How Did Prince and Andy Warhol Wind Up before the Supreme Court?

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The case before the court on October 12, Andy Warhol Foundation for the Visual Arts, Inc., v. Goldsmith, hinges on an Andy Warhol print based on a portrait of the artist Prince by photographer Lynn Goldsmith.

Image credit: Lynn Goldsmith; Andy Warhol Foundation for the Visual Arts; United States Supreme Court Documents
The US Supreme Court will take another crack at defining the fair use doctrine of copyright law—a standard that has so far remained fairly oblique in the law. And to do so, the justices will have to consider the history of a law that stretches back to the earliest renderings of life in the United States.

The case before the court on October 12, Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, hinges on a portrait of the artist Prince by photographer Lynn Goldsmith.

Goldsmith photographed the musician in her studio in 1981, just as his career was taking off. It was a quick session, she said in her testimony for the suit and Prince was uncomfortable and eager to split. She got the portrait—a black-and-white photo that became part of her oeuvre, but was never circulated.
A few years later, *Vanity Fair* paid Goldsmith to license her piece as an artistic reference photo. The magazine hired famed pop artist Andy Warhol to create a rendering of Prince based on Goldsmith’s photo, which ultimately ran with a [story about Prince](https://www.bu.edu/) in a 1984 issue of *Vanity Fair*.

All this is fine. The problem came years later: in 2016, after the musician’s death, Condé Nast (*Vanity Fair*’s parent company), reached out to the Andy Warhol Foundation to use the same 1984 print for a special commemorative issue of the magazine. They discovered that Warhol hadn’t made just one print from Goldsmith’s photo; he’d made more than a dozen. Condé Nast paid the foundation to use another one of Warhol’s Prince prints (this time in orange) for the cover, but neither the magazine nor the Warhol Foundation paid Goldsmith again.

The question for the justices is whether that second use of a print infringes on her copyright in the photograph on which it was based.

“It’s an interesting case,” says Jessica Silbey, a Boston University School of Law professor, who studies intellectual property law. “One question that will come up is whether *Vanity Fair* had to pay Goldsmith an artist fee at all. Under the ‘fair use’ doctrine, you don’t need permission, that’s the whole point.” Silbey, also the Yanakakis Faculty Research Scholar at BU, dives deep into the nuances of this case with *BU Today*.  

Q&A
BU Today: Let’s start with copyright law and “fair use.” Can you set the table for what these terms mean?

Silbey: The purpose of copyright was originally to promote science. It’s about making more works; it’s not meant to stifle creativity. And “fair use” is the breathing space of copyright laws.

There’s a famous Supreme Court case called Campbell v. Acuff-Rose Music, Inc., in which a rap parody of Roy Orbison’s “Oh, Pretty Woman” was held to be fair use, not because the new song by 2 Live Crew didn’t take from the original, but because it created a new genre, a new message. It was more than a version; it was a new song.

Part of what’s important about fair use is that it’s supposed to promote conversations about the work. It’s supposed to make you ask: what’s that art doing in relation to that other art? It’s not supposed to interfere with the market for the original art. We can see an example of [the latter] in book translations—in those instances, the translation is part of the original copyright because it’s a new version of the same story in a new language. It’s the same book, just in a different language. Translations are not fair uses, they are derivative.
works, and they need to be licensed.

So, does copyright law have to do with free speech? What’s the relationship between the two?

Copyright came first: Article 1, Section 8, Clause 8 of the Constitution grants Congress the power to regulate copyrights, which are restrictions on a particular kind of speech (published works of authorship), considered at the time to be speech sold in the marketplace.

The first copyright statute came in 1790, before the First Amendment was added to the Constitution. It granted limited rights for 14 years in maps, charts, and books. What that was supposed to do was promote the progress of science in understanding geography, navigational tools, and books, which at the time were books of chemistry, plant science, things of that nature. It was giving authors a very limited, 14-year right in the investment in their work. Importantly, the scope of right of infringement was piracy: an exact copy in the market.

So, copyright at the time of the founding was a very limited right to prevent the copying of the exact work so you could recoup your investment in the effort it took to write these maps and charts.
Then, the First Amendment comes along in 1791 to protect citizens’ right of speech against the government. The First Amendment is about self-determination in politics.

Copyright law and the First Amendment weren’t considered antithetical; they were considered to be harmonious with one another. That is: the marketplace of ideas was supposed to be fomented by both the progress of science and political speech.

The problem is that copyright has expanded so much over time. It covers so many more things: photographs, choreography, architecture, applied art on consumer goods, even shampoo labels, everything—and it now lasts for 70 years after the author dies, in most instances. The duration of a copyright now is so antithetical to the idea of free speech.

And, it’s not only about copying whole works anymore. If we were just worried about wholesale copying of books or photographs, the only issue would be whether Lynn Goldsmith’s photo was copied and put online, and that’s not what happened here. The kind of lawsuits we see now concern bits and parts of the original work. That is not what copyright was meant to be, and it does
interfere with the idea of talking back, and engaging in conversation about art.

How does the fair use doctrine play into this history?

Unlike copyright laws, which are statutes, fair use is a *standard* and is considered by many to be pretty oblique.

Fair-use language was added to the Copyright Act in 1976, but it came from the common law of federal courts in the mid-19th century. The famous case is *Folsom v. Marsh*, in which a three-volume biography of George Washington was abridged to be much shorter—think an old-fashioned form of Cliff Notes. The question for the court was whether the abridgment was a fair use or an infringement of the original copyright.

The federal court’s answer was that it replaced the original book in the marketplace; it wasn’t a complement to the original, it wasn’t a conversation with the original. People were reading the abridgment instead of the three-volume series. Superseding the market with the unauthorized copy is a copyright harm and is part of the question in this case.
In the Goldsmith case, what sorts of questions do you expect the justices to consider?

One question that will come up is whether *Vanity Fair* had to pay Goldsmith an artist fee at all.

I expect that the justices will focus some attention on the relevance of that initial licensing fee. The fact that Goldsmith was paid once for the use of her photo to make one piece of art: is that relevant for the fair use analysis?

And here’s where you can see *Folsom v. Marsh* coming up again: the existence of licensing revenue suggests that there’s a market that’s being interfered with if Warhol’s use is not authorized.

No one is replacing the photo in the marketplace, but there’s a licensing market for artistic references that Warhol isn’t participating in for a second time.

Think about it this way: you’re a children’s book author and you anticipate that stuffed animals are going to be made from your characters, so you’re going to license the making of these copyrighted sculptures.

Some people would say that those stuffed animals should be fair uses. But it is true in the industry that children’s book authors anticipate making
their money back not only by selling their books, but by selling stuffed animals, cartoons, keychains, and more that are based on the book. There’s an anticipation that the scope of the copyright extends to those ancillary markets, which are made of what we call “derivative works.”

That’s the argument that Lynn Goldsmith is going to make: artist references are an anticipated revenue stream for her work and that the Warhol print is therefore derivative and not a fair use. His use is erasing her artistic reference market, and it’s a market that she should be able to count on.

This case isn’t exactly like the early fair use cases. It’s an evolution in the way that copyrighted works are sold.

But, I’m telling you: all of that questioning about the original fee may be a red herring in copyright law, because under the fair use doctrine (if this is a fair use and not a derivative work), you don’t need permission, that’s the whole point.

What other questions are likely to come up during oral argument?

Irrespective of the license, the question is whether Warhol’s work—which is about consumerism, pop
culture, questioning the original—whether that work is so transformative that it is fair use per se.

He took this very dramatic and traditional black-and-white photo of Prince and he turned it into something that is electric, something that is Prince, but is not Prince. It’s about celebrity and the role of identity in music, and it’s in the backdrop of the Jackie Kennedy prints and the Marilyn Monroe prints—you can’t see the Prince prints without seeing Warhol’s whole oeuvre, and so part of it is: that’s a new story, that’s a new message, that’s transformative, and if that’s true, then Warhol doesn’t need permission from Goldsmith.

I think the justices are going to be uncomfortable saying what a Warhol artwork means, though. They’re not supposed to be the judges of art, but it’s impossible to talk about fair use without talking about meaning.

Do you remember the famous Obama “Hope” poster? That poster is based on a photograph of Barack Obama by Associated Press photographer Mannie Garcia. But Shepard Fairey [the graphic artist who made the poster] didn’t ask Garcia if he could use that photograph as the basis for his work; he just did it. There was a lot of debate about that poster: was it a graphic version of the original photo, or was it new art?
There’s the same question here: is Andy Warhol’s version of this photo a graphic treatment of the original, or is it new art?

SENIOR WRITER

Molly Callahan began her career at a small, family-owned newspaper where the newsroom housed computers that used floppy disks. Since then, her work has been picked up by the Associated Press and recognized by the Connecticut chapter of the Society of Professional Journalists. In 2016, she moved into a communications role at Northeastern University as part of its News@Northeastern reporting team. When she's not writing, Molly can be found rock climbing, biking around the city, or hanging out with her cat, Junie B. Jones. Profile