BRIEF OF AMICI CURIAE PROFESSORS OF INTELLECTUAL PROPERTY LAW IN SUPPORT OF DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 7.1, the undersigned states that none of amici is a corporation that issues stock or has a parent corporation that issues stock.

Dated: November 30, 2015

By: /s/
Counsel for Amici Curiae
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I. Interest of Amici

Amici, Barton Beebe (New York University School of Law); Christopher Buccafusco (Benjamin N. Cardozo School of Law); Brandon Butler (American University-Washington College of Law); Mark McKenna (Notre Dame Law School); Mark Lemley (Stanford Law School); Betsy Rosenblatt (Whittier Law School); Matthew Sag (Loyola University of Chicago School of Law); Pam Samuelson (Berkeley Law); Jeremy Sheff (St. John’s University School of Law); Jessica Silbey (Northeastern University School of Law); Christopher Jon Sprigman (New York University School of Law); Madhavi Sunder (UC Davis School of Law); Rebecca Tushnet (Georgetown Law); and Molly Shaffer Van Houweling (Berkeley Law), are academics with an interest in the proper development of copyright and fair use law.¹ Amici research, teach, and write in the area, and believe that a consistent understanding of fair use benefits authors and audiences of all sorts. In particular, amici believe that ordinary online behavior of sharing political memes through social media is fair use and should be protected against liability.

II. Summary of Argument

Fox’s use of plaintiff’s image in a political meme commemorating the anniversary of 9/11 was a classically transformative use, commenting on and contextualizing the image by

¹ Academic affiliations are listed for identification purposes only. Amici hereby state that none of the parties to this case nor their counsel in this case authored this brief in whole or in part; no party or any party’s counsel contributed money intended to fund preparing or submitting the brief; and no one else other than Amici and their counsel contributed money that was intended to fund preparing or submitting this brief. Amici also hereby state that Fox has consented to the filing of this brief, and plaintiff has declined to consent.

using it as a signifier of a larger historical event. The fact that the meme already existed did not change its transformativeness in Fox’s hands. Given transformativeness, the other fair use factors also favor Fox.

III. Argument

A. The Use of the Image in a Meme Is Transformative

A picture is worth a thousand words. See Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright Law*, 125 Harv. L. Rev. 683, 753-55 (2012). Generally, images communicate differently from the way words do and thus can serve as important evidentiary, persuasive, and rhetorical roles that cannot be filled by words. “Images transform statistics and anecdotes into fact.” Farhad Manjoo, *True Enough: Learning To Live In A Post-Fact Society* 79 (2008). Empirical evidence demonstrates that images can affect decisionmaking.\(^2\) This is unsurprising, because pictures are generally processed more quickly in the brain and are easier to remember than words.\(^3\) Pictures increase our attention to, and the information we acquire from, accompanying text.\(^4\) Pictures can even shape our perception of words: using pictures

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3 See, e.g., Neal Feigenson & Christina Spiesel, *Law on Display* 7-9 (2009) (reviewing research on effects of images and arguing that law should recognize the relevance of the special features of images); Julie A. Edell, *Nonverbal Effects in Ads: A Review and Synthesis*, in *Nonverbal Communication in Advertising* 11, 13 (Sidney Hecker & David W. Stewart eds., 1988) (summarizing research showing that “pictorial stimuli frequently were remembered better than were their verbal equivalents”).

emphasizing one side of a balanced news report, for example, changes readers’ perceptions of contested issues, even when they don’t consciously remember the content of the images.  

Because there is no substitute for the power of visuals, much political communication relies on images. Today, “memes”—usually combinations of images and text, easily understood and also easily changed and commented on—are some of the most significant ways in which ordinary people communicate online, often to greater effect than slickly produced, professional offerings. Visual memes are also particularly open to transformative reuses, because visuals have so many possible different meanings. As scholar Limor Shifman observed, a meme shows how images are changeable in their meaning, rather than an unchanging record of the past.

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6 See Limor Shifman, Memes in Digital Culture 75 (2014); see also Sophie Lecheler, Book Review: Memes in Digital Culture by Limor Shifman, LSE Review of Books, Jan. 18, 2014, available at http://blogs.lse.ac.uk/lseviewofbooks/2014/01/18/book-review-memes-in-digital-culture-by-limor-shifman/ (“Shifman argues that memes offer a new way of civic participation, one where citizens are able to express political opinions and participate in important debates. This argument connects with other studies in the field of new media, which also find that user-generated content may function as a mobilizer for citizens who are not usually able or willing to convey their political opinions in the traditional mass media.”).

7 See Shifman, supra, at 150 (“[One] implication of the visual nature of Internet memes relates to their polysemic potential—that is, their tendency to be open to multiple readings. Whereas in verbal jokes the target of mockery and its scorned feature are often clear, visual images’ openness and lack of a clear narrative may invoke contrasting interpretations.”).

8 Limor Shifman, The Cultural Logic of Photo-Based Meme Genres, 13 J. Visual Culture 340, 347–48 (2014) (citations omitted); see also id. at 342 (citations omitted) (“Meme genres may be regarded as prominent examples of vernacular creativity. While one might expect that in the absence of formal gatekeeping people would create an endless array of meme types, in reality, participants tend to mold their memetic contributions according to a surprisingly small number of formulations. … The apparent rigidity of users who work within a few generic boxes may in fact have an important social function: following shared pathways for meme production is vital for creating a sense of community in a fragmented world.”).
Other scholars have specifically analyzed the photo at issue in this case. As Robert Hariman, a professor of communication studies at Northwestern, and John Louis Lucaites, a professor of communication studies at Indiana-Bloomington, stated, “What we find noteworthy is that [plaintiff’s photograph] is the first instance of an iconic photograph being created out of the template of a predecessor.” Robert Hariman & John Louis Lucaites, Performing Civic Identity: The Iconic Photograph of the Flag Raising on Iwo Jima, 88 Q.J. Speech 363, 384 (2002) (citations omitted); see also id. at 364, 368 (“The varied appropriations of the image across successive generations demonstrate how liberal-democratic public life is continually redefined in respect to an array of attitudes ranging from civic piety to cynicism…. [D]emocratic citizenship is continually renegotiated through artistic variation on what has become a conventional model of civic identity.”). Hariman and Lucaites identified multiple instances in which this image was used to make arguments about American patriotism across the decades, or later even altered to criticize aspects of the American response to 9/11. The meme is significant and transformative because the call to refocus our attention on the victims of terrorism and the first responders who died has a different meaning and message than the immediate factual content of the photograph.

This type of contextualizing is at the heart of the Second Circuit’s understanding of transformativeness. Bill Graham Archives v. Dorling Kindersley made clear that juxtaposition and historical contextualization of an image are transformative endeavors. 448 F.3d 605, 609-10 (2d Cir. 2006); cf. ETW Corp. v. Jireh Publ’g, Inc., 332 F.3d 915, 937 (6th Cir. 2003) (finding transformativeness for right of publicity purposes in juxtaposition of image of famous golfer with others, which constituted an implicit argument for their equivalence); Hart v. Electronic Arts, Inc., 717 F.3d 141, 169-70 (3d Cir. 2013) (same for image of football player). In essence,
defendants’ use of the meme was an act of historical contextualization: they were providing evidence about the persistence of national memory. See, e.g., Religious Tech. Ctr. v. Lerma, 908 F. Supp. 1362, 1366 (E.D. Va. 1995) (finding fair use in part because documents were copied for “news gathering, news reporting and responding to litigation,” not to “scoop” copyright owner); cf. Bill Graham Archives, 448 F.3d at 612 (use of plaintiff’s images in book sold for profit was transformative because book used images as historical evidence, not for their expressive value as posters, and use was not for “commercial gain” because defendant “has not used any of BGA’s images in its commercial advertising or in any other way to promote the sale of the book.”).

B. Fox’s Republication of the Meme Does Not Diminish Its Transformativeness.

In the Court’s previous opinion in a related case, it opined that “there is also an issue as to whether the commentary Fox News wished to convey created anything new at all, much less anything transformative,” since it just reposted a meme (“a secondary use of a secondary use”). North Jersey Media Group Inc. v. Pirro, 74 F. Supp. 3d 605, 617 (S.D.N.Y. 2015). The Court suggested that Fox’s endorsement of the meme could not be transformative. Amici respectfully suggest that the Court, which was not aided by the submissions of the parties on this point, did not apply the doctrine of transformativeness as the Supreme Court and the Second Circuit have set it forth: the proper comparison is whether the defendant’s use provides a new meaning and message compared to the plaintiff’s use, not compared to anything else.

Initially, characterizing Fox’s position on the meme as “Me too!” (although here Fox added a far more substantial amount of text) is not relevant to the level of protection its political speech—speech about the anniversary of one of the most important events in American
history—should enjoy. As one district court explained, “[t]he First Amendment’s protections, advanced by the fair use defense, have never applied to some bizarre oligarchy of ‘qualified’ speakers.” Caner v. Autry, 2014 WL 2002835, *9 (W.D. Va. May 14, 2014). Few propositions are more firmly established than that a publisher’s editorial judgment about which speech to select is entitled to the highest level of protection. See, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 570 (1995) (“[T]he presentation of an edited compilation of speech generated by other persons is a staple of most newspapers’ opinion pages, which, of course, fall squarely within the core of First Amendment security ….” (citation omitted)); Turner Broadcasting Sys., Inc. v. Fed. Communic. Comm’n, 512 US 622, 675 (1994) (O’Connor, J., concurring in part and dissenting in part) (“Selecting which speech to retransmit is, as we know from the example of publishing houses, movie theaters, bookstores, and Reader’s Digest, no less communication than is creating the speech in the first place.”); Miami Herald Publ’g. Co. v. Tornillo, 418 U.S. 241, 258 (1974). As a necessary implication, given the relationship between fair use and the First Amendment, the fact that speech was selected and not created in-house cannot affect the transformativeness element.

More importantly, no fair use case has ever reasoned in this way. By this reasoning, Richard Prince’s catalog, published by his gallery, would be infringing even if his canvases weren’t, because they merely republished his canvases. See Cariou v. Prince, 714 F.3d 694, 703 (2d Cir. 2013), cert. denied, 134 S. Ct. 618 (2013). The anti-abortion sites that reposted an anti-abortion video using excerpts from an abortion clinic’s video in Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform, 868 F. Supp. 2d 962, 967 (C.D. Cal. 2012), would likewise be unprotected, despite the fair use of the original video-maker. The radio stations willing to play 2 Live Crew’s “Pretty Woman” would be liable because their use is
nontransformative—they were simply repeating what 2 Live Crew had already done. See Campbell v. Acuff–Rose Music, Inc., 510 U.S. 569 (1994). A college art class that included examples transformed by the professor who wrote the textbook, but not further transformed by the professor teaching the course, would not be protected, because reaching a new audience would not matter.

Transformativeness can be properly measured only be considering a work’s difference from the accusing work, not difference from all other speech out in the world. If a work has been transformed enough to create a new meaning or message such that the initial speaker is making a fair use, then the transformativeness factor must weigh in exactly the same way for a publisher or republisher. The difference in the status of any particular subsequent publisher can be taken into account in the other elements of the fair use analysis, such as the degree of commerciality of the use.

C. The Other Fair Use Considerations Favor Fair Use.

Given that Fox’s use is transformative, the fact that Fox indirectly may have served its interests as a for-profit publisher by having a Facebook page with meaningful content does not weigh heavily against fair use. As the Second Circuit has explained:

The commercial/nonprofit dichotomy concerns the unfairness that arises when a secondary user makes unauthorized use of copyrighted material to capture significant revenues as a direct consequence of copying the original work. This factor must be applied with caution because, as the Supreme Court has recognized, Congress could not have intended a rule that commercial uses are presumptively unfair. Instead, the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.
Cariou, 714 F.3d at 708 (internal quotation marks, citations, and alterations omitted); see also Authors Guild v. Google, Inc., 804 F.3d 202, 218-19 (2d Cir. 2015) (holding that general commercial purpose didn’t outweigh transformative use in the absence of substantial substitution; “[m]any of the most universally accepted forms of fair use, such as news reporting and commentary, quotation in historical or analytic books, reviews of books, and performances, as well as parody, are all normally done commercially for profit”); Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73, 83 (2d Cir. 2014) (discounting commercial nature of use where “the link between the defendant’s commercial gain and its copying is attenuated such that it would be misleading to characterize the use as commercial exploitation” (quotations and alterations omitted)).

The second §107 factor, the nature of the work, favors Fox in two ways. First, Fox copied a work that had already been widely disseminated. This favors fair use. See, e.g., Kelly v. Arriba Soft Corp., 336 F.3d 811, 820 (9th Cir. 2003) (“Published works are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred.”); Arica Inst. v. Palmer, 970 F.2d 1067, 1078 (2d Cir. 1992) (plaintiff’s work was “a published work available to the general public,” and the second factor thus favored the defendant). Second, the copied works was a news photo, and “[i]t is well established that ‘the scope of fair use is greater with respect to factual than non-factual works.’” Swatch, 756 F.3d at 89 (quoting New Era Publ’ns Int’l, ApS v. Carol Publ’g Grp., 904 F.2d 152, 157 (2d Cir. 1990)). The additional presence of expressive elements makes the photo copyrightable, but it remains a primarily factual work, the copyright on which is thin compared with highly creative works.

As for the third factor, copying an entire work is often consistent with fair use, and such is the case here. From 1978-2005, defendants who took the entirety of the plaintiff’s work won
their fair use claims roughly as often as defendants overall. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. Pa. L. Rev. 549, 575–76, 616 (2008); *see also, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449–50 (1984); Kelly, 336 F.3d at 820–21; Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 803 n. 8 (9th Cir. 2003) (“entire verbatim reproductions are justifiable where the purpose of the work differs from the original”); *Bill Graham Archives*, 448 F.3d at 609 (2d Cir. 2006) (same). Especially when images are involved, it may be impossible to convey a message about the image without reproducing the entirety or nearly the entirety, and so the amount reproduced will not weigh against an otherwise transformative purpose. See Tushnet, *supra*, at 753-54.

Furthermore, the defendants did not use high-resolution images, a factor that favors fair use when the use is of an image. *See, e.g.*, Kelly, 336 F.3d at 821 & n.37. More generally, the cases recognize that copying is justified when the details copied assist the fair user in accomplishing her purpose. *See, e.g.*, Campbell, 510 U.S. at 588; Authors Guild, 804 F.3d at 221 (“[N]ot only is the copying of the totality of the original reasonably appropriate to Google’s transformative purpose, it is literally necessary to achieve that purpose.”); *Bill Graham Archives*, 448 F.3d at 613 (finding fair use when copying was of the “size and quality” necessary to the transformative purpose); Sony Computer Entertainment America, Inc. v. Bleem, LLC, 214 F.3d 1022, 1030 (9th Cir. 2000) (finding fair use where real images were necessary for accurate comparisons); Time Inc. v. Bernard Geis Assocs., 293 F.Supp. 130, 146 (S.D.N.Y. 1968) (finding copies of images fair because they made defendant’s theory of Kennedy’s assassination easier to understand).

Analysis of the fourth factor, market harm, depends very much on the legitimate markets a copyright owner is allowed to control. See Authors’ Guild, Inc. v. HathiTrust, 755 F.3d 87, 99
(2d Cir. 2014) (“any economic ‘harm’ caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work”); Arrow Prods., LTD. v. Weinstein Co. LLC, 44 F. Supp. 3d 359, 372 (S.D.N.Y. Aug. 25, 2014) (copies of short portions of film Debbie Does Dallas were transformative fair use; alleged licensing market was not within copyright owner’s legitimate market because uses were transformative); Bill Graham Archives, 448 F.3d at 614-15 (“[A] copyright holder cannot prevent others from entering fair use markets merely by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work. [C]opyright owners may not preempt exploitation of transformative markets ….”); Blanch v. Koons, 467 F.3d 244, 256 (2d Cir. 2006) (“If the use is otherwise fair, then no permission need be sought or granted.”) (quoting Campbell, 510 U.S. at 585 n.18). The fact that some entities might seek to license photos for memes that would qualify as fair use should not be used to destroy fair use; that only encourages copyright owners to engage in more aggressive attempts to bootstrap the practices of risk-averse entities into a rule of law. Jim Gibson, Risk Aversion and Rights Accretion in Intellectual Property Law, 116 Yale L.J. 882 (2007).

The copyright owner’s lack of entitlement to transformative markets is not just a normative rule. It has strong empirical grounding in copyright owners’ own interests, which lead them to restrict licenses in ways that tend to choke off core fair uses, such as contrasts between photos that might show the subjects of the photos in an unflattering light, or uses by entities that hold views opposed to those of the copyright owner (something that any media entity with an interest in taking political stances has good reason to fear), even if the same uses by other entities would be tolerated. See, e.g., Katz v. Google, 802 F.3d 1178, 1182-83 (11th Cir. 2015) (use of photo to criticize subject of photo was fair use); Galvin v. Illinois Republican Party, --- F. Supp.

Relatedly, the Second Circuit has recently emphasized that, to weigh in favor of a plaintiff, the fourth factor requires a “meaningful or significant effect” on the market for the plaintiff’s work via substitution. *Authors Guild*, 804 F.3d at 224. A meme, including large-type text to make it suitable for informal Internet communication, is not such a replacement.

**CONCLUSION**

For the foregoing reasons, amici urge the Court to grant Defendant’s renewed motion for summary judgment.

Dated: November 30, 2015

Respectfully submitted,

/s/
Christopher Jon Sprigman
Counsel for Proposed Amici Curiae