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Artificial Intelligence and Transformative Use After *Warhol*

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Artificial Intelligence and Transformative Use After *Warhol*

Gary Myers*

Abstract

The Supreme Court's recent decision in Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith clarifies the scope of transformative use and the role of these uses in the fair use analysis. This important case has implications for a fair use analysis of artificial intelligence. This article evaluates the interaction between copyright law's fair use doctrine and typical sources and uses for artificial intelligence. In other words, the article will assess whether or not the use of copyrighted material to "train" AI programs—AI inputs—and the products of AI programs—AI outputs—are likely to found to be transformative in light of the Warhol framework. This article assesses the potential fair use analysis for generative AI applications in light of Warhol's analytical framework. The central question in Warhol is the scope of transformative use versus a use that is derivative and which supplants a market for the original copyrighted work. Whether the use of copyrighted material to "train" AI programs and the products of AI programs are likely to found to be transformative in light of the Warhol framework is an intensely factual inquiry. This article concludes that the use of copyrighted material as inputs for training AI programs is—by itself—likely to be found to be a transformative fair use in most circumstances. The more difficult question is how AI outputs are analyzed. Fair use is necessarily a case-by-case inquiry. In light of cases like Warhol and Google v. Oracle, the

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analysis will turn on a series of considerations that are identified in this article. It is likely that the fair use question will be litigated frequently in the context of AI outputs, which can involve myriad factual scenarios.

Table of Contents

INTRODUCTION	2
I. THE <i>WARHOL</i> FAIR USE RULING	3
II. FAIR USE AND ARTIFICIAL INTELLIGENCE	18
CONCLUSION.....	28

INTRODUCTION

The Supreme Court’s recent decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*¹ clarifies the scope of transformative uses and the role of these uses in the fair use analysis.² This article evaluates the interaction between copyright law’s fair use doctrine and typical sources and uses for artificial intelligence (AI). In other words, the article will assess whether or not the use of copyrighted material to “train” AI programs—AI *inputs*—and the products of AI programs—AI *outputs*—are likely to be found transformative in light of the *Warhol* framework. This article assesses the potential fair use analysis for generative AI applications in light of *Warhol*’s analytical framework. The central question in *Warhol* is the scope of transformative use versus a use that is derivative, and which supplants a market for the original copyrighted work.³

1. 598 U.S. 508 (2023).

2. *See id.* at 539–50 (detailing why the Court’s transformative use analysis ultimately did not weigh in favor of the Andy Warhol Foundation).

3. *See id.* at 523–26 (“[T]he only question before this Court is whether the court below correctly held that the first factor, ‘the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,’ weighs in Goldsmith’s favor.”).

I. THE WARHOL FAIR USE RULING

Justice Sotomayor began her opinion for the Court by noting that the dispute “involves not one, but two artists. The first, Andy Warhol, is well known.”⁴ The second, Lynn Goldsmith, although less well known, “was a trailblazer. Goldsmith began a career in rock-and-roll photography when there were few women in the genre. Her award-winning concert and portrait images, however, shot to the top.”⁵ In 1984, for a \$400 fee, Goldsmith licensed to Vanity Fair magazine a one-time use image she had taken of Prince for use as an “artist reference.”⁶ Vanity Fair hired Andy Warhol to create a silkscreen using Goldsmith’s photo, which Vanity Fair then published.⁷

Warhol used Goldsmith’s photograph to create fifteen additional works, now known as the “Prince Series.”⁸ Eventually, the Andy Warhol Foundation for the Visual Arts, Inc. (“AWF”), which owns the Warhol copyrights after his death, licensed one of those works to Condé Nast for a 2016 magazine story about Prince.⁹ AWF was paid \$10,000, while Goldsmith received no compensation or credit for her contributions.¹⁰ This was the first time Goldsmith learned of these additional works, and she informed AWF that its actions infringed her copyright.¹¹ AWF sought a declaratory judgment that its use was a permissible “fair use.”¹²

4. *Id.* at 514–15.

5. *Id.* at 515.

6. *Id.* at 515.

7. *See id.* at 508 (“The magazine credited Goldsmith for the source photograph.” (internal quotations omitted)).

8. *Id.* at 518.

9. *See id.* at 519 (“By that time, Warhol had died, and the Prince Series had passed to [AWF]. AWF no longer possesses the works, but it asserts copyright in them. It has licensed images of the works for commercial and editorial uses.”).

10. *Id.* at 520.

11. *Id.* at 522.

12. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 522 (2023) (noting that “AWF then sued Goldsmith and her agency for a declaratory judgment of noninfringement or, in the alternative, fair use,” which the District Court granted citing 17 U.S.C. § 107).

Fair use is an affirmative defense to copyright infringement claims.¹³ It is found in Section 107 of the Copyright Act of 1976, and it states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.¹⁴

As frequently occurs in fair use cases, the lower courts were split.¹⁵ The district court granted summary judgment in AWF's favor,¹⁶ finding that Warhol's use was transformative because it gave "Goldsmith's photograph a new expression, and employ[ed] new aesthetics with creative and communicative results distinct from Goldsmith's."¹⁷ The district court indicated that the new works created a distinctly identifiable Warhol-style

13. *See id.* at 553 (Gorsuch, J., concurring) ("The question before us . . . concerns the meaning of one of four factors Congress has instructed courts to consult when a party invokes the affirmative defense of fair use to a claim of copyright infringement." (internal quotations omitted)).

14. 17 U.S.C. § 107.

15. *See infra* notes 16–22 (illustrating the different decisions reached by the district court and the Second Circuit).

16. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 316 (S.D.N.Y. 2019).

17. *Id.* at 325–26 (internal quotations omitted).

transformation of “Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure.”¹⁸

The Second Circuit reversed, holding that all fair use factors favored Goldsmith.¹⁹ As to the first fair use factor, the Second Circuit identified the issue as “whether the secondary work’s use of its source material is in service of a fundamentally different and new artistic purpose and character.”²⁰ Although Warhol may have imposed his style on the silkscreen images based on the photographs, his contributions did not enable him to avoid obtaining a license for this use, just as Martin Scorsese’s film *The Irishman* may be recognizable as Scorsese movie, but he must still license the original book.²¹ As to the other fair use factors, the Second Circuit found that the works were creative and unpublished, that the amount and substantiality of the material taken was excessive, and that AWF usurped Goldsmith’s market to license her photograph to publications and artists.²²

The Supreme Court granted certiorari limited to a single question related to the first fair use factor—the purpose and character of the use—and whether it “weighs in favor of AWF’s recent commercial licensing to Condé Nast. On that narrow issue . . . the Court agrees with the Second Circuit: The first factor favors Goldsmith, not AWF.”²³

The Court began by addressing AWF’s argument that the Prince Series is transformative because the works offer new expression that conveys a different meaning or message than the Goldsmith photograph.²⁴ Justice Sotomayor noted that the first factor does not merely require the addition of new expression, but rather “focuses on whether an allegedly infringing use has a further purpose or different character,

18. *Id.* at 326.

19. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 54 (2d Cir. 2021).

20. *Id.* at 42 (internal quotations omitted).

21. *Id.* at 43.

22. *Id.* at 44–51.

23. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 516 (2023).

24. *See id.* at 539–45 (describing the Court’s analysis of whether AWF’s Prince Series offered a new expression or meaning from Goldsmith’s original photographs).

which is a matter of degree, and the degree of difference must be weighed against other considerations, like commercialism.”²⁵ On the facts of this case, AWF’s for-profit licensing of Orange Prince to Condé Nast served the same purpose as Goldsmith’s commercial licensing of her images to other publications.²⁶

Highlighting the need to balance both author incentives and access to material for the creation of new works, the Court noted that fair use involves a careful balancing within the parameters of each individual case.²⁷ Fair use must therefore be flexible, and “its application may well vary depending on context.”²⁸ Thus, “copyright’s protection may be stronger where the copyrighted material . . . serves an artistic rather than a utilitarian function.”²⁹

A key question as to the first fair use factor is “whether the new work merely ‘supersede[s] the objects’ of the original creation . . . (‘supplanting’ the original), or instead adds something new, with a further purpose or different character.”³⁰ Restating the point, the Court notes that “the first factor relates to the problem of substitution—copyright’s *bête noire*.”³¹ Thus, the use of some copyrighted expression in the context of a book review or a news report or for classroom discussion generally does not supplant the market for the original work.³²

In close cases, the greater the difference between the purpose or character of the new use, the more likely the use is fair—it is a matter of degree.³³ Here the Court makes probably

25. *Id.* at 525 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

26. *See id.* at 526 (“Moreover, the copying use is of a commercial nature.”).

27. *See id.* at 527 (“The [Copyright] Act’s fair use provision, in turn, set[s] forth general principles, the application of which requires judicial balancing, depending upon relevant circumstances.” (internal quotations omitted)).

28. *Id.* at 527 (citation omitted).

29. *Id.* at 527 (citation omitted).

30. *Id.* at 509 (quoting *Campbell*, 510 U.S. at 579).

31. *Id.* at 528.

32. *See id.* at 528 (“The use of an original work to achieve a purpose that is the same as, or highly similar to, that of the original work is more likely to substitute for, or supplant[], the work.” (internal quotations omitted)).

33. *See Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 529 (2023) (“[The first factor] asks whether and to what extent the use at issue has a purpose or character different from the original.” (internal quotations and emphasis omitted)).

its most important statement regarding transformative use. Observing that the term does not appear in the fair use provision but can be found in reference to the copyright owner's right to create derivative works,³⁴ which includes "any other form in which a work may be recast, transformed, or adapted."³⁵ As the Court then notes:

In other words, the owner has a right to derivative transformations of her work. Such transformations may be substantial, like the adaptation of a book into a movie. To be sure, this right is "[s]ubject to" fair use. The two are not mutually exclusive. But an overbroad concept of transformative use, one that includes any further purpose, or any different character, would narrow the copyright owner's exclusive right to create derivative works. To preserve that right, the degree of transformation required to make "transformative" use of an original must go beyond that required to qualify as a derivative.³⁶

It is here that the Court draws a nuanced distinction between Warhol's use of the photograph in comparison to the parody song in *Campbell*³⁷ or the lines of computer software code in *Google v. Oracle*.³⁸ *Campbell* involved 2 Live Crew's use of a few lyrics and a guitar riff and other musical content from Roy Orbison's song, "Oh, Pretty Woman," in its rap version, "Pretty Woman."³⁹ The Court notes that the new message alone was not enough to render the 2 Live Crew song transformative; instead, the key was that it was also commenting on or criticizing the original Orbison song.⁴⁰

34. See *id.* at 529 (noting that "the word 'transform,' though not included in § 107, appears elsewhere in the Copyright Act," including § 106(2)).

35. 17 U.S.C. § 101.

36. *Warhol*, 598 U.S. at 529.

37. 510 U.S. 569 (1994).

38. 141 S. Ct. 1183 (2021); *Warhol*, 598 U.S. at 531–32 ("This discussion illustrates two important points: First, the fact that a use is commercial as opposed to nonprofit is an additional element of the first factor. . . . Second, the first factor also relates to the justification for the use." (internal quotations omitted)).

39. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 571–73 (1994).

40. See *Warhol*, 598 U.S. at 530 (discussing Justice Sotomayor's observation that "*Campbell* considered whether parody may be fair use. In holding that it may, the Court explained that 'parody has an obvious claim to transformative value' because 'it can provide social benefit, by shedding light

In *Google v. Oracle*,⁴¹ which involved computer code with inherently functional elements, even though Google’s use was for profit, “Google put Sun’s code to use in the ‘distinct and different computing environment’ of its own Android platform, a new system created for new products,” which required interoperability.⁴²

The Court highlights AWF’s commercial purposes (licensing the images, along with selling the original Warhol works) as relevant to the transformative use determination.⁴³ In contrast to a non-profit use, a commercial use is of course much more likely to supplant or substitute the original work or a derivative version of it.⁴⁴

Overall, the Court found that the focus should be on:

[w]hether the use of a copyrighted work has a further purpose or different character, which is a matter of degree, and the degree of difference must be balanced against the commercial nature of the use. If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying.⁴⁵

Here, the parties essentially served the same commercial purpose, providing media outlets with either photographs or artistic references for use in coverage of celebrities such as Prince.⁴⁶ Both marketed and profited from licenses related to this common activity, as compared to being in a distinct and

on an earlier work, and, in the process, creating a new one.” (quoting *Campbell*, 510 U. S. at 579)).

41. 141 S. Ct. 1183 (2021).

42. *Warhol*, 598 U.S. at 533 n.8.

43. See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 537 (“The undisputed commercial character of AWF’s use, though not dispositive, tends to weigh against a finding of fair use.” (internal quotations omitted)).

44. See *id.* at 531–32 (“A use that shares the purpose of a copyrighted work, by contrast, is more likely to provide the public with a substantial substitute for matter protected by the copyright owner’s interests in the original work or derivatives of it, which undermines the goal of copyright.” (citations and internal quotations omitted)).

45. *Id.* at 533.

46. See *id.* at 534–37 (explaining the ways and timeline by which both Goldsmith and AWF licensed and commercially used the photographs).

separate environment in which they might not supersede one another.⁴⁷ In that situation, fair use is unlikely to be found unless there is a further justification for copying—like parody or interoperability of software.⁴⁸

The majority and the dissent diverge in their treatment of the other part of the first fair use factor, the “character” of the use.⁴⁹ To the majority, the main focus is on the “the commercial or nonprofit character of an activity.”⁵⁰ Even using the dissent’s definition of character, which focuses on the nature of a use as “serving to distinguish,” the majority finds that AWF’s use does not distinguish it from Goldstein’s photograph.⁵¹ “So return to Orange Prince on the cover of the Condé Nast issue commemorating Prince, and ask, what is the main or essential nature of the secondary use of Goldsmith’s photograph in that context?”⁵²

The majority differentiates Warhol’s use of Campbell’s logo in his Soup Cans series, which “not only serves a completely different purpose, to comment on consumerism rather than to advertise soup, it also ‘conjures up’ the original work to ‘she[d] light’ on the work itself.”⁵³ “Here, by contrast, AWF’s use of Goldsmith’s photograph does not target the photograph, nor has AWF offered another compelling justification for the use.”⁵⁴

The Court rejects AWF’s argument that Warhol’s Prince series, like his Soup Cans series, is transformative simply because it conveys a new meaning or message—Prince as “an iconic, larger-than-life figure,” along with the “dehumanizing nature of celebrity.”⁵⁵ Instead, “*Campbell* cannot be read to

47. *See id.* at 537 (“Just as Goldsmith licensed her photograph to Vanity Fair for \$400, AWF licensed Orange Prince to Condé Nast for \$10,000.”).

48. *See id.* at 537–38 (“Taken together, these two elements [the substantially similar purpose and commercial nature] counsel against fair use, absent some other justification for copying.”).

49. *See id.* at 537, 575–76.

50. *Id.* at 538 n.14 (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 448–49 (1984)).

51. *See id.* at 538 n.14 (“But the dissent’s preferred definition helps Goldsmith, not AWF.”).

52. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 538 (2023).

53. *Id.* at 540.

54. *Id.* at 540.

55. *Id.* at 540–41.

mean that § 107(1) weighs in favor of any use that adds some new expression, meaning, or message.”⁵⁶ If that were a sufficient condition for a lawful transformative use, Justice Sotomayor observes that it would vitiate the copyright owner’s exclusive right to prepare derivative works, which by definition add new material—“[T]hat is an intractable problem for AWF’s interpretation of transformative use.”⁵⁷

Further, the Court highlighted Campbell’s distinction between parody and satire: “parody cannot function unless it conjures up the original, [while] ‘satire can stand on its own two feet and so requires justification for . . . borrowing.’”⁵⁸ The court noted that *Google v. Oracle* focused on the use of copyrighted code in a different context, and only as necessary to achieve Google’s new purpose.⁵⁹

As to aesthetic considerations related to Warhol’s standing as an artist, the majority observes that it “should not attempt to evaluate the artistic significance of a particular work.”⁶⁰ As Justice Holmes famously stated: “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits.”⁶¹ It critiques the dissent’s focus on how “Warhol created worthy art. Goldsmith’s original work, by contrast, is just an ‘old photo,’ one of Warhol’s ‘templates.’”⁶² To the majority, that view basically says, “It’s a Warhol.”⁶³ This “logic would create a kind of privilege that has no basis in copyright law. Again, the Court does not deny that Warhol was a major figure in American art. But it leaves the worth of his works to the critics.”⁶⁴

56. *Id.* at 541.

57. *Id.* at 541.

58. *Id.* at 543 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–81 (1994)).

59. *Id.* at 543 n.18 (2023) (citing *Google v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1203 (2021)).

60. *Id.* at 544 (citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)).

61. *Id.* at 544.

62. *Id.* at 544 n.19.

63. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 544 n.19 (2023).

64. *Id.*

Restating its approach, the Court notes that the first fair use factor is “an objective inquiry into what use was made, i.e., what the user does with the original work.”⁶⁵ Granting the district court’s conclusion that Orange Prince reasonably can be perceived to portray Prince as iconic, whereas Goldsmith’s portrayal is photorealistic, that difference must be evaluated in the context of the specific use at issue.”⁶⁶ That use remains a commercial one that supplants the original. “To hold otherwise would potentially authorize a range of commercial copying of photographs, to be used for purposes that are substantially the same as those of the originals. As long as the user somehow portrays the subject of the photograph differently”⁶⁷ Noting that AWF did not contend that Warhol sought to comment on, parody, or critique the original Goldsmith photograph, “[a]lthough targeting is not always required, fair use is an affirmative defense, and AWF bears the burden to justify its taking of Goldsmith’s work with some reason other than, ‘I can make it better.’”⁶⁸

The Court illustrates this point with the *Gone With the Wind* case,⁶⁹ where a novel, *The Wind Done Gone*, “‘inverts’ the original’s ‘portrait of race relations’ to expose its ‘romantic, idealized’ portrayal of the antebellum South.”⁷⁰

The Court noted that AWF’s commercial use lacks any justification, beyond conveying a new message.⁷¹ That consideration would be found in many situations: “a musician who finds it helpful to sample another artist’s song to make his own, a playwright who finds it helpful to adapt a novel, or a filmmaker who would prefer to create a sequel or spinoff, to

65. *Id.* at 545.

66. *Id.* at 545.

67. *Id.* at 546.

68. *Id.* at 547 n.21.

69. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1270 (11th Cir. 2001).

70. *Warhol*, 598 U.S. at 547 n.21 (quoting *SunTrust*, 268 F.3d at 1270).

71. *See id.* at 547–48 (“Yet AWF offers no independent justification, let alone a compelling one, for copying the photograph, other than to convey a new meaning or message. As explained, that alone is not enough for the first factor to favor fair use.”).

name just a few.”⁷² To the dissent’s argument regarding artistic freedom, the Court stated that:

It will not impoverish our world to require AWF to pay Goldsmith a fraction of the proceeds from its reuse of her copyrighted work. . . . Nor will the Court’s decision, which is consistent with longstanding principles of fair use, snuff out the light of Western civilization, returning us to the Dark Ages of a world without Titian, Shakespeare, or Richard Rodgers.⁷³

The majority noted that:

copyright law is replete with escape valves: the idea—expression distinction; the general rule that facts may not receive protection; the requirement of originality; the legal standard for actionable copying; the limited duration of copyright; and, yes, the defense of fair use. . . . These doctrines (and others) provide ample space for artists and other creators to use existing materials to make valuable new works. They account for most, if not all, of the examples given by the dissent.⁷⁴

In conclusion, the Court found that:

Goldsmith’s original photograph of Prince, and AWF’s copying use of that photograph in an image licensed to a special edition magazine devoted to Prince, share substantially the same purpose, and the use is of a commercial nature. AWF has offered no other persuasive justification for its unauthorized use of the photograph. Therefore, the “purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,” § 107(1), weighs in Goldsmith’s favor.⁷⁵

In light of the lack of challenge to the Second Circuit’s holding in favor of Goldsmith as to the other three fair use factors, the Court affirmed the ruling rejecting the fair use defense and finding in favor of the photographer.⁷⁶

72. *Id.* at 547–48.

73. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 549 (2023).

74. *Id.* at 550.

75. *Id.*

76. *See id.*

Justice Gorsuch, joined by Justice Jackson, wrote a concurring opinion.⁷⁷ His focus is on statutory interpretation regarding the meaning of the terms purpose and character under the first prong of the fair use provision.⁷⁸ As he notes, AWF contends that Warhol's work is transformative because it gives the Prince image a "new aesthetic," changing Prince's image from vulnerable to iconic.⁷⁹ Goldsmith, on the other hand, argues that both parties are seeking to license Prince images to magazines and completely overlap as to their intended market.⁸⁰ Agreeing with Goldsmith's view, Justice Gorsuch states:

By its terms, the law trains our attention on the particular use under challenge. And it asks us to assess whether the purpose and character of that use is different from (and thus complements) or is the same as (and thus substitutes for) a copyrighted work. It's a comparatively modest inquiry focused on how and for what reason a person is using a copyrighted work in the world, not on the moods of any artist or the aesthetic quality of any creation.⁸¹

He draws his conclusion from three features of the Copyright Act: (1) the fair use preamble focuses on "purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research," i.e., on the nature of the particular use; (2) the specific exclusive right to create derivative works, which necessarily transform or adapt, imply that transformation alone "cannot automatically mean he has made fair use of it;" and (3) the fourth fair-use factor, effect of the use on the potential market for or value of the work, "requires courts to ask whether consumers treat a challenged use 'as a market replacement' for a copyrighted work or a market complement that does not impair demand for the original."⁸²

Countering Justice Kagan's dissent, he states that "[t]here is no double counting here. Instead, the statute proceeds from

77. *Id.* at 553–58 (Gorsuch, J., concurring).

78. *See infra* note 81 and accompanying text.

79. *Id.* at 553.

80. *Id.*

81. *Id.* at 554.

82. *Id.* at 554–56 (discussing and applying these three features of the Copyright Act).

step to step, asking judges to assess whether the challenged use (as revealed by its purpose, character, amount of source material used, and effect) serves as a complement to or a substitute for a copyrighted work.”⁸³

Instead of analyzing the artistic features of the two works, Justice Gorsuch notes that the key point is that “the Foundation sought to use its image as a commercial substitute for Ms. Goldsmith’s photograph. . . . To know that much is to know the first fair-use factor favors Ms. Goldsmith.”⁸⁴ Nor need the Court decide broader questions of copyright policy:

Worried about the fate of artists seeking to portray reclining nudes or papal authorities, or authors hoping to build on classic literary themes? Worry not. This case does not call on us to strike a balance between rewarding creators and enabling others to build on their work. That is Congress’s job.⁸⁵

Justice Gorsuch concludes by noting that every fair use determination is fact-specific.⁸⁶ Although the use of the Prince image for licensing to magazines is not a fair use, the result could differ if “the Foundation had sought to display Mr. Warhol’s image of Prince in a nonprofit museum or a for-profit book commenting on 20th-century art, the purpose and character of that use might well point to fair use.”⁸⁷

Justice Kagan, joined by Chief Justice Roberts, dissented.⁸⁸ Her opening paragraph sums up the point of her lengthy opinion:

Today, the Court declares that Andy Warhol’s eye-popping silkscreen of Prince—a work based on but dramatically altering an existing photograph—is (in copyright lingo) not “transformative.” Still more, the Court decides that even if Warhol’s portrait were transformative—even if its expression and meaning were worlds away from the

83. *Id.* at 555.

84. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 556 (2023).

85. *Id.*

86. *See id.* at 557 (“[W]hile our interpretation of the first fair-use factor does not favor the Foundation in this case, it may in others.”).

87. *Id.* at 558.

88. *Id.* at 558–93 (Kagan, J. dissenting).

photo—that fact would not matter. For in the majority’s view, copyright law’s first fair-use factor—addressing “the purpose and character” of “the use made of a work”—is uninterested in the distinctiveness and newness of Warhol’s portrait. What matters under that factor, the majority says, is instead a marketing decision: In the majority’s view, Warhol’s licensing of the silkscreen to a magazine precludes fair use.⁸⁹

Justice Kagan is clearly a Warhol fan:

You’ve probably heard of Andy Warhol; you’ve probably seen his art. You know that he reframed and reformulated—in a word, transformed—images created first by others. Campbell’s soup cans and Brillo boxes. Photos of celebrity icons: Marilyn, Elvis, Jackie, Liz—and, as most relevant here, Prince. That’s how Warhol earned his conspicuous place in every college’s Art History 101.⁹⁰

In her view, before the majority’s ruling, determining whether a work is transformative depended on whether it “add[s] something new, with a further purpose or different character, altering the [original] with new expression, meaning, or message.”⁹¹ She proceeds to note: “But today’s decision—all the majority’s protestations notwithstanding—leaves our first-factor inquiry in shambles. The majority holds that because Warhol licensed his work to a magazine—as Goldsmith sometimes also did—the first factor goes against him.”⁹² In short, “[b]ecause the artist had such a commercial purpose, all the creativity in the world could not save him.”⁹³

After an extensive discussion of Warhol’s creative process, Justice Kagan finds that the “works are ‘materially distinct’ in ‘their composition, presentation, color palette, and media’—i.e., in pretty much all their aesthetic traits. And with the change in form came an undisputed change in meaning.”⁹⁴ She further notes that Goldsmith’s focus was on Prince’s “unique human

89. *Id.* at 558.

90. *Id.* at 558–59.

91. *Id.* at 559 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

92. *Id.*

93. *Id.* at 559.

94. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 566 (2023).

identity,” while Warhol emphasized “not the private person but the public image.”⁹⁵ Warhol reframed Prince as a “larger than life” “icon or totem He manifested, in short, the dehumanizing culture of celebrity in America.”⁹⁶

To Justice Kagan, decisions by the magazine editors highlighted “the difference—the gulf in both aesthetics and meaning—between the Goldsmith photo and the Warhol portrait. They knew about the photo; but they wanted the portrait. They saw that as between the two works, Warhol had effected a transformation.”⁹⁷ Justice Kagan hinges her dissent on the purposes behind fair use—“Beyond promoting ‘availability,’ fair use itself advances creativity and artistic progress This Court has long understood the point—has gotten how new art, new invention, and new knowledge arise from existing works.”⁹⁸ She then quotes Justice Story: “In truth, in literature, in science and in art, there are, and can be, few, if any, things, which . . . are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.”⁹⁹

To her, what is distinctive about the first fair use factor is that it “focuses on what the copier’s use of the original work accomplishes In that way, the first factor gives the copier a chance to make his case. Look, the copier can say, at how I altered the original, and what I achieved in so doing.”¹⁰⁰

Citing *Campbell*, she notes that “[t]he critical factor 1 inquiry, we held, is whether a new work alters the first with ‘new expression, meaning, or message.’ The more it does so, the more transformative the new work. And (here is the final takeaway) ‘the more transformative the new work, the less will be the significance of other factors, like commercialism, that

95. *Id.*

96. *Id.*

97. *Id.* at 567.

98. *Id.* at 568.

99. *Id.* at 568 (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C. Mass. 1845) (No. 4,436)).

100. *Id.* at 570 (citing Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1116 (1990) (describing factor one as “the soul of fair use.”)).

may weigh against a finding of fair use.”¹⁰¹ Further, citing *Google v. Oracle*, which clearly involved a commercial use, “[w]hat mattered instead was that Google had used Sun’s code to make ‘something new and important’: a ‘highly creative and innovative’ software platform.”¹⁰² To Justice Kagan, “without fair use, 2 Live Crew’s and Google’s works—however new and important—might never have been made or, if made, never have reached the public. The prospect of that loss to ‘creative progress’ is what lay behind the Court’s inquiry into transformativeness—into the expressive novelty of the follow-on work (regardless whether the original creator granted permission).”¹⁰³ She characterizes the majority as saying that “Warhol’s artistry and social commentary is negated by one thing: Warhol licensed his portrait to a magazine, and Goldsmith sometimes licensed her photos to magazines too. That is the sum and substance of the majority opinion.”¹⁰⁴ Put another way, “because Warhol entered into a licensing transaction with Condé Nast, he could not get any help from factor 1—regardless how transformative his image was.”¹⁰⁵ The only way out of this corner, she notes, is to have critiqued or commented on Goldsmith’s photo, instead of commenting on the dehumanizing culture of celebrity.¹⁰⁶

In the end, to Justice Kagan, “Warhol, as this Court noted in *Google*, is the very embodiment of transformative copying. He is proof of concept—that an artist working from a model can create important new expression. Or said more strongly, that appropriations can help bring great art into being. Warhol is a towering figure in modern art not despite but because of his use of source materials. His work—whether *Soup Cans* and *Brillo Boxes* or *Marilyn* and *Prince*—turned something not his into something all his own.”¹⁰⁷

101. *Id.* at 571.

102. *Id.* at 572 (citing *Google v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1202–03 (2021)).

103. *Id.* at 573.

104. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 575 (2023).

105. *Id.*

106. *Id.*

107. *Id.* at 592.

More broadly, she expressed concern about the implications of the ruling: “If Warhol does not get credit for transformative copying, who will? And when artists less famous than Warhol cannot benefit from fair use, it will matter even more. Goldsmith would probably have granted Warhol a license with few conditions, and for a price well within his budget.”¹⁰⁸ In her view, the majority’s ruling “will stifle creativity of every sort. It will impede new art and music and literature. It will thwart the expression of new ideas and the attainment of new knowledge. It will make our world poorer.”¹⁰⁹

One is left with the question whether Justice Kagan is correct that the *Warhol* majority’s ruling “will stifle creativity of every sort. It will impede new art and music and literature. It will thwart the expression of new ideas and the attainment of new knowledge. It will make our world poorer.”¹¹⁰ Or is the majority correct that this concern is overblown? That broader question is left for another day and further litigation.

II. FAIR USE AND ARTIFICIAL INTELLIGENCE

Generative AI has become the topic of the year (perhaps the decade). When ChatGPT entered the public consciousness in late 2022, it led to a revolution in thinking about the time-line for the development of AI.¹¹¹

After the initial glow of enjoying the hobby of giving ChatGPT and other AI programs creative prompts to see what would be produced, a major issue came to the forefront. Copyright owners suspected and perhaps know in some instances that generative AI makes use of vast amounts of pre-existing content in order to train its algorithms.¹¹² Much of that content is likely to be copyrighted. So, when someone suggests that ChatGPT develops a short story based on a Harry

108. *Id.* at 593.

109. *Id.* at 593.

110. *Id.* at 593.

111. See Gary Myers, *The Future is Now: Copyright Protection for Works Created by Artificial Intelligence*, 102 TEX. L. REV. ONLINE (forthcoming 2023).

112. *What is Generative AI?*, MCKINSEY & CO. (Jan. 19, 2023), <https://perma.cc/Y9RY-3PXF> (“[E]stimates indicate that GPT-3 was trained on around 45 terabytes of text data—that’s about one million feet of bookshelf space, or a quarter of the entire Library of Congress—at an estimated cost of several million dollars.”).

Potter character, or that DALL-E creates a painting in the style of Mark Rothko, it is very likely that the software will produce a result based on copyrighted works.

This article assesses the potential fair use analysis for generative AI applications in light of *Warhol's* analytical framework. The central question in *Warhol* is the scope of transformative use versus the use that is derivative and which supplants the original copyrighted work.¹¹³ Justice Sotomayor notes that the first factor does not merely require the addition of new expression, but rather “focuses on whether an allegedly infringing use has a further purpose or different character, which is a matter of degree, and the degree of difference must be weighed against other considerations, like commercialism.”¹¹⁴ Thus, AWF’s for-profit licensing of Orange Prince to Condé Nast serves the same purpose as Goldsmith’s commercial licensing of her images to other publications.¹¹⁵ In the AI context, a central issue would be whether the AI outputs supplant the original work, or whether they have a different purpose. Moreover, the commercial or non-commercial nature of the AI output or use would be directly relevant.

In order to balance both author incentives and access to material for the creation of new works, fair use necessarily involves a careful balancing based on the facts of each individual case.¹¹⁶ Fair use must therefore be flexible, and “its application may well vary depending on context.”¹¹⁷ Thus, “copyright’s protection may be stronger where the copyrighted material . . . serves an artistic rather than a utilitarian function.”¹¹⁸ In the context of AI outputs, the purpose of the use will again be an important consideration, and the inquiry will necessarily be fact-specific.

113. See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

114. See *id.* at 525 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

115. See *id.* at 526 (“Here, the specific use of Goldsmith’s photograph alleged to infringe her copyright is AWF’s licensing of Orange Prince to Condé Nast.”).

116. See *id.* at 527 (citing *Google v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021)).

117. *Id.* at 527 (citation omitted).

118. *Id.* at 527.

Warhol asks “whether the new work merely ‘supersede[s] the objects’ of the original creation . . . (‘supplanting’ the original), or instead adds something new, with a further purpose or different character.”¹¹⁹ Restating the point, the Court notes that “the first factor relates to the problem of substitution—copyright’s *bête noire*.”¹²⁰ Thus, if AI outputs are used in the context of a book review, a news report, or for research or a classroom discussion, these uses are not likely to supplant the market for the original work.

The *Warhol* Court also noted that, in close cases, the greater the difference between the purpose or character of the new use, the more likely the use is fair—that it is a matter of degree.¹²¹ The Court noted that:

[A]n overbroad concept of transformative use, one that includes any further purpose, or any different character, would narrow the copyright owner’s exclusive right to create derivative works. To preserve that right, the degree of transformation required to make ‘transformative’ use of an original must go beyond that required to qualify as a derivative.¹²²

The Court cites to *Campbell*, which involved 2 Live Crew’s use of a few lyrics and a guitar riff and other musical content from Roy Orbison’s song, “Oh, Pretty Woman,” in its rap version, “Pretty Woman.” The 2 Live Crew song’s new message alone was not enough to make it transformative; rather it was the fact that the song was commenting on or criticizing the original Orbison song. This reading of *Campbell* suggests that AI outputs that serve as commentary, criticism, or parody targeting the original work will have greater fair use leeway.

In defending particular AI output results, a potential defendant will rely on *Google v. Oracle*. In that case, although Google’s use was for profit, “Google put Sun’s code to use in the ‘distinct and different computing environment’ of its own Android platform, a new system created for new products,”

119. *Id.* at 528 (quoting *Campbell*, 510 U.S. at 579).

120. *Id.* at 528.

121. *See id.* at 528 (citing *Campbell*, 510 U.S. at 579).

122. *Id.* at 529.

which required interoperability.¹²³ On the other hand, if the AI output is put to commercial use and serves as substitute for the original, it is unlikely to be found to be a fair use.¹²⁴ As the Court notes: “A use that shares the purpose of a copyrighted work, by contrast, is more likely to provide the public with a substantial substitute for matter protected by the copyright owner’s interests in the original work or derivatives of it, which undermines the goal of copyright.”¹²⁵

In close cases, whether an AI output is transformative is likely to involve a nuanced question of degree:

[W]hether the use of a copyrighted work has a further purpose or different character, which is a matter of degree, and the degree of difference must be balanced against the commercial nature of the use. If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying.¹²⁶

Where a use is commercial, fair use is unlikely to be found unless there is a further justification for copying—like parody or interoperability of software.¹²⁷

The *Warhol* Court highlighted *Campbell’s* distinction between parody and satire: “parody cannot function unless it conjures up the original, [while] ‘satire can stand on its own two feet and so requires justification for . . . borrowing.’”¹²⁸ The Court noted that *Google v. Oracle* focused on the use of copyrighted code in a different context, and only as necessary to achieve Google’s new purpose.¹²⁹ Thus, a use that requires

123. See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 533 n.8 (2023).

124. See *id.* at 530–31 (noting that derivative works used for commercial purposes that provide a substitute for the original work are less likely to be protected by fair use).

125. *Id.* (citations and internal quotations omitted).

126. *Id.* at 532–33.

127. See *id.* at 533 (“The same copying may be fair when used for one purpose but not another.”).

128. *Id.* at 543 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–81 (1994)).

129. See *id.* at 543 n.18.

content drawn from the original, or that targets the original, is more likely to be found to be transformative.

With regard to the remainder of the first fair use factor, the “character” of the use, the *Warhol* majority focuses on “the commercial or nonprofit character of an activity.”¹³⁰ Thus, if the AI output is put to a commercial use, it is less likely to be found to be a fair use, in contrast to a non-profit or non-commercial use.

The first fair use factor is “an objective inquiry into what use was made, i.e., what the user does with the original work.”¹³¹ If a use is a commercial one that supplants the original, this factor will weigh against fair use.¹³² “To hold otherwise would potentially authorize a range of commercial copying of photographs, to be used for purposes that are substantially the same as those of the originals. As long as the user somehow portrays the subject of the photograph differently . . .”¹³³ Noting that AWF did not contend that Warhol sought to comment on or larger the original Goldsmith photograph, “[a]lthough targeting is not always required, fair use is an affirmative defense, and AWF bears the burden to justify its taking of Goldsmith’s work with some reason other than, ‘I can make it better.’”¹³⁴

Thus, if the AI output is merely replacing the original and potentially displacing sales, it is unlikely to be fair use. The Court gives several illustrations of this point: “[A] musician who finds it helpful to sample another artist’s song to make his own, a playwright who finds it helpful to adapt a novel, or a filmmaker who would prefer to create a sequel or spinoff, to name just a few.”¹³⁵

130. *Id.* at 538 n.14 (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 448–49 (1984)).

131. *Id.* at 545.

132. *See id.* at 547 (“Moreover, because AWF’s copying of Goldsmith’s photograph was for commercial use so similar to the photograph’s typical use, a particularly compelling justification is needed. Copying the photograph because doing so was merely helpful to convey a new meaning or message is not justification enough.”).

133. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 546 (2023).

134. *Id.* at 547 n.21.

135. *Id.* at 547–48.

On the other hand, if it is a critique of the original work, fair use is more likely. The Court illustrates this point with the *Gone With the Wind* case, where a novel, *The Wind Done Gone*, “‘inverts’ the original’s ‘portrait of race relations’ to expose its ‘romantic, idealized’ portrayal of the antebellum South.”¹³⁶ Thus, if AI produces a critical or a parody type of work, it is more likely to be found to be a transformative fair use.

In short, the analysis of whether AI-generated output is transformative and whether the first fair use factor favors fair use is an intensely factual question, focusing on the purpose and character of the use, on whether it is commercial or non-profit, and whether it substitutes for the original.¹³⁷ The fair use analysis would then need to proceed to the other factors, including the nature of the copyrighted work.¹³⁸ If a copyrighted work is factual, this factor weighs in favor of fair use, whereas a fictional work is entitled to greater protection.¹³⁹ Thus, if the AI output involves a scientific or medical article, the scope of fair use is greater than if it involves placing Harry Potter in a new setting such as New York City.

On the other hand, almost by definition, the copyrighted work is likely to be a published, as opposed to an unpublished work, as it is unlikely that AI could obtain unpublished content. Consequently, this factor would weigh in favor of fair use.

The third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, is again an intensely factual inquiry.¹⁴⁰ For example, Judge Tjoflat, writing for the Eleventh Circuit in *Cambridge Univ. Press v. Patton*,¹⁴¹ concluded that it was necessary to perform a work-by-work analysis of individual instances of alleged infringement in order to determine whether the use was fair or

136. *Id.* at 547 n.21 (quoting *SunTrust Bank v. Houghton Mifflin Co.*, 268 F. 3d 1257, 1270 (11th Cir. 2001)).

137. *See id.* at 530–31 (detailing the relevant considerations under the first fair use factor).

138. *See id.* at 527 (describing the factors for a fair use inquiry).

139. *See Stewart v. Abend*, 495 U.S. 207, 231 (1990) (“In general, fair use is more likely to be found in factual works than in fictional works.”).

140. *See Warhol*, 598 U.S. at 523 (“The third factor, the amount and substantiality of the portion used in relation to the copyrighted work, favored AWF because, according to the District Court, ‘Warhol removed nearly all the photograph’s protectible elements in creating the Prince Series.’”).

141. 769 F.3d 1232 (11th Cir. 2014).

not.¹⁴² The lower court proceeded to carry out just such an analysis, eventually finding that most of the uses were privileged fair use, but that a handful were not.¹⁴³

The fourth factor, the effect of the use on the potential market for or value of the work, is fact specific but likely to be readily determined.¹⁴⁴ It also plays a role in the analysis of the first fair use factor, as highlighted in *Warhol*.¹⁴⁵ This factor hones in on whether there is market substitution—does the AI output supplant a market that would normally be served by the copyrighted work.¹⁴⁶ This might be a direct form of competition—a photo that substitutes for the original for use on a website—or a derivative market, such as a Harry Potter character now located in modern-day New York City for purposes of an unauthorized sequel.

Synthesizing the line of fair use cases through and including *Warhol*, a series of important considerations will guide the fair use analysis. This list is non-exclusive, as other factors may be included in the analysis, such as the good faith or bad faith of the alleged infringer.¹⁴⁷ A primary consideration will be whether the AI output serves as a market substitute for the original, either in direct competition or in a recognized derivative market. If it offers direct competition, as in the *Warhol* photograph used on a magazine cover, fair use is unlikely. So too, if a recognizable derivative market is affected, there can be serious harm to the copyright owner. For example, even though a movie version of a novel adds considerable new

142. *See id.* at 1259–60 (explaining how the court finds “the District Court’s work-by-work approach—in which the District Court considered whether the fair use defense excused a representative sample of instances of alleged infringement in order to determine the need for injunctive relief—was the proper one”).

143. *See* Order of April 14, 2016, amending order of March 31, 2016, *Cambridge Univ. Press v. Patton*, No. 1:08-cv-01425 (N.D. Ga. Apr. 14, 2016).

144. *See* *Andy Warhol Found. for the Visual Arts, Inc., v. Goldsmith*, 598 U.S. 508, 551 (2023) (noting that the fourth factor to consider under fair use is “the effect of the use upon the potential market for or value of the copyrighted work.”).

145. *See id.* (explaining that the fourth factor includes “the effect of the use upon the potential market for or value of the copyrighted work.”).

146. *See id.* (describing the fourth factor for a fair use inquiry).

147. *See id.* at 569–70 (explaining how the statute sets forth what qualifies as fair use based on four factors to help courts in deciding fair use; however, these four factors are non-exclusive).

expression—additional dialogue, costumes, set design, cinematography, and so forth—a movie adaptation of a novel is a standard derivative market that the copyright owner is entitled to seek out.

A second consideration is whether the AI output is used for commercial or non-commercial/non-profit purposes.¹⁴⁸ The use of a work to sell copies is likely to impinge upon the copyright owner's market, but a use for teaching or research or commentary purposes is not likely to do so.¹⁴⁹ Next, courts will consider the extent to which the new work is transformative, which includes not only the addition of new expression but also providing a different use, purpose, or market for the work.¹⁵⁰

The next consideration, and one that was referenced in *Campbell*, is whether the AI output targets the original work, by virtue of being a parody, commentary, criticism, or review of the copyrighted material.¹⁵¹ This was the exact scenario in the 2 Live Crew case, and it favors fair use because the new work must conjure up the original.¹⁵² On the other hand, if the new work merely makes use of the work for convenience, the use of significant amounts of expression would be unjustified.

Another consideration is the quantitative amount and the qualitative substantiality of the taking, which is always an important factor in the fair use analysis, and which varies by

148. *See id.* at 531 n.6 (2023) (“The authors of the Copyright Act of 1976 included the language ‘whether such use is of a commercial nature or is for non-profit educational purposes,’ in the first fair use factor ‘to state explicitly’ that, ‘as under the present law, the commercial or non-profit character of an activity, while not conclusive . . . can and should be weighed with other factors.’”).

149. *See id.* at 528 (Noting as examples of fair use “criticism, comment, news reporting, teaching . . . scholarship, or research.” “Although the examples given are ‘illustrative and not limitative,’ they reflect ‘the sorts of copying that courts and Congress most commonly ha[ve] found to be fair uses,’ and so may guide the first factor inquiry.”).

150. *See id.* at 509 (“Although new expression, meaning, or message may be relevant to whether a copying use has sufficiently distinct purpose or character, it is not, without more, dispositive of the first factor.”).

151. 510 U.S. 569 (1994).

152. *See id.* at 528 (“The ‘central’ question it asks is ‘whether the new work merely ‘supersedes’ the objects’ of the original creation . . . (‘supplanting’ the original), or instead adds something new, with a further purpose or different character.’”).

every individual instance.¹⁵³ Next is the nature of the underlying original work, including whether it is a factual or fictional work.¹⁵⁴ Those seeking to rely upon earlier works are entitled to greater leeway in copying factual works, as opposed to works of fiction. Thus, a later user is free to copy historical figures and events, like George Washington crossing the Delaware River. But the scope of copying for works of fiction, such as characteristics of Hermione or events in one of the Harry Potter books, are given less leeway. Finally, in any particular case, there may be other fact-specific considerations related to the purpose, character, and nature of the use.¹⁵⁵

Thus far, this article has focused on whether the output produced by generative AI can constitute a fair use. It is also important to consider whether the use of copyrighted material to “train” AI might involve an infringing use, and if so whether fair use would apply on the input side of the generative AI process. An initial consideration is whether the AI training produced a sufficiently fixed copy, as opposed to a merely transitory version, of any particular copyrighted work. A transitory copy does not infringe, but a fixed copy would entail a *prima facie* copyright violation—a reproduction of the copyrighted work.¹⁵⁶

Assuming that the AI training does create sufficiently fixed copies, the analysis will again turn on whether the fair use defense applies. The most relevant case for this part of the analysis is the Second Circuit’s decision in *Authors Guild v. Google*.¹⁵⁷ The court described Google’s allegedly infringing uses:

Through its Library Project and its Google Books project, acting without permission of rights holders, Google has made

153. *See id.* at 550 (explaining “the general rule that facts may not receive protection . . .”).

154. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

155. *See Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 510 (2023) (“A use that has further purpose or different character is said to be ‘transformative,’ but that too is a matter of degree.”).

156. *See id.* at 546 (“To hold otherwise would potentially authorize a range of commercial copying of photographs, to be used for purposes that are substantially the same as those of the originals. As long as the user somehow portrays the subject of the photograph differently, he could make modest alterations to the original, sell it to an outlet to accompany a story about the subject, and claim transformative use.”).

157. 804 F.3d 202 (2d Cir. 2015).

digital copies of tens of millions of books, including Plaintiffs', that were submitted to it for that purpose by major libraries. Google has scanned the digital copies and established a publicly available search function. An Internet user can use this function to search without charge to determine whether the book contains a specified word or term and also see "snippets" of text containing the searched-for terms.¹⁵⁸

The court found that Google's actions in making a digital copy of books in order to create a search function was transformative—the use provided information about the books, thereby advancing the store of knowledge.¹⁵⁹ At the same time, Google does not produce a market substitute, and therefore does not harm the copyright owners' economic interests in the books or in a recognized derivative market.¹⁶⁰ Similarly, the court found that Google's offering of snippet views of the books does not usurp any derivative market, and that the snippets serve very different functions than the books themselves.¹⁶¹ Further, the copyright owners' derivative rights do not encompass a right to supply general information about their books.¹⁶² Finally, Google's profit motive does not negate fair use on the facts of this case.¹⁶³

The analysis of the use of copyrighted works to train an AI program would proceed along similar lines. The inputting of the information, by itself, is potentially transformative as it would enable the creation of an entirely new set of AI programs. Although it is possible that a particular AI-generated *output* might infringe, the use of the material as a training input seems

158. *See id.* at 207.

159. *See id.* at 216–17 ("We have no difficulty concluding that Google's making of a digital copy of Plaintiffs' books for the purpose of enabling a search for identification of books containing terms of interest to the searcher involves a highly transformative purpose, in the sense intended by *Campbell*.").

160. *See id.* at 207 ("[E]ven if Google's copying and revelations of text do not infringe plaintiffs' books, they infringe Plaintiffs' derivative rights in search functions, depriving Plaintiffs of revenues or other benefits they would gain from licensed search market . . .").

161. *See id.* at 218 ("Snippet view thus adds importantly to the highly transformative purpose of identifying books of interest to the searcher.").

162. *See id.* ("[A]n author's derivative rights do not include an exclusive right to supply information (of the sort provided by Google) about her works.").

163. *See id.* at 207 (explaining how "Google's profit motivation does not in these circumstances justify denial of fair use").

directly analogous to Google’s scanning of books for its search function. Further, even if the AI program is offered for profit, that along would not undermine the fair use argument.

The Supreme Court’s recent *Google v. Oracle* ruling also provides support for the use of copyrighted material to train AI programs.¹⁶⁴ Even though Google’s use was for profit, “Google put Sun’s code to use in the ‘distinct and different computing environment’ of its own Android platform, a new system created for new products,” which required interoperability.¹⁶⁵ Moreover, “[w]hat mattered . . . was that Google had used Sun’s code to make ‘something new and important’: a ‘highly creative and innovative’ software platform.”¹⁶⁶

Similarly here, the use of copyrighted material as inputs to train AI makes use of the material in a distinct computing environment and in a way that creates innovative new products. Like Google’s use in Android, AI offers new, important, and creative new material, potentially revolutionizing many fields. In short, so long as the outputs of AI are not infringing, the use of copyrighted material as inputs would seem to be a classic fair use.

CONCLUSION

The Supreme Court’s decision in *Warhol* clarifies the scope of transformative uses and the role of these uses in the fair use analysis. This important case has implications for a fair use analysis of the inputs and outputs of artificial intelligence. This article has assessed the potential fair use analysis for generative AI applications in light of *Warhol*’s analytical framework. The central question in *Warhol* is the scope of transformative use versus a use that is derivative, and which supplants the original copyrighted work.¹⁶⁷

The critical inquiry is whether or not uses of copyrighted material to “train” AI programs and the products of AI programs are likely to found to be transformative in light of the *Warhol* framework. This article concludes that the use of copyrighted

164. 141 S. Ct. 1183 (2021).

165. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 533 n.8 (2023).

166. *Id.* at 572 (Kagan, J. dissenting).

167. *See id.*

material as inputs for training AI programs is—by itself—likely to be found to be a transformative fair use in most circumstances. The more difficult question is how AI outputs are analyzed.

Fair use is necessarily a case-by-case inquiry. In light of cases like *Warhol* and *Google v. Oracle*, the analysis will turn on the following non-exclusive list of considerations—

1—whether the AI output serves as a market substitute for the original, either in direct competition or in a recognized derivative market;

2—whether the AI output is used for commercial or non-commercial/non-profit purposes;

3—the extent to which the work is transformative, which includes not only the addition of new expression but also providing a different use, purpose, or market for the work;

4—whether the AI output targets the original work, by virtue of being a parody, commentary, criticism, or review, or whether it simply makes use of the work for convenience;

5—the quantitative amount and the qualitative substantiality of the taking;

6—the nature of the underlying original work, including whether it is a factual or fictional work; and

7—other fact-specific considerations related to the purpose, character, and nature of the use.

As is clear from this list of considerations, each case will necessarily be decided on its individual facts and circumstances. Fair use, as has long been true, remains a complicated and often unpredictable doctrine. It is likely that the fair use question will be litigated frequently in the context of AI outputs, which can involve myriad factual scenarios.