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Supreme Court Holds New Meaning Alone Is Not Sufficient For The Fair Use Defense

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Decided May 18, 2023 ***Andy Warhol Foundation for the Visual Arts v. Goldsmith*, No. 21-869 Today, the Supreme Court held 7-2 that the fact that a secondary work of art that incorporates copyrighted source material conveys a distinct meaning or message is not sufficient to render the secondary work transformative for purposes of the fair use analysis. Background:** Photographer Lynn Goldsmith licensed a black and white photograph of Prince to Vanity Fair for use as an artist's reference in its November 1984 issue. The artist Vanity Fair chose, Andy Warhol, cropped the photograph, silkscreened it onto multiple canvases, and layered each canvas with different brightly colored paints. In all, Warhol created four drawings and 12 silkscreens from the photograph, one of which Vanity Fair ultimately published. After Prince's death in 2016, the Andy Warhol Foundation licensed one of Warhol's other silkscreened Prince images to Condé Nast for a special tribute issue. When Goldsmith asserted that Warhol's image infringed her copyright, the Foundation sued her for a declaration that Warhol's Prince series was protected under the fair use doctrine. Goldsmith countersued for copyright infringement. The district court held that the images were protected fair use because Warhol transformed Goldsmith's original photograph to convey a different meaning. The Second Circuit reversed, cautioning that the addition of new meaning was not necessarily transformative. **Issue:** Is a work of art sufficiently transformative for purposes of the fair use doctrine when it conveys a different meaning or message from the source material? **Court's Holding:** No. That a work of art adds a new meaning or message to the source material is not sufficient to render that work transformative—courts must also consider the purpose and commercial nature of both the source material and the secondary work.

> *"Many secondary works add something new. That alone does not render such uses fair."*

Justice Sotomayor, writing for the Court **What It Means:**

- The decision is the first time the Supreme Court has addressed fair use in the context of visual art. The Court addressed only the first fair use factor, namely, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). For this factor, the Court confirmed that uses that have a further purpose or different character can be "transformative," but clarified that the degree of difference must be balanced against the commercial nature of the use.
- The Court explained that if the secondary use shares the same or similar purpose as the source material and is of a commercial nature, the factor is likely to weigh against fair use "absent some other justification for copying." Slip op. 20. For example, the purpose of Warhol's Soup Can series was "to comment on consumerism rather than advertise soup," and thus served "a completely different purpose" than the original Campbell's Soup label. *Id.* at 27. Here, in contrast, "portraits of Prince used to depict Prince in magazine stories about Prince . . . share substantially the same purpose" and "the copying use is of a commercial nature." *Id.* at 12–13.

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- The Court limited its holding in *Campbell v. Acuff-Rose Music, Inc.*, 510 U. S. 569 (1994), which upheld fair use in the context of musical parody. The Court explained that *Campbell* "cannot be read to mean that § 107(1) weighs in favor of any use that adds some new expression, meaning or message." Slip op. 28. By limiting the availability of the fair use defense for secondary works that merely claim some further purpose or different character, the Court thus placed a premium on incentivizing and protecting original creation.
- The Court's decision could create new avenues to allege infringement by secondary works that build on or reference other works, although the Court emphasized that its analysis was "limit[ed]" to Warhol's "commercial licensing of Orange Prince to Condé Nast." Slip op. 21.

The Court's opinion is available here. Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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