

Warhols, Tigers and Monkees, Oh My! – The Tenth Circuit Applies the Supreme Court’s Warhol Decision Against Netflix

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by Bruce R. Ewing

In a mashup that the late pop artist Andy Warhol surely would have loved, the U.S. Court of Appeals for the Tenth Circuit has applied the Supreme Court’s 2023 decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* to vacate a prior district court decision on the issue of fair use, and to remand the case for further fact-finding. Does the decision settle the defense of fair use in that case? No, but as explained below, the defendants in that case still have reason to hope that their defense will prevail.

In the dark days of the 2020 pandemic, one obsession of many television viewers looking for something to take themselves out of the world in which we were then living was the Netflix documentary, *Tiger King*. As explained by Netflix, the documentary focused on “the stranger-than-fiction world of big cat owners,” most notably “Joe Exotic, a mulleted, gun-toting polygamist and country western singer who presides over an Oklahoma roadside zoo. Charismatic but misguided, Joe and an unbelievable cast of characters including drug kingpins, conmen, and cult leaders all share a passion for big cats and the status and attention their dangerous menageries garner. But things take a dark turn when Carole Baskin, an animal activist and owner of a big cat sanctuary, threatens to put them out of business, stoking a rivalry that eventually leads to Joe’s arrest for a murder-for-hire plot, and reveals a twisted tale where the only thing more dangerous than a big cat is its owner.”

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Tiger King was a massive hit and, as sometimes happens, Netflix and the documentary's producers became the subject of a variety of legal claims, including, in this case, for copyright infringement. In 2020, Netflix and the *Tiger King* production company were sued in Oklahoma by Whyte Monkee Productions and Timothy Sepi, the alleged owners of the copyright in certain video footage from the documentary that was, per plaintiffs, used without their authorization or compensation. The footage in question consisted of eight recorded excerpts – seven created while Mr. Sepi was working for the animal park in question, and an eighth excerpt filmed after Mr. Sepi was no longer employed there.

As to the first seven excerpts, both the district court and the Tenth Circuit agreed that plaintiffs did not own any copyright in them because Mr. Sepi shot the footage as part of his duties at the animal park, so they were works made for hire that did not belong to plaintiffs, such that there could be no infringement of plaintiff's rights. But the copyright in the eighth excerpt – footage from the funeral of Joe Exotic's husband, Travis Maldonado – did belong to plaintiffs because Mr. Sepi filmed the funeral after he ceased to be an animal park employee. To be sure, Mr. Sepi acknowledged that all he did to create this footage was place a video camera on a tripod in a location where funeral speakers could be recorded, hit "record," and then press "stop" when the funeral was over. But, both the district court and Tenth Circuit held that the footage was sufficiently original to warrant copyright protection.

However, the district court and the Tenth Circuit parted company on the defendants' affirmative defense of fair use. Applying pre-*Warhol* precedents, the district court held that the inclusion of the eighth excerpt in the documentary was permitted under principles of fair use, largely because the excerpted sixty-six seconds of funeral footage focusing on portions of Mr. Exotic's eulogy was "transformative." Specifically, the district court held that the "purpose" of the excerpt's inclusion in *Tiger King* – to make a point about Mr. Exotic's narcissism – was different from the "purpose" of the original funeral

footage – to record the services for Mr. Maldonado – meaning that the first statutory fair use factor (the “purpose and character of the use”) weighed strongly in favor of fair use.

Enter *Warhol*, decided while the plaintiffs’ appeal was pending at the Tenth Circuit. In *Warhol*, the Supreme Court downplayed considerations of whether a particular use was or was not “transformative,” in favor of a two-part inquiry: (i) whether and to what extent the challenged use has a purpose that is different from that of the original work; and (ii) whether the challenged use is commercial or non-commercial. As the Supreme Court held,

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

Applying *Warhol* to the *Tiger King* controversy before it, the Tenth Circuit concluded that the video was not used in a transformative way to comment on the video, but to comment on Mr. Exotic. In the same way, per the Tenth Circuit, Andy Warhol’s use of Lynn Goldsmith’s photo of the artist Prince to create a new image was merely a commentary on Prince, not the Goldsmith photo, and therefore insufficiently transformative. To this writer, that is not quite what the Supreme Court said in *Warhol* on the issue of transformativeness. But, the Tenth Circuit went on to hold, per *Warhol*, that the commercial purpose of *Tiger King*, and the fact that using excerpted video in a documentary is often a purpose different from that underlying the creation of the excerpted video in the first place, tilted the first fair use factor strongly against defendants. That reasoning is entirely consistent with *Warhol* and highlights how sharply the Supreme Court’s decision has altered the fair use analysis, at least on the first statutory factor, to favor plaintiffs in copyright cases.

What of the other three fair use factors? The second factor – the nature of the copyrighted work – weighed in favor of the defendants because the funeral excerpts were factual and had been live streamed, and therefore published. As to the third factor – the amount and substantiality of the portion of the funeral video used – the sixty-six-second excerpt from a twenty-four-minute video was a factor that weighed in favor of defendants, as they used only what a reasonable person would think appropriate to make their artistic point. Further, while the short excerpt was an “unusual” part of the video, both the district court and the Tenth Circuit felt that the segment was not likely to be viewed by most people as the most important portion of the video.

As for the last fair use factor – the impact of the allegedly infringing use on the market for the plaintiffs’ video – here again the district court and Tenth Circuit diverged. The district court held that *Tiger King* was not a market substitute for the original funeral video, but the Tenth Circuit held that there was no evidence of this, nor of whether the inclusion of the funeral excerpt in *Tiger King* had an impact on plaintiffs’ ability to license their footage elsewhere. Indeed, because fair use is an affirmative defense, it was defendants’

burden to prove the absence of a market impact, a burden they largely made no attempt to carry, other than by establishing that plaintiffs had never licensed the video anywhere, which the Tenth Circuit felt was, by itself, insufficient. The court pointed to other evidence suggesting that licensing opportunities may have existed for the footage, and in light of the incomplete evidentiary record concerning this factor, the Court remanded the case for more fact-finding on that factor. Defendants therefore have every reason to believe that they can once again prevail on the defense of fair use, provided they can marshal evidence showing an absence of market harm.

The main takeaway from the Whyte Monkey Productions case is that when it comes to fair use, the ability of defendants to persuade courts to weigh the first fair use factor in their favor has been substantially limited by the Warhol decision. It is therefore crucial that parties seeking to rely on that defense do everything they can to swing the other three factors – especially the fourth – in their favor.