No. 19-55348

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DR. SEUSS ENTERPRISES, L.P., a California Limited Partnership,

Plaintiff-Appellant,

v.

COMICMIX LLC, a Connecticut limited liability company;
MR. GLENN HAUMAN, an individual; MR. DAVID JERROLD FRIEDMAN A/K/A DAVID GERROLD, an individual;
and MR. TY TEMPLETON, an individual,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California (Case No. 16-cv-02779)
The Hon. Janis L. Sammartino, United States District Judge, Presiding

BRIEF OF THE COPYRIGHT ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the Copyright Alliance states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of *amicus*'s stock.

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STATEMENT OF INTEREST[1]

The Copyright Alliance is a non-profit, non-partisan, public interest and educational organization that represents the copyright interests of more than 1.8 million creators, including more than 9,000 authors and 13,000 organizations across the United States. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright and to protecting the rights of creators and innovators.

The Copyright Alliance represents individual creators including authors, photographers, performers, artists, software developers, musicians, journalists, directors, songwriters, game designers, and others. The Copyright Alliance also represents the interests of publishers, motion picture studios, software companies, recording companies, sports leagues, broadcasters, guilds, and unions. These diverse members all rely on copyright law to protect their ability to pursue a livelihood based on creativity and innovation. They depend on an appropriately balanced fair use doctrine that furthers the purposes of copyright law, including the

[1] All parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the Copyright Alliance states that no counsel for any party authored this brief in whole or in part, no party nor party's counsel made a monetary contribution intended to fund preparing or submitting this brief, and no person other than the Copyright Alliance, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

rights to control the reproduction and distribution of their works (as well as derivative works).

SUMMARY OF ARGUMENT

The district court's decision bungled the fundamentals of copyright law and the fair use doctrine. While the decision below missed the mark in a number of important respects, the Copyright Alliance concentrates here on the district court's most dramatic departure from this Court's precedent: its erroneous analysis of the critical fourth factor in the fair use test, which focuses on market harm. When analyzing the fourth factor, the district court created an unduly demanding bright-line standard under which plaintiffs will be required to present evidence that a challenged use causes "substantial harm" to the market for their protected works. That rule finds no support in existing case law, and, if left to stand, would upset the goals of the Copyright Act by protecting infringers whose conduct is likely to adversely affect the market for a creator's protected works. The district court then compounded its error by making a separate series of missteps when identifying and analyzing the relevant market and the corresponding harms.

Taken together, these errors led the court to the wrong conclusion on the facts of this case. The instant dispute concerns Dr. Seuss Enterprises, L.P.'s ("DSE") claim that ComicMix LLC ("ComicMix") infringed DSE's copyright when it created and sought to sell a book titled "Oh the Places You'll Boldly Go!"

("*Boldly*"), which used copyrighted elements from Dr. Seuss's "Oh the Places You'll Go!" ("*Go!*") and mixed them with copyrighted elements from the television series *Star Trek*. Applying an incorrect legal standard and misconstruing the nature of the relevant markets and harms, the district court erroneously found that ComicMix's "slavish copy[ing]" of *Go!* was a fair use.

Congress intended the fair use doctrine to be applied carefully and in a manner that respects both the purposes of copyright law and creators' ability to preserve derivative markets for their work. The Copyright Alliance has long recognized that the fair use doctrine, when applied in that manner, promotes creativity and the public good. But the district court's application of the fair use doctrine departed markedly from these important principles. *See infra* § I.

Specifically, we highlight three critical errors the district court made. <u>First</u>, the district court adopted an unprecedented bright-line standard, requiring plaintiffs to introduce evidence that the challenged use will "substantially harm" the market for their protected works. Although the district court cited *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), as support for its novel test, *Campbell* expressly eschews bright-line rules and prescribes no such standard. If permitted to stand, the district court's test—which requires a creator to have already established a widespread market before she can protect her rights in that market—would create significant practical obstacles for both smaller creators (who may be in fewer, smaller markets) and for aspiring creators (who may have a variable track record of success and more speculative market data). *See infra* § II.

Second, the district court erred by failing to meaningfully consider the potential markets that DSE *could* enter and the significant harm that *Boldly* and similar works may cause creators in those markets. The evidence of potential market harm was particularly strong in this case, especially given that DSE had previously generated significant revenues from mashups similar to *Boldly* and had active plans to develop additional licensing and derivative works based on Dr. Seuss's books. Relying on inapposite precedent and disregarding substantial record evidence, the district court erroneously dismissed the probable harm to DSE's not-yet-tapped markets as merely "hypothetical." *See infra* § III.

Third, the district court placed copyright owners in an impossible position by penalizing them for both non-entry into a market and successful entry into other, existing markets. This unfair double-standard would effectively force copyright owners who wish to protect their works to enter all markets while at the same time being careful not to be too successful in those markets. *See infra* § IV.

On one hand, the district court found that a creator's ability to show market harm is impaired when that creator has not yet entered the market for a certain derivative work. That finding ignored the fact that the Copyright Act protects creators' decisions about when—and whether—to enter a market at all. This error resulted in an unduly narrow definition of the relevant market, and if left undisturbed would threaten creators large and small by penalizing them for failing to exploit available markets before an infringer does so. *See infra* § IV.A.

On the other hand, the district court also viewed a copyright owner's success in existing markets as weighing against a finding of market harm in derivative and potential markets, even though it was presumably DSE's success in those markets that attracted the defendant to exploit DSE's works in the first place. A fair use defense should not be easier to establish merely because the original work is popular; to hold otherwise would penalize creators for their success. *See infra* § IV.B.

The errors identified above are of significant concern for the members of the Copyright Alliance because they pose threats to all creators who may be called upon to defend against meritless claims of fair use. Small creators (whose future market success will be speculative) will seldom be able to show "substantial" market harm. Nor will larger, established creators be able to do so, given that their success will be held against them. The district court's analysis will also lead to judicial second-guessing of creators' choices about when, where, and how to exploit their works, in plain contravention of the Copyright Act. *See infra* § V.

The district court's decision should be reversed.

ARGUMENT

I. The Fair Use Doctrine Must Be Carefully Balanced Against Creators' Rights in Order to Advance the Purposes of Copyright Law.

As the Supreme Court has explained, "the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985). Thus, by protecting original works from copying by secondary users, the law avoids disincentivizing creators from producing such works.

That said, Congress has determined that certain otherwise-infringing uses of copyrighted materials may be allowed under the fair use doctrine, which "permits 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." *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (quotation marks omitted). The current fair use doctrine, codified at 17 U.S.C. § 107, instructs courts to consider four factors: (1) "the purpose and character of the [challenged] use"; (2) "the nature of the copyrighted work"; (3) "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"; and (4) "the effect of the use upon the potential market for or value of the copyrighted work." The Supreme Court has indicated that the fourth factor "is undoubtedly the single most important element of fair use" because it advances the notion that fair use is "'limited to copying by others which does not materially impair the marketability of the work which is copied.'" *Harper & Row*, 471 U.S. at 566–67 (citation omitted); *see* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][4], at 13-202 to -202.1 & nn.217.1, 217.2 (2019).

Importantly, Congress codified the fair use doctrine with an eye towards ensuring that creators retain the ability to explore derivative and licensing markets for copyrighted works. *Harper & Row*, 471 U.S. at 568. Indeed, courts have made clear that the fourth factor in the fair use test "must take account not only of harm to the original but also of harm to the market for derivative works." *Campbell*, 510 U.S. at 590 (quoting *Harper & Row*, 471 U.S. at 568); *see Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1181 (9th Cir. 2012). This protection of derivative markets is grounded in an author's clear and exclusive right "to prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106(2). Thus, courts have not hesitated to find that the fourth factor weighs against fair use when there is evidence that the conduct at issue will cannibalize derivative markets that Congress intended to reserve for creators. *See Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993) (fourth factor counseled against a finding of fair use where defendant produced books detailing plots of plaintiff's TV show, thus "risk[ing] impairment of the market for" derivative books about the

TV show that had been produced by the plaintiff itself). As explained in detail below, the district court's opinion contravenes Congress's intent by erecting extremely high barriers for copyright owners who attempt to protect their rights in lucrative existing and potential derivative markets.

II. The District Court Imposed an Incorrect and Overly Heightened "Substantial Market Harm" Standard.

The district court, with little explanation, invented a heightened bright-line standard for showing market harm that finds no support in existing precedent. The district court's test requires plaintiffs—not defendants, the proponents of the affirmative defense—to "introduce evidence tending to demonstrate that the challenged work will ***substantially harm*** the market for its Copyrighted Works." 1ER 34[2]; *see* 1ER 25; 1ER 26; 1ER 29 (same standard).

According to the district court, the "substantial harm" test can be derived from the Supreme Court's opinion in *Campbell*. *See* 1ER 25 ("Plaintiff [must] introduce '[e]vidence of substantial harm to it,' *see Campbell*, 510 U.S. at 593."). But the district court's suggestion that *Campbell* created a "substantial harm" rule runs afoul of *Campbell* itself, which expressly held that fair use analysis "is not to be simplified with bright-line rules." *Campbell*, 510 U.S. at 577; *see id.* at 590

[2] "ER" refers to the Appellant's excerpts of record (ECF 8), filed August 5, 2019. The preceding numeral refers to the applicable volume of the excerpts. "Dist. Ct. Dkt." refers to the district court's docket below (No. 16-cv-02779).

n.21 (noting that the fourth factor is subject to a "sensitive balancing of interests" (quotation marks omitted)). Indeed, the Supreme Court disavowed the black-and-white approach employed by the district court by noting that "[m]arket harm is a matter of degree, and the importance of this factor will vary . . . with the amount of harm." *See id.* at 590 n.21.

The district court's reliance on a single snippet of *Campbell* lends no support to its newfound standard. While the *Campbell* Court did suggest that "[e]vidence of substantial harm [to a derivative market] would weigh against a finding of fair use," *id.* at 593, that fragment of *Campbell* does not impose a "substantial harm" threshold. Rather, *Campbell*'s discussion of the fourth factor in the fair use test suggests that there is no bright-line rule for the amount of harm that must be shown. Instead, the question is what the evidence shows about the "likely effect" of the allegedly infringing use and the potential for the challenged use to inflict a "cognizable market harm" on the creator. *Id.* at 590-91. The *Campbell* Court merely articulated the common sense sentiment that evidence of substantial harm would make it *more* difficult for a defendant to assert fair use. That does not mean that some lesser showing of harm would render the use fair. *See* 4 *Nimmer on Copyright* § 13.05[A][4] at 13-204 to -206 (noting that *Campbell* "is silent" on how to go about filling the "evidentiary hole").

In addition to misstating the controlling standard, the district court also placed the burden of satisfying that standard on the wrong party. The district court held that, because it found *Boldly* transformative and thus there was no presumption of market harm, the burden shifted to the plaintiff to introduce evidence of substantial harm to it under a "preponderance of the evidence" standard. 1ER 29. In so holding, the district court cited a Supreme Court case that limited such burden shifting to instances of *non-commercial* secondary use. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984). But *Boldly* does not claim to be non-commercial, and in fact the district court held that it *is* commercial. 1ER 19. In any event, fair use is an affirmative defense, *see Campbell*, 510 U.S. at 590, and thus the ultimate burden necessarily remains with the alleged infringer. The Supreme Court has indicated that a silent record on market harm would "disentitle[]" an alleged infringer to summary judgment on fair use, *id.* at 594, and that a fair use "proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets," *id.* at 590. These statements confirm that the burden with respect to the fourth factor *cannot* lie exclusively with the copyright owner. *See Monge*, 688 F.3d at 1170-71.

The appropriate case-by-case inquiry, as articulated by both the Supreme Court in *Campbell* and the Ninth Circuit (and other courts of appeals), is whether, "if the challenged use should become widespread, it would ***adversely affect the potential market*** for the copyrighted work." *Harper & Row*, 471 U.S. at 568 (emphasis added) (internal quotation marks omitted); *accord VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 744 (9th Cir. 2019), *petition for cert. filed*, 87 U.S.L.W. 3486 (U.S. June 13, 2019) (No. 18-1540). The burden of proving a lack of market harm lies with the fair use claimant, and to prevail on the fourth factor a copyright owner need only show that a future widespread use of the allegedly infringing work could "adversely affect" the owner's potential markets. *See VHT*, 918 F.3d at 744. Showing an adverse effect does not require any particular quantification of market harm, and as such plaintiffs need not present robust market data on sales or licensing (or indeed any evidence at all that actual harm has accrued). *See, e.g.*, *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 80-82 (2d Cir. 1997) (finding plaintiff not required to show a decline in the number of licensing requests to show adverse impact on a potential market); *Balsley v. LFP, Inc.*, 691 F.3d 747, 761 (6th Cir. 2012); *see also Campbell*, 510 U.S. at 590 n.21 (noting that "[m]arket harm is a matter of degree"). Moreover, a showing of quantifiable harm is not needed—and indeed would be impossible to make—where, as here, the infringing work has not yet entered the market. *See infra* at 15-18. Imposing a requirement that a plaintiff show "substantial" market harm therefore contravenes controlling precedent.

The district court, in creating the bright-line and quantitative[3] "substantial harm" standard and imposing an unfounded burden, failed to consider how copyright owners who have explored few or no derivative markets at the time of an infringement could provide the type of detailed and expansive market harm showing that it required under its new rule (particularly when an infringement is caught early, as a copyright owner no doubt hopes it would be). The district court's bright-line standard would be problematic for established creators who have plans to expand into a given market, but who have not yet acted on them. And the district court's error also raises concerns for smaller or newer creators, who may lack the types of licensing and derivative market data that would be necessary to satisfy the "substantial harm" standard or who otherwise lack the resources to present such data (particularly given that it should not be their burden to do so).[4] If this Court were to credit the district court's legal analysis, the fourth fair use factor would become almost meaningless by effectively permitting the

[3] For example, the district court found instructive that *Go!* has sold over 12.5 million copies whereas defendants have "raised $29,575 from 727 backers for *Boldly* over a two month period" and had an order for only 5,000 copies of *Boldly*. 1ER 31.

[4] One can readily imagine the first-time author whose only market data consists of modest profits from a first novel, with no existing licensing or sequel revenues, failing to show "substantial" harm after a playwright sells a script that co-opts the author's central plot points and characters. While the author may be able to make some showing about the types of revenue authors can expect from book adaptations, she may struggle to establish any of these harms as "substantial."

rampant copying of protected works in markets that the creator has not yet had the chance to exploit.

III. The District Court Erroneously Focused on Existing Rather than Potential Markets and Therefore Failed to Appreciate the Significance of the Potential Market Harms to Plaintiff.

In addition to misstating the relevant standard, the district court also failed to meaningfully consider the relevant markets that DSE could potentially enter—focusing instead only on those markets it had *already* entered. This error in turn resulted in an overly narrow analysis that understated or ignored much of the potential harm that an infringing work can cause creators in as-yet-untapped markets.

The district court's analysis reads an important term out of the Copyright Act. The market harm analysis must include "the effect of the use upon the ***potential*** market for or value of the copyrighted work." 17 U.S.C. § 107(4) (emphasis added). This Court has repeatedly underscored the importance of looking to a copyright owner's untapped potential markets. *See, e.g.*, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001); *VHT*, 918 F.3d at 744; *Monge*, 688 F.3d at 1181. Ignoring this Court's admonition, the district court's opinion merely paid lip service to the numerous harms that DSE may suffer in potential markets as a result of defendant's conduct. Instead, the district court's opinion focused primarily on the harms that DSE may suffer in the existing market for *Go!* sales. Though the district court claimed to have considered plaintiff's potential derivative markets, in practice it dismissed what it called a "hypothetical" harm and determined that the available evidence did not permit it to "extrapolate the likely effect" of *Boldly* on *Go!*'s potential derivative markets. 1ER 26, 31.

In so doing, the district court glossed over a mountain of evidence suggesting that DSE fully intended to exploit potential derivative markets. DSE presented the district court not only with evidence of a vast existing licensing program, but also of its plans to develop licensing and derivative products based on Dr. Seuss's works. *See, e.g.*, Dist. Ct. Dkt. No. 119, at 13 (DSE's opposition to defendants' motion for summary judgment) (suggesting, with citation to record evidence, that DSE "has partnered, and will partner, with other rights holders on licensed 'collaborations' that combine Dr. Seuss's works with another property to create new works" and that *Boldly* was "***exactly*** the type of derivative collaboration that DSE might license" (emphasis in original)). Indeed, the release of *Boldly* threatens two significant potential revenue streams from these not-yet-exploited markets—(1) licensing revenues that DSE could earn from entering into its own arrangement with the owner of the Star Trek property, and (2) profits from direct-to-consumer sales of derivative works. These potential harms are not speculative or hypothetical; on the contrary, DSE's prior successful experience in the generalized market for derivative works demonstrates that DSE's as-yet untapped market for a Seuss-Star Trek mashup would likely generate considerable revenues that may well be slowed to a trickle if *Boldly* hits the market.[5]

In an attempt to bolster its cursory analysis, the district court relied on *Perfect 10* and *Equals Three* for the proposition that "hypothetical" market harms need not be credited. But neither case supports the district court's backhanded dismissal of DSE's significant potential-market harms.

In *Perfect 10, Inc. v. Amazon.com, Inc.*, this Court considered whether Google's use of "thumbnails" of certain images owned by Perfect 10 was a fair use. 508 F.3d 1146, 1168 (9th Cir. 2007). The Court briefly considered whether Google's use of the thumbnails would affect Perfect 10's secondary market for the downloading of reduced-size images on cellphones. It concluded that any potential harm to this secondary market was "hypothetical" given the absence of evidence that Google users had actually "downloaded thumbnail images for cell phone use." *Id.* In seeking to leverage *Perfect 10* for its own purposes, the district court here failed to appreciate two critical distinctions between that case and this one. First

[5] Indeed, even the district court recognized that DSE has often successfully "collaborate[d] with other intellectual property holders . . . that combine Dr. Seuss' works with those holders' creations to develop new works and products that have combined appeal to larger audiences." 1ER 5-6. These prior successful *Go!* derivatives include *Go!: Oh Baby! Go, Baby!*; *Oh the Places I'll Go! by ME, Myself*; *Oh, Baby, The Places You'll Go!*; *Oh, the Places You'll Go (Pop-up)*; *Oh, the Places I've Been! Journal*; and collaborative or mashup works such *Wubbulous World of Dr. Seuss, Grinch Panda Pop*, the Comme des Garçons clothing line, Dr. Seuss Funko figurines, and *The Cat in the Hat Knows a Lot About That*.

and most importantly, the record evidence of harm in this case is substantially stronger than the evidence in *Perfect 10*. DSE marshalled evidence suggesting that it was actively exploring the market for mashups and that the publication of *Boldly* would impair its revenue streams in that future market. *See supra* at 14. By contrast, the Ninth Circuit found that any harm to Perfect 10 from Google remained hypothetical because there was no finding that Google was in the market for thumbnail images for cell phone use. 508 F.3d at 1168. Second, Perfect 10 had already entered the market for thumbnails, whereas in this case, DSE has not yet entered the specific market for a Seuss-Star Trek mashup (despite having entered the more general derivative market via other Dr. Seuss collaborations). *Perfect 10*'s finding of fair use based on a record in which the plaintiff presented *no* evidence of harm within a secondary market it *had* entered long ago provides no support for the district court's finding of fair use despite DSE's *strong* evidence of expected harm within a specific secondary market it *had not* yet entered.

The court's reliance on *Equals Three, LLC v. Jukin Media, Inc.* is similarly unavailing. There, a secondary user took the copyright owner's videos and incorporated them into its own commentary videos. 139 F. Supp. 3d 1094, 1098-1101 (C.D. Cal. 2015). When considering whether the secondary user's videos might create a "substitute" for the copyright owner's works, the court found that the copyright owner had failed to present evidence suggesting that even "a single viewer" had actually substituted the secondary user's work for the copyright owner's work or that the copyright owner had ever "lost a deal to license its videos." *Id.* at 1108. Although the district court presented *Equals Three* as supporting its holding, that conclusion suffers from the same two flaws that undermine the district court's *Perfect 10* analysis: (1) DSE's evidence of harm is much stronger than the evidence presented in *Equals Three*, and, in any event (2) *Equals Three* turned on a lack of evidence in a case where the infringing product had already entered the market, unlike here where *Boldly* has not yet been published.

In short, *Perfect 10* and *Equals Three* support the notion that a failure to provide *any* evidence of harm to an actual market following prolonged infringement may make allegations of market harm too hypothetical. That principle has no bearing in this case, where DSE presented strong evidence of potential harm based on its prior involvement in the market for derivative Dr. Seuss works and where *Boldly* has not yet even entered the market.

This Court has long counseled that potential markets cannot be ignored when analyzing the fourth fair use factor, and this case shows why that principle is so important. On these facts—where past practice and record evidence strongly support the likelihood that the infringing use will cannibalize derivative markets reserved to the creator—an examination of potential rather than existing markets should have been the centerpiece of the district court's analysis. But instead the district court elided that issue by focusing on existing markets and underestimating the potential harms to DSE's derivative untapped markets. Although there may be some cases where potential market harms are too speculative or hypothetical as to render the fourth factor neutral, this is not such a case. Indeed, if the extremely strong evidence of potential market harms to DSE in this dispute is not sufficient to shift the fourth factor to the plaintiff's column, it is difficult to imagine how *any* copyright holder could preserve its interests in not-yet-tapped derivative markets. For this reason, the members of the Copyright Alliance are gravely concerned. The district court's decision seriously jeopardizes their fundamental right to decide when and how to enter each of their potential markets without fear that fast-acting copycats will be given a greenlight to harvest their original creative works for commercial gain.

IV. The District Court's Analysis Creates a Dangerous Double Standard By Penalizing Creators Both for Entering Markets Too Slowly and for Entering Markets and Experiencing Too Much Success.

The district court's decision places copyright owners into a no-win situation by penalizing them for both entering new markets and not entering new markets. On one hand, the district court held that defendant's fair use defense was strengthened by the fact that DSE had not yet entered the derivative market for mashups that either combine Dr. Seuss characters with third-party characters or use

"Seuss-like rhymes" (1ER 32 n.8), and thus DSE could not show that *Boldly* endangered its future revenues in that market. *See infra* § IV.A. On the other hand, the district court held that defendant's fair use defense was strengthened by the fact that DSE has entered the *general* derivative market and has experienced significant success, and thus that any harm from *Boldly* would be relatively small. *See infra* § IV.B. In addition to producing a double standard, this analysis stifles creative exploitation by flouting the right of copyright owners to decide when and whether to enter markets.

A. The District Court Failed to Appreciate the Right of Copyright Owners to Determine When and Whether to Enter Markets.

The district court's analysis, if left to stand, would threaten the long-established right of creators to determine when—and whether—to enter markets at all. Copyright owners may wish to stagger entry into new markets, or financial necessity may dictate whether they can enter a particular market at any given time. Moreover, artistic considerations might compel a copyright owner to refrain from entering a derivative market, or even a primary market, at all.

Courts have uniformly protected artists' copyrights whether they actively chose to enter certain markets or not. As this Court has stated, "even an author who had disavowed any intention to publish his work during his lifetime was entitled to protection of his copyright." *Monge*, 688 F.3d at 1181 (quotation marks omitted). In *Monge*, a celebrity couple was able to show market harm despite the defendant magazine's assertion that plaintiffs did not intend to sell publication rights in their wedding photos because this Court found that the magazine did not have "license to forever deprive them of their right to decide when, 'whether and in what form to release' the photos." *Id.* at 1182 (quoting *Harper & Row*, 471 U.S. at 553). Copyright owners also have the right to selectively enter certain derivative markets and not others. *See, e.g., Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 145 (2d Cir. 1998) (finding infringement of the "Seinfeld" television show by a trivia game creator even though the creator "evidenced little if any interest in exploiting this market for derivative works"). As this Court has explained, the protection for an artist's unexploited markets, while not encompassing the purely hypothetical market, extends to all markets that are "traditional, reasonable, or likely to be developed." *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013) (quotation marks omitted).

The district court erred in finding that DSE's decisions about how and when to enter certain markets made the derivative market in question unprotectable. The district court suggested that *Boldly* occupies a market "that [DSE] has not traditionally targeted or is likely to develop." 1ER 32 n.8. The district court drew this impermissible conclusion based on its examination of DSE's "Style Guide," which lists several constraints imposed on licensees who wish to use Dr. Seuss creations in a secondary work. *Id.* However, DSE's choice not to allow licensees to put Dr. Seuss material with third-party characters or among “Seuss-like” rhymes, *id.*, reflects a protected decision about how a work will interact with the market. That choice should not have been used by the district court to cut off protection for a market that DSE has thus far declined to enter.

In sum, the district court’s ruling hinders future artists’ ability to meaningfully determine what markets they want to explore. Indeed, the district court’s approach risks forcing artists either to flood derivative markets to protect their economic and artistic interests or else face the likelihood of rampant, unauthorized derivative works if they choose to limit certain market exploitations. The Copyright Act does not present artists with this stark choice, and this Court should correct the error that threatens to impose it on copyright owners.

B. The District Court Improperly Considered Plaintiffs’ Market Success in Assessing the Potential Harm of the Infringing Use.

The district court also erred in considering DSE’s success in licensing Dr. Seuss’s work when assessing market harm. The district court found that there is “no evidence concerning the likely incidence of [purchases of *Boldly* by graduating students] or the possible impact—if any—on [DSE’s] considerable licensing revenues.” 1ER 31. The district court then turned to a discussion of the plaintiff’s robust sales, placement on best-seller lists, and significant licensing revenues. A copyright owner’s success, however, has no bearing on whether a secondary work has infringed her copyrights.

Neither the Copyright Act nor the relevant case law lends any support to the proposition that those who would seek to ride on the coattails of others' creativity for commercial gain should have a lesser burden when presenting a fair use defense because the original work has enjoyed success. And for good reason. Such a requirement would punish copyright owners for creating successful works—undercutting the creation-enhancing purpose of the Copyright Act.

The practical effect of the district court's "substantial harm" test is that rebutting a fair use defense will now be more challenging for successful creators. This is so because any market harm caused by an infringing user's work would—in quantifiable terms—pale in comparison to the revenues attributable to the copyright owner's success. But, as explained above, that fact alone cannot be used to immunize an otherwise-infringing use. The district court's fixation on the original copyright owner's success risks turning market harm into a purely quantitative litmus test for creators raising infringement claims.

V. The District Court's Errors Matter to the Members of the Copyright Alliance Because They Pose Serious Threats to Creators Attempting to Defend Against Infringement.

The Copyright Alliance represents creators big and small, and the district court's reasoning threatens both.

Requiring plaintiffs in an infringement action to show "substantial" market harm creates a particularly untenable threshold for smaller and/or less successful creators, whose market success may be variable or speculative. Moreover, if the district court's ruling is left undisturbed, smaller authors who may not be able to afford to enter all derivative markets at once will face an uncertain future, unsure if they retain rights to exploit markets left untapped.

The district court's ruling similarly threatens the Copyright Alliance's larger and/or more successful members. In addition to penalizing success, *see supra* § IV.B, the district court's test does not explain how much market usurpation is required for a showing of "substantial" harm when sales are strong and growing. Under the district court's ruling, creators are left with nothing but instinct to determine the answer.

Moreover, the district court's ruling will force artists of all sizes to confront choices that are not imposed by the Copyright Act. Should they prematurely flood the market with derivative works, rather than carefully considering how and when to enter such markets? Or should they incur the expense of raising seriatim lawsuits over time, as they can only show market harm when they have already entered a market? Neither is good policy, and both possibilities are anathema to the goals of the Copyright Act. Indeed, copyright law specifically protects the ability to make choices of when, where, and how to publish one's work. *See Monge*, 688 F.3d at 1181-82. This is because the concept of choice is key to all creators' works and artistic identities. The decisions copyright owners make about what derivative markets to enter—and at what speed—are careful and deliberate choices that reflect significant practical, economic, and artistic thought. Entering new markets may take time, but copyright law ensures that creators are afforded that time. The district court's market harm analysis threatens the ability of copyright owners to take that time, making it harder for them to enforce their rights when they do so. The decision thus diminishes Congressionally crafted incentives to create new works—a result which harms all copyright owners and, in turn, the public at large.

CONCLUSION

For all of these reasons, the decision below should be reversed, and this Court should hold that there was no fair use as a matter of law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,819 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as counted by Microsoft® Word 2007, the word processing software used to prepare this brief.

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DATED: August 12, 2019

CERTIFICATE OF SERVICE

I hereby certify that, on August 12, 2019, a true and correct copy of the foregoing Brief of *Amicus Curiae* was timely filed in accordance with Fed. R. App. P. 25(a)(2)(D) and served on all counsel of record via CM/ECF.

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