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 FOR *AMICUS CURIAE* ASSOCIATION OF AMERICAN PUBLISHERS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The Association of American Publishers, Inc. ("AAP") represents book, journal, and education publishers in the United States on matters of law and policy, including major commercial houses, small and independent houses, and university presses and other noncommercial scholarly publishers. AAP has a particular mandate and expertise in copyright law. It seeks to promote an effective and enforceable framework that enables publishers to create and disseminate a wide array of original works of authorship to the public on behalf of their authors and in furtherance of informed speech and public progress.

AAP believes that copyright is the legal foundation of the publishing industry—the engine of free expression—and that each of the exclusive rights enumerated by Congress and reserved to the author, including the right to prepare and authorize derivative works, is essential to the integrity and operation of the Copyright Act. AAP has a particular interest in ensuring that the transformative use test does not exceed the traditional balance that Congress and this Court have established between authors and users of creative works, including, especially, by maintaining effective norms of licensing for downstream appropriation.

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of record for all parties have consented to this filing.

Relevant to this case, AAP and its members rely on the Copyright Act's critical balance between meaningful derivative markets, on the one hand, and reasonable contours of fair use, on the other hand. Petitioner's proffered test for transformativeness vitiates this well-accepted balance in favor of a "new meaning or message" test that would tilt the tables decisively toward fair use—not only for the visual artworks that are at issue in the case, but in all instances in which a subsequent author might seek to circumvent permission from the original author, especially where significant parts of the underlying work are at issue, such as when converting a print book to an e-book or audiobook, or when producing a film from a literary work. Adopting Petitioner's rule would be exceptionally harmful to the publishing industry, stripping both authors and publishers of the ability to license and realize the full potential of their literary expression and copyright interests with respect to downstream derivative uses that exploit and benefit from the underlying work. As a result, the robust exchange and publication of creative expression that AAP works so hard to protect would be undermined, as would our culture, education, workforce, and democracy.

SUMMARY OF THE ARGUMENT

This case tests the Copyright Act's balance between the author's exclusive right to prepare and to authorize derivative works and the application of fair use to a subsequent author's unlicensed appropriation of a creative work in a new work. Congress codified fair use in the 1976 Copyright Act following decades of judicial development, bearing in mind the

constitutional purpose of copyright law more generally: to incentivize the creation and dissemination of original works of authorship to promote progress and public welfare. Ever since, authors and publishers have relied on this Court to enforce their exclusive rights, as codified, and to recognize the limited circumstances in which the unlicensed use of pre-existing material must be allowed to ensure that commentary and scholarship are not unduly stifled.

It is because of this Court's precedent that publishers and other creative businesses can thrive. Indeed, publishers rely on this Court's assurances that, first, copyright interests are divisible and potentially valuable throughout the statutory term of protection, and second, a reasonable fair use doctrine will be applied as an essential safeguard to promote free expression. This balance best serves free expression.

Petitioner, however, seeks to disrupt the creative ecosystem copyright law has developed by turning the "fair use" exception to copyright infringement into the rule. When properly applied, fair use "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 v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994). But fair use has its limits—it is not a universal get-out-of-jail-free card for copying "to get attention or to avoid the drudgery in working up something fresh." *Id.* at 579. Rather, the Copyright Act provides that the use must be "for purposes such as criticism, comment, news reporting, teaching (including

multiple copies for classroom use), scholarship, or research," and considered in light of four factors to determine whether the particular use is fair. *Id.* at 576; 17 U.S.C. § 107.

Petitioner implores the Court to ignore the plain language of the Copyright Act and this Court's precedent in favor of a blanket rule that would run contrary to well-established principles of copyright law and render transformative *any* use of an original work that contains a new meaning or message capable of observation by any person. Pet'r's Br. 40. Thus, any appropriation of an original work for its intrinsic, artistic value, so long as it is recast or adapted in some way, would favor fair use, *notwithstanding* the fact that the right to such use is expressly designated to the original author through the exclusive right to prepare and to authorize derivative works. Indeed, under Petitioner's approach, one could arguably copy Harper Lee's *To Kill a Mockingbird*, but change the ending; record an audiobook of *Pride and Prejudice* with toddler actors; or turn *The Hitchhiker's Guide to the Galaxy* into a comic book—and the use would be non-infringing. Similarly, auteurs could produce films from books without a license at their pleasure. Resp't Br. 48. Petitioner's test would deem Steven Spielberg's film adaptation of Peter Benchley's *Jaws* transformative simply because it reflects Spielberg's "unique style." *Id.* at 50.

Although a drastic and unprecedented result, Petitioner and its *amici* would lead this Court to believe that disruption of decades of law, on which creative individuals and organizations nationwide rely, is worthwhile because of one, particular artist

implicated by this case: Andy Warhol. But Petitioner elides that this case is not about Andy Warhol or anything he did. Even if it were about Warhol, however, the application of copyright law does not succumb to the supposed talent or wonder of appropriation authors, nor did the Framers intend it would. To the contrary, the Framers were clear: the purpose of copyright is to incentivize the creation and dissemination of original works of authorship, not famous copies.

Thus, this Court should reject the plea of Petitioner and its *amici* to adopt an overly broad test for transformative use that would vitiate the rights of copyright owners. Such a result would have a catastrophic impact on the publishing industry and would undermine our copyright system that engenders an ecosystem of free expression, fueled by marketable and enforceable exclusive rights and a reasonable fair use doctrine. Instead, this Court should affirm the Second Circuit's judgment, which dutifully applied this Court's command that the original author's exclusive rights will only be overcome in limited circumstances, so that copyright law may continue to facilitate the progress of art that our Framers intended.

ARGUMENT

I. Copyright Protection Itself Is the Engine of Free Expression

Our Founders astutely recognized that free expression is encouraged by securing marketable rights to the use of one's expression. If authors ceded their creative expression to the public domain upon

disclosure, creators would never disseminate their works, and art would not progress. Thus, our Founders vested in Congress the power to enact a statutory scheme that ensures the "economic incentive to create and disseminate ideas." *Harper & Row Pubs., Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985); U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power to secure copyrights to authors "[t]o 'promote the Progress of Science and useful Arts'"); *accord Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1195 (2021) ("[C]opyright has practical objectives. It grants an author an exclusive right to produce his work (sometimes for a hundred years or more), not as a special reward, but in order to encourage the production of works that others might reproduce more cheaply.").

Indeed, fostering the incentive to create *and* disseminate new works is critical to growing our creative ecosystem. Otherwise, there would be no building blocks for art and related scholarship, and the public would fail to benefit. Congress understood that our creative ecosystem requires balancing the need to "borrow, and use much which was well known and used before," *Emerson v. Davis*, 8 F. Cas. 615, 619 (No. 4, 436) (C.C.D. Mass. 1845) (Story, J.), with the author's right to "secure a fair return for [her] creative labor." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Thus, the Copyright Act has mechanisms, including the affirmative defense of fair use, that allow for the unlicensed use of pre-existing

material in limited circumstances to ensure that commentary and scholarship are not unduly stifled.[2]

As set forth below, publishers—like many who work in creative industries—have come to rely on the Copyright Act's promise of copyright protections as limited only by reasonable, not categorical, exceptions, including the affirmative defense of fair use. This equation provides businesses with the confidence to invest in and distribute a variety of creative works that engage the minds of the public. *See* Copyright Alliance Br. 17–21 (cataloging business models in creative industries). This Court should affirm its prior commitment to protecting this balance, which, as a result, will ensure that copyright remains the engine of free expression our Framers intended.

A. Publishers Rely on Copyright Protection to Foster a Vibrant and Diverse Landscape of Original Expression

Copyright incentivizes creators of *all* viewpoints, backgrounds, and socio-economic status to create and publish works. This framework is of particular importance to AAP and the publishing industry at large—the original industry of free expression—because it enables publishers to create, market, and distribute a wide array of books, articles, journals, and

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[2] This Court has also recognized the critical role of the idea-expression distinction in promoting free expression. *See Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) ("Due to this distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.").

educational materials, to the benefit of authors and the public, alike. *See Golan v. Holder*, 565 U.S. 302, 326 (2012) (copyright incentivizes both creation and dissemination of new works). Without publishers' distribution of works across a variety of disciplines and perspectives, our culture would not be enriched by a vibrant marketplace of ideas and our public would be less informed.

But copyright protection means nothing if the exclusive rights under the law are unenforceable or undermined by exceptions and limitations that swallow their value in the marketplace. As discussed in greater detail below, the right to prepare derivative works is a particularly key exclusive right for the long-term value of literary works; without it, publishers would be deprived of the benefit of revenue generated by derivative uses of the copyrighted works they have created or licensed. Publishers rely on meaningful exclusive rights, including the right to prepare derivative works, not only to invest in and distribute as many original works as possible, but also to undertake the operational costs associated with bringing those works to the market, often in a variety of forms. Indeed, the supply chains associated with publishing literary works in global and digital commerce are often complex and resource intensive. Publishers must go through editorial, design, manufacturing, marketing, sales, and legal processes before a work goes to market—all of which come with a cost. Publishers rely on the value of their copyright interests to fund these activities.

The profits received from published works are also critical to publishers' ability to promote new works and new authors. Not all books published are

profitable. Thus, publishers rely on the subset of financially successful books for the resources available to support the production and distribution of works in unproven markets. Eric Priest, *An Entrepreneurship Theory of Copyright*, 36 Berk. Tech. L.J. 737 (2021) (because their economic activities are speculative, authors and entrepreneurs rely on compensation via property rights in lieu of dependable salaries or wages). Both artists and the public benefit when publishers do so because, among other things, having latitude to promote a larger volume of works necessarily results in more voices (i.e., more free expression) entering the market. *See* Terry Hart, *Breyer's Flawed Fourth Fair Use Factor in* Google v. Oracle, COPYHYPE (June 1, 2021), https://www.copyhype.com/2021/06/ breyers-flawed-fourth-fair-use-factor-in-google-v-oracle. But publishers will only take risks on such works under the promise granted by copyright, namely that they will be entitled to the reward if the work succeeds.

Protection of copyright holders' exclusive right to "prepare derivative works based upon the copyrighted work" is paramount to the publishing industry. 17 U.S.C. § 106(2). The downstream market for works "based upon" literary pieces can be massive and diverse—one successful book can engender an empire of creative works. Indeed, it is not uncommon to walk into a bookstore and see a single book adapted into multiple series (such as a children's series, graphic novels, or a television or film series), formats (such as e-books and audiobooks), or languages. Books can also form the basis for a variety of merchandise, from t-shirts to tote bags to magic wands or board games. Publishers rely on the Act's reassurances that they

will also have the exclusive right to exploit these markets. *See* Authors Guild, Inc. Br. 10–12 (licensing revenues support investments in new works); Copyright Alliance Br. 21 ("[C]opyright owners derive significant value from controlling derivative uses of their works, and the prospect of that value incentivizes the creation of original works.").

Notably, an ecosystem that both protects the original owner's rights in the downstream market to her work and facilitates the creation of an array of derivative works, champions copyright principles to the benefit of all. *First,* the original author reaps commercial success from the fruits of her labor and is incentivized to continue creating in the future, thus "promot[ing] the Progress of [] useful Arts," as the Framers intended. U.S. CONST. art. I, § 8, cl. 8; *Sony Corp. v. Universal*, 464 U.S. 417, 450 (1984) ("The purpose of copyright is to create incentives for creative effort."). *Second,* the follow-on authors are enriched with a body of creative source material, as well as job and commercial opportunities arising from licensing the right to prepare derivative works based on those materials. *Sony*, 464 U.S. at 432 ("[T]he ultimate aim" of the incentive to create is "to stimulate artistic creativity for the general public good."). *Third,* the public benefits from more ways to enjoy the original author's creativity through a vast body of derivative material. Terry Hart, *Breyer's Flawed Fourth Fair Use Factor in* Google v. Oracle, COPYHYPE (June 1, 2021), https://www.copyhype.com/2021/06/breyers-flawed-fourth-fair-use-factor-in-google-v-oracle. This is precisely the progress of art that the Framers intended—and what the publishers are able to accomplish when copyright holder's exclusive rights,

including the right to prepare derivative works, are properly protected.

B. When Properly Applied, Fair Use Balances Authors' Exclusive Rights with the Constitutional Directive to Promote the Progress of Art

Congress has recognized that there are limited circumstances in which the progress of art may be stifled by an inability to use another author's source material without a license. In those instances, the unauthorized use of the copyrighted work is deemed fair and non-infringing. *Campbell*, 510 U.S. at 577 (fair use "'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.'" (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)); *Google*, 141 S. Ct. at 1196 (same). The Copyright Act includes an illustrative list of the uses to which Congress intended the defense to apply: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107. Under the principles of *noscitur a sociis* and *expressio unius*, each of these examples must be read together to determine the breadth of Congress' intended reach of fair use. *Yates v. United States*, 574 U.S. 528, 543 (2015) (*noscitur a sociis* "avoid[s] ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress" (citation omitted)); *N.L.R.B. v. SW General, Inc.*, 137 S.Ct. 929, 940 (2017) ("expressing one item of [an] associated group or series

excludes another left unmentioned") (cleaned up). The "common thread" uniting these examples, and thus defining fair use, is a necessary and deliberate relation back to, and dependence on, the pre-existing copyrightable work. Publishers regularly rely on fair use for uses related to these examples, such as displaying copyrighted images for documentary purposes in historical works, *see Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); quoting from copyrighted works for critical biographies, *see New Era Publ'ns Int'l, ApS v. Carol Publ'g Grp.*, 904 F.2d 152 (2d Cir. 1990); and creating critical retellings of fictional works, *see SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001). Notably, none of these examples contemplate using the underlying work commercially purely for its intrinsic value. Those uses fall within the author's exclusive right to create derivative works (i.e., "a work based upon one or more preexisting works" including a work that is "recast, transformed, or adapted" from an original, 17 U.S.C. § 101), and thus are within the discretion of the original author to license.

These uses are to be considered when assessing the four statutorily prescribed factors of fair use: (1) "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107. None of these factors are dispositive, though this Court has correctly observed that the

fourth factor is "undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. Rather, they "require[] judicial balancing, depending upon relevant circumstances[.]" *Google*, 141 S. Ct. at 1197. "Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright." *Campbell*, 510 U.S. at 579 (cleaned up).

Petitioner's brief calls into question the scope of the first factor: "the purpose and character of the use." For decades, this Court has explained that the object of this factor is to determine whether the secondary user's use "supersede[s] the objects of the original creation" or if it is "transformative." *Id.* at 579 (cleaned up). Consistent with Section 107's preamble, to be transformative, the use must not merely consist of copying "to get attention or to avoid the drudgery in working up something fresh." *Id.* at 580. Rather, it must "'add[] something new, with a further purpose or different character, altering' the copyrighted work 'with new expression, meaning or message.'" *Google*, 141 S. Ct. at 1202 (quoting *Campbell*, 510 U.S. at 579); *see also Folsom v. Marsh*, 9 F. Cas. 342, 349 (No. 4,901) (C.C.D. Mass. 1841) (Story, J.) ("None are entitled to save themselves trouble and expense, by availing themselves, for their own profit, of other men's works, still entitled to the protection of copyright."); Pierre N. Leval, *Campbell as Fair Use Blueprint?*, 90 WASH. L. REV. 597, 610 (2015) (transformative copying is "ordinarily to communicate some kind of commentary about the original or provide information about it"). Petitioner and its *amici*, however, contend that fair use should be grossly expanded beyond its

Congressionally set bounds with a limitless transformative use test for two reasons. ***First,*** Petitioner argues that this Court's holding in *Google v. Oracle* supports a conclusion that fair use must allow for all "creative 'progress'." Pet'r's Br. 36. But the Court's decision made no such generalized finding. To the contrary, the Court went to great lengths to explain that "[g]enerically speaking, computer programs differ from books, films, and many other 'literary works' in that such programs almost always serve functional purposes." *Google*, 141 S. Ct. at 1198. Thus, considerations for fair use in computer program copyright differ from these traditional forms of media.

Furthermore, the Court emphasized that its decision was limited to the *particular* facts at issue, including that the Court concluded the jury could have found the accused operating system was not an anticipated derivative market for the copyright owner's code. *Id.* at 1206–08. That has no bearing here, where a magazine cover is an expected derivative market for photographs, as is use of the photograph as an artist's reference. Nor should *Google* have any bearing on other traditional forms of media, where there are many expected derivative markets, from dramatizations and translations to audiobooks and character and theme-related merchandise. Justice Thomas forewarned that reading *Google* so broadly so as to find fair use for any use that helps "create new products"—as Petitioner suggests—would "eviscerate[] copyright." *Id.* at 1219.

Second, Petitioner and its *amici* claim that restricting fair use will chill the expression of influential appropriators. *See, e.g.*, Pet'r's Br. 54.

That concern, however, is misguided. As a threshold matter, expanding fair use beyond its Congressionally set bounds for expression of influential appropriators improperly infuses fair use with a valuation of artistic merit. *Bleistein v. Donaldson Litho. Co.*, 188 U.S. 239, 251 (1903) (cautioning that "[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," in part because it would risk copyright protection being denied based on the taste of the judge, notwithstanding the work's intrinsic artistic value); *cf. Folsom*, 9 F. Cas. at 346 (copyright cannot depend on perceived merit because "it is extremely difficult to say, what letters are or are not literary compositions").

But also, such a view improperly dismisses the rights of original creators. Our Framers enshrined copyright in the Constitution because they understood that enforceable, exclusive rights to one's expression is necessary to incentivize original creation. *See Eldred*, 537 U.S. at 219. Without that incentive, there would be no original works published—and nothing for second comers to build on—which is a far greater threat to public benefit advanced by copyright protection. *See* Terry Hart, *Breyer's Flawed Fourth Fair Use Factor in* Google v. Oracle, COPYHYPE (June 1, 2021), https://www.copyhype.com/2021/06/breyers-flawed-fourth-fair-use-factor-in-google-v-oracle.

Moreover, allowing the desirability of the infringing work to determine fair use lends the affirmative defense to a limitless application that would usurp entirely the copyright holder's exclusive rights. Plenty of infringing expression can be

considered desirable by those who infringe. It could make original expression available in a more convenient fashion online; offer a dense literary work in an easy-to-read, digestible summary; place existing fictional characters in a new adventure; or simply make more copies of an original artwork available for purchase. But making those uses per se fair is not what our Framers intended, what Congress codified, or what this Court has recognized transformative use to be. *See, e.g., Campbell*, 510 U.S. at 599 (Kennedy, J., concurring) ("If we allow any weak transformation to qualify as parody, however, we weaken the protection of copyright. And under protection of copyright disserves the goals of copyright just as much as overprotection, by reducing the financial incentive to create.").

Such a result may also lead courts to give inadequate consideration to the fourth fair use factor: "the effect of the use upon the potential market for or value of the copyrighted work." That factor considers "not only of harm to the original but also [] harm to the market for derivative works," and has been repeatedly recognized as "the single most important element of fair use." *Campbell*, 510 U.S. at 574, 590 (quoting *Harper & Row*, 471 U.S. at 566); *see also Bouchat v. Baltimore Ravens Ltd. P'ship*, 619 F.3d 301, 312 (4th Cir. 2010) (same). If desirable infringing expression, however, were per se fair, that would allow any appropriator to usurp the derivative market of an original work, for any purpose, without consequence. That is hardly the wholistic, balanced view of fair use that Congress intended, and is contrary to the economic incentives the Copyright Act grants to authors to create.

Importantly, honoring the original copyright owner's protections does not mean that influential appropriators cannot create. Where the appropriator wants to use the original work for its intrinsic artistic value, she can—and should—obtain a license. That is what happened here: a license was obtained for Warhol to use Goldsmith's photograph to create Purple Prince. Resp't Br. 9–11. Where the appropriator wants to use the original work to add something new, with a further purpose or different character, then fair use can intervene. Maintaining this balance—which this Court has done for decades—is critical to preserving the original author's incentives to start the chain of creativity on which second comers rely, exactly as the Framers intended.

II. Petitioner's "Transformative Use" Test Transmogrifies Fair Use from an Exception into a Rule

Copyright protection is the rule, and fair use is the exception. *See Google*, 141 S. Ct. at 1196 (fair use "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." (quoting *Stewart*, 495 U.S. at 236)); *Campbell*, 510 U.S. at 577 (same); *Folsom*, 9 F. Cas. at 347 (private persons do not have a right to publish copyrighted materials). The Second Circuit also correctly understood this—as do circuit courts across the country—and treated fair use accordingly. *See, e.g.*, Pet'r's App. 12a ("The fair use doctrine seeks to strike a balance between an artist's intellectual property rights to the fruits of her own creative labor,

including the right to license and develop (or refrain from licensing or developing) derivative works based on that creative labor" and follow-on authors need to borrow building blocks of creation.).[3]

Petitioner, however, argues this Court should overturn centuries of precedent and long-settled expectations in favor of an unfathomable standard that would make fair use the rule. Under Petitioner's treatment of transformativeness, a secondary user could change slight details of a protected work and claim immunity from infringement due to the work's "new" meaning or message. *Compare* Pet'r's Br. 30 ("[T]he transformativeness inquiry focuses on what a follow-on work *means*, not how much of the original is discernible.") (emphasis in original) *with Campbell*, 510 U.S. at 587–88 ("[A] work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original" or its derivatives.);

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[3] *See also Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 759 (7th Cir. 2014) ("The fair use privilege [] 'is not designed to protect lazy appropriators. Its goal instead is to facilitate a class of uses that would not be possible if users always had to negotiate with copyright proprietors.'"); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1175 (9th Cir. 2013) (quoting *Campbell*); *Gaylord v. United States*, 595 F.3d 1364, 1372 (Fed. Cir. 2010) (quoting *Campbell*); *Suntrust Bank*, 268 F.3d at 1264 (Section 107 lists limited "exceptions carved out" of the universe of copyright); *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 25 (1st Cir. 2000) ("Unauthorized reproduction of professional photographs by newspapers will generally violate the Copyright Act of 1976; in this context, however, where the photograph itself is particularly newsworthy, the newspaper acquired it in good faith, and the photograph had already been disseminated, a fair use exists under 17 U.S.C. § 107.").

see also Dr. Seuss Enter., L.P. v. ComicMix LLC, 983 F.3d 443, 453–54 (9th Cir. 2020) ("[T]he addition of new expression to an existing work is not a get-out-of-jail-free card that renders the use of the original transformative.").

But, as set forth below, Petitioner's rule is incompatible with the plain language of the Copyright Act, this Court's precedent, and would jeopardize the right to prepare derivative works. Perhaps recognizing the lengths to which it is asking this Court to go, Petitioner makes a last-ditch effort to argue that, at the very least, fair use should make space for reputable artists, such as Andy Warhol. But fame is not, and has never been, a shield against liability. This Court should reject Petitioner's arguments and affirm the primacy of the Copyright Act's text, which recognizes an exception to infringement actions where uses are of proper "purpose and character."

A. A Boundless Transformative Use Test Usurps Publishers' Derivative Work Right

Although both the test for fair use and the exclusive right to prepare derivative works examine whether the secondary work "transform[s]" the original—they are not one in the same. As the Second Circuit correctly recognized, the transformations that create derivative works are "those that creators of original works would in general develop or license others to develop." *Campbell*, 510 U.S. at 592. These can be adaptations or recasted versions of the original work, which use the original work for its intrinsic value. Transformations for fair use, on the other hand

concern a secondary work that has a further purpose or different character from the original work, but also—as evidenced by the examples in Section 107's preamble—a necessary and deliberate relation back to, and dependence on, the pre-existing copyrightable material. *Google*, 141 S. Ct. at 1203.

If the presence of new expression, alone, made use of a copyrighted work transformative—as Petitioner suggests—then all derivative works would be transformative as a matter of law, rendering the derivative work right meaningless. *See* Motion Picture Association, Inc. Br. 17–18, 20 ("By definition, . . . derivative works would qualify as 'transformative uses' under petitioner's test."); *see also* Clark D. Asay et. al, *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905, 941 (2020). Not only does Petitioner's request defy the established canon of statutory interpretation that statutes should be interpreted without rendering a provision superfluous, *Bilski v. Kappos*, 561 U.S. 593, 607–08 (2010), but it also seeks to circumvent the well-settled principle that "exploit[ing] the creative virtues of [an] original work" requires a license. *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006); *see also Campbell*, 510 U.S. at 587 ("[A] work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use"); Pierre N. Leval, Campbell *as Fair Use Blueprint?*, 90 WASH. L. REV. 597, 611 (derivative works within the scope of Section 106(2) "seek to re-communicate the protected expression of the original, converted into a different form or medium"); Authors Guild Br. 8 ("a key inquiry should be whether the marketability and value of the challenged work

derives, at least in part, from the aesthetic and entertainment value of the original copyrighted work").

Nullification of the derivative works right via Petitioner's limitless test for transformative use would also severely disrupt publishers' businesses. Publishers rely on the derivative works right daily, including to justify the use of a license for a film adaptation of a novel, translation of a novel into another language, or recasting of a novel into an e-book or audiobook—all of which are quintessential examples of derivative works.[4] *See, e.g., Stewart*, 495 U.S. at 238 ("a classic example of an unfair use: a commercial use of a fictional story that adversely affects the story owner's adaptation rights."); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 101 (2d Cir. 2014) ("Paradigmatic examples of derivative works include the translation of a novel into another language, the adaptation of a novel into a movie or a play, or the recasting of a novel as an e-book or an audiobook.").

Although Petitioner rebuffs that film adaptations of novels are generally not transformative because they do not "change the meaning or message of the original," that conclusory hypothesis is unsupported

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[4] See 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.").

by industry practice and Petitioner's articulation of the law. Indeed, if all that is required for transformative use is *some* new meaning or message, perceptible by *some* person—as Petitioner and its *amici* claim—it is difficult to imagine when a film adaptation of a novel would *ever* require a license. *See L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 492 (2d Cir. 1976) (en banc) ("To extend copyrightability to minuscule variations would simply put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work."); *see also* Motion Picture Association, Inc. Br. 21 (film adaptations "by their very nature differ from the original, sometimes greatly").

To be sure, the requisite new meaning or message could derive from the myriad creators involved in the production of the film. *Cf. Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000) (Although "[e]veryone from the producer and director to casting director, costumer, hairstylist, and 'best boy' gets listed in the movie credits because all of their creative contributions really do matter, . . . [a] creative contribution does not suffice to establish authorship of the movie."). Consider the role of the following creative contributors to a movie adaptation:

***The director*:** Directors leave their own "marks" on a film through the imposition of their unique directing style. Indeed, consumers can often readily recognize a film as deriving from a particular director. For example, Spike Lee used his signature "heightened visual flourish[es]" to affect the viewer's perception of the action in his film *BlacKkKlansman*, adapted from a memoir by Ron Stallworth. Mekado

Murphy, *Visual Storytelling Through 'Spikeisms,'* N.Y. TIMES (Aug. 5, 2018), at AR11.

***The producer*:** The producer selects projects, writers, directors, actors, and other studio personnel; oversees the film's development; makes decisions regarding the geographical and temporal setting of the story; selects takes to incorporate; and supervises the film's editing. Through each of these activities, the producer infuses the story with the creative message that led them to finance and market the adaptation in the first place. *See* F. Jay Dougherty, *Not a Spike Lee Joint? Issue in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 U.C.L.A. L. REV. 225, 283–85 (2001).

***The screenwriter*:** A film adaptation is based upon a screenplay, which itself is a based upon the source material. In the process of adapting a book into a screenplay, the screenwriter infuses the film with new meaning or message by cutting or adding characters, changing plot points, or altering the setting. For example, whereas a work of nonfiction—such as *Moneyball* or *The Big Short*—explains events as they logically unfolded, a dramatic screenwriter will add a connective intentionality to the characters when drafting their adaptation.

***The composer*:** Scoring films infuses them with new motifs and conveys information about the story's plot or theme. John Williams' famous scores for *Jaws*, *Harry Potter*, and *Jurassic Park* convey tension, whimsy and adventure that transcend the dialogue in a particular scene—so much so that they are regularly enjoyed by audience members as standalone musical works. *See* Alex Ross, *The Force Is Still Strong with*

John Williams, New Yorker (July 21, 2020), https://www.newyorker.com/culture/persons-of-interest/the-force-is-still-strong-with-john-williams.

***The cinematographer*:** Cinematography is a "form of personal expression, even a response to current events," and cinematographers "bring essential dimensions, even trademarks, to their art." Ben Kenigsberg, *Two Films, and One Cinematographer's Signature*, N.Y. TIMES, July 17, 2020, at C3. The distinctive framing of shots can convey tone, theme, and emotion distinct from other creative contributions to the film.

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Under Petitioner's view that any new meaning or message dictates transformative use, if any of these artists touch a film adaptation of a novel—and of course all of them do—the resulting use of the copyrighted source material is per se transformative. And because a finding of transformative use can weigh heavily in fair use cases, then many film adaptations could be fair use and capable of production and distribution without a license.

Notably, it is not just films that Petitioner's test would disrupt—it puts far more of the copyright holder's exclusive rights in danger. Publishers' rights to the markets for e-books, audiobooks, translation rights, new distribution channels, and other derivative works play a critical role in their ability to support their authors and recoup their investments. Each of these examples arguably add a "new" meaning or message to the underlying work, *see, e.g., Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 99 (2d Cir. 2002) ("the art of translation

involves choices among many possible means of expressing ideas"), yet publishers contract for them as a matter of course. For the exclusive rights to reproduction, distribution, public performance, and public display, "new meaning or message" could easily arise from infringing uses, too. For example, displaying a piece of artwork in an obscure location, delivering dialogue in a play in an exaggerated and absurd manner, or reproducing a work on a platform devoted to a specific mission could all allow *someone* to perceive the use as have *some* new meaning or message and be—in Petitioner's view—transformative.

That is an absurd result that would be catastrophic to the publishing industry and the authors it supports. As set forth more fully below, it is also at odds with the plain text of the Copyright Act and long-standing precedent, *cf. Folsom*, 9 F. Cas. at 349 (appropriating the "essential value" of an original work to create another is a "clear invasion of the right of property" of the copyright owner), and should be rejected.

B. Consideration of a "New Meaning or Message" Must Account for the Appropriation's "Purpose and Character"

The limitless test Petitioner and its *amici* advance for "transformative use" has no basis in this Court's precedent or the plain text of the Copyright Act. Petitioner's test provides that if *any* person can perceive *any* "new meaning or message" in a challenged appropriation of a copyrighted work, the use is transformative—irrespective of its "purpose and

character." *See, e.g.*, Pet'r's Br. 40; Art Law Professors Br. 5. But this Court's precedent explains that the "purpose and character" of the use is paramount and frames the transformative use analysis, consistent with the Copyright Act's explicit directive. *Campbell*, 510 U.S. at 579–80; *see also Google*, 141 S. Ct. at 1203; 17 U.S.C. § 107.

Although the "new meaning or message" imbued by a follow-on creator's use may be relevant to fair use, it is only relevant insofar as the added expression informs the follow-on user's justified "purpose or character." For example, this Court has recognized that parody may qualify as fair use because it comments on or criticizes another work. *Campbell*, 510 U.S. at 580. Thus, the parodist's "new meaning or message" added to the original work helps identify the worthy purpose of the use. *See Dr. Seuss*, 983 F.3d at 453. But there is nothing in this Court's precedent to suggest that *any* new meaning or message in a secondary work that uses the original for *any* purpose will suffice. Rather, the secondary work must use the work because it has a necessary and deliberate relation back to, and dependence on, the pre-existing copyrightable work, consistent with Section 107's preamble. Otherwise, the use creates a derivative work, which is within the province of the original author to license.

Notably, Petitioner's and its *amici*'s obfuscations notwithstanding, Andy Warhol's supposed purpose for creating the artwork at issue in this case is irrelevant. This case is not about Andy Warhol, or anything he did or meant to do. Instead, as the Second Circuit correctly recognized, before the Court is a controversy

over the Andy Warhol *Foundation*'s decision to profit off works incorporating Lynn Goldsmith's copyrighted expression, beyond the scope of the license that Goldsmith granted. *See* Pet'r's App. 29a; *id.* at 51a (Jacobs, J., concurring) ("Goldsmith does not claim that the original works infringe and expresses no intention to encumber them; the opinion of the Court necessarily does not decide that issue."). Thus, the Court need not decide whether any of Warhol's works are transformative. Rather, it should only decide whether AWF's commercial usurpation of Lynn Goldsmith's derivative market for magazine covers was transformative. Even under Petitioner's unprecedently unlimited test, the answer to that question is clearly: no.[5]

Notably, even if this case *were* about Andy Warhol, his involvement as a party should make no difference. Congress and this Court have made clear there are no special rules for celebrities; the "same general standards of fair use are applicable to all kinds of uses of copyrighted material." S. REP. No. 94–473, at 65 (1975), *quoted in Harper & Row*, 471 U.S. at 553–54. Were the law otherwise, copyright law's incentives would be grossly distorted. The incentive to create would rely on influential artists *not* wanting to use the original author's work—which would be impossible to predict and, in any event, defy logic.[6]

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[5] Notably, the Petitioner does not claim AWF's commercial licensing added any new meaning or message to Goldsmith's photograph.

[6] As set forth above, expanding fair use beyond its Congressionally set bounds for influential appropriators would

Thus, Petitioner's contention that "Warhol's unique style," alone, is per se transformative because it infuses his works with a consistent message, should nonetheless fail. *See* Pet'r's Br. 50–51. Regardless of what Petitioner believes Andy Warhol's style to "mean," Petitioner's argument does not change the fundamental fact that this case concerns the use of Goldsmith's photograph for the same purpose for which it was licensed, beyond the scope of the license—a patently *un*fair purpose.

Thus, this Court should reject Petitioner's arguments and protect the balance of copyright owner's exclusive rights with the limited exception of fair use. Such a result would preserve established practices—which have developed under the aegis of centuries' worth of statutory and case law—and the copyright system our Founders intended.

CONCLUSION

For the foregoing reasons, this Court should affirm the Second Circuit's judgment.

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also improperly infuse fair use with a valuation of artistic merit. *Cf. Bleistein*, 188 U.S. at 251.

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