

12-20-2023

Written Statement: Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith

Yolanda M. King

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Recommended Citation

Yolanda M. King, *Written Statement: Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 23 Chi.-Kent J. Intell. Prop. 124 (2023).

Available at: <https://scholarship.kentlaw.iit.edu/ckjip/vol23/iss1/12>

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*A version of the following remarks was delivered during a panel discussion on
Andy Warhol Foundation v. Goldsmith at the Chicago-Kent Supreme Court
Intellectual Property Review*

WRITTEN STATEMENT: *ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC. v. GOLDSMITH*

YOLANDA M. KING*

I joined the Amicus Brief for the Institute of Intellectual Property & Social Justice (IIPSJ) and Intellectual Property Professors in Support of Respondents.¹ The brief’s main argument was that the fair use exception not be construed so broadly as to swallow the exclusive right of copyright owners to prepare derivative works. It proposed a test that would refine the transformativeness inquiry in the aesthetic-to-aesthetic context, asking whether a secondary work subordinates, subverts, or extinguishes the message of the original work (before being deemed transformative).

The Supreme Court’s *AWF v. Goldsmith* decision appropriately limits the scope of transformative purpose under the first factor of the fair use doctrine, “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”² As discussed

* Director of the Center for Intellectual Property, Information & Privacy Law and Associate Professor of Law, University of Illinois Chicago School of Law.

1. Brief of Amici Curiae Institute for Intellectual Property and Social Justice and Intellectual-Property Professors in Support of Respondents, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (No. 21-869) (hereinafter IIPSJ Brief).

2. 17 U.S.C. § 107.

in the conference materials, the Court first articulated transformative purpose in *Campbell v. Acuff-Rose Music, Inc.*³ AWF sought to conflate transformativeness with the exclusive right of the copyright holder to prepare derivative works under Section 106 of the Copyright Act. If AWF would have prevailed, there would have been yet another use of the fair use doctrine to further the “exclusionary impact that copyright fair use has had on the ability of marginalized and/or economically disadvantaged creators to create and reap the economic benefits of their creations.”⁴

When the Supreme Court introduced transformative use in *Campbell*, its application swung the pendulum in favor of secondary users, and the predominance of transformativeness and its interpretation has done so since then, to the detriment of creators, even in non-parody cases. The Court mitigates the aforementioned harm to creators by focusing the first factor fair use inquiry on the commercial licensing of the secondary work and the substantially similar purposes of the original and secondary works, thereby disallowing the formerly broad interpretation of transformativeness to nullify the copyright owner’s right to authorize derivative works and eclipse the fourth factor of fair use, “the effect of the use upon the potential market for or value of the copyrighted work.”⁵ The *AWF v. Goldsmith* decision is impactful because the Court addresses the overapplication of transformative purpose and therefore preserves a copyright owner’s full bundle of exclusive rights, giving meaning to statutory language in both Sections 106 and 107. The decision has far-reaching consequences for all creators and makes it more difficult to justify copying another’s work to create a new work. Yet, it could also deter secondary creators from using the fair use doctrine to intimidate original creators into silence or agreement.

Unlike parody in *Campbell* or searchable thumbnails of images in *Perfect 10, Inc. v. Amazon.com, Inc.*,⁶ *AWF* involved two works that serve the same purpose. When two works serve the same aesthetic function, the secondary work is more likely to supersede or supplant the original and thus intrude on the derivative work right.⁷ The Court astutely observes that the first fair use factor’s examination of whether a secondary work conveys a different meaning or message is a matter of degree, which must be weighed against other considerations like the commercial nature of the use. In this case, commercialism carried significant weight because of AWF’s commercial licensing of Warhol’s work (referred to as “Orange Prince” in the conference materials) to Conde Nast. Even if Warhol’s use of Goldsmith’s photograph of Prince “add[ed] something new,” the use’s “further purpose or

3. 510 U.S. 569 (1994) (“adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message”).

4. IIPSJ Brief, *supra* note 1, at 2.

5. 17 U.S.C. § 107.

6. 508 F.3d 1146, 1154 (9th Cir. 2007).

7. IIPSJ Brief, *supra* note 1.

different character” did not dispose of the first fair use factor inquiry.⁸ If the inquiry ended there, the secondary use in this context would have subsumed Goldsmith’s exclusive right to prepare derivative works.

The Court’s approach to transformativeness is reflective of the overall balancing of interests that is required to determine whether a use is fair. This approach allows creativity to flourish but protects the derivative works right of the copyright owner, which advances the goals of copyright law. The economic goals of copyright law cannot be divorced from considerations of social justice, access, inclusion, and empowerment. If the goal of copyright is to promote progress—the stimulation of innovation, creation, dissemination, and use of artistic works—then the legal system must consider the unjust effects and exclusionary impacts that result from the copyright regime, even if they are unintended.⁹

Secondary creators from dominant groups claim they intend to transform a preexisting work, and because these claims are typically judged by members of the majority, they are accepted. The subjective nature of the fair use inquiry, which entails evaluation of expressive works and their transformativeness, means the commercial prospects of marginalized artists are often subject to the cultural biases of the gatekeepers, including the judiciary. No matter how neutral the fair use doctrine is on its face, in practice, its application has resulted in an “overdog effect,” which is supported by an empirical study of nearly 300 fair use decisions.¹⁰ Underprivileged litigants tend to lose fair use cases, and the risk of ideological influence is even greater in cases like this, where the secondary user has gained popular acclaim.

A narrower application of transformative use can blunt its weaponization against socially and/or economically disadvantaged creators. The Supreme Court did not adopt the test set forth in the Brief, but it did clarify its articulation of transformative use. The Court’s decision is sound in concluding that AWF’s use of Goldsmith’s photograph was not transformative. It is a step in the right direction for the fair use doctrine specifically and copyright law overall.

8. *Campbell*, 510 U.S. at 579.

9. IIPSJ Brief, *supra* note 1.

10. *Id.*