

Appeal No. 11-16358

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RIGHTHAVEN LLC,

Appellant,

v.

CENTER FOR INTERCULTURAL ORGANIZING, and KAYSE JAMA,

Appellees.

Appeal from the United States District Court for the District of Nevada
Case No. 2:10-cv-01322-JCM-LRL
The Honorable Judge James C. Mahan

**BRIEF OF *AMICUS CURIAE* GOOGLE INC.
IN SUPPORT OF APPELLEES CENTER FOR INTERCULTURAL
ORGANIZING AND KAYSE JAMA**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and the Ninth Circuit's Rules, 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.

IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

Amicus curiae 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 maintains one of the world's largest and most popular search engines, accessible, among other places, on the internet at www.google.com. 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. For example, this Court has ruled that Google's activities in the operation of its image search engine constitute fair use. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163-68 (9th Cir. 2007).

¹ No person other than *amicus curiae* 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.

While Google takes no position on the ultimate merits of this case, it has a strong interest in the careful and considered application of the fair use doctrine. As a consequence, it supports Appellees in their arguments in this appeal against Righthaven's misguided construction of the fair use doctrine. Consistent with well-settled precedent, the application of the fair use doctrine requires a flexible, case-by-case approach in which courts weigh and balance numerous factors and no single statutory factor is outcome-determinative. As the Supreme Court has made clear, the ultimate touchstone of any fair use analysis is the Constitutional purpose of copyright law: "to promote the Progress of Science and useful Arts."

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575, (1994)(quoting U.S. Const., art. I, § 8, cl. 8).

Google urges the Court to reject Righthaven's false assertion that there is "almost a per se pronouncement" in the Ninth Circuit precluding the application of the fair use doctrine when an entire work has been copied. That simply is not the law, nor should it be. Indeed, adoption of any such *per se* rule would wreak havoc on businesses like Google, whose ability to offer innovative and useful services to the public depends on the adaptability of the fair use doctrine.

SUMMARY OF ARGUMENT

Google submits this brief to rebut Righthaven's false assertion that the fair use doctrine is unavailable when a work has been copied in its entirety, regardless of a court's findings on the other fair use factors. Such an assertion is false for at least three reasons: (1) *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000), the sole authority on which Righthaven relies for its assertion, neither created nor endorsed any *per se* ban on wholesale copying when, in *dictum*, it failed to acknowledge multiple precedents of this Court upholding fair use in the copying of entire written works; (2) the Supreme Court, in its first case applying the fair use doctrine under the 1976 Act, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1985), specifically recognized a fair use in the copying of complete works, and further indicated that fair use analysis must use a flexible, case-by-case approach; and (3) using this flexible approach, the Supreme Court, this Court, and courts in other Circuits rightly have held, in numerous contexts, that a work may be copied in its entirety and yet still qualify as a fair use.

ARGUMENT

Relying exclusively on *dictum* in *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000), Righthaven asserts that copying of a work in its entirety necessarily precludes application of the fair use

doctrine. Opening Brief at 13, 19 (arguing there is an “almost per se pronouncement [in this Circuit] against a finding of fair use in cases of 100% unauthorized replication”). This argument is contrary to the law and this Court should reject it.

I. *WORLDWIDE CHURCH OF GOD DID NOT CREATE OR ENDORSE ANY PER SE DENIAL OF FAIR USE BASED ON COPYING OF AN ENTIRE WORK.*

Righthaven’s reliance on *Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110 (9th Cir. 2000) (“*WWCG*”) is badly mistaken. That case neither created nor endorsed any *per se* prohibition against the reproduction of entire works. To the contrary, *WWCG* explicitly *rejected* such a rule, specifically acknowledging that “wholesale copying *does not preclude fair use per se*[.]” *WWCG*, 227 F.3d at 1118 (quoting *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986) (emphasis added)).²

While this Court ultimately concluded in *WWCG* that the use of the copyrighted work at issue was not fair, that conclusion followed a careful weighing and balancing of all four statutory fair use factors and a determination that the first

² In the wake of the Supreme Court’s decision in *Sony*, this Court recognized in *Hustler* that a work can be copied in its entirety yet still qualify as a fair use (discussed further in Part II below), and that any previous “pronouncements” concerning the unavailability of the fair use doctrine to wholesale copying were no longer valid. *Hustler*, 796 F.2d at 1155 (“*Sony Corp.* teaches us that the copying of an entire work does not preclude fair use *per se*”).

three weighed against fair use while the fourth factor was, at most, neutral.

WWCG, 227 F.3d at 1120.

Against this backdrop, Righthaven's reliance on language in *WWCG* stating that this Court "ha[d] found no published case holding that fair use protected the verbatim copying, without criticism, of a written work its entirety" (Opening Br. at 14) is misplaced. Counsel in *WWCG* evidently failed to bring to this Court's attention the fact that the *Hustler* case itself found the defendant's use of the plaintiff's written work to be fair use. *Cf. Hustler*, 796 F.2d at 1149-50 (describing written parody interview of Jerry Falwell; Hustler sued Moral Majority for copying and redistributing that written parody). Moreover, in two other Ninth Circuit decisions that rejected a *per se* rule against fair use based on reproductions of entire works (discussed in Part III below), the defendants had made fair use of entire computer programs of the plaintiffs. *See Sega v. Accolade*, 977 F.2d 1510 (9th Cir. 1992), amended 1993 U.S. App. LEXIS 78, *5 (9th Cir. 1993); *Sony v. Connectix*, 203 F.3d 596, 601 (9th Cir. 2000) ("*Connectix*").³

Further, not only did the *WWCG* decision fail to acknowledge this Court's precedents, but the cited language was also *dictum*: the observation occurred in the context of the Court's evaluation not of the *third* statutory fair use factor (amount

³ Copyright law treats computer programs as "literary works" within the meaning of 17 U.S.C. § 102. *See* 17 U.S.C. § 101 (definition of "literary works"); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1246-49 (3d Cir. 1983).

and proportionality of the portion used in relation to the original work as a whole) but instead of the *fourth* statutory factor (effect of the use on the potential market for the work), which, this Court recognized, must be judged in conjunction with the other three statutory factors. In fact, elsewhere in its opinion, the Court specifically recognized that “[T]he extent of permissible copying varies with the purpose and character of the use.” *WWCG*, 27 F.3d at 1118 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586-87 (1994)). Again, as noted above, *WWCG* quoted *Hustler* for the proposition that “wholesale copying *does not preclude fair use per se*[.]”⁴ *WWCG*, 227 F.3d at 1118 (quoting *Hustler*, 796 F.2d at 1155) (emphasis added). *WWCG*’s failure to identify three relevant Ninth Circuit precedents involving fair use of entire copies of written works did not divert this Court from the correct, flexible multi-factor approach to the fair use analysis that the Supreme Court has mandated (as discussed immediately below), and in which the third factor is not dispositive.

⁴ Even if one were to read *WWCG* as holding that reproduction of entire copies is *per se* not fair use, it would not matter. *Hustler* flatly forecloses this, and, under Ninth Circuit rules, as the earlier-decided panel opinion, it must be followed and *WWCG* disregarded. See *United States v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005).

II. RIGHTHAVEN’S ARGUMENT RUNS DIRECTLY AFOUL OF SUPREME COURT PRECEDENT PROHIBITING BRIGHT-LINE RULES IN THE FAIR USE ANALYSIS.

The fair use doctrine is codified in 17 U.S.C. Section 107, but that provision does not purport to define fair use. Section 107 instead provides a nonexclusive list of factors⁵ to guide courts in determining whether a particular unauthorized use of a copyrighted work qualifies as fair, thereby rendering it “not an infringement.” 17 U.S.C. § 107. Those factors are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion of the copyrighted work used; and (4) the effect of the use on the potential market for, or value of, the copyrighted work. *Id.* Courts “balance these factors to determine whether the public interest in the free flow of information outweighs the copyright holder’s interest in exclusive control over the work.” *Hustler*, 796 F.2d at 1151-52.

The Supreme Court repeatedly has emphasized that the fair use analysis must be a flexible one, leaving courts room to find fair use (or not) depending upon examination of all the relevant facts and circumstances and how they interplay with one another in a particular case. *Sony*, 464 U.S. at 448 n. 31 (“each case raising the question must be decided on its own facts”) (quoting H. Rep. No. 94-1476); *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 560

⁵ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817 (9th Cir. 2003) (describing statutory fair use factors as “nonexclusive”).

(1985) (“Section 107 requires a case-by-case determination whether a particular use is fair”); *Campbell*, 510 U.S. at 578 (all four statutory factors “are to be explored, and the results weighed together, in light of the purposes of copyright.”). Thus, when evaluating the third statutory fair use factor—the amount and substantiality of the portion of the work copied—the court should consider whether the amount copied “is reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586.

Accordingly, black-and-white rules like the one that Righthaven urges simply have no place in the fair use analysis. In *Sony*, the Court observed that the Senate Committee, like the House Report, “eschewed a rigid, bright line approach to fair use.” *Sony*, 464 U.S. 448 n. 31. “The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.” *Campbell*, 510 U.S. at 577. The avoidance of such rigid proclamations honors Congress’ intent to give courts the freedom to evaluate, on a case-by-case basis, the “endless variety of situations and combinations of circumstances that can arise in particular cases,” an adaptability that Congress viewed as particularly critical “during a period of rapid technological change.” *Sony*, 464 U.S. at 448 n. 31; *see also Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1166 (9th Cir. 2007) (noting the Supreme Court’s mandate to “analyz[e] fair use flexibly in light of new circumstances”). Indeed, with modern technology

developing at an unprecedented pace, the need for flexibility in the fair use analysis is more crucial than ever.

III. COURTS AT ALL LEVELS HAVE FOUND FAIR USE IN NUMEROUS CONTEXTS WHERE COPYING OF AN ENTIRE WORK HAS OCCURRED.

Righthaven ignores the fact that the Supreme Court, this Court, and numerous courts outside this Circuit have expressly found fair use in cases involving complete copies of a plaintiff's work.

The Supreme Court recognized this more than 25 years ago, when it concluded that the copying of television programs in their entirety (for the purpose of “time-shifting”) was a fair use. “[W]hen one considers the nature of a televised copyrighted audiovisual work . . . and that timeshifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use.” *Sony*, 464 U.S. at 449-50. This conclusion was consistent with the Supreme Court’s recognition that the fair use inquiry must be able to adapt to new situations—there, the creation of a technology that “expand[ed] public access to freely broadcast television programs, [thereby] yielding societal benefits.” *Id.* at 454.

Since *Sony*, this Court has found the complete copying of a work to qualify as a fair use in a variety of other contexts. The first such case was *Hustler*. In that

case, Moral Majority, Inc. (a conservative political lobbying group) copied the complete text of a one page written parody article, published by Hustler Magazine, and distributed the copies in a mass mailing seeking donations to help fund the Reverend Jerry Falwell's legal battle against Hustler Magazine. *Hustler*, 796 F.2d at 1151-52. The Court thoughtfully considered and balanced all relevant factors, concluding that the use was fair notwithstanding that the parody was a creative work, the copying was for commercial purposes, and the parody was copied in its entirety, because there was no evidence that the copy displaced the demand for the original. *Id.* at 1154-56.

Later, as noted above, the Ninth Circuit twice found fair use where entire computer programs had been copied during the process of reverse engineering to ascertain interoperability requirements. In *Sega*, 1993 U.S. App. LEXIS 78 at *31-52, Accolade's copying of a video game for purposes of creating a game compatible with Sega's Genesis game console was fair; the fact that the third statutory factor weighed against Accolade due to copying of the whole "[did] not ... preclude a finding of fair use." In *Connectix*, 203 F.3d at 602-08, Connectix's copying of Sony's entire BIOS software program, for the purpose of developing a program that would allow users to play Sony Playstation games on their computers, was fair; the fact that the third statutory factor weighed against Connectix due to copying of the entire program was given "very little weight" in

the overall analysis. *Connectix*, 203 F.3d at 606. As in *Sony*, this Court carefully weighed all factors in both cases with an eye toward the ultimate aim of the Copyright Act—to “stimulate artistic creativity for the general public good.” *Sega*, 1993 U.S. App. LEXIS 78 at *49 (quoting *Sony*, 464 U.S. at 432); *Connectix*, 203 F.3d at 603 (quoting *Sony*).

This Court has also twice found fair use where search engines have copied and displayed photographic images, in their entirety, as “thumbnails” displayed in search results. *See Kelly*, 336 F.3d at 818-822; *Perfect 10*, 508 F.3d at 1163-1168. Both times, the Court recognized that, although the images were copied in their entirety, the “amount and substantiality” factor *did not even weigh against the search engine*—much less preclude a finding of fair use—because the 100% copying was reasonable in view of the purpose of the search engines, namely, to allow internet users to recognize the images and decide whether to pursue more information about them. *Kelly*, 336 F.3d at 821; *Perfect 10*, 508 F.3d at 1167-1168.⁶ The Court observed that this purpose served the public interest by creating an entirely new use for the original work. *Kelly*, 336 F.3d at 819 (“Arriba’s use of the images serves a different function than Kelly’s use - improving access to

⁶ Also at issue in *Perfect 10* was the process by which an internet user’s browser automatically makes “cache” copies of the entire contents of a webpage, including the full-sized images at issue. The Ninth Circuit agreed with the district court’s conclusion that the making of such cache copies was a fair use, even though it constituted a reproduction of the entire work. *Perfect 10*, 508 F.3d at 1169.

information on the internet versus artistic expression”); *Perfect 10*, 508 F.3d at 1165 (“a search engine provides a social benefit by incorporating an original work into a new work, namely, an electronic reference tool”).

In *Mattel Inc. v. Walking Mountain Prod’ns, Inc.*, 353 F.3d 792 (9th Cir. 2003), this Court reiterated the point: “We have . . . held that entire verbatim reproductions are justifiable where the purpose of the work differs from the original.” *Id.* at 803 n. 8 (citing *Kelly*, 336 F.3d at 821).

Nor is there anything categorically different about written works. Lower courts in this Circuit, relying on the precedents cited above, have found fair use despite the reproduction of entire written works. For example, in *Field v. Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006), Google’s copying of 51 of plaintiff’s writings, in their entirety, was a fair use; the court observed that the “Supreme Court has made clear that even copying of entire works should not weigh against a fair use finding where the new use serves a different function from the original, and the original work can be viewed by anyone free of charge.” *Id.* at 1120. *See also Religious Tech Ctr. v. Netcom Online Commc’n Services, Inc.*, C-95-20091 RNW, 1997 WL 34605244 (N.D. Cal. Jan. 6, 1997) (citing *Sony*, 464 U.S. at 449-450); *Newport-Mesa Unified School District v. California Department of Education*, 371 F. Supp. 2d 1170, 1178 (C.D. Cal. 2005) (citing *Hustler*, 796 F.2d at 1155, and *Sony*, 464 U.S. at 456).

Other Circuits likewise have rejected any *per se* ban on the application of fair use to reproductions of entire works, including cases involving written material. *See, e.g., Bill Graham Archives v. Dorling Kindersley Limited*, 448 F.3d 605, 613 (2d Cir. 2006) (copying of concert posters and tickets in their entirety protected by fair use; observing that “[C]ourts have concluded that [the reproduction of an entire work] does not necessarily weigh against fair use because copying the entirety of a work is sometimes necessary to make a fair use of the image.”) (emphasis in original); *Triangle Publ’ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1177 n.15 (5th Cir. 1980) (“[T]he idea that the copying of an entire copyrighted work can never be a fair use is an overbroad generalization, unsupported by the decisions and rejected by years of accepted practice.”) (internal quotation omitted); *Nuñez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000) (copying of photographs in their entirety protected as fair use, noting that the inquiry under the third statutory fair use factor “must be a flexible one, rather than a simple determination of the percentage [of the work] used”); *A.V. v. iParadigms*, 562 F.3d 630, 642 (4th Cir. 2009) (wholesale copying of student papers protected as fair use); *Bond v. Blum*, 317 F.3d 385, 393 (4th Cir. 2003) (copying of entire manuscript protected as fair use); *Ass’n of Am. Medical Colleges v. Cuomo*, 928 F.2d 519 (2d Cir. 1991) (concluding that verbatim copying of copyrighted standardized testing forms for purpose of statutorily-mandated

study could constitute fair use, reversing lower court's decision to the contrary, and remanding).

Lower courts in other Circuits consistently reach the same conclusion. *See, e.g., Belmore v. City Pages, Inc.*, 880 F. Supp. 673 (D. Minn. 1995) (wholesale copying of short story in newspaper protected as fair use); *Haberman v. Hustler Magazine Inc.*, 626 F. Supp. 201 (D. Mass. 1986) (complete reproduction of fine art postcards protected as fair use); *Dow Jones & Co. v. Board of Trade*, 546 F. Supp. 113 (S.D.N.Y. 1982) (non-profit organization's wholesale copying and distribution of plaintiff's time-sensitive, copyrighted financial markets data protected as fair use); *Key Maps, Inc. v. Pruitt*, 470 F. Supp. 33 (S.D. Tex. 1978) (wholesale reproduction of county thoroughfare map protected as fair use).

As the cases discussed here make abundantly clear, a flexible, multi-factor approach to the fair use analysis, consistent with Supreme Court precedent, allows no *per se* rule against application of the fair use doctrine in cases of the reproduction of entire works.

CONCLUSION

Since the Supreme Court's decision in *Sony*, courts at all levels, both within and outside this Circuit, consistently have recognized that there is no *per se* rule against fair use that arises simply because a work has been reproduced in its entirety. Even *WWCG*, upon which Righthaven relies, recognized the same thing.

Righthaven's reliance upon *WWCG's dictum*, which apparently failed to take into account precedents of this Court, seeks to divert this Court from those precedents and from the Supreme Court's decision in *Sony*. The Court should reject Righthaven's effort.

Dated: January 13, 2012

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CERTIFICATE OF COMPLIANCE
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I certify that this brief of *amicus curiae* Google Inc. in support of Appellees, Center for Intercultural Organizing and Kayse Jama, in Appeal No. 11-16358, complies with the length limitations established by Ninth Circuit Rule 29(d), which states that “an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief.” This amicus brief contains 3470 words, 291 lines of text, or 15 pages, excluding portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: January 13, 2012

Respectfully submitted,

/s/ Andrew P. Bridges

Andrew P. Bridges

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Motion for Leave to File Brief of *Amicus Curiae* Google Inc. in support of Appellees Center for Intercultural Organizing and Kayse Jama and the accompanying Brief of *Amicus Curiae* Google Inc. in support of Appellees Center for Intercultural Organizing and Kayse Jama with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 13, 2012.

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

/s/ Andrew P. Bridges
Andrew P. Bridges