



## The Supreme Court's Landmark Andy Warhol Copyright Decision Has Significant Implications for Creators and Artists

On May 18, 2023, the U.S. Supreme Court issued a [decision](#) in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith et al.* The case involved a dispute over whether Andy Warhol's use of a photograph of Prince was a fair use of the copyright in the original photograph.

The Court held that Warhol's use of the photograph did not constitute fair use. In determining whether a fair use defense is valid, a court examines the four factors of fair use. The four factors are:

1. **The purpose and character of the use**, including whether such use is of commercial nature or is for nonprofit educational purposes. Courts typically focus on whether the use is "transformative." That is, whether it adds new expression or meaning to the original, or whether it merely copies from the original.
2. **The nature of the copyright work**. Using material from primarily factual works is more likely to be fair than using purely fictional works.
3. **The amount and substantiality of the portion used in relation to the copyrighted work as a whole**. Borrowing small bits of material from an original work is more likely to be considered fair use than borrowing large portions. However, even a small taking may weigh against fair use in some situations if it constitutes the "heart" of the work.
4. **The effect of the use upon the potential market for, or value of, the copyrighted work**. Uses that harm the copyright owner's ability to profit from his or her original work by serving as a replacement for demand for that work are less likely to be fair uses.

In this decision, the Court focused on the first factor of fair use, which is the purpose and character of the use. The decisions stated that Warhol's use of the photograph was commercial in nature and was not "transformative" building upon the original photograph. As a result, the Court held that Warhol's use was not fair use and that he had infringed Goldsmith's copyright.

## **The Impact of the Decision on Artists and Copyright Holders**

This decision is a victory for copyright holders. Although copyright infringement and analysis of the Fair Use Doctrine is a case-by-case factual analysis where a judge determines whether fair use is a valid defense based on the four factors above, this decision sends a clear message that commercial uses of copyrighted works might be less likely to be considered fair use. This decision could have a significant impact on photographers, artists, and other creators such as software engineers.

Creators who build off copyrighted works should be aware of this decision and know the potential consequences of building off of other's work. This decision will likely make it more difficult to show a work is "transformative" while leaving an artist open to liability. The penalties for copyright infringement are nothing to brush off. A defendant, convicted for the first time of violating 17 U.S.C. § 506(a) by the unauthorized reproduction or distribution of a copyrighted work with a retail value of more than \$2,500 can be imprisoned for up to five years and fined up to \$250,000, or both<sup>[1]</sup>.

The potential penalties should be quite the incentive for creators to take steps to avoid infringing copyrights. Some actions taken could be obtaining permission from the copyright holder to use their work, or opting to build off of work that is in the public domain.

Copyright holders should also be aware of this decision and take steps to protect their copyrights. This could include registering their copyrights and monitoring for unauthorized uses of their works.

Takeaways for creators and businesses.

- If you have current works that are protected under copyright law, keep your eyes peeled for potentially infringing works. Speak with an experienced intellectual

property attorney to see if you may have a valid infringement claim.

- If you build off of other creator's work to create your own, speak to an intellectual property attorney who will walk you through the four factors of the Fair Use Doctrine and help determine if your work could be considered infringement and open you up to potential liability.

*This blog post was drafted by [Jon Farnsworth](#) and [Jack Amaral](#), both attorneys in the Minneapolis office of Spencer Fane. For more information, please visit [www.spencerfane.com](http://www.spencerfane.com).*

[\[1\]](#) 18 U.S.C. §§ 2319(b), 3571(b)(3)