

No. 21-869

In The
Supreme Court of the United States

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

Petitioner,

v.

LYNN GOLDSMITH, *et al.*,

Respondents.

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

—◆—
**BRIEF OF AMICUS CURIAE
PHILIPPA S. LOENGARD, EXECUTIVE DIRECTOR,
KERNOCHAN CENTER FOR LAW, MEDIA
AND THE ARTS COLUMBIA LAW SCHOOL
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICUS CURIAE*¹

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¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus* or her counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Constitutional purpose of copyright to promote creativity, or clarity in the application of the law.



SUMMARY OF ARGUMENT

The assertion of fair use by Petitioner the Andy Warhol Foundation for the Visual Arts, Inc. (the “Foundation”) concerning the Foundation’s intended use of a print by Andy Warhol (“Warhol”) whose composition is taken entirely from a photograph by Respondent Lynn Goldsmith (“Goldsmith”) poses great risk to Congress’s instruction in Section 107 of the Copyright Act of 1976, and to decades of the Court’s guidance. This is more like the colorization of black and white films that the Copyright Office has determined is a derivative, not a fair, use than it is a work covered by Section 107. *See* Copyright Registration for Colorized Versions of Black and White Motion Pictures, 52 Fed. Reg. 23443, 23445 (June 22, 1987).

The concept of transformativeness as a determining factor in a fair use analysis was first introduced in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). But the Foundation’s broad claim to fair use where there is any amount of transformation of a photograph would divert the analysis, the purpose and character of the use under Section 107’s first factor, away from the Congressional proscription. More disruptively, it would be unmanageable and would undermine the legislative balance between expression and copyright protection. The Constitution authorizes a

copyright system that incentivizes individual creators in order to enrich our cultural ecosystem, while at the same time protecting the rights of the individuals whose labor forms the bedrock of two centuries of copyright law. The natural consequence of the Foundation’s position would be to render photographers whose works are modified, recast or adapted in almost any manner powerless to enforce their copyright so long as a scintilla of new meaning could be perceived, something presciently noted by a dissent in the last term. *See Google, LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1214 (2021) (Thomas, J., dissenting) (addressing similar concern for computer code: “The result of this distorting analysis is an opinion that makes it difficult to imagine any circumstance in which declaring code will remain protected by copyright.”).

This is not a case, as others have suggested, pitting artist against artist, or creation against restraint of speech. Both Goldsmith and Warhol are or were accomplished creators, but they also shared the practical goal of productive economic use of their creations, and there is a method of resolving this dispute that allows both to flourish. Affirming the court of appeals allows all artists to continue both to create and to receive appropriate remuneration—and credit—for their services. By contrast, a ruling for the Petitioner would remove all barriers to one visual artist exploiting another artist’s work without either compensation or acknowledgement. That is not the balance that Congress struck in enacting Section 107.

The Court should affirm the court of appeals and hold that an artist who copies another work of visual art in its entirety (or nearly so) and makes it the basis of a secondary work must offer some degree of comment on the original work in order to show a change in the purpose or character of the use required by Section 107.

◆

ARGUMENT

A. Lower courts' focus on the meaning or message since *Campbell* has created analytical chaos for visual art.

The Framers made explicit only specific powers of Congress in Article I of the Constitution. Copyright is among those enumerated few. Congress has continually strengthened the nation's copyright laws initially authorized by Art. I, Section 8, Cl. 8 over the past two-plus centuries, “[t]o promote the progress of science and useful arts,” affirming a commitment to incentivizing creativity and culture. U.S. CONST. art. I, § 8, cl. 8. Not wishing to create a monopolistic system, however, Congress has imposed limitations and exceptions on these rights.

The doctrine of fair use allows secondary users to use otherwise copyrighted works without penalty. The concept was codified in Section 107, but the origin of an exception to copyright allowing later creators the freedom to use works has its roots in 19th century law and tradition. In *Folsom v. Marsh*, Justice Story laid an

outline for the unlicensed use of copyrighted works in certain situations. *Folsom v. Marsh*, 9 F. Cas. 342, 348–49 (C.C.D. Mass. 1841). But the Court noted that the exception must be treated cautiously lest it allow an avalanche of users, each reasonable, yet together eroding all the rights of the original author. *Id.* at 349. The points enunciated in *Folsom* developed into the four-factor test of Section 107. Since its adoption in 1978, the fair use doctrine has been significantly shaped by the Court. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539 (1985); *Feist Publications, Inc. v. Rural Tel. Service Co.*, 499 U.S. 340 (1991).

Campbell constituted a watershed moment in this jurisprudence. There, the Court referenced the Hon. Pierre N. Leval’s article *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990) and the judge’s recharacterization of the purpose and character analysis that had traditionally held sway. Whereas previous cases looked at whether the secondary work superseded the original creation, the Court allowed for a second possibility that might permit the secondary work to be considered a fair use—the infusion of new meaning or message. *Campbell*, 510 U.S. at 579. The Court did not define the addition of new meaning or message as the *exclusive* avenue to fair use, however; nor did the Court reach the application of this test. Lower courts have struggled in the interim to determine whether artists’ works would qualify for the fair use exception when analyzing meaning or message in place of the prior

inquiry into the purpose or character of the works. In recent years, particularly in the visual arts, the first factor has taken on increasingly more importance, and become determinative in a majority of cases. See Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law* 22 STAN. TECH. L. REV. 163 (2019).

Since *Campbell*, courts have frequently turned to the first factor of Section 107 to determine whether the facts weigh in favor of fair use. Even in *Campbell*, the Court recognized that 2 Live Crew’s song might qualify as transformative because it “comment[ed] on the original or criticiz[ed] it, to some degree.” 510 U.S. at 583. The Court emphasized that the song, “Pretty Woman,” which humorously comments on the naiveté of the original Roy Orbison hit, “Oh, Pretty Woman,” “necessarily springs from recognizable allusion to its object through distorted imitation.” *Id.* at 588. Transformative-ness can constitute a new purpose and character—*Campbell* has already so held. Yet transformative-ness cannot be an outcome determinative factor for the simple reason that Congress chose not to make it one. This proper balance is consistent with Congressional purpose as expressed in the statute. While *Campbell* noted the suitability of parody to meeting the comment or criticism element (in an example that was transformative), parody is not a statutory element.

Interpreting the meaning or message standard in the context of visual art without that balance has bedeviled the courts. Compare *Gaylord v. U.S.*, 85 Fed.Cl. 59, 68–69 (2008) (“Mr. Alli, through his photographic talents, transformed [an outdoor statue’s] expression

and message, creating a surrealistic environment with snow and subdued lighting where the viewer is left unsure whether he is viewing a photograph of statues or actual human beings.”), *with Gaylord v. U.S.*, 595 F.3d 1364, 1373 (Fed. Cir. 2010) (“Nature’s decision to snow cannot deprive Mr. Gaylord of an otherwise valid right to exclude.”).

More recently, a district court in the Ninth Circuit held that the book, *Oh the Places You’ll Boldly Go!*, a Star Trek adaptation of Dr. Seuss’ *Oh the Places You’ll Go!*, was “no doubt transformative” since it “combine[d] into a completely unique work the two disparate worlds of Dr. Seuss and *Star Trek*.” *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 256 F. Supp. 3d 1099, 1106 (S.D. Cal. 2017). The district court focused on the differences across the narratives of the two stories and accompanying illustrations. *Id.* By contrast, on appeal, the Ninth Circuit in finding for the plaintiff focused on a requirement to comment *on the original* rather than an altered substantive meaning or message of the work. New expression by itself was not sufficient to be deemed transformative, and recontextualizing on its own was not transformative. *Dr. Seuss Enters., Ltd. P’ship v. ComicMix Ltd. Liab. Co.*, 983 F.3d 443, 453–54 (9th Cir. 2020).

1. Determining meaning or message cannot be done consistently.

The meaning and message standard makes this vacillation a constant possibility. No one person’s

interpretation—whether by district court judges or juries—is more valid than another’s. Courts are ill-suited to make value judgements about creative works, and there has never been a consensus on an alternative. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“[i]t 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”). A jury is no more competent to make this determination.

Courts and litigants attempt to resolve this conundrum with evidence about meaning, but such evidence does not actually solve the problem. One evidentiary option is testimony from the artists themselves,² but this can reflect attorney preparation as much as artistic intent. Artists themselves often intend to communicate multiple meanings through their work. To make matters even more complicated, many artists decry the need to ascribe a meaning or even *any* meaning or message to their work. See *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013). Conversely, granting the alleged infringer a safe haven from liability by identifying any alternate meaning or message would frustrate the purpose of the law, and courts have been divided about how to treat authors’ own testimony. Compare *Cariou*

² For example, in *Blanch v. Koons*, the court’s decision was influenced by Jeff Koons’s testimony: “Koons is, by his own undisputed description, using Blanch’s image as fodder for his commentary on the social and aesthetic consequences of mass media.” *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006).

v. Prince, 784 F. Supp. 2d 337, 349 (S.D.N.Y. 2011) (holding the works were not transformative based upon the artist testifying that he did not “‘really have a message,’ and . . . was not ‘trying to create anything with a new meaning or a new message’”), *with Cariou*, 714 F.3d at 706–07 (disagreeing that “we must hold Prince to his testimony”; instead ruling that, “[w]hat is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work.”); *compare also Brammer v. Violent Hues Prods., LLC*, 1-17-CV-01009, 2018 WL 2921089 (E.D. Va. June 11, 2018), rev’d and remanded, 922 F.3d 255 (4th Cir. 2019) (defendant’s purpose for using the original work was “informational” in contrast to plaintiff’s “promotional and expressive” purpose for taking the photo), *with Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 263 n.3 (4th Cir. 2019) (reversing, and focusing on “reasonable observer,” not “subjective intent”).

Another option is to provide the judge or jury with competing experts, each testifying as to the meaning conveyed. This happened in the lower courts in the present case.³ Yet art is often ambiguous, and its “meaning” or “message” may prove impossibly elusive. Well-qualified experts acting in good faith—to say nothing

³ *See also Rosen v. Martin*, CV 12-0657 ABC (FMOx), 2012 WL 12845103, at *3 (C.D. Cal. June 7, 2012) (“For their fair use defense, Defendants claim they will present expert testimony that the autographs on the photos make them transformative works, a form of fair use that could defeat Plaintiff’s infringement claims.”).

of judges and juries—can reach dramatically different conclusions about a work’s meaning.

An example outside of litigation proves the point. In 2001, Rotterdam’s Boijmans Van Beuningen Museum hosted an exhibit of works by Hieronymus Bosch. That exhibit had two curators, Paul Vandebroek and Jos Koldewey, who disagreed with each other about the message and meaning of Bosch’s work. Vandebroek “contends that Bosch was the first Netherlandish artist to present a secular vision of society[,]” and he reported that “[to] our eyes, Bosch was an incredibly unpleasant man. His women are harlots or witches, and his paupers, peasants, and beggars seem to deserve their sorry lot.” Brigid Grauman, *Conflicting Interpretations of Bosch*, W.S.J. (Oct. 11, 2001), <https://www.wsj.com/articles/SB1002762724895503160>. Koldewey responded: “Utter nonsense!” He viewed Bosch “as a deeply religious man” and objected: “We cannot conclude from his paintings that Bosch hated women. . . . And if he painted cripples, it was because he wanted to show society’s outcasts.” *Id.* Under Vandebroek’s interpretation of Bosch—but not Koldewey’s—an artist who added somber devotional language to a Bosch painting would have changed its meaning or message from secular to religious.

Accordingly, Vandebroek and Koldewey assigned a different “meaning or message” to Bosch’s specific artwork—even his most famous work, *The Garden of Earthly Delights*. Vandebroek described the central panel as “a depiction of what paradise might have been if Adam and Eve hadn’t spoiled it[,]” whereas

Koldweij believed that it “shows the dangers of the world they lived in, the ‘false paradise’ promised by unbridled sexual pleasure.” *Id.* Predictably, the two co-curators also reached drastically different conclusions about certain secular panels, with Vandebroek describing his own co-curator’s analysis as “Ridiculous!” *Id.* Relevant for present purposes, the expert testimony proffered in this case to the district court also diverged; adjudicating those competing opinions misses the real point of Section 107.



Heironymus Bosch, *The Garden of Earthly Delights Triptych*, Image Copyrighted ©Museo Nacional del Prado

The discord between experts does not merely render expert testimony an inadequate solution; it demonstrates why the “meaning or message” test fails all artists, including those who would borrow from preexisting works. If two co-curators at a major museum cannot agree on the meaning of *the artwork they are exhibiting together*, artists cannot reasonably be

expected to intuit whether or not their planned use of preexisting art will be deemed to have sufficiently changed the original meaning or message.

The “meaning or message” standard provides no reliable guidance, but it imposes a significant cost: subsequent artists risk a monetary judgment if they guess incorrectly. Under the preponderance of the evidence standard, the opposing expert (or other evidence of meaning) need only be slightly more convincing. Moreover, because so much art is reasonably susceptible to multiple interpretations, very few suits could be determined without a trial on the merits, burdening the courts and all parties.

Another concern with focusing the first factor’s analysis on the allegedly infringing work’s “meaning or message” is that *any* transformation can be argued to have changed an artwork’s meaning. This has the potential to decimate an artist’s statutory derivative work right, one of the bundle of rights contained in Section 106 which have been described as “fundamental” to copyright law. H.R. Rep. No. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674. Photographs, due to their born-digital nature, are perhaps the most easily manipulated of all art forms. Moreover, the creativity involved in documentary and portrait photos is often unperceived by a layperson, who may assume their meaning or message to be mere conveyance of information, and deem any change to be fair use. Copyright law, however, is not subject to the layperson’s misconceptions about photography. Rather photographs with the requisite originality, an admittedly

low threshold, receive all the exclusive rights outlined in Section 106. *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (acknowledging that there is “no doubt that the constitution is broad enough to cover an act authorizing copyright of photographs”); *see also Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1074 (9th Cir. 2000) (“Courts as well as photographers have recognized the artistic nature of photography. Indeed, the idea that photography is art deserving protection reflects a longstanding view of Anglo-American law”); *see also* 1 DAVID NIMMER, NIMMER ON COPYRIGHT § 2A.08 (2022) (“almost any photograph may claim the necessary originality to support a photograph merely by virtue of the photographers’ personal choice of the rendition of the image, the subject matter, or the precise time when the photograph is taken.”).

B. Visual art warrants a simple test focused on the statutory language of purpose and character.

Congress explicitly directed courts in Section 107(1) to look at “the **purpose** and character” of the secondary use. (Emphasis added.) The preamble of 107 states that fair use is permissible “for **purposes** such as criticism, comment, news reporting, teaching . . . , scholarship or research[.]” 17 U.S.C. § 107 (emphasis added). “Purpose” is presumed to have its plain meaning unless otherwise noted. *See United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543 (1940); *see also Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004); *Bellino v. JPMorgan Chase Bank, N.A.*, No. 14-cv-3139 (NSR),

2015 WL 4006242, at *8 (S.D.N.Y. June 29, 2015). Here, the word purpose is used twice, in concert, and clearly with the same meaning. Purpose means “the reason for which anything is done, created[.]” *Purpose*, COLLINS ENGLISH DICTIONARY (13th ed. 2018). This definition encompasses both creative motivation and commercial purpose. Courts are entirely capable of looking at the reason for the creation of a secondary work of art in light of the first sentence of Section 107, from which this first factor should not be removed.

The list of purposes for which a visual work might incorporate another in a way that constitutes fair use need not be exhaustively compiled because they share important commonalities. Chiefly, they would all relate back to the original work specifically. Courts could look at what the purpose of each work is and ensure that those purposes differ, if there is to be a finding of fair use.

In the present case, Warhol’s print had the purpose of conveying the visage of rock star Prince in precisely the same composition as Goldsmith’s photograph. Protecting Goldsmith’s right to control her image is in keeping with the objective standards established in Section 107; whether something is criticism or comment, or, for example, the subject of a class, a news report, or a book or film used for educational purposes rather than entertainment can be easily determined without expert training. *See Campbell*, 510 U.S. at 578–79; *TCA Television Corp. v. McCollum*, 839 F.3d 168, 179 (2d Cir. 2016) (observing that “the uses

identified by Congress in the preamble to § 107—criticism, comment, news reporting, teaching, scholarship, and research—might be deemed most appropriate for a purpose or character finding indicative of fair use” (internal quotation marks omitted)). The focus of this factor is whether the use “merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative.” *Fioranelli v. CBS Broad. Inc.*, 551 F.Supp.3d 199, 229 (S.D.N.Y. 2021) (quoting *Campbell*, 510 U.S. at 579). *Campbell*’s allowance of the possibility that transformativeness alone can support fair use should not be interpreted to rewrite the statute to *require* subjective transformativeness or to allow the first factor of a fair use analysis to subsume all other factors.

Many courts have declined to consider the meaning and message of a work in a transformative use inquiry, choosing instead to focus on the purpose and character of that use. *See Ringgold v. Black Entm’t TV, Inc.*, 126 F.3d 70, 79 (2d Cir. 1997) (the use of Faith Ringgold’s story quilt in a TV show served the same decorative purpose as the original work, weighing against fair use); *see also Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014) (enabling full text search of books was transformative because the feature created a different purpose apart from the original author’s intentions); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (the

use of images originally intended for promotional posters served a different, biographical purpose which weighed in favor of fair use).

The better-reasoned opinions understand that allowing small transformations to overwhelm the four factors of Section 107 is a mistake. *See, e.g., Dr. Seuss Enter., L.P.*, 983 F.3d 443 (recontextualizing Dr. Seuss’s book into a Star-Trek adaptation did not comment on the original work or Dr. Seuss’s style, and thus did not weigh in favor of fair use); *Gaylord*, 595 F.3d at 1373 (holding that a photograph of the Korean war memorial made into a stamp did not qualify as fair use of the original sculpture, in part, because “the stamp did not use The Column as part of a commentary or criticism”); *Morris v. Guetta*, No. LA CV12-00684 JAK (RZx), 2013 WL 440127, at *5 (C.D. Cal. Feb. 4, 2013) (the work of appropriation art did not have a purpose or character that weighs in favor of fair use because “there must be some showing that a challenged work is a commentary on the copyrighted one, or that the person who created the challenged work had a justification for using the protected work as a means of making an artistic statement”); *McGucken v. Newsweek, LLC*, 464 F. Supp. 3d 594, 606 (S.D.N.Y. 2020) (“the mere addition of some token commentary is not enough to transform the use of a photograph when that photograph is not itself the focus of the [commentary]”).

In order to give artists, attorneys and courts clear guidelines, the Court should mandate that appropriation art—where one piece of copyrightable work is necessarily and substantially copied—comment on the

original work in order to show a change in the purpose or character of the use. This standard is easier for artists to understand. As noted below, mandating that a secondary artist have a reason for choosing a specific work to reference will not impede their creativity. As in this Court's opinion in *Google*, 141 S. Ct. 1183, which narrowly construed its reasoning to cases involving computer code, this requirement can be limited to cases of appropriation art.

Indeed, a very recent opinion from the Ninth Circuit makes the point, albeit unintentionally, even when grappling with the extent of transformation. In *McGucken v. Pub Ocean Limited*, the court of appeals reversed a district court's finding of fair use of photographs of Death Valley after a rare rainstorm in those "lucky, magically strange, and even eerie minutes" in a desert just after the rain. *McGucken v. Pub Ocean Ltd.*, No. 21-55854, 2022 WL 3051019, at *2 (9th Cir. Aug. 3, 2022) ("When a copyrighted work is used simply to illustrate what that work already depicts, the infringer adds no 'further purpose or different character.'"). After the photographer (McGucken) posted his images to Instagram, several newspapers and periodicals approached him to license the work, which he did. The Defendant, a publisher, posted an article entitled, "A Massive Lake Has Just Materialized In The Middle Of One Of The Driest Places On Earth," and reprinted twelve of McGucken's photographs. Examining the first factor of Section 107, the court of appeals came right to the point: "The article does not present McGucken's photos in a new or different light. It uses

them for exactly the purpose for which they were taken: to depict the lake.” *Id.* at 5. While the court of appeals couched much of its analysis in terms of transformation, in the actual application the court was properly focused on the purpose and character. There may be some hypothetical use incorporating McGucken’s images, or merely a portion of them, that would satisfy Section 107, but Pub Ocean’s use did exactly what Warhol’s did: “to depict [Prince]” at a moment that was, by definition, unique, selected by the photographer, and fully deserving of copyright protection.

1. The Foundation’s analysis would gut protection for photographs.

The importance of copyright protection also stems from the reciprocity between photographers and other artists, such as Andy Warhol. Both Warhol and the photographer mutually benefit from licensing; photographers rely on income from licenses to continue to create, and inversely, without a robust licensing market, appropriation artists have less access to source images that oftentimes, as is the case here, inform many aspects of the subsequent work. *See* Preliminary Expert Report of Professor Jeffrey Sedlik submitted for *Warhol v. Goldsmith* at the district level:

photographers, like other creators, typically rely on both primary and derivative markets for their works. The creation of a photograph is often only the first event in a long series of events throughout the copyright life of that photograph. Revenue (if any) initially

generated by the photographer upon the creation of the photograph is often insufficient to provide an incentive for the photographer to create new works. Instead, photographers and their heirs expect, plan for, and depend upon myriad opportunities to monetize their works in the diverse, global, derivative markets for photographs.

The Foundation illustrates the risks of allowing the misconception that photographs are interchangeable. JA 292 (Sedlik expert report). It argues that Warhol's intent entirely supplanted Goldsmith's, although the contested print remains recognizably hers. The Foundation's observation that other artists made front-on photographs of Prince merely confirms the distinctiveness of Goldsmith's work. Her photograph shares the fundamental essence of the Warhol print in a way that the other front-on photographs of Prince do not. *See* Petitioner's Brief 15 (Goldsmith), 16–17 (other), 19 (Warhol). Warhol's art is fundamentally derived from Goldsmith's—yet the Foundation implies that Warhol simply needed clear documentation about the angles of Prince's face, and Goldsmith happened to have the information he sought. There simply is no depiction of Prince equivalent to Goldsmith's, yet the Foundation cites *Feist* as though Goldsmith merely printed the musician's telephone number. If Goldsmith were to lose her licensing rights through a “meaning or message” argument, *no* photographer can be assured of meaningful copyright protection, gutting not only his or her primary right to exploit that specific image, but also his or her derivative work

right. *See Google*, 141 S. Ct. at 1214 (Thomas, J., dissenting) (“difficult to imagine any circumstance [that] will remain protected by copyright.”).

The nature of the licensing market for photographs, although connected to purpose and character, also deserves to be weighed as part of the fourth statutory factor in the fair use analysis. Considering the potential adverse impact on photographers and licensors of allowing secondary artists to utilize original works without obtaining a license militates against a finding of fair use. *See Harper & Row Publishers*, 471 U.S. at 568 (stating that widespread use that “adversely affects” the market negates a finding of fair use); *see also VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 744 (9th Cir. 2019) (internal quotations omitted) (even though plaintiff “licens[ed] only a handful of photos for secondary uses” the licensing market was “more than hypothetical”).

C. Focus on the purpose and character of works of visual art rather than meaning or message supports free expression.

Interacting with, and borrowing from, prior works is an essential aspect of visual art. Indeed, it is canonical. Among the short list of the greatest painters ever is Diego Rodríguez de Silva y Velázquez, and *Las Meninas* is his crowning masterpiece. The painting depicts the Infanta Margarita—daughter of King Philip IV, Velázquez’s chief patron—and her attendants. Velázquez himself stands to the left of the frame

looking directly at the viewer, painting a canvas whose front cannot be seen. At the rear of the room, King Philip and Queen Mariana can be seen in a mirror, as though they are the viewers seeing their reflection from afar.



Diego Rodríguez de Silva y Velázquez, *Las Meninas*,
Image Copyrighted ©Museo Nacional del Prado

The room is lined with paintings, which arrives at the point here. The Cuarto del Príncipe in the Alcázar of Madrid displayed copies of the portrayals by Peter Paul Rubens of Ovid's *Metamorphosis* by another

artist, portrayals that recognizably, but hazily, can be seen on the walls of the room depicted as a studio in *Las Meninas*. Would this be infringement of Rubens by Velázquez? Of course not. The purpose and character of *Las Meninas* is not to depict Ovid's stories with images slavishly based on Rubens's works. The purpose of *Las Meninas* is to depict the king's family but also announce Velázquez as the greatest painter in the world, greater still than Rubens whose works held a place of prominence in his patron's chamber. Protecting the right of photographers like Lynn Goldsmith would pose no threat were this great icon of art history created today. The simpler purpose and character test advocated here is no threat to that critical expressive value.

Efforts to propose counterexamples of classic examples of art history offered by various *Amici* are not persuasive. One set of *Amici* noted that Vincent Van Gogh had made twenty-one paintings "based on" works by Jean-François Millet. Brief of Art Institute of Chicago *et al.* at 13–14. The brief reproduces one such example side by side.



Van Gogh, *First Steps, after Millet*



Jean-François Millet, *First Steps*

Van Gogh's inspiration by Millet is undeniably central to the evolution of his work. See Alexandra R.

Murphy, *et al.*, *DRAWN INTO THE LIGHT: JEAN-FRANÇOIS MILLET* (Yale 1999). Yet even assuming Millet's work were copyrighted when Van Gogh made his, Van Gogh would not be vulnerable to an infringement claim—and not because his work has a different meaning or message. Van Gogh would be clear of liability because it could barely be considered a copy in the first instance, and its purpose and character is readily distinguishable in a manner that a district court judge could determine at the threshold stage. The central tree in each is different; Millet's is sparse and denuded, while Van Gogh's is bursting with leaves. The trunks branch in different directions. Millet's fence carries off the frame to the right; Van Gogh's is actually a gate through which the space behind can be seen at the right edge of the image. Millet's wheelbarrow is square-fronted, its contents partially visible, while Van Gogh's wheelbarrow is angular and articulated in the front, its load heaped on top. What is the meaning or message of each image? They could be the same; they could be different. Purporting to reach a definitive conclusion would be arbitrary, which is why the inquiry is doomed to fail.

The reasoning of *Kienitz v. Sconnie Nation LLC* accords with this approach. While the allegedly infringing work does reproduce the face of its subject, arguably like Warhol's print, the distinct purpose is plain: to mock a politician for attending a party, a classic example of protected political speech whose purpose is identifiably different from the journalistic purpose of the original. See *Kienitz v. Sconnie Nation*

LLC, 766 F.3d 756, 760 (7th Cir. 2014) (unlike Warhol’s use of Goldsmith’s photo, “by the time defendants were done, almost none of the copyrighted work remained.”).

Adjusting a currently-inflated fair use defense does not mean appropriation art will end; it simply means many appropriation artists will need to obtain licenses for some of the art they use,⁴ just as artists must also buy their canvases or camera lenses—and just as Warhol did.

Warhol was no stranger to the licensing market. He obtained copyright permission for his use of Mickey Mouse and other cartoon characters for his 1981 *Myths* series. By the 1970s, most of his screen prints were based on his own photographs, and he took an active hand in how his subjects were depicted, directing women to wear white makeup to compensate for the flash, or when props were involved, instructing sitters to move them according to his preferences. Richard B. Woodward, *Instant Andy Instant Art*, in *ANDY WARHOL*

⁴ Collage artists would also be protected. If an appropriation artist creates a collage that uses entire works by other creators, as in Richard Prince’s Canal Zone series, the secondary artist frequently changes the work in substantial ways. Courts may also find that a collage has a different purpose than the original work. If they do not, a court may still determine that the use is a fair one based on the other three factors favoring the appropriation artist. For instance, a collage may not pose the market harm to the original work that other types of reproductions do. It is true that the third factor would, in all likelihood, weigh in favor of the original artist, but this just reinforces Congress’s desire for those who take entire works to obtain a license from the original artist.

POLAROID 1958–1987 9, 11 (Reuel Golden ed., 2017). Warhol noted that his Polaroid camera “dissolves the wrinkles and imperfections,” and agreed that the Polaroid’s output of color seemed custom-made to his art. Barry Binderman, *Modern “Myths”: Andy Warhol in ART TALK: THE EARLY 80S* 14, 17 (Jeanne Siegel ed., 1988). The need for a license did not have any detrimental effect on Warhol’s creativity, but it did protect the creative works of others.

Warhol also created many works of appropriation art whose purpose and character are easily distinguished and for which the Foundation would have little trouble establishing fair use. For example, Warhol’s *Van Heusen 356* (1985) was a screen print featuring a 1950s promotion of Ronald Reagan advertising a shirt that would not wrinkle, and Warhol’s *Vote McGovern* (1972) appropriated a photograph of Richard Nixon from a *Newsweek* cover (McGovern’s opponent in that year’s Presidential election) dyeing Nixon’s face green and blue akin to the Wicked Witch of the West from the *Wizard of Oz*. Stated succinctly: *Van Heusen 356* was not for the purpose of selling shirts (30 years later, no less) and *Vote McGovern* was not for the purpose of selling *Newsweek* copies, or encouraging votes for Nixon.

In the present case, Warhol and Goldsmith are not adversaries; the question here is the Foundation’s maximalist view of other artists’ work’s availability, and the Foundation’s dismissive treatment of photographs as creative works entitled to protection. The Foundation should instead be guided by its own

namesake: as discussed above, when Warhol himself perceived a need to obtain a license, he did not refrain from creating art; he either obtained a license or created an underlying photograph himself. Indeed, he had a license to use the Goldsmith photograph for the magazine image at issue here (because Condé Nast wished the image Warhol created to look a certain way and also understood the importance of going through the correct channels to obtain a reference work), and his creativity was clearly not stifled. Focusing on the purpose and character of the works at issue will not eviscerate the fair use defense, nor will it disincentivize artists to create. It will allow one group of artists to receive fair compensation for the use of their works while allowing all artists' creativity to flourish.

◆

CONCLUSION

Whether the meaning and message of two artworks differ should not be the basis of a fair use analysis. Congress carefully chose the words purpose and character as the determinative component of the first of four factors. For the foregoing reasons,

Amicus respectfully submits that the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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