

Abstract

Determining Fair Use and the Role of Transformative Use Test - On the Rulings in *Wofsy v. De Fontbrune* -

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Recently, as the size of the cultural industry has grown and cultural and informational products that utilize copyrighted materials have increased, there have been notable fair use rulings by the U.S. Supreme Court (such as *Google v. Oracle* and *Andy Warhol v. Goldsmith*). Korea Supreme Court upheld an appellate court ruling that the use of nude photographs in satire posters was not fair use. Courts need to show both ① consistency in the application of fair use doctrine in past and recent rulings on new types of cases, and ② that all rulings are consistent with the purpose of copyright law. However, the diversity of types of copyrighted works and uses, and the nature of fair use as a general provision, make this difficult.

In 2022, the Ninth Circuit ruled in the ‘Zervos Catalog Case’ that the use of copyrighted photographs was not fair use, and the Supreme Court denied certiorari. In this case, both plaintiff and defendant published catalogs of Pablo Picasso’s works, and the defendant had used some of the plaintiff’s copyrighted photographs. There were virtually no major issues, considering that the catalogs of the plaintiff and defendant were in direct competition and that the defendant had dead-copied the plaintiff’s work (photographs). However, the trial court’s decision, the appellate court’s decision, and the grounds in the petition for certiorari all show common

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problems in determining fair use. Therefore, this case is very useful to exemplify errors and issues in fair use applications.

This article first introduces the 'Zervos Catalog Case' (II), compares and analyzes the rulings and grounds for certiorari petition (III), and examines the relationship between the first factor of fair use and other factors. Then, it argues ① that fair use is a tool for balancing the freedom of expression of both creator and the user (secondary creator or information producer), and for allocating the costs of creation between them, along with creativity (idea-expression dichotomy) and substantial similarity, ② that the Supreme Court in 'Warhol Case' showed the potential to address issues of balancing freedom of expression and of allocation of creation costs in relation to appropriation art, ③ that the second factor might be deleted from the fair use provision, due to the lack of its independent significance, and ④ that the fair use factors should be considered together, not separately, and a final conclusion should be reached in the light of the purposes of copyright law, which should be explicitly stated in Copyright Act (IV).

Keywords

creativity, substantial similarity, fair use, transformative use, freedom of expression, cost of creation, secondary creativity, Andy Warhol, appropriation art