

Copyright Law

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Topics:

- Legal rules as tools for solving problems
- Identify and understand the problem(s)
- Fair use problems:
 - (i) How to enable cultural “progress”; all creation builds on other material.
 - (ii) How to identify (reinforce?) markets that do/don’t work.
 - (iii) How to keep copyright out of non-copyright areas (*e.g.*, trademark, identity, & branding interests, free expression, tech development, privacy).

Fair use: compressing the preamble and 4 factors into 3 patterns

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(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.

Pattern 1: © is all about creating things, “originality,” and cultural “progress,” individually or collectively (small and large groups).

Pattern 2: (c) is all about the money and the economic logic of creating, publishing, and using/accessing things.

Pattern 3: © is a morality tale, good people and bad people; thieves and heroes, sometimes tied to the economic story, sometimes to the creation and originality story, and sometimes standing alone (as when © touches privacy or tech development – as with VCRs, or peer-to-peer systems).

Question one: Is this helpful in understanding how cases get decided?

Question two: Is this helpful in understanding how to advise clients?

The patterns reveal conflicts:

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Where copying things is inherent to the art / the culture / the technology (*and it almost always is!* *Humans are natural mimics; copying one another and learning from one another is an evolutionary imperative*), we run into conflicts among:

- **intuitive expectations** in art and/or in business (“Copying is bad”; “borrowing is ordinary”)
- **what the people practicing the art / the tech believe** (“Copying is absolutely essential”; “copying is fair in context”; “copying requires permission”; “requires attribution”; “\$\$\$ makes it different”)
- **the purposes of copyright law** (“when it comes to books, copying is bad. Usually. Because piracy, or because unfair competition, or because ‘original.’ Sometimes not. Sometimes it’s hard to tell. Beyond books, the *theory* of copyright makes more sense than the *practice* of what people actually do when they make and sell stuff. So good luck with that.”)

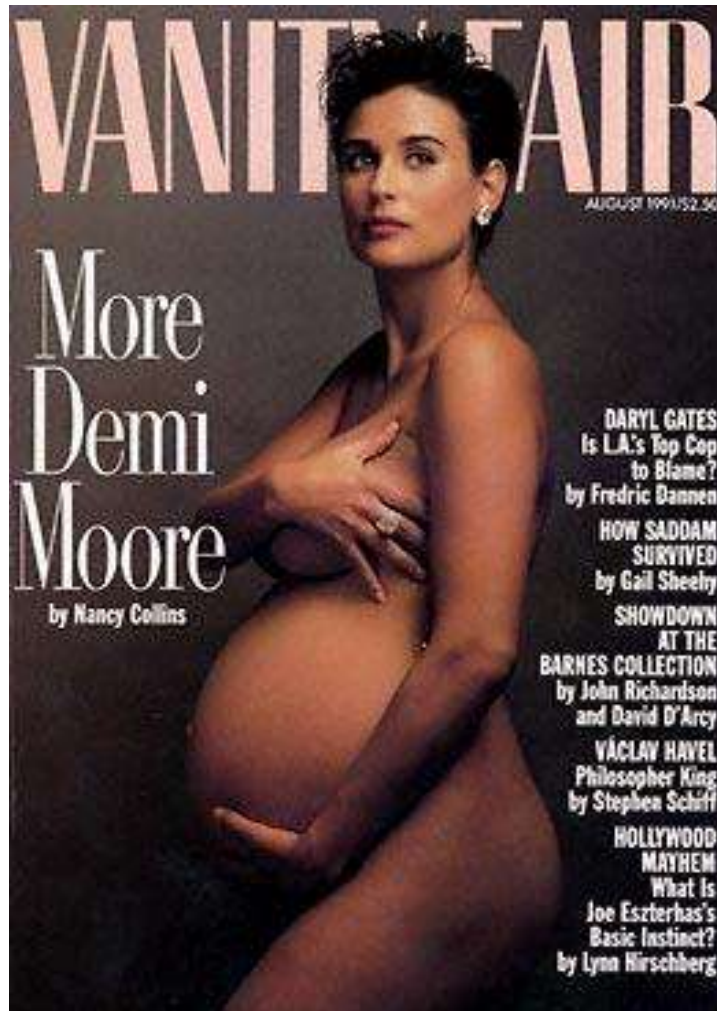
Fair use: Does it work differently for visual art (compared to text)?

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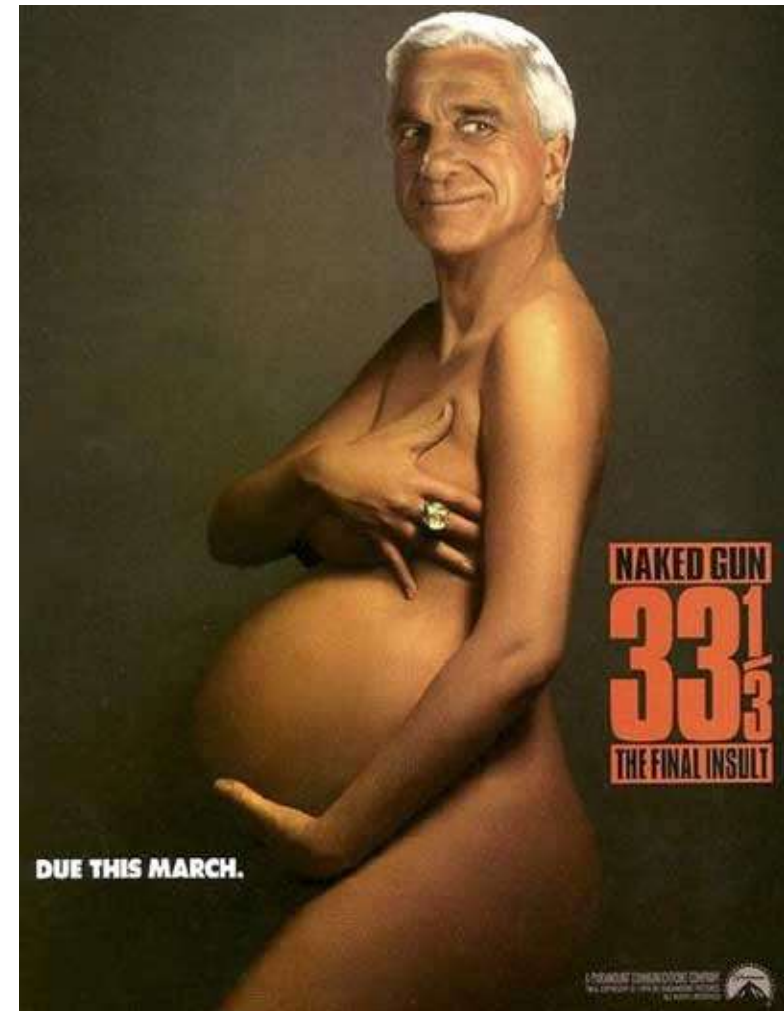
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1991



1994

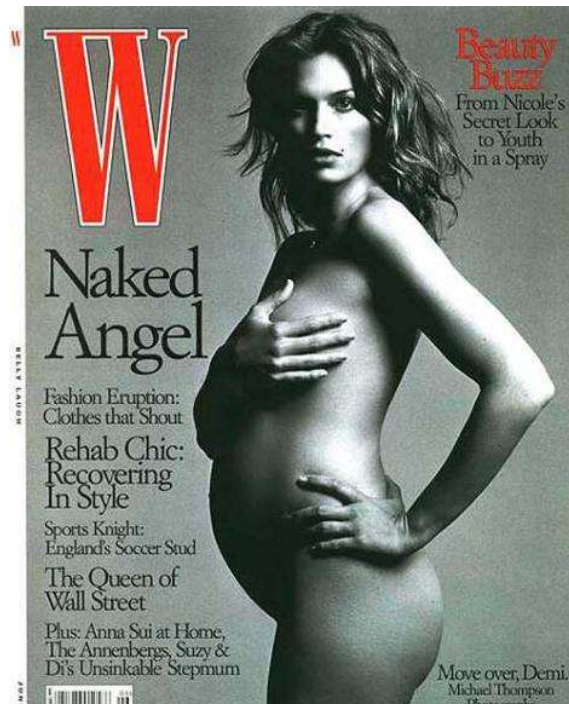
Leibovitz v. Paramount Pictures Corp.
(2d Cir. 1998)



Dec 2019 Margot Robbie



June 1999 Cindy Crawford



June 1999 Claudia Schiffer

August 2006: Britney Spears



October 2011: composite



[All produced after the Demi Moore/Annie Leibovitz photo was published]

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**Associated Press & Mannie Garcia v.
Shepard Fairey (settled)**

Fair use: Does it work differently for visual art (compared to text)?



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What is the work?

Associated Press & Mannie Garcia v. Shepard Fairey

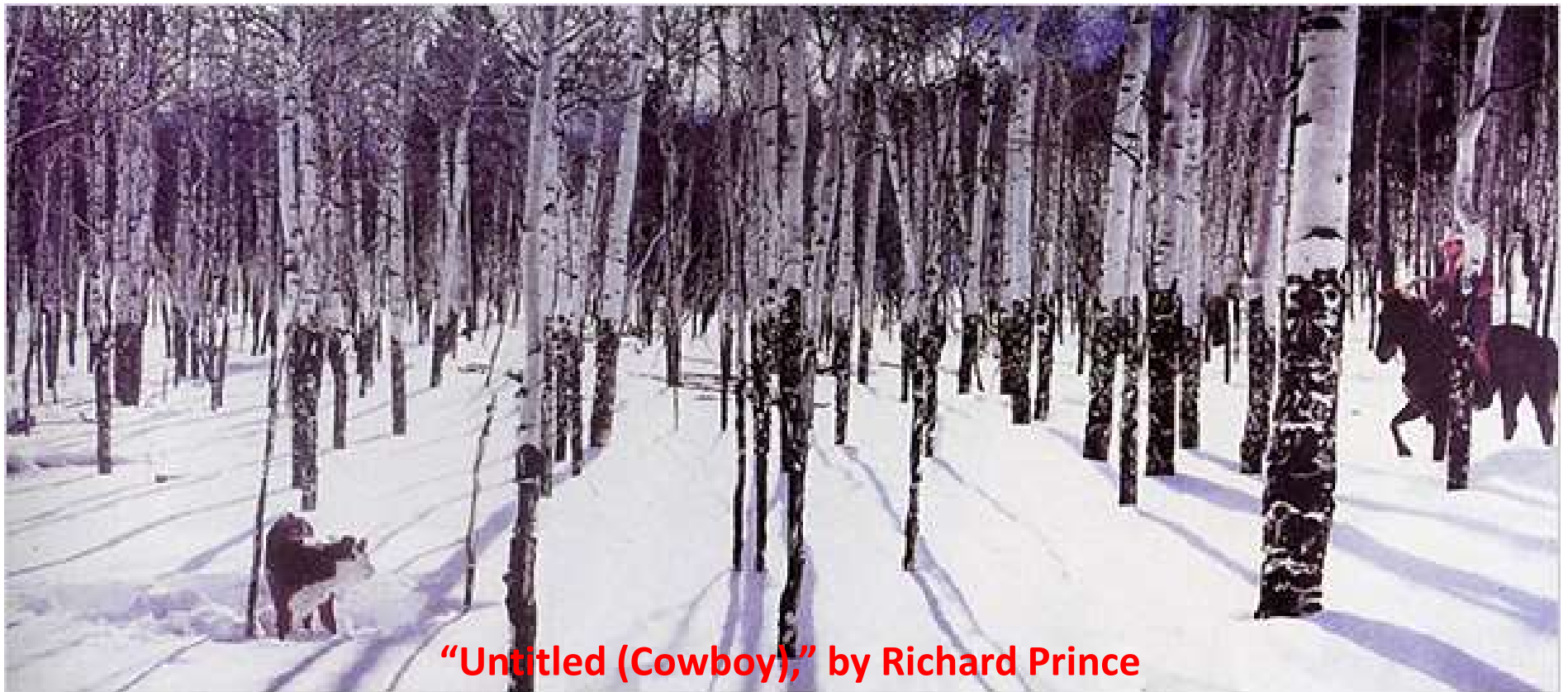
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**Sedlik v. Von Drachenberg (C.D. Ca. 2024)
(The tattoo artist won a jury verdict in a
case brought by the photographer!)**



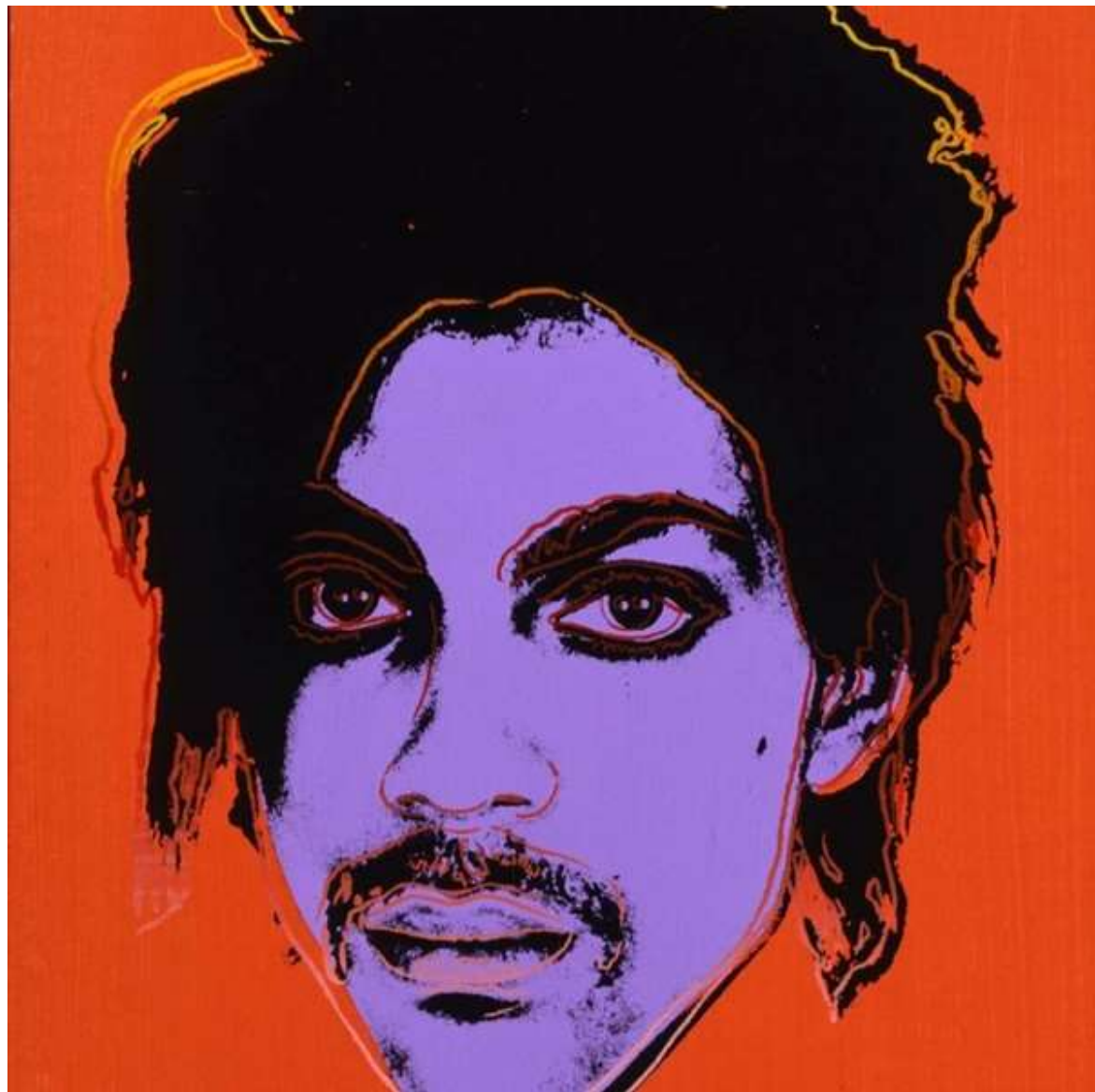
Photo by Jim Krantz (1998): "Calf Rescue," for Marlboro



"Untitled (Cowboy)," by Richard Prince



Photo of Prince by
Lynn Goldsmith (1981)



Silk screen by Andy Warhol

**Did Warhol appropriate protected expression?
Transform the work (“purpose and character” of
the defendant’s use was ...)? Harm the (or “a”)
market for Goldsmith’s work?**

Photo of Prince
by
Lynn Goldsmith
(1981)



Focus on the use of Orange Prince by the magazine, rather than on the creation of Orange Prince by Warhol. Is the use “fair” under Section 107? Why / why not?

The End

