

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

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PATRICK CARIOU,

*Petitioner,*

*v.*

RICHARD PRINCE, *et al.*,

*Respondents.*

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

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**MOTION FOR LEAVE TO FILE  
AMICUS CURIAE BRIEF AND BRIEF OF  
NEW YORK INTELLECTUAL PROPERTY  
LAW ASSOCIATION AS AMICUS CURIAE IN  
SUPPORT OF GRANTING THE PETITION**

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**MOTION OF NEW YORK INTELLECTUAL  
PROPERTY LAW ASSOCIATION FOR LEAVE TO  
FILE A BRIEF *AMICUS CURIAE* IN SUPPORT  
OF GRANTING THE PETITION**

The New York Intellectual Property Law Association (“NYIPLA”) hereby moves, pursuant to S. Ct. R. 37.2, for leave to file a brief *amicus curiae* in support of the petition for a *writ of certiorari* to the United States Court of Appeals for the Second Circuit. *Amici* are filing this motion because they have been unable to secure consent from Respondent.\* The proposed brief is attached.

As more fully explained in the Statement of Interest of *Amici Curiae* beginning on page 1 of the attached brief, *amici* is an association dedicated to the consistent application of intellectual property law who is concerned that the Second Circuit’s decision, if allowed to stand, will have serious negative repercussions for members of *amici*’s association and the larger community of authors, artists and copyright owners. The brief of *amici* will assist the Court in determining whether to grant *certiorari*, because the brief elaborates on why the Second Circuit’s ruling on the correct scope of the fair use exception embodied in Section 107 of the Copyright Act erroneously expands the defense too far as a matter of law.

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\*On September 17, 2013, counsel for *amici* contacted counsel for both Petitioner and Respondents, and asked whether both would consent to *amici* filing a brief in support of the Petition for Certiorari as well as to waiving the ten day notice provision pursuant to Rule 37. Consent was provided on September 17th by Petitioner, but Respondents declined to consent.

In particular, the brief explains why the Second Circuit’s opinion concerning the “transformative” use element of the first prong of the fair use test extends this Court’s ruling in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) further than it was intended, and in a manner that improperly invades an author’s exclusive right to prepare and authorize the copying of derivative works under Section 106(2) of the Copyright Act. *Amici*’s brief will also assist the Court by explaining how this erroneous ruling, if allowed to stand, would impact authors, artists and copyright owners. Accordingly, *amici* respectfully request that the Court grant leave to file the attached brief as *amici curiae*.

Respectfully submitted,

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**AMICUS BRIEF OF NEW YORK INTELLECTUAL  
PROPERTY LAW ASSOCIATION IN SUPPORT  
OF GRANTING THE PETITION**

**INTEREST OF THE *AMICI CURIAE*<sup>1</sup>**

*Amici curiae* The New York Intellectual Property Law Association (“NYIPLA” or “Association”) is a professional association of approximately 1,300 attorneys whose interests and practices lie in the area of patent, trademark, copyright, trade secret and other intellectual property law. The Association’s members include a diverse array of attorneys specializing in intellectual property law, from in-house counsel for businesses that own, enforce and challenge copyrights, to attorneys in private practice who represent authors and copyright owners in various proceedings before the courts and other tribunals that adjudicate copyright claims or set copyright royalty rates. A substantial percentage of the Association’s member attorneys participate actively in copyright litigation, representing both copyright owners and accused infringers. The NYIPLA’s members also frequently engage in copyright licensing matters on their clients’ behalf, representing both copyright licensors and licensees.

The entities served by the Association’s members include authors, publishers, artists, entrepreneurs, venture capitalists, businesses, universities, and industry

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici* or their counsel, made a monetary contribution intended to fund its preparation or submission.



and trade associations.<sup>2</sup> The NYIPLA's members and their respective clients have a strong interest in the issues presented by this case because their day-to-day activities depend on the consistently-applied and longstanding broad scope of subject matter protected under the derivative works right in the Copyright Act, and its members have a particularly strong interest in ensuring that their reasonable expectation that those principles continue to be consistently applied.

### SUMMARY OF THE ARGUMENT

The Second Circuit's holding in *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), App. 1-31, conflicts with this Court's precedent in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) and *Stewart v. Abend*, 495 U.S. 207 (1990). It does so by extending the "transformative" use element of the first prong of the fair use test in Section 107 of the Copyright Act beyond its intended scope, and in a manner that improperly invades an author's exclusive right to prepare and authorize the copying of derivative

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2. The arguments set forth herein were approved on September 18, 2013 by unanimous approval of the officers and members of the Board of Directors of the NYIPLA, but do not necessarily reflect the views of a majority of the members of the Association, or of the law or corporate firms with which those members are associated. After reasonable investigation, the NYIPLA believes that no officer or director or member of the Committee on *Amicus* Briefs who voted in favor of filing this brief, nor any attorney associated with any such officer, director or committee member in any law or corporate firm, represents a party in this litigation. Some officers, directors, committee members or associated attorneys may represent entities, including other *amici curiae*, which have an interest in other matters which may be affected by the outcome of this litigation.

works under Section 106(2) of the Copyright Act. The Second Circuit was incorrect in holding that a proponent of a fair use defense need not demonstrate that the purpose of its so-called transformation falls within the statutory purposes of fair use enunciated in the statute’s preamble in order to be eligible to succeed with that defense. This Court should grant *certiorari* because the Second Circuit decision conflicts directly with this Court’s prior decisions. Under the Copyright Act, authors have the exclusive right to prepare and authorize derivative works. The Second Circuit’s decision in *Cariou* has conflated the difference between a “transformation” in the creation of an unauthorized derivative work and a “transformative use” for the purpose of the fair use inquiry. By doing so, the court below contradicted both the direct text of the Copyright Act and this Court’s precedents. Because this issue has directly contravened the Court’s authority, as well as leading to adoption of this incorrect standard in other circuits, the Court should grant the petition.

## ARGUMENT

### I. Introduction

This case concerns the use of one artist’s works – Patrick Cariou’s photographs – by another artist – Richard Prince – in his paintings, and turns on whether Prince’s infringement of Cariou’s photographs should be excused under the copyright fair use doctrine, 17 U.S.C. § 107. In the course of its fair use analysis, the Second Circuit Court of Appeals held that the “purpose and character,” prong of the fair use test could be satisfied if the infringer merely manipulates the source work enough to make the new work sufficiently different from the

original, without any regard to whether, or any need to show, that the infringer intended to engage in a purpose such as “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,” in order to qualify for the fair use defense under the Copyright Act, 17 U.S.C. § 107.

It so held because it claimed that the use was “transformative” under this Court’s decision in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), and further held that a proponent of a fair use defense need not show that the purpose of the so-called transformation was to comment on the original or satisfy any of the other criteria as stated in the preamble of the fair use section of the Copyright Act. This approach is demonstrably wrong — as a matter of law and as a matter of practical application and policy because it reads out of the Copyright Act the exclusive right of the author to create – and thus control the copying of – derivative works under 17 U.S.C. § 106(2). This Court should hear this case now because it impacts not only this case, but others working their way through the courts in other circuits and is of great concern to copyright owners who rely upon the exclusivity of the derivative use right as a means of protecting their works.

This brief thus addresses the first question presented by the Petitioner only, specifically:

Whether the first statutory fair use factor, “the purpose and character of the [secondary] use,” requires consideration of the secondary user’s purpose (i.e., his or her justification for appropriating particular copyrighted materials), and not just of the secondary work’s expressive character.

Petition at i. In particular, *amici* are concerned that by not requiring a purpose included within the fair use preamble, the Second Circuit’s decision improperly invades a copyright owner’s exclusive right to prepare and authorize transformative derivative works, and thus carries this Court’s approval of the word “transformative” in the fair use analysis too far. Because of the importance of interpreting the legal scope of this Court’s own precedent, the high profile nature of this case in the copyright community, the conflict the Second Circuit’s decision has caused with the statutory scheme of Congress in the Copyright Act, and the early repetition of the Second Circuit’s error by other circuit courts, this is an issue of importance that is ripe for this Court’s adjudication.

## **II. This Court Should Grant the Petition for *Certiorari* to Avoid the Persistence of Conflicting Authority and Confusion Amongst the Circuit Courts**

### **A. The Second Circuit’s Decision in *Cariou* is in Direct Conflict With This Court’s Precedents in This Area**

#### **1. Authors Hold the Exclusive Right to Make – and Control Copying of – Derivative Works**

Section 106 of the Copyright Act provides authors with the *exclusive* right to do *and to authorize*, reproduction, distribution, display and performances not only their original works but to prepare derivative works made therefrom. *See* 17 U.S.C. § 106(2). Section 101 of the Copyright Act defines a derivative work as: “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization,

motion picture eversion, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, *transformed*, or adapted.” 17 U.S.C. § 101 (emphasis added). In *Stewart v. Abend*, 495 U.S. 207, 237 (1990), this Court held that where a motion picture derived from a short story was qualified as a derivative work, there was no fair use because the derivative use did not fall into any of the categories enumerated in the preamble of § 107. This Court also held that unauthorized commercial uses are a presumptively unfair intrusion into the “monopoly privilege that belongs to the owner of the copyright.” *Id.* See also *Castle Rock Entm’t v. Carol Publ’g Group*, 150 F.3d 132, 143 (2d Cir. 1998) (noting that “[a] derivative work, over which a copyright owner has exclusive control, is defined as a work based upon one or more preexisting works,” rejecting a fair use defense). The definition continues: “A work consisting of editorial revisions, annotations, *elaborations*, or *other modifications*, which, as whole, represent an original work of authorship, is a ‘derivative work.’” 17 U.S.C. § 101 (emphasis added).

The derivative work right, and the issues raised by this case, are important not only for visual artists and authors, but for all copyright owners. In addition to the other reasons set forth below, one of the principal benefits that the exclusive derivative works right confers on copyright owners is that such works are separately licensable by the copyright owner. The Copyright Act confers upon the owner of a copyright a bundle of discrete exclusive rights, each of which may be transferred or retained separately by the copyright owner. This “divisibility” doctrine is codified throughout the copyright law. See, e.g., 17 U.S.C. §§ 106, 201(d), 501(b). As noted, the derivative works right is one

of the rights enumerated in Section 106, and Section 201(d) (2) provides that “[a]ny of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred . . . and owned separately.” 17 U.S.C. § 201(d)(2). Accordingly, if the result of the Second Circuit’s decision as discussed below is to eviscerate the separate derivative works right, it will deprive copyright owners of a valuable property right conferred by the statutory scheme.

**2. This Court has Long Held That to Invoke the Transformative Use Element of the First Prong of the Fair Use Test, the Statutory Purpose of Fair Use as Enunciated in the Preamble Must Be Satisfied First**

The fair use doctrine in the current Copyright Act is statutory, but over the years has also been the subject of judicial gloss. In particular, it has been stated that the four enumerated factors are “non-exclusive.” However, the preamble of the statutory section makes clear that Congress’ purpose in including the fair use defense in the Copyright Act is to permit uses such as “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research.” 17 U.S.C. § 107. The four non-exclusive factors are then to be used in determining whether the infringing use at issue falls within those statutory purposes. *Id.* There is no indication that Congress ever intended purely commercial uses such as those by Respondents to qualify for fair use.

“Transformative use” is not mentioned in either the preamble or the statutory factors, but it has

been imported into the first statutory factor which directs the finder of fact to make an inquiry into the purpose and character of the infringing use. *Id.* In *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), this Court first announced that an inquiry into whether the use is “transformative” should be part of the first factor. In *Campbell*, the infringing work at issue was a parody, which the Court first found fell within the purview of the statutory purpose because parody can be equated with criticism and comment. *Id.* at 579-80. Having met that threshold, in its examination of the first enumerated factor, purpose and character of the use, the Court said that even where the second use is commercial in nature, the inquiry should include an analysis of whether the second user’s effort was transformative in some sense, and defined what it meant by “transformative”: whether it “*adds something new*, with a further purpose or different character, *altering the first* with new expression, meaning, or message.” *Id.* at 579 (emphasis added). But, as explained more fully below, this Court has never said that the inquiry into transformation should be divorced from the purposes set forth in the preamble or should supersede otherwise infringing derivative works.

**3. The Second Circuit’s Extension of Fair Use to Works Qualifying as Derivative Works Without Regard to The Purpose of the Copying Should Be Closely Examined by This Court**

The District Court in this case found that the infringing works at issue qualified as infringing derivative works. App. at 49. In so doing, the District Court noted, and explained at length, the differences between when

a new use of a copyrighted work is “transformed” for purposes of creating a derivative work, and when it is “transformative” for purposes of the fair use analysis, relying upon well-worn Second Circuit and Supreme Court precedent. *Id.* at 49-51. In particular, the District Court held:

As the Second Circuit clearly noted in *Castle Rock*, the fact that a work “recast[s], transform[s], or adapt[s] an original work into a new mode of presentation,” thus making it a “derivative work” under 17 U.S.C. § 101, does not make the work “transformative” in the sense of the first fair use factor. *Castle Rock*, 150 F.3d at 143. Nevertheless, Defendants invite this Court to find that use of copyrighted materials as raw materials in creating “appropriation art” which does not comment on the copyrighted original is a fair use akin to those identified in the preamble to § 107.

The cases Defendants cite for the proposition that use of copyrighted materials as “raw ingredients” in the creation of new works is per se fair use do not support their position, and the Court is aware of no precedent holding that such use is fair absent transformative comment on the original. To the contrary, the illustrative fair uses listed in the preamble to § 107 – “criticism, comment, news reporting, teaching [ ... ], scholarship, [and] research” – all have at their core a focus on the original works or their historical context, and all of the precedent this Court can identify imposes a requirement that



the new work in some way comment on, relate to the historical context of, or critically refer back to the original works. *See, e.g., Campbell*, 510 U.S. at 579 (transformative use is use that “alter[s] the first with new expression, meaning, or message”); *Bourne v. Twentieth Century Fox Film Corp.*, 602 F.Supp.2d 499 (S.D.N.Y. Mar. 15, 2009) (Batts, J.) (parody song which commented both on the copyrighted original and on famous person associated with original was transformative); *Blanch v. Koons*, 467 F.3d at 252-53 (use of copyrighted fashion advertisement as “raw material” was transformative because artist used it to comment on the role such advertisements play in our culture and on the attitudes the original and other advertisements like it promote); *Liebowitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114 (2d Cir. 1998) (superimposition of Leslie Nielsen’s face on photo of body intended to resemble pregnant Demi Moore commented on original photo of Moore by holding its pretentiousness up to ridicule). *Cf. Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992), *cert. denied*, 506 U.S. 934 (1992) (sculpture drawn from copyrighted photograph was not fair use because while the sculpture was a “satirical critique of our materialistic society, it is difficult to discern any parody of [or comment on] the photograph. . . itself.”)

“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.” *Rogers v. Koons*, 960 F.2d at 310. The Court therefore declines Defendants’ invitation to find that appropriation art is per se fair use, regardless of whether or not the new artwork in any way comments on the original works appropriated. Accordingly, Prince’s Paintings are transformative only to the extent that they comment on the Photos; to the extent they merely recast, transform, or adapt the Photos, Prince’s Paintings are instead infringing derivative works. *See Castle Rock*, 150 F.3d at 143.

*Id.* This holding is well-reasoned and should not have been disturbed by the Second Circuit because if no distinction is recognized between transforming something for purposes of fair use, on the one hand, and transforming something for purposes of creating a derivative work, on the other hand, then the exclusive right of the original author to prepare and authorize derivative works will be judicially written out of the Copyright Act. The Second Circuit’s decision does not disturb the factual finding that Prince’s uses in this case were a derivative work, but rather approves them as a *per se* fair use, because it held that, as a matter of law, the Congressional statutory purpose need not be consulted. With all due respect, that is not the proper function of the courts.

That is why the District Court correctly held that for a derivative work to be considered “transformative” under the fair use doctrine, it must in some manner comment on the original or otherwise fall within one of the purposes

in the preamble of Section 107. The works at issue here, all created for commercial purposes, concededly do not. If permitted to stand, the Second Circuit's ruling will harm copyright owners by ending their right to prevent others from creating unauthorized derivative works.

As noted, the District Court's finding that the infringing uses in this case fall outside of the purposes enunciated in Section 107 was not disturbed on appeal. Rather, the Second Circuit inexplicably cites this Court's decisions in *Campbell* and *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561 (1985) for the proposition that:

The law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those (criticism, comment, news reporting, teaching, scholarship, and research) identified in the preamble to the statute.

App. 16. But that analysis is wrong, and the citations to this Court's decisions in stating the principle are not supportive of the Second Circuit's holding.

In *Harper & Row*, this Court actually overturned the Second Circuit's finding of fair use even though it recognized that the secondary works were for a purpose stated in Section 107's preamble because the second use qualified as "news." And, in *Campbell*, this Court's treatment of the parody at issue as a fair use was *precisely* because it found that parody is akin to comment and

criticism, two of the bedrocks of the statutory purpose set forth in the preamble to Section 107. *Campbell*, at 579-80 (noting that parody is defined as “a song sung alongside another, and that it creates a new work that “at least in part, comments on th[e original] author’s works.”

In *Campbell*, this Court pointed out, rightly, that “[p]arody needs to mimic an original to make its point,” *id.*, at 580-81, and thus may sometimes qualify as a fair use (note that the *Campbell* court did not decide that the parody at issue was a fair use, only that the issue should not have been decided as a matter of law by the lower courts). But the *Campbell* court was also careful to provide the important caveat that: “If, on the contrary, the commentary *has no critical bearing on the substance or style of the original* composition, which the alleged infringer merely uses to get attention or to avoid the drudgery of working up something fresh, the claim to fairness in borrowing from another’s work diminishes (if it does not vanish) and other factors, like the extent of its commerciality, loom larger.” *Id.* at 580. The Second Circuit ignored that caveat in this case.

Here, again, the Second Circuit did not reverse the District Court’s finding that Respondents’ use was essentially, “merely to avoid the drudgery of working up something fresh.” The District Court found that because Respondent Prince did not have any intention to comment on Cariou’s works, the accused works were not transformative within the meaning of the first factor in the fair use inquiry as intended by this Court in *Campbell*. App. at 51. The Second Circuit did not disturb this finding (App. at 18-19), but instead stated that Prince’s works “have a different character, give Cariou’s photographs a

new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's." App. at 19-20. But having different aesthetics does not make something "transformative" for purposes of fair use. The Second Circuit ignored the actual holding of *Campbell* and instead substituted its own judgment of what "transformative" means. The holding of *Campbell* is merely this: "[w]e thus line up with the courts that have held that parody, *like other comment or criticism*, may claim fair use under Section 107." *Campbell* at 580. This Court's reliance on the Congressional statement of purpose embodied in the preamble of the fair use statute was key.

Instead, by finding that the change in context from one aesthetic to another can be a fair use, the Second Circuit trampled on exactly what the exclusive right to authorize and prepare derivative works permits only Cariou to do or authorize. By *abridging, recasting, transforming* and *adapting* Cariou's works and *elaborating* and *modifying* them, Prince created exactly what the derivative works definition in Section 101 defines as unauthorized derivative works. If there is no meaningful and substantive limitation on "transformation" in the fair use inquiry under *Campbell*, then there is no right to prevent others from creating a derivative work. *Campbell* did not intend to overrule *Stewart v. Abend*, and it did not do so *sub silentio*.

The works at issue concededly do not contain any comment or criticism. App. at 19-20, 51-52. The question is not simply whether the accused use supplants the original use, which may be a more proper inquiry at the remedies phase of the case, but rather whether the accused use fairly invades the province of the author to

exclusivity. Where the use is purely commercial, this Court in *Campbell* made a very narrow exception where the work itself is transformed, but did not go the further step of suggesting that merely altering the work to the second user's aesthetic taste can make the second use transformative for purposes of fair use. The Second Circuit's decision goes a step too far.

Even assuming, *arguendo*, that the purpose in the statutory preamble could be ignored, the infringing works at issue here do not “add” anything or “alter” the original use intended for the copyrighted works in any way. The literal copying performed by Respondent Prince and sold by the other Respondents is not putting the copyrighted works to a different intrinsic purpose than the originals. Both have the intrinsic purpose of creating and sharing art, and deriving economic benefits from that use. Prior Second Circuit precedent makes it crystal clear that the work itself must be transformed and that a mere change of context is insufficient to make a pure literal copy into a “transformative” fair use. “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.” *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992), *cert. denied*, 506 U.S. 934 (1992).

It is not clear why the Second Circuit deviated from its prior precedent in this case. For example, in *On Davis v. The Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001), the use of a literal copy by the defendant was deemed not transformative because the work itself was not transformed: the display of copyrighted jewelry in a clothing

advertisement “in the manner it was made to be worn” was not transformative. *Id.* at 174. Similarly, in *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997), a visual image of plaintiff’s copyrighted quilt was used without alteration but for a different purpose than originally intended, namely to create a mood in a televised scene. *Id.* at 78. Nevertheless, the Second Circuit held it not to be transformative as the infringing use did not alter the work itself: “the defendants have used Ringgold’s work for precisely a central purpose for which it was created – to be decorative.” *Id.* at 79. Here, the copyrighted works at issue were created to be viewed as art; the appropriation of the author’s images into other works of art did not transform them by simply adding additional paint or context to the images.

Making something new that liberally uses another’s images in the background with other images added on top is not a transformative use any more than translating a work from English to French is, or converting a short story into a film or a play. Indeed, the use to which Prince put Cariou’s original works is far less transformative, in that the portions of Cariou’s works Prince appropriated remained unchanged. Where one translates an entire work into a different language, or rewrites a story into a screenplay, no one doubts the resulting second use is transformative, but no one also doubts that those secondary uses are subject to copyright protection by the original author as a derivative work, and a second user who creates the derivative work must have the original author’s authorization. Prince’s recasting of Cariou’s photographs deserves no protection from this principle. The question is not simply whether the work competes with the original in markets reserved by Congress for the original, but also in

markets reserved by Congress for the original author with respect to derivatives. This Court did not intend to write the derivative works right out of the statute in *Campbell*.

Whether the challenged use costs the author a sale or license is beside the point. The Copyright Act is not just about monetary harms; it is about the right to control how an author’s work is used. Otherwise, there is no reason to grant a right to create and control the copying of derivative works. All derivative works are by their nature, to so qualify, transformative. By making all “transformative” uses, irrespective of what the nature of their alternative purpose is, as eligible for treatment as meeting the “transformative purpose” test of *Campbell* is simply to ignore the right to control derivative works. *See also* 2 Paul Goldstein, *Goldstein on Copyright* § 12.2.2.1(c), 12:39–40 (3d ed. Supp. 2010) (criticizing “transformative” use doctrine as inconsistent with derivative works right).<sup>3</sup>

If the Second Circuit’s opinion were allowed to stand, it would also elevate judge made law over Congress’ specific statutory language. Congress knew how to use the word “transform” and its variants when it wanted

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3. Merely changing the purpose of something cannot alone make a use transformative, or else it would mean that people who translate books from English to French enjoy a fair use defense, having transformed the use of the book from its original purpose – to be read by English speakers – into a totally new use – to be read by French speakers. *See Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 72 (2d Cir. 1999) (finding copyright infringement “not in the least transformative . . . [because] the abstracts are for the most part direct translations . . . ; defendants added almost nothing new in their works. This factor weighs strongly against fair use.”).



to in the Copyright Act, and it used it in the definition of derivative works, not the definition of what constitutes fair use. A failure to place a limitation on fair use where the second work qualifies as an unauthorized derivative work would thus ignore improperly this statutory distinction made by Congress.

**B. This Court Should Grant the Petition Because This Issue Is Not Isolated to the Second Circuit**

Recently, in *Seltzer v. Green Day et al.*, the Ninth Circuit Court of Appeals repeated and relied upon the Second Circuit's holding that a derivative work need not comment on the original in order to be a transformative fair use: "Green Day used the original as 'raw material' in the construction of the four-minute video backdrop. It is not simply a quotation or a republication; although Scream Icon is prominent, it remains only a component of [a new work.]" *Seltzer v. Green Day, Inc. et al.*, Nos. 11-56573, 11-57160, 2013 U.S. App. LEXIS 16322, \*11 (9th Cir. Cal. Aug. 7, 2013). If the Second Circuit's opinion is allowed to stand, the likelihood of other circuits continuing to follow it is strong given the Second Circuit's location in the center of the art world of New York. Accordingly, this Court's intervention is needed to correct the notion that the statutory purpose can be ignored when analyzing a claimed fair use.

**CONCLUSION**

The Second Circuit's finding on "transformation" represents a sharp break from existing case law that should be corrected. A determination that something is "transformative" for purpose of the first fair use factor should not focus on whether the second use simply looks "different enough," but must consider the underlying purpose of the infringing use, so as to give effect to the "criticism, comment" language of § 107, and prevent judicial expansion of the fair use doctrine from crossing the line and constricting copyright owner's exclusive rights to prepare and authorize derivative works. The Second Circuit's decision crosses this line. This Court should grant *certiorari* to fully consider this important issue. *Amici* thus urge the Court to grant the Petition for *certiorari*.

Respectfully submitted,

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