Exploring the Economic, Social, and Moral Justice Ramifications of the *Warhol* Decision

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ABSTRACT

Beyond rectifying the interplay of the derivative work right and fair use, Justice Sotomayor's vigorous, direct, and, at times, combative parrying with the dissent in Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith *drove a dagger into the free culture movement's critique of copyright law. The resulting decision repudiates the movement's campaign to undermine the derivative work right through a simplistic transformativeness shortcut for applying the fair use doctrine.*

As this Article explains, the Copyright Act's drafters enhanced the financial rewards to, economic power of, and control of copyrighted works by authors through the grant of a bundle of exclusive rights, including a broad exclusive right to prepare derivative works. The Act tempered those rights through limiting doctrines, express recognition and codification of the fair use doctrine, and a series of statutory limitations, exemptions, and compulsory licenses. The codification of fair use, however, was not intended to "change, narrow, or enlarge" the doctrine outside of its traditional bounds—criticism, commentary, news reporting, educational, and research uses—"in any way." The legislative history further noted courts' freedom "to adapt the doctrine to particular situations on a case-by-case basis," "especially during a period of rapid technological change." Congress saw licensing as a principal vehicle for supporting cumulative creativity and ensuring fair compensation to and control of derivative uses by authors.

Notwithstanding this foundation and the Supreme Court's faithful interpretation of the fair use doctrine in Campbell v. Acuff-Rose Music, Inc.*, the fair use doctrine veered off course as lower courts collapsed* Campbell*'s nuanced framework into a simplistic transformativeness analysis. The collision of this approach with the derivative work right prompted the Supreme*

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Court's intervention. The resulting Warhol *decision reinforced the economic and social empowerment undergirding the 1976 Act. After tracing the emergence of the free culture movement and the devolution of the fair use doctrine, this Article explores the economic, social justice, and moral right dimensions of the copyright regime reflected in the* Warhol *decision.*

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INTRODUCTION

Although the Copyright Act of 1976 was not characterized during its formation as a civil rights statute, its drafters approached this monumental task with the belief that empowering authors on an equal basis was the best way to promote progress of expressive creativity. Continuing the trend of prior copyright enactments, legislators accelerated the shift of ownership, compensation, and control away from publishers toward creators. The drafters enhanced the financial rewards, power, and control of authors by granting them an expanded bundle of exclusive rights, including a broad exclusive right to prepare derivative works.[1] The statute expanded copyright duration and ensured that the additional duration went to authors, not licensees. And the revamping of the work made for hire provision guarded against overbearing publishers by affording authors an inalienable right to terminate unremunerative transfers after thirty-five years. The legislators were not indifferent to the effects of expanded rights upon the public and follow-on creators. The 1976 Act balanced its exclusive rights through numerous limitations, exemptions, and compulsory licenses, including the perpetuation of the fair use doctrine.[2]

Over the past half century, copyright law's empowerment of authors has served as a potent force in the nation's struggle to promote civil rights and social justice.[3] The content industries have served as influential platforms for telling the stories of under-represented people and securing greater compensation and economic power for authors and artists, including many under-represented voices. Competitive markets have brought talent to the fore and enabled many authors, musicians, filmmakers, actors, artists, and athletes[4] from marginalized groups to achieve unprecedented economic success.[5] This success has altered power structures across the creative industries,[6] which in turn has brought new genres, art forms, and a broader range of

1. *See infra* Part I.A; Shyamkrishna Balganesh & Peter S. Menell, *Going "Beyond" Mere Transformation:* Warhol *and Reconciliation of the Derivative Work Right and Fair Use*, 47 COLUM. J. L. & ARTS 411 (2024).

2. *See infra* Part I.B.

3. *See* Peter S. Menell, *Property, Intellectual Property, and Social Justice: Mapping the Next Frontier*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 147, 173–82 (2016); Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97, 141–47 (2009).

4. The professional sports industries are in many respects copyright industries. Broadcasting rights have catapulted the earnings of professional athletes to stratospheric levels. Furthermore, celebrity athletes can leverage on-field success through lucrative endorsement deals and other media opportunities, such as broadcasting commentators, acting, and other pursuits. *See, e.g.*, Alexis Reese, *The World's Highest-Paid Athletes 2021: 33 Black Athletes Made the List*, BET (Aug. 31, 2021, 8:12 AM), https://www.bet.com/article/sc8o35/these-black-athletes-are-the-world-s-highest-paid-in-2021 [https://perma.cc/A9TT-AJ9X] [https://web.archive.org/web/20240628151946/https://www.bet.com/article/sc8o35/these-black-athletes-are-the-world-s-highest-paid-in-2021].

5. *See* Justin Hughes & Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513 (2016).

6. As one example, Dr. Dre's success with N.W.A. led to his running the Aftermath Entertainment label, which in turn brought Eminem, 50 Cent, Kendrick Lamar, and many other performing artists fame, fortune, and influence. *See Dr. Dre*, WIKIPEDIA, https://en.wikipedia.org/wiki/Dr._Dre

perspectives to the public. None of this is to say that the United States has achieved economic equality and social justice, but to point out that economic empowerment of authors has promoted these goals in tangible and important ways.

Notwithstanding these unprecedented achievements, most copyright scholars over the past several decades have overlooked the role of copyright's core statutory framework in advancing economic empowerment across society. As digital technology reshaped the creative and telecommunications industries, it expanded the ease with which follow-on creators could alter pre-existing works and disseminate them widely. A growing cadre, drawing loosely on First Amendment gloss and the Constitution's "promote progress" clause, and advocating a superficial reading of the Supreme Court's *Campbell* decision, pressed for a fundamental shift in fair use jurisprudence: that any alteration of a copyrighted work that could be characterized as "transformative" constituted fair use. About a decade after *Campbell*, the influential Second Circuit began to apply such an expansive view of fair use, effectively swallowing much of the right to prepare derivative works.[7] Eventually, however, some judges came to question how far the doctrine had strayed from its statutory mooring.

The Supreme Court's *Warhol* decision brought the simmering clash of the right to prepare derivative works and the fair use doctrine to a head. Justice Sotomayor's 7-2 majority opinion reconciled the interplay of the right to prepare derivative works and the fair use doctrine and returned the fair use doctrine to its textual, purposive, and jurisprudential foundation.[8] In so doing, the decision explicated the broader economic and social justice principles of the copyright regime.

As background for exploring these principles, Part I of this Article uncovers the Copyright Act's statutory framework and the drafting of the pertinent provisions. Part II traces the emergence of the free culture movement and its role in stoking the derivative work right/fair use controversy. Part III summarizes the background and key holdings of the Supreme Court's *Warhol* decision. Part IV then discusses the economic, social justice, and moral right dimensions of the copyright regime.

[https://perma.cc/E3HG-KH3D]
[https://web.archive.org/web/20240127030656/https://en.wikipedia.org/wiki/Dr._Dre] (last visited Feb. 24, 2024). As another example, Queen Latifah leveraged her breakthrough music success into a motion picture career, product endorsement empire, and cultural phenomena. *See Queen Latifah*, WIKIPEDIA, https://en.wikipedia.org/wiki/Queen_Latifah [https://perma.cc/4YHN-LPSW] [https://web.archive.org/web/20240127030825/https://en.wikipedia.org/wiki/Queen_Latifa] (last visited Feb. 24, 2024). She is perhaps only outdone by television talk show host Oprah Winfrey, referred to as the "Queen of All Media." *See Oprah Winfrey*, WIKIPEDIA, https://en.wikipedia.org/wiki/Oprah_Winfrey [https://perma.cc/9JQJ-H3AZ]
[https://web.archive.org/web/20240127030919/https://en.wikipedia.org/wiki/Oprah_Winfrey] (last visited Feb. 24, 2024), or Beyoncé, also known as "Queen Bey." *See Beyoncé*, WIKIPEDIA, https://en.wikipedia.org/wiki/Beyonc%C3%A9 [https://perma.cc/U4AV-N6XS] [https://web.archive.org/web/20240127040516/https://en.wikipedia.org/wiki/Beyonc%C3%A9] (last visited Feb. 24, 2024). *See generally* Lateef Mtima, *Digital Tools and Copyright Clay: Restoring the Artist/Audience Symbiosis*, 38 WHITTIER L. REV. 104, 123–26 (2018).

7. *See infra* Part II.B.1.

8. *See* Balganesh & Menell, *supra* note 1.

I. THE LEGISLATIVE BACKDROP

After multiple aborted efforts to update the 1909 Copyright Act in response to technological, industrial, and social change, [9] Congress in 1955 authorized appropriations over the next three years for the Copyright Office to conduct comprehensive research to lay the groundwork for omnibus copyright reform. The Register of Copyrights produced a detailed report on a general revision of the copyright law by mid 1961[10] and issued a "Preliminary Draft for Revised U.S. Copyright Law"[11] in advance of hearings set for 1963.[12] As with other ambitious legislative reform efforts, the process took more than a decade of wrangling after those initial hearings to reach passage. Yet many of the key provisions were hammered out and their rationale explained by the mid-1960s. Disagreements over how to handle the rapidly developing field of cable television delayed a final bill.[13]

The Copyright Office invited scholars, practitioners, and representatives from the various creative industries, author organizations, libraries, technology companies, and the public to participate in the drafting process, much of which (including the preparatory studies) were published contemporaneously. Consequently, scholars, judges, and the public have a broad window into how the legislation was crafted. This is especially useful in reconciling the interplay of the right to prepare derivative works and the fair use doctrine. At a macroscopic level, the Copyright Act of 1976 can be divided into two main features: the empowerment of authors and the various mechanisms for balancing the rights of follow-on creators and the public.

A. AUTHOR EMPOWERMENT AS A MEANS TO PROMOTE PROGRESS

The Register's Report begins with a discussion of theories of copyright. [14] It characterizes the "essential" "nature of copyright" as

> the right of an author to control the reproduction of his intellectual creation. As long as he keeps his work in his sole possession, the author's absolute control is a physical fact. When he discloses the work to others, however, he makes it possible for them to

9. *See* H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW IX–X (Comm. Print 1961) [hereinafter REGISTER'S REPORT] (noting the emergence of radio and television and the development of motion pictures and sound recordings, and international developments).

10. *See id.* at 24–25.

11. *See* H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 2, DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1963).

12. H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 3, PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT (Comm. Print 1964).

13. *See* H.R. REP. NO. 94-1476, at 48 (1976) (recounting the long gestation of the Copyright Act of 1976).

14. REGISTER'S REPORT, *supra* note 9, at 3–6.

> reproduce it. Copyright is a legal device to give him the right to control its reproduction after it has been disclosed.[15]

The Report makes clear that "[c]opyright does not preclude others from using the ideas or information revealed by the author's work."[16] It notes copyright's property, personal property, and monopoly character, qualifying that copyrighted works compete against each other and highlighting the risks that can arise from pooling of copyrighted works.[17]

The Report then discusses the purposes of copyright, noting its constitutional basis "To Promote Progress" and its "ultimate purpose" "to foster the growth of learning and culture for the public welfare."[18] The Report states that "the grant of exclusive rights to authors for a limited time is a means to that end."[19] It quotes from legislative history of the 1909 Act, noting that

> The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors.
>
> In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public, and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.[20]

The Report explains that "[a]lthough the primary purpose of the copyright law is to foster the creation and dissemination of intellectual works for the public welfare, it also has an important secondary purpose: To give authors the reward due them for their contribution to society."[21] The Report explains that

> [t]hese two purposes are closely related. Many authors could not devote themselves to creative work without the prospect of remuneration. By giving authors a means of securing the economic reward afforded by the market, copyright stimulates their creation and dissemination of intellectual works. Similarly, copyright protection enables publishers and other distributors to invest their resources in bringing those works to the public.[22]

15. *Id.* at 3; *see also* Mtima, *supra* note 6, at 110–13.
16. REGISTER'S REPORT, *supra* note 9, at 3.
17. *See id.* at 3–5.
18. *Id.* at 5.
19. *Id.*
20. *Id.* at 5 (quoting H.R. REP. NO. 2222 (1909) (relating to the Copyright Act of 1909)).
21. *Id.* at 5.
22. *Id.* at 6.

The Report notes that the interests of authors and the public will often coincide, with both groups benefiting from widespread dissemination of authors' works, but that transaction costs often get in the way. In these circumstances, copyright law imposes limitations on the author's rights, including various exemptions, compulsory licenses, the fair use doctrine, durational limits, and formalities.[23] The Register concludes this discussion by emphasizing the role of the author's reward in developing the modern copyright regime:

> While some limitations and conditions on copyright are essential in the public interest, they should not be so burdensome and strict as to deprive authors of their just reward. Authors wishing copyright protection should be able to secure it readily and simply. And their rights should be broad enough to give them a fair share of the revenue to be derived from the market for their works.[24]

As noted by Register Abraham L. Kaminstein five years in to the revision process, the 1961 Register's Report's substantive recommendations generated "fervent opposition to some its major recommendations,"[25] particularly relating to the duration of copyright.[26] After extensive hearings and consideration of comments, many of the disagreements were resolved, leading to the 1964 Bill introduced in Congress.[27] After a further set of revisions, the Copyright Office produced the comprehensive *Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill*[28] setting forth the drafters' rationale for the revised text. This report is especially important in understanding the modern act because the ultimate 1976 Act tracks many of the key provisions of the 1965 Bill verbatim or with only minimal change. The major impediment to passage of the 1965 Bill was disagreement over how the Act should address Community Antenna Television (CATV), what is now known as cable television. Due to this delay, the final House Report, although very helpful in understanding the modern act, is far more removed in time and focus from many of the core copyright law provisions which did not change between 1965 and 1976 and the rationale underlying these provisions.

In the preface to the *Supplementary Report*, Register Kaminstein explained how the consultation, study, and drafting process led the Copyright Office to favor stronger author rights:

> I realize, more clearly now than I did in 1961, that the revolution in communications has bought with it a serious challenge to the author's copyright. This challenge comes not only from the ever-growing commercial interests who wish to use the author's works for private gain. An equally serious attack has come from people with a sincere interest in the

23. *See id.*

24. *Id.*

25. H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 6, SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW IX (Comm. Print 1965) [hereinafter SUPPLEMENTARY REPORT].

26. *See id.* at X.

27. *See id.* at XI–XII.

28. *See id.*

> public welfare who fully recognize (in the words of Sir Arthur Bliss) "that the real heart of civilization, the letters, the music, the arts, the drama, the educational material, owes its existence to the author"; ironically, in seeking to make the author's works widely available by freeing them from copyright restrictions, they fail to realize that they are whittling away the very thing that nurtures authorship in the first place. An accommodation among conflicting demands must be worked out, true enough, but not by denying the fundamental constitutional directive: to encourage cultural progress by securing the author's exclusive rights to him for a limited time.[29]

Recognizing the dawning of "an era when copyrighted materials are being disseminated instantaneously throughout the globe," Register Kaminstein noted the "injustice of this situation to authors" of differing copyright standards and the importance of bridging Berne Convention and Universal Copyright Convention nations.[30]

Register Kaminstein's concern for robust author's rights is evident in the text of § 106 enumerating those rights and the definitions, particularly relating to derivative works.[31] These provisions track the 1976 Act nearly verbatim.[32] The *Supplementary Report* explains the rationale for robust author's rights:

> It is hard to predict which provisions of the bill will ultimately be most significant in the development of the copyright law, but on the basis of our discussions there is no question as to which group of sections is most important to the interests immediately affected. The nine sections setting forth the scope and limitations on the exclusive rights of copyright owners represent a whole series of direct points of conflict between authors and their successors on the one side, and users, both commercial and noncommercial, on the other. Moreover, of the many problems dealt with in the bill, those covered by the exclusive rights sections are most affected by advancing technology in all fields of communications, including a number of future developments that can only be speculated about. It is not surprising, therefore, that these sections proved extremely controversial and difficult to draft.
>
> In a narrow view, all of the author's exclusive rights translate into money: whether he should be paid for a particular use or whether it should be free. But it would be a serious mistake to think of these issues solely in terms of who has to pay and how much. The basic legislative problem is to insure that the copyright law provides the necessary monetary incentive to write, produce, publish, and disseminate creative works, while at the same time guarding against the danger that these works will not be disseminated and used as fully as they should because of copyright restrictions. The problem of balancing existing interests is delicate enough, but the bill must do something even more difficult. It must try to foresee and take account of changes in the forms of use and the relative importance

29. *See id.* at XV.

30. *See id.*

31. *See* H.R. 4347, 89th Cong. § 101 (1965) ("A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'").

32. *Compare id.* § 106 (1965), *with* 17 U.S.C. § 106 (1976).

> of the competing interests in the years to come, and it must attempt to balance them fairly in a way that carries out the basic constitutional purpose of the copyright law.
>
> Obviously no one can foresee accurately and in detail the evolving patterns in the ways author's works will reach the public 10, 20, or 50 years from now. Lacking that kind of foresight, the bill should, we believe, adopt a general approach aimed at providing compensation to the author for future as well as present uses of his work that materially affect the value of his copyright. As shown by the jukebox exemption in the present law, a particular use which may seem to have little or no economic impact on the author's rights today can assume tremendous importance in times to come. A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances.
>
> For these reasons, we believe that the author's rights should be stated in the statute in broad terms, and that the specific limitations on them should not go any further than is shown to be necessary in the public interest.[33]

The Act's empowerment of authors can also be seen in its channeling of additional duration to authors as opposed to publishers and other licensees[34] and the revamping of the work made for hire provision to afford authors an inalienable right to terminate unremunerative transfers after thirty-five years.[35]

B. BALANCING AUTHOR'S RIGHTS, CUMULATIVE CREATIVITY, AND FREEDOM OF EXPRESSION

Beyond author empowerment, the drafters of the 1976 Act were concerned with the public interest in gaining access to copyrighted works and balancing copyright protection with freedom of follow-on creators to use ideas and exercise freedom of expression. The Constitution's Intellectual Property Clause [36] afforded Congress substantial leeway in how to design copyright law. After sketching a framework for analyzing the trade-offs in designing copyright law, this section discusses how the Copyright Act drafters exercised that discretion and guided courts in applying the fair use doctrine.

1. An Analytic Framework

There are multiple ways of promoting expressive creativity through copyright protection. At one end of the spectrum, strong intellectual property rights can serve as robust motivation for creators and investors to pursue creative projects. Yet the strength of such rights can hamper cumulative creativity to the extent that follow-on creators bear costs of negotiating permission to build upon protected works. Various

33. *See* H. COMM. ON THE JUDICIARY, *supra* note 25, at 13–14.
34. *See* 17 U.S.C. §§ 203(c)(3), 304(d)(2).
35. *See* 17 U.S.C. § 203(a)(3).
36. U.S. CONST. art. I, § 8, cl. 8.

limiting doctrines, exemptions, fair use, and compulsory licenses—such as, for example, the cover license[37]—can alleviate the potential impediments to follow-on creativity, but rules authorizing re-use and re-purposing can themselves be murky, adding to the costs associated with cumulative creativity. Insurance and other risk-spreading devices can also alleviate some of the exposure. At the other end of spectrum, the absence of intellectual property rights or only very weak rights can fuel a wide range of follow-on projects, but can diminish the motivation and funding to pursue ambitious pioneering works.

The efficacy of different approaches depends significantly on transaction costs and licensing.[38] Where transaction costs are low, strong rights are more likely to produce the greatest bounty: substantial investment in foundational creative projects along with robust cumulative creativity. Where transaction costs are substantial, strong rights can choke off follow-on works, as well as interfere with educational and research uses of copyrighted works.

Furthermore, in view of copyright law's freedom to build on the *ideas* of others—as reflected in the idea-expression dichotomy—a robust right to prepare derivative works motivates creators to pursue more original and less derivative projects. Professor Joseph Fishman offers the example of a young George Lucas who sought, but was denied permission, to create a remake of *Flash Gordon*.[39] Rebuffed, but undaunted, Lucas pursued a far more ambitious project. Drawing on ideas from *Flash Gordon*, the original *Star Trek* television series, other science fiction films, Japanese Samurai films, westerns, and John Campbell's *The Hero with a Thousand Faces*,[40] Lucas created *Star Wars*, one of the most iconic films (and film series). Other examples of stymied creators who went on to pursue great works abound,[41] as are examples of documentary filmmakers, mashup artists, and other creators who are blocked or chilled in their use of prior works.[42] Whether and how expressive freedom or copyright constraint affect creative

37. *See* 17 U.S.C. § 115.

38. Peter S. Menell & Suzanne Scotchmer, *Intellectual Property Law*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1473, 1499–1505 (A. Mitchell Polinsky & Steven Shavell eds., 2007); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1608, 1613, 1618, 1628–29 (1982).

39. *See* Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1336 (2015); J.W. RINZLER, THE MAKING OF STAR WARS 4 (2007).

40. *See* Star Wars *Sources and Analogues*, WIKIPEDIA, https://en.wikipedia.org/wiki/Star_Wars_sources_and_analogues [https://perma.cc/2SFR-LN97] [https://web.archive.org/web/20240122194934/https://en.wikipedia.org/wiki/Star_Wars_sources_and_analogues] (last visited Feb. 24, 2024).

41. *See* Fishman, *supra* note 39, at 1336–37 (noting that Donkey Kong and Super Mario resulted from a copyright owner's refusal to license Popeye, among other examples).

42. *See* PATRICIA AUFDERHEIDE & PETER JASZI, CTR. FOR SOC. MEDIA, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS 7–29 (2004), https://cmsimpact.org/resource/untold_stories/#:~:text=in%20your%20browser.-,Executive%20Summary,of%20independent%2C%20professional%20documentary%20filmmakers [https://perma.cc/SL2P-5R93] [https://web.archive.org/web/20240122235135/https://cmsimpact.org/resource/untold_stories/]; LAWRENCE LESSIG, FREE CULTURE 105–06, 181–82 (2004); Nancy Ramsey, *The Hidden Cost of Documentaries*, N.Y. TIMES (Oct. 16, 2005), http://www.nytimes.com/2005/10/16/movies/16rams.html

progress is both an empirical question and a judgment call about what are the most valuable forms of creativity and the distribution of economic value. It is also influenced by the First Amendment's protection of freedom of expression.

2. How the Copyright Act Drafters Balanced the Competing Interests

The *Supplementary Report* directly addresses the trade-off between strong author's rights and limitations to facilitate access and follow-on creativity. As noted above, the drafters explained that "the author's rights should be stated in the statute in broad terms, and that the specific limitations on them should not go any further than is shown to be necessary in the public interest."[43] Following that direct statement about how the statute balanced this trade-off, the drafters further explained that they were confident that transaction costs would not stand in the way of effective bargaining:

> In our opinion it is generally true, as the authors and other copyright owners argue, that if an exclusive right exists under the statute a reasonable bargain for its use will be reached; copyright owners do not seek to price themselves out of a market. But if the right is denied by the statute, the result in many cases would simply be a free ride at the author's expense.
>
> We are entirely sympathetic with the aims of nonprofit users, such as teachers, librarians, and educational broadcasters, who seek to advance learning and culture by bringing the works of authors to students, scholars, and the general public. Their use of new devices for this purpose should be encouraged. It has already become clear, however, that the unrestrained use of photocopying, recording, and other devices for the reproduction of authors' works, going far beyond the recognized limits of "fair use," may severely curtail the copyright owner's market for copies of his work. Likewise, it is becoming increasingly apparent that the transmission of works by nonprofit broadcasting, linked computers, and other new media of communication, may soon be among the most important means of disseminating them, and will be capable of reaching vast audiences. Even when these new media are not operated for profit, they may be expected to displace the demand for authors' works by other users from whom copyright owners derive compensation. Reasonable adjustments between the legitimate interests of copyright owners and those of certain nonprofit users are no doubt necessary, but we believe the day is past when any particular use of works should be exempted for the sole reason that it is "not for profit."
>
> As possible methods of solving the practical difficulties of clearance with respect to both commercial and noncommercial uses, various suggestions have been advanced for voluntary clearinghouses or for systems of compulsory licensing under the statute. All of these suggestions deserve consideration, but we are inclined to doubt the present need to impose a statutory licensing system upon the exercise of any of these rights. We believe that the work already in progress toward developing a clearinghouse to license

[https://perma.cc/3H35-3TWU]
[https://web.archive.org/web/20240123000155/https://www.nytimes.com/2005/10/16/movies/the-hidden-cost-of-documentaries.html] (discussing the film *Tarnation*); KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 165–66, 203–05 (2011) (detailing the high transaction costs associated with clearing music samples).

43. *See* SUPPLEMENTARY REPORT, *supra* note 25, at 14.

> photocopying offers the basis for a workable solution of that problem, and, if found necessary, could be expanded to cover other uses.[44]

Thus, the drafters considered strong rights to be a vital engine for driving expressive creativity, believed that transaction costs of licensing would be manageable, and opposed "free riding" on the work of others. While these are debatable propositions, they nonetheless bear directly on the interpretation of the Copyright Act.

3. The Fair Use Doctrine

The drafting of the fair use provision also bears critically on the balancing of author's rights, dissemination of copyrighted works, and the freedom of follow-on creators. The Copyright Office identified the fair use doctrine as one of the key areas for study in advance of the drafting process.[45] Alan Latman's study on fair use (hereinafter "*Fair Use Study*") began by noting how the courts had "grappled with the problem of fair use without the aid of any specific statutory guide."[46] It then summarized the jurisprudence, identifying eight principal contexts in which courts had recognized fair use: (1) incidental use; (2) review and criticism; (3) parody and burlesque; (4) scholarly works and compilations; (5) personal or private use; (6) news; (7) use in litigation; and (8) use for nonprofit or governmental purpose.[47] It then explored fair use criteria, acknowledging "widespread agreement" that "it is not easy to decide what is and what is not a fair use."[48] Nonetheless, drawing on Justice Joseph Story's oft-quoted criteria in *Folsom v. Marsh*,[49] contemporary decisions, copyright scholarship, draft bills, foreign legislation, and international conventions, the *Fair Use Study* offered some general guideposts.[50] It concluded with options for the legislative drafters, ranging from merely recognizing the fair use doctrine and leaving its definition to the courts to specifying general criteria. The appendix to the *Study* contained comments by leading scholars and practitioners split on which path to follow.

In its initial proposal, the Register of Copyrights channeled the *Fair Use Study*'s synthesis of the fair use doctrine, noting the principal examples and synthesizing four key factors that courts consider:

> (1) the purpose of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the materials used in relation to the copyrighted work as a whole, and (4)

44. *Id.*

45. *See* S. COMM ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION, STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS, STUDIES 14–16, at V (Comm. Print 1960).

46. ALAN LATMAN, STUDY NO. 14: FAIR USE OF COPYRIGHTED WORKS (1958), *reprinted in* S. COMM ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION, STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS, STUDIES 14–16, at 1, 5 (Comm. Print 1960) [hereinafter FAIR USE STUDY].

47. *See id.* at 8–14.

48. *See id.* at 14 (quoting Saul Cohen, *Fair Use in the Law of Copyright*, 6 ASCAP COPYRIGHT L. SYMP. 43, 52 (1955)).

49. 9 F. Cas. 342, 348 (C.C.D. Mass 1841) (No. 4,901).

50. *See* FAIR USE STUDY, *supra* note 46, at 15–32.

> the effect of the use on the copyright owner's potential market for his work. These criteria are interrelated and their relative significance may vary, but the fourth one—the competitive character of the use—is often the most decisive.[51]

The Register recommended that "[t]he statute should include a provision affirming and indicating the scope of the principle that fair use does not infringe the copyright owner's rights."[52]

After further consideration, the next iteration proposed much of the now familiar four-factor test, but without the preambular list of categories.[53] Section 7 therein contained an elaborate provision which would have permitted libraries to make a single photocopy of one article from a copyrighted work.[54]

The photocopying provision drew substantial opposition, leading the drafters to drop it and add a qualification to the fair use preamble in the 1964 Bill stating that "the fair use of a copyrighted work to the extent reasonably necessary or incidental to a legitimate purpose such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright."[55] This provision also generated substantial opposition, leading the drafters of the 1965 Bill to propose merely stating: "Notwithstanding the provisions of section 106, the fair use of a copyrighted work is not an infringement of copyright."[56] The *Supplementary Report* noted that

> we do not favor sweeping, across-the-board exemptions from the author's exclusive rights unless an overriding public need can be conclusively demonstrated. There is hardly any public need today that is more urgent than education, but we are convinced that this need would be ill-served if educators, by making copies of the materials they need cut off a large part of the revenue to authors and publishers that induces the creation and publication of those materials.[57]

A year later, following compromise among publishers and educational and library groups, the drafters reintroduced the multi-factor formulation along with the preamble.[58] This language carried forward to the 1976 Act with a few adjustments. The final provision qualified the preamble "teaching" category by adding "(including multiple copies for classroom use)" and inserting into the first fair use factor: "including whether such use is of a commercial nature or is for nonprofit educational purposes."[59]

The *House Report* on the enacted legislation reinforces the statutory text in various ways. It notes that "[t]he examples enumerated at page 24 of the Register's 1961 Report, while by no means exhaustive, give some idea of the sort of activities the courts might

51. REGISTER'S REPORT, *supra* note 9, at 24–25.
52. *Id.* at 25.
53. *See* H. COMM. ON THE JUDICIARY, 88TH CONG., *supra* note 12, at 6.
54. *See id.*
55. *See* SUPPLEMENTARY REPORT, *supra* note 25, at 27.
56. *See id.* at 28.
57. *Id.* at 27–28.
58. *See* H.R. 4347, 89th Cong. (1966).
59. *See* H.R. REP. NO. 94-1476, at 5 (1976).

regard as fair use under the circumstances."[60] It then explains the commerciality language added to the first fair use factor:

> The Committee has amended the first of the criteria to be considered—"the purpose and character of the use"—to state explicitly that this factor includes a consideration of "whether such use is of a commercial nature or is for non-profit educational purposes." This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.[61]

The *House Report* then explains the "general intention" behind § 107:

> [T]he endless variety of situations and combinations of circumstances that can [a]rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.[62]

Thus, the drafting of the fair use provision culminated close to where it began. The final legislation channeled the relatively narrow examples that Register Abraham Kaminstein referenced in 1961, which were summarized in the preamble. Although Congress expressed the intention to perpetuate the doctrine's case-by-case and common law character and not to "freeze" its development, the main thrust of the provision was to restate the fair use doctrine without any intention to alter the doctrine beyond ensuring that it could address unforeseen technological developments and address "particular situations on a case-by-case basis."

II. THE DERIVATIVE WORK RIGHT-FAIR USE COLLISION

Beginning in the mid-1990s, a cadre of First Amendment and copyright scholars embarked on a multi-institutional campaign to "liberate" the public and follow-on creators from the burden of copyright law's derivative work right. As a statutory reform effort, these proposals were innovative, insightful, and controversial, well worthy of serious legislative consideration and debate. The project, however, soon morphed into a movement to persuade judges to rewrite key elements of the Copyright Act through constitutional and doctrinal interpretation. This section traces that movement and its apparent impact on the fair use doctrine, which ultimately culminated in *Andy Warhol*

60. *Id.* at 65 (quoting the full list from REGISTER'S REPORT, *supra* note 9).
61. *Id.* at 66.
62. *Id.*

Foundation for the Visual Arts, Inc. v. Goldsmith.[63] We examine that decision in Part III and its economic, social, and moral justice aspects in Part IV.

A. THE FREE CULTURE MOVEMENT

Prior to the late 1960s, the interplay of copyright protection and the First Amendment attracted relatively little scholarly attention.[64] A couple of notable cases in the late 1960s, however, aroused interest in the role of free expression in copyright jurisprudence. In one, the reclusive mogul Howard Hughes sought to block a biographer from reporting on his life by acquiring the rights to a series of journal articles about him. [65] While emphasizing that copyright law's idea-expression dichotomy helps to ensure that copyright law does not trench on First Amendment values by ensuring that ideas cannot be encumbered, Professor Melville Nimmer nonetheless criticized the Second Circuit's decision overturning a preliminary injunction on the ground that the defendant had copied substantial expression verbatim and not merely facts and ideas.[66] Professor Nimmer noted the importance of the fair use doctrine in *Time, Inc. v. Bernard Geis Associates*,[67] where the court denied a copyright claim against the publisher of a book about the assassination of President Kennedy which included still images from the copyright owner's film of the event—the only video account of this tragic, publicly important event.[68]

Interest in the interplay of the First Amendment and copyright protection waned in the 1980s as interest turned to the copyright protection for computer software and the challenges posed by interoperability of computer systems.[69] This scholarship greatly aided the courts in ensuring that copyright did not extend to the functionality of digital

63. 598 U.S. 508 (2023).

64. In a 1945 article, Professor Zechariah Chafee addressed free speech concerns, although not expressly through a First Amendment lens. *See* Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 506 (1945).

65. *See* Rosemont Enters. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966).

66. *See* Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1201–02 (1970) (inaugural Brace Lecture); *see also* Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1011–13, 1057 (1970) (commenting on the fair use aspect of the opinion).

67. *See* Nimmer, *supra* note 66, at 1198 (discussing Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 144–46 (S.D.N.Y. 1968)). Interestingly, the court in *Time, Inc.* considered the draft fair use provision from the 1967 Bill in rendering its decision.

68. The book in question criticized the Warren Commission, the government report about the assassination which relied heavily on that film in its analysis. *See Time Inc.*, 293 F. Supp., at 134; Nimmer, *supra* note 66, at 1200–01; *see also* Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979); Harry N. Rosenfield, *The Constitutional Dimension of "Fair Use" in Copyright Law*, 50 NOTRE DAME L. REV. 790 (1975).

69. *See LaST Frontier Conference Report on Copyright Protection of Computer Software*, 30 JURIMETRICS J. 15 (1989); Peter S. Menell, *An Analysis of the Scope of Copyright Protection for Application Programs*, 41 STAN. L. REV. 1045 (1989); Peter S. Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV. 1329 (1987); Pamela Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 DUKE L.J. 663 (1984).

machines.[70] It also opened up a new branch of fair use jurisprudence: reverse engineering to determine uncopyrightable features of computer software.[71] The free software movement,[72] which traces back to Richard Stallman's GNU Project to promote the freedom to share and modify computer software in 1983,[73] fed into the emergence of the "copyleft" movement.[74]

Dovetailing with these developments, the Digital Future Coalition (DFC) formed to advocate "prosperous information commerce" and "a robust shared culture."[75] Convened by copyright scholar Professor Peter Jaszi, the DFC's membership comprised educators, computer and telecommunications industry associations, libraries, artists, software and hardware producers, archivists, and scientists.[76] The DFC initially focused on participating in deliberations over adapting copyright legislation to address the digital revolution. Professor Pamela Samuelson, an early contributor to the software copyright literature,[77] entered the political fray over what would become the Digital Millennium Copyright Act of 1998.[78]

Out of and from beyond the DFC community emerged a range of scholars advocating for greater freedom to access, use, and adapt copyrighted works.[79] Many of

70. *See* Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807 (1st Cir. 1995), *aff'd* by an equally divided Court, 516 U.S. 233 (1996); Comput. Assocs. Int'l v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992).

71. *See* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992).

72. *See Free Software Movement*, WIKIPEDIA, https://en.wikipedia.org/wiki/Free_software_movement [https://perma.cc/H63W-MHC9] [https://web.archive.org/web/20240127190905/https://en.wikipedia.org/wiki/Free_software_movement] (last visited Feb. 24, 2024); *see also Open-Source-Software Movement*, WIKIPEDIA, https://en.wikipedia.org/wiki/Open-source-software_movement [https://perma.cc/A449-9HQE] [https://web.archive.org/web/20240127193433/https://en.wikipedia.org/wiki/Open-source-software_movement] (last visited Feb. 24, 2024) (describing an offshoot of the Free Software Movement with a less restrictive sharing philosophy).

73. *See GNU Project*, WIKIPEDIA, https://en.wikipedia.org/wiki/GNU_Project [https://perma.cc/P872-JSM2] [https://web.archive.org/web/20240127193938/https://en.wikipedia.org/wiki/GNU_Project] (last visited Feb. 24, 2024).

74. *See Copyleft*, WIKIPEDIA, https://en.wikipedia.org/wiki/Copyleft [https://perma.cc/JH3U-H4FU] [https://web.archive.org/web/20240127194242/https://en.wikipedia.org/wiki/Copyleft] (last visited Feb. 24, 2024).

75. *See* Letter from Peter Jaszi, Digital Future Coalition to the U.S. Copyright Office et al. (n.d.), https://www.copyright.gov/reports/studies/dmca/comments/Init009.pdf [https://perma.cc/F4R5-C8L4] [https://web.archive.org/web/20240127200251/https://www.copyright.gov/reports/studies/dmca/comments/Init009.pdf].

76. *See id.*; *Digital Future Coalition*, WIKIPEDIA, https://en.wikipedia.org/wiki/Digital_Future_Coalition [https://perma.cc/X9HZ-LVEU] [https://web.archive.org/web/20240127204742/https://en.wikipedia.org/wiki/Digital_Future_Coalition] (last visited Feb. 24, 2024).

77. *See* Samuelson, *supra* note 69.

78. Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860; *see* Pamela Samuelson, *The Copyright Grab*, WIRED (Jan. 1, 1996), https://www.wired.com/1996/01/white-paper/ [https://web.archive.org/web/20240127205530/https://www.wired.com/1996/01/white-paper/].

79. *See* Yochai Benkler, *Free as the Air To Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 386–400 (1999); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 664–78 (1997); Neil Weinstock Netanel, *Copyright and a*

these scholars came to question the very notion of creativity based on what Professor James Boyle characterized as the "romantic authorship" myth.[80] Illustrating Boyle's point, Professor Jessica Litman in 1990 began an article with a provocative quotation: "Artists have been deluding themselves, for centuries, with the notion that they create. In fact they do nothing of the sort."[81]

Out of the blue, Professor Lawrence Lessig, known at the time more for his constitutional law scholarship,[82] burst onto the copyright scene in the late 1990s.[83] With unusual flair (for a law professor anyway), he mounted a constitutional challenge to the Copyright Term Extension Act of 1998 (CTEA),[84] a statute extending the term of copyright protection by twenty years. Industry and author groups pitched the legislation as harmonizing U.S. copyright law with protection in much of the rest of the world. Professor Lessig, along with many copyright scholars and economists, saw the legislation as a needless extension that deprived the public of access to copyrighted works that had already enjoyed very long duration, did not meaningfully increase incentives to create, and interfered with cumulative creativity.[85]

Democratic Civil Society, 106 YALE L.J. 283, 301–05 (1996); Brief of *Amici Curiae* Concerned Law Professors Robert C. Berry et al. in Support of Petitioners, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (No. 92-1292) (advocating a First Amendment defense for parody).

80. *See* JAMES BOYLE, SHAMANS, SOFTWARE, & SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1997); ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 219–20, 283, 378 n.52, 379 n.56 (1998); RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY 33–68 (1996) (tracing the ownership and control of culture and information to corporate interests); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, *in* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 29, 29-30 (Martha Woodmansee & Peter Jaszi eds. 1994) (quoting Michel Foucault, *What Is an Author?*, *in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURAL CRITICISM 141, 141 (Josue V. Harari ed., 1979)) (discussing Michel Foucault's questioning of the emergence of "authorship" as a "privileged moment of *individualization* in the history of ideas"). *But see* Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 877–85 (1997) (book review) (questioning Boyle's critique of copyright law as mired in an eighteenth century mythical view of authors creating "'original' works from whole cloth").

81. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 965 (1990) (quoting Spider Robinson, *Melancholy Elephants*, *in* MELANCHOLY ELEPHANTS 1, 16 (1985)). Professor Boyle would go on to deepen this line of thinking. *See* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, L. & CONTEMP. PROBS., Winter–Spring 2003, at 33; JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (2008). He would also become an advocate, co-founding Duke Law School's Center for the Study of the Public Domain in 2002. *See About Us*, CTR. FOR THE STUDY OF THE PUB. DOMAIN, https://web.law.duke.edu/cspd/about/ [https://perma.cc/XY88-XX3M] [https://web.archive.org/web/20240225053849/https://web.law.duke.edu/cspd/about/] (last visited Feb. 25, 2024).

82. *See* Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1058 (2001).

83. *See* LAWRENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE (1999).

84. Sonny Bono Copyright Term Extension Act, Pub. L. 105-298, 112 Stat. 2827 (1998).

85. *See* Dennis S. Karjala, *Judicial Review of Copyright Term Extension Legislation*, 36 LOY. L.A. L. REV. 199 (2002); *see also* Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners at 12, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618). *But see* Stan J. Liebowitz & Stephen Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects*, 18 HARV. J.L. & TECH. 435 (2005) (offering a counterpoint the *Eldred* Economists' Brief); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 484–88 (2003) (suggesting that "congestion externalities" could diminish the value of a popular work that is in the public domain).

Professor Lessig launched not just a lawsuit on behalf of Eric Eldred, a public domain works publisher,[86] but a politically-styled campaign to "liberate Mickey Mouse," the beloved Disney character nearing the end of his seventy-five year copyright term.[87] Around this time, the copyright world was abuzz with the meteoric rise of Napster, a powerful file-sharing technology.[88] To the youth of America, accustomed to shelling out eighteen dollars for a CD, and the free culture movement, this was a godsend. To the record industry, which had just fought a difficult battle to pass the DMCA, it was doomsday.

As these controversies were unfolding, Professor Lessig opened an innovative flank in the free culture movement.[89] With the emergence of user-generated content and the websites hosting such works in jeopardy, he launched the Creative Commons Project to enable and encourage creators to disavow copyright limitations, in whole or in part, on their works.[90] Drawing on the open source software movement, Creative Commons's standardized licensing platform and tagging tools reduced the transaction costs for creators to pre-license their works on the terms that they preferred and for downstream users to find, share, and build on them. This innovative copy*left* model proved successful,[91] although traditional copy*right* protection continues to dominate mainstream content markets.

86. *See* Amy Harmon, *Debate To Intensify on Copyright Extension Law*, N.Y. TIMES (Oct. 7, 2002), https://www.nytimes.com/2002/10/07/business/debate-to-intensify-on-copyright-extension-law.html [https://perma.cc/LTS3-XQW6] [https://web.archive.org/web/20240225055156/https://www.nytimes.com/2002/10/07/business/debate-to-intensify-on-copyright-extension-law.html]; Carl S. Kaplan, *Online Publisher Challenges Copyright Law*, N.Y. TIMES (Jan. 15, 1999), https://archive.nytimes.com/www.nytimes.com/library/tech/99/01/cyber/cyberlaw/15law.html [https://perma.cc/4TWS-AKAD] [https://web.archive.org/web/20240225055604/https://archive.nytimes.com/www.nytimes.com/library/tech/99/01/cyber/cyberlaw/15law.html].

87. *Free Mickey Mouse*, ECONOMIST (Oct. 10, 2002), https://www.economist.com/business/2002/10/10/free-mickey-mouse [https://perma.cc/RN8H-B6YG] [https://web.archive.org/web/20240225060031/https://www.economist.com/business/2002/10/10/free-mickey-mouse]; Michael Connor, *Free the Mouse!*, AUSTIN CHRON. (Mar. 8, 2002), https://www.austinchronicle.com/screens/2002-03-08/84942/ [https://perma.cc/4CT3-V7TY] [https://web.archive.org/web/20240120234910/https://www.austinchronicle.com/screens/2002-03-08/84942/].

88. *See Napster*, WIKIPEDIA, https://en.wikipedia.org/wiki/Napster [https://perma.cc/25QN-TTQK] [https://web.archive.org/web/20240307172416/https://en.wikipedia.org/wiki/Napster] (last visited Mar. 7, 2024).

89. *A History of Creative Commons*, CREATIVE COMMONS, https://creativecommons.org/timeline/ [https://perma.cc/NCK6-BT5J] [https://web.archive.org/web/20240225145738/https://creativecommons.org/timeline/] (last visited Feb. 4, 2024) (noting that the organization was founded in 2001 and went live in 2002).

90. *Creative Commons*, WIKIPEDIA, https://en.wikipedia.org/wiki/Creative_Commons [https://perma.cc/BQ6X-WYFB] (last visited Feb. 4, 2024).

91. Based on some early surveys of Creative Commons licenses, many users decline to pre-authorize commercial uses. *See* Zachary Katz, *Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing*, 46 IDEA 391, 411–12 (2006) (reporting February 2005 data finding that nearly all licenses (ninety-five percent) require attribution, seventy-four percent of licenses prohibit commercial use (NC), and thirty-two percent prohibit derivative works (ND)). This suggests that some and possibly many Creative Commons licensees

Professor Lessig's effort to overturn the CTEA, however, did not prove successful. In 2003, the Supreme Court ruled decisively against the constitutional attack.[92] Justice Ginsburg's 7-2 majority opinion rejected the argument that the legislation violated the Intellectual Property Clause's "limited times" provision, steering clear of addressing the wisdom of Congress's policy judgment. Furthermore, the decision narrowed the First Amendment's independent role in regulating copyright protection, observing that "[t]he First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches. To the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them."[93] The Court was referring principally to the fair use doctrine, noting in an earlier passage that "the 'fair use' defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances. . . . The fair use defense affords considerable 'latitude for scholarship and comment,' and even for parody."[94]

The effort to immunize file-sharing platforms from indirect liability also faltered. In many ways, this controversy was far more significant for the creative ecosystem than the battle over extending copyright duration. Unlike the CTEA challenge, which for the most part affected works that have long since lost their salience, file-sharing went to the beating heart of the content industries: authors' ability to enforce their rights effectively during the first seconds following dissemination. A unanimous Supreme Court held that the file-sharing services could be (and were) liable for inducing massive copyright infringement.[95] Although the decision did not disturb the staple article of commerce safe harbor, it fueled the development of and licensing to subscription services, generating tremendous investment in new content and seamless, competitively priced streaming platforms.[96]

use this model for promotional purposes. We are not aware of more recent systematic surveys of Creative Commons licensing.

92. Eldred v. Ashcroft, 537 U.S. 186 (2003); *see* David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281 (2004).

93. *Eldred*, 537 U.S. at 221.

94. *Id.* at 219–20.

95. MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005). The decision did not, however, block peer-to-peer technology in general. The Court sustained the availability of the *Sony* staple article of commerce doctrine while holding that the defendants induced infringement. *Id.* at 933–40.

96. In the medium of audio streaming, see Anne Steele, *Spotify Dominates Audio Streaming, but Where Are the Profits?*, WALL ST. J. (Jan. 18, 2024), https://www.wsj.com/business/media/spotify-streaming-music-podcasts-audiobooks-3e88180d [https://web.archive.org/web/20240225151817/https://www.wsj.com/business/media/spotify-streaming-music-podcasts-audiobooks-3e88180d] (reporting that Spotify has a thirty percent market share of audio streaming, approximately 600 million users, and is adding millions of new subscribers a month); Marie Charlotte Götting, *Spotify's Revenue Worldwide from 2013 To 2022*, STATISTA (Sept. 26, 2023), https://www.statista.com/statistics/813713/spotify-revenue/ [https://perma.cc/U9HA-R6Y8] [https://web.archive.org/web/20240123221250/https://www.statista.com/statistics/813713/spotify-revenue/] (reporting revenue growth from €746 million in 2013 to €11,727 million in 2022). A substantial share of that revenue (approximately seventy-five percent) goes to copyright owners, recording artists, and composers. *See* Marie Charlotte Götting, *Share of Spotify's Cost of Revenue from 2011 To 2022*, STATISTA (Feb. 5,

Professor Lessig and other scholars continued to press for liberalization of the copyright system. [97] Professor Jaszi, in collaboration with Professor Patricia Aufderheide, a communication studies scholar, embarked on a project to, in their words, "reclaim fair use" and make it more accessible to documentary filmmakers and other creators.[98] Professor Lessig took a more combative approach, assailing "fair use [as] the right to hire a lawyer."[99] In 2007, Professor Rebecca Tushnet and other "fan fiction" enthusiasts co-founded the Organization for Transformative Works "to serve the interests of fans by providing access to and preserving the history of fanworks and

2024), https://www.statista.com/statistics/370618/spotifys-cost-of-goods-sold-share/ [https://perma.cc/RJY9-MF6E] [https://web.archive.org/web/20240307172907/https://www.statista.com/statistics/370618/spotifys-cost-of-goods-sold-share/]. In the medium of video streaming, see Julia Stoll, *Number of Netflix Paid Subscribers Worldwide from 1st Quarter 2013 To 4th Quarter 2023*, STATISTA (Jan. 31, 2024), https://www.statista.com/statistics/250934/quarterly-number-of-netflix-streaming-subscribers-worldwide/ [https://perma.cc/2PM6-LL2R] [https://web.archive.org/web/20240222013824/https://www.statista.com/statistics/250934/quarterly-number-of-netflix-streaming-subscribers-worldwide/] (reporting subscriber growth from thirty-four million subscribers in the first quarter of 2013 to nearly 250 million subscribers in the third quarter of 2023); *Netflix's Annual Revenue from 2002 To 2023*, STATISTA (Jan. 30, 2024), https://www.statista.com/statistics/272545/annual-revenue-of-netflix/ [https://perma.cc/MMT4-3CSQ] [https://web.archive.org/web/20240225153853/https://www.statista.com/statistics/272545/annual-revenue-of-netflix/] (reporting revenue growth from $682 million in 2005 to $31,615 million in 2022). A substantial portion of that revenue goes to audio-visual production and licensing. *See* Elliot Deubel, *What Is the Revenue Model Filmmakers and Studios Receive from Netflix Instant Streaming?*, JAMBOX (May 8, 2023), https://blog.jambox.io/what-is-the-revenue-model-filmmakers-and-studios-receive-from-netflix-instant-streaming/ [https://perma.cc/DKX3-CQSJ] [https://web.archive.org/web/20240307173631/https://blog.jambox.io/what-is-the-revenue-model-filmmakers-and-studios-receive-from-netflix-instant-streaming/].

97. *See* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004) [hereinafter LESSIG, FREE CULTURE]; Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004).

98. *See* PATRICIA AUFERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT x-xiv (2011); PATRICIA AUFERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT (2d ed. 2018) [hereinafter RECLAIMING FAIR USE, 2d ed.]. Michael Donaldson, a Hollywood entertainment lawyer, focused his practice on this type of work. *See* MICHAEL C. DONALDSON ET AL., CLEARANCE & COPYRIGHT: EVERYTHING YOU NEED TO KNOW FOR FILM, TELEVISION, AND OTHER CREATIVE CONTENT (5th ed. 2023) (the first edition appeared in 1995).

99. See LESSIG, FREE CULTURE, *supra* note 97, at 187; Stephen Manes, *Let's Have Less of Lessig*, FORBES (Apr. 2, 2004), https://www.forbes.com/2004/04/02/cz_sm_0402manes.html [https://perma.cc/CV42-7Q5Y] [https://web.archive.org/web/20240225162054/https://www.forbes.com/2004/04/02/cz_sm_0402manes.html]. At a 2006 conference, he said: "I hate fair use. I hate it because it distracts us from free use." RECLAIMING FAIR USE, 2d ed., *supra* note 98, at 66.

fan culture in its myriad forms."[100] Its website states: "We believe that fanworks are transformative and that transformative works are legitimate."[101]

These scholars viewed the Supreme Court's *Campbell* decision—with its incorporation of "transformativeness" into the fair use balance—as the vehicle to liberate follow-on creativity from copyright restrictions.[102] Their analysis, however, collapsed Justice Souter's carefully constructed and nuanced framing of the fair use doctrine into a simplistic transformativeness inquiry.[103] What was peculiar about much of the scholarly work—especially Professor Lessig's, Professor Jaszi's, and Professor Tushnet's—was the absence of any engagement with the Copyright Act's text (the definition of derivative works and the fair use preamble and factors) or legislative history.[104] This was surprising in view of the explosion of interest in statutory

100. *Welcome!, Org. for Transformative Works*, https://www.transformativeworks.org/ [https://perma.cc/LT59-8PRW] [https://web.archive.org/web/20240225162338/https://www.transformativeworks.org/] (last visited Feb. 4, 2024); *Organization for Transformative Works*, WIKIPEDIA, https://en.wikipedia.org/wiki/Organization_for_Transformative_Works [https://perma.cc/DB59-GJKV] [https://web.archive.org/web/20240123225845/https://en.wikipedia.org/wiki/Organization_for_Transformative_Works] (last visited Feb. 4, 2024).

101. *Welcome!, supra* note 100.

102. *See* Tushnet, *supra* note 97, at 544–45 (stating that "[t]he derivative works right is difficult to reconcile with a transformation-friendly fair use" and "thus threatens to give copyright owners power to control interesting, creative, and culturally significant reuses of their works").

103. *See* Shyamkrishna Balganesh & Peter S. Menell, *Misreading* Campbell*: Lessons for* Warhol, 72 DUKE L.J. ONLINE 113 (2023).

104. Professor Jessica Litman, who had earlier written about the legislative history of the Copyright Act, was a notable exception, although she declined to weigh in presumably because it conflicted with her normative views on copyright law. In her critique of the Copyright Act of 1976 for succumbing to "negotiated" solutions to impasses, Professor Litman forthrightly acknowledged that the drafters enacted broad rights and narrow exceptions. *See* JESSICA LITMAN, DIGITAL COPYRIGHT 54–58 (2001); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 875–77, 886 (1987) (noting the Act's "expansively defined rights and rigid exemptions" and discussing the hammering out of the fair use compromise). In a 2013 article that purported to analyze the full legislative history of the derivative work provision, Professor Pamela Samuelson contended that "[t]here is . . . no credible evidence that Congress intended to create a vast and open-ended expansion of derivative work rights by inserting [the clause 'or any other form in which a work may be recast, transformed, or adapted' at the end of the definition]." *See* Pamela Samuelson, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 GEO. L.J. 1505, 1562 (2013). Although her analysis references the 1965 *Supplementary Report*—which directly and contemporaneously addresses the intent behind the exclusive rights—at several points in her analysis, see *id.* at 1512 n.35, 1527 n.103, 1540 n.171, Professor Samuelson makes no mention of the parts of that report that characterize the exclusive rights as "broad" and the limitations narrow. *See* SUPPLEMENTARY REPORT, *supra* note 25, at 13–14. Moreover, the specific text that she contends is narrow is anything but: "*or any other form* in which a work may be *recast*, *transformed*, or *adapted*" (emphasis added). One of the "cardinal" canons of statutory interpretation would not exclude such clear language as mere surplusage. *See* Nat'l Ass'n of Mfrs. v. Dep't of Def., 583 U.S. 109, 128–29 (2018) ("As this Court has noted time and time again, the Court is 'obliged to give effect, if possible, to every word Congress used.'") (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979)); *see also* Tex. Educ. Agency v. U.S. Dep't of Educ., 908 F.3d 127, 133 (5th Cir. 2018) (describing the canon as a "cardinal principle of statutory construction") (quoting Bennett v. Spear, 520 U.S. 154, 173 (1997)).

interpretation in the courts and the broader scholarly community over the previous two decades.[105] The following section traces the jurisprudential detour that unfolded.

B. THE JURISPRUDENTIAL FAIR USE DETOUR

About a decade after the *Campbell* decision, the fair use doctrine took a significant turn in the Second Circuit, collapsing the analysis into a focus on transformativeness. Even as these cases began to influence other courts, Judge Frank Easterbrook's opinion in *Kienitz v. Sconnie Nation LLC*[106] and Judge Margaret McKeown's opinion in *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*[107] questioned the shift.

105. *See* Gregory S. Crespi, *The Influence of a Decade of Statutory Interpretation Scholarship on Judicial Rulings: An Empirical Analysis*, 53 SMU L. REV. 9 (2000) (cataloging 132 statutory interpretation articles published between 1988 and 1997, many of which were cited by the courts); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989) (cited twenty-one times); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (sixteen cites); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (ten cites); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (ten cites) (highlighting the three dominant modes of statutory interpretation: intentionalism, purposivism, and textualism).

106. 766 F.3d 756 (7th Cir. 2014).

107. 983 F.3d 443 (9th Cir. 2020).

1. The Second Circuit Detour

a. Blanch v. Koons

This case pitted fashion photographer Andrea Blanch against noted and notorious[108] appropriation artist Jeffrey Koons.[109] In *Niagara*, Koons cropped a portion of Blanch's photograph (*Silk Sandals*), described by District Judge Louis Stanton as showing

> the lower part of a woman's bare legs (below the knee) crossed at the ankles, resting on the knee of a man apparently seated in an airplane cabin. She is wearing Gucci sandals with an ornately jeweled strap. One of the sandals dangles saucily from her toes. . . . The photograph as a whole conveyed a sense of sleek elegance, with faintly erotic undertones, and was designed to illustrate the metal-flecked polish on the model's toenails, as part of Allure[magazine's] six-page article about metallic makeup.[110]

As depicted in Figure 1, Koons cropped the model's legs, feet, and sandals as a component of a painting which dangles four pairs of women's legs and feet as a faux waterfall into a basin of confections: a massive chocolate-fudge brownie a la mode, glazed donuts, and apple Danish pastries. Koons asserted that his work "transformed" a

> collage of common images found in popular culture—advertisements, retail displays, and beauty and fashion magazines— . . . into an entirely new artistic work by altering the context, orientation, scale, and material of the original images, and by combining and

108. *See* Charles Kessler, *Jeff Koons: The Artist Critics Hate To Love—Part* 1, LEFT BANK ART BLOG (Aug. 9, 2014), http://leftbankartblog.blogspot.com/2014/08/jeff-koons-artist-critics-hate-to-love.html [https://perma.cc/VH6P-X7WF] [https://web.archive.org/web/20240225171229/http://leftbankartblog.blogspot.com/2014/08/jeff-koons-artist-critics-hate-to-love.html] (quoting art critic Jerry Saltz, *Taking in Jeff Koons, Creator and Destroyer of Worlds*, VULTURE (June 25, 2014), https://www.vulture.com/2014/06/jeff-koons-creator-and-destroyer-of-worlds.html [https://perma.cc/8EKB-SUTW] [https://web.archive.org/web/20240225171614/https://www.vulture.com/2014/06/jeff-koons-creator-and-destroyer-of-worlds.html], on Koons's 1994 to 2007 works: "huge, shiny baubles for billionaires. . . . the readymade crossed with greed, money, creepy beauty . . . and the ugliness of our culture") and Roberta Smith, *Shapes of an Extroverted Life*, N.Y. TIMES (June 26, 2014), https://www.nytimes.com/2014/06/27/arts/design/jeff-koons-a-retrospective-opens-at-the-whitney.html [https://web.archive.org/web/20240225171931/https://www.nytimes.com/2014/06/27/arts/design/jeff-koons-a-retrospective-opens-at-the-whitney.html], commenting that the works in Koons's 2014 Whitney Museum retrospective "unavoidably reek of Gilded Age excess, art star hubris and the ever-widening inequality gap that threatens this country"). This was not Koons's first encounter with a copyright infringement allegation. Three of his sculptures from his 1998 *Banality* series, see *Banality (sculpture series)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Banality_(sculpture_series) [https://perma.cc/7YXD-PKHW] [https://web.archive.org/web/20240225172505/https://en.wikipedia.org/wiki/Banality_%28sculpture_series%29] (last visited Feb. 25, 2024), were found to be infringements. *See* Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992); Campbell v. Koons, No. 91 Civ. 6055(RO), 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993); United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370 (S.D.N.Y. 1993). Koons's fair use defense failed in each of those cases.

109. In a prior case involving a sculptural work commissioned by Koons based on a photograph (*String of Puppies*), the Second Circuit ruled that the secondary work did not qualify as a fair use. *See Rogers*, 960 F.2d at 308–12 (2d Cir. 1992).

110. Blanch v. Koons, 396 F. Supp. 2d 476, 478–79 (S.D.N.Y. 2005).

> layering the images over sublime landscapes in a large scale oil painting that comments on and celebrates society's appetites and indulgences, as reflected in and encouraged by a ubiquitous barrage of advertising and promotional images of food, entertainment, fashion and beauty.[111]

Figure 1: Andrea Blanch, *Silk Sandals* (left); Jeff Koons, *Niagara* (2000) (right)

Niagara was one of seven paintings in Koons's *Easyfun-Ethereal* series, for which Deutsche Bank paid Koons $2 million.[112] Sotheby's reportedly appraised *Niagara* at $1 million in 2004.[113] *Allure* paid Blanch $750 to use *Silk Sandals*.[114]

Judge Stanton granted Koons's motion for summary judgment on his fair use defense. On the first fair use factor, Judge Stanton ruled that "Koons' use of the legs is transformational."[115] The court's analysis placed particular emphasis on Koons's statement that

> certain physical features of the legs of that model represented for me a particular type of woman frequently presented in advertising. In this photograph, I saw legs and especially elongated toes that were glossy, smooth, expertly manicured, and dressed in very expensive and not particularly practical sandals. . . . For *Niagara*, I removed these anonymous legs from the context of the photograph, and totally inverted their orientation. I then added these legs to other contrasting images of legs . . . and along with ice cream, donuts and pastries, floated them playfully and "ethereally" above a liberating landscape of grass, a waterfall and sky. In so doing, I transformed the meaning of these legs (as they appeared in the photograph) into the overall message and meaning of my painting. I thus suggest how commercial images like these intersect in our consumer

111. *Id.* at 479 (quoting Koons's affidavit).
112. *See* Blanch v. Koons, 467 F.3d 244, 248 (2d Cir. 2006).
113. *See id.*
114. *See id.* at 249.
115. *Blanch*, 396 F. Supp. 2d at 480.

> culture and simultaneously promote appetites, like sex, and confine other desires, like playfulness.
>
> And I did not even strictly copy the legs. I completely inverted their orientation, painting them to surreally dangle or float over the other elements of the painting. I also changed the coloring and added a heel to one of the feet (a heel that had been completely obscured in the photograph by the man's leg).[116]

Koons noted that he "select[ed] the legs in the photograph (rather than simply painting a model's legs himself) because of their iconic representation as presented to the public in ubiquitous media," and that it was important to him to "present real things that are actually in our mass consciousness."[117]

Judge Stanton found that "[n]o original creative or imaginative aspect of Blanch's photograph was included in Koons' painting."[118] Drawing on Judge Leval's seminal fair use article,[119] Judge Stanton concluded that "[t]he painting's use did not 'supercede' or duplicate the objective of the original, but uses it as raw material in a novel context to create new information, new aesthetics, and new insights." [120] He concluded, notwithstanding Koons's commercial purpose, that the first fair use factor favored the defendant.

Judge Stanton found that the second factor—the nature of the copyrighted work—favored Koons on the ground that *Silk Sandals* was published and the photograph of the crossed legs (and disregarding the sandals) is "banal rather than creative."[121] He found that the third factor—the amount and substantiality of the portion used in relation to the copyrighted work as whole—favored neither party, noting that "the quality of copyright protection for the crossed legs . . . [w]ithout the Gucci sandals (in which Blanch has no copyright interest) . . . is not sufficiently original to deserve much copyright protection."[122] Judge Stanton concluded that the fourth factor—the effect of the use upon the potential market for or value of the copyrighted work—favors the defendant because "'Niagara' is not a substitute for Blanch's photograph, and is in no way competitive with the it [sic]."[123]

On appeal, Judge Robert Sack, who cut his teeth as a First Amendment lawyer prior to his judicial appointment,[124] began his discussion characterizing the fair use doctrine

116. *Id.* at 480–81 (omissions in original).

117. *Id.* at 481.

118. *Id.*

119. *Id.* at 480 (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)) ("[I]f the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.").

120. *Id.* at 481.

121. *Id.* at 482.

122. *Id.*

123. *Id.*

124. *See* Caryn E. Neumann, *Robert Sack*, FREE SPEECH CTR. AT MIDDLE TENN. STATE U. (Sept. 19, 2023), https://firstamendment.mtsu.edu/article/robert-sack/ [https://perma.cc/9TNK-JG22] [https://web.archive.org/web/20240123233610/https://firstamendment.mtsu.edu/article/robert-sack/]; *see also* ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS (2017).

as mediating "the inevitable tension between the property rights it establishes in creative works" and "the ability of authors, artists, and the rest of us to express them—or ourselves by reference to the works of others."[125] His analysis emphasized that secondary works that "add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message . . . *lie at the heart of the fair use doctrine's guarantee of breathing space*."[126] In so doing, the court continued the process of boiling fair use down to a simplistic transformativeness inquiry. It also characterized the first fair use factor as "[t]he heart of the fair use inquiry,"[127] overlooking the Supreme Court's statement that the fourth factor is "the single most important element of fair use,"[128] and the Copyright Act drafters' description of the fourth factor as "often the most decisive."[129]

In finding *Niagara* to be transformative, the court credited Koons's assertion that he was "using Blanch's image as fodder for his commentary on the social and aesthetic consequences of mass media. His stated objective is thus not to repackage Blanch's 'Silk Sandals,' but to employ it 'in the creation of new information, new aesthetics, new insights and understandings.'" [130] The court gave short shrift to the substantial commercial value of *Niagara*, emphasizing its substantial transformativeness and the benefits to the public from exhibition. On the issue of justification, the court credited Koons's assertion that "[a]lthough the legs in the Allure Magazine photograph . . . might seem prosaic, I considered them to be necessary for inclusion in my painting rather than legs I might have photographed myself. The ubiquity of the photograph is central to my message. . . . By using an existing image, I also ensure a certain authenticity or veracity that enhances my commentary."[131] The court concluded that the first fair use factor "strongly favors" Koons.[132]

Although questioning the lower court's finding that the second factor favored Koons because Blanch's photograph was banal, Judge Sack nonetheless downplayed its importance because Koons used Blanch's work in a transformative way,[133] triggering a transformativeness domino effect. The third and fourth factors similarly fell in Koons's direction.[134]

Foreshadowing the risks inherent in the majority opinion, Judge Robert Katzmann noted in his concurrence that appropriation art "inherently raises difficult questions about the proper scope of copyright protection and the fair-use doctrine."[135] He

125. Blanch v. Koons, 467 F.3d 244, 250 (2d Cir. 2006).

126. *Id.* at 251 (emphasis in original) (quoting On Davis v. The Gap, Inc., 246 F.3d 152, 174 (2d Cir. 2001)).

127. *Id.* at 251.

128. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

129. REGISTER'S REPORT, *supra* note 9, at 25.

130. *Blanch*, 467 F.3d at 253 (citing Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 142 (2d Cir. 1998)).

131. *Id.* at 255.

132. *See id.* at 256.

133. *Id.* at 257.

134. *See id.* at 257–58.

135. *Id.* at 263.

emphasized that "the fair-use inquiry is a fact-specific one that is 'not to be simplified with bright-line rules,'"[136] just as the majority's simplistic transformativeness domino effect had done.

b. Cariou v. Prince

Several years after *Blanch v. Koons*, *Cariou v. Prince* pitted Patrick Cariou, a professional photographer/ethnographic researcher whose work focuses on communities at the edge of society,[137] against Richard Prince, a well-known appropriation artist. Over the course of six years, Cariou spent substantial time with Rastafarians in Jamaica gaining their trust, which enabled him to take a series of photographs which were published in a 2000 book, *Yes, Rasta*.[138] Prince cropped dozens of Cariou's candid portraits and landscape photographs in creating the *Canal Zone* series; twenty-eight of the twenty-nine paintings included images from *Yes, Rasta*.[139] These works prominently displayed substantial portions of Cariou's photographs, in some cases along with other cropped photographs.[140] Some of Prince's works superimposed oval "lozenges" over facial features, others superimposed guitars, and others altered the colors of Cariou's photographs and made other changes.[141]

Figure 2 shows Prince's *Canal Zone* (2007), which incorporates thirty-one of Cariou's photographs. Figure 3 shows Prince's *Graduation*, which reproduces and augments one of Cariou's photographs. Figure 4 shows Prince's *Tales of Brave Ulysses*, which crops and repeats the same Cariou photograph and adds cropped images of female nudes (some with lozenges). Figure 5 shows Prince's *Back to the Garden*, which crops and augments one of Cariou's photograph (with lozenges) and adds two cropped female nude photographs (with lozenges). Figure 6 shows Prince's *Charlie Company*, which crops the same Cariou photograph in a double pane with a different female nude image (with lozenges). Prince's canvases are wall-sized, typically four feet or more in width and height.

136. *Id.* (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994)).

137. *See Patrick Cariou: Works 1985–2005* (2022), https://www.amazon.com/Patrick-Cariou-Works-1985-2005/dp/8862087772 [https://perma.cc/SRB9-2B8J] [https://web.archive.org/web/20240124002525/https://www.amazon.com/Patrick-Cariou-Works-1985-2005/dp/8862087772].

138. *See* Cariou v. Prince, 784 F. Supp. 2d 337, 343 (S.D.N.Y. 2011).

139. *See id.* at 343–44.

140. *See id.*

141. *See* Cariou v. Prince, 714 F.3d 694, 700–01 (2d Cir. 2013).

Figure 2: Richard Prince, *Canal Zone* (2007), 48" x 82¾

Figure 3: Patrick Cariou, *Yes, Rasta* (p. 118) (left); Richard Prince, *Graduation*, 72¾" x 52½ (right)

Figure 4: Patrick Cariou, *Yes, Rasta* (p. 118) (left); Richard Prince, *Tales of Brave Ulysses*, 80" x 120¼" (right)

Figure 5: Patrick Cariou, *Yes, Rasta* (p. 53–54) (left); Richard Prince, *Back to the Garden*, 80" x 120" (right)

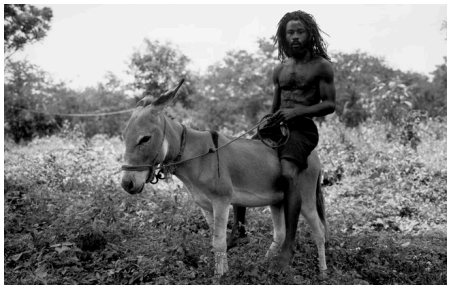

Figure 6: Patrick Cariou, *Yes, Rasta* (p. 53–54) (left); Richard Prince, *Charlie Company*, 131" x 120" (right)

After publication of *Yes, Rasta*, gallery owner Celeste Celle expressed interest in an exhibition featuring Cariou's photographs.[142] Celle planned to exhibit between thirty and forty of the photos, with multiple prints of each to be sold at prices ranging from $3,000.00 to $20,000.00, depending on size. She also planned to have *Yes, Rasta* reprinted for a book signing to be held during the show. When Celle became aware of the *Canal Zone* exhibition at the Gagosian Gallery, however, she cancelled the show because she did not want to seem to be capitalizing on Prince's success and notoriety and because she did not want to exhibit work which had been "'done already' at another gallery."[143]

Cariou sued Richard Prince and related defendants[144] (hereinafter "Prince") for copyright infringement. Prince asserted a fair use defense. Both parties filed for summary judgment. Judge Deborah A. Batts, in the Southern District of New York, ruled for Cariou with regard to all of Prince's works at issue.

In framing the analysis of the first fair use factor, Judge Batts noted, relying on *Campbell*, that "'the purpose and character of the use,' may be guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like."[145] She rejected Prince's assertion that use of copyrighted materials as "raw ingredients" in the creation of new works is per se fair

142. *Cariou*, 784 F. Supp. 2d at 344.

143. *Id.*

144. Cariou also sued the Gagosian Gallery (which exhibited Prince's works and published and sold an exhibition catalog), Lawrence Gagosian (the gallery owner), and Rizzoli International Publications (which produced the catalog). *See id.* at 343.

145. *Cariou*, 784 F.Supp. 2d at 348 (quoting *Campbell*, 510 U.S. at 578–79).

use, noting that "the Court is aware of no precedent holding that such use is fair absent *transformative comment* on the original."[146] She also took note of one of the earlier appropriation art cases involving Jeffrey Koons: "If an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer's claim to a higher or different artistic use . . . there would be no practicable boundary to the fair use defense."[147]

Judge Batts based her conclusion that Prince's works did not make transformative use of Cariou's photographs on Prince's deposition testimony that he "ha[d] no interest in the original meaning of the photographs he uses . . . he doesn't 'really have a message' he attempts to communicate when making art," and he "did not intend to comment on any aspects of the original works or on the broader culture."[148] Based on the lack of transformative use in conjunction with the commerciality of the use (Gagosian sold eight of the *Canal Zone* paintings for a total of $10,480,000, sixty percent of which went to Prince and forty percent of which went to the Gagosian Gallery; and exhibition catalog sales brought in $6,874), Judge Batts concluded that the first factor weighed against fair use.[149]

The remaining factors also weighed against fair use. On the second factor, the court found Cariou's photographs to be "highly original and creative."[150] Regarding the third factor, the court found that Prince appropriated the central figures portrayed in the photographs, which went to the heart of the works.[151] On the fourth factor, Judge Matts emphasized the cancellation of Cariou's exhibition as evidence of adverse effects on both the actual and potential markets for Cariou's photographs.[152]

On Prince's appeal, the Second Circuit panel dispensed with the justification inquiry and expanded transformativeness to greater importance.[153] Judge Barrington Parker began the analysis by taking issue with Judge Matts's search for a justification for the act of copying.[154] In the appellate court's view, "alter[ing] the original with 'new expression, meaning, or message'" suffices to establish that a use is transformative.[155] Based on this simplification of *Campbell*'s framework, the court concluded that twenty-five of Prince's thirty works—including *Tales of Brave Ulysses* (Figure 4) and *Back to the Garden* (Figure 5)—are transformative. In the court's view, these works "have a

146. *Id.* (emphasis added).

147. *Id.* (omission in original) (quoting Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992)).

148. *Id.* at 349 (citations omitted).

149. *See id.* at 350.

150. *See id.* at 352.

151. *See id.*

152. *See id.* at 353.

153. *See* Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).

154. *See id.* at 706 (rejecting the district court's "requirement that, to qualify for a fair use defense, a secondary use must 'comment on, relate to the historical context of, or critically refer back to the original works'" (quoting *Cariou*, 784 F.Supp. 2d at 284)). *But see* H.R. REP. NO. 94-1476, at 65–66 (1976) (noting that "[t]he examples enumerated at page 24 of the Register's 1961 Report, while by no means exhaustive, give some idea of the sort of activities the courts might regard as fair use under the circumstances," and explaining that "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way").

155. *Cariou*, 714 F.3d at 706 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).

different character, give Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's."[156]

As in *Blanch*, this finding triggered a domino effect across the fair use factors. While recognizing the commerciality of Prince's works, the court downplayed its significance "due to the transformative nature of the work[s]."[157] With regard to the second factor, the court recognized that Cariou's photographs were creative, but again discounted the importance of this factor in light of the transformativeness of the secondary uses.[158] Similarly, the court also discounted the third factor based on the transformativeness of Prince's works.[159]

As regards the fourth factor, the court rejected Judge Batts's concern with Cariou's loss of revenue resulting from the cancellation of a showing of his work at Celle's gallery.[160] The appellate court wrote off the cancellation of Cariou's exhibition at Celle's gallery on the ground that Celle mistakenly believed that Cariou had collaborated with Prince on the Gagosian exhibition.[161]

As regards other effects on the actual or potential markets for Cariou's photographs, Judge Parker focused the inquiry on "whether the secondary use *usurps* the market of the original work," not "damage to Cariou's derivative market."[162] Furthermore, the court noted that "[t]he more transformative the secondary use, the less likelihood that the secondary use substitutes for the original," even though "the fair use, being transformative, might well harm, or even destroy, the market for the original."[163] Based on this framing, the court concluded that "[a]lthough certain of Prince's artworks contain significant portions of certain of Cariou's photographs, neither Prince nor the *Canal Zone* show usurped the market for those photographs. Prince's audience is very different from Cariou's, and there is no evidence that Prince's work ever touched—much less usurped—either the primary or derivative market for Cariou's work."[164] As support for this point, Judge Parker explained that:

> Prince's work appeals to an entirely different sort of collector than Cariou's. Certain of the *Canal Zone* artworks have sold for two million or more dollars. The invitation list for a dinner that Gagosian hosted in conjunction with the opening of the *Canal Zone* show included a number of the wealthy and famous such as the musicians Jay–Z and Beyonce Knowles, artists Damien Hirst and Jeff Koons, professional football player Tom Brady, model Gisele Bundchen, *Vanity Fair* editor Graydon Carter, *Vogue* editor Anna Wintour, authors Jonathan Franzen and Candace Bushnell, and actors Robert DeNiro, Angelina

156. *Id.* at 708.
157. *Id.*
158. *See id.* at 709–10.
159. *See id.* at 710–11.
160. *See id.* at 708.
161. *See id.* at 703–04, 709.
162. *Id.* (quoting Blanch v. Koons, 467 F.3d 244, 258 (2d Cir. 2006)).
163. *Id.* at 709 (quoting Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 145 (2d Cir. 1998)).
164. *Id.*

> Jolie, and Brad Pitt. Prince sold eight artworks for a total of $10,480,000, and exchanged seven others for works by painter Larry Rivers and by sculptor Richard Serra.[165]

This opinion collapsed the fair use analysis into a transformativeness test without any need for justifying the copying. "[A]lter[ing] the original with 'new expression, meaning, or message'" does not only establish transformativeness; it essentially resolves the fair use question.[166] The court found that five of the paintings—*Canal Zone* (2007) (Figure 2), *Canal Zone* (2008) (similar in character to *Canal Zone* (2007)), *Graduation* (Figure 3), *Meditation* (similar to *Graduation*), and *Charlie Company* (Figure 6)—were not fair use as a matter of law due to the "relatively minimal alterations," but might nonetheless be fair use.[167] The court remanded consideration of these works for determination by the trial court.[168]

Senior Judge J. Clifford Wallace from the Ninth Circuit, sitting by designation, concurred with much of the majority opinion, including the determination that the district court incorrectly imposed a requirement that Prince's works comment on Cariou's photographs, but he dissented from the appellate court's resolution of the matter on summary judgment.[169] He "fail[ed] to see how the majority in its appellate role can 'confidently' draw a distinction between the twenty-five works that it has identified as constituting fair use and the five works that do not readily lend themselves to a fair use determination."[170]

We note our bewilderment at how *Back to the Garden* (Figure 5) and *Charlie's Company* (Figure 6) could be treated differently. This shows not only how *Cariou* collapsed the fair use framework into a simplistic test, but also its arbitrariness.

165. *Id.*

166. *Id.* at 706 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)) (citing *Blanch*, 467 F.3d at 253 ("[O]riginal must be employed in the creation of new information, new aesthetics, new insights and understandings" (internal quotation marks omitted))).

167. *Id.* at 710–11.

168. *Id.* at 711.

169. *See id.* at 712–13.

170. *Id.* at 713.

As the following chart from Neil Weinstock Netanel, reproduced from his article *Making Sense of Fair Use*, illustrates,[171] the transformativeness inquiry came to dominate the outcome of fair use determinations:

The Transformative Use Doctrine in Unreversed District Court Preliminary Injunctions, Bench Trials, and Crossed Motions for Summary Judgment			
	1995–2000	**2001–2005**	**2006–2010**
(1) Considers Transformativeness	70.45%	77.27%	95.83%
(2) Finds that use is transformative	22.72%	31.81%	50.00%
(3) Defendant wins when court considers transformativeness	32.14%	47.06%	60.87%
(4) Defendant wins when court finds that use is transformative	88.89%	100%	100%
(5) Overall defendant wins	22.73%	40.91%	58.33%

2. Toward Restoration of the Fair Use Doctrine

As the fair use doctrine veered dangerously close to swallowing the right to prepare derivative works, Seventh and Ninth Circuit panels questioned the reframing of fair use as a transformative inquiry. These cases set the stage for the *Warhol* showdown.

a. Kienitz v. Sconnie Nation

Photographer Michael Kienitz sued Sconnie Nation, a University of Wisconsin student group, for copyright infringement based on its copying of Kienitz's portrait of Madison's Mayor Paul Soglin to create and sell t-shirts poking fun at the mayor for shutting down an annual block party.[172] The altered photograph—which crops Mayor Soglin's face in a monochromatic photo-negative style, places it against a black background, shades it lime green, and superimposes "Sorry for Partying" in contrasting color lettering—aimed to take Mayor Soglin to task for having participated in the

171. Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 755 (2011); *see also* Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 167 n.19 (2019).

172. Kienitz v. Sconnie Nation LLC, 965 F. Supp. 2d 1042, 1044 (W.D. Wis. 2013).

annual block party during his college days and opposing the party decades later as a public official.[173]

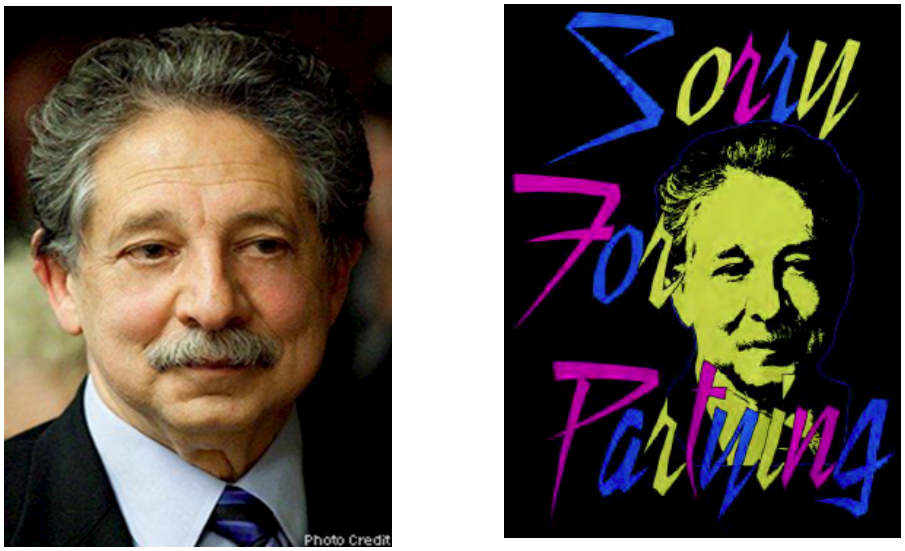

Figure 7: © Michael Kienitz (left); Sconnie Nation alteration (right)

Sconnie Nation moved for summary judgment on fair use grounds, emphasizing the transformative nature of the use.[174] Magistrate Judge Stephen Crocker relied significantly upon the recent Second Circuit *Cariou* decision to find the use transformative and grant summary judgment for Sconnie Nation.[175] While acknowledging that the shirts had a modest commercial nature, the decision emphasized the altered appearance of the Kienitz photograph and the purpose of ridiculing Mayor Soglin.[176]

On appeal, Kienitz questioned whether "transformative use" was the correct standard for analyzing fair use.[177] Writing for the Seventh Circuit panel,[178] Judge Frank Easterbrook agreed:

> The Copyright Act sets out four non-exclusive factors for a court to consider. 17 U.S.C. § 107. The district court and the parties have debated whether the t-shirts are a "transformative use" of the photo—and, if so, just how "transformative" the use must be. That's not one of the statutory factors, though the Supreme Court mentioned it in

173. *See id.* at 1046–47.
174. *See id.* at 1044.
175. *See id.* at 1049–52.
176. *See id.*
177. *See* Appellant's Opening Brief and Short Appendix, *Kienitz*, 965 F.Supp.2d (No. 12-CV-464-SLC), 2013 WL 6069366, at *10–17.
178. Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 757–58 (7th Cir. 2014).

> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) . . . . The Second Circuit has run with the suggestion and concluded that "transformative use" is enough to bring a modified copy within the scope of § 107. See, e.g., *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013). Cariou applied this to an example of "appropriation art," in which some of the supposed value comes from the very fact that the work was created by someone else.
>
> We're skeptical of *Cariou's* approach, because asking exclusively whether something is "transformative" not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works. To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2). *Cariou* and its predecessors in the Second Circuit do no[t] explain how every "transformative use" can be "fair use" without extinguishing the author's rights under § 106(2).
>
> We think it best to stick with the statutory list, of which the most important usually is the fourth (market effect). We have asked whether the contested use is a complement to the protected work (allowed) rather than a substitute for it (prohibited).[179]

Applying the statutory framework, Judge Easterbrook emphasized that Sconnie Nation had removed much of the expression reflected in the original photograph, the political commentary associated with the use, and the lack of economic loss for a photograph that was posted for viewing and downloading without cost on the mayor's website. He commented, however, that "the fair use privilege . . . is not designed to protect lazy appropriators," but rather "to facilitate a class of uses that would not be possible if users always had to negotiate with copyright proprietors."[180] Nonetheless, Judge Easterbrook affirmed the lower court's grant of summary judgment based on the removal of much of the photograph's expression.[181]

b. Dr. Seuss Enterprises, L.P. v. ComicMix LLC

The "transformativeness" reconceptualization of the fair use doctrine emboldened secondary creators to push the transformativeness trend past the breaking point. *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*[182] illustrates a particularly mercenary effort.

The case involves Dr. Seuss's perennial best-seller, *Oh, the Places You'll Go!* (hereinafter "*Go!*"), which tells a hopeful story about the journey of a young person leaving home to discover the world in Seussian illustrations and rhyming prose.[183] It reached number one on the *New York Times* "Best-Selling Fiction Hardcover" list when it was first published in 1990 and rises high on the best-seller list every spring as the

179. *Id.* at 758–59.

180. *Id.* at 759 (further noting that "[m]any copyright owners would block all parodies").

181. *See id.*

182. Dr. Seuss Enters., L.P. v. ComicMix LLC, 372 F. Supp. 3d 1101, 1106–07 (S.D. Cal. 2019), *rev'd in part*, 983 F.3d 443 (9th Cir. 2020).

183. *See Oh, the Places You'll Go!*, WIKIPEDIA, https://en.wikipedia.org/wiki/Oh,_the_Places_You%27ll_Go! [https://perma.cc/2LTU-T4YV] [https://web.archive.org/web/20240202043935/https://en.wikipedia.org/wiki/Oh,_the_Places_You%27ll_Go!] (last visited Feb. 1, 2024).

high school and college graduation season approaches.[184] Although Theodor S. Geisel (pen-named Dr. Seuss), author and illustrator of the Dr. Seuss books, passed away shortly after its publication, Dr. Seuss Enterprises (DSE), which holds the rights to his books, has long pursued a robust business of reissuing the book in special editions and new formats and licensing other authors and illustrators to prepare related and derivative works.[185] DSE ensures that these books continue the quality of the original Dr. Seuss books. DSE also licenses Dr. Seuss works, including *Go!*, for development of films, television, stage productions, theme parks, and museum exhibitions.[186]

The defendants in this case—David Gerrold, Ty Templeton, Glenn Hauman, and ComicMix, the limited liability company that they established (collectively referred to as "ComicMix")—were looking to develop a business venture that would take advantage of their skill sets.[187] Gerrold, a science fiction screenwriter and novelist, had written episodes for the original *Star Trek* television series, including the celebrated episode "The Trouble with Tribbles," as well as some of the early 1970s animated series and *Star Trek: The Next Generation*.[188] Hauman had experience as a publisher, author, illustrator, and comic book colorist, including work on the *Star Trek* franchise.[189]

In May 2016, Gerrold suggested to Hauman creating a *Star Trek* primer if they could get a license from the copyright owner, Paramount Pictures.[190] His idea was to combine *Star Trek* themes with beloved children's books, such as *Pat the Bunny*, *Fun with Dick & Jane*, *Goodnight Moon*, and *The Very Hungry Caterpillar*, before finally settling on *Go!*. They enlisted Templeton, a skilled comic book illustrator,[191] on the project a month later, telling him that "this would be Seuss-style [(*Star Trek*: The Original Series)] backgrounds," and that "we're going to want the cover and at least a background art piece for promotions, as well as be able to use the cover for posters, mugs, and all the

184. *See id.*; *Dr. Seuss Book Graduation Gift Tradition*, MAMA CHEAPS, https://www.mamacheaps.com/every-year-have-your-childs-teachers-sign-the-book-oh-the-places-youll-go-by-dr-seuss-give-it-as-a-high-school-graduation-gift/ [https://perma.cc/A23L-UZZU] [https://web.archive.org/web/20240202045558/https://www.mamacheaps.com/every-year-have-your-childs-teachers-sign-the-book-oh-the-places-youll-go-by-dr-seuss-give-it-as-a-high-school-graduation-gift/] (last visited Feb. 1, 2024).

185. *See ComicMix*, 372 F. Supp. 3d 1101, 1106–07 (S.D. Cal. 2019).

186. *See id.* at 1106–07.

187. *See id.* at 1107–10.

188. *See David Gerrold*, WIKIPEDIA, https://en.wikipedia.org/wiki/David_Gerrold [https://perma.cc/3RMS-SA44] [https://web.archive.org/web/20240202053428/https://en.wikipedia.org/wiki/David_Gerrold] (last visited Feb. 1, 2024).

189. *See Glenn Hauman*, WIKIPEDIA, https://en.wikipedia.org/wiki/Glenn_Hauman [https://perma.cc/SWF4-4TBS] [https://web.archive.org/web/20240202055015/https://en.wikipedia.org/wiki/Glenn_Hauman] (last visited Feb. 1, 2024).

190. *ComicMix*, 372 F. Supp. 3d at 1107.

191. *See Ty Templeton*, WIKIPEDIA, https://en.wikipedia.org/wiki/Ty_Templeton [https://perma.cc/WN7B-R4ZA] [https://web.archive.org/web/20240202060721/https://en.wikipedia.org/wiki/Ty_Templeton] (last visited Feb. 1, 2024).

merchandise that will push this thing over the top."[192] Templeton responded "Holy CRAP that's a cool idea. The title is like printing money. I'm totally in."[193]

Thinking that their project would qualify as a transformative fair use as a parody, they proceeded to create *Oh, the Places You'll Boldly Go!* (hereinafter "*Boldly*") to parallel and evoke the structure and appearance of *Go!*. Templeton "painstakingly" attempted to make his illustrations "nearly identical" to *Go!*, admitting that he "slavishly" copied.[194] To raise money for the project, ComicMix launched a Kickerstarter campaign, in which they warned the public that

> While we firmly believe that our parody, created with love and affection, fully falls within the boundary of fair use, there may be some people who believe that this might be in violation of their intellectual property rights. And we may have to spend time and money proving it to people in black robes. And we may even lose that.[195]

As Figures 9 through 12 show, ComicMix produced very similar artwork to *Go!* and *The Sneetches and Other Stories*. Figure 8 contains the covers, which are less similar, but reveal indicia of copying.

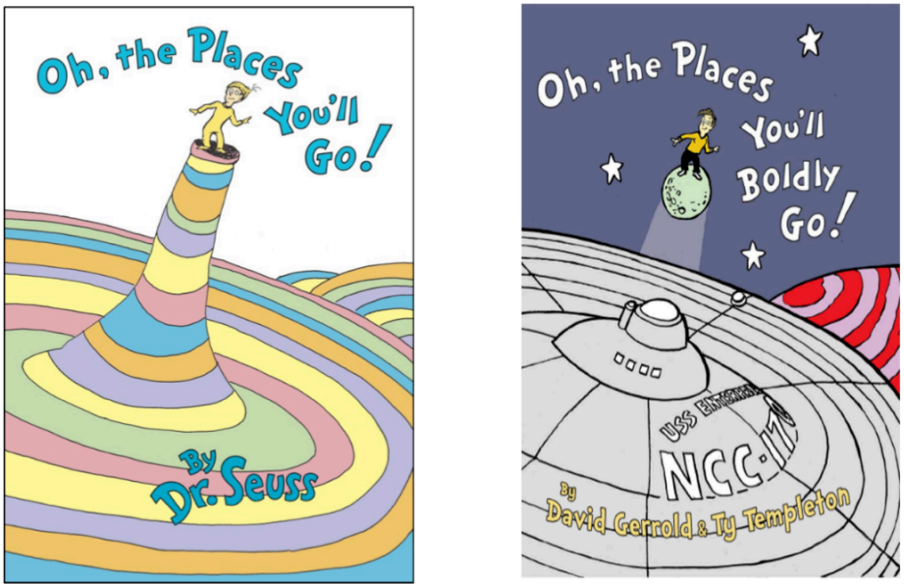

Figure 8: Dr. Seuss, *Oh, the Places You'll Go!* book cover (left); David Gerrold & Ty Templeton, *Oh the Places You'll Boldly Go!* book cover (right)

192. *ComicMix*, 372 F. Supp. 3d at 1107.
193. *Id.* at 1108.
194. *Id.* at 1108.
195. *Id.* at 1109.

Figure 9: Dr. Seuss, *Oh, the Places You'll Go!* (left); David Gerrold & Ty Templeton, *Oh the Places You'll Boldly Go!* (right)

Figure 10: Dr. Seuss, *Oh, the Places You'll Go!* (left); David Gerrold & Ty Templeton, *Oh, the Places You'll Boldly Go!* (right)

Figure 11: Dr. Seuss, *Oh, the Places You'll Go!* (left); David Gerrold & Ty Templeton, *Oh, the Places You'll Boldly Go!* (right)

Figure 12: Dr. Seuss, *Oh, the Places You'll Go!* (left); David Gerrold & Ty Templeton, *Oh, the Places You'll Boldly Go!* (right)

Figure 13: Dr. Seuss, *Oh, the Places You'll Go!* (left); David Gerrold & Ty Templeton, *Oh, the Places You'll Boldly Go!* (right)

Figure 14: Dr. Seuss, *Sneetches and Other Stories* (left); David Gerrold & Ty Templeton, *Oh, the Places You'll Boldly Go!* (right)

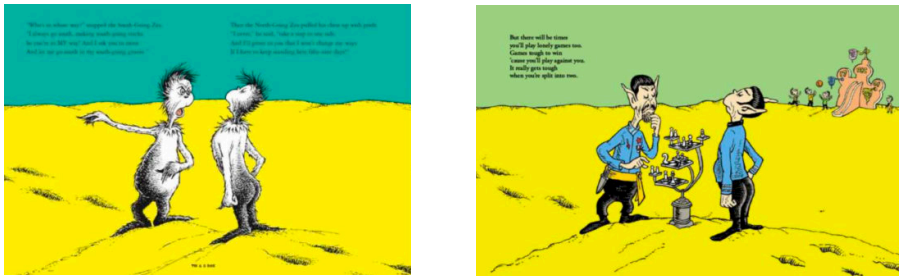

Figure 15: Dr. Seuss, *Sneetches and Other Stories* (left); David Gerrold & Ty Templeton, *Oh, the Places You'll Boldly Go!* (right)

Upon learning of the project, DSE brought a copyright infringement suit. ComicMix sought to dismiss the lawsuit on fair use grounds, leading to cross-motions for summary judgment. Applying the simplified transformativeness inquiry reflected in *Cariou*,[196] District Judge Janis Sammartino in the Southern District of California granted ComicMix's motion based on her findings that *Boldly* was "highly transformative" and unlikely to substantially harm the market for *Go!*.[197] The court's opinion effectively held that "mashups" are inherently "highly transformative" for purposes of fair use analysis, used the same transformativeness finding to downplay the other factors, and shifted to the copyright owner the burden of proving market harm for the fourth factor.

DSE appealed. Recognizing the head-on collision of the derivative work right and fair use reflected in this case, one of us co-authored an amicus brief calling attention to the problem.[198] Judge Margaret McKeown, writing for the panel, shared our concern.[199] Her opinion began by hoisting ComicMix on its own petard, noting that "[t]he creators thought their *Star Trek* primer would be 'pretty well protected by parody,' but acknowledged that 'people in black robes' may disagree. Indeed, we do."[200]

The Ninth Circuit held that all of the statutory fair use factors "decisively weigh against ComicMix."[201] Drawing on *Campbell*'s nuanced discussion of the first fair use factor, Judge McKeown rejected ComicMix's parody justification, puncturing its assertion that *Boldly* critiques or comments on *Go!*, critiques "banal narcissism" in *Go!*, or is otherwise transformative.[202] She noted that *Boldly* does not ridicule *Go!* or other Dr. Seuss works, and that mimicking Dr. Seuss's style does not amount to parody,

196. In *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1177–78 (9th Cir. 2013), a Ninth Circuit panel adopted *Cariou*'s and *Blanch*'s simplified analysis of fair use.

197. *ComicMix*, 372 F. Supp. 3d at 1115, 1120, 1122–26.

198. *See* Brief Amici Curiae of Professors Peter S. Menell, Shyamkrishna Balganesh, and David Nimmer in Support of Petitioners, Dr. Seuss Enters., L.P. v. ComicMix LLC, 983 F.3d 443 (9th Cir. 2020) (No. 19-55348), 2019 WL 3947891 (Aug. 12, 2019).

199. *See ComicMix*, 983 F.3d.

200. *Id.* at 448.

201. *Id.* at 451.

202. *See id.* at 452–53.

criticism, or commentary.[203] Rather, according to the court, *Boldly* parallels *Go!*'s purpose, and in conjunction with its commercial nature, tips the first fair use factor "definitively against fair use."[204] ComicMix did not fare better on the other factors. According to the court, *Go!* is highly creative. *Boldly* copied slavishly. And on the fourth factor, on which ComicMix (and not DSE) bears the burden of proof, *Boldly* directly targeted *Go!*'s graduation market and would curtail *Go!*'s potential market for derivative works.[205]

Acknowledging the argument made in the amicus brief, the court rejected an expansive understanding of transformative use, noting that ComicMix failed to "address a crucial right for a copyright holder—the derivative works market, an area in which Seuss engaged extensively for decades."[206] It went on to observe:

> As noted by one of the amici curiae, the unrestricted and widespread conduct of the sort ComicMix is engaged in could result in anyone being able to produce, without [plaintiff's] permission, *Oh the Places* Yoda*'ll Go!, Oh the Places You'll* Pokemon *Go!, Oh the Places You'll* Yada Yada Yada*!,* and countless other mash-ups. Thus, the unrestricted and widespread conduct of the sort engaged in by [defendant] could "create incentives to pirate intellectual property" and disincentivize the creation of illustrated books . . . [which] is contrary to the goal of copyright "[t]o promote the Progress of Science." U.S. Const. art I, § 8, cl. 8.[207]

III. *ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC. v. GOLDSMITH*

The simmering battle over the interplay of the right to prepare derivative works and the fair use doctrine came to a head in the *Warhol* litigation.[208] A panel of the influential Second Circuit, which played a large role in provoking the collision between the derivative work right and the fair use doctrine, sought to unwind the confusion that the circuit's jurisprudence had wrought.[209]

In contrast to *Blanch*, *Cariou*, and *ComicMix*, the secondary works in question, or at least one of them, were produced pursuant to an artist reference, a form of license to an image or object.[210] The controversy arose decades later when other works based on the licensed work became known and one was used without authorization.[211] Rather than agreeing to a share of the revenue from licensing that work (and belated attribution), however, the Andy Warhol Foundation for the Visual Arts (AWF), the owner of the secondary works, fired off a declaratory relief action asserting that the

203. *See id.* at 453.

204. *See id.* at 455.

205. *See id.* at 458–61.

206. *Id.* at 460 (citing 17 U.S.C. § 106(2)).

207. *Id.* at 461 (citing Brief Amici Curiae of Professors Peter S. Menell, Shyamkrishna Balganesh, and David Nimmer in Support of Petitioners, *supra* note 198, at 2).

208. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 515–25 (2023) (setting forth the factual background and procedural history).

209. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 38–39 (2d Cir. 2021).

210. *See Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 515.

211. *See id.* at 522.

works qualified for fair use pursuant to the permissive transformativeness jurisprudence.[212]

The story begins in the early 1980s, when Prince Rogers Nelson, better known as Prince, broke onto the music scene.[213] *Newsweek* magazine hired Lynn Goldsmith, who had by that time become an accomplished photographer of rock 'n roll stars, to photograph Prince.[214] She took a series of photographs of Prince in concert and portraits in her New York City studio.[215] She retained copyrights. *Newsweek* published one of the concert photographs for an article entitled "The Naughty Prince of Rock" in 1981.[216]

In 1984, by which time Prince had achieved superstardom following the release of his *Purple Rain* album, his most iconic record,[217] *Vanity Fair* licensed one of the studio portraits (Figure 16) as an artist reference for an illustration to be prepared for the magazine.[218] The license agreement provided that the illustration was "to be published in Vanity Fair November 1984 issue. It can appear one time full page and one time under one quarter page. No other usage right granted."[219] Goldsmith was to receive $400 and a source credit.[220]

212. *See id.* Warhol died in 1987, leaving his copyrights and remaining works to AWF.

213. *See id.*

214. *See id.* at 516.

215. *See id.*

216. *See id.*

217. *See Prince (musician)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Prince_(musician) [https://perma.cc/8K6M-5C6W] [https://web.archive.org/web/20240202061304/https://en.wikipedia.org/wiki/Prince_%28musician%29] (last visited Feb. 1, 2024); *Purple Rain (album)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Purple_Rain_(album) [https://perma.cc/F6Z4-56Q8] [https://web.archive.org/web/20240202061507/https://en.wikipedia.org/wiki/Purple_Rain_%28album%29] (last visited Feb. 1, 2024).

218. *See Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 517.

219. *Id.*

220. *See id.*

Figure 16

Vanity Fair hired renowned pop artist Andy Warhol to create the illustration for a feature story and provided him with Goldsmith's portrait.[221] Warhol produced the illustration, which appeared, along with a credit to Goldsmith, in the November 1984 issue of *Vanity Fair*. Figure 17 shows the Warhol illustration ("*Purple Prince*") next to the feature article "Purple Fame."

221. *See id.* at 517–18.

Better the sexual depravities of Prince than the sexual deprivations of Michael Jackson, declares TRISTAN VOX. Plus a special portrait for *Vanity Fair* by ANDY WARHOL

A few days after Mary Lou Retton won a gold medal at the Los Angeles Olympics, she appeared on *The Tonight Show* before Joan Rivers, who was swaddled in taffeta. The tergagant asked the cherub about her new prosperity. The cherub replied that she was the proud owner of a new car. "A little red Corvette," she exclaimed, with the most wholesome smile in the world. Suddenly one was filled with alarm. Had American popular culture played a dirty trick on Mary Lou? It had, if her reference was to Prince. "Little Red Corvette," you see, is a ballad of broken hearts and dirty condoms which Prince recorded a few years ago. "You're the kinda person / That believes in makin out once / Love 'em and leave 'em fast / I guess I must be dumb / Cuz U had a pocket full of horses / Trojan and some of them used / But it was Saturday night / I guess that makes it alright . . ."

Who kindles to such sentiments, and who does not, is not the point. The point is that escape from Prince is no longer possible. Finally he has arrived. The evidence is everywhere. The reasons are good. His music is some of the tightest and most turnid rock 'n' roll ever made. The movie *Purple Rain* is a crude minor classic, an American successor to *The Harder They Come*. The myths are all the mighty ones: young rebel, lonely artist, battered child, mysterious stranger. There is even a motorcycle. From Minneapolis, Minnesota, there comes another tough but tender, violent but vulnerable American hero.

Well, not quite. Look again. "Rude Boy," he calls himself. The name suits. He dresses as a dandy or as a stud; in glove and ruffles and a long lurid purple doublet, or in a sloping black codpiece and a cross. He poses against a backdrop of bedsprings, or shining ready on a bed. He sings, in a kind of filthy falsetto, about sexual climax (" . . . I wanna be your lover / I wanna be the only one that makes you come . . . running"), sexual confusion ("Bambi can't you understand? / Bambi it's better with a man"), sexual cross-dressing ("When you were mine / I used to let you wear all my clothes"), and sexual combinations ("I never was the kind to make a fuss / When he was there / Sleepin between the two of us"). There are odes to onanism, lots of them; and onstage he sometimes writhes, tossing and turning on the hard black amplifiers, until the convulsions conclude with what used to be called, when Nijinsky did it at the end of *L'Après-midi d'un Faune*, an autoerotic movement. Indeed, he looks rather like a faun—lithe body, satin skin, trembling lips—until you see the eyes, and the mustache that has not grown in, and the gait. They are cold and they are mean.

Is this coarse creature really the favorite of American popular culture? Wait until Jerry Falwell hears. There will be hell to pay; and the repulsive reverend might have a point. In fact, the protests have already begun—from liberals, who generally find out about the fun first. There are murmurings about misogyny. Prince, it is said, hates women. No doubt he does; the sexual style he exemplifies is primarily an expression of anger. In his music, women are had against their will. In his movie, they are beaten and tossed into the trash. (This is not the Minneapolis of Mary Tyler Moore.) There is no doubt, if it is the politics of culture that you want, that this inner-city satyr is a perfect star for the great era of American reaction that is upon us. The re-objectification of women that John Travolta began on the backseat of a car in *Saturday Night Fever* has, well, climaxed in the songs and the scenes of Prince.

But leave politics; too much politics and there is no mind for pleasure. Anyway, the path to pleasure is frequently not pretty. One woman's misogynist may be the image of another woman's desire. And men have been known to hunger for those who hate them, too. There is a measure of spiritual authenticity in sleaze. Better the low than the level. Better the sexual depravities of Prince than the sexual deprivations of Michael Jackson. (Prince will never find fans among parents.) His single-mindedness about sex means that he is serious about *(Continued on page 120)*

PURPLE FAME

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Figure 17

Unbeknownst to Goldsmith, Warhol produced fifteen other works based on Goldsmith's photograph.[222] Figure 18 shows the full series.

222. *See id.* at 518.


AWF-2001 (Ex. 48)
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches
AWF-1992 (Ex. 39)
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches
AWF-1993 (Ex. 40)
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches
AWF-1995 (Ex. 42)
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches
AWF-2002 (Ex. 49)
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches
AWF-1994 (Ex. 41)
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches
AWF-2003 (Ex. 50)
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches
AWF-1997 (Ex. 44)
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches
AWF-1996 (Ex. 43)
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches
AWF-1999 (Ex. 46)
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches
AWF-2004 (Ex. 51)
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches
AWF-2005 (Ex. 52)
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches
AWF-1998 (Ex. 45)
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches
AWF-2000 (Ex. 47)
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches
AWF-2006 (Ex. 53)
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches
AWF-2007 (Ex. 54)
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches

Figure 18

Following Prince's untimely death in April 2016, Condé Nast, *Vanity Fair*'s owner, reached out to AWF about reusing *Purple Prince* in a special edition magazine commemorating Prince.[223] Upon learning of the additional prints, Condé Nast licensed *Orange Prince* (Figure 19) for the commemorative issue, "The Genius of Prince."[224] It paid AWF $10,000 for the license.[225] Condé Nast did not obtain a license from Goldsmith, nor provide her payment or attribution.[226]

Figure 19

Upon seeing *Orange Prince* for the first time on Condé Nast's special edition cover, Goldsmith notified AWF that she believed that the image infringed copyright in her

223. *See id.* at 519.

224. *See id.* at 519–20.

225. *See id.* at 520.

226. "Twelve of the Prince Series works have since been auctioned or sold throughout the world, and AWF has given the remaining four to the Andy Warhol Museum in Pittsburgh, Pennsylvania." Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 320 (S.D.N.Y. 2019).

photograph.[227] AWF filed a declaratory relief action asserting noninfringement or, in the alternative, fair use for all sixteen works. Goldsmith counterclaimed for copyright infringement.[228]

The case came before Southern District of New York District Judge John Koeltl.[229] Applying established Second Circuit law—notably *Cariou*'s simplified transformativeness framework[230]—he had little difficulty determining that *Orange Prince* and the fifteen other secondary works were fair use. In Judge Koeltl's view, the sixteen works "may reasonably be perceived to be transformative of the Goldsmith Prince Photograph" under *Cariou*'s interpretation of *Campbell*.[231] He noted in particular that unlike Goldsmith's photograph, which shows Prince to be vulnerable and uncomfortable, Warhol's bold images present Prince as "an iconic, larger-than-life figure," consistent with other Warhol representations of celebrities ranging from Marilyn Monroe to Mao.[232] In his view, this transformative quality—"different character," "new expression," and "new aesthetics"—tipped the first fair use factor "strongly in AWF's favor," notwithstanding their commercial nature (most of the works were sold and *Orange Prince* was licensed to Condé Nast).[233] Furthermore, the transformative nature of the works tipped the third and fourth fair use factors in AWF's favor. Judge Koeltl considered the second factor to be neutral, leading to the conclusion that fair use "points decidedly" in AWF's favor.[234]

On appeal, the panel used this opportunity to "clarify" the Second Circuit's fair use jurisprudence in light of the criticism that had emerged.[235] Writing for the majority, Judge Gerald Lynch pulled back from the district court's broad reading of *Cariou* (and other cases) that a secondary work is transformative as a matter of law "[i]f looking at the works side-by-side, the secondary work has a different character, a new expression, and employs new aesthetics with [distinct] creative and communicative results."[236] After pointing out that even the five works that *Cariou* declined to rule fair use as a matter of law offered a "new aesthetic," such as the placement of lozenges over the facial features in *Graduation* (Figure 3), Judge Lynch noted that the definition of "derivative works" encompasses "transformed" works.[237] The court concluded that for appropriation art works such as the *Prince Series*, "where a secondary work does not obviously comment on or relate back to the original or use the original for a purpose other than that for which it was created, the bare assertion of a 'higher or different

227. *See Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 522.
228. *See id.*
229. *See id.*
230. *See Andy Warhol Found. for the Visual Arts, Inc.*, 382 F. Supp. 3d at 325–26.
231. *Id.* at 326.
232. *See id.*
233. *Id.* at 326.
234. *Id.* at 327.
235. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 38 (2d Cir. 2021).
236. *Id.* (alterations in original) (quoting *Andy Warhol Found. for the Visual Arts, Inc.*, 382 F. Supp. 3d at 325–26).
237. *See id.* at 39.

artistic use,' is insufficient to render a work transformative."[238] In place of the district court's standard, Judge Lynch raised the transformativeness bar to require "a 'fundamentally different and new' artistic purpose and character, such that the secondary work stands apart from the 'raw material' used to create it."[239]

Based on that clarification, the court concluded that the *Prince Series* was not transformative: "As in the case of such paradigmatically derivative works, there can be no meaningful dispute that the overarching purpose and function of the two works at issue here is identical, not merely in the broad sense that they are created as works of visual art, but also in the narrow but essential sense that they are portraits of the same person."[240] In the appellate panel's view, "the Prince Series retains the essential elements of the Goldsmith Photograph without significantly adding to or altering those elements."[241] The court further noted that "it is entirely irrelevant to this analysis that 'each Prince Series work is immediately recognizable as a "Warhol."'"[242] While noting that the *Prince Series*, while commercial, serves a public interest in exhibition, the court concluded that the first fair use factor does not significantly favor fair use.[243]

The panel determined that the other factors also incline against fair use.[244] The court disagreed with AWF's contention that "[d]enying fair-use protection to works like Warhol's will chill the creation of art that employs pre-existing imagery to convey a distinct message," explaining that concerns about public access to the works are better addressed at the remedy stage:[245]

> Nothing in this opinion stifles the creation of art that may reasonably be perceived as conveying a new meaning or message, and embodying a new purpose, separate from its source material. AWF also lists the possible consequences that it contends will flow if we deny fair use in this case. As discussed *supra*, however, those consequences would be significant to a district court primarily when assessing appropriate equitable relief for a copyright violation. And here, Goldsmith expressly disclaims seeking some of the most extreme remedies available to copyright owners. *See* 17 U.S.C. 503(b). Moreover, what encroaches on Goldsmith's market is AWF's commercial licensing of the Prince Series, not Warhol's original creation. Thus, art that is not turned into a commercial replica of its source material, and that otherwise occupies a separate primary market, has significantly more "breathing space" than the commercial licensing of the Prince Series. *Campbell*, 510 U.S. at 579.[246]

The Second Circuit's resolution of the *Warhol* controversy reinforced the right to prepare derivative works and moved fair use back toward its statutory and traditional jurisprudential contours. This begged the question of why the Supreme Court granted

238. *Id.* at 41 (quoting Rogers v. Koon, 960 F.2d 301, 310 (2d Cir. 1992)).
239. *Id.* at 42 (quoting Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013)).
240. *Id.* (citation omitted).
241. *Id.* at 43.
242. *Id.* (quoting Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019)) (rejecting the lower court's emphasis on this consideration).
243. *See id.* at 45.
244. *See id.* at 45–51.
245. *Id.* at 50.
246. *Id.* at 50–51.

review of the Second Circuit's handling of the first fair use factor.[247] We independently prepared amicus briefs articulating a return to the statutory mooring.[248]

Writing for a 7-2 majority, Justice Sotomayor directly confronted the tension between the derivative work right and the fair use transformativeness jurisprudence, explaining that

> the [copyright] owner has a right to derivative transformations of her work. Such transformations may be substantial, like the adaptation of a book into a movie. To be sure, this right is "[s]ubject to" fair use. . . . The two are not mutually exclusive. But 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. To preserve that right, the degree of transformation required to make "transformative" use of an original must go beyond that required to qualify as a derivative [work].[249]

Much of the majority opinion focuses on explicating *Campbell*'s nuanced incorporation of transformativeness into the analysis of the "purpose and character" of the use. Reinforcing the Second Circuit's logic, the Court observed that because "[m]ost copying has some further purpose" and "[m]any secondary works add something new," it cannot be the case that such acts constitute a transformative use.[250] Quoting the Second Circuit, Justice Sotomayor noted that the § 107 preamble "examples are easily understood," as they contemplate the use of an original work to "serv[e] a manifestly different purpose from the [work] itself."[251] "Criticism of a work, for instance, ordinarily does not supersede the objects of, or supplant, the work. Rather, it uses the work to serve a distinct end."[252]

The Court harmonized the derivative work right and transformative uses that qualify as fair use by requiring a secondary user to: (1) provide an independent justification for its use of a copyrighted work; (2) explain a distinct objective purpose for the use that is different from the copyright owner's purposes; and (3) establish that the transformativeness of the use outweighs the commerciality of that use.[253]

247. AWF limited its petition to "[w]hether a work of art is 'transformative' when it conveys a different meaning or message from its source material (as this Court, the Ninth Circuit, and other courts of appeals have held), or whether a court is forbidden from considering the meaning of the accused work where it 'recognizably deriv[es] from' its source material (as the Second Circuit has held)." Petition for a Writ of Certiorari at i, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023) (No. 21-869).

248. *See* Brief of *Amici Curiae* Institute for Intellectual Property and Social Justice and Intellectual-Property Professors in Support of Respondents, *Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. 508 (No. 21-869); Brief of Professors Peter S. Menell, Shyamkrishna Balganesh, and Jane C. Ginsburg as *Amici Curiae* in Support of Respondents, *Andy Warhol Foundation for the Visual Arts, Inc.*, 598 U.S. 508 (No. 21-869).

249. *Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 529 (alteration in original).

250. *See id.*; *see also id.* at 541 ("*Campbell* cannot be read to mean that § 107(1) weighs in favor of any use that adds some new expression, meaning, or message. Otherwise, 'transformative use' would swallow the copyright owner's exclusive right to prepare derivative works.")

251. *Id.* at 528 (quoting Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2d Cir. 2021)).

252. *Id.*

253. See Balganesh & Menell, *supra* note 1, at Part III.

Applying these considerations to AWF's licensing of *Orange Prince* to Condé Nast, the Court determined that Goldsmith's original photograph and AWF's use served "substantially the same purpose."[254] Both could serve as cover art for a magazine commemorating Prince's life. Therefore, AWF's use "'supersede[d] the objects' . . . i.e., shared the objectives, of Goldsmith's photograph, even if the two were not perfect substitutes."[255] To illustrate the point, the Court called attention to a range of covers commemorating Prince's life (Figure 20), noting that "[a]ll of them used a copyrighted photograph in service of that object. And all of them (except Condé Nast) credited the photographer."[256] The Court determined, based on the absence of targeting Goldsmith's photograph[257] and the commerciality of AWF's use—a $10,000 license fee—that the first fair use factor did not support fair use.

254. *Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 536–38.

255. *Id.* at 536 (citation omitted).

256. *Id.* at 521.

257. *Id.* at 544–45 (noting that while "the subjective intent of the user (or the subjective interpretation of a court) determine the purpose of the use . . . the meaning of a secondary work, as reasonably can be perceived, should be considered to the extent necessary to determine whether the purpose of the use is distinct from the original, for instance, because the use comments on, criticizes, or provides otherwise unavailable information about the original").

Figure 20

The Court cautioned against a rule that would allow any user to "make modest alterations to the original, sell it to an outlet to accompany a story about the subject, and claim transformative use."[258] It also reinforced that commentaries that have no critical bearing on a work are at *Campbell*'s "lowest ebb," and that their "'claim to fairness in borrowing' . . . 'diminishes accordingly (if it does not vanish).'"[259]

Justice Kagan's dissenting opinion channeled the free culture movement's core precepts, emphasizing the reliance of all creators on those who came before[260] and the need for a permissive transformativeness to promote progress.[261] In response, Justice Sotomayor countered that licensing payments induce original works in the first place

258. *Id.* at 546.
259. *Id.* at 546–47 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994)).
260. *See id.* at 568.
261. *See id.* at 593.

and that the Copyright Act's numerous escape valves provide "ample space for artists and other creators to use existing materials to make valuable new works."[262]

IV. RAMIFICATIONS OF THE *WARHOL* DECISION FOR ECONOMIC, SOCIAL, AND MORAL JUSTICE, FREEDOM OF EXPRESSION, AND CUMULATIVE CREATIVITY

Justice Sotomayor's opening lines to the Court's watershed opinion foreshadowed a journey into copyright's soul:

> This copyright case involves not one, but two artists. The first, Andy Warhol, is well known. His images of products like Campbell's soup cans and of celebrities like Marilyn Monroe appear in museums around the world. Warhol's contribution to contemporary art is undeniable.
>
> The second, Lynn Goldsmith, is less well known. But she too was a trailblazer. Goldsmith began a career in rock-and-roll photography when there were few women in the genre. Her award-winning concert and portrait images, however, shot to the top. Goldsmith's work appeared in Life, Time, Rolling Stone, and People magazines, not to mention the National Portrait Gallery and the Museum of Modern Art. She captured some of the 20th century's greatest rock stars: Bob Dylan, Mick Jagger, Patti Smith, Bruce Springsteen, and, as relevant here, Prince.[263]

Justice Sotomayor's vigorous, direct, and, at times, combative parrying with the dissent drove a dagger into the free culture movement's critique of copyright law.[264] The resulting decision repudiates the movement's campaign to undermine the derivative work right through a simplistic transformativeness shortcut for applying the fair use doctrine.

Thus, beyond clarifying the interplay of the derivative work right and fair use, Justice Sotomayor's majority opinion in *Warhol* addresses the economic, social, and moral justice principles underlying the Copyright Act as well as the safety valves serving First Amendment values and promoting cumulative creativity.

A. ECONOMIC AND SOCIAL JUSTICE

Justice Sotomayor's majority opinion substantiates what we have been referring to as the author empowerment conception of the modern copyright regime. Her decision reaffirms the text, core framework, and empirical assumptions underlying the modern Copyright Act: that "the author's rights should be stated in the statute in broad terms,

262. *Id. at* 549–50.

263. *Id.* at 515.

264. The tone of Justice Sotomayor's opinion was no doubt influenced by Justice Kagan's dissent, which was condescending and snarky in places. *See, e.g., id.* at 560 n.2 (suggesting that the majority opinion is "self-refuting" for responding thoroughly to the dissent's lengthy arguments); *Id.* at 559, 572-92 (offering a "refresher course" on art history); *Id.* at 574 (contending that the majority did not "actually look[] at the images" at issue).

and that the specific limitations on them should not go any further than is shown to be necessary in the public interest."[265] Congress could well have chosen to open up the fair use doctrine when it reformed the Copyright Act. Yet as we traced in Part II.B.3 and elsewhere,[266] the drafters of the modern Copyright Act considered the options for promoting progress and chose the author empowerment path. Throughout the opinion, Justice Sotomayor focuses attention on the statutory text and reinforces its evident logic.

Copyright law's broad protections have enabled many authors, musicians, filmmakers, actors, artists, and athletes from marginalized groups to achieve unprecedented economic success.[267] This success has altered power structures across the creative industries, which in turn has brought new genres, art forms, and a broader range of perspectives to the public. These structural changes and elevation of historically underrepresented creators and performers have had far-reaching consequences, including beneficial impacts upon civil rights.

Free culture scholars worry, however, that protection for derivative works locks down cumulative creativity, silences less powerful and younger voices, and stifles social engagement. Yet even as Professor Lessig attacked content companies' "ferocious assault" on freedom of expression, his own account revealed a vibrant and creative emerging digital ecosystem.[268]

There is no doubt that copyright law has stood in the way of those who would like to create their own *Star Wars* and *Harry Potter* sequels and merchandise. Absent permission or critical perspectives, these follow-on creators risk demand letters if they commercialize their work. And even if they are commenting on or otherwise parodying those works, they might, as Alice Randall experienced, encounter copyright litigation.[269]

But what we have seen in the more than two decades since Web 2.0 emerged is a much more permissive ecosystem that has supported a wide range of follow-on creative and cultural activities. The software industry has implemented various forms of open licenses that re-engineered copyright's defaults through ex ante license.[270] Hollywood has substantially embraced fan engagement with their works and generally does not

265. *See* H. COMM. ON THE JUDICIARY, *supra* note 25, at 14.

266. *See* Balganesh & Menell, *supra* note 1, at Part I.B; Brief of Professors Peter S. Menell, Shyamkrishna Balganesh, and Jane C. Ginsburg as *Amici Curiae* in Support of Respondents, *supra* note 248, at 6–13.

267. *See* Hughes & Merges, *supra* note 5.

268. *See* Julia D. Mahoney, *Lawrence Lessig's Dystopian Vision*, 90 VA. L. REV. 2305, 2307–09 (2004) (reviewing LESSIG, FREE CULTURE, *supra* note 97) (commenting that Lessig's FREE CULTURE "actually portrays a world that should elicit cautious optimism rather than fear of impending catastrophe," noting that "[b]y Lessig's own account, the expansion of the Internet has resulted in" many examples that dispel his assertion "that American culture is in grave peril").

269. *See* SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001); David D. Kirkpatrick, Mitchell Estate Settles 'Gone with the Wind' Suit, N.Y. TIMES (May 10, 2002), https://www.nytimes.com/2002/05/10/business/mitchell-estate-settles-gone-with-the-wind-suit.html [https://perma.cc/A962-NAVM] [https://web.archive.org/web/20240226014712/https://www.nytimes.com/2002/05/10/business/mitchell-estate-settles-gone-with-the-wind-suit.html].

270. *See* STEVEN WEBER, THE SUCCESS OF OPEN SOURCE (2005).

object to non-commercial fan activities.[271] We do not see enforcement actions against most fan scripts and other creative efforts that populate the internet. YouTube's Content ID system provides a broad ecosystem for user-generated content, while affording copyright owners tools for taking down and monetizing uses.[272] Social media websites are filled with memes and images that implicate copyrighted works. And Creative Commons has established a parallel universe in which creators offer works with pre-authorized licenses. The growing availability of insurance and codes of best practices for documentary films and a growing number of areas have also facilitated cumulative creativity.[273] Thus, reports of the stifling of user generated content have been greatly exaggerated.

Perhaps what is most remarkable is how few uses wind up being pursued in light of the millions of new and follow-on works being created and distributed each day. But it is those disputes that make their way up the federal court system that serve as the bellwethers for the freedom to create. These controversies steer copyright owners and follow-on creators in their pursuits and bring us to the question of whether the *Warhol* decision, even beyond its correctness as a matter of copyright law, offends principles of economic and social justice.

We stand firmly behind the correctness of the decision on those grounds. We believe as a general proposition that affording authors a robust derivative work right, subject to copyright law's limiting doctrines and a fair use escape valve, provides a good balance between pioneering and follow-on creativity while affording freedom of expression and access for public interests.

Within that framework, however, remains the specific economic and social justice inquiry of whether the follow-on use was fair. We struggle to see why these follow-on creators should be privileged to use the works of Andrea Blanch, Patrick Cariou, or Lynn Goldsmith without permission. In all of these cases, the follow-on creators were essentially using the fair use doctrine as a means to obtain free raw material for their commercial gain without any targeted commentary. They are exceptionally well-off creators catering to an even more well-off clientele. Deutshe Bank was bankrolling Koons. *Vanity Fair* commissioned Warhol, and he leveraged that commission into a series of sixteen works. And Richard Prince had a long-standing relationship with the

271. *See* Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617 (2008).

272. *Content ID*, WIKIPEDIA, https://en.wikipedia.org/wiki/Content_ID [https://perma.cc/LDX3-66DD] [https://web.archive.org/web/20240226014939/https://en.wikipedia.org/wiki/Content_ID] (last visited Feb. 25, 2024).

273. *See* RECLAIMING FAIR USE, 2d ed., *supra* note 98, at 119–77, 188–98.

Gagosian Gallery,[274] one of the hottest appropriation art galleries.[275] These cases reek of redistribution from less well-off creators to support the ultra-wealthy.[276]

But is it ethical to overlook this redistribution for the "expressive benefits" that would flow? Or more precisely, do we think that affording Koons, Prince, and Warhol free access to others' photographs is necessary for such expression? In Warhol's case, the answer is clearly no. *Vanity Fair* had already cleared the rights for Warhol to prepare an illustration to accompany its feature story. The question is whether Warhol, or AWF, should be required to negotiate with Goldsmith over rights to use the other fifteen works (or to make further use of *Purple Prince*). We fail to see how this is asking too much of Warhol or AWF. Moreover, there were certainly other Prince photographs that he could have used for his silkscreens. The incremental "expressive benefits," if any, for allowing Warhol free raw material at the expense of other creators and copyright's legislative framework are dubious.

As regards Jeffrey Koons, Andrea Blanch might have been amenable to working out licensing arrangements at a mutually agreeable price. And if not, there are other sources of stock and other photographs that could have served comparably well for Koons's work.

With respect to Richard Prince, we are less sure that Patrick Cariou, as an ethnographic researcher who devoted years to building a trusting relationship with his subjects, would have been amenable to having his photographs presented in Cariou's style. Moreover, we are skeptical that Jamaican Rastafarian photographs of that quality could have been found elsewhere. That said, we are not sure that society was better off with Prince's appropriation. Cariou's work might well have found other outlets and interest had Prince not interfered with Cariou's ability to exhibit his work. Moreover, since Prince was not commenting on Cariou's work, it is not clear what society lost given that Prince likely could have found other photography to pursue his artistic vision. Furthermore, affording Prince free use of Cariou's photographs without clear purpose other than commercial gain could well chill ethnographic photographers from pursuing projects such as Cariou's.

As the foregoing has highlighted, the role of licensing has long been a source of deep division in copyright scholarship discourse. The free culture movement considers any

274. *See Exhibitions/Richard Prince,* GAGOSIAN, https://gagosian.com/exhibitions/archive/artist/richard-prince/ [https://perma.cc/U9KQ-MKTS] [https://web.archive.org/web/20240202231737/https://gagosian.com/exhibitions/archive/artist/richard-prince/] (last visited Feb. 2, 2024) (listing over fifty exhibitions of Prince's work dating back to 2002).

275. *See Gagosian Gallery*, WIKIPEDIA, https://en.wikipedia.org/wiki/Gagosian_Gallery [https://perma.cc/YNR8-TMYD] [https://web.archive.org/web/20240202231908/https://en.wikipedia.org/wiki/Gagosian_Gallery] (last visited Feb. 2, 2024) (describing the enormous scale of Gagosian's operations).

276. AWF's use of a declaratory judgment action in response to Goldsmith's demand illustrates another problematic power dynamic. Well-heeled secondary creators have the resources to intimidate original creators into forgoing their rights and pressure poorer parties to settle claims at a steep discount. Ironically, such power dynamics also affect the way marginalized creators produce original works. Fearful of infringement litigation, legitimate or otherwise, they tend to license preexisting works prophylactically or self-censor and restrict their own creative output.

need to obtain permission to adapt or repurpose a copyrighted work to be a grave interference with freedom of expression and progress. As Part I explained, Congress viewed licensing as a critical part of copyright's creative engine and did not believe that transaction costs would unduly chill follow-on creativity. When works of authorship combine the talents of multiple artists, paying for permission to use an underlying work or sharing the revenue that results from the license rewards all of the contributors to the follow-on works. This promotes both economic efficiency and distributive justice. While not always seamless, free, or without the occasional need for legal assistance, copyright and alternative institutions have generated a vast ecosystem of access and use.

We believe that the fair use doctrine, as reflected in *Warhol*, perpetuates a significant role for licensing of uses that cannot meet the justification, "go beyond," and multi-factor inquiries.[277] Although this reinforced test might hamper some follow-on works, particularly of a commercial nature, we do not expect that there will be substantial changes in the creative community. Pursuing copyright enforcement is a costly activity and many follow-on uses, including much fan fiction, will continue to be tolerated. Where a major, well-heeled artist appropriates the work(s) of others, there will be greater risk, but that can be mitigated through licensing and possibly insurance. Furthermore, as Professor Xiyin Tang has observed,[278] the artistic community already implements norms that align with the *Warhol* decision. Artists recognize the injustice of unauthorized use and take steps to avoid violating fairness norms.

Which brings us to the role of "fairness" in fair use. The Copyright Act's multi-factor test was specifically designed to incorporate fairness considerations, which is why courts consider commerciality, amount of use, and effects upon the potential market. As the Act's drafters noted, free riding is not indicative of fairness, and licensing provides a mechanism for distributing the value and credit associated with cumulative creativity. Compensation is a fundamental aspect of fairness. This seems fairly obvious to us, but perhaps bears stating in view of the antipathy toward compensation reflected in much of the free culture literature. The drafters of the copyright statute considered compensation and licensing to be vital features of the copyright regime and economic justice.[279]

Fair use, as well as the *eBay* remedies doctrine, are mechanisms for dealing with circumstances in which recognized (categories enumerated in the § 107 preamble) or emergent social interests could be compromised by copyright owners blocking access and use. By contrast, opening up fair use to any transformation would create tremendous subjectivity, confusion, and injustice.

277. These elements of *Warhol*'s first fair use factor are explained in Balganesh & Menell, *supra* note 1.
278. *See* Xiyin Tang, *Art After Warhol*, 71 UCLA L. REV. (forthcoming 2024).
279. *See supra* Part I.

B. MORAL JUSTICE

Although Congress did not formally add moral rights provisions to the Copyright Act until 1990,[280] the derivative work right has long served as a form of moral right protection by empowering authors to demand attribution and use limitations on licenses to prepare derivative works.[281]This power, of course, does not extend to fair use of copyrighted works. But as the *Warhol* makes clear, the derivative work right is alive and well.

The backstory to the *Warhol* decision illustrates the importance of attribution for photographers. As Justice Sotomayor notes, Lynn Goldsmith worked hard to build her reputation, enabling her to establish herself at a young age as a leading rock photographer in an era "when women on the scene were largely dismissed as groupies." [282] By her mid-30s, she had chronicled the lives and tours of Bruce Springsteen, Michael Jackson, Bob Dylan, Patti Smith, and the Rolling Stones.[283] Her work appeared throughout the music press and on album covers. [284] Building her reputation, *which required attribution*, kept her at the top of the game. In this fast moving industry, she continued to hustle, and when Prince Rogers Nelson emerged on the scene, she "convinced" *Newsweek* to hire her to photograph him on stage and in studio. [285] Their publication of her photograph established her as a source for high quality photography of this up-and-coming recording and performance artist.

Lynn Goldsmith requested and obtained attribution for the use of her Prince studio portrait, as is common. She received attribution in a fair bargain for the use of her source photograph for the 1984 *Vanity Fair* feature article about Prince, "Purple Fame." But decades later, AWF and Condé Nast did not think to credit her source photograph for the cover art for the Prince commemorative issue. This illustrates how the derivative work right promotes not just economic justice, but also moral interests. And the two go hand in hand, vindicating the original author's moral rights by controlling the content and labeling of derivative works. Attribution is key to building many creators' reputation, opportunities, and success.

This attribution right can be especially valuable and important to authors and artists who have been discriminated against or otherwise marginalized. Such creatives can be

280. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (including the Visual Rights Act of 1990, title VI, § 603(a), 104 Stat. 5128, which added 17 U.S.C. § 106A, establishing rights of attribution and integrity for works of visual art); *see also Moral Rights in Our Copyright Laws: Hearing on S. 1198 and S. 1253 Before the Subcomm. on Patents, Copyrights and Trademarks of the Comm. on the Judiciary*, 101st Cong. (1989).

281. *Cf.* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.02[C] (2023) (observing that "the exclusive right 'to prepare derivative works' could be conceptualized as an author's integrity right").

282. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 516 (2023).

283. *See id.*

284. *See Lynn Goldsmith*, WIKIPEDIA, https://en.wikipedia.org/wiki/Lynn_Goldsmith [https://perma.cc/E88L-YQXX] [https://web.archive.org/web/20240202232312/https://en.wikipedia.org/wiki/Lynn_Goldsmith] (last visited Feb. 25, 2024).

285. *Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 516.

cultivated through non-traditional art forms and genres, with much of their creative talent manifest in their ability to translate, adapt, and otherwise render their native creative arts accessible to mainstream audiences. When well-known and other mainstream artists appropriate their work without attribution, society applauds the unprecedented "originality" of the follow-on artist, while the underlying, marginalized creators languish in obscurity and impecuniosity.

This is what occurred in *Cariou v. Prince*.[286] After the gallery owner who planned to exhibit Cariou's photographs and reprint his book for signings became aware of Prince's appropriation art exhibition featuring Cariou's work, she cancelled the show because she did not want to seem to be capitalizing on Prince's success and notoriety and did not want to exhibit work which had been "'done already' at another gallery."[287]

Marginalized artists can offer new perspectives toward traditional art forms. Here too, appropriation without attribution denies them recognition and financial reward, while the mainstream, appropriating artists enjoy commercial success and artistic acclaim, and in some cases, the rejuvenation of fading careers. [288]

Attribution enables marginalized and lesser known creators to gain attention, respect, and reputational clout that can propel their careers. At the very least, it protects them from the indignity of misappropriation, and provides them with encouragement to continue their artistic labors and the knowledge that there is an audience for their work, even if that audience consists solely of other artists who appreciate their artistic achievements.

Both the *Blanch* and *Cariou* decisions illustrate the harm from the trampling of the derivative work right. Although Andrea Blanch and Patrick Cariou had not become household names, they were professional photographers looking to support themselves through photography. They had each achieved a modicum of success and no doubt would have been receptive to offers to sell and license their works. Unfortunately, however, copyright's fair use doctrine veered off the rails at key points in their career, emboldening well-heeled appropriation artists to treat their photographs as free raw material for million dollar projects. As a result, they were left with nothing to show but humiliating court decisions and large legal bills.

In teaching these cases, we have asked ourselves and our students: Would we or they feel comfortable appropriating other people's art without payment or attribution to make seven-figure follow-on works that do not target or comment on the particular appropriated works except, perhaps, as some sort of general reflection on the general culture? The answer for us is "no." We recognize, of course, the need for breathing space for artists and others in expressing their views.

286. *See supra* text accompanying notes 142 and 143.

287. *See* Cariou v. Prince, 784 F. Supp. 2d 337, 344 (S.D.N.Y. 2011).

288. *See* Robert Brauneis, *Copyright, Music, and Race: The Case of Mirror Cover Recordings*, in THE CAMBRIDGE HANDBOOK OF INTELLECTUAL PROPERTY AND SOCIAL JUSTICE 183 (Steven D. Jamar & Lateef Mtima eds., 2024); Trevor Reed, *Fair Use as Cultural Appropriation*, 109 CAL. L. REV. 1373, 1385–90 (2021); Toni Lester, *Blurred Lines - Where Copyright Ends and Cultural Appropriation Begins - The Case of Robin Thicke versus Bridgeport Music and the Estate of Marvin Gaye*, 36 HASTINGS COMM. & ENT. L.J. 217 (2014); K. J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339 (1998).

C. FREEDOM OF EXPRESSION AND ESCAPE VALVES

As Justice Sotomayor noted in response to the dissent's alarm that withholding the fair use privilege from *Orange Prince*—"a Warhol" after all[289]—would stifle creativity, the Copyright Act contains a broad array of limiting doctrines and escape valves to accommodate free expression and promote cumulative creativity. She specifically noted the idea-expression dichotomy, the unprotectability of facts, the requirement of originality, the legal standard for actionable copying (including the filtration of unprotectable elements), durational limits, and, especially, the fair use doctrine.[290] We would also note the various other statutory limitations and compulsory licenses, including the cover license, and Judge Lynch's recognition of the role of remedies in balancing the public interests.[291] As noted in the 1965 *Supplementary Report*, Congress sought to implement a law that could stand the test of time, and it has adapted to and weathered various social and technological disruptions.

We have no doubt that the copyright law should be reformed to better accommodate both free expression and cumulative creativity. Doing so in the heat of the explosive emergence of Web 2.0, however, would have been unwise. As those advances disrupted traditional music, film, publishing, and software markets, the free culture movement was quick and correct to question the ability of the existing copyright system and institutions to support a robust and free creative ecosystem. But their doomsday predictions of runaway copyright litigation and stifling of creativity were open to question, especially when the former problem was promoted by free culture advocates.[292] Furthermore, their reform proposals—such as immunizing file-sharing services, [293] "voluntary" licensing (tip jars) for file-sharing, [294] broad spectrum

289. *See id.* at 558, 592 (Kagan, J., dissenting) (suggesting that Warhol is "the very embodiment of transformative copying").

290. *See id.* at 550 (majority opinion).

291. *See* quotation accompanying note 246.

292. Both the Electronic Frontier Foundation's lead copyright counsel and Professor Mark Lemley, who was counsel for Grokster, suggested that record companies ought to sue file-sharers—mostly high school and college students—rather than file-sharing services. *See* Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y U.S.A. 235, 256–59 (2014) (reporting Fred von Lohmann's public statements: calling attention to the "strangely" "empty category" of lawsuits against end-users; commenting that content owners "are hunting the wrong target"; observing that suing end-users would not be "such a radical statement" in view of the fact that going after the pirates has "always been the rule" in the copyright field; and stating that "a few targeted suits would certainly clarify the message"); Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN L. REV. 1345, 1390–93 (2004).

293. *See* Lemley & Reese, *supra* note 292, at 1379–90.

294. *See Making P2P Pay Artists*, ELEC. FRONTIER FOUND., https://www.eff.org/pages/making-p2p-pay-artists [https://perma.cc/V2Q2-W936] [https://web.archive.org/web/20240202232417/https://www.eff.org/pages/making-p2p-pay-artists] (last visited Feb. 2, 2024).

compulsory licensing regimes,[295] and vast expansion of fair use—were premature and questionable.

At the time that the free culture movement burst onto the scene, internet technology was evolving rapidly, and the empirical basis for making dramatic changes was thin. These scholars thought that making the world safe for file-sharing was the way to go. But as the aftermath of the Supreme Court's *Grokster* decision makes plain, peer-to-peer file-sharing was not the answer to society's prayers. By helping to stanch internet piracy, *Grokster* accelerated the path toward subscription services such as Spotify and Netflix that have proven remarkably successful for creators, consumers, and technology companies. Reforming copyright law during the turmoil of the Web 2.0 revolution was unrealistic and would likely have missed the mark. We needed to see how society and technology would adapt.

We do not doubt that the copyright system should be updated. After all, we are now half a century past when the drafters of the "modern" Act worried about designing the law to last "10, 20, or 50 years from [then]."[296] Now that *Warhol* has restored the fair use doctrine, the time is ripe to pursue balanced legislative/democratic solutions for improving free expression and cumulative creativity.

A good place to start would be in the documentary film field. These works have tremendous educational and research value to society. They are also often produced by non-profit organizations. And even though these purposes are within both the § 107 preamble and the first factor balance, many documentary makers are often pressured by distributors to clear the rights to use historical photographs and audiovisual works. They further face the problem of dealing with orphan works.[297] Congress can facilitate the production of these works by crafting exemptions, limitations of remedies, and other reforms to reduce the risks faced by documentary film makers.

More generally, Congress should consider a range of adjustments to the Copyright Act to reduce the transaction costs associated with licensing copyrighted works. These include establishing pre-clearance institutions,[298] discouraging fair use hold-outs,[299]

295. *See* WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 199–258 (2004); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy To Allow Free Peer-To-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003).

296. *See* quotation accompanying note 33.

297. *See* Menell, supra note 292, at 334–36; *see* Joshua O. Mausner, *Copyright Orphan Works: A Multi-Pronged Solution To Solve a Harmful Market Inefficiency*, 12 J. TECH. L. & POL'Y 395, 398 (2007); Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2d Sess. 2006) (limiting remedies against users who "performed and documented a reasonably diligent search in good faith to locate the owner of the infringed copyright"); *cf.* U.S. COPYRIGHT OFF., REPORT ON ORPHAN WORKS 95–112 (2006), http://www.copyright.gov/orphan/orphan-report.pdf [https://perma.cc/9ER6-7ZYJ] [https://web.archive.org/web/20240208222653/https://www.copyright.gov/orphan/orphan-report.pdf].

298. *See* Peter S. Menell, *Economic Analysis of Copyright Notice: Tracing and Scope in the Digital Age*, 96 B.U. L. REV. 967, 1013–142 (2016); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1123–27 (2007); David Nimmer, *A Modest Proposal To Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11, 12 (2006) (proposing a panel of "Fair Use Arbiters" appointed by the Register of Copyrights).

299. Peter S. Menell & Ben Depoorter, *Using Fee Shifting To Promote Fair Use and Fair Licensing*, 102 CAL. L. REV. 53 (2014).

tailoring compulsory licensing regimes (such as for mashups),[300] and, most importantly, reforming and recalibrating remedies.[301]

V. CONCLUSION

The free culture movement is built on a deep and fundamental skepticism of copyright: questioning whether any creative work can be original and opposing nearly any restraints on follow-on creativity. While it is tautological that authors are influenced by exposure to prior works, the gulf between that truism and the conclusion that copyright protection should be narrow and alteration or repurposing should be privileged is quite wide. What is not debatable is that the drafters of the Copyright Act rejected that precept of the free culture movement. To the contrary, the drafters empowered authors with broad exclusive rights and viewed licensing in conjunction with a limited fair use privilege as the best approach for promoting creativity, access, and cumulative creativity.

Even if judges accepted the free culture movement's perspective, they would lack the authority to override the legislative will as reflected in positive law. The Copyright Act's legislative text and intent do not support the evisceration of the derivative work right or an open-ended and subjective fair use doctrine. And for the reasons we have articulated, there is good reason to question such an approach within a social justice framework.

The Supreme Court's restoration of the statutory text, legislative intent, and economic logic undergirding the right to prepare derivative works has important ramifications for social justice and authors' control of their works. Time will tell whether the *Warhol* decision will promote or chill cumulative creativity,[302] but we do not expect the decision to cause the sky to fall. The utilitarian character of the "promote progress" clause does not require copyright protection to end whenever a follow-on creator "transforms" the work of others, at least in the view of the Copyright Act drafters. As the cases explored herein illustrate, a secondary user can nearly always find literary or art critics who can attest to a transformative alteration or purpose.[303]

300. *See* Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 U. PA. L. REV. 441 (2016).

301. *See* Menell, *supra* note 292, at 302–36.

302. Similar predictions by copyright critics have not come to pass. *See, e.g.*, Robert Hof, *Ten Years of Chilled Innovation*, BUS. WEEK (June 29, 2005), https://web.archive.org/web/20110306102756/http://www.businessweek.com/technology/content/jun2005/tc20050629_2928_tc057.htm (interviewing Lawrence Lessig after the *Grokster* decision). The *Grokster* decision fueled the streaming marketplace, producing an explosion of licensing that vastly expanded access to creative works, rewarded artists, and protected consumer privacy. Moreover, the resulting decline of peer-to-peer services greatly reduced the proliferation of malware. *See* John Borland, *"Spyware" Piggybacks on Napster Rivals*, CNET (Jan. 29, 2002), https://www.cnet.com/tech/services-and-software/spyware-piggybacks-on-napster-rivals/ [https://perma.cc/RX2P-SDHW] [https://web.archive.org/web/20240226025450/https://www.cnet.com/tech/services-and-software/spyware-piggybacks-on-napster-rivals/].

303. *See* 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:35:31 (2022) (commenting on AWF's art expert's credibility: "Such hyperbole may wow gullible undergraduates taking a class on Pop Art, but it has no place in federal court as a way to decide whether fair use exists or not").

Furthermore, the Copyright Act and jurisprudence have substantial safety valves in place to support valuable cumulative creativity. It is clear, however, that *Warhol* will encourage secondary creators to think more carefully about licensing of raw material. It might also point them toward less derivative and more innovative projects.

We are hopeful that the *Warhol* decision will promote various dimensions of progress and enhance social justice through its bolstering of authors' rights, and that escape valves will continue to promote free expression and cumulative creativity. Requiring future artists who seek to use the work of prior creators as raw material for non-critical uses—e.g., not as commentary, criticism, or parody—to negotiate the terms of appropriation with copyright owners, especially for commercial uses, serves the purposes that the drafters of the Copyright Act sought to advance. Moreover, the Copyright Act's numerous safety valves provide substantial leeway for secondary users. Furthermore, Congress can enhance the efficacy of the copyright law by enacting further adjustments, such as the ones we have discussed, to support fair and efficient cumulative creativity.