

Case No. 19-55348

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

DR. SEUSS ENTERPRISES, L.P.

Plaintiff-Appellant

v.

COMICMIX LLC, ET AL.

Defendants-Appellees

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

**BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION,
ORGANIZATION FOR TRANSFORMATIVE WORKS, PUBLIC
KNOWLEDGE, FRANCESCA COPPA, DAVID MACK, AND
MAGDALENE VISAGGIO IN SUPPORT OF DEFENDANTS-APPELLEES
AND AFFIRMANCE**

Dated: October 11, 2019

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* Electronic Frontier Foundation, Public Knowledge, Organization for Transformative Works, Francesca Coppa, David Mack, and Magdalene Visaggio each state that they are individuals and/or that they do not have parent corporations and that no publicly held corporation owns ten percent or more of their stock.

Dated: October 11, 2019

By: /s/Mason Kortz
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STATEMENT OF COMPLIANCE WITH RULE 29

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici curiae* certify that all parties have consented to the filing of this brief.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person — other than the amici curiae, their members, or their counsel — contributed money that was intended to fund the preparation or submission of this brief.

Dated: October 11, 2019

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STATEMENT OF INTEREST OF AMICI CURIAE

Amicus curiae Electronic Frontier Foundation (“EFF”) is a member-supported, non-profit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF and its over 32,000 dues-paying members have a strong interest in helping the courts and policymakers ensure that copyright law serves the interests of creators, innovators, and the general public.

Amicus curiae Organization for Transformative Works (“OTW”) is a non-profit organization dedicated to protecting and preserving non-commercial works created by fans based on existing works, including popular television shows, books, and movies. OTW’s “Archive of Our Own” also functions as a platform hosting transformative non-commercial works, supporting over 2,000,000 registered users and receiving upwards of 230 million page views per week.

Amicus curiae Public Knowledge (“PK”) is a non-profit organization that is dedicated to preserving the openness of the Internet and the public’s access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. PK advocates on behalf of the public interest for a balanced copyright system, particularly with respect to new and emerging technologies.

Amicus curiae Francesca Coppa is a Professor of English and Director of Women's and Gender Studies at Muhlenberg College, where she teaches courses in dramatic literature, popular fiction, and mass media storytelling. A founding member of OTW, she is the author of *The Fanfiction Reader: Folk Tales for the Digital Age* (2017), which won the Prose Award for Best Book in Media and Cultural Studies. She has been an advocate for copyright reform and fair use. Her book on fan vidding, *Vidding: A History*, is forthcoming from the University of Michigan Press.

Amicus curiae David Mack is a *New York Times* bestselling author whose experience spans multiple media, including television, novels, comic books and video games. His work runs the gamut from comedy to drama, fantasy to science fiction, and includes numerous *Star Trek* novels and television scripts. As a literary artist, he depends upon the protection of the First Amendment and the standards of Fair Use.

Amicus curiae Magdalene Visaggio is the writer and creator of the Eisner-nominated comic series *Kim & Kim* and *Eternity Girl*, the latter for DC Comics. She is also the creator of *Vagrant Queen*, which will air on SyFy in 2020.

Amici curiae EFF, OTW, PK, Dr. Coppa, David Mack, and Magdalene Visaggio (“*Amici Curiae*” or “*Amici*”) share a strong interest in promoting a robust and balanced fair use doctrine. *Amici* have decades of collective experience and

expertise among them, advocating for the interests of creators and ensuring that copyright law (and, in particular, application of copyright’s fair use doctrine) serves to promote values of free speech and freedom of expression.

SUMMARY OF ARGUMENT

Millions of Americans communicate through the art of mash-up, putting multiple works in conversation with one another to create new expression. The district court correctly concluded that the fair use doctrine protects this important form of expression, which makes transformative use of source material from other works. *Amici* urge the Court to affirm that conclusion.

This case concerns two works: *Oh The Places You’ll Boldly Go!*, by David Gerrold and Ty Templeton (“*Boldly*”) and *Oh The Places You’ll Go!* by Theodore Geisler (professionally known as Dr. Seuss) (“*Go!*”) (the latter in the context of the works of Dr. Seuss more generally). The lower court found, correctly, that — to the extent that *Boldly* borrows from and builds upon copyrightable material embodied in *Go!* — such use constitutes fair use within the meaning of Section 107 of the United States Copyright Act. 17 U.S.C. § 107.

Boldly is a significantly transformative work within the meaning of copyright law. It recasts, recontextualizes, and adds new expression or meaning to *Go!* in order to create a new, significant work of creative expression. *Boldly* falls within the broader genre of “mash-ups,” which can be highly worthwhile works of

art that serve many purposes. Mash-ups often comment on the works on which they rely and compare their themes to those of other works. They also can provide a powerful way for marginalized groups to critique media and use existing cultural works to express a new, transformative meaning. *Boldly*'s creative adaptation of selected parts of Dr. Seuss works is just one example of the expression that would be stifled by an overly restrictive application of copyright law.

ARGUMENT

I. *Boldly* Is a Highly Transformative Work Within the Meaning of the Fair Use Doctrine.

A. Transformative Works Like *Boldly* Satisfy the First Factor of the Fair Use Test and Further the Goals of Copyright Law.

Copyright's fair use doctrine protects the creation of transformative works, or those that "add[] something new, with a further purpose or different character, altering the [original work] with new expression, meaning, or message." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).¹ In this way, the law recognizes that artists, thinkers, writers, and creators must have the freedom to build upon existing elements of culture to create new works that further enrich our society and advance the very purposes of copyright law. *Id.*; see Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1109 (1990).

¹ In recognizing that creativity requires "breathing space," the Supreme Court declared that "the goal of copyright . . . is generally furthered by the creation of transformative works." *Campbell*, 510 U.S. at 579.

Although transformative aspects of remix works, like mash-ups, often involve or imply commentary on the underlying work(s), a remix work does not have to comment on the original to be transformative for the purposes of the first fair use factor. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1177 (9th Cir. 2013). This Court and other courts have found visual art works that use prior works as “raw material” to be transformative even when they fail to comment on or parody the original. For example, this Court held that Green Day’s use of a black and white illustration of a face frozen mid-scream, *Scream Icon*, as a backdrop for a music video was transformative. *Id.* at 1170. The poster was slightly weathered and had been spray-painted with a bright red cross. *Id.* at 1174. In holding that the use was transformative, this Court emphasized the difference between the “expressive content and message” of the video and *Scream Icon*. *Id.* at 1176-77. *Scream Icon* reflected a specific time and culture of Los Angeles, whereas the video had a religious theme. *Id.*

The Second Circuit has similarly held that visual collages — works incorporating other artists’ images into unique, cohesive wholes — were transformative because they changed the expression or aesthetic of the underlying works. In *Cariou v. Prince*, 714 F.3d 694 (2nd Cir. 2013), Prince, an artist, used photographs of Rastafarians to create a collection of collages. 714 F.3d at 706. For some of the collages, Prince painted bright objects, such as lozenges and an electric

blue guitar, over the photographs; for others, Prince took bits and pieces of the photographs to create distorted human shapes. *Id.* at 699-702. The majority of the collages were transformative because the aesthetic differed from that of the original photographs. *Id.* at 706. In *Blanch v. Koons*, 467 F.3d 244 (2nd Cir. 2006), the court held that a collage created from photographs of women’s legs imposed over a pastoral landscape dotted with scrumptious desserts was transformative. 467 F.3d at 247, 253. The court commented directly on how original works could serve as “raw material,” writing, “[w]hen, as here, the copyrighted work is used as raw material in the furtherance of distinct creative or communicative objectives, the use is transformative.” *Id.* at 253 (internal citations and quotations omitted).

B. A Close Reading of *Boldly* and *Go!* — Within the Broader Context of the Worlds of *Star Trek* and Dr. Seuss — Underscores *Boldly*’s Status as a Transformative Work.

The district court in this case correctly concluded that *Boldly* is a transformative work and makes fair use of elements of *Go!* because *Boldly* adapts the stylistic, visual, and rhyming elements from *Go!* to create new expression. *Dr. Seuss Enters., L.P. v. ComixMix LLC*, 372 F. Supp. 3d 1101, 1115 (S.D. Cal. 2019). A close reading of the works demonstrates that this conclusion was correct and that the lower court’s decision should be affirmed.

In *Boldly*, the authors have remixed and remade not a single Dr. Seuss book but the very idea of “Dr. Seuss.” *Boldly* speaks with specificity to thematic

elements of *Star Trek*. It draws out those meanings of “Dr. Seuss” that resonate with *Star Trek* fans while adding new meanings that speak with particularity to the themes of *Star Trek* beloved by its community of fans.

Star Trek fandom is, indeed, a community as numerous scholarly works have documented. See, e.g., John Tulloch et al., *Science Fiction Audiences: Watching Doctor Who and Star Trek* (1995); Roberta Pearson & Máire Messenger Davies, *Star Trek and American Television* (2014). *Star Trek* is, for many people, a culture in the literal sense: a place of shared history and family. There are *Star Trek* weddings. See, e.g., Gerard Milewski, *How to Plan Your Own Star Trek Wedding*, *Star Trek* (May 19, 2019), <https://www.startrek.com/article/our-star-trek-wedding>. *Star Trek* provides a text that parents eagerly look forward to sharing with their children (hence the existence of products like *Star Trek* uniform onesies, plush toys, and crib mobiles²). Parents want their kids to share their love of *Star Trek* and the show’s values.³

² *Star Trek* products include a wide variety of unlicensed merchandise available on sites like Etsy. See, e.g., *Popular Items for Star Trek Onesie*, Etsy, https://www.etsy.com/market/star_trek_onesie (last visited Oct. 9, 2019) (displaying 64 results).

³ Andrew Copson describes *Star Trek*’s values as humanist, and notes that they include cooperation, liberality, the equality of persons, the dignity of life, scientific curiosity and awe at the natural world. Andrew Copson, *The Humanist Values of Star Trek*, *The New Statesman* (Feb. 22, 2007) <https://www.newstatesman.com/blogs/the-faith-column/2007/02/star-trek-humanist-values>.

Both the original *Star Trek* and the works of Dr. Seuss share a wonky “Sixties vibe.” In fact, both *Star Trek* and the television version of *How The Grinch Stole Christmas* debuted in 1966. *Star Trek*, IMDB, <https://www.imdb.com/title/tt0060028/> (last visited Oct. 9, 2019); *How the Grinch Stole Christmas! (1966)*, IMDB, <https://www.imdb.com/title/tt0060345/> (last visited Oct. 9, 2019). Both texts still feel of that era and appear antiquated to contemporary audiences. Mervyn Nicholson argues that, compared to almost all subsequent science fiction, including later iterations of *Star Trek*, the original series is minimalist, “primitive, even quaint — not much more than ‘a lot of orange paint [and] plastic plants.’” Mervyn Nicholson, *Minimalist Magic: The Star Trek Look*, *Bright Lights Film Journal* (Apr. 30, 2010), <https://brightlightsfilm.com/minimalist-magic-the-star-trek-look/#.XZ4ao-dKjOQ>. This description could easily describe Dr. Seuss’s illustrations. Nicholson goes on to argue that the look of *Star Trek*, its odd visual style (which includes the use of strong blocks of color and what he calls “winding ways,” that is, “places where there are turnings and no direct route . . . for instance, of rocky barren lands, foggy landscapes, caverns — places that are confusing or that lack markers,” *id.*), is integral both to *Star Trek*’s meaning and its success. Similar strong blocks of color (orange deserts, green skies) and “winding ways” appear throughout the works of Dr. Seuss, some of which have been sampled and reread for *Boldly*.

A good remix like *Boldly* is not accidental; the mashed-up works are chosen particularly to resonate and cannot simply be swapped out with another work. *Star Trek* mashed-up with *Peanuts* would be a very different creation despite them being from the same era. *Peanuts* has a pop-psychological vibe, and it deals with themes like anxiety, depression, and failure, which are very different from *Star Trek*'s utopian idealism. *Star Trek* in the style of Andy Warhol would mean something else altogether. Owen Galliger notes that, in remix, "previously understood meanings of particular visual signs are altered and updated through recontextualization." Owen Gallagher, *Reclaiming Critical Remix Video: The Role of Sampling in Transformative Works* 4 (2017). Gallagher goes on to explain:

The ability to recall the meaning of a specific visual sign and immediately understand it points to the fact that its meaning is stored in memory as a result of having been perceived in the past . . . However, in the case of remix, previously perceived and understood signs are presented in a very different context, which causes a moment of realization in the viewer, during which comparisons are made between the old and new meanings and a reinterpretation of the previously understood signs occurs."

Id. In other words, the intervention has to be visible to make it mean something; similarity between the old and new work is not an accident. *Boldly* re-evaluates the previously perceived through the pleasure of a good pun, giving the reader joy through hearing and understanding two meanings simultaneously. See Sigmund Freud, *Wit and Its Relation to the Unconscious* 173 (1999).

The audience re-sees the saucer-shape on Dr. Seuss's cover as the famous saucer of *Star Trek*'s iconic ship, the Enterprise. ER1105. It sees beloved *Star Trek* creatures like the *Gorn* (a giant lizard who wears a sparkly tunic), *Star Trek: The Arena* (NBC television broadcast Jan. 19, 1967); the *Horta* (a silicon-based rock creature who turns out to be an incredibly sensitive and enlightened alien being), *Star Trek: The Devil in The Dark* (NBC television broadcast Mar. 9, 1967); and Gerrold's own *Tribbles* (fuzzy animals who multiply faster than rabbits), *Star Trek: The Trouble with Tribbles* (NBC television broadcast Dec. 29, 1967), drawn in the style of Seussian creatures. ER1110; ER1115; ER1126. The remix integrates all these creatures with their delightful names into one great, alien-sixties-fantastic. It also argues that the sense of wonder and curiosity toward the strange that readers find in Dr. Seuss's work for children should continue into adulthood.

Science- and science-fiction-loving adults believe strongly in cultivating and maintaining a sense of curiosity and wonder about the universe. They value optimism and international collaboration, both political (the United Federation of Planets) and scientific. This makes the audience re-imagine Seuss's characters as the world's future explorers and scientists, reinscribing Seussian fantasy and fable into the real world of science and politics. The line of Whos of Dr. Seuss's Whoville — who hold hands and sing — is redrawn so as to include not only Starfleet officers in their gold, red, and blue uniforms but also Vina (a green-

skinned alien slave girl) and Christopher Pike (the disabled former Enterprise captain in his futuristic wheelchair). ER1111. An original panel in Dr. Seuss's *How The Grinch Stole Christmas* reflects the idea of community coming together around the Christmas tree to sing; in *Boldly*, that idea of community is extended in ways meaningful to *Star Trek* and science fiction fans. *See Id.* It is a vision of a utopian international community of the future.

The fact that *Boldly* does not rely solely on *Go!* but reworks and responds to individual drawings from five of Seuss's books is part of what makes it a good remix. There has been curation and careful artistic selection, just as DJs select samples and beats from the larger sea of music, *see* Aram Sinnreich, *Mashed Up: Music, Technology, and the Rise of Configurable Culture* (2010), and vidders select short clips out of the vast archive of television and film footage, *see* Francesca Coppa, *Women, Star Trek, and the Early Development of Fannish Vidding*, 1 *Transformative Works & Cultures* (2008), <https://doi.org/10.3983/twc.2008.044>. The selection process is important: remix is all about the editing.

The imagery selected in *Boldly* invites the reader to reimagine *Star Trek* in the Dr. Seuss universe, drawing parallels between similar themes, storylines and characters. *Boldly* primarily uses three kinds of images: (1) alien machines and landscapes (including Nicholzen's winding ways); (2) depictions of flight; and (3)

portrayals of community. All of these images are particularly resonant for *Star Trek* fans. Gerrold and Templeton's expression focuses on the communal exploration of alien worlds, not on home-bound mischief as in *The Cat in the Hat* or on the isolated figure who walks down new streets as in *Go!*. From *Go!*, Gerrold and Templeton take only images of flight and then turn to other Seussian texts to pull resonant images and reinterpret them. For instance, Sylvester McMonkey McBean, whom Seuss describes a "fix it up chappie," Dr. Seuss, *The Sneetches*, in *The Sneetches and Other Stories* 9 (1961) ("*The Sneetches*"), is reimagined as Scotty, the famously "can-do" Chief Engineer of the Enterprise. ER1122.

McBean's marvelously cobbled-together machine is reimagined as a *Star Trek* transporter. *Id.* While McBean is a trickster figure whose machine enables endless status competition between Sneetches until he departs for greener pastures, *The Sneetches*, at 22, Scotty constantly works last-minute engineering miracles on *Star Trek*, see, e.g., *Star Trek IV: The Voyage Home* (Paramount Pictures 1986) (Scotty being described as a "miracle worker" by the ship's chief medical officer). The audience see McBean as Scotty and Scotty as McBean in a kind of visual pun, and there is also a commentary on the relative "rickety-ness" of *Star Trek's mis en scene* of cardboard control panels and colored lights. *Star Trek's* sets and props were, famously, improvised — wall decorations made of spray-painted styrofoam packaging, medical equipment made of salt and pepper shakers. See generally,

Stephen E. Whitfield & Gene Roddenberry, *The Making of Star Trek* (1986). In short, the behind-the-scenes world of *Star Trek* is made to evoke Dr. Seuss's cobbled-together steam pipes and blowing horns. And, conversely, *Boldly* invites the reader to see those aspects of the Dr. Seuss universe as creative engineering.

Similarly, the meeting of the North-Going and South-Going Zax, Dr. Seuss, *The Zax, in The Sneetches and Other Stories* (1961) (“*The Zax*”) (story of two creatures who, upon meeting each other, each refuse to give way), is reimagined as *Star Trek*'s iconic character, Mr. Spock, meeting his evil, bearded doppelganger, *Star Trek: Mirror, Mirror* (NBC television broadcast Oct. 6, 1967). ER1123.

Where the Zax argue endlessly, *see The Zax*, the Spocks battle in their own, highly logical way through 3-dimensional chess, *Star Trek: Mirror, Mirror* (NBC television broadcast Oct. 6, 1967). The story of the pointlessly fighting Zax also evokes a classic *Star Trek* theme: the narcissism of small differences. Though nearly identical in appearance and aim, the North-Going Zax and the South-Going Zax can't cooperate enough for either of them to succeed. For the Trekkie, this evokes *Star Trek* storylines like the race war between *people whose faces are black on the left side and white on the right side* and those whose are opposite. *Star Trek: Let That Be Your Last Battlefield* (NBC television broadcast Jan. 10, 1969). On one hand, these disputes are silly; on the other, they are deadly serious. Mashing-

up Dr. Seuss and *Star Trek* highlights the way the latter uses fables, metaphors, and thought experiments to instigate ethical thinking.

Technology has allowed humans to share culture on a scale never before seen. Millions upon millions read the same books, hear the same music, and watch the same movies. The sheer scale of distribution means works like *Star Trek* have become a shared cultural language. While fans of *Star Trek* and Dr. Seuss may get different meaning from the ways in which the two universes intersect, their shared utopianism argues that mashing together *Star Trek* with Dr. Seuss contributes to a mutual culture of optimism and experimentation. By putting these two bodies of work into conversation, *Boldly* cleverly comments on both *Star Trek* and the works of Dr. Seuss, and it expresses new visual and thematic puns by comparing and contrasting them.

II. Mash-Ups, Generally, Constitute Works of Important Transformative Value.

Mash-ups are works that generate new meaning through the combination of two or more original works. Like the video in *Seltzer* or the collages in *Cariou*, mash-ups transform original works by adding context, characters, imagery, and storylines from one work to another. They imbue original works with new expression or aesthetic; add commentary, insight, or humor; or reshape old narratives through new voices. The creative act of combining works tends to change the context of the originals, as the case at hand perfectly illustrates. Just as

Green Day's video adds a religious theme to *Scream Icon*, *Boldly* instills *Go!* with *Star Trek*'s themes of utopian optimism, human dignity, and scientific discovery and exploration.

The prevalence of mash-ups in music, visual art, and literature highlights the many ways in which mash-ups enrich our culture. From the perspective of consumers, because mash-ups typically juxtapose or draw parallels between two works, they provide new insights, commentary, or meaning. From the perspective of creators, mash-ups enable individuals, particularly new and inexperienced creators or minorities, to express themselves with a unique salience and poignancy. Mash-ups are an integral part of a flourishing cultural landscape, and their creation should be encouraged to foster creativity and new expression.

A. Mash-ups Are Ubiquitous Across Many Media and Genres of Art.

Both historically and currently, musical mash-ups have been an important part of the musical landscape. Beginning in the Renaissance Era and extending into the 1900s, European classical composers such as Johann Sebastian Bach would weave refrains from secular, and often bawdy, popular tunes into sacred music, in a composition known as a quodlibet. See Maria Rika Maniates, *Quodlibet Revisum*, 38 *Acta Musicologica* 169, 169-78 (Dec. 1966); Thomas Braatz, *The Quodlibet Represented in Bach's Final Goldberg Variation*, Bach Cantatas Website (Jan. 2005), [https://www.bach-cantatas.com/Articles/BWV988-Quodlibet\[Braatz\].htm](https://www.bach-cantatas.com/Articles/BWV988-Quodlibet[Braatz].htm).

While quodlibets took many forms, the juxtaposition of the profane and the sacred was often done as a form of musical parody. *See* Maniates, *supra*, at 170-71. In the United States, the practice of interweaving musical snippets became popular in early 20th century jazz music. *See* Kembrew McLeod & Peter DiCola, *Creative License: The Law and Culture of Digital Sampling*, 29-30 (2011). Jazz musicians commonly “riffed” or improvised on variations of other songs in their own music. *Id.* at 29. In later decades, musical sampling was integral to electronic, disco, and hip-hop music, “becom[ing] the most important technique of today’s composers and songwriters.” *Id.* at 7 (quoting Joanna Demers, *Steal This Music: How Intellectual Property Law Affects Musical Creativity* 9 (2006)).

Musical mash-ups have received critical acclaim and widespread popularity. For example, *Feed the Animals*, an album by Girl Talk, ranked number four on *Time* magazine’s top ten album list in 2008. Josh Tyrangiel, *Top 10 Albums*, *Time* (Nov. 3, 2008), http://content.time.com/time/specials/packages/article/0,28804,1855948_1864324_1864335,00.html. It also received four stars from *Rolling Stone* magazine. Christian Hoard, *Girl Talk: Feed the Animals*, *Rolling Stone* (Jul. 10, 2008), https://web.archive.org/web/20080626154650/http://www.rollingstone.com/reviews/album/21457036/review/21463543/feed_the_animals. A more recent YouTube mash-up artist, DJ Earworm, has produced mash-ups of popular songs that have

received over 25 million views. *See, e.g.,* DJ Earworm, *DJ Earworm Mashup - The United States of Pop 2014 (Do What You Wanna Do)*, YouTube, <https://www.youtube.com/watch?v=BjYWwZLYEs> (last visited Oct. 9, 2019).

In the fine arts, mash-ups have been canonized as an art form in the form of collage, papier collés, bricolage, and more. *See* Richard Rinehart, *Collage is Dead, Long Live Collage!*, in *Remix: Selections from the International Collage Center* 15 (2012). First emerging as a revolutionary technique during early 20th century movements such as Cubism, Surrealism, and Dadaism, collage was provocative, reflecting disillusionment in politics, society, and culture through the fragmentation of original works. Thomas Piché Jr., *Remix Metaphors: A Brief History of Post-War Collage*, in *Remix: Selections from the International Collage Center* 10 (2012). Celebrated artists such as Pablo Picasso, Marcel Duchamp, and Andy Warhol routinely appropriated and transformed original imagery into iconic works. McLeod & DiCola, *supra*, at 36. As collage became more ingrained as a technique, artists used it to challenge mainstream narratives, from expressing discontentment with World War II to the questioning of societal conditions by marginalized groups, such as members of the LGBT community and ethnic minorities. Piché Jr., *supra*, at 11-12.

With the invention of digital technology, visual mash-ups took on new forms and meanings. “Vids,” for example, are fan-made music videos that combine

footage from one or more visual media sources, typically as a form of commentary or criticism. See *Vidding History*, Organization for Transformative Works, <https://www.transformativeworks.org/vidding-history/> (last visited Oct. 9, 2019). Take one such vid, *Vogue*. Luminosity Deville, *Vogue - 300*, YouTube (Sep. 27, 2009), https://www.youtube.com/watch?v=2_NrUD1iqME. This vid “takes footage of violence and suffering from the film *300* and sets it to Madonna's hit song, transforming the homoeroticism of the original into something blatant and ludicrous.” Rebecca Tushnet, *Scary Monsters: Hybrids, Mashups, and Other Illegitimate Children*, 86 *Notre Dame L. Rev.* 2133, 2136 (2011). Regardless of their medium, visual mash-ups are powerful forms of expression in the art world.

Literary mash-ups are frequently seen in fan works, such as fan fiction, where writers bring together characters or storylines from different sources. Often these works blend together well-known storylines, such as a mash-up between *Twilight* and *Harry Potter* which envisions Edward Cullen at Hogwarts. Ewan Morrison, *In the Beginning, There Was Fan Fiction: From the Four Gospels to Fifty Shades*, *The Guardian* (Aug. 13, 2012), <https://www.theguardian.com/books/2012/aug/13/fan-fiction-fifty-shades-grey>. These mash-ups can be extremely popular and appeal to a wide audience. For example, as of September 2019, fanfiction.net, a website that allows individuals to post their own fan writings, contained over 47,000 mash-ups involving *Harry*

Potter. Book Crossovers,⁴ FanFiction, <https://www.fanfiction.net/crossovers/book/> (last visited Sep. 23, 2019). Literary mash-ups have also been successful commercially. *Pride and Prejudice and Zombies*, a reimagined version of *Pride and Prejudice* with a zombie apocalypse storyline, reached number three on the *New York Times*' best sellers list and was eventually turned into a movie. Alison Flood, *Jane Austen in Zombie Rampage Up the Book Charts*, *The Guardian* (Apr. 9, 2009), <https://www.theguardian.com/books/2009/apr/09/austen-zombie-pride-prejudice>.

B. Mash-ups Generate New Meaning and Cultural Value for Both Creators and Consumers.

In any genre, mash-ups are valuable forms of cultural expression for both creators and consumers alike. On the consumer side, mash-ups can provide insight, humor, or political, social, and cultural commentary. Combining together two or more works of art exposes how those works overlap and intersect; likewise, juxtaposing them sharply highlights the incongruities or contradictions in their narratives. *See, e.g.*, Ragnhild Brøvig-Hanssen & Paul Harkins, *Contextual Incongruity and Musical Congruity: The Aesthetics and Humour of Mash-Ups*, 31 *Popular Music* 87 (Jan. 2012) (discussing how musical mash-ups tend to combine incongruous music, such as the Beatles and Jay-Z, often for humorous effect).

⁴ A “crossover” is a term used in fan works to describe a scenario where a character from one story “crosses over” into another story.

Through these intersections and contradictions, mash-ups add new meaning to the original works. Sometimes the new expressive content is commentary or humor, such as a popular 2002 video that satirized George W. Bush and Tony Blair's close relationship by overlaying the duet "Endless Love" with clips of them ostensibly singing the lyrics. Johan Söderberg, *Read My Lips: Bush and Blair*, YouTube (Mar. 26, 2011), <https://www.youtube.com/watch?v=g6-NDTWM8VE>. Other times new meaning is created by telling new narratives through the intersection of different works. Fanfiction mash-up writers imagine compelling ways in which distinct worlds and characters collide. Characters from one storyline interact with characters from another in ways that neither originally intended nor expressed, ultimately transforming the originals. See Kyle D. Stedman, *Remix Literacy and Fan Compositions*, 29 *Computers & Composition* 107, 117 (2012) (describing a yearly fanfiction event called Remix Redux where authors are assigned to remix each other's works).

On the creator side, the ability to utilize original works to create new ones enables people to express themselves more saliently and persuasively. Mash-ups are a uniquely poignant form of expression because they contain content that is often well-known to the audience. Just as a picture is worth a thousand words, speaking through cultural works has the power to resonate strongly because of the associations, familiarity, and emotional significance of the underlying works.

Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* 74 (2008).

Mash-ups also empower and educate new speakers. Many successful writers began their careers by creating mash-ups and other fan works. David O'Brien, *Famous Authors Who Began in Fan Fiction*, Authors.Me (Oct. 27, 2016), <https://www.authors.me/famous-authors-began-fan-fiction/>. Starting with familiar material helps new authors “to think through their own plots” or “develop new insights into the characters” and stimulates their creativity by allowing them to engage with a familiar platform. Henry Jenkins, *Why Heather Can Write*, MIT Tech. Rev. (Feb. 6, 2004), <https://www.technologyreview.com/s/402471/why-heather-can-write/>. Constructing a mash-up forces the creator to comprehend the underlying materials deeply and insightfully in order to effectively combine elements from different sources. *See, e.g.*, McLeod & DiCola, *supra*, at 64 (discussing how music sampling requires a “deep musical knowledge” of “every part” of the original songs). There are also educational benefits to mash-ups. Musical and video mash-ups are valuable teaching tools because they are accessible and enable interest-based learning: “When kids get to do work that they feel passionate about, kids (and for that matter, adults) learn more and learn more effectively.” Lessig, *supra*, at 80. The process of creating a mash-up also teaches

important skills, such as critical thinking, editing, writing, and video and software development.

Mash-ups also serve as an important expressive outlet for minorities. Despite progress in recent years, women and minorities are still underrepresented in mainstream media.⁵ Mash-ups provide an opportunity for minorities and women to change these narratives and to insert their own voice, whether by highlighting the dominance of overrepresented perspectives or reimagining the viewpoints of underwritten characters. For example, a video mash-up between *Buffy the Vampire Slayer* and *Twilight* that has received over 4 million views and been translated into over thirty languages comments on *Twilight*'s idolization of male stalking and female disempowerment by juxtaposing clips of Edward Cullen acting creepy with clips of sassy comments from Buffy. See Kasia Cieplak-Mayr Von Baldegg, *Buffy vs. Edward: Twilight Remixed*, *The Atlantic* (Nov. 17, 2011), <https://www.theatlantic.com/entertainment/archive/2011/11/buffy-vs-edward-twilight-remixed/469065/>.

⁵ A 2018 study by the Center for the Study of Women in Television and Film reported that, of the 100 top-grossing films, female characters accounted for 31% of protagonists. See *2018 Statistics, Women & Hollywood* (2018), <https://womenandhollywood.com/resources/statistics/2018-statistics/>. Similarly, a UCLA study reported that 78.1% of film roles in 2016 were for white characters, even though minorities comprised nearly 40% of the U.S. population. *Hollywood Diversity Report 2018: Five Years of Progress and Missed Opportunities*, UCLA (2018), <https://socialsciences.ucla.edu/wp-content/uploads/2018/02/UCLA-Hollywood-Diversity-Report-2018-2-27-18.pdf>.

C. Requiring Artists to Seek Permission Before Developing Mash-Ups Would Have a Chilling Effect and Stifle Important Creative Expression.

If every mash-up artist had to receive permission to use every underlying source, it is likely that many, if not most, mash-up artists would not be able to engage in their valuable craft. Licensing is not a reasonable option for the average creator. In the music, film, and photography industries, licensing options are limited and likely to be prohibitively expensive. Rebecca Tushnet, *Comments of the Organization for Transformative Works (OTW)*, Organization for Transformative Works 67-68 (Nov. 13, 2013), https://www.uspto.gov/sites/default/files/documents/Organization_for_Transformative_Works_Comments.pdf (“OTW Comments”). Nor is the chilling effect on mash-ups is merely hypothetical. Music sampling declined in the 1990s because the high costs and difficulties of negotiating licenses effectively made it impossible to create certain kinds of musical mash-ups, particularly those that used multiple samples.⁶

⁶ Multiple scholars have argued that increasingly strict enforcement of licensing has led to the decline of sampling in hip-hop music. See McLeod & DiCola, *supra*, at 28; Erik Nielson, *Did the Decline of Sampling Cause the Decline of Political Hip Hop?*, The Atlantic (Sep. 18, 2013), <https://www.theatlantic.com/entertainment/archive/2013/09/did-the-decline-of-sampling-cause-the-decline-of-political-hip-hop/279791/>; see also Marjorie Heins & Tricia Beckles, *Will Fair Use Survive?*, Brennan Ctr. for Just. 6 (Nov. 16, 2005), https://www.brennancenter.org/sites/default/files/2019-08/Report_Will%20Fair%20Use%20Survive%3F.pdf (describing how the

The bureaucratic complexity of the licensing system also particularly discourages younger and less experienced creators, who likely have access to fewer resources and less information. However, it is precisely this demographic who should be encouraged to be creative if copyright law’s goal to “promote the Progress of Science and useful Arts,”⁷ is to be fulfilled. Giving young and inexperienced creators the freedom to fully express themselves is the key to incentivizing creation of valuable cultural works in the future.

A licensing-focused system also enables censorship. OTW Comments at 69-70. If a copyright holder does not like the way a transformative work portrayed the original, then the copyright holder could refuse to license. Critical works, or those that comment on the underlying works in unflattering ways, are particularly likely to be suppressed. *Id.* at 69. Fair use is the essential safety valve that ensures subsequent speakers do not have to beg permission from a copyright holder in order to make transformative art to express a new meaning — even when that meaning is one that the copyright holder does not like.

“clearance culture” forces filmmakers to cut parts of their work for which they cannot get permission).

⁷ See *Campbell*, 510 U.S. at 575 (citations omitted) (discussing how fair use fulfills “copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts’” by “simultaneously . . . protect[ing] copyrighted material and . . . allow[ing] other to build upon it”).

Mash-ups enrich society in a myriad of ways. They serve as tools to generate new creative expression and empower communities who otherwise might feel they lack a voice. They have also become an integral technique across many genres of art. It is important to remove barriers to the creation of transformative works like mash-ups to stimulate a flourishing culture and society.

III. Application of the Third and Fourth Fair Use Factors to *Boldly and Go!* Weigh in Favor of Protection for *Boldly* under Copyright’s Fair Use Doctrine.

A. The Third Fair Use Factor Permits Transformative Works to Use More Than the Minimal Amount Necessary for Their Purpose.

Under the third fair use factor, transformative works are permitted to use *more* than “the absolute minimum amount of the copyrighted work possible.” *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 804 (9th Cir. 2003); *see also Campbell*, 510 U.S. at 588. In assessing the third factor, “the extent of permissible copying *varies* with the purpose and the character of the use.” *Campbell*, 510 U.S. at 586-87. This Court has recognized that transformative works may permissibly use substantial or even verbatim copying of the original works to create “new expression, meaning or message.” *Seltzer*, 725 F.3d at 1179; *see also Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820-21, (9th Cir. 2003); *Cariou*, 714 F.3d at 710.

Identifying whether the work is transformative is only part of the third factor analysis. A court must also consider the fourth factor in relation to the third factor.

“Once enough [of the work] has been taken to assure identification, how much more is reasonable will depend [on] ... the likelihood that [the work] may serve as a market substitute for the original.” *Campbell*, 510 U.S. at 588. “[S]o long as the first and fourth factors favor the parodist” then the third factor has “little, if any, weight against fair use.” *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 116 (2d Cir. 1998).

While the district court correctly concluded that the third factor did not weigh against ComicMix, *Dr. Seuss Enters.*, 372 F. Supp. 3d at 1118, the district court should have analyzed the third factor more broadly in light of *Boldly*'s transformative nature. The district court compared *Boldly* to *Leibovitz* by focusing on the number of original protectable elements *Boldly* copied from *Go!*. *Id.* Analyzing the third factor in such a numerically comparative way oversimplifies how mash-ups like *Boldly* use original works. Rather, given the transformative nature of *Boldly*, the district court should have acknowledged that *more* than the minimal use of the original work is allowed. Limits to how much copying beyond the minimum should be based on the market effect of *Boldly* on *Go!*. For works like *Boldly*, the amount of copying permitted beyond the minimal should be generous because the district court was correct in stating that the market effect is merely hypothetical, as will be discussed next.

B. Hypothetical Markets Are Insufficient to Establish Market Harm Under the Fourth Fair Use Factor.

1. The Plaintiff Bears the Burden of Proving Market Harm When a Use Is Transformative.

The district court was correct that when a work is transformative, as it found *Boldly* to be, there is no presumption of market harm. *Dr. Seuss Enters.*, 372 F. Supp. 3d at 1111. Plaintiffs have conceded that they bear the burden of demonstrating market harm if this Court finds, as the lower court has, that *Boldly* is transformative. *Id.* at 1119. Applicable case law supports a paradigm in which, when a use is transformative, plaintiff must show by a preponderance of the evidence that a work like *Boldly* is likely to substantially harm the market for a work like *Go!* (or its licensed derivatives). *See Campbell*, 510 U.S. at 593; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

2. Plaintiff’s Argument That It Could Have Licensed This Work Is the Kind of “Circular Reasoning” This Court Has Warned Against.

The market harm factor considers whether defendants’ use would harm “traditional, reasonable, or likely to be developed markets.” *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994). This factor is not meant to encourage a finding of market harm on the syllogistic grounds that plaintiff could have licensed any fair use work. *See Seltzer*, 725 F.3d at 1179. Many courts have warned against such circular reasoning in analyzing the fourth factor. *See*

Cambridge Universal Press v. Patton, 769 F.3d 1232 (11th Cir. 2014)

("[L]icensing poses a particular threat that the fair use analysis will become circular, and Plaintiffs may not head off a defense of fair use by complaining that every potential licensing opportunity represents a potential market for the purposes of the fourth fair use factor.")

Courts must walk a careful line in analyzing this factor: the statute requires that they consider potential markets, but blanket consideration of all hypothetical harms undermines the fair use analysis. Although there are no clear guidelines for restraining excessively speculative market harm, the case law offers some useful limits. Most importantly, courts should adhere closely to the prevailing practice of accounting only for hypothetical markets that are "likely to be developed." *Am. Geophysical Union*, 60 F.3d at 930. Accordingly, plaintiffs with clear policies against licensing a given category of uses should not be able to assert potential market harm for transformative works that fall within said category. In this case, Plaintiff instructed licensees not to "use Seuss characters with third party's characters," *Dr. Seuss Enters.*, 372 F. Supp. 3d at 1124 n.8, suggesting that Plaintiff would not have licensed a Seuss mash-up such as *Boldly*. The market for such licenses was not "likely to be developed" by Plaintiffs. *Id.* Additionally, the Second Circuit has suggested that the danger of circular reasoning is especially pronounced when a potential market is too narrowly defined. *Swatch Grp. Mgmt.*

Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73, 91 (2d Cir. 2014). In *Swatch*, the court held that a potential market for “audio recordings of earnings calls convened by foreign companies that are exempt from Regulation FD” was too narrow to show market harm. *Id.* Had Dr. Seuss Enterprises argued in the case at hand that they had a potential licensing market for Seuss/*Star Trek* mash-ups, the court should have found that such a narrow market was unduly hypothetical. Likelihood of development and unreasonable narrowness are not the only limits that should be imposed upon a market harm analysis. Nevertheless, courts should ensure that they are not establishing precedent that would restrict an overly broad category of legitimate transformative uses simply because they could hypothetically be licensed.

Indeed, an overly broad reading of the fourth factor could preclude virtually all defendants from winning motions to dismiss on fair use grounds. If a plaintiff could assert that a defendant’s use infringes upon any hypothetical market, a defendant would never win on the fourth factor and courts would be highly unlikely to dismiss cases against them at the pleading stage. The ability to dismiss a case on fair use grounds is essential to the copyright balance for two reasons. First, it ensures that defendants are not forced to litigate long, expensive cases against “copyright trolls” — entities dedicated to litigating copyright cases on often dubious grounds — or other plaintiffs seeking to abuse the copyright system.

Second, early dismissal helps online content creators fight DMCA takedown notices quickly and ensure that their works can remain online. Often, when large media companies send mass takedown notices to hosting sites like YouTube in an effort to have infringing content removed, works that clearly constitute fair use, such as political remix videos, are caught in the net. *See* MG Siegler, *Hitler is Very Upset That Constantin Film is Taking Down Hitler Parodies*, TechCrunch (Apr. 19, 2010), <http://techcrunch.com/2010/04/19/hitler-parody-takedown/> (reporting on the removal of the popular Hitler internet memes). Creators who challenge these notices expose themselves to potential litigation. Without the ability to end that litigation quickly, at relatively small expense, these creators will not often seek to defend their legal content. To ensure that defendants have an opportunity to dismiss cases based on a fair use defense, and thereby maintain the essential copyright balance, courts must be aware of the dangers of circular reasoning in the fourth fair use factor.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court affirm the decision of the district court.

Dated: October 11, 2019

Respectfully submitted,

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⁸ *Amici* thank fall 2019 Cyberlaw Clinic students Tyler Bowen and Katie Lin, summer 2019 Cyberlaw Clinic interns Shenelle Salcido and Michelle Rodriguez, and summer 2019 Electronic Frontier Foundation intern Carmen Sobczak for their valuable contributions to this brief.

CERTIFICATE OF COMPLIANCE

Pursuant to the Fed. R. App. P. 32(a)(7)(C), I hereby certify that:

This brief complies with the type volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(b) and Ninth Circuit Rule 32-1(a) because it contains 6,984 words as calculated by the word count feature of Microsoft Word 2017, exclusive of the sections exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* Electronic Frontier Foundation, Organization for Transformative Works, Public Knowledge, Francesca Coppa, David Mack, and Magdalene Visaggio in Support of Defendants-Appellees and Affirmance with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 11, 2019. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECC system.

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