



**ALERT**

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## **Warhol Case Likely to 'Diminish but Not Eliminate' Creative Use of Previous Artworks**

**By: MHH Intellectual Property Practice Group**

Recently, the U.S. Supreme Court ruled 7-2 against the Andy Warhol Foundation in a copyright dispute over a portrait of Prince that Warhol created using a photograph by another artist, Lynn Goldsmith.

"The court's opinion will likely diminish – but not eliminate – the amount of borrowing or building on previous creative works by artists that takes place commercially. This also has implications for works generated by artificial intelligence (AI)," said Michael J. Schwab, an attorney in Moritt Hock & Hamroff's intellectual property practice.

"Anyone using a prior work as the basis for a new work should consult expert legal counsel to evaluate the chances that the use of prior work can be defended as a fair use," he advised.

The Supreme Court ruling hinged on the "purpose and character" of the works in question. The Court found that both the original photograph by Goldsmith and Andy Warhol's subsequent work served the same purpose (a graphic in a magazine) and had a similar commercial purpose. The ruling clarified the first of the four factors of the fair-use analysis, but does not mean that all works based on a prior work, nor all uses of them, are prohibited or not a fair use, Schwab explained.

In delivering the Court's majority opinion, Justice Sonia Sotomayor contrasted the art in dispute in this case with Warhol's famous Campbell's Soup Cans series. In the latter, the opinion noted, "The purpose of Campbell's logo is to advertise soup. Warhol's canvases do not share that purpose ...."

The following is a [link to the Supreme Court decision](#) in Andy Warhol Foundation for the Visual Arts, Inc. vs. Goldsmith. An excerpt from the opinion summarizing the case is below.

"In 1984, Vanity Fair sought to license one of Goldsmith's Prince photographs for use as an 'artist reference.' The magazine wanted the photograph to help illustrate a story about the musician. Goldsmith agreed, on the condition that the use of her photo be for 'one time' only. The artist Vanity Fair hired was Andy Warhol. Warhol made a silkscreen using Goldsmith's photo, and Vanity Fair published the resulting image alongside an article about Prince. The magazine credited Goldsmith for the 'source photograph,' and it paid her \$400."

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"Warhol, however, did not stop there. From Goldsmith's photograph, he derived 15 additional works. Later, the Andy Warhol Foundation for the Visual Arts, Inc. (AWF) licensed one of those works to Condé Nast, again for the purpose of illustrating a magazine story about Prince. AWF came away with \$10,000. Goldsmith received nothing."

"When Goldsmith informed AWF that she believed its use of her photograph infringed her copyright, AWF sued her. The District Court granted summary judgment for AWF on its assertion of 'fair use,' but the Court of Appeals for the Second Circuit reversed. In this Court, the sole question presented is whether the first fair use factor, 'the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,' weighs in favor of AWF's recent commercial licensing to Condé Nast. On that narrow issue, and limited to the challenged use, the Court agrees with the Second Circuit: The first factor favors Goldsmith, not AWF."

If you have any questions regarding the matter raised in this Alert, please feel free to contact Terese Arenth at [tarenth@moritthock.com](mailto:tarenth@moritthock.com) or Michael Schwab at [mschwab@moritthock.com](mailto:mschwab@moritthock.com)

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