

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRONICLE BOOKS, LLC, HACHETTE
BOOK GROUP, INC., HARPERCOLLINS
PUBLISHERS LLC, MACMILLAN
PUBLISHING GROUP, LLC, PENGUIN
RANDOM HOUSE LLC, SCHOLASTIC INC.,
AND SIMON & SCHUSTER, INC.,

Plaintiffs,

-against-

AUDIBLE, INC.,

Defendant.

Case No. 1:19-cv-07913-VEC

ECF Case

**BRIEF OF AMICI CURIAE THE AUTHORS GUILD AND
THE ASSOCIATION OF AUTHORS' REPRESENTATIVES IN SUPPORT OF
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

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INTERESTS OF AMICI CURIAE

Founded in 1912, **The Authors Guild, Inc. (the “Guild”)** is a national non-profit association of approximately 10,000 professional, published writers of all genres including periodicals and other composite works. The Guild counts historians, biographers, academicians, journalists, and other writers of nonfiction and fiction as members. The Guild works to promote the rights and professional interests of authors in various areas, including copyright, freedom of expression, and taxation. Many Guild members earn their livelihoods through their writing. Their work covers important issues in history, biography, science, politics, medicine, business, and other areas; they are frequent contributors to the most influential and well-respected publications in every field. The Guild’s members are the creators on the front line, fighting for their constitutional rights under copyright to reap financial benefits from their labors.

The Association of Authors’ Representatives, Inc. (“AAR”) is a New York not-for-profit corporation formed in 1991 by the consolidation of the Society of Authors’ Representatives and the Independent Literary Agents’ Association. AAR is the only national organization of literary and dramatic agents, and currently has over 350 members. Members of AAR represent authors of all types of literary and dramatic works, including many authors whose works have been published by Plaintiffs in this case. Negotiating the terms by which authors grant rights in their creative works is central to a literary agent’s work. AAR members have negotiated tens of thousands, if not hundreds of thousands, of agreements on behalf of authors. Major changes in these agreements or in interpretations of such agreements are of vital importance to AAR and its members as they seek to protect the literary and economic interests of their author-clients.

Notably, in their respective histories, the Guild and AAR have only joined together to submit a brief as *amici curie* in one previous case. The importance of the issues in this case—both for the

community of authors and their representatives—necessitates that the Guild and AAR work together once again to inform the Court of the many reasons why an injunction is warranted. While individual authors and literary agents may not have the resources to participate in litigation, *amici* are well-positioned to offer the Court an important viewpoint regarding the significant public interests at risk.

SUMMARY OF THE ARGUMENT

Audible’s Captions feature presents a significant threat to the rights and livelihoods of authors and their representatives. Rather than obtain the right to display the text through the proper channels, Audible has instead spurned the authors that it publishes, along with their representatives and publishers, and opted to proceed with its scheme to seize a right to which it is not entitled. Audible does not dispute that it only has the right to resell audiobooks. This does not include the right to create a derivative textual version of the audiobook. Instead, Audible seeks to bypass its glaring infringement of authors’ and publishers’ rights by arguing that this is a contract issue, not a copyright issue and that, in any event, its misappropriation qualifies as fair use. As discussed below, and in further detail in the above-captioned plaintiffs’ (collectively, “Plaintiffs”) reply brief, Audible’s arguments fail on their face.

Audible completely ignores the Copyright Act’s explicit recognition of the divisibility of the bundle of exclusive rights. Whether publishing with a traditional publisher or self-publishing, authors must make careful decisions about how they want their work to be released, including which rights they will grant or license, and which rights they will retain. Each right in the bundle holds considerable value and authors and their representatives skillfully negotiate the exploitation of these rights to maximize the profits authors reap from their creative works. Audible’s Captions threatens to upend this system by allowing Audible to seize ungranted rights, thereby diminishing the value (and the compensation an author will receive) from the exploitation of these rights. By

offering a two-in-one product, Audible is essentially circumventing express provisions of the Copyright Act and betraying essential copyright principles in the process.

The result will not only award Audible rights for which it neither bargained nor paid, but will also inflict significant damage on authors, their representatives, and other publishers, which often hold the exclusive rights that Audible has sought to usurp. Authors will see their valuable rights stripped away without compensation and will also face the loss of control of their work. While a consumer using the Captions feature may expect to read the authors' work along with listening to the audio version, Audible will not offer a faithful reproduction of the authors' writing, but will instead deliver an error-ridden, computer-generated version that does not take the authors' prose, punctuation, or style into effect. For authors, whose careers rise and fall based on their writing, this bastardizing of their work will wreak considerable harm on their professional reputations.

Audible's arguments in favor of fair use do not help its case. This is not an instance in which Audible is transforming authors' works. Such an argument would lead to absurd results and allow other would-be infringers to essentially perform an end run around the Copyright Act. Moreover, Audible's hollow claims that the feature will benefit the public do not make its unauthorized use "fair," especially where it is apparent that Audible's intent in releasing this product is to enable it to gain a competitive advantage and bolster its profit margin. Audible is not taking a small portion of authors' writings—such as what one might find in a caption¹—but is instead copying and reproducing potentially every word of the underlying works. As a result, Audible's Captions stands to supplant the market for electronic text versions of the work. If permitted, the effect of Audible's circumvention of the Copyright Act would surely embolden

¹ Indeed, Audible curiously refers to its feature as "Captions," a term that is not befitting of what Audible actually offers. Plaintiffs' term, "Distributed Text" may more accurately convey the nature of Audible's feature.

other audiobook publishers to adopt a similar business model. The Court should not allow this erosion of copyright law.

ARGUMENT

I. AUDIBLE IS CIRCUMVENTING THE COPYRIGHT ACT'S EXPLICIT RECOGNITION OF THE DIVISIBILITY OF THE BUNDLE OF EXCLUSIVE RIGHTS GRANTED TO AUTHORS

Copyright law grants authors a “bundle” of exclusive rights to their works as an incentive to create and publish. These rights vest in an author upon the creation of a work and prohibit “infringement from that point forward.” *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 891 (2019); *see* 17 U.S.C. § 302. An author is free to publish or authorize publication—or not—in print, e-book, or audio formats, or as a serialized work in a periodical or online. She may grant selected rights in the work to one publisher and other rights to other publishers, or not; she may choose to give away her work for free or seek financial compensation from its exploitation. At least upon creation, an author owns and controls all aspects, *i.e.*, the entire fate, of her work.

An important and, in most cases, necessary incentive for authors is the ability to earn income from their writing—enough to earn a living if possible, or at least enough to justify the time and money spent writing and publishing. Authors’ incomes have declined significantly in recent years.² There are myriad reasons for the income decline, but unauthorized uses of their writings is one of them; there has been a gradual chipping away at markets that were previously licensed, and this has impacted many writers to the point that they can no longer afford to write (eighteen percent of full-time authors earned nothing in 2017 from writing).³ As a consequence, authors are

² *See* The Authors Guild, *Six Takeaways from the Authors Guild 2018 Author Income Survey*, AuthorsGuild.org (Jan. 5, 2009), https://www.authorsguild.org/industry-advocacy/six-takeaways-from-the-authors-guild-2018-authors-income-survey/#_ftnref1 [hereinafter *Authors Guild Survey*].

³ *See Authors Guild Survey, supra* note 2.

taking other jobs, which means that the financial incentives intended by copyright law are breaking down. Thus, authors and their agents must be particularly vigilant in retaining rights and existing markets, and preventing further devaluations of authors' copyrights.

Authors monetize their copyrights by granting specific rights to publishers. *See* 17 U.S.C. § 201. As provided by the Copyright Act, an author may choose to transfer (usually by “license”) her copyright ownership in whole or in part, and may choose to license certain of her exclusive rights, but retain others. Congress expressly recognized the importance of the divisibility of these exclusive rights by providing, in the text of the statute, that “any subdivision of any of the rights specified by section 106” may be owned separately. § 201(d)(2); *see also New York Times Co. v. Tasini*, 533 U.S. 483, 494 (2001). As the House of Representatives and Senate pointed out in their committee reports, this provision was the “first explicit statutory recognition of the principle of divisibility of copyright in our law.” H.R. Rep. 94-1476, at 123 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5738; S. Rep. 94-473, at 106–07 (1975). Each of the exclusive rights enumerated in Section 106 “may be subdivided indefinitely” and “each subdivision of an exclusive right may be owned and enforced separately.” H.R. Rep. 94-1476, at 61; S. Rep. 94-473, at 57; *see* § 201(d) (copyright rights to be transferred separately); *see also* 17 U.S.C. § 106.

Determining how to separate and monetize their bundle of rights requires authors and their representatives to make careful decisions about how they want their work to be released and exploited (including when, in what territories, and in which formats). *See* § 106. In recent years, given the advent of technology that makes reading or listening to literary works on electronic devices possible, along with the growing popularity of audiobooks and e-books, the decision of whether to grant licenses to audiobooks, e-books, and other electronic rights, which may be verbatim or enhanced, are key considerations for authors. Whether authors choose to publish with

a traditional publisher or self-publish, however, the agreements often grant exclusive rights to the formats being licensed. Audible's actions here undercut that exclusivity and interfere with authors' abilities to separately license rights.

II. AUTHORS AND THEIR REPRESENTATIVES WILL BEAR THE BRUNT OF THE HARM FROM THE RELEASE OF AUDIBLE CAPTIONS

In addition to the significant harm to the publishers who are seeking to enforce their rights in this litigation, authors and their agents will bear the loss of a valuable right and revenue stream, along with a loss of control of their work, if Audible is permitted to proceed with its Captions feature. As discussed above, authors and their representatives specifically negotiate how they want their work to be distributed, and grant their rights accordingly. In addition to its right to resell audiobooks, Audible asserts that it is entitled to enable the reading of the text of the work along with the authorized audio version. But in doing so, Audible is helping itself to an additional right that it was not granted and for which it does not intend to pay. As a result, authors will not only lose revenue from a right that they never granted (or only granted to a specific party) but they will also be deprived of any revenue they would have received under a negotiated agreement.

Contrary to Audible's claims that it will pay royalties and license fees, it makes clear in its opposition that it does not think it needs any other rights and that it intends to pay for only the rights to the audiobooks at issue (*see* Dkt. No. 34 ("Opp") at 2, 14–15)—but Audible's rights do not include the right to produce computer-generated texts derived from the audio recording. Audible's attempt to circumvent the Copyright Act and seize rights that it is not entitled to eviscerates the purposes of copyright law and should not be permitted. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) ("The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors."); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("[T]he limited grant is a

means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”).

Audible’s Captions does not faithfully reproduce an author’s text but instead creates a derivative work of the audio version—often with misuses of punctuation and paragraph breaks, as well as mis-readings and misspellings. Authors very rarely grant publishers the right to edit their text without approval, which Audible is essentially doing through Captions—a right it could not have obtained from the publishers. Generally speaking, an author would not permit a new text version to be created that introduces grammatical, stylistic, or other mistakes. Authors and publishers put enormous effort into line editing, copy editing, and proofreading each book they publish. Audible effectively undoes all of this important work with its Captions feature. Authors thus face a significant threat in the loss of control of their work and harm to the value of their work. If permitted, Audible’s Captions feature would produce its own bastardized version of an author’s writing without the author’s permission.

Additionally, the feature will also cause material non-economic damage to authors, whose reputation depends on their writing. Audible emphasizes the educational purposes underlying its audio-to-text offering by enabling the viewer to read the author’s written words while he is listening to the audiobook. But unlike Audible’s Immersion Reading, which pairs the audiobook with an e-book, Audible Captions does not actually feature the author’s written words. Instead, it offers a shoddy computer-generated transmission, which, as Audible readily admits, is rife with errors and omissions. *See* Dkt. No. 1 ¶ 32; *Opp.* at 7. For authors of literary works, who agonize over every word and comma, and whose reputations depend on the quality of their writing,

Audible’s Captions feature would butcher their creative expression. As Audible acknowledges in its opposition, this feature will not capture punctuation. *See* Opp. at 7. Punctuation is critical in writing. An Oxford comma or serial comma, for example, can spell the difference between two entirely different expressions. *See O’Connor v. Oakhurst Dairy*, 851 F.3d 69, 70, 80–81 (1st Cir. 2017) (finding the failure to use a comma between the penultimate and last item of a series enumerated within a statute rendered the language ambiguous and thus subject to a liberal construction). Audible’s Captions is just as likely to miss turns of phrase, and words that should be read with a particular emphasis. Through this bait-and-switch, consumers, who would reasonably believe they are viewing the author’s work while listening to the audiobook, would instead be viewing a bastardized version of the author’s writing. This misrepresentation would inflict immeasurable damage on the reputation of authors who have previously licensed their audiobook rights without any notice that their writing would be abused in this way.

III. DEFENDANT’S CLAIM OF “FAIR USE” IS UNFOUNDED

Audible does not appear to dispute that it is providing an entire textual rendition of the audiobooks offered. *See* Opp. at 27. Accordingly, the third factor clearly weighs heavily against fair use. *Amici* thus focus primarily on the first and fourth factors of the fair use analysis and direct the Court to Plaintiffs’ reply brief for a full discussion of why Audible’s Captions does not constitute fair use. *See* Dkt. No. 43.

A. “Captions” Is Not Transformative

Audible argues that the first fair use factor, the nature of the use, favors fair use. *See* Opp. at 21–24. While admitting (albeit trying to minimize) the “commercial”—*i.e.*, profit-seeking—motive underlying “Captions,” Audible argues that its program is transformative and attempts to pass off the gambit as some kind of “public benefit” through gilded claims of assisting people with

difficulties listening to and understanding what they hear. But this self-serving rationalization fails of its own weight.

In producing an unauthorized derivative version of the entire text that underlies the audiobook, Audible is not creating a transformative version of a work with Captions, but simply one in which Audible has no rights. Its argument that Captions transforms the underlying works would lead to absurd results: anyone with a license for a certain narrow set of rights, as Audible evidently has here, could argue that exploiting other rights not granted is “transformative” and thus fair use. Audible’s application of the fair use doctrine in this instance undermines Congress’ intent in allowing rights to be divided and transferred separately in the Copyright Act. *See* H.R. Rep. 94-1476, at 123; S. Rep. 94-473, at 106–07; *see also* Abraham L. Kaminstein, U.S. Copyright Office, *Divisibility of Copyrights*, Study No. 11 (June 1957), in *Copyright Law Revision: Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 86th Cong., 2d Sess. 17–23 (Comm. Print 1960) (discussing the need for divisibility of copyrights).

In any event, Audible’s claim that it created Captions purely as a public benefit is surely disingenuous. Audible’s parent company, Amazon, is a for-profit corporation with a fiduciary duty to its shareholders to increase share value. Audible likely wants to launch the Captions program for one reason only—to beat out competitors, which is to be expected from a for-profit corporation. But to do so, Audible must still comply with copyright law. There are already means by which companies, both for profit and not, assist individuals with disabilities.⁴ With Captions,

⁴ In addition to the many business and not-for-profit entities that have reading education expertise, and are devoted to helping individuals learn to read, in typical traditional publishing agreements, authors usually grant the primary publisher the right to make their books available without compensation to persons with disabilities—including Braille editions for the blind. There are also express exceptions in the Copyright Act that permit copies for the reading disabled. *See* 17 U.S.C. § 121A.

Audible is seeking to make an end run around the Copyright Act under the guise of helping individuals with their reading. This, Audible should not be permitted to do, especially where Audible is depriving authors of the income they would otherwise receive from an actual license of such rights. Audible is, in effect, coercing authors to contribute financially to its self-proclaimed “public benefit,” by drawing directly from authors’ pockets, even while Audible itself seeks to profit from the use. This Court should ensure that Audible is required to license the rights it seeks to exploit for its profit—just as others must—as required by copyright law and fundamental fairness.

B. Audible’s Conduct Will Materially and Adversely Affect the Market for Exclusive Licenses of Electronic Text

It is well recognized that the fourth fair use factor—the effect on the market or value of the copyrighted work—“is undoubtedly the single most important element of fair use.” *Harper & Row Publishers*, 471 U.S. at 602. “It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (internal quotations omitted). Audible argues that its feature does not usurp the market or alter Plaintiffs’ economic circumstances because Captions does not provide a replacement for a book or e-book. But this argument not only ignores the fact that Audible is taking the entirety of the underlying work for its computer-generated version, but also overlooks the clear threat to the licensing market Audible presents by essentially offering a two-for-one product. What Audible proposes to do is a real and present danger to all authors and agents.

As described above, audio and electronic text are often subject to exclusive licenses, which may bring authors separate royalties and, in many instances, additional advances. Audible will

significantly interfere with authors' abilities to grant exclusive electronic text rights to publishers and later licensees by offering an unauthorized derivative version of audiobooks. This material interference is not without financial consequence, as it would severely diminish the value of these rights if authors are unable to grant exclusive rights. Authors will no longer have the ability to fully exploit their rights in each separate format, resulting in a loss of market opportunity and revenue streams.

This loss will not just affect authors who are currently featured by Audible but will also extend to future contract negotiations, creating an adverse ripple effect throughout the industry. For example, an e-book publisher seeking to acquire exclusive digital rights may be deterred by audiobook publishers like Audible whose two-in-one product would threaten to whittle away the e-book publisher's exclusive rights. Not only would e-book publishers likely refuse to pay a high price for exclusive digital rights (if they choose to pay for exclusive rights at all), but this business model would diminish the overall value of separate digital rights.

Audible can hardly argue that the effect of its program will not adversely affect authors, their representatives, and other publishers. Authors' incomes are already on a steep decline,⁵ so the loss of any of an author's salable rights, and the resulting revenue forfeiture, will only further diminish the fruits authors can receive for their creative labors. If permitted to proceed, Audible will likely not be the only company that rushes to exploit this business model. This type of product, which takes the entirety of the underlying work and produces a computerized version, albeit in a faulty and crude manner, will supplant the market for electronic text. This is why courts consider "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would

⁵ Indeed, as indicated in a 2018 survey of authors, royalties have decreased by eleven percent for most authors since 2013. *See Authors Guild Survey, supra* note 2. Median income for all published authors (including part-time and full-time authors who were traditionally published, self-published, and hybrid-published) is down to \$6,080, as compared to \$10,500 in 2009, and is also down to \$20,300 for full-time authors, as compared to \$25,000 in 2009. *Id.*

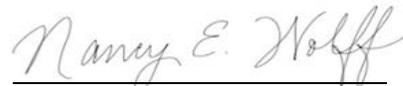
result in a substantially adverse impact on the potential market.” *Campbell*, 510 U.S. at 590. Without adequate incentives to create, in the form of reasonable compensation, many authors are already turning to other work. *See Authors Guild Survey*, *supra* note 2. Audible’s actions will only exacerbate this problem and lead more authors to write less or stop writing completely. This represents a direct attack on the incentive of copyright that should not be permitted. As such, the Court should enjoin Audible from proceeding with its Captions program.

CONCLUSION

For the reasons set forth above, and for those set forth in Plaintiffs’ briefs, *amici curiae* respectfully request that the Court grant a preliminary injunction against Defendant.

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Respectfully submitted,



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