



Brief of Library Amici Curiae (ALA, ACRL, LFI, ARL, SPN, EveryLibrary)

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IN THE
Supreme Court of the United States

ANDY WARHOL FOUNDATION FOR THE
VISUAL ARTS, INC.,

Petitioner,

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,

Respondents.

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

**BRIEF OF *AMICI CURIAE* LIBRARY FUTURES
INSTITUTE, THE SOFTWARE PRESERVATION
NETWORK, THE EVERYLIBRARY INSTITUTE,
THE AMERICAN LIBRARY ASSOCIATION, THE
ASSOCIATION OF COLLEGE AND RESEARCH
LIBRARIES, AND THE ASSOCIATION OF RESEARCH
LIBRARIES IN SUPPORT OF NEITHER PARTY**

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INTEREST OF AMICI CURIAE¹

Library Futures Institute (“LFI”) is a grassroots non-profit organization representing a growing coalition of stakeholders, united behind our mission to empower libraries, archives, and other cultural institutions to engage with and stand up for their digital rights.

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

The EveryLibrary Institute (“ELI”) is a public policy and tax policy research and training organization focusing on issues affecting the future of public, academic, and school libraries and the profession of librarianship in the United States and abroad. Its areas of interest include funding, copyright, ownership, the structure and governance of libraries, and the impact of library work on society.

The American Library Association (“ALA”), established in 1876, is a non-profit professional organization of more than 57,000 librarians, library trustees, and other

1. On May 2, 2022, counsel for both parties filed blanket consent to the filing of any amici curiae briefs that are timely. 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.

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 126 research libraries in North America. ARL’s members include university libraries, public libraries, and government and national libraries. ARL programs and services promote equitable access to and effective use of recorded knowledge in support of teaching and research.

Collectively, ALA, ACRL, and ARL represent over 117,000 libraries in the United States.

SUMMARY OF ARGUMENT

The Court’s decision in this case may bear directly on the interests of visual artists who rely on existing works as raw material for their own creations, but it could also affect far more. As the Court considers how to decide this case in light of its deep and recently reaffirmed commitment to a robust fair use doctrine, it should keep in mind the substantial progress enabled by its past decisions. In particular, it should consider the interests

of some of fair use’s core beneficiaries: libraries, archives, cultural heritage institutions, and their users.

Fair use is an “equitable rule of reason” that “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” *Stewart v. Abend*, 495 U.S. 207 (1990) (internal quotation marks omitted). The jurisprudence that has evolved since *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), through this Court’s most recent transformative fair use determination in *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021), has focused on whether a second work or use has a different message, meaning, or purpose from that of the work being used. This understanding of fair use is particularly critical to research, education, librarianship, and the arts—as well as their continued accessibility—in the Twenty-First Century. *Amici* urge that the Court exercise great care to ensure that its reasoning in no way jeopardizes the *amici*’s transformative uses in support of research, teaching, scholarship, 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, including libraries, archives, and their users, as well 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, especially in the digital realm. This Court’s opinion in *Google* deepened and reaffirmed its commitment to a robust fair use doctrine that serves as a shield for core domains like research and teaching. The Second Circuit’s simplistic and at times incoherent treatment of transformative use is inconsistent

with that line of reasoning. And lastly, as the stewards of many creative works in our collections, libraries, archives, and cultural heritage institutions do not want the legality of such specialized collections to be called into question by this fair use decision.

ARGUMENT

Fair use is a central part of modern copyright law. As the Court reaffirmed last term in *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021), 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), increasing access for people who have print disabilities, copying for virtual classroom use, and many other new technology-dependent uses rely on fair use. The Court should carefully consider the effects of a fair use decision in this case on the much wider set of uses that rely upon this doctrine. Its opinion in *Google* reaffirmed and extended the logic of *Campbell*, which in turn had “rescued” the rights codified in Section 107 after they had been “lost adrift for a turbulent decade.” Pierre N. Leval, *Campbell v. Acuff-Rose: Justice Souter’s Rescue of Fair Use*, 13 Cardozo Arts & Entm’t L.J. 19, 19 (1994). In its *Campbell* opinion, this Court laid the foundation for a new generation of innovation, creativity, preservation, and learning. Its opinion in this case should avoid any adverse impact on *Campbell* and its progeny, including *Google*, 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 Vital 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*, 510 U.S. at 577 (internal quotation omitted). From the earliest days of the Anglo-American copyright system, allowances for non-permissioned 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 “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. See *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). 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 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).

One of the most significant alignments 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.” *See* 510 U.S. at 579. The Court stated that “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.’” *Id.* (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 be heavily favored in the fair use calculus. *See id.* In this way, the law recognizes that creators must have the freedom to build upon existing elements of culture—whether from visual arts or computer code—to create new works that further enrich our society and advance the very purposes of copyright law. *Id.*; *see also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1109 (1990).

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. 905, 912 (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 American University. See, e.g., *Code of Best Practices in Fair Use in Academic and Research Libraries*; *Set of*

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.

These 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,

*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 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).*

were spurred to action when they noticed that certain kinds of projects were being systematically avoided due to copyright concerns. Patricia Aufderheide and Peter Jaszi, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers* (2004). When a culture of fair use avoidance 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.” 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 in the Copyright Act. *See* 17 U.S.C. § 108 (statutorily authorized noninfringing uses for libraries and archives); § 110(1) and (2) (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); § 1201(d) (exemption for libraries, archives, and educational institutions from the prohibition on the circumvention of technological protection measures); § 1203(5)(B) (limitation on liability for libraries, archives, and educational institutions); § 1506(aa) (preemptive

opt-out by libraries and archives from claims brought before the Copyright Claims Board). For fair use, Congress similarly identified “teaching,” “research,” and “scholarship” in the statutory fair use preamble as examples of uses that would ordinarily be found to be fair. 17 U.S.C. § 107 (2019).³ *Google* reiterated the centrality of research and teaching in the fair use ecosystem, insisting that the transformative use analysis “go further” in the context of computer programs and “examine the copying’s more specifically described ‘purpose[s]’ and ‘character’” to avoid an approach that might “severely limit” the scope of fair use of computer programs in paradigm cases such as “for teaching or research.” 141 S. Ct. 1203.

Fair use has always been integral to library uses of copyrighted works. Before Section 108 was created in the Copyright Act of 1976, libraries frequently relied on early fair use common law almost exclusively for making accessible copies for patrons. Section 108 acknowledges the importance of fair use for libraries a number of times in both the text of the Act itself and in its legislative history. H.R. Rep. No. 94-1476 (1976); (“Nothing in this section...(4) in any way affects the right of fair use as provided by section 107” 17 U.S.C. § 108 (f)(4) (2022)).

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

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).

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. 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 fair use to enable the digital reproduction of entire sets of texts for computational analysis, using text and data-mining techniques to yield new insights into topics ranging from the emergence of the COVID-19 pandemic to how language and culture have developed over time. Eric Niiler, *An AI Epidemiologist Sent the First Warnings of the Wuhan Virus*, *Wired*, Jan. 25, 2020, <https://www.wired.com/story/ai-epidemiologist-wuhan-public-health-warnings/> [<https://perma.cc/9AZC-DNNE>]; 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, Inc. v. HathiTrust*, 755 F.3d 87 (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.* at 97. 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 In writing for the district court, Judge Harold Baer noted, “I cannot imagine a definition of fair use that would not encompass the transformative uses made by Defendants’ [mass digitization project] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts.” *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 464 (S.D.N.Y. 2012). The Second Circuit largely agreed. 755 F.3d at 97.

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).

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.” *Id.* at 103. When this Court rejected a constitutional challenge to retroactive extension of copyright terms in *Eldred v. Ashcroft*, 537 U.S. 186 (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.⁵ 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 Warhol’s use in this case was transformative or otherwise

5. The *Code of Best Practices in Fair Use for Academic and Research Libraries* (2012) identifies principles for employing fair use in eight common library situations, emphasizing the lengthy process behind the development of the community best practices: (1) supporting teaching and learning with access to library materials via digital technologies; (2) using selections from collection materials to publicize a library’s activities, or to create physical and virtual exhibitions; (3) digitizing to preserve at-risk items; (4) creating digital collections of archival and special collections materials; (5) reproducing material for use by disabled students, faculty, staff, and other appropriate users; (6) maintaining the integrity of works deposited in institutional repositories; (7) creating databases to facilitate non-consumptive research uses (including search); and (8) collecting material posted on the web and making it available online.

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. Key Elements of the Opinion Below Conflict with Supreme Court Precedent and Well-Developed Understandings of Fair Use

Our principal concern in this brief is to inform the Court of the centrality of fair use to libraries and other cultural heritage institutions and their users, and to warn against any change in the doctrine that could make it harder for us to engage in preservation, scholarship, and teaching. While the Second Circuit reassures “art historians, critics, collectors, and the museum-going public” that the decision will not be harmful, its interpretation of the transformative fair use test is quite the opposite; if upheld, the decision will have a drastic chilling effect on the communities served by libraries, museums, and other cultural institutions including “art historians, critics, collectors, and the [] public.” Pet. App. 27a. There is a key error in the Second Circuit’s opinion below that merits mention here because of this potential impact on *amici* and the public. In its analysis of transformative use, the opinion below begins with the observation that “purpose is perhaps a less useful metric where, as here, our task is to assess the transformative nature of works of visual art that, at least at a high level of generality, share the same overarching purpose (i.e., to serve as works of visual art).” Pet. App. 20a.

To compare purpose at such a high level of generality (and then to abandon the inquiry upon concluding the

purposes are the same at that level) would be clear error after *Google*, which held that “in determining whether a use is ‘transformative,’ we must go further and examine the copying’s more specifically described ‘purpose[s]’ and ‘character.’” 141 S. Ct. at 1203. In *Google*, the Federal Circuit had found that Oracle and Google used the computer code at issue for the same basic functional purpose (to enable programmers to call up implementing code to carry out recurring tasks), rendering Google’s uses not transformative. Justice Breyer observed that defining a computer program’s purpose in this way would “severely limit the scope of fair use in the functional context of computer programs,” since “virtually any unauthorized use of a copyrighted computer program (say, for teaching or research)” would fail this version of the test. *Id.* Rejecting this constrained view of the transformative test, this Court instead directed lower courts to “go further.” *Id.*

Yet the Second Circuit’s ultimate analysis of purpose does not move much beyond its initial, high-level shrug. After surveying a variety of fair use cases in the visual arts, the court concludes that “the secondary work itself must reasonably be perceived as embodying a distinct artistic purpose, one that conveys a new meaning or message separate from its source material.” Pet. App. 22a. While this formulation would seem to suggest a more probing inquiry than the initial comparison (“both are works of visual art”), the court goes on to say, “the district judge should not assume the role of art critic and seek to ascertain the intent behind or meaning of the works at issue.” Pet. App. 22a-23a. But of course ascertaining intent and meaning is necessary if one is to determine whether the second work’s purpose was “distinct” and whether

its “meaning or message” was “new” and “separate” relative to the first. The result of the Second Circuit’s contradictory rulings is to create precisely the kind of bias against fair use that this Court barred in *Google*. Judges attempting to apply it will “severely limit the scope of fair use” in the visual arts and anywhere else it is applied. Preserving fair use requires reversal, at least with respect to the Second Circuit’s treatment of purpose.

IV. Libraries and Archives Own Works of Appropriation Art in their Collections

Libraries, archives, and cultural heritage institutions are stewards to countless creative works that rely on appropriation techniques similar to Warhol’s; we collect, preserve, and provide access to such works to the public. The Second Circuit’s fair use analysis threatens to render unlawful special collections of contemporary art that incorporates and reframes copyrighted works to convey a new meaning or message. To the extent that works like the Prince Series do not make fair use of their source material and therefore constitute infringement, the apparent implication would be that libraries, archives, and cultural heritage institutions cannot lawfully display the works. *See* 17 U.S.C. § 109(c) (display right limited to copies “lawfully made”).⁶ Furthermore, the copyright owner of the source material may seek the “impoundment” and “destruction” of the works. *See id.* § 503. Such a ruling has the potential

6. Judge Jacobs addressed this precise issue in the Second Circuit in his concurrence, stating, “our holding may alarm or alert possessors of other artistic works. Warhol’s works are among many pieces that incorporate, appropriate, or borrow from protected material. Risk of a copyright suit or uncertainty about an artwork’s status can inhibit the creativity that is a goal of copyright.” Pet. App. 51a (Jacobs, D., concurring).

to jeopardize existing culturally significant works and collections of important art and artists.

Numerous library collections contain works from well-known artists who adapt source material in a way that changes its meaning and message, while leaving the source material recognizable. For example, Yale University and Harvard University libraries, among other libraries across the country, own catalogs of Barbara Kruger's work—an artist known for juxtaposing text over found photographs, as well as an amicus party to this case. Similarly, many libraries own a catalog of Vik Muniz's works, a contemporary Brazilian artist who is known for recreating famous works of art using garbage and other ephemeral materials. *Vik Muniz*, Ben Brown Fine Arts, <https://www.benbrownfinearts.com/artists/45-vik-muniz> (last visited June 10, 2022) [<https://perma.cc/5R36-NC4C>]. Over 100 U.S. libraries own the original publication of *Evidence* by Larry Sultan and Mike Mandel—one of the most influential photo books from the 1970s containing a collection of assembled photographs that Sultan and Mandel found in government archives. Sandra S. Phillips, *A History of the Evidence*, *The Paris Review* (May 3, 2017), <https://www.theparisreview.org/blog/2017/05/03/a-history-of-the-evidence> [<https://perma.cc/87NS-YMQ2>]. Many library systems also own the 2003 reprint edition of *Evidence* in their General Collections, demonstrating continuing patron interest in the work.

Beyond library collections of appropriation art, many artists use photographs from library collections as study images from which to create a new work, or use a compilation and juxtaposition of found images to create new art. There is a long tradition in libraries of collecting

pictures for visual reference that enables users to create such works, similar to an analog Google Images. For example, the Picture Collection of the New York Public Library has, for more than a century, lent images to library users who are seeking visual information for a multitude of educational and artistic purposes. See Arthur Lubow, *Hands Off the Library's Picture Collection!*, N.Y. Times (Aug. 3, 2021), <https://www.nytimes.com/2021/08/03/arts/design/new-york-public-library-picture-collection.html> [<https://perma.cc/W2JW-YCQ8>]. The Print and Picture Collection at the Free Library of Philadelphia, a similar collection of images clipped from magazines and original artwork, is also often used by local appropriation artists. *Print and Picture Collection*, FreeLibrary.org, <https://libwww.freelibrary.org/locations/departments/print-and-picture-collection> (last visited June 10, 2022) [<https://perma.cc/SB4V-FX59>]. Libraries and archives must be protected from legal risk for collecting and displaying potentially infringing content, as well as from secondary liability for the potentially infringing works that their users create. *Amici* urge that the legality of such specialized collections not be called into question by this fair use decision.⁷

7. As a more general matter, we agree with Judge Jacobs' concurring opinion in the Second Circuit that Goldsmith's complaint centers not on the lawfulness of the Prince series, but rather more narrowly on the lawfulness of the Andy Warhol Foundation's licensing of the Prince Series for reproduction and distribution in *Vanity Fair*. See Pet. App. 51a (Jacobs, D., concurring). Thus, properly understood, this case does not necessarily address whether the creation of appropriation art is a fair use, but whether the licensing of a derivative image for widespread distribution in a magazine is a fair use. Accordingly, this Court should take care to decide this case in a manner that does not implicate the creation of appropriation art in library and archive collections.

CONCLUSION

The judgment of the court below should be vacated, and the case remanded for a much more particularized consideration of fair use made possible by this Court's crucial opinions in *Campbell* and *Google*.

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