

In the
Supreme Court of the United States

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

Petitioner,

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,

Respondents.

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

BRIEF OF AMICI CURIAE
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC.,
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION,
AMERICAN PHOTOGRAPHIC ARTISTS, JOINED BY
NORTH AMERICAN NATURE PHOTOGRAPHY ASSOCIATION
AND GETTY IMAGES (US), INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE¹

AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC. (ASMP) is a 501(c)(6) not-for-profit trade association, established in 1944 to protect and promote the interests of professional photographers and all visual creators who earn their living by making works intended for publication, display, and every avenue of art and commerce. With thousands of members across 38 chapters and in 22 countries, working in every genre of photography, videography, content creation, and media, ASMP is a leading trade organization representing professional creators' interests.

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION (NPPA) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing, and distribution. NPPA's members include video and still photographers, editors, students, and representatives of businesses that serve the visual journalism community. Since its founding in 1946, the NPPA has been the Voice of Visual Journalists, vigorously promoting the constitutional and intellectual property rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

¹ In accordance with this Court's Rule 37.6, counsel for amici curiae certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than amici curiae, their members, or their counsel have made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief by blanket consent.

AMERICAN PHOTOGRAPHIC ARTISTS (APA) is a 501(c)(6) not-for-profit organization run by, and for, professional photographers since 1981. Recognized for its broad industry reach, APA works to champion the rights of photographers and image-makers worldwide.

NORTH AMERICAN NATURE PHOTOGRAPHY ASSOCIATION (NANPA) is a 501(c)(6) non-profit organization founded in 1994. NANPA promotes responsible nature photography (both stills and video) as an artistic medium for the documentation, celebration, and protection of the natural world. NANPA is a critical advocate for the rights of nature photographers on a wide range of issues, from intellectual property to land access.

GETTY IMAGES (US), INC.² (Getty Images) is a leading source for visual content around the world, including a comprehensive editorial offering. Through our brands Getty Images, iStock, and Unsplash, we provide a platform that enables customers to lawfully license editorial and creative work from content creators who are able to monetize their work. We support these endeavors by advocating for the rights of creative professionals and journalists.

² Corporate Disclosure: Getty Images (US), Inc., a New York corporation that is not publicly traded, is a wholly owned subsidiary of Getty Images, Inc. Getty Images, Inc., a Delaware corporation that is not publicly traded. Getty Images, Inc. is an indirect wholly-owned subsidiary of Getty Images Holdings Inc., a publicly traded company on the New York Stock Exchange under the ticket symbol "GETY".



SUMMARY OF THE ARGUMENT

What's the use? Under the plain language of 17 U.S.C. § 107, the first enumerated fair use factor looks at the offending use, including “whether such use is of a commercial nature or is for nonprofit educational purposes.” While fair use is notoriously resistant to bright line rules, in most cases the ultimate question in determining whether a use is transformative will be whether a particular use is “fairly” necessary to accomplish a different function or purpose and does not unreasonably supplant the original in the market. By definition, a derivative work will always add something new, and may include a new meaning or message, but whether the unauthorized use of that derivative is found to be fair use will depend on the particulars of the use, not the new meaning or message per se.

The Andy Warhol Foundation’s (“AWF”) argument that a derivative use of a copyrighted work should be found “transformative” so long as it adds any cognizable echo of “new meaning or message” ignores the plain language of the Act and invites the fair use exception to swallow the derivative use rule. The fair use defense was never meant to give infringers a pass so long as they claim some new subjective “meaning or message” in their derivative use regardless of how it is used, and neither this Court’s prior holdings nor common sense support that position. Rather, any purported new meaning or message is only relevant in the context of a qualitatively different purpose or use than that of the original.

In this case an artistic portrait of Prince was used to create a derivative portrait of Prince. Both the original and the derivative were published on magazine covers following his death. The derivative did not criticize, comment on, or even credit the original. It was not in any real sense a qualitatively different use, and it in fact supplanted Goldsmith's original on the cover of *Condé Nast*. Thus, the Second Circuit correctly determined that Warhol's artistic additions and any new meaning and message conveyed did not make the use transformative. While AWF and their ilk may prefer a rule more favorable to appropriation artists, the text of the Act, Congressional history, this Court's opinions, and the weight of lower-court case law compels the conclusion that Goldsmith had the right to control the use of her work as it was misused by AWF.

If a derivative work is found to be "transformative" regardless of how it is used merely because it arguably has some new meaning or message then millions of photographers, illustrators, filmmaker, writers, painters, and other creatives will be asking themselves "what's the use?" of spending their time and resources to create and register wholly original works. Many will conclude that the loss of control over their work is unacceptable and give up their craft altogether, largely frustrating the goals of the Act.

"What's the use?" isn't an academic inquiry; it is the crux of the question when deciding whether a use is transformative. To ignore that question, so rightly evaluated by the Second Circuit not once, but reconsidered a second time in light of this Court's opinion in *Google LLC v. Oracle America, Inc.*, 141 S.Ct. 1183 (2021), would be devastating to all photographers like

Goldsmith, and all creators like the members of amici organizations.

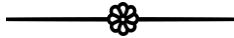
AWF and its amici further attempt to argue that respecting Goldsmith’s copyright, would inhibit free expression and impact First Amendment protections. But the policy behind copyright law is to “motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.” *Harper & Row Publishers, Inc. v. National Enterprises*, 471 U.S. 539, 546 (1985). Free expression is best served in a copyright framework that respects and protects the original artist except in limited fair use circumstances. This is not one of those circumstances—all that happened here is that Warhol created a derivative of Goldsmith’s photograph pursuant to a limited license and then exceeded that license. That is not fair use, it is textbook infringement.

The role of the creative community in this country cannot be overstated. The depth and breadth of these creators surpass their collective output and contribute immeasurably to the understanding of our world. Almost nothing in our lives is untouched by the professional creativity of photographers like Goldsmith and the many other skilled writers, sculptors, painters, graphic designers, illustrators, musicians, screenwriters, poets, choreographers who act as both an economic engine and a cultural touchstone in society. These individuals, many represented by amici, are watching this case closely as their livelihood depends on it.

This Court should reject AWF’s efforts to divorce fair use analysis from the use at issue and instead put undue weight—if not sole focus—on whether a

derivative arguably has a new meaning or message. AWF would turn copyright law on its head by making fair use the rule rather than the exception, and stifle the creative activity of authors and inventors by undermining the incentives to invest in and create truly original work.

“What’s the use?” indeed.



ARGUMENT

I. THE PLAIN LANGUAGE OF THE ACT AND THIS COURT’S PRECEDENT REQUIRE THE SECOND CIRCUIT’S WELL-REASONED ANALYSIS TO BE AFFIRMED.

In its question presented, AWF sets up a false dichotomy—either any derivative that potentially conveys a different meaning or message from its source material is “transformative” and thus satisfies the first fair use factor, or courts should be forbidden from considering the meaning of the accused work except where the source material used is unrecognizable. Neither simplistic position is correct. Rather, under the plain language of the Act a derivative work that conveys a different meaning or message should generally be found to be “transformative” only where a traditional statutory “fair use” is involved (*e.g.*, parody, criticism, or commentary) or when the “purpose and character” of the secondary use is substantially different from the “purpose and character” of the source material such that the secondary work does not supplant the original. Thus, the “meaning or message” of the accused work only becomes relevant where the

purpose and character of the new use is sufficiently different.

This Court has emphasized that fair use is a context-sensitive inquiry that does not lend itself to simple bright-line rules. *See, e.g., Google*, 141 S.Ct. at 1196-97; *Campbell v. Acuff-Rose Music, LLC*, 510 U.S. 569, 577-78 (1994). Thus, a justification for a fair use ruling in one case cannot create a bright-line rule for all future cases—yet that is precisely what AWF is attempting to do by seizing on *Campbell's* “new meaning or message” language. AWF advocates for a bright-line rule that the first factor should be satisfied any time new meaning or a new message is arguably present in the derivative work. But such a rule would improperly divorce the “new meaning and message” from the “purpose and character” of the use to which it must apply.

In *Campbell*, this Court did not hold that a work was transformative where it merely added some articulable new meaning or message to the original. Rather, it held that the “new expression, meaning or message” in a parody song “adds something new, with a further purpose or different character” than the source song. *Campbell*, 510 U.S. at 579. Because the parody served a substantially different purpose, it does not “merely supersede the objects of the original creation.” *Id.* at 579. And, of course, a “[p]arody needs to mimic an original to make its point.” *Id.* at 580–81.

The facts of this case are materially different from those of *Campbell*. Unlike 2 Live Crew’s parody of “Oh, Pretty Woman”, Warhol did not need to mimic Goldsmith’s original portrait of Prince to make his point (assuming he had a point other than commercial exploitation), and he was plainly not commenting on

or criticizing Goldsmith's work. While it was highly unlikely that 2 Live Crew's song would adversely affect the market for the original, Warhol's derivative image of Prince used by Condé Nast plainly superseded and supplanted the Goldsmith photo.

Because the first factor requires consideration of whether the "use" of the challenged work risks superseding the original, there is some overlap between that factor, which is the focus of this Court's inquiry, and the fourth enumerated factor which considers "[t]he effect of the use upon the potential market for, or value of, the copyrighted work." *See* 17 U.S.C. § 107. However, in many cases a work that supersedes the original (*i.e.*, serves the same functional purpose) may not have an appreciable effect on the market value of the original—thus the first factor may weigh against fair use and the fourth factor in favor of fair use. This case provides a perfect example—Warhol has not "transformed" Goldsmith's artistic portrait of Prince into anything other than a derivative portrait of Prince, and thus his work cannot be a transformative use to the extent that use is as an artistic rendering of Prince. But to the extent Warhol's work is being offered and sold in a different market as a work of pop art there may be little effect on the market for the original photographic portrait.³ The problem for AWF, of course, is that it did not so limit its use, it insinuated itself into a market where it was in direct competition with

³ Amici do not suggest that this use would in fact favor AWF as the Court would still need to consider the licensing market for works like Goldsmith's photo as source artwork for new artistic works. The point of this example is simply that a derivative work that is the same in kind as the original may not in all circumstances be a direct market substitute.

Goldsmith.⁴ In this way, one use of a derivative work might be fair use while another use may not. Again, the question is context-specific. What’s the use?

AWF must understand that *Campbell* is readily distinguishable and did not create the bright line rule it is trying to advance. That is likely why it and many of its amici have spilled much ink suggesting that photographs are generally not entitled to broad protection and should more readily be susceptible to fair use claims. But that assault on the value of photographic works misreads this Court’s prior holdings and defies common sense. It is true that just last year this Court acknowledged that “copyright protection is narrower, and the corresponding application of the fair use defense greater, in the case of factual works than in the case of works of fiction or fantasy.” *Google*, 141 S.Ct. at 1198 (quoting 4 M. Nimmer & D. Nimmer, NIMMER ON COPYRIGHT § 13.05[A][2][a] (2019)). But that is because there is no copyright to the facts or utilitarian elements in a work. This Court also explained that “copyright’s protection may be stronger where the copyrighted material . . . serves an artistic rather than a utilitarian function as it does here. *Google*, 141 S.Ct. at 1197. *See also, e.g., Stewart v. Abend*, 495 U.S. 207, 237-38 (1990); *Harper & Row*, 471 U.S. at 563.”

Photographs generally serve an artistic rather than a utilitarian function. While in some sense

⁴ Thus, the Second Circuit correctly affirmed “the district court’s overall conclusion the two works occupy distinct markets, at least as far as direct sales are concerned . . . [but disagreed] that the Prince Series poses no threat to Goldsmith’s licensing markets.” *Warhol v. Goldsmith*, 11 F.4th 26, 48-49 (2nd Cir. 2021).

Goldsmith’s work can be deemed “factual” because it shows what Prince looks like, such works are fundamentally artistic, with a virtually infinite number of variations of angles, lighting, poses, wardrobe, and other elements that go into any particular photograph, even where those things are not specifically chosen by the photographer. In this case, the extraordinary record of Goldsmith’s efforts to create the portrait at issue are well established and make clear that core of her work—what Warhol used as source material—is an artistic rendering, not facts that serve a utilitarian function.

In *Google*, this Court “emphasized the need to ‘recogni[ze] that some works are closer to the core of [copyright] than others.’” *Google*, 141 S.Ct. at 1202 (quoting *Campbell*, 510 U.S. at 586). Because Goldsmith’s portrait of Prince is artistic and not utilitarian—a fact neither Warhol nor its supporting amici seriously dispute—it is close to the core of copyright and entitled to broad copyright protection. So owing, it is not so easily susceptible to being “transformed” by the superimposition of Warhol’s artistic additions.

AWF’s challenge to the Second Circuit’s holding must be rejected given the plain language of the statute, which compels an inquiry into the objective “purpose and character” of the use—not the subjective meaning that some viewers, or the secondary user, may ascribe to the works. The Second Circuit did not opine that courts are “forbidden from considering the meaning of the accused work where it ‘recognizably deriv[es] from’ its source material,” as AWF suggests, but merely recognized what is clearly true—that “there exists an entire class of secondary works that add “new expression, meaning, or message” to their source mate-

rial, but may nonetheless fail to qualify as fair use: derivative works.” *Warhol*, 11 F.4th at 39. Warhol’s argument in this case entirely fails to address that distinction.

A “derivative work” is defined in 17 U.S.C § 101 as “. . . a work based upon one or more preexisting works, such as a . . . art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” In AWF’s circular logic of the “transformative use” test, any creation of a derivative work in which the work is “transformed” instantly becomes a “transformative use,” and thus supports “fair use” despite being precisely the type of derivative the Act meant to grant copyright holders the right to control. And derivative works by definition recast, transform, or adapt the original work.

While fair use does not lend itself to bright line rules, it appears that there are three general buckets that fair use cases fall into: (1) cases in which a copier reasonably needs to use an artistic work to criticize or comment on the artistic work, (2) cases where a copier uses an artistic work but transforms it into a new type or character of work; or, (3) cases in which a copier reasonably needs to use portions of a factual work to address the underlying facts. This case falls into none of these buckets. Warhol took an artistic portrait of Prince and used it to make a derivative portrait of Prince—he did not transform it into a new type or character of work and did not criticize or comment on the original. Thus, the Second Circuit properly found that Warhol’s Prince Series was not “transformative.”

Fair use does not grant a blanket license to an author who reads another’s book and decides she does

not like the message it conveys to rewrite the ending and commercialize that derivative. Similarly, fair use offers no blanket license to a musician, who hears another's song and thinks the lyrics too sad, to record a new version of the song that ends on a happier note. And Warhol cannot fairly take a professionally crafted portrait of a celebrity, decide that the celebrity looks too humble, and then modify that artistic portrait into a new artistic portrait in which the celebrity looks more "iconic." In each case the purpose and character of the use is the same—*i.e.*, the publishing of a story, recording of a song, and creation of a portrait—and the new use is not a parody, criticism, or comment on the original. *See e.g., Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 264 (4th Cir. 2019) ("Fair use is not designed to protect lazy appropriators.")

Photographs—like much of art—often have different meaning for different audiences and viewers, and can often convey multiple messages, especially with the passage of time. For example, a photo of the devastation caused by Hurricane Katrina informed the viewer of the immediate news when it happened, but for years that followed, those same photographs were used to illustrate policy discussions and infrastructure failure. The message conveyed through the photographs was different, but the use—to show what happened—was the same, and nobody would suggest that a newspaper must license the former use but not the latter. Thus, a consideration as subjective as "new message or meaning" cannot by itself be the benchmark for a "transformative" use.

AWF leans heavily on its claim that Warhol added new artistic expression to Goldsmith's work. But removing Goldsmith's work from the *Orange Prince*

work at issue in this case leaves nothing copyrightable. As the Ninth Circuit recently held in *McGucken v. Pub Ocean*, “[t]o be transformative, the infringing use must bring about a much starker change in expression. No. 21-55854, 2022 U.S. App. LEXIS 21425, at *19 (9th Cir. 2022). For example, using a thumbnail image of a photo in a search engine “transforms the image into a pointer directing a user to a source of information.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007). And a theatrical musical about a rock band transforms a video clip of the band’s performance by using it “to mark an important moment in the band’s career” rather than “for its own entertainment value.” *SOFA Entm’t, Inc. v. Dodger Prods.*, 709 F.3d 1273, 1278 (9th Cir. 2013). The Ninth Circuit’s view in that case of when and whether a use is transformative under the first factor is firmly in line with the Second Circuit’s holding in this case.

The Second Circuit correctly held that evidence that a derivative works has a new meaning or message from the original is not enough to render that work transformative. Rather the use—the key word in fair use—of that work must be sufficiently different in order for the meaning or message of the derivative to take on importance as a consideration. In other words, courts must ask: “What’s the use?”

II. AN OVERBROAD DEFINITION OF “TRANSFORMATIVE” THREATENS COPYRIGHT AS THE ENGINE OF FREE EXPRESSION AND IMPAIRS THE ABILITY OF VISUAL JOURNALISTS AND PHOTOGRAPHERS TO CONTRIBUTE TO PUBLIC DISCOURSE AND CULTURE.

AWF suggests that respecting Goldsmith’s copyright—by prohibiting it from using its derivative copy

for the same use as Goldsmith—will somehow inhibit free expression. On the contrary, “the Framers intended copyright itself to be the engine of free expression.” *Harper & Row*, 471 U.S. at 558. Restricting plagiarism does not impede the free flow of information because there is no copyright in facts. Rather, it protects the market for artistic expression—if misappropriationists like AWF are allowed to copy works like Goldsmith’s freely and then use those copies in the same markets then copyright law will permit the very outcome this Court and Congress have sought to prevent. AWF’s proposed standard for finding a work “transformative” would destroy the market for expressive work by removing an author’s incentive to create the work. Rather, copyright’s important purpose is in spurring creative contributions to society by “motiv[at]ing the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.” *Harper & Row*, 471 U.S. at 546.

A. Free Expression and the First Amendment Are Supported by a Proper—and Properly Limited—Application of Fair Use.

This Court has repeatedly drawn connections between the free expression of ideas and the economic incentive supplied by copyright. *See id.* at 558 (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (same); *Golan v. Holder*, 565 U.S. 302, 326 (2012) (same). Historically, this Court has always recognized that “the fortunes

of the law of copyright have always been closely connected with freedom of expression” and that copyright law seeks to balance “the interest of the [author] in the control and exploitation of his intellectual property, the related interest of the publisher, and the competing interest of society in the untrammelled dissemination of ideas.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 n.12 (1984). The reward provided by copyright “is the best way to advance public welfare through the talents of authors and inventors in Science and useful Arts,” *Mazer v. Stein*, 347 U.S. 201, 219 (1954), and the public good is served by the incentive of copyright, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). The close interconnection between copyright law and the ability to exercise First Amendment rights should not be conflated to support a fair use exception that co-opts the rule.

The underlying policy principles of fair use are coextensive with those behind the First Amendment; they promote free and open discourse. In providing for fair use via statute, Congress highlighted examples of uses related to such discourse: “purposes such as criticism, comment, news reporting, teaching, scholarship, or research.” 17 U.S.C. § 107. The reason behind these carve-outs is to provide a “guarantee of breathing space within the confines of copyright.” *Campbell*, 510 U.S. at 579. This is similar to the principles behind the core protection of the “breathing space that [free expression] need[s] . . . to survive” that serves as the foundation of much of First Amendment jurisprudence. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272, 84 S.Ct. 710, 721 (1964). See also *Snyder v. Phelps*, 562 U.S. 443, 458, 131 S.Ct. 1207, 1219 (2011) (outlining the

importance of “provid[ing] adequate ‘breathing space’ to the freedoms protected by the First Amendment.”).

The examples given in Section 107 are a “guide” to the breathing space protected by the fair use defense, with the caveat that there are no *per se* categories of fair use. *See Campbell*, 510 U.S. at 578. The guidance makes it clear that advancing discourse of the work itself is the baseline reasoning behind fair use. The legislative history went deeper into what this means, giving the following more detailed examples:

[Q]uotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author’s observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broad-cast, of a work located in the scene of an event being reported.

H. Rept. No. 94-1476, at 65 (1976).

Notably, none of the preamble categories or the legislative history examples include “art.” Of course, an artistic work could serve as a criticism or comment on an earlier work, but just being labeled “art” is not enough to render a use “transformative” just like “the mere category of ‘news reporting,’” is insufficient

to support a per se finding of fair use. *McGucken*, No. 21-55854 at *19. That is because even when a use is referenced in section 107 it is not presumptively a fair use. See *Harper & Row*, 471 U.S. at 561. There is always an unfettered right to discuss the facts depicted in a work, but in *Harper & Row*, the appropriators went “beyond simply reporting uncopyrightable information and actively sought to exploit the headline value of its infringement, making a ‘news event’ out of its unauthorized first publication of a noted figure’s copyrighted expression.” *Id.* at 561. Such use does not qualify as transformative, because the “intended purpose” of the infringement was to supplant “the copyright holder’s commercially valuable right”. *Id.* at 563. The same is true in the case at bar, where the “intended purpose” of the derivative use “supplanted” the copyright holder’s commercially valuable rights in her work. A publication needed an image of Prince to place on the cover of the magazine, they entered the marketplace to find such a work, and there they chose a work that acted exactly as Goldsmith’s image did in that same market; an engaging visual depiction of Prince.

B. There Is a Distinction Between Transformative Uses of Photographs in News Media and “Free Riding” on the Efforts of the Photographer.

The use of photos and videos in the non-fiction reporting context have provided countless opportunities for courts to analyze the newsgathering component of fair use, and the consistent result is instructive here as this was a use in the news media. There is a stark distinction between a discourse *about* a photo and a discourse *about the subject* in the photo. Use of the original work in the former is necessary for free and

open discussion, but the latter is clearly possible “without reproducing the photographs,” *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000). See also, *Harper & Row*, 471 U.S. at 561. When analyzing media uses, courts below have followed *Harper & Row*’s directive that no category is “presumptively fair use.” *Id.* The cases clearly highlight that the use of a photograph for comment, critique, or education about the photograph may be transformative, but it is not transformative when “the new work merely “supersede[s] the objects” of the original creation,” *Brammer*, 922 F.3d at 262 (quoting *Campbell*, 510 U.S. at 579).

This is true even when the use is reporting on newsworthy events in a photograph that has itself gained notoriety or fame. These cases have follow this Court’s guidance to “distinguish[] between ‘a true scholar and a chiseler who infringes a work for personal profit.’” *Harper & Row*, 471 U.S. at 563. Time and again, when a work of visual journalism is used simply to illustrate a story about the subject of the image, courts have declined to find transformative use, and instead find that the user is free riding on the author’s efforts. Consequently, the mere category of “news reporting,” is “not sufficient itself to sustain a per se finding of fair use.” *McGucken*, No. 21-55854, at *19. Therefore, when a television station infringed exclusive video of the 1992 beating of trucker Reginald Denny during riots in Los Angeles it was not fair use. *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1121 (9th Cir. 1997), *cert. denied*, 139 L.Ed.2d 39, 118 S.Ct. 81 (1997). While the video itself became a news item because it was so extraordinary, the *KCAL* court explained that *KCAL* did not use the video to illustrate the story of the video. It didn’t attribute the tape to

its owners, and “aired it as if it were KCAL’s own.” *Id.* at 1122. Instead of “investing in its own helicopter and crew to obtain the footage itself” KCAL rode the videographer’s “copyrighted coattails.” They “placed their own logo on it and used it for the same purpose for which it would have been used had it been paid for.” *Id.* at 1122. Those facts all weighed against a finding that the use was transformative. *See also, L.A. News Serv. v. Reuters TV Int’l, Ltd.*, 149 F.3d 987, 993 (9th Cir. 1998) (use was not transformative when “Reuters does not explain the footage, edit the content of the footage, or include editorial comment”); *see also, McGucken*, at 12-13 (the infringement of images to illustrate ephemeral lakes was not transformative, even when the article discusses some elements of the photo); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1176 (9th Cir. 2012) (*quoting Harper & Row*, 471 U.S. at 561) (publishing stolen wedding photographs in order to report on the fact of a wedding was not a transformative use and “newsworthiness itself does not lead to transformation.”); *Otto v. Hearst Commc’ns, Inc.*, 345 F.Supp.3d 412 (S.D.N.Y. 2018) (“Stealing a copyrighted photograph to illustrate a news article, without adding new understanding or meaning to the work, does not transform its purpose—regardless of whether that photograph was created for commercial or personal use.”); *Barcroft Media, Ltd. v. Coed Media Grp., LLC*, 297 F.Supp.3d 339, 351-52 (S.D.N.Y. 2017) (it was not transformative when a defendant “displayed the Images in the same manner and for the same purpose as they were originally intended to be used.”). *See also, Iowa State Univ. Research Found. v. ABC*, 621 F.2d 57, 61 (2d Cir. 1980). In each of these cases, copyright was not an impediment to free expression—the infringers always maintained

an “unfettered right” to enlighten their audience by sharing the factual information revealed by the original works. *Id.* The sacred “free flow of information” is protected because there is no valid copyright to facts. *Id.* Consistent with these rulings, the unauthorized use of an iconic photograph of a flag raising in the ruins of the World Trade Center to “comment[] in remembrance of the events of September 11” was not a per se transformative use.⁵ *N. Jersey Media Grp., Inc. v. Jeanine Pirro & Fox News Network, LLC*, 74 F.Supp.3d 605, 611, 617 (S.D.N.Y. 2015).⁶ In media cases, if the photograph itself is the story, such as a politician’s salacious photos, “news reporters would have a better claim of transformation.” *McGucken*, No. 21-55854, at *19.

Courts that find transformative fair use in news reports about the works typically explain that the use is related to the discussion of the work itself, and there is no “general ‘newsworthiness’ exception.” *See Nunez*, 235 F.3d at 22 (“This is not to say that appellate’s use of the photographs was necessarily fair merely because the photographs were used for news purposes,

⁵ In contrast, the use of the same image in a photography class to discuss the similarities between the 9/11 photo and the classic Joe Rosenthal photo of the flag raising at Iwo Jima during World War II would almost certainly be transformative fair use.

⁶ *See also, Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F.Supp.2d 537,553 (S.D.N.Y. 2013) (In denying fair use and granting summary judgment to the plaintiff, the court wrote, “[i]nvestigating and writing about newsworthy events occurring around the globe is an expensive undertaking and enforcement of the copyright laws permits AP to earn the revenue that underwrites that work. Permitting Meltwater to take the fruit of AP’s labor for its own profit, without compensating AP, injures AP’s ability to perform this essential function of democracy.”)

nor does it establish a general “newsworthiness” exception). Indeed, this Court “has specifically frowned upon such an exception.” *Id.* (citing *Harper & Row*, 471 U.S. at 561).

Media cases that found a use to be “fair” demonstrate this principle as well. In *Nunez v. Caribbean Int’l News Corp.*, the defendant publisher repurposed salacious photographs of Ms. Puerto Rico to illustrate a story about a highly public controversy surrounding the photographs themselves. The First Circuit Court of Appeals held that the publisher “reprinted the pictures not just to entice the buying public, but to place its news articles in context; as the district court pointed out, ‘the pictures were the story.’” The court explained that “[i]t would have been much more difficult to explain the controversy without reproducing the photographs.” *Nunez*, 235 F.3d at 22. *See also Yang v. Mic Network, Inc.*, 405 F. Supp. 3d 537, 543 (S.D.N.Y. 2019) (using a screenshot to identify a controversial photograph in an article about the controversy was fair use); *Clark v. Transp. Alts., Inc.*, 2019 U.S. Dist. LEXIS 46274, at *8 (S.D.N.Y. 2019) (a critique of an article that used a screenshot of a photo in the context of the article, was not “just a depiction of a . . . bicycle, but a sly barb at the Post’s sloppy journalism” and therefore transformative). Courts that find transformative fair use in news reports about the works typically clarify that the finding is related to the discussion of the work itself, and there is no “general ‘newsworthiness’ exception.” *See e.g., Nunez*, 235 F.3d at 22 (“This is not to say that appellee’s use of the photographs was necessarily fair merely because the photographs were used for news purposes, nor does it establish a general “newsworthiness” exception). Indeed, this Court

“has specifically frowned upon such an exception.” *Id.* (citing *Harper & Row*, 471 U.S. at 561).

In each of these examples where fair use was found, the resulting work included commentary about the underlying work and the discourse could not be advanced without the reference to that specific work. The social benefit is that the new work “shed[s] light on an earlier work.” *Campbell*, 510 U.S. at 579. These examples also “need to mimic” the victim’s work to make their point. *Id.* at 581. In contrast, Warhol didn’t “need to mimic” Goldsmith’s work, he could have used any photograph of Prince, or drawn an original piece. But beyond that, the overlaying of color in the *Orange Prince* title didn’t “criticiz[e], comment, [r]eport,” or “teach[]” 17. U.S.C. § 107.

The use at issue in this lawsuit does not advance free discourse or comment on, criticize, teach about, or report on the original work. Goldsmith wasn’t even acknowledged as the photographer. *See Respt’s Br.* at 16.⁷ The image here was used to illustrate the subject of the photograph, Prince, for an article about him. Like the above media cases that denied fair use, Warhol’s work did not need Goldsmith’s work to communicate the message, he was merely riding the copyright coattails of her work.

⁷ In the Respondent’s Brief, Goldsmith explains that the use she is trying to prevent is the commercial licensing—she has not made a claim related to the use of the same photograph in the Prince Series where it was for Andy Warhol’s personal use. *Respt’s Br.* at 18.

C. Proper Enforcement of Copyright Drives Free Expression Because It Supports the Market That Pays for the Expressive Works.

Amici and their members have a front row seat to the reality that First Amendment rights are meaningless without effective copyright protection. Never has it been more obvious that copyright is not the enemy of free expression—it is the very engine of free expression. Our images help Americans—and others—understand the important events taking place throughout their world—whether in their own backyard, or across the world. Professional photographers capture every aspect of our lives: local schools, businesses and other news, the war in Ukraine, local and national politics, high school football games, family weddings, corporate products and services, and beyond. But photographers' fortunes are small. *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ'g Co.*, 747 F.3d 673, 686 (9th Cir. 2014). A free press is costly: a consortium of investigative journalists estimated that the Panama Papers investigation last decade cost millions of dollars.⁸ The *New York Times* estimates it spent \$10,000 per day to cover stories from Baghdad during the war. *Id.* Professional photographers, who have of late risked their health and safety covering such things as the Covid pandemic, social justice protests and the war in Ukraine are small businesses in the truest sense, often shouldering the burdens of keeping their businesses afloat during the most trying

⁸ See, France24, *Crippling Costs of War Reporting And Investigative Journalism* (Aug. 28, 2018), <https://www.france24.com/en/20180828-crippling-costs-war-reporting-investigative-journalism>.

times as they provide imagery to all clients, from mom-and-pop corner stores to multinational corporations.⁹

If there is any doubt about the value of photography, we invite the Court to imagine the current public discourse without images. Visual journalism and photography are and have always been a critical piece of the conversation. Breathtaking images from historical events such as the flag raising at Iwo Jima, the “napalm girl” helping to change the course of the Vietnam War, or the aftermath of the 9/11 attack on the World Trade Center continue to inform current discussions. Beyond these iconic examples, visual journalism informs communities large and small about everyday events that are critical to the health, welfare and future of their communities and the country as a whole. They help people make decisions about how to raise their children, who to vote for, and how to respond to current events and trends. When this work is infringed, infringers benefit by using a business model that is more profitable without the cost of creating or licensing the work. Comparatively, those who invest time and money to create these contributions lose their investment. “Were a ‘newsworthy’ use per se fair, journalists and news photographers would be left with little assurance of being rewarded for their work.” *Nunez v. Caribbean Int’l News Corp.*,

⁹ Other types of professional photography are expensive as well. Wedding and portrait photographers typically are only able to take home 20% of their gross revenue. See, *What Should I Charge? Photography Pricing 101, Professional Photographers of America*, Oct. 05, 2021, <https://www.ppa.com/articles/what-should-i-charge-photography-pricing-101>. Yet the value of their images is often priceless to the families who pass these photos on for generations.

235 F.3d at 22. The same is true with artistic reference derivative uses.

The use in this case was a commonly licensed use. As the Fourth Circuit so aptly explained, “If the ordinary commercial use of stock photography constituted fair use, professional photographers would have little financial incentive to produce their work.” *Brammer*, 922 F.3d at 269. Such seemingly entitled use by Warhol of Ms. Goldsmith’s photo does not even begin to constitute the creation of “new information, new aesthetics, new insights and understandings” required for finding a transformative purpose. *Castle Rock Entertain. v. Carol Publish. Group*, 150 F.3d at 132, 142 (2d Cir. 1998). AWF’s use was not therefore the type of activity that the fair use doctrine intended to protect “for the enrichment of society.” *Id.*



CONCLUSION

For the reasons set forth above, amici join the Petitioner in respectfully requesting that the Court affirm the Second Circuit’s opinion.

Respectfully submitted,

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