

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* TEN CREATORS'
RIGHTS ORGANIZATIONS IN
SUPPORT OF RESPONDENT**

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INTEREST OF *AMICI CURIAE*¹

Amici comprise a group of organizations that represent authors, artists, and other creators across the spectrum of copyright disciplines. The ten creators' rights organizations have joined together for the first time as *amici* to address the important issues before the Court that have a significant bearing on their members' daily lives. Members of the *amici* rely on copyright law to protect their work and to maintain a robust licensing system that provides them with the financial ability to be able to continue to create for the public good. As such, *amici* have a strong interest in the proper application of the fair use doctrine and know that any ruling will affect all creators across all disciplines. Consistent with their missions of advocating policies that promote and preserve the value of copyright, and protect the rights of creators, the ten creators' rights organizations participate as *amici* in this case to help this Court understand how courts have applied the fair use analysis over the past twenty-five years since the Court's decision in *Campbell v. Acuff-Rose Music, Inc.* *Amici* also take

¹ Pursuant to Sup. Ct. R. 37.6, *amici curiae* states that no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. Only *amici curiae* made such monetary contributions. All parties have consented to the filing of this brief.

part to seek guidance from the Court on the application and balancing of the four fair use factors. *Amici* believe that Google's use of Oracle's Java SE software code was not fair and want to preserve the ability to license creative content across multiple platforms.²

The ten creators' rights organizations include:

American Photographic Artists, Inc. ("APA") is a leading non-profit organization run by, and for, professional photographers since 1981. Recognized for its broad industry reach, APA champions the rights of photographers and image-makers worldwide.

American Society of Journalists and Authors ("ASJA"), founded in 1948, is the nation's professional association of independent and entrepreneurial nonfiction writers. ASJA represents the interests of freelancers and promotes their rights to control and profit from the uses of their work wherever it appears.

American Society of Media Photographers, Inc. ("ASMP") represents thousands of members who create and own substantial numbers of copyrighted photographs, used by entities of all sizes. In its

² *Amici* do not address the first question before the Court regarding the copyrightability of Oracle's software code in this brief, but instead refer the Court to Oracle's brief on the merits.

seventy-five-year history, ASMP is committed to protecting the rights of photographers and promoting the craft of photography.

The Authors Guild, Inc. (the “Guild”) is the nation’s oldest and largest professional organization for all writers with approximately 10,000 members, writers of all forms of nonfiction and fiction. The Guild promotes the rights and professional interests of authors in various areas, including freedom of expression and copyright.

Digital Media Licensing Association (“DMLA”) represents the interests of digital licensing entities that offer, for license, millions of images, illustrations, film clips, and other content on behalf of thousands of individuals to editorial and commercial users. DMLA advocates to ensure copyright protection for content to ensure a fair licensing economy.

Graphic Artists Guild, Inc. advocates for graphic designers, illustrators, animators, cartoonists, comic artists, web designers, and production artists on best industry practices through webinars, e-news, resource articles, and meetups, and for the protection of their works through copyright.

National Press Photographers Association, the *Voice of Visual Journalists*, is a non-profit organization dedicated to the advancement of visual journalism and vigorously promotes the First

Amendment and intellectual property rights of journalists and freedom of the press in all its forms.

North American Nature Photography Association is a preeminent nature photography association that advocates for the rights of nature photographers.

Science Fiction and Fantasy Writers of America, Inc. is the national organization for professional authors of science fiction, fantasy, and related genres.

Western Writers of America Inc. promotes the literature of the American West and recognizes the best in Western writing with the Spur Award and the Western Writers Hall of Fame.

SUMMARY OF ARGUMENT

As a matter of law and policy, the Court should affirm the Federal Circuit’s decision and find that Google’s use of Oracle’s software code to create its Android mobile platform does not constitute fair use. The crux of the issue in dispute is whether Google may fairly reuse protected elements of Oracle’s Java SE code without paying a licensing fee. The Federal Circuit answered this question in the negative, after undertaking a thorough analysis of the fair use doctrine and assessing and balancing the factors in light of the purposes of copyright law, as Congress intended. *See Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1191 (Fed. Cir. 2018) (“Congress intended

§ 107 to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way and intended that courts continue the common-law tradition of fair use adjudication.” (internal citations and quotations omitted)). But there is much more at stake than a review of the Federal Circuit’s decision.

In addressing the Federal Circuit’s fair use analysis, this Court has the opportunity to clarify certain standards for the application of the fair use test set forth in *Campbell v. Acuff-Rose Music, Inc.* While fair use is intended to provide ample breathing room and prevent the rigid application of the copyright statute, *see Campbell*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)), today, the doctrine is hindered by uncertainty. Courts and copyright owners alike struggle to properly assess and balance the statutory factors. Some courts have expanded the notion of “transformative use,” case-by-case, in a game of telephone tag to include uses that traditionally would have required a license, resulting in a loss of important licensing income for creators and divesting them of a full return on their creative labors. At the same time, other courts have hewed more closely to traditional principles of fair use described in *Campbell*, resulting in inconsistent applications of the doctrine.

Specifically, courts have extended the meaning of “transformative use” far beyond the Court’s intended

construction of a “new expression, meaning, or purpose,” and found transformative use where there is merely a new audience, technology, or platform—areas that should be reserved for the copyright owner. As a leading copyright scholar observed, “transformative” is now a conclusory label that means “all things to all people.” See 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][1][b] (2019). At the same time, once some courts find an allegedly transformative use, the statutory factors are ignored or viewed in a manner that makes them automatically favor fair use. Further, some courts applying the transformative use test have seemingly ignored *Campbell’s* instructions to consider the impact on the value of the works if the challenged use was to become widespread and unrestricted.

Some *amici* for Google have proffered that the Court should limit its decision to the software context. The present *amici* disagree. They have seen first-hand how expansive fair use decisions—which approve a particular unlicensed use—are applied to uses well beyond the facts of the case. *Amici* support and regularly rely on robust fair use, but they have been devastated by overly expansive applications of fair use, particularly in areas where works would traditionally be subject to a license. *Amici* thus urge the Court to adopt an appropriate and balanced application of the doctrine—not to cabin its decision to software as fair use applies

equally to all works. Indeed, *Campbell* was a parody case about a rap song, but courts have applied the decision broadly to all types of uses. *Amici* believe that the Federal Circuit's articulation of fair use, and its application of the *de novo* standard, correctly applied the doctrine to the facts of this case and support the Court's adoption of its analysis.

Additionally, as a matter of law and policy, *amici* believe that judges are in a better position than juries to make fair use determinations. A jury trial requirement would not only overturn decades of established copyright law, but would also discourage small businesses and independent creators, who cannot afford the high costs of trial, from enforcing their rights against clear infringers.

ARGUMENT

I. THE SUPREME COURT SHOULD PROVIDE GUIDANCE ON THE APPLICATION OF THE STATUTORY FAIR USE FACTORS AND UPHOLD THE FEDERAL CIRCUIT'S DECISION

When Congress codified the judge-made doctrine in the Copyright Act of 1976, it intended for judges to continue the common-law tradition of adjudicating fair use on a case-by-case basis. *See* H.R. Rep. No. 94-1476, at 66, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679 (1975); S. Rep. No. 94-473, at 62 (1975). Since the Court's 1994 decision in *Campbell*, when the

Court last directly addressed fair use and adopted the transformative use test, that test has dominated fair use analyses and, oftentimes, overshadowed the statutory factors.

The Court in *Campbell* held that the court below had given inordinate weight to the commercial nature of a work and clarified that it is but one element in the first factor inquiry. Since the Court's decision in *Sony Corp. of America v. Universal City Studios, Inc.*, courts had relied too heavily on *Sony's* statement that commercial use is presumptively unfair. 464 U.S. 417, 449 (1984). *Campbell* reset the balance by ruling that a commercial use should carry no presumption against a fair use finding.

As “[t]he fair use pendulum has now swung too far away from its roots and purpose,” this case gives the Court the opportunity to step in and reset the doctrine so that it does not sweep in new forms of revenue, robbing creators of important new sources of revenue as traditional ones disappear. Mary Rasenberger & June Besek, *The Authors Guild v. Google: The Future of Fair Use?*, MLRC Bulletin, no. 2, 2014, at 54, 58.

If the copyright incentives are to continue working as our Founders intended, copyright owners should retain the ability to earn licensing income from new modes of distribution, new functionality,

and derivative works. The fundamental purpose of copyright, to promote science and the arts, is hindered when fair use is relied upon to immunize would-be infringers from paying for the use of creative expression. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) (“The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”); *Sony*, 464 U.S. at 450 (“The purpose of copyright is to create incentives for creative effort.”).

The Court’s guidance on these issues would confirm that fair use serves the underlying purposes of copyright by ensuring creators receive a fair return on their creation to foster creativity, rather than stifle it.

A. Courts Have Drastically Expanded the Fair Use Doctrine Since *Campbell*.

In *Campbell*, the Court emphasized that the statutory factors should not be treated in isolation but should instead be explored and weighed together in light of the purposes of copyright. 510 U.S. at 578. The Court also provided new guidance on the

first statutory factor, adopting Judge Pierre Leval’s analysis, which asked whether and to what extent the new work is transformative. *Id.* at 579; Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990). As Judge Leval conceived, determining whether, and to what extent, a use is “transformative” is a way of answering the question of how powerful or persuasive the justification for the use is, “because the court must weigh the strength of the secondary user’s justification against factors favoring the copyright owner.” Leval, *supra*.

Though the Court noted that transformative use is not necessary for a finding of fair use, courts have widely adopted the judicially created sub-factor. See Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 Lewis & Clark L. Rev. 715, 736 (2011) (providing empirical data about fair use decisions to show that the “fair use doctrine today is overwhelmingly dominated by the Leval-Campbell transformative use doctrine”); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. Pa. L. Rev. 549, 605 (2008) (undertaking an empirical study and finding that, in the opinions in which transformativeness played a role, “it exerted nearly dispositive force not simply on the outcome of factor one but on the overall outcome of the fair use test”). Some courts have gone a step further and deemed the transformative use test a required factor, see, e.g., *Caner v. Autry*, 16 F. Supp. 3d 689, 709 (W.D. Va. 2014); *Ascend Health Corp. v. Wells*,

No. 4:12-CV-00083-BR, 2013 WL 1010589, at *13 (E.D.N.C. Mar. 14, 2013).

While courts initially tracked the language of *Campbell* closely, *see, e.g., Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 141–46 (2d Cir. 1998), later decisions drastically expanded the meaning of “transformative,” resulting in broad fair use findings even where alterations to the original work were nominal or non-existent. For example, the Second Circuit, in the 2013 case *Cariou v. Prince*, determined that appropriation artist Richard Prince’s mildly derivative versions of twenty-five of Patrick Cariou’s images of Rastafarians were transformative because Prince had given the photographs new expression by employing new aesthetics. 714 F.3d 694, 706–08 (2d Cir. 2013).

The Second Circuit cited *Campbell* for this standard (*id.* at 707), plucking out the language “reasonably be perceived” from an observation about parody in which the Court stated, “[t]he threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived.” *Campbell*, 510 U.S. at 582. Instead of confining the “reasonably be perceived” standard to parody, per *Campbell*, the Second Circuit applied it broadly to any type of transformative use. *See Cariou*, 714 F.3d at 707 (“[W]e do not analyze satire or parody differently from any other transformative use.”). In doing so, the Second Circuit extended the

analysis of what is transformative beyond the question of whether there is a persuasive justification for the use, as originally intended. See Leval, *supra*.

Though not all courts have agreed with *Cariou*'s reasoning, see, e.g., *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (“We’re skeptical of *Cariou*’s approach, because asking exclusively whether something is “transformative” not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works.”), some courts have closely followed this expansive application of the transformative use test. For instance, recently, in the 2019 case *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, the Southern District evaluated whether Andy Warhol’s color-illustrated versions of a black-and-white photograph of the musician Prince constituted fair use. 382 F. Supp. 3d 312, 318–20, 325–26 (S.D.N.Y. 2019). Notably, Vanity Fair had paid a single license fee for Lynn Goldsmith’s photograph, which Warhol later used in a commissioned work for the magazine, without Goldsmith’s authorization. *Id.* at 318. But Warhol did not stop there, and continued to improperly make use of the photograph, creating a series of sixteen color-illustrated versions. *Id.* at 319–20.

In evaluating fair use, the Southern District, relying on the *Cariou* court’s analysis, determined

that the use was a transformative fair use, because Warhol's works "can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure." *Id.* at 326. Even though Warhol had merely added color to the photographs, the Court stretched the meaning of transformative to find fair use in a simple derivative work, negating the photographer's exclusive right to authorize derivative uses.

In another example of a strained interpretation of "transformative" involving minimal alterations to the underlying work, the Ninth Circuit, in *Seltzer v. Green Day, Inc.*, considered whether the rock band's use of an illustrator's drawing of a screaming, contorted face in the backdrop of a music video was transformative where the image was displayed in full with a red cross spray-painted over it. 725 F.3d 1170, 1173–74 (9th Cir. 2013). Even though the court recognized that the transformative use test is a "highly contentious topic," it nonetheless found that the spray-painted cross was sufficient to transform the underlying work. *Id.* at 1176–77. In reaching its decision, the Ninth Circuit compared the meaning of the song in the music video (about the hypocrisy of religion) with the message or meaning of the underlying image (which the court could not determine with certainty), finding that because the original work said nothing about religion, the use of the image in the backdrop conveyed "new information, new aesthetics, new insights and

understandings” that were plainly distinct from those of the original piece. *Id.* at 1177.

Other courts have similarly expanded the understanding of what is transformative, finding a different purpose where the context has changed. For instance, in *Swatch Group Management Services Ltd. v. Bloomberg L.P.*, the Second Circuit held that Bloomberg’s release of an earnings call, which Swatch made to its investors, to Bloomberg’s paid subscribers was transformative. 756 F.3d 73, 84–85 (2d Cir. 2014). The Second Circuit noted that courts often find transformative uses “by emphasizing the altered purpose or context of the work, as evidenced by surrounding commentary or criticism,” but despite its finding that Bloomberg provided no additional commentary or analysis, determined that Bloomberg’s release of the earnings call in full was transformative because its purpose was to publish factual information, while Swatch’s purpose was to withhold it. *Id.*

The *Swatch* decision is similar to *Kennedy v. Gish, Sherwood & Friends, Inc.*, in which a Missouri district court determined that the defendant’s use of a photographer’s images in advertising mockups and presentations was transformative because the defendant used the images in a new context to serve a different purpose, and was not simply superseding the photographer’s purpose. 143 F. Supp. 3d 898, 910–11 (E.D. Mo. 2015). There, the judge relied

heavily on *Cariou* and other cases that improperly expanded the meaning of transformative, concluding that the defendant’s use was “transformed” merely because it was placed in a new context. *Id.* Following the lead of the prior courts, the district court simply drew the broad conclusion that the work was “transformative,” doing little to explain its reasoning beyond a conclusory finding that the purposes were different. What the court failed to understand is that a work can be licensed for many purposes under copyright.

The decision by the district court in the case at bar offers another example of the expansive application of fair use. The district court found that Google’s selection and verbatim copying of some of Oracle’s Java API packages, combined with new implementing code and new methods, classes, and packages written by Google, constituted a fresh context giving new expression, meaning, or message to the duplicated code.” *Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA, 2016 WL 3181206, at *9 (N.D. Cal. June 8, 2016). The lower court based its transformative finding on the *context* of the use, noting that Oracle’s copyrighted work was designed and used for desktop and laptop computers, rather than smartphones. *See id.* By focusing on context and applying such a sweeping view of the transformative test, the district court disregarded the *Campbell* Court’s express formulation—that the new work must “add[] something new, with a further

purpose or different character, altering the first with new expression, meaning, or message.” *Campbell*, 510 U.S. at 579. The Federal Circuit later reversed the lower court’s decision, correctly concluding that Google’s use is not transformative because Google did not have a new, distinct purpose in using Oracle’s API packages, nor did it make any alteration to the expressive content or message of the underlying copyrighted material. *Oracle*, 886 F.3d at 1199–1201.

As evidenced by numerous lower court decisions, judges have distorted the meaning of transformativeness by expanding the test well beyond what the Court could have originally intended. See Pierre N. Leval, *Campbell As Fair Use Blueprint?*, 90 Wash. L. Rev. 597, 608 (2015) [hereinafter Leval, *Blueprint*] (discussing the ambiguity of “transformative” and stating that the term was “never intended as a full definition or explanation of fair use”). Notably, the *Campbell* Court introduced transformativeness specifically to explain why a parody was fair use. 510 U.S. at 579. The judicially created sub-factor, which is not included in the statutory text of Section 107, has now come to dominate fair use analyses, even though the Court made clear that transformativeness is but one aspect that courts may consider and is not a requirement for a fair use finding. See *id.*; *TCA Television Corp. v. McCollum*, 839 F.3d 168, 179 n.9

(2d Cir. 2016) (“Fair use is not limited to transformative works”).

Rather than continue to permit “transformative” to be applied so broadly that it means all new uses, the Court should rein in the test and provide additional guidance on the meaning of “transformative,” and rebalance fair use again, so that it provides sufficient breathing room for free expression.³ *See Golan v. Holder*, 565 U.S. 302, 327–28 (2012).

B. The Transformative Use Test Should Not Engulf the Statutory Factors.

In its provision of guidance on a narrower application of “transformative,” the Court should also emphasize the importance of balancing the first factor in context with the other fair use factors, along with a proper analysis of them. In recent years, once many courts have found a use to be transformative, they have viewed other factors only through this lens, including whether the use is commercial, and found the factors automatically weigh in favor of fair use. *See, e.g., Bouchat v. Baltimore Ravens Ltd. P’ship*, 737 F.3d 932, 941–43

³ In addition to resolving erroneous applications of the transformative use test, the Court should affirm the Federal Circuit’s holding with respect to its finding that, “while bad faith may weigh against fair use, a copyist’s good faith cannot weigh in favor of fair use.” *Oracle*, 886 F.3d at 1203.

(4th Cir. 2013), *as amended* (Jan. 14, 2014); *Cariou*, 714 F.3d at 708–10.

As the *Campbell* Court recognized, the statutory factors should not be treated in isolation but should instead be explored and weighed together in light of the purposes of copyright, with deference to the fourth factor as explained in *Harper & Row*. *See Campbell*, 510 U.S. at 578; *Harper & Row*, 471 U.S. at 566. While courts may generally recognize *Campbell*'s instruction to balance the fair use factors, in practice, the nature of the copyrighted work, and the amount and substantiality of the use, are often rendered meaningless as they are regarded as an afterthought of the transformative finding.

1. The Nature of the Copyrighted Work Is a Statutory Factor and Should Not Be Disregarded.

While the *Campbell* Court observed that the second factor was less important in parody cases, limiting its comment to parodies, *see* 510 U.S. at 586, over the years, courts have stretched this proposition to its extreme and routinely dismissed the second factor as having little relevance. *See, e.g., Leibovitz v. Paramount Pictures Corp.*, No. 94 CIV. 9144 (LAP), 2000 WL 1010830, at *4 (S.D.N.Y. July 21, 2000) (“It is well-established that the second factor—the nature of the copyrighted work—is not very important to the fair use analysis.”). Such a blanket exclusion of the second factor ignores the importance

of its inclusion in the statute, even in instances where it may play an important role.

In *Harper & Row*, for example, a case that was decided a mere decade before *Campbell*, the unpublished nature of the manuscript was a notable aspect of the fair use analysis. See 471 U.S. at 564. While some later cases similarly found that the unpublished nature of the work was significant in the fair use analysis, see, e.g., *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1177–78 (9th Cir. 2012) (finding that, where photographs were unpublished, the second factor outweighed defendant’s claim of fair use), others have not. See, e.g., *Swatch*, 756 F.3d at 87 (discussing whether a sound recording that was previously disseminated was statutorily “published,” but looking past the statutory definition and finding the second factor favored fair use).

The creative nature of the work should play an important role in most fair use analyses, as it is well-settled that highly creative forms of expression are entitled to stronger copyright protection. See *Campbell*, 510 U.S. at 586 (stating that creative expression “falls within the core of the copyright’s protective purposes”); accord *Oracle*, 886 F.3d at 1204; *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997). One might expect then that the second factor would weigh more heavily in analyses involving literary works,

photographs, artwork, and other works that are at the high-end of copyright protection.

However, that has not usually been the case, as courts in matters involving creative works have often glossed over this factor or found it to be neutral. *See, e.g., Estate of Smith v. Graham*, No. 19-28, 2020 WL 522013, at *2 (2d Cir. Feb. 3, 2020) (“We need not spend much time on the second factor”); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 98 (2d Cir. 2014) (finding that the works at issue were of “the type that the copyright laws value and seek to protect,” but that the factor was of limited usefulness because the works were used for a transformative purpose); *Bouchat*, 737 F.3d at 943 (“[W]hile Bouchat’s original drawing is a creative work, the NFL’s transformative use lessens the importance of the Flying B logo’s creativity. Consequently, this factor is largely neutral.”); *Andy Warhol Found.*, 382 F. Supp. 3d at 327 (finding the second factor to be of limited importance because the works were transformative and concluding that this factor favored neither party); *Faulkner Literary Rights, LLC v. Sony Pictures Classics Inc.*, 953 F. Supp. 2d 701, 709 (N.D. Miss. 2013) (noting that the novel is entitled to the core protections of copyright law, but deeming the second factor neutral).

To provide further guidance on the proper application of the fair use analysis, the Court should

take this opportunity to emphasize the importance of considering the second factor and to reiterate that all of the fair use factors matter and should be considered.

2. The Amount and Substantiality of the Use Should Not Be Swept Up in the Transformative Use Test or Reduced to a Mathematical Formula.

Though the amount and substantiality of the portion used in relation to the copyrighted work as a whole may relate to the first factor based on the user's justification, *see Campbell*, 510 U.S. at 586, in practice, the third factor has often been incorrectly downplayed or subsumed in the transformative test.

For example, numerous courts have held that this factor is neutral or does not weigh against fair use even though an *entire* image or book is used, focusing instead on the transformativeness of the use. *See, e.g., Authors Guild v. Google, Inc.*, 804 F.3d 202, 221 (2d Cir. 2015) (concluding that “not only is the copying of the totality of the original reasonably appropriate to Google's transformative purpose, it is literally necessary to achieve that purpose”); *HathiTrust*, 755 F.3d at 98 (“Because it was reasonably necessary for the HDL to make use of the entirety of the works in order to enable the full-text search function, we do not believe the copying was excessive.”); *Seltzer*, 725 F.3d at 1178–79 (concluding the use of the entire photograph “was necessary to

achieve Green Day’s ‘new expression, meaning or message’” (internal citation omitted)); *Kennedy*, 143 F. Supp. 3d at 911 (finding that copies of entire photographs weighed in favor of fair use because they provided advertisers “with the look and feel of a mocked-up ad”); *Dhillon v. Does 1-10*, No. C 13-01465 SI, 2014 WL 722592, at *5 (N.D. Cal. Feb. 25, 2014) (holding that it “would not have been feasible in these circumstances for the defendant to have copied less than the entire photo”).

In *Campbell*, the Court described the analysis of the third factor as taking no more than “necessary” for the purpose of the use. 510 U.S. at 589. The Court should clarify that the third factor should be evaluated in each instance, and that taking the *entire* work should weigh against fair use—which is not the same as saying taking an entire work is *never* fair use. The amount and substantiality of the use is simply one of the factors that should be considered among the others, even when a use is considered transformative.

Additionally, the Court should reiterate that the third factor is not a mathematical formula. For literary works in particular, courts are more likely to evaluate the amount and substantiality of the use in terms of percentages and consider whether the taking is no more than necessary for the transformative use. *See, e.g., de Fontbrune v. Wofsy*, 409 F. Supp. 3d 823, 842–43 (N.D. Cal. 2019)

(finding the third factor favored fair use where the defendants copied less than ten percent of the catalogue of photographs and there was no evidence that the copied photographs went to the heart of the catalogue), *appeal docketed*, Nos. 19-16913, 19-17024 (9th Cir. Oct. 11, 2019); *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1243 (N.D. Ga. 2012) (applying a 10 percent-or-one-chapter rule for the third fair use factor), *rev'd sub nom. Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014).

However, as the Federal Circuit aptly noted, the analysis of the third factor is not merely quantitative. *Oracle*, 886 F.3d at 1205. Though the proportion of the text copied should be considered in the context of the entire work, courts should not forget to thoroughly evaluate the *qualitative* significance of the portion used. Even if a relatively small amount is copied, where users have taken the qualitatively significant part of the copyrighted work, as in the case at bar, or the “heart” of the work as seen in *Harper & Row*, this consideration certainly weighs against fair use. *See Harper & Row*, 471 U.S. at 565 (finding that the quoted portions of manuscript were “among the most powerful passages in those chapters”); *Oracle*, 886 F.3d at 1207 (concluding that “no reasonable jury could conclude that what was copied was qualitatively insignificant, particularly when the

material copied was important to the creation of the Android platform”).

In line with the underlying purpose of fair use, the analysis of the third factor should not require a rigid application of the statute or merely ask the question of whether the use is “necessary” based on the transformative finding. *See Campbell*, 510 U.S. at 577 (citing H.R. Rep. No. 94-1476, at 66; S. Rep. No. 94-473, at 62); *id.* at 589 (analyzing the third factor and noting that “context is everything”). Taking a substantial part of a particular work, quantitatively or qualitatively, is justified only where the use is necessary to the transformative purpose, such as to “conjure up” a work in order to parody it. *Id.* at 573. But this cannot be justified if the particular work was not essential to the use in the first place.

For example, the Fourth Circuit in *Brammer v. Violent Hues Productions, LLC*, a case involving a website’s descriptive use of a photograph of the Adams Morgan neighborhood of Washington, D.C., considered what actions the secondary user might have taken instead of copying the plaintiff’s image to illustrate the website. 922 F.3d 255, 261, 268 (4th Cir. 2019). Rather than focus on the defendant’s choice to crop the top and bottom of the photograph, while maintaining the focal point of the image, the Fourth Circuit noted that the secondary user could have found a different image, such as one available

under a free license, in lieu of copying the image without authorization. *See id.* at 268.

It would be helpful for the Court to stress that a finding of transformativeness does not always permit the taking of an entire work without authorization if the particular work is non-essential to the purpose of the use and also emphasize the importance of examining the qualitative significance of the portion taken.

C. Courts Should Consider Effects on Existing and Potential Markets from Widespread and Unrestricted Use, Including the Impact a Fair Use Finding Would Have on Creators' Ability to License Divisible Rights.

As Congress directed, the analysis of the fourth factor should include “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). The *Campbell* Court interpreted this factor to require “courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.” 510 U.S. at 590 (quoting *Nimmer* § 13.05[A][4]).

In providing guidance on the fourth factor, the Court should reiterate its statement in *Campbell*—that courts must look to the effect on the current and potential markets *if the use becomes widespread and unrestricted*. Judges in many cases have failed to heed the Court’s instruction and have not explored potential markets, much less what will happen to the value of the work if the use becomes widespread and unrestricted. *See, e.g., NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 481–82 (2d Cir. 2004) (considering only whether the secondary use served as a market substitute and failing to consider potential markets); *Dhillon*, 2014 WL 722592, at *6 (refusing to explore potential markets where the plaintiff did not allege that she attempted to sell, or had plans to sell, the photograph).

Though Section 107 itself states that potential markets should be included in the analysis, several courts only looked at the effect on the existing market, which, in some instances, may be very narrow. For example, in *Hughes v. Benjamin*, the Southern District held that the fourth factor favored fair use because there was no danger that the secondary use would usurp the market for the original because the target audiences for the works were different (comparing conservatives to liberals). No. 17-CV-6493 (RJS), 2020 WL 528704, at *7 (S.D.N.Y. Feb. 3, 2020). Given the differences in the target audiences, the court determined that viewers would not abandon the copyright owner’s progressive

YouTube channel for a conservative channel, so there was no danger of the secondary user usurping the market. *Id.* Similarly, in *Hosseinzadeh v. Klein*, another Southern District judge employed a comparable analysis, finding that the secondary video would not serve as a market substitute because viewers would have a different experience watching the two videos. 276 F. Supp. 3d 34, 47 (S.D.N.Y. 2017). These decisions fail to consider potential or likely-to-be-developed markets.

Further, some courts have dismissed licensing harm outright because a license was not made available or the relative licensing amount was little-to-nothing. *See, e.g., Cambridge Univ. Press*, 769 F.3d 1232, 1278–79 (11th Cir. 2014) (finding that the plaintiffs’ choice not to enter a market indicated that the value of the market would be *de minimis* or zero); *Kennedy*, 143 F. Supp. 3d at 912 (finding that the plaintiff’s offer of a free license cut against market harm). Though there are instances in which the present monetary value of the licensing is minimal, this does not diminish the importance of licensing income, including future licensing opportunities, to creators. Many creators have seen their incomes decline in recent years, even as creators seek out different ways to receive a return for their creations.⁴ Broad fair use findings, which

⁴ *See, e.g., Six Takeaways from the Authors Guild 2018 Author Income Survey*, AuthorsGuild.org (Jan. 5, 2019),

do not properly take potential markets into account, further threaten creators' incomes by diverting the income that creators could be receiving through licensing to alleged fair users.

Without properly considering potential, likely to be developed markets, including markets for derivative uses, courts essentially restrict the ways by which copyright owners may later exploit their exclusive rights. This is antithetical to the purpose of copyright law, which grants creators the exclusive right to their writings for a limited time. *See* U.S. CONST. art. I, § 8, cl. 8; *Sony*, 464 U.S. at 429 (“[T]he limited grant . . . is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”).

While a creator's monopoly is not unlimited, as the Federal Circuit recognized, the copyright owner alone has the right to determine when, whether, and in what form to release his work during the life of the copyright. *Oracle*, 886 F.3d at 1208. This right may include whether to enter a new market or not,

https://www.authorsguild.org/industry-advocacy/six-takeaways-from-the-authors-guild-2018-authors-income-survey/#_ftnref1; U.S. Bureau of Labor Statistics, *Occupational Outlook Handbook: Photographers*, BLS.gov, <https://www.bls.gov/ooh/media-and-communication/photographers.htm#tab-1> (last modified Sept. 4, 2019).

or whether to license one of the copyright owner's exclusive rights or withhold it. Copyright law expressly recognizes the divisibility of copyrights, *see* 17 U.S.C. § 102, and it is important for copyright owners to license their rights separately, both to control how their work is used and to better monetize their creations.

With the increasingly fast pace of innovation and technological change, platforms are consistently changing and opening new avenues for copyright owners to exploit their works. Creators now create works that can be used, published, displayed, and distributed in a variety of different media. For example, an author that once licensed her literary work to a publisher, who published and distributed the work in print, may now separately license that work for use on a different platform—whether as an electronic book (or e-book) or as an audiobook. Similarly, a photographer who previously only licensed his work to traditional print publications, now has a vast new range of digital media outlets and platforms available for licensing. However, fair use findings that do not carefully consider potential markets usurp copyright owners' valuable rights by permitting the "fair user," who was able to get to the market faster, to gain a competitive advantage and exploit the copyright owner's creation without paying a customary fee.

This case presents a prime example of a secondary user taking advantage of fair use to circumvent a licensing model. At the heart of this dispute is whether Google may reuse protected portions of Oracle's Java SE libraries without paying a licensing fee (or agreeing to the public benefit terms of Oracle's free license). The Federal Circuit appropriately determined that Google's reuse is not fair. A finding otherwise, along with other expansive applications of the fair use doctrine, would only serve to reward would-be infringers who refuse to pay the licensing fee sought by the copyright owner, or comply with the owners' licensing terms, while seriously harming creators who are prevented from receiving a full return on their creative investment.

Though fair use should be adjudicated by judges on a case-by-case basis, *see* H.R. Rep. No. 94-1476, at 66; S. Rep. No. 94-473, at 62, often, if a court determines a use is "fair" and no licensing is required, the unlicensed use becomes the norm for uses well beyond the facts of the case, which can diminish a future licensing market or destroy it entirely. For this reason, it is important for courts to consider, as the *Campbell* Court directed, whether such uses, if they were to become unrestricted and widespread, would result in a substantially adverse impact on the potential market.

Courts have, at times, failed to heed the *Campbell* Court's explicit instruction. For example,

in *Cambridge University Press*, the Eleventh Circuit found that the district court’s “analysis under the fourth factor was correct” even though it failed to analyze the impact on existing and potential licensing revenue and books sales if all universities refused to pay license fees. 769 F.3d at 1278–79.

A potential market, of course, should not be limited to a market which the copyright owner intends to enter. As the Federal Circuit noted, “a market is a potential market even where the copyright owner has no immediate plans to enter it or is unsuccessful in doing so.” *Oracle*, 886 F.3d at 1210. The Second Circuit’s decision in *Fox News Network, LLC v. Tveyes, Inc.* provides a helpful example in which a court evaluated the success of the defendant’s business model, and resulting value of the market in the aggregate, to find that there was a “plausibly exploitable market” worth consideration under the fourth factor. 883 F.3d 169, 180 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 595 (2018). There, the Second Circuit concluded that it was “proper to consider whether TVEyes displaces potential Fox revenues when TVEyes allows its clients to watch Fox’s copyrighted content without Fox’s permission,” ultimately finding that such displacement does occur. *Id.*

The law recognizes copyright owners’ rights to exploit their copyrights as they see fit. Copyright owners should not be blocked from entering a

potential market whenever they so choose in the future, or deprived of future licensing opportunities, while a would-be infringer is permitted to make use of the copyright owner's creation without paying the customary fee. Rather, users should be encouraged to license work for new market opportunities and creators should be incentivized to create by being permitted to fairly monetize their creative expression during the life of the copyright. This includes the right to divide the exclusive rights and separately license same for use or distribution on different platforms.

D. Judges, Not Juries, Are Better Positioned to Make Fair Use Determinations.

Google's *amici* incorrectly argue that fair use is a question that should always go to the jury. *See generally* Br. Civ. Pro. ISO Pet.

The Court recognized in *Harper & Row*, that fair use is a mixed question of law and fact that can be decided by a district court. 471 U.S. at 560. Google's *amici* attempt to distinguish *Harper & Row*, but lower courts have widely and continuously read *Harper & Row* to decide fair use as a matter of law. *See, e.g., Seltzer*, 725 F.3d at 1175; *Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 59 (1st Cir. 2012); *Castle Rock Entm't v. Carol Publ'g Grp., Inc.*, 955 F. Supp. 260, 267, 272 (S.D.N.Y. 1997), *aff'd*, 150 F.3d 132 (2d Cir. 1998); *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149

F.3d 987, 993 (9th Cir. 1998).⁵ The argument made by Google’s *amici* would overturn decades of established copyright law that clearly states that fair use can be decided on summary judgment and, even in certain cases, motions to dismiss.

Moreover, the leading treatise on copyright law has stated that “[u]nder the modern view, in which fair use presents a mixed question of law and fact, to the extent that the parties dispute only ultimate conclusions to be drawn from an admitted set of facts, the court may resolve the fair use defense as a matter of law on summary judgment,” Nimmer, *supra*, § 12.10. This makes sense as the doctrine codified in Section 107 arose from years of fair use adjudication by judges, who developed the specific set of criteria that courts should consider in evaluating whether a particular use is fair. *See* H.R. Rep. No. 94-1476, at 65; S. Rep. No. 94-473, at 61. There are occasions in which a fact finder is needed to evaluate a specific fact in dispute underlying a fair use factor, but more often, the relevant facts are agreed upon or public knowledge, which allows the district judge to apply the statutory factors to the facts and weigh them in light of the underlying purposes of copyright law.

⁵ It is particularly remarkable that Google would advocate this position given that it routinely has requested that fair use be decided as a matter of law. *See, e.g., Google*, 804 F.3d at 202; *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

Contrary to claims by Google’s *amici*, juries are not “well suited to decide issues of fair use.” Br. Civ. Pro. ISO Pet. at 17. A jury cannot engage in the same type of thorough analysis and undertake the careful balancing contemplated by Congress or the courts. A jury would simply answer “yes” or “no” to whether the fair use defense was established and would not likely be able to provide the detailed legal analysis of the facts as required.

The ability of judges to adjudicate fair use is also important to copyright litigation as a matter of policy. As this Court is aware, copyright litigation is expensive, and the costs of a jury trial can significantly magnify the overall amount a copyright owner would have to pay simply to enforce his or her rights against a potential infringer. Small-business creators often cannot afford to commence even simple enforcement measures against infringers, let alone engage in a fair use battle before a jury to protect their works. AM. INTELLECTUAL PROP. LAW ASS’N, REPORT OF THE ECONOMIC SURVEY 2019 at I-208 (estimating that the mean cost of litigating a copyright infringement lawsuit, inclusive of all pre- and post-trial costs, including an appeal when applicable, is \$397,000). A jury trial requirement for fair use would further discourage small businesses and independent creators from enforcing their rights against clear infringers.

E. The Federal Circuit Employed the Correct Standard of Review.

The Federal Circuit did not arbitrarily decide what the level of review would be. Rather, it carefully considered this Court's recent opinion in *U.S. Bank Nat. Ass'n ex rel. CWC Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 2018 WL 1143822, at *5 (2018), and concluded:

whether the court applied the correct legal standard to the fair use inquiry is a question we review *de novo*, whether the findings relating to any relevant historical facts were correct are questions which we review with deference, and whether the use at issue is ultimately a fair one is something we also review *de novo*.

Oracle, 886 F.3d at 1193.

The Court held that *de novo* review is appropriate where applying the law to the historical facts “involves developing auxiliary legal principles of use in other cases—appellate courts should typically review a decision *de novo*.” *U.S. Bank*, 2018 WL 1143822, at *5. The Federal Circuit's determination in this case that the standard of review on the ultimate question of fair use should be *de novo* was thereby appropriate as Google and its *amici* argue that a new rule of fair use should be established for software that could then be used in other cases. *See*,

e.g., Google Br. at 37–41; 83 Comp. Sci. Br. at 22–26; Microsoft Br. at 30–32.

Moreover, despite claims that the Federal Circuit failed to employ a deferential standard of review to the jury’s findings, the court clearly stated that it “review[ed] the . . . findings of . . . fact for substantial evidence.” *Oracle*, 886 F.3d at 1195. For example, the court held that factor two favored fair use, despite significant evidence of creativity, because it did not want to disturb the jury’s finding. *Id.* at 1205. Thus, any argument based on the Seventh Amendment is without merit. The Federal Circuit employed a *de novo* standard of review for what is ultimately a legal question—the balancing of the fair use factors—and appropriately gave deference to the jury’s factual findings.

CONCLUSION

The decision of the Federal Circuit should be affirmed.

Respectfully submitted.

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February 19, 2020