

COPYRIGHT LAW MOVING TOWARDS A NEW FORM OF ART: TATTOOS AND FAIR USE

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I. INTRODUCTION

Tattoo artists may be facing copyright infringement claims in their future in the wake of two recent court decisions that were decided using the fair use framework discussed in the United States Supreme Court's case *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* ("Warhol").²

II. COPYRIGHT LAW AND THE FAIR USE DEFENSE

Copyright law ensures that a creator of a "tangible medium of expression" maintains ownership over their original work and protects the creator from unauthorized uses of their work.³ In order to use copyrighted materials, one must either obtain permission from the copyright holder or their use must constitute fair use.⁴ In determining whether a use constitutes fair use, courts weigh four factors.⁵ The factors are:

(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; (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.⁶

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² *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

³ 17 U.S.C.S. § 101.

⁴ See Generally Stanford Librs., *The Basics of Getting Permission*, COPYRIGHT & FAIR USE STANFORD LIBRS., <https://fairuse.stanford.edu/overview/introduction/getting-permission/> (July 28, 2024).

⁵ 17 U.S.C.S. § 107.

⁶ *Id.*

III. *WARHOL* DECISION

In *Warhol*, the plaintiff, photographer Lynn Goldsmith (“Goldsmith”), asserted a copyright infringement claim against the Andy Warhol Foundation (“AWF”). The case centered around a photograph of Prince taken by Goldsmith in 1981 and licensed to Vanity Fair in 1984 for a one-time use to serve as an “artist reference for an illustration.”⁷ Vanity Fair selected Andy Warhol to create the illustration for their November 1984 issue.⁸ Additionally, unbeknownst to Goldsmith, Warhol created 15 other works based on Goldsmith’s photograph, collectively referred to as the ‘Prince Series.’⁹ After Prince passed away in 2016, Condé Nast licensed one of the ‘Prince Series’ illustrations, ‘Orange Prince,’ from the AWF.¹⁰

After discovering the creation of the ‘Prince Series’ as a result of the Condé Nast tribute issue cover in 2016, Goldsmith contacted the AWF to inform them of the potential copyright infringement by way of the use of ‘Orange Prince.’¹¹ In response, the AWF sued Goldsmith and her agency for a declaratory judgment based on noninfringement or fair use, and Goldsmith countersued for copyright infringement.¹² The District Court granted summary judgment for the AWF, however the Court of Appeals for the Second Circuit reversed and remanded, finding that all four fair use factors weighed in favor of Goldsmith.¹³

In affirming the Second Circuit’s decision, the Supreme Court of the United States held that Warhol’s use of Goldsmith’s photograph did not constitute fair use.¹⁴ As the AWF did not challenge the determination that factors two, three, or four weighed in favor of Goldsmith, the

⁷ *Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 517.

⁸ *Id.* 517–18.

⁹ *Id.* at 518–19.

¹⁰ *Id.* at 519–20.

¹¹ *Id.* at 522.

¹² *Id.*

¹³ *Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 522.

¹⁴ *Id.* at 551.

Court only discussed factor one.¹⁵ When analyzing factor one, the Court noted that the question at hand is “whether and to what extent” the use has a different purpose or character from the original.¹⁶ The larger the difference, or ‘transformative’ nature of the use, the more likely that factor one weighs in favor of fair use.¹⁷ The Court described a work as ‘transformative’ when it “adds something new, with a further purpose or different character.”¹⁸ However, the Court acknowledged that the first factor is likely to weigh against fair use where the original work and use “share the same or highly similar purposes” and the use is of a commercial nature.¹⁹

In determining that factor one weighed in favor of Goldsmith, the Court found that Goldsmith’s photograph and the AWF’s ‘Orange Prince’ shared “substantially the same purpose” as both were “portraits of Prince used to depict Prince in magazine stories about Prince.”²⁰ Additionally, the AWF’s use of Goldsmith’s photograph was of a commercial nature.²¹

In comparison, the Court noted that Warhol’s ‘Soup Can Series’ illustrated that some uses, although heavily borrowing from the original, can still be fair use.²² Although Warhol’s ‘Soup Can Series’ clearly used Campbell’s soup logo, the Court stated that the purpose of Campbell’s logo and Warhol’s artwork did not share the same purpose: the former’s purpose related to advertising soup, while the latter intended to comment on consumerism.²³

¹⁵ *Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 551.

¹⁶ *Id.* at 529.

¹⁷ *Id.*

¹⁸ *Id.* at 528.

¹⁹ *Id.* at 532–33.

²⁰ *Id.* at 526.

²¹ *Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 526.

²² *Id.* at 539–40.

²³ *Id.* at 540.

IV. TATTOOS AND THE FAIR USE DEFENSE



Prior to the *Warhol* decision, copyright infringement claims regarding tattoos were not common.²⁶ However, following *Warhol* and its discussion of factor one, two cases were decided by District Courts on opposite sides of the country with differing potential implications for tattoo artists as a result.

In September 2023, a Pennsylvania District Court found that Netflix’s use of the plaintiff’s tattoo constituted fair use.²⁷ In *Cramer v. Netflix*, the plaintiff, a tattoo artist, brought a copyright infringement claim against Netflix for their use of a photograph depicting the plaintiff’s Joe Exotic tattoo that appeared for approximately 2.2 seconds during episode one of Netflix’s second season of “Tiger King.”²⁸ In finding for Netflix, the Court found that factors one, three, and four weighed in favor of fair use.²⁹ Specifically, when discussing factor one, the Court relied on the *Warhol* decision in finding that Netflix’s use of the plaintiff’s tattoo was ‘transformative.’³⁰ The Court stated that, unlike *Warhol*, Netflix’s use of the plaintiff’s tattoo was for a “fundamentally different purpose than [the] plaintiff originally intended,” noting that Netflix’s purpose was to show the

²⁴ *Cramer v. Netflix, Inc.*, No. 3:22-CV-131, 2023 WL 6130030 *2 (W.D. Pa. Sept. 18, 2023).

²⁵ Complaint at 7, *Sedlik v. Drachenberg*, No. CV211102, 2023 WL 6787447 (C.D. Cal. Oct. 10, 2023) (No. 2:21CV01102).

²⁶ See Generally Alyssa Corianna-Marie Anderson, *Implications of Fair Use regarding Socioeconomic & Social Status the Tattoo Industry as the Final Frontier*, 15 AM. U. INTEL. PROP. BRIEF 1, 8 (2023); *Solid Oak Sketches, LLC, v. 2K Games, Inc.*, 449 F. Supp. 3d 333 (2d. Cir. 2021); *Alexander v. Take-Two Interactive Software, Inc.*, 489 F. Supp. 3d 812 (S.D. Ill. 2020).

²⁷ *Cramer*, 2023 WL 6130030, at *1-11.

²⁸ *Id.* at *1-3.

²⁹ *Id.* at *8-9.

³⁰ *Id.* at *6-8.

public reaction to Joe Exotic after season one of ‘Tiger King.’³¹ Additionally, although the Court found that factor two weighed in favor of the plaintiff, the Court noted that less weight is given to factor two where the use is ‘transformative’ under factor one, like in this case.³²

More recently in January 2024, a California District Court found in favor of the tattoo artist based on the fair use defense following a jury trial.³³ In *Sedlik v. Drachenberg*, the plaintiff, photographer Jeffrey Sedlik (“Sedlik”), brought a copyright infringement claim against tattoo artist Katherine Von Drachenberg (“Kat Von D”).³⁴ Kat Von D used Sedlik’s photograph of famous jazz musician, Miles Davis, in a tattoo that Kat Von D had inked and posted on social media.³⁵ Both parties moved for summary judgment, with Sedlik arguing both the tattoo and social media post were substantially similar to his photograph, whereas Kat Von D relied on the fair use defense.³⁶ The Court refused to grant summary judgment to either party, finding that a trial was necessary to determine whether Kat Von D’s use of Sedlik’s photograph constituted copyright infringement or fair use.³⁷ However, before trial began, the *Warhol* decision was released, forcing the Court to reconsider the motions for summary judgment based on the Supreme Court’s analysis of factor one of the fair use defense.³⁸ Although influential on the analysis, the Court determined that *Warhol* did not impact the Court’s conclusion that the issue of fair use was more appropriately left to the jury in this case.³⁹ In January 2024, following a trial, the jury had determined that Kat Von D’s tattoo of Sedlik’s photograph was not substantially similar to the original photograph,

³¹ *Cramer*, 2023 WL 6130030, at *7–8.

³² *Id.* at *8.

³³ Judgment at 1, *Sedlik v. Drachenberg*, No. CV211102, 2023 WL 6787447 (C.D. Cal. Oct. 10, 2023) (No. 2:21-cv-01102-DSF-MRW).

³⁴ *Sedlik v. Drachenberg*, No. CV211102, 2023 WL 6787447 *1 (C.D. Cal. Oct. 10, 2023).

³⁵ *Id.* at *1.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at *2.

³⁹ *Id.*

thus a fair use determination was not required, and that Kat Von D’s social media post of the inking constituted fair use.⁴⁰ Notably, although a written opinion by the Court has yet to be released, Kat Von D may have been successful in her attempt to distinguish this case from *Warhol* by indicating that she opted to not seek compensation for her tattoo or monetize her social media posts of the tattoo.⁴¹

V. WHAT DOES THIS MEAN FOR TATTOO ARTISTS?

As courts continue to analyze the framework set out by the Supreme Court in *Warhol*, it is important that all artists, especially tattoo artists, recognize their rights regarding copyright law and their tangible mediums of expression. In attempting to argue a use constitutes fair use, it is clear that the defense is a fact-based analysis and that courts may give more weight to ‘transformative’ works that are not of a commercial nature. As such, tattoo artists need to be prepared to explain the purpose behind their use, either original or when using copyrighted material.

⁴⁰ Verdict Form at 2–4, *Sedlik v. Drachenberg*, No. CV211102, 2023 WL 6787447 (C.D. Cal. Oct. 10, 2023) (No. 2:21-cv-01102-DSF-MRW).

⁴¹ Thomas Holt & Kathleen Wills, *The Legal Future of Tattoos: A Jury Rules Against Copyright Infringement*, JD SUPRA (Feb. 12, 2024), <https://www.jdsupra.com/legalnews/the-legal-future-of-tattoos-a-jury-5834767/>.