

12-3200

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE AUTHORS GUILD, INC., Associational Plaintiff, BETTY MILES, JOSEPH GOULDEN, and JIM BOUTON, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

GOOGLE INC.,

Defendant-Appellant.

On Appeal from an Order Granting Certification of a Class Action, Entered on May 31, 2012, by the United States District Court for the Southern District of New York, No. 1:05-cv-08136-DC Before the Honorable Denny Chin

BRIEF *AMICI CURIAE* OF THE DRAMATISTS GUILD; THE DRAMATISTS LEGAL DEFENSE FUND; THE NATIONAL WRITERS' UNION; THE ROMANCE WRITERS OF AMERICA; THE SOCIETY OF CHILDREN'S BOOK WRITERS AND ILLUSTRATORS; THE SONGWRITERS GUILD OF AMERICA, AND THE TEXT AND ACADEMIC AUTHORS ASSOCIATION IN SUPPORT OF APPELLEES AND AFFIRMANCE.

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CORPORATE DISCLOSURE STATEMENT

No *amicus* has a corporate parent. No public corporation controls 10 percent of any *amicus* ' stock.

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STATEMENT OF CONSENT TO FILING

Amici are authorized to file this brief under Fed. R. App. P. 29(a), as all parties have consented to its filing.

INTEREST AND IDENTITY OF THE AMICI*

Amici are associations of individual songwriters, illustrators, playwrights and authors who rely on the revenue streams from the sale, licensing, and exploitation of their copyrighted works to make a living. The effect of advances in digital technology on the dissemination of their works has both provided a tremendous opportunity and a tremendous risk: opportunity, in that they have the ability to reach a mass audience that they could not reach before, and risk in that through the use of the technology their works may be subject to large-scale misappropriation and made available without permission or payment.

In this case, a technology provider centrally and unilaterally decided that it would scan several entire libraries' worth of published works and make portions of them available over the Internet for the provider's own benefit. That provider asserts not only that it may do so without permission or payment, but also that the sheer indiscriminate scope and scale of that copying renders its alleged wrong incapable of adjudication via Rule 23.

* Pursuant to Local Rule 29.1(b), no portion of this brief has been authored, in whole or in part, by a party or counsel for any party. Neither counsel for a party nor a party has contributed money intended to fund the preparation or submission of this brief. The sole entities that have contributed money to its preparation or submission are the ones whose names appear on the cover.

Conduct like the defendant's, if not redressed through the class action procedure, tilts the balance irrevocably from "opportunity" entirely to "risk." Although *amici* earn a living from their creations, in many if not most cases, it is not an affluent one. Without the ability to aggregate their claims against infringing technology providers, *amici* fear that the exclusive rights that the copyright act promises will be illusory to all except the largest and best-heeled copyright owners: it will encourage technology providers to simply take first, and worry about the consequences later. That position has implications for all *amici*, who will face a similar digitization of songs, sheet music, plays, and other derivative works—indeed virtually any copyrighted work, without a meaningful ability to deter that wrong. The *amici* are as follows:

The Dramatists Guild of America, Inc. is the national association of professional playwrights, librettists, lyricists and composers writing for the stage, with nearly 7,000 members around the world. The Guild is governed by an elected Board of Directors, who currently include such artists as Marsha Norman (*The Color Purple*, *Night, Mother*), Edward Albee (*Who's Afraid of Virginia Woolf*, *Seascape*), Stephen Sondheim (*Sweeney Todd*, *Company*), John Guare (*House of Blue Leaves*, *Six Degrees of Separation*), current president Stephen Schwartz (*Wicked*, *Godspell*) and past president John Weidman (*Assassins*, *Pacific Overtures*). Since its inception in 1912, the Guild's elected board of authors has

worked to advance the rights of dramatists everywhere. Toward that end, the Guild provides services and institutional advocacy on behalf of its membership.

The Dramatists Legal Defense Fund, Inc., was organized by the Dramatists Guild of America, Inc., to act as a legal defense fund protecting constitutional rights and conducting educational programs and activities focused on supporting freedom of speech and artistic integrity in the world of theater, and protecting the culture from the illegal diminishment of artistic expression freely available in the public domain. It also focuses on educating the public, the theater industry and the legal community about the protections afforded authors under the Copyright Act, the interaction and balance between such copyright protection and the First Amendment, and the proper administration of copyrights as the best means of serving the public interest.

The **National Writers Union** (“NWU”) is a national labor union that advocates for freelance and contract writers. The NWU includes local chapters as well as at-large members nationwide and abroad. The NWU works to advance the economic conditions of writers in all genres, media, and formats. NWU membership includes, among others, book authors, journalists, business and technical writers, website and e-mail newsletter content providers, bloggers, poets, playwrights, editors, and academic writers. The NWU is a national amalgamated union (Local 1981) of the United Auto Workers, AFL-CIO.

The **Romance Writers of America**® (“RWA”) is a nonprofit association dedicated to advancing the professional interests of career-focused romance writers through networking and advocacy. RWA was founded in 1980. It has more than 10,000 members and 145 chapters. RWA acts as the collective voice of romance writers and works to support the efforts of its members to earn a living from the publication of their romance novels and novellas. RWA’s mission is based on the principles that writers have the right to reasonable remuneration and preservation of authorial and intellectual property rights; literacy is individually and culturally vital; storytelling is fundamental to human experience; and romance fiction explores issues of universal and eternal human interest.

The **Society of Children’s Book Writers and Illustrators** (“SCBWI”) is a non-profit, 501(c)(3) organization and the only professional organization specifically for those individuals writing and illustrating for children and young adults in the fields of children’s literature, magazines, film, television, and multimedia. Several of the most prestigious children’s literature professionals sit on the SCBWI Board of Advisors. SCBWI serves as a consolidated voice for professional writers and illustrators the world over. SCBWI acts to effect important changes within the field of children's literature, promoting new copyright legislation, equitable treatment of authors and artists, and fair contract terms. There are currently more than 22,000 members worldwide, in over 70

regional chapters writing and illustrating in all genres for young readers from board books to young adult novels, making it the largest children's writing organization in the world.

The **Songwriters Guild of America, Inc.** (“SGA”) is the nation’s oldest and largest organization run exclusively by and for songwriters, with more than five thousand members nationwide and over eighty years of advocacy experience concerning the rights of music creators, songwriters, and their heirs. SGA’s activities on behalf of all U.S. songwriters include advocacy before the U.S. Congress to obtain favorable legislation for music creators and heirs, and participation as a party or as amicus curiae in litigation of significance to the creators of the American canon of popular music.

The **Text and Academic Authors Association, Inc.** (“TAA”) is the only nonprofit membership association dedicated solely to assisting authors of scholarly books, textbooks, and journal articles. Formed in 1987, the TAA has over 1,400 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 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.

SUMMARY OF ARGUMENT

Class action suits provide a vehicle to vindicate statutory policies in situations where the filing of individual actions is inefficient. The court below correctly recognized the underlying policies of the copyright law and certified a class that reflects them. The goals of U.S. Const. art. I, § 8, cl. 8, as reflected in our copyright law, are twofold: to "promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings." The copyright system thus depends on two premises: first, that the creation and dissemination of works is, ultimately, for the public benefit; and second, that the provision of economic incentives is the best way to accomplish that end.

Google, and in particular its Academic Authors in Support ("*Academic Amici*") attempt to sever those conjoined principles and argue that the district court abused its discretion in certifying that class because some academic authors do not write primarily for a profit motive, and that making works available to the public is the only legitimate goal of the copyright statute and the constitutional provision that undergirds it. They challenge the lower court's class certification from first principles.

These arguments advanced by Google and its amici promise to frustrate the constitutional design and the way that Congress has implemented it. The two

copyright policies have never been severable. As the Founders, this Circuit, and the Supreme Court have repeatedly recognized "the public good ... fully coincides with the claims of individuals." The profit motive is what stimulates the creation of particular works, and that incentive has formed the basis of every copyright law, which has given exclusive rights to authors and prohibited others from exploiting those works without authorization. The class certified by the district court fits those contours perfectly.

The Academic *Amici* argue that the class is too broad because they do not write for profit, but for some other reason. Those other reasons are both irrelevant and not representative of the class. And even if no academic author was interested in earning a profit from his or her intellectual labors, they do not publish their own works but are dependent upon the interest and efforts of university and commercial presses, which must recover or at least defray the cost of publication in order to take on publication of those scholarly works. Indeed, were the holy grail of tenure unavailable, we suspect that Academic *Amici's* views on the scope of copyright protection would be substantially different. The academic amici, however, do not represent most U.S. copyright owners or most U.S. academics.

Amici do not enjoy the sinecure of lifetime employment, and depend on the revenue derived from their exclusive rights to earn a living. It is that activity—and control over those rights—that is at the heart of *amici's* participation in this

case. Google and its *amici* attempt to turn their greatest weakness into a strength: namely, that the sheer size, scope, and indiscriminate nature of Google's copying is "too big to fail." If that is the rule, then individual authors like *amici* will simply have no realistic means of enforcing their rights against mass digitization.

To the extent that Google's fair use claims are bound up with certification, those claims are of dubious value. No case has ever excused wholesale copying on the scale that Google has embarked, and the availability of works (especially scholarly ones) on Google Books will readily substitute for the use of an authorized copy. Such uses are neither "transformative," nor presumptively fair.

Finally, *amici* agree that there may be some public benefits to Google's digitization of works. *Amici* would like to see those benefits continue—on a legal and revenue-producing basis. If those benefits truly are shown to exist after the merits of this case have been litigated, it is certainly within the power of the parties to negotiate, and for the courts to approve, a fair settlement or remedy permitting Google to continue its activity within legally prescribed contours. Google simply has to pay to exercise the author's exclusive rights.

ARGUMENT

I. THE CLASS CERTIFIED BY THE DISTRICT COURT ADEQUATELY REFLECTS THE INTERESTS OF CLASS MEMBERS

In 2007, one of Google’s founders observed, “thousands of years of human knowledge, and probably the highest-quality knowledge is captured in books.”¹ The defendant in this case then attempted to capture those books for its own commercial benefit when, without permission or payment, it scanned over 12 million books given to it by several major research libraries. (SPA 5.) It returned digital copies to those libraries, but forbade those libraries from making those copies available to anyone else. (Br. of Appellee 8, 11.) It also kept copies for its own purposes, which include, but are by no means limited to, offering “snippets” of those works in response to its users’ specified search terms. (SPA 5.) With some relatively trivial skill with its search engine, a persistent user can reveal roughly 78% of most scanned works. (See Br. of Appellee 9-10.)

The District Court correctly certified a class under Fed. R. Civ. P. 23 consisting of all U.S.-resident copyright owners and authors of full-length books, who had registered those works in the first three months of publication.² As a

¹ Jeffrey Toobin, *Google’s Moon Shot*, *The New Yorker* (Feb. 5, 2007), http://www.newyorker.com/reporting/2007/02/05/070205fa_fact_toobin#ixzz2KPhdbYPr.

² “All persons residing in the United States who hold a United States copyright interest in one or more Books reproduced by Google as part of its Library Project,

result of that registration, the class members' works are eligible for statutory damages and attorneys' fees. *See* 17 U.S.C. § 412. The law requires nothing more of the copyright holder.

As the District Court decided, and the class plaintiffs make clear in their filing, the unprecedented scope and scale of Google's copying renders its legality perfectly susceptible to class resolution. (*See, e.g.*, Br. of Authors Guild 14; SPA 23-26.) Google and in particular the Academic Authors in Support of Google ("Academic *Amici*") now contest that certification on two grounds: one express, one implied. First, Google argues that the District Court abused its discretion when it certified that class because the class was not representative of its members. (*See* Br. of Google 17-18; Br. of *Amici Curiae* Academic Authors in Supp. of Def.-Appellant and Reversal 4 [hereinafter *Academic Amici Br.*].) The second, more subtle point is that permitting the class to assert its registered rights harms the public weal by interfering with the increased access to information that the Google

who are either (a) natural persons who are authors of such Books or (b) natural persons, family trusts or sole proprietorships who are heirs, successors in interest or assigns of such authors. "Books" means each full-length book published in the United States in the English language and registered with the United States Copyright Office within three months after its first publication. Excluded from the Class are the directors, officers and employees of Google; personnel of the departments, agencies and instrumentalities of the United States Government; and Court personnel[.]" (SPA 2.)

Books project provides. (*See, e.g.*, Academic *Amici* Br. 2-3; Br. of Google 2-5.)

Amici write to address both of these issues.

II. COPYRIGHT LAW RECOGNIZES NO DISTINCTION BETWEEN THE AUTHOR'S PROFIT MOTIVE AND PROMOTION OF THE PUBLIC BENEFIT

Amici and Google disagree on first principles. Copyright exists “[t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings” U.S. Const. art. I, § 8, cl. 8. The Clause therefore creates an “end” (Progress) and a “means” (exclusive right). “The public good fully coincides in both cases with the claims of individuals.” The Federalist No. 43 (James Madison). Thus, “[t]he economic philosophy behind the [Copyright] [C]lause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.” *Mazer v. Stein*, 347 U.S. 201, 219 (1954). That is why, as a matter of fundamental public policy, “copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge. . . . The profit motive is the engine that ensures the progress of science.” *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992) (emphasis in original), *aff'd*, 60 F.3d 913 (2d Cir. 1994); *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003); *see Harper & Row v. The Nation*, 471 U.S. 539, 558 (1985). The

receipt of income from the dissemination of copyrighted works both enables the author to earn a living, and encourages him or her to create additional works in the future (and also encourages the publisher, whose motives are even more financially dependent and without whom the subject works will never see the light of day).

By such means does public access to creative works advance.

That simple premise forms the entire basis of the copyright system, and conflicts to a large degree with Google's stated mission to "organize the world's information and to make it universally accessible and useful."³ *Amici* do not gainsay the utility of Google's search functionality, but "universal access" to information enabled by widespread, unauthorized and uncompensated copying of protected works, and the policies reflected in and advanced by the copyright law are not the same thing. "Such messianism cannot obscure the central truth about Google Book Search: it is a business." Toobin, *supra* note 1. In fundamental respects, Google's mission and copyright's conflict, and where it does, Google must be held responsible.

³ *Company Overview*, Google, <http://www.google.com/about/company> (last visited Feb. 14, 2013).

A. THE ACADEMIC AMICI ARE UNREPRESENTATIVE OF ACADEMICS

In their filing, the Academic *Amici* attempt to sever those basic principles, emphasizing that the class certification interferes with their wish to make these works accessible to the broadest possible audience. They argue that the District Court abused its discretion by certifying a class that fails to take into account the interests of academic authors because there is a “strong likelihood” that academic authors are a substantial portion of the class, and that academic authors will be harmed by the injunctive relief that the Authors’ Guild seeks. (*See Academic Amici* Br. 5, 9.)

Those assertions are incorrect. Fed. R. Civ. P. 23(a)(4) requires only that the class “fairly and adequately protect” the interests of the class. Although the adequacy of that protection must receive a “rigorous analysis,” *Wal-Mart v. Dukes*, 131 S.Ct. 2541, 2551 (2012), the Rule does not require absolute perfection: “A class action should not be denied merely because every member of the class might not be enthusiastic about enforcing his rights.” *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 563 n.7 (2d Cir. N.Y. 1968). The District Court correctly noted that it “need only concern itself with whether those members who are parties are interested enough to be forceful advocates and with whether there is reason to believe that a substantial portion of the class would agree with their representatives were they given a choice.” (SPA 31 (quoting *Eisen*, 391 F.2d at 563 n.7).)

Google’s primary challenge to the adequacy of the class is based on a survey that it conducted of published authors that showed a majority “approved” of Google’s scanning of their works. (Br. of Google 20.) The District Court correctly rejected that survey. (SPA 30-31.) The survey, tellingly, did not ask any participant whether they would prefer to receive compensation for the use of their work as a result of participating in a lawsuit. (*See id.*) The Academic *Amici* attempt to fill that gap by claiming that academics are motivated by “maximizing access to knowledge” (Academic *Amici* Br. 7.) and that the assertion of the class’s rights denies them “the benefits that flow from greater public access to their works that Google Books made possible.” (*Id.* at 11.)

There are several problems with the Academic *Amici*’s assertion. The first is that they are atypical of those persons teaching post-secondary education: roughly seventy percent of which are in adjunct, *non-tenure track positions*. *See* Audrey Williams June, *Adjuncts Build Strength in Numbers*, The Chronicle of Higher Education (Nov. 5, 2012), <http://chronicle.com/article/Adjuncts-Build-Strength-in/135520>. These instructors typically make far less than their tenure track counterparts, do not receive benefits such as health insurance or a retirement plan, and have no or *de minimis* roles in institutional governance. *See* Audrey Williams June & Jonah Newman, *Adjunct Project Reveals Wide Range in Pay*, The Chronicle of Higher Education (Jan. 4, 2013),

http://chronicle.com/article/Adjunct_Pay_Conditions/136439. As importantly, these professionals also typically lack *any* academic freedom: their employment is contingent on remaining in the good graces of the tenured faculty or the university administration. *See id.*; *see also* Colleen Flaherty, *Making Room for the Majority*, *Inside Higher Ed*, (Jan. 23, 2013), <http://www.insidehighered.com/news/2013/01/23/aaup-recommends-more-adjunct-faculty-participation-governance> (noting that the American Association of University Professors had taken note that the adjunct faculty “are legitimately open to influence and intimidation and all those sorts of things because they don’t have academic freedom”).

Of the 155 signatories to the *Academic Amici* brief, only *three* identified themselves using the term adjuncts (a non-tenure track instructor). One hundred twenty-five of those signatories are self-identified or identified on their school’s web sites in tenure-track positions (e.g., Assistant, Associate, or Full Professor). What the *Academic Amici* neglect to discuss is that as academic writers, they can afford, as few other authors can, to waive the relatively modest royalties they would earn and insist instead on free distribution of their books. Educational institutions significantly compensate such authors for publishing books: whether it is through gaining tenure (and all its benefits) for their first academic book, or the promotion and pay raises that only come —and in some public institutions are

mandated—for subsequent books. Even tenured professors ultimately depend upon the interest of scholarly publishers for publication of the works that contribute substantially to earning them tenure, promotion, and merit pay increases the effect of which is compounded over the course of an academic career.

Academic authors like most of the *Academic Amici* therefore can and do earn thousands more a year in salary for the rest of their academic careers from each book published. While the *Academic Amici's* views may be heartfelt, they are by no means representative either of the class or academics themselves.

Similar selection bias appears throughout their brief. For example, the *Academic Amici* proffer a survey of academic authors, which found that “over 75% of the more than 8,000 respondents indicated that it was very important or important to be able to offer their work free online to a global audience” via “open access.”⁴ (*Academic Amici* Br. 13 (internal quotations omitted).) The *Academic Amici* neglected to mention that the touted survey, funded by a for-profit open access publisher, consisted *solely* of its “customer list:” authors that signed up to publish under that firm’s for-profit model.⁵ *Academic Amici* also neglect to

⁴ *Amici* note that 83 percent of scholarly articles are published through traditional channels, not open access. Laasko and Björk, *Anatomy of Open Access Publishing: A Study of Longitudinal Development and Internal Structure*, 10:124, BMC Medicine 8 (2012), available at <http://www.biomedcentral.com/content/pdf/1741-7015-10-124.pdf>.

⁵ See TBI Comm., Intech Pub., *Author Attitudes Towards Open Access Publishing*

mention that of 8,015 respondents, *only 240 potentially class eligible respondents supported the Academic Amici's position.*⁶

There is also no indication of how many of these respondents would consider it “very important” or “important” to receive royalties for their open access publications. The survey merely indicates that 75% of those *globally* solicited individuals actually responding to the question feel that it is “very important” or “important” *to be able to offer* their work free online to a global audience even if the author pays: it does not provide any significant insight into the potential class members’ opinions on receiving royalties for such publication. *See TBI Comm, Author Attitudes, supra* note 5, at 7 (emphasis added).

With respect to the other survey cited by the Academic *Amici* for the proposition that 89% of those surveyed thought that “open access” to journals was beneficial to their field (Academic *Amici* Br. 13), *only 12 percent* of those surveyed paid in whole or part for their submissions to be published: the balance had the publication fees paid by their institution or through research funds. *See Study of*

6 (2011), *available at* http://www.intechopen.com/public_files/Intech_OA_Apr11.pdf.

⁶ Of the total 8,015 respondents, only 339 identified as being from the United States and answered the cited question. *See id.* at 8. Even for that small number of American respondents, the rate that thought open access was “important” or “very important” was actually 70.8 percent (e.g., 240 respondents), not the “over seventy five percent” rate that the Academic *Amici* claim.

Open Access Publishing, *Highlights from the SOAP Project Survey 9* (2011), available at <http://arxiv.org/ftp/arxiv/papers/1101/1101.5260.pdf>. Nothing in either of these surveys suggests that, if presented with the opportunity to receive income from their works, any meaningful percentage of these authors would forego it.

B. THE ACADEMIC AMICI'S CLAIMS ARE AT ODDS WITH CUSTOMARY PRACTICE.

In *amici's* view, this distorted and incomplete picture does not represent the typical academic publication. Most authors, including academic ones, do not forego compensation if that compensation is available. For example, the process of authoring a textbook requires an enormous amount of work. All told, the publishing cycle—from the author's conception of an idea for a new textbook to the time that the text reaches bookshelves—generally takes two to four years. Mary Ellen Lepionka, *Writing and Developing your College Textbook* 43 (2d ed. 2008). During this time, a textbook author must complete a wide range of tasks including actually writing the text, requiring both extensive knowledge and research. Authors of text materials must be able to transform expert knowledge and field-specific jargon into accessible and understandable formats. Furthermore, many authors also will have a role in creating a new textbook, for example: compiling appendices, references, and bibliographies; producing figures and

tables; obtaining necessary permissions for the use of photographs, artwork, quotations, and other illustrative materials; providing feedback as to the book's design; and proofing the text at various stages. *See generally* Lepionka, *supra*, at 29-42 (explaining the publication process); William Germano, *Getting it Published: A Guide for Scholars and Anyone Else Serious about Serious Books* 139-54 (2d ed. 2008) (advising authors on the process of obtaining necessary permissions to use others' work in a textbook). As an academic field develops, the previously authored textbook will require revision and updating. As just one example, the TAA found that the effort to update one textbook from the sixth to seventh edition required over 8,000 hours of work by the authors and contributors—and over ten man-years altogether (when accounting for development, editing, artistic production, and other necessary tasks). Text and Academic Authors Association, *TAA Debunks the Top 7 Myths Regarding Textbook Costs*, available at <http://www.taaonline.net/notes/TAAmythsflyer.pdf>.

Authoring a textbook is neither an easy nor financially certain task, but it is one that takes an extraordinary amount of work to complete. While there are a number of reasons that authors engage in this endeavor—career enhancement, the desire to augment existing literature—authors are entitled to, and motivated in substantial part by, the compensation they receive from sales of their textbooks.

Academic writers, like all writers, illustrators, and other creative professionals, want to get compensated for their work and enjoy the protection of copyright. In *amici's* experience, it would be highly unusual for *any* author to forego that royalty income, especially those (as is often the case) that write textbooks and do not hold a “tenure-track” position of any kind. Unlike a typical publishing contract, which splits royalties on an 85/15 basis between publisher and author, the textbook split of permission fees and revenue from licensing is generally 50/50. To the extent that the Academic *Amici* wish to forego such payments, Rule 23 permits them simply to opt out of the lawsuit. The Academic *Amici's* claim that the main reward scholars receive is the pleasure of seeing their work as contributing to dialogue is, in *amici's* experience, nonsense.

III. “TOO BIG TO FAIL” IS NOT A DEFENSE TO CLASS CERTIFICATION UNDER RULE 23

Google’s next argument is that there are so many differing kinds of potential factual inquiries into the millions of books that they copied that class resolution will be impossible. (*See, e.g.*, Br. of Google 15-16; 29-30 (citing *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2561 (2012) .) There is, however, a fundamental difference between *Wal-Mart* and this case: there was no specific practice at issue in *Wal-Mart*. *See* 131 S. Ct. at 2553-54. The plaintiffs there had alleged a

“corporate culture” that resulted in sex discrimination, but could allege no specific employment practice that affected all the class members. *See id.*

Here, in contrast, Google made a centralized decision to copy verbatim millions of the class’s works, make substantial portions of them available over the Internet and use their entireties for its own internal purposes. Moreover, the plaintiffs have not invoked anything approaching a “detailed remedial scheme.” *Wal-Mart*, 131 S. Ct. at 2561, as the class seeks the set statutory minimum of \$750 per work. (*See also* Br. of Appellee 2.) The District Court correctly concluded that it could, if need be, conduct fair use evaluations of types of books. (*See* SPA 30.) *See also McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 488 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 338 (2012) (reversing district court and granting class certification because of existence of company-wide policy, and permitting recovery despite having to have several “mini-trials”).

The District Court properly recognized that having made a decision to copy these works indiscriminately, Google may not turn the massive scale of its centralized decision into a legal shield, rendering it literally “too big to fail.” For *amici*, the practical result of such a rule would be devastating, and puts control over their works in the hands of technology providers. While it has become trivial for one entity to copy and distribute copyrighted works on scales unimaginable just a decade ago, writing songs, monographs, romance novels, and plays still takes an

enormous amount of individual time and effort, and carries uncertain prospects of return. Many romance writers, playwrights, songwriters, illustrators, and other authors have other careers, and simply will not be able to afford to hire a lawyer to engage against a technology behemoth. That some of them may even prevail is irrelevant, as those that have the inclination to undergo the time, expense, and burden of a lawsuit will pale before the scale of infringement not just by Google, but by any technology provider with the desire and wherewithal to do what Google has done. Google's activity not only threatens the royalty streams for existing works, it jeopardizes the revenue from works yet to be written. Without the authors' ability to band together to fight these practices, many of these revenue streams—and the future works that will be created because of them—will disappear.

IV. GOOGLE'S CONDUCT IS NOT FAIR USE

Google's attempts to color the Google Books program as "fair" are unavailing. Its brief touts its copying program as "transformative" (Br. of Google 1.) Academic *Amici* find Google's theory of fair use more persuasive than that of the class plaintiffs' because, in their view, (a) the works at issue are mainly scholarly which favors a finding of fair use; and (b) Google's copying is "transformative" and has benefitted the public by increasing its access to these works. (*See Academic Amici* Br. 14-15.)

The District Court correctly resolved the issues involved in this case by noting that the issues of fair use and the use of “snippets” are capable of class-wide resolution. (*See* SPA 29-32.) To the extent that the question of class-wide certification is bound with a decision on the merits, *see Wal-Mart*, 131 S. Ct. at 2552, the merits tilt in the plaintiffs’ favor. The class plaintiffs address these points in detail; *amici* write to emphasize a few brief points.

First, the fact that the Academic *Amici* benefit from the availability of these works is legally irrelevant to the fair use defense or to the validity of the class. No doubt Napster users (and occasionally artists) may have benefitted from having access to or promotion of a variety of songs and sound recordings, but that fact neither shielded Napster from infringement nor aggregate liability. *See A&M Records Inc., v. Napster, Inc.*, 239 F.3d 1004, 1018 (9th Cir. 2001) (noting that even if the copyright owner receives an ultimate benefit from unauthorized public distribution, that should not deprive the copyright owner the opportunity to license works); *see In re Napster, Inc. Copyright Litigation*, No. C 00-1369 MPH, 2005 U.S. Dist. LEXIS 11498, at *44 (N.D. Cal., May 31, 2005) (certifying the class). The copyright grants the author the right to set the terms and conditions under which the market may access his or her works. Such are the benefits of exclusive rights.

Google argues that its “snippets” are not a substitute for reading the book and considers its wholesale copying “transformative.” (Br. of Google 7.) That statement rather misses the point. *See UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y.) (finding that reproduction of audio CD into MP3 format is not transformative), *certification denied*, 00 Civ. 472, 2000 U.S. Dist. LEXIS 7439, at *2 (S.D.N.Y. June 1, 2000) (denying an interlocutory appeal because infringement “clothed in the exotic webbing of the Internet does not disguise its illegality”). A student or scholar looking to quote a list of proteins present in DNA or a key explanation of existential philosophy, for example, could easily find that information (complete with page citation, title and year of publication) for inclusion in a term paper. The student’s use is unquestionably a “fair” one, but made from an infringing copy, a copy from which that student may view 78% of the work to gain context from both the information that the author conveys and the manner in which he or she conveyed it. That same situation exists whether the user researches science or the collective works of Nora Roberts. Google has no more “transformed” these works than the public library has. Nothing it has done “supersede[s] the objects’ of the original creation, or instead adds something new, with a . . . different character, altering the first with new expression, meaning or message.” *See Campbell v. Acuff Rose-Music, Inc.*, 510 U.S. 569, 579 (1994) (alteration in original) (internal citations omitted) (quoting

Story, J.). Rather than seek that information from an authorized copy, the user simply uses an unauthorized one.

Second, Google and the Academic *Amici* overstate significantly the weight to be accorded a scholarly work in the fair use analysis under Section 107. The mere fact that a work is “scholarly” does not automatically entitle a user to copy that work in its entirety. Indeed, *amici* note that when enacting the Copyright Act of 1976, Congress eschewed creating a special category of exemptions for *nonprofit* institutions to use works for scholarly purposes. *See* William F. Patry, *Patry on Fair Use* § 3:6 (2012); *see also* S. Rep. No. 94-473, at 63 (1976).

Similarly, in 1998, concern over unauthorized digital copying of works by libraries caused Congress to limit the amount of copies that a library could make. S. Rep. No. 105-190, at 61 (1998) (explaining amendments to 17 U.S.C. § 108). Here, of course, that copying has been performed by a commercial entity, and made available to both for-profit and nonprofit users—indeed anyone with an Internet connection. If Congress rejected creation of a special fair use presumption for scholarly uses in a nonprofit university setting, it stands to reason that no such presumptive favoritism would attach to Google’s for-profit indiscriminate copying; indeed, the likelihood of qualitative substitution cuts against a fair use finding. *Cf. e.g.*, 17 U.S.C. § 110(2) (providing exemptions for use of works in distance education, except for those works created for use in that specific market).

Third, *amici* note that even from a quantitative standpoint, Google’s focus on “snippets” is misleading and by no means determinative, as 78% of the copied works are available to Google users. Infringement in cases involving the copying of academic coursepacks has been found when the copying percentage was much less, *even when done in or for an educational setting*. See *Princeton University Press v. Michigan Document Serv.*, 99 F.3d 1381, 1384-85 (6th Cir. 1996) (copying ranging from 5% to 18%); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1527 (S.D.N.Y. 1991) (copying ranging from 5% to 28%); See also *Craft v. Kobler*, 667 F. Supp. 120, 125, 128, 130 (S.D.N.Y. 1987) (Leval, J.) (finding quotation or paraphrase of 3,500 words from Igor Stravinsky conversations both infringing and unprotected by fair use, and noting that 13% of a work can represent a qualitative taking).

What really seems to worry the Academic *Amici*, however, is the prospect Google Books project will terminate, and some scholars’ ability to “mine” the contents of the copied works for research purposes will be cut off. (See, e.g., *Academic Amici Br. 2-3*.) But *amici* have no interest in seeing the Google Books project come to an end. They have no issue with data “mining” of their works; they simply want Google to pay for the ore so that new sources of works can continue to emerge. Further, the works that are likely to go wanting for an interested publisher because of the loss of licensing revenue are precisely those

works of highest value, those works on the margins of economic viability, at the frontier of scientific and literary advancement, where the market is simultaneously most sophisticated and necessarily thinnest. There is no reason to believe that, given the history of this case, Google Books cannot operate legally. The proper time to consider such issues is *not* at the time of determining liability (much less class certification), but when considering injunctive relief. In the unlikely event that the parties cannot agree on a continuing royalty, the Court may effectively create a compulsory license if the public purpose is strong enough and the equities balance in that direction after full resolution on the merits. *See, e.g., Ebay v. MercExchange, L.L.C.*, 547 U.S. 388, 392-93 (2006) (explaining and equating the principles of injunctions for patent law with copyright law); *New York Times Co. v. Tasini*, 533 U.S. 483, 505 (2001) (citing *Campbell*, 510 U.S. at 578, n. 10); *Elvis Presley Enters. v. Passport Video*, 357 F.3d 896, 899 (9th Cir. 2003) (reversing injunctive grant for consideration of the public interest in seeing Elvis Presley materials).

CONCLUSION

In short, the District Court correctly certified a class of authors justifiably concerned about protecting their work from mass misappropriation. In defense, Google has offered a theory that rips from all individual authors the ability to join

together and combat massive, systematic, and centralized infringement, at the cost of undermining the incentives on which the copyright law depends.

For the foregoing reasons, the District Court's certification of the class should be AFFIRMED.

Respectfully Submitted,

/S/

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B), because this brief contains 6,354 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The word count was measured by the word-processing program used to prepare the brief, Microsoft Word 2010.

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/S/

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Dated: February 15, 2013

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On this 15th day of February 2013.

/S/

Christopher Mohr