

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 IN OPPOSITION

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QUESTION PRESENTED

Google Books gives readers a dramatically new way to find books located in major research libraries. Using text searches they formulate themselves, readers can identify, determine the relevance of, and locate books they might otherwise never have found.

The question presented is whether the court of appeals properly concluded, based on its examination of the facts of this case in light of the statutory “fair use” factors set forth at 17 U.S.C. § 107, that Google Books constitutes fair use of petitioners’ copyrighted works.

CORPORATE DISCLOSURE STATEMENT

Google Inc. is a wholly owned subsidiary of Alphabet Inc., a publicly traded company. No other company owns 10% or more of Google's stock.

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BRIEF IN OPPOSITION

INTRODUCTION

In a carefully reasoned decision that closely examined the facts of this case in light of the statutory “fair use” factors set forth at 17 U.S.C. § 107, the Second Circuit concluded that Google Books constitutes fair use and thus does not infringe petitioners’ copyrights. That decision follows this Court’s instructions, is correct, and does not conflict with any decision of this Court or any other court of appeals. It therefore does not warrant this Court’s review. As Judge Leval’s opinion demonstrates persuasively, Google Books is entirely consistent with the purposes of copyright law and in fact advances the interests of authors.

Google Books gives readers a dramatically new way to find books of interest. By formulating their own text queries and reviewing search results, users can identify, determine the relevance of, and locate books they might otherwise never have found. In response to a search query, Google Books provides the user with a list of books that contain the chosen search term and (in many cases) information about the immediate context in which the term appears. Google Books also informs the user where he or she can buy or borrow the book. Google Books is thus, as the Second Circuit concluded, quintessentially transformative in nature: It provides new and valuable information that users do not otherwise have.

Google Books does not supersede the books themselves or replace buying or borrowing them. It does not significantly affect the market for books or their protected derivatives (except to boost the market by helping readers find them, *see* Pet. App. 76a). As Judge Leval's careful examination of the factual record demonstrates, Google Books has been designed to prevent users from reading any substantial portion of any book. To read a book, users must obtain the book elsewhere—by buying it from a bookseller or borrowing it from a library; Google Books simply enables users to find the books they want to read. And although petitioners claimed that Google Books preempted a licensing market for similar digital search tools, the Second Circuit correctly concluded that copyright law does not recognize any exclusive right to furnish information about a work; a copyright does not protect its holder against the listing of a work in either a traditional card catalog or in this vastly superior new form of search tool. In any event, there was no evidence of an existing, or likely future, licensing market for such a purported derivative use. *Id.* 45a-46a.

Contrary to petitioners' caricature of the decision below, Judge Leval carefully and separately weighed each factor in the fair use analysis and assessed Google Books "in light of the purposes of copyright," as articulated by this Court's decisions, Pet. App. 17a (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994)). Petitioners' attempt to manufacture a circuit split with respect to the first fair-use factor is without merit; no court of appeals has required "creative" expression (Pet. 19) distinct from the dramatically new kind of information provided to users of Google Books. To the contrary, the decision below follows the approach of other circuits that found similar uses to be fair use. See *A.V. ex rel. Vanderhuyse v. iParadigms, LLC*, 562 F.3d 630, 645 (4th Cir. 2009); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003).

Nor is there any error or circuit conflict in the court of appeals' conclusion that there was no infringement in the digital scans provided by Google to the libraries that owned the books. Google provided a digital scan of a book only to the library that owned the book from which the scan was made, and Google required the library to use the digital scans only for their own non-infringing activities. There is no evidence that the libraries are violating those terms.

Given the soundness of the Second Circuit's decision and the absence of any circuit conflict, there is no warrant for this Court to grant certiorari.

STATEMENT

A. The Google Books Project

1. In 2004 Google entered into bilateral agreements with 11 major research libraries to make digital copies of books in their collections. Pet. App. 5a. Those collections include the full range of type and subject matter, including novels, children’s books, and books of poetry, but the “vast majority” of selections were “non-fiction, and most are out of print.” *Id.* 6a. Many of the books are in the public domain, but Google also made digital copies of books that remain in copyright.

For each book, Google made a digital scan and extracted machine-readable text by using optical character recognition technology. By doing so, Google was able to create a comprehensive index of the books’ texts that can be searched by users. Pet. App. 5a-6a. All of the files involved in the process are securely stored on servers that are not accessible from the public Internet and are protected by the same security systems that protect Google’s own confidential information. *Id.* 6a, 49a.

When a user enters a search term on the Google Books website, Google uses its index to return a list of books in which the term appears. Pet. App. 6a. Here is an example of the results for a search of the term “Steve Hovley” (*see* CAJA242):

About 1,160 results (0.22 seconds)

Web

Images

Maps

Videos

News

Shopping

Books

More

The 1969 Seattle Pilots: major league baseball's one-year team - Page 71
[books.google.com](#)
 Kenneth Hogan - 2006 - 198 pages - Preview
 Milkes replaced them with another left-handed pitcher, Gary Roggenbuck, who was acquired on the waiver wire from Boston, and young outfielder **Steve Hovley**. Hovley was a talented college ballplayer who had not endeared himself to ...

Baseball Digest - Feb 1983 - Page 72
[books.google.com](#)
 Vol. 42, No. 2 - 96 pages - Magazine - Full view
 1969 SEATTLE PILOTS Batters HR Avg. 1B DonMincher 25 .246 2B John Donaldson 1 .234 SS Ray Oyler 7 .165 3B Terry Harper 9 .235 LF Tommy Davis 6 .271 CF Wayne Comer 15 .245 RF **Steve Hovley** 3 .277 C Jerry McVertney 8 .241 Pitchers WL ERA ...

Ball four
[books.google.com](#)
 Jim Bouton, Leonard Shecter - 1990 - 504 pages - Snippet view
Steve said he thought that was pretty interesting, because when Joe says to dress like a major-league ballplayer he means there's a certain style of dress followed by baseball players and you're supposed to conform. In fact **Hovley** and I ...
 More editions

2011 Standard Catalog Of Baseball Cards - Page 443
[books.google.com](#)
 Bob Lemke, Robert F. Lemke - 2010 - 1848 pages - Google eBook - Preview
 Blair Moore. Ina I about Steve Gameau Dana Hamilton Dnistru Risker Tabur Harrah

Browse books

Any books
 Preview available
 Google eBooks
 Free Google eBooks

Any document
 Books

Ads

Located: Steve Hovley
[www.instantcheckmate.com/](#)
 Information found on **Steve Hovley**
Steve Hovley found in database.

Steve Hovley
[www.ebay.com/](#)
 ebay.com is rated ★★★★★
 Looking for **Steve Hovley**? When it's on your mind, it's on eBay.™

We Found Steve Hovley
[www.peoplefinders.com/](#)
 Current Address, Phone and Age.
 Find **Steve hovley**, Anywhere.

We Found Steve Hovley
[www.intellius.com/](#)
 Current Phone, Address, Age & More.
 Instant & Accurate **Steve Hovley**

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After entering a query, a user can click a particular search result to see an “About the Book” page for the chosen book. “About the Book” pages include links that allow the user to buy the book and to find the book in a nearby library when that is possible. Pet. App. 6a. Those pages do not contain advertising (other than bookseller information), and Google receives no payment in connection with the “buy the book” links. Pet. App. 7a.

For certain titles, Google Books displays up to three short snippets of text—each approximately one-eighth of a book page—in response to user queries. Those “tiny segment[s]” give users “some minimal contextual information to help the searcher learn whether the book’s use of that term will be of interest to her.” Pet. App. 47a; *see id.* 8a-9a. An example from the record in this case is the following snippet view from the “About the Book” page for *Ball Four*, which shows three of the book’s 34 references to the phrase “Steve Hovley” (*see* CAJA246):

Steve Hovley

34 pages matching Steve Hovley in this book

Page 233

Steve Hovley has been called up. Old Tennis Ball Head hasn't had a haircut since he left. Which means Joe Schultz had four comments to him the very first day.

"Where's your barber?"

"Don't you need a haircut?"

Page 237

well, i think it looks norsemit, marty ramm says.

Moments later, perhaps feeling bad about his comment, or perhaps wishing to stick the needle in further, Pattin approaches Hovley and says, "I don't care how long you wear your hair, Hovley. You can wear it down to your ass as far as I'm concerned."

Page 288

At the start of this trip Joe Schultz called in Steve Hovley and said, "I want you to start dressing like a major-league ballplayer."

Joe only said that because Steve wears Levi's to the park sometimes

By reviewing snippets containing the searched term, a user can often determine the relevance of a book to her interests in a way not possible with earlier methods such as a card catalog or bibliographic index. Judge Leval illustrated the value of the information provided by snippet view as follows:

For example, a searcher seeking books that explore Einstein's theories, who finds that a particular book includes 39 usages of "Einstein," will nonetheless conclude she can skip that book if the snippets reveal that the book speaks of "Einstein" because that is the name of the author's cat. In contrast, the snippet will tell the searcher that this is a book she needs to obtain if the snippet shows that the author is engaging with Einstein's theories.

Pet. App. 26a-27a.

Google Books places several restrictions on snippet view that ensure that the snippets cannot be used as a substitute for buying or borrowing the book itself. No more than three snippets are displayed in response to a search query, even if the same search term appears elsewhere, and Google Books always displays the same snippets in response to a given search term, no matter how many times the search is run. Pet. App. 9a, 36a-37a. Snippets are “fixed”: they do not slide around the search term or overlap, so that a user cannot summon the next snippet by searching for a term that appears near the end of the previous one. *Id.* 9a. Only the first responsive snippet on a page is displayed; Google also “blacklists” (*i.e.*, makes unavailable for snippet view) at least one snippet per page and one page out of ten per book. *Id.* And there are additional technological restrictions to prevent automated downloading of snippets. As the Second Circuit stated, “Google has constructed the snippet feature in a manner that substantially protects against its serving as an effectively competing substitute for Plaintiffs’ books.” *Id.* 36a.

Google Books does not offer snippet view for certain types of books, such as dictionaries, cookbooks, and books of short poems, where there is a risk that access to a small portion of the book could substitute for the book itself. Pet. App. 9a. Google also excludes any works a rightsholder has asked Google not to display. A rightsholder can exclude a book from both search and snippet view by filling out an online form that has been available since 2005. *See id.* 5a n.2, 9a.¹

¹ Google Books differs from a separate Google project known as the “Partner Program.” In the Partner Program, rightsholders authorize Google to make available to users extensive excerpts

2. The search and snippet view functions of Google Books have dramatically changed the ways readers can find books. Users anywhere in the world can now search the collections of major research libraries across the country as well as abroad to find books relevant to their interests. The project has also enabled new fields of digital humanities research, such as Google’s “ngram” project, which provides “statistical information to Internet users about the frequency of word and phrase usage over centuries.” Pet. App. 7a.

Google Books also encourages sales of books by facilitating browsing. In bookstores, books are typically displayed on shelves or tables, so that readers can leaf through them to determine if they are of interest. Today, browsing often occurs online, and Google Books allows users to view small snippets of books to determine whether a book would be of interest to purchase.²

from their books, generally about 20% of a book. Rightsholders participating in the Partner Program receive no financial compensation; instead, they consider the availability of online excerpts of their books to be the benefit received. The amicus brief of the American Society of Journalists and Authors (ASJA) cites two books for which it incorrectly claims that large portions are readable in snippet view (*see* ASJA Br. 21-22); the lengthy excerpts the ASJA brief points to are in fact willingly included in the Partner Program by the books’ publishers.

² In other contexts, authors and publishers have recognized the benefits of online browsing. Many rightsholders make significant portions of their works available for browsing through Amazon’s “Search Inside the Book” and Google’s Partner Program, for which they receive no compensation. *See supra* n.1. The Authors Guild itself has recommended that its members make the entire first chapter of a book freely available on the Internet because “allowing a book to be browsed in this way promotes the sale of the book.” CAJA294.

In addition, copyright owners have never received, and are not entitled to receive, compensation for inclusion of their works in card catalogs, bibliographic indexes, and other sources that enable readers to find books they want, even where there may be a limited display of text to aid that process. And although petitioners have pointed to various paid digital licensing schemes that “allow or would have allowed public users to read substantial portions of the book,” those arrangements are quite different from Google Books, which makes available only “limited data about the contents of the book, without allowing any substantial reading of its text.” *Id.* 45a.

3. The agreements between Google and each library permit the library to download and retain a digital copy of each book it has submitted for scanning. Pet. App. 2a. The agreements “require the libraries to abide by copyright law in utilizing the digital copies they download and to take precautions to prevent dissemination of their digital copies to the public at large.” *Id.* 10a. A library may, for example, use the scans to provide accessibility to individuals who are blind or otherwise print-disabled. *See* 17 U.S.C. § 121. It may also use the scans to create its own index to enable limited searches similar in kind to Google Books. *See* Pet. App. 51a; *see also Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 101 (2d Cir. 2014) (rejecting infringement claim challenging the libraries’ uses).

B. Proceedings Below

1. Petitioners filed their copyright infringement suit against Google on September 20, 2005, seeking declaratory and injunctive relief and statutory damages

on behalf of a purported class.³ In 2008, the parties reached a settlement resolving petitioners' claims on a class-wide basis. Pet. App. 11a. Had it been approved, the settlement would have "allowed Google to make substantially more extensive use" of the books indexed by Google Books. *Id.* 11a-12a. For example, under certain conditions, the settlement would have permitted Google to make full electronic versions of books available online. The district court rejected the proposed settlement in 2011. *Id.* 12a.

After rejection of the settlement, petitioners moved to certify a class of natural persons in the United States who hold copyright interests in books included in the project. The district court granted the motion, but on Google's petition for review, the court of appeals vacated the class certification order, explaining that "resolution of Google's fair use defense in the first instance will necessarily inform and perhaps moot [the] analysis of many class certification issues[.]" Pet. App. 82a. On remand, the district court entertained the parties' cross-motions for summary judgment on Google's fair use defense. The court granted Google's summary judgment motion, denied petitioners' motion, and dismissed the case. *Id.* 56a-78a.

2. The court of appeals unanimously affirmed. Pet. App. 1a-55a. In a thorough opinion by Judge Leval, the court explored the facts of Google Books' digital copying, as well as its search function and limited snippet display of petitioners' works, and concluded that they constitute fair use. The court analyzed Google Books under the fair use factors articulated in 17 U.S.C. § 107, both separately and in combination,

³ The Authors Guild sought only declaratory and injunctive relief.

noting this Court’s admonition in *Campbell* that the statute’s four factors “are not to ‘be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.’” Pet. App. 17a (quoting *Campbell*, 510 U.S. at 578). The court also took note of this Court’s decisions indicating that the first and fourth factors warrant particularly careful examination and greater weight, and it followed this Court’s instructions in applying those factors. See *id.* 17a-18a (discussing *Campbell*, emphasizing the first factor, and *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), emphasizing the fourth).

As to the first factor (purpose and character), the court analyzed whether Google Books “supersede[s] the objects’ of the original creation, ... or instead adds something new, with a further purpose”—that is, “whether and to what extent the new work is ‘transformative.’” Pet. App. 19a (quoting *Campbell*, 510 U.S. at 578-579). Taking “important guidance” from this Court’s decision in *Campbell*, the court explained that “a transformative use is one that communicates something new and different from the original or expands its utility.” *Id.* Applying that analysis, the court concluded that Google Books’ search and snippet functions are highly transformative. As the court explained, “the purpose of Google’s copying of the original copyrighted books is to make available significant information *about those books*, permitting a searcher to identify those that contain a word or term of interest,” and “[s]nippet view ... adds importantly to the highly transformative purpose of identifying” such books. *Id.* 25a, 27a. The court also saw “no reason ... why Google’s overall profit motivation should prevail as a reason for denying fair use over its highly convincing transformative purpose, to-

gether with the absence of significant substitutive competition, as reasons for granting fair use.” *Id.* 30a.

The court stated that the second factor (the nature of the work) on its own did not influence its analysis; the court might have weighed that factor in favor of *Google*, since most of the works in Google Books are factual, not fiction, but it did not do so. Pet. App. 31a-33a. As to the third factor (amount and substantiality of the portion used), the court explained that digital “copying of the totality of the original ... is literally necessary to achieve” Google’s “transformative purpose” of enabling search. *Id.* 35a. For snippet view, the court observed, what matters is “the amount and substantiality of *what is ... made accessible* to a public for which [the copy] may serve as a competing substitute.” *Id.* 36a. Noting the many restrictions that Google placed on the display of snippets, the court concluded that “Google has constructed the snippet feature in a manner that substantially protects against its serving as an effectively competing substitute for Plaintiffs’ books.” *Id.*

The court then separately considered the extent to which Google’s uses could harm the market for or value of petitioners’ books or any protected derivative interest (the fourth factor). It found no evidence of any significant harm to the market for petitioners’ books, noting that petitioners had not shown that any amount of searching could yield more than a small fraction of a book’s text. Pet. App. 40a-41a. The court also rejected petitioners’ claim that licensing markets for search uses would have arisen but for Google Books. As the court explained, petitioners’ copyright interest in their books does “not include an exclusive right to supply information (of the sort provided by Google) about [their] works.” *Id.* 4a. And the court noted that the licensing

markets relied on by petitioners, which license the digital display of whole books or substantial excerpts, “involve very different functions than those that Google provides.” *Id.*

Finally, the court rejected petitioners’ claims that permitting the libraries to download digital scans of their own books constituted infringement: “Google’s provision of digital copies to participating libraries, authorizing them to make non-infringing uses, is non-infringing, and the mere speculative possibility that the libraries might allow use of their copies in an infringing manner does not make Google a contributory infringer.” Pet. App. 4a.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY CONSIDERED EACH OF THE STATUTORY FAIR USE FACTORS AND REACHED THE CORRECT RESULT ON THE FACTS OF THIS CASE

Judge Leval’s meticulous opinion for the court of appeals is unrecognizable in petitioners’ depiction. In the petition’s telling, that decision “fundamentally re-makes the fair-use doctrine,” “nullified the ... fair-use factors,” and “substitutes a single ‘transformative use’ test for meaningful application of the four statutory factors.” Pet. 3, 14-15. Those contentions are refuted merely by reading the opinion, which carefully examines the application of the statutory fair use factors to the facts of this case, both separately and in combination, as instructed by this Court’s decisions. *See* Pet. App. 18a.

1. Petitioners principally fault the court of appeals for giving excessive weight to the first statutory fair use factor—the “purpose and character” of the use,

17 U.S.C. § 107(1). But the court did no such thing. It did indeed give close attention to the first factor—as this Court’s decision in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), required it to do (*see* Pet. App. 18a (discussing *Campbell*, 510 U.S. at 591))—but that factor was not dispositive in its fair use analysis.

As the court of appeals explained, the central issue under the first factor is whether the use is “transformative”: “*Campbell’s* explanation of the first factor’s inquiry into the ‘purpose and character’ of the secondary use focuses on whether the new work” “merely ‘superse[de]s’ the objects’ of the original creation, ... or instead adds something new, with a further purpose.... [I]t asks, in other words, whether and to what extent the new work is ‘transformative.’” Pet. App. 18a-19a (quoting *Campbell*, 510 U.S. at 578-579). The court then reviewed the purpose and character of Google Books’ uses under *Campbell’s* framework. It concluded that “the result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn,” and that snippet view “adds important value” by showing the context in which a search term is used. *Id.* 25a-26a.

As the court explained, there is a fundamental difference between providing information *about* a book—which is what Google Books does—and appropriating the content of that book. “Google’s making of a digital copy of Plaintiffs’ books for the purpose of enabling a search for identification of books containing a term of interest to the searcher involves a highly transformative purpose, in the sense intended by *Campbell*,” because it “augments public knowledge by making available information *about* Plaintiffs’ books without providing the public with a substantial substitute for matter protected by the Plaintiffs’ copyright interests in the

original works or derivatives of them.” Pet. App. 3a-4a, 24a. Further, “[s]nipet view ... adds importantly to the highly transformative purpose of identifying books of interest to the searcher” because it reveals “just enough context surrounding the searched term to help [a user] evaluate whether the book falls within the scope of her interest.” *Id.* 27a.

In light of that analysis, there is nothing to petitioners’ charge that the Second Circuit “eliminat[ed] any focus on whether the use involves the creation of ‘new expression, meaning, or message.’” Pet. 14. To the contrary, the court of appeals’ analysis on the first factor is expressly directed at that very issue. Pet. App. 25a-26a. The court concluded that Google Books is expressive in a different way than the copyrighted works because it communicates new information about those books to would-be readers who first need to find the books in which they may be interested.

In petitioners’ view, the court should have analyzed this case as if Google had simply copied petitioners’ books and made them available as a substitute for the original. That is why the petition says throughout that Google Books made and displayed “unaltered” copies of petitioners’ works, as if there were nothing more to this case. *See, e.g.*, Pet. 9, 14, 16, 18, 23. But the court of appeals properly rejected petitioners’ approach, because “the creation of a full-text searchable database is a quintessentially transformative use,” Pet. App. 25a (quoting *Authors Guild, Inv. v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014)), “which augments public knowledge by making available information *about* Plaintiffs’ books without providing the public with a substantial substitute for matter protected by the

Plaintiffs' copyright interests in the original works or derivatives of them," *id.* 3a-4a.⁴

Petitioners wrongly contend that Google Books cannot qualify as transformative because it does not "add new creative expression" and displays "unaltered content." Pet. 14, 19. As the court of appeals explained, Google Books does "add[] something new, with a further purpose or different character," *Campbell*, 510 U.S. at 579—namely, search listings and limited text snippets that enable users to find books relevant to their interests. A poetic parody may be "new creative expression," but so is a search tool that tells would-be readers what books are relevant to their interests as reflected by their own search terms. Petitioners' contention that no use can be transformative unless it alters the content of the original work finds no support in this Court's decisions, and that rigid approach to fair use ignores *Campbell's* warning against "simplification] with bright-line rules." 510 U.S. at 577.

The court of appeals also properly weighed the role of commercial motive in the first factor, and rightly concluded that the fact that Google is a commercial business does not outweigh the dramatically transformative character of Google Books. *See* Pet. App. 27a-31a. The petition asserts that the decision "bless-

⁴ The court of appeals was also correct to consider the public benefits of Google Books in the fair use analysis. This Court has instructed that Section 107's factors should be considered "in light of the purposes of copyright," *Campbell*, 510 U.S. at 578—to promote "the Progress of Science and useful Arts," *id.* at 575 (quoting U.S. Const. Art. I, § 8, cl. 8); *see also Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) ("The sole interest of the United States and the primary object in conferring the [copyright] monopoly ... lie in the general benefits derived by the public from the labors of authors." (internal quotation marks omitted)).

es” “infringement on a massive scale to enhance [a company’s] own profitability.” Pet. 15. But the petition does not seriously challenge the court of appeals’ conclusion that a commercial motivation will rarely undermine a claim of fair use when the use in question is transformative. See Pet. App. 29a-30a. As this Court explained in *Campbell*, “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.” 510 U.S. at 579; see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448-449 (1984) (explaining that the commercial character of any activity is “not conclusive” in a fair use determination).

Google does not dispute that it is a commercial enterprise or that it benefits from providing valuable information to Google users. But commercial motives are commonplace among copyright owners as well as users, including those who make fair use of others’ works. See *Campbell*, 510 U.S. at 584. *Campbell* itself involved a work intended for commercial exploitation, and yet the Supreme Court had no difficulty in finding the work to be transformative in character. The court of appeals’ analysis of the role of Google’s commercial motivation reflects that insight, see Pet. App. 27a-31a, and petitioners’ suggestion that the court simply “dismissed Google’s commercial purpose” as “irrelevant” (Pet. 28) reflects a serious misreading of its opinion.

2. The Second Circuit’s analysis of the third factor likewise followed this Court’s guidance in *Campbell* that the “amount and substantiality” of the portion used must be “reasonable in relation to the purpose of

the copying.”⁵ 510 U.S. at 586. The relevant question is not the scope of the reproduction as an absolute matter, but rather the relation between that reproduction and the purpose for which it is used. As the court of appeals explained, Google’s conversion of the original work into digital form as a foundation for the search function is not only “reasonable in relation to the purpose of the copying,” Pet. App. 34a (quoting *Campbell*, 510 U.S. at 586), but “literally necessary to achieve” Google’s transformative purpose, *id.* 35a. “If Google copied less than the totality of the originals, its search function could not advise searchers reliably whether their searched term appears in a book[.]” *Id.*

With respect to snippet view, the Second Circuit again followed *Campbell* and evaluated that function in light of “the relationship between the third and the fourth factors.” Pet. App. 33a; *see also Campbell*, 510 U.S. at 587 (“The facts bearing on this [third] factor will also tend to address the fourth, by revealing the degree to which the [secondary use] may serve as a market substitute for the original or potentially licensed derivatives.”). The court’s fact-specific inquiry concluded, based on “a variety of limitations Google imposes on the snippet function,” that “Google has constructed the snippet feature in a manner that substantially protects

⁵ The second factor (nature of the work) properly played a limited role in the court of appeals’ analysis of Google Books. This Court has observed that “fair use is more likely to be found in factual works than in fictional works.” *Stewart v. Abend*, 495 U.S. 207, 237 (1990). The court of appeals observed that the majority of petitioners’ books are factual in nature, but it nonetheless did not weigh the second factor in Google’s favor, and it stated that “[n]othing in this case influences us one way or the other with respect to the second factor considered in isolation.” Pet. App. 32a-33a. There was no error in that analysis, which if anything favored petitioners.

against its serving as an effectively competing substitute for Plaintiffs' books." Pet. App. 36a.

Petitioners contend that, by focusing the third-factor analysis on the amount of text displayed in snippet view, "the court ignored the myriad ways Google profits from having copied the entire book without a license." Pet. 29. But the court of appeals' approach to the third factor was exactly right; it considered whether the amount of text converted into digital form is "reasonable in relation" to Google Books' search and snippet display uses, as well as whether the amount displayed threatens to "serve as a market substitute for the original or potentially licensed derivatives." Pet. App. 34a-35a; *see Campbell*, 510 U.S. at 586-587.⁶

Petitioners also repeat the incorrect assertion from their briefing below that Google makes "78% of the books available for display." Pet. 17. The decision below rightly dismantled that claim. Although only 22% of a book is categorically blocked from all access whatsoever, technological limits that Google built into snippet view (*supra* at 8) effectively prevent a searcher from viewing more than a much smaller fraction of any book—even a persistent searcher struggling to win this case. As the court of appeals noted, "Plaintiffs' counsel

⁶ Petitioners also argue (at 3) that the court of appeals erred in "giving little or no weight" to the digital copying required to enable Google Books' search and snippet functions, which in their view constitutes an independent violation of rightsholders' exclusive right of reproduction under 17 U.S.C. § 106(1), Pet. 34; *see also* Copyright Clearance Center Br. 6-7; Elsevier Br. 4-5. That argument ignores Congress's express instruction that the right of reproduction—like every other "[e]xclusive right[] in copyrighted works," 17 U.S.C. § 106—must give way to fair use. *Id.* (providing that "[e]xclusive rights in copyrighted works," including the right of reproduction, are "[s]ubject to section[] 107").

employed researchers over a period of weeks to do multiple word searches on Plaintiffs' books" and yet "[i]n no case were they able to access as much as 16% of the text." Pet. App. 37a. Even then, "the snippets collected were usually not sequential but scattered randomly throughout the book." *Id.*⁷

3. Petitioners' contention that the court of appeals "neutered" the fourth factor (Pet. 29) is also meritless. The court of appeals prominently noted this Court's statement that the potential for harm to the market for, or value of the copyright in, the original is "undoubtedly the single most important element of fair use." Pet. App. 17a-18a (quoting *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985)). The court of appeals also recognized that, although the first and fourth factors must be considered in relation to each other, the fourth factor requires a distinct analysis from the first:

Even if the *purpose* of the copying is for a valuably transformative purpose, such copying might nonetheless harm the value of the copyrighted original if done in a manner that results in widespread revelation of sufficiently significant portions of the original as to make available a significantly competing substitute.

Id. 39a-40a.

After closely examining the facts of this case, the court of appeals correctly concluded that Google Books

⁷ Petitioners further quibble that the Second Circuit "did not even bother to assess the authors' individual books to determine whether the 'heart' ... of any could be accessed through displays of excerpts." Pet. 29. But the court had no basis in the record to make such an assessment because petitioners did not introduce any such evidence in the district court.

“does not threaten the rights holders with any significant harm to the value of their copyrights.” Pet. App. at 40a-41a. Although snippet view may from time to time satisfy “the searcher’s need for access to a text,” an occasional lost sale does not constitute “a meaningful or significant effect ‘upon the potential market for or value of the copyrighted work.’” *Id.* 40a-41a (quoting 17 USC § 107(4)). Further, even if a user might find a fact in a book that she would otherwise buy or borrow, such a lost sale generally would not implicate interests protected by copyright, which extends only to expressions, and not facts. *See id.* 41a.

The court of appeals’ conclusion that snippet view is not likely to result in any substantial harm to the value of petitioners’ works is amply supported by the record. Petitioners have not—in nearly a decade of litigation—introduced evidence of a single lost sale attributable to Google Books. In fact, the individual petitioners admitted in depositions that they have not lost sales or that they are unaware of any harm to sales from Google Books. CAJA1421 (petitioner Miles); CAJA1434 (petitioner Bouton); CAJA1437-1438 (petitioner Goulden).

Finally, the court of appeals properly rejected petitioners’ assertion that they suffered economic harm because Google Books somehow preempted their right to license their books for search uses. As the court explained, the exclusive right that petitioners seek to preserve is not one that copyright protects: “[T]he copyright that protects Plaintiffs’ works does not include an exclusive derivative right to supply ... information [about their works] through query of a digitized copy.” Pet. App. 43a. In any event, petitioners presented nothing to suggest that any such licensing market exists or is likely to emerge. Although petitioners

pointed to foreign licensing projects as well as the proposed settlement in this case, those arrangements “involve very different functions than those that Google provides.” *Id.* 4a. Those projects all involved the full-text display of whole books or substantial portions of books, which substituted for the original work; none of them is limited to indexing and snippet view for search. *See id.* 45a.⁸

In sum, the decision below reflects a nuanced analysis of all four statutory fair use factors based on a conscientious examination of the facts of this case. That is exactly what this Court’s decisions require. Although petitioners disagree with the outcome, there is no basis to their charges that the court of appeals submerged all but one factor and applied an excessively expansive approach to that factor. Further review of the court of appeals’ meticulous opinion is unwarranted.

II. THE DECISION BELOW DOES NOT CONFLICT WITH OTHER CIRCUITS’ APPLICATION OF THE FIRST FAIR-USE FACTOR

Petitioners further contend that the court of appeals’ approach to the first statutory fair use factor was mistaken and in conflict with decisions of other circuits and this Court’s decision in *Campbell*. They maintain

⁸ There is also nothing to the claim of petitioners’ amici that the decision below is inconsistent with the United States’ international obligations. *See generally* International Authors Forum Br. The United States has explained that “existing U.S. copyright law properly construed is fully sufficient to comply with our international obligations.” Tr. Oral Arg. 25, *American Broad. Cos. v. Aereo, Inc.*, No. 13-461 (U.S. Apr. 22, 2014). International law adds nothing to the fair use analysis in this case. If Google is correct that its uses are fair under U.S. copyright law, then the United States’ international obligations are satisfied. *See* Law Professors & Scholars Amicus C.A. Br.

that, to qualify as transformative under the first factor, a use must “alter[] the content of a copyrighted work.” Pet. 16; *see also id.* 18. Petitioners suggest that the Second Circuit’s holding to the contrary deepens a circuit split over what qualifies as a transformative use. *Id.* 19-22.

Petitioners are mistaken on both counts. Neither this Court nor any other court of appeals has adopted petitioners’ rule that use of a copyrighted work must alter the original content to qualify as transformative. To be sure, many transformative uses do involve such alterations, but many do not; under this Court’s decisions, alteration of the original work is neither necessary nor sufficient as a categorical matter.

Transformative uses may deploy the “unaltered content” of the original. *See, e.g., Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 21-23 (1st Cir. 2000) (newspaper’s copying of a photo as part of a story about a beauty pageant winner’s fitness to hold her title was fair use); *see also* Pet. App. 22a n.17 (collecting cases). And most of the uses listed in the preamble to Section 107—news reporting, teaching, scholarship, and research—as well as much comment and criticism rely on faithful reproduction of the original. *See Campbell*, 510 U.S. at 578 (instructing that the first-factor inquiry should be “guided by the examples given in the preamble”); *see also Sony*, 464 U.S. at 478-479 (Blackmun, J., dissenting) (the uses recognized in Section 107 “reflect[] a common theme: each is a *productive* use, resulting in some added benefit to the public beyond that produced by the first author’s work”).

Petitioners rely heavily on *Campbell*, which observed that the parody at issue in that case had made use of, but had also altered, features in the original re-

ording. See Pet. 18-19; *Campbell*, 510 U.S. at 579. But *Campbell*—which at every turn emphasized the need for fact-sensitive analysis unbounded by categorical rules—imposed no rigid requirement that a use must alter the original to be transformative. Certainly nothing in *Campbell* precludes the use of unaltered content, provided that the new use serves a purpose different from that served by the original work. *Campbell* involved an altered work, but it does not hold that alteration of a work is essential or that providing dramatically new information is insufficient to make a new work transformative (or that a work will necessarily be transformative if it is altered from the original).

The Second Circuit’s application of the first fair use factor in no way conflicts with the approaches taken by other courts of appeals. In *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003), for example, the Ninth Circuit held that a search engine operator’s use of “thumbnail” images in response to search queries was transformative because it “serve[d] a different function than [the original] use—improving access to information on the internet”—and thus did not supersede the “artistic expression” of the original work. *Id.* at 819; see also *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (“Although an image may have been created originally to serve an entertainment, aesthetic, or informative function ... a search engine puts images ‘in a different context’ so that they are ‘transformed into a new creation.’”). The Fourth Circuit reached the same conclusion in *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009), involving a defendant that digitally archived manuscripts to detect plagiarism by comparing the manuscripts to other works in its database. Finding that the defendant’s service “had an entirely different

function and purpose than the original works,” the court of appeals held that the new use was transformative. *Id.* at 639.

Contrary to the petition’s claim, the Third, Sixth, and Eleventh Circuits follow the same approach when applying the first fair use factor, asking whether the new use adds something of value, and not limiting the inquiry to whether it alters the original. None of the cases cited in the petition supports the claim that other circuits impose a separate requirement to “add new creative expression” (Pet. 19), if that phrase is understood to require something more than the valuable new content provided by a search tool.

The petition obscures the Third Circuit’s analysis in *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 342 F.3d 191 (3d Cir. 2003), the principal case on which petitioners rely for their claimed circuit split. *Video Pipeline* is not about a search tool like Google Books. In that case, the defendant created and publicly displayed its own unauthorized trailers, or “previews,” of copyrighted Disney movies instead of paying for trailers licensed by Disney. The court found that the unauthorized clips “share[d] the same character and purpose as Disney’s derivative trailers” and would therefore “likely serve as substitutes for those derivatives.” *Id.* at 199. Indeed, the court expressly looked to the Ninth Circuit’s decision in *Kelly* to inform its analysis. In contrast to the search engine in *Kelly*, the court explained, the Video Pipeline database does “not improve access to authorized previews located on other web sites,” but rather “indexes and displays unauthorized copies of copyrighted works.” *Id.* In other words, those unauthorized copies did not serve a different purpose than Disney’s trailers, but superseded them.

The Sixth and Eleventh Circuit cases petitioners invoke likewise involved uses of copyrighted works that substituted for the originals. In *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996) (en banc), a copyshop made and sold to students “coursepacks” including “substantial segments of copyrighted works of scholarship.” *Id.* at 1383. Much of the decision’s analysis under the first factor addressed whether the material was commercial or noncommercial given its use in educational instruction, *id.* at 1388-1389, but the court noted that “verbatim copies of 95 pages of a 316-page book” could not be considered transformative since the purpose of the coursepack was fundamentally the same as the purpose of the book—to allow students to read the material in the book. *See id.* at 1389.

The defendants in *Cambridge University Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014), similarly copied and distributed to students (this time via an electronic reserve system) lengthy excerpts of copyrighted books. Explaining that a “nontransformative use” is “one which serves the same ‘overall function’ as the original work,” *id.* at 1262, the court concluded that defendants’ use of the copyrighted works was not transformative, *id.* However arranged, the excerpts served “the same intrinsic purpose” as the original books: “reading material for students in university courses.” *Id.* at 1262-1263. Thus, the court held, defendants’ use of the segments “supersede[d] the objects of the original creation.” *Id.* at 1263 (quoting *Campbell*, 510 U.S. at 579).

Far from requiring “new creative content” to qualify a use as transformative (Pet. 18 (capitalization omitted)), the Eleventh Circuit expressly recognized that “[e]ven verbatim copying ‘may be transformative so long as the copy serves a different function than the

original work,” 769 F.3d at 1262 (quoting *Perfect 10*, 508 F.3d at 1165 (emphasis added)). The Fourth Circuit has noted the same point. See *iParadigms*, 562 F.3d at 639 (“The use of a copyrighted work need not alter or augment the work to be transformative in nature. Rather, it can be transformative in function or purpose without altering or actually adding to the original work.”). No court of appeals has held to the contrary.

Equally spurious is the alleged tension between this case and *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1555 (2015). True, the Seventh Circuit in *Kienitz* criticized what it perceived as the Second Circuit’s “exclusive[]” focus in *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), on “whether something is ‘transformative.’” 766 F.3d at 758. Whatever the merits of that critique of *Cariou*, the decision here has no such “myopic focus” (Pet. 31). Like *Kienitz*, the opinion below makes clear that all of Section 107’s factors “are to be explored.” Pet. App. 17a; see *supra* at 14-23. And both courts emphasize (consistent with this Court’s decisions) the importance of the fourth factor (market impact) and analyze that factor separately from the first factor. Compare Pet. App. 18a with *Kienitz*, 766 F.3d at 758.

Although the two courts of appeals diverge in their shorthand to describe permissible secondary uses—with the Seventh Circuit preferring “complement[ary],” *Kienitz*, 766 F.3d at 758, and the Second Circuit favoring the traditional “transformative,” Pet. App. 23a-24a n.18—the distinction is largely a matter of locution rather than substance. Indeed, the decision below recognized that “[t]he word ‘transformative’ cannot be taken too literally as a sufficient key to understanding the elements of fair use,” but rather should be understood as “a suggestive symbol for a complex

thought.” Pet. App. 19a; *see also id.* 23a n.18 (“We recognize ... that the word ‘transformative,’ if interpreted too broadly, can also seem to authorize copying that should fall within the scope of an author’s derivative rights.”). Finally, the decision in *Kienitz* found the challenged use to be fair, 766 F.3d at 760, and so it lends no support to any suggestion that this case would have been decided differently in the Seventh Circuit.

III. THE SECOND CIRCUIT’S DECISION AS TO THE LIBRARY COPIES DOES NOT CONFLICT WITH SIXTH CIRCUIT PRECEDENT

Petitioners argue that, independent of Google Books’ search and snippet view tools, Google infringed petitioners’ copyrights by making available to each participating library digital copies of the books scanned from the library’s collection. *See* Pet. 32-36. The court of appeals rejected that contention, recognizing that Google’s agreements with the libraries grant the libraries access only to scans of the physical books they already own and restrict the libraries to use of the copies in “a non-infringing fair use manner.” Pet. App. 51a; *see id.* 10a (explaining that libraries must “abide by copyright law in utilizing the digital copies they download” and “take precautions to prevent dissemination of their digital copies to the public at large”). That conclusion was correct and does not conflict with Sixth Circuit authority.⁹

⁹ Petitioners objected below to the provision of library copies on the ground that it “exposes the [authors] to risks of loss if the library uses its digital copy in an infringing manner, or if the library fails to maintain security over its digital copy.” Pet. App. 50a; *see also, e.g.*, Plaintiffs-Appellants C.A. Br. 12 & n.6, 36 & n.10, 56. The court of appeals rejected those arguments as “sheer speculation” on the present record. Pet. App. 52a. Petitioners offer nothing that

Petitioners contend (at 32) that the court of appeals effectively allowed Google to avoid copyright liability by arguing that its “non-commercial business partners would only use the copies in non-infringing ways and would be protected by the fair-use doctrine had *they* engaged in the original reproduction.” But, first, petitioners’ argument leaps over a critical step: establishing that the arrangement constituted “distribut[ion]” of the copyrighted work, 17 U.S.C. § 106(3), that may give rise to infringement liability. It does not. To constitute infringement, distribution of a work must be “to the public,” *id.*, and there is no “public” distribution where a library receives only digital scans of the physical books that the library itself owns. As this Court explained in the context of the copyright statute’s transmit clause, 17 U.S.C. § 101, “owners or possessors” of works do not constitute “the public.” *American Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2510 (2014); *see also id.* (“an entity that transmits a performance to individuals in their capacities as owners or possessors does not perform to ‘the public’”).

The dramatically different context of this case—where Google is not broadly disseminating digital copies to the public (superseding any need to purchase the original), but only permitting libraries to make a digitized version of books they already own—undermines any reliance petitioners might place on the Sixth Circuit’s decision in *Princeton University Press*. Rather than pay to license the copied excerpts (in an existing licensing market), the copyshop in that case sought to defend its practice as fair use on the ground that the purchasers of the coursepacks were students. 99 F.3d

undermines the court of appeals’ conclusion on that point, and indeed they now object only to Google’s role in the arrangement. Pet. 34 (“Google is the infringer here, not the libraries.”).

at 1386. The question before the Sixth Circuit was whether the copyshop’s use—reproduction and distribution of lengthy excerpts substituting for the original works, *see id.* at 1389-1390—was a fair use because of its customers’ (the students’) “nonprofit educational” end use, *id.* at 1389 (“The defendants argue that the copying at issue here would be considered ‘nonprofit educational’ if done by the students or professors themselves.”). The court declined to endorse the “proposition that it would be fair use for the students or professors to make their own copies,” *id.*, but held, in any event, that the copyshop could not justify its reproduction and sale of the copyrighted materials based on the purported educational uses of its customers, *id.*

This case is nothing like *Princeton University Press*. There, the copyshop was making copies of works for distribution to the public—to students who had no previous relationship to the copyrighted works—and those copies clearly substituted for students’ purchase or borrowing of the original works. *Cf. Aereo*, 134 S. Ct. at 2510 (stressing that individuals “who lack any prior relationship to the works” do fall within the definition of “public”). By contrast, the libraries here already own the copyrighted materials, and Google simply provides the libraries the technical capacity to make digital copies for their own fair and other non-infringing uses, not to be read as substitutes for the original books. Pet. App. 51a.

Google’s sharing of the digital scans with their hardcopy owners thus does not “usurp[] the authors’ market for digital copies of their books.” Pet. 34. As explained above, Google Books, unlike the Princeton copyshop, is not supplying materials that customers might otherwise buy. Moreover, the agreement between Google and participating libraries expressly lim-

its the libraries' use of the scans to non-infringing purposes, and “[n]othing in [Section 108]” of the Copyright Act—which governs reproduction of copyrighted works by libraries—“in any way affects the right of fair use as provided by section 107.” 17 U.S.C. § 108(f)(4). In other words, the libraries are within their rights, with or without permission from copyright owners, to use the digital scans to create accessible copies for print-disabled individuals, *id.* § 121(a), and to “enable the very kinds of searches [the decision below] hold[s] to be fair uses in connection with Google’s offer of such searches to the Internet public,” Pet. App. 51a. No license is required for those uses, and unlike in *Princeton University Press*, petitioners have pointed to no such existing licensing arrangements. The libraries’ uses, and Google’s role in facilitating those uses, thus in no way diminish the market for petitioners’ books.

IV. ASSOCIATIONAL STANDING IS IRRELEVANT HERE

Petitioners ask this Court (at 36-37) to decide whether the Authors Guild has “associational standing” to represent the interests of its individual members in this case. But the question whether the Authors Guild has standing is irrelevant to the proper disposition of this case. In its earlier *HathiTrust* decision, the Second Circuit held that the Authors Guild lacks standing under the Copyright Act to sue for copyright infringement on its members’ behalf. *See Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 94 (2d Cir. 2014). But the court of appeals had no reason to—and did not—apply that holding here. Instead, recognizing that “the three individual author-plaintiffs clearly do have standing,” Pet. App. 5a n.1, the court simply noted that “their suit and their appeal are properly adjudicated, notwithstanding the Authors Guild’s lack of standing,” *id.*

Nothing in this case turns on whether the Authors Guild is a proper party to this suit. The Authors Guild has sought only declaratory and injunctive relief, and that relief is encompassed within the request for relief sought by the individual petitioners, who have Article III standing in this case. Given that the individual petitioners do have standing to raise all the arguments that the Authors Guild would seek to raise, the proper course—which the court of appeals followed—is not to reach the question of the Authors Guild’s standing. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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