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# Copyright Law and the Visual Arts: Legislation, Litigation, and Community Practice

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# Copyright Law and the Visual Arts: Legislation, Litigation, and Community Practice

## **Abstract**

This historical survey focuses on developments in Anglo-American copyright law during the past three centuries, tracing how a system originally based exclusively on printed texts has gradually expanded its parameters to include works of art as well. Using visual examples as evidence, this overview reviews legislation (what the law actually says); litigation (how courts have interpreted the law); and the formulation of community practice standards that offer practitioners proactive guidance in navigating copyright's "gray areas". This study concludes by asking whether current American copyright law is capable of addressing increasingly complex questions of access and re-use in a rapidly evolving era of digital creation in our networked world.

## **Keywords**

Copyright, fair use, transformative use

## **Author Bio**

Art historian **Allan T. Kohl** is Librarian for Visual Resources and Library Instruction at the Minneapolis College of Art & Design, where he also serves as the College Archivist. He did his graduate study in Library/Information Science at the University of Wisconsin-Madison, and in art history at the University of Minnesota-Twin Cities. He is a former President and Treasurer of the Visual Resources Association, and has served for many years on the VRA's Financial Advisory, Travel Awards, and Intellectual Property Rights Committees, the latter with a particular interest in copyright issues as these affect the educational use of images documenting works of art and visual culture.

This historical survey focuses on developments in Anglo-American copyright law during the past three centuries. It examines how a sequence of awkward, sometimes reactive, attempts to expand a system originally based exclusively on text gradually evolved into a more comprehensive intellectual property regime encompassing a variety of non-text works ranging from popular prints to motion pictures to digital photography. Using visual examples as evidence, this overview looks at legislation (what the law actually says); at litigation (how courts have interpreted the sometimes-ambiguous intent of a law); and, more recently, to the formulation of community practice statements that offer proactive guidance to practitioners in navigating copyright's "gray areas".

This article is based in part on a series of "you be the jury" image pairings developed by the author for use in a unit on copyright and fair use as part of the Minneapolis College of Art and Design's upper division Professional Practice course, with a goal of guiding students in assessing whether certain works, produced by visual artists working in a variety of mediums, represent examples of infringement on one hand, or allowable practice on the other.

For many centuries, making a truthful, accurate copy of an existing work of art was regarded as an entirely appropriate, even virtuous, action. Byzantine Christians believed that painting a faithful copy of a revered icon ensured the spiritual integrity of the new work [Fig. 2]. This was especially true for copies of some of the earliest icons, which were thought to have been painted from life by the Apostles themselves, and thus were regarded as being actual portraits of the saints, and even of the Virgin Mary and the Christ Child [Fig. 1].



Figure 1. Russian Orthodox: *Saint Luke painting an icon of the Virgin and Child*, ca. 16th century. Pskov Museum, Russia. This work is itself believed to be a copy after the much older *Theotokos of Vladimir*.

Figure 2. Byzantine: *Sacra Parallela of John of Damascus*; detail, artist copying an icon, ca. 750-850. Ink, colors on parchment. Bibliothèque Nationale, Paris [Parisinus Graec. 923]. Image source: Robin Cormack, Maria Vasilake, and Royal Academy of Arts, *Byzantium, 330-1453* (London: Royal Academy of Arts, 2008), 34.

For the Confucian or Daoist scholar in imperial China, making an exact copy of an acknowledged masterpiece provided him with a deeper appreciation for the original, typically acknowledged in the copy's colophon [Fig. 3].



Figure 3. China, Northern Song Dynasty (Emperor Huizong 宋徽宗): *Court ladies preparing newly woven silk*, early 12th century. Ink, colors, gold on silk. Museum of Fine Arts, Boston [12.886]. The scholar-emperor here copied a famous, now-lost Tang Dynasty scroll attributed to Zhang Xuan. Image Source: MFA Boston, <https://collections.mfa.org/objects/28127>.

Europe also enjoyed a long tradition of artistic “homage works,” within which artists created works based on familiar prototypes. Titian’s *Venus of Urbino* referenced a well-known, centuries-old figure “type”: the reclining female nude as temptress [Fig. 4]. More than three centuries later, Edouard Manet echoed Titian’s goddess in his *Olympia*, a portrait of a contemporary courtesan [Fig. 5].



Figure 4. Titian. *Venus of Urbino*, 1538. Oil on canvas. Galleria degli Uffizi. Image Source: Scala Archives, Artstor, <https://jstor.org/stable/community.14499071>. (accessed September 16, 2025). Figure 5. Edouard Manet. *Olympia*, 1863. Oil on canvas. Musée d'Orsay, Paris. Image source: Édouard Manet, Public domain, via Wikimedia Commons.

In late 20th century America, Mel Ramos turned Manet’s courtesan into a men’s magazine centerfold [Fig. 6], while Larry Rivers made an ironic commentary on racial equality by juxtaposing identical painted cutout reclining nudes – one Black, the other White – each with appropriate maidservant and cat [Fig. 7].



Figure 6. Mel Ramos. *Manet's Olympia*, 1973. Oil. Private collection. Image Source: Honey Truewoman [pseud. Judith VanBaron], "Realism in Drag," *Arts Magazine* 48, no. 5 (February 1974): 44-45. Figure 7. Larry Rivers. *I like Olympia in Blackface*, 1970. oil on wood, plasticized canvas, plastic, Plexiglas, 1970. Musée National d'Art Moderne, Centre Georges Pompidou, Paris. Image Source: Réunion des Musées Nationaux (RMN), Artstor, <https://jstor.org/stable/community.10593844>. (accessed September 16, 2025).

Following the introduction of paper to Europe, young Renaissance artists were taught to copy drawings by recognized masters as an exercise that combined close observation with hand-eye coordination. Control over the making of copies seems to have become a legal issue only after technological innovations such as the printing press made systematic multiple reproductions of works easier and less expensive to produce. The freewheeling decades of the latter 15th and early 16th centuries witnessed a proliferation of books published in what we would today call "pirated editions". One noteworthy example is provided by Peter Schoeffer's 1485 publication *Gart der Gesundheit* (*Garden of Health*), an illustrated natural history encyclopedia that described the uses of plants to foster human wellbeing. In 1491, this book was printed in Mainz by Jacob Meydenbach as the *Hortus sanitatis* in a Latin translation intended to market the work to international scholars [Fig. 8]. Meydenbach's version featured hundreds of fanciful woodcut illustrations, hand-colored in some copies. One such copy evidently found its way to Venice, where in 1511 Bernardinus Benalius and Johannes de Tridino (alias Tacuinus) produced their own knock-off edition, thus sparing themselves the cost of importing copies across the Alps from Germany. Because the duo lacked access to the original woodcuts, they simply made reverse copies of these, complete with fanciful additions such as human faces in the buds of flowers [Fig. 9]. This pirated edition doubtless found ready customers among students at nearby Padua, location of one of the earliest and most prestigious medical schools.

Only after the power of the printing press became obvious during the Protestant Reformation did government and religious authorities move aggressively to limit what texts (and their associated images) could be printed and distributed to the public, through legal controls such as the Catholic Church's *Imprimatur*, the *privilegio* in Rome and Venice, and French royal licenses to publish ("*Avec Approbation et Privilège du Roi*"). In England, the right to produce and distribute copies of printed works was vested in London's Worshipful Company of Stationers, a trade monopoly, in legislation such as the Licensing of the Press Act of 1662, which bore the lengthy title *An Act for*



Figure 8. Jacob von Meydenbach. *Hortus sanitates*, ca. 1491. Printed with moveable in Gothic font, with hand-colored woodcut illustrations. Image Source: U.S. National Library of Medicine, Internet Archive, <https://archive.org/details/9413026.nlm.nih.gov>. Figure 9. Bernardinus Benalius and Johannes de Tridino. *Ortus Sanitatis: de herbis et plantis*, 1511. Collection of the Library, Minneapolis College of Art and Design.

*preventing the frequent Abuses in printing seditious treasonable and unlicensed Books and Pamphlets and for regulating of Printing and Printing Presses.*<sup>1</sup>

The evolving concept of copyright at first applied exclusively to texts. Only gradually and incrementally did copyright expand to include works which were not primarily text-based, including works of visual art. The Statute of [Queen] Anne (also known as the Copyright Act of 1709/1710) is often regarded as the foundation document of Anglo-American copyright law.<sup>2</sup> This statute was the first law to authorize copyright under the regulation of a national government and courts, rather than by private commercial interests. The Statute of Anne also established that the author, rather than a publisher, owned the copyright in a work, a standard now universal in intellectual property law. However, the Statute of Anne applied almost exclusively to text, with one noteworthy exception: maps and nautical charts. These items were printed from engraved copperplates and were often hand-colored. In keeping with tradition, they were typically embellished with imaginative pictorial vignettes, allegorical portraits of the winds, and illustrations of ships under sail [Fig. 10].

One of the first major expansions of copyright to include works of visual art, specifically engravings, was the Engravers' Copyright Act in 1735: “An Act for the encouragement of the arts of designing, engraving, and etching historical and other prints, by vesting the properties thereof in

<sup>1</sup> 14 Cha. 2 c.33. Full text available at: [https://en.wikipedia.org/wiki/List\\_of\\_acts\\_of\\_the\\_Parliament\\_of\\_England\\_from\\_1662#14\\_Cha.\\_2](https://en.wikipedia.org/wiki/List_of_acts_of_the_Parliament_of_England_from_1662#14_Cha._2)  
<sup>2</sup> 8 Ann c.21 of 8 Ann c.19. Full text available at: [https://en.wikipedia.org/wiki/List\\_of\\_acts\\_of\\_the\\_Parliament\\_of\\_Great\\_Britain\\_from\\_1709#8\\_Ann](https://en.wikipedia.org/wiki/List_of_acts_of_the_Parliament_of_Great_Britain_from_1709#8_Ann).

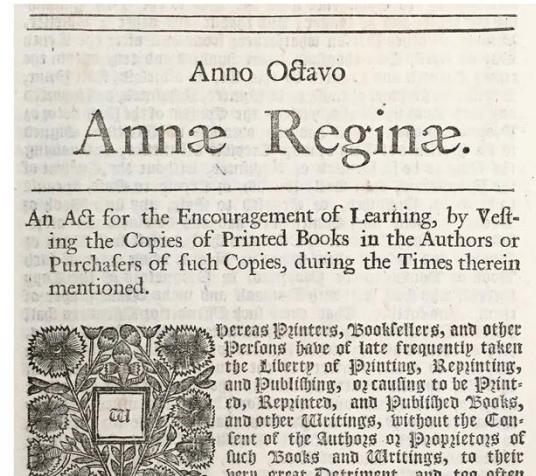
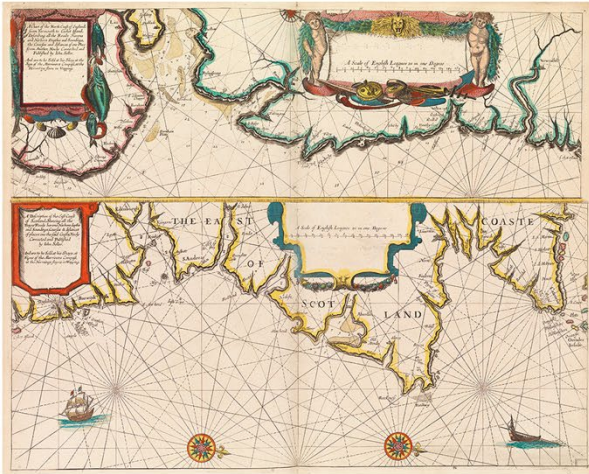


Figure 10. John Seller, *The English Pilot*, ca. 1671. National Maritime Museum, Greenwich, UK. Maps and nautical charts were among the first non-text works to become eligible for copyright protection. Image Source: Royal Museums Greenwich, <https://www.rmg.co.uk/collections/objects/rmgc-object-539971>. (accessed September 7, 2025). Figure 11. The Statute of Anne, title page, 1710. Image Source: “The Statue of Anne: a note on the ‘original copy,’” The 1709 Blog, <https://the1709blog.blogspot.com/2009/05/statute-of-anne-note-on-original-copy.html>. (accessed September 26, 2025).

the inventors and engravers, during the time therein mentioned.”<sup>3</sup> This law is sometimes referred to as the “Hogarth Act” because it was approved by Parliament in response to intense lobbying by the artist William Hogarth, backed by a number of his fellow engravers. Hogarth wanted to capitalize on the immense popularity of his paintings by producing prints of them for sale at prices his fans could afford. But his plans were frustrated by hacks who forged and sold unauthorized, inferior copies of his works. The Engravers’ Copyright Act granted Hogarth and his fellow artists the exclusive right to reproduce and sell their works for a period of 14 years and is often considered a landmark in the development of copyright law, extending protection beyond literary works to works of art [Figs. 12, 13].

The fledgling United States often looked to English precedent in establishing its own intellectual property laws. Congress first exercised its copyright authority with the Copyright Act of 1790 which granted to authors the exclusive right to publish and vend “maps, charts and books”.<sup>4</sup> With the exception of the slightly reworded provision on maps and charts, the Copyright Act of 1790 is copied almost verbatim from the Statute of Anne, securing for authors the “sole right and liberty of printing, reprinting, publishing and vending” the copies of their “maps, charts, and books” for a term of 14 years, with the right to renew for one additional 14-year term “should the copyright holder still be alive.” On April 29, 1802, the 1790 Copyright Act was amended to include “historical and other prints” and to require, for the first time, “statutory formalities” including a prescribed notice of copyright to be affixed to every copy of a work distributed to the public, along with registration and deposit requirements.

<sup>3</sup> 8 Geo. 2 c. 13. Full text available at: [https://en.wikipedia.org/wiki/List\\_of\\_acts\\_of\\_the\\_Parliament\\_of\\_Great\\_Britain\\_from\\_1734#8\\_Geo.\\_2](https://en.wikipedia.org/wiki/List_of_acts_of_the_Parliament_of_Great_Britain_from_1734#8_Geo._2)

<sup>4</sup> Full text available at: <https://www.copyright.gov/history/1790act.pdf>



Figure 12. William Hogarth. *The Rake's Progress: Tavern Scene*, 1732-33. Oil on canvas. Sir John Soane's Museum, London, UK. Image source: William Hogarth, Public domain, via Wikimedia Commons.

Figure 13. William Hogarth. *The Rake's Progress: Plate 3, Tavern Scene*, 1735. Engraving. This reverse composition after Hogarth's painting, accompanied by the artist's doggerel verse in the bottom register, is one of a series presenting a moral lesson in eight scenes showing the downfall, and ultimate death in poverty, of an irresponsible young heir who squanders his late father's estate in loose living. Image Source: The National Gallery of Art, Rosenwald Collection, <https://jstor.org/stable/community.14811030>. (accessed September 7, 2025).

Congress made the first major revision to the original law with the Copyright Act of 1831.<sup>5</sup> This act not only extended the original copyright term from 14 years to 28 years (with an option to renew) but also added musical compositions to the list of statutorily protected works. By the mid-19th century, many printed musical compositions included songs with covers featuring distinctive illustrations based on the song's lyrics, intended to catch the eyes of prospective buyers [Fig. 14].

Throughout the 19th century, the United States continued keeping its eye on English copyright law, and in particular on the passage of the United Kingdom's Fine Art Copyright Act of 1862 that extended copyright protection to paintings, drawings, and photographs. In 1865, Congress made photographs copyrightable in the United States, perhaps due in part to the immense public interest in Civil War battlefield photographs taken by Mathew Brady and his associates, Alexander Gardner and Timothy O'Sullivan. But photographic technology had also evolved, from early Daguerreotypes as unique objects to albumen wet-plate glass negatives, from which many identical copies could be printed. The copyrightability of photographs would be confirmed in 1884 by the Supreme Court's *Burrow-Giles Lithographic Co. v. Sarony* decision, which ruled that a photograph is a "writing" within the copyright clause of the United States Constitution.<sup>6</sup>

In 1870, Congress expanded federal copyright law to include a variety of works not previously eligible, including "painting[s], drawing[s], chromo[s], statue[s], statuary, and . . . models or designs intended to be perfected as works of the fine arts."<sup>7</sup> By introducing the term "fine arts" into

<sup>5</sup> 4 Stat. 436 (1831). Full text available at: Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, [https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record\\_us\\_1831](https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_us_1831).

<sup>6</sup> *Burrow-Giles Lithographic Company v. Sarony*, 111 U.S. 53 (1884).

<sup>7</sup> 16 Stat. 198, Section 86.

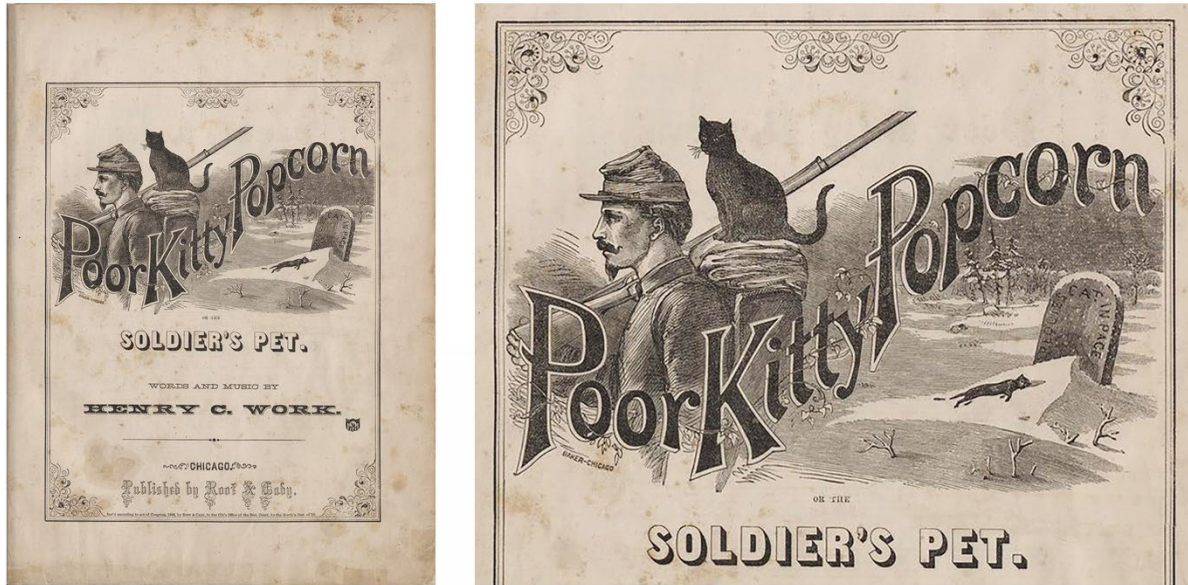


Figure 14. Henry Clay Work's sentimental ballad "Poor Kitty Popcorn, or the Soldier's Pet," published just after the Civil War in 1866, features a custom cover illustration based on two incidents described in the song's lyrics. Image Source: Library of Congress, <https://www.loc.gov/item/2023783744/> (accessed September 7, 2025).

copyright legislation, Congress conformed to the standards of the time, which defined the fine arts as painting, drawing, and sculpture. But the law also placed unique works on an equal footing with works intended to be created and distributed in multiple copies, such as the popular prints issued by firms like Currier & Ives. In so doing, it necessitated the creation of alternate forms of registration and deposit. It also showed expansive thinking beyond the publication of multiple copies into legal protection for the integrity of an artist's unique expressions by providing that the creator of a work of art would "have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same" (Section 86).

The ensuing final quarter of the 19th century witnessed major developments in printing technologies, such as the photogravure process, allowing for the conversion of photographs documenting works of art into illustrations for books, catalogs, and periodicals. These years also saw rapid advances in color printing, including chromolithography, that made the mass production of books with color illustrations economically possible. But the lack of mutual copyright enforcement between Great Britain and the United States resulted in a growing proliferation of pirated editions on both sides of the Atlantic, especially in the new and rapidly growing market for illustrated children's books. Beautifully hand-crafted color illustrations by engraver Edmund Evans for works such as Kate Greenaway's *Mother Goose* appeared in America as cheap knock-offs with inferior lithographic copies [Figs. 15, 16]. The situation would finally be resolved when the United States agreed to join the International Copyright Act of 1891, providing reciprocal copyright protection for works produced in signatory countries.<sup>8</sup>

By the early twentieth century, technological methods for reproducing and duplicating works subject to copyright had significantly increased since the most recent Copyright Act of 1870.

<sup>8</sup> 26 Stat. 1106, chapter 565 (March 3, 1891). Full text available at: <https://uslaw.link/citation/stat/26/1106>.



Figures 15, 16. Kate Greenaway. *Mother Goose*, 1881. On the left is a detail from the original London edition published by George Routledge and Sons, with color wood engravings by Edmund Evans; on the right is a similar detail from the American edition, with illustrations supposedly “as engraved and printed by Edmund Evans,” but here reworked as color lithographs. Both collection of Allan T. Kohl.

President Theodore Roosevelt expressed the need for a complete revision of copyright law, as opposed to amendments, saying in a December 1905 address to Congress: "Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection ... they are difficult for the courts to interpret and impossible for the Copyright Office to administer with satisfaction to the public."<sup>9</sup>

The Copyright Act of 1909 expressly included protection for works produced using new technologies, such as sound recordings, the great majority of which were contemporary popular songs already under copyright [Figs, 17, 18]. It also explicitly granted protection to works of art, reproductions of works of art, prints, and pictorial illustrations. However, as a report to the House Committee on Patents affirmed, the new law was intended "not primarily for the benefit of the author, but primarily for the benefit of the public."<sup>10</sup> By specifying that copyright protection attached to original works only when those works were 1) published, and 2) had a notice of copyright affixed, and requiring that repository copies be filed with the Register of Copyrights in the U.S. Copyright Office,



Figures 17, 18. Edison wax cylinder record and phonograph, both ca. 1905. Image source: The original uploader was Phonatic at English Wikipedia., CC BY-SA 3.0 via Wikimedia Commons.

<sup>9</sup> The House Report 1 on the Copyright Act of 1909, [https://ipmall.law.unh.edu/sites/default/files/hosted\\_resources/lipa/copyrights/The%20House%20Report%201%20on%20the%20Copyright%20Act%20of%201909.pdf](https://ipmall.law.unh.edu/sites/default/files/hosted_resources/lipa/copyrights/The%20House%20Report%201%20on%20the%20Copyright%20Act%20of%201909.pdf)

<sup>10</sup> Pub. L. 60-349, 35 Stat. 1075. Full text available at: <https://www.copyright.gov/history/1909act.pdf>

Congress provided that works failing to conform to these requirements would pass into an increasingly robust public domain. This included many works that would today be described as popular visual culture, including posters, picture postcards, and advertising trade cards [Figs. 19, 20].

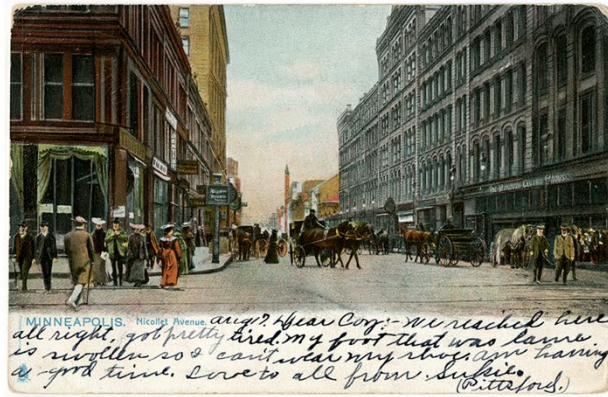


Figure 19. Household Sewing Machine Co., Providence, R.I. Chromolithograph trade card, ca. 1880-1884. Library Special Collections, Minneapolis College of Art and Design. Image source: MCAD Library, Flickr, <https://www.flickr.com/photos/69184488@N06/51832585238/in/album-72177720296099738>.

Figure 20. Nicollet Avenue, Minneapolis. Recolored photographic picture postcard, ca. 1902-1906. Library Special Collections, Minneapolis College of Art and Design. Image source: Image Source: MCAD Library, Flickr, <https://www.flickr.com/photos/69184488@N06/51832585238/in/album-72177720296099738>.



Figure 21. Georges Méliès. *À la conquête du pôle* (*The Conquest of the Pole*), 1912; film still: the Giant of the Snows attacks the polar explorers. Museum of Modern Art, NY. Image Source: MoMA, <https://www.moma.org/collection/works/306308> (accessed September 7, 2025).

In 1912, as the result of intensive lobbying from the burgeoning film industry, the Townsend Amendment to the Copyright Act of 1909 resulted in motion pictures being added to the category of protected works. Prior to this amendment, the law had not protected motion picture films. As an unwieldy stopgap, most motion picture filmmakers had been registering each of their works as a series of still photographs [Fig. 21].<sup>11</sup>

While the 1909 law provided copyright protection for works of art that had been “fixed in a tangible medium of expression,” it did not protect an artist’s distinctive “signature style.” Many viewers of Norman Rockwell’s “The Connoisseur” cover illustration for *The Saturday Evening Post* would surmise that Jackson Pollock is the artist of the Abstract-Expressionist-style work

before which the bemused older gentleman pauses. But rather than copying any of Pollock’s actual “drip paintings,” Rockwell studied the elements of Pollock’s style and used these to create his own original take on a contemporary art idiom – without infringing any of the late artist’s copyrights [Figs. 22, 23].

<sup>11</sup> Frank Evina, “Copyright Lore,” U.S. Copyright Office, October 2004, <https://copyright.gov/history/lore/2004/oct04-lore.pdf>

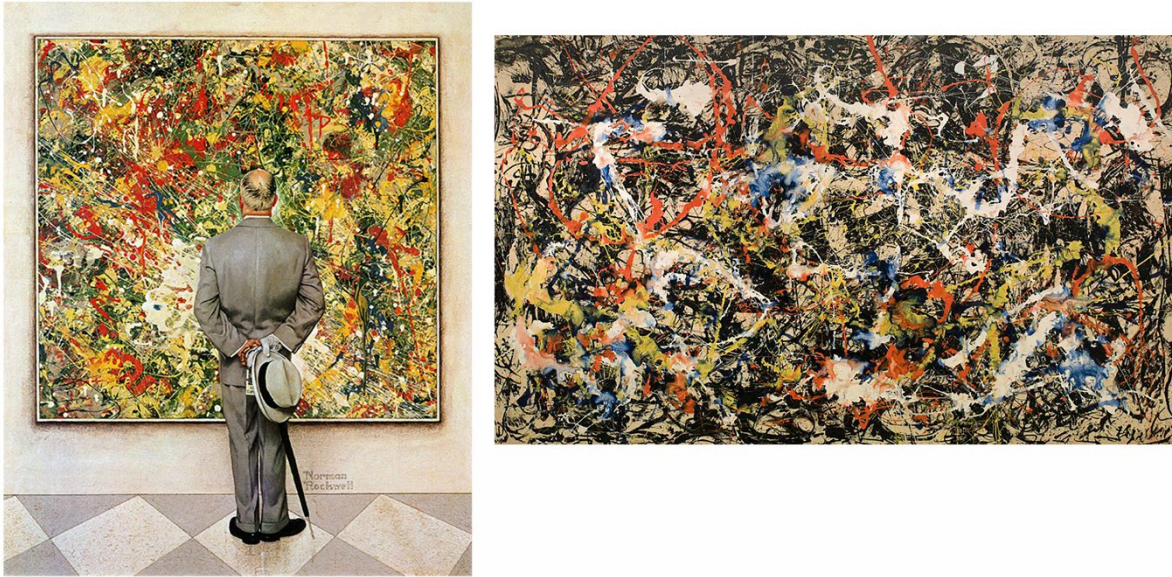


Figure 22. Norman Rockwell. “The Connoisseur”; cover illustration for *Saturday Evening Post*, issue of January 13, 1962; the painting displayed on the wall beyond the viewer is executed in the signature style of Jackson Pollock’s Abstract-Expressionist “drip paintings,” but does not copy any of Pollock’s actual works. Figure 23. Jackson Pollock. *Convergence*. oil on canvas, 1952. Albright-Knox Art Museum, Buffalo, NY. Image source: Buffalo AKG Art Museum; Gift of Seymour H. Knox, Jr., <https://jstor.org/stable/community.21795384>.

The 1909 law specifically required creators to register their works with the Copyright Office prior to publication in order to secure protection. Many visual artists evidently remained ignorant of this requirement and failed to register their works in a timely manner. By neglecting to apply for copyright, their works often passed into the public domain by default. One particularly notorious instance involved Robert Indiana’s celebrated “LOVE” design, which the artist originally created for private use and then re-worked as a greeting card published by the Museum of Modern Art in New York. Indiana’s now-familiar design, inspired by the large “Hard-Edge” paintings of his friend Ellsworth Kelly, arranged each of the four letters in one quarter of a rectangular grid. Indiana used the heavy-serif Didone font, tilting the letter “O” on the upper right onto a diagonal to provide a dynamic contrast to an otherwise static layout. The self-proclaimed “painter of signs” later claimed that his saturated red-blue-green color palette was derived from a youthful fascination with advertising signage [Fig. 24].

Indiana chose not to apply a copyright notice to his design, feeling that it would spoil the purity of his simple form. He then authorized the publication of a poster featuring his work, also without a notice. But several years later, as he began to be concerned about the proliferation of unauthorized commercial knock-offs of his design, he belatedly attempted to file for copyright, only to have his application rejected by the Copyright Office on the grounds that the work, having been published “without notice” and widely circulated, had already passed into the public domain. Consequently, when the United States Post Office chose to use the “LOVE” design for a Valentine’s Day postage stamp, it was not obligated to pay the artist a licensing fee for the hundreds of millions of copies it produced (though in response to pressure from the arts community the USPO did offer Indiana a token \$1000 honorarium) [Fig. 25].

Over the years, the distinctive elements of Indiana's design have appeared in innumerable iterations without the artist's approval. A typical derivative can be seen in the "Renegades" album cover for the rock band Rage Against the Machine, in which the red letters are darker in hue, Indiana's green background is replaced by black, and the tilted letter is now the "G" in the lower left quarter. Ironically, this album cover is copyrighted [Fig. 26].



Figure 24. Robert Indiana. *LOVE*, 1967. Screenprint. Museum of Modern Art, NY. Image Source: Susan Elizabeth Ryan, *Robert Indiana: Figures of Speech*. New Haven: Yale University Press, 2000, 198.

Figure 25. *LOVE* stamp issued by the United States Post Office, 1973. Image Source: National Postal Museum, <https://postalmuseum.si.edu/exhibition/art-of-the-stamp-the-artwork-love/love-1973>.

Figure 26. Cover art for the album "Renegades" by Rage Against the Machine, 2000. Image source: Rage Against the Machine, Public domain, via Wikimedia Commons.

During the United States' Bicentennial year of 1976, Congress passed the most recent Copyright Act (Pub. L. No. 94-553, 90 Stat.), which went into effect on January 1, 1978. In conformity with international standards, the 1976 Act eliminated the registration requirement, instead stipulating that copyright protection begins immediately when an original work is fixed in a tangible medium of expression, regardless of publication or affixation of notice. In so doing, it strengthened the rights of content creators and owners over the public access rights that had characterized the previous 1909 law. However, the 1976 law also codified for the first time the standards of Fair Use that almost uniquely distinguish American practice from that of the rest of the world.

Over the years following its implementation, interpretation of the 1976 law has often been refined through litigation rather than legislation. A number of key court cases have involved works of visual art. One of the most pivotal decisions was *Campbell v. Acuff-Rose Music, Inc.*, (510 U.S. 569), decided by the U.S. Supreme Court in 1994. This case articulated the doctrine of "Transformative Use" as an expansion of Fair Use. The Court was guided in its deliberation by an influential article published by Judge Pierre Leval in the *Harvard Law Review* (1990), which stated:

"...if the [appropriated content] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings – this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society."<sup>12</sup>

<sup>12</sup> Pierre N. Leval, "Toward a Fair Use Standard," *Harvard Law Review* 103 (1990): 1105.

In its unanimous *Campbell v. Acuff-Rose Music, Inc.* decision (510 U.S. 569 1994), the United States Supreme Court affirmed the Transformative Use doctrine as an expansive interpretation of Fair Use:

“...the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright ... and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”

This decision represented a significant affirmation of common artistic practice: taking another artist’s original work and transforming or enhancing it by the addition of new expression, insights, or meaning. For example, Twin Cities graphic artist Adam Turman’s “Cycles Minneapolis” screenprint is a contemporary re-interpretation of Alphonse Mucha’s Art Nouveau advertising poster, using the same composition, hand-drawn lettering style, and focal figure, now transformed into a modern young woman engagingly posed with her bicycle against the Minneapolis skyline [Figs. 27, 28].



Figure 27. Alphonse Mucha. *Cycles Perfecta*, advertising poster, 1902.



Figure 28. Adam Turman. *Cycles Minneapolis*, promotional poster, 2007.

The *Campbell* decision also appeared to confirm the legality of other transformative art works created prior to 1994. Pop artist Roy Lichtenstein (whose estate, ironically, is very aggressive in

defending his copyrights) lifted specific elements from several panels of DC Comics' "All-American Men of War" and "G.I. Combat", both published in 1962, in creating his iconic painting *Okay, Hot Shot* the following year. Critical studies of Lichtenstein's working methods had pointed out these borrowings, implicitly raising the question as to whether this constituted copyright infringement (which no one had enforced at the time, perhaps because the realms of comic books and modern art then seldom intersected). Or was it legitimate for Lichtenstein to have quoted selected portions from a number of different panels because he synthesized these into a new compositional arrangement, used a different medium, and presented a social commentary on the young male fantasy realm of war comics? [Fig. 29] The *Campbell* decision seems to have settled the issue.

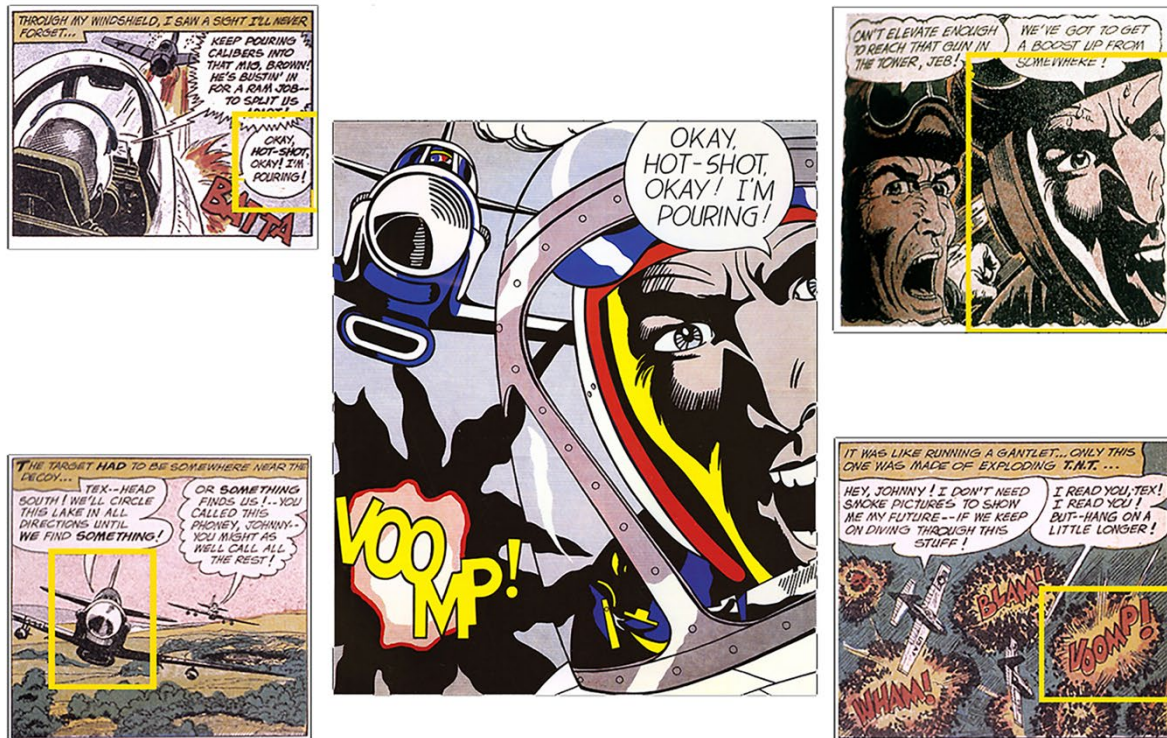


Figure 29. Roy Lichtenstein: *Okay, Hot Shot*, 1963. Acrylic, oil on canvas. Private collection. [center], surrounded by selected panels by Irv Novik and Russ Heath from DC Comics *All-American Men of War* #89, January-February 1962; and *G.I. Combat* #94, June-July, 1962. Panel vignetting by the author. Image source: Diane Waldman, *Roy Lichtenstein* (New York: Solomon R. Guggenheim Museum, 1993), 106-107.

As if to underscore the fact that Transformative Use can also benefit a comics artist who quotes from a recognized fine artist, the late Trina Robbins used Social Realist painter Reginald Marsh's Depression-era *High Yaller* (1934) as her source for the title panel of "Lulu's Back in Town" in 1976. While Robbins changes Marsh's vertical format into an expanded horizontal composition and highlights the Harlem setting using heightened colors and black outlines, rather than having the urban environment fade into neutral space in order to accentuate the confidently striding Black woman, she echoes Marsh's central figure completely, from details of her stylish attire down to the raised pinkie of her gloved right hand, and the clutch purse she flaunts in her left [Figs. 30, 31].

In 2011, following a review of court cases over the previous decade, law professor Neil Weinstock Netanel concluded that Transformative Use had become widely accepted in American jurisprudence:

“the transformative use paradigm has come to dominate fair use case law ... the key question...is whether the defendant used the copyrighted work for a different expressive purpose from that for which the work was [originally] created.”<sup>13</sup>

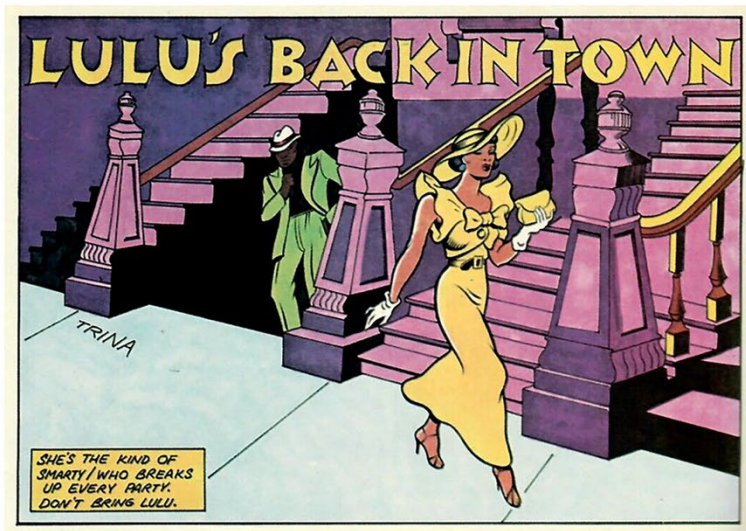


Figure 30. Trina Robbins: “Lulu’s Back in Town,” *High Times Magazine*, #14, October, 1976. Collection of Diana Green. Figure 31. Reginald Marsh: *High Yaller*, 1934. Tempera on composition board. Private collection.

As if to confirm its understanding of the validity of the Transformative Use doctrine, in 2015 the College Art Association issued its “Code of Best Practices in Fair Use for the Visual Arts.” One of the areas the Code specifically addresses is the Making of Art:

For centuries, artists have incorporated the work of others as part of their creative practice. Today, many artists occasionally or routinely reference and incorporate artworks and other cultural productions in their own creations. Such quotation is part of the construction of new culture, which necessarily builds on existing culture. It often provides a new interpretation of existing works, and may (or may not) be deliberately confrontational ... Sometimes this copying is of a kind that might [potentially] infringe copyright, and sometimes not. But whatever the technique, and whatever may be used (from motifs or themes to specific images, text, or sounds), new art can be generated.<sup>14</sup>

This statement is followed by suggestions as to how artists can act thoughtfully and responsibly, within good faith efforts, to use – but not abuse – Transformative Use reasoning in

<sup>13</sup> Neil Weinstock Netanel, “Making Sense of Fair Use,” *Lewis & Clark Law Review*, 15, 3 (2011): 768, <https://ssrn.com/abstract=1874778>.

<sup>14</sup> College Art Association, “Code of Best Practices in Fair Use for the Visual Arts,” *CAA*, 2015, <https://www.collegeart.org/programs/caa-fair-use>

their practice. The CAA’s “Code of Best Practices” was based in part on the Visual Resources Association’s own “Statement on the Fair Use of Images for Teaching, Research, and Study,” published two years earlier in 2013.<sup>15</sup> These two statements, crafted under the guidance of attorneys specializing in intellectual property law, not only described common practices, but offered guidelines for both the legal defense and continued ethical exercising of these practices. Statements such as these, issued by a number of professional organizations, were increasingly seen as useful guides in helping their members to navigate copyright’s “gray areas” that had not been clearly addressed in either legislation or litigation.<sup>16</sup>

A second significant court case – one of particular interest to visual resources practitioners – was the *Bridgeman v. Corel* decision by the United States District Court for the Southern District of New York in 1998, which affirmed the non-copyrightability of photographs documenting public domain works of art.<sup>17</sup> For decades, museums had asserted a sort of perpetual copyright over photographs of works in their collection – even after those works had themselves passed into the public domain. The *Bridgeman* decision invalidated this practice for photographs documenting two-dimensional works such as paintings, drawings, and prints, though it conceded that photographs documenting three-dimensional works such as sculptures could still claim a degree of originality.



Figure 32. Leonardo da Vinci. *Mona Lisa*, ca. 1503-06. Oil on poplar panel. Musee du Louvre, Paris. Image source: Leonardo da Vinci, Public domain, via Wikimedia Commons. Figure 33. Dean Rohrer. “Monica Lewinsky” cover for *The New Yorker*, issue of February 8, 1999.

This decision also gave artists free rein to build upon or modify images of well-known historic works of art. One of the most familiar works in the Western art history canon is Leonardo da Vinci’s *Mona Lisa*. The *Bridgeman* ruling meant that illustrator Dean Rohrer could use a photograph of the painting, altering the facial features to those of Monica Lewinsky as a commentary on the Bill Clinton scandal, in his design for a *New Yorker* magazine cover [Figs. 32, 33].

Although many museums had for years relied on licensing fees for use of their documentation photographs of public domain works in their collections, and some continued to do so even after the *Bridgeman* decision had been appealed and confirmed, the General Counsel of the American Association of Museums advised

<sup>15</sup> [https://cmsimpact.org/wp-content/uploads/2016/01/vra\\_fairuse\\_statement.pdf](https://cmsimpact.org/wp-content/uploads/2016/01/vra_fairuse_statement.pdf)

The VRA Statement describes six uses of copyrighted still images that the Association believes fall within the U.S. doctrine of fair use, including: 1) preservation (storing images for repeated use in a teaching context and transferring images to new formats); 2) use of images for teaching purposes; 3) use of images (both large, high-resolution images and thumbnails) on course websites and in other online study materials; 4) adaptations of images for teaching and classroom work by students; 5) sharing images among educational and cultural institutions to facilitate teaching and study; and 6) reproduction of images in theses and dissertations.

<sup>16</sup> A number of Fair Use statements and standards of community practice published by professional organizations for the guidance of their members were compiled and disseminated by the American University’s Washington College of Law. These Best Practices in Fair Use documents are now distributed by the University’s Center for Media & Social Impact: <https://cmsimpact.org/report-list/codes/>

<sup>17</sup> 36 F. Supp. 2d 191 (S.D.N.Y. 1999)

against this practice. Over the following years, a general consensus grew that the *Bridgeman* case had been correctly decided and was now regarded as “good law.”

In the early years of the current century, the Transformative Use argument was a core issue in several cases pitting “fine artists” against “commercial artists.” Ever since the relatively freewheeling days of Pop Art in the 1960s, “appropriation artists” like Robert Rauschenberg and Andy Warhol had made use of imagery from sources such as news media and advertising to comment on America’s consumer culture, typically without seeking licensing agreements or crediting their sources. In 2000, Jeff Koons’ painted collage *Niagara* used as one of its sources a fashion magazine advertisement featuring a photograph by Andrea Blanch, who sued Koons for copyright infringement [Figs. 34, 35].

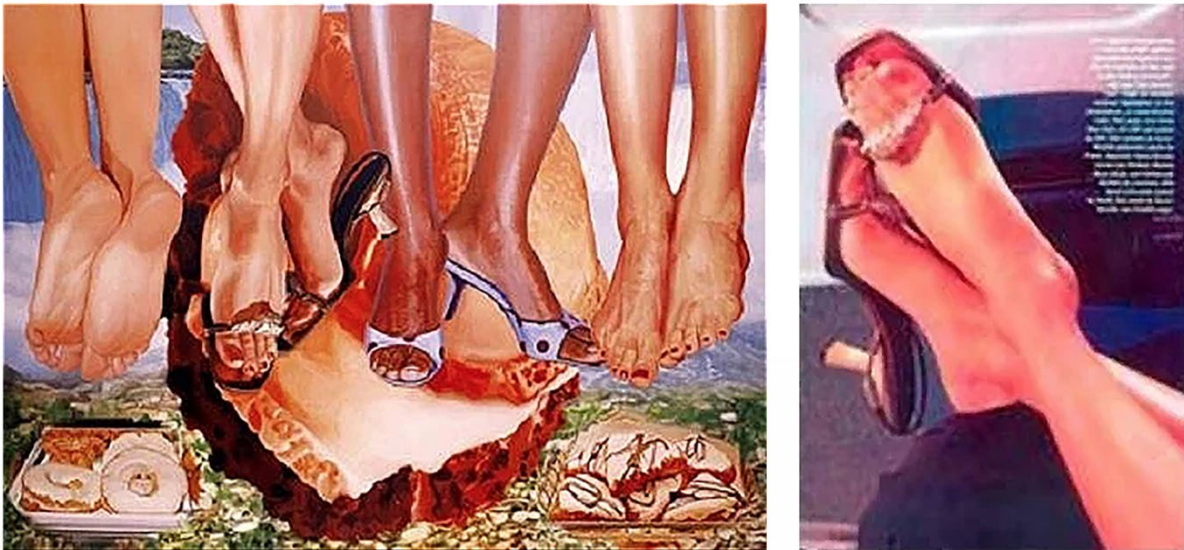


Figure 34. Jeff Koons. *Niagara*, 2000. Collage, oil on canvas. Solomon R. Guggenheim Museum, NY. Image source: Solomon R. Guggenheim Museum, <https://www.guggenheim.org/artwork/10734>. Figure 35. Andrea Blanch. “Silk Sandals by Gucci,” advertising photograph for *Allure*, August, 2000. Image source: “Significance: Blanch v. Koons,” *Artist Rights*, <https://www.artistrights.info/blanch-v-koons>

However, in 2006 the Second Circuit Court in *Blanch v. Koons* granted the latter a summary judgment, subsequently affirmed by the Court of Appeals, that Koons’ use of Blanch’s photograph was within Fair Use.<sup>18</sup> The Second Circuit Court found that Koons’ collage was transformative in character and purpose, while Blanch’s photograph, though technically accomplished, displayed limited originality. It also noted that the two works were aimed at different audiences and markets, and that Koons’ appropriation had not caused documentable financial harm to Blanch as a fashion photographer.

Over the last decade, as the United States Supreme Court has become more conservative, many in the arts field have wondered whether a diminution of Transformative Use would be forthcoming. Those fears seemed initially to have been realized in the Court’s 2023 *Andy Warhol*

<sup>18</sup> *Blanch v. Koons*: 467 F.3d 244 (2d Cir. 2006).

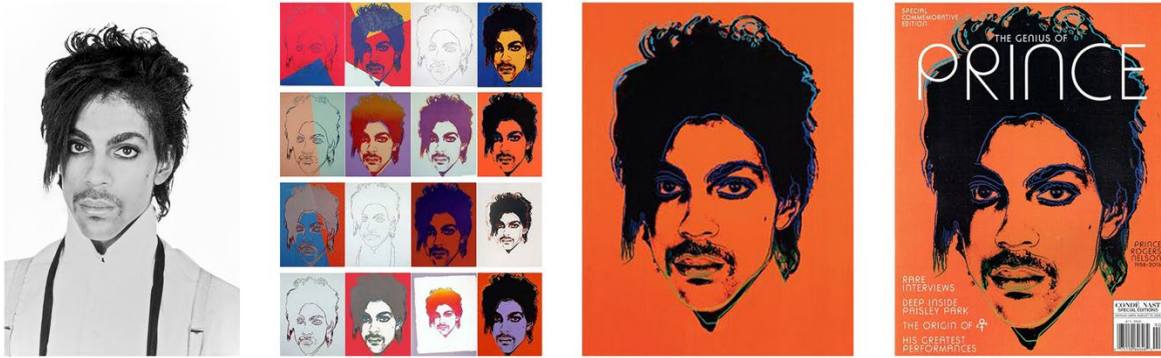


Figure 36. Lynn Goldsmith. Headshot of Prince, 1981. Unpublished black & white photograph. Image Source: United States Supreme Court ruling in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*: 598 U.S. 508 (2023), p. 4. Figure 37. Andy Warhol. *Prince* series, 1984. 14 silkscreen prints and 2 pencil drawings. Image source: Image Source: United States Supreme Court ruling in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*: 598 U.S. 508 (2023), Appendix, p. 39. Figure 38. Andy Warhol: *Orange Prince*, 1984. Synthetic polymer paint and silkscreen on canvas. Image Source: “File:Prince, by Andy Warhol.jpg,” Wikipedia, [https://en.wikipedia.org/w/index.php?title=File:Prince,\\_by\\_Andy\\_Warhol.jpg&oldid=1266562960](https://en.wikipedia.org/w/index.php?title=File:Prince,_by_Andy_Warhol.jpg&oldid=1266562960). Figure 39: “The Genius of Prince,” cover design for Conde Nast Publications, Special Commemorative Edition, 2016. Image Source: United States Supreme Court ruling in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*: 598 U.S. 508 (2023), p. 5, figure 3.

*Foundation for the Visual Arts, Inc. v. Goldsmith* decision.<sup>19</sup> The case involved a photograph of Prince Rogers taken in 1981 by Lynn Goldsmith, who was known for her images of rock musicians [Fig. 36]. Three years later, the publication *Vanity Fair* licensed Goldsmith’s unpublished but copyrighted image to be used by Andy Warhol to create a potential cover illustration. The contract specified that only a single use would be made of the source photograph, with Goldsmith credited.

However, Warhol proceeded to turn the photograph into an entire *Prince Suite* consisting of two pencil drawings and fourteen variations in his signature style using acrylic paint and silkscreen – not notifying or crediting Goldsmith [Fig. 37]. After Warhol’s death, the Andy Warhol Foundation for the Visual Arts asserted control over the late artist’s intellectual property, including licensing of his work for commercial purposes. In 2016, following Prince’s death, Condé Nast publications (which owns *Vanity Fair*) sought to use *Orange Prince*, one of the works from the *Prince Suite*, as cover art for a special commemorative issue, and paid the Warhol Foundation a licensing fee – again, with neither party notifying or crediting Goldsmith [Figs. 38, 39]. When this came to the photographer’s attention, she sued for copyright infringement, and the Supreme Court in a 7-2 decision ruled in her favor.

The announcement of this outcome was cause for concern among many in the arts community, who feared that the current Court, under pressure from powerful entertainment corporations, would no longer defend Transformative Use. Upon careful reading of the full published decision, however, legal scholars felt that the case actually applied only to this particular set of circumstances, in which a purported exercise of Fair Use had violated the terms and conditions of a commercial licensing contract. The Court had not ruled on the legality of the *Prince Suite* itself as transformative appropriation art.

<sup>19</sup> *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023)

Is the current United States Copyright law, now nearly half a century old and written before the development of a worldwide networked environment, hopelessly outdated and in need of a complete overhaul? Is it able to address questions such as whether a born-digital work like an online game that continuously evolves through play by gaming community members is ever truly “fixed in a tangible form of expression”? Is the underlying origin code the only “fixed” element, or is every conceivable play-based iteration? Is the current law sufficient to determine ownership disputes over content generated by Artificial Intelligence? Thinking more broadly, is the utilitarian philosophical justification for copyright, rooted in Western beliefs prioritizing the creativity of individuals, personal rights, and legal ownership of “intellectual property,” at odds with the values of traditional cultures that may regard their narratives, image-making, or ritual performances as the shared ancestral heritage of all of their community members – a heritage not to be exploited by “outsiders”?

Looking ahead into the future, might a complete Congressional revision of the law be unduly shaped by lobbying pressure from powerful media corporations pushing for increased restrictions on public access, potentially imposing new limits on the re-purposing of cultural materials in favor of stricter licensing controls and pay-for-use systems? On the other hand, would a putative new law finally acknowledge that the worldwide networked environment now offers a rich variety of self-publishing opportunities for creatives who choose to prioritize access to their works by a wider audience above the monetization of those works?<sup>20</sup>

History suggests that copyright legislation, litigation, and standards of community practice will continue to evolve as our technological and social environments change; and that visual artists and other creatives will continue to produce new works inspired by, referencing, or even re-purposing existing cultural “properties.”

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<sup>20</sup> For example, the nonprofit Creative Commons offers six open use licenses and a public domain dedication tool that individual creators can apply on their own to the self-publishing of their works, especially online: <https://creativecommons.org/share-your-work/ccllicenses/>. These licenses allow content creators to grant specific uses of their works under specific conditions, in effect parsing automatic copyright restrictions and applying only those that creators select on a case-by-case basis. Creative Commons also gives creators a legal way to dedicate their works to the public domain – an option not provided by the current U.S. Copyright law.

Visual Resources Association. *Statement on the Fair Use of Images for Teaching, Research, and Study*.  
2013. [https://cmsimpact.org/wp-content/uploads/2016/01/vra\\_fairuse\\_statement.pdf](https://cmsimpact.org/wp-content/uploads/2016/01/vra_fairuse_statement.pdf).