19-2420-cv

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 and LYNN GOLDSMITH, LTD.,

Defendants-Counter-Plaintiffs-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION AND RULE 35(b) STATEMENT

The panel's opinion in this case conflicts with Supreme Court and Second Circuit precedent and creates a circuit split on an issue of exceptional importance to copyright law and free expression. In a holding that threatens to render unlawful many of the most historically significant artistic works of the last half-century, the panel adopted an unprecedentedly narrow conception of the "fair use" doctrine.

Until the panel's decision, the fair-use inquiry turned largely on whether a creative work deployed pre-existing content to express a new "meaning[] or message." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). If so, the new work was "transformative," and thus likely to be fair use. The panel expressly departed from that principle. It established a first-of-its-kind categorical rule, effectively foreclosing the fair-use defense for *any* creative work that "recognizably derive[s] from, and retain[s] the essential elements of," a pre-existing one—*even where* the new work has a different meaning or message from the original. Op.28. Applying its novel principle, the panel found iconic depictions of the musician Prince by the artist Andy Warhol were not fair use of the reference photograph on which they were based. Op.51.

That holding sharply conflicts with the Supreme Court's binding interpretation of the Copyright Act and contradicts the rule embraced by other courts of appeals and this Court's own prior decisions—to wit, that works using

pre-existing material to express a new and different meaning or message *are* transformative, regardless of whether their source material remains recognizable.

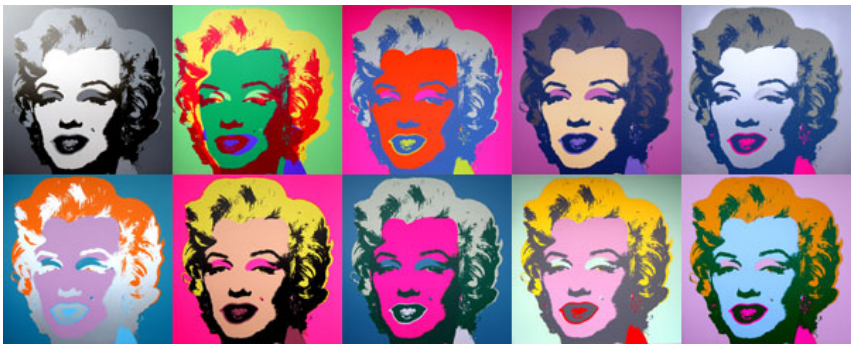
Rehearing is especially appropriate because just days after the panel's decision, the Supreme Court issued its first major opinion on the fair-use doctrine in over 25 years. *See Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021). The *Google* decision comprehensively refutes the panel's reasoning. Indeed, *Google* described—as a paradigm example of transformative use—a Warhol-like work of art that is materially indistinguishable from the works at issue here. *Id.* at 1203. A decision by this Court conflicting with the most recent authoritative decision of the Supreme Court cannot stand. Rehearing is warranted.

BACKGROUND

1. Because "rigid application" of the copyright laws "would stifle the very creativity which [they are] designed to foster," *Stewart v. Abend*, 495 U.S. 207, 236 (1990), the Copyright Act grants the public the right to make "fair use" of copyrighted content. 17 U.S.C. § 107. Fair use turns on a consideration of four factors: (1) "the purpose and character of the use," (2) "the nature of the copyrighted work," (3) "the amount and substantiality of the portion used," and (4) "the effect of the use upon the potential market for or value of the copyrighted work." *Id.* Works qualifying as "transformative" under the first factor "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright."

Campbell, 510 U.S. at 579. A work is "transformative," the Supreme Court has explained, if it "adds something new" by "altering [the source material] with new expression, meaning, or message." *Id.* By protecting such expression, the fair-use defense provides a critical "First Amendment safeguard[]." *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003).

2. This case concerns Andy Warhol's creation of sixteen works of visual art known together as the "Prince Series." SPA9-10. As exemplified by his iconic portrayals of Marilyn Monroe, Jackie Kennedy, Mao Zedong, and others, Warhol's "distortion" and "careful manipulation" of photographs have long been understood as "social comment" about the exploitation and dehumanization of celebrity, among other topics. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001). Warhol's "typical" process involved painting, pencil drawing, and silkscreen printing to: (i) transform the "detailed, three-dimensional being" depicted in a photograph into "a flat, two-dimensional figure," (ii) soften, outline, or shade "bone structure that appear[ed] crisply in the photograph," (iii) add "loud, unnatural colors," (iv) change the composition to remove the subject's "torso," and (v) obscure the subject's facial expression "almost entirely." SPA10, 24-25. For example, here are ten silkscreen portraits of Monroe that Warhol made in 1967, alongside the original photograph:



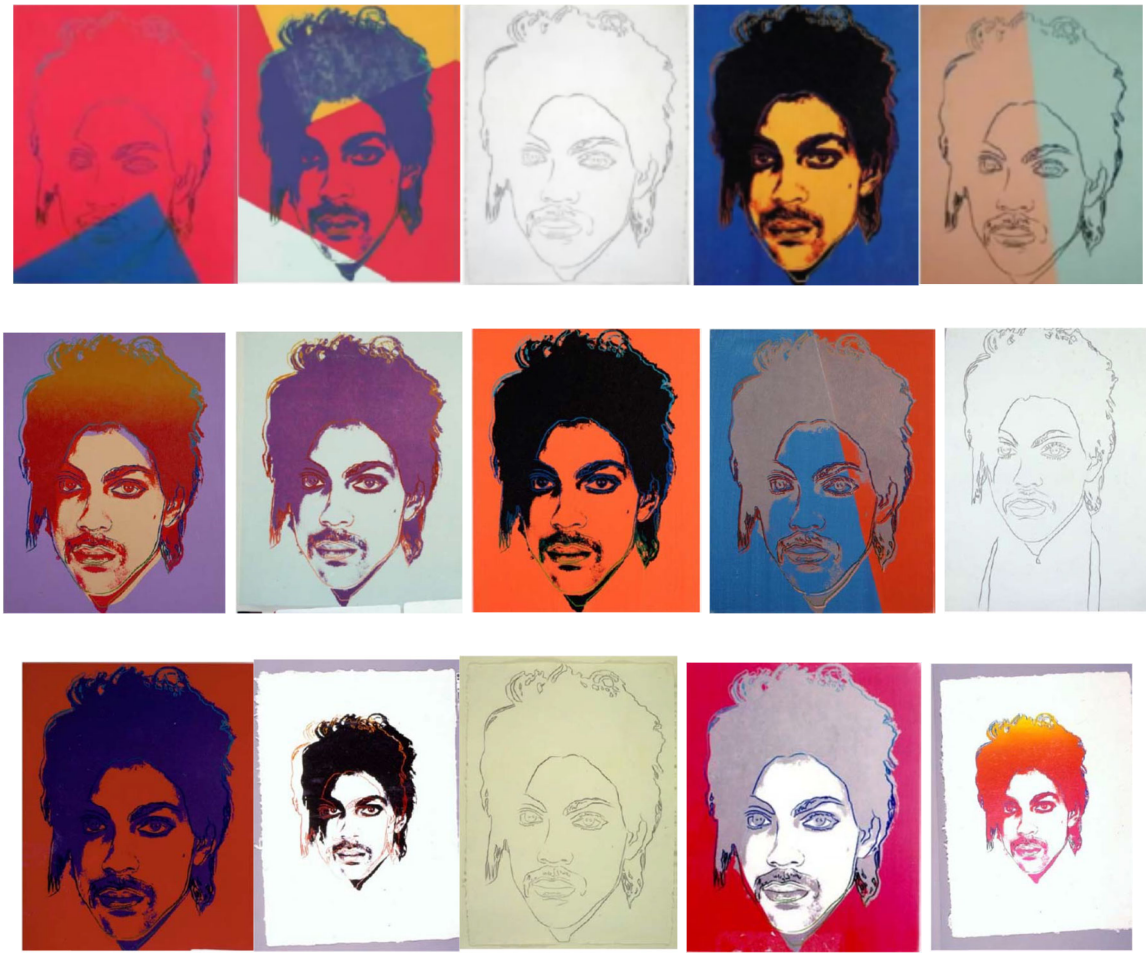
In 1984, *Vanity Fair* commissioned Warhol to create an image of the musician Prince for a magazine article. SPA8. *Vanity Fair* licensed a black-and-white photograph of Prince taken three years earlier by photographer Lynn Goldsmith. SPA8.

As Goldsmith explained, her intimate, true-to-life photograph portrayed Prince as "a really vulnerable human being," preoccupied with "immense fears" about his newfound stardom. JA1553, 1557-58. While the work reflects valuable artistic choices, copyright law protects only Goldsmith's own creative expression—*e.g.*, the photograph's lighting, shading, color, contrast, and composition—but not other features of the work, such as the selection of Prince as a subject, or Prince's facial

features and hairstyle, or the look on his face. *See, e.g.*, *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 116 (2d Cir. 1998).

Using Goldsmith's photograph, Warhol produced the first image in the Prince Series. SPA9. Warhol cropped the image to remove Prince's torso, resized it, altered the angle of Prince's face, and changed tones, lighting, and detail. JA1370. Warhol then added layers of bright and unnatural colors, conspicuous hand-drawn outlines and line screens, and stark black shading that exaggerated Prince's features. JA1371. The result is a flat, impersonal, disembodied, mask-like appearance. SPA31.

Warhol then created fifteen more images of Prince using Goldsmith's photograph, all of them similarly overhauled. SPA9-11. As the district court explained, Warhol's creative process "transformed" Goldsmith's intimate depiction into "an iconic, larger-than-life figure," stripping Prince of the "humanity . . . embodie[d] in [the] photograph" to comment on the manner in which society encounters and consumes celebrity. SPA25; *see* JA 1373.



Since 1984, the Prince Series works have been displayed in museums, galleries, and other public places dozens of times. SPA12.

3. In 2016, Goldsmith accused the Andy Warhol Foundation (AWF), which held the rights to the Prince Series, of infringing her photograph. SPA12-13; Op.11. AWF sued Goldsmith for a declaration of non-infringement, and Goldsmith countersued for infringement. Op.11.

The district court held that the fair-use defense applied and granted summary judgment to AWF. SPA36-37. On the first factor, the court concluded that the Prince Series was "transformative" because it communicated a different "meaning"

and "message" from the original. SPA22, 24. Whereas Goldsmith's photograph portrayed Prince as "uncomfortable" and "vulnerable," the district court explained, the Prince Series "reflect[ed] the opposite" message. SPA24-25; *see* JA1373.

After determining that the second factor (nature of the copyrighted work) favored "neither party," the district court concluded that the third factor (amount and substantiality of the pre-existing work used) favored fair use. SPA26-33. The court found that "Warhol removed nearly all the photograph's protectable elements," observing that neither "Prince's facial features" nor his "pose" are "copyrightable." SPA32-33. Finally, as to the fourth factor (market effects), the court concluded that Warhol's heavily stylized images were far from a "market substitute" for Goldsmith's "intimate and realistic photograph of Prince." SPA35.

4. A panel of this Court reversed. Op.4-5. As to the first factor, the panel rejected an approach to transformative use that "seek[s] to ascertain" the "meaning of the works at issue." Op.27. Indeed, like the district court, the panel expressly acknowledged that Goldsmith's photograph and Warhol's Prince Series embodied different messages: Whereas Goldsmith "portray[ed] Prince as a 'vulnerable human being,'" the panel observed, Warhol deliberately "strip[ped] Prince of that humanity and instead display[ed] him as a popular icon." Op.26. But the panel nevertheless held that Warhol's concededly different "meaning [and] message," *Campbell*, 510 U.S. at 579, were beside the point, Op.27. What mattered instead was that the Prince

Series "recognizably deriv[ed] from, and retain[ed] the essential elements of, its source material"—that is, each of Warhol's images remained "a recognizable depiction of Prince." Op.28-29 & n.4.

The panel reasoned that, at least where the works in dispute serve the same general "function"—here, being "works of visual art" constituting "portraits of the same person"—follow-on works like the Prince Series cannot be transformative unless they sufficiently obscure the "foundation upon which [they are] built." Op.29, 31. Thus, even though the Prince Series gave "a different impression of its subject" than Goldsmith's photograph, the panel concluded that Warhol had, in substance, "present[ed] the same work [as Goldsmith]." Op.30-31.

After concluding that the Prince Series was not transformative as a matter of law, the panel held that the remaining section 107 factors favored Goldsmith. In the panel's view, Goldsmith's photograph was "both creative and unpublished" (factor two); the Prince Series "borrow[ed] significantly" from the photograph (factor three); and while "the primary market[s]" for Goldsmith's photograph and the Prince Series "do not meaningfully overlap," the works could compete in secondary markets for licensing portraits of Prince to "popular print magazines" and other "artists" (factor four). Op.37, 40, 45, 49-50. The panel thus concluded that the "defense of fair use fails as a matter of law." Op.51. Having separately concluded

that Goldsmith had otherwise shown "actionable infringement," Op.51-52, the panel held that Warhol could no longer "claim" the Prince Series "as his own," Op.33.

ARGUMENT

The panel's novel test for transformative use contravenes the Supreme Court's opinions in *Google* and *Campbell*, conflicts with numerous decisions from other federal courts of appeals, and effectively overrules this Court's own precedent. The panel's test replaces the fair-use doctrine's "guarantee of breathing space" for creative expression with the promise of a muzzle for anyone inspired to draw on existing imagery to create "new expression." *Campbell*, 510 U.S. at 579. As numerous commentators have recognized, it imperils the fate of countless works of art, chills future expression, and upends copyright law in this Circuit. Rehearing by the panel or full court is urgently required.

I. THE PANEL'S DECISION DEPARTS FROM THE ESTABLISHED TEST FOR TRANSFORMATIVE USE

A. The Panel's Decision Conflicts With Supreme Court Precedent

The Supreme Court's test for transformative use turns on whether an allegedly infringing work conveys "new expression, meaning, or message" distinct from the original. *Campbell*, 510 U.S. at 579. The panel's decision here squarely conflicts with that standard.

The panel unequivocally rejected a test for transformative use that requires "ascertain[ing] the intent behind *or meaning of* the works at issue." Op.27 (emphasis

added); *see also* Op.26 (holding that transformative use "cannot turn" on "the meaning or impression that a critic—or for that matter, a judge—draws from the work"). "Instead," the panel explained, "a judge must examine whether the secondary work[] . . . stands apart from the 'raw material' used to create it" by inspecting the *visual differences* between the two works. A work cannot "stand[] apart," the panel held, if it "remains both recognizably deriving from, and retaining the essential elements of, its source material." Op.28; *see also* Op.25 (stressing that works granted fair-use protection in prior cases "juxtaposed [the original] with other photographs and 'obscured and altered [them] to the point that [the] original [is] barely recognizable'").

The panel's rule, therefore, categorically denies "transformative" status to all works whose source material is clearly "recognizable" within them—*even where* it is undisputed that the later works convey a distinct message or meaning. That result cannot be squared with *Campbell*, where the Supreme Court held that transformative use turns on whether an artist's use of a copyrighted work "adds something new," such as a distinct "meaning[] or message," not whether it sufficiently stamps out traces of its source material. 510 U.S. at 579.

If there were any doubt, the Supreme Court made this distinction unmistakably clear in its *Google* decision, issued shortly after the panel's opinion here. In *Google*, the defendant "copied" the plaintiff's software code "precisely,"

and did so for "the same reason" that the plaintiff wrote it: "to enable programmers to call up implementing programs that would accomplish particular tasks." 141 S. Ct. at 1203. Yet the Supreme Court held that such line-for-line copying—where the original work was obviously "recognizable" in the new one—was nonetheless transformative. *Id.* Even though the defendant used the pre-existing material *verbatim* in its follow-on work, and even though both works were of the exact same type, the follow-on work served a socially constructive, distinct purpose—the development of "a highly creative and innovative" alternative to the original. *Id.* So the first factor favored fair use. *Id*. at 1204.

The *Google* Court even explained how that principle would apply in a case just like this one—observing that an "artistic painting" could "fall within the scope of fair use even though it precisely replicates a copyrighted advertising logo to make a comment about consumerism"—an obvious nod to Warhol himself. *Id.* at 1203; *see* JA1311 (reproducing Warhol's iconic work, *32 Campbell's Soup Cans*). A precisely replicated image, of course, would "both recognizably deriv[e] from, and retain[] the essential elements of, its source material," Op.28, and would thus fail the panel's novel legal test. Indeed, a new message or idea—whether expressed in lines of code or works of art—often *requires* having recognizable source material. Using a branded soup can to "comment about consumerism" only makes sense if the original image is recognizable. *Google*, 141 S. Ct. at 1203; *see also Campbell*, 510

U.S. at 580-81 (noting that a musician might need to "mimic an original [song] to make [his] point").

So too with the Prince Series. Warhol's comment about fame and celebrity would have been lost without "a recognizable depiction of Prince." Op.29 n.4. And even the panel agreed that Warhol used Goldsmith's photograph to convey a new message. Op.26. While Goldsmith portrayed Prince as "a vulnerable human being," the panel acknowledged, Warhol "strip[ped] Prince of that humanity" and transformed the musician into "a popular icon." Op.26; *see also* JA1337. Only by deeming *irrelevant* Warhol's starkly different "meaning [and] message," *Campbell*, 510 U.S. at 579, could the panel conclude that his works failed to "transform" the original. Op.26-28.

The panel considered that unprecedented rule necessary to avoid "crowding out statutory protections for derivative works." Op.20. Not so. Run-of-the-mill derivative works like the average "film adaptation of a novel," Op.21, do not express a new message. Although they incorporate "the creative contributions of the screenwriter, director, cast, camera crew," and so on, Op.21, adaptions tell fundamentally the same story—with the same core message—as their source material. For instance, the *Harry Potter* movies cast J.K. Rowling's novels in a different medium, but they use the same plot to convey the *same* messages about the struggles of adolescence and the triumph of love over hate. There is nothing

transformative about that. But here, it is undisputed that the Prince Series communicated precisely the "opposite" message that Goldsmith's photograph did. SPA24. Warhol's works were therefore undeniably "transformative" under *Campbell* and *Google*.[1]

B. The Panel's Decision Conflicts With This Court's Prior Decisions And Creates A Circuit Split

The panel's decision also warrants rehearing because it sharply breaks with decisions from this Court and other federal courts of appeals. *See* Fed. R. App. P. 35(b)(1)(A)-(B).

The panel expressly limited this Court's seminal decisions in *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), and *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006), to their "own facts" by rejecting a "literal construction" of their key legal holdings. Op.18-19. Like this case, *Blanch* and *Cariou* concerned works of visual art that incorporated and recontextualized copyrighted photographs. In *Blanch*, this Court deemed the work in suit transformative precisely because of its "sharply different objective[]": The new piece commented "on the social and aesthetic consequences of mass media," while the original photograph conveyed an "'erotic

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[1] Of course, where a film adaption *does* "transform" the core "message of the underlying literary work," Op.22, it *is* transformative. Contrary to the panel's mistaken assertion, a work can be *both* "derivative" *and* protected by fair use. *See* 17 U.S.C. § 107 (stating that "fair use" is not copyright infringement, "[n]otwithstanding the provisions of section[] 106," which include the right to exploit "derivative" works).

sense.'" 467 F.3d at 252-53. And in *Cariou*, this Court explained that most of the art at issue "employ[ed] new aesthetics with creative and *communicative results* distinct" from the original photographs. 714 F.3d at 708 (emphasis added).

Notably, *Cariou* pointed to "Andy Warhol's work, including work incorporating appropriated images . . . of Marilyn Monroe," as the quintessential example of transformative use, because it "comments on consumer culture and explores the relationship between celebrity culture and advertising." *Id.* at 706. Yet the panel's decision here holds that a work materially identical to the illustrative example given in *Cariou* is in fact *not* transformative. That is an obvious—and impermissible—effort to overturn this Circuit's settled precedent. *See also Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608-09 (2d Cir. 2006) (finding the use of entirely unmodified concert posters to be transformative).

The panel's decision also creates an open conflict with other circuits, including the Ninth Circuit, which (like this Circuit) is a major forum for copyright litigation. In *Seltzer v. Green Day, Inc.*, for example, the Ninth Circuit squarely held that a work qualifies as transformative "as long as new expressive content or message is apparent," "even where" the "work *makes few physical changes to the original*." 725 F.3d 1170, 1177 (9th Cir. 2013) (emphasis added). In that case, a band incorporated an original drawing into a visual display. *Id.* at 1173-75. Even though the drawing remained "prominent" and readily recognizable, the Ninth

Circuit concluded that the band reproduced the drawing to express a "plainly distinct" message "about the hypocrisy of religion." *Id.* at 1176-77. But under what is now Second Circuit precedent, *Seltzer* would necessarily have come out the other way, because the secondary work there "recognizably deriv[ed] from, and retain[ed] the essential elements of," the original. Op.28.

Seltzer is just one of many cases where the Second Circuit's rule would require a contrary outcome. *See, e.g.*, *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000) (exact reproduction of salacious photographs found to be transformative use because the new message was "not just to titillate, but also to inform"); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 693 (7th Cir. 2012) (verbatim imitation of YouTube clip found to be transformative use because the new message was "critiqu[ing] the social phenomenon that is the 'viral video'"). And other courts—unlike the panel decision here—likewise base the transformative-use inquiry on whether the allegedly infringing work employs copyrighted material to convey a distinct message. *See, e.g.*, *Balsley v. LFP, Inc.*, 691 F.3d 747, 759 (6th Cir. 2012); *Gaylord v. United States*, 595 F.3d 1364, 1373 (Fed. Cir. 2010); *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 263 (4th Cir. 2019).

By contrast, no other court of appeals holds—as the panel did here—that a follow-on work is *not* fair use if it retains a "recognizable foundation" in pre-existing material, even when the follow-on work objectively recasts the original to express a

new meaning or message. Op.27, 31. The panel's message-blind test for transformative use makes this Court a stark outlier among the circuits.

II. THE PANEL'S ANALYSIS OF THE FOURTH FAIR-USE FACTOR IS IRRECONCILABLE WITH *GOOGLE*

The panel's decision as to the fourth fair-use factor also conflicts with *Google*. There, the Supreme Court held that the "market harm" inquiry requires a "*balancing* of public benefits [against any alleged] losses to copyright owner." 141 S. Ct. at 1206 (emphasis added). The Court stressed that this factor "can prove more complex than at first it may seem," because it "require[s] a court to consider" (1) "the amount of money that the copyright owner might lose," (2) the "source of th[at] loss" and (3) "the public benefits the copying will likely produce." *Id.*

Under *Google*'s "balancing" approach, the fourth factor weighs decisively in AWF's favor here. Countless works incorporating existing, recognizable imagery, such as Warhol's, are widely displayed, highly influential artistic achievements, whose "public benefit" cannot possibly be denied.[2] The public harm from chilling the creation and curation of such works far outweighs the private loss of any

[2] *See, e.g.*, Paul Alexander, *'Warhol' paints the Pop Art icon as the most influential artist of the 20th century*, Washington Post (Apr. 17, 2020), https://www.washingtonpost.com/entertainment/books/warhol-paints-the-pop-art-icon-as-the-most-influential-artist-of-the-20th-century/2020/04/15/664124e8-7db4-11ea-9040-68981f488eed_story.html.

potential licensing fees.[3] Rehearing is warranted because the panel did not conduct the balancing analysis now plainly mandated by *Google*.

III. THE PANEL'S DECISION IS EXCEPTIONALLY IMPORTANT AND WILL HAVE FAR-REACHING CONSEQUENCES

The panel's decision will have extraordinary and harmful effects in an area of exceptional public importance. Fed. R. App. P. 35(b)(1)(B). The panel's opinion threatens to render *unlawful* large swaths of contemporary art that incorporates and reframes copyrighted material to convey a new and different message—effectively outlawing a genre widely viewed as "one of the great artistic innovations of the modern era."[4]

To the extent that works like the Prince Series do not make fair use of their source material, here are just a few of the apparent implications as a matter of copyright law:

- Museums cannot lawfully display the works. *See* 17 U.S.C. § 109(c) (display right limited to copies "lawfully made").

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[3] The panel's reliance on Goldsmith's *hypothetical* licensing market in "popular print magazines" (Op.48) also contravenes *Google*, in which the Court noted the "'danger of circularity posed' by considering unrealized licensing opportunities." 141 S. Ct. at 1207.

[4] Blake Gopnik, *Warhol a Lame Copier? The Judges Who Said So Are Sadly Mistaken*, N.Y. Times (Apr. 5, 2021), https://www.nytimes.com/2021/04/05/arts/design/warhol-copyright-appeals-court.html.

- Owners of the works cannot lawfully resell them. *See id.* § 109(a) (sale right limited to copies "lawfully made").
- The copyright owner of the source material may seek the "impoundment" and "destruction" of the works. *See id.* § 503.
- Artists like Warhol lose all copyright protection, such that licensing fees for their new works can be reaped only by the copyright owner of the source material (even when the second artist's contributions underpin all licensing demand). *See id.* § 103(a) (no copyright protection for portions of works unlawfully using pre-existing material).

Countless seminal works of contemporary art would be imperiled to suffer the same fate as the Prince Series.[5]

Perhaps more important, the panel's holding will inevitably chill the creation of similar art in the future. As this Court has observed, "[w]ithout any possibility of copyright protection against infringement for [their] original fair-use [work],

[5] Acknowledging precisely this cause for "alarm" in a concurrence, Judge Jacobs tried to reassure the art world that "Goldsmith does not claim that the original [Prince Series] infringe." Jacobs Op.2. But that is not correct: Goldsmith expressly contended that the Prince Series was "a *classic* example of an infringing derivative work," Goldsmith Br.21 (emphasis added), and the panel's decision, in turn, expressly concluded that Warhol could not claim the Prince Series "as his own" *because it was an act of infringement*, Op.33.

[creators] might be dissuaded from creating at all." *Keeling v. Hars*, 809 F.3d 43, 50 (2d Cir. 2015). If left in place, the panel's decision will deter many artists—particularly up-and-coming artists who cannot afford royalties or lawyers—from using existing imagery in the service of new and different creative expression. Indeed, under the panel's rule, the works of Andy Warhol and other generation-defining American artists might never have existed. Stifling creative expression in this manner directly undercuts the central "goal[s] of copyright," *Campbell*, 510 U.S. at 579, and eviscerates the "First Amendment safeguard[]" that fair use is meant to provide, *Eldred*, 537 U.S. at 220.

CONCLUSION

The rehearing petition should be granted.

Dated: April 23, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the type-volume limitations of Federal Rules of Appellate Procedure 35(b)(2) and 40(b)(1) because it contains 3,892 words, excluding the parts of the foregoing exempted by Federal Rule of Appellate Procedure 32(f). The petition is prepared in a format, typeface, and type style that complies with Federal Rule of Appellate Procedure 32(a)(5)-(6).

Dated: April 23, 2021

/s/ Roman Martinez
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