Warhol's Lessons for the Publishing Industry

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INTRODUCTION

What, if anything, can the publishing industry learn from *Andy Warhol Foundation v. Goldsmith*?[1]

In this Article, I will focus on three key areas that the *Warhol* Court touched on in its decision—transformativeness, commerciality, and market harm—to see what questions were answered and what questions were left for another day.

Publishing is, of course, the original copyright industry. The world's first general copyright law, Great Britain's Statute of Anne, exclusively protected "books."[2] The primary focus of the first copyright law in the United States was also books, though the law also covered maps and charts.[3]

Today, the U.S. publishing industry is diverse, ranging from major commercial book and journal publishers to small, non-profit, university, and scholarly presses, as well as leading publishers of educational materials and digital learning platforms. Further, it remains vital to society. In 2022, the U.S. book publishing industry generated $28.1 billion in revenue.[4] Beyond its economic contributions, a healthy and independent publishing industry supports the nation's political, intellectual, and cultural systems.

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1. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023). This Article assumes familiarity with the decision and opinion.

2. 8 Anne, c. 19 (1710).

3. Copyright Act of 1790 § 1, 1 Stat. 124 (1790).

4. Press Release, Association of American Publishers, AAP StatShot Annual Report: Publishing Revenues Totaled $28.10 Billion for 2022 (May 31, 2023), https://publishers.org/news/aap-statshot-annual-report-publishing-revenues-totaled-28-10-billion-for-2022/ [https://perma.cc/NW3F-EG8D] [https://web.archive.org/web/20240202231430/https://publishers.org/news/aap-statshot-annual-report-publishing-revenues-totaled-28-10-billion-for-2022/].

Indeed, the free operation of the publishing industry in a nation cannot be separated from the free exercise of democracy.[5]

Copyright continues to serve as a critical legal foundation for the work of publishers. This includes both an appropriately balanced fair use doctrine, which publishers rely on regularly in the course of their work, and a meaningful derivative works right.

Helping courts correctly distinguish between the two is what motivated the Association of American Publishers (AAP), the national trade association for U.S. publishers, to file an amicus brief in support of Lynn Goldsmith. AAP's concern was not that courts were generally not getting it right, at least in cases involving books and other publications. The concern, rather, was that there was a lot of room for the Supreme Court to get things wrong and undermine the derivative works right through an unbalanced conception of the transformativeness doctrine.

The amicus brief observed that "[p]ublishers 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 ebook or audiobook—all of which are quintessential examples of derivative works."[6] Publishers in the educational space also rely on the derivative works right to protect supplementary materials, instructor solution manuals, and other adjuncts to the textbooks and course materials they create and distribute.

From the perspective of book publishers, then, the Court got it right. It recognized the tension between transformativeness and the derivative works right, explaining that "an overbroad concept of transformative use, one that includes any further purpose, or any different character, would narrow the copyright owner's exclusive right to create derivative works."[7] If the Court did nothing beyond shining a light on this tension, it would be considered a good outcome for publishers.

I. TRANSFORMATIVENESS

The Court discussed the doctrine of transformativeness extensively beyond its recognition of the tension with the derivative works right, and this discussion has the potential to impact many issues facing publishers going forward. I will look more closely at how *Warhol*'s transformativeness holding plays out in certain factual situations that commonly come up in the fair use space for publishers, starting with the

5. "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W. T. Barry (Aug. 4, 1822), https://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html [https://perma.cc/E4MP-Q2B8] [https://web.archive.org/web/20231002192051/https://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html].

6. Brief for Amicus Curiae Ass'n of American Publishers in Support of Respondents at 21, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023) (No. 21-869).

7. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 529 (2023).

one most analogous to the facts of that case—that is, modifying an original work to make a new creative work. I will then consider the use of an unaltered work in a new work, and finally consider uses which neither alter the original work nor result in the creation of a new work.

A. ALTERED ORIGINAL, NEW WORK

Prior to *Warhol*, there have been a number of cases involving books where a court has denied a fair use defense under similar factual situations. In *Penguin Random House v. Colting*, the U.S. District Court for the Southern District of New York denied the defendant's fair use argument for its series of "Kinderguides," which are illustrated children's books that contain condensed, simplified versions of classic novels, that included four novels in which the plaintiff owned the copyright.[8] Defendants made three claims of transformation: abridgment of the original work, removal of "adult" themes, and addition of several pages of commentary and background information. The court rejected all three as insufficiently transformative, categorizing the Kinderguides instead as unauthorized derivative works.

In *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, the Second Circuit rejected the defendant's fair use argument for its publication of *The Seinfeld Aptitude Test*, "a trivia quiz book devoted exclusively to testing its readers' recollection of scenes and events from the fictional television series Seinfeld."[9] It concluded the book was not created to comment on or criticize *Seinfeld*, but "to repackage *Seinfeld* to entertain *Seinfeld* viewers."[10]

The Ninth Circuit has denied fair use in two cases involving the works of Dr. Seuss. In *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, the court held "The Cat NOT in the Hat," a poetic retelling of the O.J. Simpson double murder trial done in the style of Dr. Seuss, was not protected by fair use—though it mimicked Seuss's protected expression, the work did not criticize or comment on Seuss's work.[11] More recently, in *Dr. Seuss Enterprises, L.P. v. ComicMix L.L.C.*, the court held that "Oh, the Places You'll Boldly Go!", a mashup of Seuss's iconic work "Oh, the Places You'll Go" with elements from the *Star Trek* universe, was not entitled to fair use.[12] Again, the court concluded that the work merely repackaged Seuss and failed to make any type of transformative criticism or critique of the work.[13]

In other cases, courts have found a defendant's modification of an original work to make a new creative work to be fair use. In *SunTrust Bank v. Houghton Mifflin Co.*, the Eleventh Circuit considered the publication of "The Wind Done Gone," a retelling of Margaret Mitchell's classic novel "Gone With the Wind" from the perspective of one

8. Penguin Random House LLC v. Colting, 270 F. Supp. 3d 736 (S.D.N.Y. 2017).
9. Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 135 (2d Cir. 1998).
10. *Id.* at 142.
11. Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997).
12. Dr. Seuss Enters., L.P. v. ComicMix L.L.C., 983 F.3d 443 (9th Cir. 2020).
13. *Id.* at 455.

of the enslaved characters.[14] It found transformative value in the new work, calling it "principally and purposefully a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of [Gone With the Wind]."[15] Meanwhile, in *New Era Publications International, ApS v. Carol Publishing Group*, the Second Circuit found that the incorporation of over 100 quotations of L. Ron Hubbard, the founder of Scientology in a critical biography was fair use. The purpose of the use was to illustrate and demonstrate the author's view of the character of Hubbard, "qualities that may best (or only) be revealed through direct quotation."[16]

Two points are worth noting about these cases. First, while these cases can certainly generate robust discussion and differing views on whether courts reached the correct outcome, there is general agreement that, as a whole, the logic of each court is consistent, relatively clear, and acceptable—at least with respect to the publishing industry. Second, the *Warhol* decision probably would not have led to different outcomes for these decisions.

B. UNALTERED ORIGINAL, NEW WORK

Let's take things one step further. How would *Warhol* apply in a situation where an original work is used in a new creative work, but the work itself remains unaltered? For example, consider the seven copyrighted Grateful Dead concert posters reproduced by defendants in their entirety in an illustrated history book of the band in *Bill Graham Archives LLC v. Dorling Kindersley Ltd.*[17] The U.S. District Court for the Southern District of New York found this use transformative because the images were used to commemorate the occurrence of the concerts as part of a visual timeline rather than merely for their aesthetic value.[18]

While this fact pattern is a little bit farther from the question *Warhol* considered, the Court did touch on it a little bit. In a footnote, the Court noted that, in theory, "the question of transformative use or transformative purpose can be separated from the question whether there has been transformation of a work."[19] But "[i]n practice," it continued, "the two may overlap."[20] Not incredibly helpful or insightful, at first glance.

Fortunately, the lower courts have done a lot of good work here. Consider, for example, the Fourth Circuit's 2019 decision in *Brammer v. Violent Hues Productions, LLC*.[21] There, the court identified "two recurring situations" where courts have found unmodified uses to be transformative.[22] In one of these situations, "copyrighted works

14. SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).
15. *Id.* at 1270.
16. New Era Publ'ns Int'l, ApS v. Carol Publ'g Grp., 904 F.2d 152, 156 (2d Cir. 1990).
17. 386 F. Supp. 2d 324 (S.D.N.Y. 2005).
18. *Id.* at 329.
19. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 529 n.5 (2023).
20. *Id.*
21. 922 F.3d 255 (4th Cir. 2019).
22. *Id.* at 263–64.

serve documentary purposes and may be important to the accurate representations of historical events."[23] Such "representations often have scholarly, biographical, or journalistic value, and are frequently accompanied by commentary on the copyrighted work itself."[24]

In other words, the Fourth Circuit suggests that in some situations a copyrighted work is used as a sort of historical artifact, which is a purpose different from its original purpose. This aligns with the discussion of transformativeness in *Warhol* and embodies the type of justification the Court identified as part of that analysis. So, to the extent that courts are looking at this type of situation post-*Warhol*, we will not necessarily see any changes in the outcomes they have been reaching pre-*Warhol*.

C. NO ALTERATION, NO NEW WORK

The final situation I want to consider involves what are sometimes referred to as "functional uses," which is probably the farthest from *Warhol* we could get. This category includes uses where not only is the original work not changed or altered in any sort of aesthetic fashion, but also there is no creation of a new work. Instead, the copyrighted work is being used for some other functional or technological purpose independent of the creation of a new work. And it is often the case that the use involves large numbers of copyrighted works rather than a single copyrighted work.

Some illustrative examples of "functional uses" that have been found to be fair use include *Authors Guild v. Google, Inc.* (digitization of books to create search index),[25] *A.V.* ex rel *Vanderhye v. iParadigms, LLC* (reproduction of student coursework to check for plagiarism),[26] *Perfect 10, Inc. v. Amazon.com, Inc.* (reproduction of images to create search result pointers),[27] and *Kelly v. Arriba Soft Corp.* (same).[28] On the flip side, courts have rejected fair use arguments for functional uses in such cases as *Hachette Book Group, Inc. v. Internet Archive* (digitization and online distribution of books),[29] *Fox News Network, LLC v. TVEyes, Inc.* (reproduction and distribution of TV clips),[30] *Associated Press v. Meltwater U.S. Holdings, Inc.* (scraping and distribution of online news article excerpts),[31] and *Infinity Broadcast Corp. v. Kirkwood* (retransmission of radio broadcasts over telephone).[32]

At the time of writing, the big question mark for functional uses in a post-*Warhol* landscape arises from the use of copyrighted works in the development of artificial

23. *Id.* at 264.
24. *Id.*
25. 804 F.3d 202 (2d Cir. 2015).
26. 562 F.3d 630 (4th Cir. 2009).
27. 508 F.3d 1146 (9th Cir. 2007).
28. 336 F.3d 811 (9th Cir. 2003).
29. 664 F. Supp. 3d 370 (S.D.N.Y. 2023).
30. 883 F.3d 169 (2d Cir. 2018).
31. 931 F. Supp. 2d 537 (S.D.N.Y. 2013).
32. 150 F.3d 104 (2d Cir. 1998).

intelligence (AI) tools—particularly generative AI tools. This currently popular subset of AI models relies on the ingestion of large quantities of expressive material for machine learning inputs.[33] The unpermitted use of copyrighted works for training AI models has raised questions about fair use—and sparked litigation.[34] Such litigation will be a big test for functional uses.

Does *Warhol* give us any clues as to how courts will address these issues? On the one hand, the Court did cite to one of these functional use cases in a manner that may be seen as implicitly endorsing the purpose at issue as transformative. In describing when "the meaning of a secondary work . . . should be considered to the extent necessary to determine whether the purpose of the use is distinct from the original," the Court included as one example "provid[ing] otherwise unavailable information about the original," which was the purpose found in *Google Books*.[35] This suggests at least some functional uses may be consistent with the Court's understanding of transformativeness in *Warhol*.

On the other hand, *Warhol* also provides very strong language that serves as a counterweight to these functional use cases—such as when the majority chides the dissent for "[i]ts single-minded focus on the value of copying," the result of which "is an account of fair use that is unbalanced in theory."[36] Elsewhere, the Court cautions against overreading its earlier decision in *Google LLC v. Oracle America, Inc*, saying, "[t]he Court did not hold that any secondary use that is innovative, in some sense, or that a judge or Justice considers to be creative progress consistent with the constitutional objective of copyright, is thereby transformative."[37] Perhaps this language will be taken by courts as a signal to be less amenable to finding functional uses of original works transformative.

II. COMMERCIALITY

Commerciality is another key area of *Warhol*'s discussion of the first fair use factor, and one that plays an important role in many cases related to the publishing industry.

33. *See* U.S. PAT. & TRADEMARK OFF., PUBLIC VIEWS ON ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY POLICY 23–24 (Oct. 2020), https://www.uspto.gov/sites/default/files/documents/USPTO_AI-Report_2020-10-07.pdf [https://perma.cc/A2W9-4JBQ] [https://web.archive.org/web/20240205041212/https://www.uspto.gov/sites/default/files/documents/USPTO_AI-Report_2020-10-07.pdf].

34. Sheera Frenkel & Stuart A. Thompson, *'Not for Machines To Harvest': Data Revolts Break Out Against A.I.*, N.Y. TIMES (July 15, 2023), https://www.nytimes.com/2023/07/15/technology/artificial-intelligence-models-chat-data.html [https://perma.cc/XR2T-MWPG] [https://web.archive.org/web/20240205040809/https://www.nytimes.com/2023/07/15/technology/artificial-intelligence-models-chat-data.html].

35. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 544–45 (2023).

36. *Id.* at 549.

37. *Id.* at 543 n.18.

The Copyright Act establishes that courts must consider whether a use "is of a commercial nature" as part of the first factor analysis.[38] And we also knew prior to *Warhol* that courts should avoid presumptions on either side. That is, just because a use or a user is not for-profit, that does not automatically mean the first fair use factor favors finding fair use.[39] And just because a use is commercial, that does not bar fair use.[40] In the publishing industry, that second presumption is especially important because most publishers operate for profit but still rely on fair use.[41]

What did *Warhol* add to that? Not much.

The Court did say, "[f]irst, the fact that a use is commercial as opposed to nonprofit is an additional 'element of the first factor.' The commercial nature of the use is not dispositive. But it is relevant."[42]

Given how little new ground the Court broke, why did it discuss commerciality at all? Perhaps the Court observed lower courts treating it as a sort of a non-factor in the fair use analysis.[43] Perhaps it wanted to reiterate that yes, this is a factor that courts must consider—even if it is not dispositive, courts should not give it short shrift.

What effect might this recognition have going forward?

I can think of two potential effects, recalling the two presumptions that courts want to avoid. One, to what extent is there a commercial penalty under the first fair use factor—or, how much will a commercial use weigh against fair use? And two, to what extent is there a noncommercial privilege—or, how much will a noncommercial use weigh in favor of fair use?

The Supreme Court's existing discussions of commerciality provide strong guideposts. The Court has been very clear about putting little weight on commerciality. As *Campbell* observed, barring fair use on commerciality "would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107 . . . since these activities 'are generally conducted for profit in this country.'"[44] The majority cited approvingly to Samuel Johnson's pronouncement that "no man but a blockhead ever wrote, except for money."[45] Justice Breyer reiterated this point in *Google v. Oracle*, saying, "[t]here is no doubt that a finding that copying was not commercial in nature tips the scales in favor of fair use. But the inverse is not necessarily true, as many common fair uses are

38. 17 U.S.C. § 107(1).

39. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994).

40. *Id.*

41. *Id.*

42. *Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 531.

43. *See, e.g.*, Authors Guild v. Google, Inc., 804 F.3d 202, 219 (2d Cir. 2015); Cariou v. Prince, 714 F.3d 694, 708 (2d Cir. 2013) ("Although 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."); *see also* Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 168 (2019) ("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.").

44. *Campbell*, 510 U.S. at 584 (quoting Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 592 (1985)).

45. *Id.*

indisputably commercial."[46] Given this, we will unlikely see the commercial penalty increase after *Warhol* given that the Court has established clear outside bounds.

But on the other hand, maybe there will be less weight given to noncommercial uses because of *Warhol*. The Supreme Court has already suggested "profit" should be read broadly. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, it held, "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[47] That language sweeps in a lot of uses by noncommercial users. Other holdings from lower courts also point to a narrow noncommercial privilege. For example, appellate courts have held that the fact that a user is a nonprofit organization is not dispositive,[48] that the benefits a nonprofit organization accrues through the use may be considered commercial,[49] and that it is irrelevant if the ultimate use is noncommercial.[50] Perhaps this points toward a continued narrowing of the noncommercial privilege, and less emphasis being placed on the noncommercial nature of a use in the first fair use factor.

This deemphasis is consistent with other aspects of the Copyright Act. For example, consider the public performance right: The 1976 revision removed the "for-profit" limitation that accompanied the 1909 Act's public performance right.[51] As the legislative history reveals, the dropping of the for-profit limitation was driven in part by technological advances, the maturation of the nonprofit sector, and the impact that nonprofit uses have on commercial markets.[52] Since the Copyright Act has narrowed the privilege for nonprofit uses there, it is consistent to narrow it in the fair use context.

III. MARKET HARM

The *Warhol* decision was confined to just two aspects of the first fair use factor: transformativeness and commerciality. Yet we know the fourth fair use factor—"the effect of the use upon the potential market for or value of the copyrighted work"—plays

46. Google LLC v. Oracle Am., Inc., 593 U.S. 1, 32 (2021).

47. *Harper & Row, Publishers*, 471 U.S. at 562.

48. *See, e.g.*, Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory, 689 F.3d 29, 61 (1st Cir. 2012); Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1118 (9th Cir. 2000); Weissmann v. Freeman, 868 F.2d 1313, 1324 (2d Cir. 1989).

49. *See, e.g.*,Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1118 (9th Cir. 2000); *Weissmann*, 868 F.2d at 1324; Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory, 689 F.3d 29, 61 (1st Cir. 2012).

50. *See, e.g.*, De Fontbrune v. Wofsy, 39 F.4th 1214, 1224 (9th Cir. 2022); Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1386 (6th Cir. 1996).

51. H.R. REP. NO. 94-1476, at 62 (1976).

52. "The line between commercial and 'nonprofit' organizations is increasingly difficult to draw. Many 'non-profit' organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad 'not for profit' exemption could not only hurt authors but could dry up their incentive to write." *Id.* at 62–63.

a central role in the fair use analysis. The Court in *Harper & Row* called it "undoubtedly the single most important element of fair use,"[53] a point cited approvingly in both the concurring[54] and dissenting[55] *Warhol* opinions. Does *Warhol* offer any guidance to courts related to the fourth fair use factor?

For one, *Warhol* makes a helpful insight. In a footnote, the majority explains that the first and fourth factors are related, then draws a distinction between the two by explaining, "[w]hile the first factor considers whether and to what extent an original work and secondary use have substitutable purposes, the fourth factor focuses on actual or potential market substitution."[56] It chides the dissent for "fumbl[ing] the relationship between the first and fourth fair use factors."[57] The analysis for each is different—unlike the fourth factor, "the first factor does not ask whether a secondary use causes a copyright owner economic harm."[58] However, there is a correlation between the two. The majority explains, "[a] secondary use that is more different in purpose and character is less likely to usurp demand for the original work or its derivatives."[59] This key insight regarding the distinction and correlation between the first and fourth fair use factors should prove helpful to courts when applying the fair use analysis.

But *Warhol* also raises a concern regarding misapplication of the fourth fair use factor.

The concern arises out of the majority's careful clarification that its decision in *Campbell* does not mean that "any use that adds some new expression, meaning, or message" weighs in favor of fair use.[60] "Otherwise," the majority explains, "'transformative use' would swallow the copyright owner's exclusive right to prepare derivative works"[61]—a right that both the majority and the dissent agree includes the adaptation of a novel into a film.[62] The majority again takes to the footnotes to confront the dissent, which it says is "stumped" on how to apply its transformative use test without vitiating the derivative works right.[63] According to the majority, the dissent "suggests that the fourth fair use factor alone takes care of derivative works like book-to-film adaptations," but the majority is aware of no authority for this proposition.[64]

The dissent counters that the majority's first factor test would not stop "the freeloading filmmaker."[65] And herein lies the problematic language. In explaining its

53. Harper & Row, Publishers. v. Nation Enters., 471 U.S. 539, 566 (1985).
54. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 555 (2023) (Gorsuch, J., concurring).
55. *Id.* at 569 (Kagan, J., dissenting).
56. *Id.* at 536 n.12 (majority opinion).
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 541.
61. *Id.*
62. *Id.*; *Id.* at 569 n.5 (Kagan, J., dissenting).
63. *Id.* at 541 n.17 (majority opinion).
64. *Id.*
65. *Id.* at 569 n.5 (Kagan, J., dissenting).

rationale, the dissent asserts that the majority's test "boils down to whether a follow-on work serves substantially the same commercial purpose as the original," a "mold" that a film adaption "doesn't fit."[66] According to the dissent, "[t]he filmmaker . . . wants to reach different buyers, in different markets, consuming different products."[67]

This is an unfortunate error made by courts in applying the fourth fair use factor. It is a common error, particularly when dealing with licensing and derivative works markets.[68]

The error arises—keeping with the example of a book-to-film adaptation—in comparing the market of the film adaptation itself with the end user market of the book that the film is based on. In other words, a court mistakenly asks if watching the film serves as a substitute for the book—if someone sees the movie, are they less likely to buy the book? This analysis misconstrues derivative works markets and leads to erroneous results.

Instead, when a court looks at licensing and derivative works markets, the correct focus of the market analysis should be on the derivative works market itself. That is, will an unauthorized film adaptation of an original work substitute for authorized adaptations of the original work? In most instances, the answer will be yes, absent some further transformative purpose, such as parody.

It is worth revisiting the Court's opinion in *Campbell* here, because its discussion of the fourth fair use factor highlights the care courts should take when examining harm to derivative works markets.

As a reminder, contrary to the common understanding that *Campbell* held that 2 Live Crew's commercial parody of Roy Orbison's song "Oh Pretty Woman" was fair use, the Court actually reversed the Sixth Circuit's finding of infringement and remanded the issue.[69] It did so in part because of a lack of an evidentiary record of any harm to derivative works markets. The Court famously held that the law does not recognize a derivative market for critical works, such as parody, but less famously cautioned that "the later work may have a more complex character, with effects not only in the arena of criticism but also in protectible markets for derivative works, too."[70] 2 Live Crew's song was both a parody and a rap version of Orbison's tune, and

66. *Id.*

67. *Id.*

68. *See, e.g.*, Tresóna Multimedia, Ltd. Liab. Co. v. Burbank High Sch. Vocal Music Ass'n, 953 F.3d 638, 652 (9th Cir. 2020) (concluding that use of song by show choir in musical performance "does not affect the consumer market for the sheet music in the song at all"); Fox News Network, LLC v. TVEyes, Inc., 43 F. Supp. 3d 379, 396 (S.D.N.Y. 2014) (analyzing market harm based on whether media clipping service product acts as a substitute for copyright owner's broadcast programming), *rev'd*, 883 F.3d 169 (2d Cir. 2018) (finding harm to copyright owner because service undercut ability to license searchable access to its copyrighted content to third parties); Brammer v. Violent Hues Prods., LLC, No. 1-17-cv-01009, 2018 U.S. Dist. LEXIS 98003, at *7 (E.D. Va. June 11, 2018) (finding unauthorized use of photo on website did not have adverse effect on market because user "did not sell copies of the photo or generate any revenue from it"), *rev'd*, 922 F.3d 255 (4th Cir. 2019).

69. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572 (1994).

70. *Id.* at 592.

the latter must also be part of the fourth factor analysis. "Evidence of substantial harm" to the derivative market for rap music, said the Court, "would weigh against a finding of fair use, because the licensing of derivatives is an important economic incentive to the creation of originals."[71]

Courts should similarly take care to examine the effects of any use on all protectible markets for derivative works to ensure that the use is not unfairly encroaching on a copyright owner's interests.

IV. CONCLUSION

As seen above, *Warhol* represents at times an extension, clarification, or correction of fair use on the issues of transformation, commerciality, and market harm. For publishers, the original copyright industry, the careful reasoning by the majority should provide comfort that copyright will continue its important role as a catalyst for markets in literary works that inform, inspire, and entertain. As Justice Sotomayor wisely observed in the opinion, "[i]f the last century of American art, literature, music, and film is any indication, the existing copyright law, of which today's opinion is a continuation, is a powerful engine of creativity."[72]

71. *Id.* at 593.

72. *Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 550.