A Feminist Perspective on Copyright and *Andy Warhol Found. v. Goldsmith*

*Nora K. Harding**

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* Nora K. Harding, J.D. Candidate, Class of 2025, The University of Iowa College of Law. I am incredibly grateful for the support and encouragement from the *JGRJ* board and student writers. My deepest thanks go to my partner, James, whose humor and steadfast patience made this Note (and law school) significantly more manageable—the first sentence of the third paragraph in Section II.E is a special nod to your writing style. Lastly, to my dog, Neela, who provided a gentle presence when I needed it most.

I. INTRODUCTION

Artists have relied on copyright law to protect their works for more than a century.[1] Just as art is an ever-evolving, fluid field, so, too, is copyright law.[2] Consequently, it is logical that the parameters and framework of copyright law have evolved throughout this period. Copyright law must adjust as a result of the nature of the "property" it seeks to safeguard. There are several theories of copyright law which illustrate why protection is necessary. One theory of copyright law builds its framework around ideas as we understand them in terms of traditional property rights. Another version centers on the notion of personal or moral rights of the creator of the work.

Regardless of what kind of work is being protected, the gender of the work's creator bears more on its protectability than any copyright statute facially indicates. Data illustrates that the percentage of women registering copyrighted works has generally trended upward in the past several decades, but the representation of registered artworks by men outweighs that of women.[3] In addition to women accounting for a lower share of works of registered copyrights, the percentage of women artists represented in galleries is consistently lower than those of their male counterparts.[4] This pervasive underrepresentation of women's work is disheartening as it is, but to make matters worse, if someone infringes upon a woman's copyright, few women will take legal action—and even fewer will win.[5] However, the Supreme Court's decision in *Warhol v. Goldsmith*[6] marks a pivotal shift that goes beyond merely reinterpreting fair use; it lays groundwork for a more equitable legal

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[1] *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § TL (Matthew Bender ed., rev. ed. 2024) (visualizing the evolution of copyright law).

[2] *See, e.g.*, *id.* (indicating from the timeline, there have been forty-four events in the past worth noting on this timeline of copyright and even five future events).

[3] U.S. COPYRIGHT OFF., WOMEN IN THE COPYRIGHT SYSTEM: AN ANALYSIS OF WOMEN AUTHORS IN COPYRIGHT REGISTRATIONS FROM 1978 TO 2020 7, 16 (2022).

[4] *See* CLARE MCANDREW, ART BASEL & UBS, THE ART MARKET 2023 81 (2023) (reporting comprehensively on the art market for the year 2023).

[5] *See infra* Figure 1.

[6] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023).

landscape for women artists. By affirming the rights of original creators, especially in cases where they lack the cultural and economic capital of celebrity artists, this decision provides a powerful new precedent that may help dismantle the historical biases embedded in copyright law, opening a path toward more balanced protections and recognition for women's contributions in the art world.[7] In Part II, this Note will discuss the background of copyright law and the experience of women navigating the jurisprudence. Next, Part III will analyze the copyright law regime and the decision in *Warhol v. Goldsmith*. Part IV of this Note provides recommendations for an injection of moral rights to the current U.S. copyright law regime. Finally, Part V concludes by revisiting the history of copyright law to reaffirm its problematic implications concerning equality and a call to action for continued research at this nexus.

II. BACKGROUND

Copyright law, a creation of the Constitution, is designed to encourage the progress of the arts and sciences.[8] The First Congress advanced this constitutional mandate with the enactment of The Copyright Act of 1790[9] which aimed to incentivize creativity by granting creators a bundle[10] of exclusive rights to their work. Over the years, copyright laws have morphed in response to the ever-changing landscape of artistic expression, which the law seeks to protect.[11]

As artistic expression continually evolves, copyright law faces the challenging task of adapting to meet the needs of creators.[12] The types of subject matter eligible for copyright protection span various methods of production and media, resulting in a legal framework the must grapple with rapidly emerging and complex issues.[13]

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[7] *See infra* Section II.G.2.

[8] U.S. CONST. art. I, § 8, cl. 8.

[9] *Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RSCH. LIBRS., https://www.arl.org/copyright-timeline [https://perma.cc/J44Z-3CDY].

[10] Perhaps the turn of phrase "bundle of exclusive rights" sounds odd if the reader is not indoctrinated with foundational copyright law jargon. It is simply just another quirk of copyright law—the rights accorded to copyright owners are sometimes referred to as a "bundle" because it can be imagined as a bundle of sticks. Each stick (right) in the bundle is the copyright owners to do what she so pleases with it. If she wants to give one of her sticks away for a time, she still has other sticks left in her bundle. But the sticks are hers and the bundle as a whole is a metaphor of for all of the rights that attach to the copyright protected work that the creator produced.

[11] *See* H.R. REP. NO. 94-1476, at 66 (1976); *see also* 4 NIMMER, *supra* note 1, § 13F.03 (commenting on the evolution of fair use specifically within copyright law, Nimmer posits: "Fair use thus continues to evolve alongside developments in the creative sectors as well as advances in technologies for reproducing and distributing copyrighted works").

[12] H.R. REP. NO. 94-1476, at 66.

[13] *Id.*

A. Copyright Law: Dynamic and Dubious?

Justice Story famously likened the interpretation of copyright law to a metaphysical pursuit, highlighting its complexity and nuanced nature.[14] The premise of this Note emphasizes that copyright law often generates more questions than it resolves. Whether for a novice student or a seasoned copyright expert, grasping the intricacies of copyright law proves to be a daunting task.[15]

A particular dizzying aspect of U.S. copyright law lies in its historical evolution and the numerous revisions it has undergone over time.[16] Understanding the trajectory of the Copyright Act and the various amendments it has endured presents a significant challenge for those delving into the realm of copyright law. As with many aspects of life, we must accept the good with the bad. It is most certainly beneficial that copyright law evolves to meet that changing needs of society. However, navigating these legislative changes can sometimes feel like a farrago of folly as one attempts to piece it together and comprehend the intentions of various groups of policy makers.

1. Justifications for Copyright

A brief overview of the justifications of copyright is helpful in elucidating the aim of this complex body of law. Broadly speaking, the underpinnings of copyright justifications relevant to the analysis in this Note stem from viewing copyright as a property or personal right.[17] This Note will also explore moral rights, which are much more prevalent in European countries.[18] However, even once the foundations of copyright are plainly laid out, it remains unclear exactly what is the end goal with U.S. copyright law.

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[14] Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841).

[15] DAVID NIMMER, COPYRIGHT ILLUMINATED: REFOCUSING THE DIFFUSE U.S. STATUTE 49 (2008) ("The problem with the [Copyright] Act is that . . . parts of it continue page after unreadable page, the result being that it is difficult to make any sense of what is being enacted . . . .") (footnotes omitted).

[16] *See generally* 3 GEORGE S. GROSSMAN, OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (2001). The first Copyright Act, enacted in 1790, accorded protection for only for charts, maps, and books. The 19th century led to copyrightable subject matter including dramatic works, musical compositions, photographs, and certain works of the fine and graphic arts. The Copyright Act of 1909 led to some confusion over what classes of work were eligible for copyright protection, thus leading courts to interpret the language narrowly. Congress painstakingly worded the Copyright Act of 1970 in hopes of remedying the past confusion and setting courts up for success—leaving little room for interpretation.

[17] *Id.* at 3–4.

[18] *See infra* Section II.A.1.b.

a. Economic justifications

Given the significance of capitalism in the U.S. overall, it is unsurprising that copyright law is deeply intertwined with economic principles. U.S. copyright laws are predominantly utilitarian in nature, meaning they prioritize the greatest good for the greatest number of people.[19] This utilitarian approach stems from the belief that fostering creativity and innovation ultimately benefits society as a whole.

To elaborate, the utilitarian nature of U.S. copyright law is reflected on their emphasis on providing economic incentives for creators. As a result, the borders of copyright law are built around what makes the creator's work economically fruitful or useful to the public.[20] By granting creators exclusive rights to their works for a limited period, copyright law aims to encourage the production and dissemination of creative works. This incentivization mechanism serves not only to reward individual creators for their efforts but also to stimulate a vibrant cultural and intellectual environment.

Furthermore, the utilitarian framework of U.S. copyright laws extends beyond rewarding creators to consider the interests of the public. Copyright law seeks to strike a balance between protecting the rights of creators and promoting access to knowledge and culture. This balance is achieved through mechanisms such as fair use,[21] which allows for the limited use of copyrighted works without permission for purposes such as education, criticism, and commentary.[22] In essence, the utilitarian nature of U.S. copyright law reflects a pragmatic approach to balancing interests of creators, consumers, and society. By incentivizing creativity while also safeguarding the public's right to access and use creative works, copyright law plays a crucial role in aiding innovation, cultural exchange, and the advancement of knowledge.

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[19] *See* Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909, 919 (2002) ("In America . . . proponents of the natural right view of copyright repeatedly sought a perpetual copyright; . . . the term of copyright was instead strictly limited in order to serve the public interest; and . . . it took an authoritative decision by the highest court in the land to firmly establish the utilitarian rationale as the dominant rationale for copyright.").

[20] *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright*, 18 J. LEGAL STUD. 325, 326 (1989) ("Copyright protection—the right of the copyright's owner to prevent others from making copies—trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place. Striking the correct balance between access and incentives is the central problem in copyright law. For copyright law to promote *economic efficiency*, its principal legal doctrines must . . . maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection.") (emphasis added).

[21] *See infra* Sections II.B–C.

[22] 17 U.S.C. § 107.

Justice Holmes provided an apt description of the unique characteristics of copyright as property.[23] First, the Justice notes that the concept of property ownership begins with the established control over a physical item, and it encompasses the entitlement to prevent others from interfering with one's unrestricted use of it as they see fit.[24] Justice Holmes then goes on to assert that "in copyright[,] property has reached a more abstract expression."[25] The substantive explanation Justice Holmes posits in his explanation of copyright as property gives one much to consider:

> The right to exclude is not directed to an object in possession or owned, but is *in vacuo*, so to speak. [Copyright protection] restrains the spontaneity of men where[,] but for it[,] there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right.[26]

Justice Holmes uses the Latin phrase, "*in vacuo*," which translates to "in a vacuum."[27] When applied figuratively, as is the case here with the concept of the right to exclude if one thinks of copyright as property, the sentence implies that something (the copyright protected work) is being analyzed in the abstract, or as a hypothetical environment, where factors outside the vacuum (traditional notions of property ownership attaching to a physical thing) do not make sense. Furthering this point, the right to exclude others from the thing being protected does not attach to a physical thing. As such, it makes it easier for others to do what they please with it, but for copyright protection. To make matters even more unwieldy, the copyright owner's work "may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong."[28]

Although comparing copyright to common law property concepts can prompt useful reflections on what copyright protects, the analogy ultimately lacks substance. If one continues with the schema of copyright as a property right, and analyzes copyright infringement in this framework, one finds that infringement is more akin to trespass to personal property than real property.[29] Professor Christina Bohannan draws out this analogy, specifically comparing copyright to real property, and highlights that whether copyright

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[23] White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *In vacuo*, OXFORD ENG. DICTIONARY (2021), https://www.oed.com/dictionary/in-vacuo_adv?tl=true [https://perma.cc/X96D-K43B].

[28] *White-Smith Music Publ'g Co.*, 209 U.S. at 19.

[29] Christina Bohannan, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 983–84 (2007).

is thought of as personal or real property, in either case one must show proof of harm.[30] In copyright infringement, this would mean that a plaintiff must show proof that they were actually harmed by the defendant's conduct.[31] Part IV of this Note will return to Professor Bohannan's approach to weave it into the recommendations, but at this point it is important to acknowledge that viewing copyright as a property right cannot stand on its own.

b. Moral justifications

Moral justifications in copyright law come in the form of two basic moral rights: attribution and integrity. As mentioned in Section II.A.1, *supra*, of this Note, by and large, European countries place moral rights of the creator at the forefront of their Copyright law. However, moral rights in copyright law are not exclusive to European countries. In fact, moral rights (attribution and integrity) are found to be protected in every piece of legislation around the world. For example, in developing countries and post-colonial nations, moral rights often serve as means of cultural preservation and identity assertion.[32] These countries may emphasize the protection of traditional knowledge and folklore, safeguarding creators' works and ensuring that their works are not distorted or misused.[33] So, while the latitude and enforcement of moral rights vary across jurisdictions, the underlying values of attribution and integrity remain globally resonant, reflecting shared commitment to honoring the personal and cultural connections between creators and their works. Envisioning a scenario where moral rights seamlessly thread through the fabric of U.S. copyright law is challenging, given the deeply ingrained economic and utilitarian principles that form its foundation and framework. However, in 1988, Congress amended the 1976 Copyright Act strictly to comply with the Berne Convention, thus somewhat bringing the issue of moral rights into the conversation of U.S. copyright law.[34]

Then, in 1990, with the enactment of the Visual Artists Rights Act (VARA),[35] Congress severely hemmed in just how far moral rights would go in U.S. copyright law. One only needs to read the language of VARA to understand that moral rights are only afforded to a very small, incredibly specific subsection of creators and their works.[36] In contrast, French copyright law view the author's moral rights as perpetual, inalienable, and

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[30] *Id.* at 984.

[31] *Id.*

[32] Irwin A. Olian, Jr., *International Copyright and the Needs of Developing Countries: The Awakening at Stockholm and Paris*, 7 CORNELL INT'L L.J. 81, 92 (1974).

[33] *Id.* at 83.

[34] Berne Convention Implementation Act of 1988, H.R. 4262, 100th Cong. (1988).

[35] Visual Artists Rights Act of 1990, H.R. 2690, 101st Cong. (1990)

[36] *Id.*

imprescriptible.[37] French copyright law places a more substantial emphasis on the author's role as the creator (and thus owner) than in U.S. copyright law.

Two states have incorporated some version of VARA into their respective state codes.[38] Unfortunately, though, that means these two states are the exception and not the rule. Nevertheless, the states that *do* have these VARA-type provisions incorporated into their state laws are providing an added layer of protection to their citizens producing certain kinds of intellectual property.[39] Not only is it an added layer of protection, but it is also a way to give their state citizens a local forum in which to bring these sorts of actions.[40]

B. Statutory Provisions of Copyright

Copyright owners are afforded certain exclusive rights under the Copyright Act.[41] Among this bundle of rights is the adaptation right, granting the exclusive right to creative derivative works recasting, transforming based on the copyright owner's already existing works.[42] Thus, a third party who creates a derivative work without the copyright owner's consent infringes this right. Additionally, it is possible that one may license a right to reproduce the copyrighted work[43] without licensing the right to create a derivative work. In that scenario, an action against the licensee for creating a derivative of the licensed work would rest on infringement of the adaptation right.[44] While this hypothetical infringement case is clearly laid out, as this Note will illustrate, many real-world scenarios do not neatly fall into this category.[45] In 1958, prior to statutory codification of fair use, Alan Latman produced a study, analyzing the issues underlying fair use and their possible legislative

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[37] *Copyright in France*, CASALONGA (2021), https://www.casalonga.com/documentation/droit-d-auteur/le-droit-d-auteur-en-france-230/Copyright-in-France.html?lang=en#:~:text=The%20moral%20right%20is%20perpetual%2C%20inalienable%20and%20imprescriptible%2C,author%2C%20the%20moral%20right%20passes%20to%20his%20heirs [https://perma.cc/QPL7-UMHM] ("The moral right is perpetual, inalienable and imprescriptible, and therefore may not be transferred, may not be renounced by the author and exists and must be respected even after the work has entered the public domain. Upon the death of the author, the moral right passes to his heirs.").

[38] CAL. CIV. CODE § 987 (West 2024); N.Y. ARTS & CULT. AFF. LAW § 14.01 (Consol. 2025).

[39] CIV. § 987; ARTS & CULT. AFF. § 14.01.

[40] *See, e.g.*, CIV. § 987(e).

[41] 17 U.S.C. § 106.

[42] 17 U.S.C. § 106(2).

[43] 17 U.S.C. § 106(3).

[44] 17 U.S.C. § 106(2).

[45] *See infra* Section II.G.2.

resolution.[46] Latman keenly observed, "the variations in usage demand careful scrutiny."[47] Indeed, one wonders if the courts have maintained this careful scrutiny or if they have veered in another direction, mechanically applying the statutory provisions Congress ultimately codified nearly two decades after Latman's analysis.

As an example of this mechanistic application of the statutory provisions, consider sections 106 and 107, which outline exclusive rights of the copyright holder and the fair use doctrine, respectively. When standing on its own, the adaptation right in section 106 appears straightforward, not leaving much room for interpretation.[48] However, upon reading the preamble to section 107, one can see trouble on the horizon.[49] When sections 106 and 107 meet, a gnarly tension springs forth. This tension arises from the interplay between the copyright holder's exclusive right to create derivative works and a provision of the Copyright Act, deemed "fair use," that places a limit on the scope of a valid copyright. Fair use is an exception to the exclusive rights of copyright owners and is a complete defense to infringement.[50] When determining whether a certain use is a fair use, courts consider four non-exhaustive statutory factors.[51] For reference purposes, including the oft-ignored[52] preamble, section 107 provides:

> 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—

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[46] Alan Latman, *Analysis: The Issues Underlying Fair Use and their Possible Legislative Resolution*, *in* 12 NIMMER, *supra* note 1, § V (1958) (discussed in Copyright Law Revision Study 14: Fair Use of Copyrighted Works).

[47] *Id.*

[48] 17 U.S.C. § 106.

[49] 17 U.S.C. § 107 ("Notwithstanding the provisions of sections 106 and 106A . . . ." Meaning, one must interpret this forthcoming provision with those subsequent provisions in mind, knowing that there will be some way in which the two interact).

[50] *Id.*

[51] *Id.*

[52] Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019*, 10 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 6 (2020) ("Over the 42-year period from 1978 through 2019, only 21.6% of the opinions cited the preamble to justify their fair use determination, and that proportion has remained essentially unchanged throughout the period.").

> (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 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*.[53]

C. Fair Use Caselaw

Fair use is a complex and evolving doctrine in copyright law, with numerous judicial opinions shaping its boundaries.[54] The four factors in fair use determinations can be traced back to the formative case, *Folsom v. Marsh*, where Justice Story amplified the importance of considering material injury to the copyright owner as the touchstone of fair use.[55] In his analysis, Justice Story emphasized that fair use determinations should weigh whether the use of copyrighted material serves a legitimate purpose, such as education or criticism, while also avoiding undue harm to the economic interests of the copyright holder.[56] Justice Story's analysis laid the foundation for the legal framework of the fair use doctrine in copyright law, underscoring the need to balance the rights of copyright owners with the broader societal interests in promoting creativity and enlightenment.

Over time, Congress codified this framework from the case law into four statutory factors.[57] This Section will provide an overview of various Supreme Court decisions that have contributed to shaping the contours of the fair use defense.[58] Additionally, this Section will introduce two more recent decisions that offer insights into the current judicial landscape surrounding fair use analysis, particularly relevant when considering a case like *Warhol v. Goldsmith* that reached the High Court in this timeframe.[59]

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[53] 17 U.S.C. § 107 (emphasis added).

[54] *See, e.g.*, Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (setting forth the four factors for fair use determination for the first time); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562–66 (1985) (analyzing the four fair use factors; this case is one of the most cited cases in copyright law); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (expounding upon the first factor, characterizing certain kinds of fair uses as "transformative").

[55] *See Folsom*, 9 F. Cas. at 348.

[56] *Id.* at 344–49.

[57] NIMMER, *supra* note 19, at 360.

[58] The order of the cases follows the numbering of the Fair Use Factors. *See infra* Section II.C.

[59] *See infra* Sections II.C.2–3.

1. Harper & Row, Inc. Defines the Edges of the Four Fair Use Factors

An unpublished manuscript of the autobiography of former President Gerald Ford gave rise to a heavily cited opinion from the Supreme Court addressing each of the four fair use factors in a copyright infringement case.[60] One particularly titillating topic addressed in the memoirs contained pivotal information about the Watergate crisis that had previously never been published.[61] Harper & Row Publishers owned the right to publish the Ford memoirs as well as the exclusive right to license prepublication excerpts.[62] As the memoirs were approaching completion, Harper & Row negotiated a prepublication licensing agreement with Time magazine for the right to publish a 7,500-word excerpt from the account of Mr. Ford's perspective of the Nixon pardon.[63] The exclusivity element of this agreement was integral, as it made the information more valuable to Time.[64] Prior to Time's publication of the authorized excerpt, The Nation, a political commentary magazine, unscrupulously obtained a copy of the Ford manuscript.[65] The editor of The Nation quickly threw together a piece composed of quotes, paraphrases, and facts extracted singularly from the Ford manuscript.[66] Speed was paramount in successfully pulling off this news leak, so the editor did not add any independent commentary, research or criticism in their piece.[67] Following The Nation's article, Time canceled its piece and brought suit violations of the Copyright Act, *inter alia*.[68]

The district court spurned The Nation's assertion of fair use, determining that The Nation had commercially disseminated the core of the soon-to-be-published work for financial gain, thereby disrupting the Time agreement and consequently depreciating the copyright's value.[69] However, a split panel within the Second Circuit overturned this decision.[70] The appellate court, taking into account the politically significant character of the implicated news reporting, the necessity of direct quotations for authenticity, and the limited

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[60] *Harper & Row, Publishers, Inc.*, 471 U.S. at 562–66.

[61] *Id.* at 542.

[62] *Id.*

[63] *Id.* at 542–43.

[64] *Id.* at 543.

[65] *Id.*

[66] *Harper & Row, Publishers, Inc.*, 471 U.S. at 543.

[67] *Id.*

[68] *Id.*

[69] Harper & Row, Publishers, Inc. v. Nation Enters., 557 F. Supp. 1067, 1072–73 (S.D.N.Y. 1983).

[70] Harper & Row, Publishers, Inc. v. Nation Enters., 723 F.2d 195, 209 (2d Cir.1983).

extent of verbatim reproduction deemed the publication eligible for protection under the fair use doctrine.[71]

The Supreme Court, in overturning the previous decision, determined that The Nation's article had exceeded the boundary distinguishing fair use from impermissible appropriation. Through a sequential examination of the four factors delineated in section 107, the majority concluded that each factor weighed against a fair use designation.[72] In contrast, three dissenting justices unanimously assessed the same factors as supporting a determination of fair use.[73]

2. *Campbell v. Acuff-Rose Music, Inc.* Shades in the Forms of the Four Fair Use Factors

In the early 1990s, a song called *Pretty Woman* by a rap group, 2 Live Crew, got the attention of Acuff-Rose Music.[74] The reason Acuff-Rose Music noticed the song *Pretty Woman* is because in their catalogue of copyright-protected songs is a song called *Oh, Pretty Woman*, written and released in the 1960s by recording artist, Roy Orbison.[75] The song *Pretty Woman* borrows much of *Oh, Pretty Woman*; there are similar riffs of melody, and structure and use of lyrics.[76] However, perhaps interestingly, 2 Live Crew reached out to Acuff-Rose Music prior to releasing *Pretty Woman*, asking if they could pay a fee in exchange for permission to use *Oh, Pretty Woman*.[77] Acuff-Music Rose denied the request, but alas, 2 Live Crew released their version of *Pretty*

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[71] *Id.* at 208–09.

[72] *Harper & Row, Publishers, Inc.*, 471 U.S. at 561–70.

[73] *Id.* at 590–605 (Brennan, J., dissenting).

[74] Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1151 (M.D. Tenn. 1991).

[75] *Id.* at 1151–52.

[76] *Id.* at 1152.

[77] Prior to the release of 2 Live Crew's song in question:

> 2 Live Crew's manager informed Acuff–Rose that 2 Live Crew had written a parody of "Oh, Pretty Woman," that they would afford all credit for ownership and authorship of the original song to Acuff–Rose . . . and that they were willing to pay a fee for the use.

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572 (1994).

Woman.[78] After a journey through the lower courts,[79] the case landed at the Supreme Court, which granted certiorari in 1993 and heard the case in 1994.[80]

When embarking on fair use analysis, *Folsom* urges investigating courts to "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or *supersede the objects, of the original work*."[81] Here, the Court took the guidance on superseding the objects of the original work and labored at length on the transformative nature of 2 Live Crew's use of *Oh, Pretty Woman*.[82] The substantive portion of the opinion begins by underscoring the undeniable—that 2 Live Crew's song would be an infringement of Acuff-Rose's rights in *Oh, Pretty Woman* but for a finding of fair use through parody.[83] The Court Post-*Campbell*, cases in which the defendant uses the plaintiff's work as a source for parody appear to be the only subset of fact patterns that will almost certainly be a slam-dunk for fair use, especially when the allegedly infringing work is found to be transformative.[84]

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[78] Acuff–Rose's agent denied 2 Live Crew's request for permission, stating that "I am aware of the success enjoyed by 'The 2 Live Crews', but I must inform you that we cannot permit the use of a parody of 'Oh, Pretty Woman.'" *Id.* at 572–73. However, in 1989, 2 Live Crew released "Pretty Woman," and "[t]he [works] identify the authors of 'Pretty Woman' as Orbison and Dees and its publisher as Acuff–Rose." *Id.* at 573.

[79] The District Court initially granted summary judgment in favor of 2 Live Crew, determining that their song constituted a parody and constituted fair use of the original song. *Acuff-Rose Music, Inc.*, 754 F. Supp. at 1160, *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *rev'd*, 510 U.S. 569 (1994). However, the Court of Appeals later reversed this decision and sent it back for further consideration. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1439 (6th Cir. 1992), *rev'd*, 510 U.S. 569 (1994). The Court of Appeals based their reversal on several factors, including the commercial nature of the parody, which they believed made it inherently unfair according to the first of the four factors outlined in § 107. *Id.* at 1437. Additionally, they argued that 2 Live Crew had taken a significant portion of the original work and made it a central element of their new work, which was deemed excessive under the third § 107 factor. *Id.* at 1438. Finally, they argued that the presumption of market harm applied to commercial uses, affecting the fourth § 107 factor. *Id.* at 1439.

[80] *See generally* Campbell v. Acuff-Rose Music, Inc., 507 U.S. 1003 (1993) (granting certiorari in part to the United States Court of Appeals for the Sixth Circuit, cabining the scope to the question of whether 2 Live Crew's commercial parody was a "fair use" within the meaning of 17 U.S.C. Section 107).

[81] Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (emphasis added).

[82] *Campbell*, 510 U.S. at 578–85.

[83] *Id.* at 574.

[84] *See generally* Beebe, *supra* note 55, at 28 ("A subset of transformativeness cases consists of cases in which the defendant made a parody of the plaintiff's work. In nearly all of these, the defendant's conduct was deemed to be transformative and a fair use. . . . Even more so than generally transformative works, the species of such works that qualify as parodic are especially privileged under factor one and the overall four-factor fair use analysis.").

3. The Second Circuit Creates Controversy in *Cariou v. Prince*

In 2000, Patrick Cariou released *Yes Rasta*, a coffee table book containing a collection of classical portraits and landscape photos captured during his six-year immersion in Rastafarian culture in Jamaica.[85] Richard Prince subsequently appropriated and integrated some of Cariou's *Yes Rasta* photos in his series of paintings and collages titled *Canal Zone*, showcased initially in St. Barth's in 2007 and 2008, and later in New York at the Gagosian Gallery.[86] Moreover, Gagosian produced and sold an exhibition catalog featuring reproductions of Richard Prince's works and images from his suit.[87] Cariou filed a lawsuit against Richard Prince and Gagosian, alleging copyright infringement concerning Richard Prince's *Canal Zone* works and the exhibition catalog, which incorporated Cariou's *Yes Rasta* photographs.[88] The defendants invoked a fair use defense.[89] Following cross-motions for summary judgment, the United States District Court for the Southern District of New York granted Cariou's motion, denied the defendants', and issued a permanent injunction.[90] This injunction required the defendants to surrender any unsold infringing works to Cariou for destruction, sale, or other disposal.[91]

In Richard Prince and Gagosian's appeal to the Second Circuit, they primarily argued that Richard Prince's work was transformative and constituted fair use of Cariou's copyrighted photographs.[92] They asserted that the district court applied an incorrect legal standard by requiring Richard Prince's work to "comment on Cariou, on Cariou's Photos, or on aspects of popular culture closely associated with Cariou or the Photos" to qualify for a fair use defense.[93] The Second Circuit agreed with Richard Prince and Gagosian such that the law does not mandate a secondary use to comment on the original artist work, or popular culture.[94] As a result, they determined that twenty-five of Richard Prince's artworks did indeed make a fair use of Cariou's copyrighted photographs.[95] Regarding the remaining five artworks,

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[85] Cariou v. Prince, 714 F.3d 694, 698 (2d Cir. 2013).

[86] *Id.* In an effort to minimize confusion using the name "Prince" in two different cases, I will refer to the defendant Richard Prince by his first and last name.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Cariou*, 714 F.3d at 698.

[92] *Id.*

[93] *Id.* This quote is a direct nod to the requirements of parody as outlined in *Campbell*. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–79 (1994).

[94] *Cariou*, 714 F.3d at 698.

[95] *Id.* at 698–99.

the Second Circuit remanded the case to the district court to determine whether Richard Prince was entitled to a fair use defense.[96]

The Second Circuit made the distinction that succeeding on the first factor did not necessarily mean that the secondary work *must* comment on the original work (as in parody), but rather that this is merely one path to succeeding on the first factor.[97] Further, the Second Circuit judge quoted *Campbell* and asserted that, according to the Supreme Court, to be eligible as a fair use, a new work typically must alter the first work with "new expression, meaning, or message."[98]

D. Discussion of Gender Disparities in Copyright Ownership

Women have been integrated into society, with all the same freedoms and rights as men. However, enough research and data to fill several tomes illustrate a less than equitable existence between genders.[99] Copyright law was written by men; and whether the benefit of its protection flows as freely to women as it does to men has not been a primary consideration of policymakers.[100] The founding *fathers* penned patriarchy into the laws of the land.[101] At the time when copyrights were codified into the U.S. body of law, women had not yet won the right to vote. It should go without saying that women were not afforded the privilege of input at the dawn of copyright law. Thus, male authors and creators disproportionately benefit from the

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[96] *Id.* at 699.

[97] *Id.* at 706.

[98] *Id.* (citing *Campbell*, 510 U.S. at 579).

[99] Generally, women's wages are still lower than men's. Based on an OECD 2012 report, one can see that women are still behind men when it comes to economic stability. Accordingly, if a woman photographer (or creator in any medium) wants to sue for infringement, the economic factor alone may be enough to deter her from bringing the suit. This barrier only becomes even more daunting if the alleged infringer is a person or entity with ample economic resources at their disposal. *See* ORG. FOR ECON. COOP. & DEV., CLOSING THE GENDER GAP: ACT NOW 165 (2012), https://doi.org/10.1787/9789264179370-en (on file with author); *see also* Nicole B. Lyons et al., *Gender Disparity Among American Medicine and Surgery Physicians: A Systematic Review*, 361 AM. J. MED. SCIS. 151, 154–60 (2021) (finding that there is still disparity and discrimination in research, leadership, and pay between male and female physicians); *see also* HANNAH ALSGAARD, *Rural Inheritance: Gender Disparities in Farm Transmission*, 88 N.D. L. REV. 347, 389–94 (2012) (discussing how there is still a gender disparity in farm inheritance and the farming profession).

[100] Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER, SOC. POL'Y & L. 551, 557 (2006).

[101] Other examples of patriarchy in law: The Declaration of Independence using the language, "[A]ll *men* are created equal." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added); 1920 marked the year when women finally got the right to vote with the ratification of the 19th Amendment. U.S. CONST. amend. XIX; the fact that the U.S. did not address coverture until the Women's Property Act of 1839. Further, this act only spoke to the economic issues with coverture. *Married Women's Property Act*, WOMEN & THE AM. STORY, https://wams.nyhistory.org/expansions-and-inequalities/politics-and-society/married-womens-property-act [https://perma.cc/EML8-MNAD].

operations of the copyright system.[102] Indeed, it is bold to say as much, but given the significant differences in copyright registration rates between men and women,[103] might one plausible explanation be that equality in copyright law does not exist? This Note will primarily focus on two core aspects: firstly, the feminist critical analysis of copyright law,[104] and secondly, the implications arising from the decision in *Warhol v. Goldsmith*.[105] The analysis of these aspects will involve examining the entrenched power imbalances, societal perceptions and consequences of labor, the repercussions stemming from the lack of recognition for women and marginalized groups, and the presence of economic injustices.

E. Path to The Supreme Court: Andy Warhol Found. v. Goldsmith

In 1981, Newsweek commissioned a rock and roll photographer named Lynn Goldsmith to do a photoshoot of a musical artist whose star was on the rise.[106] The musician, Prince Rogers Nelson or, "Prince," went on to achieve international celebrity status and the wealth to match. In 1984, as Prince became more popular and in-demand, Vanity Fair reached out to Goldsmith to license one of her photographs of Prince for a one-time use as an "artist reference."[107] With that one-time license, Vanity Fair hired Warhol to create a purple silkscreen portrait of Prince.[108] The Warhol portrait, with the source photograph credited to Lynn Goldsmith, appeared in the 1984 November issue of Vanity Fair accompanying an article about Prince.[109] Though Goldsmith only received $400 for the one-time license,[110] this was but one transaction in her career—or so it might have seemed at that time.

Goldsmith has gone on to attain success in the arts and has a professional website chock-full of her works, accolades, achievements, and

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[102] Carys J. Craig, *21 for 2021: Copyright & Gender – Evidencing the Connections*, CREATE BLOG (Dec. 17, 2021), https://www.create.ac.uk/blog/2021/12/17/21-for-2021-copyright-gender-evidencing-the-connections [https://perma.cc/89TU-RD5J].

[103] U.S. COPYRIGHT OFF., WOMEN IN THE COPYRIGHT SYSTEM: AN ANALYSIS OF WOMEN AUTHORS IN COPYRIGHT REGISTRATIONS FROM 1978 TO 2020 6–8 (2022), https://www.copyright.gov/policy/women-in-copyright-system/Women-in-the-Copyright-System.pdf [https://perma.cc/8TRC-45FL].

[104] *See infra* Section II.G.

[105] *See infra* Part III.

[106] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 508 (2023).

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

more.[111] Justice Sotomayor called Lynn Goldsmith a "trailblazer."[112] But just how did Lynn Goldsmith end up in a copyright suit as a defendant in the Supreme Court? At first blush, one might think Lynn Goldsmith is the infringer since she is defendant in this case. However, Lynn Goldsmith winds up on the wrong side of the v, so to speak, because the party on the other side is a foundation for the arts with *deep* pockets and cunning intellectual property litigators.

In 2016, Prince died.[113] Condé Nast (Vanity Fair's parent company) asked Andy Warhol Foundation for the Visual Arts, Inc. (AWF) about using the 1984 Vanity Fair purple silkscreen Prince portrait for a special edition publication that would celebrate the life of Prince.[114] Then, Condé Nast learned that Warhol had actually created sixteen works, known as the Prince Series, derived from the Goldsmith's 1981 copyrighted portrait of Prince.[115] Subsequently, Condé Nast licensed "Orange Prince," an orange silkscreen print from the Prince Series, for $10,000.[116] Goldsmith, who had no prior knowledge of the Prince Series, saw the Condé Nast magazine with Orange Prince on the cover and notified AWF of her belief that it had infringed her copyright.[117]

Not long after Goldsmith reached out to AWF regarding her copyrighted photograph, AWF sued Goldsmith for a declaratory judgment of noninfringement, or in the alternative, fair use.[118] Goldsmith counterclaimed for infringement.[119] The federal trial court disposed of any discussion on infringement because the infringing behavior occurred long enough ago that this issue was no longer within reach per the statute of limitations.[120] Goldsmith, however, focused her infringement claim on AWF's 2016 licensing of the Prince Series works, which was still within the statute of limitations.[121] Ultimately, the district court held that the Prince Series constituted fair use of Goldsmith's photograph.[122] When analyzing the

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111 *See* LYNN GOLDSMITH, https://lynngoldsmith.com/wordpress [https://perma.cc/MA5G-25AY].

112 *Goldsmith*, 598 U.S. at 515.

113 *Id.* at 508.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.* at 515.

118 *Goldsmith*, 598 U.S. at 508.

119 *Id.*

120 Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 324 (S.D.N.Y. 2019).

121 *Id.*

122 *Id.*

first factor of fair use (purpose and character of the use), the trial court heavily relied on transformative nature.[123] Part III of this Note will discuss at greater length why the court's reliance on transformative nature was misguided, but for now it is enough to say that there is no mention of transformative nature in the statutory provisions of the fair use doctrine.[124] The District Court considered the four fair use factors and found fair use in favor of AWF.[125] Goldsmith subsequently appealed the district court's decision.[126] The Court of Appeals, finding that all four fair use factors favored Goldsmith, reversed.[127] Meanwhile, on April 5, 2021, The Supreme Court handed down the *Google v. Oracle* opinion that considered fair use at the crux of the holding.[128] Thinking this might be yet another possibly effective arrow in their quiver, the Warhol Foundation petitioned for a rehearing en banc considering the *Google* decision.[129] AWF then filed a petition for a writ of certiorari, in which the sole question presented was whether a work of art is "transformative" when it conveys a different meaning or message from its source material, or whether a court is prohibited from considering the meaning of the accused work where it recognizably derives from its source

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[123] *Id.* at 325.

[124] *See* Caile Morris, *Transforming "Transformative Use": The Growing Misinterpretation of the Fair Use Doctrine*, 5 PACE INTELL. PROP., SPORTS & ENT. L.F. 10, 14–20 (2015).

[125] *Goldsmith*, 382 F. Supp. 3d at 324.

[126] *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 992 F.3d 99, 105 (2d Cir. 2021), *opinion withdrawn and superseded on reh'g sub nom.* Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022), *and aff'd sub nom.* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023)

("Goldsmith . . . contend[s] that the district court erred in its assessment and application of the four fair-use factors. . . . [T]hey argue that the district court's conclusion that the Prince Series works are transformative was grounded in a subjective evaluation of the underlying artistic message of the works rather than an objective assessment of their purpose and character. We agree. We further agree that the district court's error in analyzing the first factor was compounded in its analysis of the remaining three factors. We conclude upon our own assessment of the record that all four factors favor Goldsmith and that the Prince Series works are not fair use as a matter of law.").

[127] *Goldsmith*, 992 F.3d at 105.

[128] The facts of the case in *Google v. Oracle* are quite the departure from the other cases discussed in this Note. The intellectual property at issue in *Google* comes down to computer code in which Oracle asserted copyright ownership. Essentially, the inception of Google's Android Operating System (Android OS) gave rise to the development of a proprietary programming language, drawing heavily from Java, an intellectual property asset owned by Oracle.

Google L.L.C. v. Oracle Am., Inc., 593 U.S. 1, 1–2 (2021).

[129] Petition for Panel Rehearing and Rehearing En Banc at 16–17, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 992 F.3d 99 (2d Cir. 2021) (No. 19-2420).

material.[130] The Supreme Court affirmed the Court of Appeals' finding for Goldsmith.[131]

The only issue to resolve at this point was the matter of how the first factor of fair use was meant to be applied.[132] Delivering the majority opinion, Justice Sotomayor relied heavily on the text of the statute.[133]

F. Women in Art and Women Copyright Owners

This Part will first lay out a concise overview of the art world, drawing insights from empirical research to depict the current status of women within this sphere. Delving into empirical studies will effectively underscore the prevailing dynamics concerning women's representation, recognition, and opportunities in the realm of art. Subsequently, the discussion will shift towards an examination of three distinct copyright infringement cases involving women photographers. In each case, these photographers, as rightful owners of copyrighted works, seek to exercise their legal rights. Through an exploration of the outcomes of these cases, this Part aims to illuminate the challenges and obstacles faced by women artists in asserting their creative ownership and protecting their intellectual property rights. By analyzing the nuances and complexities of these legal disputes, the narrative aims to emphasize the systemic undervaluation of women in the artistic domain and the consequential implications for their engagement with copyright law. It is imperative to highlight not only the pervasive disparities in the valuation of women's artistic contributions but also the historical inadequacies in affording women equitable benefits from the legal framework intended to safeguard creative works, namely copyright law.

G. The Feminist Critical Perspective Defined

This Note resides at the intersection of feminist criticism and feminist jurisprudence. While it might appear insignificant, distinctions within feminist analysis are crucial for attaining a profound understanding of the subject matter. To clarify, the examination in Section II.G.1, *infra*, will adopt a broader feminist perspective, focusing on feminist criticism as applied to the arts. Conversely, the discussion in Section II.G.2, *infra*, will examine feminist jurisprudence, scrutinizing the legal system through this feminist lens.

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[130] Petition for a Writ of Certiorari at 12–13, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023) (No. 21-869), 2021 WL 5913520, at *2–3.

[131] *Goldsmith*, 598 U.S. at 513.

[132] *Id.* at 525.

[133] *Id.* at 527–29.

1. Gender Representation in the Arts

Investigating gender parity in the arts sheds light on the overarching theme of this Note: Women often face disadvantages. One particular study focuses on gender representation within blue-chip galleries.[134] These galleries exclusively exhibit art of high investment value, usually priced in the range of six to eight digits.[135] The study questions how education plays a significant role in this context.[136] Despite educational background, women artists tend to have fewer opportunities for gallery representation, museum exhibitions, and inclusion in collections.[137] This study highlights the perception that access to these top-tier galleries is heavily restricted, contributing to the gender disparity.[138] A lack of transparency in the art world serves as a notable barrier.[139] Kuntz & Vick further explore the complexities of this issue, emphasizing the factors influencing the demand for art at such astronomical levels and questioning whose art is valued in this elite space.[140]

The historical narrative of needlework and textile production reveals another noteworthy disparity, specifically concerning the roles and opportunities afforded to women. Initially, the majority of sewing and needlework tasks were confined to domestic settings until the emergence of a commercial garment history in the late 19th century.[141] This transition saw a swift departure of cloth manufacturing from small scale home-based operations to large industrial factories, predominantly located in northern England.[142] The genesis of industrial designs protection stemmed directly from the Industrial Revolution in late 18th century England, yet it's crucial to note that this legislative safeguard benefited textile manufacturers, principally male-dominated entities at the time.[143]

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[134] *See generally* Melissa Kuntz & Brandon Vick, *Education, Gender, and Blue-Chip Gallery Representation: The Importance of Educational Prestige in a Male-Dominated Art World*, 42 EMPIRICAL STUD. ARTS 560 (2023) (exploring the gender gap among contemporary artists in career-related outcomes, including representation in blue-chip galleries).

[135] *Id.* at 562.

[136] *Id.* at 560.

[137] *Id.* at 570–74.

[138] *Id.* at 562.

[139] *Id.*

[140] Kuntz & Vick, *supra* note 134, at 562.

[141] Shelley Wright, *A Feminist Exploration of the Legal Protection of Art*, 7 CANADIAN J. WOMEN & L. 59, 90 (1994).

[142] *Id.*

[143] *Id.*

2. Women Copyright Owners: Your Work Has Been Infringed—Now What?

In 2019, a woman photographer named Kristen Pierson found out that a photograph she took, (of which she owns a valid copyright) was taken without her permission and used on a commercial website.[144] Pierson filed a complaint alleging that the commercial entity infringed her copyright by displaying on their website an unauthorized copy of the photograph she took.[145] Here, the court did not see fit to grant Pierson's motion for summary judgment on Dostuff Media's fair use defense.[146]

In 2023, a woman photographer and copyright owner, Stephanie Campbell, entered into a licensing agreement with a media content broker for use of one of her photographs.[147] Campbell's copyright protected photograph wound up in a situation that exceeded the terms of the licensing agreement.[148] Here, the court did *not* find fair use for the defendants.[149]

Also in 2023, yet another woman photographer and copyright owner, Julie Dermansky, found two of her photographs used on a political blog.[150]

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[144] Pierson v. DoStuff Media, L.L.C., No. 19-435, 2021 WL 2772810, at *1 (W.D. Tex. Mar. 17, 2021) (ruling that Pierson had a prima facie case of copyright infringement, showing ownership of a valid copyright and unauthorized copying). Dostuff Media did not rebut Pierson's evidence or dispute copying without permission. However, the court found insufficient facts to entitle Pierson summary judgement on Dostuff Media's fair use defense. *Id.* at *4–5.

[145] *Id.* at *1.

[146] *Id.* at *5.

[147] Campbell v. Gannett Co., No. 21-557, 2023 WL 5250959, at *1 (W.D. Mo. Aug. 15, 2023).

[148] *Id.* at *1–2. Here, the outcome is a mixed ruling on Gannett's motions for summary judgment, permitting some of Campbell's copyright claims to proceed, but limiting damages. Breaking the ruling down—the court denied Gannett's motions for summary judgment on copyright infringement, rejecting their arguments that they had an implied license to use the work or that their use amounted to fair use. *Id.* at *3–4. Accordingly, Campbell's infringement claims can go to trial, where a jury will decide if Gannett unlawfully used the copyrighted photo. As a side issue, however, the court granted summary judgment in favor of Gannett on Campbell's claim that they removed or altered copyright management information, finding insufficient evidence to support that allegation. *Id.* at *8–10. The court also ruled that Campbell could not seek disgorgement of Gannett's profits, eliminating that potential remedy from the case. *Id.* at *10–11. While Campbell may still recover statutory damages if she prevails, the court limited her to a single statutory damages award rather than multiple awards for separate instances of infringement. *Id.* at *11–13. Finally, the court denied the defendants' motion for summary judgment on the issue of willful infringement, allowing the question of whether the defendants acted willfully or recklessly to go before a jury. *Campbell*, 2023 WL 5250959, at *13. As a result, while the plaintiff's primary infringement claims remain intact, her potential recovery has been narrowed, and certain claims have been dismissed entirely.

[149] *Id.* at *8.

[150] Dermansky v. Hayride Media, L.L.C., No. 22-3491, 2023 U.S. Dist. LEXIS 168076, at *2 (E.D. La. Sept. 21, 2023). On the matter of fair use, the court decided against Hayride and awarded Dermansky partial summary judgment. *Id.* at *43. The court found that Hayride's use

Dermansky was neither attributed nor compensated in either instance.[151] She sued for copyright infringement and the defendants claimed fair use.[152] Here, not only did the court not find fair use in defendant's favor, but it also had a Supreme Court decision to which it could directly cite—*Warhol v. Goldsmith*.[153]

In 2024, Brigitte Stelzer, a female photographer, received favorable news about a copyright infringement case in which she was the plaintiff. Stelzer filed suit against Wang Law Office as a result of the law office's unpermitted use of Stelzer's copyrighted photograph.[154] In November 2024, the judge presiding over Stelzner's case rebuffed the law office's fair use defense.[155] Again, not only did the court reject the defendant's fair use defense argument, but it also had a Supreme Court decision to which it could directly cite—*Warhol v. Goldsmith*.[156]

III. ANALYSIS

Within the copyright community, the Second Circuit's in favor of Goldsmith came as a shock.[157] Leading up to the Supreme Court's consideration of *Warhol v. Goldsmith* and its subsequent ruling, copyright academics and attorneys hoped for a more predictable analysis and bright line rules for fair use.[158] However, when the opinion dropped in May 2023, it was

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of the photos was not transformative since it fulfilled the same function as Dermansky's original intended use—that of illustrating articles about the subjects shown. *Id.* at *42–43. The court also noted that the images were creative works, which runs contrary to a fair use defense. *Id.* at *32–33. More importantly, Hayride had also used a substantial portion of the photos, therefore undermining its case. *Id.* at *37–40. Most crucially, the court decided that Hayride's usage compromised Dermansky's licensing market, so allowing such use without authorization may reduce the commercial value of the original works. *Id.* at *40–43. These results led the court to deny Hayride's petition for summary judgment on fair use and grant Dermansky's motion for partial summary judgment, therefore guaranteeing the case would proceed. *Dermansky*, 2023 U.S. Dist. LEXIS 168076, at *43.

[151] *Id.* at *3.

[152] *Id.* at *6–7.

[153] *Id.* at *19–26.

[154] Stelzer v. Wang L. Off., P.L.L.C., No. 23-4264, 2024 WL 4836299, at *1 (E.D.N.Y. Nov. 20, 2024).

[155] *Id.* at *6–7. At this stage in the *Stelzner* litigation, it is enough to say that the court did not agree with any of the law firm's defenses for using the photo and the copyright infringement claim has since been allowed to proceed its course of litigation. While this movement in a case might not seem groundbreaking to some, it truly is considered a small but special victory for the plaintiff in a copyright infringement suit.

[156] *Id.* at *6.

[157] Corynne McSherry et al., *What the Supreme Court's Decision in Warhol Means for Fair Use*, ELEC. FRONTIER FOUND.: DEEPLINKS BLOG (May 23, 2023), https://www.eff.org/deeplinks/2023/05/what-supreme-courts-decision-warhol-means-fair-use [https://perma.cc/P4QY-BRBJ].

[158] Kyle Jahner, *High Court's Tricky Task in Warhol Case Carries Big Implications*, BLOOMBERG L.

surprising to many in the copyright community to find that the Court's approach to fair use analysis was relatively narrow.[159]

Despite the limited application of the ruling, many prominent copyright law experts argue that the outcome from the High Court is significant.[160] This Note presents a theory that remains relevant regardless of differing interpretations of the ruling's implications for copyright law. This Note posits an interconnected theory, suggesting that historically, copyright law has favored men, particularly when viewed through a feminist lens.[161] Building on this premise, the Note argues that the decision in *Warhol v. Goldsmith* will be particularly beneficial to all artists, with a notable emphasis on its potential impact for women artists.[162] With these concepts in mind, this Note positions the *Warhol v. Goldsmith* decision as a likely harbinger for a reevaluation of the predominantly patriarchal framework of copyright law.[163]

A. How One Narrow Decision from the Supreme Court Benefits Women Artists

Another unfortunate quirk of copyright law is that the scope of types of works it protects has significantly expanded since its inception, so its bundle of rights vested in the creator rarely make for straightforward interpretation when it comes to infringement litigation.[164] It follows then, that much of the cases involving visual works of art makes the perfect environment for creative lawyering.[165] After all, if each copyright infringement case could

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(Apr. 1, 2022, 4:15 AM), https://news.bloomberglaw.com/ip-law/high-courts-tricky-task-in-warhol-case-carries-big-implications (on file with author).

[159] Kyle Jahner, *Warhol Fair Use Ruling Reframes Appropriation Art Legal Fights*, BLOOMBERG L. (May 30, 2023, 4:05 AM), https://news.bloomberglaw.com/ip-law/warhol-fair-use-ruling-reframes-appropriation-art-legal-fights (on file with author).

[160] Noah Feldman, *The Court's Warhol-Prince Ruling Is Pro-Artist, Anti-Art*, BLOOMBERG L. (May 20, 2023, 7:00 AM), https://www.bloomberg.com/opinion/articles/2023-05-20/supreme-court-warhol-prince-ruling-is-pro-artist-anti-art (on file with author); Kyle Jahner, *Warhol Ruling Decimates Artist's Fair Use Defense, Court Told*, BLOOMBERG L. (July 3, 2023, 4:29 PM), https://news.bloomberglaw.com/ip-law/warhol-ruling-decimates-artists-fair-use-defense-court-told (on file with author).

[161] *See supra* Section II.G.

[162] *See infra* Section III.A.

[163] *See infra* Section III.B.

[164] 4 NIMMER, *supra* note 1, § 13F.02 ("The original 1963 edition of this treatise included a section devoted to fair use, and its comprehensive 1978 revision followed suit. Given the volume of cases adjudicating fair use, almost every update over the succeeding decades added to the discussion. By the early 2020s, that single section had grown to an unwieldy size, with thousands of footnotes shoehorned in to address the myriad twists and turns of the field.") (footnotes omitted).

[165] How many areas of the law would put the Court in position to state that a monkey lacks statutory standing to sue? *See* Naruto v. Slater, 888 F.3d 418, 420 (9th Cir. 2018) ("We must determine whether a monkey may sue humans, corporations, and companies for damages and injunctive relief arising from claims of copyright infringement. Our court's precedent requires

reasonably argue an affirmative defense such as fair use, what competent lawyer would opt *not* to throw in that argument? In fact, looking to cases from the last few decades, cases prior to *Warhol v. Goldsmith* with similar fact patterns would often result in the infringer winning with the fair use affirmative defense. Of the copyright infringement cases from the last several decades, however, there are very few in which a woman copyright owner takes action.[166] This, in and of itself, is troubling. Are there too few cases exhibiting fact patterns, one being women copyright owners because people are not infringing on women's works? Or is it because women are easily deterred by the thought of costly litigation?[167] A lack of data makes it nearly impossible to answer these questions. However, Lynn Goldsmith's experience is rich with information about what it can be like for a woman copyright owner seeking a remedy when someone has infringed her work.[168]

To show how this ruling will be beneficial to women artists, consider the line of cases discussed in Section II.G.2, *supra*, of this Note. First, in the *Pierson* decision in 2021 about a woman photographer's copyright-protected photo being used on a commercial website without her permission, the court finds it was fair use in favor of the defendant website owner.[169] Then, in the infamous *Warhol* ruling in May 2023, where a woman photographer whose copyright-protected photo was used in a way she did not authorize (let alone know about) by a celebrity artist to create a series of celebrity-as-subject artworks, the Supreme Court finds it was *not* a fair use, finding in favor of the woman photographer.[170] Months later in August 2023, in the *Campbell* case considering infringement of a woman photographer's copyright-protected

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us to conclude that the monkey's claim has standing under Article III of the United States Constitution. Nonetheless, we conclude that this monkey—and all animals, since they are not human—lacks statutory standing under the Copyright Act. We therefore affirm the judgment of the district court.") (footnote omitted).

166 *See infra* Figure 1.

167 *See, e.g.*, *How Much Does an Appeal Cost?*, ALEXANDER APP. L. P.A. (Dec. 30, 2023), https://www.alexanderappeals.com/appellate-brief/how-much-does-an-appeal-cost [https://perma.cc/T2GV-752V] (stating that the cost of litigation depends on several factors, including the complexity and number of issues involved, the duration of litigation and trial proceedings, and the attorney's hourly rate. Further, for cases that involve straightforward and limited issues, it is unrealistic to anticipate costs below $15,000. However, for more intricate cases, it is not uncommon for fees to range from $20,000 to $35,000); *see also* Rosemary Feitelberg, *Supreme Court Victor Lynn Goldsmith Talks Warhol, Prince and Celebrity Facades*, WOMEN'S WEAR DAILY (May 19, 2023, 6:29 PM), https://wwd.com/eye/people/lynn-goldsmith-prince-photograph-andy-warhol-supreme-court-interview-1235658276 [https://perma.cc/QM2R-PQE9] (interviewing Goldsmith and reporting that Goldsmith invested more than $2 million defending her copyright).

168 *See generally* Feitelberg, *supra* note 167 (interviewing Goldsmith and reporting on her experience going through the years-long litigation).

169 *See* Pierson v. DoStuff Media, L.L.C., No. 19-435, 2021 WL 2772810, at *1, *5 (W.D. Tex. Mar. 17, 2021).

170 *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 508–13 (2023) (discussed *supra* Section II.E).

photo that she licensed to a media broker who then used her photo beyond that license, the court did not find fair use for the defendants, citing *Warhol v. Goldsmith*.[171] Then, in September 2023, in the *Dermansky* case in which a woman photographer sought summary judgment against a political blog that made unauthorized use of two of her copyrighted photographs, the court rejected the defendant's fair use claim.[172] Further, the *Dermansky* court cited *Warhol v. Goldsmith* nearly twenty times and used it extensively in their fair use analysis.[173] Whether the Court has feminist intentionality at the forefront of their decision making does not matter in this moment. Women artists find true validation in the fact that it will now be more challenging for infringers to dismiss a woman's copyrighted work using a fair use defense—the post-*Warhol* cases as clear evidence.[174] While the Supreme Court's ruling in *Warhol* did not explicitly firm up fair use analysis by proscribing new bright line rules,[175] the way that they approached the fair use analysis gives a subtextual suggestion on how the Court feels about the way lower courts have been interpreting the four fair use factors in the past twenty-odd years.[176]

A pertinent example of how lower courts deficiently interpreted the fair use analysis lies in two of the cases that led *Warhol v. Goldsmith* to the Supreme Court. Based on the direction that the Supreme Court took in its analysis of fair use, it seemed to echo Judge Sullivan's sentiment (concurring, out of the Second Circuit) that lower Courts had been leaning much too heavily on transformative use when considering the first factor.[177] While indeed, the 1994 Supreme Court precedent *Campbell v. Acuff-Rose Music, Inc.* is where the notion of transformative use gained clout and status as Supreme Court precedent,[178] it is not statutorily codified. Furthermore, finding that a defendant's use of the plaintiff's work was transformative does not

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[171] Campbell v. Gannett Co., No. 21-557, 2023 WL 5250959, at *5, *8 (W.D. Mo. Aug. 15, 2023).

[172] Dermansky v. Hayride Media, L.L.C., No. 22-3491, 2023 U.S. Dist. LEXIS 168076, at *43 (E.D. La. Sept. 21, 2023).

[173] *See, e.g.*, *id.* at *19–26.

[174] *See generally Campbell*, 2023 WL 5250959 *and Dermansky*, 2023 U.S. Dist. LEXIS 168076 (holding defendants' uses of the plaintiffs' works was not fair use, with both cases citing *Warhol*).

[175] *See Goldsmith*, 598 U.S. at 525 (restricting the analysis at bar to whether the court below correctly held that the first factor weighs in Goldsmith's favor).

[176] *SCOTUS Says Warhol Not So Fast: The Limitations of Transformative Use*, THE ART L. PODCAST (June 5, 2023) [hereinafter THE ART L. PODCAST], https://artlawpodcast.com/2023/06/05/scotus-says-warhol-not-so-fast-the-limitations-of-transformative-use [https://perma.cc/ZDW6-CHYZ].

[177] *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 992 F.3d 99, 125 (2d Cir. 2021) (Sullivan, J., concurring).

[178] Judge Leval coined the phrase, "Transformative use," in a 1990 Law Review article. The Supreme Court took hold of it and the rest is history. Morris, *supra* note 128, at 16–17.

automatically justify a finding of fair use.[179] As one keen Columbia University intellectual property law professor, Shyamkrishna Balganesh, noted in April 2022 (well before the case was argued at the Supreme Court), the current textualist bent of the high court could mean that it may explore a quirk in the legal framework: The Copyright Act's definition of "derivative" includes works "recast, transformed, or adapted" from an original, to which the original artist has rights.[180]

B. A Feminist Reading of Warhol v. Goldsmith

Even without going deep in the weeds of the facts at play in *Warhol v. Goldsmith*, the case is steeped in misaligned power dynamics. The celebrity artist, Andy Warhol, is a white male who has achieved status, wealth, and fame as a cultural icon. The photographer, Lynn Goldsmith, is a female who has worked hard in the arts. Goldsmith has published numerous photography books, won dozens of awards, and her work has appeared in scores of exhibitions.[181] Notwithstanding Goldsmith's contributions to and success in the photography world, not many outside of her field (or perhaps the arts) would know her name. The fact that a male with heaps of privilege (on top of being a male in the U.S., that is) can *take* something from a "less than" (on multiple levels because she is female and a photographer) and possibly get away with it as a matter of law (fair use) reeks of a deeply rooted misaligned power dynamic. Accordingly, even if someone has only a basic understanding of the case and knows the Supreme Court's final decision, they can certainly interpret this decision as a clear sign that the current state of affairs, which has strongly benefited men, is no longer as effective.

The journey *Warhol v. Goldsmith* took in getting to the Supreme Court illuminates the lopsided power dynamic and bias for those with economic wealth as well.[182] On average, the cost of litigating a copyright infringement

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[179] *See* 4 NIMMER, *supra* note 1, § 13F.05[B][2] ("[Instead of such conclusory applications, o]ne should perform the transformative inquiry on its own merits, bearing in mind that *just because a given use qualifies as 'transformative' does not [even mean] that defendants prevail under the first factor, much less that they prevail altogether on the fair use defense*.") (emphasis added).

[180] Jahner, *supra* note 158.

[181] *See, e.g.*, LYNN GOLDSMITH, PHOTODIARY (1995); LYNN GOLDSMITH, ROCK AND ROLL (2007); LYNN GOLDSMITH ET AL., ROCK AND ROLL STORIES (2013); *Lynn Goldsmith: 2020 Honoree / Achievement in Portraiture*, THE LUCIE AWARDS (2023), https://lucies.org/jury/lynn-goldsmith [https://perma.cc/W68G-L46A]; *Bio & CV*, LYNN GOLDSMITH, https://lynngoldsmith.com/wordpress/bio-cv [https://perma.cc/9R39-HWRT].

[182] *See* ORG. FOR ECON. COOP. & DEV., *supra* note 102, at 165 (reporting in-depth that generally women's wages are still lower than men's). With this data, one can see that women are still behind men when it comes to economic stability. Accordingly, if a woman photographer (or creator in any medium) wants to sue for infringement, the economic factor alone may be enough to deter her from bringing the suit. This barrier only becomes even more daunting if the alleged infringer is a person or entity with ample economic resources at their disposal.

case in federal court from pre-trial up to the appeals process is $278,000.[183] For Lynn Goldsmith, however, the cost of litigating *her* case was approximately eight times that amount, setting her back more $2,000,000.[184] Consider the procedural posture of the case once it landed at the Supreme Court. Goldsmith had tried her case at the district court level and lost, subsequently appealing.[185] Then, upon appeal, the Second Circuit found in Goldsmith's favor, deeming the Condé Nast instance of the Warhol Foundation's use of Goldsmith's photo *not* fair.[186] After the Second Circuit's decision from March 26, 2021, the Warhol Foundation, still ready to go for however many rounds it took until they got the judgement they wanted, pounced on what they perceived to be a fortuitous opportunity. On April 5, 2021, The Supreme Court just happened to hand down the *Google v. Oracle* opinion that considered fair use at the crux of the holding.[187] Thinking this might be yet another possibly effective arrow in their quiver, the Warhol Foundation petitioned for a rehearing en banc considering the *Google* decision.[188]

The court granted the motion, determined that further argument was unnecessary,[189] and subsequently issued an amended decision reiterating the same conclusions. The appellate court embraced a more limited perspective on transformative use compared to the district court. While acknowledging that the defendant's work needs not necessarily comment on the original to

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[183] *Copyright Litigation 101*, THOMSON REUTERS (Dec. 16, 2022), https://legal.thomsonreuters.com/blog/copyright-litigation-101 [https://perma.cc/74EZ-6UBR].

[184] *See generally* Feitelberg, *supra* note 167 ("Six-and-a-half years into the legal battle, the American photographer and artist had mortgaged her house and invested more than $2 million defending her copyright of a 1981 photograph of the musician Prince. Despite being a pivotal legal case for artists, photographers, musicians, filmmakers and other creatives with copyrighted work, Goldsmith received little financial support from the artist community, including several financially successful celebrity photographer friends.").

[185] *See generally* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312 (S.D.N.Y. 2019) (noting that Goldsmith's motion for summary judgment was denied).

[186] *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 992 F.3d 99, 105 (2d Cir. 2021).

[187] Google L.L.C. v. Oracle Am., Inc., 593 U.S. 1, 1 (2021).

[188] Petition for Panel Rehearing and Rehearing En Banc at 16–17, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 992 F.3d 99 (2d Cir. 2021) (No. 19-2420).

[189] *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 32 n.1 (2d Cir. 2021) ("After our initial disposition of this appeal, *see Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99 (2d Cir. 2021), the Supreme Court issued its decision in *Google LLC v. Oracle America, Inc.*, [593 U.S. 1 (2021)], which discussed the fair-use factors implicated in this case. Shortly thereafter, Plaintiff-Appellee filed a 'Petition for Panel Rehearing and Rehearing En Banc' (the 'petition'). Apart from its reliance on the *Google* opinion, the petition mostly recycles arguments already made and rejected, and requires little comment. Nevertheless, in order to carefully consider the Supreme Court's most recent teaching on fair use, we hereby GRANT the petition, conclude that additional oral argument is unnecessary, *see* Fed R. App. P. 40(a)(4)(A), withdraw our opinion of March 26, 2021, and issue this amended opinion in its place.").

qualify as transformative, it imposed a higher standard on works lacking commentary. In such cases:

> [T]he secondary work itself must reasonably be perceived as embodying a distinct artistic purpose, one that conveys a new meaning or message separate from its source material. While we cannot, nor do we attempt to, catalog all of the ways in which an artist may achieve that end, we note that the works that have [successfully] done so thus far have themselves been distinct works of art that draw from numerous sources, rather than works that simply alter or recast a single work with a new aesthetic.[190]

Applying this criterion, the Second Circuit determined that the defendant's portraits failed to meet the standard, even though they reflected Warhol's unique aesthetic sensibility.[191] This was because the portraits drew exclusively from a single source and preserved (and sometimes amplified) the essential elements of the original.[192] Although the resulting portrait may present "a different impression of its subject, the Goldsmith Photograph remains the recognizable foundation upon which [Warhol's] Prince Series is built."[193]

The Supreme Court's holding did not directly follow the Second Circuit's rationale; however, it did come to the same conclusion—that AWF's use of Goldsmith's photo was *not* fair use.[194] Here, the holding from the opinion situates the reader perfectly for the majority's reasoning, "[t]he 'purpose and character' of AWF's use of Goldsmith's photograph in commercially licensing Orange Prince to Condé Nast does not favor AWF's fair use defense to copyright infringement."[195] Justice Sotomayor comes to this conclusion by assessing factor one in a more holistic manner. Instead of focusing on the judge-made rule of transformative nature, the majority returns to the statutory text. In the majority's rejection of AWF's contention that Warhol's use bore new meaning rendering it transformative, the Court emphasized that such a subjective inquiry cannot override the statutory

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[190] *Goldsmith*, 11 F.4th at 41. The court also addressed the more familiar transformative-use question of whether defendant's work effectuated a different purpose than the plaintiff's. It labeled that test "perhaps a less useful metric" in cases involving visual art, *id.* at 40, concluding that "the overarching purpose and function of the two works at issue here is identical, not merely in the broad sense that they are created as works of visual art, but also in the narrow but essential sense that they are portraits of the same person." *Id.* at 42 (footnotes omitted).

[191] *Id.* at 41–42.

[192] *Id.* at 43.

[193] *Id.*

[194] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 509 (2023).

[195] *Id.*

condition to consider *purpose and character* of the use.[196] By grounding its analysis in the statutory language instead of an abstract judicial gloss, the majority held out that commercial licensing, even of a work with some new expression, does not inherently mean a finding of fair use is more likely than not.[197]

One industry opinion writer claims that the *Warhol* ruling is "Pro-Artist, Anti-Art."[198] I disagree. While many industry folks (like Justice Kagan and those who wrote amicus briefs in favor of AWF) think that this kind of interpretation of the fair use analysis will have a chilling effect on art and "make our world poorer,"[199] that simply cannot be. Fortunately, Justice Sotomayor addresses that far-fetched fear in the majority opinion and breaks it down like the faulty logic that it is.[200] In Justice Sotomayor's direct response to this she puts forth that the dissent's claims about the supposed chilling effect on the art world "will not age well."[201] Justice Sotomayor goes even further to reveal the flaw in the dissent's logic first, by pointing out that "[i]t will not impoverish our world to require AWF to pay Goldsmith a fraction of the proceeds from its reuse of her copyrighted work."[202] Then, Sotomayor reminds the dissent that payments (like licenses and royalties) are the means of incentivizing artists to create original works in the first place.[203] Even if this unlikely chilling effect were to become a problem, one thing about copyright law is that it is protean.[204] Further, the Supreme Court has exhibited on multiple occasions that it is not wary of hearing important copyright cases when the system so clearly shows itself as breaking down.[205]

With all the talk of transformativeness that has permeated *Warhol v. Goldsmith* since its first trial, naturally, the Supreme Court must address it. Reading this part with a feminist critical lens, it feels as though Justice Sotomayor is telling the AWF (and the dissent) that the Court has told them,

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196 *Id.*

197 *Id.*

198 Feldman, *supra* note 160.

199 *Goldsmith*, 598 U.S. at 593 (Kagan, J., dissenting).

200 *Id.* at 548 (majority opinion) ("If AWF must pay Goldsmith to use *her* creation, the dissent claims, this will 'stifle creativity of every sort,' 'thwart the expression of new ideas and the attainment of new knowledge,' and 'make our world poorer.'").

201 *Id.* at 549.

202 *Id.*

203 *Id.*

204 *Id.* at 527. ("Because those principles apply across a wide range of copyrightable material, from books to photographs to software, fair use is a 'flexible' concept, and 'its application may well vary depending on context.'") (quoting Google L.L.C. v. Oracle Am., Inc., 593 U.S. 1, 20 (2021)).

205 *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562–66 (1985); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994); *Google L.L.C.*, 593 U.S. at 3.

explicitly, where transformativeness comes into play in a copyright infringement case—and it's not here. Justice Sotomayor effectively reminds the reader that "[t]he Court's decision in *Campbell* is instructive."[206] Nevertheless, as is true with many a Supreme Court opinion, *Warhol v. Goldsmith* also has a strong dissenting opinion.

1. Above the Line, Below the Belt

The dissent served by Justice Kagan heaps a contemptuous commentary on the reader. Not only did she belittle the ability of her fellow Justices to understand the case and analysis at bar, but she handily put down Lynn Goldsmith and her life's work while she was at it.[207] Many a commentator has labeled Kagan's dissent as steeped in vitriol or something akin to that.[208] Justice Kagan points to a recently decided case in which the Supreme Court included transformative use as a major consideration in finding for fair use[209] and proceeds to say, "That Court would have told this one to go back to school." Then, Justice Kagan begins the next paragraph, building upon that insult opining, "What is worse, that refresher course would apparently be insufficient. For it is not just that the majority does not realize how much Warhol added; it is that the majority does not care."[210] These remarks are overtly condescending both to the majority *and* Goldsmith. The way Justice

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[206] *See Goldsmith*, 598 U.S. at 510.

[207] "You've probably heard of Andy Warhol; you've probably seen his art," Justice Kagan then continuing on about all of Warhol's iconic works saying, "That's how Warhol earned his conspicuous place in every college's Art History 101." *See id.* at 558–59 (Kagan, J., dissenting). Further glorifying Warhol's accomplishments for another full paragraph before lamenting, "All that matters is that Warhol and the publisher entered into a licensing transaction, similar to one Goldsmith might have done. Because the artist had such a commercial purpose, all the creativity in the world could not save him." *Id.* at 559–60. Facially, all of Justice Kagan's commentary in this particular cited excerpt could be read interpreting her tone as matter of fact. However, given the common sentiment throughout Justice Kagan's dissent, for her to carry on about Warhol, deifying him and cataloging his achievements at every turn, the subtext seems to carry an air of putting Goldsmith down. The fact that she closes that paragraph plaintively asserting that Warhol could not be saved by his creativity truly cements Justice Kagan's flair for the dramatic in this dissenting opinion.

[208] *See* THE ART L. PODCAST, *supra* note 176 (using the word "vitriol" to describe Justice Kagan's dissent and noting that the tone was distracting); Katherine Tangalakis-Lippert, *In Pointed Dissent, Justice Kagan Accuses Fellow Liberal Justice Sotomayor of Hypocrisy in Warhol Decision, Says the Court Is 'Trying Too Hard' and Anti-Artist Ruling Will 'Stifle Creativity' and 'Make Our World Poorer,'* BUS. INSIDER (May 20, 2023, 11:56 PM), https://www.businessinsider.com/justice-elena-kagan-accuses-justice-sotomayor-hypocrisy-in-warhol-decision-2023-5 [https://perma.cc/7RUP-K2EG] (describing Justice Kagan's dissent as "scathing"); Joe Patrice, *Elena Kagan Uses Footnote to Unleash Surprise Sotomayor Diss Track*, ABOVE THE L. (May 18, 2023, 5:43 PM), https://abovethelaw.com/2023/05/elena-kagan-footnote-withering-condemnation-warhol [https://perma.cc/WR95-EDBX] ("It's kind of fun and it's always appreciated when a judge inserts some shade without childish, vacuous insults. As someone who thinks Kagan is the best writer on the Court, I'm particularly tickled to see how she crafts a burn.").

[209] *See Goldsmith*, 598 U.S. at 559 (citing *Google L.L.C.*, 593 U.S. at 29).

[210] *Id.*

Kagan weaves Warhol into this sentence seems such that she is practically deifying him.[211] What, then, does Justice Kagan make of Lynn Goldsmith's work? It comes off as even more scathing when considered in contrast to the opening of the majority opinion, delivered by Justice Sotomayor.[212] The majority opinion begins with two paragraphs acknowledging Lynn Goldsmith as a person and an artist and speaking volumes on the milestones of achievement to her name and her status as a trailblazer.[213]

2. Footnotes Flooded with Spilled Tea

One motif appearing in the *Goldsmith* opinion that elicited a cacophony of commentary was the sense of disdain and contempt found in what seemed to be a battle between Justices Sotomayor and Kagan in their respective footnotes. In Justice Sotomayor's footnotes, she mentions the dissent 26 times.[214] The footnotes accompanying Justice Kagan's dissenting opinion confront the majority 22 times.[215] Quite frankly, the barbs thrown in the footnotes were downright uncivil. For instance, Justice Sotomayor calls out Justice Kagan for attempting to dismantle the majority's interpretation of the first factor:

> While keenly grasping the relationship between The Two Lolitas, the dissent fumbles the relationship between the first and fourth fair use factors. Under today's decision, as before, the first factor does not ask whether a secondary use causes a copyright owner economic harm. Cf. *post*, at 1303 (opinion of KAGAN, J.). There is . . . a positive association between the two factors: A secondary use that is more different in purpose and character is less likely to usurp demand for the original work or its derivatives, as the Court has explained . . . . This relationship should be fairly obvious. But see *post*, at 1303 – 1304 (KAGAN, J., dissenting) (suggesting that the first factor can favor only the user and the fourth factor only the copyright owner).[216]

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[211] In Section II of the dissenting opinion, especially, Justice Kagan waxes poetic about Warhol's works and style. Essentially, the subtext of Justice Kagan's sentiment in Section II is: "But it's a *Warhol*!" *Id.* at 574.

[212] *Id.* at 514 (majority opinion).

[213] *Id.* at 514–15.

[214] *Id.* at 534–44, 547–48 nn.10–19, 21–22.

[215] *Goldsmith*, 598 U.S. at 560, 566, 569, 577, 582 nn.2–3, 5, 7–8 (Kagan, J., dissenting).

[216] *Id.* at 536 n.12 (majority opinion) (citation omitted). The Court also addressed the more familiar transformative-use question of whether the defendant's work effectuated a different purpose than the plaintiff's. The Second Circuit labeled that test "perhaps a less useful metric" in cases involving visual art. Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 40 (2d Cir. 2021). The Court ultimately concluded that "the overarching purpose and

Although Justice Sotomayor is handily correcting the dissent's misguided understanding of the first and fourth fair use factors, her turns of phrase are dripping with derision. As a reader, it was challenging not to be distracted by the shots fired.

IV. RECOMMENDATION

Amending legislation is a painstakingly slow process—but for valid reasons. Whether you love Machiavelli or hate him, the man keenly observed and recorded the difficulty surrounding the implementation of major changes for an established society:

> Because he who innovates . . . has for his enemies all those who made any advantage by the old laws; and those who expect benefit by the new will be but . . . lukewarm in his defence; which lukewarmness proceeds from a certain awe for their adversaries, who have their old laws on their side, and partly from a natural incredulity in mankind, which gives credit but slowly to any new thing, unless recommended first by the experiment of success.[217]

What Machiavelli is saying here is that when someone introduces a new system of reform, they create enemies—especially among those who have profited from the old system. Further, while some people might stand to gain from the new system, their support is often weak or hesitant. People tend to distrust new ideas and prefer to see proof of success before fully committing to them. Ultimately, the burden of showing positive results first is on the innovator or reformer—and until she can prove that, she faces great resistance without much backing. It follows then, that amending legislation is a painstakingly slow process. This deliberateness stems from the complex nature of lawmaking, which requires careful consideration of numerous factors such as societal needs, legal precedents, potential consequences, and stakeholder perspectives. In the best-case scenario, policymakers approach the task with a sense of duty and responsibility, recognizing the significant impact their decisions will have on individuals, communities, and institutions. Thus, the drafting of legislation is not merely a bureaucratic exercise, but a nuanced endeavor rooted in principles of justice, equity, and democratic governance.

Accordingly, if the end goal is a new law or a revision of an old law, then the means by which we achieve that end goal are multipronged and well considered. This process involves extensive research, consultation with experts, public hearings, debates, and negotiations. Each step is critical in

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function of the two works at issue [here] is identical, not merely in the broad sense that they are created as works of visual art, but also in the narrow but essential sense that they are portraits of the same person." *Goldsmith*, 598 U.S. at 523 (quoting *Goldsmith*, 11 F.4th at 42).

[217] NICCOLÒ MACHIAVELLI, THE PRINCE (COLLINS CLASSICS) 27 (HarperCollins 2011).

ensuring that the resulting legislation is fair, effective, and reflective of the diverse interests and values within society. Moreover, the iterative nature of legislative amendment allows for refinement and improvement over time, as new evidence emerges and societal norms evolve. Therefore, while the pace of legislative change may seem slow, it is a deliberate and necessary aspect of the democratic process, designed to uphold the rule of law and protect the rights and interests of all citizens.

Advocating for gender parity in copyright law is not merely a lofty aspiration; it is an urgent necessity. The current lack of comprehensive scholarly research on this subject, coupled with a reluctance among policymakers to inquire deeply into the intricate interplay between gender and copyright law, are significant hinderances to progress. Nevertheless, when the Supreme Court not only hears a landmark case like *Warhol v. Goldsmith*, but also hands down an opinion that unequivocally champions the woman artist, it serves as a resounding declaration that the highest echelons of our legal system are committed to rectifying historical imbalances. This momentous decision not only signals a course correction but also ignites a call to action for all stakeholders in the realm of copyright law to join the push for gender equity. The time to effect meaningful change is now.

A crucial part of this reform effort must include strengthening moral rights protection, which are currently underdeveloped in U.S. copyright law. The Visual Artists Rights Act (VARA) of 1990 provides limited protections, applying only to works of "recognized stature" and leaving out broad categories of creative professionals, including authors, musicians, filmmakers, and digital artists. Amending VARA to extend its coverage beyond visual art to other forms of creative expression is a necessary step toward protecting artists from unauthorized distortions of their work. Moreover, incorporating automatic attribution rights—as seen in European *droit d'auteur* laws—would ensure that creators receive credit for their work as a default legal right rather than an optional contractual provision.

Beyond expanding VARA, the United States ought to consider introducing a Federal Moral Rights Statute that aligns with international standards. While contract law and the Lanham Act provide some protections, they fall short of the Berne Convention's moral rights requirement. A dedicated Moral Rights Act under Title 17 of the U.S. Code could: (1) guarantee attribution rights across all creative works; (2) prohibit unauthorized distortions or modifications that harm an artist's reputation; and (3) provide posthumous protections for creators' heirs to preserve artistic integrity. Adopting elements of France's *Droit Moral* and Germany's *Urheberpersönlichkeitsrecht* could establish a comprehensive framework in the U.S., ensuring creators retain dignity and control over their intellectual output.

Further, while federal law sets the foundation for copyright protections, state-level initiatives could provide additional safeguards. States like

California and New York have already enacted some protections, but these are not uniformly recognized nationwide. Encouraging state adoption of moral rights statutes, similar to California's Artists' Rights Act, would allow creators to seek local recourse for unauthorized modifications or loss of credit. Undoubtedly there would be plenty of people who would say that since California and New York are generally known as commercially creative hubs in the U.S., there would be no reason to go as far as nationwide protections in this arena. This concern is unfounded. Many of the cases that I saw in my research were in jurisdictions all across the U.S.—not one of them being in California or New York.

Imagine a version of the United States where moral rights are seamlessly woven into the fabric of copyright law, where the protection of artists' creative integrity is not an afterthought but a fundamental principle. While it is true that U.S. copyright law has historically been rooted in economic and utilitarian reasoning, we must recognize the evolving landscape of intellectual property rights and embrace a more holistic approach. Although the U.S. took a step towards acknowledging the significance of moral rights with the enactment of VARA, it was primarily driven by international obligations, such as the Berne Convention. Consequently, the inclusion of moral rights in U.S. copyright law can sometimes feel like a perfunctory gesture rather than a sincere commitment to the concept. In contrast, European countries have successfully integrated moral rights into their copyright structures, prioritizing the artist's moral autonomy.

It is time for the United States to consider a paradigm shift, one that places moral rights at the forefront of all intellectual property ownership discussions. Instead of confining the protection of moral rights to a niche subsection like VARA, policymakers should contemplate a comprehensive overhaul of copyright law. Such a transformation would necessitate a reevaluation of the balance between economic interests and the preservation of artists' moral rights, ultimately resulting in a more equitable and artist-friendly legal framework. By embracing this change, we can ensure that the U.S. remains a global leader in championing the rights and dignity of creative individuals. maybe policymakers would be better suited to do a major overhaul of copyright law. An overhaul like this would require a reassessment of the balance between the importance placed with the economic perspective of copyright law and the moral rights aspect, respectively.[218]

Undoubtedly, embarking on such a monumental endeavor is no small feat. This kind of project would demand an incredible collective effort, drawing on the expertise and insights of numerous individuals from diverse backgrounds. Advocates will have to wholeheartedly appeal for an intensified focus on research and scholarly commentary about the intersection of

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[218] The decision in *Warhol v. Goldsmith* gives the impression that the U.S. Supreme Court is subtly signaling that lower courts should be considering questions of fair use in a different manner than they have been for the past few decades.

copyright law and gender. Esteemed scholars who have firmly established themselves at the nexus of copyright law and gender assert that although gender-related concerns may not be immediately apparent within the framework of copyright law, a compelling case can be made for more extensive research and in-depth scholarly analysis. It is imperative that we amass a body of evidence that unequivocally illustrates the presence of gender-related issues within copyright law and critically evaluates their implications.

It is essential to clarify that our aim is not merely to point out flaws and gender biases within copyright law. Rather, the objective is to unearth these deeply ingrained issues, subject them to rigorous examination, and thereby provide policymakers with a comprehensive and profound understanding of the true nature of the situation. This includes shedding light on concrete instances of harm within fair use considerations. By undertaking this vital work, we can foster a more equitable and just legal landscape that genuinely addresses the intersection of copyright law and gender, leading to positive changes that benefit all individuals affected by these intricacies.[219]

V. CONCLUSION

For more than a century, artists have leaned on copyright law as a safeguard for their creations. Much like the dynamic and ever-changing nature of art itself, copyright law has also undergone a continuous evolution. It is only logical that the parameters and reach of copyright law have shifted over this period, mirroring its responsiveness to the very essence of the "property" it seeks to preserve. While there are multiple theories and justifications for copyright law, as a myriad of holdings from case law and murky statutory provisions reveal, it remains nebulous as to whether the current overriding economic theme in U.S. copyright law is working.[220]

The Copyright Act grants copyright owners exclusive rights, including the adaptation right, allowing them to control the creation of derivative works based on their original creations. Unauthorized creation of such derivative works by a third party constitutes infringement. Notably, licensing the right to reproduce a copyrighted work does not necessarily include the right to create derivatives, leading to potential infringement claims if done without proper authorization. The seemingly straightforward adaptation right becomes more complex when it intersects with "fair use," the cumbersome provision in the Copyright Act limiting the scope of copyright. As explored in this Note, this tension between the right to create derivative works and the fair use exception adds an incommodious element to this already labyrinthine body of law.

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[219] *See* Bohannan, *supra* note 29, at 1031.

[220] *See generally* Andrew Gilden, *Copyright's Market Gibberish*, 94 WASH. L. REV. 1019 (2019) (examining the ill-fitting nature of applying economics to copyright law in the sweeping manner such as the U.S. does).

Examining gender equality in the arts serves to underscore the central theme of this Note: women often face disadvantages. A study focused on gender representation in prestigious blue-chip galleries, where art commands high prices, reveals a notable gender disparity. Even when considering education, women artists experience lower rates of gallery representation and participation in museum exhibitions and collections. The study's researchers emphasize the perceived exclusivity of access to these galleries, attributing it to barriers such as the lack of transparency in the art world. Interestingly, if one mirrors the opaqueness of the art world with the turbidity of the U.S. copyright regime, one finds that they both have a way of handily keeping women on the periphery.

Indeed, one could attempt to remove gender, for example, when distilling the procedural posture of *Warhol v. Goldsmith*. In a barebones, just-the-facts approach, how *Warhol v. Goldsmith* made it to the High Court might read a little bit like this:

> Despite some misreporting around the case, the majority did *not* rule that Warhol wasn't entitled to paint his own rendition of a prominent photographer's portrait of **Prince**. Actually, Warhol had explicit permission to do just that—albeit on a "one time" basis for a *Vanity Fair* article 40 years ago. The real problem stemmed from the Warhol Foundation's 2016 licensing of other works that Warhol had . . . created based on the same photograph. . . . [A]s Sotomayor goes to pains to emphasize, the problem wasn't the original creation but rather the *licensing*. The Foundation insisted that the entire Prince series constituted "fair use" due to the "transformative" nature of the artist's works. It was the Supreme Court's job to decide whether that argument held true.[221]

The fact that even media coverage of this case refers to the males by their respective names and does not name Goldsmith at all shows just how deeply the undervaluing of women's work goes in society. That summary of the case was written by a man on a boutique liberal online news outlet, intending to make the complexities of the case easier to follow for a layperson reading the article. Notwithstanding the journalist's noble goal of making this case accessible to a larger swath of readers, he perpetuates the deification of Warhol and Prince as the subjects here. Further, he does more damage by objectifying the "prominent photographer" at the outset, and then essentially writing [her] out of the summary.

In conclusion, despite the integration of women into society and the ostensibly equal rights and freedoms granted to both genders, an extensive

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[221] Eriq Gardner, *The Warhol Diaries: Kagan v. Sotomayor*, PUCK (May 22, 2023), https://puck.news/the-warhol-diaries-kagan-v-sotomayor (on file with author).

body of research underscores the persisting disparities between men and women. The origins of copyright law, primarily crafted by men, inadvertently encoded patriarchal principles into the legal framework. Policymakers, at the inception of copyright legislation, paid scant attention to whether the protective benefits of copyright flowed equitably to women. Given that women had not yet secured the right to vote when copyright laws were established, it is evident that their perspectives were not considered in the shaping of these laws. Consequently, the copyright system disproportionately favors male creators. While it may be considered a brazen assertion, the substantial differences in copyright registration rates between men and women suggest that this may be a plausible explanation.

Essentially, the claim of equality within copyright law is misguided. This Note, focusing on the feminist critical analysis of copyright law and the *Warhol v. Goldsmith* decision, digs into the undeniable misalignment of power dynamics, the stark reality and consequences of labor as a societal construct, implications arising from the lack of recognition for women and marginalized groups, and the resultant economic injustices, all in an effort to add something new to the discourse on copyright and gender already happening in academia. Further, by interpreting the Supreme Court opinion through a feminist lens and analyzing how its decision could potentially indicate beneficial outcomes for female artists in the future, this Note invites further contemplation and discourse on the effect of copyright and fair use on the art world generally.

Figure 1. *Author conducted research, sampling 999 copyright infringement cases from the years 1993–1998. If the pronoun "she" was used to refer to the plaintiff in the action, I labeled it as a "Female Plaintiff" bringing the action.*