

**In the
Supreme Court of the United States**

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

Petitioner,

v.

LYNN GOLDSMITH, ET AL,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

**BRIEF OF AMICI CURIAE
GRAPHIC ARTISTS GUILD, INC. AND
AMERICAN SOCIETY FOR COLLECTIVE
RIGHTS LICENSING, INC.
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICI CURIAE¹

Graphic Artists Guild, Inc. (GAG), a 501(c)(6) not-for-profit corporation, has advocated on behalf of illustrators, designers, fine artists, photographers, pre-production artists, and educators since it was founded in 1967. The Guild educates artists on best practices through webinars, Guild e-news, resource articles, and meetups. THE GRAPHIC ARTISTS GUILD HANDBOOK: PRICING & ETHICAL GUIDELINES, now in its 16th edition, raises industry standards and provides graphic artists and their clients guidance on best practices and pricing standards.

The American Society for Collective Rights Licensing, Inc. (ASCRL) is a 501(c)(6) not-for-profit corporation founded to collect and distribute collective rights revenue for U.S. visual artists and rights holders, and foreign national artists and rights holders whose works are published in the United States. ASCRL represents over 10,000 photographers and illustrators, and is the leading collective rights organization in the United States for this constituency of rights owners. ASCRL is a zealous defender of the primary rights of illustrators and photographers, and ASCRL promotes the collective administration of rights, and the establishment of secondary rights, as alternative means of advancing and expanding the marketplace of its constituents.

Together, amici represent professional visual artists in a wide range of disciplines. This includes

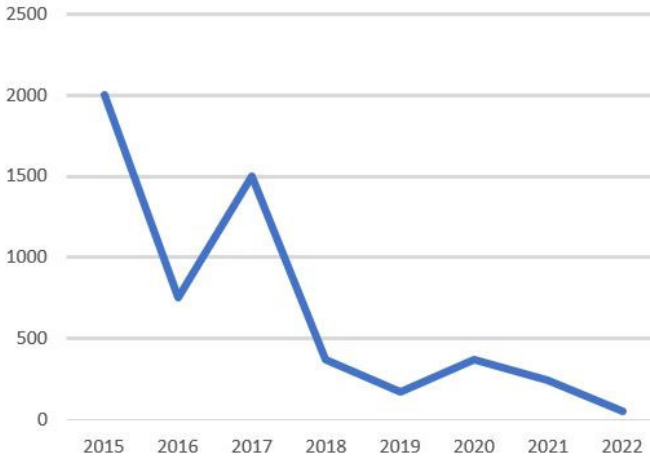
¹ No one other than the amici and their counsel authored this brief, in whole or in part, or made a monetary contribution intended to fund its preparation or submission. Blanket consent from the Parties is noted in the docket.

architectural illustrators, aviation illustrators, cartoonists, editorial illustrators, fashion illustrators, lifestyle illustrators, natural science and medical illustrators, children's book illustrators, magazine and book illustrators, website illustrators, wildlife illustrators, and illustrators in other genres. This includes photographers in the advertising, architectural, editorial, event, fashion, food, fine art, journalism, lifestyle, magazine, portrait, publishing, science, travel, and other fields. This also includes graphic designers, website designers, surface and textile designers, package designers, motion graphic designers, model makers, branding and corporate identity designers. And, this includes visual artists in the fine arts.

Amici have a dedicated interest in promoting the rights of visual artists, and protecting the ability of visual artists to earn a livelihood through their work. Amici's constituents earn their livelihoods primarily through paid commissions and licensing usage rights to their artwork, including licensing rights to create new derivative works (such as illustrations based on photographs), and rights to exploit the works in new markets, such as merchandise or NFTs. Such residual markets often prove more economically valuable than the initial uses.

To be successful in today's economic marketplace, visual artists must promote their works through online portfolios, social media, licensing platforms, and other online venues, which are the primary sources for art directors, publishers, media outlets, merchandisers, and other content users (potential licensees) to find visual material. Unfortunately, digital copying from online sources is rampant, as is the creation and online distribution of unauthorized, often uncredited derivative

works. When this happens, visual artists are deprived of both established and potential markets for their work. For example, Guild member Crisy Meschieri tracked the drop in sales in her design, *Let's Settle This*, when knock-off t-shirts bearing variations of her design appeared for sale in 2016 and 2017.



Let's Settle This T-Shirt Sales

Many digital imaging technologies enable users to easily copy and modify existing works in innumerable ways, using filters that apply new visual effects and content. Multiple derivatives can be quickly created from one original, including “Warholesque” images. See, e.g.,



<https://www.online-tech-tips.com/fun-stuff/3-ways-to-add-the-andy-warhol-pop-art-effect-to-photos/>



<https://www.picmonkey.com/blog/pop-art-effects>

Programs known as “NFT generators” enable creation of tens of thousands of derivatives from one original for exploitation in the emerging NFT market. *See, e.g.*, <https://hotpot.ai/nft-generator>; <https://www.fotor.com/nft-creator/>.

When derivatives appear without credit, visual artists lose the marketing value of being associated with their work. Invariably, uncredited iterations of a work lead to successive unauthorized downstream copies, exponentially increasing this harm. Even when the originating artist is recognizable, the derivatives may be poorly executed, applied in an inappropriate context, or associated with offensive content, resulting

in reputational damage and loss of further licensing potential.

INTRODUCTION

This case involves transformative fair use when both the original work and the “follow-on” derivative work are works of visual art. Contrary to Petitioner AWF’s assertion, the Second Circuit’s decision below does not threaten to overturn “decades of settled expectations.” Br.Pet.32, 54. As this case, and the many other fair use cases in the field of visual art, aptly demonstrate, there is no clear precedent for determining when an unauthorized derivative artwork is excused as transformative fair use. The lower courts have reached vastly different and difficult to reconcile decisions (often, as in this case, with the appellate court rejecting the district court’s entire analysis).

Moreover, there is no settled expectation among artists that appropriation art is always fair use. As a matter of standard business practice, professional artists request permission to incorporate pre-existing content into their works, and are typically required by their clients to warrant that they have done so. Likewise, they expect to be asked for permission when their own work is incorporated into someone else’s work. Many originating artists have objected to incorporation of their works in appropriation art, including numerous photographers who challenged and sometimes sued Andy Warhol over his unauthorized use of their photographs. Warhol vowed to take his own photographs as a result of such complaints, and he did so, using his own Polaroid photos as the basis for his later silk-screened celebrity portraits. Kate Donohue, *Andy The Appropriator: The Copyright Battles You Won’t Hear*

About at The Whitney's Warhol Exhibit, COLUM. J.L. & ARTS (Aug. 2, 2019), <https://Journals.Library.Columbia.Edu/Index.Php/Lawandarts/Announcement/View/112>; *see also* Blake Gopnik, WARHOL 846 (2020).

Copyright law does not exist only for the benefit of follow-on artists. The Constitution dictates that the creation of *original* works must be incentivized. U.S. Const. Art. I, § 8, Cl.8. Copyright law provides such incentive by granting to originating artists control over whether and how their works are copied by others, including new works which incorporate, and arguably “transform,” their original works. 17 U.S.C. §§ 101; 106(2). New technologies are developing rapidly which are making it ever easier to copy and modify works of visual art. Both original artists and follow-on appropriation artists need to understand how such technologies may be utilized legally. In light of the varied lower court decisions, neither originating artists nor follow-on artists can currently predict with any certainty whether a modified visual work will be deemed fair use.

SUMMARY OF ARGUMENT

Contrary to Petitioner’s mischaracterization of the Second Circuit’s decision, the court did not forbid consideration of the meaning or message of a follow-on visual work in the transformativeness analysis. The court rejected giving dispositive weight to *purely subjective* assertions of the purported new meaning or message. It actually held that:

where a secondary work does not obviously comment on or relate back to the original, or use the original for a purpose other than that for which it was created, the *bare assertion* of a higher or different artistic use

is insufficient to render a work transformative. Rather, the 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.21a-22a (emphasis added).

The Second Circuit found that the purported new meaning or message of Warhol's Prince Series, when viewed objectively, is insufficiently distinct from the Goldsmith Photograph to be deemed "transformative." Amici do not necessarily agree that Warhol's Prince Series embody no transformative meaning or message. Rather, amici endorse the court's implicit understanding that the Prince Series are not transformative enough to override the remaining fair use factors. Transformativeness exists on a spectrum, with varying degrees of differences in purpose and/or character (as accomplished through new meaning, message, or expression) to be given corresponding varying degrees of weight in the overall fair use analysis. *Campbell vs. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

Critically, the Second Circuit recognized that, unlike the parody in *Campbell*, Warhol's Prince Series do not "obviously comment on or relate back to the original," and assessed all the fair use factors accordingly. Pet.App.35a. The court recognized that it was not necessary to copy Goldsmith's particular photograph to accomplish Warhol's purported meaning and message. *Id.* It gave this fact, and other relevant considerations, appropriately strong weight in ultimately determining that Warhol's Prince Series do not qualify as fair use. As *Campbell* teaches, the fair use analysis should never turn merely on whether a

work is pronounced “transformative” under the first factor. Amici respectfully submit that, whether or not one agrees with the Second Circuit’s decision that Warhol’s Prince Series were not “transformative,” the court ultimately reached the correct decision through its holistic, context-sensitive evaluation of all of the fair use factors. Pet.App.16a.

ARGUMENT

I. TRANSFORMATIVE IS NOT ALL OR NOTHING

A. Differing Degrees of Transformativeness Must Be Evaluated Among All the Fair Use Factors

The concept of transformativeness as the most important element in a fair use analysis arose from two sources: Judge Leval’s 1990 Harvard Law Review article *Toward a Fair Use Standard*, and this Court’s 1994 decision in *Campbell, supra*. Judge Leval opined that the justification for fair use “turns primarily on whether, and to what extent, the challenged use is transformative.” 103 Harv. L. Rev. 1105, 1111, https://www.law.berkeley.edu/files/Leval_-_Fair_Use.pdf. *Campbell* put it this way: “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.” 510 U.S. at 579 (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 478-480 (1984)) (internal cites omitted).

Since *Campbell*, transformativeness “has been gradually approaching total dominance in fair use

jurisprudence.” Jiarui Liu, *An Empirical Study of Transformative Use In Copyright Law*, 22 STAN. TECH. L. REV. 163, 163 (2019), https://www-cdn.law.stanford.edu/wp-content/uploads/2019/02/Liu_20190203.pdf. Through 2019, 90% of all fair use decisions involved transformative use. *Id.* “More importantly, of all the dispositive decisions that upheld transformative use, 94% eventually led to a finding of fair use.” *Id.* Once a defendant’s use is deemed transformative, courts persistently hold that the transformativeness outweighs, or renders irrelevant, the remaining three fair use factors. *See* Pet.5 (“In practice, the transformativeness inquiry is virtually always dispositive of the fair use question.”)

Under the statutory language and this Court’s jurisprudence, however, the characterization of a work as “transformative” should never automatically flip the remaining three statutory factors in favor of fair use. *Campbell* and *Leval* both explicitly teach that transformativeness is not an absolute concept; rather, it encompasses a spectrum of differing degrees. The central purpose of the first fair use factor is to ask “whether *and to what extent* the new work is transformative.” *Campbell*, 510 U.S. at 579 (quoting *Leval* at 1111) (emphasis added). This Court was clear that the relative degree of transformativeness affects the considerations and relative weight given to the remaining fair use considerations: “the *more transformative* the new work, *the less* will be the significance of the other factors, like commercialism, that may weigh against a finding of fair use.” *Id.* (emphasis added).

B. Recognizing Degrees of Transformativeness Protects the Rights of Originating Artists in Derivative Works

The owner of copyright in an original work has the exclusive rights to, and to authorize others to, “prepare derivative works based upon the copyrighted work.” 17 U.S.C. § 106(2). A “derivative work” is “a work based upon one or more preexisting works,” in “any . . . form in which a work may be recast, *transformed*, or adapted” 17 U.S.C. § 101 (emphasis added).

Thus, by statutory definition, a derivative work necessarily incorporates “something new” that alters the original work “with new expression” and a “different character.” With respect to visual works, for example, a full-color sculpture based on a black & white photograph adds three-dimensional rendering and color as new expression. Many derivative works will also add “something new” in terms of meaning or message. For example, embedding a textual commentary into a reproduction of a photograph, or substituting a white flag of surrender for a nation’s flag in a battle scene, can transform the message.

Unlike the statutory derivative right, the fair use provision of the Copyright Act does not expressly mention “transformed” or “transformative.” 17 U.S.C. § 107. Interpreting “transformative use” so broadly that it would encompass any follow-on work with a different meaning or message, as Petitioner advocates, would improperly elevate a judicial interpretation of a statute over that statute’s own express language. It would largely eliminate the derivative right under Section 106, and the economic incentives the derivative right provides. *See, e.g., Fourth Estate Public Benefit*

Corp. v. Wall-Street.com, LLC, 139 S.Ct 881, 889-90 (2019) (statutory interpretations must be rejected that “would in practical effect render [a provision] superfluous in all but the most unusual circumstances”) (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 29 (2001); *United States v. Menasche*, 348 U.S. 528, 538–539 (1955)).

The question of fair use cannot turn merely on whether a follow-on work transforms the original with new expression, meaning or message. The degree of transformativeness must be evaluated to ensure that the derivative rights of originating artists are preserved.

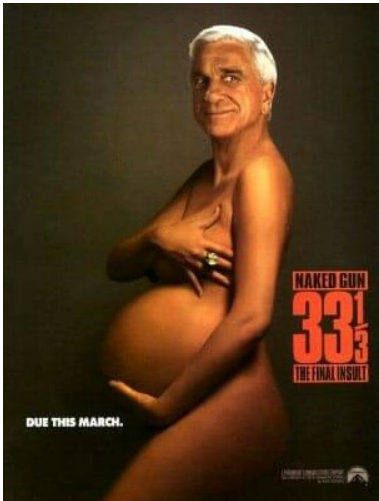
II. DEGREES OF TRANSFORMATIVENESS IN VISUAL WORKS

A. Fundamentally Transformative

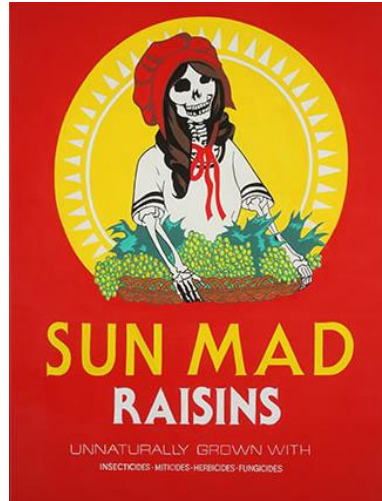
Campbell involved a parody (2 Live Crew’s song *Pretty Woman*) which directly mocked its underlying source material (Roy Orbison’s *Oh Pretty Woman*). Parody is a form of commentary and criticism; it thus comprises one of the core statutory examples of fair use. “The heart of any parodist’s claim to quote from existing material, is the use of some elements to create a new one, that at least in part, comments on” that existing material. *Campbell*, 510 U.S. at 580 (citing *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986); *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981)).

Parody is fundamentally transformative: it not only adds new expression, but *also* adds new meaning *and* a new message in accomplishing its purpose to mock the original. Moreover, as *Campbell* explained, parody *must* make use of the original to make its point—the direct commentary on that original cannot happen without quoting it.

In the field of visual art, analogous examples of parody include the movie poster *Naked Gun 33-1/3 The Final Insult*, which mocked the original Annie Leibovitz Vanity Fair cover photograph of a pregnant Demi Moore, *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998), or Esther Hernandez' powerful critique of corporate practices through her parody of the Sun Maid raisins box art:

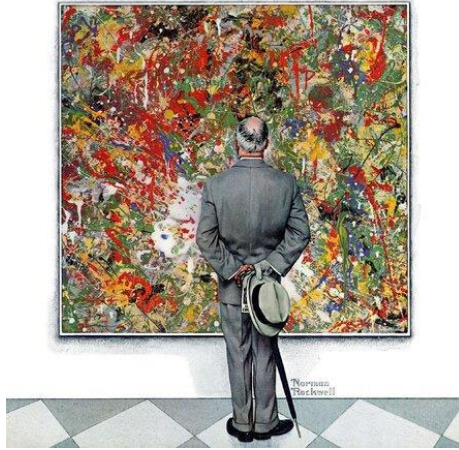


Dazu, Inc.,
Naked Gun 33-1/3 (1984)



Esther Hernandez,
Sun Mad (1982)

Follow-on works that directly comment on the originals, without necessarily mocking them, also exemplify this highest degree of transformativeness. Examples include the many paintings that are based on Manet's *Olympia*, whose new expressions comment on the racial and sexual politics conveyed by Manet's work. Amici.Br. of Kruger/Storr in support of Cert. ("Kruger/Storr") 10-11. Or, for example, Norman Rockwell's famous painting *The Connoisseur*, depicting a traditionally dressed museum patron trying to understand a Pollack-like painting:



Norman Rockwell, *The Connoisseur* (1961)

In fundamentally transformative works, the meaning and message of the follow-on work relates directly to, and rests upon, widespread public knowledge of the underlying work.

B. Highly Transformative

1. Cultural Commentary

In *Campbell*, the Court made a point of contrasting parody, which comments at least in part on the original work, from use of a work solely to comment on or criticize something else:

If, on the contrary, the commentary has no critical bearing on the substance or style of the [original work], which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work *diminishes accordingly* (if it does not vanish), and other factors, like the extent of its commerciality, loom larger. Parody *needs*

to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.

510 U.S. at 580-81 (emphasis added).

In addition to satire, many types of cultural commentary are accomplished through visual works that incorporate existing visual works, but do not comment on them directly. Works of appropriation art often replicate common objects or well-known works of art, sometimes with little added artistic expression, but which through context and added commentary convey a new message entirely distinct from the original. Examples include Duchamp's "cheeky modification of the Mona Lisa" and Barbara Kruger's superimposition of text commentary on iconic imagery. Kruger/Storr 13, 18-20. Andy Warhol's images that replicate popular products to comment upon consumerism also fall into this category:



Andy Warhol, *Campbell's Soup Cans* (1962)



Andy Warhol, *Brillo Boxes* (1964)

These works do not add significantly new artistic expression, nor do they directly comment on the artwork comprising the products. The same meanings and messages about consumerism could be accomplished by replicating other ubiquitous commercial product packaging. However, these particular choices are instantly recognizable examples of consumer products Warhol was targeting, and thus their use is important to his message. Moreover, in these Warhol examples there is also a clearly distinct purpose: the original commercial product packaging is designed to promote purchase of the product; Warhol's copies are works of visual art with a message about pop culture and consumerism. See *Google LLC v. Oracle America, Inc.*, 141 S.Ct. 1183, 1202-03 (2021) (“[an] 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”) (quoting 4 M. Nimmer & D. Nimmer, NIMMER ON COPYRIGHT § 13.05[A][1][b]).

In other works, Warhol used mass media photographs of celebrities to create new works that both comment on the nature of fame and add artistic expression. These include, for example, his Mao Zedong series, obviously based on Mao's ubiquitous official portrait:



Andy Warhol, *Mao* (1973)

Similarly, Warhol's Marilyn Monroe series were made from a widely distributed promotional image. Br.Pet.12. These types of works should be understood as having a lesser degree of transformativeness than parody and direct commentary. Yet they still carry a relatively high degree of transformativeness because the easily recognizable, culturally iconic status of the underlying mass media imagery is key to the copyist's message. One doesn't need to see the original to immediately recognize what the source image was. See Br.Pet.10 (as a member of the Pop Art movement,

Warhol “made art that mirrored, critiques, and, at times, incorporated everyday items, consumer goods, and mass media messaging and imagery”) (quoting Museum of Modern Art Learning, *Pop Art*, 13, https://www.moma.org/learn/moma_learning/themes/pop-art/); (“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 fan magazines, those halfway houses between fact and fiction.”) (quoting Kenneth Silver, *Modes of Disclosure: The Construction of Gay Identity and the Rise of Pop Art 197*, https://aestheticperceptions.files.wordpress.com/2013/01/silver_modes_of_disclosure.pdf).

2. Very Different Expression

Contrary to Petitioner’s argument, the Second Circuit was correct in noting that transformativeness does not always turn on whether a distinct meaning or message can reasonably be perceived or articulated in words. Works that incorporate purely new visual expression may also qualify, if they embody a high degree of expressive alteration that creates a very different character. *Campbell* 510 U.S. at 579 (transformativeness inquiry asks, in the alternative, whether the follow-on work alters “the first with new expression, meaning *or* message”) (emphasis added).

Complex collages that incorporate multiple disparate images exemplify such a high degree of alteration. Such collages are a form of compilation authorship, in which each piece of the collage is used as raw material to contribute to an “entirely different form of art.” Pet.App.21a. None of the underlying copied pieces is itself the major or dominant component of the new work’s expression. *Id.* Such collages exhibit a high degree of transformativeness because they

have a very different character. An example is the collage work *Niagara* by Jeff Koons, which utilized pieces of several different images to create a visual work entirely distinct from any of its component parts. *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006):



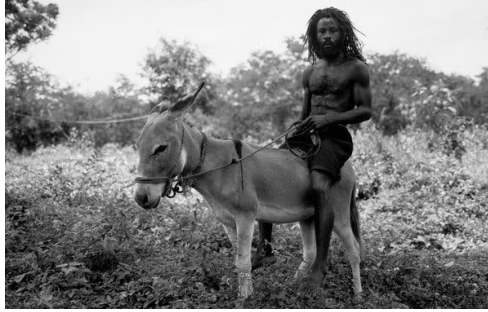
Andrea Blanch, *Silk Sandals by Gucci* (2000)



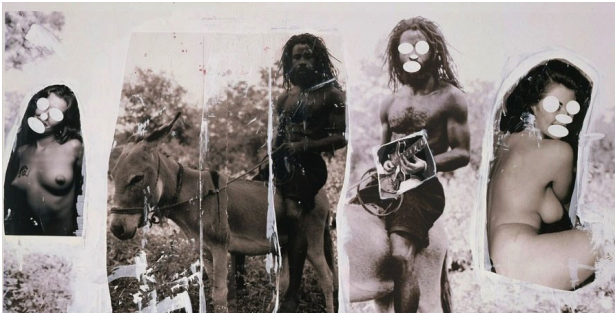
Jeff Koons, *Niagara* (2001)

Similarly, in *Cariou v. Prince*, 714 F.3d 694 (2d Cir.), *cert. denied*, 571 U.S. 1018 (2013), the collages which were held transformative as a matter of law

juxtaposed pieces of the plaintiff's works with other photographic images in ways which obscured and altered the original artistic expression.



Patrick Cariou, *Yes Rasta* (2000)



Richard Prince, *Canal Zone* (2007)

C. Somewhat or Minimally Transformative

Appropriation art which does not need the original work to make its point and does not fundamentally alter the original with *very different* expression, meaning or message, should be understood as embodying a lesser degree of transformativeness than the fundamentally transformative and highly transformative works discussed above.

Examples would be replication of a relatively unknown photograph as a three-dimensional sculptural

work, such as was at issue in *Rogers v. Koons*, 960 F.2d 301 (2d Cir.), *cert. denied*, 506 U.S. 934 (1992).



Art Rogers, *Puppies* (1985)



Jeff Koons, *String of Puppies* (1988)

The meaning or message of the sculpture (subjectively articulated by Koons as about kitsch and the banality of popular culture) cannot depend upon the viewer's awareness of the original photograph, because the original image is not well known. Even the mere combination of a known icon with a couple other elements in a copyist's sculpture typically would not add

sufficient new meaning to make a highly transformative work. *See United Features Syndicate v. Koons*, 817 F.Supp. 370, 379 (S.D.N.Y. 1993) (court rejected Defendant’s assertion that a sculpture combining renderings of the comic character Odie with two other elements excused the copying: “The fact that the infringing copy can be classified as “art” or as being part of an “artistic tradition” cannot be used as a shield to salvage an otherwise defective fair use defense.”).



Jim Davis,
Odie (1978)



Jeff Koons,
Wild Boy and Puppy (1988)

See also Cariou. supra (Defendant’s images that preserved Cariou’s original photograph as the main and dominant element of the new work, with only a couple superimposed added pieces of imagery, held not sufficiently transformative to qualify as fair use as a matter of law).



Patrick Cariou



Richard Prince

D. Warhol's Prince Series Are at Best, Somewhat Transformative

There is no question that Warhol's series of Prince images at issue in this case, through his mechanical reproduction and modifications of Goldsmith's photograph, incorporate new artistic expression of the type that was famously unique to Warhol.² They are clearly "transformed" works incorporating new expression. 17 U.S.C. § 101 (definition of a derivative work).

² Petitioner asserts that Warhol cropped Goldsmith's photo, resized it, altered the original angle of Prince's face, changed tone, lighting and detail, added layers of bright and unnatural colors, conspicuous hand-drawn outlines and line screens, and stark black shading that exaggerated Prince's features. Br.Pet.18. Amici dispute this characterization to the extent it misstates the degree of hand-drawn elements as opposed to mechanical effects, that anything about these effects changed the lighting, facial features or facial expression, or that resizing an image or slightly altering the angle of a face within a rectangle constitute significant alterations.

Petitioner argues that this new expression, which is essentially the imposition of Warhol's artistic style onto Goldsmith's photograph, creates the proffered new purpose, meaning and message that renders the Prince Series transformative fair use. "Warhol's portraits of Prince, as with his celebrity portraits generally, 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 defining the contemporary conditions of life." Br.Pet.20.

By situating the Prince Series within the larger body of Warhol's works, Petitioner essentially argues that they necessarily share the same transformative message and meaning, and/or artistic expression, as his other celebrity portraits. This argument misses the point that there are differing degrees of transformativeness. Fair use is an "equitable rule of reason, with each case to be decided on its own facts." Br.Pet.8 (citing *Sony Corp.*, 464 U.S. at 448 n.31; 454-55 & n.40; *Harper & Row Pubrs., Inc. v Nation Enterp.*, 471 U.S. 539, 560 (1985)). As the Second Circuit stated, there cannot be a "celebrity plagiarist privilege" which would overrun the rights of originating artists.

it is entirely irrelevant to this analysis that 'each Prince Series work is immediately recognizable as a Warhol.' Entertaining 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. But the law makes no such distinctions.

Pet.App.26a-27a.

Unlike his Mao series and other celebrity images, Warhol's Prince Series do not replicate a mass media image of his subject. Goldsmith's unknown photograph was not a well-known image like Warhol normally utilized to convey his ideas about ubiquitous celebrity. Indeed, his message would have been stronger had he used a widely-publicized portrait of Prince already known to consumers, for example, the iconic photograph of Prince published on the cover of his 1981 album *Controversy*. Br.Pet.16. *See also* Amicus Br. of Meyer in support of Cert. ("Meyer") at 4 (relying on an incorrect assumption that the Goldsmith Photograph was a popular image: Meyer explains "how the series, like much of Warhol's work as a Pop artist, incorporated *popular imagery of celebrity* not to portray the celebrity as a human subject, but to comment on the machinery of fame itself."); 24 ("By creatively reworking *popular photography* of celebrities, Warhol forces us to look not simply at the pictures of stars (which, after all, *we see all the time*) but at the construction of stardom and the commodification of individuals." (emphasis added)).

Warhol's Prince Series are not highly transformative. While there may be a reasonably perceived new meaning or message in the Prince Series, there was no compelling need for Warhol to take Goldsmith's photograph to achieve it. Warhol could've arranged to take his own photograph of Prince, or licensed any other pre-existing photograph of Prince. As the author of a leading treatise on copyright law explains, "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.” William F. Patry, PATRY ON FAIR USE § 3.1 (emphasis added).

The Second Circuit concluded that the Prince Series “are closer to what the law deems ‘derivative’ (and not ‘transformative’).” Pet.App.27a. Amici believe that rather than treating derivative and transformative works as mutually exclusive, the better understanding is to recognize that some derivative works can be transformative. Giving Petitioner the benefit of the doubt, even if considered “transformative,” the Prince Series are at best only somewhat transformative, and a greater justification must be shown to excuse Warhol’s choice to use the underlying work without authorization than for his other more highly transformative works. See *Leval* 1111 (“extensive takings may impinge on creative incentives. And the secondary user’s claim under the first factor is weakened to the extent that her takings exceed the asserted justification. The justification will likely be outweighed if the takings are excessive and the other factors favor the copyright owner.”).

III. ALL FAIR USE FACTORS MUST BE WEIGHED IN LIGHT OF THE DEGREE OF TRANSFORMATIVENESS

As this Court has repeatedly instructed, fair use is a context-specific analysis. All factors must be examined in relation to each other. The degree to which a work is “transformative” affects the weight given to the other factors. *Campbell*, 510 U.S. at 579 (“the more transformative the new work, the less will be the significance of the other factors”). After evaluating transformativeness, the significance of other aspects of the first factor, and of the remaining three fair use factors, must not be understated. Indeed, even in

Campbell, which involved a fundamentally transformative parody work, this Court did not find transformative fair use as a matter of law, but remanded to the appellate court for reconsideration of the fourth factor. *Id.* at 594.

A. The Second Circuit Properly Evaluated the Remaining Considerations Under All of the Fair Use Factors

1. First Factor: Commercial Use

The fair use provision directs courts to consider whether the use is “of a commercial nature.” 17 U.S.C. § 107(1). However, nearly all of the fair use preamble examples are generally conducted for profit in this country. *Campbell*, 510 U.S. at 585. This is true for most works of visual art. Petitioner, for example, manages sales of Warhol’s physical works of art as well as licensing their imagery for publication. Warhol’s Prince Series were created and used for economic gain both through sales and licensing of the works. Pet.Ap.9a. (Petitioner’s licensing of one of them for publication in *Vanity Fair* led to Goldsmith’s awareness of the alleged infringement. *Id.* 10a.) At the same time, their dissemination to the public, like all works of great art, is undeniably in the public interest. The Second Circuit considered this, but appropriately concluded that the public interest does not entitle Warhol (or Petitioner) to monetize the derivatives without paying the customary price. It properly concluded that this factor weighs against fair use. Pet.App.29a.

2. Second Factor: Nature of the Copyrighted Work

The second fair use factor “calls for recognition that some works are closer to the core of intended

copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.” *Campbell*, 510 U.S. at 586 (citing *Stewart v. Abend*, 495 U.S. 207, 237-38 (1990); *Harper & Row*, 472 U.S. at 563-64); *Google*, 141 S.Ct. at 1202 (same, quoting *Campbell*).

Many of the original images featured in Warhol’s works, like the Campbell’s Soup label and Brillo box, are essentially product advertisements, entitled to relatively thin copyright protection and correspondingly less protection under this factor. Goldsmith’s photograph, on the other hand, is a highly creative visual artwork within the core of copyright protection. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (a photographer’s “posing the [subject] in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression” make the photograph “an original work of art”); *Rogers v. Koons*, 960 F.2d at 307. The single license she issued for the one authorized Vanity Fair illustration did not diminish the law’s protection of her choice to withhold her work to shore up demand. Pet.App.30a.

The Second Circuit correctly held that “the district court should’ve found this factor to favor Goldsmith irrespective of whether it adjudged the Prince Series works transformative.” *Id.* 31a.

3. Third Factor: Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

This factor asks whether “the quantity and value of the materials used are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586 (internal quotations omitted) (quoting *Folsom v. Marsh*, 9 F.Cas. 342, 348 (CCD Mass. 1841)). This Court recognizes that “the extent of permissible copying varies with the purpose and character of the use.” *Id.* The analysis “calls for thought not only about the quantity of the materials used, but their quality and importance, too.” *Id.* The relevance and weight of this factor is affected by and affects the other fair use factors, for

it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use; fulfilling demand for the original.

Id. 577-588.

The appellate court in *Campbell* applied these principles to conclude that the third factor weighed against fair use. This Court reversed, holding that, in that specific case, the (fundamentally transformative) parodic nature of the follow-on work necessarily renders less significant the amount of the original work taken. Importantly, however, this Court did *not* hold that this factor is less significant for *any* transformative work. Parody is a special case: “Parody’s humor, or in any

event its comment, *necessarily* springs from *recognizable allusion to its object* through distorted imitation. Its art lies in the tension between a *known original* and its parodic twin.” 510 U.S. at 588 (emphasis added). In referring to the recognizable “object” and the “known original,” the Court is referring to the original expressive work, not the subject matter of that work: “When parody takes aim at a particular original *work*: the parody must be able to ‘conjure up’ at least enough of the original to make the *object* of its critical wit recognizable.” *Id.* (emphasis added).

Warhol’s Prince Series are not parodies, and as discussed above, they are not fundamentally or highly transformative works. The purported transformative message of the Prince Series has no relationship to Goldsmith’s photograph specifically, nor does it rely in any way on public recognition of her photograph. Warhol’s meaning and message about celebrity and fame relate to Prince, not to Goldsmith’s specific depiction of Prince. *None* of the copyrighted expression comprising Goldsmith’s photograph was necessary to accomplish the purpose of Warhol’s Prince Series.

As the images demonstrate, Warhol’s Prince Series copy extensively both the quantity and quality of Goldsmith’s copyrighted expression. The Second Circuit’s assessment is accurate:

A comparison of the images in the Prince Series makes plain that Warhol did not use the Goldsmith Photograph simply as a reference or *aide-mémoire* in order to accurately document the physical features of its subject. Instead, the Warhol images are instantly recognizable as depictions or images of the Goldsmith Photograph itself . . . many of the

aspects of Prince's appearance in the Prince Series, such as the way in which his hair appears shorter on the left side of his face, are present in the Goldsmith Photograph yet absent even from some other photographs that Goldsmith took of Prince during the same photo sessions. In other words, whatever the effect of Warhol's alterations, the essence of [Goldsmith's] photograph was copied and persists in the Prince Series. Indeed, Warhol's process had the effect of amplifying, rather than minimizing, certain aspects of the Goldsmith photograph. For example, the fact that Prince's mustache appears to be lighter on the right side of his face than the left is barely noticeable in the grayscale Goldsmith Photograph but is quite pronounced in the black-and-white Prince Series screenprints. Moreover, this feature of the Goldsmith Photograph is, again, not common to all other photographs of Prince even from that brief session. The similarity is not simply an artefact of what Prince's facial hair was like on that date, but of the particular effects of light and angle at which Goldsmith captured that aspect of his appearance.

Pet.App.34a-35a (internal citations omitted, emphasis added, footnoted text included).

In addition to these observations, it is clear by looking at the two parties' images that, contrary to Petitioner's characterization, by mechanically increasing the contrast from the original photograph to essentially solid black-and-white graphic forms, Warhol's Prince Series emphasize, rather than "alter" the lighting which

Goldsmith created in her photograph. This technique also intensifies the appearance of his facial features and his direct gaze at the viewer, replicating even the glint in Prince's eyes; it does not change them. Contrary to Petitioner's characterization, this intensely personal gaze in the Prince Series does not create a "mask-like impersonal simulacrum of his actual existence." Br.Pet.20.

Prince's gaze and the appearance of his facial features and hair, not the small upper portion of his torso (essentially, his shoulders), comprise the heart of Goldsmith's unique portrait. Thus is it hardly significant that his shoulders are not shown in Warhol's Prince Series. Moreover, all of the Prince Series duplicate the shadow below his chin created by his collar, and the abrupt angle at which his hair is cut off behind his collar, thus clearly indicating that his head is connected to his neck and torso. One of the Prince Series even includes delineation of his clothing, indicating the same sash he was wearing in the same portion of his upper torso as in Goldsmith's photograph. Contrary to Petitioner's misleading characterization, the Prince Series do not depict a "disembodied" head; they depict the same embodied head as Goldsmith's photograph.³

The Second Circuit correctly concluded that this factor weighs heavily against fair use.

³ Amicus Meyer shows a cropped version of one of the Prince Series which makes it appear disembodied, but this is not an accurate depiction of that work. *Compare* Meyer 16 to Br.Pet.19.

4. Fourth Factor: Effect of the Use Upon the Potential Market For or Value of the Copyrighted Work

a. Harm to the potential market for the copyrighted work

Courts have focused on the fourth factor as requiring inquiry into market harm. Not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the *potential* market for the original, and also of harm to the market for *derivative works*, must be evaluated. *Campbell*, 510 U.S. at 590 (citing *Folsom v. Marsh*, 9 F.Cas. at 349; *Harper & Row*, 471 U.S. at 568) (emphasis added). The “licensing of derivatives is an important economic incentive to the creation of originals.” *Id.* at 593.

This factor is also interrelated with the other fair use factors. The nature of the underlying work and degree of transformativeness of the follow-on work directly impact whether there is potential market harm. For example, Warhol’s Campbell’s Soup or Brillo images did not affect the economic market of the underlying product labels at all: those advertising images sold products, not works of art. Regarding the parodic song in *Campbell*, this Court reversed the appellate court’s determination that the fourth factor weighed against fair use. The reversal was based again on the fundamentally transformative nature of parody as direct commentary or criticism on the original work: “there is no protectable derivative market for criticism.” 510 U.S. at 592.

No such excuse exists for merely somewhat transformative uses like Warhol's Prince Series, which do not involve any commentary or criticism of Goldsmith's photograph. The Prince Series are indeed exactly the opposite of parody. Rather than being outside the scope of the derivative market, they are a perfect example of direct impact on the protectable market for derivative works. They were created precisely because Warhol had access to Goldsmith's photograph via an explicit (paid) license to use it to create a single derivative work.

As the Second Circuit found, market harm in this case is self-evident, to both Goldsmith's existing and potential markets:

there is no material dispute that both Goldsmith and AWF have sought to license (and indeed have successfully licensed) their respective depictions of Prince . . . Most directly, AWF's licensing of the Prince Series to Condé Nast without paying or crediting Goldsmith deprived her of royalty payments to which she would have otherwise been entitled.

Pet.App.39a.

There currently exists a market to license photographs of musicians, such as the Goldsmith Photograph, to serve as the basis for a stylized derivative image; permitting this use would effectively destroy that broader market, as, if artists "could use such images for free, there would be little or no reason to pay for them."

Id. 41a (quoting *Barcroft Media, Ltd. v. Coed Media Grp., LLC*, 297 F.Supp.3d 339, 355 (S.D.N.Y. 2017).

On this basis of direct market harm alone, the Second Circuit correctly held that the fourth factor weighs heavily against fair use.

b. Harm to the value of the copyrighted work

The statutory text does not limit the fourth factor inquiry to market harm. The Copyright Act explicitly directs courts to consider, *in the alternative*, the effect on “the value of the copyrighted work.” 17 U.S.C. § 107(1). The value of the copyrighted work must encompass kinds of harm outside the scope of market harm. See *Fourth Estate*, 139 S.Ct at 889-90 (statutory text is not to be interpreted as superfluous). While courts generally have missed this consideration, it is an important alternative inquiry, especially in light of today’s technologies which make it so easy for follow-on artists to take and modify the online works of other artists, often before the originating artists have had a chance to exploit their own economic markets for their works.

Columbia Law Professor Jane C. Ginsberg recently explored the meaning and application of the fourth factor’s alternate instruction to inquire into “the value of the copyrighted work” in her article *Fair Use Factor Four Revisited: Valuing the “Value of the Copyrighted Work”*—Essay, J. OF THE COPR. SOC’Y OF THE U.S.A., Vol. 67, p.19 (2020); Columbia Pub. Law Rsch. Paper No. 14-653 (2020); https://scholarship.law.columbia.edu/faculty_scholarship/2677. Reputational value—the association of the artist with her work—is one example of significant

value that is lost when a work is taken, modified, and published without attribution.

Reputational harm is also present in this case. Pursuant to the original Vanity Fair license, Goldsmith was given credit for her photograph as the source image for Warhol's first Prince image. Pet.Ap.7a. Viewers wishing to license the same photograph, or others like it, could contact Goldsmith. Goldsmith was not given credit when subsequent, unlicensed works in the Prince Series were published. *Id.* 10a. Consequently the reputational value was lost.

Professional artists rely on reputational value to create and grow markets for their copyrighted works by displaying them in online portfolios, social media image sharing sites like Instagram, licensing platforms and other online venues. Such displays may offer the copyrighted works for potential licensing, but also are shown to demonstrate the artist's artistic skills in order to attract new commissions to create new copyrighted works. This "draw" value cannot be overstated: it is the primary way that visual artists develop their livelihoods today. Recognizing and protecting this reputational draw value is a key incentive to visual artists to publicly display their works.

On this alternative basis also, the fourth factor weighs heavily against fair use. Accordingly, the Second Circuit reached the correct conclusion: all the fair use factors, evaluated in light of the minimal transformative nature of the Prince Series, weigh against fair use.

**IV. HONORING *CAMPBELL'S* MANDATE
TO CONSIDER DEGREES OF
TRANSFORMATIVENESS PROTECTS
THE FREE EXPRESSION OF BOTH
ORIGINATING ARTISTS AND
APPROPRIATION ARTISTS**

Petitioner correctly states that “the core public interest served by copyright law is the creation and publication of free expression,” and that “the limits of copyright protection accordingly must be construed in light of the basic purpose of stimulating artistic creativity for the general public good.” Br.Pet.4 (citing *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) and *Sony Corp.*, 464 U.S. at 432 (internal quotations omitted)). Petitioner essentially argues that the Prince Series (and all works comprising the Pop Art movement and appropriation art), must be protected as transformative fair use because they “communicate innovative ideas to the public,” Br.Pet.2; otherwise the fair use doctrine would “lose much of its vitality in protecting new contributions to the marketplace of ideas” and would “plunge copyright into conflict with the First Amendment.” Br.Pet.30.

Petitioner invokes these principles, however, solely on behalf of follow-on artists, as if it is only their freedom of expression, and only the stimulation of their artistic creativity, that copyright law is meant to protect. But of course, copyright’s primary purpose is to incentivize the creation of *original* works. It does so by granting to originating authors exclusive rights to economically benefit from their creations, including through their statutory derivative rights. Copyright law protects free expression under the First Amendment by ensuring that the monopoly granted

to originating artists extends only to their specific creative expression, never the ideas underlying their expression. 17 U.S.C. § 102(b).

Follow-on works do not merely communicate innovative “ideas.” They are derivative works which take copyrightable expression from other artists. The First Amendment does not protect any follow-on work merely because it offers a valuable new message, meaning, or “idea.” *Eldred*, 537 U.S. at 221 (“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.”) The expression of a follow-on artist must be appropriately balanced against the Constitutional mandate to incentivize original works, and originating artists’ equally valuable statutory derivative rights. Proper evaluation of degrees of transformativeness and the relative weight of the other fair use factors achieves that balance.

V. RECOGNIZING DEGREES OF TRANSFORMATIVENESS DOES NOT UNDULY ENDANGER APPROPRIATION ART OR ITS PUBLIC ENJOYMENT

Contrary to the alarmist assertions of Petitioner and many other amici, honoring *Campbell’s* mandate to consider the relative degree of transformativeness, as part of the holistic fair use analysis, does not threaten destruction of appropriation artworks, or the ability of museums, galleries, libraries, or educational institutions to collect and display them. Irreparable harm may no longer be presumed upon a finding of infringement: copyright plaintiffs seeking injunctive relief must prove, inter alia, irreparable injury, inadequacy of monetary damages; and that the

public interest would not be disserved by a permanent injunction. *eBay v. MercExchange*, 547 U.S. 388, 392-92 (2006); *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, 32 (2008); *Esbin & Alter, LLP v. Sabharwal, Globus, & Lim, LLP*, 403 F.App'x 591, 592-93 (2d Cir. 2010); *Flexible Lifeline Systems, Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 998-1000 (9th Cir. 2011).

Plaintiffs seeking severe injunctive relief such as the destruction of follow-on works, or their removal from public view or publications, must meet these criteria. Monetary damages in the amount of reasonable license fees or royalties may be sufficient to redress market harm. Ensuring attribution to originating artists may redress reputational harm. The public interest in preserving and learning from acclaimed works of art will likely weigh heavily against removing such works from our cultural heritage, regardless of whether they are deemed infringing.

CONCLUSION

It is not the purpose of the Copyright Act to shield from infringement liability all works that have achieved acclaim in the art world. *See, e.g.* William F. Patry, PATRY ON COPYRIGHT, § 10:35.20 (“finding that one work of art infringes another does not make the infringing work not art; it merely makes it infringing art.”) Copyright law exists primarily to protect and foster the creation of original works. Fair use should always be considered a limited exception to the statutory right of originating artists to control and benefit economically from the creation of derivative works. Petitioner’s expansive view of transformativeness would disincentivize the creation of original works by

eviscerating the potential derivatives market, in direct contradiction to Constitutional and statutory mandates.

The choice presented by this case is not between protecting the First Amendment “free expression” of appropriation artists or dangerously chilling the creation of new works in this genre. Upholding the Second Circuit’s decision will not mean that appropriation artists cannot make their works, or that downstream users cannot show them. It simply means that appropriation artists should expect to obtain permission, and pay for the privilege of incorporating another artist’s copyrighted expression into their follow-on artwork. Follow-on artists should be excused from respecting the derivative rights of originating artists only if their follow-on works are so fundamentally or highly transformative that their potential impact on the original artist’s equally valuable expression and livelihood is correspondingly minimal.

The Second Circuit’s judgment should be upheld.

Respectfully submitted,

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