

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* THE AMERICAN
LIBRARY ASSOCIATION, THE ASSOCIATION OF
RESEARCH LIBRARIES, THE ASSOCIATION OF
COLLEGE AND RESEARCH LIBRARIES AND
THE SOFTWARE PRESERVATION NETWORK
IN SUPPORT OF PETITIONER**

On the Brief

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INTEREST OF *AMICI CURIAE*¹

The American Library Association (“ALA”), established in 1876, is a nonprofit professional organization of more than 57,000 librarians, library trustees, and other friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society.

The Association of College and Research Libraries (“ACRL”), the largest division of the ALA, is a professional association of academic and research librarians and other interested individuals. It is dedicated to enhancing the ability of academic library and information professionals to serve the information needs of the higher education community and to improve learning, teaching, and research.

The Association of Research Libraries (“ARL”) is an association of 124 research libraries in North America. ARL’s members include university libraries, public libraries, government and national libraries. ARL programs and services promote equitable access to and effective use of recorded knowledge in support of teaching and research.

The Software Preservation Network (“SPN”) is a non-profit organization established to advance software

1. Counsel for the parties have consented to this brief. Under Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part, and no person other than amici or its counsel made a monetary contribution to fund the preparation or submission of this brief.

preservation through collective action. Its 20 institutional members are libraries, museums, and archives on the cutting edge of software preservation. These institutions rely on fair use to permit almost every aspect of their software preservation practice.

Collectively, these four associations represent over 100,000 libraries and 350,000 librarians and other personnel that serve the needs of their patrons in the digital age. As a result, the associations share a strong interest in the balanced application of copyright law. Librarians and the users they serve are especially dependent on a robust and stable fair use right. Because this case asks the Court squarely to assess Google's fair uses, representing this Court's first guidance on fair use in over 25 years, we write to share our views on the broader implications at stake, especially for teaching, learning, research, and scholarship.

SUMMARY OF ARGUMENT

The Court's decision in this case could affect far more than the reuse of software interfaces. The transformative use jurisprudence that has evolved in the quarter century since *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), has enabled a wide range of technology-dependent uses, ranging from search engines to user-generated content. This new understanding of fair use is particularly critical to research, education, and librarianship in the Twenty-First Century. If the Court takes up the issue of whether Google's use in this case was fair (and especially if it considers the scope and meaning of transformative use), *amici* urge that it exercise great care to ensure that its reasoning in no way jeopardizes *amici*'s transformative uses in support of research, teaching, and learning.

This brief first argues that since *Campbell*, fair use has evolved into a stable right relied upon by a wide variety of practice communities such as documentary filmmakers, journalists, and art historians. The brief then explains how this stability has enhanced research, teaching, scholarship, and the preservation of cultural heritage. In particular, the Second Circuit’s decision in *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014), found that fair use allowed the creation of a digital repository of millions of books, which has enabled unprecedented text and datamining, access for people with print disabilities, and preservation of works for future generations. These socially beneficial uses must not be disrupted. Finally, the brief suggests that the easiest way to avoid disrupting the fair use ecosystem is to avoid the issue altogether by deciding the case on other, more straightforward grounds.

ARGUMENT

Fair use is a central part of modern copyright law. Since this Court last addressed the doctrine over 25 years ago, lower courts have found that fair use supports a multitude of new uses that further the “Progress of Science and useful Arts.” U.S. Const. Art 1, § 8, cl. 8. Search engines, plagiarism detection software, digitization of books so readers can search their contents, digitization to allow access for people who have print disabilities, copying for virtual classroom use and many other new technology-dependent uses rely on fair use. Should this Court reach the fair use question in this case, this Court should carefully consider the effects of a fair use decision on a much wider set of uses than those presented by Google. The Court’s last fair use opinion “rescued” the rights codified in Section 107 after they had been “lost adrift for a turbulent decade,” and it laid the foundation for

a new generation of innovation, creativity, preservation, and learning. Pierre N. Leval, *Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use*, 13 *Cardozo Arts & Entm't L.J.* 19, 19 (1994). Its opinion in this case should avoid any adverse impact on *Campbell* and its progeny, which have been essential to copyright achieving its central aims—promoting the progress of science and art in teaching, scholarship, and research.

I. Fair use is a critical and stable codified right

Fair use both “permits and requires courts to avoid rigid application of the copyright statute, when, on occasion, it would stifle the very creativity that law is designed to foster.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 577 (1994) (internal quotation omitted). From the earliest days of the Anglo-American copyright system, allowances for unpermitted reuse of works were considered important to foster productive recasting of ideas, new criticism, refinement, and commentary. See Matthew Sag, *The Prehistory of Fair Use*, 76 *Brooklyn L. Rev.* 1371 (2011) (tracing fair use and “fair abridgment” back to early English caselaw). When Congress codified fair use as Section 107 of the 1976 Copyright Act, it did so explicitly “[n]otwithstanding the provisions of sections 106 and 106A”. 17 U.S.C. § 107. And, in turn, Congress made the copyright holder’s rights in sections 106 and 106A expressly “[s]ubject to” section 107. 17 U.S.C. §§ 106-106A. Due to this “notwithstanding-subject to” relationship, fair use statutorily inheres in and shapes the rights of copyright holders. The express “right of fair use”, 17 U.S.C. 108(f)(4), is a cornerstone of the Copyright Act.

Described as an “equitable rule of reason,” *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984) (citation omitted), fair use’s flexible, principle-based approach has allowed U.S. copyright law to successfully adapt to new technology. This has included now-ubiquitous technology such as home video recording devices, *id.*, and search engines. *Kelly v. Arriba Soft Corp.*, 336 F. 3d 811 (9th Cir. 2003). *See also* Fred von Lohmann, *Fair Use as Innovation Policy*, 23 Berkeley Tech. L.J. 829, (2008) (describing how fair use supports everyday personal copying using devices such as DVRs and MP3 players); Jonathan Band, *Google and Fair Use*, 3 J. Bus. & Tech L. 1 (2008). The flexibility that fair use provides has been a hallmark of U.S. technology policy. Recognizing that this flexibility has given U.S. technology companies a competitive advantage, other jurisdictions have adopted the fair use framework, including Israel, Korea, Singapore, Malaysia, Taiwan, and Hong Kong. *See* Jonathan Band, *The Global API Copyright Conflict*, 31 Harvard J. Law & Technology 615 (2018). The legislature in South Africa has passed a Copyright Amendment Bill that would add a fair use exemption modeled on U.S. law, including transformative use. *Recreate South Africa, Answers to some Frequently asked questions about the Copyright Amendment bill waiting to be signed by President Ramaphosa*, <https://www.re-createza.org/commonly-asked-questions> (2019). In Australia, after an exhaustive inquiry, including a cost-benefit analysis of the adoption of fair use, the Australian Productivity Commission concluded, “[a]dopting fair use would benefit follow on creators and innovators, Australian consumers, schools, other education institutions, libraries and archives.” Productivity Commission, *Inquiry Rep. No. 78, Intellectual Property Arrangements*, 185 (2016)

See also Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* 44 (2011) (acknowledging the benefits of the flexibility afforded by fair use).

The most significant realignment in fair use caselaw began in earnest with this Court's decision in *Campbell v. Acuff-Rose*, which addressed the reuse of elements of a musical composition in a subsequent parody. A critical part of the fair use analysis, the *Campbell* Court explained, was whether a given use was "transformative." "The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely 'supersede[s] the objects' of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'" *Campbell*, 510 U.S. at 579 (1994) (citations omitted). While not strictly required to find fair use, such transformative new uses generally further the goal of copyright to promote science and the arts, and therefore tend to weigh heavily in favor of fair use. *See id.*

Courts in almost all circuits have coalesced around the centrality of the transformative use analysis. As the transformative use doctrine has been applied to new uses since *Campbell*, it has retained its essential focus on the question of whether the new use adds something new (including a new purpose), or merely substitutes for the original. These cases have included traditional copying for commentary and criticism, such as in *Sundeman v. Seajay Socy., Inc.*, 142 F.3d 194, 202 (4th Cir. 1998) (copying and reuse of unpublished manuscript for

scholarly commentary). They have also included cases in which the entirety of a work has been reused for a new purpose. For example, in *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, (2d Cir. 2006), the Second Circuit found that reuse of several complete (though reduced-size) Grateful Dead concert posters in an illustrated biographical book about the band constituted transformative use, as the new use was repurposing the originals as “historical artifacts” from which readers could learn. *Id.* at 610.

Courts have also found uses to be transformative and fair even when the new use and new purpose does not necessarily result in a new copyrightable work. In *A.V. ex rel. Vanderhuy v. iParadigms, LLC*, 562 F.3d 630, 640 (4th Cir. 2009), the Fourth Circuit concluded that the full copying of students’ term papers for archiving and use by software to detect future plagiarism was transformative. Similarly, the Ninth Circuit in *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) concluded that the copying and creation of thumbnails of images found on the open web to facilitate image search was transformative. “Although an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information.” *Id.* at 1165.

Fair use sometimes suffers from the criticism that its flexible, principle-based approach is too amorphous for most users to discern. Lawrence Lessig, *Free Culture* 187 (2004) (fair use is “the right to hire a lawyer.”). In this case, the court below repeated the often-quoted line that “fair use is the most troublesome in the whole law of

copyright.” *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1372 (Fed. Cir. 2014)(citing *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (2d Cir. 1939)). Both Professor Lessig’s dig (which he subsequently recanted) and the 80-year-old “troublesome” characterization are belied by a raft of empirical studies of fair use caselaw, and by the lived experience of practitioners who rely on fair use.

Over the last decade, several empirical studies of U.S. fair use caselaw have highlighted significant alignment among courts on both analysis of the specific fair use factors as well as overall outcomes of clusters of similar cases. See Matthew Sag, *Predicting Fair Use*, 73 Ohio St. L.J. 47, 47 (2012) (“[T]he fair use doctrine is more rational and consistent than is commonly assumed.”); Pamela Samuelson, *Unbundling Fair Uses*, 77 Fordham L. Rev. 2537, 2541 (2009) (“This Article argues that fair use law is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns”); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. Penn. L. Rev. 549, 621 (2008) (“In practice, judges appear to apply section 107 in the form of a cognitively more familiar two-sided balancing test in which they weigh the strength of the defendant’s justification for its use, as that justification has been developed in the first three factors, against the impact of that use on the incentives of the plaintiff.”); Neil Netanel, *Making Sense of Fair Use*, 15 Lewis & Clark L. Rev. 715, 719 (2011) (“Looking at fair use’s recent historical development, on top of Beebe’s and Sag’s statistical analyses and Samuelson’s taxonomy of uses, reveals greater consistency and determinacy in fair use doctrine than many previously believed was the

case.”); Clark Asay, *Is Transformative Use Eating the World?*, 61 Boston Col. L. Rev. __, 24 (forthcoming 2020) (“[O]ver time there has been a steady progression of both appellate and district courts adopting the transformative use paradigm, with modern courts relying on it nearly ninety percent of the time.”).

Fair use’s consistency and coherence after *Campbell* is further evident in the diverse practice communities that have announced their own fair use best practices and successfully relied on them. Documentary filmmakers, for example, created the *Documentary Filmmakers’ Statement of Best Practices in Fair Use*, a relatively short and simple document that explains how and why fair use permits several commonly recurring uses of copyrighted works in documentaries. Ass’n of Indep. Video and Filmmakers et al., *Documentary Filmmakers’ Statement of Best Practices in Fair Use* (2004). Communications scholars, poets, artists and art historians, and journalists, among many others, have followed suit, developing and promulgating fair use best practices grounded in *Campbell*’s transformative use paradigm.²

2. Anthony Falzone and Jennifer Urban helpfully summarize the effect of these best practices in *Demystifying Fair Use: The Gift Of The Center For Social Media Statements Of Best Practices*, 57 J. Copyright Soc’y 337 (2010). Many of these statements of best practices in fair use have been coordinated by the Center for Media and Social Impact at the American University. See, e.g., *Code of Best Practices in Fair Use in Academic and Research Libraries*; *Set of Principles for Fair Use in Journalism*; *Code of Best Practices in Fair Use for the Visual Arts*; *Documentary Filmmakers’ Statement of Best Practices in Fair Use*; *Code of Best Practices for Fair Use in Software Preservation*; *Fair Use and Sound Recordings: Lessons for Community Practice*; *Code*

Nearly all of these best practice documents begin with a recognition that fair use is central to core activities of the community. They then address how to apply the fair use right, and in particular the transformative use standard, to the community's work. For example, the *Documentary Filmmakers' Statement* gives guidance on quoting from copyrighted works in support of a filmmaker's argument, using copyrighted material that is captured incidentally (such as music playing at filmed locations), and using archival footage.

Such best practices are often developed in response to a perceived challenge to community mission or values from a "permissions culture" originating from the era before *Campbell*. Documentary filmmakers, for example, were spurred to action when they noticed that certain kinds of projects were being systematically avoided due to copyright concerns. Patricia Aufderheide & Peter

*of Best Practices in Fair Use for Online Video; Code of Best Practices for Fair Use in Poetry; Statement of Best Practices in Fair Use of Dance-Related Materials; Society for Cinema and Media Studies' Statement of Fair Use Best Practices for Media Studies Publishing; Society for Cinema and Media Studies' Statement of Best Practices in Fair Use in Teaching for Film and Media Educators; Statement on the Fair Use of Images for Teaching, Research, and Study; Code of Best Practices in Fair Use for Scholarly Research in Communications; Statement of Best Practices in Fair Use in Collections Containing Orphan Works for Libraries, Archives, and other Memory Institutions; Code of Best Practices in Fair Use in OpenCourseWare; and Code of Best Practices in Fair Use for Media Literacy Education. All are collected together at <https://cmsimpact.org/codes-of-best-practices/>. See also Patricia Aufderheide and Peter Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2nd ed. 2018).*

Jaszi, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers* (2004). When such a culture takes hold, projects can be abandoned or modified, or scarce budgets spent needlessly on expensive permissions, out of fear and uncertainty. Fair use provides a powerful tool in these situations where, as the Court said in *Campbell*, to require permission “would stifle the very creativity that law is designed to foster.” *Campbell*, 510 U.S. at 577.

II. Research, Teaching, Scholarship, and Preservation Rely on the Stability of Fair Use

Research, teaching, scholarship, and preservation are especially important to the copyright system. Located at the heart of the Constitutional prerogative to advance “the Progress of Science and useful Arts,” teaching, scholarship, research, and preservation are singled out repeatedly for special treatment by Congress. *See* 17 U.S.C. §108 (statutorily authorized noninfringing uses for libraries and archives); § 110 (statutorily authorized noninfringing uses for classroom teaching); § 121 (statutorily authorized noninfringing uses for people who have print disabilities); § 504(c)(2) (limitation on liability for employees of educational institution, library or archives); § 512(f) (special safe harbor from liability for online uses). For fair use, Congress similarly identified “teaching”, “research”, and “scholarship” in the statutory fair use preamble as exemplars of uses that would ordinarily be found to be fair. 17 U.S.C. § 107 (2019).³

3. Indeed, the Eleventh Circuit recognized that an educational use was favored under the first fair use factor even if it was not transformative. *Cambridge Univ. Press v. Patton*, 769 F. 3d 1232 (11th Cir. 2014).

It is difficult to overstate the importance of fair use, as “rescued” by this Court in *Campbell*, to the daily activities of librarians, researchers, teachers, and students. Libraries rely on fair use to preserve and provide fragile materials for researchers, or to provide one-off copies of an image for a student writing a term paper. Teachers at all levels rely on fair use to allow them to share course materials digitally with students, who can engage in virtual classroom settings to criticize and comment on original works. Students rely on fair use when they create podcasts, video essays, and multimedia presentations that include images, text, sound recordings, and audiovisual works. While student creations may begin as course assignments, they can become portfolios that demonstrate important skills to potential employers. Fair use becomes even more important when students share their work with the public online or through eventual publication as journal articles, books, or works of art.

Beyond those everyday uses, a great deal of research now depends on digital reproduction of entire sets of texts for computational analysis, using text and data-mining techniques to yield new insights into how language and culture have developed over time. Matthew Jockers, *Macroanalysis: Digital Methods and Literary History* (2013); Michael Carroll, *Copyright and the Progress of Science: Why Text and Datamining is Lawful*, 53 U.C. Davis L. Rev. 893 (2019). Libraries can foster these new research projects and the creation of new research tools based on precedent in the most significant recent case for library and educational users: *Authors Guild v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014), a suit brought by the Authors Guild against five universities and their collective digital library, “HathiTrust,” which was created

from scans of their collections. The university libraries in that case had millions of books scanned for the purpose of, among other things, allowing full-text search. In the HathiTrust system, digital files could be searched for particular words or phrases, and responsive page locations would be returned to the user, though users could not access or read the text of the books themselves. The Second Circuit applied the reasoning from the search engine cases noted above, holding that “the creation of a full-text searchable database is a quintessentially transformative use.” *Id.* This was because “the result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn. Indeed, we can discern little or no resemblance between the original text and the results of the . . . full-text search.” *Id.*⁴

Additionally, the *HathiTrust* court recognized that by storing digital copies of the books, HathiTrust “preserves them for generations to come, and ensures that they will still exist when their copyright terms lapse.” 755 F.3d at 103. When this Court rejected a constitutional challenge to retroactive extension of copyright terms in *Eldred v.*

4. Professor Matthew Sag characterizes acts of copying which do not communicate the author’s original expression to the public as “nonexpressive uses.” Matthew Sag, *Copyright and Copy-reliant Technology*, 103 Nw. U. L. Rev. 1607, 1624 (2009). It should be noted that these fair use-enabled research tools have significant commercial applications as well. See *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015). Indeed, fair use facilitates the ingestion of the enormous amounts of data necessary to “train” artificial intelligence processes. See Matthew Sag, *The New Legal Landscape for Text Mining and Machine Learning*, 66 J. Copyright. Soc’y U.S.A. 201 (2019).

Ashcroft, 537 U.S. 186, 219-220 (2003), it invoked fair use as a crucial “safety valve” that would ensure that copyright did not unduly interfere with the First Amendment. Copyright terms that can easily exceed a century far outstrip both the commercial life of most works and the usable life of many media formats. Chris Hubbles, *No Country For Old Media?*, 65 J. Copyright Soc’y U.S.A. 271 (2018). Most software titles are obsolete in less than a decade, and the previous 20 years have seen several generations of digital storage media rise and fall. Fair use empowers libraries, archives, and other cultural heritage institutions to take action to preserve valuable works, including software, webpages, and other digital media, before it is too late.

Digitization pursuant to fair use also holds great promise for making collections more accessible for disabled users. Relying on the *HathiTrust* fair use holding, among other key sources, a coalition led by the University of Virginia is working to link several massive repositories of digital text and make them easier for universities to use as sources of remediated accessible text for print-disabled users. Prue Adler, Brandon Butler, and Krista Cox, *The Law and Accessible Texts: Reconciling Civil Rights and Copyrights* (2019).

Libraries and librarians, along with archivists and other cultural heritage professionals, are among the communities of users that have developed and documented their own best practices for fair use under *Campbell* and subsequent case law. The *Code of Best Practices in Fair Use for Academic and Research Libraries* describes approaches to common scenarios such as digital exhibitions and website preservation. Another statement

provides a fair use approach to the problem of “orphan works,” a common challenge for libraries that want to use a work but cannot identify or locate a copyright holder. Patricia Aufderheide et al., *Statement of Best Practices in Fair Use of Collections Containing Orphan Works for Libraries, Archives, and other Memory Institutions* (2014). Most recently, the *Code of Best Practices in Fair Use for Software Preservation* (2018) has charted a way forward for libraries and others by describing how fair use applies at each stage of a software preservation workflow.

The established practices of all these communities could be upended if the Court were to cast doubt on how transformative use has been interpreted and applied in the years since *Campbell*. As the Court decides whether Google’s use in this case was transformative or otherwise fair, *amici* urge that it exercise great care to ensure that it in no way undermines the transformative use jurisprudence that has evolved over the past quarter century.

III. This Court Can Easily Avoid Disturbing Fair Use By Properly Applying Section 102(b)

As Google argues in its brief, the Java SE declarations at issue in this case clearly fall outside of the scope of copyright protection under 17 U.S.C. 102(b) and the related merger doctrine. Such useful creations (as distinct from expressive ones) are the province of patent, not copyright, and as this Court explained in *Baker v. Selden*, 101 U.S. 99, 102 (1879), to extend copyright’s monopoly over subject matter that is rightfully governed by patent “when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public.”

Fair use is a powerful, important right, but the Court need not reach it here when the Court can instead decide in Google's favor on the basis of Section 102(b) and merger. Doing so would avoid any possible unintended disruption of the current, settled state of fair use law.

CONCLUSION

The judgment of the court below should be reversed, and the revitalization of fair use made possible by this Court's crucial opinion in *Campbell* should be preserved.

On the Brief

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