

No. 21-869

In The
Supreme Court of the United States

THE ANDY WARHOL FOUNDATION
FOR THE VISUAL ARTS, INC.,

Petitioner,

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit**

**BRIEF OF ART LAW PROFESSORS AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI CURIAE

Amici are law professors with an interest in art law, the First Amendment, or copyright law.¹ They have an interest in the proper interpretation and application of the First Amendment and copyright law to art. Because the Second Circuit opinion threatens to chill the creation of new works of art and conflicts with the law of this Court and other circuits, amici believe this Court should reverse the Second Circuit and hold that Warhol's art is legally protected. A list of amici appears in Appendix A.



SUMMARY OF THE ARGUMENT

By making its own views on the merits of Andy Warhol's artistic work determinative and ignoring the meaning and the message his art may have for the artistic community, the Second Circuit decision runs afoul of the First Amendment. Courts should not be gatekeepers deciding what qualifies as art. This Court's First Amendment precedent protects speech that a reasonable observer could perceive as communicating

¹ Pursuant to Supreme Court Rule 37, counsel for amici represent that this brief was authored solely by amici and their counsel. No part of this brief was authored by the parties or their counsel, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief. Affiliations are provided for identification purposes; this brief does not purport to present the institutional views, if any, of their employers. Counsel for petitioner and respondent filed blanket consent to the filing of all amicus briefs.

a message different from what the copyright owner intended, whether or not the court itself perceives or agrees with that message.

◆

ARGUMENT

I. THE FAIR USE DOCTRINE IS A FIRST AMENDMENT SAFEGUARD FOR ALL WORKS THAT USE PREEXISTING EXPRESSION

Copyright law restricts speech and presents a clear tension with the First Amendment. Copyright law is compatible with the First Amendment only because of two “built-in First Amendment accommodations”—the idea/expression dichotomy (which is not at issue here) and fair use. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

Fair use protects the First Amendment rights of both speakers and listeners by ensuring that those whose speech involves dialogue with preexisting copyrighted works are not prevented from sharing that speech with the world. *See Golan v. Holder*, 565 U.S. 302, 328–29 (2012) (the “First Amendment protections” embodied in fair use require courts to afford “considerable latitude for scholarship and comment” (citations omitted)). As Judge Leval explained, “fair use serves as the First Amendment’s agent within the framework of copyright.” Pierre N. Leval, *Campbell As Fair Use Blueprint?*, 90 Wash. L. Rev. 597, 614 (2015). It is only because of fair use and the idea/expression

dichotomy—the two “speech-protective purposes and safeguards embraced by copyright law”—that copyright law has avoided the “heightened review” often merited when Congress limits the freedom of speech. *Golan*, 565 U.S. at 329 (citation omitted).

Notably, fair use “allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself[.]” *Eldred*, 537 U.S. at 219. Interpreting fair use to flatly exclude any work in which the preexisting work “remains . . . recognizable,” as the panel did here (JA624), grants copyright owners the very monopoly on certain forms of expression that fair use was intended to prevent. This not only undermines copyright law, it conflicts with the First Amendment.

II. THE PANEL OPINION IS INCONSISTENT WITH THE FIRST AMENDMENT BECAUSE IT IGNORES THE MEANING AND MESSAGE OF WARHOL’S ART

A. The Second Circuit’s Visual Similarity Test Ignores A Work’s Meaning And Message

This Court has cautioned that courts should not style themselves as art critics passing on the worth and meaning of artistic works. As Justice Holmes explained:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and

most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. . . . It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time.

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903). Justice Scalia applied the same principle in the First Amendment context, writing, “For the law courts to decide ‘What is Beauty’ is a novelty even by today’s standards.” *Pope v. Illinois*, 481 U.S. 497, 505 (1987) (Scalia, J., concurring).

In its attempt to fashion a test that avoids that trap, the Second Circuit instead fell directly into it. Immediately after warning that a judge “should not assume the role of art critic,” JA621, the court went on to do exactly that, basing its own analysis solely on its “viewing the works side-by-side.” *Id.* at 622. Indeed, based on this decision, a court deciding a fair use case must, on its own behalf, with no context, visually analyze the works at issue to make a subjective aesthetic judgment: whether the court perceives that the second work evidences “the imposition of another artist’s style on the primary work” or whether the second work “recognizably deriv[es]” from the first. *Id.* at 621–22.

The Second Circuit’s new standard focuses solely on the aesthetic and purely visual similarity between the two works at issue and dismisses the possibility of any meaning or message that a judge does not perceive on the surface.

That is not the law. *Campbell* establishes that courts must view a work as transformative if it adds a new “meaning or message,” even if they themselves don’t ‘get’ the message, so long as an audience may reasonably perceive it. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, 582 (1994) (the question is whether transformative meaning “may reasonably be perceived,” not whether the new expression “is in good taste or bad”).

Instead of following *Campbell*, the Second Circuit established a rule that when two works are facially similar enough, they are never transformative. See JA621–22 (“[T]he secondary work’s transformative purpose and character must, at a bare minimum, comprise something more than the imposition of another artist’s style on the primary work such that the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material.”). That is, the Second Circuit assumed as a matter of law that visual works that are facially similar can *never* differ in their purpose and can *never* convey a different expression, meaning, or message. That approach contradicts this Court’s decision last Term in *Google v. Oracle* as well as the weight of authority in other circuits. See *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183, 1203 (2021) (an artist’s use of an existing work “might . . . fall within the scope of fair use even though it precisely replicate[d]” a copyrighted work); *Campbell*, 510 U.S. at 580 (the defendant’s “use of some elements of a prior author’s composition to create a new one” may be transformative); *Seltzer v. Green*

Day, Inc., 725 F.3d 1170, 1177 (9th Cir. 2013) (the defendant’s work is “typically viewed as transformative as long as new expressive content or message is apparent . . . even where . . . the allegedly infringing work makes few physical changes to the original. . . .”); *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 939 (9th Cir. 2002) (the inclusion of lightly edited copyrighted clip in a video montage was transformative even though the clip remained recognizable).

To make matters worse, the Second Circuit disavowed any inquiry into the meaning of a visual work, stating that courts should not “seek to ascertain the . . . meaning of the works at issue.” JA621. But to ignore a work’s meaning and message is to ignore the essence of its expressive value.

B. Focusing Only On A Work’s Visual Similarity To Another Work Is Inconsistent With The First Amendment

That rule is inconsistent with the First Amendment. The First Amendment recognizes that communication can take many different forms and requires courts to consider the variety of meanings that can reasonably be attached to a particular work by different observers. What is to one person an “unseemly expletive” is to another a powerful message; “one man’s vulgarity is another’s lyric.” *Cohen v. California*, 403 U.S. 15, 23, 25–26 (1971) (jacket reading “Fuck the Draft” was protected speech because the Court looked beyond the “cognitive content” of speech to protect the

“emotive function” beneath the surface “which, practically speaking, may often be the more important element of the overall message sought to be communicated”); *see also Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157–58 (1946) (“What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. . . . But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system.”). Indeed, the very same word can convey radically different meanings based on who uses it and in what context. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (trademark office violated the First Amendment when it denied registration of the name of a rock band chosen by a member of a minority group to “reclaim” a racial slur directed at that group); *see also Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (the Lanham Act’s bar on registration of “immoral[] or scandalous” trademarks violates the First Amendment).

This Court has expressly recognized that the First Amendment does not require “a narrow, succinctly articulable message.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (parade was constitutionally protected speech even absent a “particularized” message). Otherwise, the First Amendment would “never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.” *Id.*; *see also Cohen*, 403 U.S. at 26 (linguistic speech “conveys not only ideas capable of relatively

precise, detached explication, but otherwise inexpressible emotions as well”).

Nor must a speaker’s message be facially obvious to a judge for her speech to be constitutionally protected. As the Court warned in *Pope v. Illinois*, the First Amendment protects a work even if its meaning is appreciated by only a “minority of a population.” 481 U.S. at 501 n.3. When confronted with a work of art, courts must therefore consider all of the work’s potential audiences and the messages those audiences may reasonably perceive, or risk running afoul of the First Amendment. *See Cohen*, 403 U.S. at 25 (“[W]e think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.”).

In such circumstances, the First Amendment’s answer to the difficulty of discerning the meaning or message of speech is to err on the side of permitting speech where it would be permissible if considered from the perspective of *some* relevant observer. The Court made this clear in *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009). In *Summum*, the Court analyzed whether the First Amendment required a city to allow a private group to place a donated monument in a park in which other donated monuments were already present. The Court held that the city was not required to accept the monument, reasoning that the placement of a monument is a form of government speech. *Id.* at 470–71. In arguing otherwise, the would-be monument donor warned that the government speech doctrine

could be used as a “subterfuge for favoring certain private speakers over others based on viewpoint,” and suggested that a government entity accepting a privately donated monument should be required to adopt a formal resolution publicly embracing the monument’s “message.” *Id.* at 473.

The Court disagreed. The Court explained that the donor’s argument assumed “that a monument can convey only one ‘message’—which is, presumably, the message intended by the donor—and that, if a government entity that accepts a monument for placement on its property does not formally embrace *that* message, then the government has not engaged in expressive conduct.” *Id.* at 474. But that argument “fundamentally misunderstands the way monuments convey meaning.” *Id.* Rather than conveying a simple message, “the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways.” *Id.* Accordingly, “it frequently is not possible to identify a single ‘message’ that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor.” *Id.* at 476. Thus, the Court recognized, “text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable.” *Id.* at 475.

So too with art. Consider Marcel Duchamp’s *Fountain*. Is *Fountain* one of the most important works of

twentieth century art, or is it just a urinal? Different people would likely answer that question differently. But courts can neither decide who is right nor ignore the question. The First Amendment requires courts to consider the wide variety of possible meanings conveyed by a work of art. And it accordingly protects Duchamp's message even if any individual judge looks at *Fountain* and thinks "that's not art."

The Second Circuit opinion does the opposite. Rather than take into account the meaning or message of Warhol's art to different audiences, the opinion erases its potential meaning from the fair use analysis entirely. The Second Circuit held that a work of visual art that "recognizably deriv[es] from, and retain[s] the essential elements of," a pre-existing work can *never* be transformative. JA622. It did not take into account whether Warhol's work has a different potential meaning or message than the photograph on which it was based. Under the Second Circuit's test, that question is irrelevant if the new work is too similar in appearance to the original work. Ignoring the transformative message of a work of art violates the fair use doctrine and the First Amendment.

C. A Test Based Only On Visual Similarity Will Chill The Creation Of New Art

The Second Circuit's error in disregarding the Supreme Court's guidance with respect to both fair use and the First Amendment is particularly egregious in this case because of Warhol's recognized influence on

modern art and on a whole generation of artists working today who will be chilled were this ruling to stand. The silkscreen prints by Andy Warhol are some of the most widely recognized and iconic works of the twentieth century, taught to every student of modern art. See 1 H.H. Arnason & Elizabeth C. Mansfield, *History of Modern Art* 477 (7th ed. 2013) (introductory textbook on modern art explaining how Warhol's silkscreens "examin[e] . . . contemporary American folk heroes and glamorous movie stars"); see also The Metropolitan Museum of Art, *Andy Warhol, Marilyn*, in *The Metropolitan Museum of Art Guide* 233 (2012) ("Warhol's embrace of commercial methods transformed Marilyn's image" by recasting it as a consumer product).

In refusing to consider that Warhol's work might convey a new or different message, the Second Circuit ignored the very expression that makes Warhol a pivotal figure in twentieth-century art. Courts cannot protect the First Amendment value of a Warhol work, or many other works of art, by looking only at their surfaces and disregarding underlying meaning. Scholars can and do differ over whether we should view art from the artist's perspective or the plaintiff's perspective or the perspective of a reasonable audience member or the perspective of a viewer with some familiarity with art. See Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 *Law & Lit.* 20 (2013); Amy Adler, *Fair Use and the Future of Art*, 91 *N.Y.U. L. Rev.* 559 (2016); Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 *Mich. L. Rev.* 1251 (2014). But

virtually all of those perspectives see something new and important in Warhol's work.

To be clear, our point is not that the Court should protect Warhol's works because they are famous. Quite the contrary. Fair use is supposed to "guarantee [] breathing space within the confines of copyright[.]" *Campbell*, 510 U.S. at 579. Our point is that if fair use does not even protect these familiar works despite volumes and indeed entire careers devoted to explicating their meaning, it is difficult to see how there can be any breathing room for new artists or forms of art that challenge a judge's notions of what counts as art.

* * *

By insisting that courts evaluate art only from the perspective of someone who sees only what is on the surface, the Second Circuit opinion not only excludes a wide swath of transformative works from the protection of fair use, it also contravenes this Court's guidance that speech can convey a wide variety of messages, even if those messages are not facially obvious to a court. The Second Circuit's failure to consider the variety of meanings that can be attached to a particular work by different observers is therefore inconsistent with the Court's speech jurisprudence. *Summum* held that courts could not properly take the monument at issue in that case only at face value. *Tam* held the same for the trademark at issue in that case, and *Hurley* for the parade at issue in that case. So too here. This Court should not take the painting at issue in this case only at face value, ignoring the meaning

Warhol’s transformation conveys to different audiences—customers, critics, and the public at large. Indeed, the Second Circuit stands alone among its sister circuits in doing so. *Compare Seltzer*, 725 F.3d at 1177 (holding that the defendant’s use of a copyrighted work with “few physical changes to the original” is transformative “as long as new expressive content or message is apparent,” even if the meaning of that message is “debatable”); *Núñez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 21–22 (1st Cir. 2000) (reproduction of salacious photographs deemed transformative where the photographs “were shown not just to titillate, but also to inform”).

“First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.” *Yankee Pub. Inc. v. News Am. Pub. Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992) (quoted in *Campbell*, 510 U.S. at 579). And likewise, First Amendment protections do not apply only to artists whose message appears plainly on the face of their artwork.



CONCLUSION

This Court should reverse the Second Circuit and hold that Andy Warhol's art is not illegal.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*¹

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¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus* or her counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Constitutional purpose of copyright to promote creativity, or clarity in the application of the law.



SUMMARY OF ARGUMENT

The assertion of fair use by Petitioner the Andy Warhol Foundation for the Visual Arts, Inc. (the “Foundation”) concerning the Foundation’s intended use of a print by Andy Warhol (“Warhol”) whose composition is taken entirely from a photograph by Respondent Lynn Goldsmith (“Goldsmith”) poses great risk to Congress’s instruction in Section 107 of the Copyright Act of 1976, and to decades of the Court’s guidance. This is more like the colorization of black and white films that the Copyright Office has determined is a derivative, not a fair, use than it is a work covered by Section 107. *See* Copyright Registration for Colorized Versions of Black and White Motion Pictures, 52 Fed. Reg. 23443, 23445 (June 22, 1987).

The concept of transformativeness as a determining factor in a fair use analysis was first introduced in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). But the Foundation’s broad claim to fair use where there is any amount of transformation of a photograph would divert the analysis, the purpose and character of the use under Section 107’s first factor, away from the Congressional proscription. More disruptively, it would be unmanageable and would undermine the legislative balance between expression and copyright protection. The Constitution authorizes a

copyright system that incentivizes individual creators in order to enrich our cultural ecosystem, while at the same time protecting the rights of the individuals whose labor forms the bedrock of two centuries of copyright law. The natural consequence of the Foundation’s position would be to render photographers whose works are modified, recast or adapted in almost any manner powerless to enforce their copyright so long as a scintilla of new meaning could be perceived, something presciently noted by a dissent in the last term. *See Google, LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1214 (2021) (Thomas, J., dissenting) (addressing similar concern for computer code: “The result of this distorting analysis is an opinion that makes it difficult to imagine any circumstance in which declaring code will remain protected by copyright.”).

This is not a case, as others have suggested, pitting artist against artist, or creation against restraint of speech. Both Goldsmith and Warhol are or were accomplished creators, but they also shared the practical goal of productive economic use of their creations, and there is a method of resolving this dispute that allows both to flourish. Affirming the court of appeals allows all artists to continue both to create and to receive appropriate remuneration—and credit—for their services. By contrast, a ruling for the Petitioner would remove all barriers to one visual artist exploiting another artist’s work without either compensation or acknowledgement. That is not the balance that Congress struck in enacting Section 107.

The Court should affirm the court of appeals and hold that an artist who copies another work of visual art in its entirety (or nearly so) and makes it the basis of a secondary work must offer some degree of comment on the original work in order to show a change in the purpose or character of the use required by Section 107.

◆

ARGUMENT

A. Lower courts' focus on the meaning or message since *Campbell* has created analytical chaos for visual art.

The Framers made explicit only specific powers of Congress in Article I of the Constitution. Copyright is among those enumerated few. Congress has continually strengthened the nation's copyright laws initially authorized by Art. I, Section 8, Cl. 8 over the past two-plus centuries, “[t]o promote the progress of science and useful arts,” affirming a commitment to incentivizing creativity and culture. U.S. CONST. art. I, § 8, cl. 8. Not wishing to create a monopolistic system, however, Congress has imposed limitations and exceptions on these rights.

The doctrine of fair use allows secondary users to use otherwise copyrighted works without penalty. The concept was codified in Section 107, but the origin of an exception to copyright allowing later creators the freedom to use works has its roots in 19th century law and tradition. In *Folsom v. Marsh*, Justice Story laid an

outline for the unlicensed use of copyrighted works in certain situations. *Folsom v. Marsh*, 9 F. Cas. 342, 348–49 (C.C.D. Mass. 1841). But the Court noted that the exception must be treated cautiously lest it allow an avalanche of users, each reasonable, yet together eroding all the rights of the original author. *Id.* at 349. The points enunciated in *Folsom* developed into the four-factor test of Section 107. Since its adoption in 1978, the fair use doctrine has been significantly shaped by the Court. *See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539 (1985); *Feist Publications, Inc. v. Rural Tel. Service Co.*, 499 U.S. 340 (1991).

Campbell constituted a watershed moment in this jurisprudence. There, the Court referenced the Hon. Pierre N. Leval’s article *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990) and the judge’s recharacterization of the purpose and character analysis that had traditionally held sway. Whereas previous cases looked at whether the secondary work superseded the original creation, the Court allowed for a second possibility that might permit the secondary work to be considered a fair use—the infusion of new meaning or message. *Campbell*, 510 U.S. at 579. The Court did not define the addition of new meaning or message as the *exclusive* avenue to fair use, however; nor did the Court reach the application of this test. Lower courts have struggled in the interim to determine whether artists’ works would qualify for the fair use exception when analyzing meaning or message in place of the prior

inquiry into the purpose or character of the works. In recent years, particularly in the visual arts, the first factor has taken on increasingly more importance, and become determinative in a majority of cases. See Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law* 22 STAN. TECH. L. REV. 163 (2019).

Since *Campbell*, courts have frequently turned to the first factor of Section 107 to determine whether the facts weigh in favor of fair use. Even in *Campbell*, the Court recognized that 2 Live Crew’s song might qualify as transformative because it “comment[ed] on the original or criticiz[ed] it, to some degree.” 510 U.S. at 583. The Court emphasized that the song, “Pretty Woman,” which humorously comments on the naiveté of the original Roy Orbison hit, “Oh, Pretty Woman,” “necessarily springs from recognizable allusion to its object through distorted imitation.” *Id.* at 588. Transformative can constitute a new purpose and character—*Campbell* has already so held. Yet transformativeness cannot be an outcome determinative factor for the simple reason that Congress chose not to make it one. This proper balance is consistent with Congressional purpose as expressed in the statute. While *Campbell* noted the suitability of parody to meeting the comment or criticism element (in an example that was transformative), parody is not a statutory element.

Interpreting the meaning or message standard in the context of visual art without that balance has bedeviled the courts. Compare *Gaylord v. U.S.*, 85 Fed.Cl. 59, 68–69 (2008) (“Mr. Alli, through his photographic talents, transformed [an outdoor statue’s] expression

and message, creating a surrealistic environment with snow and subdued lighting where the viewer is left unsure whether he is viewing a photograph of statues or actual human beings.”), *with Gaylord v. U.S.*, 595 F.3d 1364, 1373 (Fed. Cir. 2010) (“Nature’s decision to snow cannot deprive Mr. Gaylord of an otherwise valid right to exclude.”).

More recently, a district court in the Ninth Circuit held that the book, *Oh the Places You’ll Boldly Go!*, a Star Trek adaptation of Dr. Seuss’ *Oh the Places You’ll Go!*, was “no doubt transformative” since it “combine[d] into a completely unique work the two disparate worlds of Dr. Seuss and *Star Trek*.” *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 256 F. Supp. 3d 1099, 1106 (S.D. Cal. 2017). The district court focused on the differences across the narratives of the two stories and accompanying illustrations. *Id.* By contrast, on appeal, the Ninth Circuit in finding for the plaintiff focused on a requirement to comment *on the original* rather than an altered substantive meaning or message of the work. New expression by itself was not sufficient to be deemed transformative, and recontextualizing on its own was not transformative. *Dr. Seuss Enters., Ltd. P’ship v. ComicMix Ltd. Liab. Co.*, 983 F.3d 443, 453–54 (9th Cir. 2020).

1. Determining meaning or message cannot be done consistently.

The meaning and message standard makes this vacillation a constant possibility. No one person’s

interpretation—whether by district court judges or juries—is more valid than another’s. Courts are ill-suited to make value judgements about creative works, and there has never been a consensus on an alternative. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“[i]t would be a dangerous undertaking for persons trained only [in] the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits”). A jury is no more competent to make this determination.

Courts and litigants attempt to resolve this conundrum with evidence about meaning, but such evidence does not actually solve the problem. One evidentiary option is testimony from the artists themselves,² but this can reflect attorney preparation as much as artistic intent. Artists themselves often intend to communicate multiple meanings through their work. To make matters even more complicated, many artists decry the need to ascribe a meaning or even *any* meaning or message to their work. See *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013). Conversely, granting the alleged infringer a safe haven from liability by identifying any alternate meaning or message would frustrate the purpose of the law, and courts have been divided about how to treat authors’ own testimony. Compare *Cariou*

² For example, in *Blanch v. Koons*, the court’s decision was influenced by Jeff Koons’s testimony: “Koons is, by his own undisputed description, using Blanch’s image as fodder for his commentary on the social and aesthetic consequences of mass media.” *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006).

v. Prince, 784 F. Supp. 2d 337, 349 (S.D.N.Y. 2011) (holding the works were not transformative based upon the artist testifying that he did not “‘really have a message,’ and . . . was not ‘trying to create anything with a new meaning or a new message’”), *with Cariou*, 714 F.3d at 706–07 (disagreeing that “we must hold Prince to his testimony”; instead ruling that, “[w]hat is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work.”); *compare also Brammer v. Violent Hues Prods., LLC*, 1-17-CV-01009, 2018 WL 2921089 (E.D. Va. June 11, 2018), rev’d and remanded, 922 F.3d 255 (4th Cir. 2019) (defendant’s purpose for using the original work was “informational” in contrast to plaintiff’s “promotional and expressive” purpose for taking the photo), *with Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 263 n.3 (4th Cir. 2019) (reversing, and focusing on “reasonable observer,” not “subjective intent”).

Another option is to provide the judge or jury with competing experts, each testifying as to the meaning conveyed. This happened in the lower courts in the present case.³ Yet art is often ambiguous, and its “meaning” or “message” may prove impossibly elusive. Well-qualified experts acting in good faith—to say nothing

³ *See also Rosen v. Martin*, CV 12-0657 ABC (FMOx), 2012 WL 12845103, at *3 (C.D. Cal. June 7, 2012) (“For their fair use defense, Defendants claim they will present expert testimony that the autographs on the photos make them transformative works, a form of fair use that could defeat Plaintiff’s infringement claims.”).

of judges and juries—can reach dramatically different conclusions about a work’s meaning.

An example outside of litigation proves the point. In 2001, Rotterdam’s Boijmans Van Beuningen Museum hosted an exhibit of works by Hieronymus Bosch. That exhibit had two curators, Paul Vandebroek and Jos Koldewey, who disagreed with each other about the message and meaning of Bosch’s work. Vandebroek “contends that Bosch was the first Netherlandish artist to present a secular vision of society[,]” and he reported that “[to] our eyes, Bosch was an incredibly unpleasant man. His women are harlots or witches, and his paupers, peasants, and beggars seem to deserve their sorry lot.” Brigid Grauman, *Conflicting Interpretations of Bosch*, W.S.J. (Oct. 11, 2001), <https://www.wsj.com/articles/SB1002762724895503160>. Koldewey responded: “Utter nonsense!” He viewed Bosch “as a deeply religious man” and objected: “We cannot conclude from his paintings that Bosch hated women. . . . And if he painted cripples, it was because he wanted to show society’s outcasts.” *Id.* Under Vandebroek’s interpretation of Bosch—but not Koldewey’s—an artist who added somber devotional language to a Bosch painting would have changed its meaning or message from secular to religious.

Accordingly, Vandebroek and Koldewey assigned a different “meaning or message” to Bosch’s specific artwork—even his most famous work, *The Garden of Earthly Delights*. Vandebroek described the central panel as “a depiction of what paradise might have been if Adam and Eve hadn’t spoiled it[,]” whereas

Koldweij believed that it “shows the dangers of the world they lived in, the ‘false paradise’ promised by unbridled sexual pleasure.” *Id.* Predictably, the two co-curators also reached drastically different conclusions about certain secular panels, with Vandebroek describing his own co-curator’s analysis as “Ridiculous!” *Id.* Relevant for present purposes, the expert testimony proffered in this case to the district court also diverged; adjudicating those competing opinions misses the real point of Section 107.



Heironymus Bosch, *The Garden of Earthly Delights Triptych*, Image Copyrighted ©Museo Nacional del Prado

The discord between experts does not merely render expert testimony an inadequate solution; it demonstrates why the “meaning or message” test fails all artists, including those who would borrow from preexisting works. If two co-curators at a major museum cannot agree on the meaning of *the artwork they are exhibiting together*, artists cannot reasonably be

expected to intuit whether or not their planned use of preexisting art will be deemed to have sufficiently changed the original meaning or message.

The “meaning or message” standard provides no reliable guidance, but it imposes a significant cost: subsequent artists risk a monetary judgment if they guess incorrectly. Under the preponderance of the evidence standard, the opposing expert (or other evidence of meaning) need only be slightly more convincing. Moreover, because so much art is reasonably susceptible to multiple interpretations, very few suits could be determined without a trial on the merits, burdening the courts and all parties.

Another concern with focusing the first factor’s analysis on the allegedly infringing work’s “meaning or message” is that *any* transformation can be argued to have changed an artwork’s meaning. This has the potential to decimate an artist’s statutory derivative work right, one of the bundle of rights contained in Section 106 which have been described as “fundamental” to copyright law. H.R. Rep. No. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674. Photographs, due to their born-digital nature, are perhaps the most easily manipulated of all art forms. Moreover, the creativity involved in documentary and portrait photos is often unperceived by a layperson, who may assume their meaning or message to be mere conveyance of information, and deem any change to be fair use. Copyright law, however, is not subject to the layperson’s misconceptions about photography. Rather photographs with the requisite originality, an admittedly

low threshold, receive all the exclusive rights outlined in Section 106. *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (acknowledging that there is “no doubt that the constitution is broad enough to cover an act authorizing copyright of photographs”); *see also Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1074 (9th Cir. 2000) (“Courts as well as photographers have recognized the artistic nature of photography. Indeed, the idea that photography is art deserving protection reflects a longstanding view of Anglo-American law”); *see also* 1 DAVID NIMMER, NIMMER ON COPYRIGHT § 2A.08 (2022) (“almost any photograph may claim the necessary originality to support a photograph merely by virtue of the photographers’ personal choice of the rendition of the image, the subject matter, or the precise time when the photograph is taken.”).

B. Visual art warrants a simple test focused on the statutory language of purpose and character.

Congress explicitly directed courts in Section 107(1) to look at “the **purpose** and character” of the secondary use. (Emphasis added.) The preamble of 107 states that fair use is permissible “for **purposes** such as criticism, comment, news reporting, teaching . . . , scholarship or research[.]” 17 U.S.C. § 107 (emphasis added). “Purpose” is presumed to have its plain meaning unless otherwise noted. *See United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543 (1940); *see also Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004); *Bellino v. JPMorgan Chase Bank, N.A.*, No. 14-cv-3139 (NSR),

2015 WL 4006242, at *8 (S.D.N.Y. June 29, 2015). Here, the word purpose is used twice, in concert, and clearly with the same meaning. Purpose means “the reason for which anything is done, created[.]” *Purpose*, COLLINS ENGLISH DICTIONARY (13th ed. 2018). This definition encompasses both creative motivation and commercial purpose. Courts are entirely capable of looking at the reason for the creation of a secondary work of art in light of the first sentence of Section 107, from which this first factor should not be removed.

The list of purposes for which a visual work might incorporate another in a way that constitutes fair use need not be exhaustively compiled because they share important commonalities. Chiefly, they would all relate back to the original work specifically. Courts could look at what the purpose of each work is and ensure that those purposes differ, if there is to be a finding of fair use.

In the present case, Warhol’s print had the purpose of conveying the visage of rock star Prince in precisely the same composition as Goldsmith’s photograph. Protecting Goldsmith’s right to control her image is in keeping with the objective standards established in Section 107; whether something is criticism or comment, or, for example, the subject of a class, a news report, or a book or film used for educational purposes rather than entertainment can be easily determined without expert training. *See Campbell*, 510 U.S. at 578–79; *TCA Television Corp. v. McCollum*, 839 F.3d 168, 179 (2d Cir. 2016) (observing that “the uses

identified by Congress in the preamble to § 107—criticism, comment, news reporting, teaching, scholarship, and research—might be deemed most appropriate for a purpose or character finding indicative of fair use” (internal quotation marks omitted)). The focus of this factor is whether the use “merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative.” *Fioranelli v. CBS Broad. Inc.*, 551 F.Supp.3d 199, 229 (S.D.N.Y. 2021) (quoting *Campbell*, 510 U.S. at 579). *Campbell*’s allowance of the possibility that transformativeness alone can support fair use should not be interpreted to rewrite the statute to *require* subjective transformativeness or to allow the first factor of a fair use analysis to subsume all other factors.

Many courts have declined to consider the meaning and message of a work in a transformative use inquiry, choosing instead to focus on the purpose and character of that use. *See Ringgold v. Black Entm’t TV, Inc.*, 126 F.3d 70, 79 (2d Cir. 1997) (the use of Faith Ringgold’s story quilt in a TV show served the same decorative purpose as the original work, weighing against fair use); *see also Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014) (enabling full text search of books was transformative because the feature created a different purpose apart from the original author’s intentions); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (the

use of images originally intended for promotional posters served a different, biographical purpose which weighed in favor of fair use).

The better-reasoned opinions understand that allowing small transformations to overwhelm the four factors of Section 107 is a mistake. *See, e.g., Dr. Seuss Enter., L.P.*, 983 F.3d 443 (recontextualizing Dr. Seuss’s book into a Star-Trek adaptation did not comment on the original work or Dr. Seuss’s style, and thus did not weigh in favor of fair use); *Gaylord*, 595 F.3d at 1373 (holding that a photograph of the Korean war memorial made into a stamp did not qualify as fair use of the original sculpture, in part, because “the stamp did not use The Column as part of a commentary or criticism”); *Morris v. Guetta*, No. LA CV12-00684 JAK (RZx), 2013 WL 440127, at *5 (C.D. Cal. Feb. 4, 2013) (the work of appropriation art did not have a purpose or character that weighs in favor of fair use because “there must be some showing that a challenged work is a commentary on the copyrighted one, or that the person who created the challenged work had a justification for using the protected work as a means of making an artistic statement”); *McGucken v. Newsweek, LLC*, 464 F. Supp. 3d 594, 606 (S.D.N.Y. 2020) (“the mere addition of some token commentary is not enough to transform the use of a photograph when that photograph is not itself the focus of the [commentary]”).

In order to give artists, attorneys and courts clear guidelines, the Court should mandate that appropriation art—where one piece of copyrightable work is necessarily and substantially copied—comment on the

original work in order to show a change in the purpose or character of the use. This standard is easier for artists to understand. As noted below, mandating that a secondary artist have a reason for choosing a specific work to reference will not impede their creativity. As in this Court's opinion in *Google*, 141 S. Ct. 1183, which narrowly construed its reasoning to cases involving computer code, this requirement can be limited to cases of appropriation art.

Indeed, a very recent opinion from the Ninth Circuit makes the point, albeit unintentionally, even when grappling with the extent of transformation. In *McGucken v. Pub Ocean Limited*, the court of appeals reversed a district court's finding of fair use of photographs of Death Valley after a rare rainstorm in those "lucky, magically strange, and even eerie minutes" in a desert just after the rain. *McGucken v. Pub Ocean Ltd.*, No. 21-55854, 2022 WL 3051019, at *2 (9th Cir. Aug. 3, 2022) ("When a copyrighted work is used simply to illustrate what that work already depicts, the infringer adds no 'further purpose or different character.'"). After the photographer (McGucken) posted his images to Instagram, several newspapers and periodicals approached him to license the work, which he did. The Defendant, a publisher, posted an article entitled, "A Massive Lake Has Just Materialized In The Middle Of One Of The Driest Places On Earth," and reprinted twelve of McGucken's photographs. Examining the first factor of Section 107, the court of appeals came right to the point: "The article does not present McGucken's photos in a new or different light. It uses

them for exactly the purpose for which they were taken: to depict the lake.” *Id.* at 5. While the court of appeals couched much of its analysis in terms of transformation, in the actual application the court was properly focused on the purpose and character. There may be some hypothetical use incorporating McGucken’s images, or merely a portion of them, that would satisfy Section 107, but Pub Ocean’s use did exactly what Warhol’s did: “to depict [Prince]” at a moment that was, by definition, unique, selected by the photographer, and fully deserving of copyright protection.

1. The Foundation’s analysis would gut protection for photographs.

The importance of copyright protection also stems from the reciprocity between photographers and other artists, such as Andy Warhol. Both Warhol and the photographer mutually benefit from licensing; photographers rely on income from licenses to continue to create, and inversely, without a robust licensing market, appropriation artists have less access to source images that oftentimes, as is the case here, inform many aspects of the subsequent work. *See* Preliminary Expert Report of Professor Jeffrey Sedlik submitted for *Warhol v. Goldsmith* at the district level:

photographers, like other creators, typically rely on both primary and derivative markets for their works. The creation of a photograph is often only the first event in a long series of events throughout the copyright life of that photograph. Revenue (if any) initially

generated by the photographer upon the creation of the photograph is often insufficient to provide an incentive for the photographer to create new works. Instead, photographers and their heirs expect, plan for, and depend upon myriad opportunities to monetize their works in the diverse, global, derivative markets for photographs.

The Foundation illustrates the risks of allowing the misconception that photographs are interchangeable. JA 292 (Sedlik expert report). It argues that Warhol's intent entirely supplanted Goldsmith's, although the contested print remains recognizably hers. The Foundation's observation that other artists made front-on photographs of Prince merely confirms the distinctiveness of Goldsmith's work. Her photograph shares the fundamental essence of the Warhol print in a way that the other front-on photographs of Prince do not. *See* Petitioner's Brief 15 (Goldsmith), 16–17 (other), 19 (Warhol). Warhol's art is fundamentally derived from Goldsmith's—yet the Foundation implies that Warhol simply needed clear documentation about the angles of Prince's face, and Goldsmith happened to have the information he sought. There simply is no depiction of Prince equivalent to Goldsmith's, yet the Foundation cites *Feist* as though Goldsmith merely printed the musician's telephone number. If Goldsmith were to lose her licensing rights through a “meaning or message” argument, *no* photographer can be assured of meaningful copyright protection, gutting not only his or her primary right to exploit that specific image, but also his or her derivative work

right. *See Google*, 141 S. Ct. at 1214 (Thomas, J., dissenting) (“difficult to imagine any circumstance [that] will remain protected by copyright.”).

The nature of the licensing market for photographs, although connected to purpose and character, also deserves to be weighed as part of the fourth statutory factor in the fair use analysis. Considering the potential adverse impact on photographers and licensors of allowing secondary artists to utilize original works without obtaining a license militates against a finding of fair use. *See Harper & Row Publishers*, 471 U.S. at 568 (stating that widespread use that “adversely affects” the market negates a finding of fair use); *see also VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 744 (9th Cir. 2019) (internal quotations omitted) (even though plaintiff “licens[ed] only a handful of photos for secondary uses” the licensing market was “more than hypothetical”).

C. Focus on the purpose and character of works of visual art rather than meaning or message supports free expression.

Interacting with, and borrowing from, prior works is an essential aspect of visual art. Indeed, it is canonical. Among the short list of the greatest painters ever is Diego Rodríguez de Silva y Velázquez, and *Las Meninas* is his crowning masterpiece. The painting depicts the Infanta Margarita—daughter of King Philip IV, Velázquez’s chief patron—and her attendants. Velázquez himself stands to the left of the frame

looking directly at the viewer, painting a canvas whose front cannot be seen. At the rear of the room, King Philip and Queen Mariana can be seen in a mirror, as though they are the viewers seeing their reflection from afar.



Diego Rodríguez de Silva y Velázquez, *Las Meninas*,
Image Copyrighted ©Museo Nacional del Prado

The room is lined with paintings, which arrives at the point here. The Cuarto del Príncipe in the Alcázar of Madrid displayed copies of the portrayals by Peter Paul Rubens of Ovid's *Metamorphosis* by another

artist, portrayals that recognizably, but hazily, can be seen on the walls of the room depicted as a studio in *Las Meninas*. Would this be infringement of Rubens by Velázquez? Of course not. The purpose and character of *Las Meninas* is not to depict Ovid's stories with images slavishly based on Rubens's works. The purpose of *Las Meninas* is to depict the king's family but also announce Velázquez as the greatest painter in the world, greater still than Rubens whose works held a place of prominence in his patron's chamber. Protecting the right of photographers like Lynn Goldsmith would pose no threat were this great icon of art history created today. The simpler purpose and character test advocated here is no threat to that critical expressive value.

Efforts to propose counterexamples of classic examples of art history offered by various *Amici* are not persuasive. One set of *Amici* noted that Vincent Van Gogh had made twenty-one paintings "based on" works by Jean-François Millet. Brief of Art Institute of Chicago *et al.* at 13–14. The brief reproduces one such example side by side.



Van Gogh, *First Steps, after Millet*



Jean-François Millet, *First Steps*

Van Gogh's inspiration by Millet is undeniably central to the evolution of his work. See Alexandra R.

Murphy, *et al.*, *DRAWN INTO THE LIGHT: JEAN-FRANÇOIS MILLET* (Yale 1999). Yet even assuming Millet's work were copyrighted when Van Gogh made his, Van Gogh would not be vulnerable to an infringement claim—and not because his work has a different meaning or message. Van Gogh would be clear of liability because it could barely be considered a copy in the first instance, and its purpose and character is readily distinguishable in a manner that a district court judge could determine at the threshold stage. The central tree in each is different; Millet's is sparse and denuded, while Van Gogh's is bursting with leaves. The trunks branch in different directions. Millet's fence carries off the frame to the right; Van Gogh's is actually a gate through which the space behind can be seen at the right edge of the image. Millet's wheelbarrow is square-fronted, its contents partially visible, while Van Gogh's wheelbarrow is angular and articulated in the front, its load heaped on top. What is the meaning or message of each image? They could be the same; they could be different. Purporting to reach a definitive conclusion would be arbitrary, which is why the inquiry is doomed to fail.

The reasoning of *Kienitz v. Sconnie Nation LLC* accords with this approach. While the allegedly infringing work does reproduce the face of its subject, arguably like Warhol's print, the distinct purpose is plain: to mock a politician for attending a party, a classic example of protected political speech whose purpose is identifiably different from the journalistic purpose of the original. See *Kienitz v. Sconnie Nation*

LLC, 766 F.3d 756, 760 (7th Cir. 2014) (unlike Warhol’s use of Goldsmith’s photo, “by the time defendants were done, almost none of the copyrighted work remained.”).

Adjusting a currently-inflated fair use defense does not mean appropriation art will end; it simply means many appropriation artists will need to obtain licenses for some of the art they use,⁴ just as artists must also buy their canvases or camera lenses—and just as Warhol did.

Warhol was no stranger to the licensing market. He obtained copyright permission for his use of Mickey Mouse and other cartoon characters for his 1981 *Myths* series. By the 1970s, most of his screen prints were based on his own photographs, and he took an active hand in how his subjects were depicted, directing women to wear white makeup to compensate for the flash, or when props were involved, instructing sitters to move them according to his preferences. Richard B. Woodward, *Instant Andy Instant Art*, in *ANDY WARHOL*

⁴ Collage artists would also be protected. If an appropriation artist creates a collage that uses entire works by other creators, as in Richard Prince’s Canal Zone series, the secondary artist frequently changes the work in substantial ways. Courts may also find that a collage has a different purpose than the original work. If they do not, a court may still determine that the use is a fair one based on the other three factors favoring the appropriation artist. For instance, a collage may not pose the market harm to the original work that other types of reproductions do. It is true that the third factor would, in all likelihood, weigh in favor of the original artist, but this just reinforces Congress’s desire for those who take entire works to obtain a license from the original artist.

POLAROIDS 1958–1987 9, 11 (Reuel Golden ed., 2017). Warhol noted that his Polaroid camera “dissolves the wrinkles and imperfections,” and agreed that the Polaroid’s output of color seemed custom-made to his art. Barry Binderman, *Modern “Myths”: Andy Warhol in ART TALK: THE EARLY 80S* 14, 17 (Jeanne Siegel ed., 1988). The need for a license did not have any detrimental effect on Warhol’s creativity, but it did protect the creative works of others.

Warhol also created many works of appropriation art whose purpose and character are easily distinguished and for which the Foundation would have little trouble establishing fair use. For example, Warhol’s *Van Heusen 356* (1985) was a screen print featuring a 1950s promotion of Ronald Reagan advertising a shirt that would not wrinkle, and Warhol’s *Vote McGovern* (1972) appropriated a photograph of Richard Nixon from a *Newsweek* cover (McGovern’s opponent in that year’s Presidential election) dyeing Nixon’s face green and blue akin to the Wicked Witch of the West from the *Wizard of Oz*. Stated succinctly: *Van Heusen 356* was not for the purpose of selling shirts (30 years later, no less) and *Vote McGovern* was not for the purpose of selling *Newsweek* copies, or encouraging votes for Nixon.

In the present case, Warhol and Goldsmith are not adversaries; the question here is the Foundation’s maximalist view of other artists’ work’s availability, and the Foundation’s dismissive treatment of photographs as creative works entitled to protection. The Foundation should instead be guided by its own

namesake: as discussed above, when Warhol himself perceived a need to obtain a license, he did not refrain from creating art; he either obtained a license or created an underlying photograph himself. Indeed, he had a license to use the Goldsmith photograph for the magazine image at issue here (because Condé Nast wished the image Warhol created to look a certain way and also understood the importance of going through the correct channels to obtain a reference work), and his creativity was clearly not stifled. Focusing on the purpose and character of the works at issue will not eviscerate the fair use defense, nor will it disincentivize artists to create. It will allow one group of artists to receive fair compensation for the use of their works while allowing all artists' creativity to flourish.

◆

CONCLUSION

Whether the meaning and message of two artworks differ should not be the basis of a fair use analysis. Congress carefully chose the words purpose and character as the determinative component of the first of four factors. For the foregoing reasons,

Amicus respectfully submits that the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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No. 21-869

IN THE
Supreme Court of the United States

THE ANDY WARHOL FOUNDATION
FOR THE VISUAL ARTS, INC.,

Petitioner,

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF *AMICUS CURIAE* NEW YORK
INTELLECTUAL PROPERTY LAW ASSOCIATION
IN SUPPORT OF NEITHER PARTY**

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INTEREST OF AMICI CURIAE¹

This amicus curiae brief is submitted on behalf of the New York Intellectual Property Law Association (“NYIPLA”).

The NYIPLA is a bar association of attorneys who practice in the area of patent, copyright, trademark, and other intellectual property (“IP”) law. It is one of the largest regional IP bar associations in the United States.

The NYIPLA’s members include various attorneys specializing in copyright law, including in-house counsel for businesses that own, enforce, and challenge copyrights, as well as attorneys in private practice who advise a wide array of clients on copyright matters and procure copyright registrations through the U.S. Copyright Office. NYIPLA’s members represent inventors, entrepreneurs, businesses, universities, and industry and trade associations.

The NYIPLA’s members and their clients have a strong interest in this case and regularly participate in copyright litigation on behalf of both plaintiffs and

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no one other than *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented in writing to the filing of this brief by blanket consent.

defendants in federal court. The NYIPLA supports strong copyright protection, while acknowledging the importance of fair use, and is committed to ensuring that Congress strikes a balance between the exclusive rights of original creators and a meaningful fair use doctrine. The NYIPLA hereby submits its *amicus curiae* brief in support of neither party.²

SUMMARY OF THE ARGUMENT

This Court's test for transformativeness in the fair use analysis of a copyrighted work has been in place for nearly three decades and has been interpreted and applied in various forms to myriad scenarios by circuit and district courts across the country. This case affords an opportunity to clarify the standard and set forth a flexible rubric to accommodate for the various scenarios and applications to which it applies.

² The arguments made in this brief were approved by an absolute majority of the officers and members of the NYIPLA's Board of Directors, but do not necessarily reflect the views of a majority of the members of the Association, or of the law or corporate firms with which those members are associated. After reasonable investigation, the NYIPLA believes that no officer or director or member of the Amicus Briefs Committee who voted in favor of filing this brief, nor any attorney associated with any such officer, director or committee member in any law or corporate firm, represents a party to this litigation. Some officers, directors, committee members or associated attorneys may represent entities, including other *amici curiae*, which have an interest in other matters that may be affected by the outcome of this litigation.

As explained below, the NYIPLA respectfully asks this Court to clarify the transformative test outlined in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), consistent with its other rulings, and undertake a “totality of circumstances” approach instead of holding that any one factor in the transformative test is necessarily dispositive. In particular, this Court should consider artistic intent and change of meaning as just one factor among many to determine the “purpose and character of the use” under the first prong of the Copyright Act’s fair use test. Such an approach would be consistent with how most circuit and district courts across the country have followed this Court’s jurisprudence to decide these fact-specific inquiries over the past three decades.

Here, however, the Second Circuit went too far by concluding that the artist’s subjective intent should not be considered as part of a fair use analysis. While courts should not become art critics, they are well suited to consider evidence of artistic intent and other factors from the artist herself as well as from other evidence, including from experts in the pertinent field. At the same time, the Second Circuit correctly noted that not all changes that add new aesthetics or expressions to the source materials necessarily satisfy the transformative inquiry. Indeed, the change in meaning must be sufficient *to change the purpose or character of the use* in order to differentiate between a

permitted fair use and a derivative work for which a license is needed.

While the proposed flexible rubric will make the transformativeness test more robust, the fair use inquiry should not end on that finding alone. Instead, the inquiry must necessarily consider whether the appropriation of a copyrighted work was necessary to accomplish the alleged transformative work. This prong of the analysis will ensure that the secondary work is in fact a justified fair use and strikes the appropriate balance of protecting both copyright owners and secondary users alike.

This approach will provide a highly flexible and thorough test for the fact-specific transformativeness analysis while at the same time ensuring the promotion of creativity, progress, and enrichment of the public with artistic works.

ARGUMENT

I. The Court Should Clarify That Its Transformative Test Employs a Totality of the Circumstances Approach

This Court's decisions in *Campbell* and *Google* set forth the central inquiry focused on whether a secondary work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is

‘transformative.’” *Campbell*, 510 U.S. at 579; *see also Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183, 1208-09 (2021). The instant case offers this Court the opportunity to clarify that its transformative test should consider artistic intent and change of meaning, not as the sole determinative factor as to whether the copying constitutes fair use, but as one factor among many to determine the “purpose and character of the use” under the first prong of the Copyright Act’s fair use test. 17 U.S.C. § 107.

Although the Court should not take on the role of an art critic in conducting its transformative analysis, courts are well suited to consider evidence of artistic intent, including through expert opinions in the field, and other extrinsic factors. To that end, this Court should adopt a holistic approach to the analysis akin to a totality of the circumstances approach. Here, the Second Circuit declined to consider the artist’s subjective intent as part of a fair use analysis, thereby limiting its inquiry to solely examining “whether the secondary work’s use of its source material is in service of a ‘fundamentally different and new’ artistic purpose and character, such that the secondary work stands apart from the ‘raw material’” used to create it. *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 42 (2d Cir. 2021) (citing *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013)). In so doing, the Second Circuit’s approach unnecessarily truncated the analysis and did not consider that Andy Warhol, for instance, was widely known for creating

artwork that commented on how society views and consumes celebrity, such that the Prince Series might comprise a commentary on celebrity consistent with Mr. Warhol's reputation in the art community.

At the same time, however, the Second Circuit correctly held that not all changes that add a new aesthetic or new expression to its source material are necessarily transformative. *Id.* at 38. The change in meaning or purpose resulting from the transformation must change the purpose or character of the use. *Id.* at 42. This distinction is necessary to differentiate between a permissible fair use and derivative work for which a license is needed. As the Second Circuit correctly pointed out, the Copyright Act of 1976 defines a "derivative work" as a work based on one or more pre-existing works "in which a work may be recast, *transformed* or adapted." *Id.* at 36 (quoting 17 U.S.C. §101) (emphasis added).

Absent a transformation that changes the meaning or purpose of the underlying work, the line between derivative works and transformative fair use becomes hopelessly blurred. Consider, for example, a classic example of a derivative work, the stage or screen adaptation of a novel. A test for transformativeness that improperly considers only whether the meaning or message of the adaptation has changed from the original novel, without considering whether the fundamental character or purpose of the underlying

novel also has changed, renders any such screen or stage adaptation a possible fair use. Such a result will add confusion and uncertainty into the markets for such content, rather than the needed clarity.

By contrast, a holistic, totality of the circumstances test would allow for the necessary flexibility to account for the various situations that arise in connection with the first fair use factor. Indeed, Congress intended flexibility in the fair use test when it adopted a broad construction that left the courts “free to adapt the doctrine to particular situations on a case-by-case basis.” (H. R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66 (1976)). Consistent with the Congressional intent, this Court has explained that the fair use analysis was an “equitable rule of reason” that “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” *Stewart v. Abend*, 495 U.S. 207, 236 (1990).

II. The Court Should Delineate the Factors for Inclusion Under a Totality of the Circumstances Transformativeness Test

This case presents an opportunity for the Court to clarify the factors courts must consider when examining transformativeness under a totality of the circumstances approach. The foundation begins with this Court’s transformative test that courts across the country have applied through the consideration of

numerous and differing factors because such inquiries are necessarily highly fact-specific. These factors, outlined below, would provide the requisite guidance for courts to decide this fact-based inquiry based on the rubric the NYIPLA proposes:

- consideration of the secondary work with respect to its context or the particular circumstances relating thereto, *see Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (thumbnails of photographs for information purpose changed the context of the work for transformative purposes); *Brammer v. Violent Hues Prods. LLC*, 922 F.3d 255, 263 (4th Cir. 2019) (“even a wholesale reproduction may be transformed when placed in a new context to serve a different purpose”) (internal quotations omitted);
- the artistic intent (i.e., a subjective analysis), *Balsey v. LFP, Inc.*, 691 F.3d 747, 759 (6th Cir. 2012) (finding no transformative use because defendant “did not add any creative message or meaning to the photograph”);
- how the “work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work” (i.e., an objective analysis), *see Cariou*, 714 F.3d 694, 707 (2d Cir. 2013);
- whether there is “new information, new aesthetics, new insights and understandings,” *see Blanch v. Koons*, 467 F.3d 244, 251-52 (2d

Cir. 2006) (quoting *Castle Rock Entm't v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998)); *Fox News Network, LLC v. Tveyes, Inc.*, 883 F.3d 169, 176 (2d Cir. 2018);

- the function of the new work, *see A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 139 (4th Cir. 2009); *Perfect 10*, 508 F.3d at 1165;
- any “apparent” new expressive content or message, *see Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1177 (9th Cir. 2013) (“an allegedly infringing work is typically viewed as transformative as long as new expressive content or message is apparent”);
- whether a justification exists for the use along with a changed meaning or message behind the new work, *see Authors Guild v. Google Inc.*, 804 F.3d 202, 215 (2d Cir. 2015);
- “[t]he extent to which unlicensed material is used in the challenged work,” *see Bill Graham Archives v. Doring Kindersley, Ltd.*, 448 F.3d 605, 611 (2d Cir. 2006);
- whether the work simply removes objectionable content, *see Disney Enterprises v. VidAngel, Inc.*, 869 F.3d 848, 861 (9th Cir. 2017);
- whether the change relates simply to format, *see Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 983 F.3d 443, 454 (9th Cir. 2020), cert. denied, 141 S. Ct. 2803, 210 L. Ed. 2d 933

(2021) (no transformative use found where a work was “merely repackaged into a new format”); and

- whether the change merely abridges content, *see Penguin Random House LLC v. Colting*, 270 F. Supp. 3d 736, 750 (S.D.N.Y. 2017) (“U.S. law no longer protects abridgements as fair use”); *see also Folsom v. Marsh*, 9 F.Cas. 342, 344–45 (C.C.D. Mass. 1841).

Although other factors can be derived from the various circuit and district court cases that have applied this Court’s *Campbell* test, the salient point is that numerous factors have been and should be considered based on the particular facts and circumstances presented to courts in each individual case. Under a totality of the circumstances analysis, courts can continue to conduct these fact-specific analyses by using the aforementioned factors to provide certainty and clarity and without undue restriction.

III. The Purpose and Character Inquiry Should Also Consider Whether the Use of the Copyrighted Work Was Necessary or Could Have Been Accomplished by Using Non-Protectable Material

While a totality of the circumstances approach is necessary, the determination of the first fair use factor should not terminate upon the inquiry of transformiveness. Rather, even if a work is transformative, the court should also require

consideration of whether the appropriation of the original work was necessary to accomplish the alleged transformative purpose. As commentators have explained, “while the preamble directs the courts to determine whether the use is of a type potentially qualifying as a fair use, the first factor directs the courts to examine whether the particular use made of copyrighted material was *necessary* to the asserted purpose of criticism, comment, etc., or instead, whether defendant’s purpose could have been accomplished by taking nonprotectable material such as facts, ideas, or less expression.” 2 William F. Patry, *Patry On Fair Use* § 3.1 (May 2018 ed.) (emphasis added).

By analyzing whether the appropriation was necessary, a court can determine whether the secondary work is in fact transformative or instead, simply a gratuitous use of the copyrighted work. This part of the analysis is crucial because “[i]n analyzing a fair use defense, it is not sufficient simply to conclude whether or not justification exists [but instead] [t]he question remains how powerful, or persuasive, is the justification, because the court must weigh the strength of the secondary user’s justification against factors favoring the copyright owner.” Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990).

As applied to the instant matter, once the Court determines whether Warhol’s works at issue are

transformative and have a different purpose or meaning than Ms. Goldsmith's photo, the question becomes whether the appropriation of Ms. Goldsmith's photo was necessary to accomplish Warhol's purpose. If Warhol's artistic purpose was to parody or comment on Ms. Goldsmith's photo or the understanding or presentation of celebrity in America as shown in her photo, then copying elements of the photo may be necessary to the purpose, as was made clear by this Court in the context of a parody. *See Campbell*, 510 U.S. at 581-83 (parody of Roy Orbison song). That said, if Warhol's purpose in creating the Prince Series was to comment on celebrity in America, how necessary to that purpose was Warhol's use of Ms. Goldsmith's photo? If it was not necessary, then using Ms. Goldsmith's photo may be an act for which a licensing fee would be appropriate.

CONCLUSION

For these reasons, the Court should clarify its prior jurisprudence regarding transformativeness.

June 16, 2022

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SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -
ANDY WARHOL FOUNDATION FOR THE)
VISUAL ARTS, INC.,)
Petitioner,)
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LYNN GOLDSMITH, ET AL.,)
Respondents.)
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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 ANDY WARHOL FOUNDATION FOR THE)
4 VISUAL ARTS, INC.,)
5 Petitioner,)
6 v.) No. 21-869
7 LYNN GOLDSMITH, ET AL.,)
8 Respondents.)
9 - - - - -
10 Washington, D.C.
11 Wednesday, October 12, 2022

12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:02 a.m.

16
17 APPEARANCES:
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20 LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of
21 the Respondents.
22 YAIRA DUBIN, Assistant to the Solicitor General,
23 Department of Justice, Washington, D.C.; for the
24 United States, as amicus curiae, supporting the
25 Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case Number 21-869, Andy Warhol Foundation versus Goldsmith. Mr. Martinez.

ORAL ARGUMENT OF ROMAN MARTINEZ
ON BEHALF OF THE PETITIONER

MR. MARTINEZ: Mr. Chief Justice, and may it please the Court:

Both courts below agreed and Goldsmith doesn't dispute that Warhol's Prince Series can reasonably be perceived to convey a fundamentally different meaning or message from Goldsmith's photograph. The question in this case is whether that different meaning or message should play a role, any role, in the fair use analysis.

Our answer is yes. Warhol's transformative meaning puts points on the board under Factor 1 of the four-factor balancing test. Goldsmith and the Second Circuit say no. Warhol's new meaning is categorically irrelevant and can't be considered as part of Factor 1 or any other factor.

1 I want to emphasize three points.
2 First, the precedent supports us. Campbell
3 unambiguously requires an examination of meaning
4 or message. Google reaffirms that test and
5 cites Warhol's soup cans as a paradigmatic
6 example of when it's satisfied. Goldsmith's
7 test is at odds with both cases.

8 Second, our approach, unlike
9 Goldsmith's, maintains a balance between
10 protecting artists' rights to monetize their
11 works and encouraging new and important
12 follow-on expression. We give follow-on artists
13 credit for innovation at Factor 1 while
14 recognizing that Factor 4 and the other factors
15 will sometimes cut decisively the other way.

16 Goldsmith's necessity test, by
17 contrast, upends that balance. It banishes
18 transformative meaning from the equation
19 altogether, and by doing so, it violates 107's
20 text, contradicts precedent, and undermines
21 copyright's key goal, promoting creativity for
22 the public good.

23 Finally, the stakes for artistic
24 expression in this case are high. A ruling for
25 Goldsmith would strip protection not just from

1 the Prince Series but from countless works of
2 modern and contemporary art. It would make it
3 illegal for artists, museums, galleries, and
4 collectors to display, sell, profit from, maybe
5 even possess a significant quantity of works.
6 It would also chill the creation of new art by
7 established and up-and-coming artists alike.

8 These results are repugnant to
9 copyright and to the First Amendment. You
10 should reject them. We ask you to reaffirm
11 Campbell and reverse the decision below.

12 JUSTICE THOMAS: Could you give us an
13 example of any follow-on work that fails your
14 test?

15 MR. MARTINEZ: Sure. I think a
16 classic example would be a -- a book-to-movie
17 adaptation. I think that would be a follow-on
18 work. It would be a derivative work. I think,
19 if you -- if someone were to, you know, try to
20 do that, I think that the -- the original
21 creator, the author of the book, could very
22 easily assert that that was not fair use and
23 would have a winning case under Factor 4 and
24 probably also under Factor 1. And, certainly,
25 that would be a kind of classic example of a

1 follow-on work that would not count.

2 JUSTICE SOTOMAYOR: Why? I mean,
3 derivative works are generally in a different
4 medium, and almost all of them, even a
5 dramatization on -- on theater or even a motion
6 picture or a sequel, they add something new
7 according to your definition in your brief.

8 So why shouldn't they be protected as
9 well according to your theory?

10 MR. MARTINEZ: Yeah, I think -- I
11 think there's a Factor 4 issue and a Factor 1
12 issue. I think the most obvious problem would
13 be a Factor 4 problem for the person who's
14 trying to copy or -- or create the movie
15 adaptation.

16 JUSTICE SOTOMAYOR: I -- I'm sorry. I
17 read Factor 1, the purpose and character of the
18 use, including whether such use is of a
19 commercial nature or is for nonprofit
20 educational purposes.

21 So what's the use here? Is -- I think
22 I have to look at a use under 1 as well. So is
23 the use the creation of the Prince Series by
24 Warhol? Is it the 2016 license of the Orange
25 Prince? That factor, I think, is telling to me

1 to look at a use.

2 So which use are you looking at?

3 MR. MARTINEZ: So -- so we think that
4 both uses are directly implicated in this case.
5 I know there's a significant amount of confusion
6 between our side and the other side on this, so
7 I'd like to try to clarify it.

8 This case came about because Ms.
9 Goldsmith contacted the foundation, asserted
10 that -- that the -- the original Warhol works
11 were infringing, demanded a quite substantial
12 seven-figure sum of money, and also demanded the
13 copyrights in the work.

14 JUSTICE SOTOMAYOR: I --

15 MR. MARTINEZ: We then filed --

16 JUSTICE SOTOMAYOR: -- I'm -- I'm
17 putting that aside.

18 MR. MARTINEZ: Sure.

19 JUSTICE SOTOMAYOR: Okay? They can
20 tell us whether they're claiming -- I think
21 they're out of the statute of limitations, so
22 they can't claim that.

23 MR. MARTINEZ: But --

24 JUSTICE SOTOMAYOR: So I think the
25 only thing they can claim under the statute is

1 the 2016 license.

2 MR. MARTINEZ: No, respectfully, Your
3 Honor, that's not right, because what they
4 claimed in their -- in their brief -- in their
5 complaint, and this is at JA 120 to 121, was
6 that they said that we were not allowed to
7 invoke our copyright in the works.

8 And that wasn't just a past question
9 that's sort of like water under the bridge
10 because of the statute of limitations. That has
11 ongoing significance because, if we --

12 JUSTICE SOTOMAYOR: All right. So
13 then I want to break them down. Assume that
14 it's the creation. I understand your argument.
15 It was a painting. It was a comment on
16 consumerism. If that's all he did, that's one
17 thing.

18 But let's look at the 2016 license of
19 Orange Prince, which is what I thought this case
20 was about, but putting that aside, assume it's
21 that.

22 MR. MARTINEZ: Okay. Assuming --
23 assuming that we're just talking about that
24 piece of the case, the licensing use --

25 JUSTICE SOTOMAYOR: Right.

1 MR. MARTINEZ: -- even with respect to
2 the licensing use, you'd still need to look at
3 Factor 1, which would look at -- at the purpose
4 and character of the use. And that would
5 certainly encompass the fact that Warhol's use,
6 the image that's being licensed, was
7 transformative and created -- and -- and infused
8 a new meaning or message on top of Goldsmith's
9 original work.

10 JUSTICE SOTOMAYOR: That I give you --
11 I spot you. It should be considered.

12 MR. MARTINEZ: Well --

13 JUSTICE SOTOMAYOR: The Second Circuit
14 didn't. But then what do I do with the rest of
15 Factor 1, the purpose and use and -- and
16 character of the use? Because that's not just
17 up to the author. That's up to what was made,
18 what use was made of Orange Prince. It was a
19 highly commercial use. Goldsmith also licensed
20 her photographs to magazines, just as Warhol's
21 estate did.

22 So how is it that your 2006 license
23 and Goldsmith's photographs do not share the
24 same commercial purpose?

25 MR. MARTINEZ: Well, I think that it's

1 -- it's true that -- that there is a -- a
2 commercial purpose and so that might be a factor
3 that would cut against us when assessing Factor
4 1. We think that the -- the -- the quite
5 substantial and -- and this in our view
6 undisputed transformation in meaning or message
7 --

8 JUSTICE SOTOMAYOR: Yeah, but for that
9 --

10 MR. MARTINEZ: -- would -- would trump
11 that.

12 JUSTICE SOTOMAYOR: -- don't we have
13 to look at the context of the use?

14 MR. MARTINEZ: I -- I think you would
15 look at all -- all the factors. But --

16 JUSTICE SOTOMAYOR: Right.

17 MR. MARTINEZ: -- but, again, Your
18 Honor, I think your point, it's not a small
19 point to say that the Second Circuit got this
20 wrong by banishing transformative meaning or
21 message. That's a huge deal.

22 JUSTICE SOTOMAYOR: Assume that it got
23 it wrong. The question is --

24 MR. MARTINEZ: How would we win -- how
25 would we still win?

1 JUSTICE SOTOMAYOR: -- you -- I
2 thought your brief was arguing, and you seem to
3 be arguing something different today, that the
4 transformation standing alone gives you Factor
5 1.

6 MR. MARTINEZ: Right. So --

7 JUSTICE SOTOMAYOR: And I don't see
8 how that can be.

9 MR. MARTINEZ: -- Your Honor, I think
10 that's -- I think -- let me clarify our
11 position. Our position is that Factor 1 has to
12 encompass the new meaning or message. We do not
13 deny that there are other considerations that
14 may bear on Factor 1.

15 We think the district court below
16 correctly recognized that the transformative
17 meaning or message was so significant here that
18 that would mean that we win under Factor 1 and,
19 in fact, you know, for the other reasons under
20 the other factors that we also win the whole
21 case.

22 If you disagreed with us on that, I
23 think what you could do is make very clear that
24 the Second Circuit's banishment of meaning or
25 message from the inquiry was wrong. You could

1 send it back down to them.

2 I think you should say that the
3 transformation in meaning or message here was
4 substantial, but if you thought that other
5 factors had to be weighed, you could send it
6 back down to the district court or the Second
7 Circuit to reweigh that.

8 JUSTICE KAGAN: Mr. Martinez --

9 CHIEF JUSTICE ROBERTS: Mr. Martinez,
10 let -- let's suppose that I think you can do
11 this with technology instead of the mood that
12 Prince is conveying in the Goldsmith photograph.
13 You put a little -- a smile on his face and say
14 this is a new message. The message is Prince
15 can be happy. Prince should be happy.

16 Is that enough of a transformation?
17 The message is different.

18 MR. MARTINEZ: I -- I think you would
19 certainly have to consider the new meaning or
20 message as part of the inquiry. And so, if the
21 question is whether that would be like
22 categorically irrelevant, the answer is no. And
23 I think the Second Circuit would -- would not
24 even consider it, and, therefore, the Second
25 Circuit's wrong.

1 I think, though, Your Honor, you're
2 sort of suggesting, I think correctly, that
3 there might be different degrees in
4 transformation that might make a difference in
5 the analysis. We -- we would agree with that.

6 CHIEF JUSTICE ROBERTS: Well, what I
7 guess I'm trying to suggest is that there may be
8 nothing left to the original author for
9 derivative works. I mean, if that's not a
10 derivative work, it's hard to see what would be.

11 MR. MARTINEZ: Well, I think if you're
12 -- I think it would do two things. First, at
13 Factor 1, you would have to look at the degree
14 of transformation in meaning or message.

15 I think that that wouldn't be
16 dispositive of the fair use question as a whole,
17 though, because I think you would then look at
18 Factor 4 and you would really have to look at
19 whether the market for the new work is -- is
20 in -- in a real substantial way, is going to be
21 a market substitute or compete with either the
22 original work or the potential derivative uses
23 of the original work by the original author.

24 So we think -- we're not denying that
25 Factor 4 is relevant here. We're just saying

1 that for purposes of Factor 1, you certainly
2 wouldn't ignore the transformative meaning or
3 message for purposes of that factor.

4 JUSTICE KAGAN: And --

5 MR. MARTINEZ: It just needs to be
6 considered as part of a holistic analysis.

7 JUSTICE KAGAN: -- can I take you
8 back, Mr. Martinez, to your answer to Justice
9 Thomas's question? Because you said: Well, the
10 classic example of non-transformative work would
11 be a movie from a book.

12 And, indeed, we expect Hollywood, when
13 it takes a book and makes a movie, to pay the
14 author of the book. But I think moviemakers
15 might be surprised by the notion that what they
16 do can't be fundamentally transformative.

17 I mean, mostly movies are tons of new
18 dialogue, sometimes new plot points, new
19 settings, new characters, new themes. You would
20 think new meaning and message.

21 So why is it that we, you know, can't
22 imagine that Hollywood could just take a book
23 and make a movie out of it without paying?

24 MR. MARTINEZ: I -- I -- first of all,
25 I -- I certainly agree with your -- your

1 bottom-line conclusion that you can't just take
2 a book and make a movie out of it. I think the
3 question is how do you get there and how do the
4 different factors play in.

5 We think two factors are relevant,
6 Factor 1 and Factor 4. The other factors are
7 probably also relevant, but Factor 1 and 4 may
8 be the most relevant.

9 With respect to Factor 1, we would say
10 that the normal sort of book-to-movie
11 transition, we don't think that the -- the --
12 the necessary sort of changes in the form
13 from -- from the written word into a movie, that
14 that would inherently be a change in meaning or
15 message.

16 It's possible -- and we think actually
17 in most cases, the -- the change from a book to
18 a movie wouldn't have a different meaning or
19 message, or, if it did, it would be very slight.

20 I think the more fundamental reason,
21 though, why the book-to-movie adaptation would
22 not be fair use is Factor 4, because the classic
23 thing, if you're an author, a successful author,
24 the -- the most natural derivative market -- the
25 derivative use of your work and the potential

1 market for your work, you know, you sell a
2 million copies of your book, the next thing you
3 want to do is make the movie based on the book.
4 That's like the classic thing you would do.

5 And so, of course, if someone comes in
6 and makes the movie, you know, a year before
7 you -- you make it, that would be interfering
8 with the market for your --

9 JUSTICE KAVANAUGH: Isn't the
10 classic --

11 MR. MARTINEZ: -- for your potential
12 market.

13 JUSTICE KAVANAUGH: -- isn't the
14 classic thing with a photograph that it'll be
15 used in stories about the subject of the
16 photograph and, therefore, competing in the same
17 market that this adaptation was used in?
18 Namely, it was used in a story about Prince, not
19 a story about Warhol.

20 And at least from the perspective of
21 the other side and some of the amicus briefs,
22 that's the key distinction here.

23 MR. MARTINEZ: I -- I don't -- I don't
24 think so, Your Honor. I don't think -- and I
25 think the Second Circuit actually agreed with us

1 on this. They said that the -- the -- the
2 primary work itself would not actually compete
3 as a market substitute for -- with -- with
4 Goldsmith's photograph. And I think that's
5 exactly right.

6 I don't think that the -- the standard
7 use of -- of Goldsmith's work would be to
8 create, you know, Warhol-style transformed
9 celebrity, you know, art -- fine art portraits
10 in the way that Warhol did.

11 And I -- I think, in any event, if you
12 had concerns about that --

13 JUSTICE KAVANAUGH: No, but it's used
14 --

15 MR. MARTINEZ: -- it's really a Factor
16 4 --

17 JUSTICE KAVANAUGH: -- I mean, I guess
18 this goes to the use, but it's being used in a
19 story about Prince, just like the '84 story in
20 Vanity Fair.

21 MR. MARTINEZ: Oh, you mean the story
22 like the Vanity Fair article?

23 JUSTICE KAVANAUGH: Mm-hmm.

24 MR. MARTINEZ: I -- I don't -- well, I
25 guess what I would say is that if you think that

1 that's a competing sort of substitute, that's a
2 Factor 4 inquiry. I think that the court below
3 recognized that -- that the Warhol work did not
4 compete as a market substitute at Factor 4 with
5 the Goldsmith photograph and this is really a
6 Factor 1 case.

7 JUSTICE JACKSON: Can I -- sorry.

8 MR. MARTINEZ: Yes, Justice Jackson,
9 sorry.

10 JUSTICE JACKSON: Can I have you focus
11 in on Factor 1 because I sort of thought that
12 that's really what we were focused on here. And
13 you continue to say that meaning and message,
14 you think the problem with the Second Circuit is
15 that they banished meaning and message from that
16 factor. I understand that.

17 But it doesn't help me to understand
18 how you use or you purport to use meaning and
19 message in the context of the purpose or
20 character -- and character inquiry in Factor 1.

21 So I could see, for example, as we
22 evaluate the purpose and character of the use,
23 that you might say: Well, this is a new purpose
24 insofar as our purpose was to provide a new
25 meaning and message. So it's sort of embedded

1 in the consideration of purpose or this is --
2 has a new character because -- because it
3 conveys a new meaning and message.

4 Is that how you're doing this? I
5 didn't see you --

6 MR. MARTINEZ: Sure.

7 JUSTICE JACKSON: -- filtering mean --
8 meaning and message through --

9 MR. MARTINEZ: So --

10 JUSTICE JACKSON: -- purpose and
11 character.

12 MR. MARTINEZ: -- thank you, and thank
13 you for focusing on the text. Let's talk about
14 the text. The text talks about purpose and
15 character. I don't think there's any real
16 dispute about what those words mean. We think
17 that the transformative meaning or message
18 directly affects both purpose and character, so
19 let me just take them one at a time.

20 With respect to purpose, we're talking
21 about visual art, and visual art is intended to
22 be seen by audiences. The -- a major purpose of
23 visual artists is to communicate through their
24 work, you know, when they put the work in front
25 of the audience, certain meanings or messages to

1 that audience.

2 JUSTICE JACKSON: Can I just stop you
3 for a second? Are you just sort of
4 hypothesizing about that, or are you saying that
5 was actually the purpose of this use in this
6 situation?

7 MR. MARTINEZ: I think --

8 JUSTICE JACKSON: Because anybody can
9 sort of say after the fact, oh, a purpose of
10 visual art is X. I thought this was about --

11 MR. MARTINEZ: I think --

12 JUSTICE JACKSON: -- the purpose of
13 the use in this particular case.

14 MR. MARTINEZ: I don't -- I don't
15 think it's -- I don't think it's disputed, and I
16 think it's common sense that -- that artists
17 like Warhol intended their works to be seen and
18 were intending to communicate, you know,
19 messages through their works.

20 JUSTICE JACKSON: So it wasn't the
21 purpose of this particular use to illustrate the
22 Vanity Fair article. This is where the
23 commercial part comes in.

24 MR. MARTINEZ: I --

25 JUSTICE JACKSON: That wasn't the

1 purpose?

2 MR. MARTINEZ: That -- that was part
3 of the purpose if you look at it at a higher
4 level of generality. We're not saying that's
5 irrelevant. But I think even when you look at
6 the actual article it was illustrating, it was
7 illustrating an article entitled "Purple Fame"
8 that was all about Prince's, like, emerging
9 celebrity iconic status.

10 And so it's perfectly natural to
11 illustrate that article that you would want a
12 Warhol-type work that has as its meaning or
13 message a -- a picture of Prince that shows him
14 as the exemplar of sort of the dehumanizing
15 effects of celebrity culture in America.

16 JUSTICE ALITO: How is the --

17 MR. MARTINEZ: But just to go back
18 to -- oh, sorry.

19 JUSTICE ALITO: No, go ahead. Finish.

20 MR. MARTINEZ: But just to go on the
21 text, so I do think that a new meaning or
22 message, like, necessarily changes the purpose
23 of the original work.

24 As to character, just briefly,
25 character just means a quality, trait, or

1 attribute. And, certainly, if -- if the -- the
2 message of the work changes, that would be a
3 quality, trait, or attribute of the work.

4 And I think the problem with
5 Goldsmith's side is that they're essentially
6 arguing that a new meaning or message has
7 nothing to do with purpose, has -- doesn't
8 change the character of the work, and it's
9 just -- the only level of generality you can
10 look at those things is -- is at the level of,
11 well, they're both portraits of Prince, they
12 must be the same. And I don't think that's a
13 common sense or appropriate way to look at this.

14 Sorry, Justice Alito.

15 JUSTICE ALITO: How is a court to
16 determine the purpose of meaning, the message or
17 meaning of works of art like a photograph or a
18 painting? Should it receive testimony by the
19 photographer and the artist? Do you call art
20 critics as experts? How does a court go about
21 doing this?

22 MR. MARTINEZ: So, Justice Alito, I
23 think that the short answer is I think the court
24 can do it in exactly the same way that this
25 Court and the lower courts did in the Campbell

1 case.

2 So, in the Campbell case, the issue
3 was parody, but in order -- one of the issues in
4 the case was whether the 2 Live Crew song was,
5 in fact, a parody. And in order to do that, the
6 Court needed to assess what the meaning or
7 message of the work was.

8 And Justice Souter, in his opinion for
9 the Court at page 583, he -- he sort of, like,
10 does his own analysis. So I think you could
11 just look at the two works and figure out what
12 you think as a judge. But I think that more
13 likely, in most of these cases, the way that
14 they've been litigated for almost 40 years, that
15 the litigants would put forward -- in addition
16 to the works themselves, put forward evidence.
17 Sometimes it's evidence from the -- the creator,
18 both creators. Sometimes it's expert evidence.
19 Sometimes it's other kinds of evidence.

20 But that's sort of like the standard
21 run-of-the-mill way that -- that -- that
22 litigants in -- in these copyright cases try to
23 argue about and establish meaning or message.
24 And we think that's totally appropriate in this
25 circumstance.

1 JUSTICE ALITO: Well, you make it
2 sound --

3 JUSTICE KAGAN: But even --

4 JUSTICE ALITO: -- you make it sound
5 simple, but maybe it's not so simple at least in
6 some cases to determine what is the meaning or
7 the message of -- of a work of art. There can
8 be a lot of dispute about what the meaning or
9 the message is. Some people would say it's not
10 necessarily the meaning or the message that the
11 artist had in mind.

12 I don't know, if you called Andy
13 Warhol as a -- as a witness, what would he say
14 was the purpose of his -- and the -- the message
15 or meaning of his -- of his creation?

16 MR. MARTINEZ: I -- I wish I could
17 answer that question. He's not with us, as you
18 know, Your Honor.

19 JUSTICE ALITO: I know that.

20 MR. MARTINEZ: But I will say -- I
21 will say this about the problem that you've
22 pointed to, which is a real concern, and I
23 understand why it's a real problem. I think
24 that the answer to that problem is solved by
25 Campbell, because Campbell does not say that the

1 court or the fact finder needs to figure out the
2 meaning or message. It says it needs to figure
3 out whether a new meaning or message could
4 reasonably be perceived.

5 And that creates a -- a -- a bit of
6 latitude, of -- of sort of wiggle room that
7 defers to the fact that there might indeed be,
8 you know, a bunch of different reasonable
9 interpretations of art.

10 JUSTICE KAGAN: You say in your -- in
11 your reply brief that the new thing has to be
12 important, correct?

13 MR. MARTINEZ: That's -- taking that
14 from Google, new and important, yes.

15 JUSTICE KAGAN: And -- and -- and how
16 does -- how do you go about thinking about
17 what's important --

18 MR. MARTINEZ: Well, I think you would
19 --

20 JUSTICE KAGAN: -- in the follow-on
21 work?

22 MR. MARTINEZ: I think, in the context
23 of copyright law, you would look at important in
24 light of the objectives of copyright law. And
25 here, it's promoting creativity for the public

1 good. And so you would look at that just the
2 same way that Judge Leval talked about in his --
3 in his decision and I think the way that both
4 the Campbell and Google Courts did.

5 And what Google said, right after it
6 said --

7 JUSTICE KAGAN: I mean, that doesn't
8 give me a lot of specificity. I understand that
9 we're supposed to be encouraging creativity, but
10 -- but what's the difference in the follow-on
11 work that when we look at it, we can say, well,
12 that's an important difference that does
13 something that -- that we really need to hear or
14 to see?

15 MR. MARTINEZ: So what the Court said
16 in Campbell was it equated the new or important
17 inquiry with -- with a serious inquiry into
18 transformative meaning or message. And when the
19 -- when Campbell uses that language, "new and
20 important," it's immediately following the --
21 the sentence where it's quoting -- sorry -- when
22 Google uses that phrase, it's immediately
23 following the place where it quotes the language
24 in Google -- in Campbell that says new meaning
25 or message, you know, count.

1 JUSTICE SOTOMAYOR: Counsel, going
2 back to your answer to Justice Kavanaugh and now
3 to Justice Kagan, what's the right level of
4 generality? You keep going back to the author's
5 purpose, and I can't stay there because, when I
6 look at Harper & Row, we defined the purpose of
7 the use as news reporting. In Campbell, we
8 repeatedly referred to the uses -- the use as
9 its parody character. In Google, we talked
10 about creating a new product that does something
11 different.

12 That's a fairly high level of
13 generality, and that's the level we talked of.

14 MR. MARTINEZ: Well, I think --

15 JUSTICE SOTOMAYOR: And so --

16 MR. MARTINEZ: Sorry.

17 JUSTICE SOTOMAYOR: -- I don't know
18 why the level that we talk about here is the
19 actual use, which is what Section 1 tells us to
20 do, of this piece of art. And we go back to
21 Justice Kavanaugh's point, the specific use was
22 of this one part of the Prince Series, only one
23 level of it, as a photograph in the life of
24 Prince.

25 Now that use -- you say on Factor 4

1 that it doesn't compete with the photograph,
2 Goldsmith's photograph, but hard to see how not.
3 They both sell photographs to magazines, and
4 they both sell photographs to magazines to
5 display Prince's -- Prince's vision or Prince's
6 look.

7 So I guess I go back to my point,
8 which is why isn't the general -- the -- the
9 higher level of generality what Section 1 is
10 looking at?

11 MR. MARTINEZ: Your Honor, I don't
12 think that that's what Section 1 is getting at,
13 but I think Campbell makes that absolutely clear
14 because, if it were the case that you had to
15 look at the higher level of generality, in
16 Campbell, what you would have said is you have a
17 Roy Orbison song that's a work of popular music
18 that's commenting on sexual attraction, and you
19 have a 2 Live Crew song that's also a work of
20 popular music, also commenting on sexual
21 attraction, they would have the same purpose.

22 But you didn't do that. Instead, you
23 said let's -- we need to look at the meaning or
24 message, and then you analyzed whether the
25 second work was -- had a different meaning or

1 message because it was commenting on the first.
2 So you had to do that analysis.

3 And I actually think Goldsmith's test
4 actually requires you to do that analysis.
5 They're not asking you to overturn the parody
6 case law. What they're asking you to say is to
7 -- is that the only meaning or message that can
8 possibly ever count as a difference in meaning
9 or message is when you have a parody. But
10 that's -- that's our --

11 JUSTICE KAVANAUGH: Isn't the --

12 JUSTICE BARRETT: Well, I don't think
13 --

14 JUSTICE KAVANAUGH: -- isn't the --

15 JUSTICE BARRETT: -- that's true. I
16 mean, I -- I think that the -- one -- one thing
17 that Campbell pointed out is that 2 Live Crew
18 couldn't have parodied or -- and this would also
19 apply to commenting on, this would also apply to
20 critiquing maybe in the way that Warhol's
21 Campbell soup painting does, but that you needed
22 the object. He didn't need or Warhol didn't
23 need Goldsmith's particular photo, right? I
24 mean, it could have been a different photo of
25 Prince.

1 MR. MARTINEZ: Well, what Goldsmith
2 said below is that he did need the -- the photo.
3 And I think that's -- that's reflected in the
4 district court opinion.

5 But I think leaving -- just stepping
6 back from the question of -- of need, I think
7 that it's true that in parody there might be a
8 -- an especially strong need to quote from the
9 -- the work that you're critiquing. But that's
10 not -- that doesn't mean that -- that -- that
11 that's a requirement of transformative meaning
12 or message.

13 And as Your Honor pointed out, when
14 Google invokes the soup cans hypothetical, the
15 soup cans -- you know, if you're -- if you're
16 issuing a comment on consumerism, you don't need
17 to use, you know, a copyrighted Campbell soup
18 can logo in order to make that comment.

19 JUSTICE BARRETT: Yeah. But you could
20 use Cheerios. I mean, you'd have to use -- I
21 mean, it doesn't -- it has --

22 MR. MARTINEZ: You could find some --

23 JUSTICE BARRETT: Yeah. It just
24 doesn't have --

25 MR. MARTINEZ: You could find one

1 that's not copyrighted.

2 JUSTICE BARRETT: -- the same punch if
3 it's generic. Well -- okay.

4 MR. MARTINEZ: But I think what -- but
5 I think the soup cans example is especially
6 helpful on that point because it doesn't look
7 for some sort of need or justification. You
8 know, neither party sort of argued and the
9 courts below didn't, like, assess a necessity
10 test.

11 I understand Goldsmith at this stage
12 in the case to be introducing for the first time
13 a kind of indispensability requirement, which is
14 -- has really no footing in any of the Court's
15 case law and really wouldn't make a lot of
16 sense. Certainly, the soup cans example, it was
17 not, like, indispensable for -- for Warhol to --
18 to use the Campbell soup logo in order to create
19 that image, and yet the Court itself recognized
20 that was a paradigmatic example of -- of fair
21 use.

22 JUSTICE KAVANAUGH: You said something
23 a minute ago about commenting on the original
24 being a key feature. And I think that's true
25 with the -- the examples listed in the statutory

1 text as well where they're commenting on the
2 original. And I think that the -- the import of
3 Campbell is that parody is a comment on the
4 original in some respects.

5 But how is a photograph used in an
6 article about Prince commenting in any way on
7 the original photograph? You might say that's
8 the wrong way to look at it probably, but if
9 that's what you're going to say, tell me why.

10 MR. MARTINEZ: Could I just answer the
11 -- the -- your point about the text?

12 JUSTICE KAVANAUGH: Mm-hmm.

13 MR. MARTINEZ: Because I think that
14 the text does not actually require commenting or
15 criticizing the original. It just says comment
16 or criticism. And so there's nothing textually
17 that requires the comment actually to be the
18 original.

19 I think the better way to understand
20 the text is if you look at Justice Blackmun's
21 dissent in the Sony case, not a point that was
22 -- this point was not, you know, what he was
23 dissenting on, but he was describing those
24 different uses, and what he said is that they're
25 all productive uses. And -- and that was the

1 term that was used at that time to talk about
2 the sort of transformative uses --

3 JUSTICE KAVANAUGH: Well, if --

4 MR. MARTINEZ: -- that we're talking
5 about now.

6 JUSTICE KAVANAUGH: -- if you go to
7 Campbell, the -- the part of Campbell right
8 before the part that you quoted says the central
9 purpose of this investigation is to see in
10 Justice Story's words whether the new work
11 merely supersedes the objects of the original
12 creation or, instead, adds something new.

13 MR. MARTINEZ: Exactly. And so I
14 think what -- what "supersedes" is doing there
15 is it's set up as a -- it's juxtaposed as the
16 opposite of what comes after the "instead"
17 clause. And what the "instead" clause is new
18 meaning or message.

19 And so I think what it's recognizing
20 is that the superseding that Justice -- Justice
21 Story was worried about is when you don't have a
22 new meaning or message.

23 JUSTICE KAVANAUGH: Can you go back to
24 the question I asked about --

25 MR. MARTINEZ: Sure. Right.

1 JUSTICE KAVANAUGH: -- when a
2 photograph is used in a --

3 MR. MARTINEZ: Is it commenting on the
4 original?

5 JUSTICE KAVANAUGH: -- in -- in a
6 story about the subject of the photograph, how
7 is that not superseding the object of the
8 original photograph?

9 MR. MARTINEZ: So it's -- it's not
10 because it has a transformative meaning or
11 message. It would have sent a different message
12 to have -- to use the Goldsmith photograph
13 illustrating that "Purple Fame" article. The
14 "Purple Fame" picture, the picture that
15 accompanied that -- that article, was intended
16 to -- or did show its -- its meaning. Its
17 meaning or message was about the dehumanizing
18 effects of celebrity as applied to Prince.

19 The Goldsmith photograph, as she
20 herself said below, this is at JA 490 -- around
21 496, she was testifying as to what she was
22 capturing was a photo realistic portrait of
23 Prince that showed him as fragile and
24 vulnerable.

25 There's no real dispute in this case

1 that the meaning or message of the two works
2 were different. The only real question in this
3 case is whether that difference matters.

4 And it has to matter both because of
5 the text of 107, which talks about purpose and
6 character, and -- sorry.

7 JUSTICE KAVANAUGH: Does it matter,
8 though, how the new photograph, the Warhol
9 photograph, is used? It's used in a magazine
10 article about Prince. That would be one thing.
11 It's used in a museum setting.

12 MR. MARTINEZ: I --

13 JUSTICE KAVANAUGH: That might be
14 something very different because the Goldsmith
15 photograph competes with the Warhol in the
16 first.

17 MR. MARTINEZ: I think, if you're
18 talking about a particular use, absolutely, it
19 would matter for Factor 4. I think it would
20 also potentially matter as to Factor 1, but it
21 wouldn't cancel out the fact that you would have
22 to consider transformative meaning or message.

23 I just want to emphasize, though, and
24 this is a very important point, this case really
25 is not about just the licensing use. This case

1 is about the creation. If you look at the
2 request that -- her request for relief and our
3 request for relief in the original complaints,
4 this was a dispute over who owns the copyright
5 to these works.

6 She was asking for an injunction from
7 us that would prevent us not just from licensing
8 the one 2016 work, she wanted an injunction that
9 would prevent us from reproducing, displaying,
10 selling, or licensing those works.

11 The -- the -- the order that we won
12 from the district court was -- was an order that
13 as a matter of law summary judgment fair use as
14 to all 16 works. She didn't dispute that. In
15 fact, she proposed the order that the district
16 court ultimately issued.

17 So this case is not just about the
18 use. It's about the creation. And the reason
19 that she wants to change the subject and make it
20 only about the creation -- about the licensing
21 use is because she realizes that if this case
22 turns -- this case is about use -- about the
23 creation of the works, then it would have
24 dramatic spillover consequences not just for the
25 Prince Series but for all sorts of works of

1 modern art that incorporate preexisting images
2 and use preexisting images as raw material in
3 generating completely new creative expression by
4 follow-on artists.

5 JUSTICE KAGAN: I -- I wonder, Mr.
6 Martinez, if your case doesn't benefit from a
7 certain kind of hindsight. I mean, now we know
8 who Andy Warhol was and what he was doing and
9 what his works have been taken to mean. So it's
10 easy to say that there's something importantly
11 new in what he did with this image.

12 But, if you imagine Andy Warhol as a
13 struggling young artist, who we didn't know
14 anything about, and then you look at these two
15 images, you might be tempted to say something
16 like, well, I don't get it. All he did was take
17 somebody else's photograph and put some color
18 into it.

19 So -- so it seems that it's harder
20 than you say. I mean, we can't always count on
21 the fact that Andy Warhol is Andy Warhol to know
22 how to make this inquiry.

23 MR. MARTINEZ: Yeah. I think
24 you're -- you're right in part, Justice Kagan,
25 but I actually think that that sort of

1 emphasizes the importance of this case. This
2 case isn't just about Warhol. It's about the
3 young and up-and-coming artists who want to be
4 Warhol's successors.

5 You know, the artists' amicus brief, I
6 think, says that the average, you know, salary
7 or -- or earnings for a young artist is less
8 than \$50,000 a year. Think about what it would
9 be like for that artist who wants to create new
10 and innovative work that integrates preexisting
11 images.

12 If this Court were to adopt
13 Goldsmith's rule and say that that's not going
14 to count, it's -- the fact that you're doing
15 something completely new and different in terms
16 of meaning or message, it makes no difference,
17 that person is going to be dissuaded.

18 They don't want to have -- be tied up
19 in litigation where they're going to have to pay
20 attorneys' fees. They don't want to have
21 their -- their -- their hard work then nullified
22 and their copyrights essentially taken over by
23 -- by people who -- who created the original
24 works.

25 So this case is very important not

1 just for those artists. It's also important for
2 museums, collectors, galleries who want to
3 display these works. I see my time's expired.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Under your test, you know, there are
7 artists whose work consists of a single color
8 within a frame, right? I'm sure you recognize
9 those. And --

10 MR. MARTINEZ: So I've heard, Your
11 Honor.

12 CHIEF JUSTICE ROBERTS: Yeah.
13 Mondrian, Albers. And let's say somebody has --
14 uses a different color. You know, the original
15 is blue, and the -- the -- the allegedly
16 copyright violation work is -- is yellow.

17 Sort of following up on Justice
18 Alito's point, if you got art critics to come in
19 and say that blue sends a particular message,
20 yellow sends a different one, would -- would
21 that satisfy any claim of copyright violation?

22 MR. MARTINEZ: Well, I think, at -- at
23 the threshold, you'd have a question of whether
24 that was -- that was, you know, infringement or
25 not. I don't think anyone can copyright a

1 color. But just assuming it was infringement, I
2 think you would look at --

3 CHIEF JUSTICE ROBERTS: Well, are
4 those -- I mean, maybe you don't know, but, I
5 mean, are those paintings copyrighted or --

6 MR. MARTINEZ: I don't know the
7 specific paintings, Your Honor. Sorry. But --

8 CHIEF JUSTICE ROBERTS: Well, they're
9 framed with a color in them.

10 MR. MARTINEZ: I think, if it was just
11 the color, I don't think you can copyright a
12 color. I do think, though -- let's just assume
13 that -- that you made other changes and there
14 was a -- a -- some sort of minor change.

15 I think you would still do the -- the
16 four-factor analysis. I think, at Factor 1, you
17 would have to look whether there's, in fact, a
18 new meaning or message.

19 It sounds to me like under the
20 hypothetical there's no difference in meaning or
21 message. And so I think it would be a -- a
22 loser under Factor 1.

23 CHIEF JUSTICE ROBERTS: Well, you --
24 you and I might think there's no difference, but
25 I'm sure there's art critics who will tell you

1 there's a great difference between blue and
2 yellow.

3 MR. MARTINEZ: And -- and I think what
4 a court would have to do in -- in -- if you're
5 assessing whether those two works -- again,
6 assuming that there was infringement, assessing
7 whether they had a different meaning or message,
8 you would have to listen to those critics and
9 you -- you know, we see experts on both sides of
10 almost every case, right, and they don't always
11 say the things that persuade the court.

12 And you'd have to take them seriously
13 to the extent that you would listen to their
14 arguments and then you'd judge whether it was
15 reasonably perceived -- whether their view of --
16 of a transformed meaning or message is
17 reasonable, whether it could reasonably be
18 perceived.

19 And I think that in a lot of these
20 cases, where you're really talking about a very
21 minor change and -- and someone is just a
22 knock-off artist making a bogus claim to new
23 meaning or message, I think that juries or fact
24 finders can exercise their common sense and say
25 that there's no transformative meaning or

1 message there.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Justice Thomas?

4 JUSTICE THOMAS: I assume that the
5 Orange Prince is -- is -- is copyright.

6 MR. MARTINEZ: Yes. And I think that
7 copyright's directly at issue in this case.

8 JUSTICE THOMAS: The -- let's say that
9 I'm both a Prince fan, which I was in the '80s,
10 and --

11 (Laughter.)

12 JUSTICE KAGAN: No longer?

13 (Laughter.)

14 JUSTICE THOMAS: Well --

15 (Laughter.)

16 JUSTICE THOMAS: -- so only on
17 Thursday night.

18 (Laughter.)

19 JUSTICE THOMAS: But let's say that
20 I'm also a Syracuse fan and I decide to make one
21 of those big blowup posters of Orange Prince and
22 change the colors a little bit around the edges
23 and put "Go Orange" underneath.

24 Would you sue me --

25 MR. MARTINEZ: Would -- would -- would

1 -- would --

2 JUSTICE THOMAS: -- for infringement?

3 MR. MARTINEZ: -- would the -- would
4 the Warhol foundation sue you if you were to do
5 that?

6 JUSTICE THOMAS: Well, you're their
7 lawyer, so --

8 MR. MARTINEZ: I -- I can't comment on
9 whether we would sue you. But I think, to --
10 to -- to try to get at your question, Your
11 Honor, I think the question of whether that
12 would be fair use, I mean, it sounds like
13 you're, by hypothesis, asking me to consider
14 that there's, like, a different meaning or
15 message associated with the work. I don't think
16 that's the only part of the -- the inquiry.

17 I think that everyone recognizes that
18 at Factor 1, the ultimate goal here is to figure
19 out whether the follow-on user is doing
20 something sort of creative that matters --

21 JUSTICE THOMAS: Oh, I'm just waving
22 it in the -- I'm waving it during the game with
23 a big Prince face on it, Go Orange.

24 MR. MARTINEZ: Yeah. I -- I think
25 that in -- in circumstances like that, it's very

1 unlikely if it was just one of you that -- that
2 -- that anyone would see you.

3 JUSTICE THOMAS: Oh, no, no. I'm
4 going to market it to all my Syracuse buddies.

5 (Laughter.)

6 MR. MARTINEZ: So I think, in that
7 case, the -- a court would -- would quite
8 reasonably look at that and say that this is not
9 the kind of -- of productive creativity
10 promoting use that is -- is --

11 JUSTICE THOMAS: So, in other words,
12 you would sue me?

13 (Laughter.)

14 MR. MARTINEZ: I would not sue -- I --
15 I -- I think that -- I think that you would
16 probably have a very weak case against me, Your
17 Honor.

18 JUSTICE THOMAS: So -- but you've just
19 changed position with Goldsmith then.

20 MR. MARTINEZ: No, not at all, Your
21 Honor. I think that in -- in this kind of
22 circumstance, I think this -- this is totally
23 different because there is a transformative
24 meaning or message and there's an enormous
25 amount of creativity.

1 JUSTICE THOMAS: Well, I had Go Orange
2 under it. I've changed the message.

3 MR. MARTINEZ: Right. But, as I was
4 saying, in addition to the -- the difference in
5 meaning or message, I think it's fair to
6 consider at Factor 1 whether the kind of
7 transformation is the kind that the copyright
8 laws are intended to foster, which is really
9 encouraging follow-on artists to -- to use
10 creativity to kind of introduce new ideas into
11 the public domain.

12 I think that -- that with all respect
13 to your -- your very accomplished re-rendering
14 of Prince, I think that what -- what Warhol did
15 here, as even Goldsmith concedes, was very
16 substantially creative and -- and absolutely is
17 consistent with the goals of copyright law.

18 CHIEF JUSTICE ROBERTS: Justice Alito?

19 JUSTICE ALITO: Very often a popular
20 song will be originally performed by one artist
21 and then other artists come along and perform it
22 in a very different way. Presumably, they think
23 that they are conveying a different meaning or
24 message when they alter the way it's performed.

25 Is it possible for any of them to --

1 that any of them would not be infringing the
2 original copyright?

3 MR. MARTINEZ: I think it would be
4 very hard to imagine a circumstance in which
5 they were not infringing ultimately under the --
6 you know, the full analysis.

7 JUSTICE ALITO: Why would that be?

8 MR. MARTINEZ: Well, I think it would
9 be in part because of Factor 4 because I think
10 that you would have -- you know, it would sound
11 like if you -- if you have -- Roy Orbison does a
12 version of "Pretty Woman" and then another sort
13 of Roy -- Roy Orbison style "Pretty Woman"
14 emerges, I think it would directly compete with
15 the original. So I think you'd have a very big
16 Factor 4 problem.

17 I think, under Factor 3, if you're
18 taking an enormous, you know, percentage of the
19 work, that would weigh against you as well. I
20 think that, you know, would you get points on
21 the board because of a transformative meaning or
22 message? Maybe. But I don't think that in that
23 kind of hypothetical that that would win the
24 day.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: I think my
3 colleague, Justice Thomas, needs a lawyer.

4 (Laughter.)

5 JUSTICE SOTOMAYOR: And I'm going to
6 provide it.

7 I see the first and fourth factors as
8 closely related. And I think he has a better
9 case because he's not using it at the game for
10 commercial purposes. But even if he were, it
11 wouldn't be related to the picture. It would be
12 related to the team. That's no different than
13 that case involving -- what mayor was it?

14 MR. MARTINEZ: The Kienitz case?

15 JUSTICE SOTOMAYOR: Yes, exactly, in
16 which the T-shirts took his face and put
17 something about his -- statement about a party
18 on the T-shirt. And the Court said that's okay
19 because that was really a commentary on a social
20 issue, and it is commercial but in a different
21 way.

22 But I -- what I don't -- having a
23 problem with is, why doesn't the fourth factor
24 just destroy your defense in this case? Meaning
25 you licensed directly to a magazine, which is

1 exactly what the original creator does, and as
2 Justice Kavanaugh said, it was licensing to the
3 very topic that both do, which is two magazines
4 that are talking about the life of Warhol -- not
5 Warhol, but of Prince.

6 So why isn't that direct competition?

7 MR. MARTINEZ: So a couple comments on
8 that. First --

9 JUSTICE SOTOMAYOR: And -- and for
10 commercial purposes.

11 MR. MARTINEZ: First of all, just to
12 -- just to reemphasize, it's not just the
13 licensing use in this case. But just assuming
14 we're just talking about the licensing use here,
15 I think that -- that Judge Koeltl's analysis of
16 Factor 4 is essentially correct. And -- and
17 with respect to the Second Circuit, I think the
18 Second Circuit's analysis of Factor 4 was overly
19 influenced by its impression that these were
20 essentially, for all intents and purposes, the
21 same work because they were both portraits of
22 Prince.

23 If we were going to rerun the Factor 4
24 analysis and if you wanted to look at it, I
25 would just suggest you look at the briefing in

1 -- in the lower courts because we obviously
2 didn't do it here. I think the key things that
3 I would suggest that would deserve attention
4 would be, who is the audience for Warhol,
5 Warhol's licensing versus Goldsmith's licensing?
6 I think there's substantial record evidence
7 showing that the -- the audience is different in
8 terms of the license -- the people who would do
9 the licensing, where Goldsmith's works were
10 predominantly being targeted more to
11 photorealistic sort of like -- you know, like a
12 Newsweek or -- or, in most cases, like rock and
13 roll magazines and other kinds of -- of
14 publications.

15 I think you'd look at the price to see
16 whether there were market substitutes. There,
17 you'd see that Warhol's works, even at the
18 licensing as opposed to the -- the -- the
19 purchase of the original works, were selling for
20 a lot more. I think you would look at the
21 aesthetics. The aesthetics are quite different.
22 And I also think you would look at the
23 transformed meaning or message.

24 All those things, I think -- we think
25 we -- we would win for the reasons that the

1 district court said.

2 If you disagreed with us on that, I
3 think maybe you would say this is a fact issue
4 that's got to go to a jury. But it certainly
5 wouldn't be summary judgment on -- as to Factor
6 4 for Goldsmith.

7 JUSTICE SOTOMAYOR: All right.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?
9 Justice Gorsuch?

10 JUSTICE KAVANAUGH: In 1984, did
11 Vanity Fair need to pay Goldsmith?

12 MR. MARTINEZ: No, Your Honor. I
13 think -- I don't think they needed to pay, but I
14 think what this Court recognized in Campbell is
15 that if people offer to pay or do pay that
16 doesn't -- that doesn't make a difference. I
17 mean, I think, in the 2 Live Crew example, they,
18 in fact, did try to -- to get a license even
19 though, as the Court recognized, it wasn't
20 required.

21 JUSTICE KAVANAUGH: And then, on your
22 point about up-and-coming artists, obviously,
23 that can be played both ways. And some of the
24 amicus briefs -- I just want you to comment on
25 this. One of the amicus briefs says your

1 position poses an existential threat to
2 photographers. So I just want you to comment on
3 that.

4 MR. MARTINEZ: We -- we -- we
5 absolutely strongly disagree with that.

6 JUSTICE KAVANAUGH: And why, though?

7 MR. MARTINEZ: Because we think that
8 -- that the kind of transformation that's
9 important here is -- is -- is something that
10 really adds -- it creates a new original work in
11 a fundamental way, not just because the work's
12 in a different form or because it has different
13 colors; because it has a different meaning or
14 message.

15 And I don't think in the circumstance,
16 especially if -- if we're right on Factor 4,
17 that there's either zero or not much impingement
18 on her market, we don't think that that actually
19 destroys anyone's livelihood.

20 JUSTICE KAVANAUGH: Thank --

21 MR. MARTINEZ: Rather, we think that
22 promotes creativity in artists of all kinds.

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

1 JUSTICE BARRETT: Mr. Martinez, I
2 think one of the problems that you have, as
3 evidenced by a lot of the questions that you've
4 been getting, is with the derivative works
5 protection, you know, which, in, you know,
6 106(2), actually talks about transforming any
7 other form in which a work may be recast,
8 transformed, or adapted.

9 And it seems to me like your test,
10 this meaning or message test, risks stretching
11 the concept of transformation so broadly that it
12 kind of eviscerates Factor 1 and puts all of the
13 emphasis on Factor 4. I mean, when you've been
14 asked about book to movie and -- and -- and, you
15 know, songs, you keep flipping to Factor 4.

16 So, if a work is derivative, like Lord
17 of the Rings, you know, book to movie, is your
18 answer just like, well, sure, that's a new
19 meaning or message, it's transformative, so all
20 that matters is 4?

21 MR. MARTINEZ: I don't think that Lord
22 of the Rings is -- has the -- has a
23 fundamentally different meaning or message, but
24 I would have to probably --

25 JUSTICE BARRETT: The movie?

1 MR. MARTINEZ: -- but I would probably
2 have to learn more and read the books and see
3 the movies to give you a --

4 (Laughter.)

5 MR. MARTINEZ: -- definitive judgment
6 on that. And I recognize reasonable people
7 could probably disagree on that.

8 I think that with respect to the
9 derivative work issue, I think textually it's
10 very important that in the -- in Section 106,
11 when it's -- it's talking about derivative --
12 sorry, in Section 101, when it's defining
13 derivative works and later in the copyright
14 statutes when it's giving protection to
15 derivative works, it says it's subject to
16 Section 107. And so, just textually, we know
17 that the fact that you're a derivative work
18 doesn't mean fair use is out the window.

19 So is there a tension between those
20 two in some cases? I think probably there is
21 some tension, and I think that what it means is
22 that you need to do a very careful analysis of
23 new meaning or message, and -- and it's really
24 going to be only in the cases that -- that there
25 really fundamentally is a new meaning or message

1 that are going to be able to sort of satisfy
2 that first factor.

3 With respect to the balance between
4 Factor 1 and Factor 4, I think Factor 4 plays a
5 role when it comes to some of the very
6 challenging hypotheticals that were put forward
7 by Goldsmith and the government and by the
8 Court.

9 I don't think it's -- it's -- it's
10 really that big a deal in this case, though,
11 because this case really involves a very
12 fundamental transformation in meaning or message
13 and we think very little impingement on the
14 market under Factor 4.

15 JUSTICE BARRETT: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Jackson?

18 JUSTICE JACKSON: Yes. So I've been
19 trying to figure out when you continually say
20 "transformational meaning and message" and
21 you're focusing on meaning and message, it feels
22 like it's doing a lot of work with respect to
23 your Factor 1 analysis, and I think -- I think
24 that it might be because you're conflating
25 meaning or message with purpose.

1 What I've heard you say a couple times
2 is that the purpose of Warhol in this situation
3 was to essentially convey a different meaning or
4 message, that, you know, the original was
5 conveying Prince in a vulnerable light and so
6 the purpose was to convey him in a more iconic
7 way.

8 But the statute -- and I think this is
9 something that Justice Sotomayor has sort of
10 focused on and to some extent Justice Thomas
11 with his hypothetical. The statute seems to be
12 looking at purpose at a -- in a different way,
13 that it's saying the purpose is, are you using
14 it for a commercial nature? Is it going in a
15 magazine or is it going to a school? When you
16 look at the actual text of the fair use factors,
17 it's purpose and character of the use, including
18 whether such use is of a commercial nature or
19 for nonprofit educational purposes.

20 So I think you're actually treating
21 purpose differently than in the statute. So can
22 you --

23 MR. MARTINEZ: Sure. So I think we're
24 -- we're definitely not conflating meaning or
25 message with purpose. I think what we're saying

1 is similar to -- it's not quite conflating, but
2 we think they're related. We think that one way
3 to get to a different purpose is if you have a
4 different meaning or message.

5 Let me just give you an example. Say
6 that you had a portrait of Abraham Lincoln and
7 Abraham Lincoln was depicted in a heroic way.
8 And then you had another portrait that depicted
9 him in a very negative way. I think that the
10 purpose of both of those works would be
11 fundamentally different, and --

12 JUSTICE JACKSON: Absolutely not what
13 the statute says about purpose. You -- you just
14 made my point exactly.

15 MR. MARTINEZ: No, Your Honor.

16 JUSTICE JACKSON: That it's not --
17 there may be a different meaning or message, but
18 if both of those depictions are going in a
19 magazine for a commercial nature, the purpose,
20 the reason why you've used it, is -- is the
21 same.

22 MR. MARTINEZ: Well, let's just look
23 at the moment of creation. At the moment of
24 creation, they have different purposes, I -- I
25 think. One -- one is to show Lincoln as a good

1 guy. One is to show him as a bad guy. And --

2 JUSTICE JACKSON: So what -- what is
3 the work of including whether such use is of a
4 commercial nature or for nonprofit educational
5 purposes? I thought that was Congress telling
6 us what kind of purpose, you know, it cared
7 about.

8 MR. MARTINEZ: Right. I think that's
9 -- Congress is saying that -- it says
10 "including," so it doesn't say that's the only
11 factor, number one. And, number two, as this
12 Court held in Campbell, the commercial use is
13 not like the main event and certainly not the
14 only dispositive event. And that was actually
15 the -- the exact issue in Campbell.

16 JUSTICE JACKSON: Well, but it's a
17 type of purpose. Why are you doing this?

18 MR. MARTINEZ: Of course.

19 JUSTICE JACKSON: You're saying why am
20 I doing this, because I want to depict Abraham
21 Lincoln in a heroic way; when Congress is saying
22 why are you doing this, because I want to put
23 this -- you know, are you doing this because you
24 want to sell it commercially or are you doing --

25 MR. MARTINEZ: But, Your Honor, I

1 think, if that were the way to -- the right --
2 the only level of generality to look at -- we're
3 not -- I'm not denying, by the way, that I think
4 you could look at purpose in that way, and that
5 would also be a -- a legitimate way of looking
6 at it, of -- of considering it.

7 What I'm saying is that you can't
8 exclude meaning or message. And I think the
9 best case to show that is Campbell because
10 Campbell, again, you have two works of popular
11 music that at your level of generality have the
12 exact same purpose.

13 Or entertaining people on the radio.
14 You know, I listened to them on Spotify
15 yesterday. They have the same purpose. What's
16 different between them is the difference between
17 their message.

18 JUSTICE JACKSON: Why isn't that
19 character? Why isn't the difference that you're
20 pointing to character and that's -- and that's
21 something you factor in? I'm not excluding it.
22 I'm just saying it's not purpose.

23 MR. MARTINEZ: We think it's both
24 purpose and character. We think it's purpose
25 because the -- the meaning or message that

1 someone is communicating is tied up with their
2 purpose. If I give a speech that says vote for
3 Biden or vote for Obama or vote for Mitt Romney,
4 I'm giving a speech, but the purpose in giving
5 the speech is to convince people to -- of my
6 meaning or message.

7 JUSTICE JACKSON: All right. One
8 final question. If you -- let's say you win on
9 this point of the Second Circuit made a mistake
10 with respect to the way in which they treated
11 meaning and message and the Court vacates.

12 Would you want us to go on and deal
13 with the other factors or --

14 MR. MARTINEZ: I don't think the other
15 factors are briefed up in this Court.

16 JUSTICE JACKSON: Right.

17 MR. MARTINEZ: And so I -- I think,
18 you know, there are some questions that have
19 been raised about the other factors. I think
20 it's reasonable to think that -- that there
21 might be some factual issues there that should
22 go back -- probably maybe even back to the
23 district court. It could even require a trial.

24 We won at summary judgment on -- on
25 that. But, if you thought differently or had

1 concerns about Judge Koeltl's treatment of the
2 other factors, I think that would be the
3 appropriate disposition.

4 Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 MR. MARTINEZ: Thank you.

8 CHIEF JUSTICE ROBERTS: Ms. Blatt.

9 ORAL ARGUMENT OF LISA S. BLATT
10 ON BEHALF OF THE RESPONDENTS

11 MS. BLATT: Thank you, Mr. Chief
12 Justice, and may it please the Court:

13 Fair use is an affirmative defense.
14 It involves a multi-factor balancing test, and
15 Factor 1 focuses on purpose: What is the reason
16 or justification to take another's copyrighted
17 work?

18 The reason can't be to avoid paying
19 the customary price or the drudgery of coming up
20 with something fresh. The copier has to explain
21 why it needed and not just wanted to use someone
22 else's expression.

23 Here, Petitioner has never given any
24 reason for copying Ms. Goldsmith's picture to
25 commercially license Warhol's Orange Prince in

1 2016. Indeed, Warhol got the picture only in
2 1984 because Ms. Goldsmith was paid and
3 credited.

4 Petitioner responds Warhol is a
5 creative genius who imbued other people's art
6 with his own distinctive style.

7 But Spielberg did the same for films
8 and Jimi Hendrix for music. Those giants still
9 needed licenses. Even Warhol followed the
10 rules. When he did not take a picture himself,
11 he paid the photographer. His foundation just
12 failed to do so here.

13 Petitioner argues adding new meaning
14 is a good enough reason to copy for free. But
15 that test would decimate the art of photography
16 by destroying the incentive to create the art in
17 the first place, and it's obvious why the
18 multi-billion dollar industries of movies,
19 music, and publishing are horrified.

20 Petitioner's colloquial definition of
21 the word "transformative" is too easy to
22 manipulate. The act also gives creators and not
23 copiers the right to make derivative works that
24 transform the original into new ones with new
25 meaning.

1 If Petitioner's test prevails,
2 copyrights will be at the mercy of copycats.
3 Anyone could turn Darth Vader into a hero or
4 spin off "All in the Family" into "The
5 Jeffersons" without paying the creators a dime.

6 I welcome your questions.

7 JUSTICE THOMAS: Ms. Blatt, you, in
8 your -- in your brief and even in your opening
9 statement, you focus on purpose in 107. You did
10 not mention character in your opening statement,
11 and you don't give it a primary role in your
12 briefs.

13 What role does it play in your
14 analysis?

15 MS. BLATT: Character, I mean, I think
16 we don't -- we agree with their definition that
17 character of the use of the copying is one of
18 commercial licensing.

19 And the purpose -- I mean, it's just
20 -- I think that they are very similar here. The
21 purpose and character of commercial licensing,
22 the purpose and character of a parody, I guess,
23 is very similar, so I'm not sure that they ever
24 play and haven't seen them play a distinct role
25 in any of the case law or in the common law for

1 that matter.

2 But -- yeah?

3 JUSTICE KAGAN: How can you inquire
4 into purpose and character without thinking
5 about meaning or message? You know, what --
6 what the first factor is really asking you to do
7 is to say what is this use doing, and how can
8 you answer that question without thinking about
9 the use's meaning --

10 MS. BLATT: So we --

11 JUSTICE KAGAN: -- its message?

12 MS. BLATT: -- we absolutely think
13 meaning and message is relevant as it relates to
14 purpose.

15 JUSTICE KAGAN: So that is different
16 from what the Second Circuit said, because I
17 thought the Second Circuit took it out of the
18 analysis entirely, said it was irrelevant to the
19 question.

20 MS. BLATT: No. And I -- I think
21 that's very unfair to three members of Article
22 III who three times said meaning and message is
23 relevant. What they --

24 JUSTICE KAGAN: Three times.

25 MS. BLATT: Yes. Well, it's -- I find

1 it insulting to the Second Circuit panel when
2 they said do not assume the role of art critic
3 and buy this notion of, well, Prince is shy here
4 and he's iconic there. But, of course, meaning
5 and message is relevant as to purpose.

6 I mean, I can just keep reading you
7 quotes, but you know how to read a decision as
8 best as I do. But, on the very same page
9 they're yacking about, it says it has to be
10 reasonably perceived as having a distinctive
11 artistic purpose, one that conveys a new
12 meaning.

13 It's just saying what you can't have
14 and what we're all unified on, the government,
15 us, and all of our amici, is you cannot have a
16 bare purpose to add new meaning to someone
17 else's art for profit.

18 And if that's all he has, he has
19 nothing else. He has no justification for this
20 other than I wanted to take someone else's art
21 and put my own distinctive style on. And one
22 expert thought that Prince looked happy or dead
23 or, I don't know, larger than life, and one
24 thought he looked -- the artist here thought
25 Prince looked real.

1 And so that is all the Second Circuit
2 had, was they had a district court opinion that
3 went completely, this is a Warhol, and, oh, my
4 God, it's a Warhol, so it's transformative by
5 definition.

6 And the Second Circuit said: No, no,
7 we're not going to do that here. You're going
8 to have to give me something more than this is a
9 Warhol with a distinctive style.

10 JUSTICE ALITO: Well, what's a --

11 JUSTICE KAGAN: And where do you --

12 JUSTICE ALITO: Go ahead.

13 JUSTICE KAGAN: Where do you get the
14 idea that you have to need the -- the original
15 work?

16 MS. BLATT: So where we get the need
17 is from the five times in Campbell that the
18 Court said it, but it's --

19 JUSTICE KAGAN: So Campbell doesn't
20 say that. Campbell says, well, if you need the
21 original work, that's the paradigmatic case.
22 But it doesn't say that if you don't need the
23 original work, the first -- you -- it can't be
24 transformative.

25 MS. BLATT: So, yeah, let me just

1 state our -- our test. When the defendant has
2 an asserted purpose for copying someone else's
3 work, you ask was there -- was the copying of
4 the original needed to best achieve the
5 defendant's -- I'm sorry, yeah, the copier's
6 purpose?

7 Now, in Campbell, it is very
8 significant that they are mis-citing and quoting
9 Campbell. The Court did not hold it could be
10 reasonably perceived as having a new meaning.
11 The Court actually held it could be reasonably
12 perceived as criticizing or commenting on the
13 original.

14 And without that necessary element and
15 the Court five times said it was critical, it
16 was critical, it was the heart, and without the
17 need to mimic, you have no claim to the victim's
18 imagination.

19 And why we know that new meaning could
20 not have been the test --

21 JUSTICE KAGAN: But Campbell starts
22 with a statement of things being new and
23 different and encouraging creativity to give new
24 and different things the kind of fair use pass.

25 And then Google follows up on that and

1 it doesn't talk about -- in -- in -- in -- in
2 your language at all, and it uses Warhol as an
3 example of how somebody can take an original
4 work and make it be something entirely different
5 and that that's exactly what the fair use
6 doctrine wants to protect.

7 So, you know, I take it that Campbell
8 has some language that cuts your way in -- in --
9 in the sense of saying, well, if you are
10 commenting on the original, that's real fair use
11 protection. We almost don't need to go any
12 further.

13 But, if you're not commenting on the
14 original, there's still the -- the possibility
15 under -- under Campbell and then certainly under
16 Google that, yes, this is fair use because it's
17 the kind of thing we think of as truly
18 transformative.

19 MS. BLATT: So I would say you should
20 look at a holding over a dicta that uses a
21 non-statutory word, transformative, when the
22 actual word transformation is in the statute.

23 The dicta that they're relying on is
24 saying we think that when you have a parodic
25 purpose and a parody in the process of shedding

1 light, which I'm just quoting your words,
2 shedding light on the original, you benefit
3 society and create new meaning.

4 But why you know and why all that
5 matters in this case is they had an affirmative
6 defense and they just didn't give you a good
7 reason for copying.

8 And why you know that Campbell just
9 completely rules that out is what mattered in
10 Campbell was exclusively the parodic purpose.
11 If new meaning were and message were relevant,
12 the Court would have been spending the whole
13 time talking about the pretty woman you wanted
14 to meet on the street versus all those not so
15 pretty women you didn't want to meet on the
16 street that were hairy, bald, two-timing Mr. Mix
17 and one was pregnant and wasn't sure whose
18 friend it was. No one was talking about the
19 women's personalities in Campbell.

20 It was just --

21 CHIEF JUSTICE ROBERTS: Was it, Ms.
22 Blatt --

23 MS. BLATT: -- were you trying to
24 criticize. No one was talking about the
25 personalities of George Washington in Folsom

1 versus Marsh. It was just, is this a biography
2 about Washington? And, no, that's too -- that's
3 too -- that's the same purpose.

4 CHIEF JUSTICE ROBERTS: Ms. Blatt, you
5 said that the only thing that's different was
6 the -- the distinctive style of Warhol.

7 I think your friend's point is -- is
8 broader than that. It's not just that Warhol
9 has a different style. It's that unlike
10 Goldsmith's photograph, Warhol sends a message
11 about the depersonalization of modern culture
12 and celebrity status and the iconic -- and --
13 and it goes through the different features to
14 support that.

15 So it's not just a different style.
16 It's a different purpose. One is the commentary
17 on modern society. The other is to show what
18 Prince looks like.

19 MS. BLATT: Yes, I think -- right.
20 And when I say distinctive style, his
21 distinctive style, by definition, is commenting
22 on celebrity and dehumanizing him. And we're
23 saying that that level of what is the
24 personality, what do we perceive in Prince's
25 face, or what we think about when we think about

1 what the author intended, would just drive a
2 giant hole through a derivative work, which, by
3 definition, is a work that adds new meaning to
4 the original.

5 And anytime -- I know you wanted to
6 stick to book versus movies, but any spinoff,
7 any adaptation is -- it just starts with a new
8 meaning. Take "All in the Family." Norman Lear
9 would be turning over in his grave right now.
10 He had more spinoffs than any show in American
11 history. "The Jeffersons" was about a
12 prospering African American family who lived on
13 the East Side. "All in the Family" was about a
14 white bigot living in Queens who couldn't keep
15 up with society. And in his --

16 CHIEF JUSTICE ROBERTS: But they both
17 were -- they both were television shows, right,
18 and they were portraying a particular
19 socioeconomic, whatever, element.

20 This is a whole different thing. The
21 one is a picture. You want it there to show
22 what Prince looks like. So it's a photograph,
23 sure, composed in a particular way and all that.
24 The other, you're not looking at it. The
25 message you have -- if you put them side by

1 side, the message is not the same. The one is
2 Prince's hair is like this. His expression is
3 like that. The other one's entirely different.
4 That's why they put the black around -- around
5 one eye. That's why it's just the disembodied
6 face, all of that.

7 And you don't say, oh, here are two
8 pictures of Prince. You say that's a picture of
9 Prince, and this is a work of art sending a
10 message about modern society.

11 MS. BLATT: That just would turn
12 Folsom versus Marsh on its head, which was they
13 had a completely imaginized autobiography of
14 George Washington, the first president, and all
15 that mattered to Justice Story was that they
16 were depicting -- both works were depicting the
17 life of George Washington.

18 Your test lies madness in the way of
19 almost every photograph to a silkscreen or
20 lithograph or any editing. I guarantee the
21 air-brushed pictures of me look better than the
22 real pictures of me, and they have a very
23 different meaning and message to me.

24 (Laughter.)

25 JUSTICE ALITO: What's your --

1 CHIEF JUSTICE ROBERTS: Well, I think
2 that's not right. I mean, I think you would
3 look at --

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: -- I think you
6 would look at both of them, and one would say
7 those are pictures of the same woman. This one
8 may look a little better than that one, but it's
9 the same woman, it's for the same purpose, it's
10 to show what she looks like.

11 But, if you had a picture, a
12 photograph of you and then a Warhol, you know,
13 it's just not the same thing. You look at the
14 Warhol thing and you say, oh, that's -- you
15 know, that's --

16 MS. BLATT: The problem --

17 CHIEF JUSTICE ROBERTS: -- counsel.
18 The other one --

19 MS. BLATT: -- the problem with this
20 line of -- of theory is you're just putting
21 photography in its own category and saying
22 photography can just be ripped to shreds because
23 you can always edit a picture and make these
24 arguments, black-and-white versus color, et
25 cetera. But, once you move to any other type of

1 medium, books, movies, and songs, these
2 giants -- there are giants in all these creative
3 fields who by very -- by virtue of the fact that
4 they took someone else's worth -- work and
5 transformed it into shows that are way more
6 valuable.

7 If I could just talk about Factor 4
8 because his answer was just astonishing, that --
9 the first half of his argument was solve
10 everything under Factor 4. The last half of his
11 argument is we win in this case under Factor 4
12 because of a trial in a different market. And
13 imagine my Jeffersons hypothetical. Everything
14 he said about Warhol versus a Goldsmith is the
15 same article you could have said about the
16 audiences that want to watch "Mork and Mindy"
17 versus "Happy Days."

18 (Laughter.)

19 MS. BLATT: That is one character from
20 "Happy Days" involving some Martian who came in,
21 and Robin Williams was so funny that a whole new
22 show was created called "Mork and Mindy." They
23 had nothing to do with one another, different
24 audiences.

25 And under his view, just everything he

1 said about Factor 4 you would have a trial in
2 every single case. And he just basically forces
3 all authors to go into Factor 4 with one hand
4 tied behind their back where there's already a
5 finding that this is a transformative work.

6 Ms. Goldsmith lost a -- lost under
7 summary judgment under Factor 4 because the
8 district court said, hey, you have a
9 transformative Warhol, and it is inconceivable
10 that somebody would want a shy-looking Prince
11 over a -- the same market that wants a happy,
12 iconic Prince.

13 JUSTICE JACKSON: Ms. Blatt --

14 JUSTICE ALITO: Ms. Blatt, what --
15 what do you think the Second Circuit meant when
16 it yakked about art critics, about judges not
17 being art critics? Did -- was the -- was the
18 point that a judge is supposed to determine
19 whether -- a person who knows nothing about
20 either of the works of art is supposed to
21 determine whether they seem different? You
22 can't have testimony, evidence about the meaning
23 of those things?

24 MS. BLATT: So the -- the district
25 court -- I mean, sorry, the Second Circuit had

1 left open very large amounts of type of fair use
2 that I think -- or, sorry, transformative
3 purpose that we would not think is correct,
4 where I think, in their view, you can look at it
5 objectively.

6 What the district court -- sorry, the
7 Second Circuit was saying about don't assume the
8 role of art critic was the notion that you would
9 have such a level of specificity as to the vibe
10 that the -- that the character being depicted
11 was giving off, just like the -- the notion
12 of -- you know, we could talk about all kinds of
13 movies and adaptations. Was the character in
14 Jaws, the book, different than the way the
15 sheriff was depicted in the movie? And we could
16 get -- The Shining is the best example. We know
17 Stephen King had a very specific view of who
18 Jack was. It was basically him and it was a
19 tragedy, and we know what Stanley Kubrick did to
20 it. He said I don't like your Jack. I'm going
21 to do my Jack, who's a horror -- a horror film.

22 JUSTICE ALITO: Well, suppose that the
23 Mona Lisa was copyrighted and somebody, a real
24 -- really skillful copyist, made almost an exact
25 copy. Most people could never detect the

1 difference, except the -- the copyist changed
2 the color of her dress.

3 If you showed those two to most people
4 today, they would say, well, all right, brown
5 dress, blue dress, red dress, doesn't make any
6 difference, right? That's not really important.

7 But, if you called somebody who knows
8 something about Renaissance art, the person
9 would say that makes a big difference. If
10 that's a blue dress, that's sending a message.
11 If it's a red dress, that's sending a different
12 message.

13 MS. BLATT: So where I think all this
14 goes wrong is you're just focusing on meaning
15 and message independent of the underlying use.
16 In this case, the statute, just by its terms, is
17 talking about use.

18 And in the case of the Conde Nast, the
19 use is to portray Prince. If you reprint our
20 pictures, whether it's Ms. Goldsmith's or Andy
21 Warhol's, you're commenting on the pictures. I
22 don't think you're saying anything about Prince.
23 Your use of those pictures is to describe and
24 discuss the case, same way with the briefs and
25 news articles. These are news reporting or any

1 kind of commentary about the pictures.

2 And in your Mona Lisa example, fair
3 use never -- I mean, nobody sues an artist or
4 sued 2 Live Crew when they were in the recording
5 studio. You have to look at the actual use.
6 And in -- and in -- and in Campbell, the Court
7 said in a parody, fine, we'll give you -- we'll
8 spot you that, but we'll send it back for a
9 trial under Factor 4. But, if you're going to
10 start using it for advertising, that doesn't
11 count as an appropriate use under Factor 1.

12 The same thing was true in Sony. It
13 wasn't the recording that the Court was focused
14 on. It was the time shifting. When you watch
15 it at home, for -- not for money, you know, not
16 for profit, that's the only way you're going to
17 be able to see the show that the networks were
18 -- were offering.

19 JUSTICE BARRETT: So, Ms. Blatt, what
20 about the use in the museum, like a Warhol
21 hanging in a museum, versus the use in Conde
22 Nast and Vanity Fair? Is there any difference?

23 MS. BLATT: Absolutely and for a
24 variety of reasons. The first is Factor 4. And
25 we have the largest museum in the world sitting

1 next to me on my right, who -- who's on my right
2 and not one on my left. Factor 4 is just
3 different. Goldsmith doesn't compete in that
4 market.

5 On Warhol -- if I can just take you
6 away from Prince -- and also now that this
7 Prince Series is famous, I don't see how any
8 museum can't display these. But the Prince
9 Series is very complicated because of the
10 license. But, if the poster child for museums
11 is Andy Warhol, let them tell you what Andy
12 Warhols they're worried about.

13 He got -- he took all the pictures of
14 the famous ones or he got a license. Marilyn,
15 who's I think worth a lot of money now, that
16 picture is in the public domain. That guy
17 didn't renew the copyright, Gene Korman, before
18 he died and the copyright law was passed. So I
19 don't know what they're worried about.

20 If you look at the pictures in the
21 museum brief, it's a bunch of naked women. And
22 no one is trying to say that naked women are
23 going to be taken down from museums. There is
24 nothing that -- I just -- the pop art they were
25 --

1 JUSTICE KAGAN: But maybe there's a
2 different point about museums, and the point is
3 why do museums show Andy Warhol? They show Andy
4 Warhol because he was a transformative artist
5 because he took a bunch of photographs and he
6 made them mean something completely different.
7 And people look at Elvis and people look at
8 Marilyn Monroe or Elizabeth Taylor and Prince,
9 and they say this has an entirely different
10 message from the thing that started it all off.
11 And that's why he's hanging up on those museums.

12 And that's why whatever the Section 4
13 -- the -- the Factor 4 inquiry might be, that's
14 why it's hard to look at it and not say under
15 Factor 1 that's transformation.

16 MS. BLATT: Well, in our view, that --
17 I mean, I think the government might have a
18 different view under museums, but everyone
19 agrees that in museums there's going to be fair
20 use. And there's also particular provisions,
21 mainly 109, that both our brief and the
22 government's brief talk about that separates for
23 display for museum purposes.

24 But, on your -- under where I think I
25 disagree with you is just that the display in a

1 museum of Prince is still copying and still
2 using Ms. Goldsmith's in a way that doesn't
3 justify the copying of Ms. Goldsmith.

4 Now she doesn't have market harm,
5 still fair use, she can't sue. All remedies as
6 to museums and to possession and sale were
7 waived here in the complaint. You read the
8 complaint accurately, but it was all expressly
9 disclaimed.

10 And so all we have here is the
11 commercial licensing. But you also have a
12 disclaimer both in the Second Circuit and in the
13 Supreme Court that Warhol doesn't have a claim
14 -- I'm sorry, that Ms. Goldsmith doesn't have a
15 claim for museums.

16 JUSTICE JACKSON: Can you --

17 JUSTICE SOTOMAYOR: Counsel -- excuse
18 me. Do you have a claim for the original Prince
19 Series, the original painting?

20 MS. BLATT: So the -- the possession
21 and physical -- the -- it turns on the license
22 because, remember, Warhol had -- there was --
23 these were produced under a license, and so it's
24 unclear whether all 16 were made pursuant to
25 that license or made as drafts.

1 And if Warhol wants to -- and -- and
2 the Warhol -- the Warhol Foundation doesn't even
3 own any of these. So the possession and sale is
4 not -- wouldn't be with respect to them.

5 But assuming that they were all
6 lawfully created, they can be -- then this turns
7 under 109(a), which says you can -- you can sell
8 the possession.

9 JUSTICE SOTOMAYOR: So what do you
10 think --

11 MS. BLATT: What's not protected is
12 just the commercial licensing.

13 JUSTICE SOTOMAYOR: Justice -- Judge
14 Jacobs below said he didn't think that the
15 Second Circuit's decision or injunctive relief
16 encumbered the original Prince Series -- I'm
17 quoting him, I think -- or anything that was
18 hanging in museums and things.

19 Do you read -- what's at issue here?
20 What use is at issue? Is it the 2000 and --

21 MS. BLATT: Only the commercial
22 licensing. And I think 46(a) --

23 JUSTICE SOTOMAYOR: What commercial
24 licensing?

25 MS. BLATT: Of Orange Prince in 2016,

1 plus --

2 JUSTICE SOTOMAYOR: Right, plus.

3 MS. BLATT: -- the request for
4 injunctive relief for other similar commercial
5 editorial licensing, so in -- for magazine
6 usages.

7 JUSTICE JACKSON: Can we go back to
8 your --

9 CHIEF JUSTICE ROBERTS: Thank you.

10 JUSTICE JACKSON: Oh.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas?

14 Justice Alito?

15 Justice Sotomayor?

16 Justice Kagan?

17 Justice -- Justice Jackson.

18 JUSTICE JACKSON: Yes, thank you. Can
19 we go back to the necessary condition?

20 MS. BLATT: Mm-hmm.

21 JUSTICE JACKSON: Because I'm still
22 not quite understanding it.

23 First, I thought there was something
24 in the legislative history that I may have read
25 about Congress considering a necessary condition

1 and taking it out. Does that sound familiar to
2 you?

3 MS. BLATT: No.

4 JUSTICE JACKSON: No? Okay. Maybe I
5 made that up.

6 MS. BLATT: That doesn't mean it's not
7 there. The legislative history, though, is very
8 helpful because it's got -- and I highly
9 recommend the Menell, Balganesh, Jane Ginsburg
10 brief because it gives you all of the complete
11 history and background, and they would read it a
12 little beyond relation back where it's necessary
13 to copy, but it basically is limited to these
14 very core usage -- uses -- usages.

15 JUSTICE JACKSON: But what about --
16 what about commentary? That's what I'm worried
17 about, right? The parody, I understand, you
18 would say it's necessary and so that would fall
19 into your fair use test.

20 But something like the Campbell's soup
21 can where we've already established perhaps he
22 could have used some other item to make the same
23 kind of comment, would that not be necessary?

24 MS. BLATT: No, I think that
25 Campbell's soup fits in two places, and Justice

1 Kennedy's concurrence in Campbell is really good
2 on this point.

3 What Justice Kennedy is saying is that
4 the writer can always pick his target. You can
5 always pick what book review you want to
6 critique or what song you want to parody. So
7 it's never you have to say, well, you didn't
8 necessarily have to pick on my song.

9 So Warhol was entitled to -- to -- to
10 comment on Campbell's Soup as a form of talking
11 about consumerism and make whatever broader
12 point he wanted to make about society. But the
13 Campbell's Soup label, not only is it a
14 completely different purpose because one's an
15 advertising logo that goes on a supermarket
16 shelf to a work of art, but -- and I think the
17 government's brief says this, he can't have used
18 a generic soup can, he had to use the Campbell's
19 Soup logo.

20 Same as if he had picked Cheerios.
21 It would have been really weird to do, I guess
22 back then they didn't have the giant Cheerios,
23 but you've got to use Cheerios to make your
24 point about consumerism and brand loyalty.

25 JUSTICE JACKSON: You're saying it's

1 still necessary?

2 MS. BLATT: Absolutely necessary.

3 JUSTICE JACKSON: Some -- some branded
4 product?

5 MS. BLATT: And what the government
6 would say, and, obviously, the government can
7 speak for herself, but it's -- they would say at
8 least useful. And we're okay with that. We're
9 actually okay with anything other than the new
10 meaning or message test.

11 JUSTICE JACKSON: But you're -- so --
12 so you're -- the Second Circuit looked at this a
13 certain way. And are you saying they -- they
14 did it wrong?

15 MS. BLATT: No, they did it absolutely
16 correct because they were just rejecting the
17 district court and saying, we're leaving open
18 everything but something that says Prince looked
19 iconic versus Prince looked shy based on these
20 interpretations of what one might reasonably
21 think of Prince's, I don't know, mood or
22 something, or personality.

23 But I read the Second Circuit as way
24 broad, saying, you don't have to comment. I
25 mean, I think they leave open all kinds of stuff

1 like collages, like if you took a picture of
2 Prince and made him into a -- like Goldsmith's
3 Prince and made him into a big butterfly, I
4 think they would say that's completely fair use.

5 So I think, for your purposes, and
6 which is what's driving all the -- you know, the
7 amici being kind of very upset here, is just to
8 reject a new meaning or message test where it's
9 just a bare, unadorned new meaning or message
10 test. It's not tied to any purpose other than I
11 want to make some money off some art and I had
12 some really cool idea here.

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Ms. Dubin.

17 ORAL ARGUMENT OF YAIRA DUBIN

18 FOR THE UNITED STATES, AS AMICUS CURIAE,
19 SUPPORTING THE RESPONDENTS

20 MS. DUBIN: Mr. Chief Justice, and may
21 it please the Court:

22 Two questions drive Factor 1: Does
23 the use serve a distinct purpose or instead
24 supersede the original and what is the
25 justification for copying? Both point against

1 fair use here.

2 The foundation has never tried to show
3 that copying the Goldsmith photographs' creative
4 elements was essential to accomplish a distinct
5 purpose.

6 And the foundation commercially
7 licensed Warhol's Prince to serve the same
8 purpose as the original, depicting Prince in an
9 article about Prince.

10 Using another artist's work as a
11 starting point to turn around and compete
12 directly with their original has never been
13 considered fair. The foundation suggests
14 otherwise, only by urging you to look primarily
15 to what the silk screens mean rather than why
16 the copying was justified.

17 The Court should reject that test. It
18 misreads Campbell, it requires courts to inquire
19 into the meaning of art, and it would
20 destabilize longstanding industry licensing
21 practices that promote the creation of original
22 works. Sequels, spinoffs, adaptations all
23 become fair game if conveying a different
24 meaning confers license to copy.

25 I welcome the Court's questions.

1 CHIEF JUSTICE ROBERTS: Counsel, in --
2 in what way is the government's position
3 different from that of Respondents?

4 MS. DUBIN: We agree with Respondent
5 that the most straightforward way to establish
6 fair use under the first factor is if your work
7 is -- if your use is commenting on the original,
8 criticizing it or otherwise shedding light on
9 the original, but fair use is an affirmative
10 defense.

11 And we would leave open to defendants
12 in various cases to establish that their copying
13 was justified for other reasons. The problem
14 with Petitioner's approach here is that they
15 haven't tried to establish that the copying was
16 justified, just that the meaning of the works
17 was different. And the Court has never
18 recognized that to be a sufficient justification
19 under the first factor.

20 CHIEF JUSTICE ROBERTS: Well, you
21 agree, don't you, that the -- the Warhol work is
22 not a commentary on the Goldsmith photograph,
23 right?

24 MS. DUBIN: We would agree. And they
25 have never argued that.

1 CHIEF JUSTICE ROBERTS: And Goldsmith
2 had a very different purpose than Warhol. She
3 was photographing Prince. This is what he looks
4 like.

5 Now a lot goes into that composition,
6 but it's not that Warhol's work was just a
7 different composition, was it?

8 MS. DUBIN: We think that the relevant
9 question is what is the use at issue here, and
10 the use at issue here is to depict Prince in an
11 article about Prince, which is very similar to
12 the purpose at issue when Goldsmith took the
13 photo.

14 CHIEF JUSTICE ROBERTS: But, if you
15 really wanted to know what Prince looks like,
16 you wouldn't get that from Warhol's depiction.
17 He doesn't have one eye that's, you know,
18 blacker than the other. He -- his head doesn't
19 float in the air as it does in Warhol's but not
20 in Goldsmith's. And that's because -- I think
21 your friend on the other side would say it's
22 because the purpose of that picture is not to
23 show you what Prince looks like. It's supposed
24 to show you a particular perspective on the pop
25 era and celebrity status. No?

1 MS. DUBIN: Those changes that Your
2 Honor is discussing are the same sorts of
3 changes that really accompany the adaptation or
4 transformation of any derivative work. You can
5 imagine all of those comments being made about a
6 book being transformed into a movie. Those are
7 comments about a change in style, a change in
8 aesthetic appearance, and things of those
9 nature.

10 That has never been thought sufficient
11 under the first factor to be a different
12 purpose.

13 JUSTICE JACKSON: What about
14 character? Is that sufficient for character?
15 You talk about them together. And so is
16 character doing different work at all in this
17 analysis?

18 MS. DUBIN: The Court has long
19 considered them together as a unit and then done
20 an inquiry into purpose and character together.
21 We think that if you were inclined to do so, you
22 could look at character as focusing more on the
23 commercial nature of the works -- of the use at
24 issue and the purpose as looking to, you know,
25 what was the justification for copying.

1 But either way, you would come to the
2 same analysis here, which is that this is a
3 highly commercial use that usurps the market for
4 the original and that the justification for
5 copying isn't present.

6 JUSTICE JACKSON: But the meaning of
7 message you say is not indicative of character?

8 MS. DUBIN: That's not our position.
9 The position is that meaning or message can be
10 relevant insofar as it assists the Court in
11 determining what is the purpose and character.
12 And I think that's exactly what the Court looked
13 at in Campbell.

14 In Campbell, the Court looked at the
15 meaning or message of the 2 Live Crew song to
16 determine if it was, in fact, a parody and
17 therefore had purpose and character that we're
18 looking for under Factor 1.

19 JUSTICE KAGAN: The -- the purpose of
20 all copyright law is to foster creativity. So
21 why shouldn't we ask at Factor 1, not in a
22 determinative way, there's Factors 2, 3, and 4,
23 but in Factor 1, well, is this really creative?
24 Is this thing we have here something new and
25 entirely different? That seems -- you know, it

1 seems to fit right into why we're having this
2 inquiry in the first place.

3 MS. DUBIN: The purpose of the
4 copyright law are to serve as the engine of free
5 expression, but the balance that Congress struck
6 in achieving that is to say we do that best by
7 protecting the rights of original creators and
8 protecting the incentive to create with a safety
9 valve --

10 JUSTICE KAGAN: Except when we don't.
11 I mean, we protect original creators except when
12 we don't, and the purpose of the entire thing is
13 to foster creativity. So why shouldn't we ask
14 whether, at the follow-on level, there really is
15 creativity here?

16 And then we can ask a whole bunch of
17 other questions about -- about markets and --
18 and so forth, but -- but to -- to take that out
19 of the analysis, to say it doesn't matter that
20 some -- that the follow-on work is -- is -- is
21 adding something of real significance to
22 artistic expression, why would we do that?

23 MS. DUBIN: I think the most
24 significant difficulty with -- with Petitioner's
25 approach is not -- we're not trying to take it

1 out of the equation. It's not about putting
2 points on the board. It's whether it goes to
3 the purpose and character of the use.

4 And I think -- maybe this helps with
5 what Your Honor is driving at. In the statute,
6 there is a specific right given to the copyright
7 holder to derivative works, to prepare
8 derivative works. And that provision looks to
9 whether a secondary work transforms -- that's
10 the language of the statute -- the original. So
11 Congress thought about this question and gave
12 that right to the original copyright holder.

13 Someone who wants to make a
14 creative -- a very, very creative work can go
15 and license that work to use it, or they can
16 justify why they needed to take this work or why
17 it was essential or highly useful to take this
18 work in order to create the work.

19 But what's going on here is you have
20 someone who's just saying my second work was
21 very creative, my second work was transformative
22 in the colloquial sense. And that doesn't fit
23 within the definition of derivative works versus
24 the safety valve for fair use.

25 JUSTICE JACKSON: Can I -- can I just

1 paraphrase what I thought I heard you say?

2 Because I'm not an expert in this area.

3 So the whole of copyright law itself
4 in this area is to give the person who has the
5 copyright the right to make other uses of the
6 thing. It's sort of like a property interest in
7 -- I get to -- I, because I hold the copyright,
8 get to make other uses. So, when someone else
9 makes another use of your thing, you then can
10 question, you then say: Why are you using my
11 thing to do your work?

12 And I think your argument is, if that
13 person says I'm using your work because I have a
14 better idea or because I want to add a little
15 thing to it or because I want -- that's not
16 going to be good enough. They have to say I'm
17 using your work for some other purpose that's --
18 that's outside of or in addition to I want to
19 add a new meaning.

20 Am I right -- at a very high level of
21 generality, did I sort of get what your point
22 is?

23 MS. DUBIN: I think you got it exactly
24 right, Justice Jackson. That -- that is our --
25 that is our point. The point is that you have

1 to justify the copying, not just explain why
2 your work is a creative addition to the world of
3 creative additions. And I think that's
4 important because of the derivative work right
5 that I was discussing, and it's important
6 because of sort of how the licensing regimes
7 work across industries where there are many,
8 many very, very creative people who are
9 producing derivative works, whether it's the one
10 that Respondents' counsel already addressed, but
11 it's -- it's -- you know, it's Spielberg, it's
12 Scorsese, it is so many people who do tremendous
13 creative additions to the work that they're
14 using, but because they don't have the sort of
15 justification for copying, they need to get a
16 license.

17 JUSTICE SOTOMAYOR: How do we get --
18 how do we fit your answer to the following
19 scenarios, okay? Do you acknowledge that a
20 commercial licensing would be fair, such as an
21 authorized reproduction of Orange Prince in an
22 art magazine or in a book about Warhol?

23 MS. DUBIN: We would analyze that by
24 running through the four fair use factors, and I
25 think in that case --

1 JUSTICE SOTOMAYOR: How would you deal
2 with the first one? Because it is a commercial
3 use. It's use of a painting that you say is a
4 derivative -- derivative work. So how do we
5 explain that?

6 MS. DUBIN: Right. I think Factor 1
7 and Factor 4 might play out differently than
8 here. Factor 1, you might say the purpose is to
9 say something about Warhol, to teach about
10 Warhol. And under Factor 4, you might say that
11 it's very unlikely that that would harm the
12 market for the Goldsmith photograph because her
13 photograph could not be used for that sort of
14 occasion.

15 JUSTICE SOTOMAYOR: So how about the
16 commercial license for Orange Prince, like
17 happened here? Why do you say it doesn't fit
18 for a magazine about Prince's life?

19 MS. DUBIN: Because the purpose of the
20 Goldsmith photograph is to depict Prince, and
21 while there might be differences in how she did
22 it and how Warhol did it, they were both being
23 used in this -- when you compare the two, the
24 work and the -- and the use, they're both being
25 used for the purpose of depicting Prince. Let's

1 have it --

2 JUSTICE SOTOMAYOR: So let's go back
3 to Vanity Fair, which was -- it was paid for,
4 but assume it wasn't, okay? But Vanity Fair was
5 an article about Prince, but its focus was on
6 his superstar status, his consumer sort of life.
7 It seems as if those purposes coexisted -- not
8 coexisted but were joined at the hip with using
9 a Warhol because Warhol was known for making
10 commentary on the very same issues.

11 So did they -- why would they have
12 needed a license back then?

13 MS. DUBIN: I think the key to
14 thinking about this case is what is the
15 justification for borrowing. Why did you need
16 to take the creative elements of the Goldsmith
17 photograph? So, to produce the Warhol version
18 of Prince, Warhol could have taken a photograph
19 of Prince himself. He could have used other
20 photographs. He didn't need to reproduce the
21 creative elements of the Goldsmith photograph to
22 have that effect.

23 JUSTICE ALITO: Well, what if Andy
24 Warhol -- what if Prince would not have sat for
25 a photo by somebody sent by Andy Warhol, and

1 Andy Warhol wanted to comment on Prince, and
2 what he needed was a full-face portrait looking
3 straight ahead, and I don't know how many of
4 those were available, but he had to take one of
5 those, so he chose this one?

6 Wouldn't -- wouldn't he have --
7 wouldn't it be highly necessary for him to take
8 one of those photos to do what he wanted to do?

9 MS. DUBIN: You might have a different
10 argument in a case where, you know, someone
11 has -- has passed away and there's only one
12 version of the photograph that you could
13 possibly use. That might be a different case,
14 and you might be able to establish a
15 justification for borrowing.

16 And, like I said, we don't want to
17 foreclose additional justifications working, but
18 this is a very different case. What happened
19 here is that Vanity Fair, because they had a
20 license, picked this photograph and gave it to
21 Andy Warhol so that he could produce an image of
22 it. And that's the opposite of having a
23 justification for borrowing. That's I wanted to
24 start here because it was a very good photograph
25 of Prince, and that enables Andy Warhol's

1 duplicative methods because it works to
2 reproduce that as a photographic negative.

3 JUSTICE ALITO: Is that dependent on
4 the fact that he could have picked another
5 photo? Do we know that there were other photos
6 that met the criteria that I mentioned?

7 MS. DUBIN: There were other full --
8 full-face photographs of Prince. I think
9 they're in Respondents' -- in Petitioner's
10 brief. And I also think very much in his -- in
11 Andy Warhol's life, after the 1960s, when he was
12 sued for copyright infringement, he often took
13 photos of the people he was going to paint, and
14 so that, you know, was Dolly Parton, Jane Fonda,
15 and many other celebrities.

16 JUSTICE BARRETT: So I have a question
17 about the derivatives. When I asked your friend
18 on the other side about derivative use and the
19 tension between the transformation point here,
20 and you also pointed to the language that I
21 asked Mr. Martinez about, the transformative in
22 the derivative use provision, he responded to
23 me, well, sure, but, you know, that's also
24 subject to the fair use statute, so they have to
25 be read, you know, in tandem.

1 What's your response to his point?

2 MS. DUBIN: We think they have to be
3 read in tandem, although the word "transform" is
4 in the provision for derivative works, and it is
5 not in the fair use factors. It was, I think, a
6 shorthand for purpose and character inquiry
7 drawn from Judge Leval's articles, which all
8 look to transformative purpose, not
9 transformative content, which is, I take it, how
10 they are framing the case.

11 I do think that if you are sort of
12 thinking about how to balance those rights and
13 carve out space, you would never want a reading
14 of the fair use safety valve that totally
15 eviscerates the derivative work rights. And
16 that's what we're particularly concerned about
17 with Petitioner's test here, because so many
18 derivative works can be described as conveying
19 new meanings or messages.

20 JUSTICE KAVANAUGH: You said in your
21 opening that the position of Petitioner would
22 destabilize longstanding industry practice. So
23 why -- can you flesh that out, why you think
24 that?

25 MS. DUBIN: Yes, and that follows

1 right up from what I was just saying to Justice
2 Barrett, which is across industries there's --
3 one of the -- the greatest incentives given to
4 original -- original artists to create
5 particularly in spaces where the original work
6 maybe doesn't have the same commercial viability
7 as derivatives, the incentive is the licensing
8 of derivatives, so whether that's photographers,
9 books who are hoping that a movie takes their
10 book, things of that nature.

11 All of those, I think, would be
12 subject to a different meaning or message
13 analysis like Petitioner proposes here. And so
14 it's whether, I think Justice Kagan said
15 earlier, the -- the plot is changed, the story
16 line is altered, new characters are added. It
17 would seem to me it's very hard to distinguish
18 those from what's going on here, which is
19 suggesting that a change in a particular face
20 from vulnerable to iconic is enough to justify
21 fair use under the first factor.

22 And, you know, Petitioner has said
23 today that it's really more about putting points
24 on the board. But the way that I had understood
25 their test is that they said that that sort of

1 meaning or message renders fair use presumptive,
2 and that's in their brief at 40. And I think
3 that's the particular danger of an approach like
4 that as to how much meaning or message could
5 tilt the test and how frequent you'd be able to
6 find a new meaning or message and how hard it
7 would be to disprove.

8 JUSTICE JACKSON: So, if we agree with
9 you that the first -- about the mistakes or
10 affirm on the grounds of the first factor, why
11 wouldn't we just vacate and send it back and let
12 the Second Circuit go ahead and do all the other
13 aspects of the analysis?

14 You asked us to affirm. And I'm just
15 wondering, since it wasn't briefed, two, three,
16 four, why -- why wouldn't we send it back?

17 MS. DUBIN: If you agree with us?

18 JUSTICE JACKSON: Yes. Are you asking
19 to affirm?

20 MS. DUBIN: Yeah.

21 JUSTICE JACKSON: Yes. And my
22 question is why -- why are you asking to affirm
23 the entirety of the Second Circuit's analysis in
24 this case as opposed to sending it back and let
25 the rest operate? Is that not what's happening

1 here?

2 MS. DUBIN: The Second Circuit made --
3 ruled on the second, third, and fourth
4 factors --

5 JUSTICE JACKSON: Correct.

6 MS. DUBIN: -- and they did so
7 correctly. So there's no reason I --

8 JUSTICE JACKSON: But that part is not
9 briefed. I mean, we haven't gone through the
10 second -- is that -- is the second, third, and
11 fourth factors briefed before us now?

12 MS. DUBIN: Petitioner only sought
13 certiorari on the first factor. So I think, if
14 you were going to reverse or vacate, you would
15 do so on the first factor, but I think it is
16 well within the Court's purview to affirm based
17 on agreeing with one of -- either how we have
18 approached fair use under the first factor or
19 with agreeing with the Second Circuit and then
20 affirming on the rest of the Second Circuit.

21 JUSTICE JACKSON: But would we go
22 through the rest of the analysis? We wouldn't
23 talk about it, we would just affirm and move on?

24 MS. DUBIN: I think that would be what
25 you would do if you were limiting yourself to

1 the way that Petitioner has framed this case.

2 If there were things at the point the
3 Court wanted to clarify to help the lower courts
4 in this difficult area on a case-by-case basis
5 in the second through fourth -- second through
6 factors, the Court could -- could certainly do
7 that.

8 JUSTICE SOTOMAYOR: Can -- can I ask
9 the question slightly differently, which is
10 let's assume we adopt Petitioner's first
11 argument, the argument first raised here,
12 because he seemed to be saying in his briefs
13 that meaning and -- that meaning trumps
14 everything else, but, here, he says it's only
15 one variable.

16 Let's assume that we were to find that
17 the Second Circuit should have given more weight
18 to meaning, and so that the first factor is at
19 either an equipoise or slightly favors him or
20 whatever, or favors him a lot, why would we
21 affirm and not vacate and remand?

22 MS. DUBIN: So we think that the --
23 the Second Circuit did consider meaning or
24 message. We agree with Respondent. They --
25 they do mention that they considered meaning or

1 message several times in their analysis.

2 But, if the Court found that they
3 didn't weigh it heavily enough or you agree with
4 the position being put forth by Petitioner
5 today, then I think the right answer would be to
6 vacate and have the court run the analysis with
7 that change on Factor 1.

8 JUSTICE SOTOMAYOR: Okay.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas, anything further?

12 Justice Alito?

13 Justice Sotomayor, anything further?

14 Justice Kagan?

15 Justice Gorsuch?

16 JUSTICE GORSUCH: I am a little
17 uncertain about the government's position on
18 what it means in Factor 1. The purpose of the
19 use could mean, as we've discussed, they are
20 both being used for identifying an individual in
21 a magazine, okay, or it could mean the purpose
22 of the use could have something to do with the
23 artistic message being conveyed.

24 I've heard bits of both flavors from
25 -- from both sides in this case. And -- and,

1 certainly, the Second Circuit thought that the
2 -- the latter idea, that there's some artistic
3 message that's relevant at Step 1 is part of the
4 analysis.

5 And what is the government's position?
6 I -- I -- I -- I -- I could see possibly saying
7 oh, no, it's only that it's being used for
8 commercial purposes in a magazine. It's the
9 same use of the image and that any differences
10 between the images is something that we take
11 account of maybe in -- in Factor 3, which has to
12 do with the amount and substantiality of the
13 portion used.

14 Can you help clarify that for me?

15 MS. DUBIN: Yes. We think it's
16 principally the purpose and character of the
17 use. It's a broad inquiry. And we're not
18 trying to carve out certain justifications from
19 not being made.

20 But what you are looking at is whether
21 you have a purpose along the lines that is
22 distinct, right, it's distinct from the original
23 purpose, and that the use at issue was essential
24 for you to copy from the underlying work to
25 accomplish that purpose.

1 And I think that the Court -- what the
2 Court --

3 JUSTICE GORSUCH: Yeah, I'm going to
4 stop you.

5 MS. DUBIN: Yeah.

6 JUSTICE GORSUCH: I'm sorry. But that
7 -- that -- that isn't helpful for me.

8 MS. DUBIN: Okay.

9 JUSTICE GORSUCH: Okay? And -- and
10 maybe I'm being too dramatic in the difference
11 between the two, but I -- I do see a way to read
12 Number 1, the first factor, in two very
13 different ways. The purpose of the use could be
14 the purpose of this particular use in a
15 commercial setting, right, I mean, because it
16 does go on and talk about commercial versus
17 non-commercial.

18 And, here, we would say they are both
19 being used in magazine covers to identify an
20 individual. Okay? Done.

21 Or one could say: Ah, but Andy Warhol
22 had all sorts of different subjective meanings
23 and a reasonable viewer could take away
24 different meanings from them.

25 Is that second thing relevant at all

1 at the first step in the government's view? And
2 I'd kind of like a yes or a no if I can get one
3 out of you.

4 MS. DUBIN: Can I say yes to part of
5 your question and explain why? Is that okay?

6 (Laughter.)

7 JUSTICE GORSUCH: You -- you can do
8 whatever you want. I was just hoping for a yes
9 or no.

10 (Laughter.)

11 MS. DUBIN: Well, the -- the reason
12 that I -- the reason that I would like to do
13 that is because you asked about his subjective
14 intent, but then you also asked about the
15 reasonable perception of the audience. So I
16 don't think the subjective intent is relevant,
17 so that's a no to that part of the question.

18 JUSTICE GORSUCH: All right.

19 MS. DUBIN: But, to the subject, the
20 audience's perception, I think it can be
21 relevant and here is how. I think Campbell's
22 Soup Cans is a very good example of this.

23 In Campbell's Soup Cans, the effect on
24 the viewer, the effect on the audience depended
25 on the incorporation of -- of a very well-known

1 commercial advertising logo. It wouldn't have
2 worked if you had --

3 JUSTICE GORSUCH: Well, let me stop
4 you there. And I'm sorry to interrupt again.
5 But, see, Campbell's Soup seems to me an easy
6 case because the purpose of the use for Andy
7 Warhol was not to sell tomato soup in the
8 supermarket. It was to induce a reaction from a
9 viewer in a museum or in other settings.

10 And the difficulty of this case is
11 that this -- this particular image is being used
12 arguably maybe for the same purpose, to identify
13 an individual in a magazine, okay, in a
14 commercial setting.

15 So the Campbell's Soup one seems to me
16 a very different case. This is a much harder
17 case. So back to my question.

18 MS. DUBIN: So I completely agree with
19 you on the purpose of the use being very
20 different in the Campbell's Soup Can analysis,
21 which makes it an easier case. But -- and also,
22 I was also using the Campbell's Soup Cans as an
23 example of why the effect on the audience would
24 matter. And the effect on the audience in the
25 Campbell's Soup Can case, it would matter that

1 you incorporated from a preexisting commercial
2 advertising logo as opposed to made your own
3 logo, made up a logo.

4 Whereas, here, if he had taken his own
5 photograph of Prince, that wasn't necessary for
6 the effect, which is a very different type of
7 analysis.

8 I hope I answered Your Honor's
9 question.

10 JUSTICE GORSUCH: You've done a great
11 job. Thank you.

12 CHIEF JUSTICE ROBERTS: Yes, Justice
13 Kagan.

14 JUSTICE KAGAN: Can I just ask you
15 about that? Because you said it wasn't
16 necessary. But I had thought that one of the
17 differences between these two briefs was that
18 Ms. Blatt says it has to be necessary and that
19 the government says, well, it -- it's --
20 necessary is -- is a significant part of the
21 question, but, even if it's not necessary, it
22 can satisfy Factor 1.

23 MS. DUBIN: You're exactly right.
24 That is a difference between us. I think that
25 -- and -- and the answer in the Campbell's Soup

1 Can analysis is probably that it's not necessary
2 that he needed to use the Campbell's soup can,
3 because maybe he could have used Cheerios, but
4 that it was highly useful to use that type of
5 advertising logo.

6 I think the best example of those --
7 of those distinctions is in a book review, where
8 it's not necessary to incorporate the underlying
9 book. You can certainly imagine publishing the
10 book review without incorporating some excerpts
11 from the underlying work, but then you would be
12 telling the reader things as opposed to showing
13 them. So it makes that far more effective to
14 the audience.

15 CHIEF JUSTICE ROBERTS: Justice
16 Kavanaugh?

17 JUSTICE KAVANAUGH: So the exact words
18 we use on that question in the opinion, if we
19 were to agree with your side, will undoubtedly
20 be the subject of a lot of debate, so I want to
21 get it exactly right.

22 So what are you -- what are you
23 advocating? I've heard you say necessary,
24 essential, or highly useful. Is that the
25 formulation?

1 MS. DUBIN: We would say that's a
2 great formulation or you could say necessary or
3 at least useful or you could say just essential,
4 and I think that covers it. But I think the
5 best way to explain what the --

6 JUSTICE KAVANAUGH: Okay. Those are
7 going to be in --

8 (Laughter.)

9 JUSTICE KAVANAUGH: Those are very
10 different in -- you know, in some courts of
11 appeals.

12 MS. DUBIN: So the reason --

13 JUSTICE KAVANAUGH: So what's your --
14 what's your best, like you -- your best answer
15 as to what the best formulation is from the
16 perspective of the United States for the opinion
17 --

18 MS. DUBIN: If you're going --

19 JUSTICE KAVANAUGH: -- if your side
20 wins?

21 MS. DUBIN: If you're going for the
22 straightforward clarity of a one-word answer, I
23 would say essential. The reason we use --

24 JUSTICE KAVANAUGH: No, you can use
25 multiple words. What's the formulation?

1 (Laughter.)

2 MS. DUBIN: The reason we said
3 necessary or at least useful and the reason we
4 used that formulation was because, in a lot of
5 cases and a lot of the most straightforward fair
6 cases, it will be necessary. And I think that's
7 why Respondent has used that word.

8 We think that there are cases in which
9 it is essential or highly useful and those
10 should also count.

11 JUSTICE KAVANAUGH: So -- so --

12 JUSTICE KAGAN: I always thought
13 necessary and essential were synonyms. So, if
14 you say necessary and you say essential, that to
15 me means the same thing, which is something
16 different from useful or even highly useful.

17 MS. DUBIN: We think that highly
18 useful works too. And -- and, like I said, I
19 think the reason that a highly useful test would
20 work is in the book review context that I gave
21 Your Honor earlier, which it's not necessary,
22 and I think in a lot of examples that's the
23 case.

24 I think using the word "necessary"
25 does lead to more straightforward results in the

1 mine-run of cases.

2 JUSTICE KAVANAUGH: Okay. I'm going
3 to really pin you down again on that.

4 MS. DUBIN: Yes.

5 JUSTICE KAVANAUGH: Necessary or
6 highly useful or necessary or -- or at least
7 useful?

8 MS. DUBIN: We would say necessary or
9 at least useful. And the important thing is
10 that it's an affirmative defense. So the
11 defendant in the case is giving a justification
12 for why their borrowing is necessary.

13 What really separates us from
14 Petitioner is not necessary versus useful or
15 essential. It's that we think you need that
16 justification for borrowing, right? We think
17 you need some reason why it was essential for
18 you to incorporate the preexisting work.

19 I think the best formulation given
20 your considerations here is necessary or at
21 least useful. That's how I would phrase it for
22 your opinion.

23 JUSTICE KAVANAUGH: Very helpful,
24 thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: So you would leave
3 out essential?

4 (Laughter.)

5 MS. DUBIN: I was deferring to Justice
6 Kagan who sees necessary and essential as
7 synonyms but I think that essential would work
8 as well.

9 JUSTICE BARRETT: Okay, thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Jackson?

12 JUSTICE JACKSON: And can I just
13 clarify, essential to incorporate the existing
14 work in order to what? In order to achieve a
15 purpose that's different than I just have a
16 better idea, right, in order to achieve a
17 purpose that transcends a changed message or
18 meaning, right?

19 MS. DUBIN: That's exactly right. In
20 order to achieve a distinct purpose.

21 JUSTICE JACKSON: A distinct purpose.
22 Thank you.

23 MS. DUBIN: Yes. That's exactly
24 right.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 A rebuttal, Mr. Martinez?

3 REBUTTAL ARGUMENT OF ROMAN MARTINEZ

4 ON BEHALF OF THE PETITIONER

5 MR. MARTINEZ: Thank you, Your Honor.

6 I want to address three things,
7 meaning or message/purpose, indispensability,
8 usefulness, necessity and then the consequences
9 of this case.

10 With respect to meaning or message, I
11 understood my friend Ms. Blatt to concede, she
12 said it was absolutely true that you could
13 consider meaning or message at Factor 1 as part
14 of the -- the purpose inquiry. She said that.

15 I took that to be a very big
16 difference from what she said in her brief. In
17 page 2 she says it would be a fool's errand to
18 conduct that analysis. And, on page 22 of her
19 brief she says that courts are just incapable of
20 doing this.

21 I think that's a very significant
22 concession and we agree with that concession.
23 We think that it requires a reversal in this
24 case or at least a vacatur of the Second
25 Circuit's ruling because on pages 22 to 23 of

1 the Second Circuit's analysis, I think they were
2 unambiguously saying that courts cannot try to
3 do this meaning or message inquiry and then they
4 go on to say, instead, you need to look at the
5 degree of visual similarity.

6 Now, I'm not sure what the
7 government's position exactly is, whether
8 they've made the same concession or not. As I
9 understood the government's position with
10 respect to purpose, they continue to hold the
11 line that the level of generality has to be,
12 these are two Portraits of Prince, therefore,
13 they are the same purpose, which I understand to
14 mean that if you have two different Portraits of
15 Prince conveying very different meaning or
16 messages, it doesn't matter.

17 In other words, they would still
18 excommunicate meaning or message from the Factor
19 1 analysis. We don't think that's right. We
20 don't think it's consistent with the text.
21 Campbell, Google, all the things that we've
22 already talked about.

23 Secondly, with respect to
24 indispensability, I understood my friend, Ms.
25 Blatt, again, to concede that the position she

1 took in her brief is -- is not the right one, or
2 at least to say she's fine with the government's
3 much different and lower standard. She went
4 from indispensability in the brief to usefulness
5 here at oral argument.

6 With respect to whether usefulness is
7 required, a couple of things. First of all,
8 Goldsmith herself conceded usefulness. And if
9 you just look at page 76A of the petition
10 appendix, the district court quoted her as
11 conceding usefulness and even perhaps as
12 conceding necessity.

13 Secondly, usefulness, at least in the
14 sense that it's been discussed here today, has
15 not been briefed, has not been argued at any
16 stage in the case. We heard a long colloquy on
17 exactly what the varying different standards
18 mean.

19 If you thought that that was some sort
20 of requirement, at a minimum we would need to
21 have a fair opportunity to satisfy that
22 requirement, once you tell us what the law is.

23 As to what the law should be with
24 respect to usefulness, we think the real way --
25 the best way to look at this is it's a question

1 of justification. And the way you should get
2 the answer to what kind of justification is
3 required, if you look at Judge Leval's article
4 at page 1111, he talks about the justification
5 for the taking being the addition of new meaning
6 or message. We think that's what Campbell had
7 in mind.

8 Essentially you're justified in -- in
9 borrowing, at least you under Factor 1 to some
10 extent, if you are -- if -- if you're doing
11 something more than just avoiding the drudgery
12 of coming up with something new on your own.

13 And, finally, with respect to
14 usefulness, just on the facts, we absolutely
15 would satisfy this, not just because she
16 conceded it, but because of course it's useful
17 for -- for an artist -- for an artist to use an
18 artist reference. The whole purpose of an
19 artist reference is to make use of that because
20 it's useful in creating the work of art, the
21 second work of art. So of course it was -- it
22 was useful.

23 Goldsmith herself concedes in her
24 brief that we needed to use a picture of Prince.
25 And I think both the government and Goldsmith

1 said that, hey, they could have used any old
2 picture of Prince, and the examples they give is
3 to point to a bunch of other copyrighted
4 pictures of Prince that appeared in our brief at
5 pages 16 to 17.

6 But it can't be the case that their
7 answer is that we should have borrowed from
8 someone else and then we'd be having the same
9 case with a different photographer. I think the
10 reality, Justice Alito, to your point is any
11 picture of Prince that was out there in 1984
12 when Warhol was creating this work, there's
13 every reason to believe it would have been
14 copyrighted.

15 The copyright attaches in the
16 photograph at the moment the photograph is
17 taken. There's no reason to believe that there
18 would have been any sort of non-copyrighted
19 option.

20 Finally, Your Honors, consequences.
21 On consequences, it's really important to
22 understand that the creation of the Warhol works
23 is directly at play in this case. If you look
24 at the request for relief, both sides requested
25 essentially an adjudication of who owns the

1 copyright. That turns on whether it was -- the
2 -- whether the -- Warhol acted lawfully or
3 unlawfully at the moment of creation.

4 We sought a declaratory judgment, we
5 sought summary judgment as to all 16 works, not
6 just the two works, orange and purple, that are
7 at issue here. We sought a declaratory judgment
8 as to all 16 works. We won that declaratory
9 judgment. They appealed and they got that
10 victory overturned.

11 Ms. Blatt says that she's -- in some
12 other segments of the case, maybe it was at oral
13 argument, maybe it was at briefing, she sort of
14 like changed the relief she was seeking. It
15 doesn't matter. We sought a declaratory
16 judgment on all 16 works. We won that. That's
17 in play. And the creation matters.

18 I think the other reason the creation
19 matters, Justice Barrett, to your question, is
20 because it directly -- it directly governs the
21 display question when you're talking about
22 museums.

23 The reason a museum can display a work
24 under -- under section 109 is because it was
25 lawfully made. So the question is at the moment

1 it was made, was it lawful?

2 The copyright question of who owns the
3 copyrights here turns on that. If the -- if
4 Warhol infringed the copyright, it wasn't
5 lawfully made, Your Honors, this case has
6 meanings -- has implications beyond just Warhol.
7 It affects all artists and especially
8 contemporary artists. We ask you to reverse.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.

11 (Whereupon, at 11:45 a.m., the case
12 was submitted.)

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No. 21-869

In the
Supreme Court of the United States

THE ANDY WARHOL FOUNDATION FOR THE VISUAL
ARTS, INC.,

Petitioner,

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

This Court has repeatedly made clear that a work of art is “transformative” for purposes of fair use under the Copyright Act if it conveys a different “meaning[] or message” from its source material. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1202 (2021). In the decision below, the Second Circuit nonetheless held that a court is in fact forbidden from trying to “ascertain the intent behind or meaning of the works at issue.” Pet. App. 22a-23a. Instead, the court concluded that even where a new work indisputably conveys a distinct meaning or message, the work is not transformative if it “recognizably deriv[es] from, and retain[s] the essential elements of, its source material.” *Id.* at 24a. The question presented is:

Whether a work of art is “transformative” when it conveys a different meaning or message from its source material (as this Court, the Ninth Circuit, and other courts of appeals have held), or whether a court is forbidden from considering the meaning of the accused work where it “recognizably deriv[es] from” its source material (as the Second Circuit has held).

PARTIES TO THE PROCEEDINGS BELOW

Petitioner The Andy Warhol Foundation for the Visual Arts, Inc. was a plaintiff-counter-defendant-appellee in the U.S. Court of Appeals for the Second Circuit.

Respondents Lynn Goldsmith and Lynn Goldsmith, Ltd. were defendants-counter-plaintiffs-appellants in the U.S. Court of Appeals for the Second Circuit.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner The Andy Warhol Foundation for the Visual Arts, Inc. has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

RELATED PROCEEDINGS

The proceedings directly related to this case are:

Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, No. 19-2420, U.S. Court of Appeals for the Second Circuit. Amended judgment entered on August 24, 2021. Petition for rehearing en banc denied on September 10, 2021.

Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, No. 1:7-cv-02532-JGK, U.S. District Court for the Southern District of New York. Judgment entered July 15, 2019. Notice of appeal filed August 7, 2019.

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OPINIONS BELOW

The amended panel decision (Pet. App. 1a-52a) is reported at 11 F.4th 26 (2d Cir. 2021), and the original decision (JA601-51) is reported at 992 F.3d 99 (2d Cir. 2021). The order denying rehearing en banc (Pet. App. 84a-85a) is unpublished. The district court's order granting summary judgment to petitioner (Pet. App. 53a-83a) is published at 382 F. Supp. 3d 312 (S.D.N.Y. 2019).

JURISDICTION

On March 26, 2021, the Second Circuit reversed the district court's judgment. JA601-51. On August 24, 2021, the court granted petitioner's petition for panel rehearing, withdrew the original opinion, and issued an amended opinion. Pet. App. 1a-52a. On September 10, 2021, the court denied petitioner's petition for rehearing en banc. Pet. App. 84a-85a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set out in the addendum to this brief.

INTRODUCTION

This case presents the question whether a creative work that conveys a new meaning or message is transformative for purposes of the Copyright Act’s fair use defense. Sharply breaking with this Court’s precedent, the Second Circuit found that Andy Warhol’s Prince Series—a set of hand-crafted artistic works that have been displayed in museums and galleries for decades—was not transformative, even though all agree it conveyed a message distinct from its photographic source material. In so holding, the court expressly rejected a transformativeness test that considers the meaning or message of an artistic work as part of the fair use analysis—and instead mandated an inquiry focused on the degree of visual similarity between the two works. That approach has no basis in this Court’s precedent or in the text, purpose, or history of the Copyright Act. If embraced by this Court, it would upend settled copyright principles and chill creativity and expression at the heart of the First Amendment. The decision below should be reversed.

In *Campbell v. Acuff-Rose Music, Inc.*, this Court made clear that a follow-on work is considered “transformative”—and thus satisfies the first factor of the statutory fair use defense—if it “adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message.” 510 U.S. 569, 579 (1994); see also *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1202 (2021). This straightforward meaning-or-message test corresponds with the core purpose of the fair use defense, which is to provide “breathing space” for creators to use pre-existing material to communicate innovative ideas to the public.

Campbell, 510 U.S. at 579. It also aligns with the text, history, and purpose of the Copyright Act, which all ensure that genuinely novel expression is encouraged—not suppressed—by law, just as the First Amendment envisions.

The Second Circuit’s decision below threatens those foundational principles. It holds that a court conducting the fair use inquiry is actually *forbidden* from “seek[ing] to ascertain” the “meaning” of a follow-on work. Pet. App. 22a-23a. Instead, even where a new work indisputably conveys a distinct meaning or message, the work is not transformative if it “recognizably deriv[es] from, and retain[s] the essential elements of, its source material.” *Id.* at 23a-24a. On that basis, the Second Circuit found that Andy Warhol’s Prince Series was unlawful, because it bore too close a visual resemblance to a source photograph by rock-and-roll photographer Lynn Goldsmith. That was the outcome below even though the Second Circuit and the district court both recognized that the Prince Series communicated a fundamentally different idea from the photograph.

If adopted by this Court, the Second Circuit’s rule would chill artistic speech by substantially foreclosing an entire category of creative expression from the protection of the fair use doctrine. That result defies this Court’s precedent, subverts the purposes of the Copyright Act, and strikes at core First Amendment values. Copyright law is designed to foster innovation and creativity—even when that innovation recognizably builds on the achievements of others. This Court should reaffirm its historical commitment to free expression and reverse the decision below.

STATEMENT OF THE CASE

A. The Copyright Act's Protection Of Free Expression

1. The Constitution provides that “Congress shall have Power . . . To promote the Progress of Science and useful Arts[] by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I, § 8, cl. 8.

This Court has long recognized that the “monopoly privileges that Congress may authorize” under the Copyright Clause “are neither unlimited nor primarily designed to provide a special private benefit.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). Instead, the “limited grant” of copyright protection “rewards the individual author” instrumentally, in order to “benefit the public.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985); *cf.* H.R. Rep. No. 60-2222, at 7 (1909) (noting that copyrights are granted “[n]ot primarily for the benefit of the author, but primarily for the benefit of the public”).

The core public interest served by copyright law is “the creation and publication of free expression.” *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). The limits of copyright protection accordingly must be “construed in light of th[e] basic purpose” of “stimulat[ing] artistic creativity for the general public good.” *Sony Corp.*, 464 U.S. at 432.

2. In 1790, the First Congress enacted the country’s first copyright statute. Act of May 31, 1790, § 1, 1 Stat. 124, 124. Subsequent Congresses substantially revised the statute in 1831, 1870, and 1909. The most recent major overhaul culminated in

the Copyright Act of 1976. *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 159-61 (1985).

Under the 1976 Act, “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). But copyright protection does not “extend to any idea, . . . concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” *Id.* § 102(b). This reflects the common law’s historic differentiation between ideas, which are not copyrightable, and the form in which those ideas are expressed, which is protectable. *See Golan v. Holder*, 565 U.S. 302, 328 (2012); *see also Baker v. Selden*, 101 U.S. 99, 100-06 (1879).

Photographs present difficult questions under copyright law because they typically include *non*-copyrightable elements, making it hard to identify precisely what the photographer’s copyrightable creativity encompasses. In *Burrow-Giles Lithographic Co. v. Sarony*, the Court concluded that photographs are protected only “so far as they are representatives of original intellectual conceptions of the author.” 111 U.S. 53, 58 (1884). Specifically, the Court identified the photographer’s selection and arrangement of the subject’s attire, arrangement of “light and shade,” and evocation of “the desired expression” on the part of the subject as the “original,” and therefore copyright-protected, portions of the photograph. *Id.* at 60. Since then, courts have likewise held that elements of originality “may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression,” among other things. *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992). But if the photograph depicts an

individual, a photographer may not copyright the subject of the photograph, including their facial features, nor can the photographer “copyright the pose itself and thereby prevent others from photographing a person in the same pose.” *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1119 (9th Cir. 2018).

The copyright statute grants a copyright holder certain “exclusive rights,” including to reproduce, distribute, and display the copyrighted work, as well as to prepare “derivative works based upon the copyrighted work.” 17 U.S.C. § 106(2). A “derivative work” is one “based upon one or more preexisting works, such as a translation, . . . motion picture version, . . . art reproduction, . . . or any other form in which a work may be recast, transformed, or adapted.” *Id.* § 101.

To prove copyright infringement, a plaintiff must establish: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original and protectable. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). To qualify as “actionable copying” under the second prong, the follow-on work must be “substantially similar” to the original. 4 Melville Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03[A] (2022). In the context of visual art, publicly displaying a work deemed to infringe the rights of another, such as by hanging an infringing painting on the wall of a museum, is independently actionable, 17 U.S.C. §§ 106(5), 109(c), and the owner of an infringing painting cannot lawfully resell it, *id.* §§ 106(3), 109(a).

The Copyright Act authorizes a range of remedies for infringement. These include “impoundment” and

“destruction” of objects that embody infringing material. *Id.* § 503. A plaintiff can also seek either (1) actual damages plus the follow-on user’s profits, *id.* § 504(b), or (2) statutory damages of up to \$30,000 for non-willful infringement and \$150,000 for willful infringement, *id.* § 504(c). Creators of infringing works have no right to reap any reward from their incremental contributions, and no ability to prevent others from exploiting them. *Id.* § 103(a).

3. Copyright law has always recognized that creative works often build on pre-existing material. When they do, even if the incorporation of such material constitutes a *prima facie* act of infringement of one of Section 106’s exclusive rights, the new work is not actionable if it qualifies as a “fair use.”

The Copyright Act recognizes this common-law fair use defense as an express limitation on copyright owners’ exclusive rights:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(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.

The fair use doctrine, which dates back at least to the 19th century, reflects the longstanding recognition that a “rigid application of the copyright statute” would “stifle the very creativity which that law was designed to foster.” *Campbell*, 510 U.S. at 577 (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)); *see also Google*, 141 S. Ct. at 1196. The doctrine is not susceptible to “bright line” rules, but must instead be applied as an “equitable rule of reason,” *Sony Corp.*, 464 U.S. at 448 n.31, 454-55 & n.40, with each case “decided on its own facts,” *Harper & Row*, 471 U.S. at 560 (quoting H.R. Rep. No. 94-1476, at 65 (1976)). By providing a safety valve to liability for innovation and creative expression, fair use protects essential First Amendment values that would otherwise be burdened by copyright. *Golan*, 565 U.S. at 328-29.

4. This case centers on the first statutory fair use factor, addressing the “purpose and character of the use.” The factor is designed to assess whether the use of pre-existing content in a follow-on work “fulfill[s] the objective of copyright law to stimulate creativity

for public illumination” and, as a result, “is vitally important to the fair use inquiry.” Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990) (hereinafter “Leval”).

In *Campbell*, this Court set forth the test for assessing whether the first factor is satisfied. The Court explained that the central question is “whether the new work merely ‘supersede[s] the objects’ of the original creation, . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Campbell*, 510 U.S. at 579. Where a follow-on work meets that criteria, it is considered “transformative.” *Id.* (quoting Leval 1111).

Although transformative use is not required for fair use, “the more transformative the new work, the less will be the significance of the other factors . . . that may weigh against a finding of fair use.” *Id.* Moreover, as this Court has explained, “the four statutory factors [cannot] be treated in isolation, one from another.” *Id.* at 578. Indeed, a finding of transformative use will typically make it easier to satisfy the third and fourth factors, because it justifies a greater degree of copying and renders the new work less likely to operate as a market substitute for the original it borrows from. *Id.* at 586-87, 591.

B. Warhol’s Prince Series

1. Andy Warhol is one of the most significant and innovative American artists of the twentieth century. As one expert put it, “[N]o museum gallery on the planet could consider itself representative of Contemporary Art without a Warhol somewhere on its walls.” JA449. Warhol’s works are found in premier collections across the world, including those

of the Museum of Modern Art in New York and the Tate Modern in London. JA450. The Smithsonian collection likewise includes many dozens of different works by Warhol. See Smithsonian Institution, CollectionsSearchCenter, <https://collections.si.edu/search/> (last visited June 8, 2022).

Warhol is one of many artists who made up the Pop Art movement that emerged in Britain and the United States in the mid- to late-1950s. Museum of Modern Art Learning, *Pop Art*, https://www.moma.org/learn/moma_learning/themes/pop-art/ (last visited June 8, 2022). Members of the movement “made art that mirrored, critiqued, and, at times, incorporated everyday items, consumer goods, and mass media messaging and imagery.” *Id.*

From the outset of his career, “Warhol was an avid student of media: he was acutely aware of the way images are produced, distributed, and consumed in contemporary culture.” JA452. Warhol’s art reflects those observations and insights, depicting images of diverse subjects, from everyday objects like soup cans and bicycles to celebrities and other public figures. JA453. From his depictions of money, which “operates as a cultural sign,” to celebrities of the “movie industry,” the power of images and the role they play in contemporary life are some of the dominant themes of Warhol’s art. JA453-54.

While other members of the Pop Art movement sometimes “cast a[] contemptuous . . . eye on commercial culture,” Warhol “adopted a very different perspective.” Tony Scherman & David Dalton, *POP: The Genius of Andy Warhol* at 51 (Harper 2009). His art “unapologetically depicted [celebrities] as idols.” *Id.* at 52; see also JA241 (expert testimony noting that Warhol’s work reflects the “major characteristics of

recent consumer society and the way it works in people's subjective imaginations").

Warhol's celebrity depictions are among his best known works. JA458. His subjects ranged from Marilyn Monroe to Muhammad Ali. In crafting these renditions of people famous in popular culture, Warhol often utilized techniques that were pioneering in the world of fine art—but applied them to subjects that had often been viewed as too low-brow to warrant inclusion in the Western canon. *See* Blake Gopnik, *Warhol* 272 (2020) (discussing Warhol's use of silkscreening).

For example, to create his now-ubiquitous depictions of Monroe, Warhol started with a black-and-white photorealistic image. JA459; JA157-58. He then cropped Monroe from the neckline up, essentially "severing the head from the shoulders and bust," which "produc[ed] the disembodied effect of a cinematic close-up." JA459. Whereas the source photograph recorded the full range of color tones, Warhol eliminated that graded spectrum; instead, he created high-contrast images for his silkscreens, reducing the gray scale to produce an exaggerated, unnatural distinction between black and white, with nothing in between. JA460; JA164. This process would flatten the appearance of the underlying subject and remove all realism and depth. JA461; JA214.

The outline of the cropped image was then hand-drawn by Warhol on a canvas and painted over using bright, artificial, and exotic-colored synthetic polymer paints that had a flat consistency and industrial appearance. JA465; JA165. Warhol then used the high-contrast silkscreen he had created to screen the image onto the painted canvas. JA164-66. Below are

the silkscreen portraits of Monroe that Warhol created in 1967 using that technique, beneath the original promotional image:



See JA158; Masterworks Fine Art Gallery, Andy Warhol Marilyn Monroe, <https://www.masterworksfineart.com/artists/andy-warhol/marilyn-monroe> (last visited June 8, 2022).

Warhol utilized a similar process for his depiction of Muhammad Ali, taking an image of Ali's torso and focusing in narrowly on just the subject's fist before remaking the image:



JA173; JA170. “In the repetition of images, the off-register printing, and the general lack of nuance, Warhol’s portraits of stars reveal their source in the daily newspaper and the fan magazines, those halfway houses between fact and fiction.” Kenneth Silver, *Modes of Disclosure: The Construction of Gay Identity and the Rise of Pop Art 197*, https://aestheticappreciations.files.wordpress.com/2013/01/silver_modes_of_disclosure.pdf.

Warhol’s celebrity images are the subject of countless art history treatises, exhibitions, and commentaries. They are often understood to comment on the nature of fame in 20th century American society, beyond simply depicting a famous person. Warhol was working in “the wake of a boom of mass-consumption,” where celebrity imagery proliferated unlike any time previously—making celebrities at once a familiar feature of daily life, and another “consumable and expendable

product.” Naomi Martin, *Andy Warhol Portraits: A Definitive Guide*, Artland Magazine, <https://magazine.artland.com/andy-warhol-portraits-a-definitive-guide/> (last visited June 8, 2022).

By presenting a disembodied head, or body part, and doing so with wholly unrealistic colors—yet still giving the viewer enough to identify the subject and evoke essentially all he knows about them—Warhol showed that the viewer sees celebrities not as real people, but as icons and totems of fame itself. JA238 (expert stating the images do not portray “the actual individual in any kind of depth”); *see also* Gopnik, *supra*, at 268 (Warhol’s silkscreen of Elizabeth Taylor “turned the painted face of a human being . . . into something as ‘blank, blunt, bleak, stark’ as any consumable product—which was precisely what Hollywood’s media machine had made of Liz”). The meaning and message in Warhol’s works has been studied, identified, and articulated by generations of art history scholars, curators, journalists, and everyday museum-goers. *See, e.g.*, Karen Rosenberg, *For Andy Warhol, Faith and Sexuality Intertwined*, N.Y. Times (Dec. 2, 2021), <https://www.nytimes.com/2021/12/02/arts/design/warhol-religion-museum-review-catholic.html>.

2. Lynn Goldsmith is a self-described “rock-and-roll photographer,” who sells her work primarily through galleries focusing on pictures of rock stars and to collectors interested in realistic photographs of musicians. JA478; JA589-90. Goldsmith’s goal in creating her works is to connect with her subjects to “help[] [them] formulate their identities” and “capture her subjects’ ‘true selves.’” Pet. App. 55a; JA478-83; JA267-68. Goldsmith thus seeks to humanize those she photographs. JA479.

In December 1981, Goldsmith photographed the pop singer Prince at her studio while on assignment for *Newsweek* magazine. JA488. Prince arrived wearing makeup and the same clothes and hairstyle shown in the photographs taken, except for a black sash that Prince selected from Goldsmith's clothing room. Pet. App. 56a; JA490-91; JA276-79. Goldsmith testified that she gave Prince lip gloss to let him know she was "looking after him," and applied additional eyeshadow because of her "feeling [that] Prince was in touch with the female part of himself." JA489-90. By her own account, Goldsmith intended to capture a "vulnerable human being." Pet. App. 57a (quoting JA494). Goldsmith explained that the photographs from the shoot show Prince as "fragile" and "not a comfortable person." *Id.*; JA283-84.



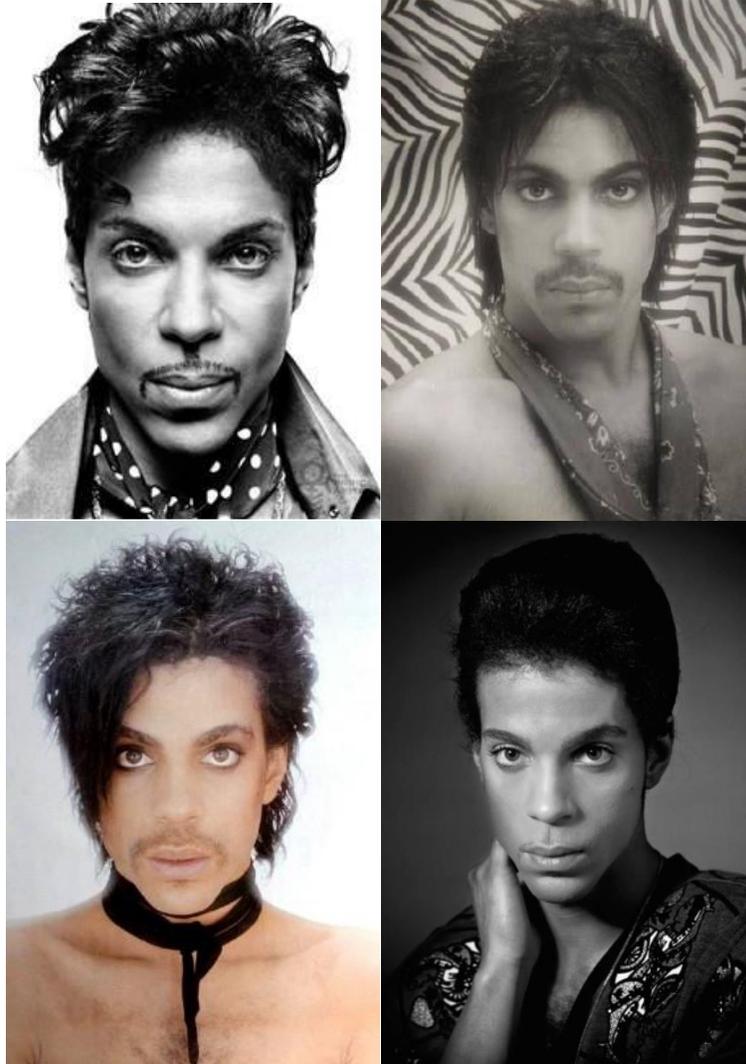
JA320; JA501.

Goldsmith is not the only (or even the first) photographer to shoot a front-on photograph of Prince's face and torso. For example, Prince's cover art for his 1981 album, *Controversy*, was taken by the photographer Allen Beaulieu.



JA397.

In addition to that album cover, there have been scores of front-on photographs taken of Prince, four of which are reproduced below:



Platon, *Prince*, <http://www.platonphoto.com/gallery/portraits/music/prince/> (last visited June 8, 2022);
Brienne Tracy, *Prince Like You've Never Seen Him Before*, *People* (July 15, 2019), <https://people.com/music/prince-rare-photos-jeff-katz-exclusive/>; JA399-400.

In 1984, *Vanity Fair* was preparing a magazine article on Prince, to be entitled “Purple Fame.” JA524. The piece focused on Prince’s ascendancy to celebrity, asserting that “escape from Prince is no longer possible,” and culminating in the punch-line, “he presents a dream.” *Id.*; Tristan Vox, *Purple Fame*, *Vanity Fair* (Nov. 1984), <https://archive.vanityfair.com/article/1984/11/purple-fame>. In light of these themes, the magazine commissioned Warhol to create art depicting Prince to accompany the article. After all, “Warhol was known, more than any other artist, to have made fame his defining subject.” JA221.

Vanity Fair wanted to give Warhol an “artist’s reference” to start from. JA499; JA505. It chose one of Goldsmith’s photographs of Prince from the 1981 shoot. JA505. Goldsmith’s company, in turn, granted *Vanity Fair* the express right to use the photograph as “an artist reference for an illustration to be published in *Vanity Fair* November 1984 issue,” further providing that “it can appear one time full page and one time under one quarter page. No other usage right granted.” JA85 (capitalization normalized). There is no record evidence of any written engagement between *Vanity Fair* and Warhol, or that *Vanity Fair* communicated to Warhol the terms of its license from Goldsmith.

Warhol proceeded to create twelve silkscreen paintings, two screen prints on paper, and two drawings (collectively, the “Prince Series”). All of the works depicted Prince’s head and a small portion of his neckline in Warhol’s characteristic style. Pet. App. 60a; JA505-06. Starting from Goldsmith’s photograph, Warhol cropped the image to remove Prince’s torso, resized it, altered the angle of Prince’s face, and changed tones, lighting, and detail. JA222-

23. Warhol also added layers of bright and unnatural colors, conspicuous hand-drawn outlines and line screens, and stark black shading that exaggerated Prince's features. JA223-24. The result in all the Prince Series works is a flat, impersonal, disembodied, mask-like appearance. Pet. App. 77a-78a.



See JA505-06.

As Dr. Thomas Crow, a leading Warhol scholar at New York University's Institute of Fine Arts, later explained, the Prince Series used the tools of visual art to express a completely different message than Goldsmith's original photograph. While based on the photo as an initial referent, Warhol's works reflect distinctive changes that communicate a comment on the dehumanizing nature of celebrity. JA227. Using his characteristic techniques, Warhol created "an image of Prince as a kind of icon or totem of something rather than just being the actual human being that made the music." JA257. Whereas Goldsmith's photograph had focused on Prince's "unique human identity," Warhol's work "sought to use the flattened, cropped, exotically colored, and unnatural depiction of Prince's disembodied head to communicate a message about the impact of celebrity and . . . the contemporary conditions of life," turning an intimate image of Prince into a "mask-like simulacrum of his actual existence." JA227; JA249. In doing so, Warhol created "a kind of barrier between [the] viewer and whatever [Prince's] inner life might be." JA255.

3. Vanity Fair ultimately published one of the Prince Series works alongside the "Purple Fame" article in its November 1984 edition. Pet. App. 58a; JA524.

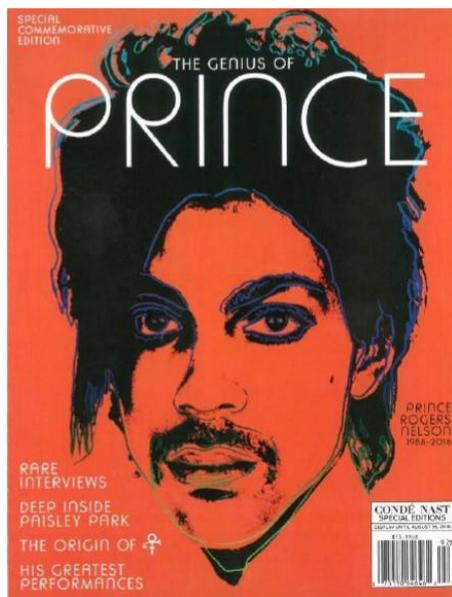


JA325.

Since 1984, works from the Prince Series have been displayed more than 30 times in museums, galleries, books, magazines, and other public locations. Pet. App. 60a-61a; JA526-38. They have also been prized by collectors and others. For example, the most recent sale of a work in the Prince Series was for \$173,664 in October 2015. JA546-56.¹ Though the Prince Series works have been sold several times since Warhol's death in 1987, The Andy Warhol Foundation ("AWF") retains ownership of the copyright in the Prince Series (subject to the outcome of this litigation). JA526-30.

¹ Warhol's other works generally garner even higher prices. In 2014, Warhol works collectively sold at public auction for \$653 million, representing nearly 5% of the entire global art market that year. JA542. From 2004 through 2014, Warhol auction sales exceeded \$3 billion. *Id.*

Prince died in April 2016. Soon afterwards, *Vanity Fair* published an online version of the November 1984 “Purple Fame” article. Pet. App. 61a; JA343-44. Condé Nast also published a commemorative magazine titled “The Genius of Prince,” with a different one of the Prince Series works licensed from AWF:



Pet. App. 62a; JA352; JA565-66.

C. Procedural History

1. In July 2016, Goldsmith contacted AWF, claiming that the Prince Series infringed her copyright. Pet. App. 61a; JA355. In April 2017, AWF filed a declaratory judgment action seeking, among other things, a judgment that (1) none of the works in the Prince Series used copyrightable elements of Goldsmith’s 1981 photograph; and (2) the Prince Series is protected as fair use. JA41-43.

Goldsmith filed counterclaims for copyright infringement. JA90-124. She sought damages for AWF’s use of her photograph in the Warhol Prince Series work on the April 2016 Condé Nast cover, which was the only infringing use alleged within the three-year limitations period. JA119; 17 U.S.C. § 507(b). She also sought broader declaratory, injunctive, and monetary relief implicating *all* of the Prince Series works, requesting: (1) a “[f]inding” that AWF could not “assert copyright protection” in the Prince Series; (2) “permanent injunctive relief, enjoining [AWF] from further reproducing, modifying, preparing derivative works from, selling, offering to sell, publishing or displaying” those same works; and (3) “all profits earned by [AWF] attributable to infringement.” JA120-21.

2. The parties filed cross-motions for summary judgment. The district court granted AWF’s motion, concluding that all of the Prince Series works were protected fair use. Pet. App. 68a.

For purposes of the first fair use factor, the court applied *Campbell* and found that the Prince Series is “transformative” because the original and follow-on works conveyed distinct messages. The court emphasized Goldsmith’s admission that her work conveys that “Prince is ‘not a comfortable person’ and he is a ‘vulnerable human being,’” noting that “Warhol’s Prince Series, in contrast, can reasonably be perceived to reflect the opposite.” Pet. App. 71a (quoting JA394). The court highlighted that Warhol cropped out Prince’s torso and brought his face and a small portion of his neck to the forefront. *Id.* Removing the “humanity” in Goldsmith’s photograph, Warhol created a “flat, two-dimensional figure” unlike “the detailed, three-dimensional being in

Goldsmith’s photograph.” *Id.* at 71a-72a. Warhol also removed the photograph’s “crisp[]” details that “Goldsmith sought to emphasize” and added “loud, unnatural colors, in stark contrast with the black-and-white original photograph.” *Id.*

The district court thus concluded that “the Prince Series works are transformative” because “[t]hey add something new to the world of art” by turning a “realistic photograph[]” of a “vulnerable, uncomfortable person” into a depiction of “an iconic, larger-than-life figure.” *Id.* at 72a. This change in “communicative result[]” provided the “new expression, meaning, or message” needed to satisfy *Campbell*. *Id.* at 69a (quoting 510 U.S. at 579), 72a.

The court then considered the other three fair use factors. As to the second factor—the nature of the copyrighted work—the court emphasized that Goldsmith had made her photograph available for licensing, which undercut the ordinary protection an unpublished work would receive. *Id.* at 73a-74a. The court concluded that the third factor—the amount and substantiality of the portion used—likewise favored AWF because (1) “Warhol’s alterations wash away the vulnerability and humanity Prince expresses in Goldsmith’s photograph and Warhol instead presents Prince as a larger-than-life icon” and (2) “[e]ach Prince Series work contains little, if any, of the copyrightable elements of the Goldsmith Prince Photograph.” *Id.* at 78a. “[T]o the extent that Prince’s facial features remain in Warhol’s works,” the district court explained, “the features themselves are not copyrightable.” *Id.* And because Warhol “transformed Goldsmith’s work ‘into something new and different[,] . . . this factor weigh[ed] heavily’ in AWF’s favor.” *Id.* at 79a.

Finally, the court concluded that the fourth factor—the effect of the Prince Series on the market for or value of Goldsmith’s photograph—also favored AWF. *Id.* at 79a-82a. The court found that “the markets for a Warhol and for a Goldsmith fine-art or other type of print are different.” *Id.* at 80a. There was no evidence that “the Prince Series works are market substitutes for her photograph,” or that “a magazine or record company would license a transformative Warhol work in lieu of a realistic Goldsmith photograph.” *Id.* at 81a.

3. The Second Circuit reversed. JA644. The panel’s original opinion began by quoting *Campbell*’s meaning-or-message test and acknowledging the importance of the transformative use inquiry in evaluating “the purpose and character of the use.” JA612. The panel also recognized that Goldsmith’s photograph and Warhol’s Prince Series effectively expressed different messages: Whereas Goldsmith “portray[ed] Prince as a ‘vulnerable human being,’” Warhol deliberately “strip[ped] Prince of that humanity and instead display[ed] him as a popular icon.” JA620.

Notwithstanding its quotation of *Campbell* and the concededly different messages of the works at issue, however, the panel departed sharply from *Campbell*’s transformative use test and determined the Prince Series was not transformative based on three interrelated holdings.

First, the panel categorically barred courts from assessing a follow-on work’s meaning or message, holding that “the district judge should not assume the role of art critic and seek to ascertain the intent behind or meaning of the works at issue.” JA621. In the panel’s view, “judges are typically unsuited to

make aesthetic judgments and . . . such perceptions are inherently subjective.” *Id.* Based on that premise, the panel declined to offer any further assessment of the different meanings embodied in the original and follow-on works, and nowhere relied on those differences in its opinion.

Second, the panel reasoned that, instead of discerning a work’s meaning or message in the first factor of the fair use analysis, a court should—at least in the context of visual art—focus on whether the works are visually similar. In the panel’s view, “the secondary work’s transformative purpose and character *must, at a bare minimum*, comprise something more than the imposition of another artist’s style on the primary work such that the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material.” JA621-22 (emphasis added).

Third, the panel found that Warhol’s work was not transformative for the additional reason that it had the same “purpose” as the Goldsmith photograph. The panel claimed that “there can be no meaningful dispute that the overarching purpose and function of the two works at issue here is identical, not merely in the broad sense that they are created as works of visual art, but also in the narrow but essential sense that they are portraits of the same person.” JA622.

After concluding that the Prince Series was not transformative as a matter of law, the panel held that the remaining fair use factors favored Goldsmith—largely resting on the same considerations that underpinned its transformativeness ruling. JA629; JA634; JA639 & n.11. The panel concluded that the second factor favored Goldsmith because of the photograph’s “unpublished and creative” nature, and

that this factor was more important because of the supposedly non-transformative nature of the follow-on work. JA628-29. The panel concluded that the third factor favored Goldsmith because, in its view, “the Warhol images are instantly recognizable as depictions or images of the Goldsmith Photograph itself.” JA632. Finally, the panel found for Goldsmith on the fourth factor too, which it deemed “closely linked” to the first factor, because it believed the Prince Series poses a threat to Goldsmith’s licensing market. JA635. The panel thus held that the “defense of fair use fails as a matter of law” and that Warhol could no longer “claim” the Prince Series “as his own.” JA640; JA625.²

Judge Jacobs concurred, contending that the “opinion of the Court does not necessarily decide” whether the “original [Warhol] works infringe,” and suggesting that the panel’s analysis may instead be limited to commercial licenses to reproduce the Warhol originals. JA649-50. But he identified nothing in the opinion that would preclude application of the court’s holding to the original Prince Series. And he explicitly recognized the chilling effect of the court’s decision on artists, noting that “our holding may alarm or alert possessors of other artistic works,” and that “uncertainty about an artwork’s [legal] status can inhibit the creativity that is a goal of copyright.” JA650.

² Although the district court had not formally reached whether there was a *prima facie* act of infringement of protected elements of the Goldsmith photograph at all, the panel also held that the Prince Series and the Goldsmith photograph were “substantially similar” in the relevant sense as a matter of law, “given the degree to which Goldsmith’s work remains recognizable within Warhol’s.” JA643-44.

4. Ten days later, this Court issued its decision in *Google*, which considered the application of the fair use doctrine to the “precise[]” copying of computer code. 141 S. Ct. at 1203. As part of that inquiry, the Court explored whether the “copying was transformative” under *Campbell’s* meaning-or-message test. *Id.* at 1202-04.

Explaining how that test functions in the context of visual art, the Court observed that “[a]n ‘artistic painting’ might, for example, fall within the scope of fair use even though it *precisely replicates* a copyrighted advertising logo to make a comment about consumerism.” *Id.* at 1203 (emphasis added). That statement was an unmistakable allusion to Warhol’s famous *Campbell’s Soup Cans* paintings, which identically replicated the company’s logo:



See JA153-55; see also Museum of Modern Art, *Andy Warhol, Campbell’s Soup Cans*, 1962, <https://www.moma.org/collection/works/79809> (last visited June 8, 2022).

5. AWF petitioned the Second Circuit for panel rehearing and rehearing en banc based on the conflict between the panel’s opinion and this Court’s decisions in *Google* and *Campbell*.

The panel granted rehearing and issued an amended opinion. The court purported to limit *Google* to its facts, stating that the “unusual context of that case, which involved copyrights in computer code, may well make its conclusions less applicable to [other] contexts.” Pet. App. 44a. In a footnote, the court attempted to distinguish *Google’s Soup Cans* example from the Prince Series, because Warhol’s “artistic painting” purportedly had a different “purpose[]” from an “advertising logo.” *Id.* at 24a n.5. The court also generally asserted that it was not adopting a bright-line categorical rule for analyzing whether a work is transformative. *Id.* at 43a-44a. But it did not revise the core substance of its opinion, including the three holdings described above. *Id.*; *supra* at 25-27.

SUMMARY OF ARGUMENT

I. The Prince Series is transformative under a straightforward application of this Court’s precedent.

Campbell held that a work is transformative if it can “reasonably be perceived” as “add[ing] something new, with a further purpose or different character, altering the first with new expression, *meaning, or message,*” and carefully applied that test. 510 U.S. at 578-86 (emphasis added). Just last year in *Google*, this Court confirmed that this meaning-or-message test governs the transformative use inquiry even in circumstances far afield from *Campbell’s* facts. See 141 S. Ct. at 1202-03. Indeed, the Court even used an example drawn from Warhol’s work to illustrate how an ““artistic painting” might . . . fall within the scope of fair use even though it precisely replicates” a prior work, so long as it modifies the meaning or message. *Id.* at 1203 (quoting 4 *Nimmer on Copyright*

§ 13.05[A][1][b]). In its holdings and reasoning alike, this Court has thus established that the transformativeness inquiry focuses on what a follow-on work *means*, not how much of the original is discernible.

That approach properly reflects the text, purpose, and history of copyright law. The fair use doctrine has always served as a safeguard to ensure that copyright does not unduly “stifle” creativity. *Id.* at 1195. For that doctrine to fulfill its historic purpose, it must ensure that works conveying genuinely new and distinctive ideas are not suppressed by copyright-created monopolies. Indeed, if works conveying undisputedly new meanings or messages were generally *not* considered transformative, the fair use doctrine would lose much of its vitality in protecting new contributions to the marketplace of ideas. That would plunge copyright into conflict with the First Amendment: While copyright-law restrictions on speech may be justified when the follow-on work merely replicates “other people’s speech[],” *Eldred*, 537 U.S. at 221, such restrictions cannot properly block follow-on works that provide new and innovative meanings or messages. *Campbell’s* meaning-or-message test is thus essential to maintain harmony between copyright’s restrictions on speech and core First Amendment values.

Here, there is no serious dispute that the Prince Series is transformative under a faithful application of *Campbell*. Both courts below recognized that the Prince Series conveys a new meaning or message distinct from Goldsmith’s photograph. While Goldsmith portrayed Prince as a vulnerable human, Warhol made significant alterations that erased the humanity from the image, as a way of commenting on

society's conception of celebrities as products, not people. The Prince Series is thus transformative.

II. The Second Circuit found otherwise by jettisoning the meaning-or-message test in favor of a novel visual similarity test with no basis in this Court's precedent. That decision rested on three fatally flawed premises.

First, the Second Circuit held that a "district judge should not assume the role of art critic and seek to ascertain the intent behind or meaning of the works at issue." Pet. App. 22a-23a. That approach *forbids* a court from even trying to assess the very thing that *Campbell requires* it to evaluate: meaning or message. The Second Circuit grounded that remarkable holding in nothing but its own intuition—and it cannot be reconciled with this Court's precedents.

Second, the court incorrectly held that visual similarity drives the transformativeness inquiry, concluding that the follow-on work "must, at a bare minimum, comprise something more than the imposition of another artist's style . . . such that the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material." *Id.* at 23a-24a. That approach cannot be squared with *Campbell* and *Google*, where the follow-on works both "recognizably derived from, and retain[ed] essential elements" of their predecessors. And it ends up conflating the fair use inquiry with the antecedent "substantial similarity" question of whether one work borrows enough copyrightable elements of a pre-existing work to constitute a *prima facie* act of infringement in the first place.

Finally, the Second Circuit compounded these errors by claiming that the Prince Series could not be transformative because it had the same “overarching purpose and function” as the Goldsmith photograph, since both were “created as works of visual art” and were “portraits of the same person.” *Id.* at 24a-25a. That approach considered the “purpose” of the Prince Series at so high a level of generality as to be meaningless. Almost any two works can be categorized as having the same “purpose and function” in some general sense. Indeed, the two works at issue in *Campbell* were both popular musical compositions addressing the same topic—yet this Court had no difficulty finding the follow-on work transformative. 510 U.S. at 579-80. The central question is not whether the respective works can be defined in such a way as to fall into the same broad category, but whether the follow-on work communicates a different meaning or message. *Id.* at 579. The Second Circuit erred in holding otherwise.

These errors have enormous practical consequences. If adopted by this Court, the Second Circuit’s approach would work a sea change in the art world and to copyright law more generally—overturning decades of settled expectations, and chilling core First Amendment expression. Works long held by museums, galleries, and collectors could be imperiled, and the creation of new works would be chilled. That would run directly counter to the purpose of the fair use doctrine, which is to offer “breathing space” for innovators building from existing works to generate, express, and disseminate new ideas. *Id.* The decision below should be reversed.

ARGUMENT

I. The Prince Series Is Transformative

Ever since *Campbell v. Acuff-Rose Music, Inc.*, this Court has interpreted the first fair use factor to turn on whether the follow-on work is “transformative”—*i.e.*, whether it conveys a “new expression, meaning, or message” different from the original. 510 U.S. 569, 579 (1994). Here, the Prince Series is transformative because it indisputably has a distinct meaning or message from the Goldsmith photograph: While Goldsmith’s work conveyed that Prince was a vulnerable person (unlike his larger-than-life persona), Warhol’s works conveyed a very different message about the ways in which popular culture dehumanizes those it elevates to celebrity. The Second Circuit’s decision misapplied *Campbell* and should be reversed.

A. Under *Campbell*, A Follow-On Work Is Transformative If It Can Reasonably Be Perceived As Communicating A New Meaning Or Message

1. Section 107(1) of the Copyright Act requires courts considering a fair use defense to address the “purpose and character of the [follow-on] use.” 17 U.S.C. § 107(1). This Court defined the contours of that inquiry in *Campbell*. There, the Court addressed whether 2 Live Crew’s parody of the Roy Orbison song, “Oh, Pretty Woman,” was sufficiently transformative to justify copying significant protected elements of that song.

The Sixth Circuit had concluded that 2 Live Crew’s song was not transformative based on the *amount* of copying at issue. According to that court, 2 Live Crew’s song reflected “excessive borrowing”; the

court held that, “by ‘taking the heart of the original and making it the heart of a new work,’ 2 Live Crew had, qualitatively, taken too much.” 510 U.S. at 572, 574 (quoting *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1438 (6th Cir. 1992)).

This Court reversed. The relevant question, the Court explained, was not the amount of material copied, but whether the follow-on work can “reasonably be perceived” as “*add[ing]* something new, with a further purpose or different character, altering the first with new expression, *meaning, or message.*” *Id.* at 579, 582 (emphasis added). Under that approach, the Court explained, a parody has “an obvious claim to transformative value,” because as a work of “comment or criticism,” it can “provide social benefit, by shedding light on [the] earlier work.” *Id.* at 579. By contrast, if the follow-on work was instead simply a way of “get[ting] attention or avoid[ing] the drudgery in working up something fresh,” the claim to transformativeness would “diminish[.]” *Id.* at 580.

Applying those principles, the Court found that, although 2 Live Crew took heavily from Orbison’s original—for example, copying “the characteristic opening bass riff (or musical phrase) of the original” and “the words of the first line”—it also altered other lyrics to “juxtapose[] the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility.” *Id.* at 583, 587. Those alterations shifted the *message* of the original, from a song that “ignores the ugliness of street life and the debasement that it signified” to a song that “reasonably could be perceived as commenting on the original or criticizing it to some degree.” *Id.* at 583;

see also id. at 582 (citing district court’s description of 2 Live Crew’s transformation of Orbison’s song).

The Court’s analysis in *Campbell* thus turned on whether 2 Live Crew’s follow-on song “c[ould] reasonably be perceived” to convey a meaning or message distinct from the Orbison original. And because 2 Live Crew’s song could be so perceived, the Court found it transformative.

2. *Campbell*’s meaning-or-message test governs the transformative use inquiry generally, not just in parody cases. Last year, this Court applied *Campbell*’s test in *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021), to the alleged infringement of copyrighted computer software. There, Google “precisely” copied a portion of an Oracle computer program “that enables a programmer to call up prewritten software that, together with the computer’s hardware, . . . carr[ies] out a large number of specific tasks.” *Id.* at 1190, 1203. The Court explained that, “[i]n the context of fair use, we have considered whether the copier’s use ‘adds something new, with a further purpose or different character, altering’ the copyrighted work ‘with new expression, meaning, or message.’” *Id.* at 1202 (quoting *Campbell*, 510 U.S. at 579); *see also id.* at 1203 (“[W]e have used the word ‘transformative’ to describe a copying use that adds something new and important.”).

The Court offered two examples of transformative uses, one of which is especially apposite here. First, it observed that “[a]n ‘artistic’ painting might, for example, fall within the scope of fair use even though it precisely replicates a copyrighted ‘advertising logo to make a comment about consumerism’”—a clear reference to Warhol’s *Campbell’s Soup Cans* work. *Id.*

at 1203 (quoting 4 *Nimmer on Copyright* § 13.05[A][1][b], which states in full that transformative use can occur by “modifying the meaning or message of the original work, in whatever form that may occur” and providing the *Soup Cans* painting as an example). Second, it pointed to *Campbell*, noting that “a parody can be transformative because it comments on the original or criticizes it, for ‘[p]arody needs to mimic an original to make its point.’” *Id.* (quoting 510 U.S. at 580-81). In both illustrations, the follow-on works recognizably resembled the originals. Notwithstanding those similarities, it was the difference in meaning or message that rendered the new works transformative.

Applying these principles, the Court found that Google’s use of the copyrighted work was “transformative” because of the socially productive purpose for which the copying was done. *Id.* (noting that the copying “was consistent with that creative ‘progress’ that is the basic constitutional objective of copyright itself”). And this was so in spite of the fact that both the original and follow-on works were the same type of content (computer software), deployed for commercial profit, in the service of the same high-level purpose (providing tools for third-party developers to create applications). *Id.*

Campbell and *Google* thus establish a straightforward rule: A follow-on work is transformative—and has a different “purpose and character” under Section 107(1)—when it can “reasonably be perceived” to “add[] something new,” by “altering the first with new expression, meaning, or message.” *Campbell*, 510 U.S. at 578-79, 582. That principle applies to visual art, as *Google*’s

Warhol example made clear. And it appropriately trains the inquiry on what a follow-on work *means*, not on how much of the original material is discernible.

B. *Campbell's* Meaning-Or-Message Test Aligns With The Copyright Act's Text, Purpose, And History

Campbell's meaning-or-message test properly implements the text and purpose of the Copyright Act. Indeed, that test provides a vital safeguard, ensuring the copyright laws do not unduly impede core expression protected by the First Amendment.

1. Section 107(1) requires courts to consider the “purpose and character of the [follow-on] use” as the first factor of the fair use inquiry. 17 U.S.C. § 107(1). It draws directly from Justice Story’s formulation of the fair use test, which considered “the nature and objects of the selections made.” *Campbell*, 510 U.S. at 578 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (1841)). As this Court explained in *Campbell*, Section 107(1) was intended to capture the longstanding common-law approach to fair use. *See id.* at 576. Under that approach, the fair use doctrine empowered courts to apply an equitable rule of reason that would prevent copyright protection from “stifl[ing] the very creativity [the copyright laws]” were “designed to foster.” *Id.* at 577. *Campbell's* meaning-or-message test faithfully carries out that historic mission.

Copyright ultimately rests on a “pragmatic,” utilitarian bargain: “[S]ociety confers monopoly-exploitation benefits for a limited duration on authors and artists” to incentivize and promote “the intellectual and practical enrichment that results

from such creative endeavors.” Leval 1109; *see also Google*, 141 S. Ct. at 1195 (noting that copyrights are granted “not as a special reward” to creators, but rather “to encourage the production of works that others might reproduce more cheaply”); *Harper & Row Publishers, Inc. v. Nation Enters.* 471 U.S. 539, 545 (1985) (copyright protection is “intended to increase and not to impede the harvest of knowledge”); *supra* at 4. In other words, copyright protection for creators serves the ultimate end of securing for the public a rich marketplace of ideas.

This purpose was reflected in the first modern copyright statute, Britain’s Statute of Anne, which Parliament enacted in 1710 “to destroy the booksellers’ monopoly of the booktrade and to prevent its recurrence” by vesting copyright in books in their authors, who could then communicate new ideas without fear of censorship, thereby promoting “the encouragement of learning,” L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. Copyright Soc’y USA 365, 379 (2000) (quoting 8 Anne C.19 (1710)). That same goal underpins the Constitution’s Copyright Clause, which expressly states that the goal of Congress’s copyright power is “[t]o promote the Progress of Science and useful Arts.” U.S. Const. art. I, § 8, cl. 8; Leval 1108.

Courts have long recognized that the “exclusive rights” awarded by copyright have “negative features.” *Google*, 141 S. Ct. at 1195. They “can sometimes stand in the way of others exercising their creative powers” by preventing the use of existing expression as a basis for innovation. *Id.* It has thus been understood since “the infancy of copyright protection” that, for copyright to serve rather than undermine the public good, some borrowing must be

permitted. *Campbell*, 510 U.S. at 575. As Justice Story explained nearly two centuries ago, “[e]very book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.” *Emerson v. Davies*, 8 F. Cas. 615, 619 (No. 4,436) (C.C.D. Mass. 1845).

The doctrine of fair use has always ensured that copyright monopolies do not unduly “stifle” creativity. *Campbell*, 510 U.S. at 577 (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)). Under the common law, a creator was allowed to make “justifiable use of the original materials, such as the law recognizes as no infringement of the copyright” held by the materials’ author. *Folsom*, 9 F. Cas. at 348. A follow-on work that reflected “intellectual labor and judgment,” rather than “merely the facile use of the scissors,” constituted a justifiable use worthy of protection. *Id.* at 345. The doctrine avoids “put[ting] manacles upon science,” and thus provides leeway for follow-on users to rely on existing expression to develop works communicating new ideas. *Cary v. Kearsley*, 170 Eng. Rep. 679, 680 (1803). Fair use thus advances the core purpose of the copyright laws—“to stimulate activity and progress in the arts for the intellectual enrichment of the public.” Leval 1107.

For the fair use doctrine to fulfill these purposes, it must ensure that works conveying genuinely new and distinctive ideas are not suppressed by copyright-created monopolies. Fair use has accordingly always placed significant emphasis on whether the new work conveys a distinct meaning or message from the source material. *See Gyles v. Wilcox*, 26 Eng. Rep. 489, 490 (1740) (explaining that copyright “must not be carried so far as to restrain persons from” creating follow-on works where the “invention, learning, and

judgment of the [follow-on work's] author is shewn in them, and in many cases [the follow-on works] are extremely useful"); *see also Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539, 542 (1st Cir. 1905) (“[I]nstances may be easily cited where portions of a copyrighted book may be published for purposes other than those for which the original book was intended.”).

In *Campbell*, this Court established the meaning-or-message test to implement these historic principles. That test creates a strong presumption that works conveying new meanings or messages will not be suppressed by law. In doing so, it implements this Court’s prior teaching that the limits of copyright protection should be “construed in light of th[e] basic purpose” of encouraging “artistic creativity for the general public good.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); citing *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)).

If a work conveying a new meaning or message was generally *not* considered transformative, the fair use doctrine would lose much of its vitality in protecting new contributions to the marketplace of ideas. Even works that “add[ed] something new” to public understanding would be prohibited—leaving dangerously little “breathing space” for the elaboration of new concepts, in ways that recognizably build on prior contributions. *Campbell*, 510 U.S. at 579. A meaning-or-message test for transformativeness is thus crucial to ensuring that the fair use inquiry fulfills its core, historic function of protecting the marketplace of ideas.

2. *Campbell's* meaning-or-message test is also faithful to Section 107(1)'s literal text. After all, a follow-on work that communicates a new meaning or message inherently has a different "purpose" and "character" than the original: By definition, it seeks to communicate something different to—and provoke a different response from—its audience.³

In addition, the meaning-or-message test tracks the list of examples that Congress provided in Section 107 as illustrations of possible fair uses of prior works, which this Court has noted can help "guide[]" the fair use inquiry. *Id.* at 578-79. These examples include "criticism, comment, news reporting, teaching, . . . scholarship, or research." 17 U.S.C. § 107; *see also* H.R. Rep. No. 94-1476, at 65 (also mentioning "parody"). While falling within one of these categories does not automatically confer fair use protection, they nonetheless provide "general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses." *Campbell*, 510 U.S. at 577-78.

And the unifying theme of those disparate categories is that, for each one, a follow-on work often conveys a new meaning or message different than the original it borrows from. For example, as this Court alluded to in *Google*, a copyrighted soup-can label is used in a transformative manner when it is used in a follow-on work to comment on "consumerism." 141 S. Ct. at 1203. That is because the label, even when

³ *See Webster's New World Dictionary of the American Language* 1154 (1970) (defining "purpose" as "the object for which something exists or is done"); *id.* at 239 (defining "character" as "a distinctive trait, quality, or attribute; characteristic").

visually identical in the second work, communicates a new and distinct meaning when placed into a new context. Similarly, works of research and scholarship that quote prior works in their field qualify as transformative when the new works' authors do not simply replicate the messages of the prior works, but use pre-existing materials to convey the new authors' different ideas.⁴

3. Finally, the meaning-or-message test plays a key role in preventing the Copyright Act from impinging on core expressive activity protected by the First Amendment.

The Copyright Act directly curtails expression by making certain speech illegal. *See Golan v. Holder*, 565 U.S. 302, 327-28 (2012) (“[S]ome restriction on expression is the inherent and intended effect of every grant of copyright.”). That raises fundamental First Amendment concerns. As this Court has explained, however, the fair use defense operates as a critical safeguard to ensure that the copyright laws do not abridge protected expression.

Twice in recent years, this Court has rejected First Amendment challenges to copyright statutes based on the “built-in First Amendment accommodation[]” provided by fair use. *Eldred*, 537 U.S. at 219-21 (rejecting challenge to Copyright Term Extension Act); *see also Golan*, 565 U.S. at 327-29 (rejecting challenge to extension of copyright protection to works protected in treaty-partner countries). Both times, the Court relied on *Campbell* to describe the “considerable latitude” afforded to follow-on users

⁴ Compare *Nutt v. Nat'l Inst. Inc. for the Improvement of Memory*, 31 F.2d 236, 237-38 (2d Cir. 1929), with *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1260 (2d Cir. 1986).

seeking to use preexisting “expression itself” in new works. *Eldred*, 537 U.S. at 219; *Golan*, 565 U.S. at 329; see also Ned Snow, *The Forgotten Right of Fair Use*, 62 Case W. Res. L. Rev. 135, 138 (2011) (fair use “is intended to calm the strife between copyright and free speech”).

For the fair use defense to properly safeguard the First Amendment, it must focus on whether the follow-on work makes an independent contribution to the marketplace of ideas. Copyright-law restrictions on speech may be justified when the follow-on work merely replicates “other people’s speech[]” without adding anything new of significance. *Eldred*, 537 U.S. at 221. But such restrictions undermine First Amendment values—and are *not* justified—when they block follow-on works that express new and distinctive meanings or messages. The creation and dissemination of such messages promote “the continued building of our politics and culture.” *Police Dep’t of the City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

Campbell’s meaning-or-message test advances First Amendment values by “allow[ing] later authors to use a previous author’s copyright to introduce new ideas or concepts to the public.” *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264 (11th Cir. 2001). At the same time, it gives no aid to copiers merely seeking to express the *same* message in a different form. In these ways, *Campbell* promotes innovation and prevents copyright law from suppressing original creative works that build on prior contributions.

C. The Prince Series Can Reasonably Be Perceived To Communicate A New Meaning Or Message

It is undisputed here that the Prince Series conveys a new meaning or message, as both courts below found. Pet. App. 26a, 71a-72a. While Goldsmith communicated the message of a vulnerable Prince, Warhol's Prince Series conveys the dehumanizing nature of celebrity. Not even Goldsmith has argued otherwise.

1. Both courts below recognized that Warhol's Prince Series thoroughly altered Goldsmith's source photograph in order to convey a fundamentally new and distinct meaning and message. As the district court explained, Warhol removed Prince's torso and brought his face and a small part of his neckline "to the forefront." *Id.* at 71a. The details of Prince's bone structure "are softened" in some of the works or "outlined or shaded" in others. *Id.* And Warhol rendered Prince as a "flat" and "two-dimensional figure" rather than the "three-dimensional portrayal" in Goldsmith's photograph, and introduced "loud, unnatural colors" rather than the black-and-white of the original. *Id.* at 71a-72a.

Taken together, "[t]hese alterations result[ed] in an aesthetic and character different from the original," which conveyed a new message. *Id.* at 72a. Whereas Goldsmith's photograph portrayed Prince as "uncomfortable" and "vulnerable," the Prince Series "reflect[ed] the opposite" message by portraying Prince as "an iconic, larger-than-life figure." *Id.* at 71a-72a.

The Second Circuit similarly recognized the different meanings and messages of the two works,

noting that that “the cumulative effect of [Warhol’s] alterations may change the Goldsmith Photograph in ways that give a different impression of its subject.” *Id.* at 26a. And in opposing certiorari, Goldsmith did not dispute that the Prince Series conveys a different message than the Goldsmith photograph. Indeed, below Goldsmith candidly acknowledged that Warhol’s creations involved “substantial creativity and distinctive quality.” *See Resps. C.A. Br.* 32.

2. Ample record evidence supports those conclusions. As Goldsmith herself testified, the message conveyed by her studio photographs was that Prince was a “vulnerable human being.” *Pet. App.* 71a (quoting JA394). And the resulting images reflect that aim. As Goldsmith explained, the photographs from the photoshoot depict Prince as “fragile” and “not a comfortable person.” *Pet. App.* 71a; JA283-84.

By contrast, as Professor Crow explained, Warhol’s alterations convey the message that Prince is an “icon or totem of something rather than [an] actual human being.” JA257. The “flattened, cropped, exotically colored, and unnatural depiction of Prince’s disembodied head . . . communicate[d] a message about the impact of celebrity and defin[ed] the contemporary conditions of life.” JA227. By flattening out the images, removing their natural aspects, and adding in their place exaggerated and unnatural colors, Warhol turned Goldsmith’s portrayal of a vulnerable Prince into a “mask-like simulacrum of his actual existence,” which reflects the dehumanizing effect of celebrity. JA249; *see also* JA255.

There is thus no reasonable dispute on this record that the meanings or messages of the two works are not remotely similar. Indeed, the messages here are

just as different—if not more different—than those in *Campbell*. As in that case, Warhol used a pre-existing work to convey a distinctive idea. While 2 Live Crew commented on Orbison’s original song, Warhol used the original to comment on society—but in both cases the follow-on work offered a distinctive “meaning[] or message.” *Campbell*, 510 U.S. at 579. And just as in *Campbell*, Warhol’s work *needed* at least some aspects of the original image to be recognizable to the audience in order to convey the idea he sought to express.

The Prince Series is thus plainly transformative under a proper application of *Campbell*.

II. The Second Circuit Wrongly Departed From *Campbell*’s Meaning-Or-Message Test

The Second Circuit made this straightforward case complicated by jettisoning the meaning-or-message test in favor of a novel visual similarity test lacking any basis in this Court’s precedent. As a result, it rejected AWF’s fair use defense and granted summary judgment to Goldsmith. That decision should be reversed.

A. The Second Circuit’s Approach Violates This Court’s Precedent And Is Unworkable

Although the Second Circuit paid lip service to *Campbell*, it created a new test that directly contravenes *Campbell*’s central holding. The Second Circuit held that, when assessing transformative use under the first fair use factor, courts should *not* analyze differences in meaning between two artworks that are visually similar and share the same high-level “purpose.” Pet. App. 22a-25a. That holding

rests on three flawed premises at odds with precedent.

1. *First*, the Second Circuit held that a “district judge should not assume the role of art critic and seek to ascertain the intent behind or meaning of the works at issue.” *Id.* at 22a-23a. That approach thus *forbids* a court from even trying to “ascertain [the] meaning” of a follow-on work. But that makes it impossible for a court to assess the very thing that *Campbell* requires it to evaluate: meaning or message. 510 U.S. at 579. There is no way to reconcile the Second Circuit’s flat-out prohibition on ascertaining meaning or message with *Campbell*’s unequivocal statement that the “central purpose” of the first factor is to assess whether a work is transformative because it can reasonably be perceived to “add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Id.*

Nor is there any way to reconcile the panel’s approach here with what this Court *did* in *Campbell*—which was to examine the content of the lyrics in the follow-on work to determine whether they expressed a distinct message from the original. *Id.* at 583 (“2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later *words can be taken as a comment* on the naiveté of the original of an earlier day” (emphasis added)). If the Second Circuit is right that courts are forbidden from assessing a work’s meaning, *Campbell*’s reasoning and overall approach would have made little sense.

The Second Circuit appeared to believe it necessary to bar courts from ascertaining meaning

because “judges are typically unsuited to make aesthetic judgments and because such perceptions are inherently subjective.” Pet. App. 22a-23a. But that misapprehends *Campbell*’s meaning-or-message test. As this Court explained, the fact-finder is not required to make any subjective or aesthetic judgment regarding the “quality” of the respective works. *Campbell*, 510 U.S. at 582. Rather, it must determine whether a distinct meaning or message can “reasonably be perceived.” *Id.*; see also *id.* at 583 (noting that it did not matter whether a court would “assign a high rank” to the new meaning or message). That is an objective question regarding what a reasonable person could identify in a follow-on work, with an answer discernible from the work’s objective features, as potentially elucidated (if necessary) by expert testimony and other evidence. The question in *Campbell*, for example, was not whether the 2 Live Crew song was *effective* parody, but whether it could be seen as parody at all. This Court had no problem resolving that question. *Id.* at 582.

2. *Second*, the Second Circuit incorrectly held that visual similarity—not the meaning-or-message test—drives the transformativeness inquiry. As the panel put it, “the secondary work’s transformative purpose and character *must*, at a bare minimum, comprise something more than the imposition of another artist’s style on the primary work such that the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material.” Pet. App. 23a-24a (emphasis added). In other words, the Second Circuit found that a work cannot be transformative if the essential elements of its source material remain recognizable within it. That approach is mistaken.

a. The Second Circuit’s singular focus on visual similarity directly contradicts *Campbell* and *Google*. In *Campbell*, this Court determined that the new work borrowed core features of the original’s composition, including the recognizable “opening riff” and the opening line. 510 U.S. at 588. Those are clearly “essential elements” of the original song—indeed, the very *point* of the second work in *Campbell* was that it “recognizably derived from” the former, but placed those same essential elements in a distinctive context, in order to convey how the original “ignore[d] the ugliness of street life.” *Id.* at 583; *id.* at 580-81 (noting that the later work “need[ed] to mimic [the] original to make its point”).

Similarly, in *Google*, there was no dispute that the second work “recognizably deriv[ed] from, and retain[ed] the essential elements of,” the original work. Pet. App. 23a-24a. There, Google had “precisely” “copied roughly 11,500 lines of code” and used it “for the same reason” as the original work, specifically to “enable programmers to call up implementing programs” that would accomplish particular tasks. 141 S. Ct. at 1191, 1203. Yet, again, the Court found that what mattered was that Google’s work nonetheless embodied a distinct creative innovation, by developing “a new platform” for the “smartphone environment.” *Id.* at 1203. The Second Circuit’s visual similarity rule simply defies this Court’s precedent.

b. That rule also collapses the transformative use inquiry into the distinct, threshold question of substantial similarity. To prove that a follow-on work infringes an exclusive right of the copyright owner in the first place, a plaintiff “must show . . . substantial similarity between the copyrighted work and the

defendant's work." *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984). Courts assess substantial similarity based on the visual similarities between the works. See *Peter F. Gaito Architecture, LLC v. Simone Development Corp.*, 602 F.3d 57, 64 (2d Cir. 2010); see also *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1121 (9th Cir. 2018).

Even if substantial similarity is found, however, courts must still determine whether the follow-on work constitutes fair use. As the leading treatise explains, "fair use is a defense not because of the absence of substantial similarity but rather despite the fact that the similarity is substantial." See 4 *Nimmer on Copyright* § 13.05[A]. Yet under the Second Circuit's recognizability framework, it is virtually inevitable that a substantially similar work will *not* be deemed transformative. Compare *Pet. App. 49a* (stating that the Prince Series and the Goldsmith photograph were substantially similar because of the "degree to which Goldsmith's work remains recognizable within Warhol's"), *with id.* at 23a-24a (stating that the Prince Series was not transformative because it "remains both recognizably deriving from, and retaining the essential elements of, its source material"). The Second Circuit failed to provide any workable dividing line to separate substantially similar visual works that are not transformative from those that differ enough to be transformative.

Instead, the panel impermissibly brushed aside Warhol's extensive changes, asserting that transformative use could not be found where there was "imposition of another artist's style on the primary work." *Id.* at 23a-24a. But Warhol's unique style is the very thing that gives the Prince Series its

distinct message, transforming Goldsmith's photograph into a comment on the dehumanizing effects of celebrity. The fact that some visual elements of Goldsmith's work (most or all of which are not properly copyrightable in any event) are still recognizable does not negate that transformation.

c. The Second Circuit also sought to justify its rule on the premise that an overly broad transformative use test would conflict with a copyright holder's "exclusive right[]" over "derivative works"—*i.e.*, works "such as a translation . . . [or] motion picture version," that are "based upon" the owner's prior work. 17 U.S.C. §§ 101, 106(2); *see* Pet. App. 24a-25a. In the panel's view, the Prince Series was no more transformative than a film adaptation of a novel. Pet. App. 24a.

That reasoning wrongly assumes that a work cannot be both derivative and fair use, which runs directly counter to the Copyright Act's text. Fair use is a defense even where the derivative work right is alleged to be infringed. 17 U.S.C. § 107; *see also* *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 95 (2d Cir. 2014). Indeed, that defense only becomes relevant once the creation of a new work has been deemed to constitute a *prima facie* act of infringement of an original (including as a derivative work). Thus, contrary to the Second Circuit's premise, a film adaptation *can* (under the right circumstances) be fair use, despite also being a derivative work within the meaning of 17 U.S.C. § 101. *See* 17 U.S.C. §§ 106(2), 107.

In any event, the Second Circuit's assertion that the Prince Series was less transformative than a film adaptation only highlights the problem with its misguided test, which elevates visual similarity to the

exclusion of whether there is a new meaning or message. An adaptation of a novel into a movie is typically not considered fair use precisely because it does *not* change the meaning or message of the original—even though it *does* significantly alter the work’s form and function, and the original may even be “barely recognizable.” Pet. App. 21a; *see also* *Authors Guild v. Google, Inc.*, 804 F.3d 202, 215 (2d Cir. 2015) (“[D]erivative works generally involve transformations in the nature of *changes of form.*”). Thus, film adaptations, and other specified categories of “derivative works” (such as “translation” and “abridgment”) only highlight that meaning or message—not literal resemblance—is the key to transformativeness for purposes of the fair use analysis.

3. *Finally*, the Second Circuit compounded these errors with another mistake, claiming that the Prince Series could not be transformative because it had the same “overarching purpose and function” as the Goldsmith photograph, since both were “created as works of visual art” and were “portraits of the same person.” Pet. App. 24a-25a.

The panel erred in considering the “purpose” of the Prince Series at far too high a level of generality. The panel’s observation that both works are “portraits of [Prince]” ignores what each work *says* through its respective portrayal: Whereas Goldsmith displayed Prince’s unique human identity, Warhol depicted Prince to reflect back to the viewer his own skewed and dehumanizing view of celebrity. The two works thus had different “purposes” *because* they conveyed different meanings and messages. The panel’s artificial approach ignores that a difference in meaning or message *is* a difference in “purpose.”

The panel's level-of-generality error is also at odds with precedent. In *Campbell*, for example—just like here—the two songs could be described as sharing the same “purpose and function,” in that both were popular musical compositions addressing the same topic. Nonetheless, this Court had no difficulty finding the follow-on work transformative. *Campbell*, 510 U.S. at 579-80. Similarly, in *Google*, the follow-on work copied the computer code “in part for the same reason” as the original was created. 141 S. Ct. at 1190, 1195, 1203. Yet again, this Court rightly deemed the follow-on work transformative. *Id.* at 1203. Indeed, the *Google* Court explicitly rejected an analysis of purpose that would define the purposes of works at too high a level of generality. *Id.* (refusing to “stop” at a definition of purpose limited to fact that both works “enable[d] programmers to call up implementing programs that would accomplish particular tasks”).

The Second Circuit's “purpose and function” rationale is highly malleable and can be gerrymandered to obtain a preferred result. As *Campbell* and *Google* illustrate, it will virtually always be possible to identify *some* level of generality at which two works can be deemed to have the same “purpose and function.” Such an approach provides no meaningful guidance in close cases—and could lead to chaotic and inconsistent results.

B. The Second Circuit's Cramped Understanding Of Transformative Use Would Harm Artists And The Public

If adopted by this Court, the Second Circuit's approach to transformative use would work a sea change in the art world and to copyright law more

generally—overturning decades of settled expectations, and chilling core First Amendment expression.

First, the Second Circuit’s view renders presumptively unlawful numerous works of art that borrow from—but add to—preexisting works. A standard that treats the Prince Series as non-transformative would make illegal “[m]any great modern artists,” whose works do not make the “kind of aesthetic change” that the Second Circuit’s ruling requires. Blake Gopnik, *Warhol a Lame Copier? The Judges Who Said So Are Sadly Mistaken*, N.Y. Times (updated Sept. 24, 2021), <https://www.nytimes.com/2021/04/05/arts/design/warhol-copyright-appeals-court.html>; *see also* Robert Rauschenberg Found. et al. Cert. Amici Br. (“Rauschenberg Br.”) 26 (“[A]ppropriation is widely recognized as a hallmark of modernist and contemporary art.”); Kruger & Storr Cert. Amici Br. 13-24 (cataloguing numerous contemporary artists and works of art that utilize appropriation).

Numerous works that employ the time-honored practice of borrowing from existing works (including many Pop Art pieces) would be denied copyright protection and the rewards that accompany it. 17 U.S.C. § 103(a) (denying protection to works that “employ[] preexisting material” for “any part of the work in which such [copyrighted] material has been used unlawfully”). Many works, such as Warhol’s *Green Marilyn* and Roy Lichtenstein’s *Look Mickey* explicitly borrow from preexisting creations. *See* National Gallery of Art, Andy Warhol, *Green Marilyn*, 1962, <https://www.nga.gov/collection/art-object-page.72039.html> (last visited June 8, 2022); *see also* National Gallery of Art, Roy Lichtenstein, *Look*

Mickey, 1961, <https://www.nga.gov/collection/art-object-page.71479.html> (last visited June 8, 2022). That means countless artistic works could lose protection and be subject to exploitation by those who claim to have inspired their creation.

Second, the decision below could prevent museums, foundations, and galleries from displaying culturally significant artwork. Only a “lawfully made” painting or print of a copyrighted work may be publicly displayed by someone other than the copyright owner. 17 U.S.C. §§ 106(5), 109(c). Faced with a choice between copyright infringement litigation under the Second Circuit’s circumscribed transformative use standard and removing artwork from public view, many institutions may choose the latter. Museums and galleries without significant financial resources are especially likely to err on the side of not displaying works that draw on pre-existing creations, depriving the public of the opportunity to interact with those pieces. As *amici* at the certiorari stage emphasized, the Second Circuit’s decision threatens the livelihood of museums and galleries that many Americans rely on for “access to art and arts education.” See *Rauschenberg Br. 27* (collecting cases where galleries were sued “just for displaying allegedly infringing art”).

Third, under the Second Circuit’s approach, owners of many existing paintings and prints would not be allowed to lawfully resell them. 17 U.S.C. §§ 106(3), 109(a). For example, Warhol’s 1964 silkscreen “Shot Sage Blue Marilyn” recently sold at auction for \$195 million, breaking the auction record for an American artist. Robin Pogrebin, *Warhol’s ‘Marilyn,’ at \$195 Million, Shatters Auction Record for an American Artist*, N.Y. Times (May 9, 2022),

<https://www.nytimes.com/2022/05/09/arts/design/warhol-auction-marilyn-monroe.html>. If works that flunk the Second Circuit’s test cannot be resold, the value of influential pieces previously purchased for significant sums, like Blue Marilyn, could tumble. Foundations that seek to preserve works through acquisition will be unable to do so lawfully.

Fourth, the Second Circuit’s test could lead to the removal of seminal works of art from the public sphere. Under 17 U.S.C. § 503, allegedly infringing works can be “impound[ed]” and, following a final judgment, can be ordered destroyed. Although Goldsmith does not seek the destruction of the Prince Series in this particular case, JA120-21, the Second Circuit’s ruling in no way limits the statutory remedies that can be sought in future cases.

Finally, and perhaps most fundamentally, the Second Circuit’s rule would have a chilling effect on artists and would-be artists. Under that rule, many works in the last century’s most significant artistic movement might never have been created in the first place. Going forward, artists will be deterred from drawing upon existing works to offer new, creative messages if their works will not be protected and cannot be displayed or sold. The effect will be particularly pernicious for less-established artists who cannot afford to pay royalties or to mount a legal defense. The damage to the creative process, and the creation of future works, will be substantial.

* * *

The fair use doctrine is meant to offer “breathing space” for innovators building from existing works to generate, express, and disseminate new ideas. *Campbell*, 510 U.S. at 579. The exclusion of meaning

and message from the transformativeness inquiry suffocates that vitally important space. Here, by forbidding consideration of meaning or message, the Second Circuit deemed Warhol's Prince Series non-transformative and thereby rejected AWF's fair use defense. *Supra* at 25-27. That result is incompatible with the role of fair use as a First Amendment safeguard and with copyright's core purpose of encouraging the contribution of genuinely new ideas. Because the Second Circuit's approach renders presumptively unlawful works that belong at the heart of fair use protection, it cannot stand.

CONCLUSION

The Second Circuit's judgment should be reversed.

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ADDENDUM

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U.S. Const. art. I, § 8, cl. 8

Section 8. The Congress shall have Power

* * *

To promote the Progress of Science and useful
Arts, by securing for limited Times to Authors and
Inventors the exclusive Right to their respective
Writings and Discoveries

* * *

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

17 U.S.C. § 101

§ 101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

* * *

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”.

* * *

A “work of visual art” is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

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A work of visual art does not include—

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

* * *

17 U.S.C. § 102

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 103

**§ 103. Subject matter of copyright:
Compilations and derivative works**

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

17 U.S.C. § 106

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 107**§ 107. Limitations on exclusive rights: Fair use**

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 109**§ 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord**

(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord. Notwithstanding the preceding sentence, copies or phonorecords of works subject to restored copyright under section 104A that are manufactured before the date of restoration of copyright or, with respect to reliance parties, before publication or service of notice under section 104A(e), may be sold or otherwise disposed of without the authorization of the owner of the restored copyright for purposes of direct or indirect commercial advantage only during the 12-month period beginning on—

(1) the date of the publication in the Federal Register of the notice of intent filed with the Copyright Office under section 104A(d)(2)(A), or

(2) the date of the receipt of actual notice served under section 104A(d)(2)(B),

whichever occurs first.

* * *

(c) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image

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at a time, to viewers present at the place where the
copy is located.

* * *

17 U.S.C. § 502

§ 502. Remedies for infringement: Injunctions

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

(b) Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person. The clerk of the court granting the injunction shall, when requested by any other court in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all the papers in the case on file in such clerk's office.

17 U.S.C. § 503

§ 503. Remedies for infringement: Impounding and disposition of infringing articles

(a)(1) At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable—

(A) of all copies or phonorecords claimed to have been made or used in violation of the exclusive right of the copyright owner;

(B) of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced; and

(C) of records documenting the manufacture, sale, or receipt of things involved in any such violation, provided that any records seized under this subparagraph shall be taken into the custody of the court.

(2) For impoundments of records ordered under paragraph (1)(C), the court shall enter an appropriate protective order with respect to discovery and use of any records or information that has been impounded. The protective order shall provide for appropriate procedures to ensure that confidential, private, proprietary, or privileged information contained in such records is not improperly disclosed or used.

(3) The relevant provisions of paragraphs (2) through (11) of section 34(d) of the Trademark Act (15 U.S.C. 1116(d)(2) through (11)) shall extend to any impoundment of records ordered under paragraph (1)(C) that is based upon an ex parte application, notwithstanding the provisions of rule 65 of the Federal Rules of Civil Procedure. Any references in

paragraphs (2) through (11) of section 34(d) of the Trademark Act to section 32 of such Act shall be read as references to section 501 of this title, and references to use of a counterfeit mark in connection with the sale, offering for sale, or distribution of goods or services shall be read as references to infringement of a copyright.

(b) As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

17 U.S.C. § 504**§ 504. Remedies for infringement: Damages and profits**

(a) IN GENERAL.—Except as otherwise provided by this title, an infringer of copyright is liable for either—

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) ACTUAL DAMAGES AND PROFITS.—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) STATUTORY DAMAGES.—

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than

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\$750 or more than \$30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in section 118(f)) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

(3)(A) In a case of infringement, it shall be a rebuttable presumption that the infringement was committed willfully for purposes of determining

relief if the violator, or a person acting in concert with the violator, knowingly provided or knowingly caused to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the infringement.

(B) Nothing in this paragraph limits what may be considered willful infringement under this subsection.

(C) For purposes of this paragraph, the term “domain name” has the meaning given that term in section 45 of the Act entitled “An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes” approved July 5, 1946 (commonly referred to as the “Trademark Act of 1946”; 15 U.S.C. 1127).

(d) ADDITIONAL DAMAGES IN CERTAIN CASES.—In any case in which the court finds that a defendant proprietor of an establishment who claims as a defense that its activities were exempt under section 110(5) did not have reasonable grounds to believe that its use of a copyrighted work was exempt under such section, the plaintiff shall be entitled to, in addition to any award of damages under this section, an additional award of two times the amount of the license fee that the proprietor of the establishment concerned should have paid the plaintiff for such use during the preceding period of up to 3 years.

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17 U.S.C. § 507

§ 507. Limitations on actions

* * *

(b) CIVIL ACTIONS.—No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

No. 21-869

In the Supreme Court of the United States

ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS,
INC.
PETITIONER,

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,
RESPONDENTS.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Petitioner frames the question presented as follows:

Whether a work of art is “transformative” when it conveys a different meaning or message from its source material (as this Court, the Ninth Circuit, and other courts of appeals have held), or whether a court is forbidden from considering the meaning of the accused work where it “recognizably deriv[es] from” its source material (as the Second Circuit has held).

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In the Supreme Court of the United States

ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC.
PETITIONER,

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,
RESPONDENTS.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

BRIEF FOR RESPONDENTS

STATEMENT

Every day, novelists strike gold selling film rights to Hollywood. Musicians license songs for commercials. Photographers license photographs for magazines, calendars, and news stories. Comic-book writers beget cartoons. To all creators, the 1976 Copyright Act enshrines a longstanding promise: Create innovative works, and copyright law guarantees your right to control if, when, and how your works are viewed, distributed, reproduced, or adapted. Creators and multi-billion-dollar licensing industries rely on that premise.

Copyrights have limits. Section 107 of the Act codifies the common-law fair-use doctrine, an affirmative defense against infringement. The contours of fair use have long been clear. Courts determine whether secondary uses are fair by holistically balancing four factors: whether the new use embodies a different “purpose and character” from the original; the nature of the original work; how much, and how significantly the new use copies; and the potential market impact on the original. That test encourages creative works that stand apart from original works, while preventing copycats from shortcutting ingenuity.

Petitioner Andy Warhol Foundation (AWF) would throw the traditional fair-use test overboard. AWF isolates one fair-use factor, “the purpose and character of the use”—in the Court’s shorthand, a “transformative use.” According to AWF, infringing works are transformative, and presumptively fair use, if they add new meaning or message to the original.

But the Act does not refer to “new meaning or message.” From the common law onward, adding new meanings to original works has never absolved copiers of liability for infringement. This Court and others have instead asked whether copying is necessary to accomplish some distinct end, such that the new use stands on its own without substituting for the original. Parody, news commentary, and criticism are paradigmatic examples where some copying is necessary for the secondary works to exist. Those distinct purposes usually prevent secondary works from supplanting originals.

AWF’s meaning-or-message test is completely unworkable and arbitrary. Asking if new works are “reasonably perceived” to have different meanings is a fool’s errand. Creators, critics, and viewers disagree about what

works mean. Nor could AWF's test apply to many copyrightable works—like marine charts—that harbor no hidden depths.

AWF's test would transform copyright law into all copying, no right. Altering a song's key to convey different emotions: presumptive fair use. Switching book endings so the bad guys win: ditto. Airbrushing photographs so the subject conforms to ideals of beauty: same. That alternative universe would decimate creators' livelihoods. Massive licensing markets would be for suckers, and fair use becomes a license to steal.

Under established principles, this is a classic case of nontransformativeness. Respondent Lynn Goldsmith, a renowned photographer, took a distinctive studio photograph of Prince. In 1984, *Vanity Fair* commissioned Andy Warhol to use Goldsmith's photograph to create an illustration of Prince for an article. No one thought Warhol could appropriate Goldsmith's photograph without permission. *Vanity Fair* paid Goldsmith \$400 for a license and credited her photograph as the source for Warhol's illustration, "Purple Prince," which Warhol apparently created as part of the "Prince Series"—16 silkscreens and sketches of Prince.

Fast forward to 2016. Warhol had long since passed away; Prince suddenly died. *Vanity Fair*'s parent, Condé Nast, wanted to rerun Purple Prince. AWF offered other Prince Series images; Condé Nast chose Warhol's "Orange Prince." That use—the only one at issue—substituted for Goldsmith's photograph in the same magazine market. Magazines depicting Prince could choose between Warhol's and Goldsmith's images. Same source photograph as Purple Prince; same publisher; same use—

yet, this time, no credit or payment to Goldsmith. Copyright law cannot possibly prescribe one rule for purple silkscreens and another for orange ones.

Under AWF's test, this case becomes a manipulable battle of opinions. In AWF's view, because Goldsmith testified that Prince seemed "vulnerable" but art critics opined that Warhol made celebrities appear "iconic," Warhol's versions are transformative. Pitting Goldsmith's purported subjective intent against critics' decades-later assessment of Warhol's oeuvre compares apples to oranges and raises questions sure to fuel endless litigation. If Goldsmith says Prince looked "iconic" or hired experts to so testify, does the outcome change? If newly discovered Warhol diaries reveal he saw Prince as "vulnerable," what then? Under AWF's theory, if critics say every Warhol-style silkscreen alters a photograph's meaning, copiers would prevail. This Court should not jettison longstanding fair-use principles for a jerry-rigged test designed to let AWF always win.

A. Goldsmith's 1981 Portraits of Prince

In 1981, the Rolling Stones' "Start Me Up" dominated the airwaves, but Prince's star was rising with his new album *Controversy*. Eric Braun, *Prince* 24 (2017). He hosted Saturday Night Live and opened for the Stones. *Id.* at 22.

Lynn Goldsmith took notice. She suggested to *Newsweek's* photo editor, Myra Kreiman, that *Newsweek* commission her to shoot portraits of Prince. C.A. Joint Appendix (C.A.J.A.) 698. *Newsweek* agreed. Goldsmith, Kreiman explained, was "our A list photographer for this type of assignment." C.A.J.A.771. "[W]hen Lynn Goldsmith took somebody into the studio," Kreiman said, "you

generally expected to get something that was ... exceptional. That was creative.” C.A.J.A.773.

Goldsmith already had created many iconic portraits:



Roger Daltrey



Mick Jagger



Bruce Springsteen



Patti Smith



Bob Dylan

Bob Marley

Goldsmith had “bec[o]me a leading rock photographer at a time when women on the scene were largely dismissed as groupies.” Sia Michel, *Rock Portraits*, N.Y. Times, Dec. 2, 2007. Patti Smith commissioned Goldsmith for the cover of *Easter*, and Tom Petty commissioned Goldsmith for “The Waiting.” Lynn Goldsmith, *Album Covers*, <https://bit.ly/3BIisXA>. As culture reporter Anthony Mason put it: “Lynn is a real legend in that world, she’s a great photographer, and a real pioneer.” CBS News, *New Photography Book Captures the Rise of Legendary Band KISS* (Dec. 16, 2017), <https://cbsn.ws/3GicmgG>.

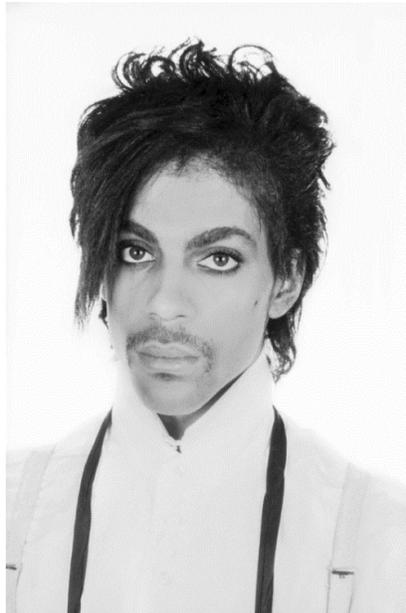
Vanity Fair, *Rolling Stone*, *Life*, and *Time* commissioned Goldsmith photographs. C.A.J.A.639; Lynn Goldsmith, *Rock and Roll Stories* 40, 392 (2013). *Interview*, Andy Warhol’s own magazine, featured her work. C.A.J.A.1639. Museums including the Smithsonian’s National Portrait Gallery and the Museum of Modern Art showcase Goldsmiths. J.A.310. For her groundbreaking

portraiture, Goldsmith won a Lucie Award, the Oscar of photography. Lucie Awards, *Lynn Goldsmith*, <https://bit.ly/39UP010>.

Thus, when Goldsmith portrayed Prince, it was no mere matter of pointing the camera and clicking. The process spanned two days. She captured Prince in concert, then brought him to her studio. J.A.319.

There, she assembled a playlist of early rock to channel Prince's formative years. J.A.274. She gave Prince purple eyeshadow and lip gloss to accentuate his sensuality. Pet.App.4a. She set the lighting to showcase Prince's "chiseled bone structure." J.A.316. And she alternated 85-mm and 105-mm lenses to frame Prince's face. Pet.App.4a-5a. Goldsmith explained: "There is a reason I pick everything I pick." C.A.J.A.1517.

Goldsmith created the below portrait—the subject of this case—during that session:

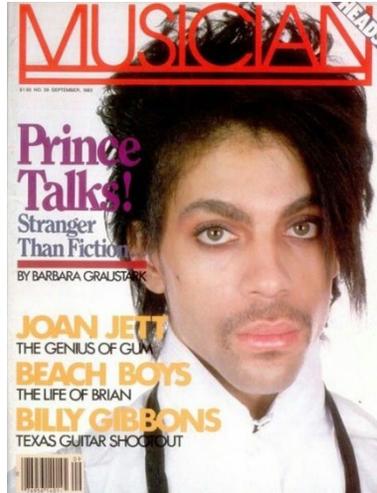


The lip gloss that Goldsmith had Prince apply glints off his lip. J.A.279-80. The pinpricks of light in Prince's eyes reflect her photography umbrellas. J.A.285. And the well of shadow around Prince's eyes and across his chin come from Goldsmith's lighting choices. J.A.316.

Newsweek featured a Goldsmith photograph from Prince's concert. J.A.496. Goldsmith kept the black-and-white portraits in her files for future publication or licensing. J.A.319.

Like many photographers, Goldsmith's livelihood relies on licensing. J.A.109. Profits from the initial creation and sale of individual photographs tend to be low. J.A.292 (Sedlik expert report). Thus, photographers "are in the business of licensing reproduction rights for a variety of unanticipated uses." William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 266 (2003). Photographers often license a single photograph across different mediums, from magazines to book covers to calendars. J.A.292-93.

By holding back her Prince portraits, Goldsmith retained control over when, where, and how others would view her art. For example, she licensed a portrait from her 1981 session to *Musician* magazine for a 1983 cover:



Goldsmith licensed other Prince portraits to *People*, *Reader's Digest*, and the Smithsonian catalog. J.A.369-70. Her books feature later Prince portraits and recount her 1981 shoot. *Rock and Roll Stories*, *supra*, at 54-55; Lynn Goldsmith, *PhotoDiary* (1995). The National Portrait Gallery also displayed a Goldsmith portrait of Prince. C.A.J.A.990.

B. Andy Warhol's 1984 Prince Series

1. In 1984, Prince's star became a supernova with the release of *Purple Rain*. For its November 1984 issue, *Vanity Fair* wanted an illustration of Prince for an article, "Purple Fame," assessing Prince's rise. J.A.524. The magazine hired Andy Warhol for the commission. The record is silent as to why Warhol specifically was chosen. *Contra Pet.* Br. 18.

By 1984, Warhol's "cutting-edge reputation had taken a beating," in the words of AWF's expert Thomas Crow. J.A.218. Warhol's celebrity portraits from the 1960s gave way to commissions for wealthy socialites. J.A.211. Warhol delegated much of his production process so that he

could complete 50 commissions annually, at \$25,000 apiece. Naomi Martin, *Andy Warhol Portraits*, Artland Mag., <https://bit.ly/3OYasEH>.

Warhol also maintained a sideline doing small-dollar magazine commissions that “could generate orders” for more “lucrative portraits.” C.A.J.A.1876 (\$1,000 commission). Earlier in 1984, Warhol accepted a *Time* commission to portray Michael Jackson for the cover, despite qualms about *Time*’s artistic judgment. (Per Warhol’s diary: “The cover should have had more blue. I gave them some in [another] style ... , but they wanted *this* style.” March 12, 1984, in *The Andy Warhol Diaries* (Pat Hackett ed., 1989).)

Now, *Vanity Fair* wanted a Warhol silkscreen of Prince. But not of whatever image struck Warhol’s fancy. *Vanity Fair* licensed a Goldsmith photograph of Prince “for use as artist reference for an illustration to be published in *Vanity Fair*.” J.A.85. An artist reference is a photograph which “an artist would create a work of art based on.” Pet.App.6a (cleaned up). Goldsmith’s agency selected Goldsmith’s above, never-before-seen portrait of Prince. J.A.146. In return, *Vanity Fair* paid Goldsmith a \$400 licensing fee—a fact AWF omits. J.A.86.

Vanity Fair agreed to credit Goldsmith for the source photograph alongside Warhol’s illustration—another key fact AWF omits. J.A.86. *Vanity Fair* agreed that any illustration based on Goldsmith’s photograph could run only in the November 1984 issue. J.A.85. *Vanity Fair* agreed to run only one full-page and one quarter-page version of the illustration and only in the North American print edition. J.A.85. And *Vanity Fair* agreed that “[o]ther than for the purpose indicated herein,” Goldsmith’s photograph “may not be reproduced or utilized in

any form or by any means” without Goldsmith’s permission. J.A.86. The license stated: “NO OTHER USAGE RIGHTS GRANTED.” J.A.85.

2. License secured, *Vanity Fair* sent Goldsmith’s photograph to Warhol to use in the commissioned work. According to AWF’s expert Crow, Warhol likely would not have depicted Prince at all absent this commission. J.A.307. The record is silent on Warhol’s ensuing creation of 16 silkscreens and sketches of Prince, now called the Prince Series. The Prince Series was apparently not memorable enough to feature in Warhol’s diaries.

What is apparent is that Warhol employed his well-established silkscreening technique to create the Prince Series. Silkscreen printing “allowed Warhol and his assistants to mass-produce a large number of prints with relative ease.” Andy Warhol Museum, *PowerPoint: Silkscreen Printing* 4, <https://bit.ly/38HwTPD>. Warhol proclaimed: “Anyone can do them.” J.A.195. By the 1980s, Warhol outsourced silkscreening to a contractor who “deliver[ed] the still-damp canvases to the back rooms of Warhol’s studio,” so Warhol appeared to have created them himself. Blake Gopnik, *Warhol* 850 (2020).

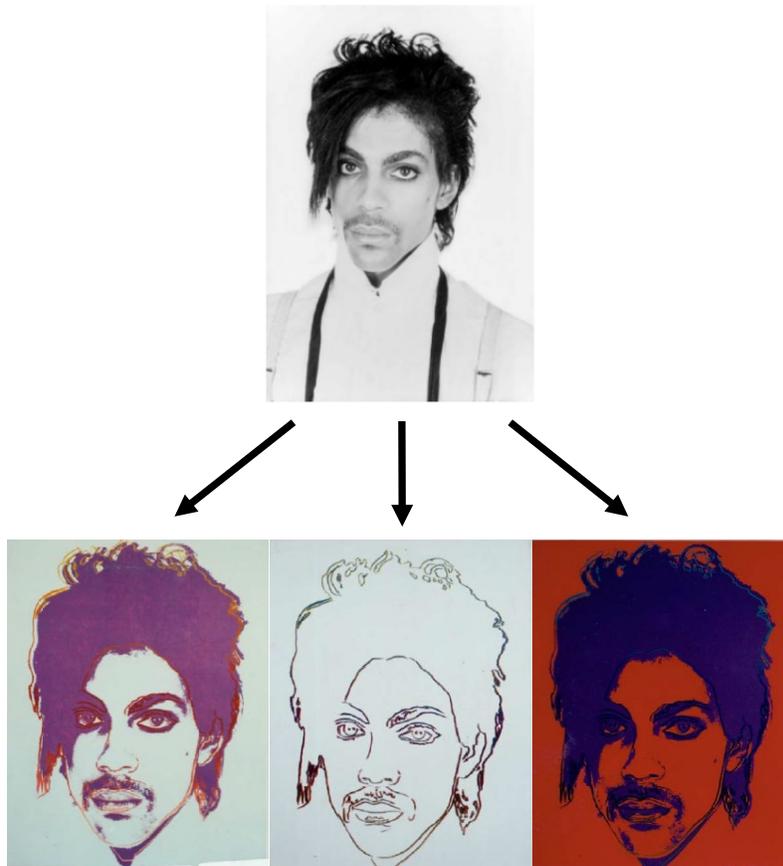
The silkscreening process would have begun with a professional printer enlarging and reproducing Goldsmith’s photograph onto a fine-mesh silkscreen using a chemical solution to produce essentially a blown-up photographic negative. J.A.160, 164-65. The printer would have also printed Goldsmith’s photograph on transparent acetate, so that Warhol or assistants could trace the photograph onto canvas and apply brightly colored paint. J.A.168. The two drawings and two screen prints in the Prince Series were preliminary phases of the silkscreen process. C.A.J.A.802-03. For example:



Warhol or assistants would place the silkscreen with the photograph on the canvas, pour ink on the silkscreen, then squeegee the ink through the silkscreen onto the canvas. The end result reproduced the photograph on the painted canvas. J.A.164-65; see Andy Warhol Museum, *Andy Warhol's Silkscreen Technique*, YouTube (Sept. 26, 2017), <https://bit.ly/3Qnjwnw>. The remaining 12 works in the Prince Series were created this way.

Essential features of Goldsmith's portrait thus recur throughout the Prince Series. Pet.App.34a-35a & n.10. The angle of Prince's gaze is identical. Prince's dark

bangs obscure his right eye. Pet.App.34a. The shadows ringing Prince's eyes and darkening his chin remain. The light and shadow on Prince's lips owe their pattern to Goldsmith's lip gloss. Even the reflections from Goldsmith's photography umbrellas in Prince's eyes carry through. Pet.App.36a. As Warhol's assistant Gerard Malanga explained, Warhol's prints were not intended "to get away from the preconceived image, but to more fully exploit it through the commercial techniques of multiple reproduction." J.A.191.



Vanity Fair ran one Prince Series image, Purple Prince, inside the November 1984 issue, crediting Goldsmith alongside the image and elsewhere:

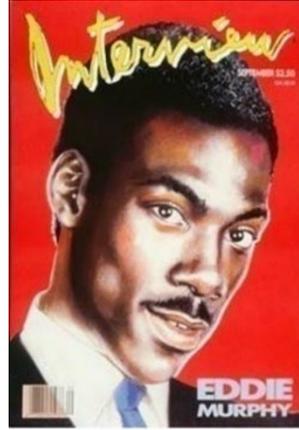


C.A.J.A.1046, 1048; *contra* Pet. Br. 21 (omitting credit).

Those credits were typical when magazines used Goldsmith's work for artist's references. Indeed, Warhol's magazine, *Interview*, licensed a Goldsmith portrait of comedian Eddie Murphy as a source photograph and prominently credited her when artist Richard Bernstein used her photograph in a cover portrait of Murphy. *Interview* did so even though Bernstein cropped Murphy, altered his face, and changed colors. *Interview 1987-09*, Internet Archive, <https://bit.ly/39X1o3Z>:



Goldsmith Original

*Interview* Cover**COVER:**

Designed and Painted by Richard Bernstein.

Eddie Murphy Photographed by Lynn Goldsmith/LGI.

3. After *Vanity Fair* ran Purple Prince, Warhol never sold or displayed the Prince Series. See William F. Patry, *Patry on Copyright* § 10:35.31 (Mar. 2022 update).

Warhol died in 1987. Petitioner AWF took ownership of the Prince Series, plus Warhol's copyrights and other works—assets worth around \$337 million. AWF, Form 990-PF, at 1 (Mar. 3, 2021), <https://bit.ly/3oTy4Q7>. AWF began monetizing the Prince Series, selling 12 of the 16 originals for large sums and licensing many Prince images. J.A.340; C.A.J.A.1822-31. The Andy Warhol Museum holds the other four. Pet.App.9a.

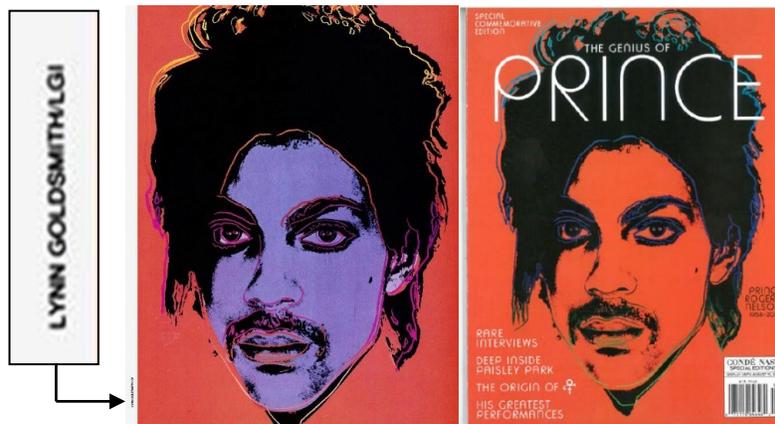
That revenue stream is part of AWF's licensing empire, which nets AWF over \$3.4 million annually for Warhol reprints on everything from cat toys to pint glasses. Form 990-PF, *supra*, at 12. AWF protects its copyrights aggressively, even sending a cease-and-desist letter to an artist who planned to project Warhol's works within a mu-

sical parody. Ian Mohr, *Warhol Foundation Sends Cease-and-Desist Letter to Ryan Raftery's Musical Parody*, Page Six (Feb. 28, 2022), <https://pge.sx/3LFKjsN>.

C. AWF's 2016 License to Condé Nast

This case arises from a 2016 magazine reprint of another Warhol Prince Series image. When Prince died in 2016, magazines raced to feature him. Several approached Goldsmith: *People* paid \$2,000 to license her Prince concert photographs, and *Guitar World* paid \$2,300 to license her work for a cover. J.A.369

Condé Nast, *Vanity Fair's* parent company, expedited a tribute, “The Genius of Prince,” featuring many Prince photographs. C.A.J.A.2393-2400. Condé Nast sought AWF's permission to rerun Purple Prince. Pet.App.9a. After AWF flagged other Prince Series works, Condé Nast picked Orange Prince instead. Pet.App.9a. AWF charged \$10,250 to run Orange Prince on the cover. J.A.360. But, unlike when this same publisher ran Purple Prince, Goldsmith received no credit or payment for the Orange Prince cover. C.A.J.A.1142.



1984 *Vanity Fair*

2016 Condé Nast

When the Condé Nast cover circulated, Goldsmith saw Orange Prince for the first time and recognized her work. J.A.354-55. Warhol's depiction of Prince struck Goldsmith as "identical" to hers. J.A.289. "Not just the outline of his face, his face, his hair, his features, where the neck is. It's the photograph." J.A.290.



Goldsmith contacted AWF in July 2016 to "find a way to amicably resolve" the issue. C.A.J.A.1152; J.A.355-56.

D. Proceedings Below

1. Instead, in April 2017, AWF sued Goldsmith in the Southern District of New York, seeking a declaratory judgment that the entire Prince Series was noninfringing or, alternatively, fair use. Pet.App.2a.

Goldsmith filed a single counterclaim, alleging that AWF infringed her copyright "by reproducing, publicly displaying, commercially licensing and distributing" Orange Prince. J.A.119. Her counterclaim identified one use only: AWF's 2016 license to Condé Nast. J.A.119. Goldsmith initially sought declaratory and injunctive relief, J.A.120-21, but later clarified that request only reaches

similar commercial licensing. C.A. Br. 50; C.A. Reply Br. 18; C.A. Arg. 9:06-10:59. Goldsmith does not seek to enjoin displays of the Prince Series, which AWF no longer possesses. Pet.App.29a n.8, 42a; C.A. Arg. 7:57-8:06. And the Act has a 3-year limitations period. 17 U.S.C. § 507(b).

2. On summary judgment, the district court held that the whole Prince Series was fair use, and thus that AWF's licensing of Orange Prince was fair use. Pet.App.68a.

On the first factor, "the purpose and character of the use," the court reasoned that works are per se transformative "[i]f looking at the works side-by-side, the secondary work has a different character, a new expression, and employs new aesthetics with [distinct] creative and communicative results." Pet.App.71a (cleaned up). In the court's view, the Prince Series could "reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure" that is "immediately recognizable as a 'Warhol.'" Pet.App.72a.

The court deemed the second factor, "the nature of the copyrighted work," "of limited importance because the Prince Series works are transformative." Pet.App.74a. As to the third factor, "the amount and substantiality of the portion used," the court held that the Prince Series "wash[ed] away the vulnerability and humanity Prince expresses in Goldsmith's photograph." Pet.App.78a. Finally, the court dismissed the market effect on Goldsmith's photograph because "the licensing market for Warhol prints is for 'Warhols.'" Pet.App.81a.

3. The Second Circuit reversed, J.A.644, and reaffirmed that conclusion in an amended opinion after *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021). Pet.App.3a n.1. The court recognized that fair use requires "a holistic, context-sensitive inquiry," "weigh[ing]"

all four factors without “bright-line rules.” Pet.App.12a-13a, 16a (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994)). Here, the court held, all factors favored Goldsmith. Pet.App.43a.

As to transformativeness, the court rejected the district court’s subjective per se rule “that any secondary work that adds a new aesthetic or new expression to its source material is necessarily transformative.” Pet.App.16a. The court considered judges ill-equipped to make “inherently subjective” judgments about an artist’s “intent” or “meaning.” Pet.App.23a. Further, derivative works (like movie adaptations of books) often “transform the aesthetic and message of the underlying” work—but are not automatically fair use. Pet.App.18a-19a, 27a.

Instead, the court recognized that transformative uses typically involve necessary copying of the original, *e.g.*, to “comment[] on” it. Pet.App.14a. Under circuit precedent, however, even unnecessary copying could be transformative. Pet.App.14a. For such copying, the court prescribed a holistic test, asking whether the new work “embod[ied] a distinct artistic purpose” without “catalog[ing] all of the ways in which an artist may achieve that end.” Pet.App.22a. Sometimes, the court explained, imbuing an original work “with new expression, meaning, or message” contributes to transformativeness. Pet.App.16a (cleaned up).

Here, Warhol’s works were nontransformative for two reasons. First, Warhol’s and Goldsmith’s depictions of Prince had the same specific “purpose and function” of “portra[ying] the same person” in a “work[] of visual art.” Pet.App.24a-25a. Second, Warhol’s works “retain[ed] the essential elements” of Goldsmith’s photograph. Pet.App.24a, 26a. The court assumed *arguendo* that Gold-

smith and Warhol “may well have had” different “subjective intent[s].” Pet.App.22a. But transformativeness “cannot turn merely on the stated or perceived intent of the artist.” Pet.App.22a.

The second factor, “the nature of the copyrighted work,” favored Goldsmith “irrespective of whether ... the Prince Series works [were] transformative” because her portrait was “both creative and unpublished.” Pet.App.31a; *contra* Pet. Br. 26-27.

The third factor, “the amount and substantiality” of the copying, favored Goldsmith because Warhol copied “the essence of [her] photograph.” Pet.App.34a.

Finally, the fourth factor, market effect, favored Goldsmith because Goldsmith and AWF both licensed “their respective depictions of Prince to popular print magazines.” Pet.App.39a. The court rejected concerns about suppressing art: “[W]hat encroaches on Goldsmith’s market is AWF’s commercial licensing of the Prince Series, not Warhol’s original creation.” Pet.App.42a. “Direct sales” of the Prince Series would raise different questions. Pet.App.37a.

Judge Jacobs concurred, noting that the court did “not decide [third parties’] rights to use and dispose of [the Prince Series] because Goldsmith does not seek relief as to them.” Pet.App.50a. The “only use at issue” is “commercial licensing,” where Goldsmith’s and Warhol’s Princes compete as “portrait[s] of the musician Prince.” Pet.App.51a-52a.

SUMMARY OF ARGUMENT

I. AWF did not make transformative use of Goldsmith’s photograph.

A. Section 107’s “purpose and character of the use” inquiry examines whether new uses copy original works out of necessity, or instead supersede them. Section 107 treats each “use” separately and employs the word “purpose” to refer to instances where copying is necessary to some distinct creative end. This Court’s fair-use cases examine *why* copiers had to copy, permitting fair use only where copying was necessary—like when the new use comments on or parodies the original. Likewise, at common law, uses that substituted for original works were infringing. Limiting fair use to necessary copying furthers copyright’s goals by protecting creators from market usurpers while permitting novel innovation.

B. The Second Circuit correctly deemed AWF’s use of Goldsmith’s photograph nontransformative. Warhol’s works do not need to copy Goldsmith’s photograph specifically to depict Prince. AWF’s magazine licensing of Orange Prince, which clearly derives from Goldsmith’s photograph, displaces her ability to license her photograph to the same magazines. AWF mischaracterizes the Second Circuit as holding that meaning or message are irrelevant and that visual similarity controls. Instead, the court rightly rejected the district court’s misimpression that artists’ subjective intent and artistic style are dispositive.

C. AWF’s reports of the death of art are greatly exaggerated. Fair use is a *four*-factor, use-by-use, holistic inquiry. Creating and displaying art involves materially different fair-use and remedial questions than the commercial licensing at issue. Artists routinely obtain licenses for copyrighted works or choose alternatives. Indeed, after facing copyright-infringement suits, Warhol took his own photographs or obtained permission.

II. AWF’s any-new-meaning-or-message test would obliterate copyrights.

A. The Copyright Act directs courts to look at “the purpose and character of the use,” not its putative meaning alone. *Campbell*’s reference to a new work’s meaning, 510 U.S. at 579, simply describes how changing the purpose of the work—there, through parody—added new meaning. *Campbell* and the Court’s other modern fair-use cases would make no sense if adding new meaning was dispositive.

Common-law courts similarly did not treat new meaning as dispositive. Otherwise 19th-century lithographers (the silkscreeners of their day) would not have consistently lost copyright lawsuits. And seminal fair-use cases where new meaning was obvious would have come out the other way.

AWF’s test would devastate derivative-work and exclusive-performance rights. Book-to-movie adaptations, unauthorized sequels, and songs in commercials or campaign ads would be fair game—no license required.

AWF’s argument that the First Amendment *requires* fair use whenever someone adds new meaning ignores copyright’s balance between original and secondary creativity, and would render much of copyright law unconstitutional.

B. AWF’s any-new-meaning-or-message test is manipulable and would inject instability into multi-billion-dollar licensing markets across creative contexts. Courts cannot sensibly discern the meaning of art when artists, critics, and the public often disagree about what art signifies. Copyists could always assert a different intent and claim fair use. For other copyrightable works, like puzzles, toys, or architecture, identifying the “meaning or message” is befuddling. Confusion over what AWF’s test entails invites decades of follow-on litigation.

This case proves the point. AWF applies its supposedly objective test through a subjective, apples-to-oranges comparison. AWF contrasts Goldsmith’s decades-later testimony about what her Prince photograph subjectively means with critics’ interpretation of Warhol’s works writ large. Apparently, Warhol’s “unique style” renders all Warhol-style silkscreens transformative. Pet. Br. 50. This Court should not discard centuries of copyright law for an AWF-always-wins rule.

ARGUMENT

I. AWF’s Use of Goldsmith’s Photograph Was Not Transformative

The first fair-use factor—the “purpose and character of the use”—examines whether the new use necessarily borrows from the original to accomplish its purpose, or instead substitutes for the original. Under that longstanding approach, AWF’s use of Goldsmith’s photograph was not transformative.

A. Transformative Uses Necessarily Borrow from the Original

1. Since the dawn of the Republic, Congress has granted original creators certain “exclusive rights” through copyright. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545-46 (1985). The 1976 Copyright Act vests creators with exclusive control over when, where, and how their works will be published, reproduced, or distributed. Creators also control whether to authorize “derivative works,” which “recast, transform[, or adapt[]” the original. 17 U.S.C. §§ 101, 106.

Copyright law also has always recognized that some uses of copyrighted works that otherwise infringe on the original are lawful “fair use.” *Campbell*, 510 U.S. at 575.

The 1976 Act codified this affirmative defense by requiring case-by-case examination of whether a specific “use made of a work” is “fair” based on four factors that courts “shall” consider. 17 U.S.C. § 107. Congress directed courts to assess (1) the “purpose and character of the use,” (2) “the nature of the copyrighted work,” (3) “the amount and substantiality of the portion used,” and (4) how the “use” affects “the potential market for ... the copyrighted work.” *Id.*

That use-by-use inquiry is holistic by design. “Uses” of an original work can range widely: *The Cat in the Hat* might be commented on, parodied, dramatized, or spawn stuffed animals and Halloween costumes. Some of those might be fair use; others not. Section 107 requires all four factors to “be explored, and the results weighed together,” for each use, without resort to “bright-line rules.” *Campbell*, 510 U.S. at 577-78. Ultimately, the fair-use inquiry asks whether someone has “use[d] the copyrighted material in a reasonable manner,” such that the law should presume creators would consent. *Harper & Row*, 471 U.S. at 549-50.

2. AWF isolates one fair-use factor, “the purpose and character of the use.” 17 U.S.C. § 107(1). This Court has described the predominant consideration there as whether someone’s use of an original work is “transformative.” *Campbell*, 510 U.S. at 579 (citation omitted). Statutory text, precedent, common-law cases, and statutory purpose all align: A follow-on use is transformative only if that use must necessarily copy from the original without “supersed[ing] the use of the original work, and substitut[ing] ... for it.” *Harper & Row*, 471 U.S. at 549-50 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (Story, J.)).

a. **Statutory Text.** The “purpose and character of the use” in section 107(1) refers to the “use made” of the original “work,” and thus demands comparing the two. “Purpose” means “[t]hat which one sets before himself as an object to be obtained.” *Webster’s New International Dictionary* 2018 (2d ed. 1949). And “character” conveys “the essential or intrinsic nature.” *Id.* at 451.

Section 107(1) thus paraphrases Justice Story’s famous formulation in *Folsom*, which assessed “the nature and objects of the selections made” to gauge whether the new use “supersede[s] the objects[] of the original.” 9 F. Cas. at 348; see *Campbell*, 510 U.S. at 578-79. “Purpose and character” look to the ends to which the copier puts the original. So courts assess whether the new use necessarily draws from the original to accomplish a different end, or instead competes as a substitute.

Section 107’s other references to “purpose” carry the same meaning. See *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019). Section 107’s preamble lists possible fair uses involving “purposes” like “criticism, comment, news reporting, teaching ... , scholarship, or research.” All of those purposes by definition require copying from the original work. Fair use thus applies only “to works whose very subject is the original composition.” *Campbell*, 510 U.S. at 597 (Kennedy, J., concurring). Those purposes also make substitution unlikely, precisely because the original work is repurposed for a different end. Reporting about a book, for instance, does not trade off with the primary audience for readers. Copyright All. Br. 23-25; MPA Br. 14; NYIPLA Br. 10-11; William F. Patry, *Patry on Fair Use* § 3:1 (May 2022 update); *Patry on Copyright, supra*, § 10:13.

Section 107 also identifies “whether such use is of a commercial nature” or for “nonprofit educational purposes” as aspects of “the purpose and character of the use.” 17 U.S.C. § 107(1). Again, those purposes illuminate whether the new use would supplant the original work by cannibalizing its audience.

b. **Precedent.** Under this Court’s modern fair-use cases, new uses transform original works with a different “purpose and character” only when some copying is indispensable to accomplishing a different end that does not substitute for the original. Thus, this Court has linked the “purpose and character of the use” to the fourth and “most important” fair-use factor, “the effect of the use upon the potential market for” the original. 17 U.S.C. § 107(4); *Harper & Row*, 471 U.S. at 566; see *Campbell*, 510 U.S. at 591-92.

Start with *Sony Corp. of America v. Universal City Studios, Inc.*, which held that using the Sony Betamax to record copyrighted television programs for home viewing was fair use. 464 U.S. 417, 448-49 (1984). As to the “purpose and character” of home recording, *Sony* noted that the Betamax recording device necessarily copied original, copyrighted works. But, whereas studios created the originals for profitable public display, viewers used the Betamax for “private home use”—“a noncommercial, nonprofit activity.” *Id.* at 449. Like reproducing works for teaching purposes, home-use copying does not substitute for original broadcasts. *Id.*

Harper & Row, by contrast, involved an unfair use that eclipsed the original. *The Nation* printed extracts of President Ford’s unpublished memoirs already licensed to *Time*. 471 U.S. at 542-43. Because the “general purpose of *The Nation*’s use” was “news reporting,” *id.* at 561—the same purpose as *Time*’s licensed use—*The Nation*’s

preemptive publication superseded the original by “supplanting the copyright holder’s commercially valuable right of first publication.” *Id.* at 562.

Campbell emphasized the risk of substitution—and the necessity of using the original—as central to the purpose-and-character inquiry. Under *Campbell*, unfair uses “merely ‘supersede[] the objects of the original creation.’” 510 U.S. at 579 (quoting *Folsom*, 9 F. Cas. at 348). Fair uses are more likely “transformative,” *i.e.*, “add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Id.* (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990) (Leval, *Standard*)).

Campbell explained that parody can qualify as “transformative” because parody “shed[s] light on an earlier work, and, in the process, creat[es] a new one” by ridiculing the original. *Id.* That feature of parody makes “market substitution” “less likely”: The parody supplements the original rather than competing with it. *Id.* at 593 & n.24. Parody also *requires* “mimic[king] an original to make its point.” *Id.* at 580-81; *accord id.* at 597 (Kennedy, J., concurring). But the copier cannot just copy to “avoid the drudgery in working up something fresh.” *Id.* at 580 (majority opinion). Thus, 2 Live Crew made “transformative” use of Roy Orbison’s “Pretty Woman,” despite copying many signature elements, because 2 Live Crew relied on those elements to “comment[] on the original or criticiz[e] it.” *Id.* at 583. *Campbell* nonetheless remanded so lower courts could evaluate whether the parody “serve[d] as a market replacement” for the original. *Id.* at 591, 594.

Google similarly found transformativeness because Google needed to repurpose copyrighted computer code developed for desktops to “create a different task-related

system for a different computing environment (smartphones).” 141 S. Ct. at 1205. Significantly, “Google limited its use” of the original code “to tasks and specific programming demands related to” that new purpose. *Id.* at 1203. And *Google* emphasized that the code’s creators believed adapting the code to smartphones would “benefit the[ir] company,” not supplant the creators’ markets. *Id.* at 1204. Google’s use thus gave the underlying code a new “purpose and character”—programming smartphones. That new purpose could only be accomplished through copying, and did not crowd out the original code.

c. **Common Law.** Section 107 “codif[ies] the common-law doctrine” of fair use. *Harper & Row*, 471 U.S. at 549. The common law centered on “whether the defendant’s publication would serve as a substitute for [the plaintiff’s].” *Roworth v. Wilkes*, 170 Eng. Rep. 889, 890 (1807).

As Justice Story put it, the question was whether the new use will “prejudice or supersede the original work; whether it will be adapted to the same class of readers;” and similar considerations. *Gray v. Russell*, 10 F. Cas. 1035, 1038 (C.C.D. Mass. 1839). Justice Story elaborated in *Folsom*, assessing “the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale ... or supersede the objects, of the original work.” 9 F. Cas. at 348. As Justice Woodbury explained, the “leading inquiry” was whether new uses eclipsed the original “in the market with the same class of readers and purchasers.” *Webb v. Powers*, 29 F. Cas. 511, 517 (C.C.D. Mass. 1847). *Campbell* later described this inquiry into “whether the new work merely ‘supersede[s] the objects’ of the original creation” as “[t]he central purpose” of the modern-day

transformativeness inquiry. 510 U.S. at 579 (quoting *Folsom*, 9 F. Cas. at 348).¹

That substitution inquiry did not just ask whether the infringing use undercut the audience for the original, but *why* the use inflicted harm. A scathing review that excerpted the original might hurt sales, but was still fair use because criticism and originals are not fungible. See *Folsom*, 9 F. Cas. at 344-45; *Whittingham v. Woller*, 36 Eng. Rep. 679, 680-81 (1817). By contrast, a review that quotes enough so as to “communicate[] the same knowledge as the original work, ... is an actionable violation of literary property.” *Story*, 23 F. Cas. at 173. The reader has no reason to buy the original.

d. **Statutory Purpose.** Distinguishing uses that supplant the original from those that necessarily copy to accomplish a distinct end advances copyright’s goals. Copyright law “stri[k]es a balance between two subsidiary aims: encouraging and rewarding authors’ creations while also enabling others to build on that work.” *Kirtsaeng v. Jon Wiley & Sons, Inc.*, 579 U.S. 197, 204 (2016).

Copyright “encourage[s] the production of works,” *Google*, 141 S. Ct. at 1195, by allowing artists “to reap the rewards of their creative efforts,” Leval, *Standard*, *supra*, at 1107. Fair use provides a limited “exception” for uses

¹ Accord *Story v. Holcombe*, 23 F. Cas. 171, 173 (C.C.D. Ohio 1847) (McLean, J.) (asking whether new use rendered original “less valuable by superseding its use, in any degree”); George Ticknor Curtis, *Treatise on the Law of Copyright* 240 (1847) (asking if new use “furnishes a substitute for the [original]”); *Hill v. Whalen & Martell, Inc.*, 220 F. 359, 360 (S.D.N.Y. 1914) (“partial satisfaction” of demand for original “ordinarily decisive”); cf. *Bloom v. Nixon*, 125 F. 977, 979 (C.C.E.D. Pa. 1903) (fair use offered “distinct and different variety” of art without harming public’s interest in original).

that promote further innovation without cannibalizing the original. *Harper & Row*, 471 U.S. at 566 n.9; see *Google*, 141 S. Ct. at 1195. The transformativeness inquiry—along with other fair-use factors—further both aims. When new uses supplant originals, creators do not receive their fair reward. Copyists reap economic gain that rightly belonged to original creators. But the more new uses serve different purposes, “the less likely that the secondary work will compete in the original’s exclusive markets.” Pierre N. Leval, *Campbell as Fair Use Blueprint?*, 90 Wash. L. Rev. 597, 602 (2015) (Leval, *Blueprint*).

B. The Second Circuit Correctly Found No Transformativeness

1. The Second Circuit correctly held that AWF’s use of Goldsmith’s photograph was not transformative. “Following ... *Campbell*,” the court explained, “our assessment of th[e] first factor ... focuse[s] chiefly on the degree to which the use is ‘transformative,’ *i.e.*, ‘whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.’” Pet.App.13a (quoting 510 U.S. at 579); see Pet.App.14a, 16a, 23a, 43a-45a (applying *Campbell* and *Google*). That inquiry, the court elaborated, requires “examining how [a work] may ‘reasonably be perceived.’” Pet.App.14a (quoting *Campbell*, 510 U.S. at 582).

The court observed that section 107’s preamble lists “[p]aradigmatic examples of transformative uses,” like “criticism” and “comment,” which necessarily copy from the original to accomplish a “manifestly different purpose.” Pet.App.14a; see *Campbell*, 510 U.S. at 578-79. The court concluded that “the most straightforward cases of

fair use thus involve a secondary work that comments on the original in some fashion.” Pet.App.14a.

Under the statutory text and this Court’s precedents, the court could have stopped there. AWF has never contended that Warhol’s Orange Prince—the image on the 2016 magazine cover—needed to use *Goldsmith’s* photograph. “[T]here is no evidence that Warhol ... was involved in identifying or selecting the particular photograph.” Pet.App.35a. Warhol depicted Prince only because *Vanity Fair* paid him to, and could use Goldsmith’s photograph only because *Vanity Fair* licensed it. *Supra* p. 11. AWF (at 30) claims Warhol “erased the humanity” from Goldsmith’s photograph, but Warhol could have used any Prince photograph, *e.g.*, Pet. Br. 16-17, for that purported aim.

Nor does AWF dispute that licensing Orange Prince to magazines supplants Goldsmith’s original. Pet.App.40a. Because both works depict Prince, “someone seeking a portrait of [Prince] might interchangeably use either one.” Pet.App.45a. Obvious market substitution makes this “an easy case.” Jane C. Ginsburg, *Comment on Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 16 J. Intell. Prop. L. & Prac. 638, 642 (2021) (Ginsburg, *Comment*). In 1984, *Vanity Fair* paid Goldsmith \$400 and credited her photograph as the source for Warhol’s Purple Prince. Fair use does not allow AWF to sell for \$10,250 a materially identical image to the same publisher without paying or crediting Goldsmith.

Nonetheless, the court applied a broader conception of fair use than the Act or this Court have adopted. Previous circuit cases had “rejected the proposition that a secondary work *must* comment on the original ... to qualify as fair use.” Pet.App.14a (citing *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013)). The court thus assessed

when new uses might be fair even where copying was unnecessary to illuminate the original work. Answer: “[T]he secondary work itself must reasonably be perceived as embodying a distinct artistic purpose, one that conveys a new meaning or message separate from its source material.” Pet.App.22a; *see* Pet.App.24a (likewise requiring “different and new artistic purpose” so “secondary work stands apart from the ‘raw material’”).

But the court declined to “catalog all of the ways” of satisfying that broader test, Pet.App.22a, instead simply rejecting AWF’s claims. AWF rested on “the bare assertion of a higher or different artistic use,” which alone “is insufficient.” Pet.App.22a. AWF asserted that subjective differences in the purported meanings of Goldsmith’s and Warhol’s works should control, which risked rendering “any alteration ... transformative.” Pet.App.22a (quoting Melville B. Nimmer & David B. Nimmer, *Nimmer on Copyright* § 13.05[B][6]). And AWF relied on the “imposition of another artist’s style,” which alone is not transformative. Pet.App.23a-24a.

Even if secondary works that *unnecessarily* copy can be transformative, this case is straightforward. As the Second Circuit emphasized, “the overarching purpose and function” of Goldsmith’s and Warhol’s Prince depictions is “identical.” Both are “works of visual art” and “portraits of the same person,” Pet.App.24a-25a, which strongly disfavors finding a “distinct artistic purpose.” Pet.App.22a. Additionally, the Prince Series silkscreens are “much closer to presenting the same work in a different form” (*i.e.*, turning photographs into silkscreens) “than they are to being works that make a transformative use of the original.” Pet.App.25a. “[T]he overlay of Warhol’s ‘style’ did not render his treatment of the Goldsmith photo any less

‘plainly an adaptation.’” Ginsburg, *Comment, supra*, at 643 (quoting Pet.App.24a).

2. AWF (at 47) mischaracterizes the decision below, which did not “forbid[]” consideration of meaning or message. The court emphasized that new meaning could be relevant, just not dispositive. Pet.App.13a, 16a-17a, 22a-23a, 41a-42a; accord *Patry on Copyright, supra*, § 10:35.33 (calling AWF’s portrayal “inaccurate”); AIPLA Br. 20-21. Like *Campbell*, the court considered the meaning of the new use as a subsidiary aspect of whether a secondary use embodies a different purpose, such as ridiculing the original. Pet.App.22a-24a; 510 U.S. at 579-81.

Rather, the court rejected giving dispositive weight to *subjective* impressions of what two works mean. Pet.App.22a-23a. That holding follows section 107’s text, this Court’s precedents, and the common law, *infra* pp. 39-47, as well as other circuits’ cases and leading treatises. *E.g., Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 453 (9th Cir. 2020) (“[T]he addition of new expression to an existing work is not a get-out-of-jail-free card that renders the use of the original transformative.”); *Patry on Copyright, supra*, § 10:35.30.

AWF (at 48) inexplicably accuses the Second Circuit of holding that “a work cannot be transformative if the essential elements of its source material remain recognizable.” False: The court focused on purpose, consistent with section 107’s text. Insofar as secondary works that involve unnecessary copying could ever be fair use, the court reasoned, the secondary work must embody “a distinct artistic purpose” that “stands apart.” Pet.App.22a-23a. But Goldsmith’s and Warhol’s Princes shared the same general purpose (fine art) and the specific purpose of depicting Prince. Pet.App.24a-25a. The court could have ended there.

Instead, the court *expanded* fair use by declining to treat that same specific purpose as dispositive. The court held that secondary works that “added material that pulled [the originals] in new directions” could be transformative even if both works share a specific purpose. Pet.App.26a (discussing artworks in *Cariou*, 714 F.3d 694). But Warhol’s work “retain[ed] the essential elements of its source material” and “recast[] ... photographs in a new medium,” much like movie adaptations that recognizably retain essential elements of books. Pet.App.26a.

Nor did the court collapse transformativeness with substantial similarity. *Contra* Pet Br. 49-50. Substantial similarity is a threshold infringement question that compares works to see whether the copy is recognizably “appropriated from the copyrighted work.” Pet.App.46a-47a (citation omitted); Nimmer, *supra*, § 13.03[A]. By contrast, the court assessed visual similarity only to ascertain if Warhol’s copying accomplished some distinct purpose. *Compare* Pet.App.25a-26a (transformativeness inquiry includes whether “essential elements” were copied), *with* Pet.App.48a-49a (substantial-similarity analysis asks whether copying happened at all). Comparing two works side-by-side is inherent to the fair-use inquiry. *E.g.*, *Campbell*, 510 U.S. at 583 (comparing lyrics).

AWF (at 52-53) faults as overbroad the court’s articulation of the “purpose” of Warhol’s and Goldsmith’s works—“visual art” that portrays “the same person,” Pet.App.24a-25a. But the Act’s examples of “purpose[],” including “criticism, comment, news reporting, teaching ... , scholarship, or research,” are even more general. 17 U.S.C. § 107. This Court has defined purposes expansively, too. *Harper & Row* defined *The Nation*’s purpose as “news reporting,” not reporting about presidential decision-making. 471 U.S. at 561. *Campbell* said 2 Live

Crew’s purpose was “parody,” 510 U.S. at 588, not ridiculing romantic aspirations. *Google* defined Google’s purpose as “creat[ing] new products” involving smartphones, not developing specific applications. 141 S. Ct. at 1203. Compared to those descriptions, “portraits of [Prince]” looks hyper-specific. When two works share such a specialized purpose, secondary works that unnecessarily copy the original do not embody a different “purpose or character.”

3. AWF did not challenge the Second Circuit’s holdings on the three other fair-use factors. The “nature of the copyrighted work” favored Goldsmith because her photograph was “both unpublished and creative.” Pet.App.30a. And “the unpublished nature of a work is a key ... factor tending to negate a defense of fair use.” *Harper & Row*, 471 U.S. at 554 (cleaned up). On factor three, Warhol undisputedly copied substantial portions of Goldsmith’s photograph. Pet.App.34a-36a. Nor does AWF contest the court’s holding on the key fourth factor, market harm, that licensing Warhol’s Prince to magazines supplanted Goldsmith’s ability to license her image of Prince to the same magazines. Pet.App.37a-40a. This Court should not tinker with one factor in a holistic inquiry when the other three factors overwhelmingly disfavor fair use and AWF bears the burden to prove this affirmative defense. *See Campbell*, 510 U.S. at 590.

C. AWF’s Policy Concerns Are Illusory

1. AWF (at 54-56) equates affirmance with a latter-day bonfire of the vanities, where “seminal works of art” would become contraband. But the decision below hardly heralds the second coming of Savonarola. Section 107 mandates use-by-use analysis. *Contra* Pet. Br. 7, 37 (twice paraphrasing section 107(1) as if statute said “work” instead of “use”). Just because one use infringes does not

mean all uses infringe. Courts weigh all four fair-use factors together, and outcomes can differ for different uses. *Patry on Copyright, supra*, § 10:157; AIPLA Br. 8-10; Authors Guild Br. 28-31; MPA Br. 26-29.²

Take this case. The Second Circuit held that licensing Orange Prince to Condé Nast infringed Goldsmith’s copyright by undermining the magazine market for Goldsmith’s Prince photographs. Magazines seeking an image of Prince would less likely license Goldsmith’s if hers must compete with similar Warhol depictions. Pet.App.39a-40a. Thus, market harm—the “most important” factor, *Harper & Row*, 471 U.S. at 566—heavily favored Goldsmith. But “Warhol’s original” physical works did not risk comparable market harm. Pet.App.42a.

Museum displays and art sales are not endangered either. Pet.App.50a (Jacobs, J., concurring); Library Br. 20 n.7. Museums and collectors do not create single-subject shrines to Prince. They collect Warhols as exemplars of Pop Art, and Goldsmiths as exemplars of fine-art photography—hence, the Second Circuit thought these uses could fare differently from magazine licensing. Pet.App.42a.

The Copyright Act also protects museum displays if displayed works were “lawfully made.” 17 U.S.C. § 109(c). Here, the creation of the Prince Series is not at issue because the only alleged infringement involves the 2016

² *Accord Bouchat v. Balt. Ravens Ltd. P’ship*, 619 F.3d 301, 306, 309, 314 (4th Cir. 2010) (Ravens logo infringed artist’s design when used in highlight films, but not “museum-like” historical display); *Ringgold v. Black Ent. Television, Inc.*, 126 F.3d 70, 79 (2d Cir. 1997) (copyrighted quilt in sitcom set infringed; similar shots in news broadcast would almost certainly be fair use).

magazine licensing of Orange Prince. And the circumstances of the Prince Series' creation remain obscure. For instance, it is unclear whether Warhol created the Prince Series so *Vanity Fair* could pick the image it liked best—in which case the Prince Series might have been “lawfully made” under *Vanity Fair*'s license.

Limits on relief offer further protection. Though AWF (at 55-56) belabors severe injunctive remedies, those remedies are discretionary and must account for the extent to which the infringing use “serves the public interest.” Pet.App.29; *Campbell*, 510 U.S. at 578 n.10; see 17 U.S.C. § 503(a)(1). Courts that propose incinerating museum collections would abuse their discretion. Courts should provide “[r]easonable compensation” but deny injunctive relief that would deprive “the public of a work of significant value.” Leval, *Blueprint*, *supra*, at 601; accord *Patry on Copyright*, *supra*, § 22:82. Anyway, Goldsmith disclaimed such remedies here, Pet.App.42a, which are unavailable regardless since AWF no longer holds the Prince Series, Pet. Br. 21.

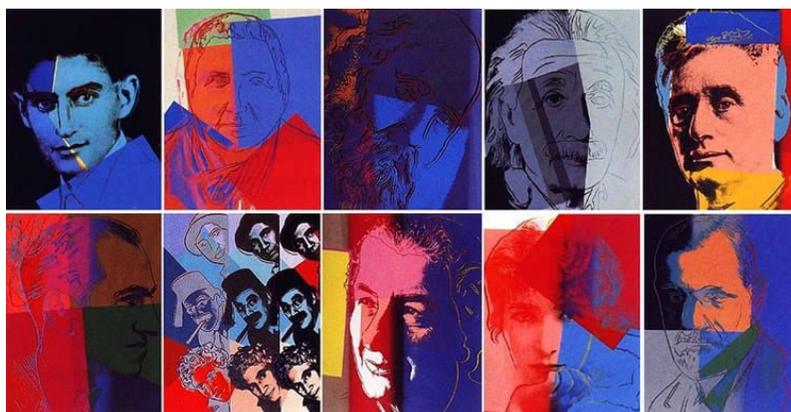
2. AWF (at 56) argues that requiring licenses would chill artistic expression. But “just as artists must pay for their paint, canvas, neon tubes, marble, film, or digital cameras,” they must also pay to “incorporate the existing copyrighted expression of other artists,” at least when new works “draw their purpose and character” from that original. Pet.App.45a.

Artists can use noncopyrighted images or “create[] an entirely original work.” *Dr. Seuss*, 983 F.3d at 454. Or artists can pay licensing fees if they consider particular photographs indispensable. J.A.295-99 (Sedlik expert report). Getty Images offers licensable photos of nearly everything. Creators constantly license original works to create new expression. Movie studios and playwrights li-

cense novels. Video-game makers license characters and plots. Musicians license songs to sample or cover. Entire industries facilitate such licensing. Copyright All. Br. 15-20. Far from being “particularly pernicious for less-established artists,” Pet. Br. 56, licensing sustains less-established creators so they can keep creating. *Infra* p. 47.

Warhol himself refutes AWF’s chilling concerns. In the 1960s, three photographers sued Warhol for using their copyrighted photographs. Mark Rose, *Authors in Court* 149-50 (2016). Rather than abandoning his paintbrush, Warhol took his own Polaroids for ensuing silk-screens. Gopnik, *supra*, at 846. “[T]hat way,” Warhol noted, “there’s no copyright to worry about.” January 13, 1981, in *Warhol Diaries*, *supra*. Warhol’s Muhammad Ali (Pet. Br. 13) is typical: Warhol took Ali’s photo, then silk-screened it. J.A.381. Warhol even photographed Prince. Andy Warhol, *Negatives*, Stanford Univ., <https://stanford.io/3PAUvFA>.

When Warhol considered someone else’s work indispensable, he “tracked down and obtained the rights.” Laura Gilbert, *No Longer Appropriate?*, Art Newspaper, May 9, 2012. Take Warhol’s *Ten Portraits of Jews of the 20th Century*, of Einstein, Justice Brandeis, and others:



Despite coloring and shading the source photographs, Warhol paid or obtained permission to silkscreen them. *Id.* Likewise, Warhol obtained permission to use Mickey Mouse and Superman in his 1981 *Myths* series. Martha Buskirk, *The Contingent Object of Contemporary Art* 87 (2003). And Warhol’s magazine, *Interview*, licensed and credited Goldsmith’s Eddie Murphy photograph as the basis for a cover portrait that changed Murphy’s appearance. *Supra* pp. 14-15. The status quo—licensing unless copying is necessary—strikes the right balance between fair compensation and creative breathing space.

II. AWF’s Test Would Upend Copyright

AWF argues that whenever copiers add new “meaning or message” to copyrighted works, the new works are transformative, and virtually always fair use. Pet. Br. 35, 40, 43. That “sweeping expansion of fair use” is a recipe for appropriating creative works without consent or payment. MPA Br. 23.

A. Text, Precedent, History, Structure, and Purpose Refute AWF’s Test

1. **Statutory Text.** The first fair-use factor is “the purpose and character of the use, including whether such use is of a commercial nature.” 17 U.S.C. § 107(1). That text rebuts AWF’s interpretation. The Act never mentions “meaning or message.” The Act does not even mention “transformativeness,” which entered the fair-use lexicon by way of a law-review article by Judge Leval, *see* Leval, *Standard*, *supra*, at 1111, and “was never intended as a full definition or explanation of fair use,” Leval, *Blueprint*, *supra*, at 608. And the Act lists four nonexhaustive factors without making any one controlling. *Contra* Pet. Br. 40. Had Congress wanted to adopt AWF’s test, Congress could have swapped “the purpose and character of

the use” for “meaning or message of the works” and made that consideration dispositive.

AWF (at 41) erroneously contends that any “follow-on work that communicates a new meaning or message inherently has a different ‘purpose’ and ‘character’ than the original.” The Act grants creators the rights to create derivative works, like movie adaptations of books, that, by definition, can “transform[]” the original with new meaning. 17 U.S.C. §§ 101, 106(2); *see infra* pp. 47-50. It cannot possibly be the case that derivative works—*i.e.*, transformative uses of originals—are statutorily protected, yet always fair use. *See* MPA Br. 18-19.

Section 107’s examples of illustrative fair uses also belie AWF’s claim. All involve different “purposes,” but many do not “convey[] a new meaning or message.” *Contra* Pet. Br. 41. Take “comment.” Book reviews might excerpt key passages to convey the original writer’s arguments. Such reviews faithfully transmit the writer’s message. But the “purpose” of commenting on the original distinguishes that use. The same goes for “teaching”: Discussing a novel does not change its meaning, but publishing and teaching novels nonetheless have very different purposes.

2. Precedent. AWF (at 2, 9, 29, 34-36, 47) seizes on *Campbell’s* statement that the “central purpose” of the first factor “is to see ... whether the new work merely supersedes the objects of the original creation ... or instead *adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.*” 510 U.S. at 579 (cleaned up) (emphasis added). But “the language of an opinion is not always to be parsed as though we were dealing with [the] language of a statute.” *Brown v. Davenport*, 142 S. Ct. 1510, 1528

(2022) (citation omitted); accord *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1474 (2022).

Nothing in that *Campbell* passage directs courts to begin and end by asking whether new works convey new meanings. The rest of the paragraph refers to the common law and Justice Story's analysis in *Folsom*—which reject the notion that a new use that conveys different meaning is transformative. *Infra* pp. 43-45. The paragraph continues by instructing courts to “be guided by the examples given in the preamble to § 107,” 510 U.S. at 578—many of which do not change the original work's meaning. The paragraph then explains that “add[ing] something new” involves having “a further purpose or different character”—a change that in turn “alter[s] the first with new expression, meaning, or message.” *Id.* at 579. Translation: The focus is on how the new use alters purpose and character of the work—there, parody.

In the next paragraph, *Campbell* underscored what kinds of changed purposes qualify. “[T]ransformative” uses must “provide social benefit, by shedding light on an earlier work.” *Id.*; see *id.* at 598 (Kennedy, J., concurring). The second work cannot just appropriate copyrighted works for profit or to make an unrelated point. MPA Br. 5-6; Jane C. Ginsburg, *Does ‘Transformative Fair Use’ Eviscerate the Author’s Exclusive Right to ‘Transform’ Her Work?*, 17 J. Intell. Prop. L. & Prac. (forthcoming 2022) (preprint at 2).

Campbell's facts further preclude equating “transformation” with new meaning or message. *Campbell* could have simply noted that 2 Live Crew's and Roy Orbison's lyrics convey different messages (“degrading taunts” versus romantic fantasy). 510 U.S. at 583. Instead, *Campbell* evaluated the lyrics to determine whether the new song “reasonably could be perceived as commenting on the

original or criticizing it,” *id.*, as part of a lengthy assessment of whether parody can transform the purpose of the original work, *id.* at 582-85. *Campbell* thus asked whether the new song could “reasonably be perceived” as having “parodic character,” not whether the new song could “reasonably be perceived as communicating a new meaning or message.” *Contra* Pet. Br. 33; *accord* Pet. Br. 29, 34-36, 44, 47-48 (eight times splicing together disparate *Campbell* quotes).

AWF (at 40) is also wrong that *Campbell* created “a strong presumption” of fair use for “works conveying new meanings or messages.” *Campbell* rather rejected any “categories of presumptively fair use,” instructing that every use “has to work its way through the relevant factors, and be judged case by case.” 510 U.S. at 581, 584.

Further undermining AWF’s reading of *Campbell*, the lengthy majority and dissenting opinions in *Sony* and *Harper & Row* never mention new meaning or message. The Betamax in *Sony* added no new meaning to the copyrighted programs, simply recording them for later viewing. 464 U.S. at 448-49. *Sony* still found fair use because the Betamax was for noncommercial home viewing—a different purpose from the original, for-profit public broadcasts. *Id.* *Campbell* did not repudiate those cases.

Likewise, *Google* did not involve changing the meaning of computer code. Google copied portions of Oracle’s Java code into Google’s Android platform so computer programmers would not have to learn new code to perform the same functions. Insofar as code has a “meaning or message,” the meaning stayed the same: type “X” and the computer does task X. 141 S. Ct. at 1204. *Google* centered on “the nature of the copyrighted work,” because “some factors may prove more important in some contexts than in others.” *Id.* at 1197, 1201-02.

AWF (at 35-36) stresses *Google*'s dicta that an "artistic painting might ... fall within the scope of fair use even though it precisely replicates a copyrighted advertising logo to make a comment about consumerism," as in Warhol's *Campbell's Soup Cans*. *Id.* at 1203. That stray line hardly enshrines AWF's meaning-or-message test. Elsewhere, *Google* equated the transformativeness inquiry with the "reasons for copying." *Id.* at 1199. Anyway, the Court's remark fits the fair-use mold if the work comments on the logo itself. By turning a logo to sell soup into fine art, Warhol drew upon and subverted associations with the original, and competed in a different market. Jane C. Ginsburg, *Letter from the US Part I*, 270 *Revue Internationale du Droit d'Auteur* 91, 132-33 (2021).

3. Common Law. Common-law cases decisively reject AWF's approach. Start with the 19th century version of this case, *Falk v. Donaldson*, where Benjamin Falk, the greatest photographer of New York's Gilded Age, photographed actress Julia Marlowe. 57 F. 32, 36 (C.C.S.D.N.Y. 1893). The defendants sold lithographs—cousins of Warholian silkscreens—made by etching images onto stone or metal often based upon earlier works. Encyclopaedia Britannica, *Lithography*, <https://bit.ly/3ILB9ea>.

The Marlowe lithograph used Falk's photograph without permission. 57 F. at 36. Like AWF, the lithographers dismissed photographers as "mere mechanic[s]" with no right to anyone's likeness. *Id.* at 33; *cf.* Pet. Br. 5-6, 51. Like here, the Marlowe lithograph "var[ied]" from the photograph; the lithographers' experts identified 40 differences. 57 F. at 35. And, like here, the lithographers claimed "the idea or conception of the original artist may be followed and used by another, provided he ... clothed them in his own form and expression." *Id.*

Nineteenth-century courts treated those contentions as borderline frivolous. The photograph was copyrightable, since photography is an art form like any other. *Id.* at 34. The lithograph’s key elements “irresistibly suggest[ed] and recall[ed] the photograph.” *Id.* at 36. And there was no fair use because such copying undermined the photographer’s right to make his own derivative works—including lithographs. *Id.* at 36-37.

Other common-law cases reached the same conclusion, even though lithographs flatten and change subjects’ appearances.³ Famously, the Court in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), held that a lithograph of Oscar Wilde (right) infringed a photograph (left) (both zoomed on face):



³ *Springer Lithographing Co. v. Falk*, 59 F. 707, 710 (2d Cir. 1894) (infringement although lithograph was allegedly “composite reproduction” of copyrighted photograph and another); *Falk v. Brett Lithographic Co.*, 48 F. 678, 679 (C.C.S.D.N.Y. 1891) (infringement where lithograph “copied the position, features, and most of the photograph” but reversed orientation and changed details); cf. *Falk v. T.P. Howell & Co.*, 37 F. 202, 202 (C.C.S.D.N.Y. 1888) (infringement where defendant turned copyrighted photograph into leather stamp on chair).

This Court deemed the photograph “an original work of art” protected by copyright. *Id.* at 60. It was irrelevant that the lithograph transformed Wilde’s features. Maybe the lithographer’s Wilde, with soulful gaze and brooding eyebrows, embodies the dashing poet, while the photograph’s thousand-yard stare conveys calculated ennui. Whatever the messages, once the Court determined that photographs are copyrightable, the case was over; the lithograph was so obviously nontransformative the lithographer did not even try to raise fair use.

Conveying new meanings or messages did not save infringers in other contexts, either. Take *Folsom*, 9 F. Cas. 342, which distilled “the essence of law and methodology from the earlier cases.” *Campbell*, 510 U.S. at 576. The plaintiff published George Washington’s compiled letters in eleven copyrighted volumes. 9 F. Cas. at 345. The infringers sold Washington’s imagined autobiography, where Washington “told” his life story via narrative that wove in 5% of the copyrighted letters. *Id.* The autobiography clearly involved “a plan different from” the original. *Id.* And perhaps the autobiography humanized Washington, while the compiled letters conveyed an aloof legend. *Folsom* does not say, because Justice Story saw no need to divine meanings. He “had no doubt whatever” that the autobiography was not fair use because it shared the same purpose as the compiled letters: Both used Washington’s letters to “illustrat[e] the life, the acts, and the character of Washington.” *Id.* at 349.⁴

⁴ *Accord, e.g., Bradbury v. Hotten*, 42 Law J. Rep. 28 (1872) (account of Napoleon III infringed by appropriating caricatures lampooning him, even though multivolume work featured biography and explanatory text casting him in different light); *Gross v. Seligman*, 212 F. 930, 930-31 (2d Cir. 1914) (infringement where photographer reproduced copyrighted nude photograph, but changed model from “sedate” to

AWF (at 37-39) counters that copyright’s “historic mission” is to encourage follow-on innovation. But the 1710 Statute of Anne (cited at Pet. Br. 38) granted authors copyrights in their works to correct the “very great detriment, ... too often to the ruin of [authors] and their families” from unchecked copying. Act of Apr. 10, 1710, 8 Anne c. 19, art. I; see *Sayre v. Moore*, 102 Eng. Rep. 139, 140 n.(b) (1785). And *Cary v. Kearsley* (cited at Pet. Br. 39) balanced “put[ting] manacles upon science” against original authors’ “enjoyment of copy-right.” 170 Eng. Rep. 679, 680 (1803). Likewise, AWF’s observation (at 39) that creators could make “justifiable use of the original materials,” *Folsom*, F. Cas. at 348, is true but irrelevant. *Folsom* only authorized such use when the secondary work would not supplant the original. *Id.*

AWF’s two purported examples (at 39-40) of common-law cases applying a meaning-or-message test did no such thing. *Sampson & Murdock Co. v. Seaver-Radford Co.* looked to the secondary use’s “purpose[.]” in the market, not meaning. 140 F. 539, 542 (1st Cir. 1905). The compiler of a social guide could copy entries from a general directory for that “bona fide and limited purpose,” *id.*, even though each entry’s meaning (how to contact someone) stayed the same. *Gyles v. Wilcox* merely observed that fair use should encourage innovative, “extremely useful”

“smiling” and added cherry stem between her teeth); *Daly v. Palmer*, 6 F. Cas. 1132, 1135 (C.C.S.D.N.Y. 1868) (infringement where defendant copied railroad-track rescue from play, but replaced original’s dashing heroine with drunkard “Old Tom,” among other changes); *Campbell v. Scott*, 59 Eng. Rep. 784, 785, 787 (1842) (infringement where defendant reprinted copyrighted poems, despite adding essay and using reprints “to illustrate the progress of English poetry”).

follow-on works. 26 Eng. Rep. 489, 490 (1740). No common-law case suggests that fair use turns on new meaning.

4. Derivative Works. Copyright owners have exclusive rights “to prepare derivative works based upon the copyrighted work,” 17 U.S.C. § 106(2), in any “form in which a work may be recast, transformed, or adapted,” *id.* § 101. That right lets creators turn photographs into silkscreens, novels into movies, write sequels, or remix songs, while controlling their creations (subject to fair use). Entire licensing industries exist so creators can decide whether to give others the reins for derivative works, and at what price. Copyright All. Br. 16-21; Ginsburg, *Comment, supra*, at 642-43; J.A.292-95 (Sedlik expert report).

AWF’s any-meaning-or-message test would nullify creators’ rights over derivative works. Silkscreens are classic derivative works of photographs. Alexandra Darraby, *Darraby on Art Law* § 7:89 (July 2021 update). If silkscreening Goldsmith’s Prince portrait creates new meaning, then anyone could make follow-on works and claim fair use. *See* Pet.App.17a-19a; MPA Br. 20-22; Copyright All. Br. 8-11, 15-21; Authors Guild Br. 13; AIPLA Br. 14; Paul Goldstein, *Goldstein on Copyright* § 12.2.2.1.c (3d ed. 2022). Copiers could simply find someone to testify that the new work changes the portrait’s expression (here, from vulnerable to iconic; elsewhere, from happy to sad, or complacent to disturbed). That result would collapse licensing markets, deprive creators of livelihoods, and leave them powerless to stop copycats from distorting their creations.

Movies routinely change perceptions of original books, yet studios pay and credit authors for adaptations. Under AWF’s test, movie studios have wasted billions. So long as studios add plot elements or characters, they could

brandish fair use and dispense with permissions. MPA Br. 18-23; Copyright All. Br. 16-18.

AWF (at 52) responds that book-to-movie adaptations typically do not “change the meaning or message of the original.” That assertion would astound moviegoers, critics, and film scholars. MPA Br. 21-23. So-called auteurs like Hitchcock, Coppola, Spielberg, and Tim Burton employ immediately recognizable styles that imprint their films with “substantial creativity and distinctive quality,” Pet. Br. 45. And the list of films that add “distinctive ideas” or “distinctive changes” (Pet. Br. 20, 46) to source novels and would thus satisfy AWF’s colloquial definition of “transformativeness” is endless.

Take Stanley Kubrick’s adaption of Stephen King’s *The Shining*, which infuriated King by dramatically altering his book. King’s novel is an allegory for his own writer’s block: Frustrated writer Jack Torrance wants to do right by his family, but (spoiler alert) succumbs to evil forces at the Overlook Hotel. But the movie is signature Kubrick: Slow-paced long shots, awkward silences, and jarring music telegraph claustrophobia and fear. Jack Torrance, played by Jack Nicholson, goes from angry jerk to madman. Yet even auteurs pay for licenses. *E.g.*, Pet.App.27a (Scorsese).

Sequels are another classic derivative work that would fall prey to AWF’s new-meaning-or-message test. Every sequel adds new meaning. Characters’ new experiences reframe the story. One of cinema’s greatest twists—Darth Vader’s “I am your father”—happens in a sequel. MPA Br. 22. Over seven Harry Potter books, a magical children’s tale becomes an epic good-versus-evil struggle as Dumbledore dies, Severus Snape is revealed as a good guy, and Voldemort is vanquished. Under AWF’s test, anyone can leverage the popularity of these

classics by writing more sequels and claiming fair use. Likewise, copy the whole work but change the ending, and bingo, new meaning. MPA Br. 5 (competing Casablancas).

AWF's test would decimate other exclusive rights where creators sell licenses—especially music, where licensing ecosystems exist for using songs in commercials, video games, TV shows, movies, and political campaigns. *See generally* Bob Kohn, *Kohn on Music Licensing* (5th ed. 2019); 17 U.S.C. § 106(6). The premise of that system is that new meaning is no shortcut. Thanks to long-running commercials, Bob Seger's "Like a Rock" connotes Chevrolets barreling down highways, not the devastating breakup that inspired the song. Heinz made Carly Simon's "Anticipation" about waiting for ketchup; Simon wrote the original about waiting for dinner with Cat Stevens. In AWF's world, those changed associations are transformative and presumptively fair use; businesses have been fools to pay.

Artists also depend on the power to say no. Musicians routinely object to having their songs refashioned into political messages—witness Bruce Springsteen's refusal to let candidates since Reagan use "Born in the U.S.A." Eveline Chao, *Stop Using My Song*, *Rolling Stone*, July 8, 2015. Under AWF's test, because campaigns change a song's meaning ("Reagan is a patriot"), musicians would have no say, nor would creators across countless other contexts. Comic book authors license works for movies and video games. In AWF's world, add a new theme, and no need to pay.

Indeed, AWF's approach indicts its own licensing empire. If adding meaning presumptively means fair use, no one should pay to print Warhols on towels, mugs, toys, totes, or jewelry. Warhol turned mass-produced objects into fine art. Turnabout seems fair play: Commodifying

Warhol's art by plastering it on mass-produced objects adds a whole new meaning.

5. Statutory Purpose and the First Amendment.

AWF (at 43) asserts that the Copyright Act's purpose and the First Amendment require that "follow-on works that express new and distinctive meanings or messages" are fair use. That argument discounts copyright's goal of promoting creators' further speech and misapprehends the First Amendment.

Copyrights promote free expression on both sides of the ledger. *Campbell*, 510 U.S. at 599 (Kennedy, J., concurring); *Patry on Copyright*, *supra*, § 4:44; MPA Br. 23. Copyrights "promote the creation and publication of free expression," by "suppl[ying] the economic incentive to create and disseminate ideas." *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). Copyrights protect creators' right to determine how their original expression gets used—including "to refrain from speaking." *Harper & Row*, 471 U.S. at 559 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). Fair use, in turn, promotes other creators' speech interests only for uses that do not eclipse the original. "The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches." *Eldred*, 537 U.S. at 221; *see Patry on Copyright*, *supra*, § 10:35.34.

AWF's argument also proves too much. If "block[ing] follow-on works that express new and distinctive meanings" is unconstitutional, Pet. Br. 43, so is the four-factor fair-use test itself. Courts would violate the First Amendment whenever follow-on works have new meaning but other factors tip the balance against fair use. Courts since the Founding would have persistently violated the First Amendment by rejecting fair-use defenses even where

new works carry new meaning. *Supra* pp. 43-45. Also unconstitutional: Compulsory licenses in the Copyright Act, like those for cover songs. 17 U.S.C. § 115. Aretha Franklin's iconic rendition of Otis Redding's "Respect," which added "R-E-S-P-E-C-T" and "sock-it-to-me-sock-it-to-me," became a 1960s civil-rights anthem and still draws millions to the dance floor. Yet, under AWF's test, such licensing abridges secondary artists' speech.

B. AWF's Test Is Unworkable

AWF (at 36) calls its test "straightforward." But discerning whether two works reflect different meanings or messages would be as reliable as divining animal shapes in clouds.

1. AWF argues that courts should assess whether two works "can 'reasonably be perceived'" as embodying different meanings or messages. Pet. Br. 29 (quoting *Campbell*, 510 U.S. at 582). AWF (at 48) calls this an "objective" reasonable-person test, but does not say who the reasonable person evaluating a work's "objective features" should be. The artists? Critics? Students? Ordinary viewers? AWF's amici are all over the map. *E.g.*, Authors All. Br. 13 ("the artist and members of the relevant artistic community, among others"); EFF Br. 15 (creators, "intended audiences," and "other viewers with relevant experience"); Lemley Br. 8 ("all of the work's potential audiences"); Rauschenberg Br. 29 ("reasonable person from [intended] audience"); Tushnet Br. 11 ("groups likely to encounter the works at issue").

Those are no small distinctions. Graduate students battle eternally over whether meaning derives from the author's intent or gets formed by individual viewers, and whether critics' views are authoritative or gobbledygook. *E.g.*, Roland Barthes, *The Death of the Author* (1967).

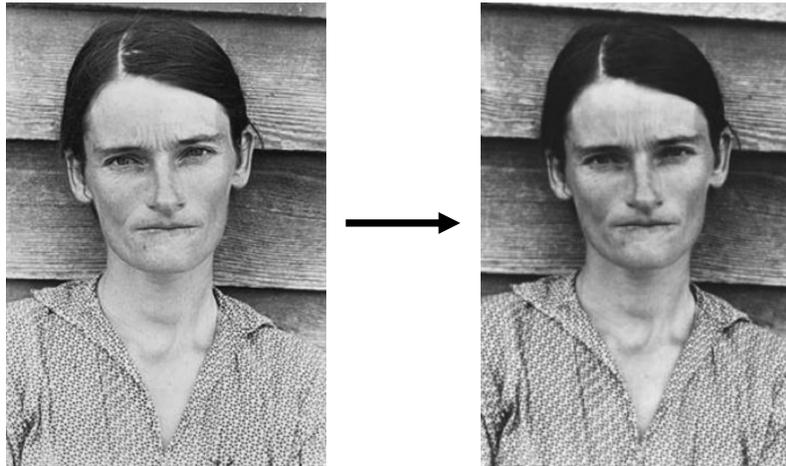
Disparate audiences also disagree about what creative works mean. Take Jackson Pollock. Collectors pay over \$100 million for works that Pollock left untitled to thwart attempts to find meaning. Carol Vogel, *A Pollock Is Sold, Possibly for a Record Price*, N.Y. Times, Nov. 2, 2006. Some critics call Pollock America's greatest painter, whose works comment on art itself. Others trash his seemingly "random" works as "meaningless." Steven McElroy, *If It's So Easy, Why Don't You Try It*, N.Y. Times, Dec. 3, 2010. Courts should not stage modern-day Scopes Trials pitting postmodernists against their detractors just to resolve one fair-use factor.

Moreover, for many artists, lack of any meaning *is* the intended meaning. John Lennon wrote "I Am the Walrus" on acid, as deliberate nonsense. Catherine Walthall, *The Meaning of the Weirdest Beatles Song, "I Am the Walrus,"* Am. Songwriter (July 9, 2022), <https://bit.ly/3B22rv7>. Pablo Picasso "mocked ... those who wanted to understand his art." E.H. Gombrich, *The Story of Art* 577 (2021). Artist Richard Prince disclaimed "trying to create anything with a new meaning or a new message." *Cariou*, 714 F.3d at 707. Under AWF's test, it is unclear whether meaninglessness is itself a message, or negates the whole inquiry. Similarly, AWF's test creates unanswerable questions about artists like Freddie Mercury, who died before revealing what "Bohemian Rhapsody" meant. Congress did not erect a test only philosophy professors and mediums could resolve.

Meanings also shift over time, and AWF does not say which period governs. Artists change their minds about what works signify. *Patry on Copyright, supra*, § 10:35.33. Early critics rejected Marcel Duchamp's urinal as art; later critics hailed "Fountain" for inspiring Pop Art and agreed that treating an ordinary urinal as art

makes it art. Kelly Grovier, *The Urinal That Changed How We Think*, BBC (Apr. 11, 2017), <https://bbc.in/3OkQhQQ>. Public perceptions likewise evolve. Wagner’s operas conveyed a darker message to many after Hitler made them the theme music for the Third Reich. In 1915, D.W. Griffith’s *Birth of a Nation* was a smash-hit presidential favorite. Today, the film is an unwatchable ode to virulent racism. A test where two works might share perceived meaning one day but diverge the next does not bode well for stability.

The malleability of purported meaning also encourages manipulation. Would-be appropriators could always assert that their works mean something different. Take Sherrie Levine’s series *After Walker Evans*, where Levine simply photographed Evans’ photographs:



Whereas Evans purportedly conveyed the harshness of the Depression, Levine described her message in capturing the same pictures as “undermining ... those most hallowed principles of art in the modern era: originality, intention, expression.” *Patry on Copyright, supra*,

§ 10:35.31. Critics agreed, heralding Levine’s “feminist hijacking of patriarchal authority, a critique of the commodification of art, and an elegy on the death of modernism.” *Id.* § 10:35.33 (quoting Museum of Modern Art commentary). If naked copying itself creates new meaning, all appropriation is fair game. Out the window: The longstanding rule that “merely labeling something as art” does not “automatically render[] it immune from copyright treatment.” *Id.* § 10:35.20.

The Copyright Act also requires use-by-use analysis, 17 U.S.C. § 107, begging questions about whether different uses of a work inherently change its message. Viewing Picasso’s *Old Guitarist* at the Art Institute of Chicago presumably conveys different meaning from experiencing *Old Guitarist* on shower curtains or socks.

AWF’s meaning-or-message test becomes absurd for many “original works of authorship fixed in any tangible medium of expression” that the Copyright Act protects. 17 U.S.C. § 102. Copyrightable works encompass architecture, maps, toys, quilts, pantomime, piggy banks, computer programs, and stuffed animals. *Id.* § 102(4), (5), (8); Nimmer, *supra*, § 2.08[A]; *Patry on Copyright, supra*, §§ 3:70, 3:121. Probing such works for their “meaning or message” is nonsense.

Take the Willis Tower (née Sears). If towers convey meaning, perhaps that one trumpets Chicago’s self-perceived exceptionalism. Maybe, after losing the World’s Tallest Building title in 1998, the tower signifies urban decline. But surely, if an architect built a multicolored clone in Fargo, the fair-use inquiry should not turn on whether changed location and new colors transformed a tower’s supposed message.

Similar imponderables afflict other copyrightable works. It is not obvious that mazes and puzzles have deeper meaning beyond their solution. Conversely, Barbies produce meaning overload. Depending on who you ask, Barbie signals uber-femininity, unrealistic body image, America, the versatility of high-heels-only fashion, patriarchy, and consumer culture. See Rebecca Tushnet, *Make Me Walk, Make Me Talk, Do Whatever You Please*, in *Intellectual Property at the Edge* 405 (Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds., 2014). Her meaning perennially shifts with new editions: Bathing-suited Original Barbie (1959) gave way to Malibu Barbie (1971), Marie Antoinette Barbie (2003), Computer Engineer Barbie (2010), and even Elvis Barbie (2021). The endless open questions AWF’s meaning-or-message test would raise—as well as the arbitrariness of any routes to narrowing that test—would guarantee confusion and litigation.

2. This case encapsulates the problems. Despite lip service to an “objective” reasonable-person test (at 48), AWF concludes that Warhol’s and Goldsmith’s depictions of Prince embody different meanings by mixing and matching whose intent counts, and for which works.

For Goldsmith, AWF analyzes the Prince photograph *Vanity Fair* licensed. AWF treats Goldsmith’s 2018 deposition statements about her purported subjective intent as dispositive of what her 1981 photograph means: Prince is “vulnerable” and “fragile.” Pet. Br. 15, 45. Apparently, had Goldsmith stated that she saw Prince as iconic—or retained experts to explain that celebrity photographers defigy rockers—the outcome would change. If viewers’ objective reactions count, the Second Circuit noted that “a whole generation of Prince’s fans might have trouble seeing the Goldsmith Photograph as depicting anything other than the iconic songwriter and performer.” Pet.App.23a.

For Warhol, AWF never says how Orange Prince was “reasonably perceived” by anyone reading the 2016 Condé Nast tribute—the relevant “use” under section 107. Instead, AWF treats the 16-work Prince Series as a monolith that shares the same meaning, no matter how each work is used. And, despite emphasizing Goldsmith’s subjective intent, AWF does not compare Warhol’s subjective intent. Warhol died before lawyers could depose him and omitted the Prince Series from his diaries. Perhaps Warhol saw Goldsmith’s Prince as iconic. Warhol’s only known opinion is his willingness to depict Prince if *Vanity Fair* paid him. And Warhol’s canonical statement about the meaning of his art—art is “anything you can get away with,” Patricia L. Dooley, *Freedom of Speech* 77 (2017)—presumably sends the wrong message here.

AWF (at 20, 45) instead divines what Warhol “sought ... to communicate” through art critics Thomas Crow and Neil Printz, who never met Warhol. J.A.187, 227. Crow opined that Warhol would not likely have depicted Prince had *Vanity Fair* not paid him. J.A.307. Both equate the Prince Series with how critics today see Warhol’s other works—as commentary on celebrity. J.A.187, 227-28. Crow emphasizes features like adding colors, flattening, and abstracting images, as central to conveying the dehumanizing “impact of celebrity,” but those features typify silkscreens generally. Pet. Br. 44-45; see J.A.227. Anyway, two works in the Prince Series are pencil drawings and five are essentially grayscale. More broadly, AWF’s comparison between a photographer’s subjective, 37-years-later impression of her photograph and expert witnesses’ rendition of how critics see Warhol’s silkscreens is arbitrary and manipulable.

AWF's contention (at 50-51) that "Warhol's unique style is the very thing that gives the Prince Series its distinct message" would treat any "difference in style" as transformative, "weaken[ing] the protection of copyright." *Campbell*, 510 U.S. at 599 (Kennedy, J., concurring). Under AWF's test, every Warhol-style silkscreen conveys a different message from the original photograph. That "logic would inevitably create a celebrity-plagiarist privilege; the more established the artist and the more distinct that artist's style, the greater leeway that artist would have to pilfer the creative labors of others." Pet.App.27a; *see* AIPLA Br. 27-28. No one doubts Warhol's artistic innovations. But Warhol charged for his art and AWF will continue profiting, including by vigorously asserting Warhol's copyrights. Fame is not a ticket to trample other artists' copyrights.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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