No. 15-849

IN THE

Supreme Court of the United States

THE AUTHORS GUILD, *ET AL.*

Petitioners,

v.

GOOGLE, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL AUTHORS FORUM (IAF), INTERNATIONAL PUBLISHERS ASSOCIATION (IPA), AND INTERNATIONAL ASSOCIATION OF SCIENTIFIC, TECHNICAL AND MEDICAL PUBLISHERS (STM) IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

The International Authors Forum ("IAF") is a membership body for organizations representing authors all over the world. IAF provides a forum for discussion, debate and action for authors on a global scale. IAF's mission is to ensure that authors' voices are heard when issues that impact them are presented.

The International Publishers Association ("IPA") is the international industry federation of national and regional associations representing all aspects of book and journal publishing globally. Established in 1896, IPA actively fights against censorship and promotes copyright, literacy, and freedom of speech on behalf of its member associations and publishers in more than 55 countries.[2]

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[1] No party or counsel for any party authored any part of this brief or made a monetary contribution intended to fund the preparation and submission of this brief. In addition to *Amici*, the International Federation of Reproduction Rights Organisations (IFRRO) contributed to funding the preparation of this brief. Counsel for all parties received at least ten-days' notice of *Amici*'s intent to file this brief. All parties consent to *Amici* filing this brief.

[2] Although the Association of American Publishers, Inc. ("AAP") is a member of IPA, it has not participated in the preparation or submission of this brief.

The International Association of Scientific, Technical & Medical Publishers ("STM") was founded in 1969 and has its Secretariat in the Netherlands. STM is the voice of scholarly and academic publishers world-wide and comprises approximately 120 scientific, technical, medical, and scholarly publishers, collectively responsible for more than 65% of the global annual output of scientific and technical research articles, over half the active research journals, and hundreds of thousands of print and electronic books, reference works, and databases.

Collectively, *Amici* have strong interests in U.S. compliance with copyright-related international treaties and agreements and with preserving an effective level of copyright protection for authors and copyright owners from the U.S. and abroad. Their breadth of experience with how copyright laws facilitate creative output around the world provides them with a unique perspective on Google's mass-digitization efforts and on the Second Circuit opinion's erroneous approach to the fair use doctrine.

SUMMARY OF ARGUMENT

The Court should grant the Authors Guild's Petition because the Second Circuit's opinion adopts an interpretation of the fair use doctrine that is contrary to this Court's prior decisions, conflicts with decisions of at least three Courts of Appeal, and, if broadly applied, would place the United States out of compliance with numerous international treaties

and agreements that place limits on the scope of limitations and exceptions to the exclusive rights of copyright owners.

The Copyright Act must be interpreted to achieve its purpose of promoting "the Progress of Science and useful Arts." U.S. Constitution, Art. 1, § 8, cl. 8. As this Court has observed:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

Mazer v. Stein, 347 U.S. 201, 219 (1954). To implement that philosophy, "Congress [has] determined that U.S. interests [a]re best served by our full participation in the dominant system of international copyright protection." *Golan v. Holder*, 132 S. Ct. 873, 894 (2012). Thus, beginning in the 1970's, Congress passed a series of laws to bring the U.S. Copyright Act into accord with international norms. *See* Eric J. Schwartz & David Nimmer, *United States*, § 1[1][a], *in* 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE (P.E. Geller & M.B. Nimmer, eds., 2015) (listing statutory amendments).

Now, *inter alia*, the U.S. is obligated to meet the minimum standards for copyright protection required of members of the Berne Convention, the World Trade Organization's TRIPs Agreement, and the WIPO Copyright Treaty. *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 (Paris Text 1971, as amended Sept. 28, 1979), 25 U.S.T. 1341, 828 U.N.T.S. 221; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1867 U.S.T. 154, 33 I.L.M. 81; WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65.[3]

In exchange for the U.S. recognizing the rights of foreign nationals, other member nations also protect the rights of U.S. authors and copyright owners under the principle of national treatment, which "obligates a country to protect the works of foreign nationals on at least the same terms that it extends to works of its own nationals." III Paul Goldstein, GOLDSTEIN ON COPYRIGHT § 18.3 (2015).

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[3] These treaties and agreements were implemented by the following statutes: Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (implementing Berne Convention); Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (implementing TRIPs); Digital Millennium Copyright Act, tit. I, Pub. L. No. 105-304, 112 Stat. 2860, 2861 (1998) (implementing WCT). They are not self-executing. *See Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 83 (2d Cir. 1995).

This international regime requires the U.S. to provide copyrightable works of authorship, including virtually all the works contained in the books that Google copied, with certain exclusive rights, including the right to reproduce the works in copies and to display the works publicly. Berne Convention, arts. 2, 9(1); TRIPs, art. 9; WCT, art. 8. The regime also prohibits the U.S. from creating any exceptions to these exclusive rights, other than (1) in certain special cases that do not (2) conflict with the normal exploitation of works or (3) unreasonably prejudice the legitimate interests of copyright owners. *See* Mihaly Ficsor, THE LAW OF COPYRIGHT AND THE INTERNET 280-88, 300-03 (2002) (discussing article 9(2) of the Berne Convention and article 13 of the TRIPs Agreement). This standard for judging the legitimacy of limitations and exceptions, which is a pervasive feature of the entire international copyright system, is referred to as the "three-step test." Not only is the United States bound to respect it, its failure to do so can lead to international sanctions against it. *See generally* Jo Oliver, *Copyright in the WTO: The Panel Decision on the Three-Step Test*, 25 Colum. J.L. & Arts 119 (2002).

Ever since the Supreme Court's decision in *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), U.S. courts have been bound to interpret and apply statutes passed by Congress in a way that avoids conflicts with the law of nations, particularly explicit obligations that the U.S. has undertaken by negotiating and ratifying international treaties. *See United States v. Weingarten*, 632 F.3d 60, 64-65 (2d

Cir. 2011) ("[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.") (citation omitted). Since the fair use doctrine acts as a limitation on the scope of exclusive rights, U.S. courts are required to apply the fair use doctrine in a manner that satisfies the requirements of the three-step test, if there is "any possible construction" of fair use that would do so.

Indeed, Congress itself, in adopting implementing legislation for the first of the many international agreements to which the U.S. has acceded that include the three-step test, specifically declared that "[t]he amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention." Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853, sec. 2(3) (1988). Those obligations include the duty to confine copyright exceptions and limitations, including fair use, to those meeting the three-step test.

There is no logical reason why fair use cannot be applied consistently with the three-step test. Traditional fair use principles line up with the three-step test quite well.

The decision below is a striking outlier in this regard. The panel made no effort to engage in any "case-by-case" analysis of the vast spectrum of books that Google copied cover-to-cover, nor even to

categorize the different types of works involved, in order to assess the differential impact of the copying on different categories of authors and publishers. This approach made it impossible to gauge whether the exception being recognized is confined to "certain special cases." And the Second Circuit panel's expansive application of "transformative" use swept aside any meaningful consideration of how the mass copying would conflict with actual or potential licensed means of exploitation of the works, or the extent to which it would prejudice legitimate interests of copyright owners. While the Petition for *Certiorari* amply indicates how the decision below conflicts with the fair use jurisprudence of this Court and with the approaches taken by other Courts of Appeal, review by this Court would also enable it to instruct the lower courts on how to apply the fair use doctrine in a manner consistent with this nation's international obligations. Doing so will ultimately benefit the public by maximizing incentives to create and license works in a competitive marketplace.

ARGUMENT

I. Limitations On Exclusive Rights, Including Fair Use, Must Be Confined To Certain Special Cases That Do Not Conflict With The Normal Exploitation Of Works Or Unreasonably Prejudice The Legitimate Interests Of Copyright Owners.

Consistent with the treaties and agreements that establish international standards for copyright protection, the United States Congress crafted the Copyright Act to provide broad protections in the form of exclusive rights in original "works" subject to narrowly defined statutory exceptions. *See* H. Rep. on Copyright Law Revisions, H.R. Rep. No. 94-1476, at 61 (1976) ("The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications or exemptions in the … sections that follow."). These exceptions, including the fair use defense of 17 U.S.C. § 107, must not be interpreted to unreasonably narrow the exclusive rights of copyright owners if the United States is to comply with its international obligations.

The risks of non-compliance with those obligations – and specifically with the three-step test – are far from theoretical. When a signatory to the TRIPs agreement fails to provide the requisite level of protection, other WTO members can bring dispute-resolution proceedings against that country. *See* I Sam Ricketson & Jane C. Ginsburg, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS § 4.38 (2d ed. 2006) (summarizing articles 63 and 64 of TRIPs). If a WTO-appointed panel determines that insufficient protection is provided, monetary sanctions can result. *Id.*

In one such case, the European Union brought a dispute against the United States based on overly broad exceptions, contained in section 110(5) of the

Copyright Act, to the exclusive right to publicly perform musical works. *See generally* Jo Oliver, *Copyright in the WTO: The Panel Decision on the Three-Step Test*, 25 Colum. J.L. & Arts 119 (2002). In an authoritative and detailed opinion, a WTO panel defined the requirements of the three-step test and concluded that the U.S. statute violated the test by exempting millions of bars, restaurants and other venues from paying royalties to songwriters and music publishers. *See* Rep. of the Panel, United States – Section 110(5) of the U.S. Copyright Act, WT/DS160/R (June 15, 2000) [hereinafter "WTO Report"].[4] Subsequently, the U.S. has paid the E.U. millions of dollars of compensation.[5]

A. Limitations Must Be Confined To Certain Special Cases.

The first step in the three-step test requires limitations and exceptions to be confined to "certain special cases." TRIPs, art. 13. "Certain" cases are those that are "clearly defined," such that they provide "a sufficient degree of legal certainty." WTO Report ¶ 6.108. "Special" cases are "limited in [their] field of application or exceptional in [their] scope. In

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[4] The report is available here: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm.

[5] The United States Trade Representative summarizes the dispute and payments here: http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/united-states-%E2%80%94-section-1105-us-copyright-ac.

other words, an exception or limitation should be narrow in [a] quantitative as well as a qualitative sense." *Id.* ¶ 6.109.

Consistent with this first step of the three-step test, fair use also requires a "case-by-case" analysis. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). The analytical factors identified in the statute's non-exhaustive list, such as the "purpose and character of the use," the "nature of the copyrighted work," and "the effect of the use upon the potential market for or value of the copyrighted work," call out for such individualized consideration. 17 U.S.C. § 107. Thus, fair use decisions cannot validly declare broad, vague swaths of conduct to be categorically lawful for all works, and traditionally they have not done so. Instead, courts must adjudicate the merits of particular instances of copying by specific defendants of certain copyrighted works for specific purposes, as well as the impact of such copying on particular markets.

This Court's opinion in *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) involved unauthorized use of an unpublished manuscript, written by President Gerald Ford, in *The Nation* magazine. The Court emphasized that "fair use analysis must always be tailored to the individual case." *Id.* at 552. Thus, the Court carefully analyzed how the unpublished nature of the copied material, and the significant historical importance of this newsworthy material, impacted the application of the statutory factors. The Court

concluded that *The Nation* had used too much, stating: "Any copyright infringer may claim to benefit the public by increasing public access to the copyrighted work. But Congress has not designed, and we see no warrant for, judicially imposing, a 'compulsory license' permitting unfettered access to the unpublished copyrighted expression of public figures." *Id.* at 569.

Similarly, in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), this Court paid close attention to the types of works at issue when conducting a fair use analysis. There, the Court was confronted with whether in-home copying by consumers of over-the-air broadcast television programs for the purpose of later viewing was a fair use. The Court, in finding that such copying could, at times, be lawful, emphasized that the works at issue were televised audiovisual works that viewers were already invited to watch, "free of charge." *Id.* at 449-50.

Finally, in *Campbell*, the Court considered whether a hip hop parody of Roy Orbison's rock n' roll song, *O Pretty Woman*, was a fair use. *Campbell*, 510 U.S. at 571. Rather than announcing a widely applicable rule that all parodies are lawful, the Court cautiously remanded the case to the lower court for more factual finding on exactly what impact the specific parody at issue in that case was likely to have on the specific allegedly infringed work. *Id.* at 594.

The type of analysis contained in this Court's three fair use opinions, which take account of the specific types of works at issue, renders fair use, when properly applied, available as a defense only in certain special cases, as the first of the three steps binding on U.S. courts requires.

B. Limitations Must Not Conflict With The Normal Exploitation Of Works.

The second step of the three-step test prohibits limitations and exceptions that conflict with the normal exploitation of works. TRIPs, art. 13. "Normal" exploitations include those that are regular or significant in the current marketplace, as well as those that could become regular or significant in the future as technology progresses. WTO Report ¶ 6.180. A limitation "conflict[s]" with normal exploitations if it "enter[s] into economic competition with the ways that right holders normally extract economic value" from works. *Id.* ¶ 6.183.

Fair use analysis under U.S. law overlaps considerably with this second step when U.S. courts consider the fourth statutory factor, namely "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107. *See, e.g., Am. Geophysical Union v. Texaco Inc.,* 60 F.3d 913, 930 (2d Cir. 1994) (fourth fair use factor involves assessing what impact a defendant's use could have on all of the plaintiff's "traditional, reasonable, or likely to be developed markets").

Courts also assess, under the first statutory factor, whether the nature of a defendant's use makes it likely to compete with uses that authors typically exploit. *See Harper & Row*, 471 U.S. at 550 ("[T]he fair use doctrine has always precluded a use that '[supersedes] the use of the original.'") (citation omitted). This analysis includes, importantly, determining whether a use is "transformative." *See Campbell*, 510 U.S. at 579 ("The central purpose of this investigation is to see … whether the new work … adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message…"). Where a use is not transformative, the "commercial" nature of a use weighs more heavily against a fair use finding, because commercial uses are more likely to supplant methods of normal exploitation. *See id.* at 590-91.[6]

C. Limitations Must Not Unreasonably Prejudice The Legitimate Interests Of Copyright Owners.

The third step in the three-step test prohibits limitations and exceptions that unreasonably prejudice the legitimate interests of copyright owners. TRIPs, art. 13. The "legitimate" interests of

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[6] Commercial enterprises cannot stand in the shoes of their customers who make non-commercial uses. *See, e.g.*, *Zomba Enters. v. Panorama Records, Inc.*, 491 F.3d 574, 582 (6th Cir. 2007) ("[T]he end-user's utilization of the product is largely irrelevant; instead, the focus is on whether alleged infringer's use is transformative and/or commercial.").

copyright owners include those that are consistent with copyright's underlying purpose and goals, both economic and moral. *See* WTO Report ¶ 6.224. A limitation unreasonably prejudices those interests where it "causes, or has the potential to cause, an unreasonable loss of income to copyright owners," if the limitation were widely used. *Id.* at ¶¶ 6.225, 6.226, 6.229. Where allowing an unlicensed use would unreasonably prejudice the legitimate interests of copyright owners, a compulsory license or some form of compensation, at least, must be provided for. *See* Oliver, *supra*, at 169.

As this Court has repeatedly articulated, the purpose of copyright law is to provide incentives for authors and their business partners to generate and disseminate new works of authorship. *See, e.g.*, *Golan*, 132 S. Ct. at 889 ("Our decisions . . . recognize that 'copyright supplies the economic incentive to create and *disseminate* ideas.'") (emphasis in original) (citation omitted); *see also Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1529-30 (S.D.N.Y. 1991) ("The copyright law, through the fair use doctrine, has promoted the goal of encouraging creative expression and integrity by ensuring that those who produce intellectual works may benefit from them.").

In order to ensure that the fair use defense does not undermine these incentives, courts consider, under the fourth statutory factor, whether creative output could be inhibited by allowing a defendant, and all persons similarly situated to that

defendant, to engage in a use without authorization. *See Campbell*, 510 U.S. at 590 (The fourth U.S. fair use factor "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' for the original.") (citation omitted). Thus, the fair use factors, when properly construed, shield creators from the same harms, and protect the public from the same threats to its welfare, that the three-step test is designed to prevent.

II. The Second Circuit Panel's Opinion Below Does Not Meet The International Norm Of The Three-Step Test.

A. The Second Circuit Panel Did Not Confine Its Fair Use Holding To Certain Special Cases.

The scope of Google's copying is mind-boggling. The Internet giant has copied tens of millions of books. Anything between two covers was fair game, without regard to whether the books were in-print or out-of-print; whether they were published last week, last year, or 50 or 100 years ago; whether their contents were fiction or non-fiction, prose or poetry; whether they were first published in the U.S. or abroad; whether they were best sellers or self-

published works of obscurity. Compilations, reference books, romance novels, technical manuals, and works of literary criticism, for example, were all digitized verbatim and *in toto*.

Perhaps due to the unprecedented amount of copying at issue here, the Second Circuit did not analyze the nature of each copied work separately; nor did it even attempt to engage in a "case-by-case" analysis of any of the categories into which these works could reasonably have been classified. *See Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015) ("The second [fair use] factor has rarely played a significant role in the determination of a fair use dispute."). Instead, just as Google copied every book without discrimination or differentiation, so too the court below considered all this copying *en masse*, and concluded that all of it was lawful because it serves the beneficial purpose of "provid[ing] valuable information about the original [works]." *Id.*

This approach disrespected the long U.S. legal tradition of requiring nuanced analyses of fair use defenses, and cannot be squared with the binding obligation that U.S. law confine exceptions to copyright protection to "certain special cases." TRIPs, art. 13. It is self-evident that the operation of any of the section 107 statutory factors, or of the second and third "steps" of the international three-step test, could vary dramatically among the different categories of publications involved. While *Amici* recognize that the unprecedented scope of

mass-digitization projects such as Google's puts the long-standing norm that fair use must be assessed on a "case-by-case" basis under considerable stress, that norm was authoritatively established by this Court in *Campbell*, 510 U.S. at 577, and other cases, and the court below was bound to follow it.[7] As well, it defies logic that an exception to copyright protection that allows every book in massive university libraries to be copied in its entirety, without discriminating among the differential impacts of such copying on different categories of works or the different audiences they seek to serve, could be considered an exception that applies only to "certain special cases." Since a copyright exception must satisfy all three of the steps in the international standard in order to be acceptable (Oliver, *supra*, at 150-51), the divergence between the first step and the approach taken by the court below should be sufficient by itself to require a remand.

B. The Second Circuit Panel Did Not Take Into Account The Normal Expectations And Legitimate Interest Of Copyright Owners In Entering And Developing Markets For Digital Exploitation Of Their Works.

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[7] Other Circuit Courts have done so in their fair use cases, even when numerous individual works were involved. *See, e.g.*, *Cambridge University Press v. Patton*, 769 F.3d 1232, 1259 (11th Cir. 2014) ("applying the four [statutory] factors to *each work* at issue") (emphasis added).

Markets for mass digitization of books are already emerging in the U.S. and abroad. As the U.S. Copyright Office discussed in its 2011 report, *Legal Issues In Mass Digitization: A Preliminary Analysis and Discussion Document* [hereinafter "*Legal Issues*"],[8] the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) have had in place for some years privately-negotiated, collective licensing agreements, buttressed by statutes that extend their terms to significant numbers of works. More recently, the European Commission facilitated a privately-negotiated memorandum of understanding ("MoU") regarding the digitization and making available of out-of-print works by non-profit libraries through collective licenses.[9] *Id.* Since that time, several E.U. countries have adopted schemes to implement such licensing practices.[10] *Id.*

As the world increasingly becomes an interconnected, digital marketplace, exploiting opportunities for digital distribution and display is

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[8] The report is available here: http://copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf.

[9] The MoU is available here: http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20110920-mou_en.pdf.

[10] South Korea has also adopted a regime for mass digitization within libraries whereby the libraries compensate copyright owners. *See* Copyright Act of the Republic of Korea, art. 31(3) and (5), *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=190144.

increasingly "normal." Google's commercial mass-digitization project effectively pre-empts publishers' negotiations with potential licensees, and thus conflicts with, and unreasonably prejudices, publishers' efforts to compete in the digital arena.[11] For example, the ability of Google to make unauthorized databases available for free interferes with the launch of licensed databases, including those which could provide more unrestricted access to books – and thus could be of greater and more certain public benefit – than what even the Second Circuit panel's vague conception of fair use allows Google to offer.

Even to the extent that the court below was correct that Google's "snippet view" product "adds importantly to the highly transformative purpose" (Pet. 19a), a look at the international experience would have undermined its assumption that a finding of non-infringement was required in order for such a product to come to market. Leading courts in several European jurisdictions (all of them adherents to the Berne Convention and subject to its three-step test) have ruled that commercial products that make similar "snippets" available were infringing under applicable copyright laws. *See e.g.*, *Editions Seuil SA v. Google Inc.*, Tribunal de Grande

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[11] Google benefits commercially because the availability of digitized books through the Google search engine draws users to Google's service. "Google is profit-motivated and seeks to use its dominance of book search to fortify its overall dominance of the Internet search market..." *Authors Guild*, 804 F.3d at 218.

Instance [Court of First Instance] Paris, 3e ch., 2e sec. Dec. 18, 2009, RG No. 09/00540 (Google Book project infringing under French copyright law); *Google Inc. v. Copiepresse*, Cours d' Appel (CA)/Hoven van Beroep (HvB)[Courts of Appeals] Bruxelles, 9e ch. May 26, 2011, R No. 2011/2999 No. 817 (provision of snippets from news articles infringing under Belgian copyright law); Case C-5/08, *Infopaq Int'l A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-06569 (same, Court of Justice of European Union applying European Union Copyright Directive in case arising from Denmark). However, the ultimate outcome in these markets was the provision of similar services under licenses from the copyright owners. Eric Pfanner, *In France, Publisher and Google Reach Deal*, N.Y. Times, Aug. 26, 2011, at B5 (regarding Editions du Seuil settlement); Thierry Geerts, *Partnering with Belgian News Publishers*, Google Europe Blog (Dec. 12, 2012), http://www.googlepolicyeurope.blogspot.jp/2012/12/partnering-with-belgian-news-publishers.html (regarding relationship between Copiepresse and Google following litigation).

If judicially sanctioned unfair competition from Google reduces incentives for the development of licensed services, those valuable and socially beneficial business models may never see the light of day. Consumers will end up with fewer options and less access – not more. Furthermore, the legitimate interest of copyright owners to be compensated for the systematic commercial use of their works is completely ignored.

As this Court has recognized, almost all commercial, non-transformative uses, such as Google's, that do not involve the creation of new works of authorship, present this kind of unfair competition with authorized offerings. *See Campbell*, 510 U.S. at 590-91 (market harm may be presumed or inferred in cases involving "mere duplication for commercial purposes"). Since *Campbell*, at least three Circuits have interpreted the "transformative use" standard to require some incorporation of the allegedly infringed work, or some portion thereof, into a new work of authorship. *See* Petition at 19-22 (discussing *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 342 F.3d 191, 195 (3d Cir. 2003), *Princeton University Press. v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996) (*en banc*), and *Cambridge University Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014)).

Such a standard respects *Campbell*'s warning that "mere duplication for commercial purposes" is likely to have harmful effects. In contrast, the Second Circuit's expansive definition of "transformative," which lacks any contours and merely asks whether a use has public benefits, has a tendency to overwhelm any objective consideration of the normal expectations and legitimate interests of copyright owners – notably, the expectation to be able to license uses of their works, and the legitimate interest to receive compensation for doing so. Such an approach undermines the objectives of U.S. copyright law; but by threatening the welfare of

individual copyright owners and weakening the economic scheme for stimulating creative production, it also falls short of satisfying the second and third prongs of the three-step test that the U.S. is obligated to respect in applying its fair use doctrine.

The Google model approved by the court below undermines the ability of our copyright laws to provide the public with the maximum amount of access to creative works. Allowing an unauthorized, profit-seeking corporation to sneak behind the fair use curtain in order to develop a service of limited utility, without compensating anyone other than the libraries who enabled the unauthorized copying, is a long-term recipe for *reducing* public access to books. At the very least, Google should be required to pay some remuneration to the copyright owners whose works Google is making available to the public in a manner that effectively crowds out any potential licensees who would pay for licenses in order to offer more user-friendly databases to the public for a fee. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 392-93 (2006) (infringing offerings need not be permanently enjoined if the circumstances presented justify ordering the defendant to instead compensate copyright owners for making the infringing use).

CONCLUSION

Amici respectfully submit that the Court should grant *certiorari*. In this case, which involves an extraordinary – indeed, unprecedented – amount of copying and dissemination of copyrighted

expression, it is essential that the Court consider the international implications of the Second Circuit's sweeping ruling. *See Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (looking to "the laws and practices of other nations and international agreements" as relevant to statutory interpretation). If the Second Circuit panel's view of "transformative use" takes hold, the United States' venerable fair use doctrine might evolve into an unbounded exception that runs afoul of numerous international obligations that our nation has solemnly taken on by entering into agreements and treaties. That would not only injure authors and publishers, but also place our country out of step with the rest of the world and, ultimately, harm the public.

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