No. 18-956

IN THE

GOOGLE LLC,

*Petitioner*,

—v.—

ORACLE AMERICA, INC.,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

# BRIEF FOR *AMICUS CURIAE* NEWS MEDIA ALLIANCE IN SUPPORT OF RESPONDENT


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## TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES .................. ii

INTEREST OF *AMICUS CURIAE* ........... 1

SUMMARY OF ARGUMENT ................ 4

ARGUMENT—

Google's Argument Relies on an Incorrect and Overly Aggressive Invocation of the Fair Use Factors ..................... 5

*Factor 1: The Purpose and Character of the Use* ............................ 6

*Non-Transformative Use* ............... 6

*Commercial Use* ...................... 10

*Factor 2: The Nature of the Copyrighted Work* ................................ 12

*Factor 3: The Amount and Substantiality of the Portion Used* .................... 13

*Factor 4: The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work* ................. 15

CONCLUSION ............................ 20

## TABLE OF AUTHORITIES

PAGE(S)

### Cases

*Am. Geophysical Union v. Texaco*,
60 F.3d 913 (2d Cir. 1994) . . . . . . . . . . . . . . . . 17

*Associated Press v. Meltwater U.S. Holdings, Inc.*,
931 F. Supp. 2d 537 (S.D.N.Y. 2013) . . . . . . 14-15

*Authors Guild v. Google, Inc.*,
804 F.3d 202 (2d Cir. 2015) . . . . . . . . . . . . . . . 6

*Basic Books, Inc. v. Kinko's Graphics Corp.*,
758 F. Supp. 1522 (S.D.N.Y. 1991). . . . . . . . . 19

*Campbell v. Acuff-Rose Music, Inc.*,
510 U.S. 569 (1994) . . . . . . . . . . . . . . . . . . . . . . 6, 7, 9

*Capitol Records, LLC v. ReDigi Inc.*,
910 F.3d 649 (2d Cir. 2018),
*cert. denied*, 139 S. Ct. 2760 (2019) . . . . . . . . 16

*Castle Rock Entm't, Inc. v. Carol Pub. Group, Inc.*,
150 F.3d 132 (2d Cir. 1998) . . . . . . . . . . . . . . . 15

*Eldred v. Ashcroft*,
537 U.S. 186 (2003) . . . . . . . . . . . . . . . . . . . . . . 16

*Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*,
499 U.S. 340 (1991) . . . . . . . . . . . . . . . . . . . . . . 13

*Folsom v. Marsh*,
9 F. Cas. 342 (C.C.D. Mass. 1841) . . . . . . . . . 6, 7

*Fox News Network, LLC v. TVEyes, Inc.*,
883 F.3d 169 (2d Cir. 2018) . . . . . . . . . . . . . . . 17

*Harper & Row, Publrs., Inc. v. Nation Enters.*,
471 U.S. 539 (1985) . . . . . . . . . . . . . . . . . . . 11, 13, 15

PAGE(S)

*Infinity Broad. Corp. v. Kirkwood*,
150 F.3d 104 (2d Cir. 1998) . . . . . . . . . . . . . . . 7

*Los Angeles News Serv. v. CBS Broad., Inc.*,
305 F.3d 924 (9th Cir. 2002) . . . . . . . . . . . . . . 13

*Oracle Am., Inc. v. Google Inc.*,
750 F.3d 1339 (Fed. Cir. 2014) . . . . . . . . . . . . 12

*Oracle Am., Inc. v. Google LLC*,
886 F.3d 1179 (Fed. Cir. 2018), *cert. granted*,
No. 18-956, 2019 WL 6042317
(U.S. Nov. 15, 2019) . . . . . . . . . . . . . . . . . . . . . . 9

*Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*,
274 F.2d 487 (2d Cir. 1960) . . . . . . . . . . . . . . . 12

**Statutes**

17 U.S.C. § 101 . . . . . . . . . . . . . . . . . . . . . . . . . . . . 8

17 U.S.C. § 106 . . . . . . . . . . . . . . . . . . . . . . . . . . . . 8

17 U.S.C. § 107(1) . . . . . . . . . . . . . . . . . . . . . . . . . . 10

17 U.S.C. § 107(4) . . . . . . . . . . . . . . . . . . . . . . . . . . 15, 16

**Regulations**

37 CFR 202.4(e) . . . . . . . . . . . . . . . . . . . . . . . . . . . . 14

**Other Authorities**

Grimmelmann, James, *Copyright for Literate Robots*, 101 Iowa L. Rev. 657 (2016) . . . . . . . 12

PAGE(S)

*Knowhere Launches with $1.8M in Funding to Deliver Unbiased News Coverage with Machine Learning* (Apr. 4, 2018), *available at* https://s3.us-west-2.amazonaws.com/cruncher-images/static/press-release/knowhere-launch-press-release.pdf ........ 18

Leval, Pierre N., *Toward A Fair Use Standard*, 103 Harv. L. Rev. 1105 (1990)............. 10

Madison, Michael J., *A Pattern-Oriented Approach to Fair Use*, 45 Wm. & Mary L. Rev. 1525 (2004)....................... 7

Nimmer, Melville B. and Nimmer, David, 4 Nimmer on Copyright .................. 11, 15

Sobel, Benjamin L. W., *Artificial Intelligence's Fair Use Crisis*, 41 Colum. J.L. & Arts 45 (2017) .................................... 10

U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* (3d ed. 2017).... 14

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PAGE(S)

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Zuckerberg, Mark, *The Facts About Facebook* (Jan. 29, 2019), *available at* https://www.wsj.com/articles/the-facts-about-facebook-11548374613?mg=prod/com-wsj . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 11

## INTEREST OF *AMICUS CURIAE*[1]

The News Media Alliance (the "Alliance") is a nonprofit organization that represents the interests of more than 2,000 news media organizations in the United States and internationally. The Alliance diligently advocates for news organizations before the federal government on issues that affect them today, including protecting news organizations' intellectual property. The proper implementation of copyright's fair use doctrine is a matter of urgent importance to the Alliance and its members. The Alliance respectfully submits this brief limited to question 2: whether Google's use of Oracle's software constitutes fair use.

News organizations play a critical role in a democratic society. Every day, through great human effort and financial investment, news publishers disseminate reliable information necessary to maintain an informed citizenry and government, hold power to account by undertaking investigations and analyses, present a diversity of opinions, and serve as an incubator of new viewpoints.

Notwithstanding this commitment and their irreplaceable societal role, news organizations are struggling to maintain high-quality journalism. They struggle in large part because the online marketplace is dominated by a few digital platforms—such as

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[1] Pursuant to Rule 37.6, amicus curiae certifies that this brief was not written in whole or in part by counsel for any party, and no person or entity other than amicus curiae and its counsel has made a monetary contribution to the preparation and submission of this brief. This brief is submitted with the blanket consent of Google LLC and with the written consent of Oracle America, Inc.

petitioner Google LLC ("Google")—that determine the reach and audience for news content online and control the digital advertising ecosystem, thereby reducing the ability of news organizations to develop relationships with their readers and benefit from digital advertising to support their critical endeavors. Dominant tech platforms such as Google do so in a variety of ways that make unlicensed use of news media output. The fair use arguments Google deploys here, in a case involving the unlicensed use of Oracle's intellectual property, are strikingly similar to the arguments it has made, and will make, in its quest for ever-increasing dominance of a range of communicative fields.[2]

The fault lines in this case between Oracle and Google reoccur throughout the digital landscape where "platforms" that do not themselves create the content contained in their products exploit content created by others in a manner that constitutes a derivative commercial use and has economic value. Oracle asserts that Google has taken code that Oracle created and expropriated that code *without alteration* into the Android software package. Google argues that the mere act of incorporating and integrating

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[2] Such arguments have led relevant agencies in both the United States and internationally to call for comments on the proper scope of fair use in connection with the kinds of digital uses of greatest concern to the Alliance. *See* U.S. Patent and Trademark Office, Request for Comments on Intellectual Property Protection for Artificial Intelligence Innovation, *available at* https://www.federalregister.gov/documents/2019/10/30/2019-23638/request-for-comments-on-intellectual-property-protection-for-artificial-intelligence-innovation; *see also* World Intellectual Property Organization, *WIPO Begins Public Consultation Process on Artificial Intelligence and Intellectual Property Policy*, Press Release (Dec. 13, 2019), a*vailable at* https://www.wipo.int/pressroom/en/articles/2019/article_0017.html.

Oracle's code into Android has "transformed" the manner in which that code is used and is therefore fair use. Members of the Alliance hear similar arguments made to justify the unlicensed use of their work product. Each day, for example, digital platforms exploit news content in news aggregation services, search, and social media in a manner that does not build upon but often substitutes for the underlying creation. Tech companies ingest massive quantities of news reporting for the purpose of teaching their computers how to report news so they can compete with the originators of the reports in the dissemination of news content without expending the effort required to investigate, research, check, and prepare the news reports. In these instances, members of the Alliance are in a position analogous to Oracle in that they have created valuable content that a third party then incorporates in a larger, highly valuable commercial product claiming that this act is "transformative," even though it has not altered or built upon the original news content.

The members of the Alliance are dependent on the resolute enforcement of their intellectual property rights, particularly copyright, for their economic health and, indeed, their continued existence. For that reason, the Alliance is deeply invested in assuring that the courts properly articulate and apply the law of copyright, including the fair use doctrine. Members of the news media, of course, are both providers and consumers of information including copyright-protected expression, and often have reason not only to assert their copyrights but also to invoke the fair use defense in appropriate cases. The Alliance, however, cannot stand silent when entire digital industries are built, and technology companies seek to achieve and maintain dominance, by the

overly aggressive assertion of fair use as Google does in this case. The Court's decision here, assuming it reaches the fair use question, will likely have significant influence on the general fair use doctrine and thus on the news media business.

## SUMMARY OF ARGUMENT

Google's articulation of the fair use doctrine is premised upon an incorrect and overly aggressive understanding of the four well-known factors. ***First***, Google's arguments in favor of the transformative and non-commercial nature of its use of Oracle's computer code are overbroad and misguided. Google appropriated and integrated Oracle's computer code into its product, a use that is properly understood as consumption not transformation, and it did so with a commercial objective. ***Second***, Google's argument would demote certain highly valuable and socially useful works to second-class copyright citizenship. ***Third***, Google advocates for an overly formulaic, percentage-based approach to examining the "amount and substantiality" of the portion of Oracle's computer code that it used in relation to the copyrighted work as a whole. Such an approach ignores qualitative analysis regarding the significance of what was taken, and relies on what can often be arbitrary factors that dictate the metes and bounds of the copyrighted "work" in question. ***Fourth***, Google asks the Court impermissibly to narrow the inquiry into the effect of its use of Oracle's code upon the potential market for or value of that work. By reducing the Factor 4 analysis to one trained on horizontal competition and traditional markets, it fails to account for technological change that is increasingly uncovering and enabling new markets for copyrighted

work—markets that the creators of protected content should retain the right to enter.

If the Court reaches the fair use question, it should reject Google's arguments, which depart from precedent and, if accepted, would frustrate the intent of the copyright law to protect intellectual property and encourage creative expression. Regardless of the Court's ultimate decision in this case, it should preserve a balanced interpretation of the fair use doctrine, just as it has done before.

## ARGUMENT

### Google's Argument Relies on an Incorrect and Overly Aggressive Invocation of the Fair Use Factors

While understood to be a part of copyright law for centuries, the fair use doctrine was not codified until the 1976 Act. In section 107, Congress identified four factors, which themselves are not exhaustive, but merely indicative of whether a use should be deemed fair:

> **(1)** the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> **(2)** the nature of the copyrighted work;
>
> **(3)** the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> **(4)** the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107.

The preamble of that section also mentions "news reporting" as an example of the type of use that could attract a fair use defense, but this Court has made clear that these examples are "illustrative and not limitative" and "provide only general guidance about the sorts of copying that courts and Congress most commonly ha[ve] found to be fair uses." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994). As the Second Circuit observed in the *Google Books* decision, "[t]hose who report the news undoubtedly create factual works. It cannot seriously be argued that, for that reason, others may freely copy and re-disseminate news reports." *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015) ("*Google Books*").

***Factor 1: The Purpose and Character of the Use***

***Non-Transformative Use***

Fair use emerged from a concern that an overly broad view of copyright may prevent others in society from, for example, criticizing or commenting upon the work of others. Writing in 1841, Justice Story stated that "no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism." *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841). "On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, ***but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law [an infringement].*** " *Id.* (emphasis added). Fair use doctrine, of course, extends beyond uses that are purely critical in nature. And, as Google urges, the fair use doctrine "must be construed in light of [its] basic purpose." Pet. Br. at 37 (citation omitted).

Starting with *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), this and lower courts have placed increasing emphasis on whether a secondary use is transformative. It is no secret, however, that the doctrine of "transformative use" has taken on a life of its own. Much like an urban legend that changes upon each retelling, the doctrine has morphed to the point that, as one commentator laments, it "has become all things to all people." Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 Wm. & Mary L. Rev. 1525, 1670 (2004).

In *Campbell*, the Court found that music group 2 Live Crew's parody of Roy Orbison's rock ballad, "Oh, Pretty Woman," may be a fair use within the meaning of section 107. Quoting Justice Story and *Folsom*, the Court articulated a standard trained on whether the new use "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *Campbell*, 510 U.S. at 579. Crucial to *Campbell* was the fact that the second comer's work was a comment on the original made possible by the transformative qualities of the parody—a classic justification for fair use. Google's arguments in favor of transformation both misunderstand the teachings of *Campbell* and invite further complication to an already murky area of copyright law.

First, Google argues that the mere act of incorporating and integrating Oracle's code into Android renders that use transformative. Pet. Br. at 42-43. Such a device- or media-focused standard that ties transformation to the location in which Oracle's lines of code are running, *i.e.*, laptop v. smartphone, is woefully misplaced. *See Infinity Broad. Corp. v. Kirkwood,* 150 F.3d 104, 108 (2d Cir. 1998) (retransmission of radio broadcast over telephone

lines is not transformative). If this constituted a "transformation" sufficient to result in a fair use, the mere act of (say) republishing otherwise protected online news content *via* a smart speaker could cloak a would-be infringer with fair use immunity, assuming other fair use elements balanced in its favor. *See id.* at 108 n.2 ("[C]hange of format, though useful, is not technically a tran[s]formation."). Taken to its logical extreme, Google's position would render a motion picture adaptation of a novel a "transformative" fair use due to the change of medium, when the law is quite clear that this is not a fair use, but an infringing derivative work. *See* 17 U.S.C. § 106 ("[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . . . to prepare derivative works based upon the copyrighted work[.]").[3] Such an outcome is both inequitable and cannot be aligned with fair use principles.

Second, Google suggests that the mere act of adding material to protected content "transforms" that work for purposes of a Factor 1 analysis. Pet. Br. at 42-45. This is an unsurprising position from Google, a tech platform that routinely scrapes news websites, ingests copyright-protected news content, and then aggregates that work to feed its news aggregation products and its machine learning, which enables Google's machines to learn how to write news articles to compete with its sources. Google would like to claim that this act of

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[3] "Derivative work" is defined as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." *Id.* § 101.

consumption is "transformative," even though Google has not altered or built upon the underlying content. This challenges the core of *Campbell,* which grounds transformation in a use that "alter[s] the first [work] with new expression, meaning, or message." 510 U.S. at 579.

Third, Google challenges another of *Campbell*'s central teachings: When an alleged infringer uses work merely to "avoid the drudgery in working up something fresh . . . the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish) . . . ." 510 U.S. at 580. The music group 2 Live Crew did not use Roy Orbison's ballad to avoid the hassle of "working up" such a tune. Rather, the secondary work was informed by, and commented upon, the unique attributes of the underlying work.

Google could have written its own software interface, but did not. Rather, it simply avoided the burden in creating its own, by taking Oracle's. *Campbell*, 510 U.S. at 580; *see also Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1196 (Fed. Cir. 2018), *cert. granted*, No. 18-956, 2019 WL 6042317 (U.S. Nov. 15, 2019) ("The parties now agree . . . that there were other ways for Google to write API packages."); *see id.* at 1187 ("The Android team had been working on creating its own APIs, but was unable to do so successfully."). It is *always* cheaper and easier for an infringer to appropriate the property of another than to engage in its own efforts to create a new work or to pay for a license to use the other's work, but that is not an efficiency argument in favor of fair use because it fails to account for the economic disincentive to creation that would ensue. In a world in which everyone is allowed to republish for free,

soon there would be no original publishers and nothing to republish.

Similarly, Google is currently using protected content from news publishers to feed its news-aggregation and machine-learning efforts—content that it could "work up fresh" if Google were willing to invest the necessary funds and efforts. Those machine-learning efforts involve, *inter alia*, teaching machines to review news articles, identify the most salient parts, and manipulate and replicate news content. The fact that this might be difficult, time-consuming, and expensive for Google to do only serves to illustrate the value of what is being expropriated for free. The ingestion of volumes of news content to obtain material for news aggregation and machine learning is a pure act of consumption, not of transformation, and courts have been too quick to assume that a computer can freely do something a human would not be allowed to do under copyright. *See* Benjamin L. W. Sobel, *Artificial Intelligence's Fair Use Crisis*, 41 Colum. J.L. & Arts 45, 74 (2017) ("[M]achine learning makes consumptive use of copyrighted materials in order to facilitate future productivity. If future productivity is no defense for unauthorized human consumption, it should not excuse robotic consumption, either.").

***Commercial Use***

A determination whether the secondary work is transformative does not complete the Factor 1 analysis, let alone the fair use inquiry. *See* 17 U.S.C. § 107(1) (requiring consideration of "whether such use is of a commercial nature or is for nonprofit educational purposes"); Pierre N. Leval, *Toward A Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990) ("The existence of any identifiable transformative

objective does not, however, guarantee success in claiming fair use. The transformative justification must overcome factors favoring the copyright owner."); 4 Nimmer on Copyright § 13.05 ("[J]ust because a given use qualifies as 'transformative' does not even mean that defendants prevail under the first factor, much less that they prevail altogether on the fair use defense."). Use of the copyrighted work in a way that is commercial "tends to weigh against a finding of fair use." *Harper & Row, Publrs., Inc. v. Nation Enters.,* 471 U.S. 539, 562 (1985).

Google misconstrues the standard by which a use is deemed "commercial," suggesting that the presence of "*some* non-commercial purposes" for a secondary work supports a legal determination that the nature of the use is not commercial. Pet. Br. at 43-44 (emphasis added). This is a myopic view of commercialism. In the digital age, much content is "given away" for free but for an ultimately commercial purpose, whether to sell advertising or to cause the user to be involved in and ultimately dependent on the vendor's online ecosystem. The fact that Android is open-sourced in certain contexts does not negate a commercial purpose. Entire multi-billion dollar business models would be excused as "non-commercial" if this were the case.[4]

In short, while true fair uses such as criticism and commentary are not disqualified from fair use merely because they are sold rather than given away, it is a fallacy to argue the converse as Google does here—

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[4] *See, e.g.,* Mark Zuckerberg, *The Facts About Facebook* (Jan. 24, 2019), *available at* https://www.wsj.com/articles/the-facts-about-facebook-11548374613?mg=prod/com-wsj ("Here you get our services for free—and we work separately with advertisers to show you relevant ads.").

that the absence of a price tag alone means the use must be fair.

Google's arguments in favor of the transformative and non-commercial nature of its secondary use should be rejected.

***Factor 2: The Nature of the Copyrighted Work***

Google argues that the jury properly found that the Oracle software is "entitled to, at best, minimal copyright protection" because of "substantial evidence that the declarations were functional, not creative." Pet. Br. at 46. This argument indulges what some have dubbed the "romantic reader" fallacy. *See* James Grimmelmann, *Copyright for Literate Robots*, 101 Iowa L. Rev. 657, 657-58 (2016); *id.* at 659 ("Copyright's romantic readers are drawn to a work because something of the author's unique humanity (as expressed in the work) resonates with their own."). That approach would elevate works with "aesthetic appeal" to the highest level of protection, and demote works not issued for their artistic merit to second-class copyright citizenship. *See id.* at 658 (citing *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (Hand, J.)).

Such a notion ignores the fact that Congress expressly contemplated copyright protection for computer code. *See Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1367 (Fed. Cir. 2014) (citing legislative history for section 102(b) and discussing "Congress's express intent to provide copyright protection to computer programs"). It is also increasingly perilous as a general proposition of copyright law in the digital age, in which so much of the creativity that drives our economy is embodied in works that would not conventionally be described as

"artistic." Computer software can represent remarkable flights of human creativity, as can the synthesis and eloquent expression of events and ideas, investigative skill, and intrepid reporting that mark the best news reporting. While the distinction between unprotected bare facts and copyrightable expression is not in question, *see, e.g., Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991), this Court should not be misled into making overbroad pronouncements regarding the degree of protection available to "non-artistic" works.

***Factor 3: The Amount and Substantiality of the Portion Used***

Google similarly argues that Factor 3 supports the jury verdict on fair use because "less than 0.5% of the code" was used, consisting of "short and scattered" excerpts of the copyrighted work. Pet. Br. at 46-47. This too represents a dangerous distortion of the law.

First, Factor 3 requires consideration of the qualitative as well as the quantitative significance of what was taken—a well-settled principle that Google ignores. *E.g., Harper & Row, Publrs.,* 471 U.S. at 566; *Los Angeles News Serv. v. CBS Broad., Inc.,* 305 F.3d 924, 940 (9th Cir. 2002). As Oracle points out, Google appropriated far more code than was functionally necessitated—suggesting that Google commandeered significant amounts of content that it valued independently for its competitive purposes. *See* Resp. Br. at 14 n.2.

Second, even considered on a purely quantitative basis, computing ratios of the amount taken to the entirety of the "work" in question can be misleading, because the form in which copyrightable content is packaged for consumption can reflect a variety of

practical or arbitrary considerations that should be irrelevant to whether a use of a portion of that content is fair. Moreover, the form in which a work is *registered* with the Copyright Office is often dictated by practices ordained by the Office for reasons of its own administrative convenience. For example, paper editions of newspapers are typically registered in bulk on a monthly basis under 37 CFR 202.4(e). By contrast, the Copyright Office has yet to offer a viable way to register the content of the same newspaper's website. *See generally*, *U.S. Copyright Office, Compendium of U.S. Copyright Office Practices* Ch. 1000 (3d ed. 2017) (setting forth guidance on registration of websites and website content); *Compendium (Third)* § 1006.1(B) (". . . [A]t present there is no group registration option for website revisions that have been made over a period of time."). Nonetheless, each article and photograph contained in each edition can represent the result of enormous time, effort, and exemplary expression, and is entitled to copyright protection as a distinct work, not merely as a small part of a larger collective work.

Third, Google's repeated invocation of the supposedly small percentage of code it used recalls the "romantic reader" fallacy. A copyist who plagiarizes an 800-page novel that the author in his garret spent a decade writing surely has infringed. But in the digital age, small nuggets of content are increasingly valuable. Whereas not long ago most of the reading public obtained its news from purchasing and reading a daily newspaper, which was sold as an integral unit with contents determined by the publisher, today many are satisfied to scan a news aggregation site to quickly absorb snippets of the day's news from multiple sources and never make their way back to the source articles. *See, e.g., Associated Press v.*

*Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 554-55 (S.D.N.Y. 2013).

The Court should decline Google's invitation to adopt a formulaic, percentage-based approach to Factor 3.

***Factor 4: The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work***

The Fourth fair-use factor focuses on "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). This Court has characterized this factor as "the single most important element of fair use." *Harper & Row, Publrs.*, 471 U.S. at 566 (citing 3 Nimmer § 13.05[A]).

The scope of the market-harm inquiry is broad. It does not "merely rais[e] the question of the extent of damages to plaintiff caused by the particular activities of the defendant" but instead "poses the issue of 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, or value of, the plaintiff's present work." 4 Nimmer on Copyright § 13.05[A][4]. And it "take[s] account…of harm to the market for derivative works, defined as those markets that creators of original works would in general develop or license others to develop[.]" *Castle Rock Entm't, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 145 (2d Cir. 1998) (citation omitted).

Google would have this Court narrow the scope of the inquiry in a manner that is inconsistent with precedent and contrary to the intent of the copyright law to protect intellectual property so as to encourage

creative expression for the ultimate benefit of the public. *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). Google's market-harm conception admits only of harm between companies whose products compete directly with one another. Indeed, Google argues that its use of Java lines of code did not cause cognizable copyright harm "because Java SE, which was designed for servers and desktop computers, is not suitable for the modern smartphone market." Pet. Br. at 48. Because "Android and Java SE did not compete," Google asserts, there can be no harm. *Id.*

This Court should reject Google's narrow conception of market harm for two reasons. First, market harm is not limited to horizontal competition. To be sure, the diversion of audience that occurs when someone markets an infringement in direct horizontal competition with the original is an obvious example of Factor 4 harm. *See e.g.*, *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649, 662-63 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 2760 (2019). But that is not the only relevant type of harm. Factor 4 has a vertical aspect as well: depriving content creators of natural markets wherein they can sell or license their works to users is also a pernicious "effect of the use upon the potential market for or value of" the copyrighted material. 17 U.S.C. § 107(4). Oracle owned the copyright in software that was valuable to Google in developing Android. Google appropriated and used that software in the very form published but did not pay for that use. The system of economic incentives that underlies copyright law cannot abide immunizing that act of pure consumption as "fair use."

Courts have long recognized that loss of potential licensing revenue is a cognizable Factor 4 harm. As the Second Circuit explained: "It is indisputable that, as a general matter, a copyright holder is entitled to

demand a royalty for licensing others to use its copyrighted work, and that the impact on potential licensing revenues is a proper subject for consideration in assessing the fourth factor[.]" *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 929 (2d Cir. 1994) (citations omitted). When a consumer of copyrighted material exploits that material without permission, Factor 4 is triggered even where the use is for a purpose collateral to the main or original purpose of creating the material. That is one of the important lessons of *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 182 (2d Cir. 2018), where the defendant ingested vast amounts of broadcast news programming and enabled its subscribers to watch, download, and save actual news clips of up to ten minutes duration without license from the source broadcasters. *Id.* at 175. The court found that "Fox itself might wish to exploit the market for such a service . . . [and that] TVEyes deprives Fox of revenues to which Fox is entitled as the copyright holder." *Id.* at 180. A finding of fair use under Factor 4 is particularly inappropriate in this case insofar as there were *existing* licensing markets for Java SE. Indeed, Google itself sought a custom license from Sun Microsystems, Java SE's creator, but ultimately declined to license the product, electing instead to copy thousands of lines of code. *See* Resp. Br. at 13-14.

Second, market harm includes lost revenue from new or potential markets, not only traditional markets. In assessing market harm, courts look to the use's impact on "traditional, reasonable, or likely to be developed markets." *Texaco*, 60 F.3d at 930. Thus, in *Texaco*, the bulk photocopying by a commercial enterprise's research arm of scientific articles published by plaintiff was deemed not a fair use where the licensing of such articles was a natural

market for such scientific articles through the development of clearinghouses established to license such photocopying. Likewise, the fact that the writers of Oracle's software originally contemplated use in desktops and laptops should not negate Oracle's ability to commercialize its software for mobile devices.

Google's self-servingly narrow conception of Factor 4 fails to recognize how technological change—sometimes prompted by Google itself—can uncover new uses and additional value for copyrighted works, and companies should retain the right to license into markets created by new technologies. For example, the news media traditionally earned recompense for their efforts and publications by selling copies to the public. Now, however, computers operated by tech companies ingest massive quantities of news content and analyze that expression in order to learn how to compose their own news reports and reproduce news items without linking the user back to the original source.[5] If reproduction for such "machine learning" were to qualify as fair use because it is not the original or principal market into which the press distributed their publications, copyright would be

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[5] *See, e.g., Knowhere Launches with $1.8M in Funding to Deliver Unbiased News Coverage with Machine Learning* (Apr. 4, 2018), *available at* https://s3.us-west-2.amazonaws.com/cruncher-images/static/press-release/knowhere-launch-press-release.pdf ("Knowhere's technology scours the internet, evaluating narratives, factual claims and bias in reporting, by outlets as varied as the New York Times and Breitbart, to inform three 'spins' of every controversial story: left, impartial, and right, or positive, impartial and negative. The technology can write stories in anywhere from 60 seconds to 15 minutes, depending on the amount of controversy among the sources. Once article drafts are complete, human journalists review the piece, which in turn trains the machine learning algorithm.").

turned on its head, and incentives to originate content would evaporate. As one court said in rejecting a fair use defense by a company that engaged in massive unlicensed photocopying of textbooks, creating a new business through the exploitation of copyrighted materials does not in itself justify immunity from infringement: "defendant has effectively created a new nationwide business allied to the publishing industry by usurping plaintiffs' copyrights and profits. This cannot be sustained by this Court as its result is complete frustration of the intent of the copyright law which has been the protection of intellectual property and, more importantly, the encouragement of creative expression." *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1534 (S.D.N.Y. 1991).

If this Court were to adopt Google's narrow conception of market harm, the Alliance members' ability to license their copyrighted material would be threatened in evolving commercial markets, just as Oracle's ability to license its software would be curtailed. The instant case is emblematic of how Google has exploited fair use to free ride on others' creative expression. In doing so, it has deprived content generators of the ability to commercialize and license their products in various sectors of the economy.

This Court should reaffirm well-established principles that Factor 4 does not require horizontal competition, takes account of harm to the market for derivative works, and considers harm not only in existing markets but also in potential markets and new markets made possible by technological change. So understood, Factor 4 protects Oracle from Google's use of Java code just as it protects media organizations from tech platforms' use of proprietary content to train AI.

## CONCLUSION

The Court should reject the overbroad conception of the fair use defense offered by Google, and affirm the judgment below.

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Respectfully submitted,

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