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SUPREME COURT OF THE UNITED STATES

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**ANDY WARHOL FOUNDATION FOR THE VISUAL
ARTS, INC. v. GOLDSMITH ET AL.****CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

No. 21–869. Argued October 12, 2022—Decided May 18, 2023

In 2016, petitioner Andy Warhol Foundation for the Visual Arts, Inc. (AWF) licensed to Condé Nast for \$10,000 an image of “Orange Prince”—an orange silkscreen portrait of the musician Prince created by pop artist Andy Warhol—to appear on the cover of a magazine commemorating Prince. Orange Prince is one of 16 works now known as the Prince Series that Warhol derived from a copyrighted photograph taken in 1981 by respondent Lynn Goldsmith, a professional photographer. Goldsmith had been commissioned by Newsweek in 1981 to photograph a then “up and coming” musician named Prince Rogers Nelson, after which Newsweek published one of Goldsmith’s photos along with an article about Prince. Years later, Goldsmith granted a limited license to Vanity Fair for use of one of her Prince photos as an “artist reference for an illustration.” The terms of the license included that the use would be for “one time” only. Vanity Fair hired Warhol to create the illustration, and Warhol used Goldsmith’s photo to create a purple silkscreen portrait of Prince, which appeared with an article about Prince in Vanity Fair’s November 1984 issue. The magazine credited Goldsmith for the “source photograph” and paid her \$400. After Prince died in 2016, Vanity Fair’s parent company (Condé Nast) asked AWF about reusing the 1984 Vanity Fair image for a special edition magazine that would commemorate Prince. When Condé Nast learned about the other Prince Series images, it opted instead to purchase a license from AWF to publish Orange Prince. Goldsmith did not know about the Prince Series until 2016, when she saw Orange Prince on the cover of Condé Nast’s magazine. Goldsmith notified AWF of her belief that it had infringed her copyright. AWF then sued Goldsmith for a declaratory judgment of noninfringement or, in the

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alternative, fair use. Goldsmith counterclaimed for infringement. The District Court considered the four fair use factors in 17 U. S. C. §107 and granted AWF summary judgment on its defense of fair use. The Court of Appeals reversed, finding that all four fair use factors favored Goldsmith. In this Court, the sole question presented is 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,” §107(1), weighs in favor of AWF’s recent commercial licensing to Condé Nast.

Held: The “purpose and character” of AWF’s use of Goldsmith’s photograph in commercially licensing Orange Prince to Condé Nast does not favor AWF’s fair use defense to copyright infringement. Pp. 12–38.

(a) AWF contends that the Prince Series works are “transformative,” and that the first fair use factor thus weighs in AWF’s favor, because the works convey a different meaning or message than the photograph. But the first fair use factor instead focuses on whether an allegedly infringing use has a further purpose or different character, which is a matter of degree, and the degree of difference must be weighed against other considerations, like commercialism. Although new expression, meaning, or message may be relevant to whether a copying use has a sufficiently distinct purpose or character, it is not, without more, dispositive of the first factor. Here, the specific use of Goldsmith’s photograph alleged to infringe her copyright is AWF’s licensing of Orange Prince to Condé Nast. As portraits of Prince used to depict Prince in magazine stories about Prince, the original photograph and AWF’s copying use of it share substantially the same purpose. Moreover, AWF’s use is of a commercial nature. Even though Orange Prince adds new expression to Goldsmith’s photograph, in the context of the challenged use, the first fair use factor still favors Goldsmith. Pp. 12–27.

(1) The Copyright Act encourages creativity by granting to the creator of an original work a bundle of rights that includes the rights to reproduce the copyrighted work and to prepare derivative works. 17 U. S. C. §106. Copyright, however, balances the benefits of incentives to create against the costs of restrictions on copying. This balancing act is reflected in the common-law doctrine of fair use, codified in §107, which provides: “[T]he fair use of a copyrighted work, . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright.” To determine whether a particular use is “fair,” the statute enumerates four factors to be considered. The factors “set forth general principles, the application of which requires judicial balancing, depending upon relevant circumstances.” *Google LLC v. Oracle America, Inc.*, 593 U. S. ___, ___.

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

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educational purposes,” §107(1), considers the reasons for, and nature of, the copier’s use of an original work. The central question it asks is whether the use “merely supersedes the objects of the original creation . . . (supplanting the original), or instead adds something new, with a further purpose or different character.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U. S. 569, 579 (internal quotation marks and citations omitted). As most copying has some further purpose and many secondary works add something new, the first factor asks “whether *and to what extent*” the use at issue has a purpose or character different from the original. *Ibid.* (emphasis added). The larger the difference, the more likely the first factor weighs in favor of fair use. A use that has a further purpose or different character is said to be “transformative,” but that too is a matter of degree. *Ibid.* To preserve the copyright owner’s right to prepare derivative works, defined in §101 of the Copyright Act to include “any other form in which a work may be recast, transformed, or adapted,” the degree of transformation required to make “transformative” use of an original work must go beyond that required to qualify as a derivative.

The Court’s decision in *Campbell* is instructive. In holding that parody may be fair use, the Court explained that “parody has an obvious claim to transformative value” because “it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.” 510 U. S., at 579. The use at issue was 2 Live Crew’s copying of Roy Orbison’s song, “Oh, Pretty Woman,” to create a rap derivative, “Pretty Woman.” 2 Live Crew transformed Orbison’s song by adding new lyrics and musical elements, such that “Pretty Woman” had a different message and aesthetic than “Oh, Pretty Woman.” But that did not end the Court’s analysis of the first fair use factor. The Court found it necessary to determine whether 2 Live Crew’s transformation rose to the level of parody, a distinct purpose of commenting on the original or criticizing it. Further distinguishing between parody and satire, the Court explained that “[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.” *Id.*, at 580–581. More generally, when “commentary has no critical bearing on the substance or style of the original composition, . . . the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.” *Id.*, at 580.

Campbell illustrates two important points. First, the fact that a use is commercial as opposed to nonprofit is an additional element of the first fair use factor. The commercial nature of a use is relevant, but not dispositive. It is to be weighed against the degree to which the use

has a further purpose or different character. Second, the first factor relates to the justification for the use. In a broad sense, a use that has a distinct purpose is justified because it furthers the goal of copyright, namely, to promote the progress of science and the arts, without diminishing the incentive to create. In a narrower sense, a use may be justified because copying is reasonably necessary to achieve the user's new purpose. Parody, for example, "needs to mimic an original to make its point." *Id.*, at 580–581. Similarly, other commentary or criticism that targets an original work may have compelling reason to "conjure up" the original by borrowing from it. *Id.*, at 588. An independent justification like this is particularly relevant to assessing fair use where an original work and copying use share the same or highly similar purposes, or where wide dissemination of a secondary work would otherwise run the risk of substitution for the original or licensed derivatives of it. See, e.g., *Google*, 593 U. S., at ___ (slip op., at 26).

In sum, if an original work and secondary use share the same or highly similar purposes, and the secondary use is commercial, the first fair use factor is likely to weigh against fair use, absent some other justification for copying. Pp. 13–20.

(2) The fair use provision, and the first factor in particular, requires an analysis of the specific "use" of a copyrighted work that is alleged to be "an infringement." §107. The same copying may be fair when used for one purpose but not another. See *Campbell*, 510 U. S., at 585. Here, Goldsmith's copyrighted photograph has been used in multiple ways. The Court limits its analysis to the specific use alleged to be infringing in this case—AWF's commercial licensing of Orange Prince to Condé Nast—and expresses no opinion as to the creation, display, or sale of the original Prince Series works. In the context of Condé Nast's special edition magazine commemorating Prince, the purpose of the Orange Prince image is substantially the same as that of Goldsmith's original photograph. Both are portraits of Prince used in magazines to illustrate stories about Prince. The use also is of a commercial nature. Taken together, these two elements counsel against fair use here. Although a use's transformativeness may outweigh its commercial character, in this case both point in the same direction. That does not mean that all of Warhol's derivative works, nor all uses of them, give rise to the same fair use analysis. Pp. 20–27.

(b) AWF contends that the purpose and character of its use of Goldsmith's photograph weighs in favor of fair use because Warhol's silk-screen image of the photograph has a different meaning or message. By adding new expression to the photograph, AWF says, Warhol made transformative use of it. *Campbell* did describe a transformative use as one that "alter[s] the first [work] with new expression, meaning, or

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message.” 510 U. S., at 579. But *Campbell* cannot be read to mean that §107(1) weighs in favor of any use that adds new expression, meaning, or message. Otherwise, “transformative use” would swallow the copyright owner’s exclusive right to prepare derivative works, as many derivative works that “recast, transfor[m] or adap[t]” the original, §101, add new expression of some kind. The meaning of a secondary work, as reasonably can be perceived, should be considered to the extent necessary to determine whether the purpose of the use is distinct from the original. For example, the Court in *Campbell* considered the messages of 2 Live Crew’s song to determine whether the song had a parodic purpose. But fair use is an objective inquiry into what a user does with an original work, not an inquiry into the subjective intent of the user, or into the meaning or impression that an art critic or judge draws from a work.

Even granting the District Court’s conclusion that Orange Prince reasonably can be perceived to portray Prince as iconic, whereas Goldsmith’s portrayal is photorealistic, that difference must be evaluated in the context of the specific use at issue. The purpose of AWF’s recent commercial licensing of Orange Prince was to illustrate a magazine about Prince with a portrait of Prince. Although the purpose could be more specifically described as illustrating a magazine about Prince with a portrait of Prince, one that portrays Prince somewhat differently from Goldsmith’s photograph (yet has no critical bearing on her photograph), that degree of difference is not enough for the first factor to favor AWF, given the specific context and commercial nature of the use. To hold otherwise might authorize a range of commercial copying of photographs to be used for purposes that are substantially the same as those of the originals.

AWF asserts another related purpose of Orange Prince, which is to comment on the “dehumanizing nature” and “effects” of celebrity. No doubt, many of Warhol’s works, and particularly his uses of repeated images, can be perceived as depicting celebrities as commodities. But even if such commentary is perceptible on the cover of Condé Nast’s tribute to “Prince Rogers Nelson, 1958–2016,” on the occasion of the man’s death, the asserted commentary is at *Campbell*’s lowest ebb: It “has no critical bearing on” Goldsmith’s photograph, thus the commentary’s “claim to fairness in borrowing from” her work “diminishes accordingly (if it does not vanish).” *Campbell*, 510 U. S., at 580. The commercial nature of the use, on the other hand, “loom[s] larger.” *Ibid.* Like satire that does not target an original work, AWF’s asserted commentary “can stand on its own two feet and so requires justification for the very act of borrowing.” *Id.*, at 581. Moreover, because AWF’s copying of Goldsmith’s photograph was for a commercial use so similar to the photograph’s typical use, a particularly compelling justification is

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