

No. 21-869

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

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ANDY WARHOL FOUNDATION FOR  
THE VISUAL ARTS, INC.

*Petitioner,*

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,

*Respondents.*

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

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**BRIEF OF PROFESSOR TERRY KOGAN AS  
AMICUS CURIAE IN SUPPORT OF  
RESPONDENTS**

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

*Amicus* Terry Kogan is Professor Emeritus at the University of Utah S.J. Quinney College of Law. He has written extensively on copyright law and art law. He has an interest in the correct application of the fair-use doctrine in the context of visual art.

### SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to clarify that the fair-use doctrine’s “transformative” standard is not an invitation to turn judges into art critics, but instead should be guided by assessments of objective evidence capable of consistent application by courts.

Notwithstanding Petitioner’s efforts to distort the Second Circuit’s holding, the issue in this case is *not* whether the Circuit disregarded this Court’s instruction in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) that a follow-on work is “transformative” if it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Id.* at 579. Rather, the question is *how* to determine whether a follow-on work is transformative—*i.e.*, on *what forms of evidence* should a court rely in making this determination. *Amicus* respectfully submits that courts should eschew airy and subjective evaluations

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<sup>1</sup> Pursuant to S. Ct. Rule 37.3(a), all parties have provided written consent to its filing. No counsel for a party authored this brief in whole or in part, and no person other than the *amicus* or his counsel made a monetary contribution to fund its preparation or submission.

of aesthetics of artworks and instead train their focus on artworks' objective physical features.

Petitioner relies heavily on the district court's subjective appraisal of the aesthetic meaning of the follow-on work, which the court emphasized was recognizably a "Warhol." Were that enough, it would be difficult to imagine how *any* famous visual artist's follow-on work would not necessarily be "transformative." Petitioner is, in effect, asking this Court to write a blank check to well-known visual artists to skirt copyright laws, a position that Congress could not possibly have intended.

As the Second Circuit correctly explained, in determining whether a follow-on visual work is transformative "the district judge should not assume the role of art critic and seek to ascertain the intent behind or meaning of the works at issue." *Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 41 (2d Cir. 2021). Instead, courts should focus on objective physical features and metrics cognizable by a reasonable perceiver. *See id.* at 42-43 (explaining, *inter alia*, that the works at issue are both "works of visual art" and "are portraits of the same person"; and finding that the follow-on work "retains the essential elements of its source materials," such that "the Goldsmith Photograph remains the recognizable foundation upon which the Prince Series is built").

Thus, as the decision below recognizes, Congress did not intend to foist upon courts the inherently subjective and wrought task of evaluating whether the aesthetics of a follow-on visual work are sufficiently different as to render it "transformative." Rather, Congress charged courts to ascertain "the purpose and character of the use," 17 U.S.C.

§ 107(1)—*i.e.*, “the nature and objects of the selections made.” *Folsom v. Marsh*, 9 F. Cas. 342, 348 (No. 4,901) (C.C.D. Mass. 1841) (Story, J.). As *Google LLC v. Oracle Am., Inc.* shows, courts are well-equipped to make the fair-use determination in the context of functional work on the basis of objective evidence. 141 S. Ct. 1183, 1203 (2021).

So too when it comes to visual works. Courts determining whether a follow-on artwork is transformative of a protected artwork are well-equipped to assess objective evidence—*i.e.*, observable features of the two works and common understandings of those features. The Second Circuit took just that approach in evaluating the fair-use claim in this case. In so doing, it avoided the morass of engaging in wishy-washy aesthetic appraisal of the merits and intent of the works at issue. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.) (“It would be a dangerous undertaking for persons trained only [in] the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”).

Were the law otherwise, it would invite courts to be swayed by a litigant’s reliance on art critics’ high praise of the artist who authored the follow-on work. But the law cannot be that a famous, well-regarded artist is immune from misappropriating protected expression of a less well-known artist. Here, because Petitioner’s assertion that Warhol’s silkscreens are transformative is based largely on subjective assessments, rather than objective evidence, the Second Circuit correctly determined that Warhol’s use

of Goldsmith's protected photographs was not transformative.

## ARGUMENT

### I. The Second Circuit Correctly Applied Fair-Use Doctrine To Determine That Warhol's Silkscreens Were Not Transformative

#### A. The Second Circuit's Objective Approach Faithfully Applied *Campbell v. Acuff-Rose Music, Inc.*

Notwithstanding Petitioner's assertions to the contrary,<sup>2</sup> in the decision below the Second Circuit adhered faithfully to this Court's articulation of the "message or meaning" test in *Campbell*. See 11 F.4th at 37, 42 (quoting *Campbell*). Nothing in *Campbell* requires, as Petitioner would have it, that judges doff the robe and don the trained, appraising eye of an art critic. See Pet. Br. 30 ("While Goldsmith portrayed Prince as a vulnerable human, Warhol made significant alterations that erased the humanity from the image[.]").

*Campbell* does not instruct courts to assess whether a follow-on artwork depicts a subject as "a vulnerable human" or not. Rather, the question under the first factor in the fair-use inquiry is "the nature and objects of the selections made." 510 U.S. at 578 (quoting *Folsom*, 9 F. Cas. at 348). As the Second Circuit correctly understood, the first factor requires assessment of objective, verifiable evidence—*i.e.*,

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<sup>2</sup> See, e.g., Pet. Br. 25 ("[T]he [Second Circuit] panel categorically barred courts from assessing a follow-on work's meaning or message. . . .").



perceivable attributes and common understandings of the artworks in issue. See 11 F.4th at 37 (“We evaluate whether a work is transformative by examining how it may ‘reasonably be perceived.’”) That reasonable-perception approach flows directly from *Campbell*: “[t]he threshold question . . . is whether a parodic character may *reasonably be perceived*.” 510 U.S. at 582 (emphasis added).

*Campbell*’s focus on reasonable perceptions is entirely consistent with the Second Circuit’s holding that, where both the protected and follow-on works “are created as works of visual art”—and, to boot, “portraits of the same person”—the analysis should proceed by “viewing the works side-by-side” and assessing whether “the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material.” 11 F.4th at 42.

Thus, Petitioner’s contention that the Second Circuit rejected *Campbell*’s “message or meaning” test in favor of a “visual similarity” test is far off point.<sup>3</sup> Rather, in assessing the reasonable perceptions of the works, the court recognized that visual similarity is *one* piece of objective evidence—but not the only one—that may indicate a lack of transformativeness.

Indeed, the Second Circuit pointed to another piece of objective evidence critical to its determination that Warhol’s silkscreens were not transformative: the source material for Warhol’s work. Like visual

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<sup>3</sup> Pet. Br. 46 (“The Second Circuit made this straightforward case complicated by jettisoning the meaning-or-message test in favor of a novel visual similarity test lacking any basis in this Court’s precedent.”).

similarity, the source material that went into Warhol's artwork is objective, perceivable evidence that enables a reasonable person to compare that work with Goldsmith's protected photograph. See 11 F.4th at 43 ("the Prince Series retains the essential elements of its source material, and Warhol's modifications serve chiefly to magnify some elements of that material and minimize others").<sup>4</sup>

Consider, by contrast to the Second Circuit's objective approach, the district court's interpolation of intangible and subjective notions of aesthetics into the transformativeness inquiry:

The Prince Series works can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure. The humanity Prince embodies in Goldsmith's photograph is gone.

*Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019). Worse yet, the district court emphasized that "each Prince Series work is immediately recognizable as a 'Warhol,'" whereas "the Goldsmith Prince Photograph is not a 'Warhol.'" *Id.* at 326 & n.8.

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<sup>4</sup> In another fair-use case involving a follow-on visual work, the Second Circuit similarly undertook a careful, detailed assessment of the works' physical characteristics. See *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006) (in applying *Campbell* test, noting "changes of [the protected work's] colors, the background against which it is portrayed, the medium, the size of the objects pictured, [and] the objects' details"). Although the court noted the follow-on artist's "description" that he was using the protected work "as fodder for his commentary," the court grounded its analysis in its assessment of the physical features of the works. *Id.*

It should be apparent that the district court’s “reasonabl[e] . . . perce[ptions]” are just a dressed-up *ipse dixit* aesthetic judgment, unmoored from any objective criteria. It is unclear what the basis is for the conclusion that Prince is an “iconic, larger-than-life figure” in Warhol’s works, and why that perception is determinative of the works’ transformativeness.

To drive home the subjectivity of such assessments, consider an example cited by the district court—“Warhol’s famous representations of . . . Mao.” *Id.* at 326. Did Warhol’s various modifications of Mao’s portrait (*e.g.*, using artificial, loud colors) make Warhol’s Mao “larger than life”? Or did they puncture Mao’s cult of personality? *See, e.g.*, Art Institute of Chicago, *Mao (1972)* (“Warhol melded his signature style with the scale of totalitarian propaganda to address the cult of personality surrounding the Chinese ruler Mao Zedong[.]”).<sup>5</sup> Though appropriately within the purview of art historians, such assessments are beyond the judicial ken—and can’t be dispositive of copyright law.

Indeed, as discussed below, *infra* § I.C., the notion that the work’s “recognizab[ility] as a ‘Warhol’” is dispositive runs contrary to basic legal principles. It is reasoning like this that has led a leading commentator to note: “[T]he transformative use standard has become all things to all people.” Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05(B)(6) at n.337.169 (2022).

This is just the sort of analytically untenable morass into which Petitioner seeks to thrust the Court. Petitioner claims that, “[w]hile Goldsmith

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<sup>5</sup> Available at <https://www.artic.edu/artworks/47149/mao>.

communicated the message of a vulnerable Prince, Warhol's Prince Series conveys the dehumanizing nature of celebrity." Pet. Br. 44. Says who? And what does this have to do with the objective, physical features of the visual works?

Though it may well have been Goldsmith's subjective intent to portray Prince as a "vulnerable human being" and Warhol's to strip Prince of that humanity and instead display him as a popular icon, whether a work is transformative cannot turn merely on the stated or perceived intent of the artist or the impression that a critic—or for that matter, a judge—draws from the work. Were it otherwise, the law may well "recogniz[e] any alteration as transformative." 4 Nimmer on Copyright § 13.05(B)(6).

It is established that Warhol blatantly copied Goldsmith's photograph of Prince to create his silkscreen. The only question before this Court is whether that follow-on work is transformative. Looking solely to objective evidence—visual similarity and source material—despite any alterations Warhol may have made, Goldsmith's photograph of Prince remains recognizably front and center in Warhol's artwork. Accordingly, that silkscreen is not transformative of Goldsmith's copyright-protected work.

**B. When Relying On Objective Evidence, Courts Are Well-Equipped To Determine When A Follow-On Work Is Transformative.**

The use of objective evidence to assess transformativeness leads to judicially administrable,

consistent analysis across the spectrum of protected works—from the purely functional to artworks.

Consider this Court’s recent decision in *Google v. Oracle*. There, the Court explained that fair use protected Google’s “precise[]” copying of certain computer programming language in part because Google sought “to create new products [and] expand the use and usefulness of smartphones” with it. *Google*, 141 S. Ct. at 1203. In so doing, this Court relied entirely on objective evidence—not subjective evaluations of the meaning and message of the follow-on code. *Id.* at 1204.

Using the objective approach, the lower courts have shown themselves equally adept at assessing transformativeness when considering a protected artwork that is copied in its entirety into a functional work. For example, in *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003), and *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), the Ninth Circuit found that copying protected photographs in their entirety for use in a functional search engine was a transformative use. In *Perfect 10*, the court explained: “Although an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information.” 508 F.3d at 1165. In each case, the court was able to determine the purpose and meaning of both the protected work and the follow-on work by relying solely on objective evidence—*i.e.*, the

functional purpose of a search engine in comparison to the purpose of a protected artwork.<sup>6</sup>

As the Circuit noted in this case, the transformativeness inquiry is made more complex in the context of visual artworks because such works have the same purpose at the highest level of generality—“(i.e., to serve as works of visual art).” 11 F.4th at 40. Notwithstanding such shared general purpose, however, the lower courts in such cases have shown that it is not necessary to rely on subjective aesthetic judgments or artistic intentions to resolve the transformativeness inquiry. Rather, courts in such cases have looked to objective, physical features of the artworks.

Consider, for example, *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006). There, the defendant copied plaintiff’s protected photographs for use in a coffee table book, *Grateful Dead: Illustrated Trip*, about the history of the Grateful Dead.<sup>7</sup> The Second Circuit upheld the district court’s conclusion that defendant’s use was transformative. The court concluded that the plaintiff’s posters were created for “the dual purposes of artistic expression and promotion,” *id.* at 609, while

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<sup>6</sup> See also, e.g., *Author’s Guild v. Hathi-Trust*, 755 F.3d 87, 97 (2d Cir. 2014) (“the creation of a full-text searchable database is a quintessentially transformative use” of a book because “the result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn”).

<sup>7</sup> “Specifically, [defendant] reproduced seven artistic images originally depicted on Grateful Dead event posters and tickets. [Plaintiff’s] seven images are displayed in significantly reduced form and are accompanied by captions describing the concerts they represent.” *Id.* at 607.

the use of those images in defendant's book were as "historical artifacts to document and represent the actual occurrence of Grateful Dead concert events featured on *Illustrated Trip's* timeline." *Id.*

In reaching this conclusion, the court looked to objective, physical features of the two works: the defendant "significantly reduced the size of the reproductions"; the defendant combined plaintiff's images "with a prominent timeline, textual material, and original graphical artwork, to create a collage of text and images on each page of the book"; and "[Plaintiff's] images constitute an inconsequential portion of *Illustrated Trip.*" *Id.* at 611.

As *Bill Graham* shows, no resort to art criticism is necessary in fair-use cases involving visual works. Artworks have perceivable physical attributes whose appraisal does not require judges to delve into the inherently subjective realm of aesthetics.

**C. In Determining Whether A Follow-On Artwork Is Transformative, Courts Should Not Be Swayed By An Artist's Reputation Or Art Critics' Praise.**

The copyright laws apply equally to all—whether the author of the follow-on work is Andy Warhol or Joe Schmo. Spurning that premise, Petitioner relies heavily on Warhol's reputation to support the district court's finding that the artist's silkscreens of Prince are transformational, gushing that "Warhol's celebrity images are the subject of countless art history treatises, exhibitions, and commentaries." Pet. Br. 13; *see id.* at 14 ("The meaning and message in Warhol's works has been studied, identified, and

articulated by generations of art history scholars, curators, journalists, and everyday museum-goers.”). But the legal question at issue here is not the merit of Warhol’s artwork—which no one doubts—but whether he misappropriated Respondents’ copyright in the protected photograph at issue.

As discussed, the district court expressly based its finding of transformativeness on Warhol’s works’ recognizability as “Warhols”:

[E]ach Prince Series work is immediately recognizable as a “Warhol” rather than as a photograph of Prince – in the same way that Warhol’s famous representations of Marilyn Monroe and Mao are recognizable as “Warhols,” not as realistic photographs of those persons.

382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019). That is not a tenable basis for a finding of fair use. As the Second Circuit explained, “that logic would inevitably create a celebrity-plagiarist privilege; the more established the artist and the more distinct that artist’s style, the greater leeway that artist would have to pilfer the creative labors of others.” 11 F.4th at 43.<sup>8</sup> Such a rule

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<sup>8</sup> Similarly, the American Intellectual Property Law Association states: “The fair use doctrine should be applied equally to all works and should not immunize certain infringers based on their degree of fame or recognition. Celebrities should be required to obtain licenses to create derivative works, just like other creators.” Amicus Br. of American Intellectual Property Law Association at 27; see also Professor Jane C. Ginsburg, *US Second Circuit Court of Appeals tames ‘transformative’ fair use; rejects ‘celebrity-plagiarist privilege’; clarifies protectable expression in photographs*, *Journal of 16 INTELLECTUAL PROPERTY LAW & PRACTICE* 638, 639 (2021) (“[T]he district court’s analysis suggested that Warhol may permissibly preempt



would be little more than an invitation to the illustrious to pilfer from the obscure. That is no idle concern; indeed, the Second Circuit noted in a prior case that “[t]he copying was so deliberate as to suggest that defendants resolved so long as they were significant players in the art business, and the copies they produced bettered the price of the copied work by a thousand to one, their piracy of a less well-known artist’s work would escape being sullied by an accusation of plagiarism.” *Rogers v. Koons*, 960 F.2d 301, 303 (2d Cir. 1992).

Recognizing that Warhol’s accolades from art critics and consumers alike did not give him a free pass to infringe, the Second Circuit appropriately focused on the question at hand: whether Warhol’s infringement on Goldsmith’s photograph was entitled to the affirmative fair-use defense. Comparing the objective features of Goldsmith’s protected work with Warhol’s silkscreens, the Second Circuit concluded that Warhol’s work—notwithstanding its recognizability as a “Warhol”—was not transformative.

The Circuit correctly held that there is no “fame” defense to infringement. This Court should uphold the Circuit’s vindication of the fundamental principles of copyright protection.

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Goldsmith’s opportunities to license her work simply because he is more famous and recognizable than she.”).

**CONCLUSION**

For the foregoing reasons, the Court should affirm the judgment of the Second Circuit.

Respectfully submitted,

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