

No. 21-869

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

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THE ANDY WARHOL FOUNDATION FOR THE  
VISUAL ARTS, INC.,

*Petitioner,*

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,

*Respondents.*

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

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**BRIEF OF AMICUS CURIAE  
DR. SEUSS ENTERPRISES, L.P.  
IN SUPPORT OF RESPONDENTS**

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## **INTEREST OF AMICUS CURIAE**

*Amicus Curiae* Dr. Seuss Enterprises, L.P. (“DSE”) owns the copyrights and other intellectual property rights in the works of the late Theodor Seuss Geisel, the author and illustrator of the books written under the pseudonym “Dr. Seuss” (“Dr. Seuss”).<sup>1</sup> Dr. Seuss wrote and illustrated numerous works that remain popular today, including: *The Cat in the Hat*; *Green Eggs and Ham*; *How the Grinch Stole Christmas!*; *Oh, the Places You’ll Go!*; *One Fish Two Fish Red Fish Blue Fish*; and *The Sneetches and Other Stories*.

DSE works to ensure that each generation can experience the amazing world of Dr. Seuss. To this end, DSE publishes and reissues the iconic Dr. Seuss books. DSE also operates a robust licensing program, where DSE authorizes and oversees the creation of new works under the Dr. Seuss brand. These licensed new works include: books in Dr. Seuss’s style that often incorporate his original artwork or characters; fine art sold in high-end galleries; toys; video games; stage productions; and major motion pictures.

DSE has licensed many published works that incorporate many elements of the original Dr. Seuss books. These authorized works include *There’s No Place Like Space!* (a *Cat in the Hat* book) and various derivatives based on *Oh, the Places You’ll Go!* (“Go!”), which is DSE’s best-selling book and a very popular gift for graduating college and high school seniors.

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<sup>1</sup> Pursuant to this Court’s Rule 37.6, *Amicus Curiae* DSE certifies that no party or counsel for any party authored this brief in whole or in part, and that no person other than DSE or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties have filed blanket consents to the filing of amicus briefs.

DSE also licenses works where, after a careful vetting and selection process, it collaborates with other intellectual property holders. The resulting works combine Dr. Seuss's creative elements with properties of the collaborator. For example, DSE and The Jim Henson Company collaborated on *The Wubbulous World of Dr. Seuss*, a television and book series that featured "muppetized" Dr. Seuss characters and non-character "creative elements." Other collaborative works include: *Grinch Panda Pop*, a digital game that combines Jam City's Panda character with the Grinch character; figurines that combine Funko Inc.'s distinctive toy designs with Dr. Seuss characters; and a line of clothing combining Comme des Garçons' well-known heart design alongside *Grinch* artwork.

As a copyright owner, licensor, and caretaker of Dr. Seuss's legacy, DSE has a vital interest in ensuring that the fair use doctrine is not improperly expanded to steamroll the legitimate rights of copyright owners. As this Court has held, the fair use doctrine affords some "guarantee of breathing space within the confines of copyright." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). DSE recognizes the importance of this doctrine. But an overly expansive fair use doctrine would itself stifle innovation by eroding the incentives for original creation that copyright law is designed to foster.

DSE was also the plaintiff and appellant in *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020). In that case, the Ninth Circuit reversed a summary judgment of fair use and ordered summary judgment of no fair use against a work that had meticulously and extensively copied from "Go!"

and other Dr. Seuss works to create a *Star Trek*-flavored version of *Go!*. Among the many Court of Appeals decisions cited by the parties and other amici in this case, the Ninth Circuit’s *Seuss* decision is an especially instructive application of fair use principles and this Court’s precedents to artistic works.

While this amicus brief does not specifically focus on the Second Circuit’s decision below—much ink is devoted to it elsewhere—DSE believes that the summary judgment of no fair use in this case is entirely consonant with the Copyright Act, this Court’s precedents, and the underlying principles of fair use. Petitioner’s proposed “meaning or message” test for the first fair use factor, by contrast, clashes with those authorities and principles. Petitioner’s proposal would allow forms of unlicensed copying that are incompatible with the exclusive nature of copyrights and far exceed the “breathing space” that fair use allows. DSE thus respectfully submits this amicus brief in support of Respondents and affirmance of the Second Circuit’s judgment.

### **SUMMARY OF ARGUMENT**

Petitioner seeks to replace the actual first fair use factor—“the purpose and character of the use”—with a lax and amorphous “meaning or message” test. Petitioner’s proposal is not and should not be the law. The Copyright Act and this Court’s precedent root the first factor firmly in an objective assessment of purpose and character. An illustrative set of examples enumerated in the statute—criticism, comment, news reporting, teaching, scholarship, research—guides this inquiry. The common thread of these purposes is that, in each instance, the new work deploys expression from the original work in a manner that is directed to or bears on the original work itself. This Court has

recognized that, when a new work uses the original work's expression without such a purpose, the copyist's claim to fairness is substantially weaker—if not altogether absent.

Petitioner's "meaning or message" test would unmoor this inquiry from any genuine justification or need to use the original. This test would be met whenever someone conscripts the original work's expression to perform whatever duty the copyist wishes to assign to it, so long as some different idea accompanies it. But copyright law stimulates creativity by encouraging the creation of new expression—not the copying of another's expression simply as a convenient or attractive vehicle for whatever new "meaning or message" the copyist may have in mind. The objective "purpose and character" inquiry, guided by the illustrative statutory categories and conducted at their level of generality, best serves the goals of copyright. There is no good reason to depart from it, and Petitioner's test should be rejected.

Finally, Petitioner's decision to focus only on the first factor before this Court should not eclipse the crucial role that the other three factors play in the fair use analysis. Contrary to Petitioner's suggestion, those factors are perfectly capable of tipping the overall balance against fair use even when some degree of "transformative" use is found.

## ARGUMENT

### **I. The First Fair Use Factor Is The “Purpose and Character of the Use”—Not Petitioner’s Watered-Down “Meaning or Message” Standard**

The first fair use factor is “the purpose and character of the use” of the original work. *See* 17 U.S.C. § 107; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). It is not merely whether the “meaning or message” of the new work is different from that of the original. Petitioner fashions its test by plucking out of context one part of one phrase from the Court’s explication of the first factor’s purpose in *Campbell* and promoting it to the status of the entire first factor itself. This approach not only is unsound as a rudimentary matter of law, but also would unravel the legislative and judicial design reflected in the first factor.

#### **A. The Copyright Act Itself Precludes Petitioner’s Approach**

Starting with the statute’s text, and consistent with the common law it codifies, the first factor is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1). If Congress had wanted to focus the inquiry only on “meaning or message,” it could have done so. It did not. Petitioner’s proposed test thus starts off on the wrong foot.

The statutory text also illuminates the contours of the “purpose” inquiry. In addition to the first factor’s own identification of “commercial nature” and “nonprofit educational purposes,” the preamble gives several examples of “purposes” that may be indicative (though not dispositive) of fair use. These exemplary purposes



are “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” 17 U.S.C. § 107. Moreover, this list is prefaced by the phrase “purposes such as.” *Id.* There is no comma between “purposes” and “such as.” Accordingly, the list that follows not only provides examples of relevant purposes, but also conveys the *types* of purposes contemplated. See William Strunk Jr. & E.B. White, *The Elements of Style* 4-5, 59, 94 (4th ed. 1999) (identifying rule of grammar that a restrictive clause limits or defines what immediately precedes it and is not set off by a comma).

The relevant common thread running through the purposes identified in the statutory preamble is that, in each instance, the new work communicates a message *about* the original work in some meaningful way. The new work criticizes the original, comments on the original, reports on the original, teaches about the original, or presents scholarship or research about the original. While this list is not exhaustive, it is illustrative and instructive of both (1) the level of generality at which purpose should be assessed and (2) the types of purposes for which the statute contemplates some breathing space is needed.

Moreover, while the statute may not strictly require that the new work bear directly on the original in all instances, the fact that all the illustrative purposes share this feature cannot be ignored. At a minimum, the list identifies the types of relationships between new and original works on which fair use is focused. The direct relationship between the new work and the original work is what spawns the need to use some measure of the original in the first place. Absent such a relationship, what justification is there to take from the original at all, as opposed to creating new

expression without such borrowing (or seeking a license)? Essentially parallel relationships between works are therefore, at most, at the periphery of the statutory zone. If such uses ever can be deemed transformative at all, it should be with reluctance and only to a slight degree.

Strikingly absent from Congress's list is any purpose whereby the new work uses the original work (or part of it) simply as a vehicle to convey some different meaning or message that does not bear on the original work itself. Yet that is precisely what Petitioner's test would place at the core of fair use. Petitioner tries to square this approach with the preamble's examples by asserting that "the unifying theme of those disparate categories is that, for each one, a follow-on work often conveys a new meaning or message different than the original it borrows from." Pet. Br. at 41. But this sauce is too weak: it hardly excludes any use besides mimicry and hollows nearly all meaning from the statutory text.

Likewise, Petitioner's assertion that "a follow-on work that communicates a new meaning or message inherently has a different 'purpose' and 'character' than the original" eviscerates the statute's use of "purpose." *Id.* Assigning a unique "purpose" to each particular "meaning or message" that a work might convey is inconsistent with the statute's use of broader categories to identify different purposes: *e.g.*, criticism, comment, news reporting, educational nonprofit. And, again, the statutory examples of purpose all express some relationship between the new work and the original. If any "new meaning or message" were enough to differentiate one work's purpose from another's, it hardly would have been worth the trouble for the Congress to provide the illustrative list that it

did. Nor would it have made sense for Congress to describe illustrative purposes in terms of broad categories if any “new meaning or message” sufficed as a “different purpose.” Under Petitioner’s approach, each new work could occupy its own unique category of one depending on the precise meaning or message it conveyed. This outcome is hardly consonant with the statute’s design.

### **B. Petitioner’s Approach Misreads *Campbell***

Next, Petitioner’s “meaning or message” test distorts the *Campbell* decision from which it purports to derive. For one thing, *Campbell* confirms that the illustrative statutory categories are not mere trivia. 510 U.S. at 577-78. Central to the Court’s determination that parody “has an obvious claim to transformative value” is the recognition that parody is a form of comment or criticism that “shed[s] light on an earlier work, and, in the process, create[s] a new one.” *Id.* at 579. This Court “thus line[d] up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107.” *Id.*

Turning to what qualifies as “parody,” this Court explained: “For the purposes of copyright law, the nub of the definitions, and the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, *at least in part, comments on that author’s works.*” *Id.* at 580 (emphasis added). “If, on the contrary, the commentary *has no critical bearing on the substance or style of the original composition*, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, *the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish)*,

and other factors, like the extent of its commerciality, loom larger.” *Id.* (emphasis added).

If “new meaning or message” alone were the relevant inquiry, then this pivotal passage in *Campbell* would have been superfluous. There would have been no need to the Court to consider the relationship of the accused work’s “new meaning or message” to the original. And while the Court may not have established a bright-line rule that *always* requires the new work to bear on the original, it confirmed that the “claim to fairness” will “diminish[]”—if not “vanish”—absent such a relationship. *Id.* The Court punctuated this distinction in contrasting parody with satire: “Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.” *Id.* at 580-81.

Petitioner also takes the “new meaning or message” language far out of its limited context in *Campbell*. The Court made clear that the first factor is the purpose and character of the use and explained how the statutory examples guide this inquiry. *Id.* at 578-79. The Court then explained: “The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely ‘supersede[s] the objects’ of the original creation, [citations omitted] (‘supplanting’ the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’” *Id.* at 579. Consistent with the language of the first factor, the Court made clear that the “something new” must have “a further purpose or different character.” *Id.* “[N]ew expression,

meaning, or message” alone does not render a work “transformative” under *Campbell*. *Id.* Petitioner’s proposed test elides this crucial component of *Campbell*’s explication of the relevant standard. The purpose and character of the use remain the touchstone of the inquiry. *See id.*

The *Seuss* decision provides an instructive counterpoint to Petitioner’s diluted approach to the first factor. The Ninth Circuit recognized that “[a] transformative work ‘adds something new, *with a further purpose or different character*, altering the first with new expression, meaning or message.’” 983 F.3d at 452 (quoting *Campbell*, 510 U.S. at 579) (emphasis added). The court then considered and roundly rejected the defendants’ assertion that their work was a parody. *Id.* at 452-53. The court recognized that parody is a type of use whose “purpose and character . . . fits squarely into preamble examples” and “has ‘an obvious claim’ to transformative use,” but concluded that this shoe did not come close to fitting in that case. *Id.* (quoting *Campbell*, 510 U.S. at 579). The court “also reject[ed] as ‘completely unconvincing’” the defendants’ “post-hoc characterization of the work’ as criticizing” an asserted theme of the original. *Id.* (quoting *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997)).

Having dispensed with these asserted purposes, the Ninth Circuit then considered whether the accused work was “otherwise transformative.” *Id.* at 453. The court engaged in a careful, fact-specific analysis to conclude that the defendants’ “repackaging, copying, and lack of critique of Seuss, coupled with [defendants’] commercial use of *Go!*, do not result in a transformative use.” *Id.* at 455.

Even if Petitioner’s unsound proposal actually became the law, the first-factor analysis in *Seuss* still would have come out the same way. For example, the Ninth Circuit observed that *Boldly* “propound[ed] the same message as *Go!*” 983 F.3d at 454. Even though the defendants had “plugged in the *Star Trek* characters,” “*Go!* continue[d] to carry the same expression, meaning, or message.” *Id.* And the defendants’ “repackag[ing of] *Go!*’s text . . . did not result in the *Go!* story taking on a new expression, meaning, or message.” *Id.* at 455. One of the defendants had even “urged the team to ‘keep to [*Go!*’s] sentiment’ that ‘life is an adventure but it WILL be tough and there WILL be setbacks, and you should not despair of them.’” *Id.* at 450. The Ninth Circuit explained that “*Boldly*’s claim to transformative use rests on the fact that it has ‘extensive new content.’ But 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. Regardless, Petitioner’s proposed “meaning or message” test strays too far from the statute, this Court’s precedent, the goals of the fair use doctrine, and the aims of copyright generally. If adopted, Petitioner’s test would place far too heavy a thumb on the copyist’s side of the first-factor scale. It therefore should be rejected.

Maintaining a careful focus on objective purpose and character also will guard against giving too much leeway to a particular type of use that is exploitative, not transformative. Circuit Judge Leval—on whose academic writings this Court relied extensively in *Campbell*—summarized this issue in a recent lecture on fair use. Judge Leval expressed concern about

a common form of copying that is neither parodic nor satirical, where one simply piggy-

backs on a famous song or poem, passage, or logo, playing on public recognition of the original to give punch or humor to a new, unrelated message. Where the copying is essentially either to harness the expressive brilliance of the original for the delivery of the copier's message, or to gain audience impact for the new message by free-riding on the fame of the original expression, courts should ponder whether such changes can qualify as transformative, whether they have arguable justification for copying. It's difficult to see why the original author should not be entitled to a fee for licensing such a utilization of her work.

Pierre Leval, *Fair Use: A Ramble Through the Bramble*, NYU Proving IP Symposium, May 16, 2019, video available at [https://www.youtube.com/watch?v=OGky\\_yG8dV8](https://www.youtube.com/watch?v=OGky_yG8dV8) (last accessed August 14, 2022) (starting at 11:49); *see also* Pierre Leval, *Campbell As Fair Use Blueprint*, 90 Wash. L. Rev. 597, 611-12 (2015).

For all these reasons, Petitioner's invitation to replace the historical first-factor inquiry with its flimsy "meaning or message" test should be rejected.

## **II. Keeping "Purpose And Character" At The Heart Of The First Factor Facilitates Proper Analysis Of The Third And Fourth Factors Too**

Petitioner's choice to focus only on the first factor before this Court should not be allowed to diminish the independent significance of the other fair use factors. As this Court has explained, the third factor—"the amount and substantiality of the portion used in relation to the copyrighted work as a whole"—"will

harken back to” the first factor because “the extent of permissible copying varies with the purpose and character of the use.” *Campbell*, 510 U.S. at 586-87. Even when a use is deemed “transformative,” it is still eminently possible for the copyist to take too much. *See id.* So the first factor provides a barometer for this inquiry, but it does not itself dictate the answer.

Likewise, under the fourth factor—“the effect of the use upon the potential market for or value of the copyrighted work”—the first factor’s outcome may influence the readiness with which market harm may be inferred. *See id.* at 590. Yet *Campbell* itself confirms that even a clear parodic purpose does not conclude the fair use inquiry. *Id.* at 591-92. This Court, in fact, remanded for further development of the factual record on the fourth factor and ultimate reweighing of the four factors together. *Id.* at 593-94. Rather, a transformative use still may cause cognizable market harm, and both potential markets and markets for derivatives must be considered. *Id.* at 590-93. Moreover, courts must “consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original.” *Id.* at 590 (citations and quotations omitted) (alteration in original). The answers to these questions require an analysis that transcends the first factor’s outcome alone.

Petitioner is therefore wrong to assert that, even if its flawed first-factor test were adopted, it would “create[] a strong presumption that works conveying new meanings or messages will not be suppressed by law.” Pet. Br. at 40. For one thing, “transformative-



ness” is not a mere binary proposition, but is instead a matter of degree. *See Campbell*, 510 U.S. at 579 (the first factor asks “whether *and to what extent* the new work is ‘transformative’”) (emphasis added). For another, while the first factor “influences the lens through which [courts] consider” the third and fourth factors, *Seuss*, 983 F.3d at 451, the first factor’s outcome does not simply run the table. Rather, “[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright.” *Campbell*, 510 U.S. at 578.

In fact, the third and fourth factors themselves may influence the analysis of the first factor, as well as each other. As this Court explained in *Campbell*, “whether ‘a substantial portion of the infringing work was copied verbatim’ from the copyrighted work is a relevant question, [citation omitted], for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; 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.” *Id.* at 587-88.

Likewise, evidence relating to harm to actual or potential markets may shed light on the first and third factors. For example, the Ninth Circuit in *Seuss* cited extensive evidence of likely harm to DSE’s actual and potential markets (including markets for derivatives) as cementing the defendants’ failure to meet their burden on the fourth factor. 983 F.3d at 458-61. Such evidence can further weaken a claim to transformative use under the first factor and indicate that too much (quantitatively and/or qualitatively) was taken under the third factor.

The Ninth Circuit has observed that “fair use analysis can be elusive to the point of approaching the metaphysics of the law, where the distinctions are . . . very subtle and refined, and, sometimes, almost evanescent.” *Id.* at 451 (citations and quotations omitted) (alteration in original). Much of this elusiveness can be attributed to varying applications of the concept of “transformative” use. The third and fourth factors often can provide a more concrete grounding for the inquiry and rein in the journeys to the metaphysical legal edge.

Further, if Petitioner’s “meaning or message” test were adopted, the first factor would become *less* useful as a frame for the third and fourth factors. For example, recognizing as transformative the mere co-opting of another’s expression as a vehicle for some different “meaning or message” would not supply a useful tool for measuring the justification for the amount taken. In fact, it would be difficult to perceive the justification for *any* amount of taking if the new work is not directed to the original at all. *See Campbell*, 510 U.S. at 580. Likewise, such a weak conception of “transformativeness” would dim the light shed on market harm, as relevant “markets” are far less plausibly defined in terms of individual messages or meanings conveyed than by more economically sensible categories like “the market for rap derivatives.” *Id.* at 590.

Finally, while the second factor, “the nature of the copyrighted work,” usually attracts the least attention—perhaps the Ringo Starr of fair use law—it too can provide a useful independent frame for the analysis. For example, while the second factor did not feature prominently in the *Seuss* decision, the Ninth Circuit acknowledged that “the creative nature of *Go!* weighs against fair use.” 983 F.3d at 456. The court rooted

this conclusion in *Campbell*'s recognition that “creative works are “closer to the core of intended copyright protection” than informational and functional works, “with the consequence that fair use is more difficult to establish when the former works are copied.”” *Seuss*, 983 F.3d at 455 (quoting *Penguin Books*, 109 F.3d at 1402) (in turn quoting *Campbell*, 510 U.S. at 586). For the same reason, the second factor is also a useful tool for distinguishing the rhythms of the fair use analysis in a case like *Google*—where the functional nature of the work loomed large—from those in cases involving artistic works, like *Campbell*, *Seuss*, and this one. See *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183, 1197-98, 1208-09 (2021).

### CONCLUSION

*Amicus Curiae* Dr. Seuss Enterprises, L.P. supports affirmance of the Second Circuit's judgment because it is the outcome that the Copyright Act, this Court's precedents, and sound fair use principles require.

Respectfully submitted,

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