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 AMICUS CURIAE OF FLOOR64, INC. D/B/A THE COPIA INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus Copia Institute is the think tank arm of Floor64, Inc., the privately-held small business behind Techdirt.com ("Techdirt"), an online publication that has chronicled technology law and policy for nearly 25 years. In this time Techdirt has published more than 70,000 articles regarding subjects such as freedom of expression and copyright, as well as trademark, platform liability, patents, privacy, innovation policy, and more. The site often receives more than a million page views per month, and its articles have attracted nearly two million reader comments.

As a think tank the Copia Institute also produces evidence-driven white papers examining the underpinnings of tech policy. Then, armed with its insight, it regularly files amicus briefs, regulatory comments, and other advocacy instruments on these subjects to help educate lawmakers, courts, and other regulators—as well as innovators, entrepreneurs, and the public—with the goal of influencing good policy that promotes and sustains innovation and expression. Many such filings have implicated the exact same issues as those at the fore of this litigation.

As an enterprise whose business is built around engaging in expressive activities, copyright policy is

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[1] All parties have consented to the filing of the Brief. No counsel for any party authored this brief in whole or in part. Amicus and its counsel authored this brief in its entirety. No person or entity other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

itself highly relevant to its own endeavors, which also heavily depend on the First Amendment protections implicated by this case. The Copia Institute therefore submits this brief *amicus curiae* wearing two hats: as a longtime commenter on the issues raised by the underlying litigation at issue,[2] and as a small business whose expressive freedom is directly injured by the appellate decision now before this Court for its review.

SUMMARY OF ARGUMENT

In its brief Petitioner explains how the Second Circuit's decision deviates from previously established fair use doctrine and the First Amendment principles copyright law must inherently conform with. Amicus Copia Institute writes to further amplify (1) how the practical effect of that deviation is to chill expression far beyond the reach of the instant case and (2) how this chilling evinces that the Second Circuit's decision refusing to find that the copyright statute's fair use

[2] See in particular two Techdirt posts commenting on the judicial decisions described herein: Cathy Gellis, *Oh The Culture You'll Cancel, Thanks To The Ninth Circuit And Copyright*, TECHDIRT (Mar. 10, 2021), https://www.techdirt.com/2021/03/10/culture-youll-cancel-thanks-to-ninth-circuit-copyright/ and Cathy Gellis, *Oh Look, Here's Some More Culture Being Canceled, Now Thanks To The Second Circuit*, TECHDIRT (Apr. 12, 2021), https://www.techdirt.com/2021/04/12/look-heres-some-more-culture-being-canceled-now-thanks-to-second-circuit/.

provisions apply to the instant case makes copyright law now violate the Constitution.

ARGUMENT

I. Law that suppresses expression is not Constitutional

Over the decades and centuries copyright law in America has often changed form, sometimes dramatically and in raw statutory substance, such as in the shift from the 1909 copyright law to the 1976 version, and sometimes via seminal interpretations by this and other courts. But in any of its many forms copyright law has always had to comply with two Constitutional requirements.

First, Congress's power to legislate is inherently limited to areas articulated by the Constitution as places where it is appropriate for it to act. *See United States v. Morrison*, 529 U.S. 598, 607 (2000) (citing *Marbury v. Madison*, 1 Cranch 137, 176 (1803) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. 'The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.' ")). If Congress acts in a way that is not consistent with that grant of legislative authority, then its legislation is unconstitutional. *Id.* at 602.

The federal authority to implement a system of copyrights is found in the Progress Clause, which

empowers Congress to further the progress of sciences and useful arts through systems of limited monopolies, such as copyright. U.S. CONST. art. I, § 8, cl. 8 ("To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."). But if Congress produces a law that does not further this Constitutional objective to promote the progress of science and useful arts, then that resulting law cannot be rooted in this authority, even if it may bear on those systems of limited monopolies. The condition for this particular grant of legislative power is that exercising it will promote progress, and it is an important predicate for the exercise of it. Were it not, then that language conditioning that power would not have needed to be included in this Constitutional clause otherwise empowering Congress. *See Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) ("It is, however, a cardinal principle of statutory construction that we must 'give effect, if possible, to every clause and word of a statute.'"); *Marbury v. Madison*, 1 Cranch 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.").

But because it is an important predicate constraining Congress's ability to implement a copyright law, it means that Congress cannot simply label anything it wants to do legislatively as copyright-related to automatically make it a product of this grant of legislative authority. If it could then Congress could easily

pass a "copyright" law with all sorts of random provisions not even tangentially related to promoting the progress of sciences and useful arts, including those affecting areas of regulation left to the states by the Tenth Amendment. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution [. . .] are reserved to the States respectively, or to the people."). *See Gonzales v. Raich*, 545 U.S. 1, 52 (2005) (O'Connor, J., dissenting) ("[Congress's] authority must be used in a manner consistent with the notion of enumerated powers—a structural principle that is as much part of the Constitution as the Tenth Amendment's explicit textual command."). While this Court has found Congress to have wide latitude to decide how best to promote the progress of science and useful arts in its legislation, *Eldred v. Ashcroft*, 537 U.S. 186, 211-13 (2003), it did not and could not grant Congress the power to do the exact *opposite* of promoting progress with its legislation. Thus, statutory terms that do *not* advance the progress of sciences and the useful arts are inherently unsound Constitutionally, because it is beyond Congress's authority to do something ostensibly involving copyright law that does not meet that objective, or, worse, directly undermines it.

Congress's hands are also further tied by the First Amendment, which prohibits making a law that impinges on free expression. U.S. CONST. amend. I ("Congress shall make no law [. . .] abridging the freedom of speech"). So, again, if the effect of legislation that Congress passes is that free expression has

been impinged, then that legislation would be unconstitutional on that basis as well.

Crucially, however, in this case no issue is taken with Congress's legislative drafting, which incorporated in the 1976 Copyright Act that is still in effect language expressly protecting fair use. 17 U.S.C. § 107. As this Court has found, fair use helps vindicate the First Amendment values promoting discourse within copyright law. *Golan v. Holder*, 132 S.Ct. 873, 890 (2012); *Eldred*, 537 U.S. at 219-20. It also helps vindicate the goals and purposes of the Progress Clause itself, given how it helps promote the creation of future new works. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) ("The fair use doctrine thus permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.").

The issue with this case is that the decision by the Second Circuit (and also the Ninth Circuit, as discussed in Section II, *infra*) has interpreted this statutory language in a way that now deprives it of its inherent constitutionality. *See Eldred*, 537 U.S. at 212 ("We have also stressed, however, that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."). Rather than fostering more expression, this interpretation outright chills it by imposing liability upon subsequent expression that follows-on an earlier work, as nearly all works do, one way or another. *Campbell*, 510 U.S. at 575 (1994) ("Every book in literature, science and art, borrows, and must necessarily borrow, and use much

which was well known and used before.") (citing *Emerson v. Davies*, 8 F. Cas. 615, 619 (No. 4,436) (C.C.D. Mass. 1845)). Such an interpretation puts the statute in conflict with both the First Amendment and the goals and purposes of copyright law articulated in the Constitution. *Campbell*, 510 U.S. at 575 ("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.'). Only here it is the Second Circuit that has rendered the current copyright statute now unconstitutional, and not Congress.

Courts, however, cannot unilaterally change the effective meaning of statutory text. *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1738 (2020) ("If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives."). And they especially cannot be permitted to change it in a way that alters its constitutionality. *See id.* ("[W]e would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations."). *See also id.* at 1753 ("[T]he same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.").

For this reason, the decision must be overturned, and in a way that makes clear that the measure of constitutionality for copyright law in any form, regardless

of whether the parameters of that law have been crafted by Congress or by the courts, is that it does not chill expression, as this decision, thanks to its reasoning, does in measurable effect.

II. The practical effect of the Second Circuit's decision will be a chill on new expression

A. Its reasoning will not be confined to only the Warhol work

If this decision were to prevail as an accurate statement of copyright law, it will chill future expression. Such an effect is evident both from its own facial terms and because this decision does not stand in isolation, and thus should not be considered by this Court in a vacuum. Rather, it represents just one of the latest in a series of cases where courts—including federal appellate courts—have similarly deviated from previous doctrine and precedent to curtail fair use. In these cases court have effectively extended the reach of the copyright holder in an original work to give them effective veto power over follow-on works, including those that would convey new meanings not in the original. The plausible fear these decisions raise is that if this decision here is allowed to stand then there will be many more similar decisions eviscerating the speech-protecting ability of the fair use provision, which will consequently lead to the loss of future expression, as well as even the basic ability to convey certain expression, and for long into the future.

Illustrating this concern is a similar case decided by the Ninth Circuit shortly before the Second Circuit issued its decision in the instant case, which the latter then referenced as persuasive authority. *See*, *e.g.*, *Andy Warhol Foundation v. Goldsmith*, 11 F.4th 26, 49 (2d Cir. 2021). In *Dr. Seuss Enterprises, LP v. ComicMix LLC*, 983 F.3d 443, 461 (9th Cir. 2020), the Ninth Circuit similarly overturned a fair use finding by the district court and held that a follow-on work combining Seussian and Star Trek themes ("Oh, The Places You'll Boldly Go!") could not qualify as a fair use of a previous work by Dr. Seuss ("Oh, The Places You'll Go!"). According to the Ninth Circuit, only the rightsholders to the original book could authorize any subsequent use of these themes in a later book, no matter how novel the expression of the new work, by virtue of their exclusive right to control derivative works. *Id.* at 460.

This Court will never again have the opportunity to formally review the Seuss decision[3] because the *ComicMix* case was settled, reportedly due to a defendant's cancer diagnosis that precluded further

[3] This Court denied review in June 2021, 141 S.Ct. 2803 (2021), while a petition for rehearing was still pending before the Second Circuit in the instant case. JA-12. Given that this Court had just spoken to the strength of fair use protection in *Google v. Oracle*, 141 S.Ct. 1183 (2021), such review should have no longer been necessary, as the *Google* decision should have implicitly overruled it. But with the Second Circuit subsequently rejecting the applicability of the *Google* precedent to fair uses other than those involving software, *Warhol*, 11 F.4th at 51-52, *ComicMix* remains at minimum relevant as a further example of the expressive harm that results when fair use is inadequately protected by the courts.

litigating the case.[4] But the fact that this particular decision will not be subject to further review raises the stakes for the instant case because if this Second Circuit decision is not repudiated, it will not be the last time courts will render similar decisions penalizing new expression. As it is, the Ninth Circuit's errors in *ComicMix* reverberated in the Second Circuit's decision, *see*, *e.g.*, *Warhol*, 11 F.4th at 50, and they will continue to reverberate in future cases if this Court does not take this opportunity to check them by reiterating that it meant what it said in *Campbell*, that copyright cannot and should not be able to preclude subsequent expression that gives new meaning to pre-existing works and instead must afford "breathing space" for it. *Campbell*, 510 U.S. at 579.[5]

Indeed, there are a number of striking similarities between the two cases, both in rationale, with both courts rejecting prior precedent that should have protected these fair uses, and in their ultimate impact on

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[4] *See* Timothy Geigner, *Seuss Estate And ComicMix Copyright Case Settles In The Saddest Possible Way*, TECHDIRT (Oct. 7, 2021), https://www.techdirt.com/2021/10/07/seuss-estate-comicmix-copyright-case-settles-saddest-possible-way/.

[5] It is notable that neither the *Warhol* nor *ComicMix* decisions even once referenced the First Amendment in their decisions limiting fair use, even though it is what fair use is intended to vindicate. *See also Golan*, 132 S.Ct. at 908 (Breyer, J., dissenting) ("[T]he First Amendment interest is important enough to require courts to scrutinize with some care the reasons claimed to justify the Act in order to determine whether they constitute reasonable copyright-related justifications for the serious harms, including speech-related harms, which the Act seems likely to impose.").

expression. More specifically, both decisions deem as not fair uses follow-on works conveying new meanings that the original works had not, and both decisions also effectively broadened the reach of copyrights to allow monopolistic control of far more than the fixed expression of the original works or their creative, copyrightable elements. Furthermore, the implications of both decisions are that copyright holders will be able to bar all sorts of new expression, including the sort of new expression that otherwise would itself be the sort of original expression encouraged by copyright, and until long after the original creator is gone.

i. It chills expression by foreclosing works with new meanings if they build on a previous work

One point the Petitioner made in the instant case, which the Second Circuit gave short shrift to, was how the Warhol work conveyed new meaning that was not conveyed by the original photograph. *Warhol*, 11 F.4th at 41. In the *ComicMix* case, the new meaning conveyed by the second book was also discounted by the court. *ComicMix*, 983 F.3d at 451-55. Although Dr. Seuss had originally written an ostensibly motivational book (the original "Oh, the Places You'll Go"), he had obviously never written *this* book that the defendant had written, "Oh, the Places You'll Boldly Go," which incorporated motifs of another culturally-understood genre to say something that had obviously not been said to the world before in this form. *See*, *e.g.*, *id.* at 453 ("Boldly's replacement of Grinch's 'Whos from

Who-ville' with the diverse crew and Kirk's 'lovers of every hue,' the redrawing of a Sneetches machine to signify the Enterprise transporter, and the rendering of the 'lonely games' played in Go! as a contemplative chess match between two Spocks' were all used to tell the story of the Enterprise crew's adventures, not to make a point about Go!"). Despite this Court having made clear that follow-on works that "add[] something new, with a further purpose or different character [that alters] the first [work] with new expression, meaning, or message" are fair use, *Google*, 141 S.Ct. at 1202-03 (citing *Campbell*, 510 U.S. at 579), per the Ninth Circuit, no one could make such a statement, or tell such a new story, with any sort of new elements unless the copyright owner authorized it. *Id.* at 460.

Which is why this decision, and also the Second Circuit's, are so Constitutionally untenable: because they serve as a bar to expression. Per these courts, the public only gets to experience the original work conveying whatever it originally conveyed, even if there is more to be said, and even if aspects of the original work provide the most appropriate vocabulary with which to express this new idea. These decisions would lock away this vocabulary with copyright law and force future expression to have to use another vernacular that may be far less adept in order to try to convey whatever the new creator would like to express about the subject.

The upshot of the Ninth Circuit's decision is that the world might never get to have a book that combines Dr. Seuss and Star Trek if the respective rightsholders either did not themselves combine forces or consciously

choose to permit someone else to combine them. *Id.* at 460-61.[6] And it is surely not the only new expression the world will lose, because, according to the Second and Ninth Circuits, any copyright holder could say no to the world ever getting access to any combination of ideas involving a work if its copyright holder did not wish, for whatever reason, for such expression to exist. *Id.* at 461 ("[T]he unrestricted and widespread conduct of the sort ComicMix is engaged in could result in anyone being able to produce, without Seuss's permission, Oh the Places Yoda'll Go!, Oh the Places You'll Pokemon Go!, Oh the Places You'll Yada Yada Yada!, and countless other mash-ups."). Which would give a copyright holder an inordinate amount of censorial power over future expression, and far beyond whatever could be justified to preserve their own economic incentive to continue to create, which are highly unlikely to include all of the same new expressive ideas that a

[6] The follow-on book also never was published, *ComicMix*, 983 F.3d at 580, and, given the settlement, apparently will never be published, which will deprive the public of getting to read the new ideas it had to say. As a result, the Ninth Circuit's decision has also had the effect of impinging on the public's right to read incorporated in the First Amendment, as well as on the follow-on author's First Amendment right to free expression. *See Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 866-67 (1982) ("[W]e have recognized that the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.") (internal citations omitted). *See also Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 545 (1985) ("[C]opyright is intended to increase and not to impede the harvest of knowledge.").

public full of fair users free to express themselves could come up with.

The reality is that if the original copyright holder can be a gatekeeper on all new expression referencing their works, then they have the right to limit new expression, even though getting more expression is what copyright law is supposed to achieve. *See Golan*, 132 S.Ct. at 900 (Breyer, J., dissenting) ("The possibility of eliciting new production is, and always has been, an essential precondition for American copyright protection."). Without strong fair use tempering the right to refuse uses, copyright law will only result in less new expression, as it will only permit exactly as much expression as the copyright holder will allow, and no more.

ii. It chills expression by expanding the power of a copyright holder to foreclose later works beyond what the copyright statute allows

In the instant case the Second Circuit also broadened the power of a copyright holder to exclude new works by dismissing the defense that Warhol had removed the copyrightable elements of the original work. *Warhol*, 11 F.4th at 46 ("AWF argues, and the district court concluded, that this factor weighs in its favor because, by cropping and flattening the Goldsmith Photograph, thereby removing or minimizing its use of light, contrast, shading, and other expressive qualities, Warhol removed nearly all of its copyrightable

elements. We do not agree."). Logically that removal should have been dispositive, however, because for Warhol to be able to say something new about the subject new elements would be necessary to change the portrayal of the subject from one of vulnerability to one of iconic stature. *Id.* at 41.

But in the *ComicMix* case the Ninth Circuit went even further than the Second in extending the power of the copyright holder, dismissing the defense's even *greater* removal of protected elements, ignoring the extent to which they had been *replaced* by other elements, and ultimately finding that the potential infringement of the original work to be supported by how the follow-on work also incorporated elements of a *completely different work*. *ComicMix*, 983 F.3d at 455 (finding the copying of an image from the Sneetches work to be relevant in finding against a fair use of the "Boldly Go" work). In other words, copyright protection arising from an "original work fixed in a tangible medium," which is what copyright protects, 17 U.S.C. § 102, could reach far beyond that specific work. With *ComicMix* the Ninth Circuit opened the door to a copyright holder of a single work being able to preclude follow-on works using elements not even present in the original work itself and *by virtue* of the follow-on work using those additional elements. Such a decision significantly expands copyright protection beyond the bounds of the statute, and at the expense of others' future expressive uses of works that the original creator had never created himself.

iii. It denies this new expression for generations

The *ComicMix* case helps illustrate the problem with the Second Circuit's decision in a key way that the instant *Warhol* case does not. In *Warhol*, the creator of the follow-on work had long since passed away, while the copyright owner of the original is still alive. She has not, in the intervening decades since this alleged infringement, created or licensed works that added to her original work what Warhol had, but at least in theory she still could. But in *ComicMix* the situation was the other way around, where a living, breathing artist found his expression foreclosed by the estate of a copyright holder who had long been dead, and, being dead, thus in no way able to continue to be incentivized by copyright to create any more expression. *See Google LLC v. Oracle America, Inc.*, 141 S.Ct. 1183, 1198 (2021) ("[C]opyright should not grant anyone more economic power than is necessary to achieve the incentive to create.") (internal citations omitted).

In all cases it is only those who are alive who are physically able to add to our cultural reservoir of expression, but without adequate protection for their fair uses copyright gives the dead the power to reach beyond the grave to gag the living. And given the enormous duration of copyright terms, the dead are able to haunt the living for decades, if not generations, after departing this mortal coil. While this Court has sanctioned Congress extending terms as an exercise of its legislative authority to define the contours of copyright law, *Eldred*, 537 U.S. at 194, it did not find that this

extension obviated any other First Amendment concerns implicated by copyright law, which were inherently bound up within copyright law itself. *Id.* at 219. On the contrary, it found that for copyright to be constitutional, it must exist in a way where those concerns can remain vindicated, which happens in large part by preserving a right to make fair use that can exist in balance with the rest of copyright law. *Id.* at 219-21. *See also id.* at 266 (Breyer, J., dissenting) (raising concerns about expressive harms resulting from lengthy copyright terms); *Golan*, 132 S.Ct. at 901 (Breyer, J., dissenting) (citing Thomas Jefferson and James Madison's concerns about monopolies and their agreement that they should be granted only in "certain cases," "with caution" to guard against abuse, and only to the extent that they "serve as an encouragement to men to pursue ideas that may produce public utility.").

Obviously in the *Warhol* case that particular absurdity of the dead censoring the living has not been an issue, and yet the essential problem remains, even in this case: when a copyright becomes too powerful it is a power that may not only be wielded by a creator, or in furtherance of additional creativity. It may instead be a power wielded *against* a creator, and additional creativity. And ultimately, the greater a copyright's power to foreclose others' expression, the less additional new expression there will be, which is exactly the opposite of what copyright law is supposed to engender. Copyright is supposed to lead to more creativity, not less, which is why the power of copyright always must be tempered, including through robust

protection for fair use. The law must therefore show significant deference to the new ideas later creators bring to the world so that past creators—including but not limited to long-expired ones—cannot chill the expression of those able and inspired to continue creating the new expression copyright law is supposed to incentivize and not deter.

B. Tempering the power of a copyright holder with strong protection for fair use does not harm expression

Decisions finding against fair use tend to be rooted in the assumption that if there was money to be made in the follow-on work, that money should have gone to the original creator. *See*, *e.g.*, *ComicMix*, 983 F.3d at 460 (finding it objectionable that both the follow-on work "intentionally targeted and aimed to capitalize on the same graduation market" of the original work, even though the copyright in the original only gave a monopoly in copies of the work and not the entire market it competed in). *See also Warhol*, 11 F.4th at 40 (taking issue with the follow-on work generally having the same "overarching purpose and function" of the original work). Whereas with fair use, the original creators are not in line for a share of any revenue the follow-on work may generate. The judicial assumption running through these decisions appears to be that if the value of the original copyright does not include all the possible revenue that may relate to it, then it somehow devalues the copyright and with it the

incentive that copyright is intended to provide creators to produce more expression.

But as this Court has said, not every possible source of economic "loss" is a loss for copyright to remediate. *Google*, 141 S.Ct. at 1206 (also noting that any losses must be measured against public benefits). It is also apparent that economic incentives are not always necessary to drive creativity. In fact, sometimes copyright itself isn't necessary. Volunteer labor frequently produces complex works, like opensource software,[7] or community wikis,[8] without the prospect of remuneration for those efforts. Many artists regularly produce works with generous uses automatically granted, including the right to make derivative works, and without requiring any payment for the license.[9]

Promoting expression also promotes markets for expression, which in turn helps remunerate copyright holders. Allowing creative uses tends to create new markets and new market opportunities, which in turn can provide more revenue generation opportunities for copyright owners of original works. As the Copia Institute has been documenting for over a decade, the fears of "piracy" wrought by the Internet have not destroyed

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[7] *See generally* Jennifer Still, *What is open-source software? Understanding the non-proprietary software that allows you to modify its code*, BUSINESS INSIDER (Sep. 17, 2021), https://www.businessinsider.com/what-is-open-source-software.

[8] One of the most famous is Wikipedia. *See* https://en.wikipedia.org/wiki/Wikipedia:About.

[9] Often creators use Creative Commons licenses to invite these uses. *See* https://creativecommons.org/share-your-work/.

incomes or chilled expression; rather there has been a significant increase in all sorts of creative outputs. *See* The Copia Institute, *The Sky Is Rising 2019*[10] ("No matter where you look, there are signs of an incredible abundance of not just creation of new content, but myriad ways to make money from that content. Contrary to clockwork complaints of content creation being killed off—all evidence points to an internet that has enabled stunning growth and opportunity for content. The internet has provided new tools and services that have enabled more creation, more distribution, more promotion, more access to fans and more ways to make money than ever before."). In other words, more power for copyright holders is not necessary for getting more expressive works. In fact, the opposite appears to be the case.

In any case, it should not be assumed that a use of a work is necessarily harmful for a copyright holder, particularly if it fills a market niche that the copyright holder was not pursuing, nor was likely to pursue given how the later work manifested new ideas from new people. It simply presumes too much to assume that a copyright holder is hurt just because someone else may benefit in some way connected to their work. Copyright is supposed to be about promoting expression for the benefit of the public and not about providing copyright

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[10] Available at https://skyisrising.com/TheSkyIsRising2019.pdf. This whitepaper, itself a work of original authorship fixed in a tangible medium that took significant effort to create, has also has been dedicated to the public domain. *Id.* at the second page (unnumbered).

holders any more monopolist power than what is needed to get it. But when copyright ends up shutting down others' expression, then nobody benefits.

CONCLUSION

For the forgoing reasons, the Second Circuit's judgment should be reversed.

Respectfully submitted,

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