

**Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith
19-2420-cv, 2021 U.S. App. LEXIS 8806 (2d Cir. Mar. 26, 2021)**

Year	2021
Court	United States Court of Appeals for the Second Circuit
Key Facts	Plaintiff Andy Warhol Foundation for the Visual Arts, Inc. (“AWF”) controls and licenses the works of Andy Warhol. Defendant Lynn Goldsmith is a professional photographer who took a series of photographs of the musician Prince in 1981 that were never published. In 1984, Goldsmith’s agency licensed one of the photographs to Vanity Fair for use as an artist reference. Warhol referred to that photograph when he created an illustration that was published in the magazine, as well as fifteen additional silkscreen prints and drawings (the “Prince Series”). Following Prince’s death in 2016, Vanity Fair contacted AWF about the possibility of republishing the original illustration in a tribute issue, but elected to use a different work from the Prince Series on the cover. When Goldsmith became aware of the Prince Series, she contacted AWF and alleged copyright infringement. AWF brought a declaratory judgment action and Goldsmith countersued for copyright infringement. The district court granted summary judgment for AWF, concluding that Warhol’s use of the photograph was a fair use. Goldsmith appealed.
Issue	Whether using a photograph of an iconic musician as the basis for a series of artworks is fair use.
Holding	The appellate panel concluded that the district court’s entire fair use analysis was affected by its erroneous conclusion that the works were “transformative” based on a “subjective evaluation of the underlying artistic message of the works rather than an objective assessment of their purpose and character.” On the first factor, purpose and character of the use, the court emphasized that adding new aesthetic or expression to a work is not necessarily transformative. To determine whether a work is a derivative work, which requires authorization from the owner of the source material, or transformative, which may be non-infringing, a court must generally consider whether the purpose of the primary and secondary works is the same. Specifically for visual arts, to be transformative, the secondary work must do more than impose another artist’s style on the primary work in a manner that retains the essential elements of the original work. “[T]he 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,” a standard the Prince Series did not meet. The second factor, nature of the work, disfavored fair use because the photograph was creative and unpublished. The third factor, amount and substantiality of the work used, also disfavored fair use because the “essence” of the photograph was evident in the Prince Series. The use was also not reasonable in relation to its purpose because there was no reason compelling Warhol to use this particular photograph as a reference. On the fourth factor, effect of the use on the potential market for or value of the work, although the works occupied distinct markets with respect to direct sales, both AWF and Goldsmith had licensed their works to print magazines. Because AWF failed to present evidence that the Prince Series did not threaten Goldsmith’s ability to license to that market, that factor weighed against fair use. The panel concluded that all four factors favored Goldsmith and that the Prince Series works were not fair use.
Tags	Painting/Drawing/Graphic; Photograph; Unpublished
Outcome	Fair use not found