

19-2420

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC.,
Plaintiff-Counter-Defendant-Appellee,

v.

LYNN GOLDSMITH, LYNN GOLDSMITH, LTD.,
Defendants-Counter-Plaintiffs-Appellants.

On Appeal from the United States District Court
for the Southern District of New York
No. 17-cv-2532 (Hon. John G. Koeltl)

**BRIEF OF THE ROBERT RAUSCHENBERG FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for *Amicus Curiae* states as follows:

- The Robert Rauschenberg Foundation has no parent corporation, and no company holds 10 percent or more of its stock.

INTEREST OF THE *AMICUS CURIAE*¹

Robert Rauschenberg (1925-2008) was an American artist who worked in a wide range of media, subjects, styles, materials, and techniques. He founded the Robert Rauschenberg Foundation in 1990 to advance creativity in the arts through grants, artist and research residencies, and special projects that foster artistic and social innovation. The Rauschenberg Foundation is the steward of Rauschenberg's legacy of copyrighted works, some of which build on other artists' work, and some that have been built on by other artists.

As a funder of artistic expression, a guardian of Rauschenberg's legacy, and an organization with an affirmative policy supporting fair use, the Rauschenberg Foundation has a strong interest in ensuring that the fair-use doctrine continues to strike a proper balance between free expression and protection of an artist's creative work. To that end, the Foundation has submitted its views as *amicus curiae* in important copyright and fair-use cases. *E.g.*, *Google LLC v. Oracle Am. Inc.*, No. 18-956 (U.S. filed Jan. 13, 2020); *Cariou v. Prince*, No. 08-cv-11327, 2013 WL 8180422 (S.D.N.Y. filed Oct. 22, 2013).

¹ All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION

Artists are inspired by other artists. Inspiration sometimes involves use or appropriation, when one artist uses or builds on another artist's work to create a new work of her own. Under the law of fair use, that new work does not infringe on the copyright of the prior work, so long as the new work "transforms" the purpose, character, or expression of the original.

Goldsmith would narrow the fair-use doctrine, rewriting it to protect only transformations of "purpose." And she would limit evidence of transformation to the four corners of the respective works, stripping courts of the ability to consider additional evidence of a secondary work's meaning or message. That disregard for a secondary work's transformative meaning or message follows naturally from Goldsmith's constrained view of fair use: if a change in the meaning or message of a work cannot "transform" it, then there is no need to consider meaning or message at all.

That understanding of fair use cannot be right. Courts have consistently held that a secondary work's alteration of the expression, *or* character, *or* purpose of the original work can be "transformative," thus qualifying the secondary work for the protections of fair use. If a court can discern that change by conducting a side-by-side comparison of the two works, it can certainly apply the fair-use doctrine without further inquiry. But if a side-by-side comparison alone does not readily reveal

transformation, then courts should consider additional evidence that might shed light on the meaning or message of the secondary work.

A contrary view of fair use would stifle artistic progress. If Goldsmith is right, and works of visual art must be transmuted into something else entirely (i.e., something other than a work of visual art) to qualify for fair-use protection, the world would be deprived of countless artworks that were forged from earlier works. And future generations of artists would be foreclosed from innovating based on the works of others, as artists have done for centuries.

The Rauschenberg Foundation submits this amicus brief to suggest a framework for understanding fair use that would maintain the proper balance between free expression and the protection of an artist's creative work, and to provide a roadmap for how courts should apply the fair-use doctrine. Notably, the *type* of artwork (whether photograph, painting, or some other medium) is irrelevant—all artistic works are equally and fully deserving of copyright protection. Just as irrelevant is the popularity of the artist creating the secondary work—that Andy Warhol was “famous and talented” has nothing to do with whether he may use another artist's work without permission. Had the District Court based its fair-use determination on those characteristics, as Goldsmith suggests (at 36), then there would be merit to her arguments. But the District Court did not find that the *Prince Series* was fair use because Warhol was Warhol; rather, it was the essence of

Warhol’s “artmaking, with its repetitions, distortions, camouflages, incongruous colors, and endless recyclings”—the “destabilizing of the image”—that transformed Goldsmith’s work by new expression, providing the public with fresh meaning and message.²

For many artists, fair use will cut both ways—one artist will borrow from other artists, and her work, in turn, may be borrowed by others. Warhol himself was prolific in numerous media, including photography. His various works were and remain subject to fair use by other artists. The same is true of Rauschenberg. This is therefore not a case pitting one creative medium against another, let alone denigrating the validity or integrity of Goldsmith’s own artistry. But what is true for those who would use or appropriate works by Warhol or Rauschenberg remains true here: the right to build on another artist’s work is essential to the progress of artistic innovation. If fair use is truly meant to *encourage* innovation and serve as a “First Amendment safeguard[]” in copyright law against the undue constriction of speech, *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003), the doctrine must continue to protect new transformations of original expression.

² See Donna De Salvo, *Andy Warhol: From A to B and Back Again* 32 (2018); e.g., *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001) (discussing Warhol’s use of “distortion” and “careful manipulation of context” to provide “social comment” about the exploitation and dehumanization of celebrity).

ARGUMENT

I. A work protected by fair use can be “transformed” in different ways—physical alteration is only one such form of transformation.

Four factors determine whether the use of a copyrighted work is “fair” and thus protected from claims of copyright infringement. 17 U.S.C. § 107. The first factor—“the purpose and character of the use”—looks to whether the work is “transformative.” A work is transformative when it does more than merely “supersede[] the object of the original creation”—a transformative work must “add[] 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, 578-79 (1994) (citing 17 U.S.C. § 107).

Courts applying *Campbell*’s transformation test have generally discerned three types of “transformation”: (1) transformation of the *purpose*, or function, of the work, (2) transformation of the *character* of the work, and (3) transformation of *what is being expressed* in the work. These categories are not mutually exclusive—*Campbell* recognized that there is overlap, and that a “new expression, meaning, or message” can reveal a “further purpose *or* different character.” *Id.* at 578-79 (emphasis added).

Goldsmith contends that the transformation must be purposive to be considered fair use; according to her, anything else, such as a change in message or meaning, is necessarily a *derivative* (and therefore unprotected) use. Goldsmith Br.

27. While she concedes that the expressive form of Warhol’s *Prince Series* is plainly different from her own, *id.* at 31-32, she nevertheless argues that her photographs and Warhol’s depictions of Prince both serve the same general *purpose*—“a work of visual art that may serve as both an object of appreciation in its own right or as an illustration well-adapted to publication”—thus rendering Warhol’s work nontransformative and “derivative,” *id.* at 37-38. That narrowing construction of *Campbell* cannot be right: both the Supreme Court and this Court have clearly held that transformative use goes beyond transformation of purpose, and includes transformations of character and expression.

A. Fair use covers transformation of purpose or function.

A secondary work can be transformative if it has a purpose that is different from the original—even if the two works are absolutely identical in appearance. *Hughes v. Benjamin*, No. 17-cv-6493, 2020 WL 528704, at *4 (S.D.N.Y. Feb. 3, 2020). This Court’s decision in *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), provides an apt illustration. In that case, Google scanned, indexed, and made searchable more than 20 million books to create the Google Books database. *Id.* at 208-09. In response to a search query, Google Books provides a list of books containing the queried terms, and snippets of excerpts from those books. *Id.* at 210.

A group of authors claimed that Google infringed on their copyrights by making their books available on Google Books. Even though Google Books copied

the authors' works without alteration, this Court concluded that the search function and the snippets were transformative. It explained that "transformative" did not require a *literal* transformation. *Id.* at 214. Google's search function was "transformative" even though the authors' copy remained exactly the same, as the search tool and snippet preview enabled two new functions: (1) the identification of books relevant to a search term; and (2) research about linguistic usage. *Id.* at 217-18.

Swatch Group Management Services Ltd. v. Bloomberg L.P., 756 F.3d 73 (2d Cir. 2014), provides another example. That case concerned a recording of a private conference call that Swatch Group held with financial analysts. *Id.* at 78. Bloomberg, a news organization, obtained the recording and a transcript of the call and published both "without alteration or editorial commentary." *Id.* at 78-79. Swatch claimed that Bloomberg infringed on the company's copyright by publishing the call. Bloomberg asserted fair use, arguing that its publication of the call served a new function of "news reporting" and "data delivery," *i.e.*, to provide information "of critical importance to securities markets." *Id.* at 82.

Although "Bloomberg provided no additional commentary or analysis," this Court explained that a secondary work "can be transformative in function or purpose without altering or actually adding to the original work." *Id.* at 84 (citation omitted). The *lack* of alteration better served the new purpose: producing the sound recording

as-is allowed the news-consuming public to gain insights as to “a speaker’s demeanor, tone, and cadence.” *Id.*

Goldsmith does not quarrel with the principle that a change in purpose is sufficiently transformative for fair use. But she would make transformations in purpose the exclusive ground for fair use, and she defines purpose so broadly that one work of art borrowing from another could never be considered fair use. *See* Goldsmith Br. 38 (arguing that Warhol’s work and Goldsmith’s have “the same intrinsic purpose” because both are works of “visual art”). That is not the law. If it were, *Campbell* would not have come out the way it did: the original and secondary works were both songs. 510 U.S. at 572; *see infra* pp. 8-9. And as explained below, even in the specific context of visual arts, this Court (among others) has repeatedly held that one such work of art is capable of transforming another.

B. Fair use also protects works that undergo a transformation of character.

Fair use also protects works that are transformative as to the “character of the use.” A song, for example, may continue to serve the general purpose of musical entertainment even when copied, but it may take on a satirical or parodic character.

Campbell provides a paradigmatic example of transformation of character. The rap group 2 Live Crew used the melody of Roy Orbison’s “Oh, Pretty Woman” to create a new song called “Pretty Woman.” *Campbell*, 510 U.S. at 572. 2 Live Crew used the Orbison original’s famous refrain to create a new song that

purportedly served as commentary on the blandness and banality of Orbison’s song. *Id.* at 582. The Supreme Court concluded that 2 Live Crew’s song could “reasonably be perceived” as a parody of the Orbison original: the “parodic character” of the song could be found in the juxtaposition of “romantic musings” with “degrading taunts, a bawdy demand for sex, and a sigh of relief for paternal responsibility.” *Id.* at 582-83.

Jimmy Kimmel’s popular segment, “Celebrities Read Mean Tweets” is another example of readily apparent transformative character—even where there is no physical transformation at all.³ In that segment, celebrities perform deadpan readings of cruel tweets that have been directed toward them by Twitter users. Even though there is no alteration to the original tweet, any reasonable observer would conclude that the character of the original tweet has been transformed based on the context, including the identity of the individual (the target of the offensive comment) doing the copying.

³ See, e.g., Jimmy Kimmel Live, *Mean Tweets—President Obama Edition*, YouTube (Mar. 12, 2015), <https://www.youtube.com/watch?v=RDocnbkHjhI>.

Although a change in character need not be accompanied by a change in expression, the two frequently go together, so a change in the latter will often result in a change in the former. 2 Live Crew changed the lyrics of “Pretty Woman” to achieve parodic effect. And in *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003), an artist changed the “expression” of Barbie to transform the character of Barbie into a parody. By placing Barbie dolls in unconventional settings—wrapped in tortillas and smothered in salsa, or in fondue pots—and taking photographs of the dolls, the artist said he was “critiq[uing] the objectification of women associated with Barbie.” *Id.* at 796.



Tom Forsythe, *Barbie Enchiladas* (1997); *Fondue a la Barbie* (1997). The Ninth Circuit agreed, holding that the artist’s work could “reasonably be perceived as a parody of Barbie”—a display of the harm of “Barbie’s influence on gender roles and the position of women in society.” *Id.* at 802.

C. Transformations of expression, standing alone, can also qualify as fair use.

Many fair-use works will have a discernible transformation in function or character. And many will not. Fair use requires only that a secondary work “add[] value to the original,” and a work may provide such value by offering “new information, new aesthetics, new insights and understandings.” *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990)). A work that has a new meaning or message is sufficiently transformative, even if there is no change to the work’s “purpose” or “character.”⁴

This Court’s decision in *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), provides a useful illustration. In *Cariou*, the photographer Patrick Cariou published a book of “classical portraits and landscape photographs” taken while “living among Rastafarians in Jamaica.” *Id.* at 698. Richard Prince, an appropriation artist, used the photographs in different ways to create a series of new works. Some of the photographs were “enlarged and tinted,” cut out and pasted onto other figures, or manipulated to change the facial features of photographed individuals. *Id.* at 700-02. This Court concluded that most of Prince’s works made fair use of Cariou’s photographs, while others required additional factfinding. In so holding, this Court

⁴ A parody of a parody, for example, will remain a parody, even though the message conveyed by the secondary parody will change.

noted that “[t]he law imposes no requirement that a work comment on the original or its author in order to be transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those” identified in section 107. *Id.* at 706. “[T]o qualify as a fair use, a new work generally must alter the original with ‘new expression, meaning, or message.’” *Id.* (quoting *Campbell*, 510 U.S. at 579).⁵

That reaffirmation of *Campbell*’s central holding—that a change in expression, standing alone, can be sufficiently transformative for fair use—was essential to the result in *Cariou*. Both Cariou’s work and Prince’s served as works of visual art in the *general* sense, so transformation could not be discerned from a change in function or purpose. Because Prince did not provide insight as to the meaning or message of his works, this Court looked to Prince’s aesthetics to discern the “creative and communicative results” of Prince’s work, and whether the message conveyed was different from that of Cariou’s photographs. *Id.* at 707-08. The Court determined that the aesthetic changes Prince made resulted in two different works with two different messages: Cariou’s photographs conveyed serenity and natural beauty, while Prince’s works were “crude and jarring,” “hectic and provocative.”

⁵ Goldsmith pays lip service to *Cariou*, but ignores its central holding: it is the transformation of “expression, meaning, or message” that qualifies a work for fair use. She asserts (at 34) that the secondary work must make the original “barely recognizable” under *Cariou*. But that is not the law—in fact, many of the works deemed to be fair use in *Cariou* itself would have failed her test.

Id. at 706. The difference in the message conveyed was enough for this Court to determine that most of Prince’s works were sufficiently transformative to be protected as fair use.

Seltzer v. Green Day, Inc., 725 F.3d 1170 (9th Cir. 2013), provides another example of a transformation in expression. That case concerned this drawing, *Scream Icon* (by Dereck Seltzer, 2003):



Id. at 1173.

The band Green Day took the drawing, spray-painted a large red cross over the middle of the face, “changed the contrast and color[,] and added black streaks running down on the right side of the face.” *Id.* at 1174.



Green Day then used the altered work as part of its backdrop for its performance of “East Jesus Nowhere,” a song about the hypocrisy of religion. *Id.*

When *Scream Icon*’s creator sued, Green Day asserted fair use, arguing that it had transformed the work into a new expression about religion. The Ninth Circuit agreed, explaining that “the typical ‘non-transformative’ case” involved a use in which there was “no alteration to the expressive content or message of the original work.” *Id.* at 1177 (surveying and collecting cases). But when “new expressive content or message” is apparent in a secondary work, that work is “typically viewed as transformative.” *Id.* (citing *Cariou*, 714 F.3d at 708). Though it was unclear precisely what message *Scream Icon* was intended to express, “it clearly sa[id] nothing about religion,” while Green Day’s secondary work was clearly a message about the hypocrisy of religion, given the alterations and the context. *Id.* Thus, Green Day’s work was considered transformative.

Goldsmith concedes that Warhol’s work “adds new expression,” so that should mark the end of the Court’s inquiry. Goldsmith Br. 31. But it is important to note that Goldsmith’s singular focus on physical changes is incorrect and incomplete. The changes that Warhol made went beyond his use of “loud, unnatural colors,” *id.* at 31-32, his transfer of Goldsmith’s photograph to paper or canvas, *id.* at 37, and other changes to the “aesthetic.” As *Seltzer* demonstrates, the relevant question is not just the nature or scope of any physical alterations; rather, the question is *how* such alterations (whether physical, contextual, or otherwise, as discussed below), change the “expression, meaning, or message” of the work. *See Campbell*, 510 U.S. at 579. And here they did, as the District Court concluded.

D. Derivative works adopt and rely on the original expression, while transformative works do not.

One way to change a work is through physical alteration. That said, whether physical alterations sufficiently transform a work depends on the context—sometimes the changes are transformative, and sometimes they are derivative. The difference between a transformative work protected by fair use and an infringing derivative work is the role the original expression plays in the secondary work. If a secondary work adopts the same creative message of the original work, merely in a different format or medium, then it is derivative rather than transformative. Consider, for example, the *Seinfeld* trivia book in *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, 150 F.3d 132 (2d Cir. 1998). The author drafted “643

trivia questions and answers about the events and characters depicted in *Seinfeld*.” *Id.* at 135. While the questions may have been creatively organized, the expression remained unchanged: the trivia book was still telling the same “fictitious expression created by *Seinfeld*’s authors” about “the petty tribulations in the lives of four single, adult friends in New York.” *Id.* at 135, 139. This Court deemed the book derivative because it “transform[ed] an original work into a new mode of presentation” that carried the same expression. *Id.* at 143.

Even if a work is altered (and more is added to the work), the secondary work is derivative if the ultimate expression is unchanged. That was the lesson of *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010), a case that involved the U.S. Postal Service’s derivative use of a photograph of the Korean War Memorial on a stamp:



The Postal Service argued that it had “transformed” the work by capturing the sculpture while in snow and by using subdued hues, expressing the message that war

is cold and surreal. *See id.* at 1372-73. But that was the *same* message expressed by the original sculpture—the sculpture conveyed a “dream-like presence of ghostly figures.” *Id.* at 1374. By “[c]apturing [the sculpture] on a cold morning after a snowstorm,” the Postal Service did not “transform [the sculpture’s] character, meaning, or message”—it merely conveyed the same message in a slightly different way. *Id.* That is what made the work derivative—not, as Goldsmith contends, because “the stamp and the sculpture shared the ‘common purpose’ of honoring Korean War veterans.” Goldsmith Br. 33.

Gaylord is consistent with this Court’s observation in *TCA Television Corp. v. McCollum*, 839 F.3d 168 (2d Cir. 2016), that “there is nothing transformative about using an original work *in the manner it was made to be used*.” *Id.* at 182-83 (citation omitted, emphasis added). *TCA Television* was a case about Abbott and Costello’s vaudevillian “Who’s on First?” routine. The creators of the contemporary play *Hand to God* decided to incorporate the routine as part of their play about a student “who finds a creative outlet and a means of communication through a hand puppet.” *Id.* at 175. The routine was performed by the lead actor and his puppet almost exactly in the way that Abbott and Costello performed it—with the duo delivering the same “message” of vaudevillian humor that Abbott and Costello conveyed in 1938. *Id.* at 175-76. That the comedic routine was used *in a play* that

served as “a dark critique of society” did not transform the play’s use of “Who’s on First?” because it advanced precisely the same message as the original. *Id.* at 181.

As these cases demonstrate, to determine whether a secondary work is derivative or transformative, it is critical for a court to grasp the message that the work is intended to convey, or may “reasonably be perceived” to convey, *Campbell*, 510 U.S. at 582, and then determine whether *that message* is retained in and advanced by the secondary work. Goldsmith ignores these essential ingredients and instead focuses entirely on physical similarities between the original and secondary works. If that were the test, then the fair-use doctrine would be superfluous because it would duplicate the “substantial similarity” test that governs infringement.

II. Some transformation can be immediately discerned, while other forms require additional facts about context and interpretation.

Having clarified the differences between a transformative use and a derivative use, an obvious question arises: how are courts, which presumably have no specialized artistic knowledge, supposed to determine whether a use is, or “may reasonably be perceived” to be, transformative? *Campbell*, 510 U.S. at 582. Despite myriad fair-use cases arising since *Campbell*, there remain questions about how to apply the fair-use test in everyday litigation—in particular, when can fair use can be discerned just by looking at two works, and when is additional factfinding necessary? This case provides an excellent opportunity for this Court to provide that clarification.

To that end, the Rauschenberg Foundation offers a framework that could provide guidance to lower courts. To determine whether a secondary work may reasonably be perceived as transformative, a court should first compare the two works, ideally by examining the actual works rather than reproduced images (which may not reveal differences in scale, materials, or other physical attributes that are critical for properly experiencing a work). In many cases, transformation will be readily apparent even to the untrained eye. But if it is not, additional evidence should be examined to determine whether the use is transformative despite physical similarities between two works.

When undertaking this second step, courts should not confine themselves to the subjective views of any particular individual—not their own or even the artist herself. To be sure, an artist’s *bona fide* explanation of the message she intended to convey will inevitably be helpful in discerning transformation. *See Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006). But the ultimate inquiry is “examin[ing] how the artworks may ‘reasonably be perceived’ in order to assess their transformative nature.” *Cariou*, 714 F.3d at 707 (quoting *Campbell*, 510 U.S. at 582). As this Court expressed it, courts must consider the works through the eyes of a “reasonable observer.” *Id.*

This reasonable-observer concept serves as a proxy for a range of perceptions and understandings. The knowledge required in order to assess transformation may

vary as a function of the nature of the works being compared, the context in which they are presented, and the audience to whom the works are addressed. *Campbell*, 510 U.S. at 577 (fair use requires a “case-by-case” analysis). The transformative nature of some works may reasonably be perceived without any specialized knowledge. But the meaning or message of other works may require expert testimony or other evidence in order to be understood. Such evidence might come from art historians, curators, members of a relevant audience, or from the creator of the secondary work. Courts should therefore encourage the parties to present such evidence where useful to the trier of fact.

A. Transformation that is immediately apparent without any specialized knowledge may be deemed fair use without further inquiry.

Transformation is most readily apparent when the transforming artist makes clear how she intended to change the expression of a work, and there is an alteration that manifests that intended transformation. In *Campbell*, for example, 2 Live Crew’s stated objective was to mock the naïvete of the Orbison original, and it accomplished that purpose by altering the lyrics to its secondary work. 510 U.S. at 583. Nevertheless, a statement of intent by the transforming creator is not “critical” to determining whether there is a “*new* expression, meaning, or message.” *Cariou*, 714 F.3d at 707 (citation omitted, emphasis added). The transformation in expression in *Cariou*, for example, could be discerned from the change in aesthetics:

“Prince’s composition, presentation, scale, color, palette, and media [were] fundamentally different and new compared to the photographs, as [was] the expressive nature of Prince’s work.” *Id.* at 706.

Context may also make transformation apparent to a reasonable observer, even in the absence of physical alteration. An observer comparing the Google Books search engine to a book catalogued by the search engine can immediately conclude that the search engine’s excerpts are not “literary works” in the same way that the book itself might be. *See Authors Guild*, 804 F.3d at 217. That observer also may compare the original *Scream Icon* to Green Day’s apostate version of it and conclude, while listening to Green Day’s song about the hypocrisy of religion, that *Scream Icon* and Green Day’s visual work have two different meanings—one about religion, and one not. *See Seltzer*, 725 F.3d at 1177. But sometimes, transformation may not be readily apparent to a reasonable observer, and in those instances, more information may be necessary.

B. When transformation is not obvious, the fair-use determination should be informed by evidence of how a subsequent work may be perceived by the relevant audience.

Some changes in expression may escape the perception of a reasonable observer. This should be no surprise, as art—and particularly modern and post-modern art—can go beyond the mere depiction of an image. *See Arthur C. Danto, After the End of Art* 16 (Princeton Univ. Press, 1997). For example, art may be

experiential, as Felix Gonzalez-Torres's installation, *Untitled (Portrait of Ross in L.A.)* (Art Institute of Chicago, 1991), demonstrates:



The work is a 175-pound pile of candy that visitors are encouraged to take pieces of. The weight is equal to that of Gonzalez-Torres' partner. As the pile of candy shrinks, it mirrors the physical demise of the artist's partner as he slowly succumbed to AIDS.⁶

⁶ See Jennifer Tucker, *Untitled (Portrait of Ross in L.A.)*, Sartle, <https://www.sartle.com/artwork/untitled-portrait-of-ross-in-l.a.-felix-gonzalez-torres> (last visited Feb. 28, 2020).

Because understanding the message in an artistic piece often requires looking beyond the piece itself, it would be wrong to conclude from appearance alone that there is no transformation, as a reasonable observer may need specialized knowledge necessary to understand both the original and secondary works. Indeed, even under the substantial-similarity test that governs the question of infringement, courts emphasize that if the relevant audience is “more narrow,” then the “ordinary observer” used to discern substantial similarity is one assumed to possess the knowledge of the relevant audience. *Dawson v. Hinshaw Music, Inc.*, 905 F.2d 731, 736 (4th Cir. 1990). Accordingly, if transformation is not fully discernible on a side-by-side comparison, but may be revealed by looking to facts that require a reasonable observer to have specialized knowledge, the fair-use inquiry should be informed by evidence obtained from members of a relevant community, whether it be consumers of post-modern art, art critics, art historians, curators, or others. *Cf. Castillo v. G&M Realty L.P.*, --- F.3d ----, 2020 WL 826392, at *4 (2d Cir. Feb. 20, 2020) (to determine artistic stature, the court must determine whether a work is “acknowledged” as “one of high quality” by those in the “artistic community, comprising art historians, art critics, museum curators, gallerists, prominent artists, and other experts”); *see generally* Arthur C. Danto, *What Art Is* (Yale Univ. Press 2013).

Consider Constantin Brancusi’s *Bird in Space*:



Constantin Brancusi, *Bird in Space (Oiseau Dans L'Espace)* (1926) (Seattle Art Museum, polished bronze on marble and wood base). When Brancusi sought to import his work, the U.S. Customs Service tried to charge him a tariff—works of art were tariff-free, but metal wares were not. *Brancusi v. United States*, No. T.D. 64063, 1928 Cust. Ct. LEXIS 3 (Cust. Ct. Nov. 26, 1928). Brancusi fought the tariff in court, introducing expert testimony to prove that his work was indeed art. Experts explained that *Bird in Space* expressed “the suggestion of flight,” suggesting “grace, aspiration, vigour, coupled with speed in the spirit of strength, potency, beauty, just as a bird does.” MaryKate Cleary, “*But Is It Art?*” *Constantin Brancusi vs. the*

United States (July 24, 2014), https://www.moma.org/explore/inside_out/2014/07/24/but-is-it-art-constantin-brancusi-vs-the-united-states/. The Customs Court recognized that the work was part of a “so-called new school of art, whose exponents attempt to portray abstract ideas rather than to imitate natural objects.” *Brancusi*, 1928 Cust. Ct. LEXIS, at *7. While the court did not profess to be “in sympathy with these newer ideas,” it held for Brancusi on the basis that the work was “recognized” as influential in the art world. *Id.* at *7-*8.

Knowledge need not be limited to background in the visual arts. Say an artist decided to recreate the title screen of a 1930 Warner Brothers film, *Big Boy*.



But imagine that the artist chose to recreate the screen using black shoe polish. A reasonable observer with no specialized knowledge may think the reproduction is simply copying *Big Boy*'s title screen in a different medium. Yet someone

knowledgeable in the fields of sociology, ethnic studies, or even the history of theatre and cinema would reasonably perceive the work as a commentary on Al Jolson, who was known for performing in blackface, a controversial form of entertainment fueled by cultural stereotypes and implied racism.⁷

As these examples demonstrate, it is possible that newness of expression cannot be gleaned by looking at the work in isolation—sometimes, other knowledge is necessary to understand the meaning of a work. So if fair-use transformation requires a determination that there is a *new* expression, the individual tasked with perceiving the work must have the knowledge required to understand it. In copyright litigation where transformation cannot be discerned with a side-by-side comparison, courts should allow the parties to submit evidence that would inform how the work could (or could not) “reasonably be perceived,” so as to determine whether the secondary work provides “new expression, meaning, or message,” *Campbell*, 510 U.S. at 579, 582. That evidence may be expert testimony from art historians or curators, but it may also be non-artistic contextual evidence, such as (for the Al Jolson example above) testimony from an expert on vaudeville and Broadway.

In assessing how a work may “reasonably be perceived,” however, courts should take care not to confuse knowledge about an artist’s style or body of work

⁷ Wil Haygood, *Why Won’t Blackface Go Away?*, N.Y. Times (Feb. 7, 2019), <https://www.nytimes.com/2019/02/07/arts/blackface-american-pop-culture.html>.

with the popularity of the artist's work. Goldsmith is right in one respect: a work should not be viewed as transformative merely because a well-known artist has created it. Goldsmith Br. 39-40. Indeed, fair use is often most critical to lesser-known artists who rely on the doctrine to protect their breakthrough alterations of more established artists' works. *E.g.*, Irina Tarsis, *Paper, Rock, Scissors: Smith-Clay Conflict and Resolution*, Center for Art Law (Nov. 4, 2013), <https://itsartlaw.org/2013/11/04/paper-rock-scissors-smith-clay-conflict-and-resolution/> (describing a fair-use dispute arising from Lauren Clay's aesthetic transformations of David Smith's "monumental steel sculptures"); Ivy Cooper, *Hello Masterpiece: Leslie Holt* (May 10-June 21, 2008) (describing Leslie Holt's *Hello Masterpiece* series, in which Sanrio's Hello Kitty is placed in recreations of masterworks of European and American Art in miniature, creating a "conflation of high and mass culture that marks 21st century Capitalism"), http://phdstl.com/hello_masterpiece.html.

Finally, the foregoing discussion should not be understood to suggest that a trial will be necessary in most cases—that would make asserting a fair-use defense practically impossible for all but the wealthiest artists. To the contrary, the abundance of fair-use cases decided at an early stage of litigation suggests that transformation may frequently be discernible to a well-informed judge, *see Lombardo v. Dr. Seuss Enters., L.P.*, 279 F. Supp. 3d 497, 504 (S.D.N.Y. 2017)

(noting that many courts have resolved fair-use issues at the pleading stage); *e.g.*, *Blanch*, 467 F.3d at 244 (affirming fair-use determination made on undisputed summary judgment record), even though “persons trained only to the law” may not ordinarily be the best “final judges of the worth of pictorial illustrations,” *Bleistein v. Donaldston Lithographing Co.*, 188 U.S. 239, 251 (1903). Thus, when transformative use can be discerned on the face of the pleadings, by comparison of the works in appearance and context, or through review of other undisputed evidence, no trial or further factfinding will be necessary.

III. A broad understanding of fair use transformation is necessary to protect progress in the arts.

A robust interpretation of the fair-use doctrine is particularly important in the visual arts, where artists have long borrowed and appropriated creative elements from other artists. As Justice Story recognized, in art, as elsewhere, there are “few, if any, things” that “are strictly new and original throughout.” *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (Story, J.). For example, Manet’s 19th-century Impressionist masterpiece, *Olympia*, borrowed from the 16th-century *Venus of Urbino* by Titian, which in turn used as its foundation an earlier work called *Sleeping Venus* by Giorgione. The similarities between Manet’s work and the earlier Renaissance pieces are visually apparent. But Manet’s work was intended to convey a very different message than its 16th-century counterparts by placing a French

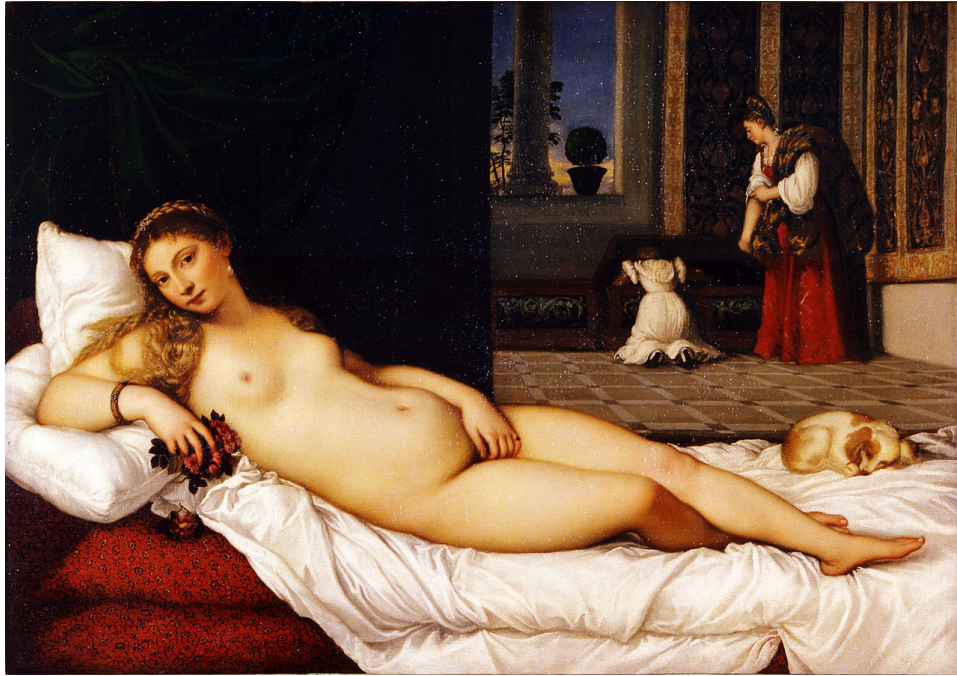
prostitute in the same position that an Italian courtesan would have found herself three centuries earlier. As the French novelist Emile Zola remarked:

When our artists give us Venuses, they correct nature, they lie. Edouard Manet asked himself why lie, why not tell the truth; he introduced us to Olympia, this *fille* of our time, whom you meet on the sidewalks.

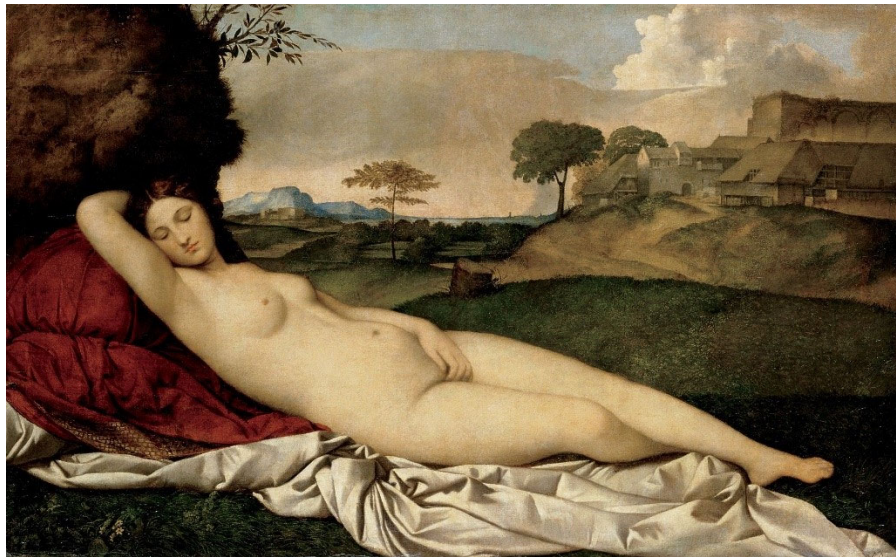
Frits Andersen, *Corpus Delicti*, in *Reinventions of the Novel: Histories and Aesthetics of a Protean Genre* 79 (2004). The visual similarities and dissimilarities between the works are obvious in some respects—for example, the similar poses, forms, and contrast of light and dark. But understanding the different expressions—Manet’s commentary about the bleakness of Parisian life against Titian and Giorgione’s glamorization of High Renaissance beauty—is far less obvious.



Édouard Manet, *Olympia* (1863) (Musée d'Orsay, oil on canvas)



Titian, *Venus of Urbino* (1538) (Uffizi Gallery, oil on canvas)



Giorgione, *Sleeping Venus* (1510) (Gemäldegalerie Alte Meister, Dresden, oil on canvas). And in a contemporary iteration of the pose, Mickalene Thomas uses the pose as a commentary on race: “oust[ing] the white European woman from the bed

where she often lounges, attended by a black maidservant,” such as the one in Manet’s work.



Mickalene Thomas, *A Little Taste Outside of Love* (2007) (Brooklyn Museum of Art, enamel on rhinestones on wood panel), <https://www.brooklynmuseum.org/opencollection/objects/5044>. Without prior knowledge of the preceding Venuses, a reasonable observer could not capture that novel meaning and message.

Secondary works can sometimes be visually indistinguishable from their source works. Andy Warhol famously silk-screened another artist’s “Brillo” graphic designs onto plywood sculptures that were the exact size of the cardboard boxes in which Brillo pads were sold.



Andy Warhol, *Brillo Box* (1964) (Andy Warhol Museum, synthetic polymer paint and silkscreen ink on wood). To understand the work as (among other things) a commentary on art as a mass-produced commodity, a reasonable observer would need further context: that Warhol “made numerous *Brillo Boxes* and sold them to art collectors and museums,” making his works “mass-produced consumer goods.” Philadelphia Museum of Art, *Brillo Boxes*, <https://philamuseum.org/collections/permanent/89204.html>.

Warhol’s work has itself been appropriated and copied for artistic commentary—the artist Charles Lutz created *Warhol Denied*, a series of paintings and sculptures that exactly replicated Warhol’s aesthetic. Lutz submitted his copies to the Andy Warhol Art Authentication Board *not* as works purporting to have been created while Warhol was alive (this being years after the artist’s death), but rather

for the stated purpose of obtaining the judgment of that Board that the works were not “authentic” Warhols, which it did by stamping them “DENIED.” He did so as a conceptual project and commentary on two questions of art criticism: (1) what is an “authentic” Warhol anyway; and (2) who has the authority to decide that question? Michael Straus, *Charles Lutz “Babel (Brillo Stockholm Type),”* Brooklyn Rail (Mar. 2013), <https://brooklynrail.org/2013/03/artseen/charles-lutz>.



Charles Lutz, *BABEL (Brillo Stockholm Type)* (2013) (silkscreen on cardboard).

Fair use allows this artistic progress to continue because it tolerates “copying” in the legal sense, when the copying serves a purpose, or results in a change of meaning, different from that of the original creation. *Campbell*, 510 U.S. at 579. And because art’s meaning or message cannot be limited to one objective determination, fair use (and the determination of whether a work has been sufficiently “transformed”) also cannot be so limited. Rather, that determination

requires only that such transformation “may reasonably be perceived.” *Id.* at 582; *see also Pope v. Illinois*, 481 U.S. 497, 504-05 (1987) (Scalia, J., concurring) (“[I]t is quite impossible to come to an objective assessment of (at least) literary or artistic value.”). Two observers may perceive different messages while looking at a secondary work that borrows from an original one. But if one of those observers may reasonably perceive a “new expression, meaning, or message” in the secondary work, the work should be deemed sufficiently “transformed” for fair use.

To be sure, a broad fair-use doctrine does not mean an artist can steal another artist’s creative work without consequences. A court need not find fair use based solely on an artist’s say-so: courts are well-positioned to determine if a work is truly transformative, judge the credibility of an artist’s statement of intent, and discern whether there is a genuine dispute as to transformation. *E.g., Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992).

But Goldsmith’s fair-use regime would chill artistic progress and innovation. There is no doubt that an artist is entitled to the fruits of her creativity. Yet it is equally important that an artist be able to build upon what other artists have done. Goldsmith’s fair-use test would make that accretion impossible, as she argues that there is no “transformation” when a work of visual art is copied to create another work of visual art, both sharing the same broad purpose of being visual art. Goldsmith Br. 38. That is true whether the first artist is a photographer or a painter.

Yes, an artist can seek a license to copy a work, as Goldsmith suggests (at 36), but that would not undo the creative damage caused by tightening fair-use protections in the extreme manner that Goldsmith proposes. The original artist (or her representative) could simply deny a license for any concept she does not like, and would retain that creative veto for her entire life—and another 70 years after that. 17 U.S.C. § 702.

The First Amendment values embodied in the fair-use doctrine prevent such stifling: a “new expression, meaning, or message” is all that is needed to make a “copying” work transformative. The District Court discerned new expression in Warhol’s *Prince Series*, and Goldsmith does not dispute that observation. It further found new meaning and message conveyed through Warhol’s alterations. Fidelity to fair use—and the “Progress of Science and useful Arts” that it is intended to protect, U.S. Const. art. I, § 8, cl. 8—requires affirmance of the District Court’s judgment.

CONCLUSION

This Court should affirm the District Court's judgment.

Dated: February 28, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 32(g)(1), I hereby certify that the foregoing Brief of the Robert Rauschenberg Foundation as *Amicus Curiae* Supporting Appellee complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5). According to the word count feature of Microsoft Word, the word-processing system used to prepare the brief, the brief contains 6,949 words.

I further certify that the foregoing brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman font, a proportionally spaced typeface.

Dated: February 28, 2020

/s/ Jaime A. Santos

Jaime A. Santos

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2020, I electronically filed the foregoing document with the United States Court of Appeals for the Second Circuit by using the CM/ECF system.

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