

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2005

4 (Argued: May 30, 2006

Decided: October 25, 2006

5 Amended: November 16, 2006)

6 Docket No. 05-6433-cv

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8 ANDREA BLANCH,

9 Plaintiff-Appellant,

10 - v -

11 JEFF KOONS, THE SOLOMON R. GUGGENHEIM FOUNDATION, and DEUTSCHE  
12 BANK AG,

13 Defendants-Appellees.

14 -----  
15 Before: SACK and KATZMANN, Circuit Judges, and MURTHA, District  
16 Judge.<sup>\*</sup> Judge Katzmann concurs in a separate opinion.

17 Appeal from a judgment of the United States District  
18 Court for the Southern District of New York (Louis L. Stanton,  
19 Judge) granting summary judgment to the defendants, a visual  
20 artist and institutions that commissioned and exhibited one of  
21 his paintings. The district court concluded that the defendants  
22 were not liable for copyright infringement for using an image of  
23 the plaintiff's copyrighted photograph, because the defendant  
24 artist's incorporation of the photograph in a collage painting  
25 constituted fair use.

26 Affirmed.

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\* The Honorable J. Garvan Murtha of the United States District Court for the District of Vermont, sitting by designation.

1 ROBERT W. CINQUE, Cinque & Cinque, P.C.  
2 (James P. Cinque, of counsel) New York,  
3 NY, for Plaintiff-Appellant.

4 JOHN B. KOEGEL, The Koegel Group, New  
5 York, NY, for Defendant-Appellee Jeff  
6 Koons.

7 LAWRENCE B. FRIEDMAN, Cleary Gottlieb  
8 Steen & Hamilton LLP (Inna Reznik, Hoon-  
9 Jung Kim, of counsel) New York, NY, for  
10 Defendant-Appellee The Solomon R.  
11 Guggenheim Foundation.

12 CAROL A. WITSCHER, White & Case LLP  
13 (Steven Betensky, Stefan M. Mentzer, of  
14 counsel), New York, NY, for Defendant-  
15 Appellee Deutsche Bank AG.

16 SACK, Circuit Judge:

17 This appeal presents the question whether an artist's  
18 appropriation of a copyrighted image in a collage painting is,  
19 under the circumstances, protected "fair use" under the copyright  
20 law. See 17 U.S.C. § 107.

21 On commission from defendants Deutsche Bank AG, a  
22 German corporation ("Deutsche Bank"), and The Solomon R.  
23 Guggenheim Foundation, a New York not-for-profit corporation  
24 ("Guggenheim"), defendant Jeff Koons created a collage painting,  
25 initially for display in Berlin, Germany, in which he copied, but  
26 altered the appearance of, part of a copyrighted photograph taken  
27 by the plaintiff Andrea Blanch. After seeing the painting on  
28 subsequent display at Guggenheim's museum in New York City,  
29 Blanch brought this action for copyright infringement. The  
30 district court (Louis L. Stanton, Judge) granted summary judgment

1 to the defendants on the ground that Koons's appropriation of  
2 Blanch's photograph was fair use. We affirm.

### 3 **BACKGROUND**

4 Jeff Koons is a visual artist. His work has been  
5 exhibited widely in museums and commercial galleries and has been  
6 the subject of much critical commentary. He is known for  
7 incorporating into his artwork objects and images taken from  
8 popular media and consumer advertising, a practice that has been  
9 referred to as "neo-Pop art" or (perhaps unfortunately in a legal  
10 context) "appropriation art."<sup>1</sup> His sculptures and paintings often  
11 contain such easily recognizable objects as toys, celebrities,  
12 and popular cartoon figures.

13 Koons has been the subject of several previous lawsuits  
14 for copyright infringement. In the late 1980s, he created a  
15 series of sculptures for an exhibition entitled the "Banality  
16 Show" ("Banality"). In doing so, he commissioned large three-  
17 dimensional reproductions of images taken from such sources as  
18 commercial postcards and syndicated comic strips. Although many  
19 of the source images were copyrighted, Koons did not seek  
20 permission to use them. In separate cases based on three  
21 different sculptures from "Banality," this Court and two district  
22 courts concluded that Koons's use of the copyrighted images  
23 infringed on the rights of the copyright holders and did not

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<sup>1</sup> See E. Kenly Ames, Note, Beyond Rogers v. Koons: A Fair Use Standard for Appropriation, 93 Colum. L. Rev. 1473, 1477-80 (1993).

1 constitute fair use under the copyright law. See Rogers v.  
2 Koons, 960 F.2d 301 (2d Cir.), cert. denied, 506 U.S. 934 (1992);  
3 Campbell v. Koons, No. 91 Civ. 6055, 1993 WL 97381, 1993 U.S.  
4 Dist. LEXIS 3957 (S.D.N.Y. Apr. 1, 1993); United Feature  
5 Syndicate v. Koons, 817 F. Supp. 370 (S.D.N.Y. 1993).

6 The present action arises in connection with a later  
7 series of Koons's work entitled "Easyfun-Ethereal." It was  
8 commissioned in 2000 by Deutsche Bank in collaboration with  
9 Guggenheim.

10 Deutsche Bank and Guggenheim have jointly established  
11 the "Deutsche Guggenheim Berlin," an art exhibition space housed  
12 in a Deutsche Bank building in Berlin, Germany. Under their  
13 collaboration agreement, Deutsche Bank provides space,  
14 underwrites exhibition expenses, and pays for the commission of  
15 new works of art. Guggenheim curates the exhibitions and advises  
16 as to which work should be commissioned. Pursuant to a separate  
17 agreement, Deutsche Bank donates a fifty percent interest in each  
18 commissioned work to Guggenheim.

#### 19 Koons's Painting

20 To create the "Easyfun-Ethereal" paintings, Koons  
21 culled images from advertisements or his own photographs, scanned  
22 them into a computer, and digitally superimposed the scanned  
23 images against backgrounds of pastoral landscapes. He then  
24 printed color images of the resulting collages for his assistants  
25 to use as templates for applying paint to billboard-sized, 10' x  
26 14' canvasses. The "Easyfun-Ethereal" paintings, seven in all,

1 were exhibited at the Deutsche Guggenheim Berlin from October  
2 2000 to January 2001.

3 One of the "Easyfun-Ethereal" paintings, "Niagara," is  
4 the subject of this action. Like the other paintings in the  
5 series, "Niagara" consists of fragmentary images collaged against  
6 the backdrop of a landscape. The painting depicts four pairs of  
7 women's feet and lower legs dangling prominently over images of  
8 confections -- a large chocolate fudge brownie topped with ice  
9 cream, a tray of donuts, and a tray of apple danish pastries --  
10 with a grassy field and Niagara Falls in the background. The  
11 images of the legs are placed side by side, each pair pointing  
12 vertically downward and extending from the top of the painting  
13 approximately two-thirds of the way to the bottom. Together, the  
14 four pairs of legs occupy the entire horizontal expanse of the  
15 painting. A black-and-white reproduction of "Niagara" is  
16 included in the Appendix to this opinion.

17 In an affidavit submitted to the district court, Koons  
18 states that he was inspired to create "Niagara" by a billboard he  
19 saw in Rome, which depicted several sets of women's lower legs.  
20 By juxtaposing women's legs against a backdrop of food and  
21 landscape, he says, he intended to "comment on the ways in which  
22 some of our most basic appetites -- for food, play, and sex --  
23 are mediated by popular images." Koons Aff., dated June 10,  
24 2005, at ¶ 10. "By re-contextualizing these fragments as I do, I  
25 try to compel the viewer to break out of the conventional way of

1 experiencing a particular appetite as mediated by mass media."

2 Id.

3 Blanch's Photograph

4 Koons drew the images in "Niagara" from fashion  
5 magazines and advertisements. One of the pairs of legs in the  
6 painting was adapted from a photograph by the plaintiff Andrea  
7 Blanch, an accomplished professional fashion and portrait  
8 photographer. During her career of more than twenty years,  
9 Blanch has published her photographs in commercial magazines,  
10 including Details, G.O., Vogue, and Allure; in photography  
11 periodicals and collections; and in advertisements for clients  
12 selling products under such widely recognized names as Revlon,  
13 Universal Films, Johnny Walker, and Valentino. She is also the  
14 author of a book of photographs and interviews entitled Italian  
15 Men: Love & Sex.

16 The Blanch photograph used by Koons in "Niagara"  
17 appeared in the August 2000 issue of Allure magazine. Entitled  
18 "Silk Sandals by Gucci" ("'Silk Sandals'"), it depicts a woman's  
19 lower legs and feet, adorned with bronze nail polish and glittery  
20 Gucci sandals, resting on a man's lap in what appears to be a  
21 first-class airplane cabin. The legs and feet are shot at close  
22 range and dominate the photograph. Allure published "Silk  
23 Sandals" as part of a six-page feature on metallic cosmetics  
24 entitled "Gilt Trip." A black-and-white reproduction of the  
25 photograph is also in the Appendix.

1           Blanch photographed "Silk Sandals" at a "shoot"  
2 organized by Condé Nast Publications, Allure's publisher.  
3 According to Blanch's deposition testimony, Paul Cavaco, the  
4 creative director of Allure, suggested the model, sandals, and  
5 nail polish to be used in the photograph. Blanch participated in  
6 their selection and retained control over the camera, the film,  
7 the lighting, and the composition of the photographs. She  
8 testified that it was her idea to use an airplane interior as a  
9 backdrop and to place the female model's feet on the male model's  
10 lap. She explained that she wanted to "show some sort of erotic  
11 sense[;] . . . to get . . . more of a sexuality to the  
12 photographs." Blanch Dep., March 8, 2005, at 112-13.

13           Koons's Use of Blanch's Photograph

14           While working on the "Easyfun-Ethereal" series, Koons  
15 saw "Silk Sandals" in Allure. According to Koons, "certain  
16 physical features of the legs [in the photograph] represented for  
17 me a particular type of woman frequently presented in  
18 advertising." He considered this typicality to further his  
19 purpose of commenting on the "commercial images . . . in our  
20 consumer culture." Koons Aff. at ¶ 10.

21           Koons scanned the image of "Silk Sandals" into his  
22 computer and incorporated a version of the scanned image into  
23 "Niagara." He included in the painting only the legs and feet  
24 from the photograph, discarding the background of the airplane  
25 cabin and the man's lap on which the legs rest. Koons inverted  
26 the orientation of the legs so that they dangle vertically

1 downward above the other elements of "Niagara" rather than slant  
2 upward at a 45-degree angle as they appear in the photograph. He  
3 added a heel to one of the feet and modified the photograph's  
4 coloring. The legs from "Silk Sandals" are second from the left  
5 among the four pairs of legs that form the focal images of  
6 "Niagara." Koons did not seek permission from Blanch or anyone  
7 else before using the image.

#### 8 The Parties' Economic Gains and Losses

9 Deutsche Bank paid Koons \$2 million for the seven  
10 "Easyfun-Ethereal" paintings. He reports that his net  
11 compensation attributable to "Niagara" was \$126,877. Deutsche  
12 Bank received gross revenues of approximately \$100,000 from the  
13 exhibition of the "Easyfun-Ethereal" paintings at the Deutsche  
14 Guggenheim Berlin, a total that includes admission fees and  
15 catalogue and postcard sales. The record does not reflect  
16 Deutsche Bank's expenses for that exhibition other than the  
17 commission of the paintings.

18 The subsequent exhibition of the paintings at the  
19 Solomon R. Guggenheim Museum in New York sustained a net loss,  
20 although when profits from catalogue and postcard sales are taken  
21 into account, Guggenheim estimates that it earned a profit of  
22 approximately \$2,000 from "Niagara."<sup>2</sup> In 2004, the auction house  
23 Sotheby's reportedly appraised "Niagara" at \$1 million. The work

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<sup>2</sup> Guggenheim's figures for catalogue and postcard sales include sales at the Deutsche Guggenheim Berlin. It is possible, therefore, that those sales are double-counted in Deutsche Bank's and Guggenheim's earnings calculations.



1 has not, however, been sold, nor does the record indicate that it  
2 or any other painting commissioned by Deutsche Bank has been  
3 offered for sale or been the subject of a bid.

4 Allure paid Blanch \$750 for "Silk Sandals." Although  
5 Blanch retains the copyright to the photograph, she has neither  
6 published nor licensed it subsequent to its appearance in Allure.  
7 Indeed, Blanch does not allege that she has ever licensed any of  
8 her photographs for use in works of graphic art or other visual  
9 art. At her deposition, Blanch testified that Koons's use of the  
10 photograph did not cause any harm to her career or upset any  
11 plans she had for "Silk Sandals" or any other photograph in which  
12 she has rights. She also testified that, in her view, the market  
13 value of "Silk Sandals" did not decrease as the result of Koons's  
14 alleged infringement.

#### 15 This Lawsuit

16 After the initial exhibition of the "Easyfun-Ethereal"  
17 painting at the Deutsche Guggenheim Berlin, "Niagara" was  
18 exhibited in other museums and public galleries. Blanch did not  
19 see the painting until it was on display at the Guggenheim Museum  
20 in New York during the summer of 2002. On October 10, 2003, she  
21 filed this lawsuit asserting that Koons infringed her copyright  
22 in "Silk Sandals" in violation of the Copyright Act of 1976, 17  
23 U.S.C. § 101 et seq. On August 20, 2004, Blanch amended her  
24 complaint to add Deutsche Bank and Guggenheim as defendants and  
25 later served them with the amended complaint. She alleges that

1 they "participated in, facilitated, and caused the acts of  
2 infringement by Koons" by commissioning the work despite knowing,  
3 based on Koons's history with, among other things, the "Banality"  
4 cases, that Koons was likely to infringe the copyrights of  
5 others. First Am. Compl. ¶ 15.

6 On November 1, 2005, the district court granted summary  
7 judgment to the defendants. The court concluded that Koons's  
8 "Niagara" did not infringe Blanch's "Silk Sandals" because its  
9 use of the image from "Silk Sandals" constituted fair use. See  
10 Blanch v. Koons, 396 F. Supp. 2d 476 (S.D.N.Y. 2005).

11 Considering the four non-exclusive statutory factors upon which a  
12 fair-use determination is made, see 17 U.S.C. § 107, the court  
13 determined that: (1) the purpose and character of Koons's use was  
14 "transformative" and therefore favored by copyright law, see  
15 Blanch, 396 F. Supp. 2d at 480-81; (2) Blanch's copyrighted work  
16 was "banal rather than creative," and therefore the nature of the  
17 copyrighted work weighed in favor of the defendants, see id. at  
18 481-82; (3) although the women's legs are the "focal point of  
19 interest" in Blanch's photograph, the image is of limited  
20 originality, so the statutory factor concerning "the amount and  
21 substantiality of the portion used in relation to the copyrighted  
22 work as a whole," was neutral between the parties, id. at 482  
23 (citing 17 U.S.C. § 107(3)); and (4) Blanch's photograph could  
24 not have captured the market occupied by "Niagara," so that the  
25 final factor, the effect of the use upon the potential market for  
26 the copyrighted work, favored the defendants, see id. Based on

1 its conclusion that, as a matter of law, each of the statutory  
2 factors concerning fair use either favored the defendants or was  
3 neutral between the parties, the court concluded that the  
4 defendants were entitled to summary judgment.

5 Blanch appeals.

## 6 DISCUSSION

### 7 I. Standard of Review

8 We review a district court's grant of summary judgment  
9 de novo. See Tenenbaum v. Williams, 193 F.3d 581, 593 (2d Cir.  
10 1999), cert. denied, 529 U.S. 1098 (2000). Summary judgment  
11 should be granted if "there is no genuine issue as to any  
12 material fact and . . . the moving party is entitled to a  
13 judgment as a matter of law." Fed. R. Civ. P. 56(c). "Although  
14 '[f]air use is a mixed question of law and fact,' this court has  
15 on a number of occasions resolved fair use determinations at the  
16 summary judgment stage where . . . there are no genuine issues of  
17 material fact." Castle Rock Entm't, Inc. v. Carol Publ'g Group,  
18 Inc., 150 F.3d 132, 137 (2d Cir. 1998) (quoting Harper & Row,  
19 Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985)  
20 (other internal quotation marks and citation omitted)).

### 21 II. Fair Use

22 The Supreme Court, in its landmark decision addressing  
23 the fair-use defense, Campbell v. Acuff-Rose Music, Inc., 510  
24 U.S. 569 (1994), remarked: "From the infancy of copyright  
25 protection, some opportunity for fair use of copyrighted

1 materials has been thought necessary to fulfill copyright's very  
2 purpose, 'To promote the Progress of Science and useful Arts.'  
3 Id. at 575 (quoting U.S. Const., Art. I, § 8, cl. 8).

4           As Judge Leval observed in his seminal law review  
5 article on the subject, the law of copyright "is intended to  
6 motivate the creative activity of authors and inventors by the  
7 provision of a special reward . . . . The monopoly created by  
8 copyright thus rewards the individual author in order to benefit  
9 the public." Pierre N. Leval, Toward a Fair Use Standard, 103  
10 Harv. L. Rev. 1105, 1108 (1990) (quoting Harper & Row, 471 U.S.  
11 at 545-46) (ellipsis in original; internal quotation marks and  
12 footnote omitted). At the same time, though, "excessively broad  
13 protection would stifle, rather than advance, the [law's]  
14 objective." Id. at 1109. "Monopoly protection of intellectual  
15 property that impeded referential analysis . . . would strangle  
16 the creative process." Id. at 1108. Fair use should therefore  
17 be perceived as an "integral part of copyright, whose observance  
18 is necessary to achieve the objectives of that law." Id. at  
19 1107.

20           Copyright law thus must address the inevitable tension  
21 between the property rights it establishes in creative works,  
22 which must be protected up to a point, and the ability of  
23 authors, artists, and the rest of us to express them- or

1 ourselves by reference to the works of others, which must be  
2 protected up to a point. The fair-use doctrine mediates between  
3 the two sets of interests, determining where each set of  
4 interests ceases to control.

5 The fair-use doctrine was first codified in the  
6 Copyright Act of 1976, which describes four non-exclusive factors  
7 that must be considered in determining fair use.

8 [T]he fair use of a copyrighted work . . .  
9 for purposes such as criticism, comment, news  
10 reporting, teaching (including multiple  
11 copies for classroom use), scholarship, or  
12 research, is not an infringement of  
13 copyright. In determining whether the use  
14 made of a work in any particular case is a  
15 fair use the factors to be considered shall  
16 include--

17 (1) the purpose and character of the  
18 use, including whether such use is of a  
19 commercial nature or is for nonprofit  
20 educational purposes;

21 (2) the nature of the copyrighted work;

22 (3) the amount and substantiality of the  
23 portion used in relation to the copyrighted  
24 work as a whole; and

25 (4) the effect of the use upon the  
26 potential market for or value of the  
27 copyrighted work.

28 The fact that a work is unpublished shall not  
29 itself bar a finding of fair use if such  
30 finding is made upon consideration of all the  
31 above factors.

32 17 U.S.C. § 107.

1           As the words of section 107 indicate, the determination  
2 of fair use is an open-ended and context-sensitive inquiry. In  
3 Campbell, the Supreme Court warned that the task

4           is not to be simplified with bright-line  
5 rules, for the statute, like the doctrine it  
6 recognizes, calls for case-by-case analysis.  
7 The text employs the terms "including" and  
8 "such as" in the preamble paragraph to  
9 indicate the illustrative and not limitative  
10 function of the examples given, which thus  
11 provide only general guidance about the sorts  
12 of copying that courts and Congress most  
13 commonly had found to be fair uses. Nor may  
14 the four statutory factors be treated in  
15 isolation, one from another. All are to be  
16 explored, and the results weighed together,  
17 in light of the purposes of copyright.

18 Campbell, 510 U.S. at 577-78 (citations and some internal  
19 quotation marks omitted). "The ultimate test of fair  
20 use . . . is whether the copyright law's goal of 'promoting the  
21 Progress of Science and useful Arts,' U.S. Const., art. I, § 8,  
22 cl. 8, 'would be better served by allowing the use than by  
23 preventing it.'" Castle Rock Entm't, 150 F.3d at 141 (quoting  
24 Arca Inst., Inc. v. Palmer, 970 F.2d 1067, 1077 (2d Cir. 1992)  
25 (alteration incorporated)); see also Bill Graham Archives v.  
26 Dorling Kindersley Ltd., 448 F.3d 605, 608 (2d Cir. 2006)  
27 (similar).

28 A. First Factor: The Purpose and Character of the Use

1           The first statutory factor in the fair-use inquiry is  
2 "the purpose and character of the use, including whether such use  
3 is of a commercial nature or is for nonprofit educational  
4 purposes." 17 U.S.C. § 107(1).

5           1. "Transformative" Use. We have, post-Campbell,  
6 addressed and applied this first factor many times. In Davis v.  
7 The Gap, Inc., 246 F.3d 152, 174 (2d Cir. 2001), we described it  
8 this way:

9           The heart of the fair use inquiry is into the  
10 first specified statutory factor identified  
11 as "the purpose and character of the use."  
12 17 U.S.C. § 107 (1). This formulation, as  
13 the Supreme Court observed in Campbell, 510  
14 U.S. at 578, draws on Justice Story's famous  
15 reference in Folsom v. Marsh, 9 F. Cas. 342,  
16 348 (C.C.D. Mass. 1841) (No. 4901), to "the  
17 nature and objects of the selections made."  
18 As the Campbell Court explained,

19           The central purpose of this  
20 investigation is to see, in Justice  
21 Story's words, whether the new work  
22 merely "supersedes the objects" of the  
23 original creation, or instead adds  
24 something new, with a further purpose or  
25 different character, altering the first  
26 with new expression, meaning, or  
27 message . . . , in other words, whether  
28 and to what extent the new work is  
29 "transformative." Although such  
30 transformative use is not absolutely  
31 necessary for a finding of fair use, the  
32 goal of copyright, to promote science  
33 and the arts, is generally furthered by  
34 the creation of transformative works.  
35 Such transformative works thus lie at  
36 the heart of the fair use doctrine's  
37 guarantee of breathing space . . . .

1           Campbell, 510 U.S. at 579 (emphasis added [in  
2           Davis]) (alteration in original) (citations  
3           omitted).

4   Id. If "'the secondary use adds value to the original -- if  
5   [copyrightable expression in the original work] is used as raw  
6   material, transformed in the creation of new information, new  
7   aesthetics, new insights and understandings -- this is the very  
8   type of activity that the fair use doctrine intends to protect  
9   for the enrichment of society.'" Castle Rock Entm't, 150 F.3d at  
10  142 (quoting Leval, supra, at 1111; brackets in Castle Rock).<sup>3</sup>

11           Koons does not argue that his use was transformative  
12   solely because Blanch's work is a photograph and his a painting,  
13   or because Blanch's photograph is in a fashion magazine and his  
14   painting is displayed in museums. He would have been ill advised  
15   to do otherwise. We have declined to find a transformative use  
16   when the defendant has done no more than find a new way to  
17   exploit the creative virtues of the original work.<sup>4</sup> See Davis,

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<sup>3</sup> As the Supreme Court noted in Campbell, however, a finding of transformativeness "is not absolutely necessary for a finding of fair use." Campbell, 510 U.S. at 579 (citing Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 416, 455 n.40 (1984)); see also 17 U.S.C. § 107 (listing "multiple copies for classroom use" as among the categories of potentially fair uses); Rebecca Tushnet, Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It, 114 Yale L.J. 535, 555 (2004) (noting that historically some forms of "pure copying" were "at the core of fair use"). Nor is transformativeness necessarily the only important factor. See Campbell, 510 U.S. at 578 ("[T]he four statutory factors . . . [a]re all to be explored, and the results weighed together, in light of the purposes of copyright.").

<sup>4</sup> It has been suggested that the exploitation of new, complementary markets is the hallmark of fair use. See Ty, Inc. v. Publ'ns Int'l, 292 F.3d 512, 517 (7th Cir. 2002) ("[C]opying



1 246 F.3d at 174 (use of plaintiff's eyewear in a clothing  
2 advertisement not transformative because it was "worn as eye  
3 jewelry in the manner it was made to be worn"); Castle Rock  
4 Entm't, 150 F.3d at 142-43 (quiz book called the "Seinfeld  
5 Aptitude Test" not transformative when its purpose was "to  
6 repackage [the television show] Seinfeld to entertain Seinfeld  
7 viewers"); Ringgold v. Black Entm't Television, Inc. 126 F.3d  
8 70, 79 (2d Cir. 1997) (copy of plaintiff's painting used as  
9 decoration for a television program's set not transformative  
10 because it was used for "the same decorative purpose" as the  
11 original).

12 But Koons asserts -- and Blanch does not deny -- that  
13 his purposes in using Blanch's image are sharply different from  
14 Blanch's goals in creating it. Compare Koons Aff. at ¶ 4 ("I  
15 want the viewer to think about his/her personal experience with  
16 these objects, products, and images and at the same time gain new

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that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws), or for derivative works from the copyrighted work, is not fair use." (citation omitted)); see also 4-13 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.05[B][1] (2006) ("[I]f . . . the defendant's work, although containing substantially similar material, performs a different function than that of the plaintiff's, the defense of fair use may be invoked."). But as the Seventh Circuit recognized, this reasoning is in tension with the Copyright Act's express grant to copyright holders of rights over derivative works. See Ty, Inc., 292 F.3d at 518 ("Were control of derivative works not part of a copyright owner's bundle of rights, it would be clear that [defendant's] books fell on the complement side of the divide and so were sheltered by the fair-use defense."). A derivative use can certainly be complementary to, or fulfill a different function from, the original.

1 insight into how these affect our lives.") with Blanch Dep. at  
2 112-113 ("I wanted to show some sort of erotic sense[;] . . . to  
3 get . . . more of a sexuality to the photographs."). The sharply  
4 different objectives that Koons had in using, and Blanch had in  
5 creating, "Silk Sandals" confirms the transformative nature of  
6 the use. See Bill Graham Archives, 448 F.3d at 609 (finding  
7 transformative use when defendant's purpose in using copyrighted  
8 concert poster was "plainly different from the original purpose  
9 for which they were created"); see also 17 U.S.C. § 107(1) (first  
10 fair-use factor is the "purpose and character of the use"  
11 (emphasis added)).

12 Koons is, by his own undisputed description, using  
13 Blanch's image as fodder for his commentary on the social and  
14 aesthetic consequences of mass media. His stated objective is  
15 thus not to repackage Blanch's "Silk Sandals," but to employ it  
16 "'in the creation of new information, new aesthetics, new  
17 insights and understandings.'" Castle Rock Entm't, 150 F.3d at  
18 142 (quoting Leval, supra, 103 Harv. L. Rev. at 1111). When, as  
19 here, the copyrighted work is used as "raw material," Castle Rock  
20 Entm't, 150 F.3d at 142 (internal quotation marks and citation  
21 omitted), in the furtherance of distinct creative or  
22 communicative objectives, the use is transformative. Id.; see  
23 also Bill Graham Archives, 448 F.3d at 609 (use of concert  
24 posters "as historical artifacts" in a biography was  
25 transformative); Leibovitz v. Paramount Pictures Corp., 137 F.3d  
26 109, 113 (2d Cir. 1998) (parody of a photograph in a movie poster

1 was transformative when "the ad [was] not merely different; it  
2 differ[ed] in a way that may reasonably be perceived as  
3 commenting" on the original).

4           The test for whether "Niagara's" use of "Silk Sandals"  
5 is "transformative," then, is whether it "merely supersedes the  
6 objects of the original creation, or instead adds something new,  
7 with a further purpose or different character, altering the first  
8 with new expression, meaning, or message." Campbell, 510 U.S. at  
9 579 (internal quotation marks and citation omitted, alteration  
10 incorporated); Davis, 246 F.3d at 174 (same). The test almost  
11 perfectly describes Koons's adaptation of "Silk Sandals": the use  
12 of a fashion photograph created for publication in a glossy  
13 American "lifestyles" magazine -- with changes of its colors, the  
14 background against which it is portrayed, the medium, the size of  
15 the objects pictured, the objects' details and, crucially, their  
16 entirely different purpose and meaning -- as part of a massive  
17 painting commissioned for exhibition in a German art-gallery  
18 space. We therefore conclude that the use in question was  
19 transformative.

20           2. Commercial Use. Koons made a substantial profit  
21 from the sale of "Niagara." And "whether [the] use [in question]  
22 is of a commercial nature or is for nonprofit educational  
23 purposes" is an explicit part of the first fair-use factor. 17

1 U.S.C. § 107(1). In American Geophysical Union v. Texaco Inc.,  
2 60 F.3d 913 (2d Cir. 1994), we said:

3 The commercial/nonprofit dichotomy concerns  
4 the unfairness that arises when a secondary  
5 user makes unauthorized use of copyrighted  
6 material to capture significant revenues as a  
7 direct consequence of copying the original  
8 work.

9 Consistent with these principles, courts will  
10 not sustain a claimed defense of fair use  
11 when the secondary use can fairly be  
12 characterized as a form of commercial  
13 exploitation, i.e., when the copier directly  
14 and exclusively acquires conspicuous  
15 financial rewards from its use of the  
16 copyrighted material. Conversely, courts are  
17 more willing to find a secondary use fair  
18 when it produces a value that benefits the  
19 broader public interest. The greater the  
20 private economic rewards reaped by the  
21 secondary user (to the exclusion of broader  
22 public benefits), the more likely the first  
23 factor will favor the copyright holder and  
24 the less likely the use will be considered  
25 fair.

26 Id. at 922 (internal quotation marks and citations omitted).

27 But the use at issue in American Geophysical Union was  
28 photocopying -- "an untransformed duplication" of the copyrighted  
29 works. Id. at 923. And we later observed in NXIVM Corp. v. Ross  
30 Inst., 364 F.3d 471 (2d Cir. 2004), that

31 The Supreme Court in Campbell rejected the  
32 notion that the commercial nature of [a] use  
33 could by itself be a dispositive  
34 consideration. The Campbell opinion observes  
35 that "nearly all of the illustrative uses  
36 listed in the preamble paragraph of § 107,  
37 including news reporting, comment, criticism,  
38 teaching, scholarship, and research . . .  
39 'are generally conducted for profit,'"  
40 Campbell, 510 U.S. at 584 (quoting Harper &

1           Row, 471 U.S. at 592) (Brennan, J.,  
2           dissenting), and that Congress "could not  
3           have intended" a rule that commercial uses  
4           are presumptively unfair. Id. The  
5           commercial objective of the secondary work is  
6           only a subfactor within the first factor.  
7           "The more transformative the new work, the  
8           less will be the significance of other  
9           factors, like commercialism, that may weigh  
10          against a finding of fair use." Id. at 579.  
11          Finding the work substantially  
12          transformative, the district court properly  
13          discounted the secondary commercial nature of  
14          the use. We agree.

15         Id. at 477-78; see also Campbell, 510 U.S. at 591 ("When a  
16         commercial use amounts to mere duplication of the entirety of an  
17         original, it clearly 'supersedes the objects,' Folsom v. Marsh, 9  
18         F. Cas. at 348, of the original and serves as a market  
19         replacement for it, making it likely that cognizable actionable  
20         market harm to the original will occur. But when, on the  
21         contrary, the second use is transformative, market substitution  
22         is at least less certain, and market harm may not be so readily  
23         inferred."); Davis, 246 F.3d at 174-75 (similar to NXIVM Corp.);  
24         Leibovitz, 137 F.3d at 113 (similar); Am. Geophysical Union, 60  
25         F.3d at 921-22 (similar).

26                 We do not mean to suggest that the commercialism of the  
27         use by the secondary user of the original is not relevant to the  
28         inquiry. But here, since the "new work" is "substantially  
29         transformative," NXIVM Corp., 364 F.3d at 478, "the significance  
30         of other factors, [including] commercialism[,] are of [less

1 significance], " id. (quoting Campbell, 510 U.S. at 579). We  
2 therefore "discount[] the secondary commercial nature of the  
3 use." Id.

4 It can hardly be said, moreover, that the defendants'  
5 economic gains from "Niagara" were "to the exclusion of broader  
6 public benefits." Am. Geophysical Union, 60 F.3d at 921-22.

7 Notwithstanding the fact that artists are sometimes paid and  
8 museums sometimes earn money, the public exhibition of art is  
9 widely and we think properly considered to "have value that  
10 benefits the broader public interest." Id. at 922; see also 20  
11 U.S.C. § 951 (stating that "access to the arts and the  
12 humanities" fosters "wisdom and vision" and makes citizens  
13 "masters of their technology and not its unthinking servants").

### 14 3. Parody, Satire, and Justification for the Copying.

15 The secondary work in Campbell was a parody, and some of the  
16 language in the opinion, and some of the cases following it, see,  
17 e.g., Leibovitz v. Paramount Pictures Corp., supra, are  
18 specifically about parody. "Niagara," on the other hand, may be  
19 better characterized for these purposes as satire -- its message  
20 appears to target the genre of which "Silk Sandals" is typical,  
21 rather than the individual photograph itself. See Rogers, 960  
22 F.2d at 310 (concluding that a previous work by Koons was not a  
23 parody because "the copied work must be, at least in part, an  
24 object of the parody" and it was "difficult to discern [in

1 Koons's work] any parody of the photograph . . . itself");  
2 Campbell, 510 U.S. at 581 n.15 ("Satire has been defined as a  
3 work 'in which prevalent follies or vices are assailed with  
4 ridicule,' 14 Oxford English Dictionary, . . . at 500, or are  
5 'attacked through irony, derision, or wit,' American Heritage  
6 Dictionary . . . at 1604.").

7 We have applied Campbell in too many non-parody cases  
8 to require citation for the proposition that the broad principles  
9 of Campbell are not limited to cases involving parody. But the  
10 satire/parody distinction may nevertheless be relevant to the  
11 application of these principles. As the Campbell Court observed,  
12 "[p]arody needs to mimic an original to make its point, and so  
13 has some claim to use the creation of its victim's (or collective  
14 victims') imagination, whereas satire can stand on its own two  
15 feet and so requires justification for the very act of  
16 borrowing." Id. at 580-81.

17 It is not, of course, our job to judge the merits of  
18 "Niagara," or of Koons's approach to art. See Campbell, 510 U.S.  
19 at 582 ("'[I]t would be a dangerous undertaking for persons  
20 trained only to the law to constitute themselves final judges of  
21 the worth of a work, outside of the narrowest and most obvious  
22 limits.'" (quoting Bleistein v. Donaldson Lithographing Co., 188  
23 U.S. 239, 251 (1903) (Holmes, J.))). The question is whether

1 Koons had a genuine creative rationale for borrowing Blanch's  
2 image, rather than using it merely "to get attention or to avoid  
3 the drudgery in working up something fresh." Id. at 580.  
4 Although it seems clear enough to us that Koons's use of a slick  
5 fashion photograph enables him to satirize life as it appears  
6 when seen through the prism of slick fashion photography, we need  
7 not depend on our own poorly honed artistic sensibilities. Koons  
8 explained, without contradiction, why he used Blanch's image:

9           Although the legs in the Allure Magazine  
10           photograph ["Silk Sandals"] might seem  
11           prosaic, I considered them to be necessary  
12           for inclusion in my painting rather than legs  
13           I might have photographed myself. The  
14           ubiquity of the photograph is central to my  
15           message. The photograph is typical of a  
16           certain style of mass communication. Images  
17           almost identical to them can be found in  
18           almost any glossy magazine, as well as in  
19           other media. To me, the legs depicted in the  
20           Allure photograph are a fact in the world,  
21           something that everyone experiences  
22           constantly; they are not anyone's legs in  
23           particular. By using a fragment of the  
24           Allure photograph in my painting, I thus  
25           comment upon the culture and attitudes  
26           promoted and embodied in Allure Magazine. By  
27           using an existing image, I also ensure a  
28           certain authenticity or veracity that  
29           enhances my commentary -- it is the  
30           difference between quoting and paraphrasing  
31           -- and ensure that the viewer will understand  
32           what I am referring to.



1 Koons Aff. at ¶ 12.<sup>5</sup> We conclude that Koons thus established a  
2 "justif[ication for] the very act of [his] borrowing." Campbell,  
3 510 U.S. at 581. Whether or not Koons could have created  
4 "Niagara" without reference to "Silk Sandals," we have been given  
5 no reason to question his statement that the use of an existing  
6 image advanced his artistic purposes.

7 4. "Bad Faith." Much has been written about whether  
8 good faith was de-emphasized by the advent of Campbell or  
9 essentially written out of the first part of the fair-use test.  
10 The question was thoroughly explored by the majority and  
11 concurring opinions in NXIVM Corp., 364 F.3d at 478-79; id. at  
12 483-87 (Jacobs, J., concurring). In any event, the only act of  
13 bad faith alleged here is that Koons used Blanch's photograph  
14 without first asking her permission. We are aware of no  
15 controlling authority to the effect that the failure to seek  
16 permission for copying, in itself, constitutes bad faith and the  
17 cases addressing bad faith tend to arise in circumstances  
18 strikingly different from the situation here. See Harper & Row,  
19 471 U.S. at 562-63 (purloined manuscript); NXIVM Corp., 364 F.3d  
20 at 478 (breach of confidentiality agreement); Rogers, 960 F.2d at

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<sup>5</sup> Koon's clear conception of his reasons for using "Silk Sandals," and his ability to articulate those reasons, ease our analysis in this case. We did not mean to suggest, however, that either is a *sine qua non* for a finding of fair use - as to satire or more generally.

1 309 (tearing off of copyright mark); Weissman v. Freeman, 868  
2 F.2d 1313, 1324 (2d Cir. 1989) ("total deletion of the original  
3 author's name and substitution of the copier's"). And as the  
4 Campbell Court noted by way of dictum, "If the use is otherwise  
5 fair, then no permission need be sought or granted." Campbell,  
6 510 U.S. at 585 n.18; see also Castle Rock Entm't, 150 F.3d at  
7 146 (2d Cir. 1998) ("One factor that is of no relevance to the  
8 fair use equation, however, is defendants' continued distribution  
9 of [the defendants' work] after [the plaintiff] notified  
10 defendants of its copyright infringement claim, because '[i]f the  
11 use is otherwise fair, then no permission need be sought or  
12 granted . . . . [B]eing denied permission to use a work does not  
13 weigh against a finding of fair use.'") (citing Campbell, 510  
14 U.S. at 585 n.18) (other citation omitted). In light of that  
15 statement by the Supreme Court and ours based upon it, it can  
16 hardly be said to have been an act of bad faith for Koons to have  
17 neither "sought [n]or [been] granted" permission for the use of  
18 "Silk Sandals" so long as, as we conclude here, the use is  
19 "otherwise fair."

20 5. Conclusions as to the First Factor. Because  
21 Koons's appropriation of Blanch's photograph in "Niagara" was  
22 intended to be -- and appears to be -- "transformative," because  
23 the creation and exhibition of the painting cannot fairly be  
24 described as commercial exploitation and the "commerciality" of

1 the use is not dispositive in any event, and because there is  
2 insufficient indication of "bad faith," we agree with the  
3 district court that the first fair-use factor strongly favors the  
4 defendants.

5 B. Second Factor: Nature of the Copyrighted Work

6 The second statutory factor is "the nature of the  
7 copyrighted work." 17 U.S.C. § 107(2). It "calls for  
8 recognition that some works are closer to the core of intended  
9 copyright protection than others, with the consequence that fair  
10 use is more difficult to establish when the former works are  
11 copied." Campbell, 510 U.S. at 586.

12 Two types of distinctions as to the nature of  
13 the copyrighted work have emerged that have  
14 figured in the decisions evaluating the  
15 second factor: (1) whether the work is  
16 expressive or creative, such as a work of  
17 fiction, or more factual, with a greater  
18 leeway being allowed to a claim of fair use  
19 where the work is factual or informational,  
20 and (2) whether the work is published or  
21 unpublished, with the scope for fair use  
22 involving unpublished works being  
23 considerably narrower.

24 2 Howard B. Abrams, The Law of Copyright, § 15:52 (2006).

25 As noted, Blanch's "Silk Sandals" was published. Under  
26 the second of the two considerations mentioned by Abrams, that  
27 fact favors the defendants.<sup>6</sup>

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<sup>6</sup> We have said that when "'the copyrighted [material is] unpublished, the second [fair-use] factor weighs heavily in favor'" of the plaintiff. New Era Publ'ns Int'l, ApS v. Henry Holt and Co., Inc., 873 F.2d 576, 583 (2d Cir. 1989) (quoting Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir.), cert. denied, 484 U.S. 890 (1987)), cert. denied, 493 U.S. 1094 (1990). "In 1992, however, Congress amended § 107 to state that: 'The

1           As for the first consideration, we disagree with the  
2 district court's characterization of Blanch's photograph as  
3 "banal rather than creative." Blanch, 396 F. Supp. 2d at 482.<sup>7</sup>  
4 Accepting that "Silk Sandals" is a creative work, though, it does  
5 not follow that the second fair-use factor, even if it somewhat  
6 favors Blanch, has significant implications for on our overall  
7 fair-use analysis. As we recently explained, although "the  
8 creative nature of artistic images typically weighs in favor of  
9 the copyright holder," "the second factor may be of limited  
10 usefulness where the creative work of art is being used for a  
11 transformative purpose." Bill Graham Archives, 448 F.3d at 612;  
12 cf. Campbell, 510 U.S. at 586 (stating that the second factor is  
13 rarely "likely to help much in separating the fair use sheep from  
14 the infringing goats in a parody case"). To paraphrase Bill  
15 Graham Archives, the second fair-use factor has limited weight in  
16 our analysis because Koons used Blanch's work in a transformative  
17 manner to comment on her image's social and aesthetic meaning

---

fact that a work is unpublished shall not itself bar a finding of  
fair use if such finding is made upon consideration of all the  
above factors.'" Sundeman v. Seajay Soc'y, Inc., 142 F.3d 194,  
204 (4th Cir. 1998) (quoting 17 U.S.C. § 107). We have not had  
occasion to address the published/unpublished distinction since  
that amendment. But see NXIVM Corp., 364 F.3d at 480 (the  
parties did not dispute that because the copyrighted work was  
unpublished, the second fair-use factor favored the plaintiffs).

<sup>7</sup> The district court did not actually say that Blanch's  
photograph was banal, but rather that the elements of the  
photograph copied by Koons were banal. We think that the  
expressiveness of the copied elements is better considered as  
part of the third fair-use factor, the amount and substantiality  
of the portion used.

1 rather than to exploit its creative virtues. See Bill Graham  
2 Archives, 448 F.3d at 612-13.

3 C. Third Factor: Amount and Substantiality of the Portion Used

4 The third factor bearing on fair use is "the amount and  
5 substantiality of the portion used in relation to the copyrighted  
6 work as a whole." 17 U.S.C. § 107(3). The question is whether  
7 "'the quantity and value of the materials used,' are reasonable  
8 in relation to the purpose of the copying." Campbell, 510 U.S.  
9 at 586 (quoting Folsom, 9 F. Cas. at 348); see also id. at 587  
10 (noting that analysis "calls for thought not only about the  
11 quantity of the materials used, but about their quality and  
12 importance, too."); Nihon Keizai Shimbun, Inc. v. Comline Bus.  
13 Data, Inc., 166 F.3d 65, 73 (2d Cir. 1999) (same).

14 As we have discussed in part II.3 of this opinion,  
15 above, Koons asserts that his artistic goals led him to  
16 incorporate preexisting images such as Blanch's photograph into  
17 his paintings in order to reference certain "fact[s] in the  
18 world." Koons Aff. at ¶ 12. The issue here is not  
19 "justification," which we addressed in part II.3. The question  
20 is whether, once he chose to copy "Silk Sandals," he did so  
21 excessively, beyond his "justified" purpose for doing so in the  
22 first place -- whether the use was "reasonable in relation to the  
23 purpose of the copying." Campbell, 510 U.S. at 586

1           It seems to us that Koons's copying of "Silk Sandals"  
2 was indeed reasonable when measured in light of his purpose, to  
3 convey the "fact" of the photograph to viewers of the painting,  
4 Koons Aff. at ¶ 12, and in light of the quantity, quality, and  
5 importance of the material used, Campbell, 510 U.S. at 587. He  
6 did not copy those aspects of "Silk Sandals" "whose power lies in  
7 [Blanch's] individualized expression." Harper & Row, 471 U.S. at  
8 563. As Blanch testified in her deposition, her key creative  
9 decisions in the shoot were the choice of an airplane cabin as a  
10 setting and her placement of the female model's legs on the male  
11 model's lap. But neither the airplane background nor the man's  
12 lap appear in "Niagara." It depicts only the woman's legs and  
13 sandal-clad feet. In light of Koons's choice to extract the  
14 legs, feet, and sandals in "Silk Sandals" from their background,  
15 we find his statement that he copied only that portion of the  
16 image necessary to evoke "a certain style of mass communication,"  
17 Koons Aff. ¶ 12, to be persuasive. We conclude that the amount  
18 and substantiality of Koons's copying was "reasonable in relation  
19 to the purpose of the copying." Campbell, 510 U.S. at 586. The  
20 district court said that "[t]he third factor is neutral as  
21 between the parties," Blanch, 396 F. Supp. 2d at 482; we think  
22 that it weighs distinctly in Koons's favor. This modest  
23 difference in our views, however, does not alter our ultimate  
24 conclusion on fair use.

1 D. Fourth Factor: Market Effects

2 The fourth and final statutory factor is "the effect of  
3 the use upon the potential market for or value of the copyrighted  
4 work." 17 U.S.C. § 107(4).<sup>8</sup> "In considering the fourth factor,  
5 our concern is not whether the secondary use suppresses or even  
6 destroys the market for the original work or its potential  
7 derivatives, but whether the secondary use usurps the market of  
8 the original work." NXIVM Corp., 364 F.3d at 481-82. "The  
9 market for potential derivative uses includes only those that  
10 creators of original works would in general develop or license  
11 others to develop." Campbell, 510 U.S. at 592.

12 Blanch acknowledges that she has not published or  
13 licensed "Silk Sandals" subsequent to its appearance in Allure,  
14 that she has never licensed any of her photographs for use in  
15 works of graphic or other visual art, that Koons's use of her  
16 photograph did not cause any harm to her career or upset any  
17 plans she had for "Silk Sandals" or any other photograph, and  
18 that the value of "Silk Sandals" did not decrease as the result  
19 of Koons's alleged infringement. In light of these admissions,

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8

The Supreme Court has recently retreated from its earlier cases suggesting that the fourth statutory factor is the most important element of fair use, see Harper & Row, 471 U.S. at 566, recognizing instead that "all [factors] are to be explored, and the results weighed together, in light of the purposes of copyright," Campbell, 510 U.S. at 578 . . . .

Castle Rock Entm't, 150 F.3d at 145.

1 it is plain that "Niagara" had no deleterious effect "upon the  
2 potential market for or value of the copyrighted work." 17  
3 U.S.C. § 107(4).<sup>9</sup> The fourth fair-use factor greatly favors  
4 Koons.

#### 5 CONCLUSION

6 Having explored the statutory factors and weighed them  
7 together in light of the purposes of copyright, Campbell, 510  
8 U.S. at 78, we think that the district court's conclusion was  
9 correct -- that copyright law's goal of "promoting the Progress  
10 of Science and useful Arts," U.S. Const., art. I, § 8, cl. 8,  
11 would be better served by allowing Koons's use of "Silk Sandals"  
12 than by preventing it, see Castle Rock Entm't, 150 F.3d at 141.  
13 We therefore conclude that neither he nor the other defendants  
14 engaged in or are liable for copyright infringement. We affirm  
15 the judgment of the district court.

---

<sup>9</sup> We have sometimes found that the fourth factor favors the plaintiff even in the absence of evidence that the plaintiff has tapped, or even intends to tap, a derivative market. See, e.g., Castle Rock Entm't, 150 F.3d at 145-46 ("Although Castle Rock has evidenced little if any interest in exploiting this market for derivative works . . . the copyright law must respect that creative and economic choice."). But nothing in the record here suggests that there was a derivative market for Blanch to tap into that is in any way related to Koons's use of her work, even if she dearly wanted to. And it is of course circular to assert simply that if we were to hold in her favor she could then charge Koons for his further use of "Silk Sandals." See Am. Geophysical Union, 60 F.3d at 929 n.17 ("By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties." (quoting Leval, supra, 103 Harv. L. Rev. at 1124)).



...incorporating  
 "half" glittery  
 ...head to toe.  
 ...for metallic on the eyes  
 or lips—both is too much,"  
 she says. The optional  
 "half" might be metallic  
 eyeliner, highlighter on the  
 cheekbones, or metal-flecked  
 nails. This page: Live From  
 New York...It's OPI nail polish  
 by OPI. Silk sandals by Gucci.  
 Stretch gabardine pants by  
 Prada. Opposite: Oasis Bronze  
 cream eye shadow, Bronze  
 Glow blush, and Goldswept  
 lipstick by Lancôme. Silk  
 dress and sable jacket  
 by Fendi. Eye mask by Gucci.  
 Details, see Credits page.





1           Katzmann, Circuit Judge, concurring:

2           I concur in the disposition of this case and  
3 appreciate the very considerable thinking in the majority  
4 opinion. I agree that Koons' work is highly transformative of  
5 Blanch's, using it as raw material for an entirely different type  
6 of art, and that his use of Blanch's work furthered a purpose  
7 (art that comments on existing images by juxtaposing them against  
8 others) that can make a finding of fair use appropriate. In both  
9 respects, the facts of this case are quite distinguishable from  
10 those of Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992), in which  
11 Koons slavishly recreated a copyrighted work in a different  
12 medium without any objective indicia of transforming it or  
13 commenting on the copyrighted work. Moreover, the fourth factor  
14 of the fair-use analysis dramatically favors Koons, in that  
15 Blanch failed to show that Koons' use of her work actually harmed  
16 her in any way. She thus stands in stark contrast to the  
17 plaintiff in Rogers, for whom licensing of his work in general,  
18 and the appropriated work in particular, yielded considerable  
19 revenue. On the facts of this case, it is easy to conclude that  
20 the copyright law's goals are better served by a finding of fair  
21 use.

22           I respectfully part company with the majority  
23 opinion, however, because I believe it sweeps more broadly in

1 several places than is necessary to decide this simple case. For  
2 example, I see no need to state that we "discount[] the secondary  
3 commercial nature of the use." See Majority Op. at 22. This  
4 language was taken from NXIVM Corp. v. Ross Inst., 364 F.3d 471,  
5 478 (2d Cir. 2004), which used it in the context of applying our  
6 presumption that the first factor favors the defendant where the  
7 use is for one of the purposes specifically listed in 17 U.S.C. §  
8 107. Here, where Koons' use is not for one of the archetypal  
9 purposes specifically contemplated by Congress and such a  
10 presumption does not apply, it is uncertain whether we have  
11 license to "discount" its commercial nature, as opposed to  
12 balancing that consideration against the use's transformativeness  
13 and other countervailing concerns - particularly because  
14 consideration of a use's commercial nature (unlike its  
15 "transformativeness") is explicitly part of our statutory  
16 mandate. See 17 U.S.C. § 107(1).

17  
18 Rather than reaching this question, I would simply apply our  
19 established analysis for weighing commercialism, see Am.  
20 Geophysical Union v. Texaco, Inc., 60 F.3d 913, 922-23 (2d Cir.  
21 1994). As in Am. Geophysical Union, "the link between [the  
22 defendant's] commercial gain and [the defendant's] copying is  
23 somewhat attenuated," in that the copying of Blanch's work was  
24 simply one small part of what made Koons' work so valuable rather  
25 than the heart of the enterprise. See 60 F.3d at 922.

1           Similarly, there seems to be no need to rely so heavily on  
2 what the majority acknowledges is a sentence of dictum in a  
3 footnote in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569  
4 (1994), to the effect that failure to seek authorization, even  
5 where doing so would have been feasible, is not relevant to the  
6 fair-use inquiry. See Majority Op. at 26-29. I see no reason,  
7 on these facts, to wade into the contentious battle over the role  
8 of good faith in the post-Campbell fair use inquiry. Instead, I  
9 would simply conclude that whatever bad faith Koons may have  
10 exhibited in this case, as well as the limited commercial nature  
11 of his use, would not outweigh the much stronger considerations  
12 pointing toward a finding of fair use.

13  
14           To be clear, I do not argue with the majority's thoughtful  
15 discussion of these points, except to question whether its  
16 conclusions are compelled by precedent. If and when I encounter  
17 a case that requires me to do so, I may well adopt them. I  
18 merely believe that this is not such a case, and so I do not now  
19 join what I regard as dicta as applied to these facts.

20           This is our Circuit's second encounter with Koons' work.  
21 His work, like that of other appropriation artists, inherently  
22 raises difficult questions about the proper scope of copyright  
23 protection and the fair-use doctrine. I would continue to answer  
24 those questions as necessary to decide particular cases, mindful

1 that the fair-use inquiry is a fact-specific one that is "not to  
2 be simplified with bright-line rules." Campbell, 510 U.S. at  
3 577.

4

5

6