

2009-5044

**United States Court of Appeals
for the Federal Circuit**

FRANK GAYLORD,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

*Appeal from the United States Court of Federal Claims in 06-CV-539,
Judge Thomas C. Wheeler*

**BRIEF OF AMICI CURIAE THE ANDY WARHOL
FOUNDATION FOR THE VISUAL ARTS, INC., THE ANDY
WARHOL MUSEUM, THOMAS LAWSON, BARBARA
KRUGER, JONATHAN MONK, ALLEN RUPPERSBERG AND
ELEVEN PROFESSORS OF LAW IN SUPPORT OF
DEFENDANT-APPELLEE AND URGING AFFIRMANCE**

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CERTIFICATE OF INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1 and Federal Circuit Rule 47.4, counsel for *amici curiae* certifies the following:

1. The full name of every party or amicus represented by me is: The Andy Warhol Foundation for the Visual Arts, Inc.; The Andy Warhol Museum (a museum of the Carnegie Institute of Pittsburgh); Thomas Lawson; Barbara Kruger; Jonathan Monk; Allen Ruppertsberg; Brian Carver; Eric Goldman; Peter Jaszi; Mark Lemley; Lawrence Lessig; David Olson; Matthew Sag; Pamela Samuelson; Christopher Sprigman; Rebecca Tushnet; Jennifer Urban.
2. There are no real parties in interest associated with the amicus parties listed.
3. There are no parent corporations or any publicly held companies that own 10 percent or more of the stock of any amicus party listed above.
4. The amicus parties did not appear in the Trial Court. The names of all attorneys who will be appearing before this Court on behalf of the amicus parties are Anthony T. Falzone, Julie A. Ahrens and Sarah Hinchliff Pearson, all of whom are employed by the Stanford Law School Center for

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I. STATEMENT OF INTEREST

The decision of the Court of Federal Claims holding the United States Postal Service made fair use of Appellant Frank Gaylord's sculpture *The Column* vindicated important rights of free expression and creative freedom. For centuries, art and culture has built on itself. Artists have always manipulated the world around them, including images, objects and scenes – some familiar, some not – to create new works that express new aesthetics and convey new meaning. Much of this imagery and other material is under copyright protection, for copyright now covers nearly every creative work fixed in a tangible medium and often lasts well over a century. The right to use existing imagery under the fair use doctrine is therefore critical to free speech and free expression.

Amici in this case are parties who care about and exercise the free expression rights that fair use protects in the visual arts and beyond. The Andy Warhol Foundation for the Visual Arts was established upon the death of that esteemed artist through a gift from his estate. Its mission is to advance the visual arts by fostering innovative artistic expression and the artistic process itself. In pursuit of these objectives, the Foundation has made grants worth approximately \$200 million to fund the creation, presentation and documentation of contemporary art. All of its work is premised upon the belief that art reflects an important

cultural dialogue, and that the freedom of artistic expression is fundamental to a democratic society.

The Andy Warhol Museum features extensive permanent collections of art and archives documenting the life and work of Andy Warhol, and exhibits innovative work from other contemporary artists, much of which looks to the world around us as inspiration for artistic expression. Serving more than 80,000 visitors annually, the Museum is a vital forum in which diverse audiences of artists, scholars, and the general public are galvanized through creative interaction with the art and life of Andy Warhol and other important artists.

Other amici in this case include contemporary artists Thomas Lawson, Barbara Kruger, Jonathan Monk and Allen Ruppersberg. All have incorporated existing imagery into their work and believe it is important to recognize the rights of artists to do so. Additional amici include eleven law professors who study and write about copyright law and care about the extent to which it promotes new creativity. A full list of amici is attached as Exhibit A. Amici sought and received all parties' consent to file this brief.

II. INTRODUCTION

The most fundamental goal of copyright is to encourage creativity and new expression. The Copyright Act advances this goal by providing exclusive rights to authors of original works. These exclusive rights reserve to the author the

sole right to exploit the copyrighted work in particular respects, establishing a financial incentive for the creation of new works. Yet this produces an inherent tension; the restrictions that provide a financial reward to authors may also restrict the creation of other new works that incorporate copyrightable expression for new and creative purposes. Copyright law must therefore strike a delicate balance. It must grant exclusive rights that reward authors, but it must avoid thwarting further creativity and other productive uses of copyrighted material.

The fair use doctrine is the primary vehicle by which copyright law pursues this balance. It is, in the words of the Supreme Court, a critical “First Amendment safeguard.” It protects the right to use copyrighted material in new and transformative ways. It protects not merely those works that criticize or discuss a copyrighted work, but many others that incorporate copyrighted content to express new meaning. It creates the breathing room necessary to prevent copyright from stifling the very creativity it is supposed to encourage.

In urging this Court to reverse the judgment below, Plaintiff-Appellant Frank Gaylord (“Gaylord”) ignores the underlying purpose of copyright and the fair use doctrine, as well as the wave of recent authority that demonstrates the Court of Federal Claims applied well-established principles to reach precisely the right decision under the law.

Contrary to Gaylord’s assertions, fair use is not limited to situations where a secondary work criticizes or discusses a copyrighted work, or situations where use of the copyrighted work is somehow “necessary.” Fair use applies broadly, protecting, among other things, creative works that build on copyrighted works to transform them by adding new expression, meaning and aesthetics. The image at issue here does exactly that, while inflicting no discernible harm to Gaylord’s economic interests or the basic incentives copyright is designed to create. The Trial Court recognized the use in question here fits within established parameters of fair use, and it stands as an example of the very creativity the Copyright Act is supposed to promote, not stifle. The Trial Court’s decision should be affirmed.

III. BACKGROUND

A. The Sculpture – Frank Gaylord’s *The Column*

In 1990, Cooper-Lecky Architects selected Frank Gaylord to create a sculpture for the Korean War Veterans Memorial (the “Memorial”) on the National Mall in Washington, D.C. Joint Appendix (“JA”) 460-61 (Stipulated Uncontested Material Facts (“Stip.”) ¶¶3-5). Gaylord’s sculpture is called *The Column*. JA 461 (Stip. ¶5). It was installed as part of the Memorial in 1995. JA 461 (Stip. ¶7).

The Column features nineteen stainless steel statues representing a platoon of soldiers in formation “on an undefined mission, going through enemy

territory.” JA 461 (Stip. ¶5), 1711 (Tr. at 105:1-4). The nineteen soldiers are arranged in two columns, with one figure at the point. JA 1732 (Tr. at 190:15-17). Each soldier is rendered larger than life and arranged so that together the platoon appears to emerge out of the woods at the edge of the Memorial and into a meadow. In creating each of the soldiers in *The Column*, Gaylord copied elements of photographs of U.S. Marines in the Korean War from a photojournalism book, and from likenesses of himself, friends and other soldiers he knew. See JA 1709 (Tr. at 98:6-15), 1717-18 (Tr. at 129:2-133:10).



JA 1196 (Plaintiff’s Exhibit 22 depicting *The Column* as installed)

Gaylord intended the sculpture and its nineteen soldiers to be a unitary composition. As he explained: “I wanted the eye to wander over the entire

composition, because that's what it is supposed to do. And so there's supposed to be really nothing on the figures to catch the eye, so the eye keeps moving along the whole composition." JA 1718 (Tr. at 133:24-134:6)); *see also* JA 1711 (Tr. at 105:6-8) ("...each [statue] would not have to function as a piece of sculpture by itself, because it was part of something larger.").

Although Gaylord registered the copyrights in *The Column* after its completion (JA 1719 (Tr. at 139); JA 1191-95 (PTX 19)), his commercial exploitation of the work has been minimal. Gaylord has never sold a photograph of *The Column*. JA 1736 (Tr. at 208:21-23). Nor has he ever sold posters, postcards, magnets or key chains featuring *The Column*. JA 1736-37 (Tr. at 208-209).

Shortly after Gaylord completed *The Column*, he licensed his copyrights in it to the Korean War Veterans Memorial Dedication Foundation, Inc. JA 1178-90 (PTX 18). The T-shirts and miniature statues produced under this license depicted only one or more of the individual soldier statues from *The Column*. JA 1767-68 (Tr. at 327:19-328:19). Gaylord received his last royalty payment of \$18.36 on this license in April 1997. JA 1770-71 (Tr. at 339:19-340:14); JA 1673 (DTX at G2605 (Accounting Ledger)).

Approximately two years after he completed *The Column*, Gaylord sold several ten-to-twelve inch miniature soldier statues. JA 1734 (Tr. at 199:6-

17). There was limited interest in these miniatures because of their high price, so five years ago Gaylord authorized the foundry to destroy the molds. JA 1734 (Tr. at 199:18-25).

Gaylord has not attempted to market any products relating to *The Column* for at least ten years (JA 1737 (Tr. at 209:14-16)), and has received no income relating to *The Column* since September 2002. JA 1637 (DX 43 at RFA No. 13).

B. The Photograph – John Alli’s *Real Life*

John Alli is a retired United States Marine Corps pilot and amateur photographer. JA 1778 (Tr. at 371:11-18); JA 4 (Opinion). In January 1996, he visited the Memorial in a snowstorm and took the photograph he later titled *Real Life*. JA 1517 (Alli Photograph); JA 461 (Stip. ¶12); JA 1779 (Tr. at 372:9-373:5). He intended to give *Real Life* to his father, who served in the Marine Corps in the Korean War, as a gift for his retirement from government service. JA 1780 (Tr. 376:11-16).



JA 1517 (Defendants' Exhibit 24 – John Alli, *Real Life*)

Many people photograph *The Column* every day. JA 1689 (Tr. at 17:6-8). But Alli's photograph was neither a snapshot nor an accident. In order to obtain the results he sought, Alli photographed *The Column* hundreds of times in winter, spring, summer and fall and at different times of the day. JA 1780 (Tr. 376:17-24, 377:1-15). On the January morning he captured *Real Life*, he took about 100 photographs of *The Column* to achieve the result he desired. JA 1779 (Tr. at 373:17-18). Alli testified he photographed different aspects of *The Column* using different angles, exposures, shutter speeds, apertures and lighting conditions, and varying the depth of field. JA 1779-80 (Tr. at 373:6-376:2). Alli believed

Real Life, with its subdued, near-dawn lighting, achieved his desired result, evoking a “surreal” sensation where the viewer is left unsure whether he is viewing a photograph of statues or real people. JA 1780 (Tr. at 377:7-378:3). Alli hoped viewers would feel drawn into the photograph, as if they were in Korea, feeling the frigid conditions with the soldiers. JA 1780 (Tr. at 377:7-12). Gaylord himself recognized the power of the image Alli created, acknowledging the photograph is “beautiful.” JA 1732 (Tr. 189:16-24).

Alli sought permission from Cooper-Lecky Architects, P.C., the prime contractor for the installation of the Memorial, to exploit *Real Life* commercially. JA 460 (Stip. ¶3). William Lecky, a principal of Cooper-Lecky, stated that he owned the copyright. JA 1783 (Tr. at 388:14-390:15). Alli then entered into a licensing agreement with Lecky, giving Lecky a ten percent royalty on any prints, posters or framed artwork Alli sold. JA 1783 (Tr. at 390:22-391:2); JA 1311-12 (PTX 42); JA 1784 (Tr. at 393:3-8); JA 1679-80 (DTX 47).

C. The Postage Stamp

In 2002, the United States Postal Service (“Postal Service”) decided to issue a stamp to commemorate the fiftieth anniversary of the armistice of the Korean War. JA 461 (Stip. ¶13). The Postal Service sought Alli’s permission to use his photograph as part of the postage stamp and paid him a one-time fee of \$1500. JA 1781 (Tr. at 382:20-383:25).

To make Alli’s photograph more effective on the very small surface of a postage stamp, the Postal Service simplified and enhanced the image. *See* JA 1833 (Tr. at 583:7-585:13). In particular, the Postal Service made the image’s color scheme appear grayer and colder. JA 1833 (Tr. at 583:7-24). The result is an even more monochromatic, bleak and chilling scene compared to the cool blue of the original *Real Life* photograph. *Id.*; compare JA 1517 (Alli Photograph) with JA 1592 (Stamp). Because the photograph was radically reduced to accommodate the postage stamp size, all but three of the soldiers in the original photograph appear as tiny silhouettes. Virtually all of the detail in the original statues is obscured by the snow.



JA 1208 (Plaintiff’s Exhibit 27C, Korean War Veterans Memorial Stamp

(enlarged))

On July 27, 2003, the Postal Service issued the stamp. JA 461 (Stip. ¶14). The Postal Service produced approximately 86.6 million stamps and a variety of retail goods featuring the image of the stamp before retiring it on March 31, 2005. JA 462 (Stip. ¶15).

D. The Impact Of The Stamp On Gaylord

When the stamp was issued, Gaylord had closed his studio and completed his last commercial project. JA 1766 (Tr. at 320:18-321:2). Gaylord admitted Alli’s photo did not affect any actual or potential “business deals” relating to *The Column*. JA 1737 (Tr. at 209:7-13). On the contrary, Gaylord

admitted the stamp increased the value, appeal and market for *The Column*. JA 1640 (DX 43 at RFA No. 20); p. 31, below.

E. Procedural History

In July 2006, Gaylord filed lawsuits alleging copyright infringement of *The Column* against the Postal Service and Alli. JA 63 (Complaint at ¶¶14-15); JA 1595 (DTX 41 at ¶4). Gaylord and Alli settled their case in April 2007. JA 1594-1610 (DTX 41).

In his suit against the Postal Service, Gaylord sought a royalty of ten percent on the Postal Service's net sales of the commemorative stamp and related merchandise – despite the fact the Postal Service paid only \$1500 to use the photograph in the first place. JA 687 (Pl.'s Post-Tr. Br. at 9); JA 1679-80 (DTX 47). The Trial Court ruled in favor of the Postal Service finding that, while Gaylord is the sole copyright owner of *The Column*, the Postal Service made fair use of the sculpture in the commemorative stamp. JA 2 (Opinion).

On appeal, Gaylord contends the Trial Court erred as a matter of law in finding the Postal Service's use was a fair use. Opening Brief (“OB”) 3. Amici submit this brief in support of the Trial Court's ruling on fair use because the ruling vindicates important free speech and expression rights that are critical to amici and other artists.

IV. ARGUMENT

A. The Trial Court's Fair Use Decision Vindicates Important Creative Rights And Is Correct As A Matter Of Law

In holding the postage stamp at issue is protected by fair use, the Trial Court vindicated important rights of creativity and free expression that lie at the heart of the Copyright Act and the fair use doctrine. The Trial Court recognized fair use protects the right to use copyrighted material as a raw ingredient for further creative expression.

Gaylord continues to resist that principle; he contends his copyrights in the statue allow him alone to decide whether, and on what terms, others can build on his work to produce further works of creativity and artistic expression. In doing so, he asks the Court to ignore the Copyright Act's fundamental goal of promoting creative expression, and urges this Court to adopt an exceedingly narrow interpretation of the fair use doctrine that eschews both its underlying purpose and the large body of recent case law that helps define its bounds.

The Trial Court rejected Gaylord's position for good reason. It is inconsistent with both the underlying purposes of the Copyright Act and the well-established principles of fair use. The decision below is correct as a matter of law and should be affirmed.

1. The Purpose Of The Copyright Act And The Fair Use Doctrine Is To Encourage Creativity And Protect Free Speech And Expression Rights

The fundamental goal of copyright law in this country is well-established. Its “primary objective” is “to encourage the production of original literary, artistic, and musical expression for the good of the public.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994). The Copyright Act pursues this goal by providing authors with exclusive rights in their original work. *See, e.g.*, 17 U.S.C. § 106; U.S. Const. art. I, § 8, cl. 8 (empowering Congress to grant authors exclusive rights in their works “to promote the Progress of Science and useful Arts”). These exclusive rights reserve to the author the sole right to exploit the copyrighted work in specific ways, creating a financial incentive for the creation of new works.

This financial incentive is a means to an end. Its purpose is to benefit society as a whole by “promoting broad public availability of literature, music, and the other arts.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *see Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992). This utilitarian function makes copyright law an “engine of free expression.” *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to

create and disseminate ideas.”); *see generally* Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1108-09 (1990).

Without appropriate limitations, the exclusive rights and restrictions that copyright creates have the potential to threaten, not advance, creativity. *See Atari*, 965 F.2d at 843. This is because creativity and free expression do not occur in a vacuum; they build on the past. *See id.* “[A]ll intellectual creative activity is in part derivative. There is no such thing as a wholly original thought or invention. Each advance stands on building blocks fashioned by prior thinkers.” Leval, 103 Harv. L. Rev. at 1109. The process of borrowing, referencing, transforming and critiquing existing works is essential to expressive and creative activity because “[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout.” *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 575 (1994) (quoting *Emerson v. Davies*, 8 F.Cas. 615, 619 (No. 4,436) (CCD Mass. 1845)). In all intellectual and creative pursuits, “[t]he speech of our predecessors constitutes our raw material; our refinements nourish those that follow.” Neil Weinstock Netanel, *Copyright’s Paradox*, Oxford University Press, 58-59 (2008). In short, we “build the future” from “the lumber of the past.” Lewis H. Lapham, *The Gulf of Time*, Lapham’s Quarterly, Winter 2008, at 13.

For this reason, copyright law has the potential to undermine the First Amendment commitment to freedom of speech and expression. *See* Netanel at 43 (“Appropriation lies at the heart, not the margins, of freedom of speech.”). The capacity of people to participate in culture and express themselves resides squarely in their ability to change, modify, dissect and criticize existing expression. *Id.* Therefore, while copyright law complements the First Amendment goal of fostering the dissemination of information from diverse sources, it also has the potential to impose a significant burden on speech. *See* Pamela Samuelson, *Unbundling Fair Uses*, 77 Fordham L. Rev. 2537, 2569 (2009).

The doctrine that mediates the tensions among copyrights, creativity and First Amendment values is the fair use doctrine. The Supreme Court has declared the fair use doctrine an important “First Amendment safeguard” designed to prevent copyright law from unduly burdening free speech. *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003); *see also Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263-65 (11th Cir. 2001). Fair use is therefore a critical component of the copyright scheme. *See id.*; Leval, 103 Harv. L. Rev. at 1110.

Fair use recognizes that new expression and creativity are often built on what has come before and advances the underlying objective of copyright law: “Fair use promotes the constitutional purposes of copyright by allowing second authors to make productive uses of earlier works, drawing upon expression from

them in a way that advances the ‘progress of Science and useful Arts.’”

Samuelson, 77 Fordham L. Rev. at 2569. In short, the fair use doctrine is designed to prevent copyright from “stifling the very creativity which [it] is designed to foster.” *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (quoting *Iowa State Univ. Research Found. Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980)).

In urging this Court to reverse the judgment below, Gaylord asks this Court to set aside these well-established principles and suggests the Trial Court was mistaken about the basic goal of copyright law. OB 24-25. Specifically, Gaylord suggests the Copyright Act’s paramount goal is not to promote creativity, but to reward and protect authors. *Id.* That is simply false. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 525-26 (1994) (purpose of Copyright Act is not to deter infringement, but to promote creativity); *Atari*, 975 F.2d at 842-43; pp. 14-15, above.

The Trial Court was correct to recognize the underlying purpose of the Copyright Act “is not to protect authors, but to achieve progress in the arts and sciences.” JA 10 (Opinion). It was likewise correct to recognize the critical role fair use plays in advancing this purpose by protecting the very creativity the Copyright Act is designed to promote. *Id.*

This Court should consider these same principles in reviewing the Trial Court’s decision and application of the fair use factors.

2. Each Of The Fair Use Factors Supports A Finding Of Fair Use Here

In assessing fair use, four statutory factors guide the courts. *Campbell*, 510 U.S. at 577; 17 U.S.C § 107. They are non-exclusive and must be weighed together in light of the underlying purpose of copyright. *Campbell*, 510 U.S. at 577-78. While the statutory factors inform the fair use analysis, “[t]he ultimate test of fair use” is whether copyright’s “goal of ‘promot[ing] the Progress of Science and useful Arts’ . . . ‘would be better served by allowing the use than by preventing it.’” *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998) (quoting U.S. Const. art. I, § 8, cl. 8 and *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1077 (2d Cir. 1992)); *see* Leval, 103 Harv. L. Rev. at 1110-11. Here, all of the fair use factors favor the Postal Service, and prohibiting the use would frustrate, not serve, the underlying purpose of the Copyright Act.

a. Purpose And Character Of The Use

The “heart of the fair use inquiry” lies in the first factor – “the purpose and character of the use.” *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006); *see Campbell*, 510 U.S. at 579; Leval at 1116 (the first factor is the “soul” of fair use); 17 U.S.C. § 107(1). The focus of this analysis is the “transformative” nature of the accused work. *Campbell*, 510 U.S. at 579; *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006). Although this factor also considers whether the use is commercial, commercial use is not a dispositive

consideration, and “the more transformative the new work, the less will be the significance of other factors, like commercialism. . . .” *Campbell*, 510 U.S. at 579.

i. Transformative Nature

A work is transformative when it does not “merely supersede[] the objects of the original creation,” but rather “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Campbell*, 510 U.S. at 569. Where “the secondary use adds value to the original—if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.” *Blanch*, 467 F.3d at 251-52 (quoting Leval, 103 Harv. L. Rev. at 1111).

In *Blanch*, visual artist Jeff Koons copied part of a photograph by Andrea Blanch that appeared in Allure magazine and incorporated it into his painting *Niagara*. *Id.* at 247. *Niagara* “depicts four pairs of women’s feet and lower legs dangling prominently over images of confections – a large chocolate fudge brownie topped with ice cream, a tray of donuts, and a tray of apple danish pastries – with a grassy field and Niagara Falls in the background.” *Id.* Koons explained that by “juxtaposing women’s legs against a backdrop of food and landscape . . . he intended to comment on the ways in which some of our most

basic appetites – for food, play, and sex – are mediated by popular images.” *Id.* (internal citation omitted).

In affirming summary judgment in favor of Koons on his fair use defense, the Second Circuit concluded his use of Blanch’s photograph was transformative because Koons used Blanch’s photograph not simply to repackage it, but as “raw material” to create a new work with a different meaning and message by adding new expression to the original photograph. *Id.*

That is precisely what happened here. John Alli testified that in creating the photograph the Postal Service used, he wanted to convey the feeling of being in the Korean War and the frigid cold that was so prominent in the memory of many Korean War veterans. JA 1780 (Tr. at 377:9-12). Alli felt the snow covering *The Column* epitomized the feelings and freezing conditions that were key parts of the Korean War experience. JA 1781 (Tr. at 381:12-20). Alli was able to further emphasize the emotional impact of the photograph with subdued, near-dawn lighting. The result is a “surreal” effect in which the viewer is unsure whether the subjects of the photographs are real soldiers or statues. JA 1780 (Tr. at 377:18-378:3). This effect was enhanced by the Postal Service when it manipulated the photograph to make it even more bleak and gray. JA 1833 (Tr. at 583:11-585:13).

When the nature of Alli’s image and the Postal Service’s further manipulation of it is compared to the original sculpture, there can be little doubt that the image “add[ed] something new” to Gaylord’s sculpture. *Campbell*, 510 U.S. at 579. Nor can there be any doubt the image “alter[ed] [Gaylord’s statue] with new expression, meaning, [and] message.” *Id.* Whereas Gaylord’s statue is a three-dimensional depiction of a unit on patrol in Korea set in a meadow on the edge of the woods, Alli’s image and the stamp that incorporates it represent a highly-stylized and abstracted attempt to convey a much more particularized facet of the Korean War experience – the frigid cold that describes the experience literally and depicts it symbolically. The snow and Alli’s visual manipulation transform both the visual aesthetic and the meaning of Gaylord’s sculpture, creating an altogether new expression, meaning and emotional impact. By depicting the sculpture in this frigid, surreal and highly stylized way, the image provides new insight into both the Korean War experience and Gaylord’s sculptural expression of it.

Apparently unable to dispute the plainly transformative qualities of the image or Alli’s testimony about its intended effect, Gaylord urges this Court to adopt an exceedingly narrow view of “transformative” use. Gaylord contends that to be “transformative” a work “must comment, criticize” or otherwise discuss the original work. OB 26 (citing *Campbell*). That is simply not so. While *Campbell*

identified parody as one form of commentary that may qualify as transformative, it did not hold or suggest a work must comment on or criticize the original to qualify as transformative. *See Campbell*, 510 U.S. at 579. Cases applying *Campbell* demonstrate the concept of transformative use goes well beyond commentary and criticism. Indeed, the Second Circuit has rejected outright the narrow view of transformative use that Gaylord urges.

In *Bill Graham*, the publisher of a book chronicling the history of the Grateful Dead reprinted in reduced form seven concert posters owned by the Bill Graham Archives. *Bill Graham*, 448 F.3d at 607. The Archives contended that use was not transformative because the book did not criticize or discuss the posters. *Id.* at 609. The Court rejected this contention and found the use was transformative even though the book offered no discussion or commentary regarding the posters. *See id.* at 609 (expressly rejecting argument that commentary or criticism of the posters’ artistic nature was necessary to demonstrate transformative use).¹

¹ Gaylord suggests the Second Circuit’s 1992 decision in *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), “explain[s]” that the *Campbell* decision requires direct commentary. OB 28. *Rogers* does not “explain” anything about *Campbell*; *Rogers* was decided two years before *Campbell*. *Bill Graham Archives* applied *Campbell* specifically and held no commentary or criticism is required for a work to qualify as a transformative use.

Many other cases have likewise found a work to be transformative despite the lack of any commentary on the original work. *See, e.g., Los Angeles News Svc. v. CBS Broadcasting, Inc.*, 305 F.3d 924, 939 (9th Cir. 2002) (finding fair use where CourtTV used footage of Reginald Denny beating in a video montage to introduce a prime time program); *Calkins v. Playboy Enterprises Int'l, Inc.*, 561 F.Supp.2d 1136, 1140-41 (E.D. Cal. 2008) (use of model's class photo in biographical photospread was transformative despite lack of commentary on photograph); *Hofheinz v. A & E Television Networks, Inc.*, 146 F. Supp. 2d 442, 446-47 (S.D.N.Y. 2001) (finding fair use where television biography used film clips to illustrate actor's career); *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (display of "thumbnail" images to facilitate search functionality held transformative because it places images in a "different context"); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003) ("exact replications" of images in reduced size used to facilitate internet search technology held transformative).

In attempting to restrict the concept of transformative use still further, Gaylord suggests a work cannot be transformative unless there was some "necessity" in using the copyrighted work. OB 30-31. But necessity is not a requirement either. *See, e.g., Lennon v. Premise Media Corp.*, 556 F.Supp.2d 310, 324 (S.D.N.Y. 2008) ("Determining whether a use is transformative . . . does not

require courts to decide whether it was strictly necessary that it be used.”). It was not “necessary” for the publisher of the *Illustrated Trip* to include the seven concert posters at issue in that case; it could have told the Grateful Dead’s story without them. *See Bill Graham*, 448 F.3d 605. It was not necessary for Jeff Koons to use Andrea Blanch’s photograph in creating *Niagara*; he could have simply used another pair of legs. *See Blanch*, 467 F.3d 244. It was not necessary for CourtTV to use footage of the Reginald Denny beating in its opening montage for Prime Time Justice; it could have created a different montage without that footage. *See Los Angeles News Svc.*, 305 F.3d 924. For that matter, it was not necessary for 2 Live Crew to parody Roy Orbison’s *Pretty Woman*; they could certainly have released a rap album without that song. *See Campbell*, 510 U.S. 569; *see generally Lennon*, 556 F.Supp.2d at 324.

Finally, Gaylord complains the Trial Court erred by “not considering the ‘purpose’ of the use.” OB 32-33. According to Gaylord, the stamp cannot be transformative because it and the sculpture have a “common purpose” – honoring the veterans of the Korean War. OB 32. But it is the purpose of the use that matters, not the purpose of the article. *See* 17 U.S.C. § 107(1). Here, the image does more than simply honor Korean War Veterans, and it uses *The Column* for a highly expressive purpose. Alli testified he used *The Column* because he wanted to create an image that conveyed the feeling of being in the Korean War and

epitomized the experience of it. He felt the surreal nature of the scene and the frigid cold it emphasizes captured that feeling. Just as Andrea Blanch's photograph was fodder for Jeff Koons's social commentary, *The Column* was the raw material Alli used to create an image that expressed his perspective on the Korean War and the experience of those who served in it. The stamp, in turn, uses Alli's expression and distills it further to create an even more ghostly and frigid depiction of the Korean War experience.

Moreover, Gaylord ignores the fact that a differing purpose is not necessary to demonstrate a transformative use. *Campbell* held that a work is transformative where it "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 (emphasis added). The test is disjunctive; even if two works share some common purposes, a use may still be transformative where it alters the copyrighted work with "new expression [or] meaning" (*id.*), or employs it in the creation of a new work with "new aesthetics, . . . insights and understandings." *Blanch*, 467 F.3d at 251-52 (quoting Leval, 103 Harv. L. Rev. at 1111). Regardless of purpose, a work is transformative where it uses the copyrighted work as "raw material . . . in the furtherance of distinct creative or communicative objectives." *Id.* (internal citation omitted). That is precisely what happened here. *See* Pp. 20-21, above. In placing the statue in a mysterious, surreal

and frigid scene, Alli's photograph and the stamp add new aesthetics to enhance the viewer's understanding of the Korean War in ways the statue alone does not.

In attempting to avoid the plainly transformative nature of the image at issue, Gaylord posits legal requirements that simply do not exist and fly in the face of established law. Alli's photograph and the stamp that incorporates it use *The Column* for a new purpose and add new aesthetics that communicate new meaning. Each is highly transformative.

ii. Commercial Use

While transformation is the heart of the fair use inquiry, the Court must nonetheless consider the extent to which the Postal Service used the sculpture commercially. See 17 U.S.C. § 107(1); *Campbell*, 510 U.S. at 584. Even assuming the Postal Service made a commercial use of the sculpture, that does not disqualify the stamp from fair use protection. On the contrary, *Campbell* recognized most fair uses are undertaken for profit. See *Campbell*, 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 569 (“[t]he 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 where painting sold for \$2 million). Here, any commercial use of the sculpture is significantly outweighed by its highly transformative purpose. Accordingly, the first factor weighs strongly in favor of the Postal Service.

b. Nature Of The Copyrighted Work

The second fair use factor focuses on “the nature of the copyrighted work.” 17 U.S.C. § 107(2); *Campbell*, 510 U.S. at 570. In assessing this factor, Courts typically consider whether the original work is creative or factual, and whether it is published or not. *See Bill Graham*, 448 F.3d at 612. Gaylord acknowledges this factor carries little weight when the copyrighted work has 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 cases involving transformative copying of “publicly known, expressive works”); OB 37-39.

Gaylord contends the Trial Court erred in giving this factor little weight because the use is not transformative. OB 38-39. In fact, the use of the sculpture is creative and highly transformative. *See* Pp. 19-26, above. Moreover, Gaylord ignores the fact *The Column* is not only published, but on permanent public display as part of a national memorial. If anything, the second factor should favor the Postal Service; insofar as it favors Gaylord, it does so only minimally.

c. Amount And Substantiality Of The Portion Used

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 Campbell*, 510 U.S. at 586. While the Court must consider both the quality and quantity of the copyrighted work used, the central question is whether the extent of copying is reasonable in light of its purpose. *See id.* Thus, “the extent of permissible copying varies with the purpose and character of the use.” *Id.* at 586-87.

Courts have found the third factor will not weigh against fair use where a secondary work reproduces the entire copyrighted work, but does so in a manner that reduces the visual impact of the work’s artistic expression. *See Bill Graham*, 448 F.3d at 613; *Perfect 10*, 508 F.3d at 1167-68; *Kelly*, 336 F.3d at 820-21. Here, the stamp depicts portions of *The Column* in radically reduced format, shrinking three-dimensional, larger-than-life figures into a graphic image no more than an inch and a half wide. The sculptural detail is further obscured by the snow, and all but three of the soldiers appearing on the stamp are nothing but tiny silhouettes. Any protected expression left is barely discernible.

Gaylord complains that Alli’s photograph and the stamp that incorporates it use a substantial portion of *The Column*, representing the so-called “heart or essence of the work.” OB 40. Gaylord does not bother to explain how

the “heart” of a three-dimensional sculpture of soldiers rendered larger than life could be captured in a two-dimensional image less than two inches across. But quality and quantity are not the point in any event. While relevant, those values simply inform the real question: does the image borrow “excessively” in relation to its purpose? *See Blanch*, 467 F.3d at 257. Here, the stamp used just enough of the sculpture – the broad outlines and silhouettes – to conjure its surreal vision of soldiers on patrol in the frigid cold of the Korean War, while leaving aside the expressive details of Gaylord’s sculpture. Accordingly, the stamp does not borrow excessively in relation to its transformative and artistic purposes, and the third factor favors fair use.

d. Market Effect

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). In considering potential market harm, the Court must consider harm to the markets for both the original work and potential licensing markets, while recognizing that “the more transformative the secondary use, the less likelihood that the secondary work substitutes for the original.” *Castle Rock*, 150 F.3d at 145 (citing *Campbell*, 510 U.S. at 591); *see Bill Graham*, 448 F.3d at 614-15. Not all harms to these markets, however, are cognizable. Harm that arises from criticism, for instance, is not

cognizable because copyright owners are not expected to license criticism of their work. *See Campbell*, 510 U.S. at 592.

Here, Gaylord complains about lost licensing revenue and the potential loss of future licensing revenue. OB 41, 46-47. But licensing revenues “lost” from transformative uses are likewise not cognizable because copyright owners have no right to these revenues in the first place. *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 fifteen seconds of 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).

Indeed, Gaylord asserts the same market harm the Bill Graham Archives asserted when it claimed that there was “an established market for licensing its images” and that it would suffer “the loss of royalty revenue directly from [the publisher who used the posters] and the opportunity to obtain royalties from others.” *Compare Bill Graham*, 448 F.3d at 614 *with* OB 41, 46-47. That argument was rejected there and should be rejected here based on the highly transformative nature of the work. *See Bill Graham*, 448 F.3d at 614-15 (finding

no cognizable market harm where the use of copyrighted material “falls within a transformative market”); *Lennon*, 556 F.Supp.2d at 327.

Insofar as there is any real or potential market Gaylord is entitled to protect, the record demonstrates the stamp has had no adverse impact on it. Gaylord concedes the stamp will not have an adverse effect on the market for the original sculpture or fine art reproductions of it. OB 42. As for the potential impact on licensing and derivative markets, Gaylord admits the stamp has increased “the value, appeal, market, and notoriety of [*The Column*].” JA 1640 (DX 43 at RFA No. 20).

Despite this, Gaylord worries the stamp might affect the market for derivative works, such as key chains, pins, buttons, miniature statues and images of *The Column*. OB 44, 47. Yet the record demonstrates Gaylord has never sold or licensed a photograph of *The Column*; nor has he ever sold posters, postcards, magnets or key chains. See P. 6, above. His last royalty payment for any licensed products was received in 1997, and Gaylord has neither sold nor attempted to market any products relating to *The Column* for nearly a decade. See Pp. 6-7, above. These facts make it plain that the use of *The Column* on the stamp “had no deleterious effect on the potential market or value of the copyrighted work.” *Blanch*, 467 F.3d at 258 (fourth factor greatly favors fair use where photographer had not licensed photograph for use in visual art and there was no evidence use of

photograph upset any plans to market the photograph or decreased its value) (internal citation omitted); *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 25 (1st Cir. 2000) (fourth factor favors fair use where publication of photograph only enhanced demand for it). Gaylord’s speculation about possible harm to unsubstantiated derivative markets he has shown no intention of exploiting for more than a decade does not suffice to show market harm. *See Campbell*, 510 U.S. at 593 n.23 (fourth factor demands evidence of “substantial harm” to “derivative markets”). The fourth factor weighs heavily in favor of fair use here.


e. Aggregate Analysis

The stamp at issue uses *The Column* for a highly expressive and transformative purpose, and the record demonstrates that use imposes no plausible harm to the value of *The Column*. The artistic expression embodied by the image at the center of this case is precisely the sort of creative activity copyright law should encourage, not suppress. Accordingly, the underlying purposes of the Copyright Act and the Progress Clause are better served by allowing the use rather than preventing it.

V. CONCLUSION

The Court should affirm the Trial Court's finding that the Postal Service made fair use of *The Column*.

Respectfully submitted,


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July 15, 2009

Counsel for Amici Curiae

EXHIBIT A

The following parties are Amici Curiae:

The Andy Warhol Foundation for the Visual Arts, Inc.
New York, NY

The Andy Warhol Foundation for the Visual Arts was established upon the death of that esteemed artist through a gift from his estate. Its mission is to advance the visual arts by fostering innovative artistic expression and the artistic process itself. In pursuit of these objectives, the Foundation has made millions of dollars in grants to fund the creation, presentation and documentation of contemporary art. All of its work is premised upon the belief that art reflects an important cultural dialogue, and that the freedom of artistic expression is fundamental to a democratic society.

The Andy Warhol Museum
Pittsburgh, PA

The Andy Warhol Museum features extensive permanent collections of art and archives documenting the life and work of Andy Warhol, and exhibits innovative work from other contemporary artists, much of which looks to the world around us as inspiration for artistic expression. Serving more than 80,000 visitors annually, the Museum is a vital forum in which diverse audiences of artists, scholars, and the general public are galvanized through creative interaction with the art and life of Andy Warhol and other important artists.

Thomas Lawson
Dean of the School of Art, California Institute of the Arts
Valencia, CA

Thomas Lawson, Dean of the School of Art at California Institute of the Arts, is a renowned artist whose paintings have been included in shows at the ICA Philadelphia, The Brooklyn Museum, The Gallery of New South Wales in Sydney and Laforet Museum in Tokyo. Lawson's early works are currently on view at The Metropolitan Museum of Art as part of the show "The Pictures Generation, 1974-1984." He has also created temporary public art works in New York, Glasgow, Newcastle and Madrid. Lawson has organized and selected many exhibitions for such venues as Artists Space, PSI, The Clocktower and White Columns, all in New York; National

Touring Exhibitions/Hayward Gallery in London; and the Los Angeles Municipal Art Gallery. His essays have appeared in various journals, including Artforum, Art in America, and October, as well as numerous exhibition catalogues. From 1979 until 1992 he, along with Susan Morgan, published and edited REAL LIFE Magazine. A book of selected writings, Mining for Gold, was published by JRP-Ringier, Zurich in 2004, and an anthology of REAL LIFE Magazine, was published by Primary Information, NY in 2007. He has been co-editor of Afterall, an art journal published in London and Los Angeles, since 2002, and is founding editor of East of Borneo, a new publishing venture based in Los Angeles, that will go live in late 2009.

Barbara Kruger
Los Angeles, CA

Barbara Kruger is an internationally acclaimed artist and educator, currently on faculty in the Department of Art at the University of California at Los Angeles. As an artist, Kruger is known for layering found photographs from existing sources with text that involves the viewer in the struggle for power and control that her captions speak to, including two of her most recognizable slogans read “I shop therefore I am,” and “Your body is a battleground.” Her images are often taken from mainstream magazines that sell the very ideas that she challenges with her art. For the past 15 years Kruger has created immersive video installations that continue her engagement with the power of images and both the spoken and written word. Her works are displayed in the most highly regarded museums and art institutes across the globe, including the Museum of Modern Art, the Guggenheim Museum, and the Whitney Museum, all in New York, the Art Institute of Chicago, the Institute of Contemporary Art in Boston, the Institute of Contemporary Art in Los Angeles, the Kunsthalle in Dusseldorf, the Institute of Contemporary Art in London, the National Gallery of Australia in Canberra, and the Centre Georges Pompidou in Paris. In 2005, Kruger was included as part of The Experience of Art at the Venice Biennale, and was awarded the Golden Lion for Lifetime Achievement.

Jonathan Monk
Berlin, Germany

Jonathan Monk is a world-renowned artist who works in a variety of media, including print, sculpture, film, and photography. Monk has used the work of contemporary artists such as John Baldessari, Chris Burden, Sol LeWitt, Ed Ruscha, and Lawrence Weiner, and Jeff Koons as source material for his own artwork. By employing his own intrinsic artistic strategies, appropriation and recontextualization, Monk appends art history with a narrative of his own interplay between the objects and ideas of the past and his newly conceived reincarnations. His work has been the subject of numerous solo and group exhibitions, and appears in the permanent collections of the Museum of Modern Art, New York, NY; Solomon R. Guggenheim Museum, New York, NY; Los Angeles County Museum of Art, Los Angeles, CA; TATE Modern, London, United Kingdom; FRAC, Burgandy, Dijon, France; FRAC, Languedoc-Rouyssilla, Montpellier, France; FRAC, des Pays de la Loire, Nantes, France; Moderna Museet, Stockholm, Sweden; and MMK, Frankfurt, Germany, among others.

Allen Ruppertsberg
New York, NY
Los Angeles, CA

Allen Ruppertsberg is a world-renowned American Conceptual artist whose work includes paintings, prints, photographs, sculptures, installations, and books. He participated in the groundbreaking 1969 exhibition *When Attitudes Become Form*, and is recognized as a seminal practitioner of installation art, having produced such influential works as *Al's Cafe* (1969), *Al's Grand Hotel* (1971) and *The Novel that Writes Itself* (1978). Ruppertsberg's work has been the subject of over sixty solo exhibitions and nearly 200 group shows, and can be found in permanent collections of museums world wide, including The Museum of Modern Art, New York; Whitney Museum of American Art, New York; Museum of Contemporary Art, Los Angeles; Foundation de Appel, Amsterdam, The Netherlands; and Museum für Moderne Kunst, Frankfurt, Germany, among many others.

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**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

FRANK GAYLORD,
Plaintiff-Appellant,

v.
UNITED STATES,
Defendant-Appellee.

No. 2009-5044

**DECLARATION OF AUTHORITY PURSUANT TO
28 U.S.C. § 1746 AND FEDERAL CIRCUIT RULE 47.3(d)**

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am an employee of Counsel Press's Washington DC Office. Counsel Press was retained by Attorneys for *Amici Curiae* to print the enclosed documents.

The attached *Brief of Amici Curiae* has been submitted to Counsel Press, by the above attorneys, electronically and/or has been reprinted to comply with the Court's rules. Because of time constraints and the distance between counsel of record and Counsel Press, counsel is unavailable to provide an original signature, in ink, to be bound in one of the briefs. Pursuant to 28 U.S.C. §1746 and Federal Circuit Rule 47.3(d), I have signed the documents for Anthony T. Falzone, with actual authority on his behalf as an attorney appearing for the party.

July 15, 2009



John C. Kruesi, Jr.

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

FRANK GAYLORD,
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v.
UNITED STATES,
Defendant-Appellee.

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PROOF OF SERVICE

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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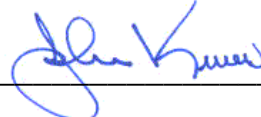
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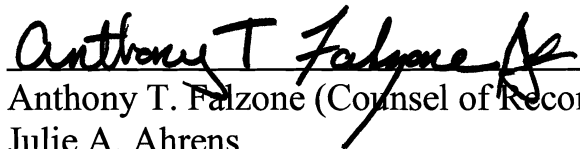
July 15, 2009



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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and (C) and Federal Circuit Rule 32(b). It was prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman font, and it contains 6,982 words.

Dated: July 15, 2009
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