No. 21-869

In The
Supreme Court of the United States

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

Petitioner,

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,

Respondents.

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

BRIEF OF *AMICI CURIAE* COPYRIGHT LAW PROFESSORS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici, listed in the Appendix,[1] are professors who teach and have written extensively about copyright law and related subjects. Our sole interest in this case is in the development of copyright law in a way that serves the public interest.[2]

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 art would be at risk if fair use inquiries ignored reasonable audiences' views about when a new creation based on an existing work has a new meaning and message.

This Court held in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), and reaffirmed in *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021), that an inquiry into whether a work is a fair use requires evaluation of whether a second work has a different

[1] Institutional affiliations are listed for identification purposes only.

[2] Counsel for the parties did not author this brief in whole or in part. The parties have not contributed money intended to fund preparing or submitting the brief. No person other than *Amici Curiae* or their counsel contributed money to fund preparation or submission of this brief. The parties have consented to filing of *amicus* briefs and have been provided with timely notice.

message, meaning, or purpose. Without such an evaluation, the presence of substantial similarity—a predicate question before fair use is relevant—turns into a rejection of fair use despite the statutory command.

Because meaning matters, substantial similarity and transformativeness are not mutually exclusive. In some cases, some reasonable audiences will see new meaning, while others will not. The solution is not to reject one reasonable view in favor of another—that would be the very aesthetic discrimination the law has long rejected. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903) (explaining that treating the reaction of the general public as dispositive would "miss some works of genius," and also that, at the same time, "the taste of any public is not to be treated with contempt"). Instead, the Court should recognize the common existence of varying interpretations of artistic works. Where a reasonable, identifiable audience recognizes new message and meaning, the transformativeness factor favors fair use. The existence of that audience further bears on the market effect factor because it shows that the accused and accusing works are not pure substitutes.

By reaffirming *Campbell* and *Google*, the Court can correct three key errors of the opinion below. The primary error was in refusing to consider whether Warhol transformed the meaning of the original photograph. As this Court has emphasized, the factors interrelate. *See*, *e.g.*, *Campbell*, 510 U.S. at 586-87 ("[T]he [factor three] enquiry will harken back to the first of the statutory factors, for, as in prior cases, we recognize

that the extent of permissible copying varies with the purpose and character of the use."); *id.* at 591 (same for factor four, market effect). The error on factor one therefore generated other, inherently related mistakes: The court below refused to consider, in factor three, how much of what Warhol took from the photo was original expression and how much was unprotectable. Likewise, the court below erred in treating the accused and accusing works as market substitutes for purposes of factor four (market effect) because it refused to consider that the works appealed to different markets for different reasons.

ARGUMENT

I. Meaning Matters, and When a Reasonable Audience Finds New Meaning or Message, Transformativeness Is Present.

A. New Meaning and Message Is at the Heart of Many Fair Uses.

There is often no other way to evaluate transformativeness than to look at the meaning of the contending uses. Only a person who understands English can evaluate whether a use of an English text is transformative, and the need to evaluate meaning does not stop with comprehension of dictionary definitions. Even shifts in context that the court below agreed were 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).

[3]

(The now-common practice of courts including entire images in their opinions, as in the opinion below, is another example of transformation in meaning: the images are used for their evidentiary and explanatory significance, not their expressive value.)

In *Núñez v. Caribbean Intern. News Corp.*, 235 F.3d 18 (1st Cir. 2000), for example, the defendant reproduced the modeling photos in suit without alteration, but the First Circuit found transformative purpose and fair use because the photos were reproduced in the context of a public controversy about the

[3] Original concert poster and accused use in *Grateful Dead: The Illustrated Trip*, a 480-page coffee table book that recounted the history and cultural impact of the band.

appropriateness of a Miss Puerto Rico appearing in sexualized photos. This created a new meaning that was easily distinguishable from the original, promotional purposes of the photos:

[4]

So too in *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003), where the copyrighted Barbie doll was immediately recognizable as central to defendant's photographic series, two of which are shown on the next page.

[4] El Vocero Oct. 24, 1997, at 1.

The defendant stated that the photos were his critique of "the objectification of women associated with [Barbie]," and that they attacked "the conventional beauty myth and the societal acceptance of women as objects because this is what Barbie embodies." *Id.* at 796. He transformed Mattel's preferred image of Barbie "by displaying carefully positioned, nude, and sometimes frazzled looking Barbies in often ridiculous and apparently dangerous situations." *Id.* at 802. Barbie's smiling obliviousness to danger created a "disturbing[]" effect, and some photos involved "sexually suggestive contexts." *Id.* The court found the commentary reasonably perceptible despite Mattel's survey showing that many ordinary viewers didn't get the point. *Id.* at 801.

By contrast, the court below refused any interpretation of the meaning of the accused work and was left with superficial genre labels: both works were works of visual art, and therefore Warhol's artwork was not transformative. Pet. App. at 24a-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"). Doris Kearns Goodwin and Robert Caro both wrote biographies of President Lyndon Baines Johnson, but they hardly have the same meaning or message. *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).

In the visual realm, the sub-genre of political cartoons easily reveals that "portraits of the same person" regularly have very different purpose and effect:

[5]

[6]

[5] Ben Garrison, Image of President Trump saving Notre Dame, Apr. 17, 2019, https://miro.medium.com/max/1400/1*6ZUTqbc_3BY2Gixcku5Xsg.jpeg.

[6] Bill Bramhall, cartoon, Nov. 11, 2020, https://www.nydailynews.com/opinion/ny-bramhall-editorial-cartoons-2020-jul-20200708-zl4mvvuoejbv5ai32nsg32hjki-photogallery.html.

Likewise, images in the sub-genre of realistic photography can have very different purposes and effects. For example, lighting and cropping can change a person's image from heroic to menacing or isolated, as can captions guiding interpretation. *See*, *e.g.*, *Peterman v. Republican National Committee*, 369 F. Supp. 3d 1053 (D. Mont. 2019) (finding fair use when a photographer took a positive photo of Democratic candidate and a cropped, derogatively captioned version was reused by Republican National Committee in an anti-candidate ad).

[7]

[7] Accusing and accused images in *Peterman*.

Doctrinally, equating genre with meaning and message is directly in conflict with this Court's holdings in *Campbell* and *Google* that the transformativeness analysis must go beyond identifying genre and topic to greater particularity. In *Campbell*, the subgenre was popular songs about street life (including rap derivatives). 510 U.S. at 590. In *Google*, the subgenre was computer programs that serve as programming environments. 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.' "). Courts must consider whether a reuse is consistent with copyright's constitutional "Progress" justification, including an examination of the creative environment in which the reuse participated. *Id*. Transformativeness, that is, requires assessing how reasonable audiences would understand the new work to determine whether it is part of that "Progress."

Considering meaning in context is often the only way to explain why a transformative work is transformative. Meaning is why "For sale: baby shoes, never worn" is a tragic short story,[8] but "For sale: running shoes, never worn" is not a story but an ad. Considering

[8] Generally attributed to Ernest Hemingway. *See* For sale: baby shoes, never worn, Wikipedia, https://en.wikipedia.org/wiki/For_sale:_baby_shoes,_never_worn (visited Jun. 13, 2022).

meaning does not require evaluating the contending works' aesthetic *merit*. Merit asks about quality; meaning asks about message and purpose.

Transformativeness in meaning is an anchor of fair use doctrine because it provides necessary breathing room to artists reacting to the world around them, which includes existing works.

B. Meaning Is Rarely Unitary and Must Be Assessed from the Perspective of Reasonable Audiences.

The standard for transformativeness does not require that every reasonable person would agree that the work is transformative. *Campbell* explained that, instead, the question was whether transformative character "may reasonably be perceived." 510 U.S. at 582. The Court was at best neutral as to whether 2 Live Crew's parody succeeded among the Justices. Likewise, the Court in *Google* relied on both the stated intent of Google and the understanding of third parties, including *amici* and witnesses, to evaluate the purpose of the use. *Google*, 141 S. Ct. at 1203-04. In a world where there is not uniform agreement on the meaning of anything, including works of art, consulting relevant audiences allows fair use to promote the constitutional purpose of "Progress," generating new insights and understandings.

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 a majority, would perceive a different meaning or message. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1177 (9th Cir. 2013) (finding transformation where meaning was "debatable"); *Cariou v. Prince*, 714 F.3d 694, 709 (2d Cir. 2013) (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" of images). *Mattel* illustrates the importance of this rule for free speech and artistic innovation: As the Court foresaw decades before in *Bleistein*, there was no consensus on the meaning of Barbie. As a result, there was no consensus on whether the defendant's work was a change in meaning, even though it was plainly *reasonable* to find a new meaning and message.

There are two core reasons for considering multiple viewpoints: First, fair use is not reserved for the artistically competent who manage to communicate so clearly that everyone in the audience understands the message. *Yankee Pub'g Inc. v. News America Pub'g, Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992) ("First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed") (quoted in *Campbell*, 510 U.S. at 583).

Second, and more importantly, it is impossible to put a final interpretive stamp on a work. History reveals the wisdom of judicial interpretive modesty, as *Bleistein* teaches. A number of works now widely recognized as transformative and critical were not uniformly recognized as such. Before writing *The Clansman*

(filmed as *Birth of a Nation*), for example, Thomas Dixon wrote a response to *Uncle Tom's Cabin* that defended the honor of the South and revised what he believed to be Harriet Beecher Stowe's misrepresentations of slavery, including his own version of Stowe's characters. Many (though not all) reviewers at the time saw his book not as an assault on Stowe's message but as a continuation of her work.[9] This variety in interpretation is common with popular works. *Farah v. Esquire Magazine*, 736 F.3d 528, 536-37 (D.C. Cir. 2013) (citing additional examples from English literary history).[10]

In a large and diverse world, the meaning of a work will never be unitary. Empirical work demonstrates that different audiences read popular works differently and often in completely contradictory ways.[11]

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[9] MELVYN STOKES, D.W. GRIFFITH'S THE BIRTH OF A NATION 37, 41-42 (2007). Numerous other works have been interpreted both as parody and as valorization. SIMON DENTITH, PARODY 36, 105-06 (2000) (discussing persistent uncertainty over whether certain canonical texts are parodic or respectful).

[10] Vladimir Nabokov's estate argued that the book *Lo's Diary* did not need to retell *Lolita* from the perspective of Dolores Haze to demonstrate the monstrousness of Humbert Humbert, because he was already a monster. PIA PERA, LO'S DIARY (2001). Yet, from the beginning, critics have worried that Lolita makes Humbert too sympathetic. Michiko Kakutani, 'Lo's Diary': Humbert Would Swear This Isn't the Same Lolita, N.Y. Times, Oct. 29, 1999, http://www.nytimes.com/books/99/10/24/daily/102999pera-book review.html.

[11] *See generally* JOHN FISKE, READING THE POPULAR (1989); A.H. Hastorf & H. Cantril, They Saw a Game; a Case Study, 49 J. Abnormal & Soc. Psychol. 129 (1954). For example, "some viewers wr[o]te letters . . . which applaud Archie [of All in the Family]

There is rarely, if ever, a single message that an entire audience would agree on in a given creative work. As a result, there will also never be unbroken consensus on whether an accused use actually comments on or adds new meaning to that work, because some audience members won't see the point. In *Campbell*, for example, a number of judges didn't see anything parodic about 2 Live Crew's recasting of street "courtship" as catcalling and humiliation. 510 U.S. at 582. The same is true for images. For example, many people read a controversial New Yorker cartoon as endorsing rather than criticizing depictions of President Obama as a radical Muslim; neither reaction was "the" meaning of the cartoon itself.[12] Where reasonable audiences see a new meaning and message, the free speech and expression-promoting principles of copyright weigh against suppressing that new expression.

When a photograph of a celebrity is turned into a highly stylized series of lithographed images, as here, one reasonable interpretation is that the artist is reaching beyond realistic presentation of an individual towards an abstracted, idealized version that serves as commentary on the alienation from ordinary life produced by celebrity status. Yet the decision below refused to assess meaning despite the undeniable

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for his racist viewpoint, while others applaud[ed] the show for effectively making fun of bigotry." Neil Vidmar & Milton Rokeach, Archie Bunker's Bigotry: A Study in Selective Perception and Exposure, 24 J. Communic. 36 (1974).

[12] VICTOR S. NAVASKY, THE ART OF CONTROVERSY: POLITICAL CARTOONS AND THEIR ENDURING POWER 13 (2013).

cultural and artistic significance of Warhol's work. This stingy reasoning ensures worse results for lesser-known artists who lack a generation of experts interpreting their works. If their audiences' reactions cannot be considered, those less-favored transformations of meaning will render the artists outlaws. *See* Joseph P. Liu, Copyright and Breathing Space, 30 Colum. J.L. & Arts 429, 433-34 (2007) (discussing the overly cautious posture taken by parties who believe they may be subject to copyright claims).

Only once the degree of transformativeness is assessed from the relevant perspectives can the other factors be properly identified and weighed.

II. The Court Below Erred Further by Treating Recognizability as Disfavoring Fair Use Because It Rejected Consideration of Meaning.

Lack of substantial similarity and fair use are two different reasons that one work might not infringe another. 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 are vital protections 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).

The court below collapsed two distinct inquiries by holding that substantial similarity—or perhaps even sub-substantial similarity in the form of visual recognizability—inherently weighed against fair use in factor three, which asks whether the amount taken is reasonable in light of the purpose of the use. This error was intertwined with the court's refusal to assess the meaning of Warhol's use, because it deprived the court of any interpretive tools to evaluate the *qualitative* significance of the protectable expression—if any—that was taken. But both quantitative and qualitative assessments are required by factor three, *Campbell*, 510 U.S. at 586-87, so the factor one error fatally contaminated the factor three analysis.

A. Recognizability Is a Predicate for Infringement, Not a Strike Against Fair Use.

The opinion below reduced the question of transformativeness to whether the accusing work remained recognizable as the source of the accused work, and then used recognizability to weigh against fair use in factor three as well. Pet. App. 49a; *see also* Pet. App. 23a-24a (Warhol images "recognizably deriv[e] from, and retain[] the essential elements of, [their] source material"), *id.* at 26a (photograph "remain[ed] the

recognizable foundation upon which the Prince Series is built").[13]

The reasoning below 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 Tresóna Multimedia, LLC v. Burbank High School Vocal Music Ass'n*, 953 F.3d 638, 650-51 (9th Cir. 2020) (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) (defendant took "heart" of work in fair use); *Núñez*, 235 F.3d at 24 (transformative fair use via verbatim copying).

But the mistake is more fundamental than that. Substantial similarity of protectable expression is a baseline requirement of copyright infringement. *See*, *e.g.*, *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 350 (1991) (copying unprotectable matter is "the means by which copyright advances the progress of science and art"); *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

[13] 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.

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). Ignoring the nature and meaning of what was taken would mean that this factor always weighed against fair use anytime fair use was an issue, because substantial similarity was present.

The Second Circuit may have meant to limit its holding to visual recognizability, but it failed to explain how 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). If anything, it may regularly be necessary to copy a greater amount of a visual work than of a novel to engage in a transformative fair use, because images are perceived holistically and because the point of the new message could easily be lost if an image was not easily recognizable. *See*, *e.g.*, *Mattel*, 353 F.3d at 804 (a visual work is not "naturally severable" when depicted in photographs).

If the court below 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 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), a case about defenses to trademark infringement:[14]

> [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 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."

Id. at 120 (citation omitted).

For the same reasons, counting recognizable similarity, or even substantial similarity in protectable expression, as weighing heavily 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.

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[14] Whether copyright is a defense or an affirmative defense, the logic is the same.

B. The Correct Inquiry Focuses on the Qualitative and Quantitative Significance of the Protectable Expression Taken by the Accused Use.

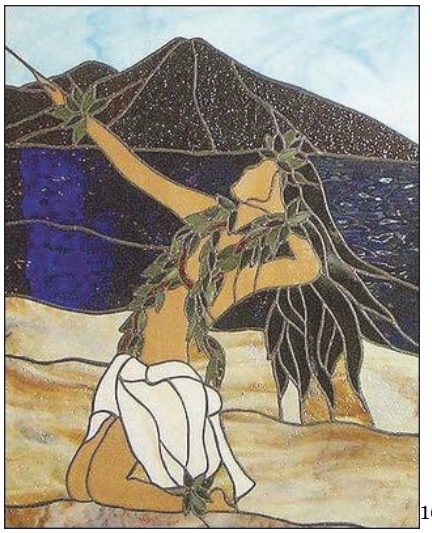
Factor three analysis should center on the amount of *expression* that was taken by the accused use. *See Google*, 141 S. Ct. at 1205. But, because the court below rejected any consideration of the meaning of what was taken, it did not evaluate how much of what remained, after Warhol's substantial artistic changes, came from Goldsmith's expression. Instead, the court simply attributed Prince's appearance to Goldsmith.[15] *E.g.*, Pet. App. 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*, 499 U.S. at 347-48; *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1119 (9th Cir. 2018) (even an artist who coaxes subject into newly-invented 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

[15] Notably, Goldsmith's agency granted a license to Vanity Fair to allow use of the photo as an artist "reference"—that is, for its utility in depicting Prince—directly implicating the exclusion of facts about the world from copyright.

separable from their artistic expression of it); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §13.03[B][2][b] (2019) (appearance of objects as they occur in nature is not protected by copyright). Goldsmith has no copyright interest in what Prince looked like, how he kept his facial hair, or the angle of his chin relative to his neck.

Goldsmith has a copyright in the product of the artistic choices she made in shooting Prince. Depending on the content of a given photograph, these may include originality in "such artistic elements as the particular lighting, the resulting skin tone of the subject, and the camera angle." *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 116 (2d Cir. 1998). It is the selection and arrangement of these artistic choices that is protectable, "not any of the individual elements standing alone." *Rentmeester*, 883 F.3d at 1119. So too with the characteristics that made it possible eventually to identify the Goldsmith photograph as the reference for the Warhol Series. *See id.* at 1116, 1121-23 (though one photograph was "obviously inspired" by the other, court had to consider whether protectable elements of lighting, background, and overall aesthetic were copied); *Harney*, 704 F.3d at 177, 187 (1st Cir. 2013) (comparing "iconic" photograph and its recreation for a fictionalized biographical film; pose, angle, and framing of the subjects were largely unprotectable, while "lighting and coloring" produced "aesthetically dissimilar impacts").

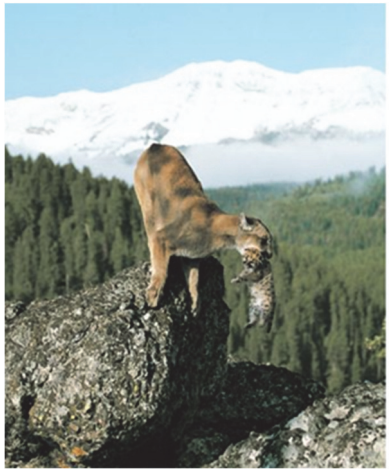
When both parties' works depict reality, it matters how they do so. In *Reece v. Island Treasures Art Gallery, Inc.*, 468 F. Supp. 2d 1197 (D. Haw. 2006), for example, the defendant transferred an image of a hula dancer in a traditional pose from photograph to abstracted stained glass. The court held that given the substantially different aesthetic impacts, even "small" differences were significant. *Id.* at 1207-08 (noting changes in angles and backgrounds; lighting effects that were "unique" to the photo; "absence of detail" in the stained glass; and "marked[] contrast" between the sepia photo and "vibrant colors" of the stained glass).



[16]

[16] Plaintiff's photograph; Defendant's stained glass window. Permanent Injunction and Order of Dismissal with Prejudice at EX. B-C, *Reece v. Island Treasures Art Gallery, Inc.*, 468 F. Supp. 2d 1197 (D. Haw. 2006) (No. 06-0049), ECF No. 96.

So too in *Dyer v. Napier*, No. CIV 04-0408-PHX-SMM, 2006 WL 2730747 (D. Ariz. Sept. 25, 2006), in which the plaintiff photographer (with the assistance of animal trainers) posed the subject and chose the time of day, cameras, lenses, angle, and film to use. The defendant created a sculpture with the same pose:



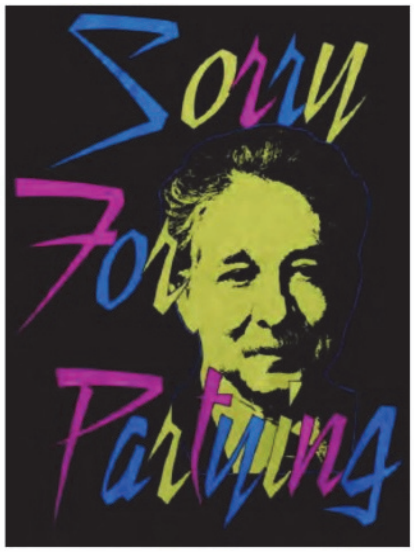
[17]

[17] Kent Dyer, Mother Mountain Lion with Baby in Mouth; Jason Napier, Precious Cargo. Statement of Facts Supp. Def.'s

As the *Dyer* court explained, the scope of copyright in realistic depictions of living beings is narrow. *Id.* at *8. The court also pointed to expert testimony about the difference between the photograph's "realistic" depiction and the sculpture's "idealized" and "altered" forms. *Id.* at *10. *See also Psihoyos v. National Geographic Society*, 409 F. Supp. 2d 268, 278-80 (S.D.N.Y. 2009) (similarity in light source and perspective in two drawings of dinosaurs had to be weighed against "significantly different" drawing styles—one detailed and brightly colored, the other simpler, less realistic, and muted—and different senses of depth created by different styles).

Judge Easterbrook made the same point in *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014), in the context of assessing fair use factor three.

Mot. summ. J., Ex. 8-9, Dyer v. Napier, No. CIV 04-0408-PHX-SMM, 2006 WL 2730747 (D. Ariz. Sept. 25, 2006).



Id. at 757. There, the defendant took a low-resolution version of a photograph of a previous Mayor of

Madison, removed the background, recolored it lime green, and put it on a t-shirt. *Id.* at 757. The court noted that "almost none of the copyrighted work remained." *Id.* at 760. "What is left, besides a hint of [the mayor's] smile, is the outline of his face, which can't be copyrighted." *Id.* at 759.

A proper factor three analysis would focus on the protectable features—lighting, cropping, exposure, and angle—of the Goldsmith photo. However difficult it was to get Prince's cooperation, the factor three inquiry must ask about protectable expression taken by the defendant, not labor or copying of facts. *See Feist*, 499 U.S. at 349 (recognizing that copyright does not protect labor, but rather expression). Warhol erased many of the subtle contours of Prince's face by heightening the contrast, giving him an edgier appearance. Warhol cropped the original image from a medium close-up torso portrait to a close-up on his face and shifted the angle. The canted angle converts Prince's off-kilter image to a direct celebrity gaze. Pet. App. 77a-78a.

What remains must be assessed for its qualitative and quantitative significance, not condemned because it began with copying. This follows from the requirement to assess the fairness of the amount taken in relation to the purpose of the copying (which requires consideration of meaning and message).

III. The Views of Reasonable Audiences Matter to Market Effect Because Audiences Determine Substitutability.

Failure to consider meaning also infected the court's analysis of factor four, market effect, reasoning circularly and therefore erroneously that Warhol's image affected Goldsmith's market because Warhol copied.

A. Cognizable Market Effects Must Be Based on Protectable Expression.

Without evaluating meaning, the Second Circuit conflated the market for a photograph that appears to represent a slice of reality with the market for a non-photographic image that through its stylization asks viewers to confront the way that art mediates reality. Because both works depict Prince, the Second Circuit treated the markets for both as the same. Pet. App. 39a. This reasoning compounded the court's error with respect to factor three: It conflated the market effect of the existence of different images of Prince—whose appearance was unprotectable fact—with the market effect of substituting for the *expression* in the accusing work. But the putative harm is also caused by the existence of concededly noninfringing images of Prince, just as many people will read one biography of a given public figure and not two or three. *See* Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1125 (1990) ("Not every type of market impairment opposes fair use. . . . A biography may impair the market for books by the subject if it exposes him as a fraud, or

satisfies the public's interest in that person. Such market impairments are not relevant to the fair use determination.").

Substitution based on nonprotectable elements—the fact that both works depict Prince—is not properly cognizable as harm to the copyright owner's cognizable interests. *See* Jeanne Fromer, Market Effects Bearing on Fair Use, 90 Wash. L. Rev. 615, 647 (2015) (under *Campbell*, "harm that befalls the copyright owner due to the defendant's use of copyrightable expression with regard to the idea motivating the [work] or the social value of the [work], both outside the scope of the copyright, is irrelevant."); WILLIAM F. PATRY, PATRY ON FAIR USE §6:7 at 548 (2014 ed.) ("[E]ven though the taking of unprotectable material such as important ideas, laboriously researched facts, or the copying of the work's overall style may cause lower sales, such losses should not be considered. The harm must be caused by the use of expression."); *cf. 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"); *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).

B. Transformativeness Matters to Markets.

Making matters worse, although the court below acknowledged that Goldsmith photos and Warhol

images accompanied articles about Prince, it ignored that the authors of those articles, and the audiences therefor, would not consider the two types of works substitutable. The record evidence indicated that the Warhol images were especially notable because they confirmed Prince's cultural importance and artistic influence. *See* 17-cv-02532-JGK, Doc. 58-20, Exh. TT (Conde Nast emails). By contrast, Goldsmith had not further licensed the photograph at issue, Pet. App. at 39a n.12, and the licensing was more than three decades ago, *id.* at 7a, but the panel insisted that allowing licensing of Warhol's work, whether standing alone or with other matter, would substantially harm Goldsmith's market. *Id.* at 40a. This speculative approach to assessing potential market harms is contrary to *Google*, which was focused on existing or reasonably foreseeable markets for the uses in suit. 141 S. Ct. at 1206-08. Just as programmers wanted Google's new operating environment because of what Google had added, the public wanted Warhol's artwork, and they wanted it because of the new meaning Warhol added.

Because meaning matters, the Second Circuit erred in relying on mantras about markets. The Warhol image added layers of different meaning to the photograph and therefore editorial decisions choosing one or the other were based not just on a desire to have an image of Prince but a desire to have a specific type of image. A candid photograph of a politician falling down a stage is not substitutable with a posed photograph of the same politician enjoying the respect of other dignitaries because of their meanings. Similarly, the fact

that both works here were visual does not mean, as the Second Circuit held, that they are substitutes as a matter of law regardless of what the evidence shows. *See Google*, 141 S. Ct. at 1206-08 (that both parties' works consisted of software didn't mean that market harm inevitably favored the accusing work). A market analysis indifferent to meaning likewise conflicts with *Campbell*, given that 2 Live Crew's parody was, like "Pretty Woman" by Roy Orbison, also played by radio stations. *See Campbell*, 510 U.S. at 591 (transformativeness made market substitution less plausible despite presence of both songs in a commercial market).

Instead, a meaning-indifferent marketing analysis falls directly into the well-known trap of circularity. *Google*, 141 S. Ct. at 1207 (discounting Sun's attempt to enter the Android market; quoting 4 NIMMER & NIMMER, *supra*, §13.05[A][4] (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")); *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1387 (6th Cir. 1996) (stating that a copyright holder must have a right to copyright revenues before finding that a failure to pay a license fee equals market harm); Leval, *supra*, at 1124 (1990) (stating that "[b]y definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties"); Lydia Pallas Loren, Redefining the Market Failure Approach to Fair Use in an Era of Copyright

Permission Systems, 5 J. Intell. Prop. L. 1, 39 (1997) ("Consideration of the permission fees allegedly 'lost' in determining whether a use is a fair use is inappropriate because no fees are required unless the use is not a fair use.").

Proper consideration of transformativeness can identify uses for which no permission should be required; a copyright owner should not be able to preempt the right to make transformative uses merely by announcing a willingness to license. *See*, *e.g.*, *Bill Graham Archives*, 448 F.3d at 614-15 (in transformative use cases, copyright owners may not control "fair use markets" merely by willingness to license, and loss of revenue in such markets is not cognizable harm) (citing *Campbell*, 510 U.S. at 585 n.18 ("being denied permission to use [or pay license fees for] a work does not weigh against a finding of fair use")); *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 146 n.11 (2d Cir. 1998) ("copyright owners may not preempt exploitation of transformative markets"). As Professor Fromer concluded, excluding copyright-irrelevant market effects (along with implausible market effects) "does not interfere with copyright owners' plausible incentives to create copyrightable works and also benefits society by making further works available to them." Fromer, *supra*, at 648-49.

CONCLUSION

Fundamentally, the court below thought that it was unfair that Warhol's works were recognizably based on Goldsmith's photo, and therefore refused to consider the distinct meaning and message of the works. That is not and cannot be the rule of fair use.

Respectfully submitted,

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