
EQUALITY THROUGH THE PHOTOGRAPHER'S LENS

MARK P. MCKENNA*

The Supreme Court has just granted certiorari in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*,¹ a case about images Andy Warhol created in the 1980s that depict the late musician Prince.² Warhol's works were based on a photograph taken by Lynn Goldsmith, a photographer well known for portraits of musicians.³

Figure 1. Photograph Taken by Lynn Goldsmith.⁴



* Professor of Law and Faculty Co-Director of the Ziffren Institute for Entertainment, Media, Technology & Sports Law, UCLA School of Law.

¹ 11 F.4th 26 (2d Cir. 2021), *cert. granted*, No. 21-869, 2022 WL 892102 (U.S. Mar. 28, 2022).

² *Id.* at 32.

³ *Id.*

⁴ Answer of Defendants, Counterclaim of Lynn Goldsmith for Copyright Infringement and Jury Demand at 14, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312 (S.D.N.Y. 2019) (No. 1:17-cv-02532).

Figure 2. Warhol's Images.⁵

⁵ Complaint at 9-12, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312 (S.D.N.Y. 2019) (No. 1:17-cv-02532).

The legal issue before the Court is whether Warhol's images make fair use of Goldsmith's photograph, which most suggest will come down to the meaning of transformativeness in copyright.⁶ Specifically, the Court will need to determine what kinds of transformations make a use fair as opposed to violating the exclusive right to prepare derivative works (which, of course, are defined in the Copyright Act as works that *transform* the original).⁷ But that question is ultimately about the purposes of copyright law and the ways it prioritizes the interests of different creators.

From Goldsmith's perspective, Warhol's images are fundamentally reuses of her photograph—they tweak the images, but they don't meaningfully transform the photographs in the sense of giving them different meaning. If pop artists like Warhol can make such minor changes and claim fair use, it would substantially diminish the value of copyright in photographs, at a time when photographers are already struggling to realize value in their work.⁸

That's at least the standard way of talking about what's at issue—in terms of economic value and incentives. But as Jessica Silbey's terrific new book shows us in great detail, those incentives are not the whole story, at least from the perspective of photographers. Silbey's detailed qualitative interviews reveal motivations that are both more complex than the standard incentive story suggests, and that implicate a wider range of interests—many of which sound more in the register of dignity and autonomy than economic value.⁹ To be sure, the photographers in Silbey's study care about their ability to make a living, and in that sense their interests are decidedly economic in nature. But they also have a strong sense of the artistic integrity of the photos and the context in which they were created.

Here I think Professor Silbey opens a window into a critical divergence in modern thought about intellectual property ("IP"). American IP scholars are overwhelmingly instrumentalists—specifically, they regard intellectual property rights as being justified only insofar as they are necessary to incentivize creative and innovative output. One significant challenge for these approaches is to define the appropriate level of output. That's a pretty fundamental issue, because it's impossible to know how strong the incentives need to be without knowing how much output we are trying to get.

Still, the framing of the Warhol case for many IP scholars is straightforward: if treating Warhol's use of Goldsmith's photograph as fair use would meaningfully decrease the incentives for photographers such that we wouldn't

⁶ *Warhol*, 11 F.4th at 32.

⁷ 17 U.S.C. § 101 (defining a derivative works as one that is "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, *transformed*, or adapted" (emphasis added)).

⁸ See JESSICA SILBEY, *AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE* 32-46 (2022).

⁹ *Id.* at 25-86.

get enough photography, then Warhol's use shouldn't be deemed fair. If, on the other hand, Warhol's use wouldn't seriously affect photographers' incentives, then it just adds more creative output and finding it to be fair use would therefore promote the progress of science.¹⁰

The important thing here is that the incentive theory is not particularly concerned with the specific interests of Goldsmith, except insofar as she stands in for others similarly situated. The "similarly situated" part of that formulation is a difficult one. In one sense, we clearly don't need copyright incentives for photography. Indeed, we live in a world of photographic abundance. That abundance is actually the problem for professional photographers, as Silbey's interviews reveal.¹¹ So the question isn't really whether we want or need incentives for photography; it's instead whether we want or need rules that support professional photographers in a particular type of practice.

That's not really a question to which the incentive theory has an answer, because it requires a normative judgment about the value of a particular kind of craft. Several scholars, most notably Rob Merges, have recently made arguments along these lines, specifically suggesting that IP rules should be shaped to support *professional* creators, people who can support themselves through their creative endeavors.¹² That approach might be in tension with the standard incentive account to the extent it focuses on a particular kind of creative content or a particular creative culture.

But the photographers Professor Silbey interviewed talk primarily about their craft, their professional identities, and their ability to support themselves as professional creators. She connects those concerns to concepts of equality and autonomy that, she argues, are largely absent in IP literature.¹³

Questions about which creators and which creative communities should be prioritized are inescapable, to be sure—there is no neutral design. But equality is an interesting frame for that discussion since claims by creators that their work deserves recognition are demands, not for equal treatment, but for the special treatment copyright affords only to *creative* work.

Technology has profoundly disrupted markets for all types of labor, making it difficult for many workers to continue supporting themselves in the same ways that once worked for them. Very few of those workers can claim any special protection for the outputs of their labor. Copyright provides precisely that special protection, but only for authors.¹⁴ A broader equality frame would consider not only certain creators' claims as against the interests of other creators, but what

¹⁰ U.S. CONST. art. I, § 8, cl. 8 (providing Congress the power to "Promote the progress of science . . . by securing for limited times to authors . . . the exclusive right to their . . . writings").

¹¹ *Id.* at 46-66.

¹² See, e.g., ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (2011).

¹³ See SILBEY, *supra* note 8, at 87-155.

¹⁴ 17 U.S.C. § 102 ("Copyright protection subsists, in accordance with this title, in original works of authorship . . .").

justifies the special treatment of creators compared to others who don't count as authors.

In my view, no one has yet made a compelling case for tailoring copyright to protect the interests of certain professional creators. That's not to say no such argument exists. But general incentive-based arguments aren't sufficient in a world of abundant creation. The argument for supporting professional creators has to specify the particular importance of professionally-created work or of the professional community that produces it. Those arguments will almost certainly be cultural ones about the kinds of artistic expression we want and the kinds of communities we want, and that is uncomfortable territory for most IP instrumentalists. And it must grapple with the question of why creative labor deserves special treatment as compared to the many other kinds of disrupted labor.

One of the most important contributions of rich qualitative accounts, like those Silbey has now given us in several settings, is that they lay bare the divergence between the motivations of the creative communities and the legal rules that govern them. And they force us to focus on more fundamental questions about whom these rules should serve. This book in particular shines a light on the need for critical focus on the unique value of creative work.