No. 18-956

In the
Supreme Court of the United States

GOOGLE LLC,
Petitioner,

v.

ORACLE AMERICA, INC.,
Respondent.

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

Brief of *Amici Curiae* Helienne Lindvall, David Lowery, Blake Morgan and the Songwriters Guild of America in Support of Respondent

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INTERESTS OF AMICI CURIAE[1]

Amici curiae Helienne Lindvall, David Lowery and Blake Morgan are professional songwriters, recording and performing artists, label owners, and leaders of organizations who support strong and fair protection of intellectual property and privacy rights as well as fair compensation for violation of those rights. In addition to their creative activities, amici are educators as well as regular commentators on public policy.

Ms. Lindvall is an award-winning professional songwriter, musician and columnist. She is Chair of the Songwriter Committee & Board Director, Ivors Academy of Music Creators (formerly British Academy of Songwriters, Composers & Authors BASCA) and chairs the esteemed Ivor Novello Awards. She also writes the Guardian music industry columns *Behind the Music* and *Plugged In* and has contributed to a variety of publications and broadcasts discussing songwriters' rights, copyright and other music industry issues.

Mr. Lowery is the founder of the musical groups Cracker and Camper Van Beethoven and is a lecturer at the University of Georgia Terry College of Business. He has testified before Congress on the topic of fair use policy and is a frequent commentator on copyright

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in any part or made a monetary contribution intended to fund preparation or submission of the brief, and no person other than the amici curiae, its members, or its counsel, made such a monetary contribution. All parties have provided general written consent to the filing of this brief pursuant to Supreme Court Rule 37.3(a).

policy and artist rights in a variety of outlets, including his blog at TheTrichordist.com.[2]

Mr. Lowery and Camper Van Beethoven recorded the 2003 album *Tusk*, a song-by-song parody of the Fleetwood Mac *Tusk* album.

Mr. Morgan is an artist, songwriter, label owner, and the leader of the IRespectMusic campaign, which in partnership with songwriters focuses on supporting fair payment for use and play of artists' music across all mediums and platforms.[3] Mr. Morgan also lectures on artists' rights at music, business and law schools across the United States.

Amicus Songwriters Guild of America, Inc. (SGA) is the longest-established and largest songwriter advocacy and copyright administrative organization in the United States run solely by and for songwriters, composers and other music creators, as well as their heirs. It is registered as a non-profit corporation in the state of Tennessee pursuant to the Tennessee Non-Profit Corporation Act. SGA has not applied to the Internal Revenue Service for recognition of exemption as an organization described in Section 501(c)(3) of the Internal Revenue Code. Founded in 1931, SGA's organizational membership today stands at approximately 4,500 members, and through its affiliations with both Music Creators North America,

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[2] *See The Scope of Fair Use: Hearing before the Subcomm. on the Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (Jan. 28, 2014) (statement of David Lowery) [hereinafter Scope of Fair Use].

[3] *See* I Respect Music, *available at* https://www.irespectmusic.org.

Inc. (MCNA) (of which it is a founding member) and the International Council of Music Creators (CIAM) (of which MCNA is a key Continental Alliance Member), SGA is part of a global coalition of music creators and heirs numbering in the millions. SGA is also a founding member of the international organization Fair Trade Music, which is the leading U.S. and international advocacy group for the principles of transparency, equitable treatment, and financial sustainability for all songwriters and composers.

Amici express no opinion on the first question on which this Court granted certiorari and limit themselves to issues arising out of the second question.

SUMMARY OF ARGUMENT

Independent creators rely on copyright protection to safeguard their works. This is true not just of songwriters and composers, but of countless creators, including recording artists, photographers, filmmakers, visual artists, and software developers. Copyright is, in fact, of existential importance to such creators, who would be utterly lacking in market power and the ability to earn their livings without it.

Google's business model is a prime example of the need for strong copyright protection. Since Google's founding, Amici have experienced, observed and believe that Google has used its unprecedented online footprint to dictate the terms of the market for creative works. By tying together a set of limited exceptions and exclusions within the U.S. Copyright Act and analogous laws in other countries, and then advocating for the radical expansion of those exceptions, Google has

amplified its own market power to the great detriment of copyright owners. Thus, where fair use is meant to be a limited defense to infringement founded on the cultural and economic good for both creators and the public, Google has throttled it into a business model: what its amicus brazenly refers to as the bedrock on which rests the fictitious "fair use industries."

There is no shortage of amici exhorting this Court to weigh carefully the implications of this case's fair use issues, and their resolutions. Amici today simply join the chorus of those seeking to illustrate Google's longstanding pattern of integrating willful copyright infringement into its business model. Google does so, as it did here, by advocating for fair use exceptions so broad as to include its wholesale, verbatim copying of Oracle's declaring code and structure without a license. Google's flagrant disregard of original expression in order to make a larger profit—by taking without authority the works belonging to others—compromises any argument that its use is non-commercial, transformative, or in any sense "fair."

Accordingly, the Federal Circuit was correct in finding that the nature and purpose of Google's unlicensed use of Oracle's code and program organization was to create a commercial substitute in the form of Android. It is abundantly clear that this unauthorized substitution is not in the public interest. Here, Google's claim to be, "promoting software innovation" is just a code word for promoting *Google*'s interest in extracting higher profit margins out of the pockets of creators. Given that its interest in doing so is antithetical to incentives to create original works,

finding fair use would clearly not serve the constitutional and statutory purposes of copyright.

ARGUMENT

I. INDEPENDENT ARTISTS AND SONGWRITERS RELY ON COPYRIGHT PROTECTION AND CLEAR FAIR USE STANDARDS TO DEFEND THEMSELVES IN THE MARKET.

Copyright is of critical importance to independent creators and artists. It is not empty rhetoric to say that without the statutory and constitutional protections of copyright, professional creators could not earn their livings and simply would not produce new works, and the world would be poorer for it.[4] The reason is simple but profound: copyright protection allows for a vibrant creative environment in which artists can predictably recover the gains of their creative labors. *See* U.S. Const. Art. I, § 8, cl. 8; *see also Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558

[4] Songwriters have only just begun to recover from a generation of losses due to music piracy and expansive interpretations of copyright exceptions. *See* Nate Rau, *Musical Middle Class Collapses*, The Tennessean (Jan. 3, 2015) ("Since 2000, the number of full-time songwriters in Nashville has fallen by 80 percent.") available at https://www.tennessean.com/story/entertainment/music/2015/01/04/nashville-musical-middle-class-collapses-new-dylans/21236245/. The Copyright Royalty Judges have taken note of the need for higher statutory mechanical rates. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1957 (Feb. 5, 2019) ("[T]he Judges find that the evidence in this proceeding supports a conclusion that the…decline in songwriter income…has led to fewer songwriters.").

(1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."). Because Congress has codified this incentive structure through centuries of copyright legislation, independent artists and songwriters regularly rely on the exercise of their exclusive rights by creating, reproducing, distributing and publicly performing their works.

Importantly, these rights are not just abstractions. They tangibly alter the licensing negotiations vital to a modern creative ecosystem. An exclusive right to exploit a creative work (such as a musical composition or a sound recording) can be the only backstop against markets where the marginal cost to digitally create perfect copies of an original is nil. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005) (noting "digital distribution of copyrighted material threatens copyright holders as never before, because every copy is identical to the original [and] copying is easy"). These burdens do not fall solely on creators of sound recordings or musical compositions, but extend across copyrightable subject matter, including visual arts, motion pictures, and literary works such as novels or software. *See* 17 U.S.C. §§ 101, 102(a).

To be sure, independent creators may also benefit from uses that fall under the category of fair use. Fair use helps disseminate the artist's work to the larger culture, and increases the amplitude and quality of discourse within and surrounding the work—all without compromising the work's value. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (noting fair use must be analyzed "in light of the

purposes of copyright"); Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1107 (1990). ("[f]air use should be perceived . . . as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law."). It is therefore not surprising that a significant number of fair use cases arise in the music business. *See, e.g.*, *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994); *Estate of Smith v. Graham*, No. 19-28 (2d Cir. Feb. 3, 2020); *Capitol Records, LLC v. ReDigi Inc.*, No. 16-2321 (2d Cir. Dec. 12, 2018); *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310 (S.D.N.Y. 2008); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 632 F.2d 252 (2d Cir. 1980).

Yet these fair use benefits only accrue when the analysis is predictable, consistent, and respectful of the underlying existing copyright incentives for original creation. Under such market conditions, independent creators nearly always stand ready to license their works at a fair market rate to those who respect their rights. This is how fair use works effectively within the creative industries. On the other hand, the more amorphous and unreasonably expansive the analysis and application of the fair use doctrine, the harder it becomes to establish the value of the copyrighted work during licensing negotiations that are the lifeblood of the creative ecosystem.

In the modern music business, such licensing negotiations are intricate and delicate. The exclusive rights guaranteed by the U.S. Copyright Act have allowed independent songwriters, recording artists and

labels to contract with distributors such as Audiam, CD Baby, INgrooves, Merlin Network, The Orchard and TuneCore. These aggregators in turn sublicense collectively to interactive, on-demand digital delivery services like Amazon Music, Apple Music, Deezer, iTunes, Google Play Music, Pandora, and Spotify in return for royalties that the aggregators pay to their songwriter or artist licensees.[5]

SoundExchange, for example, administers the limited statutory performance license for noninteractive exploitations of sound recordings. *See* 17 U.S.C. § 114. Through this statutory scheme, SoundExchange oversees the statutory license of sound recordings used by many noninteractive services such as Pandora, SiriusXM, iHeart Radio and other Internet radio services as well as business establishments. Meanwhile, performing rights organizations like ASCAP, BMI, Global Music Rights and SESAC collectively license the public performance of the corresponding compositions.

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[5] *See, e.g.*, TuneCore, *How to Sell Your Music Online*, available at https://www.tunecore.com/sell-your-music-online (overview of TuneCore's commercial process which is representative in the industry). In some cases, aggregators also handle exploitations of the exclusive rights for physical distribution of compact disc and vinyl media. The biggest difference between independents licensing through aggregators and majors licensing directly is that majors typically receive multimillion dollar minimum guarantees and other benefits that are confidential but occasionally leak to the public. *See generally*, Michah Singleton, *This Was Sony Music's Contract With Spotify*, The Verge (May 19, 2015) available at https://www.theverge.com/2015/5/19/8621581/sony-music-spotify-contract ("Spotify paid Sony Music up to $42.5 million in advances.").

Artists and songwriters rely on this intricate market system of licensing that is entirely based on the exclusive rights of copyright owners and the traditionally reasonable application of the fair use doctrine. These market practices have, over the past two decades, undergone a metamorphosis, as new customs evolved in the digital age, emerging once again into a predictable licensing landscape.[6] The exclusive rights that independents enjoy as copyright owners allow them to compete with the licensing, distribution and marketing operations of major labels and music publishers—when those rights are respected.

And that is where Google's seemingly perpetual campaign for fair use expansion becomes a major hindrance in the equitable and efficient functioning of the marketplace.

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[6] Tim Ingham, *SoundExchange Paid Out $908 Million to Artists and Labels in 2019*, Music Business Worldwide (Jan. 27, 2020); *ASCAP Distributes a Record $1.1 Billion in Royalties*, Variety (May 1, 2019) available at https://variety.com/2019/music/news/ascap-distributes-a-record-1-1-billion-in-royalties-1203202183/#!; Mordor Intelligence, Music Publishing Market, Growth Trends and Forecast 2020-2025 (2020) ("The Music Publishing market was valued at USD 4813.9 million in 2019 and is expected to reach USD $7265.02 million by 2025, at a [Compound Annual Growth Rate] of 7.1% over the forecast period 2020 – 2025") available at https://www.mordorintelligence.com/industry-reports/music-publishing-market. *But see* a recent large study of 1,564 independent musicians sponsored by the City of Austin that documented 44% of respondents stated digital music sales "Contributes None" to their income. Titan Music Group LLC, *The Austin Music Census* 27 (Fig. 5) (June 1, 2015) available at https://www.austintexas.gov/sites/default/files/files/Austin_Music_Census_Interactive_PDF_53115.pdf.

Google interacts with the music industry in a variety of ways, but primarily through its YouTube video platform.[7] YouTube is by far the world's most popular music streaming service, with over 1.9 billion registered users as of June 2018. It is much, much larger than subscription-based services like Spotify (with 160 million users) or Apple Music (with 45 million users). According to the International Federation of the Phonographic Industry, nearly half of all streaming users consume music on YouTube. It is hard to be in the music business online and not do business with YouTube.[8]

And in turn, music is a large part of YouTube's business. As of Jan 2020, 93% of the most-watched videos were music videos." Kit Smith, *54 Fascinating and Incredible YouTube Statistics*, Brandwatch (Jan. 17, 2020) available at https://www.brandwatch.com/blog/youtube-stats/; "47% of time spent listening to on-demand music is on YouTube," *Music Consumer Insight Report*, International Federation of the Phonographic Industry (IFPI) at 13 (2018). This revenue accrues to Google's great benefit, with its

[7] YouTube is the second largest search platform and web site in the world as scored by search ranking service Alexa (second to the Google text search). Alexa, *The Top 500 Sites on the Web*, available at https://www.alexa.com/topsites accessed Feb. 14, 2020.

[8] Google's search engine is its own "content discovery" operation with links to infringing material at a mind-boggling scale. Google's Transparency Report shows the company has received over four billion DMCA takedown notices for infringing material in Google search alone. See Content Delistings Due to Copyright, Google Transparency Report available at https://transparencyreport.google.com/copyright/overview.

parent company Alphabet reporting more than $15 billion in revenue from YouTube last year alone.[9]

Unfortunately, despite YouTube's market success, revenue does not proportionately flow back to copyright owners. In the aggregate, advertising-supported free streaming services (of which YouTube is by far the largest) contributed one-third of all streams in 2018, but only 8% of total revenue. *See* Recording Industry Association of America, RIAA *2018 Year End Music Revenue Report* (Feb. 2019). YouTube's royalty rates are consistently lowest among the top digital music services.[10]

In fairness, Google does contract with aggregators representing independents to collect YouTube royalties, such as Audiam.

However, in Amici's experience, YouTube is the primary music service that actually incorporates an ad hoc and arbitrary exploitation of copyright safe harbors and exceptions like fair use as a part of its largely advertising-supported business model which is grounded substantially on "user-generated content" or "UGC."

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[9] *See* Rob Copeland, *Google Parent Debuts YouTube, Cloud Results, Reports Weak Earnings*, Wall Street J. (Feb. 3, 2020) available at https://www.wsj.com/articles/google-parent-posts-disappointing-earnings-but-discloses-new-youtube-cloud-details-11580765421

[10] Patrick Wagner, *Music Streaming: Who Pays Best?* Statistica (April 3, 2018) available at https://www.statista.com/chart/13407/music-streaming_-who-pays-best/ (YouTube's average per-stream rate is estimated at $0.00074.)

Therefore, YouTube is incentivized to unfairly attempt over and again to utilize narrow, statutory exceptions to copyright protection, including the fair use doctrine, on a seemingly ad hoc and extremely expansive basis to undermine the very protections that creators rely on. This unpredictable fiat guides YouTube's partners toward monetizing their UGC—which generates a reward of revenue that YouTube shares with the partner.[11] Google's exploitation of fair use as a business significantly increases the transaction cost of dealing with YouTube beyond what independents like Amici can reasonably afford. It sure costs a lot of money to give things away for free.

This is particularly true since independents cannot credibly use litigation as leverage[12] against a

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[11] See YouTube Help, *YouTube Partner Earnings Overview* available at https://support.google.com/youtube/answer/72902?hl=en ("The YouTube Partner Program lets creators monetize their content on YouTube. Creators can earn money from advertisements served on their videos and from YouTube Premium subscribers watching their content.")

[12] This disparity may be ameliorated if a copyright small claims tribunal comes into effect such as in the CASE Act. As of this writing, that legislation has passed the House of Representatives as the Copyright Alternative in Small Claims Enforcement Act (H.R. 2426, S. 1273 116th Cong. 1st Sess.) and is currently pending in the Senate due to a legislative hold placed on the Senate bill by Senator Wyden. *See, e.g.,* Amer. Bar Assn., Intellectual Property Law Section Litigation Section, *Report to the House of Delegates, Resolution 110A* (2019) at 1 (supporting a Copyright Small Claims Program). ("Copyright owners with small infringement claims essentially have a right without a remedy. The cost of bringing a federal lawsuit significantly outstrips the value of their claims, and they cannot resort to state courts, since they can pursue

commercial giant. Examples of these costs include engaging services to identify infringements and send takedown notices under the Digital Millennium Copyright Act (hereinafter DMCA) for infringing links in search or on YouTube,[13] or analyzing fair use claims in counternotifications. *See* 17 U.S.C. §§ 512(c)(1)(C), 512(g). Nor are these costs common across other ad-supported digital music services. For example, Amici do not bear these high transaction costs with other ad-supported digital music services such Spotify's free version.

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copyright claims only in federal court. So they must endure infringements of their work.").

[13] *See, e.g.,* Kerry Muzzey, [YouTube Delay Tactics with DMCA Notices], Twitter (Feb. 13, 2020) available at https://twitter.com/kerrymuzzey/status/1228128311181578240 (Film composer with Content ID account notes "I have a takedown pending against a heavily-monetized YouTube channel w/a music asset that's been fine & in use for 7 yrs & 6 days. Suddenly today, in making this takedown, YT decides "there's a problem w/my metadata on this piece." There's no problem w/my metadata tho. This is the exact same delay tactic they threw in my way every single time I applied takedowns against broadcast networks w/monetized YT channels….And I attached a copy of my copyright registration as proof that it's just fine."); Zoë Keating, [Content ID secret rules], Twitter (Feb. 6. 2020) available at https://twitter.com/zoecello/status/1225497449269284864 (Independent artist with Content ID account states "[YouTube's Content ID] doesn't find every video, or maybe it does but then it has selective, secret rules about what it ultimately claims for me.").

It appears to Amici that Google's business model, both with YouTube and with its verbatim copying in Android, are prime examples of what one of Google's amici has repeatedly proclaimed to be the "fair use industries."[14]

Amici—like most creators—do not think of fair use as the basis for an "industry" whose "rights" can be asserted separately from authorship furthered by reliable rules of copyright protection and narrow exceptions under individualized, special circumstances. If fair use were an "industry," Amici would be rendered into both the unlicensed input and the royalty-free output of that economic sector, destroying the market balance that has developed under copyright regimes over a period of centuries. Rather, fair use is a statutory defense that permits creators to use copyrighted materials for well-defined and generally noncommercial or noncompeting purposes. Without copyright, of course, *there is no fair use*. At best, the notion of "fair use industries" and its protection is a non-sequitur. At worst, it is a destroyer of markets and eventually of national cultures.[15]

In short, the "fair use industries" spin is Google's attempt to invent cover for its extremely predatory market practices against creators. Amici are concerned

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[14] *See, e.g.*, Computer & Communications Industry Association, *Fair Use In The Economy: Economic Contribution of Industries Relying on Fair Use* (2017), available at https://www.ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf.

[15] *See generally*, Jean-Noël Jeanneney, *Google and the Myth of Universal Knowledge: A View from Europe* (2007).

that "fair use industries" are merely those markets in which Google's monopoly power permits it to simply ignore the copyright interests of other market actors (including and especially independent creators) and call its conduct fair use, safe in the knowledge that challenging Google in court is a nonstarter for most independents. This spin is bolstered through funding academic research[16] as well as outright lobbying and strategic litigation[17] that consistently weakens

[16] *See, e.g.,* "Google pledges $2 million to support [Stanford] Law School center" Stanford Report (December 6, 2006) available at https://news.stanford.edu/news/2006/december6/google-120606.html (Google funds Stanford Center for Internet and Society); Schedule B, 2008 Form 990 Creative Commons Corporation disclosing Google, Inc. contribution of $1,500,000 available at https://web.archive.org/web/20160208090558/http://www.ibiblio.org/cccr/docs/990B-2008.pdf; David Dayen, *Google's insidious shadow lobbying: How the Internet giant is bankrolling friendly academics—and skirting federal investigations*, Salon (Nov. 15, 2015) available at https://www.salon.com/test/2015/11/24/googles_insidious_shadow_lobbying_how_the_internet_giant_is_bankrolling_friendly_academics_and_skirting_federal_investigations/ ("From the beginning of the FTC investigation through the end of 2013, Google gave George Mason University's Law and Economics Center (LEC) $762,000 in donations, confirmed by cancelled checks obtained in a public records request. In exchange, the LEC issued numerous studies supporting Google's position that they committed no legal violations, and hosted conferences on the same issues where Google representatives suggested speakers and invitees.").

[17] *See, e.g.,* Roger Parloff, *Google and Facebook's New Tactic in the Tech Wars*, Fortune (July 30, 2012) available at https://fortune.com/2012/07/30/google-and-facebooks-new-tactic-in-the-tech-wars/ ("If the Electronic Frontier Foundation, the nation's preeminent digital rights nonprofit, had disclosed last year that it received a cool $1 million [cy pres] gift from Google — about 17% of its total revenue — some eyebrows might have been raised.").

copyright and undermines creators. Even Google's amici in this appeal include individuals paid by or otherwise associated with Google. *See* Br. of 83 Computer Scientists at A1 n.1.

In fact, Google reportedly said as much to former Prime Minister David Cameron when lobbying him in 2011 to amend UK copyright laws to remove "barriers to new internet-based business models" raised by the "costs of obtaining permissions from existing rights-holders." Adam Sherwin, *David Cameron's "Google-Model" Vision for Copyright Under Fire*, The Guardian (March 14, 2011) ("[Prime Minister Cameron's announcement] was greeted with unalloyed delight at Google's California HQ—and left the music industry, ravaged by web piracy, with that all too familiar sinking feeling.").

Of course, Google's responses are essentially the same each time—as they are here. Google wields a variety of weaponized copyright exceptions on top of rhetoric that is both deceptively public-spirited (letting Google win is "promoting innovation") and ominous (impeding Google would "break the internet"). Google further seeks to justify these exceptions by trying to hide behind small players.[18] It engages in astroturfing

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[18] Several years ago, the Copyright Office held a roundtable considering uses of "orphan works" (works of unknown provenance with likely infrequent and de minimis uses). Google's representative laid its cards on the table, stating, "I would encourage the Copyright Office to consider not just the very, very small scale, the one user who wants to make use of the work, but also *the very, very large scale and talking in the millions of works."* Copyright Office, *Orphan Works Roundtable*, at 21 (July 26, 2005) (statement of Alexander Macgillivray of Google) (emphasis added),

tactics to give the impression that it has more public support than it does.[19]

All of this is on display in Google's brief and its many amicus briefs. *See, e.g.*, Pet. Br. 44 ("Android is an open source initiative that benefits hundreds of device manufacturers, millions of developers, and more than a billion consumers around the world."), 45 (Android "enabled Java developers to unleash their creativity" by using Google's platform), 49 ("Android benefitted Oracle"); 50 (finding against Google "would disrupt the ingoing development of modern, interoperable computer software").

II. GOOGLE'S USE IS CLEARLY COMMERCIAL.

Against this backdrop, Amici agree wholeheartedly with the Federal Circuit that "the fact that Android is free of charge does not make Google's use of the Java API packages noncommercial." *Oracle Am., Inc. v. Google, LLC*, 886 F.3d 1179, 1197 (Fed. Cir. 2018)

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available at https://www.copyright.gov/orphan/transcript/0726LOC.PDF.

[19] *See* Matthew Moore, *Google Funds Website the Spams for its Causes*, The Times of London (August 6, 2018) ("Google is helping to fund a website that encourages people to spam politicians and newspapers with automated messages backing its policy goals[,] intended to amplify the extent of public support for policies that benefit Silicon Valley[.]"); Former Member of the European Parliament Helga Truepel tweeted about her experience in the European Copyright Directive that "[c]opyright lawyers of @Facebook and @Google told me last September in #SiliconValley that they will interfere in European lawmaking. And they did." TWITTER (Feb. 19, 2019) available at https://twitter.com/Helga Truepel/status/1098071632273301505.

("*Oracle II*"). In arriving at this conclusion, the Federal Circuit cited evidence that Google generated over $42 billion from Android through advertising. *Id.* at 1187, 1197.

Google concedes that its creation of Android was "a commercial endeavor," but argues more amorphously that its copying of Oracle's code and organization served the noncommercial purpose of "promoting software innovation." Pet. Br. at 43-44. Likewise, Google's amici argue that because Android was offered to consumers for free, its copyright cannot be commercial. *See* Copyright Scholars Br. At 12.

Yet contrary to the views of Google's amici, the Federal Circuit properly found that Google's use was commercial *and* properly weighed such a commerciality finding in the fair use inquiry. Just because Google did not *sell* Android to consumers does not mean its copying did constitute *commercial* use. In fact, the $42 billion figure cited by the Federal Circuit is likely only the tip of the iceberg.

A. Google's Market Dominance Lowers the "Customary Price" of Copyrighted Works.

As this Court stated in *Harper & Row*, whether a use is commercial "is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying *the customary price*." 471 U.S. at 562 (emphasis added). In other words, a commercial use is found where a defendant is "[g]iving customers for free something they would ordinarily have to buy."

Oracle II, 886 F.3d at 1197 (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001)).

The Federal Circuit is in accord with the other Courts of Appeals that have considered this proposition. *See, e.g.*, *Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 61 (2d Cir. 2012) ("'Profit,' in this context, is thus not limited simply to dollars and coins; instead, it encompasses other non-monetary calculable benefits or advantages."); *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (factor one disfavored use where professor's benefit in academic prestige and recognition was "ill-measured in dollars"); *A&M Records*, 239 F.3d at 1015 ("Direct economic benefit is not required to demonstrate a commercial use."); *see generally* Nimmer on Copyright 13.05 ("Commercial uses' are extremely broad.").

Here, there should be no question that the purpose of offering a mobile platform was commercial in nature: Google simply wanted to maintain its ad sales dominance. *See Oracle II*, 886 F.3d at 1210.

One thing that content creators have grown to understand is that Google is not a tech company—it is an advertising company. When one sees this, all is revealed. *See* Jake Swearingen, *Can Google Be More Than an Advertising Company?* New York Magazine (Feb. 5, 2019) ("Of the $39 billion [Google's parent Alphabet] brought in [during Q4 2018], $32.6 billion of it was in advertising revenue — that's 83 percent of its total revenue."). Google has become enormously

successful, though not always transparently.[20] Moreover, Google dominates the market for online advertising, with disturbing implications for privacy.[21]

As is well-known by now, Google extracts value from its users through selling advertising on works that Google makes available at no charge to the user, and through scraping user data in the background that Google then adds to its ballooning behavioral knowledge database through highly complex user profiling.[22] Google extracts this value by selling targeted advertising, often in connection with verbatim copies of works generally offered for free to users on

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[20] *See* Therese Poletti, *The Market Says Alphabet Is Worth $1 Trillion, But Figuring Out Google's Real Value is Tricky*, MarketWatch (Jan. 18, 2020) ("Even Google's most well-known business outside of its core search engine, YouTube, has never had its financial performance detailed by the company, even after the Securities and Exchange Commission asked for it.").

[21] *See* Public Citizen, *Mission Creepy*, at 1 (Nov. 2014) ("Google may possess more information about more people than any entity in the history of the world."), available at https://www.citizen.org/wp-content/uploads/google-political-spending-mission-creepy.pdf.

[22] *See* Jeff Gould, *The Natural History of Gmail Data Mining*, Medium (June 24, 2014), available at https://medium.com/@jeffgould/the-natural-history-of-gmail-data-mining-be115d196b10 (noting internal Google documents discussing use of Gmail to scrape user data in the background and classify users into "millions of buckets").

YouTube.[23] There are untold riches in running the internet of other people's things.

The reason is this: free is critical to Google's model, which depends on the *en masse* exploitation of copyrighted content. This business model is the sort that this Court has analyzed as commercial:

> [Defendants] make money by selling advertising space, by directing ads to the screens of computers employing their software. As the record shows, the more the software is used, the more ads are sent out and the greater the advertising revenue becomes. Since the extent of the software's use determines the gain to the distributors, the commercial sense of their enterprise turns on high-volume use, which the record shows is infringing.

See Grokster, 545 U.S. at 940. Likewise, Google's business model enables staggering profits with little to no direct commercial transactions between it and the end-user, particularly on YouTube. *See* Jason

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[23] Artists and songwriters have no control over Google's advertising practices, such as using music as a honeypot to illegally target children. *See, e.g.,* Press Release, *Google and YouTube Will Pay Record $170 Million for Alleged Violations of Children's Privacy Law*, Federal Trade Commission (Sept. 4, 2019) available at https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations ("'YouTube touted its popularity with children to prospective corporate clients,' said FTC Chairman Joe Simons. 'Yet when it came to complying with COPPA, the company refused to acknowledge that portions of its platform were clearly directed to kids. There's no excuse for YouTube's violations of the law.'").

Fitzpatrick, *If You're Not Paying for It; You're the Product*, Lifehacker (Nov. 23, 2010).

Google's evangelists have even coined a term to describe such takings: "permissionless innovation." *See* Adam Thierer and The Mercatus Center, *Permissionless Innovation and Public Policy: A 10 Point Program* at 12 (2016). Vinton G. Cerf, *Keep the Internet Open*, N.Y. Times (May 24, 2012) https://www.nytimes.com/2012/05/25/opinion/keep-the-internet-open.html.

Yet "permissionless innovation" is just another term for what polite creators call the underpinning of the infamous "value gap" currently plaguing the global community of music creators and artists. In fact, the disparity between artists' royalties and Google's enormous ad-based music distribution profits off of their music has become its own market phenomenon[24]

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[24] Songwriter Sir Paul McCartney defined the "value gap" as "that gulf between the value [platforms like Google] derive from music and the value they pay creators." Sir Paul McCartney, *An Open Letter to the European Parliament*, IFPI (July 3, 2018), available at https://ifpi.org/downloads/European_Parliament_Support_Letter_July2018.pdf; *see also* Debbie Harry, *Musicians Like Me Need to Fight Against the Giants of YouTube and Google*, The Guardian (Mar. 22, 2019) available at https://www.theguardian.com/commentisfree/2019/mar/22/musician-shocked-opposition-eu-copyright-law-youtube-debbie-harry-blondie; International Federation of the Phonographic Industries, *Fixing the Value Gap: The European Copyright Directive* (2016), available at https://ifpi.org/value_gap.php (landing page for campaigners against value gap); Letter of 1600 Artists and Songwriters, *Securing a sustainable future for the European music sector* (June 29, 2016) available at https://ifpi.org/downloads/Recording_Artists_calling_for_a_Solution_to_the_Value_Gap_Sept2016.pdf ("This is a pivotal moment for music.[]But the future is

and largely led to the adoption of the European Copyright Directive in 2019[25] which seeks to address the devastating value gap by requiring Google to operate on a more level playing field for creators.

In order to achieve and maintain permissionless innovation in the United States, accused infringers in contrast continue to lean on burden-shifting regimes like the DMCA safe harbors to impose the costs of policing infringement onto copyright owners while giving Google leverage in licensing negotiations.

From a copyright perspective, permissionless innovation relies on a system of risk shifting safe harbors and forces artists into an unsustainable game of whack-a-mole to which Google's amorphous interpretation of fair use is tightly bound.

Google leverages this commercial windfall into exerting dominance at scale.[26] For example, while

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jeopardised by a substantial "value gap" caused by user upload services such as Google's YouTube that are unfairly siphoning value away from the music community and its artists and songwriters.")

[25] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market (amending Directives 96/9/EC and 2001/29/EC), 62 Off. J. Euro. Union. L130 (May 17, 2019).

[26] Google uses the tactic against major labels as well as independents. *See* Jordan Kahn, *Major record labels again complain of unfair YouTube deals as contracts set to expire*, 9to5Google (April 11, 2016) available at https://9to5google.com/2016/04/11/record-labels-youtube-riaa-royalities-complaint/ (quoting then RIAA head Cary Sherman: 'The way the [Google] negotiation goes is something like this: 'Look. This is all we can afford to pay you,' YouTube says. 'We hope that you'll find that

Google makes much of the purported (and unsubstantiated) "lock in" effect that would result from Oracle's vindication of its copyrights, *see* Pet. Br. 40, Google itself locks in creators to coerce their agreement to commercial deals with YouTube.[27] For example and as further discussed below, contracting with YouTube's subscription service was a condition of access to YouTube's infamous Content ID system[28] a linkage that continues to draw scrutiny.[29]

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reasonable. But that's the best we can do. And if you don't want to give us a license, okay. You know that your music is still going to be up on the service anyway. So send us notices, and we'll take 'em down as fast we can, and we know they'll keep coming back up.'").

[27] *Google reserves YouTube DRM for partners only*, Reuters (Feb. 19, 2007) https://www.alphr.com/news/internet/105118/google-reserves-youtube-drm-for-partners-only.

[28] See generally YouTube, *How Content ID Works* available at https://support.google.com/youtube/answer/2797370?hl=en-GB ("YouTube only grants Content ID to copyright owners who meet specific criteria. To be approved, they must own exclusive rights to a substantial body of original material that is frequently uploaded by the YouTube creator community…. If accepted to use Content ID, copyright owners will be required to complete an agreement explicitly stating that only content with exclusive rights can be used as references.").

[29] Google's practices with Content ID have drawn the attention of Congress. See Letter to Google CEO Sundar Pichai and YouTube CEO Susan Wojcicki from Senators Thom Tillis, Christopher Coons, Diane Feinstein and Marsha Blackburn and Representatives Jerrold Nadler, Doug Collins, Ben Cline and Martha Roby (February 6, 2020) available at https://musictechpolicy.files.wordpress.com/2020/02/tilis-content-id-letter.pdf ("[We have heard] examples of creators whom you seemed to agree were wrongly denied access to Content ID…Have you considered making Content ID more widely available and publishing the eligibility…criteria to be approved to use Content ID?")

Any revenue that copyright owners receive, then, must price in the transaction costs of dealing with Google's unpredictable policies. The aggregate revenue from Google after deducting transaction costs is a long way from a "customary price."

B. Google Benefits Commercially from Weaker Copyright Protection.

Amici, as creators in the digital age, are largely beholden to the whims of distributors. As romantic the notion is of solitary artists laboring over their works, the fact remains that they will ultimately need to distribute their creative expression. That means going through Google far more often than not.

Artists like Amici have a tense relationship with Google and its subsidiaries. On the one hand, Google controls access to the market directly or indirectly. On the other hand, Google has consistently abused or outright ignored copyright when it comes to interactions with creators and their intellectual property.

For example, when YouTube rolled out its subscription service, it reportedly warned independent artists and labels that if they refused YouTube's licensing terms, their music would be blocked on YouTube's free service, and YouTube would keep any advertising revenue. Ben Sisario, *Independent Music Labels Are in a Battle with YouTube*, N.Y. Times (May 24, 2014) https://www.nytimes.com/2014/05/24/

business/media/independent-music-labels-are-in-a-battle-with-youtube.html.[30]

In Amici's experience, Google has a long history of leveraging copyright exceptions for its enormous profit at creators' expense. Through YouTube, Google profits directly from verbatim copies of Amici's own works. These copies are often unauthorized, unlicensed, and severely undermonetized. *See* Jonathan Taplin, *Do You Love Music? Silicon Valley Doesn't*, L.A. Times (May 20, 2016).

Google is able to artificially lower the floor for the market for music and other copyrighted works by strategically leveraging a variety of copyright exceptions and loopholes across all of its platforms, particularly YouTube and search.

As discussed above, in order to maximize user engagement with its ads, Google needs a constant influx of creative content. Copyright is treated as an imposition, and Google avoids liability through an

[30] *See* Zoë Keating, *What Should I Do About YouTube?* available at https://zoekeating.tumblr.com/post/108898194009/what-should-i-do-about-youtube ("My Google Youtube rep contacted me the other day. They were nice and took time to explain everything clearly to me, but the message was firm: I have to decide. I need to sign on to the new Youtube music services agreement or I will have my [ad supported] Youtube channel blocked."); Kevin Erickson, *Zoë Keating's YouTube Dilemma*, Future of Music Blog (Jan. 29, 2015) available at https://futureofmusic.org/blog/2015/01/29/zoë-keatings-youtube-dilemma-what-you-need-know ("The terms offered [to Zoë Keating] by YouTube aren't particularly surprising. That's because they seem to be essentially the same as the terms offered to independent labels, which spurred outcry from indie trade groups including WIN (World Independent Network) and inspired protests outside Google offices.").

abuse of exceptions such as the safe harbor provisions in the Digital Millennium Copyright Act. *See* 17 U.S.C. § 512(a)–(d). Google frequently argues that these provisions immunize Google from liability for infringing content, while also making it very easy for Google to restore content with the check of a box.[31]

Google has cobbled together a system of copyright "strikes" based on DMCA notices received from copyright owners against infringing YouTube channels.[32] With sufficient strikes, YouTube blocks public access to the channel. The channel operator, however, can easily restore content by filing a counter-notification with YouTube often attesting without firm legal grounds to a good faith belief that their unauthorized use of the material is non-infringing. Such an assertion frequently mimics Google's general assertions that the fair use doctrine is malleable enough to accommodate any use no matter how damaging, non-transformative, commercially based or unnecessarily broad. *See* 17 U.S.C. § 512(g)(3)(C). Assuming the copyright owner does not seek relief in court—and very few do because of the prohibitive costs

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[31] A recent review of Google's own Transparency Report shows the company has received over 4 billion DMCA takedown notices. Google Transparency Report https://transparencyreport.google.com/copyright/overview.

[32] *See generally* YouTube Help, *Copyright Strikes Basics*, available at https://support.google.com/youtube/answer/2814000?hl=en ("Submit a counter notification: If your video was mistakenly removed because it was misidentified as infringing, *or qualifies as a potential fair use*, you may wish to submit a counter notification." (emphasis added).).

and time required—then YouTube restores the content, and Google has another video to monetize.

Thus, assertions of fair use (real or imagined) play a critical role in this scheme, and therefore ultimately Google's advertising inventory. YouTube's counter-notification webform, in fact, arguably encourages a channel operator to claim a good-faith belief that its infringing video was fair use under the broadest of circumstances. *See Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015).

These channel operators are rarely represented by counsel, meaning their claims of fair use are more folk wisdom and internet legend than law. Five-time Grammy Award winner and independent composer and band leader Maria Schneider gave an example of this culture in comments to the Copyright Office:

> As just one small example, just put in the YouTube "search" bar the phrases "fair use" and "full CD." There are literally countless whole albums digitally uploaded by users who state that it is "fair use" (which it obviously isn't). YouTube knows there is infringement of epic proportions broadly across its platform, and . . . certainly makes it possible, and easier, for infringement to occur.[33]

Coupled with its porous repeat infringer policy, YouTube has leveraged counternotifications into a broad-based fair use business strategy—truly an

[33] Comments of Maria Schneider, Study on the Moral Rights of Attribution and Integrity, U.S. Copyright Office, at 6 (2017).

attempt to fashion its non-existent "fair use industries" entirely out of whole cloth.

Google overamplifies fair use in other ways. For example, since 2015, YouTube has sponsored an initiative to subsidize legal fees for certain fair use cases that it decides are "some of the best examples of fair use on YouTube by agreeing to defend them in court if necessary."[34] YouTube announced that it intended to "indemnify creators whose fair use videos have been subject to takedown notices for up to $1 million of legal costs in the event the takedown results in a lawsuit for copyright infringement."[35] Google tells us "[they] believe even the small number of videos [Google] are able to protect will make a positive impact on the entire YouTube ecosystem, ensuring YouTube remains a place where creativity and expression can be rewarded."[36]

The promise of Google's million-dollar fair use indemnity promotion effectively provides a faux license against copyright liability without the consent of the copyright owner, and purports to protect YouTube partners for fair use cases that Google judges worthy, i.e., cases that promote Google's private interests in protecting and expanding YouTube's advertising

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[34] Fred Von Lohmann, *A Step Toward Protecting Fair Use on YouTube*, Google Policy Blog (Nov. 19, 2015) available at https://publicpolicy.googleblog.com/2015/11/a-step-toward-protecting-fair-use-on.html?m=1

[35] *YouTube's Fair Use Protection*, YouTube About, *available at* https://www.youtube.com/about/copyright/fair-use/#yt-copyright-protection.

[36] *A Step Toward Protecting Fair Use on YouTube* supra.

inventory. It is unclear which, if any, cases Google or YouTube have taken on under this indemnity or what the criteria would be because Google does not disclose when or if they get involved. One can easily discern through market behavior, however, that the threat alone more than satisfies Google's imputed aims to dissuade creators from even attempting to enforce their rights.

Moreover, Amici believe that Google's fair use expansion campaigns are designed to serve as a honeypot for Google's data scraping business model that feeds its outsized profits from ads. Google likewise seems to promote expansion of the fair use doctrine as way to easily keep more videos on YouTube, while providing material support to its partners that allows them to outlast any songwriter or artist in the game of whack-a-mole under its copyright strike policies. No one is giving creators a shadowy million-dollar fund to defend against the *misapplication* of fair use.

Amicus Mr. Lowery summed it up in his 2014 testimony to the House Judiciary Committee:

> I am not concerned with parody, commentary, criticism, documentary filmmakers, or research. These are legitimate fair use categories. I am concerned with the illegal copy that masquerades as fair use, but is really just a copy. This masquerade trivializes legitimate fair use categories and creates conflict where there need be none.

Scope of Fair Use at 22.

Unfortunately, Google manipulates fair use to extract value by monetizing verbatim copies to the great disadvantage of creators who can little afford to fight back against the multi-national, trillion dollar corporation, and usually do not.[37] Thus, independents are caught without leverage in cases that rarely get to court.[38]

The end result is that even where its use is "free," Google's interests are steadfastly commercial. Accordingly, the Federal Circuit was correct in finding that the nature and purpose of Google's use was entirely commercial in nature.

III. GOOGLE'S PRIVATE INTERESTS ARE NOT THE PUBLIC INTEREST.

The ultimate question in a fair use analysis is "whether, and how powerfully, a finding of fair use would serve or disserve the objectives of the copyright." Leval at 1110–1111; *see also Harper & Row*, 471 U.S. at 546 (noting purpose of copyright is to give creators "a fair return for their labors"). Google's only response

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[37] *See* Joint Supplemental Comments of the American Association Of Independent Music and Future Of Music Coalition In Response To Request For Empirical Research at 5-6, In the Matter of Section 512 Study, U.S. Copyright Office (Docket No. 2015-7) (noting that 77% of surveyed companies that did not remove their music from unauthorized services stated they lacked the resources to do so).

[38] *See, e.g.*, Kurt Sutter, *Kurt Sutter Slams Google, Argues for DMCA Update*, Rolling Stone (July 15, 2016) *available at* https://www.rollingstone.com/music/music-news/kurt-sutter-slams-google-argues-for-dmca-update-97834/; Eriq Gardner, *Irving Azoff Threatens to Yank 20,000 Songs From YouTube*, Hollywood Reporter (Nov. 12, 2014) *available at* https://www.hollywoodreporter.com/thr-esq/irving-azoff-threatens-yank-20000-748631.

to whether its use furthers the public interest—i.e., in promoting an effective system of copyright—is that allowing it to copy verbatim Oracle's declaring code and structure would be "promoting software innovation." Such verbatim copying is a "facile use of the scissors." *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass 1841) (Story, J.).

Yet what is good for Google is not synonymous with what is good for the public—no more than "[w]hat's good for General Bullmoose is good for the USA." Johnny Mercer and Gene De Paul, *Li'l Abner* (1956). In fact, a ruling for Google would be "promoting" software innovation only in that the purported "innovation" would be furthering Google's *private* interest—i.e., using works without permission or a license fee.

This case again appears to be the latest in Google's long-term strategy to use its market dominance and overwhelming commercial power to continually distort copyright exceptions, thereby artificially depressing the market price of copyrighted works.

Google's proposed outcome would be yet another distortion. Were Google to prevail here, Amici expect Google (and its proxies) to throw its full weight behind such a ruling, far beyond the confines of its text. This case would become another totemic faux license or safe harbor that Google could use as a cudgel against creators and copyright owners. Left unchecked, eventually the copyright distortions they seek—including in the case at bar—could nullify copyright, particularly for those who cannot afford to fight back or fear retaliation for doing so. Under the

Google anti-copyright regime, exceptions would devour the rules of protection in whole, digesting art and culture along with them.

CONCLUSION

Amici respectfully suggest that the Court should consider whether a decision in favor of Google would merely "unleash" yet another weapon for Google's private benefit, and whether Google's infringement of Oracle's declaring code and structure constitutes "simple piracy" for which the company should most certainly be held accountable.

This Court should affirm the decision of the Federal Circuit below.

Respectfully submitted,

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