

Copyright Act of 1976 — Fair Use —
Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith

Art is imitation (at least according to Plato and Justice Kagan).¹ Last Term, in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*,² the Supreme Court held that the licensing of Andy Warhol’s “Orange Prince” portrait to Condé Nast was not a transformative use of Lynn Goldsmith’s reference photo because “Goldsmith’s original photograph of Prince, and the Andy Warhol Foundation’s (AWF) copying use of that photograph . . . share substantially the same purpose, and the use is of a commercial nature.”³ Exhibiting skepticism toward subjective reactions to artistic works, the majority’s analysis resembled formalist art philosophy, while Justice Kagan — whose dissent defined the value of the Prince series through its exhibition of new expression — embodied the techniques of expressionism.⁴ Theories of art philosophy⁵ help to explain the fundamental disagreements in the Court’s understanding of transformative use. While a formalist approach furthers judicial restraint, such a technique frustrates the fair use defense’s role as an “escape valve” for First Amendment values,⁶ as the First Amendment is uniquely concerned with the specific messages conveyed by the speaker and perceived by the audience.

“This copyright case involves not one, but two artists.”⁷ The first, Andy Warhol, was a world-renowned artist, “known for his blotted-line ink drawings, using a process he developed.”⁸ The second artist, Lynn Goldsmith, “is less well known” but “a trailblazer,” too.⁹ Goldsmith is a recording artist, film director, celebrity portrait photographer, and one

¹ The “imitation” described by Plato referred to imitation of the real world, while Justice Kagan’s use of imitation referred to the recycling of artistic elements. Compare Cornelius Chukwudi Amadi, *Art as Imitation in Plato’s Philosophy: A Critical Appraisal*, 20 J. APPLIED PHIL. 125, 127 (2022) (“In the *Republic*, Plato argues that art of any kind and epic poetry in particular is an imitation (*mimesis*), and the creator of this imitation . . . is an imitator.”), with *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1305–11 (2023) (Kagan, J., dissenting).

² 143 S. Ct. 1258.

³ *Id.* at 1287.

⁴ These theories have been the leading theories of art philosophy within the past century. F. David Martin, *On the Supposed Incompatibility of Expressionism and Formalism*, 15 J. AESTHETICS & ART CRITICISM 94, 94 (1956) (“Aesthetics in the last hundred years has been dominated by expressionists and formalists.”).

⁵ “[T]hese theories often have multiple variations.” Glen Cheng, *The Aesthetics of Copyright Adjudication*, 19 UCLA ENT. L. REV. 113, 136 n.194 (2012).

⁶ Courts “have systemically rejected first amendment claims in copyright cases” because of “limitations [that] include the doctrine of fair use, the dichotomy between idea and expression, and the compulsory licensing scheme.” Henry S. Hoberman, *Copyright and the First Amendment: Freedom or Monopoly of Expression?*, 14 PEPP. L. REV. 571, 571–72 (1987) (footnotes omitted).

⁷ *Warhol*, 143 S. Ct. at 1266.

⁸ *Andy Warhol*, ANDY WARHOL MUSEUM, <https://www.warhol.org/andy-warhols-life> [https://perma.cc/5VLQ-5U4J].

⁹ *Warhol*, 143 S. Ct. at 1266.

of the first women to become a rock-and-roll photographer.¹⁰ For artists such as Goldsmith and Warhol, the Constitution grants Congress the powerful ability to secure for “Authors” the “exclusive Right to their respective Writings” — all in order to “promote the Progress of Science and useful Arts.”¹¹ The Copyright Act of 1976¹² enshrines this right and allows artists to stop the unlawful reproduction (or the creation of derivative works) of their art.¹³ However, the doctrine of fair use allows the “fair use” of a copyrighted work.¹⁴ Now codified in 17 U.S.C. § 107, this equitable defense requires courts to consider four factors in determining whether a use is “fair,” the first of which evaluates “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”¹⁵

In 1981, Goldsmith “convinced Newsweek magazine to hire her to photograph Prince Rogers Nelson, then an ‘up and coming’ and ‘hot young musician.’”¹⁶ The magazine agreed, and Goldsmith photographed Prince in concert and in her studio.¹⁷ Then, in 1984, Goldsmith licensed one of the Prince photographs to *Vanity Fair* for use as an “artist reference.”¹⁸ The agreed-upon license required that the illustration created from Goldsmith’s photograph would be used “one time full page and one time under one quarter page.”¹⁹ Goldsmith’s agency made clear that “[n]o other usage right [had been] granted.”²⁰

Vanity Fair then hired Warhol to create the illustration from Goldsmith’s reference photo.²¹ The violet-hued final piece was published in an article titled “Purple Fame.”²² Unbeknownst to Goldsmith, Warhol made a whole set of works from the reference photograph that included thirteen silkscreen prints and two pencil drawings, collectively referred to as the “Prince Series.”²³ Goldsmith learned of the Prince Series only in 2016 when, after Prince passed away,²⁴ Condé Nast published an *orange* — not purple — silkscreen portrait of Prince (“Orange

¹⁰ *Bio & CV*, LYNN GOLDSMITH, <https://lynngoldsmith.com/wordpress/bio-cv> [<https://perma.cc/7F65-FHWB>].

¹¹ U.S. CONST. art. I, § 8, cl. 8.

¹² 17 U.S.C. §§ 101–805.

¹³ *See id.* § 106.

¹⁴ *Warhol*, 143 S. Ct. at 1273.

¹⁵ 17 U.S.C. § 107.

¹⁶ *Warhol*, 143 S. Ct. at 1266.

¹⁷ *Id.*

¹⁸ *Id.* at 1267.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *See* Tristan Vox, *Purple Fame: An Appreciation of Prince at the Height of His Powers*, VANITY FAIR (Apr. 22, 2016), <https://www.vanityfair.com/culture/2016/04/prince-at-the-height-of-his-powers> [<https://perma.cc/E8UZ-HKKR>].

²³ *Warhol*, 143 S. Ct. at 1268.

²⁴ *See* *Legendary Musician and Megawatt Star Prince Dies at 57*, HISTORY, <https://www.history.com/this-day-in-history/music-legend-prince-dies> [<https://perma.cc/56EV-Q57T>].

Prince”)²⁵ on the cover of a “special edition magazine” celebrating the iconic artist’s life.²⁶

To obtain the Orange Prince, Condé Nast had previously contacted AWF²⁷ — which now owned copyrights in the Prince Series after Warhol’s passing — “about the possibility of reusing the [Purple Fame] image for a special edition magazine.”²⁸ After AWF informed Condé Nast about the rest of the Prince Series, the company elected to license the Orange Prince instead.²⁹ Following her discovery of the cover, Goldsmith notified AWF of her belief that the licensing of the Orange Prince to Condé Nast infringed her copyright.³⁰ Following this contact, AWF sued Goldsmith and her agency for “a declaratory judgment of noninfringement or, in the alternative, fair use.”³¹

The district court granted summary judgment for AWF, declaring that Warhol made a “fair use” of [Goldsmith’s] photograph[.]³² Judge Koeltl held that the Prince Series was a “transformative”³³ use of the reference photo because when viewed “side-by-side,”³⁴ the works “have a different character, give Goldsmith’s photograph a new expression, and employ new aesthetics with creative and communicative results.”³⁵

The Court of Appeals for the Second Circuit reversed and remanded, finding that all four § 107 factors favored Goldsmith.³⁶ Notably, Judge Lynch defined a “transformative” use not as “any secondary work that adds a new aesthetic or new expression to its source material,”³⁷ but instead, one that uses “its source material . . . in service of a ‘fundamentally different and new’ artistic purpose and character.”³⁸

AWF sought certiorari at the Supreme Court.³⁹ On appeal, AWF challenged only the analysis of the first § 107 factor.⁴⁰ The Supreme Court granted certiorari to determine whether “the purpose and character” of Warhol’s use weighed in Goldsmith’s favor.⁴¹

²⁵ See *Orange Prince, 1985*, WIKIART, <https://www.wikiart.org/en/andy-warhol/orange-prince-1984> [<https://perma.cc/TTR9-DF3M>].

²⁶ *Warhol*, 143 S. Ct. at 1270.

²⁷ See generally *About*, ANDY WARHOL FOUND. FOR VISUAL ARTS, <https://warholfoundation.org/about> [<https://perma.cc/5VXY-BYRX>].

²⁸ *Warhol*, 143 S. Ct. at 1269.

²⁹ *Id.*

³⁰ *Id.* at 1271.

³¹ *Id.*

³² *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 331 (S.D.N.Y. 2019).

³³ *Id.* at 326.

³⁴ *Id.* at 325 (quoting *Cariou v. Prince*, 714 F.3d 694, 707–08 (2d Cir. 2013)).

³⁵ *Id.* at 326 (alterations in original) (quoting *Cariou*, 714 F.3d at 708).

³⁶ *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 32 (2d Cir. 2021).

³⁷ *Id.* at 38–39.

³⁸ *Id.* at 42. Additionally, the Court of Appeals rejected AWF’s assertion that the Prince Series did not infringe Goldsmith’s copyright because the works were not “substantially similar.” *Id.* at 52–54.

³⁹ *Warhol*, 143 S. Ct. at 1272.

⁴⁰ *Id.*

⁴¹ *Id.* at 1272–73 (quoting 17 U.S.C. § 107(1)).

Writing for the majority, Justice Sotomayor affirmed the Second Circuit’s decision, stating that although “Warhol’s contribution to contemporary art is undeniable,”⁴² the alleged use was not “transformative” because the work and AWF’s use “share substantially the same purpose.”⁴³ Using the seminal fair use case *Campbell v. Acuff-Rose Music, Inc.*,⁴⁴ Justice Sotomayor clarified two points of the first-factor analysis. *First*, “the fact that a use is commercial as opposed to nonprofit is an additional ‘element of the first factor’” that does not automatically render the use unfair.⁴⁵ *Second*, “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.”⁴⁶ Justice Sotomayor noted that a “typical use of a celebrity photograph is to accompany stories about the celebrity, often in magazines,”⁴⁷ and such licenses “provide an economic incentive to create original works, which is the goal of copyright.”⁴⁸ Therefore, AWF’s licensing possessed “substantially the same [purpose] as that of Goldsmith’s photograph.”⁴⁹ Thus, the first factor leaned in Goldsmith’s favor.⁵⁰

Next, Justice Sotomayor disagreed with AWF’s contention that the Prince Series is transformative because it “has a new meaning or message” as a “comment on celebrity.”⁵¹ While *Campbell* “did describe a transformative use as one that ‘alter[s] the first [work] with new expression, meaning, or message,’” new meaning or expression is not sufficient to render a work transformative; otherwise, the fair use defense would “swallow the copyright owner’s exclusive right to prepare derivative works.”⁵² Additionally, the “subjective intent of the user (or the subjective interpretation of a court) [does not] determine the purpose of the use.”⁵³ Instead, the “meaning of a secondary work” should be evaluated only to ascertain “whether the purpose of the use is distinct from the original, for instance, because the use comments on, criticizes, or provides otherwise unavailable information about the original.”⁵⁴

⁴² *Id.* at 1266.

⁴³ *Id.* at 1287. The majority defined the challenged “use” in question as “AWF’s licensing of Orange Prince to Condé Nast” and not the initial creation of the Prince Series. *Id.* at 1273.

⁴⁴ 510 U.S. 569 (1994).

⁴⁵ *Warhol*, 143 S. Ct. at 1276 (quoting *Campbell*, 510 U.S. at 584).

⁴⁶ *Id.* (citing, inter alia, *Campbell*, 510 U.S. at 579).

⁴⁷ *Id.* at 1278.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1273.

⁵¹ *Id.* at 1281–82.

⁵² *Id.* at 1282 (alterations in original) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

⁵³ *Id.* at 1284.

⁵⁴ *Id.* (citing *Authors Guild v. Google, Inc.*, 804 F.3d 202, 215–16 (2d Cir. 2015)).

Before concluding, Justice Sotomayor addressed the dissent's concerns that the majority's holding will frustrate creativity — writing that it “will not impoverish our world to require AWF to pay Goldsmith a fraction of the proceeds from its reuse of her copyrighted work.”⁵⁵ Additionally, “copyright law is replete with escape valves” like “the idea-expression distinction . . . and, yes, the defense of fair use.”⁵⁶

Justice Gorsuch concurred, writing that the “question before us is a narrow one of statutory interpretation.”⁵⁷ He agreed with the majority's view because “[n]othing in the copyright statute calls on judges to speculate about the purpose an artist may have in mind when working on a particular project” or “requires judges to try their hand at art criticism and assess the aesthetic character of the resulting work.”⁵⁸ Therefore, § 107 does not instruct a judge to answer whether “Mr. Warhol's image seek[s] to depict Prince as a ‘larger-than-life’ icon while Ms. Goldsmith's photograph attempts to cast him in a more ‘vulnerable’ light” or whether “the artistic purposes latent in the two images and their aesthetic character [are] actually more similar than that.”⁵⁹

Dissenting from the majority, Justice Kagan proclaimed that “the Court declares that Andy Warhol's eye-popping silkscreen of Prince — a work based on but dramatically altering an existing photograph — is (in copyright lingo) not ‘transformative.’”⁶⁰ She argued that this conclusion contradicted the Court's own precedent that has “used Warhol paintings as the perfect exemplar of a ‘copying use that adds something new and important.’”⁶¹ Justice Kagan stated that the fact that consumers, like Condé Nast, would value the aesthetic differences between the two pieces demonstrates that “Warhol had effected a transformation.”⁶²

“Nothing comes from nothing,” copied Justice Kagan from songwriter Richard Rogers, and judicial precedent recognizes that “new art, new invention, and new knowledge arise from existing works.”⁶³ The dissent asserted that the “differences in meaning that arose from replacing a realistic — and indeed humanistic — depiction of the performer with an unnatural, disembodied, masklike one” rendered the work transformative.⁶⁴ However, the “majority does not see it” and the dissent observed that there “is precious little evidence in today's opinion that the majority has actually looked at these images, much less that it has engaged with expert views of their aesthetics and meaning.”⁶⁵ While

⁵⁵ *Id.* at 1286.

⁵⁶ *Id.* at 1287.

⁵⁷ *Id.* at 1288 (Gorsuch, J., concurring).

⁵⁸ *Id.* at 1289.

⁵⁹ *Id.* at 1290 (quoting *id.* at 1271, 1284 (majority opinion)).

⁶⁰ *Id.* at 1291 (Kagan, J., dissenting).

⁶¹ *Id.* at 1292 (quoting *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1202–03 (2021)).

⁶² *Id.* at 1297.

⁶³ *Id.*

⁶⁴ *Id.* at 1300.

⁶⁵ *Id.* at 1301.

Justice Gorsuch explicitly eschewed inquiries into artistic meaning, the majority “occasionally acknowledge[d] the balance that the fair use provision contemplates” but failed to apply it.⁶⁶ The Court’s own “precedent . . . conflicts with nearly all the majority says.”⁶⁷ To prove that copying is essential to a creative ecosystem, Justice Kagan proffered quotations and anecdotes from artists who knew that “[c]reative progress unfolds through use and reuse, framing and reframing: [o]ne work builds on what has gone before; and later works build on that one; and so on through time.”⁶⁸ Warhol is “the very embodiment of transformative copying.”⁶⁹

Audience reactions to *Warhol* “are best described as uncertain.”⁷⁰ Like the doctrine of fair use, defining what “is” or “isn’t” art — and why — is a millennia-old problem yet to be solved.⁷¹ This fundamental judgment regarding the definition of art constructs the gap between the majority and dissent. How we define art determines how we see its value, and a utilitarian⁷² judge’s perception of the value of a use shapes whether or not the use is labeled “transformative.” Perhaps unknowingly, the opinions of the Court utilized different theories of art philosophy to justify their understanding of the Orange Prince’s transformative value.⁷³ Justice Kagan’s dissent resembled expressionism, while Justices Sotomayor and Gorsuch exhibited a formalistic understanding of art. Theories regarding the “role” of a judge likely drew the majority to a formalistic understanding of art. However, by deflating the value of added expression, the majority’s test frustrates the fair use doctrine’s

⁶⁶ *Id.* at 1303.

⁶⁷ *Id.* at 1304.

⁶⁸ *Id.* at 1311.

⁶⁹ *Id.*

⁷⁰ Peter J. Karol, *After Warhol: The Transformative Impact of Warhol v. Goldsmith*, ARTFORUM (June 5, 2023, 9:20 AM), <https://www.artforum.com/slant/the-transformative-impact-of-warhol-v-goldsmith-90667> [<https://perma.cc/W7T8-75HV>]. *But see* Amy Adler, *The Supreme Court’s Warhol Decision Just Changed the Future of Art*, ART AM. (May 26, 2023, 10:47 AM), <https://www.artnews.com/art-in-america/columns/supreme-court-andy-warhol-decision-appropriation-artists-impact-1234669718> [<https://perma.cc/AT3Z-L99S>] (writing that “the Court’s Warhol decision will significantly limit the amount of borrowing from and building on previous works that artists can engage in”). Many see the case as a rebuke of the Second Circuit’s infamous *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), in which artist Richard Prince’s appropriation works set the “high water mark” of artistic fair use. Kyle Jahner, *Warhol Fair Use Ruling Reframes Appropriation Art Legal Fights*, BLOOMBERG L. (May 30, 2023, 5:05 AM), <https://news.bloomberglaw.com/ip-law/warhol-fair-use-ruling-reframes-appropriation-art-legal-fights> [<https://perma.cc/JLR4-YGT6>].

⁷¹ Plato wrote that “the painter, the tragedian, and the musician are imitators of an imitation, twice removed from the truth.” *Mimesis*, BRITANNICA (Nov. 22, 2011), <https://www.britannica.com/art/mimesis> [<https://perma.cc/RLX2-Y97K>].

⁷² “Intellectual property is fundamentally about incentives to invent and create.” Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 993 (1997).

⁷³ Although the majority attempts to cabin its fair use analysis to AWF’s licensing to Condé Nast, this distinction does not feel particularly convincing. *See, e.g.*, Karol, *supra* note 70 (“If this all feels a bit off to you, good. It should. It doesn’t track with art practice.”).

ability to operate as a First Amendment escape valve that protects free speech.

Alchemist-like, thinkers have spent careers attempting to distill definitions of art. What separates the “good” art from the “bad”?⁷⁴ Why do we react emotionally to certain compilations of shapes, words, colors, and sounds?⁷⁵ Art philosophers specialize in this difficult task. While the art “critic says that a given work of music is expressive, . . . the philosopher of art asks what is meant by saying that a work of art is expressive and how one determines whether it is.”⁷⁶

Like art, the doctrine of fair use has confounded countless intellectuals (and jurists).⁷⁷ In *Campbell*, the Supreme Court embraced Judge Leval’s formulation of fair use that appeared in his seminal article, *Toward a Fair Use Standard*.⁷⁸ Judge Leval believed that a fair use “must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity.”⁷⁹ And, the thrust of that determination “turn[ed] primarily on whether, and to what extent, the challenged use is *transformative*.”⁸⁰ Thus, the first factor of the fair use analysis essentially boils down to a utilitarian evaluation of the defendant’s use.⁸¹

Justice Kagan’s opinion fielded an expressionistic understanding of transformative use. The expressionist manifesto is that “art is expression.”⁸² Expressionists believe that “[i]nstead of reflecting states of the external world, art is held to reflect the inner state of the artist.”⁸³ Thus, the expressionist critic focuses on the communicative aspects of art — that is, what the audience can glean from the specific messages conveyed by the artist through their medium. Justice Kagan emphasized that the Prince Series is “a transformation”⁸⁴ not only because of aesthetic differences, but also because Warhol’s physical alterations amount to “an

⁷⁴ See generally Thomas Adajian, *The Definition of Art*, STAN. ENCYCLOPEDIA OF PHIL. (Aug. 14, 2018), <https://plato.stanford.edu/archives/spr2022/entries/art-definition> [<https://perma.cc/J5DV-JFBR>].

⁷⁵ See generally Jaspal Riyait & Melissa Kirsch, *How We Respond to Art*, N.Y. TIMES (Feb. 18, 2021), <https://www.nytimes.com/2021/02/18/at-home/how-we-respond-to-art.html> [<https://perma.cc/6BFH-JPLP>].

⁷⁶ John Hospers, *Philosophy of Art*, BRITANNICA (Oct. 4, 2022), <https://www.britannica.com/topic/philosophy-of-art> [<https://perma.cc/E9EB-AMC7>].

⁷⁷ See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990).

⁷⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (citing Leval, *supra* note 77, at 1111).

⁷⁹ Leval, *supra* note 77, at 1110.

⁸⁰ *Id.* at 1111.

⁸¹ Professor Rebecca Tushnet argues that the “transformation” framework means that “non-transformative copying, including plain old photocopying even in educational or scientific contexts, begins to look unfair.” Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 556 (2004).

⁸² Hospers, *supra* note 76.

⁸³ *Id.*

⁸⁴ *Warhol*, 143 S. Ct. at 1296 (Kagan, J., dissenting).

undisputed change in meaning.”⁸⁵ Justice Kagan described Goldsmith’s photo as conveying “corporeality and luminosity” with a focus on “Prince’s ‘unique human identity,’”⁸⁶ while Warhol’s works portrayed Prince as “spectral, dark, [and] uncanny — less a real person than a ‘mask-like simulacrum.’”⁸⁷ The Prince Series is transformative because Warhol “manifested, in short, the dehumanizing culture of celebrity in America.”⁸⁸ Justice Kagan valued the pieces because of their emotive expression and the specific (but subjective) messages that can be perceived by the onlooker — the same reasons that an expressionist would be drawn to the works.

In contrast, both Justices Sotomayor’s and Gorsuch’s analyses resemble the theory of formalism. Formalism “describes the critical position that the most important aspect of a work of art is its form — the way it is made and its purely visual aspects — rather than its narrative content or its relationship to the visible world.”⁸⁹ In visual art, “a formalistic critic would focus exclusively on the qualities of colour, brushwork, form, line and composition.”⁹⁰ Formalists reject external considerations in the appreciation of art, believing that, otherwise, “they would find their attention drawn away from the sublimities of art to the more approachable concerns of humanity.”⁹¹ Like the formalists, Justice Sotomayor distrusted subjective interpretations of a piece as a method of understanding its value, writing “[a] subject as open to interpretation as the human face, for example, reasonably can be perceived as conveying several possible meanings.”⁹² Through the majority’s eyes, the Orange Prince merely “crops, flattens, traces, and colors the photo but otherwise does not alter it.”⁹³ By focusing solely on the objective elements of Warhol’s work, the majority embodies formalist values in its analysis.

When an artist makes minimal alterations to a work that are alleged to give rise to significant changes in meaning (such as appropriation art⁹⁴), it is understandable that formalists and expressionists would

⁸⁵ *Id.*

⁸⁶ *Id.* (quoting Joint Appendix, Volume I at 176, 227, *Warhol*, 143 S. Ct. 1258 (No. 21-869)).

⁸⁷ *Id.* (quoting Joint Appendix, Volume I, *supra* note 86, at 187, 249).

⁸⁸ *Id.*

⁸⁹ *Formalism*, TATE, <https://www.tate.org.uk/art/art-terms/f/formalism> [<https://perma.cc/3CRC-MBWW>].

⁹⁰ *Id.*

⁹¹ Hospers, *supra* note 76.

⁹² *Warhol*, 143 S. Ct. at 1285.

⁹³ *Id.* at 1270.

⁹⁴ “Appropriation in art and art history refers to the practice of artists using pre-existing objects or images in their art with little transformation of the original.” *Appropriation*, TATE, <https://www.tate.org.uk/art/art-terms/a/appropriation> [<https://perma.cc/NZ2L-X8LR>].

disagree about the transformative nature of the second work.⁹⁵ The appeal of formalism to the majority makes instinctual sense as it parallels impulses of modern theories of statutory and constitutional interpretation, and, perhaps, makes sense of a copyright law that extends protection to less “expressive” works such as software code.⁹⁶ Fascinatingly, there is perhaps a direct line between formalist theories of poetry criticism and Justice Scalia’s development of textualism.⁹⁷ Much of Justice Scalia’s “theory of adjudication built on what he took to be a constitutionally warranted view of judicial restraint” and this “anti-discretion” principle “accounts for a surprisingly large element of his textualism and originalism.”⁹⁸ Like Justice Scalia and the formalists, the majority and concurrence felt that incorporating subjective judgments, such as emotional reactions to artistic works, is not the role of the judge.

Although the Copyright Act of 1976 might not ask judges to become art critics,⁹⁹ the First Amendment might require it. Although “[c]opyright has always posed a potential conflict with the First Amendment,”¹⁰⁰ doctrines like fair use are intended to operate as escape valves that curb a copyright holder’s power to suppress the speech of others.¹⁰¹ *Warhol*, however, limits fair use (in scenarios of added expression) to instances where “the use comments on, criticizes, or provides otherwise unavailable information about the original.”¹⁰² But the First Amendment protects more than just talismanic categories of *criticism*

⁹⁵ This conflict was most apparent when the majority took aim at Justice Kagan’s proposed “magazine editor” test, stating that it “does not have much of a future in fair use doctrine.” *Warhol*, 143 S. Ct. at 1278 n.11. On the majority’s telling, the “flaw” of the test is that “[i]f all that mattered under the first factor [of fair use was] whether a buyer was ‘drawn aesthetically’ to a secondary work (instead of the pre-existing work it adapted) or whether the buyer preferred ‘to convey the message of’ the secondary work, . . . then every derivative work would qualify.” *Id.* (quoting *id.* at 1297 (Kagan, J., dissenting)). Utilizing an all-too-familiar *reductio ad absurdum* argument, the majority renounced subjective reactions as a trustworthy basis for forming (or dissolving) legal liability.

⁹⁶ Certain copyright doctrines, such as tests for “substantial similarity,” already instruct judges to distill a visual work into its physical elements and disregard preconceived notions regarding the author’s intent or audience perception. See, e.g., *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1118 (9th Cir. 2018).

⁹⁷ Justice Scalia’s father, Professor Salvatore Eugene Scalia, produced scholarship on Italian poetry and was influenced by the writings of the New Critics, a group advocating a formalist approach to critiquing poems. See generally Note, *Textualism’s Mistake*, 135 HARV. L. REV. 890 (2022).

⁹⁸ John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 748–50 (2017).

⁹⁹ See *Warhol*, 143 S. Ct. at 1289 (Gorsuch, J., concurring).

¹⁰⁰ Tushnet, *supra* note 81, at 540.

¹⁰¹ See *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003). In *Eldred v. Ashcroft*, the Supreme Court affirmed fair use’s First Amendment aims, writing that the defense “allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances.” *Id.* at 219.

¹⁰² *Warhol*, 143 S. Ct. at 1284.

or *parody*;¹⁰³ it protects freedom of *expression* and, in fact, abhors content-based limitations on speech that privilege certain topics over others.¹⁰⁴ *Warhol's* approach encourages judges to ignore “subjective interpretation[s]” of a use.¹⁰⁵ This command is in tension with the First Amendment, which protects speech — subjective or not.¹⁰⁶ In other First Amendment realms, such as challenges to laws regulating expressive conduct, courts explicitly consider the message perceived by the audience.¹⁰⁷ However, now, jurists might be tempted to ignore nuances of expression when considering whether an alleged infringement constitutes a fair use and dismiss the value of art that is frequently sought by the public.¹⁰⁸ This move sterilizes artistic fair uses, putting art on the same footing as computer software.¹⁰⁹ As Justice Kagan’s dissent demonstrates, artists build upon one another to generate valuable new works not by criticizing or parodying the works of the forebearers, but by paying homage and “framing and reframing.”¹¹⁰

Art *is* subjective — some might say, that’s the whole darn point.¹¹¹ Art, and life, is composed of both subjective and objective elements.¹¹² By shuttering one’s eyes to subjectivity in a desire to constrain the judicial role, one shuts their eyes from *reality* and arrives at legal conclusions unprepared for the contours of humanity. And, without a transformative-use analysis that grapples with the gooey complexities of subjective artistic expression, the fair use defense’s First Amendment aims are weakened. Whether or not AWF’s licensing of the Orange Prince to Condé Nast constitutes a fair use of Goldsmith’s photograph, the art world is at a loss when creatives can no longer reliably point to added communicative expression as a method of establishing fair use.

¹⁰³ The Court’s recognition of “parody” and “criticism” betrays the inherent unworkability of a formalist understanding of transformative use. The majority suggests that Warhol’s Soup Cans are fair uses because “the Soup Cans series uses Campbell’s copyrighted work for an artistic commentary on consumerism, a purpose that is orthogonal to advertising soup.” *Id.* at 1281. But determining the meaning of the Soup Can series requires the same sort of “art criticism” foresworn by Justice Gorsuch. *See id.* at 1289 (Gorsuch, J., concurring).

¹⁰⁴ *See, e.g., Reed v. Town of Gilbert*, 576 U.S. 155, 159 (2015).

¹⁰⁵ *Warhol*, 143 S. Ct. at 1284.

¹⁰⁶ Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1, 39 (2002).

¹⁰⁷ *See Texas v. Johnson*, 491 U.S. 397, 404 (1989).

¹⁰⁸ *See Chiara Bastoni, Value in Art — What Makes Art Valuable?*, ARTLAND MAG., <https://magazine.artland.com/value-art> [<https://perma.cc/M4UU-6TL5>] (“Another relevant element of art value is societal meaning.”).

¹⁰⁹ *See, e.g., Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197–98 (2021).

¹¹⁰ *Warhol*, 143 S. Ct. at 1311 (Kagan, J., dissenting).

¹¹¹ “Art is the uniting of the subjective with the objective, of nature with reason, of the unconscious with the conscious, and therefore art is the highest means of knowledge.” LEO TOLSTOY, *WHAT IS ART?* 27 (Aylmer Maude trans., London, Walter Scott, Ltd. 1899).

¹¹² *See A.H. Hannay, Is Art Subjective?*, 48 PROC. ARISTOTELIAN SOC’Y 29, 30 (1948) (“The question that is so often and so easily asked, ‘How then are we to know who is right and who is wrong?’ is not a question that can only be asked about matters of taste. It can be asked about any kind of judgment, scientific and historical as well as ethical and aesthetic.”).