

No. 19-2420

IN THE
United States Court of Appeals
for the Second Circuit

THE ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC.,
Plaintiff-Counter-Defendant-Appellee,

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,
Defendants-Counter-Claimants-Appellants.

On Appeal from the United States District Court for the Southern District of New York
(Civ. No. 17-2532) (Hon. John G. Koeltl, J.)

BRIEF FOR *AMICI CURIAE*
THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC.
AND FOUR OTHER VISUAL ARTS GROUPS
IN SUPPORT OF DEFENDANTS-COUNTER-CLAIMANTS-APPELLANTS

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helped write this brief.

CORPORATE DISCLOSURE STATEMENT

In accordance with FRAP 26.1, *amici* state as follows:

American Society of Media Photographers, Inc. (ASMP) has no parent company nor issues stock. Accordingly, no publicly-held company owns 10% or more of its stock.

National Press Photographers Association (NPPA) has no parent company nor issues stock. Accordingly, no publicly-held company owns 10% or more of its stock.

Professional Photographers of America (PPA) has no parent company nor issues stock. Accordingly, no publicly-held company owns 10% or more of its stock.

Graphics Artist Guild (GAG) has no parent company nor issues stock. Accordingly, no publicly-held company owns 10% or more of its stock.

North American Nature Photography Association (NANPA) has no parent company nor issues stock. Accordingly, no publicly-held company owns 10% or more of its stock.

Dated: November 20, 2019

/s/ Thomas B. Maddrey

Counsel for Amici Curiae American Society of Media Photographers, Inc., National Press Photographers Association, Professional Photographers of America, Graphic Artists Guild, and North American Nature Photography Association.

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INTEREST OF *AMICI CURIAE*

American Society of Media Photographers, Inc. (ASMP) is a 26 U.S.C. § 501(c)(6) non-profit trade association representing thousands of members who create and own substantial numbers of copyrighted photographs. These members all envision, design, produce, sell, and license their photography in the commercial market to entities as varied as multinational corporations to local mom and pop stores, and every group in between. In its seventy-five-year history, ASMP has been committed to protecting the rights of photographers and promoting the craft of photography.^{1, 2}

National Press Photographers Association (NPPA) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing, and distribution. NPPA's members include video and still photographers, editors, students, and representatives of businesses that serve the visual journalism community. Since its founding in 1946, the NPPA has been the *Voice of Visual Journalists*, vigorously promoting the constitutional and intellectual property rights

¹ Pursuant to this Court's Local Rule 29.1(b), counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

² All *amici* wish to thank the students of the UCLA School of Law for their work on this brief.

of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

Professional Photographers of America (PPA) is the world's oldest and largest association representing professional photographers. Founded in 1868, PPA strives to provide its members with the artistic knowledge and entrepreneurial skills necessary to foster their success in the photographic industry. In addition to providing support to its members, PPA is also dedicated to preserving the intellectual-property rights of photographers, videographers, and other visual artists.

Graphic Artists Guild, Inc. (GAG) has advocated on behalf of graphic designers, illustrators, animators, cartoonists, comic artists, web designers, and production artists for over fifty years. GAG educates graphic artists on best practices through webinars, Guild e-news, resource articles, and meetups. The Graphic Artists Guild Handbook: Pricing & Ethical Guidelines has raised industry standards and provides graphic artists and their clients guidance on best practices and pricing standards.

North American Nature Photography Association (NANPA) is a 501(c)(6) non-profit organization founded in 1994. NANPA promotes responsible nature photography as an artistic medium for the documentation, celebration, and protection of our natural world. NANPA is a critical advocate for the rights of nature

photographers on a wide range of issues, from intellectual property to public land access.



SUMMARY OF THE ARGUMENT

In 1981, Lynn Goldsmith (“Goldsmith”), a renowned photographer who specializes in portraits of musicians, leveraged her skill and reputation to convince the young and notoriously shy Prince to sit in her studio for a series of photographs. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 317–18 (S.D.N.Y. 2019) (hereinafter, “*Warhol*”). Three years later, Goldsmith did what professional photographers do to make a living: she licensed a photograph from the Prince series to *Vanity Fair* magazine for Andy Warhol to use as an “artist reference” in connection with an illustration to accompany an article about Prince. *Id.* at 318. Consistent with industry practice, and in order to protect her professional standing and future livelihood, Goldsmith explicitly limited the license:

- “for use as artist reference for an illustration”;
- “to be published in Vanity Fair November 1984 issue”;
- “Can appear one time full page and one time under one quarter page”;
- “No other usage right granted”;
- “This credit line – Lynn Goldsmith”; and

- The license denied the right to “reproduce” the photograph striking it from the licensed terms: “license is granted to use ~~or reproduce~~ above-described photograph(s). . . .” JA-1022.
- “All rights not specifically granted . . . are reserved by Lynn Goldsmith.” JA-1024.

Warhol used the Goldsmith photograph as the basis for the *Vanity Fair* illustration as well as for *fifteen* other distinct works that were unauthorized. Rather than using the photograph as a “reference” (*i.e.*, as inspiration for his own, independent work), Warhol had “his silkscreen printer create a high contrast half tone silkscreen from [the] photograph,” JA-0804—a process typically used by Warhol—then colored that copy, traced its outline, shaded it, and cut off the bottom portion, leaving a reproduction of Prince’s face and pose as Goldsmith had captured them. Warhol’s illustration literally was “derived” from Goldsmith’s photograph. Warhol and *Vanity Fair* acknowledged as much when Warhol’s work was originally published with a copyright credit to Goldsmith as “source photograph © 1984 by Lynn Goldsmith/LGI.” JA-1777. That term of art, “source photograph,” means “the underlying image that was used to create the artwork.” *Warhol*, 382 F. Supp. 3d at 318.

Over thirty years later, in 2016, Warhol’s successor, the Andy Warhol Foundation for the Visual Arts, Inc. (“AWF”), licensed one of Warhol’s other fifteen unauthorized derivative works to *Condé Nast* (specifically, one with Prince’s face in

a different color), for use as the cover of a memorial magazine dedicated to Prince. *Id.* at 321.^{3,4} Goldsmith was not a party to the new license, was not informed of it or the new use, did not consent, was not paid, and did not receive credit. Sole credit went to Warhol, including for the “image” previously credited to Goldsmith. *Id.* It read, “Andy Warhol, Prince, © 1984. Image and Artwork © The Andy Warhol Foundation for the Visual Arts, Inc./Licensed by ARS.” JA-2178. Yet, as a music photographer whose work routinely appears in nationally distributed magazines (including *Newsweek*, which had hired her to photograph Prince in the first instance) Goldsmith produced her portraits for precisely the type of use the *Condé Nast* cover represents. *Warhol*, 382 F. Supp. 3d at 18.

The district court granted Warhol’s summary judgment motion after assuming Goldsmith’s photograph was original and protectable, that there existed “probative similarity” between Warhol’s cover illustration and Goldsmith’s photograph, and that Warhol had made a silkscreen copy of the Prince photograph as part of his process. *Id.* at 323–24. Relying almost exclusively on its own subjective view of the feeling evoked by the two works and on Warhol’s fame, the district court held, as a

3 For convenience, AWF and Warhol are referred to herein as “Warhol”.

4 The license between *Condé Nast* and Warhol was filed under seal. *Amici* have not had access to it.

matter of law, that Warhol’s illustration was transformative, and weighed that heavily in favor Warhol on all four of the fair use factors. *Id.* at 326, 331.

Amici agree with Goldsmith that, notwithstanding any creative contribution by Warhol, far from engaging in a transformative use of Goldsmith’s photograph, Warhol created commercial, unauthorized derivative works. That error alone requires reversal. Even assuming, without conceding, that Warhol’s alterations made some transformative use of Goldsmith’s photograph, that does not override consideration of the remaining fair use factors. When the other factors—the nature of the work, the amount taken, and the effect on the market—are fairly considered in the context of the creative business of photography, the fair use balance clearly favors Goldsmith.

Congress mandated that “[i]n determining whether the use made of a work in any particular case is a fair use, the factors to be included *shall include*” all four enumerated factors.⁵ The Supreme Court confirmed that no single factor is dispositive—any fair use analysis must balance all factors and modulate their relative weight in light of the facts. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (“[T]he four statutory factors [may not] be treated in isolation, one from another. All are to be explored, and the results weighed together,

5 17 U.S.C. § 107 (emphasis added).

in light of the purposes of copyright.”). This Court agrees. *See, e.g., Fox News Network, LLC v. TvEyes, Inc.*, 883 F.3d 169, 176 (2d Cir. 2018) (“In fair use litigation, courts undertake a ‘case-by-case analysis’ in which each factor is considered, ‘and the results [are] weighed together, in light of the purposes of copyright.’”) (quoting *Campbell*).

Though transformative nature is an appropriate consideration in the fair use analysis, it is not the only, nor even primary, consideration. Judge Leval recognized this in his seminal article.⁶ Transformative use exists on a sliding scale and is weighed against the other factors. *See, e.g., Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649, 660–61, 663 (2d Cir. 2018) (defendant’s “faint showing” of transformative purpose “was overwhelmed by substantial harm . . . inflicted on value of copyrights through its direct competition in copyright holders’ legitimate market”); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1176, 1184 (9th Cir. 2012) (defendant’s “minimally transformative” copying of plaintiff’s photographs did not outweigh adverse findings under factors two through four).

⁶ Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (“The existence of any identifiable transformative objective does not . . . guarantee success in claiming fair use. The transformative justification must overcome factors favoring the copyright owner.”); *see* Pierre N. Leval, *Campbell as Fair Use Blueprint?*, 90 WASH. L. REV. 597, 605 (2015) (“[The] importance [of transformative copying to the enrichment of society] . . . is not at the expense of the fourth factor[;] [t]o the contrary, *Campbell* characterizes the first factor inquiry as subservient to the fourth.”).

Here, the district court conducted its factor analysis virtually in service of its incorrect transformative use finding and failed to engage in the required balancing based on the specific facts. As discussed below, the court gave essentially no weight to the undisputed creativity and unpublished status of Goldsmith’s photograph under factor two because it found Warhol’s work to have “transformative purpose.” *Warhol*, 382 F. Supp. 3d at 326–27. In evaluating factor three—the amount used—the court discounted that Warhol copied the “heart” of the photograph and then substituted the court’s own subjective interpretation of the “meaning” of the two works to find Warhol’s work was transformative. *Id.* at 327–30. When considering factor four—the effect on the market—the court failed to appreciate that photographers rely on high volume licensing in current and prospective derivative markets. The court ignored Goldsmith’s proven track record in both the actual markets and potential markets for derivative works based on her photographs. Instead, the court crafted what is tantamount to a “famous artist exemption,” concluding that, notwithstanding copying and similarity, because Warhol’s alterations manifested a “uniquely Warhol aesthetic,” the result was a transformed work that could not harm Goldsmith’s market. *Id.* at 330–31. The district court thus failed to consider how photographs are taken, how photographic meaning is generated, and how the business of photography works. *Amici* submit this brief on

behalf of Goldsmith and all professional photographers to provide this Court with that necessary perspective.



ARGUMENT

A. FACTOR TWO: GOLDSMITH’S PHOTOGRAPH IS CREATIVE AND ORIGINAL

The story of copyright protection for photography is one of recognition of originality and, concurrently, expanding rights. In 1865, copyright was first extended to photographs and photographic negatives.⁷ The Copyright Act of 1870 included photographs and photographic negatives as subjects of copyright.⁸ The Supreme Court confirmed the constitutionality of this protection, recognizing that photographers are “authors” and their photographs creative “writings.” *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56, 61 (1884). The Court observed that a photograph of Oscar Wilde exhibited originality and creativity by “posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression.” *Id.* at 60. Later, Justice Holmes

⁷ Wendi A. Maloney, *Lincoln Authorized 1865 Copyright Legislation*, COPYRIGHT NOTICES (Feb. 2009), https://www.copyright.gov/history/lore/pdfs/200902%20CLore_February2009.pdf.

⁸ Copyright Act of 1870 § 86 (repealed 1909).

rejected any distinction between fine art and ordinary art, further broadening the types of photographs eligible for copyright. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-252 (1903). There is little doubt that now the same copyright protections serve to protect photographs (Goldsmith) as other art (Warhol). *See, e.g., Burrow-Giles*, 111 U.S. at 61 (“Photography is to be treated for the purposes of the act as an art, and the author is the man who really represents, creates, or gives effect to the idea, fancy, or imagination.”); *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1074 (9th Cir. 2000) (“[T]hat photography is art deserving protection reflects a longstanding view of Anglo-American law.”).

The district court recognized Warhol’s concession that Goldsmith’s Prince photograph was “a creative work.” *Warhol*, 382 F. Supp. 3d at 327; *see, e.g., Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992) (photographer’s “inventive efforts in posing the group for the photograph, taking the picture, and printing [the work] suffices to meet the original work of art criteria.”). But the court then discounted this factor because (the court asserted) Warhol’s use was transformative. By disregarding the undisputed creativity of Goldsmith’s photograph, the district court rolled back copyright protections for photographs that have been recognized since the nineteenth century.

The district court also acknowledged that the Goldsmith photograph was “unpublished” and that generally an author’s decision to “withhold the work to shore

up demand” weighed against fair use. *Warhol*, 382 F. Supp. 3d at 327; *see, e.g., Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 553 (1985). However, the court also discounted the unpublished nature of the Goldsmith photograph because “Goldsmith’s photography agency licensed the photograph for use as an artist’s reference,” and, therefore, the unpublished nature of her work carried “little force.” *Warhol*, 382 F. Supp. 3d at 327. This analysis ignores the significant limits Goldsmith placed on the use of her photograph, permitting it to be used only as a “reference” and *not copied or published*. In fact, she severely restricted the use of her photograph precisely “to withhold the work to shore up demand”—the very demand Goldsmith was planning to capture when she “editioned” her Prince photographs. JA-0759. The court concluded by giving this factor “limited importance” and holding it favored neither party because of the alleged transformative nature of the use. *Warhol*, 382 F. Supp. 3d at 327.

B. FACTOR THREE: THE AMOUNT AND SUBSTANTIALITY OF THE USE FAVORS GOLDSMITH

In analyzing the third factor—“the amount and substantiality of the portion used in relation to the copyrighted work as a whole”⁹—the district court should have considered the process by which Warhol incorporated the results of Goldsmith’s

9 17 U.S.C. § 107.

creative efforts and the nature of any modifications Warhol made to the photograph, while keeping the “heart” of the photograph.

1. Goldsmith’s Prince Photograph

Goldsmith’s Prince photographs were not created by happenstance (although such photographs also make significant societal contributions). Nor were they public domain, freely-available publicity photographs of the type Warhol used in the past.¹⁰ Goldsmith planned and employed countless creative decisions that are reflected in her photographs, beginning with securing Prince as a subject. Prior to pressing the shutter, knowing Prince was a shy person, Goldsmith worked to make the artist comfortable. JA-0700 to JA-0706. She altered and emphasized Prince’s self-styled makeup in part to establish a connection with him and effectuate her creative vision for the shoot. *Id.* Goldsmith then engaged in a complex set of decisions during the session. She chose the backdrop, lighting, and how to instruct Prince to look and pose. She chose specific types of film, lens, and camera, how much light to let in through her lens and for how long, while also deciding how much of Prince would be in focus. *See Warhol*, 382 F. Supp. 3d at 317 (Goldsmith “employed several interpersonal techniques to establish rapport with her subjects, as well as several

¹⁰ Lawrence Alloway, *Art: Review of Exhibition at the Whitney Museum*, THE NATION, May 24, 1971, at 668, *reprinted in* THE CRITICAL RESPONSE TO ANDY WARHOL 78, 79 (Alan R. Pratt ed., 1997) (“All [Warhol’s] best pictures are based on photographs in the public domain.”).

photographic techniques with respect to lighting, camera position, and other elements.”).

These are the same choices courts point to when describing protectable, creative elements of photographs. “The technical aspects of photography imbue the medium with almost limitless creative potential.” *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 310 (S.D.N.Y. 2000) (“[T]he selection of a camera format governs the film size and ultimately the clarity of the negative. Lenses affect the perspective. Film can produce an array of visual effects. Selection of a fast shutter speed freezes motion, while a slow speed blurs it. Filters alter color, brightness, focus and reflection.”); *see Rogers*, 960 F.2d at 307 (creative elements “of a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved.”); *E. Am. Trio Prods., Inc. v. Tang Elec. Corp.*, 97 F. Supp. 2d 395, 417 (S.D.N.Y.), *voluntarily dismissed*, 243 F.3d 559 (Fed. Cir. 2000) (“[T]he necessary originality for a photograph may be founded upon, among other things, the photographer’s choice of subject matter, angle of photograph, lighting, determination of the precise time when the photograph is to be taken, the kind of camera, the kind of film, the kind of lens, and the area in which the pictures are taken.”); *Kisch v. Ammirati & Puris Inc.*, 657 F. Supp. 380, 382 (S.D.N.Y. 1987) (“[T]he copyrightable elements

[of a photograph] include such features as the photographer’s selection of lighting, shading, positioning and timing.”).¹¹

These and other decisions have discernable effects on the Prince photographs Goldsmith produced. As such, the works of both Goldsmith and Warhol are emblematic of the creative choices Goldsmith made. Deviations in any of these creative decisions would have altered the appearance of Prince’s facial features. And it is exactly these features of Prince, as captured by Goldsmith, that are apparent in and controlled the look of Warhol’s final work.

2. Warhol Took the Heart of Goldsmith’s Work

Warhol gained access to Goldsmith’s unpublished Prince photograph only after she licensed it to *Vanity Fair* with the restrictions quoted above. The use of the photograph was limited to a *one-time* use, in connection with a particular article, *only* as an “artist reference.” However, Warhol did not limit his use to an “artist reference,” nor to a one-time, specific use. He made multiple uses of the photograph, including on the 2016 magazine cover. Warhol converted the Prince photograph to a silkscreen *copy*, which then served as the base for his initial illustration, and, another version that was the 2016 cover. *See* Opening Brief of Appellants at 10–12

¹¹ *See also* U.S. Copyright Office, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 101.1(A) at 909.1 (3d ed. 2017) (“The creativity in a photograph may include the photographer’s artistic choices in creating the image, such as the selection of the subject matter, the lighting, any positioning of subjects, the selection of camera lens, the placement of the camera, the angle of the image, and the timing of the image.”).

(describing process). When referencing an image, an artist “looks to” the image for “information and inspiration.”¹² Once art is used beyond a simple reference as for example in order “to learn about the characteristics of your subject,” the resulting work is a derivative when the use resembles something more like actual copying.¹³

As reflected below, the result was that Warhol’s Prince illustrations captured the same pose and head angle; many of the same shaded areas created by Goldsmith’s lighting; facial hair details; intensity of eyes with dual flash lights reflected in each pupil; detailed shape and fall of hair (including prominent “tendrils”); light reflected off Prince’s lower lip to accentuate that feature as orchestrated by Goldsmith; Prince’s chiseled bone structure highlighted by Goldsmith’s intentional lighting; and the sensuality of Prince’s mouth accentuated by lip gloss Goldsmith applied—all of which, when viewed as a whole, reflect the “look” and “feel” of the Goldsmith photograph. *See Knitwaves, Inc. v. Lollytogs Ltd. (Inc.)*, 71 F.3d 996, 1011 (2d Cir. 1995).

12 Jessie Oleson Moore, *Deference to the Reference: Using Reference Images to Create Great Art*, MYBLUPRINT.COM (Sept. 10, 2014, 06:00 AM), <https://www.mybluprint.com/article/using-reference-images>.

13 Marion Boddy-Evans, *Artists and Copyright: Painting From Reference Photos*, THESPRUCECRAFTS.COM (Oct. 31, 2019), <https://www.thesprucecrafts.com/marion-boddy-evans-4686530>; *see also* JA-0592 to JA-0593.



LEFT: GOLDSMITH’S PHOTOGRAPH OVERLAID WITH THE WARHOL ILLUSTRATION THAT APPEARED ON THE COVER OF 2016 *CONDÉ NAST*.

RIGHT: GOLDSMITH’S PHOTOGRAPH. JA-0523.

The district court’s conclusion that Warhol used “only a portion of the Goldsmith photo,” understates this reality. *Warhol*, 382 F. Supp. 3d at 327. Warhol’s entire process copied the most important part of Goldsmith’s photograph—Prince’s features and positioning. The court, in fact, (grudgingly) acknowledged that Warhol’s work “only” included Prince’s head and pose, but it then eliminated these elements from consideration by wrongly claiming they were not protectable. *Id.* at 329. The court’s reasoning fails to engage with the way photographers create. Popular culture teaches that portrait photographers exclaim, “Strike a pose!” and

their subjects instantly react. It is not so simple. A portrait photographer must first choose and refine a model's appearance, then direct him or her to pout, glare, or seduce; a model's "pose," as it appears on the printed page, is the product of multiple, intentional creative choices. In addition to choices concerning their subject, photographers must consider the effects of numerous technical aspects, such as the lens, film speed, shutter speed, distance from subject, camera elevation, light intensity, and light position. These examples represent a small fraction of the creative decisions that Goldsmith employed in December 1981, as she stood in front of a shy and impatient Prince. The court's approach ignores the unique and copied aesthetic effect created by Goldsmith's personalized arrangement of her photograph's elements. *See, e.g., Jewelers' Circular Publ'g Co., v. Keystone Publ'g Co.*, 274 F. 932, 934 (S.D.N.Y. 1921), *aff'd*, 281 F. 83 (2d Cir. 1922) ("[N]o photographs, however, simple can be unaffected by the personal influence of the author" and "no two will be absolutely alike.").

The district court further misapprehended the protectable art of the photographer. After finding that Warhol copied from Goldsmith's photograph, the pose and angle of Prince's head, the court wrongly stated that these elements cannot

be copyrighted. *Warhol*, 382 F. Supp. 3d at 329.¹⁴ However, the *Kate Spade* opinion, relied on by the district court, recognized that while the *idea* of a pose may not be protectable, copyright *does* protect a “plaintiff’s particular photographic expression of . . . poses.” *Bill Diodato Photography, LLC v. Kate Spade, LLC*, 388 F. Supp. 2d 382, 393 (S.D.N.Y. 2005); *see Burrow-Giles*, 111 U.S. at 53 (a multitude of a photographer’s choices constituted protectable expression, including the model’s pose). Unlike *Kate Spade*, which concerned two distinct photographs of two different models *independently* posed in a similar manner, Warhol used photosensitive materials to copy the *exact photographic expression* of Prince’s pose from the original. JA-0804 to JA-0806.

Similarly, the district court eliminated another manifestation of Goldsmith’s creativity by positing that facial “features themselves are not copyrightable.” *Warhol*, 382 F. Supp. 3d at 329 (citing *Mattel, Inc. v. Goldberger Doll Mfg. Co.*, 365 F.3d 133, 134 (2d Cir. 2004) (Leval, J.)).¹⁵ In fact, the *Mattel* court correctly held the opposite: “we did not say that . . . facial features [a]re not protected by copyright.” *Mattel*, 365 F.3d at 136. Rather, copyright “will protect [Mattel’s] own

¹⁴ While stating at page 329 that “such a pose cannot be copyrighted,” at page 322 the district court quoted *Rogers*, 960 F.2d at 307, to the effect that the protectable original elements of a photograph include “posing the subjects.”

¹⁵ This was after citing authority that “photographic images of actual people . . . may be” copyrighted. *Warhol*, 382 F. Supp. at 322.

particularized expression of [an upturned nose, bow lips, and wide eyes] and bar a competitor from copying Mattel’s realization of the Barbie features.” *Id.* Therefore, a competitor’s doll with an independently-created upturned nose, bow lips, and wide eyes did not violate Mattel’s copyright where the features were not *Barbie’s* upturned nose, bow lips, and wide eyes. *Id.* Ultimately, the district court’s analysis here fails: if the court is correct, there can be virtually no copyright in portrait photography—not in the features of subjects and not in their poses—and the art of photography would return to its long debunked status as a noncopyrightable, mechanical process.¹⁶

Warhol did make some changes to the copy of Goldsmith’s Prince photograph, but the changes neither changed the “heart” of the photograph nor the nature of Warhol’s illustration as an (unauthorized) derivative work. *See, e.g., Mattel*, 365 F.3d at 137 n.4 (“Nor can one who copies portions of a work protected by copyright escape liability by changing other portions.”). In the seminal fair use case, the court explained, “[t]here must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the

¹⁶ *See* Melville B. Nimmer & David Nimmer, 1 NIMMER ON COPYRIGHT § 2A.02 (2019) (“At the medium’s inception, the dominant view is that a photographer was not a creator, but simply the operator of a machine.”); *id.* at § 2A.08 (“Since 1865, photographs have been eligible for copyright protection by statute.”).

original work.” *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841). Warhol used the silkscreen copy to extract Prince’s face, features, and expression; the heart of Goldsmith’s photograph. By using his “scissors” to crop the lower part of the photograph—the largely white torso—Warhol actually *emphasized*, rather than limited, the heart of the photograph that was Prince from the neck up. *See Monge*, 688 F.3d at 1178 (“[M]inimal cropping of each picture demonstrates that the ‘heart’ of each individual copyrighted picture was published.”). He then traced the outline of the photograph and added shading and coloring. Each of these is a tool used by photographers and none changed the derivative nature of the Warhol illustration. *Morris v. Young*, 925 F. Supp. 2d 1078, 1087 (C.D. Cal. 2013) (third factor weighed against fair use where the defendant used “most or all” of the original work and “add[ed] nothing more than shading and a new medium”).

The district court then compared these adaptations by Warhol to those in *Kienitz*. *Warhol*, 382 F. Supp. 3d at 327–30. *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014), The comparison is telling: the district court here described the *Kienetz* photograph as a parody and the Seventh Circuit described it as “a form of political commentary,” both of which necessarily have greater leeway in the amount of the original that can be taken. *Kienitz*, 766 F.3d at 758; *see also Campbell*, 510 U.S. at 586–88. In *Kienitz*, a large part of the commentary—the message—obscured the face and because “a low-resolution version” of the photograph was used, “much

of the original's detail never had a chance to reach the copy. . . .” *Kienitz*, 766 F.3d at 759. In contrast, Warhol's illustration was not parody or comment on Goldsmith's photograph. He relied on Goldsmith's high-resolution photograph and maintained much of the detail that the *Kienitz* defendant did not, including, among other things, the shape and detailing of Prince's hair and facial hair, the shading around Prince's features, and the expression in Prince's eyes. The cases are not comparable.

Finally, the district court incorrectly grounded its opinion on the claim that “the distinctive (and therefore copyrightable) way in which Goldsmith presented those features is absent from the Prince Series works.” *Warhol*, 382 F. Supp. 3d at 329. The court based this conclusion on its subjective impression (over thirty years after the photograph was taken and the Warhol illustration was made) that attributed all Warhol's “alterations,” not to a change in the heart of the photograph, and certainly not to a change in Prince's facial features, but to “wash[ing] away the vulnerability and humanity” that the court saw in Goldsmith's photograph. *Id.* The court relied on this nebulous, subjective, assessment, ostensibly projected by Prince, without quoting either Prince or Warhol.

Courts have long counselled that “[i]t 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*, 188 U.S. at 251. It would be a particularly dangerous undertaking for

untrained judges to declaim what any particular picture means, especially in the vague “personality terms” employed by the district court and without exposure to the “ordinary observer.” Ascribing specific (and here, dispositive) characteristics is also dangerous. Photographs are open to interpretation, a quality the noted photographer, critic, and teacher Allan Sekula called “the ‘polysemic’ character of the image.”¹⁷

The district court’s psychological analysis is especially suspect. The *Vanity Fair* article accompanying the original Warhol illustration describes Prince in arguably a third way, unlike the district court’s view of either Goldsmith’s photograph or Warhol’s illustration: “there is a sympathetic human meaning in Prince’s staggering sales. In the very heart of our popular culture, in homes and in shopping malls and in cinemas throughout the land, *there is evidence of the strength and the sincerity of sexual fantasy.*” JA-1777 (emphasis added). This only reinforces that at the end of the day, the subjective meanings ascribed to the works by the district court do not and should not matter.

¹⁷ Allan Sekula, PHOTOGRAPHY AGAINST THE GRAIN: ESSAYS AND PHOTO WORKS 1973–1983 7 (2016) (“[T]he photograph, as it stands alone, presents merely *the possibility of meaning.*”) (emphasis in original).

C. FACTOR FOUR: WARHOL’S PRINCE SERIES SUBSTANTIALLY HARMS GOLDSMITH’S LICENSING MARKETS

In 2019, an estimated 132,100 people were employed in the U.S as photographers.¹⁸ In 2018, sixty-four percent of photographers were self-employed running a small business.¹⁹ This figure is projected to reach seventy-four percent in 2028.²⁰ These self-employed photographers have to manage their small businesses and build their reputations to make a living.²¹ These photographers, who struggle to make a livelihood, build a portfolio, and shoot that “iconic photograph,” also make a substantial financial investment in their careers—for training and education, equipment (which must be upgraded), a studio, subjects and props, and often other expenses for a particular assignment, such as travel and lodging.

To be sure, some photographers are able to sell selected photographs (as did Goldsmith, including photographs of Prince, *see Warhol*, 382 F. Supp. 3d at 321–22). For many others, however, the predominant business model in the industry is

18 Occupational Outlook Handbook: Media and Communication, Sep. 4, 2019, *Photographers*, BUREAU OF LABOR STATISTICS, <https://www.bls.gov/ooh/media-and-communication/mobile/photographers.htm> (last visited Nov. 20, 2019).

19 Occupational Employment and Wages, May 2017, 27-4021 *Photographers*, BUREAU OF LABOR STATISTICS, <https://www.bls.gov/oes/current/oes274021.htm> (last visited Nov. 10, 2019).

20 *Id.*

21 *Innovation in America Part I: Hearing Before Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 37 (2013) (statement of Eugene Mopsik, Executive Director Am. Soc’y of Media Photographers).

“high volume, low value” licensing.²² Photographers rely on repetitive, limited licensing for diverse uses, often years or decades apart (as here).²³ These licenses generally limit the nature and context of the use of their works, the duration of the use, the medium of use, and, of course, provide for payment and credit whenever a work is used.²⁴ In order to protect their economic viability, photographers such as Goldsmith must compete in various markets, from magazines to album covers, to book covers, to reproductions, to merchandise of different types and to new uses such as the Internet. *Warhol*, 382 F. Supp. 3d at 321–22. As here, these markets are particularly viable for a photographic portrait of a celebrity with a large following, especially in an early stage of his career or one of a celebrity recently deceased.

The fourth factor recognizes and protects the economic purpose of copyright: the grant of exclusive rights allows for the control of the economic value of a work, including derivative uses, ultimately incentivizing the creation of new original works. *See, e.g., Campbell*, 510 U.S. at 593 (“[T]he licensing of derivatives is an important economic incentive to the creation of originals.”). One can imagine that if Goldsmith, and even Warhol, understood that they would not be able to profit from

22 *Initial Comments of American Society of Media Photographers in Response to Notice of Inquiry Concerning Copyright Protection for Certain Visual Works* (July 23, 2015), https://www.asmp.org/wp-content/uploads/2015/08/ASMP_NOI_Submission_20150724-1.pdf.

23 John Harrington, *BEST BUSINESS PRACTICES FOR PHOTOGRAPHERS* 413–452 (Cathleen D. Small 2d ed 2010) (2006).

24 *Id.* at 416, 419, 438.

their work, they may never have entered the photography and art worlds. This was not a hypothetical question for Warhol, who famously said: “making money is art and working is art and good business is the best art.”²⁵

The 2016 *Condé Nast* cover, viewed in the context of two other covers related to the Prince article, provide a concrete example of market harm. Together, they show how celebrity portraits, such as Goldsmith’s Prince photograph and Warhol’s illustration, are both licensed *interchangeably* for use on the covers of popular magazines. See *TCA Television Corp. v. McCollum*, 839 F.3d 168, 186 (2d Cir. 2016) (“[A] court properly considers the challenged use’s impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets.”) (citations omitted).

²⁵ *The Business Artist: How Andy Warhol Turned a Love of Money Into a \$228 Million Art Career*, HUFF POST (Dec. 06, 2017), https://www.huffpost.com/entry/the-business-artist-how-a_b_797728.



VANITY FAIR, NOVEMBER 1984

First, the *Vanity Fair* November 1984 issue, in which the initial Warhol illustration appeared, featured a posed portrait of a celebrity, Brooke Shields, by a photographer (not Goldsmith) as the “focal point” of the cover. JA-1772



CONDÉ NAST, SPECIAL COMMEMORATIVE EDITION,
“THE GENIUS OF PRINCE,” 2016

Second, when choosing the cover for the 2016 memorial issue, *Condé Nast* considered photographs of Prince along with the Warhol Prince illustration. JA-1149. The Warhol won out, thus also proving that even Warhol engaged in repetitive (sometimes decades apart) licensing of images and did so in competition with portrait photography.



CONDÉ NAST, SPECIAL COMMEMORATIVE EDITION REPRINT,
“THE GENIUS OF PRINCE,” 2019

A few years later in 2019, *Condé Nast* replaced the Warhol illustration on the cover of its 2016 memorial magazine with a professional photograph of Prince (not Goldsmith’s).²⁶ The contents of the two editions were the same, the text on the cover was the same, the size of the images was generally the same—essentially with a head shot taking up the entire cover—and the function and market was the same—reaching fans and potential purchasers of a magazine about Prince. The Warhol

²⁶ See *The Genius of Prince*, AMAZON, https://www.amazon.com/Genius-Prince-Editors-Cond%C3%A9-Nast/dp/0998957518/ref=sr_1_1?keywords=genius+of+prince&qid=1574273192&s=books&sr=1-1 (last visited Nov. 20, 2019).

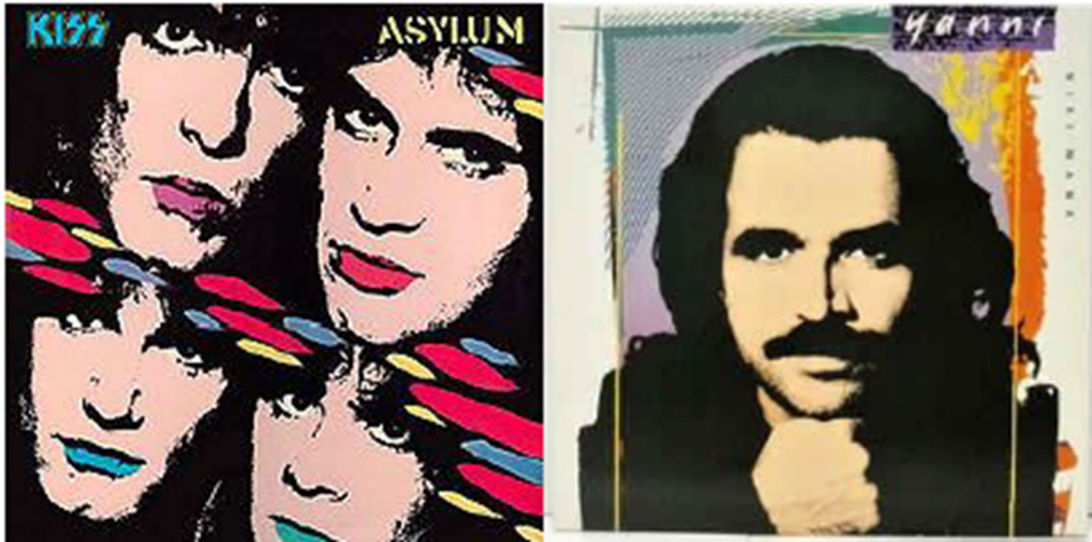
illustration was, in this instance, a direct substitute for a portrait photograph of Prince.

This is just one example of the potential impact on Goldsmith's market. *Harper & Row*, 471 U.S. at 568 ("With certain special exceptions . . . a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement.") (citing and quoting S. Rep. No. 94-473, at 65). Illustrations and photographs frequently are interchangeable in magazines, books, documentaries, and other illustrated material.²⁷ Just as Goldsmith's unaltered photographs have served to illustrate popular magazine covers,²⁸ her photographs also have been cover art for Kiss and Yanni recordings. These same musicians have illustrated other albums with half-tone, re-colored photographs, visually reminiscent of Warhol's style.²⁹

²⁷ See generally Harold Evans, *PICTURES ON A PAGE: PHOTO-JOURNALISM, GRAPHICS, AND PICTURE EDITING* (1978) (describing how illustrations and photographs often perform the same function in print).

²⁸ See Lynn Goldsmith, *Magazine Covers*, <https://lynngoldsmith.com/wordpress/galleries/magazinecovers/> (last visited Nov. 19, 2019).

²⁹ Lynn Goldsmith, *Album Covers*, <https://lynngoldsmith.com/wordpress/galleries/albumcovers/> (last visited Nov. 10, 2019); *Kiss-Asylum*, Discogs, <https://www.discogs.com/Kiss-Asylum/release/1856002> (last visited Nov. 10, 2019); *Yanni-Niki Nana*, Discogs <https://www.discogs.com/Yanni-Niki-Nana/release/4435209> (last visited Nov. 10, 2019).



This case also demonstrates another market harm suffered directly by Goldsmith—the licensing market for her photographs as reference material.³⁰ The reference market is an established license market for photographs, as evidenced, at a minimum, by Goldsmith’s license to *Vanity Fair*. That *Vanity Fair* obtained a reference license from Goldsmith is recognition that this derivative market exists for Goldsmith. See, e.g., *N. Jersey Media Group, Inc. v. Pirro*, 74 F. Supp. 3d 605, 622 (S.D.N.Y. 2015) (a copyright holder “maintains an active licensing program for [a] photograph, including by licensing [it for] precisely the type of use” engaged in “poses a very real danger that other[s] will forego paying licensing fees for the work and instead opt to use [it] at no cost.”).

30 Goldsmith also was deprived of credit for the 2016 memorial magazine cover. She did not receive any credit, even “source photograph,” while Warhol received credit for both the image and artwork. JA-2178. Goldsmith was thus deprived of recognition and commercial opportunities (including attention from fans of Prince who purchased the magazine and might have visited Goldsmith’s website).

As shown by the album covers above, the reference licensing market for source photographs used in creating half-tone illustrations is among the licensing markets for original photographs. Prince continues, even after his death, to sell new recordings and to be a potential market.³¹ Goldsmith was active in this submarket, licensing several of her photographs as source material for half-tone illustrations.³²



Warhol's derivative illustration was created for precisely the same purpose as and based on the original photograph: to depict Prince alongside a magazine article. Another version was then used to identify Prince as the subject of a memorial magazine. *Warhol*, 382 F. Supp. 3d at 321. Both Warhol and Goldsmith employ agents to license their works in the same markets, appealing to the same customers.

31 *Prince—Originals*, Discogs, <https://www.discogs.com/Prince-Originals/master/1565224> (last visited Nov. 19, 2019).

32 *Téléphone—Au Cœur De Le Nuit*, Discogs, <https://www.discogs.com/Téléphone-Au-Cœur-De-La-Nuit/release/623838> (last visited Nov. 11, 2019) *Grand Funk*—Shinin' On*, Discogs, <https://www.discogs.com/Grand-Funk-Shinin-On/release/4830225> (last visited Nov. 11, 2019).

JA-0597. This market is expansive. *See Warhol*, 382 F. Supp. 3d at 320 (referring to license of the Prince derivative illustration in books, magazines, and promotional materials, among others). Goldsmith regularly made and licensed similar derivative works of her original photographs. JA-0597. Certainly “unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact of the potential market for the original.” *Campbell*, 510 U.S. at 590 (internal quotation omitted). The market harm to Goldsmith (and all photographers who depend on licensing revenue) is patent. *Harper & Row*, 471 U.S. at 568 (“With certain special exceptions . . . a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement.”) (citing and quoting S. Rep. No. 94–473, at 65); *see Campbell*, 510 U.S. at 590 (“[T]he proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.”).

The district court once again unduly relied on its finding that the Warhol illustration was “transformative” and essentially “manifested a uniquely Warhol aesthetic”—a debatable proposition made without the aid of experts. *Warhol*, 382 F. Supp. 3d at 331. Even assuming that to be true, the fact that a Warhol is recognizable

as a Warhol does not mean it cannot be an infringing Warhol.³³ This Warhol, there is no doubt, is recognizable as Prince and, indeed, as Goldsmith’s depiction of Prince. For that reason, and as above, it serves as a substitute in Goldsmith’s actual and potential markets.



CONCLUSION

There are over a hundred thousand professional photographers in the United States. The images these artists create are a distillation of their art and their craft as well as the source of their livelihood. They are an integral part of our everyday lives. Beyond the livelihoods of these hardworking professionals, their copyrighted creations enrich the public by preserving and providing access to iconic moments and promoting public discourse on important historical, social, and cultural events. Our experience of contemporary life is fundamentally a visual experience.

The Copyright Office recently noted the “iconic importance” and “broad impact on U.S. culture” that photographs exert.³⁴ A few examples suffice to illustrate the breadth of that contribution. Photographs taken by Dorothea Lange during the Great

33 PATRY ON COPYRIGHT § 10.13 (2019) (“Focusing on the use, not the user, forces courts to properly examine the actual nature of the use made, rather than the general nature of defendant(s) work as a whole.”).

34 *Copyright Protection for Certain Visual Works*, 80 Fed. Reg. 23,054–55 (Apr. 24, 2015).

Depression created an enduring visual record of a cataclysmic time in American history.³⁵ Robert Capa's famous D-Day photograph has communicated to generations the horrors of combat.³⁶ Robert Frank's *The Americans* represents one of the first long-form photographic projects showing the underbelly of the American dream.³⁷ Richard Avedon's iconic series *In the American West* continues to inform and inspire portrait photographers over thirty years after its debut, including Lynn Goldsmith.³⁸ Music photography, especially rock photography, not just of Goldsmith, but Jim Marshall, Bob Gruen, and many others, frequently defines what we think of as the epochal moments in music history.³⁹

The authors that create these and enumerable other photographs necessarily rely on copyright protection to earn a return on their creative and economic investments through the licensing of the right to copy, distribute, or display their work to magazines, newspapers, and other media outlets, both in print and online. Without

35 See Dorothea Lange & Paul Taylor, *AN AMERICAN EXODUS: A RECORD OF HUMAN EROSION* (1939).

36 See Robert Capa, *D-Day and the Omaha Beach Landings*, MAGNUM PHOTOS, <https://www.magnumphotos.com/newsroom/conflict/robert-capa-d-day-omaha-beach/> (last visited Nov. 19, 2019).

37 See Robert Frank, *THE AMERICANS* (1959).

38 See Richard Avedon, *IN THE AMERICAN WEST: PHOTOGRAPHS* (1985).

39 See Gail Buckland, *WHO SHOT ROCK & ROLL: A PHOTOGRAPHIC HISTORY, 1955–PRESENT* (2009).

that protection, there is no return. Without that return, these authors could not create and the world would be a far poorer place.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that,

1. This brief complies with the type-volume limitation of Second Circuit Local Rule 29.1(c) because it contains 6,562 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Times New Roman type style.

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing brief with the Clerk of the United States Court of Appeals for the Second Circuit via the CM/ECF system this 22nd day of November 2019, to be served on all counsel of record via ECF.

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