

**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**

---

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  
Washington, D.C. 20540*

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  
Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@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

	Page
Interest of the United States.....	1
Statement .....	2
Summary of argument .....	9
Argument:	
A. Copyright law strikes a balance between incen- tivizing original expression and facilitating sec- ondary expression .....	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:

<i>Blanch v. Koons</i> , 467 F.3d 244 (2d Cir. 2006).....	34
<i>Bleistein v. Donaldson Lithographing Co.</i> , 188 U.S. 239 (1903).....	23
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	<i>passim</i>
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003).....	12, 27
<i>Folsom v. Marsh</i> , 9 F. Cas. 342 (C.C.D. Mass. 1841).....	15, 26
<i>Golan v. Holder</i> , 565 U.S. 302 (2012).....	27

## IV

Cases—Continued:	Page
<i>Google LLC v. Oracle Am., Inc.</i> , 141 S. Ct. 1183 (2021) ..... <i>passim</i> <i>Gyles v. Wilcox</i> , (1740) 26 Eng. Rep. 489 (H.L.) ..... 26 <i>Harper &amp; Row Publishers, Inc. v. Nation Enters.</i> , 471 U.S. 539 (1985).....15, 19, 20, 29, 30 <i>Kirtsaeng v. John Wiley &amp; Sons, Inc.</i> , 579 U.S. 197 (2016)..... 12 <i>Rogers v. Koons</i> , 960 F.2d 301 (2d Cir.), cert. denied, 506 U.S. 934 (1992)..... 34 <i>Sampson &amp; Murdock Co. v. Seaver-Radford</i> <i>Co.</i> , 140 F. 539 (1st Cir. 1905) ..... 26 <i>Sony Corp. of Am. v. Universal City Studios,</i> <i>Inc.</i> , 464 U.S. 417 (1984)..... 14, 17, 29, 34	
Constitution and statutes:	
U.S. Const.:	
Art. I, § 8, Cl. 8 (Intellectual Property Clause) ..... 2, 26, 27 Amend. I..... 26, 27	
Copyright Act of 1976, 17 U.S.C. 101 <i>et seq.</i> ..... 2	
17 U.S.C. 101..... 2	
17 U.S.C. 102(a) ..... 2	
17 U.S.C. 102(a)(5)..... 2	
17 U.S.C. 106..... 12, 13	
17 U.S.C. 106(1) ..... 2	
17 U.S.C. 106(2) ..... 2, 12, 22	
17 U.S.C. 106(3) ..... 2	
17 U.S.C. 106(5) ..... 2	
17 U.S.C. 107..... <i>passim</i>	
17 U.S.C. 107 Pmbl.....8, 10, 15, 19, 26	
17 U.S.C. 107(1) .....7, 10, 11, 13, 15, 29	

Statutes—Continued:	Page
17 U.S.C. 107(2) .....	7, 32
17 U.S.C. 107(3) .....	7, 31
17 U.S.C. 107(4) .....	7, 14, 29
17 U.S.C. 701 (2018 & Supp. I 2019).....	1
35 U.S.C. 2(b)(8).....	1
35 U.S.C. 2(c)(5).....	1
Miscellaneous:	
Pierre N. Leval, <i>Toward A Fair Use Standard</i> , 103 Harv. L. Rev. 1105 (1990) .....	15
4 Melville B. Nimmer & David Nimmer, <i>Nimmer on Copyright</i> (2022).....	22, 29
U.S. Copyright Office, <i>U.S. Copyright Office</i> <i>Fair Use Index</i> (last updated June 2022), <a href="https://www.copyright.gov/fair-use/">https://www.copyright.gov/fair-use/</a> .....	18

# In the Supreme Court of the United States

---

No. 21-869

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**

---

## **INTEREST OF THE UNITED STATES**

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 struggl[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 silk-screen 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.

3. Goldsmith had herself licensed her Prince photographs to print magazines seeking to memorialize Prince after his death. J.A. 369-370. When Goldsmith saw the Condé Nast image circulating online, she advised petitioner of potential copyright infringement. Pet. App. 10a. Petitioner sued for a declaratory judgment of non-infringement, or, in the alternative, fair use. *Ibid.* Respondents countersued, alleging that

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.<sup>1</sup>

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).

---

<sup>1</sup> 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 purported difference as sufficient under Section 107(1) would dramatically expand the scope of fair use. Derivative works such as book-to-film adaptations, for example, 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 appeals' conclusion that the first fair-use factor favors respondents.

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. Petitioner's commercial licensing of the Orange Prince image to a popular magazine undermines Goldsmith's ability 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 analyses. 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 borrowing.

## ARGUMENT

### A. Copyright Law Strikes A Balance Between Incentivizing Original Expression And Facilitating Secondary Expression

The Copyright Act "strikes 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 non-profit 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.<sup>2</sup>

---

<sup>2</sup> 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 Stat-  
utory 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).<sup>3</sup>

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.

---

<sup>3</sup> 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.

23a-24a, 27a. 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 copyrighted 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 “stifl[ing]” 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.<sup>4</sup>

---

<sup>4</sup> “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—inevitably 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”).<sup>5</sup>

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,

---

<sup>5</sup> 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 “comment[ary],” 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