

INTRODUCTION

Plaintiff, the Allied Press ("AP"), a global news corporation, sued Defendant, Sandy Warhol ("Warhol"), for copyright infringement. Compl. ¶ 9. Warhol filed a motion for summary judgment, pursuant to Fed. R. Civ. P. 56(a). This is a brief in support of that motion.

STATEMENT OF FACTS

AP is a global news and media corporation. Its subsidiary, AP Images, is in the business of licensing and selling high quality media for capital gain. Compl. ¶¶ 5-8. Warhol is a New York City artist, best known for her "appropriation" works. Aff. ¶¶ 1-2. Appropriation art is a modern art movement that re-uses mainstream images and concepts from pop culture and other sources to create new meaning. Aff. ¶ 2.

AP alleges that Warhol infringed upon its copyright when she downloaded a low-quality version of an image from its website, removed AP's copyright overlay, and appropriated a small portion of the image for use in her artwork, entitled "Faith," without contacting AP. Compl. ¶ 14.

Warhol creates art to support herself and benefit her community, not for commercial gain. Aff. ¶ 5. Warhol first displayed "Faith" on August 15, 2011, at a gallery on Canal St., drawing thousands of people to the gallery and eventually selling the work for \$825,000. Compl. ¶ 14. To further support herself and benefit the public, Warhol agreed to another showing of "Faith," from which she also profited. Compl. ¶ 18. Subsequently, Warhol has been invited to display "Faith" and her other works at various New York City galleries. Compl. ¶ 19. Warhol's recent artistic success is not only a victory for her, but for the modern art movement, the public, and the city of New York.

ARGUMENT

I. WARHOL IS ENTITLED TO SUMMARY JUDGEMENT PURSUANT TO FED. R. CIV. P. 56(a) BECAUSE THERE IS NO GENUINE ISSUE OF MATERIAL FACT.

Summary judgment is appropriate as a matter of law "if the movant shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). In deciding a motion for summary judgment, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). While summary judgment is an important part of civil procedure, and not a "disfavored procedural shortcut," it is important to evaluate motions governed by this rule with care, to protect the rights of the parties. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). Yet, if "there can be but one reasonable conclusion as to the verdict," summary judgment must be granted as a matter of law. Anderson, 477 U.S. at 250. In the present case, the record reflects that the parties have stipulated to all facts that could potentially affect the legal analysis. See Compl.; Answer; Aff.; Exs. A, B. Thus, a trial is unnecessary, and Warhol is entitled to summary judgment as a matter of law, pursuant to Fed. R. Civ. P. 56(a).

II. WARHOL'S WORK IS A FAIR USE PURSUANT TO 17 U.S.C. § 107 (2006) BECAUSE EACH STATUTORY FACTOR WEIGHS IN HER FAVOR.

Warhol's appropriation is a protected "fair use" of AP's photograph. 17 U.S.C. § 107. Fair use is an equitable doctrine that permits certain uses of copyrighted material without the owner's permission. Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992). Section 107 enumerates four factors the Senate provides as guidance to analyze a fair use defense.

Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985). When evaluating the factors, courts should be mindful of the "constitutional policy [behind copyright law] of promoting the progress of science and the useful arts," as a failure to do so "would stifle the creativity which that law is designed to foster." Id. at 549; Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994). The 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.

A. The first factor favors Warhol because "Faith" is transformative.

This factor favors Warhol because she transformed a marginal portion of AP's news image into meaningful art. See Campbell, 510 U.S. at 579; Exs. A, B. The key question for this factor is how and to what extent a derivative work is transformative. Id. When a defendant's use is transformative, the significance of commerciality and propriety diminish. Id. Thus, the first factor greatly favors Warhol. See id.

1. Warhol's work is highly transformative.

Whether a work is transformative depends on whether the defendant has merely created a substitute for the original work, or has transformed the original, resulting in a "further purpose or different character . . . with new expression, meaning, or message." Id. Therefore, if a derivative work "adds value to the original-if the quoted matter is used as raw material, transformed in the creation of the new information, new

aesthetics, new insights and understandings- this is the very type of activity the fair use doctrine intends to protect for the enrichment of society.” Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1111 (1990). To corroborate the transformative use inquiry, courts consider the purported and discernable purposes each party had in creating its respective works. Blanch v. Koons, 467 F.3d 244, 252 (2d Cir. 2006).

In Blanch, an artist’s extraction and duplication of a copyrighted image from a fashion magazine, for use in a collage painting, was transformative. Id. at 253. Referencing the “new expression, meaning, or message” test set out in Campbell, the Blanch court found the artist’s aesthetic alteration of the original photograph, namely the “colors, the background against which it is portrayed, the medium, the size of the objects pictured, [and] the objects’ details,” to perfectly comport. Id.; 510 U.S. at 579. Contrasting the parties’ purposes in creating their works (sexual accentuation of objects vs. commission of art), the court held that when an artist’s purposes are “sharply different from [a photographer’s] goals in creating [an image],” it is critical evidence of transformative use. See Blanch, 467 F.3d at 252-53. Similarly, in Graham, a duplication of posters for use in a book was transformative when the publisher reduced the posters’ size to further its purpose of highlighting the historical value of the images, rather than exploiting any aesthetic attributes or expressions. See Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 611-13 (2d Cir. 2006).

In the instant case, like the defendant in Blanch, Warhol greatly altered AP’s image by overhauling its aesthetic features. 467 F.3d at 253; Exs. A, B. First, like the defendant in Blanch, Warhol changed the color

composition by adding shades of green, blue, and magenta, while removing yellow completely. 467 F.3d at 253; Exs. A, B. Next, like defendant in Blanch, Warhol omitted and replaced the entire background of the original. 467 F.3d at 253; Exs. A, B. In addition, like defendants in Blanch and Graham, Warhol converted the original image to an entirely different medium. 467 F.3d at 253; 448 F.3d at 611-13; Exs. A, B. Finally, like defendants in Blanch and Graham, Warhol reduced the size of the image, omitting the creative details. Blanch, 467 F.3d at 253; 448 F.3d at 611-13; Exs. A, B. Indeed, the copied portion of the original photo contains few creative attributes enumerated by AP; the borrowed portion of Exhibit B appears to be pixilated, cropped, and modified. Compl. ¶ 11; Exs. A, B.

Aesthetics aside, Warhol created her work for different purposes than AP. See Compl. ¶ 6; Aff. AP is a source of high-quality images for professional image buyers. Compl. ¶¶ 5, 6. Thus, AP's purpose in creating the original image was to achieve profit. See id. Conversely, Warhol is an artist who uses images from popular culture to create new meaning, thereby benefitting her community. Aff. ¶¶ 1, 2. While Warhol admits to supporting herself through art, her primary purpose is not commercial gain. Aff. ¶ 5. Indeed, her commercial success in the "Re-Use It Gallery" not only benefitted her, but also the gallery and public. Compl ¶ 17. Thus, the parties' purposes are very different—a consideration critically indicative of transformative use. See Blanch, 467 F.3d at 252-53.

By contrast, in Castle Rock Entm't v. Carol Publ'g Group, 150 F.3d 132, 142-43 (2d Cir. 1998), defendant's television trivia book pertaining to single show was not transformative, because it repackaged the content of the show without significant alterations, and was created for the same

purpose: to entertain the show's fans. Similarly, in Cariou v. Prince, 784 F. Supp. 2d 337, 347-50 (S.D.N.Y. 2011), borrowing images for a collage, with little (or no) aesthetic alteration, and for the same purpose as the original photographer was not transformative. These cases are distinguishable. As previously mentioned, Warhol altered the aesthetic properties of AP's image, and acted with a radically different purpose than AP in its creation. See Castle, 150 F.3d at 142-43; Cariou, 784 F. Supp. 2d at 347-50; Exs. A, B; Aff. ¶ 5.

2. The transformative inquiry controls this factor.

If a derivative work is transformative, Campbell instructs courts to give less weight to other factors like commerciality and propriety, as "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works." 510 U.S. at 579. Moreover, the Court in Campbell expressly limits the dictum in Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449 (1984), that a profitable derivative use is presumptively unfair. 510 U.S. at 591. Such a presumption only applies in cases of "mere duplication of the entire original." Id. Applying this precedent to the case at bar, any assertion that Warhol's profits should somehow weigh against a finding of fair use is erroneous. See Sony, 464 U.S. at 449; Campbell, 510 U.S. at 591.

In addition, Campbell has alluded to the flawed logic in questioning a defendant's propriety. See 510 U.S. 585 n.18. If a use is innately fair, there is no reason to ask an owner for permission, and thus, any state of mind inquiry is immaterial to the fair use analysis. See id. For Judge Leval, "[t]he inquiry should focus not on the morality of the secondary user, but on . . . whether the secondary use is productive and

transformative.” Leval, supra, at 1126. Though some courts still follow the holding in Harper that fair use implies good faith, this should be limited to cases where a defendant has the “[intended purpose] of supplanting the copyright holders' commercially valuable right of first publication.” See Cariou, 784 F. Supp. 2d at 351; 471 U.S. at 540.

B. The second factor favors Warhol because the AP's photograph is not highly creative.

This factor favors Warhol because a news photograph is relatively low on the spectrum of creativity. Indeed, “some works are closer to the core of intended copyright protection than others.” Campbell, 510 U.S. at 586. Moreover, when a use is transformative, this factor is not as relevant. Stewart v. Abend, 495 U.S. 207, 237 (1990); Blanch, 467 F.3d at 257. Finally, published works gain less protection than unpublished works as a matter of law. Blanch, 467 F.3d at 256.

While not a fair use case, Bill Diodato Photography, L.L.C. v. Kate Space, L.L.C., 388 F. Supp. 2d 382, 391-94 (S.D.N.Y. 2005) identifies which elements of a photograph are protectable expression. In Diodato, defendant re-used plaintiff's idea to pose and shoot a photograph of a woman's legs, handbag, and shoes, from a floor-level angle in a public bathroom stall, in its own nearly identical image. Id. at 391. The court held that elements flowing from the idea for a photograph are not protected, and nor are events that result from a choice of setting. See id. at 392. In addition, subjects common to other photographs, are not protectable. Id. Moreover, if a photographer in the same circumstances would take a similar picture, certain creative elements such as angle and depth of field are not protectable. Id. Finally, a pose is not copyrightable—only the idea for it. Id. at 393.

In the present case, the borrowed portion of AP's photograph is fair to use because it resulted from happenstance, or a fortuitous choice of setting. See id. at 392; Ex. B. Moreover, as AP admits, this image is well known. See Diodato, 388 F.Supp.2d; Compl. ¶ 11. Finally, the photographic elements stated by AP (angle, framing, center of focus, depth of field) are not unique; they are what any sports photographer would capture in that situation. See Diodato, 388 F. Supp. 2d at 393; Compl. ¶ 11.

To further contrast, in Rogers, plaintiff planned, posed, and shot a unique image. 960 F.2d at 304. Calling plaintiff's photo "imaginative," the court held that the second factor favored the plaintiff. Id. at 310.

In the present case, AP did not plan, pose, or use its imagination in any way. See id. at 304-10. Instead, AP's photographer was merely in the right place at the right time. See Diodato, 388 F. Supp. 2d at 392. For these reasons, and because AP's photo is published on the internet, the second factor favors Warhol. See Blanch, 467 F.3d at 256.

C. The third factor favors Warhol because she borrowed only what was necessary for her artistic purposes.

This factor favors Warhol because she transformed only the portion of AP's image necessary for her artistic purposes. Building on the analysis in the first and second factors, this factor hones in on the "amount and substantiality of the copyrighted [expression] that has been used, not the [factual content] of the material." Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir. 1987). Thus, because Warhol borrowed the bare minimum amount of AP's expression necessary to fulfill her purposes, the second factor weighs heavily in favor of Warhol. See id.

In Blanch, the court held this factor to favor the defendant after comparing the stated purpose of the defendant (appropriating factual

elements of popular images for artistic commentary) with the expressive purposes of the photographer (pose, background). 467 F.3d at 257-58. The analysis revealed that the elements the photographer valued as her creative expression were absent from the defendant's appropriation. Id.

Similarly, in the present case, Warhol's stated expressive purpose was to transform a piece of a factual pop culture into an object of social commentary; AP's stated expressive purposes lie within the quality of the image and its aesthetic attributes (angle, focus, color, depth of field, contrast, unique composition, etc.). Aff. ¶ 2; Compl. ¶ 11, 15; 467 F.3d at 257-58. Thus, a plain viewing of the exhibits reveals that the AP's expression is virtually absent from Warhol's work. Exs. A, B; Compl. ¶ 11.

D. The fourth factor favors Warhol because Warhol's use of AP's expression in "Faith" is unlikely to compete with AP's image, and AP has not provided evidence of market harm.

This factor favors Warhol because the borrowed expression in "Faith" is unlikely to compete with the original or its derivatives. See Campbell, 510 U.S. at 586. To gauge potential competition, courts look at not only whether the secondary use directly usurps or supersedes the original, but also whether, if the same type of use became widespread, it would cause harm. Id. However, only the extent that a defendant's use of a plaintiff's expression hurts the plaintiff's market is relevant to the analysis. Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1078-79 (2d Cir. 1992).

In Arica, the creator of a training program consisting of images and explanations aimed at improving human lives, sued defendants, a psychology professor and book publisher, for copying and attempting to publish its images and ideas. 970 F.2d at 1070. Defendants claimed fair use. Id. at 1074. In analyzing the fourth fair use factor, the court reasoned that

although there was a potential for market competition, "a meaningful distinction may be drawn between the infringing portions of defendant's work and the work as a whole." Id. at 1078. Since much of the borrowed material was expressionless ideas, the court held that "[w]here "marginal amounts of expressive content were taken from [plaintiff's] works ...[i]mpairment of the market for these works is unlikely." Id.; (quoting Wright v. Warner Books, Inc., 953 F.2d 731, 739 (2d Cir. 1991)).

In the present case, like defendants in Arica, Warhol appropriated only marginal amounts of AP's expression. See 970 F.2d at 1078; supra pp.7-8. Due to the distinction between expression and idea cited in Arica, this factor should weigh heavily in favor of Warhol. See 970 F.2d at 1078.

In addition, AP has not presented more than speculation of actual or potential market harm. See Compl. ¶ 11; Sony, 464 U.S. at 450 (holding that a plaintiff must show some likelihood of potential harm to prevail on this factor). Thus, this factor favors Warhol because "a use that has no demonstrable effect upon the potential market for, or value of a copyrighted work need not be prohibited." Sony, 464 U.S. at 450.

CONCLUSION

The facts before this Court are undisputed. Each fair use factor, in light of the guiding principles of copyright, clearly favors Warhol. Thus, Warhol respectfully requests summary adjudication as a matter of law.

SANDY WARHOL

By: _____
Brian A. Klein

Cosmo, Sacamano & Maestro, LLP
1001 Lawyers' Lane
New York, NY 10001