

No. 19-55348

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

DR. SEUSS ENTERPRISES, L.P.,

Plaintiff-Appellant,

v.

COMICMIX LLC, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California
No. 3:16-cv-02779-JLS-BGS
Hon. Janis L. Sammartino

**BRIEF OF *AMICI CURIAE* PROFESSORS MARK A. LEMLEY, JESSICA
LITMAN, LYDIA LOREN, PAMELA SAMUELSON,
AND REBECCA TUSHNET
IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE**

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INTEREST OF AMICI¹

Amici are full-time legal academics who teach and write about copyright law and who have written extensively about fair use practice and jurisprudence. Mark A. Lemley is William H. Neukom Professor of Law, Stanford Law School; Jessica Litman is John F. Nickoll Professor of Law, University of Michigan Law School; Lydia Loren is Henry J. Casey Professor of Law, Lewis & Clark Law School; Pamela Samuelson is Richard M. Sherman Distinguished Professor of Law and Information, University of California, Berkeley, School of Law; Rebecca Tushnet is Frank Stanton Professor of First Amendment Law, Harvard Law School. Collectively, amici represent multiple decades of experience and expertise in the area of copyright law and policy. Amici respectfully submit this brief solely in the interest of proper interpretation of traditional principles of copyright law and out of concern that the fair use doctrine not be unduly restricted to chill the creation of transformative new works of expression.

¹ The parties have consented to the filing of amicus briefs. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than Amici made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In keeping with its recent precedents, this Court should endorse a robust and flexible conception of transformative fair use in this case and eschew the rigid approach that Doctor Seuss Enterprises (“DSE”) and its amici have urged this Court to adopt. Particularly when a second comer uses a pre-existing work that has a widely shared cultural significance to reinterpret another work of similar significance, courts should be skeptical about granting the first work’s author control over the ability to reconceptualize its meaning through creative reuses.

The District Court properly refused to require the second work to criticize the first author’s work. It avoided characterizing “mashups” as a monolithic category. And it avoided second-guessing the artistic choices of the second comer’s use. Its analysis was faithful to the statutory text and to fair use’s important role in furthering the constitutional purpose of copyright and the free expression interests of follow-on creators that are protected by the First Amendment.

This Court in *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015), characterized fair uses as “wholly authorized by law” and said it was a “misnomer” to call fair use an affirmative defense. Hence, the District Court correctly put the burden of proving market harm on DSE and concluded that it had failed to establish a likelihood of market harm, notwithstanding DSE’s extensive licensing regime. DSE was unlikely to have licensed the particular use at issue here, and the District

Court rightly concluded that Appellees' work will not supplant demand for the original.

To ensure that fair use fulfills its constitutional purpose, copyright owners should have to show a likelihood of harm to their traditional, reasonable, or likely markets. It never has been and never should be enough to carry that burden to show that the copyright owner maintains a robust licensing program or participates in a seasonal market that the second comer would like to enter. A likelihood of market substitution must be shown, and the District Court properly concluded that DSE had failed to make a sufficient showing to satisfy its burden.

ARGUMENT

I. Fair use supports creative reuses of existing works to promote the progress of science and culture.

As the Ninth Circuit and other appellate courts have held, and contrary to the claims of DSE and its amici, transformative uses are not restricted to criticism, comment, and parody. The purpose of the transformativeness inquiry is to provide new creators with breathing room to enable them to make their own meaningful contributions to the universe of expressive works.

A. Using one work to reinterpret and explain another is a favored transformative purpose.

Culturally significant works, such as *Star Trek* and Dr. Seuss's books, invite a variety of creative responses. Given that some cultural symbols "have a grip on the

mind that only use of the original can shake,” preserving the ability to repurpose those symbols is one vital function of fair use. Wendy J. Gordon, *A Property Right in Self-Expression*, 102 Yale L.J. 1533, 1568-69 (1993). “Should these former audience members and those they serve not be able to play with the symbols that formed their mental vocabulary, they may be worse off than if they had initially not been exposed to them.” *Id.* Monopolies on the interpretation of well-known works can be particularly harmful to public discourse, since well-known works provide useful guides to thinking about the world. *See, e.g., Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 802 (9th Cir. 2003) (protecting use of Barbie dolls in photographs because they “convey[] these messages in a particular way that is ripe for social comment”); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1272 (11th Cir. 2001) (noting cultural significance of *Gone with the Wind*).

To confine fair use’s protection for iconic works to explicit criticism or obvious commentary on those works would mean that, absent the author’s permission, cultural symbols could be repurposed only to refer to themselves. Fair use provides more freedom of interpretation. The ability to use original works for varied transformative purposes unlocks new forms of creativity. *See, e.g., Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 328 (S.D.N.Y.

2019) (lithographs made from photographs of the late musician Prince “can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure”).

The fundamental purpose of the transformativeness inquiry is thus not whether the secondary use straightforwardly comments on or criticizes the original. It is whether the defendant’s use has “alter[ed] the first with new expression, meaning, or message,” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994), that “may *reasonably* be perceived” in the new work, *id.* at 582 (emphasis added).²

² “May reasonably be perceived” does not require there to be a consensus about the message of the transformative work. Fair use is not reserved for the artistically competent who manage to communicate so clearly that everyone in the audience understands the message. *Yankee Publ’g Inc. v. News Am. Publ’g Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992) (“First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.”) (quoted in *Campbell*, 510 U.S. at 583). More importantly, to engage in commentary is not to impose a singular meaning on a work. *Cf. Mattel*, 353 F.3d at 801 (majority opinion should not determine fair use). In a large and diverse world, the meaning of a work will never be uniformly agreed upon. Empirical work demonstrates that different audiences read mainstream works differently, meaning that there is no one message to rebut. *See, e.g.*, Neil Vidmar & Milton Rokeach, *Archie Bunker’s Bigotry: A Study in Selective Perception and Exposure*, 24 J. Comm. 36, 37 (1974). Given the inevitability of varying interpretation, the “reasonably perceived” standard both serves the interests behind the Copyright Act in promoting the creation of new expression as well as the First Amendment interests served by fair use. *See* Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 Law & Lit. 20 (2013) (arguing in favor of recognizing the multiplicity of meanings to different communities); Michael W. Tyszko, Note, *Whose Expression Is It, Anyway? Why “New Expression, Meaning, or Message” Should Consider All Reasonably Available Viewpoints*, 65 Syracuse L. Rev. 221 (2014) (advocating use of multiple reasonable viewpoints).

Here, the District Court could reasonably perceive *Boldly* as, among other things, using Seussian imagery to interpret and explain another cultural icon, which simultaneously changes the meaning and message of the original images. The juxtaposition of two cultural icons that were ubiquitous during the childhood of many of today's adults creates new meaning in ways that words alone could not do. *Cf. Mattel*, 353 F.3d at 802 (finding visual transformativeness evident even without a clear narrative statement). Especially given its use of *Star Trek* characters rather than Seuss characters, *Boldly* is not a “new Dr. Seuss book”; it is an interpretation of *Star Trek* that also offers a way to think about Seuss.

Separate from this litigation, commentators have recognized the hyper-individualistic character of *Go!*. *See, e.g.,* Alison Lurie, *Boys and Girls Forever: Children's Classics from Cinderella to Harry Potter* 102 (Penguin 2003); Thomas Esposito, *The Roots that Clutch: Letters on the Origins of Things* 59 (2018) (noting that *Go!*'s “lone primary character never interacts with *anyone* except in competitive terms, and he does not once perceive the need to seek or receive help along his way”); David Brooks, *The Strange Failure of the Educated Elite*, N.Y. Times, May 28, 2018, <https://perma.cc/38Y2-PJBU> (“On graduation days, members for the educated class give their young Dr. Seuss’ ‘Oh, the Places You’ll Go!’ which shows a main character, ‘you,’ who goes on a solitary, unencumbered journey through life

toward success. If you build a society upon this metaphor you will wind up with a society high in narcissism and low in social connection.”).

Boldly, by contrast, endorses not individual enterprise randomly leading to positive encounters as in the original, but rather institutional structures that promote discovery through combining the efforts of trained commanders, scientists, engineers, and others. Whereas recent “official” *Star Trek* programs have followed the trend in mass culture towards darkness, moral ambiguity, and “gritty” reboots,³ Appellees read the original *Star Trek* as a story about exploration, adventure, and connection-building. They used Seussian imagery as an interpretive tool by which to make the case for a hopeful future, achieved by collective efforts and not by unplanned individual wanderings alone, more persuasively than words alone, or unfamiliar images, could. The use of Seussian imagery thus has a new purpose: not merely to retell the same story or a sequel, but to create new meaning by juxtaposing two culturally significant works.

DSE and its amici attempt to avoid this understanding of Appellees’ work by misconstruing the District Court’s ruling as having concluded that all mash-ups were

³ See, e.g., Emily Todd VanDerWerff, *Star Trek: Discovery’s First Season Shows Dark, Gritty Reboots Can Have a Purpose*, Vox (Feb. 11, 2018), <https://perma.cc/9XFE-BQ76>; Ben Travis, *Tarantino’s Star Trek Project Is Sweary and R-Rated*, Empire (June 12, 2019), <https://www.empireonline.com/movies/news/tarantino-star-trek-project-sweary-r-rated/>.

automatically transformative in purpose. Opening Br. at 29-30, MPAA Br. at 16. DSE's brief also oversimplifies the relevant purposes of the original and secondary works as "to entertain the reader . . . with an uplifting story." Opening Br. at 37. The former is not an accurate description of the District Court's holding. The latter ignores the specificity required by fair use analysis. It is always possible to describe the purpose of a work at multiple levels of abstraction: the purposes "to increase the amount of knowledge in the world," "to entertain," and so on are shared by many works, including both those that rely on fair uses and their sources. Wisely, courts have eschewed word games about the purpose of a use. Instead, where a case involves two creative works in the same general genre, courts ordinarily look for differences in expressive *meaning* or *message*. *Campbell*, 510 U.S. at 579 (two musical works); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (two works of visual art); *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013) (multiple works of visual art).

B. Flexibility in the transformativeness inquiry furthers the purpose of copyright and First Amendment interests.

Many creative, original works build on earlier ones, which is why fair use is necessary to fulfill copyright's purpose to promote the progress of science and the useful arts. *Campbell*, 510 U.S. at 575. Rather than being limited to a set of statutorily endorsed purposes, transformativeness is present when someone uses some expression from another's copyrighted work to create a new artistic or expressive work, and when the second work "adds something new, with a further purpose or

different character, altering the first with new expression, meaning, or message.” *Id.* at 579. Consistent with *Campbell*, this Court has protected works that build upon, reinterpret, and reconceive existing works, rejecting a narrow view of transformability. *Mattel*, 353 F.3d at 799-800; *SOFA Entm’t, Inc. v. Dodger Prods. Inc.*, 709 F.3d 1273, 1280 (9th Cir. 2013).

The flexibility of fair use is not, as DSE and its amici would have it, either accidental or unfortunate. The Supreme Court has explained that fair use must avoid “rigid applications” that “would stifle the very creativity which [copyright] law is designed to foster.” *Campbell*, 510 U.S. at 577. Courts consistently recognize a secondary use’s transformative purpose where existing work is used as “raw material . . . in the creation of new information, new aesthetics, new insights and understandings.” *Seltzer v. Green Day*, 725 F.3d 1170, 1176 (9th Cir. 2013) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990)). How that “raw material” gets cooked may vary, and fair use accommodates that variance.

This flexibility ensures that copyright does not impinge on the breathing space for new authors mandated by the First Amendment. *Eldred v. Ashcroft*, 537 U.S. 186, 220-21 (2003); *Suntrust Bank*, 268 F.3d at 1264 (“The exceptions carved out for these purposes are at the heart of fair use’s protection of the First Amendment,

as they allow later authors to use a previous author’s copyright to introduce new ideas or concepts to the public.”).

Some uses may be explicitly critical of the original; others need not be. *See Campbell*, 510 U.S. at 577 (examples cited in the statute are illustrative and not exclusive). In *Seltzer v. Green Day*, this Court held that the second comer’s use of an earlier work as raw material in a “street-art focused music video about religion” was fair notwithstanding that the original work “clearly says nothing about religion.” *Seltzer*, 725 F.3d at 1176-77, 1179. The Second Circuit too has recognized that the question is whether the secondary user had a “genuine creative rationale for borrowing.” *Blanch*, 467 F.3d at 255; *see also Cariou*, 714 F.3d at 706. Thus, Appellees’ work, which transmutes Seussian images into interpretations of the *Star Trek* universe, is not required to be conventional criticism or parody.⁴

DSE and its amici attempt to avoid the rule that transformativeness can be present where a new meaning or message could reasonably be perceived. *See, e.g.,*

⁴ *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997) does not require a contrary conclusion. Among other things, that case was about a different work and a different fair use analysis. In addition, that case confined its analysis to whether the secondary use was a parody; defendants focused exclusively on parody in their briefs, *id.* at 1402-03. But parody is not the standard required by *Campbell*: transformativeness is. *Seltzer*, 725 F.3d at 1177 (new work can be transformative without comment on the original so “long as new expressive content or message is apparent”). *See also* R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 Colum. J.L. & Arts 467, 472-73, n.27 (2008) (criticizing case).

Opening Br. at 31 (suggesting that a secondary use must be parody, commentary, or criticism to be “meaningfully transformative”); Sesame Workshop Amicus Br. at 14 n.6 (arguing that “‘True Mud’ is transformative both in parodying the dark, violent, original series and in creating new expression, meaning, and purpose by using the mash-up to teach young children to rhyme”). Sesame Workshop’s distinction relies on common knowledge that Sesame Street is funny and the existence of an additional (albeit not critical) message about rhymes. Neither the humor of the collision of two well-known works nor the intention to teach rhyming is a “new meaning” that is meaningfully distinguishable from Appellees’ new message about *Star Trek*. *See also* Sesame Street, *Homelamb*, YouTube (Oct. 28, 2013), <https://youtu.be/v1zL106SGZ8> (Sesame Street version of *Homeland*). Sesame Street’s popularity should not give it greater rights to engage in fair use than unknown creators would have; to defer to its status would give powerful speakers more free speech rights than others.

C. The derivative work right does not change the analysis.

Section 107 is crystal clear: fair use limits all of the copyright owner’s exclusive rights under § 106, including the derivative work right. *See Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 95 (2d Cir. 2014). The derivative work right has an important role to play, but that role is not to shrink fair use. *See* Pamela Samuelson,

The Quest for a Sound Conception of Copyright's Derivative Work Right, 101 Geo. L.J. 1505, 1538 (2013).

A transformative use that has a new *purpose* is not the same thing as a derivative work, such as a sequel, that simply has new *expression*. See Reese, *supra*, at 484-85. Instead, the absence of significant aesthetic additions or contextual changes may prevent a finding of fair use transformativeness. *Cariou*, 714 F.3d at 711 (remanding to district court to determine whether alterations in five works were transformative). For example, an unauthorized creation of a new episode of *Gilligan's Island* would not be identical to previous episodes, but the different ways in which Gilligan bollixed a new attempt to leave the island would not themselves change the meaning or message of Gilligan programs. Cf. *TCA Television Corp. v. McCollum*, 839 F.3d 168, 181-83 (2d Cir. 2016) (reversing grant of motion to dismiss because comedy routine was not meaningfully altered, nor did its specific content matter to the meaning of the accused work as a whole).

The proper reconciliation of the two kinds of use is that a fair use does not interfere with the legitimate scope of copyright rights, including the derivative work right or the other exclusive rights subject to § 107 fair use.

II. Transformative uses of culturally significant works can be fair use when the amount taken is reasonable in light of a creator’s artistic purpose.

The extent of permissible copying varies with the purpose and character of the use. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006) (quoting *Campbell*, 510 U.S. at 586-87). Where there is pervasive alteration, copying of even substantial elements of the original can be fair. *See, e.g., Suntrust Bank*, 268 F.3d 1257 (retelling of *Gone With the Wind* that reversed its racial judgments and sexual mores); *Adjmi v. DLT Entm’t Ltd.*, 97 F. Supp. 3d 512 (S.D.N.Y. 2015) (reworking of *Three’s Company* with more modern content); *Lombardo v. Dr. Seuss Enters., L.P.*, 279 F. Supp. 3d 497, 513 (S.D.N.Y. 2017) (uses of Seuss characters for distinct purposes was fair use).

Deference to artistic decisions about follow-on uses of such works is consistent with the “breathing room” fair use must provide. A fair user can take more than strictly necessary (as determined by judicial hindsight) to accomplish the user’s transformative purpose. More than a “fleeting evocation of an original” may be needed for the transformative use to make its point. *Elsmere Music, Inc. v. Nat’l Broad. Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980) (per curiam). Even when the second comer goes to great lengths to copy protectable elements, taking more of a work “than was minimally necessary to conjure it up” does not necessarily tip against fair use. *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 116 (2d Cir. 1998).

The District Court looked to the *Leibovitz* decision because it recognized that case's essential similarity to this one: once a second comer has made an artistic decision to transform some expression from a specific existing work, the copying of small details can be important to that artist *as an artist*. Courts should not force artists to do different work than they are capable of where the overall work they produce has a new meaning and message. To require the second artist to use only the absolute minimum that courts might someday deem necessary would force artists to be preoccupied with second-guessing the unknowable minutiae of justification. The choice is, in fact, between the judicial judgment of artistic choices and artistic judgment of artistic choices, and as between those, *Bleistein* counsels the latter. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."); *Mattel*, 353 F.3d at 802 n.7 ("We do not make judgments about what objects an artist should choose for their art.").

Once transformativeness has been established, courts should be guided by the artist's choices about what is a reasonable amount, especially where the copying is

of only a portion of the original work rather than a full copy.⁵ See Michael C. Donaldson, *Refuge from the Storm: A Fair Use Safe Harbor for Non-Fiction Works*, 59 J. Copyright Soc’y U.S.A. 477, 489-90 (2012) (a court’s fair use determination “often explicitly defers to the artist to determine how much is needed” and “the real test is whether the creator of the new work only uses what is reasonably appropriate to illustrate or support the point being made in the new work”). This flexibility is particularly sensible given that the details of the images and the placement of characters on the page are unlikely to affect either whether there is a transformative meaning or a substantial market effect. Indeed, DSE had never seen *Boldly* when it asserted that the book infringed its copyright. Appellees Br. at 12.

Here, particularly because *Boldly* uses no Dr. Seuss characters, the meticulous copying of certain settings (which themselves constitute only a small number of the total Seuss images) was reasonable in view of its purpose of using the Seussian and

⁵ The “amount taken” analysis may differ when the transformation at issue involves a pure transformation in purpose, without a change in the content. For example, entire images at a lower level of definition may be acceptable for image search, *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); and amounts exceeding the length of the average news story may be unacceptable for TV news, *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018). Judges need not be guided by artistic choices in “big data” cases. But in cases where new art has been created, creators’ aesthetic decisions should be given attention and respect.

Trekkian worlds to interpret each other. Deference to Appellees' artistic decisions allows the court to avoid passing judgment on the artistic merits of the copying.

III. The District Court properly held that DSE failed to show a likelihood of harm to the traditional, reasonable, or likely markets for its works.

The text of the Copyright Act and this Court's precedents support placing the burden on the plaintiff copyright owner to show a likelihood of market harm when a defendant raises a fair use defense. Where the second comer has transformed some expression from an existing work targeted at a different audience, the existence of an extensive licensing regime and the original work's prominence in a seasonal market do not suffice to carry that burden. The District Court properly concluded that the market harm factor favored neither party.

A. Consistent with this Court's precedents, the copyright owner bears the burden of showing a likelihood of market harm.

Although the Supreme Court in *Campbell*, 510 U.S. at 590, characterized fair use as an "affirmative defense" and said the burden of proof was on defendants who raise fair use defenses, this Court in *Lenz* recognized that this characterization was a "misnomer." 801 F.3d at 1133. It was thus consistent with Ninth Circuit precedent for the District Court below to place the burden on DSE to demonstrate a likelihood of harm to the market for its works. ER 25.

In *Lenz*, the Ninth Circuit relied on the text of the fair use provision, case law, and relevant policies to support the view that fair use is a defense, but not an affirmative defense. *Lenz*, 801 F.3d at 1132-33.⁶ As that decision pointedly observed: “Fair use is not just excused by the law; it is wholly authorized by the law.” *Id.* at 1132.

The court in *Lenz* more specifically concluded that unless Universal Music considered fair use, it could not rightfully send a takedown notice to YouTube demanding it take down Lenz’s video of her son dancing to a Prince song. *Id.* at 1133. The statute explicitly requires copyright owners to affirm that they have a “good faith belief” that a particular unlicensed use of a protected work is “not authorized by the copyright owner, its agent, or the law” before sending a takedown notice. *Id.* at 1132 (quoting 17 U.S.C. § 512(c)(3)(A)(v)). Because fair uses are “authorized by the law,” Universal could send a takedown notice in good faith only if it decided that Lenz’s use was unfair. *Id.* at 1133.

The textual argument supporting the proposition that fair use is a defense, but not an affirmative defense, is simple and straightforward. Section 106, which sets forth the exclusive rights granted to authors, states that all exclusive rights are “[s]ubject to sections 107 through 122.” 17 U.S.C. § 106. That is, the exclusive rights

⁶ The *Lenz* decision cited approvingly to a scholarly article explaining why fair use is a defense, but not an affirmative defense. See Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 Wash. L. Rev. 685 (2015), cited in *Lenz*, 801 F.3d at 1133.

set forth in § 106 do not extend to any acts that fall within the limitations or exceptions authorized by these sections. Section 107, moreover, plainly states that “the fair use of a copyrighted work . . . is not an infringement of copyright,” 17 U.S.C. § 107, and specifically states that this is so “[n]otwithstanding the provisions of sections 106 and 106A.” *Id.* The Ninth Circuit also invoked 17 U.S.C. § 108(f)(4), which characterizes fair use as a “right,” as further statutory evidence supporting its view that fair uses are “authorized by the law” and must be considered before copyright owners can conclude that any particular use constitutes an infringement. *Lenz*, 801 F.3d at 1132; *see also id.* at 1133 (quoting *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996) for the proposition that because fair use is not infringement, the better view is that fair use is a right); *Suntrust Bank*, 268 F.3d at 1260 n.3 (11th Cir. 2001) (opining that under the 1976 Act fair use should be considered an affirmative right).

As with a merger defense, the defendant may initially need to raise fair use as a defense to an infringement charge, but the burden of persuasion that a challenged use is infringing and not based on merged expression or not a fair use should remain on the plaintiff because these defenses undermine the plaintiff’s prima facie case. *See, e.g., Ho v. Taflove*, 648 F.3d 489, 499 (7th Cir. 2011) (plaintiff failed to show defendant copied protectable expression); *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 36 (1st Cir. 2001) (plaintiff bears “heavy burden” of proof when

merger defense raised). *See also* Loren, *supra*, at 697-98 (citing *Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005) (“Absent some reason to believe that Congress intended otherwise, . . . the burden of persuasion lies where it usually falls, upon the party seeking relief.”)). The Ninth Circuit in *Lenz* distinguished fair use from misuse and similar types of affirmative defenses because those defenses excuse what would otherwise be infringing acts. *Lenz*, 801 F.3d at 1132-33. By contrast, fair use is only “affirmative” in the sense that the defendant must raise it as a procedural matter. *Id.*

While there is no ambiguity in the text of § 107 that would require looking into the legislative history of that provision, this history nevertheless supports the interpretation of fair use as a defense, but not an affirmative defense. The Register of Copyright’s 1965 Supplementary Report on the copyright reform bills then pending reported that copyright industry groups had proposed that the burden of persuasion in fair use cases should be put on defendants. *See* Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill at 28 (Comm. Print 1965). The Register rejected that idea, saying that this would constitute “a radical change in the meaning and effect of the doctrine of fair use.” *Id.* Two years later, a House Report stated the committee’s view that “any special statutory provision placing the burden of proving fair use on one side or the other would be unfair and undesirable.” H.R. Rep. No. 90-83, at 37 (1967).

Treating fair use as a defense, but not an affirmative defense, is also appropriate given the very important role that fair use plays in providing breathing space for new creations that build upon parts of pre-existing works. *Campbell*, 510 U.S. at 579. Allowing subsequent creators to engage in transformative uses of some expression from those works advances the constitutional purpose of copyright, *id.* at 575-77, and maintains copyright law's consistency with the First Amendment's guarantee of freedom of expression. *See Eldred*, 537 U.S. at 219-20; *see also* Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 30 *Cardozo L. Rev.* 1781, 1795-98 (2010) (arguing that the burden of proof should lie with copyright owners when defendants raise fair use defenses).

Finally, placing the burden on plaintiffs to show market harm also makes sense because they are in a position to have better information about harm caused by the challenged use than the defendants can have. *See Loren, supra*, at 691, 707. "Requiring the defendant to elicit this information through laborious discovery when it is at the plaintiff's disposal would only prolong litigation and encourage evasion of the discovery process." Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 *U. Miami L. Rev.* 233, 323 (1988) (also noting that placing the burden on the defendant would effectively require proving a negative).

B. Showing a likelihood of harm requires more than evidence of an extensive licensing regime or a favorable market position.

Presumptions of market harm are unwarranted in cases involving transformative uses, even commercial ones. *See Campbell*, 510 U.S. at 591 (“No ‘presumption’ or inference of market harm . . . is applicable to a case involving something beyond mere duplication for commercial purposes.”); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1181 (9th Cir. 2012) (refraining from presuming market harm from use of unpublished photos). This is true even when the original work is widely popular and heavily merchandised. With the record before it, the District Court’s evaluation of evidence was careful, and its conclusion that the fourth factor favored neither party was proper. By refusing to recast an extensive licensing regime and *Go!*’s seasonal best-seller status as a comprehensive bar against unlicensed transformative uses, the court preserved fair use’s role in “facilitat[ing] a class of uses that would not be possible if users always had to negotiate with copyright proprietors.” *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 759 (7th Cir. 2014).

The market harm inquiry considers “any impact on ‘traditional, reasonable, or likely to be developed markets.’” *Seltzer*, 725 F.3d at 1179 (quoting *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 81 (2d Cir. 1997)). *See also Campbell*, 510 U.S. at 592 (“The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.”).

Thus, courts have found that the fourth factor favors the second comer when no evidence suggests the copyright owner “would ever develop or license secondary uses of his work in the vein” of the second comer’s work. *Cariou*, 714 F.3d at 709.

DSE tries to pull *Boldly* into *Go!*’s orbit by pointing to its “robust licensing program.” *See, e.g.*, Opening Br. at 3-4 (cataloging licensed Dr. Seuss derivative works and merchandise). Licensing and merchandising of *Go!* and other Seuss properties are undeniably extensive, including children’s books, television shows and movies, accessories and footwear, even home furnishings. ER 673-76. This licensing also includes collaborations with other rightsholders, such as a television show with “muppetized” characters, a line of children’s clothing, figurines, and a free-to-play video game for mobile phones. ER 32. However, while extensive, DSE’s putative “mash-up type collaborations with other copyright owners,” Opening Br. at 20, such as Dr. Seuss-themed Chuck Taylor shoes or “co-branded collegiate bibs,” ER 676, are quite distinct from works like *Boldly*. With the possible, and very marginal, exception of *Grinch Panda Pop*,⁷ none of these collaborations involve combining characters from distinct worlds. A Funko-style or Muppet-style Dr. Seuss character is

⁷ *Panda Pop* is a free-to-play “bubble shooter” mobile game. *Panda Pop*, Jam City, <https://perma.cc/ECL6-S5S> (last visited Oct. 9, 2019). It does not combine characters in any meaningful sense: putting the Grinch in a videogame does not comment on or affect the meaning of the other game characters. *See Panda Pop, Tutorial: The Grinch’s First Race Event*, YouTube (Dec. 4, 2017), <https://youtu.be/1fDcQF2R080>.

not a “mashup,” but rather a Seuss character presented in a different artistic style. Nor is there any record of DSE licensing a literary mash-up like *Boldly*. Simply put, current licensing does not use Seussian imagery as an interpretive tool to understand a different cultural artifact.⁸

Treating a pair of shoes, a video game, and *Boldly* as if they perform the same function and serve the same, undifferentiated market would convert an extensive licensing and merchandising regime into a universal one that controls even transformative works. As this Court has recognized, “[i]t is not in the public’s interest to allow [the copyright owner] complete control over the kinds of artistic works that use [the original] as a reference for criticism and comment.” *Mattel*, 353 F.3d at 806. Courts have thus been careful not to treat the existence of a licensing market as foreclosing fair use. *See Bill Graham Archives*, 448 F.3d at 615 (“a publisher’s willingness to pay license fees for reproduction of images does not establish that the publisher may not, in the alternative, make fair use of those images”). *See also* Rebecca Tushnet, *All of This Has Happened Before and All of This Will Happen Again: In-*

⁸ As one Seuss critic explains, for example, “the ‘Wubbulous’ books [are] ‘blank parody’, a ‘neutral practice of [. . .] mimicry, without any of parody’s ulterior motives, amputated of the satiric impulse.’” Philip Nel, *The Disneyfication of Dr Seuss: Faithful to Profit, One Hundred Percent?*, 17 *Cultural Stud.* 579, 598 (2003) (citation omitted).

novation in Copyright Licensing, 29 Berkeley Tech. L.J. 1447, 1487 (2014) (“Current doctrine correctly recognizes that copyright owners’ willingness to license, control, or monetize a use does not mean that the use is unfair if unauthorized.”).

Preserving room for fair use to operate even in the face of an extensive licensing regime is particularly important for the category of works that lie near but outside the copyright owner’s traditional, reasonable, and likely-to-be-developed markets. For example, while DSE licenses stage productions, it is unlikely to ever license the adult-themed play, centered on the *Grinch* character Cindy-Lou Who, at issue in *Lombardo*. In its market harm analysis there, the court accepted as true that DSE was developing *Grinch* derivatives that included the same character and involved adult themes. Nonetheless, the court held that the fourth factor weighed strongly in the second comer’s favor because DSE “makes no allegations that it intends to authorize a parody containing references to bestiality, drug use, and other distinctly ‘un-Seussian’ topics.” *Lombardo*, 279 F. Supp. 3d at 513.

Similarly, Harper Festival publishes the best-selling children’s book *Goodnight Moon* by Margaret Wise Brown and Clement Hurd. In addition to the original book, there are *Goodnight Moon* stuffed animals, puppets, clothing, board games,

videos, and more.⁹ However, that extensive licensing regime does not give Harper Festival the right to lay claim to, or censor, Julia Yu’s mash-up *Goodnight Dune*, an online publication that depicts characters, places, and objects from Frank Herbert’s 1965 science fiction classic *Dune* in the literary and artistic style of the original children’s book.¹⁰ The transformative work lies beyond the licensing regime. So, too, here. For all of its licensed derivatives, DSE offers nothing like *Boldly*.

Moreover, the record includes evidence that works like *Boldly* are disfavored, or perhaps even prohibited. DSE polices its brand integrity in part through a proprietary “Style Guide, . . . the packet of materials that a partner under license would receive to help them start designing products for Dr. Seuss[.]” ER 32 n.8.¹¹ The Style Guide’s “Do’s and Don’ts” includes two relevant limitations on licensees’ use of the works. First, “Plaintiff instructs its licensees not to show characters with items ‘not

⁹ See *United Media Begins “Goodnight Moon” Licensing*, Gifts & Decorative Accessories (Feb. 18, 2010), <https://perma.cc/3WQA-HLUJ>. All of the examples given above may be found on Amazon.com.

¹⁰ Julia Yu, *Goodnight Dune*, <http://goodnightdune.com/>.

¹¹ Because DSE filed the Style Guide under seal both here and in the pleadings below, we rely on the description of the Style Guide in the District Court’s decision and the parties’ pleadings. To the extent that DSE suggests it may break its own rules, fair use exists precisely so transformative uses do not depend on the magnanimity of the copyright owner, particularly when they do not harm derivative markets the copyright owner is *likely* to develop.

from [the Seuss] world’ and not to ‘use Seuss characters with third party’s characters.” *Id.* (quotations and alterations in the original). Second, the Guide instructs licensees not to “make up Seuss-like rhymes.” *Id.* As the District Court noted, *Boldly* breaks these rules. *Id.* Other decisions similarly have looked to licensing conditions or restrictions in determining whether a secondary use fell within or harmed the copyright owner’s markets for licensed derivatives. *See Suntrust Bank*, 268 F.3d at 1282 (Marcus, J., concurring) (noting that the secondary work contravened “certain editorial restrictions on the authors of its licensed derivatives”). Those conditions also may help identify market niches the copyright owner is unlikely to fill. *See Twin Peaks Prods., Inc. v. Publications Int’l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993) (“In the cases where we have found the fourth factor to favor a defendant, the defendant’s work filled a market niche that the plaintiff simply had no interest in occupying.”).

Just as an extensive licensing regime does not suffice to show that a secondary use falls within the penumbra of likely derivatives, a prominent position in a market the secondary user seeks to enter does not suffice to show a likelihood of market harm. Instead, the copyright owner must show that the secondary use would serve as an “effective competing substitute” for the original work or likely derivatives in relevant markets. *Perfect 10*, 508 F.3d at 1168 (holding that the fourth factor favored

neither party when the potential harm to the relevant markets “remains hypothetical”). The market harm analysis requires a careful “balance . . . between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied.” *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d. Cir. 1981); *see also Bill Graham Archives*, 448 F.3d at 613. Assigning dispositive weight to a copyright owner’s licensing regime or best-seller status is inconsistent with that careful balancing.

Both at summary judgment and on appeal, DSE’s market harm argument relies chiefly on *Go!*’s licensing program, its perennial best-seller status in the graduation gift market, and Appellees’ interest in entering that market. Opening Br. at 51-52; DER 69-73. A prominent position in a market is not enough to enjoin publication of a transformative work seeking access to that market, particularly when much more relevant evidence is available.¹² This would be akin to saying that Acuff-Rose was entitled to a presumption of market harm if both Orbison’s “Oh, Pretty Woman” and 2 Live Crew’s “Pretty Woman” were Christmas songs. Similarly, the directive to consider potential impact should the accused use become widespread, *Campbell*, 510

¹² For example, the transcript of the summary judgment hearing discusses weekly sales figures that might have shown whether previous unlicensed books using *Go!*’s protectable elements impacted sales of the original. DER 82-83.

U.S. at 590, does not entitle a copyright owner to a presumption of harm. The outcome in *Campbell* would be no different if the Court hypothesized 2 Live Crew’s transformative use joined by a variety of other parodies. In all cases, there must be evidence to show a likelihood of harm. Given its absence here, the District Court properly concluded that the fourth factor favored neither party, particularly in view of its conclusion that *Boldly*’s target audience—adult *Star Trek* fans who already have an appreciation for *Go!*—is distinct from the market for *Go!* or its likely derivatives. Treating a leading market position or extensive licensing program as sufficient evidence of market harm on its own would set a troubling precedent to keep transformative works out of the marketplace and give today’s prominent speakers more rights than less well-recognized speakers, contrary to the constitutional purpose of copyright. *See Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523-24 (9th Cir. 1993) (“[A]n attempt to monopolize the market by making it impossible for others to compete runs counter to the statutory purpose of promoting creative expression and cannot constitute a strong equitable basis for resisting the invocation of the fair use doctrine.”).

CONCLUSION

The District Court properly analyzed the works and evidence before it, recognizing the multiplicity of ways in which a new work can be transformative and the appropriate burden of providing evidence of harm. This Court should affirm the District Court's grant of summary judgment.

Dated: October 11, 2019

Respectfully submitted,

/s/ Erik Stallman

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