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American copyright law’s “primary objective . . . is to encourage the production of original literary, artistic, and musical expression for the good of the public.”¹ To accomplish this goal, the Copyright Act not only incentivizes artistic creation by giving artists and creators a bag of exclusive rights to exploit for a limited period of time,² but it also limits those rights through the doctrine of “fair use.”³ Fair use plays the vital role of balancing “the interests of authors and inventors in the control and exploitation of their [works] on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand.”⁴ It recognizes that “in art, there are . . . few, if any, things, which, in the abstract sense, are strictly new and original,”⁵ and that on occasion artists must be allowed to borrow from existing art if creativity is to prosper.⁶ Thus, robust protection of the fair use doctrine is essential to ensuring that copyright law promotes, and does not threaten, creativity.⁷

In *Gaylord v. United States*, the U.S. Court of Appeals for the Federal Circuit considered the issue of fair use directly.⁸ The plaintiff, sculptor Frank Gaylord, claimed that the U.S. Postal Service infringed his copyright in part of the Korean War Veterans Memorial in Washington, D.C., by releasing a commemorative stamp that incorporated a photograph of the memorial without his permission.⁹ Mr. Gaylord also claimed that the Postal Service was not entitled to the affirmative defense of fair use codified in 17 U.S.C. § 107.¹⁰ At trial, the U.S. Court of Federal Claims disagreed with Mr. Gaylord, finding that the stamp constituted fair use and that, therefore, the Postal Service did not infringe his copyright in the memorial.¹¹ The Federal Circuit, however, reversed both of these findings, declining to protect the stamp under the fair use doctrine.¹² This case comment contends that the Federal Circuit misapplied the § 107 fair use factors in deciding *Gaylord*. In particular, the court erred in declining to recognize the unique and transformative nature of the stamp, giving too much weight to the memorial’s status as a creative work, and

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1. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994).
 2. *See* 17 U.S.C. § 106 (2006) (providing copyright owners with exclusive rights to reproduce, distribute, publicly perform, publicly display, and prepare derivatives of their work).
 3. *See id.* § 107.
 4. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).
 5. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (Story, Circuit Justice, C.C.D. Mass. 1845) (No. 4,436)).
 6. *See id.* at 577 (“The fair use doctrine thus ‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster.’” (alteration in original) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990))).
 7. *See id.*
 8. *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010).
 9. *Id.* at 1368–72.
 10. *Id.* at 1372.
 11. *Id.* at 1371.
 12. *Id.* at 1381.

failing to render an opinion in accordance with the purpose of the Copyright Act. As a result, the Federal Circuit's decision in *Gaylord* impermissibly stifles the creation and dissemination of publicly useful art in the United States.

In 1986, Congress passed legislation authorizing the American Battle Monuments Commission to create a memorial on the National Mall honoring veterans of the Korean War.¹³ The Commission enlisted the help of the U.S. Army Corps of Engineers, who selected Cooper-Lecky Architects "as the prime contractor for the creation, construction, and installation of the [m]emorial."¹⁴ Both the Commission and Cooper-Lecky subsequently held competitions designed to pick the memorial's sculptor.¹⁵ The Commission initially picked a team of architects from Penn State University who proposed creating "38 larger-than-life granite soldiers in formation," but that team later withdrew from the project.¹⁶ Cooper-Lecky then sponsored a second contest and picked Frank Gaylord as the memorial's sculptor.¹⁷

Mr. Gaylord began working on the memorial in 1990 and his final sculptural contribution, known as *The Column*, was installed on the National Mall in Washington, D.C., on May 1, 1995.¹⁸ In keeping with the basic ideas of the Penn State team, *The Column* "featured 19 stainless steel statues representing a platoon of foot soldiers in formation."¹⁹ The statues were staggered and incorporated into the rest of the memorial, which included "landscaping, a mural, and granite plates representing the reflection of rice paddies at the soldiers' feet."²⁰ Mr. Gaylord filed five copyright registrations in his name relating only to his soldier statues, including one registration for the statues as they appeared on the National Mall after installation.²¹

Throughout 1995 and 1996, amateur photographer John Alli made five or six trips to the memorial at different times of the day and year.²² During one such visit in January 1996, he spent two hours taking about one hundred photographs of the memorial after a snowstorm.²³ These photographs captured Mr. Gaylord's soldier sculptures "from various angles using different [camera] exposures and [under different] lighting conditions."²⁴ Mr. Alli then selected one of his photographs from

13. *Id.* at 1368–69.

14. *Id.* at 1368.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 1368–69.

19. *Id.* at 1368 (quoting *Gaylord v. United States*, 85 Fed. Cl. 59, 63 (2008), *rev'd*, 595 F.3d 1364 (Fed. Cir. 2010)).

20. *Id.* at 1369.

21. *Id.*

22. *Id.*

23. *Id.* at 1369–70.

24. *Id.* at 1370.

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that snowy day “as a retirement gift for his father,” a Korean War veteran.²⁵ He titled the photograph *Real Life*,²⁶ and it subsequently “won first place in a Naval Institute Press photo contest.”²⁷

In 2002, the U.S. Postal Service paid Mr. Alli \$1,500 for the right to incorporate *Real Life* into a thirty-seven-cent postage stamp “commemorating the 50th anniversary of the armistice of the Korean War.”²⁸ As issued, the stamp featured a modified image of *Real Life*,²⁹ in which fourteen of Mr. Gaylord’s nineteen soldier statues from *The Column* were recognizable.³⁰ Approximately 86.8 million *Real Life* stamps were issued until the design was retired in March 2005.³¹ The Postal Service generated approximately \$5.4 million in revenue from the sale of *Real Life* stamps to collectors, in addition to receiving revenue from those stamps sold to the general public for use as postage.³²

On July 25, 2006, Mr. Gaylord brought suit against the United States in the Court of Federal Claims alleging that the Postal Service infringed his copyright in *The Column* by issuing a stamp that contained an image of his soldier sculptures.³³ In response, the government argued that the Postal Service made fair use of *The Column* pursuant to section 107 of the Copyright Act,³⁴ and the district court agreed.³⁵

The § 107 fair use factors, dealt with in more detail below, require a court to analyze (1) the “purpose and character” of the new, secondary work,³⁶ (2) the nature of the underlying copyrighted work, (3) the amount of the copyrighted work used in the secondary work, and (4) the secondary work’s effect on the value of the copyrighted work.³⁷ In applying these factors, the court determined that the *Real Life* stamp’s character was transformative because it exhibited a “new and different

25. *Id.* at 1369.

26. *Id.* at 1370.

27. *Gaylord v. United States*, 85 Fed. Cl. 59, 63 (2008), *rev’d*, 595 F.3d 1364 (Fed. Cir. 2010).

28. *Gaylord*, 595 F.3d at 1370.

29. *Gaylord*, 85 Fed. Cl. at 69–70. (“The Postal Service . . . [made] the color in the ‘Real Life’ photo even grayer, creating a nearly monochromatic image.”).

30. *Gaylord*, 595 F.3d at 1375.

31. *Id.* at 1371.

32. *Id.*

33. *Gaylord*, 85 Fed. Cl. at 62.

34. *Id.* at 66, 68.

35. *Id.* at 71. The government also argued that *The Column* was a work of joint authorship between itself and Mr. Gaylord, but the district court rejected this argument on the grounds that “Mr. Gaylord performed virtually all of the artistic work on the sculptures” and because there was no evidence that the parties intended to create a joint work. *Id.* at 66–67.

36. This is often an inquiry into whether the secondary work is transformative—whether it adds a “further purpose or different character” to the copyrighted work through the addition of “new expression, meaning, or message.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). *See infra* notes 80–87 and accompanying text.

37. 17 U.S.C § 107 (2006).

character and expression” from *The Column*;³⁸ *The Column*’s status as a creative work was unimportant because the stamp “did not copy Mr. Gaylord’s creation in an effort to exploit its virtues,” but rather created “a new, surrealistic vision”;³⁹ and the stamp had no adverse impact on *The Column*’s present or future value.⁴⁰ The court found that only the third factor, regarding the amount of the copyrighted work used, tipped in favor of Mr. Gaylord.⁴¹ Therefore, since three of the four factors favored fair use, the district court found that Mr. Gaylord’s copyright was not infringed by the *Real Life* stamp.⁴²

On appeal, the Federal Circuit reversed the district court’s finding.⁴³ Specifically, the court disagreed with the district court’s analysis of the first fair use factor, i.e., the “purpose and character” of the secondary work.⁴⁴ The court determined the stamp was not transformative in purpose because it shared an identical purpose with *The Column*—“to honor veterans of the Korean War”—and did not transform *The Column*’s character by merely muting its colors and adding snow.⁴⁵ According to the appellate court, “[n]ature’s decision to snow cannot deprive Mr. Gaylord of an otherwise valid right to exclude.”⁴⁶ Furthermore, the court found that the stamp’s commercial character weighed against fair use,⁴⁷ as did its determination that the stamp did not use *The Column* as part of “a larger commentary or criticism.”⁴⁸ On the basis of the foregoing, the Federal Circuit determined that the first fair use factor weighed heavily against fair use.⁴⁹

In applying the remainder of the fair use factors, the Federal Circuit determined that the second factor, the “nature of the copyrighted work,” weighed heavily against fair use “given the overall creative and expressive nature” of *The Column*.⁵⁰ The court also determined that the third factor, the amount of the copyrighted work used, weighed against fair use because the stamp incorporated a substantial number of Mr.

38. *Gaylord*, 85 Fed. Cl. at 69.

39. *Id.*

40. *Id.* at 70–71.

41. *Id.* at 69–70 (“The Postal Service’s use of many of the statues weighs against fair use. This fact is somewhat mitigated, however, by the [fact that] . . . [t]he statues were not copied verbatim in the [s]tamp.”).

42. *Id.* at 71.

43. *Gaylord v. United States*, 595 F.3d 1364, 1381 (Fed. Cir. 2010).

44. *Id.* at 1372–74.

45. *Id.* at 1373–74.

46. *Id.* at 1374.

47. *Id.*

48. *Id.* at 1373 (“Works that make fair use of copyrighted material often transform the purpose or character of the [copyrighted] work by incorporating it into a larger commentary or criticism. . . . By contrast, here the stamp did not use *The Column* as part of a commentary or criticism.”).

49. *Id.* at 1374.

50. *Id.*

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Gaylord's soldier statues.⁵¹ However, in addressing the fourth factor, the circuit court found "no clear error" in the district court's finding that the stamp did not adversely affect *The Column's* present or future market value.⁵² Nonetheless, having determined that three of the four § 107 factors weighed against fair use, the Federal Circuit held the Postal Service liable for infringement of Mr. Gaylord's copyright in *The Column*.⁵³

This case comment contends that the Federal Circuit incorrectly decided *Gaylord* by misconstruing the first and second fair use factors. Specifically, the court erred in its analysis of the first factor by dismissing the ways in which the *Real Life* stamp transformed *The Column* by giving it a further purpose and different expressive character. The court also placed too much emphasis on the commercial nature of the stamp and mistakenly suggested that it lacked transformative value because it was not part of "a larger commentary or criticism."⁵⁴ In analyzing the second factor, the court gave too much weight to *The Column's* status as a creative work in light of Supreme Court precedent. Ultimately, the Federal Circuit's narrow construction of § 107 suppresses the creation and dissemination of original artistic work in the United States, and it does not further the purpose of the Copyright Act.

The fair use doctrine, codified in 17 U.S.C. § 107, places substantive limits upon the rights of copyright owners.⁵⁵ The statute reads:

[F]air use of a copyrighted work . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁵⁶

The Supreme Court has determined that fair use is a mixed question of law and fact,⁵⁷ and that courts are to consider its applicability on a case-by-case basis.⁵⁸ "[T]he doctrine is an equitable rule of reason,"⁵⁹ and all of the factors "are to be explored,

51. *Id.* at 1375.

52. *Id.*

53. *Id.* at 1381.

54. *Id.* at 1373.

55. 17 U.S.C. § 107 (2006) ("Limitations on exclusive rights: Fair Use.").

56. *Id.*

57. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

58. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994); *Harper & Row*, 471 U.S. at 560; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984). Although there are no "categories of presumptively fair use," the preamble to 17 U.S.C. § 107 indicates that uses "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" are among the types of uses most often found to be fair. *Campbell*, 510 U.S. at 576 (referencing 17 U.S.C. § 107 (1988)).

59. *Sony*, 464 U.S. at 448 n.31 (internal quotation marks omitted).

and the results weighed together, in light of the purposes of copyright.”⁶⁰ Thus, application of the fair use doctrine requires a “sensitive balancing of interests.”⁶¹

In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court held that the “central purpose” of the first fair use factor is to determine whether the new, secondary work “merely supersedes” the original work, or whether it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative.”⁶² A finding of “transformative use is not absolutely necessary for a finding of fair use,” but transformative works “lie at the heart” of the fair use doctrine because they tend to further copyright law’s goal of promoting original artistic expression.⁶³ Therefore, a finding of transformative use weighs strongly in favor of fair use.⁶⁴

The *Campbell* transformation test is one of broad applicability and courts have applied it in a range of cases.⁶⁵ For example, in *Blanch v. Koons*, an artist incorporated a copyrighted photograph from a fashion magazine into a collage painting to express his views about contemporary American culture, and the Second Circuit found the use to be transformative under *Campbell*.⁶⁶ The court stated, “When, as here, the copyrighted work is used as raw material, in the furtherance of distinct creative or communicative objectives, the use is transformative.”⁶⁷ In other words, the collage painting in *Koons* was transformative because it added a “further purpose or different character”⁶⁸ to the underlying work.

Likewise, in *Gaylord*, Mr. Alli’s *Real Life* photograph added new expressive character to *The Column* because, at the very least, it captured Mr. Alli’s own personality and artistic choices.⁶⁹ Mr. Alli visited the memorial five or six times over

60. *Campbell*, 510 U.S. at 578.

61. *Id.* at 584 (quoting *Sony*, 464 U.S. at 455 n.40 (1984)).

62. *Id.* at 579 (internal quotation marks omitted).

63. *Id.*

64. *Id.*

65. See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1164–67 (9th Cir. 2007) (applying *Campbell* in the context of finding Google’s use of thumbnails in its search engine to be transformative fair use); *Blanch v. Koons*, 467 F.3d 244, 246 (2d Cir. 2006) (holding that “an artist’s appropriation of a copyrighted image in a collage painting” is transformative fair use and that “the broad principles of [the] *Campbell* [transformative test] are not limited to cases involving parody”); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) (determining use of Grateful Dead posters and tickets in a biographical book to be transformative fair use under *Campbell*); *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 322–24 (S.D.N.Y. 2008) (holding that a documentary’s use of a short song clip was transformative fair use); *Hofheinz v. A & E Television Networks*, 146 F. Supp. 2d 442, 446–47 (S.D.N.Y. 2001) (holding that the use of film clips in a performer’s biography was transformative under *Campbell*).

66. See *Blanch*, 467 F.3d at 253.

67. *Id.* (citation omitted) (internal quotation marks omitted).

68. *Campbell*, 510 U.S. at 579.

69. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) (holding that copyright protection extends “to those components of a work that are original to the author”).

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the course of several months before deciding that the *Real Life* photograph best represented his artistic vision;⁷⁰ and, in recognition of his artistic achievement, the photograph won first place in a U.S. Naval Institute photography contest. Yet, the appellate court gave no weight to Mr. Alli's unique choice of expression as incorporated in the Postal Service's stamp, at one point claiming that "[n]ature's decision to snow cannot deprive Mr. Gaylord of an otherwise valid right to exclude."⁷¹ This was in error.



A PICTURE OF *THE COLUMN*.⁷²



JOHN ALLI'S *REAL LIFE* PHOTOGRAPH.⁷³



AN ENLARGED IMAGE OF THE POSTAGE STAMP.⁷⁴

Mr. Alli chose to photograph *The Column* after a winter snowstorm, from a particular angle, with a precise camera exposure, and under certain lighting conditions.⁷⁵ These choices resulted in a photograph that transformed *The Column*, a collection of stainless steel sculptures, into a one-dimensional, surrealistic photograph "with snow and subdued lighting where the viewer is left unsure whether he is viewing a photograph of statues or actual human beings."⁷⁶ Furthermore, when incorporating *Real Life* into a stamp, the Postal Service made Mr. Alli's image "greyer" and more "monochromatic."⁷⁷ These changes made Mr. Gaylord's soldier statues appear "colder"⁷⁸ and more lifelike than in Mr. Alli's photograph, imbuing the stamp with still more expressive character not inherent in *The Column* itself.⁷⁹ As

70. *Gaylord v. United States*, 595 F.3d 1364, 1369–70 (Fed. Cir. 2010).

71. *Id.* at 1374. The Federal Circuit also determined that the transformative "inquiry must focus on the purpose and character of the stamp, rather than that of Mr. Alli's photograph," thereafter declining to give any weight to Mr. Alli's artistic choices. *Id.* at 1373. Mr. Alli's artistic choices, however, should not be dismissed so readily, as they were intentionally incorporated into, and made part of, the *Real Life* stamp, albeit with further alteration by the Postal Service.

72. *Id.* at 1369, available at <http://iplaw.hllaw.com/uploads/file/90370.PDF>. Due to publication formatting restrictions, the color has been stripped from the above image.

73. *Id.* at 1370. Due to publication formatting restrictions, the color has been stripped from the above image.

74. *Id.* at 1371. Due to publication formatting restrictions, the color has been stripped from the above image.

75. *See id.* at 1369–70.

76. *Gaylord v. United States*, 85 Fed. Cl. 59, 68–69 (2008), *rev'd*, 595 F.3d 1364 (Fed. Cir. 2010).

77. *Id.* at 69.

78. *Id.*

79. *See id.*

a result, the stamp took on a clearly delineated and uniquely nostalgic quality, an attribute most appropriate for commemorating the Korean War.

The Federal Circuit was also incorrect to conclude that the *Real Life* stamp served no “further purpose” than that of *The Column*.⁸⁰ Unlike *The Column* itself, which was authorized by Congress in 1986 to honor Korean War veterans generally, the stamp, issued in 2002, was specifically intended to commemorate the fiftieth anniversary of the Korean War, and it was released with that new purpose in mind.⁸¹ The stamp also served a further purpose by conveying a different message to its viewers than *The Column*. As the district court found, a viewer of Mr. Alli’s photograph “experiences a feeling of stepping into the photograph” and “being in Korea with the soldiers, under [] freezing conditions.”⁸² The *Real Life* stamp builds upon and conveys a similar surrealistic message. This message is not inherent in Mr. Gaylord’s three-dimensional metal sculpture on the National Mall, which, relative to the stamp, distances the viewer and exhibits more traditional monument-like qualities. Furthermore, while viewers of *The Column* may visit Mr. Gaylord’s statutes, and observe them from different angles and under varying weather conditions, the *Real Life* stamp provided a new opportunity for stamp collectors and the public to join in commemorating the fiftieth anniversary of the Korean War by sending or collecting a uniquely expressive postage stamp.⁸³

In *Campbell*, the Supreme Court determined that works involving parody have an “obvious claim” to transformative value because they “can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”⁸⁴ The *Real Life* stamp, while not a parody, provides a similar type of transformative value by adding new, expressive character to *The Column* for the socially valuable purpose of commemorating the fiftieth anniversary of the Korean War. The stamp cannot be said to have duplicated or “merely supersede[d]”⁸⁵ *The Column*. The two works are not substitutes for one another, as “[s]omeone seeking to take a photograph of *The Column* or otherwise create a derivative work [of *The Column*] would not find the

80. *Gaylord*, 595 F.3d at 1373 (“Both the stamp and *The Column* share a common purpose: to honor veterans of the Korean War.” (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994))).

81. *See id.* at 1368–70. Even if one takes the view, as the appellate court did, that the stamp does not reflect any meaningful further purpose, it is not fatal to the argument that the stamp is transformative. This is because the *Campbell* test is disjunctive, requiring a transformative secondary work to serve either a “further purpose or different character, altering the first [work] with new expression, meaning, or message.” *See Campbell*, 510 U.S. at 579 (emphasis added). Furthermore, § 107 does not require that fair use works have a totally different purpose from the original copyrighted work, but rather instructs the court to consider the secondary work’s purpose as part of its fair use analysis. *See* 17 U.S.C. § 107 (2006).

82. *Gaylord*, 85 Fed. Cl. at 69.

83. This is not to suggest that a change in medium (e.g., memorial to stamp), without more, is enough to make a secondary work transformative (rather than just derivative). Nonetheless, a change in medium helps to establish that a secondary work will indeed be serving a different purpose in the marketplace than the original copyrighted work.

84. *Campbell*, 510 U.S. at 579.

85. *Id.* (holding that a transformative work does not “merely supersede[] the original work”).

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stamp to be a suitable substitute for *The Column* itself.”⁸⁶ To use language from *Koons*, the stamp incorporated *The Column* as “raw material’ in the furtherance of [a] distinct creative or communicative objective[.]”⁸⁷ Simply stated, *The Column* was transformed, first by Mr. Alli and then by the Postal Service, and the resulting product acquired a further purpose and substantially different expressive character than Mr. Gaylord’s original creation. On this basis alone, the Federal Circuit should have found that the first § 107 factor weighed in favor of fair use.

Nonetheless, the Federal Circuit went on to attack the stamp’s fair use value on the basis of its commercial nature as a postage stamp.⁸⁸ Precedent does not warrant this given the stamp’s transformative value.⁸⁹ As stated in *Campbell*, § 107 clearly indicates that a secondary work’s commercial nature “is only one element of the first factor enquiry into its purpose and character,” and that “the more transformative the new work, the less will be the significance of other factors, like commercialism.”⁹⁰ The Second Circuit followed this guidance in *Blanch* when it found that the first factor weighed in favor of fair use despite the fact that the collage painting at issue (which was deemed transformative) sold commercially for \$126,877.⁹¹ In *Gaylord*, given the stamp’s transformative value, the Federal Circuit should have likewise discounted its commercial nature as a postage stamp. Transformative secondary

86. *Gaylord*, 595 F.3d at 1375.

87. *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006) (citation omitted).

88. *See Gaylord*, 595 F.3d at 1374 (“The Postal Service acknowledged receiving \$17 million from the sale of nearly 48 million 37-cent stamps. An estimated \$5.4 million in stamps were sold to collectors in 2003. . . . Because the stamp did not have a further purpose or different character, and because it had a commercial use, we conclude that this factor weighs strongly against fair use.”). “The crux of the profit/nonprofit distinction,” i.e., the commercialism inquiry, should not be “whether the sole motive of the [secondary] use is monetary gain,” as the Federal Circuit seemed to imply, “but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985). Here, it is undisputed that the Postal Service increased its revenue by releasing the stamp, but the Postal Service also paid Mr. Alli \$1,500 for the use of *Real Life*, *Gaylord*, 595 F.3d at 1370, and there is no indication that Mr. Gaylord could have negotiated a higher licensing fee himself. Therefore, it is not entirely clear that the Postal Service exploited *The Column*, as incorporated into Mr. Alli’s *Real Life* photograph, “without paying the customary price,” *Harper & Row*, 471 U.S. at 562. In this respect, the Federal Circuit was incorrect to look solely at the Postal Service’s revenue from the *Real Life* stamp in determining how much weight to give the stamp’s for-profit status in analyzing the commercialism prong of the first § 107 factor. Nonetheless, for the purposes of this case comment, analysis of the second § 107 factor assumes, arguendo, that the postage stamp is indeed commercial in nature.

89. *Campbell*, 510 U.S. at 579.

90. *Id.*; *see A.V. v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009) (finding the “commercial aspect . . . not significant in light of the transformative nature of [defendant’s] use”); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1166–67 (9th Cir. 2007); *Blanch*, 467 F.3d at 254; *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 939–40 (9th Cir. 2002) (transformative use “reduced the importance of the commerciality of the use”); *Higgins v. Detroit Educ. Television Found.*, 4 F. Supp. 2d 701, 706 (E.D. Mich. 1998) (“[T]he transformative nature of the use neutralized the commercialism.”).

91. *See Blanch*, 467 F.3d at 253–54. (“[S]ince the new work is substantially transformative, . . . [w]e therefore discount[] the secondary commercial nature of the use.” (third alteration in original) (citations omitted) (internal quotation marks omitted)).

works warrant this treatment because they do not trade on the expressive value of the copyrighted work itself, but rather minimize its importance to achieve a new and different artistic vision.⁹² As such, the commercial nature of the postage stamp should not have weighed against a finding of fair use.

The Federal Circuit also mistakenly suggested that the *Real Life* stamp contained no transformative value because it did not use *The Column* as part of “a larger commentary or criticism.”⁹³ The broad transformative use test set forth by the Supreme Court in *Campbell* contains no such explicit requirement,⁹⁴ and implying such a requirement unduly impinges upon the creation and dissemination of original artistic expression. *Campbell* only maintains, albeit in dicta, that certain secondary works not containing comment or criticism of an incorporated copyrighted work require some “justification for the very act of borrowing.”⁹⁵ This is because such works could presumably “stand on [their] own two feet” without reference to, or the incorporation of, an original copyrighted work.⁹⁶ As applied in *Blanch*, determining whether there is justification for incorporating a copyrighted work into a new work is an inquiry into whether the artist “had a genuine creative rationale for borrowing.”⁹⁷ It is not an inquiry into the merits of the secondary work itself.⁹⁸

Even assuming arguendo that a justification for borrowing from *The Column* was necessary, Mr. Alli, a diligent amateur photographer, was unquestionably justified in using *The Column* to bring his expression of the Korean War into existence. Where else could he have photographed soldiers in formation? Presumably nowhere. Likewise, it would have been absurd to require Mr. Alli or the Postal Service to take photographic equipment into a modern-day war zone or to sculpt their own soldier statues in an effort to achieve the photographic vision inherent in the *Real Life* stamp. In this respect, Mr. Alli and the Postal Service were not trying to “avoid the drudgery

92. See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006); *Blanch*, 467 F.3d at 257.

93. *Gaylord*, 595 F.3d at 1373. To be more specific, the Federal Circuit stated that “[w]orks that make fair use of copyrighted material often transform the purpose and character of the [copyrighted] work by incorporating it into a larger commentary or criticism” and used the stamp’s lack of commentary or criticism to “conclude that the stamp does not transform the character of *The Column*” under *Campbell*. *Id.* (emphasis added).

94. *Campbell*, 510 U.S. at 579. For example, in *Perfect 10*, the Ninth Circuit explicitly applied *Campbell* and found that Google’s use of thumbnails in its search engine, which contained no comment or criticism, was a “highly transformative” secondary use given its “public benefit.” *Perfect 10*, 508 F.3d at 1164–67.

95. *Campbell*, 510 U.S. at 580–81 (“Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s . . . imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.”).

96. *Id.*

97. *Blanch*, 467 F.3d at 255.

98. *Id.*; see *Campbell*, 510 U.S. at 582 (“[I]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits.” (second alteration in original) (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (internal quotation marks omitted))).

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in working up something fresh”⁹⁹ by incorporating *The Column* into the stamp. The Postal Service “did not copy Mr. Gaylord’s creation in an effort to [simply] exploit its virtues.”¹⁰⁰ Rather, use of *The Column* was ancillary to the creation of a new and transformative artistic vision. In *Blanch*, the court declined to use its self-proclaimed “poorly honed artistic sensibilities” to second-guess an artist’s personal creative justifications for using an existing work.¹⁰¹ The Federal Circuit in *Gaylord* should have shown similar deference to the artistic decisions of Mr. Alli and, ultimately, the Postal Service.

This case comment now turns briefly to the Federal Circuit’s analysis of the second fair use factor under § 107, the “nature of the copyrighted work.”¹⁰² As explained in *Campbell*, the second factor “calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.”¹⁰³ Two considerations are particularly important in looking at the second factor: (1) whether the copyrighted work is expressive or factual in nature, with more protection being afforded to expressive works, and (2) whether the copyrighted work is published or unpublished, with less protection being provided to publicly available published works.¹⁰⁴ Notably, *Campbell* found that the second factor is not “ever likely to help much in separating the fair use sheep from the infringing goats” in cases where the copyrighted work is both expressive and “publicly known.”¹⁰⁵

In *Gaylord*, *The Column* is expressive in nature¹⁰⁶ and it is “perhaps the epitome of a published work” because it is “part of a national monument.”¹⁰⁷ Therefore, *The Column* fits into the category of “publicly known, expressive works”¹⁰⁸ described in

99. *Campbell*, 510 U.S. at 580.

100. *Gaylord v. United States*, 85 Fed. Cl. 59, 69 (2008), *rev’d*, 595 F.3d 1364 (Fed. Cir. 2010).

101. *Blanch*, 467 F.3d at 255. *See generally* *Bleistein*, 188 U.S. at 251 (holding that it is “dangerous” for judges to adjudicate the artistic merits of a work).

102. 17 U.S.C. § 107 (2006).

103. *Campbell*, 510 U.S. at 586.

104. *Blanch*, 467 F.3d at 256.

Two types of distinctions as to the nature of the copyrighted work have emerged that have figured in the decisions evaluating the second factor: (1) whether the work is expressive or creative, such as a work of fiction, or more factual, with a greater leeway being allowed to a claim of fair use where the work is factual or informational, and (2) whether the work is published or unpublished, with the scope for fair use involving unpublished works being considerably narrower.

Id. (quoting 2 HOWARD B. ABRAMS, *THE LAW OF COPYRIGHT* § 15:52 (2006)).

105. *Campbell*, 510 U.S. at 586.

106. *See* *Gaylord v. United States*, 595 F.3d 1364, 1374 (Fed. Cir. 2010) (“We see no clear error in the Court of Federal Claims’ finding that *The Column* is expressive and creative.”).

107. *Id.* at 1374.

108. *Campbell*, 510 U.S. at 586.

Campbell, and the importance of the second factor should be given less significance.¹⁰⁹ The Federal Circuit, however, neither mitigated nor neutralized the importance of the second factor in *Gaylord*, but instead determined that *The Column's* "overall creative and expressive nature" weighed against fair use.¹¹⁰ This determination was particularly misplaced in light of the fact that some courts have found it necessary to further discount the expressive nature of an underlying work when the secondary work is transformative,¹¹¹ as is the case with the *Real Life* stamp. Given the public nature of *The Column* and the transformative nature of the stamp, the Federal Circuit was misguided in weighing the second factor against fair use.

Ultimately, the Federal Circuit held that the first two factors weighed against a finding of fair use and, thus, in favor of holding the Postal Service liable for copyright infringement.¹¹² The court also found that the third factor weighed against fair use since the *Real Life* stamp incorporated a substantial number of Mr. Gaylord's soldier statues,¹¹³ but that the fourth factor favored fair use because the stamp had no adverse impact on the value of *The Column*.¹¹⁴ Nonetheless, since the Federal Circuit determined that a majority of the factors favored infringement, the court denied fair use protection to the Postal Service.¹¹⁵ Had the court weighed the first and second fair use factors according to the analysis provided above, it would have come to the opposite conclusion. Unfortunately, though, the court declined to recognize the transformative nature of the stamp and did not properly discount the importance of *The Column's* status as an expressive work in light of Supreme Court precedent.

No doubt, a tension exists in American copyright law between the "need simultaneously to protect copyrighted material and to allow others to build upon it."¹¹⁶ However, the guiding purpose of copyright law is not to protect copyright holders per se, but rather to encourage and incentivize the creation of original artistic expression for the benefit of the public.¹¹⁷ Therefore, in situations where the public

109. See, e.g., *Lennon v. Premise Media Corp., L.P.*, 556 F.Supp.2d 310, 326 (S.D.N.Y. 2008) (citing *Campbell* and holding that the second fair use factor weighs in favor of fair use partly because the copyrighted work is a creative and widely published song).

110. See *Gaylord*, 595 F.3d at 1374.

111. See *Blanch v. Koons*, 467 F.3d 244, 257 (2d Cir. 2006) ("[T]he second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose." (quoting *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006))).

112. *Gaylord*, 595 F.3d at 1372–74.

113. *Id.* at 1375.

114. *Id.*

115. *Id.* at 1376.

116. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

117. See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) ("We have often recognized the monopoly privileges that Congress has authorized, while 'intended to motivate the creative activity of authors and inventors by the provision of a special reward,' are limited in nature and must ultimately serve the public good." (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984))); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) ("The primary objective of copyright is

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benefit of a creative secondary work substantially outweighs any potential harm to the copyright holder, the secondary work should be deemed fair and legal.¹¹⁸ Otherwise, the creation of new artistic expression is stifled “without serving any legitimate interest of the copyright holder.”¹¹⁹

In *Gaylord*, the *Real Life* stamp does not trade on the expressive value of *The Column* given its transformative nature; and, as the Federal Circuit and the Court of Federal Claims both agreed, the stamp “has not and will not adversely impact Mr. Gaylord’s efforts to market derivative works of *The Column*.”¹²⁰ Furthermore, the uniquely expressive *Real Life* stamp presented the public with a new way in which to remember and commemorate the fiftieth anniversary of the Korean War. Denying the stamp fair use protection under these circumstances does not further the purpose of the Copyright Act. Rather, it places an impermissible chilling effect upon the creation of publicly useful artistic expression and threatens the dissemination of creativity throughout the United States.¹²¹

not to reward the labor of authors, but “[t]o promote the Progress of Science and useful Arts.” (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8)).

118. See Matthew D. Bunker, *Eroding Fair Use: The “Transformative” Use Doctrine After Campbell*, 7 COMM. L. & POL’Y 1, 21 (2002) (“Fair use should properly be an analysis of the public benefit of dissemination of the work . . . balanced against the commercial harm to the statutory rights of the copyright holder.”).

119. *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992) (“Where the infringement is small in relation to the new work created, the fair user is profiting largely from his own creative efforts rather than free-riding on another’s work. A prohibition on all copying whatsoever would stifle the free flow of ideas without serving any legitimate interest of the copyright holder.”).

120. *Gaylord*, 595 F.3d at 1375.

121. *Fogerty*, 510 U.S. at 524 (“The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public.”).