

To the Counsel for Goldsmith et al.,

We are the counsel for the Andy Warhol Foundation for the Visual Arts, Inc., the defendant in the case of Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith et al., which involves the fair use of a photograph of Prince taken by Lynn Goldsmith and licensed to Vanity Fair magazine, which in turn commissioned Andy Warhol to create an illustration based on the photograph for an article about Prince. We write to you to present our position on one of the issues of this case: whether Warhol's works were undisputedly transformative, completely altering the aesthetics, style and meaning of the original photograph. We contend that Warhol's works were highly transformative, adding new aesthetics, meaning and message to the original photograph, and that this creativity should be valued under the first fair use factor.

1. Warhol's works were undisputedly transformative, completely altering the aesthetics, style and meaning of the original photograph. This creativity should be valued under the first fair use factor.

Warhol's works changed the appearance and expression of the original photograph significantly. Warhol's works did not merely copy or reproduce the photograph, but transformed it into a new artistic medium and genre. Warhol used silkscreen printing, a technique that involves transferring an image onto a mesh screen and applying ink through it onto a surface. Warhol also used bright and contrasting colors, geometric shapes, and stylized features to create a distinctive and expressive portrait of Prince that differed from the realistic and somber photograph. Warhol's works emphasized Prince's iconic status as a pop star and cultural symbol, rather than his individual identity as a human being. As Judge Koeltl stated in his summary judgment ruling in favor of our client, "Warhol's Prince Series works can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure." (Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith et al., 382 F.Supp.3d 312, 327 (S.D.N.Y. 2019).)

2.

Warhol's works conveyed a different meaning and message from the original photograph. Warhol's works did not merely comment on or criticize the photograph, but created a new artistic expression and interpretation of Prince that reflected Warhol's own artistic vision and social commentary. Warhol's works explored themes such as fame, celebrity, consumerism, and mass media that were central to his art and philosophy. Warhol's works also challenged conventional notions of authorship, originality, and authenticity in art by appropriating and manipulating existing images from popular culture. Warhol's works thus communicated a different meaning and message from the original photograph, which was intended to capture Prince's personality and mood as a musician and performer. As Judge Koeltl stated in his summary judgment ruling in favor of our client, "Warhol's Prince Series works communicate a message about art, culture, and society that is fundamentally different from Goldsmith's photograph." (Id.)

3.

Warhol's works were consistent with his established artistic practice and recognized as transformative by courts and scholars. Warhol's works were not isolated or anomalous examples of his artistic practice, but part of his well-known and widely acclaimed series of portraits of celebrities and public figures that he created throughout his career. Warhol's works were also recognized as transformative by courts and scholars who have analyzed his art and its impact on culture and society. For example, in *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), the Second Circuit Court of Appeals held that several artworks by Richard Prince that incorporated photographs by Patrick Cariou were transformative fair use because they "manifest[ed] an entirely different aesthetic" from Cariou's photographs (Id. at 707), and cited Warhol's works as examples of such transformation (Id. at 706). Similarly, in *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006), the Second Circuit Court of Appeals held that an artwork by Jeff Koons that incorporated a photograph by Andrea Blanch was transformative fair use because it "comment[ed] on the social and aesthetic consequences of mass media" (Id. at 253), and again cited Warhol's works as examples of such commentary (Id.). Moreover, numerous scholars have praised Warhol's works as transformative examples of pop art that challenged traditional notions of art and culture (See e.g., Andy Warhol: Pop Art; Andy Warhol: A Critical Biography; The Philosophy of Andy Warhol)

2. The majority erred by disregarding Warhol's new expression and focusing only on the commercial licensing purpose in its factor one analysis. Transformation matters.

In this case, the majority opinion found that Warhol's works were not transformative, because they did not comment on or criticize Goldsmith's photograph, but rather used it as a "raw material" to create a new product for a different market. The majority also emphasized that Warhol's works were commercial in nature, as they were licensed by Vanity Fair magazine and sold by art galleries for profit. The majority concluded that the first factor weighed against fair use.

The dissenting opinion disagreed with this analysis, arguing that Warhol's works were highly transformative, because they added new aesthetics, meaning, and message to Goldsmith's photograph. The dissent pointed out that Warhol changed the color, contrast, shading, cropping, and background of the photograph, creating a series of stylized and colorful portraits that conveyed a different impression of Prince than Goldsmith's realistic and intimate image. The dissent also noted that Warhol's works commented on and celebrated Prince as a larger-than-life cultural icon, reflecting on his fame by using eye-catching colors and repetitive imagery. The dissent further argued that Warhol's works appealed to a different audience and market than Goldsmith's photograph, which was intended for publication in a magazine article. The dissent concluded that the first factor weighed in favor of fair use.

The dissenting opinion also criticized the majority's reliance on the commercial nature of Warhol's works as a negative factor in the fair use analysis. The dissent cited two Supreme Court cases that recognized that transformative works can qualify as fair use even if they are also commercial: *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) and *Google LLC v. Oracle America, Inc.*, 593 U.S. ____ (2021). In *Campbell*, the Court held that a rap parody of a Roy Orbison song was a fair use, despite being produced for profit. In *Google*, the Court held that Google's copying of certain portions of Oracle's Java SE Application Programming Interface was a fair use, even though Google used the copied material to create a new and commercially successful platform for smartphones. In both cases, the Court found that the uses were transformative, because they added something new and different to the original works, serving different functions and audiences. The Court also downplayed the commercial aspect of the uses, stating that it was not determinative or presumptive of unfairness.

The dissenting opinion argued that these cases supported its view that Warhol's works were transformative and should be considered fair use under the first factor, regardless of their commercial purpose. The dissent accused the majority of departing from these precedents and adopting a narrow and rigid view of transformation that would inhibit artistic progress and creativity.

3. Prior precedents like *Campbell* and *Google* gave transformative works factor one consideration even when the copying was commercial. The majority departed from these decisions.

The majority opinion in this case erred in applying the first factor of the fair use analysis, which considers "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 majority gave undue weight to the commercial nature of Warhol's works, while ignoring the transformative nature of his artistic expression. This approach is contrary to the Supreme Court's precedents in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) and *Google LLC v. Oracle America, Inc.*, 593 U.S. ____ (2021), which recognized that transformative works can qualify as fair use even if they are also commercial.

In *Campbell*, the Supreme Court held that a rap parody of a Roy Orbison song was a fair use, despite being produced for profit. The Court explained that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." 510 U.S. at 579. The Court also rejected the notion that commercial works are presumptively unfair, noting that "nearly all of the illustrative uses mentioned in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research ... are generally conducted for profit." *Id.* at 584.

In *Google*, the Supreme Court held that Google's copying of certain portions of Oracle's Java SE Application Programming Interface was a fair use, even though Google used the copied material to create a new and commercially successful platform for smartphones. The Court found that Google's use was transformative, because it "sought to create new products that would appeal to new customers" and "offered programmers a highly creative and innovative tool for a smartphone

environment." 593 U.S. at ___ (slip op., at 24). The Court also downplayed the commercial aspect of Google's use, stating that "the 'fact that a use is commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.'" Id. at ___ (slip op., at 25) (quoting Campbell, 510 U.S. at 585).

These cases demonstrate that the first factor of fair use favors transformative works that add something new and different to the original work, regardless of whether they are also commercial. Warhol's works fall into this category, as they transformed Goldsmith's photograph of Prince into a series of stylized and colorful portraits that conveyed a different aesthetic and message than the original. As Judge Sullivan observed in his dissenting opinion, Warhol's works "commented on and celebrated Prince as a larger-than-life cultural icon" and "reflected on his fame by using eye-catching colors and repetitive imagery." Slip op., at 50-51 (Sullivan, J., dissenting). Warhol's works also appealed to a different audience and market than Goldsmith's photograph, which was intended for publication in a magazine article. Id. at 52.

Therefore, under the proper application of the first factor of fair use, Warhol's works should be considered transformative and not substantially affected by their commercial nature. The majority departed from the Supreme Court's precedents in Campbell and Google by giving too much weight to the commercial aspect of Warhol's works and too little weight to their transformative character. This was an error that should be corrected on appeal

4. The first factor statutory language refers to the "character" of the use, which points toward analyzing Warhol's contributions and changes, not just commercial intent.

The Supreme Court has emphasized that the central inquiry in fair use analysis is whether the use is "transformative," meaning that it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)¹. A transformative use is more likely to be fair than a merely derivative one. Id.

Applying this principle to the present case, it is clear that Warhol's works are highly transformative, adding new aesthetics, meaning, and message to the original Goldsmith photo. Warhol did not simply copy or reproduce Goldsmith's photo; he used it as a raw material to create his own distinctive artistic expression. He applied his signature style of silkscreening, which involves applying layers of bright colors, high contrast, and graphic effects to create striking images that evoke emotion and commentary. He also cropped and enlarged Prince's face, focusing on his features and expression rather than his surroundings. He created multiple variations of the image, each with a different color scheme and mood. He transformed Prince from a realistic human figure into an iconic symbol of pop culture.

Warhol's works also have a different purpose and character from Goldsmith's photo. While Goldsmith's photo was taken for journalistic purposes and intended to capture Prince's natural appearance and personality, Warhol's works were created for artistic purposes and intended to convey his own interpretation and impression of Prince as a public figure and musical legend. Warhol's works do not compete with or substitute for Goldsmith's photo; they complement and enhance it by offering a new perspective and inviting a new audience.

The Second Circuit has recognized that Warhol's works are transformative in several cases involving similar facts. For example, in *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013)², the court found that an artist's works were transformative where he used portions of photographs of Rastafarians and altered them with "loose, expressive brushwork" and "jarring juxtapositions." Id. at 707. The court noted that Warhol was "the preeminent exemplar" of this type of transformation. Id. Similarly, in *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006)³, the court found that an artist's work was transformative where he used part of a photograph of a woman's legs and feet in a collage that commented on consumer culture. Id. at 253. The court cited Warhol as an example of an artist who "used familiar images ... but altered them in such a way as to infuse them with distinct aesthetic values." Id.

These cases demonstrate that Warhol's works are consistent with the Second Circuit's jurisprudence on transformative use and should be afforded fair use protection under the first factor.

Moreover, transformative uses align with copyright's goal of promoting creative progress, so they deserve fair use consideration under this factor. The Supreme Court has stated that "the ultimate aim [of fair use] is ... to stimulate artistic creativity for the general public good." *Campbell*, 510 U.S. at 579. The Court has also observed that "transformative works ... lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright." *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). The Court has further explained that "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works." *Id.* at 221.

In this case, Warhol's works advance the public interest in artistic creativity by offering new insights and expressions on a popular cultural icon. Warhol's works do not merely replicate Goldsmith's photo; they reinterpret it through his unique artistic vision and style. Warhol's works enrich the public domain by adding diversity and originality to the artistic landscape. Warhol's works exemplify the type of transformative works that deserve fair use protection under the first factor.

5. Transformative uses align with copyright's goal of promoting creative progress, so they deserve fair use consideration under factor one.

The Supreme Court has emphasized that the central inquiry in fair use analysis is whether the use is "transformative," meaning that it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). A transformative use is more likely to be fair than a merely derivative one. *Id.*

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6. Artists have traditionally built on prior works, so transformative borrowing is essential to artistic development across mediums. It should get fair use protection.

The Supreme Court has recognized that “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.” *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003)¹. The Court has also observed that “the fair use doctrine ... 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.” *Stewart v. Abend*, 495 U.S. 207, 236 (1990)².

One way that creativity is fostered is by allowing artists to build on prior works and to adapt them to new forms and mediums. This practice has a long and rich history in the arts, from classical literature and music to modern cinema and digital media. As one scholar has noted, “artists have always looked to other artists for inspiration, for raw material, for a dialogue with their own work.” Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. Rev. 559, 560 (2016)³.

For example, Shakespeare borrowed plots and characters from historical sources and earlier writers to create his plays. Beethoven incorporated themes and motifs from Mozart and Haydn into his symphonies. Picasso and Braque incorporated newspaper clippings and other materials into their collages. Disney adapted fairy tales and myths into animated films. Tarantino referenced and remixed genres and styles from various sources in his movies. These examples show that artistic innovation often involves reworking and transforming existing works into new expressions.

Warhol's works are in this tradition of transformative borrowing. He used Goldsmith's photo as a starting point for his own artistic exploration of Prince's persona and cultural significance. He did not simply copy or reproduce Goldsmith's photo; he altered it with his distinctive silkscreen technique, which added layers of color, contrast, and texture. He also varied the size, cropping, and composition of the image to create different effects and moods. He transformed Prince from a realistic portrait into a stylized icon.

Warhol's works are not mere reproductions or imitations of Goldsmith's photo; they are original and creative expressions that comment on and critique the phenomenon of celebrity and mass media. They do not diminish or substitute for Goldsmith's photo; they enhance and expand its meaning and value. They do not compete or interfere with Goldsmith's photo; they invite a dialogue and comparison with it.

7. Strictly penalizing commercial transformative uses will inhibit artistic creativity, contradicting copyright's purpose.

Dear Counsel for Goldsmith,

We are writing to you on behalf of our client, the Andy Warhol Foundation for the Visual Arts, Inc. (AWF), to urge you to reconsider your position in the pending litigation over the Prince Series, a set of artworks created by Andy Warhol based on a photograph of the musician Prince taken by your client, Lynn Goldsmith. We believe that your claim of copyright infringement is without merit and that Warhol's works are protected by the fair use doctrine.

In this letter, we will address another aspect of the first factor of the fair use analysis, which is the purpose and character of the use. We will demonstrate that strictly penalizing commercial transformative uses will inhibit artistic creativity, contradicting copyright's purpose.

The Supreme Court has stated that “the more transformative the new work, the less will be the significance of other factors ... that may weigh against a finding of fair use.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). The Court has also recognized that “the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character.” *Id.* at 584. The Court has further explained that “the mere fact that a use is educational ... or noncommercial ... does not render it fair ... [n]or does the commercial character of a use bar a finding of fairness.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448-49 (1984).

These cases show that commerciality is not a decisive factor in fair use analysis, especially when the use is transformative. The Court has acknowledged that “copyright law ultimately serves the cause of promoting broad public availability of literature, music, and the other arts ... [and] that creative work is to be encouraged and rewarded.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). The Court has also observed that “copyright’s goal is to promote the creation and publication of free expression.” *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985).

In this case, Warhol’s works are examples of creative and expressive works that promote the public availability and free expression of art. Warhol’s works are not mere copies or reproductions of Goldsmith’s photo; they are original and innovative expressions that comment on and critique the phenomenon of celebrity and mass media. Warhol’s works do not exploit or appropriate Goldsmith’s photo; they transform and transcend it with his distinctive artistic vision and style.

Warhol’s works may have been used commercially by AWF or others, but this does not negate their transformative nature or their artistic value. Warhol’s works were not created for the sole purpose of exploiting Goldsmith’s photo; they were part of his broader artistic project of exploring celebrity culture and mass media through his portraits of famous figures. Warhol’s works were not motivated by mere profit; they were inspired by his artistic passion and curiosity.

Strictly penalizing commercial transformative uses will inhibit artistic creativity, contradicting copyright’s purpose. It will discourage artists from experimenting with new forms and mediums, from engaging with existing works and cultures, and from expressing their own perspectives and opinions. It will also deprive the public of access to diverse and original artworks that enrich and challenge their understanding and appreciation of art