

The future of fair use: Will Supreme Court apply the same 'transformative' analysis to a photograph as it did to software?

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AUGUST 29, 2022

In April 2021, the Supreme Court decided *Google LLC v. Oracle Am., Inc.* finding that Google's direct copying of 11,500 lines of software code for the Java interface (now owned by Oracle) was exempt from copyright infringement because it fell under the "fair use" exemption. (141 S. Ct. 1183 (2021)). The Java interface at issue was a popular platform for programmers to write programs in Java, one of the most commonly used software languages. Google had directly copied 11,500 lines of code and inserted it into code that Google had written itself.

The fair use exemption balances copyright owners' interests with public interests by exempting certain uses (such as for parodies) from infringement. The fair use exemption is codified in the Copyright Act, which states that "the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching ... , scholarship, or research, is not an infringement of copyright." (17 U.S.C. §107).

Ever since the Google opinion issued, there has been speculation about whether the perceived expansion of the fair use exemption would apply in non-software cases. We may soon have the answer.

The Act provides four factors to be considered in determining whether the fair use exemption applies: (1) the "purpose and character of the use;" (2) the "nature of the copyrighted work;" (3) the "amount and substantiality of the portion used in relation to the copyrighted work as a whole;" and (4) the "effect of the use upon the potential market for or value of the copyrighted work." (*Id.*).

The Supreme Court has held that works that are "transformative" under the first factor "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright."

(*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)). "[T]he more transformative the new work, the less will be the significance of other factors ... that may weigh against a finding of fair use." (*Id.*).

Traditionally, a work is "transformative" if it "adds something new" by "altering the [source material] with new expression, meaning, or message." (*Id.*). In practice, transformativeness is often dispositive of the fair use inquiry. For example, the Supreme Court has held with respect to the "amount and substantiality of the portion used" factor that this factor "will generally weigh in favor of fair use where ... the amount of copying was tethered to a valid, and transformative, purpose." (*Google*, 141 S. Ct. at 1205 (citing *Campbell*, 510 U.S. at 586–587)).

The 2021 *Google* Court likewise discussed transformativeness. Despite Google admittedly copying 11,500 lines of code and doing so for generally "the same reason" as the original work (i.e., to enable programmers to call up programs), the Court found that Google's use of the copied code "seeks to create new products" and "expand the use and usefulness of" a different technology: smartphones. (*Id.* at 1203).

The Court noted that Google's "new product offers programmers a highly creative and innovative tool for a smartphone environment," which was different from Java's original computer environment. (*Id.*). The Court said Google's "use was consistent with that creative 'progress' that is the basic constitutional objective of copyright itself." (*Id.*).

Many feared *Google* expanded the scope of transformativeness and, consequently, expanded the fair use exception. Ever since the *Google* opinion issued, there has been speculation about whether the perceived expansion of the fair use exemption would apply in non-software cases. We may soon have the answer.

Currently before the Court is *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, (No. 21-869), a case involving whether renowned artist Andy Warhol's artwork based on Lynn Goldsmith's 1981 photograph of the musician Prince falls under the fair use exception. Warhol applied his unique style to Goldsmith's photograph: resizing; cropping to remove Prince's torso; altering

the angle of Prince's face; adding bright colors; changing tones, lighting, and detail; and adding hand-drawn lines, outlines, and shading.

Warhol is the first non-software fair use case to come before the Supreme Court post-*Google*. The key issue before the Court is whether Warhol's work is sufficiently transformative to qualify as a fair use. It is an appeal from the 2nd U.S. Circuit Court of Appeals, which found that Warhol's work was not a "transformative" fair use because it "retain[ed] the essential elements of the Goldsmith Photograph" and was not "fundamentally different and new." (992 F.3d 99, 114–15 (2d Cir. 2021)).

Although the 2nd Circuit found that Warhol's "alterations may change the Goldsmith Photograph in ways that give a different impression of its subject [Prince], the Goldsmith Photograph remains the recognizable foundation upon which [Warhol's] Prince Series is built." (*Id.* at 115). The 2nd Circuit reasoned that "the overarching purpose and function of the two works at issue here is identical, not merely in the broad sense that they are created as works of visual art, but also in the narrow but essential sense that they are portraits of the same person." (*Id.* at 114).

If the Supreme Court applies the rationale voiced in *Google*, many believe they will find that Warhol's work is transformative and thus the fair use exemption applies. Interestingly, the *Google* opinion alluded to Warhol, explaining — in an unmistakable allusion to one of Warhol's classic pieces centered on a Campbell's soup can — that "[a]n 'artistic painting' might, for example, fall within the scope of fair use even though it precisely replicates a copyrighted advertising logo to make a comment about consumerism." (*Google*, 141 S. Ct. at 1203).

But hope is not lost for those wanting the Court to tighten the transformative analysis. The *Google* Court left a hook for non-software cases to apply a different analysis, stating that the doctrine of fair use "is flexible, [and] courts must apply it in light of the sometimes conflicting aims of copyright law, and that its application may well vary depending upon context." (*Id.* at 1197).

Of particular relevance here, the *Google* Court said that "copyright's protection may be stronger where the copyrighted material ... serves

an artistic rather than a utilitarian function." (*Id.*). The Court could use this as a basis to apply a stricter transformative analysis in the current case.

Another difference between *Google* and *Warhol*: the members of the Court. Despite only 19 months passing between the Court's decision in *Google* and argument in *Warhol*, there are two new justices on the Court who were not involved in the *Google* decision. Neither Associate Justice Amy Coney Barrett nor Associate Justice Ketanji Brown Jackson participated in *Google*, but both could play a role in determining the application of the transformative analysis and the fair use exception in the pending *Warhol* case.

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One thing is for sure: The case has the potential to make big waves and has the attention of many interested parties. More than three dozen amicus briefs have been filed, including from filmmakers, professors, politicians, artists, and authors. There are briefs in favor of each side, as well as briefs supporting neither party that focus instead on various aspects of the fair use doctrine.

The Solicitor General submitted a brief — in collaboration with the Copyright Office — arguing that the fair use exemption does not apply and requesting to participate in oral argument as amicus curiae. The Court has not yet ruled on the Solicitor General's request.

Argument before the Supreme Court is set for Oct. 12, 2022.

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This article was first published on Reuters Legal News and Westlaw Today on August 29, 2022.