

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

ERIC MCNATT,

Plaintiff,

vs.

RICHARD PRINCE, BLUM & POE, LLC and
BLUM & POE NEW YORK, LLC,

Defendants.

Case No. 1:16-CV-08896-SHS

DEFENDANTS RICHARD PRINCE, BLUM & POE, LLC AND BLUM & POE NEW YORK, LLC'S RULE 56.1 STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56.1 of the Local Rules of the United States District Court for the Southern and Eastern Districts of New York, defendants Richard Prince, Blum & Poe, LLC and Blum & Poe New York, LLC set forth the following undisputed material facts in support of their Motion for Summary Judgment:

Richard Prince and Appropriation Art

1. Richard Prince is one of the best known contemporary artists. (Boyajian Decl. Ex. 8 ¶¶ 27-28).¹

2. Prince has had solo exhibitions at the Guggenheim and Whitney museums in New York City and has had his work acquired by and exhibited at the world's preeminent museums. (*Id.*).

Prince's New Portraits

3. In the spring of 2014, Prince was captivated by Instagram and used the platform to create a series of portraits of Instagram users. (Prince Decl. ¶ 11; Boyajian Decl. Ex. 10 at

¹ Citations to "Boyajian Decl. Ex. ___" refer to the records submitted with the Declaration of Nina D. Boyajian in Support of Defendants' Motion for Summary Judgment, dated Oct. 4, 2018. Citations to "Prince Decl." refer to the Declaration of Richard Prince in Support of Defendants' Motion for Summary Judgment, dated Oct. 3, 2018.

PRINCE_MCNATT 0000254).

4. Prince spent weeks and months – and hours on a single profile – on Instagram to get to “know” the personas of users in this virtual world and selected images that he used as a starting point for his *New Portraits* series, envisioning the iPhone as both his paintbrush and his studio. (Prince Decl. ¶¶ 11, 15; Boyajian Decl. Ex. 10 at PRINCE_MCNATT 0000254).

5. Many of Prince’s *New Portraits* works feature an Instagram user’s post, with the addition of Prince’s commentary within the post itself. (Boyajian Decl. Ex. 16). Prince clicked on images in Instagram and combed through all of the comments on the thousands of posts he viewed to determine which comments had interesting language that he wanted to comment on and include in his portrait and which ones he wanted to exclude. (Prince Decl. ¶ 17; Boyajian Decl. Ex. 9 at 193:12-194:12, 199:5-23).

6. Other times, Prince would simply find an image on Instagram and make his own commentary. (Prince Decl. ¶¶ 14, 18).

7. Commenting was Prince’s “contribution.” (Boyajian Decl. Ex. 9 at 126:7-12, 126:17-23; Prince Decl. ¶ 17).

8. After Prince determined that he could only keep three comments in a screenshot, he had to decide which comments to remove. (Prince Decl. ¶ 17; Boyajian Decl. Ex. 9 at 199:9-14).

9. By swiping comments and reporting them as spam, Prince was able to manipulate which comments – including his – would appear on the screensave, and in which order. (Prince Decl. ¶ 17; Boyajian Decl. Ex. 9 at 127:2-20).

10. The resulting image was a combination of photographs and text that often existed only on his iPhone (i.e., his removal of comments only effected Prince’s view of the post, not others’). (Prince Decl. ¶ 17; Boyajian Decl. Ex. 9 at 198:18-199:4).

11. Next, he captured the image as a screenshot and sent the digital file to his studio assistant who cropped the file according to his instructions, such that only certain of the Instagram content was included in the portrait, framed by white space. (Boyajian Decl. Ex. 9 at 191:7-10, 195:25-197:12; Boyajian Decl. Ex. 11 at 159:17-163:7).

12. Once the cropping was complete, Prince's assistant printed studies of the potential paintings in color, on 22 x 17-inch paper, at his studio, which he kept in piles on his desk and reviewed to determine which few he would turn into large-scale works of art. The selected studies were then sent to the lab for printing. (Boyajian Decl. Ex. 11 at 161:8-163:8; Prince Decl. ¶¶ 21-22).

13. Prince spent a great deal of time considering the presentation and production of the portraits. (Prince Decl. ¶¶ 23-26; Boyajian Decl. Ex. 9 at 115:5-17).

14. After experimenting with different types of media on which to print the Instagram works, including on wood, plastic, and metal, Prince worked with a printing lab to select a brand-new type of canvas that "received the jet, meaning the process, in a brand-new way. It fused the coating of the image that, in a way, since [he] was using [his] phone at the time as [his] new paint brush, in a way that was very satisfying, the way the ink – it didn't sit up on the canvas, it didn't sit inside the canvas, it just hovered in such a way that [he] had never seen the process of Inkjet conduct itself." (Boyajian Decl. Ex. 9 at 115:16-116:15; *see also* Prince Decl. ¶ 23).

15. All of the *New Portraits* are a uniform size. The *New Portraits* measure 65.75" x 48.75", and the photographic element of the *New Portraits* measure approximately 41 x 41 inches, as an homage to Andy Warhol's portraits in approximately that size. (Prince Decl. ¶ 25).

16. The *New Portraits* are intended to be frameless, and the canvases were stretched in a way that the paintings wrap-around the wooden stretchers so that they were three-dimensional paintings rather than a two-dimensional photograph, representing the feel of an iPhone. (Prince Decl.

¶¶ 26, 37; Boyajian Decl. Ex. 6 ¶ 32).

17. The *New Portraits* stretcher bars on each *New Portrait* were separately photographed in a gallery book made to commemorate the *New Portraits* exhibition at Blum & Poe’s Tokyo, Japan gallery. (Boyajian Decl. Ex. 12 at BLUM0001726).

18. Prince’s *New Portraits* series as a whole “comment[s] on the social media, the whole idea of putting up images on a new platform that was available to anyone, to an entire population...” (Boyajian Decl. Ex. 9 at 202:12-15; *see also* Prince Decl. ¶¶ 10, 12, 31).

Prince’s Creation of the *Portrait of Kim Gordon*

19. Prince’s *Portrait of Kim Gordon*, which incorporates a cropped image of the photograph allegedly taken by Eric McNatt at issue in this case (the “Photograph”), was one of the works in the *New Portraits* series and was created in a manner similar to that described above. (Prince Decl ¶ 18). Prince searched through Instagram for an image of Kim Gordon until he found an image that he wished to turn into a *New Portrait*. (Boyajian Decl. Ex. 9 at 181:23-24, 185:6-21, 192:18-193:17, 195:8-24).

20. Kim Gordon is a musician, songwriter and visual artist best known for her role as the bassist, guitarist and vocalist of seminal alternative rock band Sonic Youth. (Compl. ¶ 16).

21. On or about September 10, 2014, Prince took a mobile screenshot of the image of Ms. Gordon as found online, and posted that screenshot to his own Instagram account, @richardprince4, with the addition of three comments: (1) “Portrait of Kim Gordon” (2) “Kool Thang You Make My Heart Sang You Make Everythang Groovy” and (3) music-themed emojis. (Boyajian Decl. Ex. 9 at 185:6-21; Prince Decl. ¶ 18; Compl. ¶ 22).

22. The second comment was a play on Ms. Gordon’s band’s first major label record single, “Kool Thing.” (Compl. ¶ 23; Prince Decl. ¶ 30).

23. The image of Kim Gordon that Prince saw online did not have a copyright notice or watermark. (Boyajian Decl. Ex. 5 at 123:16-25; Boyajian Decl. Ex. 9 at 225:24-226:13).

24. Prince chose to create a portrait of Kim Gordon because they have been friends for many years. (Prince Decl. ¶¶ 14, 29).

25. By using lyrics to one of her band's songs, but with a variation on the spelling, Prince intended his comments to be an "inside joke" between Kim Gordon and himself – and others who are familiar with and would recognize the lyric. (Prince Decl. ¶ 30; Boyajian Decl. Ex. 9 at 203:3-204:17).

26. The use of words, books, and text play a central role in Prince's artwork (Boyajian Decl. Ex. 8 ¶ 39), which can be traced back to his interest as a bibliophile and his *Jokes* series of provocative text-only paintings. (Boyajian Decl. Ex. 9 at 79:20-21; Prince Decl. ¶ 7).

27. In creating his *New Portraits*, Prince was inspired by artists including Andy Warhol, Willem de Kooning, and Romaine Brooks, and was influenced by hip hop culture of the 1970s and 1980s and the idea of "mash-ups" that create art from mixes of different things. (Prince Decl. ¶ 2).

28. Prince's concept for the *New Portraits* series was to reimagine traditional portraiture and create a physical representation of the virtual world of social media. (*Id.* ¶¶ 12, 19).

29. Prince wanted to convey the different ways that people present themselves on Instagram, and in so doing, make people think about the ways we use social media to present ourselves to the world and to confront broader truths of this new world. He set out to satirize and comment on the way people communicate and relate to each other through social media by presenting a cross-section of people, who he imagined might be part of a band, together, blown up larger-than-life, in a physical representation of the virtual world of social media. (*Id.* ¶¶ 12, 31).

30. Prince's vision for the *New Portraits* series was that each portrait represented a part

of a novel, and that when the portraits were exhibited together, they represented a democracy and told a complete story. (*Id.* ¶ 32; Boyajian Decl. Ex. 9 at 136:12-137:6).

The Blum & Poe Exhibition

31. Between April 3, 2015 and May 30, 2015, the *Portrait of Kim Gordon* was publicly exhibited, along with twenty-six other paintings in the *New Portraits* series, in Blum & Poe's gallery located in Tokyo, Japan ("Blum & Poe Exhibition"). (Boyajian Decl. Exs. 15 & 16).

32. Each of the works exhibited in the Blum & Poe Exhibition depicted a screenshot of a post from Instagram (with the Instagram frame and Prince's and others' addition of comments), enlarged and painted on a 65.75" x 48.75" canvas. (Boyajian Decl. Ex. 16).

33. Prince's *Portrait of Kim Gordon* was one of the twenty-six paintings included in the Exhibition. (Boyajian Decl. Ex. 17 at 247:20-23).

34. All of the works displayed were list-priced at [REDACTED] and were released for sale before the Blum & Poe Exhibition opened on April 3, 2015. (Boyajian Decl. Ex. 16; Poe Decl. ¶ 5).²

35. The *Portrait of Kim Gordon* was purchased prior to the start date of the Blum & Poe Exhibition. (Boyajian Decl. Ex. 18; Poe Decl. ¶ 6).

36. The *Portrait of Kim Gordon* was purchased for [REDACTED] at the recommendation of Alexander DiPersia for the art collection of Mr. DiPersia and his mother. (Boyajian Decl. Ex. 18; Boyajian Decl. Ex. 19 ¶ 3; Supp. DiPersia Decl. ¶¶ 5, 8).

The Gallery Book

37. Approximately one year and four months after the Blum & Poe Exhibition closed, in September 2016, Blum & Poe released a book commemorating the Exhibition (the "Gallery Book"). (Boyajian Decl. Ex. 17 at 306:21-307:5).

² Citations to "Poe Decl." refer to the Declaration of Jeff Poe in Support of Defendants' Motion for Summary Judgment, dated Oct. 3, 2018. Citations to "Supp. DiPersia Decl." refer to the Supplemental Declaration of Alexander DiPersia, dated October 4, 2018.

38. The Gallery Book contained images of each of the *New Portraits* works on display at the Exhibition, including the *Portrait of Kim Gordon*. (Boyajian Decl. Ex. 12). The Gallery Book also included the stretcher bars from the back of each *New Portrait*, installation images depicting portions of the Exhibition, and an excerpt from Prince's "Birdtalk" which described Prince's process for making the *New Portraits* works. (*Id.*).

39. The Gallery Book was created as a historical record of the Exhibition, and no more use of Prince's *Portrait of Kim Gordon* was made than necessary for that purpose. (Poe Decl. ¶ 10). Moreover, several other *New Portraits* works that were included in the Blum & Poe Exhibition are featured on more pages than is the *Portrait of Kim Gordon*. (*Id.*)

40. The Gallery Book was displayed and/or offered for sale at various book fairs and art book stores. (Boyajian Decl. Ex. 17 at 306:21-307:13).

41. At the time the Gallery Book was offered for sale, all of the *New Portraits* works included in the Exhibition had already been sold. (Poe Decl. ¶ 11).

42. It is impossible for anyone to have purchased any works from the Blum & Poe Exhibition after seeing the Gallery Book.

Eric McNatt

43. Eric McNatt is a photographer based in New York. (Comp. ¶ 12).

44. Throughout his career, McNatt has primarily been commissioned to take commercial photographs for editorial and advertising purposes. (*Id.*).

45. McNatt has frequently licensed his images for a fee of \$100. (Boyajian Decl. Ex. 5 at 72:9-23).

46. McNatt was paid a [REDACTED] license fee per image by the BBC in 2004 (Boyajian Decl. Ex. 27), and [REDACTED] for use of a single existing image in a book in 2014. (Boyajian Decl. Ex. 28).

47. McNatt has also entered into multiple agreements where he relinquished all ownership and copyright rights to his photographs to the entity that commissioned his work. (Boyajian Decl. Exs. 60-67).

48. McNatt's images have been displayed in a gallery on only two occasions, both in 2009, as a part of group shows. (Boyajian Decl. Ex. 5 at 111:11-113:8; *see also* Boyajian Decl. Ex. 20). Only one of the photographs included in the group shows sold, for approximately \$500. (Boyajian Decl. Ex. 5 at 111:21-113:2).

49. There is no evidence that McNatt has ever had a solo exhibition at a major museum, or had his work acquired by any museum.

McNatt's Photograph

50. McNatt took the Photograph on July 25, 2014 in connection with an interview for publication in *Paper Magazine*. (Compl. ¶ 16).

51. McNatt was paid \$100 by *Paper Magazine* for both the photoshoot of Kim Gordon and the use of the Photograph. (Boyajian Decl. Ex. 5 at 67:10-20).

52. Ms. Gordon was one of 37 artists and icons (referred to as the "Original Gangsters" or "OGs") selected by *Paper* for their 30th anniversary issue. (Boyajian Decl. Ex. 49 at 29:20-30:3; Boyajian Decl. Ex. 21).

53. To ensure "[REDACTED]," McNatt was provided with a written guide for the commissioned images that directed him to comply with the following creative directives:

[REDACTED]

[REDACTED]



54. Included with the creative directives were a series of six sample photographs which demonstrated *Paper's* art direction for the photoshoot. (*Id.*).

55. According to *Paper's* former Editorial Director, McNatt followed the instructions given to him by the magazine in producing a photograph of Ms. Gordon that was in line with the other photographs in the series. (Boyajian Decl. Ex. 49 at 52:5-9).

56. The Photograph has not been and would not be displayed at Blum & Poe Gallery, where the *Portrait of Kim Gordon* was displayed. (Poe Decl. ¶ 8).

57. McNatt himself never chose to put the image of his Photograph in the Instagram frame prior to the time Prince created his *Portrait of Kim Gordon*. (Boyajian Decl. Ex. 5 at 265:4-13; Boyajian Decl. Ex. 54 ¶ 4).

58. An image of the Photograph was posted on *Paper's* Instagram page on September 9, 2014. (*See* Boyajian Decl. Ex. 29).

59. An image of the Photograph was also published on *Paper's* website on September 9, 2014 alongside the magazine's interview with Ms. Gordon. (*See* Boyajian Decl. Ex. 30).

60. A link to the *Paper* Magazine article was posted on McNatt's Twitter page on September 10, 2014, and Ms. Gordon replied to McNatt's Twitter post on the same date. (*See* Boyajian Decl. Ex. 31).

61. Ms. Gordon also posted an image from *Paper* Magazine's article—which included an image of the Photograph—to her own Instagram page on September 10, 2014. (*See* Boyajian Decl. Ex. 32).

62. On September 13, 2014, McNatt posted an image of the Photograph from *Paper Magazine*'s article to his own Instagram page. (Boyajian Decl. Ex. 33).

63. McNatt currently displays a digital image of the Photograph on his public website. (Boyajian Decl. ¶ 2 & Ex. 1). To this day, there is no copyright notice or watermark embedded in the image of the Photograph on McNatt's website.

64. McNatt's website also includes a PDF Portfolio Builder tool to "Make a PDF" from a library of his digital images. (Boyajian Decl. ¶ 3 & Ex. 2). By clicking on "Download", the image(s) selected by the user may be downloaded free of charge, without any watermark or copyright symbol embedded in the images. (*Id.*). The Photograph is one such image that can be downloaded for free from McNatt's website without any watermark or copyright symbol embedded in the image (although there is a notice on a separate page preceding the Photograph). (*Id.*).

65. At the time *Paper* and Kim Gordon posted an image of the Photograph to Instagram, Instagram's Terms of Use in effect provided:

[Y]ou hereby grant to Instagram a non-exclusive, fully paid and royalty-free, transferable, sublicensable, worldwide license to use the Content that you post on or through the Service, subject to the Service's Privacy Policy, available here <http://instagram.com/legal/privacy/>, including but not limited to sections 3 ("Sharing of Your Information"), 4 ("How We Store Your Information"), and 5 ("Your Choices About Your Information").

(Boyajian Decl. Ex. 34).

66. On September 11, 2014, McNatt posted a screenshot of Prince's Instagram post containing the *Portrait of Kim Gordon* to his Facebook page, and spoke of Instagram's "copyright rules," and called Instagram a "treasure trove" of copyrighted material). (Boyajian Decl. Ex. 43).

67. Images of McNatt's Photograph and other of his photographs have been reproduced without his express permission and without attribution or a photo credit on multiple occasions over the years. For example, the Photograph was posted to *Paper Magazine*'s Tumblr blog without

in February 2015 (Boyajian Decl. Ex. 25), *Rolling Stone* in February 2015 (Boyajian Decl. Ex. 24), and VOGUE.com in March 2016 (Boyajian Decl. Ex. 45), but none panned out, in part because McNatt understood that “it was going to take too long” to obtain Ms. Gordon’s permission to re-use the image. (Boyajian Decl. Ex. 5 at 207:4-22).

77. On September 11, 2014, after learning about Prince’s *Portrait of Kim Gordon*, McNatt posted a screenshot of Prince’s Instagram post containing the *Portrait of Kim Gordon* to his Facebook page, and commented on Prince’s use. (Boyajian Decl. Ex. 43).

McNatt Did Not Obtain a Model Release and Lacks Sufficient Rights to Commercially Exploit the Photograph

78. McNatt did not obtain a written right of publicity waiver from Kim Gordon to use her name, image, and likeness commercially. (Boyajian Decl. Ex. 5 at 67:21-68:13; 190:25-191:11).

79. Ms. Gordon confirmed that she did not give McNatt permission to use her image for any purpose other than the *Paper* Magazine article and does not consent to his commercial use of her image and likeness. (Gordon Decl. ¶ 8).

80. McNatt knows that he lacks sufficient rights to make commercial use of the Photograph. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

81. Additionally, in an email dated February 10, 2015, McNatt requested that Samantha Xu of Billboard not send the link of photographs to Ms. Gordon’s representatives. (See Boyajian Decl. Ex. 25). He thereafter contacted Ms. Gordon’s publicist Gaby Skolnek on February 11, 2015 and requested Ms. Gordon’s permission to use images from the photoshoot for syndication purposes.

(See Boyajian Decl. Ex. 69). The request was never granted.

82. Despite not receiving Ms. Gordon’s permission, McNatt licensed the Photograph to VOGUE.com in February 2015. (Boyajian Decl. Ex. 26; Boyajian Decl. Ex. 5 at 67:21-68:21.)

83. Ms. Gordon does not approve of any further potential uses by McNatt of the Photograph. (Gordon Decl. ¶ 14).

McNatt Uses Social Media and Understands its Purpose

84. McNatt uses the internet and social media to promote his work. (Boyajian Decl. Ex. 5 at 7:16-8:19, 40:11-16, 46:5-9).

85. McNatt has also posted photographs on social media that he did not take, without permission from the photographers, even after he first raised concerns with Prince’s use in this case. (e.g., *id.* at 19:23-20:16; 240:20-245:23; 247:22-249:2). [REDACTED]

Social Media has Caused a Paradigm Shift in how People Communicate and Share Information

87. Social media has revolutionized the ways in which people communicate with each other, express themselves, and engage in creative work. (Boyajian Decl. Ex. 3 ¶ 12).

88. Image-sharing is a key feature of social media. (*Id.* ¶ 15).

89. Depending on the context and circumstances of a given post, the same piece of content can be imbued with different meaning depending on how, where, when, and by whom it is communicated. (*Id.* ¶ 61).

90. The vast majority of content circulating through social media is removed from its original context. (*Id.* ¶¶ 14-15).

91. In general, social media users who do not want an image to be circulated freely can choose not to post an image, to post it privately, or to post it with a copyright or watermark. (*Id.* ¶ 15). People can also choose to have private accounts altogether, restricting who can see any content about them. (*Id.* ¶ 72).

92. Many social media users, and specifically, those who post works for commercial or promotional purposes, post content with the expectation, or even the goal, that it will be *virally* reposted, re-distributed, and commented on, by persons known and unknown to the original poster in order to become better known. (*Id.* ¶ 15; Boyajian Decl. Ex. 4 at 235:19-239:21, 249:15-20).

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