



NEW ENGLAND LAW | BOSTON





# Bleistein, Fair Use, and Aesthetic Non-discrimination

Copyright law has been a primary arena for fights over the “aesthetic non-discrimination” principle

- Likely heading down that road again with fair use in Warhol
- Born out of a copyrightability dispute over whether posters advertising a circus could attain copyright

“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”

- *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.)



Bleistein and aesthetic non-discrimination has meant different things to different judges:

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Judges should ordinarily not make copyrightability (or fair use?) determinations according to:

- whether there is aesthetic value in the underlying work  
ie, don't ask: is it any good as a picture?

- the work is art or not

- the work was made for aesthetic, as opposed to commercial/useful, purposes

Judges without aesthetic training or expertise should not do any of the above

- But maybe others with more training can do so?



In 2005 Prof.  
Christine Farley  
Observed a  
“Doctrine of  
Avoidance” of  
Artistic  
Determinations by  
Courts

(1) “[C]ourts' explicit resistance to engage in aesthetic analysis only masks that they do so nonetheless.

(2) “[T]hese cases reveal how courts adopt aesthetic theory intuitively, even as they remain seemingly ignorant of that body of scholarship. Thus the lure of objectivity may in fact draw courts further inward into the subjective realm.”

- Christine Haight Farley, Judging Art, 79 Tul. L. Rev. 805 (2005)

Might be exactly where we end up once again in Warhol

# Aesthetic Analysis at the District Court:

## At least three types of aesthetic determinations made in analyzing transformativity

### Formal comparisons of treatment of the subject, Prince

- “Prince's torso is removed and his face and a small portion of his neckline are brought to the forefront. The details of Prince's bone structure that appear crisply in the photograph, which Goldsmith sought to emphasize, are softened in several of the Prince Series works and outlined or shaded in the others. . . .

### Comparisons of message (what is communicated about Prince to a viewer)

- Prince goes from “a vulnerable, uncomfortable person to an iconic, larger-than-life figure.”

### Value judgment about Warhol's overall contribution to art

- The Prince Series works “add something new to the world of art and the public would be deprived of this contribution if the works could not be distributed.”

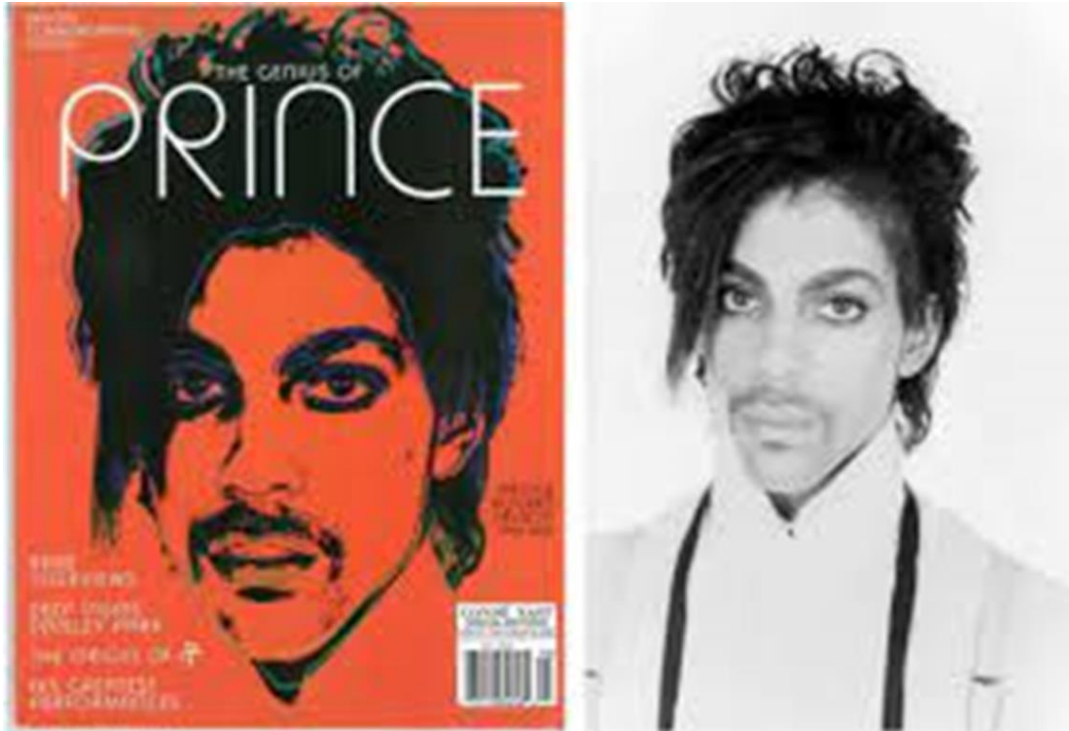
# Aesthetic Avoidance at the Second Circuit

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Cites Bleistein to warn that judges conducting a transformativity inquiry “should not assume the role of art critic and seek to ascertain the intent behind or meaning of the works at issue” . . . because “judges are typically unsuited to make aesthetic judgments and because such perceptions are inherently subjective”

But still requires that “the secondary work itself must reasonably be perceived as embodying a distinct artistic purpose, one that conveys a new meaning or message separate from its source material.”





## Yet the Second Circuit Clearly Made Aesthetic Determinations

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“the Prince Series retains the essential elements of its source material, and Warhol's modifications serve chiefly to magnify some elements of that material and minimize others. While the cumulative effect of those alterations may change the Goldsmith Photograph in ways that give a different impression of its subject, the Goldsmith Photograph remains the recognizable foundation upon which the Prince Series is built.”

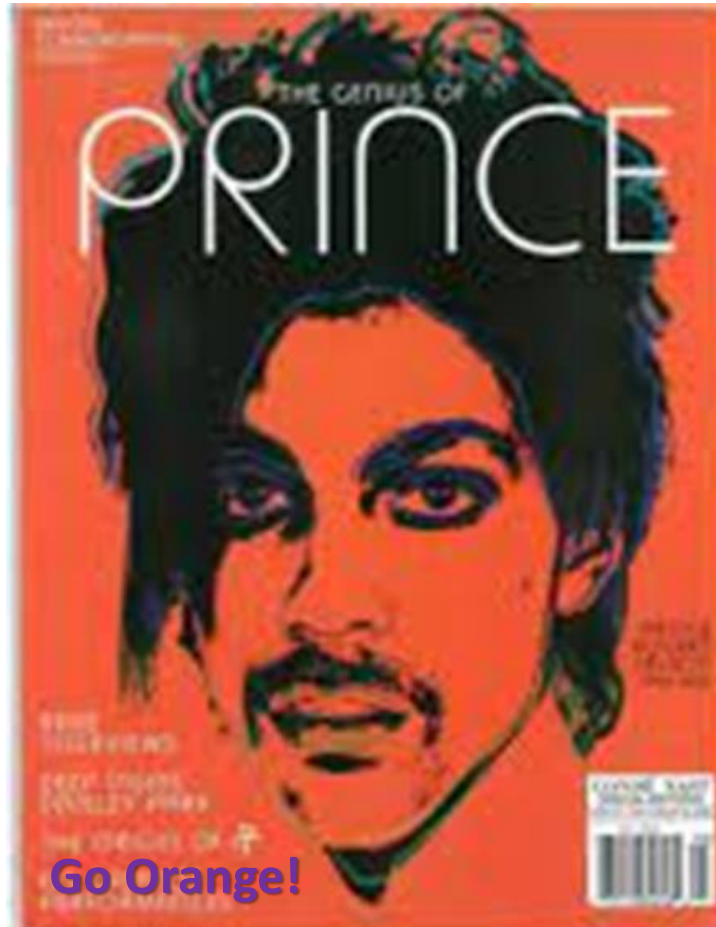


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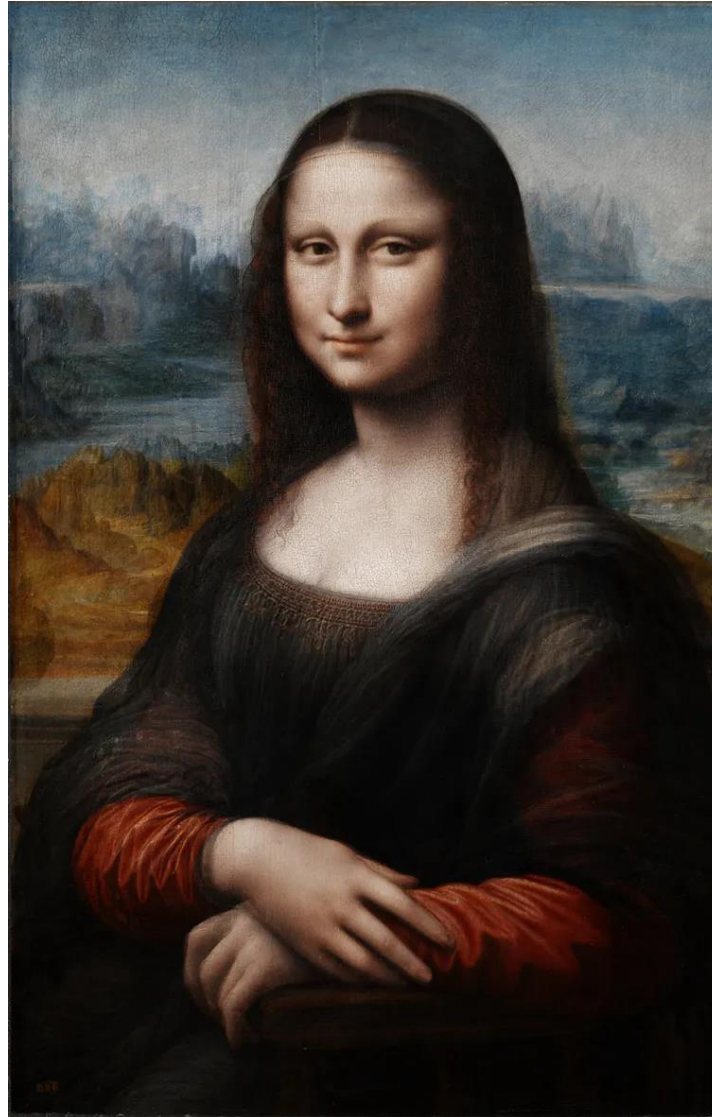
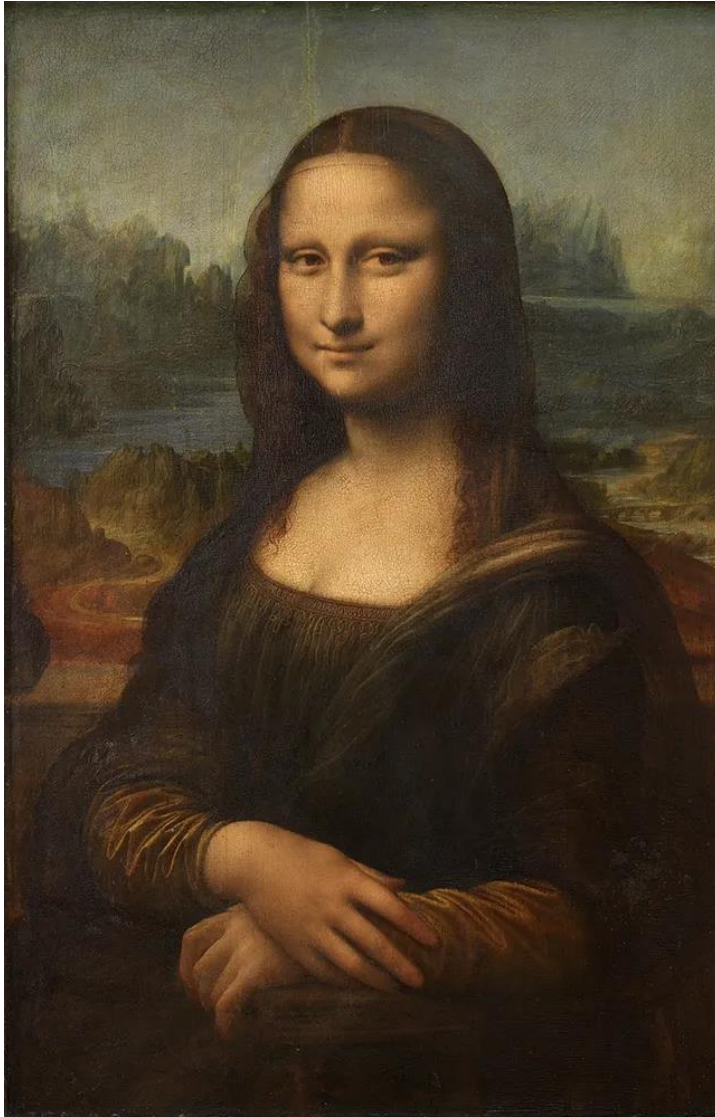


# Justices and aesthetics at oral argument





# Justices and aesthetics at oral argument, cont.



## Justices and aesthetics at oral argument, cont.

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See:

<https://matiasventura.com/post/the-colours-of-the-mona-lisa/>



# Justices and aesthetics at oral argument, cont.

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# Justices and Aesthetics at Oral Argument

Those Most at Ease with Aesthetic Judgments, at Least with Respect to Meaning or Message:

- Kagan, Roberts, Sotomayor

Those Focused on How to Make Aesthetic Judgments

- Alito, Gorsuch

Those Looking for Frameworks that Facially Avoid Aesthetic Judgments:

- Jackson, Barrett, Kavanaugh, Thomas
  - Appear to want to focus on the purpose of the use, at a high level of generality, as illustrating a commercial magazine article about Prince



# What to Expect in the Opinion?

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Majority consensus (maybe) that Second Circuit was too dismissive of meaning and message in Factor 1, and should have included it more overtly

Some question as to how judges should make determinations of meaning and message (use of experts, etc)

Substantial block of justices looking for framework to avoid the issue entirely, perhaps through taking a broad view of “purpose” of the use

Little appetite for exploring theoretical aesthetic underpinnings of meaning and message