

High Court's Warhol Ruling Poses New Concerns for Artists

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Bracewell's **Jonathon Hance** [told Law360](#) that the US Supreme Court's ruling to reject Andy Warhol Foundation's fair use defense over Warhol's portrait of music icon Prince may make it harder for artists to determine during their creative process whether their works are transformative or merely derivative.

"In this case, it was a use by Mr. Warhol's foundation after he was deceased," Hance noted. "So, you're asking an artist to make a determination — essentially whether to get a license or not at the beginning of the process, based on all the many different ways the work might be used in the future."

This would likely be "even harder" in the context of artificial intelligence, where the discussion could shift from whether there was human creativity to becoming almost less about the creativity of the work itself and more about the work's potential use, according to Hance.

In a 7-2 decision, the high court shot down the foundation's arguments that its licensing of Warhol's "Orange Prince" for a magazine cover was fair use of photographer Lynn Goldsmith's copyrighted photo of Prince. The foundation's licensing of the work in question didn't have a sufficiently different purpose as the photo taken by Goldsmith, as both were "portraits of Prince used in magazines to illustrate stories about Prince," the justices said.

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