No. 15-849

In The Supreme Court of the United States

THE AUTHORS GUILD, *ET AL.*,

Petitioners,

v.

GOOGLE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR AUTHORS MALCOLM GLADWELL, J.M. COETZEE, MARGARET ATWOOD, URSULA LE GUIN, STEPHEN SONDHEIM, PETER CAREY, THOMAS KENEALLY, TONY KUSHNER, DIANE MCWHORTER, TAYLOR BRANCH, TRACY CHEVALIER, DOUGLAS WRIGHT, MICHAEL FRAYN, RICHARD FLANAGAN, TRACY KIDDER, MARSHA NORMAN, AND YANN MARTEL, *AMICI CURIAE*, SUPPORTING PETITIONERS

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The individual authors and dramatists named above (who, following the teachings of this Court, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884); *Feist Pub. Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 346-47 (1991), will all be referred to as "authors") submit this brief as *amici curiae* in support of Petitioners.[1] The *amici curiae* are renowned authors from the United States, Australia, Canada, and the United Kingdom and copyright owners of bestselling works ranging from short stories to novels and historical fiction to nonfiction to fantasy and imaginative

[1] Pursuant to Rule 37.2(a), counsel for both parties received timely notice of *amici's* intent to file a brief; on January 14, 2016, counsel for both parties filed letters consenting to the filing of all *amicus curiae* briefs in support of either or no party. Pursuant to Rule 37.6, this brief was authored entirely by counsel for *amici curiae*. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief. The Dramatists Legal Defense Fund, whose sole member is The Dramatists Guild of America, contributed money to partially fund the preparation of this brief.

fiction to long-running plays and musicals. The *amici curiae* have won nearly every major literary and drama prize, including the Nobel Prize for literature, multiple Pulitzer Prizes, Booker Prizes, Tony Awards, and an Academy Award. Short biographies of each of the authors follow.

Malcolm Gladwell, a staff writer at the New Yorker, is the author of five bestselling books, including the nonfiction works *The Tipping Point*, *Blink*, and *Outliers*. Mr. Gladwell has been named one of the 100 most influential people by TIME magazine.

J.M. Coetzee is the recipient of the 2003 Nobel Prize in Literature. A native of South Africa and now an Australian national, Mr. Coetzee is a playwright and novelist, including *Life & Times of Michael K* and *Disgrace*, both of which won the Booker Prize. Mr. Coetzee has held a number of positions at universities in the United States, South Africa, and Australia.

Margaret Atwood, a founder of the Writers' Union of Canada, is the author of essays, poetry, short-stories and novels. Her novel *The Blind Assassin* won the Booker Prize in 2000, and Ms. Atwood has received countless other awards and honors. Her 2008 Massey Lecture series, *Payback: Debt and the Shadow Side of Wealth* was adapted into the documentary film *Payback*.

Ursula K. Le Guin, novelist and poet, is one of the world's most respected authors of imaginative fiction. Among the many honors and rewards she has received are the National Book Award, the designation

of "Living Legend" by the U.S. Library of Congress, and the National Book Foundation Medal for Distinguished Contribution to American Letters.

From *West Side Story* and *Gypsy* to *Sweeney Todd* and *Into the Woods*, lyricist and composer Stephen Sondheim has made monumental contributions to American theatre. Mr. Sondheim has received countless awards for his wide-ranging work, including eight Tony Awards; eight Grammy Awards; a Pulitzer Prize; an Academy Award; the Laurence Olivier Award; and the Presidential Medal of Freedom.

Peter Carey, an Australian, is one of only three writers to have received the Booker Prize twice – for *Oscar and Lucinda* and *The True History of the Kelly Gang*. Mr. Carey has won Australia's Miles Franklin Award three times, the Commonwealth Writers' Prize twice, and the Prix du Meilleur Livre Étranger. He has taught creative writing at several American universities, and currently directs the MFA program in creative writing at Hunter College. He is also a former Vice President of PEN America.

Thomas Keneally is an Australian author of some forty novels including *Confederates* and *Daughters of Mars*. He has won the Miles Franklin Award, the Booker Prize (for *Schindler's Ark*, later adapted to become the Oscar-winning movie, *Schindler's List*), the Los Angeles Times Prize, the Mondello International Prize, and the Helmerich Award. He has held a Distinguished Professorship at the University of

California/Irvine and served for a time on the U.S. National Endowment of the Arts.

Tony Kushner is a Pulitzer Prize winning playwright, screenwriter and author. Mr. Kushner's plays include *A Bright Room Called Day*; *Angels in America*, *Parts One and Two*; *Slavs!*; and *Homebody/Kabul*. Mr. Kushner wrote the screenplays for the films *Angels in America*, *Munich* and *Lincoln*. Among other honors, Mr. Kushner has received two Tony Awards, three Obie Awards, two Evening Standard Awards, an Olivier Award, an Emmy award and, in 2012, he was awarded a National Medal of Arts by President Barack Obama.

Diane McWhorter, an author and journalist, won the Pulitzer Prize for General Nonfiction, the J. Anthony Lukas Book Prize, and many other awards for her book *Carry Me Home: Birmingham, Alabama, the Climactic Battle of the Civil Rights Revolution*. *Time* named *Carry Me Home* to its list of the 100 best nonfiction books published since the magazine's founding, in 1923. She is a long-time contributor to The New York Times.

Taylor Branch is a historian, whose works include a three-volume narrative history of the civil rights era, *America in the King Years*. The trilogy's first book, *Parting the Waters: America in the King Years, 1954-63*, won the Pulitzer Prize. Mr. Branch has received lifetime achievement awards from the Dayton Literary Peace Prize and the Anisfield-Wolf Book Awards.

Tracy Chevalier is an author of seven historical novels, including *Girl with a Pearl Earring*. She is a Fellow of the Royal Society of Literature, and the recipient of honorary doctorates from Oberlin College and the University of East Anglia.

Douglas Wright received the Pulitzer Prize for Drama in 2004, as well as a Tony Award for best play, for *I Am My Own Wife*. A playwright, librettist, director and screenwriter, Mr. Wright wrote the book for the musicals *Hands On a Hardbody*, *The Little Mermaid*, and *Grey Gardens*. His play *Quills* won the Kesselring Prize for Best New American Play, and was later adapted into a feature film for which Mr. Wright wrote the screenplay.

Michael Frayn is an English novelist, translator, memoirist, nonfiction author and Tony Award winning playwright (for *Copenhagen*, in 2000). His novels have won countless honors, including the Somerset Maugham Award, the Whitbread Novel Award, and the Commonwealth Writers Prize. Mr. Frayn's plays also include *Noises Off* and *Democracy*.

Richard Flanagan won the 2014 Booker Prize for his novel *The Narrow Road to the Deep North*. An Australian novelist, screen writer and director, Mr. Flanagan is the author of six novels which have been published in twenty-six countries. In addition to the Booker Prize, his novels have won the Commonwealth Writer's Prize, the Queensland Premier's Prize, and the Western Australian Premier's Prize.

Tracy Kidder won the Pulitzer Prize for General Nonfiction and the National Book Award for his book *The Soul of a New Machine*, which describes the race to design the next-generation of computers, and *Mountains Beyond Mountains: The Quest of Dr. Paul Farmer, A Man Who Would Cure the World.* Mr. Kidder also has written short fiction, essays and articles for publications including The Atlantic, The New Yorker, The New York Times, and Granta.

Marsha Norman is a Pulitzer Prize winning playwright, screenwriter, author and teacher. Ms. Norman won the Pulitzer Prize for Drama for her play *'night, Mother*. Her works include the book and lyrics for the Broadway musicals *The Secret Garden*, for which she won a Tony Award and the Drama Desk Award for Outstanding Book of a Musical, and *The Red Shoes*, and the book for *The Color Purple* and the musical *The Bridges of Madison County*.

Yann Martel is a Canadian author of novels and short stories. His novel *Life of Pi* won the 2002 Booker Prize, was an international bestseller, and was adapted into a blockbuster movie. In 2005 Martel was a visiting scholar at the University of Saskatchewan.

INTEREST OF THE *AMICI CURIAE*

Three critical developments require this Court to re-visit the fair-use doctrine and its application in order to ensure that authors' copyright rights are not further weakened. First, in *Campbell v. Acuff-Rose*

Music, Inc., 510 U.S. 569 (1994) ("*Campbell*"), a case addressing whether a parody is fair use, this Court attempted a recalibration of the fair-use analysis. Reacting to the perception that commercial interests had become too prominent in fair-use analysis, *id*. at 574, this Court refocused the analysis, using Judge Leval's formulation, which asks "whether and to what extent the new use is 'transformative,'" *id.* at 579, citing Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) ("Leval").

This Court then added the much-quoted statement that "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." *Id.* at 579. As a result, many courts, once they determine under Factor One of 17 U.S.C. §107 that a use is transformative, dismiss or minimize all the remaining fair-use factors because the use is transformative, leading one commentator to ask "Is there now 'transformative sweep?'"[2] Such an analysis is contrary to the repeated direction of Congress and this Court that fair use "calls for case-by-case analysis," "is not to be simplified with bright-line rules," "nor may the four statutory factors be treated in

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[2] Richard Dannay, *Copyright Injunctions and Fair Use: Enter eBay – Four-Factor Fatigue or Four-Factor Freedom?*, 55 J. COPYRIGHT SOC'Y 449, 461 n.25 (2008) (37th Annual Donald C. Brace Memorial Lecture). *See also*, 4 Melville Nimmer & David Nimmer, NIMMER ON COPYRIGHT §13.05[B][6] at 13-224.1 – 13-224.10 ("NIMMER").

isolation." *Id.* at 577-78; *Harper & Row, Inc. v. Nation Enter.*, 471 U.S. 539, 560 (1985); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448 & n.31 (1984); H.R. Rep. No. 94-1476 p. 66 (1976) ("House Report"); S. Rep. No. 94-473, p. 62 (1975).

Second, the technological changes of the past 20 years, especially the mass digitization of works and their easy and fast transmission over the Internet, was never contemplated by either the Congress that enacted the 1976 Act or this Court when it decided *Campbell*. These developments affect not only an author's reproduction right, which was already a concern (in the form of photocopying) when the Copyright Act of 1976, 17 U.S.C. §§101 *et seq.* ("Copyright Act") was enacted, but now also threatens the distribution right because of the ease of transmitting digital versions of a work electronically. An appropriate balancing of all the fair-use factors must take account of these developments.

Third, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), held that "whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards." *Id.* at 394. While *eBay* was a patent case, this Court made clear that the remedy applies in the same way in copyright cases. *Id.* at 392-93. Indeed, in a case where both sides claim the greater equity, like this one, "[l]itigants and

courts *must* now consider the impact of *eBay* in *all* copyright cases."[3]

Copyright protection was included in the Constitution to reward authors and provide incentives for them to continue writing. The *amici* do not believe that the fair-use doctrine was ever intended – either by the judges who developed the doctrine at common law or the many Congresses that drafted and finally codified the fair-use doctrine – to permit a wealthy for-profit entity to digitize millions of works and to cut off authors' licensing of their reproduction, distribution, and public display rights. They also believe that the manner in which this Court embraced "transformativeness" has led courts to ignore their obligations, contrary to the direction of Congress and this Court, to consider and weigh all the fair-use factors, apply no bright lines, and consider the broad goals set out in the preface of section 107.

[3] Dannay, *supra* note 2, at 460 (emphasis in original).

REASONS FOR GRANTING THE WRIT

I. NEITHER THE CONGRESS THAT ENACTED THE 1976 COPYRIGHT ACT NOR THE COURT THAT DECIDED *CAMPBELL V. ACUFF-ROSE* WAS AWARE OF MASS DIGITIZATION OF MILLIONS OF WORKS OR THE ABILITY TO DISTRIBUTE THEM ON THE INTERNET.

A. The Internet Was Not Anticipated

Much of Justice Story's original description of the fair-use doctrine in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901), still survives in the current statutory language. The doctrine continued to be developed at common law and was first codified in the Copyright Act. What is important to the issue before this Court is that neither *Folsom v. Marsh* nor any intervening case, nor the Congresses that spent 21 years studying and drafting the 1976 Copyright Act, nor this Court when it decided *Campbell v. Acuff-Rose* knew anything about the digital reproduction of copyrighted works and their communication on the Internet or the phenomenon of "mass digitization" of vast collections of copyrighted works.

The studies, drafting, and hearings leading to the 1976 Copyright Act took 21 years. Publishers and authors participated extensively in the congressional hearings, and there is statutory evidence that

Congress attempted to meet their concerns.[4] Congress recognized that the endless varieties of situations in which fair-use considerations may arise require that the doctrine be flexible "especially during a period of rapid technological change." House Report at 66. But nothing demonstrates that Congress ever contemplated the effect on authors of the kinds of facts that are presented to this Court in this case. Similarly, even when *Campbell* was addressing very different facts in 1994, the Internet was still in the future for everyone but its inventors.

B. Google's Library Book Project

Google is an enormous company whose core businesses are advertising and search. It is a for-profit company, which, as of the end of December 2015, was valued at over a half-trillion dollars.[5] Google has assembled its massive wealth "primarily by delivering relevant, cost-effective online advertising." (Google 2013 10-K at 3.[6]) Its "business is primarily

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[4] *See, e.g.*, *Quality King Distributors, Inc. v. L'anza Research International, Inc.*, 523 U.S. 135, 147-49 & n.20 (1998) (showing that Congress's adoption of the market allocation provision described in 17 U.S.C. §109(a) had been a response to the problem of importation into the U.S. of authorized, foreign English-language editions, described in the 1964 testimony of publishers' representatives).

[5] https://ycharts.com/companies/GOOG/market_cap.

[6] "Google's 2013 10-K" means the form Google submitted to the Securities and Exchange Commission for the period ending

(Continued on following page)

focused around the following key areas: search and display advertising, the Android operating system platform, consumer content through Google Play, enterprise, commerce and hardware products." *Id.* Google acknowledges that its search function "continues to evolve and improve as more information comes online, and as people increasingly look to their mobile devices for answers throughout the day." *Id.* at 4.

One way that Google has "evolve[d]" is by increasing the volume of information it makes available online – thereby improving its search function – by copying over 20 million books that it obtained from several research libraries, and by displaying through Google Books search results based on digital copies of these books.

Google's aspirations have become only more ambitious (Google 2014 10-K at 3[7]):

> Our founders started Google because they share a profound sense of optimism about the potential for technology to create a positive impact in the world. As Larry [Page] and Sergey [Brin] explained in their first letter to shareholders, our goal is to: " . . . develop services that significantly improve the lives

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December 2013, available at https://investor.google.com/pdf/131231_google_10K.pdf.

[7] "Google's 2014 10-K" means the form Google submitted to the Securities and Exchange Commission for the period ending December 2014, available at https://investor.google.com/pdf/20141231_google_10K.pdf.

> of as many people as possible." In many ways, Google itself began with a series of questions: What if we could download and index the entire web? What if we could organize all the world's information?[8]

A fundamental question for this case is: why did Google decide to create the Google Library Book Project? Google does not create its own books of history, fiction, poetry, or other expressive works of authorship. Google is not a university library; those not-for-profit institutions have traditionally created finding aids for their own libraries. *See Authors Guild Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).[9]

Google is an advertising company. The Google Library Book Project permits it to employ its search algorithms to create pages on which it can sell advertising, the income from which redounds to the benefit

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[8] Although Google's use of the word "information" suggests that it is referring only to facts and ideas, which are not protected by copyright, what Google intends to absorb into its search engine knows no boundaries; it includes fiction, poetry, and nonfiction works that are protected by copyright.

[9] In so saying, the *amici* do not endorse the underlying infringing bargain between Google and the libraries whereby the libraries permitted Google to copy books in their collections, a right they did not control, in exchange for Google's distribution to them of searchable electronic copies of those works, a right that Google did not control. Libraries had no right to authorize the copying of the physical copies of works in their collections that are still in copyright, unless they also own the copyrights. Google had no right to distribute its infringing copies to the libraries.

of Google's shareholders – not authors. Although Google described its Library Book Project to the public as though it were a charitable endeavor, the Library Book Project was a vehicle to make searchable digital copies of over 20 million authors' works (four million in copyright) available for searching. Paying for licenses for those copies was not part of Google's business model.[10] Users' searches returned Web pages on which Google initially sold advertising. By creating a search project that would draw people repeatedly to new searches, as one consults a dictionary, Google created a vehicle for creating new, advertising-bearing Web pages that would enrich its advertising revenue. "Our innovations in search and advertising have made our website widely used and our brand one of the most recognized in the world. We generate revenues primarily by delivering online advertising that consumers find relevant and that advertisers find cost-effective." (Google 2014 10-K at 3.)

In the process, Google edged out a competitor, Amazon, which had begun its own A9.com search service in early 2004 after obtaining nearly 200

[10] When Google's Library Book Project first launched, the pages carried paid advertising. When authors complained, Google created a program for sharing the advertising income, but suspended it on the ground that it was too complicated to keep track of and account for the small amounts of money collected. Pet. App. 59a-60a. Google has never represented that it will never post advertising at some time in the future on the Web pages returned by the Google Library Book Project.

licenses from publishers. Google entered the market in December 2004. In the contest between paid licenses and "free," Google prevailed and authors lost a new source of licensing income.[11] Google also provided digitized copies of the books it had scanned to all the participating universities that had provided them for scanning. As a result Google deprived authors of yet another market for licensing digitized books.

In drafting the Copyright Act, Congress was attuned to authors, those whose livelihoods depend on copyright protection. It cannot be assumed that Congress believed that a run-of-the-mine application of section 107 was alone sufficient to meet the threat to authors of mass digitization of millions of works and the potential loss of control of the distribution of digitized copies through electronic media. The technological advances of the last 20 years that now pit commercial companies that do not produce copyrighted works against individual authors in the fair-use analysis, rather than one author's use of another author's work, require a new look at the fair-use analysis.

C. Loss of Security of Electronic Copies

This case also raises a relatively new fair-use issue relating to the security of the many electronic copies of authors' works that may be stored in library

[11] Affidavit of Paul Aiken, Executive Director of the Authors Guild, C.A. App. A1290, ¶¶10-31.

databases all over the country as the result of the decision below and decisions sanctioning the mass digitization of works for search. While even Petitioners' experts in this case lauded the high level of Google's system for maintaining the security of digitized copies, Pet. App. 29a, the same cannot be said for all the nation's academic libraries, including those to which Google distributed digitized copies as consideration for their willingness to permit Google to make copies, without authority of the copyright owners. Yet under the reasoning of the decision below and *HathiTrust*,[12] any college or university would be entitled to digitize the books in its library for purposes of search. Even if that were an appropriate fair-use purpose, a fully informed conclusion about fair use should require consideration of whether such institutions maintain sufficient safeguards to secure the vast numbers of digitized works in their collections and the economic impact upon authors if those copies are not securely maintained.

[12] The suggestion in *HathiTrust*, 755 F.3d at 100-01, that a breach of security can be addressed when it occurs ignores the fact that the breach of security of copies of whole works that can be communicated on the Internet in seconds has more disastrous (and costly) consequences than do one or two pirated physical copies. This is another example of a court's not appreciating that fair use in the context of new facts may require a more subtle fair-use analysis.

II. THIS COURT'S MOST RECENT FAIR-USE DECISION MAY HAVE LED TO THE CURRENT OVER-EMPHASIS ON "TRANSFORMATIVENESS."

In *Campbell*, in a case involving a song parody, this Court began its analysis of Factor One with Justice Story's formulation, which focused on "whether the new work merely 'supersede[s] the objects'; of the original creation" (*Folsom v. Marsh*, 9 F. Cas. at 348) "or instead 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'" (510 U.S. at 579, relying on Leval at 1111).

Deciding whether a use is "transformative" has led courts and commentators to ponder the meaning of "transformative," including its use in the Copyright Act's definition of "derivative works."[13] *See, e.g.*, *Castle Rock Ent. Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 143 (2d Cir. 1998). Having adopted this formulation, this Court also declared that "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." *Campbell*, 510 U.S. at 579. But at the same time, the Court also cautioned, as have courts since *Folsom v. Marsh*, that

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[13] Richard Dannay, *Factorless Fair Use? Was Melville Nimmer Right?*, 60 J. COPYRIGHT SOC'Y 127, 131-36 (2013).

the task of determining fair use is "not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." *Id*. at 577.

Unfortunately, this has led to 22 years of courts trying to determine the meaning of "transformative" in fair-use cases. Increasingly, it has led courts, especially in the Second Circuit beginning in 2006, to focus almost exclusively on whether a use was "transformative." If so, courts pay lip-service to the other fair-use factors, concluding that the transformative nature of the use was predominant. *See, e.g.*, *Cariou v. Prince*, 714 F.3d 694, 708-10 (2d Cir.), *cert. denied*, 134 S. Ct. 618 (2013); 4 NIMMER §13.05[B][6] at 13-224.4 – 13-224.6 and at 13-224.16(1) – 13-224.20. *Cariou*, a case involving the use of Cariou's published photographs by the appropriation artist Richard Prince, is an example of this approach. Analyzing whether Prince's use of Cariou's photographs was transformative, the Court of Appeals acknowledged that Prince did not provide any explanation for why his use of Cariou's photographs was transformative, but decided that that was "not dispositive,"[14] 714 F.3d at 707, because the court of appeals determined that

[14] Prince testified at his deposition that he was "not trying to create anything with a new meaning or a new message" 714 F.3d at 706-07, and that "he [doesn't] have any real interest in what [another artist's] original intent is because what I do is change it into something that's completely different. . . . " *Id.* at 707.

"*our* observation of Prince's artworks themselves convinces us of the transformative nature of all but five. . . . " 714 F.3d at 706 (emphasis added).[15] Then the analysis of each of Factors One, Two, and Four concluded with slight variations of this Court's statement that "[t]he more transformative the new work, the less will be the significance of other factors." 714 F.3d at 708, 709, 710.

The result is that in an effort to re-balance the fair-use analysis and diminish undue reliance on the commercial factor (*Sony Corp. of America*, 464 U.S. at 451 (1984)), this Court substituted another concept – "the more transformative the new work, the less will be the significance of other factors like commercialism that may weigh against fair use." The court of appeals below now tries to diminish the force of the concept of "transformative," saying that "it cannot be taken too literally as a sufficient key to understanding the elements of fair use. It is rather a suggestive symbol for thought, and does not mean that any and all changes made to an author's original text will necessarily support a finding of fair use." Pet. App. 19a.

This case gives the Court the opportunity to recalibrate fair-use analysis once again. In *Folsom v. Marsh*, Justice Story stated that "The question, then,

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[15] "What is critical is how a work in question appears to the reasonable observer, not simply what an artist might say about a particular piece of work." *Id*.

is, whether [the second use] is a *justifiable* use of the original materials." 9 F. Cas. at 349 (emphasis added). The Second Circuit also talks about "justification," but only in the context of Factor One: "A taking from another author's work for the purpose of making points that have no bearing on the original may be fair use, but the taker would need to show a *justification*." Pet. App. 20a (emphasis added).

"Justification" is used by one commentator to propose what may be the most straightforward and useful balancing test for fair use:

> Mindful of the purposes of copyright law and the public interest, is there sufficient "justification" for the use to outweigh the copyright owner's interests in prohibiting the use or at least in being compensated for it, if an injunction is not warranted?[16]

This approach recognizes that, after consideration of the four factors, the prefatory language, transformativeness, and any other considerations that might be helpful in fair-use analysis, "the real test for deciding fair use may be the 'gut' balancing of interests" described in test quoted above.[17]

In determining whether that justification is "fair" requires consideration and balancing of *all* the

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[16] Dannay, note 12, *supra* at 144; 4 NIMMER at §13.05[A] & n.26.

[17] Dannay, note 12, *supra* at 144.

fair-use considerations: the copyright goals described in §107's preface and in the Copyright Act generally as well as the four factors, transformativeness, and any other relevant factor; the same applies to considering the copyright owner's claim that the use is not fair. In some cases, other factors not described in the statute may be considered – especially when considering cases involving new technological changes never anticipated by the Copyright Act or the courts. Not all the factors will weigh the same in all cases. How could they, when the facts of different cases are so variable? There is no iron-clad formula. That the "commercialism" factor was once relied upon too much in the past (*Campbell*, 464 U.S. at 574) does not mean that it should not be a significant factor in the balance of the equities where, for example, a fabulously wealthy for-profit company such as Google preempts authors of an entire class of licensing opportunities for all of their works.[18] The balancing test set out above

[18] *See*, *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1262 (2d Cir. 1986) ("We do not read Section 107(1) as requiring us to make a clear-cut choice between two polar characterizations, 'commercial' and 'non-profit.' Were that the case, fair use would be virtually obliterated, for 'all publications presumably are operated for profit. . . .'" (citation omitted); *Iowa State University v. American Broadcasting Co.*, 621 F.2 57, 60-62 (2d Cir. 1980). Unlike fair-use cases like these, the parties in this case are not both creators of copyrighted works.

> might possibly be more candid, more direct, less Procrustean, in evaluating and weighing each of the factors, less concerned with four-factor weighing and tallies and "aggregate assessment," less vulnerable to "twisting and turning" in finding or rejecting transformative purpose or use.[19]

Fair use is not easy and never has been. It is not for nothing that the first fair-use case drove Justice Story to comment that "[p]atents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtile and refined, and, sometimes, almost evanescent." 9 F. Cas. at 344.

The unprecedented scale of the Google Library Book Project, by itself, warrants a reconsideration of fair use in this case.

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[19] Dannay, *supra* note 12 at 144, referring at 132, to David Nimmer, "*Fairest of them All" and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS., 263, 287 (2003) (evaluating and weighing the factors); at 135, to *Leibovitz v. Paramount Pictures, Corp.*, 137 F.3d 109, 117 (2d Cir. 1998) ("aggregate assessment"); at 140, to Diane Leenheer Zimmerman, *The More Things Change, the Less They Seem "Transformed": Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC'Y 251, 268 (1999) ("twisting and turning").

III. THIS COURT SHOULD EMPHASIZE THAT INJUNCTIONS ARE NOT ALWAYS REQUIRED IN COPYRIGHT INFRINGEMENT CASES; MONETARY REMEDIES IN LIEU OF INJUNCTIONS COULD BE USEFUL IN BALANCING EQUITIES IN FAIR-USE CASES.

This case would also permit this Court to emphasize the role of injunctions in copyright cases. Although the Court has thrice commented on the role of injunctions in copyright cases (*Campbell*, 510 U.S. at 578 n.10; *New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 505 (2001); *eBay Inc. v. MercExchange*, 547 U.S. 388, 392-93 (2006), the bar and the lower courts have been slow to catch on. *See*, *e.g.*, *Salinger v. Colting*, 607 F.3d 68, 74-75 (2010). In *eBay*, a concurrence explained that "the equitable discretion over injunctions, granted by the Patent Act, is well suited to allow courts to adapt to the rapid technological developments in the patent system." 547 U.S. at 397.

This case offers this Court the opportunity to make clear to bench and bar that the same equitable discretion should play a part in every copyright fair-use case where there are significant equities on both sides.[20] For example, a court, concluding that Google had advanced a serious justification for its use of the authors' works but also convinced that the effect of

[20] Dannay, *supra* note 2 at 458-60; 4 NIMMER §14.06[A][3][a] at 14-140, §14.06[A][5][b] at 14-155 – 14-156 & nn.183-197.

the use weighed too heavily on the authors' economic interests might decide that the more equitable solution would be to find that Google's use was infringing, permit the authors to recover their economic losses, but impose no injunction. This is a solution that provides far more flexibility in balancing interests in fair-use analyses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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