



IP ITeasers 065:

Copyright exceptions – still in a period of transformation?

There has been much excitement in Art and Law circles about the US case of *Andy Warhol Foundation for the Visual Arts v. Goldsmith* (<https://lnkd.in/eE9Q4555>) which culminated in a decision of the US Supreme Court on 18 May 2023. Many summaries and comments have already been produced more thoroughly than is possible here, and I would recommend artnet's posts here (<https://lnkd.in/erXBFMUC>) for a view of the facts and issues, and here (<https://lnkd.in/esxW8HXx>) for a flavour of the responses of legal experts so far.

Why has this case captured so much interest? For a start it involves two of the most famous and engaging characters of 20th century culture- Andy Warhol and Prince. For those of us also interested in geekier legal pursuits, it grapples with the US copyright doctrine of fair use, and in particular transformative use. Or at least it did in earlier stages of the appeal process - for an explanation of why the Supreme Court's decision is somewhat anticlimactic, I cannot improve on the post by Alexander Herman at the Institute of Art and Law here (<https://lnkd.in/eDKUJEEe>).

There are many differences between the US copyright exceptions of fair use, and the UK exception of fair dealing, but the concept of transformative use is one of the most intriguing. Whereas UK law is careful to stand at arms-length from any aesthetic judgement of engagement with art, the US concept of transformative use requires at least some level of analysis of the expression and meaning behind works.

Appropriation art presents the ultimate challenge to judicial minds who are trained to make

comparisons of works visually rather than in terms of artistic meaning and purpose. The UK courts have yet to consider appropriation art in the context of copyright infringement under UK law but, without considerations of transformative use, a UK judgment on this point will be a very different read from *Andy Warhol v Goldsmith* (and its predecessor cases) in the US.

There is a case however where the UK court considered transformative use under US law. For a flavour of a British approach to transformative use in the context of music see *Sony/ATV v WPMC Ltd* [2015] EWHC 1852 (Ch) (<https://lnkd.in/e46sb49p>). As my first instruction, the trial of this case was memorable for many reasons. One of the most entertaining being the judicial eyeroll in response to counsel's opening question as to whether the Judge might be familiar with the pop group "the Beatles" (he was).