



INTERNATIONAL LAW  
JOURNAL

---

**WHITE BLACK  
LEGAL LAW  
JOURNAL**  
**ISSN: 2581-  
8503**

**Peer - Reviewed & Refereed Journal**

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

[WWW.WHITEBLACKLEGAL.CO.IN](http://WWW.WHITEBLACKLEGAL.CO.IN)

### **DISCLAIMER**

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of White Black Legal – The Law Journal. The Editorial Team of White Black Legal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of White Black Legal. Though all efforts are made to ensure the accuracy and correctness of the information published, White Black Legal shall not be responsible for any errors caused due to oversight or otherwise.

WHITE BLACK  
LEGAL

## **EDITORIAL** **TEAM**

### **Raju Narayana Swamy (IAS ) Indian Administrative Service** **officer**



Dr. Raju Narayana Swamy popularly known as Kerala's Anti Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala . He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University . He also has an LLM (Pro) ( with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru

and a professional  
Procurement from the World Bank.

diploma in Public

### **Dr. R. K. Upadhyay**

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB , LLM degrees from Banaras Hindu University & Phd from university of Kota.He has succesfully completed UGC sponsored M.R.P for the work in the ares of the various prisoners reforms in the state of the Rajasthan.





## **Senior Editor**

### **Dr. Neha Mishra**



Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; Ph.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St.Louis, 2015.

### **Ms. Sumiti Ahuja**

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi,

Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.



### **Dr. Navtika Singh Nautiyal**

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.



### **Dr. Rinu Saraswat**

Associate Professor at School of Law, Apex University, Jaipur, M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

### **Dr. Nitesh Saraswat**

E.MBA, LL.M, Ph.D, PGDSAPM

Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.

More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.



### **Subhrajit Chanda**

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

## ***ABOUT US***

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **A CRITICAL ANALYSIS OF ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC. v. GOLDSMITH ET AL THROUGH THE LENS OF DOCTRINE OF FAIR USE**

AUTHORED BY: BHAGAVATH HARINI V J<sup>1</sup>

---

## **ABSTRACT**

*Andy Warhol Foundation for the Visual Arts v. Goldsmith et al* is one of the landmark judgments pertaining to fair use decided by the US Supreme Court. This case specifically deals with transformative use of copyrighted works. The subject matter in issue is the Goldsmith's copyrighted photograph of Prince which was alleged to be copied by Warhol in creating his Prince Series. The District Court held in favour of AWF which was later reversed and remanded by the Court of Appeals for the Second Circuit. The only question which came up for consideration before the Supreme Court was regarding the first fair use factor. The US Supreme Court decided in favour of Goldsmith. The court reiterated that the very object of copyright law is to promote art, literature and music availability to the public at large in exchange for the reward provided to the creator in the form of monopoly. The majority noted the difference between transformative use and derivative work, both of which included the word transform but in different connotations. However, the dissent reiterated that nothing results from nothing which clearly argues that every new work results from an already existing work without which it is impossible to create one. It stated that fair use per se promotes the objective of copyright law and it also stressed upon the importance of building on existing works. This article throws light on the majority and dissenting opinion of the US Supreme Court in the case of *Andy Warhol Foundation for the Visual Arts, Inc v. Goldsmith et al* in the light of fair use, transformative work, and objective of copyright law.

***Keywords: Transformative use, Creativity, Artistic purpose, Fair use, Copyright.***

---

<sup>1</sup> LL.M., School of Excellence in Law, The Tamil Nadu Dr. Ambedkar Law University.



## I. INTRODUCTION

Copyright Law grants an exclusive right to the creators of literary, dramatic, musical, and artistic works. It also accords protection to cinematograph films and sound recordings. Copyright is said to grant the creators a bundle of rights such as rights of reproduction, communication, adaptation, and translation. The copyright law provides an incentive or reward to the creators in order to promote further creations. Creativity is considered to be the most significant element of progress or development and so it becomes vital to encourage the same. It promotes economic and social development of the society. Copyright law therefore can be said to encourage creativity thereby providing an environment most suited for further creations and development of the society.<sup>2</sup> Any unauthorised reproduction or use of the copyrighted work amounts to infringement. However, the common law doctrine of fair use is an exception to such infringements. This common law doctrine was incorporated as part of the copyright statute under 17 U.S.C. §107.<sup>3</sup> Under the fair use doctrine, the copyrighted work can be utilized for several purposes such as criticism, comments, news reporting, educational purposes, research and scholarship without the consent or permission of the owner of such copyrighted work which would not amount to infringement.<sup>4</sup> In India, the concept of fair use is permitted and can be found under Section 52 of the Indian Copyright Law. Article I, §8, cl. 8 of the U.S. Constitution stipulates the power of the US Congress to work towards the promotion of progress of science and useful arts by granting copyright. This can be promoted by granting the authors and inventors an exclusive right for a limited duration over their works or creations. Under 17 U.S.C. §107, there are four main factors to be considered while deciding a defence of fair use. *Andy Warhol Foundation for the Visual Arts v. Goldsmith* primarily revolves around the fair use doctrine, more particularly focuses on the first factor before the Supreme Court of the United States.

## II. DOCTRINE OF FAIR USE

The doctrine of fair use can be found in 17 U.S.C. §107. According to the provision, fair use of a copyrighted work is permitted for certain purposes such as criticism, comment, news

---

<sup>2</sup> A hand book of Copyright Law, *available at*: <https://copyright.gov.in/documents/handbook.html> (last visited on March 10, 2024).

<sup>3</sup> Fair use as an exception to Copyright, *available at*: <https://www.yourlegalcareercoach.com/fair-use-as-an-exception-to-copyright/> (last visited on March 10, 2024).

<sup>4</sup> What is fair use, *available at*: <https://copyrightalliance.org/faqs/what-is-fair-use/> (last visited on March 10, 2024).



reporting, teaching, scholarship or research. These purposes further the object of copyright law<sup>5</sup> and so would not amount to infringement of copyright. There are four main factors which the court must consider while deciding any case in which fair use defence is put forth by a party.<sup>6</sup>

The four fair use factors are as follows:

1. The purpose and character of the use.<sup>7</sup>
2. The nature of the copyrighted work.
3. The amount of the work used and its substantiality.
4. The effect caused by such use on the potential market or effect upon the value of the work.<sup>8</sup>

### **III. FACTUAL BACKGROUND**

The case revolves around the Respondent Lynn Goldsmith, a professional photographer who holds the copyright in a photograph of Prince Rogers Nelson and Andy Warhol, a well-known pop artist. Vanity Fair was in need of the Goldsmith's copyrighted photograph of the prince for penning a story about the musician. For this purpose, Vanity Fair in 1984 sought a license for the photograph of prince to be used as an artist reference. Goldsmith licensed the photograph to the Vanity Fair on a condition that it shall be used for "one time" alone. According to this condition, the image can appear once in the full page of the magazine and for once in the quarter page. The Vanity Fair hired Andy Warhol as the artist responsible for creating a silkscreen portrait of the prince image. The article containing the artist's sketch was published by the Vanity Fair. As a result, Goldsmith was paid \$400 as fee and was credited<sup>9</sup> for the work. The dispute sparked when Andy Warhol derived 15 additional works apart from the permitted use of making the silkscreen portrait which ultimately resulted in the suit. From the additional works created without authorisation, the Andy Warhol Foundation for the Visual Arts in 2016, licensed one of those works to Conde Nast for yet another magazine story about prince. As a reward, the Andy Warhol Foundation earned \$10,000 whereas on the other hand, no source credit and a license fee was paid to the copyright owner Goldsmith. The creation of the portrait involves a process<sup>10</sup> which raises the significant question as to whether this process qualifies to be a transformative fair use or whether it falls short of the required transformativeness. In

---

<sup>5</sup> To promote the progress of science and useful arts.

<sup>6</sup> 17 U.S.C. §107.

<sup>7</sup> including whether such use is of a commercial nature or is for a nonprofit educational purpose.

<sup>8</sup> 17 U.S.C. §107.

<sup>9</sup> Goldsmith was credited as the source photographer of the image.

<sup>10</sup> The portrait is created by cropping, flattening, tracing and colouring the original photograph with no further alterations.

2016, after the publication of the magazine, Goldsmith came to know that her photograph of the prince was used without permission and communicated about the same to AWF. In furtherance of such notice, AWF initiated a suit against Goldsmith seeking a declaratory judgment that there is no copyright infringement.<sup>11</sup>

#### IV. DISTRICT COURT (2019)

In the District Court, the case was decided in favour of AWF finding fair use. The four fair use factors as stipulated in 17 U.S.C. §107 were taken into consideration by the court in this regard in order to find that the first, third and fourth factor to be in favour of AWF and the second factor to be in favour of Goldsmith.

**First factor:** The court held that the works were transformative in nature. The transformativeness was found by comparing the orange silk screen portrait and the photograph. Both the works were compared by keeping them side by side to determine if it involves a different character and if it is distinct or not. The comparison revealed a clear difference in character which ultimately gave a new expression and aesthetics to the photograph and therefore was distinct in the court's view. The court also found that the portrait work transformed<sup>12</sup> the photograph and its nature, which favoured a transformative use. This transformation increased the recognizability of the work of Warhol.

**Second factor:** The second factor favoured Goldsmith because the work was unpublished one and was creative in nature. However, this factor was given limited importance as the work was found to be transformative in nature.

**Third factor:** The third factor favoured AWF on the ground that Warhol in the process of creating the portrait did not take the protectible elements of the copyrighted photograph. Therefore, in the case of photographs, when the protectible elements could not be found in the secondary work i.e., the portrait, it cannot be said to be an infringement.

---

<sup>11</sup> Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, *available at*: [https://www.supremecourt.gov/opinions/22pdf/21-869\\_87ad.pdf](https://www.supremecourt.gov/opinions/22pdf/21-869_87ad.pdf) (last visited on March 10, 2024).

<sup>12</sup> The copyrighted photograph portrayed Prince as a vulnerable, uncomfortable person. However, the portrait transformed it into a larger than life figure and made it iconic.

**Fourth factor:** The fourth factor also favoured AWF as Warhol's work did not act as a market substitute for the Goldsmith's photograph and didn't affect the value of the original work.<sup>13</sup>

## V. THE COURT OF APPEALS FOR THE SECOND CIRCUIT (2021)

The District Court's ruling was reversed and remanded by the Court of Appeals for the Second Circuit. According to the Court of Appeals, all the four fair use factors favoured Goldsmith which essentially means that Warhol fails to succeed in his claim for fair use thereby infringing the copyright vested with the photographer, Goldsmith.

**First factor:** The court of appeals rejected the district court's explanation<sup>14</sup> of the term transformative. Instead, the court stressed on finding out if the use of the source material was for a fundamentally different and new artistic purpose and character or not. This purpose in the court's opinion must be more than mere copying of another's style.

**Second factor:** The second factor favoured Goldsmith because the work was creative and unpublished in nature.

**Third factor:** The third factor favoured Goldsmith owing to the fact that the amount or substantiality of the portion used from the copyrighted work was not reasonable which implies that the use of the original work was more than what was required for the purpose for which it was used.

**Fourth factor:** The fourth factor favoured Goldsmith as the commercial licensing of AWF according to the court affected the potential market of Goldsmith in licensing the photograph to the editorials or other artists.<sup>15</sup>

## VI. THE SUPREME COURT OF THE UNITED STATES (2023)

The key and the only question which came up for consideration before the US Supreme Court in this case was whether the first factor as stipulated under 17 U.S.C §107(1)<sup>16</sup> weighs in

---

<sup>13</sup> *Id.* at 11.

<sup>14</sup> According to the District Court, the transformative use was assessed based on new aesthetics or expression that has been added to the secondary work.

<sup>15</sup> *Id.* at 11.

<sup>16</sup> The first factor in fair use analysis as per 17 U.S.C §107(1) inquires into the purpose and character of the use, including whether such use is for a commercial purpose or is for non-profit educational purposes.



favour of Goldsmith or not.

## MAJORITY OPINION

The majority opinion of the court is explained here under various heads such as further purpose or different character, rationale behind the fair use defense, problem of substitution, difference between transformative use and derivative works, and inquiring into the specific use of the work pertaining to the first fair use factor.

### **Further purpose or different character**

As rightly pointed out by the court in the case of *Campbell v. Acuff-Rose Music*<sup>17</sup>, the first fair use factor analyses whether the secondary use has a further purpose or different character. This analysis is found to be a matter of degree which analyses the extent to which both the works are different. This degree and extent of difference between the original and the secondary work will be measured against commercialism of such work. In the instant case, the photograph was specifically used by the AWF to license one of the unauthorized works derived from such photograph to Condé Nast. This clearly shows that both these works share a similar purpose. The similar purpose being the use of the photograph for depiction of Prince in magazine stories. This is deemed by the court to be a commercial use. The first fair use factor according to the majority opinion was therefore held to be in favor of Goldsmith by considering the above grounds.<sup>18</sup>

### **Rationale behind fair use defense**

Article I, §8, cl. 8 of the USA Constitution states that the Congress has the power to work towards promoting the development of arts, which can be done by providing exclusive right for a limited period of time to the authors<sup>19</sup> over their own writings or works. The court in *Harper & Row Publishers v. Nation Enterprises*<sup>20</sup> observed that the author of an original work is granted a bundle of exclusive rights by the Copyright Act in order to encourage creativity. As per 17 U.S.C. §106, this bundle of exclusive rights includes the right of reproduction, preparation of derivative works and in pictorial or graphic works to display such works publicly. In *Twentieth Century Music Corp v. Aiken*<sup>21</sup>, the court emphasized on rewarding the

---

<sup>17</sup> 510 U.S. 569 (1994).

<sup>18</sup> *Id.* at 11.

<sup>19</sup> Author in case of copyright or inventor in case of patent.

<sup>20</sup> 471 U.S. 539 (1985).

<sup>21</sup> 422 U.S. 151 (1975).

creative labour exercised by the authors which certainly must be encouraged while also ensuring that the monopoly granted to them must ultimately result in the increased availability of such works including literature, music and other arts to the public at large. It is reiterated that the exclusive right serves as a reward and encouragement to the authors for their creative labour expended on one hand while on the other hand is also ultimately granted for increasing the availability of creative works for the public use which is the whole purpose behind the copyright law. The exclusive rights of the copyright owner are subjected to some limitations such as those stipulated under 17 U.S.C §107 to 122 which includes limited duration of copyright protection, ideas and facts per se are not copyrightable, and fair use. The defense of fair use acting as a limitation on copyright aids to strike a balance between promotion of creativity on one hand and availability of works for public use on the other. The court is permitted to refrain from applying the copyright statutes rigidly or in a strict manner by the strength of the doctrine of fair use for the main reason that it would at times hamper creativity which is the whole objective of the statute.<sup>22</sup> The fair use doctrine is a flexible concept and so the application of the same entirely depends upon the facts and circumstances of each case at hand. This is so because of the fact that there are a variety of copyrightable subject matters ranging from books, photographs to software which essentially differ in their nature.<sup>23</sup>

### **Problem of substitution**

The first factor of fair use is discussed under §107(1) which emphasizes on the purpose and character of the use. It assesses whether the secondary use is for a commercial purpose or for a non-profit educational purpose. It analyses the reasons for which the original work has been copied and also looks into the nature of such secondary work. One of the key questions addressed here is regarding the transformativeness of the work, that is whether the new work essentially acts as a substitute for the original or whether it contributes something new<sup>24</sup> to the original work. In order to find out if a work can be said to be a substitute or not, the purpose sought to be achieved by the secondary work is analyzed by the courts to determine the similarity in purpose between the two. If the similarity is high, there are high chances of such work acting as a substitute for the original and if the differences are high then there are less chances of the secondary work to act as a substitute for the same. §107 lists down certain uses to be regarded as fair use including criticism, comment, news reporting, research, scholarship

---

<sup>22</sup> *Stewart v. Abend*, 495 U.S. 207 (1990).

<sup>23</sup> *Id.* at 11.

<sup>24</sup> Whether it attributes a further purpose or a different character to the original work or not.

and teaching. This list of fair uses mentioned in §107 is held to be only illustrative. It is not a complete list which means that depending upon the facts of each case this list may increase. It becomes important here to note that in most of the secondary works some further purpose or different character might result from the addition of something new which alone cannot result in fair use. The court according to the first factor will inquire into “whether and to what extent” the secondary use can be said to have a different purpose and character. This implies that when the difference in purpose or character is large, there are more chances of finding in favour of the first fair use factor. However, per contra, when the difference between the original work and the secondary work is small, there are less chances to rule in favour of fair use.<sup>25</sup>

### **Transformative use v. Derivative work**

Transformative use refers to any use which serves a further purpose or possesses a different character. The term transform is different from the term transformative use. Transform is used to define derivative works which is one of the exclusive rights of the owner as under §106(2). Derivative work has been defined under §101<sup>26</sup>. As opposed to derivative works which focuses on the different forms in which the original work can be converted into, the transformative use of the original work, per contra, shrinks the scope of owner’s exclusive right to prepare derivative works. The transformation of the work must be more than what is required for a mere derivative use in order to become a transformative use. In practice, the transformative use and derivative work may tend to overlap with each other. The use which has a distinct purpose act as a justification for the sole reason that it helps in promoting the goal of copyright law.<sup>27</sup> It can be understood that whenever an original work and a secondary work possess same or similar purposes, the nature of such secondary work is commercial and when there is no adequate justification, then the first factor will weigh against fair use.<sup>28</sup>

### **Specific use of the work**

It is essential to look into the specific use for which the original work has been taken in every case of fair use analysis. Depending upon the purpose for which an original work is used, the copying may be regarded as a fair use. In the instant case, the original photograph was used for various purposes, however, the alleged infringement was regarding the AWF’s licensing of

---

<sup>25</sup> *Id.* at 11.

<sup>26</sup> According to the definition, it refers to any other form in which a work may be recast, transformed or adapted.

<sup>27</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202.

<sup>28</sup> *Id.* at 11.



Orange Prince<sup>29</sup> (which was derived out of the original photograph) to Condé Nast in 2016. Apart from the AWF's illustration on the magazine cover, there were various other pictures of Prince from the concert as well as studio. The secondary use shares a similar purpose for which the original work can be used. It is deemed similar as AWF's image and Goldsmith's photograph are used for illustrating stories and so they cannot be deemed as distinct and different areas. This clearly shows that the licensing of Orange Prince Portrait by AWF has the potential to replace the purpose for which Goldsmith's original photograph can be used. The commercial nature of AWF's use of the original copyrighted work plays a significant role in finding against fair use. The court cited the example of Soup Cans wherein the logo was used to advertise soup by Campbell and on the other hand, the Soup Cans Series by Warhol used the logo (copyrighted work of Campbell) to comment on consumerism. In the cited example, the purposes are clearly distinct or different from each other and does not merely replace the purpose for which the original work can be used. However, in the present case, AWF's secondary use acted as a replacement for the original photograph which implies that it had the potential to be used in place of the original. Further, it was found that AWF failed to provide appropriate justification for such use of the original.<sup>30</sup>

## DISSENTING OPINION

Justice Kagan and Chief Justice Roberts delivered the dissenting opinion in this case. The dissent was against the majority's view that the Warhol's orange silkscreen portrait was a subtle alteration of the Goldsmith's photograph. It was considered in the opinion of the majority to be the result of mere cropping and flattening of the original photograph which failed to differ in its nature. The dissent pointed out that in a previous decision, the court has cited the paintings of Warhol as an example for describing the term "transformative".<sup>31</sup> The majority held that Warhol licensing his work to the magazine because of its commercial nature would not favour a finding of fair use as it provided a market substitute for Warhol's photograph which was criticized by the dissent. According to the dissent, the original and secondary works neither had the same aesthetics nor did they convey the same meaning, and because of these dissimilarities, the secondary work did not act as a substitute for the original. The dissimilarities were considered by the magazines which led to the choosing of the subtle alteration over the original one. The dissent also notes that the majority's opinion hinders the key object of copyright law.

---

<sup>29</sup> To appear on the cover of a magazine titled "The genius of prince."

<sup>30</sup> *Id.* at 11.

<sup>31</sup> *Google LLC v. Oracle America, Inc.*, 593 U.S. \_\_\_\_ (2021).

The dissent pointed out that the authors are rewarded with exclusive right in the form of monopoly not only as a form of encouragement and motivation for the creative labour that has been expended but also for the promotion of creativity. It was rightly pointed that the courts may when needed can apply the copyright law to promote its objective rather than applying it strictly in a rigid fashion. When the copyright law is applied strictly by the courts, the authors will be restricted from creating upon the already existing works which in the words of the dissent is impossible as “nothing comes from nothing, nothing ever could” and so this restriction will in turn hinder the creativity of the artists.<sup>32</sup>

### **Process involved in the creation of orange silkscreen portrait**

The court cited the example of Marilyn Monroe which was one of the previous works of Warhol. In Marilyn Monroe, Warhol started with the publicity image. This image was then reframed by zooming in which thereby created a disembodied effect. In this process, a high contrast flattened image was produced on an acetate sheet. This was then used to trace an outline on a canvas. Over the canvas, Warhol painted by applying exotic colours. The high contrast image will then be produced in negative on silkscreen. The silkscreen functions as a porous mesh. The ink will be poured onto the back of the mesh by placing the screen facing down on the canvas, after which the ink will be pulled through the weave and on the canvas using a tool. Warhol created many such Marilyn Monroe artworks in few of which he reordered this process. Ultimately, it results in a new work which is not a literal copy of the original photograph with which it all started. Through these portraits, it is said that Warhol exposed the deficiencies of mass media culture as a social commentary apart from creating a portrait. In the orange silkscreen portrait of prince, a disembodied effect was created which was similar to the one created in the case of Marilyn Monroe. The portrait gave an effect as if it was magically suspended in space.<sup>33</sup>

### **Substitute v. New aesthetics**

From the 14 prints and 2 drawings created by Warhol for the Prince series, the purple prince was chosen by Vanity Fair. The majority considers both the works to be portraits of Prince which may be used to depict Prince in magazine stories about him. However, dissent argues that one would be aesthetically drawn to one work instead of the other. It cannot be seen as

---

<sup>32</sup> *Id.* at 11.

<sup>33</sup> *Id.* at 11.

substitutes for one another rather it can be seen as two different ways in which the image of Prince can be sketched to accompany an article on the magazine. In dissent's view, the editors of both Vanity Fair and Condé Nast were well aware of this difference in aesthetics as well as meaning. It must be noted that inspite of knowing about the original photo (Goldsmith's photograph), the publisher wanted the Warhol's portrait which shows that the magazine preferred the meaning and aesthetics of Warhol's portrait to be more suitable for accompanying their article about Prince.<sup>34</sup>

### **Rationale behind fair use**

The dissent states that apart from the promotion of availability of works to the public at large, fair use per se helps in improving creativity and artistic progress. This is so because creativity cannot flow from an empty space. The dissent explains that new art, new invention or new knowledge is built from existing works. In support of this, the dissent quotes the opinion of Justice Story which states that in literature, science and arts, there can be only few things that are new and original. According to him, every book takes from the existing works and it becomes essential or necessary to make use of the well-known works in order to create the same.<sup>35</sup> The copyright law is designed to promote creativity and if the law has no exceptions like fair use, it would hamper the very object of the copyright law to promote creativity. It permits the authors to build upon already existing works without restricting the creative progress. The transformative use is protected to stimulate creativity thereby meeting the object of copyright law.<sup>36</sup>

### **Transformative use**

The dissent stated that the majority does not take into account the transformation of the image of prince as pointed out earlier in this article, instead it focused its attention on the same nature between the portrait and the photograph. The commentary and purpose of Warhol's work was undermined due to Warhol's licensing of the work to the magazine which was opposed by the dissent. The dissent pointed out that the majority opinion did not align with the copyright law and was against the precedents. The artistic purposes in the opinion of the dissent were also taken into consideration by the drafters of the law which was not considered by the majority. Criticism, comment, news reporting, teaching, research, or scholarship all takes place for

---

<sup>34</sup> *Id.* at 11.

<sup>35</sup> *Emerson v. Davies*, 8 F. Cas. 615.

<sup>36</sup> *Id.* at 11.



gaining profit. This was known to the Congress at the time of drafting this preamble. The majority considered both the first and the fourth factor together as a single factor, which the Congress clearly did not intend to do by placing both as two different factors.<sup>37</sup>

The courts are entrusted with the challenging task of striking a balance between providing incentives to the creators on one hand and allowing creators to work upon the already existing works. This cannot be achieved when the court ignores the second element which is to build on the works. The majority in some places determined if new purpose or character was added which was different from the original and in some other places, focused on determining the new expression which included new meaning and message. In *Google v. Oracle*<sup>38</sup> and *Campbell v. Acuff Rose Music*<sup>39</sup>, the secondary work was built on the original and the use was of commercial nature. In both the cases, commercialism did not make any difference due to the transformativeness of the use. The court also considered music and renaissance canvases created from existing ones. Creative progress in the opinion of dissent occurs through use, reuse, framing and reframing and so courts must consider the purpose behind the taking of the original. This decision in the view of the dissent affects not only Warhol but also other artists as it affects the creation of new arts, and new knowledge which ultimately affects the public.<sup>40</sup>

## VII. CONCLUSION

The copyright is granted as an exclusive monopoly to the creators or authors for encouraging the progress and development of arts and creativity for a limited duration over their works or creations. The creative labour expended by the authors must be encouraged and rewarded while also ensuring the ultimate object of copyright law which is to make the works publicly available which furthers creativity and knowledge sharing. The defense of fair use acting as a limitation on copyright aids to strike a balance between promotion of creativity on one hand and number of works being available for the public at large on the other. The court is free to interpret the copyright law based on the facts and circumstances of the case at hand so as to promote its object deviating from rigid application of the statute. Depending upon the purpose for which an original work is used, the copying may be regarded as a fair use. In the present case, the AWF's use merely replaced the Goldsmith's photograph and also did not provide any

---

<sup>37</sup> *Id.* at 11.

<sup>38</sup> 593 U.S. \_\_\_\_ (2021).

<sup>39</sup> 510 U.S. 569 (1994).

<sup>40</sup> *Id.* at 11.

appropriate justification for such use. As noted in this case, every new meaning or message cannot be regarded as transformative because it would take away the owner's exclusive right to prepare derivative works. The court need not look into the artistic value of the work or the intention with which such work was created. The author accepts the majority's reasoning and is of the view that as required by law, the courts must determine the purpose and character of the use. The portrait created by AWF offered a potential market substitute for the Goldsmith's photograph and every subtle change cannot constitute a transformative use favoring fair use. The courts are tasked with striking a balance between promoting art, creativity and dissemination of knowledge to the public on one hand and advancing the rights of the creator on the other which is quite a complex task which was rightly balanced by the court in this case.

### **REFERENCES**

#### **Webliography:**

- ❖ *A hand book of Copyright Law*. (n.d.). Government of India. Retrieved March 10, 2024, from <https://copyright.gov.in/documents/handbook.html>
- ❖ *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*. (2023, May 18). Supreme Court of the United States. [https://www.supremecourt.gov/opinions/22pdf/21-869\\_87ad.pdf](https://www.supremecourt.gov/opinions/22pdf/21-869_87ad.pdf)
- ❖ *Fair use as an exception to Copyright*. (2021, December 10). Your Legal Career Coach. <https://www.yourlegalcareercoach.com/fair-use-as-an-exception-to-copyright/>
- ❖ *What is fair use*. (n.d.). Copyright Alliance. Retrieved March 10, 2024, from <https://copyrightalliance.org/faqs/what-is-fair-use/>

WHITE BLACK  
LEGAL