

Abstract

## Transformative Use under Test in *Andy Warhol Foundation v. Goldsmith*

Shiwon Ryu\*

We met only a few cases that assessed fair use over ten years since fair use clause were introduced to our copyright act. Therefore, a pile of U.S. fair use cases that have accumulated in the fields of art and technology can be good reference to interpreting our fair use clause. The concept of transformative use bears a significant role in fair use analysis of U.S. case law. The U.S. Supreme Court defines the transformative use as adding new purpose or character to the original works by changing its “expression, meaning or messages”, and accepted the fair use defense in *Campbell* and *Google* mainly based on its assessment that the the use was transformative in each case.

The role of transformativeness is essential in realization of the purpose of fair use doctrine, i.e., flexibly responding to technological changes in order to provide “breathing room” for freedom of expression. There also exist concerns regarding this concept as increasing vagueness of fair use standards leading to declined predictability, as well as harming carefully designed balance between copyright protection and fair use. Conflicting interests were expressed in a recent case related to a portrait photograph work employed in appropriation art works, *Andy Warhol Foundation v. Goldsmith*. As the district court and the appellate court arrived at opposite conclusions showing different views on transformativeness of Andy Warhol’s works, the U.S. Supreme Court is to resolve issues regarding limits of transformative use.

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\* Chonnam National University Law School, Associate Professor

As reviewed in this article, it was timely and meaningful attempt that the appellate court sought for the balance of conflicting interests of copyright owners and users while paying attention to the relationship between derivative works and transformative use. However, the appellate court decision exposed some limitations in terms of compatibility with the Supreme Court's standards and its logic of interpretation. The Supreme Court's decision to be made would have great meaning in modern application of fair use clause, and bring about great impact in the creation of modern art and licensing business. Also, the issues being dealt with in this case bear significance in our own situation where Korean Supreme Court provides no specific standards on the application of our fair use clause which was imported from U.S. copyright law.

#### **Keywords**

fair use, transformative use, derivative works, appropriation art, Andy Warhol, Goldsmith, Prince