

Graham v. Prince

No. 15-CV-10160, 2023 U.S. Dist. LEXIS 83267 (S.D.N.Y. May 11, 2023)

Year	2023
Court	United States District Court for the Southern District of New York
Key Facts	<p>Plaintiff Donald Graham (“Graham”), a professional photographer, published and sells prints of a photograph he took titled <i>Rastafarian Smoking a Joint</i>. Defendant Richard Prince (“Prince”) came across Graham’s photograph on Instagram, where user “@Rastajay92” had reposted the photograph with a comment. Prince added a comment to the post, took a screenshot, and had the resulting image printed on a canvas. The final product, <i>Portrait of Rastajay92</i>, which includes a cropped portion of Graham’s photograph as an Instagram post and the two comments, was exhibited for sale by Defendant Gagosian Gallery (“Gagosian”) as part of Prince’s <i>New Portraits</i> series, included in an exhibition pamphlet, and after the exhibition closed, displayed on a billboard and in a Twitter compilation posted by Prince. After sending a cease and desist letter, Graham sued Prince and Gagosian for copyright infringement. After the court denied Defendants’ motion to dismiss, the parties cross-moved for summary judgment.</p> <p>Plaintiff Eric McNatt (“McNatt”), a professional photographer, took a photograph of musician Kim Gordon, <i>Kim Gordon I</i>, and licensed it to appear in print and online magazines. Prince took a screenshot of McNatt’s photograph on Instagram, posted a cropped version of the image to his own Instagram account, and added three comments. Prince took another screenshot and had the resulting image printed on a canvas. The final product, <i>Portrait of Kim Gordon</i>, which includes a cropped portion of McNatt’s photograph as an Instagram post and Prince’s three comments, was exhibited by Defendants Blum & Poe, LLC and Blum & Poe New York, LLC (each entity individually or both entities collectively, “Blum & Poe”) as part of the <i>New Portraits</i> series and included in a gallery book that was published and sold. McNatt sued Prince and Blum & Poe for copyright infringement. After Defendants withdrew a joint motion to dismiss, the parties cross-moved for summary judgment.</p>
Issue	Whether using photographs in artworks that feature the photographs in social media post “portraits,” which include comments posted by the user, is fair use.
Holding	Because of parallels in the summary judgment filings made by the parties in the two related cases, the court analyzed whether Prince’s uses of the photographs were fair uses in both cases together. Considering the first factor, the purpose and character of the use, the court found that Prince’s portraits were not transformative in either aesthetics or purpose, which weighed against fair use. On aesthetics, the court concluded that a reasonable observer would likely only identify limited alterations to the photographs, specifically the addition of the Instagram frame and Prince’s posted comments, and determined that Prince did not “significantly alter plaintiffs’ presentation, color palette or mood.” As to Prince’s purpose, the court noted that his reasons for using the photographs were unclear and inconsistent. The court rejected Prince’s attempt to classify the portraits as parody or satire, concluding that his asserted purpose, to comment on social media culture, had “no critical bearing” on either photograph and Prince could have used any number of other photographs to convey the same message. Additionally, it was undisputed that Prince’s uses of the photographs were commercial, which weighed against fair use. The second factor, the nature of the copyrighted work, weighed against fair use because both photographs were creative, rather than factual or informational, works. The third factor, the amount and substantiality of the portion used, disfavored fair use as well because although

	<p>Prince reproduced “cropped” versions of the photographs with negative space removed, the amount used did not serve a transformative purpose and Prince’s reproductions were “even <i>larger</i>” than the originals. Lastly, the court concluded that the fourth factor, the effect of the use on the potential market for or value of the work, slightly favored fair use. Considering the primary market for the works, the court determined that Prince’s portraits did not usurp the market for Plaintiffs’ photographs because they “appeal[ed] to an “entirely different sort of collector” than Plaintiffs’ works. Likewise, the court observed that the derivative markets for the works largely did not overlap. Nonetheless, the court acknowledged that permitting Prince’s use of the photographs, without payment or sufficient transformation, would allow others to do the same, which could disincentivize artists like Graham and McNatt from creating new works. Taken together, the court concluded that the four factors “weigh significantly against a finding of fair use.”</p> <p>As for the other ancillary works that used the photographs, the court found that: (1) factual disputes concerning market harm attributable to uses in the pamphlet and book and on the billboard precluded a fair use determination; (2) an issue of material fact as to whether the use of Graham’s photograph in the Twitter compilation was commentary precluded a fair use finding, but the use was nonetheless <i>de minimis</i>; and (3) Defendants failed to prove that Prince’s reposting of the McNatt photograph to his own Instagram account was a fair use.</p>
Tags	Painting/Drawing/Graphic; Photograph
Outcome	Preliminary finding; Fair use not found; Mixed result

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