

# IT AIN'T REAL FUNKY UNLESS IT'S GOT THAT POP: ARTISTIC FAIR USE AFTER *GOLDSMITH*

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## INTRODUCTION

Born Prince Rogers Nelson, Prince was one of the most influential artists in history, transforming rock and pop music by drawing from his roots in Black funk and soul to assert an undeniable charisma and sexuality in his work.<sup>1</sup> Although people largely agree that Prince was a transformative musician, there is considerably more debate on whether Andy Warhol was a transformative artist.<sup>2</sup> *Andy Warhol Foundation for the Visual Arts v. Goldsmith* presents an opportunity for the Supreme Court to weigh in on the nature of transformation in art, and what role that transformation may play in a proper fair use analysis.

In *Goldsmith*, the Court will decide whether modification of an artwork's "meaning or message" suffices as "transformative" under the Court's established four-factor fair use analysis test.<sup>3</sup> Further, the Court will have the opportunity to clarify the sources of meaning and message that courts may consider, which may include the artist's stated intentions, critical reviews, or a lay observer's interpretations.

To facilitate further growth in art, the Court should hold that a work's meaning or message can be considered when evaluating "transformativeness" under the four-factor balancing test. Such a holding would encourage continual development, innovation, and

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1. JOHN COVACH & ANDREW FLORY, WHAT'S THAT SOUND?: AN INTRODUCTION TO ROCK AND ITS HISTORY 414 (5th ed. 2018).

2. Melissa Rossato, *The Contradictions of Warhol: More than Pop and Color*, THE COLUMBIA CHRONICLE (Jan. 22, 2020), <https://columbiachronicle.com/the-contradictions-of-warhol-more-than-pop-and-color>.

3. Petition for a Writ of Certiorari, *Andy Warhol Found. for the Visual Arts v. Goldsmith*, U.S. (2022) (No. 21-869), 2021 WL 5913520, at i (*cert. granted* March 28, 2022).

discourse in art and public expression, while protecting artists in a pop art culture built on commodification. To conclude otherwise would almost categorically eliminate the field of pop art and unduly restrict artists' ability to convey commentary and criticism. Further, this decision would comport well with long-established precedent and comply with the constitutional goal of "promoting the Progress of Science and useful Arts."<sup>4</sup>

## I. FACTS

In 1981, Linda Goldsmith arranged to photograph the up-and-coming pop sensation Prince.<sup>5</sup> Prince attended the photography session for less than an hour and appeared uncomfortable and nervous around the lights and cameras.<sup>6</sup> He wore his own clothes to the studio and did not change his wardrobe, although Goldsmith did provide him with a black sash and lip gloss to show that he was "in touch with the female part of himself."<sup>7</sup> Goldsmith's photographs from this session went unpublished.<sup>8</sup>

Subsequently, Vanity Fair approached Goldsmith in 1984 to license a photograph for use in a forthcoming magazine article on Prince entitled *Purple Fame*.<sup>9</sup> Goldsmith knew that the selected photograph would be used as an artist's reference, as Vanity Fair paid Goldsmith \$400 for the right to use the photo.<sup>10</sup> She did not know that Andy Warhol was the artist involved.<sup>11</sup> Warhol proceeded to use Goldsmith's photograph to create the *Prince Series*—a group of sixteen artworks with his iconic color flattening and silkscreen techniques.<sup>12</sup> One of the pieces, *Purple Prince*, was used in the 1984 Vanity Fair article, and Goldsmith was credited as the original photographer.<sup>13</sup> She did not look at the article at the time.<sup>14</sup>

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4. U.S. CONST. art. I, § 8, cl. 8.

5. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 318 (S.D.N.Y. 2019).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 318 (S.D.N.Y. 2019).

12. *Id.* at 319.

13. *Id.* at 318.

14. *See id.* at 321 (stating that Goldsmith only became aware of the *Prince Series* in 2016).



From left to right, see Linda Goldsmith's original 1981 photograph of Prince;<sup>15</sup> *Purple Prince* as used in the 1984 Vanity Fair article, "Purple Fame";<sup>16</sup> and *Orange Prince* as used in the 2016 Condé Nast commemorative edition.<sup>17</sup>

In the following years, Warhol sold the constituent artworks of the *Prince Series* to museums and private collectors.<sup>18</sup> After Andy Warhol's death in 1987, the Andy Warhol Foundation for the Visual Arts (AWF) assumed management and licensing control of his artworks.<sup>19</sup>

When Prince died in 2016, Condé Nast approached AWF to license *Orange Prince* from the *Prince Series* as the cover art for a retrospective on Prince's life and career.<sup>20</sup> Condé Nast paid AWF \$10,000 for the licensing,<sup>21</sup> and Goldsmith was not credited as the original photographer.<sup>22</sup> This time, Goldsmith saw *Orange Prince* on the magazine cover and recognized the photograph underlying Warhol's work as the one she had taken in the initial 1981 photoshoot.<sup>23</sup>

Goldsmith approached AWF, demanding a substantial payment for what she believed was an unauthorized, infringing use of her

15. Answer and Counterclaim at 14, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312 (S.D.N.Y. 2019) (No. 17-cv-02532-JGK), 2017 WL 6818950.

16. Tristan Vox, *Purple Fame*, VANITY FAIR, Nov. 1984, at 66.

17. Tom Prince, *The Genius of Prince*, CONDÉ NAST, May 17, 2016, at cover.

18. *Goldsmith*, 382 F. Supp. 3d at 320.

19. *Id.*

20. *Id.* at 321.

21. Answer and Counterclaim at 15, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312 (S.D.N.Y. 2019) (No. 17-cv-02532-JGK), 2017 WL 6818950.

22. *Goldsmith*, 382 F. Supp. 3d at 321.

23. *Id.*

copyright.<sup>24</sup> She argued that the *Prince Series* was a derivative work and that the law conferred to her, as the original artist, the exclusive right to control the photograph.<sup>25</sup> AWF, recognizing that litigation was imminent, sought a declaratory judgment from the Southern District of New York that *Orange Prince* and the remaining pieces of the *Prince Series* are protected under fair use and are therefore not derivative works.<sup>26</sup> Goldsmith counterclaimed, asserting that the district court should declare that the *Prince Series* is derivative and grant her control over and compensation for uses of the *Prince Series*.<sup>27</sup>

The district court engaged in a fair use analysis and granted AWF's request for a declaratory judgement, finding that *Orange Prince* was transformative as a matter of law and therefore protected under fair use.<sup>28</sup> Notably, the court stated that the "*Prince Series* works can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure."<sup>29</sup> The remaining factors, including the creative nature of the secondary work, did not detract from this finding.<sup>30</sup> Goldsmith appealed to the Second Circuit, arguing that the district court incorrectly and impermissibly weighed the claim of transformation.<sup>31</sup>

## II. LEGAL BACKGROUND

The goal of copyright law is to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>32</sup> Congress has passed several copyright statutes under this grant of power, including the Copyright Act of 1976, which the courts have expounded upon as the law developed through the litigation of unique cases and factual scenarios.<sup>33</sup> There are two competing goals in determining the boundaries of fair use: protecting the right of original

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24. Complaint at 24, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312 (S.D.N.Y. 2019) (No. 1:17-cv-02532), 2017 WL 1330503.

25. *Id.*

26. *Id.* at 2.

27. Answer and Counterclaim at 27, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312 (S.D.N.Y. 2019) (No. 17-cv-02532-JGK), 2017 WL 6818950.

28. *Goldsmith*, 382 F. Supp. 3d at 331.

29. *Id.* at 326.

30. *Id.* at 327.

31. *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 11 F.4th 26, 32 (2d Cir. 2021).

32. U.S. CONST. art. I, § 8, cl. 8.

33. See e.g., *Folsom v. Marsh*, 9 F. Cas. 342, 344-45, 349 (D. Mass. 1841) (supporting protection for "fair and reasonable criticism" and providing the first common law articulation of the fair use test).

creators to control their works and derivatives thereof, while also ensuring that those who build upon previously copyrighted material enjoy a safe harbor. The oppositional nature of these competing values means, however, that each goal can only be achieved at the expense of the other.

#### A. *Copyright Act of 1976*

Ordinarily, the original author of a work has the right “to prepare derivative works based upon the copyrighted work.”<sup>34</sup> A derivative work is “a work based upon one or more preexisting works, such as a translation . . . art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”<sup>35</sup>

The Copyright Act of 1976 recognized that subjecting all secondary uses of a work to the original author’s control as derivatives would unduly restrict the ability of others to build upon and further develop that work. Thus, the Act formally established a fair use safe harbor, which permits the use of copyrighted work by other persons for “purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research.”<sup>36</sup>

Courts consider four factors when determining whether a particular use is fair:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>37</sup>

From this statutory baseline, the Supreme Court has explored, affirmed, and reaffirmed the guiding lights of the fair use inquiry.

#### B. *Common Law Precedent*

The earliest common law articulation of fair use came in *Folsom v. Marsh*, which involved two competing biographies of George Washington that used the first president’s unpublished personal letters

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34. 17 U.S.C. § 106(2).

35. 17 U.S.C. § 101.

36. 17 U.S.C. § 107.

37. *Id.*

as the basis for their narratives.<sup>38</sup> Justice Story authored the opinion in the case, prior to his elevation to the Supreme Court. Justice Story charged judges in fair use cases to “look to 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 diminish the profits, or supersede the original work” in rendering a judgment.<sup>39</sup> Federal courts used Justice Story’s articulation of fair use as common law until the Copyright Act of 1976 codified the standard into statute, although the seminal *Folsom* case still holds persuasive authority today.<sup>40</sup>

In 1985, the Supreme Court examined the four-factor test in the light of the explicit command of the 1976 Act. In the case of *Harper & Row*, the Court considered a magazine’s published excerpts from President Gerald Ford’s memoirs prior to the release of his autobiography.<sup>41</sup> This case contains three valuable insights. The first is the importance of the fourth factor—when there is a substantial impact on the market for the original work, a court is unlikely to find fair use.<sup>42</sup> The second is the nature of the copying—duplicating incidental qualities of a work is more acceptable than copying the “heart of the work.”<sup>43</sup> Even a small amount of copying can be infringement if it duplicates what was special and vital about the original work. Finally, fair use is an affirmative defense that must be proven—otherwise, the allegedly infringing work is derivative and the creator of the original work can exercise control.<sup>44</sup>

The foundational fair use case is *Campbell v. Acuff-Rose Music, Inc.*, which examined the doctrine in 2 Live Crew’s parody of Roy Orbison’s “Pretty Woman.”<sup>45</sup> Although parody is the paradigmatic example of fair use, the *Campbell* test has been used for other, non-parodic analyses as well.<sup>46</sup>

Prior to *Campbell*, the strongest articulation of the first factor, referring to the purpose and character of the use, was that “every

38. *Folsom*, 9 F. Cas. at 345.

39. *Folsom*, 9 F. Cas at 348.

40. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994) (praising *Folsom* as “distill[ing] the essence of law and methodology”); *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 550 (1985) (using *Folsom* as guidance for a fair use analysis).

41. *Harper & Row*, 471 U.S. at 542-43 (1985).

42. *Id.* at 566.

43. *Id.* at 564-65.

44. *Id.* at 561.

45. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572-573 (1994).

46. See *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18 (1st Cir. 2000).

commercial use of copyrighted material is presumptively an unfair exploitation.”<sup>47</sup> The *Campbell* Court, however, took care to demonstrate that there is far more to this factor than commercial use.<sup>48</sup> Rather, the first factor aims to discern if the new work merely “supersedes the objects of the original creation,”<sup>49</sup> or if it “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.’”<sup>50</sup>

The introduction of the word “transformative” to the fair use inquiry originated in a law review article by Judge Pierre Leval. In the original form, “transformative” included items like criticism, exposing the character of the original author, proving a fact, debating ideas in the original, parody, symbolism, aesthetic statements, and “innumerable other uses.”<sup>51</sup> The Court did not adopt this specific language, instead stating in *Campbell* that transformativeness hinges on whether the new work could “reasonably be perceived” as conveying a new meaning or message.<sup>52</sup> The more transformative the work, the less that commercialism and other factors matter.<sup>53</sup>

*Campbell* revolved around parody and, accordingly, targeted its analysis at the first factor of fair use analysis. But the fourth factor, regarding the impact of the secondary work on the market for the original, continues to play a significant role.<sup>54</sup>

Appellate courts have had myriad opportunities to apply *Campbell* in the context of transformative fair use analysis over the years. The case closest to the facts of *Goldsmith* came out of the Seventh Circuit, where a Wisconsin clothing company appropriated a photograph of the Mayor of Madison, changed the color to a bright lime green, and added the caption “Sorry for Partying.”<sup>55</sup> Looking at the meaning or message

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47. Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 451 (1984).

48. *Campbell*, 510 U.S. at 584.

49. Folsom v. Marsh, 9 F. Cas. 342, 348 (D. Mass. 1841).

50. *Campbell*, 510 U.S. at 579.

51. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARVARD L. REV. 1105, 1111 (1990). This specific language is a helpful guide, but was not adopted in *Campbell*, and as such is not binding.

52. *Campbell*, 510 U.S. at 582.

53. *Id.* at 579.

54. *See id.* at 590 (stating that because free use is an affirmative defense, the alleged infringer has the burden of providing evidence about market impact, although there is not an automatic inference of market harm); *cf.* WEIRD: THE AL YANKOVIC STORY at 23:00 (Funny or Die 2022) (exploring the commercial value of parody when the original work remains available).

55. Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 757 (7th Cir. 2014).

of the work, the Seventh Circuit found that it was a form of political commentary, and thus transformative for the purposes of fair use.<sup>56</sup> Similar cases have been heard in the First, Third, Fourth, Sixth, Ninth, and Federal Circuits.<sup>57</sup>

In 2021, the Supreme Court discussed fair use in the context of computer code in *Google LLC v. Oracle America, Inc.*<sup>58</sup> Google copied basic Java program-building tools verbatim into its Android platform to encourage developers to create cross-compatible apps.<sup>59</sup> The term “transformative” was clarified to mean the addition of “something new and important.”<sup>60</sup> Although the dissent disagreed on the applicability of fair use to computer code, its articulation of transformation similarly recognized the value of adding new purpose to a work: “To be transformative, a work must do something fundamentally different from the original. A work that simply serves the same purpose in a new context . . . is derivative, not transformative.”<sup>61</sup> Interestingly, Justice Breyer specifically endorsed the precise replication of advertising logos, such as in Andy Warhol’s *Soup Cans*, as paradigmatic of fair use.<sup>62</sup>

*Google*, which marks the latest modification of fair use by the Supreme Court, stated that the fourth factor’s consideration of the impact on the market for the original work is important,<sup>63</sup> that copying the heart of the work will weigh against an affirmative defense of fair use,<sup>64</sup> and, critically, that one can consider the meaning or message in evaluating transformativeness under the first factor.<sup>65</sup> The more

56. *Id.* at 759.

57. *See, e.g.,* Nunez v. Caribbean Int’l News Corp., 235 F.3d 18 (1st Cir. 2000) (finding new meaning in the republication of photographs to criticize the individual portrayed); Murphy v. Millennium Radio Group, LLC, 650 F.3d 295 (3d Cir. 2011) (holding that the mere reproduction of a photograph on a website lacked any new meaning); Brammer v. Violent Hues Productions, LLC, 922 F.3d 255, 261, 263-64 (4th Cir. 2019) (finding that no new meaning was added when a photograph was replicated for the sole purpose of portraying the subject of the photograph); Basley v. LFP, Inc., 691 F.3d 747 (6th Cir. 2012) (searching for meaning in a magazine’s usage of a preexisting photograph); Seltzer v. Green Day, 725 F.3d 1170 (9th Cir. 2013) (using a photograph as a concert backdrop added new meaning when contrasted with the performance); Gaylord v. United States, 595 F.3d 1364 (Fed. Cir. 2010) (determining that a reproduction of the Korean War Memorial on a postage stamp did not add new meaning or criticism).

58. *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021).

59. *Id.* at 1191.

60. *Id.* at 1203.

61. *Id.* at 1219 (Thomas, J., dissenting).

62. *Id.* at 1203 (citing 4 NIMMER ON COPYRIGHT § 13.05[A][1][b]).

63. *See Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183, 1207 (2021).

64. *Id.* at 1205.

65. *Id.* at 1203.



transformative the use, the greater the likelihood the use is fair. In some cases, sufficient transformativeness may be dispositive.

### III. SECOND CIRCUIT HOLDING

The Second Circuit originally heard the case at issue before the Supreme Court handed down *Google*, initially deciding in favor of Goldsmith.<sup>66</sup> Upon petition by AWF, the panel reheard the case to evaluate whether *Google* affected the outcome.<sup>67</sup> Deciding that *Google* did not refute its reasoning, the panel modified and rereleased its prior opinion.<sup>68</sup>

The current controversy surrounds the court's treatment of the first factor. On appeal to the Second Circuit, Goldsmith argued that the district court's finding of fair use was "grounded in a subjective evaluation of the underlying artistic message of the works rather than an objective assessment of their purpose and character."<sup>69</sup> The Second Circuit agreed, and it held that neither the actual or perceived intent of the artist, nor the impressions of the meaning or message of an artwork by a critic or judge, can be considered when evaluating if a work is transformative.<sup>70</sup> Because the meaning of the artwork cannot be considered, artworks such as those by Andy Warhol become the mere imposition of another style onto a preexisting copyrighted work.<sup>71</sup> *Orange Prince* and the entire *Prince Series* thus become derivative works sharing the exact same purpose as Goldsmith's original photo—to serve as portraits of Prince, regardless of potential interpretations of meaning or message.<sup>72</sup>

The Second Circuit leaves open only two avenues for meaning or message to play a role in evaluating transformation. The first concerns the question of whether the new work comments on the original work from which it draws inspiration. Absent such relation, the assertion of a "higher or different artistic use" is insufficient to show

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66. Andy Warhol Found. for the Visual Arts v. Goldsmith, 11 F.4th 26, 51 (2d Cir. 2021).

67. *Id.*

68. *Id.* at 51-52. In finding that *Google* did not refute their original reasoning, the Second Circuit claimed that the main function of *Google* was to extend fair use protection to the novel context of computer code, and not to alter the traditional understanding of the four fair use factors. Furthermore, the court relies on a statement in *Google* that copyright protection may be stronger in artistic, rather than utilitarian contexts.

69. *Id.* at 32.

70. *Id.* at 42.

71. *Id.*

72. *Id.*

transformation.<sup>73</sup> The second is collage—pieces comprised of “distinct works of art that draw from numerous sources, rather than works that simply alter or recast a single work with a new aesthetic.”<sup>74</sup>

Outside of these avenues, purpose and character under the first factor can only be assessed by looking to whether the use of the source material was necessary for a “fundamentally different and new artistic purpose and character, such that the secondary work stands apart from the raw material used to create it.”<sup>75</sup> The court discarded the standard articulated in *Campbell* and applied by the district court. This articulation of transformativeness is more limited than the one found in the Second Circuit’s precedent, where it was permissible to consider the size, color, general composition, and nature of the works.<sup>76</sup>

#### IV. ORAL ARGUMENT

The Court began oral argument by probing Petitioner AWF over the distinction between derivative works and secondary works that are protected by fair use.<sup>77</sup> Justices Thomas, Sotomayor, and Barrett were concerned about potentially expanding the scope of fair use to include movie adaptations, which have long been considered a quintessential derivative work, by placing weight on the first factor at the expense of the fourth factor.<sup>78</sup> Chief Justice Roberts and Justice Thomas explored the dangers of allowing the fair use defense whenever there was some aesthetic change—now easily achievable with a computer program<sup>79</sup>—accompanied by a flat claim of originality.<sup>80</sup> Petitioner declined to give

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73. *Rogers v. Koons*, 960 F.2d 301, 310 (2nd Cir. 1992). The Second Circuit has previously stated in dicta that Warhol’s *Marilyn Triptych* is exactly the kind of transformational commentary that is protected by fair use. *Cariou v. Prince*, 714 F.3d 694, 706 (2nd Cir. 2013). This sentiment has been echoed by other courts. *See, e.g., Comedy III Prod., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001).

74. *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 11 F.4th 26, 41 (2d Cir. 2021).

75. *Id.* at 42.

76. *Cariou*, 714 F.3d at 706.

77. Transcript of Oral Argument at 5, *Andy Warhol Found. for the Visual Arts v. Goldsmith* (U.S. argued Oct. 12, 2022) (No. 21–869).

78. *Id.* at 5–6, 52.

79. Artificial intelligence bots that can create stunning artworks are becoming more sophisticated every day, blurring the line between programmer and program, artist and brush. Kevin Roose, *An A.I.-Generated Picture Won an Art Prize. Artists Aren’t Happy.*, N.Y. TIMES, (Sept. 2, 2022), <https://www.nytimes.com/2022/09/02/technology/ai-artificial-intelligence-artists.html>. Although not at issue in *Goldsmith*, the copyright and fair use implications of these computer-generated works are palpable and of concern to courts and artists alike. *See Sarah Ligon, AI Can Create Art, but Can It Own Copyright in It, or Infringe?*, THE LEXIS PRACTICE ADVISOR JOURNAL, Mar. 1, 2019.

80. Transcript of Oral Argument at 12, 42–45, *Andy Warhol Found. for the Visual Arts v.*

dispositive weight to the first factor, instead claiming that meaning or message was simply one element that ought to be considered when assessing transformativeness.<sup>81</sup> Justice Jackson attempted to delineate between the terms “purpose” and “character” in 17 U.S.C. § 107,<sup>82</sup> with Petitioner answering that both terms were affected by a work’s transformation, meaning, and message.<sup>83</sup> Justices Alito and Kagan remarked upon the ever-present<sup>84</sup> challenge of calling upon judges to conduct aesthetic assessments and discern the meaning of artistic works.<sup>85</sup> Petitioner assured the Court that such analysis was entirely possible and had been done by courts for years by calling witnesses and evaluating evidence.<sup>86</sup> Justice Kavanaugh explored the potential competition between the original photograph and Warhol’s work, remarking that there was a possibility for competition within a magazine, but not in an art museum.<sup>87</sup> Petitioner classified competition as a fourth factor issue, not a concern under the first factor.<sup>88</sup> Justice Kagan concluded by pointing out the benefit of hindsight—Andy Warhol is now widely regarded as a transformative artist, even if his work was controversial at the time of its creation.<sup>89</sup> Petitioner claimed that this point supported AWF, since a broader interpretation of fair use would help protect burgeoning artists.<sup>90</sup>

Respondent Goldsmith argued that an overbroad definition of “transformative” would destroy the market for derivative works and that including meaning or message within the scope of the first factor would render the doctrine hopelessly vague.<sup>91</sup> Justice Kagan inquired how one could evaluate a work’s purpose and character without

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Goldsmith (U.S. argued Oct. 12, 2022) (No. 21–869). Justice Thomas stated that he was “a Prince fan . . . in the ‘80s,” and, when pushed further by Justice Kagan, revealed that he was now a fan of Prince “only on Thursday nights.” The constitutional implications of this statement remain unknown.

81. *Id.* at 13.

82. *Id.* at 54–56.

83. *Id.* at 56–58.

84. *See* *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 251 (1903) (expressing concerns over judges acting as art critics).

85. Transcript of Oral Argument at 22–27, *Andy Warhol Found. for the Visual Arts v. Goldsmith* (U.S. argued Oct. 12, 2022) (No. 21–869).

86. *Id.* at 22–24.

87. *Id.* at 35.

88. *Id.*

89. *Id.* at 37.

90. *Id.* at 38.

91. Transcript of Oral Argument at 61–62, *Andy Warhol Found. for the Visual Arts v. Goldsmith* (U.S. argued Oct. 12, 2022) (No. 21–869).

considering its meaning and message.<sup>92</sup> Respondent backtracked, stating that meaning and message could be considered, but that a “bare purpose to add new meaning to someone else’s art for profit” was insufficient to merit a finding of fair use.<sup>93</sup> Chief Justice Roberts explored the relationship between style and message, prompting Respondent to compare the present case to the large number of *All in the Family* spinoffs.<sup>94</sup> The Chief Justice expressed skepticism over the analogy.<sup>95</sup> Justice Alito, previously skeptical of the ability of judges to act as art critics, queried Respondent over why judges would be categorically unable to discern meaning and message from testimony and evidence.<sup>96</sup> Respondent answered that the commercial use of the new work also needed to be considered.<sup>97</sup> In conversation with Justice Jackson, Respondent advanced a new necessity requirement, in which copying from a work must be essential for commentary or criticism before it would be protected under fair use.<sup>98</sup>

Appearing as amicus curiae for Respondent, the United States advanced concerns about expanding the scope of fair use too broadly.<sup>99</sup> The Government ceded that meaning and message can be used when assessing the purpose and character of a work under the first factor, but that this should not be given overly dispositive weight.<sup>100</sup> Justice Alito appeared wary of the Government’s articulation of a weaker version of the necessity requirement.<sup>101</sup> Justice Gorsuch pointed out the difficulty of considering commercial purpose for both the first factor and the fourth factor.<sup>102</sup>

On rebuttal, Petitioner remarked that Respondent Goldsmith’s arguments had changed before the Court, now seeming to accept the relevance of interpreting a work’s meaning or message, although hesitant to treat meaning or message as dispositive.<sup>103</sup> Petitioner also strongly pushed back against a necessity requirement, because adding

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92. *Id.* at 63.

93. *Id.* at 64.

94. *Id.* at 70.

95. *Id.* at 70–71.

96. *Id.* at 74–75.

97. Transcript of Oral Argument at 76–77, *Andy Warhol Found. for the Visual Arts v. Goldsmith* (U.S. argued Oct. 12, 2022) (No. 21–869).

98. *Id.* at 83–84.

99. *Id.* at 88, 106.

100. *Id.* at 91.

101. *Id.* at 98.

102. *Id.* at 107.

103. Transcript of Oral Argument at 116, *Andy Warhol Found. for the Visual Arts v. Goldsmith* (U.S. argued Oct. 12, 2022) (No. 21–869).

the condition would heavily restrict the types of art that could be fairly used.<sup>104</sup>

## V. ANALYSIS

The Supreme Court should reverse the Second Circuit’s decision and clarify the role of meaning and message in fair use analysis. In *Campbell*’s articulation of the first factor, a different purpose and character was taken to include a new meaning and message.<sup>105</sup> This interpretation was affirmed in *Google*, as the addition of something “new and important” satisfied the first factor.<sup>106</sup> The Second Circuit wrote this consideration out of its analysis, resting its decision on the impossibility of objective interpretations of meaning and message and the commercial use of *Orange Prince* within the pages of a magazine.<sup>107</sup> Several issues make this position untenable.

Initially, removing consideration of meaning or message from the law would solve a nonexistent problem—in the decades since *Campbell*, courts have aptly demonstrated their ability to apply the fair use standard consistently and effectively. Only in extreme cases would a use be so transformative that the first factor would be dispositive—in the normal course of business, it would simply remain a thumb on the scale in evaluating a fair use defense.<sup>108</sup>

The Second Circuit’s inconsistency with binding precedent from the Supreme Court, persuasive authority from the other circuits, and its own prior holdings, is troubling. This comparison is most concerning with the case of the artist Jeff Koons, who’s 2002 *Easyfun–Ethereal* collage was created by taking cutouts from several different magazines and contrasting them against each other.<sup>109</sup> The Second Circuit held that “changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictured, [and] the objects’ details”<sup>110</sup> were sufficient to show that the original photographs had been used “as raw material for an entirely different type of art . . . that

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104. *Id.* at 120.

105. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

106. *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183, 1203 (2021).

107. *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 11 F.4th 26, 41–42 (2d Cir. 2021). (holding that all interpretations of art are subjective, and that both Goldsmith’s photograph and *Orange Prince* were essentially portraits).

108. *Campbell*, 510 U.S. at 579.

109. *Blanch v. Koons*, 467 F.3d 244, 247 (2d Cir. 2006).

110. *Id.* at 253.

comments on existing images by juxtaposing them against others.”<sup>111</sup> Koons’s artwork was therefore considered fair use.<sup>112</sup> Inspection of *Orange Prince* reveals that all of these criteria are met—the only salient difference being that *Orange Prince* is a silkscreen, while *Easyfun–Ethereal* is a collage drawn from multiple sources. Absent the Second Circuit having a baffling fondness for collage, its holding in the present case results in strange lines being drawn—if works that comment directly on the original and works that comment on each other are protected by fair use, then the exclusion of works that comment on social phenomena like fame, politics, and consumerism becomes arbitrary.

The articulation of a necessity requirement for fair use is also impractical. Requiring a particular photograph or precursor work to be necessary for an artist to convey his or her message would result in fair use rarely applying, if at all.<sup>113</sup> If only one photograph existed that was suitable for use as an artistic reference of a particular person, then the use of it would be necessary.<sup>114</sup> If a second photograph existed, however, then neither image could meet the necessity requirement because the other photograph would be a viable alternative. Andy Warhol did not have to use Goldsmith’s photograph to create the *Prince Series*—but, had he used another photographer’s work, an identical controversy would have arisen with a different appellee.<sup>115</sup> The existence of multiple photographs of a person cannot render the fair use of one of them impossible.

A final point of concern is that the use of the term “transformative” for the first factor originally emerged in *Campbell*,<sup>116</sup> while “transform” is actually included in the statutory language regarding derivative works.<sup>117</sup> While ostensibly relevant, the common law histories of the words differ significantly—“transformative” was taken from a law

111. *Id.* at 262 (Katzmann, J., concurring).

112. *Id.* at 259.

113. Parody would be the only category of fair use likely to remain eligible, because parody has the express purpose of commenting on the original and requires borrowing from that original to do so. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994).

114. Prior to *Campbell*, the Second Circuit had occasionally employed a necessity requirement regarding direct literary quotes from other works. Leval, whose articulation of “transformative” was accepted by the Supreme Court, disavowed the need for such a requirement as contrary to the purposes of fair use. *See Pierre N. Leval, Toward a Fair Use Standard*, 103 HARVARD L. REV. 1105, 1113-14 (1990).

115. Transcript of Oral Argument at 120, *Andy Warhol Found. for the Visual Arts v. Goldsmith* (U.S. argued Oct. 12, 2022) (No. 21–869).

116. *Campbell*, 510 U.S. 569, 579 (1994).

117. 17 U.S.C. § 106.

review article and its specific, novel meaning in this context should not be neutered simply because the term shares an etymological origin with a term used elsewhere in the statute.<sup>118</sup> Furthermore, 17 U.S.C. § 106 is expressly made subject to § 107 in the statutory text.<sup>119</sup> Therefore, if the four-factor test is met, then the secondary work is protected even if it derives heavily from the original.

The Court should reaffirm *Campbell* and reverse the Second Circuit, stating that meaning or message can be considered in evaluating the transformative nature of a work. This doctrine was recently reaffirmed by six Justices in *Google*, which presented a significant stretching of the fair use defense. Reversing the Second Circuit would comport well with long-established precedent while protecting the goals of fair use. After so ruling, the case could be remanded to the Second Circuit or District Court for a new balancing of the four factors by either judge or jury. Regardless of the factors considered, fair use is, and should always be, a holistic inquiry.

### CONCLUSION

In oral argument, Justice Gorsuch compared the application of the fair use defense to the present controversy with its application to Warhol's *Soup Cans*, observing that "this is a much harder case."<sup>120</sup> The goal of copyright law is to further the progress of science and useful arts by balancing the incentive of exclusive ownership rights with the incentive of a fair use safe harbor. Charting a course between the Scylla and Charybdis of unlimited free use and overly restrictive derivative works protections will be challenging. Luckily for the Court, it has a lighthouse to look to: *Campbell v. Acuff-Rose Music*. By taking meaning and message into account as one factor among many, *Campbell* laid down a practical, workable test that courts have successfully invoked in many cases. Adding a necessity requirement or other hurdles would restrict artists from creating new works and run contrary to a commonsense maxim: "if it ain't broke, don't fix it."<sup>121</sup>

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118. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARVARD L. REV. 1105 (1990).

119. *Id.* § 106 is "subject to" § 107, while § 107 applies "notwithstanding" § 106. This means that something is only subject to the derivative work provisions if fair use does not apply, and not that something falls within fair use only if it is not derivative.

120. Transcript of Oral Argument at 109, *Andy Warhol Found. for the Visual Arts v. Goldsmith* (U.S. argued Oct. 12, 2022) (No. 21–869).

121. *Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1347 (7th Cir. 1985) (Will, J., concurring).

The Court should stand by its precedent and not fall prey to the pleas of either side to harshly restrict or overly expand the scope of fair use. Art is objective and subjective, beautiful and ugly, original and inspired, pleasing and disgusting—it is this multifaceted nature that allows it to convey new meanings and messages to all viewers, be they critics or creators, laymen or lawmen.<sup>122</sup> As Justice Story wisely observed about copyright law in *Folsom v. Marsh*:

This is one of those intricate and embarrassing questions, arising in the administration of civil justice, in which it is not, from the peculiar nature and character of the controversy, easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases. Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent.<sup>123</sup>

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122. See LEO TOLSTOY, WHAT IS ART? 48, 50 (Alymer Maude trans., 1899) (1896) (essay on the role of art in conveying sensation, emotion, and knowledge).

123. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (D. Mass. 1841).