

Wesley Lewis in MLRC MediaLawLetter: 'Nothing Compares 2' a Warhol

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PRACTICES Copyright, Litigation, Intellectual Property Litigation, Media and Entertainment Litigation

This July, a federal district court in New York granted the Andy Warhol Foundation's motion for summary judgment in a copyright dispute between the non-profit foundation and music photographer Lynn Goldsmith. *The Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, No. 17-cv-2532 (S.D.N.Y. July 1, 2019).

Background

At the center of the lawsuit was a series of sixteen distinct artistic works depicting the recording artist Prince, which Warhol based on one of Goldsmith's photographs of the enigmatic musician. In a 35-page Opinion and Order, United States District Judge John Koeltl conducted a thorough fair use analysis, ultimately holding that Warhol's "Prince Series" of works was subject to fair use protection. The decision relied heavily on the transformative nature of the allegedly infringing works, noting that Warhol transformed the reference photo "into something new and different" that was "immediately recognizable as a 'Warhol.'"

In 1981, Goldsmith photographed Prince in her New York City studio on assignment for Newsweek Magazine. According to the record on summary judgment, Goldsmith applied makeup and selected the photographic equipment, film, and background for the shoot. Goldsmith stated that her artistic choices resulted in photographs that portrayed Prince as a "vulnerable human being" and "not a comfortable person."

Approximately three years later, Condé Nast licensed one of Goldsmith's photographs from that 1981 session for use as an artist's reference for artwork for an upcoming issue. Warhol used that photograph to create a full-color illustration of Prince to accompany an article in a 1984 issue of Vanity Fair Magazine. Later that year, Warhol created the Prince Series of sixteen distinct works based on that same photograph.

After Warhol's death in 1987, AWF obtained ownership of the Prince Series, and the foundation has continued to license the works to third parties for use in books, magazines, and for other purposes. When Prince died in 2016, Condé Nast once again displayed one of Warhol's Prince Series works in the magazine—this time licensing the work through AWF. Upon learning of this, Goldsmith informed AWF that she believed the photograph infringed on her original work and obtained copyright registration of her original photograph—a prerequisite to bringing a copyright infringement claim. AWF brought an action seeking a declaratory judgment of non-infringement, and Goldsmith countersued for copyright infringement.

Both parties moved for summary judgment. AWF argued that the Prince Series works were not substantially similar under "ordinary observer" test employed in the Second Circuit and additionally, even if the two works were substantially similar, that the works were sufficiently transformative to constitute fair uses of the Photograph. Goldsmith argued that the Prince Series impermissibly appropriated protectible elements of her photograph and that the Warhol pieces were not fair uses

of her work. (AWF also argued that the Copyright Act's three-year statute of limitations barred Goldsmith from asserting an infringement claim based on alleged acts that occurred more than three years prior to bringing her claim. Goldsmith responded by focusing on AWF's license of the work to Condé Nast in 2016, which fell within the relevant statute of limitations, as well as AWF's ongoing practice of licensing the Prince Series works. The Court determined that certain actions were time-barred but nevertheless treated Goldsmith's copyright infringement claims as timely to the extent that they involved AWF's actions within the limitations period, such as the 2016 license.)

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