

No. 21-869

IN THE
Supreme Court of the United States

ANDY WARHOL FOUNDATION
FOR THE VISUAL ARTS, INC.,

Petitioner,

v.

LYNN GOLDSMITH, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR *AMICI CURIAE* THE
RECORDING INDUSTRY ASSOCIATION OF
AMERICA (“RIAA”) AND THE NATIONAL
MUSIC PUBLISHERS’ ASSOCIATION (“NMPA”)
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICI CURIAE¹

The Recording Industry Association of America (“RIAA”) is a nonprofit trade organization that supports and promotes the creative and financial vitality of recorded music and the people and companies that create it in the United States. RIAA’s several hundred members—ranging from major American music companies with global reach to artist-owned labels and small businesses—make up the world’s most vibrant and innovative music community. RIAA’s members create, manufacture, and/or distribute the majority of all legitimate recorded music produced and sold in the United States, and own the copyrights and/or other exclusive rights in sound recordings embodying the performances of some of the most popular and successful recording artists of all time. In supporting its members, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels, and monitors state and federal laws, regulations, and policies, to ensure that the United States music industry remains the most vibrant in the world.

The National Music Publishers’ Association (“NMPA”) is the principal trade association representing the United States music publishing and songwriting industries. NMPA is the leading voice representing those industries before Congress, in the courts, within the music,

1. Pursuant to Supreme Court Rule 37.6, counsel for amici 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 amici or its counsel made such a contribution. All parties have consented to the filing of this brief.

entertainment and technology industries, and to the public. NMPA's membership includes music publishers affiliated with large entertainment companies as well as independently owned and operated music publishers of all sizes, and their songwriting partners. Taken together, compositions owned or controlled by NMPA's members account for the majority of musical compositions licensed for commercial use in the United States.

The question presented in this case bears directly on both the business and artistic interests of amici and their members. Adopting the broad and subjective fair use test advocated by Petitioner would directly undermine the rights of amici's members (and other copyright holders) to assert, control, and protect their valuable copyrights, including in particular the exclusive rights to license their copyrighted works, and to create and to authorize others to create derivative works based on those works. Those exclusive rights are expressly granted in Section 106 of the United States Copyright Act (the "Act") to further the Constitutional purpose provided for in Article I, Section 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."

Petitioner's test would not only abrogate those exclusive rights, it would rewrite the limited fair use exception in Section 107 of the Act, reducing it from a four-factor balancing test to a single dispositive determination of artistic purpose—i.e. whether the secondary work has imbued the original work that has been appropriated with a new "meaning or message"—which is subjective, speculative, manipulable, and impossible to apply with

meaningful consistency. Focusing exclusively on the secondary work’s “meaning or message” converts judges and juries into art critics, and risks decisions influenced by the prominence of the artist. For example, a determination as to whether a sound recording that “samples” an existing recording without a license is (i) an unauthorized and infringing derivative work (which, under existing music industry practice, is generally the case), or (ii) a “fair use” for which no license is required, should not rest on divining the supposed “intent” (or, as the Second Circuit cautioned, the fame) of the artist who sampled, or on the “meaning” of the new use.² Rather, all four factors enumerated in Section 107, including the relative commercial interests and whether the new work usurps a market or potential market (including any licensing market) of the old, must be considered and balanced to properly reflect the statutory boundaries between the exclusive rights in Section 106 and fair use.

SUMMARY OF ARGUMENT

The Second Circuit correctly concluded that Andy Warhol’s and Petitioner’s unauthorized reproduction and exploitation of Lynn Goldsmith’s copyrighted and unpublished photograph of Prince violated Goldsmith’s copyright in her photograph. An overly broad and dominant

2. For instance, The Hershey Company likely *intended* its use of the 1982 song “I Melt With You” in chocolate advertisements to invoke melted and shared chocolate, and the *meaning* of the composition as used in the Hershey’s advertisement (*i.e.* to sell chocolate) was certainly different than as originally intended by Modern English. It is clear that intended meaning and message cannot be the only consideration to determine whether a new use is fair.

transformative use test, like that proposed by Petitioner, threatens to engulf the entire fair use analysis (which, by statute, includes at least three other factors unrelated to transformation) and to subvert rights statutorily exclusive to copyright holders (including, significantly for amici and their members, the exclusive rights to license and to prepare or authorize the preparation and exploitation of derivative works). A more thorough and less subjective and manipulable analysis than that advanced by Petitioner is needed in fair use cases—one that protects the rights granted in Section 106 of the Copyright Act and gives meaning to and effectuates *all* of Section 107 rather than carving factors out of the statute.

One of the fundamental flaws in Petitioner’s argument is revealed even before reaching the substance of Petitioner’s opening brief: the *only* question presented by Petitioner to this Court concerns the “transformative use” test. Based solely on its (flawed) analysis of that limited question, Petitioner requests that the Court reverse the Second Circuit’s decision and hold that Warhol’s reproduction and AWF’s exploitation of Goldsmith’s photograph are fair. But “transformative use” is a judicially-created doctrine that does not appear in the text of Section 107 of the Act. The question of transformative use was originally considered by this Court only with respect to one portion of one factor of the four-factor fair use test set forth and mandated in the statute. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). A consideration that does not appear in the statutory text should not be elevated over the statutory factors themselves. Petitioner’s cramped view of the issue in this case reflects the problem with the opinion of the district court (and certain others that have considered fair use in the three decades since *Campbell*):

the tendency of the “transformative use” examination to reduce Section 107’s four-part balancing test to a single dispositive factor that is not even identified in the text of Section 107. For its incompleteness alone Petitioner’s argument is inconsistent with Section 107; the Second Circuit’s decision should be affirmed.

Even as limited to the question of transformation, Petitioner’s proposed formulation is unduly narrow, impracticable, and does not reflect this Court’s holdings in *Campbell* and *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021). Petitioner would have courts boil the entire analysis of transformation (and, by Petitioner’s extension, the entire analysis of fair use) down to a subjective inquiry into any differences between the reasonably perceived or intended “meaning or message” of the original and secondary work as evidenced by the creators’ own testimony (where available) and/or by artistic analyses conducted by courts with the help of experts. That is a misconstruction of *Campbell*, and would result in exactly the sort of artistic value judgments and interpretations in which the district court engaged and which the Second Circuit correctly identified as inappropriate.³ Courts are arbiters of *law*, not art, and their mandate should and can

3. Tellingly, Petitioner’s brief is rife with art criticism extolling the virtue of Andy Warhol. *See* Pet. Br., *passim* (citing Blake Gopnik, *Warhol* (2020), Karen Rosenberg, *For Andy Warhol, Faith and Sexuality Intertwined*, N.Y. Times (Dec. 2, 2021); Tony Scherman & David Dalton, *POP: The Genius of Andy Warhol* (Harper 2009); Kenneth Silver, *Modes of Disclosure: The Construction of Gay Identity and the Rise of Pop Art*). But the Second Circuit’s statement that a “judge should not assume the role of art critic” should be non-controversial, and nothing in either the statutory fair use analysis or *Campbell* suggests differently.

only be to determine if a secondary use is fair (and, as only one component thereof, transformative) from a *legal* perspective.⁴ Moreover, courts are bound to interpret and apply the Act and the Constitution as written, which is exactly what the Second Circuit did when it appropriately assessed *all four factors* in Section 107 and reversed the district court.

Petitioner largely ignores the impact that its circumscribed formulation of the fair use analysis would have on other provisions of the Act, including, as most relevant to amici, the licensing and derivative rights exclusively granted to copyright holders in Section 106. While Petitioner brushes off these concerns, its argument would effectively permit the rights of secondary users to swallow the rights granted to creators, virtually nullifying the purpose of copyright protection as contemplated and granted in the Constitution and codified in the Act.

The Second Circuit’s decision and reasoning should be affirmed, and this Court should build on its recent decision in *Google v. Oracle* in reaffirming that all four statutory fair use factors—including, significantly, the fourth market factor—must be given due and independent consideration in any fair use analysis. *See* 141 S. Ct. at 1197.

4. As noted by Respondents, neither Petitioner nor its amici are clear about exactly who—*i.e.* which “objective” reasonable person or groups of people—should ultimately be responsible for determining whether the competing works have a distinct “meaning or message.” That significant hole in Petitioner’s proposal is telling.

ARGUMENT

The fundamental purpose of copyright law is “[t]o promote the Progress of Science and useful Arts.” U.S. Const., art. I, § 8, cl. 8. If creators are not economically compensated for their creations, they will be disincentivized from creating and the public will be deprived of the benefit of their works. In order to “promote” creation, the Constitution explicitly grants Congress the power to vest exclusive rights in creators. Of course, granting exclusive ownership in a certain expression to one person may restrict the rights of another (including free speech rights), so, among other things, an appropriately applied doctrine of fair use provides “breathing space” to help copyright law avoid running afoul of the First Amendment. *Campbell*, 510 U.S. at 579.

Providing “breathing space” does not mean giving carte blanche to infringe the exclusive rights set forth and protected in Section 106 of the Copyright Act. To protect and incentivize creators—indeed, for the Act and its Constitutional prerogative to make any sense—those rights cannot be implicitly abrogated by an expansive judicial interpretation of fair use as codified in Section 107. Yet abrogation of those rights is exactly what the overly broad interpretation and application of the fair use doctrine employed by the district court and urged by Petitioner would accomplish. That interpretation inappropriately elevates transformation of “meaning or message” above all other considerations, and involves a convoluted analysis which ultimately hinges almost entirely on the artistic and pseudo-psychological (and, in any event, extra-legal) conclusion that Goldsmith’s depiction of Prince was “vulnerable” while Warhol’s was “dehumanized.”

I. THE COPYRIGHT ACT'S STATUTORY TEXT MUST BE GIVEN PRIMACY

A. All Four Statutory Factors Must Be Considered

Section 107 of the Act mandates that in determining whether the fair use limitation applies, the “factors to be considered *shall* include” the listed four factors. 17 U.S.C. § 107 (emphasis added). The words “transformative use” do not appear in Section 107. Yet Petitioner conflates the transformative use inquiry adopted to guide analysis under the first factor with the full fair use analysis itself, essentially arguing that “transformation” alone is sufficient to find a use “fair.” Under the test advocated by Petitioner, a finding of transformative use would not only suffice to conclusively tip the first factor toward fair use, but would also “typically make it easier to satisfy the third and fourth factors, because it justifies a greater degree of copying and renders the new work less likely to operate as a market substitute for the original work it borrows from.” Pet. Br. at 9. Amici disagree, and this Court should confirm that the statute requires that each of the four factors be independently considered in its own right.

Aside from being statutorily mandated, a complete and balanced consideration of all four factors is a fairer and more predictable method of analysis. It vindicates the interests that the Constitution recognizes and that the Act protects in Section 106. Moreover, it gives appropriate weight to the language of Section 107. With a focus almost exclusively on transformativeness, the second factor (consideration of the nature of the copyrighted work) and the fourth factor (the effect upon the potential markets) are eclipsed. A more balanced analysis accounts for

these important factors—which look to the heart of the copyright holder’s creation and her economic interest in it—to produce a result more in line with the purpose and language of the Act, by protecting rights that properly belong to the copyright holder (including licensing and derivative rights, as discussed below).

Finally, a balanced fair use analysis protects the rights of original creators and would-be fair users alike, contrary to Petitioner’s position (which could very well lead to a finding of fair use in virtually any case). Consider Andy Warhol’s Campbell’s Soup Cans paintings. Petitioner points to these works, and this Court’s implied blessing of them in *Google v. Oracle*, 141 S. Ct. at 1203, as both (i) evidence that the Warhol-ization of an image is *de facto* transformative (and therefore, Petitioner would argue, constitutes a fair use), and (ii) an example of an important artwork that would be endangered were the Court not to adopt Petitioner’s cramped “meaning or message” test. Neither claim is true. It is not the mere “Warhol-ization” of the imagery of the soup packaging (iconic as it may be) that made Warhol’s use fair. While the first fair use factor may cut both ways in this example (Warhol’s artistic image of a consumer good was clearly different in purpose, but largely the same in character, and also commercial), and the third factor may weigh against fair use (because Warhol copied virtually the entire substantively significant portion of the cans), the second and fourth factors both favor a finding of fair use (because, respectively, the original can designs were not inherently creative and were widely published and the markets or potential markets for soup packaging and for artistic recreations of soup packaging have virtually no overlap). Thus, the fair use factors properly weighed together could easily

lead a court to conclude that Warhol's use of the soup can imagery was fair, and Petitioner's purported concern that a ruling against it in this case would invalidate Warhol's entire body of work, *see* Pet. Br. 53-56, is at least wildly overblown (if not a complete red herring).⁵

1. An Overemphasis On Transformation In Considering Fair Use Improperly Subordinates Derivative Work Rights and Undervalues the Fourth Factor (Market Effects)

Courts must distinguish, consistently and uniformly, between an infringement of the derivative work right (including the right to license, or withhold a license for, the

5. Petitioner's purported concern that if courts apply Section 107 as written (which they are required to do) then there would have been no Andy Warhol, no Robert Rauschenberg, no Richard Prince, is distraction. The Second Circuit correctly held in *Rogers v. Koons* in 1992 that Jeff Koons violated Art Rogers' copyright in a photograph by creating a large statue replicating, in bright colors, the tranquil scene of spouses holding eight puppies. 960 F.2d 301, 303 (2d Cir. 1992) (chastising the artist and his gallery for seeming to think that "so long as they were significant players in the art business, and the copies they produced bettered the price of the copied work by a thousand to one, their piracy of a less well-known artist's work would escape being sullied by an accusation of plagiarism"). Although this case predated *Campbell*, its correctness has not been seriously questioned and, tellingly, there has been no discernible chilling effect on artists. Koons, like Warhol (who eventually began taking his own photos or licensing pre-existing works after facing and settling multiple copyright infringement lawsuits), simply should have licensed the photograph. This is the law, and, in upholding the Second Circuit's decision here, this Court would be reinvigorating it.

creation of such derivative work) and a *bona fide* fair use. A transformation analysis alone cannot carry this burden. In acknowledging that Warhol did not sufficiently transform Goldsmith’s photograph, the Second Circuit said that the Prince Series “recognizably derive[s] from, and retain[s] the essential elements of, its source material.” *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 42 (2d Cir. 2021). Contrary to Petitioner’s position that this approach “is mistaken” and “cannot be squared” with this Court’s precedents, the Second Circuit’s formulation is correct and readily workable: it describes a derivative work and protects such work from infringement.

A derivative work can “transform” (a word used in the definition of the phrase “derivative work” in Section 101) the original, while retaining essential elements: like a sequel, a movie adaption of a novel, a musical adaptation of a play, an “art reproduction” of a photograph, or a new sound recording and/or musical work built around a sample or portion of a preexisting sound recording or musical work. Although the form of the work clearly changes (*e.g.* from a book to a film), the purpose—or “meaning or message”—may also change, when, for example, a historical nonfiction book meant primarily to educate is turned into an action film meant primarily to entertain, or, to reiterate the example above, when a love song is used in a commercial to sell chocolate. Asking, therefore, only whether a secondary work transformed the “meaning or message” of the original does not adequately distinguish a fair use from a statutorily protected derivative work. The Second Circuit was squarely correct in this analysis. *See* 11 F.4th at 38-40.

Instead, courts must look to the markets for the original and secondary works. Since this Court stated in 1985 in *Harper & Row Publishers, Inc. v. Nation Enters.* that the fourth statutory factor—“the effect of the use upon the potential market for or value of the copyrighted work”—was “undoubtedly the single most important element of fair use,” 471 U.S. 539, 566 (1985), the importance (if not the primacy) of the fourth factor has been widely recognized. Even after *Campbell*, which Petitioner argues elevated transformativeness over the statutory factors, many decisions have continued to place particular emphasis on market considerations. *See, e.g. Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 459–61 (9th Cir. 2020); *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015); *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014). And even in the *Campbell* decision itself this Court suggested that transformation is important to consider largely because it can reduce the risk of “affect[ing] the market for the original in a way cognizable under [the fourth] factor.” 510 U.S. at 591; *see also* Pierre N. Leval, *Campbell as Fair Use Blueprint?*, 90 Wash. L. Rev. 597, 605 (2015) (*Campbell* “characterizes the first factor inquiry as subservient to the fourth.”).⁶

6. In his 2015 article Judge Leval himself also appears to recognize the importance of the fourth market factor and the relationship between the market factor and transformation, which is particularly significant because the entire notion of transformation as discussed and adopted in *Campbell* was originally developed and advocated by Judge Leval. *See Campbell*, 510 U.S. at 579 (citing, 13 times, Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990)).

An appropriate weighing of the fourth factor (rather than its near complete dismissal as by the district court and as advocated by Petitioner) leads to a more accurate and reliable determination of whether a work is properly considered a protected derivative work or a fair use. This factor focuses on “whether the secondary use usurps demand for the protected work by serving as a market substitute,” and considers “not only the extent of market harm caused by the particular actions of the alleged infringer, but 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.” *TCA Television Corp. v. McCollum*, 839 F.3d 168, 186 (2d Cir. 2016) (citing and quoting *Campbell*, 510 U.S. at 590, 592). In addition, “[a] court considering fair use properly identifies and weighs relevant harm to the derivative market for a copyrighted work, which market includes uses that creators of original works might ‘license others to develop,’” and “properly considers the challenged use’s ‘impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets.”” *TCA Television*, 839 F.3d at 186 (citing and quoting *Campbell*, 510 U.S. at 592 and *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994)).

In other words, a copyright holder may grant to a new user a license which authorizes the creation of a derivative work, and such work may “transform” the original in myriad ways. That potential transformation does not justify a finding that the secondary use is “fair,” but rather is a paradigmatic exercise of a copyright owner’s exclusive rights (and exactly what Goldsmith did in this case).

2. Consideration Of the Effect On Goldsmith's Licensing Market Confirms That Warhol's Prince Series Works Are Derivative Works Based Upon Goldsmith's Copyright-Protected Photograph

Goldsmith, for the sum of \$400, licensed Vanity Fair the limited right to reproduce and distribute her photograph of Prince in a limited way and for a specific purpose: “as an artist’s reference in connection with an article to be published in Vanity Fair Magazine.” As required by the license, the article expressly credited Goldsmith as the source of the accompanying image. Warhol’s creation of 15 *other* illustrations based on Goldsmith’s photograph (*i.e.* the Prince Series) and, following Warhol’s death, Petitioner’s display, reproduction, sale, licensing, and other exploitation of the Prince Series, were indisputably *not* in connection with the Vanity Fair article, and thus exceeded the scope of Goldsmith’s license to Vanity Fair and infringed Goldsmith’s copyright.⁷

An unauthorized use of another’s copyrighted work must be justified by consideration of all the statutory fair use factors, even where the secondary author wishes to convey a different “meaning or message.” Indeed, as the Second Circuit stated in *Author’s Guild*: “A secondary author is not necessarily at liberty to make wholesale takings of the original author’s expression merely because of how well the original author’s expression would convey

7. Presumably Goldsmith would have demanded far more than \$400 to grant permission for Warhol (in the words of the district court, an “art-world colossus”) to reproduce her photograph in 15 other prints and for AWF to exploit the resultant prints for substantial sums of money over the next three decades.

the secondary author's different message. Among the best recognized justifications for copying from another's work is to provide comment on it or criticism of it. A taking from another author's work for the purpose of making points that have no bearing on the original may well be fair use, but the taker would need to show a justification." *Authors Guild*, 804 F.3d at 215. Here, there is no justification for Warhol's further *unlicensed* use of Goldsmith's photograph in the rest of the Prince Series or for AWF's decades of lucrative exploitation of the Prince Series thereafter. Not only did Warhol take nearly the entirety of Goldsmith's photo, his taking had a demonstrably negative impact on an actual market in which Goldsmith was engaged, and usurped the obvious potential licensing and derivative markets in which Goldsmith might partake.

While Petitioner relies entirely on its argument that Warhol sufficiently transformed Goldsmith's photograph (purportedly merely by imbuing it with a new "meaning or message") such that his taking was fair, the changes Warhol made to the photograph were fundamentally the same as his licensed use of the photograph. The photograph served as a reference, from which Warhol made his art as contemplated by the license. Pointing to the identifiable markings of Warhol's art as the transformation of the photograph is backward reasoning. These markings created an *authorized* derivative use of Goldsmith's photograph because of the limited license. Warhol should have—and, for the right price, surely could have—licensed the photograph for additional use before he created the Prince Series works, each of which is an *unauthorized* derivative use of Goldsmith's photograph. Having failed to do so, his creation and the subsequent exploitation of those works was not fair, but instead an infringement of

Goldsmith's derivative right, a right Vanity Fair plainly recognized when licensing the photograph in the first instance (for a limited purpose and a concomitant sum).

In short, Warhol's use of Goldsmith's photograph in this case was similar to one musical artist sampling a sound recording owned by another: a paradigmatic example of a secondary user capitalizing on the preexisting value of an original creator's work (or, in the more direct language of this Court from *Campbell*, "avoid[ing] the drudgery in working up something fresh") and which use, at least in the music industry, generally is considered a derivative work requiring a license from the owner of the original creator. As such, Warhol's unauthorized use of Goldsmith's preexisting work can be deemed unfair without devolving into debate about critical art theory. Even if this Court finds that the Prince Series had a "meaning or message" distinct from Goldsmith's photograph, there is no legal support for the notion that such a supposed transformation of purpose is by itself sufficient to qualify the secondary use as fair. The Court need only give proper regard to the statutory language and consider evenhandedly all four factors (none of which considers the fame or importance of the would-be fair user). The clear impact on Goldsmith's licensing and derivative markets for her creative works outweighs any subjective claimed transformation.

This Court should adopt the Second Circuit's thoughtful consideration of the effects of Warhol's and Petitioner's unlicensed use of Goldsmith's photograph on the licensing market for that photograph, which is a faithful reading of the statute, including in particular the fourth factor. *See, e.g.,* Jane C. Ginsburg, *Comment on Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*,

992 F.3d 99 (2d Cir. 2021), *Journal of Intellectual Property Law and Practice* forthcoming; Columbia Public Law Research Paper No. 14-691 (2021) (“The Second Circuit’s course correction restores the independence of the fourth fair use factor, particularly with respect to the importance of the markets for derivative works.”).

B. The First Factor Requires More Than “Transformativeness”

Petitioner’s unduly narrow formulation of fair use not only reads three factors out of the statute entirely but also is incomplete with respect to the one factor it focuses on. The first factor of the statutory fair use analysis requires courts to consider “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit education purposes.” 17 U.S.C. § 107(1). The word “transform” does not appear in the first factor of the statutory fair use provision (whereas it *is* used in the definition of a derivative work). The first factor’s text does, however, require a consideration of whether “such [new] use is of a commercial nature or is for nonprofit educational purposes,” which provides some insight into the meaning of “purpose and character” and is an inquiry that has nothing at all to do with transformativeness.

Petitioner does not acknowledge this statutory mandate. Instead, Petitioner argues that under *Campbell* the “purpose and character” test is actually only a “meaning or message” test. But even the short excerpt of *Campbell* most often cited as guidance on the notion of transformation demonstrates that this Court’s analysis was significantly more complex than the three-word “meaning or message” test advanced by Petitioner.

This Court assessed “whether the new work merely ‘supersede[s] the objects’ of the original creation...or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁸ Petitioner compounds the problem by reading into its drastically reductive reformulation an impracticable degree of latitude. In addition, Petitioner ignores the commercial nature of the Prince Series in relation to its analysis under the first factor, notwithstanding that the statute explicitly includes that requirement.

Petitioner’s purely transformative purpose analysis would allow an original work to be duplicated in its entirety and in an unaltered manner so long as the supposed purpose for which the original work was duplicated was deemed sufficiently different from the purpose of the original work. But as Section 107 and *Campbell*, 510 U.S. at 579 make clear, and as *Google v. Oracle* reaffirmed, it is critical that transformation of both “purpose” and “character” be required, particularly in cases related to artistic competing works.⁹ *See Google*

8. Given that so much of the *Campbell* analysis hinged on the Court’s and the parties’ characterization of the secondary use as parodic—a factual issue about which there was little dispute and to which only *de minimis* attention was paid—there is reasonable ground to question whether there is any single passage or portion from *Campbell* that can truly function as a useful directive on the proper meaning and application of transformative use outside the parody context.

9. Petitioner marshals the search engine cases, *see Authors Guild*, 804 F.3d at 207, 217-18, *cert. denied*, 136 S. Ct. 1658 (2016); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 105 (2d Cir. 2014); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1157 (9th

v. Oracle, 141 S. Ct. at 1203 (“[I]n determining whether a use is ‘transformative,’ we must go further and examine the copying’s more specifically described ‘purpose[s]’ and ‘character.’”).

Section 107 is clear that the character of the new work must be considered along with its purpose, including whether the new work is commercial in nature. A faithful application of this factor would find both a similar purpose and a similar character in Goldsmith’s and Warhol’s artistic portraiture of Prince (in addition to virtually

Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818-20 (9th Cir. 2003), as evidence that transforming only the purpose of an original work is enough to satisfy a fair use inquiry. In those cases, the Court upheld the right of internet search engines to duplicate copyrighted original works in their entirety for the purpose of digitally preserving, cataloging and/or locating images or excerpts of those works, rather than for the purpose of consuming or viewing the works for their artistic or aesthetic purpose. But the general through-line of the search engine cases is that even though the original works were duplicated entirely, the secondary uses (which, again, were designed to preserve and catalog) were not intended to permit the wholesale consumption or exploitation of the original works. By contrast, in a subsequent case considering “a service that enables its clients to easily locate and view segments of televised video programming,” the Second Circuit ultimately determined that—notwithstanding some similarities between the service at issue and a search engine—the service’s use was not fair because it was “unlawfully profiting off the work of others by commercially re-distributing all of that work that a viewer wishes to use, without payment or license.” *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 181 (2d Cir. 2018). Note that all of these cases could have reached the same result by analyzing the uses at issue under the fourth market harm factor, without even getting into the more esoteric issue of whether the secondary uses were sufficiently “transformative.”

wholesale copying of the Goldsmith work by Warhol), including by acknowledging the commercial nature of both. This Court’s decision in this case should reaffirm that the words of the statute, as partially informed, but not overridden, by the transformative use inquiry from *Campbell*, govern the fair use inquiry.

II. ADHERING TO THE COPYRIGHT ACT WOULD NOT BE A “SEA CHANGE”

Contrary to Petitioner’s arguments, adherence in this case to the statutory text and a careful balancing of all four fair use factors would not be a “sea change.” *See* Pet. Br. at 50. Setting aside that Section 107 *mandates* that all four factors be considered and properly balanced, circuit courts are not, as Petitioner suggests, uniformly aligned behind an expansive “transformative use” test. Numerous decisions have continued to expressly follow this Court’s guidance in *Harper & Row* that the fourth factor is the most important in the analysis. *See, e.g., Society of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 64 (1st Cir. 2012); *Authors Guild v. Google, Inc.*, 804 F.3d 202, 223 (2d Cir. 2015); *Bouchat v. Baltimore Ravens Ltd. P’ship*, 619 F.3d 301, 312 (4th Cir. 2010); *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014); *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1069 (9th Cir. 2014).

On the other hand, an expansive transformative use test has been developed mostly in certain decisions from the Second and Ninth Circuits (suggesting increased immunity for unlicensed users of copyrighted works from infringement claims in those jurisdictions, and likely leading to forum shopping). Even still, that jurisprudence

reached a generally-acknowledged “high water mark” in 2013 with the much-criticized decisions of the Second and Ninth Circuits, respectively, in *Cariou v. Prince*, 714 F.3d 694, 705-06 (2d Cir. 2013), and *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1176 (9th Cir. 2013). See *TCA Television*, 839 F.3d at 181 (citing, *inter alia*, 4 *Nimmer on Copyright* § 13.05 (2019) (“It would seem that the pendulum has swung too far in the direction of recognizing any alteration as transformative, such that this doctrine now threatens to swallow fair use.”)).

Indeed, the Second Circuit’s robust and balanced fair use analysis in the present case (which appropriately considered the effect on Goldsmith’s market and honored her statutory rights) echoes a recent decision from the Ninth Circuit in *Dr. Seuss Enters., L.P. v. ComicMix Inc.*, which did not find fair use in a mashup of Dr. Seuss’s *Oh the Places You’ll Go* and *Star Trek*. See 983 F.3d 443 (9th Cir. 2020). The court said: “[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.” *Id.* at 453. “[A]nticipating” the Second Circuit’s analysis, the Ninth Circuit emphasized the new use’s “potential superseding of Seuss’s licensing markets for variations on *Oh the Places You’ll Go*.” Ginsburg, *Comment* at 10.

These correct decisions highlight a trend toward a more robust and balanced fair use approach that appropriately considers the usurpation of the original holder’s market(s). In its 2014 decision in *Kienitz*, the Seventh Circuit applied a version of this approach, and helpfully articulated a workable harmonization of the statutory fair use factors, *Campbell*, and *Campbell*’s more market-focused predecessors. See 766 F.3d at 757-58.

Specifically, the court noted that cases giving ultimate primacy to transformation “do no[t] explain how every ‘transformative use’ can be ‘fair use’ without extinguishing the author’s rights under § 106(2),” and instead deemed it “best to stick with the statutory list, of which the most important usually is the fourth (market effect).” *Id.* at 758;¹⁰ *see also id.* (“[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.”). The Seventh Circuit also helpfully provides an alternative summation of the ultimate question in a fair use case: “whether the contested use is a complement to the protected work (allowed) rather than a substitute for it (prohibited).” *Id.*

While the Seventh Circuit in *Kienitz* expressed skepticism of an unbridled emphasis on transformation, it still functionally considered the transformative purpose and transformative content of the secondary work at issue

10. *Campbell* is often cited for the proposition that the first factor is the primary factor of the analysis, at the expense of the fourth factor. The language cited for this argument is usually the following: “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” *Campbell*, 510 U.S. 579. However, a better interpretation of this language is that the commercial nature of the new work (required to be considered per the first factor) is less important if a new work is significantly transformative. In other words, the transformativeness analysis was not meant to spill out beyond the first factor, but was meant to allow that factor to weigh toward a fair use even if the new use was commercial in nature. This aligns with a concurrent move away from “punishing” commerciality *qua* commerciality in the fair use analysis, but says nothing about the fourth factor and market usurpation.

in its analysis by noting, in the context of the third and fourth statutory factors, that a “[a] t-shirt or tank top is no substitute for the original photograph” (although it is a paradigmatically license-able derivative use) and that “Defendants removed so much of the original [work in the secondary work] that, as with the Cheshire Cat, only the smile remains.” 766 F.3d at 759. In other words, in addition to expressly relying on Section 107 and hearkening back to *Harper & Row* for guidance, the *Kienitz* decision also effectively incorporated *Campbell*’s transformative use consideration.

Amici submit that this Court should affirm the Second Circuit and consummate the trend toward a balanced fair use test that gives regard to the statutory mandate. Specifically, this Court should guide lower courts, like the Seventh Circuit did in *Kienitz*, to adhere closely to the Section 107 statutory fair use factors, with an emphasis on the fourth, and to incorporate the limited consideration of transformative use—i.e., whether there was transformation of purpose *and* character, as set forth in *Campbell*—when and as appropriate, as one consideration under the first statutory factor. This approach is best suited to: (i) satisfy the Constitution’s prerogative to “promote the Progress of Science and useful arts” by balancing a creator’s monopoly rights over her creation with the limited right of the public to freely exploit the creation; (ii) harmonize Section 107, *Harper & Row*, and *Campbell*; (iii) unify the lower courts regarding the relative weight to be given the statutory factors; and (iv) provide adequate and stable guidance to courts, litigants, copyright owners, and secondary users going forward.

III. ADOPTING PETITIONER’S BROAD AND SUBJECTIVE “TRANSFORMATIVE USE” TEST COULD BE PARTICULARLY DAMAGING TO THE MUSIC INDUSTRY

Finally, if this Court does see fit to adopt a version of Petitioner’s test—rendering a purported different “meaning or message” alone sufficient to find a secondary use “transformative” and fair *per se*—then its opinion should limit its holding to the visual fine arts context in which this case arose (much as *Google v. Oracle* focused on the utilitarian nature of the software under consideration). While Petitioner claims that the visual fine arts industry recognizes and values the type of appropriation to which Petitioner asks this Court to grant its imprimatur, the music industry does not.

There is no practice, custom, or artistic tradition within the music industry that is similar to the unlicensed “appropriation art” genre Petitioner purports to protect. Rather, express and intentional appropriation in the music context (*e.g.* a recording artist’s creation of a new interpretation of an existing work in a “cover”) is virtually always licensed, and generally considered an infringement if it is not. Petitioner’s test, were it adopted, could render meaningless the exclusive rights to prepare and to authorize others to prepare derivative works based on the copyrighted work, could unsettle the expectations of parties to existing licenses, and could result in an appropriation free-for-all.

A. Accepting Petitioner’s Formulation of Fair Use Could Abrogate the Right to License

The risk to a copyright holder’s exclusive, divisible, and unlimited licensing rights, *see* 17 U.S.C. §§ 101, 201(d), 106; *John Wiley & Sons, Inc. v. DRK Photo*, 882 F.3d 394, 407 (2d Cir. 2018), presented by Petitioner’s wide and manipulable exception to copyright protection is particularly critical to the American music industry, which relies on licensing to monetize existing copyrighted works and finance the creation of new works. For example, although early hip-hop artists sometimes sampled well-known sound recordings without a license, such practice quickly gave way to the current practice of “clearing” and licensing such sample uses. Both would-be licensors and licensees in the music industry recognize that a work that interpolates or incorporates a pre-existing work is in most cases a derivative work, regardless of the addition of new expression or a change in “meaning or message,” and that “appropriation” without license is infringement.

As the Library of Congress and the Copyright Office have stated, all “uses of music require licenses from copyright owners,” and licenses for certain significant uses—including (i) “advertising and other type of commercial uses”; (ii) “derivative uses such as ‘sampling’”; and (iii) the reproduction and distribution of sound recordings, including for use in “television shows, films, video games, etc.”—are negotiated freely, voluntarily, and directly between the licensee and copyright owner. “Music Licensing Study: Notice and Request for Public Comment,” 78 Fed. Reg. 14739 (Mar. 17, 2014). Petitioner’s proposed test would instead create a scenario in which a new user can simply indicate that the “message” (which

she may, unilaterally, determine) of the new work is different than that of the original, thereby making the new use fair. Allowing Petitioner’s conception of the fair use exception to swallow the licensing right could make obtaining and paying for licenses for numerous uses of copyrighted sound recordings, compositions, and other works unnecessary.

Holding that Warhol’s unlicensed use was fair could, for instance, substantially reduce or even eliminate the highly valuable market for sound recording sample licenses or re-mix licenses, as many such uses could be said to “transform” the original recording in a manner arguably equal to or greater than Warhol’s alterations of Goldsmith’s photograph in his Prince Series. Likewise, even where a license has been granted, under Petitioner’s argument any limitations on the license would be meaningless, as long as the licensee can claim that it has “transformed” the work in “meaning or message.” This would discourage record labels and other sound recording owners from granting licenses to use recordings in a limited way, *e.g.*, for sampling or for use only in a specific medium, because such a license could result in a loss of all rights to further exploit the work to a “fair user” who has minimally “transformed” the work.¹¹ Thus, a decision that impedes or undermines licensing rights is directly relevant, significant and detrimental to amici’s members and musicians.

11. Indeed, in this case the district court confusingly found that Goldsmith’s exercise of her statutory right to license her work weighed toward a finding of fair use. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 327 (S.D.N.Y. 2019).

B. Accepting Petitioner’s Formulation of Fair Use Could Abrogate the Right to Create Derivative Works

Like the licensing right, the copyright owner’s exclusive right under Section 106(2) to create and license derivative works based on the original work is of critical importance to the music industry. Sound recordings are themselves generally derivative works based on underlying musical compositions, as are medleys and so-called “jukebox musicals” (such as the hit Broadway musical *Mamma Mia!*, which is based on the songs of the pop group ABBA).¹² Sound recordings also frequently sample or interpolate other sound recordings, and remixes and music videos are also derivative works that embody existing sound recordings. All of the aforementioned uses are rightly recognized in the music industry as derivative works that require a license from the owner of the underlying work.

Moreover, new artists may never develop or release their creations (for the benefit of all society) if their works can simply be “re-purposed” by superstars without authorization or compensation and called a fair use. This is particularly concerning with the rise of new media technology, such as YouTube or TikTok videos, and the markets that they spawn. These new technologies may present material in new ways, or even for new purposes,

12. Given that the “meaning or message” of the ABBA compositions is arguably entirely distinct as originally released by the band versus as incorporated into the plot of the musical, under Petitioner’s formulation, *Mamma Mia!* arguably could have been created, performed, and distributed without a single license under the auspices of “fair use.” This defies sensibility.

but that does not sufficiently change the underlying material such that creators should lose their rights.¹³ With an overly broad interpretation of transformativeness, and an undue emphasis on the first factor, the use of pre-existing works in such formats might be deemed fair simply because the use is novel, notwithstanding that the exploitation is fundamentally the same licensed synchronization of audio and video content in which the music industry has been engaged, and which has been protected by the Copyright Act, for over a century. *See Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018).

CONCLUSION

This Court should give primacy to the text of the Copyright Act and vindicate copyright holders' interests in their works. The fair use doctrine is an important exception to the protections afforded copyright owners, but an exception it should remain. Respectfully, this Court should set a clear standard for the limited circumstances where the public interest dictates the curtailing of a copyright holder's rights in favor of the creation of a new, fair use. The standard should be objective (not relying on the subjective "meaning or message" of the artist or, even more confusingly, the art as perceived by an undefined reasonable observer) and properly balanced among all four of the factors set forth in and required by Section 107 (including the significant economic interests the Copyright

13. Giving YouTube, TikTok, and other internet platforms carte blanche to claim that videos embodying music are not derivative works subject to licensing but "transformative" fair uses would be devastating to music and other content creators (and contrary to both existing law and industry practice).

Act meant to protect as at least partially reflected in the fourth factor). Amici submit that the Second Circuit properly applied the appropriate standard and determined that Warhol's and AWF's use was not fair in this case, and its decision and reasoning should be affirmed.

Respectfully submitted,

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