Figure 1. A black and white portrait photograph of Prince taken in 1981 by Lynn Goldsmith.

created a silkscreen portrait of Prince, which appeared alongside an article about Prince in the November 1984 issue of Vanity Fair. See fig. 2, *infra*. The article, titled "Purple Fame," is primarily about the "sexual style" of the new celebrity and his music. Vanity Fair, Nov. 1984, p. 66. Goldsmith received her $400 fee, and Vanity Fair credited her for the "source photograph." 2 App. 323, 325–326. Warhol received an unspecified amount.

In addition to the single illustration authorized by the Vanity Fair license, Warhol created 15 other works based on Goldsmith's photograph: 13 silkscreen prints and two

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impressions" served as an "'under-drawing,'" over which Warhol painted colors by hand. *Id.*, at 165.

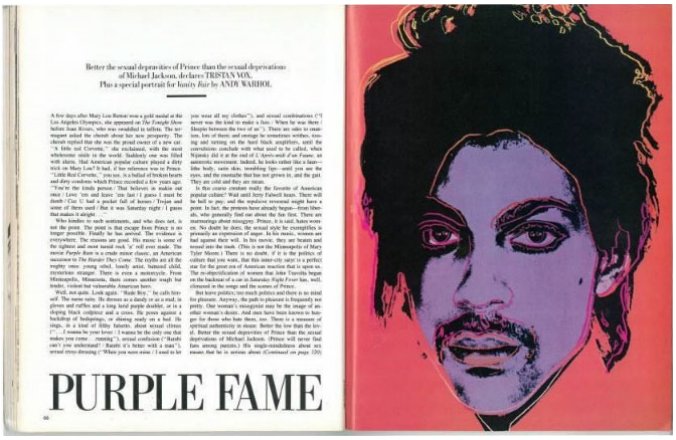

Figure 2. A purple silkscreen portrait of Prince created in 1984 by Andy Warhol to illustrate an article in Vanity Fair.

pencil drawings. The works are collectively referred to as the "Prince Series." See Appendix, *infra*. Goldsmith did not know about the Prince Series until 2016, when she saw the image of an orange silkscreen portrait of Prince ("Orange Prince") on the cover of a magazine published by Vanity Fair's parent company, Condé Nast. See fig. 3, *infra*.

By that time, Warhol had died, and the Prince Series had passed to the Andy Warhol Foundation for the Visual Arts, Inc. AWF no longer possesses the works,[2] but it asserts copyright in them. It has licensed images of the works for commercial and editorial uses. In particular, after Prince died in 2016, Condé Nast contacted AWF about the possibility of reusing the 1984 Vanity Fair image for a special edition magazine that would commemorate Prince. Once AWF informed Condé Nast about the other Prince Series images, however, Condé Nast obtained a license to publish Orange

[2]AWF sold 12 of the works to collectors and galleries, and it transferred custody of the remaining four works to the Andy Warhol Museum in Pittsburgh.

Figure 3. An orange silkscreen portrait of Prince on the cover of a special edition magazine published in 2016 by Condé Nast.

Prince instead. The magazine, titled "The Genius of Prince," is a tribute to "Prince Rogers Nelson, 1958–2016." It is "devoted to Prince." 2 App. 352. Condé Nast paid AWF $10,000 for the license. Goldsmith received neither a fee nor a source credit.

Remember that Goldsmith, too, had licensed her Prince images to magazines such as Newsweek, to accompany a story about the musician, and Vanity Fair, to serve as an artist reference. But that was not all. Between 1981 and 2016, Goldsmith's photos of Prince appeared on or between the covers of People, Readers Digest, Guitar World, and Musician magazines. See, *e.g.*, fig. 4, *infra*.

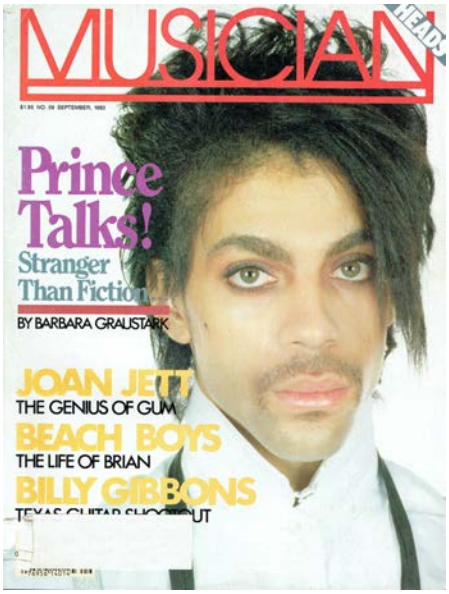

Figure 4. One of Lynn Goldsmith's photographs of Prince on the cover of Musician magazine.

People magazine, in fact, paid Goldsmith $1,000 to use one of her copyrighted photographs in a special collector's edition, "Celebrating Prince: 1958–2016," just after Prince died. People's tribute, like Condé Nast's, honors the life and music of Prince. Other magazines, including Rolling Stone and Time, also released special editions. See fig. 5, *infra*. All of them depicted Prince on the cover. All of them used a copyrighted photograph in service of that object. And all of them (except Condé Nast) credited the photographer.

Figure 5. Four special edition magazines commemorating Prince after he died in 2016.

When Goldsmith saw Orange Prince on the cover of Condé Nast's special edition magazine, she recognized her work. "It's the photograph," she later testified. 1 App. 290. Orange Prince crops, flattens, traces, and colors the photo but otherwise does not alter it. See fig. 6, *infra*.

Figure 6. Warhol's orange silkscreen portrait of Prince superimposed on Goldsmith's portrait photograph.

Goldsmith notified AWF of her belief that it had infringed her copyright. AWF then sued Goldsmith and her agency for a declaratory judgment of noninfringement or, in the alternative, fair use. Goldsmith counterclaimed for infringement.

The District Court granted summary judgment for AWF. 382 F. Supp. 3d 312, 316 (SDNY 2019). The court considered the four fair use factors enumerated in 17 U. S. C. §107 and held that the Prince Series works made fair use of Goldsmith's photograph. As to the first factor, the works were "transformative" because, looking at them and the photograph "side-by-side," they "have a different character, give Goldsmith's photograph a new expression, and employ new aesthetics with creative and communicative results distinct from Goldsmith's." 382 F. Supp. 3d, at 325–326 (internal quotation marks and alterations omitted). In particular, the works "can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an

uses. In *Google*, the Court suggested that "[a]n 'artistic painting' might, for example, fall within the scope of fair use even though it precisely replicates a copyrighted 'advertising logo to make a comment about consumerism.'" 593 U. S., at ___–___ (slip op., at 24–25) (quoting 4 M. Nimmer & D. Nimmer, Copyright §13.05[A][1][b] (2019), in turn quoting N. Netanel, Making Sense of Fair Use, 15 Lewis & Clark L. Rev. 715, 746 (2011) (some internal quotation marks omitted)). That suggestion refers to Warhol's works that incorporate advertising logos, such as the Campbell's Soup Cans series. See fig. 7, *infra*.

Yet not all of Warhol's works, nor all uses of them, give rise to the same fair use analysis. In fact, Soup Cans well illustrates the distinction drawn here. The purpose of Campbell's logo is to advertise soup. Warhol's canvases do

Figure 7. A print based on the Campbell's soup can, one of Warhol's works that replicates a copyrighted advertising logo.

APPENDIX

Andy Warhol created 16 works based on Lynn Goldsmith's photograph: 14 silkscreen prints and two pencil drawings. The works are collectively known as the Prince Series.

gold frames"—disconnected from the everyday world of products and personalities—Warhol's paintings landed like a thunderclap. A. Danto, Andy Warhol 36 (2009). Think Soup Cans or, in another vein, think Elvis. Warhol had created "something very new"—"shockingly important, transformative art." B. Gopnik, Warhol 138 (2020); Gopnik, Artistic Appropriation.

To see the method in action, consider one of Warhol's pre-Prince celebrity silkscreens—this one, of Marilyn Monroe. He began with a publicity photograph of the actress. And then he went to work. He reframed the image, zooming in on Monroe's face to "produc[e] the disembodied effect of a cinematic close-up." 1 App. 161 (expert declaration).

At that point, he produced a high-contrast, flattened image on a sheet of clear acetate. He used that image to trace an outline on the canvas. And he painted on top—applying exotic colors with "a flat, even consistency and an industrial appearance." *Id.*, at 165. The same high-contrast image was then reproduced in negative on a silkscreen, designed

to function as a selectively porous mesh. Warhol would "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." *Id.*, at 164. On some of his Marilyns (there are many), he reordered the process—first ink, then color, then (perhaps) ink again. See *id.*, at 165–166. The result—see for yourself—is miles away from a literal copy of the publicity photo.

Andy Warhol, Marilyn, 1964, acrylic and silkscreen ink on linen

And the meaning is different from any the photo had. Of course, meaning in great art is contestable and contested (as is the premise that an artwork is great). But note what some experts say about the complex message(s) Warhol's Marilyns convey. On one level, those vivid, larger-than-life paintings are celebrity iconography, making a "secular, profane subject[]" "transcendent" and "eternal." *Id.*, at 209 (internal quotation marks omitted). But they also function as a biting critique of the cult of celebrity, and the role it plays

in American life. With misaligned, "Day-Glo" colors suggesting "artificiality and industrial production," Warhol portrayed the actress as a "consumer product." The Metropolitan Museum of Art Guide 233 (2012); The Metropolitan Museum of Art, Marilyn (2023) (online source archived at https://www.supremecourt.gov). And in so doing, he "exposed the deficiencies" of a "mass-media culture" in which "such superficial icons loom so large." 1 App. 208, 210 (internal quotation marks omitted). Out of a publicity photo came both memorable portraiture and pointed social commentary.

As with Marilyn, similarly with Prince. In 1984, Vanity Fair commissioned Warhol to create a portrait based on a black-and-white photograph taken by noted photographer Lynn Goldsmith:

As he did in the Marilyn series, Warhol cropped the photo, so that Prince's head fills the whole frame: It thus becomes "disembodied," as if "magically suspended in space." *Id.*, at

174. And as before, Warhol converted the cropped photo into a higher-contrast image, incorporated into a silkscreen. That image isolated and exaggerated the darkest details of Prince's head; it also reduced his "natural, angled position," presenting him in a more face-forward way. *Id.*, at 223. Warhol traced, painted, and inked, as earlier described. See *supra*, at 5–6. He also made a second silkscreen, based on his tracings; the ink he passed through that screen left differently colored, out-of-kilter lines around Prince's face and hair (a bit hard to see in the reproduction below—more pronounced in the original). Altogether, Warhol made 14 prints and two drawings—the Prince series—in a range of unnatural, lurid hues. See Appendix, *ante*, at 39. Vanity Fair chose the Purple Prince to accompany an article on the musician. Thirty-two years later, just after Prince died, Condé Nast paid Warhol (now actually his foundation, see *supra*, at 1, n. 1) to use the Orange Prince on the cover of a special commemorative magazine. A picture (or two), as the saying goes, is worth a thousand words, so here is what those magazines published:

Andy Warhol, Prince, 1984, synthetic paint and silkscreen ink on canvas

the whole fair-use test. *Ante*, at 24.

Finally, back to the visual arts, for while Warhol may have been the master appropriator within that field, he had plenty of company; indeed, he worked within an established tradition going back centuries (millennia?). The representatives of three giants of modern art (you may know one for his use of comics) describe the tradition as follows: "[T]he use and reuse of existing imagery" are "part of art's lifeblood"—"not just in workaday practice or fledgling student efforts, but also in the revolutionary moments of art history." Brief for Robert Rauschenberg, Roy Lichtenstein, and Joan Mitchell Foundations et al. as *Amici Curiae* 6.

Consider as one example the reclining nude. Probably the first such figure in Renaissance art was Giorgione's Sleeping Venus. (Note, though, in keeping with the "nothing comes from nothing" theme, that Giorgione apparently modeled his canvas on a woodcut illustration by Francesco Colonna.) Here is Giorgione's painting:

Giorgione, Sleeping Venus, c. 1510, oil on canvas

But things were destined not to end there. One of Giorgione's pupils was Titian, and the former student undertook to riff on his master. The resulting Venus of Urbino is a prototypical example of Renaissance *imitatio*—the creation of an original work from an existing model. See *id.*, at 8; 1 G. Vasari, Lives of the Artists 31, 444 (G. Bull transl. 1965). You can see the resemblance—but also the difference:

Titian, Venus of Urbino, 1538, oil on canvas

The majority would presumably describe these Renaissance canvases as just "two portraits of reclining nudes painted to sell to patrons." Cf. *ante*, at 12–13, 22–23. But wouldn't that miss something—indeed, everything—about how an artist engaged with a prior work to create new expression and add new value?

And the reuse of past images was far from done. For here is Édouard Manet's Olympia, now considered a foundational work of artistic modernism, but referring in obvious ways to Titian's (and back a step, to Giorgione's) Venus:

Manet, Olympia, 1863, oil on canvas

Here again consider the account of the Rauschenberg, Lichtenstein, and Mitchell Foundations: "The revolutionary shock of the painting depends on how traditional imagery remains the painting's recognizable foundation, even as that imagery is transformed and wrenched into the present." Brief as *Amici Curiae* 9. It is an especially striking example of a recurrent phenomenon—of how the development of visual art works across time and place, constantly building on what came earlier. In fact, the Manet has itself spawned further transformative paintings, from Cézanne to a raft of contemporary artists across the globe. See *id.*, at 10–11. But the majority, as to these matters, is uninterested and unconcerned.

Take a look at one last example, from a modern master very different from Warhol, but availing himself of the same appropriative traditions. On the left (below) is Velázquez's portrait of Pope Innocent X; on the right is Francis Bacon's Study After Velázquez's Portrait.

Velázquez, Pope Innocent X, c. 1650, oil on canvas

Francis Bacon, Study After Velázquez's Portrait of Pope Innocent X, 1953, oil on canvas

To begin with, note the word "after" in Bacon's title. Copying is so deeply rooted in the visual arts that there is a naming convention for it, with "after" denoting that a painting is some kind of "imitation of a known work." M. Clarke, The Concise Oxford Dictionary of Art Terms 5 (2d ed. 2010). Bacon made frequent use of that convention. He was especially taken by Velázquez's portrait of Innocent X, referring to it in tens of paintings. In the one shown above, Bacon retained the subject, scale, and composition of the Velázquez original. Look at one, look at the other, and you know Bacon copied. But he also transformed. He invested his portrait with new "expression, meaning, [and] message," converting Velázquez's study of magisterial power into one of mortal dread. *Campbell*, 510 U. S., at 579.

But the majority, from all it says, would find the change immaterial. Both paintings, after all, are "portraits of [Pope Innocent X] used to depict [Pope Innocent X]" for hanging in some interior space, *ante*, at 12–13; so on the