No. 15-849

IN THE

Supreme Court of the United States

THE AUTHORS GUILD, INC., *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

REPLY BRIEF OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner The Authors Guild, Inc. states that it has no parent corporation. As a nonprofit corporation it has issued no stock. No publicly held corporation owns ten percent or more of the corporation.

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"This copyright dispute tests the boundaries of fair use." Pet. App. 2a. These are the opening words of the Second Circuit's opinion. By Google's telling, however, this is a minor dispute about an online card catalog providing beneficial "information about" books. The facts and caselaw belie Google's portrayal. Google made unauthorized digital reproductions of four million books in copyright. That alone was an historic infringement. Google then made any number of copies of the books for internal research purposes. This free "use" was neither fair nor necessary to the "Google Books" search process. Google also gave libraries millions of unauthorized digital copies of books—"e-books" that otherwise would have been purchased or licensed by the libraries for a fee—an arrangement the court below glossed over without reference to the statute's four fair-use factors, 17 U.S.C. § 107, or its careful limits on when libraries may make digital copies of books in their collections, *id.* § 108. Next, Google indexed the books' words to permit it to generate search results in response to users' queries. Finally, Google displayed verbatim excerpts from the books, drawn from the 78% of each book Google unilaterally decided should be available for display.

Google's response focuses on the indexing and display steps, claiming (without substantial evidence) that they are not only fair but beneficial to authors. But even if that claim were itself persuasive, given the amount of text displayed and the wide variety of works at issue, the Second Circuit went much further. It

allowed as fair use not just the search and display functions but also Google's original mass reproduction of books, its copying of those digital texts for valuable internal purposes, and its delivery of separate full copies to the libraries as compensation for access to their collections. Google's purposes for undertaking this whole operation, without paying a dime to the authors, were entirely commercial. But under the decision below, because those purposes differed from the authors' creative purpose in writing the books, the Second Circuit deemed Google Books to be transformative, a determination that drove the court's analysis of all four statutory fair-use factors.

The Second Circuit's conception of "transformative purpose" and the overriding weight afforded it conflicts with this Court's precedent and with the rulings of other circuits. At the heart of this conflict is a fundamental disagreement about how to apply the Copyright Act in the digital age—an issue this Court must resolve, as more and more content is digitized and becomes susceptible to mass infringement. The Second Circuit's decision, if allowed to stand, fundamentally upsets the long-standing balance in the Act by extending the rights of users at the expense of creators.[1]

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[1] Google seeks to bypass the issue of associational standing, asserting that the court below did not apply its rule denying such standing in copyright cases. Opp. 32. Not so; the court plainly held that The Authors Guild lacked standing, Pet. App. 5a n.1, and Google does not deny that this holding conflicts with the Eleventh Circuit's rule.

I. The Circuits Conflict on Whether Transformative Use Requires New Creative Expression.

The circuits fundamentally disagree on whether a secondary use may be deemed "transformative" when it adds no new creative expression to the original. Google's denial of this conflict is unpersuasive.

Google breezes over the Third Circuit's decision in *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 342 F.3d 191 (3d Cir. 2003), declaring that "*Video Pipeline* is not about a search tool like Google Books." Opp. at 26. But the similarities are uncanny. *Video Pipeline* involved a web-based search tool that returned lists of movies in response to queries, along with information about them, two-minute video clip previews, and links to retailers. 342 F.3d at 195-96. Google Books is a web-based search tool that returns lists of relevant books in response to queries, along with information about them, verbatim excerpts from the books, and links to retailers.[2] The only real difference is that the unauthorized clips displayed in *Video Pipeline* were pre-selected and reproduced by the infringer, whereas Google reproduced entire works and allows the search process to determine which portions are displayed.

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[2] Google highlights Google Books' links to retailers. Opp. 2, 6. As the Third Circuit has explained, "a link to a legitimate seller . . . does not . . . make *prima facie* infringement a fair use." *Video Pipeline*, 342 F.3d at 199.

Contrary to the rationale employed by the Second Circuit in this case, the Third Circuit held that Video Pipeline's clips were not transformative of the original movies because they added no new creative expression to the original. The court held that the clip previews "do not add significantly to Disney's original expression. . . . [because they] involve[] no new creative ingenuity." *Id.* at 199-200 (internal quotation marks omitted). "[T]he fact that 'a substantial portion,' indeed almost all, 'of the infringing work was copied verbatim from the copyrighted work' with no additional creative activity 'reveal[s] a dearth of transformative character or *purpose*." *Id.* at 200 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994) (emphasis added)).

To be sure, as Google points out, the Third Circuit also noted that the clips duplicated the promotional function of another copyrighted work—Disney's authorized movie trailers. But that additional reason for rejecting fair use hardly undercuts the circuit conflict. The Third Circuit clearly held that new creative expression is required for a use to be transformative—in direct conflict with the Second Circuit's view.

Google's effort to reconcile the Second Circuit's approach with those of the Sixth and Eleventh Circuits likewise fails. In *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996) (en banc), the court explained that verbatim copying was not transformative: "[t]his kind of mechanical 'transformation' bears little resemblance to

the *creative metamorphosis* accomplished by the parodists in the *Campbell* case." *Princeton*, 99 F.3d at 1389 (emphasis added). Google ignores this, conjecturing that what the *Princeton* court *really* meant was that the copying "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." Opp. 27. Surely the Sixth Circuit would have said so if this were its rationale.

Moreover, the Eleventh Circuit was clear that "verbatim copies of portions of the original books which have merely been converted into a digital format" do not exhibit a transformative purpose, and that facilitating access to excerpts of books did not constitute a transformative purpose. *See Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1262-63 (11th Cir. 2014).

These circuits stand in contrast to the Second, Fourth, and Ninth Circuits, which in some cases highlight the *absence* of creative purpose as the reason to find a use transformative. *See, e.g.*, *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (finding secondary use transformative because it *lacks* the original's "aesthetic" purpose). This conflict implicates basic questions about the nature of copyright. The Second, Fourth, and Ninth Circuits have used fair use to conjure up a totally new exception for non-creative, commercial exploitations of copyrighted works, where those business models are perceived as socially beneficial. Such policymaking for

the digital age is Congress's prerogative, not the courts'.

II. The Second Circuit Allows a Finding of Transformative Use to Override the Statutory Factors.

The Second Circuit supplanted the statutory fair-use factors with its conclusion that Google exhibited a "highly convincing transformative purpose." Pet. App. 30a. Google tells the Court that the opinion was "meticulous" and "carefully examines the application of the statutory fair use factors." Opp. 14. In fact, while the Second Circuit *recited* the statutory factors, its analysis simply repeated its "transformative purpose" conclusion at each step.

With respect to the first factor—the purpose and character of the use—the Second Circuit quoted *Campbell* in discussing "transformative use," but with a noteworthy omission: the court inserted ellipses to eliminate this Court's instruction that a use is transformative if it "alters the first with new expression, meaning, or message." *Compare Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994), *with* Pet. App. 19a. Google responds that Google Books is nonetheless "new creative expression" because it is a "search tool that tells would-be readers what books are relevant to their interests as reflected by their own search terms." Opp. 17. But it does not and cannot point to any actual creative expression, meaning or message it has added to the books, which it merely copied. Nor does Google explain why its non-creative but commercially valuable business model—including

its display of verbatim text and its internal use of entire books for various research purposes—should be authorized if the company has not bothered to obtain licenses in the marketplace. Instead, it seeks to dismiss all of these concerns by falsely describing its service as merely indexing and displaying "information *about*" books, Opp. 15, much like a card catalog.

The Second Circuit exported its misapprehension of the first factor into the remaining three. Google ignores the Second Circuit's distortion of the second factor, the nature of the copyrighted work, *see* Pet. 28-29, instead attempting to justify its infringement by arguing that "the majority of petitioners' books are factual in nature," Opp. 19 n.5. But it is the rare non-fiction book that is merely "factual"; most contain a great deal of original, creative expression. And, in any event, Google's copying included hundreds of thousands of fictive, highly creative works.

Regarding the third factor, the "amount and substantiality" used, Google cites *Campbell* for the proposition that "[t]he 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." Opp. 19. Here, says Google, copying entire books is "'literally necessary to achieve' Google's *transformative purpose*." Opp. at 19 (quoting Pet. App. 35a) (emphasis added).[3]

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[3] Google objects to the statistic—which was undisputed in the trial court—that Google Books makes 78% of every book available for display, citing the Second Circuit's assertion

Google's argument proves Petitioners' point. The Second Circuit's approach strips the third factor of any meaning. So long as the secondary user's "purpose" is deemed transformative, whatever copying is necessary to achieve that purpose is permissible.

When this Court explained that the third factor should be assessed by reference to the secondary user's purpose, it did not intend that the mere identification of any purpose whose fulfillment requires substantial copying sufficed. Rather, *Campbell* referred to excerpt use in book reviews and news articles as the types of purposes that could warrant substantial copying. 510 U.S. at 587. The type of "purposes" that may warrant substantial copying are therefore similar to the examples identified in *Campbell*—those that "alter[] . . . [original works] with new expression, meaning, or message." *Id.* at 579. Nothing in Campbell suggests that wholesale copying—where no new creative expression, meaning or message is added to the work—should be disregarded under this factor merely because the infringer's commercial "purpose" requires it.

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that Petitioners hired a researcher who was only able to obtain 16% of a book. The court below mischaracterized the record. The "researcher" was actually a paralegal who made a few attempts between other work duties to demonstrate how much content could be readily obtained through a few quick searches. The 16% figure apparently was derived from the court's own calculations based upon the flawed premise that this effort was some comprehensive expert investigation.

Finally, Google does not show how the fourth factor, market harm, was given appropriate weight. In *Campbell*, this Court instructed that courts should assess how the potential market for the copyrighted work would be affected if the alleged infringing conduct became "unrestricted and widespread." 510 U.S. at 590 (quotation marks omitted). The Second Circuit was thus required to consider the consequences of authorizing countless other actors to bypass getting licenses before building full-text databases of copyrighted works and displaying portions thereof. As we enter an era when the primary means of distribution for books will be digital, it would be alarming for the courts to authorize any and all entrepreneurs to build digital collections of the entire canon (with no specific security requirements) and then display whatever portions they choose (subject only to after-the-fact and unpredictable judicial rulings about whether they have gone too far). The fourth factor thus plainly points in favor of requiring Google to obtain licenses in the marketplace for what it did here.

Indeed, as Google acknowledges, Opp. 22, the Second Circuit did acknowledge that Google Books probably causes lost sales of books. But it conjectured (based on nothing in the record) that the losses are not "meaningful or significant." Pet. App. 41a. Then it engaged in pure sophistry by holding that such losses somehow do not count if they result from users

accessing factual information without having to acquire the book to do so. *Id.*[4]

In sum, the Second Circuit gave "transformative use" singular importance—a pattern that the Seventh Circuit has criticized. *See Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1555 (2015). Google does not address Judge Easterbrook's criticism on the merits. Rather, it offers the unremarkable observation that his criticism predated *this* case and was aimed instead at an earlier decision of the Second Circuit, *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013). But the Second Circuit's approach in this case was the same as in *Cariou*. *See, e.g.*, *id.* at 710 (dismissing second statutory factor as less relevant in light of "transformative purpose"); *id.* (stating that third factor permits enough copying to "fulfill [copy's] transformative purpose"). It was this approach—repeated here—that the Seventh Circuit criticized as violating the statute by "asking exclusively whether something is 'transformative.'" *Kienitz*, 766 F.3d at 758.

Finally, Google defends the Second Circuit's focus on the social benefit of widespread distribution and

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[4] Although Google defends this ruling, Opp. 22, it makes no sense. In assessing market harm, Section 107 does not instruct courts to guess buyers' motivation and disregard those who would purchase a book to learn facts rather than experience expression. The statute focuses on harm to the copyrighted work itself and asks whether the secondary use affects its market. Here the court admitted it has to some unknown extent.

display of copyrighted works, labeling it an appropriate consideration because the purpose of copyright is to benefit the public.[5] Opp. 17 n.4. This proves too much. No doubt free goods benefit their recipients—this can be said of *any* use that infringes copyright. But ours is a system of economic incentives, and the founders decided that the public good was best served by granting creators economic control of their works in order to encourage creation. *See* U.S. Const. art. I § 8 cl. 8; *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (noting that the social value of dissemination does not eliminate exclusive rights afforded by copyright). Copyright has no meaning if it can be bypassed anytime the public would benefit from free access to content.

III. The Second Circuit's Analysis of the Library Copies is Contrary to the Statute and Conflicts with the Sixth Circuit.

The Second Circuit's analysis of the digital copies distributed to the libraries is contrary to the statute and conflicts with the Sixth Circuit, contrary to Google's assertions. First, the court concluded this arrangement was a fair use without reference to Section 107's statutory factors. Instead, the court relied on the libraries' promise not to violate copyright law in their use of the unauthorized digital copies. But Google's infringing conduct does not become fair use

[5] As noted in the petition, Petitioners do not seek injunctive relief to shut down Google Books, but rather damages and a license arrangement going forward.

just because the libraries agree not to further infringe. Nor is it excused by the fact that the libraries own the physical books. Opp. 30. A fundamental tenet of the Copyright Act is that the "right" to "copy" rests exclusively with the copyright holder; libraries have no right to make, or have others make, digital copies of books just because they own the physical copies. 17 U.S.C. § 106.[6]

Moreover, even if libraries did have such a right, that would only highlight the conflict with the Sixth Circuit's ruling in *Princeton*. That court held that a commercial enterprise cannot evade copyright liability by asserting its customers would be protected by fair use had *they* engaged in the infringing behavior. 99 F.3d at 1389. Google says it was permissible to provide the library copies because the libraries already had a "relationship" with the physical books. Opp. 31. Whatever that "relationship" is, and whatever rights it might give the libraries, it would have no legal significance as an excuse for Google's conduct, at least not in the Sixth Circuit.[7]

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[6] *See* Adam Vacarro, *Why It's Difficult for Your Library to Lend Ebooks*, Boston.com (June 27, 2014), http://www.boston.com/business/technology/2014/06/27/why-difficult-for-your-library-stock-ebooks/rrl464TPxDaYmDnJewOmzH/story.html (noting that libraries typically separately license e-books, and that e-book licenses are significantly more expensive than physical books).

[7] Although Google argues that giving the copies to the libraries was not infringing "distribution" in the technical sense, Opp. 30, that claim hardly matters. Google plainly

Finally, Google cannot evade the fact that the decision below eviscerates Section 108, which carefully limits the conditions under which libraries may digitize their books. Google's only response is to cite Section 108's savings clause regarding fair use. Opp. 32. But if libraries can obtain unauthorized, full digital copies of their entire collections without regard to Section 108, which explicitly limits library copying, that entire section of the Act becomes meaningless surplussage.

CONCLUSION

The petition for a writ of certiorari should be granted.

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infringed the exclusive right of reproduction by making and giving away the library copies.

Respectfully submitted,

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