No. 21-869

In the Supreme Court of the United States

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 FOR RESPONDENTS

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QUESTION PRESENTED

Petitioner frames the question presented as follows:

Whether a work of art is "transformative" when it conveys a different meaning or message from its source material (as this Court, the Ninth Circuit, and other courts of appeals have held), or whether a court is forbidden from considering the meaning of the accused work where it "recognizably deriv[es] from" its source material (as the Second Circuit has held).

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BRIEF FOR RESPONDENTS

STATEMENT

Every day, novelists strike gold selling film rights to Hollywood. Musicians license songs for commercials. Photographers license photographs for magazines, calendars, and news stories. Comic-book writers beget cartoons. To all creators, the 1976 Copyright Act enshrines a longstanding promise: Create innovative works, and copyright law guarantees your right to control if, when, and how your works are viewed, distributed, reproduced, or adapted. Creators and multi-billion-dollar licensing industries rely on that premise.

Copyrights have limits. Section 107 of the Act codifies the common-law fair-use doctrine, an affirmative defense against infringement. The contours of fair use have long been clear. Courts determine whether secondary uses are fair by holistically balancing four factors: whether the new use embodies a different "purpose and character" from the original; the nature of the original work; how much, and how significantly the new use copies; and the potential market impact on the original. That test encourages creative works that stand apart from original works, while preventing copycats from shortcutting ingenuity.

Petitioner Andy Warhol Foundation (AWF) would throw the traditional fair-use test overboard. AWF isolates one fair-use factor, "the purpose and character of the use"—in the Court's shorthand, a "transformative use." According to AWF, infringing works are transformative, and presumptively fair use, if they add new meaning or message to the original.

But the Act does not refer to "new meaning or message." From the common law onward, adding new meanings to original works has never absolved copiers of liability for infringement. This Court and others have instead asked whether copying is necessary to accomplish some distinct end, such that the new use stands on its own without substituting for the original. Parody, news commentary, and criticism are paradigmatic examples where some copying is necessary for the secondary works to exist. Those distinct purposes usually prevent secondary works from supplanting originals.

AWF's meaning-or-message test is completely unworkable and arbitrary. Asking if new works are "reasonably perceived" to have different meanings is a fool's errand. Creators, critics, and viewers disagree about what

works mean. Nor could AWF's test apply to many copyrightable works—like marine charts—that harbor no hidden depths.

AWF's test would transform copyright law into all copying, no right. Altering a song's key to convey different emotions: presumptive fair use. Switching book endings so the bad guys win: ditto. Airbrushing photographs so the subject conforms to ideals of beauty: same. That alternative universe would decimate creators' livelihoods. Massive licensing markets would be for suckers, and fair use becomes a license to steal.

Under established principles, this is a classic case of nontransformativeness. Respondent Lynn Goldsmith, a renowned photographer, took a distinctive studio photograph of Prince. In 1984, *Vanity Fair* commissioned Andy Warhol to use Goldsmith's photograph to create an illustration of Prince for an article. No one thought Warhol could appropriate Goldsmith's photograph without permission. *Vanity Fair* paid Goldsmith $400 for a license and credited her photograph as the source for Warhol's illustration, "Purple Prince," which Warhol apparently created as part of the "Prince Series"—16 silkscreens and sketches of Prince.

Fast forward to 2016. Warhol had long since passed away; Prince suddenly died. *Vanity Fair*'s parent, Condé Nast, wanted to rerun Purple Prince. AWF offered other Prince Series images; Condé Nast chose Warhol's "Orange Prince." That use—the only one at issue—substituted for Goldsmith's photograph in the same magazine market. Magazines depicting Prince could choose between Warhol's and Goldsmith's images. Same source photograph as Purple Prince; same publisher; same use—

yet, this time, no credit or payment to Goldsmith. Copyright law cannot possibly prescribe one rule for purple silkscreens and another for orange ones.

Under AWF's test, this case becomes a manipulable battle of opinions. In AWF's view, because Goldsmith testified that Prince seemed "vulnerable" but art critics opined that Warhol made celebrities appear "iconic," Warhol's versions are transformative. Pitting Goldsmith's purported subjective intent against critics' decades-later assessment of Warhol's oeuvre compares apples to oranges and raises questions sure to fuel endless litigation. If Goldsmith says Prince looked "iconic" or hired experts to so testify, does the outcome change? If newly discovered Warhol diaries reveal he saw Prince as "vulnerable," what then? Under AWF's theory, if critics say every Warhol-style silkscreen alters a photograph's meaning, copiers would prevail. This Court should not jettison longstanding fair-use principles for a jerry-rigged test designed to let AWF always win.

A. Goldsmith's 1981 Portraits of Prince

In 1981, the Rolling Stones' "Start Me Up" dominated the airwaves, but Prince's star was rising with his new album *Controversy*. Eric Braun, *Prince* 24 (2017). He hosted Saturday Night Live and opened for the Stones. *Id.* at 22.

Lynn Goldsmith took notice. She suggested to *Newsweek*'s photo editor, Myra Kreiman, that *Newsweek* commission her to shoot portraits of Prince. C.A. Joint Appendix (C.A.J.A.) 698. *Newsweek* agreed. Goldsmith, Kreiman explained, was "our A list photographer for this type of assignment." C.A.J.A.771. "[W]hen Lynn Goldsmith took somebody into the studio," Kreiman said, "you

generally expected to get something that was … exceptional. That was creative." C.A.J.A.773.

Goldsmith already had created many iconic portraits:

Roger Daltrey

Mick Jagger

Bruce Springsteen

Patti Smith

Bob Dylan Bob Marley

Goldsmith had "bec[o]me a leading rock photographer at a time when women on the scene were largely dismissed as groupies." Sia Michel, *Rock Portraits*, N.Y. Times, Dec. 2, 2007. Patti Smith commissioned Goldsmith for the cover of *Easter*, and Tom Petty commissioned Goldsmith for "The Waiting." Lynn Goldsmith, *Album Covers*, https://bit.ly/3BIisXA. As culture reporter Anthony Mason put it: "Lynn is a real legend in that world, she's a great photographer, and a real pioneer." CBS News, *New Photography Book Captures the Rise of Legendary Band KISS* (Dec. 16, 2017), https://cbsn.ws/3GicmgG.

Vanity Fair, *Rolling Stone*, *Life*, and *Time* commissioned Goldsmith photographs. C.A.J.A.639; Lynn Goldsmith, *Rock and Roll Stories* 40, 392 (2013). *Interview*, Andy Warhol's own magazine, featured her work. C.A.J.A.1639. Museums including the Smithsonian's National Portrait Gallery and the Museum of Modern Art showcase Goldsmiths. J.A.310. For her groundbreaking

portraiture, Goldsmith won a Lucie Award, the Oscar of photography. Lucie Awards, *Lynn Goldsmith*, https://bit.ly/39UP0l0.

Thus, when Goldsmith portrayed Prince, it was no mere matter of pointing the camera and clicking. The process spanned two days. She captured Prince in concert, then brought him to her studio. J.A.319.

There, she assembled a playlist of early rock to channel Prince's formative years. J.A.274. She gave Prince purple eyeshadow and lip gloss to accentuate his sensuality. Pet.App.4a. She set the lighting to showcase Prince's "chiseled bone structure." J.A.316. And she alternated 85-mm and 105-mm lenses to frame Prince's face. Pet.App.4a-5a. Goldsmith explained: "There is a reason I pick everything I pick." C.A.J.A.1517.

Goldsmith created the below portrait—the subject of this case—during that session:

The lip gloss that Goldsmith had Prince apply glints off his lip. J.A.279-80. The pinpricks of light in Prince's eyes reflect her photography umbrellas. J.A.285. And the well of shadow around Prince's eyes and across his chin come from Goldsmith's lighting choices. J.A.316.

Newsweek featured a Goldsmith photograph from Prince's concert. J.A.496. Goldsmith kept the black-and-white portraits in her files for future publication or licensing. J.A.319.

Like many photographers, Goldsmith's livelihood relies on licensing. J.A.109. Profits from the initial creation and sale of individual photographs tend to be low. J.A.292 (Sedlik expert report). Thus, photographers "are in the business of licensing reproduction rights for a variety of unanticipated uses." William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 266 (2003). Photographers often license a single photograph across different mediums, from magazines to book covers to calendars. J.A.292-93.

By holding back her Prince portraits, Goldsmith retained control over when, where, and how others would view her art. For example, she licensed a portrait from her 1981 session to *Musician* magazine for a 1983 cover:

Goldsmith licensed other Prince portraits to *People*, *Reader's Digest*, and the Smithsonian catalog. J.A.369-70. Her books feature later Prince portraits and recount her 1981 shoot. *Rock and Roll Stories, supra*, at 54-55; Lynn Goldsmith, *PhotoDiary* (1995). The National Portrait Gallery also displayed a Goldsmith portrait of Prince. C.A.J.A.990.

B. Andy Warhol's 1984 Prince Series

1. In 1984, Prince's star became a supernova with the release of *Purple Rain*. For its November 1984 issue, *Vanity Fair* wanted an illustration of Prince for an article, "Purple Fame," assessing Prince's rise. J.A.524. The magazine hired Andy Warhol for the commission. The record is silent as to why Warhol specifically was chosen. *Contra* Pet. Br. 18.

By 1984, Warhol's "cutting-edge reputation had taken a beating," in the words of AWF's expert Thomas Crow. J.A.218. Warhol's celebrity portraits from the 1960s gave way to commissions for wealthy socialites. J.A.211. Warhol delegated much of his production process so that he

could complete 50 commissions annually, at $25,000 apiece. Naomi Martin, *Andy Warhol Portraits*, Artland Mag., https://bit.ly/3OYasEH.

Warhol also maintained a sideline doing small-dollar magazine commissions that "could generate orders" for more "lucrative portraits." C.A.J.A.1876 ($1,000 commission). Earlier in 1984, Warhol accepted a *Time* commission to portray Michael Jackson for the cover, despite qualms about *Time*'s artistic judgment. (Per Warhol's diary: "The cover should have had more blue. I gave them some in [another] style … , but they wanted *this* style." March 12, 1984, *in The Andy Warhol Diaries* (Pat Hackett ed., 1989).)

Now, *Vanity Fair* wanted a Warhol silkscreen of Prince. But not of whatever image struck Warhol's fancy. *Vanity Fair* licensed a Goldsmith photograph of Prince "for use as artist reference for an illustration to be published in Vanity Fair." J.A.85. An artist reference is a photograph which "an artist would create a work of art based on." Pet.App.6a (cleaned up). Goldsmith's agency selected Goldsmith's above, never-before-seen portrait of Prince. J.A.146. In return, *Vanity Fair* paid Goldsmith a $400 licensing fee—a fact AWF omits. J.A.86.

Vanity Fair agreed to credit Goldsmith for the source photograph alongside Warhol's illustration—another key fact AWF omits. J.A.86. *Vanity Fair* agreed that any illustration based on Goldsmith's photograph could run only in the November 1984 issue. J.A.85. *Vanity Fair* agreed to run only one full-page and one quarter-page version of the illustration and only in the North American print edition. J.A.85. And *Vanity Fair* agreed that "[o]ther than for the purpose indicated herein," Goldsmith's photograph "may not be reproduced or utilized in

any form or by any means" without Goldsmith's permission. J.A.86. The license stated: "NO OTHER USAGE RIGHTS GRANTED." J.A.85.

2. License secured, *Vanity Fair* sent Goldsmith's photograph to Warhol to use in the commissioned work. According to AWF's expert Crow, Warhol likely would not have depicted Prince at all absent this commission. J.A.307. The record is silent on Warhol's ensuing creation of 16 silkscreens and sketches of Prince, now called the Prince Series. The Prince Series was apparently not memorable enough to feature in Warhol's diaries.

What is apparent is that Warhol employed his well-established silkscreening technique to create the Prince Series. Silkscreen printing "allowed Warhol and his assistants to mass-produce a large number of prints with relative ease." Andy Warhol Museum, *PowerPoint: Silkscreen Printing* 4, https://bit.ly/38HwTPD. Warhol proclaimed: "Anyone can do them." J.A.195. By the 1980s, Warhol outsourced silkscreening to a contractor who "deliver[ed] the still-damp canvases to the back rooms of Warhol's studio," so Warhol appeared to have created them himself. Blake Gopnik, *Warhol* 850 (2020).

The silkscreening process would have begun with a professional printer enlarging and reproducing Goldsmith's photograph onto a fine-mesh silkscreen using a chemical solution to produce essentially a blown-up photographic negative. J.A.160, 164-65. The printer would have also printed Goldsmith's photograph on transparent acetate, so that Warhol or assistants could trace the photograph onto canvas and apply brightly colored paint. J.A.168. The two drawings and two screen prints in the Prince Series were preliminary phases of the silkscreen process. C.A.J.A.802-03. For example:

Warhol or assistants would place the silkscreen with the photograph on the canvas, pour ink on the silkscreen, then squeegee the ink through the silkscreen onto the canvas. The end result reproduced the photograph on the painted canvas. J.A.164-65; *see* Andy Warhol Museum, *Andy Warhol's Silkscreen Technique*, YouTube (Sept. 26, 2017), https://bit.ly/3Qnjwnw. The remaining 12 works in the Prince Series were created this way.

Essential features of Goldsmith's portrait thus recur throughout the Prince Series. Pet.App.34a-35a & n.10. The angle of Prince's gaze is identical. Prince's dark

bangs obscure his right eye. Pet.App.34a. The shadows ringing Prince's eyes and darkening his chin remain. The light and shadow on Prince's lips owe their pattern to Goldsmith's lip gloss. Even the reflections from Goldsmith's photography umbrellas in Prince's eyes carry through. Pet.App.36a. As Warhol's assistant Gerard Malanga explained, Warhol's prints were not intended "to get away from the preconceived image, but to more fully exploit it through the commercial techniques of multiple reproduction." J.A.191.

Vanity Fair ran one Prince Series image, Purple Prince, inside the November 1984 issue, crediting Goldsmith alongside the image and elsewhere:

C.A.J.A.1046, 1048; *contra* Pet. Br. 21 (omitting credit).

Those credits were typical when magazines used Goldsmith's work for artist's references. Indeed, Warhol's magazine, *Interview*, licensed a Goldsmith portrait of comedian Eddie Murphy as a source photograph and prominently credited her when artist Richard Bernstein used her photograph in a cover portrait of Murphy. *Interview* did so even though Bernstein cropped Murphy, altered his face, and changed colors. *Interview 1987-09*, Internet Archive, https://bit.ly/39X1o3Z:

Goldsmith Original *Interview* Cover

COVER:
Designed and Painted by Richard Bernstein.
Eddie Murphy Photographed by Lynn Goldsmith/LGI.

3. After *Vanity Fair* ran Purple Prince, Warhol never sold or displayed the Prince Series. *See* William F. Patry, *Patry on Copyright* § 10:35.31 (Mar. 2022 update).

Warhol died in 1987. Petitioner AWF took ownership of the Prince Series, plus Warhol's copyrights and other works—assets worth around $337 million. AWF, Form 990-PF, at 1 (Mar. 3, 2021), https://bit.ly/3oTy4Q7. AWF began monetizing the Prince Series, selling 12 of the 16 originals for large sums and licensing many Prince images. J.A.340; C.A.J.A.1822-31. The Andy Warhol Museum holds the other four. Pet.App.9a.

That revenue stream is part of AWF's licensing empire, which nets AWF over $3.4 million annually for Warhol reprints on everything from cat toys to pint glasses. Form 990-PF, *supra*, at 12. AWF protects its copyrights aggressively, even sending a cease-and-desist letter to an artist who planned to project Warhol's works within a mu-

sical parody. Ian Mohr, *Warhol Foundation Sends Cease-and-Desist Letter to Ryan Raftery's Musical Parody*, Page Six (Feb. 28, 2022), https://pge.sx/3LFKjsN.

C. AWF's 2016 License to Condé Nast

This case arises from a 2016 magazine reprint of another Warhol Prince Series image. When Prince died in 2016, magazines raced to feature him. Several approached Goldsmith: *People* paid $2,000 to license her Prince concert photographs, and *Guitar World* paid $2,300 to license her work for a cover. J.A.369

Condé Nast, *Vanity Fair*'s parent company, expedited a tribute, "The Genius of Prince," featuring many Prince photographs. C.A.J.A.2393-2400. Condé Nast sought AWF's permission to rerun Purple Prince. Pet.App.9a. After AWF flagged other Prince Series works, Condé Nast picked Orange Prince instead. Pet.App.9a. AWF charged $10,250 to run Orange Prince on the cover. J.A.360. But, unlike when this same publisher ran Purple Prince, Goldsmith received no credit or payment for the Orange Prince cover. C.A.J.A.1142.

1984 *Vanity Fair* 2016 Condé Nast

When the Condé Nast cover circulated, Goldsmith saw Orange Prince for the first time and recognized her work. J.A.354-55. Warhol's depiction of Prince struck Goldsmith as "identical" to hers. J.A.289. "Not just the outline of his face, his face, his hair, his features, where the neck is. It's the photograph." J.A.290.

Goldsmith contacted AWF in July 2016 to "find a way to amicably resolve" the issue. C.A.J.A.1152; J.A.355-56.

D. Proceedings Below

1. Instead, in April 2017, AWF sued Goldsmith in the Southern District of New York, seeking a declaratory judgment that the entire Prince Series was noninfringing or, alternatively, fair use. Pet.App.2a.

Goldsmith filed a single counterclaim, alleging that AWF infringed her copyright "by reproducing, publicly displaying, commercially licensing and distributing" Orange Prince. J.A.119. Her counterclaim identified one use only: AWF's 2016 license to Condé Nast. J.A.119. Goldsmith initially sought declaratory and injunctive relief, J.A.120-21, but later clarified that request only reaches

similar commercial licensing. C.A. Br. 50; C.A. Reply Br. 18; C.A. Arg. 9:06-10:59. Goldsmith does not seek to enjoin displays of the Prince Series, which AWF no longer possesses. Pet.App.29a n.8, 42a; C.A. Arg. 7:57-8:06. And the Act has a 3-year limitations period. 17 U.S.C. § 507(b).

2. On summary judgment, the district court held that the whole Prince Series was fair use, and thus that AWF's licensing of Orange Prince was fair use. Pet.App.68a.

On the first factor, "the purpose and character of the use," the court reasoned that works are per se transformative "[i]f looking at the works side-by-side, the secondary work has a different character, a new expression, and employs new aesthetics with [distinct] creative and communicative results." Pet.App.71a (cleaned up). In the court's view, the Prince Series could "reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure" that is "immediately recognizable as a 'Warhol.'" Pet.App.72a.

The court deemed the second factor, "the nature of the copyrighted work," "of limited importance because the Prince Series works are transformative." Pet.App.74a. As to the third factor, "the amount and substantiality of the portion used," the court held that the Prince Series "wash[ed] away the vulnerability and humanity Prince expresses in Goldsmith's photograph." Pet.App.78a. Finally, the court dismissed the market effect on Goldsmith's photograph because "the licensing market for Warhol prints is for 'Warhols.'" Pet.App.81a.

3. The Second Circuit reversed, J.A.644, and reaffirmed that conclusion in an amended opinion after *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021). Pet.App.3a n.1. The court recognized that fair use requires "a holistic, context-sensitive inquiry," "weigh[ing]"

all four factors without "bright-line rules." Pet.App.12a-13a, 16a (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994)). Here, the court held, all factors favored Goldsmith. Pet.App.43a.

As to transformativeness, the court rejected the district court's subjective per se rule "that any secondary work that adds a new aesthetic or new expression to its source material is necessarily transformative." Pet.App.16a. The court considered judges ill-equipped to make "inherently subjective" judgments about an artist's "intent" or "meaning." Pet.App.23a. Further, derivative works (like movie adaptations of books) often "transform the aesthetic and message of the underlying" work—but are not automatically fair use. Pet.App.18a-19a, 27a.

Instead, the court recognized that transformative uses typically involve necessary copying of the original, *e.g.*, to "comment[] on" it. Pet.App.14a. Under circuit precedent, however, even unnecessary copying could be transformative. Pet.App.14a. For such copying, the court prescribed a holistic test, asking whether the new work "embod[ied] a distinct artistic purpose" without "catalog[ing] all of the ways in which an artist may achieve that end." Pet.App.22a. Sometimes, the court explained, imbuing an original work "with new expression, meaning, or message" contributes to transformativeness. Pet.App.16a (cleaned up).

Here, Warhol's works were nontransformative for two reasons. First, Warhol's and Goldsmith's depictions of Prince had the same specific "purpose and function" of "portra[ying] the same person" in a "work[] of visual art." Pet.App.24a-25a. Second, Warhol's works "retain[ed] the essential elements" of Goldsmith's photograph. Pet.App.24a, 26a. The court assumed arguendo that Gold-

smith and Warhol "may well have had" different "subjective intent[s]." Pet.App.22a. But transformativeness "cannot turn merely on the stated or perceived intent of the artist." Pet.App.22a.

The second factor, "the nature of the copyrighted work," favored Goldsmith "irrespective of whether … the Prince Series works [were] transformative" because her portrait was "both creative and unpublished." Pet.App.31a; *contra* Pet. Br. 26-27.

The third factor, "the amount and substantiality" of the copying, favored Goldsmith because Warhol copied "the essence of [her] photograph." Pet.App.34a.

Finally, the fourth factor, market effect, favored Goldsmith because Goldsmith and AWF both licensed "their respective depictions of Prince to popular print magazines." Pet.App.39a. The court rejected concerns about suppressing art: "[W]hat encroaches on Goldsmith's market is AWF's commercial licensing of the Prince Series, not Warhol's original creation." Pet.App.42a. "Direct sales" of the Prince Series would raise different questions. Pet.App.37a.

Judge Jacobs concurred, noting that the court did "not decide [third parties'] rights to use and dispose of [the Prince Series] because Goldsmith does not seek relief as to them." Pet.App.50a. The "only use at issue" is "commercial licensing," where Goldsmith's and Warhol's Princes compete as "portrait[s] of the musician Prince." Pet.App.51a-52a.

SUMMARY OF ARGUMENT

I. AWF did not make transformative use of Goldsmith's photograph.

A. Section 107's "purpose and character of the use" inquiry examines whether new uses copy original works out of necessity, or instead supersede them. Section 107 treats each "use" separately and employs the word "purpose" to refer to instances where copying is necessary to some distinct creative end. This Court's fair-use cases examine *why* copiers had to copy, permitting fair use only where copying was necessary—like when the new use comments on or parodies the original. Likewise, at common law, uses that substituted for original works were infringing. Limiting fair use to necessary copying furthers copyright's goals by protecting creators from market usurpers while permitting novel innovation.

B. The Second Circuit correctly deemed AWF's use of Goldsmith's photograph nontransformative. Warhol's works do not need to copy Goldsmith's photograph specifically to depict Prince. AWF's magazine licensing of Orange Prince, which clearly derives from Goldsmith's photograph, displaces her ability to license her photograph to the same magazines. AWF mischaracterizes the Second Circuit as holding that meaning or message are irrelevant and that visual similarity controls. Instead, the court rightly rejected the district court's misimpression that artists' subjective intent and artistic style are dispositive.

C. AWF's reports of the death of art are greatly exaggerated. Fair use is a *four*-factor, use-by-use, holistic inquiry. Creating and displaying art involves materially different fair-use and remedial questions than the commercial licensing at issue. Artists routinely obtain licenses for copyrighted works or choose alternatives. Indeed, after facing copyright-infringement suits, Warhol took his own photographs or obtained permission.

II. AWF's any-new-meaning-or-message test would obliterate copyrights.

A. The Copyright Act directs courts to look at "the purpose and character of the use," not its putative meaning alone. *Campbell*'s reference to a new work's meaning, 510 U.S. at 579, simply describes how changing the purpose of the work—there, through parody—added new meaning. *Campbell* and the Court's other modern fair-use cases would make no sense if adding new meaning was dispositive.

Common-law courts similarly did not treat new meaning as dispositive. Otherwise 19th-century lithographers (the silkscreeners of their day) would not have consistently lost copyright lawsuits. And seminal fair-use cases where new meaning was obvious would have come out the other way.

AWF's test would devastate derivative-work and exclusive-performance rights. Book-to-movie adaptations, unauthorized sequels, and songs in commercials or campaign ads would be fair game—no license required.

AWF's argument that the First Amendment *requires* fair use whenever someone adds new meaning ignores copyright's balance between original and secondary creativity, and would render much of copyright law unconstitutional.

B. AWF's any-new-meaning-or-message test is manipulable and would inject instability into multi-billion-dollar licensing markets across creative contexts. Courts cannot sensibly discern the meaning of art when artists, critics, and the public often disagree about what art signifies. Copyists could always assert a different intent and claim fair use. For other copyrightable works, like puzzles, toys, or architecture, identifying the "meaning or message" is befuddling. Confusion over what AWF's test entails invites decades of follow-on litigation.

This case proves the point. AWF applies its supposedly objective test through a subjective, apples-to-oranges comparison. AWF contrasts Goldsmith's decades-later testimony about what her Prince photograph subjectively means with critics' interpretation of Warhol's works writ large. Apparently, Warhol's "unique style" renders all Warhol-style silkscreens transformative. Pet. Br. 50. This Court should not discard centuries of copyright law for an AWF-always-wins rule.

ARGUMENT

I. AWF's Use of Goldsmith's Photograph Was Not Transformative

The first fair-use factor—the "purpose and character of the use"—examines whether the new use necessarily borrows from the original to accomplish its purpose, or instead substitutes for the original. Under that longstanding approach, AWF's use of Goldsmith's photograph was not transformative.

A. Transformative Uses Necessarily Borrow from the Original

1. Since the dawn of the Republic, Congress has granted original creators certain "exclusive rights" through copyright. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545-46 (1985). The 1976 Copyright Act vests creators with exclusive control over when, where, and how their works will be published, reproduced, or distributed. Creators also control whether to authorize "derivative works," which "recast, transform[], or adapt[]" the original. 17 U.S.C. §§ 101, 106.

Copyright law also has always recognized that some uses of copyrighted works that otherwise infringe on the original are lawful "fair use." *Campbell*, 510 U.S. at 575.

The 1976 Act codified this affirmative defense by requiring case-by-case examination of whether a specific "use made of a work" is "fair" based on four factors that courts "shall" consider. 17 U.S.C. § 107. Congress directed courts to assess (1) the "purpose and character of the use," (2) "the nature of the copyrighted work," (3) "the amount and substantiality of the portion used," and (4) how the "use" affects "the potential market for … the copyrighted work." *Id.*

That use-by-use inquiry is holistic by design. "Uses" of an original work can range widely: *The Cat in the Hat* might be commented on, parodied, dramatized, or spawn stuffed animals and Halloween costumes. Some of those might be fair use; others not. Section 107 requires all four factors to "be explored, and the results weighed together," for each use, without resort to "bright-line rules." *Campbell*, 510 U.S. at 577-78. Ultimately, the fair-use inquiry asks whether someone has "use[d] the copyrighted material in a reasonable manner," such that the law should presume creators would consent. *Harper & Row*, 471 U.S. at 549-50.

2. AWF isolates one fair-use factor, "the purpose and character of the use." 17 U.S.C. § 107(1). This Court has described the predominant consideration there as whether someone's use of an original work is "transformative." *Campbell*, 510 U.S. at 579 (citation omitted). Statutory text, precedent, common-law cases, and statutory purpose all align: 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." *Harper & Row*, 471 U.S. at 549-50 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (Story, J.)).

a. **Statutory Text.** The "purpose and character of the use" in section 107(1) refers to the "use made" of the original "work," and thus demands comparing the two. "Purpose" means "[t]hat which one sets before himself as an object to be obtained." *Webster's New International Dictionary* 2018 (2d ed. 1949). And "character" conveys "the essential or intrinsic nature." *Id.* at 451.

Section 107(1) thus paraphrases Justice Story's famous formulation in *Folsom*, which assessed "the nature and objects of the selections made" to gauge whether the new use "supersede[s] the objects[] of the original." 9 F. Cas. at 348; *see Campbell*, 510 U.S. at 578-79. "Purpose and character" look to the ends to which the copier puts the original. So courts assess whether the new use necessarily draws from the original to accomplish a different end, or instead competes as a substitute.

Section 107's other references to "purpose" carry the same meaning. *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019). Section 107's preamble lists possible fair uses involving "purposes" like "criticism, comment, news reporting, teaching … , scholarship, or research." All of those purposes by definition require copying from the original work. Fair use thus applies only "to works whose very subject is the original composition." *Campbell*, 510 U.S. at 597 (Kennedy, J., concurring). Those purposes also make substitution unlikely, precisely because the original work is repurposed for a different end. Reporting about a book, for instance, does not trade off with the primary audience for readers. Copyright All. Br. 23-25; MPA Br. 14; NYIPLA Br. 10-11; William F. Patry, *Patry on Fair Use* § 3:1 (May 2022 update); *Patry on Copyright*, *supra*, § 10:13.

Section 107 also identifies "whether such use is of a commercial nature" or for "nonprofit educational purposes" as aspects of "the purpose and character of the use." 17 U.S.C. § 107(1). Again, those purposes illuminate whether the new use would supplant the original work by cannibalizing its audience.

b. **Precedent.** Under this Court's modern fair-use cases, new uses transform original works with a different "purpose and character" only when some copying is indispensable to accomplishing a different end that does not substitute for the original. Thus, this Court has linked the "purpose and character of the use" to the fourth and "most important" fair-use factor, "the effect of the use upon the potential market for" the original. 17 U.S.C. § 107(4); *Harper & Row*, 471 U.S. at 566; *see Campbell*, 510 U.S. at 591-92.

Start with *Sony Corp. of America v. Universal City Studios, Inc.*, which held that using the Sony Betamax to record copyrighted television programs for home viewing was fair use. 464 U.S. 417, 448-49 (1984). As to the "purpose and character" of home recording, *Sony* noted that the Betamax recording device necessarily copied original, copyrighted works. But, whereas studios created the originals for profitable public display, viewers used the Betamax for "private home use"—"a noncommercial, nonprofit activity." *Id.* at 449. Like reproducing works for teaching purposes, home-use copying does not substitute for original broadcasts. *Id.*

Harper & Row, by contrast, involved an unfair use that eclipsed the original. *The Nation* printed extracts of President Ford's unpublished memoirs already licensed to *Time*. 471 U.S. at 542-43. Because the "general purpose of The Nation's use" was "news reporting," *id.* at 561—the same purpose as *Time*'s licensed use—*The Nation*'s

preemptive publication superseded the original by "supplanting the copyright holder's commercially valuable right of first publication." *Id.* at 562.

Campbell emphasized the risk of substitution—and the necessity of using the original—as central to the purpose-and-character inquiry. Under *Campbell*, unfair uses "merely 'supersede[] the objects of the original creation.'" 510 U.S. at 579 (quoting *Folsom*, 9 F. Cas. at 348). Fair uses are more likely "transformative," *i.e.*, "add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *Id.* (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990) (Leval, *Standard*)).

Campbell explained that parody can qualify as "transformative" because parody "shed[s] light on an earlier work, and, in the process, creat[es] a new one" by ridiculing the original. *Id.* That feature of parody makes "market substitution" "less likely": The parody supplements the original rather than competing with it. *Id.* at 593 & n.24. Parody also *requires* "mimic[king] an original to make its point." *Id.* at 580-81; *accord id.* at 597 (Kennedy, J., concurring). But the copier cannot just copy to "avoid the drudgery in working up something fresh." *Id.* at 580 (majority opinion). Thus, 2 Live Crew made "transformative" use of Roy Orbison's "Pretty Woman," despite copying many signature elements, because 2 Live Crew relied on those elements to "comment[] on the original or criticiz[e] it." *Id.* at 583. *Campbell* nonetheless remanded so lower courts could evaluate whether the parody "serve[d] as a market replacement" for the original. *Id.* at 591, 594.

Google similarly found transformativeness because Google needed to repurpose copyrighted computer code developed for desktops to "create a different task-related

system for a different computing environment (smartphones)." 141 S. Ct. at 1205. Significantly, "Google limited its use" of the original code "to tasks and specific programming demands related to" that new purpose. *Id.* at 1203. And *Google* emphasized that the code's creators believed adapting the code to smartphones would "benefit the[ir] company," not supplant the creators' markets. *Id.* at 1204. Google's use thus gave the underlying code a new "purpose and character"—programming smartphones. That new purpose could only be accomplished through copying, and did not crowd out the original code.

c. **Common Law.** Section 107 "codif[ies] the common-law doctrine" of fair use. *Harper & Row*, 471 U.S. at 549. The common law centered on "whether the defendant's publication would serve as a substitute for [the plaintiff's]." *Roworth v. Wilkes*, 170 Eng. Rep. 889, 890 (1807).

As Justice Story put it, the question was whether the new use will "prejudice or supersede the original work; whether it will be adapted to the same class of readers;" and similar considerations. *Gray v. Russell*, 10 F. Cas. 1035, 1038 (C.C.D. Mass. 1839). Justice Story elaborated in *Folsom*, assessing "the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale … or supersede the objects, of the original work." 9 F. Cas. at 348. As Justice Woodbury explained, the "leading inquiry" was whether new uses eclipsed the original "in the market with the same class of readers and purchasers." *Webb v. Powers*, 29 F. Cas. 511, 517 (C.C.D. Mass. 1847). *Campbell* later described this inquiry into "whether the new work merely 'supersede[s] the objects' of the original creation" as "[t]he central purpose" of the modern-day

transformativenesss inquiry. 510 U.S. at 579 (quoting *Folsom*, 9 F. Cas. at 348).[1]

That substitution inquiry did not just ask whether the infringing use undercut the audience for the original, but *why* the use inflicted harm. A scathing review that excerpted the original might hurt sales, but was still fair use because criticism and originals are not fungible. *See Folsom*, 9 F. Cas. at 344-45; *Whittingham v. Woller*, 36 Eng. Rep. 679, 680-81 (1817). By contrast, a review that quotes enough so as to "communicate[] the same knowledge as the original work, … is an actionable violation of literary property." *Story*, 23 F. Cas. at 173. The reader has no reason to buy the original.

d. **Statutory Purpose.** Distinguishing uses that supplant the original from those that necessarily copy to accomplish a distinct end advances copyright's goals. Copyright law "strik[es] a balance between two subsidiary aims: encouraging and rewarding authors' creations while also enabling others to build on that work." *Kirtsaeng v. Jon Wiley & Sons, Inc.*, 579 U.S. 197, 204 (2016).

Copyright "encourage[s] the production of works," *Google*, 141 S. Ct. at 1195, by allowing artists "to reap the rewards of their creative efforts," Leval, *Standard*, *supra*, at 1107. Fair use provides a limited "exception" for uses

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[1] *Accord Story v. Holcombe*, 23 F. Cas. 171, 173 (C.C.D. Ohio 1847) (McLean, J.) (asking whether new use rendered original "less valuable by superseding its use, in any degree"); George Ticknor Curtis, *Treatise on the Law of Copyright* 240 (1847) (asking if new use "furnishes a substitute for the [original]"); *Hill v. Whalen & Martell, Inc.*, 220 F. 359, 360 (S.D.N.Y. 1914) ("partial satisfaction" of demand for original "ordinarily decisive"); *cf. Bloom v. Nixon*, 125 F. 977, 979 (C.C.E.D. Pa. 1903) (fair use offered "distinct and different variety" of art without harming public's interest in original).

that promote further innovation without cannibalizing the original. *Harper & Row*, 471 U.S. at 566 n.9; *see Google*, 141 S. Ct. at 1195. The transformativeness inquiry—along with other fair-use factors—furthers both aims. When new uses supplant originals, creators do not receive their fair reward. Copyists reap economic gain that rightly belonged to original creators. But the more new uses serve different purposes, "the less likely that the secondary work will compete in the original's exclusive markets." Pierre N. Leval, Campbell *as Fair Use Blueprint?*, 90 Wash. L. Rev. 597, 602 (2015) (Leval, *Blueprint*).

B. The Second Circuit Correctly Found No Transformativeness

1. The Second Circuit correctly held that AWF's use of Goldsmith's photograph was not transformative. "Following … *Campbell*," the court explained, "our assessment of th[e] first factor … focuse[s] chiefly on the degree to which the use is 'transformative,' *i.e.*, 'whether the new work 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.'" Pet.App.13a (quoting 510 U.S. at 579); *see* Pet.App.14a, 16a, 23a, 43a-45a (applying *Campbell* and *Google*). That inquiry, the court elaborated, requires "examining how [a work] may 'reasonably be perceived.'" Pet.App.14a (quoting *Campbell*, 510 U.S. at 582).

The court observed that section 107's preamble lists "[p]aradigmatic examples of transformative uses," like "criticism" and "comment," which necessarily copy from the original to accomplish a "manifestly different purpose." Pet.App.14a; *see Campbell*, 510 U.S. at 578-79. The court concluded that "the most straightforward cases of

fair use thus involve a secondary work that comments on the original in some fashion." Pet.App.14a.

Under the statutory text and this Court's precedents, the court could have stopped there. AWF has never contended that Warhol's Orange Prince—the image on the 2016 magazine cover—needed to use *Goldsmith*'s photograph. "[T]here is no evidence that Warhol … was involved in identifying or selecting the particular photograph." Pet.App.35a. Warhol depicted Prince only because *Vanity Fair* paid him to, and could use Goldsmith's photograph only because *Vanity Fair* licensed it. *Supra* p. 11. AWF (at 30) claims Warhol "erased the humanity" from Goldsmith's photograph, but Warhol could have used any Prince photograph, *e.g.*, Pet. Br. 16-17, for that purported aim.

Nor does AWF dispute that licensing Orange Prince to magazines supplants Goldsmith's original. Pet.App.40a. Because both works depict Prince, "someone seeking a portrait of [Prince] might interchangeably use either one." Pet.App.45a. Obvious market substitution makes this "an easy case." Jane C. Ginsburg, *Comment on* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 16 J. Intell. Prop. L. & Prac. 638, 642 (2021) (Ginsburg, *Comment*). In 1984, *Vanity Fair* paid Goldsmith $400 and credited her photograph as the source for Warhol's Purple Prince. Fair use does not allow AWF to sell for $10,250 a materially identical image to the same publisher without paying or crediting Goldsmith.

Nonetheless, the court applied a broader conception of fair use than the Act or this Court have adopted. Previous circuit cases had "rejected the proposition that a secondary work *must* comment on the original … to qualify as fair use." Pet.App.14a (citing *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013)). The court thus assessed

when new uses might be fair even where copying was unnecessary to illuminate the original work. Answer: "[T]he secondary work itself must reasonably be perceived as embodying a distinct artistic purpose, one that conveys a new meaning or message separate from its source material." Pet.App.22a; *see* Pet.App.24a (likewise requiring "different and new artistic purpose" so "secondary work stands apart from the 'raw material'").

But the court declined to "catalog all of the ways" of satisfying that broader test, Pet.App.22a, instead simply rejecting AWF's claims. AWF rested on "the bare assertion of a higher or different artistic use," which alone "is insufficient." Pet.App.22a. AWF asserted that subjective differences in the purported meanings of Goldsmith's and Warhol's works should control, which risked rendering "any alteration … transformative." Pet.App.22a (quoting Melville B. Nimmer & David B. Nimmer, *Nimmer on Copyright* § 13.05[B][6]). And AWF relied on the "imposition of another artist's style," which alone is not transformative. Pet.App.23a-24a.

Even if secondary works that *un*necessarily copy can be transformative, this case is straightforward. As the Second Circuit emphasized, "the overarching purpose and function" of Goldsmith's and Warhol's Prince depictions is "identical." Both are "works of visual art" and "portraits of the same person," Pet.App.24a-25a, which strongly disfavors finding a "distinct artistic purpose." Pet.App.22a. Additionally, the Prince Series silkscreens are "much closer to presenting the same work in a different form" (*i.e.*, turning photographs into silkscreens) "than they are to being works that make a transformative use of the original." Pet.App.25a. "[T]he overlay of Warhol's 'style' did not render his treatment of the Goldsmith photo any less

'plainly an adaptation.'" Ginsburg, *Comment*, *supra*, at 643 (quoting Pet.App.24a).

2. AWF (at 47) mischaracterizes the decision below, which did not "forbid[]" consideration of meaning or message. The court emphasized that new meaning could be relevant, just not dispositive. Pet.App.13a, 16a-17a, 22a-23a, 41a-42a; *accord Patry on Copyright*, *supra*, § 10:35.33 (calling AWF's portrayal "inaccurate"); AIPLA Br. 20-21. Like *Campbell*, the court considered the meaning of the new use as a subsidiary aspect of whether a secondary use embodies a different purpose, such as ridiculing the original. Pet.App.22a-24a; 510 U.S. at 579-81.

Rather, the court rejected giving dispositive weight to *subjective* impressions of what two works mean. Pet.App.22a-23a. That holding follows section 107's text, this Court's precedents, and the common law, *infra* pp. 39-47, as well as other circuits' cases and leading treatises. *E.g.*, *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 453 (9th Cir. 2020) ("[T]he addition of new expression to an existing work is not a get-out-of-jail-free card that renders the use of the original transformative."); *Patry on Copyright*, *supra*, § 10:35.30.

AWF (at 48) inexplicably accuses the Second Circuit of holding that "a work cannot be transformative if the essential elements of its source material remain recognizable." False: The court focused on purpose, consistent with section 107's text. Insofar as secondary works that involve unnecessary copying could ever be fair use, the court reasoned, the secondary work must embody "a distinct artistic purpose" that "stands apart." Pet.App.22a-23a. But Goldsmith's and Warhol's Princes shared the same general purpose (fine art) and the specific purpose of depicting Prince. Pet.App.24a-25a. The court could have ended there.

Instead, the court *expanded* fair use by declining to treat that same specific purpose as dispositive. The court held that secondary works that "added material that pulled [the originals] in new directions" could be transformative even if both works share a specific purpose. Pet.App.26a (discussing artworks in *Cariou*, 714 F.3d 694). But Warhol's work "retain[ed] the essential elements of its source material" and "recast[] … photographs in a new medium," much like movie adaptations that recognizably retain essential elements of books. Pet.App.26a.

Nor did the court collapse transformativeness with substantial similarity. *Contra* Pet Br. 49-50. Substantial similarity is a threshold infringement question that compares works to see whether the copy is recognizably "appropriated from the copyrighted work." Pet.App.46a-47a (citation omitted); Nimmer, *supra*, § 13.03[A]. By contrast, the court assessed visual similarity only to ascertain if Warhol's copying accomplished some distinct purpose. *Compare* Pet.App.25a-26a (transformativeness inquiry includes whether "essential elements" were copied), *with* Pet.App.48a-49a (substantial-similarity analysis asks whether copying happened at all). Comparing two works side-by-side is inherent to the fair-use inquiry. *E.g.*, *Campbell*, 510 U.S. at 583 (comparing lyrics).

AWF (at 52-53) faults as overbroad the court's articulation of the "purpose" of Warhol's and Goldsmith's works—"visual art" that portrays "the same person," Pet.App.24a-25a. But the Act's examples of "purpose[]," including "criticism, comment, news reporting, teaching … , scholarship, or research," are even more general. 17 U.S.C. § 107. This Court has defined purposes expansively, too. *Harper & Row* defined *The Nation*'s purpose as "news reporting," not reporting about presidential decision-making. 471 U.S. at 561. *Campbell* said 2 Live

Crew's purpose was "parody," 510 U.S. at 588, not ridiculing romantic aspirations. *Google* defined Google's purpose as "creat[ing] new products" involving smartphones, not developing specific applications. 141 S. Ct. at 1203. Compared to those descriptions, "portraits of [Prince]" looks hyper-specific. When two works share such a specialized purpose, secondary works that unnecessarily copy the original do not embody a different "purpose or character."

3. AWF did not challenge the Second Circuit's holdings on the three other fair-use factors. The "nature of the copyrighted work" favored Goldsmith because her photograph was "both unpublished and creative." Pet.App.30a. And "the unpublished nature of a work is a key … factor tending to negate a defense of fair use." *Harper & Row*, 471 U.S. at 554 (cleaned up). On factor three, Warhol undisputedly copied substantial portions of Goldsmith's photograph. Pet.App.34a-36a. Nor does AWF contest the court's holding on the key fourth factor, market harm, that licensing Warhol's Prince to magazines supplanted Goldsmith's ability to license her image of Prince to the same magazines. Pet.App.37a-40a. This Court should not tinker with one factor in a holistic inquiry when the other three factors overwhelmingly disfavor fair use and AWF bears the burden to prove this affirmative defense. *See Campbell*, 510 U.S. at 590.

C. AWF's Policy Concerns Are Illusory

1. AWF (at 54-56) equates affirmance with a latter-day bonfire of the vanities, where "seminal works of art" would become contraband. But the decision below hardly heralds the second coming of Savonarola. Section 107 mandates use-by-use analysis. *Contra* Pet. Br. 7, 37 (twice paraphrasing section 107(1) as if statute said "work" instead of "use"). Just because one use infringes does not

mean all uses infringe. Courts weigh all four fair-use factors together, and outcomes can differ for different uses. *Patry on Copyright*, *supra*, § 10:157; AIPLA Br. 8-10; Authors Guild Br. 28-31; MPA Br. 26-29.[2]

Take this case. The Second Circuit held that licensing Orange Prince to Condé Nast infringed Goldsmith's copyright by undermining the magazine market for Goldsmith's Prince photographs. Magazines seeking an image of Prince would less likely license Goldsmith's if hers must compete with similar Warhol depictions. Pet.App.39a-40a. Thus, market harm—the "most important" factor, *Harper & Row*, 471 U.S. at 566—heavily favored Goldsmith. But "Warhol's original" physical works did not risk comparable market harm. Pet.App.42a.

Museum displays and art sales are not endangered either. Pet.App.50a (Jacobs, J., concurring); Library Br. 20 n.7. Museums and collectors do not create single-subject shrines to Prince. They collect Warhols as exemplars of Pop Art, and Goldsmiths as exemplars of fine-art photography—hence, the Second Circuit thought these uses could fare differently from magazine licensing. Pet.App.42a.

The Copyright Act also protects museum displays if displayed works were "lawfully made." 17 U.S.C. § 109(c). Here, the creation of the Prince Series is not at issue because the only alleged infringement involves the 2016

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[2] *Accord Bouchat v. Balt. Ravens Ltd. P'ship*, 619 F.3d 301, 306, 309, 314 (4th Cir. 2010) (Ravens logo infringed artist's design when used in highlight films, but not "museum-like" historical display); *Ringgold v. Black Ent. Television, Inc.*, 126 F.3d 70, 79 (2d Cir. 1997) (copyrighted quilt in sitcom set infringed; similar shots in news broadcast would almost certainly be fair use).

magazine licensing of Orange Prince. And the circumstances of the Prince Series' creation remain obscure. For instance, it is unclear whether Warhol created the Prince Series so *Vanity Fair* could pick the image it liked best—in which case the Prince Series might have been "lawfully made" under *Vanity Fair*'s license.

Limits on relief offer further protection. Though AWF (at 55-56) belabors severe injunctive remedies, those remedies are discretionary and must account for the extent to which the infringing use "serves the public interest." Pet.App.29; *Campbell*, 510 U.S. at 578 n.10; *see* 17 U.S.C. § 503(a)(1). Courts that propose incinerating museum collections would abuse their discretion. Courts should provide "[r]easonable compensation" but deny injunctive relief that would deprive "the public of a work of significant value." Leval, *Blueprint*, *supra*, at 601; *accord Patry on Copyright*, *supra*, § 22:82. Anyway, Goldsmith disclaimed such remedies here, Pet.App.42a, which are unavailable regardless since AWF no longer holds the Prince Series, Pet. Br. 21.

2. AWF (at 56) argues that requiring licenses would chill artistic expression. But "just as artists must pay for their paint, canvas, neon tubes, marble, film, or digital cameras," they must also pay to "incorporate the existing copyrighted expression of other artists," at least when new works "draw their purpose and character" from that original. Pet.App.45a.

Artists can use noncopyrighted images or "create[] an entirely original work." *Dr. Seuss*, 983 F.3d at 454. Or artists can pay licensing fees if they consider particular photographs indispensable. J.A.295-99 (Sedlik expert report). Getty Images offers licensable photos of nearly everything. Creators constantly license original works to create new expression. Movie studios and playwrights li-

cense novels. Video-game makers license characters and plots. Musicians license songs to sample or cover. Entire industries facilitate such licensing. Copyright All. Br. 15-20. Far from being "particularly pernicious for less-established artists," Pet. Br. 56, licensing sustains less-established creators so they can keep creating. *Infra* p. 47.

Warhol himself refutes AWF's chilling concerns. In the 1960s, three photographers sued Warhol for using their copyrighted photographs. Mark Rose, *Authors in Court* 149-50 (2016). Rather than abandoning his paintbrush, Warhol took his own Polaroids for ensuing silkscreens. Gopnik, *supra*, at 846. "[T]hat way," Warhol noted, "there's no copyright to worry about." January 13, 1981, *in Warhol Diaries*, *supra*. Warhol's Muhammad Ali (Pet. Br. 13) is typical: Warhol took Ali's photo, then silkscreened it. J.A.381. Warhol even photographed Prince. Andy Warhol, *Negatives*, Stanford Univ., https://stanford.io/3PAUvFA.

When Warhol considered someone else's work indispensable, he "tracked down and obtained the rights." Laura Gilbert, *No Longer Appropriate?*, Art Newspaper, May 9, 2012. Take Warhol's *Ten Portraits of Jews of the 20th Century*, of Einstein, Justice Brandeis, and others:

Despite coloring and shading the source photographs, Warhol paid or obtained permission to silkscreen them. *Id.* Likewise, Warhol obtained permission to use Mickey Mouse and Superman in his 1981 *Myths* series. Martha Buskirk, *The Contingent Object of Contemporary Art* 87 (2003). And Warhol's magazine, *Interview*, licensed and credited Goldsmith's Eddie Murphy photograph as the basis for a cover portrait that changed Murphy's appearance. *Supra* pp. 14-15. The status quo—licensing unless copying is necessary—strikes the right balance between fair compensation and creative breathing space.

II. AWF's Test Would Upend Copyright

AWF argues that whenever copiers add new "meaning or message" to copyrighted works, the new works are transformative, and virtually always fair use. Pet. Br. 35, 40, 43. That "sweeping expansion of fair use" is a recipe for appropriating creative works without consent or payment. MPA Br. 23.

A. Text, Precedent, History, Structure, and Purpose Refute AWF's Test

1. **Statutory Text.** The first fair-use factor is "the purpose and character of the use, including whether such use is of a commercial nature." 17 U.S.C. § 107(1). That text rebuts AWF's interpretation. The Act never mentions "meaning or message." The Act does not even mention "transformativeness," which entered the fair-use lexicon by way of a law-review article by Judge Leval, *see* Leval, *Standard*, *supra*, at 1111, and "was never intended as a full definition or explanation of fair use," Leval, *Blueprint*, *supra*, at 608. And the Act lists four nonexhaustive factors without making any one controlling. *Contra* Pet. Br. 40. Had Congress wanted to adopt AWF's test, Congress could have swapped "the purpose and character of

the use" for "meaning or message of the works" and made that consideration dispositive.

AWF (at 41) erroneously contends that any "follow-on work that communicates a new meaning or message inherently has a different 'purpose' and 'character' than the original." The Act grants creators the rights to create derivative works, like movie adaptations of books, that, by definition, can "transform[]" the original with new meaning. 17 U.S.C. §§ 101, 106(2); *see infra* pp. 47-50. It cannot possibly be the case that derivative works—*i.e.*, transformative uses of originals—are statutorily protected, yet always fair use. *See* MPA Br. 18-19.

Section 107's examples of illustrative fair uses also belie AWF's claim. All involve different "purposes," but many do not "convey[] a new meaning or message." *Contra* Pet. Br. 41. Take "comment." Book reviews might excerpt key passages to convey the original writer's arguments. Such reviews faithfully transmit the writer's message. But the "purpose" of commenting on the original distinguishes that use. The same goes for "teaching": Discussing a novel does not change its meaning, but publishing and teaching novels nonetheless have very different purposes.

2. **Precedent.** AWF (at 2, 9, 29, 34-36, 47) seizes on *Campbell*'s statement that the "central purpose" of the first factor "is to see … whether the new work 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*." 510 U.S. at 579 (cleaned up) (emphasis added). But "the language of an opinion is not always to be parsed as though we were dealing with [the] language of a statute." *Brown v. Davenport*, 142 S. Ct. 1510, 1528

(2022) (citation omitted); *accord City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1474 (2022).

Nothing in that *Campbell* passage directs courts to begin and end by asking whether new works convey new meanings. The rest of the paragraph refers to the common law and Justice Story's analysis in *Folsom*—which reject the notion that a new use that conveys different meaning is transformative. *Infra* pp. 43-45. The paragraph continues by instructing courts to "be guided by the examples given in the preamble to § 107," 510 U.S. at 578—many of which do not change the original work's meaning. The paragraph then explains that "add[ing] something new" involves having "a further purpose or different character"—a change that in turn "alter[s] the first with new expression, meaning, or message." *Id.* at 579. Translation: The focus is on how the new use alters purpose and character of the work—there, parody.

In the next paragraph, *Campbell* underscored what kinds of changed purposes qualify. "[T]ransformative" uses must "provide social benefit, by shedding light on an earlier work." *Id.*; *see id.* at 598 (Kennedy, J., concurring). The second work cannot just appropriate copyrighted works for profit or to make an unrelated point. MPA Br. 5-6; Jane C. Ginsburg, *Does 'Transformative Fair Use' Eviscerate the Author's Exclusive Right to 'Transform' Her Work?*, 17 J. Intell. Prop. L. & Prac. (forthcoming 2022) (preprint at 2).

Campbell's facts further preclude equating "transformation" with new meaning or message. *Campbell* could have simply noted that 2 Live Crew's and Roy Orbison's lyrics convey different messages ("degrading taunts" versus romantic fantasy). 510 U.S. at 583. Instead, *Campbell* evaluated the lyrics to determine whether the new song "reasonably could be perceived as commenting on the

original or criticizing it," *id.*, as part of a lengthy assessment of whether parody can transform the purpose of the original work, *id.* at 582-85. *Campbell* thus asked whether the new song could "reasonably be perceived" as having "parodic character," not whether the new song could "reasonably be perceived as communicating a new meaning or message." *Contra* Pet. Br. 33; *accord* Pet. Br. 29, 34-36, 44, 47-48 (eight times splicing together disparate *Campbell* quotes).

AWF (at 40) is also wrong that *Campbell* created "a strong presumption" of fair use for "works conveying new meanings or messages." *Campbell* rather rejected any "categories of presumptively fair use," instructing that every use "has to work its way through the relevant factors, and be judged case by case." 510 U.S. at 581, 584.

Further undermining AWF's reading of *Campbell*, the lengthy majority and dissenting opinions in *Sony* and *Harper & Row* never mention new meaning or message. The Betamax in *Sony* added no new meaning to the copyrighted programs, simply recording them for later viewing. 464 U.S. at 448-49. *Sony* still found fair use because the Betamax was for noncommercial home viewing—a different purpose from the original, for-profit public broadcasts. *Id.* *Campbell* did not repudiate those cases.

Likewise, *Google* did not involve changing the meaning of computer code. Google copied portions of Oracle's Java code into Google's Android platform so computer programmers would not have to learn new code to perform the same functions. Insofar as code has a "meaning or message," the meaning stayed the same: type "X" and the computer does task X. 141 S. Ct. at 1204. *Google* centered on "the nature of the copyrighted work," because "some factors may prove more important in some contexts than in others." *Id.* at 1197, 1201-02.

AWF (at 35-36) stresses *Google*'s dicta that an "artistic painting might … fall within the scope of fair use even though it precisely replicates a copyrighted advertising logo to make a comment about consumerism," as in Warhol's *Campbell's Soup Cans*. *Id.* at 1203. That stray line hardly enshrines AWF's meaning-or-message test. Elsewhere, *Google* equated the transformativeness inquiry with the "reasons for copying." *Id.* at 1199. Anyway, the Court's remark fits the fair-use mold if the work comments on the logo itself. By turning a logo to sell soup into fine art, Warhol drew upon and subverted associations with the original, and competed in a different market. Jane C. Ginsburg, *Letter from the US Part I*, 270 Revue Internationale du Droit d'Auteur 91, 132-33 (2021).

3. **Common Law.** Common-law cases decisively reject AWF's approach. Start with the 19th century version of this case, *Falk v. Donaldson*, where Benjamin Falk, the greatest photographer of New York's Gilded Age, photographed actress Julia Marlowe. 57 F. 32, 36 (C.C.S.D.N.Y. 1893). The defendants sold lithographs—cousins of Warholian silkscreens—made by etching images onto stone or metal often based upon earlier works. Encyclopaedia Britannica, *Lithography*, https://bit.ly/3ILB9ea.

The Marlowe lithograph used Falk's photograph without permission. 57 F. at 36. Like AWF, the lithographers dismissed photographers as "mere mechanic[s]" with no right to anyone's likeness. *Id.* at 33; *cf.* Pet. Br. 5-6, 51. Like here, the Marlowe lithograph "var[ied]" from the photograph; the lithographers' experts identified 40 differences. 57 F. at 35. And, like here, the lithographers claimed "the idea or conception of the original artist may be followed and used by another, provided he … clothed them in his own form and expression." *Id.*

Nineteenth-century courts treated those contentions as borderline frivolous. The photograph was copyrightable, since photography is an art form like any other. *Id.* at 34. The lithograph's key elements "irresistibly suggest[ed] and recall[ed] the photograph." *Id.* at 36. And there was no fair use because such copying undermined the photographer's right to make his own derivative works—including lithographs. *Id.* at 36-37.

Other common-law cases reached the same conclusion, even though lithographs flatten and change subjects' appearances.[3] Famously, the Court in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), held that a lithograph of Oscar Wilde (right) infringed a photograph (left) (both zoomed on face):

[3] *Springer Lithographing Co. v. Falk*, 59 F. 707, 710 (2d Cir. 1894) (infringement although lithograph was allegedly "composite reproduction" of copyrighted photograph and another); *Falk v. Brett Lithographic Co.*, 48 F. 678, 679 (C.C.S.D.N.Y. 1891) (infringement where lithograph "copied the position, features, and most of the photograph" but reversed orientation and changed details); *cf. Falk v. T.P. Howell & Co.*, 37 F. 202, 202 (C.C.S.D.N.Y. 1888) (infringement where defendant turned copyrighted photograph into leather stamp on chair).

This Court deemed the photograph "an original work of art" protected by copyright. *Id.* at 60. It was irrelevant that the lithograph transformed Wilde's features. Maybe the lithographer's Wilde, with soulful gaze and brooding eyebrows, embodies the dashing poet, while the photograph's thousand-yard stare conveys calculated ennui. Whatever the messages, once the Court determined that photographs are copyrightable, the case was over; the lithograph was so obviously nontransformative the lithographer did not even try to raise fair use.

Conveying new meanings or messages did not save infringers in other contexts, either. Take *Folsom*, 9 F. Cas. 342, which distilled "the essence of law and methodology from the earlier cases." *Campbell*, 510 U.S. at 576. The plaintiff published George Washington's compiled letters in eleven copyrighted volumes. 9 F. Cas. at 345. The infringers sold Washington's imagined autobiography, where Washington "told" his life story via narrative that wove in 5% of the copyrighted letters. *Id.* The autobiography clearly involved "a plan different from" the original. *Id.* And perhaps the autobiography humanized Washington, while the compiled letters conveyed an aloof legend. *Folsom* does not say, because Justice Story saw no need to divine meanings. He "had no doubt whatever" that the autobiography was not fair use because it shared the same purpose as the compiled letters: Both used Washington's letters to "illustrat[e] the life, the acts, and the character of Washington." *Id.* at 349.[4]

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[4] *Accord, e.g.*, *Bradbury v. Hotten*, 42 Law J. Rep. 28 (1872) (account of Napoleon III infringed by appropriating caricatures lampooning him, even though multivolume work featured biography and explanatory text casting him in different light); *Gross v. Seligman*, 212 F. 930, 930-31 (2d Cir. 1914) (infringement where photographer reproduced copyrighted nude photograph, but changed model from "sedate" to

AWF (at 37-39) counters that copyright's "historic mission" is to encourage follow-on innovation. But the 1710 Statute of Anne (cited at Pet. Br. 38) granted authors copyrights in their works to correct the "very great detriment, … too often to the ruin of [authors] and their families" from unchecked copying. Act of Apr. 10, 1710, 8 Anne c. 19, art. I; *see Sayre v. Moore*, 102 Eng. Rep. 139, 140 n.(b) (1785). And *Cary v. Kearsley* (cited at Pet. Br. 39) balanced "put[ting] manacles upon science" against original authors' "enjoyment of copy-right." 170 Eng. Rep. 679, 680 (1803). Likewise, AWF's observation (at 39) that creators could make "justifiable use of the original materials," *Folsom*, F. Cas. at 348, is true but irrelevant. *Folsom* only authorized such use when the secondary work would not supplant the original. *Id.*

AWF's two purported examples (at 39-40) of common-law cases applying a meaning-or-message test did no such thing. *Sampson & Murdock Co. v. Seaver-Radford Co.* looked to the secondary use's "purpose[]" in the market, not meaning. 140 F. 539, 542 (1st Cir. 1905). The compiler of a social guide could copy entries from a general directory for that "bona fide and limited purpose," *id.*, even though each entry's meaning (how to contact someone) stayed the same. *Gyles v. Wilcox* merely observed that fair use should encourage innovative, "extremely useful"

"smiling" and added cherry stem between her teeth); *Daly v. Palmer*, 6 F. Cas. 1132, 1135 (C.C.S.D.N.Y. 1868) (infringement where defendant copied railroad-track rescue from play, but replaced original's dashing heroine with drunkard "Old Tom," among other changes); *Campbell v. Scott*, 59 Eng. Rep. 784, 785, 787 (1842) (infringement where defendant reprinted copyrighted poems, despite adding essay and using reprints "to illustrate the progress of English poetry").

follow-on works. 26 Eng. Rep. 489, 490 (1740). No common-law case suggests that fair use turns on new meaning.

4. **Derivative Works.** Copyright owners have exclusive rights "to prepare derivative works based upon the copyrighted work," 17 U.S.C. § 106(2), in any "form in which a work may be recast, transformed, or adapted," *id.* § 101. That right lets creators turn photographs into silkscreens, novels into movies, write sequels, or remix songs, while controlling their creations (subject to fair use). Entire licensing industries exist so creators can decide whether to give others the reins for derivative works, and at what price. Copyright All. Br. 16-21; Ginsburg, *Comment*, *supra*, at 642-43; J.A.292-95 (Sedlik expert report).

AWF's any-meaning-or-message test would nullify creators' rights over derivative works. Silkscreens are classic derivative works of photographs. Alexandra Darraby, *Darraby on Art Law* § 7:89 (July 2021 update). If silkscreening Goldsmith's Prince portrait creates new meaning, then anyone could make follow-on works and claim fair use. *See* Pet.App.17a-19a; MPA Br. 20-22; Copyright All. Br. 8-11, 15-21; Authors Guild Br. 13; AIPLA Br. 14; Paul Goldstein, *Goldstein on Copyright* § 12.2.2.1.c (3d ed. 2022). Copiers could simply find someone to testify that the new work changes the portrait's expression (here, from vulnerable to iconic; elsewhere, from happy to sad, or complacent to disturbed). That result would collapse licensing markets, deprive creators of livelihoods, and leave them powerless to stop copycats from distorting their creations.

Movies routinely change perceptions of original books, yet studios pay and credit authors for adaptations. Under AWF's test, movie studios have wasted billions. So long as studios add plot elements or characters, they could

brandish fair use and dispense with permissions. MPA Br. 18-23; Copyright All. Br. 16-18.

AWF (at 52) responds that book-to-movie adaptations typically do not "change the meaning or message of the original." That assertion would astound moviegoers, critics, and film scholars. MPA Br. 21-23. So-called auteurs like Hitchcock, Coppola, Spielberg, and Tim Burton employ immediately recognizable styles that imprint their films with "substantial creativity and distinctive quality," Pet. Br. 45. And the list of films that add "distinctive ideas" or "distinctive changes" (Pet. Br. 20, 46) to source novels and would thus satisfy AWF's colloquial definition of "transformativeness" is endless.

Take Stanley Kubrick's adaption of Stephen King's *The Shining*, which infuriated King by dramatically altering his book. King's novel is an allegory for his own writer's block: Frustrated writer Jack Torrance wants to do right by his family, but (spoiler alert) succumbs to evil forces at the Overlook Hotel. But the movie is signature Kubrick: Slow-paced long shots, awkward silences, and jarring music telegraph claustrophobia and fear. Jack Torrance, played by Jack Nicholson, goes from angry jerk to madman. Yet even auteurs pay for licenses. *E.g.*, Pet.App.27a (Scorsese).

Sequels are another classic derivative work that would fall prey to AWF's new-meaning-or-message test. Every sequel adds new meaning. Characters' new experiences reframe the story. One of cinema's greatest twists—Darth Vader's "I am your father"—happens in a sequel. MPA Br. 22. Over seven Harry Potter books, a magical children's tale becomes an epic good-versus-evil struggle as Dumbledore dies, Severus Snape is revealed as a good guy, and Voldemort is vanquished. Under AWF's test, anyone can leverage the popularity of these

classics by writing more sequels and claiming fair use. Likewise, copy the whole work but change the ending, and bingo, new meaning. MPA Br. 5 (competing Casablancas).

AWF's test would decimate other exclusive rights where creators sell licenses—especially music, where licensing ecosystems exist for using songs in commercials, video games, TV shows, movies, and political campaigns. *See generally* Bob Kohn, *Kohn on Music Licensing* (5th ed. 2019); 17 U.S.C. § 106(6). The premise of that system is that new meaning is no shortcut. Thanks to long-running commercials, Bob Seger's "Like a Rock" connotes Chevrolets barreling down highways, not the devastating breakup that inspired the song. Heinz made Carly Simon's "Anticipation" about waiting for ketchup; Simon wrote the original about waiting for dinner with Cat Stevens. In AWF's world, those changed associations are transformative and presumptively fair use; businesses have been fools to pay.

Artists also depend on the power to say no. Musicians routinely object to having their songs refashioned into political messages—witness Bruce Springsteen's refusal to let candidates since Reagan use "Born in the U.S.A." Eveline Chao, *Stop Using My Song*, Rolling Stone, July 8, 2015. Under AWF's test, because campaigns change a song's meaning ("Reagan is a patriot"), musicians would have no say, nor would creators across countless other contexts. Comic book authors license works for movies and video games. In AWF's world, add a new theme, and no need to pay.

Indeed, AWF's approach indicts its own licensing empire. If adding meaning presumptively means fair use, no one should pay to print Warhols on towels, mugs, toys, totes, or jewelry. Warhol turned mass-produced objects into fine art. Turnabout seems fair play: Commodifying

Warhol's art by plastering it on mass-produced objects adds a whole new meaning.

5. **Statutory Purpose and the First Amendment.** AWF (at 43) asserts that the Copyright Act's purpose and the First Amendment require that "follow-on works that express new and distinctive meanings or messages" are fair use. That argument discounts copyright's goal of promoting creators' further speech and misapprehends the First Amendment.

Copyrights promote free expression on both sides of the ledger. *Campbell*, 510 U.S. at 599 (Kennedy, J., concurring); *Patry on Copyright*, *supra*, § 4:44; MPA Br. 23. Copyrights "promote the creation and publication of free expression," by "suppl[ying] the economic incentive to create and disseminate ideas." *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). Copyrights protect creators' right to determine how their original expression gets used—including "to refrain from speaking." *Harper & Row*, 471 U.S. at 559 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). Fair use, in turn, promotes other creators' speech interests only for uses that do not eclipse the original. "The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches." *Eldred*, 537 U.S. at 221; *see Patry on Copyright*, *supra*, § 10:35.34.

AWF's argument also proves too much. If "block[ing] follow-on works that express new and distinctive meanings" is unconstitutional, Pet. Br. 43, so is the four-factor fair-use test itself. Courts would violate the First Amendment whenever follow-on works have new meaning but other factors tip the balance against fair use. Courts since the Founding would have persistently violated the First Amendment by rejecting fair-use defenses even where

new works carry new meaning. *Supra* pp. 43-45. Also unconstitutional: Compulsory licenses in the Copyright Act, like those for cover songs. 17 U.S.C. § 115. Aretha Franklin's iconic rendition of Otis Redding's "Respect," which added "R-E-S-P-E-C-T" and "sock-it-to-me-sock-it-to-me," became a 1960s civil-rights anthem and still draws millions to the dance floor. Yet, under AWF's test, such licensing abridges secondary artists' speech.

B. AWF's Test Is Unworkable

AWF (at 36) calls its test "straightforward." But discerning whether two works reflect different meanings or messages would be as reliable as divining animal shapes in clouds.

1. AWF argues that courts should assess whether two works "can 'reasonably be perceived'" as embodying different meanings or messages. Pet. Br. 29 (quoting *Campbell*, 510 U.S. at 582). AWF (at 48) calls this an "objective" reasonable-person test, but does not say who the reasonable person evaluating a work's "objective features" should be. The artists? Critics? Students? Ordinary viewers? AWF's amici are all over the map. *E.g.*, Authors All. Br. 13 ("the artist and members of the relevant artistic community, among others"); EFF Br. 15 (creators, "intended audiences," and "other viewers with relevant experience"); Lemley Br. 8 ("all of the work's potential audiences"); Rauschenberg Br. 29 ("reasonable person from [intended] audience"); Tushnet Br. 11 ("groups likely to encounter the works at issue").

Those are no small distinctions. Graduate students battle eternally over whether meaning derives from the author's intent or gets formed by individual viewers, and whether critics' views are authoritative or gobbledygook. *E.g.*, Roland Barthes, *The Death of the Author* (1967).

Disparate audiences also disagree about what creative works mean. Take Jackson Pollock. Collectors pay over $100 million for works that Pollock left untitled to thwart attempts to find meaning. Carol Vogel, *A Pollock Is Sold, Possibly for a Record Price*, N.Y. Times, Nov. 2, 2006. Some critics call Pollock America's greatest painter, whose works comment on art itself. Others trash his seemingly "random" works as "meaningless." Steven McElroy, *If It's So Easy, Why Don't You Try It*, N.Y. Times, Dec. 3, 2010. Courts should not stage modern-day Scopes Trials pitting postmodernists against their detractors just to resolve one fair-use factor.

Moreover, for many artists, lack of any meaning *is* the intended meaning. John Lennon wrote "I Am the Walrus" on acid, as deliberate nonsense. Catherine Walthall, *The Meaning of the Weirdest Beatles Song, "I Am the Walrus,"* Am. Songwriter (July 9, 2022), https://bit.ly/3B22rv7. Pablo Picasso "mocked … those who wanted to understand his art." E.H. Gombrich, *The Story of Art* 577 (2021). Artist Richard Prince disclaimed "trying to create anything with a new meaning or a new message." *Cariou*, 714 F.3d at 707. Under AWF's test, it is unclear whether meaninglessness is itself a message, or negates the whole inquiry. Similarly, AWF's test creates unanswerable questions about artists like Freddie Mercury, who died before revealing what "Bohemian Rhapsody" meant. Congress did not erect a test only philosophy professors and mediums could resolve.

Meanings also shift over time, and AWF does not say which period governs. Artists change their minds about what works signify. *Patry on Copyright*, *supra*, § 10:35.33. Early critics rejected Marcel Duchamp's urinal as art; later critics hailed "Fountain" for inspiring Pop Art and agreed that treating an ordinary urinal as art

makes it art. Kelly Grovier, *The Urinal That Changed How We Think*, BBC (Apr. 11, 2017), https://bbc.in/3OkQhQQ. Public perceptions likewise evolve. Wagner's operas conveyed a darker message to many after Hitler made them the theme music for the Third Reich. In 1915, D.W. Griffith's *Birth of a Nation* was a smash-hit presidential favorite. Today, the film is an unwatchable ode to virulent racism. A test where two works might share perceived meaning one day but diverge the next does not bode well for stability.

The malleability of purported meaning also encourages manipulation. Would-be appropriators could always assert that their works mean something different. Take Sherrie Levine's series *After Walker Evans*, where Levine simply photographed Evans' photographs:

Whereas Evans purportedly conveyed the harshness of the Depression, Levine described her message in capturing the same pictures as "undermining … those most hallowed principles of art in the modern era: originality, intention, expression." *Patry on Copyright, supra*,

§ 10:35.31. Critics agreed, heralding Levine's "feminist hijacking of patriarchal authority, a critique of the commodification of art, and an elegy on the death of modernism." *Id.* § 10:35.33 (quoting Museum of Modern Art commentary). If naked copying itself creates new meaning, all appropriation is fair game. Out the window: The longstanding rule that "merely labeling something as art" does not "automatically render[] it immune from copyright treatment." *Id.* § 10:35.20.

The Copyright Act also requires use-by-use analysis, 17 U.S.C. § 107, begging questions about whether different uses of a work inherently change its message. Viewing Picasso's *Old Guitarist* at the Art Institute of Chicago presumably conveys different meaning from experiencing *Old Guitarist* on shower curtains or socks.

AWF's meaning-or-message test becomes absurd for many "original works of authorship fixed in any tangible medium of expression" that the Copyright Act protects. 17 U.S.C. § 102. Copyrightable works encompass architecture, maps, toys, quilts, pantomime, piggy banks, computer programs, and stuffed animals. *Id.* § 102(4), (5), (8); Nimmer, *supra*, § 2.08[A]; *Patry on Copyright*, *supra*, §§ 3:70, 3:121. Probing such works for their "meaning or message" is nonsense.

Take the Willis Tower (née Sears). If towers convey meaning, perhaps that one trumpets Chicago's self-perceived exceptionalism. Maybe, after losing the World's Tallest Building title in 1998, the tower signifies urban decline. But surely, if an architect built a multicolored clone in Fargo, the fair-use inquiry should not turn on whether changed location and new colors transformed a tower's supposed message.

Similar imponderables afflict other copyrightable works. It is not obvious that mazes and puzzles have deeper meaning beyond their solution. Conversely, Barbies produce meaning overload. Depending on who you ask, Barbie signals uber-femininity, unrealistic body image, America, the versatility of high-heels-only fashion, patriarchy, and consumer culture. *See* Rebecca Tushnet, *Make Me Walk, Make Me Talk, Do Whatever You Please*, *in Intellectual Property at the Edge* 405 (Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds., 2014). Her meaning perennially shifts with new editions: Bathing-suited Original Barbie (1959) gave way to Malibu Barbie (1971), Marie Antoinette Barbie (2003), Computer Engineer Barbie (2010), and even Elvis Barbie (2021). The endless open questions AWF's meaning-or-message test would raise—as well as the arbitrariness of any routes to narrowing that test—would guarantee confusion and litigation.

2. This case encapsulates the problems. Despite lip service to an "objective" reasonable-person test (at 48), AWF concludes that Warhol's and Goldsmith's depictions of Prince embody different meanings by mixing and matching whose intent counts, and for which works.

For Goldsmith, AWF analyzes the Prince photograph *Vanity Fair* licensed. AWF treats Goldsmith's 2018 deposition statements about her purported subjective intent as dispositive of what her 1981 photograph means: Prince is "vulnerable" and "fragile." Pet. Br. 15, 45. Apparently, had Goldsmith stated that she saw Prince as iconic—or retained experts to explain that celebrity photographers deify rockers—the outcome would change. If viewers' objective reactions count, the Second Circuit noted that "a whole generation of Prince's fans might have trouble seeing the Goldsmith Photograph as depicting anything other than the iconic songwriter and performer." Pet.App.23a.

For Warhol, AWF never says how Orange Prince was "reasonably perceived" by anyone reading the 2016 Condé Nast tribute—the relevant "use" under section 107. Instead, AWF treats the 16-work Prince Series as a monolith that shares the same meaning, no matter how each work is used. And, despite emphasizing Goldsmith's subjective intent, AWF does not compare Warhol's subjective intent. Warhol died before lawyers could depose him and omitted the Prince Series from his diaries. Perhaps Warhol saw Goldsmith's Prince as iconic. Warhol's only known opinion is his willingness to depict Prince if *Vanity Fair* paid him. And Warhol's canonical statement about the meaning of his art—art is "anything you can get away with," Patricia L. Dooley, *Freedom of Speech* 77 (2017)—presumably sends the wrong message here.

AWF (at 20, 45) instead divines what Warhol "sought … to communicate" through art critics Thomas Crow and Neil Printz, who never met Warhol. J.A.187, 227. Crow opined that Warhol would not likely have depicted Prince had *Vanity Fair* not paid him. J.A.307. Both equate the Prince Series with how critics today see Warhol's other works—as commentary on celebrity. J.A.187, 227-28. Crow emphasizes features like adding colors, flattening, and abstracting images, as central to conveying the dehumanizing "impact of celebrity," but those features typify silkscreens generally. Pet. Br. 44-45; *see* J.A.227. Anyway, two works in the Prince Series are pencil drawings and five are essentially grayscale. More broadly, AWF's comparison between a photographer's subjective, 37-years-later impression of her photograph and expert witnesses' rendition of how critics see Warhol's silkscreens is arbitrary and manipulable.

AWF's contention (at 50-51) that "Warhol's unique style is the very thing that gives the Prince Series its distinct message" would treat any "difference in style" as transformative, "weaken[ing] the protection of copyright." *Campbell*, 510 U.S. at 599 (Kennedy, J., concurring). Under AWF's test, every Warhol-style silkscreen conveys a different message from the original photograph. That "logic would inevitably create a celebrity-plagiarist privilege; the more established the artist and the more distinct that artist's style, the greater leeway that artist would have to pilfer the creative labors of others." Pet.App.27a; *see* AIPLA Br. 27-28. No one doubts Warhol's artistic innovations. But Warhol charged for his art and AWF will continue profiting, including by vigorously asserting Warhol's copyrights. Fame is not a ticket to trample other artists' copyrights.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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