No. 18-956

IN THE

Supreme Court of the United States

GOOGLE LLC

Petitioner,

v.

ORACLE AMERICA, INC.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF OF THE ROBERT RAUSCHENBERG FOUNDATION AND THE ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC. AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Robert Rauschenberg (1925-2008) was an American artist who worked in a wide range of subjects, styles, materials, and techniques. He was awarded the National Medal of Arts, the highest honor the United States bestows upon artists, and his work has been regularly displayed at such institutions as the Smithsonian, the White House, and numerous museums across the country and around the world.

Rauschenberg created the **Robert Rauschenberg Foundation** in 1990 to advance creativity in the arts through grants, artist and research residencies, and special projects, all in support of artistic and social innovation. The Foundation has a strong interest in protecting artists' ability to create original works of authorship, together with artists' rights to make fair use of existing works in the creation of new meaning and expression. As both a funder of creative expression in the visual and other artistic fields and a charitable organization with an affirmative policy of its own on fair use, the Rauschenberg Foundation recognizes that any application of the fair use doctrine must be well informed and properly contextualized in order to maintain the essential balance between free expression and the protection of the limited monopoly that copyright confers. The Foundation has submitted its views as *amicus curiae* in important intellectual property cases, *e.g.*, *Cariou v. Prince*, 2013 WL

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici* or its counsel made such a contribution. All parties have consented to the filing of this brief.

8180422 (S.D.N.Y. 2013), and writes here to offer its perspective on fair use as it may be relevant outside the software context.

The Andy Warhol Foundation for the Visual Arts, Inc. has a strong interest in making sure that copyright law provides sufficient protection for original works of authorship, while preserving the freedom to use those works to create new forms of artistic expression.

Founded upon Mr. Warhol's death, the Foundation advances the visual arts by promoting the creation, presentation and documentation of contemporary art. It has made grants totaling more than $300 million to fund individual artists, scholars, researchers, museums, and other organizations, including The Andy Warhol Museum. All of its work is premised upon the belief that art reflects an important cultural dialogue, and that freedom of artistic expression is fundamental to a democratic society. This is consistent with the Foundation's approach to intellectual property and fair use, which carefully balances the protections that copyright law affords with the free speech and expressive interests at stake in the creation of art. The Foundation writes here to emphasize the importance of fair use in protecting and promoting creative expression outside of the software context.

SUMMARY OF ARGUMENT

Whatever this Court chooses to say about fair use in the software context, it should be careful not to suggest inadvertently that the same analysis necessarily applies to visual art, or in other artistic contexts such as literature or music. As this Court has explained, when considering fair use, "context is everything." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 589

(1994). Long before the Copyright Act or the Constitution itself, artists of many cultures have a storied tradition of re-using and re-interpreting other artists' creations. Roman sculptors, ancient Chinese artists, and even the painter of an iconic portrait of George Washington, drew freely from other models. William Shakespeare famously borrowed from numerous sources. Fair use as applied in the context of the creative arts thus must account for the reality that art's expressive purpose and content often must build on and refer, incorporate, or otherwise pay homage to pre-existing forms and images.

As a result, the fair use doctrine is of vital significance to the work of a wide variety of creative professionals such as painters, sculptors, musicians, and authors. Yet no such individuals are a party to this litigation, nor do the facts of the case concern their varied media. While we express no views as to the proper application of the fair use doctrine in this case's specific, software development context, we do address ways in which the issues in the case could implicate concerns other than those that arise when visual, literary, or musical works are involved. And we likewise note that to the extent that there are open issues in the latter contexts, this Court should avoid implicating those often highly-fact specific issues here, both because they might well benefit from further percolation in the lower courts and because this Court cannot properly decide them without appropriately developed evidentiary records.

We therefore urge that any statements about fair use this Court may make should be limited to the specific, software development context of this case. Resolution of other questions of law can and should await a proper record and vehicle.

ARGUMENT

I. THE USE AND RE-USE OF OTHER CREATIVE WORKS HAVE LONG BEEN ESSENTIAL PARTS OF ARTISTIC EXPRESSION

Long before the advent of copyright protections or the First Amendment's exceptions to it, one artist's use of another artist's imagery or other constituent elements has, for centuries, been a critical part of the creative process. This tradition of re-contextualization and re-use spans numerous countries, cultures, and schools of art. Moreover, today, artists' fair use of pre-existing works often implicates the First Amendment.

A. Such Use and Re-Use Are Often Vital to the Visual, Literary, and Musical Arts

The Romans copied Greek statutes, sometimes with a Romanized flare, sometimes as a "pastiche of more than one Greek original," and sometimes as an exact replica. *See* The Metropolitan Museum of Art, *Roman Copies of Greek Statues* (Oct. 2002), http://www.metmuseum.org/toah/hd/rogr/hd_rogr.htm. Copying great works has likewise been an essential training ground for Chinese artists since at least the sixth century, when Xie He identified the "[t]ransmitting and reproducing [or] copying from a model" as one of the six principles of Chinese painting. Paul R. Goldin, *Two Notes on Xie He's [] "Six Criteria" [], Aided by Digital Database*, 104 T'oung Pao 496, 497 (2018) (Chinese characters omitted).

So too in America's founding era. For his iconic portrait of George Washington, Gilbert Stuart "borrowed freely from an engraving of a late 17th-century French portrait in composing this painting." The White House Historical Association, *Treasures of the White House: George Washington*,

https://www.whitehousehistory.org/photos/treasures-of-the-white-house-george-washington (last visited Jan. 9, 2020). The two portraits (reproduced herein), contain striking similarities in the overall composition, the subject's pose, and distinctive details, including the column, drapery, books, table, and chair. Likewise, John Trumbull, who created monumental depictions of the signing of the Declaration of Independence and of George Washington resigning his commission, "studied portraits by fellow artists . . . [and] contacted members of Congress for portraits of the delegates," in addition to using his own pre-existing miniatures. Architect of the Capitol, *General George Washington Resigning His Commission*, https://www.aoc.gov/art/historic-rotunda-paintings/general-george-washington-resigning-his-commission (last visited Jan. 9, 2020).

Gilbert Stuart, *George Washington ("Lansdowne" portrait)* (1796), National Portrait Gallery, https://npg.si.edu/blog/gilbert-stuart-paints-george-washington (last visited Jan. 9, 2020).

Pierre-Imbert Drevet, *Jacques-Benigne Bossuet, 1627 -1704, Bishop of Meaux* (1723), Scottish National Portrait Gallery, https://www.nationalgalleries.org/art-and-artists/25254/jacques-benigne-bossuet-1627-1704-bishop-meaux (last visited Jan. 9, 2020) (Creative Commons).

In the modern era too, visual artists frequently draw from and remix each other's creations. Pablo Picasso reinterpreted *Las Meninas*, a masterwork of the Spanish Golden Age painted by Diego Velázquez. The Solomon R. Guggenheim Foundation, *Comparative Works* (2012), http://web.guggenheim.org/exhibitions/picasso/artworks/maids_of_honor. Samuel F. B. Morse – who, before he invented Morse code, was an established artist – portrayed a scene at the Louvre, complete with miniaturized depictions of other artists' actual paintings. Seattle Art Museum, *Samuel F. B. Morse's Gallery of the Louvre*, http://www.seattleartmuseum.org/exhibitions/morse (last visited Jan. 9, 2020). More recently, the Japanese artist Yasumasa Morimura inserted himself into old masters and other works, as a purposeful recontextualization and commentary on the connection between the Western and Eastern traditions. International Center of Photography, *Yasumasa Morimura*, https://www.icp.org/browse/archive/constituents/yasumasa-morimura (last visited Jan. 9, 2020).

Robert Rauschenberg himself combined pre-existing pictures, words, and objects from a variety of sources, which, he explained, "transformed these images . . . as ingredients in . . . compositions which are dependent on reportage of current events and elements in our current environment[] to give the work the possibility of being reconsidered and viewed in a totally new context." Gay Morris, *When Artists Use Photographs: Is It Fair Use, Legitimate Transformation or Rip-Off?*, 80 ARTnews 102, 104 (1981). In Rauschenberg's "Combines" – the artist's famous series of work, made between 1954 and 1964 – he "brought real-world images and objects into the realm of abstract painting and countered sanctioned divisions between painting and sculpture." Robert Rauschenberg Foundation,

Artist, https://www.rauschenbergfoundation.org/artist (last visited Jan. 9, 2020). Another work, "Buffalo II" (depicted herein), fused familiar political images and cultural themes of the era:

Robert Rauschenberg, *Buffalo II* (1964).

Entire genres of visual art build on pre-existing works and objects. For example, collage, while typically associated with Cubism at the turn of the twentieth century, actually has "a history stretching back hundreds of years. . . ." Patrick Elliot, *Cut and Paste: 400 Years of Collage* 9-10 (2019). Related forms of collage spread into photography, *id.* at 17-19, text and textiles, *id.* at 19-23, and other media and audiences. "Collage also has captured some of the momentous shifts in culture, politics, and economics and can thus be said to present a compelling historical record of our time." Diane Waldman, *Collage, Assemblage, and the Found Object* 8 (1992). "It is almost a cliché . . . to remark that the invention of collage has had a greater and more profound effect on twentieth-century art than any other development." Elisabeth Hodermarsky, *The Synthetic Century: Collage from Cubism to Postmodernism* 6 (2002).

In contemporary art, "[a]ppropriation is a structural element of the montage genre[:]"

> Montage artists incorporate previously published images into their own work of art as allegorical elements that enrich an artistic statement. For example, a photograph depicting a scene of the Vietnam War adds expressive content to a work which seeks to comment on militarism and aggression in contemporary society. The addition of the photograph makes the montage itself journalistic; it imposes a view of reality that adds meaning to the artistic conceit.

Patricia Krieg, *Copyright, Free Speech, and the Visual Arts*, 93 Yale L. J. 1565, 1566 (1984). *See also id.* at nn. 6-8 (discussing Rauschenberg).

More broadly, similar cross-pollination and creative usage of existing work arise in other art forms.

Shakespeare borrowed extensively from numerous sources for plot lines, characters, and even turns of phrase. *See generally* I *Narrative and Dramatic Sources of Shakespeare* x (Geoffrey Bullough, ed., 1957) (first of eight-volume publication setting forth "the chief narrative and dramatic sources and analogues of Shakespeare's plays and poems"); Kenneth Muir, 1 *Shakespeare's Sources* (1965) (first of two-volume publication discussing sources). Modern dramatists and writers in turn borrow from Shakespeare. *See generally* Irene G. Dash, *Shakespeare and the American Musical* (2010). Novelists, dramatists, and poets routinely retell Greek and Roman myths, fairy tales, Bible stories, and other classics. *See, e.g., Abridgements and Retellings of Classics*, 77 The English Journal 72, 72-74 (Dec. 1988) (recommending such works); *id.* at 72 (noting that "[l]iterature is a participatory democracy").

Composers in varied genres of music, including classical music, opera, jazz, and rap, also borrow from earlier works. Examples of this practice, sometimes referred to as musical quotation, include: "Madame Butterfly," where Puccini quoted "The Star-Spangled Banner," *see* The Metropolitan Opera, *A Musical Collision Course: Puccini's Representation of Conflicting Cultures*, https://www.metopera.org/discover/education/educator-guides-content/madama-butterfly/classroom-activities/a-musical-collision-course-puccinis-representation-of-conflicting-cultures/ (last visited Jan. 9, 2020); Tchaikovsky's "1812 Overture," featuring the Russian and French national anthems, *see* Judith Kogan, *It's ironic that we play the '1812 Overture' at Fourth of July celebrations*, Public Radio International (July 4, 2018), https://www.pri.org/stories/2018-07-04/its-ironic-we-play-1812-overture-fourth-july-celebrations; Louis

Armstrong's quotation of Gershwin's "Rhapsody in Blue," *see* Thomas Brothers, *Louis Armstrong, Master of Modernism* 349 (2014); and numerous chart-topping rap songs, *see The 25 Most Essential Remixes of Rap Songs*, Complex (Jan. 28, 2013), https://www.complex.com/music/2013/01/the-25-most-essential-remixes-of-rap-songs/.

"[A]n honored [] compositional tradition," in jazz and beyond, is the "writing an original melody over the chord changes of a standard tune," known as a "contrafact." Richard A. Helzer, *Cultivating the Art of Jazz Composition*, Jazz Education Journal (May 2004), https://web.archive.org/web/20070928041417/http://www.iaje.org/article.asp?ArticleID=171.
"Documentaries in film and video similarly depend upon the appropriation of visual images in order to convey critical expression." Krieg, *supra* at 1567.[2]

Even the design of the Supreme Court's own building contains adornments that are "virtually identical" to prior creations, such as a candelabra (depicted herein) that "bear[s] such a strong resemblance to [those] in the Vatican Museum that it is impossible to deny the influence," and aspects of the façade that have a "most startling resemblance" to a "model of the Pantheon that used to be displayed in the Metropolitan Museum of Art." Lucille A. Roussin, *The Temple of American Justice: The United States Supreme Court Building*, 20 Chap. L. Rev. 51, 61-62 (2016).

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[2] In educational terms, the fair use doctrine has also become a key pillar of non-profits and art foundations like *amici*, which proactively recognize and support reproductions of works of art – including for scholarly initiatives, museums, and educational partners.

U.S. Bureau of Land Management, *U.S. Supreme Court Building in Washington, D.C.* (2014), http://www.publicdomainfiles.com/show_file.php?id=13949227816389.

Bernard Frischer, *Art from Hadrian's Villa: Barberini Candelabra (2)* (2012), Digital Hadrian's Villa Project, http://vwhl.soic.indiana.edu/villa/database(static).php (object 23).

There is nothing unusual – and certainly nothing unfair – about these forms of artistic usage. Indeed, this time-honored tradition of re-use underscores why, if the Court reaches the second question presented in this case, it should be attentive to the potentially sweeping implications that its statements (even in the form of dicta) about fair use could have outside the software domain. It should take care not to decide more than it has to, because when it comes to fair use, "context is everything." *Campbell*, 510 U.S. at 589.

B. Fair Use By Artists Often Implicates the First Amendment

An added reason for caution in whether and how the Court addresses the second question presented here is that artists' free expression touches upon First Amendment issues and special public interest considerations that are less salient in this case. As this Court indicated in *Campbell*, for example, parody, like criticism, can contain expressive ideas entitled to "First Amendment protections." 510 U.S. at 583 (quoting *Yankee Publishing Inc. v. News America Publishing, Inc.,* 809 F. Supp. 267, 280 (S.D.N.Y. 1992) (Leval, J.)).

Such First Amendment concerns may be particularly relevant when art makes a political statement, which works by Rauschenberg, countless political cartoonists, and many other artists unmistakably do. *See generally* Victor S. Navasky, *The Art of Controversy: Political Cartoons and Their Enduring Power* (2013). As this Court has repeatedly stressed, political speech lies at the heart of First Amendment protections. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("political speech must prevail against laws that would suppress it, whether by design or inadvertence."); *id.* at 473 (Stevens, J., dissenting) ("None of this is to

suggest that . . . a work of art such as *Mr. Smith Goes to Washington* may be banned"). While the case at bar does not involve a First Amendment claim, the Court should be mindful that broad language about fair use could inadvertently raise new constitutional issues for artists.[3]

In addition to these constitutional guardrails, this Court has emphasized that the Copyright Act incorporates special concern for matters of public interest. Specifically, limitations on the scope of copyright "reflect[] a balance of competing claims upon the public interest: creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). While the "immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor," the "ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Id.* Indeed "'[t]he sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.'" *Id.* (citations omitted). Presciently, this Court in 1975 stressed that "[w]hen technological

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[3] *See Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003) (recognizing that fair use doctrine provides necessary First Amendment protections); Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright,* 125 Harv. L. Rev. 683, 751 (2012) ("[F]air use is one of the key limits that keep copyright from unconstitutionally suppressing speech and harming the very cultural richness it aims to promote."); Krieg, *supra*, at 1578 (discussing appropriation as a political statement); *id.* at 1568 ("The absence of a definite legal standard for appropriation of visual images results in a chilling of freedom of speech interests.").

change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose" of serving the public's access to the arts. *Id.*

These constitutional and statutory considerations, as they apply to the arts, further accentuate the importance of addressing the fair use doctrine narrowly, as it may arise in the specific technical context of this case, if at all.

II. THE FAIR USE OF SOFTWARE INTERFACES PRESENTS UNIQUE LEGAL ISSUES THAT DO NOT NECESSARILY APPLY TO THE CREATIVE ARTS

In an abstract sense, perhaps "'great artists and great engineers are similar in that they both have a desire to express themselves,'" Walter Isaacson, *Steve Jobs* 567-58 (2011) (quoting Steve Jobs). But in concrete terms, the objects they create often differ, as a matter of function and legal implication.

The parties, *amici*, and lower courts recognize that the copyright and fair use issues around software development may operate differently than in other contexts for several reasons.[4] Unlike some other

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[4] *See, e.g.*, Pet. at 24 ("While recognizing the functional nature of software interfaces, the Federal Circuit gave them the same copyright protection—and, as is relevant here, the same fair-use treatment—afforded to literary and artistic works. The Federal Circuit thus systematically erred when it discounted the particular characteristics of software interfaces."); Opp. at 26 ("That is not to say that each fair use factor dictates the same result for code as for a novel."); Br. of Amicus Microsoft (certiorari stage) 3 ("Software presents unique challenges for copyright."); *id.* at 9 ("Compared to traditional works, there are likely to be both more copyright holders in any given piece of software, and a greater practical need to reuse aspects of software to foster follow-on innovation. Those 'changes' from the literary context require a

works, software "perform[s] functions that are not entitled to copyright protection." *Sony Computer Entertainment Inc. v. Connectix Corp.*, 203 F.3d 596, 602 (9th Cir.), *cert. denied*, 531 U.S. 871 (2000). In light of that functional character, courts have held that software often lies "at a distance from the core" of copyright protection and may thus be owed a "lower degree of protection than more traditional literary works." *Id.* at 603; *see also Sega Enterprises Ltd. v. Accolade Inc.,* 977 F.2d 1510, 1527 (9th Cir. 1992) ("the key to this case is that we are dealing with computer software . . . . [and] if a work is largely functional, it receives only weak protection."). While "[m]ost of the law of copyright . . . developed in the context of literary works such as novels, plays, and films," "[t]he problem presented by computer programs is fundamentally different." *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 819 (1st Cir. 1995) (Boudin, J., concurring), *aff'd by an equally divided court*, 516 U.S. 233 (1996).[5]

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reasoned 'response' from the courts when applying fair use.") (citation omitted); Br. of Amicus Python Foundation (certiorari stage) 4 ("Computer software provides unique challenges in the context of copyright, because it incorporates both functional and expressive elements."). *See also* Br. of the United States (certiorari stage) 21 ("[T]he analysis used to determine whether a particular use is transformative may be different for computer programs than for traditional literary works"); *id.* at 24-25 (the courts below in this case have addressed various questions that "may have little significance in more typical disputes").

[5] This case appears to involve not only source code as a general category, but the specific sub-issue of application programming interfaces, which this Court may or may not decide have their own set of special qualities. We thus note that among the uniquely technical issues presented by this case are such questions as whether even within the software context, an application programming interface has a different mix of expressive and functional characteristics than, for example, a graphical user interface or set of visually-intensive special effects.

Any holdings or other statements about the fair use doctrine in the context of application programming interfaces (APIs) would therefore not necessarily fit neatly in copyright cases involving the creative arts. Oracle seems to suggest otherwise in asserting that Google's logic would enable an author to copy from *Harry Potter* because it would "'allow' readers 'to rely on their preexisting knowledge of' JK Rowling's famous characters, fictional locations, and unique spells." Opp. at 23 (citation omitted). But as pointed out above, lower courts have recognized the distinctively functional qualities of software, with important implications for how the fair use doctrine might be applied in this context-specific case. *See also* Opp. at 26 ("Congress directed the same fair-use analysis for all works, from the most functional manual to the most creative novel. . . . That is not to say that each fair use factor dictates the same result for code as for a novel.").[6]

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[6] Oracle's reference to the Harry Potter books actually highlights the fact that copyright law in the context of art takes account of different considerations than copyright law with respect to software, both as to fair use and as to what can be copyrighted in the first place. Under the doctrine of *scénes à faire*, for example, "there are certain elements that necessarily follow from a common theme or setting or that, for a particular topic, are so standard, stock, or common that they are denied copyright protection." Ralph E. Lerner & Judith Bresler, II *Art Law: The Guide for Collectors, Investors, Dealers, & Artists* 923 (4th ed. 2012). Thus, "in a story about witches, one expects to find broomsticks, spells, and cauldrons." *Id.* In evaluating a copyright infringement claim, then, a court might well have to consider what elements of J.K. Rowling's work are *scénes à faire* and what elements are original. Moreover, assuming copyright protection, the use of Rowling's "famous characters, fictional locations, and unique spells," Opp. at 23, might be fair use depending on the nature of the new work. *See, e.g., Suntrust Bank v. Houghton Mifflin Co.,* 268 F.3d 1257, 1268-76 (11th Cir. 2001) (finding that

This Court's opinion in *Campbell* itself provides a prime example of the way fair use analysis varies with genre and context. In *Campbell*, this Court emphasized repeatedly that the challenged work was a parody, a fact that explicitly informed its analysis. *See, e.g., Campbell*, 510 U.S. at 588 (describing some of parody's unique characteristics, including its need to incorporate a "recognizable allusion to its object through distorted imitation"); *id.* (noting that parody may require copying "the 'heart' of the original"); *id.* at 592 (explaining why parody is unlikely to cause cognizable market harm to the owner of the copyright for the original). And *Campbell* required highly specific and separate analyses of parody's lyrics and of its repeated use of the original's "bass riff," *id.* at 589, as well as a contextualized analysis of the market for rap music, *id.* at 593.[7]

The need for such contextualized analysis is precisely why this Court should remain aware of the risk that any fair use analysis it articulates for the software development context could be misinterpreted, misconstrued, or misapplied in the visual, literary, or musical arts. For instance, the Court would presumably not want to inadvertently suggest that if replicating a software interface did or did not constitute fair use here, then replicating a musical interface (like a piano layout) would necessarily follow the identical analysis or result in the same outcome.

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fair use defense was likely to succeed where author of *The Wind Done Gone* appropriated characters, plot points, and settings from *Gone with the Wind* for parodic and critical purposes).

[7] We do not suggest, nor did this Court hold, that a secondary use must be parodic in order to be "transformative" fair use, 510 U.S. at 579. That was simply the context in which *Campbell* arose.

See Pet. at 5-6 (analogizing the Java API to a "QWERTY keyboard layout").

Moreover, the fact that functional works, like software, have "thinner" copyright protection than do the visual, literary, or musical arts[8] provides added reason to be careful, since a broadly worded ruling that the API here did *not* constitute fair use could provoke unintended restrictions on fair use (and thus freedom of expression) in the creative arts, with resulting disruption to a variety of creative industries and professionals.

III. OTHER ISSUES RELATED TO FAIR USE ARE NOT PRESENTED HERE

Although there may be open questions about the application of the fair use doctrine in the arts that are not presented in this case, this Court should decline the invitation of some *amici* to delve into those areas anyway. *See* Br. of Amici Eight Intellectual Property Scholars 3 (certiorari stage). These issues, many of which are highly fact-specific, are still percolating in the lower courts, and ordinary judicial prudence alone

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[8] *See, e.g.*, *Sega*, 977 F.2d at 1527; *Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007, 1012 (7th Cir. 2005) ("The exclusion of functional features from copyright protection grows out of the tension between copyright and patent laws. Functional features are generally within the domain of the patent laws."); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 537 (6th Cir. 2004) ("'fair use doctrine preserves public access to the ideas and functional elements embedded in copyrighted computer software programs.'") (citations omitted); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][2][a] (under second factor of fair use test, "the more creative a work, the more protection it should be accorded from copying; correlatively, the more informational or functional the plaintiff's work, the broader should be the scope of the fair use defense.") (footnotes omitted).

thus cautions against addressing them even indirectly by a broadly worded fair use decision. For example, courts have considered various approaches to assess the weight to be given to the various fair use factors,[9] with other appeals currently pending, including one involving *amici*.[10] Additionally, some circuits continue to examine related issues as to whether there is a *de minimis* exception for common forms of audio sampling,[11] or whether even resemblant musical arrangements are copyrightable.[12]

While this Court may choose to address such issues in another case, it should avoid implicating them in this one. Not only are none of these issues presented here, but no individuals or entities typically affected by these questions – such as photographers, painters, printmakers, sculptors, composers, musicians, singers, record producers, songwriters, authors, or

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[9] *See, e.g., Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758–59 (7th Cir. 2014); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1176–78 (9th Cir. 2013); *Cariou v. Prince*, 714 F.3d 694, 705–08 (2d Cir. 2013); *Fox Broad. Co. v. Dish Network, L.L.C.*, 723 F.3d 1067, 1076 (2d Cir. 2013); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 693 (7th Cir. 2012); *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 306 (3d Cir. 2011).

[10] *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312 (S.D.N.Y. 2019), *appeal docketed*, No. 19-2420 (2d Cir. Aug. 7, 2019).

[11] *See, e.g.*, *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886 (9th Cir. 2016); *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2004). While these cases did not directly address fair use, they implicate similar issues about the nature and quantum of re-using content.

[12] *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018). *See also* Joseph P. Fishman, *Music as a Matter of Law*, 131 Harv. L. Rev. 1861 (2018) (arguing that jurisprudential shift in focus beyond melody as key aspect of copyright in music is disruptive).

publishers – are a party to this litigation. Moreover, the lack of a relevant record would make wading into fair use doctrine outside the software context problematic, to say the least. As this Court's opinion in *Campbell* demonstrates, a proper fair use analysis requires close attention to the details, messages, meanings, or purposes of the relevant works. *See* 510 U.S. at 588-94 (discussing specific aspects of the challenged work's lyrics and music). A fair use analysis in the specific context of the visual arts, for example, may implicate several unique factors not at issue here, such as artworks' visual similarities or distinctions, conceptual purpose, contextual placement and/or art historical circumstances. The Court simply does not have a proper record that could allow it to speak to the considerable body of law and commentary that has amassed around fair use in the visual and other creative arts.

CONCLUSION

For the foregoing reasons, this Court should decide the second question presented narrowly, if at all.

Respectfully submitted,

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