

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 OF AMICUS CURIAE THE
ROYAL MANTICORAN NAVY: THE OFFICIAL
HONOR HARRINGTON FAN ASSOCIATION, INC.
IN SUPPORT OF PETITIONER**

—◆—
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**STATEMENT OF INTEREST
OF AMICUS CURIAE¹**

Honor Harrington is a heroic military commander, expert personal combatant, and a wise mentor. Over the course of her story arc, she rises from Commander to Admiral, yeoman to Duchess, and alters the course of her entire galaxy. Little wonder, then, that readers of David Weber’s military science-fiction epics spend so much time building out the world through additional fiction, art, music, and so on.

That drive lead to the creation of The Royal Manticoran Navy: The Official Honor Harrington Fan Association, Inc. (“TRMN”)—a 501(c)(7) not-for-profit corporation to serve as a nexus for fans of (copyright holder) Weber’s series. From its beginning, the organization has been a home for people that creatively express their enthusiasm for—and engage with—Weber’s work in different ways.

TRMN’s social interests stretch beyond just Honor Harrington, though. It believes in and advocates for the interests of other similarly situated fan organizations, as well as for the protection and advancement of

¹ Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the amicus curiae, its members, or its counsel, made a monetary contribution intended to fund its preparation or submission. This brief is filed with the written consent of all parties pursuant to this Court’s Rule 37.3(a). Copies of the blanket consent letters from all parties have been filed with the Clerk.

fan works in general, and the right of fans to create them. It believes that members of the public should be able to celebrate fictitious worlds, and legally express their creativity in as many ways as possible.

Over the 15 years of TRMN's existence it has hosted 8 conventions and participated in dozens of others where its members have shared the fruit of their creative efforts. These have included artwork, songs, presentations on in-universe concepts alongside real-world analogues, skits/sketches, and more. And while it has done so for the last 11 years as the *official* fan organization for the Honor Harrington series, it spent the first four years of its existence doing so in an unofficial capacity.

With that history, TRMN is cognizant of the difficulties faced by the millions of unofficial fan creators across the country. This case presents unresolved issues that plague such creators with legal uncertainty and a looming threat of suit. TRMN knows from experience that fan communities do not present economic or intellectual threats to rights-owners. Quite the opposite: fan works consistently support and reinforce the originals. But the Second Circuit's decision codifies a reverse tragedy of the commons that would scare many fan authors out of creating in the first place.

Thus, this Court should resolve the issues before it in a way that allows fan creators return to their efforts—which will only happen if the Court reverses,

and such creators stand on firm legal ground consistent with previous precedent.



SUMMARY OF THE ARGUMENT

In recent decades, millions of fans of works of popular culture have relied on this Court’s determination that new uses of expressive material that add “new expression, meaning, or message” to the original and do not “supersede the objects of the original creation” weigh in favor of a finding of fair use, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994), to participate in creative activities related to their shared love of particular creative works. These uses of popular culture works often convey new messages and meanings to others, serving expressive and communicative functions.

The Second Circuit’s decision, which explicitly instructs district courts to refrain from assessing the meaning of works which are visually similar, shatters this expectation. Works which are quite likely to be found to be transformative under the *Campbell* framework, because they are used in the service of communicating new messages and different meanings than their source material, in ways that in no way usurp the original, are unlikely to be fair use under this framework. This radical reduction in the First Amendment leeway built into copyright law is inconsistent with this Court’s prior decisions, the approach used in other

Circuits, and the everyday conduct of millions of individual users.

While TRMN takes no position on whether the Warhol painting itself made fair use of the Goldsmith photograph under existing fair use precedents, Respondent correctly argues that the decision below disregards existing law in ways that radically limit the applicability of fair use. TRMN urges this Court to reverse the decision below and remand with instructions to examine the question using a framework that protects the critical role of fair use as one of copyright law’s “traditional First Amendment safeguards.” *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003).

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ARGUMENT

I. Fan Creativity and Fair Use

The Royal Manticoran Navy: The Official Honor Harrington Fan Association, Inc. is, as its name suggests, a fan club. It is a group of people who share a fondness for David Weber’s Honor Harrington books and enjoy engaging in a range of activities that relate to this series. In particular, TRMN is, as a group, best known for engaging in “cosplay” (defined just below) based on the characters and fictional universe Weber created. TRMN also has a strong interest in supporting its individual members as they participate in activities within the broader science fiction and popular culture fan communities, including other forms of fan creativity such as fan fiction.

Cosplay—a shortening of “costume play”—is a term that was coined to describe the practice of dressing up and acting as a character from a particular work of popular culture. See Molly Rose Madonia, *All’s Fair in Copyright and Costumes: Fair Use Defense to Copyright Infringement in Cosplay*, 20 Marquette Intellectual Property L. Rev. 177, 177 (2016). Cosplay is a major feature of modern popular culture conventions, with some attracting thousands of attendees in costume. See Rich Johnston, *Over 200 Cosplay Photos From MCM London Comic Con Spring 2002*, Bleeding Cool News and Rumors, <https://bleedingcool.com/comics/over-200-cosplay-photos-from-mcm-london-comic-con-spring-2022/> (May 30, 2022) (estimating that between 16,000 and 32,000 people attended convention in costume, and providing photos of “a small fraction”). Cosplay, by its very nature, makes use of existing copyright-protected content, either in the form of the character’s costume or as a performance of a character.

TRMN members also write reams of “fan fiction.” Fan fiction has been defined as “any kind of written creativity that is based on an identifiable segment of popular culture . . . and is not produced as professional writing.” Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 Loyola of LA Ent. L. J. 651, 655 (1997). A wide variety of works fall within this definition. Some of these are simple extensions of existing storylines, while others are more elaborate, and draw on popular culture in the service of purposes such as allowing marginalized groups to, in effect, write themselves into popular culture and gain

a sense of belonging. See Betsy Rosenblatt, *Belonging as Intellectual Creation*, 82 Mo. L. Rev. 91, 104-11 (2007). Fan fiction also makes use of existing popular culture content by its very nature. Fan fiction is generally noncommercial and unlicensed and attempts to change either of these norms have met with little success.

Cosplay and fan fiction are just two examples of common fan works. Many others exist, covering a range of media from visual art, to knitted dolls and accessories, and beyond. See, e.g., F. E. Guerra-Pujol, *Of Coase and Copyrights: The Law and Economics of Literary Fan Art*, 9 NYU J. INTELL. PROP. & ENT. L. 91 (2019) (discussing literary-based fan art); Michelle Jaworski, *From “Doctor Who” to “Outlander”: How Fans Craft Reverse Engineer Knits* (Daily Dot, 5 February 2021) <https://www.dailydot.com/unclick/reverse-engineer-knits-pattern-doctor-who-outlander-star-wars/>. Amicus has members who engage in many of these activities, and an interest in supporting them both in their participation in the organization and within the broader science fiction and popular culture fandoms.

Although fanworks attracted little copyright attention until near the start of this century, they are not a new form of creativity. See generally Tushnet, *supra*. Fanworks are, instead, a tradition that stretches back centuries. Fans of Gulliver’s Travels created fan art in the 18th Century, see Shannon Chamberlain, *Fan Fiction Was Just as Sexual in the 1700s as It Is Today*, The Atlantic (June 6, 2020) <https://www.theatlantic.com/>

culture/archive/2020/02/surprising-18th-century-origins-fan-fiction/606532/, and many authors, including Mark Twain, indulged in Sherlock Holmes fan fiction in the late 19th and early 20th Centuries. See Mark Twain, *A Double Barreled Detective Story*, Harper & Bros (1902). Even cosplay, which is often seen as a relatively new form of fanwork, can trace its roots back at least as far as the first World Science Fiction Convention in 1939. See Karen Hellekson, *The Fan Experience*, A Companion to Media Fandom and Fan Studies 67, 67-68 (Paul Booth ed., 2018). The protection of these works by current fair use law is not merely consistent with the expectations that are based on *Campbell*. It is also consistent with the long history of fanworks.

While there is little caselaw directly addressing noncommercial fanworks, there is a broad academic consensus that most noncommercial fanworks are mostly covered by fair use most of the time. See generally, e.g., Tushnet, *supra*; Anupam Chander and Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 Cal. L. Rev. 597 (2007). This position is widely viewed as consistent with existing case law on fair use, and in particular on this Court's decision in *Campbell. Id.*

The central holding in *Campbell*—that fair use is favored where the 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—fits well with how fanworks are used. In addition to being creative works in their own right, fan creations also serve valuable social functions. They

are a form of active reading that engages with the original in new ways, and which allows fans to, in effect, form their own communities and culture “from the semiotic raw materials the media provides.” Henry Jenkins, *Textual Poachers: Television Fans and Participatory Culture* 49 (Updated 20th Anniversary Edn 2012). They provide activities that support the development of communities, and often serve to allow members of underrepresented, marginalized, and subordinated groups to find or create places for themselves within these communities and to comment on related issues within the context of popular culture. See Camille Bacon-Smith, *Enterprising Women: Television Fandom and the Creation of Popular Myth* (1992) 45-78; Betsy Rosenblatt, *Fair Use as Resistance*, 9 U.C. Irvine L. Rev. 377, 391-92 (2007). And they are ways that fans speak to each other, participating actively in a world that they share. Tushnet, *Legal Fictions* at 665.

If “copyright’s purpose is to *promote* the creation and publication of free expression,” *Eldred v. Ashcroft*, 537 US 186, 219 (2003) (emphasis in original), there can be no doubt that the use of “the fair use doctrine’s guarantee of breathing space within the confines of copyright,” *Campbell*, 510 U.S. at 579, to create fan works has served that goal well. Millions of people have, over a period of decades, participated in culture through the creation of tens of millions of individual fanworks. Consider the existence of Archive of Our Own, <https://www.archiveofourown.org>, a single and non-comprehensive website that currently has over 4.7

million users and hosts over 9.4 million unique fan creations.

Put more directly, fair use has allowed millions of people to develop a sense of community by participating in their creation and sharing. See Rosenblatt, *Belonging as Intellectual Creation*, *supra*. And they do so not by replacing or supplanting the original works they are associated with, but as a means of displaying their authors' feelings and attitudes about those originals. See Pierre Leval, *Campbell as Fair Use Blueprint*, 90 Wash. L. Rev. 597, 611-12 (2015).

Fan creations are vehicles for conveying new meanings and messages using the trappings provided by the original pop culture works. Forbidding courts from considering the meaning of visually similar works will drastically reduce the likelihood that fan creations will be found to be fair use. This will create substantial legal uncertainty for millions of individuals. It will reduce their ability to participate in popular culture and to express themselves through the use of cultural references. It will, in effect, remove the legal protection of fair use, and leave users' ability to engage in noncommercial expressive uses of works subject to the whims of copyright owners.

The immediate question in this case is whether the use of one work of art as a starting point in the creation of a second work of art is fair use. However, the reasoning employed by the Second Circuit to resolve this case will, if endorsed by this Court, reach much further. The application of the new rule will

inevitably sweep up fan creators and countless others who are not before this Court. This result is not required by the Copyright Act, and this Court should hesitate before endorsing changes to fair use that will radically limit creative practices that have endured for centuries.

II. Two Fanworks Under Two Versions of Fair Use

Fair use has a lengthy history as a common law limitation to copyright law's exclusive rights, *see Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841), and was incorporated into the 1976 Copyright Act as a statutory exception to the author's exclusive rights. The doctrine provides a defense to copyright if the court determines that the new use was fair based on its consideration of:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107.

The first factor of this analysis is particularly important and has required courts to consider whether the new use “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). However, in analyzing the works at issue in this case, the Second Circuit determined that it is inappropriate to consider the meaning or message of the new work, instead placing the center of the first factor analysis on the extent to which the old work was altered. *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 37-44 (2d Cir. 2021). Besides being counter-textual, that innovation will cause no end of mischief.

To see that disruptive effect, consider the two fan-works below: one classic work of fan fiction, and one example of cosplay. Both examples make recognizable use of material from a well-known work. But both do so in ways that convey messages and meanings that differ significantly from the entertainment roles served by the original—and that have no effect on the market for the original work. But, fatal to these works under the Second Circuit’s novel approach, they do so by using the new material in ways which “both recognizably deriv[e] from, and retain[] the essential elements of, its source material.” 11 F.4th at 42.

A. Two Fanworks

Paula Smith’s fanfiction short story, *A Trekkie’s Tale*, was published in the Star Trek fanzine *Menagerie* in 1973. This story, which has been reproduced in full in the Appendix to this brief, is a work of Star Trek fan fiction featuring Lt. Mary Sue, a young officer who works her way into the hearts of the ship’s crew and saves the ship before her tragic and untimely death. *A Trekkie’s Tale* is short, even by fanfiction standards, but it has become iconic in its own right. *See, e.g.*, Susana Polo, “Why the Mary Sue” *The Mary Sue*, <https://www.themarysue.com/why-the-mary-sue/> 27 Feb. 2011 (using “Mary Sue” as the name of the website to “re-appropriate a cliché that is closely but only circumstantially associated with femininity on a website for geek girls”).

This 306-word story is clearly not actually intended to be a work of *Star Trek* entertainment. Rather, it is a form of commentary on what the author perceived as the state of Star Trek fan fiction at the time, and in particular on the perceived prevalence of overly-idealized characters such as the story’s protagonist within the genre. It started a conversation on such characters that continues to the present, and the name of the protagonist—“Mary Sue”—is now (sub-)cultural shorthand for similar characters. The story has also become fodder for extensive academic work on fan creativity. *See, e.g.*, Chander and Sunder, *supra*. The story has a form that is similar to Star Trek fiction, at least at a high level of generality, but a meaning that is radically different.

Second, consider the illustration below, which depicts a costume based on the well-known Stormtroopers from the Star Wars franchise, but painted with a detailed and colorful pattern. Twitter user @Pneumaz, <https://mobile.twitter.com/pneumaz/status/1353866647778504704> (Jan. 25, 2021). The pattern has not been featured, on a costume or otherwise, in any official production within the franchise. It is a pattern that once appeared on the carpets of the Marriott Marquis hotel in Atlanta, Georgia. See Melissa Anne Agnetti, *When the Needs of the Many Outweigh the Needs of the Few: How Logic Clearly Dictates the First Amendment's Use as a Defence to Copyright Infringement Claims in Fan-Made Works*, 45 *Southwestern L. Rev.* 115, 116-19 (2015).



Figure 1

This cosplay, like *A Trekkie's Tale*, is not something that will displace the original work as a form of entertainment. It is not intended to do so. It, too, is a work that comments on the fandom it is part of. In this case, the use of the carpet pattern is tied to earlier costumes that were developed by another cosplayer who attended the annual science fiction convention held at that hotel. *Id.* It is one of many examples of costumes and other works that feature the carpet pattern. See Cameron McWhirter, “We’re Spending Our Hard-Earned Money to Dress Up Like Carpet,” *The Tight-Knit World of Rug Fans*, Wall Street Journal, <https://www.wsj.com/articles/were-spending-our-hard-earned-money-to-dress-up-like-carpet-the-tight-knit-world-of-rug-fans-1535642554> (Aug. 30, 2018). This costume, and others like it, serve as a kind of in-joke or badge showing the wearer’s membership in and commitment to the science fiction fan community that exists around this convention. As such, it conveys a message far different from the menacing villain of the original.

B. The Two Fanworks Under *Campbell*

The modern fair use landscape, and particularly the first factor analysis, has been largely shaped by this Court’s decision in *Campbell*. There, faced with a new, parody song based on an original rock song, the Court placed the meaning and message of the new original at the center of the first factor analysis. *Campbell*, 510 U.S. at 579. It did not matter that the iconic guitar refrain was obviously pulled from the original: Protecting the right to create new words that convey a

new message and meaning and that do not “merely supersede the objects of the original creation,” *id.* (cleaned up), is required, *Campbell* tells us, because it furthers the “goal of copyright, to promote science and the arts.” *Id.* This protection also, as this Court subsequently stated, serves as a First Amendment safeguard, ensuring that the limited monopoly copyright provides authors does not impermissibly interfere with freedom of expression. *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003).

Under the test for fair use that this Court articulated in *Campbell*, both the short story and the costume seem to be obvious fair uses of the material they borrow from the iconic popular culture franchises they are associated with. Both transform the original material by changing its meaning, and both have a “genuine creative rationale” for using their source material. See *Blanch v. Koons*, 467 F.3d 244, 255 (2d Cir. 2006). And neither is a market substitute for either the original work or any licensing market associated with the original. This is apparent at a glance, and it only becomes clearer on examination of the four statutory factors.

In both cases, the traditional first factor analysis shows that the works are transformative and noncommercial. The “purpose and character” of *A Trekkie’s Tale* is not to create a work that “supersedes the object of the original creation.” 510 U.S. at 579 (cleaned up). The new work might be, in the broadest sense, similar to an ‘official’ work of Trek fiction, in that both feature Kirk and Spock as characters and both are literary works. However, the purpose of the use here is to be a

brief, satirical examination of the tropes of fan fiction of the day. It is not truly a Trek narrative, its transformation into a pop culture icon in its own right cannot be explained if the work is viewed as simply a ‘Trek story.’ The transformative nature of the story is clear under the *Campbell* test.

The analysis for the stormtrooper costume is similar. Here, too, the *Star Wars* content is not being used “to avoid the drudgery in working up something fresh.” 510 U.S. at 580. Instead, it is a badge of affirmation, an affectionate display of a love of the original films, of the fan culture expressed through cosplay and convention attendance, and for the community that attends Dragon Con each year. It does not, in any way, supersede the purpose of the original, which was intended to convey the “allegiance, force, menace, purpose and . . . anonymity” of the film’s stormtrooper characters. *Lucasfilm Ltd. v. Ainsworth*, [2008] EWHC 1878 (Ch) para 121.

The second fair use factor, “the nature of the copyrighted work,” 17 U.S.C. § 107(2) is, as in the case of parody, not “ever likely to help much in separating the fair use sheep from the infringing goats” where fanworks are concerned. 510 U.S. at 586. This is true for both the short story and costume. Fan creations will “almost invariably copy publicly known, expressive works.” *Id.*

The third factor will favor fair use for these fanworks. Neither uses more of the original than is necessary for its transformative purpose. The short story, in

particular, uses only as much of the characters and setting as is needed to firmly anchor itself to the Trek fandom of the day. Similarly, the use of the stormtrooper costume invokes the Star Wars setting, while the use of the carpet pattern shows its association with the convention community. In both cases, the humor and commentary associated with the fanworks conjure up the original in the minds of the viewers enough to make the associations—and, thereby, the humor—of their depictions clear. 510 U.S. at 587-89.

Finally, the analysis of the fourth statutory factor, “the effect of the use upon the potential market for or value of the copyrighted work,” 17 U.S.C. § 107(4) is relatively simple for these two fanworks. Neither *A Trekkie’s Tale* nor the patterned stormtrooper costume is in any way a replacement for any original work within either the Star Trek or Star Wars franchise. Nor does either one directly replace any licensed work within either franchise. Finally, not only are there not mechanisms or markets to explicitly license fan creations, but the few attempts that have been made to create such markets have failed. *See, e.g.*, Jen Talty, *Amazon Slams the Doors to Kindle Worlds*, Hidden Gems Books, <https://www.hiddengemsbooks.com/amazon-closes-kindle-worlds/> (June 1, 2018) (detailing closure of Amazon’s attempt to provide a venue for licensed fanfiction).

With three of the four factors favoring fair use when examined using the *Campbell* approach, both fanworks are likely to be fair use. This outcome, as noted above, matches both the expectations that fans

have relied on in the decades since *Campbell*, and the practices in this area that long predate that decision. The decision below upends those expectations. In particular, the Second Circuit’s decision to disregard the purpose of the new work at any but the most superficial level radically reduces the scope of protection that fair use currently provides for new expressive uses with purposes that clearly differ from the original.

C. The Two Fanworks Under *Warhol*

The test applied below radically departs from the fair use approach that was outlined by this Court in *Campbell*, reinforced in *Google v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021), and which has been applied by the courts for the last several decades. This case involves a Warhol silk-screen of the late musician Prince, which was created using Respondent’s photograph as a basis for Warhol’s own creativity. The court conceded that Warhol’s painting and Goldsmith’s photographs had radically different meanings, with the photograph intended to depict Prince as a vulnerable human while the Warhol altered the image in the service of creating a depiction of Prince as a larger-than-life icon. *Warhol*, 11 F.4th at 41. Even so, the panel held that it was inappropriate to consider such factors, and that the proper inquiry is restricted to “whether the secondary work’s use of its source material is in the service of a fundamentally different and new artistic purpose and character, such that the secondary work stands apart from the raw material used to create it. 11 F.4th at 42 (cleaned up).” In so holding, the panel in effect reduced

the first factor test from one focused on the nature and meaning of the new work to one that examines only the techniques used to create it. But there are only so many techniques in the world. Indeed, it is hard to imagine how 2 Live Crew's sampling of the "Oh, Pretty Woman" guitar riff would be fair use under the panel's novel test.

Similarly, under the panel's test, it is at best unclear if either *A Trekkie's Tale* or the Carpet Stormtrooper would still be viewed as transformative. It is possible that these works will be seen to comment, in part, on the original, but this is far from certain. Detecting commentary can itself require that the court exercise aesthetic judgment.

Aside from the most explicit of parodies, such as the retelling of *Gone with the Wind* at issue in *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001), it is not always easy to determine whether a work will be seen to comment on the original. For example, a series of fan made films that draws its humor from its juxtaposition of absurd conversations against the grim world of the video game it draws from might be viewed as commenting on that video game. However, it is equally possible that the commentary here, as in *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), would be viewed as a comment on the general genre rather than the specific work. See J. Remy Green, *All Your Works Are Belong to Us: New Frontiers for the Derivative Work Right in Video Games*, 19 N.C. J.L. & TECH. 393, 417-22 (2018).

And that is what concerns TRMN: Most fanworks are not explicit parodies. The comments they convey are often ones of homage, rather than criticism, and courts are typically often more willing to protect the latter than the former. *See* Madhavi Sunder, *Intellectual Property in Experience*, 117 MILR 197, 254 (2018). In other cases, they are comments on the omission of elements like representation from the original, and that commentary is made by the inclusion of those elements in the fan creations. Nor are most fanworks as radically different in form as, for example, the digitization of works to permit full-text searching was in *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2018). They use the works to different purposes and to convey new messages and meanings, but they do so in formats that can be depicted as sharing the same “overarching purpose” as the original works they draw from. 11 F.4th at 40.

If the first factor inquiry is artificially limited to superficial similarities between the works, it is unlikely that the works will be found to be transformative. The short story is, like many licensed works of Star Trek fiction, a literary work. The painted costume is, at a high level of generality, still a costume. And, of course, both fan creations recognizably derive from, and retain essential elements of, their source material. Assessed only as creative works within those genres, without an examination of meaning, it is entirely plausible that the “purpose” of the short story will be viewed as “being a short story,” and the “purpose” of the costume as “being a costume.” Like the portraits in

Warhol, both will also be works of the same subject as the corresponding originals. A direct application of the Warhol standard, without the addition of consideration of the purpose or meaning of the works, is likely to conclude that these works are not transformative and that the first factor does not favor fair use.

With the first factor no longer favoring fair use, it is likely that the third would follow suit. The assessment of this factor is based on the reasonableness of the use “in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586. Where the purpose of the copying is transformative, copying is more likely to be reasonable. Absent a transformative use, the question becomes one of why the copying came from this particular source, and the amount of use that is permissible plummets accordingly.

When meaning is assessed, it is likely that both *A Trekkie’s Tale* and the carpet stormtrooper are fair use. In each case, at least three of the four factors are likely to weigh in favor of fair use. If, however, the court is forbidden from assessing meaning aside from a determination of whether there is comment on the original, it is likely that the analysis shifts to one where at least three of the factors weigh against fair use. Such an outcome would shatter the expectations that millions of people have relied on over a period of decades in creating such works. And the First Amendment breathing room TRMN and other fan authors have long relied on will be no more.

III. This Second Circuit’s Disregard for Meaning Is Inconsistent with This Court’s Decisions, Inconsistent with the Decisions of Other Circuits, Internally Inconsistent, and Unworkable

The decision below is not consistent with current law. It contradicts this Court’s prior decisions and the approach used in fair use cases both in other circuits and within the Second Circuit itself. It is also unworkable. It provides inconsistent guidance to district courts, and it places users in a position where their ability to reasonably make fair uses of material becomes largely dependent on their ability to correctly guess whether a judge will find that their use is different enough in appearance from the original.

Although the plain language of the Copyright Act mandates an examination of “the *purpose* and character of the use,” 17 U.S.C. § 101 (emphasis added), the Second Circuit’s treatment of the factor is restricted to, at most, an extremely superficial level. Purpose is declared “a less useful metric” for works that “at least at a high level of generality, share the same overarching purpose (*i.e.*, to serve as works of visual art).” 11 F.4th at 40. Rather than assess purpose, the Second Circuit instructs that “the district judge should not assume the role of art critic and seek to ascertain the intent behind or meaning of the works at issue.” 11 F.4th at 41. “Instead, the judge must examine whether the secondary work’s use of its source material is in service of a ‘fundamentally different and new’ artistic purpose and character, such that the secondary work stands

apart from the ‘raw material’ used to create it.” 11 F.4th at 42. Although the court did not provide explicit guidance on how much difference would be enough, it made it clear that a use of material is problematic if the “secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material.” *Id.*

This approach, which tells district courts that conducting an analysis of the meaning of the new work can be reversible error, is not merely inconsistent with the express language of the statute. It is also starkly at odds with this Court’s precedent. In *Campbell*, the Court focused explicitly on the need to assess whether the new work contains any “new expression, *meaning, or message*” in the fair use analysis. *Campbell*, 510 U.S. at 579 (emphasis added). The Second Circuit attempts to restrict this meaning-free approach to only certain cases: those in which the new work “does not obviously comment on or relate back to the original or use the original for a purpose other than that for which it was created.” 11 F.4th at 41.

The Second Circuit appears to attempt to thread the needle between disregarding meaning in most cases where both new and old work are the same general type of work—both works of visual art, for example, or both songs—without openly contradicting this Court’s holding that uses that parody “traditionally [has] had a claim to fair use protection as transformative works.” *Campbell*, 510 US at 583. In so doing, however, it misses a critical point: the holding in *Campbell* was not restricted to new works that comment on the

original. The Court there found that parody “needs to mimic an original” to comment on that original, and therefore has a built-in reason for using the original. *Id.* at 580-81. Other works, which lack this justification, need to provide a reason for their borrowing—but the Court explicitly noted that this might be possible even in cases of satire, which do not comment on the original. *Id.* at 581 n. 14.

This Court reinforced the importance of purpose, meaning, and message in the first factor analysis in *Google v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021). There, the court explicitly rejected arguments that the nature of the work is the same when both old and new works are the same type of work, such as computer programs. *Id.* at 1199. The court also explicitly rejected the argument that the purpose and character of the new work is the same in such cases. *Id.* The Second Circuit’s attempt to limit Google to computer programs misses the point. 11 F.4th 51-52. The particular facts of the case were, of course, critical to the outcome. However, nothing in the case suggests that the approach used to assess fair use depended on the nature of the works. Whether or not a particular new purpose is sufficient to yield a finding of fair use may vary some from work to work—because, for example, the second factor adds weight where the original is a factual work “further . . . from the core of copyright.” *Google*, 141 S. Ct. 1202. The assessment of purpose itself, however, remains critical.

Second Circuit aside, the Courts of Appeals have, since *Campbell*, routinely looked to the purpose,

meaning, and message of a new work, and determine transformativeness on this basis, rather than on superficial similarities. They have found that new meaning and message transformed works even where there is little visual change to the work, *see, e.g., Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1177 (9th Cir. 2013); *Núñez v. Caribbean International News Corp.*, 235 F.3d 18 (1st Cir. 2000), but not when there was a lack of new meaning or message. *See, e.g., Balsey v. LFP, Inc.*, 691 F.3d 747, 759 (6th Cir. 2012). Similarly, courts have found that even in cases of significant superficial change, a work is not transformative because there is not sufficient new purpose, meaning, or message. *See, e.g., Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 983 F.3d 443, 452 (9th Cir. 2020). In all these cases, the core of the first factor analysis rests on the assessment of the purpose, meaning, or message of the new work. This is consistent with the text of the statute and this Court’s prior decisions, but not with the Second Circuit’s approach here.

In addition to resting on soft legal footing, the Second Circuit’s guidance is also internally inconsistent. The court does not instruct district judges to ignore meaning in all cases. It instructs that the district courts “should not . . . seek to ascertain the intent behind or meaning of the works at issue . . . because judges are typically unsuited to make aesthetic judgments and because such perceptions are inherently subjective” where the new work “does not obviously comment on or relate back to the original or use the original for a purpose other than that for which it was

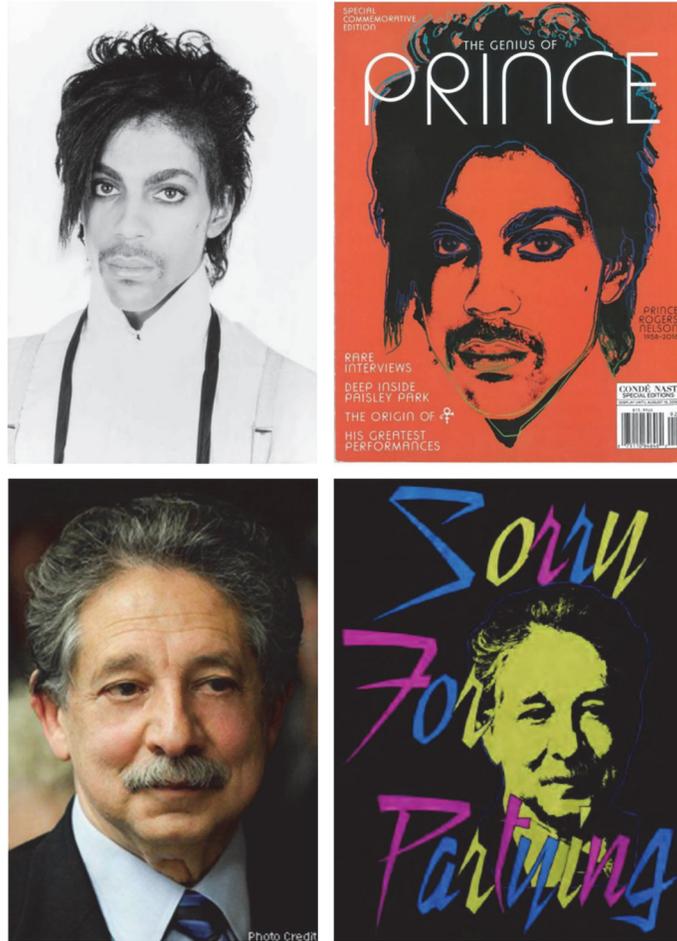
created.” 11 F.4th at 41-42. This, in effect, requires that the judge first ascertain if the intent was to comment on the original, and only if the judge determines that this was not the intent, to refrain from seeking to ascertain the intent of the original.

Instead of assessing meaning in all cases, the Second Circuit’s approach shifts when the court determines that there is a lack of commentary on the original to one that focuses instead on the similarities between the new and original works. 11 F.4th at 42-43. The court, rather than assessing whether the new use has a different purpose, message, or meaning than the original, focuses on how much the new work resembles the old. This conflates the analysis of the first factor, which examines the purpose of the new use, with the third factor, which is where the amount used is assessed. *Compare* 17 U.S.C. § 107(1) *with* 17 U.S.C. § 107(3).

The decision to assess the similarity between the two works at a fine-grained level is in tension with the court’s decision to refrain from assessing meaning because “judges are typically unsuited to make aesthetic judgments.” 11 F.4th at 41. Instead of determining the intent behind the creation of the new work, the court placed itself in a position where it needed to first assess what the “essential elements” of the Goldsmith photograph were, and then whether the Warhol silk-screen retained those elements. 11 F.4th at 43. Yet, even then, the panel found itself making decisions based on factors such as “the glint in Prince’s eyes where the umbrellas in Goldsmith’s studio reflected off

his pupils.” 11 F.4th at 48. It is not clear how aesthetic judgment is implicated less by these assessments than by an assessment of the intended use of the new work.

Finally, the effect of these changes is unworkable. Ultimately, these changes place users who need to determine if the use they plan to make of a new work is a fair use in an unenviable position. If their new work does not, in the judgment of the court, comment on the original, they must successfully guess whether it is more similar to the examples in the top row below, which are not fair use in the view of the Second Circuit, 11 F.4th at 48, or the two in the bottom, which are fair use in the view of both the Second and Seventh Circuits, *id.*; *Kienitz v. Sconnie Nation*, 766 F.3d 756, 759 (7th Cir. 2014).



The millions of creators of fanworks face, if they incorrectly guess which of these examples is closer to their new work, the potential strict liability for copyright infringement. If the source work they utilize was timely registered, they may be subject to both statutory damages of up to \$150,000 and awards of attorney's fees, even if they make no profit from the infringing work and the copyright owner sustains no

actual damages. 17 U.S.C. § 504. And, given the non-commercial nature of their work, they will likely have to make their guess without the assistance of counsel. The result? They will simply stop creating (or stop sharing it). And, as TRMN can assure the Court, that is not the result *anyone* wants—neither fans nor copy-right holders.



CONCLUSION

Amicus’s interests and experience are in the popular culture arena, not fine art. It takes no position on whether one artist’s use of another artist’s photograph as the basis for the creation of a new and distinct work of art is fair use. In fact, it is not certain that correcting the Second Circuit’s approach to the first fair use factor, reinforcing the importance of meaning to the analysis, and remanding the case for further proceedings would necessarily result in a change to the outcome of this case. It is possible, for example, that a shift in meaning from “Prince, vulnerable” to “Prince, iconic” is not enough of a change in meaning, particularly in combination with the commercial purpose of the new work, to permit the first factor to favor fair use. *See, e.g., Campbell*, 510 U.S. at 579 (“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”). It is also possible that, even if the shift in meaning results in the first factor favoring the Prince series, the potential effect on the existing market for depictions of Prince might offset

that, and the total analysis might not favor fair use. The first factor is, after all, not outcome-dispositive in and of itself; all the factors should play a role in the analysis.

But the test is wrong in a way that will sow chaos. Thus, amicus merely urges this Court to answer the question presented, “whether a work of art is ‘transformative’ when it conveys a different meaning or message from its source material,” Cert. Pet. at i, in the affirmative. The meaning-centric approach to the first fair use factor utilized by this Court in *Campbell* and *Google*, and by the Circuit Courts of Appeals in many other cases has allowed millions of works of fan fiction, fan art, and memes to blossom. This result has served valuable social functions, and it has served the constitutional purposes of incentivizing the creation of new works. It should be preserved.

Considering the purpose, meaning, and message of works is a critical part of determining whether a new use of a copyright-protected work is intended to unfairly interfere with the limited grant of monopoly privileges provided by copyright, see *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), or if it is the kind of transformative use that embodies “the very creativity which that law is designed to foster.” *Stewart v. Abend*, 495 U.S. 207, 236 (1990). Identifying works that use the original as a vehicle for communicating new meanings to others—a purpose of many fan creations—is consistent with fair use’s role as one of copyright’s First Amendment safeguards.

Amicus respectfully urges this Court to reverse the decision below and remand for further proceedings consistent with the longstanding recognition of the importance of message and meaning in the fair use analysis. By so doing, the Court will preserve the ability of millions to continue to create noncommercial fanworks, the ability of millions more to use visual popular culture references as a form of communication, and the critical role of fair use as a First Amendment safeguard.

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