

Robert W. Clarida
Reitler Kailas & Rosenblatt LLC
885 Third Avenue
New York, New York 10022
(212) 209-3044

Julie A. Ahrens
Stanford Law School
Center for Internet & Society
559 Nathan Abbott Way
Stanford, CA 94305-8610

Donn Zaretsky, Esq.
John Silberman Associates, PC
145 East 57th Street
New York, New York 10022

Attorneys for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ROBERT J. LANG, NOBORU MIYAJIMA, MANUEL
SIRGO, NICOLA BANDONI, TOSHIKAZU
KAWASAKI, and JASON KU,

Plaintiffs,

Case No.: 11 CV 8821
(BSJ)(AJP)

-against-

SARAH MORRIS,

Defendant.

-----X

**DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

I. INTRODUCTION1

II. COUNTERSTATEMENT OF THE UNDISPUTED, MATERIAL FACTS.....3

 A. Plaintiffs’ evidence confirms that many of their claims fall outside of the three-year statute of limitations.....4

 B. Plaintiffs fail to present evidence rebutting Morris’s fair use defense5

 1. Plaintiffs’ evidence confirms that Morris’s paintings are transformative5

 2. Plaintiffs’ allegations of bad faith are not supported by record evidence8

 3. Plaintiffs present no evidence of market harm11

III. ARGUMENT11

 A. Plaintiffs cannot establish ownership of the copyright in thirteen of the crease patterns in this case.....11

 B. Plaintiffs cannot overcome Morris’s statute of limitations defense.....12

 C. Morris’s paintings make fair use of Plaintiffs’ crease patterns.....13

 1. Factor one.....13

 2. Factor two18

 3. Factor three19

 4. Factor four.....21

IV. CONCLUSION.....24

TABLE OF AUTHORITIES

CASES

Abend v. MCA, Inc., 863 F.2d 1465 (9th Cir. 1988)..... 21

Auscape Intern. v. National Geographic Soc., 409 F. Supp. 2d 235 (S.D.N.Y. 2004)..... 12

Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006) *passim*

Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006) *passim*

Bourne Co. v. Twentieth Century Fox Film Corp., 602 F.Supp.2d 499 (S.D.N.Y. 2009)..... 16

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)..... *passim*

Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc., 150 F.3d 132 (2d Cir. 1998)..... 15, 17

Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991)..... 11

Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) 20

In re Illusions Holdings Inc., 189 F.R.D. 316 (S.D.N.Y. 1999)..... 7

Italian Books Corp. v. American Broad. Cos., Inc., 458 F. Supp. 65 (S.D.N.Y. 1978) 22

Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003) 19

Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998)..... 17

Lennon v. Premise Media Corp., 556 F. Supp. 2d 310 (S.D.N.Y. 2008) 20, 23

Lexington Ins. Co. v. Rounds, 349 F. Supp. 2d 861 (D.Vt. 2004) 7

Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003)..... 14

MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1981)..... 21

MiTek Holdings, Inc. v. Arce Engineering Co., Inc., 89 F.3d 1548 (11th Cir. 1996)..... 18

NXIVM Corp. v. The Ross Institute, 364 F.3d 471 (2d Cir. 2004)..... 3, 17

Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal., 475 U.S. 1 (1986)..... 21

Red Lion Broad. v. FCC, 395 U.S. 367 (1969)..... 21

Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992) 14, 22

Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010) 21

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984)..... 17

Stewart v. Abend, 495 U.S. 207 (1990)..... 21

Swatch Group Management Services Ltd. v. Bloomberg L.P., __ F. Supp. 2d __, 2012 WL 1759944 (S.D.N.Y. May 17, 2012)..... 17

Video-Cinema Films, Inc. v. CNN, Inc., 2001 WL 1518264 (S.D.N.Y., Nov. 28, 2001) 18, 20, 22

Warner Bros. Entm’t Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) 16

Wright v. Warner Books, Inc., 953 F.2d 731 (2d Cir. 1991)..... 21

STATUTES

17 U.S.C. § 107..... 13, 18, 19, 21

OTHER AUTHORITIES

Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990)..... 15

Defendant Sarah Morris (“Morris”) respectfully submits this memorandum of law in opposition to Plaintiffs’ motion for summary judgment.

I. INTRODUCTION

Defendant Sarah Morris created a series of paintings, themselves part of a broader body of work about Beijing, that reference and comment on the practice of origami. These paintings use Plaintiffs’ origami crease patterns as their starting point. In her own motion for summary judgment, Morris provided detailed evidence establishing the transformative meaning of these works and showing that her work caused Plaintiffs no market harm. *See* Memorandum of Law in Support of Defendant’s Motion for Summary Judgment (Docket #34) (“Def. MSJ Br.”) at 6-10, 17-25. Thus, under the test established by *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) and *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006), Morris’s work makes fair use of Plaintiffs’ crease patterns and their claims of copyright infringement must fail.

Plaintiffs’ motion for summary judgment is directed at overcoming this fair use defense. The motion misapplies the law and misstates the facts. Instead of applying the well-established principles of *Campbell* and *Blanch*, Plaintiffs invent a variety of non-existent requirements for fair use. They variously argue that: (1) the accused works are “presumptively unfair” because they are commercial works; (2) Morris’s paintings cannot be fair use because they lack “heft”; and (3) Morris’s use of the crease patterns cannot be fair because it was not “necessary.” None of these are relevant considerations under settled law. First, the suggestion that commercial works are “presumptively unfair” has been rejected by the Supreme Court. *See Campbell*, 510 U.S. at 584-85. Second, the Court is not required to be an art critic and decide if Morris’s work has sufficient “heft” – the question is whether her work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *See id.* at 579. Finally, Morris does not have to show that her use of the crease patterns was “necessary,” only that it was reasonable in relation to her artistic purpose. *See Campbell*, 510 U.S. at 586; *Blanch*, 467 F. 3d at 257.

Plaintiffs fare no better on the facts. Much of their brief is devoted to claims that Morris acted in bad faith. Without even citing evidence, Plaintiffs accuse Morris of lying to the public. In reality, Morris always described her “Origami” paintings as being based on “found” patterns. Plaintiffs also ask the Court to infer bad faith from the fact that Morris never requested a license, even though this inference is rejected under well-settled authority. *See Blanch*, 467 F. 3d at 256. On the crucial issue of meaning and transformation, Plaintiffs offer only conclusory assertions and inadmissible opinion evidence from Plaintiff Lang. For example, Plaintiffs state that Morris’s paintings have “no meaning” – thereby ignoring Morris’s detailed and unrebutted evidence regarding her artistic purpose. On the issue of market harm, Plaintiffs claim that Morris has “stolen” their “opportunity to enter the market with colorized versions of their own works.” In reality, all three Plaintiffs admitted that they have suffered no market harm whatsoever. The undisputed facts show that all fair use factors favor Morris. Indeed, the artistic transformation embodied by her paintings is precisely the sort of creative activity that is protected by the Copyright Act.

Plaintiffs’ motion for summary judgment fails for two additional reasons. First, Plaintiffs have not proved ownership of the copyrights in the 13 crease patterns published by AK Peters Ltd. in the book *Origami Design Secrets: Mathematical Methods for an Ancient Art*. As Morris explains in her Supplemental Memorandum of Law in Support of Motion for Summary Judgment (Docket #63) (“Def. Supp. Memo.”), Lang admitted he signed a copyright agreement with AK Peters vesting copyright ownership in AK Peters and AK Peters is the registered copyright holder in that book. The newly-created, so called “Assignment Agreement” between Lang and AK Peter’s successor in interest, Taylor and Francis, does not confer standing for Lang to pursue infringement claims for the crease patterns published in the book. Because Plaintiffs cannot prove Plaintiff Lang owns the copyright in the book, Counts 2 and 4 through 15 of Plaintiffs’ First Amended Complaint must be dismissed.¹ *See* Def. Supp. Memo. at 1-5.

¹ Defendant’s motion for summary judgment and this opposition refer to the counts in Plaintiffs’ First Amended Complaint (“FAC”) (Docket #27-1). By an order dated July 2, 2012 (Docket

In addition, twenty counts of Plaintiffs' First Amended Complaint fail because they are barred by the statute of limitations. Plaintiffs allege Morris infringed 25 crease patterns, but for 20 crease patterns there is no evidence of any allegedly infringing activity that occurred in the three years before Plaintiffs filed their Complaint. *See* Def. MSJ Br. at 3-4, 12-16. In their motion for summary judgment, Plaintiffs do not present any evidence of infringement for these crease patterns within the relevant time period; indeed Plaintiffs' evidence confirms that the allegedly infringing activity occurred outside the limitations period. Thus Counts 2 through 19, 21, and 24 of the First Amended Complaint are barred by the statute of limitations and must be dismissed.

II. COUNTERSTATEMENT OF THE UNDISPUTED, MATERIAL FACTS

As an initial matter, Plaintiffs failed to comply with the requirements of this Court's Local Rules because they omit most of their factual allegations from their Rule 56.1 Statement.² Plaintiffs' motion—together with most of their factual assertions—is directed to overcoming a fair use defense. Yet Plaintiffs submit a Rule 56.1 Statement consisting of only the barest allegations of ownership and copying; it includes no facts regarding the fair use factors. Such facts are plainly not sufficient to overcome a defense of fair use. *See NXIVM Corp. v. The Ross Institute*, 364 F.3d 471, 476 (2d Cir. 2004) (a "prima facie showing of infringement" is defeated by fair use). Plaintiffs' procedural failure here is symptomatic of a deeper flaw: the record evidence does not support their claims.

#48), Magistrate Judge Andrew J. Peck granted Plaintiffs' motion to amend their complaint so the FAC is the operative complaint in this action.

² This alone is grounds to deny Plaintiffs' motion. *See* Local Rule 56.1(a) ("Upon any motion for summary judgment . . . [the movant must file] a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion.").

A. Plaintiffs' evidence confirms that many of their claims fall outside of the three-year statute of limitations.

In her own motion for summary judgment, Morris presented evidence showing that, for many counts of the First Amended Complaint, any acts of alleged infringement occurred more than three years before Plaintiffs brought this action. *See* Def. MSJ Br. at 3-4; Declaration of Julie Ahrens ("Ahrens Dec."), Ex. A. Morris created her "Origami" paintings from December 2006 through April 2009. *See* Declaration of Sarah Morris, dated June 28, 2012 (Docket #53) ("Morris 6/28/12 Dec.") ¶¶ 8, 19. Only five works at issue in this case were created and/or sold after December 5, 2008 (and thus more than three years prior to the filing of this action on December 5, 2011).³

Plaintiffs submit no evidence to the contrary. With respect to nine counts, Plaintiffs present evidence of purported copyright violations that occurred in 2007. *See* Pls. Rule 56.1 Statement ¶¶ 26, 54, 61, 74, 81, 88, 102, 109, 116 (regarding FAC Counts 5, 12-13, 16-17, 19 and 22-24). For one count, they submit evidence of a purported copyright violation in 2008. *Id.* at ¶ 19 (regarding FAC Count 3). For two counts, they submit evidence of creation in 2009. *Id.* at ¶¶ 95, 123 (regarding FAC Counts 20 and 25). For other claims, Plaintiffs submit no evidence at all relating to the date of the alleged infringement. Thus, Plaintiffs have submitted evidence of infringement within the limitations period for only Counts 20 and 25 of their First Amended Complaint.

³ Since the filing of Defendant's Motion for Summary Judgment, Defendant received payment of an invoice dated July 30, 2012 reflecting an additional sale of two "Rockhopper [Origami]" prints in Germany, and produced this invoice to Plaintiffs' counsel as document number D SUPP 00004. In addition, two of Morris's accused works, "Angel [Origami]" and a 289 cm "Rockhopper [Origami]" were created after December 5, 2008 but have not been sold. *See* Morris 6/28/12 Dec., Ex. A. An updated table showing each of Plaintiffs' titles at issue and the creation and sale dates for all allegedly infringing works by Morris is attached as Exhibit A to the accompanying Declaration of Julie Ahrens. As reflected in this table, the total number of Plaintiffs' time-barred counts is now 20, rather than 21 as asserted in Morris's Motion for Summary Judgment. Five counts involve Morris's works that were either created or sold after December 5, 2008: FAC Count 1 (regarding alleged infringement of Lang's "Cooper's Hawk"); FAC Count 20 (regarding Miyajima's "Penguin"); FAC Count 22 (regarding Miyajima's "Swan") FAC Count 23 (regarding Miyajima's "Weasel"); and FAC Count 25 (regarding Ku's "Harpy").

B. Plaintiffs fail to present evidence rebutting Morris’s fair use defense.

1. Plaintiffs’ evidence confirms that Morris’s paintings are transformative.

In her own motion for summary judgment, Morris cited deposition testimony showing that Plaintiffs’ crease patterns served primarily functional and instructional purposes. *See* Def. MSJ Br. at 6-7. Plaintiffs’ motion and supporting declarations present an identical picture, listing “several purposes” of crease patterns with the vast majority of these being functional and educational. *See* Memorandum of Law in Support of Plaintiffs’ Motion for Summary Judgment (Docket #46) (“Pls. MSJ Br.”) at 4-5. At the same time, Plaintiffs present no evidence rebutting Morris’s evidence showing the transformative artistic meaning behind her paintings.

Plaintiffs present three functional and instructional purposes of crease patterns. *First*, they confirm that a crease pattern “acts as a kind of mathematical ‘proof’ to show that all of the folds fit on one (usually square) piece of paper.” *Id.* at 4; *see also* Declaration of Noboru Miyajima (Docket #41) (“Miyajima Dec.”), ¶ 6; Declaration of Jason Ku (Docket #40) (“Ku Dec.”), ¶ 8. In Lang’s words, a crease pattern is a “proof certificate” that shows “that a folded object really is what it claims to be.” Declaration of Robert Lang (Docket #44) (“Lang Dec.”), ¶ 29iii.

Second, Plaintiffs confirm that crease patterns are a “guide for how to fold an object” and thus are a form of written instruction. Lang Dec. ¶ 29ii; *see also* Ku Dec. ¶ 8; Miyajima Dec. ¶ 6. Plaintiffs allege that it requires great skill to use crease patterns as folding instructions, but this does not change the fact that they are a form of instruction. *See id.*

Third, Plaintiffs confirm that crease patterns are instructive about the structure of the folded origami model. *See* Lang Dec. ¶ 29. Indeed, at his deposition, Lang repeatedly explained the “meaning” of his crease patterns purely in terms their role as illustrations of structural concepts. *See* Def. Rule 56.1 Statement ¶¶ 44-56.

In addition to the multiplicity of functional and educational purposes, Plaintiffs claim that crease patterns serve a decorative or artistic purpose (Pls. MSJ Br. at 19), and argue that they

find crease patterns to be “elegant.” *Id.* at 5. But Plaintiffs admit they liken the elegance of their crease patterns to the elegance of mathematical equations. *See* Deposition Transcript of Robert Lang (“Lang Tr.”), attached as Exhibit C to Declaration of Robert Clarida, dated June 29, 2012 (Docket #54) (“Clarida 6/29/12 Dec.”), at 61:13-62:3; Deposition Transcript of Jason Ku (“Ku Tr.”), attached as Exhibit D to Clarida 6/29/12 Dec., at 49:14-20. Indeed, Lang has explained that he sees origami as being “like math” because it’s “just out there waiting to be discovered.” Clarida 6/29/12 Dec., Ex. G at 9; *see also* Lang Tr. 33:10-16.

Plaintiffs also present an exaggerated factual account of the role of crease patterns as stand-alone art. *See* Pls. MSJ Br. at 19-20. For example, Lang claims that, together with sculptor Kevin Box, he “created a limited series of bison origami sculptures and crease patterns that sell for \$120,000 each.” Pls. MSJ Br. at 3 (citing Lang Dec. ¶ 22). Tellingly, Lang submits no documentary support for this claim. The documents reveal that Lang and Box advertised a *monument-sized* bison sculpture for as much \$150,000 dollars with the accompanying crease pattern available at \$800. Ahrens Dec., Ex. B. The only document Lang or Box produced regarding an actual sale of a monument-sized bison origami sculpture does not even mention the crease pattern. Ahrens Dec., Ex. C. Similarly, Plaintiffs argue that crease patterns can be “purely decorative” and serve a significant purpose that is divorced from the folded origami model. *See* Pls. MSJ Br. at 20. They assert “one of the best examples” of this is Lang’s installation of crease patterns on a Santa Monica sidewalk. *See id.* But Plaintiffs neglect to include Lang’s testimony describing those crease patterns as part of a larger installation that includes bronze sculptures of the folded origami model “immediately adjacent on the sidewalk.” Lang Dec. ¶¶ 29vi and 29vii; Lang Tr. at 265:9-266:14.

Morris does not deny that crease patterns can have aesthetic value for origami practitioners, but the evidence is clear that, in origami, the folded model is primary – and that the crease pattern exists as an instructional and educational guide to it. This is the fundamental purpose of crease patterns. This is why crease patterns are presented alongside the folded model itself (and in printed publications, alongside a photograph of a folded model). *See* Lang Tr. 32:8-

11 (Lang not aware of a single origami book that shows a crease pattern not in conjunction with the finished model); *see also* Ku Tr. at 37:7-13; Deposition Transcript of Noboru Miyajima (“Miyajima Tr.”), annexed as Exhibit B to Clarida 6/29/12 Dec., at 77:13-16.

Even admitting Plaintiffs’ crease patterns have an aesthetic or artistic value, there is no denying that Morris’s purpose in using the crease patterns is radically different than Plaintiffs’ purpose. Plaintiffs present no evidence to rebut Morris’s account of transformative meaning and purpose. Instead, Plaintiffs offer irrelevant value judgments and inadmissible opinion testimony. *See, e.g.*, Pls. MSJ Br. at 8 (asserting that Morris does not fit the “image of an artist standing, anguished, in front of the canvas”). Plaintiffs rely on deposition testimony in which Lang purports to offer evidence regarding “the biology of the way our eye works and the way our mental wiring goes together.” *Id.* at 16. Based on this claimed expertise, Lang testified, “our eyes are drawn to the edges” in paintings and that “other aspects, changes of scale, changes of color, these are things we are less sensitive to.” *Id.* This testimony is plainly inadmissible. First, Lang was not disclosed as an expert as required by Federal Rule of Civil Procedure 26(a)(2). *See In re Illusions Holdings Inc.*, 189 F.R.D. 316 (S.D.N.Y. 1999). Second, even if Lang had been disclosed as an expert, he is neither a biologist nor an art critic and is unqualified to offer expert testimony about how the general public perceives paintings. *See, e.g., Lexington Ins. Co. v. Rounds*, 349 F. Supp. 2d 861, 870 (D.Vt. 2004) (holding that since an expert “may not offer an opinion outside of his or her area of expertise” an engineer was not qualified “to offer an expert opinion on how someone would be ‘inclined’ to behave as a lay person”).

The only document Plaintiffs cite regarding transformative meaning is an email concerning a painting not even at issue in this case. In that message, Morris instructs an assistant to add some additional horizontal lines to an “Origami” painting titled *Rose*. Pls. MSJ Br. at 17 (citing Jacobson Dec., Ex. T). Based on this twelve word email, Plaintiffs conclude that all of Morris’s changes to crease patterns “had no meaning.” *Id.* In reaching this conclusion, Plaintiffs ignore the voluminous and unrebutted evidence regarding the context and interpretation of Morris’s work and her significant changes to scale, geometry, format, and color. For example,

Plaintiffs ignore the fact that Morris spent months developing her color palette based upon investigations and found samples from Beijing. *See* Morris 6/28/12 Dec. ¶ 17; *see also* Sarah Morris Deposition Transcript (“Morris Tr.”), attached as Exhibit A to the Clarida 6/29/12 Dec., at 78:6-97:23 (describing her transformative project in detail). And, most important, Plaintiffs ignore Morris’s detailed testimony regarding her transformative meaning and commentary. *See* Morris 6/28/12 Dec. ¶¶ 12-18; Morris Tr. 78:6-97:23.

In her own motion for summary judgment, Morris presents declaration and deposition testimony explaining how her art referenced and commented on origami. *See* Def. MSJ Br. at 8-9. Morris explained that her “Origami” paintings are part of a broader body of work – including a feature-length film and her “Rings” paintings – inspired by Beijing that commented on the mixture of hypercapitalism and extreme authoritarianism that existed in China at the time of the 2008 Olympics. *See* Morris 6/28/12 Dec. ¶ 9. Inspired by the use of origami as a symbol (especially in the Ridley Scott movie *Blade Runner*), Morris utilized and commented on origami as a harbinger of change and a potentially oppressive future. *Id.* ¶ 13. She also commented on origami itself, employing its patterns as a symbol of a very difficult, even impossible, task – with this artistic comment reinforced formally by the fact that her paintings are on canvas and are impossible to fold. *See id.* ¶ 14. This evidence is consistent with interviews Morris gave to the art and popular press months and years before Lang contacted her and this litigation began. *See* Morris 6/28/12 Dec., Exs. B-G. Plaintiffs have presented no evidence to rebut this comprehensive demonstration of how Morris used origami crease patterns as a starting point for new works of art with meaning not found in Plaintiffs’ diagrams.

2. Plaintiffs’ allegations of bad faith are not supported by record evidence.

Sarah Morris created the accused paintings and drawings in her “Origami” series from December 2006 through April 2009. Morris 6/28/12 Dec. ¶¶ 8, 19. Since then Morris has consistently conveyed a deep and clear artistic purpose that is radically different from Plaintiffs’

goals. Morris has not, as Plaintiffs baselessly accuse, ever “lied to the public” or tried to conceal the starting point of her paintings. *See* Pls. MSJ Br. at 1. As the record evidence demonstrates, in interviews conducted years before this litigation, Morris repeatedly gave the same account of her intentions regarding her “Origami” paintings and their role in the “Beijing” series. *See* Morris 6/28/12 Dec., Exs. B-G. Morris mentioned Plaintiff Lang by name when asked to explain her “Origami” paintings and creative process in interviews dating back to at least March 2008, more than a year before Lang ever contacted her. *See* Morris 6/28/12 Dec., Ex. G at 755-56; Morris Tr. 224:12-22; Lang Tr. at 268:8-16. Moreover, the press releases for Morris’s exhibitions at Galerie Max Hetzler and White Cube Gallery explain that her Origami Series is based on “found origami diagrams” and explain that her “paintings refer to traditional origami diagrams, which depict an unfolded pattern of creases.” *See* Ahrens Dec., Exs. E & F; Morris Tr. 136:3-137:16. These repeated public statements about Morris’s use of existing origami crease patterns to create her works are hardly the actions of someone engaged in a “cover up.” Indeed, Morris included “Origami” paintings in large-scale, widely publicized, exhibitions of her work at leading museums of art. *See* Morris 6/28/12 Dec. ¶¶ 3, 19.

Unable to cite any actual evidence of bad faith, Plaintiffs attempt to concoct a bad faith story by pointing to Morris’s supposed delayed response to Plaintiff Lang’s letters accusing her of infringement and to Morris’s choice to change the titles of some of her works. But in her letter to Lang, dated June 23, 2009, Morris admits using Lang’s crease patterns and she explains her good faith belief that she had done nothing wrong because her works are radically transformative, serve a very different purpose than Plaintiffs’ crease patterns and treat “the idea of Origami as a sign or a harbinger of something to come.” Lang Dec., Ex. J.

Indeed Morris had no reason to conceal her use of Lang’s origami patterns. Lang himself has invited others to borrow from his work. In the Introduction to his book *Origami Insects and Their Kin*, Lang wrote:

The models were invented over a period of several years, and therefore show not only an evolution of folding style, but an evolution of influences as well. The Butterfly was inspired by a model of the same subject by Peter Engel; the Spotted Ladybug was inspired by the striped and spotted creations of John Montroll; and the Samurai Helmet Beetle was inspired by a design of Seiji Nishikawa. Less overt influence permeate the rest of the models, for I admit that I get my ideas and techniques from everywhere I can. Or, as Picasso once said, “Good artists borrow; great ones steal.”

And I hope you will steal—or at least borrow—from me

See Ahrens Dec., Ex. D.

At the time she was creating the Origami series, Morris read this introduction and understood it to mean that Lang was very supportive of transformative works inspired by his patterns. *See Morris Tr. 24:20-26:19.* Morris also noted that Lang’s own methodology involves extensive borrowing and builds on numerous influences, including math, design, and traditional origami. *See id. at 25:9-26:9.* Morris’s letter to Lang is entirely consistent with this belief, as well as with her statements in interviews prior to contact from Lang and with her testimony in this case. *See Morris 6/28/12 Dec., Ex. G at 755-56; Morris Tr. 24:20-26:19; 224:12-22.* There was no change of story or attempt to hide anything.

Morris’s testimony also refutes Plaintiffs’ unfounded accusation that Morris’s change of titles was part of a cover up. Morris explained that she titled her works based on her subjective aesthetic choice. Throughout her career, Morris has made changes to her titles, including right up to the time of public exhibition. *See Morris Tr. 183:3-19; 242:20-243:5.* For her “Origami” paintings, Morris sometimes incorporated the same title as the origami model (in her titles for this series she also included “[Origami]” to signal that they were based on origami patterns and used origami as a sign), while for others she did not like the original title and chose to change it. *Morris Tr. 61:13-62:5; 63:10-19.* Moreover, Morris’s titles did not hide anything, as each Plaintiff admitted the titles never deterred them in any way from investigating acts of alleged infringement. *Miyajima Tr. at 88:4-15; Lang Tr. at 277:11-19; Ku Tr. at 127:7-14.* Plaintiffs offer no evidence to support their allegations that Morris was trying to deceive Plaintiffs.

3. Plaintiffs present no evidence of market harm.

Plaintiffs' brief lacks a single cite to evidence of any market harm. *See* Pls. MSJ Br. at 2-11. This is no surprise because all three Plaintiffs admitted Morris's work has not harmed the market for their own works in any way. Lang testified he could not point to any specific diminution in the market for his crease patterns as a result of Morris's works. Lang Tr. 267:21-23. He admitted the sales of the book *Origami Design Secrets: Mathematical Methods for an Ancient Art* have been "consistent year in, year out" since its publication in 2003, Lang Tr. 41:17-20, and that the number of lectures and the fees he commands have continued to increase over time. Lang Tr. 48:11-13. Plaintiffs Ku and Miyajima testified they have not suffered any lost sales, revenues, commissions, or invitations to exhibit their origami, and both admitted they have no evidence of any market harm. Ku Tr. 130:8-22; 134:5-15; Miyajima Tr. 17:12-21; 79:16-18; 81:4-21.

Plaintiffs' evidence demonstrates that their ability to market their crease patterns in any manner they choose continues unabated despite the existence of Morris's "Origami" paintings. Lang's declaration details several exhibitions of his origami sculptures and corresponding crease patterns, dating from 1999 through the present. *See* Lang Dec. ¶¶ 13-22, 29vi, 29ix. Lang has only once displayed a crease pattern alone, *i.e.*, not in proximity to a folded origami model, and that exhibit took place in February 2011, long after Morris sold her "Origami" paintings. Lang Tr. 88:7-18; Lang Dec. ¶ 32. Lang admitted that in just the last few months, he was commissioned to create crease patterns. Lang Tr. 240:8-243:5; Lang Dec. ¶ 43. There is simply no evidence that Morris's work harmed any market for Plaintiffs' works.

III. ARGUMENT

A. Plaintiffs cannot establish ownership of the copyright in thirteen of the crease patterns in this case.

It is Plaintiffs' burden to prove that they own the copyrights in all crease patterns asserted in this case. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 360 (1991) (ownership

is an element of any copyright claim). Plaintiffs are therefore not entitled to summary judgment for any claims for which they fail to prove ownership. Plaintiffs' First Amended Complaint brings thirteen claims (in Counts 2 and 4-15) based on crease patterns that appeared as small figures in the book *Origami Design Secrets: Mathematical Methods for an Ancient Art*, authored by Plaintiff Lang and published in 2003 by AK Peters Ltd. Plaintiffs have submitted an "Assignment Agreement" that purports to transfer copyright in this book from Taylor & Francis Group, LLC (AK Peters' successor in interest) to Lang as of January 1, 2007. *See* Lang Dec., Ex. C. This document lacks any signature date, strongly suggesting that Plaintiffs did not want the actual date of the agreement to be known. Indeed, supplemental discovery revealed that the agreement was actually executed on June 16, 2012 after the close of discovery in this case. *See* Def. Supp. Memo. at 2. Furthermore, the agreement does not memorialize a prior oral transfer and does not convey any right to sue for past infringements. *See id.* at 1-3. For the reasons given in Morris's supplemental memorandum in support of her own motion for summary judgment, Plaintiffs therefore cannot prevail on any of these claims. *See id.* at 1-5.

B. Plaintiffs cannot overcome Morris's statute of limitations defense.

Plaintiffs' summary judgment brief addresses only fair use. Of course, Plaintiffs must also present evidence sufficient to overcome Morris's statute of limitations defense. *See Auscape Intern. v. National Geographic Soc.*, 409 F. Supp. 2d 235, 242 (S.D.N.Y. 2004) (plaintiffs must come forward with admissible evidence sufficient to demonstrate infringement during the limitations period). Morris has presented evidence and legal argument establishing that 20 counts of the First Amended Complaint are barred by the statute of limitations. *See* Def. MSJ Br. at 3-4, 12-16; Ahrens Dec., Ex. A. Plaintiffs submit no evidence sufficient to rebut this defense – indeed, their evidence confirms that all but five of their claims are time-barred. *See* Part II.A., *supra*.

C. Morris’s paintings make fair use of Plaintiffs’ crease patterns.

Plaintiffs’ summary judgment motion is primarily directed at overcoming Morris’s fair use defense. In her own motion, Morris presented evidence showing that her paintings have a different purpose and character than Plaintiffs’ crease patterns and do not in any way diminish Plaintiffs’ economic incentive to produce crease patterns. *See* Def. MSJ Br. at 6-10, 17-25. Morris’s paintings are therefore transformative and not infringing under the *Campbell / Blanch* test. When discussing fair use, Plaintiffs repeatedly misstate the relevant legal standards and rely on unsupported or irrelevant factual claims. Contrary to Plaintiffs’ arguments, all four fair use factors favor Morris and she, not Plaintiffs, is entitled to summary judgment on this basis.

1. Factor one.

The first fair use factor addresses “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1). The most important issue with respect to the first factor is the “transformative” nature of the work. *See Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006). The first factor also considers whether the defendant acted in good faith and whether work is commercial.

Transformation

Whether a work is transformative or not depends on whether it “supersedes the objects of the original . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.” *Campbell*, 510 U.S. at 579 (internal quotations omitted). The fundamental question is simple: Does Morris’s work contain new expression, new meaning, or a new message that is “separate and distinct” from Plaintiffs’? *Bill Graham*, 448 F.3d at 610; *see also Blanch*, 467 F.3d at 252. The evidence confirms that Morris’s paintings have a different purpose and character than Plaintiffs’ crease patterns. *See* Part II.B.1, *supra*. Plaintiffs testified their crease patterns primarily served functional and instructional purposes. *See* Miyajima Dec. ¶ 6; Ku Dec. ¶ 8; Lang Dec. ¶ 29; Def. Rule 56.1 Statement ¶¶ 44-

56. And Morris has provided detailed testimony (corroborated by extensive public interviews pre-dating this litigation) explaining that her “Origami” paintings comment *inter alia* on political, economic, and psychological issues around Beijing during its hosting of the 2008 Olympics. *See* Morris 6/28/12 Dec. ¶¶ 8-18, Exs. B-G. She also explained in detail how her paintings both reference *and* comment on origami. *See* Morris 6/28/12 Dec. ¶¶ 9, 13, 14; Morris Tr. 18:22-19:2, 20:23-21:8, 27:5-16. Morris’s paintings are therefore transformative.

Rather than apply this well-settled *Campbell / Blanch* standard, Plaintiffs simply denigrate Morris’s art, arguing that her “intentions . . . lack the heft needed to drag them into the arena of ‘transformative’ works.” Pls. MSJ Br. at 18; *see also id.* at 8 (comparing Morris’s studio to a McDonalds fast food outlet); Lang Dec. ¶ 36 (claiming that Morris is akin to a “skilled child” with “color crayons”). In making this argument, Plaintiffs ask the court to do precisely what the law says it should not – judge the merit of Morris’s art. *See Blanch*, 467 F.3d at 255 (“It is not, of course, our job to judge the merits of ‘Niagara,’ or of Koons’s approach to art.”); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801-02 (9th Cir. 2003). The proper approach is to ask “whether [Morris] had a genuine creative rationale for borrowing” Plaintiffs’ crease patterns. *Blanch*, 467 F.3d at 255. If so, it is only necessary that a transformative purpose can “reasonably be perceived.” *See Campbell*, 510 U.S. at 582 n.17. Here, Morris has presented un rebutted evidence establishing her creative rationale and transformative purpose. *See* Morris 6/28/12 Dec. ¶¶ 8-18.

Plaintiffs’ reliance on the pre-*Campbell* decision in *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) is misplaced. The *Rogers* Court found that the accused Koons sculpture neither commented on the plaintiff’s photograph nor created transformative meaning. *See* 960 F.2d at 309-10. In contrast, *Blanch* is far closer to the facts of this case. In *Blanch*, the Second Circuit applied the Supreme Court’s rationale in *Campbell* and considered artist testimony regarding meaning together with the physical changes in “colors,” “medium,” and “size” and concluded that Koons’s use of Blanch’s photograph was transformative. *See* 467 F.3d at 253. As in *Blanch*, Morris’s paintings employ the crease patterns “in the creation of new information, new

aesthetics, new insights and understandings.” *Id.* (internal quotation omitted). Tellingly, Plaintiffs make no effort to distinguish *Blanch* from this case.

Plaintiffs also misapply *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132 (2d Cir. 1998). That decision explains that the term “transformed” in the definition of a derivative work in 17 U.S.C. § 101 has a different meaning from the term “transformative” when applied to fair use. A derivative work simply repackages the original in a new format (such as a movie adaptation of a book). *See Castle Rock*, 150 F.3d at 143. In *Castle Rock*, the Court found that the book was a derivative work because it was intended “to repackage *Seinfeld* to entertain *Seinfeld* viewers.” *Id.* at 142. In contrast, transformative works, such as Morris’s paintings, use the original as raw material “in the creation of new information, new aesthetics, new insights and understandings.” *Blanch*, 467 F.3d at 253 (internal quotation omitted); *see also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (transformative uses “may include parody, symbolism, aesthetic declarations, and innumerable other uses”). Moreover, unlike in *Castle Rock*, where the defendant’s book was expressly promoted as a substitute for the original program, Morris’s audience is completely different. She never attempted to market her fine art paintings to readers of Lang’s highly specialized and technical *Origami Design Secrets: Mathematical Methods for an Ancient Art* or to readers of the specialized origami websites created by Miyajima and Ku.

Plaintiffs’ purported evidence on transformation is irrelevant and inadmissible. *See* Part II.B.1, *supra*. For example, Plaintiffs rely on plainly inadmissible opinion testimony from Lang regarding “the way our eye works” and how he believes the public will perceive Morris’s paintings. *See* Pls. MSJ Br. at 15-16. This self-serving opinion testimony is not even consistent with Lang’s own first reaction to Morris’s paintings. Upon first seeing Morris’s work, Lang wrote that “she is clearly creating new works of art that can stand on their own merits (as opposed to merely copying something and passing it off as her own).” Clarida 6/29/12 Dec., Ex. M. Plaintiffs now simply assert that Morris’s changes to their crease patterns “had no meaning.” *Id.* at 17. But it is Morris’s testimony, not Plaintiffs’ conclusory assertions, that provides the best

evidence of transformative intent. *See Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F.Supp.2d 499, 507-08 (S.D.N.Y. 2009) (“The Second Circuit has given weight to [an artist’s] explanation of their creative rationale when conducting fair use analysis”) (citing *Blanch*, 467 F.3d at 255). Even Plaintiffs concede that the artist should have the definitive view of his or her own purpose in making works. *See* Pls. MSJ Br. at 19 (“that task falls to the artists who create them”). Here, Morris has explained in detail how her carefully made choices regarding color, scale, and context created meaning and commentary. *See* Def. MSJ Br. at 6-9, 17-20.

Good faith

Neither the facts nor the law support Plaintiffs’ arguments on bad faith. As explained in Part II.B.2, *supra*, the evidence does not support a finding that Morris acted in bad faith. Morris never “lied to the public” as Plaintiffs allege. To the contrary, she consistently explained that her “Origami” paintings were based on found origami diagrams. *See* Morris Tr. 136:3-137:16; Ahrens Dec., Exs. E & F. As Plaintiffs themselves concede, “Morris promoted her Origami series as being based on ‘found’ origami crease patterns, and indeed that appears to be the case for the majority of the works.” Pls. MSJ Br. at 21.

Plaintiffs ask the Court to infer bad faith from: 1) the fact that Morris never sought a license; and 2) Morris did not immediately reply to correspondence from Lang. *See* Pls. MSJ Br. at 9-11, 18. But these facts do not, and under controlling authority cannot, support an inference of bad faith. In *Blanch*, the Second Circuit expressly rejected Blanch’s argument that Koons had acted in bad faith by not seeking permission. *See Blanch*, 467 F.3d at 256 (“We are aware of no controlling authority to the effect that the failure to seek permission for copying, in itself, constitutes bad faith.”); *see also Campbell*, 510 U.S. at 585 n.18 (noting that “being denied permission to use a work does not weigh against a finding of fair use”). Courts have similarly rejected the suggestion that failure to promptly respond to a copyright holder constitutes bad faith. *See Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513, 545-46 (S.D.N.Y. 2008). In *RDR Books*, the court held that “intentional delays in responding to Plaintiffs’ communications from counsel” did not demonstrate bad faith. *Id.* at 545. The court reasoned that,

because the defendants had a good faith belief that the work was fair use, they were not obligated to respond to the plaintiffs' letters and were entitled to proceed with marketing the book. *See id.* Here, Morris similarly had a good faith belief that her work constituted fair use. *See Morris Tr.* 24:20-26:19; Lang Dec., Ex. J.

Even if the facts supported an inference bad faith – which they do not – Plaintiffs' overwhelming focus on Morris's purported misdeeds would still be misplaced. Bad faith has little significance in the fair use analysis. *See NXIVM*, 364 F.3d at 479 n.2 (the good or bad faith of a defendant “generally contributes little to fair use analysis”); *Swatch Group Management Services Ltd. v. Bloomberg L.P.*, ___ F. Supp. 2d ___, 2012 WL 1759944 at *4 (S.D.N.Y. May 17, 2012) (“fair use does not depend on a finding of good faith”). Moreover, this sub-factor supports Morris as she reasonably believed her paintings constituted fair use and always spoke of her work as being based on found origami diagrams.

Commerciality

Plaintiffs cite *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984), for the proposition that works made “for commercial or profit-making purposes are presumptively unfair.” Pls. MSJ Br. at 18. But this holding has been expressly overruled by the Supreme Court. *See Campbell*, 510 U.S. at 584; *see also Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 113 (2d Cir. 1998) (noting that the *Campbell* Court “abandoned” the statement in *Sony*, that “every commercial use of copyrighted material is presumptively . . . unfair”).

In *Campbell*, the Supreme Court explained that most fair uses are undertaken for profit. *See* 510 U.S. at 584. Accordingly, the Court should not “give much weight to the fact that the secondary use was for commercial gain.” *Castle Rock*, 150 F.3d at 142. Where, as here, the secondary work is highly transformative, its commercial nature should receive even less weight. *See Campbell*, 510 U.S. at 579 (“the more transformative the new work, the less will be the significance of other factors, like commercialism”); *Blanch*, 467 F.3d at 254 (“discount[ing]” the commercial nature of the secondary work in light of its “substantially transformative” nature).

While Morris's paintings are sold for profit, that fact is significantly outweighed by their transformative purpose. Accordingly, the first factor weighs strongly in favor of Morris.

2. Factor two

The second fair use factor focuses on "the nature of the copyrighted work." 17 U.S.C. § 107(2); *Bill Graham*, 448 F.3d at 612. Two issues are relevant to this factor: (1) whether the work is published or unpublished, and (2) whether the work is factual or creative. Here, Plaintiffs' crease patterns are all published, a fact favoring Morris. *See Video-Cinema Films, Inc. v. CNN, Inc.*, 2001 WL 1518264 at *7 (S.D.N.Y., Nov. 28, 2001) (BSJ) ("where the plaintiff's work has already been published, this fact alone supports a finding of fair use under the second statutory factor").

All of the crease patterns at issue in this case were published as small diagrams accompanying photographs of folded origami models. *See Clarida* 6/29/12 Dec., Exs. H, I and J; Lang Tr. 31:24-32:4; 32:8-11; Miyajima Tr. 77:13-16; Ku Tr. 37:7-13. The crease patterns, as published, are also primarily factual or instructive in nature. In context, the diagrams are a "proof certificate" showing that the model is folded from a single sheet. *See Lang Tr.* 101:2-14. Thus, although Morris does not here dispute that the subject crease patterns are sufficiently creative to qualify for copyright protection,⁴ their mathematical nature puts them at the less-protected end of the copyright spectrum. *See MiTek Holdings, Inc. v. Arce Engineering Co., Inc.*, 89 F.3d 1548, 1557 n.20 (11th Cir. 1996).

Ultimately, the second factor is of limited importance in this case since the copyrighted crease patterns have been put to a transformative use. *See Campbell*, 510 U.S. at 586 (second factor is not "likely to help much in separating the fair use sheep from the infringing goats" in

⁴ Plaintiffs offer the testimony of Meher McArthur on the issue of whether "crease patterns are sufficiently expressive to qualify for copyright." Pls. MSJ Br. at 5. This testimony is irrelevant. Copyrightability is not, as Plaintiffs claim, the "central issue of this case." *Id.* Morris does not argue that the crease patterns cannot qualify for copyright protection.

cases involving transformative copying of “publicly known, expressive works”). Thus, even if the second factor were thought to favor Plaintiffs, it would carry little weight.

3. Factor three

The third fair use factor requires the Court to assess “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3); *see Blanch*, 467 F.3d at 257. While the Court must consider both the quality and quantity of the portion of the copyrighted work that was used, the central question is whether the extent of copying is reasonable in light of its purpose. *See Campbell*, 510 U.S. at 586; *Blanch*, 467 F.3d at 257 (same; quoting *Campbell*). Depending on the purpose, using a substantial portion of a work – or even the whole thing – may be permissible. *See Bill Graham*, 448 F.3d at 613 (finding fair use where publisher reproduced entire concert posters in reduced size) (citing *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003); *see generally Campbell*, 510 U.S. at 586-87 (“extent of permissible copying varies with the purpose and the character of the use”).

Morris used Plaintiffs’ crease patterns as a starting point for a series of paintings that comment on the impossibility of origami and origami’s place as a signifier relating to the political and psychological context of modern China at the moment of the Beijing Olympics. Morris 6/28/12 Dec. ¶¶ 8-18. The record demonstrates that Morris did not use any of Plaintiffs’ crease patterns in their entirety. She removed and inserted lines, removed dashes, dots, curves and shading. *See Morris* 6/28/12 Dec. ¶ 15; Morris Tr. 92:5-11. Morris altered the thickness, angles and geometry of lines, added axes and space, dramatically altered the scale of the crease patterns and applied her unusual and particular color palette to evoke the city of Beijing and to tie the “Origami” paintings to the themes of her “Beijing” body of work: the idea of an unmanageable and potentially oppressive future. *See Morris* 6/28/12 Dec. ¶¶ 12-18; Morris Tr. 187:14-188:15. Her use of Plaintiffs’ crease patterns was closely tied to her artistic purpose.

Contrary to Plaintiffs' argument, Morris's use did not take the "heart of the copyrighted work." Pls. MSJ Br. at 20. "Taking the heart of a work means taking the key informational or creative component that serves as a substitute for the original." *Video-Cinema Films*, 2001 WL 1518264 at *8; *see also Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564-65 (1985). Plaintiffs offer no evidence, nor make a plausible suggestion, that Morris's work is a substitute for their original works.

Plaintiffs further contend the third factor weighs in their favor because it was not necessary for Morris to use Plaintiffs' crease patterns to create her work, specifically alleging that, "[u]sing origami crease patterns was not the only way to obtain what Morris was seeking." Pls. MSJ Br. at 21. But necessity is not the test. Second Circuit case law flatly rejects Plaintiffs' suggestion that fair use is only applicable when the defendant's use of a pre-existing work is "necessary":

In *Blanch*, although certainly Koons did not need to use Blanch's copyrighted photo, as opposed to some other image of a woman's feet, in his painting, the Second Circuit did not suggest that this lack of necessity weighed against a finding of fair use. Similarly, in *Bill Graham Archives*, the Second Circuit found a transformative use in the defendants' unauthorized inclusion of several of the plaintiff's images—principally concert photos—in a coffee-table book about the musical group the Grateful Dead. 448 F.3d at 607, 608-12. Although the defendants manifestly could have proceeded without the plaintiff's images, which constituted only a small part of the book, this posed no obstacle to a finding of fair use.

Lennon v. Premise Media Corp., 556 F. Supp. 2d 310, 324 (S.D.N.Y. 2008).

The applicable test is whether the "quantity and value of the material used . . . are *reasonable* in relation to the purpose of the use." *Campbell*, 510 U.S. at 586 (emphasis added); *Blanch*, 467 F. 3d at 257 (same; quoting *Campbell*). Here, Morris tailored the original patterns to her specific purpose and used no more of the copyrighted works than what is reasonable and appropriate to her artistic purpose, including commenting upon origami's difficulty as a craft and its role as a signifier of things to come. Accordingly, Morris's works do not borrow excessively in relation to her transformative and artistic purposes, and the third factor favors fair use.

4. Factor four

The fourth factor is “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). This factor “requires a balancing of the benefit the public will derive if the use is permitted” versus “the personal gain the copyright owner will receive if the use is denied.” *Bill Graham*, 448 F.3d at 613 (quoting *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981)); *Wright v. Warner Books, Inc.*, 953 F.2d 731, 739 (2d Cir. 1991). In considering potential market harm, the Court must consider harm to the markets for both the original copyrighted works and derivative works, while recognizing that the “more transformative the secondary use” the less likely the secondary work is to substitute for the original. *See Castle Rock*, 150 F.3d at 145 (citing *Campbell*, 510 U.S. at 591); *Bill Graham*, 448 F.3d at 614-15.

Plaintiffs make no attempt to balance the benefits to the public versus their personal gain, and instead insist that their right to control all uses of their crease patterns trumps all. *See* Pls. MSJ Br. at 23. Plaintiffs ignore the public’s strong and well-established interest in encouraging the production of expressive works of art, and in receiving the benefits of artistic expression. *See Salinger v. Colting*, 607 F.3d 68, 82 (2d Cir. 2010) (“The public’s interest in free expression . . . is significant and is distinct from the parties’ speech interests”). The public’s First Amendment interest in access to expressive works is rooted in the “public’s interest in receiving information” and the need to preserve the free and open exchange of ideas. *Id.* (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 8 (1986)); *see also Red Lion Broad. v. FCC*, 395 U.S. 367, 390 (1969) (recognizing “the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas”); *Abend v. MCA, Inc.*, 863 F.2d 1465, 1479 (9th Cir. 1988) (recognizing the public interest in seeing a feature film), *aff’d on other grounds sub nom. Stewart v. Abend*, 495 U.S. 207 (1990).

While the public benefits of permitting the expressive artistic use of visual images in new works of art are obvious and substantial, the impact on the market for Plaintiffs’ copyrighted

works is non-existent. Plaintiffs present no evidence of harm to the markets for their original works, and Plaintiffs' reliance on *Rogers v. Koons* is unavailing. Here, unlike in *Koons*, Plaintiffs' own evidence demonstrates that Morris's use in no way "prejudice[s] [Plaintiffs'] potential market for [their] work" or "undercuts the demand for the original work." See Pls. MSJ Br. at 22-23 (quoting *Rogers v. Koons*, 960 F. 2d at 312). "If the allegedly infringing use 'is not in competition with the copyrighted use,' the fair use defense is ordinarily sustained." *Video-Cinema Films*, 2001 WL 1518264 at *8 (quoting *Italian Books Corp. v. American Broad. Cos., Inc.*, 458 F. Supp. 65, 70 (S.D.N.Y. 1978)).

Nothing in the record here suggests that Morris's paintings competed with or reduced the market for Plaintiffs' works. Plaintiffs each conceded they have no evidence of any harm to the market for their originals. Plaintiff Lang admitted sales of *Origami Design Secrets: Mathematical Methods for an Ancient Art* have been "consistent year in, year out" since its publication in 2003. Lang Tr. 41:17-20. And Lang cannot point to any specific diminution in the market for his crease patterns. Lang Tr. 267:21-23. Plaintiffs Ku and Miyajima testified they have not suffered any lost sales, revenues, commissions, or invitations to exhibit their origami as the result of Morris's work, and both admitted they have no evidence of any market harm. Ku Tr. 130:8-22; 134:5-15; Miyajima Tr. 17:12-21; 79:16-18; 81:4-21.

Plaintiffs instead complain, without citing any evidence, that Morris has "stolen from the origami artists the opportunity to enter the market with colorized versions of their own works." Pls. MSJ Br. at 24. But all of the evidence in the record refutes this contention. First, Morris's transformative works are radically different than Plaintiffs' works. See Part II.B.1, above. There is no plausible suggestion, much less actual evidence, that anyone would buy a work created by Morris instead of one of Plaintiffs'. Second, Plaintiffs admit their success in entering whatever markets they choose notwithstanding the existence of Morris's work: "For over a decade, Dr. Lang has been proving there is a market for origami crease patterns in an artistic context." Pls. MSJ Br. at 23-24. Lang's success in doing so demonstrates that Morris's work has had zero adverse effect on his markets. Lang's declaration is replete with testimony that he has displayed

and sold his crease patterns as art for years, including color versions. *See* Lang Dec. ¶¶ 13-22, 29vi, 29ix. These exhibitions and sales have continued unscathed in the six years since Morris created her “Origami” series. Indeed, Lang’s ability to market his crease patterns has only *improved* over time. Lang testified that just last year, for the first time, he exhibited crease patterns as stand-alone art at Washington State University (Lang Tr. 88:7-18; Lang Dec. ¶ 32), that this year he was commissioned to create crease patterns based on origami designs he had previously created (Lang Tr. 240:8-243:5; ¶ 43), and that the number of lectures and the fees he commands have continued to increase over time. Lang Tr. 48:11-13. In fact, Lang did not begin creating and exhibiting crease patterns colorized with multiple primary colors until *after* he saw Morris’s work and filed this lawsuit. *See* Lang Dec. ¶¶ 29xix. This is the exact opposite of evidence of a “stolen” opportunity. Plaintiffs simply cannot prove market harm.

Plaintiffs’ argument that their copyrights give them the right to control and demand a licensing fee for all uses of their crease patterns has no basis in law. Copyright owners do not have a right to control transformative uses, and “lost” licensing revenues from transformative uses are not cognizable. *Bill Graham*, 448 F.3d at 615 (“Copyright owners may not preempt exploitation of transformative markets” by charging licenses for what would otherwise be fair use) (quoting *Castle Rock*, 150 F.3d at 146 n. 11); *Lennon*, 556 F. Supp. 2d at 327 (no cognizable market effect where filmmaker used John Lennon’s *Imagine* for transformative purpose); *see generally Blanch*, 467 F.3d at 258 n.9 (any fair use involves some loss of licensing revenue by definition because the secondary user has not paid a royalty). Morris’s paintings are highly transformative; her works are no substitute or competition for Plaintiffs’ works. Plaintiffs cannot as a matter of law claim such “transformative markets” for themselves and the law does not recognize the supposed harms Plaintiffs claim to suffer.

IV. CONCLUSION

Based on the above reasons and authorities, Defendant Sarah Morris respectfully requests that Plaintiffs' motion for summary judgment be denied.

Dated: September 10, 2012

/s/ Julie A. Ahrens

Julie A. Ahrens
Stanford Law School
Center for Internet and Society
559 Nathan Abbott Way
Stanford, CA 94305

Robert W. Clarida
Reitler Kailas & Rosenblatt LLC
885 Third Avenue
New York, New York 10022
(212) 209-3044

Donn Zaretsky, Esq
Jon Silberman Associates, PC
145 East 57th Street
New York, New York 10022

Attorneys for Defendant