

No. 21-869

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

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ANDY WARHOL FOUNDATION FOR  
THE VISUAL ARTS, INC.,

*Petitioner,*

*v.*

LYNN GOLDSMITH, *et al.*,

*Respondents.*

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

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**BRIEF OF *AMICI CURIAE* ELECTRONIC  
FRONTIER FOUNDATION AND  
ORGANIZATION FOR TRANSFORMATIVE  
WORKS IN SUPPORT OF PETITIONER**

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**INTEREST OF AMICI CURIAE<sup>1</sup>**

*Amicus curiae* the Electronic Frontier Foundation (“EFF”) is a nonprofit civil liberties organization that has worked for more than 30 years to protect innovation, free expression, and civil liberties in the digital world. EFF and its more than 38,000 dues-paying members have a strong interest in a balanced copyright system that serves the interests of creators, innovators, and the general public. As a legal services organization, we also counsel users, including internet creators, who have had their lawful expression taken offline due to a takedown notice submitted pursuant to the Digital Millennium Copyright Act or a flag from an automated content filter.

The Organization for Transformative Works (“OTW”) is a nonprofit organization established in 2007 to protect and defend fans and fanworks from commercial exploitation and legal challenge. Our members make and share works commenting on and transforming existing works, adding new meaning and insights—from reworking a film from the perspective of the “villain,” to using storytelling to explore racial dynamics in media, to retelling the story as if a woman, instead of a man, were the hero. The OTW’s nonprofit, volunteer-operated website hosting transformative, noncommercial works,

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1. Pursuant to Supreme Court Rule 37.3(a), all parties have provided their consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than Amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

the Archive of Our Own, has over 4.7 million registered users, hosts over 9.3 million unique works, and receives approximately two billion page views per month.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

While the facts of this case are relatively narrow, its impact may reach far beyond the world of fine arts. In a digital age, copyright law necessarily plays an ever-increasing role in day-to-day life: it not only shapes creative work but also influences innovation, education, politics, security, and privacy.

Virtually everything we do online involves reproducing copyrightable works, making new ones, or both. Every time someone posts on social media, forwards an e-mail, or texts a GIF to a friend, they are making use of copyrighted material. Vast economies exist for posting, streaming, and commenting on performances of all kinds. New internet creators remake and rework all kinds of copyrighted works to create new meanings and messages. Given the ubiquity of software in our devices and appliances, many aspects of security testing, repair, and the development of competitive products depend on reverse engineering copyrighted software—often against the desires of the manufacturer. Educators, students, parents, families, political organizers, human rights defenders, journalists, and many others depend on internet platforms to communicate—a dependence that has been underscored by the pandemic.

The present case has the potential to affect all of this. The activities described above depend on a robust

and flexible fair use doctrine. Rightsholders may be reluctant to permit many of these uses, assuming those rightsholders can even be contacted. Many users will not even realize they might need fair use protections until they get an overzealous cease-and-desist notice backed up by a threat of massive statutory penalties or find their creative works taken down based on nothing more than an allegation of infringement. The need is even more acute where the user is not well-resourced: pro bono copyright lawyers are few and far between, and statutory damages can end a career or a company. The fair use doctrine gives these users the tools they need to fight back, in keeping with its core purpose—to ensure that copyright continues to foster, not impede, creative expression and, relatedly, to reconcile the First Amendment and the Copyright Clause.

The Second Circuit’s new fair use approach, especially its analysis of the first fair use factor, throws a relatively stable regime into chaos. It cannot be reconciled with established law, including this Court’s own rulings. If endorsed by this Court, it will undermine valuable expressive activity that builds on existing works, including fan fiction and works whose new meaning and message might not be apparent to all audiences.

Amici urge the Court to reverse. In addition, Amici urge the Court to reinforce fair use protections by clarifying that, where a use is at least minimally transformative and/or noncommercial, the rightsholder bears the burden to show market harm.

## ARGUMENT

### I. Fair Use Breathing Space Is More Important Than Ever

Copyright acts as an “engine of expression” only when it respects the traditional contours that keep it within its appropriate bounds. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 219–21 (2003); *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1195–96 (2021). These traditional contours, such as fair use and the idea/expression dichotomy, serve as “built-in First Amendment accommodations” that, when they are respected, help alleviate the obvious tension between the First Amendment and the Copyright Clause. *Golan v. Holder*, 565 U.S. 302, 327–29 (2012); *Eldred*, 537 U.S. at 219.

More specifically, fair use helps fulfill copyright’s essential purposes by fostering new creativity. Creators and innovators often build on what has come before; a robust fair use doctrine ensures that building can continue and that original creators don’t have unlimited power to police the work of the next generation.

The doctrine is more important than ever in the twenty-first century, thanks to several overlapping developments that, taken together, amount to “copyright creep”—the expansion of copyright ownership into areas where it is increasingly likely to inhibit, rather than encourage, new creativity and expression.

The first significant change was the extension of the copyright term, combined with the abandonment of meaningful registration requirements. Every day, ordinary people as well as professionals create and

use all kinds of works. Thanks to new technologies and platforms, we can also share and re-use those works widely. Without registration requirements, however, every blog post, comment, and selfie is a copyrighted work, and hence, sharing, quoting, or commenting on them—that is, doing exactly what many of these works are meant for—becomes a potential lawsuit in the making. Thanks to extraordinarily lengthy copyright terms, the threat lingers for decades, whether or not the copyright holder has any interest in enforcing their rights. Digital technologies aside, copyright term extension has led to a “missing century” of books that publishers have decided not to re-publish because of copyright risks, at the very time when books could be more available than ever.<sup>2</sup>

*Second*, and relatedly, huge swaths of copyrighted works, both new and old, are “orphans,” *i.e.*, works of uncertain copyright status and, more importantly, for which the rightsholder cannot be identified. As the Copyright Office puts it:

[T]he uncertainty surrounding the ownership status of orphan works does not serve the objectives of the copyright system. For good faith users, orphan works are a frustration, a liability risk, and a major cause of gridlock in the digital marketplace.<sup>3</sup>

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2. Rebecca J. Rosen, *The Missing 20th Century: How Copyright Protection Makes Books Vanish*, *The Atlantic* (Mar. 30, 2012), <https://www.theatlantic.com/technology/archive/2012/03/the-missing-20th-century-how-copyright-protection-makes-books-vanish/255282/>.

3. U.S. Copyright Office, *Orphan Works and Mass Digitization* 35 (2015), <https://www.copyright.gov/orphan/>.

In 2008, Congress attempted to address some aspects of the “orphan work” problem with new legislation, but the effort failed and the problem remains unresolved.<sup>4</sup>

*Third*, there is an ever-growing body of “born digital” works for which licenses are either effectively unobtainable (because there is no one with whom to negotiate) or take the form of contracts of adhesion that prevent important uses such as preservation and archiving.<sup>5</sup> The Music Library Association has extensively documented how, by conditioning access to works on the acceptance of adhesive contract terms, copyright owners of “born digital” works can undermine key limitations and exceptions to copyright, such as the first sale doctrine and statutory permissions for library archival reproduction.<sup>6</sup> See *Kirtsaeng v. John Wiley & Sons*, 568 U.S. 519, 523 (2013) (identifying the first sale doctrine, library archival reproduction, and fair use as limitations on exclusive rights).

*Fourth*, copyright has become a weapon to silence critical speech—a weapon that is easily wielded thanks to the Digital Millennium Copyright Act (“DMCA”). The DMCA gives internet intermediaries powerful incentives to remove any content that has been identified as

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4. See Corynne McSherry, *The Orphan Works Problem: Time to Fix It*, EFF Deeplinks Blog (Feb. 4, 2013), <https://www.eff.org/deeplinks/2013/02/orphan-works-problem-time-fix-it>.

5. *Comments of the Music Library Association to the U.S. Copyright Office in the Matter of Music Licensing Study*, Dkt. No. 2014-03 (May 15, 2014), [https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014\\_3/Music\\_Library\\_Association\\_MLS\\_2014.pdf](https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/Music_Library_Association_MLS_2014.pdf).

6. *Id.*



infringing, whether or not that content actually infringes.<sup>7</sup> Thanks to those incentives, a DMCA notice allows the sender to do what no court could: cause the temporary or permanent deletion of speech, even lawful speech, based on nothing more than an allegation. To take just a few of of many examples:

- A media personality and addiction specialist used the DMCA to take down a video criticizing him for spreading Covid-19 misinformation.<sup>8</sup>
- City officials used the DMCA to target a blogger who used a modified version of the town's logo in a post criticizing its efforts to deter unhoused people from camping.<sup>9</sup>
- Political operatives used the DMCA to take down statements by former President Trump and other conservative statements based on their incorporation of copyrighted material.<sup>10</sup>

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7. See *Comments of Organization for Transformative Works to the U.S. Copyright Office in the Matter of Section 512 Study*, Dkt. No. 2015-07, at 6–10 (Mar. 30, 2016), [https://downloads.regulations.gov/COLC-2015-0013-86027/attachment\\_1.pdf](https://downloads.regulations.gov/COLC-2015-0013-86027/attachment_1.pdf).

8. *TV Doctor Believes Copyright Will Save Him from Criticism, Is Very Wrong*, EFF Takedown Hall of Shame (2020), <https://www.eff.org/takedowns/tv-doctor-believes-copyright-will-save-him-criticism-very-wrong>.

9. Clicky Steve, *Hall of Shame: Something Stinks in Abbotsford*, Automattic (May 3, 2017), <https://transparency.automattic.com/2017/05/02/hall-of-shame-something-stinks-in-abbotsford/>.

10. See, e.g., Mike Masnick, *Twitter Taking Down Trump Campaign Video Over Questionable Copyright Claim*

And so on.<sup>11</sup> Unfortunately, given the potential costs of defending against such an allegation—both litigation expenses and statutory damages if you fail—many fair users fear fighting back, no matter how confident they are that their speech is lawful.

Moreover, rightsholders have repeatedly used the DMCA Section 512(h) subpoena process to attempt to unmask and silence anonymous critics. For example, the Watch Tower Bible and Tract Society of Pennsylvania (“Watch Tower”) served a Section 512(h) subpoena on the social media site Reddit, seeking to uncover an anonymous poster’s identity after he posted images of

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*Demonstrates Why Trump Should Support Section 230*, Techdirt (June 5, 2020), <https://www.techdirt.com/2020/06/05/twitter-taking-down-trump-campaign-video-over-questionable-copyright-claim-demonstrates-why-trump-should-support-section-230/>; Mike Masnick, *Rather Than Attacking Section 230, Why Aren’t Trump Supporters Angry About the DMCA That’s Actually Causing Issues?*, Techdirt (July 2, 2020), <https://www.techdirt.com/2020/07/02/rather-than-attacking-section-230-why-arent-trump-supporters-angry-about-dmca-thats-actually-causing-issues/>; Mike Masnick, *While Trump Continues to Complain About 230, It’s Copyright Law That Once Again Actually Gets His Content Removed*, Techdirt (Oct. 9, 2020), <https://www.techdirt.com/2020/10/09/while-trump-continues-to-complain-about-230-copyright-law-that-once-again-actually-gets-his-content-removed/>. Many additional examples are collected at <https://transparency.automattic.com/tag/hall-of-shame/> and <https://www.eff.org/takedowns>.

11. See generally Jennifer Urban, Joe Karaganis, and Brianna Schofield, *Notice and Takedown in Everyday Practice*, UC Berkeley Public Law Research Paper No. 2755628 (March 2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2755628#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628#).

Watch Tower documents to comment on its fundraising and data collection practices.<sup>12</sup> In that case, the anonymous poster was able to obtain pro bono counsel and quash the subpoena. *See In re DMCA Subpoena to Reddit*, 441 F. Supp. 3d 875 (N.D. Cal. 2020). But many others have not been so fortunate: Watch Tower has served some seventy-two DMCA subpoenas since 2017 seeking to identify individuals who have posted criticisms of the Jehovah’s Witnesses. Watch Tower has almost never used the information obtained from these subpoenas to file an infringement action.<sup>13</sup>

*Fifth*, everyday objects and processes increasingly rely on copyrighted computer software. Software-enabled devices have become ubiquitous, from thermostats to tractors to medical devices. Researchers, makers, and ordinary consumers must reverse engineer that software to test and improve those devices. For example, photographers frustrated by the limitations of digital cameras have found creative ways to make their cameras more effective and versatile using custom firmware.<sup>14</sup> To

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12. Order re Mot. to Quash at 2–3, *In re DMCA Subpoena to Reddit, Inc.*, 441 F. Supp. 3d 875 (N.D. Cal. 2020) (No. 19-mc-80005-SK (JD)), [https://www.eff.org/files/2020/03/03/2020-03-02\\_order\\_re\\_motion\\_dckt\\_30\\_0.pdf](https://www.eff.org/files/2020/03/03/2020-03-02_order_re_motion_dckt_30_0.pdf).

13. Paul Alan Levy, *Watch Tower’s Misuse of Copyright to Suppress Criticism*, Public Citizen: Consumer L. & Pol’y Blog (Mar. 7, 2022), <https://pubcit.typepad.com/clpblog/2022/03/watch-towers-misuse-of-copyright-to-suppress-criticism.html>.

14. The term “firmware” typically refers to software built into a physical device that controls the device’s operation. A project called “Magic Lantern” has created firmware that enables new functionality such as video capture capability, audio filtering,

create this enhanced firmware and ensure that it will be compatible with the camera, camera users need to create readable copies of the original copyrighted firmware code to analyze its functional attributes. Overzealous copyright owners may see that copying as infringement.

Some industry associations have complained that the fair use doctrine has “drastically expanded.”<sup>15</sup> If it has, that expansion has been essential to the doctrine’s fundamental purpose of ensuring that copyright law fosters, rather than unduly inhibits, new creativity and innovation. Because copyright has expanded its coverage to so many activities and people, fair use needs equal scope and flexibility simply to keep up. Rebecca Tushnet, *Content, Purpose, or Both?*, 90 Wash. L. Rev. 869, 892 (2015); Jessica Litman, *Campbell at 21/Sony at 31*, 90 Wash. L. Rev. 651, 652–53 (2015); Justin Hughes, *Rules, Standards, and Copyright Fair Use* 60 (2020) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3592312](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3592312) (revised Oct. 12, 2021).

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overlays, exposure settings, motion detection, user scripting ability, improved dynamic range to capture shadowed details and fast-moving subjects, and a host of other features not included in the stock firmware of the Canon EOS SD Mark II and other Canon EOS DSLR cameras. *See* Magic Lantern Home Page, [www.magiclantern.fm](http://www.magiclantern.fm) (last visited June 16, 2022). Similar projects exist for Nikon and Panasonic cameras. *See* Nikon Hacker Showcase, <https://nikonhacker.com/viewforum.php?f=9> (last visited June 16, 2022); PTool FAQ, Personal View FAQs Wiki, <https://www.personal-view.com/faqs/ptool/ptool-faq> (last modified Apr. 21, 2022).

15. Brief of Amici Curiae Ten Creators’ Rights Organizations in Support of Respondent at 9, *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021) (No. 18-975), 2020 WL 1131469.

Fair use, and in particular the definition of “transformative purpose,” need not mean “all things to all people.” See 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][1][b] (2019). But the doctrine must be robust and flexible enough to match the needs of the twenty-first century. Today, thanks to that very flexibility, it helps ensure that copyright does not impede the development, protection, and sharing of our cultural heritage. See, e.g., Jennifer Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 Berkeley Tech. L.J. 1379 (2012). It helps safeguard political and critical speech online. See, e.g., *In re DMCA Subpoena to Reddit*, 441 F. Supp. 3d at 887 (quashing subpoena seeking to unmask a fair user); see also *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1157 (9th Cir. 2016) (rightsholders must consider fair use before sending DMCA takedown notice). It helps ensure that we can continue to understand, repair, and improve upon the technologies we use every day. See, e.g., *Sony v. Connectix*, 203 F.3d 596, 607 (9th Cir. 2000). It allows developing creators to find their voices and build their skills.<sup>16</sup> All of this work is crucial to fulfilling copyright’s purpose, creating breathing space that benefits both creators and the public interest.

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16. *Comments of the Organization for Transformative Works to the USPTO/NTIA* (Nov. 13, 2013), <https://www.transformativeworks.org/wp-content/uploads/old/Comments%20of%20OTW%20to%20PTO-NTIA.pdf>.

## II. The Second Circuit's Factor One Analysis Confuses Far More Than It Clarifies and Would Stifle New Creativity

This Court's opinion in *Campbell*, as recently affirmed in *Google v. Oracle*, is key to the doctrine's continued vigor. With respect to factor one in particular, this Court held that a transformative purpose is nothing more or less than one that alters the original to create a new expression, meaning, or message. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). That simple tenet is relatively easy to adapt to the wide variety of uses copyright implicates today.

The Second Circuit's factor one analysis, by contrast, substantially weakens and narrows fair use protections in three ways. *First*, it assumes that two works in a similar medium will share the same overarching purpose. *Second*, it holds that if a secondary use doesn't obviously comment on the primary work, then a court cannot look to the artist's asserted intent or even the impression reasonable third parties, such as critics, might draw. *Third*, it holds that, to be fair, the secondary use must be so fundamentally different that it should not recognizably derive from and retain essential elements of the original work. All three conclusions not only undermine fair use protections but also run contrary to practical reality.

### A. Two works of visual art (or any two works in a roughly similar medium) do not necessarily share the "same overarching purpose"

The Second Circuit's initial conclusion that the two works in question—works of visual art—share the same

overarching purpose (to serve as works of visual art) is both conclusory and circular. The works at issue in *Campbell* were both works of popular music and therefore shared the purpose of providing musical entertainment. *See Campbell*, 510 U.S. at 573. The works at issue in *Google v. Oracle* were both computer programs and therefore shared the purpose of operating the Java programming language. *See Oracle*, 141 S. Ct. at 1193–94. But in both cases, this Court recognized that medium and purpose are not coextensive.

In fact, transformative works—that is, works that “add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message”<sup>17</sup>—often share a medium with the work(s) they are based upon, and their audiences and purposes are likely to overlap. For example, both fictional and non-fictional films are just that—films—but they are unlikely to serve the same purpose, unless that purpose is defined as “to serve as films.” It is well understood that quoting copyrighted works of popular culture (including other films) to illustrate an argument or point fits within fair use best practices for documentary filmmakers,<sup>18</sup> but under the Second Circuit’s approach, such uses could be ruled non-transformative.

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17. *Campbell*, 510 U.S. at 579. The *Campbell* court rejected a definition of “transformative” that would have required the follow-on work to constitute a commentary or criticism of the underlying work. *Compare Campbell*, 510 U.S. at 579 (majority opinion) *with id.* at 597–98 (Kennedy, J., concurring) (urging narrower definition of parody).

18. Ass’n of Indep. Video & Filmmakers et al., *Documentary Filmmakers Statement of Best Practices in Fair Use* 4 (2005), <https://cmsimpact.org/wp-content/uploads/2016/01/Documentary-Filmmakers.pdf>.

Similarly, television shows and fan fiction videos that comment on those shows could also be understood to serve the same overarching purpose: to entertain. *See infra* Section II.B. Even a Saturday Night Live sketch poking fun at political figures using the model of “Where in the World Is Carmen Sandiego” arguably serves the same overarching purpose as the PBS show: to entertain and even educate via television.<sup>19</sup> All of these examples—including examples that closely resemble the facts of *Campbell*—could fall into the Second Circuit’s unhelpful trap.

**B. In many cases, transformativeness cannot be assessed without considering intent and audience**

Many uses that can be described as serving the same overarching purpose at a high level of generality (as construed by the Second Circuit) can be transformative even if they don’t obviously comment on the original. But that transformative aspect may not be evident without consulting the accused creator and the intended audience.

Sometimes, the transformative meaning or message of a follow-on work will be broadly obvious to just about any audience. This may be true, for example, of broad parodies or overt political statements. But more subtle or nuanced commentary—while no less transformative—may not always be clear to some audiences.

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19. Saturday Night Live, *Where in the World is Kellyanne Conway?*, YouTube (May 7, 2017), <https://www.youtube.com/watch?v=NgWWube0M1c>.



Fan fiction videos (or “vids”) provide a textbook example. Vids are fan-made videos that involve the re-cutting and remixing of footage from television shows or films, creating a video montage set to a new soundtrack. Vids are usually rapidly cut, preserving little or none of the narrative structure of the underlying source. The purpose of vidding is to remix the source material in order to provide a new narrative, highlighting an aspect of the source that may have been peripheral to the source’s initial message, and often commenting on or critiquing that source. The transformative messages of these vids are apparent to the vidders who created them, to their intended audiences, and to other viewers with relevant experience. Other viewers, until they read a description of the vid’s critical objective, may not recognize the transformative messages a vid conveys. But the fact that some viewers may lack knowledge does not detract from the vid’s valuable transformative purpose.

Amicus OTW has compiled an illustrative collection of such vids in support of its successful petitions for a “vidding” exemption to the anti-circumvention provisions of 17 U.S.C. § 1201.<sup>20</sup> Section 1201 provides that the Copyright Office can grant such exemptions (subject to a number of additional requirements) where Section 1201 would interfere with likely fair uses. The Copyright Office did so here, acknowledging that vids qualify as likely fair uses.

For example, in one vid entitled “The Price,” vidder ThingsWithWings crafted a carefully edited critique of

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20. See Org. for Transformative Works, *Test Suite of Fair Use Vids*, <https://www.transformativeworks.org/legal/vidtestsuite/>.

standard media narratives in which a female character is harmed for the sole purpose of providing a motivation for the main male character's storyline, and harms to her are shown only to emphasize how he suffers as a result.<sup>21</sup> The vid catalogs this trope and illustrates the misogyny inherent in it by using examples from well-known films such as Harry Potter, Batman, and Lord of the Rings. "The Price" ends with shots of multiple men crying, initially intended as dramatic but turned bathetic by the vid's repetition and juxtaposition.

Within fan communities where such tropes are widely discussed, ThingsWithWings' message would be immediately understood. Outside of those communities, however, it might not "reasonably be perceived" without further description and explanation. Indeed, that sort of subtlety may be necessary to achieve successful criticism of deeply ingrained media tropes. How better to educate viewers about potential social harms in mainstream media than through examples they may previously have viewed uncritically?

To take another example, vidder Obsessive24's "Piece of Me" combines glossy DVD footage from Britney Spears' videos and other, grittier images of the singer (tabloid photography, deliberately grainy YouTube video) to draw a contrast between the singer's projected self-image and the more pathetic narrative of exploitation, commodification, and breakdown revealed by the tabloids. The song "Piece of Me," which is Spears' own, plays throughout. Spears seems to intend for the song to be read as a challenge to a fight: "You want a piece of me?" The images in the

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21. *See id.*

original video reinforce that aggressive, defiant meaning. But Obsessive24's video remix suggests another meaning: the violence of being ripped apart. The result is an almost classically tragic narrative wherein Spears is picked apart by vultures: her family, Hollywood, the media, and us, the consuming audience. Again, some audiences will perceive that new message readily. Others will not. If the large and reasonable audience that perceives a new, critical message is ignored, fair use will no longer protect the "Progress" and free speech interests that it has historically furthered.

**C. Many digital transformative uses recognizably derive from and retain essential elements of the original**

The Second Circuit's test would characterize works as non-transformative if they merely "impos[e]... another artist's style on the primary work such that the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material." *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 42 (2d Cir. 2021). This approach directly conflicts with this Court's ruling in *Campbell*, in which the imposition of 2 Live Crew's style on Roy Orbison's song *was* the transformative activity. *See Campbell*, 510 U.S. at 588. Unquestionably, 2 Live Crew's version was both recognizably derived from, and retained essential elements of, its source material. And it was also a paradigmatic example of transformativeness.

More recently, in the midst of the pandemic, many people turned to TikTok for entertainment—including making their own videos. This was particularly true for musicians, dancers, and choreographers, whose outlets

for performance were severely constrained. In 2021, content creators on TikTok began posting homages to the 2007 Disney film *Ratatouille* with original song and dance numbers that included careful choreography, graphic design, sets, and costumes. These new short works transformed Disney’s *Ratatouille* story from a top-down corporate pronouncement that “anyone can cook” into a real-life meta-demonstration that expression and creativity could come from all kinds of people and walks of life.<sup>22</sup>

The short, fan-created videos all derived from and retained essential elements of the original movie. They also all served a transformative purpose because they added new and distinct messages about the nature of creatorship in the TikTok era, the potential for unity in a time of isolation, and the survival of creative expression amidst a global pandemic.

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22. Julia Reinstein, *How “Ratatouille” Went From TikTok to an (Almost) Broadway Musical*, BuzzFeed News (Jan. 2, 2021), <https://www.buzzfeednews.com/article/juliareinstein/ratatouille-musical-tiktok-broadway>; Zachary Pincus-Roth, *The Most Exciting Theater Now is a Figment of Our Imagination*, Wash. Post (Dec. 22, 2020), <https://www.washingtonpost.com/arts-entertainment/2020/12/22/tiktok-broadway-musical-theater-ratatouille/>; Alyssa Bereznak, *Anyone Can Cook: The Oral History of ‘Ratatouille: The Musical,’* The Ringer (Dec. 31, 2020), <https://www.theringer.com/movies/2020/12/31/22206943/ratatouille-musical-oral-history-tiktok-trend-making-of>; Emily Maskell, *A Complete Guide to the ‘Ratatouille’ TikTok Musical*, Paper Mag. (Nov. 26, 2020), <https://www.papermag.com/a-complete-guide-to-the-ratatouille-tiktok-musical-2649046202.html?rebelltitem=26#rebelltitem26>.

As these examples suggest, the Second Circuit’s attempt to draw a distinction between works that “convey a new meaning or message” and works that “recognizably deriv[e] from, and retain[] the essential elements of,” their source material cannot be reconciled with either this Court’s jurisprudence or with the practical reality of online creativity. *Warhol v. Goldsmith*, 11 F.4th at 42. It is possible for a work to be transformative without, in the Second Circuit’s words, “draw[ing] from numerous sources, rather than . . . simply alter[ing] or recast[ing] a single work with a new aesthetic.” *Id.* at 41. Indeed, such transformative uses are common. Holding otherwise would disserve copyright’s purpose by inhibiting, rather than fostering, new creativity.

### **III. The Factor One Analysis Should Be Flexible and Tied to the Circumstances of the Case—Including, Where Appropriate, the Intended Audience of the Work**

The Second Circuit correctly observed that the judge should not assume the role of aesthetic critic. But neither should the judge attempt to substitute an imaginary “reasonable perceiver” who does not need to consult with either the accused creator or their intended audience. And while a court need not always consult creators, experts, or third parties to assess transformativeness, it should be permitted to do so in circumstances where the use calls for it.

A court can, at the outset, evaluate from an accused work or its context whether a use is obviously transformative, as with a quotation in a review, a clear parody, an explicit criticism, or an overtly political comment. That kind of

swift analysis is particularly helpful where the copyright holder appears to be acting in bad faith and/or leveraging a lawsuit or subpoena for retaliatory purposes. A fair user can respond to a DMCA takedown notice, fend off such a subpoena, or end a lawsuit promptly, based on the facts already before the court. *See, e.g., In re DMCA Subpoena to Reddit*, 441 F. Supp. 3d at 884–85 (quashing subpoena on fair use grounds when entire works were posted in forum “dedicated to criticism of Watch Tower by former members” for “criticism and commentary in a manner fundamentally at odds with Watch Tower’s original purposes”); *Art of Living Found. v. Does 1–10*, 2011 WL 5444622, at \*6 (N.D. Cal. Nov. 9, 2011) (quashing subpoena when pseudonymous speech was “obviously critical”); *Hughes v. Benjamin*, 437 F. Supp. 3d 382, 394 (S.D.N.Y. 2020) (dismissing copyright complaint on fair use grounds when accused work, comprised entirely of quotations from single video, was edited so “a reasonable observer who came across the [accused] video would quickly grasp its critical purpose”); *Sedgwick Claims Mgmt. Servs., Inc. v. Delsman*, 2009 WL 2157573, at \*4 (N.D. Cal. July 17, 2009), *aff’d*, 422 F. App’x 651, 652 (9th Cir. 2011) (dismissing complaint on fair use grounds when accused work recontextualized otherwise unaltered photos into “wanted” poster format); *Adjmi v. DLT Entm’t Ltd.*, 97 F. Supp. 3d 512, 531–32 (S.D.N.Y. 2015) (dismissing complaint on fair use grounds when parodic nature of use was immediately apparent without need for further discovery).

But—for the reasons discussed above—when the transformative meaning, message, or purpose of a use is not immediately obvious, the analysis cannot stop there. Courts must consider additional facts, including evidence

of the accused creator's intent in using the underlying work, and how the relevant audience for the accused work will perceive that work. *See Blanch v. Koons*, 467 F.3d 244, 251–52 (2d Cir. 2006) (relying on artist testimony to explain transformative nature of use); *Oracle Am., Inc. v. Google Inc.*, 2016 WL 1743129, at \*2 (N.D. Cal. May 2, 2016) (permitting expert testimony regarding transformative purpose of use); *Shady Records v. Source Enters.*, 2005 WL 14920, at \*19 (S.D.N.Y. Jan. 3, 2005) (holding that testimony of accused infringer regarding purpose of use created question of fact as to transformativeness, precluding summary judgment).

While evidence regarding the intent of the accused creator or the reactions of the intended audience for the accused work may not necessarily be dispositive of transformativeness, they are certainly relevant to it—particularly when transformativeness is reasonably disputable. In such circumstances, courts should be permitted to consider the totality of the circumstances to determine whether a particular use is transformative.

Indeed, as a practical matter courts already consider audience reactions in the fair use analysis, when they consider the relevant markets and whether the follow-on use would serve as a market substitute. For example, in a case involving a documentarian's use of a video clip of a hip-hop song made by players on the Chicago Bears, the court weighed the fourth factor in the defendant's favor:

In this case, the plaintiffs do not argue that '85: *The Greatest Team in Football History* affected the market for full recordings, whether they be audio or audiovisual, of the *Super Bowl Shuffle*.

Rightly so, because no one would purchase the right to view '85 as a substitute for purchasing the *Shuffle*. It is frankly inconceivable that hearing a clip of the song in the documentary would dissuade a listener from purchasing it if she was otherwise predisposed to do so.

*Red Label Music Publ'g, Inc. v. Chila Prods.*, 388 F. Supp. 3d 975, 986 (N.D. Ill. 2019). To come to this conclusion, the court had to make an assessment as to the nature and preferences of the audience for both works. *See also, e.g., Wright v. Warner Books, Inc.*, 953 F.2d 731, 739 (2d Cir. 1991) (affirming district court's finding of no reasonable likelihood of injury to alleged market where, inter alia, "sparing" use of original work was unlikely to supplant market for full work); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003) (concluding enlarged versions of thumbnail images would not be successful substitute for original images); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007) (same, and deeming theory that thumbnail images could be substitutes for reduced-size images overly hypothetical absent finding that anyone had used them this way); *Magnum Photos Int'l., Inc. v. Houk Gallery, Inc.*, 2018 WL 4538902, at \*4 (S.D.N.Y. Sept. 21, 2018) (finding thumbnail versions of images posted on a gallery's website were no substitute for the original works because, inter alia, "no reasonable buyer would consider the internet thumbnail images a significantly competing substitute").

Ironically, the Second Circuit's approach effectively accomplishes the opposite of its stated goal. Assuming that a court can assess transformativeness without giving due weight to the creator's intent and the reception of the



work necessarily requires the judge to ignore relevant evidence. That, in turn, requires the judge to substitute their own assessment, in violation of one of the core maxims of copyright law: that “persons trained only to the law” should not “constitute themselves final judges” of the worth and meaning of expressive works. *Bleistein v. Donaldson Lithographing*, 188 U.S. 239, 251–52 (1903).

#### **IV. The Court Should Take This Opportunity to Reassess the Factor Four Burden**

Courts have long understood that the four fair use factors must be considered together, in light of the purposes of copyright. *See, e.g., Campbell*, 510 U.S. at 578 (fair use factors must not “be treated in isolation” but “weighed together”). For example, the third factor—the “amount and substantiality of the portion used” can only be assessed in light of the user’s purpose. *Id.* at 586–87; *Oracle*, 141 S. Ct. at 1205. And crucially, where a work is transformative, any presumption of market substitution no longer applies. *Campbell*, 510 U.S. at 591.

As that lack of presumption indicates, that interrelationship can and should affect the burden of proof. Specifically, where fair use comes from a new meaning or message and/or serves a noncommercial purpose, the purposes of fair use, and copyright generally, are best served by recognizing that some relevant evidence is entirely under the copyright claimant’s control.

A fair use is, by definition, a lawful, noninfringing, use and, therefore, an affirmative right. *Lenz*, 815 F.3d at 1152–53 (9th Cir. 2016) (citing *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996) (Birch, J.)).

Because it is styled as an affirmative defense, however, courts have put the burden of proof on the defendant. With respect to factors one through three, this approach often makes practical sense as the secondary user is better or equally well-positioned to offer relevant evidence.

But even if a party seeking to rely on fair use bears the overall burden of proving that a use is fair, that does not mean that party should bear the burden of proving every aspect of every factor. *See Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1279 & n.34 (11th Cir. 2014) (holding that ultimate burden to prove fair use was on defendant, but factor four burden of production was on plaintiff); *cf. St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506–07 (1993) (explaining that burden of production with respect to specific aspects of a claim can be on one party while overall burden of proof remains on opposing party); *Dubner v. City and Cnty. of S.F.*, 266 F.3d 959, 965 (9th Cir. 2001) (same).

With respect to factor four, the copyright owner is far better positioned to understand and produce evidence of its licensing market than the defendant. Courts have recognized this type of information asymmetry as a reason to shift the burden of production. *See Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 255–56 (1981); *Dubner*, 266 F.3d at 965.

Moreover, given the copyright creep outlined in Section I, *supra*, many actual defendants as well as those targeted by DMCA notices are likely to lack the financial resources to hire experts to help them muster evidence that their conduct has not caused market harm. For those defendants, the price of defending their lawful speech will

be too high to contemplate, giving copyright owners an effective heckler’s veto.<sup>23</sup>

As nonprofits that provide legal services to individual creators and internet users, Amici have seen firsthand how the uncertainty and cost of mounting a fair use defense can dissuade follow-on creators from taking their chances in court. In addition to the resulting suppression of lawful speech, this dynamic has negative consequences for the development of fair use jurisprudence addressing the types of everyday fair uses discussed in this brief. That is, because relatively few individuals have the resources to litigate, courts do not have the opportunity to weigh in on many of the most common types of fair uses. As a result, the problem is to some extent self-perpetuating, in that it prevents the development of case law that could help to reduce litigants’ uncertainty.

The Second Circuit has correctly noted that “the more the copying is done to achieve a purpose that differs from the purpose of the original, the less likely it is that the copy will serve as a satisfactory substitute for the original.” *Authors Guild v. Google, Inc.*, 804 F.3d 202, 223 (2d Cir. 2015). In effect, this recognition puts a thumb on the scale for transformative uses. But it does not answer the more fundamental issue of evidentiary sources. It is procedurally unfair to put the burden on the accused creator to prove the absence of potential harm, especially given the plaintiff’s low initial burden—a

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23. See Ned Snow, *Proving Fair Use: Burden of Proof As Burden of Speech*, 31 *Cardozo L. Rev.* 1781 (2010) (discussing chilling effect of placing fair use burden on defendant); Haochen Sun, *Copyright Law As an Engine of Public Interest Protection*, 16 *Nw. J. Tech. & Intell. Prop.* 123, 162–64 (2019) (same).

simple showing of ownership and copying—compared to the multiple issues the accused creator must address.<sup>24</sup> *Cf. Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 200–02 (2014) (concluding fairness requires placing burden of proving infringement on patentee in declaratory action); *Burdine*, 450 U.S. at 255–56 (burden-shifting in discrimination cases gives plaintiff “full and fair opportunity to demonstrate pretext”); *Dubner*, 266 F.3d at 965 (burden-shifting in unlawful arrest cases avoids “forc[ing] plaintiffs to produce evidence that they cannot possibly acquire”).

Fair use is a distinctive defense that plays a constitutional role by mediating the tension between the First Amendment and the Copyright Clause. Given that role, and the potential chilling effect that improper copyright allegations and legal process can have for online speech, the Court should affirm that where a secondary use is at least minimally transformative and/or noncommercial, the plaintiff must provide evidence of market harm.

## CONCLUSION

For the foregoing reasons, Amici urge the Court to reverse. We also urge the Court to clarify that the rightsholder must show market harm where the use in question is at least minimally transformative and/or noncommercial.

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24. Amici recognize that in this case, the Plaintiffs may have failed to meet their burden of proof on substantial similarity as well.

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Respectfully submitted,

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