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15 **UNITED STATES DISTRICT COURT**  
16 **NORTHERN DISTRICT OF CALIFORNIA**  
17 **SAN FRANCISCO DIVISION**  
18

19 ANDREA BARTZ, ANDREA BARTZ, INC.,  
CHARLES GRAEBER, KIRK WALLACE  
20 JOHNSON, and MJ + KJ, INC., individually and on  
21 behalf of others similarly situated,

22 Plaintiffs,

23 v.

24 ANTHROPIC PBC,

25 Defendant.  
26  
27  
28

Case No. 3:24-CV-05417-WHA

Action Filed: August 19, 2024

**DEFENDANT ANTHROPIC PBC'S  
SUPPLEMENTAL BRIEF IN SUPPORT  
OF MOTION FOR SUMMARY  
JUDGMENT**

Judge: Honorable William H. Alsup

1 **The Court’s Questions:**

2 At yesterday’s hearing, Anthropic cited two related cases which held that a mass book  
3 digitization project by university libraries and Google was fair use: *Authors Guild v. Google, Inc.*,  
4 804 F.3d 202 (2d Cir. 2015) (Leval, J.) (“*Google Books*”) and *Authors Guild, Inc. v. HathiTrust*,  
5 755 F.3d 87 (2d Cir. 2014) (Parker, J.) (“*HathiTrust*”). The Court then asked: (1) “In the *Google*  
6 *Books* decision did the decision expressly and explicitly say that the original copying by the  
7 universities or by Google at the universities was protected by fair use?” and (2) “Was it briefed?”  
8 May 23, 2025 Hrg. Tr. at 72:9-12, 16-17.

9 **Short Answer:**

10 Yes, the court in *Google Books* expressly held that the original copying of books was  
11 protected by fair use and rejected emphatic argument from the plaintiffs that the initial copying by  
12 Google should have been analyzed in isolation from the later creation of the search tools.

13 **Detailed Answer:**

14 **Background.** “Beginning in 2004, several research universities . . . agreed to allow Google  
15 to electronically scan the books in their collections. In October 2008, thirteen universities  
16 announced plans to create a repository for the digital copies and founded an organization called  
17 HathiTrust to . . . operate the HathiTrust Digital Library (or ‘HDL’).” *HathiTrust*, 755 F.3d at 90.  
18 After Google created the digital copies—*i.e.*, the libraries did *not* create the initial copies—multiple  
19 copies were given to HathiTrust, and Google kept one copy. *Id.* at 92 n.3. Then, the trade association  
20 Authors Guild and individual authors (referred to in this brief as “AG”) sued HathiTrust and Google  
21 on the grounds that neither HathiTrust nor Google had permission to copy the books.

22 ***HathiTrust.*** The Second Circuit decided *HathiTrust* first, after the district court granted  
23 summary judgment to HathiTrust. It considered—and rejected—the very arguments Plaintiffs  
24 advance here. AG argued on appeal, just as Plaintiffs do, that HathiTrust should have paid for digital  
25 copies of the works in their searchable database, instead of taking unauthorized copies. Declaration  
26 of Joseph Farris (“Farris Decl.”), Ex. 1 at 38-39 (“Each digital copy of a book that the Libraries  
27 created—for preservation, archiving or any other purpose—***rather than purchasing it through***  
28 ***lawful channels***, represents a lost sale to the book’s rights-holders.”) (emphasis added). Further

1 echoing Plaintiffs’ argument yesterday, AG cited *Napster* to support its theory: “the Libraries  
2 received their own ‘free’ digital copies, ***avoiding the need to buy digital copies of the books from***  
3 ***the Authors and millions of other copyright holders.***” *Id.* at 26 (citing *A&M Records, Inc. v.*  
4 *Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (emphasis added); *see also id.* at 31 (arguing  
5 that the “mechanical conversion of printed books into digital form” was itself not transformative).  
6 The Second Circuit rejected these arguments. It declined to view the initial act of copying in  
7 isolation and found fair use, noting that the initial copies enabled the transformative purpose  
8 because, “in order to perform a full-text search of books, the Libraries must first create digital copies  
9 of the entire books.” 755 F.3d at 97.

10 ***Google Books.*** *Google Books* was decided one year later and, once again, considered but  
11 rejected an “initial acquisition” theory. In opposing Google’s motion for summary judgment, AG  
12 had articulated three distinct theories of infringement, *i.e.*, that Google had: (i) “digitally reproduced  
13 millions of copyrighted books” in violation of 17 U.S.C. § 106(1); (ii) “made digital copies available  
14 for its Library Project partners to download” in violation of 17 U.S.C. § 106(3); and (iii) “displayed  
15 snippets from the books to the public” in violation of 17 U.S.C. § 106(5). *Authors Guild, Inc. v.*  
16 *Google Inc.*, 954 F. Supp. 2d 282, 289 (S.D.N.Y. 2013). The district court analyzed these theories  
17 as part of a related course of conduct and found fair use. *Id.*

18 On appeal, AG ***expressly*** and ***repeatedly*** argued that the district court erred in not ***separately***  
19 analyzing Google’s first, unauthorized act of copying independently from the search and display  
20 functions: “[T]he District Court failed to separately evaluate whether each of Google’s uses,  
21 including its reproduction, archival storage and distribution of the books in full, passes the  
22 transformative use test.” Farris Decl., Ex. 2 at 4; *id.* at 6 (breaking out three separate “issues  
23 presented” including a first issue of “unauthorized copying”); *id.* at 23 (arguing “each and every  
24 part of Google’s Library Project” was not fair use); *id.* at 31, n.9 (“These uses must be analyzed  
25 separately.”); *id.* at 33 (“The District Court sidestepped Google’s reproduction and creation of  
26 millions of e-books, instead improperly focusing its analysis of transformativeness on the Library  
27 Project’s independent search index and text mining functions.”). AG further specifically argued that  
28 the “mechanical conversion” via “[d]igitization” was akin to mere “photocopying” and could not

1 be transformative when analyzed in isolation (*id.* at 32), and that this “shortcut” let Google avoid  
 2 “the ‘painstaking’ and ‘costly’ process of obtaining permission before scanning copyrighted books”  
 3 (*id.* at 27) (citation omitted).

4 In its Answering Brief, Google refuted this, arguing, “as *HathiTrust* recognizes, such  
 5 scanning cannot be assessed in a vacuum and *is* permissible if the scans are for a fair-use purpose.”  
 6 Farris Decl., Ex. 3 at 28 (emphasis in original). In its Reply Brief, AG again took issue with  
 7 “Google’s narrow framing of the issue (*see* Opp. Br. at 53-57),” and emphasized that it had “long  
 8 contended that Google’s copying and dissemination of digital books to the libraries implicates *both*  
 9 the reproduction and distribution rights under the Copyright Act.” Farris Decl., Ex. 4 at 20; *id.* at  
 10 20 n.12 (emphasis in original).

11 In light of the extensive briefing of this issue, Judge Leval undoubtedly considered AG’s  
 12 theory that the court should divorce Google’s initial copying from its ultimate purpose of building  
 13 search tools. But the court rejected that false separation, writing: “We have no difficulty concluding  
 14 that Google’s ***making of a digital copy*** of Plaintiffs’ books for the purpose of enabling a search for  
 15 identification of books containing a term of interest to the searcher involves a highly transformative  
 16 purpose, in the sense intended by *Campbell*.” 804 F.3d at 216-17 (emphasis added). The court also  
 17 expressly recognized that in *HathiTrust* it had also “concluded that ***both*** the making of the digital  
 18 copies ***and*** the use of those copies to offer the search tool were fair uses.” *Id.* at 217 (emphasis  
 19 added). The Supreme Court has since cited *Google Books* with approval. *See Andy Warhol Found.*  
 20 *for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 531, 545, 548 (2023).

21  
 22 Dated: May 23, 2025

Respectfully submitted,

**ARNOLD & PORTER KAYE SCHOLER LLP**

25 By: /s/ Joseph Farris  
 JOSEPH FARRIS

*Attorneys for Defendant*  
 ANTHROPIC PBC

**CERTIFICATE OF SERVICE**

I, Joseph Farris, am the ECF user whose identification and password are being used to file the foregoing **DEFENDANT ANTHROPIC PBC'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.**

Dated: May 23, 2025

/s/ Joseph Farris

JOSEPH FARRIS

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