No. 21-869

In the Supreme Court of the United States

THE ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC.

Petitioner,

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.

Respondents.

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

BRIEF OF AMICUS CURIAE JEFFREY SEDLIK, PROFESSIONAL PHOTOGRAPHER AND PHOTOGRAPHY LICENSING EXPERT, IN SUPPORT OF RESPONDENTS

Matthew Hersh
Counsel Of Record
99 Blair Alley SW #1155
Washington, DC 20024
(202) 253-2514
matt@matthewhersh.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Jeffrey Sedlik's expertise as a photographer and as a leader in the visual arts community lend him an uncommon range of interests in this case.

Like Lynn Goldsmith, Sedlik has made his mark as a celebrity photographer. He takes pride in making the most of every photo session. He once earned an audience with B.B. King by sending a note to the blues legend's hotel room before a concert. The portrait he created at the brief session that followed in King's tiny dressing room, depicting King with his beloved guitar Lucille, earned instant acclaim. Another time, after a movie poster shoot with George Burns, he petitioned the famed comedian for an extra minute. With carefully positioned flash backlighting to illuminate and freeze the smoke from his subject's ever-present El Producto Queens cigar, he created a portrait that now hangs in prestigious collections worldwide.

[1] Pursuant to Rule 37.6, no party or counsel authored this brief in whole or in part and no person other than Amicus or his counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of amicus briefs.

Sedlik is a longtime advocate for his colleagues in the visual arts community. He is the President and co-founder of the PLUS Coalition, a global non-profit standards body for the licensing of visual artworks. Before that, he was the National President of the Advertising Photographers of America and a founding Director of the American Society for Collective Rights Licensing. Sedlik has also been a professor at the Art Center College of Design in California for twenty-five years, providing instruction to young visual artists on copyright law, licensing, and creative techniques. When not engaged in these endeavors, Sedlik also manages copyright licensing for the estates of several prominent deceased photographers. He has earned a wide range of honors, including the United Nations Photography Council Industry Leadership Award, the PhotoMedia Photographer of the Year, and a Lifetime Achievement Award from American Photographic Artists.

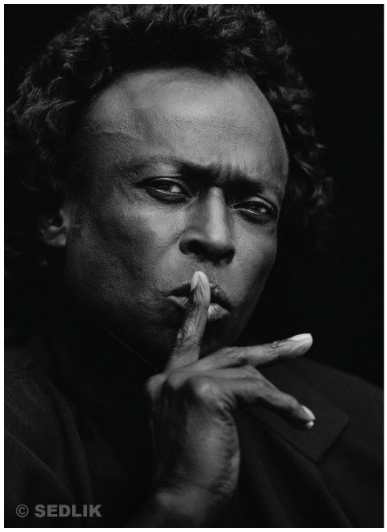
Sedlik has built upon his professional experience to become a recognized expert on copyright matters—particularly in licensing and derivative use of photography, the issues at the core of this case. He has served as a consultant or expert witness in over three hundred copyright actions, many involving a fair use defense to a claim of infringement of a photograph.[2] He has testified before congressional committees on a wide range of proposed copyright reforms and is a

[2] Sedlik was engaged as an expert witness by Respondents and provided testimony when this action was before the District Court, but his engagement concluded at that time and he is no longer retained by Respondents or their counsel.

frequent speaker at copyright events hosted by the United States Copyright Office, the Department of Commerce, and other government agencies. And he serves on the Copyright Public Modernization Committee, at the request of the Librarian of Congress. These and other activities have propelled him into a decades-long struggle to defend photographers against efforts, like those of the Andy Warhol Foundation in this case, to unmoor fair use from its origins and expose artists like Goldsmith to yet more piracy of their life's work.

Sedlik's interest in this case has been driven home, in a deeply personal way, in the months since the Court granted *certiorari*. In 1989, as a young photographer, Sedlik created what one federal court has characterized as "the iconic photographic portrait depicting world-famous jazz musician Miles Davis." *Sedlik v. Drachenberg,* No. CV 21-1102-DSF (MRWx), 2022 WL 2784818 at *1 (C.D. Cal. May 31, 2022) Though his Miles Davis portrait has all too often been exploited by others without permission, a particularly flagrant act of appropriation by an internationally known tattooist in 2017 prompted Sedlik, a generally reluctant litigant, to turn to the courts. The principal defendant in that case, Katherine Von Drachenberg ("Kat Von D" to her many fans), inked a near-perfect replica onto a customer's upper arm—going so far as to meticulously trace the photograph on a lightbox as an intermediate step—and then repeatedly used the unauthorized derivative tattoo (and Sedlik's original portrait) to promote her business to over twenty million followers on social media.

Sedlik's original and the tattooist's unauthorized replica are below:[3]



Sedlik will soon have to convince a jury that the tattoo on the right was not a fair use of the photograph on the left—a task that will become considerably more difficult if the decision below is not affirmed. Sedlik is prepared to assume the risks of litigation in his own case. But many photographers cannot. Sedlik proudly contributes this brief on their behalf.

SUMMARY OF ARGUMENT

Jeffrey Sedlik respectfully tenders this brief to bring to the attention of the Court a career photographer's perspective. Sedlik will not repeat legal arguments that have been made by counsel for Goldsmith. Those advocates have ably explained why

---

[3] Record in No. 21-1102 (C.D. Cal.), Doc. 35-17 (Miles Davis photograph); *id*., Doc. 35-28 (tattoo). A copyright notice has been added to Sedlik's photograph here to identify Sedlik as the copyright owner on copies extracted from this brief

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), and its progeny, do not remotely support the argument the Andy Warhol Foundation advances here. Sedlik tenders this brief, instead, to make three distinct points.

1. The extreme position on fair use taken by the Foundation poses an existential threat to photographers. On the surface, the Foundation's rule looks like it treats all creative works the same. In reality it does anything but. By the Foundation's boundless theory, anyone can claim a transformative use—and thereby assert an essentially irrebuttable presumption of fair use—merely by claiming a change to the "meaning or message" of a work. We are not talking about news, criticism, scholarship, parody, or other traditional mainstays of fair use. This is the taking of art to make other art. And no form of art will be so easily taken, under the Foundation's theory, as photography. It takes considerable time to rewrite a book, rearrange a song, recode an operating system, or re-edit a movie. But a novice with a computer, smartphone or crayon can alter a photograph in seconds. "Anyone can do them," Andy Warhol said of his own alterations. J.A.195. Everyone will.

Experience bears this out. Photographers have come to expect that when new fair use doctrines emerge in the circuit courts, they will be built upon the backs of photographers. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006), *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006), *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), and *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014), are all landmark decisions that considerably expanded the scope of fair use doctrine in the realm of visual

arts. And each came at the expense of photography. Even *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013), the graphic arts case that arguably stretched the fair use doctrine to its farthest extreme to date, threatens terrible consequences for the art and profession of photography. Whatever can be done to a work of graphic art can be done just as easily to a photograph.

The Foundation's limitless doctrine threatens the most vulnerable class of creative artists. Secondary and derivative uses—like the use that is at the heart of this case—are essential for photographers to make a living. Photographers cannot afford to rest on their laurels and wait for royalty checks to arrive. They are forced to constantly innovate—by creating new works, identifying new and different ways to exploit their works, acquiring new clients, and opening new markets. If the Foundation's proposal becomes the law, many photographers will lose the lion's share of their revenue. And unlike the corporate titans of motion pictures, music, books and software, few photographers have the resources to protect their works from piracy. Photographers face a Hobson's choice: either ignore the infringing activity and thus encourage continued infringement, or allow their businesses to dwindle away while they chase down pirates. Fair use doctrine is already hard enough on photographers. The Foundation's rule would all but eviscerate their profession.

2. The Foundation does not merely challenge the livelihood of photographers. It also needlessly denigrates the entire art form. Warhol was an undeniable genius. But he also built his empire, at least in part, on the backs of the photographers whose

works he appropriated without compensation. In so doing, he sent the unmistakable message that photographs are free for the taking—a viewpoint that remains in currency today. And now the Foundation asks this Court to bestow on that piracy the protection of the law. The damage is not measured in mere dollars.

The Foundation spreads deep misimpressions about the nature of photography. We have long passed the time when "it was debated whether a camera could do anything more than merely record the physical world." *Meshworks, Inc. v. Toyota Motor Sales*, 528 F.3d 1258, 1264 (10th Cir. 2008) (Gorsuch, J.) (internal quotation omitted). But the Foundation seeks to turn back the clock. To the Foundation, it would seem, "a photograph of Prince is a photograph of Prince"—interchangeable, adaptable, appropriable. That is not remotely true. Celebrity portraits, like all photographs, reflect an almost infinite constellation of creative decisions in lighting, composition, background, perspective, subject pose, depth of field, focal length, camera height, color, texture, contrast, and post-processing (and this is to mention only a few). And it is a fool's game to assume that the value of a photograph rises and falls only with the identity of the subject. Some of the best-known photographs of our time involved subjects who were anonymous to the world and even to the photographer. An Afghan girl with green eyes is testament to that.

It is a similar fallacy that the value of a photograph can be cabined to a single message or meaning, as the Foundation would have this Court believe. Susan Sontag spoke for a generation of photographers when she wrote that "[p]hotographs,

which cannot themselves explain anything, are inexhaustible invitations to deduction, speculation, and fantasy." Susan Sontag, On Photography 24 (1973). Sedlik has licensed his photographs for use in billboards, magazine covers, and advertising campaigns—to say nothing of the inevitable mousepads, t-shirts, and coffee mugs. Each of those uses could readily give a new meaning or message to his work. If they become cost-free, as the Foundation suggests, many photographers will lose their livelihoods.

3. Finally, the Warhol Foundation's chicken-little routine—the suggestion that appropriation artists from the Warhol tradition will suffer if forced to obtain licenses to create derivative works—is not only unseemly but also empirically wrong. Artist reference licenses are widely available and easy to obtain. And like most professional photographers, Sedlik has repeatedly granted such licenses to his fellow artists. The sky will not fall if the Second Circuit's judgment is affirmed.

In a larger sense, the challenge photographers confront today is the same one that movie studios, record labels and music publishers faced at the time that this Court decided *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). Peer-to-peer website pirates were threatening to destroy those industries—and worse, were proclaiming that their acts of theft were legal. This Court put an end to that folly. Today, it is photographers who have suffered from a nearly twenty-year erosion of their rights as creators. The Court has a chance once again to put things right.

ARGUMENT

I. The Warhol Foundation's Boundless Interpretation of the Fair Use Doctrine Poses an Existential Threat to the Business of Photography.

A. The Warhol Foundation's Proposed Rule Would Lead to a Flood of Unlicensed Use of Photographs.

The Warhol Foundation's proposed rule is neutral on its face, but will single out photographers in practice. The Foundation posits that any creative work that conveys a "meaning or message" distinct from the original—just *how* distinct apparently does not matter—should be deemed transformative for purposes of the fair use defense. Brief for Petitioner ("Pet. Br.") 2. That doctrine, at least on the surface, would open the door for appropriation of all types of creative works, be they motion pictures, sound recordings, dramatic works, books, or software code. But the artist who would suffer the greatest loss of rights is the photographer. There are three reasons why.

1. For one thing, it is far easier to alter a photograph—and thereby claim to have imbued that photograph with a new "meaning or message"—than just about any other type of work. The time and effort one invests in a work, of course, does not determine whether that work deserves protection. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359-60 (1991) (rejecting "sweat of the brow" doctrine). But it still tells us something about the *practical* consequences of the Foundation's rule. It takes considerable time to rewrite a book, rearrange a song,

recode an operating system, or re-edit a movie. But anyone with a computer, smartphone or crayon can alter a photograph in seconds, claim a new meaning or message, and thereby entitle themselves—by the Foundation's apparently boundless doctrine—to "a strong presumption" of protection under the law. Pet. Br. 40. If the Foundation's rule is adopted, legalized piracy of photographs will become endemic.

2. Moreover, the argument the Foundation advances here—as it surely knows—is almost certain to be implemented more aggressively when it comes to photographs. Photographers like Sedlik have come to understand that when unfavorable new doctrines evolve in the courts, they and their colleagues will be on the front lines. The opinion on review is a salutary example of a panel that understood the expressive value of photographs and evaluated all four fair use factors correctly. But that decision came in the wake of (and perhaps as a corrective to) a long run of cases that expanded the doctrine of fair use in new and unforeseen ways, each one at the expense of photographers. *See Bill Graham Archives v. Dorling Kindersley Ltd.,* 448 F.3d 605 (2d Cir. 2006) (use of photographs of a famous musical group to illustrate a chronologically ordered, 480-page coffee table book), *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (appropriation of photograph for a collage work), *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (appropriation of black-and-white photographs for oversized canvas collages), and *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014) (appropriation of photograph of a local mayor for a t-shirt). Each of those decisions was on the forefront of a continuous, systematic expansion of fair use

doctrine in the wake of *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). And in each decision, photography paid the price.

The story is quite different with other types of works. A Colorado company once endeavored to make "clean" versions of movies that, by cutting scenes of sex, violence, and profanity, would enable the videos to be watched by families "without concern for any harmful effects on their children." *Clean Flicks of Colorado, LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1240 (2006). Those modifications worked a far greater change in meaning and message than Warhol carried out here. The court rejected fair use. *Id.* at 1241-42. And in *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010), a writer penned a novel about a 76-year-old "Mr. C," ostensibly an advanced-age version of Holden Caulfield, navigating a world in which a fictionalized J.D. Salinger "has been haunted by his creation and now wishes to bring him back to life in order to kill him." *Id.* at 71-72. It was assuredly a different meaning and message from the original. It was *still* not fair use. *Id.* at 83. *See also Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 278 (6th Cir. 2009) (copying of elements of the classic "Atomic Dog" refrain not fair use as a matter of law, even though used in a song with "a different theme, mood, and tone").

Even *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013), the case on which the Foundation premised a circuit split, came indirectly at the expense of photographers. In that case, a rock band used an illustration of a screaming face as the centerpiece for a video backdrop during the performance of one of its songs. The Ninth Circuit, concluding that the video

conveyed "new information, new aesthetics, new insights and understandings" that were distinct from the original piece, termed it fair use. 725 F.3d at 1177. The unlicensed work in that case was a graphic illustration and not a photograph. But the open-ended fair use doctrine elaborated in that case may well be applied, if the decision on appeal is not affirmed, to defeat legitimate infringement claims brought by photographers—such as the claim that Sedlik has brought against the tattooist who purloined his work.

3. Finally, the position staked out by the Foundation would alter the business of photography in ways that go well beyond the question presented in this case. A decision in the Foundation's favor will even further fix in the minds of the public the devastating urban myth that photographs are free for the taking. "Photographs present difficult questions under copyright law," the Foundation tells us at the outset of its brief. Pet. Br. 5. In fact, the principal difficulty photographers face is the dismissive attitude of fellow artists like Warhol and others of his school. Warhol generously helped himself to the work of photographers—displaying the same apparent disregard for copyright as his Foundation does today—to generate a personal fortune, to say nothing of an almost-mythical celebrity status. In the 1960's he was sued three times for it. Brief for Respondent ("Resp. Br.") 38. And here we are again. The Foundation does not apologize for this. The Foundation, like Warhol himself, even appears proud of the artist's appropriation. Its message to other visual artists is unmistakable: Help yourself to all the photographs you want. You'll get away with it.

That attitude is already far too prevalent today. Many people buy into the urban myth that the photographs they find on the internet are free—or that if they modify a photograph even in the slightest, they can use—or worse, sell—the result. When Sedlik brought his claim against the California tattooist, social media ballooned with comments like: "All the photos you have access to on the internet are public domain and nobody can sue," or "It's not 100 percent the photo, so it's very petty and shouldn't be legal to sue." Even worse, Sedlik has faced a battery of harassment, online and off, for standing up to the tattooist who threatened his rights and his livelihood. And he is not the only one.[4]

Equally striking is the fact that the Foundation makes this argument without acknowledging any other form of creative art. It is hard to imagine the Foundation arguing—at least to this Court—that a modest adjustment in "meaning or message" could effectively convey a license to an Elvis Presley song, The Phantom of the Opera, a Better Call Saul episode, the source code for the latest MacOS, or a Harry Potter book. *See also* Brief for The Motion Picture Association, Inc. as Amicus Curiae 5 (hypothesizing a "remake of the film Casablanca that is entirely the

[4] Sedlik is not the first photographer to face a public backlash for attempting to enforce his rights in a photograph of Miles Davis. After Jay Maisel successfully sued Kickstarter CTO Andy Baio for appropriating one of his photos of the legend, critics vandalized his building and deluged his Facebook page with comments along the lines of "hope you get colon cancer and die." https://menuez.com/journal/2020/4/7/a-copyright-manifesto-slander-stupidity-amp-the-mindless-mob-attacks-on-jay-maisel. (A copy of all material sourced to the internet is maintained in counsel's files.)

same as the original except that at the end Rick boards the flight out of the city with Ilsa and leaves Victor Laszlow behind to be apprehended by the Nazis"). But one doubts the Foundation truly intends those consequences. More likely the Foundation, like Warhol himself, simply sees photography as a medium best suited for cannibalization, not subject to the rights and remedies on which they have built an empire.[5]

B. The Business of Photography Is Structurally Ill-Equipped to Withstand the Flood of Unlicensed Uses That the Warhol Foundation's Proposed Rule Would Enable.

It is bad enough that the Warhol Foundation proposes to open the door for a flood of unlicensed uses of photographs. The Foundation's proposal also targets the creative artists who are already the most vulnerable.

1. Photographers almost never make a living off of a single photo session—to say nothing of a single photograph. Musicians or movie producers sometimes have better luck. A single song or Hollywood production might bring in revenue for its creators and their heirs over the course of generations, as classic

---

[5] Not only is it easier to alter photographs than other works; it is also easier to poach them, whether by "right-click" downloads, screenshots, "click and drag," or image harvesting apps. In response to rampant image theft, some photographers—including Sedlik—password-protect their entire websites or employ other technical measures in (largely unsuccessful) attempts to protect their works on the web. *Cf*. https://www.wpoven.com/blog/protect-images/

film festivals and "80's nights" continue to attest. And even a creator who never strikes gold again will still enjoy revenues for a lifetime—as the phrase "one-hit wonder" suggests. The band that both figuratively and literally killed the radio star is one notorious example. https://www.avclub.com/video-killed-the-radio-star-killed-the-radio-star-1798284997.

Photographers have no such equivalent. Of course a single photograph may enjoy fame or popularity. Sedlik and Goldsmith both know what that is like. But the revenue from a "hit" photograph (the term even *sounds* awkward, which is telling) does not approach the revenue from a hit movie or a hit song. Photographs might be gold or platinum in tint but not in status. Moreover, a single use of a photograph in a particular medium—even if lucrative at the time—may well exhaust all future licensing opportunities for that photograph in the same medium. Once a photograph is reproduced on a book cover, for example, no other publisher will seek to license that photograph for another book cover.

So photographers—even successful ones—have to work doubly hard to make ends meet. Sedlik tells his students that the first paycheck they get for licensing a photograph should be followed by at least twenty more. And that is no exaggeration. Photographers are constantly on the lookout for opportunities to exploit licensed secondary uses of their photographs—many of the exact type of uses that, if the Foundation's doctrine is adopted, will become fair game. A typical photographer may grant licenses for use on books, magazines, billboards, subways, shirts, PowerPoint presentations, greeting cards, mouse pads, furniture, bus benches, product packages, coffee mugs, caps,

statues, album covers, movie posters, neckties, jackets, museum banners, motion pictures, television shows, athletic shoes, calendars, posters, trade show displays, restaurant menus, commercials, prints, social media, websites, web advertising, newspapers and many other types of media. And timing also matters: a photographer may elect to withhold a photograph from the licensing marketplace in order to allow the photograph to accrue value over time, while also waiting for an ideal opportunity to maximize compensation for what may be a one-time event. Indeed, Goldsmith did just that with her Prince photographs. *See* Resp. Br. 8.

2. Photographers start from behind in another way. Photographers, more than most other creative artists, face tremendous challenges in collecting license revenues and pursuing infringers.

Begin with the lack of powerful collection and enforcement agencies. There is no ASCAP, Harry Fox Agency, or SoundExchange to collect revenues from photography consumers and distribute them to their rightful owners. Photographers do not have the money and clout to create such organizations. And even if they did, those organizations would not have the same leverage. When it comes to other creative works—and this is particularly so with music and movies—consumers demand to have entire catalogs of content at their fingertips (think: Netflix, Spotify, or Pandora). That was true even in the dance hall days. *See Herbert v. Shanley Co.*, 242 U.S. 591, 595 (1917)

(earliest ASCAP case). Photographers have never been able to wield such leverage.[6]

And then there is the challenge of piracy. All copyright owners spend valuable time chasing down infringers. Nobody relishes the task—but few artists could survive without it. Yet the task is not the same for everybody. Those who create movies and music and software, for instance, have lost tremendous revenues to pirates. But they have advantages as well. For one thing, the creators of most forms of mass entertainment have massive, well-funded trade organizations and a blizzard of AmLaw 100 law firms at their disposal. They can afford to spend time chasing infringers. For another, the people who steal movies and music generally do so to share those works with others (and thereby profit from web traffic). If they cannot be easily found, they do not earn. And because those pirates often enjoy massive revenues, the upside of a lawsuit—infringers' profits or heavy statutory damages—can offset the cost of litigation.

None of this is true for photographers. There is no organization with the clout or power of the major studios or record companies—to say nothing of the financial resources to go after infringers. And the nature of photography infringement is different as well. The infringement at issue in one of Goldsmith's counterclaims—the unlicensed reproduction of a

---

[6] As it happens, the most closely analogous organization for photographers and illustrators is one that Sedlik helped form. But that organization, American Society for Collective Rights Licensing, is capable only of distributing royalties earned under foreign statutory schemes. No such law covers photographers in this country.

photograph within a national publication—is not the norm. To the contrary, most infringement of photography takes place on the internet, scattered one by one through thousands or even millions of sites. There are services that can find some of them, but at a cost—and then the challenge is enforcement. The photographer who wishes to take on infringers this way must file dozens or even hundreds of lawsuits, each an uphill battle with only a small potential for payout. Most choose not to.

And thus in theory photographs are protected by copyright law, but in reality they are not. Photographers are among the smallest of small businesses. Most have no employees and must dedicate days, nights, weekends, and holidays to seeking commissions and licensing opportunities—to say nothing of creating photographs. The time required to identify infringements, locate and contact the infringers, submit takedown notifications under the Digital Millennium Copyright Act, and negotiate settlements is overwhelming. Photographers face a Hobson's choice: either ignore the infringing activity and thus encourage continued infringement, or allow their businesses to dwindle away while they chase down pirates.

3. All of these themes are on display when we turn to derivative uses—the kind of exploitation that is at issue here. Like all artists, photographers seek to exploit not only the secondary use markets for their works, but also to create (or license others to create) derivative works. For example, the photographer may colorize a previously black and white photograph, add or remove visual elements in a photograph, remove and replace the background of a photograph,

recompose a photograph by cropping, combine a photograph with other photographs, change the visual appearance of the subject or other elements of the photograph, or otherwise manipulate the photograph to create new meanings or effects. For that matter, photographers may render a photograph in an entirely different medium, such as a painting, sketch or (it goes without saying) a silkscreen. Photographers deserve to be paid for use of these derivative creations. But far too often they are not.

Sedlik can speak from searing personal experience about this issue. Sedlik licenses his Miles Davis photograph for a wide range of derivative uses, including as a reference for other creative artists. At one point he licensed the photograph to a city in France, Joué-lès-Tours, so that it could make a statue based on the photo. He has also licensed it, on at least one occasion, to a tattooist on the East Coast. The California tattooist described at the opening of this brief has never obtained a license—and depending on the outcome of this case, might pay no price at all for using Sedlik's work.

But the California tattooist is only one of legions of pirates of the Miles Davis photograph. On the following page is a sampling of infringing uses that Sedlik has discovered:

Every one of these uses is a derivative work based on Sedlik's Miles Davis photo. Many were difficult to find. They were identified online, in many cases, only after many hours of searching. And the pirates, when contacted, trotted out all the classic urban myths: "I found this on the internet—so it's free." Or: "All you

did was snap the photo—I did the real work." And not one of these unlicensed derivative works is remotely "complementary to the copyrighted work." *Ty, Inc. v. Publications Int'l Ltd.*, 292 F.3d 512, 517 (7th Cir. 2002) (Posner, J.). They are not parodies of the original photograph nor commentaries on Sedlik or his work. They are simply *substitutes* for Sedlik's photograph—"the only harm to derivatives," this Court has declared, "that need concern us." *Campbell*, 510 U.S. at 593.

4. In a larger sense, the challenge photographers face today is the same one that movie studios, record labels and music publishers faced at the time this Court decided *MGM v. Grokster*. Spinoffs of the infamous Napster were at the time facilitating "massive infringement" of sound recordings, 545 U.S. at 937—and worse, were eroding not only the value of creative works but "respect for the very foundations of copyright law in the digital age." Brief for Petitioner in *MGM v. Grokster*, O.T. 2004, No. 480, p.14. Things changed immediately after the *Grokster* decision issued. Licensed online providers, previously locked in an unwinnable struggle against free, became the predominant resources for online music, movies, and music videos. Revenues for the recorded music industry, after a decade of free-fall, recovered from their post-1999 plunge. https://riaa.medium.com/the-grokster-decision-6faa91247dbf. Put simply, the *Grokster* decision ushered in a sea change in public attitudes toward piracy of mass media—and opened a desperately-needed space for legitimate services to thrive.

The parallels between this case and *Grokster* are inescapable. Just like the creative artists in *Grokster*,

photographers are hampered by circuit court jurisprudence that threatens their ability to protect themselves from pirates. And just as in *Grokster*, a decision in favor of creators here could work a sea change in public attitudes about the intrinsic value of intellectual property. It is not exaggerating to say that for those in the business of photography, a decision in affirmance by this Court could become this generation's *Grokster*.

II. The Warhol Foundation's Interpretation of the Fair Use Doctrine Is Rooted in Deep Misimpressions About the Nature of Photography.

A. The Foundation Rehashes Long-Discredited Arguments About the Creative Value of Portrait Photography.

1. Ansel Adams once said that "you don't take a photograph, you make it."[7] This Court has long shared the sentiment. Almost one hundred and fifty years ago, the Court acknowledged the artful manner in which Napoleon Sarony composed his famous portrait of Oscar Wilde "entirely from his own original mental conception . . . posing [Wilde] in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, [and] suggesting and evoking the desired expression."

---

[7] Quoted in Edward A. Wasserman, *As If By Design: How Creative Behaviors Really Evolve* 190 (2021).

Burrow-Giles Lithographic Company Co. v. Sarony, 111 U.S. 53, 55 (1884).[8]

While this Court was quick to appreciate the art of photography, many other pillars of society were not. Even after the *Burrow-Giles* decision, photography labored in the shadows of other forms of expression—"a handmaiden to science and art," as English photographer and writer Peter Henry Emerson once put it. Teresa M. Bruce, In the Language of Pictures: How Copyright Law Fails to Adequately Account for Photography, 115 W. Va. L. Rev. 93, 101 n. 27 (2012). Only with time did luminaries such as Sarony, Alfred Stieglitz, Richard Avedon, Irving Penn, Annie Leibovitz, and Ansel Adams—and let us not forget, Andy Warhol himself—elevate photography to its rightful place in the panoply of culture.

2. But the Andy Warhol Foundation's opening brief is a throwback to the nineteenth century. It is bad enough that the Foundation celebrates Warhol's legacy of appropriating the work of photographers. Worse, the Foundation also takes aim at the art form itself—by devaluing, and even disparaging, the creativity of photographers such as Goldsmith. The following sentence is illustrative: "Goldsmith is not the only (or even the first) photographer to shoot a front-on photograph of Prince's face and torso." Pet. Br. 16. The brief then follows with two full pages of frontal images of Prince (leading with one from his personal biographer, Allen Beaulieu). The implication of this passage is clear: A photograph of Prince is just

[8] The famous Sarony photograph adorns the cover of one of the leading contemporary copyright law treatises. Jane C. Ginsburg & Robert A. Gorman, Copyright Law (2012).

a photograph of Prince. And once you've seen one, the Foundation appears to be saying, you've seen them all.[9]

The Foundation's papers below are no better. When this case was before the district court, the Foundation tendered a declaration from Neil Printz, the editor of The Andy Warhol Catalogue Raisonné. Printz made it eminently clear that Warhol saw celebrity portrait photographs as nothing more than empty vessels for their underlying "commodity":

> Warhol's movie star portraits were based on publicity stills and pictures in fan magazines. In this capacity, they were not portraits in the traditional sense: they did not attempt to capture the way a sitter really looked or to reveal his or her inner character. The photographs that Warhol selected were, in fact, already images. Like a soup can, Marilyn Monroe's face in the studio still he selected for his paintings was already a commodity; and like a dollar bill, her face already functioned as a sign.

J.A.157-58.

3. And that is where the Foundation's argument founders on the facts (to say nothing of the law). Begin

---

[9] One person who decidedly would *not* think that "a photograph of Prince is just a photograph of Prince" was Beaulieu, who contended that a former collaborator absconded with over 5,000 of his images of the late musician and filed suit, albeit so far unsuccessfully, to recover them. *Beaulieu v. Stockwell et al.*, Civ. No. 16-3586 DWF/HB (D. Minn. slip op. Dec. 7, 2018), *appeal pending*, No. 21-3833 (CA8).

with the notion that the entire "commodity" within a photograph is the star power of the subject. No serious student of photography would believe that for a moment. Irving Penn was heralded for his portraits of celebrities, but the highest price paid at auction for a print of one of Penn's works was for a photograph of two anonymous children in tattered clothes standing on a bare tile floor in Cuzco, Peru. https://www.christies.com/en/lot/lot-5056795. Robert Mapplethorpe's heralded (and controversial) "Man in Polyester Suit" brought in nearly $500,000 at an auction in 2015. N.Y. Times, Oct. 9, 2015, p. C2. And the name of the green-eyed Afghan girl who graced what is perhaps the best-known National Geographic cover of our time was not even known to her photographer, Steve McCurry, until he tracked her down many years later. https://www.nationalgeographic.com/magazine/article/afghan-girl-revealed.

And even where a celebrity is the focus of a photograph, it is only the photographer's artistry that brings the portrait to life. Any original photograph is entitled to copyright protection, even the most casual point-and-shoot image. *Jewelers' Circular Pub. Co. v. Keystone Pub. Co.*, 274 F. 932, 934 (S.D.N.Y. 1921) (Hand, J.) (subsequent history omitted). But in challenging the creative contribution of Goldsmith's Prince photograph, the Foundation has chosen an unusual target indeed. Counsel for Goldsmith has briefly described (in their limited pages available) some of the creative decisions that Goldsmith exercised during her photography session with Prince, including her use of lighting, her choice of lens, and her application of eyeshadow and lip gloss. Resp. Br.

7-8. Sedlik, who interviewed Goldsmith about the photograph in 2018, can attest to the full spectrum of Goldsmith's original expression in the photograph—including the creative decisions that she made about lens focal lengths (she used two different lens focal lengths, 85mm and 105mm), depth of field, focal point, film selection, contrast, color/tone, composition, line, form, texture, lighting (type, angle, distance, and modifiers), background, subject direction, and selection of the "decisive moment" that brought her other creative decisions to life.

4. Sedlik's own experience as a photographer also illustrates the point. As noted above, Sedlik authored one of the most widely known images of Miles Davis that has ever been created. But the photograph was no happenstance. Sedlik invested more than a year of creative development—before, during, and after the photo session—in order to imbue that photograph with the expressive elements he desired. Sedlik had proposed a low-key, moody photograph. But he was given a session at noon on a beach—a photographer's nightmare. As always, Sedlik was determined to make the most of his opportunity. He designed a custom 400 square foot studio in his lot and transported it, piece by piece, to the location. But that was only the stage for Sedlik's creative process.

Lighting, as with all of Sedlik's photographs, played a central role in this photography session. The roof of the outdoor studio was a 20' x 20' white sailcloth suspended in a metal frame. Sedlik covered the entire sailcloth with black opaque fabric, thus blocking the sunlight. With an assistant standing in for Davis at a position that Sedlik selected, Sedlik then created a small, carefully shaped opening in the

black cloth to sculpt Davis's face and body with a shaft of light emanating from directly over his head. He also draped the sides of the custom studio with black fabric, in order to deepen and enhance the quality of the shadows in the portrait. He placed black squares of fabric at the left and right sides of the stool on which Davis would sit, in order to modulate the transitions he desired—in some cases more smooth, in others more abrupt—between highlights and shadows on Davis's face. He positioned reflectors behind his camera, choosing just the right size, distance and angle to reflect diffused light into the makeshift studio and to create white "catchlights" in Davis' eyes. And he covered the ground with black cloth in order to control the reflection of sunlight and to maintain the quality of the range of tones he sought.

Sedlik also paid exacting attention during the photo session to directing Davis' pose. To realize his vision of Davis' physical appearance, he gave Davis suggestions about how to tilt his head, where to position his shoulders and arms, and in which direction to look. He asked Davis to put his finger to his lips, symbolizing the jazz legend's masterful use of silent negative space—the pauses between his notes—in his performances. On several occasions he approached Davis and physically adjusted the position of his fingers to achieve the visual effect of a series of cascading musical notes. And as a final touch, he suggested that Davis lower and raise his hand and simultaneously tense his facial muscles, rendering his cheeks and the veins in his face in an intensity of expression to contrast with the symbolic pose.

The examples below represent just a few of the many images Sedlik produced during one of his photo

sessions with Miles Davis. Each is based on a sketch made by Sedlik in advance of the session, and each reveals a distinctive version of Sedlik's vision. But only one—that shown at the bottom right—best captured the perfect combination of light, shade, posture, intensity, focus, and the dozens of other visual elements that Sedlik painstakingly rendered. That portrait has become an iconic photograph of the legend and a favorite among art collectors and licensees alike.

B. The Foundation Wrongly Suggests That a Photograph's Protection Extends No Further Than Its Initial Meaning or Purpose.

The Warhol Foundation makes another confounding error in its brief. The Foundation suggests, under its misreading of *Campbell*, that one can appropriate a photograph merely by giving it a new meaning or message. That is wrong as a matter of law. But it also assumes a factual impossibility. As Ansel Adams once said, "There are always two people in every picture: the photographer and the viewer." N.Y. Times, Nov. 12, 1976, p. C20. No photograph can

be cabined to a single meaning or message. *No* visual art can be so cabined. Art, like beauty—or so we have been informed by cliché since grade school—is in the eye of the beholder. It is nonsensical to suggest otherwise.

That is as true for photography as it is for any other form of art. As one of the most prominent writers of the twentieth century has explained:

> Any photograph has multiple meanings; indeed, to see something in the form of a photograph is to encounter a potential object of fascination. The ultimate wisdom of the photographic image is to say: "There is the surface. Now think—or rather feel, intuit — what is beyond it, what the reality must be like if it looks this way." Photographs, which cannot themselves explain anything, are inexhaustible invitations to deduction, speculation, and fantasy.

Sontag, On Photography 24.

The widely cited passage above is echoed by any number of photographers. Asked by *Interview* (the magazine Warhol founded) what he wanted people to take away from his photographs, acclaimed photographer Alec Soth responded: "The reason I often say, for me, photography is analogous to poetry, for my kind of work more so than journalism, is because it's so open to interpretation. And I'm very happy having different interpretations of it, so I don't have an agenda to push at all." https://www.interviewmagazine.com/art/alec-soth-photography. And Allan Sekula, the influential L.A.-based photographer, critic, and educator who once

earned a grant from The Warhol Foundation,[10] roundly rejected the notion that a photograph is "an utterance of some sort, that it carries, or is, a message." Instead, he has explained:

> the photograph is an "incomplete" utterance, a message that depends on some external matrix of conditions and presuppositions for its readability. That is, the meaning of any photographic message is necessarily context determined.

Sekula, On the Invention of Photographic Meaning, 13:5 Artforum 37 (Jan. 1975).

Sedlik's own experience bears this out. He has licensed his photographs for use in billboards, magazine covers, brochures, shirts, calendars, mugs, bus benches, television shows, greeting cards, documentary films, PowerPoint presentations, statues, subway ads, artist reference, book covers, posters, museum displays, album covers, press releases, annual reports, social media posts, website use, digital display ads, television commercials, product packaging, point-of-purchase displays, direct mail promotions, tattoos, and all manner of other media. Needless to say, the message a viewer will take from a boardroom PowerPoint and a novelty mug will

---

[10] https://warholfoundation.org/grants/archive/theater-of-operations-the-gulf-wars-1991-2011/. The Foundation's grant to Sekula, it should be noted, is just one example of the extraordinarily important work that the Foundation has done to support creative artists—including photographers—since its beginnings. That is one reason why it is especially disheartening to see the Foundation in such an aggressive posture today with respect to the art of photography.

be entirely irreconcilable. If every one of those uses could be made license-free, few photographers could afford to create new works.

And the licenses that Sedlik has chosen *not* to grant are just as instructive as those he has. In response to each license request he receives, Sedlik asks detailed questions about the nature and message of the work in which the photograph will be used. If he does not approve of the message, he will not approve the license. In *Seltzer*, for example, a rock band used an illustration of a screaming face for an anti-religious message during the performance of one of its songs. 725 F.3d at 1177. If the band had asked for his permission to use one of his photographs of B.B. King or Miles Davis as part of that backdrop, Sedlik (out of respect for his subjects) would never have approved such a use. That is—or at least should be—his right as an artist.

III. Appropriation Artists Can Readily Obtain Artist Reference Licenses from Photographers.

There will not be the remotest "chilling effect" on artists if the Court affirms the decision below. Pet. Br. 56. The specialized kind of license that would allow a creative artist to use a photograph in a derivative work is called an "artist reference license." This kind of license has been in broad use for decades. Andy Warhol was even the beneficiary of one, in 1984, for the very photograph he later pirated. It is not hard to obtain.

The practice of licensing photographs for artist reference purposes is so ubiquitous that the PLUS Coalition—the non-profit standards body for image

licensing that Sedlik co-founded—developed a standard definition of the term.[11] Photographers and stock photography agencies are nearly always willing to grant a license for the use of a photograph for reference purposes in creating a derivative work. Most rights holders and their agents welcome such inquiries. And why would they not? For most photographers, derivative usage licenses are an indispensable source of income.

And it is typically easy to identify the copyright owner of a photograph. Anyone can use the free "reverse image search" on Google Images (among many options) to see where a photograph is published. From there it is a simple matter to identify either the photographer's website (complete with contact information) or a stock photo website serving as an authorized licensor for that photograph—or perhaps even a copy of that photograph with attribution information identifying the photographer. Google has made this even easier in the past year by launching a "licensable badge" option. Under this tool, which Google developed in part in collaboration with Sedlik's PLUS Coalition, photographers can direct Google to add a "Licensable" badge directly on top of their images within search results. A user who clicks that badge will be taken directly to that photographer's licensing information page.

---

[11] Definitions in the PLUS Picture Licensing Glossary (http://www.usePLUS.com/useplus/glossary.asp) are developed and approved by representatives of all communities engaged in creating, distributing, using or preserving visual artworks. *See also* http://www.PLUS.org.

And in the rare instance in which web-based searches fail to identify the copyright owner of a photograph, it is a simple matter to contact one of the photography trade associations that, as a free public service, routinely help identify authorized licensors for specific photographs. Examples include American Society of Media Photographers, American Photographic Artists, Professional Photographers of America, National Press Photographers Association, North American Nature Photography Association, and Digital Media Licensing Association. (The non-profit PLUS Coalition also provides a free, global registry of contact information for photographers and rights holders.) In short: if a visual artist does not have an artist reference license, that artist probably did not want one in the first place.

CONCLUSION

The judgment of the Second Circuit should be affirmed.

Respectfully submitted,

Matthew Hersh
Counsel Of Record
99 Blair Alley SW #1155
Washington, DC 20024
(202) 253-2514
matt@matthewhersh.com

Counsel for Amicus Curiae