

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

—◆—
**BRIEF OF AMICI CURIAE
COPYRIGHT LAW PROFESSORS
IN SUPPORT OF PETITION FOR CERTIORARI**

—◆—
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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are professors who teach and have written extensively about copyright law and other intellectual property law subjects. Our sole interest in this case is in the orderly development of copyright law in a way that serves the public interest.¹

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SUMMARY OF ARGUMENT

If the meaning of artistic works were objective, an art appreciation class would be like a standard math class: It would have only right and wrong answers. But the skills of interpretation are not calculation skills. Much of modern art would be at risk if judges engaged in fair use inquiries were required to ignore reasonable audiences' views about when a new creation based on an existing work has a new meaning and message.

This Court could not have been clearer in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), and *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021), that an inquiry into whether a work is transformative requires consideration of whether a second work has a different message, meaning, or purpose. The trial court correctly followed this Court's rule. The Second Circuit's decision has erroneously forbidden consideration

of this very inquiry. This mistake also created a conflict with other circuits and collapsed whether two works are substantially similar—a predicate question before any consideration of fair use is required—into a rejection of fair use. Even if the Second Circuit’s new rule is limited to visual similarity, it errs by treating the existence of substantial similarity as essentially conclusive against fair use. Because meaning matters, substantial similarity and transformativeness are not mutually exclusive. This Court should grant certiorari to clarify this important point given the confusion generated by the ruling below.

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ARGUMENT

I. The Decision Below Conflicts with Supreme Court Precedent and Creates a Circuit Split.

This Court has recently reaffirmed its longstanding holding that transformativeness is a consideration in all fair use cases, and that transformation can occur in different ways, including by changing the meaning or message of an original work. *See Google*, 141 S. Ct. at 1202-03 (citing *Campbell*, 510 U.S. at 579). The opinion below rejected this controlling precedent.

A. The court below wrongly rejected consideration of the meaning of accused works, which distorted its entire analysis.

The Second Circuit reasoned that courts evaluating fair use disputes must not consider the meaning of the contending works because meaning is subjective.

Pet. App. 22a-23a. Beyond its defiance of settled law, this holding is wrong because there is often no other way to evaluate transformativeness than to look at the meaning of the contending works. Even shifts in context that the court below considered transformative—such as a shift from promoting a concert to recording the historical and cultural significance of the band performing the concert—are shifts in the meaning of works. *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

Without considering meaning, the court was left only with broad categories: both works were works of visual art, and thus they shared the same genre, and thus Warhol’s was not transformative. Pet. App. at 20a, 25a (relying on the conclusion that, “at least at a high level of generality, [the works] share the same overarching purpose (i.e., to serve as works of visual art),” and had the same purpose as “portraits of the same person”). But equating genre with meaning and message is both unpersuasive—Doris Kearns Goodwin and Robert Caro both wrote biographies of President Lyndon Baines Johnson, but they hardly have the same meaning or message—and directly in conflict with this Court’s holding in *Google* that the transformativeness analysis must not stop with identifying genre and topic (in *Google*, computer programs that serve as programming environments for more specific programs) but must continue to greater particularity. 141 S. Ct. at 1203 (“Google copied portions of the Sun Java API precisely, and it did so in part for the same reason that Sun created those portions, namely, to enable programmers to call up implementing programs that would accomplish particular tasks. . . . [I]n determining

whether a use is ‘transformative,’ we must go further and examine the copying’s more specifically described ‘purpose[s]’ and ‘character.’”); *see also Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259 (11th Cir. 2001) (finding transformative fair use of *Gone With the Wind* despite defendant’s use of the same genre—fiction about Southern women’s experience of the Civil War).

Considering meaning is often the only way to make sense of why a transformative work is transformative—it is the only way to explain why “For sale: baby shoes, never worn” is a tragic short story, but “For sale: running shoes, never worn” is not a story but an ad. Considering meaning requires a very different inquiry from one evaluating the contending works’ aesthetic *merit*, but the opinion below wrongly conflated the two. Merit asks about quality; meaning asks about message in context. Transformativeness requires analysis of the latter, not the former. And transformativeness in meaning provides necessary breathing room to artists reacting to the world around them, which includes existing works.

The court’s primary error about not evaluating meaning then fatally infected its analysis of two of the remaining fair use factors. Factor three, whether the amount taken is reasonable in light of the purpose of the use, requires a consideration of the amount and substantiality of the accused work’s copying of protectable expression. The opinion below reduced that inquiry to whether the accusing work remained recognizable as the source of the accused work. Pet. App. 23a-24a (finding lack of transformation when “the

secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material”). This approach conflicts with this Court’s longstanding rule that a transformative work may take the heart of the original where that is reasonable in light of the purpose of the use. *Campbell*, 510 U.S. at 588 (“Copying does not become excessive in relation to a parodic purpose merely because the portion taken was the original’s heart.”); *see also, e.g., Tresóna Multimedia, LLC v. Burbank High School Vocal Music Ass’n*, 953 F.3d 638, 650-51 (9th Cir. 2020) (finding that qualitatively substantial and recognizable copying did not weigh against fair use where use was transformative in meaning and purpose); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 693 (7th Cir. 2012) (finding transformative fair use where defendant took “heart” of the work); *Núñez v. Caribbean Intern. News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000) (finding fair use in verbatim copying where use was transformative).

Factor three analysis should center on the amount of expression that was taken by the accused use. *See Google*, 141 S.Ct. at 1205. But, because the court below disregarded the meaning of what was taken, it did not evaluate how much of what remained after Warhol’s substantial artistic changes was expressive, instead attributing Prince’s appearance to Goldsmith. *E.g., Pet. App.* at 34a (finding that the crucial fact under factor three was that the Warhol image remained “readily identifiable as deriving from a *specific* photograph of Prince”) (emphasis in original). This reasoning defied basic principles that copyright covers only

protectable expression, not factual portrayals of the world. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 347-48 (1991); *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1119 (9th Cir. 2018) (even artist who coaxes human subject into new pose cannot monopolize pose); *Harney v. Sony Pictures Television, Inc.*, 704 F.3d 173, 177 (1st Cir. 2013) (appearance of humans in photo is largely unprotectable); *Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc.*, 575 F.2d 62, 65 (3d Cir. 1978) (artists have a “weak” copyright claim when the “reality of [their] subject matter” is not easily separable from their artistic expression of it). Goldsmith has no copyright interest in what Prince looked like or the angle of his chin.

Failure to consider meaning also infected the court’s analysis of factor four, market effect. The opinion below erroneously treated the parties’ works as market competitors. Without evaluating meaning, the court conflated the market for a photograph that appears to represent a slice of reality with the market for a nonphotographic image that through its stylization asks viewers to confront the way that art mediates reality. Since both are “markets,” the court treated them as the same, because they both depicted Prince, and Prince was a popular artist whose image was portrayed in articles. Pet. App. at 40a. Although the court referred to the use of both Goldsmith photos and Warhol images to illustrate articles about Prince, it did not rely on any record evidence that the creators of those articles considered the two types of works substitutable. By the Second Circuit’s logic, 2 Live Crew’s parody

in *Campbell* would have been unfair because both it and “Pretty Woman” by Roy Orbison were both played by radio stations. *But see Campbell*, 510 U.S. at 591 (transformativeness made market substitution less plausible despite presence of both songs in a commercial market). Similarly, the opinion below conflicts with *Google*, which made clear that the potential to license a use does not mean that there was a cognizable market harm from an unlicensed use. *Google*, 141 S. Ct. at 1207 (discounting Sun’s attempt to enter the Android market; quoting 4 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.05[A][4] (2019) (cautioning against the “danger of circularity posed” by considering unrealized licensing opportunities because “it is a given in every fair use case that plaintiff suffers a loss of a potential market if that potential is defined as the theoretical market for licensing the very use at bar”)).

B. These errors created a serious conflict among the circuits.

The decision below creates a split with the courts that have followed this Court’s precedent. The petition for certiorari details the split with examples that make clear that the Second Circuit’s new focus on recognizability—that is, visual similarity—diverges sharply from other circuits’ approaches and distorts fair use doctrine. Many other courts have also found transformativeness despite visual recognizability. (As detailed in the next Part, it would be shocking were this not so, given that fair use is only a consideration if

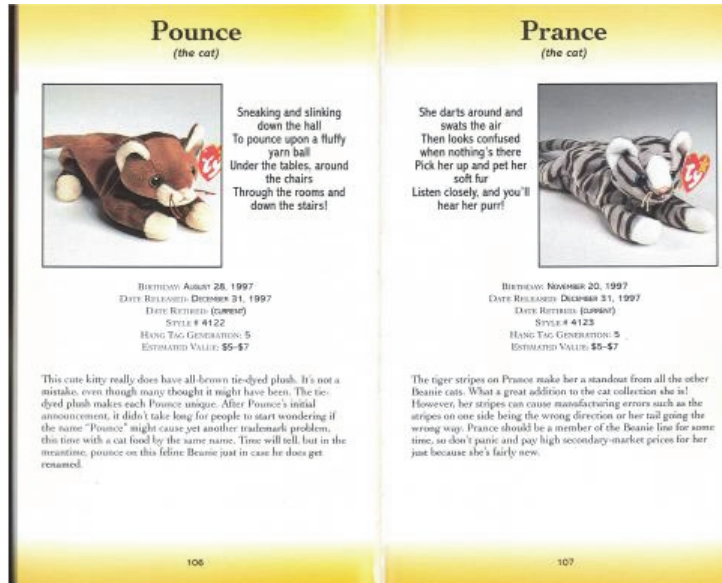
there is substantial similarity of protectable expression.)

In *Núñez*, for example, the defendant reproduced the photos in suit without alteration, but the First Circuit found transformative purpose and fair use:



Likewise, *Ty v. Publications Int'l Ltd.*, 292 F.3d 512, 521 (7th Cir. 2002), explained that a Beanie Babies Collectors Guide needed to reproduce images of the entire line of copyrighted Beanie Babies in order to reach a legitimate market of collectors:

² El Vocero Oct. 24, 1997, at 1.



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Bouchat v. Baltimore Ravens Ltd. Partnership, 737 F.3d 932, 940, 944 (4th Cir. 2013), found transformation in the recognizable use of images of a sports team logo in contexts that historicized them:



³ Holly Stowe, *Beanie Babies Collectors Guide* 106-07 (1998).



So too in *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003), where the Barbie doll was immediately recognizable as central in defendant's series of photographs, one of which is shown below:



See also *SOFA Entertainment, Inc. v. Dodger Productions, Inc.*, 709 F.3d 1273 (9th Cir. 2013) (fair use of

⁴ Screenshot from accused NFL Top Ten: Draft Classes video with logo at bottom right; photograph of accused timeline display panel focusing on logo in Baltimore Ravens stadium, with logo in center of image, by Andrea Trento, associate at Hogan Lovells.

⁵ Tom Forsythe, *Land of Milk and Barbie II* (n.d.) (one of the works in suit).

recognizable clip of band playing on Ed Sullivan Show in musical about band).

The split here is particularly important because copyright litigation is concentrated in the Second Circuit and the Ninth, which together render more than half of all appellate copyright decisions annually on average. No other circuit averages more than 10% of such decisions. *See* William K. Ford, *Judging Experience in Copyright Law*, 14 J. Intell. Prop. L. 1, 41 (2006). The opinion below thus threatens significant disruption and conflict in fair use across circuits.

Aside from the basic error in the Second Circuit’s rejection of considering change in meaning, it attempted to obscure its conflict with settled law, and to distinguish its earlier rulings in *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), and *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006), by introducing a new consideration that itself generated a circuit split—whether the accused work was a collage using preexisting works from at least two sources. Pet. App. at 21a. Neither *Campbell* nor *Google* involved collages and nonetheless found transformativeness. Thus, it is unsurprising that the Second Circuit’s new collage rule conflicts with prominent cases in the Ninth Circuit, where collage is neither necessary, *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1177 (9th Cir. 2013) (finding transformative fair use of one work without reference to collage), nor sufficient, *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 983 F.3d 443, 452 (9th Cir. 2020) (finding “mashup” of two works not transformative); the Eleventh Circuit, *Suntrust*, 268 F.3d at 1270 (finding

critical re-envisioning of *Gone with the Wind* transformative without need for juxtaposition with another work); and the Seventh Circuit, *Brownmark* (same, for viral online music video), and *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014) (finding fair use of single photo substantially changed on T-shirt).

Indeed, the decision below deepened an existing split with respect to the Seventh Circuit, which has rejected transformativeness (despite this Court's embrace of it) in favor of a complement/substitute distinction—economic complements that enhance the value of existing works are fair and economic substitutes are not, and there is no third possibility—with no basis in this Court's jurisprudence or the text of §107. Compare *Kienitz*, 766 F.3d at 758 (disparaging transformativeness; applying complement/substitute test), and *Ty*, 292 F.3d at 517-18 (same), with *Google*, 141 S.Ct. at 1206 (requiring much more sensitive market analysis, including accounting for public benefit).

II. The Decision Below Conflicts with the Core Copyright Principle that Substantial Similarity is a Predicate for Infringement and Thus Cannot Disqualify a Fair Use.

The court below erred, and created a circuit split, because it mistook copying in fact for lack of transformativeness, a mistake that goes to the heart of copyright doctrine. The Second Circuit relied on the fact that Warhol's works were copies of Goldsmith's work. *See, e.g.*, Pet. App. 23a-24a (holding that use was

not transformative because it “recognizably deriv[es] from, and retain[s] the essential elements of, its source material”); Pet. App. 26a (same, because the photograph “remain[ed] the recognizable foundation upon which the Prince Series is built”).⁶

But substantial similarity of protectable expression is a baseline requirement of copyright infringement. *See, e.g., Arnstein v. Porter*, 154 F.2d 464, 472 (2d Cir. 1946) (“Assuming that adequate proof is made of copying, that is not enough; for there can be ‘permissible copying.’”); *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 76 (2d Cir. 1997) (no fair use analysis is required if similarities are not substantial); *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1198-99 (7th Cir. 1987) (“So long as the second comer creates a work that is not substantially similar to the copyrighted features of the first work, there is no infringement.”); 4 Nimmer on Copyright § 13.03. If it were otherwise, Jurassic Park might infringe upon a different story involving shenanigans on a dinosaur island, the copyright holders of the character Superman could prevent others from creating another superhero who is super strong and flies around in a cape and primary-colored suit, and no one else could take a photograph of Michael Jordan leaping without Jacob Rentmeester’s permission. *See Williams v. Crichton*, 84 F.3d 581 (2d Cir. 1996) (rejecting ownership of “dinosaur island” concept without substantial

⁶ It is far from clear that this standard even requires substantial similarity, as opposed to but-for causation, making it even less reasonable as a consideration for fair use.

similarity of protectable expression); *Warner Bros. Inc. v. American Broadcasting Companies, Inc.*, 720 F.2d 231 (2d Cir. 1983) (same for Superman); *Rentmeester*, *supra* (same for Michael Jordan pose).

Lack of substantial similarity and fair use are two different reasons that one work might not infringe another work. Neither one alone is capable of protecting the profound First Amendment interests that subsequent speakers have in building on existing works, which is why this Court has emphasized that both limits are vital to protect against overexpansion of copyright monopolies. *Golan v. Holder*, 565 U.S. 302, 328 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); see also Oren Bracha, Not De Minimis: (Improper) Appropriation in Copyright, 68 Am. U. L. Rev. 139, 180 (2018) (detailing the different roles played by the two doctrines). If there is no substantial similarity, there is no need for a fair use defense in the first place. *Cf. Campbell*, 510 U.S. at 574-75 (explaining that fair use applies where there would otherwise be infringement).

The court below collapsed the two inquiries by holding that substantial similarity—or perhaps even sub-substantial similarity in the form of visual recognizability—was dispositive against the Foundation across multiple factors, particularly factor one (transformativeness) and three (amount taken). This conceptual error was intertwined with the court’s refusal to assess the meaning of the use.

The Second Circuit may have meant to limit its holding to visually recognizable similarities, but it

gave no explanation for why visuals are different from sounds or text in fair use-relevant ways. *See generally* Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright Law*, 125 Harv. L. Rev. 683 (2012) (exploring persistent contradictions in judicial treatment of images in copyright cases). This lack of rationale may explain why courts are already applying the precedent to other media. *See Grant v. Trump*, ___ F. Supp. 3d ___ 2021 WL 4435443 (S.D.N.Y. Sept. 28, 2021) (sound recording).

If, on the other hand, the court meant to hold that copying that results in perceptible similarities between works always weighs heavily against fair use, its conflict with precedent and logic increases: fair use is unnecessary in the absence of substantial similarity. The very facts that make a statutorily provided defense necessary cannot prevent the claimant from using that defense. The court below essentially made the same error as the one this Court reversed in *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004):⁷

[I]t would make no sense to give the defendant a defense of showing affirmatively that the plaintiff cannot succeed in proving some element (like confusion); all the defendant needs to do is to leave the factfinder unpersuaded that the plaintiff has carried its own burden on that point. A defendant has no need

⁷ *Amici* do not take a position on whether copyright is a defense or an affirmative defense; in either case the logic is the same.

of a court's true belief when agnosticism will do. Put another way, it is only when a plaintiff has shown likely confusion by a preponderance of the evidence that a defendant could have any need of an affirmative defense. . . . "[I]t defies logic to argue that a defense may not be asserted in the only situation where it even becomes relevant." Nor would it make sense to provide an affirmative defense of no confusion plus good faith, when merely rebutting the plaintiff's case on confusion would entitle the defendant to judgment, good faith or not.

Id. at 120 (citation omitted).

For the same reasons, counting recognizable similarity, or substantial similarity in protectable expression, as dispositive against a putative fair user makes no sense. If a prior work is not "recognizably" present in an accused work, there is no need for fair use in the first place. For example, an accused work that is not substantially similar to a copyright owner's work has no need to show lack of market harm, just as a trademark defendant need not show good faith if there is no likely confusion. *Matthew Bender & Co., Inc. v. West Publ'g Co.*, 158 F.3d 693, 708 (2d Cir. 1998) (holding that market harm done by works that are not substantially similar is "not cognizable under the Copyright Act"); *cf. Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904 (9th Cir. 2010) (allowing competitor to do billions of dollars of damage to plaintiff with competing dolls, in the absence of substantial similarity).

Fundamentally, the court below thought that it was unfair that Warhol’s works were recognizably based on Goldsmith’s photo. Whatever the proper result on these facts, that cannot be the rule of fair use. Such a profoundly disruptive holding merits this Court’s review.



CONCLUSION

The standard for transformativeness is not “every reasonable person would agree that the work is transformative.” *Campbell* explained that the question was whether a transformative character “may reasonably be perceived.” 510 U.S. at 582. This Court should reaffirm the rule in *Campbell* that change in meaning can be transformative, and reinforce the role of fair use in promoting First Amendment values such as encouraging new messages and new meanings.

Other fair use cases have properly looked to relevant audiences—the groups likely to encounter the works at issue—and found transformativeness when some reasonable audiences, even if not necessarily a majority, would perceive a different meaning or message. *Seltzer*, 725 F.3d at 1177 (finding transformation where meaning was “debatable”); *Cariou*, 714 F.3d at 709 (considering different audiences for works), *Mattel*, 353 F.3d at 801 (finding transformative fair use despite survey showing that “only some individuals may perceive parodic character”). These cases are correct and the Second Circuit’s decision marks a

disruptive deviation from them and the orderly development of fair use doctrine. The Second Circuit reached its result despite the undenied cultural and artistic significance of Warhol's work, ensuring worse results for lesser-known artists whose transformations of meaning will now render them outlaws without even the sop of being allowed to produce single-edition works.

This Court should grant certiorari to resolve the conflict created by the decision below; confirm the difference between substantial similarity and fair use; and restore the previous consensus that fair use determinations must consider whether a new message or meaning may reasonably be perceived in a new work.

Respectfully submitted,

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