

THE BATTLE AFTER WARHOL: TATTOOS AS ARTWORK OR INFRINGEMENT?

Hodgson Russ Intellectual Property Litigation Alert
April 24, 2024

In a high stakes trial for the tattoo industry, jurors were asked to decide whether a Kat Von D tattoo of Miles Davis infringed upon photographer Jeffrey B. Sedlik's copyrighted photograph of the musician. A key aspect of the trial revolved around fair use and whether the tattoo was substantially similar to the copyrighted photograph. The jury ultimately found Von D's tattoo work did not infringe. This outcome provides insight into the future of copyright infringement in light of a key Supreme Court case issued one year ago.

Fair Use Doctrine Set Forth in *Warhol*

Last year the Supreme Court issued a crucial copyright infringement decision in *Andy Warhol Foundation v. Goldsmith*, which addressed the fair use doctrine. The fair use doctrine allows unauthorized uses of copyrighted works if the uses are beneficial to society. Four factors are considered: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

In *Warhol*, the Supreme Court analyzed only the first factor – purpose and character of use of an image that Warhol created of Prince for a magazine cover. The image was based on a photo by Lynn Goldsmith in a separate magazine story. The Supreme Court held that the Warhol image “share[d] substantially the same purpose” as Goldsmith’s original photo. Both works served as “portraits of Prince used in magazines to illustrate stories about Prince.” Whether the work was “transformative” did not depend on the intent of the artist or impression drawn from the work. Rather, because both works shared the same commercial purpose – magazine publishing – there could not be fair use. This was a departure from how courts typically analyze fair use as it shifted the focus from the content of a particular work to whether the purpose of a secondary use is different than the original.

Sedlik v. Kat Von D

The tattoo case was the first of its kind to go to trial since the *Warhol* decision, so commentators were watching closely to see what would happen. Sedlik sued tattoo artist (and reality television star) Kat Von D for infringing his 1989 copyrighted photograph of Miles Davis. The photograph was published on the cover of *Jazziz*

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Magazine and has appeared on other magazine covers, T-shirts, and other media. Von D created the tattoo without obtaining a license from Sedlik, and she then posted the image to social media.

At trial, Sedlik's attorneys argued Von D's actions could influence millions of others to steal photographs. Von D's tattoo was a nearly identical rendering of the photo with just "a few small differences." Sedlik testified that most of his income comes from licensing his work and that many other artists have paid him to make their own interpretations of his photos. He also has his own process to determine if a work falls under fair use, for example, if it is a parody. The photograph is still profitable for Sedlik, as he recently granted a license to a painter that could generate up to \$100,000.

Von D's attorneys argued that the tattoo fell under the fair use doctrine, as it was an artistic interpretation. Von D did not charge a fee for the tattoo and made no money from her subsequent social media posts. Von D testified that "nobody" in the tattoo industry secures a license when producing a tattoo. In the past, photographers have always praised her interpretation of their work and indicated that they were honored. Von D had never been sued or threatened with a suit until now.

After hearing testimony from Sedlik, Von D, and the recipient of the tattoo, the jury deliberated for two hours. The jury ultimately decided that Von D's tattoo was not substantially similar to Sedlik's photograph, and the social media postings of the tattoo were covered by the fair use doctrine.

Takeaways

Von D's win is a victory for the tattoo industry where artists often use photographs without permission at their clients' request. But it also has a meaningful impact on copyright litigation in general as critics of the *Warhol* decision were concerned it would have a chilling effect on artistic expression. Only time will tell the lasting effect *Warhol* will have on copyright litigation moving forward, especially in the context of pure commercial use.

Hodgson Russ's intellectual property team helps clients protect their intellectual property rights by prosecuting and defending copyright infringement claims. For more information, please contact our [Intellectual Property Litigation Practice Group](#).

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