

SCOTUS To Look at 'Fair Use' in Warhol 'Prince Series' Case [WIPR]

Tuesday, October 11, 2022

Samuel Lewis was quoted in *World Intellectual Property Review* discussing the U.S. Supreme Court hearing arguments on whether Andy Warhol's "Prince Series" infringed a photographer's copyright, the outcome of which could change the law on "fair use." "What is the significance of this case? The answer to the question depends upon who you believe. Some of the briefings suggest that what is at stake is the future of artistic freedom and freedom of expression, while other briefings suggest that this case has the potential to transform copyright law into 'all copying, no right'. My own view is that this case has the potential to help reinforce, and perhaps clarify, how courts should approach fair use issues. Since the Supreme Court's decision in *Campbell v Acuff Rose* (1994) involving the song "Pretty Woman," various courts have broadened the scope of fair use as it relates to photographs and artwork. Last year, in *Google v Oracle* — a case involving computer programs, not photography or art — the court had an opportunity to change the scope of fair use, and did not do so. Still, this case has the potential for changing the way that courts approach fair use issues, and may further transform the concept of transformation as applied to fair use. The makeup of the Court has changed somewhat since the Google decision. Justice Stephen Breyer, who delivered the opinion in Google, has now retired and been replaced by Justice Ketanji Brown Jackson. Justice Amy Coney Barrett did not take part in the Google decision. I will be watching what questions, if any, each of these justices raise during oral argument. That said, attempting to predict the court's opinion based on the questions that certain justices present at oral argument is, at best, a dicey proposition. The concept of transformation is not just central to fair use, it is also a definitional part of the concept of a derivative work. I will also be watching to see if the court addresses the concept of transformation in a way that harmonises fair use and the definition of a derivative work," said Sam.

Related Practice Areas

- Copyright & Content
- Intellectual Property