

11-1197-cv

United States Court of Appeals

for the

Second Circuit

PATRICK CARIOU,

Plaintiff-Appellee,

-V.-

RICHARD PRINCE,

Defendant-Appellant,

GAGOSIAN GALLERY, INC., LAWRENCE GAGOSIAN,

Defendants-Appellants.

**BRIEF OF *AMICI CURIAE* AMERICAN SOCIETY OF MEDIA
PHOTOGRAPHERS, INC. AND PICTURE ARCHIVE COUNCIL OF
AMERICA, INC. IN SUPPORT OF PLAINTIFF-APPELLEE AND
AFFIRMANCE**

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RULES 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae American Society of Media Photographers, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Amicus curiae Picture Archive Council of America, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE IDENTITY AND INTEREST OF *AMICI CURIAE*¹

The American Society of Media Photographers, Inc. (“ASMP”), which has approximately 7,000 members, represents the interests of professional photographers whose images, both still and moving, are created for publication. It is the oldest and largest organization of its kind in the world. The Picture Archive Council of America, Inc. (“PACA”) is a not-for-profit trade association that represents the interests of entities who license images (still and motion) to editorial and commercial users. Founded in 1951, its membership currently includes over 100 content libraries globally, including large general libraries and smaller specialty libraries, that are engaged in licensing millions of images, illustrations, film clips and other content on behalf of thousands of individual creators.

The members of ASMP and PACA depend on the licensing of their photographic works in order to support themselves. Licensing images for multiple purposes to a wide variety of customers generates revenue that they use to maintain themselves and to support their ongoing photographic activities. If this Court were to overturn the District Court’s decision and find that unauthorized use of copyrighted photographs, without permission, for use in appropriation art is not an

¹ All parties to this appeal have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a). No party’s counsel authored this brief in whole or in part, and no one other than the *amicus curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

infringement, it would threaten the ability of *amici*'s members to earn a living from their work and to continue creating and archiving new copyrighted works.

STATEMENT OF ISSUES ADDRESSED BY *AMICI CURIAE*

1. Whether photographs should be subject to the same protection under copyright law as are other creative works.
2. Whether a work in which another work is merely “recast, transformed, or adapted” (see 17 U.S.C. § 101) is “transformative” for the purposes of the fair use exception under Section 107 of the Copyright Act, and whether “transformativeness” for the purposes of Section 107 requires an examination of a defendant’s intent in making the alleging infringing work.
3. Whether permitting unfettered use of copyrighted photos would undermine the economic incentives for the creation of new expressive works and harm photographers and photo archives (i.e., *amici*'s members).

INTRODUCTION AND SUMMARY OF ARGUMENT

Courts have long recognized that photographs are creative works at the core of copyright protection. As such, any unauthorized use of such works, including being used in so-called appropriation art, must be measured against the standard established by Section 107 of the Copyright Act, which establishes a limited “fair use” exception “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” 17 U.S.C.

§ 107. The fundamental inquiry under this standard is whether the unauthorized use of the original work is necessary in order for the defendant's work to have meaning. If the defendant merely "recast, transformed, or adapted" the original, without creating new meaning that relates back to the original work, then all the defendant has done is create an infringing derivative work, as defined in Section 101 of the Copyright Act. It is only when a derivative work sheds new light on the original, commenting on it or casting it in an entirely new light, that the unauthorized copying might qualify as a "fair use" within the statutory exception recognized in Section 107. To hold otherwise would render Section 101's definition of a derivative work meaningless, a result contrary to canons of statutory construction.

In an effort to avoid this well-settled limitation on unauthorized use of copyrighted works, Appellants urge this Court to adopt a new "fair use" standard and consider whether infringing works "may reasonably be perceived by an observer" as satirizing not only an existing work, but our entire culture or society. (App. Br. 1.) But the courts have traditionally looked to the purpose and intent of the user (including whether the user acted in bad faith) to determine whether an unauthorized use falls within the fair-use exception, and Appellants offer no good reason for this Court to switch to their proposed "reasonably perceived" by an observer standard (App. Br. 2) in this case. To the contrary, Appellants' proposed

standard would force judges and juries to try to ascertain the “reasonably perceived” meaning of a copy any time a fair use is claimed. Leaving aside all of the practical issues as to how such a standard would be implemented, including whether surveys or expert testimony would be used and whether the relevant “public” would consist of a general or specialized audience, this contradicts the focus of the “fair use” inquiry, which asks whether an individual’s copying of a creative work should be considered fair based upon his or her purpose and the effects of his or her use.

Furthermore, allowing unfettered use of copyrighted works without permission for appropriation art like that of Appellant Richard Prince (“Prince”) at issue here would upset the system of economic incentives established by the Constitution and embodied in the Copyright Act, including Section 107.

Individual photographers and photographic archives depend on the revenue generated by the use of their copyrighted works to support the creation of new works and the maintenance and availability of existing collections of works. Such creators exist in a symbiotic relationship with those such as Prince who depend on existing works to fuel their own creative activities. If creators were unable to generate income from their work by licensing it for uses such as the one here, it would effectively kill the golden goose, advancing the interests of one art form over another at the cost of making new source materials less available to all.

ARGUMENT

I. PHOTOGRAPHS EMBODY SIGNIFICANT CREATIVE EXPRESSION AND ARE FULLY ENTITLED TO COPYRIGHT PROTECTION.

It bears emphasis from the very start that this case is really about *two* artists: Appellant Prince and Appellee Patrick Cariou (“Cariou”). Although Appellants concede, in discussing the nature of Cariou’s copyrighted photographs (the second statutory fair use factor), that “the District Court correctly found that Cariou’s photographs are creative and expressive” (App. Br. 59), implicit in their brief is the suggestion that whereas “appropriation art is important” (App. Br. 12), works such as Cariou’s photographs are somehow of lesser importance, and thus entitled to lesser protection, than Prince’s appropriation art. But copyright law does not distinguish between different types of creators or works, nor does it establish any hierarchy of “high” or “low” art. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 581 (1994) (“[t]he Act has no hint of an evidentiary preference for parodists over their victims”). This is because copyright is intended to protect originality “of intellectual production, of thought, and conception on the part of the author,” in whatever form it may take. Burrow-Giles Litho. Co. v. Sarony, 111 U.S. 53, 58, 60 (1884); see also Feist Publ’s, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 346-47 (1991).

It has long been recognized that photographic images such as those created by *amici*'s members, and by Appellee Cariou, reflect precisely the sort of "intellectual invention" as to which "the constitution intended that congress should secure to [an author] the exclusive right to use, publish, and sell." Burrow-Giles, 111 U.S. at 60. As Judge Learned Hand observed, "no photograph, however simple, can be unaffected by the personal influence of the author," and "no two will be absolutely alike." Jewelers' Circular Publ'g Co. v. Keystone Publ'g Co., 274 F. 932, 934 (S.D.N.Y. 1921), aff'd, 281 F. 83 (2d Cir. 1922). Indeed, it has long been established that copyright protects photographers' creative choices in making an image, including an image's particular expression, or portrayal, of the subject matter, the pose, expression, and demeanor, the composition (rendition) of the subject, the lighting, the moment in time when the photograph was made, and "almost any other variable involved." Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992); see also Burrow-Giles, 111 U.S. at 60; Pagano v. Besler Co., 234 F. 963, 964 (2d Cir. 1916); Edison v. Lubin, 122 F. 240, 242 (3d Cir. 1903).

Many of the museums who submitted an *amicus* brief in this case have themselves recognized photography as a significant art form. For example, the Metropolitan Museum of Art's Department of Photographs houses a collection of

more than 25,000 works and maintains several galleries devoted to photography.² The Museum of Modern Art's Department of Photography also houses a collection of more than 25,000 works,³ and the Art Institute of Chicago maintains a photography collection that originated in 1949 with a gift from Georgia O'Keeffe of the Alfred Stieglitz Collection.⁴ Many of these institutions also have mounted significant exhibitions of photography. For example, in 2002-3 the Metropolitan Museum of Art offered "Richard Avedon: Portraits," featuring 180 photographic portraits.⁵ The Solomon R. Guggenheim Museum's 2008 show, "Catherine Opie: American Photographer," included some 200 photographs in a "major mid-career survey" of that photographer's work.⁶

Particularly in a digital age, when the ability to capture a unique moment in time through the medium of a photographic image is unparalleled, and the opportunities for exploiting such images are constantly being multiplied, the photographers who make photographs, as well as the archives who make them

² See <http://www.metmuseum.org/about-the-museum/museum-departments/curatorial-departments/photographs>.

³ See <http://www.moma.org/explore/collection/photography>.

⁴ See <http://www.artic.edu/aic/collections/photo>.

⁵ See <http://www.metmuseum.org/about-the-museum/press-room/exhibitions/2002/richard-avedon-portraits-opening-at-metropolitan-museum-on-september-26-captures-creative-genius-of-a-generation>.

⁶ See http://web.guggenheim.org/exhibitions/exhibition_pages/opie/exhibition.html.

available for use by others, are particularly in need of copyright protection in order to ensure that they are able to continue producing copyrighted works.

II. A WORK MUST DO MORE THAN MERELY TRANSFORM THE ORIGINAL IN ORDER TO BE A FAIR USE.

This Court should affirm the District Court's finding that Prince's use of Cariou's works does not fall within the fair use exception under Section 107 of the Copyright Act⁷ because Prince's work is simply a derivative work under Section 101 of the Copyright Act. Moreover, this Court should decline Appellants' invitation to adopt a new standard for assessing whether a copy is transformative for purposes of Section 107, because there is no support in existing copyright law for considering whether an observer might reasonably perceive a transformative purpose, regardless of what the copier actually intended.

⁷Whether a particular work falls within the fair use exception depends on consideration of four factors: (i) the purpose and character of the use, including whether it is of a commercial nature or for nonprofit educational purposes; (ii) the nature of the copyrighted work; (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (iv) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107. The factors are non-exclusive; no one factor is dispositive. See, e.g., Campbell, 510 U.S. at 578; Harper & Row Pubs., Inc. v. Nation Enters., 471 U.S. 539, 560 (1985); Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 141 (2d Cir. 1998). The first factor, the purpose and character of the defendant's use, has three sub-factors: (i) whether the defendant acted in bad faith, (ii) whether the use was commercial in nature, and (iii) the degree to which the use "merely supersedes the objects of the original ... or instead adds something new, with a further purpose or different character," i.e., whether the use is "transformative." Campbell, 510 U.S. 578-79.

A. An Unauthorized Copy That Does Not Alter The Character Or Purpose Of The Original Is An Infringing Derivative Work.

Despite Appellants' efforts to portray this dispute as involving "new information, new aesthetics, new insights and understanding" (App. Br. 1), it in fact involves nothing more than the straightforward application of the law of derivative works. It is well settled that the owner of a copyright in a photograph has the exclusive right to "prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106(2). 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

17 U.S.C. § 101 (emphasis added).

Because a derivative work includes a copy "based upon" an existing work, in any form in which the work "may be recast, transformed, or adapted," it is no defense to liability for an infringer to claim simply that he "transformed" a photograph into something else. See, e.g., Rogers v. Koons, 751 F. Supp. 474, 477 (S.D.N.Y. 1990), aff'd, 960 F.2d 301 (2d Cir. 1992); see also Blanch v. Koons, 467 F.2d 244, 252 (2d Cir. 2006) ("We have declined to find a transformative use [under Section 107] when the defendant has done no more than find a new way to exploit the creative virtues of the original work."). Thus, merely transforming a work results in nothing more than a derivative work. Rogers, 751 F. Supp. at 477;

see also Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65, 72 (2d Cir. 1999) (abstracts that translated Japanese-language articles were not transformative for purposes of Section 107); *accord* H.R. Rep. 94-1476, 1976 U.S.C.C.A.N. 5659, 5675 (1976) (“[A] copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation. Wide departures or variations from the copyrighted work would still be an infringement as long as the author’s ‘expression’ . . . [is] taken.”).

Here, Appellants’ copies are archetypal derivative works that infringe Cariou’s copyrights. Prince literally tore the pages out of Cariou’s book of photographs, dolloped paint on the images and interposed them with other photographs, affixed the photographs to plywood, and then presented the results as his own creations. (A-134 at 175:16-177:24; A-135 at 179:17-180:13; A-136 at 182:17-184:13; A-325-26.) The resulting images were indisputably “based upon” Cariou’s photographs.

Appellants argue, however, that Prince’s work is transformative, and that this weighs in favor of fair use. (App. Br. 39-40.) But even assuming that Prince’s work can be said to “transform” Cariou’s photographs in some way, it is clear as a matter of statutory construction that merely because a work is “transformed” in a

second author's work does not make that second work a fair use.⁸ To hold otherwise would put Section 107 in conflict with, and potentially nullify, the Copyright Act's express grant to copyright owners of the exclusive right to prepare derivative works, which by definition involve transformation. See 17 U.S.C. § 101. Basic principles of statutory construction dictate against such a result. See Bilski v. Kappos, 130 S. Ct. 3218, 3228-29 (2010) (reiterating "the cannon against interpreting any statutory provision in a manner that would render another provision superfluous" and noting that "[t]his established rule of statutory interpretation cannot be overcome by judicial speculation as to the subjective intent" of the enacting legislators); see also Hague v. Committee for Industrial Organization, 307 U.S. 496, 529-30 (1939) (Stone, J., concurring) (noting that "two provisions stand and must be read together").

Section 107 and Section 101 can be reconciled by reading "transformative" for purposes of the fair use defense as different from "transformed" under Section 101. Guidance as to what sort of purposes will suffice to differentiate between a fair use and an infringing derivative work may be found in the list of illustrative

⁸ Moreover, it should not be forgotten that whether a work is "transformative" is only one of three subfactors of a single one of the four fair use factors, and is not determinative. Rather, all of the factors must be weighed together. See Campbell, 510 U.S. at 578; see also Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513, 551 (S.D.N.Y. 2008); Video-Cinema Films, Inc. v. The Lloyd E. Rigler-Lawrence E. Deutch Found., No. 04 Civ. 5332, 2005 U.S. Dist. LEXIS 26302, at *32-33 (S.D.N.Y. Nov. 2, 2005).

examples set forth in Section 107, which includes “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” 17 U.S.C. § 107. All have in common a necessary and deliberate relation back to, and dependence on, pre-existing copyrightable works. 17 U.S.C. § 107. Thus, works that criticize a quoted work, expose the character of the original author, prove a fact, or summarize an idea from the original work in order to defend or rebut that idea, are examples of works that would be transformative for purposes of Section 107. See Hon. Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990).

It is this necessary relationship between the original work and the new work that can justify the taking of the original without permission or compensation, assuming that the application of the other fair use factors does not suggest otherwise. As the Supreme Court has elaborated, “transformation” in the fair use context means that the copy must have a “critical bearing on the substance or style of the original composition,” and not merely consist of copying “to get attention or to avoid the drudgery in working up something fresh.”⁹ See *Campbell*, 510 U.S. at 580.

⁹ Prince has referred to “rephotography” a technique he has employed, as “a technique for stealing.” (A-35.)

Appellant Prince may claim to have “transformed” Cariou’s photographs into paintings and collages, but Prince’s copies were not “transformative” in any sense relevant to the fair-use inquiry. Prince’s copies lack any critical bearing on the substance of Cariou’s photographs or the techniques Cariou used in creating his works. In fact, Prince expressly disclaimed that he was commenting upon or satirizing Cariou’s works or techniques (A-152 at 281:20-23), admitting that he simply wanted to create his own “balls-out, unbelievably looking great painting” by copying Cariou’s works (A-165 at 360:22-361:2). With Prince having unambiguously denied in sworn testimony that he intended to give his copies a meaning that depends on Cariou’s photographs, his unauthorized uses of Cariou’s photographs cannot qualify as “transformative” for purposes of fair use.

B. The Inquiry Into Whether The Unauthorized Use Of A Creative Work Is Transformative Looks First To The Copier’s Intent And Purpose, Not The Public’s “Reasonable Perceptions.”

Prince’s concession that he did not intend to comment upon Cariou’s photographs should be the beginning and end of the analysis. Prince’s wholesale copying of Cariou’s works into collages, with no justification beyond wanting to copy Cariou’s photographs, is a derivative work under Section 101, and not “transformative” as that term has been used in assessing fair use under Section 107. In order to avoid this conclusion, however, Appellants contend that the Court should ignore Prince’s sworn testimony about his intent and purpose in copying

Cariou's works and focus instead on what "reasonably could be perceived" as the purpose of his copies. (App. Br. 52.) This novel conception of fair use is based upon a misreading of the relevant case law, however, and it cannot salvage Appellants' faulty fair-use defenses.

Determining whether a work is transformative, for purposes of fair use, necessarily requires an inquiry into the defendant's intent in using a protected creative work. This principle should be obvious from the idea of "fair use" itself, as the very name of the doctrine implies an assessment of whether the defendant's course of action should be considered fair under copyright law. The Supreme Court made this principle clear in Campbell when it discussed the third fair use factor, whether the amount and substantiality of the amount copied is "reasonable in relation to the purpose of the copying." 510 U.S. at 586-87. In applying that factor, the Court instructed that attention should to turn to the infringer's "justification for the particular copying done, and the enquiry will harken back to the first of the statutory factors, for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use." Id. The clear import of Campbell, consistent with the basic concept of "fair use," is that the intent, the purpose, and the justification of the infringer are the relevant focus of inquiry.

Appellants’ suggestion that this Court ignore a defendant’s own purpose or justification (or lack thereof), and instead rely on what a third party observer may consider to be the justification for a work to be transformative (App. Br. 2-3), is based solely upon an out-of-context quotation from Campbell. (App. Br. 40-41.) The Court there did observe that the works at issue “reasonably could be perceived as commenting on the original or criticizing it, to some degree,” Campbell, 510 U.S. at 578, but it made this finding in the context of reviewing whether the defendant’s claim of parody was credible—not whether it existed at all. In other words, the defendant’s professed intent to comment upon or criticize an existing work is a necessary but insufficient condition of transformativeness: the courts will review how the copies reasonably could be perceived, but only as part of an inquiry into whether the copier’s stated intent and purpose are credible. Neither Campbell nor its progeny have held that the public’s reasonable perception of a work, standing alone, could qualify a work as transformative.¹⁰

¹⁰ Blanch v. Koons, on which Appellants rely (App. Br. 4), stated only that a defendant’s “clear conception of his reasons” and “ability to articulate those reasons” are not a *sine qua non* for finding fair use. See 467 F.3d at 255 n.5. It did not suggest that the public perception of a work could supply a credible justification for copying where a defendant has failed to do so. Moreover, Appellants’ argument that courts should look to public opinion is particularly misplaced where, as here, the artist himself has affirmatively denied having any transformative purpose.

This focus on the defendant's intent is dictated not only by precedent but also by common sense. Appellants ask this Court, in essence, to "crowd source" the purpose of the infringing work. Of course, whether such an opinion is determined through the use of expert testimony or consumer surveys, it would be a rare case indeed where all such observers agreed on a work's purpose and character. Indeed, there would potentially be as many different opinions on that point as there are observers—possibly dozens or hundred if the observers were limited to a highly specialized group such as museum curators and potentially hundreds of millions if a national opinion were sought.

In other contexts, courts have rejected the idea of polling the audience for a work in order to determine its purpose. For example, the Ninth Circuit said that "[t]he issue of whether a work is a parody is a question of law, not a matter of public majority opinion." Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 801 (9th Cir. 2003) (rejecting plaintiff's proffered survey evidence as to the public's perception of defendant's work and noting that plaintiff "present[ed] no case law in support of its contention that the parodic nature of a defendant's work should be assessed using surveys and opinion testimony").

Appellants' primary justification for requesting a sea-change to the law of fair use underscores why their argument is misplaced. They claim that an objective approach to determining the purpose of an infringing work is necessary

because the subjective approach, which looks to the intent of the artist, creates too strong an incentive for artists to perjure themselves. (App. Br. 52.) As a threshold matter, it seems peculiar for Appellants to urge that this Court adopt a new standard for assessing fair use by claiming that otherwise artists will simply lie if they are sued for infringement. Leaving aside the oddity of seemingly trying to protect liars, the argument is speculative at best, and is contradicted by Prince's own testimony here, where he apparently told the truth about his own lack of transformative intent. And in any case, the same argument might be made, with equal validity, with respect to every civil or criminal proceeding where intent is an element. There is no reason to treat fair use any differently. Moreover, Appellants' argument that artists may seek to perjure themselves actually illustrates one critical advantage of the existing law over the new test that they propose. Although the competence of judges and juries to determine the purpose of a creative expression is untested, our judicial system is predicated on their ability to assess the truthfulness of the witnesses before them. What Appellants identify as a defect in established copyright law—that some defendants may be tempted to lie in support of a meritless fair-use defense—is not a flaw, but a feature of our system.

III. PERMITTING UNLIMITED USE OF PHOTOGRAPHS WITHOUT PERMISSION OR COMPENSATION WOULD UNDERMINE THE ECONOMIC INCENTIVE FOR THE CREATION OF NEW WORKS.

Appellants contend that Prince's use of Cariou's photos "has no negative impact on Cariou's market" (App. Br. 3), and that the District Court erred in considering the potential market for licensing of Cariou's works (*id.* at 64-65) because there was no evidence that Cariou had any interest in licensing his photos for uses such as those at issue here, and "no reasonable likelihood that Prince could have obtained a license" for such a project. (*Id.* at 66). But if this Court were to permit unfettered use of photographs, without permission, by appropriation artists like Prince, or indeed anyone else who decides to use a work but cannot be bothered to ask permission and pay a fee, it would assuredly threaten harm to all authors, including not only Cariou but also *amici's* members, who depend on licensing revenue to support their ongoing creative endeavors.

The Constitution authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8. The purpose of such a monopoly is "to motivate the creative activity of authors and inventors by [providing] a special reward," Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984), and ensuring that copyright owners receive "a fair return for their labors." Harper & Row, 471 U.S. at 545-46;

see also New Era Pubs. Int'l, ApS v. Henry Holt & Co., 695 F. Supp. 1493, 1526 (S.D.N.Y. 1988) (Leval, J.) (“[T]he justification of the copyright law is the protection of the commercial interest of the artist/author. It is not to coddle artistic vanity or to protect secrecy, but to stimulate creation by protecting its rewards.”) (emphasis in original). Thus, the Copyright Act grants copyright owners the exclusive right to, among other things, reproduce their work, prepare derivative works based on it, and distribute copies of it. 17 U.S.C. § 106.

The affirmative defense of fair use empowers courts to excuse infringement where the societal benefits of the infringement outweigh the costs to the copyright owner and society of doing so. See Campbell, 510 U.S. at 576-577 (“[t]he fair use doctrine [] ‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’” (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)) (internal quotation marks and citation omitted)). In this analysis, the fourth fair use factor, “the effect of the use on the potential market or value of the copyrighted work,” 17 U.S.C. § 107(4), is of crucial significance. Courts analyzing the fourth factor consider (i) harm to the market for the original work, (ii) harm to the market for derivative works based on the original work, and (iii) harm to the copyright owner were the challenged use to become widespread. See Campbell, 510 U.S. at 590; Harper & Row, 471 U.S. at 568 (“one need only show that if the challenged

use should become widespread, it would adversely affect the potential market for the copyrighted work.”); Twin Peaks Prods., Inc. v. Publ’s Int’l, Ltd., 996 F.2d 1366, 1377 (2d Cir. 1993); Warner Bros., 575 F. Supp. 2d at 549; Paramount Pictures Corp. v. Carol Publ’g Group, 11 F. Supp. 2d 329, 336 (S.D.N.Y. 1998); United Feature Synd., Inc. v. Koons, 817 F. Supp. 370, 382 (S.D.N.Y. 1993).

Although Appellants argue that Cariou likely would not have granted Prince a license, there is no evidence that Prince ever even sought a license, much less was denied one. (SPA 24-25.) Moreover, there exists an entire photo industry, including the photographers and photo archives who make up *amici*’s members, that not only do grant such licenses on a regular basis, but also maintain and make available to users libraries of images (including royalty-free images) such as those used by Prince in this case.¹¹

Appellants, by their own admission, made millions of dollars from Prince’s works. (App. Br. 37.) Without Cariou and others who make original copyrighted images, Prince’s own works could not exist. Under Appellants’ reasoning, however, there would be no need for users such as Prince and others to pay creative artists such as Cariou anything at all for the use of their works. Such a

¹¹ See, e.g., <http://www.lonelyplanetimages.com/search?keywords=rasta&exact=1>; <http://www.agefotostock.com/age/ingles/iskw01.asp?querystr=rasta&Page=1>; <http://www.gettyimages.com/Search/Search.aspx?contractUrl=2&language=en-US&family=creative&p=rasta&lic=rf&assetType=image#2>.

result would make it less likely that *amici*'s members would want, or be able, to create new photographs, and likely would create significant incentives against continuing to maintain and make available the substantial libraries of original works that they currently maintain for licensing purposes, including for use as an artist's reference. This in turn would make it difficult, and potentially impossible, for artists such as Prince to find the original materials on which their own work depends. All photographers and archives would be harmed, and the symbiotic relationship that should to exist between those who generate new copyrighted works and those who seek to use such works in their subsequent works would be undermined. Thus, rejecting Appellants' fair use defense here is consistent with the Constitution's system of economic incentives and would serve to promote, rather than frustrate, the creation of new expressive works. See Warner Bros., 575 F. Supp. 2d at 551 (secondary authors "should not be permitted to 'plunder' the works of original authors . . . 'without paying the customary price,' lest original authors lose incentive to create new works that will also benefit the public interest" (citations omitted)); see also New Era, 695 F. Supp. at 1526 ("The copyright seeks to ensure that authors will not be deprived of the fruits of their labors and will be encouraged to employ their creative talents by confidence that the rewards will not be taken from them." (citing Harper & Row, 471 U.S. at 557)).

CONCLUSION

The district court's order of March 18, 2011, should be affirmed.

Dated: February 1, 2012 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the typeface requirements of Rule 32(a)(5)(A), because it is written in 14-pt Times New Roman font, and with the type-volume limitations of Rule 32(a)(7)(B), because it contains 4,637 words, excluding the portions excluded under Rule 32(A)(7)(A)(iii). This count is based on the word-count feature of Microsoft Word.