

No. 21-869

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**In the  
Supreme Court of the United States**

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THE ANDY WARHOL FOUNDATION  
FOR THE VISUAL ARTS, INC.,

*Petitioner,*

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

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**JOINT APPENDIX – VOLUME II  
(Pages 291 to 651)**

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**IN THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT  
OF NEW YORK**

THE ANDY WARHOL            )  
FOUNDATION FOR THE        )  
VISUAL ARTS, INC.,         )  
    Plaintiff,                )  
                                  )  
-against-                    )  
                                  )  
LYNN GOLDSMITH AND        )  
LYNN GOLDSMITH, LTD.,    )  
    Defendants.                ) Case No. 1:17-  
                                  ) cv-02532-JGK  
\_\_\_\_\_  
                                  )  
LYNN GOLDSMITH            )  
    Counterclaim Plaintiff,   )  
                                  )  
-against-                    )  
                                  )  
THE ANDY WARHOL            )  
FOUNDATION FOR THE        )  
VISUAL ARTS, INC.,         )  
    Counterclaim Defendant. )

**Preliminary Expert Report  
of Professor Jeffrey Sedlik**

Submitted May 3, 2018

\* \* \*



## **B. Exploitation of Derivatives and Derivative Markets in Photography**

Based on my knowledge and experience, photographers, like other creators, typically rely on both primary and derivative markets for their works. The creation of a photograph is often only the first event in a long series of events throughout the copyright life of that photograph. Revenue (if any) initially generated by the photographer upon the creation of the photograph is often insufficient to provide an incentive for the photographer to create new works. Instead, photographers and their heirs expect, plan for, and depend upon myriad opportunities to monetize their works in the diverse, global, derivative markets for photographs.

As a result, the purpose for which a photograph is initially created often has no similarity to the many purposes for which the photograph may serve during its copyright life, when repeatedly licensed and sold in the derivative markets. For example, a photograph initially created for an editorial feature in a particular magazine article may, at any point during the copyright life of the work, be licensed by the photographer for use in other magazine editorials, as well as book covers, advertisements, product packages, powerpoint presentations, web banner ads, direct mail promotions, billboards, websites, brochures, documentary films, and all manner of similar uses. The same photograph, initially created for editorial purposes, may at any point during the copyright life of the work be licensed for merchandising use on coffee mugs, t-shirts, baby bibs, hats, keychains, drink coolers, furniture, bedsheets, night lights, tote bags, magnets, mouse pads, greeting

cards, posters, watches, bumper stickers, tapestries, bow ties, and all manner of other products. At any point during the copyright life of the work, the photographer who created the editorial photograph may elect to exhibit the photograph in fine art galleries, offer and sell fine art prints of the photograph to collectors, and pursue other derivative uses.

A photograph that has seldom or never been monetized may be monetized at any time, at the discretion of the photographer. A photographer may elect against the licensing or sale of the work, for any period of time determined by the photographer, in an effort to protect, maintain, or enhance the value of the work in the derivative marketplace.

A photographer may focus on a particular derivative market for a period of time, and then shift to another derivative market. The photographer may at any time adopt a new or different strategy for monetizing the work in the derivative marketplace, and in so doing, significantly increase (or decrease) the revenue stream generated by the photograph. For example, a photographer may at any time submit the photograph to another party and authorize that party to develop and exploit new or different derivative markets for the photograph. Examples include submission of the photograph to a stock photography agency, gallerist, or licensing agent.

The monetization opportunities for a photograph are dynamic, in that the perceived value of the photograph may vary with time. For example, licensing revenue generated by a photograph of a public figure may temporarily increase exponentially if that person is involved in a scandal or passes away.

The value of a photographer's works on the fine art market may increase significantly as the result of a new project, positive review, effective promotional campaign, high-dollar auction sale, significant exhibition, or other event. Of course, the photographer may assign or transfer copyright ownership to another party, who may then monetize the photograph in the same or different derivative markets, in the same or different manners.

The photographer may, at any time during the copyright life of the work, elect to create and monetize variations of the photograph – new derivative works in the same or different media. The photographer may colorize a previously black and white photograph, or create a black and white version of a color photograph. The photographer may add visual elements to the photograph using paint, pencil, pen, digital tools, or other techniques. The photographer may create derivatives at different sizes, or may recompose the photograph by cropping or otherwise manipulating the photograph. The photographer may elect to render the photograph as a charcoal sketch, pencil sketch, painting, woodcut, line drawing, mosaic, embroidered work, sculpture, engraving, screened print, lithograph, or in any other medium. The photographer, as the copyright owner, has the discretion to create derivative works in any, all, or none of the above manners, and has the discretion to determine the point in time at which derivatives will be made, at any time during the copyright life of the photograph.

When the photographer eventually dies, the photographer's heirs may, at any point during the remaining seventy years of the copyright life of the

work,<sup>34</sup> elect to make derivatives or to monetize the photograph in the same or different markets.

For the aforementioned reasons, the history of a photograph – its past licenses, sales, derivative markets, and the quantity and character of the variations derived – is an inaccurate, misleading, and otherwise unreliable indicator in determining the future purposes for/methods by which that photograph may be exploited throughout its copyright life, in any and all derivative versions, in any and all derivative markets, by the photographer and the photographer’s successors and assigns.

### **C. General Background Regarding Image Copyright Licensing**

In the photography licensing industries, clients seeking to make use of photographs may either commission new photographs (“assignment photographs”), or acquire rights to existing photographs (“stock photographs”).

#### **1. Assignment Photographs**

Photographers create assignment photographs (also known as “commissioned photographs”) when clients contract with photographers or their agents to create new works. Photographers typically retain copyright ownership of the

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<sup>34</sup> In general, copyright endures for a term consisting of the life of the author and 70 years after the author’s death. For works made for hire and anonymous and pseudonymous works, the duration of copyright is 95 years from first publication or 120 years from creation, whichever is shorter (unless the author’s identity is later revealed in Copyright Office records, in which case the term becomes the author’s life plus 70 years). 17 U.S.C. § 302.

photographs that they create. Photographers often grant limited licenses to their clients in exchange for a license fee based in great measure on the scope of the rights granted. Photographers often later engage in re-licensing such photographs for additional or extended uses, and also licensing such photographs to parties other than the commissioning client, throughout the copyright life of the photographs. In the alternative, photographers may agree to assign copyright ownership to their clients, or may agree to create photographs under work-made-for-hire terms, whereby copyright ownership vests with the commissioning client upon creation.

## 2. Stock Photographs

Photographers often create stock photographs independently and speculatively, and then offer these existing photographs for licensed usage by clients. This offering is typically made on stock photography websites, either by the photographer or by a “stock agency” acting as an authorized licensor for the photographer’s photographs.

Clients seeking stock photographs typically visit stock photography websites, search for photographs meeting their requirements, and then purchase licenses and download the photographs for usage. Such purchases may be made via an automated process, or by communicating with sales staff at the stock agencies or a photographer’s office.

Clients may acquire rights to stock photographs under various “licensing models.” While some vendors specialize in certain licensing models, many vendors offer photographs under several licensing models. Common licensing models include:

(a) Royalty Free (“RF”): This model allows a client to pay a single, one-time fee based on the size of the digital photograph file desired by the client. The client receives a license allowing broad usage of the photograph—typically in unlimited media, for unlimited time, at any size, in any quantities, worldwide, for nearly any purpose, including but not limited to the promotion of products and services. For example, such a license may allow a client to use a photograph on any number of websites in any and all countries, worldwide, forever. There may be any number of detailed restrictions on RF licenses, but in general, the licenses allow broad usage. RF photographs are often professionally produced, and are typically less unique than many photographs offered under the Rights Managed model (see below).

(b) Microstock: A variant of RF licensing, microstock is typically a less expensive alternative. Like RF, microstock licenses provide broad rights for a low price, based on the size of the digital photograph file desired by the client. Like RF, microstock licenses include restrictions but typically permit usage in unlimited media, unlimited

quantities, unlimited sizes, unlimited countries, for an unlimited time. Whereas RF photographs are typically provided by professional photographers and semi-pros, microstock photographs are provided by amateurs as well.

(c) Subscription models: Many licensors now offer subscription-based licensing schemes. Subscription licensing is a variant of RF licensing, under which clients pay a monthly or annual license subscription fee and receive a broad license permitting the downloading of a quantity of photographs during each subscription period— typically per year, per month, or per day. Such licensors nearly always employ a system of graduated pricing tiers under which clients pay an amount commensurate with a maximum quantity of photographs available for downloading during each subscription period. There are many variants on subscription licensing schemes, driven by competitive pressures.

(d) Rights Managed (“RM”): A longstanding licensing model, rights managed licensing remains a common form of stock photograph licensing. In RM licensing, usage fees are based not on file size, but upon the scope of usage desired by the client. In general, the greater the scope of usage desired, the greater the licensing fee required of the client. Scope is defined broadly by the general category of the use, whether commercial or editorial, and is defined more

specifically by the type of media, the size and quantity of reproductions, the placement(s) of the photograph, geographic regions in which the reproductions will be distributed, the duration of use, exclusivity desired, and other factors. The scope of use permitted under RM licenses spans the full spectrum, from very narrow to very broad. RM photographs are primarily created by professional photographers. Fees associated with RM licenses are often (but not always) greater than fees for RF licenses.

Seeking to maximize profitability and sales, stock agencies have been experimenting with new, hybrid models, such as licenses requiring payment based on the quantity of viewers of photographs published online, or payment for advertising placement in or on a photograph published online. The market continues to evolve, and photographers continue to rely on revenue generated by licensing their commissioned and stock photographs.

Based on my review of the documents and testimony produced in this Matter, Goldsmith is engaged in Rights Managed Assignment Photography and Rights Managed Stock Photography. Based on my knowledge and experience, the license granted by Goldsmith to Vanity Fair in 1984<sup>35</sup> was a Rights Managed Stock Photography license.

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<sup>35</sup> Amended Counterclaim Exh. B [same as Bates No. LG000063]



JA-300

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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THE ANDY WARHOL FOUNDATION  
FOR THE VISUAL ARTS, INC.,

Plaintiff,

Case No.:

vs.

17-cv-02532-JGK

LYNN GOLDSMITH AND LYNN GOLDSMITH,  
LTD.,

Defendants,

----- x

LYNN GOLDSMITH AND LYNN GOLDSMITH,  
LTD.,

Counterclaim Plaintiffs,

-against-

THE ANDY WARHOL FOUNDATION  
FOR THE VISUAL ARTS, INC.,

Counterclaim Defendant.

----- x

June 27, 2018

10 a.m.

Expert Deposition of THOMAS EUGENE CROW

\* \* \* \*

\* \* \*

[11]

A It just seems a little bit archaic in a way.

Q Do you have a different way of describing your  
statements in your report other than an opinion?

A No, no. I certainly understand the meaning of the word. It's just, I mean, this is all kind of -- this is a digression, really, just about English usage.

Q. Were you told what the term transformative means in a copyright infringement context?

A No.

Q Did you ever read any articles discussing the concept of transformative views in a copyright case?

A No.

Q Did the Andy Warhol Foundation's counsel ever discuss with you what the meaning of transformative means in a copyright case?

A That was not in my scope.

\* \* \*

**[36]**

\* \* \*

Q By the way, did you ever -- did you know Andy Warhol?

A No, sadly I didn't.

Q So you never got to speak with him or --

A No.

Q You wrote an essay entitled, Saturday Disasters: Trace and Reference in Early Warhol, correct?

A Um-hum.

Q You have to answer.

A Yes.

Q Was that first published in 1987?

A Yes, it was.

Q Has it been republished since then?

A Yes, a number of times.

Q And I will refer to your report at Pages 3 and 4.

My question where you make a reference to Andy Warhol wanted to be [37] like a machine in quote, and that, quote, he and his art were all surface, closed quote.

You wrote those words, right?

A Yes, I did.

Q Was that essay, just so I understand it, an effort on your part to explore Warhol's work in contrast with Warhol's own pronouncements during his lifetime that he wanted to be like a machine and all his art was surfaced?

A Yes.

Q So this was theorizing on your part that arose after his death?

A No. It came before. It came in -- it was already implicit in modern mass culture already -- going all the way back to the early--

Q You're referring to your first essay?

A My own essay, yes.

\* \* \*

[41]

\* \* \*

Q I see.

So going back again to your report where you quote Warhol, quote, that he and his art were all surface.

That was a quote from Warhol, correct?

A Yes. It's a paraphrase of Warhol.

Q What is that paraphrase derived from?

A. It derives from something that he said or was relayed by his assistant Gretchen Berg, B-E-R-G.

\* \* \*

[43]

Q But the way Andy Warhol used surface would not necessarily be the way you just described it, correct?

A Well, who is to say? You know, you would have to be a mind reader.

Q Or you would have to ask him, correct ?

A. Yes, exactly.

Q Could you refer to -- I'm sorry, if you could go to the bottom of Page 3 of your report to the carry over onto the top of Page 4.

A Um-hum.

Q You say, quote, Warhol had exerted that control via the consistency with which he maintained his public persona limiting his remarks [44] about his art to vapid pronouncements that he wanted to be like be a machine or that he and his art were all surface, closed quote.

Again, is that statement based on Warhol's own words or paraphrasing his own words?

A Well, part of this derives from the same quotation that I just described.

Q I see.

Now, I think you mentioned one of your books The Long March of Pop?

A Yes.

Q That was published in 2015?

A Right at the end of '14, '15. It gets different dates.

Q Understood.

And do you recall -- I apologize I don't have a copy with me, but I have it and at page 304 you quoted Warhol. And just let me know if this is an accurate

quote. Quote, if [45] you want to know all about Andy Warhol just look at the surface of my paintings and films and me and there I am, there's nothing behind it, closed quote.

So, again, is that a quote from Andy Warhol?

A Yeah, that is the original quote from which these paraphrases are derived.

Q So that's a source material?

A Yes.

Q Thank you.

And in your essay again Saturday Disasters: Trace and Reference in Early Warhol, did you also write, and again I quote: In the end any critical account of Warhol's achievement as a painter will necessarily stand or fall on the visual evidence, closed quote?

A Yes.

Q And what did you mean when you wrote it will necessarily stand or [46] fall on the visual evidence?

A Because he's an artist and what counts in the end is the art and the way the art connects with its viewers.

Q And, in other words, putting it in a non-academic way, from each viewer's perspective it's how they interpret what they see in the art?

MR. NIKAS: Objection.

A Well, I'm not entirely sure. I didn't think the way I put it just now is academic, I thought it was in ordinary language.

Q I'll accept that.

A But it has a different emphasis. When you're talking about a transaction between an artist and a

viewer both of them have an equal role to play it's not just --

Q I'm sorry, both of them have?

A Have an equal roll to play.

\* \* \*

**[49]**

\* \* \*

Q Dr. Crow, what I'm showing you as Crow Exhibit 2 for identification are portions of your book that include -- is a portion of this book entitled Modern Art in the Common Culture, the copy of Chapter 3 entitled Saturday Disasters: Trace and Reference in Early Warhol.

In this the chapter, take moment please to review it, from the book as it was publish published?

A. Yes.

Q And is the version of this essay and this Chapter 3 substantially the same as your original essay?

A Yes.

Q And if you could turn to Page 50. And I'd just like to read the top full paragraph and just ask after I read it whether you still agree with what you wrote.

It reads as follows, quote: A relative lack of concentration on the **[50]** evidence of the early pictures has made a notoriously elusive figure more elusive than he needs to be or better only as elusive as he intended to be. The authority normally sited for this observed defacement of the author's voice in Warhol's picture is none other than that voice itself. It was the artist himself who told the world that he had no real point to make. That he intended no larger meaning in the choice of this or that subject and that

his assistants did most of the physical work of producing his art. Indeed, it would be difficult to name an artist who has been as successful as Warhol in controlling the interpretation of his own work, closed quote.

Do you still agree with that?

A. Yes, up to that point.

\* \* \*

[56]

\* \* \*

Q When did he start taking Polaroids?

A Well, he loved Polaroids, he took them all the time in the 1960s in the Factory. And there's a great body of Polaroid images that constituted a distinction element of his work. My understanding is that Polaroids became the -- the sort of standard basis for his art making when he began to do the commissioned portraits.

Q When did he begin to do commissioned portraits?

A This came about in the sort of mid-1970s.

Q And did he use his Polaroids as his own artist reference to create those commissioned portraits?

A Yes, he did.

Q And do you know whether Warhol started taking his own polaroids as a result of being sued for copyright infringement in the 1960s by an

\* \* \*

[131]

\* \* \*

Q \* \* \* Was -- again, I think we -- you would agree that doing the commissioned portraits became a

JA-307

significant source of income to Warhol starting in the 1970s, correct?

A Yes. I think I said that already.

\* \* \*

**[166]**

\* \* \*

Q Do you know what Vanity Fair's purpose would have been for selecting the particular photo it did that it gave to Warhol?

A Convenience? I don't know. I don't know what their relations or knowledge of Lynn Goldsmith had been.

\* \* \*

**[174]**

\* \* \*

Q Do you have any reason to believe that but for the Vanity Fair commission he would have created a portrait of Prince prior to his death?

A Unlikely

\* \* \*



JA-308

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

THE ANDY WARHOL  
FOUNDATION FOR THE VISUAL  
ARTS, INC.,

Plaintiff,

-against-

LYNN GOLDSMITH AND LYNN  
GOLDSMITH, LTD.,

Defendants.

No. 17-cv-02532-  
JGK

LYNN GOLDSMITH,

Counterclaim Plaintiff,

-against-

THE ANDY WARHOL  
FOUNDATION FOR THE VISUAL  
ARTS, INC.,

Counterclaim Defendant.

**THE ANDY WARHOL FOUNDATION FOR THE VISUAL  
ARTS, INC.'S RESPONSE TO LYNN GOLDSMITH AND  
LYNN GOLDSMITH LTD.'S RULE 56.1 STATEMENT  
AND COUNTER-STATEMENT OF MATERIAL FACTS**

Dated: November 20, 2018

\* \* \*

The Andy Warhol Foundation for the Visual Arts, Inc. respectfully submits this response to Defendants Lynn Goldsmith and Lynn Goldsmith, Ltd.'s Rule 56.1 statement in support of Defendants' motion for summary judgment (Dkt. Nos. 51–53, 57–59) and counter-statement of material facts.

**RESPONSE TO LYNN GOLDSMITH AND LYNN  
GOLDSMITH, LTD.'S RULE 56.1 STATEMENT**

**Background and Parties**

1. The Andy Warhol Foundation For The Visual Arts, Inc. (“AWF”) filed a Complaint for Declaratory Relief on April 7, 2017 (Docket No. #6) (the “Complaint”). Exhibit (“Exh.”) “A” to Declaration of Barry Werbin, Esq, dated September 28, 2018 (“Werbin Exh. \_”).

**RESPONSE: Undisputed.**

2. The Goldsmith Parties filed an Amended Answer and Counterclaim on July 10, 2017 (Docket No. #20) (the “Goldsmith Answer” and “Counterclaim”). Werbin Exh. B.

**RESPONSE: Undisputed.**

3. AWF filed an Answer to Amended Counterclaim on July 24, 2017 (Docket No. #22) (“Answer to Counterclaim”). Werbin Exh. C.

**RESPONSE: Undisputed.**

4. AWF is a New York not-for-profit corporation that was formed in 1987 after Andy Warhol (“Warhol”) died. Werbin Exh. A [Complaint ¶¶ 8, 48].

**RESPONSE: Undisputed.**

5. AWF licenses Warhol images it controls to fund its programs. <https://warholfoundation.org/licensing/index.html>.

**RESPONSE: Undisputed**

6. Goldsmith is an acclaimed professional celebrity portrait, documentary and fine art photographer. Werbin Exh. B [Counterclaim ¶ 9].

**RESPONSE: Partially disputed. Goldsmith's citation to an allegation in her unverified counterclaims is not evidence. The evidence shows that Goldsmith refers to herself and is marketed as a rock-and-roll photographer. See *infra* AWF Counter-Statement of Material Facts ¶39 (Goldsmith "proudly proclaim[s], 'Yes, I am a rock and roll photographer.'"); *id.* ¶40 (Analogue Gallery, advertising that Goldsmith "has been capturing music legends since the early 1970's.")**

7. Goldsmith's photographic works are in the collections of The Smithsonian National Portrait Gallery, The Museum of Modern Art, The Chicago Museum of Contemporary Photography, The Rock and Roll Hall of Fame, Museum Folkwang, The Polaroid Collection, The Kodak Collection, and other institutions. Werbin Exh. B [Counterclaim ¶ 9]; <https://lynngoldsmith.com/wordpress/bio-cv/>.

**RESPONSE: Undisputed.**

8. A 1993 photographic portrait by Goldsmith of the rock star Prince is in the collection of the Smithsonian Institution National Portrait Gallery. Werbin Exh. S [Paulson 7]; Werbin Exh. J [Transcript of Lynn Goldsmith deposition dated January 18, 2018 ("Goldsmith Tr.") at page 127, lines 14 – 18]

(Deposition transcript pages/line numbers are hereafter referred to as “[page number] : [line number(s)]”).

**RESPONSE: Disputed.** Werbin Exhibit S appears to be “a copy of a screen shot from Goldsmith’s web site at <http://lynngoldsmith.com/recordcovers.htm> depicting Goldsmith’s photographic images on album covers (marked as Paulson 12).” Werbin Decl. ¶ 21, Dkt. No. 59. It does not indicate anything about the collection of the Smithsonian Institute National Portrait Gallery. Werbin Exhibit R appears to be a copy of a page from the website of the Smithsonian Institute that displays a framed picture on a wall. There is no indication from this document that Goldsmith made the picture visible in the document. Finally, the cited portion of Werbin Exhibit J refers to a “legal issue . . . with the Smithsonian with regard to a photograph from 1993.” It does not indicate anything about the collection of the Smithsonian Institute National Portrait Gallery.

9. Over the past 50 years, Goldsmith’s editorial photography has appeared on and between the covers of *Life*, *Newsweek*, *Time*, *Vanity Fair*, *Rolling Stone*, *National Geographic Traveler*, *Sports Illustrated*, *People*, *Elle*, *Interview*, *The New Yorker* and many other esteemed publications. *Id.*

**RESPONSE: Disputed.** Werbin Exhibit S appears to be “a copy of a screen shot from Goldsmith’s web site at <http://lynngoldsmith.com/recordcovers.htm> depicting Goldsmith’s photographic images on

album covers (marked as Paulson 12).” Werbin Decl. ¶ 21, Dkt. No. 59. It does not indicate anything about the magazine publications in which Goldsmith’s editorial photography has appeared. The cited portion of Werbin Exhibit J refers to a “legal issue ... with the Smithsonian with regard to a photograph from 1993.” It does not indicate anything about the magazine publications in which Goldsmith’s editorial photography has appeared.

10. Goldsmith has published 13 books of photography, including *New Kids*, which was on The New York Times Best Seller list. *Id.*; <https://lynngoldsmith.com/wordpress/books-2/>.

**RESPONSE: Undisputed.**

11. Since the 1960s, Goldsmith has photographed numerous celebrity musicians, singers and bands, including Prince, Michael Jackson, Bob Dylan, the Beatles, Mick Jagger and the Rolling Stones, Eric Clapton, James Taylor, Carly Simon, Bruce Springsteen, Bob Marley, Bonnie Raitt, Iggy Pop, Led Zeppelin, James Brown, Talking Heads, Van Halen, Gene Simmons (KISS), Sting, Miles Davis, Tony Bennett and many others. <https://lynngoldsmith.com/wordpress/galleries/musicians/>; <https://www.nytimes.com/2007/12/02/books/review/Michel-t.html>.

**RESPONSE: Undisputed.**

12. Goldsmith’s photographic works have been exhibited in solo and group shows for over 30 years, including at The International Center of Photography (NY), Morrison Hotel Gallery (NY), Rock And Roll Hall Of Fame, Hallmark Museum of Contemporary Photography, Singleton-Bliss Museum of Fine Art (Santa Fe, NM), Museum of the Moving Image (NY),

People Magazine – US Tour, The Polaroid Collection, Newark Museum of Art – Springsteen Exhibition, Kodak Rock Photography Collection, Portland Museum of Art, Brooklyn Museum of Art, George Eastman House, Royal Ontario Museum (Toronto) and The National Museum of Women in the Arts (Wash. D.C.). <https://lynngoldsmith.com/wordpress/books-2/>.

**RESPONSE: Undisputed.**

13. Goldsmith’s celebrity photography has extended to non-music documentary works, including as examples the cast of Saturday Night Live and Mohammed Ali’s “Rumble in the Jungle” bout (<https://lynngoldsmith.com/wordpress/documentary-galleries/>), and non-music celebrity and statesperson portraiture, including as examples Warhol, Hunter S. Thompson, John Belushi, Dan Aykroyd, Eddie Murphy, Sarah Jessica Parker, Keith Haring, Martin Scorsese, William Shatner, Glenn Close, Richard Branson, Goldie Hawn, Mia Farrow, Kevin Costner, Hon. Madeleine Albright, Hon. Justice Stephen Breyer, and many others. (<https://lynngoldsmith.com/wordpress/galleries/famous/> and <https://lynngoldsmith.com/wordpress/galleries/environmental/>).

**RESPONSE: Undisputed.**

14. Goldsmith’s photographs of musicians and bands have appeared on over 100 album covers. <http://lynngoldsmith.com/recordcovers.htm>; Werbin Exh. S [Paulson 12].

**RESPONSE: Undisputed.**

15. Goldsmith received a 1985 World Press Photo “People in the News” award for a portrait of

Michael Jackson. Werbin Exh. B [Counterclaim ¶ 9]; <https://www.worldpressphoto.org/people/lynn-goldsmith>.

**RESPONSE: Undisputed.**

16. Goldsmith uses the camera as an instrument in her path as an artist. Werbin Exh. J [Goldsmith Tr. at 18:22 - 19:12].

**RESPONSE: Undisputed.**

17. Goldsmith was the founder of Lynn Goldsmith Inc. (“LGI”), the first photo agency that focused on celebrity portraiture, representing the work of over two hundred worldwide photographers, including Goldsmith herself. Werbin Exh. C [Counterclaim ¶ 9]; Werbin Exh. J [Goldsmith Tr. at 114:8 -18].

**RESPONSE: Undisputed.**

18. Subsequent to 1984, LGI changed its name to Lynn Goldsmith, Ltd. Werbin Exh. J [Goldsmith Tr. at 115:3 - 6]; Werbin Exh. B [Goldsmith Answer ¶ 39].

**RESPONSE: Undisputed.**

**Goldsmith Photographs Prince in 1981 on Assignment for Newsweek**

19. As of 1981, Goldsmith had worked with Michael Jackson, who was a very shy person. Goldsmith knew his co-manager, Ron Weisner. Weisner called Goldsmith in 1981 and advised her that he was managing the musician Prince Rogers Nelson, commonly known as “Prince,” and he would like her to work with Prince. Werbin Exh. J [Goldsmith Tr. at 78:20 - 80:3].

**RESPONSE: Undisputed.**

20. Following her call with Ron Weisner, Goldsmith spoke with Myra Kreiman, an art photo editor at Newsweek, about photographing Prince. Through her relationship with Weisner, Goldsmith knew that Prince was an up and coming artist and Kreiman trusted her knowledge. Werbin Exh. J [Goldsmith Tr. at 77:17 - 78:19; 80:4 - 15]; Werbin Exh. K [Transcript of Deposition of Myra Kreiman dated February 23, 2018 (“Kreiman Tr.”) at 8:9 -10]; Werbin Exh. A [Complaint ¶ 21].

**RESPONSE: Partially disputed.** The cited portion of Werbin Exhibit K states, “at that time. And at that time I was the arts photo editor for Newsweek magazine.” It does not state that Kreiman trusted Goldsmith’s knowledge. Goldsmith’s statement in Werbin Exhibit J at 78:13–14 that “[t]hey trusted that I knew who the up and coming artists were” lacks foundation and is not admissible as proof of Kreiman’s state of mind.

21. Kreiman knew that Prince was a hot young musician and was appearing at the Palladium theater in New York. Newsweek would have wanted both live performance shots and good studio shots of Prince. Werbin Exh. K [Kreiman Tr. at 12:3 -13:15].

**RESPONSE: Undisputed.**

22. Kreiman and Jim Kenney, the head of Newsweek’s photo department in 1981, had a relationship with Goldsmith, loved Goldsmith’s photography and knew that Goldsmith did fantastic work and had a good rapport with people in the music industry; they considered her an “A” list photographer for the type of assignment to photograph a performer like Prince. *Id.*



**RESPONSE: Undisputed.**

23. Kreiman agreed that Goldsmith should photograph Prince on assignment from Newsweek. Werbin Exh. J [Goldsmith Tr. at 80:16 -19].

**RESPONSE: Undisputed.**

24. Pursuant to the Newsweek assignment, Goldsmith photographed Prince over a two-day period in December 1981, the first day at a live concert in New York and the second day in her photo studio that was located at 241 West 36<sup>th</sup> Street in Manhattan. Werbin Exh. J [Goldsmith Tr. at 81:7 - 82:19].

**RESPONSE: Undisputed.**

25. During the studio photo session, Goldsmith applied makeup to Prince, including eye shadow, and gave him lip gloss to put on to accentuate his sensuality, which reflected light off of his lower lip. Werbin Exh. J [Goldsmith Tr. at 91:16 - 93:16; 94:9 - 95:12.]

**RESPONSE: Partially disputed. There is no evidence of what reflected the light off of Prince's lip—whether it was his lips themselves, moisture on his lips other than lip gloss, or something else.**

26. Goldsmith added additional eye shadow to Prince because she felt he was in touch with the female part of himself, yet he was very much male. Werbin Exh. J [Goldsmith Tr. at 93:5 - 16].

**RESPONSE: Undisputed.**

27. Goldsmith used studio lighting that showed Prince's chiseled bone structure. Werbin Exh. J [Goldsmith Tr. at 97:3 - 5].

**RESPONSE: Undisputed.**

28. At the beginning of the studio photo session, Goldsmith started out taking black and white photographs of Prince because the first pictures she usually shoots were not the ones that would be given to a publication; rather, she shot black and white first for herself. Goldsmith shot very few black and white photos because Prince was very uncomfortable and she then switched to color film. Werbin Exh. J [Goldsmith Tr. at 97:23 - 98:24].

**RESPONSE: Undisputed.**

29. While still at the beginning of the photo shoot, Prince left the studio area and went to the makeup “green” room, but after 20 minutes he did not come out. Goldsmith went in and tried to coax him to return to the shooting set, but Prince did not say anything and appeared fragile to Goldsmith. Prince then left the studio. The next day Prince sent Goldsmith roses, candy and a note about how sick and nervous he was feeling and that Goldsmith did nothing wrong. The entire session did not last long and was far shorter than Goldsmith’s usual studio sessions, which can take up to 12 hours. Werbin Exh. J [Goldsmith Tr. at 98:25 - 101:2].

**RESPONSE: Partially disputed. The cited portion of Werbin Exhibit J does not provide a basis for comparing the length of Goldsmith’s December 3, 1981 shoot with Prince to the length of Goldsmith’s “usual studio sessions.”**

30. The studio photos Goldsmith took of Prince show a reflection of two white lights in his eyes that were from flash umbrellas used as he was looking at the camera. Werbin Exh. J [Goldsmith Tr. at 103:16 - 23].

**RESPONSE: Undisputed.**

31. Goldsmith rarely forgets her subjects' eyes and the photos she took of Prince reflected through his eyes an uncomfortable person who was a vulnerable human being. Werbin Exh. J [Goldsmith Tr. at 101:17 - 22].

**RESPONSE: Undisputed.**

32. Goldsmith selected the camera, lenses and types of film she used to make the Prince photos. Werbin Exh. J [Goldsmith Tr. at 106:16 - 108:22].

**RESPONSE: Undisputed.**

33. In her photos of Prince, Goldsmith was trying to capture a sense of someone who was very expressive and willing to break through what must have been his immense fears to make the type of creative works he wanted and he was frightened. Werbin Exh. J [Goldsmith Tr. at 105:12 - 106:10].

**RESPONSE: Undisputed.**

34. Goldsmith did not consider Prince's clothing, including his buttoned up look and suspenders, as contributing to an understanding of who Prince was in the portrait she made. Werbin Exh. J [Goldsmith Tr. at 103:9 - 15].

**RESPONSE: Disputed. The cited portion of Werbin Exhibit J states that Goldsmith did not think that "the contrast of" (1) "the sensual lips which [Goldsmith] accentuated with gloss and lighting" and (2) "the sort of buttoned up look, high pants, suspenders" "contributed to [her] understanding of who" Prince was. It does not state that Goldsmith did not consider that "Prince's clothing," by themselves, did not contribute "to an understanding of who Prince was in the" photograph.**

35. Goldsmith's agency, LGI, issued an invoice to Newsweek for the Prince photo sessions dated December 6, 1981. The invoice reflected that the Prince concert photo shoot took place at the Palladium on December 2, 1981, and that the studio session took place on December 3, 1981. The invoice reflected that both color and black and white film was used. The invoice granted Newsweek a license to use the photographs for one reproduction upon payment, and required that a credit be given to LGI. Werbin Exh. T [Warhol 22 (LG000029)]; Werbin Exh. J [Goldsmith Tr. at 109:5 -113:4].

**RESPONSE: Undisputed.**

36. Goldsmith retained the copyrights in the 1981 photos she took of Prince. Werbin Exh. B [Counterclaim ¶ 19]; Werbin Exh. K [Kreiman Tr. at 82:13 - 86:6].

**RESPONSE: Undisputed.**

37. The studio photographs Goldsmith made of Prince on assignment from Newsweek included a total of 12 black and white film images and 11 color transparency film images. Werbin Exhs. U and V [LG0000197 and LG00000198 (consisting of a one contact sheet reflecting 12 black and white photographs of Prince and a copy of three strips of black and white negatives of those images produced by the Goldsmith Parties in discovery); Werbin Exh. W [Warhol 11 – 21] (copies of color transparency images produced by the Goldsmith Parties in discovery)].

**RESPONSE: Undisputed.**

38. One of Goldsmith's black and white photos of Prince from the December 3, 1981, studio session was

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the following image (the “Goldsmith Photo”), which is the subject of the Counterclaim:



Werbin Exh. B [Counterclaim at ¶ 2]; Werbin Exh. J [Goldsmith Tr. at 146:23 - 147:5]; Werbin Exh. X [LG00000026].

**RESPONSE: Undisputed.**

39. One of Goldsmith’s color concert photos of Prince was published by Newsweek on Dec. 21, 1981, in connection with an article entitled “The Naughty Prince of Rock.” The printed photo credit was to “Lynn Goldsmith – LGI,” which reflected the name of the photographer who took the photo and the name of the photo agency that represented the photographer. Werbin Exh. Y [Warhol 105]; Werbin Exh. K [Kreiman Tr. at 82:13 - 86:6].

**RESPONSE: Partially disputed.** Werbin Exhibit Y displays a photograph of Prince credited to “Lynn Goldsmith – LGI,” but there is no basis to claim that the photograph originally was in color. In the cited portion of Werbin Exhibit K, Kreiman stated that she did not know “whether the photo, this photo, as it appeared in this original article [Werbin Exhibit Y] would have been in color.”

**LGI Licenses the Goldsmith Photo to Vanity Fair in 1984**

40. In October 1984, LGI granted Vanity Fair a license to use one of Goldsmith’s December 3, 1981, black and white studio portraits of Prince for use as an artist’s reference in connection with an article to be published in Vanity Fair magazine. Werbin Exhs. Z and AA [Warhol Exhs. 23 and 107 (also Counterclaim Exh. B)]; Werbin Exh. J [Goldsmith Tr. at 113:8 - 118:2].

**RESPONSE: Undisputed.**

41. LGI sent Vanity Fair, to the attention of Esin Goknar, a photo approval form dated September 25, 1984, which specified “11” X 14” B&W STUDIO PORTRAIT OF PRINCE BY © 1981 LYNN GOLDSMITH FOR POSSIBLE USE AS AN ARTIST REFERENCE.” Werbin Exh. Z [Warhol Exh. 23]; Werbin Exh. J [Goldsmith Tr. at 115:25 - 118:2]

**RESPONSE: Undisputed.**

42. Esin Goknar was photo or picture editor at Vanity Fair in 1984; she testified that the term “artist reference” meant an artist “would create a work of art based on image reference.” Werbin Exh. L [Transcript of deposition of Esin Goknar dated March

27, 2018 (“Goknar Tr.”), at 28:8 - 29:12]; Werbin Exhs. Z and AA [Warhol Exhs. 23 and 107 (also Counterclaim Exh. B)].

**RESPONSE: Undisputed.**

43. The submission agreement specified on its reverse side: “Material submitted on approval is not sold and no rights are acquired until an invoice is submitted by Lynn Goldsmith. All rights not specifically granted on invoice are reserved by Lynn Goldsmith.” Werbin Exh. Z [Warhol 23].

**RESPONSE: Undisputed.**

44. LGI issued Vanity Fair an invoice form dated October 29, 1984 (the “VF Invoice”), which specified: “ordered by Esin Goknar.” The invoice granted Vanity Fair a license to use one of Goldsmith’s 1981 studio black and white photographs of Prince subject to the following terms:

FEE FOR THE USE OF ONE  
PHOTOGRAPH OF PRINCE,  
COPYRIGHT 1981 LYNN GOLDSMITH  
FOR USE AS ARTIST REFERENCE  
FOR AN ILLUSTRATION TO BE  
PUBLISHED IN VANITY FAIR  
NOVEMBER 1984 ISSUE. IT CAN  
APPEAR ONE TIME FULL PAGE AND  
ONE TIME UNDER ONE QUARTER  
PAGE. NO OTHER USAGE RIGHTS  
GRANTED.

ONE TIME ENGLISH LANGUAGE  
ONLY NORTH AMERICAN  
DISTRIBUTION ONLY.

Werbin Exh. AA [Warhol Exh. 107 (also Counterclaim Exh. B)].

**RESPONSE: Undisputed.**

45. The VF Invoice further expressly provided:

License is granted to use the above-described photograph(s) on condition that total amount shown hereon is paid. The credit line – LYNN GOLDSMITH – must not be omitted, abbreviated or altered under penalty of double charge. Released, on rental basis only, and in accordance with terms and conditions of submission. License, for one reproduction only, is granted to reproduce above described photograph(s) in

IN VANITY FAIR NOVEMBER 1984  
ISSUE

*Id.*

**RESPONSE: Partially disputed.** Werbin Exhibit AA states, “License is granted to use or reproduce above-described photograph(s) on condition that total amount shown hereon is paid.” It appears that two lines have been drawn through the words “or reproduce,” but those two words are still visible.

46. The VF Invoice noted “PAID DATE DEPOSITED CHECK. NO. 2/8/85.” The license fee was \$400. Werbin Exh. VV [LG 11 (same as Warhol 28)]; Werbin Exh. Z [Warhol Exh. 23].

**RESPONSE: Undisputed.**

47. Goldsmith had no knowledge in 1984 that one of her Prince photographs was submitted by her agency LGI to Vanity Fair for use as an artist reference. At that time, an employee of LGI, Wilma



Roberts, would have been involved in submitting the Goldsmith Photo to Vanity Fair and the initials “WR” appear faintly on the invoice license form issued to Vanity Fair. Goldsmith had no involvement in selecting the photograph that was submitted to Vanity Fair. Werbin Exh. J [Goldsmith Tr. at 115:10 - 117:15]; Werbin Exh. B [Counterclaim Exh. B].

**RESPONSE: Undisputed.**

**Vanity Fair Commissions Warhol to Create an Illustration Using the Goldsmith Photo as Artist Reference**

48. Vanity Fair commissioned Warhol to create an illustration of Prince for the November 1984 issue of the magazine, Volume 47, No. 1 (the “VF Issue”). Werbin Exh. BB [LG 64 (at AWF 951)][Confidential]; Werbin Exh. M [Transcript of deposition of Neil Printz dated February 8, 2018 (“Printz Tr.”) at 86:2 - 97:13]; Werbin Exh. CC [LG-4]; Werbin Exh. O [Transcript of Deposition of Chris Donnellan dated March 15, 2018 (“Donnellan Tr.”) at 38:15 - 40:8].

**RESPONSE: Undisputed.**

49. The VF Issue published an article entitled “Purple Fame” by Tristan Vox (the “VF Article”), which began on page 66 and depicted on page 67 a full-page color illustration of Prince created by Warhol for the article (the “VF Warhol Image”). The article’s attribution credits stated it featured “a special portrait for *Vanity Fair* by ANDY WARHOL.” The VF Warhol Image appeared as follows:



Werbin Exh. DD [LG 91 at pp. 66 - 67].

**RESPONSE: Undisputed.**

50. The VF Article contained an attribution credit in the gutter between pages 66 and 67 stating: "LYNN GOLDSMITH/LGI," appearing as follows:



*Id.* at page 67.

**RESPONSE: Undisputed.**

51. The VF Article published a copyright attribution credit on page 121 stating: "Page 67:

source photograph © 1984 by Lynn Goldsmith/LGI.”  
*Id.* at page 121.

**RESPONSE: Undisputed.**

52. Condé Nast’s vice president of business affairs and rights management, Chris Donnellan, testified that the reference to “source photograph” in the VF Article copyright credit meant “[t]he underlying image that was used to create the artwork.” Werbin Exh. O [Donnellan Tr. at 26:17 - 28:5].

**RESPONSE: Undisputed.**

53. A copy of the VF Warhol Image also appeared on page 4 of the VF Issue next to the Table of Contents with the caption “Wails of the Prince.” Werbin Exh. DD [LG 91 at p. 4].

**RESPONSE: Undisputed.**

54. Esin Goknar would have submitted the credits accompanying the VF Article for publication and these credits indicated that Vanity Fair used one of Goldsmith’s photographs. Werbin Exh. DD [LG 91 at p. 121]; Werbin Exh. L [Goknar Tr. at 30:8 - 32:19].

**RESPONSE: Undisputed.**

55. Vanity Fair did not commission Warhol to create more than one image for the VF Article. Werbin Exh. O [Donnellan Tr. at 20:20 - 24].

**RESPONSE: Disputed. The cited portion of Werbin Exhibit O refers to the number of rows in an Excel spreadsheet. It does not indicate how many images Vanity Fair commissioned from Warhol for the VF Article.**


56. Goldsmith was never advised by Vanity Fair who the illustrator would be for the VF Article and

never saw a copy of the Vanity Fair article at the time it was published. Werbin Exh. J [Goldsmith Tr. at 120:21 - 121:6].


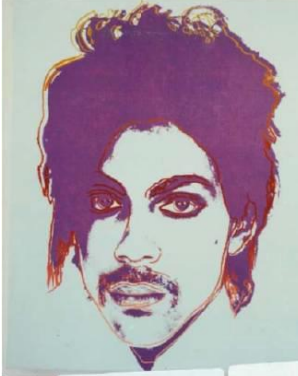

**RESPONSE: Undisputed.**

**Warhol created 16 works derived from the Goldsmith Photo**




57. AWF's Complaint disclosed that in 1984 Warhol created 16 distinct works based on the Goldsmith Photo (inclusive of the VF Warhol Image), which AWF has identified by the following images and AWF-assigned inventory numbers (collectively, the "Warhol Prince Series"):

Image	AWF Inventory No.
	<p>PO 50.537</p>


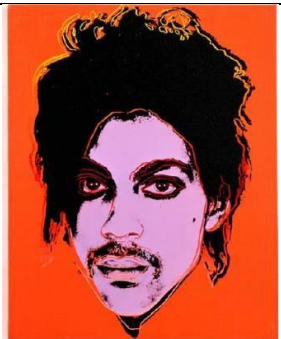
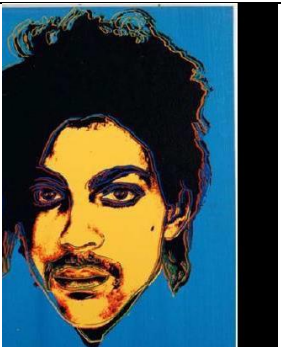
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	PO 50.539
	PO 50.538
	PO 50.541

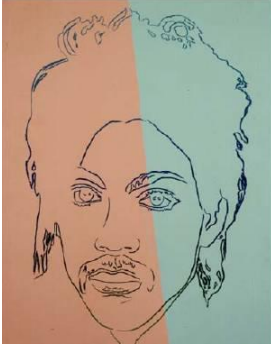


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 A stylized portrait of a man with a mustache, rendered in red and blue. The background is red, and the man's face and hair are outlined in blue. He has short, dark hair and a mustache.	PO 50.540
 A black and white line drawing of a man's face, showing a mustache and short hair. The drawing is on a light gray background with a black vertical bar on the left side.	PO 50.543
 A stylized portrait of a man with a mustache, rendered in red and blue. The background is red, and the man's face and hair are outlined in blue. He has short, dark hair and a mustache.	PO 50.542

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	PO 50.545
	PO 50.544
	PO 50.547

JA-331

	PO 50.546
	TOP115.260
	TOP115.259



JA-332

	<p>PO 50.548</p> <p>[Typographical error in the Complaint listed this as PO 50.458. See ¶ 61 below.]</p>
	<p>UP 42.72</p>
	<p>UP 42.73</p>

Werbin Exh. A [Complaint pp. 9 – 12].

**RESPONSE:** Partially disputed. AWF's Complaint, as cited by Goldsmith, does not state

**that Warhol created these works “based on the Goldsmith Photo (inclusive of the VF Warhol Image).”**

58. The above inventory code prefixes assigned by AWF to the Warhol Prince Series images mean the following: “PO” is for “portraits,” “TOP” is for “temporary on paper,” which includes drawings on paper, and “UP” is for “unpublished print.” Werbin Exh. N [Transcript of Deposition of Michael Hermann dated January 25, 2018 (“Hermann Tr.”) at 4:20 - 23; 32:14 - 35:14]; Werbin Exh. M [Printz Tr. at 34:23 - 35:7; 223:4 - 12].

**RESPONSE: Undisputed.**

59. The editor of AWF’s catalogue raisonné, Neil Allen Printz (“Printz”), testified that the inventory prefix “PO” means the original work was created by Warhol using silk screen printing and painting on canvas, that the inventory prefix “UP” means the original work was created by Warhol as a screen print on paper, and that the inventory prefix “TOP” means the original work was created by Warhol as a drawing on paper. Werbin Exh. M [Printz Tr. at 44:7 - 45:8; 54:8 - 55:11].

**RESPONSE: Partially disputed. Printz is the editor of *The Andy Warhol Catalogue Raisonné*. See Declaration of Luke Nikas (Oct. 12, 2018), Exhibit 2, ¶ 2 (Dkt. No. 60-2). The cited portions of Werbin Exhibit M do not address the meaning of the inventory prefix “TOP.” Werbin Exhibit N, at 32:14–20, states that the “TOP” prefix “refers generally,” not exclusively, “to drawings.”**

60. Each of the 16 Warhol Prince Series works was a unique and distinct image, and there are no

other images of Prince that were created by Warhol. Werbin Exh. M [Printz Tr. at 54:8 - 55:11].

**RESPONSE: Undisputed.**

61. The Warhol Prince Series image designated in the Complaint on p. 12 as PO 50.458 should be PO 50.548. Werbin Exh. D [AWF Responses and Objections to Defendants' Requests for Admission ("RA Responses") No. 9].

**RESPONSE: Undisputed.**

62. Warhol Prince Series image PO 50.544 is the Warhol VF Image published in the VF Article. Werbin Exh. D [RA Responses No. 7].

**RESPONSE: Undisputed.**

63. [REDACTED]  
[REDACTED] Werbin Exh. N [Hermann Tr. at 30:9 - 20] [[Confidential]].

**RESPONSE: Undisputed.**

64. [REDACTED]  
[REDACTED] Werbin Exh. N [Hermann Tr. at 35:10 - 37:14; 45:16 - 20] [[Confidential]].

**RESPONSE: Undisputed.**

65. AWF's catalogue raisonné records for Warhol Prince Series image PO 50.548, refers to a [REDACTED]  
[REDACTED] Warhol had possessed a "time capsule" copy of "Vanity Fair vol. 47, no. 11 (November 1984)" and a "Vanity Fair article Purple Fame featuring a portrait of Prince by Andy Warhol." Printz has never seen a publicity photograph on which the Warhol Prince Series was based. Werbin Exh. BB [LG 64 at AWF 0000951][Confidential];

Werbin Exh. M [Printz Tr. at 86:2 - 92:17; 107:11 - 108:17].

**RESPONSE: Undisputed.**

**Warhol copied the Goldsmith Photo to create the Warhol Prince Series**

66. In order to create each of the Warhol Prince Series works, Warhol would have started by making a copy of the Goldsmith Photo that Vanity Fair provided to him. Printz testified that the 12 silkscreen works (designated by the catalogue raisonné prefix “PO”) and the two screen prints (designated by the catalogue raisonné prefix “UP”) were based on a photograph and created through a process that started with Warhol “having his silkscreen printer create a high contrast half tone silkscreen from a photograph”:

The photograph would be enlarged and photographically reproduced onto a sheet of clear plastic, otherwise known as an acetate, to create a halftone image. In other words, the continuous tone, all the values of light to dark in the photograph would be reduced into a high contrast image so transitional tones would be dropped out, deliberately dropped out.

Andy Warhol would look at that image, decide how he wanted to modify it, and if he did the – they would make another acetate that he could use to trace local color shapes onto the canvas and paint, for example, the face area in PO 50537. And then the printer would use the

acetate to photo mechanically reproduce that onto a silkscreen.

Q Do you know how the photo would be reproduced onto a silkscreen?

A My understanding is the silkscreen would be treated with, like, a photographic paper with photosensitive material.

Werbin Exh. M [Printz Tr. at 51:3 - 53:6].

**RESPONSE: Partially disputed. In the cited testimony, Printz did not state that “[i]n order to create each of the Warhol Prince Series works, Warhol would have started by making a copy of the Goldsmith Photo that Vanity Fair provided to him.” Printz was asked if he knew “whether the [PO and UP images] were also based on a photograph”; he testified “[t]ypically they would be” (see Printz Tr. 51:9-11.) Printz also did not testify that the PO and UP images “were based on a photograph.” He testified that “[t]ypically for Warhol, since he worked with photographs, he would have his silkscreen printer create a high contrast half tone silkscreen from a photograph.” (See Printz Tr. 51:17-21.)**

67. Once a silkscreen was physically created from the underlying photograph, Printz testified that Warhol would have created the silkscreen works on canvas, designated with a “PO” prefix, as follows:

A silkscreen would be placed on top of the canvas which was usually painted first, so when the paint was dry the screen would be placed on top of a

canvas, un-stretched canvas. Ink would be put on the screen and a squeegee would be used by the printer to pull the ink across the mesh of the screen leaving an image on the surface of the canvas, then the screen would be removed from the canvas.

Q So --

A And probably cleaned.

Q When you say the canvas would usually be painted first, are you referring to some background coloration?

A Background and additional, what I would call local color. Q What does local color mean?

A For example, in PO 50537, and in PO 50544, and in PO 50547, I believe also in PO 50458, it is the color that -- color of the face -- of the shape the face, the whole face.

Q I'm sorry, you said the color of the face would have been painted separate from the silkscreen process?

A In those works, yes.

*Id.* [Printz Tr. at 45:17 - 46:21].

**RESPONSE: Undisputed.**

68. Printz further testified that the color backgrounds on the silkscreen "PO" works were painted first by Warhol. *Id.* [Printz Tr. at 46:25 - 48:9].

**RESPONSE: Undisputed.**

69. With respect to the two screenprints with the “UP” prefix designations, Printz testified that they were created on paper instead of canvas and the process differed from making the “PO” designated silk screen paintings because there are no painted backgrounds or faces:

Q What were the differences?

A There is no painted background and there is no painted face.

Q So is the image we see created just from the silkscreen process itself and no painting?

A Is the image in the UP4272 and 4273?

Q Yes.

A Repeat the rest of the question.

Q With respect to those two UP designated images, would they have been created only by the silkscreen process without any painting having been done separately?

A Yes. They would have been created entirely with the silkscreen technique, both works. As far as I can tell.

*Id.* [Printz Tr. at 48:10 - 49:18].

**RESPONSE: Undisputed.**

70. Printz testified that the two drawings within the Warhol Prince Series with the prefix “TOP” were created by Warhol projecting the underlying photograph and creating a contoured drawing based on that photograph, as follows:

Q And if you could look at the bottom right image on Page 11, with a T-O-P designation of 115.260. And at the top left of Page 12, which is also a top left designated as TOP 115.259. Are these drawings?

A Yes, I believe they are.

Q And do you know how these were created by Warhol?

A Yes. I believe I do.

Q How were they created?

A He would typically -- characteristically he would project an image in an opaque projector, an enlarger onto a sheet of paper and draw on the sheet of paper with a pencil freehand over the projected image.

Q So it would essentially be a outline drawing of the projected image?

A Contoured drawing would be more accurate.

Q What is a contoured drawing?

A A contoured drawing follows the contours, the outlines of the head, the face, the features to the degree he chooses to.

Q And do you know whether those drawings, those TOP designated drawings utilized a photograph that was projected to create these works.



A Characteristically they would be.

*Id.* [Printz Tr. at 49:19 - 51:2].

**RESPONSE: Undisputed.**

**AWF's acquisition and disposition of the Warhol Prince Series**

71. Warhol died on February 22, 1987. Werbin Exh. A [Complaint ¶ 47].

**RESPONSE: Undisputed.**

72. AWF was created as a not-for-profit organization in 1987 in accordance with Warhol's will. Werbin Exh. A [Complaint ¶ 8]; Werbin Exh. N [Hermann Tr. at 25:2 - 6]; <https://warholfoundation.org/foundation/index.html>.

**RESPONSE: Undisputed.**

73. Following Warhol's death, AWF acquired title to and ownership of the copyrights in the Warhol Prince Series. Werbin Exh. A [Complaint ¶ 49]; Werbin Exh. D [RA Responses Nos. 15, 16].

**RESPONSE: Undisputed.**

74. Between 1993 and 2004, AWF sold or transferred custody of 12 of the original Warhol Prince Series works to third parties identified by AWF as PO 50.537, PO 50.539, PO 50.540, PO 50.541, PO 50.543, PO 50.545, PO 50.546, PO 50.548, TOP 115.259, TOP 115.260, UP 42.72 and UP 42.73. Werbin Exh. D [RA Responses Nos. 17, 19].

**RESPONSE: Undisputed.**

75. Custody of the remaining four original Warhol Prince Series works identified by AWF as PO 50.538, PO 50.542, PO 50.544 and PO 50.547 was

transferred to The Andy Warhol Museum by AWF by 1998. Werbin Exh. D [RA Response No. 18].

**RESPONSE: Undisputed.**

**AWF's representative agency Artist Rights Society**

76. Artist Rights Society ("ARS") has acted as a representative agency for AWF since in or about 1988 or 1989 pursuant to written licensing agent or "membership" agreements. Werbin Exh. Q [Transcript of Deposition of Adrienne Rachel Fields, Esq., ARS Director of Legal Affairs dated February 6, 2018 ("Fields Tr.") at 4:29-5:2; 11:5 - 19].

**RESPONSE: Undisputed.**

77. ARS has the right to act on behalf of AWF as its representative for copyright licensing. Werbin Exh. Q [Fields Tr. at 15:7 - 16].

**RESPONSE: Disputed. ARS has the right to act as AWF's representative subject to the terms and conditions of the representation agreement between ARS and AWF. See Werbin Exhibits EE & FF.**

78. [REDACTED]

[REDACTED] Werbin Exh. Q [Fields Tr. at 11:20 - 14:23] [Confidential]; Werbin Exhs. EE and FF [LG 29; LG 30] [Confidential].

**RESPONSE: Undisputed.**

79. [REDACTED]

[REDACTED] Werbin Exh. EE [LG 29 at pp. 1 - 3]

[Confidential]; Werbin Exh. Q [Fields Tr. at 16:6 - 20][Confidential].

**RESPONSE: Undisputed.**

80. [REDACTED]

[REDACTED] Werbin Exh. N [Hermann Tr. at 170:6 - 21] [Confidential].

**RESPONSE: Undisputed.**

81. [REDACTED]

[REDACTED] Werbin Exh. N [Hermann Tr. at 174:2 - 10] [Confidential].

**RESPONSE: Undisputed.**

82. [REDACTED]

[REDACTED] Werbin Exh. N [Hermann Tr. at 174:11 - 18] [Confidential].

**RESPONSE: Undisputed.**

83. [REDACTED]

[REDACTED] Werbin Exh. Q [Fields Tr. at 19:25 - 20:7] [Confidential].

**RESPONSE: Undisputed.**

84. [REDACTED]

[REDACTED] Werbin Exh. Q [Fields Tr. at 19:13 - 23] [Confidential].

**RESPONSE: Undisputed.**

85. Third parties make permission requests for licensing Warhol images either to ARS directly or to AWF. AWF notifies ARS if it receives a licensing request. ARS generates licensing agreements and

AWF sends digital image files directly to the client licensing the image on an as-needed basis. A separate image rental fee may be charged. Both license and image fees are typically invoiced by ARS to the client. Werbin Exh. Q [Fields Tr. at 23:5 - 25:17].

**RESPONSE: Undisputed.**

86. [REDACTED]

[REDACTED] Werbin Exh. Q [Fields Tr. at 28:23 - 29:8] [Confidential].

**RESPONSE: Undisputed.**

**AWF licenses a Warhol Prince Series image to Condé Nast in 2016**

87. Prince died on April 21, 2016. [https://en.wikipedia.org/wiki/Prince\\_\(musician\)](https://en.wikipedia.org/wiki/Prince_(musician))

**RESPONSE: Undisputed.**

88. On April 22, 2016, Vanity Fair published online a copy of the 1984 VF Article, which was reformatted and contained the following attribution credit under the article title: “By Lynn Goldsmith/LGI/Andy Warhol Foundation.” The re-published article also displayed the original gutter credit “Lynn Goldsmith/LGI” as in the original 1984 print version. The first page of the re-published version appeared as follows:

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Purple Fame: An Appreciation of Prince at the Height of His Powers |... <https://www.vanityfair.com/culture/2016/04/prince-at-the-height-of-hi...>



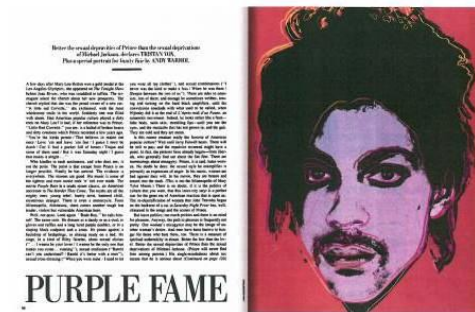
Sign In | Subscribe

FROM THE ARCHIVES

## Purple Fame: An Appreciation of Prince at the Height of His Powers

Leon Wieseltier, under the pen name Tristan Vox, wrote about Prince for the November 1984 issue of *Vanity Fair*.

BY TRISTAN VOX | APRIL 22, 2016 2:30 PM



By Lynn Goldsmith/LGI/Andy Warhol Foundation.

A few days after Mary Lou Retton won a gold medal at the Los Angeles Olympics, she appeared on *The Tonight Show* before Joan Rivers, who was swaddled in taffeta. The termagant asked the cherub about her new

1 of 8

2/6/2018, 9:53 AM

Werbin Exh. GG [LG-61]; <https://www.vanityfair.com/culture/2016/04/prince-at-the-height-of-his-powers>.

### **RESPONSE: Undisputed.**

89. Condé Nast's database included an image of the 1984 VF Article that was posted on the Vanity Fair Facebook page on April 22, 2016, and reflected the credit: "By Lynn Goldsmith/LGI/Andy Warhol Foundation." This reflected the original gutter credit in the VF Article. The gutter credit was printed under the heading of the VF Article in the April 22, 2016, Facebook posting because the gutter credit could not

be seen on a computer, which was a matter of custom and practice at Condé Nast. Werbin Exhs. GG and HH [LG-61; LG-130]; Werbin Exh. O [Donnellan Tr. at 90:17 - 96:7].

**RESPONSE: Undisputed.**

90. On April 22, 2016, Vanity Fair also published on its Facebook page the following reproduction of the 1984 VF Article, which depicted the gutter credit to “Lynn Goldsmith/LGI”:

(3) Vanity Fair - Posts

https://www.facebook.com/vanityfairmagazine/posts/10153709288767572

The screenshot shows a Facebook post from the Vanity Fair magazine page. At the top, there's a navigation bar with 'Vanity Fair', 'Home', and 'Find Friends'. The main content area features a large image of a crowd at a Vanity Fair event, with the text 'VANITY FAIR' overlaid. Below this is a smaller image of a magazine cover titled 'PURPLE FAME' featuring Prince. The text of the post reads: 'Accompanied by an Andy Warhol portrait, Leon Weselizer pointed out what everyone already knew in 1984: "Escape from Prince is no longer possible"'. Below the text are engagement metrics: 433 likes, 39 shares, and 3 comments. A list of pages liked by the user is visible on the right side, including Teen Vogue, Time+Taste, and W magazine. An exhibit stamp is visible in the bottom right corner of the screenshot, containing the text 'EXHIBIT LG 128 3/15/18 WJ'.

1 of 5

2/22/2018, 6:50 PM

Werbin Exh. II [LG-128];

<https://www.facebook.com/vanityfairmagazine/posts/%2010153709288767572>

**RESPONSE: Undisputed.**

91. Vanity Fair is currently and was in 1984 owned and published by Condé Nast. Werbin Exh. O [Donnellan Tr. at 8:16 - 9:13].

**RESPONSE: Undisputed.**

92. 

Werbin Exhs. JJ and KK [LG-3; LG-5] [Confidential].

**RESPONSE: Undisputed.**

93. 

Werbin Exh. JJ [LG-3] [Confidential].

**RESPONSE: Undisputed.**

94. 

[REDACTED] Werbin

Exh. N [Hermann Tr. at 4:20 - 23].

**RESPONSE: Undisputed.**

95. [REDACTED]

[REDACTED] Werbin Exh.

LL [LG-58 at p. 4 of email chain] [Confidential].

**RESPONSE: Undisputed.**

96. [REDACTED]

[REDACTED] Werbin Exh.

LL [LG-58 at p. 3] [Confidential]; Werbin Exh. KK [LG-5] [Confidential].

**RESPONSE: Undisputed.**



97. There was a “grueling closing” schedule because “Prince had died and there was a push to get it out on newsstands.” Werbin Exh. O [Donnellan Tr. at 67:22 - 25; 69:18 - 70:9].

**RESPONSE: Undisputed.**

98. [REDACTED]

[REDACTED] Werbin Exh. LL [LG-58 at p. 3] [Confidential].

**RESPONSE: Undisputed.**

99. [REDACTED]

[REDACTED] [*Id.* at p. 1 of email chain] [Confidential].

**RESPONSE: Undisputed.**

100. [REDACTED]

[REDACTED] Werbin Exh. MM [LG-6] [Confidential].

**RESPONSE: Undisputed.**

101. [REDACTED]

[REDACTED] Werbin Exh. NN [LG-56 (at seventh page of ARS-produced emails)] [Confidential]. This meant that AWF had transmitted to Condé Nast a link to download a high resolution file of the Prince image. Werbin Decl. Q [Fields Tr. at 109:22 - 110:11].

**RESPONSE: Undisputed.**

102. The image file AWF provided to Condé Nast was for the Warhol Prince Series image No. PO 50.541. Werbin. Exh. A [Complaint p. 9 (bottom right image); ¶ 52].

**RESPONSE: Undisputed.**

103.

[REDACTED]

Werbin Exh. OO [LG-57 at p. 2 of emails] [Confidential].

**RESPONSE: Undisputed.**

104.

[REDACTED]

Werbin Exh. N [Hermann Tr. at 114:22 - 115:13].

**RESPONSE: Undisputed.**

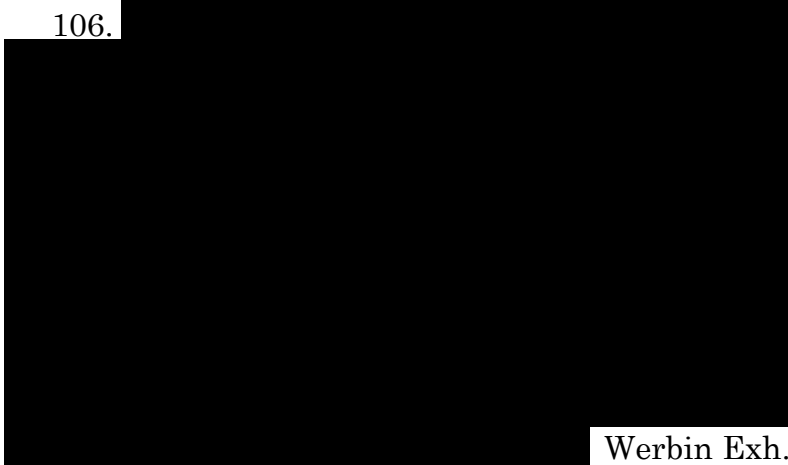
105.

[REDACTED]

Werbin Exh. NN [LG-56 at pp. 4 – 5 in email chain] [Confidential].

**RESPONSE: Undisputed.**

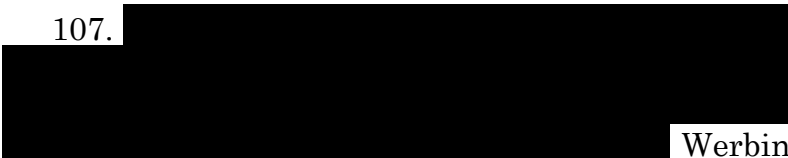
106.

A large rectangular area of the document is completely redacted with a solid black fill, obscuring the text underneath.

Werbin Exh. OO [LG-57 at p. 2 of email chain] [Confidential].

**RESPONSE: Undisputed.**

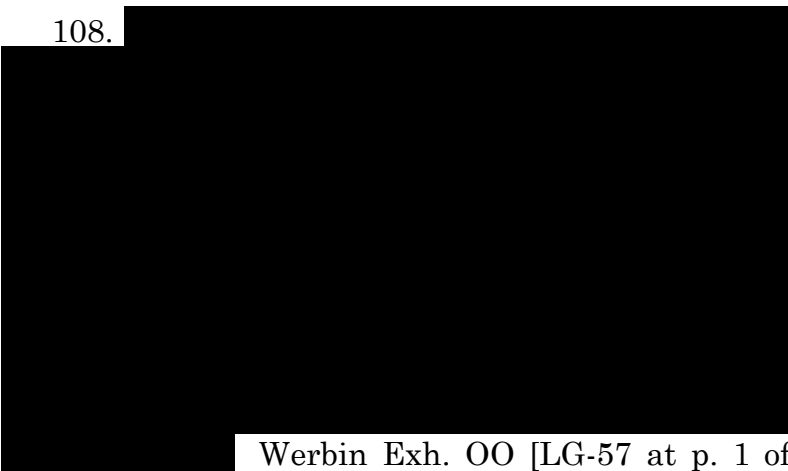
107.

A rectangular area of the document is completely redacted with a solid black fill, obscuring the text underneath.

Werbin Exh. Q [Fields Tr. at 113:16 - 114:23].

**RESPONSE: Undisputed.**

108.

A large rectangular area of the document is completely redacted with a solid black fill, obscuring the text underneath.

Werbin Exh. OO [LG-57 at p. 1 of email chain] [Confidential].

**RESPONSE: Undisputed.**

109.

Werbin Exh. PP [LG-59] [Confidential].

**RESPONSE: Undisputed.**

110.

Werbin Exh.

NN [LG-56 at pp. 1-2 of email chain] [Confidential].

**RESPONSE: Undisputed.**

111.

Werbin Exh. PP [LG-59] [Confidential].

**RESPONSE: Undisputed.**

112.

Werbin Exh. QQ [LG-9] [Confidential].

**RESPONSE: Undisputed.**

113. In May 2016, Condé Nast published a “special interest publication” or “SIP” commemorative magazine (the “CN Magazine”) devoted to Prince entitled “The Genius of Prince,” which featured on its cover Warhol Prince Series image PO 50.541, as licensed by AWF through ARS (the “Warhol CN Image”). As published, the cover appeared as follows:



Werbin Exh. RR [LG-75]; Werbin Exh. O [Donnellan Tr. at 15:21 - 16:12].

**RESPONSE: Undisputed.**

114. The CN Magazine remained on newsstands for three months, as do all Condé Nast SIPs. Werbin Exh. O [Donnellan Tr. at 72:10 - 73:2].

**RESPONSE: Undisputed.**

115. The CN Magazine listed a copyright credit for the Warhol CN Image as “Andy Warhol, Prince, © 1984. Synthetic polymer paint and silkscreen ink on canvas, 20 x 16. Image and artwork © The Andy Warhol Foundation for the Visual Arts, Inc./Licensed by ARS.” No credit of any kind was given to Goldsmith. Werbin Exh. RR [LG-75 at p. 95].

**RESPONSE: Undisputed.**

116. In planning the CN Magazine, Condé Nast did not investigate whether Goldsmith owned any rights with respect to the Warhol CN Image because Condé Nast’s rights clearance database had no record of her. That database only reflected a need to obtain rights clearance from Warhol’s estate with respect to the Warhol CN Image. Werbin Exh. SS [LG-116]; Werbin Exh. O [Donnellan Tr. at 19:19 - 21:19].

**RESPONSE: Undisputed.**

117. In planning the CN Magazine, Condé Nast did not investigate why a copyright credit was given to Goldsmith in the 1984 VF Article or whether there was any license documentation concerning the Warhol CN Image. Condé Nast had a copy of the 1984 VF Issue in its physical library but did not review it because research was not usually done of the physical library unless there was no other record of the content

that would be used. Werbin Exh. O [Donnellan Tr. at 41:12 - 42:12; 43:13 - 18].

**RESPONSE: Undisputed.**

118. In planning the CN Magazine, Condé Nast's internal emails acknowledged on April 21, 2016, the day Prince died, that "Andy Warhol DREW HIM on a special assignment for Vanity Fair, November 1984. Short appreciation by Tristan Vox (a pseudonym ?)." Condé Nast's vice president of business affairs and rights management, Chris Donnellan, testified that the term "special assignment" meant that Warhol was commissioned by Vanity Fair for a special assignment and that "commissioned" meant that in contrast to "numerous instances where [Condé Nast has] republished Warhol images in our magazines, this was something he was creating for the magazine at the request of the magazine." Donnellan noted that "it was so rare for Warhol to create something for a magazine. . . ." Werbin Exh. TT [LG-117]; Werbin Exh. O [Donnellan Tr. at 32:17 - 36:14; 38:15 - 40:8].

**RESPONSE: Undisputed.**

119. [REDACTED]

[REDACTED] Werbin Exh. N [Hermann Tr. at 97:13 - 98:20] [Confidential].

**RESPONSE: Undisputed.**

**Goldsmith discovers the existence of the Warhol Prince Series**

120. Goldsmith first learned that Warhol created the illustration of Prince for the VF Article after seeing images of Prince posted online by his fans following Prince's death on April 21, 2016, and these included the Warhol images used for the VF Article

and the CN Magazine cover. Werbin Exh. B Counterclaim ¶ 21; Werbin Exh. J [Goldsmith Tr. 127:5 - 25].

**RESPONSE: Undisputed.**

121. Goldsmith had never seen a Warhol image of Prince before and she did a Google image search of the online images. The VF Article came up in the search results and Goldsmith saw her name in the credits. Werbin Exh. J [Goldsmith Tr. 125:6 - 22].

**RESPONSE: Undisputed.**

122. Goldsmith called Michael Hermann at AWF and advised him that she believed one of her images had been infringed in reference to the CN Magazine. Hermann asked her to send him a copy of the image. Werbin Exh. N [Hermann Tr. at 123:20 - 124:18; 131:19 - 23].

**RESPONSE: Undisputed.**

123. Following that call, on July 28, 2016, at 11:53 AM, Goldsmith sent an email to Hermann attaching a copy of one of her 1981 color studio photographs of Prince, which was a three-quarter shot that showed Prince with his hands in his pockets against a white background. Goldsmith initially thought that this color Prince photograph had been used because she found a scan of it in her digital archive and it had been printed in one of her own published photography books. Goldsmith's email included a copy of her color photograph of Prince and a copy of that photograph with the VF Warhol Image superimposed on it digitally. Werbin Exh. UU [LG 10 (same as Warhol 24)]; Werbin Exh. J [Goldsmith Tr. at 123:19 - 125:5; 128:7 - 15; 150:17 - 152:18].

**RESPONSE: Undisputed.**

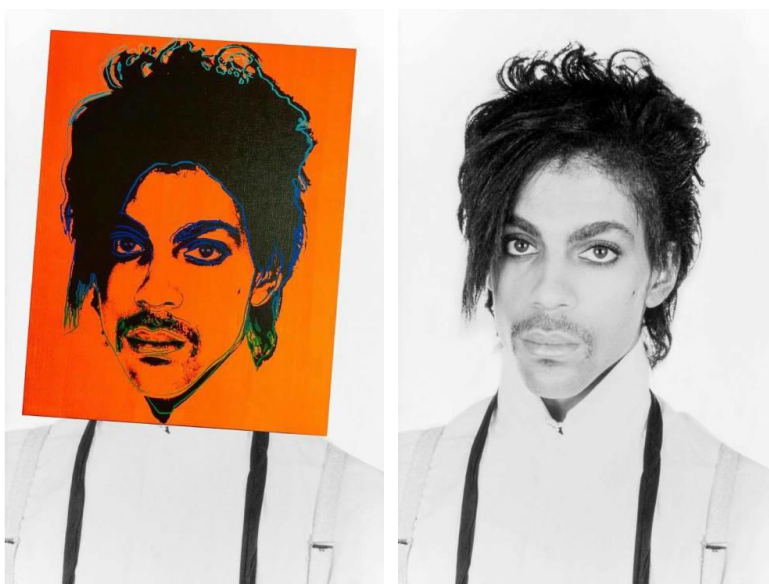


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124. Upon seeing online images of the 1984 VF Article with her attribution credit, however, Goldsmith assumed an image of hers had been licensed to Vanity Fair and she then found the license to Vanity Fair that showed it was a black and white image that had been licensed. Werbin Exh. J [Goldsmith Tr. at 125:6 - 126:7; 150:17 - 152:18].

**RESPONSE: Undisputed.**

125. Goldsmith then compared the CN Magazine cover image to the black and white Goldsmith Photo by digitally scanning her black and white negative and superimposing the magazine cover digitally on top of it to create the following digital “GIF” image:



Werbin Exh. B Counterclaim ¶ 5; Werbin Exh. VV [LG 11 (same as Warhol 28) at LG0000009 – 10 (GIF and black and white images)]; Werbin Exh. J [Goldsmith Tr. at 153:2 - 154:2].

**RESPONSE: Undisputed.**

126. Goldsmith emailed Hermann again on July 28, 2016, at 7:25 PM, advising him that after further research, the Warhol image was not based on her color portrait of Prince but on her black and white Goldsmith Image that was made during the same studio session. She also advised Hermann that she had found the 1984 license to Vanity Fair and attached to that email the above animated “GIF” image superimposed over her black and white photo. She advised Hermann that she had been unaware of these uses before. Werbin Exh. VV [LG 11 (same as Warhol 28)]; Werbin Exh. N [Hermann Tr. 132:7 - 133:16].

**RESPONSE: Undisputed.**

127. The black and white Goldsmith Photo that was included with Goldsmith’s later-sent email to Hermann on July 28, 2016, was not included in the Complaint; only the three-quarter color photo Goldsmith included with her first email of July 28, 2016, was included in the Complaint. Werbin Exhs. UU and VV [LG 10 (same as Warhol 24); LG 11 (same as Warhol 28)]; Werbin Exh. A [Complaint at ¶ 22].

**RESPONSE: Undisputed.**

**AWF’s licensing market for the Warhol Prince Series images**

128. From the respective times AWF transferred legal title to or custody of each original work in the Prince Series, images of the Warhol Prince Series

works have been made available for licensing by AWF, directly or through its agents, to third parties. Werbin Exh. D [RA Response No. 21].

**RESPONSE: Undisputed.**

129. [REDACTED]

[REDACTED]

Werbin Exh. EE [LG 29 at Exhibit “E” thereto] [Confidential]; Werbin Exh. Q [Fields Tr. at 15:17 - 19:12] [Confidential].

**RESPONSE: Undisputed.**


130. [REDACTED]

[REDACTED] Werbin

Exh. N [Hermann Tr. at 187:25 - 190:14]  
[Confidential].

**RESPONSE: Undisputed.**

131. 

 Werbin Exh. N [Hermann Tr.  
at 191:14 - 25; 201:23 - 202:11] [Confidential].

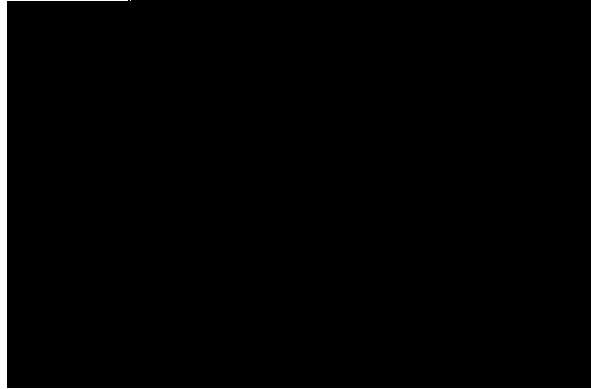
**RESPONSE: Undisputed.**

132. 

 Werbin Exh. N [Hermann Tr.  
at 203:7 - 202:11] [Confidential].

**RESPONSE: Undisputed.**

133. 

 Werbin Exh.  
WW [LG 23 (marked "Confidential")]; Werbin Exh. N  
[Hermann Tr. at 205:3 - 207:24] [Confidential].

**RESPONSE: Undisputed.**

134. Many Warhol images (but not of Prince) have  
been used on record album covers. Werbin Exh. XX  
[Paulson 10].

**RESPONSE: Undisputed.**

135. AWF makes images of the Warhol Prince Series available for licensing. Werbin Exh. D [RA Responses No. 20]. [REDACTED]

[REDACTED] Werbin Exh. ZZ (“Warhol/Prince Report”) [LG-31] [Confidential]; Werbin Exh. Q [Fields Tr. 29:18 – 31:10] [Confidential].

**RESPONSE: Partially disputed. Werbin Exhibit ZZ is an email exchange between representatives of ARS and Condé Nast. Werbin Exhibit YY contains a chart prepared by ARS reflecting ARS’s information regarding licensing for the Warhol Prince Series.**

136. The following licenses and image rentals for images of the Warhol Prince Series have been issued by ARS on behalf of AWF since 1999:

[REDACTED]

(ii) June 15, 2016, license to Condé Nast for use of Warhol Prince Series image No. PO 50.541 for editorial use on a cover for a fee of \$10,000, of which \$2,500 was paid to ARS as a commission and the balance of \$7,500 was paid to AWF. Werbin Exh. A [Complaint ¶ 53]; Werbin Exh. D [RA Response No. 10].

(iii) April 25, 2016, photo rental fee of \$250 to Condé Nast in connection with the publication in (ii) above, of which \$187.50 was paid to AWF. Werbin Exh. D [RA Response No. 11].

[REDACTED]

[REDACTED]

[REDACTED]

(vii) April 22, 2013, license to Condé Nast for full page color editorial use of Warhol Prince Series image PO 50.544 in a book entitled *Vanity Fair: 100 Years*, for a fee of \$1,125, of which \$843.75 was paid to AWF. Werbin Exh. D [RA Response No. 12].

(viii) April 3, 2013, photo rental fee of \$410 to Vanity Fair (Condé Nast) in connection with the publication in (vii) above, of which \$307.50 was paid to AWF. The Warhol Prince Series image licensed was "PO 50.544." Werbin Exh. D [RA Response No. 13].

[REDACTED]

[REDACTED]

[REDACTED]

Werbin Exh. YY [LG-31 ARS “Warhol / ‘Prince’ Report”][Confidential]; Werbin Exh. Q [Fields Tr. at 50:23 - 55:10; 57:19 - 58:22; 64:3 - 65:23; 98:5 - 100:10; 121:8 - 122:25; 130:12 - 131:18] [Confidential]; Werbin Exh. Q [Fields Tr. at 78:14 - 80:6; 86:8 - 88:88]; Werbin Exh. D [RA Response Nos. 10-13]; Werbin Exh. ZZ [LG-46] [Confidential].

**RESPONSE: Undisputed.**

137. The license and image rental fee in ¶ 130 (vii) and (viii) above were in connection with a Vanity Fair 100<sup>th</sup> anniversary coffee table book that Condé Nast was involved in producing with a third-party publisher. Condé Nast licensed from AWF, through ARS, a high-resolution digital copy of the VF Warhol Image designated as PO 50.544 to publish in this book as an interior image. The book is still in print. Werbin Exh. O [Donnellan Tr. at 98:14 - 100:12]; Werbin Exh. ZZ [LG-46]; Werbin Exh. D [RA Responses Nos. 12, 13].

**RESPONSE: Partially disputed. ¶ 130 (vii) and (viii) does not reflect any license or image rental fees charged in connection with a Vanity Fair 100<sup>th</sup> anniversary coffee table book. ¶ 130 states: “AWF makes images of the Warhol Prince Series available for commercial merchandising purposes, although no such**

licenses have been issued at least since 2005, apart from museum licenses. Werbin Exh. N [Hermann Tr. at 187:25 - 190:14] [Confidential].” ¶ 136 (vii) and (viii) appears to reflect certain license and image rental fees.

**Goldsmith’s market, sales of fine art prints and image licensing**

138. Between 2003 and 2016, Goldsmith, through her agency LGI, licensed single images of her own stock photography generally for the following totals and ranges of fees, by year:

Year	Total license fees	Range of fees per photo	Supporting exhibits (marked “Confidential”)
2016	\$77,950	\$100 - \$7,500	Werbin Exh. AAA [Warhol 74]
2015	\$128,410	\$200 - \$6,500	Werbin Exh. BBB [Warhol 71]
2014	\$125,845	\$100 - \$10,000	Werbin Exh. CCC [Warhol 66]
2013	\$65,130	\$100 – \$3,000	Werbin Exh. DDD [Warhol 65]
2012	\$47,759	\$50 - \$5,000	Werbin Exh. EEE [Warhol 62]
2011	\$47,485	\$100 - \$5,250	Werbin Exh. FFF [Warhol 60]



Year	Total license fees	Range of fees per photo	Supporting exhibits (marked "Confidential")
2010	\$61,050	\$100 - \$3,500	Werbin Exh. GGG [Warhol 57]
2009	\$165,992	\$100 - \$5,000	Werbin Exh. HHH [Warhol 54]
2008	\$140,848	\$150 - \$70,000	Werbin Exh. III [Warhol 53]
2007	\$58,450	\$100 - \$10,000	Werbin Exh. JJJ [Warhol 51]
2006	\$61,596	\$100 - \$3,500	Werbin Exh. KKK [Warhol 46]
2005	\$95,574	\$100 - \$18,900	Werbin Exh. LLL [Warhol 45]
2004	\$67,500	\$75 - \$9,988	Werbin Exh. MMM [Warhol 44]
2003	\$28,579	\$56 - \$1,000	Werbin Exh. NNN [Warhol 43]

**RESPONSE: Partially disputed.**

- **The low end of the range for 2014 fees is \$0, not \$100. See Werbin Exhibit CCC, at LG-133 ("Black and White of Jimmy Lovine and Bruce Springsteen 1978 at**

soundboard” and “BW Jimmy Lovine and Bruce Springsteen at sound board 1978”).

- The low end of the range for 2012 fees is \$0, not \$50. See Werbin Exhibit EEE, at LG-127 (“David Coverdale of Deep Purple at California Jam 1974”; “David Coverdale and Glenn Hughes at California Jam 1974”).
- The low end of the range for 2008 fees is \$100, not \$150. See Werbin Exhibit III at LG-113 (“Color image of Colin Powell”).
- The low end of the range for 2006 fees is \$60, not \$100. See Werbin Exhibit KKK at LG-106 (“Toni Morrison at Aspen ideas fest 2005, profile - SPOT ONLY p.57”; “John Fogerty at Labor Day Jazz fest 2005, profile - SPOT ONLY p.65”; “Ed Bradley in hat 2005 - SPOT ONLY p.B12 in Art & Dining guide Summer 2006”; “Sakyong Mipham Rinpoche in garden, orange robes”).
- The low end of the range for 2005 fees is \$75, not \$100. See Werbin Exhibit LLL at LG-101 (“Color image of Geralyn Lucas nude with pearls submitted for Dr. 90210”).
- The low end of the range for 2004 fees is \$50, not \$75. See Werbin Exhibit MMM at LG-100 (“President Clint and Hillary Clinton plant dogwood tree”; “Use of one image in article Adventures On the Web”; “Black and White image of Frannie Ditmer”).

139. Between 2003 and 2016, Goldsmith, through her agency LGI, sold fine art prints of her photographs generally for the following totals and ranges of fees, by year:

<b>Year</b>	<b>Total sales</b>	<b>Range of sale prices</b>	<b>Supporting exhibits (marked “Confidential”)</b>
2016	\$217,137	\$600 - \$8,000	Werbin Exh. AAA [Warhol 74]
2015	\$128,410	\$325 - \$6,500	Werbin Exh. BBB [Warhol 71]
2014	\$139,990	\$250 - \$6,000	Werbin Exh. CCC [Warhol 66]
2013	\$108,282	\$300 - \$4,500	Werbin Exh. DDD [Warhol 65]
2012	\$239,449	\$300 - \$7,500	Werbin Exh. EEE [Warhol 62]
2011	\$93,195	\$675 - \$4,725	Werbin Exh. FFF [Warhol 60]
2010	\$95,491	\$850 – \$5,000	Werbin Exh. GGG [Warhol 57]
2009	\$86,590	\$850 - \$8,100	Werbin Exh. HHH [Warhol 54]
2008	\$201,377	\$125 - \$8,250	Werbin Exh. III [Warhol 53]

Year	Total sales	Range of sale prices	Supporting exhibits (marked "Confidential")
2007	\$189,305	\$450 – \$5,625	Werbin Exh. JJJ [Warhol 51]
2006	\$175,787	\$200 - \$5,000	Werbin Exh. KKK [Warhol 46]
2005	\$61,025	\$375 - \$4,275	Werbin Exh. LLL [Warhol 45]
2004	\$112,199	\$350 - \$2,900	Werbin Exh. MMM [Warhol 44]
2003	\$37,612	\$150 - \$3,100	Werbin Exh. NNN [Warhol 43]

**RESPONSE: Partially disputed. The low end of the range for 2013 prices is \$150, not \$300. See Werbin Exhibit DDD, at LG-128 (“16/20 BW Patti (100 ed)”).**

140. Goldsmith creates her own “rock mosaics,” which depict a photograph of a person that is made up of a minimum of 2,000 other photographs taken by Goldsmith over a period of time, anywhere from three to 20 years, and are derivative of her own work. Werbin Exh. J [Goldsmith Tr. at 243:5 - 11].

**RESPONSE: Undisputed.**

141. Goldsmith currently offers her rock mosaic prints for sale in limited editions of 10 for each size of vertical mosaics of 30 x 40 inches and 40 x 60 inches, and for each size of panoramic mosaics of 14 x 42 inches and 19 x 60 inches, at prices ranging from

\$5,000 to \$12,000 each for the first nine prints in an edition, and for the last print in an edition at a higher price provided upon request. Werbin Exh. OOO [Warhol 91]; Werbin Exh. J [Goldsmith Tr. at 310:7 - 311:6].

**RESPONSE: Undisputed.**

142. Goldsmith currently offers for sale her fine art prints of rock musicians in editions of 20, both color and black and white, at prices ranging from \$1,700 to \$12,000, depending on the size ranging from 11 x 14 inches to 56 inches or larger, for the first 19 prints in an edition, and pricing upon request for the last print in an edition. These prices would also apply to fine art prints of any Goldsmith photographs of Prince made in 1981 on assignment for Newsweek. Werbin Exh. PPP [Warhol 92]; Werbin Exh. J [Goldsmith Tr. at 311:8 - 315:5].

**RESPONSE: Undisputed.**

143. Goldsmith has not yet editioned and sold any prints of the black and white Goldsmith Photo from the 1981 studio session of Prince because she doesn't edition all her work at once, and as she gets older she intends to start editioning her other works, anticipating that prices will then go up. Goldsmith had editioned her concert imagery of Prince from 1981 and other portraits she did of Prince in 1993, but she was not ready to edition the 1981 studio portraits of Prince, particularly the close-up heads of Prince. Werbin Exh. J [Goldsmith Tr. at 315:6 - 316:10].

**RESPONSE: Undisputed that Goldsmith testified as such. But there is no other evidence of any kind that this is the actual reason for Goldsmith's statements, as opposed to post-litigation rationalization.**

144. Following Prince's death in April 2016, on May 2, 2016, Goldsmith, through her agency LGI, licensed a color photograph of Prince, which she took at a concert in 1986, to People Magazine for \$1,000. Werbin Exh. J [Goldsmith Tr. at 277:12 - 279:3]; Werbin Exh. AAA [Warhol Exh. 74 at p.4] [Confidential].

**RESPONSE: Undisputed.**

145. On May 2, 2016, Goldsmith, through LGI, licensed a black and white concert photograph of Prince, which she took at the December 2, 1981, concert shoot for Newsweek, to People Magazine for \$1,000. *Id.* [Goldsmith Tr. at 279:4 - 21]; Werbin Exh. AAA [Warhol Exh. 74 at p. 4] [Confidential].

**RESPONSE: Undisputed.**

146. Both images licensed by LGI to People Magazine in 2016 were used by People Magazine for a photographic history of Prince. *Id.* [Goldsmith Tr. at 278:15 - 25].

**RESPONSE: Undisputed.**

147. On June 23, 2016, Goldsmith, through LGI, licensed a color photograph of Prince to New Bay Guitar World for \$2,300 for use on the cover of the magazine Guitar World. *Id.* [Goldsmith Tr. at 279:22 - 281:20]; Werbin Exh. AAA [Warhol 74 at p. 4] [Confidential].

**RESPONSE: Undisputed.**

148. On May 28, 2015, Goldsmith, through LGI, licensed a 1993 color studio photograph of Prince to Camera Press/Earth Port FX, for \$500. *Id.* [Goldsmith Tr. at 260:14 - 263:9]; Werbin Exh. BBB [Warhol 71 at. p. 3] [Confidential].

**RESPONSE: Partially disputed. Werbin Ex. J. (Goldsmith Tr.) does not contain the cited pages.**

149. On May 24, 2013, Goldsmith, through LGI, licensed a 1993 black and white photo of Prince to the Smithsonian Institution's Natural Portrait Gallery for use in a museum exhibition catalogue for \$400. *Id.* [Goldsmith Tr. at 250:11 - 251:9; 253:5 - 24; Werbin Ex. DDD [Warhol 65 at. p. 3] [Confidential].

**RESPONSE: Partially disputed. Werbin Ex. J. (Goldsmith Tr.) does not contain the cited pages.**

150. On November 7, 2013, Goldsmith, through LGI, licensed another photo of Prince to Readers Digest for \$150. *Id.* [Goldsmith Tr. at 251:10 – 16; 253:25 – 254:20]; Werbin Ex. DDD [Warhol 65 at. p. 3] [Confidential].

**RESPONSE: Partially disputed. Werbin Ex. J. (Goldsmith Tr.) does not contain the cited pages.**

151. On July 22, 2010, Goldsmith, through LGI, licensed a 1993 black and white studio photograph of Prince to Rittor Music for \$400 use in a Japanese publication called "Guitar Magazine." *Id.* [Goldsmith Tr. at 233:19 – 234:5; 237:6 – 22]; Werbin Ex. GGG [Warhol 57 at. p. 2] [Confidential].

**RESPONSE: Partially disputed. Werbin Ex. J. (Goldsmith Tr.) does not contain all of the cited pages.**

152. On September 2, 2009, Goldsmith, through LGI, licensed a photo of Prince called "Lightening Bolts" to Hard Rock Hotels for \$2,000. *Id.* [Goldsmith

Tr. at 211:24 - 213:6]; Werbin Exh. HHH [Warhol 54 at p. 3] [Confidential].

**RESPONSE: Partially disputed. Werbin Ex. J. (Goldsmith Tr.) does not contain the cited pages.**

153. On October 29, 2007, Goldsmith, through LGI, licensed a photo of “Prince Jumping” to People Magazine for \$250 for ¼ page use. *Id.* [Goldsmith Tr. at 207:2 - 23]; Werbin Exh. JJJ [Warhol 51 at p. 3] [Confidential].

**RESPONSE: Partially disputed. Werbin Ex. J. (Goldsmith Tr.) does not contain the cited pages.**

154. On September 16, 2005, Goldsmith, through LGI, licensed a 1993 color photo of “Prince w/orange background” to Dennis Publishing/Blender Magazine for \$350, not to exceed ¼ page. *Id.* [Goldsmith Tr. at 182:9 -183:12; 202:8 - 203:4]; Werbin Exh. LLL [Warhol 45 at p. 2] [Confidential].

**RESPONSE: Partially disputed. Werbin Ex. J. (Goldsmith Tr.) does not contain the cited pages.**

155. In 2004, Goldsmith sold a fine art portrait photograph she made in 1993 of Prince holding a guitar to a private collector, who also owns three Warhol works of art and is a billionaire collector owning an extensive rock and roll collection. Werbin Exh. J [Goldsmith Tr. at 175:5 - 178:13].

**RESPONSE: Undisputed that Goldsmith testified as such but there is no other evidence of these statements or any identification of what Warhol works the collector purportedly owns.**



**Warhol and AWF previously were sued for copyright infringement**

156. Warhol was sued by photographer Patricia Caulfield in or about 1966 in the Southern District of New York (Docket No. 66 Civ. 3776) for copyright infringement for unauthorized use of Caulfield's photograph of flowers in connection with Warhol's Flower series of artworks. The case settled. Werbin Exh. F [Caulfield complaint (S.D.N.Y. No. 66 Civ. 3776, filed November 9, 1966)]; Werbin Exh. P [Transcript of Deposition of Gerard Malanga dated February 16, 2018 ("Malanga Tr.") at 36:17 - 37:9; 38:20 - 40:19].

**RESPONSE: Undisputed.**

157. According to his assistant at the time Gerard Malanga, after being sued by Caulfield, Warhol realized he had to be very careful about appropriating images created by others for fear of being sued again and wanted to start taking his own photographs rather than using images owned by others. Werbin Exh. P [Malanga Tr. at 8:25 - 10:12; 38:20 - 44:44].

**RESPONSE: Partially disputed. In the cited portion of Werbin Exhibit P, Malanga says that the quotation "sounds like something I might have said" but that it "sounds a bit wordy for me to have said all that."**

158. AWF was sued in the Southern District of New York in 1996 for copyright infringement by Henri Dauman and Time Inc. with respect to four pictures taken by Dauman at John F. Kennedy's funeral that were featured in the December 6, 1963 issue of Life. One of the photographs contained an image of a veiled Jacqueline Kennedy walking with the Kennedy brothers, Robert and Edward. The

complaint alleged that “Warhol created a series of artworks by reproducing images of Jacqueline Kennedy; that Warhol used a total of eight ‘source images’ culled from newspapers and magazines; and that one of these images . . . was taken from the Dauman photograph published in Life.” The case settled and was voluntarily discontinued on November 13, 2001. *Dauman v. The Andy Warhol Foundation*, Docket No. 96 Civ. 9219 (TPG), 1997 WL 337488 (S.D.N.Y. 1997) (Griesa, J.) (denying AWF’s motion to dismiss); Werbin Exh. G [96 Civ. 9219 Docket No. #50]; *Andy Warhol Foundation for the Visual Arts, Inc. v. Federal Insurance Company*, 189 F.3d 208, 211, 212 - 13 (2d Cir. 1999).

**RESPONSE: Undisputed.**

**Goldsmith registered her copyright in the Goldsmith Photo**

159. On November 17, 2016, Goldsmith, through her attorney, filed an electronic application with the U.S. Copyright Office for registration of the Goldsmith Photo as an unpublished work, specifying a creation date of 1981 and designating Goldsmith as both author and copyright claimant. A Certificate of Registration was issued for the Goldsmith Photo with the foregoing specifications, effective November 16, 2016, with Registration Number VAu 1-277-562 (entitled “Prince Portrait”). Werbin Exh. B [Counterclaim at ¶ 16 and Exhibit “A” thereto].

**RESPONSE: Undisputed.**

**COUNTER-STATEMENT OF MATERIAL FACTS**

**I. ANDY WARHOL IS A LEGENDARY AMERICAN ARTIST WHOSE WORK IS DEFINED BY TRANSFORMATION**

1. Born in 1928 in Pittsburgh, Pennsylvania, Andy Warhol would go on to become a “prolific artist. . .credited with having significant achievements in, and contributions to, painting, collage, film, journalism, and a number of other media. Warhol is considered a blue chip artist and critical to be included in any serious and comprehensive private collection. . . . Similarly, no museum gallery on the planet could consider itself representative of Contemporary Art without a Warhol somewhere on its walls.” (Expert Report of Laura Paulson at 8 (citation and quotation marks omitted) **(Ex. 1)**.)<sup>1</sup>

2. Warhol remains an “art-world colossus,” the “god of contemporary art,” the “most powerful contemporary art brand in existence,” the “backbone of any auction of post-war contemporary art,” and a “global commodity.” (Paulson Expert Report at 8–9 (citations omitted) **(Ex. 1)**.)

3. Warhol’s works can be found in the world’s most important and prestigious museums, including

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<sup>1</sup> Exhibits 1-140 in The Andy Warhol Foundation for the Visual Arts, Inc.’s Counter-Statement of Material Facts are attached to the Declaration of Luke Nikas in Support of The Andy Warhol Foundation for the Visual Arts, Inc.’s Motion for Summary Judgment, dated Oct. 12, 2018 (Dkt. No. 60). Exhibits 141-171 are attached to the Declaration of Luke Nikas in Opposition to Lynn Goldsmith and Lynn Goldsmith Ltd.’s Motion for Summary Judgments, dated November 20, 2018, and submitted herewith.

the Tate Modern in London and the Museum of Modern Art in New York City. (Declaration of Neil Printz ¶2 (Ex. 2).)

4. “From the beginning of his painting career, Warhol was an avid student of media: he was acutely aware of the way images are produced, distributed, and consumed in contemporary culture, and he was fascinated by their function as vehicles of desire.” (Printz Decl. ¶9 (Ex. 2).)

5. Warhol created art depicting images of diverse subjects, from everyday objects like soup cans and bicycles to celebrities and other public figures. (Printz Decl. ¶9 (Ex. 2).)

6. The subject matter of Warhol’s art reflects his interest in imagery. From his depictions of “money[, which] operates as a cultural sign, empty of intrinsic meaning or value, but endowed as a currency,” to stars of the “movie industry[, which] was an especially powerful engine that packaged and disseminated images of intense identification and desire,” the power of images and the role they play in contemporary life is one of the dominant themes of Warhol’s art. (Printz Decl. ¶¶11–12 (Ex. 2).)

7. According to Warhol’s former assistant Gerard Malanga, the images themselves, rather than the figures depicted in the images, “were the actual subject matter [Warhol] reproduced in his” art. “[I]nstead of satirizing the products [depicted in the images] themselves, he had satirized the ‘artful’ way they were presented.” (Gerard Malanga, *A Conversation with Andy Warhol*, *The Print Collector’s Newsletter* (Jan.–Feb. 1971) (Ex. 3); Deposition Transcript of Gerard Malanga 18:9–20:11 (Ex. 4).)

8. Warhol's *Campbell Soup Cans* paintings illustrate this principle. "[O]ften misunderstood as depictions of real . . . cans of prepared soup[, i]n fact, they were reproductions of the Campbell Soup Company's logo, printed on their stationery, a purely graphic but supremely memorable sign that stood in for the product." (Printz Decl. ¶8 & figs. 2–3 (Ex. 2).)

9. Similarly, his 1962 silkscreen painting, *200 One Dollar Bills*, depicts 200 repetitively printed one-dollar bills. (Printz Decl. ¶10 & fig. 4 (Ex. 2).) According to Neil Printz, editor of the Andy Warhol Catalogue Raisonné, this work, which "literally represents the idea of printing money," underscores how "money operates as a cultural sign, empty of intrinsic meaning or value, but endowed as currency, as a medium of exchange." (*Id.* ¶¶10–11.) It displays the two-dimensional image on a flat canvas to echo the message that, like the dollar bill, there is nothing of intrinsic value behind the painting itself and that "there is nothing 'inside' the painting." (*Id.*)

10. Warhol's silkscreen paintings from this era explore popular images *as images*, rather than searching for deeper meaning in the underlying objects themselves. (Printz Decl. ¶11 (Ex. 2).)

11. Among Warhol's best known works are his celebrity portraits. Creating these works of art proceeded in multiple steps. After selecting an image of his subject, Warhol would "deliver it to a professional silk-screen printer, who would produce the silk-screen based on Warhol's instructions." (Printz Decl. ¶¶16–17 (Ex. 2).)

12. Often Warhol would crop and resize the source image—sometimes multiple times—before

arriving at the desired dimensions. (Printz Decl. ¶16 (Ex. 2).)

13. In his portraits of Marilyn Monroe, Warhol “zoom[ed] in [] on the head and face, cropping [the image] through the collar and slightly below the shadow of the chin. This has the effect of severing the head from the shoulders and bust, producing the disembodied effect of a cinematic close-up.” (Printz Decl. ¶17 & figs. 6–8 (Ex. 2).)

14. Warhol’s 1962 *Marilyn Diptych* employs this technique and uses repetition to depict 50 heads of Monroe—25 in color and 25 in black and white. (Printz Decl. ¶¶13–14, 17–18 & figs. 5–6 (Ex. 2).)

15. “Warhol invariably instructed the silk-screen maker to produce a high-contrast image.” (Printz Decl. ¶19 (Ex. 2).) Unlike “[b]lack-and-white photographs[, which] record a continuous range of tones from the deepest blacks in the shadows to the brightest lights,” Warhol’s preferred high-contrast half-tone image “reduced the gradual gray scale of the photograph to a sharp distinction between darks and lights.” (Printz Decl. ¶20 (Ex. 2).)

16. This process “entailed a drastic simplification of the original [image], a discretionary reduction of tonal gradations to a high-contrast pattern that functioned more like a heraldic emblem than any sort of rounded, particularized representation.” (Expert Report of Dr. Thomas Crow at 11 (Ex. 5).) The nuance, realism, and depth of the underlying image were removed. (Printz Decl. ¶13 (Ex. 2).)

17. Warhol examined the half-tone images before they were made into silk-screens “so that he could indicate by means of instructions, written and drawn with china-marking crayon, any changes to be made:

for example, to increase the tonal contrast by removing areas of half-tone, thereby flattening the image.” (Crow Expert Report at 11 (citation omitted) (**Ex. 5**).

18. “Once Warhol approved of the high-contrast image printed on the acetate,” he would have a silk-screen created such “that the image would be reproduced like a photographic negative onto the screen.” (Printz Decl. ¶20 (**Ex. 2**).

19. Having established the silk-screen derived from the source image, Warhol “would lay out the composition in pencil” on a linen canvas that had “been commercially prepared with a white ground layer, known as the primer.” “He would then place the screen face down on the canvas, pour ink onto the back of the mesh, and use a squeegee to pull the ink through the weave and onto the canvas.” (Printz Decl. ¶21 (**Ex. 2**).

20. After the “high-contrast half-tone impressions [had been] printed on the primed canvas[, which] served Warhol as an overall design or ‘under-drawing,’” then came the colors. Warhol painted the colors by hand over the printed impression, using the image outline as a rough guide. (Printz Decl. ¶22 (**Ex. 2**).

“He used Liquetex acrylic paints, which. . .mixed with water and dried quickly, and. . .had a flat, even consistency and an industrial appearance. With the half-tone to guide him, he could work quickly, as he liked to, laying in unmodulated applications of the acrylic paint. . .” (Printz Decl. ¶22 (**Ex. 2**).

21. Warhol often used exotic or unnaturally colored paints. (Crow Expert Report at 20 (**Ex. 5**).

22. The 1989 MoMA catalogue included a description of Warhol's techniques, by reference to how Warhol's Marilyn Monroe images were created, by the British curator and author Marco Livingstone:

A pencil tracing was taken from the full sized [transparent] acetate prepared for the photographic screen. Either by transferring the penciled line by pressing onto the front of the acetate or sheet of paper, or by placing a sheet of carbon paper beneath the tracing and then drawing the line one section at a time, a rough guide was established for each color area, for example, the lips and the eyelids. The colors were then brushed on by hand, often with the use of masking tape to create a clean junction between them, with the eventual imposition of the black screened image also serving to obscure any unevenness in the line. The acetates were examined by Warhol before they were made into screens, so that he could indicate by means of instructions, written and drawn with china-marking crayon, any changes to be made: for example, to increase the tonal contrast by removing areas of half-tone, thereby flattening the image. The position of the image would be established by taping the four corners of the acetate to the canvas and then tearing off the tape along the corner edges of the acetate; the fragments of tape remaining on the canvas would serve as a guide in locating the screen on top. The



position of the screen would be confirmed by eye, and it would then be printed.

(Crow Expert Report at 11 (**Ex. 5**) (citing Marco Livingstone, “Do It Yourself: Notes on Warhol’s Technique,” in Kynaston McShine ed., *Andy Warhol: A Retrospective* (New York: Museum of Modern Art, 1989), 72).)

23. Although he is famous for having stated, “I want to be a machine,” every Warhol painting is, in fact, a nuanced calibration between repetition and difference, mechanical means and personal touch. (Printz Decl. ¶21 (**Ex. 2**).)

24. Warhol used his signature silkscreen painting technique to explore themes that observers have universally perceived in his work: the reproduction of popular or everyday images in a manner that commoditizes and depersonalizes the underlying subject. (Crow Expert Report at 10–11 (**Ex. 5**).)

25. According to Printz, Warhol’s celebrity portraits “were not portraits in the traditional sense: they did not attempt to capture the way a sitter really looked or to reveal his or her inner character.” (Printz Decl. ¶13 (**Ex. 2**).) Rather, “[t]he photographs that Warhol selected” as the reference for his celebrity portraits “were, in fact, already images.” (*Id.*) For example, “[l]ike a soup can, Marilyn Monroe’s face in the studio still he selected for his paintings. . . was already a commodity; and like a dollar bill, her face already functioned as a sign.” (*Id.*)

26. According to Printz, Warhol’s celebrity portraits took an existing image, such as a headshot of Marilyn Monroe, and “distilled its most referential attributes, so that the subject (Marilyn Monroe) and

the medium (photography) remained identifiable, but only as trace.” (Printz Decl. ¶13 (**Ex. 2**.) “Warhol’s work is visibly a portrait of Marilyn Monroe, but his real subject is not the private person but the public image, a ‘persona’ named ‘Marilyn.’” (*Id.* ¶14.)

27. According to Dr. Thomas Crow, a renowned art historian, teacher, and scholar of Warhol and his work, the strategic cropping of images to a discrete portion—often a symbolic body part—transformed the person into a symbol. (Crow Expert Report at 10–11 (**Ex. 5**.)

28. In Warhol’s portraits of the boxer Muhammed Ali, Warhol started with an underlying Polaroid photograph that he had taken of Ali. (Printz Decl. ¶31 (**Ex. 2**.) Warhol focused on the most recognizable and symbolic emblem of Ali’s celebrity: his fist. (*Id.* ¶32.) According to Printz, “[i]n the end, the portrait depicted the most recognizable and symbolic emblem of Ali’s celebrity—his fist—making the finished work a portrait of an icon, not a man.” (*Id.*)

29. Dr. Crow testified that Warhol’s “celebrity portraits are much less, if at all, about the figure he represents” but instead “about the way that their images work on the spectator in advance of the spectator and counting Warhol’s particular transformation of those public images.” (Deposition Transcript of Dr. Thomas Crow 52:1–54:13 (**Ex. 6**.) “They are about the way that people who become celebrities and circulate via their images among people and for people who never encountered them personally function as masks, function in terms of a cultural language rather than the actual individual in any kind of depth. That’s why they flatten out. That’s

why they are, in fact, very reduced and simplified in their mode of representation or where they encode the face.” (*Id.*)

30. Printz explains that, in this respect, Warhol’s celebrity portraits were not about the individual celebrity, but how the public idolizes and consumes branded images. (Printz Decl. ¶15 (**Ex. 2**)). His portraits comment on the cultural phenomenon embodied by the “publicity machine,” a powerful engine that packages and disseminates commoditized images of intense identification and desire. (*Id.*)

31. Dr. Crow opines that “[a] Warhol painting is thus far from any unreflective replica of a photographic source, but rather the outcome of a complicated, highly considered interplay of disparate elements.” (Crow Expert Report at 11–12 (**Ex. 5**)).

32. Dr. Crow further states that “the significant character and artistic value” of Warhol’s celebrity portraits “inheres in the extent and character” of the transformation that results from his alterations and additions. (Crow Expert Report at 3 (**Ex. 5**)).

33. Critics, historians, and lay observers have adopted this understanding of Warhol’s artistic process and the significance of his artistic choices. For example, a 1989 essay by Benjamin Buchloh, an art historian then on the faculty of M.I.T. and now at Harvard, discusses Warhol’s selection of celebrity images as a consumer of such images: “Although Warhol constructed images of Marilyn Monroe, Liz Taylor, and Elvis Presley in the tragicomical conditions of their glamour, the paintings’ lasting fascination does not derive from the continuing myth of these figures but from the fact that Warhol constructed their image from the perspective of the

tragic condition of those who consume the stars' images. . . ." (Crow Expert Report at 6 (citation omitted) (**Ex. 5**.)

34. Similarly, in 2002, curator Heiner Bastian argued that Warhol's celebrity portraits contain an "aura of utterly affirmative idolization [that] already stands as a stereotype of a 'consumer-goods style' expression of an American way of life and of the mass-media culture of a nation." (Crow Expert Report at 8 (citation omitted) (**Ex. 5**.)

35. By this time, the consensus among specialists was that Warhol's celebrity portraits "entail a[n] apprehension of major characteristics of recent consumer society and the way it works in people's subjective imagination." (Crow Dep. Tr. 64:18–65:23 (**Ex. 6**.)

36. Members of the general public routinely respond to Warhol's work with the emotion and recognition of the deeper implications of his work articulated by Crow, Buchloh, Bastian, and other figures in the art world. (Crow Dep. Tr. 88:10–91:8 (**Ex. 6**.)

## **II. LYNN GOLDSMITH IS A ROCK-AND-ROLL PHOTOGRAPHER.**

37. "One of the most expressive chroniclers of the rock 'n' roll era," Goldsmith "has captured some of the finest rock, jazz, and R&B performers of our time in brilliant, often surprising images that reveal a great deal about her subject." (Lynn Goldsmith, *PhotoDiary*, About the Book (**Ex. 7**.)

38. Among many others, Goldsmith has photographed Bruce Springsteen, Michael Jackson, Patti Smith, Bob Dylan, and Tom Petty. (Goldsmith

Counterclaim ¶9 (Dkt. 20) (**Ex. 8**); Morrison Hotel Gallery: Lynn Goldsmith (**Ex. 9**.)

39. Goldsmith “proudly proclaim[s], ‘Yes, I am a rock and roll photographer.’” (LG- 151 (**Ex. 10**)).

40. She “has been capturing music legends since the early 1970’s.” (Analogue Gallery, Lynn Goldsmith Book Signing: Friday, May 23rd (**Ex. 11**)).

41. Goldsmith’s philosophy about making photographs “revolve[s] around helping others formulate their identities.” (LG-151 (**Ex. 10**)).

42. Where her “subjects want[] or need[] to be seen in a certain way,” she views it as her job “to project that face to the world.” (Deposition Transcript of Lynn Goldsmith 7:23–8:3, 20:12–21:13 (**Ex. 12**)).

43. Goldsmith aims in her photographs to capture and reveal something about her subject’s human identity. (Goldsmith Dep. Tr. 62:17–23, 244:18–245:2 (**Ex. 12**)).

44. In order to accomplish these goals, Goldsmith undertakes to create conditions that will encourage her subjects to display their inner selves. For example, in advance of a photo shoot, she not only listens to her subjects’ music, but she listens to music that was popular when her subjects were in their formative teenage years. “[T]hat really genuinely [a]ffects them” and taps into “an innocence and openness that we have from our childhood.” (Goldsmith Dep. Tr. 9:9–23, 13:17–15:3, 24:9–19 (**Ex. 12**)).

45. Goldsmith believes this enables her to connect with her subjects. (Goldsmith Dep. Tr. 14:21–15:3 (**Ex. 12**)).

46. Goldsmith also endeavors to establish a rapport and put her subjects at ease when they arrive in her studio. Getting subjects comfortable is “the main thing first.” (Goldsmith Dep. Tr. 95:21–22 (**Ex. 12**).)

47. In order for Goldsmith to make the kind of photographs she desires to make, her subject “has got to have a good time. . . . You are just trying to establish rapport and mutual respect and connection.” (Goldsmith Dep. Tr. 97:6–18 (**Ex. 12**).)

48. Among other things, “at the very beginning, when [Goldsmith is] just forming a relationship, [she] like[s] to put makeup on people because. . .it connects [her and the subject] physically.” Indeed, “sometimes [the makeup] is not that necessary and then [she] wipe[s] it off. It’s more about the relationship of [Goldsmith] talking and touching at the same time.” (Goldsmith Dep. Tr. 91:22–92:8 (**Ex. 12**).)

49. Goldsmith also suggests clothing or other accessories for her subjects to wear for the shoot. (Goldsmith Dep. Tr. 45:20–46:7 (**Ex. 12**).)

50. Gestures like these “make[ her subjects] feel like [she] care[s] about” them. (Goldsmith Dep. Tr. 45:20–46:7 (**Ex. 12**).)

51. For example, Goldsmith might employ this tactic when photographing a drummer, because “[d]rummers are always like in the background, you know, so it makes him feel like [she] care[s] about him and he is not left out because he is the drummer and not the lead singer. It’s the psychology of connecting with people.” (Goldsmith Dep. Tr. 46:2–7 (**Ex. 12**).)

52. Goldsmith often “stand[s] in different body positions” so that she can avoid asking her subjects to

stand in uncomfortable positions. (Goldsmith Dep. Tr. 32:6–14 (**Ex. 12**).)

53. Goldsmith also endeavors throughout a shoot to “keep [her subjects] so that they are having a good time, they are entertained, they’re learning something, they enjoy the environment.” (Goldsmith Dep. Tr. 98:10–13 (**Ex. 12**).)

54. The goal of these techniques is to “get [Goldsmith’s subjects] to express their true selves in th[e] photograph[s] so [she can] portray that.” (Goldsmith Dep. Tr. 46:8–11 (**Ex. 12**).)

55. “The first thing is getting [a subject] comfortable before getting him to reveal anything.” (Goldsmith Dep. Tr. 97:6–9 (**Ex. 12**).)

56. Goldsmith testified that “[y]ou can’t have a situation where you ask a person to put themselves -- you could, but I tend to ask people to be physically comfortable, their face relaxes.” (Goldsmith Dep. Tr. 32:4–18 (**Ex. 12**).)

57. Another important aspect of Goldsmith’s photography is lighting. For example, when asked how the lighting of a particular photograph “contributed to what you were trying to project in this photograph,” Goldsmith responded, “Photography is light. I mean, I can’t even -- you know, that’s part of it.” After a brief pause, she clarified, “Not part of it. That is it.” (Goldsmith Dep. Tr. 41:1–8 (**Ex. 12**); *see also id.* 54:4–5 (“As I said, photography is about light.”), 55:13–16 (Q: “[L]ighting is just as much an object as lit candles?” A: “Photography is light.”).)

58. She positions her subjects in certain ways, sets up lights and umbrellas in certain places, and chooses the right camera for her mission. (Goldsmith

Dep. Tr. 35:9–23, 42:2–8, 53:25–54:7, 104:13–14 (**Ex. 12**.)

59. When asked why she positioned a subject “slightly offset in the photograph,” Goldsmith testified “[b]ecause of the light and the shadows, and also leaning against a wall is more comfortable than, let’s say, her not leaning against a wall.” (Goldsmith Dep. Tr. 42:2–8 (**Ex. 12**).)

60. Goldsmith’s photography is part of her effort to discover her own identity, which she can only do by imagining what life is like for the subjects of her photography. Goldsmith explained that when she photographs a subject, “I put myself in the shoes of who is in front of the camera. I mean, I feel like I’m them, like when I talked about how I want the body to be comfortable, I just have this, you are me and I am you. . . . I actually feel like I’m standing there” in the place of the subject. According to Goldsmith then, when looking at one of her photographs, one sees the subject “and his identity and his story, but through [Goldsmith’s] eyes, because [Goldsmith is] in his shoes in that moment as she [made] that photograph.” (Goldsmith Dep. Tr. 67:17–22 (**Ex. 12**).)

61. Goldsmith testified further:

Q. So there is an important element of the photography in the book that you are trying to humanize, both the subjects and yourself in what you are portraying, is that right?

A. I’m just trying to find out who I am and that journey only takes place by also trying to find out who other people are.



Q. There is a real effort to communicate the uniqueness of the people and their identities in these photographs?

A. Right. Because they're all part of me, they are all part of all of us.

Q. And when you are connecting who you are with the identity of the people in your photographs, you are trying to do that as accurately as you possibly can, as it relates to their personality?

A. I don't know about accurate. I mean, that word, I'm trying to be as empathetic.

(Goldsmith Dep. Tr. 74:18–75:14 (**Ex. 12**); *see also id.* 11:25–12:5 (“[I]n my opinion, when you are able to reach outside of yourself and be yourself, but also be in other person’s shoes, you[] not only expand your experience of yourself, but of the universe. It’s a way to feel connected to other people.”); Description of Lynn Goldsmith, *PhotoDiary* (Musicians “mirror our self-projection. My work is that reflection. On outward appearances PhotoDiary [a collection of Goldsmith’s photographs] appears to be a collection of rock celebrity photos, but it is in fact, my story.”) (**Ex. 13**).

62. Through this approach to making photographs, Goldsmith has “had the opportunity to make her passion of a quest into the nature of identity and the human spirit into her living.” (LG-142 (**Ex. 14**)); Goldsmith Dep. Tr. 7:23–8:2 (“Q. Do you agree that your photography has provided you an opportunity to make your passion of a quest into the

nature of identity in the human spirit? A. Yes, I do.”)  
(**Ex. 12**.)

63. Myra Kreiman, a long-time photography editor at Newsweek, explained, “[W]hen Lynn Goldsmith took somebody into the studio, you generally expected to get something that was -- let me find the right word. That was exceptional. That was creative. That was very well-lit, very polished and brought out a feel for the person themselves.” (Deposition Transcript of Myra Kreiman 83:14–20 (**Ex. 15**).)

64. Goldsmith has explained that her motivation for litigating this dispute is “to get every photographer, every photo organization, and photo magazine to help in the protection of that which we create.” (Lynn Goldsmith, GoFundMe (**Ex. 16**)).

65. She has expressed this sentiment in private conversations, as well. As Kreiman testified, paraphrasing Goldsmith, “the point she made to me was that she thinks it is important to stand up for copyright law, as it applies to her and as it applies to . . . the industry or to photographers in general. . . so that the people who come after [her] will also be protected.” (Kreiman Dep. Tr. 44:2–11 (**Ex. 15**)).

66. Goldsmith repeatedly has criticized the Second Circuit Court of Appeals decision in *Cariou v. Prince*, stating that “due to the latest ruling in the R[i]chard Prince case,” copyright law is “broadening” and “not changing in [photographers’] favor,” (Compl., Ex. B (**Ex. 17**); Goldsmith Dep. Tr. 328:6–329:2 (**Ex. 12**)) and that “[i]t is a crime that so many ‘artists’ can get away with” reliance on the fair use doctrine (Compl., Ex. C (**Ex. 18**)).

67. Goldsmith has asserted in reference to this case specifically that “[i]f what Warhol did [with her photograph of Price] is okay, then there might as well not be a copyright law” (Goldsmith Dep. Tr. 317:12–15 (**Ex. 12**)), and that “[t]he issue at stake in this matter concerns whether a copyright owner’s rights can be trampled on in the name of fine art. I believe there is a limit to this type of taking and that Warhol overstepped the boundaries in this situation.” (Lynn Goldsmith Facebook Post (Apr. 9, 2017) (**Ex. 19**)).

### **III. GOLDSMITH PHOTOGRAPHED PRINCE IN 1981.**

68. On December 2, 1981, Goldsmith photographed the musician Prince Rogers Nelson in concert at the Palladium in New York City. (Goldsmith Dep. Tr. 81:23–82:11, 109:21–24 (**Ex. 12**); LG-29 (**Ex. 20**)).

69. The next day, she photographed him at her studio at 241 West 36th Street in New York City. (Goldsmith Dep. Tr. 81:23–82:11, 109:21–24 (**Ex. 12**); LG-29 (**Ex. 20**)).

70. Goldsmith made the photographs on assignment for the magazine Newsweek. (Goldsmith Dep. Tr. 77:8–16 (**Ex. 12**); LG-29 (**Ex. 20**)).

71. Goldsmith says she recognized Prince as an up-and-coming star and suggested the shoot to Newsweek. (Goldsmith Dep. Tr. 77:17–79:9 (**Ex. 12**)).

72. Prior to photographing Prince, Goldsmith conducted the kind of research and other preparation discussed above at paragraphs 42–57. For example, Goldsmith listened to Prince’s music and observed him perform in concert. This impressed upon her Prince’s “capab[ility] of physically really expressing himself, carrying his body in very graceful ways” and

informed “how [Goldsmith wanted] to make a photograph of” Prince. (Goldsmith Dep. Tr. 83:12–86:7 (**Ex. 12**).

73. Similarly, when Prince arrived at her studio to be photographed, Goldsmith already had compiled “a playlist of music” that she thought would “connect” her and Prince “to get [him] to open up for [her]” “without speaking.” (Goldsmith Dep. Tr. 85:3–86:7 (**Ex. 12**)). She chose songs from “the roots of rock and roll,” including “Robert Johnson, James Brown, [and] Howling Wolf,” and arranged the sequence of songs in an order designed to manipulate Prince’s energy during the shoot. (*Id.*)

74. Goldsmith also applied makeup to Prince prior to the shoot. *See supra* ¶48. Although Prince arrived with some makeup already applied, Goldsmith suggested that he apply some lip gloss “[p]robably because [his lips] were dry and also [she] wanted him to be aware that [she] noticed that his lips were dry, that [she] care[d] about what he looks like in pictures and that [she was] looking after him.” Moreover, Goldsmith wanted to “draw attention to [Prince’s] mouth,” because “[t]he mouth is a very sensual part of a person, especially someone like [Prince],” who “is sensual.” (Goldsmith Dep. Tr. 94:9–95:12 (**Ex. 12**)).

75. Goldsmith personally applied eyeshadow to Prince’s face. (Goldsmith Dep. Tr. 91:16–19, 93:5–16 (**Ex. 12**)).

76. Goldsmith did this both to connect with Prince physically and in recognition of her “feeling [that] Prince was in touch with the female part of himself, but he is also very much male.” (Goldsmith Dep. Tr. 91:22–92:8, 93:8–93:16 (**Ex. 12**)).

77. Goldsmith's perception of Prince's being "in touch with the female and male part of himself" derived in part from "what he had on," which she described as "male" but with "a touch of female," particularly "the silver sparkle in his suspenders." (Goldsmith Dep. Tr. 93:17– 93:24 (**Ex. 12**).

78. Those clothes—including the suspenders—were Prince's own clothes that he had worn to Goldsmith's studio. (Goldsmith Dep. Tr. 89:21–90:5 (**Ex. 12**).

79. The only item of clothing visible in the photographs that Prince did not bring with him to the studio was the black sash around his neck. He chose that of his own volition when Goldsmith took him to the clothing room at her studio. (Goldsmith Dep. Tr. 89:21–91:6 (**Ex. 12**).

80. Similarly, Prince arrived with his hair (including facial hair) appearing as it does in the photographs. Goldsmith made no changes to his hair. (Goldsmith Dep. Tr. 91:7–13, 93:25–94:3 (**Ex. 12**).

81. Aside from the changes identified in paragraphs 74, 75, and 79, Goldsmith did not make any other changes to Prince's appearance. (See Goldsmith Dep. Tr. 89:21–96:3 (**Ex. 12**).

82. For her photographs of Prince, Goldsmith "wanted to light him in a way that showed his chiseled bone structure." (Goldsmith Dep. Tr. 97:3–5 (**Ex. 12**).

83. Goldsmith used a Nikon 35 millimeter camera. "Nikon lenses are important" to Goldsmith, and because of her long familiarity with them, she is "very good at making [choices] quickly" about how to make her subjects appear. (Goldsmith Dep. Tr.

106:16–108:22 (**Ex. 12**.) She testified that she chose this lens for “making portraits.” (*Id.* 108:7–10.)

84. She testified that she shot the photographs against a white background, which is the “hardest to light.” (Goldsmith Dep. Tr. 104:3 (**Ex. 12**.) Goldsmith testified that it takes “more time to light white, for me, than it does for other options, so I like to get that done before the person steps on set.” (*Id.* 104:7–9.)

85. She testified that she “might have moved an umbrella an inch or two” to alter the lighting throughout the photographs. (Goldsmith Dep. Tr. 104:13–14 (**Ex. 12**.)

86. “[G]etting [Prince] to get comfortable” was at the forefront of Goldsmith’s mind. (Goldsmith Dep. Tr. 105:8–11 (**Ex. 12**.) Goldsmith explained: “I just wanted to get him comfortable before I -- that’s the main thing first.” (*Id.* 95:20–22.) “The first thing is getting someone like him comfortable before I’m getting him to reveal anything. He has got to have a good time. . . . You are just trying to establish a rapport and mutual respect and connection.” (*Id.* 97:6–17.)

87. Notwithstanding these efforts, Prince remained “really uncomfortable.” (Goldsmith Dep. Tr. 98:22–23 (**Ex. 12**.)

88. Shortly after the shoot began, Prince “very quietly and nicely said, I need to go back in the makeup room. . . and he went back in there.” After 20 minutes, Goldsmith “knock[ed] on the door and there [was] no answer, and [Goldsmith] said, I know you’re in there because there is no door out of there, so [she] said, are you there,” and Prince responded “just a few minutes.” After another five minutes, Goldsmith let

herself into the makeup room, where Prince was “sitting on a corner of the couch.” Prince would not look at Goldsmith and would not respond to her. After several more attempts to engage him, Goldsmith said, “I’m going to leave the room and what I’m going to do is wait on the other side of the wall. If you want to just leave, you can do that.” After that, Prince “disappeared.” (Goldsmith Dep. Tr. 97:22–100:14 (**Ex. 12**).)

89. Goldsmith made at least 11 photographs of Prince during the December 3, 1981 shoot in her studio. (LG-160 to -170 (**Exs. 21– 31**).)

90. The photographs of Prince from this shoot, according to Goldsmith, show that he “is not a comfortable person” and that he “is a really vulnerable human being.” (Goldsmith Dep. Tr. 101:20–22 (**Ex. 12**).)

91. According to Goldsmith, the photographs convey “someone who could be so expressive and really was willing to bust through what must be their own immense fears to make the work that they wanted to do, which kind of required a different part of themselves, but at the heart of it all, they’re frightened.” (Goldsmith Dep. Tr. 105:15–106:4 (**Ex. 12**).) She testified that “he was so fragile.” (*Id.* 100:2–3.)

92. The figure of Prince as frightened and vulnerable is what Goldsmith sees in the photographs. The photographs make Goldsmith “really sad”—so much so that she does not “even like looking at” them. (Goldsmith Dep. Tr. 105:15–106:7 (**Ex. 12**).)

93. And although the aim of her photography is to portray her subjects’ “identity and [their] story, but

through [Goldsmith's] eyes," (Goldsmith Dep. Tr. 67:17–22 (**Ex. 12**)), she has mixed feelings about the success of the Prince photographs in achieving that purpose:

Q. Do you think we can see sort of your story and your empathy when looking at the photographs that captures that?

A. In some ways, I hope so, but in other ways, I really hope nobody does.

(*Id.* 106:11–15.)

94. A few weeks after Goldsmith's concert and studio shoots with Prince, Newsweek published a photograph from the December 2, 1981 concert shoot. (Newsweek-1 (**Ex. 32**).)

95. Newsweek did not publish any of the photographs from Goldsmith's December 3, 1981 shoot at her studio. (Goldsmith Dep. Tr. 164:11–165:6 (**Ex. 12**).)

96. Goldsmith is not the only photographer to have photographed Prince staring directly at a camera. The following photographs of Prince staring directly at the camera are attributed as having been taken by Allen Beaulieu and Paul Nitkin, as noted below



JA-396



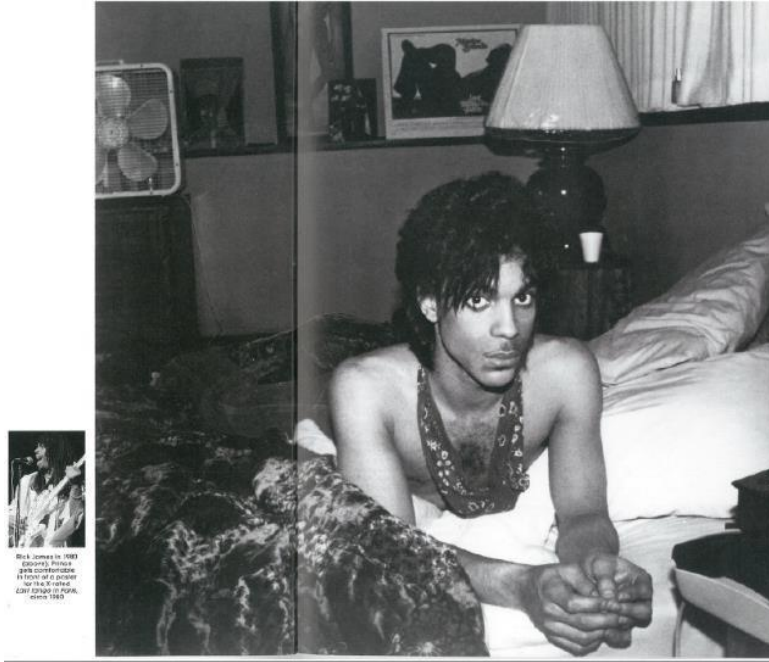
*Photograph by Allen Beaulieu*

JA-397



*Photograph by Allen Beaulieu*

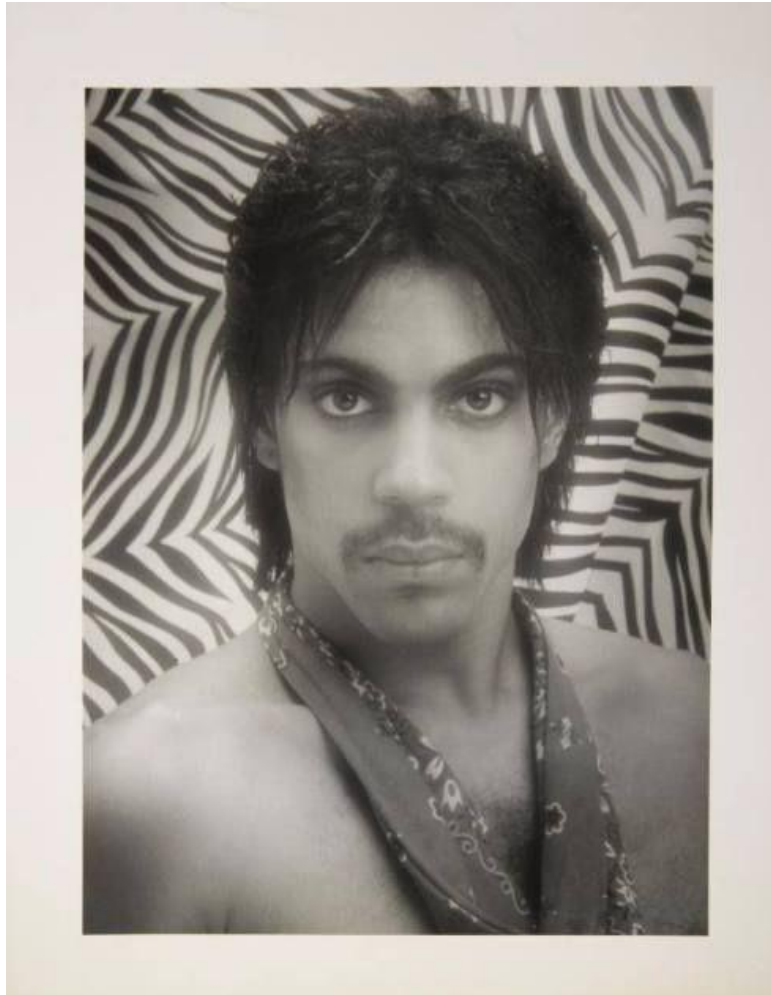
JA-398



Black & white in 1983  
Prince's Prince  
with contemporary  
in front of a picture  
of the artist  
and Prince in 1983

*Photograph by Paul Nitkin*

JA-399



*Photograph by Allen Beaulieu*

JA-400



*Photograph by Allen Beaulieu*

(Photographs by Allen Beaulieu (**Ex. 33**); Photograph  
by Paul Nitkin (**Ex. 34**).)

**IV. VANITY FAIR LICENSED ONE OF GOLDSMITH'S  
PHOTOGRAPHS IN 1984 FOR "USE AS AN ARTIST  
REFERENCE."**

97. In 1984, *Vanity Fair* licensed one of Goldsmith's photographs from her December 3, 1981 photoshoot of Prince for \$400. (Goldsmith Counterclaim ¶¶20–21 (Dkt. 20) (**Ex. 8**); LGI Invoice to *Vanity Fair* (**Ex. 35**).)

98. An approval form, dated September 25, 1984, sent on behalf of Lynn Goldsmith to Esin Goknar at *Vanity Fair* states as follows

11" X 14" B&W STUDIO PORTRAIT  
OF PRINCE BY © 1981  
LYNN GOLDSMITH FOR POSSIBLE  
USE AS AN ARTIST REFERENCE

(LG-64 (**Ex. 36**).)

99. Neither Andy Warhol nor The Andy Warhol Foundation for the Visual Arts, Inc. is mentioned in this approval form. (LG-64 (**Ex. 36**).)

100. The invoice reflecting the license to *Vanity Fair*, dated October 29, 1984, states:

FEE FOR THE USE OF ONE PHOTOGRAPH OF  
PRINCE, COPYRIGHT 1981 LYNN GOLDSMITH  
FOR USE AS ARTIST REFERENCE FOR AN  
ILLUSTRATION TO BE PUBLISHED IN VANITY  
FAIR NOVEMBER 1984 ISSUE. IT CAN APPEAR  
ONE TIME FULL PAGE AND ONE TIME UNDER  
ONE QUARTER PAGE.

NO OTHER USAGE RIGHT GRANTED.

(LGI Invoice to *Vanity Fair* (**Ex. 35**).)

101. The October 29, 1984 invoice does not state whether the licensed photo was in color or in black and white. It does not state the dimensions of the licensed photograph. (LGI Invoice to *Vanity Fair* (**Ex. 35**).)

102. Neither Andy Warhol nor The Andy Warhol Foundation for the Visual Arts, Inc. is mentioned on the October 29, 1984 invoice, as a party to the license agreement or otherwise. (LGI Invoice to *Vanity Fair* (**Ex. 35**).)

103. When Goldsmith initially contacted The Andy Warhol Foundation in July 2016, she claimed that Warhol infringed an almost full-body, color photograph of Prince. (LG-4 (**Ex. 37**); *see also* Goldsmith Dep. Tr. 123:19–124:18 (**Ex. 12**).):



104. Goldsmith subsequently has asserted that the photograph that she alleges Warhol infringed was a bust-only black and white photograph (the “Prince Photograph”) (LG-7 (**Ex. 38**)):



105. It is not known which photograph Goldsmith licensed to *Vanity Fair*. No specific photograph is identified in the September 25, 1984 approval form or in the October 29, 1984 invoice. (LG-64 (**Ex. 36**); LGI Invoice to *Vanity Fair* (**Ex. 35**)). Goldsmith herself testified that she does not know which of her photographs was provided to *Vanity Fair* in relation to this license. (Goldsmith Dep. Tr. 119:4–7 (**Ex. 12**)).

106. Goldsmith does not know which photograph of Prince was provided to *Vanity Fair*, because she



had no personal involvement “in selecting. . .a photo of Prince that was sent to *Vanity Fair*.” (Goldsmith Dep. Tr. 113:25–114:7 (**Ex. 12**).)

107. Only her staff was involved in selecting the photograph that was sent to *Vanity Fair*. (Goldsmith Dep. Tr. 115:10–117:15, 119:4–11 (**Ex. 12**).)

108. Goldsmith “ha[s] no personal knowledge of what happened in 1984 with respect to the photograph that was sent.” (Goldsmith Dep. Tr. 120:13–18 (**Ex. 12**).)

109. Goldsmith asserts that she never looked at the November 1984 issue of *Vanity Fair* to see whether and how her photograph had been used. (Goldsmith Counterclaim ¶27 (Dkt. 20) (**Ex. 8**).)

110. Goldsmith testified that she did not know that she had licensed a photograph of Prince to *Vanity Fair* until recently. (Goldsmith Dep. Tr. 120:21–25 (**Ex. 12**).)

111. Goldsmith has stated that she did not know that Warhol created the Prince Series until after Prince died in April 2016. (Goldsmith Dep. Tr. 127:5–13 (**Ex. 12**); Lynn Goldsmith Facebook Post (Apr. 9, 2017) (**Ex. 19**).)

**V. ANDY WARHOL CREATED 16 WORKS OF ART USING THE GOLDSMITH PHOTOGRAPH AS A REFERENCE, AND VANITY FAIR PUBLISHED AN IMAGE OF ONE OF THE WORKS.**

112. Referring to one of the photographs from the December 3, 1981 photoshoot at Goldsmith’s studio, Andy Warhol created 12 paintings, two screen prints on paper, and two drawings (the “Prince Series”) depicting an image of Prince’s head. (AWF-1992 to -

JA-405

2007 (Exs. 39 – 54); Pl.'s Response to Request for Admission 4 (Ex. 55).)

**AWF-2001 (Ex. 48)**

Andy Warhol, Prince,  
1984, acrylic and  
silkscreen ink on linen,  
20 x 16 inches



**AWF-1992 (Ex. 39)**

Andy Warhol, Prince,  
1984, acrylic and  
silkscreen ink on linen, 20  
x 16 inches



JA-406

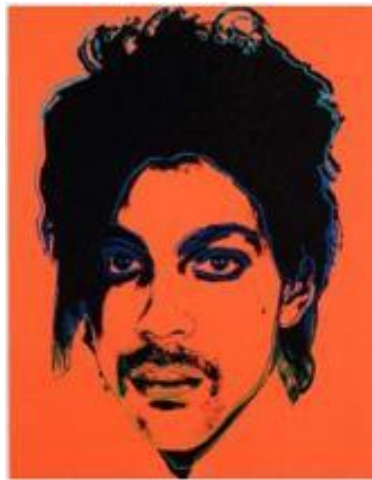
**AWF-2002 (Ex. 49)**

Andy Warhol, Prince,  
1984, acrylic and  
silkscreen ink on linen,  
20 x 16 inches



**AWF-1994 (Ex. 41)**

Andy Warhol, Prince,  
1984, acrylic and  
silkscreen ink on linen,  
20 x 16 inches



JA-407

**AWF-1993 (Ex. 40)**

Andy Warhol, Prince,  
1984, acrylic and  
silkscreen ink on  
linen, 20 x 16 inches



**AWF-1995 (Ex. 42)**

Andy Warhol, Prince,  
1984, acrylic and  
silkscreen ink on linen,  
20 x 16 inches



JA-408

**AWF-2003 (Ex. 50)**

Andy Warhol, Prince,  
1984, acrylic and  
silkscreen ink on linen,  
20 x 16 inches



**AWF-1997 (Ex. 44)**

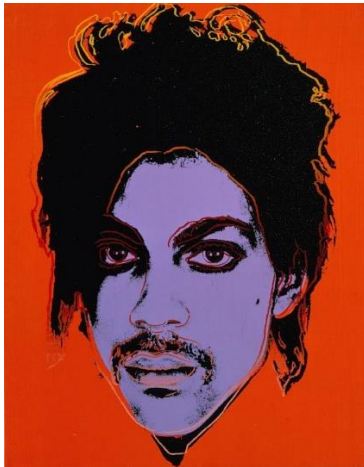
Andy Warhol, Prince,  
1984, acrylic and  
silkscreen ink on linen,  
20 x 16 inches



JA-409

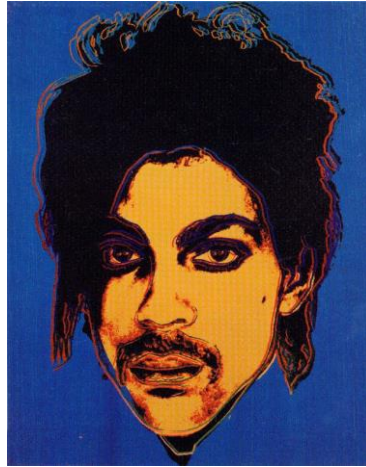
**AWF-1996 (Ex. 43)**

Andy Warhol, Prince,  
1984, acrylic and  
silkscreen ink on linen, 20  
x 16 inches



**AWF-1999 (Ex. 46)**

Andy Warhol, Prince,  
1984, acrylic and  
silkscreen ink on linen,  
20 x 16 inches



JA-410

**AWF-1998 (Ex. 45)**

Andy Warhol, Prince,  
1984, acrylic and  
silkscreen ink on  
linen, 20 x 16 inches



**AWF-2000 (Ex. 47)**

Andy Warhol, Prince,  
1984, acrylic and  
silkscreen ink on  
linen, 20 x 16 inches



JA-411

**AWF-2004 (Ex. 51)**

Andy Warhol, Prince,  
1984, graphite on  
HMP paper, 31.7 x  
23.7 inches



**AWF-2005 (Ex. 52)**

Andy Warhol, Prince,  
1984, graphite on  
HMP paper, 31.7 x  
23.7 inches





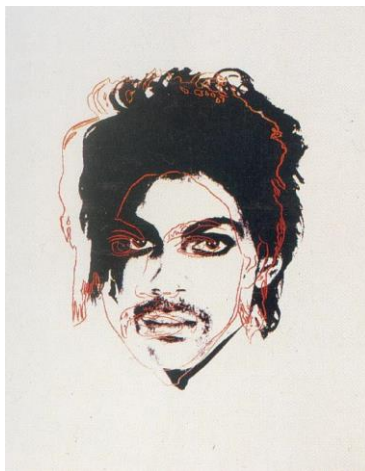
**AWF-2006 (Ex. 53)**

Andy Warhol, Prince,  
1984, unpublished  
screenprint on Moulin  
du Verger paper, 30 x  
21 3/4 inches



**AWF-2007 (Ex. 54)**

Andy Warhol, Prince,  
1984, unpublished  
screenprint on Moulin  
du Verger paper, 30 x  
21 3/4 inches



113. In the Prince Series, Warhol appears to have cropped and resized the image of Prince from Goldsmith's photograph to remove everything but Prince's head. (AWF-1992 to -2007 (**Exs. 39 – 54**); Crow Expert Report at 17 (**Ex. 5**); Crow Dep. Tr. 102:3–24 (**Ex. 6**).)

114. In doing so, Warhol removed all elements of the Goldsmith photograph aside from the outline of the features of Prince's head and, in one drawing, his shirt and suspenders. (AWF-1992 to -2007 (**Exs. 39 – 54**); Crow Expert Report at 20–21 (**Ex. 5**); Crow Dep. Tr. 102:3–24, 187:24–188:14, 201:20–202:10 (**Ex. 6**).)

115. Goldsmith testified that the Prince Series works retain only “the outline of [Prince's] face, his

face, his hair, his features, [and] where his neck is” from the photograph Goldsmith took during the December 3, 1981 shoot. (Goldsmith Dep. Tr. 157:24–158:9 (**Ex. 12**).)

116. As Printz explains, the cropping of the underlying image in the Prince Series caused “the head [to] become[] disembodied, separated from the support of the neck and shoulders, as if magically suspended in space, and filling the composition in [the] painting.” (Printz Decl. ¶33 (**Ex. 2**).)

117. According to Printz, Warhol’s cropping also “draws the lower part of the face down to a narrow point, on which the isolated head as a whole seems to balance itself.” (Crow Expert Report at 17 (**Ex. 5**).)

118. Warhol had a printer create an enlarged, high-contrast, half-tone silk-screen reproduction of the photograph. (Printz Decl. ¶34 (**Ex. 2**).)

119. Dr. Crow explained that the high-contrast half-tone, by “draining the inner tone and texture out of what was left” after the cropping, removed almost all the light and shading that were present in the photograph and had “the effect of isolating and exaggerating only the darkest details: the hair, moustache, eyes, and brows.” (Crow Expert Report at 17 (**Ex. 5**).)

120. Dr. Crow opined that “[o]ne conspicuous effect of these changes was to make the subject appear to face fully towards the front as a detachable mask, negating the more natural, angled position of the figure in the source photograph.” (Crow Expert Report at 17 (**Ex. 5**).)

121. Dr. Crow further stated that unlike in Goldsmith’s photo, where “the forehead of Prince

obviously recedes under the crown of hair[, a]nd the crown of hair projects over it, [reflecting] a sort of natural shape of the skull,” the high-contrast half-tone leaves “the hair and the forehead” in “the same flat [plane],” “differentiated [only] by color.” (Crow Dep. Tr. 187:24–188:14, 201:20–202:10 (**Ex. 6**.)

122. According to Dr. Crow, this “goes along with the transformation of Prince into this mask-like simulacrum of his actual existence.” (Crow Dep. Tr. 187:24–188:14, 201:20–202:10 (**Ex. 6**.)

123. Similarly, in the Prince Series, “[e]ven the slight shadow that you see around the bottom of the chin as a whole, which is important for seeing the way it projects and what shape it is, Warhol has taken that out too.” (Crow Dep. Tr. 187:24–188:14, 201:20–202:10 (**Ex. 6**.)

124. According to Dr. Crow, this likewise contributes to “creat[ing] this sort of flat emblem that stands in for Prince without being a naturalistic equivalent to the appearance of his head.” (Crow Dep. Tr. 187:24–188:14, 201:20–202:10 (**Ex. 6**.)

125. Although Dr. Crow’s expert report focused on the color photograph of Prince that Goldsmith initially identified as the basis for her claim, he testified that “having learned. . .that Ms. Goldsmith was claiming infringement of her black and white headshot photo” changed “nothing” with respect to his opinion and analysis. (Crow Dep. Tr. 94:12–19 (**Ex. 6**.)

126. Warhol created the paintings in the Prince Series in multiple layers, including a layer using the silk-screen reproduction of the photograph, a layer he painted by hand, and, in some, layers using additional screens created based on Warhol’s own freehand

drawing of the photograph. (Crow Expert Report at 15–18 (**Ex. 5**).)

127. The “second screen” used in some of the paintings in the Prince Series, “which was created from Warhol’s freehand lines drawn around and over the photographically derived layer beneath,” provide the features with “vibrancy and definition.” (Crow Expert Report at 18 (**Ex. 5**).)

128. Printz stated that “[p]rinted slightly off register from the half-tone impression, the line screen highlights the face; it has the effect of lip or eye liner, emphasizing the features and enhancing their impact. Moreover, the line screens were printed not only in different colors but in multi-colored inks so that the line gradually changes color from top to bottom. In two paintings, Warhol heightened the optical dynamic by superimposing two line-screen impressions over the half-tone.” (Printz Decl. ¶40 (**Ex. 2**).)

129. Dr. Crow opined that “[t]hese lines represent Warhol’s own free invention, by means of which he made a point of diverging from the given facts of the photographic impression to provide his portrayal of Prince with a confrontational presence and intensity absent in his source.” (Crow Expert Report at 18 (**Ex. 5**).)

130. Dr. Crow testified that “bringing everything towards the surface into a much more unified pla[ne] or block of black pigment emphasized by various colors both underlying and overlaying” was “directed towards” creating a “confrontational” image. (Crow Dep. Tr. 204:21–205:10 (**Ex. 6**).)

131. Dr. Crow testified that, by “bringing all the features of Prince up to the surface across the same

pla[ne], so he's occupying a kind of barrier between you as a viewer and whatever his inner life might be," Warhol's painting transforms Goldsmith's "retiring" image of Prince into one of "Prince confronting you as his admirer, his fan, a curious onlooker with a kind of uncompromising implacable character which is not present in the Goldsmith." (Crow Dep. Tr. 204:21-24, 207:13-208:2 (**Ex. 6**).

132. In the Prince Series, Warhol applied exotic, unnatural colors of paint to the canvas, such as green, pink, and red. (AWF-1992 to -2007 (**Exs. 39 - 54**).

133. In some of the works in the Prince Series, the colors correspond to the features of Prince's face and head, and in others they do not. (AWF-1992 to -2007 (**Exs. 39 - 54**).

134. Several of the works in the Prince Series have multiple colors applied near Prince's facial features. (AWF-1996 (**Ex. 43**); AWF-1999 (**Ex. 46**); AWF-2000 (**Ex. 47**); AWF-2001 (**Ex. 48**).

135. Several of the works in the Prince Series have multiple colors placed in deliberate disregard of the facial features. (AWF-1992 (**Ex. 39**); AWF-1993 (**Ex. 40**); AWF-1997 (**Ex. 44**); AWR-1998 (**Ex. 45**).

136. Some of the works in the Prince Series have a single flat color behind Prince's face. (AWF-1994 (**Ex. 41**); AWF-1995 (**Ex. 42**); AWF-2002 (**Ex. 49**); AWF-2003 (**Ex. 50**); AWF-2004 (**Ex. 51**); AWF-2005 (**Ex. 52**); AWF-2006 (**Ex. 53**); AWF-2007 (**Ex. 54**).

137. Warhol also explored varying renditions of the screens in the Prince Series. Certain works in the Prince Series show only the hand-drawn outline of Prince's face. (AWF-1993 (**Ex. 40**); AWF-1995 (**Ex.**

42); AWF-1998 (**Ex. 45**) ; AWF-2004 (**Ex. 51**); AWF-2005 (**Ex. 52**.)

138. Other works in the Prince Series use both the high-contrast and hand-drawn screens layered over one another in different colors and to differing effects. (AWF-1992 (**Ex. 39**); AWF-1994 (**Ex. 41**); AWF-1996 (**Ex. 43**); AWF-1997 (**Ex. 44**); AWF-1999 (**Ex. 46**); AWF-2000 (**Ex. 47**); AWF-2001 (**Ex. 48**); AWF-2002 (**Ex. 49**); AWF-2003 (**Ex. 50**); AWF-2006 (**Ex. 53**); AWF-2007 (**Ex. 54**.)

139. Warhol created two line drawings by hand in pencil, one of the outline of Prince's head and one of the outline of Prince's head and suspenders (AWF-2004 (**Ex. 51**); AWF-2005 (**Ex. 52**)).

140. Printz explains that these line drawings imbue the subject with a particularly eerie, empty, and inhuman effect. (Printz Decl. ¶38 (**Ex. 2**.)

141. Dr. Crow opined that, beyond the composition of the Prince Series works, the use of a photograph from "1981, when Prince had just broken through to widespread recognition" but "remained far from the celebrity" he had attained by 1984, echoes Warhol's use of a 1953 photograph of Marilyn Monroe for his *Marilyn* works in the 1960s: "The fame that is Warhol's subject in the Prince portraits was thus of a different magnitude than Prince would have been experiencing three years before, as the Marilyn Monroe mourned and remembered in 1962 had been far from the ingénue captured by photographer Gene Kornman in 1953." (Crow Expert Report at 17 (**Ex. 5**.)

142. Dr. Crow testified that the "larger than life character" Prince had become by 1984 "definitely was not carried in those early photographs of '81,

and. . . Warhol saw that, at least he responded by creating an image of Prince as a kind of icon or totem of something rather than just being the actual human being that made the music.” (Crow Dep. Tr. 211:8–212:5 (**Ex. 6**.)

143. Dr. Crow opined that the Prince Series works also parallel the *Marilyn* works in that “Prince was,” like Monroe, “a distant figure known to Warhol only via publicity images and his charismatic appearance on the cinema screen.” (Crow Expert Report at 16 (**Ex. 5**); *see also* Printz Decl. ¶33 (**Ex. 2**.)

144. *Vanity Fair* ultimately published AWF-1996 (**Ex. 43**) alongside an article titled “Purple Fame,” attributed to Tristan Vox. The article discussed Prince’s surging and omnipresent popularity, asserting that “escape from Prince is no longer possible.” (*Vanity Fair* (Nov. 1984) at 66 (**Ex. 56**.)

145. The magazine attributes the artwork accompanying the photograph to Warhol and credits Goldsmith for a copyright only in the photograph. (*Vanity Fair* (Nov. 1984) at 66, 121 (**Ex. 56**.)

146. Dr. Crow opined that the juxtaposition of a Warhol portrait next to an article titled “Purple Fame” and discussing a celebrity’s ubiquity is especially apt given that “Warhol was known, more than any other artist, to have made fame his defining subject.” (Crow Expert Report at 15 (**Ex. 5**.)

147. Dr. Crow opined that the cumulative impact of Warhol’s visual alterations in transforming Goldsmith’s photograph into the Prince Series works was to create portraits that “are materially distinct in their meaning and message. Unlike Goldsmith’s focus on the individual subjects’ unique human identity,” her personal journey in life, and her

emotional connection with her subjects, “Warhol’s portraits of Prince, as with his celebrity portraits generally, sought to use the flattened, cropped, exotically colored, and unnatural depiction of Prince’s disembodied head to communicate a message about the impact of celebrity and defining the contemporary conditions of life. This approach transforms the character, message, and historic and artistic value of Warhol’s portrait of Prince compared to Goldsmith’s photograph.” (Crow Expert Report at 20 (citation omitted) (**Ex. 5**).

**VI. WARHOL’S PRINCE SERIES WORKS WERE SOLD, LICENSED, AND EXHIBITED PUBLICLY FOR 32 YEARS BEFORE GOLDSMITH CONTENDED THAT THEY INFRINGE THE COPYRIGHT IN HER PHOTOGRAPH OF PRINCE.**

148. After Warhol died in 1987, The Andy Warhol Foundation for the Visual Arts, Inc. eventually obtained ownership of the Prince Series from Warhol’s estate. (Deposition Transcript of KC Maurer 17:22–18:14 (**Ex. 57**).

149. Since that time, the works from the Prince Series have been sold or auctioned more than two dozen times. Between 1993 and 2004, the Warhol Foundation sold 12 of the Prince Series works, as summarized below.

\* \* \*

150. The Warhol Foundation transferred custody of the remaining four works—AWF-1996 (**Ex. 43**), AWF-1999 (**Ex. 46**), AWF-2002 (**Ex. 49**), and AWF-2003 (**Ex. 50**)—to the Andy Warhol Museum in Pittsburgh, Pennsylvania. (Pl.’s Response to Request to Admit 18 (**Ex. 55**).



151. In addition to the Warhol Foundation's sales, Prince Series works have been offered at auction at least 13 times since 1999, as summarized below:

\* \* \*

152. In addition to these public auctions and private sales, the Prince Series works have been displayed in museums, galleries, books, magazines, promotional materials, and other public locations more than 30 times since the November 1984 issue of *Vanity Fair*, as summarized below:

\* \* \*

153. Neither Goldsmith nor her company enforced compliance with the terms of the 1984 license she gave to *Vanity Fair* nor monitored for any use or derivative use of the photograph of Prince that was the subject of that license. Goldsmith explained in a 2017 Facebook post that "It was not until Prince died and I saw on Instagram an image that looked so much like mine that I goggled [*sic*] it and discovered not only the *Vanity Fair* 1984 article with the image, but numerous additional versions of the illustration all by Warhol. I had not known up to that moment that Warhol was the artist who *Vanity Fair* had given it to for a reference for the illustration that he would create for their article. . . . I also did not know until further research into all this that Warhol and/or The Warhol Foundation had in addition to making paintings and screen prints, licensed the use of the illustrations to others, all without my knowledge or consent." (Lynn Goldsmith Facebook Post (Apr. 9, 2017) (**Ex. 19**).)

**VII. THE MARKET FOR WARHOL'S PRINCE SERIES WORKS DIFFERS MATERIALLY FROM THE MARKET FOR GOLDSMITH'S PRINCE PHOTOGRAPH.**

**A.** The Economics Of The Warhol Market Differ From The Economics Of The Goldsmith Market.

**1. Price Points Generally**

154. Warhol's artistic achievements, historical and cultural significance, and outsize popularity have contributed to making him "a blue chip artist." (Paulson Expert Report at 8 (**Ex. 1**).)

155. Others have described Warhol and his art in similar terms:

- Warhol is the "most powerful contemporary art brand in existence," and "[n]o museum gallery on the planet could consider itself representative of Contemporary Art without a Warhol somewhere on its walls." (Paulson Expert Report at 8 (quoting Duncan Ballantyne-Way, *The Long-Lost Art of Andy Warhol and its Ever-Growing Market*, *fineartmultiple Magazine* (Jan. 2018), <https://fineartmultiple.com/blog/andy-warhol-art-market-growth/>.) (**Ex. 1**));
- "The Warhol market is considered the bellwether of post-war and contemporary art." (*Id.* (quoting *The Pop master's highs and lows*, *The Economist* (Nov. 26, 2009), <https://www.economist.com/node/14941229>));
- Warhol is an "art-world colossus," the "god of contemporary art," the "most powerful contemporary art brand in existence," the

“backbone of any auction of post-war contemporary art,” and a “global commodity.” (*Id.* (quoting Bryan Appleyard, *A One-Man Art Market*, 1843 Magazine (Nov./Dec. 2011), <https://www.1843magazine.com/content/arts/a-one-man-market>)).

156. In 2014, Warhol works collectively sold at public auction for \$653 million, representing nearly 5% of the entire global art market that year, and in 2013, a single work (*Silver Car Crash (Double Disaster)*) sold for more than \$105 million. (Paulson Expert Report at 8 (**Ex. 1**).)

157. From 2004 through 2014, Warhol auction sales exceeded \$3 billion. (Paulson Expert Report at 8 (**Ex. 1**).)

158. Since 2007, there have been seven auction sales of Warhol works of more than \$63 million per work. (Paulson Expert Report at 8 (**Ex. 1**).)

159. In late 2017, it was rumored in a leading art industry newsletter, Baer Faxe, that Warhol’s *Orange Marilyn* sold in a private transaction for \$250 million. (Paulson Expert Report at 8 (**Ex. 1**).)

160. Goldsmith’s portrait photographs similar to her 1981 photograph of Prince typically sell for between \$1,500 and \$13,250. Goldsmith’s standard pricing matrix for these photographs is:

Size	Edition #1-5	Edition #6-10	Edition #11-15	Edition #16-17	Edition #18-19	Edition #20
11 x 14	\$1700	\$2300	\$2700	\$3500	\$4200	on request
16 x 20	\$1900	\$2300	\$2700	\$3500	\$4200	on request
20 x 24	\$2500	\$2900	\$3300	\$4000	\$4800	on request
22 x 30	\$2800	\$3300	\$3900	\$4500	\$5400	on request
30 x 40	\$3100	\$3600	\$4200	\$5000	\$6000	on request
35 x 48	\$3600	\$4000	\$4500	\$5500	\$6500	on request
40 x 60	\$4250	\$4600	\$5000	\$6000	\$7000	on request
56" and larger	\$8000	\$9,000	\$10,000	\$11,000	\$12,000	on request

(LG-3 (Ex. 80).)

161. The price that Goldsmith charges depends only on (1) the size of the print and (2) how many prints of that particular photograph Goldsmith already has sold. The subject of the photograph and the popularity of the photograph do not affect the price Goldsmith charges. (Goldsmith Dep. Tr. 213:19–215:9 (**Ex. 12**).)

162. 1stdibs.com lists 41 Goldsmith works in a price range of \$1,500 to \$13,250. (1stdibs: 41 results for “lynn goldsmith” (**Ex. 81**).)

163. No Goldsmith photograph available on Artsy.net is listed at a price higher than \$2,500. (Artsy: Lynn Goldsmith (**Ex. 82**).)

**2. Price Points Of Warhol’s Prince Series Works And Goldsmith’s 1981 Studio Photograph Of Prince**

164. Since 1993, there have been at least 22 sales of the Prince Series works—12 by the Warhol Foundation and 10 at public auction. The results of the sales by The Andy Warhol Foundation are summarized below:

\* \* \*

165. The results of the sales at public auction are summarized below:

\* \* \*

166. According to Laura Paulson, former Global Chairman, Americas at Christie’s and an expert on the Warhol market who has appraised more than 750 Warhol works, a work from the Warhol Prince Series likely would sell today for approximately \$173,664. (Paulson Expert Report at 10–11 (**Ex. 1**).)

167. A number of factors affect Paulson’s opinion that a work from the Warhol Prince Series likely would sell today for approximately \$173,664. *First*, this value corresponds to the October 2015 auction sale at Sotheby’s London, which appears to have been the first auction of a Prince Series work in more than nine years. (Paulson Expert Report at 10–11 (**Ex. 1**.) Although the work had been estimated at approximately \$46,310 to \$61,747, it ultimately sold for nearly three times the upper end of the estimate. This result demonstrates “strong competition and active interest” in the Prince Series, even before Prince’s death in 2016. (Paulson Expert Report at 10–11 (**Ex. 1**.)

168. Another factor affecting Paulson’s opinion that a Warhol Prince Series work likely would sell today for approximately \$173,664 is that following Prince’s death, an auction in Hong Kong of a Prince Series work that was estimated at \$295,151 to \$449,144 did not result in a sale. (Paulson Expert Report at 10–11 (**Ex. 1**.) This likely resulted from the “aggressive estimate” and the fact that “the subject painting was very graphic, without the same level of painterly intervention as the work sold in October 2015.” (*Id.* at 10–11.)

169. “Taken together, it is [Paulson’s] opinion that the result at Sotheby’s London in October 2015 accurately reflects the position of the market. . .and represents a reasonable estimate of what a Warhol *Prince* painting would sell for today.” (Paulson Expert Report at 10– 11 (**Ex. 1**.)

170. Goldsmith has never sold nor attempted to sell a photograph from her December 3, 1981 shoot of Prince. (Goldsmith Dep. Tr. 315:6–12 (**Ex. 12**.)

171. There is no evidence the Prince Photograph has been shown publicly in galleries or museum exhibitions.

172. Paulson opined that the fact that Goldsmith has not sold or offered to sell any of these photographs “makes it essentially impossible to assess the market for these photos,” because “there is *no* quantifiable market for” them. This “necessarily implies that the market for these photographs does not overlap at all with the market for Andy Warhol’s *Prince* portraits.” (Paulson Expert Report at 13 (**Ex. 1**.)

173. Notwithstanding her decision not to offer these photographs for sale, Goldsmith testified that her standard pricing chart (reproduced above at paragraph 160) would apply to her photograph of Prince. (Goldsmith Dep. Tr. 314:16–20 (**Ex. 12**.)

174. This would imply a range of \$1,900 to \$4,200 for photographs the same size as the paintings in the Prince Series, that is, 16 inches by 20 inches. (LG-3 (**Ex. 80**.)

175. Goldsmith photographed Prince a number of times after the December 3, 1981 shoot, and sales of those photographs by Goldsmith’s company since 2003 have ranged from \$475 to \$2,500, as summarized below:

<b>Sales of Goldsmith Prince Photographs by Lynn Goldsmith Ltd.</b>			
<b>Date</b>	<b>Purchaser</b>	<b>Sale Price</b>	<b>Citation</b>
Apr. 5, 2004	Michael Zilkha	\$825	LG-98 ( <b>Ex. 84</b> ); LG-201 ( <b>Ex. 85</b> )

<b>Sales of Goldsmith Prince Photographs by Lynn Goldsmith Ltd.</b>			
<b>Date</b>	<b>Purchaser</b>	<b>Sale Price</b>	<b>Citation</b>
June 6, 2006	Russeck Fine Art Group	\$475	LG-104 (Ex. 86); LG-204 (Ex. 87)
Sept. 2, 2009	Hard Rock Hotels	\$2000	LG-115 (Ex. 88); LG-207 (Ex. 89)
June 11, 2010	San Francisco Art Exchange, LLC	\$1900	LG-118 (Ex. 90); LG-208 (Ex. 91)
Apr. 11, 2012	Analogue Gallery	\$2250	LG-124 (Ex. 92); LG-211 (Ex. 93)
Nov. 14, 2012	Jimmy Iovine	\$950	LG-124 (Ex. 92); LG-212 (Ex. 94)
May 27, 2014	Morrison Hotel Gallery	\$1900	LG-131 (Ex. 95); LG-215 (Ex. 96)
Nov. 30, 2015	Morrison Hotel Gallery	\$1900	LG-134 (Ex. 97); LG-217 (Ex. 98)
Apr. 21, 2016	Morrison Hotel Gallery	\$1900	LG-137 (Ex. 99); LG-219 (Ex. 100)
Apr. 26, 2016	Morrison Hotel Gallery	\$2500	LG-137 (Ex. 99); LG-220 (Ex. 101)
June 21, 2016	San Francisco Art Exchange	\$1900	LG-137 (Ex. 99); LG-221 (Ex. 102)
July 13, 2016	Morrison Hotel Gallery	\$1700	LG-137 (Ex. 99); LG-222 (Ex. 103)
Oct. 30, 2016	Russeck Fine Art Group	\$1900	LG-137 (Ex. 99); LG-223 (Ex. 104)
Nov. 8, 2016	San Francisco Art Exchange	\$1900	LG-137 (Ex. 99); LG-224 (Ex. 105)



<b>Sales of Goldsmith Prince Photographs by Lynn Goldsmith Ltd.</b>			
<b>Date</b>	<b>Purchaser</b>	<b>Sale Price</b>	<b>Citation</b>
Nov. 16, 2016	Paddle 8	\$1500	LG-137 (Ex. 99); LG-226 (Ex. 106)
Dec. 10, 2016	Brian Liss Gallery	\$1900	LG-137 (Ex. 99); LG-225 (Ex. 107)
<b>AVERAGE</b>		<b>\$1,713</b>	

176. There are four Goldsmith photographs of Prince offered by online retailers 1stdibs and Artsy. Two are listed at \$2,300, and two do not have any price listed. (1stdibs: 41 results for “lynn goldsmith” (Ex. 81); Artsy: Lynn Goldsmith (Ex. 82).)

177. The range derived from Goldsmith’s standard pricing list (\$1,900 to \$4,200) is 1.09% to 2.42% of the \$173,664 approximate value of work from the Prince Series; the average sale price of Goldsmith Prince photographs since 2003 (\$1,713) is 0.99%; and the price quotes from 1stdibs and Artsy (\$2,300) are 1.32%.

178. Since 2005, Goldsmith’s company has licensed her photographs of Prince 10 times, as summarized below:

<b>Licenses of Goldsmith Prince Photographs by Lynn Goldsmith Ltd.</b>			
<b>Date</b>	<b>Licensee</b>	<b>License Fee</b>	<b>Citation</b>
Sept. 16, 2005	Dennis Pub/ Blender Mag	\$350	LG-101 (Ex. 108); LG-203 (Ex. 109)
Oct. 29, 2007	People Magazine	\$250	LG-108 (Ex. 110); LG-205 (Ex. 111)
Oct. 27, 2009	Trois Couleurs	\$100	LG-115 (Ex. 88); LG-206 (Ex. 112)
July 22, 2010	Rittor Music Inc	\$400	LG-118 (Ex. 90); LG-209 (Ex. 113)
May 24, 2013	Smithsonian Institution	\$400	LG-128 (Ex. 114); LG-213 (Ex. 115)
Nov. 7, 2013	Reader's Digest	\$150	LG-128 (Ex. 114); LG-214 (Ex. 117)
May 28, 2015	Camera Press/ Earthportfx	\$500	LG-134 (Ex. 99); LG-218 (Ex. 118)

<b>Licenses of Goldsmith Prince Photographs by Lynn Goldsmith Ltd.</b>			
<b>Date</b>	<b>Licensee</b>	<b>License Fee</b>	<b>Citation</b>
May 2, 2016	People Magazine	\$1,000	LG-137 (Ex. 99); LG-227 (Ex. 119)
May 2, 2016	People Magazine	\$1,000	LG-137 (Ex. 99); LG-227 (Ex. 119) <sup>2</sup>
June 23, 2016	New Bay Media – Guitar World, etc.	\$2,300	LG-137 (Ex. 99); LG-228 (Ex. 120)
<b>AVERAGE</b>		<b>\$645</b>	

179. In the same period, the Andy Warhol Foundation has licensed images of works from the Prince Series at least seven times. Of these seven, five have included Prince Series images as part of a larger group of images, and as a result, it is not possible to determine what fees applied to the Prince Series images specifically. (ARS: Warhol/Prince' Report (Ex. 73).)

180. The two licenses for which specific fee information is available are (1) a 2013 license to Condé Nast/*Vanity Fair* for inclusion in *Vanity Fair 100 Years: From The Jazz Age to Our Age*; and (2) a

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<sup>2</sup> This license inadvertently was omitted from the Andy Warhol Foundation's Rule 56.1 Statement, Dkt. No. 56.

2016 license to Condé Nast for inclusion on the cover of *Genius of Prince*. (ARS: Warhol/Prince' Report (Ex. 73); ARS Invoice to Condé Nast, Apr. 22, 2013 (Ex. 121); ARS Invoice to Condé Nast, June 15, 2016 (Ex. 122).) The cost for each license was \$1,125 and \$10,000, respectively. (*Id.*)

181. A comparison of the 2013 and 2016 licenses of Warhol Prince Series images and 2013 and 2016 licenses of Goldsmith Prince photographs demonstrates the extent to which the price points differ:

<b>Comparison of 2013 and 2016 License Fees for Images of Warhol Prince Series Works and Goldsmith Prince Photographs</b>					
<b>Year</b>	<b>Warhol Prince Series Works</b>		<b>Goldsmith Prince Photographs</b>		<b>Percentage Difference</b>
	<b>Licensee</b>	<b>Fee</b>	<b>Licensee</b>	<b>Fee</b>	
2013	<i>Vanity Fair</i>	\$1,125	Smithsonian Institution	\$400	121.4%
			Reader's Digest	\$150	
2016	Condé Nast	\$10,000	People Magazine	\$1,000	143.3%
			New Bay Media – Guitar World, etc	\$2,300	

Put another way, the average license fee for a Goldsmith photograph of Prince in 2013 (\$275) was 24.4% of the license fee for a work from the Prince Series that year (\$1,125), and the average license fee for a Goldsmith Prince photograph in 2016 (\$1,650) was 16.5% of the license fee for a work from the Prince Series that year (\$10,000).

182. Goldsmith testified that she did not know whether, aside from the license to *Vanity Fair* in 1984, she or her company ever (1) licensed any of the photographs from her December 3, 1981 studio shoot; (2) licensed any of those photographs for use as an artist reference; or (3) licensed any other photograph she has made of Prince for use as an artist reference. (Goldsmith Dep. Tr. 164:11–166:6 (**Ex. 12**).)

183. Goldsmith could not recall any other instance “in which one of [her] photographs was licensed for use as a possible artist reference, other than the 1984 *Vanity Fair* license.” (Goldsmith Dep. Tr. 164:11–166:6 (**Ex. 12**).)

**B. The Distribution Channels That Deliver Warhol Works To The Market Differ From Those That Deliver Goldsmith Works.**

184. Warhol’s artworks are often shown “in leading museums and gallery exhibitions” and “appear[] regularly at major auction houses.” (Paulson Expert Report 20–21 (**Ex. 1**).) “Warhol’s works are sold by primarily high-end galleries and auction houses.” (*Id.* 21.)

185. “[N]o museum gallery on the planet could consider itself representative of Contemporary Art without a Warhol somewhere on its walls,” and Warhol remains an “art-world colossus,” the “god of contemporary art,” the “most powerful contemporary

art brand in existence,” the “backbone of any auction of post-war contemporary art,” and a “global commodity.” (Paulson Expert Report at 8–9 (citations omitted) (**Ex. 1**).

186. In May 2017 alone, “at least 29 unique Warhol works [were] being auctioned in a single three-day period at Christie’s, Sotheby’s, and Phillips,” the three most prestigious auction houses in the world. (Paulson Expert Report at 21 (**Ex. 1**); Post-War and Contemporary Art Evening Sale, Christie’s, May 17, 2018 (**Ex. 123**); Post-War and Contemporary Art Morning Sale, Christie’s, May 18, 2018 (**Ex. 124**); Contemporary Art Evening Auction, Sotheby’s, May 16, 2018 (**Ex. 125**); Contemporary Art Day Auction, Sotheby’s, May 17, 2018 (**Ex. 126**); 20th Century & Contemporary Art & Design Evening Sale, Phillips, May 17, 2018 (**Ex. 127**); 20th Century & Contemporary Art & Design Morning Sale, Phillips, May 16, 2018 (**Ex. 128**).

187. The average price of the Warhol works that were sold at these auctions was \$3.595 million. (See Paulson Expert Report at 21–22 (**Ex. 1**); Post-War and Contemporary Art Evening Sale, Christie’s, May 17, 2018 (**Ex. 123**); Post-War and Contemporary Art Morning Sale, Christie’s, May 18, 2018 (**Ex. 124**); Contemporary Art Evening Auction, Sotheby’s, May 16, 2018 (**Ex. 127**); Contemporary Art Day Auction, Sotheby’s, May 17, 2018 (**Ex. 126**); 20th Century & Contemporary Art & Design Evening Sale, Phillips, May 17, 2018 (**Ex. 127**); 20th Century & Contemporary Art & Design Morning Sale, Phillips, May 16, 2018 (**Ex. 128**).

188. The galleries that sell or previously have sold Goldsmith’s photographs include the Morrison Hotel

Gallery, the Analogue Gallery, Blender Gallery, and the Richard Goodall Gallery. (Goldsmith Dep. Tr. 286:7–305:12 (**Ex. 12**).)

189. The Morrison Hotel Gallery website states that it “is the world leader in fine art music photography representing over 100 of the most highly acclaimed music photographers -- those who made, and continue to make, an indelible mark on music culture with photographic portrayals of the industry’s most influential artists.” (Morrison Hotel Gallery: About Us (**Ex. 9**).)

190. Goldsmith “select[ed] Morrison Hotel Gallery to represent [her] work, in part, because of [this] reputation.” (Goldsmith Dep. Tr. 286:24–287:5 (**Ex. 12**).)

191. The Analogue Gallery Twitter page states that: “Analogue Gallery specializes in exhibiting over 50 years of vintage and contemporary Rock & Roll photography.” (Analogue Gallery Twitter (**Ex. 129**).)

192. “At the time Analogue Gallery represented [Goldsmith’s] work, [she] believe[d] Analogue Gallery had a reputation of specializing in exhibiting over 50 years of vintage and contemporary rock and roll photography.” (Goldsmith Dep. Tr. 300:11–21 (**Ex. 12**).)

193. The Richard Goodall Gallery website states that: “Richard Goodall Gallery is the leading gallery for Contemporary Art and Fine Art Photography, and rock art in the UK.” (Richard Goodall Gallery Contemporary Art: About Us (**Ex. 130**).)

194. Goldsmith “understand[s]” this to be Goodall Gallery’s reputation. (Goldsmith Dep. Tr. 302:9–13. (**Ex. 12**).)



195. The Blender Gallery website states that: “Blender Gallery specialises in Fine Art Music Photography and Limited Edition Rock ‘n Roll Prints.” (Blender Gallery – About (**Ex. 131**).)

196. Goldsmith understands the reputation of Blender Gallery to be that it specializes in fine art music photograph[y] and limited edition rock and roll prints” and that “that it offers the opportunity to view and purchase some of the most inspiring and iconic images of music and musicians photographed over the last 50 plus years.” (Goldsmith Dep. Tr. 304:6–20 (**Ex. 12**).)

197. When selecting a gallery to sell her works, Goldsmith considers “the reputation of the galleries’ specialization,” “the client service the gallery provides to its photographers,” and “the level of honesty.” (Goldsmith Dep. Tr. 305:8–12 (**Ex. 12**).)

198. The Christie’s, Sotheby’s, and Phillips’ websites “do not indicate that current or planned auctions will include any Goldsmith photographs.” (Paulson Expert Report at 24 (**Ex. 1**).)

199. According to Artnet, “which is a source relied upon by experts in [Paulson’s] field,” “only four Goldsmith photographs have been auctioned in the last several years, three of which went unsold” (Paulson Expert Report at 24 (**Ex. 1**)), as summarized below:

<b>Sale of Goldsmith Works at Public Auction</b>				
<b>Title</b>	<b>Date</b>	<b>Auction House</b>	<b>Sale Price</b>	<b>Citation</b>
<i>Bruce Springsteen</i>	Dec. 2, 2016	Guernsey's	Unsold (est. \$2,500–\$3,500)	Artnet: Lynn Goldsmith (Ex. 83)
<i>The Rolling Stones</i>	Dec. 2, 2016	Guernsey's	Unsold (est. \$2,500–\$3,500)	Artnet: Lynn Goldsmith (Ex. 83)
<i>Patti Smith</i>	Nov. 7, 2013	Artcurial	\$2,945	Artnet: Lynn Goldsmith (Ex. 83)
<i>Untitled</i>	Dec. 8, 2010	Van Ham Kunstauktionen	Unsold (est. \$1,588)	Artnet: Lynn Goldsmith (Ex. 83)

200. Guernsey's website lists its auctions of Elvis memorabilia and Jerry Garcia's guitar collection as among its notable auctions. (Guernsey's Auction House, *The History of Guernsey's* (Ex. 132).)

### C. The Marketing Of Warhol Works Differs From The Marketing Of Goldsmith Works.

201. Galleries, auction houses, and other sellers of Warhol works emphasize a number of features of the art itself, as well as features of Warhol and the Warhol market when trying to market and sell Warhol works. Warhol's "vast" impact, "both as an artist and his influence on future generations"; the

way in which “[h]is work remains a record of the social, political, and economic life in America between 1952 and 1987”; and the extent to which it remains an “enduring commercial force in art” “are commonly described during efforts to convince potential buyers to acquire Warhol’s art.” (Paulson Expert Report at 16 (Ex. 1).)

202. The underlying meaning and message of Warhol’s work is also an important aspect of how it is marketed. For example, in 2010, when Christie’s auctioned one of Warhol’s portraits of Elizabeth Taylor, the auction catalogue included an essay describing Warhol’s artistic process and the implications of his artistic choices:

The magnificent, double-paneled *Silver Liz* from 1963...contains many of Warhol’s key ideas and themes.... As a canonization of the actress and as a comment on the manufactured nature of fame, Warhol achieved his desired aesthetic effect in the iconic *Silver Liz* by employing silkscreen. As a process that he had begun on an experimental basis in 1962, Warhol recognized both the instant electricity and underlying artificiality it generated; indeed, the inky superimpositions of photo-derived screens on the bright hand-painted hues epitomized Pop in their brand-like distinctness and recognizability.... [H]e created *Silver Liz* using a publicity image of the actress, later cropping the bust-length image just below the chin, and

sizing the screen to an enlargement of this detail.

(Paulson Expert Report at 16–17 (quoting Christie’s Post-War and Contemporary Art Evening Sale Catalogue at 80–81 (May 11, 2010)) (**Ex. 1**.)

203. Auction houses and galleries routinely market Warhol works by referencing their expressive content and transformative nature. (Paulson Expert Report at 16 (**Ex. 1**.)

204. “This approach to selling Warhol’s celebrity portraits illustrates an important feature of Warhol’s market: sellers, collectors, and buyers find expressive meaning in Warhol’s art that is relevant to their decision to purchase the works. . . . Collectors identify this transformative process as defining Warhol’s work, and it is the basis for his critical and commercial success.” (Paulson Expert Report at 17 (**Ex. 1**.)

205. Galleries promoting Goldsmith and her photographs describe her as an “iconic American photographer [who] has been capturing music legends since the early 1970’s” (Analogue Gallery, Lynn Goldsmith Book Signing: Friday, May 23rd (**Ex. 135**)) and as being “[k]nown for. . . [h]er celebrity and music portraiture” (A Gallery for Fine Photography: Lynn Goldsmith (**Ex. 133**)).

206. Goldsmith’s books “often act like catalogues” for prospective collectors of her photographs. (Goldsmith Dep. Tr. 232:8–10, 295:23–296:2 (**Ex. 12**)). Those books also identify her as a rock-and-roll photographer. (Lynn Goldsmith *PhotoDiary*, About the Book (**Ex. 7**); LG-151 (**Ex. 10**.)

207. The description on Goldsmith's website of her book *PhotoDiary* describes her as "[o]ne of the most expressive chroniclers of the rock 'n' roll era," having "captured some of the finest rock, jazz, and R&B performers of our time in brilliant, often surprising images that reveal a great deal about her subject." (Lynn Goldsmith *PhotoDiary*, About the Book (**Ex. 7**).

208. In the introduction to her book *Rock and Roll Stories*, Goldsmith explains that she "proudly proclaim[s], 'Yes, I am a rock and roll photographer.'" (LG-151 (**Ex. 10**); Goldsmith Dep. Tr. 18:17–21 (**Ex. 12**).

209. In describing Goldsmith's art to potential buyers, the focus is on her underlying philosophy and approach to photography, such as "find[ing] out who [she is]. . .by also trying to find out who other people are," "communicat[ing] the uniqueness of [her subjects] and their identities in [her] photographs," empathizing with her subjects, and portraying the human connection between herself and her subjects that occurs when she photographs them. (Goldsmith Dep. Tr. 74:18–75:14, 66:25–67:22 (**Ex. 12**); *see also supra* ¶¶60–62.)

210. Goldsmith's "artistic vision" is "part of what [an art] dealer talks about" with potential purchasers of Goldsmith photographs. (Goldsmith Dep. Tr. 308:18–25 (**Ex. 12**).

211. In selecting which photographs to promote, Goldsmith considers factors that, according to Paulson, are "unique to the rock-and-roll memorabilia market and unique to collectors of rock-and-roll photographs." (Paulson Expert Report at 25 (**Ex. 1**).

212. When selecting pictures of musicians in concert to promote, Goldsmith tries to appeal to “those people who [] want to remember the moment that they were at that show or how they perceived the artist.” (Goldsmith Dep. Tr. 293:12–25 (**Ex. 12**)).

213. In marketing her art, Goldsmith also tries to appeal to people who read rock-and-roll photography books, because “people go to the book like a catalogue and they see something that they like and they want to know if it’s available.” (Goldsmith Dep. Tr. 295:23–296:2 (**Ex. 12**)).

214. Laura Paulson opined that the themes that Goldsmith uses to market her work to potential purchasers are “completely different from Warhol’s focus on celebrity culture, artificiality, and the repetition of images in society,” which “are the themes art dealers use to describe Warhol’s art to potential purchasers.” (Paulson Expert Report at 20 (**Ex. 1**)).

215. Aside from the way in which Warhol’s works are described to potential buyers, “[a]uction houses also use the graphic clarity of Andy Warhol’s work to deploy a full menu of mark[et]ing initiatives that promote the works at auction.” (Paulson Expert Report at 18 (**Ex. 1**)). Examples of such marketing initiatives include objects, such as lucite paperweights with an image of a Warhol work; tote bags with an image of a Warhol work; single owner catalogues for a collection; dedicated films; newspaper advertisements; and highlights tours to important cities. (*Id.* at 18.)

216. Paulson has “never seen an auction house use a high-end marketing approach to offering Goldsmith’s photographs.” (Paulson Expert Report at 18 (**Ex. 1**)).

**D. Collectors Of Warhol Works Have Different Characteristics Than Collectors Of Goldsmith Works.**

217. Collectors of Warhol's works often have one or more of the following characteristics:

- The collectors usually recognize the art historical importance of Andy Warhol and the significance of including Warhol in their collections.
- At the top of the market, there is a new generation of extremely wealthy, international, multi-generational collectors.
- Warhol's work regularly attracts new audiences, such as recently emerged markets in Asia and the Middle East.
- New collectors with significant resources often begin their collection with a Warhol work.
- The collectors are not limited to Post-War and Contemporary Art collectors. Warhol is unique in that his art often appears in collections that are focused on other categories of high-end art, such as Old Masters paintings, Antiquities, Impressionist, Modern Art, or furniture and design.

(Paulson Expert Report at 25 (**Ex. 1**).)

218. By contrast, Goldsmith has identified two categories of collectors of her photographs: those interested in studio photographs and those interested in concert photographs. (Goldsmith Dep. Tr. 293:12–294:5 (**Ex. 12**).)

219. Goldsmith testified that collectors in the latter category “want to remember the moment they

were at that show or how they perceived the artist,” or they want “to have a relationship with the moment that they saw [the artist] in performance.” (Goldsmith Dep. Tr. 293:12–294:5 (**Ex. 12**).)

220. Paulson opined that “[t]hese attributes of Goldsmith’s collectors—concertgoers and readers of photography books—are not defining characteristics of the people who collect Warhol’s art.” (Paulson Expert Report at 26 (**Ex. 1**).)

221. According to Paulson, “Warhol’s collectors cannot consistently be defined by any of the attributes commonly associated with the collectors Goldsmith targets in the market for her photographs.” (Paulson Expert Report at 26 (**Ex. 1**).)

222. In identifying and selecting an image for the cover of its commemorative publication *Genius of Prince*, Condé Nast considered a number of potential images. (CN-23 (referencing multiple “cover options,” including “the Warhol one” (**Ex. 134**).)

223. As part of that search, the Condé Nast staff became aware of the November 1984 *Vanity Fair* and the Warhol portrait included in that issue. (CN-27 (**Ex. 135**).) That issue referenced Lynn Goldsmith. (*Vanity Fair*, Nov. 1984, at 66, 121 (**Ex. 56**).)

224. Condé Nast never “contacted [Goldsmith] with respect to” *Genius of Prince* and never sought “to put Goldsmith’s photograph on the cover,” there is no evidence “that would suggest that Lynn Goldsmith came to mind as someone whose work should be in” *Genius of Prince*, and in fact “there is no work of Lynn Goldsmith. . .in” *Genius of Prince* at all. (Deposition Transcript of Chris Donnellan 118:5–121:22, 125:20–126:8 (**Ex. 136**); *Genius of Prince* (**Ex. 137**).)



225. Condé Nast believed that the Warhol Foundation owned all rights to the Prince Series. (Donnellan Dep. Tr. 122:6–123:9 (**Ex. 136**).

226. A representative for the Artists Rights Society, which is the Warhol Foundation’s licensing agent, testified that she was not aware of any potential licensee “being confused about whether they wished to license an image by Warhol as opposed to an image by Lynn Goldsmith,” nor was she aware of any potential licensee “debating between licensing an image by Andy Warhol or an image by Lynn Goldsmith.” (Deposition Transcript of Adrienne Fields 136:25–137:16 (**Ex. 138**).

227. The Artist Rights Society representative testified that Warhol’s work has been licensed to museums, galleries, magazines, book publishers, newspapers, ad agencies, filmmakers, universities, hospitals, and education testing services. (Fields Dep. Tr. 135:7–136:24 (**Ex. 138**).

**VIII. DEFENDANTS’ PURPORTED EXPERT JEFFREY SEDLIK PROVIDED UNSUPPORTED OPINIONS THAT HE IS UNQUALIFIED TO OFFER.**

228. Defendants have engaged Jeffrey Sedlik as a purported expert in this action. (Expert Report of Jeffrey Sedlik at 1 (**Ex. 139**).

229. Sedlik is the President and CEO of the Picture Licensing Universal System Coalition, a non-profit trade association representing the shared business interests of photographers and other image licensors, and a photographer for over 30 years. (Sedlik Expert Report at 1, 3 (**Ex. 139**).

230. Sedlik “provide[s] forensic image analysis and consulting services to organizations and

individuals on issues related to copyright, licensing, negotiating, and business practices and procedures related to photography, advertising, and modeling.” (Sedlik Expert Report at 4 (**Ex. 139**).)

231. Sedlik purports to opine that Warhol’s Prince Series usurps the derivative market for Goldsmith’s Prince Photograph. (Sedlik Expert Report at 31 (**Ex. 139**).)

232. Sedlik purports to opine that Goldsmith “intend[s]” to monetize her Prince photographs “in all manner of derivative markets” at some point in the future. (Sedlik Expert Report at 23 (**Ex. 139**).)

233. This opinion apparently is based only on a conversation Sedlik claims to have had with Goldsmith after he “didn’t see that testimony” in Goldsmith’s “deposition transcript and its exhibits” or the other pleadings, transcripts, and documents he considered in preparing his expert report. (Sedlik Dep. Tr. 190:11–24 (**Ex. 140**); *see also* Sedlik Expert Report Exhibit B (listing documents relied upon) (**Ex. 139**).)

234. Sedlik testified that he did not speak with, or conduct any research about, collectors of Goldsmith’s work in arriving at his opinions. (Sedlik Dep. Tr. 251:18–25, 252:22–253:4 (**Ex. 140**).)

235. Sedlik testified “it would [not have been] necessary to conduct [] research to arrive at [his] opinion” that “the Warhol Prince [S]eries competes with the Warhol Prince work for opportunities” for derivative uses. (Sedlik Dep. Tr. 250:16–22 (**Ex. 140**).)

236. Sedlik stated he “did not have to find instances in which an editor put a Goldsmith

photograph next to a Warhol illustration and made a decision between the two” to support his opinion that the Prince Series competes with Goldsmith’s Prince Photograph for opportunities in the derivative marketplace. (Sedlik Dep. Tr. 250:5–25 (**Ex. 140**).

237. Sedlik testified that among the bases for his opinion that AWF and Goldsmith offer their respective works in the same derivative marketplace is that “at least one prominent wealthy collector has purchased both Warhol’s works and multiple Goldsmith works.” (Sedlik Expert Report at 30 (**Ex. 139**); *see also* Sedlik Dep. Tr. 254:7–9 (**Ex. 140**)). Sedlik did not provide further details on this topic. He did not identify any source as the basis for this statement. He did not identify which collector this statement refers to. He did not identify which Warhol works or Goldsmith works this statement refers to. (Sedlik Expert Report at 30 (**Ex. 139**); *see also* Sedlik Dep. Tr. 254:7–9 (**Ex. 140**)).

#### **IX. ADDITIONAL MATERIAL FACTS**

238. “When Andy Warhol died unexpectedly on February 22, 1987, he left a vast and complicated inventory of works of art and personal possessions.” (The Andy Warhol Foundation for the Visual Arts’ website, <https://warholfoundation.org/foundation/index.html> (**Ex. 141**)). His will “dictated that his entire estate, with the exception of a few modest legacies to family members, should be used to create a foundation dedicated to the ‘advancement of the visual arts.’” (*Id.*) “The primary focus of the Foundation’s grant making activity has been to support the creation, presentation and documentation of contemporary visual art, particularly work that is

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experimental, under-recognized, or challenging in nature.” (*Id.*)

\* \* \*

DATED: New York, NY  
November 20, 2018

Respectfully submitted,

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Arts, Inc.*

JA-448

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

THE ANDY WARHOL  
FOUNDATION FOR THE VISUAL  
ARTS, INC.,

Plaintiff,

-against-

LYNN GOLDSMITH AND LYNN  
GOLDSMITH, LTD.,

Defendants.

No. 17-cv-02532-  
JGK

LYNN GOLDSMITH,

Counterclaim Plaintiff,

-against-

THE ANDY WARHOL  
FOUNDATION FOR THE VISUAL  
ARTS, INC.,

Counterclaim Defendant.

**THE ANDY WARHOL FOUNDATION FOR THE VISUAL  
ARTS, INC.'S REPLY TO LYNN GOLDSMITH AND  
LYNN GOLDSMITH LTD.'S RESPONSES TO THE ANDY  
WARHOL FOUNDATION FOR THE VISUAL ARTS,  
INC.'S RULE 56.1 STATEMENT**

Dated: December 11, 2018

\* \* \*

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1, The Andy Warhol Foundation for the Visual Arts, Inc. (“AWF”) respectfully submits this Reply to Lynn Goldsmith and Lynn Goldsmith Ltd.’s Responses to AWF’s Rule 56.1 Statement.

**I. ANDY WARHOL IS A LEGENDARY AMERICAN ARTIST WHOSE WORK IS DEFINED BY TRANSFORMATION**

1. Born in 1928 in Pittsburgh, Pennsylvania, Andy Warhol would go on to become a “prolific artist. . .credited with having significant achievements in, and contributions to, painting, collage, film, journalism, and a number of other media. Warhol is considered a blue chip artist and critical to be included in any serious and comprehensive private collection. . . . Similarly, no museum gallery on the planet could consider itself representative of Contemporary Art without a Warhol somewhere on its walls.” (Expert Report of Laura Paulson at 8 (citation and quotation marks omitted) (**Ex. 1**).

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

2. Warhol remains an “art-world colossus,” the “god of contemporary art,” the “most powerful contemporary art brand in existence,” the “backbone of any auction of post-war contemporary art,” and a “global commodity.” (Paulson Expert Report at 8–9 (citations omitted)(**Ex. 1**).

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

3. Warhol's works can be found in the world's most important and prestigious museums, including the Tate Modern in London and the Museum of Modern Art in New York City. (Declaration of Neil Printz ¶2 (Ex. 2).)

Goldsmith Parties' Response: Not disputed factually, except the Goldsmith Parties object to the Declaration of Neil Printz ("Printz Declaration"), which should be precluded because it is a disguised expert report containing inadmissible hearsay and opinions that only a sophisticated art expert could provide, as set forth in the Goldsmith Parties' Memorandum in Opposition dated November 20, 2018, at Point II (B).

AWF's Reply: **Goldsmith Parties do not genuinely dispute the asserted fact. An evidentiary objection "does not suffice as a denial of a statement of undisputed fact." *Senno v. Elmsford Union Free Sch. Dist.*, 812 F. Supp. 2d 454, 465 n.9 (S.D.N.Y. 2011). Goldsmith Parties' response does not comply with Local Rule 56.1, which requires that "opposing statements must be supported by citations to specific evidence of the kind required by Fed. R. Civ. P. 56(c)." Local Rule 56.1, Committee Note.**

In any event, Printz's declaration is admissible for the reasons that follow and for the reasons set forth in AWF's Reply Memorandum of Law in Support of its Motion for Summary Judgment. AWF Reply Br. 6-7.

Goldsmith Parties' counterclaims allege copyright infringement based on AWF's "willful and unauthorized use" of Goldsmith's work. (Dkt. 20 (Goldsmith Amended Counterclaims))

¶1.) Goldsmith Parties further allege that AWF knew or should have known that Goldsmith’s license was “for one-time use only,” and any further unlicensed use would be infringing. (*Id.* ¶¶4, 12, 33, 45.) And Goldsmith Parties allege that, in the alternative, AWF “recklessly and irresponsibly” ignored the possibility that its use was infringing. (*Id.* ¶45.) Printz is an employee of AWF, and his knowledge and testimony are attributable to AWF. (Ex. 2 (Printz Decl.) at 1; Ex. 172 (Printz Dep.) at 4:9-19.)<sup>1</sup> This includes what AWF did or did not know—a fact put at issue by Goldsmith Parties. His testimony and declaration are therefore directly relevant.

Moreover, Printz’s declaration concerns facts about Warhol, his artistic process, how the public views and interprets his work, and the Prince Series, gleaned from his position in preparing the Catalogue Raisonné. (Ex. 2 at 1-2; *see also* Ex. 172 at 16:20-19:9.) His observations are the “product of reasoning processes familiar to the average person in everyday life” gleaned through his work, *United States v. Garcia*, 413 F.3d 201, 215(2d. Cir. 2005), and his opinions are “rationally based on [his own] perception,” Fed. R. Evid. 701(a).

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<sup>1</sup> Exhibits 1-140 are attached to the Declaration of Luke Nikas in Support of The Andy Warhol Foundation for the Visual Arts, Inc.’s Motion for Summary Judgment, dated Oct. 12, 2018 (Dkt. 60). Exhibits 172 and 173 are attached to the Reply Declaration of Luke Nikas in Support of The Andy Warhol Foundation for the Visual Arts, Inc.’s Motion for Summary Judgment, dated December 11, 2018, and submitted herewith.



Goldsmith Parties rely on Printz's testimony regarding these very topics. (Dkt. 53 (Goldsmith Motion for Summary Judgment) at 10; Dkt. 52 (Goldsmith Rule 56.1 Statement) ¶¶48, 58-60, 65-69.) They have therefore waived their objection.

Finally, Printz's declaration does not contain inadmissible hearsay. The statements made by third party sources cited in the Printz declaration are not offered for the truth of the matter asserted. See Fed. R. Evid. 801(c)(2). Rather, these statements are indicative of AWF's knowledge and state of mind, which were put at issue by Goldsmith, as noted above. Further, the statements and literature Printz cites reflect perceptions regarding Warhol's artistic processes, the messages communicated through his works, and the aesthetic qualities of his works. These reasonable and far-reaching perceptions of Warhol's work are directly relevant to the fair-use analysis, and they are offered here as evidence of commentary about how Warhol is perceived, not for the truth of the underlying facts stated about Warhol.

4. "From the beginning of his painting career, Warhol was an avid student of media: he was acutely aware of the way images are produced, distributed, and consumed in contemporary culture, and he was fascinated by their function as vehicles of desire." (Printz Decl. ¶9 (Ex. 2).)

Goldsmith Parties' Response: Disputed based the Goldsmith's Parties' objection to the Printz Declaration, as set forth in their above response to

paragraph 3, and because Printz has no personal knowledge of Warhol's "awareness" or thoughts.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶3. Printz's declaration is admissible. *Id.*; AWF Reply Br. 6-7. Printz's opinion is "rationally based on [his own] perception" in compliance with Fed. R. Evid. 701.**

5. Warhol created art depicting images of diverse subjects, from everyday objects like soup cans and bicycles to celebrities and other public figures. (Printz Decl. ¶9 (Ex. 2).)

Goldsmith Parties' Response: Not disputed factually, except the Goldsmith Parties object to the Printz Declaration on the grounds set forth above in their Response to paragraph 3, and the cited testimony also does not support AWF's contention.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶3. Printz's declaration is admissible. *Id.*; AWF Reply Br. 6-7. Goldsmith Parties' assertion that the cited testimony does not support AWF's contention does not create a disputed fact. Goldsmith Parties fail to cite any evidence to the contrary. See Local Rule 56.1. Paragraphs 8, 10, 13, 26 of the Printz Declaration further demonstrate the diversity of Warhol's subjects. (Printz Decl. ¶¶8, 10, 13, 26 (Ex. 2).)**

6. The subject matter of Warhol's art reflects his interest in imagery. From his depictions of "money[, which] operates as a cultural sign, empty of intrinsic meaning or value, but endowed as a currency," to stars

of the “movie industry[, which] was an especially powerful engine that packaged and disseminated images of intense identification and desire,” the power of images and the role they play in contemporary life is one of the dominant themes of Warhol’s art. (Printz Decl. ¶¶11–12 (Ex. 2).)

Goldsmith Parties’ Response: Disputed on the same grounds set forth above in the Goldsmith Parties’ Response to paragraph 3 and because footnote 3 at paragraph 11 of the Printz Declaration references an inadmissible third party hearsay source. There is also no record support apart from the objectionable Printz Declaration.

AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶3. Printz’s declaration is admissible. *Id.*; AWF Reply Br. 6-7. The asserted fact does not rely on footnote 3 of paragraph 11 of the Printz Declaration.

In any event, the third party source quoted in footnote 3 of paragraph 11 is not offered for the truth of the matter asserted, but rather, is relevant to AWF’s knowledge and state of mind, which were put at issue by Goldsmith. See AWF 56.1 Reply ¶3. Further, the statements and literature Printz cites reflect perceptions regarding Warhol’s artistic processes, the messages communicated through his works, and the aesthetic qualities of his works. These reasonable and far-reaching perceptions of Warhol’s work are directly relevant to the fair-use analysis, and they are offered here as evidence of commentary about how Warhol is perceived, not for the truth of the underlying facts stated about Warhol.

7. According to Warhol's former assistant Gerard Malanga, the images themselves, rather than the figures depicted in the images, "were the actual subject matter [Warhol] reproduced in his" art. "[I]nstead of satirizing the products [depicted in the images] themselves, he had satirized the 'artful' way they were presented." (Gerard Malanga, *A Conversation with Andy Warhol*, The Print Collector's Newsletter (Jan.–Feb. 1971) (Ex. 3); Deposition Transcript of Gerard Malanga 18:9–20:11 (Ex. 4).)

Goldsmith Parties' Response: Not disputed except the testimony does not relate to the Warhol Prince Images.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. The asserted fact concerns Warhol's artwork in general, which necessarily includes the Prince Series. (See e.g., Malanga Dep. Tr. (Ex. 4) at 19:3-10 ("Q: And in an instance you're talking about in this article that you wrote, you're talking about his use of photographs and transforming those to be a work of art, correct? A: Yes. I mean, that was the, I want to say, the source of material that Andy would mine to make his artworks.") Goldsmith Parties have not cited any evidence to the contrary. See Local Rule 56.1.**

8. Warhol's *Campbell Soup Cans* paintings illustrate this principle. "[O]ften misunderstood as depictions of real . . . cans of prepared soup[ i]n fact they were reproductions of the Campbell Soup Company's logo, printed on their stationery, a purely graphic but supremely memorable sign that stood in for the product." (Printz Decl. ¶8 & figs. 2–3 (Ex. 2).)

Goldsmith Parties' Response: Disputed on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 3.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶3. Printz's declaration is admissible. *Id.*; AWF Reply Br. 6-7.**

9. Similarly, his 1962 silkscreen painting, *200 One Dollar Bills*, depicts 200 repetitively printed one-dollar bills. (Printz Decl. ¶10 & fig. 4 (Ex. 2).) According to Neil Printz, editor of the Andy Warhol Catalogue Raisonné, this work, which “literally represents the idea of printing money,” underscores how “money operates as a cultural sign, empty of intrinsic meaning or value, but endowed as currency, as a medium of exchange.” (*Id.* ¶¶10–11.) It displays the two-dimensional image on a flat canvas to echo the message that, like the dollar bill, there is nothing of intrinsic value behind the painting itself and that “there is nothing ‘inside’ the painting.” (*Id.*)

Goldsmith Parties' Response: Disputed on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 3 and because footnote 3 at paragraph 11 of the Printz Declaration references an inadmissible third party hearsay source.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶3. Printz's declaration is admissible. *Id.*; AWF Reply Br. 6-7. The asserted fact does not rely on footnote 3 of paragraph 11 of the Printz Declaration.**

In any event, the third party source quoted in footnote 3 of paragraph 11 is not

offered for the truth of the matter asserted, but rather, is relevant to AWF's knowledge and state of mind, which were put at issue by Goldsmith. See AWF 56.1 Reply ¶3. Further, the statements and literature Printz cites reflect perceptions regarding Warhol's artistic processes, the messages communicated through his works, and the aesthetic qualities of his works. These reasonable and far-reaching perceptions of Warhol's work are directly relevant to the fair-use analysis, and they are offered here as evidence of commentary about how Warhol is perceived, not for the truth of the underlying facts stated about Warhol.

10. Warhol's silkscreen paintings from this era explore popular images *as images*, rather than searching for deeper meaning in the underlying objects themselves. (Printz Decl. ¶11 (Ex. 2).)

Goldsmith Parties' Response: Disputed on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 3 and because the footnote at paragraph 11 references an inadmissible third party hearsay source.

AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶3. Printz's declaration is admissible. *Id.*; AWF Reply Br. 6-7. The asserted fact does not rely on footnote 3 of paragraph 11 of the Printz Declaration.

In any event, the third party source quoted in footnote 3 of paragraph 11 is not offered for the truth of the matter asserted, but rather, is relevant to AWF's knowledge and state of mind, which were put at issue by Goldsmith.

**See AWF 56.1 Reply ¶3. Further, the statements and literature Printz cites reflect perceptions regarding Warhol's artistic processes, the messages communicated through his works, and the aesthetic qualities of his works. These reasonable and far-reaching perceptions of Warhol's work are directly relevant to the fair-use analysis, and they are offered here as evidence of commentary about how Warhol is perceived, not for the truth of the underlying facts stated about Warhol.**

11. Among Warhol's best known works are his celebrity portraits. Creating these works of art proceeded in multiple steps. After selecting an image of his subject, Warhol would "deliver it to a professional silk-screen printer, who would produce the silk-screen based on Warhol's instructions." (Printz Decl ¶¶16–17 (Ex. 2).)

Goldsmith Parties' Response: Not disputed to the extent that Printz testified to the same with respect to the Warhol Prince Images, but otherwise object to the Printz Declaration on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 3. *See* GoldsmithR. 56.1 Stmt. at ¶¶66 – 70.

AWF's Reply: Goldsmith Parties do not dispute the asserted fact. *See* AWF 56.1 Reply ¶3. Printz's declaration is admissible. *Id.*; AWF Reply Br. 6-7. Paragraphs 66–70 of Goldsmith's 56.1 Statement do not contradict the asserted fact. *See* Local Rule 56.1. AWF incorporates by reference its response to Goldsmith 56.1 Statement paragraph 66. *See* Dkt. 70.

12. Often Warhol would crop and resize the source image—sometimes multiple times—before arriving at the desired dimensions. (Printz Decl. 116 (Ex. 2).)

Goldsmith Parties' Response: Not disputed to the extent that Neil Printz testified to the same with respect to the Warhol Prince Images, but otherwise object to the Printz Declaration on the same grounds set forth above in the Goldsmith Parties' Response to paragraph. See Goldsmith R. 56.1 Stmt. at ¶¶ 66 – 70.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact. See AWF 56.1 Reply ¶12. Printz's declaration is admissible. Id.; AWF Reply 6-7. Paragraphs 66–70 of Goldsmith's 56.1 Statement do not contradict the asserted fact. See Local Rule 56.1. AWF incorporates by reference its response to Goldsmith 56.1 Statement paragraph 66. See Dkt.70.**

13. In his portraits of Marilyn Monroe, Warhol “zoom[ed] in [ ] on the head and face, cropping [the image] through the collar and slightly below the shadow of the chin. This has the effect of severing the head from the shoulders and bust, producing the disembodied effect of a cinematic close-up.” (Printz Decl. ¶17 & figs. 6–8 (Ex. 2).)

Goldsmith Parties' Response: Disputed on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 3 and because “figures” 6 – 8 in the Printz Declaration were not produced by AWF in discovery.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF**



**56.1 Reply ¶3. Printz’s declaration is admissible. *Id.*; AWF Reply Br. 6-7. Any failure by AWF to produce Figures 6-8 was harmless. See Fed. R. Civ. P. 37(c)(1). AWF produced other images of Marilyn Monroe, and these images are publicly available. Goldsmith Parties cannot assert any prejudice.**

14. Warhol’s 1962 *Marilyn Diptych* employs this technique and uses repetition to depict 50 heads of Monroe—25 in color and 25 in black and white. (Printz Decl. ¶¶13–14, 17–18& figs. 5–6 (Ex. 2).)

Goldsmith Parties’ Response: Not disputed as to what the *Marilyn Diptych* depicts visually, but otherwise object on the same grounds as set forth above in the Goldsmith Parties’ Response to paragraph 3.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶3. Printz’s declaration is admissible. *Id.*; AWF Reply Br. 6-7.**

15. “Warhol invariably instructed the silk-screen maker to produce a high-contrast image.” (Printz Decl. ¶19 (Ex. 2).) Unlike “[b]lack-and-white photographs[, which] record a continuous range of tones from the deepest blacks in the shadows to the brightest lights,” Warhol’s preferred high-contrast half-tone image “reduced the gradual gray scale of the photograph to a sharp distinction between darks and lights.” (Printz Decl. ¶20 (Ex. 2).)

Goldsmith Parties’ Response: Not disputed to the extent that Neil Printz testified to the same with respect to the Warhol Prince Images, but otherwise object to the Printz Declaration on the same grounds set forth above in the Goldsmith Parties’

Response to paragraph 3. See Goldsmith R. 56.1 Stmt. at ¶¶ 66 – 70.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶12. Printz’s declaration is admissible. *Id.*; AWF Reply Br. 6-7. Paragraphs 66–70 of Goldsmith’s 56.1 Statement do not contradict the asserted fact. See Local Rule 56.1. AWF incorporates by reference its response to Goldsmith 56.1 Statement paragraph 66. See Dkt. 70.**

16. This process “entailed a drastic simplification of the original [image], a discretionary reduction of tonal gradations to a high-contrast pattern that functioned more like a heraldic emblem than any sort of rounded, particularized representation.” (Expert Report of Dr. Thomas Crow at 11 (Ex. 5).) The nuance, realism, and depth of the underlying image were removed. (Printz Decl. ¶13 (Ex. 2).)

**Goldsmith Parties’ Response:** Disputed. The Goldsmith Parties object to the Expert Report of Dr. Thomas Crow (“Crow Report”) and seek its preclusion because it improperly supplants the Court’s role in assessing transformative use. See Goldsmith Parties’ Opp. Mem. at Point II (A). The referenced Crow statement also does not refer to the Warhol Prince Images. The Goldsmith Parties object to the statement from the Printz Declaration on the same grounds as set forth above in the Goldsmith Parties’ Response to paragraph 3.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. An evidentiary objection “does not suffice as a denial of a statement of undisputed fact.”**

*Senno*, 812 F. Supp. 2d at 465 n.9. Goldsmith Parties' response does not comply with Local Rule 56.1, which requires that "opposing statements must be supported by citations to specific evidence of the kind required by Fed. R. Civ. P. 56(c)." Local Rule 56.1, Committee Note.

In any event, the Crow Report is admissible for the reasons set forth below and the for the reasons set forth in AWF's Reply Memorandum of Law in Support of its Motion for Summary Judgment. AWF Reply Br. 4-6.

Dr. Crow is a qualified expert on Warhol's art and career. (See Crow Report(Ex. 5) at 1.) Goldsmith Parties do not dispute this fact. His opinion regarding the transformative nature of Warhol's work, generally, and the Prince Series, specifically, from both an aesthetic and interpretative perspective is completely within the scope of his experience and knowledge. (*Id.* 9-12, 15-18, 20.) Dr. Crow does not purport to opine on transformation in the legal sense. His specialized knowledge is helpful to the trier of fact who, in addition to conducting a visual comparison of the Prince Series and the Prince Photograph to assess aesthetic transformation, must consider how the Prince Series transformed the meaning and message of the Prince Photograph. See AWF Reply Br. 4-6; Fed. R. Evid. 702. Indeed, Goldsmith has asserted numerous facts related to the meaning and message of her own work. (Dkt. 53 (Goldsmith Motion for Summary Judgment) at 4 ("Goldsmith was trying to capture a sense of someone who was very

**expressive and willing to break through what must have been his immense fears to make the type of creative works he wanted, but that he was frightened.”.) AWF offers Dr. Crow for the same purpose.**

**In addition, Printz’s declaration is admissible. AWF 56.1 Reply ¶3; AWF Reply Br. 6-7.**

17. Warhol examined the half-tone images before they were made into silk-screens “so that he could indicate by means of instructions, written and drawn with china-marking crayon, any changes to be made: for example, to increase the tonal contrast by removing areas of half-tone, thereby flattening the image.” (Crow Expert Report at 11 (citation omitted) (Ex. 5).)

Goldsmith Parties’ Response: Disputed. The Goldsmith Parties object to the Crow Report on the same grounds as set forth above in the Goldsmith Parties’ Response to paragraph 16. Further, Dr. Crow’s opinion is speculative and based on inadmissible hearsay insofar as AWF cites it for the truth of the matter asserted.

AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow’s opinion is admissible. *Id.*; AWF Reply Br. 4-6.

Dr. Crow’s opinion is not speculative. It is based on his extensive experience and knowledge of Warhol’s artistic process and career. See Crow Report (Ex. 5) at 1. In addition, Goldsmith Parties’ hearsay objection is baseless. Experts may rely on hearsay. See Fed. R. Evid. 703. Dr. Crow’s opinion is also

relevant to AWF's knowledge and state of mind. See Fed. R. Evid. 801. Further, the statements and literature Dr. Crow cites reflect perceptions regarding Warhol's artistic processes, the messages communicated through his works, and the aesthetic qualities of his works. These reasonable and far-reaching perceptions of Warhol's work are directly relevant to the fair-use analysis, and they are offered here as evidence of commentary about how Warhol is perceived, not for the truth of the underlying facts stated about Warhol.

18. "Once Warhol approved of the high-contrast image printed on the acetate," he would have a silk-screen created such "that the image would be reproduced like a photographic negative onto the screen." (Printz Decl. ¶20 (Ex. 2).)

Goldsmith Parties' Response: Not disputed to the extent that Printz testified to the same with respect to the Warhol Prince Images, but otherwise object to the Printz Declaration on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 3. See Goldsmith R. 56.1 Stmt. at ¶¶ 66 – 70.

AWF's Reply: Goldsmith Parties do not dispute the asserted fact. See AWF 56.1 Reply ¶3. Printz's declaration is admissible. *Id.*; AWF Reply Br. 6-7. Paragraphs 66– 70 of Goldsmith's 56.1 Statement do not contradict the asserted fact. See Local Rule 56.1. AWF incorporates by reference its response to Goldsmith 56.1 Statement paragraph 66. See Dkt. 70.

19. Having established the silk-screen derived from the source image, Warhol "would lay out the

composition in pencil” on a linen canvas that had “been commercially prepared with a white ground layer, known as the primer.” “He would then place the screen face down on the canvas, pour ink onto the back of the mesh, and use a squeegee to pull the ink through the weave and onto the canvas.” (Printz Decl. ¶21 (Ex. 2).)

Goldsmith Parties’ Response: Not disputed to the extent that Printz testified to the same with respect to the Warhol Prince Images, but otherwise object to the Printz Declaration on the same grounds set forth above in the Goldsmith Parties’ Response to paragraph 3. See Goldsmith R. 56.1 Stmt. at ¶¶ 66–70.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact. See AWF 56.1 Reply ¶3. Printz’s declaration is admissible. *Id.*; AWF Reply Br. 6-7. Paragraphs 66–70 of Goldsmith’s 56.1 Statement do not contradict the asserted fact. See Local Rule 56.1. AWF incorporates by reference its response to Goldsmith 56.1 Statement paragraph 66. See Dkt. 70.**

20. After the “high-contrast half-tone impressions [had been] printed on the primed canvas[, which] served Warhol as an overall design or ‘under-drawing,’” then came the colors. Warhol painted the colors by hand over the printed impression, using the image outline as a rough guide. (Printz Decl. ¶22 (Ex. 2).) “He used Liquetex acrylic paints, which .mixed with water and dried quickly, and .had a flat, even consistency and an industrial appearance. With the half-tone to guide him, he could work quickly, as he liked to, laying in unmodulated applications of the acrylic paint. . . .” (Printz Decl. ¶22 (Ex. 2).)

Goldsmith Parties' Response: Not disputed to the extent that Printz testified to the same with respect to the Warhol Prince Images, but otherwise object to the Printz Declaration on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 3. See Goldsmith R. 56.1 Stmt. at ¶¶ 66 – 70.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact. See AWF 56.1 Reply ¶3. Printz's declaration is admissible. *Id.*; AWF Reply Br. 6-7. Paragraphs 66– 70 of Goldsmith's 56.1 Statement do not contradict the asserted fact. See Local Rule 56.1. AWF incorporates by reference its response to Goldsmith 56.1 Statement paragraph 66. See Dkt. 70.**

21. Warhol often used exotic or unnaturally colored paints. (Crow Expert Report at 20 (Ex. 5).)

Goldsmith Parties' Response: Not disputed factually as to Warhol's works generally, without waiving the Goldsmith Parties' objection to the Crow Report as set forth above in the Goldsmith Parties' Response to paragraph 16.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow's opinion is admissible. *Id.*; AWF Reply Br. 4-6.**

22. The 1989 MoMA catalogue included a description of Warhol's techniques, by reference to how Warhol's Marilyn Monroe images were created, by the British curator and author Marco Livingstone:

A pencil tracing was taken from the full sized [transparent] acetate prepared for the photographic screen. Either by transferring the penciled line by

pressing onto the front of the acetate or sheet of paper, or by placing a sheet of carbon paper beneath the tracing and then drawing the line one section at a time, a rough guide was established for each color area, for example, the lips and the eyelids. The colors were then brushed on by hand, often with the use of masking tape to create a clean junction between them, with the eventual imposition of the black screened image also serving to obscure any unevenness in the line. The acetates were examined by Warhol before they were made into screens, so that he could indicate by means of instructions, written and drawn with china-marking crayon, any changes to be made: for example, to increase the tonal contrast by removing areas of half-tone, thereby flattening the image. The position of the image would be established by taping the four corners of the acetate to the canvas and then tearing off the tape along the corner edges of the acetate; the fragments of tape remaining on the canvas would serve as a guide in locating the screen on top. The position of the screen would be confirmed by eye, and it would then be printed.

(Crow Expert Report at 11 (**Ex. 5**) (citing Marco Livingstone, "Do It Yourself: Notes on Warhol's Technique," in Kynaston McShine ed., *Andy Warhol: A Retrospective* (New York: Museum of Modern Art, 1989), 72).)



Goldsmith Parties' Response: Not disputed as to the content of the referenced 1989 MoMA catalogue, but the Goldsmith Parties object to the Crow Report as set forth above in the Goldsmith Parties' Response to paragraph 16. The Goldsmith Parties further object because the statements in the 1989 MOMA Catalogue are hearsay within hearsay and do not relate to the Warhol Prince Images themselves.

AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. *See* AWF 56.1 Reply ¶16. Dr. Crow's opinion is admissible. *Id.*; AWF Reply Br. 4-6.

Goldsmith Parties' hearsay objection is baseless. Experts may rely on hearsay. *See* Fed. R. Evid. 703. Dr. Crow's opinion is also relevant to AWF's knowledge and state of mind. *See* Fed. R. Evid. 801. Further, the statements and literature Dr. Crow cites reflect perceptions regarding Warhol's artistic processes, the messages communicated through his works, and the aesthetic qualities of his works. These reasonable and far-reaching perceptions of Warhol's work are directly relevant to the fair-use analysis, and they are offered here as evidence of commentary about how Warhol is perceived, not for the truth of the underlying facts stated about Warhol.

23. Although he is famous for having stated, "I want to be a machine," every Warhol painting is, in fact, a nuanced calibration between repetition and difference, mechanical means and personal touch. (Printz Decl. ¶21 (Ex. 2).)

Goldsmith Parties' Response: Disputed on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 3 with respect to the Printz Declaration.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶3. Printz's declaration is admissible. *Id.*; AWF Reply Br. 6-7.**

24. Warhol used his signature silkscreen painting technique to explore themes that observers have universally perceived in his work: the reproduction of popular or everyday images in a manner that commoditizes and depersonalizes the underlying subject. (Crow Expert Report at 10–11 (Ex. 5).)

Goldsmith Parties' Response: Disputed because the Goldsmith Parties object to the Crow Report on the same grounds set forth above in their Response to paragraph 16.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow's opinion is admissible. *Id.*; AWF Reply Br. 4-6.**

25. According to Printz, Warhol's celebrity portraits "were not portraits in the traditional sense: they did not attempt to capture the way a sitter really looked or to reveal his or her inner character." (Printz Decl. ¶13 (Ex. 2).) Rather, "[t]he photographs that Warhol selected" as the reference for his celebrity portraits "were in fact already images." (*Id.*) For example "[l]ike a soup can, Marilyn Monroe's face in the studio still he selected for his paintings. . . was already a commodity; and like a dollar bill, her face already functioned as a sign." (*Id.*)

Goldsmith Parties' Response: Disputed on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 3 with respect to the Printz Declaration.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶3. Printz's declaration is admissible. *Id.*; AWF Reply Br. 6-7.**

26. According to Printz, Warhol's celebrity portraits took an existing image, such as a headshot of Marilyn Monroe, and "distilled its most referential attributes, so that the subject (Marilyn Monroe) and the medium (photography) remained identifiable, but only as trace." (Printz Decl. ¶13 (**Ex. 2**)). "Warhol's work is visibly a portrait of Marilyn Monroe, but his real subject is not the private person but the public image, a 'persona' named 'Marilyn.'" (*Id.* ¶14.)

Goldsmith Parties' Response: Disputed on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 3 with respect to the Printz Declaration.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶3. Printz's declaration is admissible. *Id.*; AWF Reply Br. 6-7.**

27. According to Dr. Thomas Crow, a renowned art historian, teacher, and scholar of Warhol and his work, the strategic cropping of images to a discrete portion—often a symbolic body part—transformed the person into a symbol. (Crow Expert Report at 10–11 (**Ex. 5**)).

Goldsmith Parties' Response: Disputed on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 16 with respect to the

Crow Report. Further, to the extent AWF asserts that Warhol's cropping of images effected a transformation under the first fair use factor in 17 U.S.C. ¶ 107(1), such assertion is a legal conclusion and not a statement of undisputed material fact, and the Goldsmith Parties dispute this legal conclusion.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow's opinion is admissible. Id.; AWF Reply Br. 4-6.**

28. In Warhol's portraits of the boxer Muhammed Ali, Warhol started with an underlying Polaroid photograph that he had taken of Ali. (Printz Decl. ¶31 (Ex. 2).) Warhol focused on the most recognizable and symbolic emblem of Ali's celebrity: his fist. (*Id.* ¶32.) According to Printz, "[i]n the end, the portrait depicted the most recognizable and symbolic emblem of Ali's celebrity—his fist—making the finished work a portrait of an icon, not a man." (*Id.*)

Goldsmith Parties' Response: Undisputed as to Warhol starting with his own Polaroid photo, but otherwise disputed on the same grounds forth above in the Goldsmith Parties' Response to paragraph 3 with respect to the Printz Declaration.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶3. Printz's declaration is admissible. Id.; AWF Reply Br. 6-7.**

29. Dr. Crow testified that Warhol's "celebrity portraits are much less, if at all, about the figure he represents" but instead "about the way that their images work on the spectator in advance of the spectator and counting Warhol's particular

transformation of those public images.” (Deposition Transcript of Dr. Thomas Crow 52:1–54:13 (**Ex. 6**.) “They are about the way that people who become celebrities and circulate via their images among people and for people who never encountered them personally function as masks, function in terms of a cultural language rather than the actual individual in any kind of depth. That’s why they flatten out. That’s why they are, in fact, very reduced and simplified in their mode of representation or where they encode the face.” (*Id.*)

Goldsmith Parties’ Response: Disputed on the same grounds set forth above in the Goldsmith Parties’ Response to paragraph 16 with respect to the Crow Report. Further, to the extent AWF alleges “transformation” under the first fair use factor in 17 U.S.C. ¶ 107(1), such assertion is a legal conclusion and not a statement of undisputed material fact, and the Goldsmith Parties dispute this legal conclusion.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow’s opinion is admissible. *Id.*; AWF Reply Br. 4-6.**

30. Printz explains that, in this respect, Warhol’s celebrity portraits were not about the individual celebrity, but how the public idolizes and consumes branded images. (Printz Decl. ¶15 (**Ex. 2**.) His portraits comment on the cultural phenomenon embodied by the “publicity machine,” a powerful engine that packages and disseminates commoditized images of intense identification and desire. (*Id.*)

Goldsmith Parties’ Response: Disputed on the same grounds as those set forth above in the

Goldsmith Parties' Response to paragraph 3 with respect to the Printz Declaration.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶3. Printz's declaration is admissible. *Id.*; AWF Reply Br. 6-7.**

31. Dr. Crow opines that “[a] Warhol painting is thus far from any unreflective replica of a photographic source, but rather the outcome of a complicated, highly considered interplay of disparate elements.” (Crow Expert Report at 11–12 (**Ex. 5**).

**Goldsmith Parties' Response:** Disputed on the same grounds as those set forth above in the Goldsmith Parties' Response to paragraph 16 respecting the Crow Report.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow's opinion is admissible. *Id.*; AWF Reply Br. 4-6**

32. Dr. Crow further states that “the significant character and artistic value” of Warhol's celebrity portraits “inheres in the extent and character” of the transformation that results from his alterations and additions. (Crow Expert Report at 3 (**Ex. 5**).

**Goldsmith Parties' Response:** Disputed on the same grounds as those set forth above in the Goldsmith Parties' Response to paragraph 16 respecting the Crow Report. Further, to the extent AWF asserts that a “transformation” results from Warhol's alterations and additions under the first fair use factor in 17 U.S.C. ¶ 107(1), such assertion is a legal conclusion and not a statement of undisputed material fact, and the Goldsmith Parties dispute this legal conclusion.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow's opinion is admissible. *Id.*; AWF Reply Br. 4-6.**

33. Critics, historians, and lay observers have adopted this understanding of Warhol's artistic process and the significance of his artistic choices. For example, a 1989 essay by Benjamin Buchloh, an art historian then on the faculty of M.I.T. and now at Harvard, discusses Warhol's selection of celebrity images as a consumer of such images: "Although Warhol constructed images of Marilyn Monroe, Liz Taylor, and Elvis Presley in the tragicomical conditions of their glamour, the paintings' lasting fascination does not derive from the continuing myth of these figures but from the fact that Warhol constructed their image from the perspective of the tragic condition of those who consume the stars' images. . . ." (Crow Expert Report at 6 (citation omitted) (Ex. 5).)

Goldsmith Parties' Response: Disputed on the same grounds as those set forth above in the Goldsmith Parties' Response to paragraph 16 respecting the Crow Report. Thereferenced sources are also hearsay that do not relate to the Warhol Prince Images.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow's opinion is admissible. *Id.*; AWF Reply Br. 4-6.**

**Goldsmith Parties' hearsay objection is baseless. Experts may rely on hearsay. See Fed. R. Evid. 703. Dr. Crow's opinion is also relevant to AWF's knowledge and state of mind. See Fed.**

**R. Evid. 801. Further, the statements and literature Dr. Crow cites reflect perceptions regarding Warhol's artistic processes, the messages communicated through his works, and the aesthetic qualities of his works. These reasonable and far-reaching perceptions of Warhol's work are directly relevant to the fair-use analysis, and they are offered here as evidence of commentary about how Warhol is perceived, not for the truth of the underlying facts stated about Warhol. The statement concerns Warhol's work generally, which necessarily includes the Prince Series.**

34. Similarly, in 2002, curator Heiner Bastian argued that Warhol's celebrity portraits contain an "aura of utterly affirmative idolization [that] already stands as a stereotype of a 'consumer-goods style' expression of an American way of life and of the mass-media culture of anation." (Crow Expert Report at 8 (citation omitted) (**Ex. 5**).

Goldsmith Parties' Response: Disputed on the same grounds as those set forth above in the Goldsmith Parties' Response to paragraph 16 respecting the Crow Report. The referenced sources are also hearsay that do not relate to the Warhol Prince Images.

AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow's opinion is admissible. *Id.*; AWF Reply Br. 4-6.

Goldsmith Parties' hearsay objection is baseless. Experts may rely on hearsay. See Fed. R. Evid. 703. Dr. Crow's opinion is also relevant to AWF's knowledge and state of mind. See Fed.



**R. Evid. 801. Further, the statements and literature Dr. Crow cites reflect perceptions regarding Warhol's artistic processes, the messages communicated through his works, and the aesthetic qualities of his works. These reasonable and far-reaching perceptions of Warhol's work are directly relevant to the fair-use analysis, and they are offered here as evidence of commentary about how Warhol is perceived, not for the truth of the underlying facts stated about Warhol. The statement concerns Warhol's work generally, which necessarily includes the Prince Series.**

35. By this time, the consensus among specialists was that Warhol's celebrity portraits "entail a[n] apprehension of major characteristics of recent consumer society and the way it works in people's subjective imagination." (Crow Dep. Tr. 64:18–65:23 (Ex. 6).)

Goldsmith Parties' Response: Disputed on the same grounds as those set forth above in the Goldsmith Parties' Response to paragraph 16 respecting the Crow Report.

AWF's Reply: **Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow's opinion is admissible. *Id.*; AWF Reply Br. 4-6.**

36. Members of the general public routinely respond to Warhol's work with the emotion and recognition of the deeper implications of his work articulated by Crow, Buchloh, Bastian, and other figures in the art world. (Crow Dep. Tr. 88:10–91:8 (Ex. 6).)

Goldsmith Parties' Response: Disputed on the same grounds as those set forth above in the Goldsmith Parties' Response to paragraph 16 respecting the Crow Report. There is also no evidentiary support to support the assertion of how "members of the public" respond.

AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow's opinion is admissible. *Id.*; AWF Reply Br. 4-6. As an expert on the art and career of Warhol, Dr. Crow is qualified to opine on Warhol's impact on the public, and the public's expressed response to Warhol's work. See Crow Report (Ex.5) at 1; see Fed. R. Evid. 702. His opinion is based on firsthand interactions and conversations with members of the public. See Crow Dep. (Ex. 6) at 88:15-20 ("I think that the paintings are empirically and objectively impactful on a large number of people. We knew that from their documented and recorded responses to the work."); 89:7-10 ("I am talking about people outside of the academic profession or the curatorial profession."); 89:20-90:6 ("I speak individually or on panels at museums where the general public attends these events and hear from people who are not professionals at all either in questions from the floor or interactions with them that way or when they speak to me afterwards, which is -- it's a frequent part of the experience of speaking on these occasions.").

## II. LYNN GOLDSMITH A ROCK-AND-ROLL PHOTOGRAPHER

37. “One of the most expressive chroniclers of the rock ‘n’ roll era,” Goldsmith “has captured some of the finest rock, jazz, and R&B performers of our time in brilliant, often surprising images that reveal a great deal about her subject.” (Lynn Goldsmith, PhotoDiary, About the Book (Ex. 7).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

38. Among many others, Goldsmith has photographed Bruce Springsteen, Michael Jackson, Patti Smith, Bob Dylan, and Tom Petty. (Goldsmith Counterclaim ¶9 (Dkt. 20) (Ex. 8); Morrison Hotel Gallery: Lynn Goldsmith (Ex. 9).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

39. Goldsmith “proudly proclaim[s], ‘Yes, I am a rock and roll photographer.’” (LG-151 (Ex. 10).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

40. She “has been capturing music legends since the early 1970’s.” (Analogue Gallery, Lynn Goldsmith Book Signing: Friday, May 23rd (Ex. 11).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

41. Goldsmith’s philosophy about making photographs “revolve[s] around helping others formulate their identities.” (LG-151 (Ex. 10)).

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

42. Where her “subjects want[] or need[] to be seen in a certain way,” she views it as her job “to project that face to the world.” (Deposition Transcript of Lynn Goldsmith 7:23–8:3, 20:12–21:13 (**Ex. 12**)).

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

43. Goldsmith aims in her photographs to capture and reveal something about her subject's human identity. (Goldsmith Dep. Tr. 62:17–23, 244:18–245:2 (**Ex. 12**)).

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

44 In order to accomplish these goals, Goldsmith undertakes to create conditions that will encourage her subjects to display their inner selves. For example, in advance of a photo shoot, she not only listens to her subjects' music, but she listens to music that was popular when her subjects were in their formative teenage years. “[T]hat really genuinely [a]ffects them” and taps into “an innocence and openness that we have from our childhood.” (Goldsmith Dep. Tr. 9:9– 23, 13:17–15:3, 24:9–19 (**Ex. 12**)).

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

45. Goldsmith believes this enables her to connect with her subjects. (Goldsmith Dep. Tr. 14:21–15:3 (**Ex. 12**).

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

46. Goldsmith also endeavors to establish a rapport and put her subjects at ease when they arrive in her studio. Getting subjects comfortable is “the main thing first.” (Goldsmith Dep.Tr. 95:21–22 (**Ex. 12**).

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

47. In order for Goldsmith to make the kind of photographs she desires to make, her subject “has got to have a good time. . . . You are just trying to establish rapport and mutual respect and connection.” (Goldsmith Dep. Tr. 97:6–18 (**Ex. 12**).

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

48. Among other things, “at the very beginning, when [Goldsmith is] just forming a relationship, [she] like[s] to put makeup on people because...it connects [her and the subject] physically.” Indeed, “sometimes [the makeup] is not that necessary and then [she] wipe[s] it off. It’s more about the relationship of [Goldsmith] talking and touching at the same time.” (Goldsmith Dep. Tr. 91:22–92:8 (**Ex. 12**).

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

49. Goldsmith also suggests clothing or other accessories for her subjects to wear for the shoot. (Goldsmith Dep. Tr. 45:20–46:7 (**Ex. 12**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

50. Gestures like these “make[ her subjects] feel like [she] care[s] about” them. (Goldsmith Dep. Tr. 45:20–46:7 (**Ex. 12**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

51. For example, Goldsmith might employ this tactic when photographing a drummer, because “[d]rummers are always like in the background, you know, so it makes him feel like [she] care[s] about him and he is not left out because he is the drummer and not the lead singer. It’s the psychology of connecting with people.” (Goldsmith Dep. Tr. 46:2–7 (**Ex. 12**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

52. Goldsmith often “stand[s] in different body positions” so that she can avoid asking her subjects to stand in uncomfortable positions. (Goldsmith Dep. Tr. 32:6–14 (**Ex. 12**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

53. Goldsmith also endeavors throughout a shoot to “keep [her subjects] so that they are having a good time, they are entertained, they’re learning

something, they enjoy the environment.” (Goldsmith Dep. Tr. 98:10–13 (**Ex. 12**).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

54. The goal of these techniques is to “get [Goldsmith’s subjects] to express their true selves in th[e] photograph[s] so [she can] portray that.” (Goldsmith Dep. Tr. 46:8–11 (**Ex. 12**).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

55. “The first thing is getting [a subject] comfortable before getting him to reveal anything anything.” (Goldsmith Dep. Tr. 97:6–9 (**Ex. 12**).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

56. Goldsmith testified that “[y]ou can’t have a situation where you ask a person to put themselves -- you could, but I tend to ask people to be physically comfortable, their face relaxes.” (Goldsmith Dep. Tr. 32:4–18 (**Ex. 12**).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

57. Another important aspect of Goldsmith’s photography is lighting. For example, when asked how the lighting of a particular photograph “contributed to what you were trying to project in this photograph,” Goldsmith responded, “Photography is light. I mean, I can’t even -- you know, that’s part of it.” After a brief pause, she clarified, “Not part of it.

That is it.” (Goldsmith Dep. Tr. 41:1–8 (**Ex. 12**); see also *Id.* 54:4–5 (“As I said, photography is about light.”), 55:13–16 (Q: “[L]ighting is just as much an object as lit candles?” A: “Photography is light.”).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

58. She positions her subjects in certain ways, sets up lights and umbrellas in certain places, and chooses the right camera for her mission. (Goldsmith Dep. Tr. 35:9–23, 42:2–8, 53:25– 54:7, 104:13–14 (**Ex. 12**).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

59. When asked why she positioned a subject “slightly offset in the photograph,” Goldsmith testified “[b]ecause of the light and the shadows, and also leaning against a wall is more comfortable than, let’s say, her not leaning against a wall.” (Goldsmith Dep. Tr. 42:2–8 (**Ex. 12**).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

60. Goldsmith’s photography is part of her effort to discover her own identity, which she can only do by imagining what life is like for the subjects of her photography. Goldsmith explained that when she photographs a subject, “I put myself in the shoes of who is in front of the camera. I mean, I feel like I’m them, like when I talked about how I want the body to be comfortable, I just have this, you are me and I am you. . . . I actually feel like I’m standing there” in the place of the subject. According to Goldsmith then,



when looking at one of her photographs, one sees the subject “and his identity and his story, but through [Goldsmith’s] eyes, because [Goldsmith is] in his shoes in that moment as she [made] that photograph.” (Goldsmith Dep. Tr.67:17–22 (**Ex. 12**)).

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

61. Goldsmith testified further:

Q. So there is an important element of the photography in the book that you are trying to humanize, both the subjects and yourself in what you are portraying, is that right?

A. I’m just trying to find out who I am and that journey only takes place by also trying to find out who other people are.

Q. There is a real effort to communicate the uniqueness of the people and their identities in these photographs?

A. Right. Because they’re all part of me, they are all part of all of us.

Q. And when you are connecting who you are with the identity of the people in your photographs, you are trying to do that as accurately as you possibly can, as it relates to their personality?

A. I don’t know about accurate. I mean, that word, I’m trying to be as empathetic.

(Goldsmith Dep. Tr. 74:18–75:14 (**Ex. 12**); see also *Id.* 11:25–12:5 (“[I]n my opinion, when you are able to reach outside of yourself and be yourself, but also be in other person’s shoes, you[ ] not only expand your

experience of yourself, but of the universe. It's a way to feel connected to other people."); Description of Lynn Goldsmith, PhotoDiary (Musicians "mirror our self-projection. My work is that reflection. On outward appearances PhotoDiary [a collection of Goldsmith's photographs] appears to be a collection of rock celebrity photos, but it is in fact, my story.") (**Ex. 13**.)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

62. Through this approach to making photographs, Goldsmith has "had the opportunity to make her passion of a quest into the nature of identity and the human spirit into her living." (LG-142 (**Ex. 14**)); Goldsmith Dep. Tr. 7:23–8:2 ("Q. Do you agree that your photography has provided you an opportunity to make your passion of a quest into the nature of identity in the human spirit? A. Yes, I do.") (**Ex. 12**.)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

63. Myra Kreiman, a long-time photography editor at Newsweek, explained, "[W]hen Lynn Goldsmith took somebody into the studio, you generally expected to get something that was -- let me find the right word. That was exceptional. That was creative. That was very well-lit, very polished and brought out a feel for the person themselves." (Deposition Transcript of Myra Kreiman 83:14–20 (**Ex. 15**.)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

64. Goldsmith has explained that her motivation for litigating this dispute is “to get every photographer, every photo organization, and photo magazine to help in the protection of that which we create.” (Lynn Goldsmith, GoFundMe (**Ex. 16**).

Goldsmith Parties' Response: Disputed because the statement is a mischaracterization of cited document, which does not support AWF's contention. Goldsmith explained that her motivation for litigating this dispute is that “in her opinion if ‘artists’ can just take the work of photographers, make minimal changes and sell it commercially as theirs, as well as license the work . . . what is the point of copyright law?” (Lynn Goldsmith, GoFundMe (**Ex. 16**).

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Goldsmith Parties do not contend that AWF misquoted Goldsmith. The quote from this source is accurate. Goldsmith's GoFundMe page contains several statements which could describe Goldsmith's motivations, including that “I feel that if I don't take this legal battle on, it can mean every photographer, even though their image should be protected by the copyright laws, will not be able to protect rights to that which they have created.” (Lynn Goldsmith, GoFundMe (**Ex. 16**).** The statement cited by Goldsmith Parties does not contradict the fact asserted by AWF. *See Local Rule 56.1.*

65. She has expressed this sentiment in private conversations, as well. As Kreiman testified,

paraphrasing Goldsmith, “the point she made to me was that she thinks it is important to stand up for copyright law, as it applies to her and as it applies to . . .the industry or to photographers in general. . .so that the people who come after [her] will also be protected.” (Kreiman Dep. Tr. 44:2–11 (**Ex. 15**).

Goldsmith Parties’ Response: The first sentence is disputed on the same grounds set forth above in the Goldsmith Parties’ Response to paragraph 64. The second sentence is not disputed.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Goldsmith Parties do not offer evidence to the contrary. See Local Rule 56.1.**

66. Goldsmith repeatedly has criticized the Second Circuit Court of Appeals decision in Cariou v. Prince, stating that “due to the latest ruling in the R[i]chard Prince case,” copyright law is “broadening” and “not changing in [photographers’] favor,” (Compl., **Ex. B (Ex. 17)**; Goldsmith Dep. Tr. 328:6–329:2 (**Ex. 12**)) and that “[i]t is a crime that so many ‘artists’ can get away with” reliance on the fair use doctrine (Compl., **Ex. C (Ex. 18)**).

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

67. Goldsmith has asserted in reference to this case specifically that “[i]f what Warhol did [with her photograph of Price] is okay, then there might as well not be a copyright law” (Goldsmith Dep. Tr. 317:12–15 (**Ex. 12**)) and that “[t]he issue at stake in this matter concerns whether a copyright owner’s rights can be trampled on in the name of fine art. I believe there is a limit to this type of taking and that Warhol

overstepped the boundaries in this situation.” (Lynn Goldsmith Facebook Post (Apr. 9, 2017) (**Ex. 19**)).

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

### **III. GOLDSMITH PHOTOGRAPHED PRINCE IN 1981.**

68. On December 2, 1981, Goldsmith photographed the musician Prince Rogers Nelson in concert at the Palladium in New York City. (Goldsmith Dep. Tr. 81:23–82:11, 109:21–24 (**Ex. 12**); LG-29 (**Ex. 20**)).

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

69. The next day, she photographed him at her studio at 241 West 36th Street in New York City. (Goldsmith Dep. Tr. 81:23–82:11, 109:21–24 (**Ex. 12**); LG-29 (**Ex. 20**)).

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

70. Goldsmith made the photographs on assignment for the magazine Newsweek. (Goldsmith Dep. Tr. 77:8–16 (**Ex. 12**); LG-29 (**Ex. 20**)).

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

71. Goldsmith says she recognized Prince as an up-and-coming star and suggested the shoot to Newsweek. (Goldsmith Dep. Tr. 77:17–79:9 (**Ex. 12**)).

Goldsmith Parties’ Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

72. Prior to photographing Prince, Goldsmith conducted the kind of research and other preparation discussed above at paragraphs 42–57. For example, Goldsmith listened to Prince's music and observed him perform in concert. This impressed upon her Prince's "capab[ility] of physically really expressing himself, carrying his body in very graceful ways" and informed "how [Goldsmith wanted] to make a photograph of" Prince. (Goldsmith Dep. Tr. 83:12–86:7 (Ex. 12).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

73. Similarly, when Prince arrived at her studio to be photographed, Goldsmith already had compiled "a playlist of music" that she thought would "connect" her and Prince "to get [him] to open up for [her]" "without speaking." (Goldsmith Dep. Tr. 85:3–86:7 (Ex. 12).) She chose songs from "the roots of rock and roll," including "Robert Johnson, James Brown, [and] Howling Wolf," and arranged the sequence of songs in an order designed to manipulate Prince's energy during the shoot. (Id.)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

74. Goldsmith also applied makeup to Prince prior to the shoot. See supra ¶48. Although Prince arrived with some makeup already applied, Goldsmith suggested that he apply some lip gloss "[p]robably because [his lips] were dry and also [she] wanted him to be aware that [she] noticed that his

lips were dry, that [she] care[d] about what he looks like in pictures and that [she was] looking after him.” Moreover, Goldsmith wanted to “draw attention to [Prince’s] mouth,” because “[t]he mouth is a very sensual part of a person, especially someone like [Prince],” who “is sensual.” (Goldsmith Dep. Tr. 94:9–95:12 (**Ex. 12**).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

75. Goldsmith personally applied eyeshadow to Prince’s face. (Goldsmith Dep. Tr. 91:16–19, 93:5–16 (**Ex. 12**).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

76. Goldsmith did this both to connect with Prince physically and in recognition of her “feeling [that] Prince was in touch with the female part of himself, but he is also very much male.” (Goldsmith Dep. Tr. 91:22–92:8, 93:8–93:16 (**Ex. 12**).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

77. Goldsmith’s perception of Prince’s being “in touch with the female and male part of himself” derived in part from “what he had on,” which she described as “male” but with “a touch of female,” particularly “the silver sparkle in his suspenders.” (Goldsmith Dep. Tr. 93:17– 93:24 (**Ex. 12**).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

78. Those clothes—including the suspenders—were Prince’s own clothes that he had worn to Goldsmith’s studio. (Goldsmith Dep. Tr. 89:21–90:5 (Ex. 12).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

79. The only item of clothing visible in the photographs that Prince did not bring with him to the studio was the black sash around his neck. He chose that of his own volition when Goldsmith took him to the clothing room at her studio. (Goldsmith Dep. Tr. 89:21–91:6 (Ex. 12).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

80. Similarly, Prince arrived with his hair (including facial hair) appearing as it does in the photographs. Goldsmith made no changes to his hair. (Goldsmith Dep. Tr. 91:7–13, 93:25–94:3 (Ex. 12).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

81. Aside from the changes identified in paragraphs 74, 75, and 79, Goldsmith did not make any other changes to Prince’s appearance. (See Goldsmith Dep. Tr. 89:21–96:3 (Ex. 12).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

82. For her photographs of Prince, Goldsmith “wanted to light him in a way that showed his chiseled



bone structure.” (Goldsmith Dep. Tr. 97:3–5 (**Ex. 12**).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

83. Goldsmith used a Nikon 35 millimeter camera. “Nikon lenses are important” to Goldsmith, and because of her long familiarity with them, she is “very good at making [choices] quickly” about how to make her subjects appear. (Goldsmith Dep. Tr. 106:16–108:22 (**Ex. 12**).) She testified that she chose this lens for “making portraits.” (*Id.* 108:7–10.)

Goldsmith Parties’ Response: Not disputed, except with respect to the last sentence where Goldsmith testified she chose “the lens” she used for making portraits, referring to an 85 or 105 millimeter size lens. (Goldsmith Dep. Tr. 107:19 – 108:10.)

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Goldsmith testified that she shot Prince using a Nikon 35 millimeter (Goldsmith Dep. Tr. 106:16–19 (**Ex. 12**)), and when asked if she chose that lens “for any particular reason,” Goldsmith testified “[a]s it related to making portraits” (*id.* 108:7–10).**

84. She testified that she shot the photographs against a white background, which is the “hardest to light.” (Goldsmith Dep. Tr. 104:3 (**Ex. 12**).) Goldsmith testified that it takes “more time to light white, for me, than it does for other options, so I like to get that done before the person steps on set.” (*Id.* 104:7–9.)

Goldsmith Parties’ Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

85. She testified that she “might have moved an umbrella an inch or two” to alter the lighting throughout the photographs. (Goldsmith Dep. Tr. 104:13–14 (**Ex. 12**)).

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

86. “[G]etting [Prince] to get comfortable” was at the forefront of Goldsmith’s mind. (Goldsmith Dep. Tr. 105:8–11 (**Ex. 12**)). Goldsmith explained: “I just wanted to get him comfortable before I -- that’s the main thing first.” (*Id.* 95:20–22.) “The first thing is getting someone like him comfortable before I’m getting him to reveal anything. He has got to have a good time. . . . You are just trying to establish a rapport and mutual respect and connection.” (*Id.* 97:6–17.)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

87. Notwithstanding these efforts, Prince remained “really uncomfortable.” Goldsmith Dep. Tr. 98:22–23 (**Ex. 12**)).

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

88. Shortly after the shoot began, Prince “very quietly and nicely said, I need to go back in the makeup room. . . and he went back in there.” After 20 minutes, Goldsmith “knock[ed] on the door and there [was] no answer, and [Goldsmith] said, I know you’re in there because there is no door out of there, so [she]

said, are you there,” and Prince responded “just a few minutes.” After another five minutes, Goldsmith let herself into the makeup room, where Prince was “sitting on a corner of the couch.” Prince would not look at Goldsmith and would not respond to her. After several more attempts to engage him, Goldsmith said, “I’m going to leave the room and what I’m going to do is wait on the other side of the wall. If you want to just leave, you can do that.” After that, Prince “disappeared.” (Goldsmith Dep. Tr. 97:22–100:14 (Ex. 12).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

89. Goldsmith made at least 11 photographs of Prince during the December 3, 1981 shoot in her studio. (LG-160 to -170 (Exs. 21– 31).)

Goldsmith Parties’ Response: Disputed. The studio photographs Goldsmith made of Prince included a total of 12 black and white film images and 11 color transparency film images. (See Goldsmith 56.1 Statement ¶37.)

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. The fact asserted by Goldsmith—that she made a total of 23 film images of Prince—does not contradict the fact asserted by AWF—that Goldsmith made at least 11 photographs of Prince. See Local Rule 56.1**

90. The photographs of Prince from this shoot, according to Goldsmith, show that he “is not a comfortable person” and that he “is a really vulnerable human being.” (Goldsmith Dep. Tr. 101:20–22 (Ex. 12).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

91. According to Goldsmith, the photographs convey “someone who could be so expressive and really was willing to bust through what must be their own immense fears to make the work that they wanted to do, which kind of required a different part of themselves, but at the heart of it all, they’re frightened.” (Goldsmith Dep. Tr. 105:15–106:4 (**Ex. 12**)). She testified that “he was so fragile.” (*Id.* 100:2–3.)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

92. The figure of Prince as frightened and vulnerable is what Goldsmith sees in the photographs. The photographs make Goldsmith “really sad”—so much so that she does not “even like looking at” them. (Goldsmith Dep. Tr. 105:15–106:7 (**Ex. 12**)).

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

93. And although the aim of her photography is to portray her subjects’ “identity and [their] story, but through [Goldsmith’s] eyes,” (Goldsmith Dep. Tr. 67:17–22 (**Ex. 12**)), she has mixed feelings about the success of the Prince photographs in achieving that purpose:

Q. Do you think we can see sort of your story and your empathy when looking at the photographs that captures that?

A. In some ways, I hope so, but in other ways, I really hope nobody does.

(*Id.* 106:11–15.)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

94. A few weeks after Goldsmith's concert and studio shoots with Prince, Newsweek published a photograph from the December 2, 1981 concert shoot. (Newsweek-1 (**Ex. 32**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

95. Newsweek did not publish any of the photographs from Goldsmith's December 3, 1981 shoot at her studio. (Goldsmith Dep. Tr. 164:11–165:6 (**Ex. 12**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

96. Goldsmith is not the only photographer to have photographed Prince staring directly at a camera. The following photographs of Prince staring directly at the camera are attributed as having been taken by Allen Beaulieu and Paul Nitkin, as noted below:



(Photographs by Allen Beaulieu (**Ex. 33**); Photograph by Paul Nitkin (**Ex. 34**.)

Goldsmith Parties' Response: The first sentence of paragraph 96 is not disputed. The second sentence of paragraph 96 is disputed because the referenced images were not produced in discovery by AWF and are inadmissible hearsay without any evidentiary foundation insofar as AWF cites to them for the truth of the matter asserted.

AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Any failure to produce the referenced images in discovery was harmless. See Fed. R. Civ. P. 37(c)(1). These are publicly available images. Goldsmith cannot assert prejudice. Goldsmith Parties concede that Goldsmith is not the only photographer to have photographed Prince staring directly at the camera.

In addition, an evidentiary objection “does not suffice as a denial of a statement of undisputed fact.” *Senno*, 812 F. Supp. 2d at 465

n.9. Goldsmith Parties' response does not comply with Local Rule 56.1, which requires that "opposing statements must be supported by citations to specific evidence of the kind required by Fed. R. Civ. P. 56(c)." Local Rule 56.1, Committee Note.

Moreover, these photographs are not being offered as evidence but rather as argumentative support that do not require evidentiary foundation.

**IV. VANITY FAIR LICENSED ONE OF GOLDSMITH'S PHOTOGRAPHS IN 1984 FOR "USE AS AN ARTIST REFERENCE."**

97. In 1984, Vanity Fair licensed one of Goldsmith's photographs from her December 3, 1981 photoshoot of Prince for \$400. (Goldsmith Counterclaim ¶¶20–21 (Dkt. 20) (Ex. 8); LGI Invoice to Vanity Fair (Ex. 35).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

98. An approval form, dated September 25, 1984, sent on behalf of Lynn Goldsmith to Esin Goknar at Vanity Fair states as follows:

11" X 14" B&W STUDIO PORTRAIT  
OF PRINCE BY © 1981  
LYNN GOLDSMITH FOR POSSIBLE  
USE AS AN ARTIST REFERENCE

(LG-64 (Ex. 36).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

99. Neither Andy Warhol nor The Andy Warhol Foundation for the Visual Arts, Inc. is mentioned in this approval form. (LG-64 (**Ex. 36**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

100. The invoice reflecting the license to Vanity Fair, dated October 29, 1984, states:

FEE FOR THE USE OF ONE PHOTOGRAPH OF PRINCE, COPYRIGHT 1981 LYNN GOLDSMITH FOR USE AS ARTIST REFERENCE FOR AN ILLUSTRATION TO BE PUBLISHED IN VANITY FAIR NOVEMBER 1984 ISSUE. IT CAN APPEAR ONE TIME FULL PAGE AND ONE TIME UNDER ONE QUARTER PAGE.

NO OTHER USAGE RIGHT GRANTED.

LGI Invoice to *Vanity Fair* (**Ex. 35**).

Goldsmith Parties' Response: Not disputed, except the invoice further expressly provided:

License is granted to use the above-described photograph(s) on condition that total amount shown hereon is paid. The credit line – LYNN GOLDSMITH – must not be omitted, abbreviated or altered under penalty of double charge. Released, on rental basis only, and in accordance with terms and conditions of submission. License, for one reproduction only, is



JA-500

granted to reproduce above described  
photograph(s) in

IN VANITY FAIR NOVEMBER 1984  
ISSUE

The invoice also noted “PAID DATE DEPOSITED  
CHECK. NO. 2/8/85.” The license fee was \$400. (*See*  
Goldsmith 56.1 Statement ¶¶45 - 46.)

**AWF’s Reply: Goldsmith Parties do not  
dispute the asserted fact.**

101. The October 29, 1984 invoice does not state  
whether the licensed photo was in color or in black  
and white. It does not state the dimensions of the  
licensed photograph. (LGI Invoice to Vanity Fair (**Ex.**  
**35**)).

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not  
dispute the asserted fact.**

102. Neither Andy Warhol nor The Andy Warhol  
Foundation for the Visual Arts, Inc. is mentioned on  
the October 29, 1984 invoice, as a party to the license  
agreement or otherwise. (LGI Invoice to Vanity Fair  
(**Ex. 35**)).

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not  
dispute the asserted fact.**

103. When Goldsmith initially contacted The  
Andy Warhol Foundation in July 2016, she claimed  
that Warhol infringed an almost full-body, color  
photograph of Prince. (LG-4 (**Ex. 37**); see also  
Goldsmith Dep. Tr. 123:19–124:18 (**Ex. 12**)).

JA-501



Goldsmith Parties' Response: Not disputed.

AWF's Reply: **Goldsmith Parties do not dispute the asserted fact.**

104. Goldsmith subsequently has asserted that the photograph that she alleges Warhol infringed was a bust-only black and white photograph (the "Prince Photograph") (LG-7 (**Ex. 38**)):



Goldsmith Parties' Response: Not disputed, except the Goldsmith Parties object to AWF's characterization and refer to their own detailed recitation of the facts, which show that Goldsmith advised AWF that her black and white portrait was used later on the same day. See Goldsmith 56.1 Statement ¶¶122 - 126.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Paragraphs 122-126 of Goldsmith Parties' 56.1 Statement do not contradict the fact asserted by AWF. See Local Rule 56.1.**

105. It is not known which photograph Goldsmith licensed to Vanity Fair. No specific photograph is identified in the September 25, 1984 approval form or in the October 29, 1984 invoice. (LG-64 (Ex. 36); LGI Invoice to Vanity Fair (Ex. 35).) Goldsmith herself testified that she does not know which of her photographs was provided to Vanity Fair in relation to this license. (Goldsmith Dep. Tr. 119:4-7 (Ex. 12).)

Goldsmith Parties' Response: The first sentence is disputed as the material relied upon by AWF does not support its contention. The second sentence is not disputed, except the approval form dated September 25, 1984, sent on behalf of Lynn Goldsmith to Esin Goknar at *Vanity Fair* specified use of a "11x14 B&W STUDIO PORTRAIT OF PRINCE BY © 1981." (See AWF 56.1 Statement ¶98; Goldsmith 56.1 Statement ¶41.) Undisputed that the LGI Invoice to *Vanity Fair* did not specify the specific licensed photo. The third sentence is disputed because Goldsmith's actual testimony as cited was that she doesn't know which of her "black and white studio portraits" were sent Vanity Fair in 1984. (Goldsmith Dep. Tr. 119:4-7 (AWF (Ex. 12).)

Goldsmith also testified that the photo approval form sent to Vanity Fair specified a “black and white studio portrait.” (Goldsmith Dep. Tr. 119:25 – 120:6 (AWF (Ex. 12).)

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted facts. The additional facts asserted by Goldsmith Parties do not contradict the facts asserted by AWF. See Local Rule 56.1.**

106. Goldsmith does not know which photograph of Prince was provided to Vanity Fair, because she had no personal involvement “in selecting. . .a photo of Prince that was sent to Vanity Fair.” (Goldsmith Dep. Tr. 113:25–114:7 (Ex. 12).)

Goldsmith Parties’ Response: The first clause of the sentence is disputed as the testimony cited by AWF does not support its contention. The second clause of the sentence after “because” is not disputed as to Goldsmith having no personal involvement in selecting the photo that was sent to Vanity Fair. Goldsmith ascertained in 2016 that her black and white Goldsmith Photo was the photo that had been licensed to Vanity Fair. (Goldsmith R. 56.1 Statement ¶¶124 – 126.)

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Goldsmith Parties admit that Goldsmith testified that she does not know which Prince photograph was provided to Vanity Fair in 1984. See Goldsmith 56.1 Response ¶105. That she “ascertained” which photograph was provided in 2016 is argument and does not contradict the fact asserted by AWF. See Local Rule 56.1.**

107. Only her staff was involved in selecting the photograph that was sent to Vanity Fair. (Goldsmith Dep. Tr. 115:10–117:15, 119:4–11 (**Ex. 12**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

108. Goldsmith “ha[s] no personal knowledge of what happened in 1984 with respect to the photograph that was sent.” (Goldsmith Dep. Tr. 120:13–18 (**Ex. 12**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

109. Goldsmith asserts that she never looked at the November 1984 issue of Vanity Fair to see whether and how her photograph had been used. (Goldsmith Counterclaim ¶27 (Dkt. 20) (**Ex. 8**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

110. Goldsmith testified that she did not know that she had licensed a photograph of Prince to Vanity Fair until recently. (Goldsmith Dep. Tr. 120:21–25 (**Ex. 12**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

111. Goldsmith has stated that she did not know that Warhol created the Prince Series until after Prince died in April 2016. (Goldsmith Dep. Tr. 127:5–13 (**Ex. 12**); Lynn Goldsmith Facebook Post (Apr. 9, 2017) (**Ex. 19**).)s.

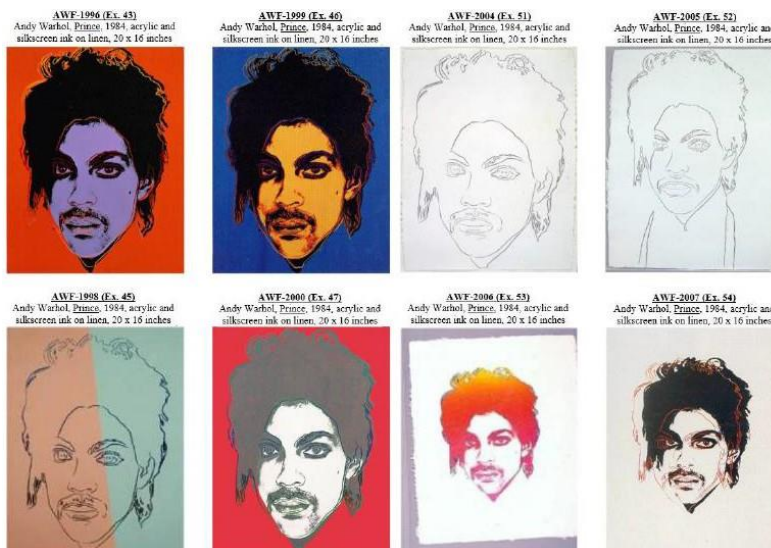
Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

**V. ANDY WARHOL CREATED 16 WORKS OF ART USING THE GOLDSMITH PHOTOGRAPH AS A REFERENCE, AND VANITY FAIR PUBLISHED AN IMAGE OF ONE OF THE WORKS.**

112. Referring to one of the photographs from the December 3, 1981 photoshoot at Goldsmith's studio, Andy Warhol created 12 paintings, two screen prints on paper, and two drawings (the "Prince Series") depicting an image of Prince's head. (AWF-1992 to -2007 (**Exs. 39 – 54**); Pl.'s Response to Request for Admission 4 (**Ex. 55**).)





Goldsmith Parties' Response: Not disputed, except dispute all the images were only of “Prince’s head” because Prince’s neckline and shirt collar is visible in all of the Prince Series Images (AWF Exs. 39-54) and his suspenders are visible in one (AWF Ex. 52).

AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. AWF asserted that Warhol’s Prince Series “depict[ed] an image of Prince’s head.” See AWF 56.1 ¶112. Goldsmith Parties do not cite any evidence to the contrary. See Local Rule 56.1. Plain observation confirms that only the outline of the small portion of Prince’s neckline before it meets his shirt collar is visible in the Prince Series. The shirt collar was removed by Warhol and is not visible. See Crow Report (Ex. 5) at 17.

113. In the Prince Series, Warhol appears to have cropped and resized the image of Prince from Goldsmith’s photograph to remove everything but

Prince's head. (AWF-1992 to - 2007 (**Exs. 39 – 54**); Crow Expert Report at 17 (**Ex. 5**); Crow Dep. Tr. 102:3–24 (**Ex. 6**.)

Goldsmith Parties' Response: Not disputed that “Warhol appears to have cropped and resized the image of Prince from Goldsmith’s photograph.” Disputed that he removed “everything but Prince’s head” on the same grounds set forth above in the Goldsmith Parties’ Response to paragraph 112.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF Reply ¶112.**

114. In doing so, Warhol removed all elements of the Goldsmith photograph aside from the outline of the features of Prince’s head and, in one drawing, his shirt and suspenders. (AWF- 1992 to -2007 (**Exs. 39 – 54**); Crow Expert Report at 20–21 (**Ex. 5**); Crow Dep. Tr. 102:3–24, 187:24–188:14, 201:20–202:10 (**Ex. 6**.)

Goldsmith Parties’ Response: Disputed on the same grounds set forth above in the Goldsmith Parties’ Response to paragraph 112. Further, the Goldsmith Parties object to the reference to the Crow Report on the same grounds set forth above in the Goldsmith Parties’ Response to paragraph 16. As set forth in Goldsmith’s Opposition Memorandum of Law, it is the province of this Court to assess substantial similarity and transformative use.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶¶16, 112. Dr. Crow’s opinion is admissible. See AWF 56.1 Reply ¶16; AWF Reply Br. 4-6. As set forth above and in AWF’s Reply Memorandum of Law in Support of its Motion**



**for Summary Judgment, Dr. Crow’s specialized knowledge regarding Warhol’s work is helpful to the trier of fact, and is not a legal opinion. See AWF 56.1 Reply ¶16; AWF Reply Br. 4-6.**

115. Goldsmith testified that the Prince Series works retain only “the outline of [Prince’s] face, his face, his hair, his features, [and] where his neck is” from the photograph Goldsmith took during the December 3, 1981 shoot. (Goldsmith Dep. Tr. 157:24–158:9 (Ex. 12).)

Goldsmith Parties’ Response: Disputed. The testimony cited by AWF does not support its contention. Goldsmith testified as follows:

Q. I’m showing you another document produced by The Foundation. It’s a picture of one of the Warhol works. Did you see this document – excuse me. Did you see this image before you filed the counterclaims we looked at as Exhibit 1?

A. Yes.

Q. And just as with Warhol 29, your view is that this is identical to the black and white photograph you took?

A. Yes.

Q. And by identical, you mean the outline of Prince’s face is identical to the photograph that you took?

A. Not just the outline of his face, his face, his hair, his features, where his neck is. It’s the photograph.

Q. And as with this photo, the infringement is, in your view, as you are

referring to in your Facebook post, that outline of his features?

A. Say that once more.

Q. Just like you said with Warhol 29—

A. It's the same thing.

Q. -- the infringement you are referring to on your Facebook page is the outline of the features identical to the photograph you took, is that right?

A. I don't know if you are trying to trick me.

Q. I'm not trying to trick anybody.

A. It's my photograph.

Q. Understood.

(Goldsmith Dep. Tr. 157:17–159:2 (Ex. 12).)

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. The additional testimony cited by Goldsmith does not contradict the fact asserted by AWF— that Goldsmith testified that the Prince Series retained “just the outline of his face, his face, his hair, his features, where his neck is.” See Local Rule 56.1.**

116. As Printz explains, the cropping of the underlying image in the Prince Series caused “the head [to] become[ disembodied, separated from the support of the neck and shoulders, as if magically suspended in space, and filling the composition in [the] painting.” (Printz Decl. ¶33 (Ex. 2).)

**Goldsmith Parties' Response:** Disputed on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 3 with respect to the Printz Declaration.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶3. Printz's declaration is admissible. *Id.*; AWF Reply Br. 6-7.**

117. According to Printz, Warhol's cropping also "draws the lower part of the face down to a narrow point, on which the isolated head as a whole seems to balance itself." (Crow Expert Report at 17 (Ex. 5).)

Goldsmith Parties' Response: Disputed. The assertion says "According to Printz" but the record citation refers to the Crow Report. Further disputed on the same grounds as those set forth above in the Goldsmith Parties' Response to paragraphs 3 and 16 respecting the Printz Declaration and Crow Report.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. AWF inadvertently attributed Dr. Crow's opinion to Printz. (Crow Expert Report at 17 (Ex. 5).) Goldsmith Parties' evidentiary objections do not suffice to dispute the fact asserted, and nevertheless lack basis. See AWF 56.1 Reply ¶¶3, 16. Printz's declaration is admissible. See AWF Reply ¶3; AWF Reply Br. 6-7. Dr. Crow's opinion is admissible. See AWF 56.1 Reply ¶16; AWF Reply Br. 4-6.**

118. Warhol had a printer create an enlarged, high-contrast, half-tone silk-screen reproduction of the photograph. (Printz Decl. ¶34 (Ex. 2).)

Goldsmith Parties' Response: Not disputed, except Plaintiff's object to the Printz Declaration on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 3.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF**

**56.1 Reply ¶3. Printz's declaration is admissible. *Id.*; AWF Reply Br. 6-7.**

119. Dr. Crow explained that the high-contrast half-tone, by “draining the inner tone and texture out of what was left” after the cropping, removed almost all the light and shading that were present in the photograph and had “the effect of isolating and exaggerating only the darkest details: the hair, moustache, eyes, and brows.” (Crow Expert Report at 17 (Ex. 5).)

Goldsmith Parties' Response: Disputed on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 16 with respect to the Crow Report.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow's opinion is admissible. *Id.*; AWF Reply Br. 4-6.**

120. Dr. Crow opined that “[o]ne conspicuous effect of these changes was to make the subject appear to face fully towards the front as a detachable mask, negating the more natural, angled position of the figure in the source photograph.” (Crow Expert Report at 17 (Ex. 5).)

Goldsmith Parties' Response: Disputed on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 16 with respect to the Crow Report.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow's opinion is admissible. See AWF 56.1 Reply ¶16; AWF Reply Br. 4-6.**

121. Dr. Crow further stated that unlike in Goldsmith's photo, where "the forehead of Prince obviously recedes under the crown of hair[, a]nd the crown of hair projects over it, [reflecting] a sort of natural shape of the skull," the high-contrast half-tone leaves "the hair and the forehead" in "the same flat [plane]," "differentiated [only] by color." (Crow Dep. Tr. 187:24–188:14, 201:20–202:10 (**Ex. 6**).)

Goldsmith Parties' Response: Disputed on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 16 with respect to the Crow Report and because Crow's testimony supplants the Court's role in assessing substantial similarity and transformative use.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow's opinion is admissible. *Id.*; AWF Reply Br. 4-6. As set forth above and in AWF's Reply Memorandum of Law in Support of its Motion for Summary Judgment, Dr. Crow's specialized knowledge regarding Warhol's work is helpful to the trier of fact, and is not a legal opinion. See AWF 56.1 Reply ¶16; AWF Reply Br. 4-6.**

122. According to Dr. Crow, this "goes along with the transformation of Prince into this mask-like simulacrum of his actual existence." (Crow Dep. Tr. 187:24–188:14, 201:20–202:10 (**Ex. 6**).)

Goldsmith Parties' Response: Disputed on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 16 with respect to the Crow Report and because Crow's testimony supplants the Court's role in assessing substantial similarity and transformative use. To the extent AWF asserts

there was a “transformation” of Prince’s image, such assertion is a legal conclusion in the context of 17 U.S.C. ¶ 107(1) and not a statement of undisputed material fact, and the Goldsmith Parties dispute this legal conclusion.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow’s opinion is admissible. *Id.*; AWF Reply Br. 4-6. As set forth above and in AWF’s Reply Memorandum of Law in Support of its Motion for Summary Judgment, Dr. Crow’s specialized knowledge regarding Warhol’s work is helpful to the trier of fact, and is not a legal opinion. See AWF 56.1 Reply ¶16; AWF Reply Br. 4-6.**

123. Similarly, in the Prince Series, “[e]ven the slight shadow that you see around the bottom of the chin as a whole, which is important for seeing the way it projects and what shape it is, Warhol has taken that out too.” (Crow Dep. Tr. 187:24–188:14, 201:20–202:10 (**Ex. 6**).

**Goldsmith Parties’ Response:** Disputed on the same grounds set forth above in the Goldsmith Parties’ Response to paragraph 16 with respect to the Crow Report and because Crow’s testimony supplants the Court’s role in assessing substantial similarity and transformative use. Further disputed because a visual comparison reflects a shadow area around the bottom chin in both the Warhol Prince Images and the Goldsmith Photo. *See also* Goldsmith Parties’ Response to paragraph 112 above.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow’s opinion is admissible.**

***Id.*; AWF Reply Br. 4-6. As set forth above and in AWF’s Reply Memorandum of Law in Support of its Motion for Summary Judgment, Dr. Crow’s specialized knowledge regarding Warhol’s work is helpful to the trier of fact, and is not a legal opinion. See AWF 56.1 Reply ¶16; AWF Reply Br. 4-6.**

Further, plain observation confirms that only the outline of the small portion of Prince’s neckline before it meets his shirt collar is visible in the Prince Series. See AWF 56.1 Reply ¶112. The shirt collar itself was removed by Warhol and is plainly not visible. (Crow Report at 17 (Ex. 5).) Goldsmith Parties cite no evidence for their contention that a “visual comparison reflects a shadow area around the bottom of the chin,” which is argument, not fact. See Local Rule 56.1.

124. According to Dr. Crow, this likewise contributes to “creat[ing] this sort of flat emblem that stands in for Prince without being a naturalistic equivalent to the appearance of his head.” (Crow Dep. Tr. 187:24–188:14, 201:20–202:10 (Ex. 6).)

Goldsmith Parties’ Response: Disputed on the same grounds set forth above in the Goldsmith Parties’ Response to paragraph 16 with respect to the Crow Report and because Crow’s testimony supplants the Court’s role in assessing substantial similarity and transformative use.

AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow’s opinion is admissible. See AWF 56.1 Reply ¶16; AWF Reply Br. 4-6. As set forth above and in AWF’s Reply

**Memorandum of Law in Support of its Motion for Summary Judgment, Dr. Crow’s specialized knowledge regarding Warhol’s work is helpful to the trier of fact, and is not a legal opinion. See AWF 56.1 Reply ¶16; AWF Reply Br. 4-6.**

125. Although Dr. Crow’s expert report focused on the color photograph of Prince that Goldsmith initially identified as the basis for her claim, he testified that “having learned. . .that Ms. Goldsmith was claiming infringement of her black and white headshot photo” changed “nothing” with respect to his opinion and analysis. (Crow Dep. Tr. 94:12–19 (**Ex. 6**).

Goldsmith Parties’ Response: Not disputed that Crow so testified.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

126. Warhol created the paintings in the Prince Series in multiple layers, including a layer using the silk-screen reproduction of the photograph, a layer he painted by hand, and, in some, layers using additional screens created based on Warhol’s own freehand drawing of the photograph. (Crow Expert Report at 15–18 (**Ex. 5**).

Goldsmith Parties’ Response: Disputed on the same grounds set forth above in the Goldsmith Parties’ Response to paragraph 16 with respect to the Crow Report.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow’s opinion is admissible. *Id.*; AWF Reply Br. 4-6.**

127. The “second screen” used in some of the paintings in the Prince Series, “which was created



from Warhol's freehand lines drawn around and over the photographically derived layer beneath," provide the features with "vibrancy and definition." (Crow Expert Report at 18 (Ex. 5).)

Goldsmith Parties' Response: Disputed on the same grounds as those set forth above in the Goldsmith Parties' Response to paragraph 16 with respect to the Crow Report.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow's opinion is admissible. *Id.*; AWF Reply Br. 4-6.**

128. Printz stated that "[p]rinted slightly off register from the half-tone impression, the line screen highlights the face; it has the effect of lip or eye liner, emphasizing the features and enhancing their impact. Moreover, the line screens were printed not only in different colors but in multi-colored inks so that the line gradually changes color from top to bottom. In two paintings, Warhol heightened the optical dynamic by superimposing two line-screen impressions over the half-tone." (Printz Decl. ¶40 (Ex. 2).)

Goldsmith Parties' Response: Disputed on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 3 with respect to the Printz Declaration, except to the extent Printz testified to the creation of the Warhol Prince Series. (See Goldsmith Parties R. 56.1 Statement at ¶¶ 66 – 70.)

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶3. Printz's declaration is admissible. *Id.*; AWF Reply Br. 6-7.**

129. Dr. Crow opined that “[t]hese lines represent Warhol’s own free invention, by means of which he made a point of diverging from the given facts of the photographic impression to provide his portrayal of Prince with a confrontational presence and intensity absent in his source.” (Crow Expert Report at 18 (Ex. 5).)

Goldsmith Parties’ Response: Disputed on the same grounds set forth above in the Goldsmith Parties’ Response to paragraph 16 respecting the Crow Report.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow’s opinion is admissible. *Id.*; AWF Reply Br. 4-6.**

130. Dr. Crow testified that “bringing everything towards the surface into a much more unified pla[ne] or block of black pigment emphasized by various colors both underlying and overlaying” was “directed towards” creating a “confrontational” image. (Crow Dep. Tr. 204:21– 205:10 (Ex. 6).)

Goldsmith Parties’ Response: Disputed on the same grounds set forth above in the Goldsmith Parties’ Response to paragraph 124.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶124.**

131. Dr. Crow testified that, by “bringing all the features of Prince up to the surface across the same pla[ne], so he’s occupying a kind of barrier between you as a viewer and whatever his inner life might be,” Warhol’s painting transforms Goldsmith’s “retiring” image of Prince into one of “Prince confronting you as his admirer, his fan, a curious onlooker with a kind of

uncompromising implacable character which is not present in the Goldsmith.” (Crow Dep. Tr. 204:21–24, 207:13–208:2 (**Ex. 6**).

Goldsmith Parties’ Response: Disputed on the same grounds set forth above in the Goldsmith Parties’ Response to paragraph 124. To the extent AWF asserts that Warhol “transforms” Goldsmith’s image, such assertion is a legal conclusion in the context of 17 U.S.C. ¶ 107(1) and not a statement of undisputed material fact, and the Goldsmith Parties dispute this legal conclusion.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶¶16, 124. Dr. Crow’s opinion is admissible. *Id.*; AWF Reply Br. 4-6. As set forth above and in AWF’s Reply Memorandum of Law in Support of its Motion for Summary Judgment, Dr. Crow’s specialized knowledge regarding Warhol’s work is helpful to the trier of fact, and is not a legal opinion. See AWF 56.1 Reply ¶16; AWF Reply Br. 4-6. Dr. Crow does not purport to opine on “transformation” in the legal sense. See AWF 56.1 Reply ¶16.**

132. In the Prince Series, Warhol applied exotic, unnatural colors of paint to the canvas, such as green, pink, and red. (AWF-1992 to -2007 (**Exs. 39 - 54**).

Goldsmith Parties’ Response: Not disputed, except object to the characterization of “exotic, unnatural colors” because the material relied upon by AWF does not support this contention. The Court is respectfully referred to the referenced images to make its own assessment of colors that appear in the Warhol Prince images.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Goldsmith Parties fail to cite any evidence to the contrary. See Local Rule 56.1.**

133. In some of the works in the Prince Series, the colors correspond to the features of Prince's face and head, and in others they do not. (AWF-1992 to -2007 (Exs. 39 - 54).)

Goldsmith Parties' Response: Disputed as vague. The Court is respectfully referred to the referenced images to make its own assessment.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Goldsmith Parties' objection that the fact is "vague" is not a denial of the asserted fact. Goldsmith Parties fail to explain how the fact is "vague." And Goldsmith Parties fail to cite any evidence to the contrary. See Local Rule 56.1.**

134. Several of the works in the Prince Series have multiple colors applied near Prince's facial features. (AWF-1996 (Ex. 43); AWF-1999 (Ex. 46); AWF-2000 (Ex. 47); AWF-2001 (Ex. 48).)

Goldsmith Parties' Response: Disputed as vague. The Court is respectfully referred to the referenced images to make its own assessment.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Goldsmith Parties' objection that the fact is "vague" is not a denial of the asserted fact. Goldsmith Parties fail to explain how the fact is "vague." And Goldsmith Parties fail to cite any evidence to the contrary. See Local Rule 56.1.**

135. Several of the works in the Prince Series have multiple colors placed in deliberate disregard of the

facial features. (AWF-1992 (Ex. 39); AWF-1993 (Ex. 40); AWF-1997 (Ex. 44); AWR-1998 (Ex. 45).)

Goldsmith Parties' Response: Disputed as vague. The Court is respectfully referred to the referenced images to make its own assessment.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Goldsmith Parties' objection that the fact is "vague" is not a denial of the asserted fact. Goldsmith Parties fail to explain how the fact is "vague." And Goldsmith Parties fail to cite any evidence to the contrary. See Local Rule 56.1.**

136. Some of the works in the Prince Series have a single flat color behind Prince's face. (AWF-1994 (Ex. 41); AWF-1995 (Ex. 42); AWF-2002 (Ex. 49); AWF-2003 (Ex. 50); AWF-2004 (Ex. 51); AWF-2005 (Ex. 52); AWF-2006 (Ex. 53); AWF-2007 (Ex. 54).)

Goldsmith Parties' Response: Not disputed that certain of the Prince Series images have single color backgrounds, but otherwise dispute the characterization and respectfully refer the Court to the referenced images to make its own assessment.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Goldsmith Parties fail to cite any evidence to the contrary. See Local Rule 56.1.**

137. Warhol also explored varying renditions of the screens in the Prince Series. Certain works in the Prince Series show only the hand-drawn outline of Prince's face. (AWF-1993 (Ex. 40); AWF-1995 (Ex. 42); AWF-1998 (Ex. 45); AWF-2004 (Ex. 51); AWF-2005 (Ex. 52).)

Goldsmith Parties' Response: Disputed as vague. The Court is respectfully referred to the referenced images to make its own assessment.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Goldsmith Parties' objection that the fact is "vague" is not a denial of the asserted fact. Goldsmith Parties fail to explain how the fact is "vague." And Goldsmith Parties fail to cite any evidence to the contrary. See Local Rule 56.1.**

138. Other works in the Prince Series use both the high-contrast and hand-drawn screens layered over one another in different colors and to differing effects. (AWF-1992 (Ex. 39); AWF- 1994 (Ex. 41); AWF-1996 (Ex. 43); AWF-1997 (Ex. 44); AWF-1999 (Ex. 46); AWF-2000 (Ex. 47); AWF-2001 (Ex. 48); AWF-2002 (Ex. 49); AWF-2003 (Ex. 50); AWF-2006 (Ex. 53); AWF- 2007 (Ex. 54).)

Goldsmith Parties' Response: Disputed as vague. The Court is respectfully referred to the referenced images to make its own assessment.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Goldsmith Parties' objection that the fact is "vague" is not a denial of the asserted fact. Goldsmith Parties fail to explain how the fact is "vague." And Goldsmith Parties fail to cite any evidence to the contrary. See Local Rule 56.1.**

139. Warhol created two line drawings by hand in pencil, one of the outline of Prince's head and one of the outline of Prince's head and suspenders (AWF-2004 (Ex. 51); AWF-2005 (Ex. 52)).

Goldsmith Parties' Response: Not disputed that Warhol created two drawings, but disputed as to

the “outline” characterization and because there is no record support cited for a pencil drawing. The Court is respectfully referred to the referenced images to make its own assessment.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Printz explained: “His drawings are pure line, what are known as ‘contour drawings’ that outline the primary features as composites of open silhouettes—the large irregular mound of the hair, the face tapering to the chin, the floating forms of eyebrows, eyes, mustache, and lips, and the profile of the nose. Only the left eyebrow, moustache, and lower lip display pencil marks inside their respective silhouettes that attest to the texture of hair on the eyebrow and mustache, the highlight on the lips. The hair itself is a single mass, broken only by three archipelagoes of tiny contoured islands at the top and on either side where the hair separates into strands.” (Printz Decl. (Ex. 2) ¶¶38, 39, figs 19-20 (noting they are “graphite on HMP paper”); see also Printz Dep. Tr. (Ex. 172) at 50:17-20 (“A contoured drawing follows the contours, the outlines of the head, the face, the features to the degree he chooses to.”) Printz’s declaration is admissible. See AWF 56.1 Reply ¶3; AWF Reply Br. 6-7.**

140. Printz explains that these line drawings imbue the subject with a particularly eerie, empty, and inhuman effect. (Printz Decl. ¶38 (Ex. 2).)

**Goldsmith Parties’ Response:** Disputed on the same grounds set forth above in the Goldsmith Parties’ Response to paragraph 3 respecting the Printz Declaration.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶3. Printz's declaration is admissible. Id.; AWF Reply Br. 6-7.**

141. Dr. Crow opined that, beyond the composition of the Prince Series works, the use of a photograph from “1981, when Prince had just broken through to widespread recognition” but “remained far from the celebrity” he had attained by 1984, echoes Warhol’s use of a 1953 photograph of Marilyn Monroe for his Marilyn works in the 1960s: “The fame that is Warhol’s subject in the Prince portraits was thus of a different magnitude than Prince would have been experiencing three years before, as the Marilyn Monroe mourned and remembered in 1962 had been far from the ingénue captured by photographer Gene Kornman in 1953.” (Crow Expert Report at 17 (**Ex. 5**).

Goldsmith Parties' Response: Disputed on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 16 respecting the Crow Report.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶16. Dr. Crow's opinion is admissible. Id.; AWF Reply Br. 4-6.**

142. Dr. Crow testified that the “larger than life character” Prince had become by 1984 “definitely was not carried in those early photographs of ‘81, and. . .Warhol saw that, at least he responded by creating an image of Prince as a kind of icon or totem of something rather than just being the actual human being that made the music.” (Crow Dep. Tr. 211:8–212:5 (**Ex. 6**).



Goldsmith Parties' Response: Disputed on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 124.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶124.**

143. Dr. Crow opined that the Prince Series works also parallel the Marilyn works in that "Prince was," like Monroe, "a distant figure known to Warhol only via publicity images and his charismatic appearance on the cinema screen." (Crow Expert Report at 16 (Ex. 5); see also Printz Decl. ¶33 (Ex. 2).)

Goldsmith Parties' Response: Disputed on the same grounds set forth above in the Goldsmith Parties' Responses to paragraph 16 respecting the Crow Report and paragraph 3 respecting the Printz Declaration.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶¶3, 16. Dr. Crow's opinion is admissible. AWF 56.1 Reply ¶16; AWF Reply Br. 4-6. Printz's declaration is admissible. AWF 56.1 Reply ¶3; AWF Reply Br. 6-7.**

144. Vanity Fair ultimately published AWF-1996 (Ex. 43) alongside an article titled "Purple Fame," attributed to Tristan Vox. The article discussed Prince's surging and omnipresent popularity, asserting that "escape from Prince is no longer possible." (Vanity Fair (Nov. 1984) at 66 (Ex. 56).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

145. The magazine attributes the artwork accompanying the photograph to Warhol and credits

Goldsmith for a copyright only in the photograph. (Vanity Fair (Nov. 1984) at 66, 121 (**Ex. 56**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

146. Dr. Crow opined that the juxtaposition of a Warhol portrait next to an article titled "Purple Fame" and discussing a celebrity's ubiquity is especially apt given that "Warhol was known, more than any other artist, to have made fame his defining subject." (Crow Expert Report at 15 (**Ex. 5**).)

Goldsmith Parties' Response: Disputed on the same grounds set forth above in the Goldsmith Parties' Response to paragraph 16.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF Reply ¶16.**

147. Dr. Crow opined that the cumulative impact of Warhol's visual alterations in transforming Goldsmith's photograph into the Prince Series works was to create portraits that "are materially distinct in their meaning and message. Unlike Goldsmith's focus on the individual subjects' unique human identity," her personal journey in life, and her emotional connection with her subjects, "Warhol's portraits of Prince, as with his celebrity portraits generally, sought to use the flattened, cropped, exotically colored, and unnatural depiction of Prince's disembodied head to communicate a message about the impact of celebrity and defining the contemporary conditions of life. This approach transforms the character, message, and historic and artistic value of Warhol's portrait of Prince compared to Goldsmith's

photograph.” (Crow Expert Report at 20 (citation omitted) (Ex. 5).)

Goldsmith Parties’ Response: Disputed on the same grounds set forth above in the Goldsmith Parties’ Response to paragraph 16.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF Reply ¶16.**

**V. WARHOL’S PRINCE SERIES WORKS WERE SOLD, LICENSED, AND EXHIBITED PUBLICLY FOR 32 YEARS BEFORE GOLDSMITH CONTENDED THAT THEY INFRINGE THE COPYRIGHT IN HER PHOTOGRAPH OF PRINCE.**

148. After Warhol died in 1987, The Andy Warhol Foundation for the Visual Arts, Inc. eventually obtained ownership of the Prince Series from Warhol’s estate. (Deposition Transcript of KC Maurer 17:22–18:14 (Ex. 57).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

149. Since that time, the works from the Prince Series have been sold or auctioned more than two dozen times. Between 1993 and 2004, the Warhol Foundation sold 12 of the Prince Series works, as summarized below.

<b>Sales of Warhol Prince Series Works by The Andy Warhol Foundation</b>			
	<b>Date</b>	<b>Purchaser</b>	<b>Citation</b>
<b>AWF-1992 (Ex. 39)</b>	Oct. 28, 1993	Anthony d’Offay Gallery	AWF-1784 (Ex. 58); AWF-2232

<b>Sales of Warhol Prince Series Works by The Andy Warhol Foundation</b>			
	<b>Date</b>	<b>Purchaser</b>	<b>Citation</b>
			( <b>Ex. 59</b> ); Pl.'s Response to Request to Admit 19 ( <b>Ex. 55</b> )
<b>AWF-2000 (Ex. 47)</b>	Oct. 28, 1993	Anthony d'Offay Gallery	AWF-1784 ( <b>Ex. 58</b> ); AWF-2232 ( <b>Ex. 59</b> ); Pl.'s Response to Request to Admit 19 ( <b>Ex. 55</b> )
<b>AWF-2007 (Ex. 54)</b>	Mar. 30, 1998	R. Feldman Fine Arts	AWF-1841 ( <b>Ex. 60</b> ); AWF-2232 ( <b>Ex. 59</b> ); Pl.'s Response to Request to Admit 19 ( <b>Ex. 55</b> )
<b>AWF-2001 (Ex. 48)</b>	Feb. 8, 2000	Bjorn Wetterling (Sweden)	AWF-1794 ( <b>Ex. 61</b> )
<b>AWF-2006 (Ex. 53)</b>	July 12, 2001	R. Feldman Fine Arts	AWF-1819 ( <b>Ex. 62</b> ); AWF-2232 ( <b>Ex. 59</b> );

<b>Sales of Warhol Prince Series Works by The Andy Warhol Foundation</b>			
	<b>Date</b>	<b>Purchaser</b>	<b>Citation</b>
			Pl.'s Response to Request to Admit 19 ( <b>Ex. 55</b> )
<b>AWF-2005 (Ex. 52)</b>	Feb. 20, 2002	Jablonka Galerie	AWF-1807 ( <b>Ex. 63</b> ); AWF-1918 ( <b>Ex. 64</b> ); AWF-2232 ( <b>Ex. 59</b> ); Pl.'s Response to Request to Admit 19 ( <b>Ex. 55</b> )
<b>AWF-2004 (Ex. 51)</b>	Jan 9, 2003	J. Kern Fine Arts	AWF-1805 ( <b>Ex. 65</b> ); AWF-2232 ( <b>Ex. 59</b> ); Pl.'s Response to Request to Admit 19 ( <b>Ex. 55</b> )
<b>AWF-1994 (Ex. 41)</b>	Oct. 7, 2003	Coskun & Co. Ltd.	AWF-1798 ( <b>Ex. 66</b> ); AWF-2232 ( <b>Ex. 59</b> ); Pl.'s Response

<b>Sales of Warhol Prince Series Works by The Andy Warhol Foundation</b>			
	<b>Date</b>	<b>Purchaser</b>	<b>Citation</b>
			to Request to Admit 19 ( <b>Ex. 55</b> )
<b>AWF-1997 (Ex. 44)</b>	Oct. 7, 2003	Coskun & Co. Ltd.	AWF-1798 ( <b>Ex. 66</b> ); AWF-2232 ( <b>Ex. 59</b> ); Pl.'s Response to Request to Admit 19 ( <b>Ex. 55</b> )
<b>AWF-1993 (Ex. 40)</b>	Feb. 6, 2004	Coskun & Co. Ltd.	AWF-1802 ( <b>Ex. 67</b> ); AWF-2232 ( <b>Ex. 59</b> ); Pl.'s Response to Request to Admit 19 ( <b>Ex. 55</b> )
<b>AWF-1995 (Ex. 42)</b>	Feb. 6, 2004	Coskun & Co. Ltd.	AWF-1802 ( <b>Ex. 67</b> ); AWF-2232 ( <b>Ex. 59</b> ); Pl.'s Response to Request to Admit 19 ( <b>Ex. 55</b> )

<b>Sales of Warhol Prince Series Works by The Andy Warhol Foundation</b>			
	<b>Date</b>	<b>Purchaser</b>	<b>Citation</b>
<b>AWF-1998 (Ex. 45)</b>	Oct. 12, 2004	Stellan Holm Gallery	AWF-1843 <b>(Ex. 68)</b> ; AWF-2232 <b>(Ex. 59)</b> ; Pl.'s Response to Request to Admit 19 <b>(Ex. 55)</b>

Goldsmith Parties' Response: Not disputed, except the Goldsmith Parties assert that the following listed Purchasers were located outside the United States as follows:

Anthony d'Offay Gallery – London. AWF Ex. 58.

Bjorn Wetterling – Sweden. AWF Ex. 61.

Jablonka Galerie – Germany. AWF Ex. 63.

J. Kern Fine Arts – London. AWF Ex. 65.

Coskun & Co. Ltd. – London. AWF Ex. 66.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact. The additional information provided by Goldsmith does not contradict the asserted fact. See Local Rule 56.1.**

150. The Warhol Foundation transferred custody of the remaining four works—AWF-1996 (Ex. 43), AWF-1999 (Ex. 46), AWF-2002 (Ex. 49), and AWF-2003 (Ex. 50)—to the Andy Warhol Museum in Pittsburgh, Pennsylvania. (Pl.'s Response to Request to Admit 18 (Ex. 55).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

151. In addition to the Warhol Foundation's sales, Prince Series works have been offered at auction at least 13 times since 1999, as summarized below.

<b>Public Auction of Warhol Prince Series Works</b>			
	<b>Date</b>	<b>Purchaser</b>	<b>Citation</b>
<b>AWF-2000 (Ex. 47)</b>	Nov. 10, 1999	Christie's New York	Artnet: Andy Warhol, <i>Prince</i> (Ex. 69)
<b>AWF-1992 (Ex. 39)</b>	Dec. 11, 1999	Cornette de Saint-Cyr	Artnet: Andy Warhol, <i>Prince</i> (Ex. 69)
<b>AWF-1992 (Ex. 39)</b>	Mar. 30, 2000	Sotheby's London	Artnet: Andy Warhol, <i>Prince</i> (Ex. 69)
<b>AWF-2000 (Ex. 47)</b>	Aug. 2, 2000	Tajan	Artnet: Andy Warhol, <i>Prince</i> (Ex. 69)



<b>Public Auction of Warhol Prince Series Works</b>			
	<b>Date</b>	<b>Purchaser</b>	<b>Citation</b>
<b>AWF-1992 (Ex. 39)</b>	Oct. 7, 2000	De Vuyst	Artnet: Andy Warhol, <i>Prince (Ex. 69)</i>
<b>AWF-2000 (Ex. 47)</b>	Dec. 9, 2000	Cornette de Saint-Cyr	Artnet: Andy Warhol, <i>Prince (Ex. 69)</i>
<b>AWF-1992 (Ex. 39)</b>	Jan 29, 2001	Cornette de Saint-Cyr	Artnet: Andy Warhol, <i>Prince (Ex. 69)</i>
<b>AWF-1992 (Ex. 39)</b>	June 28, 2002	Christie's London	Artnet: Andy Warhol, <i>Prince (Ex. 69)</i>
<b>AWF-1998 (Ex. 45)</b>	Feb. 10, 2005	Christie's London	Artnet: Andy Warhol, <i>Prince (Ex. 69)</i>
<b>AWF-1993 (Ex. 40)</b>	Oct. 25, 2005	Sotheby's London	Artnet: Andy Warhol, <i>Prince (Ex. 69)</i>

Public Auction of Warhol Prince Series Works			
	Date	Purchaser	Citation
AWF-1995 (Ex. 42)	May 12, 2006	Phillips de Pury & Co.	Artnet: Andy Warhol, <i>Prince</i> (Ex. 69)
AWF-1992 (Ex. 39)	Oct. 16, 2015	Sotheby's London	Artnet: Andy Warhol, <i>Prince</i> (Ex. 69)
AWF-1998 (Ex. 45)	May 28, 2017	Seoul Auction	Artnet: Andy Warhol, <i>Prince</i> (Ex. 69)

Goldsmith Parties' Response: Not disputed, except the Goldsmith Parties assert that of the above listed auction houses, all but two (Phillips de Pury & Co. and Christie's New York) were located outside the United States. *See* AWF Exh. 69.

AWF's Reply: Goldsmith Parties do not dispute the asserted fact. The additional information provided by Goldsmith does not contradict the asserted fact. *See* Local Rule 56.1.

152. In addition to these public auctions and private sales, the Prince Series works have been displayed in museums, galleries, books, magazines, promotional materials, and other public locations

more than 30 times since the November 1984 issue of Vanity Fair, as summarized below:

<b>Public Displays of Warhol Prince Series Works</b>			
	<b>Date</b>	<b>Exhibition or Publication</b>	<b>Citation</b>
<b>AWF-1992 (Ex. 39)</b>	1993	<i>Andy Warhol: Portraits of the Seventies and Eighties</i> (Sydney)	AWF-5 ( <b>Ex. 70</b> ); AWF-1943 ( <b>Ex. 71</b> ); AWF-1680 ( <b>Ex. 72</b> )
	1993	<i>Andy Warhol Portraits catalogue</i>	
	1993	Anthony d'Offay (London)	
<b>AWF-1994 (Ex. 41)</b>	2016	<i>Genius of Prince</i>	ARS: Warhol/Prince' Report ( <b>Ex. 73</b> ); Pl.'s Response to Request to Admit 12 ( <b>Ex. 55</b> )
<b>AWF-1996 (Ex. 43)</b>	2008	<i>Warhol Live</i>	AWF-16 ( <b>Ex. 70</b> ); ARS: Warhol/Prince' Report ( <b>Ex. 73</b> ); Pl.'s Response to Request to
	2009-11	<i>Warhol Live</i> (Montreal Museum of Fine Arts)	
		<i>Warhol Live</i> (Andy Warhol	

<b>Public Displays of Warhol Prince Series Works</b>			
	<b>Date</b>	<b>Exhibition or Publication</b>	<b>Citation</b>
		Museum (Pittsburgh)	Admit 12 ( <b>Ex. 55</b> ); <i>Andy Warhol: The Complete Commissioned Magazine Work (Ex. 74)</i> ; Email to Janet Hicks ( <b>Ex. 75</b> );
		<i>Warhol Live</i> (Frist Center (Nashville)) (and promotional materials)	
		<i>Warhol Live</i> (de Young Museum (San Francisco))	
	2012	Virginia Beach	
	2012	Zaragoza	
	2013	<i>Vanity Fair 100 Years: From The Jazz Age to Our Age</i>	
	2013	Museum of New Zealand Te Papa Tongarewa (and promotional	<i>ARS Invoice to Frist Center for the Visual Arts (Ex. 76)</i>
	2014	<i>Andy Warhol: The Complete Commissioned</i>	

Public Displays of Warhol Prince Series Works			
	Date	Exhibition or Publication	Citation
		<i>Magazine Work</i>	
	2015	<i>Phoenix Art Museum (and promotional materials)</i>	
	2016	<i>Andy Warhol Portraits, Crocker Art Museum (Sacramento)</i>	
AWF-1999 (Ex. 46)	1999	<i>The Essential Andy Warhol</i>	AWF-18 (Ex. 70); ARS Invoice to Frist Center for the Visual Arts (Ex. 76)
	2005	Tony Shafrazi Gallery (NYC)	
	2007	<i>Andy Warhol Portraits</i>	
	2008	<i>Warhol Live</i>	
	2009	<i>Andy Warhol Treasures</i>	
	2009-11	<i>Warhol Live (Montreal Museum of Fine Arts)</i>	
		<i>Warhol Live (Andy Warhol Museum (Pittsburgh))</i>	

<b>Public Displays of Warhol Prince Series Works</b>			
	<b>Date</b>	<b>Exhibition or Publication</b>	<b>Citation</b>
		<i>Warhol Live</i> (Frist Center (Nashville)) (and promotional materials)	
		<i>Warhol Live</i> (de Young Museum (San Francisco))	
	2017	Centro Cultural la Moneda (Santiago)	
<b>AWF-2000 (Ex. 47)</b>	1993	<i>Andy Warhol: Portraits of the Seventies and Eighties</i> (Sydney)	<b>AWF-1 (Ex. 70); AWF-1943 (Ex. 71); AWF-1680 (Ex. 72)</b>
	1993	<i>Andy Warhol Portraits</i> catalogue	
	1999	Anthony d'Offay (London)	

<b>Public Displays of Warhol Prince Series Works</b>			
	<b>Date</b>	<b>Exhibition or Publication</b>	<b>Citation</b>
<b>AWF-2003 (Ex. 50)</b>	2017	Centro Cultural la Moneda (Santiago)	AWF-15 ( <b>Ex. 70</b> )
<b>AWF-2004 (Ex. 51)</b>	2017	<i>Andy Warhol Drawings</i> (Galeria Starmach)	ARS: Warhol/Prince' Report ( <b>Ex. 73</b> ); ARS Invoice to Galeria Starmach ( <b>Ex. 77</b> )
<b>AWF-2006 (Ex. 53)</b>	2003	<i>Andy Warhol Prints: A Catalogue Raisonné 1962-1987</i>	AWF-1058 ( <b>Ex. 78</b> ); <i>Andy Warhol Prints: A Catalogue Raisonné</i> ( <b>Ex. 79</b> )
<b>AWF-2007 (Ex. 54)</b>	2003	<i>Andy Warhol Prints: A Catalogue Raisonné 1962-1987</i>	AWF-1058 ( <b>Ex. 78</b> ); <i>Andy Warhol Prints: A Catalogue Raisonné</i> ( <b>Ex. 79</b> )

Goldsmith Parties' Response: Not disputed, except the Goldsmith Parties assert that of the above listed "displays," at least nine occurred outside the United States based on the above descriptions.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact. The additional information provided by Goldsmith does not contradict the asserted fact. See Local Rule 56.1.**

153. Neither Goldsmith nor her company enforced compliance with the terms of the 1984 license she gave to Vanity Fair nor monitored for any use or derivative use of the photograph of Prince that was the subject of that license. Goldsmith explained in a 2017 Facebook post that “It was not until Prince died and I saw on Instagram an image that looked so much like mine that I goggled [sic] it and discovered not only the Vanity Fair 1984 article with the image, but numerous additional versions of the illustration all by Warhol. I had not known up to that moment that Warhol was the artist who Vanity Fair had given it to for a reference for the illustration that he would create for their article. . . . I also did not know until further research into all this that Warhol and/or The Warhol Foundation had in addition to making paintings and screen prints, licensed the use of the illustrations to others, all without my knowledge or consent.” (Lynn Goldsmith Facebook Post (Apr. 9, 2017) (**Ex. 19**).

Goldsmith Parties' Response: The first sentence is disputed as it assumes facts that do not exist, such assertion is not supported by the terms of the 1984 license and further constitutes a legal conclusion that the Goldsmith Parties dispute. The second sentence is not disputed, except AWF omits Goldsmith's important statement in the same Facebook post that “[b]ack in 1984 I did not see every publication that my images appeared in as I was busy



shooting, as well as promoting my Will Power album in Europe.” (AWF Ex. 19).

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Goldsmith Parties fail to cite any record evidence to the contrary. See Local Rule 56.1.**

**VII. THE MARKET FOR WARHOL’S PRINCE SERIES WORKS DIFFERS MATERIALLY FROM THE MARKET FOR GOLDSMITH’S PRINCE PHOTOGRAPH.**

**A. The Economics Of The Warhol Market Differ From The Economics Of The Goldsmith Market.**

***1. Price Points Generally***

154. Warhol’s artistic achievements, historical and cultural significance, and outsize popularity have contributed to making him “a blue chip artist.” (Paulson Expert Report at 8 (Ex. 1).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact.**

155. Others have described Warhol and his art in similar terms:

- Warhol is the “most powerful contemporary art brand in existence,” and “[n]o museum gallery on the planet could consider itself representative of Contemporary Art without a Warhol somewhere on its walls.” (Paulson Expert Report at 8 (quoting Duncan Ballantyne-Way, *The Long-Lost Art of Andy Warhol and its Ever-Growing Market*, *fineartmultiple Magazine* (Jan 2018), <https://fineartmultiple.com/blog/>

andy-warhol-art-market-growth/.) (Ex. 1));

- “The Warhol market is considered the bellwether of post-war and contemporary art.” (*Id.* (quoting *The Pop master’s highs and lows*, *The Economist* (Nov. 26, 2009), <https://www.economist.com/node/14941229>));
- Warhol is an “art-world colossus,” the “god of contemporary art,” the “most powerful contemporary art brand in existence,” the “backbone of any auction of post-war contemporary art,” and a “global commodity.” (*Id.* (quoting Bryan Appleyard, *A One-Man Art Market, 1843 Magazine* (Nov./Dec. 2011), <https://www.1843magazine.com/content/arts/a-one-man-market>)).

Goldsmith Parties’ Response: Not disputed, but also not relevant to the Warhol Prince Series that were based on the Goldsmith Photo.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact. The asserted fact is relevant to AWF’s fair use claim. The fourth factor requires consideration of the market for Warhol’s work, which includes its distribution channels, the reasons collectors acquire his work, and the meaning collectors ascribe to his work. Dkt. 55 (AWF Motion for Summary Judgment) at 39-41; Dkt. 68 (AWF Opp. Br.) at 37-42; AWF Reply Br. 8-10. Such facts also demonstrate Warhol’s Prince Series transcended and transformed Goldsmith’s photograph, which is directly relevant to**

**transformation under the first factor. Dkt. 55 (AWF Motion for Summary Judgment) at 38-39; Dkt. 68 (AWF Opp. Br.) at 29-36; AWF Reply Br. 3-4.**

156. In 2014, Warhol works collectively sold at public auction for \$653 million, representing nearly 5% of the entire global art market that year, and in 2013, a single work (Silver Car Crash (Double Disaster)) sold for more than \$105 million. (Paulson Expert Report at 8 (**Ex. 1**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

157. From 2004 through 2014, Warhol auction sales exceeded \$3 billion. (Paulson Expert Report at 8 (**Ex. 1**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

158. Since 2007, there have been seven auction sales of Warhol works of more than \$63 million per work. (Paulson Expert Report at 8 (**Ex. 1**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

159. In late 2017, it was rumored in a leading art industry newsletter, Baer Faxe, that Warhol's Orange Marilyn sold in a private transaction for \$250 million. (Paulson Expert Report at 8 (**Ex. 1**).)

Goldsmith Parties' Response: Disputed.

The reference relied upon by AWF is "rumor" and inadmissible hearsay insofar as AWF cites to it for the truth of the matter asserted.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. An evidentiary objection "does not suffice as a denial of a statement of undisputed fact." Senno, 812 F. Supp. 2d at 465 n.9. Goldsmith Parties' response does not comply with Local Rule 56.1, which requires that "opposing statements must be supported by citations to specific evidence of the kind required by Fed. R. Civ. P. 56(c)." Local Rule 56.1, Committee Note.**

**Further, Goldsmith's hearsay objection is baseless. Experts may rely on hearsay. See Fed. R. Evid. 703.**

160. Goldsmith's portrait photographs similar to her 1981 photograph of Prince typically sell for between \$1,500 and \$13,250. Goldsmith's standard pricing matrix for these photographs is:

Size	Edition #1-5	Edition #6-10	Edition #11-15	Edition #16-17	Edition #18-19	Edition #20
11 x 14	\$1700	\$2300	\$2700	\$3500	\$4200	on request
16 x 20	\$1900	\$2300	\$2700	\$3500	\$4200	on request
20 x 24	\$2500	\$2900	\$3300	\$4000	\$4800	on request
22 x 30	\$2800	\$3300	\$3900	\$4500	\$5400	on request
30 x 40	\$3100	\$3600	\$4200	\$5000	\$6000	on request
35 x 48	\$3600	\$4000	\$4500	\$5500	\$6500	on request
40 x 60	\$4250	\$4600	\$5000	\$6000	\$7000	on request
56" and larger	\$8000	\$9,000	\$10,000	\$11,000	\$12,000	on request

(LG-3 (Ex. 80).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

161. The price that Goldsmith charges depends only on (1) the size of the print and (2) how many prints of that particular photograph Goldsmith already has sold. The subject of the photograph and the popularity of the photograph do not affect the price Goldsmith charges. (Goldsmith Dep. Tr. 213:19–215:9 (**Ex. 12**).)

Goldsmith Parties' Response: Disputed in part because Goldsmith also testified that the pricing of her prints also depends on whether the print is a platinum print, silver print or archival digital print. Goldsmith Dep. Tr. 214:8 - 12 (**AWF Ex. 12**).

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. The additional information cited by Goldsmith Parties does not contradict the fact asserted by AWF. See Local Rule 56.1.**

162. 1stdibs.com lists 41 Goldsmith works in a price range of \$1,500 to \$13,250. (1stdibs: 41 results for “lynn goldsmith” (**Ex. 81**).)

Goldsmith Parties' Response: Not disputed as of the date of the listing printout.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

163. No Goldsmith photograph available on Artsy.net is listed at a price higher than \$2,500. (Artsy: Lynn Goldsmith (**Ex. 82**).)

Goldsmith Parties' Response: Not disputed as to the information available on Artsy.net as of June 7, 2018, the date of the printout from the website.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

***2. Price Points Of Warhol's Prince Series Works And Goldsmith's 1981 Studio Photograph Of Prince***

164. Since 1993, there have been at least 22 sales of the Prince Series works—12 by the Warhol Foundation and 10 at public auction. The results of the sales by The Andy Warhol Foundation are summarized below

<b>Sales of Warhol Prince Series Works by The Andy Warhol Foundation</b>				
	<b>Date</b>	<b>Purchaser</b>	<b>Sale Price</b>	<b>Citation</b>
<b>AWF-1992 (Ex. 39)</b>	Oct. 28, 1993	Anthony d'Offay Gallery	\$13,000	AWF-1784 (Ex. 58); AWF-2232 (Ex. 59); Pl.'s Response to Request to Admit 19 (Ex. 55)
<b>AWF-2000 (Ex. 47)</b>	Oct. 28, 1993	Anthony d'Offay Gallery	\$13,000	AWF-1784 (Ex. 58); AWF-2232 (Ex. 59);

<b>Sales of Warhol Prince Series Works by The Andy Warhol Foundation</b>				
	<b>Date</b>	<b>Purchaser</b>	<b>Sale Price</b>	<b>Citation</b>
				Pl.'s Response to Request to Admit 19 ( <b>Ex. 55</b> )
<b>AWF-2007 (Ex. 54)</b>	Mar. 30, 1998	R. Feldman Fine Arts	\$4,000	AWF-1841 ( <b>Ex. 60</b> ); AWF-2232 ( <b>Ex. 59</b> ); Pl.'s Response to Request to Admit 19 ( <b>Ex. 55</b> )
<b>AWF-2001 (Ex. 48)</b>	Feb. 8, 2000	Bjorn Wetterling (Sweden)	\$25,000	AWF-1794 ( <b>Ex. 61</b> )
<b>AWF-2006 (Ex. 53)</b>	July 12, 2001	R. Feldman Fine Arts	\$2,960	AWF-1819 ( <b>Ex. 62</b> ); AWF-2232 ( <b>Ex. 59</b> );



<b>Sales of Warhol Prince Series Works by The Andy Warhol Foundation</b>				
	<b>Date</b>	<b>Purchaser</b>	<b>Sale Price</b>	<b>Citation</b>
				Pl.'s Response to Request to Admit 19 ( <b>Ex. 55</b> )
<b>AWF-2005 (Ex. 52)</b>	Feb. 20, 2002	Jablonka Galerie	\$16,250	AWF-1807 ( <b>Ex. 63</b> ); AWF-1918 ( <b>Ex. 64</b> ); AWF-2232 ( <b>Ex. 59</b> ); Pl.'s Response to Request to Admit 19 ( <b>Ex. 55</b> )
<b>AWF-2004 (Ex. 51)</b>	Jan. 9, 2003	J. Kern Fine Arts	\$16,250	AWF-1805 ( <b>Ex. 65</b> ); AWF-2232 ( <b>Ex. 59</b> ); Pl.'s

<b>Sales of Warhol Prince Series Works by The Andy Warhol Foundation</b>				
	<b>Date</b>	<b>Purchaser</b>	<b>Sale Price</b>	<b>Citation</b>
				Response to Request to Admit 19 (Ex. 55)
<b>AWF-1994 (Ex. 41)</b>	Oct. 7, 2003	Coskun & Co. Ltd.	\$28,000	AWF-1798 (Ex. 66); AWF-2232 (Ex. 59); Pl.'s Response to Request to Admit 19 (Ex. 55)
<b>AWF-1997 (Ex. 44)</b>	Oct. 7, 2003	Coskun & Co. Ltd.	\$28,000	AWF-1798 (Ex. 66); AWF-2232 (Ex. 59); Pl.'s Response to Request to Admit

<b>Sales of Warhol Prince Series Works by The Andy Warhol Foundation</b>				
	<b>Date</b>	<b>Purchaser</b>	<b>Sale Price</b>	<b>Citation</b>
				19 (Ex. 55)
<b>AWF-1993 (Ex. 40)</b>	Feb. 6, 2004	Coskun & Co. Ltd.	\$27,500	AWF-1802 (Ex. 67); AWF-2232 (Ex. 59); Pl.'s Response to Request to Admit 19 (Ex. 55)
<b>AWF-1995 (Ex. 42)</b>	Feb. 6, 2004	Coskun & Co. Ltd.	\$27,500	AWF-1802 (Ex. 67); AWF-2232 (Ex. 59); Pl.'s Response to Request to Admit 19 (Ex. 55)

<b>Sales of Warhol Prince Series Works by The Andy Warhol Foundation</b>				
	<b>Date</b>	<b>Purchaser</b>	<b>Sale Price</b>	<b>Citation</b>
<b>AWF-1998 (Ex. 45)</b>	Oct. 12, 2004	Stellan Holm Gallery	\$28,000	AWF-1843 <b>(Ex. 68)</b> ; AWF-2232 <b>(Ex. 59)</b> ; Pl.'s Response to Request to Admit 19 <b>(Ex. 55)</b>

Goldsmith Parties' Response: Not disputed but see Goldsmith's above response to AWF 56.1 ¶149.

AWF's Reply: Goldsmith Parties do not dispute the asserted fact. See AWF 56.1 Reply ¶149.

165. The results of the sales at public auction are summarized below:

<b>Sales of Warhol Prince Series Works by The Andy Warhol Foundation</b>				
	<b>Date</b>	<b>Purchaser</b>	<b>Sale Price</b>	<b>Citation</b>
<b>AWF-2000 (Ex. 47)</b>	Nov. 10, 1999	Christie's New York	\$40,250	Artnet: Andy Warhol, <i>Prince</i>

<b>Sales of Warhol Prince Series Works by The Andy Warhol Foundation</b>				
	<b>Date</b>	<b>Purchaser</b>	<b>Sale Price</b>	<b>Citation</b>
				<b>(Ex. 69)</b>
<b>AWF-1992 (Ex. 39)</b>	Dec. 11, 1999	Cornette de Saint-Cyr	\$26,028	Artnet: Andy Warhol, <i>Prince</i> <b>(Ex. 69)</b>
<b>AWF-2000 (Ex. 47)</b>	Dec. 9, 2000	Cornette de Saint-Cyr	\$28,132	Artnet: Andy Warhol, <i>Prince</i> <b>(Ex. 69)</b>
<b>AWF-1992 (Ex. 39)</b>	Jan. 29, 2001	Cornette de Saint-Cyr	\$28,262	Artnet: Andy Warhol, <i>Prince</i> <b>(Ex. 69)</b>
<b>AWF-1992 (Ex. 39)</b>	June 28, 2002	Christie's London	\$54,824	Artnet: Andy Warhol, <i>Prince</i> <b>(Ex. 69)</b>
<b>AWF-1998 (Ex. 45)</b>	Feb. 10, 2005	Christie's London	\$44,568	Artnet: Andy Warhol, <i>Prince</i> <b>(Ex. 69)</b>
<b>AWF-1993</b>	Oct. 25, 2005	Sotheby's London	\$96,390	Artnet: Andy Warhol,

Sales of Warhol Prince Series Works by The Andy Warhol Foundation				
	Date	Purchaser	Sale Price	Citation
<b>(Ex. 40)</b>				<i>Prince</i> <b>(Ex. 69)</b>
<b>AWF-1995 (Ex. 42)</b>	May 12, 2006	Phillips de Pury & Co.	\$42,000	Artnet: Andy Warhol, <i>Prince</i> <b>(Ex. 69)</b>
<b>AWF-1992 (Ex. 39)</b>	Oct. 16, 2015	Sotheby's London	\$173,664	Artnet: Andy Warhol, <i>Prince</i> <b>(Ex. 69)</b>

Goldsmith Parties' Response: Not disputed, but see Goldsmith's above response to AWF 56.1 ¶151.

AWF's Reply: **Goldsmith Parties do not dispute the asserted fact. See AWF 56.1 Reply ¶151.**

166. According to Laura Paulson, former Global Chairman, Americas at Christie's and an expert on the Warhol market who has appraised more than 750 Warhol works, a work from the Warhol Prince Series likely would sell today for approximately \$173,664. (Paulson Expert Report at 10–11 **(Ex. 1)**.)

Goldsmith Parties' Response: Not disputed that this is Paulson's opinion, but disputed that this opinion extends to all 16 Warhol Prince Series original works because Paulson testified that the \$173,664, in her opinion, applied only to the

silkscreen canvases. With respect to the two Warhol Prince drawings, she testified she could not find any record of one being sold at auction but her “feeling” was they would sell in the range of \$50,000 – 70,000. She further testified that she did not research or have an opinion with respect to the two Warhol screen prints. Werbin Supplemental Decl. Exh. SSS [Paulson Tr. at 65:2 – 71:16].

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. The additional testimony cited by Goldsmith Parties does not contradict the fact asserted by AWF—that Paulson’s expert opinion is that one of the Warhol Prince Series works would likely sell for \$173,664 today. See Local Rule 56.1.**

167. A number of factors affect Paulson’s opinion that a work from the Warhol Prince Series likely would sell today for approximately \$173,664. First, this value corresponds to the October 2015 auction sale at Sotheby’s London, which appears to have been the first auction of a Prince Series work in more than nine years. (Paulson Expert Report at 10–11 (**Ex. 1**.) Although the work had been estimated at approximately \$46,310 to \$61,747, it ultimately sold for nearly three times the upper end of the estimate. This result demonstrates “strong competition and active interest” in the Prince Series, even before Prince’s death in 2016. (Paulson Expert Report at 10–11 (**Ex. 1**.)

**Goldsmith Parties’ Response:** Not disputed that the statements in paragraph 167 are the opinions of Laura Paulson as stated in her expert report, except disputed that the estimated price applies to all Warhol’s Prince works for the reasons set forth above in response to ¶166.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶166. Goldsmith Parties fail to cite any evidence to the contrary. See Local Rule 56.1.**

168. Another factor affecting Paulson's opinion that a Warhol Prince Series work likely would sell today for approximately \$173,664 is that following Prince's death, an auction in Hong Kong of a Prince Series work that was estimated at \$295,151 to \$449,144 did not result in a sale. (Paulson Expert Report at 10–11 (**Ex. 1**.) This likely resulted from the "aggressive estimate" and the fact that "the subject painting was very graphic, without the same level of painterly intervention as the work sold in October 2015." (*Id.* at 10–11.)

Goldsmith Parties' Response: Not disputed that the statements in paragraph 167 are the opinions of Laura Paulson as stated in her expert report, except disputed that the estimated price applies to all Warhol's Prince works for the reasons set forth above in response to ¶166.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶166. Goldsmith Parties fail to cite any evidence to the contrary. See Local Rule 56.1.**

169. "Taken together, it is [Paulson's] opinion that the result at Sotheby's London in October 2015 accurately reflects the position of the market. . .and represents a reasonable estimate of what a Warhol *Prince* painting would sell for today." (Paulson Expert Report at 10–11 (**Ex. 1**.)



Goldsmith Parties' Response: Not disputed that this is Paulson's opinion as stated in her expert report.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

170. Goldsmith has never sold nor attempted to sell a photograph from her December 3, 1981 shoot of Prince. (Goldsmith Dep. Tr. 315:6–12 (**Ex. 12**)).

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

171. There is no evidence the Prince Photograph has been shown publicly in galleries or museum exhibitions.

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

172. Paulson opined that the fact that Goldsmith has not sold or offered to sell any of these photographs “makes it essentially impossible to assess the market for these photos,” because “there is no quantifiable market for” them. This “necessarily implies that the market for these photographs does not overlap at all with the market for Andy Warhol's Prince portraits.” (Paulson Expert Report at 13 (**Ex. 1**)).

Goldsmith Parties' Response: Not disputed that the statements in paragraph 167 are the opinions of Laura Paulson as stated in her expert report, except the statement that “there is no quantifiable market” for Goldsmith's photographs is disputed to the extent it opines on market harm to Goldsmith as that is a legal conclusion to be decided to the Court under the fourth fair use factor, which assesses harm to actual or potential markets.

AWF's Reply: Goldsmith Parties do not genuinely disputed the asserted fact. An evidentiary objection “does not suffice as a denial of a statement of undisputed fact.” *Senno*, 812 F. Supp. 2d at 465 n.9. Goldsmith Parties’ response does not comply with Local Rule 56.1, which requires that “opposing statements must be supported by citations to specific evidence of the kind required by Fed. R. Civ. P. 56(c).” Local Rule 56.1, Committee Note.

Further, during the July 13, 2018 pre-hearing conference, the Court specifically directed the parties to include in their summary judgment briefing any objections to the admissibility of expert testimony in this matter. Dkt. 45 (Hearing Tr.) at 10:14-24. Goldsmith Parties made no objection to the admissibility of any portion of Paulson’s opinion in their memorandum of law in support of summary judgment or in opposition to AWF’s motion for summary judgment, and have therefore waived such argument. This objection also fails to comply with Local Rule 56.1.

In any event, Paulson’s opinion is admissible. *See* Fed. R. Evid. 702. Goldsmith does not dispute that Paulson is qualified to opine on art markets. Paulson’s opinion refers to the inability of defining an economic market for work that has never been offered in the market. This opinion falls within the scope of her specialized experience and knowledge. *See* Fed. R. Evid. 702. Her opinion is not a legal conclusion about damages.

173. Notwithstanding her decision not to offer these photographs for sale, Goldsmith testified that her standard pricing chart (reproduced above at paragraph 160) would apply to her photograph of Prince. (Goldsmith Dep. Tr. 314:16–20 (**Ex. 12**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

174. This would imply a range of \$1,900 to \$4,200 for photographs the same size as the paintings in the Prince Series, that is, 16 inches by 20 inches. (LG-3 (**Ex. 80**).)

Goldsmith Parties' Response: Not disputed with respect to Goldsmith's prints measuring 16 inches by 20 inches and numbered 1 through 19 out of an edition of 20, but the price would be higher than \$4,200 for the last print in the edition which is priced "on request." (LG-3 (**AWF Ex. 80**).)

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Goldsmith Parties do not cite any record evidence to the contrary or to support the assertion that the pricing "on request" means the print would be sold for more than the second to last print in an edition. See Local Rule 56.1.**

175. Goldsmith photographed Prince a number of times after the December 3, 1981 shoot, and sales of those photographs by Goldsmith's company since 2003 have ranged from \$475 to \$2,500, as summarized below:

<b>Sales of Goldsmith Prince Photographs by Lynn Goldsmith Ltd.</b>			
<b>Date</b>	<b>Purchaser</b>	<b>Sale Price</b>	<b>Citation</b>
Apr. 5, 2004	Michael Zilkha	\$825	LG-98 ( <b>Ex. 84</b> ); LG-201 ( <b>Ex. 85</b> )
June 6, 2006	Russeck Fine Art Group	\$475	LG-104 ( <b>Ex. 86</b> ); LG-204 ( <b>Ex. 87</b> )
Sept. 2, 2009	Hard Rock Hotels	\$2000	LG-115 ( <b>Ex. 88</b> ); LG- 207 ( <b>Ex. 89</b> )
June 11, 2010	San Francisco Art Exchange, LLC	\$1900	LG-118 ( <b>Ex. 90</b> ); LG-208 ( <b>Ex. 91</b> )
Apr. 11, 2012	Analogue Gallery	\$2250	LG-124 ( <b>Ex. 92</b> ); LG-211 ( <b>Ex. 93</b> )
Nov. 14, 2012	Jimmy Iovine	\$950	LG-124 ( <b>Ex. 92</b> ); LG-212 ( <b>Ex. 94</b> )
May 27, 2014	Morrison Hotel Gallery	\$1900	LG-131 ( <b>Ex. 95</b> ); LG-215 ( <b>Ex. 96</b> )

<b>Sales of Goldsmith Prince Photographs by Lynn Goldsmith Ltd.</b>			
<b>Date</b>	<b>Purchaser</b>	<b>Sale Price</b>	<b>Citation</b>
Nov 30, 2015	Morrison Hotel Gallery	\$1900	LG-134 ( <b>Ex. 97</b> ); LG-217 ( <b>Ex. 98</b> )
Apr. 21, 2016	Morrison Hotel Gallery	\$1900	LG-137 ( <b>Ex. 99</b> ); LG- 219 ( <b>Ex. 100</b> )
Apr. 26, 2016	Morrison Hotel Gallery	\$2500	LG-137 ( <b>Ex. 99</b> ); LG-220 ( <b>Ex. 101</b> )
June 21, 2016	San Francisco Art Exchange	\$1900	LG-137 ( <b>Ex. 99</b> ); LG-221 ( <b>Ex. 102</b> )
July 13, 2016	Morrison Hotel Gallery	\$1700	LG-137 ( <b>Ex. 99</b> ); LG-222 ( <b>Ex. 103</b> )
Oct. 30, 2016	Russeck Fine Art Group	\$1900	LG-137 ( <b>Ex. 99</b> ); LG-223 ( <b>Ex. 104</b> )
Nov. 8, 2016	San Francisco Art Exchange	\$1900	LG-137 ( <b>Ex. 99</b> ); LG-224 ( <b>Ex. 105</b> )

<b>Sales of Goldsmith Prince Photographs by Lynn Goldsmith Ltd.</b>			
<b>Date</b>	<b>Purchaser</b>	<b>Sale Price</b>	<b>Citation</b>
Nov. 16, 2016	Paddle 8	\$1500	LG-137 (Ex. 99); LG-226 (Ex. 106)
Dec. 10, 2016	Brian Liss Gallery	\$1900	LG-137 (Ex. 99); LG-225 (Ex. 107)
	<b>AVERAGE</b>	\$1,713	

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact. Moreover, Goldsmith Parties admit that the September 2, 2009 transfer to Hard Rock Hotels for \$2,000 was a "sale" and not a "license," contradicting their assertion below. See Goldsmith Parties 56.1 Response ¶178, *infra*. Goldsmith testified that the fee was for "display prints" and not for reproduction in Hard Rock Magazine. (Goldsmith Dep. Tr. 227:4-7 (Ex. 173).)<sup>2</sup>**

176. There are four Goldsmith photographs of Prince offered by online retailers 1stdibs and Artsy. Two are listed at \$2,300, and two do not have any price listed. (1stdibs: 41 results for "lynn goldsmith" (Ex. 81); Artsy: Lynn Goldsmith (Ex. 82).)

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<sup>2</sup> Exhibit 173 contains excerpts from the transcript of the January 18, 2018 deposition of Lynn Goldsmith that are not already contained in Exhibit 12.

Goldsmith Parties' Response: Not disputed as to the information available on Artsy.net and 1stdibs.com as of June 7, 2018, the date of the printouts from the websites.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

177. The range derived from Goldsmith's standard pricing list (\$1,900 to \$4,200) is 1.09% to 2.42% of the \$173,664 approximate value of work from the Prince Series; the average sale price of Goldsmith Prince photographs since 2003 (\$1,713) is 0.99%; and the price quotes from 1stdibs and Artsy (\$2,300) are 1.32%.

Goldsmith Parties' Response: Disputed with respect to the Warhol Prince Series other than the silkscreen canvases for the reasons set forth in response to ¶166. Also disputed because the referenced pricing of Goldsmith's editioned prints can be as high as \$12,000 for the 19th print in its largest available size. See ¶160 above. Not disputed as to Goldsmith's standard pricing list information for prints 1 through 19 in an edition in the 16 x 20 inch size but the 20th print in an edition would be sold by Goldsmith at a higher price. See ¶160 above and Goldsmith Response to ¶174. Not disputed that the percentages are derived from Paulson's expert report based on her opinion of what an original Warhol Prince Series silkscreen canvas would sell for in today's market. Also disputed because the value to Goldsmith of an edition of 20 prints in a 16 x 20 inch size would be \$20,000 for total sales of the first 19 prints, and \$95,250 for the first 19 prints sold in a 40 x 60 inch size, as derived from LG-3 (AWF Ex. 80) at ¶160.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶166. Goldsmith Parties do not cite any record evidence to the contrary, nor to support the assertion that the pricing “on request” means the print would be sold for at least as much as, if not more, than the second to last print in an edition. See Local Rule 56.1.**

<b>Licenses of Goldsmith Prince Photographs by Lynn Goldsmith Ltd.</b>			
<b>Date</b>	<b>Licensee</b>	<b>License Fee</b>	<b>Citation</b>
Sept. 16, 2005	Dennis Pub/Blender Mag	\$350	LG-101 (Ex. 108); LG-203 (Ex. 109)
Oct. 29, 2007	People Magazine	\$250	LG-108 (Ex. 110); LG-205 (Ex. 111)
Oct. 27, 2009	Trois Couleurs	\$100	LG-115 (Ex. 88); LG-206 (Ex. 112)
July 22, 2010	Rittor Music Inc	\$400	LG-118 (Ex. 90); LG-209 (Ex. 113)
May 24, 2013	Smithsonian Institution	\$400	LG-128 (Ex. 114); LG-213 (Ex. 115)



<b>Licenses of Goldsmith Prince Photographs by Lynn Goldsmith Ltd.</b>			
<b>Date</b>	<b>Licensee</b>	<b>License Fee</b>	<b>Citation</b>
Nov. 7, 2013	Reader's Digest	\$150	LG-128 (Ex. 114); LG-214 (Ex. 117)
May 28, 2015	Camera Press/ Earthportfx	\$500	LG-134 (Ex. 99); LG-218 (Ex. 118)
May 2, 2016	People Magazine	\$1,000	LG-137 (Ex. 99); LG-227 (Ex. 119)
June 23, 2016	New Bay Media – Guitar World, etc.	\$2,300	LG-137 (Ex. 99); LG-228 (Ex. 120)
	<b>AVERAGE</b>	\$606	

Goldsmith Parties' Response: Not disputed as to the listed licenses, except disputed because 11 licenses were issued, including a second May 2, 2016 license to People Magazine for \$1,000 and a September 2, 2009 license to Hard Rock Hotels for "Lightening Bolts" for \$2,000. Goldsmith 56.1 Stmt. at ¶¶144 -154. Based on these 11 licenses totaling \$8,050 in fees, the average license fee was about \$732.

AWF's Reply: AWF inadvertently omitted the May 2, 2016 license to People Magazine, which brings the average licensing fee to \$645. See AWF Counterstatement (Dkt.

**No. 70) ¶178. However, as noted above, the September 2, 2009 transfer to Hard Rock Hotels for \$2,000 was a “sale” and not a “license.” See AWF 56.1 Reply ¶175. Goldsmith Parties admitted this fact. See Goldsmith Parties 56.1 Response ¶175.**

179. In the same period, the Andy Warhol Foundation has licensed images of works from the Prince Series at least seven times. Of these seven, five have included Prince Series images as part of a larger group of images, and as a result, it is not possible to determine what fees applied to the Prince Series images specifically. (ARS: Warhol/Prince’ Report (**Ex. 73**).)

Goldsmith Parties’ Response: Not disputed, except that AWF has also “rented” the underlying photos for additional fees in connection with certain of these licenses. Goldsmith 56.1 Stmt. ¶136.

AWF’s Reply: **Goldsmith Parties do not genuinely dispute the asserted fact. The additional information cited by Goldsmith does not contradict the fact asserted by AWF. See Local Rule 56.1.**

180. The two licenses for which specific fee information is available are (1) a 2013 license to Condé Nast/Vanity Fair for inclusion in Vanity Fair 100 Years: From The Jazz Age to Our Age; and (2) a 2016 license to Condé Nast for inclusion on the cover of Genius of Prince. (ARS: Warhol/Prince’ Report (**Ex. 73**); ARS Invoice to Condé Nast, Apr. 22, 2013 (**Ex. 121**); ARS Invoice to Condé Nast, June 15, 2016 (**Ex. 122**).) The cost for each license was \$1,125 and \$10,000, respectively. (Id.)

Goldsmith Parties' Response: Not disputed, except AWF also licensed Warhol Prince Series images to Phoenix Art Museum on December 29, 2014, for \$25; to First Center for The Visual Arts on May 19, 2011, for \$15; and to Wonderland Press on September 13, 1999, for \$181.25. Goldsmith 56.1 Stmt. ¶¶136 (v), (x) and (xi).

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. The additional information cited by Goldsmith does not contradict the fact asserted by AWF. See Local Rule 56.1.**

181. A comparison of the 2013 and 2016 licenses of Warhol Prince Series images and 2013 and 2016 licenses of Goldsmith Prince photographs demonstrates the extent to which the price points differ:

<b>Comparison of 2013 and 2016 License Fees for Images of Warhol Prince Series Works and Goldsmith Prince Photographs</b>					
	<b>Warhol Prince Series Works</b>		<b>Goldsmith Prince Photograph</b>		
<b>Year</b>	<b>Licensor</b>	<b>Fee</b>	<b>Licensor</b>	<b>Fee</b>	<b>Percentage Difference</b>
2013	<i>Vanity Fair</i>	\$1,125	Smithsonian Institution	\$400	121.4%

			Reader's Digest	\$150	
2016	Condé Nast	\$10,000	People Magazine	\$1,000	143.3%
			New Bay Media –Guitar World, etc.	\$2,300	

Put another way, the average license fee for a Goldsmith photograph of Prince in 2013 (\$275) was 24.4% of the license fee for a work from the Prince Series that year (\$1,125), and the average license fee for a Goldsmith Prince photograph in 2016 (\$1,650) was 16.5% of the license fee for a work from the Prince Series that year (\$10,000).

Goldsmith Parties' Response: Disputed as the math itself is not comparable based on all the licenses issued to date by AWF of Warhol Prince Series images, the applicable licensing pricing schedules included in AWF's Artist Rights Society agency agreement, and the licensing history of both Goldsmith's other Prince images and her music celebrity photo portraits generally, which reflect average license fees equal to or greater than the license fees charged by AWF. Goldsmith 56.1 Stmt. ¶¶129; 138, 144.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. The additional information cited by Goldsmith does not contradict the fact asserted by AWF. See Local Rule 56.1. AWF incorporates by reference**

**its response to paragraph 138 of Goldsmith Parties' 56.1 Statement. See Dkt. 70.**

182. Goldsmith testified that she did not know whether, aside from the license to Vanity Fair in 1984, she or her company ever (1) licensed any of the photographs from her December 3, 1981 studio shoot; (2) licensed any of those photographs for use as an artist reference; or (3) licensed any other photograph she has made of Prince for use as an artist reference. (Goldsmith Dep. Tr. 164:11–166:6 (**Ex. 12**).)

Goldsmith Parties' Response: Disputed because Goldsmith testified at the cited transcript pages that (1) she did not know if her agency, LGI, licensed any of her Prince photographs from the December 3, 1981 studio shoot; (2) she did not have knowledge of LGI licensing any of those photographs for use as an artist reference; and (3) she did not know if her agency, LGI, licensed any of her other photos for use as an artist reference because she didn't see every license.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Goldsmith Parties fails to cite any evidence to the contrary. See Local Rule 56.1.**

183. Goldsmith could not recall any other instance “in which one of [her] photographs was licensed for use as a possible artist reference, other than the 1984 Vanity Fair license.” (Goldsmith Dep. Tr. 164:11–166:6 (**Ex. 12**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact.**

184. Warhol's artworks are often shown “in leading museums and gallery exhibitions” and

“appear[] regularly at major auction houses.” (Paulson Expert Report 20–21 (Ex. 1).) “Warhol’s works are sold by primarily high-end galleries and auction houses.” (*Id.* 21.)

Goldsmith Parties’ Response: Not disputed this is Paulson’s opinion with respect to the market for Warhol’s original artworks generally.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact. The “market for Warhol’s original artworks generally” necessarily includes the Prince Series.**

185. “[N]o museum gallery on the planet could consider itself representative of Contemporary Art without a Warhol somewhere on its walls,” and Warhol remains an “art-world colossus,” the “god of contemporary art,” the “most powerful contemporary art brand in existence,” the “backbone of any auction of post-war contemporary art,” and a “global commodity.” (Paulson Expert Report at 8–9 (citations omitted) (Ex. 1).)

Goldsmith Parties’ Response: Not disputed this is Paulson’s opinion with respect to the market for Warhol’s original artworks generally.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact. The “market for Warhol’s original artworks generally” necessarily includes the Prince Series.**

186. In May 2017 alone, “at least 29 unique Warhol works [were] being auctioned in a single three-day period at Christie’s, Sotheby’s, and Phillips,” the three most prestigious auction houses in the world. (Paulson Expert Report at 21 (Ex. 1); Post-War and Contemporary Art Evening Sale, Christie’s, May 17, 2018 (Ex. 123); Post-War and Contemporary

Art Morning Sale, Christie's, May 18, 2018 (**Ex. 124**); Contemporary Art Evening Auction, Sotheby's, May 16, 2018 (**Ex. 125**); Contemporary Art Day Auction, Sotheby's, May 17, 2018 (**Ex. 126**); 20th Century & Contemporary Art & Design Evening Sale, Phillips, May 17, 2018 (**Ex. 127**); 20th Century & Contemporary Art & Design Morning Sale, Phillips, May 16, 2018 (**Ex. 128**).

Goldsmith Parties' Response: Not disputed as to these secondary market auctions of Warhol's original artworks generally apart from his Prince Series.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact. The market for "Warhol's original artworks generally" necessarily includes the Prince Series.**

187. The average price of the Warhol works that were sold at these auctions was \$3.595 million. (See Paulson Expert Report at 21–22 (**Ex. 1**); Post-War and Contemporary Art Evening Sale, Christie's, May 17, 2018 (**Ex. 123**); Post-War and Contemporary Art Morning Sale, Christie's, May 18, 2018 (**Ex. 124**); Contemporary Art Evening Auction, Sotheby's, May 16, 2018 (**Ex. 127**); Contemporary Art Day Auction, Sotheby's, May 17, 2018 (**Ex. 126**); 20th Century & Contemporary Art & Design Evening Sale, Phillips, May 17, 2018 (**Ex. 127**); 20th Century & Contemporary Art & Design Morning Sale, Phillips, May 16, 2018 (**Ex. 128**).

Goldsmith Parties' Response: Not disputed as to these secondary market auction prices for specific Warhol works apart from his Prince Series.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

188. The galleries that sell or previously have sold Goldsmith's photographs include the Morrison Hotel Gallery, the Analogue Gallery, Blender Gallery, and the Richard Goodall Gallery. (Goldsmith Dep. Tr. 286:7–305:12 (**Ex. 12**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

189. The Morrison Hotel Gallery website states that it "is the world leader in fine art music photography representing over 100 of the most highly acclaimed music photographers --those who made, and continue to make, an indelible mark on music culture with photographic portrayals of the industry's most influential artists." (Morrison Hotel Gallery: About Us (**Ex. 9**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

190. Goldsmith "select[ed] Morrison Hotel Gallery to represent [her] work, in part, because of [this] reputation." (Goldsmith Dep. Tr. 286:24–287:5 (**Ex. 12**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

191. The Analogue Gallery Twitter page states that: "Analogue Gallery specializes in exhibiting over 50 years of vintage and contemporary Rock & Roll photography." (Analogue Gallery Twitter (**Ex. 129**).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**



192. “At the time Analogue Gallery represented [Goldsmith’s] work, [she] believe[d] Analogue Gallery had a reputation of specializing in exhibiting over 50 years of vintage and contemporary rock and roll photography.” (Goldsmith Dep. Tr. 300:11–21 (**Ex. 12**).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

193. The Richard Goodall Gallery website states that: “Richard Goodall Gallery is the leading gallery for Contemporary Art and Fine Art Photography, and rock art in the UK.” (Richard Goodall Gallery Contemporary Art: About Us (**Ex. 130**).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

194. Goldsmith “understand[s]” this to be Goodall Gallery’s reputation. (Goldsmith Dep. Tr. 302:9–13. (**Ex. 12**).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

195. The Blender Gallery website states that: “Blender Gallery specialises in Fine Art Music Photography and Limited Edition Rock ‘n Roll Prints.” (Blender Gallery – About (**Ex. 131**).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

196. Goldsmith understands the reputation of Blender Gallery to be that it “specializes in fine art music photograph[y] and limited edition rock and roll

prints” and that “that it offers the opportunity to view and purchase some of the most inspiring and iconic images of music and musicians photographed over the last 50 plus years.” (Goldsmith Dep. Tr. 304:6–20 (**Ex. 12**)).

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

197. When selecting a gallery to sell her works, Goldsmith considers “the reputation of the galleries’ specialization,” “the client service the gallery provides to its photographers,” and “the level of honesty.” (Goldsmith Dep. Tr. 305:8–12 (**Ex. 12**)).

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

198. The Christie’s, Sotheby’s, and Phillips’ websites “do not indicate that current or planned auctions will include any Goldsmith photographs.” (Paulson Expert Report at 24 (**Ex. 1**)).

Goldsmith Parties’ Response: Not disputed as of the date of Paulson’s Report, which does not otherwise specify the time periods referenced on the cited auction websites.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

199. According to Artnet, “which is a source relied upon by experts in [Paulson’s] field,” “only four Goldsmith photographs have been auctioned in the last several years, three of which went unsold” (Paulson Expert Report at 24 (**Ex. 1**)), as summarized below:

<b>Sales of Goldsmith Works at Public Auction</b>				
<b>Title</b>	<b>Date</b>	<b>Auction House</b>	<b>Sale Price</b>	<b>Citation</b>
<i>Bruce Springsteen</i>	Dec. 2, 2016	Guernsey's	Unsold (est. \$2,500–\$3,500)	Artnet: Lynn Goldsmith (Ex. 83)
<i>The Rolling Stone</i>	2, 2016	Guernsey's	Unsold est. \$2,500-\$3,00)	Artnet: Lynn Goldsmith (Ex. 83)
<i>Patti Smith</i>	Nov. 7, 2013	Artcurial	\$2,945	Artnet: Lynn Goldsmith (Ex. 83)
<i>Untitled</i>	Dec. 8, 2010	Van Ham Kunstauktionen	Unsold (est. \$1,588)	Artnet: Lynn Goldsmith (Ex. 83)

Goldsmith Parties' Response: Not disputed as to what Artnet reflects, but disputed because AWF's own Neil Printz testified that the AWF database was "[n]ot necessarily" considered reliable and that "all data is unreliable until we confirm it." Werbin Supp. Decl. Exh. XXX [Printz Tr. 136:8 – 137:3].

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. The additional information does not contradict the fact asserted by AWF. See Local Rule 56.1.**

200. Guernsey's website lists its auctions of Elvis memorabilia and Jerry Garcia's guitar collection as

among its notable auctions. (Guernsey's Auction House, The History of Guernsey's (**Ex. 132**).

Goldsmith Parties' Response: Disputed because the statement is taken out of context and is therefore misleading. Guernsey's website actually states (AWF Exh. 132):

For four decades Guernsey's has built a reputation as an auction house known for the presentation of extraordinary properties. From the largest auction in history (the contents of the ocean liner S.S. United States) to vintage racing cars on to pre-Castro Cuban cigars and the \$3 million McGwire baseball, we have few rivals when it comes to the presentation of wildly diverse art and artifacts. Guernsey's also has brought some of the most famous and intriguing personalities of the 20th Century to auction – from the official Elvis auction featuring items from the Graceland archives to documents and artifacts relating to the life and career of John F. Kennedy and from record setting sales of Jerry Garcia's guitars and items from the family of Mickey Mantle.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. The exhibit as cited by Goldsmith Parties does not contradict the fact asserted by AWF. See Local Rule 56.1.**

**C. The Marketing Of Warhol Works Differs From The Marketing Of Goldsmith Works.**

201. Galleries, auction houses, and other sellers of Warhol works emphasize a number of features of the art itself, as well as features of Warhol and the Warhol market when trying to market and sell Warhol works. Warhol's "vast" impact, "both as an artist and his influence on future generations"; the way in which "[h]is work remains a record of the social, political, and economic life in America between 1952 and 1987"; and the extent to which it remains an "enduring commercial force in art" "are commonly described during efforts to convince potential buyers to acquire Warhol's art." (Paulson Expert Report at 16 (**Ex. 1**).

Goldsmith Parties' Response: Not disputed that the statements in paragraph 201 are Paulson's opinions as stated in her expert report as to the market for Warhol's original artworks, as opposed to licensing market for his artworks. Disputed to the extent Paulson is attempting to opine improperly on any transformative use respecting the Warhol Prince Series images, for the same reasons the Goldsmith Parties are seeking in their Opposing Memorandum of Law to preclude the expert report of Dr. Crowe.

AWF's Reply: **Goldsmith Parties do not genuinely disputed the asserted fact. An evidentiary objection "does not suffice as a denial of a statement of undisputed fact." *Senno*, 812 F. Supp. 2d at 465 n.9. Goldsmith Parties' response does not comply with Local Rule 56.1, which requires that "opposing statements must be supported by citations to**

specific evidence of the kind required by Fed. R. Civ. P. 56(c).” Local Rule 56.1, Committee Note.

Further, during the July 13, 2018 pre-hearing conference, the Court specifically directed the parties to include in their summary judgment briefing any objections to the admissibility of expert testimony in this matter. Dkt. 45 (Hearing Tr.) at 10:14-24. Goldsmith Parties made no objection to the admissibility of any portion of Paulson’s opinion in their memorandum of law in support of summary judgment or in opposition to AWF’s motion for summary judgment, and have therefore waived such argument. This objection also fails to comply with Local Rule 56.1.

In any event, Paulson’s opinion is admissible. *See* Fed. R. Evid. 702. Goldsmith does not dispute that Paulson is qualified to opine on the market for Warhol’s work, how his work is marketed, and the reasons collectors acquire his art. These facts relate directly to the fourth factor—market impact—of the fair use analysis. Dkt. 55 (AWF Motion for Summary Judgment) at 39-41. And her opinion falls within the scope of her specialized experience and knowledge. *See* Fed. R. Evid. 702. She is not offering legal conclusions.

202. The underlying meaning and message of Warhol’s work is also an important aspect of how it is marketed. For example, in 2010, when Christie’s auctioned one of Warhol’s portraits of Elizabeth Taylor, the auction catalogue included an essay

describing Warhol's artistic process and the implications of his artistic choices:

The magnificent, double-paneled *Silver Liz* from 1963. . .contains many of Warhol's key ideas and themes. . . . As a canonization of the actress and as a comment on the manufactured nature of fame, Warhol achieved his desired aesthetic effect in the iconic Silver Liz by employing silkscreen. As a process that he had begun on an experimental basis in 1962, Warhol recognized both the instant electricity and underlying artificiality it generated; indeed, the inky superimpositions of photo-derived screens on the bright hand-painted hues epitomized Pop in their brand-like distinctness and recognizability. . . . [H]e created *Silver Liz* using a publicity image of the actress, later cropping the bust-length image just below the chin, and sizing the screen to an enlargement of this detail.

(Paulson Expert Report at 16–17 (quoting Christie's Post-War and Contemporary Art Evening Sale Catalogue at 80–81 (May 11, 2010)) (**Ex. 1**.)

Goldsmith Parties' Response: Not disputed that the statements in paragraph 202 were published in the referenced catalogue respecting an original Warhol work unrelated to the Warhol Prince Series but disputed they have any relevance to assessing fair use in this case as a matter of law.

AWF's Reply: **Goldsmith Parties do not genuinely dispute the asserted fact. The asserted fact is relevant to AWF's fair use claim. The fourth factor requires consideration of the**

market for Warhol's work, which includes its distribution channels, the reasons collectors acquire his work, and the meaning collectors ascribe to his work. Dkt. 55 (AWF Motion for Summary Judgment) at 39-41; Dkt. 68 (AWF Opp. Br.) at 37-42; AWF Reply Br. 8-10. Such facts also demonstrate Warhol's Prince Series transcended and transformed Goldsmith's photograph, which is directly relevant to transformation under the first factor. Dkt. 55 (AWF Motion for Summary Judgment) at 38-39; Dkt. 68 (AWF Opp. Br.) 29-36; AWF Reply Br. 3-4.

203. Auction houses and galleries routinely market Warhol works by referencing their expressive content and transformative nature. (Paulson Expert Report at 16 (**Ex. 1**.)

Goldsmith Parties' Response: Not disputed that the statement in paragraph 203 is Paulson's stated opinion in her expert report, but disputed because she is not qualified to render any opinion as to "transformative fair use" for Warhol's original artworks. This is further disputed to the extent Paulson is attempting to opine improperly on any transformative use respecting the Warhol Prince Series images, for the same reasons the Goldsmith Parties are seeking in their Opposing Memorandum of Law to preclude the expert report of Dr. Crowe. Also disputed because there is no evidentiary foundation or support for the statement.

AWF's Reply: **Goldsmith Parties do not genuinely disputed the asserted fact. An evidentiary objection "does not suffice as a denial of a statement of undisputed fact." *Senno*, 812 F. Supp. 2d at 465 n.9. Goldsmith**



Parties' response does not comply with Local Rule 56.1, which requires that "opposing statements must be supported by citations to specific evidence of the kind required by Fed. R. Civ. P. 56(c)." Local Rule 56.1, Committee Note.

Further, during the July 13, 2018 pre-hearing conference, the Court specifically directed the parties to include in their summary judgment briefing any objections to the admissibility of expert testimony in this matter. Dkt. 45 (Hearing Tr.) at 10:14-24. Goldsmith Parties made no objection to the admissibility of any portion of Paulson's opinion in their memorandum of law in support of summary judgment or in opposition to AWF's motion for summary judgment, and have therefore waived such argument. This objection also fails to comply with Local Rule 56.1.

In any event, Paulson's opinion is admissible. *See* Fed. R. Evid. 702. Goldsmith does not dispute that Paulson is qualified to opine on the market for Warhol's work, how his work is marketed, and the reasons collectors acquire his art. These facts relate directly to the fourth factor—market impact—of the fair use analysis. And her opinion falls within the scope of her specialized experience and knowledge. *See* Fed. R. Evid. 702. She is not offering a legal opinion.

204. "This approach to selling Warhol's celebrity portraits illustrates an important feature of Warhol's market: sellers, collectors, and buyers find expressive meaning in Warhol's art that is relevant to their

decision to purchase the works. . . . Collectors identify this transformative process as defining Warhol's work, and it is the basis for his critical and commercial success." (Paulson Expert Report at 17 (Ex. 1).)

Goldsmith Parties' Response: Disputed on the same grounds as those set forth in the Goldsmith Parties' Response to paragraph 203.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶203.**

205. Galleries promoting Goldsmith and her photographs describe her as an "iconic American photographer [who] has been capturing music legends since the early 1970's" (Analogue Gallery, Lynn Goldsmith Book Signing: Friday, May 23rd (Ex. 135)) and as being "[k]nown for. . . [h]er celebrity and music portraiture" (A Gallery for Fine Photography: Lynn Goldsmith (Ex. 133)).

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

206. Goldsmith's books "often act like catalogues" for prospective collectors of her photographs. (Goldsmith Dep. Tr. 232:8–10, 295:23–296:2 (Ex. 12)). Those books also identify her as a rock-and-roll photographer. (Lynn Goldsmith PhotoDiary, About the Book (Ex. 7); LG- 151 (Ex. 10).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

207. The description on Goldsmith's website of her book PhotoDiary describes her as "[o]ne of the most expressive chroniclers of the rock 'n' roll era," having

“captured some of the finest rock, jazz, and R&B performers of our time in brilliant, often surprising images that reveal a great deal about her subject.” (Lynn Goldsmith PhotoDiary, About the Book (**Ex. 7**).

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

208. In the introduction to her book Rock and Roll Stories, Goldsmith explains that she “proudly proclaim[s], ‘Yes, I am a rock and roll photographer.’” (LG-151 (**Ex. 10**); Goldsmith Dep. Tr. 18:17–21 (**Ex. 12**).

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

209. In describing Goldsmith’s art to potential buyers, the focus is on her underlying philosophy and approach to photography, such as “find[ing] out who [she is]. . .by also trying to find out who other people are,” “communicat[ing] the uniqueness of [her subjects] and their identities in [her] photographs,” empathizing with her subjects, and portraying the human connection between herself and her subjects that occurs when she photographs them. (Goldsmith Dep. Tr. 74:18–75:14, 66:25–67:22 (**Ex. 12**); see also supra ¶¶60–62.)

Goldsmith Parties’ Response: Disputed because the cited Goldsmith testimony is out of context and does not relate to “describing Goldsmith’s art to potential buyers,” but on how she views her own photography. The accurate statements of her testimony at AWF ¶¶60–62 above are not disputed.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. The additional testimony cited by Goldsmith Parties does not contradict the fact asserted by AWF. See Local Rule 56.1.**

210. Goldsmith's "artistic vision" is "part of what [an art] dealer talks about" with potential purchasers of Goldsmith photographs. (Goldsmith Dep. Tr. 308:18–25 (**Ex. 12**).)

Goldsmith Parties' Response: Disputed because Goldsmith testified that her dealers only talk about her "artistic vision" "a bit" and that this depends on who the dealer is speaking to, as some people want that kind of information before they make a purchasing decision while others "already know what they know and they're not interested in being sold or chatting it up." (Goldsmith Dep. Tr. 307:24 – 308:25 (**AWF Ex. 12**).)

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. The additional testimony cited by Goldsmith Parties does not contradict the fact asserted by AWF. See Local Rule 56.1.**

211. In selecting which photographs to promote, Goldsmith considers factors that, according to Paulson, are "unique to the rock-and-roll memorabilia market and unique to collectors of rock-and-roll photographs." (Paulson Expert Report at 25 (**Ex. 1**).)

Goldsmith Parties' Response: Disputed because the Goldsmith testimony cited for support in the Paulson Report at p. 25 does not support the statement, which is a mischaracterization of that fact testimony. The cited Goldsmith testimony on pages 25 – 26 of the Paulson Report and additional related

testimony refer to a selection of Goldsmith's photographs that Goldsmith selected to be posted on the website of the Morrison Hotel Gallery, where Goldsmith described that selection as including both studio and concert photographs, so as to appeal to people "who want to remember the moment they were at that show or how they perceived the artist." (Goldsmith Dep. Tr. 292:6 – 293:25 (AWF **Ex. 12**)). Goldsmith further testified that she selected for posting on the Morrison Hotel Gallery website one of her photos from the December 3, 1981 Prince studio shoot (not the Goldsmith Photo) that had been published in one of her books, and the reason she did that was because people often use her book like a catalogue to see if an image is available. (*Id.* at Tr. 294:6 – 296:4.)

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. The additional testimony cited by Goldsmith Parties does not contradict the fact asserted by AWF. See Local Rule 56.1.**

212. When selecting pictures of musicians in concert to promote, Goldsmith tries to appeal to "those people who [ ] want to remember the moment that they were at that show or how they perceived the artist." (Goldsmith Dep. Tr. 293:12–25 (**Ex. 12**)).

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

213. In marketing her art, Goldsmith also tries to appeal to people who read rock-and-roll photography books, because "people go to the book like a catalogue and they see something that they like and they want

to know if it's available." (Goldsmith Dep. Tr. 295:23–296:2 (Ex. 12).)

Goldsmith Parties' Response: Disputed because the testimony relates specifically to one of Goldsmith's own books, which she testified is often used by people as reference for something they like and they want to know if it's available. (Goldsmith Dep. Tr. 295:17 – 296:4) (Ex. 12).)

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. The additional testimony cited by Goldsmith Parties does not contradict the fact asserted by AWF. See Local Rule 56.1.**

214. Laura Paulson opined that the themes that Goldsmith uses to market her work to potential purchasers are “completely different from Warhol's focus on celebrity culture, artificiality, and the repetition of images in society,” which “are the themes art dealers use to describe Warhol's art to potential purchasers.” (Paulson Expert Report at 20 (Ex. 1).)

Goldsmith Parties' Response: Not disputed that this is Paulson's opinion, but disputed on the same grounds as those set forth above in the Goldsmith Parties' Response to paragraph 203, and because there is no evidentiary factual support.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶203. In any event, Paulson's opinion is admissible. *Id.*; Fed. R. Evid. 702.**

215. Aside from the way in which Warhol's works are described to potential buyers, “[a]uction houses also use the graphic clarity of Andy Warhol's work to deploy a full menu of mark[et]ing initiatives that promote the works at auction.” (Paulson Expert

Report at 18 (Ex. 1.) Examples of such marketing initiatives include objects, such as lucite paperweights with an image of a Warhol work; tote bags with an image of a Warhol work; single owner catalogues for a collection; dedicated films; newspaper advertisements; and highlights tours to important cities. (*Id.* at 18.)

Goldsmith Parties' Response: Not disputed that this is Paulson's opinion, but disputed factually as there is no evidentiary factual support for the statements, which have no relevance to the Warhol Prince Series Images.

AWF's Reply: **Goldsmith Parties do not genuinely dispute the asserted fact. An evidentiary objection "does not suffice as a denial of a statement of undisputed fact." *Senno*, 812 F. Supp. 2d at 465 n.9. Goldsmith Parties' response does not comply with Local Rule 56.1, which requires that "opposing statements must be supported by citations to specific evidence of the kind required by Fed. R. Civ. P. 56(c)." Local Rule 56.1, Committee Note.**

Further, during the July 13, 2018 pre-hearing conference, the Court specifically directed the parties to include in their summary judgment briefing any objections to the admissibility of expert testimony in this matter. Dkt. 45 (Hearing Tr.) at 10:14-24. Goldsmith Parties made no objection to the admissibility of any portion of Paulson's opinion in their memorandum of law in support of summary judgment or in opposition to AWF's motion for summary judgment, and have therefore waived

such argument. This objection also fails to comply with Local Rule 56.1.

In any event, Paulson's opinion is admissible. *See Fed. R. Evid. 702.* Goldsmith does not dispute that Paulson is qualified to opine on the market for Warhol's work, how his work is marketed, and the reasons collectors acquire his art. These facts relate directly to the fourth factor—market impact—of the fair use analysis. And her opinion falls squarely within the scope of her specialized experience and knowledge. *See Fed. R. Evid. 702.*

216. Paulson has “never seen an auction house use a high-end marketing approach to offering Goldsmith's photographs.” (Paulson Expert Report at 18 (Ex. 1).)

Goldsmith Parties' Response: Not disputed.

AWF's Reply: Goldsmith Parties do not dispute the asserted fact.

**D. Collectors Of Warhol Works Have Different Characteristics Than Collectors Of Goldsmith Works.**

217. Collectors of Warhol's works often have one or more of the following characteristics:

- The collectors usually recognize the art historical importance of Andy Warhol and the significance of including Warhol in their collections.
- At the top of the market, there is a new generation of extremely wealthy, international, multi-generational collectors.



- Warhol’s work regularly attracts new audiences, such as recently emerged markets in Asia and the Middle East.
- New collectors with significant resources often begin their collection with a Warhol work.
- The collectors are not limited to Post-War and Contemporary Art collectors. Warhol is unique in that his art often appears in collections that are focused on other categories of high-end art, such as Old Masters paintings, Antiquities, Impressionist, Modern Art, or furniture and design.

(Paulson Expert Report at 25 (**Ex. 1**.)

Goldsmith Parties’ Response: Disputed because the statements have no relevance to the Warhol Prince Series in issue in this case.

AWF’s Reply: **Goldsmith Parties do not genuinely dispute the asserted fact. An evidentiary objection “does not suffice as a denial of a statement of undisputed fact.” *Senno*, 812 F. Supp. 2d at 465 n.9. Goldsmith Parties’ response does not comply with Local Rule 56.1, which requires that “opposing statements must be supported by citations to specific evidence of the kind required by Fed. R. Civ. P. 56(c).” Local Rule 56.1, Committee Note.**

Further, during the July 13, 2018 pre-hearing conference, the Court specifically directed the parties to include in their summary judgment briefing any objections to the admissibility of expert testimony in this

matter. Dkt. 45 (Hearing Tr.) at 10:14-24. Goldsmith Parties made no objection to the admissibility of any portion of Paulson's opinion in their memorandum of law in support of summary judgment or in opposition to AWF's motion for summary judgment, and have therefore waived such argument. This objection also fails to comply with Local Rule 56.1.

In any event, Paulson's opinion is admissible. *See* Fed. R. Evid. 702. Goldsmith does not dispute that Paulson is qualified to opine on the market for Warhol's work, how his work is marketed, and the reasons collectors acquire his art. These facts relate directly to the fourth factor—market impact—of the fair use analysis. And her opinion falls within the scope of her specialized experience and knowledge. *See* Fed. R. Evid. 702.

218. By contrast, Goldsmith has identified two categories of collectors of her photographs: those interested in studio photographs and those interested in concert photographs. (Goldsmith Dep. Tr. 293:12–294:5 (Ex. 12).)

Goldsmith Parties' Response: Not disputed as to sales of Goldsmith's original rock and roll photographs, as distinct from licensing markets.

AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Goldsmith Parties fail to cite any record evidence to the contrary. *See* Local Rule 56.1.

219. Goldsmith testified that collectors in the latter category “want to remember the moment they were at that show or how they perceived the artist,”

or they want “to have a relationship with the moment that they saw [the artist] in performance.” (Goldsmith Dep. Tr. 293:12–294:5 (**Ex. 12**)).

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

220. Paulson opined that “[t]hese attributes of Goldsmith’s collectors—concertgoers and readers of photography books—are not defining characteristics of the people who collect Warhol’s art.” (Paulson Expert Report at 26 (**Ex. 1**)).

Goldsmith Parties’ Response: Disputed in part because the statement relates only to sales of concert photos and not studio portraits made by Goldsmith. Also disputed because Goldsmith sold a 1993 photo she made of Prince to a billionaire private collector who also owned three original Warhol works. Goldsmith 56.1 Stmt. ¶155.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Paulson is a qualified expert on the market for Warhol’s work, which Goldsmith Parties do not dispute, and her opinion is admissible. See AWF 56.1 Reply ¶203. Goldsmith Parties fail to cite any evidence to the contrary. See Local Rule 56.1. The additional information provided by Goldsmith Parties—even if supported by verifiable evidence (which it is not)—does not contradict the fact asserted by AWF. See Local Rule 56.1.**

221. According to Paulson, “Warhol’s collectors cannot consistently be defined by any of the attributes commonly associated with the collectors Goldsmith

targets in the market for her photographs.” (Paulson Expert Report at 26 (Ex. 1).)

Goldsmith Parties’ Response: Disputed in part on the same grounds as those set forth above in the Goldsmith Parties’ Response to paragraph 220. Moreover, Paulson acknowledged that it was a “common overlap” for collectors to own one or more Warhol canvases and original photographs, and that it is a collector’s personal subjective decision as to what to include in their own collection. Werbin Supp. Exh. SSS [Paulson Tr. 52:8 - 55:8].

AWF’s Reply: **Goldsmith Parties do not genuinely dispute the asserted fact. See AWF 56.1 Reply ¶220. Paulson is a qualified expert on the market for Warhol’s work, which Goldsmith Parties do not dispute, and her opinion is admissible. See AWF 56.1 Reply ¶203. The additional testimony cited by Goldsmith Parties does not contradict the fact asserted by AWF. See Local Rule 56.1. Paulson also testified “I don’t know collectors that contain them both,” referring to Warhol and Goldsmith. Werbin Supp. Exh. SSS (Dkt. 67- 3) (Paulson Tr. 54:13-14).**

222. In identifying and selecting an image for the cover of its commemorative publication *Genius of Prince*, Condé Nast considered a number of potential images. (CN-23 (referencing multiple “cover options,” including “the Warhol one” (Ex. 134).)

Goldsmith Parties’ Response: Not disputed, except the referenced Condé Nast exhibit does not identify the referenced “cover options.”

AWF’s Reply: **Goldsmith Parties do not genuinely dispute the asserted fact. The exhibit**

provides: “Yes, we’re a go-go!!! Monika was blown away by how great section openers look. The boys criticized the hell out of the *cover options*, but then Monika chimed in that she loved the Warhol one, and immediately the tone changed. Overall, we did okay: Also got the two EPIs and Vanity Fair, American Dynasties in, I even got to throw my two cents in about having the VF Single Sponsor Issue to show to other potential advertisers.” (CN-23 (referencing multiple “cover options,” including “the Warhol one” (Ex. 134).) (emphasis added).

223. As part of that search, the Condé Nast staff became aware of the November 1984 Vanity Fair and the Warhol portrait included in that issue. (CN-27 (Ex. 135).) That issue referenced Lynn Goldsmith. (Vanity Fair, Nov. 1984, at 66, 121 (Ex. 56).)

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

224. Condé Nast never “contacted [Goldsmith] with respect to” Genius of Prince and never sought “to put Goldsmith’s photograph on the cover,” there is no evidence “that would suggest that Lynn Goldsmith came to mind as someone whose work should be in” Genius of Prince, and in fact “there is no work of Lynn Goldsmith. . .in” Genius of Prince at all. (Deposition Transcript of Chris Donnellan 118:5–121:22, 125:20–126:8 (Ex. 136); Genius of Prince (Ex. 137).)

Goldsmith Parties’ Response: Not disputed that Condé Nast never contacted Goldsmith, but disputed as to the reason. Condé Nast failed to reference Goldsmith in its database listing and solely relied on that database to clear usage rights for the

*Genius of Prince* publication, despite having a copy of the original November 1984 Vanity Fair publication in its library that it also did not research. Goldsmith 56.1 Stmt. ¶¶116 – 117.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Goldsmith Parties fail to cite any evidence to support their assertion that Conde Nast failed to contact Goldsmith because she was not referenced in the database listing. See Local Rule 56.1.**

225. Condé Nast believed that the Warhol Foundation owned all rights to the Prince Series. (Donnellan Dep. Tr. 122:6–123:9 (Ex. 136).)

Goldsmith Parties’ Response: Disputed because Chris Donnellan testified at the cited pages that Condé Nast believed AWF owned the rights only with respect to the Warhol VF Image that was published in the November 1984 *Vanity Fair* issue, not the Warhol Prince Series itself.

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Goldsmith Parties fail to cite any evidence in support of their assertion. See Local Rule 56.1. Donnellan did not testify that Conde Nast believe AWF owned “only” the rights to the image used on the Vanity Fair cover. (Donnellan Dep. Tr. 122:6–123:9 (Ex. 136).)**

226. A representative for the Artists Rights Society, which is the Warhol Foundation’s licensing agent, testified that she was not aware of any potential licensee “being confused about whether they wished to license an image by Warhol as opposed to an image by Lynn Goldsmith,” nor was she aware of any potential licensee “debating between licensing an

image by Andy Warhol or an image by Lynn Goldsmith.” (Deposition Transcript of Adrienne Fields 136:25–137:16 (**Ex. 138**).

Goldsmith Parties’ Response: Not disputed.

**AWF’s Reply: Goldsmith Parties do not dispute the asserted fact.**

227. The Artist Rights Society representative testified that Warhol’s work has been licensed to museums, galleries, magazines, book publishers, newspapers, ad agencies, filmmakers, universities, hospitals, and education testing services. (Fields Dep. Tr. 135:7–136:24 (**Ex. 138**).

Goldsmith Parties’ Response: Disputed. Adrienne Fields testified that “the kinds of [ARS] clients who seek to license” Warhol images include museums, galleries, magazines, book publishers, newspapers, ad agencies, filmmakers, universities, hospitals, and education testing services. (Fields Dep. Tr. 135:7–136:24 (**Ex. 138**).

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. The additional testimony cited by Goldsmith Parties does not contradict the fact asserted by AWF. See Local Rule 56.1**

**VIII. DEFENDANTS’ PURPORTED EXPERT JEFFREY SEDLIK PROVIDED UNSUPPORTED OPINIONS THAT HE IS UNQUALIFIED TO OFFER**

228. Defendants have engaged Jeffrey Sedlik as a purported expert in this action. (Expert Report of Jeffrey Sedlik at 1 (**Ex. 139**).

Goldsmith Parties’ Response: Not disputed, except as to the use of the term “purported.”

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

229. Sedlik is the President and CEO of the Picture Licensing Universal System Coalition, a non-profit trade association representing the shared business interests of photographers and other image licensors, and a photographer for over 30 years. (Sedlik Expert Report at 1, 3 (**Ex. 139**).

Goldsmith Parties' Response: Not disputed, except Sedlik's additional qualifications are listed in his CV. (Sedlik Expert Report Exhibit A (CV) (**AWF Ex. 139**).

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

230. Sedlik "provide[s] forensic image analysis and consulting services to organizations and individuals on issues related to copyright, licensing, negotiating, and business practices and procedures related to photography, advertising, and modeling." (Sedlik Expert Report at 4 (**Ex. 139**).

Goldsmith Parties' Response: Not disputed, except Sedlik's additional qualifications are listed in his CV. (Sedlik Expert Report Exhibit A (CV) (**AWF Ex. 139**).

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

231. Sedlik purports to opine that Warhol's Prince Series usurps the derivative market for Goldsmith's Prince Photograph. (Sedlik Expert Report at 31 (**Ex. 139**).

Goldsmith Parties' Response: Not disputed, except as to the use of the term "purports."

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**



232. Sedlik purports to opine that Goldsmith “intend[s]” to monetize her Prince photographs “in all manner of derivative markets” at some point in the future. (Sedlik Expert Report at 23 (**Ex. 139**).)

Goldsmith Parties’ Response: Not disputed as to what Goldsmith “intends” but disputed that Sedlik “opines” on her intent. Also disputed as to the use of the term “purports.” AWF mischaracterizes Sedlik’s report, which states the factual basis for his opinion, including Goldsmith’s deposition testimony and a telephonic interview with Goldsmith. (Werbin Decl. Exh. E (Sedlik Expert Report at 23).)

**AWF’s Reply: Goldsmith Parties do not genuinely dispute the asserted fact. Goldsmith did not testify that she “intends” to monetize her Prince Photographs in “all manner of derivative markets.” See AWF Reply Br. 9. Sedlik’s opinion is therefore speculative, non-verifiable, and improper in that he opines on Goldsmith’s “intent” and “motivation.” Dkt. 55 (AWF Motion for Summary Judgment) at 43-44. It should therefore be precluded. *Id.***

233. This opinion apparently is based only on a conversation Sedlik claims to have had with Goldsmith after he “didn’t see that testimony” in Goldsmith’s “deposition transcript and its exhibits” or the other pleadings, transcripts, and documents he considered in preparing his expert report. (Sedlik Dep. Tr. 190:11–24 (**Ex. 140**); see also Sedlik Expert Report Exhibit B (listing documents relied upon) (**Ex. 139**).)

Goldsmith Parties’ Response: Disputed because Sedlik’s report also cites Goldsmith’s deposition testimony for support generally and Sedlik

reviewed that testimony in preparing his report. Goldsmith also testified that she doesn't display all her images currently because she may "want to possibly use something in, maybe edition it in the future, like to introduce a new edition, a new image being offered, so I will not put everything up, you know, and another reason would be because I'm thinking, in my mind, that I might use it for something else." (Nikas Decl. Exh. 12 [Goldsmith Tr. 294:15 – 22]; Werbin Decl. Exh. E (Exhibit B to Sedlik Report).)

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. The additional testimony cited by Goldsmith Parties does not contradict the fact asserted by AWF. See Local Rule 56.1.**

234. Sedlik testified that he did not speak with, or conduct any research about, collectors of Goldsmith's work in arriving at his opinions. (Sedlik Dep. Tr. 251:18–25, 252:22–253:4 (Ex. 140).)

Goldsmith Parties' Response: Not disputed.

**AWF's Reply: Goldsmith Parties do not dispute the asserted fact.**

235. Sedlik testified "it would [not have been] necessary to conduct [ research to arrive at [his] opinion" that "the Warhol Prince [S]eries competes with the Warhol Prince work for opportunities" for derivative uses. (Sedlik Dep. Tr. 250:16–22 (Ex. 140).)

Goldsmith Parties' Response: Disputed because the statements are incomplete and taken out of context. Sedlik testified as follows:

Q. You write on page 29, The Warhol Prince series competes with the Goldsmith

Prince work for opportunities in the derivative marketplace, correct?

A. Yes.

Q. What is the basis for that opinion, when you haven't researched why editors select Warhol works or Goldsmith works and haven't researched whether they appear -- have appeared in the past in the same magazines or books?

A. I don't find that it would be necessary to conduct that research to arrive at my opinion based on my decades of experience, photographing hundreds of magazine covers for publications all over the world and understanding how covers are selected, in general. I did not have to find instances in which an editor put a Goldsmith photograph next to a Warhol illustration and made a decision between the two. I know that in the absence of Warhol's work, there would have been Goldsmith's work from that period as a head shot that is appropriate for cover use.

(Sedlik Dep. Tr. 250:5-251:5 (AWF Ex. 140).)

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. The additional testimony cited by Goldsmith Parties does not contradict the fact asserted by AWF. See Local Rule 56.1.**

236. Sedlik stated he "did not have to find instances in which an editor put a Goldsmith photograph next to a Warhol illustration and made a decision between the two" to support his opinion that the Prince Series competes with Goldsmith's Prince

Photograph for opportunities in the derivative marketplace. (Sedlik Dep. Tr. 250:5–25 (**Ex. 140**).)

Goldsmith Parties' Response: Not disputed, except as clarified by the testimony quoted in the Goldsmith Parties' Response to paragraph 235.

**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. The additional testimony cited by Goldsmith Parties does not contradict the fact asserted by AWF. See Local Rule 56.1.**

237. Sedlik testified that among the bases for his opinion that AWF and Goldsmith offer their respective works in the same derivative marketplace is that “at least one prominent wealthy collector has purchased both Warhol’s works and multiple Goldsmith works.” (Sedlik Expert Report at 30 (**Ex. 139**); see also Sedlik Dep. Tr. 254:7–9 (**Ex. 140**).) Sedlik did not provide further details on this topic. He did not identify any source as the basis for this statement. He did not identify which collector this statement refers to. He did not identify which Warhol works or Goldsmith works this statement refers to. (Sedlik Expert Report at 30 (**Ex. 139**); see also Sedlik Dep. Tr. 254:7-9 (**Ex. 140**).)

Goldsmith Parties' Response: Disputed. Sedlik, in his report, did provide support for his statement that “at least one prominent wealthy collector has purchased both Warhol’s works and multiple Goldsmith works” with cites to the record. (Sedlik Expert Report at 30 n. 51 (AWF **Ex. 139**). Sedlik also testified that the collector to which he referred to in his report was Michael Zilkha. (Sedlik Dep. Tr. 253:23-254:9 (AWF **Ex. 140**).)

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**AWF's Reply: Goldsmith Parties do not genuinely dispute the asserted fact. The additional testimony cited by Goldsmith Parties does not contradict the fact asserted by AWF. See Local Rule 56.1.**

Dated: New York, New York  
December 11, 2018

Respectfully submitted,  
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UNITED STATES COURT OF APPEALS,  
SECOND CIRCUIT

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

v.

Lynn GOLDSMITH, Lynn Goldsmith, Ltd.,  
Defendants-Counter-Plaintiffs-Appellants.

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Docket No. 19-2420-cv  
August Term, 2020

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Argued: September 15, 2020

Decided: March 26, 2021

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Before: JACOBS, LYNCH, and SULLIVAN,  
Circuit Judges.

Judge SULLIVAN concurs in the Court's opinion,  
and files a concurring opinion in which Judge  
JACOBS joins.

Judge JACOBS concurs in the Court's opinion, and  
files a concurring opinion.

GERARD E. LYNCH, Circuit Judge:

This case concerns a series of silkscreen prints and  
pencil illustrations created by the visual artist Andy  
Warhol based on a 1981 photograph of the musical  
artist Prince that was taken by Defendant-Appellant  
Lynn Goldsmith in her studio, and in which she holds

copyright. In 1984, Goldsmith's agency, Defendant-Appellant Lynn Goldsmith, Ltd. ("LGL"), then known as Lynn Goldsmith, Inc., licensed the photograph to Vanity Fair magazine for use as an artist reference. Unbeknownst to Goldsmith, that artist was Warhol. Also unbeknownst to Goldsmith (and remaining unknown to her until 2016), Warhol did not stop with the image that Vanity Fair had commissioned him to create, but created an additional fifteen works, which together became known as the Prince Series.

Goldsmith first became aware of the Prince Series after Prince's death in 2016. Soon thereafter, she notified Plaintiff-Appellee The Andy Warhol Foundation for the Visual Arts, Inc. ("AWF"), successor to Warhol's copyright in the Prince Series, of the perceived violation of her copyright in the photo. In 2017, AWF sued Goldsmith and LGL for a declaratory judgment that the Prince Series works were non-infringing or, in the alternative, that they made fair use of Goldsmith's photograph. Goldsmith and LGL countersued for infringement. The United States District Court for the Southern District of New York (John G. Koeltl, *J.*) granted summary judgment to AWF on its assertion of fair use and dismissed Goldsmith and LGL's counterclaim with prejudice.

Goldsmith and LGL contend that the district court erred in its assessment and application of the four fair-use factors. In particular, they argue that the district court's conclusion that the Prince Series works are transformative was grounded in a subjective evaluation of the underlying artistic message of the works rather than an objective assessment of their purpose and character. We agree. We further agree that the district court's error in analyzing the first factor was compounded in its

analysis of the remaining three factors. We conclude upon our own assessment of the record that all four factors favor Goldsmith and that the Prince Series works are not fair use as a matter of law. We further conclude that the Prince Series works are substantially similar to the Goldsmith Photograph as a matter of law.

### **BACKGROUND**

The relevant facts, which we draw primarily from the parties' submissions below in support of their respective cross-motions for summary judgment, are undisputed.

Goldsmith is a professional photographer primarily focusing on celebrity photography, including portrait and concert photography of rock-and-roll musicians. Goldsmith has been active since the 1960s, and her work has been featured widely, including on over 100 record album covers. Goldsmith also founded LGL, the first photo agency focused on celebrity portraiture. LGL represents the work of over two hundred photographers worldwide, including Goldsmith herself.

Andy Warhol, né Andrew Warhola, was an artist recognized for his significant contributions to contemporary art in a variety of media. Warhol is particularly known for his silkscreen portraits of contemporary celebrities. Much of his work is broadly understood as “comment[ing] on consumer culture and explor[ing] the relationship between celebrity culture and advertising.” *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013). AWF is a New York not-for-profit corporation established in 1987 after Warhol's death. AWF holds title to and copyright in much of Warhol's work, which it licenses to generate revenue



to further its mission of advancing the visual arts, “particularly work that is experimental, under-recognized, or challenging in nature.” J. App’x at 305.

On December 3, 1981, while on assignment from Newsweek magazine, Goldsmith took a series of portrait photographs of (then) up-and-coming musician Prince Rogers Nelson (known through most of his career simply as “Prince”) in her studio. Goldsmith testified that, prior to Prince’s arrival at her studio, she arranged the lighting in a way to showcase his “chiseled bone structure.” *Id.* at 706. Goldsmith also applied additional makeup to Prince, including eyeshadow and lip gloss, which she testified was intended both to build a rapport with Prince and to accentuate his sensuality. Goldsmith further testified that she was trying to capture Prince’s “willing[ness] to bust through what must be [his] immense fears to make the work that [he] wanted to [make].” *Id.* at 1557. Goldsmith took black-and-white and color photographs using a Nikon 35-mm camera and a mixture of 85- and 105-mm lenses, which she chose to best capture the shape of Prince’s face.

Prince, who according to Goldsmith appeared nervous and uncomfortable, retired to the green room shortly after the session began and ultimately left without allowing Goldsmith to take any additional photographs. During the truncated session, Goldsmith took 23 photographs, 12 in black and white and 11 in color. Goldsmith retained copyright in each of the photographs that she took. Most relevant to this litigation is the following photograph, hereinafter referred to as the “Goldsmith Photograph”:

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In 1984, Goldsmith, through LGL, licensed the Goldsmith Photograph to Vanity Fair magazine for use as an artist reference. Esin Goknar, who was photo editor at Vanity Fair in 1984, testified that the term “artist reference” meant that an artist “would create a work of art based on [the] image reference.” *Id.* at 783. The license permitted Vanity Fair to publish an illustration based on the Goldsmith Photograph in its November 1984 issue, once as a full page and once as a quarter page. The license further

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required that the illustration be accompanied by an attribution to Goldsmith. Goldsmith was unaware of the license at the time and played no role in selecting the Goldsmith Photograph for submission to Vanity Fair.

Vanity Fair, in turn, commissioned Warhol to create an image of Prince for its November 1984 issue. Warhol's illustration, together with an attribution to Goldsmith, was published accompanying an article about Prince by Tristan Vox and appeared as follows:



In addition to the credit that ran alongside the image, a separate attribution to Goldsmith was included elsewhere in the issue, crediting her with the "source photograph" for the Warhol illustration. Vanity Fair did not advise Goldsmith that Warhol was the artist for whom her work would serve as a reference, and she did not see the article when it was initially published.

Unbeknownst to Goldsmith and LGL, Warhol created 15 additional works based on the Goldsmith Photograph, known collectively, and together with

the Vanity Fair image, as the “Prince Series.”<sup>1</sup> The Prince Series comprises fourteen silkscreen prints (twelve on canvas, two on paper) and two pencil illustrations, and includes the following images:



Although the specific means that Warhol used to create the images is unknown (and, perhaps, at this point, unknowable), Neil Printz, the editor of the *Andy Warhol Catalogue Raisonné*, testified that it was Warhol’s usual practice to reproduce a photograph as a high-contrast two-tone image on acetate that, after any alterations Warhol chose to make, would be used to create a silkscreen. For the canvas prints, Warhol’s general practice was to paint the background and local colors prior to the silkscreen transfer of the image. Paper prints, meanwhile, were generally created entirely by the silkscreen process without any painted embellishments. Finally,

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<sup>1</sup> Though it acknowledged that the depiction of Prince in the Prince Series is similar to that in the Goldsmith Photograph, AWF did not concede below that the Goldsmith Photograph was the source image for the Prince Series, arguing instead that “somehow, Warhol created” it. Dist. Ct. Dkt. 55 at 18. In its brief before this Court, however, AWF describes the Goldsmith Photograph as the “source image” for the Prince Series. Appellee’s Br. at 6-7.

Warhol's typical practice for pencil sketches was to project an image onto paper and create a contoured pencil drawing around the projected image.

At some point after Warhol's death, AWF acquired title to and copyright in the Prince Series. Between 1993 and 2004, AWF sold or otherwise transferred custody of 12 of the original Prince Series works to third parties, and, in 1998, transferred custody of the other four works to The Andy Warhol Museum. AWF retains copyright in the Prince Series images and, through The Artist Rights Society (a third-party organization that serves as AWF's agent), continues to license the images for editorial, commercial, and museum usage.

On April 22, 2016, the day after Prince died, Condé Nast, Vanity Fair's parent company, contacted AWF. Its initial intent in doing so was to determine whether AWF still had the 1984 image, which Condé Nast hoped to use in connection with a planned magazine commemorating Prince's life. After learning that AWF had additional images from the Prince Series, Condé Nast ultimately obtained a commercial license, to be exclusive for three months, for a different Prince Series image for the cover of the planned tribute magazine. Condé Nast published the tribute magazine in May 2016 with a Prince Series image on the cover. Goldsmith was not given any credit or attribution for the image, which was instead attributed solely to AWF.

It was at this point that Goldsmith first became aware of the Prince Series. In late July 2016, Goldsmith contacted AWF to advise it of the perceived infringement of her copyright. That November, Goldsmith registered the Goldsmith Photograph with the U.S. Copyright Office as an unpublished work.

On April 7, 2017, AWF sued Goldsmith and LGL for a declaratory judgment of non-infringement or, in the alternative, fair use. Goldsmith countersued for copyright infringement under 17 U.S.C. §§ 106, 501.

On July 1, 2019, the district court granted summary judgment for AWF on its fair-use claim. *See Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 316 (S.D.N.Y. 2019). Upon evaluating the four statutory fair-use factors set forth in 17 U.S.C. § 107, the court concluded that: (1) the Prince Series was “transformative” because, while the Goldsmith Photograph portrays Prince as “not a comfortable person” and a “vulnerable human being,” the Prince Series portrays Prince as an “iconic, larger-than-life figure,” *id.* at 326; (2) although the Goldsmith Photograph is both creative and unpublished, which would traditionally weigh in Goldsmith’s favor, this was “of limited importance because the Prince Series works are transformative works,” *id.* at 327; (3) in creating the Prince Series, Warhol “removed nearly all [of] the [Goldsmith] [P]hotograph’s protectible elements,” *id.* at 330; and (4) the Prince Series works “are not market substitutes that have harmed – or have the potential to harm – Goldsmith,” *id.* at 331. This appeal followed.

## DISCUSSION

### I. Standard of Review

“We review a grant of summary judgment *de novo*,” applying the standards set forth in Federal Rule of Civil Procedure 56(c). *Cariou*, 714 F.3d at 704. While fair use presents a mixed question of law and fact, it may be resolved on summary judgment where, as here, the material facts are not in dispute. *See, e.g.,*

*Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985).

## **II. Copyright, Derivative Works, and Fair Use**

The Constitution empowers Congress to enact copyright laws “[t]o promote the Progress of Science and useful Arts.” U.S. Const. art. I, § 8, cl. 8. Congress has exercised this delegated authority continuously since the earliest days of the nation, beginning with the Copyright Act of 1790 and, more recently, through the Copyright Act of 1976. Under the 1976 Act, copyright protection extends both to the original creative work itself and to derivative works, which it defines as, in relevant part, “a work based upon one or more preexisting works, such as a[n] ... art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.” 17 U.S.C. § 101.

The doctrine of fair use has developed along with the law of copyright. “[A]s Justice Story explained, ‘in truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.’” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994), quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (No. 4,436) (C.C.D. Mass. 1845) (alterations adopted). The fair use doctrine seeks to strike a balance between an artist’s intellectual property rights to the fruits of her own creative labor, including the right to license and develop (or refrain from licensing or developing) derivative works based

on that fruit, and “the ability of [other] authors, artists, and the rest of us to express them- or ourselves by reference to the works of others.” *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006).

Though it developed as a creature of common law, the fair-use defense was formally codified with the passage of the 1976 Act. The statute provides a non-exclusive list of four factors that courts are to consider when evaluating whether the use of a copyrighted work is “fair.” These factors are:

- (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.

17 U.S.C. § 107.

As the Supreme Court has held, fair use presents a holistic context-sensitive inquiry “not to be simplified with bright-line rules[.] . . . All [four statutory factors] are to be explored, and the results weighed together, in light of the purposes of copyright.” *Campbell*, 510 U.S. at 577-78, 114 S.Ct. 1164; *see also, e.g., Cariou*, 714 F.3d at 705 (“[T]he fair use determination is an open-ended and context-sensitive inquiry.”). We consider each factor in turn.

#### *A. The Purpose and Character of The Use*

This factor requires courts to consider the extent to which the secondary work is “transformative,” as



well as whether it is commercial. We address these considerations separately below.

### 1. Transformative Works and Derivative Works

Following the Supreme Court’s decision in *Campbell*, our assessment of this first factor has focused chiefly on the degree to which the use is “transformative,” *i.e.*, “whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” 510 U.S. at 579, 114 S.Ct. 1164 (internal quotations marks and citations omitted) (alterations adopted). We evaluate whether a work is transformative by examining how it may “reasonably be perceived.” *Cariou*, 714 F.3d at 707, quoting *Campbell*, 510 U.S. at 582, 114 S.Ct. 1164; *see also, e.g., Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 113-15 (2d Cir. 1998). Paradigmatic examples of transformative uses are those Congress itself enumerated in the preamble to § 107: “criticism, comment, news reporting, teaching . . . , scholarship, or research.” And, as the Supreme Court recognized in *Campbell*, parody, which “needs to mimic an original to make its point,” 510 U.S. at 580-81, 114 S.Ct. 1164, is routinely held transformative. *See, e.g., Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 693 (7th Cir. 2012). These examples are easily understood: the book review excerpting a passage of a novel in order to comment upon it serves a manifestly different purpose from the novel itself. *See Authors Guild v. Google, Inc.*, 804 F.3d 202, 215-16 (2d Cir. 2015) (“[C]opying from an original for the purpose of

criticism or commentary on the original . . . tends most clearly to satisfy *Campbell's* notion of the 'transformative' purpose involved in the analysis of Factor One.").

Although the most straightforward cases of fair use thus involve a secondary work that comments on the original in some fashion, in *Cariou v. Prince*, we rejected the proposition that a secondary work *must* comment on the original in order to qualify as fair use. *See* 714 F.3d at 706. In that case, we considered works of appropriation artist Richard Prince that incorporated, among other materials, various black-and-white photographs of Rastafarians taken by Patrick Cariou. *See id.* at 699. After concluding that the district court had imposed a requirement unsupported by the Copyright Act, we conducted our own examination of Prince's works and concluded that twenty-five of the thirty at issue were transformative of Cariou's photographs as a matter of law. *See id.* at 706. In reaching this conclusion, we observed that Prince had incorporated Cariou's "serene and deliberately composed portraits and landscape photographs" into his own "crude and jarring works . . . [that] incorporate[d] color, feature[d] distorted human and other forms and settings, and measure[d] between ten and nearly a hundred times the size of the photographs." *Id.* Thus, we concluded that these works "used [Cariou's photographs] as raw material, transformed in the creation of new information, new aesthetics, new insights and understanding," and were transformative within the meaning of this first factor. *Id.*, quoting *Castle Rock Ent. v. Carol Publ'g Grp.*, 150 F.3d 132, 142 (2d Cir. 1998).

In adjudging the Prince Series transformative, the district court relied chiefly on our decision in *Cariou*, which we have previously described as the “high-water mark of our court’s recognition of transformative works.” *TCA Television Corp. v. McCollum*, 839 F.3d 168, 181 (2d Cir. 2016). And, as we have previously observed, that decision has not been immune from criticism. *See id.* (collecting critical authorities). While we remain bound by *Cariou*, and have no occasion or desire to question its correctness on its own facts, our review of the decision below persuades us that some clarification is in order.

As discussed *supra*, both this Court and the Supreme Court have emphasized that fair use is a context-sensitive inquiry that does not lend itself to simple bright-line rules. *E.g.*, *Campbell*, 510 U.S. at 577-78, 114 S.Ct. 1164; *Cariou*, 714 F.3d at 705. Notwithstanding, the district court appears to have read *Cariou* as having announced such a rule, to wit, that any secondary work is *necessarily* transformative as a matter of law “[i]f looking at the works side-by-side, the secondary work has a different character, a new expression, and employs new aesthetics with [distinct] creative and communicative results.” *Warhol*, 382 F. Supp. 3d at 325-26 (internal quotation marks omitted) (alterations adopted). Although a literal construction of certain passages of *Cariou* may support that proposition, such a reading stretches the decision too far.

Of course, the alteration of an original work “with ‘new expression, meaning, or message,’” *Cariou*, 714 F.3d at 706, quoting *Campbell*, 510 U.S. at 579, 114 S.Ct. 1164, whether by the use of “new aesthetics,” *id.*, quoting *Blanch*, 467 F.3d at 253, by placing the work “in a different context,” *Perfect 10, Inc. v.*

*Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007), or by any other means is the *sine qua non* of transformativeness. It does not follow, however, that any secondary work that adds a new aesthetic or new expression to its source material is necessarily transformative.

Consider the five works at issue in *Cariou* that we did *not* conclude were transformative as a matter of law. Though varying in degree both amongst themselves and as compared to the works that we did adjudge transformative, each undoubtedly imbued Cariou's work with a "new aesthetic" as that phrase might be colloquially understood. Prince's *Canal Zone* (2007) is a collage of thirty-six of Cariou's photographs, most of which Prince altered by, for example, painting over the faces and bodies of Cariou's subjects, in some instances altering them significantly. See *Cariou*, 714 F.3d at 711. In *Graduation*, Prince added blue "lozenges" over the eyes and mouth of Cariou's subject and pasted an image of hands playing a blue guitar over his hands. *Id.* Both of these works certainly imbued the originals from which they derive with a "new aesthetic;" notwithstanding, we could not "confidently . . . make a determination about their transformative nature as a matter of law." *Id.*

Moreover, as we have repeatedly observed, there exists an entire class of secondary works that add "new expression, meaning, or message" to their source material but are nonetheless specifically *excluded* from the scope of fair use: derivative works. As one of our sister circuits has observed, an overly liberal standard of transformativeness, such as that embraced by the district court in this case, risks crowding out statutory protections for derivative

works. See *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (“To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under [17 U.S.C.] § 106(2).”).

We addressed derivative works in *Cariou*, characterizing them as secondary works that merely present “the same material but in a new form” without “add[ing] something new.” 714 F.3d at 708 (citation omitted); see also *Google*, 804 F.3d at 215-16 (“[D]erivative works generally involve transformations in the nature of *changes of form*.”) (emphasis in original). While that description may be a useful shorthand, it is likewise susceptible to misapplication if interpreted too broadly. Indeed, many derivative works “add something new” to their source material.

Consider, for example, a film adaptation of a novel. Such adaptations frequently add quite a bit to their source material: characters are combined, eliminated, or created out of thin air; plot elements are simplified or eliminated; new scenes are added; the moral or political implications of the original work may be eliminated or even reversed, or plot and character elements altered to create such implications where the original text eschewed such matters. And all of these editorial modifications are filtered through the creative contributions of the screenwriter, director, cast, camera crew, set designers, cinematographers, editors, sound engineers, and myriad other individuals integral to the creation of a film. It is for this reason that we have recognized that “[w]hen a novel is converted to a film . . . [t]he invention of the original author combines with the cinematographic interpretive skills of the filmmaker to produce

something that neither could have produced independently.” *Google*, 804 F.3d at 216 n.18. Despite the extent to which the resulting movie may transform the aesthetic and message of the underlying literary work, film adaptations are identified as a paradigmatic example of derivative works. See, e.g., *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 95 (2d Cir. 2014) (“Paradigmatic examples of derivative works include . . . the adaptation of a novel into a movie or a play.”).

In evaluating the extent to which a work is transformative or derivative (or neither), we typically consider the *purpose* of the primary and secondary works. In *Bill Graham Archives v. Dorling Kindersley Ltd.*, for example, we held that the reproduction in a book about the Grateful Dead of images of posters originally created to advertise Grateful Dead concerts was transformative because that use was “plainly different from the original purpose for which they were created.” 448 F.3d 605, 609-10 (2d Cir. 2006). Likewise, in *HathiTrust* we held that the defendants’ creation of a searchable “digital corpus” comprising scanned copies of tens of millions of books that enabled researchers, scholars, and others to pinpoint the exact page of any book in the catalogue on which the searched term was used was a “quintessentially transformative use.” 755 F.3d at 97. In *Google*, we reached the same conclusion when faced with a larger digital corpus complete with tools that enabled researchers to track how a specific word or phrase has been used throughout the development of the English language, despite the fact that, unlike the database in *Hathitrust*, Google’s database also permitted the searcher to view a “snippet” from the original text

showing the context in which the word or phrase had appeared. 804 F.3d at 216-17.

But purpose is perhaps a less useful metric where, as here, our task is to assess the transformative nature of works of visual art that, at least at a high level of generality, share the same overarching purpose (*i.e.*, to serve as works of visual art). While this is not the first time we have had to conduct this inquiry, our cases on such works are considerably fewer in number, and a brief review of them yields conflicting guidance. In *Blanch v. Koons*, for example, we adjudged transformative a Jeff Koons painting that incorporated a copyrighted photograph drawn from a fashion magazine where Koons had testified that he intended to “us[e] Blanch’s image as fodder for his commentary on the social and aesthetic consequences of mass media.” 467 F.3d at 253. Some time earlier, however, in *Rogers v. Koons*, we denied Koons’s fair-use defense as applied to a three-dimensional sculpture recreating a photograph, notwithstanding his claim that he intended his sculpture to serve as a commentary on modern society. 960 F.2d 301, 309-11 (2d Cir. 1992).<sup>2</sup> And, in *Cariou*, we held twenty-five of Richard Prince’s works transformative as a matter of law even though Prince had testified that he “was not ‘trying to create anything with a new meaning or a new message.’” 714 F.3d at 707.

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<sup>2</sup> We note that *Rogers* predates the Supreme Court’s formal adoption of the “transformative use” test and thus does not phrase its inquiry in precisely the same manner as the cases that have followed. However, it remains a precedential decision of this Court, and we believe it particularly relevant in this case.

Matters become simpler, however, when we compare the works at issue in each case against their respective source materials. The sculpture at issue in *Rogers* was a three-dimensional colorized version of the photograph on which it was based. *See* 960 F.2d at 305. In *Blanch*, however, Koons used Blanch's photograph, depicting a woman's legs in high-heeled shoes, as part of a larger work in which he set it alongside several other similar photographs with "changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictured, [and] the objects' details." 467 F.3d at 253. In so doing, Koons used Blanch's photograph "as raw material for an entirely different type of art . . . that comment[ed] on existing images by juxtaposing them against others." *Id.* at 262 (Katzmann, J., concurring). And in *Cariou*, the copyrighted works found to have been fairly used were, in most cases, juxtaposed with other photographs and "obscured and altered to the point that Cariou's original [was] barely recognizable." 714 F.3d at 710. The works that were found potentially infringing in *Cariou*, however, were ones in which the original was altered in ways that did not incorporate other images and that superimposed other elements that did not obscure the original image and in which the original image remained, as in the Koons sculpture at issue in *Rogers*, a major if not dominant component of the impression created by the allegedly infringing work. *See id.* at 710-11.

A common thread running through these cases is that, where a secondary work does not obviously comment on or relate back to the original or use the original for a purpose other than that for which it was created, the bare assertion of a "higher or different



artistic use,” *Rogers*, 960 F.2d at 310, is insufficient to render a work transformative. Rather, the secondary work itself must reasonably be perceived as embodying an entirely distinct artistic purpose, one that conveys a “new meaning or message” entirely separate from its source material. While we cannot, nor do we attempt to, catalog all of the ways in which an artist may achieve that end, we note that the works that have done so thus far have themselves been distinct works of art that draw from numerous sources, rather than works that simply alter or recast a single work with a new aesthetic.

Which brings us back to the Prince Series. The district court held that the Prince Series works are transformative because they “can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure.” *Warhol*, 382 F. Supp. 3d at 326. That was error.

Though it may well have been Goldsmith’s subjective intent to portray Prince as a “vulnerable human being” and Warhol’s to strip Prince of that humanity and instead display him as a popular icon, whether a work is transformative cannot turn merely on the stated or perceived intent of the artist or the meaning or impression that a critic – or for that matter, a judge – draws from the work. Were it otherwise, the law may well “recogniz[e] any alteration as transformative.” 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05(B)(6); see also *Google*, 804 F.3d at 216 n.18 (“[T]he word ‘transformative,’ if interpreted too broadly, can also seem to authorize copying that should fall within the scope of an author’s derivative rights.”). Rather, as

we have discussed, the court must examine how the works may reasonably be perceived.

In conducting this inquiry, however, the district judge should not assume the role of art critic and seek to ascertain the intent behind or meaning of the works at issue. That is so both because judges are typically unsuited to make aesthetic judgments and because such perceptions are inherently subjective.<sup>3</sup> As Goldsmith argues, her own stated intent notwithstanding, “an audience viewing the [Goldsmith] [P]hotograph today, across the vista of the singer’s long career, might well see him in a different light than Goldsmith saw him that day in 1981.” Appellants’ Br. at 40. We agree; it is easy to imagine that a whole generation of Prince’s fans might have trouble seeing the Goldsmith Photograph as depicting anything other than the iconic songwriter and performer whose musical works they enjoy and admire.

Instead, the judge must examine whether the secondary work’s use of its source material is in service of a “fundamentally different and new” artistic purpose and character, such that the secondary work stands apart from the “raw material” used to create it. Although we do not hold that the primary work must be “barely recognizable” within the secondary work, as was the case with the works held transformative in *Cariou*, the secondary work’s

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<sup>3</sup> As the Supreme Court observed over a century ago, “[i]t would be a dangerous undertaking for persons trained only in 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, 23 S.Ct. 298, 47 L.Ed. 460 (1903).

transformative purpose and character must, at a bare minimum, comprise something more than the imposition of another artist's style on the primary work such that the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material.

With this clarification, viewing the works side-by-side, we conclude that the Prince Series is not "transformative" within the meaning of the first factor. That is not to deny that the Warhol works display the distinct aesthetic sensibility that many would immediately associate with Warhol's signature style – the elements of which are absent from the Goldsmith photo. But the same can be said, for example, of the Ken Russell film, from a screenplay by Larry Kramer, derived from D.H. Lawrence's novel, *Women in Love*: the film is as recognizable a "Ken Russell" as the Prince Series are recognizably "Warhols." But the film, for all the ways in which it transforms (that is, in the ordinary meaning of the word, which indeed is used in the very definition of derivative works, *see* 17 U.S.C. § 101) its source material, is also plainly an adaptation of the Lawrence novel.

As in the case of such paradigmatically derivative works, there can be no meaningful dispute that the overarching purpose and function of the two works at issue here is identical, not merely in the broad sense that they are created as works of visual art, but also in the narrow but essential sense that they are portraits of the same person.<sup>4</sup> *See Gaylord v. United*

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<sup>4</sup> As much as art critics might distinguish Warhol's aesthetic intentions from those of portrait photographers, Warhol's celebrity prints are invariably identifiable likenesses of

*States*, 595 F.3d 1364, 1372-73 (Fed. Cir. 2010) (photograph of Korean War Memorial used on stamp not transformative despite “different expressive character” brought about by subdued lighting and snow since sculpture and stamp shared purpose of “honor[ing] veterans of the Korean War”). Although this observation does not *per se* preclude a conclusion that the Prince Series makes fair use of the Goldsmith Photograph, the district court’s conclusion rests significantly on the transformative character of Warhol’s work. But the Prince Series works can’t bear that weight.

Warhol created the series chiefly by removing certain elements from the Goldsmith Photograph, such as depth and contrast, and embellishing the flattened images with “loud, unnatural colors.” *Warhol*, 382 F. Supp. 3d at 326. Nonetheless, although we do not conclude that the Prince Series works are necessarily *derivative* works as a matter of law, they are much closer to presenting the same work in a different form, that form being a high-contrast screenprint, than they are to being works that make a transformative use of the original. Crucially, the Prince Series retains the essential elements of the Goldsmith Photograph without significantly adding to or altering those elements.

Indeed, the differences between the Goldsmith Photograph and the Prince Series here are in many respects less substantial than those made to the five

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their subjects. The district court’s description of the Prince Series works as transformative because they “can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure,” 382 F. Supp. 3d at 326, rests implicitly on the Warhol depiction being perceived as a recognizable depiction of Prince.

works that we could not find transformative as a matter of law in *Cariou*. Unlike the Prince Series, those works unmistakably deviated from Cariou's original portraiture in a manner that suggested an entirely distinct artistic end; rather than recasting those photographs in a new medium, Richard Prince added material that pulled them in new directions. *See, e.g., Cariou*, 714 F.3d at 711 ("Where [Cariou's] photograph presents someone comfortably at home in nature, [Prince's] *Graduation* combines divergent elements to present a sense of discomfort."). Nevertheless, we could not confidently determine whether those modest alterations "amount[ed] to a substantial transformation of the original work[s] of art such that the new work[s] were transformative," and remanded the case to the district court to make that determination in the first instance. *Id.*

In contrast, 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.

Finally, we feel compelled to clarify that it is entirely irrelevant to this analysis that "each Prince Series work is immediately recognizable as a 'Warhol.'" *Warhol*, 382 F. Supp. 3d at 326. Entertaining that logic would inevitably create a celebrity-plagiarist privilege; the more established the artist and the more distinct that artist's style, the greater leeway that artist would have to pilfer the creative labors of others. But the law draws no such

distinctions; whether the Prince Series images exhibit the style and characteristics typical of Warhol's work (which they do) does not bear on whether they qualify as fair use under the Copyright Act. As Goldsmith notes, the fact that Martin Scorsese's recent film *The Irishman* is recognizably "a Scorsese" "do[es] not absolve [him] of the obligation to license the original book" on which it is based. Appellants' Br. at 37.

In reaching this conclusion, we do not mean to discount the artistic value of the Prince Series itself. As used in copyright law, the words "transformative" and "derivative" are legal terms of art that do not express the simple ideas that they carry in ordinary usage. We do not disagree with AWF's contention that the cumulative effect of Warhol's changes to the Goldsmith Photograph is to produce a number of striking and memorable images. And our conclusion that those images are closer to what the law deems "derivative" than "transformative" does not imply that the Prince Series (or Warhol's art more broadly) is "derivative," in the pejorative artistic sense, of Goldsmith's work or of anyone else's. As Goldsmith succinctly puts it, "[t]here is little doubt . . . that the Prince Series reflects Andy Warhol's talent, creativity, and distinctive aesthetic." Appellants' Br. at 36. But the task before us is not to assess the artistic worth of the Prince Series nor its place within Warhol's oeuvre; that is the domain of art historians, critics, collectors, and the museum-going public. Rather, the question we must answer is simply whether the law permits Warhol to claim it as his own, and AWF to exploit it, without Goldsmith's permission. And, at least as far as this aspect of the first factor is concerned, we conclude that the answer to that question is "no."

## 2. Commercial Use

The statutory language of the first factor also specifically directs courts to consider “whether [the] use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1). Although finding that a secondary use is commercial “tends to weigh against” finding that it is fair, we apply the test with caution since “nearly all of the illustrative uses listed in the preamble paragraph of § 107 . . . are generally conducted for profit in this country.” *Campbell*, 510 U.S. at 584-85, 114 S.Ct. 1164 (citation and internal quotation marks omitted).<sup>5</sup> And, since “[t]he crux of the profit/nonprofit distinction is . . . whether the user stands to profit from exploitation of the copyrighted material without paying the customary price,” *Harper & Row*, 471 U.S. at 562, 105 S.Ct. 2218, the commercial nature of a secondary use is of decreased importance when the use is sufficiently transformative such that the primary author should not reasonably expect to be compensated. *See, e.g., Blanch*, 467 F.3d at 254.

We agree with the district court that the Prince Series works are commercial in nature, but that they produce an artistic value that serves the greater public interest. *See Warhol*, 382 F. Supp. 3d at 325. We also agree that, although more relevant to the

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<sup>5</sup> To recognize this is not to read the commercial/non-profit factor out of the statute. There are other situations in which the absence or presence of a commercial motive may be highly significant. Producing a small number of copies of a short story to be distributed for free to a high school English class may be quite different from producing a similar number of copies for a lavishly bound and illustrated “limited edition” of the work to be sold in the marketplace at a high price.

character of the *user* than of the *use*, the fact that AWF's mission is to advance the visual arts, a mission that is doubtless in the public interest, may militate against the simplistic assertion that AWF's sale and licensing of the Prince Series works necessarily derogates from a finding of fair use. Nevertheless, just as we cannot hold that the Prince Series is transformative as a matter of law, neither can we conclude that Warhol and AWF are entitled to monetize it without paying Goldsmith the "customary price" for the rights to her work, even if that monetization is used for the benefit of the public.

Of course, even where the secondary use is not transformative, the extent to which it serves the public interest, either in and of itself or by generating funds that enable the secondary user to further a public-facing mission, may be highly relevant when assessing equitable remedies, including whether to enjoin the distribution or order the destruction of infringing works.<sup>6</sup> But just as the commercial nature of a transformative secondary use does not itself preclude a finding that the use is fair, the fact that a commercial non-transformative work may also serve the public interest or that the profits from its commercial use are turned to the promotion of non-commercial ends does not factor significantly in favor of finding fair use under the circumstances present here.

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<sup>6</sup> Goldsmith does not seek such remedies, and it is highly unlikely that any court would deem them appropriate in this case. *See Campbell*, 510 U.S. at 578 n.10, 114 S.Ct. 1164 ("[T]he goals of the copyright law . . . are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.").



*B. The Nature of the Copyrighted Work*

The second factor directs courts to consider the nature of the copyrighted work, including (1) whether it is “expressive or creative . . . or more factual, with a greater leeway being allowed to a claim of fair use where the work is factual or informational, and (2) whether the work is published or unpublished, with the scope of fair use involving unpublished works being considerably narrower.” *Blanch*, 467 F.3d at 256 (citation omitted). Although courts are required to consider and weigh this factor, it “has rarely played a significant role in the determination of a fair use dispute.” *Google*, 804 F.3d at 220.

The district court correctly held that the Goldsmith Photograph is both unpublished and creative but nonetheless concluded that the second factor should favor neither party because LGL had licensed the Goldsmith Photograph to Vanity Fair and because the Prince Series was highly transformative. *See Warhol*, 382 F. Supp. 3d at 327. That was error. That Goldsmith, through LGL, made the Goldsmith Photograph available for a single use on limited terms does not change its status as an unpublished work nor diminish the law’s protection of her choice of “when to make a work public and whether to withhold a work to shore up demand.” *Id.*, citing 4 *Nimmer on Copyright* § 13.05(A)(2)(b). Further, though we have previously held that this factor “may be of limited usefulness where the creative work is being used for a transformative purpose,” *Bill Graham Archives*, 448 F.3d at 612, this relates only to the weight assigned to it, not whom it favors. *See also Blanch*, 467 F.3d at 257 (“[T]he second fair-use factor has limited weight in our

analysis because Koons used Blanch's work in a transformative manner.”).

Having recognized the Goldsmith Photograph as both creative and unpublished, the district court should have found this factor to favor Goldsmith irrespective of whether it adjudged the Prince Series works transformative within the meaning of the first factor. And, because we disagree that the Prince Series works are transformative, we would accord this factor correspondingly greater weight.

*C. The Amount and Substantiality of the Use*

The third factor considers “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). “In assessing this factor, we consider not only ‘the quantity of the materials used’ but also ‘their quality and importance’ ” in relation to the original work. *TCA Television*, 839 F.3d at 185, quoting *Campbell*, 510 U.S. at 587, 114 S.Ct. 1164. The ultimate question under this factor is whether “the quantity and value of the materials used are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586, 114 S.Ct. 1164 (citation and internal quotation marks omitted). To that end, there is no bright line separating a permissible amount of borrowing from an impermissible one; indeed, we have rejected the proposition that this factor necessarily favors the copyright holder even where the secondary user has copied the primary work *in toto* in service of a legitimate secondary purpose. See *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 89-90 (2d Cir. 2014); see also *Rogers*, 960 F.2d at 310-11 (“Sometimes wholesale copying may be permitted, while in other cases taking even a small

percentage of the original work has been held unfair use.”).

In this case, AWF argues, and the district court concluded, that this factor weighs in its favor because, by cropping and flattening the Goldsmith Photograph, thereby removing or minimizing its use of light, contrast, shading, and other expressive qualities, Warhol removed nearly all of its copyrightable elements. We do not agree.

We begin with the uncontroversial proposition that copyright does not protect ideas, but only “the original or unique way that an author expresses those ideas, concepts, principles, or processes.” *Rogers*, 960 F.2d at 308. As applied to photographs, this protection encompasses the photographer’s “posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved.” *Id.* at 307. The cumulative manifestation of these artistic choices – and what the law ultimately protects – is the image produced in the interval between the shutter opening and closing, *i.e.*, the photograph itself. This is, as we have previously observed, the photographer’s “particular expression” of the idea underlying her photograph. *Leibovitz*, 137 F.3d at 115-16.

It is thus easy to understand why AWF’s contention misses the mark. The premise of its argument is that Goldsmith cannot copyright Prince’s face. True enough. Were it otherwise, nobody else could have taken the man’s picture without either seeking Goldsmith’s permission or risking a suit for infringement. But while Goldsmith has no monopoly on Prince’s face, the law grants her a broad monopoly on its image as it appears in her photographs of him,

including the Goldsmith Photograph.<sup>7</sup> *Cf. Mattel, Inc. v. Goldberger Doll Mfg. Co.*, 365 F.3d 133, 136-37 (2d Cir. 2004) (vacating summary judgment where district court had concluded that “defendant could freely copy the central facial features of the Barbie dolls” and holding that Mattel could not monopolize the idea of a doll with “upturned nose, bow lips, and wide eyes,” but the law protected its specific rendition thereof). And where, as here, the secondary user has used the photograph itself, rather than, for example, a similar photograph, the photograph’s specific depiction of its subject cannot be neatly reduced to discrete qualities such as contrast, shading, and depth of field that can be stripped away, taking the image’s entitlement to copyright protection along with it.

With that in mind, we readily conclude that the Prince Series borrows significantly from the Goldsmith Photograph, both quantitatively and qualitatively. While Warhol did indeed crop and flatten the Goldsmith Photograph, the end product is not merely a screenprint identifiably based on a

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<sup>7</sup> It is for this reason that the cases that AWF cites in support of its position (and on which the district court relied) are not particularly instructive; each involves a claim in which a second, distinct work was alleged to infringe the protected expression of the original work, and each such claim was rejected on the basis that the second work copied only the unprotected idea of the original. *See, e.g., Bill Diodato Photography, LLC v. Kate Spade, LLC*, 388 F. Supp. 2d 382, 393 (S.D.N.Y. 2005) (involving separate photographs of women in bathroom stalls with jauntily placed handbags); *see also infra* Section III. Had Warhol used a different photograph that Goldsmith alleged was similar enough to her own to render the Prince Series an infringement of her work, these cases might be more instructive. But he did not, so they are not.

photograph of Prince. Rather it is a screenprint readily identifiable as deriving from a *specific* photograph of Prince, the Goldsmith Photograph. A comparison of the images in the Prince Series makes plain that Warhol did not use the Goldsmith Photograph simply as a reference or *aide-mémoire* in order to accurately document the physical features of its subject. Instead, the Warhol images are instantly recognizable as depictions or images of the Goldsmith Photograph itself.

To confirm this, one need look no further than the other photographs of Prince that AWF submitted in support of its motion below to evidence its contention that Prince's pose was not unique to the Goldsmith Photograph. Though any of them may have been suitable as a base photograph for Warhol's process, we have little doubt that the Prince Series would be quite different had Warhol used one of them instead of the Goldsmith Photograph to create it. But the resemblance between the Prince Series works and the Goldsmith Photograph goes even further; for example, many of the aspects of Prince's appearance in the Prince Series works, such as the way in which his hair appears shorter on the left side of his face, are present in the Goldsmith Photograph yet absent even from some other photographs that Goldsmith took of Prince during the same photo session. In other words, whatever the effect of Warhol's alterations, the "essence of [Goldsmith's] photograph was copied" and persists in the Prince Series. *Rogers*, 960 F.2d at 311. Indeed, Warhol's process had the effect of *amplifying*,

rather than minimizing, certain aspects of the Goldsmith Photograph.<sup>8</sup>

Nor can Warhol's appropriation of the Goldsmith Photograph be deemed reasonable in relation to his purpose. While Warhol presumably required a photograph of Prince to create the Prince Series, AWF proffers no reason why he required *Goldsmith's* photograph. See *TCA Television*, 839 F.3d at 181-82, 185 (wholesale borrowing of copyrighted comedy routine not reasonable where "defendants offer[ed] no persuasive justification" for its use). To the contrary, the evidence in the record suggests that Warhol had no particular interest in the Goldsmith Photograph or Goldsmith herself; Vanity Fair licensed *a* photograph of Prince, and there is no evidence that Warhol (or, for that matter, Vanity Fair) was involved in identifying or selecting the particular photograph that LGL provided.

To be clear, we do not hold that this factor will always favor the copyright holder where the work at issue is a photograph and the photograph remains identifiable in the secondary work. But this case is not *Kienitz v. Sconnie Nation LLC*, in which a panel of the Seventh Circuit held that a t-shirt design that incorporated a photograph in a manner that stripped

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<sup>8</sup> For example, the fact that Prince's mustache appears to be lighter on the right side of his face than the left is barely noticeable in the grayscale Goldsmith Photograph but is quite pronounced in the black-and-white Prince Series screenprints. Moreover, this feature of the Goldsmith Photograph is, again, not common to all other photographs of Prince even from that brief session. The similarity is not simply an artefact of what Prince's facial hair was like on that date, but of the particular effects of light and angle at which Goldsmith captured that aspect of his appearance.

away nearly every expressive element such that, “as with the Cheshire Cat, only the [subject’s] smile remain[ed]” was fair use. 766 F.3d at 759. As discussed, Warhol’s rendition of the Goldsmith Photograph leaves quite a bit more detail, down to the glint in Prince’s eyes where the umbrellas in Goldsmith’s studio reflected off his pupils. Thus, though AWF urges this court to follow the Seventh Circuit’s lead, its decision in *Kienitz* would not compel a different result here, even if it were binding on us – which, of course, it is not.

The district court, reasoning that Warhol had taken only the unprotected elements of the Goldsmith Photograph in service of a transformative purpose, held that this factor strongly favored AWF. Because we disagree on both counts, we conclude that this factor strongly favors Goldsmith.

*D. The Effect of the Use on the Market for the Original*

The fourth factor asks “whether, if the challenged use becomes widespread, it will adversely affect the potential market for the copyrighted work.” *Bill Graham Archives*, 448 F.3d at 613. “Analysis of this factor requires us to balance the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied.” *Wright v. Warner Books, Inc.*, 953 F.2d 731, 739 (2d Cir. 1991) (internal quotation marks omitted). In assessing market harm, we ask not whether the second work would *damage* the market for the first (by, for example, devaluing it through parody or criticism), but whether it *usurps* the market for the first by offering a competing substitute. *See, e.g., Bill Graham Archives*, 448 F.3d at 614. This analysis

embraces both the primary market for the work and any derivative markets that exist or that its author might reasonably license others to develop, regardless of whether the particular author claiming infringement has elected to develop such markets. *See Salinger v. Colting*, 607 F.3d 68, 74, 83 (2d Cir. 2010) (affirming that fourth factor favored J.D. Salinger in suit over unauthorized sequel to *Catcher in the Rye* despite the fact that Salinger had publicly disclaimed any intent to author or authorize a sequel, but vacating preliminary injunction on other grounds). As we have previously observed, the first and fourth factors are closely linked, as “the more the copying is done to achieve a purpose that differs from the purpose of the original, the less likely it is that the copy will serve as a satisfactory substitute for the original.” *Google*, 804 F.3d at 223, citing *Campbell*, 510 U.S. at 591, 114 S.Ct. 1164.

We agree with the district court that the primary market for the Warhol Prince Series (that is, the market for the original works) and the Goldsmith Photograph do not meaningfully overlap, and Goldsmith does not seriously challenge that determination on appeal. We cannot, however, endorse the district court’s implicit rationale that the market for Warhol’s works is the market for “Warhols,” as doing so would permit this aspect of the fourth factor always to weigh in favor of the alleged infringer so long as he is sufficiently successful to have generated an active market for his own work. Notwithstanding, we see no reason to disturb the district court’s overall conclusion that the two works occupy distinct markets, at least as far as direct sales are concerned.



We are unpersuaded, however, by the district court's conclusion that the Prince Series poses no threat to Goldsmith's licensing markets. While Goldsmith does not contend that she has sought to license the Goldsmith Photograph itself, the question under this factor is not solely whether the secondary work harms an *existing* market for the specific work alleged to have been infringed. *Cf. Castle Rock*, 150 F.3d at 145-46 ("Although Castle Rock has evidenced little if any interest in exploiting this market for derivative works . . . the copyright law must respect that creative and economic choice."). Rather, we must also consider whether "unrestricted and widespread conduct of the sort engaged in by [AWF] would result in a substantially adverse impact on the potential market" for the Goldsmith Photograph. *Campbell*, 510 U.S. at 590, 114 S.Ct. 1164 (internal quotation marks omitted) (alterations adopted); *see also Fox News Network, LLC v. TVeyes, Inc.*, 883 F.3d 169, 179 (2d Cir. 2018).

As an initial matter, we note that the district court erred in apparently placing the burden of proof as to this factor on Goldsmith. *See, e.g., Warhol*, 382 F. Supp. 3d at 330. While our prior cases have suggested that the rightsholder bears some initial burden of identifying relevant markets,<sup>9</sup> we have never held that the rightsholder bears the burden of showing

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<sup>9</sup> *See HathiTrust*, 755 F.3d at 96 ("To defeat a claim of fair use, the copyright holder must point to the market harm that results because the secondary use serves as a substitute for the original work."); *Leibovitz*, 137 F.3d at 116 n.6 ("Leibovitz has not identified any market for a derivative work that might be harmed by the Paramount ad. In these circumstances, the defendant had no obligation to present evidence showing lack of harm in a market for derivative works.").

actual market harm. Nor would we so hold. Fair use is an affirmative defense; as such, the ultimate burden of proving that the secondary use does not compete in the relevant market is appropriately borne by the party asserting the defense: the secondary user. *See Campbell*, 510 U.S. at 590, 114 S.Ct. 1164 (“Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.”); *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 110 (2d Cir. 1998) (“As always, [the secondary user] bears the burden of showing that his use does not” usurp the market for the primary work); *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 459 (9th Cir. 2020) (“Not much about the fair use doctrine lends itself to absolute statements, but the Supreme Court and our circuit have unequivocally placed the burden of proof on the proponent of the affirmative defense of fair use.”).

In any case, whatever the scope of Goldsmith’s initial burden, she satisfied it here. Setting aside AWF’s licensing of Prince Series works for use in museum exhibits and publications about Warhol, which is not particularly relevant for the reasons set out in our discussion of the primary market for the works, there is no material dispute that both Goldsmith and AWF have sought to license (and indeed have successfully licensed) their respective depictions of Prince<sup>10</sup> to popular print magazines to accompany articles about him. As Goldsmith

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<sup>10</sup> In Goldsmith’s case, photographs other than the Goldsmith Photograph, which she has withheld from the market.

succinctly states: “both [works] are illustrations of the same famous musician with the same overlapping customer base.” Appellants’ Br. at 50. Contrary to AWF’s assertions, that is more than enough. See *Cariou*, 714 F.3d at 709 (“[A]n accused infringer has usurped the market for copyrighted works . . . where the infringer’s target audience and the nature of the infringing content is the same as the original.”). And, since Goldsmith has identified a relevant market, AWF’s failure to put forth any evidence that the availability of the Prince Series works poses no threat to Goldsmith’s actual or potential revenue in that market tilts the scales toward Goldsmith.

Finally, the district court entirely overlooked the potential harm to Goldsmith’s derivative market, which is likewise substantial. Most directly, AWF’s licensing of the Prince Series works to Condé Nast without crediting or paying Goldsmith deprived her of royalty payments to which she would have otherwise been entitled. Although we do not always consider lost royalties from the challenged use itself under the fourth factor (as any fair use necessarily involves the secondary user using the primary work without paying for the right to do so), we do consider them where the secondary use occurs within a traditional or reasonable market for the primary work. See *Fox News*, 883 F.3d at 180; *On Davis v. Gap, Inc.*, 246 F.3d 152, 176 (2d Cir. 2001). And here, that market is established both by Goldsmith’s uncontroverted expert testimony that photographers generally license others to create stylized derivatives of their work in the vein of the Prince Series, see J. App’x 584-99, and by the genesis of the Prince Series: a licensing

agreement between LGL and Vanity Fair to use the Goldsmith Photograph as an artist reference.<sup>11</sup>

Further, we also must consider the impact on this market if the sort of copying in which Warhol engaged were to become a widespread practice. That harm is also self-evident. There currently exists a market to license photographs of musicians, such as the Goldsmith Photograph, to serve as the basis of a stylized derivative image; permitting this use would effectively destroy that broader market, as, if artists “could use such images for free, there would be little or no reason to pay for [them].” *Barcroft Media, Ltd. v. Coed Media Grp., LLC*, 297 F. Supp. 3d 339, 355 (S.D.N.Y. 2017); *see also Seuss*, 983 F.3d at 461 (“[T]he unrestricted and widespread conduct of the sort ComicMix is engaged in could result in anyone being able to produce” their own similar derivative works based on *Oh, the Places You’ll Go!*). This, in turn, risks disincentivizing artists from producing new work by decreasing its value – the precise evil against which copyright law is designed to guard.

Thus, although the primary market for the Goldsmith Photograph and the Prince Series may differ, the Prince Series works pose cognizable harm to Goldsmith’s market to license the Goldsmith Photograph to publications for editorial purposes and to other artists to create derivative works based on the Goldsmith Photograph and similar works. Accordingly, the fourth factor favors Goldsmith.

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<sup>11</sup> Of course, if a secondary work is sufficiently transformative, the fact that its “raw material” was acquired by means of a limited license will not necessarily defeat a defense of fair use. As discussed *supra*, however, that is not the case here.

*E. Weighing the Factors*

“[T]his court has on numerous occasions resolved fair use determinations at the summary judgment stage where there are no genuine issues of material fact.” *Cariou*, 714 F.3d at 704 (internal quotation marks omitted) (alteration adopted) (collecting cases). As no party contends that there exist any issues of material fact in this case, we believe it appropriate to exercise that discretion here.

Having considered each of the four factors, we find that each favors Goldsmith. Further, although the factors are not exclusive, AWF has not identified any additional relevant considerations unique to this case that we should take into account. Accordingly, we hold that AWF’s defense of fair use fails as a matter of law.

**III. Substantial Similarity**

AWF asks this Court to affirm the district court’s decision on the alternate grounds that the Prince Series works are not substantially similar to the Goldsmith Photograph. We decline that invitation, because we conclude that the works are substantially similar as a matter of law.

The district court did not analyze the issue of substantial similarity because, in its view, “it [was] plain that the Prince Series works are protected by fair use.” *Warhol*, 382 F. Supp. 3d at 324. While “it is our distinctly preferred practice to remand such issues for consideration by the district court in the first instance,” *Schonfeld v. Hilliard*, 218 F.3d 164, 184 (2d Cir. 2000), we are not required to do so. In this case, because the question of substantial similarity is logically antecedent to that of fair use – since there would be no need to invoke the fair use

defense in the absence of actionable infringement – and because the factors we have already discussed with respect to fair use go a considerable way toward resolving the substantial similarity issue, we do not believe a remand to address that issue is necessary in this case.<sup>12</sup>

In general, and as applicable here, two works are substantially similar when “an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.” *Knitwaves, Inc. v. Lollytogs, Ltd.*, 71 F.3d 996, 1003 (2d Cir. 1995), quoting *Malden Mills, Inc. v. Regency Mills, Inc.*, 626 F.2d 1112, 1113 (2d Cir. 1980). “On occasion, . . . we have noted that when faced with works that have both protectable and unprotectable elements, our analysis must be more discerning and that we instead must attempt to extract the unprotectable elements from our consideration and ask whether the protectable elements, standing alone, are substantially similar.” *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 66 (2d Cir. 2010) (internal citations and quotation marks omitted). AWF and its *amici* contend that this “more discerning observer” test should apply here because photographs contain both protectable and unprotectable elements. See Appellee’s Br. at 65; Law Professors’ Br. at 8. The same could be said, however, of any copyrighted work: even the most quintessentially “expressive” works, such as books or paintings, contain non-copyrightable ideas or concepts. See 4 *Nimmer on Copyright* § 13.03(B)(2).

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<sup>12</sup> We express no view on the viability of AWF’s remaining defenses, which are appropriately considered by the district court in the first instance.

Moreover, the cases in which we have applied the “more discerning observer” test involved types of works with much “thinner” copyright protection – *i.e.*, works that are more likely to contain a larger share of non-copyrightable elements. *See, e.g., Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 102 (2d Cir. 2014) (architectural designs); *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 136 n.13 (2d Cir. 2003) (Tibetan-style carpets); *Boisson v. Banian, Ltd.*, 273 F.3d 262, 272 (2d Cir. 2001) (quilts). By contrast, “photographs are ‘generally viewed as creative aesthetic expressions of a scene or image’ and have long received thick copyright protection[,] . . . even though photographs capture images of reality.” *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 267 (4th Cir. 2019), quoting *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1177 (9th Cir. 2012). We therefore reject AWF’s contention that we should be “more discerning” in considering whether the Prince Series is substantially similar to the Goldsmith Photograph and apply the standard “ordinary observer” test. *See Knitwaves*, 71 F.3d at 1002-03.

Though substantial similarity often presents a jury question, it may be resolved as a matter of law where “access to the copyrighted work is conceded, and the accused work is so substantially similar to the copyrighted work that reasonable jurors could not differ on this issue.” *Rogers*, 960 F.2d at 307 (citation omitted); *see also Gaito*, 602 F.3d at 63 (“The question of substantial similarity is by no means exclusively reserved for resolution by a jury.”).

Here, AWF has conceded that the Goldsmith Photograph served as the “raw material” for the Prince Series works. *See Appellee’s Br.* at 6-7. AWF

nevertheless attempts to compare this case to several decisions from our sister circuits concluding that the secondary works in question were not substantially similar to the original photographs on which they were based. *See, e.g., Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1121-23 (9th Cir. 2018) (Nike’s iconic “Jumpman” logo and the photograph used to create it were not substantially similar to a photograph of Michael Jordan dunking a basketball); *Harney v. Sony Pictures Television, Inc.*, 704 F.3d 173, 188 (1st Cir. 2013) (recreated image in made-for-TV movie was not substantially similar to the photograph that inspired it). But the secondary users in those cases did not merely copy the original photographs at issue; they instead replicated those photographs using their own subjects in similar poses. By contrast, Warhol did not create the Prince Series by taking his own photograph of Prince in a similar pose as in the Goldsmith Photograph. Nor did he attempt to copy merely the “idea” conveyed in the Goldsmith Photograph. Rather, he produced the Prince Series works by copying the Goldsmith Photograph itself – *i.e.*, Goldsmith’s particular expression of that idea. This case therefore stands in sharp contrast to the situation presented by *Rentmeester*, for example, in which the court explained that “[w]hat [the original] photo and the [allegedly infringing] photo share are similarities in general ideas or concepts: Michael Jordan attempting to dunk in a pose inspired by ballet’s *grand jeté*; an outdoor setting stripped of most of the traditional trappings of basketball; a camera angle that captures the subject silhouetted against the sky.” 883 F.3d at 1122-23.

This is not to say that every use of an exact reproduction constitutes a work that is substantially



similar to the original. But here, given the degree to which Goldsmith's work remains recognizable within Warhol's, there can be no reasonable debate that the works are substantially similar. *See Rogers*, 960 F.2d at 307-08. As we have noted above, Prince, like other celebrity performing and creative artists, was much photographed. But any reasonable viewer with access to a range of such photographs including the Goldsmith Photograph would have no difficulty identifying the latter as the source material for Warhol's Prince Series.

### CONCLUSION

For the foregoing reasons, we REVERSE the grant of AWF's motion for summary judgment, VACATE the judgment entered below dismissing Lynn Goldsmith and LGL's amended counterclaim, and REMAND this case for further proceedings consistent with this opinion.

RICHARD J. SULLIVAN, Circuit Judge, joined by DENNIS JACOBS, Circuit Judge, concurring:

I fully join the majority's thoughtful opinion and its conclusion that the Prince Series works are substantially similar to the Goldsmith Photograph and are not protected by fair use. I write separately only to highlight what I see as an overreliance on "transformative use" in our fair use jurisprudence, generally, and to suggest that a renewed focus on the fourth fair use factor, "the effect of the use upon the potential market for or value of the copyrighted work," 17 U.S.C. § 107(4), would bring greater coherence and predictability to this area of the law.

In the wake of the Supreme Court's decision in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S.

569, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994), the “transformative” nature of a secondary work has become the dominant focus in determining whether that work is protected by fair use. Courts and commentators have recognized this trend and have observed that it threatens to collapse the four statutory fair use factors into a single, dispositive factor. *See, e.g., Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (“[A]sking exclusively whether something is ‘transformative’ not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works.”); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][1][b] (noting that many courts’ applications of the transformative use test “are conclusory – they appear to label a use ‘not transformative’ as a shorthand for ‘not fair,’ and correlatively ‘transformative’ for ‘fair’ ”). Indeed, one recent empirical study found that, among a sample of 238 district and circuit court decisions, whether a secondary work was transformative correlated with the ultimate fair use outcome 94% of the time. *See Jiarui Liu, An Empirical Study of Transformative Use in Copyright Law*, 22 *Stan. Tech. L. Rev.* 163, 180 (2019).

This pattern is perhaps best illustrated in the district court’s opinion below. Having concluded that the Prince Series works were transformative, the district court found that the second fair use factor was neutral (despite noting that the Goldsmith Photograph was creative and unpublished, which “would ordinarily weigh in Goldsmith’s favor”) and found that the third factor weighed heavily in AWF’s favor because “Warhol transformed Goldsmith’s work into something new and different.” *Andy Warhol*

*Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 327, 330 (S.D.N.Y. 2019) (internal quotation marks omitted). But perhaps most notably, as the majority’s opinion recognizes, the district court completely dismissed evidence of harm to Goldsmith’s potential licensing and derivative markets after concluding that the Prince Series was transformative. See Majority Op. at 120–22.

Placing dispositive weight on transformative use while reducing evidence of market harm to an afterthought is difficult to square with the Supreme Court’s guidance that the fourth factor “is undoubtedly the single most important element of fair use.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985). Indeed, we have previously explained that focusing on the importance of the fourth factor “is consistent with the fact that the copyright is a commercial right, intended to protect the ability of authors to profit from the exclusive right to merchandise their own work.” *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015) (“*Google Books*”).

To be sure, some of this Court’s earlier decisions suggest that the Supreme Court “retreated” from its emphasis on the fourth factor when it explained in *Campbell* that “[a]ll [four fair use factors] are to be explored, and the results weighed together, in light of the purposes of copyright,” 510 U.S. at 578, 114 S.Ct. 1164. See, e.g., *Blanch v. Koons*, 467 F.3d 244, 258 n.8 (2d Cir. 2006); *Castle Rock Ent., Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 145 (2d Cir. 1998). But the statements in *Campbell* and *Harper & Row* are not necessarily at odds with one another: courts can consider all four factors while still recognizing that

evidence of harm to the potential market for the original work (or derivative works based on the original, *see Campbell*, 510 U.S. at 593, 114 S.Ct. 1164) should be given substantial weight.

The Supreme Court's decision in *Campbell* does not suggest otherwise. To the contrary, even though *Campbell* is recognized for crystallizing the concept of transformative use, the opinion "characterizes the first factor inquiry as subservient to the fourth." Pierre N. Leval, *Campbell as Fair Use Blueprint?*, 90 Wash. L. Rev. 597, 605 (2015). *Campbell* explained that transformative works are more likely to be fair uses *because* they are less likely to "act[] as a substitute" for or "supersede[] the objects" of the original work, and are therefore less likely to "affect the market for the original in a way cognizable under [the fourth] factor." 510 U.S. at 591, 114 S.Ct. 1164 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (No. 4,901) (C.C.D. Mass. 1841)); *see also* Leval, *supra* at 605 n.38. Moreover, *Campbell* explicitly acknowledged that the defendants in that case "left themselves at . . . a disadvantage when they failed to address the effect [of their work] on the market for rap derivatives" and remanded for further fact-finding on the fourth factor despite concluding that the defendants' secondary work was transformative. 510 U.S. at 590, 594, 114 S.Ct. 1164. *Campbell* therefore does not stand for the proposition that transformative use should be the dispositive factor in the fair use inquiry; rather, evidence of harm to the potential market for the original work (and its derivatives) is still integral to the analysis.

By returning focus to the fourth fair use factor and being particularly attentive to "whether unrestricted and widespread conduct of the sort engaged in" by an

alleged infringer would adversely affect the potential market for the original work, *id.* at 590, 114 S.Ct. 1164 (internal quotation marks omitted), courts can escape the post-*Campbell* overreliance on transformative use. Fortunately, several of our more recent fair use decisions have placed greater emphasis on the fourth factor. *See, e.g., Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649, 662 (2d Cir. 2018) (describing the fourth factor as “undoubtedly the single most important element of fair use” (quoting *Harper & Row*, 471 U.S. at 566, 105 S.Ct. 2218)); *Fox News Network, LLC v. TVeyes, Inc.*, 883 F.3d 169, 174, 180 (2d Cir. 2018) (finding no fair use despite concluding that the defendants’ technology “serve[d] a transformative purpose,” in part because the technology “usurped a function for which [the plaintiff was] entitled to demand compensation under a licensing agreement”); *TCA Television Corp. v. McCollum*, 839 F.3d 168, 186 (2d Cir. 2016) (recognizing that the district court improperly “disregarded the possibility of defendants’ use adversely affecting the licensing market for the [original work]”). And our sister circuits have followed suit. *See, e.g., Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 459–61 (9th Cir. 2020) (emphasizing that the defendant did not “address a crucial right for a copyright holder – the derivative works market”); *Kienitz*, 766 F.3d at 758 (“We think it best to stick with the statutory list, of which the most important usually is the fourth (market effect).”).

This is not to suggest that the majority’s opinion runs counter to this trend. To the contrary, it properly recognizes the harm to the potential licensing markets for the Goldsmith Photograph and

its derivatives, and reaffirms that the burden of proving a lack of market harm rests with the alleged infringer. *See* Majority Op. at 120–22. I write simply to stress that this renewed attention to the fourth fair use factor will ultimately better serve the purposes of copyright, which remains at its core “a commercial doctrine whose objective is to stimulate creativity among potential authors by enabling them to earn money from their creations.” *Google Books*, 804 F.3d at 223.

DENNIS JACOBS, Circuit Judge, concurring:

I concur in the opinion of the Court as well as Judge Sullivan’s concurrence. I write briefly to make a single point: the holding does not consider, let alone decide, whether the infringement encumbers the original Prince Series works that are in the hands of collectors or museums.

It is very easy for opinions in this area (however expertly crafted) to have undirected ramifications. A sound holding may suggest an unsound result in related contexts.

The sixteen original works have been acquired by various galleries, art dealers, and the Andy Warhol Museum. This case does not decide their rights to use and dispose of those works because Goldsmith does not seek relief as to them. She seeks only damages and royalties for licensed reproductions of the Prince Series.

Although the Andy Warhol Foundation initiated this suit with a request for broader declaratory relief that would cover the original works, Goldsmith did not expressly join issue. The Declaratory Judgment Act is reserved for disputes that are percolating over

parties' rights and obligations while harm threatens to accrue. See United States v. Doherty, 786 F.2d 491, 498–99 (2d Cir. 1986) (Friendly, J.); see also Broadview Chem. Corp. v. Loctite Corp., 417 F.2d 998, 1001 (2d Cir. 1969) (articulating the criteria for deciding whether to entertain a declaratory judgment action). But Goldsmith does not claim that the original works infringe and expresses no intention to encumber them; the opinion of the Court does not necessarily decide that issue.

The issue, however, still looms, and our holding may alarm or alert possessors of other artistic works. Warhol's works are among many pieces that incorporate, appropriate, or borrow from protected material. Risk of a copyright suit or uncertainty about an artwork's status can inhibit the creativity that is a goal of copyright.

A key consideration in this case is the effect of the Prince Series on the market for Goldsmith's photograph. Our decision depends heavily on the commercial competition between the photograph and the reproduced versions of the Prince Series.

As the opinion observes, the market for the photograph and the market for the original Prince Series works are distinct. See Majority Op. at 120–21. An original work of art is marked by the hand or signature of the artist, which is a preponderating factor in its value. When the work is reproduced, it loses that mystique, as anyone who has browsed a gift shop can appreciate. In a word, the original works and Goldsmith's photograph are not "substitutes." Castle Rock Ent., Inc. v. Carol Publ'g Grp., 150 F.3d 132, 145 (2d Cir. 1998).

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But when represented on a magazine cover, the Prince Series functions as a portrait of the musician Prince--as does Goldsmith's photograph. The Prince Series retains the photograph's expressive capacity for Prince portraiture and is sought for that purpose. It may well compete for magazine covers, posters, coffee mugs, and other media featuring the late musician. If the Foundation had refuted the evidence of such market displacement, the weight of the analytical considerations would have changed.