

# 19-0028

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IN THE  
**United States Court of Appeals**  
for the **Second Circuit**

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ESTATE OF JAMES OSCAR SMITH,  
*Plaintiff-Appellant,*  
HEBREW HUSTLE, INC.,  
*Plaintiff-Counter-Defendant-Appellant,*  
v.  
AUBREY DRAKE GRAHAM, personally known as DRAKE,  
*Defendant-Counter-Claimant-Appellee,*  
*(For continuation of caption, see inside cover)*

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On Appeal from the United States District Court  
for the Southern District of New York

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**BRIEF FOR *AMICI CURIAE* PUBLIC KNOWLEDGE, THE  
ORGANIZATION FOR TRANSFORMATIVE WORKS, AND THE  
ELECTRONIC FRONTIER FOUNDATION  
IN SUPPORT OF DEFENDANT-COUNTER-CLAIMANT-  
APPELLEE AND DEFENDANTS-APPELLEES**

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July 19, 2019

Jonathan Band  
*Counsel of Record*  
JONATHAN BAND PLLC  
21 Dupont Circle NW, Suite 800  
Washington, DC 20036  
(202) 296-5675

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- and -

CASH MONEY RECORDS, INC., UNIVERSAL REPUBLIC RECORDS,  
an unincorporated division of UMG Recordings, Inc., UNIVERSAL  
MUSIC GROUP DISTRIBUTION, CORP., EMI MUSIC PUBLISHING  
MANAGEMENT, LLC, UNIVERSAL MUSIC- MGB NA, LLC,  
WARNER/CHAPPELL MUSIC, INC., SONY/ATV MUSIC  
PUBLISHING, LLC, APPLE, INC and AMAZON DIGITAL SERVICES,  
INC.,

*Defendants-Appellees,*

- and -

STEPHEN HACKER,

*Counter-Defendant,*

- and -

MATTHEW JEHU SAMUELS, personally known as BOI-1DA and  
JORDAN EVANS,

*Defendants.*

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, *amici curiae* Public Knowledge, the Organization for Transformative Works, and the Electronic Frontier Foundation state that they have no parent corporation, and that no publicly held corporation holds 10% or more of their stock.

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## INTEREST OF AMICI CURIAE

*Amici curiae*<sup>1</sup> are public interest groups who share a common interest in balanced intellectual property rights that protect consumers' rights to access, use, and transform creative works.

Public Knowledge is a non-profit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. Public Knowledge advocates on behalf of the public interest for a balanced copyright system, particularly with respect to new and emerging technologies.<sup>2</sup>

The Organization for Transformative Works is a 501(c)(3) nonprofit organization established in 2007 and dedicated to protecting and preserving noncommercial fanworks: works created by fans based

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<sup>1</sup> Pursuant to Fed. R. App. P 29(a)(4)(E), no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

<sup>2</sup> *Amici* would like to recognize in particular the contributions of Mark Malonzo, George Washington University School of Law class of 2021, in the preparation of this brief.

on existing works, including popular television shows, books, and movies. The OTW's nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 850,000 registered users and receives over 119 million page views per week.

The Electronic Frontier Foundation is a non-profit civil liberties organization that has worked for more than 20 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 30,000 dues-paying members have a strong interest in helping the courts and policy-makers strike the appropriate balance between intellectual property and the public interest.

The subject matter of this appeal implicates the core missions of the above *amici*. The district court's decision below relies upon a standard of fair use that maintains the careful balance of competing interests that Congress constructed in enacting the statutory text comprising the Copyright Act. How this Court decides the case at issue directly impacts how end users, who are central to *amici*'s missions, can access, consume, and make fair use of expressive works.

## SUMMARY OF ARGUMENT

Fair use is a balancing test that requires courts to consider whether a secondary use furthers copyright's goal of "promoting the progress of science and the useful arts." U.S. Const. Art. I, § 8, Cl 8. There are few, if any, hard and fast rules on what qualifies (or disqualifies) a fair use. This has not stopped Appellants from supplying their own. In doing so, Appellants mischaracterize, oversimplify, or simply misread the precedent governing fair use analysis in a number of ways.

1. Appellants misinterpret this Court's jurisprudence, as well as the relationship between the enumerated fair uses in the preamble to 17 U.S.C. § 107 and the four-factor test. No court has ever required a "justification" for the use of "irrelevant" material when considering a fair use defense. The framing presented by Appellants appears, in fact, to be a misreading of a separate question altogether: the distinction between parody and satire. The list of fair uses made in the preamble to § 107 is

not—and has never been—an exhaustive recitation of “acceptable” uses.

2. Commerciality does not in and of itself defeat a fair use claim, despites Appellants’ claim to the contrary.
3. The work at issue—“Jimmy Smith Rap” (or JSR)—is not a musical work under any definition of the term. Indeed, it may not even be a work of authorship under 17 U.S.C. § 102(a). But even if it *is* a non-musical work of authorship, there is no evidence that copyright in the underlying expression meaningfully incentivized the work’s creation. Thus, the second factor tilts in favor of Appellees’ use.
4. Appellants’ argument proceeds on the assumption that, because JSR is embodied in a sound recording (which is distributed alongside other sound recordings), this imbues JSR with musical work status. The Court should be wary of this invitation to assumption, as it not only affects professional “musical” sound recordings, but a vast universe of inarguably

non-musical recordings, and in doing so raises the specter of systemic impacts across multiple information ecosystems, including news reporting and machine learning.

5. Simply because a secondary use utilizes a substantial or “core” portion of an original work does not disqualify it as a fair use. Socially beneficial uses such as news reporting and commentary art require reproducing large, essential portions of their source works.

For these and other reasons explained below, the Court should uphold the District Court’s finding of fair use.

## ARGUMENT

### I. FAIR USE DOES NOT REQUIRE A “JUSTIFICATION” FOR USE OF “IRRELEVANT” WORKS.

Fair use “is an open-ended and context-sensitive inquiry.” *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013). Appellants misinterpret multiple aspects of fair use doctrine, but the most dramatic is their claim that because “the material taken by Appellees is irrelevant to the purpose for which it was taken, justification for the use is required to qualify for a fair use defense.” *See* Appellants’ Br. at 22. This is a non sequitur; Appellants fail to explain what they mean by “irrelevant” material, or what constitutes “justification” for a secondary use. We can only surmise that, when they claim that JSR is “irrelevant” to the commentary in “Pound Cake,” they are alluding to the assertion that “Appellees could have used a similar statement from another song” in order to make the same critical point. *See id.* at 21.

This is a fundamental misreading of the statute and this Court’s jurisprudence. The only secondary use which is definitionally dependent on the use of specific source material is parody. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 597 (1994) (Kennedy, J., concurring) (“[P]arody may qualify as fair use only if it draws upon the

original composition to make humorous or ironic commentary about that same composition.”). In fact, Appellants’ argument appears to be a misunderstanding of this Court’s parody/satire analysis in *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006), which noted that “[p]arody [by its nature] needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.” 467 F.3d at 255 (citing *Campbell*, 510 U.S. at 581, n.15).

Fair use extends well beyond the boundaries of parody or even of those uses enumerated in the preamble to § 107. “[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.” *Cariou*, 714 F.3d at 706. *See also Campbell*, 510 U.S. at 577. These categories are illustrative, not determinative; they guide courts in assessing fair use, but they are not categorically separate from fair use as a whole. *See, e.g., Campbell*, 510 U.S. 582-83; *Harper & Row*, 471 U.S. at 561 (the listing of categories in the preamble “was not intended to be exhaustive,

or to single out any particular use as presumptively a ‘fair’ use.”); *Ringgold v Black Entertainment Television, Inc.*, 126 F.3d 70, 78 (2d Cir. 1997) (the examples in the preamble “have an ‘illustrative and not limitative’ function.”).

This Court has, in fact, explicitly disclaimed the kind of “relevancy” requirement that Appellants advocate here. “The law imposes no requirement that a work comment on the original or its author in order to be considered transformative.” *Cariou*, 714 F.3d at 706. It is an accepted principle that transformativeness requires only that the secondary work convey a *different* meaning from the original, not a directly *commentary* one. In *Cariou*, this Court held that a painting which alters and recasts copyrighted photographs was transformative, acknowledging that “the law does not require that a secondary use comment on the original artist or work, or popular culture.” 714 F.3d at 699. And in *Blanch*, this court ultimately accepted the artist’s justification that he selected the images at issue to comment upon broader culture and attitudes, rather than comment on the images themselves. “Whether or not Koons could have created [the painting] without reference to [the photograph] we have been given no reason to

question his statement that the use of an existing image advanced his artistic purposes.” *Blanch*, 467 F.3d at 255. *See also Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1177-1178 (9th Cir. 2013) (incorporating a piece of visual art into a video performance was transformative “even where—as here—the allegedly infringing work makes few physical changes to the original or fails to comment on the original.”); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608-09 (2d Cir. 2006) (secondary use of concert posters as “historical artifacts” was sufficiently transformative from their original artistic purpose); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818-20 (9th Cir. 2003) (thumbnail images in a search engine are transformative because the purpose of the use is sufficiently distinct).

Art rarely possesses a single, static meaning, and courts should not seek one. All a court must do is ask whether a reasonable person would perceive that the original and secondary works convey a *different* meaning or message—commentary or not.

## **II. COMMERCIAL EXPLOITATION DOES NOT DEFEAT A FAIR USE FINDING UNDER THE FIRST FACTOR.**

Contrary to Appellants’ assertion that commercial exploitation defeats fair use, *see* Appellants’ Br. at 15, there is no construction of §

107 that makes commerciality anathema to fair use. This Court has, on the contrary, taken a considered approach to assessing commerciality as only one factor among many when considering fair use. “[W]hile the commercial motivation of the secondary use can undoubtedly weigh against a finding of fair use *in some circumstances*, the Supreme Court, our court, and others have eventually recognized that [this position] was enormously overstated.” *Authors Guild v. Google, Inc.*, 804 F.3d 202, 218 (2d Cir. 2015). Moreover, “[t]he Supreme Court reversed on this very point [that commerciality defeats fair use], observing that ‘Congress could not have intended’ such a broad presumption against commercial fair uses, as ‘nearly all of the illustrative uses listed in the preamble paragraph of § 107 ... are generally conducted for profit in this country.’” *Id.* at 218–19 (citing *Campbell*, 510 U.S. at 584).

Appellants rely primarily on a selective reading of *Am. Geophysical Union v. Texaco Inc.*—a case in which this court actually warned that “unduly emphasizing the commercial motivation of a copier will lead to an overly restrictive view of fair use.” 60 F.3d 913, 921 (2d Cir. 1994). The notion that “courts will not sustain a claimed defense of fair use when the secondary use can fairly be characterized as a form of

‘commercial exploitation’,” *id.* at 922, is itself an exaggeration of the holding in *Harper & Row Publishers, Inc.*: that commercial publication, as opposed to nonprofit use, “tends to weigh against”--not destroy--a fair use defense. 471 U.S. at 562. Perhaps the most seminal fair use case dealing with a commercial work, *Campbell v. Acuff-Rose*, disclaimed this exact argument at length:

The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character. [...] If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities are generally conducted for profit in this country. Congress could not have intended such a rule, which certainly is not inferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that "no man but a blockhead ever wrote, except for money."

*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584) (some internal quotations removed). In short, Appellants grossly overstate the weight that commerciality carries in the first factor.

### **III. THE SECOND FACTOR WEIGHS IN FAVOR OF FAIR USE.**

In considering the second factor, the nature of the copyrighted work, the Court examines whether the work is “closer to the core of

intended copyright protection.” *Campbell*, 510 U.S. at 586. To determine this, courts ask “whether copyright might have reasonably encouraged or provided an incentive for an author to create the work” in question. Robert Kasunic, *Is That All There Is? Reflections on the Nature of the Second Fair Use Factor*, 31 Colum. J.L. & Arts 529, 540 (2008).

Contrary to Appellants’ assertion, the JSR is not a musical work. Indeed, it may not be a work of authorship under 17 U.S.C. § 102(a). But even if it is a work of authorship, its expressive quality is so thin that copyright could not have provided an incentive for Jimmy Smith to have created it. Thus, the second factor tilts in favor of Drake’s use.

**A. JSR Is Not a Musical Work.**

There is no “musical work” underlying JSR in the first instance. JSR is a recording of speech, without musical accompaniment. Appellants concede that the recording “is not an actual song with music,” Appellee Joint Appendix (*hereinafter* JA) at 338, and “contains no musical content.” JA-293. As such, there is no “musical work”—a category which definitionally requires “a succession of pitches or rhythms, or both, usually in some definite pattern”—embodied in the recording. *See U.S. Copyright Office, Compendium of U.S. Copyright*

*Office Practices* § 802.1 (3d ed. 2017); see also 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.05[C] (2019) (“[T]he mere fact that words are in a form adaptable to be set to music does not render them a ‘musical work’ unless, in fact, those words have been integrated with the music.”).

Appellants fail to present any affirmative arguments for JSR as a musical work. Rather, their argument presupposes the existence of a musical work.<sup>3</sup> Although Appellants fail to articulate the reasons behind this assumption, it appears to stem from the idea that, because JSR was distributed alongside works which are unquestionably musical works under copyright, this extended a penumbra of musical work status to JSR. This assumption is unsound.

Just as audio recordings do not automatically give rise to separate, underlying copyrightable expression, neither do they acquire

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<sup>3</sup> This assumption also underlies Appellants’ somewhat confused fourth factor analysis. Appellants first argue that JSR was subject to the § 115 license for musical works (a non sequitur, as § 115 applies to re-recordings, and not to sample licensing). Appellants then argue that the relevant hypothetical market is one in which they potentially licensed their song for this work—even though Appellants have explicitly acknowledged that they would not have licensed the work if approached for “several reasons, [with p]robably the biggest reason [being] that [appellee Graham is] a hip-hop artist.” JA-189, 190.

musical work status by osmosis. Rights do not multiply or shape-shift by proximity; placing a spoken-word recording alongside musical works no more transforms the spoken-word piece into a musical work than placing an illustration inside a magazine transforms the image into a literary work. *See* H.R. REP. NO 94-1476 at 57 (1976); Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.05[C] (2019).

But even if JSR *is* a musical work, or some other kind of protectable work, its nature supports a fair use finding. Appellants cannot plausibly argue that copyright was a necessary incentive to the creation of JSR. In fact, the record does not support the notion that Appellants ever considered the existence of such a right, as they never sought to register, license, or offer for licensing anything beyond than the sound recording copyright. To the extent that a copyrightable work even exists, these facts, taken together, weigh strongly in favor of a fair use finding under the second factor.

**B. The Court Should Resist Appellants' Invitation to Treat All Sound Recordings as Though They Fix Copyrightable Expression.**

Not all sound recordings (copyrightable or not) are made in a studio, and the Court should resist the temptation to allow the narrow

class of professionally produced musical tracks to define the law for all sound recordings. Copyrightable sound recordings can embody any number of “musical, spoken, or other sounds.” 17 U.S.C. § 101. Artists, individuals, and institutions utilize audio recording technology to capture not only music, but interviews, classroom lectures, courtroom arguments, personal memos, and oral histories. *See* Matthew M. Pagett, *Taking Note: On Copyrighting Students’ Lecture Notes*, 19 Rich. J. L. & Tech. 6, 7 (2013) (distinguishing fixation of planned, outlined, predetermined lectures as copyrightable from fixation of an extemporaneous, and thus uncopyrightable lecture). Given the sheer proliferation of audio recording technology—a capability which is available to every consumer carrying a cell phone—it is hard to dispute that, for the overwhelming majority of these recordings, creation of these recordings is *not* premised on the availability of copyright to protect the underlying sounds or utterances. Reading an additional right where none is necessary, as Appellants ask the Court to assume here, would create a rat’s nest of policy and practical complications.

Rather than meaningfully incentivize the creation of new recordings, injecting a new layer of copyright into such recordings

would stymie important uses of recorded sound. If a court presumes the existence of an underlying work, any recordation of speech, from voicemails to taped interviews to oral histories, would suddenly vest the speaker with a powerful property right. Not only would a secondary copyright interest fail to incentivize the creation of new recordings, it would actively hamper the usefulness of those recordings which already exist. “Affording protection [to the embodied speech] would make each vocalization a piece of property that is afforded the formidable protection of copyright law.” *Taggart v. WMAQ Channel 5 Chicago*, No. CIV.A. 00-4205-GPM, 2000 WL 1923322, at \*4 (S.D. Ill. Oct. 30, 2000). That power is formidable indeed--and not always used for copyright’s stated purposes.

Presuming that all sound recordings embody an underlying copyrighted work would upend numerous important practices, not least of which is news reporting. While copyright is designed to “promote the progress of science and the useful arts” it is, too often, used to remove embarrassing or otherwise disfavored speech from the public sphere. In *Falwell v. Penthouse Int’l., Ltd.*, 521 F.Supp. 1204 (W.D. Va. 1981), an interviewee who was embarrassed by the publication of his responses

attempted to claim common-law copyright in order to have the interview removed from circulation. In *Taggart v. WMAQ Channel 5 Chicago*, Case No. 00–4205–GPM, 2000 WL 1923322 (S.D. Ill. Oct. 30, 2000), a prisoner attempted the same. Assuming without evidence that these recordings embody a copyrightable work in the speaker’s utterances would allow any interviewee who was embarrassed by their performance on-air to pull the interview from the public sphere. “[A]ffording such protection to materials gathered in the daily task of the news reporter would essentially bring the industry to a halt.” *Taggart*, 2000 WL 1923322, at \*4.

This is particularly urgent in light of technological advances such as machine learning. Tens of millions of people use devices that feature digital assistant programs such as Amazon’s Alexa, Apple’s Siri, and Google’s Assistant. See Matt Day, et al., *Amazon Workers Are Listening to What You Tell Alexa*, BLOOMBERG (Apr. 10, 2019), <https://www.bloomberg.com/news/articles/2019-04-10/is-anyone-listening-to-you-on-alexa-a-global-team-reviews-audio> (last accessed July 18, 2019). To improve the accuracy of Alexa’s voice recognition ability, Amazon employs thousands of people worldwide to perform

“data annotation,” or the process of labelling data to make it usable for machine learning. These workers listen to sound recordings of user-generated voice commands, transcribe and annotate them, and feed that data back into the software. *See id.* While Amazon only subjects a portion of the sound recordings to the data annotation process, the number of “works” affected is not insignificant: employees work nine-hour days and review as many as 1,000 sound recordings per shift. *See id.* Under Appellants’ overbroad approach, the uttered “work” underlying every sound recording would be subject to a copyright licensing regime, in turn rendering the data annotation a derivative work, and creating a tangle of potential licensing liability for researchers and private companies alike. Contrary to the goal of “promot[ing] the Progress of Science and the useful Arts,” U.S. Const. Art. I, § 8, Cl 8, presuming that a copyrightable expression underlies all audio recordings would impose untenable challenges to progress in machine learning.

However, if this Court does decide to treat the JSR as a work of authorship, the near absence of copyrightable expression should weigh the fair use calculus in favor of Drake.

#### **IV. FAIR USE OF SUBSTANTIAL AMOUNTS OF SOURCE MATERIAL IS BOTH LEGALLY PERMISSIBLE AND SOCIALLY BENEFICIAL.**

Much as there is no bright-line rule prejudicing commercial work against fair use, the argument that Appellees utilized too substantial a portion of JSR similarly misses the mark. “The law does not require that the secondary artist may take no more than is necessary.” *Cariou*, 714 F.3d at 710. *Campbell* explicitly abandoned the idea that fair uses “could take no more than an amount sufficient to ‘conjure up’ the original.” 510 U.S. at 588 (“[O]nce enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original.”). *See also Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114 (2d Cir. 1998) (indicating the Supreme Court explicitly “depart[ed] from prior decisions indicating that a parody entitled to the fair use defense could take no more than an amount sufficient to ‘conjure up’ the original.”); *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 (2d Cir. 1980) (“Even more extensive use would still be fair use, provided the parody builds upon

the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary.”).

Rather, “[t]he Supreme Court said in *Campbell* that the extent of permissible copying varies with the purpose and character of the use and characterized the relevant questions as whether the amount and substantiality of the portion used ... are reasonable in relation to the purpose of the copying, noting that the answer to that question will be affected by the degree to which the [copying work] may serve as a market substitute for the original or potentially licensed derivatives.” *Authors Guild*, 804 F.3d at 221 (citing *Campbell*, 510 U.S. at 586-87, 587-88) (internal quotes and citations removed).

In fact, this kind of long-format fair use is necessary to a wide variety of socially valuable expressions. Accurate news reporting and political commentary depend on the ability to reproduce sound recordings (and other potentially copyrightable expressions) in full, with context. A diverse array of artistic expression, from literary to visual art, depends on the ability to recontextualize entire or near-entire works. Visual collage (such as that at issue in *Cariou*) is perhaps the most obvious, but large-format installation art such as Darren

Waterston’s “Filthy Lucre,” which re-imagines James McNeill Whistler’s iconic “Peacock Room,” similarly relies on the ability to sample, evoke, or otherwise borrow the “heart and soul” of another work. *Peacock Room REMIX: Darren Waterston’s “Filthy Lucre”*, Smithsonian, <https://www.freersackler.si.edu/exhibition/peacock-room-remix-darren-waterstons-filthy-lucre/> (last visited July 18, 2019). In designing “Filthy Lucre,” the artist “set out to recreate Whistler’s fabled Peacock Room in a state of decadent demolition—a space collapsing in on itself, heavy with its own excess and tumultuous history. I imagined it as . . . a vision of both discord and beauty, the once-extravagant interior warped, ruptured.” *Id.*

The court below was correct that “ultimate test of fair use . . . is whether the copyright law’s goal of promoting the Progress of Science and useful Arts . . . would be better served by allowing the use than by preventing it.” *Cariou*, 714 F.3d at 705 (quoting *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 141 (2d Cir. 1998)). The progress of science and the useful arts is undoubtedly furthered by allowing these kinds of fair uses to flourish.

## CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's finding of fair use.

Respectfully submitted,

Dated: July 19, 2019

/s/ Jonathan Band

Jonathan Band  
Counsel of Record  
Jonathan Band PLLC  
21 Dupont Circle NW, Suite 800  
Washington, DC 20036  
jband@policybandwidth.com

(202) 296-5675

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Local Rule 32.1(A)(4)(a) and Local Rule 29.1(C) because it contains 4401 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Microsoft Word for Mac version 16.16.12, using the Century Schoolbook typeface and a 14.0 font size.

Dated: July 19, 2019

*/s/Jonathan Band*

Jonathan Band  
Counsel of Record  
Jonathan Band PLLC  
21 Dupont Circle NW, Suite 800  
Washington, DC 20036  
jband@policybandwidth.com

(202) 296-5675

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of Public Knowledge, the Organization for Transformative Works, and the Electronic Frontier Foundation as *Amici Curiae* in support of Defendant-Counter-Claimant-Appellee and Defendants-Appellees with the Clerk of the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on July 19, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 19, 2019

/s/Jonathan Band

Jonathan Band  
Counsel of Record  
Jonathan Band PLLC  
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Washington, DC 20036  
jband@policybandwidth.com

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