No. 15-849

IN THE

# Supreme Court of the United States

THE AUTHORS GUILD, *et al.*,

*Petitioners,*

*v.*

GOOGLE, INC.,

*Respondent.*

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

## BRIEF OF *AMICI CURIAE* TEXT AND ACADEMIC AUTHORS ASSOCIATION, WESTERN WRITERS OF AMERICA, INC., THE NATIONAL ASSOCIATION OF SCIENCE WRITERS, INC. AND THE DRAMATISTS GUILD IN SUPPORT OF PETITIONERS

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## BRIEF OF TEXT AND ACADEMIC AUTHORS ASSOCIATION, WESTERN WRITERS OF AMERICA, INC., THE NATIONAL ASSOCIATION OF SCIENCE WRITERS, INC., AND THE DRAMATISTS GUILD AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The undersigned *amici curiae* respectfully submit this brief in support of the petition for certiorari filed by petitioners The Authors Guild, *et al.*, to review the decision of the United States Court of Appeals for the Second Circuit.[1]

## IDENTITY AND INTEREST OF THE *AMICI CURIAE*

The Text and Academic Authors Association ("TAA") is the only nonprofit membership association dedicated solely to serving authors of scholarly books, textbooks, and journal articles. Formed in 1987, the TAA has over 2,100 members, primarily consisting of authors or aspiring authors of scholarly books, textbooks, and academic articles. Many of the TAA's members serve on college or university

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[1] Pursuant to Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. Only *amici curiae* made such a monetary contribution. Counsel of record received timely notice of *amici curiae's* intent to file this brief under Rule 37.2. The Clerk has noted Respondent's blanket consent to *amicus curiae* briefs, dated January 14, 2016, on the docket.

faculties. The TAA's mission is to enhance the quality of educational materials and to assist text and academic authors by, for example, providing information on tax, copyright, and royalty matters, and fostering a better appreciation of their work within the academic community.

The TAA also works to promote the authorship of scholarly books and other academic materials by providing its members with educational and networking opportunities. It offers workshops, audio conferences, webinars, and materials on the substance and mechanics of scholarly book writing and the publication process, and hosts an annual conference covering such topics. Additionally, the organization offers an Academic Publication Grant to help authors cover the expenses incurred in preparing a work for publication, and a Textbook Contract Review Grant to help cover the cost of an intellectual property attorney to help negotiate an author's first textbook contract.

Western Writers of America, Inc. ("WWA") was founded in 1953 to promote the literature of the American West. WWA's 650 members include writers of traditional Western fiction, historians and other nonfictions authors, young adult and romance writers, and writers interested in regional history.

Established in 1934, the National Association of Science Writers, Inc. ("NASW") is dedicated to fostering the dissemination of accurate scientific information. NASW's members are professional

science writers; instructors of science writing; and science writing students. With over 2,600 members, NASW is the largest organization of science writers in the world.

The Dramatists Guild (the "Guild") is the only professional organization promoting the interests of playwrights, composers, lyricists, and librettists writing for the stage. Established over eighty years ago for the purpose of aiding dramatists in protecting both the artistic and economic integrity of their work, the Guild continues to educate, and advocate on behalf of, its over 6,000 members. The Guild believes a vibrant, vital theater is an essential element of this country's ongoing cultural debate, and seeks to protect those individuals who write for the theater to ensure its continued success.

*Amici* are concerned that the Second Circuit's decision will cause significant harm to individual authors of scholarly books, academic materials, dramatic works, and other informational works that serve a critical role in educating and entertaining the public. Royalties and permissions income are important contributors to authors' and publishers' ability to produce and disseminate informational and scholarly works.[2] With fewer incentives to create, authors will be less likely to produce the type of

[2] "Scholarly works" generally include, among others, anthologies, annual review or conference proceedings books, literature reviews, reference works, handbooks, and monographs (published dissertations and theses).

educational, informative works that contribute to the progress of human knowledge and understanding—the very purpose of copyright law.

The erosion of permissions income, along with other incentives contemplated by the Copyright Act, inevitably will force academic presses in particular to reduce the number of scholarly works they publish, which poses a significant threat to *amici's* members' opportunities to produce and disseminate scholarly and other educational works. The corresponding reduction in the publication of scholarly works will deprive academic authors of publication credit, which has a direct effect on promotion and tenure decisions, resulting in a substantial financial impact on a faculty member's salary over his or her entire career. Moreover, the Second Circuit's implicit presumption that non-fiction writing is solely informational and not highly expressive grossly underestimates the creative value and originality inherent in most non-fiction writing. *Amici* therefore file this brief to address the practical impact of this case on their members.

## SUMMARY OF THE ARGUMENT

The Second Circuit's opinion allows Google, one of the world's wealthiest companies, to reap profits from the digitization of millions of works with no financial compensation paid to the works' authors. It permits Google to scan voluminous collections of books, usurping the author's right to decide when or if to make his or her work available in digital form;

use those scans for its own internal business purposes; provide complete digital copies to participating libraries in consideration for access to the books—copies that Congress prohibits libraries from making themselves[3]; and make a full 78 percent of the books available to the public on a per-snippet basis – all without permission or paying the authors a cent.

The Second Circuit's opinion establishes a precedent that, if followed, undoubtedly will unleash unrestricted, unregulated, and widespread digital copying of creative works by numerous commercial entities under the guise of fair use. Any entity, whether formed for profit or more altruistic purposes, and whether or not technologically capable of keeping digital works secure to protect them from widespread piracy, may now engage in mass digitization of third party works and make those works available to the public. Allowing mass digitization and use as fair use is an extensive taking, one that has no precedent in the history of fair use jurisprudence.

The Second Circuit disregards the fact that authors have a right to determine if, when, and how to digitize their copyrighted works; it is a core right of the copyright owner under the section 106 reproduction right and should be subject to the author's authorization. Google Books denies authors the ability to exercise this right and, to the extent an

[3] *See* 17 U.S.C. § 108.

author does wish to digitize his or her work, effectively cuts off the development of what is an already existing market for eBooks and other digital licensing services.

Allowing a commercial third party to freely digitize others' works not only undermines the copyright protections contained within section 106, but negates a substantial revenue stream of publishers and, therefore, authors; the Second Circuit's decision will harm the ability of authors to profit from their works and ultimately to make a living from their creative work. If the decision is allowed to stand, there will be less incentive for authors to create—particularly scholarly, educational, and non-fiction authors—thus contravening the purpose of copyright to promote the progress of science and the useful arts. Academic authors, specifically, who are tenured and no longer expected to publish in order to advance their careers, along with other non-fiction writers not directly tied to an academic institution, may be deterred from producing the type of culturally valuable works that further human knowledge. Moreover, publishers not only provide financial incentives to authors to create new works, but serve an invaluable function as certifiers of quality, publishing only that information that can be verified.

The Second Circuit's analysis additionally misses Google Books' ramifications on what is a significant market for licensed excerpts of scholarly works,

particularly by students and academics who often may not need access to entire works, from front to back, to fulfill their purposes. According to the court, factual information contained in snippets may serve as an effective substitute for an author's work, but such information is not subject to copyright protection in the first instance. The court not only fails to acknowledge the creativity and originality that characterizes even non-fiction works, but fails to take into account the complex, ever-evolving revenue streams at play in the digital marketplace. The excerpt market for scholarly works is particularly robust given the fact that such works often relate to numerous topics or a broad topic and only portions may be relevant to a particular reader. Google's dissemination of snippets is a direct substitute for this market because Google Books allows users to search for, and view, snippets from books on the topics they are researching. As described above, if a user runs enough searches, she can access almost the entire book through snippets (only 10% of a book is "blacklisted" and will not appear in snippets). As a result, the targeted consumers of excerpts – scholars and students – get what they need for free. Despite this clear market usurpation, the Second Circuit failed to even consider the existence of excerpt licensing.

Copyright law in general, and fair use in particular, calls for balance. The Second Circuit's decision is not a balanced one, and, moreover, claims

the type of policy-making authority that is, and always has been, reserved to Congress. By focusing on the public benefit that may accompany Google's digitization efforts, the Second Circuit overlooks the enormous cost and provides a free ride to a billion-dollar company without regard to individual creators and copyright doctrine as a whole. Permitting the Second Circuit's ruling to stand will embolden others to seek ways to avoid compliance with the law, rather than encouraging businesses and citizens to comply with the statutes and legal principles that this Court is tasked with interpreting.

This Court has a history of taking cases where an intellectual property issue rises to one that is of a matter of national importance. *See, e.g., Bilski v. Kappos*, 130 S. Ct. 3218 (2010); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Such action is required now.

## ARGUMENT

### I. THE SECOND CIRCUIT'S DECISION FAILS TO CONSIDER AND FULLY APPRECIATE THE EXPRESSIVE VALUE OF NON-FICTION AND OTHER INFORMATIONAL WORKS.

In its analysis of the fourth fair use factor, the Second Circuit asserts that, while Google Books' snippet function may result in "some loss of sales," the "type of loss of sale envisioned above will generally occur in relation to interests that are not protected by the copyright." Pet. App. 41a. By way of

example, the Second Circuit identifies a historical fact that a hypothetical Google Books user might need to ascertain. The fact that this historical fact comes embedded in a snippet of an author's writing "would not change the taking of an unprotected fact into a copyright infringement" because, according to the Second Circuit, the author's writing is "superfluous to the searcher's needs." Pet. App. 42a. What the Second Circuit overlooks is that academic and other works that convey factual information are generally highly creative and expressive. Authors of such works do not merely state facts, but rather take care to craft sentences that convey information with thoughtfulness and clarity, adding to prior learning through interpretation and expression.[4] In many instances, academic and scholarly writing often seeks to resolve certain issues by convincingly persuading readers to a particular point of view. The Second Circuit's decision dismisses the arduous writing process that must be undertaken by writers of scholarly, informational works in order to achieve this goal.[5] Indeed, scholarly writing is assessed

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[4] The popularity of Malcolm Gladwell's *Blink,* for instance, or Deborah Blum's *The Poisoner's Handbook*, serves as a testament to the ability of non-fiction authors and journalists to explain intricate, complex concepts in a manner understood—and enjoyed—by the general public.

[5] As much as these works merit protection for their persuasive power and social value, the Second Circuit's analysis is not limited to academic or other non-fiction works, but rather encompasses "information" contained within fictional and dramatic works as well.

based not only on its factual accuracy, but on its originality and expressive effectiveness as well. Academic works that are used in the classroom, for instance, are chosen precisely because of their original, expressive content and ability to communicate complex information in an accessible way. Academic *amici*'s members confirm that originality in selection of topic and expression are highly important factors used by peer reviewers in assessing scholarly writings for publication. A work that is not original will, quite simply, not be published. Work that contains factual information is no less deserving of copyright protection than works of fiction, and should not automatically be placed outside the protection of copyright because it is educational.

Moreover, the Second Circuit's dismissal of the second fair use factor with respect to non-fiction works is contrary to case law finding academic and scholarly works sufficiently expressive such that the second factor weighs in favor of plaintiffs (or, at worst, is neutral). *See, e.g.*, *Princeton Univ. Press v. Mich. Document Servs., Inc.,* 99 F.3d 1381, 1389 (6th Cir. 1996); (scholarly works found to contain "creative material, or 'expression,'" which disfavored fair use); *Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983) (cake decorating booklet contained "both informational and creative aspects," and thus second fair use factor was neutral); *Weissmann v. Freeman*, 868 F.2d 1313, 1325 (2d Cir. 1989) (second fair use

factor favored neither party in case involving claim of infringement of copyright in medical research article); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 72-73 (2d Cir. 1999) (stating that newspaper articles are predominantly factual in nature and that expressive elements do not dominate, but finding that the second fair use factor was at most neutral).

Indeed, information is at the heart of copyright law. The Constitution's Copyright Clause uses the term "Progress of Science" to refer to copyright because the Founding Fathers sought to promote learning and knowledge.[6] These aims are accomplished through the creation—and protection—of everything from medical textbooks to academic articles, regional histories, fictional works exploring scientific concepts—even a musical like "Hamilton," which entertains while educating the public (in this instance, about the Founders themselves). In dismissing the originality and creativity inherent in educational, informational works, the Second Circuit fundamentally misunderstands the purpose of the second fair use factor, and the meaning of authorship and expression under copyright law.

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[6] U.S. Const. art. 1, § 8, cl. 8; *see also Feist Publ'ns, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 349-50 (1991); *Golan v. Holder,* 132 S. Ct. 873, 888 (2012) (the "'Progress of Science' refers broadly to the creation and spread of knowledge and learning").

## II. THE WIDESPREAD HARM THAT COULD RESULT IF THE SECOND CIRCUIT'S DECISION IS NOT REVERSED NECESSITATES THIS COURT GRANTING CERTIORARI.

### A. The Second Circuit Failed to Adequately Analyze the Fourth Fair Use Factor.

The fourth fair use factor directs a court to look at "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). As the Supreme Court explained in *Campbell v. Acuff-Rose*, under the fourth factor, a court should consider "whether unrestricted widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market." 510 U.S. 569, 590 (1994). Here, a licensing market is not merely a hypothetical; Google has already obtained licenses from certain publishers. *Campbell* further explained that, where the copies at issue are merely non-transformative duplicates, it is likely they will serve as a market replacement and "that cognizable market harm to the original will occur." *Campbell*, 510 U.S. at 591; *see also Sony*, 464 U.S. at 451. The Second Circuit itself recognized the significance of the fourth factor, noting that "[b]ecause copyright is a commercial doctrine whose objective is to stimulate creativity among potential authors by enabling them to earn money from their creations, the fourth factor is of

great importance in making a fair use assessment." Pet. App. 39a. *See also Harper & Row Publishers, Inc. v. Nation Enters.,* 471 U.S. 539, 566 (1985) (the fourth factor is "undoubtedly the single most important element of fair use").

Both authors, and those who invest in a work's commercialization and dissemination, are owed protection from free-riding on their investments. As Authors Guild Executive Director Mary Rasenberger has explained, many full-time authors "live on the edge of being able to keep writing as a profession"; consequently, "a loss of licensing revenue can tip the balance." Joe Mullin, *Appeals Court Rules that Google Book Scanning is Fair Use*, Ars Technica (Oct. 16, 2015), http://arstechnica.com/tech-policy/2015/10/appeals-court-rules-that-google-book-scanning-is-fair-use/. Publishers provide the financial incentives that allow authors of academic, scholarly, and non-fiction works to create new works. *See generally*, *e.g.*, Adam Mosoff, *How Copyright Drives Innovation in Scholarly Publishing*, 13-25 George Mason University Law and Economics Research Paper Series, *available at* http://ssrn.com/abstract=2243264. As this Court recently recognized, the promotion of "Progress" encompasses providing incentives toward making works available. *Golan*, 132 S. Ct. at 888 ("[I]nducing *dissemination* – as opposed to creation – was viewed as an appropriate means to promote science."); *see also Harper & Row,* 471 U.S. at 558

("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and *disseminate* ideas.") (emphasis added); *American Geophysical Union v. Texaco*, 802 F. Supp. 1, 16 (S.D.N.Y. 1992) ("Copyright protection is vitally necessary to the dissemination of scientific articles . . . . [It] is essential to finance the publications that distribute them."), *aff'd*, 60 F.3d 913 (2d Cir. 1994). Scholarly publishing entails a significant amount of risk and is, at best, a moderately-compensated practice. Because profit margins within the academic publishing market are relatively slim, this is not a market that can withstand erosion, yet the Second Circuit's decision threatens to financially disadvantage and disincentivize the countless authors and publishers that rely on the protections accorded to them by the Copyright Act.[7] Even small income reductions affect whether an academic publisher can recoup its publishing costs.

Publishers serve an additional, essential purpose as certifiers of quality. Textbook and journal editors

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[7] Books concerning highly specialized fields tend to be particularly close to the margin in terms of recoupment of costs. Even when a book is likely to contribute enormously to scholarship in the field (often in the case of highly specialized works, such as in the sciences where advances have become complex and hence necessarily specialized), publishers are unable to justify its publication if the book cannot pay for itself. As such, even a small drop in potential revenue from such books forces publishers to seek out books with broader audiences.

review the quality of research and information, publishing only that information that can be verified. Justin Fox, *Academic Publishing Is All About Status*, Bloomberg View (Jan. 5, 2016), http://www.bloombergview.com/articles/2016-01-05/academic-publishing-is-all-about-status (noting that the "most important function that journals have these days is the certification of quality"). Without selectivity in publishing, the public suffers; information may continue to be put forward, but such information may not be useful or accurate. Rather than contribute to the "progress of science," the absence of selectivity—which is sustained by financial revenue and, therefore, copyright protection—detracts from it.

### B. The Second Circuit's Analysis of the Fourth Fair Use Factor Disregards the Value of Excerpts.

The Second Circuit focused its analysis of the fourth fair use factor on Google Books' snippet view function, determining that such copying does not provide access to an effectively competing substitute. According to the Second Circuit, "Snippet view, at best and after a large commitment of manpower, produces discontinuous, tiny fragments, amounting in the aggregate to no more than 16% of a book. This does not threaten the rights holders with any significant harm to the value of their copyrights or diminish their harvest of copyright revenue." Pet. App. 40a. The Second Circuit acknowledged that the

snippet function may result in some loss of sales, but found that "the possibility, or even the probability or certainty, of some loss of sales does not suffice to make the copy an effectively competing substitute that would tilt the weighty fourth factor in favor of the rights holder in the original." *Id.*

The Second Circuit's analysis fails to recognize the value of excerpts, particularly with respect to informational or scholarly works. The snippet function is precisely the type of use that threatens revenue derived from scholarly works. Google Books' snippet function adds nothing new; factual information is otherwise available online, and through licensed means. LexisNexis and Westlaw, for instance, provide licensed access to numerous professional and academic works—works regularly consulted for particular information or facts. Moreover, to the extent a user seeks a particular fact, it is unclear why a not-insubstantial section of a factual work must be revealed in order to provide such information. Within academia, the introduction of digital technologies has obviated the practice of providing excerpts in the form of hardcopy course packs or by placing copies of a textbook, journal, or other material on reserve. Today, because professors at most higher education institutions now have the option of providing electronic copies through university electronic systems, a robust market has developed to license and readily deliver excerpts of informational works in a variety of formats. The

Second Circuit's decision, if allowed to stand, makes it acceptable to post online unlimited excerpts under the rubric of fair use, encouraging professors to assign more digital excerpts (which will be free), rather than require students to purchase textbooks or other informational works. The effect will be even fewer purchases of books for classroom use. *See Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1534 (S.D.N.Y. 1991) ("[w]hile it is possible that reading the [course] packets whets the appetite of students for more information from the authors, it is more likely that purchase of the packets obviates purchase of the full texts."). In this manner, the "fair" uses will completely usurp the market for paid excerpt use, and the excerpt market will inevitably become extinct for all but multiple chapter or particularly long excerpts. This is precisely what consideration of the fourth factor is intended to prevent. *Harper & Row,* 471 U.S. at 562; *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

The practical impact of freeing the excerpt market from copyright protection is a loss of an important source of revenue for publishers of textbooks, and other academic and informational works. Ultimately, without publishers' ability to offer the necessary incentives for authors to create, the public will be injured because there will be fewer quality works. *See Princeton Univ. Press,* 99 F.3d at 1391 (finding loss of licensing revenue could have a

"deleterious effect upon the incentive to publish academic writings"); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928-929 n.8 (2005) (warning against overstating the "mutual exclusivity" of "the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies"); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (the purpose of copyright is "to secure a fair return for an 'author's' creative labor" with "the ultimate aim . . ., by this incentive, to stimulate artistic creativity for the general public good.").[8]

Moreover, if uses such as Google's become "widespread," uncontrollable piracy is a likely result. Concerned with the extensive piracy that invariably accompanies the availability of unsecured, online digital copies, some authors do not wish their works to be digitized. Given that piracy can cannibalize an

[8] The relevant markets also include the library market for replacement copies. Libraries are the largest market by far for many books, and represent a major source of revenue for authors. Google's dissemination of complete digital copies of millions of books to libraries (in exchange for access to full works) provides libraries with free digital backup copies of these books—backup copies that would not otherwise have been authorized by 17 U.S.C. § 108, and would have instead been purchased by these libraries. *See* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 13.05(E)(1) (2012) (explaining that "if every school room or library may, by purchasing a single copy, supply a demand for numerous copies through photocopying, or similar devices, the market for copyrighted educational materials would be almost completely obliterated.").

entire market, many authors and publishers are rightfully cautious about who may digitize and have access to unsecured digital copies of their works for fear that perfect, unsecured, free copies will become viral and paying markets for the works will eventually be eliminated. While Google may have the capability of providing secure storage and display, few others have the same resources; and yet there is nothing in the Second Circuit's analysis that would prevent an entity completely lacking secure technologies from making the same uses.

### C. The Second Circuit's Decision Harms the Incentive to Publish by Endangering the Academic Publishing Ecosystem.

Publishing with a scholarly press is the principal means by which academics in almost all fields secure tenure and promotion, which in turn directly affects compensation. Salary increases and merit pay in most research institutions are tied directly to the professors' publishing record. The ability to "sell" one's scholarly writing to an established academic publisher thus has very direct and immediate financial consequences for most academic authors. Indeed, *amici*'s members who are academics report that publishing in scholarly presses is the single most important factor to career advancement in academia and obtaining the financial rewards that

follow. These benefits provide the incentives for our academic members to write.[9]

The erosion of permissions income could force publishers of academic and other scholarly, informational works to reduce the number of works published. In turn, academic authors will be deprived of scholarly publication credit required to advance their careers. *See American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 927 (2d Cir. 1995) (noting that in academia, recognition "so often influences professional advancement and academic tenure") (internal citation omitted). The inability to publish and obtain publishing rewards "could well discourage authors from creating works of a scientific or educational nature," deterring substantial numbers of potential contributors and resulting in the depletion of educational and informational literature in the name of fair use. 4 *Nimmer on Copyright* § 13.05(E)(1).

In short, the Second Circuit's decision, if not reversed, is likely to have a direct impact on the copyright incentives to disseminate works that are specifically intended to further human knowledge – exactly the type of works the founders had in mind in securing copyright protection for authors in the Constitution.

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[9] Similarly, the opportunity to publish benefits science journalists, who become experts on the topics on which they write—expertise that can be parlayed into speaking engagements and additional publishing opportunities.

## III. IN PERMITTING MASS DIGITIZATION OF ENTIRE COPYRIGHTED WORKS, THE SECOND CIRCUIT IMPROPERLY EXPANDED LIMITED STATUTORY EXCEPTIONS IN A MANNER RESERVED TO CONGRESS.

The Second Circuit engaged in judicial legislation by creating a mass digitization exception to the exclusive rights of copyright owners. The delineation of exceptions to copyright protection that would permit mass digitization of entire copyrighted works without consideration of the fair use factors is not a task for the courts, but rather, Congress. *See Tasini v. New York Times Co.,* 206 F.3d 161, 168 (2d Cir. 2000) (where the Copyright Act "sets forth exceptions to a general rule, we generally construe the exceptions 'narrowly in order to preserve the primary operation of the [provision]'") (quoting *Commissioner v. Clark*, 489, U.S. 726, 739 (1989)); Pet. App. 102a ("[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives.") (citing *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) and *Sony,* 464 U.S. at 429). The Supreme Court has noted that it is "Congress' responsibility to adapt the copyright laws in response to changes in technology." Pet. App. 103a (citing *Sony*, 464 U.S. at 430-31). This Court has also recognized that the Google Books platform implicates issues that are most properly addressed by Congress. *Golan,* 132 S. Ct. at 894. The Second

Circuit's decision creates a significant change in copyright policy without any open and public debate and input from the numerous and diverse stakeholders affected by and interested in mass digitations and preservation.

A perceived public demand or social good cannot justify a judicial expansion of copyright law of this magnitude. *See Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1240 (D. Colo. 2006) (stating that public policy arguments submitted to the district court are "inconsequential to copyright law" and "addressed in the wrong forum" because the "Court is not free to determine the social value of copyrighted works."). The Second Circuit has circumvented the careful balancing of interests that goes into legislative reform and threatens to create precedent that would undermine the very purpose of copyright—namely, to encourage authorship and expression—a purpose that is not served by a system singularly focused on profit.

## CONCLUSION

*Amici* therefore respectfully request that the ruling below be reversed, and that the Court reexamine the use at issue within the traditional contours of copyright law.

Respectfully submitted.

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