

11-1197-cv

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

PATRICK CARIOU,

Plaintiff-Appellee,

v.

RICHARD PRINCE,

Defendant-Appellant,

GAGOSIAN GALLERY, INC., LAWRENCE GAGOSIAN,

Defendants-Cross-Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

**BRIEF OF AMICUS CURIAE GOOGLE INC.
IN SUPPORT OF NEITHER PARTY**

Of Counsel:

Oliver Metzger
GOOGLE INC.
1600 Amphitheatre Parkway
Mountain View, CA 94043
650-253-0000

Joseph C. Gratz
DURIE TANGRI LLP
217 Leidesdorff Street
San Francisco, CA 94111
415-362-6666

*Attorneys for Amicus Curiae
Google Inc.*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for amicus curiae certifies the following information:

Google Inc. has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief by amicus curiae.

IDENTITY AND INTEREST OF AMICUS CURIAE¹

Amicus Google Inc., founded in 1998, is a diversified technology company headquartered in California’s Silicon Valley. Google’s mission is to organize the world’s information and make it universally accessible and useful. Google’s history has coincided with, and contributed to, a vast expansion of the internet and computer technologies that have profoundly influenced human society.

Like virtually every other internet company, Google depends on fair use. Google’s search engine works by “crawling” the web, indexing and caching web pages for the purpose of allowing users to find the information they’re looking for. The YouTube and Blogger services, both owned by Google, thrive on users’ ability to incorporate and make fair uses of each other’s creations. And Google has relied on the fair use doctrine in its project to digitize millions of library books, displaying

¹ No person other than Google and its counsel, including parties to this action and their counsel, authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief.

only “snippets” but allowing users to find books by searching their full text—creating, in essence, the world’s most useful card catalog.²

Google has litigated and won fair use cases—some of which shed light on the issues in this case and are discussed in this brief. While Google takes no position as to the ultimate merits of this case, Google has a strong interest in the careful and considered application of the fair use doctrine. It submits this amicus brief because whether or not Prince’s use of Cariou’s photographs constitutes fair use, the opinion below diverges in dangerous ways from the mainstream of fair use analysis, and threatens to distort the law in ways that would make it more difficult for companies like Google to offer innovative and useful services to their users.

SUMMARY OF ARGUMENT

Google submits this brief to make three simple points.

First, the Court should make clear that commentary and criticism are just two ways that a preexisting work may be “used as raw

² The question whether this program constitutes fair use is currently pending in the United States District Court for the Southern District of New York. *See Authors Guild v. Google Inc.*, No. 05 Civ. 8136 (S.D.N.Y. filed Sep. 20, 2005).

material, transformed in the creation of new information, new aesthetics, new insights and understandings.” Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (hereinafter “Leval”). Such use is transformative, whether or not there is commentary on or criticism of the original. To the extent the opinion below may be read to require commentary or criticism for a finding of transformative use, it misstates the law.

Second, the reasoning of the opinion below jeopardizes an emerging category of highly transformative digital uses that do not comment on the works they incorporate. These uses, for purposes such as search indexing, have a wholly different purpose than the expressive works they use. For that reason, they are transformative even though they do not comment or criticize.

Third, the Court should make clear that that one making a fair use does not need to ask the copyright holder’s permission in order to avoid being found to be in “bad faith” and being denied the protection of the fair use doctrine on that ground. But “[i]f the use is otherwise fair, then no permission need be sought or granted.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994).

ARGUMENT

I. A use need not comment on the original in order to be transformative.

The opinion below states that “all of the precedent that this Court can identify imposes a requirement that the new work in some way comment on, relate to the historical context of, or critically refer back to the original works.” (SPA-016.) Even more narrowly, the opinion below holds that “Prince’s Paintings are transformative only to the extent that they comment on [Cariou’s] photos.” (SPA-018.)

This is simply not the law. This Court should make clear that the lower court’s view of transformative use is unduly limited, and that courts may find uses transformative whenever the existing work is “transformed in the creation of new information, new aesthetics, new insights and understandings.” *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998) (quoting *Leval* at 1111).

Commentary is only one of myriad types of use whose purpose and character is transformative, militating in favor of a finding of fair use. To be sure, a use is not transformative which merely “supersedes the objects of the original” without “add[ing] something new, with a further purpose or different character.” *Campbell*, 510 U.S. at 578-79 (citing

Leval at 1111). Piracy is not transformative. But copyright law exists “to stimulate creativity for public illumination,” Leval at 1111, and that creativity frequently involves the incorporation of existing works.

The purpose of the fair use doctrine is not merely to safeguard criticism and commentary, but more broadly to fulfill the purposes of copyright—“to promote the Progress of Science and useful Arts.” U.S. Const., art. I, § 8, cl. 8.³ Fair use is necessary to allow for this forward movement of knowledge and artistic expression. As Justice Story recognized, “[e]very book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.” *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845), *quoted in Campbell*, 510 U.S. at 575. By providing a “guarantee of breathing space within the confines of copyright,” *Campbell*, 510 U.S. at 579, fair use safeguards the borrowing which facilitates innovation.

³ Fair use serves other important purposes as well—for example, as one of the “traditional contours of copyright” that make copyright compatible with the First Amendment. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

Judge Leval’s article, from which the Supreme Court took the concept of transformative use, sheds light on the breadth of uses which are properly regarded as transformative:

Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses.

Leval at 1111.⁴

Thus, in order to be transformative, “[t]he use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.” *Id.* Where “the secondary use adds value to the original—if the quoted matter is used as raw material,

⁴ The protection of transformative uses, of course, is only one way that fair use fulfills the purposes of copyright. One’s use does not need to be transformative in order to be fair. For example, a use which is not transformative but which has only a minimal effect on the market for the original may still be found to be a fair use. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448-50 (1984) (finding home taping of broadcast television to be a fair use, notwithstanding lack of transformative use). But because it was the lower court’s analysis of the transformative use prong that diverges most radically from this Circuit’s law, we focus here only on that aspect of the first fair use factor.

transformed in the creation of new information, new aesthetics, new insights and understandings— this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.” *Id.*

The productive recontextualization of existing works, with or without commentary on those works, is one common type of transformative use. One of the best examples of such use is illustrated by *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006). In that case, the defendant had published a book about the Grateful Dead called *Grateful Dead: The Illustrated Trip*. The defendant included in the book seven concert posters in which the plaintiff owned copyright. These posters were not merely informative, but also artistic; they were used by the defendant as part of “a collage of images, text, and graphic art designed to simultaneously capture the eye and inform the reader.” *Id.* at 606.

Some of the posters were accompanied by referencing commentary, albeit commentary that did not relate to the artistic merits of the images but instead to their subject. Some were not the subject of any criticism or commentary at all. The plaintiff argued that “merely placing poster images along a timeline is not a transformative

use,” and that “each reproduced image should have been accompanied by comment or criticism related to the artistic nature of the image.” *Id.* at 609. In other words, the plaintiff in *Dorling Kindersley* argued, as Cariou does here, that placing the images into a new context that gives them a new meaning is insufficient, and that there must be commentary upon the images themselves.

This Court rejected that argument. Because the defendant’s “use of the disputed images is transformative both when accompanied by referencing commentary **and when standing alone**,” the defendant “was not required to discuss the artistic merits of the images” in order to show fair use. *Id.* at 611 (emphasis added). Placing the images into a new context for a different purpose was found to be transformative. This was true even though there was some overlap with the original purpose: the original posters had a dual aesthetic and promotional purpose, and the use of those posters in the book had a dual aesthetic and informative purpose. *Id.* at 610.

Thus, even where “the concert poster image does not necessarily enhance the reader’s understanding” of the biographical text, *id.* at 611 n.4, the use was nonetheless transformative. In other words,

commentary and criticism are not, as the opinion below in this case seems to say, the *sine qua non* of transformative use.

II. The court should be particularly cognizant of the impact of its decision on digital uses of many works at once, which rarely comment but are frequently held to be transformative.

The district court's narrow formulation of the test for transformation is particularly problematic in the context of digital works. We raise this issue not because this problem is presented by the facts of this case, but because we are concerned that collapsing the transformative use inquiry to a question of criticism or commentary, as the district court did, runs contrary to case law approving of a wide range of emerging and productive fair uses in the digital realm.

In four important recent cases, courts have found transformative use, and fair use, where large-scale copying of works in digital form was required to achieve a socially useful goal. These four cases provide examples of uses that do not comment on or criticize preexisting works, but in which preexisting works are “used as raw material, transformed in the creation of new information[.]” *Leval* at 1111.

In *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003), Arriba operated an image search engine on the Internet. As part of that search

engine, Arriba stored and displayed small, “thumbnail” versions of images appearing on various websites, so that those thumbnails could be provided in response to search queries. Some of those images were copyrighted photographs taken by Kelly, who sued for copyright infringement. Arriba asserted a defense of fair use, primarily on the ground that incorporating images from the web into an image search engine is a transformative use. The Court of Appeals agreed:

Although Arriba made exact replications of Kelly’s images, the thumbnails were much smaller, lower-resolution images that served an entirely different function than Kelly’s original images. Kelly’s images are artistic works intended to inform and to engage the viewer in an aesthetic experience. His images are used to portray scenes from the American West in an aesthetic manner. Arriba’s use of Kelly’s images in the thumbnails is unrelated to any aesthetic purpose. Arriba’s search engine functions as a tool to help index and improve access to images on the internet and their related web sites.

Id. at 818. Kelly argued that because Arriba did not add any commentary or other expression to the images, Arriba’s use was not

transformative. The Court of Appeals disagreed, holding that “Arriba’s use of the images serves a different function than Kelly’s use—improving access to information on the internet versus artistic expression.” *Id.* at 819. The court held that “[b]ecause Arriba’s use is not superseding Kelly’s use but, rather, has created a different purpose for the images, Arriba’s use is transformative,” even though it did not comment on or criticize the images. *Id.*

Field v. Google Inc., 412 F. Supp. 2d 1106 (D. Nev. 2006), dealt with a different type of digital use: web caching. Along with each search result on the Google search engine, Google provides a link to a cached version of the web page in question. “When clicked, the ‘Cached’ link directs an Internet user to the archival copy of a Web page stored in Google’s system cache, rather than to the original Web site for that page.” *Id.* at 1111 n.10. The court found that this cache serves a number of purposes, including to “allow users to view pages that the user cannot, for whatever reason, access directly”; to “determine how a particular Web page has been altered over time”; and to “allow users to immediately determine why a particular page was deemed responsive to their search query, by highlighting the terms from the user’s query as

they appear on the page.” *Id.* at 1111-12 nn.15-16. The court found Google’s caching to be transformative because “Google’s presentation of ‘Cached’ links to the copyrighted works at issue here does not serve the same functions” for which the copyrighted works were intended. *Id.* at 1118. It found the purpose of the cache to be transformative, rather than superseding or substitutive. The court concluded that “[b]ecause Google serves different and socially important purposes in offering access to copyrighted works through ‘Cached’ links and does not merely supersede the objectives of the original creations,” the use was transformative, and was ultimately found to be fair use. *Id.* at 1119.

In *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), the facts were similar to those in *Kelly*. At issue was Google Image Search. The court described the service as follows: “In response to a search query, Google Image Search identifies text in its database responsive to the query and then communicates to users the images associated with the relevant text. . . . Google Image Search provides search results as a webpage of small images called ‘thumbnails,’ which are stored in Google’s servers.” *Id.* at 1155. Perfect 10, a copyright

holder in some of the images that could be located through Google Image Search, sued, and Google asserted a fair use defense.

The Ninth Circuit held that Google’s use was “highly transformative” and a fair use. *Id.* at 1165. The use was held to be transformative because “[a]lthough an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information.” *Id.* Citing *Campbell*, the court observed that “a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.” *Id.* “In other words, a search engine puts images in a different context so that they are transformed into a new creation.” *Id.* (internal quotation omitted).

In *A.V. v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009), the defendant operated a service called Turnitin. Teachers could submit student papers to Turnitin, and Turnitin would attempt to determine whether those papers had been plagiarized. Turnitin was able to do so, in part, by maintaining and searching a database of many of the

student papers that had previously been submitted for analysis.

Students who owned copyright in some of those archived papers sued, and the operators of Turnitin asserted a fair use defense.

The Fourth Circuit held the use to be transformative and found fair use, expressly rejecting the argument that transformative use requires some commentary on or alteration of the original work. “The use of a copyrighted work need not alter or augment the work to be transformative in nature. Rather, it can be transformative in function or purpose without altering or actually adding to the original work.” *Id.* at 639. Because the “use of these works was completely unrelated to expressive content and was instead aimed at detecting and discouraging plagiarism,” the court observed: “iParadigms’ use of plaintiffs’ works had an entirely different function and purpose than the original works; the fact that there was no substantive alteration to the works does not preclude the use from being transformative in nature.” *Id.* at 639-40

These findings of transformative use in connection with non-expressive uses of expressive works add to the body of cases finding transformative use in connection with non-expressive uses of non-expressive works. *See, e.g., Atari Games Corp. v. Nintendo of Am. Inc.,*

975 F.2d 832, 843 (Fed. Cir. 1992) (copying in order “to discern the unprotectable ideas” has a purpose different from the original, weighing in favor of fair use); *Sony Computer Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596, 606 (9th Cir. 2000) (holding a software program allowing PlayStation games to be played on personal computers transformative because it “affords opportunities for game play in new environments”); *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 544 (6th Cir. 2004) (finding fair use where the defendant used the copyrighted computer program “for a different purpose”—to unlock printer functionality, rather than to calculate printer toner levels).

Scholars have given different names to these types of uses. Professor Samuelson refers to them as “information-access-promoting uses.” Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2610 (2009). Professor Sag refers to them as “copy-reliant technologies.” Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 *NW. U. L. REV.* 1607, 1608 (2009). In Professor Sag’s formulation, “Copy-reliant technologies, such as Internet search engines and plagiarism detection software, do not read, understand, or enjoy copyrighted works, nor do they deliver these works directly to the

public. They do, however, necessarily copy them in order to process them as grist for the mill, raw materials that feed various algorithms and indices.” *Id.*

Both Professor Samuelson and Professor Sag argue that while the courts in these cases found the use to be “transformative,” that characterization is something of a misnomer. They argue that it elides the distinction between traditional transformative use, such as that found in the *Campbell* and *Dorling Kindersley* cases, and the use of expressive works for non-expressive purposes that was at issue in *Kelly*, *Field*, *Perfect 10*, and *iParadigms*. See Sag at 1647 (“It would be better to recognize that uses which do not relate to the expressive appeal of a work may find favor under the first fair use factor—whether they qualify as transformative in the expressive sense or not.”); Samuelson at 2612 (“The court may have felt compelled to characterize the thumbnails as transformative to avoid the presumption of harm to the market that *Campbell* endorsed when a second comer’s use was both commercial and nontransformative. But it would be more straightforward simply to say that Arriba Soft’s thumbnail images

served an entirely different function than Kelly’s original images, that is, they had an orthogonal purpose.”).

But whether this sort of nonexpressive, “orthogonal” use is a subspecies of transformative use or a separate justification for finding fair use under the first factor, it is an important factor and permits productive uses of copyrighted works which do not merely “supersede[] the objects” of the original works. *Campbell*, 510 U.S. at 578. These uses are fair, even though they do not satisfy the district court’s putative “requirement that the new work in some way comment on, relate to the historical context of, or critically refer back to the original works.” (SPA-016.)

This Court should make clear that commentary and criticism are just some of the many ways in which a use may have a “purpose and character” that militates in favor of a finding of fair use.

III. If a use is otherwise fair, it does not matter whether the defendant sought a license.

The opinion below held that “Prince’s bad faith is evident” from the fact that Prince did not ask Cariou or his publisher for permission to use Cariou’s photographs. (SPA-024-25.) This does not follow, as the Supreme Court explained in *Campbell*. “If the use is otherwise fair,

then no permission need be sought or granted.” *Campbell*, 510 U.S. at 585 n.18 (defendant had sought and been denied permission).

This principle has been recognized in numerous cases in this Circuit and elsewhere. For example, in *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006), the photographer Blanch argued that artist Koons acted in bad faith on the sole ground “that Koons used Blanch’s photograph without first asking her permission.” This Court squarely rejected that contention, holding that “it can hardly be said to have been an act of bad faith for Koons to have neither sought nor been granted permission for the use of ‘Silk Sandals’ if, as we find, the use is otherwise fair.” *Id.* (quotation omitted). *See also Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 146 (2d Cir. 1998) (continued use after objection by copyright holder is a “factor that is of no relevance to the fair use equation”); *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 325 (S.D.N.Y. 2008) (defendant’s failure to seek a license did not show bad faith or weigh against a finding of fair use); *SARL Louis Feraud Int’l v. Viewfinder Inc.*, 627 F. Supp. 2d 123, 130-31 (S.D.N.Y. 2008) (that the defendant had a limited license and made

uses which went beyond that license did not weigh against a finding of fair use).

A fair use cannot be turned foul simply because the user failed to ask for a license that he did not need. Asking for permission (or failing to do so) cannot make up any part of the fair use inquiry, because it would always lead to circularity. If the remainder of the analysis shows that the use is not fair but infringing, it would be odd indeed if the use was deemed not to have required a license merely because the infringer showed good faith by seeking one. Conversely, if the remainder of the analysis shows that the use is not infringing but fair, it would be even more perverse for the fair user to be deemed an infringer because he did not ask for permission that, but for his failure to ask for it, he would not have needed. The mere failure to seek a license should never be the factor that requires one to seek a license.

Google—along with thousands of other companies that drive the nation’s economy—makes fair uses all day, every day. It would be woefully inefficient if, in order to maintain its meritorious fair use arguments, Google has to run around asking copyright holders for

licenses it does not need, simply in order to make sure that it continues not to need those licenses.

CONCLUSION

The reasoning of the opinion below risks collateral damage to a wide range of productive, transformative, socially beneficial uses of copyrighted works. Whether Prince's paintings are found to be fair use or foul, this Court should make clear that there is more to transformative use than merely commentary or criticism and that failure to ask permission does not show bad faith.

DATED: November 2, 2011

Respectfully submitted,

Of Counsel:

Oliver Metzger
GOOGLE INC.
1600 Amphitheatre Parkway
Mountain View, CA 94043

/s/ Joseph C. Gratz

Joseph C. Gratz
DURIE TANGRI LLP
*Attorneys for Amicus Curiae
Google Inc.*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A), because it is written in 14-pt Century Schoolbook font, and with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because it contains 3,995 words, excluding the portions excluded under Fed. R. App. P. 32(a)(7)(B)(iii). This count is based on the word-count feature of Microsoft Word.

DATED: November 2, 2011

/s/ Joseph C. Gratz
Joseph C. Gratz
DURIE TANGRI LLP
Attorneys for Amicus Curiae
Google Inc.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on November 2, 2011.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that, for any participants in the case who are not registered CM/ECF users, I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days.

DATED: November 2, 2011

/s/ Joseph C. Gratz
Joseph C. Gratz
DURIE TANGRI LLP
Attorneys for Amicus Curiae
Google Inc.