

No. 21-869

IN THE
Supreme Court of the United States

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

—v.—

LYNN GOLDSMITH, *et al.*,
Respondents.

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

BRIEF FOR *AMICI CURIAE*
BARBARA KRUGER AND ROBERT STORR
IN SUPPORT OF PETITIONER THE ANDY WARHOL
FOUNDATION FOR THE VISUAL ARTS, INC.

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INTERESTS OF THE AMICI

Amici are working artists and professors of art who seek to provide the Court with their perspective on the harmful impact the Second Circuit's decision in this case would have on the creation of art in the United States.¹

Amicus Barbara Kruger is an artist whose multimedia and collage works have earned international acclaim. Her works feature in the collections of The Museum of Modern Art, The National Gallery of Art, the Art Institute of Chicago, and the Museum of Contemporary Art, Los Angeles, among many other prominent institutions. Most recently, her work is the subject of a solo exhibition currently on view at the Art Institute of Chicago. She has been awarded the Golden Lion at the Venice Biennale and is a Distinguished Professor of New Genres at the UCLA School of the Arts and Architecture. As an artist whose pieces often integrate preexisting works, and a teacher and mentor of young artists, Ms. Kruger has followed this case closely and has a strong interest in ensuring the proper application of copyright law, including the law of fair use, to ensure that artists are permitted to build and comment on existing materials as they strive to express themselves through new works of art.

Amicus Robert Storr is an artist, critic, curator, and professor. He is formerly the senior curator of

¹ The undersigned counsel for amici authored this brief on a pro bono basis. No monetary contribution was made to fund the preparation or submission of the brief, with the exception of filing costs which were paid by counsel. All parties have consented to the filing of this brief.

paintings and sculptures at the Museum of Modern Art in New York, and the former visual arts director of the Venice Biennale (the first American appointed to this role). He served as the Stavros Niarchos Foundation Dean of the Yale School of Art, and has also taught at Harvard University and New York University. He is a recipient of the medal of Chevalier des Arts et des Lettres and an Officer of that Order, one of the French government's highest awards for contributions to culture. As an artist, curator, critic, and teacher and mentor to young artists, Mr. Storr has (like Ms. Kruger) a strong interest in ensuring that fair use is properly applied to protect artistic self-expression and to allow contemporary artists to continue the long tradition of borrowing from and reworking existing works of art to find new meaning and expression.

Because amici fear that the Court of Appeals' opinion in this case threatens the ability of artists to create new works that incorporate existing material, Ms. Kruger and Mr. Storr support the Andy Warhol Foundation's petition for certiorari.

SUMMARY OF THE ARGUMENT

Copyright protections are designed to provide incentives for creators to produce a flourishing and expressive culture. But copyright laws also necessarily restrict speech and have the potential to limit free expression. Enter "fair use," which aims to prevent a "rigid application" of copyright law that "would stifle the very creativity which that law is designed to foster." *Stewart v. Abend*, 495 U.S. 207, 236 (1990). In this case, however, the Second Circuit held as a matter of law that an important work of art—an Andy Warhol print depicting Prince in

Warhol's recognizable artistic technique—was not fair use. The Court of Appeals' surprising and restrictive approach to fair use thwarts the Constitution's and copyright law's goal of promoting creativity and is anathema to centuries of established artistic practice of expressing new meaning through the integration of pre-existing works of art into new ones.

The key factor in the fair use inquiry is whether the new work is “transformative”—that is, whether it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). The Second Circuit's ruling imposes a new test for a work to be considered transformative, which no other court has recognized: the new work must not “recognizably deriv[e] from” or “retain[] the essential elements of, its source material.” Pet. App. at 24a.

This new test is legally and practically flawed—indeed, for example, it cannot be reconciled with this Court's recent observation that an “artistic painting” can “fall within the scope of fair use even though it precisely replicates a copyrighted ‘advertising logo to make a comment about consumerism.’” *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1203 (2021) (quoting 4 Nimmer on Copyright §13.05[A][1][b]). The Second Circuit's approach renders legally perilous the practice of copying, imitation, variation, or appropriation in art. These approaches have been a cornerstone of art for centuries, and have become a core component of much contemporary artistic practice, from Manet to Duchamp to Warhol to Barbara Kruger, and many others. Far from lacking creativity, incorporating or appropriating existing source material—sometimes with little change in

outward form—is in fact a wellspring of precisely the type of artistic expression that copyright law is intended to promote.

The undefined and undefinable parameters of the Second Circuit’s new test would chill exactly such artistic self-expression, deterring artists from creating the works they wish to make, if those works do not appear visibly different “enough” to be considered transformative by certain judges. No other circuit imposes such a restrictive test, and the Second Circuit’s ruling is of outsized importance given that court’s location in the country’s most important center of art. Its novel and misguided approach to fair use creates tremendous risk for many practicing artists who use, build on, or incorporate existing material into their works. Because that decision threatens to chill rather than promote artistic expression, amici urge the Court to grant the Warhol Foundation’s petition for certiorari.

ARGUMENT

I. THE HISTORY AND CULTURAL PRACTICE OF ARTISTS ILLUSTRATES THE IMPORTANCE OF USING EXISTING WORKS TO CREATE NEW ART

The Constitution’s Progress Clause establishes the purpose of copyright: “[t]o promote the Progress of Science and useful arts.” U.S. Const. art. I, § 8, cl. 8. As this Court has explained, therefore, “copyright has practical objectives. It grants an author an exclusive right to produce his work (sometimes for a hundred years or more), not as a special reward, but in order to encourage the production of works that others might reproduce more cheaply.” *Google*, 141 S. Ct. at 1195. That protection brings with it certain “negative

features,” because the exclusivity afforded to copyright owners “can sometimes stand in the way of others exercising their own creative powers.” *Ibid.*

Fair use is integral to ensuring that copyright law fulfills its purpose while keeping these negative features at bay. Fair use was originally an equitable doctrine—now codified in the Copyright Act—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*, 495 U.S. at 236. This principle is ancient, and it reflects the reality that, “in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.” *Campbell*, 510 U.S. at 575 (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436)). The Second Circuit lost sight of that reality in this case.

A. Appropriation, Variation, and Copying Have Played Key Roles in the Development of Art Throughout History

Whether characterized as “copying,” “appropriation,” “imitation,” or “quotation,” artists’ incorporation of and variations on other artists’ work is, and has been for centuries, a key component of the practice of art and artistic self-expression. *See, e.g.,* Tori Campbell, *Appropriation! When Art (very closely) Inspires Other Art*, Artland, <https://magazine.artland.com/appropriation-when-art-very-closely-inspires-other-art>. For artists, to use another’s work is not to plagiarize it, “[b]ut to imbibe it, reconstitute it, and breathe a fresh life into it

That’s how [artists] learn and grow.” Nick Bantock, *The Trickster’s Hat: A Mischievous Apprenticeship in Creativity* 124 (2014). Indeed for many artists throughout history, copying was a cornerstone of making art. It remains integral to many of the most valued and respected contemporary artists.

Copying was a key component of renaissance art in Europe, where master artists headed workshops filled with apprentices who created endless copies and variations on the supervising artist’s works—hence the profusion of paintings from this period attributed to the “School of Leonardo” or the “School of Michelangelo.” Many artists who eventually became famous in their own right developed their approaches by copying the works of earlier masters.

Copying served a similar core function in the artistic traditions of many Asian countries, notably China and Japan. See, e.g., *Copying and Imitation in the Arts of China on View at the Princeton University Art Museum*, <https://pr.princeton.edu/news/01/q1/0220-artchina.htm> (“Copying is the process underlying the cultural emphasis and artistic value placed on the authority of the past in the arts of China.”). Chinese artistic practice has long perceived copying not merely as a way to replicate great art of the past, but a mechanism whereby artists can develop a “personal style ... [by] prob[ing] the essential qualities of a past master’s style.” *Ibid.*; see also, e.g., Byung-Chul Han, *The copy is the original*, Aeon, <https://aeon.co/essays/why-in-china-and-japan-a-copy-is-just-as-good-as-an-original> (discussing the concept of fuzhipin (複製品), “exact reproductions of the original, which, for the Chinese, are of equal value to the original” without any “negative connotations”); Low Sze Wee, *Copying is a virtue in Chinese ink painting*, ThinkChina,

<https://www.thinkchina.sg/copying-virtue-chinese-ink-painting> (“As illustrated by the example of ink painting, techniques and styles are understood, practised and transmitted from one generation to the next by copying. Hence, there is value in allowing or even encouraging artists to copy the works of others.”). Thus in China and Japan, as in renaissance Europe, copying served and serves a function far beyond replication: it is a means by which artists can understand what they themselves wish to express through their art, and how they wish to express it. In this tradition, “[i]nstead of a difference between original and copy, there appears a difference between old and new.” Byung-Chul Han, *supra*.

The practice of imitation did not die out in the Renaissance—to the contrary, it has been and continues to be a key component of European and American art. Manet’s “Le Déjeuner sur l’herbe”—one of the most famous paintings of the Western canon—imitated key elements of “The Judgment of Paris,” an engraving by Marcantonio Raimondi:



Raimondi, “The Judgment of Paris”



Manet, “Le Déjeuner sur l’herbe”

Those works, in turn, drew from two earlier works: a design by Raphael for his “Judgment of Paris” and Titian’s “The Pastoral Concert.” See <https://www.musee-orsay.fr/en/node/187364>. Then, generations of artists painted their own versions of Manet’s copied work. For instance, Monet and Cézanne both created paintings titled: “Le Déjeuner sur l’herbe” that depict picnics in a forest, just like Manet. Picasso went even further, creating *over 40* variations on “Le Déjeuner sur l’herbe.” <https://www.blogmuseupicassobcn.org/2018/09/variati- ons-dejeuner-lherbe-picasso-depth-look- manet/?lang=en>. Modern reworkings of “Déjeuner” were especially important for African American artists, including Robert Colescott and Mickalene Thomas, who created their own versions of the painting that substituted Black models, thereby asserting their place in European art history while critiquing many of its racial and formal assumptions:



Colescott, "Sunday Afternoon with Joaquin Murietta"

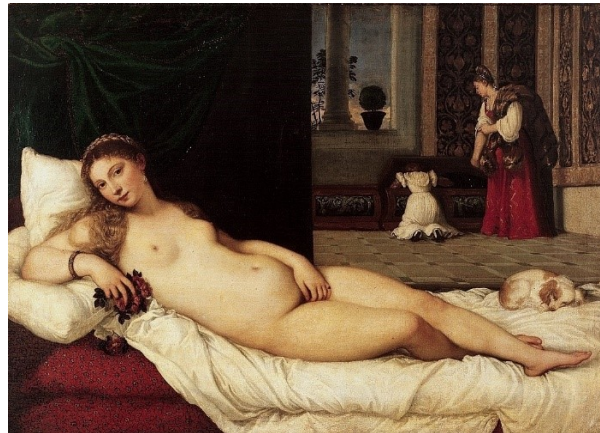


Thomas, "Le Déjeuner sur L'herbe:
Les Trois Femmes Noires"

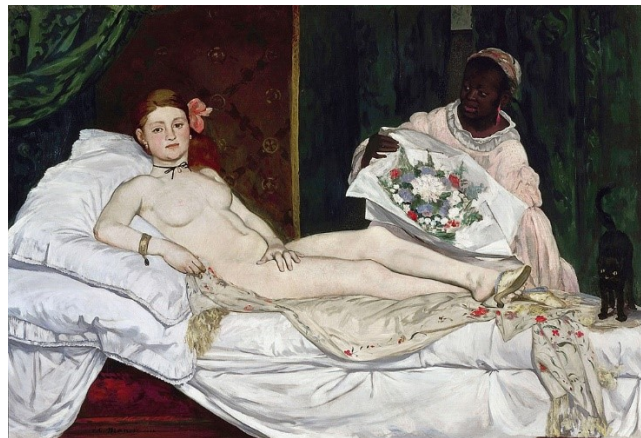
See <https://www.rizzoliusa.com/2020/02/14/rizzoli-celebrates-african-american-art-history/>. The fact that works such as these are immediately

recognizable versions of Manet's original is integral to their power and message.

A similar story attends another of Manet's masterworks, "Olympia," which was modeled directly after Titian's "Venus of Urbino":



Titian, "Venus of Urbino"



Manet, "Olympia"

While the pictures are formally similar, both showing nudes reclining in similar poses, Manet's work, rather than casting the nude as a mythological

goddess gazing serenely, depicts a well-known Parisian model, with symbolism suggestive of prostitution, gazing directly at the viewer. As with “Déjeuner,” “Olympia” has in turn been the source of countless imitations, appropriations, and reworkings by later artists, many of them aimed at turning new light on the racial and sexual politics of Manet’s picture and its status as a landmark of Western art. See Robert Storr & Carol Armstrong, *Lunch With Olympia* (2017) (catalogue for 2013 exhibit of the Yale School of Art featuring hundreds of works imitating, reworking, and referencing “Déjeuner” and “Olympia”; explaining that Manet’s canvases have “given rise to more parodies and pastiches than any other works of their time and for that matter all but a handful of works in the whole history of modern art”). For example:



Thurnauer, “Olympia #2”

The history of “Déjeuner” and “Olympia” is thus one of endless imitation, borrowing, and recasting, stretching from the Renaissance to the 20th century. This is by no means a unique phenomenon. It is an illustration of the critical importance of copying to

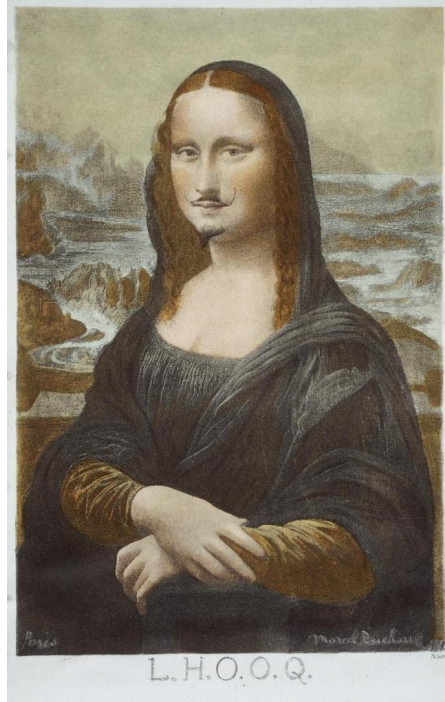
art. And that practice has a purpose. Artists routinely replicate each other's work to comment on what art is or should be, on how art should function, and on culture and history more generally. When copying Raimondi's engraving, Manet engaged with questions about the placement of figures on canvas, at the same time deliberately seeking to provoke 19th century society by including a nude amongst clothed figures at what appears to be a sedate pastoral lunch. In contrast, Monet clothed his subjects, disengaging from Manet's moral discussion, while rendering his figures in a more abstract, less precise fashion than Manet. See, e.g., Margaret Samu, *Impressionism: Art & Modernity*, Institute of Fine Arts, NYU (Oct. 2004), https://www.metmuseum.org/toah/hd/imml/hd_imml.html. Cézanne broke up the plane of the canvas even more than Monet, filling his painting with angular, abstracted bodies. And Picasso further distorted and reworked the figures of Manet's original, preserving the placement of the bodies that Manet took from Raimondi and Titian, as well as Manet's pastoral setting, and the body of water in the middle, but flouting any traditional notion of a mimetic or literal rendering of the human form. And Colecott further reworked Manet's painting, changing the scene away from the French countryside to the historical American West and inserting a Black nude figure as the focal point of the canvas.

This lineage of paintings is, at its core, a multinational, intergenerational conversation about how painting should work, dealing with key questions both about composition and about how the human form should be portrayed. Copying—and related acts of visual appropriation—makes such profound and indeed foundational discussions between artists possible.

B. Contemporary Artists Make Varied and Active Use of Preexisting Works; Appropriation, Variation, and Copying Continue to Be Central to Modern Artistic Practice

The practices of copying, appropriation, and variation took on new dimensions in the 20th century, as leading contemporary artists used direct copying and appropriation to comment on society, technology, and the very meaning of art. One of the most influential artists of the 20th Century, Marcel Duchamp, along with many others, rebelled against the concepts of originality and naturalism. Instead, Duchamp and his cohort focused on creating art out of objects and actual art works that already existed. The artistry of this approach was found in the decision to arrange or portray the objects or preexisting works in a new way, *as* art or as new works of art. The elevation of something quotidian, the tweaking of a piece to give it a new message, all with limited intervention, was, to Duchamp, the artist's role.

One such intervention was Duchamp's cheeky modification of the Mona Lisa. He took a postcard of the famous painting, doodled a mustache on it, and scribbled a new title on the bottom, an acronym standing for a provocative sexual joke. <https://www.nortonsimon.org/art/detail/P.1969.094>:



He displayed this as his own piece. Duchamp's appropriation of one of the most famous paintings of the Western canon, and his deliberate injection of silliness into a painting treated with the utmost deference, is a deliberate effort to undermine the self-seriousness he saw in much traditional European painting. His very light modifications—effectively, just a few lines and a few letters—nonetheless transform an iconic and respectable work into something clownish and subversive. As such, “L.H.O.O.Q. or La Joconde” serves both as a critique of traditional mimetic and as a proof of concept for Duchamp's theory: that an artist can take the whole of a work, make small modifications to it, and create a piece that is entirely new. Cf. Elizabeth Mix, *Appropriation and the Art of the Copy* (May 2015):

Marcel Duchamp and the Conceptual Shift of the Copy, Choice, <https://ala-choice.libguides.com/c.php?g=372675&p=2520119>.

Countless contemporary artists have followed in Duchamp's footsteps, using copies and variations to communicate social commentary and critique. Sherrie Levine created a variety of reproductions of existing works by male artists, some lightly and others significantly modified, in order to critique the dominance of men in art and narratives of art history that largely exclude women, including, in 1991, a bronze cast of a urinal entitled "Fountain (After Marcel Duchamp)" in homage to one of Duchamp's most famous works: a urinal mounted to a wall, entitled "Fountain." <https://whitney.org/media/760>. Levine cast the urinal in bronze in tribute to Constantin Brâncuși, the contemporary sculptor, and combined the urinal and the bronze in an effort to "collapse the utopian and dystopian aspects of high modernism." See <https://www.theartstory.org/artist/levine-sherrie/>:



Duchamp, "Fountain"



Levine, "Fountain (After Marcel Duchamp)"

Elaine Sturtevant, known professionally as Sturtevant, routinely recreated the works of other artists in different media (e.g., a lightly modified recreation of Roy Lichtenstein's original print "Crying Girl" as a painting entitled "Lichtenstein, Frighten Girl"):



Lichtenstein, "Crying Girl"



Sturtevant, "Lichtenstein, Frighten Girl"

Characterizing her works as "repetition," Sturtevant used the reproductions to "explor[e] ideas of authenticity, iconicity and the making of artistic celebrity." Margalit Fox, *Elaine Sturtevant, Who Borrowed Others' Work Artfully, Is Dead at 89*, N.Y.

Times, May 16, 2014, <https://www.nytimes.com/2014/05/17/arts/design/elaine-sturtevant-appropriation-artist-is-dead-at-89.html>.

Her “repetition” of other artists’ works called into question why an original is valuable, why a particular work becomes iconic, and why particular artists are elevated and lionized for their works. Her work was controversial—precisely because it raised critical points about what makes art valuable. The importance of this dialogue has been reaffirmed by shows at the Museum of Modern Art as well as numerous international venues—and also by the enduring value of her bold “repetitions,” which sometimes outstrips the value of the originals. *Ibid.*

Amicus Barbara Kruger has also used preexisting works to comment on the workings of power in contemporary society. Ms. Kruger creates immersive textual installations and multi-channel video works. She is particularly well known for her superimposition of text commentary onto illustrations or photographs, as in one of her most well known works (“We Don’t Need Another Hero”):



She views photographs and other visual media as constituting hard evidence of contemporary cultural

life. By using preexisting photographs and videos, Ms. Kruger's work is able to engage directly with this evidence, effectively annotating the visual artifacts of our times. For this commentary to resonate, the thing commented upon (be it a photograph or a video) must evoke, immediately and legibly, the issues on which Ms. Kruger comments. Frequently (though not always), the best way to ensure that effect is achieved is to comment on works that already exist.

Because Ms. Kruger's technique retains its identity regardless of size or medium, it lends itself to easy reuse by others. Rather than fight against that, Ms. Kruger has incorporated these appropriations into her own art-making. For example, for a show in Austria exploring the "aesthetic of appropriation," Ms. Kruger found hundreds of images online that were based on her work and riff on her easily recognized style. She then reproduced those images as vinyl wallpaper that covered a 200-foot wall, making a further comment on the expansion of technology and the notion of what art and authorship can be. <https://www.artforum.com/print/reviews/201207/barbara-kruger-31952>:



Kruger, "That's the Way We Do It"

For the entryhall of her current show at the Art Institute of Chicago, Ms. Kruger similarly created a new large-format work that is comprised of images showing how her own strategies had been aped—again without her permission—by advertisers, graphic designers, and others:



Another prominent contemporary artist working in this vein is Brian Donnelly, known professionally as KAWS, who uses variations on existing characters to create sculptures that provide commentary on the role of pop culture in American life. KAWS's signature sculptures constitute "appropriation,

alteration and abstraction of characters from popular American cartoons.” Shaye Weaver, *The Brooklyn Museum’s new KAWS exhibit gets the party started*, TimeOut (Feb. 25, 2021), <https://www.timeout.com/newyork/news/the-brooklyn-museums-new-kaws-exhibit-gets-the-party-started-022521>:





It would be impossible for KAWS to address the gargantuan role of pop culture in America without referring to such lodestar characters as Mickey Mouse, the Simpsons, and SpongeBob. In short, he “needs to mimic an original to make [his] point.” *Campbell*, 510 U.S. at 580-81.

For example, a recent exhibit at the Brooklyn Museum of Art showed KAWS’s “Companions”—cartoon sculptures with gloved hands and round ears, but no eyes—in attitudes of “sadness, grief, anxiety and isolation.” Weaver, *supra*. By using familiar characters, abstracted and expanded, KAWS

appropriated certain figures and modified them to reflect and recognize hurt and loneliness in contemporary life, while at the same time questioning the role of consumer culture in that loneliness. *KAWS: Along the Way*, Brooklyn Museum (2015), <https://www.brooklynmuseum.org/opencollection/exhibitions/3316>. KAWS can convey this message in large part because his “Companions” are exactly what the Second Circuit now forbids: “recognizably deriv[ed] from, and retaining the essential elements of, [their] source material.” Pet. App. at 24a.

As these examples illustrate, the use of existing cultural artifacts to create new works and new meanings—often with limited (or no) formal changes—has long been, and remains, integral to art making. Incorporating such images and objects is how many artists express themselves and comment on the culture that exists around them. Such replication and reformulation is not only compatible with artistic value, creativity, and vibrancy—it is often *essential* to the ability of artists to say what they want to say and create new meanings and understandings.

That is why amici are so alarmed by and concerned about the Second Circuit’s ruling in this case. As we now discuss, the Court of Appeals’ approach to fair use puts longstanding artistic practices in legal peril, in the process denigrating art that borrows, appropriates, and replicates prior works as something akin to plagiarism or exploitation. That fundamentally misunderstands art history and art making—and it threatens important artistic expression contrary to the purposes of copyright law.

II. THE SECOND CIRCUIT'S NOVEL AND NEBULOUS FAIR USE TEST WILL CHILL ARTISTS' CREATIVE EXPRESSION AND IS COUNTER TO THE UNDERLYING GOALS OF COPYRIGHT LAW

The key move—and fatal flaw—in the Second Circuit's approach to fair use in this case is the court's addition of a novel requirement to the “transformativeness” inquiry. As this Court has explained, the “central purpose of this investigation is to see, in Justice Story's words, 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.” *Campbell*, 510 U.S. at 579 (internal citations omitted). Transformative works “lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright.” *Ibid.* This Court recently summarized the relevant transformation as “a copying use that adds something new and important,” including whether the use “fulfills the objective of copyright law to stimulate creativity for public illumination.” *Google*, 141 S. Ct. at 1202-03 (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990)).

In this case, however, the Second Circuit adopted a new requirement for transformative use: the new work must not “recognizably deriv[e] from” or “retain[] the essential elements of, its source material.” Pet. App. at 24a. Under this approach, it is not enough that the latter work “alter[s] the first with new expression, meaning, or message” or has a different “purpose” or “character,” *Campbell*, 510 U.S. at 579, if the latter work is recognizably derived from the former. According to the Second Circuit: “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" is not enough to "transform" a work. Pet. App. at 23a-24a. This test boils down to asking whether the new work is visually similar to the prior work, rather than asking whether the meaning, intent, purpose, or message conveyed by the second work differs from the first. Indeed, the Second Circuit's conclusion that Warhol's painting of Prince was not transformative ultimately rested on the "identifiable likenesses of [Warhol's and Goldsmith's] subjects"—despite the artists' differing "aesthetic intentions." Pet. App. at 25a n.6.

This is legally wrong and in direct tension with this Court's recent observation in *Google* 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.'" 141 S. Ct. at 1203 (quoting 4 Nimmer on Copyright §13.05[A][1][b]); *accord Tresóna Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n*, 953 F.3d 638, 649 (9th Cir. 2020) (explaining that works "are transformative when 'new expressive content or message is apparent,' even if 'the allegedly infringing work makes few physical changes to the original or fails to comment on the original'" (quoting *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1177 (9th Cir. 2013))). Here, Warhol copied a photograph instead of an advertising logo, but the principle is the same: it is not the visual similarity of the replication, but the reasons behind the transformation and the message the transformation conveys, that matter in assessing transformative use. That is why, as Professor Netanel found, in "case

after case decided since *Campbell*, courts have made clear that what matters for determining whether a use is transformative is whether the use is for a different purpose than that for which the copyrighted work was created. It can help if the defendant modifies or adds new expressive form or content as well, but ***different expressive purpose, not new expressive content, is almost always the key.*** Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 Lewis & Clark L. Rev. 715, 747 (2011) (emphasis added). The Second Circuit ruptured this consensus—and in the process created confusion, uncertainty, and palpable legal risk for practicing artists.

Indeed, as discussed above, for many artists, the artistic message they seek to convey lies ***precisely*** in a verbatim or near-verbatim replication of the original work. That was certainly true for Andy Warhol—the very artist this Court seemed to have in mind when it made its observation about fair use protections for artistic works precisely replicating an advertising logo. See, e.g., <https://www.warhol.org/lessons/brillo-is-it-art/>.

Requiring that an artist make some undefined but significant visual changes to an original work for the new work to be “transformative” is an arbitrary, judicially-imposed limitation on artistic freedom, which disregards long-established practices of art-making and unduly limits the kinds of commentary and repurposing that artists may legally engage in. The effect of that approach will be to discourage artists—especially up-and-coming artists who may lack the resources needed to fight protracted legal battles—from creating some of the works that most powerfully represent and assess contemporary society. If *Andy Warhol’s* iconic works are infringing, then countless practicing artists who learned from his

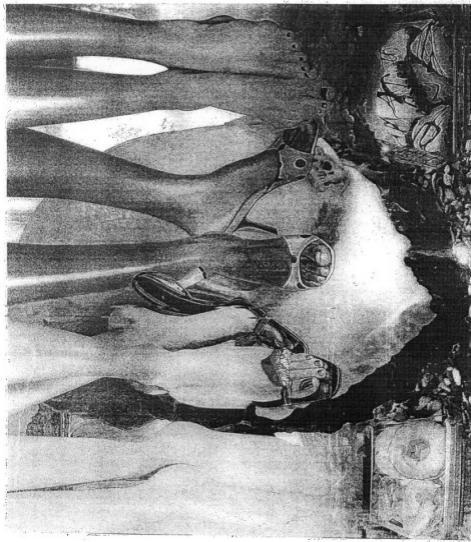
approach might reasonably fear that they too will be targeted with lawsuits.

That is especially so given how nebulous the Second Circuit’s “differing-appearance” requirement is. While the transformative use inquiry is inherently not a bright line, the requirement that a new work cannot look *too* similar to a previous work significantly exacerbates that uncertainty. As guidance for what does not “recognizably deriv[e] from” a prior work, the Court of Appeals said that a work would not be transformative if “the original image remained ... a major if not dominant component of the impression created by the allegedly infringing work.” Pet. App. at 21a. At the same time, however, the Second Circuit reaffirmed its previous holdings in *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), and *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006), that the works in those cases met the transformative standard. But the works found transformative in those cases would seem to many (if not most) to “recognizably deriv[e] from” their source material. Pet. App. at 45a.



Source Material

A-141



Non-Infringing Copy



Source Material



Non-Infringing Copy
(Richard Prince, "The Ocean Club")



Non-Infringing Copy
(Richard Prince, "Tales of Brave Ulysses")

The hazy line between these cases only underscores the impossible position that the decision here creates for artists who wish to create art that uses or incorporates existing copyrighted material.

Thus, if the Second Circuit's new fair use standard is upheld, much expression that would be transformative by this Court's standards will be chilled. The test is so vague, so subjective, and so difficult to apply that artists cannot know before litigation whether their works will be deemed non-infringing; so, they will likely avoid the risk and not create works that integrate other works. Put simply, they will self-censor in order to avoid the risk of litigation. The chill will be especially profound for young and not-yet-established artists, as well as for artists that wish to convey messages through small but significant changes. Put bluntly, no artist can know beforehand how much change is "enough" under the Second Circuit's new rule.

The Second Circuit insists that “[n]othing in this opinion stifles the creation of art that may reasonably be perceived as conveying a new meaning or message, and embodying a new purpose, separate from its source material.” Pet. App. at 41a-42a. But its entire opinion belies this claim. Indeed, the district court in this case “perceived [Warhol’s work] as conveying a new meaning or message, and embodying a new purpose.” Pet. App. at 42a; *see also* Pet. App. at 68a-72a. And while the Second Circuit agreed (Pet. App. at 25a-26a & n.6), that was not enough. The Warhol Foundation still had to meet the novel and undefined requirement that its work be visually different *enough* from the prior work. Beyond that cryptic guidance, the court gave artists no meaningful way to tell the difference between a fair use and an infringement—other than “don’t make work that looks too much like something else.” But that can lead only to artists creating less (or lesser) art, diminishing the power of art as a discursive tool between artists, and as an engine of commentary on society.

After all, Marcel Duchamp’s reworking of the Mona Lisa uses the entire image of the painting, and arguably adds nothing more than a few light pencil strokes. The mustache and the title alter the painting’s entire message, but the underlying work is nothing if not recognizable. Sherrie Levine’s “Fountain (After Marcel Duchamp)” is a bronze urinal, not a porcelain one. But it is recognizably a urinal, intended to serve as a work of visual art. Sturtevant’s “Lichtenstein, Frighten Girl,” while it is in a different medium than Lichtenstein’s original “Crying Girl,” is nonetheless a work of visual art which portrays more or less the entire original. Under the Second Circuit’s test, arguably, none of

these works would constitute a fair use because, arguably, none of the artists has made “enough” changes for the work to be considered transformative. Yet these are all works by artists whose contributions are widely recognized as being crucial interventions in contemporary art. A test that excludes from copyright protection works that are widely acclaimed as important artistic contributions (Andy Warhol, no less) results in the perverse outcome of rendering unlawful many of the most important pieces in modern art. Such a test is necessarily one that undermines the purpose of copyright to create a rich, open environment of cultural production.

And, if it were possible to know what works would be sufficiently different to qualify as fair uses under the Second Circuit’s test, the differing-appearance requirement is still wrong and harmful. Full or near-full alteration of an image is not always what an artist wants to do with an existing image. To the contrary, a requirement of full or near-full alteration might preclude the very message an artist strives to convey. Visual artists create meaning through grand gestures, yes, but also through subtle ones. A change of shade, a minute shift in angle, the flattening or sharpening of an image—these are quiet but profound alterations that generate new meanings. To deprive artists of the ability to make copies with subtle changes is like saying to a pianist “compose, by all means, but only with the loud notes.” It forecloses a whole range of valuable and expressive possibilities. The Second Circuit itself has written: “[v]isual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing.” *Bery v. City of N.Y.*, 97 F.3d 689, 695 (2d Cir. 1996) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943)). How

much more constrained, how much poorer, the visual arts will be if alterations to existing works are simply too legally dangerous for artists to attempt.

CONCLUSION

This Court should grant certiorari and reverse the judgment below.

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