No. 21-869

IN THE

Supreme Court of the United States

THE ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC.

Petitioner,

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,

Respondents.

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

---

BRIEF OF *AMICUS CURIAE* THE MOTION PICTURE ASSOCIATION, INC. IN SUPPORT OF NEITHER PARTY

VIRGINIA GRACE DAVIS
MUNGER, TOLLES & OLSON LLP
560 Mission Street
27th Floor
San Francisco, CA 94105
grace.davisfisher@mto.com
(415) 512-4083

DONALD B. VERRILLI, JR.
Counsel of Record
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500 E
Washington, DC 20001
donald.verrilli@mto.com
(202) 220-1100

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

The Motion Picture Association, Inc. ("MPA") is a not-for-profit trade association founded in 1922.[1] The MPA serves as the voice and advocate of the film and television industry, advancing the business and art of storytelling, protecting the creative and artistic freedoms of storytellers, and bringing entertainment and inspiration to audiences worldwide.

The MPA's member companies are Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, Warner Bros. Entertainment Inc., and Netflix Studios, LLC. These entities and their affiliates are the leading producers and distributors of filmed entertainment in the United States through the theatrical and home entertainment market.

The MPA's members are owners and licensors of copyrighted works that rely upon correct applications of copyright law to protect their exclusive statutory rights of reproduction, distribution, adaptation, public performance, and public display. The exclusive statutory right to create and authorize derivative works in particular is critically important to the MPA. In addition to sequels and spinoffs, MPA members license and distribute myriad products based on characters and other content from the movies and shows they produce. They also invest millions of dollars in licenses to create derivative works based on

---

[1] Counsel for all parties have filed blanket consents to the filing of *amicus* briefs. In accordance with Rule 37.6, *Amicus* confirms that no party or counsel for any party authored this brief in whole or in part, and that no person other than *Amicus* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

copyrighted material owned by other entities. The creation, licensing, and acquisition of derivative works is a cornerstone of the entertainment industry and underscores the importance of the statutory adaptation right to the MPA.

At the same time, the MPA's members also have a substantial interest in the proper application of the fair use doctrine, which protects the creative processes and free speech interests of filmmakers and their distributors. They and their affiliates regularly—and successfully—invoke the defense of fair use. Accordingly, the MPA is uniquely positioned to provide the Court with a balanced, well-informed perspective on the proper contours of the fair use defense.

The MPA does not take a position on whether or to what extent Andy Warhol's use of Lynn Goldsmith's photograph of Prince was "transformative," or ultimately qualifies as fair use. Rather, the MPA is participating in this case to advance its strong interest in clarifying the meaning of "transformative use" for fair use purposes to ensure that an unbalanced view of fair use is not permitted to swallow copyright owners' exclusive derivative works right, and more broadly to restore coherence and predictability to the application of the fair use doctrine.

INTRODUCTION AND SUMMARY OF ARGUMENT

Copyright law aims to stimulate creative activity and advancement in the arts for the enrichment of the public. To that end, the Copyright Act reserves certain rights exclusively for copyright owners. 17 U.S.C. § 106. These include the rights of reproduction, adaptation, distribution, public performance, and public display. *Id.* As this Court has

explained, in securing these exclusive rights for creators "the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Eldred* v. *Ashcroft*, 537 U.S. 186, 219 (2003) (quoting *Harper & Row Publishers* v. *Nation Enterprises*, 471 U.S. 539, 558 (1985)).

Congress also codified an important limit on these rights in the fair use provision of the Copyright Act, exempting from liability certain uses of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching …, scholarship, or research." 17 U.S.C. § 107. "From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's [constitutional] purpose '[t]o promote the Progress of Science and useful Arts[.]'" *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. Const., art. I, § 8, cl. 8). The fair use doctrine "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Campbell*, 510 U.S. at 577 (quotation omitted). Fair use thus promotes First Amendment values by affording "considerable 'latitude'" for such uses as "'scholarship and comment,' and even for parody." *Eldred*, 537 U.S. at 220 (quoting *Harper & Row*, 471 U.S. at 560).

Andy Warhol's use of respondent Goldsmith's Prince photograph may or may not be the kind of commentary that qualifies as fair use under a proper application of the statutory criteria in the Copyright Act. But it cannot possibly be found to be fair use for the reasons advanced by petitioner. Petitioner urges

a sweeping expansion of fair use in which *any* use that adds a new "meaning or message" to a copyrighted work is deemed a "transformative use" of the work (Pet. Br. at 33, 35) and any transformative use is, in turn, presumptively a fair use (Pet. Br. at 40). That approach rests on a misreading of this Court's decision in *Campbell*; is irreconcilable with the text of the Copyright Act's fair use provision and the common-law principles it codified; and finds no footing in the values of the First Amendment. Adopting it would threaten the protection afforded all manner of copyrighted works, thereby eroding the incentives for creativity and new expression that the Copyright Act seeks to foster.

Petitioner's approach poses a particularly acute threat to copyright owners' exclusive right "to prepare derivative works based upon [a preexisting] copyrighted work," 17 U.S.C. § 106(2)—a matter of enormous consequence for the MPA. In many, if not most, instances, a derivative work will be "transformative" in the sense petitioner claims is presumptively fair use because it will add a new "meaning or message" to the original work. That is hardly surprising. In the Copyright Act Congress defined a derivative work as "a work based upon one or more preexisting works," in "any … form in which a work may be recast, *transformed*, or adapted" 17 U.S.C. § 101 (emphasis added). Indeed, licensed sequels, spinoffs, and similar derivative works would routinely qualify as "transformative uses," and thus presumptively fair uses, under petitioner's extraordinarily encompassing approach because such uses add a new meaning or message to the original. *See Kienitz* v. *Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (Easterbrook, J.) ("[A]sking exclusively whether something is 'transformative' … could

override 17 U.S.C. § 106(2), which protects derivative works. To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2).").[2]

Consider, for example, a hypothetical remake of the film *Casablanca* that is entirely the same as the original except that at the end Rick boards the flight out of the city with Ilsa and leaves Victor Laszlow behind to be apprehended by the Nazis. Such a work would certainly impart a "new meaning or message" to the original and thus be transformative under petitioner's approach. The revised ending would convert the film from a noble statement about sacrifice for a higher cause into a cynical parable about the inevitable triumph of self-interest and the folly of devotion to principle. No one would think, however, that this kind of appropriation of a copyrighted work would constitute fair use merely because it "transformed" the original in this sense. Yet such a work would easily qualify as fair use under petitioner's test.

Petitioner's approach produces such implausible results because it rests on a misconception of the scope and role of fair use that traces back to a misreading of *Campbell*. In that decision, this Court emphatically did not hold that any unlicensed use that adds a new message or meaning to a copyrighted work is a "transformative use" that is presumptively fair use. To the contrary, this Court used the term

---

[2] Petitioner's assertion that its sweeping expansion of fair use will not threaten copyright owners' derivative works rights because "[a]n adaptation of a novel into a movie … does *not* change the meaning or message of the original" and thus is "typically not considered fair use" (Pet. Br. at 52) is misguided. *See* pages 22–23 *infra*.

"transformative" to describe a narrower category of unlicensed uses: works that "provide social benefit, by *shedding light on an earlier work,* and, in the process, creating a new one," thus producing new works akin to the paradigmatic fair uses identified in Section 107's preamble. *Campbell*, 510 U.S. at 578–79 (emphasis added). The work at issue in *Campbell* was "transformative" in that sense because it was a parody and "[p]arody *needs* to mimic an original to make its point." *Id*. at 580–81 (emphasis added). By the same token, this Court stressed that a finding of transformative use is not outcome determinative. Rather, all four statutory factors—the purpose and character of the use; the nature of the original work; the amount taken; and the effect on the market for the original—must be "explored, and the results weighed together, in light of the purposes of copyright." *Id*. at 578.

Unfortunately, the misreading of *Campbell* that petitioner advances has gained considerable traction in the lower courts. As a result, the concept of "transformative use" has become unmoored from the statutory considerations that Congress set forth in Section 107 and from the common-law principles that provision codified. It is no exaggeration to say that the meaning of "transformative use" in the lower courts has become amorphous to the point of incoherence. It fails to produce principled, consistent results or to provide any useful guidance as to what secondary uses qualify as fair use—and thus imposes no real constraint on the power of courts to authorize unlicensed uses under the guise of fair use. *See* 4 Nimmer on Copyright § 13.05 (2022) ("[T]he transformative use standard has become all things to all people." (quotation omitted)); *see also* Kim J. Landsman, *Does Cariou v. Prince Represent the Apogee*

or Burn-Out of Transformativeness in Fair Use Jurisprudence? A Plea for a Neo-Traditional Approach, 24 Fordham Intell. Prop. Media & Ent. L.J. 321, 324 (2014) ("[T]ransformativeness has decayed into a conclusory label that substitutes for, rather than enhances, thoughtful analysis. As such, it does not make prediction of legal outcomes any easier than the statutorily based multi-factor balancing test it is supposed to be a part of, but has in practice often dominated or replaced.").

It is imperative that the "transformative use" inquiry be restored to the meaning this Court intended in *Campbell* in order to ensure that overbroad assertions of fair use do not threaten copyright owners' exclusive statutory right to control derivative uses of their works. More generally, this Court should reaffirm *Campbell*'s clear message that the "transformative use" inquiry is not outcome determinative as petitioner now claims, but is merely one component in a holistic analysis of all of the statutory factors prescribed by Congress. 510 U.S. at 578. If kept within proper bounds, the concept of "transformative use" can play a helpful, indeed important, role in the fair use inquiry. But loosed from those bounds, the "transformative use" inquiry threatens to upend the proper functioning of copyright law.

ARGUMENT

I. THE VAST EXPANSION OF FAIR USE PROPOSED BY PETITIONER FINDS NO SUPPORT IN THE COMMON LAW, THE TEXT OF THE 1976 ACT, OR THIS COURT'S PRECEDENTS

Neither the common law of fair use nor Congress's 1976 codification of fair use principles in

the Copyright Act make any mention of "transformative use," much less suggest that it should play an outcome determinative role in fair use cases. To the contrary, Justice Story's iconic 1841 statement of the common law of fair use, which guided courts for more than a century, directs that the fair use inquiry "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." *Folsom* v. *Marsh*, 9 F. Cas. 342, 348 (CCD Mass. 1841) (No. 4,901). And when Congress codified the fair use doctrine in the 1976 Copyright Act, it "meant § 107 'to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way' and intended that courts continue the common-law tradition of fair use adjudication." *Campbell*, 510 U.S. at 577 (quoting H.R. Rep. No. 94-1476, at 66 (1976) and S. Rep. No. 94-473, at 62 (1975)).

The concept of "transformative use" made its first appearance in an opinion of this Court in *Campbell*, a case about whether hip-hop group 2 Live Crew's parody of Roy Orbison's "Oh, Pretty Woman" qualified as a fair use. 510 U.S. at 571–72, 579. There, the Court explained that a "central purpose" of the first statutory fair use factor is to determine whether the new work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message," or instead "'supersede[s] the objects' of the original creation." *Id.* at 578–79 (quoting *Folsom*, 9 F. Cas. at 348). Drawing upon a law review article by Judge Leval, the Court used the term "transformative" as a shorthand to describe the kind of use whose purpose and character would weigh in favor of a finding of fair use. *Id.* at 579

(quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990) (hereinafter "Leval")).

The Court stressed, however, that "transformative use" should not become the be-all-and-end-all of the fair use analysis. That was so both because the assessment of a work's transformative quality is a matter of degree (not a categorical up-or-down judgment), and because Section 107 requires courts to determine fair use after *all four* statutorily identified factors are "explored, and the results weighed together, in light of the purposes of copyright." *Id*. at 578. The Court's disposition of the case is particularly instructive. After finding 2 Live Crew's parody to be a transformative use, the Court did *not* hold that it was a fair use. Instead, the Court remanded for a determination of fair use based on a consideration of *all* of the statutory factors. *Id.* at 589.

As Justice Kennedy's concurrence explained, the fact that 2 Live Crew's song *parodied* Roy Orbison's original was critical. *See id*. at 596 (Kennedy, J., concurring). Because parody must rely on "quotation of the original's most distinctive or memorable features" to accomplish its purpose, it is precisely the kind of "comment" on or "criticism" of a copyrighted work that Congress identified in the text of Section 107 as the type of work that may qualify as fair use. *Id.* at 579–81, 588. It was the addition of "something new, with a further purpose or different character" in this specific sense—"shedding light on an earlier work"—that was the *sine qua non* of "transformative use." *Id.* at 579. Justice Kennedy thus emphasized "the importance of keeping the definition of parody within proper limits" to avoid "accord[ing] fair use protection to profiteers who do no

more than add a few silly words to someone else's song or place the characters from a familiar work in novel or eccentric poses." *Id.* at 598–99.

Notwithstanding the care taken by this Court to circumscribe the role of "transformative use" in the fair use analysis, in the years since *Campbell* the "transformative use" inquiry has taken on a life of its own. Without rhyme or reason, many courts are finding any secondary use that "adds something new" to a copyrighted work to be transformative, irrespective of whether the use "shed[s] light on an earlier work, and, in the process, creat[es] a new one," *Id*. at 578–79, or otherwise shares the character of the paradigmatic examples of fair use Congress identified in Section 107. And courts have increasingly treated the question of "transformative use" as outcome determinative rather than merely a consideration to be weighed in conjunction with the other statutory factors prescribed in the Copyright Act. In both of these respects the analogical progression in the lower courts away from *Campbell*'s carefully bounded reasoning has become a veritable stampede.

To a striking degree, many lower courts have reduced *Campbell*'s understanding of "transformative use" to a simplistic inquiry into whether a secondary use adds something new—even for works far afield from the kind of parodic comment and criticism at issue in *Campbell* itself. *See* Landsman, 24 Fordham Intell. Prop. Media & Ent. L.J. at 365 ("Transformative uses other than parody need to justify their taking *at all* as well as the extent of the taking."). For example, in *Seltzer* v. *Green Day, Inc.*, the Ninth Circuit held that Green Day's use of an image in a video was transformative even though it "ma[de] few physical changes to" and "fail[ed] to

comment on the original" image, simply because the image had been used as "'raw material' in the construction" of the video. 725 F.3d 1170, 1176–77 (9th Cir. 2013). Similarly, in *Cariou* v. *Prince*, the Second Circuit held that works incorporating a photographer's portraits were transformative merely because they "incorporate[d] color, feature[d] distorted human and other forms and settings," and were larger than the original photographs they incorporated. 714 F.3d 694, 706 (2d Cir. 2013).

On the basis of rulings such as these, petitioner contends that virtually *any* unlicensed use of a copyrighted work is "transformative" so long as it adds something new to the original work it appropriates. Pet. Br. at 36. At the same time, other courts take a more measured approach to assessing transformative use, in accord with this Court's approach in *Campbell*. *See* pages 15–18 *infra* (discussing cases). Simply put, in the years since *Campbell*, "transformative use" has mutated from a valuable way of elucidating the first statutory fair use factor into a freestanding, amorphous concept untethered from both the text of Section 107 and the common-law principles that provision codified. It "has become all things to all people," and fails to generate consistent, predictable results. *See* 4 Nimmer on Copyright § 13.05 (2022); *see also* Landsman, 24 Fordham Intell. Prop. Media & Ent. L.J. at 324.

Of equal concern, the "transformative use" inquiry has become outcome determinative in most fair use cases. One recent study of fair use opinions issued by the courts of appeals from 1991 to 2017 found that of the 152 opinions in which the courts found the secondary uses to be transformative, nearly 91% of those opinions also held that the uses were fair.

Clark D. Asay et. al., *Is Transformative Use Eating the World?*, 61 B.C. L. Rev. 905, 941 (2020). The rates in the Second and Ninth Circuits—which handle most U.S. copyright cases—were even higher. *Id.* Five circuits had rates of 100%. *Id.* As petitioner itself stated, "in practice, the transformativeness inquiry is virtually always dispositive of the fair use question." Pet. for Cert. at 5.

Although petitioner casts the current state of affairs in a glowing light and asks this Court to ratify and even expand it, the reality is that it distorts longstanding fair use principles and calls out for correction by this Court. The "transformative use" inquiry should therefore be restored to the role that this Court prescribed in *Campbell* and that is consistent with the express language of the Copyright Act. In particular, this Court should clarify that a use counts as transformative when it "provide[s] social benefit, by shedding light on an earlier work, and, in the process, creating a new one" consistent with the statutorily-identified examples of fair use—and not (as petitioner would have it) any time an unlicensed use adds some new creative element to an existing work. *Campbell*, 510 U.S. at 579. That clarification is essential to ensure that fair use does not swallow copyright owners' exclusive right to derivative works—which would, under petitioners' all-encompassing definition of "transformative use," be transformative of the original works from which they are derived—or result in a radical narrowing of the accepted understanding of what qualifies as a derivative work. *See* pages 22–23 *infra* (addressing petitioner's misconceived understanding of the scope of the derivative works right). And more generally, this Court should reaffirm *Campbell*'s holding that the "transformative use" inquiry is not outcome

determinative, but is merely one component in a holistic analysis of all of the statutory factors prescribed by Congress. *Id*. at 578.

II. THE COURT SHOULD RESTORE THE CONCEPT OF TRANSFORMATIVE USE TO THE MEANING INTENDED IN *CAMPBELL*

If the concept of transformative use is to continue to play a valuable role in assessing the purpose and character of an unlicensed use of a copyrighted work under Section 107, this Court must restore it to the meaning set forth in *Campbell* and provide guidance as to what kinds of uses qualify as transformative and how to make such assessments.

A. Transformative Use Is A Matter Of Degree

The Court should first reaffirm a key point in *Campbell*: the assessment of a work's transformative quality is a matter of degree that influences the judgment about a work's purpose and character, not a binary up-or-down vote that drives the result in every fair use case. That a use can be said to be transformative to some extent—in that it adds something new to an existing copyrighted work—does not in itself justify the conclusion that the purpose and character of the use favor a finding of fair use. Rather, "the more transformative the new work, the less will be the significance of other factors … that may weigh against a finding of fair use." *Id.* at 579. The inquiry should thus focus on the *extent* to which an unlicensed use is "productive and … employ[s] the quoted matter in a different manner or for a different purpose from the original" and does not supersede the objects of the original work. Leval, 103 Harv. L. Rev. at 1111. And the significance of a work's "transformative" purpose

and character should therefore vary depending on the circumstances of each case and the significance of the other statutory fair use factors.

B. Transformative Uses Are Limited To Those That Shed Light On Existing Works And, In The Process, Create Something New

Even more to the point, this Court should clarify that transformative uses are not all works that include something new, no matter how creative the addition may be, but rather are those that "provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one," *Campbell*, 510 U.S. at 578–79, in the nature of the examples of fair use identified in Section 107's preamble: "criticism, comment, news reporting, teaching …, scholarship, or research." Indeed, this Court looked to that statutory text for guidance in *Campbell*, holding that 2 Live Crew's parody had a transformative purpose and character precisely because it "comment[ed] on and criticiz[ed] the original work." *Id*. at 581–82.[3]

What the uses identified in Section 107 have in common is that they all to some degree *require* secondary users to make use of or direct their "speech" at the underlying copyrighted work to make their point. *See* § 107; *Campbell*, 510 U.S. at 580–81 (2 Live Crew's parody was transformative because "[p]arody

[3] Of course, mere relation to one or more of the examples in § 107 alone is not sufficient for a use to qualify as fair. Thus, while parody, like other forms of criticism, "has an obvious claim to transformative value," if the would-be "commentary has no critical bearing on the substance or style of the original composition, … the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish)[.]" *Campbell*, 510 U.S. at 579–80.

needs to mimic an original to make its point"); *Harper & Row*, 471 U.S. at 557–58 (no fair use where the infringer failed to show "actual necessity").

To be sure, whether a secondary use imparts a new "meaning or message" to the underlying work is relevant to whether it qualifies as transformative. In this regard, the Second Circuit placed too much emphasis on the visual similarities between Andy Warhol's Prince Series and Lynn Goldsmith's Prince photo, and not enough emphasis on the meaning or message of Warhol's works. *See Andy Warhol Found. for Visual Arts, Inc.* v. *Goldsmith*, 11 F.4th 26, 42–43 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022). But it is equally important to assess whether a secondary work's "meaning or message" has a relationship to the copyrighted work of the kind identified in the preamble to Section 107. While that relationship may be subtle, it must be present for a secondary use to qualify as a transformative use. *See Campbell*, 510 U.S. at 579–80.

The decisions of courts of appeals that have applied the fair use analysis in accord with Congress's instructions are illustrative. For example, the Eleventh Circuit held in *Suntrust Bank* v. *Houghton Mifflin Co.* that a parody of the novel *Gone With the Wind* was transformative because it was "principally and purposefully a critical statement that [sought] to rebut and destroy the perspective, judgments, and mythology of" the original work. 268 F.3d 1257, 1270 (11th Cir. 2001). In service of that goal, the parody "flip[ped] [the original's] traditional race roles, portray[ed] powerful whites as stupid or feckless, and generally set[] out to demystify [*Gone With the Wind*] and strip the romanticism from [the author's] specific account of this period of our history." *Id.* The

Eleventh Circuit recognized that "[i]t is hard to imagine how [the secondary user] could have specifically criticized [*Gone With the Wind*] without depending heavily upon copyrighted elements of that book." *Id.* at 1271.

Of course, commentary and criticism are not the only acceptable purposes for which a secondary use may incorporate an original work. *See* § 107 (listing other exemplar fair uses). For example, in *Bouchat* v. *Baltimore Ravens Ltd. Partnership*, the Fourth Circuit held that the use of the Baltimore Ravens' historical "Flying B" logo in a series of displays chronicling the Ravens' history was transformative because the displays were used as "part of the historical record to tell stories of past drafts, major events in Ravens history, and player careers." 737 F.3d 932, 940 (4th Cir. 2013), *as amended* (Jan. 14, 2014). As with the parody of *Gone With the Wind* in *Suntrust Bank*, it is difficult to see how the Ravens could have told the story of their history without using their historical logo.

In the same vein, courts that have applied the fair use factors correctly have recognized that a "transformative use" is one that sheds new light on the original work in the way that comment, criticism, news reporting, scholarship and research do. *Campbell*, 510 U.S. at 578–79; *see, e.g.*, *Sketchworks Indus. Strength Comedy, Inc.* v. *Jacobs*, No. 19-CV-7470, 2022 WL 1501024, at *5 (S.D.N.Y. May 12, 2022) (a parody of the musical *Grease* was transformative because it "relie[d] on allusion to *Grease* to convey its central message about *Grease*'s misogynistic story line"); *Boesen* v. *United Sports Publications, Ltd.*, No. 20-CV-1552, 2020 WL 6393010, at *4 (E.D.N.Y. Nov. 2, 2020) (an article that "embedded" a tennis

professional's Instagram post announcing her retirement was transformative because "the fact that [she] had disseminated the Post [] was the very thing the Article was reporting on" (quotation omitted)); *Solid Oak Sketches, LLC* v. *2K Games, Inc.*, 449 F. Supp. 3d 333, 347 (S.D.N.Y. 2020) (depictions of NBA basketball players' tattoos in NBA 2K video games were transformative because the defendants "reproduced the Tattoos in the video game in order to most accurately depict the Players"); *Lennon* v. *Premise Media Corp.*, 556 F. Supp. 2d 310, 323–24 (S.D.N.Y. 2008) (a film that paired an excerpt of John Lennon's song "Imagine" with "images that contrast[ed] with the song's utopian expression" was transformative because it "criticize[d] what the filmmakers [saw] as the naïveté of John Lennon's views"); *Abilene Music, Inc.* v. *Sony Music Ent., Inc.*, 320 F. Supp. 2d 84, 91 (S.D.N.Y. 2003) (a hip-hop song that incorporated three lines of "What a Wonderful World" was transformative because it relied on the original work to "set[] up a contrast between the assertedly delusional innocence of mainstream culture and the purportedly more realistic viewpoint of the rapper").

In contrast, secondary uses that do *not* "shed[] light on an earlier work, and, in the process, creat[e] a new one," are not properly understood as transformative in the sense that *Campbell* used that term. 510 U.S. at 578–79. For example, the Ninth Circuit held in *Dr. Seuss Enterprises, L.P.* v. *ComicMix LLC* that a "mash-up" of Dr. Seuss's classic book, "Oh The Places You'll Go!" featuring *Star Trek* characters was not transformative despite the addition of "extensive new content" because it "merely repackaged" the original work. 983 F.3d 443, 453 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2803 (2021). The

Ninth Circuit put it well when it stated that "the 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 453–54. The Second Circuit similarly recognized in *TCA Television Corp.* v. *McCollum* that the use of a comedic routine in a theatrical production was not transformative because the purpose of the defendants' use was "identically comedic to that of the original authors"—and "there is nothing transformative about using an original work in the manner it was made to be used." 839 F.3d 168, 182–83 (2d Cir. 2016) (quotation omitted).

Importantly, a change in medium alone is *not* transformative for purposes of the fair use inquiry, even though it typically involves the addition of numerous creative elements. As explained below, changes in medium—such as an adaptation of a novel into a play, a play into a film, or a film into a video game—may add new creative content, but they are paradigmatic derivative works subject to the copyright holders' exclusive control. *See* §§ 101, 106(2).

III. CLARIFYING THE DEFINITION OF TRANSFORMATIVENESS IS NECESSARY TO PROTECT THE DERIVATIVE WORKS RIGHT ENSHRINED IN THE COPYRIGHT ACT

It is particularly important that this Court clarify the proper application of the fair use doctrine to ensure that it does not overwhelm copyright owners' statutorily conferred exclusive right to "prepare derivative works based upon the copyrighted work." § 106(2). The derivative works right exists to encourage copyright owners to create (or authorize others to create) new, innovative, and socially valuable works based on prior copyrighted works. And while

Congress did not include the word "transform" anywhere within the Copyright Act's fair use provision, § 107, it *did* expressly include that term within the Act's definition of a derivative work. § 101 (a "derivative work" is "a work based upon one or more preexisting works," in "any … form in which a work may be recast, *transformed*, or adapted" (emphasis added)).

The question of where protected derivative uses end and transformative uses begin will necessarily be case-specific. The MPA recognizes that the concept of transformative use, when properly defined and applied, protects and enhances the creative processes and free speech interests of filmmakers and their distributors. *See, e.g.*, *Brownmark Films, LLC* v. *Comedy Partners*, 682 F.3d 687 (7th Cir. 2012) (*South Park*'s parody of a well-known internet video was transformative); *Leibovitz* v. *Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) (parodic replication of a famous photograph in a film advertisement was transformative); *Faulkner Literary Rights, LLC* v. *Sony Pictures Classics, Inc.*, 953 F. Supp. 2d 701, 708 (N.D. Miss. 2013) (quotation of Faulkner in a film where "[t]he speaker, time, place, and purpose of the quote in the[] two works [were] diametrically dissimilar" was transformative).

But the tension—if not outright contradiction—between Congress's decision to vest copyright owners with exclusive control over derivative works and the sweeping, easy-to-satisfy "transformative use" approach advocated by petitioner is self-evident. As discussed, petitioner's view is that assessing whether a work is "transformative" comes down to a simple decision about whether the work adds a new meaning or message to the original. Pet. Br. at 36; *id*. at 40

(asserting that *Campbell*'s transformative use test "creates a strong presumption that works conveying new meanings or messages will not be suppressed by law"). By definition, however, most derivative works would qualify as "transformative uses" under petitioner's test. A filmmaker who adapts a dark murder mystery novel into a film with largely the same plot and characters, but turns it into a lighthearted romantic comedy, is almost certainly not making fair use of the novel, even though the latter "change[s] the meaning or message of the original." *See* Pet. Br. at 52. A secondary user must show something more to justify the taking: a *need* to draw from the original work to accomplish the secondary use's purpose. *E.g.*, *Suntrust Bank*, 268 F.3d at 1270–71 ("Where [the secondary user] refers directly to [the original work's] plot and characters, she does so in service of her general attack on [the original] … . It is hard to imagine how [she] could have specifically criticized [the original] without depending heavily upon copyrighted elements of that book."). Petitioner's overbroad reading of "transformative use" would endanger the derivative works right enshrined in the Copyright Act—to the great harm of the motion picture industry and others that rely on it.

Motion pictures are often derivative works based on preexisting works, i.e., a screenplay, which in turn may be based on a book, treatment, or story. *See* § 101 (listing a "motion picture version" as an example of a derivative work). Licensed sequels, remakes, spinoffs, adaptations, and similar derivative works—all of which fall within a copyright owner's exclusive § 106 rights—are a bedrock of the motion picture and television businesses. In fact, of the ten films with the highest all-time domestic box office revenues, eight were sequels, adaptations based on fictional

characters from other media, or both.[4] A significant percentage of the entertainment industry economy is based on derivative works like these films—not to mention other adaptations in video games, on Broadway, in theme parks, and in countless other contexts.

Instances of licensed derivative uses abound in the entertainment world. For example, the *Star Wars* films have generated adaptations in the form of novels, comic books, television series, toys, board games, and more. Similarly, J.K. Rowling's *Harry Potter* novels have been adapted into a highly successful movie franchise that has in turn generated spinoff films, video games, Halloween costumes, musical recordings, a Broadway play, and theme park attractions.

Such sequels, adaptations, and other derivative works by their very nature differ from the original, sometimes greatly, and often "transform" the original works by adding "something new" that changes the perception of the original work or gives a "new meaning or message" to it. 1 Nimmer on Copyright § 3.03 (2022) (derivative works include those injecting "additional matter ... in a prior work" or "otherwise transforming a prior work"). But if this were enough to make a secondary use transformative, anyone could freely exploit protected material for profit. Such a

---

[4] Those films are: *Avengers: Endgame*, *Star Wars: The Force Awakens*, *Avengers: Infinity War*, *Spider-Man: No Way Home*, *Jurassic World*, *The Lion King* (live-action remake), *The Avengers*, and *Furious 7*. *See* Erik Childress, *The 50 Highest-Grossing Movies of All Time: Your Top Box Office Earners Ever Worldwide*, Rotten Tomatoes (Feb. 24, 2022), https://editorial.rottentomatoes.com/article/highest-grossing-movies-all-time/ (last visited June 15, 2022).

regime would deprive MPA members of the licensing revenues to which they are entitled and, even more fundamentally, would jeopardize their exclusive rights to decide what derivative uses to allow in the first place. 17 U.S.C. § 106(2).

Petitioner insists that there is no need to worry about such untoward consequences because "[a]n adaptation of a novel into a movie is typically not considered fair use precisely because it does *not* change the meaning or message of the original." Pet. Br. at 52. That contention is misconceived. In most instances a derivative work *will* alter the meaning or message of the original work. Consider two paradigmatic categories of derivative uses—sequels and spinoffs. Such works by definition add a new meaning or message to the original because they extend the story of the original into the future. Characters evolve, face new challenges, and overcome new obstacles. And the tone may change markedly from one installment to the next, as critics noted when reviewing *The Empire Strikes Back*, the follow-on to the original *Star Wars* movie.[5] Similarly, the 2019 film *The Joker*—a spinoff of the *Batman* franchise—transformed the titular villain from a campy caricature into a dark, brooding figure plagued with life-altering mental health issues, a portrait that itself was a commentary on the plight of those who experience mental illness. Under the test proposed by petitioner, *The Joker* is undeniably transformative—yet it is also plainly a derivative work. Petitioner's blithe assurance that its approach to fair use

[5] *E.g.*, Joy Gould Boyum, *The Empire Strikes Back: A Dazzling Sequel That Loses Charm Of the Original*, Wall St. Journal, May 27, 1980 ("the tone of the movie has changed [from the original], having become darker, more ominous, less frankly silly").

harmonizes with authors' exclusive derivative rights is thus wholly unpersuasive.

Petitioner's insistence that the First Amendment's free speech guarantee also requires its sweeping expansion of fair use (Pet. Br. at 42–43) is similarly misconceived. Copyright protection itself is an "engine of free expression," as this Court has recognized many times. *Eldred*, 537 U.S. at 219 (quoting *Harper & Row*, 471 U.S. at 558). Moreover, "underprotection of copyright disserves the goals of copyright just as much as overprotection, by reducing the financial incentive to create." *Campbell*, 510 U.S. at 599 (Kennedy, J., concurring).

Copyright's incentive structure, of course, does not confer a monopoly on ideas—it grants exclusive rights only in the particular form in which an idea is expressed. Petitioner's purported concern with stifling free expression is thus misplaced. Typically, a secondary author will have available many ways to express the author's idea without appropriating another person's copyrighted expression. That is why, for example, there is no First Amendment problem with requiring a film producer to license the rights to make a film sequel or to adapt a novel to the screen. *See Eldred*, 537 U.S. at 219 (copyright's "idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression" (quotation omitted)). Fair use comes into play in those situations—like criticism, commentary, parody and scholarship—where a secondary author *must* make use of a copyrighted work to express that author's ideas. There is thus no reason to credit petitioner's argument that the First Amendment compels adoption

of its sweeping reconceptualization of the law of fair use.

IV. THIS COURT SHOULD ALSO CLARIFY THAT TRANSFORMATIVE USE IS NOT OUTCOME DETERMINATIVE, AND THAT FAIR USE REQUIRES A HOLISTIC INQUIRY WITH A FOCUS ON WHETHER AN UNLICENSED USE SUPERSEDES THE MARKET FOR THE ORIGINAL USE

This Court should also reaffirm the critical point made in *Campbell* that "transformative use" is a means of assessing the first of Section 107's four statutory factors—the purpose and character of the use—and not a substitute for the thoroughgoing analysis of *all* of those factors. Petitioner's contention that any transformative use is presumptively fair, Pet. Br. at 40, flies in the face of the textual commands of the statute, which directs courts to assess the nature of the original work, the amount and substantiality of what is taken from the original, and the effect of the taking on the market for the original work—as well as the purpose and character of the unlicensed use. An approach that reduces the inquiry to a simple matter of finding a new or different message in the unlicensed work would be unworthy of the name "fair use."

A. This Court's Decision In *Google* v. *Oracle* Illustrates The Flexible Nature Of The Fair Use Inquiry And Was Explicitly Limited To The "Unique" Context Of Functional Computer Code

The contours of the fair use analysis will, of course, vary based on the circumstances of each case, and particularly on the nature of the allegedly infringing and the allegedly infringed works. *See*

Google LLC v. *Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021) (the fair use doctrine "is flexible," and "its application may well vary depending upon context"). Thus, the first fair use factor played a central role in determining whether publishing excerpts from a soon-to-be released memoir, *see Harper & Row*, 471 U.S. at 564, and parodying a well-known song, *see Campbell*, 510 U.S. at 572, qualified as fair use.

In *Google* v. *Oracle*, by contrast, it was not the purpose and character of the unlicensed use that loomed large, but the second statutory fair use factor: the "nature of the copyrighted work." 141 S. Ct. at 1201. Focusing on that factor, the Court adapted the fair use analysis to "the functional context of computer programs," which are a "different kind of copyrighted work." *Id.* at 1202–03, 1209. The Court took the unusual step of focusing at the outset on the second factor, highlighting both the unusual nature of that case and the importance of weighing all of the fair use factors together. *Id.* at 1202–03.

When it turned to examining whether the purpose and character of Google's use was transformative, this Court emphasized that the computer code's functional nature made it "difficult to apply traditional copyright concepts in that technological world." *Id.* at 1208. And given the peculiarities of the software industry, the Court concluded that looking as it usually would to the broad purpose of Google's copying would "severely limit the scope of fair use in the functional context of computer programs." *Id.* at 1203. The Court thus "examine[d] the copying's more specifically described 'purpose[s]' and 'character,'" and noted that such copying was both "common in the [computer programming] industry" and "necessary" for that industry to work as intended.

Id. at 1203–04. The Court was, however, careful to reiterate that its approach was limited to the context of functional computer code and did not affect "traditional copyright concepts" or "overturn or modify [its] earlier cases involving fair use." *Id.* at 1208.

The Court also relied heavily on the fourth fair use factor—market effects—to determine that Google's copying was fair. *Id.* at 1206–08. But the Court again underscored that its analysis was limited to the distinctive setting of functional computer code. *Id.* at 1206. Indeed, the Court went so far as to recognize that its unique analysis might not always be relevant "even in the world of computer programs." *Id.*

B. The Fair Use Inquiry Requires A Holistic Analysis Of All Four Fair Use Factors

More broadly, this Court's approach in *Google* underscored that *all* four statutory factors must bear upon the fair use inquiry, and that the interplay among these factors should determine the result in a fair use case. Petitioner's proposed approach is irreconcilable with the Court's approach in *Google*.

As *Google* illustrated, the "nature of the copyrighted work"—including the industry and context in which the work exists—will often play a critical role in the fair use determination. § 107(2); *Google*, 141 S. Ct. at 1201–02. This factor is especially important for derivative works, as whether a secondary use falls within the derivative works right largely depends on the nature of the original. The interplay between this factor and the fourth factor—market effect—is also critical in that it helps define the potential market for derivative uses. *See* § 107(4). For example, a character from a motion picture may present an opportunity to license derivative works

ranging from plush toys to digital non-fungible tokens ("NFTs") featuring images of that character, while a song from the same motion picture might more readily lend itself to the creation of derivative works in the form of remixes.

The third fair use factor requires courts to pay close attention to the "amount and substantiality of the portion used in relation to the copyrighted work as a whole." § 107(3). It, too, illustrates the interplay among the fair use factors by recognizing that secondary uses that copy more, or more important components, of the original work are less likely to be transformative. *Campbell*, 510 U.S. at 587 ("[W]hether a substantial portion of the infringing work was copied verbatim from the copyrighted work … may reveal a dearth of transformative character or purpose under the first factor[.]" (quotation omitted)). As a result, when a substantial portion of the original work is used, the overall fair use inquiry requires a correspondingly high degree of transformativeness to offset the third factor's copyright-owner leaning effect. This factor bears on the fourth fair use factor as well: the greater the extent of the copying under the third factor, the "greater likelihood of market harm under the fourth." *Id.*

The fourth fair use factor, in turn, looks to "the effect of the use upon the potential market for or value of the copyrighted work." § 107(4). This includes the impact a defendant's uses could have on all of the plaintiff's "traditional, reasonable, or likely to be developed markets." *Am. Geophysical Union* v. *Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994). The fourth factor also evinces a particular concern for derivative work rights. Recognizing that "the licensing of derivatives

is an important economic incentive to the creation of originals," *Campbell*, 510 U.S. at 593, this Court has unambiguously directed lower courts evaluating claims of fair use to "take account not only of harm to the original but also of harm to the market for derivative works." *Id.* at 590 (quotation omitted).

This Court in *Campbell* expressed particular concern regarding secondary uses that would serve as "market replacement[s]" for the original works they copied. *Id.* at 591. In so doing, the Court recognized that when a secondary use "amounts to mere duplication of the entirety of an original," it clearly serves as such a replacement. *Id.* But when a secondary use is transformative, "market substitution is at least less certain, and market harm may not be so readily inferred." *Id.* But the *Campbell* Court never held—or even suggested—that a finding of transformative use alone obviates any need to consider market effects. Quite the contrary: even after holding that 2 Live Crew's parody of "Oh, Pretty Woman" was transformative, the Court specifically identified the risk of adverse market effects and remanded so the court of appeals could assess the evidence of market harm. *Id.* at 590–94.

In sum, petitioner's core argument that any unlicensed use that adds a new meaning or message to the original is a "transformative use" that is presumptively a fair use is impossible to reconcile with this Court's analysis in cases like *Campbell*, *Google*, and *Harper & Row*—an analysis that respects Congress's directives in the text of the Copyright Act and maintains an appropriate balance between copyright's incentives for the creation of expressive works and the free-expression safety valve fair use provides for works such as comment, criticism, parody

and scholarship that must draw upon original works to make their points. "Transformative use" has a valuable role to play in the fair use analysis. But that role is as a consideration in the overall weighing of the statutory factors, not as a substitute for them.

CONCLUSION

Amicus respectfully requests that the Court clarify the meaning and application of "transformative use" for purposes of the fair use doctrine to ensure a balanced, flexible standard that protects secondary users' ability to make fair use of copyrighted material while affirming the primacy of copyright holders' derivative works right.

Respectfully submitted,

VIRGINIA GRACE DAVIS
MUNGER, TOLLES & OLSON LLP
560 Mission Street
27th Floor
San Francisco, CA 94105
grace.davisfisher@mto.com
(415) 512-4083

DONALD B. VERRILLI, JR.
Counsel of Record
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500 E
Washington, DC 20001
donald.verrilli@mto.com
(202) 220-1100

Counsel for Amicus Curiae