contemporary art across a range of media.

16. *Id.* at 318. “The article stated that it featured ‘a special portrait for Vanity Fair by ANDY WARHOL’. The article contained a copyright attribution credit for the portrait as follows: ‘source photograph © 1984 by Lynn Goldsmith/LGI.’”

17. *Id.*

18. *Id.* at 321.

19. *Warhol*, 382 F. Supp. 3d at 321.

20. *Id.* at 322.

21. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 549-51 (2023).

22. *Id.* at 515-16.

copyright protection, even against famous artists’.”²³ Specifically, the Supreme Court affirmed the Second Circuit’s bottom-line decision.²⁴

Interestingly, while the Supreme Court affirmed the Second Circuit’s decision,²⁵ it took a different analytical path to the same decision.²⁶ In the 7-2 majority opinion,²⁷ the Supreme Court stated: “In sum, the first fair use factor considers whether the use of a copyrighted work has a further purpose or different character, which is a matter of degree, and the degree of difference must be balanced against the commercial nature of the use.”²⁸ The Court highlights the relationship between the first and fourth fair use factors²⁹ and how those factors may tip the scale towards a potential copyright defense or infringement. Essentially, the Supreme Court’s decision can be interpreted to mean that anyone who seeks to reuse a work that makes a fair use of another work will need to make sure their use, as well as that of the initial work, is fair.³⁰ This decision,³¹ though widely seen as a victory for copyright holders, raises many questions for those who build upon copyrighted works, including photographers, artists, and even software engineers. In this article, we will explore the foundation of copyright laws and what this decision means for the business world.

III. COPYRIGHT ACT AND FAIR USE DEFENSE AGAINST COPYRIGHT INFRINGEMENT

United States copyright law provides that a copyright owner has exclusive rights over the copyrighted work.³² Additionally, the copyright owner has the exclusive right to authorize any reproduction or prepare derivative works based upon the copyrighted work.³³ However, there are limitations provided under this title where “the fair use of a copyrighted work, including such use by reproduction in copies,” is not

23. Genevieve Dorment et al., *Supreme Court Sides With Photographer in Interpreting Claim of Fair Use by Warhol Foundation*, WILLKIE FARR & GALLAGHER LLP (May 31, 2023), <https://www.willkie.com/-/media/files/publications/2023/supreme-court-sides-with-photographer-in-interpreting-claim-of-fair-use-by-warhol-foundation.pdf>.

24. *Warhol*, 598 U.S. at 550-51.

25. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th. 26, 44 (2d Cir. 2021), *aff’d*, 598 U.S. 508 (2023).

26. *Warhol*, 598 U.S. at 549-51.

27. *Id.*

28. *Id.* at 532.

29. *Id.* at 527, 550-51. The fourth fair use factor is “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C.A. § 107 (West).

30. Corynne McSherry et al., *What the Supreme Court’s Decision in Warhol Means for Fair Use*, ELEC. FRONTIER FOUND. (May. 23, 2023), <https://www.eff.org/deeplinks/2023/05/what-supreme-courts-decision-warhol-means-fair-use>.

31. *Warhol*, 598 U.S. at 551.

32. 17 U.S.C.A. § 106 (West 2002).

33. *Id.*

an infringement of copyright.³⁴ The fair use provision provides an exception for unauthorized use of an original work.³⁵

The fair use provision permits the unauthorized use of original work as an affirmative defense to promote innovation and creativity where creators may use inspiration to recreate an original work without violating copyright law.³⁶ Fair use is “an affirmative defense to a claim of copyright infringement, meaning that the alleged infringer has the burden of proving their use was a fair use.”³⁷

This rule recognizes that society can often benefit from the unauthorized use of copyrighted materials when the purpose of the use serves the ends of scholarship, education or an informed public.³⁸ Under this provision,³⁹ the law tries to balance the weight of stifling creativity versus allowing new innovations to emerge. When a work is found to be a fair use, such work will no longer be considered a copyright infringement.⁴⁰ Although fair use is a fact-intensive inquiry that is often not amenable to bright-line analyses, the *Andy Warhol* Supreme Court decision provides actionable guidance for content creators, allowing them to “further the public’s interest in ‘the creation and publication of free expression’ with ease.”⁴¹

IV. UNDERSTANDING FAIR USE FACTOR ANALYSIS

In determining whether the use of a work in any particular case is a fair use,⁴² courts will consider⁴³ “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;⁴⁴ (2) the nature of the copyrighted work;⁴⁵ (3) the amount and substantiality of the portion used in relation

34. 17 U.S.C.A. § 107 (West).

35. *Id.*

36. *Id.* Section 107 of the statute proves that “[n]otwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”

37. HARVARD UNIV. OFF. OF THE GEN. COUNS., COPYRIGHT AND FAIR USE: A GUIDE FOR THE HARVARD COMMUNITY 8 (President and Fellows of Harvard Univ. ed., 2023).

38. Rich Stim, *Copyright Overview Measuring Fair Use: the Four Factors*, STANFORD LIBRS. (Apr. 11, 2017), <https://fairuse.stanford.edu/overview/fair-use/four-factors/>.

39. 17 U.S.C.A. § 107 (West).

40. *Id.*

41. Matthew J. Cave et al., *Transforming Art: United States Supreme Court Set to Clarify What’s “Fair” for Fair Use*, KIBLER FOWLER & CAVE (Jan. 23, 2023), <https://kfc.law/united-states-supreme-court-fair-use/>; Warhol, 598 U.S. at 551.

42. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

43. Stim, *supra* note 38.

44. 17 U.S.C.A. § 107 (West).

45. 17 U.S.C.A. § 107 (West).

to the copyrighted work as a whole;⁴⁶ and (4) the effect of the use upon the potential market for or value of the copyrighted work.”⁴⁷

In interpreting this statute⁴⁸, many courts have held that many common fair uses are indisputably commercial.⁴⁹ Even when a work is commercial in nature, the court will still consider the meaning and purpose of the work.⁵⁰

V. THE ECONOMIC IMPACT OF FAIR USE

Copyright law was created to protect inventors and promote economic benefits through regulation. In this section, we will discuss three industries that will be impacted by this new law and how that could affect economic activities. This section will explore the economic impact⁵¹ of the *Andy Warhol* case on artists.

A. General Considerations

Unfortunately, because fair use is an affirmative defense,⁵² institutions with ample resources may have an advantage. Many critics argue that “fair use tends to be little more than a useful slogan that has little to do with fairness, and which frequently masks commercial interests that want to distribute or otherwise make creative works available without licensing.”⁵³

If creators are not compensated for their original work, the economy will suffer severe consequences. Accordingly, “the Court has undoubtedly sent the message that simply claiming transformative use is not a panacea for infringement.”⁵⁴ The economy works only if people are motivated to create innovations that will promote economic benefits directly and indirectly.⁵⁵ The Supreme Court reasoned that payments

46. 17 U.S.C.A. § 107 (West).

47. 17 U.S.C.A. § 107 (West).

48. *See Campbell*, 510 U.S. at 587-88. While there are four factors, most courts focus heavily on the first and fourth factor.

49. *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 32 (2021); *See also, Campbell*, 510 U.S. at 591.

50. *Google LLC*, 593 U.S. at 30.

51. COPYRIGHT IN THE DIGITAL ERA: BUILDING EVIDENCE FOR POLICY 15 (Stephen Merrill & William Raduchel, 2013) (hereinafter COPYRIGHT IN THE DIGITAL ERA).

52. 17 U.S.C.A. § 107 (West). Section 107 of the statute proves that “[n]otwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”

53. Neil Turkewitz, *Fair Use, Fairness and the public Interest*, MEDIUM (Feb. 20, 2017), https://medium.com/@nturkewitz_56674/fair-use-fairness-and-the-public-interest-27e0745bee86.

54. Paul Matenaer, *The Supreme Court Strikes a New Chord in Andy Warhol Foundation v. Goldsmith*, AXLEY ATT’YS (Aug. 11, 2023), https://www.axley.com/publication_article/andy-warhol-foundation-v-goldsmith/.

55. COPYRIGHT IN THE DIGITAL ERA, *supra* note 51, at 18, 21.

like these are incentives for artists to create original works in the first place.⁵⁶

B. Artists

Art is not just an expression of emotion but also a medium for communicating ideas.⁵⁷ Economic benefits are created when ideas are communicated through art because “[t]hrough art, we can chronicle history, embody societal values, and comment on political or social events.”⁵⁸ The sixth edition of the Arts and Cultural Production Satellite Account (ACPSA)⁵⁹ found that “arts and culture contributed \$877.8 billion, or 4.5 percent, to the nation’s gross domestic product (GDP) in 2017.”⁶⁰ In fact, in 2017 “there were over 5 million wage-and-salary workers employed in the arts and cultural sector, earning a total of \$405 billion.”⁶¹ Some of the art related industry includes the commission of artists, trades of art pieces, the music industry and much more. A key focus of this report is that these type of reports also focus on the economic benefits of art-related venues.⁶²

In 2023, the ACPSA released by the Bureau of Economic Analysis (BEA) provided that arts and cultural economic activity reported \$1.02 trillion in revenue in 2021.⁶³ The report provides that the data was adjusted for inflation, increasing 13.7 percent in 2021 after decreasing 4.8 percent in 2020.⁶⁴ “By comparison, the broader economy, as measured by real gross domestic product (GDP), increased 5.9 percent in 2021 after decreasing 2.8 percent in 2020.”⁶⁵ In fact, “[a]rts and cultural economic activity accounted for 4.4 percent of gross domestic product (GDP), or \$1.02 trillion, in 2021.”⁶⁶

Based on the data provided, there is no doubt of the incredible economic benefit artists provide in the U.S. and on a global scale. Once artists have secured a fan base based on their creative work, these artists sell a number of tickets drawing fans from all over the world to

56. *Warhol*, 598 U.S. at 549.

57. Eduardo Kobra, *The Importance of Art And Why It Matters*, EDEN GALLERY (Mar. 1, 2022), <https://www.eden-gallery.com/news/why-is-art-important>.

58. *Id.*

59. Kenneth Beatty & Clifford Woodruff, ARTS AND CULTURE PRODUCTION SATELLITE ACCOUNT, U.S. AND STATES 1 (Mar. 15, 2023), https://www.bea.gov/sites/default/files/2023-03/acpsa0323_0.pdf.

60. *During Economic Highs and Lows, the Arts Are Key Segment of U.S. Economy*, NAT’L ENDOWMENT FOR ARTS (Mar. 17, 2020) <https://www.arts.gov/news/press-releases/2020/during-economic-highs-and-lows-arts-are-key-segment-us-economy> (hereinafter *Economic Highs and Lows*).

61. *Id.*

62. *Id.*

63. Beatty & Woodruff, *supra* note 59, at 1.

64. *Id.*

65. *Id.*

66. *Id.*

experience their art and creativity live. National findings provide the incredible economic impact of ticket sales.⁶⁷ For example, in 2017, consumers spent \$26.5 billion on admissions to performing arts events.⁶⁸

An astonishing \$17 billion was spent on theater, musical theater, & opera performances and \$3.7 billion on music groups and artists.⁶⁹ To illustrate the economic impact of artists, we will examine Beyoncé, an award-winning artist. Recently, the Renaissance Tour by Beyoncé brought in \$179 million in a single month.⁷⁰ “The glittery tour’s economic impact has since been dubbed the ‘Beyoncé Bump,’ according to Yelp’s Economic Coverage.”⁷¹ According to Yelp, “Beyoncé is a force, and it’s fascinating to see the level of excitement and tangible interest generated for the local shops and businesses as her tour kicks off.”⁷² The economic effect of Beyoncé’s Renaissance Tour demonstrates the significant economic benefits artists have when they are able to freely create.

VI. A BALANCING OF THE POTENTIAL PROS AGAINST THE LIKELY CONS

A. *What Are The Pros of this Decision?*

This decision brings a breath of fresh air to talented individuals who are motivated to advance the arts, sciences and technology. The majority opinion explains that “the first factor does not simply weigh in favor of any use that adds new meaning because that would violate the copyright owner’s right to produce derivative works.”⁷³ Just like Justice Sotomayor stated regarding Goldsmith’s original works, “like those of other photographers, are entitled to copyright protection, even against famous artists.”⁷⁴ A ruling in favor of Warhol would potentially allow “a

67. *Id.* at 1-2, 6.

68. *The U.S. Arts Economy (1998-2017): A National Summary Report* NAT’L ENDOWMENT FOR ARTS 8 (Mar. 2020), <https://www.arts.gov/sites/default/files/The-US-Arts-Economy-%281998%E2%80%902017%29-A-National-Summary-Report.pdf>.

69. *Economic Highs and Lows*, *supra* note 60.

70. Sughnen Yongo, *What Beyoncé’s Renaissance World Tour Says About The Economic Impact Of Black Women*, FORBES (Oct. 2, 2023, 3:23 PM), <https://www.forbes.com/sites/sughnenyongo/2023/10/02/what-beyoncs-renaissance-world-tour-said-about-the-economic-impact-of-black-women/>.

71. *Id.*

72. Yelp Data, *The Beyonce Bump*, YELP (Jul. 19, 2023), <https://trends.yelp.com/beyonce-impact-report>.

73. Matenaer, *supra* note 54.

74. *Warhol*, 598 U.S. at 513.; See Melissa Quinn, *Supreme Court rules against Andy Warhol’s estate in copyright dispute over Prince image*, CBS NEWS (May. 19, 2023, 9:48 AM), <https://www.cbsnews.com/news/andy-warhol-supreme-court-prince-photograph/>.

range of commercial copying of photographs to be used for purposes that are substantially the same as those of the originals.”⁷⁵

The goal the Supreme Court highlighted was that the preservation of the right to transform an original work is dependent on the degree of transformation. “To preserve that right [the right to transform a work of art], the degree of transformation required to make ‘transformative’ use of an original must go beyond that required to qualify as a derivative.”⁷⁶ Essentially, the Warhol case provides that “[v]isual works of art that are not ‘distinct enough’ (transformative) will weigh against the artist who attempts to transform an ‘original work.’”⁷⁷

B. What Are The Cons of This Decision?

It is important to recognize “that progress in creativity depends critically on the freedom to build upon the ideas and expressions of others.”⁷⁸ However, “exclusive rights can[,] at times[,] impinge upon freedom of expression.”⁷⁹ Moreover, “the evolution of copyright law has required tailoring and balancing to ensure access, facilitate subsequent creativity and innovation, and promote knowledge, democracy, and social discourse.”⁸⁰ According to Justice Kagan’s dissent,⁸¹ Warhol’s work represents “exactly the kind of transformative art that favors a fair use finding, as articulated in *Google*.”⁸² In *Google*, the court referred to an artistic painting that “replicates a copyrighted ‘advertising logo to make a comment about consumerism,’” as Warhol did with his famed Campbell’s Soup painting, as an example of a transformative fair use.⁸³ Essentially, Justice Kagan suggested that “[the *Google*] Court would have told this one to go back to school.”⁸⁴ In the digital era, policy considerations require the court to not stifle creativity needed to encourage individuals and businesses to boost the economy.⁸⁵

Beyond artwork as illustrated in the *Warhol* case, the negatives of this decision may stifle creativity and place limitations on the freedom of expression by drawing inspiration from work that already existed.

75. *Warhol*, 598 U.S. at 512.

76. *Warhol*, 598 U.S. at 529.

77. Labate et al., *supra* note 5.

78. COPYRIGHT IN THE DIGITAL ERA, *supra* note 51, at 15.

79. *Id.*

80. *Id.*

81. *Warhol*, 598 U.S. at 561.

82. Eileen McDermott, *Dissent Says SCOTUS Ruling Against Warhol Foundation on Fair Use Will ‘Stifle Creativity’*, IP WATCHDOG (May 18, 2023), <https://ipwatchdog.com/2023/05/18/dissent-scotus-ruling-warhol-foundation-fair-use-stifle-creativity/id=161004/>; See *Google LLC*, 593 U.S. at 3.

83. *Google LLC*, 593 U.S. at 29.

84. *Warhol*, 598 U.S. at 559.

85. *Id.* at 527.

Additionally, the style and medium in which an artist may be able to express themselves may be affected because the Court seemed to care less about Warhol's style in recreating the Orange Prince, and rather focused on the purpose of the secondary work and what that work looked like when placed side-by-side with Goldsmith's work.⁸⁶

VII. CONCLUSION

The *Warhol* case clarifies the natural correlation between the first and fourth fair use factors. Understanding the history of the Warhol case demonstrates the necessity of protecting original work used in a commercial nature. Transformative works typically will lead to a finding of fair use especially when the derivative work does not usurp the market for or value of the original work. There is no single fair use factor that is determinative to use the fair use affirmative defense as the court will balance the four fair use factors. Despite the potential disadvantages of the *Warhol* decision, the economic impact of ensuring derivative works are transformative visually clarifies how artists may use other original work for inspiration to create commercial work.

86. *Warhol*, 598 U.S. at 522-23.