

No. 21-869

IN THE
Supreme Court of the United States

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

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,
Respondents.

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

**BRIEF FOR THE COPYRIGHT ALLIANCE AS
AMICUS CURIAE IN SUPPORT OF
NEITHER PARTY**

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**STATEMENT OF IDENTITY AND INTEREST
OF AMICUS CURIAE¹**

The Copyright Alliance is a non-profit, non-partisan, public interest and educational organization representing the copyright interests of over two million individual creators and 15,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright and to protecting the rights of creators and innovators.

The Copyright Alliance represents individual creators including authors, photographers, performers, artists, software developers, musicians, journalists, directors, songwriters, and many others. In addition, the Copyright Alliance represents the interests of book and journal publishers, motion picture studios, video game publishers, software companies, music publishers, sound recording companies, sports leagues, broadcasters, guilds, unions, newspaper and magazine publishers, and many other organizations. These diverse individuals and organizations all rely on copyright law to protect their ability to pursue a

¹ Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amicus or its counsel made such a contribution. The parties have provided written consent to the filing of this amicus brief.

livelihood based on creativity and innovation, and to safeguard their investments in their creation and dissemination of copyrighted works.

As particularly relevant to this case, the Copyright Alliance has individual members who both license their preexisting works for use in new works and who make fair use of preexisting works. The Copyright Alliance also has organizational members that represent the interests of individuals who engage in those creative endeavors. Copyright Alliance members therefore depend on a proper balance between the exclusive statutory right to control the creation of derivative works and the ability of secondary users to make fair use of preexisting works. That balancing requires an appropriately circumscribed fair use doctrine that furthers the purposes of copyright law, both by protecting the rights of copyright owners and by promoting the creation of new works.

The Copyright Alliance takes no position on the ultimate resolution of Petitioner's fair use defense, and thus submits this brief in support of neither party. The question presented in this case asks only whether Petitioner's use of Respondents' copyrighted photograph was "transformative," which implicates just one of the four factors courts must balance when considering a claim of fair use under Section 107. Thus, the question presented can and should be resolved without a conclusive determination of whether Petitioner's use qualifies as a fair use. Focusing on this narrow question, the Copyright Alliance seeks to underscore the importance of interpreting the

Copyright Act in a manner that draws a clear line between transformative uses, as that term is used in the fair use context, and uses that violate a copyright holder's exclusive right to prepare derivative works under Section 106(2). The Copyright Alliance also seeks to caution against the increasingly elevated weight courts have afforded to transformative use analyses and to emphasize the continued importance of the other three factors of the fair use test—in particular, the fourth factor—that are not directly at issue here.

In answering the question presented, the Court should not embrace Petitioner's position. Petitioner's proposed test for transformative use risks permitting anyone who makes a minor alteration to a preexisting work to claim that the new work reflects a different meaning or message and therefore qualifies as a transformative use. Such an outcome would risk negating a copyright owner's exclusive right to control the creation of derivative works.

As a practical matter, that result would also harm the creative community and stifle the creativity of the artists, authors, and other creators that constitute the Copyright Alliance's members. Indeed, expanding the scope of fair use, as Petitioner advocates, would permit unauthorized use of many works that presently require a derivative work license from the copyright owner. Many such uses have in fact been licensed for decades. The robust existence of such licensing markets is critical to ensuring that all creators are incentivized to create new, original works of authorship and able to reap the full benefit of their work. The Copyright Alliance

therefore submits this brief to ensure that principles of fair use are properly subject to the copyright owner's right to control derivative works in a manner consistent with copyright's goals of incentivizing the creation and distribution of works that are vital to our nation's cultural, scientific, and technological progress.

SUMMARY OF ARGUMENT

This case arises at the intersection of a copyright owner's exclusive right to control the creation of derivative works found in Section 106 of the Copyright Act and the exception to that right that permits a third party to use preexisting copyrighted works to make new works that qualify as fair use pursuant to Section 107 of the Copyright Act. This Court previously considered this issue nearly thirty years ago in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). There, the Court held that a significant inquiry in deciding fair use is "whether and to what extent the new work is 'transformative.'" *Id.* at 579. Although the word "transformative" does not appear anywhere in Section 107, the question of whether a use of a copyrighted work is "transformative" has come to dominate not just the fair use factor to which the Court applied it in *Campbell*, but the entire fair use analysis. That trend has reached a point where the transformative use inquiry unduly encroaches on and engulfs the copyright owner's exclusive right to control the creation of derivative works. With this case, the Court now has the opportunity to clarify and correct the scope and meaning of "transformative" and the impact of such a finding on

the ultimate determination of whether a use constitutes fair use under Section 107.

As a threshold matter, elevating the importance of the “transformative use” inquiry is contrary to the language and purpose of the Copyright Act. Section 106 of the Copyright Act grants copyright owners the exclusive right to control the creation of derivative works, including works that are “based upon one or more preexisting works” that have been “transform[ed].” 17 U.S.C. § 101. However, the fair use provision does not expressly mention “transformative use” at all. 17 U.S.C. § 107. Thus, interpreting “transformative use” so broadly as to encroach on the exclusive right to control the creation of derivative works improperly favors a judicial interpretation of a statute over that statute’s own express language. Such an interpretation risks upsetting the economic conditions and right to control that incentivize creativity. Indeed, copyright is the engine of creativity, as it incentivizes individuals to create art by promising them the exclusive right to reap the benefits of their work. Properly conceived, the fair use exception should function as a limited safety valve to prevent copyright law from being so rigidly applied that it prevents “criticism, comment, news reporting, teaching ..., scholarship, or research” and other similar uses. 17 U.S.C. § 107. The fair use exception was never intended to serve as a broad license to use existing works freely whenever the user modifies the existing work.

Petitioner’s articulation of what constitutes a transformative use would lower the bar so significantly

that practically any secondary use could clear it. Indeed, Petitioner articulates a test that looks only to whether a secondary work adds new expression, meaning, or message. But that is not, and has never been, the test for transformative use: The test requires a subsequent use of a preexisting work to have a “further purpose or different character” from the original. *Campbell*, 510 U.S. at 579. That test is properly derived from the first fair use factor, which requires the court to consider “the purpose and character of the use.” 17 U.S.C. § 107(1).

By arguing that new expression, meaning, or message alone is sufficient to constitute a transformative use, Petitioner seeks to disassociate the transformative use inquiry from the statute and turn the inquiry from a holistic examination of the use at issue into a perfunctory examination that nearly any secondary user could satisfy. The holistic examination of transformative use requires both an inquiry into whether the purpose of the use is consistent with those set forth in the preamble to Section 107 and whether the character of the new work is sufficiently different from the original.

Ultimately, the Court should articulate a standard for any “transformative use” inquiry that incorporates the following principles, all of which are grounded in the language and purpose of the Copyright Act. First, because the exclusive derivative work right is expressly stated in the Copyright Act and fair use is an affirmative defense, the baseline for any consideration should be that the secondary use is infringing and that the secondary user bears the burden

to demonstrate that the use qualifies as a fair use under Section 107. Second, the language of the first factor in Section 107—which requires consideration of both the “purpose and character” of the use at issue—must frame any consideration of whether a use is “transformative.” In light of that language, courts should consider on a sliding scale both whether the use was for a transformative purpose—in other words, whether the preexisting work was used for a reason closely tied to one of the examples in the preamble of Section 107—and whether the character of the use was such that the preexisting work was sufficiently altered so that the secondary work does not supersede the original. Third, this analysis must be done objectively, without consideration of the subjective assessments of the artist, experts, or the judge. If these principles are followed, the test for “transformative use” will be consistent with the Copyright Act and will properly balance the interests of both copyright owners and secondary users.

ARGUMENT

I. A Copyright Owner’s Exclusive Right To Control Derivative Works Should Not Be Undermined By A User’s Ability To Invoke A “Transformative Use.”

The Copyright Act expressly grants to copyright owners, among other things, the right to “prepare derivative works.” 17 U.S.C. § 106(2). This right is essential to the creative and economic incentives built into copyright law: It permits copyright owners to control not just the production and distribution of their

works but also further uses that might be made of those works. Thus, copyright owners can decide for themselves whether and when to permit their works to be published in different forms or media and on what creative or economic terms.

Congress expressly defined a derivative work as one “based upon one or more preexisting works,” that “recast[s], *transform[s]*, or adapt[s]” the original. 17 U.S.C. § 101 (emphasis added). Later, this Court held that when a secondary use of a copyrighted work is “transformative,” it is more likely to qualify as a fair use. *Campbell*, 510 U.S. at 579. This language has created a conflict that has plagued courts since *Campbell*: When does a new work “transform” a preexisting work (and is thus a derivative work requiring authorization from the copyright owner), and when is such use of a preexisting work “transformative” (and thus more likely to be fair use)?

Principles of statutory interpretation make clear that wherever the line is drawn, the ability of users to claim their uses of preexisting works are “transformative” cannot overwhelm the exclusive right granted to copyright owners to control derivative works. When interpreting a statute, it is the task of the court “to fit, if possible, all parts into an harmonious whole,” and, therefore, interpret the section at issue so as not to conflict with other provisions. *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (quoting *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959)). Thus,

the range of uses that are “transformative” must be cabined.²

That the derivative work right should have primacy is clear from the origins of the two interests at stake. The derivative work statutory language was established by Congress and included among core exclusive rights under copyright law, alongside the rights to reproduce or distribute a copyrighted work. 17 U.S.C. § 106. In fact, the House Report indicates that Congress considered the derivative work right “fundamental” to enacting the Copyright Act of 1976. H.R. Rep. No. 94-1476, at 61 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5674.

By contrast, the “transformative use” standard is not in the Copyright Act. Instead, it was developed by courts as a means of interpreting the language of the first fair use factor, which states that courts should consider “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1). When this Court decided *Campbell*, it introduced the “transformative use” inquiry as a frame to analyze that factor, drawing the term from a law review article by Judge Pierre Leval. 510 U.S. at 579. The Court used

² While Petitioner summarily claims that a secondary use can both be a derivative work and constitute fair use, Pet’r’s Br. at 51–52, the test that Petitioner advocates would render enormous numbers of derivative works as “transformative.” That outcome would effectively nullify the express right of copyright owners to control the creation of derivative works.

this formulation to describe generally the examples of appropriate fair use purposes in the preamble of Section 107, as a way to “look[] to whether the use is for criticism, or comment, or news reporting, and the like.” *Id.* at 578–79. The Court concluded that the work at issue in *Campbell*, a parody, “ha[d] an obvious claim to transformative value” as a “form[] of criticism.” *Id.* at 579. This finding was consistent with Judge Leval’s articulation of the first fair use factor. To Judge Leval, a use was “transformative” where the secondary work was employed “in a different manner or for a different purpose” than the original. Pierre N. Leval, *Toward A Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990). The transformative use inquiry is, therefore, a means of interpreting Section 107 to determine whether the secondary work’s purpose and character differs sufficiently from the original’s so as not to “supersede[] the objects’ of the original creation” and thus impinge on the copyright owner’s exclusive rights. *Campbell*, 510 U.S. at 579 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (Story, J.)).

Because the derivative work right is grounded in the express language of the Copyright Act but the transformative use inquiry derives from judicial interpretation of that Act, the Court should not expand its conception of “transformative use” to the point that it effectively nullifies the plain language of Sections 101 and 106 of the statute. Indeed, if the Court permitted any transformation of a preexisting work of any kind to be “transformative” for the purposes of fair use, it would be irreconcilable with the statutory derivative work right. See *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756,

758 (7th Cir. 2014) (Easterbrook, J.) (“[A]sking exclusively whether something is ‘transformative’ not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works.”). By limiting the scope of uses that are considered “transformative” so as not to limit the derivative work right, the Court can give force to both Sections 106 and 107 of the Copyright Act.

II. Petitioner Argues For An Overbroad Test That Would Nullify The Derivative Work Right.

Petitioner proposes a test that would effectively nullify the derivative work right and wreak havoc on the creative industries of the Copyright Alliance’s members. The Court should reject this test as being contrary to decades of settled copyright law and as a sweeping policy change that Congress never authorized.

A. The First Fair Use Factor Requires Consideration Of Whether A Secondary Use Has A Further Purpose Or Different Character.

When analyzing the first fair use factor, *Campbell* directed courts to consider, among other things, whether a new work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” 510 U.S. at 579. That standard is based on Section 107, which requires consideration of the “purpose and character of the use” at issue. 17 U.S.C. § 107. Petitioner would have the Court upend this standard and instead embrace a

test that is untethered to the express language of the Copyright Act.

Indeed, Petitioner presents this inquiry as turning merely on whether the secondary work conveys a “difference in meaning or message” from the preexisting work. Pet’r’s Br. at 36. Petitioner even goes so far as to argue that *any* difference in meaning or message “*is* a difference in ‘purpose.’” *Id.* at 52.

That test has no foundation in either Section 107—where the words “meaning” and “message” do not appear—or *Campbell*. In *Campbell*, the Court did not consider *only* whether the new work conveyed a different “meaning or message.” Rather, it considered whether the *purpose* of the new work—parody—was sufficient to constitute fair use and whether the new work reasonably could be conceived as containing parody. *See* 510 U.S. at 579–83. Consistent with the language of Section 107, that analysis looked beyond the narrow question of whether the new work contained some additional meaning or message not in the preexisting work.

Unsurprisingly, all of the circuits to consider this issue since *Campbell* have agreed that the test requires a consideration of whether the secondary use is of a “further purpose or different character,” not merely whether it includes a new meaning or message. *See Monsarrat v. Newman*, 28 F.4th 314, 321 (1st Cir. 2022); *MidlevelU, Inc. v. ACI Info. Grp.*, 989 F.3d 1205, 1221 (11th Cir.), *cert. denied*, 141 S. Ct. 2863 (2021); *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 452 (9th

Cir. 2020), *cert. denied*, 141 S. Ct. 2803 (2021); *Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 449–51 (D.C. Cir. 2018); *TCA Television Corp. v. McCollum*, 839 F.3d 168, 180 (2d Cir. 2016); *Balsley v. LFP, Inc.*, 691 F.3d 747, 758–59 (6th Cir. 2012); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 693 (7th Cir. 2012); *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 306 (3d Cir. 2011); *Gaylord v. United States*, 595 F.3d 1364, 1372 (Fed. Cir. 2010); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 638 (4th Cir. 2009); *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791, 823 (5th Cir. 2002); *see also Hill v. Pub. Advoc. of the United States*, 35 F. Supp. 3d 1347, 1358 (D. Colo. 2014); *Antioch Co. v. Scrapbook Borders, Inc.*, 291 F. Supp. 2d 980, 992 (D. Minn. 2003).

Moreover, this Court itself affirmed only last year that satisfying the first fair use factor requires a further purpose or different character. *See Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1203 (2021) (examining the copying’s “purpose[s] and ‘character’” (quoting 17 U.S.C. § 107(1))).

Contrary to Petitioner’s assertion, however, *Google* did not purport to address this inquiry as a general matter nor “establish a straightforward rule” building on *Campbell*. Pet’r’s Br. at 36. Instead, as the Second Circuit correctly recognized, *Google* was expressly limited to consideration of software. The Court took pains to clarify that its opinion did not “change[] the nature of” traditional copyright concepts nor “overturn or modify ... earlier cases involving fair use.” 141 S. Ct. at 1208. Rather, because it was “difficult

to apply traditional copyright concepts in [the software] world,” it looked to first principles of fair use and applied them to a specific context. *Id.* at 1208–09. In the transformative use analysis, the Court stressed that it was taking into account “the realities of how technological works are created and disseminated.” *Id.* at 1199. It noted that because a broad view of “purpose” would prevent some clearly fair uses of software, such as teaching, “to stop [at a broad purpose analysis] would severely limit the scope of fair use *in the functional context of computer programs.*” *Id.* at 1203 (emphasis added). In that specific context, the Court looked to a “more specifically described” purpose and character. *Id.* It further noted that, in the context of computer programs, Google’s actions “can further the development of computer programs” and that such copying was “necessary” for the computer programming industry to function, and took into account that such actions were common in that industry. *Id.* at 1203–04. This context-specific consideration is fitting in the special case of software and represents the flexibility the fair use analysis affords.

Thus, Petitioner’s attempt to turn the transformative use inquiry from a holistic analysis tied to the express language of Section 107 into a checkbox inquiry that asks only whether a secondary use has a different meaning or message is contrary to law.

**B. Petitioner’s Test Would Upend Existing
And New Creative Industries.**

The creative industries represented by the Copyright Alliance’s members rely on a balance between licensing derivative works and making fair use of preexisting works. Those industries depend on this balance, which has helped create billion-dollar industries and incentivizes creators—including individual creators, small businesses, and large corporations—to create and disseminate a diverse array of creative expression for the public to enjoy. Indeed, the copyright industries collectively employed nearly 11.7 million workers in 2019, accounting for 7.71% of all U.S. employment, and added over \$2.5 trillion to the U.S. GDP.

Adopting Petitioner’s “meaning or message” test for transformative use would threaten this vibrant creative ecosystem. As a practical matter, a determination that a use is transformative almost always means a court concludes it is also fair use.³ So, if

³ A 2011 study found that of all the fair use cases decided in 2006 through 2010, the defendant won 100% of the time when the court found the subject use to be transformative. Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 Lewis & Clark L. Rev. 715, 754–55 (2011). Since that time, the Copyright Alliance is aware of only one circuit court decision holding that a use was transformative but not fair. *See Fox News Network, LLC v. Tveyes, Inc.*, 883 F.3d 169, 180–81 (2d Cir. 2018); *see also* Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 Stan. Tech. L. Rev. 163, 185–86 (2019) (finding that transformative use was the only statistically significant subfactor driving the first factor determination). Notwithstanding this reality, *Campbell* made clear that all four fair use factors must be balanced against each other,

only new expression, meaning, or message were required to make a secondary use transformative, large swaths of secondary works that are currently licensed would presumptively become fair use. Below are only some examples of the disruption that adoption of Petitioner’s test could cause in the Copyright Alliance members’ industries:

- **Film, Theater, Books, and Video Games:** In storytelling industries like film, theater, book, and video games, stories and characters are often licensed between mediums. Ever since the film industry began, filmmakers have paid authors for the right to make adaptations of their works, allowing the owners of the preexisting works to reap the benefits of the creativity in those works and incentivizing authors to create new works that might also be licensed for film.

Similarly, there is a popular market of making films from plays and vice versa—for example, the recent stage adaptations of Disney cartoons and the films *Doubt*, *West Side Story*, *Frost/Nixon*, and *In the Heights*—and of making video games

and that no one factor should be dispositive. *See Campbell*, 510 U.S. at 578 (“[T]he four statutory factors [may not] be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”); *id.* at 594 (rejecting any presumption to address the first or fourth factors in determining whether a transformative use is fair). As discussed in more detail below, the Court should take this opportunity to reaffirm this holistic approach. *See infra* at 32.

from films and vice versa, such as the Resident Evil films or the Star Wars video games.

Licensing markets also exist for characters. For instance, a movie studio entered into a licensing agreement for Star Wars-themed episodes of the popular television series *Family Guy*, featuring Star Wars characters rendered in the distinctive cartoon style of the television show. Further, *The Lego Movie* obtained licenses to use a number of characters in the film, including Batman, Albus Dumbledore of Harry Potter, and The Cowardly Lion from *The Wizard of Oz*. Studios have also licensed “crossover” comic books mixing cartoon, film and/or television characters.

These adaptations are, as Judge Lynch observed below, “paradigmatic example[s] of derivative work[s].” Pet’r’s App. 19a. But Petitioner’s test would upend this licensing market and permit secondary users to take what they want without any repayment to copyright owners. Adaptations almost always “add” to the original in some way: They might change the tone of the original through new music, dialogue, or staging, change the moral or political tone, or even alter plot points to stress or destress certain aspects of the story. With this new expression, meaning, and message, an adaptation would almost always be transformative under Petitioner’s test, and as a

practical matter, courts will almost always find it to be fair use. *See supra* at 15 & n.3.⁴

- **Music:** In the music industry, recording artists regularly use preexisting sound recordings in ways that do not comment on or criticize them, as source material for new sound recordings through processes known as sampling, subsampling, remixing, stemming, or mashing up. Since the development of the technologies making such practices inexpensive and quick to accomplish, a regime has emerged in which copyright holders license those uses. Indeed, the U.S. Copyright Office expressly recognizes that such uses constitute derivative works of preexisting sound recordings. *See* U.S. Copyright Office Circular No. 56 at 2–3 (2021) (citing mashups as an example of derivative sound recording).

This common understanding in the recording industry strikes a proper balance: It allows older sound recordings to continue to be profitable, and newer works to adapt and incorporate older

⁴ In addition, Petitioner’s test would cast doubt on previously decided cases that determined the licensing market for book, television, and film guides and other adaptations. *See, e.g., Dr. Seuss Enters.*, 983 F.3d 443; *Twin Peaks Prods. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366 (2d Cir. 1993); *Penguin Random House LLC v. Colting*, 270 F. Supp. 3d 736 (S.D.N.Y. 2017); *Paramount Pictures Corp. v. Carol Publ’g Grp.*, 11 F. Supp. 2d 329 (S.D.N.Y. 1998), *aff’d*, 181 F.3d 83 (2d Cir. 1999).

works, thus permitting and incentivizing future creativity. The sampling generally does not change the purpose of the original song; the new sound recording, like the preexisting one, is recorded music meant to entertain the listener. But sampling or remixing often alters the prior song in at least a minimal way, such as by cutting only a specific few bars, thus adding new expression; an artist sometimes inserts the sample into the new song with a different theme, thus adding a new meaning. Therefore, sampling would often be transformative under Petitioner's test, and may well become presumptively so. As a consequence, copyright owners would see their sound recordings sampled and reused without any control over or payment for those uses.

- **Photography and Visual Arts:** One of the key methods photographers use to commercialize their work is licensing their photographs for secondary uses. For instance, news photographers, who capture crucial moments in ways inaccessible to anyone else, license their photographs to others wishing to illustrate an event at which they were not present. Other photographers license their photographs for artist references.

Petitioner's test would disrupt those markets. A photograph could be altered slightly and thus gain new expression and new meaning—for instance, by using a simple tool like Adobe Photoshop or a readily available Instagram filter

to darken the image to communicate a meaning of dread, or by cropping the photograph to shift the viewer's focus from one component of the image to another. A secondary user could then take that photograph and use it with impunity, and the original photographer would be unable to prevent it or be properly remunerated for their creativity. This alteration would be so easy, it may effectively gut the photography licensing market, severely harming commercial photographers in particular.

Further, all visual arts could be vulnerable in the same way as photography. Merely taking a photograph of a preexisting work of visual art and adding a filter could be sufficient to make it transformative. This would destroy the market for licensing derivative works of such preexisting works.

- **New Technologies:** Petitioner's test would also have a devastating impact on how copyrighted works are used with new technologies. For instance, companies are developing "metaverses," which are virtual reality environments where users can build, create, and interact with each other and the world. In these metaverses, users could, for instance, view recorded performances of their favorite musicians, model their avatars after their favorite film or TV characters, or see their favorite artworks transformed into three dimensions.

Under the plain language of the Copyright Act, any of these new versions are derivative works: They take the original work and “transform” it into a new setting. But a secondary user could also claim that there is new meaning, such as in the expression of the art in the three-dimensional metaverse or in the use of an avatar to represent their identification with the character. Thus, under Petitioner’s test, it is conceivable that *any* movement from the preexisting work into these new technologies could be transformative. If, as technology companies advertise, society soon will be functioning in virtual as well as physical spaces, it cannot be that a creator has no rights over the movement of a creative work into the virtual space.

As these examples demonstrate, copyright owners derive significant value from controlling derivative uses of their works, and the prospect of that value incentivizes the creation of original works. Copyright law was designed to protect and encourage that creative work. To hold otherwise and elevate the fair use defense over the exclusive rights granted to copyright owners would invert these basic policies of copyright law and would mark a sea change in creative industries. That change would benefit secondary users like Petitioner here, but it would disincentivize creators from making original works in the first instance across all creative industries.

III. A Workable Transformative Use Test Should Be Fully Consistent With The Language And Purpose Of The Copyright Act.

To function consistently with the express language of Section 107 and to incentivize authors to create new original works, any test for “transformative use” must include a holistic inquiry, considering all of the facts and context at issue. The Copyright Alliance urges the Court to take into account the following guidelines when considering what standard should govern that analysis.

A. Where The Derivative Use Right And Transformative Use Tests Overlap, The Derivative Work Right Must Retain Primacy.

If the test for determining the scope of the derivative work right and the test for determining the scope of transformative use conflict, the derivative work right should prevail. As explained above, when a user “transforms” a preexisting work, the ensuing product is a derivative work subject to the exclusive control of the copyright owner. That express statutory right should have primacy over what qualifies as transformative use for the fair use defense. Further, because fair use is an affirmative defense, *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985), the burden is on the alleged infringer to prove its applicability. Indeed, no fair use inquiry is required until after the secondary work has been deemed infringing. *Id.*; H.R.

Rep. No. 102-836, at 3 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 2553, 2554. The Court should thus start from a baseline of considering the secondary work infringing, and it is the infringer’s burden to show that the use is transformative. *Campbell*, 510 U.S. at 590. When in doubt, whether a use is transformative or qualifies as a fair use “should not be resolved in favor of the [infringer].” *Id.* at 599 (Kennedy, J., concurring). Without a meaningful burden to differentiate a transformative use from a work requiring authorization under the derivative work right, any minor change would make a work transformative, thus taking away artists’ derivative work right. *Id.* (“We should not make it easy for musicians to exploit existing works[.]”).

B. Courts Must Consider Both The Purpose And The Character Of The Secondary Use.

Section 107 is clear that a court must consider both “the purpose *and* character of the use” when analyzing fair use (emphasis added). Contrary to Petitioner’s effort to ignore this express statutory language, courts should take both prongs into account and balance them against each other depending on the facts of the case.

1. A Transformative Purpose Should Be Closely Tied To The Purposes Listed In The Preamble To Section 107.

The purpose prong considers the user’s *justification* for using the copyrighted work. *Harper &*

Row, 471 U.S. at 557–58 (noting that a work was not fair where the infringer did not demonstrate “actual necessity”); Alan Latman, *Fair Use of Copyrighted Works* (1958), reprinted as Study No. 14 in *Copyright Law Revision Studies Nos. 14–16*, prepared for the Senate Committee on the Judiciary, 86th Cong. 30–31 (1960) (“Practical necessity is at times the rationale of fair use.”). In other words, the purpose prong considers *why* the user copied. To satisfy the first fair use factor, the use must have a purpose different from the original work’s that justifies permitting the user to copy it. Such a purpose must be more than merely “get[ting] attention or ... avoid[ing] the drudgery in working up something fresh.” *Campbell*, 510 U.S. at 580; *Kienitz*, 766 F.3d at 759 (Easterbrook, J.) (“[Fair use’s] goal ... is to facilitate a class of uses that would not be possible if users always had to negotiate with copyright proprietors.”). Where the taking is not necessary—for instance, in illustrating an event which could just have easily been demonstrated by other documents, *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1175 (9th Cir. 2012), or “because of how well the original author’s expression would convey the secondary author’s different message,” *Authors Guild v. Google, Inc.*, 804 F.3d 202, 215 (2d Cir. 2015)—the purpose is not transformative. *Campbell* illustrated this distinction by comparing parody to satire: “Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s ... imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.” 510 U.S. at 580–81.

Classically permissible purposes are embodied in the preamble to Section 107, which lists criticism, comment, news reporting, teaching, scholarship, or research. 17 U.S.C. § 107. These purposes should “guide[]” the analysis of whether a secondary work has a purpose sufficient to justify the taking. *See Campbell*, 510 U.S. at 578–79.

This principle demonstrates how the expansion of transformative use caused certain lower court cases to be wrongly decided. For instance, in *Cariou v. Prince*, the Second Circuit did not find a transformative purpose, but instead found the use was transformative based on “the creation of new information, new aesthetics, new insights and understandings.” 714 F.3d 694, 706–08 (2d Cir. 2013) (quotation marks omitted). The Second Circuit itself has since called this decision the “high-water mark of [its] recognition of transformative works” and has noted that it has “drawn some criticism.” *TCA Television Corp.*, 839 F.3d at 181. For instance, the leading treatise on copyright law has observed that “this case seemingly expands transformative usage without limit,” because as long as there is any alteration, it may qualify as fair use. 4 *Nimmer on Copyright* § 13.05 (2022). This case also demonstrates the difficulties of determining transformative use based purely on new expression or meaning: The court determined that twenty-five of the thirty allegedly infringing photographs were transformative, because there was sufficient new aesthetics and expression, but that it could not make a final determination on whether five had a new expression, meaning, or message. *Cariou*, 714 F.3d at

711. But it shed no light on what the difference was between the twenty-five “transformative” uses and the five uses that were not transformative. *See id.* at 713 (Wallace, J., concurring in part and dissenting in part) (“I fail to see how the majority in its appellate role can ‘confidently’ draw a distinction between the twenty-five works that it has identified as constituting fair use and the five works that do not readily lend themselves to a fair use determination.”); Nimmer, *supra*, § 13.05.

Similarly, the Ninth Circuit in *Seltzer v. Green Day, Inc.* looked only to whether the secondary use, the use of an image in a music video, conveyed “new information, new aesthetics, new insights and understandings[.]” 725 F.3d 1170, 1177 (9th Cir. 2013) (quotation marks omitted). The court incorrectly stressed that there was an alteration to the “expressive content or message of the original work.” *Id.* By not looking at all to purpose, the Ninth Circuit did not consider whether defendant’s infringing use was necessary, or if defendant simply took the plaintiff’s art “to get attention or to avoid the drudgery in working up something fresh.” *Campbell*, 510 U.S. at 580. In fact, the Ninth Circuit itself has since fleshed out the *Seltzer* analysis, describing the transformative use test as requiring both new expression, meaning, or message, and a further purpose or different character. *Dr. Seuss Enters.*, 983 F.3d at 453. In that more recent case, the Ninth Circuit found there was no transformative use because the secondary work “paralleled” the original’s purpose, despite the addition of new expression. *Id.* at 453–54 (“[T]he addition of new expression to an existing

work is not a get-out-of-jail-free card that renders the use of the original transformative.”).

The need for a justifying purpose also demonstrates the distinction between two correctly decided cases. In *Suntrust Bank v. Houghton Mifflin Co.* and *Salinger v. Colting*, the Eleventh and Second Circuits, respectively, considered whether reworkings of famous novels were transformative. In *Suntrust Bank*, the court determined that a retelling of *Gone With the Wind* from the point of view of enslaved people was transformative, because its purpose was to criticize “the romantic, idealized portrait of the antebellum South during and after the Civil War” and “to rebut and destroy the perspective, judgments, and mythology of [*Gone with the Wind*],” and insofar as the author used the original work, it was “in service of her general attack” on the original. 268 F.3d 1257, 1270–71 (11th Cir. 2001). The court held that the copying was necessary for the transformative purpose of criticism: “It is hard to imagine how [the author] could have specifically criticized [*Gone With the Wind*] without depending heavily upon copyrighted elements of that book.” *Id.* at 1271.

By contrast, in *Salinger*, the Second Circuit held that an unauthorized sequel to *Catcher in the Rye* was not transformative, because there was no justifying purpose. *Salinger v. Colting*, 607 F.3d 68, 83 (2d Cir. 2010). The district court had found that the purpose behind the sequel was likely not criticism, but “tribute.” *Salinger v. Colting*, 641 F. Supp. 2d 250, 260 n.3 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010). This

tribute was not a justifying purpose sufficient to make the sequel transformative.

Moreover, the principle of justification means that a court should be more skeptical of transformative purposes that do not relate back to the illustrative examples of Section 107. For instance, in *Fox News Network v. Tveyes, Inc.*, 883 F.3d 169, 177 (2d Cir. 2018), the majority of the Second Circuit panel correctly looked for a transformative purpose, and found such a purpose in the technology “improving the efficiency of delivering content,” derived from their reading of *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Judge Kaplan, in a concurrence, rightly expressed his skepticism that such a use was transformative, and of that reading of *Sony*, as *Sony* was issued before the transformative use analysis came into play. *Id.* at 187–88 (Kaplan, J., concurring). Similarly, in *Authors Guild v. Google, Inc.*, the Second Circuit found a transformative purpose in making available information about searched-for books, but warned that the case “test[ed] the boundaries of fair use.” *Authors Guild*, 804 F.3d at 206, 217. These decisions demonstrate that although there can be transformative purposes outside of examples expressly articulated in Section 107, courts should not expand that principle too far and make the infringer’s burden to show a justification negligible.

2. A Transformative Character Cannot Supersede The Original.

Section 107 also requires consideration of the “character” of a use. *See Campbell*, 510 U.S. at 579

(requiring a “further purpose or *different character*” (emphasis added)). This inquiry focuses on *how* the user used the preexisting work and the degree to which the preexisting work was altered. Therefore, any test for transformative use must consider whether there has been sufficient alteration in the character of the work to make it more than a derivative work. Most importantly, the character of the work must be sufficiently altered so it does not “supersede[]” the original. *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (Story, J.). For instance, in *Campbell*, defendants changed nearly the entirety of the lyrics of the preexisting song, thus significantly altering it and making it no longer a reasonable substitute for the original. App’x A to the Opinion of the Court, *Campbell*, 510 U.S. at 594–95. But more minor changes, such as adding only a few, minimal alterations to a photograph as appropriation art, are insufficient, because the secondary work could reasonably act as a substitute for the original.⁵

Critically, the alteration in the secondary use *must* be more than a change in medium. Changes in medium are the quintessential derivative works: changes from novel to play to film, 17 U.S.C. § 101, from non-fiction to fiction, *id.*, or photograph to sculpture,

⁵ This inquiry should work in tandem with the fourth fair use factor, which considers the effect of the use on the market for the preexisting work. While the first factor considers whether the new work supersedes the preexisting work creatively, the fourth factor considers whether the new work supersedes the preexisting work economically.

Rogers v. Koons, 960 F.2d 301, 309–11 (2d Cir. 1992). Permitting a mere change in medium to create a new “character” would demolish the derivative work right.

3. Courts Should Resolve Transformative Use On A Sliding Scale Of Purpose And Character.

After a court has determined the extent to which a secondary user has shown the purpose and character of the use at issue, the court should then balance those purported justifications on a sliding scale to determine how transformative the use is. This sliding scale would reflect that the more compelling the purpose of the use, the less altered the character need be, and vice versa. Therefore, where a secondary work is for a purpose that highly justifies its use by being aligned closely with the examples in the preamble to Section 107, it may be transformative even without alteration. Alternatively, a work’s character may be so significantly altered that, despite having a less-justifying purpose, it is still transformative. This approach gives effect to the requirements of Section 107’s first factor that courts consider the character *and* purpose of the use at issue holistically.

C. The Analysis Of A Transformative Purpose And Character Cannot Rely On Subjective Assessments.

Any consideration of the purpose and character of a secondary use must be based on an objective standard, as the Second Circuit correctly stated. If the determination of a work’s purpose were based solely on

the testimony of the user, the test would be effectively meaningless: A user could simply make up a purpose, even if it had little to do with the actual original purpose of the secondary work. *See, e.g., Salinger*, 607 F.3d at 83 (noting that the defendant’s purpose asserted in court contradicted statements about his purpose made before the lawsuit). Similarly, if a court relied on critics with expertise in the relevant form of art, users could simply find a critic whose perception of the secondary work’s purpose aligned with their own argument. Further, the assessment cannot rely merely on the taste and discernment of the judge. As this Court has observed, it “would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.” *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903). Instead, a court must consider what a reasonable person would determine the purpose and character of the new work to be. *See Campbell*, 510 U.S. at 582 (“The threshold question when fair use is raised in defense of parody is whether a parodic character *may reasonably be perceived.*” (emphasis added)).

Moreover, the transformative use analysis cannot consider the status or identity of the artist, or the commercial success of a work. The district court in this case noted the Prince Series had sufficient alteration in character because it was “immediately recognizable as a ‘Warhol.’” Pet’r’s App. 72a & n.8 (“[I]t is plain that the Prince Series works are ‘Warhols,’ and the Goldsmith Prince Photograph is not a ‘Warhol.’”). As the Second Circuit correctly recognized, this sort of analysis cannot

stand. It would create a caste system among artists, with the prominent able to take with impunity from the less prominent. Such an outcome would be directly counter to the goals of copyright, which is meant to foster new creativity, not stultify it into a set of well-known artists.⁶

D. The Transformative Use Analysis Cannot Replace The Fourth Factor.

Nothing in a transformative use analysis should be seen as a substitute for a robust analysis of the fourth fair use factor, which considers the effect on the market for the copyrighted work. As *Campbell* made clear by remanding for further consideration of the fourth factor rather than relying on a finding of transformative use to find the parody song fair use, the first and fourth factors, though related, are independently necessary for the fair use analysis.

CONCLUSION

The creators and creative industries represented by the Copyright Alliance’s members rely on a robust

⁶ Different policy goals underlie the Visual Artists Rights Act (“VARA”), 17 U.S.C. § 106A, which in certain circumstances expressly considers whether a work is of a visual artist of “recognized stature.” See, e.g., *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 166 (2d Cir.), cert. denied, 141 S. Ct. 363 (2020) (acknowledging that VARA’s “recognized stature” inquiry is a “fluid concept” that might result in protecting “a ‘poor’ work by an otherwise highly regarded artist”). VARA is not at issue in this appeal.

right to create and license derivative works, balanced by fair use when required. By altering the standard for what constitutes a transformative use, and thus a fair use, Petitioner’s position threatens to disrupt that balance, hamstring those industries, and make it that much harder for creators to realize the worth of their creation. The Court should instead articulate a “transformative use” inquiry that hews closely to the Copyright Act’s language and properly grants primacy to the derivative work right, thereby incentivizing authors to create new original works.

Respectfully submitted,

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