

No. 15-849

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IN THE  
**Supreme Court of the United States**

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THE AUTHORS GUILD, *et al.*,

*Petitioners,*

*v.*

GOOGLE, INC.,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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**BRIEF OF *AMICUS CURIAE* AMERICAN  
SOCIETY OF JOURNALISTS AND AUTHORS,  
INC. IN SUPPORT OF PETITIONERS**

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## I. INTEREST OF THE *AMICUS CURIAE*

*Amicus curiae* American Society of Journalists and Authors, Inc. (“ASJA”), founded in 1948, is a non-governmental, 501(c)(6) not for profit organization with headquarters in New York City and with active regional chapters in Arizona, Illinois, New York City (local chapter separate from headquarters), Florida, Northern California, Southern California, San Diego (separate from Southern California), Boston, the Rocky Mountains region (Denver area), the Southeast (Atlanta area), the Upper Midwest (Minneapolis area), upstate New York (Rochester area), Downstate New York (separate from NYC), and Washington, DC.<sup>1</sup>

ASJA has approximately 1,200 members consisting of outstanding freelance writers of magazine articles, trade books, and many other forms of nonfiction writing, each of whom has met ASJA’s exacting standards of professional achievement. The requirements for membership in the organization are stringent: an author is required to demonstrate a substantial professional resume before being admitted to membership. Nonfiction book authors qualify with two or more traditionally published nonfiction books or one book with a second under contract. Article authors must provide a minimum of six substantial by-lined articles written on a freelance basis in national publications that pay for content. A reader browsing any

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1. No party or their counsel authored this brief in whole or in part or contributed money to fund preparing or submitting this brief. All parties have consented to the filing of this brief, as the parties agreed to a blanket consent for amicus briefs ten days in advance. ASJA has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

U.S. bookstore would find many titles by ASJA members. *See generally*, <http://www.asja.org/our-members/member-news/>.

Additionally, ASJA is the publisher and author of several works. Therefore, ASJA is itself a copyright owner of written content, was a member of the putative class when this lawsuit was a class action, and has a great interest in the outcome of this appeal on behalf of its members and itself. ASJA supports Plaintiff-Appellant Authors Guild's appeal of the opinion of the Second Circuit finding that Google, Inc.'s ("Google") use of copyrighted works in the Google Books project constitutes fair use.

## **II. ARGUMENT**

The Second Circuit's decision, if upheld, threatens to undo the balance set forth by Congress in the fair use section of the Copyright Act (the "Act"), 17 U.S.C. §107 (1992). The Act strikes a balance between copyright owners and users which the Second Circuit's decision takes too far in the direction in favor of those who seek to use copyrighted materials without compensating creators. While the Authors' Guild main brief covers many of these errors, ASJA submits this brief to aid the Court in understanding the real life impact the Google Books "snippet view" program is having on the livelihood of authors, in an environment where it is already difficult to make a living.

The Second Circuit erred by considering "transformativeness" in a manner completely detached from "justification" or fairness. It also construed this Court's use of the word "transformative" in an overly

broad manner and out of context. Next, the court failed to heed this Court's recent decisions denying the ability of technology companies to evade copyright by "inventing around" it. Finally, the Second Circuit ignored this Court's requirement that a qualitative analysis of the portions of a work used by the defendant be undertaken, and instead it opted in favor of a quantitative analysis that makes no sense in the context of Google's "snippet view" product.

#### **A. Justification, Not Transformativeness, Is The Inquiry**

Although "transformative use" is not mentioned in the statutory fair use factors in Section 107 of the Act, in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), this Court first announced that an inquiry into whether a use of a copyrighted work is "transformative" should be a part of a court's analysis of fair use. Addressing a parody of Roy Orbison's song "Oh, Pretty Woman," by 2LiveCrew, this Court found that parody was a form of criticism, thus fitting within the subject matter referred to in the preamble of Section 107. In so doing, this Court defined "transformation" as whether the otherwise infringing work "adds something new, with a further purpose or different character, **altering the first with new expression, meaning, or message.**" *Id.* at 579 (emphasis added). Finding that parody can be a form of criticism, this Court remanded the case for a determination of fair use. Here, Google has not altered the works at all, or imbued them with new meaning or message. Their meanings and messages are the same.

The term "transformative" was coined by Judge Leval in 1990, in an article entitled *Toward a Fair Use*



*Standard*, 103 Harvard Law Review 1105 (1990). To put this Court’s decision in *Campbell* into proper context, it is important to revisit the source. Doing so reveals that the Second Circuit stretched what this Court meant well beyond its intended meaning.

**1. The Fair Use Inquiry Is Concerned With Justification, And Not “Transformation” By Merely Changing The Context In Which Consumers Encounter A Work**

To engage in a bit of “text mining,” variants of the word “transformation” appear 23 times in Judge Leval’s 1990 article, while variants of the word “justification” appear 57 times. Google appears to forget that “transformation” was never intended to be a fair use factor. Rather, it was part of Judge Leval’s proposal for reaching the more important and fundamental issue of whether the infringer had a fair justification for its taking:

1. Factor One--The Purpose and Character of the Secondary Use. -- Factor One’s direction that we “consider[] . . . the purpose and character of the use” **raises the question of justification**. Does the use fulfill the objective of copyright law to stimulate creativity for public illumination? This question is vitally important to the fair use inquiry, and lies at the heart of the fair user’s case....

In analyzing a fair use defense, it is not sufficient simply to conclude whether or not justification exists. The question remains **how powerful, or persuasive, is the justification**, because the

court must weigh the strength of the secondary user's justification against factors favoring the copyright owner.

I believe the answer to the **question of justification turns primarily on whether, and to what extent, the challenged use is transformative.** The use must be productive and must employ the quoted matter **in a different manner or for a different purpose** from the original. A quotation of copyrighted material that **merely repackages or republishes the original is unlikely to pass the test**; in Justice Story's words, it would merely "supersede the objects" of the original. If, on the other hand, the secondary use adds value to the original--if the quoted matter is used as raw material, **transformed in the creation of new information, new aesthetics, new insights and understandings**-- this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.

Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses.

Leval at 1111 (emphasis added). The question is not whether something has been transformed, but whether the infringer is justified. The strength of the justification

can then be weighed – in Judge Leval’s view – based on the degree of transformation. But it begins with justification.

Thus, the Second Circuit erred when it started with finding Google successfully “transformed” the full text of the books it scanned into a searchable database of the full text of the books, but then failing to even consider whether Google was justified in doing so. What is Google’s justification other than to aid its commercial motivation? The answer: none.

This Court has held in connection with the fourth fair use factor that to avoid a finding of fair use, a copyright owner need only show “**some** meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood [of harm] may be presumed.” *Sony Corp. v. Universal Studios*, 464 U.S. 417, 451 (1984). With harm to the authors presumed, one must ask whether Google has an overriding justification.

As the district court noted in both of its early decisions in the case, Google embarked on this project without asking the authors for licenses, without asking the authors for consent, and without undertaking any individualized effort to justify the fairness of taking of any particular work of any particular author. *See Authors Guild v. Google Inc.*, 770 F. Supp.2d 666, 673 (S.D.N.Y. 2011) (rejecting proposed class action settlement); *Authors Guild v. Google, Inc.*, 282 F.R.D. 384, 389 (S.D.N.Y. 2012) (granting class certification), *vacated*, 721 F.3d 132, 133 (2d Cir. 2013) (finding the district court should decide fair use before considering class certification). Nor did Google give authors the option of opting out from participation – every work scanned remains in the database. Google proceeded

this way because its goal was to have a complete database of all of the works it could possibly scan.

A piecemeal database would have been a less attractive, and ultimately less lucrative, foundation on which to build commercial products. A database where it had to pay for licenses would have been less attractive to Google. Google certainly anticipated that in the course of asking for permissions or licenses, it would have encountered authors who would have said “no,” and that it would considerably slow the process of building the database. Any gaps or delay in building the database would have been detrimental to its business model because it would have allowed Google’s potential competitors (such as Microsoft or Yahoo!) a greater opportunity to compete in the space. Thus, Google’s justification for **scanning** the full text of all of the books was to build as comprehensive a database as possible for its own gain.

Google’s justification for **keeping** the full text of the books relates to the product Google built on top of the database, and any future products Google is planning to build on that same foundation. As both Judge Chin and the Second Circuit mentioned, keeping the entire text of all of the books was a technical necessity for the book search engine to function. *See Authors Guild v. Google, Inc.*, 954 F.Supp.2d 282, 293 (S.D.N.Y. 2013); *Authors Guild v. Google, Inc.*, 804 F.3d 202, 221 (2d Cir. 2015). Thus Google’s justification for the persistent, permanent copies of the full text of the millions of works it gathered leads us to the same place – Google’s justification is that the commercial product it wished to build required a persistent copy of the verbatim, unchanged (and not added to) texts of the scanned works.

Google's purported justification is found in what it argues is a benefit to the consumer, claiming the users of its product benefit because Google scanned and kept every book it found, allowing those users to run comprehensive searches of the written word. But Google's argument does not line up with Judge Leval's original definition of justification or the reason this Court adopted Judge Leval's rationale in *Campbell*: "Does the use fulfill the objective of copyright law to stimulate creativity for public illumination?" Leval at 1111. Google's commercial justification for building the most comprehensive database, upon which it could build the most robust commercial products, does not bear on this question at all. Even if the justification question could be framed from the perspective of consumers, which it cannot, doing so does not answer anything about stimulating creativity.

Moreover, Google's "justification" must be measured by how much "transformation" it made of the works it copied. The answer is it added nothing, and here we find an important distinction from *Campbell* (and Judge Leval's article before *Campbell*) that the Second Circuit missed in this case. Every one of the specific examples given by Judge Leval in 1990 have something in common that the Google project does not, and that is that they speak to using the copyrighted work in the creation of new works that are themselves stimulated by ownership of newly copyright works: "criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism [and] aesthetic declarations...." Leval at 1111. Google's "snippet view" does none of these things or anything remotely like them.

Judge Leval's focus in 1990 on justification - and transformativeness only as a means of measuring justification - makes perfect sense in the fair use context. That is because the ultimate question should be whether the infringer's actions were fair. But analyzing whether something is transformed, in the absence of any consideration of fairness or justification, is an empty exercise that can lead parties and courts to improper conclusions. That is what the Second Circuit did here, and this Court should accept *certiorari* to correct this error.

If "transformativeness" has a place in fair use analysis beyond the context of parody as in *Campbell*, it should be placed in its proper context – as a gauge of the strength of the infringer's justification, but measured against the rights and interests of the copyright owner. The Second Circuit failed to perform this analysis, ignoring Google's entirely commercial justification completely. This Court should grant *certiorari* to put "justification," and thus fairness, back into the first factor of the fair use test.

## **2. This Court's Adoption of The Word "Transformation" Must Be Reconsidered In Light Of The Context In Which It Arose**

When this Court adopted the word "transformative" in *Campbell*, it had Judge Leval's 1990 article in mind. But it is important to recognize that Judge Leval's main concern in the article was about the presumption of irreparable harm afforded to copyright owners at the time as part of the test for granting an injunction. Judge Leval thus felt that he needed to use the fair use doctrine (*i.e.*, justification), as a tool in order to deny injunctions in cases where he felt important information would not reach the public if an injunction were granted.

That concern, of course, preceded this Court's decision in *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), where this Court announced that injunctions should not be automatically granted upon a finding of infringement in intellectual property cases. But without *eBay* as a guide, in 1990 Judge Leval found himself bound by a presumption of irreparable harm, and had been reversed twice by the Second Circuit for using fair use to deny injunctive relief.

Thus, Judge Leval's main thesis in his 1990 article was that injunctions ought not to be freely given in cases of infringement where the fair use question was close. Judge Leval conceded, for example, that in his District Court opinion in *Salinger v. Random House*, 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987), he should have paid more attention to specific acts of copying and analyzed each separately (rather than treating the work as a whole) because he was preoccupied with the need to give an injunction which at that time were provided as of right. Leval at 1113, 1131 n. 114 ("I confess . . . with hindsight, I suspect my belief that the book should not be enjoined made me too disposed to find fair use where some of the quotations had little fair use justification."). Judge Leval thus stated: "Courts must consider the question of fair use for each challenged passage and not merely for the secondary work overall." *Id.*, at 1112. He continued: "Simply to appraise the overall character of the challenged work tells little about whether the various quotations of the original author's writings have a fair use purpose or merely supersede." *Id.* The Second Circuit ignored that teaching in its ruling here.

Furthermore, post *eBay*, it is no longer appropriate (if it ever was) to use the fair use doctrine – a defense that

brings with it a complete bar to liability – as a proxy for what should instead be a question about public benefit at the remedies stage where an injunction is sought. As in the cases where Judge Leval was reversed as a district judge that caused him to write his 1990 article, the Second Circuit here seemed overly concerned that an injunction would cut off the perceived public benefits of the indexing feature of the Google Books project (no public benefit was announced as to the “snippet view” feature). But the fair use inquiry should not be used as a substitute for the separate examination, post-*eBay*, of whether a public benefit from infringement is a factor negating the irreparable harm that an intellectual property owner is required to show to obtain an injunction. The Second Circuit here let its concern for the public benefit get in the way at an inappropriate stage of the case – liability instead of remedies. This Court should grant *certiorari* to return that inquiry to the proper stage of the case.

### **B. Inventing Around Copyright, To Enable Infringement, is Infringement, Not Fair Use**

This Court has held that where technology is used for no productive purpose other than an attempt to “invent around” the obligation to compensate copyright owners, copying will not be excused. The Second Circuit’s decision here, like its decision in the *Aereo* case which this Court recently overturned, missed this message.

The analysis of copyright-evading technologies by this Court begins with the *Sony* case, where this Court considered whether Sony was secondarily liable for copyright infringement because it had “sold equipment with constructive knowledge of the fact that their



customers may use that equipment to make unauthorized copies of copyrighted material.” *Sony*, 464 U.S. at 439.

As a case of first impression in copyright law, this Court looked to patent law approaches device design to determine contributory infringement: “When a charge of contributory infringement is predicated entirely on the sale of an article of commerce that is used by the purchaser to infringe a patent, the public interest in access to that article of commerce is necessarily implicated.” *Id.* at 440.

This Court determined that the staple article of commerce doctrine in patent law would be a welcome addition to the body of copyright law, explaining:

The staple article of commerce doctrine must strike a balance between a copyright holder’s legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.

*Id.* at 442. The Court then found substantial noninfringing uses by Sony’s customers’ “time-shifting” – recording programs at the time of broadcast for later viewing – because time shifting was a fair use. In the course of reaching this conclusion, this Court noted that the

evidence supported that people were time shifting in order to enjoy free over-the-air programming at more convenient times, and that there was no evidence of market harm to copyright owners. But had the evidence not supported the existence of widespread noninfringing uses, or that Sony was spreading technology devised only to avoid the copyright law and avoid compensating content creators, this Court presumably would have found Sony liable for secondary infringement.

Thus, twenty-one years later, this Court reached the opposite conclusion from *Sony* when it revisited the impact of technology on copyright in *Metro-Goldwyn-Mayer Studios v. Grokster*, 545 U.S. 913 (2005). In *Grokster*, this Court found liability for peer-to-peer services that allowed customers to transmit millions of copyrighted works (music files, mostly) to each other without compensation to the copyright owners. The defendants had successfully convinced both the district court and the Ninth Circuit that the design of their services avoided triggering either of the traditional tests for secondary copyright infringement.<sup>2</sup>

But this Court reversed the decision of the Ninth Circuit, finding that the defendants had been inducing copyright infringement among their users, which was

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2. The system at issue in *Grokster* was created to “design around” the holdings of prior court decisions. The Ninth Circuit and Seventh Circuit had found Napster and Aimster, respectively, liable for copyright infringement. See *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003); *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). To try to evade these rulings, *Grokster* designed its systems differently, and then argued that the architecture of its systems avoided secondary liability.

a sufficient basis to hold the services liable. Building on *Sony*, this Court explained:

In sum, where an article is ‘**good for nothing else’ but infringement, there is no legitimate public interest in its unlicensed availability**, and there is no injustice in presuming or imputing an intent to infringe. Conversely, the [staple article of commerce] doctrine absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses...

*Id.* at 932-33 (emphasis added, citations omitted). In other words, contrasted with the device design in *Sony*, the system design in *Grokster* did not pass muster because the design of technology that lacks independently productive qualities aside from infringement-inducing ones will not be excused from infringement liability.

This Court’s approach is thus to look beyond the technical aspects of a technology that enables infringement, instead focusing on the motivations and intent of the designer. Thus, where a party seeks to “invent around” the copyright law, it will not suffice to establish a defense.

The most recent example of this approach can be found in last term’s decision in *ABC, Inc. et al. v. Aereo, Inc.*, 134 S. Ct. 2498 (2015). This Court framed the question as: “whether respondent Aereo, Inc., infringes ... by selling its subscribers a **technologically complex service** that allows them to watch television programs over the Internet at about the same time as the programs are broadcast over the air. We conclude that it does.” *Id.* at 2503.

Aereo built its system specifically, and openly, to fit within the confines of the decision of the Second Circuit in *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008). As Second Circuit Judge Denny Chin noted in dissent in the *Aereo* case, “the system is a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law.” *WNET Thirteen v. Aereo, Inc.*, 712 F.3d 676, 697 (2d Cir. 2013).

Responding to the argument that the Aereo system could be compared to a copy shop that has no involvement in how its patrons use its machines, the majority of this Court held:

[T]he dissent’s copy shop argument, in whatever form, makes too much out of too little.... Here the signals pursue their ordinary course of travel through the universe until today’s ‘turn of the knob’—a click on a website—activates machinery that intercepts and reroutes them to Aereo’s subscribers over the Internet. **But this difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into “a copy shop that provides its patrons with a library card.”**

*Aereo*, 134 S. Ct. at 2507 (emphasis added). Like *Grokster* before it, the technology used by Aereo, while clever, had no productive use other than to infringe.

Turning then to this case, Google’s argument is another clever variant on what both the *Grokster* and *Aereo* defendants failed to persuade this Court. Google copied millions of copyrighted works in full, and maintains copies of those books in full, sharing various parts of the books as it sees fit, all without seeking permission from the copyright owners.

Google seeks to divert attention away from the underlying, full-text database of the copyrighted works, to the software application it has written to take advantage of that database, an application that limits how much of each work that a particular user can see at any one time (“snippet view”). It is as if Google photocopied an entire book, and then allowed people to read portions of the book through a piece of cardboard with a hole cut out of it. The product is of limited use to the consumer, while the technology is used in a counterproductive manner for no reason that benefits the consumer, unlike in *Sony*. But the justification does not escape the fact that there is an unlicensed, infringing, full-text copy of the book behind the piece of cardboard.

Google could easily provide full-text access to every book that it has scanned and maintained to users, either free or for a fee. And users – there is no doubt – would welcome that type of access and likely pay for it. The only reason Google employs the “piece of cardboard” screen over its database is to try invent around copyright – in this case through a fair use defense of its own design.

Sony was motivated by profit for sure, but to create a product that enhanced consumers’ ability to enjoy the content already being provided to them by the content

owners, in a way that would not impact the content owners' rights. It has never been suggested (as far as *amici* know) that Sony developed the Betamax as a ruse to concoct a fair use defense and to deliver content into the hands of consumers against the wishes of copyright owners. Sony also made no effort to hobble their own technology in order to stay on the right side of fair use.

Google plainly took the opposite tack, like *Grokster* and *Aereo* before it. All of these companies, each in their own way, started with a copyright defense and engineered backward from there to build their systems.

*Grokster* built peer-to-peer systems that “did not provide the distributors with actual knowledge of specific acts of infringement,” *Grokster*, 595 U.S. at 927, because the earlier *Napster* and *Aimster* cases had turned on the issue of knowledge. *Aereo*, similarly, expressly built its “Rube Goldberg-like contrivance” to mimic the system at issue in *Cartoon Network*, to make “individual copies” for each subscriber, at the subscriber’s direction, to avoid infringement.

This Court soundly rejected both of those attempts, signaling that inventing around the copyright laws, for that purpose and that purpose only, will not be given a free pass. Google argues that its use has transformed the underlying works, but it cannot say how because it is a fiction. Instead, it is just another attempt to put form before substance, using technology to build a system that appears to meet the technical criteria of the law, while ignoring the big picture.

The Second Circuit, as it mistakenly did in *Aereo*, bought into that fiction. In so doing, it expanded this Court’s use of the word “transformation” from *Campbell* way too far to cover “expanded utility” instead of “added expression.” By comparison with this Court’s language, the test articulated by the Second Circuit looks like this:

Supreme Court in <i>Campbell</i>	Second Circuit in <i>Google Books</i>
<p>whether the new work “adds something new, with a further purpose or different character, <b>altering the first with new expression, meaning, or message.</b>” <i>Campbell</i>, 510 U.S. at 579 (emphasis added).</p>	<p>where the new form of the existing work “communicates something new” or “<b>expands its utility.</b>” <i>Authors’ Guild</i>, 804 F.3d, at 214 (emphasis added).</p> <p>Providing a new way of accessing works or “information about” them is transformative (<i>id.</i> at 215-17); no alteration of the work necessary; no new expression, meaning or message required. <i>Id.</i> at 220.</p>

This Court should grant *certiorari* to correct the Second Circuit’s incorrect holding that improving utility or access by using search technology can be a fair use where nothing about the underlying works is changed. In 1990 Judge Leval also spoke approvingly of using the original work as “raw material,” Leval at 1111, but nothing in his original article, or this Court’s adoption of it in considering “transformation” in *Campbell*, suggests that there is any justification for using copyrighted works as the “raw materials” for a commercial product that merely

repackages the unchanged full text of those copyrighted works for consumption in the digital age. Rather, like the technology in *Grokster* and *Aereo*, “search” can provide a public benefit to consumers, but it cannot excuse the obligation to compensate copyright owners when the technological system is built on the backs of their work without permission.<sup>3</sup>

**C. The Second Circuit’s Decision Ignored Improperly The Required Qualitative Analysis of Google’s Takings In Favor Of A Quantitative Analysis, Erroneously Impacting Its View Of Potential Market Harm**

The Second Circuit also engaged in a flawed analysis of the third statutory factor: “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” By focusing on an overly quantitative analysis of what a single user could obtain from the several books at issue, and whittling that number down to 16%, *Authors’ Guild*, 804 F.3d at 221-23, the decision ignored the teachings of this Court. And that finding improperly influenced the Second Circuit’s analysis of the fourth factor as well.

In *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), this Court overturned the Second Circuit’s finding of fair use even though it recognized that the secondary work was for a purpose stated in the preamble of Section 107 and qualified as “news.” This Court held that although the excerpts used by

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3. “Snippet view” is nothing like a “lengthy critical study” of a sonnet with “fragments dispersed throughout the work of criticism [that] may well quote every word of the poem” and still be a fair use. *Leval* at 1123.



the defendant from President Ford’s memoirs constituted a quantitatively insubstantial portion of the work, the excerpts represented “the heart of the book” and were qualitatively substantial in view of their expressive value and their key role in the infringing work. 471 U.S. at 564-65. Thus, the Second Circuit here first erred by failing to analyze at all the qualitative substance of what was taken by Google from the works of the three authors involved, but that error is rendered even worse since millions of books that were scanned and made subject to Google’s “snippet view” are impacted by the decision.

Indeed, the excerpts used in Google’s “snippet view” can often be much longer than the 400-word excerpt of Gerald Ford’s memoirs found to be unfair in *Harper & Row*. Even Judge Leval agreed in 1990 that *Harper & Row* embodied the correct result. *See* Leval, at 1120, 1123. In this case the Second Circuit ignored the teaching of *Harper & Row* and Judge Leval’s own recognition of its correct result. *See also Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1271 (11th Cir. 2014) (each excerpt of each work must be qualitatively examined on its own).<sup>4</sup>

ASJA is particularly concerned about the lack of qualitative analysis, since many of ASJA’s authors publish shorter works or “modular” works where even 16% could easily usurp the “heart” of the works and impact their market value. In the short time between the Second Circuit’s opinion and the filing of this brief, ASJA has

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4. In *Cambridge*, the Court also held that a “10 percent-or-one-chapter approach” (as used by the district court in that case based on various industry guides concerning electronic reserves), was not relevant to an individualized fair use analysis. *Cambridge*, 769 F.3d at 1272. Of course, here Google “snippet view” is not used for purposes of “electronic reserves.”

found over two hundred examples where ASJA members believe the “heart” of their work is available on Google’s “snippet view.”

The impact of the Second Circuit’s decision is particularly pernicious for authors of short non-fiction works such as the many members of ASJA who write journal articles and other short works. Such authors are often times paid by “page views.” For example, an article or book chapter on “7 tips for networking at holiday parties,” will receive many fewer page views if the 7 tips are revealed in a Google “snippet view.” A reference to the underlying work or where it can be accessed or purchased still results in lost income to the author.

Moreover, the “16%” conclusion reached by the Second Circuit is not universal, but all authors are now stuck with the decision. For example, former President of ASJA, Minda Zetlin, who did not give Google permission to provide a “snippet” view of her book “The Geek Gap,” which she co-authored with her husband, found that about one-third of that work is available on Google’s “snippet view.” The book is an examination of the difficult relationship between business people and technology people in most organizations recounted by a married couple who happen to be a business person and a technology person. It is not a narrative where each chapter builds on the next, but is rather a modular work and some of the most interesting chapters that look at this relationship throughout history are mostly included in “snippet” view, usurping the need to purchase the book.<sup>5</sup>

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5. See <https://books.google.com/books?id=X8ZHSFz7ZaIC&printsec=frontcover&dq=asja+guide+to+freelance&hl=en&sa=X&ved=0ahUKEwifyJfzlJvKAhUBy2MKHYfNAdwQ6AEINzAC%20-%20v=onepage&q&f=false#v=onepage&q&f=false>

The Second Circuit’s rationale for its finding was also deeply flawed due to an erroneous assumption that consumers would not try to game the Google system to obtain free access to larger portions of works or to obtain their “heart” despite Google’s “hole in the cardboard” design. For example, one ASJA author has learned that her textbook was being used for a class at a well-known University. The students in the class banded together, purchased one copy of the book, and then each student in the group used terms in the purchased copy to search different terms on Google “snippet view.” By doing this, they were able collectively to obtain nearly the entire book – and certainly enough of what was being used for the class so that all the students in the group did not need to purchase the book. Further, it is not difficult for a single-user to use a different VPN to go back in a subsequent session to obtain more than he or she did the first time.

Another ASJA member, Kelly Enright, reports that the entire first chapter of her book “Osa and Martin: For the Love of Adventure” can be found on Google’s “snippet view” without her permission. She has learned that high school students are using this chapter for National History Day reports – instead of buying the book, they are referencing only the first chapter and focusing their projects on the time period covered by that chapter, resulting in a serious impact on her sales.<sup>6</sup>

In *Harper & Row*, this Court pointed out that the fourth factor, the effect of the infringing use upon the

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6. See <https://books.google.com/books?id=YUhm8uoT7QcC&printsec=frontcover&dq=inauthor:Kelly+inauthor:Enright&hl=en&sa=X&ved=0ahUKEwi-wIHEhKPKAhUI8x4KHbgiCnQQ6AEI IzAB#v=onepage&q&f=false>

potential market for the copyrighted work, was the “single most important element of fair use.” 471 U.S. at 566. Here, ASJA authors believe that Google’s “snippet view” product “directly compete[s] for a share of the market.” *Id.* at 568. It does not take long for an individual who can obtain 16% of a work to turn into five people together obtaining over 75% of a work; but even where only smaller excerpts are available, the market for the copyrighted work is being impacted. *See Sony*, 464 U.S. at 451 (“if the intended use is for commercial gain, that likelihood [of harm] may be presumed.”). There is clear evidence that Google’s “snippet view” produces market harm and actual damage of the sort recognized by this Court in *Harper & Row* and *Sony*. This further demonstrates why the quantitative analysis of the Second Circuit was an inappropriate methodology to use in the context of this case.

### III. CONCLUSION

For the foregoing reasons, this Court should grant *certiorari*.

Respectfully submitted,

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