

No. 21-869

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IN THE  
**Supreme Court of the United States**

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THE ANDY WARHOL FOUNDATION  
FOR THE VISUAL ARTS, INC.,  
*Petitioner,*

v.

LYNN GOLDSMITH,  
*Respondent.*

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

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**BRIEF OF THE AUTHORS GUILD, INC.,  
NEWS MEDIA ALLIANCE, SESAME WORKSHOP,  
INC., DRAMATISTS LEGAL DEFENSE FUND,  
ROMANCE WRITERS OF AMERICA, SISTERS  
IN CRIME, AND GARDEN COMMUNICATORS  
INTERNATIONAL AS *AMICI CURIAE*  
IN SUPPORT OF NEITHER PARTY**

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**INTEREST OF *AMICI CURIAE***

The Authors Guild, Inc. (the “Authors Guild”) is the nation’s oldest and largest professional organization for all writers with over 12,000 members, writers of all forms of nonfiction and fiction.<sup>1</sup> The Authors Guild promotes the rights and professional interests of authors, including freedom of expression and copyright. The Authors Guild’s members rely upon reasonable application of copyright law and judicial protection of their exclusive rights. The Authors Guild’s members also depend upon the proper application of the fair use defense in their writing and in licensed derivative works when incorporating prior works to comment on them or to use them as references, as well as in ensuring their own free speech rights and those of their licensees in creating television shows, motion pictures, and other derivative works. Accordingly, the Authors Guild is well positioned to provide the Court with a unique and balanced perspective on the proper contours of the fair use defense.

The Dramatists Guild of America, Inc. (the “Guild”) formed the Dramatists Legal Defense Fund (the “DLDF”) in 2009 to advocate for free expression in the dramatic arts as guaranteed in the First Amendment of the U.S. Constitution and to encourage the vitality of a robust public domain, in support of the purpose of the Constitution’s “Progress

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<sup>1</sup> Pursuant to Sup. Ct. R. 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae* and their counsel made a monetary contribution to its preparation or submission. The Clerk has noted Petitioner’s and Respondent’s blanket consents to *amici curiae* briefs, both dated May 2, 2022, on the docket.

Clause.” The DLDF is governed by a Board of Directors that currently includes several attorneys well established within the theatre industry as well as renowned dramatists J.T. Rogers (*Oslo, Blood and Gifts*), Sarah Ruhl (*In the Next Room*), Lydia Diamond (*Stick Fly*), and the current President, John Weidman (*Assassins, Pacific Overtures, Contact*).

The sole member of the DLDF is the Dramatists Guild, a trade association established in 1919 to advance the professional interests of playwrights, composers, lyricists and librettists in the United States. The Guild’s 9000+ members elect a governing board of authors that currently includes Lin-Manuel Miranda (*Hamilton, In The Heights*), Lynn Nottage (*MJ, Clyde’s, Intimate Apparel*), Tony Kushner (*Angels in America, Caroline, or Change*), and Stephen Schwartz (*Wicked, Pippin, Godspell*). The current president of the Dramatists Guild is Amanda Green (*Mr. Saturday Night, Hands on a Hard Body, High Fidelity*).

GardenComm, formerly the Garden Writers Association, is a highly-respected organization of more than 600 professional communicators in the green industry including book authors, bloggers, staff editors, syndicated columnists, freelance writers, photographers, television and radio personalities, publishers and more. Members provide direct communication and seasoned analysis between the green industry and the consumers and represent the gold standard of garden communications in all media. Members work with arboretums, garden centers and nurseries, garden clubs, garden programs and event planners, landscape architects and designers, landscape contractors, landscape product

manufacturers and marketers, master gardeners, plant breeders and marketers, plant societies, and public gardens and parks, among others. GardenComm aims to foster respect and integrity for the garden communications industry and its members. It is the source of education and information in the garden communications industry and is an advocate for responsible environmental stewardship.

The News Media Alliance (“NMA”) is a nonprofit organization that represents the interests of more than 2,000 news media organizations in the United States and internationally. NMA diligently advocates for news organizations on issues that affect them today, including protecting news organizations’ intellectual property and free speech rights. In creating expressive works, NMA’s members rely on both the exclusive right to make derivative works and the fair use defense. The proper implementation of copyright’s fair use defense and the protections of the exclusive rights of copyright owners, including the right to make and authorize derivative uses of their owned works, are matters of urgent importance to NMA and its members.

Romance Writers of America (“RWA”), founded in 1980, is a nonprofit trade association, with a membership of more than 4,000 romance writers and related industry professionals, whose mission is to advance the professional interests of career-focused romance writers through networking and advocacy. RWA works to support the efforts of its members to earn a living, to make a full-time career out of writing romance—or a part-time one that supplements his/her main income.

Sesame Workshop, Inc. (“Sesame Workshop”) is a nonprofit organization that has been responsible for the production of several educational children’s programs—including its first and best known, the iconic *Sesame Street*, the longest running program on the Public Broadcasting Service (PBS). On November 10, 2019, *Sesame Street* celebrated its fiftieth year of continuous broadcast on the PBS stations in the United States. *Sesame Street* has continued to bring critical early learning to generations through the beloved and iconic Muppets of *Sesame Street*, including Big Bird, Cookie Monster, Oscar the Grouch, Bert and Ernie, and Elmo. Sesame Workshop’s international programming includes local adaptations of *Sesame Street* customized to the unique needs and challenges of children in different languages and cultures in such countries as South Africa, Afghanistan, Mexico, and Bangladesh, among others. Sesame Workshop has received a record-setting 191 Emmy awards to date and numerous other accolades. *Sesame Street* has been recognized as the most impactful program in the history of television for its innovative work in using the power of media to help children learn and grow, preparing them for success in school and life. On July 18, 2019, Sesame Street again made history, becoming the first television program to be named as a recipient of the Kennedy Center Honors. As a copyright owner, Sesame Workshop licenses its copyrighted content for use in television, streaming video, software apps, home video, toys and games, and theme parks. In that role, Sesame Workshop often licenses others the right to create derivative works, including works that combine copyrighted characters and content owned by Sesame Workshop with copyrighted characters and

content owned by other creators.<sup>2</sup> Conversely, Sesame Workshop often relies on fair use to create expressive works. Examples include parodies of *True Blood* (“True Mud”), *Downton Abbey* (“Upside Downton Abbey”), and *Homeland* (“Homelamb”).

Sisters in Crime is the premier crime writing association focused on equity and inclusion in its community and in publishing. Founded in 1986 to represent and advocate for women crime writers, it celebrates and honors this history with its name while continuing to work for all who share the association’s commitment to and love for a vibrant, inclusive community. Its 4,500+ members enjoy access to tools to help them learn, grow, improve, thrive, and reinvent if necessary. They also gain a community of supportive fellow writers and readers, both peers to share the peaks and valleys of writing, and mentors to model the way forward.

Copyright law serves as an incentive for creators and distributors to create and disseminate expressive works. *Amici* submit this brief to assist the Court in appreciating the ways in which fair use is understood and applied in *amicus*’s fields of creation, and how the first factor of the test needs to be read and applied properly in the context of the overall fair use determination to protect the derivative-work

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<sup>2</sup> See, e.g., “Sesame Street: Respect is Coming,” a public service announcement in which *Sesame Street*’s Elmo teaches two bitter rivals from the popular and critically acclaimed HBO series *Game of Thrones* to respect each other’s point of view. YouTube (Apr. 18, 2019), <https://www.youtube.com/watch?v=l2ppLtHbag4>. The public service announcement was created pursuant to licenses from Sesame Workshop and HBO.

right while still enabling the types of uses on which *amici* rely to help further the creation of new expression.

### SUMMARY OF ARGUMENT

The Copyright Clause, Art. I, § 8, cl. 8, exists to foster the creation and dissemination of original works of authorship for the public welfare. Copyright serves as an engine of free expression, working in tandem with the First Amendment.

Critical to incentivizing the creation of expressive works is the copyright owner's exclusive right to make derivative works. Copyright Act of 1976, 17 U.S.C. § 106(2). A derivative work recasts, transforms, or adapts the original work. *Id.* § 101. Because the derivative-work right ensures that the copyright owner has the exclusive right to exploit broad markets for recast, transformed, or adapted works, section 106(2) serves as a critical incentive to creators and distributors of expressive works, all to the consuming public's benefit. So essential is the derivative-work right that some creators and publishers—including many authors, news reporters, and book and other publishers—rely on that right for their financial viability.

*Amici's* members also rely on copyright's fair use exception, 17 U.S.C. § 107, to create and disseminate expressive works. In determining whether a use is fair, a court will inquire into, among other things, whether a secondary use "transforms" the original. As many courts and commenters have noted, an overly broad standard of

transformativeness threatens to dilute statutory protections for derivative works.

Despite the tension between the derivative-work right and the standard of transformation under the fair use inquiry, in most cases involving what may be termed traditional expressive works—books, movies, television, theatre, news, images—the courts have generally reached correct decisions. This is because resolution of transformative-use questions proves more straightforward where the secondary use parodies, criticizes, or comments on the original; or where the secondary work uses the original as, for example, an historical artifact, to create a new, different form of work that has a different purpose or character from the original.

This case involves a relatively unusual scenario: the secondary work here uses almost the entire original work without obvious commentary or criticism *and* the works are in the same form (*i.e.*, works of the visual arts). In considering the fair use issue, the Second Circuit in large part properly applied this Court’s analysis in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), to determine whether the secondary use was transformative. *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 37-42 (2d Cir. 2021). Then, the Court of Appeals concluded that “the secondary work’s transformative purpose and character must, at a bare minimum, comprise something more than the imposition of another artist’s style on the primary work such that the secondary work remains both *recognizably deriving from, and retaining the essential elements of, its source material.*” *Id.* at 42 (emphasis added). However, certain recognized fair

uses depend upon recognizability of the original and retention of the essential elements of source material. *Amici* therefore suggest that, in an unusual case like this, a key inquiry should be whether the marketability and value of the challenged work derives, at least in part, from the aesthetic and entertainment value of the original copyrighted work.

In addition, because the Question Presented focuses solely on transformative use—only a part of the inquiry under the first of the four non-exclusive factors—*amici* emphasize this Court’s mandate that all fair use factors are to be explored and the results weighed together when determining whether a use is fair. This is particularly important because an overly broad interpretation of the definition of transformation could dilute the all-important derivative-work right and distort and expand fair use into an uncontrollable gaping hole in copyright protection. In accordance with the Court’s fair use jurisprudence, the transformative-use test should not be outcome determinative.

## ARGUMENT

### I. AN EFFECTIVE COPYRIGHT SYSTEM REQUIRES THAT THE COPYRIGHT OWNER’S EXCLUSIVE RIGHTS AND THE FAIR USE DEFENSE WORK TOGETHER TO ENCOURAGE THE CREATION AND DISSEMINATION OF EXPRESSIVE WORKS.

This Court has repeatedly recognized that copyright exists to incentivize the creation of expressive works in the interests of free speech. *See*,

*e.g.*, *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (copyright posits that “encouragement of individual effort by personal gain is the best way to advance public welfare”). To further this goal, Congress has granted to copyright owners a number of exclusive rights. 17 U.S.C. §106.<sup>3</sup> As a limitation on these exclusive rights, a second person may sometimes make fair use of a pre-existing work. 17 U.S.C. §107. Creators and distributors of expressive works like *amici* and their members rely on the proper balance between the scope of exclusive rights and the fair use defense to ensure a fair reward for their efforts, all to the benefit of the general public.

**A. The Derivative-Work Right Provides a Critical Incentive for the Production and Dissemination of Expressive Works for *Amici* and Their Members.**

Section 106(2) of the Copyright Act gives the copyright owner the exclusive right “to prepare derivative works based upon the copyrighted work[.]” A derivative work “recast[s], transform[s], or adapt[s]” a pre-existing work. 17 U.S.C. §101.

As Professor Paul Goldstein has noted, the derivative-work right “enables prospective copyright owners to proportion their investment in a work’s

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<sup>3</sup> These rights are the right to reproduce, to make derivative works, to distribute to the public, to publicly perform, and to publicly display the copyrighted work.

expression to the returns expected not only from the market in which the copyrighted work is first published, but from other, derivative markets as well.” Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC’Y U.S.A. 209, 216 (1983). Derivative rights “by definition, secure markets at some remove from the market first entered.” *Id.* at 217.<sup>4</sup> Exploitation of works in derivative markets—*e.g.*, a book made into a movie, then a stage play, then a video game, then a theme park ride—can prove more lucrative than the exploitation of the original market by itself.

*Amici* and their members create expressive works—*e.g.*, books, stories, plays and musicals, articles, images, video, news content, and iconic television programming—that have immense value in the public discourse. A robust derivative-work right has proved essential to incentivizing the creation of these works.<sup>5</sup> For example, *amicus* Authors Guild represents authors who produce culturally and artistically significant literary works of fiction and nonfiction. To build their careers, authors often invest a significant amount of time and money in education and training. Yet, the typical writer earns comparatively little for their level of education, often

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<sup>4</sup> Thus, “[t]he copyright owners of *Gone [w]ith the Wind* can hope to monopolize not only the sale of the novel’s hardcover and paperback editions, but also the use of the novel’s expressive elements in translations, motion pictures and countless other derivative formats.” *Id.* at 216.

<sup>5</sup> Many were adapted from books or stories, including *Harry Potter*, *Gone with the Wind*, *Rear Window*, *The Color Purple*, *The Godfather*, and *The Wizard of Oz*.

just enough to get by, which means it takes only a small loss in earnings for the writing profession to become unsustainable for them. The Authors Guild’s last income survey, conducted in 2018 with over 5000 authors participating, found that the mean writing-related income for full-time authors was only \$20,300 (down from \$25,000 in 2009), with only half of that from their books. Yet, almost 60% have advanced education beyond college.<sup>6</sup>

Without the potential to exploit the derivative-work rights in their books—via audiobooks, enhanced ebooks, abridged versions, translations, speeches, excerpts of and articles based on the book (referred to as serial rights), motion pictures, television shows, sequels, web series, video games or other medium—authors would earn far less money, and many would have to stop writing professionally. Ultimately, readers would lose out.

Moreover, the economic viability of the publishing industry is, historically, a critical goal of copyright law. *See Golan v. Holder*, 565 U.S. 302, 326 (2012) (noting that the Founding Fathers viewed publication as a significant goal of copyright). Like authors, book publishers rely on the derivative-work right to thrive. Book publishers today typically obtain from authors ebook rights, audiobook rights, translation rights, serial rights, and rights to create

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<sup>6</sup> *Six Takeaways from the Authors Guild 2018 Author Income Survey*, THE AUTHORS GUILD (Jan. 5, 2019), <https://www.authorsguild.org/industry-advocacy/six-takeaways-from-the-authors-guild-2018-authors-income-survey/>.

other book versions.<sup>7</sup> Publishers rely on income from the licensing of those rights to support their ability to invest in new works.

*Amicus* NMA's members increasingly depend on the derivative-work right to bolster their bottom lines in the face of increasing loss of traditional sources of income from the publication of their original works in traditional formats. This dependence will likely increase in the future as news publishers bring new works to the public based on their original works. Income from these derivative works funds the employment and retention of journalists, investment in new technologies, and the creation of more news and current affairs content. Similarly, *amicus* NMA's members depend on the derivative-work right for their subsistence. *See generally* News Media Alliance, *How Google Abuses Its Position as a Market Dominant Platform to Strong-Arm News Publishers and Hurt Journalism* (Jun. 2020), <http://www.newsmediaalliance.org/wpcontent/uploads/2020/06/NMA-Google-White-Paper-Design-Final.pdf>. One clear indicator of the failings of the current copyright marketplace for news, according to Pew Research, is that press publisher advertising revenues have fallen in the past 15 years from approximately \$50 billion (in 2005) to an estimated \$9.6 billion in 2020. PEW RESEARCH CENTER, NEWSPAPER FACT SHEET, <http://www.journalism.org/fact-sheet/newspapers/> (last visited June 11, 2022). A robust derivative-work

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<sup>7</sup> *See Model Trade Book Contract*, sections 2 and 6, AUTHORS GUILD, [https://go.authorsguild.org/contract\\_sections/1](https://go.authorsguild.org/contract_sections/1).

right provides an important revenue source that is vital to encouraging dissemination of expressive works fundamental to a democratic society—news reporting.<sup>8</sup>

*Amicus* Sesame Workshop licenses its copyrighted content for use in television, streaming video, software apps, home video, toys and games, and theme parks. Sesame Workshop often licenses others the right to create derivative works, including works that combine copyrighted characters and content owned by Sesame Workshop with copyrighted characters and content owned by other creators.<sup>9</sup>

Unquestionably, a copyright owner’s exclusive right to make derivative works is essential to encourage the creation and dissemination of significant expressive works. Any threat to that exclusive right could have a devastating effect on the production of the types of expressive works at the very core of copyright law.

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<sup>8</sup> Recent highly successful derivative works that owe their existence to newspaper and magazine articles include *Inventing Anna* (based on an article in *New York Magazine*), *Argo* (based on an article in *WIRED* magazine), *The Lost City of Z* (based on an article in *The New Yorker*), numerous podcasts that have their genesis in articles, and *New Yorker* greeting cards, beach towels, phone cases, and puzzles based on magazine covers and illustrations. Collections, too, have independent derivative value and include works such as *Esquire’s Big Book of Fiction*, which was based on various works published individually in the eponymous magazine.

<sup>9</sup> See, e.g., “Sesame Street: Respect is Coming,” *supra* note 2.

**B. Properly Applied, the Fair Use Defense Likewise Serves to Incentivize *Amici* and Their Members to Create and Disseminate Expressive Works.**

Historically, the fair use defense emerged to prevent the rigid application of copyright law in a manner that would “stifle the very creativity which that law is designed to foster.”<sup>10</sup> As noted in *Campbell*: “From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, [t]o promote the Progress of Science and useful Arts. . . .” 510 U.S. at 575 (quoting U.S. Const., Art. I, § 8, cl. 8). The fair use defense therefore has the same ultimate purpose as the grant of exclusive rights—to promote the creation and dissemination of expressive works.

Section 107 of the 1976 Copyright Act codifies the prior common law doctrine and provides that in evaluating an affirmative defense of fair use, a court is to consider the following non-exclusive factors: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. §107. In *Campbell*, the Court held that a key inquiry under the first factor is not just

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<sup>10</sup> 3 M.B. Nimmer, NIMMER ON COPYRIGHT § 13.05 at 1354.1 (1983) (quoting *Iowa State Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980)).

whether the use at issue is commercial or for nonprofit educational purpose but also whether the use is transformative—*i.e.*, whether the secondary use “adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message[.]” 510 U.S. at 579-80.

*Amici* and their members frequently rely on section 107 for classic fair uses like quotation, criticism, and reporting, as well as to create expressive works that are transformative according to section 107 and the three-part *Campbell* formulation. For example, media members relied on fair use to report the news in *Italian Book Corp., v. American Broadcasting Co.*, involving the use of a portion of a song playing in the background of television footage shot by a film crew covering the annual San Gennaro Festival on Mulberry Street in “Little Italy” in Manhattan. *See* 458 F. Supp. 65 (S.D.N.Y. 1978). Similarly, in *Religious Technology Center v. Lerma*, the *Washington Post*’s usage of three quotations from Church of Scientology texts was deemed fair use in reporting about the organization. *See* 908 F. Supp. 1353 (E.D. Va. 1995). *See also Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 742 F.3d 17 (2d Cir. 2014) (Bloomberg’s posting of a secretly recorded earnings call was fair use); *Yang v. Mic Network, Inc.*, 405 F. Supp. 3d 537 (S.D.N.Y. 2019), *aff’d*, No. 20-4097-CV, 2022 WL 906513 (2d Cir. 2022) (Use of a screenshot of an article in another article for purposes of commentary is fair use).

*Amicus* Authors Guild’s members and book publishers also rely on fair use to create expressive works. In *Suntrust Bank v. Houghton Mifflin*

*Company*, for example, the copyright owners of the novel *Gone with the Wind* sued the publishers of the novel *The Wind Done Gone*, which retells the original story from the perspective of Scarlet O'Hara's half-sister, Cynara, whose mother is a slave. 268 F.3d 1257 (11th Cir. 2001). The Eleventh Circuit went into detail about the transformative nature of *The Wind Done Gone*, ultimately determining that the use was fair, and that the first factor weighed heavily in favor of the defendants because the secondary work used elements from *Gone with the Wind* to "make war against it." *Id.* at 1271. In *Wright v. Warner Books, Inc.*, the Second Circuit held that a biography about prominent American author Richard Wright, which used excerpts from Wright's unpublished letters and journals, constituted fair use, largely because it "fits comfortably within several of the statutory categories of uses' that Congress has indicated may be fair[.]" 953 F.2d 731, 736 (2d Cir. 1991) (quoting *Salinger v. Random House, Inc.*, 811 F.2d 90, 96 (2d Cir. 1987) and 17 U.S.C. § 107); *see also infra* note 14 (list of preamble categories).

Similarly, *amicus* Sesame Workshop's parodies for children, which comment on the original by poking fun for an educational purpose, include *True Blood* ("True Mud"), *Downton Abbey* ("Upside Downton Abbey"), and *Homeland* ("Homelamb"). More recently, Sesame parodied the hit streaming series *Stranger Things* ("Sharing Things"), the Taylor Swift song *Shake It Off* ("Sort It All"), the superhero film *Avengers* ("The Aveggies"), and the Justin Beiber song *Despacito* ("El Patito").

In sum, when correctly applied, fair use, like the derivative-work right, is essential to fostering the creation of expressive works.

**II. AN OVERLY BROAD DEFINITION OF “TRANSFORMATIVE” UNDER THE FIRST FAIR USE FACTOR COULD SEVERELY IMPAIR THE DERIVATIVE-WORK RIGHT, TO THE DETRIMENT OF CONSUMERS OF EXPRESSIVE WORKS.**

As discussed, *amici* have an interest in a proper balance between the exclusive right to make derivative works and the fair use defense. However, as the Court of Appeals observed below, “an overly liberal standard of transformativeness, such as that embraced by the district court in this case, risks crowding out statutory protections for derivative works.” 11 F.4th at 39 (citing *Authors Guild v. Google, Inc.*, 804 F.3d 202, 216 n.18 (2d Cir. 2015)); *see also Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (“To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under [17 U.S.C.] § 106(2).”); *Castle Rock Entm’t v. Carol Publishing Grp.*, 150 F.3d 132, 143 (2d Cir. 1998); 4 M.B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT §§ 13.05[B][6], 13.224.20 (2019). Indeed, the language of the Copyright Act and the fair use opinions sow seeds of confusion: a derivative work recasts, *transforms*, or

adapts; yet *transformation* weighs in favor of fair use.<sup>11</sup>

Compounding the potential risk to the derivative-work right is that some classic derivative works superficially seem to fit *Campbell*'s three-part definition of transformation, namely (i) adding something new, (ii) with a further purpose or different character, and (iii) altering the first (work) with new expression, meaning, or message. Professor Goldstein notes that an overly broad interpretation of this definition could apply to “a music video adapted from a series of photographs, a motion picture adapted

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<sup>11</sup> An overly broad interpretation of the term “transformative” could also impinge on certain copyright holders’ reproduction rights under section 106(1). For example, while certain uses of news content from *amicus* NMA’s members by large online platforms may be superficially in the public interest—and therefore arguably transformative—these platforms often capture the essence of the protected works and do so in a systematic fashion and without commentary or any new expression, meaning, or message at all. *See Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018) (finding that the first factor weighed slightly in favor of the defendant, but finding that a transformative use was not automatically a fair use on the ground that the access to television clips that TVEyes provided in response to searches deprived Fox of revenue that properly belonged to the copyright holder); *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537 (S.D.N.Y. 2013) (involving non-transformative uses of news footage and articles that have licensing value to copyright owners). It is fundamental to the fair use doctrine that finding a new technological use for copyrighted material does not make the use “transformative” under the fair use test. *Id.* at 536 (“Meltwater has described itself as adding ‘game-changing technology for the traditional press clipping market.’ There is nothing transformative about that function.”).

from a novel, or a musical drama adapted from a play”—all unquestionably classic derivative works for which a license is required. 2 Paul Goldstein, GOLDSTEIN ON COPYRIGHT, § 12.2.2.1(c), at 12:37-38 n.78.7 (discussing *Cariou v. Prince*, 714 F.3d 694 (2013)).<sup>12</sup>

In the following subsections, *amici* discuss (i) how, despite the tension between the derivative-work right and the fair use “transformative-use” inquiry, the courts in most cases have reached correct results in cases involving traditional expressive works like books, news, motion pictures, television, and visual images; (ii) how this case presents a relatively unusual set of issues, the incorrect resolution of which could pose a potential threat to the derivative-work right; and (iii) how a targeted inquiry under the first factor regarding the source of the secondary work’s aesthetic or entertainment value could, in a case like this one, resolve the tension between the derivative-work right and the fair use transformative test. Part III discusses the importance of looking at all factors

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<sup>12</sup> Professor Goldstein cites as an example the classic Alfred Hitchcock movie *Rear Window*, which was the subject of the Court’s holding in *Stewart v. Abend*, 495 U.S. 207 (1990). The Court held (*id.* at 237) that the defendant in *Stewart* did not make fair use of the original short story. Yet the story constituted only twenty percent of the film’s storyline, and the film received four Academy Award nominations, ranks number 42 on the American Film Institute’s *100 Years...100 Movies* list, and “possessed an aesthetic and a sensibility that distinguished it from the underlying story.” Goldstein, § 12.2.2.1(c), at 12:38 n.78.7. While the Court decided *Abend* four years before *Campbell*, *Abend*’s holding on the issue of fair use remains good law. *See Campbell*, 510 U.S. at 577-78, 586 (citing *Abend* on fair use issues). The Court has never suggested that *Abend* involved a transformative use under the first factor.

set out in section 107 and not relying on whether the use is transformative to drive a court's determination of the other factors.

**A. By and Large, in Cases Involving Expressive Works like Those that *Amici* and Their Members Create, the Courts Have Reached Correct Results When Considering Whether a Secondary Use is a Fair Use.**

Despite the potential conflict between the exclusive right to make derivative works and the first fair use factor's focus on transformation, in most cases involving traditional expressive works—literature, news, plays and musicals, motion pictures, television programs, visual arts, for example—appellate courts have generally reached the correct result. Many cases involve parody, making the fair use analysis straightforward. *See, e.g., Campbell; Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) (parodic use of a photograph). Likewise, the question of transformation is less complicated where the secondary work comments on or criticizes the original. *See, e.g., Suntrust*, 268 F. 3d at 1269 (novel *The Wind Done Gone* was a “specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites” in the classic novel *Gone with the Wind* and therefore transformative); *Est. of Smith v. Graham*, 799 F. App'x 36, 38 (2d Cir. 2020) (rap song “Pound Cake” criticizes “the jazz-elitism that the ‘Jimmy Smith Rap’ espouses”).

And the courts have properly found transformative uses where the secondary work differs

in genre from the original work *and* uses the original as informational or historical artifacts for a different purpose. *See, e.g., Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (use of original concert posters as historical artifacts for the purpose of commenting on and commemorating the performances the works were designed to promote); *SOFA Entm't*, 709 F.3d 1273, 1276-77 (9th Cir. 2013) (use of a seven-second clip of a performance on *The Ed Sullivan Show* by the band The Four Seasons as a biographical anchor); *Los Angeles News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 939-42 (9th Cir.), *opinion amended on denial of reh'g*, 313 F.3d 1093 (9th Cir. 2002) (Court TV's rebroadcast of portions of L.A. riots footage in introductory montage for its show "Prime Time Justice" was fair use).<sup>13</sup>

This case, however, does not involve obvious commentary, criticism, parody, historical reference, or any of the classic fair uses referred to in the preamble to section 107.<sup>14</sup> That is, although Warhol's Prince Series does recast Goldsmith's photograph, it does not obviously parody, criticize, or comment upon it. 11 F.4th at 43. *Compare Blanch v. Koons*, 467 F.3d

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<sup>13</sup> Conversely, the courts have properly found that certain uses were *not* fair. *See, e.g., Salinger v. Colting*, 607 F.3d 68, 83 (2d Cir. 2010) (creation of purported sequel to "Catcher in the Rye" was not fair use); *Penguin Random House LLC v. Colting*, 270 F. Supp. 3d 736, 751 (S.D.N.Y. 2017) (no fair use for children's books based on famous novels); *Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (encyclopedia based on "Harry Potter" novels and films did not make fair use of original works).

<sup>14</sup> The types of uses listed in the preamble paragraph of § 107 include "criticism, comment, news reporting, teaching . . . scholarship, or research[.]" 17 U.S.C. § 107.

244, 253 (2d Cir. 2006) (artist used photograph as part of a larger work in which he set it alongside several other similar photographs with changes in size, color, and other details). Rather, this case involves use of an entire expressive work in a second expressive work in the same medium and genre and the purpose of that use is not obvious commentary, criticism, or parody of the original. For this reason, the resolution of this case implicates the continued viability of the exclusive right to make derivative works.

**B. Although the Second Circuit’s Analysis in General Correctly Applied the Law, in an Unusual Case Like This, a Court Should Appropriately Consider Whether the Value of the Secondary Work Derives, at Least in Part, from the Entertainment and Aesthetic Value of the Original Copyrighted Work.**

The Second Circuit to a significant extent properly applied fair use law. The Court of Appeals first correctly began with *Campbell’s* three-pronged test of transformativeness. 11 F.4th at 37. The court also acknowledged the tension between the transformative-use inquiry and the copyright owner’s exclusive right to make derivative works. *Id.* at 39. And the Second Circuit properly concluded that the district court erred in assuming that “any secondary work that adds new aesthetic or new expression to its source material is necessarily transformative.” *Id.* at 38-39. The Second Circuit’s last conclusion recognized that, as *amici* discuss above, many classic non-fair uses—for example movie versions of novels—add new aesthetics or expression to their source material. *See* discussion *supra*.

The Second Circuit went on to state:

“Although we do not hold that the primary work must be ‘barely recognizable’ within the secondary work ... the secondary work’s *transformative purpose* and character must, at a bare minimum, comprise something more than the imposition of another artist’s style on the primary work such that the secondary work remains *both recognizably deriving from, and retaining the essential elements of, its source material.*”

*Id.* at 42 (citations omitted, emphasis added).<sup>15</sup>

It is true that transformative use must be *something more than* (1) the imposition of another artist’s style, (2) where the secondary work remains recognizably derived from the prior work, and (3) where it retains the essential elements of the original.

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<sup>15</sup> The Question Presented on which *certiorari* was granted is incomplete and arguably misleading. The Question asks:

Whether a work of art is “*transformative*” when it conveys a different meaning or message from its source material...or whether a court is forbidden from considering the meaning of the accused work where it “recognizably *deriv[es]* from” its source material (as the Second Circuit has held).

As the full quotation from the Second Circuit opinion makes clear, nowhere does the Court of Appeals say that a court is forbidden from considering the meaning of the accused work merely because it “recognizably *deriv[es]* from” its source material. Indeed, as noted above, fair uses almost always use source material to a recognizable extent, which forms the basis of the claim that the works are substantially similar, a prerequisite for the triggering of the fair use defense. Without substantial similarity, there is no need for the defense at all.

However, *amici* do not agree that the recognizability of the prior work is a factor in determining whether a use is transformative. Rather, recognizability goes to whether the secondary work is substantially similar to (*i.e.*, possibly infringing of) the original work.

In many classic fair use cases—including commentary, parody, critique, and use as artifacts for a larger work—recognizability is the *sine qua non* of the secondary use. *Amici* therefore suggest an additional inquiry where, as here, both the original work and the secondary work at issue are expressive works (for example, books, audiovisual works, musical works, works of visual art) *and* the secondary work retains the essential elements of the original without adding a significant amount of new creative material (such that the original work is just a minor part of the new work),<sup>16</sup> and also does not comment upon or criticize the original. Specifically, *amici* suggest that, in such a case, a court should focus on whether the challenged work’s value derives, at least in part, from the entertainment and aesthetic value of the original copyrighted work or whether the second work could serve as a substitute for the original.<sup>17</sup>

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<sup>16</sup> Compare *Warner Books*, 953 F.2d at 740 (use of famous author’s journal entries and letters in biography was fair use), with *Random House*, 811 F.2d at 100-01 (use of famous author’s unpublished letters in biography was not fair use); see also *Cariou*, 714 F.3d at 707-08.

<sup>17</sup> Indeed, “[t]ransformative uses are those that add something new, with a further purpose or different character, and *do not substitute for the original use of the work.*” U.S. Copyright Office, *More Information on Fair Use*, COPYRIGHT.GOV (last

Importantly, this inquiry does not turn judges into critics making aesthetic judgments. *Cf. Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 251 (1903) (circus posters have copyright protection). Rather, analogous to other inquiries into the transformative nature of a use, the threshold question is how the entertainment or aesthetic value is “reasonably perceived.” *See Campbell*, 510 U.S. at 582. Moreover, *amici* emphasize that, as the Second Circuit correctly noted, 11 F.4th at 43, in assessing value, the renown of the secondary work’s creator should not factor into an analysis of the source of the secondary work’s value. Otherwise, the law would improperly create a “celebrity-plagiarist” privilege.

A number of courts have made such an inquiry under the first fair use factor. *See, e.g., RDR Books*, 575 F. Supp. 2d at 545 (that a secondary user seeks to profit at least in part from the inherent entertainment value of the original work weighs against fair use because the transformative value of the secondary work is diminished). *See also Bill Graham*, 448 F. 3d at 612 (Inquiring into source of value and noting, “[s]ignificantly, [defendant] has not used any of [plaintiff’s] images in its commercial advertising or in any other way to promote the sale of the book. Illustrated Trip merely uses pictures and

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visited June 16, 2022), <https://www.copyright.gov/fair-use/more-info.html>. As the Court said in *Campbell*, “[i]f, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.” 510 U.S. at 580.

text to describe the life of the Grateful Dead. By design, the use of [plaintiff's] images is incidental to the commercial biographical value of the book.”); *Elvis Presley Enters, Inc. v. Passport Video*, 349 F.3d 622, 628 (2003), *overruled on other grounds as stated in Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 995 (9th Cir. 2011) (per curiam) (assessing whether defendant’s biography of Elvis Presley was fair use and stating that the first factor weighed against defendant in part because “[o]ne of the most salient selling points on the box of *The Definitive Elvis* is that ‘Every Film and Television Appearance is represented.’ Defendant is not advertising a scholarly critique or historical analysis, but instead seeks to profit at least in part from the inherent entertainment value of Elvis’ appearances[.]”); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013) (band’s use of plaintiff’s painting was only incidentally commercial under the first factor because the defendant band never used it to market the concert, CDs, or merchandise); *Salinger*, 641 F. Supp. 2d at 262 (where defendant’s work uses the plaintiff’s expression for its inherent entertainment and aesthetic value, the transformative character of the defendant’s work is diminished); *Meeropol v. Nizer*, 560 F. 2d 1061, 1071 (2d Cir. 1977) (copyrighted letters featured prominently in promotion of defendant’s book).<sup>18</sup>

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<sup>18</sup> As is evident from the case descriptions, some courts treat this inquiry as one into commerciality, while others seem to view the issue as bearing on the transformative-use question. Either way, the inquiry bears on the nature and character of the use under the first factor.

Simple logic and numerous other cases support focusing on the source of value of the secondary use. An unauthorized movie version of a *Harry Potter* novel would undoubtedly derive its entertainment value from the original copyrighted work while necessarily recasting the original, and the purpose of the use would not be criticism or commentary. See *Abend*, 495 U.S. at 237-38 (movie version of short story was not fair use); *Castle Rock*, 150 F.3d at 142-43 (book containing trivia questions about *Seinfeld* television show was non-transformative under the first factor because it contained original *Seinfeld* material repackaged to entertain *Seinfeld* viewers); *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 454 (9th Cir. 2020) (secondary work using Dr. Seuss characters was non-transformative because the second work merely “paralleled” the original’s purpose); *Colting*, 607 F.3d at 83 (the reader of the non-transformative derivative novel was undoubtedly attracted to a sequel by the original work, *Catcher in the Rye*); *Penguin Random House*, 270 F. Supp. 2d at 754 (a series of illustrated children’s books based on adult novels were not transformative and did not qualify as fair use).

In contrast, in a truly transformative use, the secondary work’s value derives primarily from its own expression. The entertainment and aesthetic value of the secondary work in *Campbell* clearly derived from 2 Live Crew’s parody of the original—not from the original itself. A purchaser of the book about the Grateful Dead at issue in *Bill Graham Archives* is primarily attracted to the historical account and not the plaintiff’s posters. Similarly, the reader of *A Wind Done Gone*, the secondary work in *Sun Trust*, will

primarily read the book to absorb commentary on a famous novel that glossed over slavery and racism.

To summarize: As discussed above in Section II.A., in the majority of cases involving traditional expressive works like those *amici* and their members create and distribute, the courts have generally reached proper conclusions on the issue of whether particular uses are transformative under the first fair use factor—but not because a legal standard that would apply across the board has been clearly articulated. This present case tests the limits of the transformative use doctrine and the evolving surrounding case law. A clear articulation of the standard that has been applied in these cases but not stated could be stated thusly: where a secondary work uses substantially all of the original and does not obviously comment upon or criticize the original work, an inquiry into whether the marketability and value of the challenged work derives, at least in part, from the entertainment and aesthetic value of the original copyrighted work would go far in ensuring that the transformative-use inquiry does not swallow up the essential exclusive right of a copyright owner to make derivative works.

### **III. THE ULTIMATE RESOLUTION OF THIS CASE SHOULD DEPEND ON AN ANALYSIS OF *ALL* FAIR USE FACTORS.**

By focusing on a narrow and misread notion regarding “transformative use,” the Question Presented fails to take into account the importance of considering together all of the non-exclusive factors governing the inquiry into fair use. Given such a narrow focus—along with many courts’ overreliance

on the transformative-use inquiry—*amici* underscore that this case should ultimately be decided only after a court weighs *all* four fair use factors, including a broader inquiry under the first factor than merely whether a use is “transformative.” This is particularly important because, for many courts, resolution of the transformative use issue within the first factor alone has become outcome-determinative.

This Court has cautioned against undue reliance on a single fair use factor. *See Campbell*, 510 U.S. at 578 (“Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”). In *Campbell* itself, after finding that 2 Live Crew’s parody was a transformative use, the Court remanded for further consideration of the fourth factor. *Id.* at 594. And just last year, in *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021), the Court evaluated all factors, starting with the *second* fair use factor.

Yet, much like some courts gave undue weight to the question of commerciality before *Campbell* (*see* 510 U.S. at 583-84), many courts after *Campbell* have given too much weight to the issue of transformation. Some years ago, Professor Neil Netanel provided empirical data about fair use decisions to show that the “fair use doctrine today is overwhelmingly dominated by the Leval-Campbell transformative use doctrine.”<sup>19</sup> Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 Lewis & Clark L. Rev. 715, 736 (2011).

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<sup>19</sup> Referring to Judge Leval’s watershed law review article. Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

Netanel, in turn, cited Barton Beebe's *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. Pennsylvania L. Rev. 549 (2008), which concluded that a finding of transformative use tended to “stampede” all the other factors. According to Netanel, “[w]ith regard to the first factor, the purpose and character of the use, Beebe’s study reveals that 95% of the opinions that found that factor one disfavored fair use, found no fair use, while 90% of opinions that found that factor one favored fair use, found fair use.” Netanel, at 723-24.

A more recent law review article reached the same conclusion, finding that as of 2019:

Of all the dispositive decisions that upheld transformative use, 94% eventually led to a finding of fair use. The controlling effect is nowhere more evident than in the context of the four-factor test: A finding of transformative use overrides findings of commercial purpose and bad faith under factor one, renders irrelevant the issue of whether the original work is unpublished or creative under factor two, stretches the extent of copying permitted under factor three towards 100% verbatim reproduction, and precludes the evidence on damage to the primary or derivative market under factor four even though there exists a well-functioning market for the use.

Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163,

240 (2019).<sup>20</sup> As the Court mandated in *Campbell*, the inquiry into whether a use is transformative is only the beginning of the analysis of whether a particular use is a fair use.

## CONCLUSION

The exclusive right to make derivative works set forth in section 106(2) of the Copyright Act drives the ability of some of the most important creators and distributors of expressive works to survive financially. At the same time, these creators and distributors often rely on fair use to create expressive works, all to the benefit of the consuming public. While the derivative-work right and the inquiry into whether a secondary use is transformative can come into conflict, in most cases—*e.g.*, parody, criticism, commentary—the proper resolution is ordinarily fairly clear. Where, as here, a second work uses the entire original work without obvious criticism, commentary, etc., an appropriate focus is on whether the secondary work uses the original for its inherent entertainment and aesthetic value. Moreover, that

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<sup>20</sup> The implications of this unbalanced approach can be seen in the context of how online platforms and technology companies reuse content. Such use, if held to be “transformative” (which *amici* would dispute), would weigh heavily against fair use under the fourth factor, “the extent of market harm caused by the particular actions of the alleged infringer, [and] also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.” *Campbell*, 510 U.S. at 590 (quoting *Nimmer*, § 13.05[A][4] (1984)). Allowing a finding of transformative use to “stampede” every other factor would do great harm to *amici* in this context and is not in accordance with applicable law.

determination is only the beginning of the inquiry into fair use.

Respectfully submitted.

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