

***Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, a Narrow Ruling or a Transformational Decision? An Essay***

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Abstract

*The 2023 United States Supreme Court decision in Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith is the first copyright decision in decades to visit the concept of fair use and transformative use. In a fiery majority decision with an even fiercer dissent, the court restricts the concept of fair use creating a lasting impact on derivative works, licensing, and appropriation art. Arguably restoring balance to factor one, purpose and character of the use, it questionably conflates the analysis of factor four, market effect, in favor of affirming factor one's analysis as the justification premise as originally posed by Judge Leval in 1990.*

Key Terms

*Copyright, transformative use, purpose and character, fair use, four-factor fair use analysis, Orange Prince, Prince, photograph, commercial use, justification, licensing, market effect, derivative work, Judge Leval, appropriation art*

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## I. INTRODUCTION

The copyright clause in the U.S. Constitution provides that Congress shall have the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writing and Discoveries.”<sup>1</sup> The Supreme Court has repeatedly interpreted the intent of this clause as the promotion of creativity for the broad benefit of the public by rewarding authors for a limited period.<sup>2</sup> As Justice Ginsburg in her majority opinion in *Eldred v. Ashcroft* asserts:

[T]he economic philosophy behind the [Copyright] [C]lause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors. Accordingly, copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge.<sup>3</sup>

Copyright offers a bundle of exclusive rights to the owners of creative works.<sup>4</sup> Such exclusive rights reserved to the copyright owner include the right of reproduction, preparation of derivative works, distribution rights, performance rights, and display rights.<sup>5</sup> Because the copyright monopoly restricts the ability of downstream users to use or build on protected works, it seems to conflict with the underlying purpose of the Copyright Clause, stifling

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<sup>1</sup> U.S. CONST. art. 1, § 8, cl. 8.

<sup>2</sup> 1 MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03 (2023); *see also* *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”).

<sup>3</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003)(internal quotations and citations omitted).

<sup>4</sup> 17 U.S.C. § 106.

<sup>5</sup> *Id.*

rather than promoting creativity, without some mechanism to add balance to the system. Enter fair use as the safety valve for balance.

Fair use, originally a judge-made doctrine subsequently codified as part of the 1976 Copyright Act, serves as the copyright teeter-totter balancing the interests of the creator and the copyright owner.<sup>6</sup> Often misunderstood, fair use offers users of copyrighted works a right to use those works in ways that would otherwise constitute infringement without seeking permission from the copyright holder.<sup>7</sup> Procedurally, fair use is an affirmative defense, insofar as defendants in infringement lawsuits must plead fair use in order to benefit from it.<sup>8</sup> In the seminal decision of *Stewart v. Abend*, the court describes fair use as “an equitable rule of reason which permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”<sup>9</sup> Thus, in a way, it may be useful to think of fair use as the fulcrum of the balance leveling the teeter-totter. Fair use permits and fosters the promotion of creativity that the Copyright Clause requires while also preserving and protecting the ability for authors to economically exploit their works. Too much weight in either direction disturbs this balance. If the teeter-totter tilts to favor the creator, the balance tilts as a stricter application of copyright impermissibly restricts the ability of downstream users to build new works. If the teeter-totter tilts towards the user, creators may not want to create or share their works with the world. Finding a perfect balance may be impossible, and this underscores the need for the fair use teeter-totter.

This question of where the law places the balance point on the fair use teeter-totter is the ultimate issue decided by the Supreme Court in *Andy Warhol Foundation for the Visual Arts, Inc., v. Goldsmith et al.* The decision turned on the specific issue of the concept of transformative use in the context of the first factor of the fair use analysis.<sup>10</sup> Unfortunately, the Supreme Court upset the balance in a way that imperils creativity and suggests potentially serious repercussions for the production of creative works that build on pre-existing works in the future.

Fair use, as now codified at 17 U.S.C. § 107, is determined by a four-factor analysis as set out in the statute:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;

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<sup>6</sup> 17 U.S.C. § 107; 4 MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13F.03 (2023).

<sup>7</sup> See Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L. J. 47, 49 (2012).

<sup>8</sup> See, e.g., Lydia Pallas Loren, *Fair Use: An Affirmative Defense*, 90 WASH. L. REV. 685, 685 (2015) (arguing that fair use is more appropriately characterized as either an exception or a defense rather than an affirmative defense).

<sup>9</sup> *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (internal quotations and citations omitted).

<sup>10</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 550–51 (2023).

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.<sup>11</sup>

A fair use analysis considers each factor with no single factor determining the outcome.<sup>12</sup>

This essay explores the history of the 2023 *Warhol* decision and the related impact on fair use in the context of the question of transformative use.

## II. BACKGROUND

The facts in *Warhol* go back to 1981 and a soon-to-be music legend, the artist known as *Prince*.<sup>13</sup> In December of that year, after performing a concert in New York, Prince Rogers Nelson (also known as Prince, The Purple One<sup>14</sup>, His Royal Badness<sup>15</sup>, the High Priest of Pop<sup>16</sup>, the Artist Formerly Known as Prince<sup>17</sup>, Christopher<sup>18</sup>) met Lynn Goldsmith in New York.<sup>19</sup> Goldsmith was, and is, a well-known celebrity photographer with a reputation for photographing many famous musicians.<sup>20</sup> Her initial meeting with Prince was while on an assignment for *Newsweek* to create a profile photograph of Prince for use in the magazine.<sup>21</sup>

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<sup>11</sup> 17 U.S.C. § 107.

<sup>12</sup> See *Warhol*, 598 U.S. at 527.

<sup>13</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 105–08 (2d Cir.), *opinion withdrawn and superseded on reh'g sub nom. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021), *cert. granted*, (2022), and *aff'd sub nom. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023); *Warhol*, 598 U.S. at 516.

<sup>14</sup> See Kimberly R. Moffitt and W. Russell Robinson, *Introduction to the Special Issue: Centering Race in the Life and Work of "The Purple One,"* 30 *HOW. J. COMM.* 107, 107 (2019).

<sup>15</sup> See Tina Maria Harris, *Blurred Lines: Elusive Messages of Religiosity and Blackness in the Music of Prince*, 30 *HOW. J. COMM.* 164, 164–65 (2019).

<sup>16</sup> Lauren Kirkbride, *The Eccentric Life of Prince, the High Priest of Pop*, *IDOLATOR* (Apr. 28, 2020), <https://www.idolator.com/7909877/life-of-prince-the-high-priest-of-pop> [<https://perma.cc/8H65-FQWW>].

<sup>17</sup> Jack Whatley, *Why Prince Changed his Name to a Symbol*, *FAR OUT MAG.* (Nov. 25, 2020), <https://faroutmagazine.co.uk/why-prince-changed-his-name-to-a-symbol/> (on file with Ohio State Law Journal).

<sup>18</sup> Jordan Potter, *The Story Behind the Song: How the Bangles Created 'Manic Monday'*, *FAR OUT MAG.* (Feb. 3, 2022), <https://faroutmagazine.co.uk/the-bangles-manic-monday-song-story/> (on file with Ohio State Law Journal).

<sup>19</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 516 (2023).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 516.

Fast forward two years, the Purple One was well on his way to becoming a full-on music legend, and *Vanity Fair* wished to run a story about him.<sup>22</sup> The magazine needed a profile picture of the artist, and who better to create that image than also legendary pop artist, Andy Warhol? Warhol needed a reference photo of the musician to create his work, so *Vanity Fair* licensed Goldsmith's *Newsweek* image for the project.<sup>23</sup> Goldsmith received a \$400 license fee for a one-time-only use of her image as a source image for the Warhol *Vanity Fair* image.<sup>24</sup> As was his way, Warhol transferred the image to silkscreen, modified the image in several ways, including adding color, and voila, *The Prince Series* was born.<sup>25</sup> Warhol ultimately created fifteen works though only one of them, Orange Prince, was the subject of the Supreme Court's decision.<sup>26</sup>

Fast forward another twelve years to 2016, when the now absolute rock legend, the artist now once again known as Prince, died suddenly at the far-too-young age of 58.<sup>27</sup> Conde Nast, *Vanity Fair's* parent company, published a special edition commemorative magazine on Prince's career that needed a cover image.<sup>28</sup> They procured from The Andy Warhol Foundation ("the Foundation"), the current holder of the Warhol copyrights following Warhol's death, a license to publish Orange Prince on the cover of the commemorative magazine.<sup>29</sup> It was at that time that Goldsmith finally became aware of Warhol's piece, and indeed the whole Prince series.<sup>30</sup> It was also at this time that Goldsmith notified the Foundation of her belief that Warhol had infringed on her copyright.<sup>31</sup>

The Foundation filed for a declaratory judgment in the Southern District of New York.<sup>32</sup> The District Court conducted an analysis using the four fair use factors, found fair use, and granted the Foundation's motion for summary judgment.<sup>33</sup> In their analysis of the first fair use factor, the District Court concluded the works were transformative as a side-by-side comparison indicates a "different character," "new expression," and "new aesthetics" with creative elements distinct from that of the original Goldsmith photograph.<sup>34</sup> Drawing from both Supreme Court precedent in *Campbell v. Acuff-Rose*<sup>35</sup> and the Second Circuit case *Cariou v. Prince*,<sup>36</sup> the District Court found that Warhol's work "can reasonably be perceived to have transformed Prince from a vulnerable,

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<sup>22</sup> *Id.* at 516–17.

<sup>23</sup> *Id.* at 517–18.

<sup>24</sup> *Id.*

<sup>25</sup> *Warhol*, 598 U.S. at 517–19.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 519–20.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 520–22.

<sup>31</sup> *Warhol*, 598 U.S. at 522.

<sup>32</sup> *See id.*

<sup>33</sup> *Id.* at 522–23.

<sup>34</sup> *Id.*

<sup>35</sup> *See generally* 510 U.S. 569.

<sup>36</sup> *See generally* 714 F.3d 694.

uncomfortable person to an iconic, larger-than-life figure.... Moreover, each Prince Series work is immediately recognizable as a ‘Warhol’ rather than as a photograph of Prince . . . .”<sup>37</sup>

### III. THE SUPREME COURT WEIGHS IN

Goldsmith appealed, and the Second Circuit reversed the lower court, finding in Goldsmith’s favor.<sup>38</sup> In overturning the decision of the District Court, the Second Circuit rejected the notion that “any secondary work that adds a new aesthetic or new expression to its source material is necessarily transformative” and such “transformative purpose and character must, at a bare minimum, comprise something more than the imposition of another artist’s style on the primary work . . . .”<sup>39</sup> Finding the purpose and function of the Goldsmith photograph and the Orange Prince to be identical in both the larger sense of both being works of visual art as well as in the narrow sense of both being portraits of Prince, the Second Circuit ruled that Orange Prince was not transformative by law, and indeed all four fair use factors favored Goldsmith.<sup>40</sup>

Appealing the decision of the Second Circuit, the Supreme Court granted certiorari on the sole question of 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 Goldsmith.<sup>41</sup> Stated more simply was the purpose and character of Warhol’s Orange Prince transformative?

Justice Sotomayor, writing for a majority consisting of Justices Thomas, Alito, Gorsuch, Kavanaugh, Barrett, and Jackson, agreed with the Second Circuit, that *Vanity Fair’s* use of Orange Prince was not transformative.<sup>42</sup> Use of an original copyrighted work may be fair where the use possesses a purpose and character “sufficiently distinct from the original.”<sup>43</sup> In this matter the original photograph and the subsequently created work, the Orange Prince, shared substantially the same purpose with a commercial use that of magazine art.<sup>44</sup> Finding no transformative use, the first fair use factor weighs in favor of

<sup>37</sup> *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith* 382 F. Supp. 3d 312, 325–26 (S.D.N.Y. 2019).

<sup>38</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 105 (2d Cir. 2021), *opinion withdrawn and superseded on reh’g sub nom. Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 32 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022), and *aff’d sub nom. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 523–24 (2023).

<sup>39</sup> *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 38–39, 42 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022), and *aff’d sub nom. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

<sup>40</sup> *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th at 42, 51 (2022).

<sup>41</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. at 525 (2023).

<sup>42</sup> *See id.* at 513, 550–51.

<sup>43</sup> *Id.* at 550.

<sup>44</sup> *Id.*

Goldsmith and the judgment of the Second Circuit was affirmed.<sup>45</sup> It is notable that due to the procedural posture of this litigation with the initial suit by the Foundation against Goldsmith, the only factor considered by the Supreme Court was the first factor resulting in a narrow analysis of fair use.<sup>46</sup> Moreover, the Court limited the scope of its opinion only to review the specific use of Orange Prince as a magazine portrait by Conde Nast.<sup>47</sup>

#### IV. KAGAN AND ROBERTS' DISSENT

In an unprecedented and no holds barred dissent by Justice Kagan joined by Chief Justice Roberts that has everyone wanting the inside scoop,<sup>48</sup> Kagan takes issue with the suggestion that Warhol's Orange Prince is not transformative.<sup>49</sup>

Kagan's strong dissent raises questions about the potential impact this decision may have down the road and what the proper role of courts when analyzing the transformativeness of follow-on works is.<sup>50</sup> Does the majority gut our understanding of fair use undercutting the careful balance of copyright between creator and copier thwarting creativity and degrading the public benefit or is the decision narrow in scope? Given the tangled history of fair use cases, this is likely but the first of a line of decisions that will attempt to negotiate what is now a jumbled understanding of transformative use. The reasonable guestimate of the impact of the *Warhol* decision favors a narrow construction of the decision.<sup>51</sup> The majority notes that its decision focuses solely on whether Orange Prince appearing on the cover of the commemorative magazine is infringing and not the other fifteen works of art produced contemporaneously by Warhol.<sup>52</sup> Context is now central to the question of whether a particular use may be fair.<sup>53</sup> Use in a different context may result in a conclusion of fair use

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<sup>45</sup> See *id.* at 550–51.

<sup>46</sup> See *id.*

<sup>47</sup> See *Warhol*, 598 U.S. at 546–48.

<sup>48</sup> *Id.* at 558–59. (Kagan, J., dissenting).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 559–60.

<sup>51</sup> See Blake Gopnik, *Ruling Against Warhol Shouldn't Hurt Artists. But it Might*, N.Y. TIMES (May 19, 2023), <https://www.nytimes.com/2023/05/19/arts/design/warhol-prince-supreme-court-copyright.html> [<https://perma.cc/4E2A-CGDP>]; Corynne McSherry, Cara Gagliano & Katharine Trendacosta, *What the Supreme Court's Decision in Warhol Means for Fair Use*, EFF (May 23, 2023), <https://www.eff.org/deeplinks/2023/05/what-supreme-courts-decision-warhol-means-fair-use> [<https://perma.cc/722T-K6N4>]; Kevin P. Ray, *SCOTUS Warhol Decision Articulates Narrow Limitation to Transformative Fair Use*, NATIONAL L. REV. (May 31, 2023), <https://www.natlawreview.com/article/scotus-warhol-decision-articulates-narrow-limitation-to-transformative-fair-use> [<https://perma.cc/J234-AEBG>]; Kat Walsh & Stephen Wolfson, *Everything Might be OK! Warhol v. Goldsmith*, CREATIVE COMMONS (May 18, 2023), <https://creativecommons.org/2023/05/18/warhol-v-goldsmith/> [<https://perma.cc/7VCE-NKCE>].

<sup>52</sup> *Warhol*, 598 U.S. at 525–26.

<sup>53</sup> See *id.* at 534–40.

while use in the same context may deny a conclusion of fair use.<sup>54</sup> If a follow-on use serves the same function as an original – however courts decide to decline that function – then it will likely not be transformative, and factor one of the fair use analysis will weigh against the user. Narrowly construing the decision suggests that the more distinct the purpose and character are between the original work and the new work the more favorable the ruling. The heightened similar purpose the less favorable the outcome of the analysis of the first fair use factor. Where the original work and the new work share similar purposes and the use is commercial in nature the first factor is likely to weigh against a conclusion of fair use.<sup>55</sup>

## V. IMPACT

### A. Fair Use Factor 1 Purpose and Character of the Use / Transformative Use

The 1994 U.S. Supreme Court decision of *Campbell v. Acuff-Rose Music, Inc.*,<sup>56</sup> established the concept of transformative use as part of the fair use four factor balancing test.<sup>57</sup> Campbell also embraced Judge Leval’s conception of transformative use analysis originally set out in his seminal article on the matter, *Toward a Fair Use Standard*.<sup>58</sup> It seems clear that one impact on the law of fair use that *Warhol* may have is to bring transformative use analysis closer to how Judge Leval originally conceived of it in his article.

By the statute’s text, the first factor directs courts to consider the purpose and character of a follow-on use, including whether or not the use is commercial or nonprofit educational.<sup>59</sup> The preamble to the fair use statute provides a non-exhaustive list of examples of potential fair uses, including criticism, comment, news reporting, teaching and classroom use, scholarship and research appears as part of the preamble.<sup>60</sup>

Beginning with the *Campbell* decision, the concept of transformative use entered the discussion as a favored purpose.<sup>61</sup> *Campbell* and its progeny asserting transformative use dominated asking whether the “new work merely supersedes[s] the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new

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<sup>54</sup> *Id.*

<sup>55</sup> *See id.*

<sup>56</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>57</sup> *Id.*; see David E. Shipley, *A Transformative Use Taxonomy: Making Sense of the Transformative Use Standard*, 63 WAYNE L. REV. 267, 267, 272–79 (2018).

<sup>58</sup> *See generally* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

<sup>59</sup> 17 U.S.C. § 107.

<sup>60</sup> *Id.*

<sup>61</sup> *See Campbell*, 510 U.S. at 579.



expression, meaning, or message; it asks, in other words, whether and to what extent the work is ‘transformative.’”<sup>62</sup>

Relying on Judge Leval’s article *Toward a Fair Use Standard*, Campbell embraced the concept and term “transformative use.”<sup>63</sup> The history of fair use recognizes an extensive history of what is fair use prior to, after, and in spite of Leval’s article. Arguing that his own and other decisions on fair use lacked consistency, Judge Leval presented a framework for considering the four fair use factors required by statute.<sup>64</sup> Minimal guidance exists in the statute “[b]eyond stating a preference for the critical, educational, and nonprofit over the commercial, the statute tells little about what to look for in the ‘purpose and character’ of secondary use.”<sup>65</sup> This creates problems as to how to conduct the required statutory analysis created problems with consistency.<sup>66</sup> The result of Leval’s observations regarding inconsistent applications and results was a recommendation for a framework for analysis.<sup>67</sup>

Leval’s frame views each of the four statutory factors as targeting a specific “facet” of the use question.<sup>68</sup> Factor 1, the purpose and character of the use is the justification query.<sup>69</sup> “Does the use . . . simulate creativity for public illumination? This question is vitally important . . . and lies at the heart of the fair user’s case.”<sup>70</sup> Leval’s framework for factor one required not merely justification but a *powerful justification* supporting the balancing of the strength of the justification of the use by the new work against the rights of the copyright owner.<sup>71</sup> It is out of this justification and the corresponding question about the strength of justification that the concept of transformative use was born. Transformative use was more than author 2’s reproduction of author 1’s work in a new work but a new use distinct from the original intrinsic purpose.

[T]he question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story’s words, it would merely “supersede the objects” of the original. If, on the other hand, the secondary use adds value to the original – if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new

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<sup>62</sup> *Id.* (quotations and citations omitted).

<sup>63</sup> *Id.* (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

<sup>64</sup> Leval, *supra* note 60, at 1105, 1110–25.

<sup>65</sup> *Id.* at 1106.

<sup>66</sup> *See id.*

<sup>67</sup> *Id.* at 1110.

<sup>68</sup> *Id.*

<sup>69</sup> Leval, *supra* note 60, at 1111.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

insights and understandings – this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.<sup>72</sup>

Leval, however, does not conclude the factor one analysis in favor of the new work with the mere finding of the presence of transformative use.<sup>73</sup> Rather, he cautions about situations where fair use fails despite the presence of a transformative justification.

The existence of any identifiable transformative object does not, however, guarantee success in claiming fair use. The transformative justification must overcome factors favoring the copyright owner. . . . [A] secondary user's claim under the first factor is weakened to the extent that her takings exceed the asserted justification. The justification will likely be outweighed if the takings are excessive and other factors favor the copyright owner.<sup>74</sup>

Adopting Leval's framework, *Campbell* finds central to factor one's analysis the presence and extent of a transformative use of the original work reflected in the new work.<sup>75</sup> Defining transformative use in the context of fair use factor one analysis as “[where the new work is] transformed in the creation of new information, new aesthetics, new insights and understandings[.]”<sup>76</sup> Leval's framework required that the original, copied material be used in a different manner and for a purpose different from the purpose of the original use.<sup>77</sup> In adopting Leval's theory the court required (1) a productive use and (2) the material must be used in a manner different or for a different purpose from the original.<sup>78</sup> Where transformative use is present, fair use allowance is likely to be found.<sup>79</sup> The absence of transformative use served as a limitation usually with the conclusion of no fair use. Level tied the justification for the reproduction to the ultimate transformation; his premise being a connection between the original expression and a new second expression that transformed the original expression with new purpose and meaning.<sup>80</sup>

The *Campbell* decision emphasized the requirement of weighing of all four factors and did not require transformation for factor one to favor fair use; however, the court also found that “the more transformative the new work, the less will be the significance of the other factors . . . .”<sup>81</sup> Indeed, this is immediately logical: the more a follow-on use changes and/or does something different from the original, the less it interferes with the ability of the original

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1111–12.

<sup>75</sup> *Campbell*, 510 U.S. at 579.

<sup>76</sup> Leval, *supra* note 60, at 1111.

<sup>77</sup> *Id.*

<sup>78</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 578–80.

<sup>79</sup> *See id.*

<sup>80</sup> *See generally* Leval, *supra* note 60.

<sup>81</sup> *Campbell*, 510 U.S. at 577–79.

author to enjoy and economically exploit their works. Decisions interpreting the concept of transformative use following *Campbell*, assert the question of if the new use serves a transformative purpose even permitting copying of images for use in a search engine as use of the image to facilitate search optimization is distinct from the original expressive purpose.<sup>82</sup>

Still, even though *Campbell* may have emphasized the importance of all four factors, the revolutionary part of the opinion – the part that had the most impact on lower courts – was the transformative use analysis.<sup>83</sup> As such, by 2006 the Second Circuit’s transformative use analysis focused on whether a follow-on work served a differentiated purpose from the original.<sup>84</sup> In *Salinger v. Colting*, the rejection of transformative use, even when coupled with new expression, highlighted the current test as dependent on differentiation of purpose and not addition or alteration of expression.<sup>85</sup> This theory of the case continued in *Author’s Guild v. HathiTrust* where full-text search functionally in book digitalization project is determined to be *quintessentially transformative*.<sup>86</sup> Thus, going into 2023 transformative use continued to assert considerable weight towards a finding that factor one favored a fair use conclusion.

The Second Circuit case most directly on point in Warhol is *Cariou v. Prince*.<sup>87</sup> *Cariou* involved another appropriation artist – Richard Prince – and his use of photographs of Rastafarians taken by Patrick Cariou and published in his book, *Yes Rasta*.<sup>88</sup> Prince tore numerous photographs out of *Yes Rasta* and modified them in different ways, including adding color, inserting other images, and drawing on top of the images.<sup>89</sup> He displayed these modified images at a gallery showing and titled his collage *Canal Zone*.<sup>90</sup> The Second Circuit held that most – but not quite all – of these images were transformative and fair use primarily because they had a new meaning or message that could reasonably be perceived upon viewing them.<sup>91</sup> Moreover, the fact that Prince’s use was commercial did not prevent the Court from finding that factor one weighed in his favor: “[a]lthough there is no question that Prince’s artworks are

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<sup>82</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007).

<sup>83</sup> See generally Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 587–88 (2008).

<sup>84</sup> See *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006); *Blanch v. Koons*, 467 F.3d 244, 253, 256 (2d Cir. 2006) (both finding transformative uses in the new works based on differentiated purposes between the original work and the resulting new work concluding in favor of fair use).

<sup>85</sup> *Salinger v. Colting*, 641 F.Supp.2d 250, 261–62 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010).

<sup>86</sup> See *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014).

<sup>87</sup> *Cariou v. Prince*, 714 F.3d 694, 698–99 (2d Cir. 2013).

<sup>88</sup> *Id.* at 699.

<sup>89</sup> *Id.* at 699, 706.

<sup>90</sup> *Id.* at 699.

<sup>91</sup> *Id.* at 707–08.

commercial, we do not place much significance on that fact due to the transformative nature of the work.”<sup>92</sup>

Following in line with the *Cariou* decision, the Foundation initially prevailed at the district court with a finding of the presence of transformative use for factor one favoring a conclusion of fair use.<sup>93</sup> When viewing the Goldsmith photograph and Warhol’s Orange Prince, the district court found that they “have a different character, give Goldsmith’s photograph a new expression, and employ new aesthetics with creative and commercial results distinct from Goldsmith’s.”<sup>94</sup> The Supreme Court took up the question of transformative use in the context of the first fair use factor rejecting the finding of transformative use.<sup>95</sup>

Acknowledging that new expression is relevant to the determination of factor one, the question becomes one of purpose of justification. Does the new expression copying original material use the material for the same or different purpose or character?<sup>96</sup> The Foundation and Goldsmith’s uses were unusual in that they both served the same purposes and in the same market, at least as the Second Circuit and the Supreme Court narrowly defined those purposes.<sup>97</sup> Both Goldsmith’s photo and Orange Prince served as profile photos of the same musician for magazine articles.<sup>98</sup> As such, the *Warhol* decision requires future litigants to argue about whether the specific purpose of a new work is sufficiently different from the purpose of the original to permit copying. Each use is to be considered on its own and “[t]he same copying may be fair when used for one purpose but not for another.”<sup>99</sup> Repeating the obvious, Goldsmith’s photo of Prince was used as an artist’s reference, as the basis of an illustration for Vanity Fair, as a basis for the Prince Series, and as an image licensed as a magazine cover.<sup>100</sup> The purpose-based query used by the majority requires determination at the time of use.<sup>101</sup> At a minimum, any new secondary use

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<sup>92</sup> *Id.* at 708.

<sup>93</sup> *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508, 522 (2023).

<sup>94</sup> *Id.* (quoting *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 325–26 (S.D.N.Y. 2019)).

<sup>95</sup> *Id.* at 525–26.

<sup>96</sup> *Id.* at 525.

<sup>97</sup> *Id.* at 526.

<sup>98</sup> *Id.* at 524–26.

<sup>99</sup> *Andy Warhol Found.*, 598 U.S. at 533.

<sup>100</sup> *Id.* at 516–20.

<sup>101</sup> *Id.* at 533–34 (The Supreme Court describes various points of use involved in this case): “Here, Goldsmith’s copyrighted photograph has been used in multiple ways: After Goldsmith licensed the photograph to Vanity Fair to serve as an artist reference, Warhol used the photograph to create the Vanity Fair illustration and the other Prince Series works. Vanity Fair then used the photograph, pursuant to the license, when it published Warhol’s illustration in 1984. Finally, AWF used the photograph when it licensed an image of Warhol’s Orange Prince to Condé Nast in 2016. Only that last use, however, AWF’s commercial licensing of Orange Prince to Condé Nast, is alleged to be infringing. We limit

would seem to require a new and different purpose and message especially where the use is commercial. As Goldsmith's and Warhol's uses were the same, photographs published in magazines, and both uses were commercial; the majority found the mere addition of new expression was insufficient to support a factor one fair use.<sup>102</sup> Returning to the language in *Campbell* asking if the new work supplants or substitutes the original, the *Warhol* decision begins to restore the balance intended by the fair use teeter-totter by moving from transformation to a purpose-focused inquiry. "The use of an original work to achieve a purpose that is the same as, or highly similar to, that of the original work is more likely to substitute for, or 'supplan[t],' the work."<sup>103</sup> This returns the state of the law to Leval's argument of justification and decades of caselaw attempting to provide guidance as to what is fair use.

Reaffirming the significance of the illustrative purposes set out in the preamble to §107, the Court highlights those purposes as ones that are typical of a fair use.<sup>104</sup> In what appears to be a return to Leval's justification construct, the majority's focus is on the "reasons for, and nature of the copier's use of an original work."<sup>105</sup> If the use provides a competing substitute for the original – that is, the follow-on work serves the same purpose as the original – the justification is likely to be found lacking.<sup>106</sup> Where it serves a different purpose from the original – i.e., it is not a substitute – the justification is likely to support a finding of fair use.<sup>107</sup> Recognizing that purpose, copying, and transformation are all matters of degree the question becomes where to draw the line. The majority suggests that the "degree of transformation required to make 'transformative' use of an original must go beyond that required to qualify as a derivative" work.<sup>108</sup> Again, the majority affirms Leval's justification analysis and reigns in what may otherwise be characterized as an overbroad characterization of transformative use.<sup>109</sup> Uses that share the same purpose are likely to be viewed as a substitute absent something more as a justification.<sup>110</sup> Echoing Leval's strength of purpose argument, the majority noted where the use of both the new and original works share the same purpose, the presence of a justification like the purposes enumerated in the preamble to § 107 may provide a justification of sufficient strength to support a fair use conclusion.<sup>111</sup>

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our analysis accordingly. In particular, the Court expresses no opinion as to the creation, display, or sale of any of the original Prince Series works."

<sup>102</sup> *Id.* at 536–42.

<sup>103</sup> *Id.* at 527–28.

<sup>104</sup> *Id.*

<sup>105</sup> *Andy Warhol Found.*, 598 U.S. at 527–28.

<sup>106</sup> *Id.* at 528–29.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 529.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 531–32.

<sup>111</sup> *Andy Warhol Found.*, 598 U.S. at 532–33.

### B. Appropriation Art

A second impact that *Warhol* will likely have is on the creation of appropriation art.<sup>112</sup> Even if *Warhol* is narrow, as it appears to be, that does not limit the potentially transformational reach of this decision. As Kagan eloquently points out in the dissent, very few things are exclusively original.<sup>113</sup> “Every book in literature, science, and art, borrows, and must necessarily borrow, and use much which was well known and used before.”<sup>114</sup> Does this disproportionately impact appropriation artists like Richard Prince and Jeff Koons who create new art based on existing text and /or images? Is this not especially true of Warhol, an artist with a reputation of appropriating soup cans and photographs of Marilyn Monroe resulting in transforming a work rather than mirroring it?<sup>115</sup> This, alone, will carry the greatest impact as it precludes creativity. Will this decision chill creative expression, particularly that of appropriation artists, resulting in tipping the copyright balance away from the public benefit and towards the owner/creator? Will the impact extend beyond the artist/creator to museums and galleries that display the works?

Appropriation artists rely on fair use as they *borrow* from works of another in order to create a new work, a derivative of the original, with a twist.<sup>116</sup> Borrowing is, in fact, fundamental to the art form. Warhol, after being sued by Patricia Caufield, Charles Moore, and Fred Ward for appropriating their photographs for his work, determined to change course and use his own photographs.<sup>117</sup> Importantly, however, many appropriation artists may not have the same option available to them.<sup>118</sup> Consider, for instance, if an artist wanted

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<sup>112</sup> Appropriation art is defined as the practice of using pre-existing objects or images in a new work with little transformation of the original. *Appropriation*, TATE GALLERY, <https://www.tate.org.uk/art/art-terms/a/appropriation> [<https://perma.cc/6PCV-2H7A>] (last visited Dec. 27, 2023).

<sup>113</sup> *Andy Warhol Found.*, 598 U.S. at 568 (Kagan, J., dissenting).

<sup>114</sup> *Id.*

<sup>115</sup> Kate Donohue, *Andy The Appropriator: The Copyright Battles You Won't Hear About at the Whitney's Warhol Exhibit*, COLUM. J. L. & THE ARTS, <https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/112> [<https://perma.cc/65UK-9EQH>](Aug. 2, 2019). As with the Prince series, the Marilyn series exists through the appropriation of a promotional photograph used without permission to create a silkscreen in different colors and the transference of another's photograph. *Id.*

<sup>116</sup> See TATE GALLERY, *supra* note **Error! Bookmark not defined.**

<sup>117</sup> Donahue, *supra* note **Error! Bookmark not defined.** at 2. Warhol ultimately settled with each of the three.

<sup>118</sup> See Amy Adler, *The Supreme Court's Warhol Decision Just Changed the Future of Art*, ART NEWS: ART IN AMERICA (May 26, 2023) <https://www.artnews.com/art-in-america/columns/supreme-court-andy-warhol-decision-appropriation-artists-impact-1234669718/> [<https://perma.cc/C8RU-B4FQ>] (“Any artist who works with existing imagery should now reconsider her practice. Hire a lawyer, maybe try to negotiate a license and be ready to move on if you get turned away or can't afford the fee. The safest and cheapest route—a consideration particularly relevant to younger artists and those who are not rich and

to make something like Orange Prince today. Since Prince is no longer alive, a modern appropriation artist would have no choice but to use a pre-existing photograph of the musician. They could license the right to use an original photograph, but licensing decisions are at the discretion of the rightsholder. If the rightsholder does not wish the appropriation artist to use their work for a new work, they can simply say no.<sup>119</sup>

Moreover, appropriation is not limited to visual artists.<sup>120</sup> The reach here is broad, scooping in literature, music, programming, film, and the frontier of artificial intelligence to name but a few impacts. For example, appropriation art in the visual arts is, in some ways, analogous to digital sampling in music. While the fair use status of sampling has been the subject of debate for decades, after the *Warhol* decision, it seems that it would not have a transformative purpose in many cases. Ultimately the *Warhol* decision's most significant impact will be to the creation of appropriation art.

### C. Licensing

A third area that *Warhol* may have an impact is on licensing. Will the decision encourage obtaining permission to use another's work? Likely. Will the decision extend the reach of licensing even further? Again, likely. Is that a good thing? It depends on who you ask. Many commentators already suggest that licensing obviates the protection of copyright.<sup>121</sup> Others suggest that the ability or inability to obtain permission for use of the original work may result in the suffocation of creativity and stifling of the purpose of copyright.<sup>122</sup> Reading Sotomayor's opinion, the facts regarding the license issue pop.<sup>123</sup> Goldsmith licensed a one-time-only use of her photograph for \$400.00 and credit for the photograph.<sup>124</sup> The license terms specify a limited one-time use of

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famous—is to just steer clear of referencing existing work. Maybe that's the right direction for art; maybe copying and relying on past work should be discouraged. But given the centrality of allusion, emulation, and copying to the history of art, it's hard to imagine that's a good thing. This is particularly so in contemporary digital culture, where, as I have argued, ... copying has taken on even greater urgency in creativity. But like it or not, these are not questions that artists, critics, and art audiences get to decide. The Supreme Court just changed the future of art.”).

<sup>119</sup> We discuss more about *Warhol*'s impact on licensing, *infra*.

<sup>120</sup> *Appropriation*, MUSEUM OF MODERN ART: ART & ARTISTS, [https://www.moma.org/learn/moma\\_learning/themes/pop-art/appropriation/](https://www.moma.org/learn/moma_learning/themes/pop-art/appropriation/) [https://perma.cc/G2CY-NM5W] (last visited Dec. 27, 2023).

<sup>121</sup> See Richard A. Posner, *Transaction Costs and Antitrust Concerns in the Licensing of Intellectual Property*, 4 J. MARSHALL REV. INTELL. PROP. L. 325, 326 (2005); see also Aaron Perzanowski & Jason Schultz, *THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY* 11–12 (2016).

<sup>122</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 527 (2023).

<sup>123</sup> *Id.* at 545–50.

<sup>124</sup> *Id.* at 515.

the photograph as an artist reference for an illustration to be published in the November 1984 issue of *Vanity Fair*.<sup>125</sup> In return the Foundation received \$10,000 from Conde Nast for his use of the Orange Prince as the cover of the 2016 commemorative magazine.<sup>126</sup> Goldsmith received nothing, not even credit for the original reference photograph.<sup>127</sup> Was this an injustice too large to ignore? The question that begs to be answered is why did the Foundation not ask permission, seek a license, or credit Goldsmith. A recognized artist, and photographer in her own right, Goldsmith routinely received licensing income for the use of her photographs including her Prince photographs.<sup>128</sup> Is the *Warhol* decision more about permission and licensing than fair use? Given the court's giant step away from the thirteen other silkscreen prints and two pencil drawings, the remaining fifteen works comprising Warhol's Prince Series, the sentence in the opinion "[t]he Court expresses no opinion as to the creation, display, or sale of any of the original Prince series works" seems significant.<sup>129</sup>

If one construes *Warhol* as a licensing decision rather than a fair use decision, then the effects on appropriation art are likely mitigated with the licensing of the appropriated artwork bearing the disproportionate risk. But do the spectra of such market limitations for the second work create a problem with the balance copyright and fair use attempt to strike? This seems to circle back to the questions of transformative use and commercial versus nonprofit uses. For appropriation art, a foundation is the retention of the original but in a new thing.<sup>130</sup> It is the critical intersection that provides the power of appropriation art. Is the creativity of expression sacrificed at the altar of commercialism? This is what Kagan appears to suggest focusing on the practice of building and borrowing on the existing as a repetitive process throughout time.<sup>131</sup> Are we back to an environment where one artist may be given the right to destroy the derivative work of the second artist?<sup>132</sup> Where the copyright owner of the original may limit as they disapprove of the new or use licensing fees to block access thus squashing the new transformative work as Kagan suggests.<sup>133</sup>

As a thought experiment that explores both the impact of *Warhol* on licensing and appropriation art, consider again the example above. An

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<sup>125</sup> *Id.* at 515, 517–18.

<sup>126</sup> *Id.* at 520.

<sup>127</sup> *Id.*

<sup>128</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 520 (2023).

<sup>129</sup> *Id.* at 534 (discussing the multiple uses of the Goldsmith photograph as an artist reference, in the creation of the Prince Series, pursuant to a license for the *Vanity Fair* article, and the Orange Prince used pursuant to a license for the cover of the 2016 commemorative magazine and acknowledging that the sole use relevant to the court's analysis was that of the 2016 Orange Prince licensing).

<sup>130</sup> See TATE GALLERY, *supra* note **Error! Bookmark not defined.**

<sup>131</sup> *Andy Warhol Found.*, 598 U.S. 567–68 (Kagan, J., dissenting).

<sup>132</sup> *Cariou v. Prince*, 784 F. Supp. 2d 337 (2011) *rev. in part, vacated in part*, 714 F.3d 694, 698 (2d. Cir 2013) *cert. denied*, 571 U.S. 1018 (2013).

<sup>133</sup> *Andy Warhol Found.*, 598 U.S. at 593 (Kagan, J., dissenting).



appropriation artist of today seeking to make an equivalent of the Orange Prince and needing a photograph has no alternative but to use a pre-existing photograph of Prince as Prince is dead and there is no option for a new photograph. Such artist might request permission or a license from the rightsholder of an existing photograph, but the power to refuse such request is in the sole discretion of the rightsholder of the photograph. As the exclusive rightsholder, they hold all the power. They may effectively block the new creation stifling new creations at their whim, in the absence of an effective safety valve, like fair use.<sup>134</sup> This thought experiment indicates a significant problem with the *Warhol* decision. One purpose of fair use is to enable uses not approved by rightsholders.<sup>135</sup> *Campbell* itself highlights this fact.<sup>136</sup> The defendants in that case sought to license the right to use *Oh, Pretty Woman*, but the owner rejected their request.<sup>137</sup> When they sought to create their new work in the face of rejection, fair use was the only option available to them. The majority in *Warhol* attempts to reconcile its option with *Campbell*, but its attempt is unclear at best.

Warhol's additions of meaning with the silk-screening process were characterized by the majority as "modest alterations" dismissive of the concept of new meaning while focusing on commercial use.<sup>138</sup> This emphasis shift means that an artist creating a derivative work that borrows from a pre-existing copyrighted work raises the question of if the new work shares the same commercial purpose as the original.<sup>139</sup> This new emphasis on permission and similar use of the original to create something new logically should encourage permission or licensing of the original work. Sweat of the brow doctrine rejected in *Feist*<sup>140</sup> reinforces the concept now articulated in the Warhol decision that it is how differently the art is used that matters. Again, this push to permission and license will have the greatest impact on creativity and the destruction of balance. Yes, one may license or obtain permission, but the power placed in the hands of the original rights holder is significant and highly problematic granting them a disproportionate veto right. Indeed, in her arguments before the court, Goldsmith argued that follow-on users should license works unless copying is "necessary."<sup>141</sup> If the law requires a license in all but the very narrow category of "necessary" situations that Goldsmith seems to have in mind, what purpose does fair use serve? Without more, this is a destructive influence on the carefully created balance of copyright.

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<sup>134</sup> We discuss more about *Warhol* and licensing, *infra*.

<sup>135</sup> See *Andy Warhol Found.*, 598 U.S. at 581–82.

<sup>136</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572–73 (1994).

<sup>137</sup> *Id.*

<sup>138</sup> See *Andy Warhol Found.*, 598 U.S. at 546.

<sup>139</sup> *Id.* at 531.

<sup>140</sup> See *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359–60 (1991).

<sup>141</sup> Br. for Resp't at 39, *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508 (2023) (No. 21-869) ("The status quo – licensing unless copying is necessary – strikes the right balance between fair compensation and creative breathing space.").

#### D. *Creation of Derivative Works*

Next, *Warhol* may change the way courts think of derivative works vis-à-vis transformative fair uses. The majority opinion reinforces as a protected right the right to create derivative works, reminding us that the right to prepare a derivative work based on a copyrighted work is one of the exclusive rights reserved to the copyright owner.<sup>142</sup> Certainly it is correct that fair use must not interfere with a rightsholder's rights to prepare or authorize the preparation of derivative works.<sup>143</sup> Unfortunately, however, the Court's guidance about where the line between transformative fair use and a derivative work is muddled at best and stifling. Moreover, this leaves the creation of a new transformative work with the owner in the absence of a license or other permission begging the question of balance in the absence of fair use.<sup>144</sup> When is something new created given Kagan's assertion on the absence of original material? "Nothing comes from nothing, nothing ever could" borrows Kagan from Richard Rodgers.<sup>145</sup> The concept of transformation in the context of a derivative work seems to increase in significance. A work that recasts, transforms, or adapts an original is by definition a derivative work.<sup>146</sup> It is of note that the word transformed is present in the statutory definition of derivative work but not present in the statutory scheme of fair use.<sup>147</sup> This suggests that the new meaning, purpose, or use must extend beyond the definition of derivative. "A use that shares the purpose of the copyrighted work . . . is more likely to provide 'the public with a substantial substitute for matter protected by the copyright owner's interests in the original work or derivatives of it.'"<sup>148</sup> Was the concept of transformative use a danger threatening to make the derivative work concept not relevant due to its overbroad interpretation?

#### E. *Fair Use Factor Four – Market Effect*

Finally, *Warhol* also raises questions about how courts will view the relationship between fair use factor one – purpose and character – and factor four – market effect.<sup>149</sup> Does a *Warhol* commerciality analysis subsume factor four into a factor one purpose and character/commercial/non-profit use analysis? If so, this potentially conflicts with *Campbell's* requirement for courts to weigh all of the factors together. Replacement of a transformative use query with a broader purpose / use query in many ways seems more appropriate for the market effect factor four analysis. This is especially true considering the

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<sup>142</sup> 17 U.S.C. § 106(2) (2018); *Andy Warhol Found.*, 598 U.S. at 541.

<sup>143</sup> *Andy Warhol Found.*, 598 U.S. at 526–27.

<sup>144</sup> See, again, our thought experiment, *supra* Part D (ii).

<sup>145</sup> *Andy Warhol Found.*, 598 U.S. at 567–68 (Kagan, J., dissenting).

<sup>146</sup> 17 U.S.C. § 106 (2018).

<sup>147</sup> 17 U.S.C. §§ 106, 107 (2018).

<sup>148</sup> *Andy Warhol Found.*, 598 U.S. at 531–32.

<sup>149</sup> *Id.* at 578–79 (Kagan, J., dissenting).

history of fair use as a way of preventing a follow-on use from providing a competing substitute for the original.<sup>150</sup> While the majority decision focuses exclusively on factor one, not factor four of the fair use analysis, its discussion of commerciality raises the specter of factor four and the market effect of the use.<sup>151</sup> The market effect analysis classically examines the question of if the infringing work creates a substitute for the original or a derivative of the original.<sup>152</sup> A factor one analysis that focuses on commerciality has the potential to crowd out, even subsume, the market effect analysis traditional to factor four. By focusing so narrowly on how Orange Prince served the same commercial purpose as Goldsmith's photo, it suggests that one problem the majority had with Vanity Fair's use was that it was a competing market substitute for the original. Accordingly, it may blur the line between the factor one and factor four analyses.

In fact, there is tension in Supreme Court precedent about what is the "most important" part of the overall fair use analysis. Notable is the juxtapositioning of the language from *Harper & Row v. Nation*, establishing market effect as "undoubtedly the single most important element of fair use[,]"<sup>153</sup> and the establishment of transformative use and fair use factor one, purpose and character, as "the soul of fair use."<sup>154</sup> Given the rejection of a judge as the seeker of intent and the artist as the indicator of intent and more generally the long rejection of the judge as an art critic, who determines if the use embodied by the new work is one for a purpose different from the original use? One significant consequence appears to be a diminished value of market effect as its own factor. Kagan's dissent raises this specific concern "[b]ut the majority transplants factor 4 [analysis] into factor 1."<sup>155</sup>

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<sup>150</sup> See *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) ("In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work. Many mixed ingredients enter into the discussion of such questions.")

<sup>151</sup> See *Andy Warhol Found.*, 598 U.S. at 530–31.

<sup>152</sup> See H. Brian Holland, *Social Semiotics in the Fair Use Analysis*, 24 HARV. J. L. & TECH. 335, 386–87 (2011).

<sup>153</sup> *Harper & Row Publishers, Inc v. Nation Enters.*, 471 U.S. 539, 566 (1985).

<sup>154</sup> Leval, *supra* note **Error! Bookmark not defined.**, at 1116. A threshold consideration in determining if a use was justifiable was whether it "fulfill[s] the objective of copyright law to stimulate creativity for public illumination?" *Id.* at 1111. If a defendant used the plaintiff's work in a different manner or for a different purpose than the original, then the new work qualifies as a "transformative" use that furthers the objectives of copyright. *Id.* Leval thought transformative use should be balanced against the other three factors and not dictate the outcome. *Id.* at 1116.

<sup>155</sup> *Andy Warhol Found.*, 598 U.S. at 578. (Kagan, J., dissenting).

## VI. CONCLUSION

*Warhol* clearly benefits the original content creator by limiting the application of transformative uses. How great the impact will depend upon how narrowly courts construe the decision down the road. No matter what, the one takeaway we are certain of is that one who borrows from another is at greater risk today than yesterday. Seemingly there are four immediate lessons. (1) The reigning in of the concept of transformative and a return to Leval's original construct as a justification analysis. (2) A resurgence of the concept of the derivative work as a protected right. (3) Circumscription of an overbroad interpretation of transformative use in a manner that increases the importance of licensing and permission to the detriment of the creator. Appropriation artists will bear the disproportionate impact of the overt, if not implicit, license preference. Balancing the interests of new creators with the original creator considering the benefit of the copyright holder's monopoly will be imperfect. (4) Market effect factor four analysis may become conflated with the factor one consideration of commerciality and substitution. Perhaps not transformational but the majority decision in *Warhol* may ultimately prove to be deceptively more broad than narrow.