

12-4547-CV

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

AUTHORS GUILD, INC., AUSTRALIAN SOCIETY OF AUTHORS LIMITED, UNION DES ECRIVAINES ET DES ECRIVAINS QUEBECOIS, PAT CUMMINS, ANGELO LOUKAKIS, ROXANA ROBINSON, ANDRE ROY, JAMES SHAPIRO, DANIELE SIMPSON, T.J. STILES, FAY WELDON, AUTHORS LEAGUE FUND, INC., AUTHORS' LICENSING AND COLLECTING SOCIETY, SVERIGES FORFATTARFORBUND, NORSK FAGLITTERAER FORFATTER00G OVERSETTERFORENING, WRITERS' UNION OF CANADA, PAT CUMMINGS, ERIK GRUNDSTROM, HELGE RONNING, JACK R. SALAMANCA, JAMES SHAPIRO, DANIELLE SIMPSON,

Plaintiffs-Appellants,

—against—

HATHITRUST, REGENTS OF THE UNIVERSITY OF MICHIGAN, REGENTS OF THE UNIVERSITY OF CALIFORNIA, BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, TRUSTEES OF INDIANA UNIVERSITY, CORNELL UNIVERSITY,

(caption continued on inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR AMICUS CURIAE THE ASSOCIATED PRESS
IN SUPPORT OF NEITHER PARTY**

ELIZABETH A. MCNAMARA
ALISON B. SCHARY
(admission pending)
COLLIN J. PENG-SUE
DAVIS WRIGHT TREMAINE LLP
1633 Broadway, 27th Floor
New York, New York 10019
(212) 489-8230

*Attorneys for Amicus Curiae
The Associated Press*

JULIA DONOVAN DARLOW, LAURENCE B. DEITCH, DENISE ILITCH, OLIVIA P. MAYNARD, ANDREA FISCHER NEWMAN, ANDREW C. RICHNER, S. MARTIN TAYLOR, in his official capacity as the Regents of the University of Michigan, KATHERINE E. WHITE, in her official capacity as the Regents of the University of Michigan, RICHARD C. BLUM, DAVID CRANE, WILLIAM DE LA PENNA, RUSSELL GOULD, EDDIE ISLAND, ODESSA JOHNSON, GEORGE KIEFFER, SHERRY L. LANSING, MONICA LOZANO, HADI MAKARECHIAN, GEORGE M. MARCUS, ALFREDO MIRELES, JR., NORMAN J. PATTIZ, BONNIE REISS, FRED RUIZ, LESLIE TANG SCHILLING, BRUCE D. VARNER, PAUL WACHTER, in his official capacity as the Regents of the University of California, CHARLENE ZETTEL, in his official capacity as the Regents of the University of California, JEFFREY BARTELL, MARK J. BRADLEY, JUDITH V. CRAIN, JOHN DREW, TONY EVERS, MICHAEL J. FALBO, EDMUND MANYDEEDS, KATHERINE POINTER, CHARLES PRUITT, TROY SHERVEN, BRENT SMITH, MICHAEL J. SPECTOR, S. MARK TYLER, JOSE F. VAZQUEZ, in his official capacity as the Regents of the University of Wisconsin System, DAVID G. WALSH, in his official capacity as the Regents of the University of Wisconsin System, WILLIAM R. CAST, PATRICK A. SHOULDERS, MARYELLEN KILEY BISHOP, BRUCE COLE, PHILIP N. ESKEW, JR., CORA J. GRIFFIN, THOMAS E. REILLY, JR., DERICA W. RICE, in his official capacity as the Trustee of Indiana University, WILLIAM H. STRONG, in his official capacity as the Trustee of Indiana University, NATIONAL FEDERATION OF THE BLIND, GEORGINA KLEEGER, BLAIR SEIDLITZ, COURTNEY WHEELER,

Defendants-Appellees,

NATIONAL FEDERATION OF THE BLIND, GEORGINA KLEEGER,
BLAIR SEIDLITZ, COURTNEY WHEELER,

Intervenor Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, *amicus curiae* The Associated Press states that it has no parent corporation and that no publicly held company owns more than 10% of its stock.

TABLE OF CONTENTS

	<u>Page</u>
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THE COURT SHOULD CAREFULLY CONFINE ITS ANALYSIS TO CASES WHERE THE END PRODUCT DISPLAYS NO COPYRIGHTABLE MATERIAL.....	8
II. A TRANSFORMATIVE USE MUST NOT SUPERCEDE THE OBJECTS OF THE ORIGINAL WORK	11
A. The Core of the Transformative Use Doctrine Focuses on New Expressive Uses of the Original Work.....	12
B. Even Those Cases Recognizing A Functional Use As A Transformative Use Have Required That The New Work Not Be Capable of Serving the Same Purpose As The Original	22
CERTIFICATE OF COMPLIANCE.....	29

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>A.V. ex rel Vanderhye v. iParadigms, LLC</i> , 562 F.3d 630 (4th Cir. 2009)	10, 18, 23, 24
<i>Associated Press v. All Headline News Corp.</i> , 608 F. Supp. 2d 454 (S.D.N.Y. 2009)	3
<i>Associated Press v. Meltwater</i> , No. 12-1087 (S.D.N.Y. filed Feb. 14, 2012)	10
<i>Associated Press v. Moreover Technologies, Inc.</i> , No. 07 Civ. 8699 (S.D.N.Y. filed Oct. 9, 2007)	3
<i>Authors Guild, Inc. v. HathiTrust</i> , No. 11 CV 6531 (HB), 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012).....	1, 9
<i>Bill Graham Archives v. Dorling Kindersley, Ltd.</i> , 448 F.3d 605 (2d Cir. 2006)	16, 20, 21
<i>Blanch v. Koons</i> , 467 F.3d 244 (2d Cir. 2006)	13, 17, 20
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	passim
<i>Infinity Broad. Corp. v. Kirkwood</i> , 150 F.3d 104 (2d Cir. 1998).	18, 19, 27
<i>Kelly v. Arriba Soft Corp.</i> , 336 F.3d 811 (9th Cir. 2003)	passim
<i>Lennon v. Premise Media Corp.</i> , 556 F. Supp. 2d 310 (S.D.N.Y. 2008)	17
<i>Maxtone-Graham v. Burtchaell</i> , 803 F.2d 1253 (2d Cir. 1986)	17
<i>Monge v. Maya Magazines, Inc.</i> , 688 F.3d 1164 (9th Cir. 2012)	7, 21

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.