

U.S. AI and Copyright Protection Updates - Warhol's Ghost in the Machine: What Warhol v. Goldsmith Means for Generative AI

美国 AI 与版权保护动态 - 沃霍尔诉戈德史密斯案对生成式人工智能的意义

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“After *Warhol*, what uses are sufficiently ‘transformative’? Answers to [that and a number of other] questions are likely to impact the fair use analysis as applied to generative AI platforms.”

“沃霍尔案判决之后，何种使用方法足以构成‘转化性’使用？这些问题的答案很可能会影响生成式人工智能平台背景下合理使用的分析。”

On May 18, 2023, the U.S. Supreme Court [answered an exceedingly narrow question](#) of copyright law with potentially sweeping impact: did the *purpose* and *character* of Andy Warhol’s ‘Orange Prince’ work—as used on a 2016 Condé Nast magazine cover—support fair use of Lynn Goldsmith’s photograph of famed musician Prince Rogers Nelson a/k/a Prince?

2023 年 5 月 18 日，美国最高法院[回答了一个非常具体的版权法问题](#)，该问题的回答可能产生深远影响：安迪·沃霍尔（Andy Warhol）的作品《橙色王子》（Orange Prince）

（注：该作品被用于 2016 年康泰纳仕（Condé Nast）杂志封面）的 *目的* 和 *特征* 是否构成对林恩·戈德史密斯（Lynn Goldsmith）拍摄的著名音乐家普林斯·罗杰·尼尔森（Prince Rogers Nelson，又名“王子”）的照片的合理使用？

In a 7-2 decision, the Court found that it does not, calling into question nearly 30 years of fair use jurisprudence, arguably narrowing the scope of that doctrine, and potentially threatening disciplines that rely on it, *e.g.*, appropriation art. The decision is also sure to impact generative artificial intelligence (“AI”), an emerging technology that is also likely to rely heavily on fair use. 美国最高法院以 7 比 2 的裁决否认了该案中的合理使用抗辩，质疑了近 30 年来的合理使用判例。可以说，法院的裁决缩小了该原则的适用范围，并可能对依赖于该原则的学科（例如挪用艺术）构成威胁。该裁决无疑也将影响到一项可能严重依赖于合理使用原则的新兴技术——生成式人工智能（AI）。

I. The Warhol Decision

沃霍尔案的裁决

Andy Warhol died in 1987, but his copyrighted works live on. Today, those works are licensed by The Andy Warhol Foundation for the Visual Arts, Inc. (“AWF”). In 2016, AWF licensed to Condé Nast Warhol’s ‘Orange Prince,’ an unpublished, unlicensed

silkscreen artwork of Lynn Goldsmith’s 1981 black-and-white photograph, to use on a magazine cover to memorialize Prince. Goldsmith objected to ‘Orange Prince’ after learning of it from the commemorative issue, AWF responded with a declaratory judgment action, and Goldsmith counterclaimed for infringement. The district court found for AWF on fair use grounds, the U.S. Court of Appeals for the Second Circuit reversed, and the U.S. Supreme Court—faced with the narrow question of whether the first fair use factor favored Goldsmith or AWF—affirmed the Second Circuit’s ruling.

安迪·沃霍尔于 1987 年去世，留下了受版权保护的作品。如今，这些作品由安迪·沃霍尔视觉艺术基金会（The Andy Warhol Foundation for the Visual Arts, Inc.，简称“AWF”）负责授权。2016 年，AWF 将沃霍尔的作品《橙色王子》授权给康泰纳仕。该作品是以 1981 年林恩·戈德史密斯黑白照片为原型的未发表、未授权的丝网版画作品，被用于杂志封面以纪念王子。戈德史密斯从纪念版杂志上获悉作品《橙色王子》后对其提出异议。随后，AWF 对该异议以宣告判决诉讼进行回应，戈德史密斯又提起了侵权反诉。联邦地区法院以合理使用原则为由判决 AWF 胜诉，联邦第二巡回上诉法院推翻了这一判决，美国最高法院在面临合理使用原则第一要素更有利于戈德史密斯还是 AWF 这一具体问题时，确认了第二巡回上诉法院的裁决。

The majority and dissenting opinions starkly disagree on how to apply the fair use factors. Whereas the dissent focuses on the purpose and character of Warhol’s *creation* of Goldsmith’s photo to create ‘Orange Prince,’ the majority all but disregards it, and relies on the purpose and character of AWF’s *licensing* of ‘Orange Prince’ for use as a magazine cover. And whereas the majority finds that the mere addition of new expression cannot sway the first factor in a copyist’s favor without swallowing the author’s derivative works right, the dissent posits that the fourth factor—the effect on the author’s potential market for the work—addresses that concern.

在如何适用合理使用因素方面，最高法院判决中的多数意见和反对意见存在明显分歧。反对意见关注沃霍尔基于戈德史密斯的照片进行 *创造* 以创作《橙色王子》的目的和特征；而多数意见则完全无视这一点，并强调 AWF *许可*《橙色王子》用作杂志封面的目的和特征。多数意见认为，对于仅仅增加新的表达方式的行为，若在合理使用原则第一要素方面作出对作品复制者有利的判决，将严重侵害作者的衍生作品权；而反对意见则认为，合理使用原则第四要素“对作者作品的潜在市场的影响”可使该问题得到有效解决。

Warhol raises many questions. After *Warhol*, what uses are sufficiently “transformative”? Does *Warhol* square with the Court’s 2021 copyright fair use decision in *Oracle v. Google*? And does it square with the Second Circuit’s decisions in the *Author’s Guild* and *HathiTrust* cases (which the Court tacitly endorsed when it declined to grant certiorari in *Author’s Guild*)? Answers to those questions are likely to impact the fair use analysis as applied to generative AI platforms.

沃霍尔案引发了许多问题。沃霍尔案判决之后，何种使用方法足以构成“转化性”使用？沃霍尔案与法院在 2021 年甲骨文诉谷歌案中作出的版权合理使用判决是否

相一致？沃霍尔案与第二巡回法院在作家协会（Author’s Guild）案和哈蒂信托（HathiTrust）案中的判决是否相一致（注：最高法院在拒绝批准作家协案的调卷令时默许了该判决）？这些问题的答案很可能会影响到生成式人工智能平台背景下的合理使用分析。

II. What is Generative AI? 什么是生成式人工智能？

[Generative AI](#) refers to services comprised of algorithms that users can interact with to create content. A hallmark of these generative AI models is their “training” with huge datasets, *i.e.*, millions if not billions of images, in an iterative process whereby the generative AI model “learns” to generate increasingly accurate images in response to text prompts. Critically, some of the most popular generative AI text-to-image models have been trained on unlicensed datasets.

[生成式人工智能](#)是一种由算法组成的服务，用户可以与这些算法交互以创建内容。生成式人工智能模型的特点之一是，它们在迭代过程中使用大量数据集（即数百万甚至数十亿张图像）进行“训练”，响应文本，“学习”并生成愈加精确的图像。重要的是，一些最流行的生成式人工智能文本图像转换模型是使用未经许可的数据集进行训练的。

Artists use generative AI to create images in various ways. Some engage in a collaborative process involving iterative re-submission of AI-generated images to the generative AI platform. Others take an AI-generated image and modify it with traditional graphic design tools. Still others use AI-generated images as inspiration to create new works using non-AI tools. In each case, however, users benefit from a generative AI platform that may be “trained” on unlicensed images.

艺术家以各种方式使用生成式人工智能创作图像。一些艺术家与人工智能合作创作图像，包括将人工智能生成的图像反复重新提交给生成式人工智能平台，不断迭代。另一些艺术家使用人工智能生成的图像，并用传统的图形设计工具进行修改。还有一些艺术家利用人工智能生成的图像激发灵感，并使用非人工智能工具创作新作品。但无论何种情况下，用户都受益于可能利用未经许可的图像进行“训练”的生成式人工智能平台。

III. Copyright Fair Use in the Generative AI Context 生成式人工智能背景下的版权合理使用

Recent litigation involving generative AI platforms suggests that the scope of fair use will undoubtedly be an issue to consider. In its motion to dismiss a copyright infringement complaint over its use of unlicensed training sets, Midjourney, Inc. referred to its “obvious fair use defenses” to copyright infringement. Yet, following the Supreme Court’s *Warhol* decision, exactly how “obvious” is that defense?

最近涉及生成式人工智能平台的诉讼表明，合理使用的范围无疑将是一个值得关注的问题。Midjourney 公司在驳回针对其使用未经许可的训练集的版权侵权指控的动议中，提出其对版权侵权具有的“显而易见的合理使用抗辩”。但在美国最高法院的沃霍尔案裁决之后，这一抗辩究竟有多么“显而易见”呢？

Before *Warhol*, it seemed likely that a court could find the creation of a generative AI platform using unlicensed training data to be insulated by fair use; arguably, the use of content to “train” a platform that *generates* content is precisely the kind of “highly creative and innovative” use that courts have found *transformative*. [*Google LLC v. Oracle Am., Inc.*](#), 141 S. Ct. 1183, 1203 (2021). In fact, if Google’s searchable databases are transformative, one could reasonably argue that generative AI text prompts—much like word searches—must also have a different “purpose, character, expression, meaning, and message from the [work] from which [they are] drawn” and are thus “quintessentially transformative use[s].” *Authors Guild v. Google, Inc.*, 804 F.3d 202, 217 (2d Cir. 2015) (quoting *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014)).

在沃霍尔案之前，法院似乎可以认定，使用未经许可的训练数据创建生成式人工智能平台与合理使用并无关联；可以说，利用原有内容来“训练”平台生成新内容的过程，正是法院认定的那种具有转化性的“高度创造性和创新性”的使用。参见谷歌诉甲骨文案，案卷号 141 S. Ct. 1183, 1203 (2021)。事实上，如果谷歌的可搜索数据库构成转化性使用，人们可以合理地认为，生成式人工智能的文本提示就像输入搜索框的文字一样，也必然具有与其原始作品不同的“目的、特征、表达方式、意义和信息”，因此是“典型的转化性使用”。参见作家协会诉谷歌案，案卷号 804 F.3d 202, 217 (2d Cir. 2015)（该案件引用了作家协会诉哈蒂信托案，案卷号 755 F.3d 87, 97 (2d Cir. 2014)）。

Warhol, however, complicates that analysis. In *Warhol*, the Court, applying the first fair use factor, held the purpose and character of Warhol’s ‘Orange Prince’ was similar to Goldsmith’s, as both works were licensed for use in popular magazines. Does that mean that a plaintiff artist can defeat a generative AI platform’s fair use defense by licensing his or her work to similar generative AI platforms? Or by pointing to other artists that have licensed their work to generative AI platforms? This, together with the Court’s admonition that a “transformative” use must “go beyond that required to qualify as a derivative” suggests that using an identical work, commercially, to do something that artists can and have already licensed, raises serious doubts about the strength of fair use as a defense to allegedly infringing creations of generative AI platforms.

然而，沃霍尔案将这一分析复杂化了。在沃霍尔案中，法院适用了合理使用原则第一要素，认为沃霍尔的作品《橙色王子》的目的和特征与戈德史密斯的作品《橙色王子》相似，因为二者都被授权在流行杂志上使用。这是否意味着，原告艺术家可以通过将自己的作品授权给类似的生成式人工智能平台，来对抗生成式人工智能平台的合理使用原则抗辩？或者，通过指出其他艺术家已将其作品授权给生成式人工智能平台来进行抗辩？这些问题，加之法院关于“转化性”使用必须“超越构成衍

生作品的要求”的解释，表明即使艺术家商用相同的作品进行已授权行为，其被控侵权作品在生成式人工智能平台背景下合理使用抗辩的效力也将受到严重质疑。

IV. Warhol's Ghost Looms Large 沃霍尔的幽灵日益凸显？

Warhol's work, as well as his posthumous celebrity status (which, given his oeuvre, is nothing short of ironic) continue to influence modern culture and push boundaries, most recently by testing the limits of copyright fair use. Not surprisingly, Warhol's image, work, style, and legacy has also found its way into generative AI. Were he still alive today, chances are that Andy Warhol would himself be experimenting with generative AI. Fortunately for us, generative AI gives us a nearly limitless opportunity to experiment with Warhol.

沃霍尔的作品，以及他去世后的名人地位（综观他的全部作品，这一地位简直颇为讽刺）持续影响着现代文化并推动着文化边界的发展——最近一次影响与推动是通过测试版权合理使用的极限的方式来实现的。毫不奇怪，沃霍尔的形象、作品、风格和遗产也在生成式人工智能中拥有了一席之地。安迪·沃霍尔如今若仍在世，很有可能自己也在进行生成式人工智能实验。幸运的是，生成式人工智能给了我们进行近乎无限的对沃霍尔作品进行实验的机会。



Midjourney prompt: "warhol's ghost in the machine sci fi"
Midjourney 生成作品：机器中的沃霍尔幽灵科幻作品



Midjourney prompt: "ruth bader ginsburg in the style of andy warhol"
Midjourney 生成作品：安迪·沃霍尔风格的露丝·贝德·金斯伯格



Midjourney prompt: "illustration of the supreme court in the style of Andy Warhol"
Midjourney 生成作品：安迪·沃霍尔风格的最高法院插图