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 PROFESSOR GUY A. RUB AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

GUY A. RUB
JOANNE WHARTON MURPHY/ CLASSES OF 1965 AND 1973 PROFESSOR OF LAW
THE OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW
55 West 12th Avenue
Columbus, Ohio 43210
rub.1@osu.edu

KATHERINE C. FERGUSON
Counsel of Record
KOOPERMAN MENTEL FERGUSON YAROSS, LTD.
250 E. Town Street
Columbus, Ohio 43215
(614) 344-4840
kferguson@kmfylaw.com

Counsel for Amicus Curiae

August 15, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI CURIAE

Amicus is a professor of law who teaches and writes about copyright law. His sole interest is the proper development of copyright law.[1]

SUMMARY OF ARGUMENT

The dispute concerning the criteria for finding a use transformative should not obscure the core facts of this case: Lynn Goldsmith created a copyright-protected work. For a modest amount, she licensed its use and authorized artists to incorporate it into their works of art. Andy Warhol, one of the richest artists in the world at the time, could have easily purchased such a license that would have allowed him to copy protected elements from Goldsmith's work and incorporate them into his works and use them in any way going forward. Warhol has done so on other occasions but this time he chose not to seek such a license. The fair use defense should not be used to bypass well-functioning licensing markets in this way.

Contrary to the Petitioner's argument, this Court has never ruled that merely finding the use of a copyright-protected work transformative, let alone by just adding a possibly new meaning or message, creates a "strong presumption" that it is fair. Pet. Br. at 40. This excessive focus on just one aspect of one of the fair use factors is inconsistent with the text of Section 107, which lists four factors and does not

---

[1] Pursuant to Rule 37.6, Amicus affirms that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus made a monetary contribution to its preparation or submission. The parties have consented to filing of amicus briefs.

mention the word "transformative," this Court's precedent, and the value that copyright law in general, and the fair use doctrine in particular, places on promoting and preserving thriving licensing markets.

The existence of licensing markets, and the parties' involvement in those markets, must play a vital role in the analysis of fair use claims. Specifically, the creation of new works of authorship for commercial purposes, which are substantially similar to existing copyright-protected works, should typically not be considered fair if a license that permits such use is offered by the copyright owner, is readily available, but never sought and secured. The fair use defense should not be used in that way to circumvent and possibly destroy established licensing markets.

The case at bar exemplifies how excessive focus on the nature of the use as transformative by just possibly adding a new meaning or message can blur other crucial considerations. In particular, it undermines the importance of the fourth fair-use factor and its focus on the relevant market realities.

This case does not present the same type of market failures typical of many fair use cases, including all the fair use decisions of this Court. Markets, for example, can fail when copyright owners have no interest in authorizing a certain use, particularly when they try to use their copyright to censor speech and prevent new use. This was a major concern in this Court's decision in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). But it is irrelevant in this case because the Respondents were in the business of selling licenses that authorized artists, including Andy Warhol, to use photographs in their works.

Markets can also fail because the costs of reaching licensing deals are too high, making the existence of licensing markets impractical. This was the case when it came to TV time-shifting, held by this Court to be fair use in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). But in this case, the transaction costs were likely minimal. The Respondent set up a licensing scheme for such use while Andy Warhol was surrounded by assistants, agents, and lawyers and was accustomed to securing similar licenses.

The structure of the market can also cast doubt on its desirable operation. For example, a market dominated by a strong monopolist company is less likely to reach desirable results without external intervention. Distortions in the market for software languages, including those caused by third parties' long-term investments, played an important role in this Court's decision in *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021). But this case does not raise similar concerns. The Respondents lacked any meaningful market power that could have allowed them to extort unfair conditions or an excessive price from Warhol had he sought a license.

Under those circumstances, a holding that finds Andy Warhol's use fair will be in tension with the statutory multi-factor balancing test and with this Court's fair use caselaw, and in particular with the importance it places on limiting the harm to the underlying creator's market. *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 566 (1985). Holding that a license was not needed for copying copyright-protected works in this case might also put into question the strength of copyright protection of multiple works from multiple creative industries and frustrate their common expectations and practices.

ARGUMENT

I. THE FAIR USE DEFENSE SHOULD TYPICALLY COMPLETE RATHER THAN COMPETE WITH WELL-FUNCTIONING LICENSING MARKETS

A. The fair use defense plays an important role by allowing copyrighted works to be used when the circumstances indicate that market forces might fail to reach socially desirable results.

The Constitution gives Congress the power to grant authors exclusive rights over their works to "promote the Progress of Science." U.S. Const. art. I, § 8, cl. 8. Congress has used this power to pass a series of copyright statutes, which, this Court repeatedly explained, establish an incentive scheme that encourages authors to create by providing them exclusive rights that can be utilized in obtaining remuneration. *See, e.g.*, *Mazer v. Stein*, 347 U.S. 201, 219 (1954). Authors' remuneration, in turn, promotes the progress of science by advancing the production and dissemination of creative works. *See Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) ("[t]he profit motive is the engine that ensures the progress of science"); *see also Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 204 (2016).

There are, however, situations in which the author's interest in compensation might defeat rather than serve the progress of science. Various copyright law doctrines have evolved to mitigate such concerns. Fair use is one such doctrine. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Colum. L. Rev. 1600, 1602 (1982) (hereinafter "Gordon").

The fair use doctrine permits users to undertake actions that would otherwise require the right owner's

permission without authorization or compensation. It thus might harm the market share of copyright owners and reduce the authors' remuneration. Such a result is, however, justified when there are circumstances, some of them common, that cast doubt on the effective operation of the market for authorized use. *Ty, Inc. v. Publications Int'l Ltd.*, 292 F.3d 512, 517 (7th Cir. 2002); Gordon, at 1613–14.

Multiple circumstances and factors may indicate that market forces might fail to reach desirable results. A common condition that might cause a market to fail is the existence of significant costs in reaching voluntary licenses (transaction costs). If, for example, a certain use requires a license from a large number of right-holders, the costs of coordinating and negotiating with all of them might be prohibitively high. Transaction costs are especially harmful when the expected private benefits from the use are relatively small in comparison to those costs, which is typical for some activities, such as incidental use, non-commercial use, and teaching. And indeed, the commercial nature of the use, the amount used, and use for teachings are all mentioned in 17 U.S.C. § 107.

Relatedly, markets might also fail to promote social welfare when the benefits from use are mostly enjoyed by third parties. In such cases, the user might be unable to pay for a license. Political speech, non-commercial use, as well as research and scholarship, both mentioned in 17 U.S.C. § 107, are typical examples of such use. In addition, the market might fail to reach socially desirable results when the copyright owner attempts to limit the dissemination of works and knowledge. Criticism (which is also mentioned in 17 U.S.C. § 107), including by authoring parodies, is the model example for such a case.

Indeed, many circumstances, including some that were not mentioned above, might cast doubt on the effectiveness of the market and justify intervention in the form of fair use (depending, of course, on the balance of interests as reflected by the fair use factors). On the other hand, when such circumstances do not play a meaningful role, especially when *none* of them can be observed, fair use should typically be denied.

B. A well-functioning licensing market, which could have served Andy Warhol's needs, operated in this case but was ignored.

The Petitioner in this case did not point to any deficiency in the relevant licensing market or to anything else that could have prevented Andy Warhol from securing a license. This is, therefore, a case where the facts indicate that a market for appropriate licenses existed and operated well but was ignored.

The facts of this case exemplified Goldsmith's willingness to license her work. Goldsmith, through her licensing agency LGI, in return for $400, granted Vanity Fair a license that authorized the creation of the work that was published by the magazine in 1984.[2] JA85–87. There is little reason to think the Respondents would have opposed licensing Warhol's other works that are part of the Prince Series. LGI was in the business of granting such licenses, which likely kept transaction costs at bay. For example, there is no

[2] This brief takes no position as to whether that license (or any other expressed or implied license) might be interpreted to cover the creation of the other works in the Prince Series, an argument that the Petitioner did not raise. It should, however, be noted that if the initial creation of the works was authorized, even as drafts, then their later sale, resale, and public display could not be considered copyright infringement. 17 U.S.C. §§ 109 (a), (c).

indication that Vanity Fair encountered difficulties in reaching a deal with LGI. In fact, the entire negotiation between the parties probably entailed the exchange of two short documents and a check. JA85–87, 146–48, 498–500.

There is also no reason to suspect Andy Warhol would have encountered difficulties or significant costs in negotiating the proper licenses had he tried to do so. By the mid-1980s, when the Prince Series was created, Warhol was one of the most famous artists in the world, and he was surrounded by assistants, agents, and lawyers. *See* Victor Bockris, Warhol, the Biography 376–77 (2003). Warhol was also one of the richest artists alive and produced hundreds of works for massive monetary gains. *See Id*. at 378-81. Warhol was well aware and proud of this aspect of his art, famously calling his studio "the factory," forming multiple corporations, and stating that "[m]aking money is art." Andy Warhol, The Philosophy of Andy Warhol 92 (1975).

By the time the Prince Series was created, Warhol had been copying photographs into his works for decades and was well aware of the need to secure proper licenses for such use, partly because he was sued by several photographers. Warhol settled those cases after providing significant compensation to the photographers. Patrick S. Smith, Andy Warhol's Art and Films 125–26 (1986). Consequently, many of the works Warhol created in later stages of his career, including in the 1980s (even some mentioned in the Petitioner's brief), were based on photographs that he or his assistants took. *See* Brett Sokol, *Show Us Your Warhol!*, N.Y. Times (Nov. 1, 2018) (describing Warhol's practices in the 1970s and the 1980s); Smith, at 126, 278 (including an interview with one of

Warhol's assistants who explained his role in taking such photographs so Warhol "doesn't get sued").

When Warhol did not use his own photographs, he routinely secured licenses from the photographers. For example, when in 1980 Warhol worked on a series of photography-based works (entitled Ten Portraits of Jews of the 20th Century), his gallerist "tracked down and obtained the rights for all the source photographs." Laura Gilbert, *No Longer Appropriate?*, The Art Newspaper (May 9, 2012). As that gallerist, Ronald Feldman, noted, Warhol "learned a lesson from the [photographers'] lawsuits." *Id*.

Finally, in this case, the price for an appropriate license was unavoidably reasonable. The Respondents simply lacked the market power to extract an unfair, excessive return for Warhol's use. Warhol, so the Petitioner stresses, could have chosen from many photographs of Prince for his work, including many that were not taken by Goldsmith. Pet. Br. at 16–17. This means the Respondents operated in a competitive environment.

Indeed, there is no reason, and the plaintiff does not point to any reason, to believe that Warhol could not have easily secured a license authorizing him to create and use all the Prince Series for a reasonable amount if he chose to do so. The Respondents offered such licenses for affordable prices, the transaction costs were low, especially for someone like Andy Warhol, who was expected to generate a fortune from those works, and the market was competitive, which guaranteed Warhol's ability to purchase the proper license if he had chosen to do so. But he did not.

II. FINDING WARHOL'S USE FAIR WILL BE IN TENSION WITH THIS COURT'S FAIR USE CASELAW AND WILL UNDERMINE EXISTING INDUSTRIES

A. This Court's fair use precedents never allowed users to bypass existing well-functioning licensing markets.

In five previous cases, this Court was asked to decide if the use of copyrighted work was fair. In three of those cases, this Court found the use to be fair. In those cases, however, the circumstances clearly suggested that the market might not have reached desirable results if left to its own devices.

In *Sony*, this Court held that the time-shifting of TV shows was fair use. The court ruled that even unauthorized time shifting is unlikely to cause any meaningful harm to the copyright owner. Time shifting did not bypass licensing markets because such markets did not exist and could not have existed. After all, individual users were not able to engage in discrete negotiation with the right holders to secure licenses to watch TV shows at a later time. The transaction costs of such a theoretical negotiation scheme would have been prohibitively high, making it absolutely impractical. *See* Gordon, at 1655.

In *Campbell*, this Court held that a parody of the plaintiff's work was fair use. Like in *Sony*, this Court's holding in *Campbell* did not sanction bypassing established copyright markets. As this Court explained, "the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market." *Campbell*, 510 U.S. at 592. This was not a theoretical notion in *Campbell*, as

the plaintiff refused to license the defendant's use in that case. *Id*. at 572-73.

In *Google*, this Court ruled that Google's use of Java APIs was fair use even if those were protected by copyright. The Court raised serious concerns regarding Oracle's market position and its sources. Google's use was held to be fair partly because Oracle gained a monopolistic market position primarily by relying on factors, like third-parties investment, that the Court had "no reason to believe that the Copyright Act seeks to protect." *Google*, 141 S. Ct. at 1208. Indeed, it is highly questionable that the market can generate desirable results when one company gains a critical power over a crucial bottleneck technology, especially one that third parties are locked into. *See Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 821 (1st Cir. 1995) (Boudin, J., concurring) (discussing how such a monopolistic position may hurt the future development of computer programs).

Unlike *Sony*, *Campbell,* and *Google*, concerns regarding high transaction costs, censorship, or monopolistic market power do not exist in this case.

B. Finding Warhol's use fair will undermine the importance this Court places on the Fourth Fair Use Factor — the harm to the underlying work's market.

While the fair use factors "are all weighed in the 'equitable rule of reason' balance," *Sony*, 464 U.S. at 454, "the effect of the use upon the potential market for or value of the copyrighted work . . . is undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. This much cited passage refers, of course, to the fourth fair use factor, 17 U.S.C. § 107(4). *See also Steward v. Abend*, 495 U.S. 207, 238

(1990) (refereeing to the fourth factor as the "most important, and indeed, central."). The leading copyright law treaty similarly commented on this factor: "If one looks to the fair use cases . . . [the fourth factor] emerges as the most important, and indeed, central fair use factor." 4 Nimmer on Copyright § 13.05 (2022).

The centrality of the fourth factor is directly tied to the primary mechanism of copyright law: encouraging creativity by allowing copyright owners to commercialize their works.[3] This Court similarly noted that "[i]n the economists' view, permitting 'fair use' to displace normal copyright channels disrupts the copyright market without a commensurate public benefit." *Harper & Row*, 471 U.S. at 566. It ruled that "fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied." *Id.* at 566–67 (quotation marks omitted).

Courts consider the loss of licensing fees as part of their analysis of the fourth fair use factor. While some forms of harm do not fall within the scope of the fourth factor, *Campbell*, 510 U.S. at 591–92, this Court instructed lower courts to "take account . . . of harm to the market for derivative works," *Id*. at 590 (citing *Harper & Row*), noting that "the licensing of derivatives is an important economic incentive to the creation of originals," *Id*. at 593. Circuit courts routinely consider such licensing harm as part of their fair use's fourth-factor analysis. As the Sixth Circuit explained, "[when a copyright owner] clearly does

[3] The fourth factor should, of course, not be analyzed in isolation. In fact, as noted above, analyzing the market harm entails inquiries that are part of the other fair use factors such as the nature of the use as commercial or as criticism and the amount that was used.

have an interest in exploiting a licensing market—and especially where the copyright holder has actually succeeded in doing so—it is appropriate that potential licensing revenues . . . be considered in a fair use analysis.'" *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1387 (6th Cir.1996) (en banc) (quotation marks omitted). Other circuit courts agree. *See, e.g.*, *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1277–79 (11th Cir. 2014) (denying academic publishers licensing fees for copying articles' excerpts into coursepacks is market harm under the fourth factor); *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 308 (3d Cir. 2011) (denying licensing fees from a photographer when a radio station published his work on its website is market harm); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994) (denying publishers of scientific journals licensing fees for making copies of specific articles is market harm). This is also what the Second Circuit did in this case when it considered (together with other forms of relevant market harm) the "royalty payments to which [Goldsmith] would have otherwise been entitled." *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 50 (2d Cir. 2021).

This case is simpler than many others involving lost licensing fees because the Respondents already operated such a licensing scheme, and Andy Warhol was accustomed to securing licenses for similar use. Indeed, in evaluating licensing harm, circuit courts are careful to avoid the potential circularity by, among others, only consider the effect of the use on "traditional, reasonable, or likely to be developed markets." *Texaco*, 60 F.3d 913 at 930. *See, e.g.*, *Bell v. Eagle Mountain Saginaw Indep. Sch. Dist.*, 27 F.4th 313, 325 (5th Cir. 2022) (refusing to find market harm because the plaintiff never sold a license for use similar to that

of the defendant); *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 25 (1st Cir. 2000) (refusing to find market harm because the plaintiff, unlike other photographers, never "tried to sell portfolio photographs to newspapers."). However, in this case, the market was not hypothetical or about to be developed. By the time Warhol created the Prince Series, LGI was already selling licenses that authorized such use. The license Vanity Fair purchased from LGI in connection to its 1984 Price article was such a license. JA85–87. As noted, Warhol was also well accustomed to the need and the practices of securing a license when using another author's photographs.

C. Allowing unlicensed use of copyright-protected works by simply adding an arguably new meaning or message will undermine a core building block of multiple creative industries.

Accepting the Petitioner's core argument risks undercutting the practices of multiple creative industries. The Petitioner's argument proceeds in two stages: First, the Petitioner asks this Court to read the test for transformative use broadly and to hold that every use that can be reasonably perceived as communicating a new meaning or message is transformative. Pet. Br. at 33. Second, the Petitioner argues that this test, *on its own*, creates a "strong presumption" that the use is fair. Pet. Br. at 40. This approach is not just doctrinally wrong and in conflict with this Court's caselaw,[4] including *Harper & Row*'s emphasis on the

[4] This brief does not focus on the application of the transformative use doctrine to the facts of this case, but suggesting that such a "strong presumption" exists is doctrinally problematic on its face. It treats the question of transformative use as a binary one, which it is not, ignores the other statutory factors, and attributes

fourth factor, but it can also undermine existing and even thriving licensing markets and core assumptions that multiple copyright industries take for granted.

Creators often incorporate copyrighted works into their own works, and, especially if their use is commercial and if it does not criticize or comment on the underlying work, they typically seek a license whether or not they use the preexisting work in creative ways that give it an arguably new meaning or message. Warhol's actions on other occasions (for example, when he secured multiple licenses to use photographs in his Ten Portraits of Jews of the 20th Century series) and Vanity Fair's actions in this very case (securing a license from LGI in 1984 to create and present a work based on Prince photograph and securing a license from the Petitioner to present a Warhol work in 2016) exemplifies that practice.

The movie industry provides another example of the need to secure a license before using others' work. Much of the income of the U.S. movie industry today is generated from franchise films. One commentator noted that those "big name brands . . . justify[] [the] studios' very existence and the jobs of everyone who works on their glamorous lots." Ben Fritz, The Big Picture: The Fight for the Future of Movies xv (2018). The ability to control those brand characters and their engagement in new storylines is an asset worth billion to movie studios (which, in turn, they spend many millions developing).

The industry's well-established practice is that one studio cannot use, without authorization, the characters and plotlines of the other studio's franchise, even if it

---

a rule to this Court's decision in *Campbell* that is simply not there.

can give them a new meaning or message. Without a license from Warner Brothers (and J. K. Rowling), Disney cannot produce a new Harry Potter movie just by giving the story a new meaning. Similarly, no other studio could have released, without authorization, a film like the Empire Strikes Back after Lucasfilm released Star Wars: A New Hope by arguing that it infused the story of Luke Skywalker with new messages concerning the conflict between parents and their children, a narrative that was absent from the original work. Godfather II places the story of Don Corleone in a new context — the struggle of an orphan and an immigrant. But that new message did not mean Godfather II could have been produced without authorization from the right-holders in Godfather I. Indeed, with minor exceptions irrelevant to this case,[5] sequels, prequels, and spinoffs are classic examples of derivative works whose creation requires authorization from the right-holder of the original work. 17 U.S.C. § 106(2). Sequels, prequels, and spinoffs are important in other creative industries, including the book and the video game industries, and the same practices are observed there.

Synchronization licenses provide yet another example of industry practices that might be significantly impacted by the outcome of this case. Synchronization licenses "enable[] the licensee to record the copyrighted [musical] work . . . with visual image."

---

[5] This brief does not suggest that every sequel, prequal, or spinoff requires a license. For example, a parody or non-commercial fan fiction, might, under certain circumstances, be considered fair use. *See, e.g.*, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (holding that a spinoff of Gone with the Wind, which was highly critical of the original work, was fair use).

Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 94th Cong., 1st Sess. 926 (1975) (statement of the American Society of Composers, Authors and Publishers). In other words, those licenses permit those who create audio-visual works to incorporate copyrighted music in their work. The need to secure such licenses is well established. It "comes from the 1909 Copyright's Act grant to the copyright proprietor of the exclusive right to 'record' his work." *Id*. Synchronization licenses are commonly used in the movie, TV, advertising, and video game industries.[6] Creators of commercial audio-visual works know that if they do not secure synchronization licenses, they cannot use copyrighted music in their work. *See* Calum Marsh, *Why Don't Some TV Shows Sound the Way They Used To?*, N.Y. Times (Apr. 21, 2021) (discussing limitations on the use of songs when the producers of a TV series failed to secure proper synchronization licenses). For the music industry, synchronization licenses provide a valuable source of income for musicians, generating hundreds of millions of dollars every year.

However, when music is incorporated into an audio-visual work, it is often cropped, modified, and used in a way that is infused with a different meaning or message. Examples are so abundant that they might

---

[6] Here also this brief does not suggest that those licenses are always needed. For example, if the use is short and incidental, non-commercial, or critical of the underlying work, it might be protected by the fair use defense. *See. e.g.*, *Brownmark Films, LLC v. Comedy Partners*, 682 F. 3d 687 (7th Cir. 2012) (holding that the use of a copyright-protected song in a TV show as a parody was fair use). Warhol's use in this case was, however, non-incidental, commercial, and not critical of Goldsmith's work.

be the rule rather than the exception. "We'll meet again" was written by Ross Parker and Hughie Charles as a song expressing hope for the future reunion of people who are now separated. It became extremely popular during the Second World War. But the song also concluded Stanley Kubrick's 1964 cold-war masterpiece film Dr. Strangelove, where its meaning changes to imply that the U.S. and the U.S.S.R. might not be able to avoid meeting each other on the battlefield. In 1987, Pixies' frontman Black Francis wrote the song "Where Is My Mind?" The song was inspired by Francis's experiences while scuba diving, where one might lose one sense of direction. The song was later incorporated in and concluded David Fincher's 1999 modern-classic Fight Club. However, the song's meaning was changed from one about scuba diving to one about someone who loses his sanity. In 1972, Gerry Rafferty and Joe Egan wrote "Stuck in the Middle with You." The lyrics were a dismissive tale of a music industry cocktail party. In 1992 the song was used in one of the most famous and shocking scenes in Quentin Tarantino's debut film Reservoir Dogs, in which a bank rubber taunts and tortures a police officer, giving the song and its reference to being stuck with someone a completely different meaning. In 2020, IBM used a few seconds from this song in a Superbowl commercial promoting the flexibility of its cloud services, giving the song's main line, "stuck in the middle with you," yet another new context and meaning. Suggesting that such new meanings might make the use fair even if unlicensed can thus pull the rug under much of the market for synchronization licenses.

CONCLUSION

For the foregoing reasons, this Court should not rely exclusively on whether or not Warhol's work was transformative but instead consider his decision not to seek a license for his work and the resulting clear market harm that it caused Goldsmith.

Respectfully submitted,

GUY A. RUB
JOANNE WHARTON MURPHY/
CLASSES OF 1965 AND 1973
PROFESSOR OF LAW
THE OHIO STATE UNIVERSITY
MORITZ COLLEGE OF LAW
55 West 12th Avenue
Columbus, Ohio 43210
rub.1@osu.edu

KATHERINE C. FERGUSON
Counsel of Record
KOOPERMAN MENTEL
FERGUSON YAROSS, LTD.
250 E. Town Street
Columbus, Ohio 43215
(614) 344-4840
kferguson@kmfylaw.com

Counsel for Amicus Curiae

August 15, 2022