

1 NATIONAL FEDERATION OF THE BLIND, GEORGINA KLEEGER,
2 BLAIR SEIDLITZ, COURTNEY WHEELER, ELLEN HOLLOMAN,
3 *Intervenor Defendants-Appellees.*²

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5
6 Appeal from the United States District Court
7 for the Southern District of New York.
8 No. 11 CV 6351(HB) — Harold Baer, Jr., *Judge*.

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11 Argued: October 30, 2013
12 Decided: June 10, 2014

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15 Before: WALKER, CABRANES, and PARKER, *Circuit Judges*.

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18 Plaintiff-appellant authors and authors' associations appeal a
19 judgment of the United States District Court for the Southern
20 District of New York (Harold Baer, Jr., *Judge*) granting summary
21 judgment to defendants-appellees and dismissing claims of
22 copyright infringement. In addition, the court dismissed the claims
23 of certain plaintiffs-appellants for lack of standing and dismissed
24 other copyright claims as unripe. We hold, as a threshold matter,
25 that certain plaintiffs-appellants lack associational standing. We also
26 hold that the doctrine of "fair use" allows defendants-appellees to
27 create a full-text searchable database of copyrighted works and to
28 provide those works in formats accessible to those with disabilities,
29 and that the claims predicated upon the Orphan Works Project are
30 not ripe for adjudication. We vacate so much of the judgment as is

_____ ² The Clerk of Court is directed to amend the caption as set forth above.

1 based on the district court's holding related to the claim of
2 infringement predicated upon defendants-appellees' preservation of
3 copyrighted works, and we remand for further proceedings on that
4 issue. Affirmed, in part; vacated, in part.

5

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5
6 BARRINGTON D. PARKER, *Circuit Judge*:

7 Beginning in 2004, several research universities including the
8 University of Michigan, the University of California at Berkeley,
9 Cornell University, and the University of Indiana agreed to allow
10 Google to electronically scan the books in their collections. In
11 October 2008, thirteen universities announced plans to create a
12 repository for the digital copies and founded an organization called
13 HathiTrust to set up and operate the HathiTrust Digital Library (or
14 "HDL"). Colleges, universities, and other nonprofit institutions
15 became members of HathiTrust and made the books in their
16 collections available for inclusion in the HDL. HathiTrust currently
17 has 80 member institutions and the HDL contains digital copies of
18 more than ten million works, published over many centuries,
19 written in a multitude of languages, covering almost every subject
20 imaginable. This appeal requires us to decide whether the HDL's
21 use of copyrighted material is protected against a claim of copyright
22 infringement under the doctrine of fair use. *See* 18 U.S.C. § 107.

23 **BACKGROUND**

24 **A. The HathiTrust Digital Library**

25 HathiTrust permits three uses of the copyrighted works in the
26 HDL repository. First, HathiTrust allows the general public to search
27 for particular terms across all digital copies in the repository. Unless
28 the copyright holder authorizes broader use, the search results show
29 only the page numbers on which the search term is found within the

1 work and the number of times the term appears on each page. The
 2 HDL does not display to the user any text from the underlying
 3 copyrighted work (either in “snippet” form or otherwise).
 4 Consequently, the user is not able to view either the page on which
 5 the term appears or any other portion of the book.

6 Below is an example of the results a user might see after
 7 running an HDL full-text search:

The screenshot shows the HathiTrust Digital Library search results for the query "anaphylactic shock". The page header includes the HathiTrust logo and navigation links. The search bar shows the query "anaphylactic shock". The main content area displays the following information:

- About this Book:** Allergy and tissue metabolism [by] W. G. Smith, ... Smith, Walter George. Copyright: Protected by copyright law.
- Get this Book:** Find in a library.
- Add to Collection:** Login to make your personal collections permanent.
- Share:** Permanent link to this book: <http://hdl.handle.net/2027/mdp.39015006705670>
- Version:** 2012-05-07 09:10 UTC

The search results section shows:

- anaphylactic AND shock matched 41 pages in this item.**
- Broaden your search to pages having just one or more of your terms.**
- Viewing results for: 1 to 10 of 41 pages
- 1 | 11 | 31 | 32 | next ▶
- p.17 - 12 matching terms
- p.26 - 13 matching terms
- p.30 - 11 matching terms
- p.27 - 12 matching terms
- p.15 - 11 matching terms
- p.88 - 9 matching terms
- p.9 - 8 matching terms
- p.28 - 8 matching terms
- p.18 - 8 matching terms
- p.21 - 8 matching terms
- Viewing results for: 1 to 10 of 41 pages
- 1 | 11 | 31 | 32 | next ▶

The footer of the page includes navigation links: Login, About, Help, Feedback, Mobile, Take-Down Policy, Privacy, Contact.

8

9 J.A. 681 ¶ 80 (Wilkin Decl.).

10 Second, the HDL allows member libraries to provide patrons
 11 with certified print disabilities access to the full text of copyrighted
 12 works. A “print disability” is any disability that prevents a person
 13 from effectively reading printed material. Blindness is one example,

1 but print disabilities also include those that prevent a person from
2 physically holding a book or turning pages. To use this service, a
3 patron must obtain certification of his disability from a qualified
4 expert. Through the HDL, a print-disabled user can obtain access to
5 the contents of works in the digital library using adaptive
6 technologies such as software that converts the text into spoken
7 words, or that magnifies the text. Currently, the University of
8 Michigan's library is the only HDL member that permits such
9 access, although other member libraries intend to provide it in the
10 future.

11 Third, by preserving the copyrighted books in digital form,
12 the HDL permits members to create a replacement copy of the work,
13 if the member already owned an original copy, the member's
14 original copy is lost, destroyed, or stolen, and a replacement copy is
15 unobtainable at a "fair" price elsewhere.

16 The HDL stores digital copies of the works in four different
17 locations. One copy is stored on its primary server in Michigan, one
18 on its secondary server in Indiana, and two on separate backup
19 tapes at the University of Michigan.³ Each copy contains the full text
20 of the work, in a machine readable format, as well as the *images* of
21 each page in the work as they appear in the print version.

22 **B. The Orphan Works Project**

23 Separate and apart from the HDL, in May 2011, the University
24 of Michigan developed a project known as the Orphan Works
25 Project (or "OWP"). An "orphan work" is an out-of-print work that

³ Separate from the HDL, one copy is also kept by Google. Google's use of its copy is the subject of a separate lawsuit currently pending in this Court. See *Authors Guild, Inc. v. Google, Inc.*, 721 F.3d 132 (2d Cir. 2013), *on remand*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013), *appeal docketed*, No. 13-4829 (2d Cir. Dec. 23, 2013).

1 is still in copyright, but whose copyright holder cannot be readily
2 identified or located. *See* U.S. Copyright Office, Notice of Inquiry,
3 Orphan Works and Mass Digitization, 77 Fed. Reg. 64555 (Oct. 22,
4 2012).

5 The University of Michigan conceived of the OWP in two
6 stages: First, the project would attempt to identify out-of-print
7 works, try to find their copyright holders, and, if no copyright
8 holder could be found, publish a list of orphan works candidates to
9 enable the copyright holders to come forward or be otherwise
10 located. If no copyright holder came forward, the work was to be
11 designated as an orphan work. Second, those works identified as
12 orphan works would be made accessible in digital format to the
13 OWP's library patrons (with simultaneous viewers limited to the
14 number of hard copies owned by the library).

15 The University evidently became concerned that its screening
16 process was not adequately distinguishing between orphan works
17 (which were to be included in the OWP) and in-print works (which
18 were not). As a result, before the OWP was brought online, but after
19 the complaint was filed in this case, the University indefinitely
20 suspended the project. No copyrighted work has been distributed or
21 displayed through the project and it remains suspended as of this
22 writing.

23 C. Proceedings in the District Court

24 This case began when twenty authors and authors'
25 associations (collectively, the "Authors") sued HathiTrust, one of its
26 member universities, and the presidents of four other member
27 universities (collectively, the "Libraries") for copyright infringement
28 seeking declaratory and injunctive relief. The National Federation of
29 the Blind and three print-disabled students (the "Intervenors") were

1 permitted to intervene to defend their ability to continue using the
2 HDL.

3 The Libraries initially moved for partial judgment on the
4 pleadings on the ground that the authors' associations lacked
5 standing to assert claims on behalf of their members and that the
6 claims related to the OWP were not ripe. *See* Fed. R. Civ. P. 12(c).
7 The Libraries then moved for summary judgment on the remaining
8 claims on the ground that their uses of copyrighted material were
9 protected by the doctrine of fair use, *see* 17 U.S.C. § 107, and also by
10 the Chafee Amendment, *see id.* § 121. The Intervenors moved for
11 summary judgment on substantially the same grounds as the
12 Libraries and, finally, the Authors cross-moved for summary
13 judgment.

14 **D. The District Court's Opinion**

15 The district court granted the Libraries' and Intervenors'
16 motions for summary judgment on the infringement claims on the
17 basis that the three uses permitted by the HDL were fair uses. In this
18 assessment, the district court gave considerable weight to what it
19 found to be the "transformative" nature of the three uses and to
20 what it described as the HDL's "invaluable" contribution to the
21 advancement of knowledge, *Authors Guild, Inc. v. HathiTrust*, 902 F.
22 Supp. 2d 445, 460-64 (S.D.N.Y. 2012). The district court explained:

23 Although I recognize that the facts here may on some
24 levels be without precedent, I am convinced that they
25 fall safely within the protection of fair use such that
26 there is no genuine issue of material fact. I cannot
27 imagine a definition of fair use that would not
28 encompass the transformative uses made by [the HDL]
29 and would require that I terminate this invaluable
30 contribution to the progress of science and cultivation of

1 the arts that at the same time effectuates the ideals
2 espoused by the [Americans With Disabilities Act of
3 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as
4 amended at 42 U.S.C. §§ 12101, *et seq.*)].

5 *Id.* at 464.

6 Next, the district court addressed the Libraries' Chafee
7 Amendment defense. Under the Amendment, "authorized entities"
8 are permitted to reproduce or distribute copies of a previously
9 published, nondramatic literary work in specialized formats
10 exclusively for use by the blind or other persons with disabilities. *See*
11 17 U.S.C. § 121; *HathiTrust*, 902 F. Supp. 2d at 465. Under § 121, an
12 "'authorized entity' means a nonprofit organization or a
13 governmental agency that has a primary mission to provide
14 specialized services relating to training, education, or adaptive
15 reading or information access needs of blind or other persons with
16 disabilities." 17 U.S.C. § 121(d)(1).

17 The district court stated that the ADA requires that libraries of
18 educational institutions, such as the Libraries in this case, "have a
19 primary mission to reproduce and distribute their collections to
20 print-disabled individuals," which, according to Judge Baer, made
21 "each library a potential 'authorized entity' under the Chafee
22 Amendment." *HathiTrust*, 902 F. Supp. 2d at 465. As a result, the
23 district court concluded that "[t]he provision of access to previously
24 published non-dramatic literary works within the HDL fits squarely
25 within the Chafee Amendment, although Defendants may certainly
26 rely on fair use . . . to justify copies made outside of these categories
27 or in the event that they are not authorized entities." *Id.*

28 The district court held that certain associational plaintiffs
29 lacked standing under the Copyright Act and dismissed them from
30 the suit. *Id.* at 450-55. The district court also held that the OWP

1 claims were unripe for judicial review in the absence of crucial
2 information about what the program would look like and whom it
3 would affect should it be implemented, and because the Authors
4 would suffer no hardship by deferring litigation until such time as
5 the Libraries released the details of a new OWP and a revised list of
6 orphan work candidates. *Id.* at 455-56. The court entered judgment
7 against the Authors, and this appeal followed.

8 DISCUSSION

9 We review *de novo* under well-established standards the
10 district court's decisions granting summary judgment and judgment
11 on the pleadings. See *Maraschiello v. City of Buffalo Police Dep't*, 709
12 F.3d 87, 92 (2d Cir. 2013) (summary judgment); *LaFaro v. N.Y.*
13 *Cardiothoracic Grp., PLLC*, 570 F. 3d 471, 475 (2d Cir. 2009) (judgment
14 on the pleadings).

15 As a threshold matter, we consider whether the authors'
16 associations have standing to assert infringement claims on behalf of
17 their members.

18 Three of these authors' associations—Authors Guild, Inc.,
19 Australian Society of Authors Limited, and Writers' Union of
20 Canada—claim to have standing, solely as a matter of U.S. law, to
21 seek an injunction for copyright infringement on their members'
22 behalf. But, as we have previously explained, § 501 of “the
23 Copyright Act does not permit copyright holders to choose third
24 parties to bring suits on their behalf.” *ABKCO Music, Inc. v.*
25 *Harrisongs Music, Ltd.*, 944 F.2d 971, 980 (2d Cir. 1991); see also *Itar-*
26 *Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d
27 Cir. 1998) (“United States law permits suit only by owners of ‘an
28 exclusive right under a copyright’” (quoting 17 U.S.C. § 501(b))).
29 Accordingly, we agree with the district court that these associations

1 lack standing to bring suit on behalf of their members, and they
2 were properly dismissed from the suit.

3 The remaining four authors' associations—Union des
4 Écrivaines et des Écrivains Québécois, Authors' Licensing and
5 Collecting Society, Sveriges Författarförbund, and Norsk faglitterær
6 forfattero og oversetterforening—assert that foreign law confers
7 upon them certain exclusive rights to enforce the copyrights of their
8 foreign members (an assertion that the Libraries do not contest on
9 this appeal). These four associations do have standing to bring suit
10 on behalf of their members. *See Itar-Tass*, 153 F.3d at 93-94
11 (recognizing that an association authorized by foreign law to
12 administer its foreign members' copyrights has standing to seek
13 injunctive relief on behalf of those members in U.S. court).

14 I. Fair Use⁴

15 A.

16 As the Supreme Court has explained, the overriding purpose
17 of copyright is “[t]o promote the Progress of Science and useful Arts
18” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574 (1994)
19 (quoting U.S. CONST. art. I, § 8, cl. 8); *see also Twentieth Century Music*
20 *Corp. v. Aiken*, 422 U.S. 151, 156 (1975). This goal has animated
21 copyright law in Anglo-American history, beginning with the first
22 copyright statute, the Statute of Anne of 1709, which declared itself
23 to be “[a]n Act for the Encouragement of Learning, by Vesting the

⁴ Plaintiffs argue that the fair use defense is inapplicable to the activities at issue here, because the Copyright Act includes another section, 108, which governs “Reproduction [of copyrighted works] by Libraries” 17 U.S.C. § 108. However, section 108 also includes a “savings clause,” which states, “Nothing in this section in any way affects the right of fair use as provided by section 107” § 108(f)(4). Thus, we do not construe § 108 as foreclosing our analysis of the Libraries’ activities under fair use, and we proceed with that analysis.

1 Copies of Printed Books in the Authors . . . during the Times therein
2 mentioned.” Act for the Encouragement of Learning, 8 Anne, ch. 19.
3 In short, our law recognizes that copyright is “not an inevitable,
4 divine, or natural right that confers on authors the absolute
5 ownership of their creations. It is designed rather to stimulate
6 activity and progress in the arts for the intellectual enrichment of the
7 public.” Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L.
8 REV. 1105, 1107 (1990).

9 The Copyright Act furthers this core purpose by granting
10 authors a limited monopoly over (and thus the opportunity to profit
11 from) the dissemination of their original works of authorship. *See* 17
12 U.S.C. §§ 102, 106, 302-305. The Copyright Act confers upon authors
13 certain enumerated exclusive rights over their works during the
14 term of the copyright, including the rights to reproduce the
15 copyrighted work and to distribute those copies to the public. *Id.*
16 § 106(1), (3). The Act also gives authors the exclusive right to prepare
17 certain new works—called “derivative works”—that are based upon
18 the copyrighted work. *Id.* § 106(2). Paradigmatic examples of
19 derivative works include the translation of a novel into another
20 language, the adaptation of a novel into a movie or a play, or the
21 recasting of a novel as an e-book or an audiobook. *See id.* § 101. As a
22 general rule, for works created after January 1, 1978, copyright
23 protection lasts for the life of the author plus an additional 70 years.
24 *Id.* § 302.

25 At the same time, there are important limits to an author’s
26 rights to control original and derivative works. One such limit is the
27 doctrine of “fair use,” which allows the public to draw upon
28 copyrighted materials without the permission of the copyright
29 holder in certain circumstances. *See id.* § 107 (“[T]he fair use of a
30 copyrighted work . . . is not an infringement of copyright.”). “From
31 the infancy of copyright protection, some opportunity for fair use of

1 copyrighted materials has been thought necessary to fulfill
2 copyright's very purpose, '[t]o promote the Progress of Science and
3 useful Arts' *Campbell*, 510 U.S. at 574.

4 Under the fair-use doctrine, a book reviewer may, for
5 example, quote from an original work in order to illustrate a point
6 and substantiate criticisms, see *Folsom v. Marsh*, 9 F. Cas. 342, 344
7 (C.C.D. Mass. 1841) (No. 4901), and a biographer may quote from
8 unpublished journals and letters for similar purposes, see *Wright v.*
9 *Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991). An artist may employ
10 copyrighted photographs in a new work that uses a fundamentally
11 different artistic approach, aesthetic, and character from the original.
12 See *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013). An internet
13 search engine can display low-resolution versions of copyrighted
14 images in order to direct the user to the website where the original
15 could be found. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146,
16 1165 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818-22
17 (9th Cir. 2002). A newspaper can publish a copyrighted photograph
18 (taken for a modeling portfolio) in order to inform and entertain the
19 newspaper's readership about a news story. See *Nunez v. Caribbean*
20 *Int'l News Corp.*, 235 F.3d 18, 25 (1st Cir. 2000). A viewer can create a
21 recording of a broadcast television show in order to view it at a later
22 time. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417,
23 447-450 (1984). And a competitor may create copies of copyrighted
24 software for the purpose of analyzing that software and discovering
25 how it functions (a process called "reverse engineering"). See *Sony*
26 *Comp. Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 599-601
27 (9th Cir. 2000).

28 The doctrine is generally subject to an important proviso: A
29 fair use must not excessively damage the market for the original by
30 providing the public with a substitute for that original work. Thus, a
31 book review may fairly quote a copyrighted book "for the purposes

1 of fair and reasonable criticism,” *Folsom*, 9 F. Cas. at 344, but the
2 review may not quote extensively from the “heart” of a forthcoming
3 memoir in a manner that usurps the right of first publication and
4 serves as a substitute for purchasing the memoir, *Harper & Row,*
5 *Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

6 In 1976, as part of a wholesale revision of the Copyright Act,
7 Congress codified the judicially created fair-use doctrine at 17 U.S.C.
8 § 107. See Copyright Act of 1976, Pub. L. No. 94-553, § 107, 90 Stat.
9 2541, 2546 (1976) (codified as amended at 17 U.S.C. § 107). Section
10 107 requires a court to consider four nonexclusive factors which are
11 to be weighed together to assess whether a particular use is fair:

12 (1) the purpose and character of the use, including
13 whether such use is of a commercial nature or is for
14 nonprofit educational purposes;

15 (2) the nature of the copyrighted work;

16 (3) the amount and substantiality of the portion used in
17 relation to the copyrighted work as a whole; and

18 (4) the effect of the use upon the potential market for or
19 value of the copyrighted work.

20 17 U.S.C. § 107.

21 An important focus of the first factor is whether the use is
22 “transformative.” A use is transformative if it does something more
23 than repackage or republish the original copyrighted work. The
24 inquiry is whether the work “adds something new, with a further
25 purpose or different character, altering the first with new
26 expression, meaning or message” *Campbell*, 510 U.S. at 579
27 (citing *Leval*, 103 HARV. L. REV. at 1111). “[T]he more transformative
28 the new work, the less will be the significance of other factors . . .

1 that may weigh against a finding of fair use." *Id.* Contrary to what
2 the district court implied, a use does not become transformative by
3 making an "invaluable contribution to the progress of science and
4 cultivation of the arts." *HathiTrust*, 902 F. Supp. 2d at 464. Added
5 value or utility is not the test: a transformative work is one that
6 serves a new and different function from the original work and is
7 not a substitute for it.

8 The second factor considers whether the copyrighted work is
9 "of the creative or instructive type that the copyright laws value and
10 seek to foster." Leval, 103 HARV. L. REV. at 1117; *see also Folsom*, 9 F.
11 Cas. at 348 ("[W]e must often . . . look to the nature and objects of
12 the selections made . . ."). For example, the law of fair use
13 "recognizes a greater need to disseminate factual works than works
14 of fiction or fantasy." *Harper & Row*, 471 U.S. at 563.

15 The third factor asks whether the secondary use employs
16 more of the copyrighted work than is necessary, and whether the
17 copying was excessive in relation to any valid purposes asserted
18 under the first factor. *Campbell*, 510 U.S. at 586-87. In weighing this
19 factor, we assess the quantity and value of the materials used and
20 whether the amount copied is reasonable in relation to the
21 purported justifications for the use under the first factor. Leval, 103
22 HARV. L. REV. at 1123.

23 Finally, the fourth factor requires us to assess the impact of the
24 use on the traditional market for the copyrighted work. This is the
25 "single most important element of fair use." *Harper & Row*, 471 U.S.
26 at 566. To defeat a claim of fair use, the copyright holder must point
27 to market harm that results because the secondary use serves as a
28 substitute for the original work. *See Campbell*, 510 U.S. at 591
29 ("cognizable market harm" is limited to "market substitution"); *see*
30 *also NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 481-82 (2d Cir. 2004).

1

B.

2 As discussed above, the Libraries permit three uses of the
3 digital copies deposited in the HDL. We now consider whether these
4 uses are “fair” within the meaning of our copyright law.

5

1. Full-Text Search

6 It is not disputed that, in order to perform a full-text search of
7 books, the Libraries must first create digital copies of the entire
8 books. Importantly, as we have seen, the HDL does not allow users
9 to view any portion of the books they are searching. Consequently,
10 in providing this service, the HDL does not add into circulation any
11 new, human-readable copies of any books. Instead, the HDL simply
12 permits users to “word search”—that is, to locate where specific
13 words or phrases appear in the digitized books. Applying the
14 relevant factors, we conclude that this use is a fair use.

15

i.

16 Turning to the first factor, we conclude that the creation of a
17 full-text searchable database is a quintessentially transformative use.
18 As the example on page 7, *supra*, demonstrates, the result of a word
19 search is different in purpose, character, expression, meaning, and
20 message from the page (and the book) from which it is drawn.
21 Indeed, we can discern little or no resemblance between the original
22 text and the results of the HDL full-text search.

23 There is no evidence that the Authors write with the purpose
24 of enabling text searches of their books. Consequently, the full-text
25 search function does not “supersede[] the objects [or purposes] of
26 the original creation,” *Campbell*, 510 U.S. at 579 (internal quotation
27 marks omitted). The HDL does not “merely repackage[] or
28 republish[] the original[s],” *Leval*, 103 HARV. L. REV. at 1111, or

1 merely recast “an original work into a new mode of presentation,”
2 *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 143 (2d
3 Cir. 1998). Instead, by enabling full-text search, the HDL adds to the
4 original something new with a different purpose and a different
5 character.

6 Full-text search adds a great deal more to the copyrighted
7 works at issue than did the transformative uses we approved in
8 several other cases. For example, in *Cariou v. Prince*, we found that
9 certain photograph collages were transformative, even though the
10 collages were cast in the same medium as the copyrighted
11 photographs. 714 F.3d at 706. Similarly, in *Bill Graham Archives v.*
12 *Dorling Kindersley Ltd.*, we held that it was a transformative use to
13 include in a biography copyrighted concert photos, even though the
14 photos were unaltered (except for being reduced in size). 448 F.3d
15 605, 609-11 (2d Cir. 2006); *see also Blanch v. Koons*, 467 F.3d 244, 252-
16 53 (2d Cir. 2006) (transformative use of copyrighted photographs in
17 collage painting); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109,
18 114 (2d Cir. 1998) (transformative use of copyrighted photograph in
19 advertisement).

20 Cases from other Circuits reinforce this conclusion. In *Perfect*
21 *10, Inc.*, the Ninth Circuit held that the use of copyrighted thumbnail
22 images in internet search results was transformative because the
23 thumbnail copies served a different function from the original
24 copyrighted images. 508 F.3d at 1165; *accord Arriba Soft Corp.*, 336
25 F.3d at 819. And in *A.V. ex rel. Vanderhuy v. iParadigms, LLC*, a
26 company created electronic copies of unaltered student papers for
27 use in connection with a computer program that detects plagiarism.
28 Even though the electronic copies made no “substantive alteration
29 to” the copyrighted student essays, the Fourth Circuit held that
30 plagiarism detection constituted a transformative use of the
31 copyrighted works. 562 F.3d 630, 639-40.

1

ii.

2 The second fair-use factor—the nature of the copyrighted
3 work—is not dispositive. The HDL permits the full-text search of
4 every type of work imaginable. Consequently, there is no dispute
5 that the works at issue are of the type that the copyright laws value
6 and seek to protect. However, “this factor ‘may be of limited
7 usefulness where,’ as here, ‘the creative work . . . is being used for a
8 transformative purpose.” *Cariou*, 714 F.3d at 710 (quoting *Bill
9 Graham Archives*, 448 F.3d at 612). Accordingly, our fair-use analysis
10 hinges on the other three factors.

11

iii.

12 The third factor asks whether the copying used more of the
13 copyrighted work than necessary and whether the copying was
14 excessive. As we have noted, “[t]here are no absolute rules as to how
15 much of a copyrighted work may be copied and still be considered a
16 fair use.” *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2d Cir.
17 1986). “[T]he extent of permissible copying varies with the purpose
18 and character of the use.” *Campbell*, 510 U.S. at 586-87. The crux of
19 the inquiry is whether “no more was taken than necessary.” *Id.* at
20 589. For some purposes, it may be necessary to copy the entire
21 copyrighted work, in which case Factor Three does not weigh
22 against a finding of fair use. See *Bill Graham Archives*, 448 F.3d at 613
23 (entire image copied); *Arriba Soft*, 336 F.3d at 821 (“If Arriba only
24 copied part of the image, it would be more difficult to identify it,
25 thereby reducing the usefulness of the visual search engine.”).

26

27 In order to enable the full-text search function, the Libraries,
as we have seen, created digital copies of all the books in their

1 collections.⁵ Because it was reasonably necessary for the HDL to
2 make use of the entirety of the works in order to enable the full-text
3 search function, we do not believe the copying was excessive.

4 The Authors also contend that the copying is excessive
5 because the HDL creates and maintains copies of the works at four
6 different locations Appellants' Br. 27-28. But the record
7 demonstrates that these copies are also reasonably necessary in
8 order to facilitate the HDL's legitimate uses. In particular, the HDL's
9 services are offered to patrons through two servers, one at the
10 University of Michigan (the primary server) and an identical one at
11 the University of Indiana (the "mirror" server). Both servers contain
12 copies of the digital works at issue. According to the HDL executive
13 director, the "existence of a[n] [identical] mirror site allows for
14 balancing the load of user web traffic to avoid overburdening a
15 single site, and each site acts as a back-up of the HDL collection in
16 the event that one site were to cease operation (for example, due to
17 failure caused by a disaster, or even as a result of routine
18 maintenance)." J.A. 682-83 ¶ 88-89 (Wilkin Decl.). To further guard
19 against the risk of data loss, the HDL stores copies of the works on
20 two encrypted backup tapes, which are disconnected from the
21 internet and are placed in separate secure locations on the
22 University of Michigan campus. *Id.* at 683 ¶ 90. The HDL creates
23 these backup tapes so that the data could be restored in "the event of
24 a disaster causing large-scale data loss" to the primary and mirror
25 servers. *Id.*

⁵ The HDL also creates digital copies of the images of each page of the books. As the Libraries acknowledge, the HDL does not need to retain these copies to enable the full-text search use. We discuss the fair-use justification for these copies in the context of the disability-access use, *see infra* pp. 29-30.

1 We have no reason to think that these copies are excessive or
2 unreasonable in relation to the purposes identified by the Libraries
3 and permitted by the law of copyright. In sum, even viewing the
4 evidence in the light most favorable to the Authors, the record
5 demonstrates that these copies are reasonably necessary to facilitate
6 the services HDL provides to the public and to mitigate the risk of
7 disaster or data loss. Accordingly, we conclude that this factor
8 favors the Libraries.

9 **iv.**

10 The fourth factor requires us to consider “the effect of the use
11 upon the potential market for or value of the copyrighted work,” 17
12 U.S.C. § 107(4), and, in particular, whether the secondary use
13 “usurps the market of the original work,” *NXIVM Corp.*, 364 F.3d at
14 482.

15 The Libraries contend that the full-text-search use poses no
16 harm to any existing or potential traditional market and point to the
17 fact that, in discovery, the Authors admitted that they were unable
18 to identify “any specific, quantifiable past harm, or any documents
19 relating to any such past harm,” resulting from any of the Libraries’
20 uses of their works (including full-text search). Defs.-Appellees’
21 Br. 38 (citing Pls.’ Resps. to Interrogs.). The district court agreed with
22 this contention, as do we.

23 At the outset, it is important to recall that the Factor Four
24 analysis is concerned with only one type of economic injury to a
25 copyright holder: the harm that results because the secondary use
26 serves as a substitute for the original work. *See Campbell*, 510 U.S. at
27 591 (“cognizable market harm” is limited to “market substitution”).
28 In other words, under Factor Four, any economic “harm” caused by
29 transformative uses does not count because such uses, by definition,

1 do not serve as substitutes for the original work. *See Bill Graham*
2 *Archives*, 448 F.3d at 614.

3 To illustrate why this is so, consider how copyright law treats
4 book reviews. Book reviews often contain quotations of copyrighted
5 material to illustrate the reviewer's points and substantiate his
6 criticisms; this is a paradigmatic fair use. And a negative book
7 review can cause a degree of economic injury to the author by
8 dissuading readers from purchasing copies of her book, even when
9 the review does not serve as a substitute for the original. But,
10 obviously, in that case, the author has no cause for complaint under
11 Factor Four: The only market harms that count are the ones that are
12 caused because the secondary use serves as a substitute for the
13 original, not when the secondary use is transformative (as in
14 quotations in a book review). *See Campbell*, 510 U.S. at 591-92
15 (“[W]hen a lethal parody, like a scathing theater review, kills
16 demand for the original, it does not produce a harm cognizable
17 under the Copyright Act.”).

18 The Authors assert two reasons why the full-text-search
19 function harms their traditional markets. The first is a “lost sale”
20 theory which posits that a market for licensing books for digital
21 search could possibly develop in the future, and the HDL impairs
22 the emergence of such a market because it allows patrons to search
23 books without any need for a license. Thus, according to the
24 Authors, every copy employed by the HDL in generating full-text
25 searches represents a lost opportunity to license the book for search.
26 Appellants’ Br. 43.

27 This theory of market harm does not work under Factor Four,
28 because the full-text search function does not serve as a substitute
29 for the books that are being searched. *See Campbell*, 510 U.S. at 591-
30 92; *Bill Graham Archives*, 448 F.3d at 614. Thus, it is irrelevant that the

1 Libraries might be willing to purchase licenses in order to engage in
2 this transformative use (if the use were deemed unfair). Lost
3 licensing revenue counts under Factor Four only when the use
4 serves as a substitute for the original and the full-text-search use
5 does not.

6 Next, the Authors assert that the HDL creates the risk of a
7 security breach which might impose irreparable damage on the
8 Authors and their works. In particular, the Authors speculate that, if
9 hackers were able to obtain unauthorized access to the books stored
10 at the HDL, the full text of these tens of millions of books might be
11 distributed worldwide without restriction, “decimat[ing]” the
12 traditional market for those works. Appellants’ Br. 40.

13 The record before us documents the extensive security
14 measures the Libraries have undertaken to safeguard against the
15 risk of a data breach. Some of those measures were described by the
16 HDL executive director as follows:

17 First, [HDL] maintains . . . rigorous physical
18 security controls. HDL servers, storage, and networking
19 equipment at Michigan and Indiana University are
20 mounted in locked racks, and only six individuals at
21 Michigan and three at Indiana University have keys.
22 The data centers housing HDL servers, storage, and
23 networking equipment at each site location are
24 monitored by video surveillance, and entry requires use
25 of both a keycard and a biometric sensor.

26 Second, network access to the HDL corpus is
27 highly restricted, even for the staff of the data centers
28 housing HDL equipment at Michigan and Indiana
29 University. For example, two levels of network firewalls
30 are in place at each site, and Indiana University data

1 center staff do not have network access to the HDL
2 corpus, only access to the physical equipment. For the
3 backup tapes, network access is limited to the
4 administrators of the backup system, and these
5 individuals are not provided the encryption key that
6 would be required to access the encrypted files on the
7 backup tapes.

8 Web access to the HDL corpus is also highly
9 restricted. Access by users of the HDL service is
10 governed by primarily by [*sic*] the HDL rights database,
11 which classifies each work by presumed copyright
12 status, and also by a user's authentication to the system
13 (e.g., as an individual certified to have a print disability
14 by Michigan's Office of Services for Students with
15 Disabilities).

16 . . .

17 Even where we do permit a work to be read
18 online, such as a work in the public domain, we make
19 efforts to ensure that inappropriate levels of access do
20 not take place. For example, a mass download
21 prevention system called "choke" is used to measure
22 the rate of activity (such as the rate a user is reading
23 pages) by each individual user. If a user's rate of
24 activity exceeds certain thresholds, the system assumes
25 that the user is mechanized (e.g., a web robot) and
26 blocks that user's access for a set period of time.

27 J.A. 683-85 ¶¶ 94-96, 98 (Wilkins Decl.).

28 This showing of the security measures taken by the Libraries
29 is essentially un rebutted. Consequently, we see no basis in the

1 record on which to conclude that a security breach is likely to occur,
2 much less one that would result in the public release of the specific
3 copyrighted works belonging to any of the plaintiffs in this case. *Cf.*
4 *Clapper v. Amnesty Int'l USA*, --- U.S. ---, ---, 133 S. Ct. 1138, 1143,
5 1149 (2013) (risk of future harm must be “certainly impending,”
6 rather than merely “conjectural” or “hypothetical,” to constitute a
7 cognizable injury-in-fact); *Sony Corp.*, 464 U.S. at 453-54 (concluding
8 that time-shifting using a Betamax is fair use because the copyright
9 owners’ “prediction that live television or movie audiences will
10 decrease” was merely “speculative”). Factor Four thus favors a
11 finding of fair use.

12 Without foreclosing a future claim based on circumstances not
13 now predictable, and based on a different record, we hold that the
14 balance of relevant factors in this case favors the Libraries. In sum,
15 we conclude that the doctrine of fair use allows the Libraries to
16 digitize copyrighted works for the purpose of permitting full-text
17 searches.

18 **2. Access to the Print-Disabled**

19 The HDL also provides print-disabled patrons with versions
20 of all of the works contained in its digital archive in formats
21 accessible to them. In order to obtain access to the works, a patron
22 must submit documentation from a qualified expert verifying that
23 the disability prevents him or her from reading printed materials,
24 and the patron must be affiliated with an HDL member that has
25 opted-into the program. Currently, the University of Michigan is the
26 only HDL member institution that has opted-in. We conclude that
27 this use is also protected by the doctrine of fair use.

1

i.

2 In applying the Factor One analysis, the district court
3 concluded that “[t]he use of digital copies to facilitate access for
4 print-disabled persons is [a] transformative” use. *HathiTrust*, 902 F.
5 Supp. 2d at 461. This is a misapprehension; providing expanded
6 access to the print disabled is not “transformative.”

7 As discussed above, a transformative use adds something new
8 to the copyrighted work and does not merely supersede the
9 purposes of the original creation. *See Campbell*, 510 U.S. at 579. The
10 Authors state that they “write books to be read (or listened to).”
11 Appellants’ Br. 34-35. By making copyrighted works available in
12 formats accessible to the disabled, the HDL enables a larger
13 audience to read those works, but the underlying purpose of the
14 HDL’s use is the same as the author’s original purpose.

15 Indeed, when the HDL recasts copyrighted works into new
16 formats to be read by the disabled, it appears, at first glance, to be
17 creating derivative works over which the author ordinarily
18 maintains control. *See* 17 U.S.C. § 106(2). As previously noted,
19 paradigmatic examples of derivative works include translations of
20 the original into a different language, or adaptations of the original
21 into different forms or media. *See id.* § 101 (defining “derivative
22 work”). The Authors contend that by converting their works into a
23 different, accessible format, the HDL is simply creating a derivative
24 work.

25 It is true that, oftentimes, the print-disabled audience has no
26 means of obtaining access to the copyrighted works included in the
27 HDL. But, similarly, the non-English-speaking audience cannot gain
28 access to untranslated books written in English and an unauthorized
29 translation is not transformative simply because it enables a new
30 audience to read a work.

1 This observation does not end the analysis. “While a
2 transformative use generally is more likely to qualify as fair use,
3 ‘transformative use is not absolutely necessary for a finding of fair
4 use.’” *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, --- F.3d ---, ---,
5 2014 WL 2219162, at *7 (2d Cir. 2014) (quoting *Campbell*, 510 U.S. at
6 579). We conclude that providing access to the print-disabled is still
7 a valid purpose under Factor One even though it is not
8 transformative. We reach that conclusion for several reasons.

9 First, the Supreme Court has already said so. As Justice
10 Stevens wrote for the Court: “Making a copy of a copyrighted work
11 for the convenience of a blind person is expressly identified by the
12 House Committee Report as an example of fair use, with no
13 suggestion that anything more than a purpose to entertain or to
14 inform need motivate the copying.” *Sony Corp. of Am.*, 464 U.S. at
15 455 n.40.

16 Our conclusion is reinforced by the legislative history on
17 which he relied. The House Committee Report that accompanied
18 codification of the fair use doctrine in the Copyright Act of 1976
19 expressly stated that making copies accessible “for the use of blind
20 persons” posed a “special instance illustrating the application of the
21 fair use doctrine” H.R. REP. NO. 94-1476, at 73 (1976), *reprinted in*
22 *1976 U.S.C.C.A.N.* 5659, 5686. The Committee noted that “special
23 [blind-accessible formats] . . . are not usually made by the publishers
24 for commercial distribution.” *Id.* In light of its understanding of the
25 market (or lack thereof) for books accessible to the blind, the
26 Committee explained that “the making of a single copy or
27 phonorecord by an individual as a free service for a blind persons
28 [*sic*] would properly be considered a fair use under section 107.” *Id.*
29 We believe this guidance supports a finding of fair use in the unique
30 circumstances presented by print-disabled readers.

1 Since the passage of the 1976 Copyright Act, Congress has
2 reaffirmed its commitment to ameliorating the hardships faced by
3 the blind and the print disabled. In the Americans with Disabilities
4 Act, Congress declared that our “Nation’s proper goals regarding
5 individuals with disabilities are to assure equality of opportunity,
6 full participation, independent living, and economic self-sufficiency
7 for such individuals.” 42 U.S.C. § 12101(7). Similarly, the Chafee
8 Amendment illustrates Congress’s intent that copyright law make
9 appropriate accommodations for the blind and print disabled. *See* 17
10 U.S.C. § 121.

11

ii.

12 Through the HDL, the disabled can obtain access to
13 copyrighted works of all kinds, and there is no dispute that those
14 works are of the sort that merit protection under the Copyright Act.
15 As a result, Factor Two weighs against fair use. This does not
16 preclude a finding of fair use, however, given our analysis of the
17 other factors. *Cf. Davis v. Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001)
18 (“The second statutory factor, the nature of the copyrighted
19 work . . . , is rarely found to be determinative.”).

20

iii.

21 Regarding Factor Three, as previously noted, the HDL retains
22 copies as digital image files and as text-only files, which are then
23 stored in four separate locations. The Authors contend that this
24 amount of copying is excessive because the Libraries have not
25 demonstrated their need to retain the digital *image* files in addition
26 to the text files.

27

28 We are unconvinced. The text files are required for text
29 searching and to create text-to-speech capabilities for the blind and
disabled. But the image files will provide an additional and often

1 more useful method by which many disabled patrons, especially
2 students and scholars, can obtain access to these works. These image
3 files contain information, such as pictures, charts, diagrams, and the
4 layout of the text on the printed page that cannot be converted to
5 text or speech. None of this is captured by the HDL's text-only
6 copies. Many legally blind patrons are capable of viewing these
7 images if they are sufficiently magnified or if the color contrasts are
8 increased. And other disabled patrons, whose physical impairments
9 prevent them from turning pages or from holding books, may also
10 be able to use assistive devices to view all of the content contained in
11 the image files for a book. For those individuals, gaining access to
12 the HDL's image files—in addition to the text-only files—is
13 necessary to perceive the books fully. Consequently, it is reasonable
14 for the Libraries to retain both the text and image copies.⁶

15

iv.

16 The fourth factor also weighs in favor of a finding of fair use.
17 It is undisputed that the present-day market for books accessible to
18 the handicapped is so insignificant that “it is common practice in the
19 publishing industry for authors to forgo royalties that are generated
20 through the sale of books manufactured in specialized formats for
21 the blind” Appellants’ Br. 34. “[T]he number of accessible books
22 currently available to the blind for borrowing is a mere few hundred
23 thousand titles, a minute percentage of the world’s books. In
24 contrast, the HDL contains more than ten million accessible
25 volumes.” J.A. 173 ¶ 10 (Maurer Decl.). When considering the 1976
26 Act, Congress was well aware of this problem. The House

⁶ The Authors also complain that the HDL creates and maintains four separate copies of the copyrighted works at issue. Appellants’ Br. 27-28. For reasons discussed in the full-text search section, this does not preclude a finding of fair use. *See supra* pp. 20-22.

1 Committee Report observed that publishers did not “usually
2 ma[ke]” their books available in specialized formats for the blind.
3 H.R. REP. NO. 94-1476, at 73, 1976 U.S.C.C.A.N. at 5686. That
4 observation remains true today.

5 Weighing the factors together, we conclude that the doctrine
6 of fair use allows the Libraries to provide full digital access to
7 copyrighted works to their print-disabled patrons.⁷

8 3. Preservation

9 By storing digital copies of the books, the HDL preserves
10 them for generations to come, and ensures that they will still exist
11 when their copyright terms lapse. Under certain circumstances, the
12 HDL also proposes to make one additional use of the digitized
13 works while they remain under copyright: The HDL will permit
14 member libraries to create a replacement copy of a book, to be read
15 and consumed by patrons, if (1) the member already owned an
16 original copy, (2) the member’s original copy is lost, destroyed, or
17 stolen, and (3) a replacement copy is unobtainable at a fair price. The
18 Authors claim that this use infringes their copyrights.

19 Even though the parties assume that this issue is appropriate
20 for our determination, we are not convinced that this is so. The
21 record before the district court does not reflect whether the plaintiffs
22 own copyrights in any works that would be effectively irreplaceable
23 at a fair price by the Libraries and, thus, would be potentially subject
24 to being copied by the Libraries in case of the loss or destruction of
25 an original. The Authors are not entitled to make this argument on
26 behalf of others, because § 501 of “the Copyright Act does not
27 permit copyright holders to choose third parties to bring suits on

⁷ In light of our holding, we need not consider whether the disability-access use is protected under the Chafee Amendment, 17 U.S.C. § 121.

1 their behalf.” *ABKCO Music*, 944 F.2d at 980; *see also* our discussion
2 of standing, *supra* pp. 12-13.

3 Because the record before us does not reflect the existence of a
4 non-speculative risk that the HDL might create replacement copies
5 of the *plaintiffs’* copyrighted work, we do not believe plaintiffs have
6 standing to bring this claim, and this concern does not present a live
7 controversy for adjudication. *See Clapper*, --- U.S. at ---, 133 S. Ct. at
8 1147; *Jennifer Matthew Nursing & Rehab. Ctr. v. U.S. Dep’t of Health &*
9 *Human Servs.*, 607 F.3d 951, 955 (2d Cir. 2010) (noting that we have
10 an “independent obligation” to evaluate subject matter jurisdiction,
11 including whether there is “a live controversy”). Accordingly, we
12 vacate the district court’s judgment insofar as it adjudicated this
13 issue without first considering whether plaintiffs have standing to
14 challenge the preservation use of the HDL, and we remand for the
15 district court to so determine.

16 **II. Ripeness of Claims Relating to the Orphan Works Project**

17 The district court also held that the infringement claims
18 asserted in connection with the OWP were not ripe for adjudication
19 because the project has been abandoned and the record contained no
20 information about whether the program will be revived and, if so,
21 what it would look like or whom it would affect. *HathiTrust*, 902 F.
22 Supp. 2d at 455-56. We agree.

23 In considering whether a claim is ripe, we consider (1) “the
24 fitness of the issues for judicial decision” and (2) “the hardship to
25 the parties of withholding court consideration.” *Murphy v. New*
26 *Milford Zoning Comm’n*, 402 F.3d 342, 347 (2d Cir. 2005) (quoting
27 *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

28 The fitness analysis is concerned with whether the issues
29 sought to be adjudicated are contingent on unknowable future

1 events. *N.Y. Civil Liberties Union v. Grandeau*, 528 F. 3d 122, 132 (2d
2 Cir. 2008). The Authors assert that their OWP claim is fit for judicial
3 decision because it “will not change based upon the particular
4 procedures that [the University of Michigan] ultimately employs to
5 identify orphan works.” Appellants’ Br. 13. According to the
6 Authors, the legality of the OWP does not depend upon the specific
7 means the Libraries ultimately employ to identify orphan candidates
8 or the time the Libraries wait before making works available. Rather,
9 the Authors believe that any iteration of the OWP that results in the
10 publication of complete copyrighted works is an infringement of
11 copyright.

12 We are not persuaded that these concerns create a ripe
13 dispute. Even assuming, *arguendo*, that “[a]ny iteration of the OWP
14 under which copyrighted works are made available for public view
15 and download” would infringe *someone’s* copyright, *id.*, it does not
16 follow that the OWP will inevitably infringe the copyrights held by
17 the remaining plaintiffs in this case.⁸ It is conceivable that, should
18 the University of Michigan ever revive the OWP, the procedures it
19 ultimately implements to identify orphan works would successfully
20 identify and exclude works to which a plaintiff in this suit holds a
21 copyright. Consequently, we cannot say that any of the plaintiffs
22 face a “certainly impending” harm under our ripeness analysis,
23 *Clapper*, --- U.S. at ---, 133 S. Ct. at 1147; *see also Grandeau*, 528 F.3d at
24 130 n.8.

25 Nor do we perceive any hardship if decision is withheld. *See*
26 *Grandeau*, 528 F.3d at 134. The Authors argue that they would suffer
27 hardship because “there is nothing to stop the Libraries from

⁸ We note that, in addition to our conclusion about ripeness, the same reasoning leads us to conclude that the remaining plaintiffs lack standing to bring this claim, *see* our discussion of standing, *supra* pp. 12-13.

1 reinstating the OWP and then, if owners of the listed works come
2 forward, suspending it again." Appellants' Br. 16.

3 We disagree. As indicated above, it is far from clear that the
4 University of Michigan or HathiTrust will reinstitute the OWP in a
5 manner that would infringe the copyrights of any proper plaintiffs.
6 If that occurs, the Authors may always return to court. Suffice it to
7 say that "[t]he mere possibility of future injury, unless it is the cause
8 of some present detriment, does not constitute hardship." *Grandeau*,
9 528 F.3d at 134 (internal quotation marks omitted). For these
10 reasons, we conclude that the OWP claims are not ripe for
11 adjudication.

12 CONCLUSION

13 The judgment of the district court is AFFIRMED, in part,
14 insofar as the district court concluded that certain plaintiffs-
15 appellants lack associational standing; that the doctrine of "fair use"
16 allows defendants-appellees to create a full-text searchable database
17 of copyrighted works and to provide those works in formats
18 accessible to those with disabilities; and that claims predicated upon
19 the Orphan Works Project are not ripe for adjudication. We
20 VACATE the judgment, in part, insofar as it rests on the district
21 court's holding related to the claim of infringement predicated upon
22 defendants-appellees' preservation of copyrighted works, and we
23 REMAND for further proceedings consistent with this opinion.