



**Andy Warhol Fair Use Case**

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## ABOUT US

### Open Copyright Education Advisory Network

OCEAN aims to address **points of convergence** where copyright issues impact day-to-day and strategic decisions across museums, libraries, archives, research, scholarship, and education.



OCEAN

## OUR VISION

To inform and empower the cultural heritage community in recognizing that copyright and related issues are foundational to navigating our networked digital world.

[oceancopyright.org](https://oceancopyright.org)

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**To learn about OCEAN, our learning events and  
community building activities**

# Agenda and Learning Objectives

Overview of:

- *Warhol v. Goldsmith* Supreme Court opinion
- Library & Archive perspective
- Art Museum perspective
- Live Q&A



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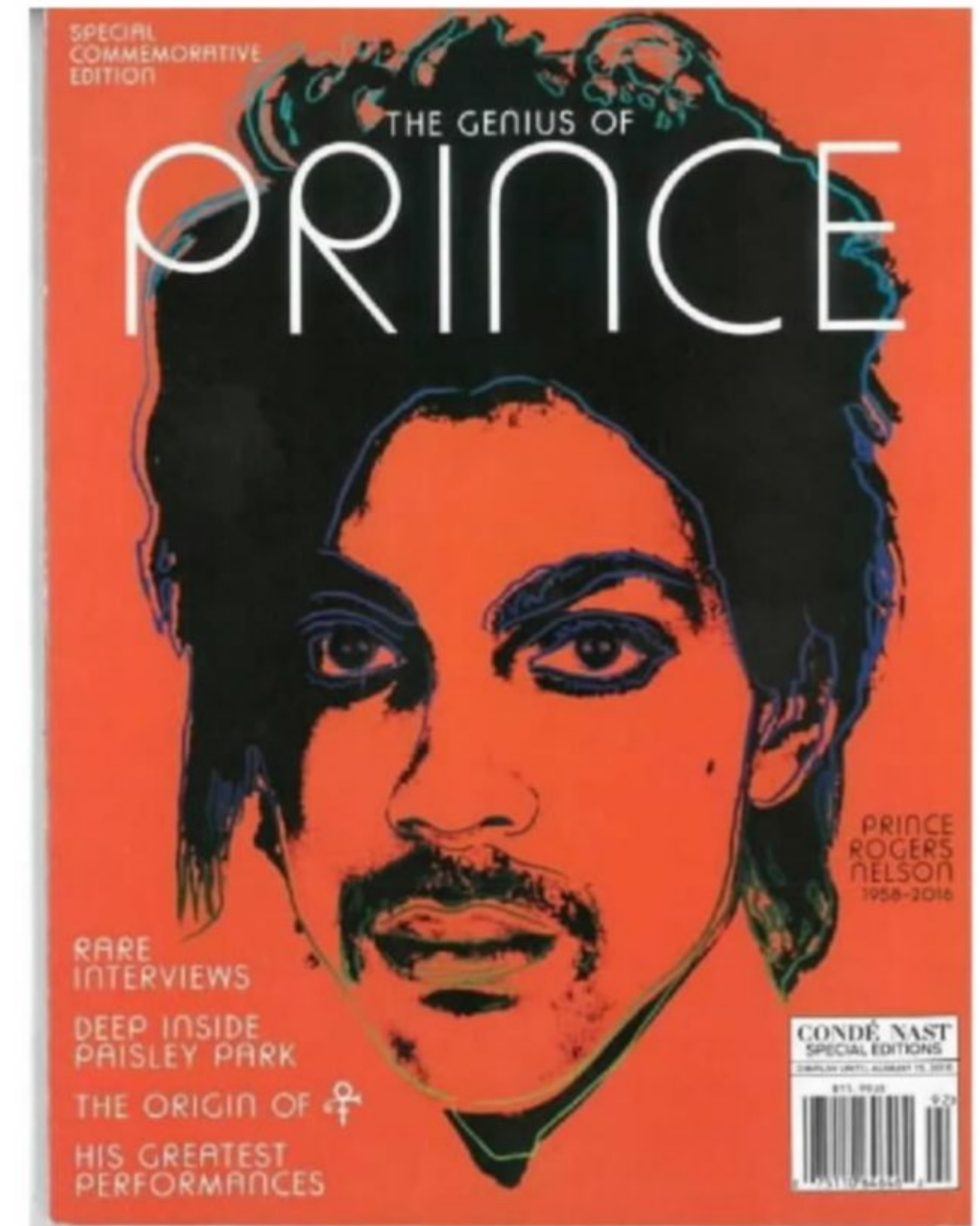
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# Supreme Court Opinion

# The Story (Briefly...)



# Section 107, Fair Use

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- (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(\*?)

# The Majority Opinion

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- The Supreme Court affirmed the Second Circuit's ruling that the first fair use factor weighed in favor of Goldsmith.
- The Court held Warhol's work and the Condé Nast magazine cover shared a substantially similar purpose as Goldsmith's original photograph - both served as portraits of Prince.
- The commercial nature of Warhol Foundations' licensing also counted against fair use.
- While a transformative use can support fair use, the Court ruled that new meaning or message alone does not necessarily make a use transformative - the specific context matters.
- Here, Warhol's use for the Condé Nast cover was non-transformative given its similar purpose to the original photo and commercial nature.

# The Dissent

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“In a recent decision, this Court used Warhol paintings as the perfect exemplar of a ‘copying use that adds something new and important’—of a use that is “transformative,” and thus points toward a finding of fair use. Google LLC v. Oracle America, Inc., 593 U.S. —, (2021). *That Court would have told this one to go back to school.*”

“The majority does not see it....*And I mean that literally.* There is precious little evidence in today’s opinion that the majority has actually looked at these images, much less that it has engaged with expert views of their aesthetics and meaning.”



# Libraries & Archives

# Libraries and Archives' Fair Use Victories

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# Library and Archival Fair Uses After Warhol

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- Identifying new purposes
  - Information location and analysis - Hathi, GBS
  - Research - Hathi, Corellium
- Avoiding “commercialism”
  - What is commercial? Judge Koeltl vs. Judge Leval
- Fair use without transformativeness: GSU



# Art Museums

# View from the Art Museum

- Museums are generally risk adverse
- Museums do not wish to appear as favoring one artistic medium over another
- Works with highly sensitive and complicated rights considerations may be avoided or “overly licensed”



# What's a Museum Store to do?

- Seek permissions and licenses for reproductions on merchandise/products
- Assess any underlying rights to an artwork are cleared prior to reproduction and sale of a product
  - photographic rights
  - publicity rights
  - celebrity rights
  - are any products using quotes?



# Artist Commissions & Acquisitions at the Museum

- Language in artist commission and acquisition agreements
- Artist representations and warranties that work is not infringing on the copyright of another
- Museums are not arbiters of determining whether appropriation by an artist is fair use or not



# Thank You!



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Questions? Email: [copyright@columbia.edu](mailto:copyright@columbia.edu)

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