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IS THE SUPREME COURT ABOUT TO EXPAND THE COPYRIGHT FAIR USE DEFENSE?

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(A Comparison: Reproduced from the complaint)

On October 12, 2022, the Supreme Court heard oral arguments in *The Andy Warhol Foundation for the Visual Arts (“AWF”) v. Goldsmith*, Dkt No. 21-869. One of the questions before the Court was whether the Prince Series (a series of colored art based on the Goldsmith

photo created by Andy Warhol) is transformative enough to be considered a “fair use,” and therefore non-infringing. 17 U.S.C. § 107.

On July 1, 2019, the Southern District of New York, granted AWF’s summary judgment motion, finding that the Prince Series was transformative and therefore a “fair use” of the Goldsmith photo and not copyright infringement. The District Court held that the Prince Series was transformative because the Series: 1) softened the lines of Prince’s face; 2) was flat and two dimensional; and 3) used “loud, unnatural colors.” The District Court went further finding that these new aesthetics changed the character and meaning of the Goldsmith photo, transforming “Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure.”

On August 24, 2021, the Second Circuit Court of Appeals disagreed and reversed the District Court’s decision, finding that the Prince Series was not transformative but derivative and therefore infringing. The Second Circuit reasoned that the Prince Series and the Goldsmith photo were “substantially similar,” because the Prince Series failed to add “something new, with further purpose or different character, altering the first with new expression, meaning or, or message.”

The big question is why the Supreme Court took the case on appeal. Will the Court expand the “fair use” defense or restrict it? Will the Court provide a more definitive answer on how the “fair use” defense should be applied in visual arts cases and/or clarify the test? Will the Court take some middle ground muddling the defense even further making it akin to the “I know it when I see it doctrine” applied to pornography.

Unfortunately, the lively oral argument answers none of these questions with certainty. The questions asked by the Justices during October’s oral argument showed that the Court has some concerns regarding the Second Circuit’s position which seemed to suggest that a derivative work could never be transformative, thus destroying the “fair use” defense for derivative visual art works, where the meaning of the work is more subtle, than say a parody. However, the Court also had concerns about an expansion of the “fair use” defense which could destroy the derivative licensing market. After hearing the arguments, the direction the Court takes on the “fair use” defense is still a mystery, which will likely be solved in late 2023.

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