No. 21-12835

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPLE INC.,

Plaintiff-Counter Defendant-Appellant,

v.

CORELLIUM, INC.,

Defendant-Counter Claimant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida, No. 9:19-cv-81160-RS (Hon. Rodney Smith)

REPLY IN SUPPORT OF PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (CIP) OF APPELLANT APPLE INC.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Appellant Apple Inc. certifies that it is a publicly traded corporation (NASDAQ: AAPL), that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of its stock.

Pursuant to Eleventh Circuit Rule 26.1-2(a), Apple Inc. certifies that the following persons and entities have an interest in the outcome of this case:

Apple Inc. (AAPL): Appellant

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Sherry, Melissa Arbus: Counsel for Appellant

Smith, Honorable Rodney: U.S. District Court Judge

Vine, S. Jonathan: Counsel for Appellee

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Dated: August 21, 2023

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Apple respectfully submits this short reply in support of its rehearing petition. Apple acknowledges that it is not entitled to a reply as of right and accordingly does not attempt a full, point-by-point rebuttal of Corellium's response. But a brief reply is warranted, to respond to Corellium's attempts to explain why its commercial distribution of iOS should be considered transformative under *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023). As legal academics and other commentators have explained, that intervening decision is an "enormously consequential"[1] opinion with "transformational reach."[2] *See* Pet. 1 & nn.1-2. Under *Warhol*, Corellium cannot carry its summary judgment burden of demonstrating a fair use defense as a matter of law.

The most notable feature of Corellium's response is what it does not dispute. Corellium acknowledges *Warhol*'s requirement that courts assessing transformative use "must determine whether the 'specific use alleged to infringe' the plaintiff's copyright 'share[s] substantially the same purpose' as *any* of the 'multiple ways' in

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[1] Prof. Tyler Ochoa, *U.S. Supreme Court Vindicates Photographer But Destabilizes Fair Use—Andy Warhol Foundation v. Goldsmith (Guest Blog Post)*, Technology & Marketing Law Blog (June 20, 2023), https://blog.ericgoldman.org/archives/2023/06/u-s-supreme-court-vindicates-photographer-but-destabilizes-fair-use-andy-warhol-foundation-v-goldsmith-guest-blog-post.htm.

[2] Prof. Caroline Osborn & Stephen Wolfson, Esq., *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, a Narrow Ruling or a Transformational Decision? An Essay*, W. Va. Coll. L. Rsch. Paper Series (forthcoming 2023) (manuscript at 10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4520008.

which the plaintiff uses (or reasonably could use) the original work." Resp. 7 (alteration in original) (citation omitted). Corellium thus defends neither the panel's pre-*Warhol* framing of the inquiry as "assessing whether [the follow-on] work"—rather than the challenged use—"is transformative," nor the panel's assertion that unauthorized copying is transformative whenever "*a* [transformative use] may reasonably be perceived." Op. 24 (alterations in original) (citation omitted). Corellium also does not dispute that, under *Warhol*, unauthorized distribution of a copyrighted work cannot be "deemed transformative without regard to the identity of the licensee or the uses authorized by the license." Pet. 14. And Corellium all but concedes that the panel's conclusion on transformative use drove the rest of its analysis—and with it, the panel's erroneous affirmance of summary judgment on Apple's claim for direct infringement of iOS. *See* Resp. 18 n.7.

The reality is the panel (not surprisingly) did not conduct the use-centric inquiry *Warhol* now requires. Corellium's challenged use of iOS—distributing iOS to paying customers to use however they see fit—must be compared with all of Apple's own uses to determine whether they overlap. Pet. 9-10. They do: Apple likewise distributes iOS for various purposes, including for security research. *Id.* Corellium's commercial distribution of Apple's copyrighted work is therefore not even moderately transformative under *Warhol*. And it is clearly commercial. The first factor cuts strongly against fair use.

Corellium attempts to avoid that straightforward conclusion. But its efforts suffer from four major flaws.

First, Corellium distorts the nature of the "specific use of [iOS] alleged to infringe [Apple]'s copyright" by trying to stand in the shoes of security researchers. *Warhol*, 143 S. Ct. at 1273. Analogizing to literary works, Corellium observes that "the author of Harry Potter has a monopoly over screen adaptions of the book, but not over parodies or literary criticism of the work"—and that the author cannot "preclude others from making their own [parodies]" by "licens[ing] a [Harry Potter] parody" herself. Resp. 10. That analogy has a glaring hole: Corellium does not conduct security research *itself*. Rather, Corellium distributes the entirety of iOS to paying customers, claiming to *facilitate* their security research. But the transformative use inquiry focuses on Corellium's use, not its customers' uses. *See Infinity Broadcasting Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998). As Corellium later admits, it (at best) provides its customers with a "tool"; what they choose to do with that tool concededly cannot make *Corellium's* use of iOS transformative. Resp. 13 (acknowledging that customer use is "irrelevant").

Corellium's purported use of iOS for research purposes is akin to a for-profit company selling searchable, full-text electronic copies of Harry Potter novels, while claiming to offer "a tool for developing knowledge about" the best-selling literary series. *Id.* Such commercial distribution of word-for-word reproductions of

J.K. Rowling's novels would not be transformative, *even assuming* the customers used their unauthorized copies of Harry Potter for critical, parodic, or research purposes. *See Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1263-64 (11th Cir. 2014) (compiling excerpts from "scholarly works" for use by others "in university courses" not transformative); *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 924 (2d Cir. 1994) (similar). The same goes for Corellium's commercial distribution of "byte-for-byte" copies of iOS with a few additional features.[3] Doc. 557-6, pg. 4. And under *Warhol*, Corellium's challenged use of iOS has "the same or highly similar purposes" as Apple's developer-facing uses. 143 S. Ct. at 1277.

The point is not, as Corellium suggests, that "the panel should have ignored [Apple's] consumer-facing uses" of iOS. Resp. 8. The point is that *Warhol* requires the panel to *also* consider Apple's Security Research Device Program, iOS Simulator, and Xcode Cloud.[4] Pet. 10-11. Because those developer-facing uses

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[3] Not so for the revolutionary database at issue in *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), which aggregated vast swaths of copyrighted works, while ensuring that no user could view more than tiny snippets of copyrighted text. *See* OB32-33; RB7-8. And contrary to the panel's characterization, Google *did* "make only a portion of its millions of Google Books available to *each* searcher based on what each *particular* searcher was interested in." Op. 29. That was the whole point of the snippet function: "to show the searcher just enough context surrounding the searched term to help her evaluate whether the book falls *within the scope of her interest* (without revealing so much as to threaten the author's copyright interests)." *Authors Guild*, 804 F.3d at 218 (emphasis added).

[4] Whether these developer-facing offerings involve original iOS or, as Corellium says, "iOS *derivatives*" is beside the point. Resp. 10. Transformative use

and Corellium's activities each involve *distribution* of iOS in its entirety, Corellium is wrong to assert that "both serve a transformative purpose." Resp. 11. It may be true that, "[e]ven if [an] author licenses a parody, that does not preclude others from making their own [parodies] without a license." *Id.* at 10. But that does not mean others can *license* the original work to third-party parodists without authorization, which is the functional equivalent of Corellium's asserted business model.

Second, Corellium twists itself into knots trying to explain how the panel adequately accounted for the myriad different ways Corellium permits its customers to use their Corellium-supplied copies of iOS. After conceding "that 'customers can use CORSEC for multiple purposes'" besides security research, Corellium claims that the panel "addressed every allegedly overlapping use Apple advanced" and deemed them all transformative. Resp. 12. What the panel actually did was acknowledge that some uses of Corellium's product are *not* transformative but hold that "transformativeness does not require unanimity of purpose" because "works rarely have one purpose." Op. 24.

Warhol refutes the panel's reasoning by focusing the transformative use inquiry on the specific challenged use, not on the follow-on work as a whole. Under *Warhol*, the "same copying"—that is, the same unauthorized follow-on work—"may

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turns on whether the challenged use "will serve as a substitute for the original *or its plausible derivatives*." *Authors Guild*, 804 F.3d at 214 (emphasis added).

be [transformative] when used for one purpose but not another." *Warhol*, 143 S. Ct. at 1277; *see* Pet. 12-13 (collecting examples of potential uses of Warhol's Prince Series posited by the Supreme Court). The identity of Corellium's licensees and the uses permitted by Corellium's licenses are thus potentially dispositive facts. Pet. 14. Corellium's sole attempt to address that controlling rule is to declare that, "in *every* application," its product serves a transformative purpose, no matter to whom it is licensed or for what purpose. Resp. 13. But Corellium has no evidence to prove up that sweeping assertion on summary judgment—which is unsurprising, given Corellium's willful blindness to how its customers actually use its product. Pet. 13.

Third, Corellium's defense of the panel's reliance on Corellium's subjective intentions and modest alterations of iOS falls flat. Corellium concedes that testimony from Corellium's founders about their intent has "no legal significance." Resp. 14 (citing Op. 5). But then Corellium argues the panel properly cited, as "objective" proof of Corellium's purpose, the assertion that Corellium's product "helps security researchers do their work in a way that physical iPhones just can't." *Id.* (quoting Op. 18). "On its face," Corellium insists, "the sentence does not rely on anyone's subjective intent." *Id.* But that is only because Corellium, like the panel, ignores that this assertion came straight from the mouth of Corellium's founders. Pet. 14. By eliding that critical context, Corellium and the panel both improperly

treat the founders' subjective view—which is concededly irrelevant under *Warhol*—as an "undisputed" fact.

Corellium also fails to meaningfully dispute that the few features it adds are "modest alterations," not revolutionary capabilities—and are therefore insufficient for transformative use under *Warhol*. 143 S. Ct. at 1285. As Apple explained, Corellium "merely 'mak[es] copyrighted material searchable'" and adds the equivalent of "a zoom function or a pause button on a movie." Pet. 15 (quoting *MidlevelU, Inc. v. ACI Info. Grp.*, 989 F.3d 1205, 1221-22 (11th Cir. 2021)). Corellium has no substantive response. It just parrots the panel's assertion that Corellium "create[d] a 'new product' that serves 'new purposes'"—without explaining how a handful of modest tweaks can support that conclusion. Resp. 15 (quoting Op. 20-21). And Corellium *concedes* that the purportedly transformative nature of its product "does not arise from its modest alteration of the iOS code" to crack Apple's technical security measures. *Id.* at 15 n.5.

Fourth, while insisting that the panel's decision "[f]ully [c]omports" with *Warhol*'s emphasis on the commerciality prong of the first factor, Corellium rewrites the panel's decision. *Id.* at 15. In Corellium's telling, the panel noted that Corellium's product is "only 'moderately transformative' and that [it] is a commercial product before concluding that, on balance," this modest degree of transformativeness outweighs the for-profit nature of Corellium's business. *Id.* at

16. But the panel's commerciality analysis nowhere acknowledged the "moderately transformative" finding and did not balance anything. It simply stated that "Corellium's use was commercial" before dismissing that undisputed fact as "'not dispositive.'" Op. 25 (citation omitted). *Warhol* requires more. And on these facts—where Corellium's copycat iOS was found only moderately transformative even under pre-*Warhol* precedent, and is far less than that after *Warhol*—Corellium's for-profit exploitation of Apple's copyrighted work tilts the first factor strongly against fair use. Pet. 16.

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Corellium concludes its response by crying wolf. "What Apple really wants," Corellium proclaims, is "to suppress the development and dissemination of knowledge" about iOS. Resp. 18. Nothing could be further from the truth. Apple "has never pursued legal action against a security researcher." Doc. 56, pg. 2. Apple encourages and rewards researchers' valuable work through its "bug bounty" program. *Id.*, pgs. 2-3. And Apple separately licenses iOS for the express purpose of facilitating security research. Doc. 518-4, pgs. 11-12. What Apple really wants is to ensure that companies like Corellium cannot commercially exploit iOS by distributing Apple's copyrighted software en masse, to "whoever [i]s interested" and willing to pay. Doc. 557-13, pgs. 102-03. That is the lawful prerogative of any

copyright holder, one Apple is appropriately exercising here. The rehearing petition should be granted.

Dated: August 21, 2023

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing document is proportionally spaced, has a typeface of 14-point Times New Roman, and contains 1,929 words, excluding the parts of the petition exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 32-4.

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