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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13

14 JEFFREY B. SEDLIK,
15
16 Plaintiff,

17 v.

18 KATHERINE VON DRACHENBERG
(a.k.a. "KAT VON D"), an individual;
19 KAT VON D., INC., a California
corporation; HIGH VOLTAGE
20 TATTOO, INC., a California corporation;
and DOES 1 through 10, inclusive,
21

22 Defendants.
23
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25
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Case No.: 2:21-cv-01102-DSF (MRWx)

Before the Hon. Dale S. Fischer,
U.S. District Court Judge

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR
RECONSIDERATION OF ORDER
GRANTING IN PART AND
DENYING IN PART CROSS
MOTIONS FOR SUMMARY
JUDGMENT**

Hearing Date: September 18, 2023
Time: 1:30 p.m.
Place: Courtroom 7D
First Street Courthouse
350 West 1st Street
Los Angeles, CA 90012

Action filed: February 7, 2021
Trial Date: November 28, 2023

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Pursuant to the Court's July 18, 2023 order (ECF 139), Plaintiff Jeffrey Sedlik ("Sedlik") hereby submits this motion for reconsideration of the Court's summary judgment decision (ECF 69) in accordance with the Court's order lifting the stay (ECF 135) and L.R. 7-18(a) and (b).

Since the date of the Court's summary judgment decision on May 31, 2022, the United States Supreme Court has altered the analysis of the first factor of the test for fair use under 17 U.S.C. § 107(1) in *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023), and the Ninth Circuit has clarified the analysis of factors two through four under 17 U.S.C. § 107(2)-(4) in *McGucken v. Pub. Ocean Ltd.*, 42 F.4th 1149 (9th Cir. 2022). Additionally, the Ninth Circuit and numerous district court decisions in the Ninth Circuit have recently confirmed that a court does not engage in a substantial similarity analysis where, as here, there is direct evidence of copying. *See, e.g., Lorador v. Kolev*, No. 22-15491, 2023 WL 3477834 (9th Cir. May 16, 2023) (unpublished).

Further and also pursuant to L.R. 7-18(a) and (b), there are new material facts and law that occurred after the Court's order. First, *Warhol* clarified that photographers routinely license their creative works to serve as reference for other artists, and that such artists' reference licenses are how photographers make their living. *Warhol*, 143 S. Ct. at 1278. Under *Warhol*, Defendants' admission of her use of Mr. Sedlik's photograph as a reference, her lack of use of any other materials in creating the tattoo (including her memory), and the similarities between the photograph and the tattoo become critical in proving Defendants' copyright infringement. Second, Defendants took the deposition of Bryan Vanegas on July 31, 2023, pursuant to the Court's prior order (which was stayed, pending the outcome of *Warhol*). Mr. Vanegas confirmed that he obtained a license from Mr. Sedlik to use the Miles Davis photograph (the exact same photograph at issue here) as a reference for creating a tattoo.

I. Fair Use

As the Court noted, the Defendants bear the burden of proving that their use was fair. (ECF 69 at 17); *see Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 459 (9th Cir. 2020) (“[T]he Supreme Court and our circuit have unequivocally placed the burden of proof on the proponent of the affirmative defense of fair use.”). In light of *Warhol* and *McGucken*, however, Defendants are unable to do so as a matter of law. As summed up well by *McGucken* and particularly applicable here, “[t]he fair use doctrine does not [] allow infringers ‘to avoid the drudgery in working up something fresh’ by exploiting the value of an image they did not create.” *McGucken*, 42 F.4th at 1152-53 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994)).

In a similar (pre-*Warhol*) case, this Court determined that summary judgment on fair use was appropriate, finding that the defendant did not make fair use of photographs, where the defendant admittedly copied several photographs in their “entirety” (factor #3) and the copying would “pose a substantial threat to the licensing market,” in light of the plaintiff’s previous licensing activity (factor #4), even though the photographs were previously published (factor #2) and slightly transformative (factor #1). *Michael Grecco Prods., Inc. v. Livingly Media, Inc.*, No. CV 20-0151 DSF (JCX), 2021 WL 2546749, at *10 (C.D. Cal. Apr. 16, 2021) (Fischer, J.).

A. Purpose and Character of the Use.

In its previous Order, the Court found the “the first factor cannot be determined as a matter of law” because “triable issues remain[ed]” as to both commerciality and transformativeness. ECF No. 69 at 21.

The Supreme Court’s clarifications of the first fair use factor supersedes prior Ninth Circuit caselaw, including *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1176 (9th Cir. 2013), and confirms that this factor weighs *against* fair use by Defendants as a matter of law. In *Warhol*, Warhol created a silkscreen using Goldsmith’s photograph of the musical artist Prince (the “Silkscreen”) and licensed it for use by Vanity Fair

1 magazine. 143 S. Ct. at 1266. The Court agreed with the Second Circuit that this
 2 factor favored Goldsmith, even though the Silkscreen adds new expression to
 3 Goldsmith’s photograph (the “Prince Photograph”). *Id.* at 1273. *See* Linger Decl., Ex.
 4 8, for the side-by-side comparison of the Photograph and the Silkscreen. The Court’s
 5 clarification of the first factor analysis includes the following:

6 1. The focus is on the purpose and character of the use of the work,
 7 not the artistic purpose or expression of underlying it in the derivative work.
 8 The Court noted that although illustrative, the “purposes” listed in the preamble
 9 paragraph of § 107 (criticism, comment, news reporting, teaching, scholarship
 10 or research) “reflect ‘the sorts of copying that courts and Congress most
 11 commonly ha(ve) found to be fair uses.’” *Id.* at 1274 (quoting *Campbell*, 510
 12 U.S. at 577-78). These examples are “easily understood,” as “they contemplate
 13 the use of an original work to ‘serv(e) a manifestly different purpose from the
 14 (work) itself.’” *Id.* (quoting the lower court’s opinion, 11 F.4th 26, 37 (2d. Cir.
 15 2021)).

16 2. A use that has a further purpose or different character is said to be
 17 “transformative,” but the degree of transformation required “must go beyond
 18 that required to qualify as a derivative [work].” *Id.* That is because a copyright
 19 “owner has a right to derivative transformations of her work”—the owner has
 20 the exclusive right to prepare derivative works, which includes “any other form
 21 in which a work may be recast, *transformed*, or adapted.” *Id.* (quoting § 101)
 22 (emphasis added).

23 3. There needs to be justification for the use of the copyrighted work.
 24 “[A] use may be justified because copying is *reasonably necessary* to achieve
 25 the user’s new purpose. Parody, for example, ‘needs to mimic an original to
 26 make its point.’” *Id.* at 1276 (quoting *Campbell*, 510 U.S. at 580-81). Other
 27 new purposes like commentary or criticism “that targets an original work” may
 28 (but not always) have a compelling reason to “conjure up” the original by

1 borrowing from it. *See id.* (citing *Campbell*, 510 U.S. at 588). Other uses,
 2 however, do not have a compelling justification and are therefore considered
 3 not fair.

4 **1. Use of the Work.**

5 Defendants' fair use defense is strikingly similar to the defense presented and
 6 rejected by the Supreme Court in *Warhol*. Warhol contended that his work was
 7 "transformative" because it conveys "a different meaning or message than
 8 [Goldsmith's] photograph." *Id.* at 1273. The Court, however, rejected this argument
 9 because the first factor focuses on whether the allegedly infringing *use* of the original
 10 has a further purpose or character, not on whether the new *work* has a different
 11 meaning or message as the result of adding new expression. *Id.* at 1273-75.

12 The addition of "something new" does not, by itself, "render such use fair," and
 13 the smaller the difference, the less likely the first factor weighs in favor of fair use. *Id.*
 14 at 1275. Indeed, *Warhol* pointed out that in *Campbell*, even though "2 Live Crew
 15 transformed Orbison's song by adding new lyrics and musical elements, such that
 16 'Pretty Woman' had a new message and different aesthetic than 'Oh, Pretty Woman'"
 17 and "the whole genre of music changed from rock ballad to rap" that "was not enough
 18 for the first factor to weigh in favor of fair use" *Id.* at 1275. It was only after the
 19 *Campbell* Court determined that 2 Live Crew had created a parody, "a distinct
 20 purpose of commenting on the original or criticizing it," that the Court found the first
 21 factor favored fair use. *Id.* (citing *Campbell*, 510 U.S. at 580-83).

22 The Court first looked at how Goldsmith had previously used the Prince
 23 Photograph, one of which was to license it for stories about Prince and another was to
 24 license it to Vanity Fair to serve as an artistic reference. *Id.* at 1277-78 ("A
 25 photographer may also license her creative works to serve as a reference for an
 26 artist."). "Such licenses, for photographs or derivatives of them, are how
 27 photographers like Goldsmith make a living. They provide an economic incentive to
 28 create original works, which is the goal of copyright." *Id.* at 1278. The Court then

1 looked at Warhol’s use—it licensed the Silkscreen to Condé Nast to appear on the
2 cover of a magazine about Prince. “In that context, the purpose of the image is
3 substantially the same as that of the Prince Photograph. Both are portraits of Prince
4 used in magazines to illustrate stories about Prince. Such environment[s] are not
5 distinct and different.” *Id.* at 1278-79 (internal citation omitted). The Court reached
6 this conclusion even though the Silkscreen “portrays Prince somewhat differently
7 from Goldsmith’s photograph.” *Id.* at 1284-85. “To hold otherwise would potentially
8 authorize a range of commercial copying of photographs, to be used for purposes that
9 are substantially the same as those of the originals.” *Id.* at 1285.

10 Evaluating the commercial/nonprofit education use (which is an additional
11 element of the first factor that is weighed against the degree to which the use is
12 transformative, *id.* at 1276), the Supreme Court found that this too weighed against
13 fair use. *Id.* at 1280. Thus, the fact that Warhol’s use of the Prince Photograph shared
14 substantially the same purpose and that Warhol’s use was commercial meant that this
15 factor weighed against fair use “absent some other justification for copying.” *Id.*

16 Here, Defendants admittedly used Sedlik’s photograph of Miles Davis (the
17 “Davis Photograph”) by (a) creating multiple reproductions as intermediate steps to
18 create a tattoo; (b) creating a derivative drawing in the form of a tattoo (the “Tattoo”);
19 and (c) publicly displaying the Davis Photograph and the Tattoo on the Internet (ECF
20 50-8, 50-9; ECF 41, 28; Plaintiff’s Statement of Undisputed Facts (“PSUF”) ¶¶ 16-
21 18).¹ These uses are the same as how Sedlik uses the Davis Photograph—Sedlik is in
22 the business of licensing the Photo for reproduction, creation of derivative works and
23 public display on the Internet (ECF 37, PSUF ¶ 7). Sedlik also licenses the Davis
24 Photograph for use as a reference and has a history of licensing his other photographs
25 for reference to artists (*See* Section III below). Kat Von D readily admitted that she
26

27 ¹ The original PSUF was filed in connection with Plaintiff’s summary judgment
28 motion (ECF 37-1). Plaintiff is concurrently filing a Statement of Additional
Undisputed Facts in connection with this Motion for Reconsideration.

1 used the Davis Photograph as a reference to create a derivative work of the Tattoo
2 (PSUF ¶ 35). Indeed, Kat Von D admitted that she created the Tattoo only from the
3 Davis Photograph—not from memory. She simply adapted the Davis Photograph
4 using her style—exactly what the Court confirmed is *not* a transformational use
5 (PSUF ¶ 36; *see Warhol*, 143 S. Ct. at 1283, 1286).

6 Neither “the artistic significance of a particular work” nor “the subjective intent
7 of the user” determine the purpose of the use. *Id.* at 1283-84. The fact that Defendants
8 used the Davis Photograph in one of the exact same ways licensed by Sedlik—as a
9 reference—dooms their claim to fair use under the first factor. Further, none of
10 Defendants’ uses of the Davis Photograph fit into any of the “purposes” listed in the
11 preamble paragraph of § 107 (criticism, comment, news reporting, teaching,
12 scholarship or research relating to the Davis Photograph), thereby confirming that
13 Defendants’ uses were not transformational absent compelling justification, for which
14 Defendants have provided none (as discussed below, Kat Von D admitted that she
15 could have used *any* photograph of Miles Davis).

16 2. Creation Of A Derivative Work Is Not Fair Use.

17 *Warhol* clarified that *Campbell* “cannot be read to mean that §107(1) weighs in
18 favor of any use that adds some new expression, meaning or message” because then
19 ‘transformative use’ would swallow the copyright owner’s exclusive right to prepare
20 derivative works.” *Warhol*, 143 S. Ct. at 1282. Derivative works “recast, transform or
21 adapt the original, add new expression, meaning or message, or otherwise provide
22 new information, new aesthetics, new insights and understandings.” *Id.* (citing § 101)
23 (cleaned up). Indeed, the right to prepare derivative works is a fundamental exclusive
24 right under the Copyright Act, is critical to a creator's ability to generate revenue from
25 his works, and is a key incentive for creators to create new works for the benefit of
26 the public. To preserve a copyright owner’s right to prepare derivative works, “the
27 degree of transformation required to make ‘transformative’ use of an original must go
28 beyond that required to qualify as a derivative.” *Id.* at 1275.

1 While the Court noted that some of Warhol’s other works borrowed heavily
2 from an original work and their uses did constitute fair use, such as Warhol’s
3 Campbell’s Soup can canvases, *id.* at 1281, the Silkscreen of Prince did not. In his
4 Campbell’s Soup canvases, Warhol went beyond creating a derivative work to use it
5 for a new purpose—“Campbell’s logo is to advertise soup. Warhol’s canvases do not
6 share that purpose.” *Id.* Additionally, Warhol’s use of the copyrighted Campbell’s
7 Soup can in his canvases “‘conjures up’ the original work to ‘shed light’ on the work
8 itself, not just the subject of the work.” *Id.* at 1281 (quoting *Campbell*, 510 U.S. at
9 579, 588). In contrast, Warhol’s use of the Prince Photograph “does not target the
10 photograph, nor has [Warhol] offered another compelling justification for the use.” *Id.*
11 (the lack of justification is discussed below).

12 Here, without Sedlik’s authorization, Defendants created a derivative work by
13 drawing a Miles Davis tattoo based upon the Davis Photograph. Both the Davis
14 Photograph and the Tattoo have the same purpose—the display of a portrait of Miles
15 Davis. Just because one is on canvas and one is on skin does not change the purpose.
16 Courts have routinely held that basing a new work on an existing one, even if there is
17 a change of medium, constitutes a derivative work. *See, e.g., Entm’n’t Research Grp.,*
18 *Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1218 (9th Cir. 1997) (three
19 dimensional inflatable costumes based upon the defendant’s two dimensional cartoon
20 characters were derivative works of those characters and not separately
21 copyrightable—even though the facial expressions of the costumes contain more than
22 trivial differences from the facial expressions seen in the underlying drawings--“no
23 reasonable trier of fact would see anything but the underlying copyrighted character
24 when looking at ERG’s costumes.”); *Gracen v. Bradford Exch.*, 698 F.2d 300, 302
25 (7th Cir. 1982) (plaintiff painted Judy Garland based upon still photographs from the
26 movie “The Wizard Of Oz” supplied to her—“As with any painting there was an
27 admixture of the painter’s creativity . . . but that it is a painting of Judy Garland as she
28 appears in photographs from the movie . . . and is therefore a derivative work, is

beyond question.”); *Rogers v. Koons*, 960 F.2d 301, 307-312 (2d Cir. 1992) (defendant created sculpture based upon plaintiff’s photograph, but with certain variations—court found copying was an unauthorized copy of plaintiff’s photograph and did not constitute fair use). Defendants offer no evidence that their use of the Davis Photograph in creating the Tattoo went beyond that required to qualify as a derivative work.

3. A Particular Use Must Have a Compelling Justification.

The first factor also relates to whether “a use may be justified because copying is reasonably necessary to achieve the user’s new purpose.” *Warhol*, 143 S. Ct. at 1276. Certain uses require copying—parody (which targets an author or work for humor or ridicule) “needs to mimic an original to make its point.” *Id.* at 1276 (internal citation omitted). Certain additional uses may need to borrow: “[O]ther commentary or criticism that targets an original work may have a compelling reason to ‘conjure up’ the original by borrowing from it.” *Id.* (quoting *Campbell*, 510 U.S. at 588). But, “when commentary has no critical bearing on the substance or style of the original composition . . . the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish) and other factors, like the extend of its commerciality, loom larger.” *Id.* (internal citation omitted).

In contrast, some uses require an independent justification to borrow from another work. For example, satire (which ridicules society but does not necessarily target an author or work) “can stand on its own two feet and so requires justification for the very act of borrowing.” *Id.* at 1276 (quoting *Campbell*, 510 U.S. at 580). An independent justification “is particularly relevant to assessing fair use where an original work and copying use share the same or highly similar purposes, or where wide dissemination of a secondary work would otherwise run the risk of substitution for the original or licensed derivatives of it.” *Id.* at 1277. Finally, where the new use is similar to the original work’s typical use, “a particularly compelling justification is needed.” *Id.* at 1285.

1 In evaluating Warhol’s use, the Court found that Warhol needed an
2 independent and compelling reason for borrowing from the Prince Photograph—“like
3 satire that does not target an original work, [Warhol]’s asserted commentary ‘can
4 stand on its own two feet and so requires justification for the very act of borrowing.’”
5 *Id.* at 1285 (internal citation omitted). While Warhol argued that the Silkscreen’s
6 purpose was to comment on the dehumanizing nature and effects of celebrity, the
7 Court rejected that such commentary constituted a new purpose. Because the
8 Silkscreen “has no critical bearing on *Goldsmith’s photograph*, the commentary’s
9 claim to fairness in borrowing from her work diminishes accordingly (if it does not
10 vanish).” *Id.* at 1285 (internal citation omitted, emphasis added). Warhol thus needed
11 a compelling reason why he needed to borrow from the Prince Photograph *itself*. “Yet
12 [Warhol] offers no independent justification, let alone a compelling one, for copying
13 the photograph, other than to convey a new meaning or message. . . . that alone is not
14 enough for the first factor to favor fair use.” *Id.* at 1285-86.

15 Similarly, Defendants needed a reason to copy the Davis Photograph itself,
16 both as to (a) the creation of a derivative work in the Tattoo and its reproduction and
17 (b) the public display of both the Davis Photograph and the Tattoo on the Internet in
18 twelve separate social media posts that reached millions of Defendants’ followers.
19 Like in *Warhol*, Defendants do not contend or provide evidence that either the
20 creation of the Tattoo or the social media posts has a critical bearing on, comment on,
21 criticize, or otherwise target the Davis Photograph, thereby requiring a compelling
22 reason for their borrowing. *Id.* at 1285-86 and n.20. Not only do Defendants not have
23 a compelling reason for copying the Davis Photograph in creating the Tattoo, they
24 admit that they had *no reason* to do so—Defendant Kat Von D acknowledged that she
25 used the Davis Photograph to create the Tattoo and that the Davis Photograph was
26 fungible—she would have “just used another image” of Miles Davis to create the
27 Tattoo if the Davis Photograph did not exist (PSUF ¶ 37). In so doing, Defendants
28 admit that they did the opposite of targeting the Davis Photograph and provide no

1 justification for why Defendants needed to copy this particular photograph. Nor do
2 Defendants present any justification, let alone a compelling one, for displaying either
3 the Davis Photograph or the Tattoo on the Web. This is fatal to Defendants' claim of
4 fair use, at least with respect to the first factor.

5 **Commerciality**

6 As to commerciality, both *Warhol* and § 107(1) make clear that the question is
7 “whether such use is of a commercial nature or is for nonprofit educational purposes.”
8 *Warhol*, 143 S. Ct. at 1274 (quoting § 107(1)). Defendants publicly displayed the
9 Davis Photograph and Tattoo to more than twenty million followers on multiple
10 commercial social media platforms over many years to advertise and promote their
11 business and brands. Yet Defendants claim that uses of the Davis Photograph,
12 including creating the Tattoo (a service for which they are customarily paid) and
13 publicly displaying both on commercial, social media platforms accessible to billions
14 of people on the Internet is “only incidentally commercial” simply because there they
15 were not directly paid (ECF 51 at 8). First, that is not the correct legal standard,
16 which is “whether the user stands to profit from the exploitation of the copyrighted
17 material without paying the customary price.” *Harper & Row, Publishers, Inc. v.*
18 *Nation Enters.*, 471 U.S. 539, 562 (1985). As discussed in Section III below, Sedlik
19 offers licenses of the Davis Photograph and other photographs to artists for use as a
20 reference in creating new works in other media, for which he typically charges a
21 license fee. Consequently, Defendants use of the Davis Photograph without paying a
22 reference license fee is the “exploitation of the copyrighted material without paying
23 the customary price” as described in *Harper*.

24 Defendants' sole focus on monetary gain missed the mark on the issue of
25 commerciality and thus has failed to meet their burden. *Worldwide Church of God v.*
26 *Phil. Church of God, Inc.*, 227 F.3d 1110, 1117–18 (9th Cir. 2000) (confirming that
27 monetary gain is not the sole criterion, that “profit” includes gaining recognition
28 among peers and authorship credit, and that the dictionary definition of profit includes

1 “an advantage, [a] benefit”). Indeed, “[g]enerating traffic to one’s website or
2 conveying one’s message effectively using copyrighted material is within the type of
3 ‘profit’ contemplated by *Worldwide Church.*” *Northland Family Planning Clinic, Inc.*
4 *v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962, 979 (C.D. Cal. 2012).

5 Second, the dichotomy is not commercial/non-commercial (nor, as Defendants
6 claim, commercial/incidentally commercial) but commercial/nonprofit educational.
7 Defendants do not argue let alone produce any evidence that their uses of the Davis
8 Photograph and the Tattoo were for nonprofit educational purposes. Accordingly, like
9 in *Warhol*, the fact that Defendants’ use of the Davis Photograph shared substantially
10 the same purpose and that Defendants’ uses were commercial in nature meant that
11 this factor weighs against fair use “absent some other justification for copying,”
12 which, as described above, they did not prove.

13 **B. Nature of the Copyrighted Work.**

14 While this Court correctly held that photographs are generally viewed as
15 creative (ECF 69 at 22), it concluded that the fact that the Davis Photograph
16 previously had been published weighed in favor of fair use, contrary to the holding of
17 *McGucken*.

18 The Ninth Circuit’s clarifications of the second fair use factor confirms that this
19 factor weighs against fair use by Defendants as a matter of law. This factor concerns
20 the extent to which a copyrighted work is creative and whether it is unpublished.
21 *McGucken*, 42 F.4th at 1161. The photographs in *McGucken* “are creative because
22 they were the product of many technical and artistic decisions.” *Id.* Although
23 *McGucken*’s photographs had been published previously, “that does not weigh in
24 favor of fair use” because “while a work’s unpublished status would weigh against
25 fair use, ‘the converse is not necessarily true.’” *Id.* at 1162 (quoting *Dr. Seuss*, 983
26 F.3d at 456 (emphasis added); see *Dr. Seuss*, 983 F.3d at 456 (confirming that the
27 publication of the copyrighted work does not weigh in favor of fair use). *McGucken*
28 found that this factor weighed against fair use. So too here.

C. Amount and Substantiality of the Portion Copied.

This Court correctly found that the third factor weighed against fair use because Defendants copied “numerous elements from” the photograph, including Miles Davis’ pose in the photograph (ECF 69 at 23). *McGucken* confirms that this is correct because just like Defendants, the *McGucken* defendants published “the heart” of the copied photograph without justification and “failed to put forward evidence that other photographs or visual aids were unavailable or an inadequate substitute for” the copied photographs. *McGucken*, 42 F.4th at 1162. Indeed, Defendant Kat Von D’s admission that she could have used any other photograph of Miles Davis (PSUF ¶ 37) confirms that other Miles Davis photographs were readily available.

Additionally, Defendants provide no justification for publicly displaying, both the Tattoo and/or the Davis Photograph, in twelve separate social media posts on the Internet. Even if Defendants were justified in publicly displaying the Tattoo and/or the Davis Photograph in one social media post (which they were not), publicly displaying them in twelve separate social media posts, reaching millions of followers, was “far more than was necessary.” *McGucken*, 42 F.4th at 1162 (finding the third factor weighed against fair use because defendant had copied extensively without justification).

D. Effect on the Potential Market.

The Court’s previous order declined to determine whether the fourth factor weighed for or against fair use because the Court found triable fact issues, pointing to Plaintiff’s deposition testimony in which he testified that he had previously licensed the photograph, including to a tattoo artist (ECF 69 at 24).

The Ninth Circuit’s clarifications of the fourth fair use factor in *McGucken* confirm that this factor weighs against fair use by Defendants as a matter of law. This factor encompasses *both* (1) the extent of market harm caused by the alleged infringer and (2) whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for

1 the original and the market for derivative works. *McGucken*, 42 F.4th at 1163.

2 The defendant “as the proponent of the affirmative defense of fair use, ‘must
3 bring forward favorable evidence about relevant markets.’” *Id.* (quoting *Dr. Seuss*,
4 983 F.3d at 459). To negate fair use, the plaintiff “need only show that if the
5 challenged use should become widespread, it would adversely affect the *potential*
6 market for the copyrighted work.” *Id.* (quoting *Monge v. Maya Magazines, Inc.*, 688
7 F.3d 1164, 1182 (9th Cir. 2012)). But where a defendant offers *no* evidence about the
8 effect on the market for licensing of the copied work, *the defendant cannot meet his*
9 *burden* and the fourth factor weighs against fair use. *Id.* (citing *Sicre de Fontbrune*,
10 39 F.4th 1214, 1226 (9th Cir. 2022) (emphasis added)).

11 *McGucken* found that even though the record reflected little direct evidence of
12 actual market harm caused by defendant’s use of plaintiff’s photographs, the harm
13 “would be immense” to the market for licensing those photos, where there was an
14 existing market to republish them. “If carried out in a widespread and unrestricted
15 fashion, [defendant’s] conduct would destroy [plaintiff’s] licensing market.
16 [Defendant] made the same use of [plaintiff’s] photos as the publications that
17 obtained licenses” *Id.*; *see also Id.* (quoting *Dr. Seuss*, 983 F.3d at 460 (“Because
18 ‘Seuss has already vetted and authorized multiple derivatives’ of the book the
19 defendant had used, *[t]his is not a case where the copyist’s work fills a market that*
20 *the copyright owner will likely avoid.*”)) (emphasis added)). Because defendant’s use,
21 if widespread, would destroy the market to license plaintiff’s works, *McGucken* found
22 the fourth factor weighed against fair use. *Id.* at 1164.

23 Here, Defendants presented ***no*** admissible evidence, as they must to
24 demonstrate fair use, about relevant markets as to the use of the Davis Photograph as
25 a reference to create a derivative work, the Tattoo. *See* ECF 32 at 21-22.² And

26 _____
27 ² Defendants sole evidence about the tattoo marketplace, opinions by its experts David Lane and
28 Catherine Montie, was excluded by the Court. ECF 71 at 7 (“The Court excludes Lane’s opinions to
the extent they pertain to the fourth prong of the fair use analysis.”); 8 (Montie’s opinions are
inadmissible with respect to the fourth fair use factor).

1 Defendants presented no argument, let alone evidence (admissible or otherwise) about
2 relevant markets to support its fair use defense as to the public display of the Davis
3 Photograph and/or the Tattoo on the Internet. Accordingly, on that basis alone, the
4 fourth factor weighs against fair use as a matter of law for both the creation of the
5 derivative Tattoo and the public display of the Davis Photograph and the Tattoo on
6 the Internet. *McGucken*, 42 F.4th at 1163.

7 Notwithstanding that Defendants presented no favorable evidence of relevant
8 markets, Plaintiff negated fair use by showing that if Defendants' uses of the Davis
9 Photograph should become widespread, it would adversely affect and usurp not only
10 the existing but also the *potential* licensing markets for the Davis Photograph.³ (ECF
11 50 at 21-22). Indeed, the harm to the market for licensing the Davis Photograph,
12 should Defendants' uses become widespread and unrestricted, would be immense.⁴
13 Consequently, even if Defendants had presented admissible evidence, Sedlik negated
14 it (see also Section III below regarding reference license), and therefore the fourth
15 factor weighs against fair use as a matter of law. *McGucken*, 42 F.4th at 1163.

16 Since all four factors weigh against fair use, Defendants' fair use defense fails
17 as a matter of law.

18 **II. No Substantial Similarity Analysis Where Evidence of Direct Copying**

19 The Ninth Circuit and numerous district court decisions in the Ninth Circuit
20 have confirmed after this Court's summary judgment order on May 31, 2022 (ECF
21 69) that a court does not engage in substantial similarity analysis where there is direct
22 evidence of copying. *See, e.g., Lorador v. Kolev*, No. 22-15491, 2023 WL 3477834,
23 at *1 (9th Cir. May 16, 2023) (unpublished) ("*Absent direct evidence of copying,*
24 *proof of infringement involves fact-based showings that the defendant had access to*
25

26 ³ Defendants provide no authority that the only applicable market is licensing for the tattoo industry.
Such argument ignores Defendants' public display of the Davis Photograph on the Internet.

27 ⁴ Sedlik presented uncontroverted evidence that he has a long history of licensing the Davis
28 Photograph to all manner of clients for all manner of uses, including use as a tattoo, and that he has
had other inquiries from potential licensees to use his photograph as a tattoo. ECF 50 at 21.

1 the plaintiff's work and that the two works are substantially similar.” (emphasis
2 added)); *Advanta-STAR Auto. Rsch. Corp. of Am. v. Search Optics, LLC*, No. 22-CV-
3 1186 TWR (BLM), 2023 WL 3366534, at *5 (S.D. Cal. May 9, 2023) (“*Absent*
4 *evidence of direct copying*, a plaintiff must establish substantial similarity between the
5 protected aspects of their work and the defendant's work to succeed on a copyright
6 infringement claim.” (emphasis added)).

7 Indeed, courts in this Circuit have laid out the two elements to prove copyright
8 infringement, then held the second element can be proved *either* by direct evidence *or*
9 through a substantial similarity analysis. *See, e.g., Irish Rover Ent., LLC v. Sims*, No.
10 20-cv-06293, 2023 WL 4317054, at *6 (C.D. Cal. June 30, 2023) (“To prevail on a
11 copyright infringement claim, a plaintiff must demonstrate “(1) ownership of a valid
12 copyright, and (2) copying of constituent elements of the work that are original. . . . In
13 order to establish copying, Plaintiff must either provide ‘evidence of direct copying’
14 or they must show that ‘Defendants had ‘access’ to [Plaintiff’s] copyrighted material
15 and that the two works at issue are ‘substantially similar.’”); *Universal Prot. Serv., LP*
16 *v. Coastal Fire & Integration Sys., Inc.*, No. 22-CV-1352, 2023 WL 4042582, at *9
17 (S.D. Cal. Jun. 15, 2023) (same); *Klauber Bros., Inc. v. Roma Costumes, Inc.*, No. 22-
18 CV-04425, 2023 WL 3903908, at *2 (C.D. Cal. June 7, 2023) (same); *Talavera v.*
19 *Glob. Payments, Inc.*, No. 21-CV-1585, 2023 WL 3080701, at *10 (S.D. Cal. Apr. 25,
20 2023) (same); *CNC Software, LLC v. Glob. Eng'g Ltd. Liab. Co.*, No. 22-CV-02488,
21 2023 WL 3035443, at *4 (N.D. Cal. Mar. 23, 2023), report and recommendation
22 adopted in *part, rejected in part*, No. 22-CV-02488, 2023 WL 3409463 (N.D. Cal.
23 May 12, 2023) (“To prove the “copying” element, a plaintiff must catch the defendant
24 in the act or can demonstrate ‘(1) circumstantial evidence of the defendant's access to
25 the copyrighted work; and (2) substantial similarity between the copyrighted work
26 and the defendant's work.’”); *Klauber Bros., Inc. v. City Chic Collective Ltd.*, No. 22-
27 1743, 2022 WL 18278400, at *4 (C.D. Cal. Dec. 6, 2022); *Moement, Inc. v.*
28 *Groomore, Inc.*, No. 22-CV-02871, 2022 WL 18284405, at *7 (C.D. Cal. Nov. 29,

1 2022).

2 This Court, relying on *Rentmeester v. Nike, Inc.*, concluded that a substantial
3 similarity analysis was called for, notwithstanding evidence of direct copying,
4 because “the second element [of copyright infringement] has two distinct
5 components: copying and unlawful appropriation.” ECF 69 at 9-10 (quoting
6 *Rentmeester*, 883 F.3d 1111, 1117 (9th Cir. 2018) (internal quotation marks omitted),
7 overruled on other grounds by *Skidmore as Tr. For Randy Craig Wolfe Tr. v. Led*
8 *Zeppelin*, 952 F.3d 1051 (9th Cir. 2020)).

9 As the cases cited above confirm, *Rentmeester*, which was not a case involving
10 direct copying (it involved the creation of two separate photographs from the same
11 idea), did not change this Circuit’s long-standing holding that a copyright owner can
12 satisfy the second element through direct evidence of copying. As this Court
13 recognized in its previous order, *Rentmeester* involved two *different* photographs of
14 Michael Jordan, with “significant differences in Jordan’s pose, the specific setting and
15 backdrop, position of the basketball hoop, and Jordan’s positioning within the frame”
16 (ECF 69 at 12). The Ninth Circuit held that the two photographs were not
17 substantially similar as a matter of law. *Rentmeester*, 883 F.3d at 1121.

18 Here, by contrast, Defendants admitted to copying the Davis Photograph.
19 Indeed, Ninth Circuit decisions prior to *Rentmeester* unanimously confirm that
20 evidence of direct copying satisfy the second copyright infringement element without
21 a substantial similarity analysis. *See, e.g., Unicolors, Inc. v. Urb. Outfitters, Inc.*, 853
22 F.3d 980, 984-85 (9th Cir. 2017) (“If there is no direct evidence of copying, a plaintiff
23 may prove this element through circumstantial evidence that (1) the defendant had
24 access to the copyrighted work prior to the creation of defendant’s work and (2) there
25 is substantial similarity of the general ideas and expression between the copyrighted
26 work and the defendant’s work.”); *Loomis v. Cornish*, 836 F.3d 991, 994 (9th Cir.
27 2016) (same); *Funky Films, Inc. v. Time Warner Entmn’t Co., L.P.*, 462 F.3d 1072,
28 1076 (9th Cir. 2006); *Murray Hill Publ’ns, Inc. v. Twentieth Century Fox Film Corp.*,

1 361 F.3d 312, 316 (9th Cir. 2004) (same); *Three Boys Music Corp. v. Bolton*, 212
2 F.3d 477, 481 (9th Cir. 2000) (same); *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir.
3 1996) (same); *Pasillas v. McDonald's Corp.*, 927 F.2d 440, 442 (9th Cir. 1991)
4 (same).

5 Indeed, in cases involving direct copying, the Ninth Circuit has been explicit
6 that substantial similarity is irrelevant. *See, e.g., Range Road Music, Inc. v. East*
7 *Coast Foods, Inc.*, 668 F.3d 1148, 1154 (9th Cir. 2012) (“A showing of ‘substantial
8 similarity’ is irrelevant in a case like this one, in which the Music Companies
9 produced evidence that the public performances entailed direct copying of
10 copyrighted works.”); *Norse v. Henry Holt and Co.*, 991 F.2d 563, 566 (9th Cir.
11 1993) (“But here the substantial similarity analysis is inapposite to the copying issue
12 because appellees admit that they in fact copied phrases from Norse’s letters.”)

13 Nor could the *Rentmeester* panel overrule these prior Ninth Circuit decisions,
14 especially considering that the issue of direct copying was not even before it. *Silva v.*
15 *Garland*, 993 F.3d 705, 717 (9th Cir. 2021) (“[T]he first panel to consider an issue
16 sets the law not only for all the inferior courts in the circuit, but also future panels of
17 the court of appeals.”); *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001).

18 Because it is undisputed that Defendants copied the Davis Photograph, a
19 substantial similarity test between the Photograph and the Tattoo should not be
20 applied, and the Court should grant Plaintiff’s motion as to copyright infringement.

21 **III. Reference Licenses.**

22 *Warhol* clarified that a photographer, such as Plaintiff, may license his creative
23 works to serve as a reference for an artist, and that such licenses are one of the ways
24 photographers make a living. *Warhol*, 143 S. Ct. at 1278. Thus, under *Warhol*,
25 claims for copyright infringement based on use of a photograph as a reference are
26 actionable. Kat Von D readily admits that she created a depiction of Miles Davis
27 based on the Davis Photograph, which she used as a reference for the Tattoo. *See,*
28 *e.g.,* ECF 41 at 28:19-20; PSUF ¶ 38. Defendant also admitted that: (a) she adapted

1 the Davis Photograph to her style and interpretation; (b) she did not create the Tattoo
2 from anything other than the Davis Photograph, including her memory; (c) while
3 making a tattoo, she always uses a copy of a reference next to her; and (d) she looks
4 at the photograph the entire time during the tattooing (PSUF ¶ 38).

5 Sedlik not only testified that he has licensed the Davis Photograph as a
6 reference, but specifically as a reference for a tattoo (PSUF ¶ 39). Indeed, Sedlik
7 produced reference licenses for the Davis Photograph, including for a tattoo (*e.g.*,
8 PSUF ¶ 40; Linger Decl., Ex. 3). The licensee of the tattoo reference license, Bryan
9 Vanegas, confirmed in a July 31, 2023 deposition that (a) he obtained a license from
10 Sedlik to use the Davis Photograph as a reference; (b) as a tattoo artist, he (or the
11 shops he has worked in) purchase tattoo flash books, which books provided a license
12 to tattoo artists to use the contained illustrations as a reference, and that by buying the
13 books, he has the right to use those images as a reference; (c) he was familiar with
14 tattoo artists offering and selling licenses of their illustrations and tattoo designs for
15 profit; (d) freehand tattooing is drawn directly on the skin with a pen before ink is
16 applied, or is tattooed directly on the skin without the aid of a drawing or stencil; and
17 (e) at the time Vanegas negotiated the reference license with Sedlik for the Davis
18 Photograph, he reviewed a page on Sedlik's website that set forth the various licenses
19 Sedlik grants, including licenses for artists' reference for the creation of tattoos
20 (PSUF ¶ 41; Linger Decl., Exs. 3-6).

21 Accordingly, *Warhol* confirmed that using a photograph as a reference, such as
22 the way in which Defendants admittedly used the Davis Photograph, requires a
23 license as a matter of law (of note, Goldsmith's reference license was in 1984,
24 confirming that reference licenses have been common for many years). Defendants
25 admitted that they used the Davis Photograph as a reference without a license, thereby
26 infringing the Photograph.

27 **IV. Direct Copying.**

28 *Warhol's* confirmation that photographers license their photographs to be used

1 as reference confirms that Defendants, through Kat Von D’s admissions, directly
2 copied the Davis Photograph in creation of the Tattoo without a license. In addition
3 to Kat Von D’s admissions, there is undisputed evidence that Defendants copied the
4 Davis Photograph, not only in the creation of the Tattoo, but also in the public display
5 (and public performance of a video) of both the Tattoo and the Davis Photograph on
6 the Internet.

7 First, Kat Von D admitted to tracing the Davis Photograph (she was video-
8 recorded during the process of her tracing the Davis Photograph on a lightbox at her
9 tattoo parlor) (ECF 50-8, 50-9; ECF 69 at 4-5). Indeed, a side-by-side comparison
10 shows that the tracing was an exact copy (ECF 50-10). Kat Von D admitted that she
11 printed out copies of the Davis Photograph and used the traced sketch to produce the
12 Tattoo (ECF 35-1 at 2-3, ¶¶ 6-9; PSUF ¶ 42). Defendants thus additionally admit to
13 intermediate copying, similarly violative of the reproduction right in Section 106(1).
14 *See, e.g. Walker v. University Books*, 602 F.2d 859, 864 (9th Cir. 1979) (“The fact
15 that an allegedly infringing copy of a protected work may itself be only an inchoate
16 representation of some final product to be marketed commercially does not in itself
17 negate the possibility of infringement.”).

18 Second, Kat Von D admitted to creating the Tattoo solely from the Davis
19 Photograph. *See* Section I.A.3.1 above. While she argues that she created her own
20 “interpretation,” that is no different than Warhol’s use of Goldsmith’s Silkscreen to
21 depict his own interpretation of Prince. *Warhol*, 143 S. Ct. at 1275, 1282 (“Many
22 derivative works, including musical arrangements, film and stage adaptations, sequels,
23 spinoffs, and others that “recast, transfor[m] or adap[t]” the original, § 101, add new
24 expression, meaning or message, or provide new information, new aesthetics, new
25 insights and understandings.”).

26 Consequently, since there is no dispute that the Davis Photograph is a creative
27 work subject to copyright protection (ECF 69 at 10), the only logical conclusion is
28 that Kat Von D copied protectible expression of the Davis Photograph, a copyright

1 protectible combination of unprotectible expression from the Davis Photograph or
2 both. *See Rentmeester*, 883 F.3d at 1119 (“What is protected by copyright is the
3 photographer's selection and arrangement of the photo's otherwise unprotected
4 elements.”). This is especially true here where the Tattoo is “instantly identifiable” as
5 an embodiment of the Davis Photograph in “yet another form.” *Entm’t Research*, 122
6 F.3d at 1223. Plaintiff described all of the protectible elements in the Davis
7 Photograph in his Interrogatory responses (ECF 50-24; PSUF ¶ 34), and the bulk of
8 those elements appear in the Tattoo as well. Notably, Defendants have no evidence to
9 the contrary, as Defendant’s expert (who purported to opine on the *differences*, not
10 the similarities), has been excluded (ECF 71 at 3-6).

11 Third, Defendant admitted to publicly displaying photographs of both the Davis
12 Photograph and the unauthorized derivative Tattoo on the Internet without a license.
13 (PSUF ¶¶ 16, 17, 31; DSUF ¶ 96; ECF 35-19 – 35-30; ECF 69 at 5-7). Defendants
14 can offer no fair use defense to these uses after *Warhol*. Defendants’ sole basis to a
15 fair use defense as to the social media posts was that the *Tattoo* itself was
16 transformative, and therefore the posts showing the Tattoo *and the Davis Photograph*
17 are also covered (ECF 32 at 24). But *Warhol* rejects the possibility that an original
18 *work* is transformative by adding new expression to it—only its *use* can be
19 transformative, such as by offering criticism or commentary of the *original work*
20 *itself*. Defendants offer no justification as to why they needed to advertise using both
21 the Tattoo and the Davis Photograph, especially where Defendant’s social media
22 posts regarding the tattoo do not target or comment on the Davis Photograph.

23 **V. Conclusion.**

24 For all of the reasons stated above, the Court should grant Plaintiff’s motion for
25 summary judgment and deny Defendant’s motion for summary judgment.
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