IN THE Supreme Court of the United States

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

Petitioner,

v

Lynn Goldsmith and Lynn Goldsmith, Ltd., Respondents.

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

BRIEF FOR THE COPYRIGHT ALLIANCE AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

SUSAN J. KOHLMANN
Counsel of Record
JACOB L. TRACER
ISABEL F. FARHI
JENNER & BLOCK LLP
1155 Avenue of the Americas
New York, N.Y. 10036-2711
(212) 891-1600
SKohlmann@jenner.com

Counsel for Amicus Curiae



i

TABLE OF CONTENTS

TABI	LE OF AUTHORITIES	iii
STAT	TEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE	1
SUMI	MARY OF ARGUMENT	4
ARGU	UMENT	7
I.	A Copyright Owner's Exclusive Right To Control Derivative Works Should Not Be Undermined By A User's Ability To Invoke A "Transformative Use."	7
II.	Petitioner Argues For An Overbroad Test That Would Nullify The Derivative Work Right	
	A. The First Fair Use Factor Requires Consideration Of Whether A Secondary Use Has A Further Purpose Or Different Character	11
	B. Petitioner's Test Would Upend Existing And New Creative Industries	15
III.	A Workable Transformative Use Test Should Be Fully Consistent With The Language And Purpose Of The Copyright Act.	22



22	Where The Derivative Use ight And Transformative Use ests Overlap, The Derivative Work Right Must Retain rimacy	A.
23	ourts Must Consider Both The urpose And The Character Of he Secondary Use	В.
23	A Transformative Purpose Should Be Closely Tied To The Purposes Listed In The Preamble To Section 107	
28	A Transformative Character Cannot Supersede The Original	
30	Courts Should Resolve Transformative Use On A Sliding Scale Of Purpose And Character	
30	he Analysis Of A ransformative Purpose And haracter Cannot Rely On ubjective Assessments	С.
	he Transformative Use nalysis Cannot Replace The ourth Factor	D.
32	N	CONCLUS



iii

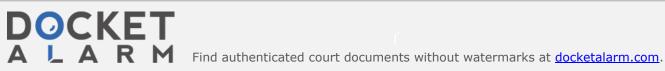
TABLE OF AUTHORITIES

CASES

American Society for Testing & Materials v. Public.Resource.Org, Inc., 896 F.3d
437 (D.C. Cir. 2018)13
Antioch Co. v. Scrapbook Borders, Inc., 291 F. Supp. 2d 980 (D. Minn. 2003)13
Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015)24, 28
A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009)13
Balsley v. LFP, Inc., 691 F.3d 747 (6th Cir. 2012)
Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903)31
Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687 (7th Cir. 2012)13
Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)4, 6, 8, 9, 10, 11, 12, 16, 23, 24, 25, 26, 28, 29, 31
Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013)25, 26
Castillo v. G&M Realty L.P., 950 F.3d 155 (2d Cir.), cert. denied, 141 S. Ct. 363 (2020)
Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d 443 (9th Cir. 2020), cert. denied, 141 S. Ct. 2803 (2021)12-13, 18, 26



Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841)	29
Fox News Network, LLC v. Tveyes, Inc., 883 F.3d 169 (2d Cir. 2018)	15, 28
Gaylord v. United States, 595 F.3d 1364 (Fed. Cir. 2010)	13
Google LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021)	13, 14
Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985)	.22, 23-24
Hill v. Public Advocate of the United States, 35 F. Supp. 3d 1347 (D. Colo. 2014)	13
Kienitz v. Sconnie Nation LLC, 766 F.3d 756 (7th Cir. 2014)	.10-11, 24
Midlevel U, Inc. v. ACI Information Group, 989 F.3d 1205 (11th Cir.), cert. denied, 141 S. Ct. 2863 (2021)	12
Monge v. Maya Magazines, Inc., 688 F.3d 1164 (9th Cir. 2012)	
Monsarrat v. Newman, 28 F.4th 314 (1st Cir. 2022)	12
Murphy v. Millennium Radio Grp. LLC, 650 F.3d 295 (3d Cir. 2011)	13
Paramount Pictures Corp. v. Carol Publishing Group, 11 F. Supp. 2d 329 (S.D.N.Y. 1998), aff'd, 181 F.3d 83 (2d	
Cir. 1999)	18



DOCKET

Explore Litigation Insights



Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time** alerts and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.

