No. 21-869

IN THE

Supreme Court of the United States

ANDY WARHOL FOUNDATION
FOR THE VISUAL ARTS, INC.,

Petitioner,

—v.—

LYNN GOLDSMITH AND LYNN GOLDSMITH LTD.,

Respondent.

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

BRIEF OF *AMICUS CURIAE* AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE

The American Intellectual Property Law Association (AIPLA) is a national bar association representing the interests of approximately 8,500 members engaged in private and corporate practice, government service, and academia. AIPLA's members represent a diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property.[1] AIPLA's mission includes providing courts with objective analyses to promote an intellectual property system that stimulates and rewards invention, creativity, and investment while accommodating the public's interest in healthy competition, reasonable costs, and basic fairness. AIPLA has no stake in any of the parties to this litigation or in the result of the case. AIPLA's only interest is in seeking correct and consistent interpretation of the law as it relates to intellectual property issues.[2]

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[1] Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the *amicus curiae*, its members, or its counsel, made a monetary contribution intended to fund its preparation or submission.

[2] Pursuant to Rule 37.3(a), AIPLA has obtained the consent of the parties to file this amicus brief by emails dated April 26, 2022, and based on blanket consent letters filed by Petitioner and Respondent, both on May 2, 2022.

SUMMARY OF ARGUMENT

In many respects, the fair use doctrine delineates the outer bounds of a copyright owner's exclusive rights. This case implicates several aspects of the fair use doctrine warranting this Court's close consideration.

First, this doctrine, by its very nature, must remain flexible and adaptable to the facts at issue in each specific case; at least all four enumerated statutory fair use factors should be weighed and no one factor (or subfactor) should, as a rule, be prioritized over all other factors found in 17 U.S.C. § 107. Part I, *infra*. Although transformativeness can sometimes play an important role in the analysis, this Court should confirm that it is not the *sine qua non* of fair use in every case. Part I.A., *infra*. The fair use doctrine, by way of transformativeness, should also not encroach upon the exclusive statutory right of copyright owners to create derivative works. This Court has yet to meaningfully weigh in on the interplay between transformativeness and the derivative works right and should be mindful of the potential overlap in its ultimate decision. Part I.B., *infra*.

Second, the Court should renounce wholly subjective determinations as to a work's purpose and meaning in favor of expanding upon and clarifying its previously articulated and more objective "reasonable perception" standard. A test that focuses the inquiry on the views of a "reasonable perceiver" familiar with the underlying work will mitigate against the impact of self-interested testimony and judicial preferences

and should yield more predictable outcomes. Part II, *infra*.

Third, and finally, the Court should expressly reject a celebrity-plagiarist exception to copyright infringement; fair use should be applied equally to all and should not turn on whether an artist or their style is famous. Part III, *infra*.

BACKGROUND

The purpose of copyright law protection is "[t]o promote the Progress of Science and useful Arts." U.S. CONST. art. I, § 8, cl. 8. Copyright law incentivizes the creation of original works of authorship by conferring on authors a bundle of exclusive rights: the rights of reproduction, distribution, public performance, and the right to create derivative works. 17 U.S.C. § 106. To this same end, these rights are bestowed only for a finite duration. 17 U.S.C. § 302. Equally important, copyright law balances the exclusive rights of authors against the rights of the public to make fair use of proprietary works. 17 U.S.C. § 107. This Court has recognized that such fair use is "necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts'" precisely because "[e]very book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436) (Story, J.)).

The parties here dispute whether certain works by the late artist Andy Warhol constitute unauthorized derivative works that infringe an

exclusive right of photographer Lynn Goldsmith, or whether the affirmative defense[3] of fair use applies.

The derivative work right and the fair use defense arguably share an origin story in the 1841 case of *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901). Justice (then Judge) Story's opinion in *Folsom* is credited with providing the framework for our present day understanding of fair use. At the time, "fair and bona fide" abridgements and translations were generally considered non-infringing. *See id.* at 345. Nevertheless, he grappled with an unauthorized abridgement of a George Washington biography. He lamented these more difficult types of copyright cases where the "question of piracy . . . depend[s] upon a nice balance of the comparative use made in one of the materials of the other." *Id.* at 344. He concluded that "we must often, in deciding questions of this sort, 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." *Id.* at 348. "Thus expressed, fair use remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act, in which Justice Story's summary is discernible." *Campbell*, 510 U.S. at 576.

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[3] Though not all agree with the characterization, this Court treats fair use as an affirmative defense to copyright infringement. *See Campbell*, 510 U.S. at 590 & n.20 (1994) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985)). The issue, therefore, is not properly framed as whether the accused works are unauthorized derivative works or fair uses, but rather as whether these derivative works qualify as fair uses.

When the fair use doctrine was finally codified, rather than simply reduce the common-law framework to bright-line mandates, Congress deliberately and expressly preserved the adaptability of the common-law approach. S. REP. NO. 94-473, at 62 (1975) ("[T]he endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. . . . Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."); H.R. REP. NO. 94-1476, at 66 (1976) (same).[4] 17 U.S.C. § 107 provides in relevant part:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a

[4] Congressman Railsback described the 1976 Act as a "compromise of compromises," 122 CONG. REC. 31982 (1976), reflecting the influence of a variety of stakeholders with divergent interests in shaping the legislation. "The wording of the fair use provision, and the language of the committee reports accompanying it, emerged from a hard fought compromise involving protracted, down-to-the-wire negotiations among representatives of authors, composers, publishers, music publishers, and educational institutions." Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 869 (1987).

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

By design, therefore, our fair use doctrine remains flexible and adaptable to the diverse array of circumstances it must address. The four factors "provide some guage [sic] for balancing the equities," H.R. REP. NO. 94-1476, at 65, and "permit[] 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." *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1196 (2021) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

In finding that the abridgement at issue infringed in *Folsom v. Marsh*, Justice Story also set in motion an expansion of the rights afforded to authors beyond mere reproduction. These rights were statutorily expanded first in 1856 when authors received the exclusive right to adapt their own works for the stage. Act of August 18, 1856, ch. 169, 11 Stat. 138–39. In 1870, authors were afforded, *inter alia*, the exclusive right to complete their works and to translate them. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 212.

The 1976 Act introduced our current umbrella concept of a "derivative work" and defined that term as: "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, ***transformed***, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U.S.C. § 101 (emphasis added).

The 1976 Act's definition of derivative work employs the term "transformed"—language notably absent from either Justice Story's articulation of fair use or § 107. The concept of "transformativeness" has nevertheless become central to the fair use analysis since this Court's decision in *Campbell*, where it embraced Judge Pierre Leval's approach to the first factor articulated in his seminal article, Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

Judge Leval posited that the first factor "turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original." *Id.* at 1111. He continued: "[a] quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test," but if "the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is

the very type of activity that the fair use doctrine intends to protect for the enrichment of society." *Id.* This framework has informed fair use analysis for nearly three decades.

As the Second Circuit observed in this case, this common terminology creates an "inherent tension in the Copyright Act." Pet. App. 17a. The right to "transform" an original work into a new one belongs solely to the copyright owner pursuant to 17 U.S.C. § 106(2); but if a transformation is "transformative" the owner's exclusivity may be extinguished. The Court's decision here can shed light on this paradox, but it should do so in a manner maintaining the essential adaptability of the fair use analysis and preserving a true balance between the exclusive rights of authors and the rights of the public to make fair use of copyrighted expression. The Court should, further, not permit unnecessary subjectivity into the analysis or create different standards for notorious works and styles.

ARGUMENT

I. NO ONE FACTOR, OR ASPECT THEREOF, SHOULD DOMINATE FAIR USE ANALYSIS

This Court has repeatedly recognized that proper analysis of fair use requires consideration of at least all four factors set forth in Section 107. "[T]he concept is flexible, . . . [and] courts must apply it in light of the sometimes conflicting aims of copyright law, and . . . its application may well vary depending upon context." *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021).

In *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the Court made clear that "[t]he task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." *Id.* at 577. The four statutory factors may not "be treated in isolation, one from another," but rather "[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright." *Id.* at 578; *see also id.* at 584 (noting the Court had previously "emphasized the need for a 'sensitive balancing of interests'" (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984))).

This is because each of the factors "directs attention to a different facet of the problem. The factors do not represent a score card that promises victory to the winner of the majority. Rather, they direct courts to examine the issue from every pertinent corner and to ask in each case whether, and how powerfully, a finding of fair use would serve or disserve the objectives of the copyright." Leval, *supra* p. 7, at 1110–11.

Indeed, the four factors are not the only factors to be considered. "The text [of § 107] employs the terms 'including' and 'such as' in the preamble paragraph to indicate the 'illustrative and not limitative' function of the examples given." *Campbell*, 510 U.S. at 577 (quoting 17 U.S.C. § 101); *see also Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) ("The factors enumerated in the section are not meant to be exclusive.").

A. "TRANSFORMATIVENESS," WHICH IS MERELY AN ASPECT OF THE FIRST FACTOR, IS NOT—AND SHOULD NOT BE—THE *SINE QUA NON* OF FAIR USE

When *Google v. Oracle* was before this Court, AIPLA asked that the Court reject (i) lower court pronouncements that the fourth factor necessarily carries the most weight and (ii) a sweeping categorization of the second factor as being generally insignificant. Notably, in *Google*, the Court affirmed *Campbell* and rejected the view that certain factors must be prioritized over others. *Google*, 141 S. Ct. at1199.

We now ask the Court to again reiterate and affirm this view, which is vital to the fair use doctrine's adaptability. Lower courts, it seems, have not heeded Judge Leval's caution that "[t]he existence of any identifiable transformative objective does not . . . guarantee success in claiming fair use." Leval, *supra* p. 7, 1111. To the contrary, and all too frequently, this is precisely what happens: a finding of transformativeness is afforded *de facto* primacy. Transformativeness may be a linchpin in certain circumstances, but it should not be presumed to be so.

The Second Circuit's 2006 decision in *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) is illustrative. There, the court's finding of transformativeness in connection with the first factor invaded and usurped its analysis for each subsequent factor: (i) "[m]ost important to the court's analysis of the first factor is the 'transformative' nature of the work"; (ii) "[w]e recognize, however, that the second factor may be of limited usefulness where

the creative work of art is being used for a transformative purpose"; (iii) "[w]e conclude that such use by DK is tailored to further its transformative purpose"; and, (iv) "[s]ince DK's use of BGA's images falls within a transformative market, BGA does not suffer market harm." *Id.* at 608, 612, 613, 615.[5]

These cases are not outliers. A recent academic study examined fair use cases from 1978 to 2019 empirically to determine how prominently transformativeness plays into the fair use analysis, and to what extent a finding of transformativeness tips the scales for the other factors—when in fact, each factor should "direct[] attention to a different facet of the problem," Leval, *supra* p. 7, at 1110. *See* Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163 (2019). The results are significant and suggest that courts are increasingly placing undue emphasis on

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[5] *See also, e.g.*, *Cariou v. Prince*, 714 F.3d 694, 708, 710 (2d Cir. 2013) (considering the factors through the lens of finding transformative use, noting, *inter alia*, "[a]lthough there is no question that Prince's artworks are commercial, we do not place much significance on that fact due to the transformative nature of the work"; "[h]ere, there is no dispute that Cariou's work is creative and published. Accordingly, this factor weighs against a fair use determination. However, just as with the commercial character of Prince's work, this factor may be of limited usefulness where, as here, the creative work of art is being used for a transformative purpose"; "[t]he third-factor inquiry must take into account that the extent of permissible copying varies with the purpose and character of the use" (citations omitted) (internal quotation marks omitted)); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1178, 1179 (9th Cir. 2013) (finding transformative use and then finding, with respect to factor three, "Green Day's use of the work was not excessive in light of its transformative purpose").

transformativeness as a shortcut to finding fair use, undercutting the relevance of the other statutory factors.

Most staggering is the correlation between a finding of transformativeness and a finding of fair use. Of the decisions in the sample that found transformative use, 94% of these found fair use; and conversely, of the decisions in the sample that found no transformative use, 94% also found no fair use. *Id.* at 180. The data also established that "[w]hile transformative use decisions as a whole account for 51.7% of all fair use decisions under Section 107, the percentage has risen closer to 90% in recent years." *Id.* at 166.

The study specifically considered the influence of transformativeness over each of the four factors individually. As to factor one, "the purpose and character of the use," which "traditionally involves three subfactors—transformative use, commerciality, and bad faith," the data shows that: "[o]f all the decisions where courts found transformative use, 92.1% found factor one in favor of fair use. A finding of transformative use consistently overrode a finding of commercial purpose in 91.5% of the decisions where the two pointed to opposite directions." *Id.* at 167–68.

Professor Liu also concluded that "[t]ransformative use also diminished the weight courts allocated to factor two, 'the nature of the copyrighted work.' Upon a finding of transformative use, the fact that the original work was unpublished or creative did not affect fair use outcome in a statistically significant way." *Id.* at 168. Likewise, as to factor three, "the amount and substantiality of the

portion used," "the quantity and quality of copying permitted under factor three correlated strongly with transformative use." *Id.* Finally, the data established that "[t]ransformative use controlled factor four," and specifically, "[o]f all the cases where courts found transformative use, 84.9% found factor four in favor of fair use." *Id.*[6]

The instant case provides an important opportunity for this Court to reaffirm *Campbell* and *Google* and again find that "fair use depends on the context" such that no one factor necessarily dominates. *Google*, 141 S. Ct. at 1199 (citing *Campbell*, 510 U.S. at 577–78). Transformativeness, which is merely one aspect of one non-exclusive factor should not dominate fair use analysis as a rule—whether *de facto* or explicit. Rather, "the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. . . . [T]he courts must be free to adapt the doctrine to particular situations on a case-by-case

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[6] Professor Liu's study is not the first to make such findings. *See, e.g.*, Neil Weinstock Netanel, *Making Sense Of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 740 (2011) ("[T]hose recent decisions that unequivocally characterize the defendant's use as transformative almost universally find fair use."); Barton Beebe, *An Empirical Study of U.S Copyright Fair Use Opinions*, 1978–2005, 156 U. PA. L. REV. 549, 604–06 (2008) (expressing skepticism "that the transformativeness inquiry has essentially superseded section 107 as the backbone of our fair use doctrine" but nevertheless observing that, all else being equal, a defendant with a nontransformative use has 35.5% chance of prevailing compared to a to 94.9% chance for a use found to be transformative).

basis." S. REP. NO. 94-473, at 62 (1975); H.R. REP. NO. 94-1476, at 66 (1976) (same).

B. "TRANSFORMATIVENESS" CANNOT ECLIPSE AN AUTHOR'S EXCLUSIVE STATUTORY RIGHT TO CREATE DERIVATIVE WORKS

The derivative work right is a vital statutorily protected right. It is, for many authors, an incredibly lucrative one upon which business models and much of the entertainment industry have been built. *See, e.g.*, PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.3 (3d ed. 2022) ("Derivative rights enable prospective copyright owners to proportion their investment to the returns they hope to receive not only from the market in which their work will first be published, but from other, derivative, markets as well. The copyright owners of *Gone with the Wind* could count on revenues not only from sales of the novel as first published, but also from the use of the novel's expressive elements in translations, dramas, motion pictures and other subsidiary formats."). Indeed, for many authors, it is the hope of earnings on derivative works that incentivizes the creation of works in the first place. *See id.* ("Derivative rights also influence copyright owners' decisions on the kinds of works they will produce."). Further, though the right to create derivative works is not personal to authors, it is considered by some—including the Copyright Office—to be "an important piece of the United States' moral rights patchwork" that brings the U.S. into compliance with the Berne Convention. U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED

STATES 103 (2019). Viewed in a certain light, the derivative work right protects an author's integrity, preserving the right, among others, to complete a work and to authorize a variety of adaptations (with, of course, the exception of parodies and other fair uses)—at least when the author is the rightsholder.

A fair use analysis that prioritizes transformativeness above all else effectively removes this right from the bundle statutorily afforded to copyright owners. *See, e.g.*, *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) ("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). *Cariou* and its predecessors in the Second Circuit do not explain how every 'transformative use' can be 'fair use' without extinguishing the author's rights under § 106(2).").

The district court's sweeping pronouncement in this case that a work ***is transformative as a matter of law*** "[i]f looking at the [works] side-by-side, the secondary work ha[s] a different character, . . . a new expression, and employ[s] new aesthetics with creative and communicative results distinct from the original," Pet. App. 71a (citation omitted) (internal quotation marks omitted), would not only impose a bright-line rule within a framework requiring flexibility, but is also tantamount to a pronouncement that all derivative works are transformative within the meaning of the first fair use factor. This cannot stand.

The Second Circuit seized upon this issue, warning that "an overly liberal standard of transformativeness, such as that employed by the

district court in this case, risks crowding out statutory protections for derivative works." Pet. App. 17a. Finding transformativeness based solely on the addition of "something new" is problematic because "many derivative works that 'add something new' to their source material would *not* qualify as fair use." Pet. App. 18a.

The Second and Ninth Circuits hear the overwhelming majority of copyright cases in the United States, so it is notable that they appear aligned in harboring such concerns. In *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2803 (2021), the Ninth Circuit rejected defendant's claim that its Dr. Seuss/Star Trek "mash-up" book *Oh, the Places You'll Boldly Go!* was transformative simply because of its "extensive new content," noting 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. Professor Jane Ginsburg observed that the Ninth Circuit appeared not to share the district court's concern that failing to find fair use would endanger "an entire body of highly creative work" (i.e. mashups). Jane C. Ginsburg, *Letter from the US, Part I: The Fair Use Pendulum Oscillates*, REVUE INTERNATIONALE DU DROIT D'AUTEUR, Nov. 15, 2021, at 100, https://la-rida.com/sites/default/files/2021-12/270-CEVA.pdf [hereinafter Professor Ginsburg]. This was in part because "one might advance the same claim regarding any kind of derivative work" including paradigmatic derivative works such as film adaptations of novels. *Id.*

For its part, the Second Circuit was critical of its previous attempts to grapple with this issue. In

Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015), it suggested that "derivative works generally involve transformations in the nature of *changes of form*" whereas "copying from an original for the purpose of criticism or commentary on the original or provision of information about it, tends most clearly to satisfy *Campbell*'s notion of the 'transformative' purpose involved in the analysis of Factor One." *Id.* at 215–16 (footnotes omitted). Here, however, the Second Circuit pointed out that this type of "shorthand" can be read "too broadly," and questioned whether "purpose" is a "useful metric" when addressing works of visual art that "at least at a high level of generality, share the same overarching purpose." Pet. App. 18a, 20a.

A few points bear mention. First, the Second Circuit's admonition of an "overly liberal" standard implicitly recognizes that a finding of transformativeness will almost certainly result in a finding of fair use. *See* Part I.A, *supra*. Guidance from this Court suggesting that a work can be "transformative" in some respect or to some degree and not a fair use in light of other factors should assuage that concern.

Second, while the Second Circuit is correct that courts should be wary of overbroad application of its "shorthand," the "overarching" purpose of an accused work should not necessarily confound the analysis. Here, Leval's insight can once again be instructive: "Courts must consider the question of fair use for each challenged passage and not merely for the secondary work overall." Leval, *supra* p. 7, at 1112. In the context of biographies, he contrasted the copying of "dazzling passages" that "ma[ke] good reading" with

passages "vital to demonstrate an objective" of the writer, such as demonstrating a particular character trait. *See id.* Indeed, Leval confessed to error in his decision in *Salinger v. Random House, Inc.*, 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987), because his "finding of fair use was based primarily on the overall instructive character of the biography" and he "failed to recognize that . . . a favorable appraisal of the constructive purpose of the overall work could conceal unjustified takings of protected expression." Leval, *supra* p. 7, at 1113. He acknowledged that the particular appropriated expression should have had a "sufficient transformative justification." *Id.* at 1112. Considered in this light, the fact that two works share an "overarching purpose" should not itself raise concerns; rather, the focus would be on the work the specific takings are doing within the alleged infringement, and whether "defendant's work . . . uses plaintiff's material creatively." WILLIAM F. PATRY, PATRY ON FAIR USE § 3:9 (2022).

Third, finally and relatedly, the question that judges and juries are called upon to answer is not whether a particular work is derivative *or* fair. These are neither mutually exclusive labels nor points along a continuum. Rather, the question—in many cases[7]—will be whether a particular derivative work is defensible and non-infringing because it rises to the level of being a fair use. No new test is needed to solve

[7] Some quintessential fair uses, such as photocopying for classroom use, involve rights other than the creation of a derivative work.

this riddle,[8] merely a return to basic principles. By ensuring that at least all four enumerated factors inform the analysis, we avoid the test becoming circular and collapsing. And by focusing on the purpose of each taking in question, we can perhaps ground the analysis in more readily answerable questions and avoid more metaphysical inquiries such as the purpose of art.

In her letter, Professor Ginsburg cites both the Second Circuit's decision below and the decision in *Dr. Seuss Enterprises*, 983 F.3d 443, as exemplary harbingers of a pendulum swing away from overly broad conceptions of transformativeness at the district court level.[9] Professor Ginsburg, *supra* p. 16, at 98–101, 103–11. Professor Ginsburg concludes that

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[8] Likewise, no new terminology is required. The doctrine of transformativeness is informed by hundreds of cases and decades of precedent. To the extent that it carries challenges, it is because the term is employed as shorthand for a variety of complex concepts. *Authors Guild*, 804 F.3d at 214 ("The word 'transformative' cannot be taken too literally as a sufficient key to understanding the elements of fair use. It is rather a suggestive symbol for a complex thought, and does not mean that any and all changes made to an author's original text will necessarily support a finding of fair use.").

[9] In addition to these two, she also points to the Fourth Circuit's decision in *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 269 (4th Cir. 2019), in which the court "rebuked the district court's credulous acceptance of the transformative use defen[s]e" and "determination that the unauthorized incorporation of a photographic view of Washington D.C.'s Adams Morgan neighbo[]rhood into a website showing D.C. tourist attractions related to a film festival transformed the purpose of the copied work." Professor Ginsburg, *supra* p. 16, at 95–96. She posits that "[t]he Fourth Circuit's reproach may help cabin the instances of 'informational' transformative fair uses." *Id.* at 96.

"[i]t remains to be seen whether lower courts and other Circuits will follow these leading Circuits' recent caution in deeming defendants' works 'transformative.'" *Id.* at 112. This Court now has the opportunity to steady that pendulum. This Court should soundly reject the bright-line oversimplification announced by the district court—or any understanding of "transformativeness" that would read the right to create derivative works out of the statute. To be clear, twenty-eight years after *Campbell*, transformativeness is part of the bedrock of our understanding of fair use; this cornerstone should not be disturbed. But it can and should be clarified in a way that elucidates a boundary that preserves the integrity of derivative works.

II. A WORK'S PURPOSE OR MEANING MUST BE DETERMINED BASED ON THE REASONABLE PERCEPTION OF THAT WORK, AND CANNOT DEPEND SOLELY ON THE SUBJECTIVE OPINIONS OF INDIVIDUALS

This Court has taken up the question of "[w]hether a work of art is 'transformative' when it conveys a different meaning or message from its source material (as this Court, the Ninth Circuit, and other courts of appeals have held), or whether a court is forbidden from considering the meaning of the accused work where it 'recognizably deriv[es] from' its source material (as the Second Circuit has held)."

AIPLA rejects the premise of that inquiry. We disagree that the Second Circuit's decision can fairly be read as "forbidding" consideration of a work's meaning in contravention of this Court's teaching in

Campbell that part of the first fair use factor requires considering whether the accused work alters the original "with new expression, meaning, or message." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

Instead, the court below provided important guidance as to *how* courts should assess the purpose or meaning of an accused work. Specifically, the Second Circuit held that "where a secondary work does not obviously comment on or relate back to the original or use the original for a purpose other than that for which it was created, . . . the secondary work itself must *reasonably be perceived* as embodying a distinct artistic purpose, one that conveys a new meaning or message separate from its source material." Pet. App. 21a–22a. This reasonable perception approach originates from this Court's decision in *Campbell*: "[t]he threshold question . . . is whether a parodic character may reasonably be perceived." *Campbell*, 510 U.S. at 582. Given that standard, "whether a work is transformative cannot turn merely on the stated or perceived intent of the artist or the meaning or impression that a critic – or for that matter, a judge – draws from the work. Were it otherwise, the law may well 'recogniz[e] any alteration as transformative.'" Pet. App. 22a (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05(B)(6)).

We urge the Court to make explicit its guidance in *Campbell* that conclusions as to meaning and purpose should be based on the reasonable perception of the accused work, and to expand upon and clarify this guidance. Notably, *Campbell* does not explain *whose* reasonable perception carries the day or *how*

that perception is to be identified; the decision simply makes clear that the personal perceptions of the presiding judges should not be determinative. *Campbell*, 510 U.S. at 582–83.[10] A reasonable perception test, however, implies a reasonable perceiver, e.g., some fictious person like the "reasonable consumer,"[11] "reasonable

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[10] In the absence of such guidance, some have questioned whether, in practice, the reasonable perception standard set forth in *Campbell* has truly replaced judicial judgment at the Circuit court level. *See, e.g.*, Bruce P. Keller & Rebecca Tushnet, *Even More Parodic Than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979, 990 (2004) ("The lesson to be learned from [*Columbia Pictures Industries, Inc. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179 (C.D. Cal. 1998), *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997), *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d. Cir. 1998), and *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001)] is that the distinction between parody and satire is in the eye of the presiding judge."); *see also* David A. Simon, *Reasonable Perception and Parody in Copyright Law*, 2010 UTAH L. REV. 779, 795 (2010) (commenting following an empirical study that: "*Campbell*'s RPT has been noted by lower courts, though not always applied. Even when applied, most courts vary in their approaches. Noticeably absent from these court decisions however, is a focus on *who* reasonably perceives the work, or how to determine what can reasonably be perceived. Some courts, for example, made judgments about what can reasonably be perceived, but paid scant attention to who the perceiver is or what characteristics she has.").

[11] *See, e.g.*, *Multi Time Mach., Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 935 (9th Cir. 2015) ("The test for likelihood of confusion is whether a 'reasonably prudent consumer' in the marketplace is likely to be confused as to the origin of the good or service bearing one of the marks." (citation omitted)); *see also Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241, 254–55 (3d Cir. 2011) (explaining that in false advertising cases under the Lanham Act, "[b]efore a defendant or a district judge decides that

person,"[12] "ordinary observer" who encounters the work,[13] or "person with ordinary skill in the art."[14] Here, that person would need at least some familiarity with the underlying work in order to make the comparison.[15] At a minimum, this Court should

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an advertisement could not mislead a reasonable person, serious care must be exercised to avoid the temptation of thinking, 'my way of seeing this is naturally the only reasonable way.'").

[12] *See, e.g.*, *In re Signal Int'l, LLC*, 579 F.3d 478, 491 (5th Cir. 2009) ("The defendant is liable for harms he negligently caused so long as a reasonable person in his position should have recognized or foreseen the general kind of harm the plaintiff suffered." (citation omitted)); *Shaw Grp., Inc. v. Marcum*, 516 F.3d 1061, 1067 (8th Cir. 2008) (noting under State law "[n]egligence is defined to mean the failure to do something which a reasonably careful person would do, or doing something which a reasonabl[y] careful person would not do, under circumstances similar to those shown by the evidence" (citation omitted)).

[13] *See, e.g.*, *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) ("[T]he intrinsic test, 'test[s] for similarity of expression from the standpoint of the ordinary reasonable observer, with no expert assistance.'" (citations omitted)); *Boisson v. Banian, Ltd.*, 273 F.3d 262, 272 (2d Cir. 2001) ("Generally, an allegedly infringing work is considered substantially similar to a copyrighted work if 'the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.'" (citation omitted)).

[14] *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 420 (2007) ("[T]he question is not whether the combination was obvious to the patentee but whether the combination was obvious to a person with ordinary skill in the art.").

[15] *Cf., e.g.*, Tyler T. Ochoa, *Dr. Seuss, the Juice and Fair Use: How the Grinch Silenced A Parody*, 45 J. COPYRIGHT SOC'Y U.S.A. 546, 558 (1997) (noting that parody "depends upon the well-

clarify that the reasonable perception standard necessarily precludes the possibility that individual subjective opinions dictate conclusions about an accused work's meaning and purpose. In other words, this determination should not be entirely subjective. Embracing this more objective reasonable perception approach is critical for at least three reasons.

First, if all that matters in determining the meaning or artistic purpose of a work is the subjective intent of the second author, the conclusion will hinge on self-interested and unreliable testimony, setting the bar too low and inviting after-the-fact claims about intent. *See, e.g.*, *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 263 n.3 (4th Cir. 2019) ("We reject Violent Hues' suggestion that we focus our analysis on the subjective intent of the parties, as the district court did. . . . Although a secondary user may go to great lengths to explain and defend his use as transformative, a simple assertion of a subjectively different purpose, by itself, does not necessarily create new aesthetics or a new work." (citations omitted) (internal quotation marks omitted)).

Second, permitting the subjective views of particular individuals to control will foment

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known predecessors from which the parodist borrows, and upon the audience's familiarity with those models"); *see also* Simon, *supra* note 10, at 805 n.146 (discussing how requiring familiarity with the underlying work can mitigate against discriminatory applications of the reasonable perception test when the underlying work was created by a minority author). This would also help balance the analysis when the accused enjoys greater fame or popularity. *See* Part III, *infra*.

unnecessary and unhelpful uncertainty and unpredictability. To be sure, because of its essential fact-specific nature, fair use analysis is necessarily somewhat uncertain. This is unavoidable. But an analysis that hinges *solely* on the second comer's intent or the opinions of individual art critics or judges as to a work's meaning renders the outcome even more unpredictable, which can chill innovation.

Third, a "reasonable perception" approach eschewing reliance on individual opinions is consistent with jurisprudence in other areas of copyright law.

We determine whether a work is creative by looking to the appearance or sound of the work, without value judgments or considerations of artistic intent. Justice Holmes famously warned: "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903). Thus, "the courts and the Copyright Office are not to judge the artistic worth or quality of the creativity but only its presence or absence." WILLIAM F. PATRY, 2 PATRY ON COPYRIGHT § 3:36 (2022); *see also* U.S. COPYRIGHT OFF., COMPENDIUM OF THE U.S. COPYRIGHT OFFICE PRACTICES § 310.2 (3d ed. 2021) ("In determining whether a work contains a sufficient amount of original authorship, the U.S. Copyright Office does not consider the aesthetic value, artistic merit, or intrinsic quality of a work."); *id.* § 310.5 ("When examining a work for original authorship, the U.S. Copyright Office will not consider the author's

inspiration for the work, creative intent, or intended meaning.").

Likewise, as this Court recently held, we determine whether the design of a useful article is protectable solely by considering "how the article and feature are perceived, *not how or why they were designed*." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) (emphasis added). This approach, which is reflected in the statute itself, similarly adds a measure of predictability into the scope of copyright.[16]

In short, this Court should clarify that (i) the "reasonable perception" approach articulated in *Campbell* applies not only to potential parodies, but also to any works seeking the protection of the fair use defense; (ii) the way to determine the purpose or meaning of an accused work is to consider how a "reasonable perceiver" familiar with the underlying work would perceive it; and, (iii) the reasonable perception of a work's character cannot be determined solely on the basis of self-interested testimony, judicial aesthetic, or personal preferences. This more objective approach to transformativeness still allows

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[16] In addition to being consistent with the approach generally taken in copyright law, viewing the inquiry from the reasonable perceiver's perspective may help to promote the goals of copyright law. *See, e.g.*, Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 450 (2008) ("[A]pproaching the transformativeness inquiry from a reader-centric position as opposed to an author-centric one . . . focuses the fair use inquiry not on the second-generation creator, who is often cast as either the hero or the villain in fair use stories, but on the reader (or viewer, or listener), who is, after all, claimed to be the beneficiary of the uses that the doctrine promotes.").

for consideration of whether a secondary work adds "new expression, meaning, or message" to the original, but reflects a move away from total subjectivity and increases predictability from one situation to the next. For the same reasons this logic has been embraced in other areas of copyright law, the Court should explicitly embrace it again.

III. THE COURT SHOULD REJECT THE NOTION OF A CELEBRITY PLAGIARIST EXCEPTION TO COPYRIGHT INFRINGEMENT

The fair use doctrine should be applied equally to all works and should not immunize certain infringers based on their degree of fame or recognition. Celebrities should be required to obtain licenses to create derivative works, just like other creators.

This case provides an optimal vehicle for the Court to expressly reject a celebrity plagiarist exception to copyright infringement. The district court found Warhol's works transformative in part because "each Prince Series work is immediately recognizable as a 'Warhol' rather than as a photograph of Prince." Pet. App. 72a. This is plainly problematic, as Professor Ginsburg has noted: "[t]he district court's analysis suggested that Warhol may permissibly preempt Goldsmith's opportunities to license her work simply because he is more famous and recognizable than she." Professor Ginsburg, *supra* p. 16, at 105–06; *see also* PATRY ON FAIR USE, *supra* p. 18, § 3:27 ("My disagreement is that it excuses all Warhol uses of other's works because Warhol has a distinctly recognizable style.").

This Court should endorse the Second Circuit's rejection of this aspect of the district court's decision:

> Finally, we feel compelled to clarify that it is entirely irrelevant to this analysis that "each Prince Series work is immediately recognizable as a 'Warhol.'" . . . Entertaining that logic would inevitably create a celebrity-plagiarist privilege; the more established the artist and the more distinct that artist's style, the greater leeway that artist would have to pilfer the creative labors of others. But the law draws no such distinctions; whether the Prince Series images exhibit the style and characteristics typical of Warhol's work (which they do) does not bear on whether they qualify as fair use under the Copyright Act.

Pet. App. 26a–27a.

CONCLUSION

For the foregoing reasons, AIPLA respectfully urges the Court to:

(i) Reiterate and emphasize that the fair use inquiry is flexible and fact-specific based on at least all four statutorily enumerated factors, and no one factor (or subfactor) should dominate. In particular, a finding of transformativeness should not be dispositive in every case and should not usurp the statutory right of a copyright holder to create derivative works;

(ii) reject a purely subjective analysis of transformativeness in favor of more objective considerations of the reasonable perception of a work; and,

(iii) expressly reject a celebrity plagiarist exception to copyright infringement.

Respectfully submitted,

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