

# **Andy Warhol, Prince, and an Android Walk Into a Bar**

**An Update on Fair Use  
June 15, 2023**

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**Klarquist**

# Fair Use Factors (17 U.S.C. § 107)

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- The purpose and character of the use;
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- The effect of the use on the potential market for or value of the copyrighted work.

“[F]air use is a ‘flexible’ concept, and ‘its application may well vary depending on context’ . . . in applying the fair use provision, ‘copyright’s protection may be stronger where the copyrighted material ... serves an artistic rather than a utilitarian function.’”<sup>1</sup>

© Work:  
Artistic  
Function



*Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258 (2023)*

© Work:  
Utilitarian  
Function



*Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021)*



Not Fair Use

Fair Use

# *Google LLC v. Oracle Am., Inc.*

# The Notorious 37 API Packages

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- For 37 Sun Java API “packages” Google copied the “declaring code” (naming and organization of particular tasks) allowing programmers to use a familiar “task calling” system
- Copied 11,500 lines of code (0.4% of the entire API)



**Java Basics for  
Android Development**

# Google's Long Road To Fair Use

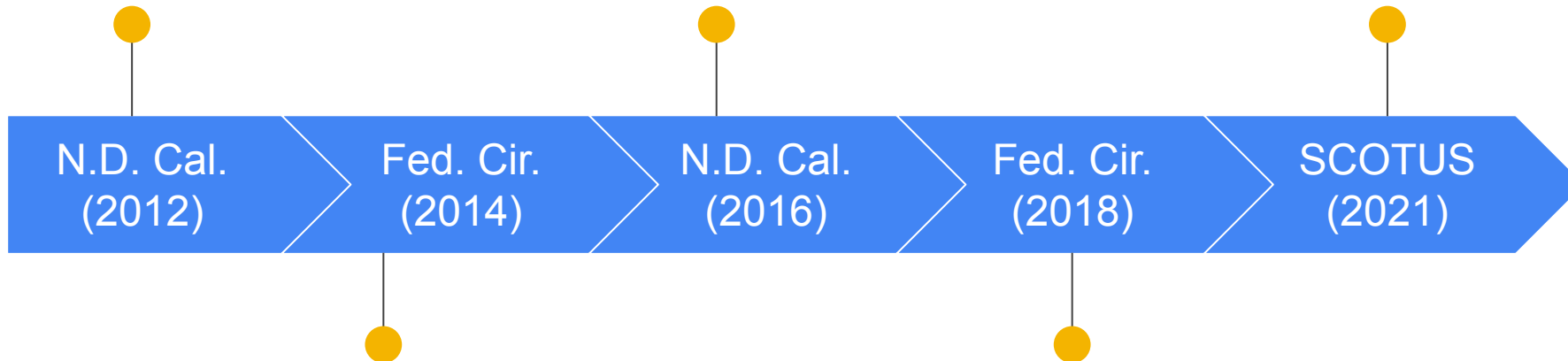
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Jury: Google infringed

Bench Trial: Declaring code not copyrightable

Jury: Google's use of APIs was "fair use"

(6-2) Google's use of APIs was "fair use" as a matter of law; all four factors favored fair use



*Rev'd*: Declaring code contained protectable expression

Google's use of API code ≠ "fair use" (copied more than was necessary)

# Purpose & Character Of The Use

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- Google’s use furthered “creative ‘progress’ that is the basic constitutional objective of copyright itself.”<sup>1</sup>
- Commercial character outweighed by transformative use<sup>2</sup>
  - NEW collection of tasks operating in a NEW environment
  - NEW implementing code



# Nature Of The © Work

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- Declaring code is “inherently bound together with:
  - uncopyrightable ideas (general task division and organization); and
  - new creative expression (Android’s implementing code)” that Google wrote<sup>1</sup>

# Amount & Substantiality Of The Use

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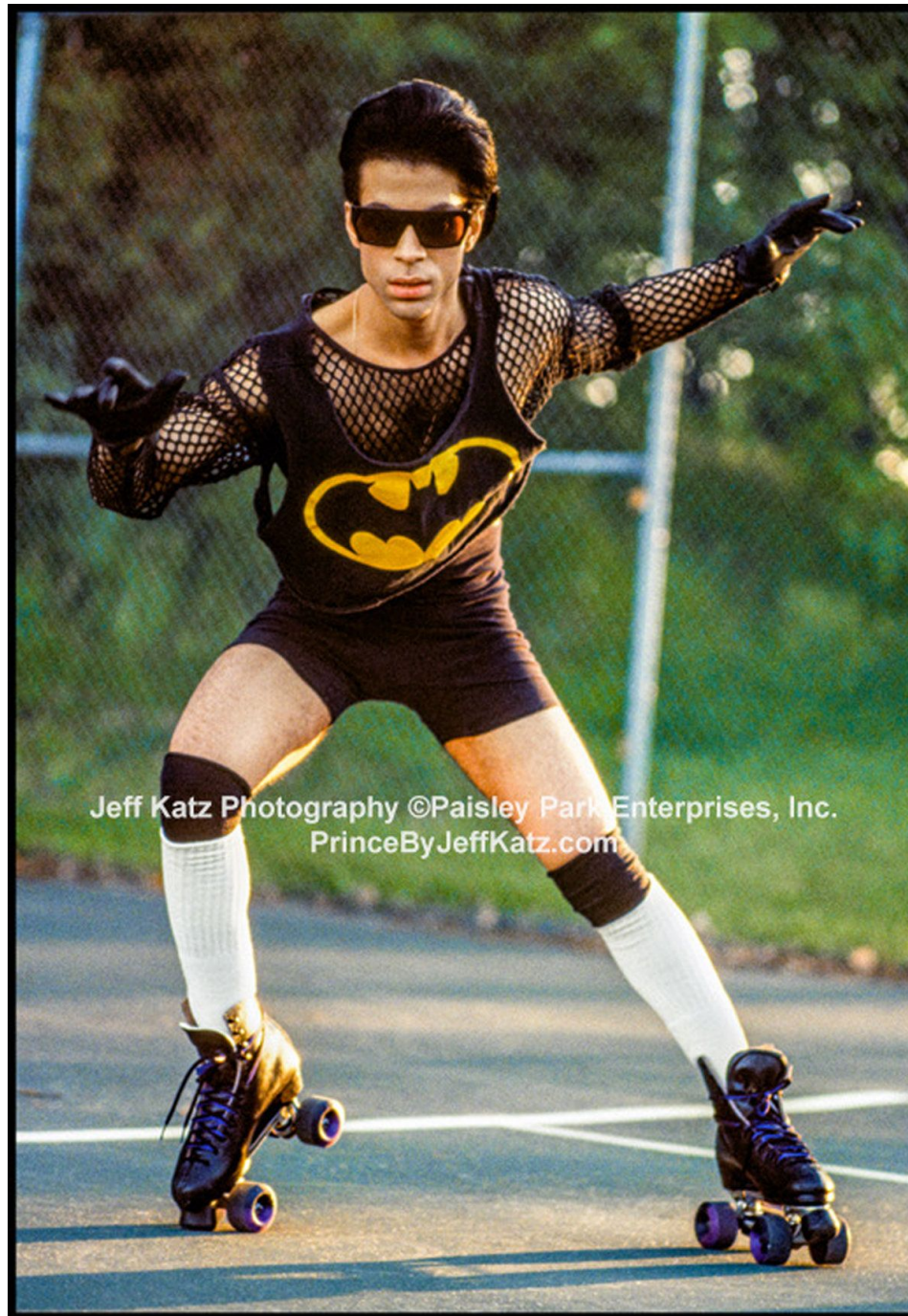
- “The ‘substantiality’ factor will generally weigh in favor of fair use where, as here, the amount of copying was tethered to a valid, and transformative, purpose.”<sup>1</sup>
- Google copied what was necessary to “permit programmers to make use of their knowledge and experience using the Sun Java API when they wrote new programs for smartphones with the Android platform.”<sup>2</sup>

# Effect On © Work's Market

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- “Google’s Android platform was part of a distinct (and more advanced) market than Java software.”<sup>1</sup>
- Copyright Act ≠ protect third parties’ investment in using a creative work.<sup>2</sup>
- “[A]llowing enforcement here would make of the Sun Java API's declaring code a lock limiting the future creativity of new programs.”<sup>3</sup>

***Andy Warhol Found. for  
Visual Arts, Inc. v. Goldsmith***



Jeff Katz Photography ©Paisley Park Enterprises, Inc.  
PrinceByJeffKatz.com



- 1) *Images on the left by Lynn Goldsmith*
- 2) *Andy Warhol photo (Creative Commons)*

# The Supreme Court May Force Us to Rethink 500 Years of Art

## THE ANDY WARHOL CASE THAT COULD WRECK AMERICAN ART

Without strong fair-use protections, a culture can't thrive.

By Paul Szynol

A copyright case about Warhol's work could change the future of Western art — and, in a sense, its history, too.

### The Supreme Court meets Andy Warhol, Prince and a case that could threaten creativity

October 12, 2022 · 5:00 AM ET



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## How a Supreme Court Case About Andy Warhol's Paintings of Prince Could Reshape Freedom of Expression

BY Shanti Escalante-De Mattel, Tessa Solomon October 12, 2022 2:45pm





1981

The "Goldsmith Photograph"

1984

License For Vanity Fair To Use "Goldsmith Photograph" As An Artist Reference; Runs "Purple Prince" in Nov '84



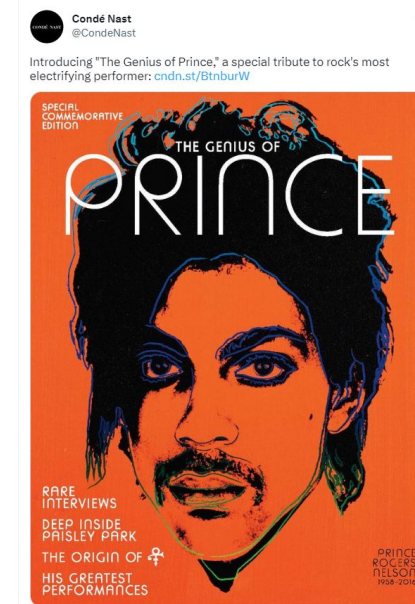
1984-1987

Andy Warhol's Creates The "Prince Series"



2016

Condé Nast Publishes Prince Tribute Using Prince Series Image ("Orange Prince")





# Litigation Ensues . . .

Goldsmith contacts AWF  
alleging copyright  
infringement

AWF sues Goldsmith and LGL  
for decl. judgment of  
non-infringement or fair use  
(Goldsmith countersues)

2nd Cir. reverses, finding no fair  
use in its initial decision and on  
reconsideration in view of  
*Google LLC v. Oracle Am., Inc.*



Goldsmith registers the  
Goldsmith Photograph with the  
U.S. Copyright Office

S.D.N.Y. grants summary  
judgment for AWF on its  
fair use claim

Supreme Court affirms

# Question Presented In Petition

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“Whether a work of art is ‘transformative’ when it ***conveys a different meaning or message*** from its source material (as this Court, the Ninth Circuit, and other courts of appeals have held), or whether a court is forbidden from considering the meaning of the accused work where it ‘***recognizably deriv[es] from’ its source material*** (as the Second Circuit has held).”<sup>1</sup>

# A Narrower Question Decided

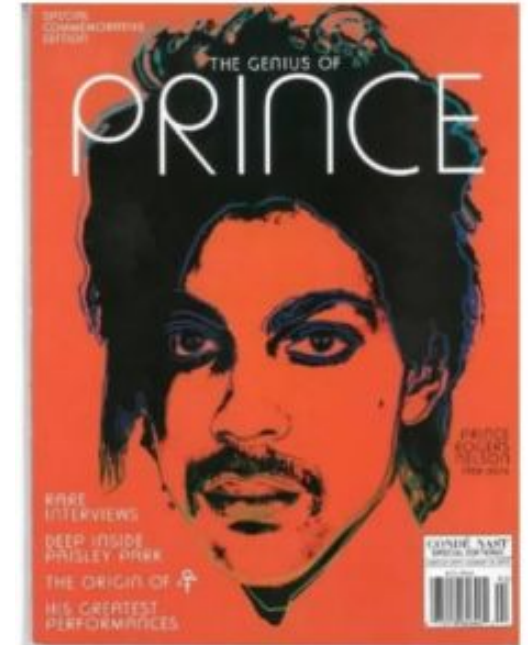
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“ . . . the sole question presented is whether the first fair use factor, the purpose and character of the use . . . weighs in favor of AWF’s recent commercial licensing to Condé Nast . . . ”<sup>1</sup>

# Focused On First Factor

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- Does the new work “add[] something new, with a further purpose or different character?”<sup>1</sup>
- It’s a question of degree that must go beyond being merely derivative.<sup>2</sup>
- Balance degree of difference with commercial nature of the secondary use – if “same or highly similar purposes” + commercial use, then first factor likely to weigh against fair use.<sup>3</sup>



1) *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1274 (2023).

2) *Id.* at 1274–75.

3) *Id.* 1277.

# Analysis Depends On The Specific Use

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## Uses of the Goldsmith Photograph

Warhol's use to create the Vanity Fair illustration for the November 1984 issue

Warhol's use to create the other Prince Series works

Vanity Fair's use of the Goldsmith Photograph pursuant to its "one-time" license

AWF's use of the Goldsmith Photograph when it licensed an image of Warhol's Orange Prince to Conde Nast in 2016

# Analysis Depends On The Specific Use

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“[T]he the Court expresses no opinion as to the creation, display, or sale of any of the original Prince Series works.”<sup>1</sup>

## Uses of the Goldsmith Photograph

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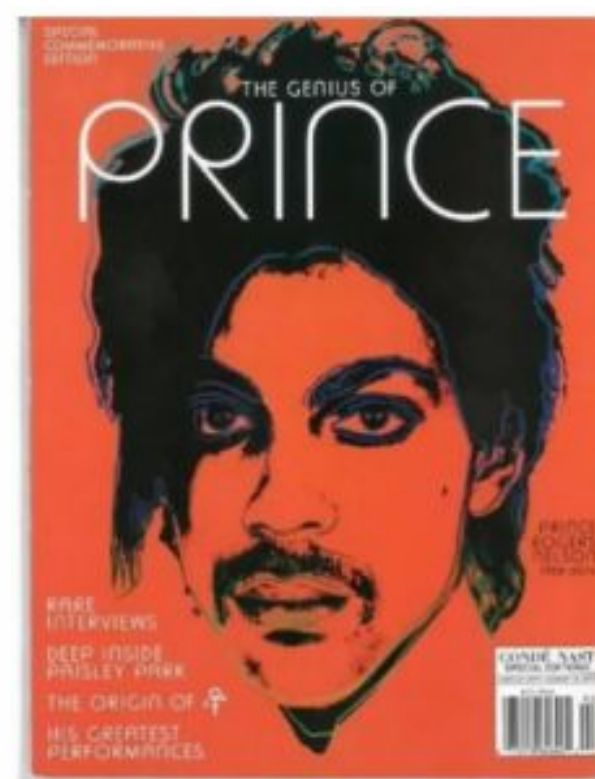
AWF’s use of the Goldsmith Photograph when it licensed an image of Warhol’s Orange Prince to Conde Nast in 2016



# Same Purpose

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“Both are portraits of Prince used in magazines to illustrate stories about Prince.”<sup>1</sup>





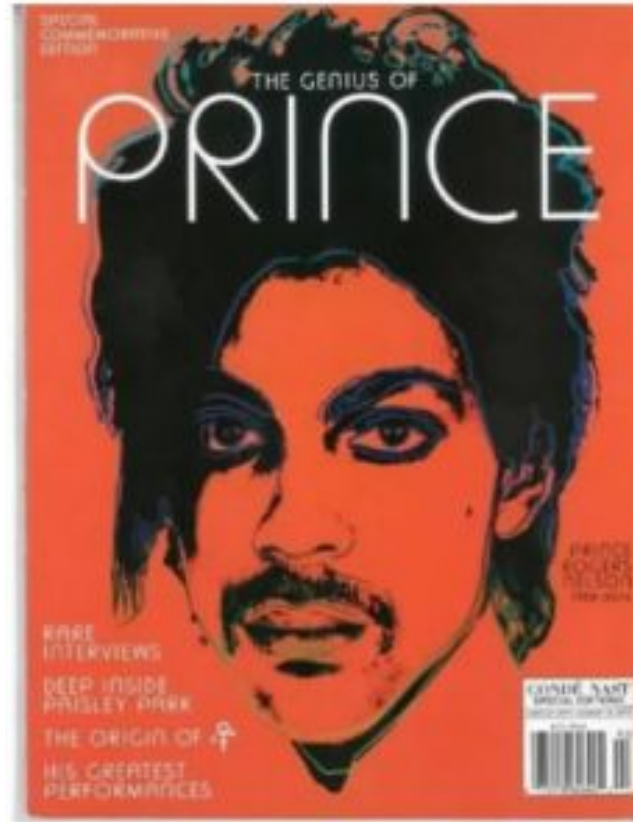
# Same Character, As In Commercial

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The use also “is of a commercial nature.” §107(1). Just as Goldsmith licensed her photograph to Vanity Fair for \$400, AWF licensed Orange Prince to Condé Nast for \$10,000. The undisputed commercial character of AWF’s use, though not dispositive, “tends to weigh against a finding of fair use.” *Harper & Row*, 471 U. S., at 562.<sup>13</sup>

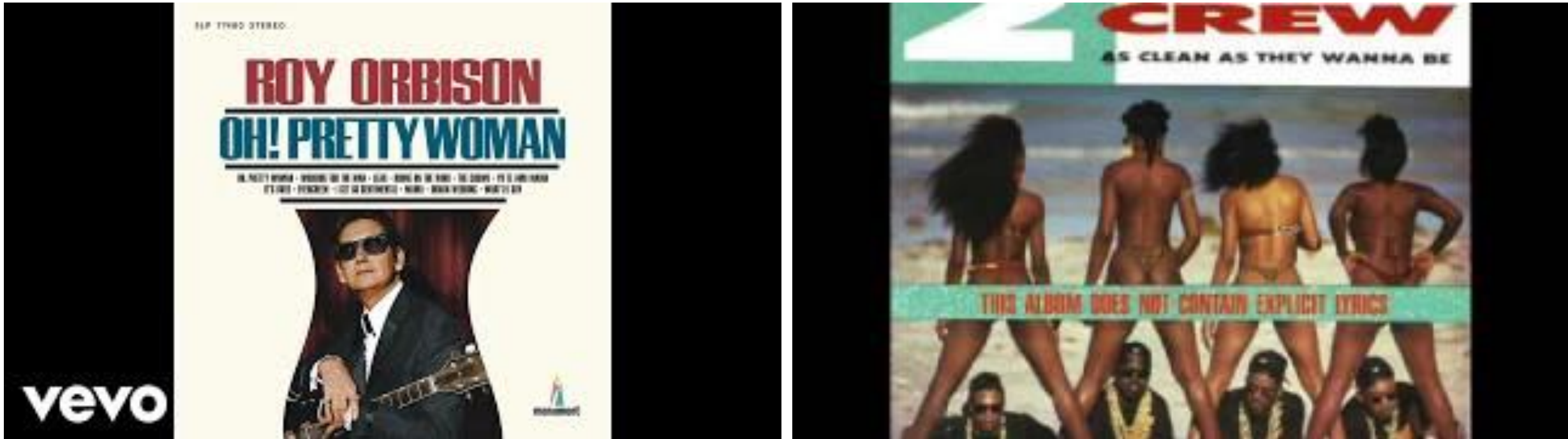
# A Distinction Without A Difference?

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# Parody & Satire: A Nuanced Distinction

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- 1) Roy Orbison, "Oh, Pretty Woman" (1964).
- 2) 2 Live Crew, "Pretty Woman" (1989).

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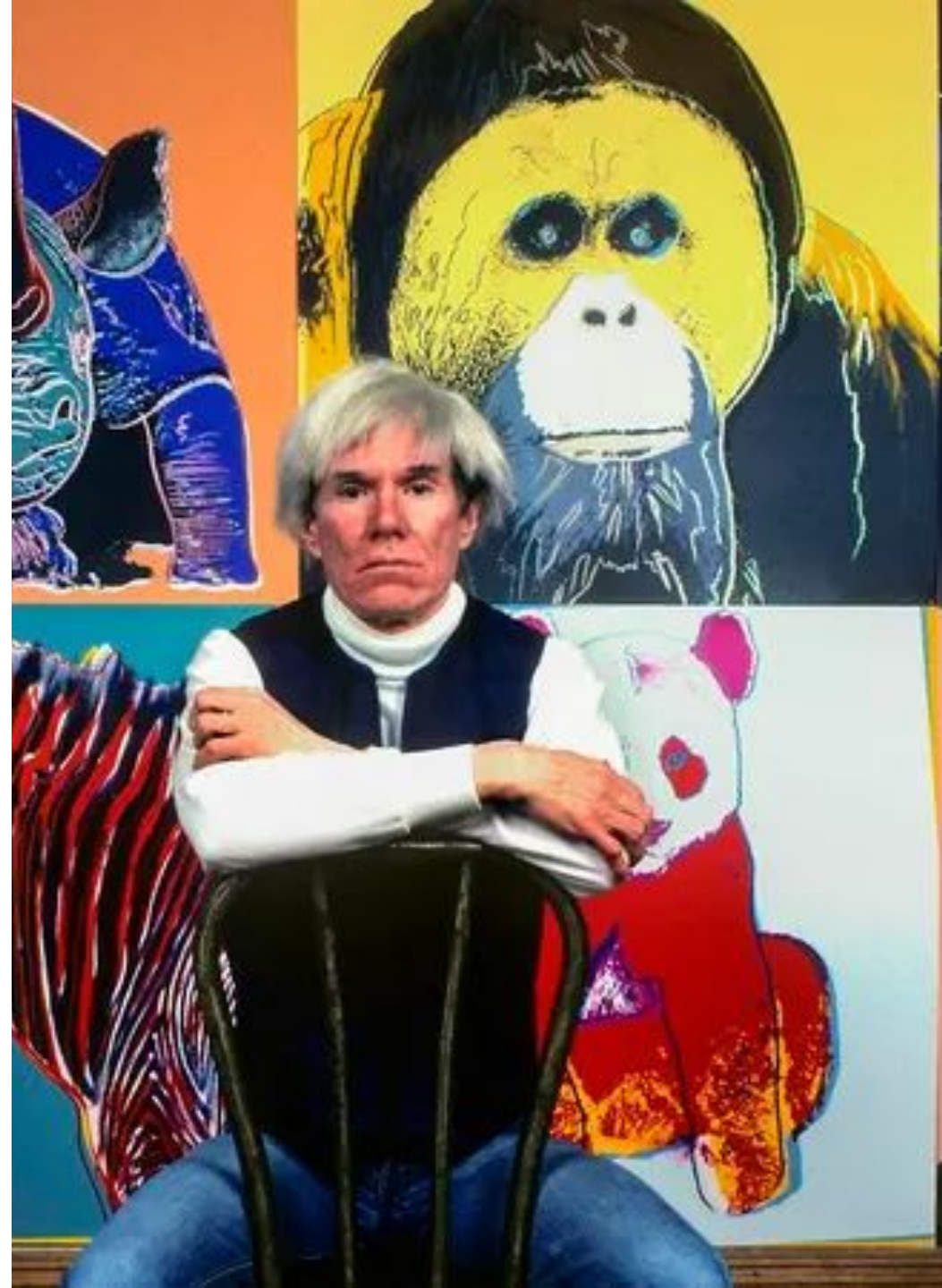
# What About New Meaning/Message?

- The meaning or message is relevant to whether the secondary use has a different purpose, but any “new expression, meaning, or message” is not dispositive.<sup>1</sup>
- Courts should not evaluate the “subjective intent of the user” of the original work.<sup>2</sup>
- Look at “the meaning of a secondary work, as ***reasonably can be perceived*** . . . to determine whether the purpose of the use is distinct from the original . . . [.]”<sup>3</sup>

1) *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1283 (2023).

2) *Id.* at 1284.

3) *Id.* (emphasis added).



# Supreme Court Holding

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“As portraits of Prince used to depict Prince in magazine stories about Prince, the original photograph and AWF's copying use of it share ***substantially the same purpose***. Moreover, the copying use is of a commercial nature. Even though Orange Prince adds new expression to Goldsmith’s photograph . . . in the context of the challenged use, the first fair use factor still favors Goldsmith.”<sup>1</sup>

# Dissent: Death Of Creative Expression

- “[T]he majority hampers creative progress and undermines creative freedom.”<sup>1</sup>
- Defends Warhol’s work whereas the majority looks at the specific use of licensing the Orange Prince to Conde Nast.
- Works here are “divergent ways to . . . illustrate a magazine about Prince with a portrait of Prince.”<sup>2</sup>
- Can’t always get a license.<sup>3</sup>
- The majority double counts the fourth factor.<sup>4</sup>



Velázquez, Pope Innocent X,  
c. 1650, oil on canvas



Francis Bacon, Study After  
Velázquez's Portrait of Pope  
Innocent X, 1953, oil on canvas

1) *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1293 (2023).

2) *Id.* at 1297.

3) *Id.* at 1300 & 1312 (citing failed negotiations between Google and Sun as an example).

4) *Id.* at 1311.

# A Contradiction Or Opposite Ends Of A Spectrum?



	<i>Google LLC v. Oracle Am., Inc.</i>	<i>Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith</i>
<b>Copyrighted Work At Issue</b>	Functional declaring code (responsible for naming and organizing of tasks)	Artistic work: The Goldsmith Photograph
<b>Use At Issue</b>	37 API packages (11,500 lines of code or >0.4% of the Java API)	AWF licensed the "Orange Prince" to Conde Nast for \$10,000 which copied most of the photograph
<b>Copyrighted Work Purpose</b>	Enable developers to develop programs for desktop/laptop devices using Java	Illustrate a tribute about Prince
<b>Secondary Use Purpose</b>	Enable developers familiar with the Java system to develop Android mobile apps	Illustrate a tribute about Prince
<b>Secondary Use Character</b>	Commercial	Commercial

# A Quick Poll

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1. Do you agree the Goldsmith Photograph and the Orange Prince had the same purpose?



# A Quick Poll

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2. Do you agree that a secondary use that “conjures up” the original work to “she[d] light on the work itself, not just the subject of the work” is more entitled to a finding of fair use? (Should a parody be more entitled to fair use than a satirical work?)

# A Quick Poll

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3. Does the majority's analysis "double count" the fourth (effect on the market) factor of the fair use analysis as the dissent suggests?

**Thank You**

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**Klarquist**

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