

Kluwer Copyright Blog

The clash of artistic rights: Warhol, Goldsmith, and the boundaries of copyright in Brazil and in the U.S.

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US Supreme Court's *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith et al* sheds light on different perspectives of copyright law in common law and civil law countries. This brief post dives into this duality, as exemplified by American and Brazilian law.



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Lynn Goldsmith, an esteemed American photographer, captured a significant moment in 1981 when she took a portrait of Prince. In 1984, Condé Nast, the publisher, obtained a license from Goldsmith to allow Andy Warhol to use her Prince portrait as the foundation for a single serigraphy to be featured in Vanity Fair magazine.

Unfortunately, Warhol exceeded the limits of the license and produced not just one serigraphy but a total of 14 serigraphies and two illustrations, collectively known as the 'Prince Series'. In 2016, Condé Nast acquired a license from the Warhol Foundation to use the Prince Series as illustrations for a new magazine. It was during this time that Goldsmith discovered her license had been violated, and the magazine had failed to properly credit her.

Responding to the controversy, the Warhol Foundation filed a declaratory action of non-infringement, arguing that Warhol's work was so exceptionally original and transformative compared to Goldsmith's that it did not require authorization from the photographer. They contended Warhol's work transcends the subjects he depicted. In their opinion, while Goldsmith uses her camera to faithfully capture portraits, Warhol employs public figures to comment on social issues. His muses – [the Foundation argued](#) – serve as human billboards for the themes he denounces, chosen based on the association society has with them, rather than their individual identities.

The Foundation further argued that Warhol's work predominantly focuses on the face and hair of the singer. The clothing and body language of Prince were integral parts of Goldsmith's portrait. Interestingly, Warhol often separates the physical body from the subject's head in his prints,

leaving viewers with the impression that the model is only partially real. Although Prince remains recognizable, the Foundation argued that Warhol's portrait eliminates certain aspects of his personality that were central to Goldsmith's work. Therefore, [the two visual artists had distinct intentions behind their respective representations](#).

This case provokes profound considerations. Firstly, both Brazilian and American legislation stipulate that the creator of a work holds copyright over it. This is explicitly stated in Article 5, XXVII, of the Brazilian Constitution, and Article 1, Section 8, of the United States Constitution. However, copyright laws in both countries serve a social purpose, promoting artistic development while respecting other fundamental rights such as artistic freedom and freedom of expression, as protected under Articles 12 of both the Brazilian and American Constitutions.

In general, the public often perceives copyright as a self-serving interest of artists who, seemingly at odds with the public, seek to profit by restricting the free use of their works. However, it is important to recognize that an author's rights [have a profound impact](#) on interests of different sectors of civil society, including the creative output of other artists, as exemplified by the *Warhol v. Goldsmith* conflict.

A second contemplation arises from the historical prejudice towards photographs in the legal realm. Photographs were often undervalued as not all of them were considered products of creative activity. This viewpoint has since been overturned by the Brazilian Superior Court of Justice (STJ), which has acknowledged that photographs are indeed protected works under Article 7 of the Brazilian Copyright law, although the level of protection may vary depending on the creativity of the photograph. Nonetheless, there remains a disconcerting number of cases within the [Lower Brazilian Courts of Justice that fail to recognize adequate protection for photographers](#), highlighting the ongoing need to combat such bias.

A third reflection emerges: undoubtedly, Warhol's work was created based on Goldsmith's. However, it is important to recognize that all artistic works are influenced by those that came before them.[\[1\]](#) Even Prince, as revolutionary as he was, was influenced by the likes of James Brown, Jimi Hendrix, and others. Therefore, the law cannot prevent an author from finding inspiration in others, as it would hinder artistic development.

Thus, guided by the principle of equality, copyright operates as a spectrum of creativity, where the level of protection granted to a work corresponds to its level of originality.[\[2\]](#) At one end of the spectrum, we find plagiarism: a completely derivative work that fails to contribute any creative elements to the original piece. An example would be an artist copying a previous painting and merely altering the colors to pass it off as a new creation. Such cases are prohibited by law and can result in civil and criminal penalties.

In the middle of the spectrum, we have derivative works: secondary creations that incorporate elements of the original work while adding their own creative contributions. A film based on a book serves as an example. In this case, the author of the original work retains ownership of the original, while the author of the derivative work holds rights to the creative additions they have made. Consequently, as a general rule, for a magazine to reproduce a derivative work, authorization is required from both the author of the original work and the author of the derivative work. However, this may not be necessary in certain cases where copyright limitations apply.

At the highest level of creativity, we encounter entirely new works: creations that, although

inspired by previous works, make significant creative contributions to artistic development, not incorporating essential elements from their predecessors. For instance, Prince's compositions do not reproduce essential elements of Jimi Hendrix's songs. While both may share similar aesthetic expressions, these similarities can be attributed to the genre within which they expressed themselves.

Nevertheless, the challenge for the law lies in establishing clear parameters to differentiate between a new work, a derivative work, and plagiarism. Perhaps it is impossible to define such boundaries definitively, necessitating a case-by-case analysis.^[3]

Regardless of the creative level of a work, copyright comes with limitations. In the United States, the Copyright Act outlines the concept of fair use – situations where usage does not require authorization. American law considers several factors when assessing fair use: (1) the purpose and character of the use, including whether it is of a commercial nature; (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 on the potential market or value of the copyrighted work.

In the case at stake, the U.S. Supreme Court concluded that (1) the use of the Prince Series by the magazine was commercial since a license fee was paid. [The Court also recognized](#) that (2) the nature of the creation being a photograph imposes greater restrictions, as unauthorized exploitation of Warhol's work without proper authorization and compensation for photographer Goldsmith could potentially enable a series of commercial copies of photographs to be used for purposes substantially similar to the originals.

It is noteworthy to observe the disparity of how photographs are treated by Brazilian and American courts – in Brazil, Lower State Courts often reject copyrights for photographs (even though [the Superior Court of Justice has expressly decided that they are protected](#)), but in the U.S. photographs seem to be receiving significant protection due to their own nature of easily replicable works.

Moreover, the U.S. Supreme Court highlighted that (3) although Warhol's work added creative elements to the photograph, it still incorporated essential elements from Goldsmith's work – notably, the portrait of Prince, which was central to both pieces. Thus, Warhol possessed rights over the creative contributions he made, but so did Goldsmith, as her creation served as the foundation for the final artwork.

Lastly, (4) it was also concluded that the market perceives Warhol's and Goldsmith's works as interchangeable since both could be used to illustrate the magazine. Therefore, the Warhol Foundation's license had a detrimental effect on Goldsmith.

In Brazil, limitations to copyright law are provided in an exemplary manner. The Superior Court of Justice recognizes the possibilities of unauthorized use based on direct constitutional rights.^[4] Furthermore, Brazil also applies the “three-step test” due to the Berne Convention. In essence, this test establishes that a work can be used in specific special circumstances (e.g., parodies, quotations, and epigraphs), as long as it does not harm the commercial exploitation of the original work and does not infringe upon the interests of the author of the original work.

Despite the similarities between the Brazilian and American systems, “fair use” in the United States has an “econocentric” nature, focusing on analyzing, among other things, the economic effects that the use of the original work has on its author.^[5] Conversely, the Brazilian system is

primarily rooted in personality rights, particularly human dignity as a constitutional basis to the Brazilian constitutional order, which is expressed by four different fundamental rights: (i) freedom, (ii) equality, (iii) physical and psychological integrity, and (iv) dignity *stricto sensu*.^[6] On practice, this means that overall Brazilian Copyright Law tends to have a pro-user interpretation, whereas US Copyright Law tends to have a pro-owner interpretation. This arises from the fact that a systematic interpretation of the Brazilian Copyright Statute in light of the Brazilian Constitution determines that there are no “exceptions to copyrights” in Brazil, but rather there is a general rule of free use and access to copyrighted works, and copyright protection is *per se* the exception to the general rule of free usage.

Given the complexity of the systems in both countries, it is difficult to ascertain whether the *Goldsmith v. Warhol* case would have had the same outcome in Brazil. Often, even individuals with good intentions find it challenging to determine when and from whom they should seek permission to use a work – both in Brazil and in the U.S.

[1] CAMPOS, Pedro de Abreu M., *Direitos Autorais de Acordo com o STJ*. Ed. Lumen Juris, 2022. P. 98. (CAMPOS, Pedro. Copyright Law in accordance to the Superior Court of Justice. 2022).

[2] BARBOSA, Pedro Marcos Nunes. Originalidade em crise. *Revista Brasileira de Direito Civil – RBDCivil*, Belo Horizonte, v. 15, p. 37, jan./mar. 2018 (BARBOSA, Pedro M. N. Originality in crisis. *Brazilian Law Review of Civil Law – RBDCivil*, v. 15, p. 37, 2018).

[3] LANDES, William M. and POSNER, Richard A. *The Economic Structure of Intellectual Property Law*. Cambridge: *The Belknap Press of Harvard University Press*, 2003, p. 4

[4] ASCENSÃO, José de Oliveira. *O fair use no direito autoral*. *Revista Forense*. v. 365, jan.-fev. 2003, pp. 73-74

[5] RUBENFELD, Jed. The freedom of imagination: copyrights’ constitutionality “. *Yale Law Review*, v. 112, n. 01, out/2002, p. 19.

[6] MORAES, Maria Celina Bodin de. *Na medida da pessoa humana*. 1ª ed. Rio de Janeiro: Ed. Processo, 2016

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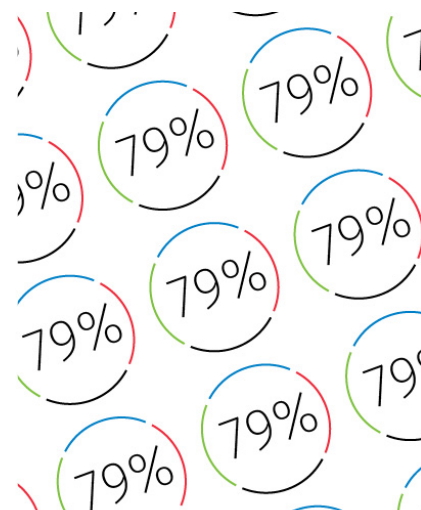
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