

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 *AMICI CURIAE* OF COPYRIGHT
CLEARANCE CENTER, INC., THE
INTERNATIONAL FEDERATION OF
REPRODUCTION RIGHTS ORGANISATIONS,
AND MARYBETH PETERS IN SUPPORT
OF PETITIONERS**

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INTEREST OF THE *AMICI*¹

The world's largest licensing organization for text-based copyrighted works, **Copyright Clearance Center, Inc. (CCC)** was established in 1977 by a consortium of publishers, authors, and copyright users in response to Congress's recommendation that an efficient mechanism be devised to license then-prevalent – but potentially detrimental to copyright interests – photocopying. *See* S. Rep. No. 93-983, 93rd Cong., 2d Sess. at 122 (1974); H.R. Rep. No. 90-83, 90th Cong., 1st Sess., at 33 (1968); S. Rep. No. 94-473, 94th Cong., 1st Sess. at 70-71 (1975). CCC opened on January 1, 1978, the day the Copyright Act of 1976 took effect.

A not-for-profit corporation, CCC acts as a centralized clearinghouse for the granting of reproduction rights for books, journals, newspapers, and other works to corporate, academic, and other users. CCC obtains by contract the nonexclusive right to issue licenses and grant permissions on behalf of tens of thousands of authors and commercial, academic, and non-profit publishers, both domestic and foreign; issues such licenses; and remits the royalties collected, net of expenses, to participating rightsholders.

As methods of reproduction have expanded, particularly in the digital age, so too have CCC's license offerings. CCC offers a variety of pay-per-use permissions

1. Pursuant to Rule 37.6, Amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than Amici and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of amicus briefs are on file with the Clerk's office.

services and annual repertory licenses suiting the needs of commercial and non-commercial users, including educational institutions wishing to provide teaching materials to students and Fortune 500 and smaller companies wishing to perform research and development. Tens of millions of works are covered by the various licenses offered by CCC. In its 2015 fiscal year, CCC returned over \$200 million in reproduction royalties to rightsholders worldwide.

From its unique U.S. vantage point, CCC can attest to the ability of rightsholders and users of copyrighted materials alike to adapt to evolving technology in ways that serve their respective goals while, at the same time, fulfilling the policies undergirding our copyright system. For nearly forty years, CCC has worked collaboratively with rightsholders and users to fashion efficient and cost-effective licenses that accommodate users' ever-increasing demands for instantaneous access to copyrighted materials while honoring the legitimate expectation of rightsholders that significant takings of their works require permission and suitable compensation.

The efficacy of CCC's efforts as a licensing intermediary has been cited by courts adjudicating fair use disputes. *See, e.g., Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1384 (6th Cir. 1996) (en banc). That recognition has helped shape copyright law and has fostered the development and growth of workable licensing solutions that facilitate copyright-compliant access to a vast number of copyrighted works.

The International Federation of Reproduction Rights Organisations (IFRRO), headquartered in Brussels, and its 145 member organizations in 83 countries worldwide, represents millions of authors and publishers and several hundred million copyrighted text and image works. IFRRO endeavors to increase the lawful use of such works and to eliminate unauthorized copying by promoting efficient collective rights management through Reproduction Rights Organisations (RROs) to complement the efforts of authors, publishers, and other copyright owners. CCC, the U.S. RRO, as well as Petitioner The Authors Guild, are among IFRRO's members.

Marybeth Peters served as United States Register of Copyright from 1994 through 2010, the culmination of almost 45 years of distinguished service in the Copyright Office. Throughout her tenure, Ms. Peters helped shape the contours of copyright law – in the process educating courts, Congress, and the American public generally on the role of copyright law in our society. In fulfilling this role, Ms. Peters was responsible for monitoring how courts apply the fair use doctrine to changing technology. Her central concern in this regard was to ensure that core copyright policies, embodying the delicate balance between promoting broad dissemination of information and providing incentives to creative expression, not be eroded. Ms. Peters currently serves as a member of CCC's Board of Directors.

Amici are concerned that the Court of Appeals in this case misapprehended a key element of the fair use analysis, namely, the proper evaluation of market harm under the fourth fair use factor. By focusing unduly on the potential harm inflicted by Google's massive,

systematic copying on *sales of Petitioners' books*, the Court of Appeals failed to account for the important role that derivative licensing markets, including those that reasonably might be expected to develop, properly play in establishing cognizable market harm (both present and potential) arising from unauthorized copying.

This Court's precedent mandates such a broader market-harm inquiry. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592-93 (1994). Moreover, Amici's experience over many decades demonstrates both the economic importance to rightsholders of enabling such derivative licensing markets as well as the salutary role licensing solutions can play in effectuating the balancing of interests prescribed by copyright law. In Amici's view, the limited nature of the excerpts (snippets) of text copied from each of Petitioners' books that Google makes accessible via Google Books does not warrant giving short shrift to the potential derivative market for the right to operate a searchable index of such excerpts on the premise that the excerpts are "information" rather than protected expression. The Google Books project is built on a huge corpus of primarily copyright-protected works. Had the Court of Appeals recognized that this sort of commercial exploitation of copyrighted expression – however socially productive – is one that readily lends itself to being licensed, the fair use balance may well have come out differently.

Amici's concerns extend well beyond this case. If the Court of Appeals' market-harm analysis is left undisturbed – coming as it does from an influential court in matters of copyright – it will likely spawn myriad other unauthorized, technology-enabled exploitations of potentially vast

amounts of copyrighted material, both here and abroad, on the premise that the uses to which these works are being put are socially valuable and do not directly compete with sales of the originals. Amici submit that this unduly narrow conception of market harm threatens to impair incentives to creative expression and warrants correction at this critical juncture in the development of digital commerce in general and of commercial databases of copyrighted material in particular.

SUMMARY OF ARGUMENT

The Court of Appeals erred in its analysis of market harm (the fourth statutory fair use factor). The court essentially set aside the large-scale, systematic copying of Petitioners' books by Google and found that Google's display of "snippets" of copied and indexed text in response to user searches did not cause cognizable market harm because the snippets were merely "information" and did not substitute for the original texts.

By focusing solely on the substitutability of the snippets for Petitioners' books, the Court of Appeals failed to heed this Court's instruction in *Campbell* that the market-harm inquiry must take into account derivative uses that the copyright owner "would in general develop or license others to develop." 510 U.S. at 592. Prior cases demonstrate that such derivative uses include the incorporation of verbatim fragments of copyrighted works into new works, whether or not the rightsholder has yet begun to exploit that particular derivative market.

If not corrected, the Court of Appeals' overly narrow conception of Petitioners' derivative rights threatens

to preempt the development of licensing solutions for commercial databases like Google Books that rely on massive copying of existing works without adding any creativity. Such products are not entitled to the fair-use latitude the Court of Appeals accorded to Google Books in this case.

ARGUMENT

I. SUBSTITUTABILITY FOR THE ORIGINAL WORK IS NOT THE SOLE MEASURE OF MARKET HARM

The Court of Appeals' fair use analysis turned on its determination that the snippets of text displayed by Google Books in response to user searches do not substitute for Petitioners' books (or for substantial, licensable portions of them) because they are fragmentary bits of "information" about the books and do not provide a commensurate reading experience. *See, e.g.*, Pet. App. 33a ("the secondary use transformatively provides valuable information about the original, rather than replicating protected expression in a manner that provides a meaningful substitute for the original"). This lack of substitutability was the cornerstone of the court's finding of transformativeness under factor one (17 U.S.C. § 107(1)) as well as of no market harm under factor four (17 U.S.C. § 107(4)).

An initial concern is that the Court of Appeals' focus on the snippets effectively ignored the systematic unauthorized scanning of millions of entire copyrighted books by Google in order to populate the Google Books database and to compensate participating libraries

with free copies of works in their collections. *See Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1497 (11th Cir. 1984) (“[E]ven if the story could not stand independent of the entire newscast, we could not ignore the fact that TV News Clips tapes virtually all of the broadcast on a daily basis.”). At its essence, Google engages in what the Second Circuit referred to, in another case involving mechanical reproduction for research purposes, as “institutional, systematic copying . . . while avoiding the necessity of paying for license fees.” *Am. Geophysical Union*, 60 F.3d at 916.

A further concern is with the Court of Appeals’ labeling of Google’s reproduction and display of snippets of Petitioners’ expression as the extraction of “information” that assertedly does not impair Petitioners’ copyright interests. By characterizing in this manner the end uses to which Google’s massive unauthorized copying is put, the court conflated Google’s conduct with that of Google Books users and accorded undue leeway to Google’s combination of digital technology and “sweat of the brow” aggregation – a combination that does not involve the creation of original expression that fair use, and copyright law generally, is designed to encourage and protect.

This problematic deference to Google’s enterprise is evident in the Court of Appeals’ analysis of the fourth fair use factor, “the effect of the use on the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). The court’s framing of the inquiry as whether the snippets displayed by Google would satisfy one *seeking to read the original work* without also considering whether Google Books impinges upon a market Petitioners “would in general develop or license others to develop,” *Campbell*,

510 U.S. at 592, was erroneous and potentially highly consequential. In failing to recognize the full scope of Petitioners' rights as described in *Campbell*, the Court of Appeals unduly circumscribed the scope of Petitioners' cognizable market harm. If not corrected, this error will lead to the loss of market opportunities by publishers and authors as Google and others engage in large-scale reproduction of copyrighted works and defend the resulting products as "informational" databases that pose no threat to sales of the originals.

Earlier appellate rulings such as *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132 (2d Cir. 1998), and *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191 (3d Cir. 2003), demonstrate the error in treating substitutability for the original work as the sole measure of market harm arising from the unauthorized use of verbatim "fragments" of copyrightable expression. The principle applied in these cases that limited verbatim copying is actionable where it intrudes on a potential derivative market should be at least as applicable to Google's database, which appropriated millions of copyrighted works without permission in circumstances where, the record shows, Petitioners and many other copyright rightsholders were willing to license Google's activity.

* * *

In *Campbell*, this Court noted that the licensing of derivatives "is an important economic incentive to the creation of originals," 510 U.S. at 593, and it held that the market for potential derivative uses "includes . . . those that creators of original works would in general develop

or license others to develop.” *Id.* at 592; *see also Am. Geophysical Union*, 60 F.3d at 930 (“an impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets should be legally cognizable when evaluating a secondary use’s ‘effect upon the potential market for or value of the copyrighted work’”) (quoting 17 U.S.C. § 107(4)).

In *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), this Court made clear that the evaluation of *potential* market harm that the statute directs requires assessing the consequences of the challenged use *should it become widespread*. The Court emphasized (even in the noncommercial setting presented there) that

[a]ctual present harm need not be shown . . . [n]or is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed.

Id. at 451 (emphasis in original).

The Court of Appeals in this case failed to adhere to these precepts in its analysis of market harm. It stated instead that the guiding criterion was whether the use resulted in “widespread revelation of sufficiently significant portions of the original as to make available a significantly competing substitute.” Pet. App. 40a. The court concluded, based on its findings as to the length of and limits on the snippets, that because the Google Books

snippet function does not offer a “competing substitute,” it “does not threaten the rights holders with any significant harm to the value of their copyrights or diminish their harvest of copyright revenue.” *Id.*

By identifying substitutability for the original work as the sole measure of cognizable market harm, the Court of Appeals disregarded the teaching of *Campbell* and *Sony* that potential market harm also may be found in likely impairment of future licensing markets, especially if the challenged use “should become widespread.” *Sony*, 464 U.S. at 451; *see also Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985). The Court of Appeals appears to have elided this branch of the market-harm analysis by deeming Google’s “snippet view” function to be purely informational and, accordingly, as not implicating Petitioners’ copyright rights. Among other flaws, this conclusion leapfrogs the fact that Google built its database by systematically copying millions of copyrighted books in their entirety. In addition, the court’s benign characterization of the snippets as information relies improperly on *how the snippets are used* rather than on the unauthorized copying and display engaged in by Google. *See Princeton Univ. Press*, 99 F.3d at 1386 & n.2 (“[T]he use of the materials by the students is not the use that the publishers are challenging . . . [I]f the fairness of making copies depends on what the ultimate consumer does with the copies, it is hard to see how the manufacture of pirated editions of any copyrighted work of scholarship could ever be an unfair use.”)

Prior court of appeals rulings have recognized the infringing nature of comparable takings. *Video Pipeline*, *supra*, involved a searchable database of movie preview

clips created by declaratory judgment plaintiff Video Pipeline. Similar to the Court of Appeals' characterization of Google Books, Video Pipeline argued that its preview clips provided information about the movies rather than duplicating the aesthetic or entertainment experience of Disney's original movies. *See* 342 F.3d at 198. The Third Circuit found, however, that the clips impaired Disney's market for derivative works, citing, *inter alia*, Disney's use of its own trailers to draw traffic to its website. *Id.* at 202. Also notable is the Third Circuit's holding that the copyright owner's right to make derivatives encompassed a database of excerpts from its original expressive works. The database of preview clips was found to impair the copyright owner's derivative market despite the absence of any claim that the clips were substitutes for the Disney movies.

The Court of Appeals' undue reliance here on substitutability for the original work as a proxy for market harm is also demonstrated by comparison to the Second Circuit's earlier evaluation of the potential derivative licensing market in *Castle Rock, supra*. That case involved an unauthorized trivia quiz book, the *Seinfeld Aptitude Test* (the "SAT"), based on the *Seinfeld* television series, which attracted an infringement suit by the producers of *Seinfeld*. The book contained 643 trivia questions and answers, drawn from 84 of the 86 *Seinfeld* episodes, about events and characters depicted in *Seinfeld*, including 211 multiple choice questions in which only one out of three to five answers was correct. The court found that the SAT copied "fragments of *Seinfeld*," *id.* at 138, and it recited the defendant's contention that the SAT's sequence had "no relationship to the sequences of any of the *Seinfeld* episodes," since it was "a totally random and scattered

collection of questions relating to events that occurred in the shows.” *Id.* at 140. As a result, “no *SAT* reader could plausibly ‘construct’ in his or her mind the plot of any *Seinfeld* episode, nor any of *Seinfeld*’s settings . . . nor even the four principal *Seinfeld* characters,” nor did the *SAT* “[duplicate] the fundamental essence or structure’ of *Seinfeld*.” *Id.* (citation omitted).

Nevertheless, in terms of market harm, the *Castle Rock* court noted that the test must account for harm to the market for works that the creator of the original work “would in general develop or license others to develop.” *Id.* at 145 (quoting *Campbell*, 510 U.S. at 592). Although the plaintiff had shown “little if any interest in exploiting th[e] market for derivative works based on *Seinfeld*,” the court stated that copyright law “must respect that creative and economic choice,” *id.* at 145-46, and it concluded that the *SAT* was “likely to fill a market niche that *Castle Rock* would in general develop,” as it was neither “critical of the program” nor a parody of it. *Id.* at 145.

The reasoning of *Castle Rock* should apply *a fortiori* to Google Books. In *Castle Rock* a “random and scattered collection” of fragments from *Seinfeld* was held to be infringing despite the fact that it did not substitute for the original and was incorporated in a quiz book that indisputably was an original work of expression. In contrast, Google’s display of “fragmentary and scattered” snippets of text from Petitioners’ books lacks any creative contribution by Google whatsoever.

Another ruling involving a searchable online database designed to provide verbatim excerpts from copyrighted works, *Associated Press v. Meltwater U.S. Holdings*,

Inc., 931 F. Supp. 2d 537 (S.D.N.Y. 2013), further calls into question the arbitrariness of the Court of Appeals' treatment of the Google Books snippets as legally innocuous "information." The defendant, Meltwater, used a computer program to scrape and index news articles on the Internet and provide short excerpts of them to subscribers in response to keyword searches. The district court found that the defendant's use of a computer program to capture and republish segments of text from copyrighted news articles, with no added commentary, was not transformative and that the use "deprive[d] AP of a licensing fee in an established market for AP's work." *Id.* at 561.

As compared with the findings in the foregoing cases, the Court of Appeals' determination in this case that Google Books snippet view does not implicate Petitioners' copyright rights at all appears arbitrary; more important, it risks undermining the development of future licensing markets that can help fulfill the incentive-creating purpose of copyright law.

II. THE COURT OF APPEALS FORECLOSED A LEGITIMATE LICENSING MARKET

As noted, the Court of Appeals excused the lack of creativity/originality in Google Books by characterizing its provision of limited snippets of text in response to each search as informational and not substitutional. This analytic perspective drove the court's finding that Google's technological ingenuity and "sweat of the brow" effort in scanning entire library collections trumped the systematic, unauthorized, verbatim copying and use of Petitioners' creative expression, even though the Second Circuit

has recognized that “[m]echanical ‘copying’ of an entire document . . . is obviously an activity entirely different from creating a work of authorship.” *Am. Geophysical Union*, 60 F.3d at 917. The Court of Appeals’ focus on the functionality of snippet view led it to assign dispositive significance to characteristics of Google Books that are not among those protected by copyright law – the goal of which is to incentivize creativity, not resourcefulness or effort. *See, e.g., Harper & Row*, 471 U.S. at 558 (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (copyright “spur[s] the creation and publication of new expression”). A consequence of this deviation from basic copyright principles is to preclude the development of a licensing market that would fairly accommodate the commercial interests of Google (and other for-profit database creators), on the one hand, and those of authors and publishers, on the other.

It is “indisputable that, as a general matter, a copyright holder is entitled to demand a royalty for licensing others to use its copyrighted work,” *Am. Geophysical Union*, 60 F.3d at 929, and Google Books should not be an exception to this general rule. Google concededly copied without permission a vast number of copyrighted works, without which the Google Books database would not exist. Moreover, whatever might be said as to the purposes for which users may access the database, Google’s snippet view indisputably displays verbatim portions of copyrighted works.²

2. Any suggestion that Google does not have the wherewithal to pay a market-determined price for copyright permissions is not

Google’s straight copying for a commercial purpose is a use it is reasonable to permit the copyright owner to develop or license others to develop. *See Campbell*, 510 U.S. at 592. This conclusion does not suffer from the “vice of circular reasoning,” *Am. Geophysical Union*, 60 F.3d at 931, that results from finding market harm in any use the copyright owner presently licenses or *claims the right* to license. That concern, indisputably present in cases involving works of criticism, as to which the law “recognizes no derivative market” because of the “unlikelihood that creators of imaginative works will license critical reviews or lampoons” of their works, *Campbell*, 510 U.S. at 592,³ is not present in this case.

In fact, publisher participation in the Google Books Partner Program, through which publishers and authors can make designated portions of their books (between 20 percent and the entire book) available for free preview on Google, indicates receptivity by the very rightsholders whose interests are at stake in this case to partnering with Google in appropriate circumstances. It surely is “not obvious” why it is “fair for [Google] to avoid having to pay at least some price to copyright holders” for the

credible. Google was prepared to pay both Petitioner and other authors and publishers who sued over the Google Book Search initiative \$125 million to resolve the case and obtain online access to their works. *See* Stephanie Condon, “Google reaches \$125 million settlement with authors”, CNET (Oct. 28, 2008), <http://www.cnet.com/news/google-reaches-125-million-settlement-with-authors/> (accessed Jan. 27, 2016).

3. *See also Castle Rock*, 150 F.3d at 145 n.11 (“copyright owners may not preempt exploitation of transformative markets, which they would not ‘*in general*’ develop or license others to develop”) (emphasis in original).

right to copy their books for commercial purposes. *Am. Geophysical Union*, 60 F.3d at 922.

In proceeding without rightsholder permission, Google preempted the development of a market for such permission. The record contains expert opinion that if Google's uses were held not to be fair use, "the market would intervene," and "one or more [Collection Management Organizations] (with proper authorization from rights holders)," such as CCC, "would license Google (and potentially others) to scan, distribute and display copyrighted works." Report of Prof. Daniel Gervais, Ex. 37 to Declaration of J. Zach, at 3 ¶ 11, *The Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136 (S.D.N.Y. Aug. 3, 2012), ECF No. 1053-6.

Indeed, until it abandoned the effort in May 2008, Microsoft, another major technology company, was pursuing a book digitization project similar to Google Books but for the fact that Microsoft did not scan or display copyrighted books without permission of the copyright owner. *See* Miguel Helft, "Microsoft Will Shut Down Book Search Program," N.Y. TIMES (May 24, 2008), <http://www.nytimes.com/2008/05/24/technology/24soft.html> (accessed Jan. 27, 2016) (suggesting that Microsoft was retrenching "in the face of competition from Google"); Microsoft, "Book search winding down," Bing Search Blog (May 23, 2008), <https://blogs.bing.com/search/2008/05/23/book-search-winding-down/> (accessed Jan. 27, 2016).

As the Microsoft initiative indicates, the need for a licensing regime applicable to mass digitization is real, but progress toward realizing such a regime is obstructed by the Court of Appeals' endorsement of Google's decision to

circumvent the permissions process altogether and thus deprive the rightsholders of the associated revenue. *See Am. Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 18 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994) (“If court rulings established that the existing practice of making photocopies violates plaintiffs’ copyright, Texaco would resort to one or more of these [licensing] procedures . . . and add significantly to the plaintiffs’ revenues and the value of its copyrights”).

As in *Castle Rock*, other appellate courts have accounted for the “potential market for or value of” copyrighted works, as the statute directs, *see* 17 U.S.C. § 107(4), by refusing to allow unlicensed first-movers to occupy the field with respect to new derivative uses of copyrighted works. For example, in *Pac. & S. Co.*, *supra*, the Eleventh Circuit considered a television news monitoring service that copied and sold segments of television news broadcasts – a use that was “neither productive nor creative in any way.” 744 F.2d at 1496. The court found it immaterial that the plaintiff television station did not market video copies of its news stories because the defendant used the broadcasts “for a purpose that WXIA *might* use for its own benefit,” *id.* (emphasis added), and the defendant’s use therefore “compete[d] with WXIA in a potential market and thereby injure[d] the television station.” *Id.* at 1496-97.

The social utility of new information technologies should not obscure the extent to which they intrude on the exclusive rights of copyright owners, nor can the perceived logistical challenges of securing the rights necessary to assemble massive aggregations of copyrighted works justify excusing the need to do so. Amici’s experience

throughout a period of rapid technological advances has been that the imperatives of new technology need not upset the delicate balance established by copyright law of securing just rewards to creators of copyrighted expression in order to promote the broad dissemination of ideas. These twin imperatives can and should be harmonized, including through robust licensing markets.

Persuasive copyright authority amply supports these tenets. In *American Geophysical Union*, the Second Circuit found that the photocopying and archiving of scientific journal articles by scientist-employees of defendant Texaco so that the articles would be “available for later reference as needed,” 60 F.3d at 915, fell within the scope of the existing “workable market for institutional users to obtain licenses” for the right to make such copies – which was at the time administered primarily by CCC. *Id.* at 930. The court found that the potential licensing revenues generated by this market were appropriately considered in the fair use analysis. *See id.* Here, in contrast, by equating market harm with substitutability for the original work, the Court of Appeals effectively granted *carte blanche* to a research tool more technologically advanced than the systematic photocopying at issue in *American Geophysical Union* but one that should no differently be subject to the development of a “workable market” — one that will efficiently reconcile the respective rights and interests of rightsholders and those of the proprietors of new digital information tools. CCC has performed precisely this role in relation to other forms of reproduction and distribution of text-based materials in the aftermath of prior fair use rulings.

CONCLUSION

By setting aside Google's systematic copying of entire copyrighted books and focusing its market-harm analysis solely on the substitutability of Google Books snippets for Petitioners' entire books without regard to the scope of Petitioners' potential derivative licensing market, the Court of Appeals adopted an unduly constrained analysis of market harm – one that is inconsistent with that applied by this Court and other courts. The vital importance of a properly articulated and applied market-harm analysis warrants this Court's review of the decision of the Court of Appeals.

Respectfully submitted,

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