

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Goldsmith is asking for something remarkable here: She wants the Court to hold that the works of Andy Warhol—universally recognized as a creative genius who pioneered the twentieth century Pop Art movement—are not transformative, and therefore are illegal. Moreover, she wants the Court to reach that conclusion based on a novel legal theory—and on a record where *no one disputes* that Warhol conveyed something unique and distinct from his underlying source material. If Warhol’s degree of creative transformation cannot even satisfy the first fair-use factor, little remains of the fair-use defense for artistic works.

In *Campbell v. Acuff-Rose Music, Inc*, this Court explained that the “central purpose” of the first fair-use factor is to determine “whether and to what extent the new work is ‘transformative.’” 510 U.S. 569, 579 (1994). This factor promotes “breathing space within the confines of copyright” for works that “add[] something new” by “altering the [original] with new expression, meaning, or message.” *Id.* The first factor is then weighed against other factors—including market effect on the original—in a holistic assessment that strikes a balance between encouraging creativity and affording fair compensation to creators. *Id.* at 575-78.

Throughout this litigation, that basic framework has been common ground. But at the eleventh hour, Goldsmith now asks this Court to jettison the transformativeness inquiry altogether. With barely disguised disdain for this Court’s reasoning in *Campbell*, she derides transformativeness as “lexicon” that “entered the [doctrine via] a law review

article,” and says looking for “different meanings” is nothing more than a “fool’s errand.” Goldsmith Br. 2, 39. In *Campbell*’s place, Goldsmith offers her own personal theory of fair use—a copyright-maximalist fantasy never before hinted at in this Court’s precedent. Goldsmith contends that even where a follow-on work indisputably transforms the content of the original, it cannot be deemed “transformative” unless the specific “use” of the follow-on work “*necessarily*” requires “copy[ing] from the original” and does not “substitute[e]” for it in any market. *Id.* at 24 (emphasis added). That theory abandons the Second Circuit’s analysis and contradicts Goldsmith’s position throughout this case. It is untethered from text and precedent, conflates the first and fourth fair-use factors, and, if taken seriously, would suppress vast swaths of material long treated as lawful. Goldsmith’s novel theory must be rejected.

The government weighs in with a new approach of its own—different from Goldsmith’s test and the Second Circuit’s. But the government neither addresses the question presented nor offers a coherent answer to it. The government’s suggestion that this case concerns only the *licensing* of one work in the Prince Series is demonstrably wrong. And even if it were not, the government’s proposed legal rule, to the extent it is discernible at all, effectively rejects *Campbell* by banishing its meaning-or-message inquiry from the fair-use analysis altogether.

Goldsmith and her *amici* also take aim at various straw-man mischaracterizations of *Campbell*’s test. AWF has never suggested that an artist’s “subjective impression” or the mere imposition of a new “style” would be enough to make a follow-on work transformative. Goldsmith Br. 32, 33. Nor would

minor changes to a work’s meaning or message qualify as transformative, or changes that simply shift the work’s medium (like a book-to-movie adaptation). And, even where the follow-on work is transformative, transformativeness must always be balanced against the other factors in the fair-use inquiry. Goldsmith’s contention that it would “devastate” copyright law to apply the message-or-meaning test that has governed for nearly three decades is just wrong.

This Court should reject Goldsmith’s revisionist account of copyright law. Warhol’s Prince Series is plainly transformative under *Campbell*. The decision below should be reversed.

I. *Campbell’s* Meaning-Or-Message Test Is The Governing Rule Under Settled Precedent

1. The fair-use doctrine strikes a balance between (1) “stimulating productive thought and public instruction” by allowing creators to build on existing expression, and (2) protecting “incentives for creativity” through fair compensation to an original creator. Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110 (1990) (“Leval”).

As this Court explained in *Campbell*, the first fair-use factor focuses on the *first half* of that equation—whether the follow-on work is sufficiently novel to qualify as “transformative.” 510 U.S. at 579. The narrow question in this case is how a court should determine what kinds of “alter[at]ions” in the follow-on work can “transform[]” the original under that first factor. *Id.*

Campbell provided critical guideposts for that inquiry: A follow-on work is “transformative” if it can

“reasonably be perceived” to “add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Id.* at 578-79, 582. Just last year in *Google LLC v. Oracle America, Inc.*, this Court re-affirmed *Campbell*’s test—explicitly noting that it would treat Warhol’s own visual art as transformative. 141 S. Ct. 1183, 1202-03 (2021) (citing Warhol’s *Soup Cans* work).

Here, *no one* seriously disputes that Warhol’s Prince Series conveys a fundamentally different meaning or message from its source photograph—not Goldsmith, not the courts below, not the government, not her other *amici*. See, e.g., Pet. Br. 44-46; Meyer Amicus Br. 18. Indeed, while Goldsmith casually derides Warhol’s work as “reproduc[ing] the photograph on the painted canvas,” she offers no substantive argument that they are in fact “the same work [presented] in a different form.” Goldsmith Br. 12, 32 (quoting Pet. App. 25a). Under settled precedent, this is therefore a straightforward case.

2. That explains why Goldsmith’s brief is a barely disguised effort to *overturn* that precedent. Remarkably, Goldsmith calls it “a fool’s errand” to “[a]sk[] if new works are ‘reasonably perceived’ to have different meanings”—even though that is precisely what this Court both said *and did* in *Campbell*. Goldsmith Br. 2; see Pet. Br. 47-48. Goldsmith has no account of that key language in *Campbell* or the comparative inquiry this Court undertook.

To the limited extent Goldsmith discusses *Campbell*, she contorts it beyond recognition. Goldsmith asserts that *Campbell* holds that “whether the new work merely ‘supersede[s] the objects’ of the

original creation” turns on whether the follow-on work “competes as a substitute.” Goldsmith Br. 28, 25. But the full sentence in *Campbell*—which Goldsmith plucks out of context—contrasts whether a work “merely ‘supersede[s] the objects’ of the original creation” with whether it “*instead* adds something new,” by “altering the first with new expression, meaning, or message.” 510 U.S. at 579 (alteration in original) (emphasis added). In other words, *Campbell* makes clear that a work adding a new meaning or message does *not* “merely supersede” the objects of the original for purposes of the first factor.

Goldsmith also misreads (at 45) *Folsom v. Marsh*, 9 F. Cas. 342 (1841). When examining a follow-on work’s “nature and objects”—the historical analogue to factor one—*Folsom* looked to the work’s *communicative effects*. *Id.* at 348. The follow-on work in *Folsom* was not transformative, because although it was styled as an autobiography, it used “verbatim” copies of “the entire contents of particular letters” from the original creator’s collection to “tell the story” of George Washington’s life. *Id.* at 345, 348. Thus, although it could have been characterized as having a different over-arching purpose from the original, the borrowed material conveyed the *same message* in both works—Washington’s own words. *Id.* at 348. And without the copied content, the follow-on work had nothing of its own to say. *Id.*

Goldsmith similarly wishes away *Google*’s key language. Goldsmith asserts (at 42) that “*Google* did not involve changing the meaning of computer code.” But while *Google*’s factual context was, of course, different from this case, *Google* expressly re-affirmed the central test and reasoning from *Campbell*. As the Court explained, a “transformative” use under the

first factor “describe[s] a copying use that adds something new and important” insofar as it “stimulate[s] creativity for public illumination”—including by “altering’ the copyrighted work ‘with new expression, meaning, or message.” 141 S. Ct. at 1202-03 (first quoting *Leval* 1111; then quoting *Campbell*, 510 U.S. at 579). Indeed, *Google’s* paradigmatic example of such a meaning-or-message transformation was Warhol’s *Soup Cans*. *Id.* Goldsmith dismisses the *Soup Cans* illustration (at 43) as “dicta,” but, again, Goldsmith is not free to ignore the parts of this Court’s precedents she dislikes.¹

3. Nor can Goldsmith avoid *Campbell’s* meaning-or-message test by occasionally focusing on the specific licensing “use” of “Orange Prince” in a magazine. Goldsmith Br. 3, 31, 36-37, 56; *see also* OSG Br. 14 & n.2 (similar).

Goldsmith seems to be leaving open the possibility that an artist’s creation of an original work that substantively alters a pre-existing one could satisfy the first fair-use factor because it is genuinely “transformative,” but that the subsequent selling or licensing of that work would *not* qualify as a

¹ That *Google* did not address whether the copied code conveyed a different meaning or message simply shows that the first factor can sometimes be satisfied without a new meaning or message in the follow-on work. *See Campbell*, 510 U.S. at 579 n.11 (noting that “multiple copies for classroom distribution” would satisfy the first factor); *Sony Corp of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454-55 (1984). It does not deny that a new meaning or message is a distinct and sufficient basis for finding a work transformative under that factor. This case, like *Campbell*, focuses on whether and when a follow-on work satisfies the first factor due to transformation in meaning or message. *See* OSG Br. 17 n.3.

“transformative” for purposes of the first factor. That approach makes little sense. The purpose of the meaning-or-message inquiry is to discern the creative alteration in the follow-on work, so as to determine whether that work “adds something new and important,” and thereby “fulfill[s] the objective of copyright law to stimulate creativity for public illumination.” *Google*, 141 S. Ct. at 1202-03 (citing *Campbell*, 510 U.S. at 579, and *Leval* 1111). The Prince Series did not become less creatively “transformative” just because it was subsequently sold or distributed. Indeed, the prospect of commercial gain from a transformative work is often what promotes the “growth in creative expression” that is central to copyright’s purpose. *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1992). That is why *Campbell* itself makes clear that an artist’s intent to sell an otherwise transformative work does *not* make it non-transformative. 510 U.S. at 583-85.

In any event, Goldsmith makes clear (at 31) that in her view, Warhol’s original creation would *not* be transformative under her “necessity” test, because “Warhol could have used any Prince photograph” to create the Prince Series. And the judgment under review here directly implicates whether Warhol’s creation of the Prince Series is transformative, and entitled to the fair-use defense. The district court granted a declaratory judgment in AWF’s favor, at AWF’s request, establishing that all 16 works—not just the one-time licensing of Orange Prince—were fair use. JA34; JA48; JA83; Pet. App. 63a. The Second Circuit vacated that judgment in full, Pet. App. 49a-50a, and Goldsmith’s request for declaratory

and injunctive relief with respect to all 16 works, JA120-21, thus remains live.²

And even as to Orange Prince, the parties and both lower courts consistently recognized that the first factor inquiry turns on whether the work itself—at the moment Warhol created it—was transformative. *See, e.g.*, Pet. App. 13a-28a, 69a-72a. Goldsmith’s late-breaking effort to shift the focus onto a single licensing use is just an effort to distract from the drastic implications of her position.

II. None Of The Proffered Alternatives To *Campbell*’s Meaning-Or-Message Test Works

The Second Circuit, Goldsmith, and the government each offer novel (and conflicting) alternatives to the meaning-or-message test. All three approaches betray *Campbell* and undermine free expression and the purposes of copyright law.

A. The Second Circuit’s Test Violates *Campbell* And Hollows Out The Fair-Use Defense

Goldsmith barely defends the Second Circuit’s approach, which departed from *Campbell* by (1) forbidding consideration of meaning or message, (2) making visual similarity dispositive of the transformativeness inquiry, and (3) considering

² The government (at 14) mischaracterizes the Second Circuit’s decision as adjudicating only the 2016 licensing of Orange Prince to Condé Nast. But its only citation is to the Second Circuit’s analysis of the fourth fair-use factor, which addressed Warhol’s creation of all of “the Prince Series works.” Pet. App. 37a-42a. And the court’s adjudication of transformativeness focused exclusively on that creation—not on anything specific to Orange Prince or the 2016 licensing. *Id.* at 13a-28a.

“purpose” at an impermissibly high level of generality. Pet. Br. 46-53.

Goldsmith contends (at 33) that AWF “mischaracterizes the decision below” as forbidding inquiry into meaning or message, but she ignores the decision’s key language: that a “district judge should *not* assume the role of art critic and *seek to ascertain the intent behind or meaning of the works at issue.*” Pet. App. 22a-23a (emphasis added). AWF pointed to that language five times in its opening brief. Pet. Br. i, 3, 25, 31, 47. Goldsmith does not acknowledge (let alone defend) it even once.

Goldsmith also insists that the Second Circuit did not tie transformativeness to visual similarity, but instead relied on whether the follow-on work “embod[ies] ‘a distinct artistic purpose’ that ‘stands apart.’” Goldsmith Br. 33 (quoting Pet. App. 22a-23a). Again, though, Goldsmith ignores the Second Circuit’s framing of its “purpose” inquiry as a “side-by-side” comparison to determine whether “the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material.” Pet. App. 23a-24a. And Goldsmith offers no defense of recognizability as the touchstone of transformativeness.

Finally, Goldsmith glosses over the ill-defined nature of the “purpose” inquiry. The Second Circuit (and Goldsmith) characterize the purpose of the works here as “portraits of [Prince].” Pet. App. 24a-25a; Goldsmith Br. 32. But that just defines “purpose” in terms of function or visual appearance. If one defines purpose in terms of their communicative meaning or message, then the two works have a different “purpose”—and the Prince Series is undeniably transformative. *See* Pet. Br. 52-

53. Only the latter approach is consistent with *Campbell*.

B. Goldsmith’s New Test Is Misguided And Waived

Instead of seriously defending the Second Circuit, Goldsmith invites this Court to jettison transformativeness altogether, in favor of a brand-new test of her own invention. Drawing from snippets of cases and law review articles, Goldsmith offers up the following, never-before-seen, theory of the first fair-use factor:

A follow-on use is transformative *only if* that use must *necessarily copy* from the original without “supersed[ing] the use of the original work, and substitut[ing] . . . for it.”

Goldsmith Br. 24 (alterations in original) (emphasis added).

By this, Goldsmith appears to mean that a follow-on work is not transformative unless both (1) the copying is “necessary” or “indispensable” to some “distinct end,” and (2) the follow-on work cannot act as a substitute for the original in any conceivable market. *Id.* at 2, 26. In other words, her test for whether a work is “transformative” has little to do with whether the follow-on work actually “transforms” the substance of the original. Even a work that “adds something new” by “altering the first with new expression, meaning, or message,” *Campbell*, 510 U.S. at 579, is *not* transformative unless it meets these two criteria. This Court should reject this extraordinary rewriting of settled copyright law.

1. Goldsmith's new theory is waived. Unlike here, her briefing in the lower courts consistently focused on the works' communicative content, not whether the copying was practically "necessary." Dkt. No. 53 at 33; Goldsmith C.A. Br. 28. And when opposing certiorari, Goldsmith argued that a transformative work "must have a new purpose or character to such an extent that the new work alters the original." BIO 16. Nowhere did Goldsmith hint that she would abandon the decision below, or advert to her new "necessity" test.

It's too late for Goldsmith to propose a rule that she never presented below, and that involves evidentiary premises entirely different from the ones on which this case has been litigated for years. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128-29 (2011); Sup. Ct. R. 15.2. Goldsmith's new test can and should be rejected on this ground alone.

2. In any event, Goldsmith's "necessity" requirement is unmoored from precedent, hopelessly indeterminate, and contrary to fair use's creativity-promoting ends.

First, Goldsmith fails to identify a single precedent from *any* court imposing a "necessity" requirement. Tellingly, when Goldsmith discusses this Court's cases, she vaguely talks around them, and focuses on their discussion of other fair-use factors, such as the fourth factor, which she deems "most important." See Goldsmith Br. 24, 26-28.

Goldsmith has to be imprecise, because her requirement is flatly incompatible with this Court's precedent, including most recently in *Google*. There, Google "used parts of [Oracle's] Sun Java" programming language "to create a new platform that

could be readily used by programmers,” borrowing from the original copyrighted work to make it easier for those users to switch away to Google’s competing one. *Google*, 141 S. Ct. at 1203. Because Google could have developed its own code, a “necessity” requirement would have condemned this borrowing as non-transformative.

Nor can the “necessity” test account for *Google*’s paradigmatic example of transformative use—an “artistic painting” that “precisely replicates a copyrighted ‘advertising logo to make a comment about consumerism.’” *Id.* (quoting 4 Melville Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][1][b] (2019)). *Google* never hinted that Warhol “needed” to use a Campbell’s Soup can. And, under Goldsmith’s rationale, Warhol’s *Soup Cans* would plainly *not* be transformative, because Warhol could have used any other widely known logo—many of which would be altogether unprotected by copyright—to make his broader point. *See* Goldsmith Br. 31 (denying that Prince Series was transformative because “Warhol could have used any Prince photograph”).

A follow-on creator’s need to utilize the original may be a relevant consideration in the broader fair-use inquiry—especially under the third factor’s examination of whether the degree of borrowing was “reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586, 589. But “necessity” cannot be a dispositive, threshold requirement for transformativeness under the first factor.

Second, making necessity a prerequisite would obliterate the fair-use defense as a practical matter. It is *never* truly “necessary” to copy. Even in the examples listed in Section 107’s preamble, copying

might be *beneficial*—but “criticism, comment, news reporting, teaching . . . , scholarship, or research,” and even parody, can all exist without directly copying any content. 17 U.S.C. § 107.

A true “necessity” test would thus overturn countless cases—including those that Goldsmith has previously conceded involved transformative changes. BIO 23-24, 26, 27. Green Day did not “need” to copy the Scream Icon in its video, rather than use a different image or create its own. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1176-77 (9th Cir. 2013). A news report does not “need” to include a particular photo, rather than use a different one or no photo at all. *Núñez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000). Nor is it “necessary” for a documentary to show (instead of blurring out) a copyrighted logo. *Bouchat v. Baltimore Ravens Ltd. P’ship*, 737 F.3d 932, 939-40 (4th Cir. 2013). Goldsmith’s invented “necessity” requirement would dramatically re-shape the law in favor of copyright holders.

Third, Goldsmith’s test is ultimately indeterminate. Any theory of “necessity” must first answer the question “necessary for what?” Goldsmith says (at 21) “some distinct creative end”—but what does that mean? A “creative end” (like a “purpose”) is a shifting concept; and copying can always be described as “necessary” if the “creative end” is defined narrowly enough. It was “necessary” for 2 Live Crew to copy the Roy Orbison song at issue in *Campbell* if the “creative end” was to make a parody that incorporated some of Orbison’s elements. But if the goal is restated as parodying the previous generation’s naiveté, the group could have easily done so using a different wholesome love song—and

certainly without using an identical opening line or bass riff.

Similarly, Goldsmith states (at 26) that, in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), “the Betamax recording device necessarily copied original, copyrighted work.” But copying was only “necessary” in the tautological sense that the product at issue was a *copying device*—it is, of course, “necessary” to copy if your goal is copying itself. If the goal in *Sony* were instead defined more broadly—say, facilitating home access to copyrighted material—then, as *amici* in *Sony* noted, copying was *not* “necessary,” because a consumer could always “buy tapes separately sold by the copyright holder” instead. 464 U.S. at 450 n.33.

These examples highlight that any theory of “necessity” ultimately turns on the legitimacy of the underlying goal. It was “necessary” for the Nation to copy excerpts of President Ford’s memoirs to accomplish its goal of trying to “scoop[]” that material. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562-63 (1985). The problem wasn’t that the copying was “unnecessary,” it was that the goal itself was *illegitimate*. See *id.* at 562 (considering the “propriety of the defendant’s conduct” under factor one). And, it was illegitimate, this Court explained, because the Nation did not seek to *add anything new*, but rather merely sought to usurp the original by “knowingly exploit[ing] a purloined manuscript.” *Id.* at 563.

To determine the legitimacy of the underlying goal, therefore, this Court’s cases have consistently returned to whether the new work “adds something new and important” to the original. *Google*, 141 S. Ct. at 1203. That test provides a guidepost for why

certain kinds of copying are permissible and others not. A “necessity” test, by contrast, simply collapses in on itself—relying on some antecedent (but unexplained) value judgment regarding the appropriateness of a creator’s goals.

3. Beyond necessity, Goldsmith also asserts (at 25)—as part of factor one—that transformative copying must not “compete[] as a substitute” with the original. But that requirement is just a more extreme version of factor *four*, thus conflating inquiries Congress intended to be distinct. *See Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019) (a statutory provision should not be interpreted so as “to duplicate another”).

Injecting factor four into the transformativeness inquiry fundamentally distorts the overall fair-use analysis. Factor one is intended to evaluate the creative contribution of the follow-on work, which is then *balanced against* the potential economic harm to the copyright owner at factor four. *See Campbell*, 510 U.S. at 580-81 n.14. That means sometimes a work will be sufficiently transformative—and important for “public illumination,” *Google*, 141 S. Ct. at 1203—that it will be fair use *despite* competing with the original in some market. The purpose of the four-factor inquiry is to let courts account for such situations by balancing the degree of transformativeness against those market consequences. By double-counting factor four, Goldsmith tilts the fair-use inquiry sharply in favor of the copyright owner, and makes “commerciality carr[y] presumptive force against a finding of fairness”—a result “Congress could not have intended.” *Campbell*, 510 U.S. at 584.

4. Goldsmith’s twin requirements would devastate artistic expression. Requiring artists to

show both “necessity” for copying and the absence of any substitutionary impact—all *within* the first fair-use factor—ratchets up the “transformativeness” inquiry to virtually insurmountable heights, and would severely inhibit creative freedom. Indeed, because Goldsmith’s test is dramatically *more* restrictive than the Second Circuit’s, the consequences explained by AWF and various *amici* would be considerably more pronounced under Goldsmith’s test. *See, e.g.*, Artists Amicus Br. 7-13; Library Futures Inst. Amicus Br. 18-20; Art Law Professors Amicus Br. 10-12; Copyright Law Professors Amicus Br. 15.

Goldsmith has little to say about those consequences. She contends (at 37-39) artists can simply pay for licenses for copyrighted works, but the whole point of the fair-use defense is that there are circumstances where a follow-on creator need not seek a license—in part, because licensors typically place stringent limits on the scope of any follow-on use. *Harper & Row*, 471 U.S. at 549; *see, e.g.*, Sedlik Amicus Br. 31 (“If [Sedlik] does not approve of the [follow-on] message, he will not approve the license.”).

Goldsmith’s only other response to the severe public harm described in AWF’s brief (at 53-57) rests on her artificial distinction between creation and use. Goldsmith Br. 36-37. But, as discussed above, Goldsmith herself makes clear (at 31) that Warhol’s *original creation* would fail her new test. *Supra* at 7. And if the Prince Series works are unprotected by fair use, then galleries and collectors can no longer display

the works. Pet. Br. 55 (citing 17 U.S.C. §§ 106(5), 109(c)).³

C. The Government’s Alternative Approach Is Ill-Defined and Wrong

The government wisely elects not to embrace Goldsmith’s “necessity” test. As the government explains, copying is permissible not only when it is “necessary,” but also when it is “useful in making the second author’s own expression clearer and more effective.” OSG Br. 10. But the government offers no clear test of its own—and the guidance it does offer appears to jettison *Campbell’s* meaning-or-message test.

The government asserts that the factor one inquiry must be “use-specific,” *id.*, and then proceeds to deem the 2016 “licensing” use here non-transformative, because “the commercial licensing of a visual depiction of Prince to accompany an article . . . in a popular print magazine” “served the same purpose that Goldsmith’s own photographs have previously served,” *id.* at 17. But that’s just a legal conclusion without a legal test. What is it about the “use” here that was too similar? Was it the “commercial licensing”? The fact that it was in a “print magazine”? That the magazine was “popular”?

³ Goldsmith suggests (at 36) that although museums would no longer be protected by Section 109(c), they may be able to assert their own fair-use defense based on their curation of Warhol’s works among other Pop Art pieces. But Goldsmith identifies no authority suggesting that museums could lawfully display an illegally created work. And, regardless, her speculation about that novel, hypothesized defense is unlikely to persuade museums (and galleries) to risk draconian penalties by continuing to display cherished works. See Art Inst. of Chicago Amicus Br. 28-37; Rauschenberg Amicus Br. 34-36.

Would licensing Orange Prince for an album cover qualify as a sufficiently transformative use? Or selling copies of Orange Prince in a gift shop? The government’s vague approach ultimately offers no guidance beyond the facts of this case, and would invite chaos in the lower courts.⁴

The crux of the question presented is what degree of creative transformation is sufficient to qualify as transformative for purposes of the first factor. Simply noting that Goldsmith’s and Warhol’s works were put to a similar “use” sheds no light on that question. If the government means to suggest that Orange Prince could not be used to “accompany a magazine article” *regardless* of the degree of creative alteration, that would obviously conflict with *Campbell*’s meaning-or-message test. The *Campbell* inquiry turns on the content of the work itself, not just on what the creator subsequently does with it. Any use-specific approach that *ignores* content cannot be reconciled with this Court’s cases or the underlying purposes of copyright law.

Notably, the government occasionally acknowledges that certain kinds of transformation—such as parody, comment, or criticism—are transformative, even if they are subsequently put to a similar “use” as the original. OSG Br. 10, 16-17, 24. But that just compounds the confusion, because the

⁴ See Eugene Volokh, “*What’s Wrong and What’s Missing in the SG’s Amicus Brief in Andy Warhol Foundation v. Goldsmith*,” Volokh Conspiracy (Sept. 6, 2022, 8:13 AM), <https://reason.com/volokh/2022/09/06/whats-wrong-and-whats-missing-in-the-sgs-amicus-brief-in-andy-warhol-foundation-v-goldsmith/> (quoting scholars criticizing government for offering no way to “decide which kinds of commercializations of the Warhol works are off limits and which are not”).

government offers no justification for why those particular kinds of transformation deserve special treatment.

Indeed, it is black-letter copyright law that follow-on works using the original to convey a fundamentally different meaning or message do not warrant lesser protection simply because their message does not happen to be *about* the source material. 1 Alexandra Darraby, *Darraby on Art Law* § 7:98 (2021) (“The new work does not have to be referential by commenting on, referring to or relating to the original or author . . .”). Copyright law does not elevate certain kinds of messages over others—and the First Amendment would not permit it. There is no sensible reason to say that works that “add something new,” *Campbell*, 510 U.S. at 579, by commenting on an original are transformative, but works that add something equally new by commenting on society are not.

In short, the government offers up a patchwork approach with no coherent foundation. Embracing it here would throw copyright law into disarray.

III. *Campbell's* Meaning-Or-Message Test Is Integral To Balancing Copyright's Competing Values

Even though *Campbell's* factor one meaning-or-message framework has been quoted in hundreds of cases and applied by courts for decades, Goldsmith and her *amici* spend page after page attacking it as an existential threat to copyright protection. Those critiques are rooted in mischaracterization and misunderstanding.

1. *Campbell's* test is not easily satisfied—and even when satisfied, will not lead inevitably to fair use.

Not every minor change in meaning or message constitutes transformation. Inherent in the concept of “transformation” is the notion that such a follow-on work contributes “something *new and important*.” *Google*, 141 S. Ct. at 1203 (emphasis added) (citing *Campbell*, 510 U.S. at 579); Leval 1111. Thus, the follow-on work must be such that the central or overall message of the original work is “transform[ed].” But trivial differences such as adding a character or changing a verse do not transform where the follow-on work still conveys the same core message as the original.

To be sure, there will be challenging cases at the margin, where determining whether a change is sufficient to convey a new meaning or message may “require[] close questions of judgment.” *Campbell*, 510 U.S. at 578 & n.10. But this case—where there is *no dispute* that Warhol’s works convey a different message than Goldsmith’s—is not one of them. *Supra* at 4.

In any event, transformativeness is only one component of the fair-use analysis. *Campbell*, 510 U.S. at 578. In many cases, a transformative work will not be fair use based on considerations properly raised under the other factors. *See, e.g., Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 180-81 (2d Cir. 2018). But that only makes it *more* important that first factor is properly trained on promoting the breathing space essential for “creative ‘progress,’” rather than being subsumed into a factor four inquiry. *Google*, 141 S. Ct. at 1203.

2. Goldsmith trots out an array of hypotheticals intended to show that a meaning-or-message test produces absurd results. Goldsmith Br. 47-55; *see*

also OSG Br. 21-22. But Goldsmith attacks a straw-man version of that test.

Goldsmith asserts (at 47-48) that the meaning-or-message test would “nullify creators’ rights over derivative works,” using Stanley Kubrick’s adaptation of *The Shining* as an example. But the transformation of a book into a movie is a quintessential example of a shift in *form*, not meaning or message.⁵ Indeed, for all of Goldsmith’s wind-up, she does not actually identify any new meaning or message in Kubrick’s film version of *The Shining*; instead, she merely cites (at 48) artistic choices such as “slow-paced long shots,” “awkward silences,” and “jarring music.” Those sorts of stylistic choices might reflect creative contributions, but they do not alter the original’s meaning or message, and thus are unlikely to qualify as transformative under *Campbell*.

The same may be true of a changed ending. See Goldsmith Br. 49. If a new ending really does alter the core meaning or message of the original, then it would be entirely reasonable to describe that new work as “transformative.” But that doesn’t automatically mean it will be fair use. Such a follow-on work would have taken a substantial portion of the copyrighted work. 17 U.S.C. § 107(3); 4 Melville Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][3] (2022). And it may well cause cognizable market harm to the original. See, e.g., *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848,

⁵ Goldsmith is thus wrong to suggest (at 22) that “AWF’s test would devastate derivative-work” rights. Run-of-the-mill derivative works, like book-to-movie adaptations, are changes in form that do not change the core meaning or message of the underlying work.

861 (9th Cir. 2017). Those factors would favor the copyright owner, even if the work is deemed transformative.

Finally, Goldsmith posits (at 43-45) that a meaning-or-message test would let people identically reproduce prior works, and then baselessly claim they have some new meaning. But a judge or jury would see through such gamesmanship, at a variety of stages of litigation. That the defendant lithographer in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), “did not even try to raise fair use,” Goldsmith Br. 45, only highlights that in the real world, manufactured efforts to claim new meaning or message have often been, and will continue to be, futile.

The government similarly suggests that the meaning-or-message test would permit a work that simply “over[lays] new lyrics onto a pre-existing musical composition.” OSG Br. 21-22. That is wrong. A “copyright in a ‘musical work’ protects against unauthorized use of the music alone or of the words alone, or of a combination of music and words.” 1 Melville Nimmer & David Nimmer, *Nimmer on Copyright* § 2.05[C] (2022). So a song that simply copied a musical composition without alteration would plainly infringe the musical work copyright, regardless of the new lyrics. *Cf. Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018).

A similar answer addresses the government’s hypothetical book on politics from 1970 to 2000 that “incorporat[es]” wholesale a book covering 1970 to 1990. OSG Br. 22. The unaltered *sections* of the book would violate the original’s copyright, and have no claim to transformativeness. *Harper & Row*, 471 U.S. at 565 (“[N]o plagiarist can excuse the wrong by

showing how much of his work he did not pirate.”); Level 1112 (courts assess “each challenged passage” rather than “appraise the [challenged work’s] overall character”).

3. Finally, Goldsmith claims (at 47, 51-55) that a meaning-or-message test is unworkable because judges and jurors will misunderstand it, litigants will lie, and the inquiry will spiral into subjectivity. But courts have undertaken a meaning-or-message inquiry for decades without any of the calamitous consequences that Goldsmith predicts.

As the district court below correctly identified, the relevant inquiry is whether the follow-on work can “reasonably be perceived” by an ordinary but informed person to convey a fundamentally different meaning or message from the original. Pet. App. 71a-72a. In resolving that question, the parties may present a range of relevant evidence from the artist, experts, or commentators. Assessing how a reasonable person would react based on such evidence is a common task for a fact-finder in “a variety of doctrinal contexts.” *Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418, 422-23 (2015); *see also* Rauschenberg Amicus Br. 30-32.

Indeed, this case exemplifies how the process is supposed to work. Below, both AWF and Goldsmith adduced evidence about whether a reasonable person would deem the Prince Series transformative. And, applying *Campbell*, the district court held that there was no genuine dispute that the Prince Series was transformative, because it conveyed the “opposite” meaning and message from Goldsmith’s original. Pet. App. 71a.

Ultimately, Goldsmith’s real point is not that *Campbell’s* framework is impossible to apply, but that it must be discarded—because licensors like her should have the final say on whether even genuinely transformative works can ever see the light of day. That view defies precedent and undercuts the First Amendment. This Court should reject any approach that dismisses quintessential works by Warhol—an innovator who blazed new trails for modern art—as contributing nothing in the eyes of copyright law.

CONCLUSION

The Second Circuit’s judgment should be reversed.

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