"Blurred Lines" – Is it Copyright Infringement or Fair Use? You Decide.

IADC – CLE Presentation

February 22, 2023

Presenters:

Nicholas Bartelt – Attorney-Advisor, U.S. Copyright Office

101 Independence Ave. SE
Washington, D.C. 20559

Nicholas Hoffman – Partner, McGuireWoods LLP

Wells Fargo Center, South Tower
355 S. Grand Ave., Ste. 4200
Los Angeles, CA 90071-3103

Anna G. Schuler – Associate, Spencer Fane LLP

6201 College Blvd., Ste. 500
Overland Park, KS 66211
Fair Use in Copyright – A Primer¹

I. What is “fair use” in the copyright context?

Only “original works of authorship” can receive copyright protection under § 102(a) of the Copyright Act. 17 U.S.C § 102(a). While neither the copyright statute nor the Constitution define “originality,” it is central to the copyright regime. Without explicit guidance, interpretation of this concept has developed over time.²

Courts are hesitant to explicitly define the contours of the requisite creativity and originality required for copyright protection. This reluctance forms the basis of the “nondiscrimination principal,” first articulated in Bleistein v. Donaldson Lithographing Co. 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”). Because deciding the creativity of a work would necessarily turn on a subjective opinion regarding the value of such work, courts have consistently applied the creativity and originality standard liberally.

To receive copyright protection, a creative work must be “fixed” in a tangible medium of expression. See 17 U.S.C. § 102. For digital content, fixation occurs when the content exists for “more than a transitory period” of time. Williams Elecs., Inc. v. Artic Int’l Inc., 685 F.2d 870, 874 (3d Cir. 1982).

Because an author’s rights exist upon fixation, registration with the government is not required to receive copyright protections.³ With or without registration, copyright owners enjoy several exclusive rights, which include the right to make copies of the work and the right to publicly display the work. 17 U.S.C. § 106 (the other exclusive rights include the right to prepare derivative works, the right to distribute copies of the work, and the right to publicly perform the

---


² It was once argued, for example, that photographs did not have the requisite creativity to qualify for copyright protections because they were simply “capturing reality.” See Burrow-Giles Lithographing Co. v. Sarony, 111 U.S. 53, 57–58 (1884) (holding that photographs could be considered “writings” and photographers were “authors” for purposes of the statute).

³ However, registration confers additional protections for copyright owners. If seeking damages from copyright infringement, the plaintiff has the right to claim actual damages plus the infringer’s profits, or statutory damages. 17 U.S.C. § 504(b)–(c). However, statutory damages are only available for copyrights that are registered with the Copyright Office. Id. In theory, authors still would be able to recover actual damages, but these are invariably harder to calculate and give the plaintiff less flexibility in litigation. See Engle v. Wild Oats, Inc., 644 F. Supp. 1089, 1091 (S.D.N.Y. 1986).
work). As American copyright law evolved, defenses to these exclusive copyright protections such as “fair use” were developed and codified.\(^5\) 17 U.S.C. § 107.

Fair use is a judicially-created doctrine with early roots in American jurisprudence. One of the earliest fair use cases was *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) in which the defendant was sued for publishing copies of George Washington’s letters. *Id.* at 345. In his famous decision, Justice Joseph Story explained several factors that courts should consider in determining if a secondary use is fair. He stated:

> [T]he question of piracy, often depend[s] upon a nice balance of the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercise the same common diligence in the selection and arrangement of the materials.

*Id.* at 344.

These factors have since been the cornerstone of the fair use defense\(^6\) and are meant to ensure that creativity will not stagnate due to the over restriction of copyrights.\(^7\) Justice Story’s fair use factors were codified in the Copyright Act of 1976, and courts now consider four nonexhaustive factors:

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;

---

\(^4\) Although copyright is not contingent on registration, before instituting a civil action for copyright infringement, a claimant must apply to register the work with the U.S. Copyright Office and receive a determination by the Office either that the work has been registered or that registration has been refused. See 17 U.S.C. § 411(a); *Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019).

\(^5\) The doctrine of fair use was not part of the original copyright statute, either in its English form or in the Copyright Act of 1790. Early copyright law recognized a “fair abridgement” claim, “by which a defendant could be found not to infringe by having demonstrated his own ‘invention, learning, and judgment’ in the production of a modified work.” See Craig Nard, et al., THE LAW OF INTELLECTUAL PROPERTY 494, 697 (4th ed. 2014).

\(^6\) The emergence of fair use to balance the benefit to the infringer against the harm to the copyright holder was explored in Justice Story’s formative opinion in *Folsom*, 9 F. Cas. at 344. In that case, Justice Story articulated a framework for analysis that largely survives in § 107. As stated by Justice Story, courts must “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 objects, of the original work.” *Id.* at 348. These fair use principles entered the common law but remained uncodified until the 1976 Act formally included the doctrine. Despite the early articulation of the fair use doctrine, the Supreme Court did not explicitly address fair use until 1984. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (“the Betamax case”).

\(^7\) 17 U.S.C. § 107 codifies copyright’s fair use doctrine and provides that certain uses of copyrighted works are not infringements of the copyright owner’s exclusive rights. That a use is “fair” is a defense to a charge of infringement, with the burdens of pleading and proving the defense falling on the alleged infringer. *Id.*
(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.


II. The legal framework for assessing fair use.

The preamble to the fair use section of the Copyright Act explains that, in general, fair use for purposes such as “criticism, comment, news reporting, teaching . . . scholarship, or research” are not infringing. 17 U.S.C. § 107. This nonexhaustive list is considered in conjunction with the four enumerated factors. However, nothing in the text or history of the statute suggests how courts should handle any of the factors or how they should balance the results of analyzing each factor separately.8 In fact, the weight of certain factors has changed over time.

In many cases, courts have afforded the fourth factor (effect on the potential market for or value of the copyrighted work) the most weight,9 but the Second Circuit has been influential in focusing on the first factor (the purpose and character of the work) by applying and expanding the “transformativeness” test outlined in the Supreme Court’s decision in Campbell v. Acuff-Rose Music, Inc.10 In analyzing the purpose and character of the use, Campbell instructs courts to consider whether a use is “transformative” by asking “whether the new work merely ‘supersede[s] 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.” Campbell, 510 U.S. 569, 579 (1994) (alteration in original) (citations omitted) (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)); accord Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013). In Campbell, one of the most important modern fair use cases, the U.S. Supreme Court arguably liberalized the traditional fair use standard—at least as to the first factor—by adopting Judge Pierre N. Leval’s “transformative” use framework. As Professor Pamela Samuelson stated, the most notable contributions of the Campbell decision have been “the Court’s emphasis on the ‘transformative’ nature of a defendant’s use as weighing in favor of fair use, and . . . its expansive

---

8 Craig Nard, et al., THE LAW OF INTELLECTUAL PROPERTY 494, 710 (4th ed. 2014). However: [T]he first and fourth factors are overwhelmingly the most important factors in fair use analysis, as measured by their correlation with the outcome of the overall fair use test. With regard to the first factor, . . . Beebe’s study reveals that 95% of the opinions that found that factor one disfavored fair use, found no fair use, while 90% of opinions that found that factor one favored fair use, found fair use . . . for the fourth factor . . . the correlation with overall outcome was even higher. Of 141 opinions that found that factor four disfavored fair use, all but one found no fair use . . . a correlation of over 99%. Of 116 opinions that found that factor four favored fair use, all but six found fair use: a correlation of 95%. Neil Weinstock Netanel, Making Sense of Fair Use, 15 LEWIS & CLARK L. REV. 715, 723–24 (2011).

9 See, e.g., Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 566 (1985) (stating that the fourth factor, the effect on the market for or value of the work, “is undoubtedly the single most important element of fair use”).

10 See, e.g., Cariou v. Prince, 714 F.3d 694, 706–08 (2d Cir. 2013) (concluding that defendant’s images incorporating plaintiff’s photographs “have a different character, give [plaintiff’s] photographs a new expression, and employ new aesthetics with creative and communicative results distinct from [plaintiff’s]”); Blanch v. Koons, 467 F.3d 244, 259 (2d Cir. 2006) (holding that Koons’s work sufficiently transformed Blanch’s photograph because it incorporated her work into a larger social commentary).

The Court in *Campbell* based its transformation test on Judge Leval’s article “Toward a Fair Use Standard.” Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990). In this highly instrumental article, Judge Leval argued that the key determination in a fair use decision should be whether, and to what extent, the challenged use is transformative. *Id.* He explained, “[t]he use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.” *Id.* at 1111. He articulates that if the secondary work “adds value” to the original, then it encompasses the very type of activity that fair use is meant to encourage in society. *Id.*

According to an empirical study of fair use cases by Professor Neil Netanel, courts that find a use to be transformative often give less weight to the other statutory factors, such as the possibility of market harm and the amount of the work taken, and are more likely to conclude that the use is fair. See Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 723–24 (2011). The concept of transformation is of central importance to appropriation art in general and has important ramifications for digital art posted on social media, as digital works are incredibly easy to manipulate and reproduce.

The second factor, the nature of the copyrighted work, analyzes the connection of the original work to copyright’s goals, such as the promotion of artistic expression. See *Campbell*, 510 U.S. at 579. The more factual the nature of the work, the less likely this factor will favor fair use, in contrast to more creative, expressive works.11 The amount and substantiality of the portion used, the third fair use factor, must be analyzed in terms of the “quantitative and qualitative aspects of the portion of the copyrighted material taken.” *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006). However, even where the entirety of the work is used, if it is necessary to achieve the purpose of the use, some courts consider this factor to be neutral. See *id.* (“[C]opying the entirety of a work is sometimes necessary to make a fair use of the image.”).

The final factor, the effect on the potential market for, or value of, the work, has been heralded as “undoubtedly the single most important element of fair use” (though never dispositive). *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 566 (1985). It considers the market substitution effects of subsequent uses of the work on the market for the original. In *Campbell*, the Court explained that use for a commercial purpose must be considered in context and that, in general, no presumption of market harm should be inferred, particularly when the use is transformative. 510 U.S. at 591. If a use is sufficiently transformative, the Court explained, there will be a lower likelihood that the use will replace the market for the original. *Id.*

**III. The Supreme Court takes on the issue – the Andy Warhol case.**

On October 12, 2022, the Supreme Court heard hours of oral arguments regarding whether Andy Warhol’s works were a “transformative” fair use of a copyrighted photo of Prince taken by photographer Lynn Goldsmith. (Below, Goldsmith’s photograph is on the left, and a silk-screened image Andy Warhol created using the photograph is on the right).

---

In March 2021 the Second Circuit found that Warhol’s “Prince Series” did not constitute a fair use of the copyrighted photograph, reversing the decision of the District Court, which had found Warhol’s use transformative, and thus constituting “fair use” of Goldsmith’s photograph. The panel issued a slightly revised opinion in August 2021 after a motion for reconsideration in light of the Supreme Court’s April 2021 decision in *Google v. Oracle*.

This will be the first time the Supreme Court has taken up the question of fair use in the fine art context since the *Campbell* decision in 1994. Counsel for the Warhol Foundation argue that affirming the Second Circuit’s decision would chill artists from building or commenting on prior works whereas Respondents assert that permitting unauthorized commercial uses by publishers would undermine licensing markets for photographs and disincentivize creation of such works. Another key question before the Supreme Court is what role courts and jurors should play in deciding cases that involve art and interpreting an artwork’s meaning and message.

Whatever the Court decides will likely have a lasting impact on the fair use doctrine and how artists engage with prior works.
Insta-Appropriation: Finding Boundaries for the Second Circuit’s Fair Use Doctrine After Campbell

Anna Schuler
Fordham University School of Law

Follow this and additional works at: https://ir.lawnet.fordham.edu/flr

Part of the Intellectual Property Law Commons

Recommended Citation
Available at: https://ir.lawnet.fordham.edu/flr/vol85/iss1/14
Copyright law’s current fair use landscape is riddled with unclear standards and old considerations forced upon new media. This is especially problematic in the context of digital appropriation of art from online social media platforms—an issue highlighted by Richard Prince’s exhibit “New Portraits,” in which he appropriated strangers’ Instagram photos for his own profit. Unless this situation is remedied, digital content creators will effectively lose their statutory copyright protections. Thus, when considering digital appropriation cases, courts should require a transformation of content rather than purpose, should elevate the weight of the fourth statutory factor, and should reinstate the “comment upon” standard for works of parody and satire. Other scholars have proposed changes to the fair use doctrine, but none adequately protect first-order digital content creators. As such, this Note proposes a reinterpretation of the fair use factors in light of digital appropriation and social media.

INTRODUCTION

I. THE PRIMARY ELEMENTS OF COPYRIGHT PROTECTION

   A. Meeting the Threshold of Originality
   B. Fixation in the Digital Age
   C. Making Fair Use of Copyrighted Works
      1. The Four Factors of Fair Use
      2. Fair Use in Nondigital Art: The Second Circuit’s Leading Approach
         a. Initial Treatment of Fair Use
         b. Post-Campbell Fair Use in the Second Circuit

II. THE SPECULATIVE FUTURE OF FAIR USE IN THE DIGITAL AGE

   A. The Status Quo: The Second Circuit’s Application
      1. Recent Digital Cases
      2. Status Quo Applied to Prince and Social Media
   B. Observations and Proposals for Reform
C. Proposing Fundamental Change to the Copyright System...... 384
  1. A Tax-Based Royalty Pooling System................................. 384
  2. A Fair Use Board .................................................................. 385
  3. A Fair Use Arbitration System ........................................... 387
  4. A Fair Use Agency.................................................................. 388
    a. Model One: The Office of Fair Use (TOFU) ...................... 388
    b. Model Two: The Copyright Infringement Review Office (CIRO) .............................................................. 389

III. PROTECTING FIRST-ORDER DIGITAL CONTENT CREATORS:
    REFORMING THE FOUR-FACTOR ANALYSIS................................. 391
    A. Requiring a Transformation of Content................................. 391
    B. Reinstituting the “Comment Upon” Standard for Parody and Satirical Uses ................................................. 392
    C. Elevate the Weight of the Economic Effect for Digital Appropriation................................................................. 392
    D. Additional Considerations................................................... 393
    E. “New Portraits” Under the Amended Statutory Factors ........... 395
    F. Critiques and Responses....................................................... 396
      1. Overruling Precedent: Changing What Constitutes a Transformative Use......................................................... 396
      2. The Factual Determination Between Amateur and Professional ........................................................................ 397

CONCLUSION ............................................................................... 397

INTRODUCTION

Imagine getting a text that reads, “I just saw your portrait at Gagosian Gallery!” As a young artist, this is your long-awaited dream. But then you find out that your photograph, which you took and posted to your personal Instagram account, is being sold for thousands of dollars—and you will not receive a dime. This was the scenario for several unsuspecting Instagram users when appropriation artist Richard Prince took their Instagram photos, commented on them, and then printed them on canvas to display and sell.1

Prince did this without permission and without crediting the original posters.2 As The Guardian writes, “Prince’s New Portraits series comprises


2. Id. Though there were several different categories of Instagram users from whom Prince copied, this Note focuses on the young artists. “Apart from the smattering of celebrities, many of Prince’s subjects are aspiring or career-beginning models, actors, artists, students, in their teens and early-20s, working at clothing stores . . . or bars, while finding their feet.” Id. In addition to appropriating posts from aspiring artists, Prince also appropriated posts containing the work of renowned photographer Donald Graham, who brought a copyright infringement suit against Prince. See Eileen Kinsella, Outraged Photographer Sues Gagosian Gallery and Richard Prince for Copyright Infringement, ARTNET NEWS (Jan. 4, 2016), https://news.artnet.com/market/donald-graham-sues-gagosian-richard-prince-401498 [https://perma.cc/4XFS-SYLH].
entirely of the Instagram photos of others. The only element of alteration comes in the form of bizarre, esoteric, lewd, emoji-annotated comments made beneath the pictures by Prince.” 3 In an age where young artists flock to social media platforms to display their work, society and the law should not sanction this type of blatant appropriation.

Appropriation artists4 such as Jeff Koons and Richard Prince have long pushed the boundaries of copyright’s theory of fair use, and Prince’s most recent exhibit, entitled “New Portraits,” pushes these limits even further. Now, an artist named Donald Graham has sued Prince in federal court,5 and the Southern District of New York and potentially the Second Circuit will have to consider whether the appropriation art doctrine established in Cariou v. Prince,6 another case involving Prince’s work, will withstand the new considerations brought on by the ease of digital appropriation. Whether Prince’s most recent appropriation style is deemed “fair” will have a profound impact on how fine art interacts with social media and Internet postings in the fair use context.7 If the Southern District of New York or the Second Circuit does find fair use, it will have overarching implications for the exclusive rights that copyright owners hold in their works. A primary inquiry of this Note will be whether current copyright standards of fair use and transformation promulgated by the Second Circuit are sufficient for the digital age. This Note also will undergo an analysis of

---

3. Parkinson, supra note 1 (writing comments such as: “置いておいての元にたった” under a picture of partially exposed breasts; “Enjoyed the ride today, lets do it again. Richard.” under a picture of a woman looking back seductively at the camera in a car; and “Jez to be dare ID quite I’m you nut schmoo fwend” under an image of a undressed woman).

4. Appropriation art is defined as “[t]he practice or technique of reworking the images or styles contained in earlier works of art, esp[ecially] (in later use) in order to provoke critical re-evaluation of well-known pieces by presenting them in new contexts, or to challenge notions of individual creativity or authenticity in art.” Emily Meyers, Art on Ice: The Chilling Effect of Copyright on Artistic Expression, 30 COLUM. J.L. & ARTS 219, 220 (2007) (quoting Appropriation Art, OXFORD ENGLISH DICTIONARY ONLINE (Oct. 2001), http://www.oed.com/view/Entry/9877?redirectedFrom=appropriation#eid [https://perma.cc/SD7X-GENG]).

5. See Kinsella, supra note 2.

6. 714 F.3d 694 (2d Cir. 2013).

7. Fair use is a defense to a claim of copyright infringement. This judge-made doctrine was codified in the Copyright Act of 1976 § 107. This section reads:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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.

how a fair use determination of Prince’s “New Portraits” likely would fare under both the current copyright regime and under proposals for reform.

The Second Circuit has taken a leading role in fair use, art law, and novel legal issues brought on by the digital age. It also has taken a leading role in cases that touch on all of these subjects. However, it has yet to hear a case that combined art appropriation and fair use issues with digital and social media concerns. How the Southern District and the Second Circuit rule on this issue will have a profound effect on the development of copyright law in the digital age.

Part I reviews the elements and doctrines of copyright law that are relevant to digital media and appropriation art. It explains that digital works posted to the Internet and on social media platforms most likely receive basic copyright protections—that is, they meet the basic requirements of creativity, fixation, and expression. This part also considers the evolving doctrine of fair use, from a judge-created common law exception, to a codified defense against infringement, to the current expansive doctrine. Then, this part will evaluate the impact of the Second Circuit’s holdings on the doctrine of fair use, tracing the changing application of appropriation art from Rogers v. Koons to Cariou.

Part II considers a number of proposals to clarify and fix the current copyright regime. Next, this part considers how Prince’s exhibit “New Portraits” likely would fare under the new considerations put forth in each proposal. It then concludes that none of the considered proposals adequately address the impact of copyright and fair use considerations on first-order digital content creators, who often are young artists using social media platforms as a way to display and exhibit their work.

Finally, Part III suggests alternative interpretations of the four statutory factors of fair use that would protect this subset of artists. This part argues that (1) courts should require transformation of content; (2) the fourth factor, the effect on the potential market, should be given more weight; and (3) the “comment upon” standard should be reinstated for parody and satirical uses.

I. THE PRIMARY ELEMENTS OF COPYRIGHT PROTECTION

The threshold of creativity required to receive copyright privileges is extremely low and copyright protection applies broadly. However, in considering social media users’ and first-order digital content creators’ rights, it first should be established whether their works meet the requirements of originality and fixation needed for copyright protection.10

8. 960 F.2d 301 (2d Cir. 1992).
9. A first-order creator is the original creator of a work. Second-order creators use the original work as the foundation for their own work. The extent to which second-order creation is permissible is currently a major tension in copyright law—a tension that this Note aims to address.
10. This poses a major issue in the context of the copyrightability of social media postings. While there is no word limit for protection, the 140-character limit for “tweets” on the Twitter platform might make most of the postings too short to meet the basic level of
A. Meeting the Threshold of Originality

Only “original works of authorship” can receive copyright protection under § 102(a) of the 2012 Copyright Act. Interestingly, nowhere in the copyright statute or in the Constitution is “originality” defined; yet it is central to the copyright regime. As such, interpretation of this concept has developed over time. Courts are hesitant to explicitly define the contours of the requisite creativity and originality required for copyright protection. This reluctance forms the basis of the “nondiscrimination principal,” first articulated in Bleistein v. Donaldson Lithographing Co. Because deciding the creativity of a work would necessarily turn on a subjective opinion regarding the value of such work, courts consistently have applied the creativity and originality standard liberally. Many social media posts indeed would meet this threshold requirement of originality; the more creative the post, the stronger the copyright protection is likely to be.

B. Fixation in the Digital Age

To receive copyright protection, a creative work must be fixed in a tangible medium of expression. Digital content clearly is “fixed” when it exists for “more than a transitory period” of time. Thus, all social media postings most likely would meet this requirement.

---

1. 17 U.S.C § 102(a).
2. It was once argued, for example, that photographs did not have the requisite creativity to qualify for copyright protections because they were simply “capturing reality.” See Burrow-Giles Lithographing Co. v. Sarony, 111 U.S. 53, 57–58 (1884) (holding that photographs could be considered “writings” and photographers were “authors” for purposes of the statute).
3. 188 U.S. 239 (1903). There, the U.S. Supreme Court famously stated: “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.” Id. at 251.
4. See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (holding that the alphabetization of listings in a telephone directory did not meet the requisite originality standard required to receive copyright protection). There the Court stated that “[o]riginality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.” Id. at 345.
5. Postings of generic items such as pictures of food or monuments might not meet the threshold of creativity required for protection. If they do, it is likely to be a “thin” protection. When a work has thin protection, infringement is likely to be found only if the defendant copied all, or substantially all, of the plaintiff’s work. See Craig Nard ET AL., THE LAW OF INTELLECTUAL PROPERTY 494 (4th ed. 2014). However, the Supreme Court has stated that photographs only need a modicum of creative composition to receive protections. See Burrow-Giles, 111 U.S. at 57.
7. Williams Elecs., Inc. v. Artic Int’l Inc., 685 F.2d 870, 874 (3d Cir. 1982). Additionally, “[a] court would likely find social media content to be fixed in tangible form. Therefore, for those works that also meet the originality requirement, this renders at least some user-generated content copyrightable material.” Jessica Gutierrez Alm, “Sharing”
Because an author’s rights exist upon fixation, registration with the government is not required to receive copyright protections. Copyright owners enjoy several exclusive rights, which include the right to make copies of the work and the right to publicly display the work. As American copyright law evolved, defenses to these exclusive copyright protections such as “fair use” were developed and codified.

C. Making Fair Use of Copyrighted Works

The concept of fair use is a judge-made doctrine with early roots in American jurisprudence. One of the earliest fair use cases was Flosom v. Marsh, in which the defendant was sued for publishing copies of George Washington’s letters. In his famous decision, Justice Joseph Story explained several factors that courts should consider to determine if a secondary use is fair. He stated:

[T]he question of piracy, often depend[s] upon a nice balance of the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercise the same common diligence in the selection and arrangement of the materials.

These factors have since been the cornerstone of the fair use defense and are meant to ensure that creativity will not stagnate due to the overrestriction of copyrights. Justice Story’s fair use factors were


18. However, registration does confer additional protections for copyright owners. If seeking damages from copyright infringement, the plaintiff has the right to claim actual damages plus the infringer’s profits, or statutory damages. However, statutory damages are only available for copyrights that are registered with the Copyright Office. Id. In theory, authors still would be able to recover actual damages, but these are invariably harder to calculate and give the plaintiff less flexibility in litigation. See Engle v. Wild Oats, Inc., 644 F. Supp. 1089, 1091 (S.D.N.Y. 1986).

19. The other exclusive rights include the right to prepare derivative works, the right to distribute copies of the work, and the right to publicly perform the work. 17 U.S.C. § 106.

20. Id. § 107. The doctrine of fair use was not part of the original copyright statute, either in its English form or in the Copyright Act of 1790. Early copyright law recognized a “fair abridgement” claim, “by which a defendant could be found not to infringe by having demonstrated his own ‘invention, learning, and judgment’ in the production of a modified work.” Nard et al., supra note 15, at 697.


22. Id. at 345.

23. Id. at 344.

24. The emergence of fair use to balance the benefit to the infringer against the harm to the copyright holder was explored in Justice Story’s formative opinion in Flosom, 9 F. Cas. at 344. In that case, Justice Story articulated a framework for analysis that largely survives in § 107. Fair use entered the law but remained uncodified until the 1976 Act formally included the doctrine. Despite the early articulation of the fair use doctrine, the Supreme Court did not explicitly address fair use until 1984. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (“the Betamax case”).

25. 17 U.S.C. § 107 codifies copyright’s fair use doctrine and provides that certain uses of copyrighted works are not infringements of the copyright owner’s exclusive rights. That a
codified in the Copyright Act of 1976, and courts now consider four nonexhaustive factors: “(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work . . . ; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”

1. The Four Factors of Fair Use

The preamble to the fair use section of the Copyright Act explains that, in general, fair use can be made of copyrighted materials for educational purposes such as, “criticism, comment, news reporting, teaching . . . scholarship, or research.” This nonexhaustive list is considered in conjunction with the four enumerated factors. However, nothing in the text or history of the statute suggests how courts should handle any of the factors or how they should balance the results of analyzing each factor separately. In fact, the weight of certain factors has changed over time. Formerly, courts afforded the fourth factor (effect on the potential market for or value of the copyrighted work) the most weight, but the Second Circuit has been influential in focusing on the first factor (the purpose and character of the work) by applying and expanding the “transformativeness” test.

In analyzing the purpose and character of the work, courts consider the transformative nature of the work and ask “whether the new work merely ‘supersed[e] 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.” In *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (alteration in original) (citations omitted) (quoting Flosom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)); accord *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013).
Rose Music, Inc.\textsuperscript{32} arguably the most important modern fair use case, the U.S. Supreme Court liberalized the traditional fair use standard by adopting Judge Pierre N. Leval’s definition of transformation.\textsuperscript{33} As Professor Pamela Samuelson stated, the most notable contributions of the \textit{Campbell} decision have been “the Court’s emphasis on the ‘transformative’ nature of a defendant’s use as weighing in favor of fair use, and . . . its expansive definition of what constitutes a ‘transformative’ use.”\textsuperscript{34}

The Court in \textit{Campbell} based its transformation test on Judge Leval’s article “Toward a Fair Use Standard.”\textsuperscript{35} In this highly instrumental article, Judge Leval argued that the key determination in a fair use decision should be whether, and to what extent, the challenged use is transformative.\textsuperscript{36} He explained, “[t]he use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.”\textsuperscript{37} He articulates that if the secondary work “adds value” to the original, then it encompasses the very type of activity that fair use is meant to encourage in society.\textsuperscript{38} A court that accepts a use as transformative gives less weight to the possibility of market harm and the amount of the work taken, and the use will most likely be deemed fair.\textsuperscript{39} The concept of transformation is of central importance to appropriation art in general and has important ramifications for digital art posted on social media, as digital works are incredibly easy to manipulate and appropriate. The interpretation of this factor is likely the most important for the fate of these works.

The second factor, the nature of the copyrighted work, analyzes the connection of the original work to copyright’s goals, such as the promotion of artistic expression.\textsuperscript{40} Works that are more factual in nature or employ common images are less likely to receive the same amount of protections as creative, individual works.\textsuperscript{41} For social media users, this second factor is relevant in determining the strength of a post’s copyright protection. Though most social media content would be deserving of at least minimal copyright protection, the strength of that protection likely would vary depending on the nature of the content.

The amount and substantiality of the portion used, the third fair use factor, must be analyzed in terms of the “quantitative and qualitative aspects of the portion of the copyrighted material taken.”\textsuperscript{42} However, some courts consider this factor to be neutral, especially when analyzing works such as photographs where anything less than the entirety would be unrecognizable,

\begin{itemize}
\item 32. 510 U.S. 569 (1994).
\item 33. \textit{See id.} At the time of this decision, Judge Pierre N. Leval sat on the bench of the Southern District of New York. He now sits on the Second Circuit Court of Appeals.
\item 36. \textit{See id.}
\item 37. \textit{Id.} at 1111.
\item 38. \textit{See id.}
\item 39. \textit{See Netanel, supra} note 28, at 723–24.
\item 41. \textit{See NARD ET AL., supra} note 15, at 494.
\item 42. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613 (2d Cir. 2006).
\end{itemize}
unlike quotations from books. In a social media context, most links and sharing platforms reproduce the entirety of a work. Thus, in the digital age, or at least regarding social media sharing platforms, this third factor might not be material to a fair use outcome.

The final factor, the effect on the potential market for, or value of, the work, has been heralded as “undoubtedly the single most important element of fair use” (though never dispositive). It considers the market substitution effects of subsequent works on the market for the original. In *Campbell*, however, the Court limited the emphasis on the fourth factor and held that the commercial purpose must be considered in context and should be given less weight when the use is transformative. If a use is sufficiently transformative, the Court explained, there will be a lower likelihood that such use will replace the market for the original. In light of “New Portraits,” and in consideration of social media users’ rights, this Note argues that in some situations, the market factor should, in fact, weigh heavily in the fair use decision.

2. Fair Use in Nondigital Art: The Second Circuit’s Leading Approach

The Second Circuit’s approach to fair use for appropriation art has changed over the years. In early appropriation art cases, the court guarded artists’ exclusive rights. However, post-*Campbell*, the court went in the opposite direction, expanding the definition of what uses are considered fair, effectively minimizing original creators’ exclusive rights in their works.

a. Initial Treatment of Fair Use

The Second Circuit’s fair use cases regarding nondigital art were the principal vehicles in creating the modern fair use landscape. Several formative cases in the past few decades have both developed and greatly expanded the traditional conceptions of fair use. Notably, the Second Circuit has been instrumental in expanding fair use by using a liberal “transformation” test post-*Campbell*.

43. See id. (“[C]opying the entirety of a work is sometimes necessary to make a fair use of the image.”).

44. For instance, on Twitter, a user can “retweet” the entirety of a posting, and on Pinterest, a user “pins” the entirety of an image. On these platforms the sharing of an entire image or message is the foundation of the community and is an accepted practice when appropriate attribution is given.


47. See id.

48. See, e.g., *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013) (holding that, in a fair use analysis, a work’s transformative nature does not depend on whether it “comments” on the original work, but rather whether it has altered the original work with “new expression, meaning, or message”).

49. See id.
The Second Circuit initially adopted a protectionist view of copyright owners’ exclusive rights in *Rogers v. Koons*.\(^{50}\) There, appropriation artist Jeff Koons took a postcard with a picture of puppies on it and instructed his assistants to build a sculpture in the likeness of the image.\(^{51}\) When sued for infringement, Koons asserted a fair use defense, but the district court granted an injunction.\(^{52}\) On appeal, the Second Circuit upheld the injunction, holding that Koons’s copying was so blatant that a trial was not required.\(^{53}\) In his defense, Koons suggested that the primary purpose of this piece was a social commentary meant to parody society at large.\(^{54}\) However, the court rejected this contention, holding that to be considered parody, the new work needs to comment upon the underlying work, not be aimed at society at large.\(^{55}\) In the court’s four-factor analysis, the fourth factor was of material importance because Koons stood to gain financially from his appropriation of the postcard image, a consideration that weighed strongly against a finding of fair use.\(^{56}\)

\(b.\) **Post-Campbell Fair Use in the Second Circuit**

Koons continued to appropriate, and in *Blanch v. Koons*,\(^{57}\) the Second Circuit considered yet another challenge to his work. However, this time the court employed a different theory and application of fair use. Koons created a series of paintings entitled “Easyfun-Ethereal” for Deutsche Bank and the Guggenheim in 2000.\(^{58}\) In this series, he used a number of images from advertisements, which he combined with his own photographs.\(^{59}\) One of his pieces incorporated part of a photo by a well-known fashion photographer, Andrea Blanch.\(^{60}\) She filed suit for copyright infringement, and the district court once again decided on summary judgment.\(^{61}\) However, this time, the court found that Koons’s use was transformative and therefore fair.\(^{62}\) On appeal, the Second Circuit upheld the lower court’s finding of fair use and stressed the transformative nature of the work as material to the fair use analysis.\(^{63}\)

In *Blanch*, the Second Circuit deemed Koons’s work transformative because it was used as a commentary on the aesthetics of mass media.\(^{64}\)

---

50. 960 F.2d 301 (2d Cir. 1992).
51.  See id. at 305.
52.  See id. at 306.
53.  See id.
54.  See id. at 310.
55.  See id. at 311.
56.  See id. at 312.
57.  467 F.3d 244 (2d Cir. 2006).
58.  See id. at 247.
59.  See id.
60.  See id.
61.  See id. at 249.
62.  See id.
63.  See id. at 256.
64.  See id. at 253.  However, in *Campbell*, the court did note that finding of transformativeness was not absolutely necessary for a finding of fair use, nor was transformativeness necessarily the only important fair use factor. *Id.*
The court articulated that when a copyrighted work is used as “raw material” for the creation of a new work with distinct “creative or communicative” intentions, then the use would be considered transformative in a fair use determination.65 This decision, in light of *Campbell*, arguably mirrored the Supreme Court’s adoption of the standard articulated in Judge Leval’s article. However, it set a liberal precedent for what the Second Circuit would consider transformative in other appropriation art cases. This is especially relevant in the digital age, where appropriation and manipulation of images is incredibly easy.

This transformation standard was further expanded in the Second Circuit case *Cariou v. Prince*.66 This decision has been incredibly influential in modern fair use analyses, especially in appropriation art cases.67 In *Cariou*, the Second Circuit examined whether Richard Prince’s “Canal Zone Series” transformed Patrick Cariou’s photographs in such a way that made Prince’s use fair.68 Cariou’s original photographs were scenic shots of Rastafarians in natural island settings, printed in the book *Yes Rasta*.69 Prince ripped out book pages and superimposed Cariou’s photographs with images and colored “lozenges” layered on top of the original work.70 Prince juxtaposed the scenic images with images of musical instruments and created dystopian scenery throughout the “Canal Zone Series.”

Some of the works were indeed more transformed than others, but most consisted of Prince’s use of Cariou’s entire photograph with few added elements. The Second Circuit held that whether a work is transformative does not depend on whether it “comments” on the original work but rather whether it has altered the original work with “new expression, meaning, or message.”71 This was an important shift in fair use theory as the “comment upon” requirement was previously an important consideration for determining the nature of derivative works.72 Additionally, under *Campbell’s* influence, the Second Circuit ignored the negative effect Prince’s exhibit had on Cariou’s ability to display his own art for monetary gain.73 The court considered this factor unimportant because of the

---

65. See id. at 251–52.
66. 714 F.3d 694 (2d Cir. 2013).
67. See Samuelson, supra note 34, at 843.
68. See Cariou, 714 F.3d at 698.
69. See id. at 699.
70. See id. at 701. The “lozenges” were oval-shaped blotches of color used sporadically throughout the pieces of the “Canal Zone Series.”
71. Id. at 705.
72. See id.
73. The district court case went into great detail regarding the effect of Prince’s work on Cariou’s market. The Gagosian Gallery showed twenty-two of Prince’s paintings that featured Cariou’s photographs, created and sold an exhibition catalog, and sent invitation cards featuring pictures that included Cariou’s work. See Cariou v. Prince, 784 F. Supp. 2d 337, 344 (S.D.N.Y. 2011). The gallery ended up selling eight paintings for $10,480,000, of which Prince received 60 percent, or $6,288,000. Id. at 350. Additionally, the gallery exchanged seven of the paintings for other art valued at between $6,000,000 and $8,000,000 and made approximately $7,000 in exhibit paraphernalia. Id. at 351. This is even more consequential because, at the same time, another gallery in New York was planning on showing Cariou’s photographs from *Yes Rasta*. However, once the gallery owner found out
transformative nature of Prince’s work. However, the Second Circuit went further than the Campbell Court, not only mitigating the importance of the fourth statutory factor, but also lowering the threshold for transformation by not requiring the secondary work to comment upon the original.  

II. THE SPECULATIVE FUTURE OF FAIR USE IN THE DIGITAL AGE

The rapid rise of the Internet and digital media has forced courts to apply dated legal standards to new contexts. In an attempt to remedy the friction between new media and traditional copyright applications, courts have broadened what constitutes fair use. However, in its expansion, the doctrine has become muddied and has ceased to adequately protect original content creators. Additionally, as a result of the shifts in both the art world and intellectual property law, the level of appropriation of copyrighted material by both artists and non-artists has become “so pervasive that traditional copyright enforcement strategies [have] lost much of their utility.” As such, the future of fair use in the digital context has been a subject of much debate and has engendered wide and disparate suggestions, observations, and proposals from commentators and professors.

Richard Prince’s exhibit “New Portraits” pushes the boundaries of fair use more. This part will analyze the potential outcome of a copyright challenge to Prince’s appropriation under the current legal framework, as well as the exhibit’s fate under the proposals addressed below.

A. The Status Quo: The Second Circuit’s Application

As one of the most influential circuits in this area of law, the Second Circuit’s holdings reflect the leading application of the fair use and transformation tests as they stand in modern copyright jurisprudence. Several recent Second Circuit cases have considered the fair use and transformation standards in digital contexts. In general, these cases fashioned liberal tests to determine whether a derivative work is considered a fair use and whether a subsequent work is sufficiently transformed for its use to be considered fair.

about the Gagosian show, she cancelled Cariou’s show because it had been “done already.” Id. at 344. At his show, Cariou had planned on selling copies of his books and prints of his photographs ranging from $3,000 to $20,000. Id.

74. Samuelson, supra note 34, at 830.


76. See Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005, 156 U. PA. L. REV. 549, 568 (2008); Netanel, supra note 28, at 721 (“First, Beebe found that, as measured by case citations, fair use opinions from courts of the Second and Ninth Circuits exerted an overwhelming influence on fair use opinions outside those Circuits, even more than we might expect.”).

77. See, e.g., Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282 (S.D.N.Y. 2013) aff’d, 804 F.3d 202 (2d Cir. 2015); see also Perfect 10, Inc. v. Amazon.com, 508 F.3d 1146 (9th Cir. 2007).
1. Recent Digital Cases

In 2012, the Author’s Guild sued HathiTrust and several of its public university partners for copyright infringement. HathiTrust created a database of ten million books from digitized copies of research library collections and claimed its database made fair use of the copyrighted books because the full-text search feature allowed users to find books more easily. The Second Circuit agreed and characterized the full-text searchable database as “a quintessentially transformative use.” The court claimed that this use was for a different purpose than the authors had in mind when they wrote their books, which weighed in favor of finding the subsequent use fair. As Professor Samuelson noted, “the court viewed the full-text search use as transformative because it considered the HathiTrust database itself as a new work . . . . [T]he court focused the harm analysis as to the transformative use on whether the use supplanted demand for the original, and if not, that factor tipped in favor of fairness.” In considering the searchable database a transformative work, the Second Circuit set the stage for other digital appropriation cases.

The most recent fair use decision from the Second Circuit, *Authors Guild v. Google, Inc.*, once again considered the boundaries of fair use. The plaintiffs, who owned copyrights in published books, sued Google for making digital copies of their books for its Google Library Project and Google Books Project. For these features, Google made digital copies of millions of books to create a publicly available search function that allows users to search for particular words or phrases in multiple books at once.

The court ultimately found that “Google’s making of a digital copy to provide a search function is a transformative use, which augments public knowledge by making available information about Plaintiffs’ books without providing the public with a substantial substitute for . . . the original works or derivatives of them.” This case is the most recent in the line of Second Circuit cases to expand the definition of fair use in response to changing Internet functions and considerations.

---

79. See *HathiTrust*, 755 F.3d at 97.
80. Id.
81. See id. The court stated that “the full-text search function does not serve as a substitute for the books that are being searched.” *Id.*
82. Samuelson, *supra* note 34, at 836.
83. 804 F.3d 202 (2d Cir. 2015).
84. See *id.* at 207.
85. See *id.* The authors alleged infringement, while Google contended that the use was fair. The district court agreed with the fair use assertion, to which the plaintiffs responded that the use was not “transformative” within the meaning of *Campbell*.
86. *Id.*
2. Status Quo Applied to Prince and Social Media

The Second Circuit has yet to apply its latest fair use standards to the growing field of social media and digital artistic appropriation. When such expansive fair use standards are applied to social media uses, the results may undermine a digital creator’s exclusive copyright rights. Recent events have highlighted this issue. In his 2015 exhibit “New Portraits,” Richard Prince displayed large canvases on which he printed screenshots of others’ Instagram photos. As a matter of transformation, Prince commented on the original Instagram post before taking the image offline, so that his comment was displayed underneath the image along with the other top comments on the photo. He then sold the canvases in New York and London for an average of $100,000 each. Under the current test, his trivial transformation might pass the fair use standard. His use is arguably for a different purpose than what the original posters conceived when posting their photos to Instagram, which has been enough to constitute fair use in other cases.

One of Prince’s canvases included a photo taken by world-renowned photographer Donald Graham. Subsequently, Graham sued Prince for copyright infringement. Now, a court will have to apply the Second Circuit’s expansive fair use test, designed for traditional art, to the world of digital and appropriation art. As such, a key issue for the court will likely be the difference in transformation of content versus transformation of purpose in the new works.

Many commentators have depicted the difference between content transformation and purpose transformation. Purpose transformation is likely to be deemed fair, as in the recent Second Circuit cases cited above. In the case of “New Portraits,” there is arguably a transformation of purpose, if not of content. Content transformation requires an alteration of the image itself. The only added element to the images in “New Portraits” is the comment underneath the photo, which is likely not enough to qualify as sufficient content transformation. However, Prince’s use could still be, and likely would be, considered fair use in light of his transformation of purpose and context. Prince took the photos out of the social media context and put them into the gallery setting, while preserving the social media element of the Instagram border. Shifting the audience for the work has been considered transformative and generally weighs in favor of a fair use

---

87. See Parkinson, supra note 1.
88. See id.
89. See id.
91. See Kinsella, supra note 2.
92. See id.
93. See Rebecca Tushnet, Content, Purpose, or Both?, 90 WASH. L. REV. 869 (2015); see also Netanel, supra note 28, at 746.
94. See, e.g., HathiTrust, 902 F. Supp. 2d at 445.
finding. In Cariou, the Second Circuit held that the audience for Cariou’s photographs was so different than Prince’s audience that his appropriation was unlikely to infringe on the market for the original work. Notably, whether the purpose or audience is truly transformed requires an underlying judicial determination of the purpose of the different works.

“New Portraits” also is unique because it is contrary to the traditional direction of appropriation. Historically, copyrighted information has passed from the professional user to the amateur user. The amateur end user rarely would have the power or opportunity to infringe significantly on the copyright owner’s exclusive rights. However, with the rise of the Internet, infringement claims against end users became more common. Then, the phenomenon of peer-to-peer sharing arose, changing the distribution of content from amateur to amateur. Now, with appropriation easier than ever, content can easily go from amateur to professional, as was the case in “New Portraits.” However, the professional should not be able to exploit copyright in a manner that extinguishes the rights of these first-order digital content creators, a result the current system seems to sanction.

B. Observations and Proposals for Reform

Many scholars lament the unpredictable nature of the current fair use system. As such, proposals for reform are abundant. Several of the most prominent suggestions include instituting a “fairness test” when considering user-generated content and amending the safe harbor provisions to declare some uses statutorily fair.

In “The Tangled Web of UGC: Making Copyright Sense of User-Generated Content,” Daniel Gervais articulates the many ways copyright is struggling with user-generated content. One reason for this struggle is the massive amount of Internet users that are “downloading, altering, mixing, uploading, and/or making available audio, video, and text content on personal web pages, social sites, or using peer-to-peer technology to allow others to access content on their computer.” Current copyright doctrine, he argues, is not equipped to meet the changing requirements of the Internet age. Now, individual Internet users have become content providers, a sphere historically reserved for professionals. Because of

---

95. See, e.g., Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).
96. See id. However, this requires that the court determine the audience of the work. By determining the audience, the court is making a determination regarding the sophistication of the audience and thus potentially the value of the work itself, which may conflict with the nondiscrimination principal.
97. Which might, once again, force judges to make determinations regarding the quality and purpose of a work in potential violation of the nondiscrimination doctrine.
99. See id. at 847.
100. See id. at 841.
101. Id. at 845–46.
102. See id. at 855.
103. See id. at 849.
the changing intellectual property landscape, Gervais suggests that courts should recognize three categories of user-generated content: user-authored content, user-derived content, and user-copied content. He then considers the potential copyright liabilities for each type of content.

Gervais dismisses any liability for user-authored content by stating, “A fair use defense [for posting their work] should not be required, because where no previous copyrighted content is reused, there should be no finding of infringement.” This in itself is clear; the original creator of the content is also the poster of the content. However, it is interesting that he does not consider the potential liabilities for people who infringe this user-authored content.

Gervais suggests that user-derived content poses the largest problem under the current fair use regime. He states that

the fair use analysis applied to online derived content must include an adequate fairness test. A distinction must be made between use value gained by the user and lost exchange value by the right holder. The proper test is one of commercial exploitation... is the derivation parasitic or simply free-riding?

He further suggests that most user-derived content is free riding and not parasitic, and thus, a court should consider this under the first and fourth statutory factors. This “fairness test” is meant to apply to amateur end users who Gervais suggests should only be liable for commercial exploitation of the copyrighted works. Interestingly, this test could be applied in the inverse—holding professional users liable when they exploit digital material from the amateur user for profit. Under the current copyright regime, the fourth factor, the effect on the market, is not as important as it once was. However, heightening this consideration for digital content is likely the fairest application of fair use standards to both everyday end users and professionals.

Gervais argues that the production of user-copied content will be fair use if the user’s act of providing access to it is fair. Gervais suggests that the current transformation analysis should apply to user-copied content, and he argues for a clear distinction between transformation in expression and transformation of dissemination, the latter weighing against a finding of fair use.

104. Content authored by the lay Internet, or “amateur” user. See id. at 858.
105. Content that the lay Internet user did not originally create but has used or has engaged with it in some way. See id.
106. Content copied by the lay Internet user. This category would include sites like Tumblr and Pinterest that rely on the copying of entire posts. See id. at 859.
107. Id. at 865.
108. See id.
109. Id. at 867.
110. See id. at 867–68.
111. See id.
112. See id. at 861.
113. See id. at 863.
When the case of Prince’s “New Portraits” is considered under this regime, one must first make the leap that Gervais’s considerations can be applied in the inverse—that is, they can be applied to the professional appropriation artist and that they also can apply when digital content is taken offline and put in the traditional gallery setting. Once that is assumed, the work then would be categorized. The original Instagram posts, if they are indeed original to the poster, are obviously user-authored content.

Categorizing Prince’s use of the work is more difficult. Even though user-generated content is usually online, this analysis might still apply to Prince’s use because his actual art was a “screen shot” of an Instagram picture. If he then had posted that image online, it would be considered user-derived or user-copied content within Gervais’s framework. This Note’s analysis goes one step further and applies these categories even though the end result was displayed offline in a gallery, rather than staying purely digital. The determination between user-derived content and user-copied content most likely would turn on whether one considers Prince’s added comments underneath the Instagram photo sufficiently transformative. A finding of transformation likely would lift Prince’s work from the user-copied category into the user-derived category. As such, both categories will be considered.

If Prince’s work is considered user-derived content, then Gervais’s system requires that the “adequate fairness test” apply. In this analysis, a court would consider the commercialization of the secondary work. In Gervais’s words, the primary inquiry should be, “is the derivation parasitic or simply free-riding?” Because this is a test of commerciality, a court would take into account that Prince sold his works for large sums of money. Thus, under this category, the nature of his exhibit most likely would fall into the parasitic category, weighing against a finding of fair use.

If one does not consider the comments under the original Instagram posts to be transformative, then Prince’s work would fall into the user-copied category. In this analysis, Gervais states that there will be a fair use defense if “the user’s act of providing access to [the work] is fair.” Here, the images were not part of a public-domain-type archive, but rather were taken from the private accounts of everyday Instagram users. For user-copied content, Gervais suggests that the current transformation analysis should apply.

Gervais argues that there should be a clear distinction between transformation in expression and transformation of dissemination. If one puts forth that Prince’s work is user-copied content and that the level of transformation is too minimal to be considered a fair use, Prince’s work would be more accurately categorized as “transformation of dissemination” rather than of expression. He simply changed the forum of the original

---

114. In this scenario, Prince would be the “user” of the content derived from the original Instagram posters.
115. Gervais, supra note 98, at 867.
116. Id. at 862.
117. Id.
Instagram images, a transformation that Gervais argues is not enough to save a derivative work from an infringement claim. Thus, under this system, whether Prince’s work is considered user-copied or user-derived, his use would likely not be considered fair. However, this analysis does require Gervais’s categories to apply to the professional end user who takes the content offline and into the traditional art world, a situation left undiscussed in his proposal.

C. Proposing Fundamental Change to the Copyright System

Several professors and commentators see the current fair use system as so fundamentally flawed that it needs to be reconceptualized in its entirety. The primary contention is that ascertaining the scope of fair use ex ante is so uncertain that the doctrine is not functioning effectively for either party. One plan looks to restructure payment incentives, and many others look to restructure the system either within the Copyright Office or through the use of new administrative procedures.

1. A Tax-Based Royalty Pooling System

Professor Richard Chused argues that because of a shift in both intellectual property law and art culture in the last century, “the level of reuse and remixing of protected material, both by artists and nonartists . . . became so pervasive that traditional copyright enforcement strategies lost much of their utility.”118 To remedy this, Chused argues that copyright law must be reconstructed in its entirety to protect copyright owners without the need for litigation. He suggests that instead of regulating digital appropriation, artists should be able to opt into a different system of payment—one that keeps traditional payment incentives without fighting copying and appropriation.119

He puts forth a system that taxes electronic and other digital equipment and pools the funds for redistribution.120 Artists, whose works are online, with or without their consent, will have the option to forgo traditional judicial remedies and join an artist group that redistributes the pooled funds based on usage.121 While he does address the ramifications for appropriation artists, the results under this system would be less than ideal for first-order digital content creators. He states:

The result for art appropriators and other remixers would be both useful and interesting. Their payment for the digital equipment they use would include a “tax”—in essence a fee allowing them to access and use

118. Chused, supra note 75, at 166.
119. See id. at 167.
120. See id. at 192.
121. Organizations seeking to obtain and distribute part of any royalty pool should be required to apply to the Copyright Office for approval to participate in the system. “Each participating royalty pooling organization should be given the freedom to develop its own monitoring methods and royalty allocation procedures.” See id. at 199. Authors and copyright owners, in turn, would then be free to select which organization to join.
copyrighted material after they have been digitized and placed online outside the control of copyright owners. Once they pay these fees, nothing would need to be done. Much like a recording arts making a cover, they could do as they wished with online digital materials subject only to moral right limitations or other non-copyright based control systems.122

He goes further, arguing that fair use would be “frictionless” under this system because any potential fair user would have paid their tax and thus have nearly unrestricted access to the work.123 Any difficulty with this system, he posits, only arises with respect to copyrighted items not embedded in the royalty pooling system.124 However, this is the very group of people and artists this Note addresses, those least likely to be part of any formalized system, yet whose works still deserve copyright protections.

Under Chused’s system, an artist like Prince would be able to make fair use of any content that is digitized and put outside the control of the copyright owners. However, Chused does not consider this system’s impact on first-order digital content creators whose first “publication” is digital. His analysis arguably works for traditional artists who have digitized physical pieces they have created. But once again, the amateur or young artists working outside this system would be left unprotected.

In the case of “New Portraits,” the original Instagram users most likely would not have been registered in any royalty-pooling scheme. Thus, Chused falls back on traditional copyright doctrine to cover those who opt out of the pooling system.125 Once again, this puts Prince’s use under the current judicial analysis that does not protect the subset of artists from whom he appropriated.

2. A Fair Use Board

In an administrative-based reform, Michael Carroll suggests that Congress amend the Copyright Act to create a “Fair Use Board” within the Copyright Office with the power to declare whether the use of a certain copyrighted material is fair.126 A declaration from the Fair Use Board would act similarly to a private letter ruling from the IRS or a no-action letter for the SEC. That is, a favorable opinion from the Fair Use Board would immunize the petitioner from copyright liability for the proposed use, subject to judicial review.127

Among others, Carroll believes that current copyright law is unable to supply copyright owners with the necessary means to enforce their rights while ensuring sufficient freedom to end users.128 With this proposal,
Carroll aims to overcome fair use uncertainty by reducing the costs of obtaining a fair use determination ex ante. Specifically, he states:

Congress should extend the advisory opinion function available in other bodies of federal law to copyright law by amending the Copyright Act to create a Fair Use Board in the U.S. Copyright Office. Fair use judges would have the authority and the obligation to consider petitions for a fair use ruling on a contemplated or actual use of a copyrighted work.\(^{129}\)

Carroll describes the Fair Use Board as an equivalent to the recently created Copyright Royalty Board.\(^{130}\) As is the case with copyright royalty judges, the Librarian of Congress would appoint members of the Fair Use Board.\(^{131}\) Under this system, a copyright owner would receive notification of the submitted petition for fair use and would have the option to participate in the proceeding.\(^{132}\)

Any determination by the Fair Use Board would be subject to administrative review by the Register of Copyrights.\(^{133}\) Additionally, any decision out of this process would be subject to judicial review in any federal circuit court of appeals.\(^{134}\) Carroll makes clear that the power to make generally binding interpretations of the law would remain with the federal courts, and the Fair Use Board would be required to apply judicial fair use precedent to the extent possible.\(^{135}\) This proposal, while providing a new structural system, does not attempt to address the underlying problem—the fact that the current framework of copyright and fair use itself provides an insufficient model to address modern fair use inquiries. Simply providing an alternative forum will not ameliorate the issue of muddy standards that is currently present in the fair use doctrine.

Additionally, Carroll’s proposal first requires that an artist or would-be user decide to bring a case before the Fair Use Board. Put bluntly—this system requires that an artist care, or worry, about his potentially inappropriate use. Artists like Prince, who have had success in court based on their fair use defenses, are unlikely to take the time, effort, and costs to get an ex ante judgment regarding use of another’s work. For “New Portraits,” Prince did not ask for permission to use the Instagram posts. This, combined with other instances of his blatant appropriation, make it seem unlikely that artists like Prince would come to the Fair Use Board for judgment.

Fellow fair use reformer Professor Jason Mazzone questions Carroll’s approach because it provides certainty only to the individual user.\(^{136}\)

\(^{129}\) See id. at 1123.

\(^{130}\) “The Copyright Royalty Board is the institutional entity in the Library of Congress that will house the Copyright Royalty Judges, appointed pursuant to 17 U.S.C. § 801(a), and their staff.” THE FEDERAL REGISTER, https://www.federalregister.gov/agencies/copyright-royalty-board (last visited Sept. 6, 2016) [https://perma.cc/9ZWE-QLE2].

\(^{131}\) See Carroll, supra note 126, at 1124.

\(^{132}\) See id. at 1190.

\(^{133}\) See id. at 1123.

\(^{134}\) See id.

\(^{135}\) See id. at 1128.

Because the decisions would be made on a case-by-case basis, there is certainty only with respect to the particular use that is on review.\footnote{137} This fails to give other users any indication that their use is fair, and “certainty on a large scale is therefore impossible.”\footnote{138} Because the Fair Use Board would not have the authority to create clear guidelines or rules, and it is obligated to apply precedent, this proposal would not solve the current system’s failure to adequately address digital media and modern forms of appropriation. Carroll’s proposal does not address the uncertainty of the current doctrine and thus likely would not handle the rights of first-order digital content creators any differently than the current regime.

3. A Fair Use Arbitration System

David Nimmer suggests an arbitration system to resolve any disputes of fair use. Under this system, the Register of Copyrights would identify a list of qualified arbiters, and users who are unable to negotiate license agreements would be permitted to institute an arbitration proceeding.\footnote{139} Professor Nimmer describes the process as an “expedited, voluntary, inexpensive, non-binding procedure to obtain an impartial indication as to fair use that would be a valuable adjunct to our copyright laws, offering guidance to prospective plaintiffs and defendants alike.”\footnote{140}

The proposal contemplates that regardless of the fair use rulings at arbitration, any subsequent review in a court of proper jurisdiction will proceed ab initio. And in fact, “the court shall not be obligated to accord any weight to the ruling of the Fair Use Arbiter(s).”\footnote{141} If the usage is deemed not fair, that ruling is admissible in the context of determining the defendant/petitioner’s willfulness.\footnote{142} Additionally, if the Fair Use Arbiters rule in favor of fair use, then the available remedies would be limited to actual damages and profits.\footnote{143}

However, this system is flawed in its assumption that parties would first attempt a licensing agreement. As stated above, this likely should not be assumed for modern appropriation artists like Prince. Similarly, the everyday copyright user would probably not have the sophistication to attempt a licensing agreement. In considering “New Portraits” under this system, because Prince did not attempt to negotiate with the original artists, and because most of the Instagram users did not know their work was appropriated, it is likely that if litigation ensued it would proceed straight to

\footnotetext[137]{See id. at 432.}
\footnotetext[138]{Id. at 433 (arguing instead that “[a]n agency can both tailor rules to particular sectors and harmonize rules across sectors. Among other things, an agency will be able to take account of practices and interests in specific industries, assess the economic impact on copyright owners of allowing particular uses as fair, and hear from creators about their needs and interests.”).}
\footnotetext[140]{Id.}
\footnotetext[141]{Id. at 14.}
\footnotetext[142]{See id. at 15.}
\footnotetext[143]{See id.}
court, which would then apply the current standards. Even if parties were to use the Fair Use Arbitration system, judges would not be obligated to put any weight on the decision, further mitigating any real change to the copyright system under this proposal.

4. A Fair Use Agency

In a complete overhaul of the current fair use system, Jason Mazzone suggests the creation of a fair use administrative agency to regulate permissible uses. He argues that this would be the most comprehensive way for the system to adapt to modern uses and eradicate uncertainty regarding fair use.144 Mazzone posits that, in most areas of the law where clear directives are needed to guide behavior but where Congress and the courts are unable to supply clarity, our system turns to administrative agencies.145 The nature of judicial decisions, he argues, fails to provide general guidance about when a proposed use is fair, making future determinations difficult.146 In each case, the judge is asked to resolve whether (1) a particular copying of (2) a specified amount of (3) a given work for (4) a certain purpose falls within the protections of fair use. This is an incredibly specific consideration that does not provide the general public with a clear understanding of the fair use doctrine.

Mazzone argues that part of this confusion stems from the fact that the provisions of § 107 of the Copyright Act are standards, rather than rules.147 In a modern administrative state such as ours, agencies can provide important legal directives with much more clarity. This is especially pressing considering that, with the rise of the Internet, intellectual property laws affect a vast number of individuals and entities, and the law is increasingly complex. To remedy this situation he proposes two variations of an administrative agency that could help mitigate the current system’s uncertainty: the Office of Fair Use (TOFU) and the Copyright Infringement Review Office (CIRO).148

a. Model One: The Office of Fair Use (TOFU)

Under this model, Congress would do three things: First, Congress would make it unlawful to interfere with fair uses of copyrighted works and subject offenders to civil penalties.149 This prong would target certain market players who routinely try to restrict fair uses of their copyrighted works.150 This approach would be similar to federal consumer protection laws, as a federal fair use protection statute would protect the public from

144. See Mazzone, supra note 136, at 399.
145. See id.
146. See id. at 401.
147. See id.
148. See id. at 415–16.
149. See id. at 415.
150. See id. at 417.
false claims and other practices that limit fair use.\textsuperscript{151} Second, Congress would create an agency whose primary role would be to enforce this statute.\textsuperscript{152} It would enforce the statute through traditional rulemaking and adjudication and would operate under the Administrative Procedure Act (APA).\textsuperscript{153} Third, Congress would specify that fair use law, including the agency regulations, would preempt state laws of contract that would potentially limit fair uses of copyrighted works.\textsuperscript{154}

In this scenario, rules would proceed under notice and comment under the APA, allowing for the public and interested parties to take part in reformation of the system.\textsuperscript{155} Additionally, as with other administrative adjudications, agency decisions would be reviewable in the U.S. courts of appeals and would receive deference from the courts.\textsuperscript{156}

This model of reform would include a huge monetary and social investment by the public. However, in the current government system where administrative offices flourish, an office such as TOFU would likely be the most consistent and fair way to determine rules for an area of law that is constantly changing.

\textit{b. Model Two: The Copyright Infringement Review Office (CIRO)}

In his second agency proposal, Mazzone suggests that Congress give a federal agency similar to TOFU more general responsibility in copyright infringement claims.\textsuperscript{157} The agency still would have the power to issue regulations defining fair use, but an agency such as CIRO also would have adjudicative authority under this scheme.\textsuperscript{158} Here, a copyright owner alleging infringement would be required to file, prior to going to court, a complaint with the office, which would in turn conduct an investigation into the fair use claim under its current regulations if a fair use defense is asserted.\textsuperscript{159} The office would issue a decision in a notice, then the copyright owner could file a suit if he so desired.\textsuperscript{160} Further, if CIRO concluded that there was no fair use defense available and therefore the use likely is an infringement, it could attempt a settlement through an office proceeding.\textsuperscript{161} Once again, in deciding the copyright infringement action, courts would defer to the agency’s decisions as to whether the use at issue was fair.\textsuperscript{162}

Other scholars have considered and critiqued the administrative approach. In “Beyond Fair Use,” Gideon Parchomovsky and Philip J.
Weiser state that “[b]oth Carroll’s and Mazzone’s proposals raise several concerns.” 163 Specifically, Parchomovsky and Weiser are concerned with two costs associated with their proposals: “First, there is the fixed cost of setting up [a] review body—be it a board within the copyright office or an independent administrative organization. Second, there is the cost of the actual review.” 164 Parchomovsky and Weiser worry that review requests would overwhelm any administrative body, creating problems much like those that plague the Patent and Trademark Office today. 165

Parchomovsky and Weiser also critique Mazzone’s first agency model, TOFU, stating that the content and basis for drafting the regulations is unclear. 166 They claim that the case law in this area does not provide a clear body of law on which to base any comprehensive regulation. 167 Fundamentally, they argue that the prevailing disagreement as to the meaning and boundaries of fair use does not bode well for Mazzone’s proposal. 168 However, Parchomovsky and Weiser seem to ignore that the muddiness of fair use guidelines is what this agency means to correct. While there may not be a clear body of law or judicial agreement, that is potentially a reason for the complete overhaul of the copyright system through an administrative agency.

Mazzone’s CIRO, in conjunction with the proposed agency in model one, would offer all ranges of end users the form and forum through which to pursue their claims. 169 Additionally, with clear regulations and published rules there would be potentially fewer cases of uncertainty requiring litigation. This system would provide an appropriate forum for all types of copyrightable materials, those seen and unforeseen.

Without the formalized rules and regulations of the proposed agency, it is very difficult to predict how “New Portraits” would fare under the proposed system. As such, this Note forgoes that analysis. However, because the public would be involved in the proposed agency rules, there is less concern that certain interests would go unaddressed or that some parties would be unprotected. 170 In fact, because an agency can tailor rules to specific instances, there could be a rule specifically for appropriation art in the digital context. Though implementing such a proposal would require an extensive overhaul of the current system, it could be the solution fair use needs.

164. Id.
165. See id. “In 2008, the average pendency time of patent applications was just over thirty-two months, and the number of applications pending before the patent office was approximately 1,200,000.” Id.
166. See id. at 111–12.
167. See id. at 112.
168. See id.
169. See Mazzone, supra note 136, at 419.
170. However, there is always the threat of agency capture, where a special interest group effectively controls an agency.
III. PROTECTING FIRST-ORDER DIGITAL CONTENT CREATORS:
REFORMING THE FOUR-FACTOR ANALYSIS

To protect end users from infringement liability, commentators have failed to address the practical consideration that young artists of all kinds flock to social media to publicly display their art and hopefully gain attention and notoriety. To shield creative end users from excessive copyright infringement liability, the rights of first-order creators of digital content are left out of consideration. Often dismissed as amateurs, Internet content creators are indeed copyright owners who enjoy the benefit of exclusive statutory rights. However, commentators have generally overlooked potential violations of these rights.

As such, this Note proposes an altered interpretation of the first and fourth fair use factors, along with additional considerations that courts should analyze in digital appropriation cases.

A. Requiring a Transformation of Content

In a standard fair use case assuming that (1) the appropriated material is original, fixed, and constitutes expression rather than ideas and (2) a defendant violated an exclusive right, a court examines the four statutory factors of fair use.\(^{171}\) The first factor has seen the most change in application since the factors were codified in 1976.\(^{172}\) In analyzing the first factor, the purpose and content of the work, courts have held that when the original work is sufficiently “transformed” its use generally will be fair.\(^{173}\) However, this Note proposes that instead of permitting transformation of setting, context, and purpose of the work to constitute fair use, the inquiry should focus primarily on transformation of content.\(^{174}\)

A focus on transformation of content will put this first factor back in alignment with the original utilitarian incentives of exclusive copyright protection.\(^{174}\) A true transformation of the original work should weigh in favor of a finding of fair use. This standard allows appropriation artists to work with copyrighted materials while providing stronger protections for the original creators. This would protect artists like the Instagram users whose work was used in “New Portraits” from having their work taken off

---

\(^{171}\) But see Alm, supra note 17, at 108 ("User-generated content, as long as it is created by the individual user, fits the first requirement of ‘independent creation.’ A user’s status updates, comments, and self-made videos and photos are all independent creations when generated by the individual user. However, much of the content on social media websites will not easily satisfy the modicum of creativity component.").

\(^{172}\) See supra Part I.A.

\(^{173}\) See supra Part I.A.

\(^{174}\) The Copyright Clause of the U.S. Constitution implies that the primary goal of copyright and patent law is utilitarian in nature and aims to benefit society. Additionally, copyright and patent laws are generally seen to operate as part of an interdependent mix of incentives and restraints that bestow benefits and impose costs on society and individuals alike. Viewed this way, copyright and patent laws strive to strike a balance between the promotion of creative and technologic expression and the dissemination of and access to its fruits.
the Internet and placed in galleries. This would additionally protect artists such as Patrick Cariou whose work was taken from print media and put into the fine arts setting with little transformation of content.175

B. Reinstating the “Comment Upon” Standard for Parody and Satirical Uses

In determining whether satire and parody uses are transformative, courts should reinstate the “comment upon” standard that the Second Circuit has largely eliminated.176 This standard provides a safeguard both for the would-be critic and the original content creator. A content creator is less likely to license work for the use of satire and parody. But, this standard still allows critics to make fair use of copyrighted works for social commentary. Reinstating the “comment upon” standard would give some control back to the copyright owner while permitting productive social dialogue.

C. Elevate the Weight of the Economic Effect for Digital Appropriation

This Note proposes that courts should give more consideration to the fourth fair use factor. As it stands now, this factor, which considers the effect on the potential market or value of the original work, is not given much weight in the fair use analysis.177 However, with digital appropriation being incredibly easy, the market factor should once again be a primary consideration in whether a use is fair.

The Campbell court mitigated the importance of the market factor partly because the case dealt with a parody use.178 With parody and satire, there is a lesser chance of the secondary work interfering with the market for the original.179 This also is likely to be the case where less than the entirety of a work is used, as in Blanch.180 However, where the entirety of the original work is used and there is no underlying social commentary, the effect on the market for the original work should be a material consideration.

Even when this factor is elevated, there is still a potential issue in the judicial determination of what the “market” or “audience” is for each work. By determining the audience, the court is making a determination regarding the sophistication of the audience and thus potentially the value of the work itself. In Cariou, for example, the Second Circuit determined that the

176. The Second Circuit has supported a broader conception of transformation that does not require the presence of comment if the purpose of the new work is “plainly different from the original purpose for which [it was] created.” E.g., Bill Graham Archives v. Dorling Kindersly, Ltd., 448 F.3d 605, 609 (2d Cir. 2006).
177. See supra Part IA.
179. See id.
180. Koons incorporated Blanch’s photograph in a collage, where the photograph became part of the overall commentary. Such an inclusion is less likely to interfere with or affect the market for the original photograph. See Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).
audiences and markets for the two artists were so vastly different that one
would have little effect on the other. However, if the audience had been
deemed broader, say, “buyers of artistic works,” then both Cariou and
Prince’s audiences would be the same. Allowing the judiciary to make a
determination of the audience potentially implicates the nondiscrimination
principle. Indeed, “disputes between appropriation artists and the
creators or owners of a work appropriated by them . . . may provoke courts
to make aesthetic determinations about the works involved under the
copyright fair use doctrine.” As such, the “market” and “audience” for
works should be construed broadly as to avoid an imposition of judicial
opinion.

D. Additional Considerations

In addition to the four statutory factors, courts should consider the type
of appropriation at issue in each case. They should consider whether the
appropriation is from professional to amateur, peer to peer, or whether it is
from amateur to professional. In professional-to-amateur situations, a court
should apply a test similar to Gervais’s fairness test. It should look to
whether the purpose is sharing, whether it is free riding, or whether it is
more nefarious and “parasitic.” A categorization of parasitic use should
weigh most heavily against a finding of fair use, while a finding that the use
is used merely in sharing or education should weigh in favor of fair use.

In cases of amateur-to-professional use, there should be a higher standard
of what constitutes fair use. Otherwise, young artists and content creators
can have their work appropriated for the gain of the professional artist.
Their original work should be protected, even when it is on a digital
platform. Thus, in this category, the market factor should be weighed most
heavily. In each category of appropriation, the court should still apply the
four amended statutory factors in their determination of fair use.

Historically, the distinction between amateur and professional was an
uncomplicated determination. Primarily, copyrights were given only to
professional users, and claims of infringement rarely were brought against
the amateur, or private user. Private and amateur uses coincided, as did
professional and public uses. Now, amateur uses are increasingly public,
making infringement of this content very easy. Because copyright’s
exclusive rights exist without reference to these traditional distinctions, this
both has increased the infringement claims brought against private end

182. See supra Part I.A.
183. Christine Farley, No Comment: Will Cariou v. Prince Alter Copyright Judges’ Taste
in Art?, 5 IP THEORY 1, 20 (2015); see also Mazzone, supra note 136, at 434 (“Although
few would admit it (and fewer judges still), determinations of whether a use is fair reflects
some degree of judgment about the value of the work.”).
184. See supra Part II.B.
185. See supra Part II.B.
186. See supra Part II.B.
187. See supra Part II.B.
188. See supra Part II.B.
users and has increased the amount of copyrighted material that is available to the general public.  

Protecting the amateur artist therefore has not been a necessary discussion in copyright law. But, it is an important modern consideration. If copyright law is primarily utilitarian, which this Note argues it is, then the incentives of this group of artists is of material importance. A professional artist should not be able to monetize the work of the amateur, for doing so could inhibit incentives for amateur artists to make and display their work. Similarly, protecting the amateur would balance the power of dominant players such as Richard Prince, who rarely seek licensing agreements or permission for the works used, with the rights of amateur artists. The equitable interests at stake are clear—amateur artists publish works online that are deserving of copyright and thus legal protection. Creating an analytic framework to uphold this interest will align with utilitarian theories of copyright.

As of yet, no commentator has addressed the unique issue of first-order digital content creators and their rights within intellectual property law. While Gervais’s test correctly categorizes digital content users, he ignores the established rights those users have when they post original content.  

As to the more intensive proposals, the primary flaw with both a Fair Use Board and an Arbitration system is that they provide clarity only to the individual user and for the individual use brought before review. In contrast, amending the interpretation of the current four statutory factors will simply alter the application of current doctrine, giving much more generalized clarity. A royalty pooling system requires voluntary participation and thus is unlikely to gain widespread participation. This, in combination with the difficulty in pooling and distributing the royalties, makes this system unlikely to flourish.

Arguably, the creation of an entirely new administrative agency, empowered not only to determine fair uses ex ante but also with the power to resolve fair use disputes, would be the most comprehensive system of reform. This would address the issue of public knowledge through notice and comment rulemaking and would be better able to address specialized groups and interests particular to fair use. However, the enormous financial and social costs of such an endeavor make it unlikely to be adopted in the near future.

By clarifying that “transformation” requires an actual change in content and not simply purpose and context, the public and appropriation art community are placed on notice that the court primarily will be considering the difference in content between the first and secondary use. Additionally, focusing on the market effect will prevent commercial exploitation of digital work on social media. Added emphasis on this factor is extremely
important in a society where appropriation is incredibly easy. Finally, requiring a work of parody or satire to “comment upon” the underlying use will narrow the field of fair use while still providing social critics with a forum and means to engage with original copyrighted work.

E. “New Portraits” Under the Amended Statutory Factors

When analyzed under the proposed amended interpretations, “New Portraits” would not be considered a fair use of the original copyrighted material. Under this analysis, a court first would need to determine whether the original work is indeed copyrightable. Because the photographs taken for “New Portraits” were artistic, original works, it is very likely they would merit copyright protection. Then, copyright owners likely would claim infringement on their exclusive right to make copies of their work and the exclusive right to publicly display their work. In response to such claims, Prince most likely would raise a fair use defense.

The court would then turn to the four-factor analysis. In considering the first factor and analyzing the transformation of the secondary work, the court would examine what elements of the underlying work were changed. Prince’s extremely minimal content transformation in “New Portraits” would weigh heavily against a finding of fair use. In terms of content, Prince added only a single comment under the Instagram photo. Under the proposed interpretation of the first statutory factor, this minor change would not be enough. Additionally, because a court would not consider the transformation of purpose or the transformation of the context of the works, Prince would be relying solely on his one added element in this part of the consideration.

The second factor, the nature and content of the copyrighted work, also would weigh against a finding of fair use. This factor looks to the nature of the original work—here, creative and artistic Instagram pictures. Their publication on social media should not detract from the amount of protection they receive.

The third factor, the amount and substantiality of the portion taken likely would be considered neutral to this analysis. It would be difficult to use a photograph in a secondary work without the whole image. However, it still should be considered that Prince took entireties of works and not merely elements from them.

The fourth factor, the effect on the market, will weigh most heavily against a finding of fair use for this case. Because this factor is elevated in this amended analysis, the fact that Prince monetized others’ work for huge financial gain is of central importance. A court also should note that the digital content creators put their work up for free, and if anyone has the right to monetize that work without sufficient transformation, it is the creators.

Finally, this Note’s amended analysis also posits that a court should consider the direction of the appropriation in its fair use determination. Because “New Portraits” appropriated material from amateur artists for a professional artist’s gain, this weighs strongly against a finding of fair use.
As such, this amended interpretation of the four statutory fair use factors would protect first-order digital content creators, such as the Instagram users in “New Portraits,” from professional appropriators like Richard Prince.

F. Critiques and Responses

Several potential critiques arise from this proposed amended interpretation. The two main critiques include: (1) the overruling of precedent and (2) the difficult factual determination between amateur and professional users.

1. Overruling Precedent: Changing What Constitutes a Transformative Use

One potential critique to the new interpretations suggested by this Note is that implementing this system will require overruling current precedent.194 Primarily, implementation of this Note’s proposal, that courts should require a transformation of content rather than a transformation of context, changes the current precedent in both the Second and Ninth Circuits.195

However, a limitation that would alleviate this concern is that courts need only apply these considerations to digital appropriation art cases. While there are parallels to other areas of copyright and appropriation art, the ease of digital dissemination and copying is the tension this proposed system aims to address. Still, applying the amended statutory factors to other appropriation art cases would not engender a negative result. For instance, if this proposed interpretation had been applied to the case of Cariou, the court would have considered more heavily the monetary gain of Prince at Cariou’s expense. While the Second Circuit might still have found that Prince “transformed” the underlying content to a sufficient degree, it would have considered the fact that the art was reproduced on a larger scale or that it was intended for a different audience.196

Forcing a more substantial transformation also reflects the utilitarian nature of Copyright Clause: that copyright protection is afforded to encourage and promote the creation of new artistic works. Fair use still would have a place but would have a higher bar. Indeed, Professor Gervais notes that before the most recent fair use cases, “transformativeness focused on changes to the work, including a creative recontextualization, but not a mere modification in its mode of dissemination.”197 So in fact, this analysis seems to only be reaffirming the traditional interpretation of this first statutory factor.

194. See supra Part II.C.2.
195. See supra Part II.C.2.
196. See supra Part II.C.2.
197. Gervais, supra note 98, at 862.
2. The Factual Determination Between Amateur and Professional

While this could be a difficult determination, in most cases it likely would be clear if one user is a professional and another is an amateur. It might be clear based on age, reputation, or career stage. Courts make fact-specific determinations in many contexts, and this determination would not be so different than deciding whether someone is an employee or independent contractor for purposes of tort or corporate law. As with other determinations, a multifactored analysis should be used to draw the line between amateurs and professionals in this context.

Courts should look to the user’s education, artistic portfolio, community reputation, history of sales, and age as a set of nonexclusive factors to categorize artists for this analysis. Art education in itself might lend toward a finding of professionalism. However, if an artist was still in school or recently graduated, that would lend itself toward a categorization of amateur. An artistic portfolio would evidence what type of work the artist usually does and in what context. Similarly, the community reputation and history of sales would look to the artist’s place and standing in the community and the regard of their peers.

Adding this judicial analysis is yet another decision for a judge to make. However, its relative ease, combined with the implications this Note discussed above, make it worth any additional time spent.

CONCLUSION

Social media is such a new phenomenon that the law has not been adequately able to address the rights and liabilities for both creators and users of copyrighted works in its context. Should participating on social media mean risking or forfeiting traditional copyright protections? Or can we amend the fair use considerations to allow for productive uses of copyrighted works while also protecting the original content creator? The answer to the latter question is yes. To propose otherwise would be denying an entire generation, which largely posts works digitally, copyright protection that has long been a societal driver of creativity and expression. In amending the weight given to the statutory fair use factors, the rights of first-order digital content creators will be more protected and will continue to encourage contribution to our artistic culture.
In the Supreme Court of the United States

ANDY WARHOL FOUNDATION
FOR THE VISUAL ARTS, INC., PETITIONER

v.

LYNN GOLDSMITH, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

BRIAN M. BOYNTON
Principal Deputy Assistant
Attorney General

MALCOLM L. STEWART
Deputy Solicitor General

YAIRA DUBIN
Assistant to the Solicitor
General

DANIEL TENNY
STEVEN H. HAZEL
Attorneys

Suzanne V. Wilson
General Counsel and
Associate Register of
Copyrights

Mark T. Gray
Jordana S. Rubel
Assistant General Counsel

Nicholas R. Bartelt
Shireen Nasir
Keyana Pusey
Attorneys
United States Copyright
Office
Washington, D.C. 20540

Supreme Ct Briefs@usdoj.gov
(202) 514-2217
QUESTION PRESENTED

The Copyright Act of 1976, 17 U.S.C. 101 et seq., provides that “the fair use of a copyrighted work * * * is not an infringement of copyright.” 17 U.S.C. 107. To determine whether an allegedly infringing use is fair, the Act directs courts to consider four enumerated factors, the first of which is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. 107(1). This case involves the commercial licensing of a silkscreen image that Andy Warhol had created based on respondent Lynn Goldsmith’s copyrighted photograph. The question presented is as follows:

Whether petitioner established that its licensing of the silkscreen image was a “transformative” use, and that Section 107(1) therefore weighs in petitioner’s favor, simply by showing that the image can reasonably be perceived to convey a meaning or message different from that of respondent’s original photograph.
# TABLE OF CONTENTS

| Interest of the United States                       | 1 |
| Statement                                           | 2 |
| Summary of argument                                 | 9 |
| Argument:                                           |   |
| A. Copyright law strikes a balance between incentivi
ing original expression and facilitating secondary expres
sion | 11 |
| B. The fair-use inquiry focuses on the specific use—
here, petitioner’s 2016 commercial licensing of the Orange Prince image to Condé Nast—that is 
alleged to be infringing | 13 |
| C. Petitioner has identified no sound basis to reject
the court of appeals’ conclusion that the first statutory fair-use factor favors respondents | 15 |
| D. The first fair-use factor should not be considered
in isolation | 29 |
| E. Other uses of Prince Series images or other works of visual art may require different fair-use analyses | 32 |
| Conclusion | 34 |

# TABLE OF AUTHORITIES

Cases:

- *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) ................ 34
- *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) .......................................................................................... 23
# IV

Cases—Continued:

<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Google LLC v. Oracle Am., Inc.</strong></td>
<td></td>
</tr>
<tr>
<td>141 S. Ct. 1183 (2021) ..................................................................</td>
<td>passim</td>
</tr>
<tr>
<td><strong>Harper &amp; Row Publishers, Inc. v. Nation Enters.</strong></td>
<td></td>
</tr>
<tr>
<td>471 U.S. 539 (1985) .........................................................................</td>
<td>15, 19, 20, 29, 30</td>
</tr>
<tr>
<td><strong>Kirtsaeng v. John Wiley &amp; Sons, Inc.</strong></td>
<td></td>
</tr>
<tr>
<td>579 U.S. 197 (2016) ..........................................................................</td>
<td>12</td>
</tr>
<tr>
<td><strong>Rogers v. Koons</strong>,</td>
<td></td>
</tr>
<tr>
<td>960 F.2d 301 (2d Cir.), cert. denied, 506 U.S. 934 (1992) ................</td>
<td>34</td>
</tr>
<tr>
<td><strong>Sampson &amp; Murdock Co. v. Seaver-Radford Co.</strong>, 140 F. 539 (1st Cir. 1905)</td>
<td>26</td>
</tr>
<tr>
<td><strong>Sony Corp. of Am. v. Universal City Studios, Inc.</strong>, 464 U.S. 417 (1984)</td>
<td>14, 17, 29, 34</td>
</tr>
</tbody>
</table>

Constitution and statutes:

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>U.S. Const.:</strong></td>
<td></td>
</tr>
<tr>
<td>Art. I, § 8, Cl. 8 (Intellectual Property Clause)</td>
<td>2, 26, 27</td>
</tr>
<tr>
<td>Amend. I.</td>
<td>26, 27</td>
</tr>
<tr>
<td><strong>Copyright Act of 1976, 17 U.S.C. 101 et seq.</strong></td>
<td>2</td>
</tr>
<tr>
<td>17 U.S.C. 101</td>
<td></td>
</tr>
<tr>
<td>17 U.S.C. 102(a)</td>
<td>2</td>
</tr>
<tr>
<td>17 U.S.C. 102(a)(5)</td>
<td>2</td>
</tr>
<tr>
<td>17 U.S.C. 106</td>
<td>12, 13</td>
</tr>
<tr>
<td>17 U.S.C. 106(1)</td>
<td>2</td>
</tr>
<tr>
<td>17 U.S.C. 106(2)</td>
<td>2, 12, 22</td>
</tr>
<tr>
<td>17 U.S.C. 106(3)</td>
<td>2</td>
</tr>
<tr>
<td>17 U.S.C. 106(5)</td>
<td>2</td>
</tr>
<tr>
<td>17 U.S.C. 107</td>
<td>passim</td>
</tr>
<tr>
<td>17 U.S.C. 107 Pmb1</td>
<td>8, 10, 15, 19, 26</td>
</tr>
<tr>
<td>17 U.S.C. 107(1)</td>
<td>7, 10, 11, 13, 15, 29</td>
</tr>
</tbody>
</table>
Statutes—Continued:

<table>
<thead>
<tr>
<th>Statute</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>17 U.S.C. 107(2)</td>
<td>7, 32</td>
</tr>
<tr>
<td>17 U.S.C. 107(3)</td>
<td>7, 31</td>
</tr>
<tr>
<td>17 U.S.C. 107(4)</td>
<td>7, 14, 29</td>
</tr>
<tr>
<td>35 U.S.C. 2(b)(8)</td>
<td>1</td>
</tr>
<tr>
<td>35 U.S.C. 2(c)(5)</td>
<td>1</td>
</tr>
</tbody>
</table>

Miscellaneous:

- U.S. Copyright Office, *U.S. Copyright Office Fair Use Index* (last updated June 2022), https://www.copyright.gov/fair-use/ ....................... 18
This case concerns the fair-use defense to copyright infringement, 17 U.S.C. 107. The Copyright Office is responsible for, among other things, advising Congress, agencies, the courts, and the public on copyright matters, including the fair-use doctrine. 17 U.S.C. 701 (2018 & Supp. I 2019). The Copyright Office maintains a Fair Use Index that summarizes fair-use precedents. The United States Patent and Trademark Office, through the Secretary of Commerce, advises the President on intellectual-property matters. 35 U.S.C. 2(b)(8) and (c)(5). The question presented implicates the expertise and responsibilities of other federal agencies and components as well. The United States therefore
has a substantial interest in the Court’s disposition of this case.

STATEMENT

1. The Intellectual Property Clause directs Congress “[t]o 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.” U.S. Const. Art. I, § 8, Cl. 8. The Copyright Act of 1976 (Copyright Act or Act), 17 U.S.C. 101 et seq., enacted pursuant to that constitutional grant of authority, protects all “original works of authorship,” 17 U.S.C. 102(a), including “photographs,” 17 U.S.C. 101, 102(a)(5).

A valid copyright grants the owner “exclusive rights” to, among other things, “reproduce the copyrighted work in copies,” 17 U.S.C. 106(1); “prepare derivative works based upon the copyrighted work,” 17 U.S.C. 106(2); “distribute copies * * * of the copyrighted work to the public,” 17 U.S.C. 106(3); and “display the copyrighted work publicly,” 17 U.S.C. 106(5). Those rights are subject, however, to exceptions and limitations, including the “fair use” doctrine, 17 U.S.C. 107, a “judge-made doctrine” that Congress subsequently codified. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994). The fair-use doctrine permits certain uses of a copyrighted work when imposing infringement liability would “stifle the very creativity which [copyright] law is designed to foster.” *Id.* at 577 (citation omitted).

Section 107 identifies a nonexclusive list of factors “to be considered” in determining whether a particular use of a copyrighted work is “fair.” 17 U.S.C. 107. The enumerated factors are (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.” *Ibid.*

2. The original copyrighted work at issue here is a photograph taken by respondent Lynn Goldsmith. Pet. App. 2a. Goldsmith “is a professional photographer primarily focusing on celebrity photography, including portrait and concert photography of rock-and-roll musicians.” *Id.* at 3a. She has photographed many well-known musicians, including the Beatles, Bob Dylan, Mick Jagger, Bob Marley, and Bruce Springsteen. J.A. 312. Her work has been featured widely, including in prominent museums such as the Smithsonian’s National Portrait Gallery and the Museum of Modern Art, and in popular magazines such as Rolling Stone, Life, and Time. Pet. App. 3a; J.A. 310; C.A. App. 1639-1644.

In 1981, Goldsmith pitched *Newsweek* to commission her to photograph Prince Rogers Nelson, or Prince, then an “up-and-coming musician.” Pet. App. 4a; C.A. App. 698. Goldsmith photographed Prince in concert and during a session at her studio. Pet. App. 4a, 56a.

Goldsmith carefully selected the details of the studio session. Pet. App. 4a. She chose a plain white backdrop and arranged the lighting to “showcase” Prince’s “chiseled bone structure,”” gave Prince eyeshadow and lip gloss to “accentuate his sensuality” and “build a rapport,” and alternated 85-mm and 105-mm lenses to capture “the shape of Prince’s face” in particular ways. *Id.* at 4a-5a, 56a-57a (citations omitted); see C.A. App. 287-288. But Prince “really strugg[ed]” during the session and soon ended it, leaving Goldsmith feeling “fortunate that [she] got something.” C.A. App. 709.
Newsweek featured one of Goldsmith’s photographs of Prince in concert but did not publish any photographs from the studio session. Pet. App. 57a. Goldsmith retained copyright in the photographs. Id. at 5a. One photograph from the studio session—a black-and-white portrait of Prince, which the parties refer to as the “Goldsmith Photograph”—is the subject of this case. Ibid.

For three years after the session, the Goldsmith Photograph remained unused. But in 1984, as Prince’s fame exploded with the release of his album Purple Rain, Vanity Fair sought to license one of Goldsmith’s photographs. Pet. App. 7a. Goldsmith’s agency selected the never-before-seen photograph at issue here. J.A. 146-148. Under the license, Goldsmith received a $400 fee in exchange for permitting the Goldsmith Photograph to be used as an “artist reference for an illustration to be published in Vanity Fair.” J.A. 85 (capitalization altered); Pet. App. 6a, 57a. The term “artist reference” meant, in industry parlance, that an artist “would create a work of art based on [the] image reference.” Pet. App. 6a (citation omitted; brackets in original). Vanity Fair agreed to credit Goldsmith for the “source photograph.” J.A. 86, 113. Vanity Fair further agreed to run only one full-page and one quarter-page version of the illustration, which could appear only in the November 1984 issue. J.A. 85. The license specified: “NO OTHER USAGE RIGHTS GRANTED.” Ibid.

The artist that Vanity Fair commissioned to create the illustration was Andy Warhol, a leader in the pop art movement who is “particularly known for his silk-screen portraits of contemporary celebrities.” Pet. App. 4a, 7a; C.A. App. 2372. He depicted A-list
celebrities such as Marilyn Monroe, Muhammad Ali, and Elizabeth Taylor. J.A. 158, 170-173, 189. His works appear in museums around the world, including the Museum of Modern Art and the Tate Modern. J.A. 450.

Goldsmith’s license to Vanity Fair authorized only a single illustration for publication in the magazine’s November 1984 issue. J.A. 85-87. From the Goldsmith Photograph, however, Warhol created 16 works (12 silkscreen prints on canvas, two silkscreen prints on paper, and two pencil illustrations) that together are now known as Warhol’s “Prince Series.” Pet. App. 8a, 59a.

The record is silent on why or how the Prince Series was produced. Warhol’s “usual practice,” however, was “to reproduce a photograph as a high-contrast two-tone image on acetate” (often with the assistance of a professional printer), make “any alterations” he saw fit, and then reproduce the image onto a silkscreen “like a photographic negative.” Pet. App. 9a; J.A. 157, 160, 164-165. For the canvas prints, he or his assistants would then “place the screen face down on the canvas, pour ink onto the back of the mesh, and use a squeegee to pull the ink through the weave and onto the canvas.” J.A. 164. Using “[t]he high-contrast half-tone impressions printed on the primed canvas” as an “‘under-drawing,’” Warhol “painted the colors by hand over the printed impression.” J.A. 165. For pencil illustrations, Warhol typically projected the underlying photograph onto paper and then sketched around it. Pet. App. 9a.

In the November 1984 issue, Vanity Fair published one of the Prince Series images, in which Prince’s face is colored purple and the background coral, accompanying an article titled “Purple Fame.” Pet. App. 8a, 58a (citation omitted). The image ran alongside a credit to Goldsmith, and elsewhere in the issue Vanity Fair
credited Goldsmith for the “source photograph.” *Id.* at 8a-9a, 58a.

Except for the license to Vanity Fair, the various Prince Series images appear to have remained unused during Warhol’s lifetime. After Warhol’s death in 1987, ownership of the Prince Series passed to petitioner Andy Warhol Foundation for the Visual Arts, Inc. Pet. App. 9a. Petitioner conveyed the 16 Prince Series originals to museums and private collectors, but retained copyright in the underlying images. *Ibid.* Over the years, petitioner has generated significant revenue by licensing the images to museums, magazines, galleries, and other commercial entities. *Id.* at 9a-10a.

After Prince died in April 2016, Condé Nast—Vanity Fair’s parent company—prepared a tribute edition commemorating Prince’s life. Pet. App. 9a. The magazine approached petitioner for permission to republish the image that had appeared in Vanity Fair in 1984. *Ibid.* But when petitioner disclosed that Warhol had produced 15 additional works, Condé Nast opted to license a different image known as “Orange Prince,” in which both Prince’s face and the backdrop were tinted orange. *Id.* at 9a, 62a. In exchange, petitioner collected a licensing fee of approximately $10,000. *J.A.* 360. Goldsmith did not receive either a fee or a credit for this use. Pet. App. 10a.

petitioner’s commercial licensing of the Prince Series image to Condé Nast (and similar uses) infringed Goldsmith’s copyright in the Photograph. *Ibid.*

a. The district court granted summary judgment to petitioner, holding that the Prince Series works “are protected by fair use.” Pet. App. 68a, 82a.

With respect to the first fair-use factor, the “purpose and character of the use,” 17 U.S.C. 107(1), the district court found that the works are “transformative” because they give the Goldsmith “photograph a new expression, and employ new aesthetics with creative and communicative results distinct from Goldsmith’s.” Pet. App. 72a (brackets and citation omitted). The court believed that the second factor, “the nature of the copyrighted work,” 17 U.S.C. 107(2), was of “limited importance” given the works’ “transformative” character. Pet. App. 73a-74a. The court concluded that the third factor, the “amount and substantiality of the portion used,” 17 U.S.C. 107(3), “weigh[ed] heavily” in petitioner’s favor because Warhol had “transformed Goldsmith’s work ‘into something new and different,’” “wash[ing] away the vulnerability and humanity Prince expresses in Goldsmith’s photograph” to “present[] Prince as a larger-than-life icon.” Pet. App. 78a-79a (citation omitted). Finally, the court held that the fourth factor—the effect of licensing the Prince Series on the market for Goldsmith’s photograph, 17 U.S.C. 107(4)—also favored petitioner because the “markets for a Warhol and for a Goldsmith fine-art *** print are different.” Pet. App. 80a.
b. The court of appeals reversed, concluding that each statutory factor favored respondents. Pet. App. 1a-52a.¹

As to the first fair-use factor, the court of appeals explained that the “[p]aradigmatic examples of transformative uses” enumerated in Section 107’s preamble “involve a secondary work that comments on the original in some fashion” and thus “serve[] a manifestly different purpose” from the original. Pet. App. 14a. The court recognized that other uses may also be transformative, emphasizing that it could not “catalog all of the ways in which an artist may achieve that end.” Id. at 22a. But the court rejected the district court’s conclusion that “any secondary work” that “employs new aesthetics with [distinct] creative and communicative results” is “necessarily transformative.” Id. at 16a (citation omitted; brackets in original). Here, the court explained, not only does “the Prince Series retain[] the essential elements of its source material,” but “the overarching purpose and function of the two works at issue here is identical.” Id. at 24a, 26a.

The court of appeals found that the second factor likewise favored respondents because the nature of the Goldsmith Photograph is “unpublished and creative.” Pet. App. 30a. As to the third factor, the court found that the Prince Series works “borrow[] significantly from the Goldsmith Photograph, both quantitatively and qualitatively”; Warhol copied the “essence of [her] photograph.”” Id. at 33a-34a (citation omitted).

¹ The court of appeals issued its original decision before this Court’s decision in Google LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021), then issued an amended opinion reaffirming its earlier holding in light of Google, Pet. App. 3a n.1.
Turning to the fourth factor, the court of appeals found that petitioner’s commercial licensing poses “cognizable harm to Goldsmith’s market to license the Goldsmith Photograph to publications for editorial purposes and to other artists to create derivative works.” Pet. App. 42a. The court observed that “both Goldsmith and [petitioner] have sought to license (and indeed have successfully licensed) their respective depictions of Prince to popular print magazines to accompany articles about him.” Id. at 39a (footnote omitted). The court further explained that “[t]here currently exists a market to license photographs of musicians, such as the Goldsmith Photograph, to serve as the basis of a stylized derivative image; permitting this use would effectively destroy that broader market.” Id. at 41a. The court limited its analysis to the allegedly infringing use at issue, explaining that “what encroaches on Goldsmith’s market is [petitioner’s] commercial licensing of the Prince Series, not Warhol’s original creation.” Id. at 42a.

Judge Jacobs concurred. Pet. App. 50a-52a. He emphasized that the court of appeals was not deciding whether “original Prince Series works” “in the hands of collectors or museums * * * are likely to infringe.” Id. at 50a. A different result might obtain there, he noted, because (among other reasons) Goldsmith’s “photograph and the original Prince Series works have distinct markets.” Id. at 51a.

SUMMARY OF ARGUMENT

A. Copyright law encourages the creation and dissemination of expressive works by granting copyright holders exclusive rights to the fruits of their creative endeavors, while preserving breathing room for secondary uses. The fair-use doctrine is an important element of this statutory balance.
B. The fair-use inquiry is necessarily use-specific. Here, the analysis should focus on the particular use—petitioner's 2016 commercial licensing of the Orange Prince image to Condé Nast—that is alleged to be infringing.

C. Petitioner focuses on the first statutory factor, the “purpose and character of the use.” 17 U.S.C. 107(1). As illustrative examples of potential fair uses, the preamble to Section 107 refers to secondary works that use copyrighted material to comment on, criticize, or otherwise shed light on the original. In such cases, the purpose of the use is necessarily distinct from that of the original; some copying of the original will often be necessary or at least useful in making the second author's own expression clearer and more effective; and the second work is unlikely to supersede the original. Those are not the only circumstances where the first statutory factor might weigh in favor of fair use. But fair use is an affirmative defense, and it is petitioner's burden to demonstrate that its own use was fair.

Here, the allegedly infringing use served the same purpose—depicting Prince in an article about him published by a popular magazine—for which Goldsmith's photographs have frequently been used, including under the 1984 Vanity Fair license. And while petitioner argues that Warhol intended the Prince Series images to communicate a message about celebrity, petitioner has not attempted to establish that Warhol needed to reproduce the creative elements of the Goldsmith Photograph in order to communicate that (or any other) message.

Petitioner instead argues that the first statutory factor supports fair use here because the Orange Prince image conveys a meaning or message different from
that of the Goldsmith Photograph. Treating that pur-
ported difference as sufficient under Section 107(1)
would dramatically expand the scope of fair use. Deriv-
ative works such as book-to-film adaptations, for exam-
ple, often introduce new meanings or messages, but that
has never been viewed as an independently sufficient
justification for unauthorized copying. Petitioner has
identified no sound basis for rejecting the court of ap-
peals’ conclusion that the first fair-use factor favors re-

D. This Court has recognized that all four statutory
fair-use factors must be considered together. Here, the
fourth factor strongly supports the court of appeals’
conclusion that petitioner’s use was not fair. Peti-
tioner’s commercial licensing of the Orange Prince im-
age to a popular magazine undermines Goldsmith’s abil-
ity to license her photograph, either for inclusion in
magazines or as an artist reference to facilitate creation
of derivative works. That harm would be magnified if
uses like this one regularly occurred.

E. Other uses of the Prince Series and other works
of visual art will be subject to different fair-use anal-
yses. In particular, museum display of the original
Prince Series images is unlikely to usurp demand for
the Goldsmith Photograph. And creators of other
works commonly described as “appropriation art” may
be able to establish stronger justifications for borrow-
ing.

ARGUMENT

A. Copyright Law Strikes A Balance Between Incentiviz-
ing Original Expression And Facilitating Secondary
Expression

The Copyright Act “stri[k]es] a balance between two
subsidiary aims: encouraging and rewarding authors’
creations while also enabling others to build on that work.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 204 (2016). Copyright law aims to “enrich[] the general public through access to creative works.” *Ibid.* (citation omitted). But there exists “inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994). In some circumstances, permitting secondary users greater latitude to copy a protected work will facilitate further expression. But when the original author’s control over her own work is diminished, the incentive to create future original works likewise declines. Creative endeavors therefore could be deterred either by a regime that categorically precluded all unauthorized uses of copyrighted expression, or by a system that allowed indiscriminate copying.

Various Copyright Act provisions reflect Congress’s determination to avoid both of those extremes. The Act generally grants an author “exclusive rights” to control the distribution, reproduction, performance, and display of her works, see 17 U.S.C. 106, including the right “to prepare derivative works based upon the copyrighted work,” 17 U.S.C 106(2). “By establishing a marketable right to the use of one’s expression,” the Act “supplies the economic incentive to create and disseminate ideas.” *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (citation omitted). But the Act also codifies the fair-use doctrine, Section 107, which “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1196 (2021) (citation omitted).
B. The Fair-Use Inquiry Focuses on the Specific Use—Here, Petitioner’s 2016 Commercial Licensing of the Orange Prince Image to Condé Nast—that Is Alleged To Be Infringing

The starting point for any fair-use analysis is to identify the allegedly infringing use. This Court has cautioned against “bright-line rules” in the fair-use context, explaining that “the statute, like the doctrine it recognizes, calls for case-by-case analysis.” *Campbell*, 510 U.S. at 577. Different uses of a particular original work can vary widely, and one use could be fair even though a different use of the same work would not be.

Section 107 states that, “[n]otwithstanding the provisions of sections 106 and 106A,” which list the copyright holder’s exclusive rights, see 17 U.S.C. 106; p. 2, *supra*, “the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, * * * is not an infringement of copyright.” 17 U.S.C. 107. Section 107 establishes an affirmative defense for conduct that would otherwise violate the copyright holder’s exclusive rights, and the fair-use inquiry accordingly focuses on the particular use(s) that the plaintiff alleges to be infringing. Section 107 directs courts to “consider[]” four factors “[i]n determining whether the use made of a work in any particular case is a fair use.” *Ibid.* And the enumerated factors themselves focus on the specific use at issue—particularly the first factor, which directs courts to consider “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,” 17 U.S.C. 107(1), and the fourth factor, which looks to “the effect of the use upon
the potential market for or value of the copyrighted work,” 17 U.S.C. 107(4).

This Court has repeatedly recognized that fair use should be assessed by considering the specific use alleged to be infringing. In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the Court classified recording television programs “for private home use” as fair, but stressed that using the same recordings for other purposes—such as resale, public display, or other “commercial use[s]”—might produce a different result. *Id.* at 446, 451. Likewise in *Campbell*, the Court explained that “the use ... of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence under the first factor of the fair use enquiry than the sale of a parody for its own sake, let alone one performed a single time by students in school.” 510 U.S. at 585.

Here, the relevant use is petitioner’s commercial licensing of the Orange Prince image to Condé Nast for reproduction in a 2016 edition celebrating Prince’s legacy after his death. Respondents’ counterclaim identifies that license as the focus of their infringement claim. Pet. App. 68a. The district court described the allegedly infringing behavior as petitioner’s “more recent licensing of the Prince Series works—namely, the 2016 license to Condé Nast.” *Ibid.* Respondents did not challenge that determination on appeal. The court of appeals accordingly identified the relevant use as petitioner’s “commercial licensing of the Prince Series, not Warhol’s original creation” of that Series. *Id.* at 42a.²

---

² To be sure, particular statutory factors sometimes may point in the same direction both for the creation of a secondary work and for
C. Petitioner Has Identified No Sound Basis To Reject The Court Of Appeals' Conclusion That The First Statutory Fair-Use Factor Favors Respondents

Petitioner focuses (see Pet. i; Pet. Br. 8) on the first statutory fair-use factor, the “purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. 107(1). The inquiry includes consideration of “whether the new work merely ‘supersede[s] the objects’ of the original creation (‘supplanting’ the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” Campbell, 510 U.S. at 579 (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,4901) (Story, J.) and Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985)). The Court has described such uses as “transformative.” Ibid. (quoting Pierre N. Leval, Toward A Fair Use Standard, 103 Harv. L. Rev. 1105, 1111 (1990)).

Section 107’s preamble refers to “the fair use of a copyrighted work *** for purposes such as criticism, comment, news reporting, teaching *** , scholarship, or research.” 17 U.S.C. 107. The fair-use doctrine is “flexible,” and “its application may well vary depending upon context.” Google, 141 S. Ct. at 1196-1197. In particular, the words “such as” in Section 107’s preamble make clear that the enumerated purposes are not exclusive. 17 U.S.C. 107. But these examples reflect “the sorts of copying that courts and Congress most commonly ha[ve] found to be fair uses.” Campbell, 510 U.S. at 577-578.

---

subsequent exploitation of that work. That will not always be so, however, see pp. 29-33, infra, and each use must be considered on its own terms.
Secondary uses falling within the enumerated categories typically serve purposes different from those of the original works that are the subject of the criticism, commentary, etc. And when new works are prepared for those purposes, some borrowing is often necessary or at least useful to make the second author’s own expression clearer or more effective. In a book review, for example, quotations from the original work may illustrate and thereby render more concrete the reviewer’s observations about the book.

In arguing that its use of the Goldsmith Photograph was fair, petitioner does not invoke either of those rationales. The allegedly infringing use here involves the commercial licensing of an image of Prince to accompany a magazine article about Prince. Goldsmith’s photographs have previously been used for the same purpose, and licensing of the sort at issue here usurps the market for the original photograph. And while petitioner argues that Warhol intended the Prince Series images as commentary about celebrity, petitioner has not argued that incorporation of the Goldsmith Photograph’s creative elements was essential to communicate any such message.

Instead, petitioner argues that the first statutory factor favors fair use here because Orange Prince purportedly conveys a different meaning or message than the original Goldsmith Photograph. Treating that as a sufficient basis for finding a new work transformative would dramatically expand copyists’ ability to appropriate existing works. Petitioner has identified no sound basis for rejecting the court of appeals’ holding that the first statutory factor favors respondents.

1. A second work that “comment[s]” on, “critici[zes],” or otherwise “shed[s] light” on an earlier work, *Campbell,*
510 U.S. at 579, 581-582, serves a different purpose than the original. Indeed, even the specific language that is copied from the original typically serves a different purpose in the commentary than in the original work. Within a book review, for example, a quoted excerpt may serve as an object of study, or as an illustration of the original author’s literary style, where in the original the same passage was used to entertain or instruct. And the risk of follow-on commentary “supplant[ing]” the original is small because the two works “usually serve different market functions.” Id. at 579, 580 n.14, 591-592 (citation omitted).

The allegedly infringing conduct here, by contrast, was the commercial licensing of a visual depiction of Prince to accompany an article about Prince in a popular print magazine. The allegedly infringing use thus served the same purpose that Goldsmith’s own photographs have previously served, including in 1984 when the Goldsmith Photograph was licensed to Vanity Fair.

---

3 Fair-use issues arise in a wide variety of circumstances, and no single test or shorthand formulation can capture all the ways in which particular uses can be fair. Campbell involved the application of fair-use principles to a secondary expressive work that incorporated elements of a copyrighted original—as Orange Prince does here. Even outside that context, however, the first statutory factor may well counsel in favor of fair use. That will be so, for example, when a teacher engages in “the straight reproduction of multiple copies for classroom distribution,” Campbell, 510 U.S. at 579 n.11, or when a consumer records television programs for “private home use,” Sony, 464 U.S. at 448-449. Although such uses copy original works in largely unmodified fashion, rather than incorporating portions of them into new creative works, they employ the originals for new purposes. This case does not present any occasion for the Court to clarify the proper application of fair-use principles in circumstances like those.
Pet. App. 39a-40a. “Transformative uses are those that add something new, with a further purpose or different character, and do not substitute for the original use of the work.” U.S. Copyright Office, U.S. Copyright Office Fair Use Index (last updated June 2022), https://www.copyright.gov/fair-use/. Where, as here, the new use “supplant[s]” the original, the first factor is unlikely to weigh in favor of fair use. *Campbell*, 510 U.S. at 579 (citation omitted).

Petitioner describes (Br. 48) the court of appeals as holding “that a work cannot be transformative if the essential elements of its source material remain recognizable.” But in fact, the court recognized that uses that “comment[] on the original in some fashion” are most likely to be fair. Pet. App. 13a-14a. In many such cases, the essential elements of the source material will be recognizable; indeed, often that is exactly why the copying is justified. See *ibid.*; pp. 16-17, *supra*; p. 19, *infra*. The problem here, however, was not simply that the essential elements of the Goldsmith Photograph were recognizable in the Orange Prince image. Rather, in commercially licensing Orange Prince to Condé Nast, petitioner used those elements for the same purpose as in the Goldsmith Photograph itself. The court of appeals correctly held that such use was not transformative.

The court of appeals likewise did not hold that “transformative use could not be found where there was imposition of another artist’s style on the primary work.” Pet. Br. 50 (citation and internal quotation marks omitted). Rather, the court simply held that neither conversion of a photograph to a silkscreen, nor “imposition” of Warhol’s distinctive style on the Prince Series image, sufficed to make the second use transformative absent some justification for copying. Pet. App.
Finally, the court did not “assume[] that a work cannot be both derivative and fair use.” Pet. Br. 51. It simply held that the transformation inherent in the creation of a derivative work is not by itself sufficient to satisfy the first factor. Pet. App. 24a-26a.

2. In *Campbell*, after looking to the statutory examples for guidance, the Court held that 2 Live Crew’s parody of Roy Orbison’s song “Oh, Pretty Woman” was transformative. The Court concluded that the parody made “transformative” use of the original—despite copying signature elements, including the opening lyrics and bass riff—because it “comment[ed] on and criticiz[ed] the original work.” *Campbell*, 510 U.S. at 581-582, 589. The Court further explained that, like “criticism,” “comment[ary],” and other common examples of fair use, 17 U.S.C. 107, parody “must be able to ‘conjure up’ at least enough of th[e] original to make the object of its critical wit recognizable.” *Campbell*, 510 U.S. at 588. “Parody,” the Court emphasized, “needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination.” *Id.* at 580-581.

To create parodies, and to engage in the illustrative uses identified in Section 107’s preamble, authors often may need to copy expression from the original copyright-protected works that are the subject of their new commentaries. If copying from the original works were categorically prohibited, secondary authors could be unable to produce and fully exploit their own expressive contributions, thereby “stif[ling]” creativity in the very manner that the fair-use doctrine is designed to prevent. *Campbell*, 510 U.S. at 577 (citation omitted); see *Harper & Row*, 471 U.S. at 557-558 (no fair use where the infringer failed to show “actual necessity” or “independent justi-
fication” for unauthorized copying). Conversely, borrowing is least likely to be justified when “the alleged infringer merely uses [the original work] to get attention or to avoid the drudgery in working up something fresh.” *Campbell*, 510 U.S. at 580. Nor is copying permitted to escape “paying the customary price.” *Harper & Row*, 471 U.S. at 562.

Petitioner contends (see, e.g., Br. 20) that Warhol intended the Prince Series as a commentary on celebrity. But petitioner does not assert, let alone attempt to demonstrate, that incorporating the creative elements of the Goldsmith Photograph into Orange Prince was necessary for Warhol to communicate that (or any other) message. The closest petitioner comes is its contention (Br. 46) that Warhol “needed at least some aspects of the original image to be recognizable to the audience in order to convey the idea he sought to express.” To communicate the message that petitioner attributes to the Prince Series, it may have been necessary that the works in that Series be recognizable as images of *Prince*. Warhol could have achieved that effect, however, without creating images that were recognizably derived from the Goldsmith Photograph, which was unknown to the public. Instead, Warhol incorporated the “essential elements of the Goldsmith Photograph”—the protected fruits of Goldsmith’s creative choices, down to replicating “where the umbrellas in [petitioner’s] studio reflected off [Prince’s] pupils.” Pet. App. 26a, 36a. Petitioner has never suggested that copying those aspects of the Goldsmith Photograph was necessary to enable Warhol’s own creative expression.4

---

4 “Warhol did not use the Goldsmith Photograph simply as a reference or aide-mémoire in order to accurately document the
3. Petitioner proposes (Br. 30; see Br. 33-46) an entirely different benchmark, arguing that the “transformativeness inquiry focuses on what a follow-on work means.” Petitioner does not limit its proposed rule to a particular method of silkscreen production, or even to visual arts. Rather, under petitioner’s proposal, courts would treat as transformative, and thus as presumptively fair, any secondary expressive work that can “reasonably be perceived” as conveying a new “meaning or message.” Br. 33, 40 (capitalization and emphasis omitted). Although petitioner asserts (Br. 53) that affirming the decision below “would work a sea change” to copyright law, petitioner’s own test would radically expand fair use and generate implausible results.

a. Most fundamentally, under a straightforward application of petitioner’s proposed rule, countless secondary uses that currently require licensing would become presumptively fair. Take a songwriter who overlaid new lyrics onto a pre-existing musical composition—not in an attempt at parody, but simply to avoid composing a new tune—and then sought to commercially exploit her own song in the same markets as the original. Ordinarily, this would be a paradigmatic example of copying “to avoid the drudgery in working up something fresh,” *Campbell*, 510 U.S. at 580, and thus precisely the type of scenario in which the second artist

---

physical features of its subject”; rather, the Prince Series images “are instantly recognizable as depictions or images of the Goldsmith Photograph itself.” Pet. App. 34a. In this Court, petitioner does not challenge the Second Circuit’s holding (id. at 46a-49a) that the Prince Series images are “substantially similar to the Goldsmith Photograph.” Rather, the only issue currently in dispute is whether petitioner has established an adequate fair-use justification for conduct that would otherwise constitute “actionable infringement,” id. at 46a, of Goldsmith’s copyright.
must negotiate a license with the original composer, Copyright Alliance Amicus Br. 18. Yet virtually any new lyrics would “reasonably be perceived” as adding some “meaning or message” that was absent from the original work. Pet. Br. 33, 40.

Or consider a written account of American politics that chronicles and analyzes the period from 1970 to 1990. If a later historian then published a book covering the period from 1970 to 2000, incorporating the full text of the earlier work while adding her own chapters discussing the period from 1990-2000, she could not plausibly claim a fair-use right to market the new, expanded volume in competition with the original. But such a follow-on author would undoubtedly add a new “meaning or message” by analyzing an additional decade of American political activity.

And so on. An author’s exclusive rights to her own copyrighted expression include the right “to prepare derivative works based upon the copyrighted work.” 17 U.S.C. 106(2). As various amici point out, classic derivative works that are commonly understood to require licensing—including sequels, motion-picture and stage adaptations, spinoffs, remakes, and cross-over works—invariably introduce new meaning or messages. See Copyright Alliance Amicus Br. 16-21; Motion Picture Association Amicus Br. 4-5; Authors Guild Amici Br. 13, 18-19; 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.05[A][1][b], at 13-169 (Dec. 2021). A secondary work may alter a character’s persona—from “vulnerable” to “larger-than-life,” as petitioner claims (Br. 33) Warhol did to Prince here—introduce new characters, insert new storylines, alter the ending, or incorporate different themes. Yet those sorts of artistic changes, creative though they might be, have never
been thought to free the secondary user from paying to license the original work. Cf. *Campbell*, 510 U.S. at 598-599 (Kennedy, J., concurring) (cautioning against “accord[ing] fair use protection to profiteers who do no more than add a few silly words to someone else's song”).

Petitioner’s suggestion (Br. 50-51) that “Warhol’s unique style is the very thing that gives the Prince Series its distinct message,” introduces further difficulties. That approach would effectively establish a “celebrity-plagiarist privilege,” granting well-known copyists special protection against infringement suits while diluting the rights of lesser-known artists. Pet. App. 27a; cf. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (warning against any doctrine that requires judges to evaluate “the worth of [an artistic work], outside of the narrowest and most obvious limits”).

In addition, petitioner’s proposed test often would enmesh courts in issues that judges typically are ill-equipped to decide. The court of appeals observed that “it may well have been Goldsmith’s subjective intent to portray Prince as a ‘vulnerable human being’ and Warhol’s to strip Prince of that humanity and instead display him as a popular icon.” Pet. App. 22a. But treating the two artists’ actual intents as central to the fair-use inquiry would substantially complicate the analysis,

---

5 Petitioner asserts (Br. 52) that its rule will not threaten copyright owners’ derivative-works rights because “adaptation of a novel into a movie * * * does not change the meaning or message of the original.” As explained above, however, even a faithful adaptation to another medium will often convey new meaning and messages. That is all the more true for purposefully distinct adaptations and for sequels, spinoffs, and remakes.
creating the potential for self-serving statements and competing expert testimony on matters that are ultimately unknowable. Similar difficulties would attend any effort to determine whether a “reasonable observer” (be that an art critic, a layperson, or another relevant audience) would perceive the Goldsmith Photograph and the Orange Prince image as conveying substantially different messages.

b. Petitioner’s approach is largely premised on a misreading of Campbell. As explained, pp. 19-20, supra, Campbell reflected the Court’s recognition that some copying from the original is necessary for a parodist to make her point. See 510 U.S. at 580-581. Parody, like more conventional forms of “criticism” or “commentary,” 17 U.S.C. 107, therefore is a type of follow-on expressive work that often would be unduly impeded by a categorical ban on copying the original.

To be sure, at one point the Campbell Court framed the relevant question as whether a secondary work “alter[s] the first with new expression, meaning, or message.” 510 U.S. at 579. Taken as a whole, however, the Court’s opinion cannot fairly be read to hold that any new meaning or message suffices to render a secondary work transformative. Rather, the Court repeatedly stressed that the new message conveyed by a parody is by its nature a form of commentary on the original, and that incorporation of some of the original’s elements into the new work is essential for a parody to be recognizable as such. See id. at 579-581. That justification for copying disappears if the new “meaning[ ] or message” of a follow-on work is unrelated to that of the original. Id. at 579; see id. at 580 (explaining that, if a particular “commentary has no critical bearing on the substance or style of the original composition, * * * the
claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish”).

Indeed, if petitioner’s proposed test were correct, most of Campbell’s analysis would be superfluous. The Court could simply have explained that 2 Live Crew’s lyrics communicated a message different from that of Orbison’s original. See 510 U.S. at 583. But the Court instead emphasized the distinctive characteristics of parody and 2 Live Crew’s consequent “need[]” to “mimic [the] original to make its point.” Id. at 580-581.

Petitioner’s reliance (Br. 35-37) on Google is likewise misplaced. Emphasizing the difficulty of “apply[ing] traditional copyright concepts in th[e] technological world” of “functional” computer programs, Google, 141 S. Ct. at 1208, the Google Court principally focused on the second statutory factor, emphasizing the copied code’s distance “from the core of copyright,” id. at 1202. And even as to the first factor, the Court did not suggest that Google had changed the “meaning” or “message” of the code. Rather, the Court explained that Google (the secondary author) had written “new implementing code * * * designed to operate within” a new smartphone environment, and that although Google had copied pre-existing code “precisely,” it had done so for a purpose distinct from that of the original, i.e., “so that programmers who had learned an existing system could put their basic skills to use in a new one.” Id. at 1203. The Court thus viewed the case as one in which some copying was fair because it facilitated programmers’ new expression, and because a ban on copying would unduly impede Google’s ability to exploit its own creative expression, i.e., the implementing code that it had written. See id. at 1203-1204.
c. Petitioner suggests (Br. 41) that the examples set forth in Section 107’s preamble support its proposed approach. Petitioner asserts (ibid.) that “the unifying theme of those disparate categories is that, for each one, a follow-on work often conveys a new meaning or message different than the original it borrows from.” But as explained above, many uses quite different from those enumerated in the statute are likely to communicate new messages. The most salient characteristics that typically attend the specified uses instead are that, for each one, (a) the copied material is used for a different purpose in the second work than in the original, and (b) some copying from the original typically will facilitate the secondary user’s own expression. See pp. 15-19, supra.

d. Petitioner’s reliance (Br. 37) on the “common-law approach to fair use” is likewise misplaced. The court in Gyles v. Wilcox, (1740) 26 Eng. Rep. 489, 490 (H.L.), merely observed that copyright law should not unduly restrain “extremely useful” secondary works that reflect the “invention, learning, and judgment” of their author. As illustrated even by the language petitioner excerpts, Sampson & Murdock Co. v. Seaver-Radford Co., 140 F. 539 (1st Cir. 1905), emphasized the distinct “purposes” for which “portions of a copyrighted book may be published.” Id. at 542. And nothing in Justice Story’s seminal opinion in Folsom—which distilled “the essence of law and methodology from the earlier cases” and influenced the drafting of Section 107, Campbell, 510 U.S. at 576—can be construed to endorse petitioner’s meaning-or-message inquiry. See Folsom, 9 F. Cas. at 348-349.

e. Petitioner’s invocation (Br. 42-43) of the First Amendment is likewise unavailing. The Intellectual
Property Clause reflects the Framers’ view that “promot[ing] the Progress of Science,” U.S. Const. Art. I, § 8, Cl. 8—i.e., “spur[ring] creative expression,” Google, 141 S. Ct. at 1206—is a worthy federal purpose, and that “protect[ing] authors’ original expression from unrestricted exploitation” permissibly furthers that purpose, Eldred, 537 U.S. at 221. “[T]he Framers regarded copyright protection” as an “‘engine of free expression.’” Golan v. Holder, 565 U.S. 302, 327-328 (2012) (brackets and citation omitted).

Nothing in copyright law prevents a second author from expressing the same idea as her predecessor. “[E]very idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation.” Eldred, 537 U.S. at 219. But a user of a copyrighted work has no First Amendment right to exploit another’s expression. Indeed, “some restriction on expression is the inherent and intended effect of every grant of copyright.” Golan, 565 U.S. at 327-328.

Petitioner’s appeal to policy considerations (Br. 37-40) is similarly unpersuasive. Under the Intellectual Property Clause and the Copyright Act, an author’s reward for her original expression is the exclusive right to that expression. See U.S. Const. Art. I, § 8, Cl. 8 (authorizing Congress “[t]o promote the Progress of Science * * * by securing for limited Times to Authors * * * the exclusive Right to their respective Writings”) (emphasis added); pp. 11-12, supra. Fair-use principles provide an important safety valve in various circumstances, including when a categorical ban on copying would unduly impede further creativity. But a new author’s public dissemination of socially valuable expression, in and of itself, does not entitle him to appropriate another’s work without paying the fair price. “[A]rtists must pay for their paint, canvas, neon
tubes, marble, film, or digital cameras,” Pet. App. 45a, as well as their kilns, acrylic, lenses, and filters. If an artist’s chosen medium involves “incorporat[ing] the existing copyrighted expression of other artists” outside the bounds of the fair-use doctrine, she “must pay for that material as well.” *Ibid.*

Petitioner correctly observes (Br. 43) that copyright law is designed to “promote[] innovation,” but achieving that objective requires protection of original as well as secondary works, see pp. 11-12, *supra*. Petitioner’s expansive rule would upset the balance struck by the Copyright Act, privileging secondary users over original creators. See *Campbell*, 510 U.S. at 599 (Kennedy, J., concurring) (“[U]nderprotection of copyright disserves the goals of copyright just as much as overprotection.”).

4. Petitioner has identified no sound basis for rejecting the court of appeals’ conclusion that the first statutory factor weighs in respondents’ favor. In commercially licensing the Orange Prince image to accompany a magazine article about Prince, petitioner did not use that image for a purpose meaningfully different from that of the Goldsmith Photograph. And petitioner does not argue that Warhol needed to copy the creative elements of the photograph in order to communicate any message about Prince or about celebrity. See pp. 19-20, *supra*.

To be sure, the two potential justifications for copying noted in the preceding paragraph are not the only rationales for finding particular uses of copied expression to be fair. But “fair use is an affirmative defense,” *Campbell*, 510 U.S. at 590, and it is the follow-on user’s burden to establish *some* permissible “justification for the very act of borrowing.” *Id.* at 581; see *Google*, 141 S. Ct. at 1199 (describing purpose-and-character
inquiry as investigation into “the reasons for copying”). The only justification petitioner offers is that the Orange Prince image conveyed a different message about Prince (and/or about celebrity more generally) than did the Goldsmith Photograph. That potential difference in meaning provides no sound basis for concluding that “the purpose and character” of the licensing, 17 U.S.C. 107(1), weighs in favor of finding fair use here.

D. The First Fair-Use Factor Should Not Be Considered In Isolation

Petitioner sought this Court’s review to clarify the first statutory fair-use factor, and specifically the standards governing whether a new work is transformative. Pet. i. This Court has cautioned, however, that the Section 107 factors cannot “be treated in isolation.” Campbell, 510 U.S. at 578. Instead, “[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright.” Ibid.; see Google, 141 S. Ct. at 1202 (emphasizing the second factor); Harper & Row, 471 U.S. at 563-566 (emphasizing the second and third factors); Sony, 464 U.S. at 450-455 (emphasizing the fourth factor).

1. Applying that analysis here, the most critical factor is that the licensing at issue “supplant[s],” or “usurps” the market for, Goldsmith’s original photograph. Campbell, 510 U.S. at 579, 592 (citations omitted); see Nimmer § 13.05[A][4], at 13-202 to 13-202.1 (describing the “effect of the use upon the potential market,” 17 U.S.C. 107(4), as the “central fair use factor”) (footnote omitted). As the court of appeals observed (Pet. App. 37a), the first and fourth factors are “linked”: a secondary use that diminishes the copyright holder’s incentive to create by “supplanting the original” ordinarily is not transformative, Campbell, 510 U.S. at 579 (citation and internal quotation marks omitted), and is also likely to
“serve[] as a market replacement,” see id. at 591. Courts must consider not only the extent of market harm caused specifically by the alleged infringer, but also “whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original.” Id. at 590 (citation and internal quotation marks omitted). Courts likewise must “take account not only of harm to the original but also of harm to the market for derivative works.” Harper & Row, 471 U.S. at 568.

Here, petitioner’s commercial licensing threatens Goldsmith’s access to licensing opportunities in two related markets. See Pet. App. 37a-42a. Goldsmith has frequently licensed her Prince photographs for publication, including to print magazines seeking to memorialize Prince after his death. Id. at 62a-63a; J.A. 369-370. The parties’ respective images have portrayed the same subject, have accompanied the same content, and have appealed to the same purchasers; petitioner’s licensing is thus a ready substitute for Goldsmith’s own. Pet. App. 45a.

Licensing of the Prince Series images to magazines for this purpose also interferes with Goldsmith’s ability to license her photograph for use as an artist reference for derivative works. Goldsmith previously earned a fee in exchange for authorizing Vanity Fair to use her photograph as the basis for a single image to be published in its November 1984 issue. Pet. App. 7a. A similar opportunity arose in 2016, when Condé Nast sought to republish the November 1984 image. Id. at 9a. By enabling Condé Nast to license a different Prince Series image, for which Goldsmith never received a licensing fee, petitioner “usurp[ed]” “demand” in the derivative
market for Goldsmith’s photograph. *Campbell*, 510 U.S. at 592 (citation omitted).

If the sort of conduct in which petitioner engaged were “unrestricted and widespread,” *Campbell*, 510 U.S. at 590 (citation omitted), it would seriously diminish the ability of Goldsmith and other photographers to reap the rewards of their own expression. “[L]icensing of derivatives is an important economic incentive to the creation of originals,” *id.* at 593, particularly for photographers, who often commercialize their work by licensing their photographs for derivative uses. See Copyright Alliance Amicus Br. 19. If the alterations that Warhol made sufficed to allow secondary artists to use original photographs without authorization, the photography licensing market would suffer. That risk is particularly acute given modern-day tools like Adobe Photoshop or Instagram filters that readily allow a secondary user to replicate and then alter an image to communicate a new message. *Ibid.*

2. The third fair-use factor is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. 107(3). The Orange Prince image “borrows significantly from the Goldsmith Photograph, both quantitatively and qualitatively”; Warhol copied the “‘essence of [her] photograph.’” Pet. App. 33a-34a, 36a. Even where the entirety of a particular work is used, the third factor might not weigh against a finding of fair use if such use was necessary. *Campbell*, 510 U.S. at 586-587. But petitioner has identified no sound reason that Warhol needed to copy those elements, or indeed needed to copy the Goldsmith Photograph at all, in order to communicate his own message. See pp. 19-20, 28, *supra.*
3. In this case, the second statutory fair-use factor—“the nature of the copyrighted work,” 17 U.S.C. 107(2)—does not appear to cut strongly in either direction. The fact that the Goldsmith Photograph was essentially unknown, however, negates any possibility that Orange Prince would be understood as a commentary on the original work.

That aspect of this case also distinguishes Orange Prince from Warhol’s Campbell’s Soup Cans. See p. 33, infra; Google, 141 S. Ct. at 1203. For those works, the effect that Warhol achieved by repackaging familiar commercial images as fine art depended on the recognizability of the images; works that depicted fictitious soup-can designs created by Warhol himself would have produced an entirely different effect. And by presenting the images as fine art, Warhol’s Campbell’s Soup Cans used the designs for a wholly different purpose than Campbell’s had sought to achieve in placing the designs on the cans themselves or on advertisements for its soup. No similar justifications for copying the Goldsmith Photograph have been or could plausibly be asserted here.

E. Other Uses Of Prince Series Images Or Other Works Of Visual Art May Require Different Fair-Use Analyses

1. A judicial determination that one use of an original work is not fair leaves open the possibility that other uses may be. See pp. 13-14, supra. Here, creation of the Prince Series is not at issue. See p. 14, supra. Given the undeveloped record, it is not clear that the creation infringed Goldsmith’s copyright at all—Warhol may have created the other Prince Series images for his own edification or as part of his artistic process for creating the licensed 1984 Vanity Fair illustration. In any event, a museum’s use of a Prince Series image will in many
cases serve “teaching,” “research,” and “scholarship” purposes. 17 U.S.C. 107. And those uses—which might entail displaying a work publicly or reproducing an image on a museum website—are unlikely to “fulfill[] demand” for Goldsmith’s work. *Campbell*, 510 U.S. at 588. Museums (and other collectors) could thus assert fair-use arguments that are unavailable here.

The fair-use analysis likewise would be different if petitioner had licensed Prince Series images to accompany articles on topics other than Prince. Suppose, for example, that petitioner had authorized an art magazine to reproduce Orange Prince alongside an article describing Warhol’s silkscreen techniques. In that circumstance, the Prince Series image would be used for a purpose for which the Goldsmith Photograph is ill-suited; reproduction of the image as a point of reference would help to facilitate the creative expression contained in the article’s text; and the licensing would not likely supplant demand for Goldsmith’s work.

2. No blanket fair-use rule applies to visual art that incorporates preexisting expression, including works described as “appropriation art.” Like Campbell’s Soup Cans, such visual art may incorporate original expression for purposes of “criticism” or “comment.” 17 U.S.C. 107; *Google*, 141 S. Ct. at 1203. And many visual artists frequently license the copyrighted material that they build on and incorporate into their own works—as Warhol himself often did. See Resp. Br. 38-39.

Petitioner contends (Br. 54-56) that affirmance of the judgment below would upset existing expectations concerning the proper analysis of infringement claims targeting visual art. But courts have long recognized the fact-specific character of fair-use analysis, and they have not always upheld fair-use arguments advanced by
famous appropriation artists. Compare, e.g., Rogers v. Koons, 960 F.2d 301, 304 (2d Cir.), cert. denied, 506 U.S. 934 (1992), with Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006). And claims of fair use in the visual arts are governed by the same Copyright Act provision (17 U.S.C. 107) that applies to other modes of expression. To the extent petitioner requests a categorical rule protecting all appropriation art (or visual art more generally), this Court’s decisions repudiate any such “bright-line approach to fair use.” Sony, 464 U.S. 449 n.31.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SUZANNE V. WILSON
General Counsel and
Associate Register of
Copyrights
MARK T. GRAY
JORDANA S. RUBEL
Assistants General Counsel
NICHOLAS R. BARTELT
SHIREEN NASIR
KEYANA PUSEY
Attorneys
United States Copyright
Office

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant
Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
YAIRA DUBIN
Assistant to the Solicitor
General
DANIEL TENNY
STEVEN H. HAZEL
Attorneys

AUGUST 2022
No. 21-869

In the Supreme Court of the United States

ANDY WARHOL FOUNDATION FOR
THE VISUAL ARTS, INC.,

Petitioner,

v.

LYNN GOLDSMITH ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF ART PROFESSOR RICHARD MEYER
AS AMICUS CURIAE IN SUPPORT OF
NEITHER PARTY

NICHOLAS J. HOFFMAN
MCGUIREWOODS LLP
355 S. Grand Ave.
Suite 4200
Los Angeles, CA 90071
(213) 627-2268
nhoffman@mcguirewoods.com

JONATHAN Y. ELLIS
Counsel of Record
MCGUIREWOODS LLP
888 16th Street N.W.
Suite 500
Washington, DC 20006
(202) 828-2887
jellis@mcguirewoods.com
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTEREST OF AMICUS CURIAE</td>
<td>1</td>
</tr>
<tr>
<td>SUMMARY OF ARGUMENT</td>
<td>2</td>
</tr>
<tr>
<td>ARGUMENT</td>
<td>4</td>
</tr>
<tr>
<td>A. Determining the Meaning and Message of</td>
<td>4</td>
</tr>
<tr>
<td>Visual Art Requires Looking Closely and</td>
<td></td>
</tr>
<tr>
<td>Thinking Contextually</td>
<td></td>
</tr>
<tr>
<td>B. Warhol Conveyed a New Meaning and</td>
<td>6</td>
</tr>
<tr>
<td>Message by Visually Altering Goldsmith's</td>
<td></td>
</tr>
<tr>
<td>Photograph</td>
<td></td>
</tr>
<tr>
<td>C. The Context of the <em>Prince</em> Series</td>
<td>19</td>
</tr>
<tr>
<td>confirms the Artwork’s New Meaning and Message</td>
<td></td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>25</td>
</tr>
</tbody>
</table>
TABLE OF AUTHORITIES

Other Authorities


PRINCE, Purple Rain, on PURPLE RAIN (Warner Bros. 1984) ............................................. 17


Andy Warhol, The Philosophy of Andy Warhol: From A to B and Back Again (Harvest, 1977) ................................................................. 21

INTEREST OF AMICUS CURIAE*

Richard Meyer, Ph.D., is the Robert and Ruth Halperin Professor in Art History at Stanford University. He teaches courses on twentieth-century American art, the history of photography, art censorship, and the First Amendment. He has published and taught courses on Andy Warhol for over 25 years and curated museum exhibitions including Warhol’s Jews: Ten Portraits Reconsidered and Contact Warhol: Photography Without End. Dr. Meyer is the author of What Was Contemporary Art? (2013) and, most recently, Master of the Two Left Feet: Morris Hirshfield Rediscovered (2022).

Dr. Meyer has a strong and sincere interest in the appropriate recognition of the meaning and purpose of visual artwork like Andy Warhol’s Prince series. He believes that, through careful visual examination and thoughtful consideration of context, the meaning of such works can be understood not only by an art professor or critic, but by any reasonable observer. He submits this brief to demonstrate how any reasonable observer can understand the meaning and message of the artwork at the center of this case.

* Pursuant to Rule 37, Amicus states that no counsel for a party authored this brief in whole or in part, and no person other than Amicus or his counsel made a monetary contribution to its preparation or submission. Counsel for petitioner and respondents filed blanket consent to the filing of all amicus briefs.
SUMMARY OF ARGUMENT

While analyzing visual art may seem daunting at first, it does not take a professional critic or curator to deduce its message and meaning. In teaching his students, Dr. Meyer emphasizes two foundational principles: (1) look closely, and (2) think contextually. These directives can assist first-day art students, or any reasonable observer, to understand the expressive purpose of visual art.

To consider the message and meaning of Warhol’s *Prince* series, a reasonable person should first look closely. Close visual inspection reveals that Warhol cropped Prince’s face out of Goldsmith’s black-and-white photograph, made the image larger, removed humanizing details, changed the medium from photograph to painting, saturated the work in high contrast colors, and added multiple elements to the composition (e.g., new contour lines around the face and hair through free-hand drawing).

The observer should then consider context, including how the work relates to the broader field of Pop art and its sustained focus on the machinery of consumerism and fame. Goldsmith’s original black-and-white photograph was meant for print magazines and depicted a true-to-life, and apparently self-reflective, Prince. Warhol’s series used the photograph as raw material for an entirely different type of art—a series of paintings, prints, and drawings meant to hang in galleries, museums, and private collection—in keeping with his career-long interest in using such celebrities and consumer products to provide social commentary on popular culture.
Considered in this light, the *Prince* series may be reasonably perceived to convey the dehumanizing effect of fame. Indeed, when carefully considered, it vividly demonstrates how celebrities are idolized and envied, but the machinery of fame packages them up like canned goods and turns them into endlessly repeatable images of desire.

This analysis does not require any judgment about the actual competency or value of Warhol’s work. An observer may consider the message and meaning of Warhol’s work without critiquing Warhol’s skill level or whether his social commentary was good or in good taste. It requires only careful inspection and thoughtful consideration. Regardless how the Court resolves the legal questions in this case, Dr. Meyer respectfully submits that the Second Circuit erred in concluding otherwise.
ARGUMENT

Dr. Meyer takes no position on the legal questions before the Court. He respectfully submits, however, that the Second Circuit was wrong to suggest that only an “art critic” can “ascertain the intent behind or meaning of the works at issue.” Pet. App. 22a-23a. At the core of Dr. Meyer’s career as a teacher and writer has been the conviction that the valid interpretation of art is hardly the sole province of critics, curators, and scholars. Indeed, in his view, arts professionals sometimes rely too heavily on specialized knowledge—rather than common sense—in their claims.

By using principles that Dr. Meyer teaches his students on their first day of class—i.e., by closely examining the artwork and then considering the artwork in its proper context—any reasonable observer can assess the message and meaning of visual artwork, including the artwork at the center of this case. Dr. Meyer offers this brief to demonstrate how the visual details of Warhol’s *Prince* series and the context in which he created it conveys a meaning quite different from the source materials on which the artist draws. He explains how the series, like much of Warhol’s work as a Pop artist, incorporated popular imagery of celebrity not to portray the celebrity as a human subject, but to comment on the machinery of fame itself.

A. Determining the Meaning and Message of Visual Art Requires Looking Closely and Thinking Contextually.

No work of visual art arises in isolation. Each relies on preceding sources and references. Pablo Picasso could never have painted his cubist paintings of the
1900s without having seen African sculptures and Iberian masks.\(^1\) Italian Renaissance artists like Michelangelo were inspired by the idealizing precedent of Ancient Greek and Roman sculpture.\(^2\) Locating the particular sources from which an artist draws is often quite helpful. But what matters more is what the artist has done with that source. The advancement of artistic expression requires the creation of new visual forms and meanings.

To consider the message and meaning of visual art, Dr. Meyer teaches his art history students to (1) look closely and (2) think contextually. This analysis can be performed by anyone. Assessing the expressive purpose of visual art does not include making value judgments; it does not matter whether the observer finds the expression to be beautiful or in good taste. For this purpose, the task is only determining the message and meaning the artist intended to convey from the visual and contextual cues he offers.

In a culture where the pace of communication has become ever more rapid, even instantaneous, it is sometimes a challenge to slow down and look carefully. We have become accustomed to Instagram feeds, Facebook posts, and phone camera albums as default modes of visual experience. Looking at a painting or

---


photograph in material form—or even as a reproduction in a published book—has become less common than seeing a picture, often fleetingly, as a digital image.

Dr. Meyer asks his students to slow down and look more closely than may be their habit. Doing so reveals how the formal properties of a visual image shape the message or meaning we take away from it. The reasonable observer should perform a visual survey of the artwork, paying attention to things like scale, texture, medium, and asking how any sources were cropped, altered, re-positioned, reshaped, resized, or recolored. Dr. Meyer sometimes refers to these elements as the “visual evidence” on which any persuasive interpretation of an artwork must rest.

Visual evidence must be combined with the context in which the artwork was made and understood at the time. Just as context is critical to recognizing parody or satire in written works, it can be a significant aid in discerning the meaning of visual art. “Thinking contextually” includes considering how a visual work was presented (e.g., in galleries and museums), the context in which it was created, and the audience to whom it was directed.

B. Warhol Conveyed a New Meaning and Message by Visually Altering Goldsmith’s Photograph.

Looking at the small photographs on a piece of printer paper or viewed on a computer screen fails to tell the full story of Warhol’s *Prince* series.
The Prince Series

3 Pet. App. 60a.
To understand Warhol’s visual transformation of the Goldsmith photograph, one must look closer and dive deeper into his process. We must consider what constitutes the work in these works of art.

1. As the parties explain, the *Prince* series began with a black-and-white photograph that Goldsmith shot in 1981 of the musician Prince’s head and upper torso. To create the final product, however, Warhol relied on an elaborate and complicated silkscreen process that he employed throughout his career by which he pressed multiple layers of paint through a silkscreen, using a squeegee, one color at a time. As Warhol pushed paint onto the canvas through the silkscreen, he would overwhelm and partially erase details of the source photographs while gaining layers of color, lines, and visual texture. The effect was both to distort and to amplify the original image.

---

4 See Pet. App. 9-10; Br. in Opp. 9; JA105-07.
Among Warhol’s first silkscreens was a series devoted to Marilyn Monroe’s face. The series is based on a promotional still for the 1953 film *Niagara*.

---

As he would later do with the photograph of Prince, Warhol cropped the photograph so that only the face (along with a bit of the neck and a trace of the collar of the blouse) remained visible. Then, through the silk-screen process, he pushed paint onto and over the canvas. In doing so, he obscured some details of the source photograph as well as its sense of depth, while gaining layers of color, lines, and form that exist only in the

---

6 JA158.
painting. Warhol then employed the same source image across a series of paintings while varying its formal treatment so that each version of a portrait, whether Gold Marilyn, Shot Sage Blue Marilyn, or Marilyn Twenty Times, was unique.

Andy Warhol, Marilyn Twenty Times, 1962, acrylic on canvas, 76.8 in. x 44.7 in.  

---

The result leaves a starkly different visual impression than the source. Viewers of the Marilyn series looking for traditional portraits (i.e., careful delineation of facial features and suggestion of the sitter’s interior life) were sorely disappointed. Those looking for a radical break with the visual past—for a challenge

---

rather than a confirmation of established notions of art—were inspired.

But to what end? What is the visual meaning that differentiates a Warhol painting from its source image? Warhol’s art was almost always based on photographs taken by other people. What made the finished silkscreen paintings into original works of art conveying a new meaning and message from the source? We can use the *Prince* series as a case study.

2. To create the paintings and prints in the *Prince* series, Warhol started, as he did with the *Marilyn* series, by cropping a source photograph of the musician such that only the face is visible. In Goldsmith’s photograph, Prince is wearing a high-collared white shirt with suspenders. The lighting, black-and-white contrasts, stark background, and intense visual expression of Prince in Goldsmith’s photograph make the musician look soulful and a bit vulnerable, perhaps even melancholy.
Goldsmith Photograph, 1981, 11 in. x 14 in.\(^9\)

In Warhol’s work, Prince’s face floats free of his clothing and the rest of his body. Prince is no longer standing before us in a white, high-collared shirt, suspenders with silver clasps, and black braces. Prince’s black, silver, and white clothing, and with them a

\(^9\) JA320.
sense of fashionable minimalism, have vanished from view.

After cropping the photograph, Warhol enlarged the image to 20 inches by 16 inches, increasing the size of the disembodied head to nearly twice the size of the original photograph.

For most of the works in the *Prince* series, Warhol then had the outline for Prince’s head transferred to a silkscreen. And he applied a solid layer of paint to create the background for the composition. In the purple *Prince*, for example, the background is fiery red.

Once the background paint dried, Warhol pressed multiple layers of paint through the silkscreen, using a squeegee, one color at a time. The process created a vibrant contrast of the black-and-white outline of Prince with blocks of light and dark colors transmitted through the mesh and onto the canvas. It eliminated any gradient or shadows, while isolating and exaggerating Prince’s darkest details: his hair, moustache, eyes, and eyebrows.

Warhol often then added additional features (e.g., lines, drawings, or exaggerated blocks of color) to complete the image.

Finally, he repeated the process over and over, varying color and the silkscreen registration of paint (sometimes heavy, sometimes streaky) to create the series.

The result is stunning.
Andy Warhol, *Prince*, 1984, acrylic and silkscreen ink on linen, 20 in. x 16 in.¹⁰

Consider the purple *Prince*. Warhol’s silkscreened portrait does not offer a fleshly, fully embodied subject. Instead, the face, now colored electric purple, a flesh tone not known to humankind, is suspended in red. (The purple may have been a reference to Prince’s song *Purple Rain*).¹¹ Meanwhile, Prince’s hair is outlined

¹⁰ JA177.
in gold, as though encircled by a jagged electric current, and his eyes, lips, and brows are contoured in hot red, purple, and pink lines. The lighting from Goldsmith’s photograph, a lighting that revealed Prince’s glassy eyes, hollow cheeks, and uncomfortable stare, is gone, leaving only Prince the painted icon. The icon may be repeated and varied but the individual at its center will never seem as alive as he does in the Goldsmith photograph.

Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 in. x 16 in.\(^\text{12}\)

\(^{12}\text{JA178.}\)
3. Each visual transformation and step in the process contributes to the *Prince* series’ message on the nature of fame.

The cropping and enlarging of the photograph help present Prince not as a person, but as a larger-than-life idol.

The silkscreen process distorts and amplifies the source photograph just as fame and celebrity distort the individual into a desirable product to be marketed. By stripping and obstructing detail—while leaving enough detail for Prince to be immediately recognizable—Warhol powerfully demonstrates how an indelible image of the star is imprinted on our minds, allowing us to easily supply what is missing.

The drastic flattening and exuberant colorization of the source image wash away any sense of vulnerability or fear, leaving the star’s face as a representation of the musician’s celebrity, rather than a specific moment in his career.

Finally, the series of similar prints created from the same source comments on the way in which images of celebrities, especially their faces, are relentlessly repeated, stage managed, made up, and distributed across popular media (films, magazines, advertisements, television, and today, of course, the internet). These pictures vary according to context (*e.g.*, the rock star in the photo-studio, on stage, in a music video, on TV, on the cover of a magazine) but function in aggregate to create a special aura around the individual, to crown the man who was born Prince Rogers Nelson into the superstar Prince.
The *Prince* series shows us the importance of images to the production of celebrity, while reminding us of the dehumanization that the process entails. In the star, we are given a highly prepared and professionally managed persona rather than a person. The star is a product to be promoted. Likewise, as art historian Cecile Whiting put it, “Warhol’s paintings are not showing us any real or private [person], rather they depict the public image of these stars as given by the popular press and make us conscious of them as images or symbols through the manipulation of colour and shadow.”13 Indeed, Warhol’s work does not even promote film starring Monroe or a song by Prince; it draws attention to the act of popular promotion itself.

C. The Context of the *Prince* Series Confirms the Artwork’s New Meaning and Message.

While close visual inspection of the *Prince* series can tell the reasonable observer a great deal about their meaning, the context in which they were created and presented confirms it.

The *Prince* series must be understood as part of the broader Pop art movement. Warhol emerged in the early 1960s as a Pop artist—that is, an artist who takes up popular imagery (consumer objects, ads, celebrity images) as subject matter.14 While this approach is now so prevalent among artists as to seem

unremarkable, it was a radical break with inherited traditions of high art in Warhol's day. Indeed, the term “Pop art” had to be invented to describe a phenomenon that was startlingly new in the early 1960s.\textsuperscript{15} To a degree greater than any other artist of day, Warhol's work became sensationaly well-known and singularly influential. He was, at one point, dubbed “the Pope of Pop.”\textsuperscript{16} He challenged the boundaries and very definition of art.

It was not only the adoption of popular imagery that defined Pop art but also the use of techniques associated with the commercial realm rather than the fine art. Warhol's fellow Pop artist, James Rosenquist, had worked as a billboard painter and imported the expansive scale and gleaming consumer imagery of that form into his paintings.\textsuperscript{17} In the fall of 1962, Warhol took up photo-silkscreen painting as his primary medium.\textsuperscript{18} Although the technique had long been employed for commercial purposes, in shop signs, posters, printed fabrics, and so on, its application to fine art paintings was unprecedented.

The importance of the silkscreen technique to Warhol was not only its commercial association but the


\textsuperscript{16} Andy Warhol, \textit{The Philosophy of Andy Warhol: From A to B and Back Again} 193 (Harvest, 1977).

\textsuperscript{17} See Judith Goldman, \textit{James Rosenquist: Painting Pop Art} (New York: Viking, 1985).

reason it had worked. Silkscreen signs and posters—with their blocks of color and radical flattening of form—can often spark a sense of visual immediacy. Warhol wanted his paintings to likewise arrest the attention of viewers, including gallery and museumgoers, in unexpected ways.¹⁹

The work of the Pop artists, and especially of Warhol, has often been mistaken as pandering to popular taste. In its moment, however, Pop marked a defiance of what was expected from high art including depth of meaning and emotional authenticity. That defiance shaped the Marilyn and Prince series, the Campbell’s Soup Cans, the silkscreen paintings of Electric Chairs, and, indeed, Warhol’s entire body of work. The artist’s use of popular imagery sought to demonstrate, in vibrant visual form, the power it wields over individuals in modern society; the ways in which surface seems to matter more than substance.²⁰

Warhol’s red *Prince* appeared on the cover of a magazine paying tribute to the musician shortly after his death in 2016. The painting was chosen, presumably, because it conveys Prince’s iconic stardom, across his career rather than the particular moment in 1981 when he posed for a camera in white shirt and suspenders in a studio. It is a picture of fame rather than vulnerability. In this sense, it is synoptic of Prince’s success as a pop music star rather than specific to his emotional state on the day he was photographed by Goldsmith.

The work was an apt companion to the magazine’s tribute, which was titled “The Genius of Prince,” not “The Life of Prince.” Like the story, the work has left the realm of real life behind in favor of a star with a blazingly red face, the same red that fills the entire background of the picture, with pulsing outlines of blue, green, purple, and yellow lines. On the cover of the magazine, Prince is an image, however artificial, that transcends death.
The painting fits neatly into the movement of which Warhol was an important part and conveys a meaning or message with continuing relevance today.

One of Warhol’s primary insights was to recognize that mass culture was not, as had been previously assumed, the opposite of high art. By creatively reworking popular photography of celebrities, Warhol forces us to look not simply at the pictures of stars (which, after all, we see all the time) but at the construction of stardom and the commodification of individuals. He transformed his source imagery of movie and music stars into representations of the machinery of fame itself. Through careful inspection and thoughtful consideration, his works are readily perceived to convey a meaning and message—that celebrity culture makes individuals into images; people into products—that remains all too relevant today.
CONCLUSION

The Second Circuit erred by concluding that only an art critic can determine whether a work of visual art is reasonably perceived as conveying a distinct meaning and message from its source materials. By looking closely and thinking contextually about Warhol's *Prince* series, any reasonable observer can perceive the artist’s distinct message about the machinery of fame and the dehumanizing production of celebrity.

Respectfully submitted,

JONATHAN Y. ELLIS
*Counsel of Record*
McGUIREWOODS LLP
888 16th Street N.W.
Suite 500
Washington, DC 20006
(202) 828-2887
jellis@mcguirewoods.com

NICHOLAS J. HOFFMAN
McGUIREWOODS LLP
355 S. Grand Ave.
Suite 4200
Los Angeles, CA 90071
(213) 627-2268
nhoffman@mcguirewoods.com

June 17, 2022