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# Defining Fair Use in the Digital Era: A Tentative Appraisal of Google LLC v. Oracle America, Inc.

*Dale P. Olson* \*

## ABSTRACT

Fair use, as a defense to a claim of copyright infringement in American law, has evolved within a framework rooted in nineteenth century precedents. Fair use was assessed by the United States Supreme Court in *Google LLC v. Oracle America, Inc.*, which required the Court to address the factually intensive inquiry required by an assertion of fair use against an expansive use of copyrighted software code by Google LLC. In reversing a decision by the United States Court of Appeals for the Federal Circuit in favor of Oracle America, and negating a potentially multi-billion dollar damage award, the Court evaluated traditional fair use concepts against a backdrop of rapidly evolving technology. While reaffirming the validity of its earlier precedents, the Supreme Court outlined a template for evaluating this venerable defense to copyright infringement in the light of continually – and rapidly – evolving technology.

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## I. INTRODUCTION

When *certiorari* was granted by the United States Supreme Court in *Google LLC v. Oracle America, Inc.*,<sup>1</sup> review was extended to two broad questions: whether copyright protection extends to a software interface; and whether, as a jury found, Google’s “use of a software interface in the context of creating a new computer program constitutes fair use.” The breadth of the petition’s questions was prefaced by a significant explanatory statement that identified the basis for the review requested in the petition. Significant in the introductory statement is the assertion that:

As is relevant here, software interfaces are lines of computer code that allow developers to operate prewritten libraries of code used to perform particular tasks. Since the earliest days of software development, developers have used interfaces to access essential tools for building new computer programs. Contravening that longstanding practice, the Federal Circuit in this case held both that a software interface is copyrightable and that petitioner’s use of a software interface in a new computer program cannot constitute fair use as a matter of law.<sup>2</sup>

Google’s petition asserted a position, relative to existing precedent, which supports its assertion that software interfaces—a term of inexact definition—allow the utilization of existing and protected code to write a new program. Embedded implicitly in that assertion is the basis for the second assertion which is that fair use cannot be foreclosed as a “matter of law.” This second premise is directed at the determination of the United States Court of Appeals for the Federal Circuit, applying—and interpreting—the precedent of the United States Court of Appeals for the Ninth Circuit, that Google’s use of the *complete* coding of a series of computer commands was not a determination which a reasonable jury could make as a matter of law. From that determination of controlling precedent, the Federal Circuit overruled the fair use determination made by the jury at trial and, on which, the district court entered judgment.<sup>3</sup> In turn, this led to the ultimate resolution of the fair use issue before the United States Supreme Court.

The Copyright Act of 1976 confers “a bundle of exclusive rights,”<sup>4</sup> which, in turn, are “subject to a list of statutory exceptions” including fair use.<sup>5</sup> From those premises, the Copyright Act of 1976 identifies the role of fair use: it is a complete defense to a claim of infringement, as “the fair use of a copyrighted work. . . is not an infringement of copyright.”<sup>6</sup> The element of protection is balanced by a right of

1. *Google LLC v. Oracle Am., Inc.*, 140 S. Ct. 520 (2019) (mem.).

2. Petition for Writ of Certiorari at I, *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021) (No. 18-956), 2019 WL 338902 at I.

3. *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1210 (Fed. Cir. 2018).

4. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546–47 (1985).

5. *Bond v. Blum*, 317 F.3d 385, 393 (4th Cir. 2003).

6. 17 U.S.C. § 107. As a mediating element between the rights granted to the copyright owner and those of the public, the idea/expression dichotomy contained in 17 U.S.C. § 102(b) mirrors the holding in *Baker v. Selden*, 101 U.S. 99 (1879) and was cited by the Supreme Court in *Oracle America* but only tangentially as the Court did not address the copyrightability of the declaring code. *See infra* notes 73–76. In dissent, Justice Thomas presumed the protectability of the declaring code. *See infra* note 53 and accompanying text. Accordingly, the dimensions of the protection accorded to the declaring code specifically, and computer code generally, were not addressed by the Supreme Court. The dividing line has been uncertain for works involved in a system or method of operation. *See* 17 U.S.C. § 102(b). *See generally* Dale P. Olson, *The Uneasy Legacy of Baker v. Selden*, 43 S.D. L. Rev. 604 (1998).

access as “the public interest in that access is as great as the public interest in the enforcement of copyright.”<sup>7</sup>

A central feature of a transformative work is that the “more transformative the new work, the less important the other factor including commercialism become.”<sup>8</sup> At the same time, “[a]lthough ‘transformative’ use is not absolutely necessary for a finding of fair use, the goal of copyright. . . is generally furthered by the creation of transformative works.”<sup>9</sup> In turn, the fair use assessment “remains a totality inquiry, tailored to the particular facts of each case. Because this is not a mechanical determination, a party need not ‘shut out’ her opponent on the factor tally to prevail.”<sup>10</sup> As a court that, along with the United States Court of Appeals for the Ninth Circuit, has historically been a center of copyright litigation, the United States Court of Appeals for the Second Circuit has formulated essential elements of the fair use defense to copyright actions. While each case is necessarily highly individualized given the nature of the analytical requirements set out in Section 107 of the Copyright Act of 1976, both on a case-by-case basis and collectively, the Second Circuit’s precedents form a matrix of precedents that inform the evolution of the fair use defense in American copyright law.

## II. FAIR USE IN THE DIGITAL ERA

As a starting point, Judge Learned Hand’s characterization of fair use as “the most troublesome in the whole of copyright”<sup>11</sup> captures the perplexity that fair use presents both historically and presently for adjudication. The House Report accompanying the Copyright Act of 1976 acknowledged that “[a]lthough the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept of fair use has ever emerged.”<sup>12</sup> Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. From a decisional standpoint, the House Report concluded that the provision “is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”<sup>13</sup>

The Copyright Act of 1976 states the required four-factor analysis in Section 107:

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7. *Assessment Tech. of WI, LLC v. Wiredata, Inc.*, 361 F.3d 434, 436 (7th Cir. 2004).

8. *See Kelly v. Ariba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003) where the display of low resolution “thumbnails” was deemed protectible fair use because the creation of an index would lead the viewer to a high resolution, and copyrighted, image. Accordingly, this made the display of the thumbnail a transformative use. *Cf. NXIVM Corp. v. Ross Inst.*, 364 F.3d 471 (2d Cir. 2004) (where despite bad faith in obtaining a manuscript which was distributed on restrictive terms not permitting redistribution, fourth factor measuring market harm nonetheless is fair use as the use “being transformative, might well harm, or even destroy the market for the original is of no concern to [the court] as long as the harm stems from the force of the criticism offered).

9. *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 579 (1994) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n. 40 (1984)). *See also Am. Soc’y for Testing v. Pub. Res. Org.*, 896 F.3d 437, 450 (D.C. Cir. 2018).

10. *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991).

11. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 661 (2d Cir. 1939).

12. H.R. REP. NO. 94-1476 at 65 (1976).

13. *Id.* at 66.

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- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Understanding the role of the four-factor test as it is applied in translating the Supreme Court's holding in *Google LLC v. Oracle America* is facilitated by a review of illustrative cases decided by appellate courts that are preeminent in copyright litigation.

The volume of copyright litigation in the Second Circuit has resulted in elaboration of fair use in highly specific fact patterns. An illustrative example of a determination of fair use that applies all four statutory factors within a framework and which, at the same time, evaluates the use of the work and the nature of the work is *The Swatch Group Management Services Ltd. v. Bloomberg L.P.*<sup>14</sup> This case involved the question of whether a conference call, initiated by a publicly traded company to disseminate earnings reports but restricted to invited financial analysts, had its copyright infringed when Bloomberg, a financial news service, distributed an unauthorized recorded copy to paying subscribers.<sup>15</sup> The district court found fair use and dismissed the action. Swatch appealed that determination.

In affirming the district court's order of dismissal on fair use grounds, the Second Circuit articulated a particular focus relative to the asserted defense of fair use. In stating the basis for its assessment of the successful fair use defense, the Second Circuit identified as a central premise in applying the Section 107 factors<sup>16</sup>: "[t]hrough mandatory, these four factors are non-exclusive." Citing *NXIVM v. Ross Institute*,<sup>17</sup> the opinion emphasized the importance of evaluating all four factors collectively.<sup>18</sup>

Central to the Second Circuit's evaluation was its assessment under the first factor in Section 107 of whether the use by Bloomberg of the unauthorized recording was "transformative."<sup>19</sup> This was combined with an assessment of whether the distribution by Bloomberg was in "good faith" and a "news reporting activity" as contained in Section 107 of illustrative permissible activities.<sup>20</sup>

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14. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 81 (2d Cir. 2014). Fair use as a defined concept in American law is traced to *Lawrence v. Dana*, No. 8,136, 1869 U.S. App. LEXIS 1152, at \*79 (Mass. Dist. Ct. Sept. 20, 1869).

15. *Swatch Grp. Mgmt. Servs. Ltd.*, 756 F.3d at 78–79.

16. *Id.* at 81.

17. *Id.*

18. The United States Court of Appeals for the Eleventh Circuit in an extended assessment of whether placing copyrighted educational materials which had been photocopied into an electronic reserve – making it unnecessary for a student class member to purchase the course materials – referred to the mandatory process of applying the four-factor test of Section 107 as "holistic." *Cambridge Univ. Press v. Albert*, 906 F.3d 1290, 1300 (11th Cir. 2018).

19. *Swatch Grp. Mgmt. Servs. Ltd.*, 756 F.3d at 84.

20. *Id.* at 83–84.

Beginning with the district court's assessment that Bloomberg's "work as a prominent gatherer and publisher of business and financial information serves an important public interest for the public is served by the full, timely and accurate dissemination of business and financial news."<sup>21</sup> Rejecting a need to impose a precise characterization upon the specific type of information being distributed by Bloomberg regarding the Swatch Group, the Second Circuit concluded that the first statutory factor favors fair use because "[a]t a minimum, such public dissemination of financial information serves this public purpose in the nature of news reporting."<sup>22</sup>

In turning to the second factor under Section 107<sup>23</sup>, the Second Circuit identified that Swatch Group stood on firmer ground in light of prior rulings because they stressed the commercial nature of Bloomberg's use.<sup>24</sup> In this context, while Bloomberg as a commercial enterprise benefited financially from its overall enterprise efforts, Bloomberg's reporting of the Swatch Group's financial results was a minimal part of its overall reporting. As the Second Circuit concluded: "Moreover, it would strain credulity to suggest that providing access to Swatch Group's earnings call more than trivially affected the value of the service. So while we will not ignore the commercial nature of Bloomberg's use, we assign it [somewhat reduced] weight."<sup>25</sup>

From those introductory assessments, the court turned to the central issue of transformativeness. Recognizing the special nature of Bloomberg's distribution of the taped recording, the Second Circuit summarized its assessment of this factor in cogent terms which emphasized the need to use the exact terms as embedded in an actual recording to convey the information on the Swatch Group's earnings:

In the context of news reporting and analogous activities, moreover, the need to convey information to the public accurately may in some instances make it desirable and consonant with copyright law for a defendant to faithfully reproduce an original work rather than transform it. In such cases, courts often find transformation by emphasizing the altered purpose or context of the work as evidenced by surrounding commentary or criticism . . . Here, Bloomberg provided no additional commentary or analysis of Swatch Group's earnings call. But by disseminating not just a written transcript or article but an actual sound recording, Bloomberg was able to convey with precision not only *what* Swatch Group's executives said, but also how they said it. This latter type of information may be just as valuable to investors and analysts as the former, since a speaker's demeanor,

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21. *Id.* at 81–82.

22. *Id.* at 82. *See also* *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 742 F.3d 17, 26 (2d Cir. 2014), *amended by*, 756 F.3d 73 (2d Cir. 2014) (stating that at a minimum, a use of copyrighted material that serves this public purpose is very closely analogous to "news reporting," which is indicative of fair use).

23. *Swatch Grp. Mgmt. Servs. Ltd.*, 756 F.3d at 87.

24. *Id.* at 83. *See also* *Swatch Grp. Mgmt. Servs. Ltd.*, 742 F.3d at 27, *amended by*, 756 F.3d 73 (2d Cir. 2014) (stating that Swatch Group stands on firmer ground when it stresses the commercial nature of Bloomberg's use). The Second Circuit cited to and quoted from its seminal case involving expansive photocopying in a corporate setting, *Am. Geophysical Union v. Texaco*, 60 F.3d 913 (2d Cir. 1995) (where the photocopying of articles from scientific journals in a corporate research in lieu of purchasing either a license or multiple subscriptions did not constitute fair use).

25. *Swatch Grp. Mgmt. Servs. Ltd.*, 756 F.3d at 83. While recognizing that Bloomberg did not act in good faith, the Second Circuit stated that Bloomberg's lack of good faith likewise merits relatively little weight in this case.

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tone, and cadence can often elucidate his or her true beliefs far beyond what a stale transcript or summary can show.<sup>26</sup>

Applying the second factor to the nature and character of the copyrighted works, the Second Circuit emphasized the factual nature of the conference call; accordingly, the “through and through factual nature of the earnings call places it at the very edge of copyright’s protective purposes.”<sup>27</sup> Consequently, the second factor “favors fair use.”<sup>28</sup>

As to the third factor addressing the amount and substantiality of the use, the fact that Bloomberg used the entirety of the recording did not preclude a finding of fair use as even the “copying of the entirety of a work is sometimes necessary to make a fair use.”<sup>29</sup>

While the fourth factor—the effect on the market for the copyrighted work—is often of primary significance in a fair use analysis, the objective in this context was the distribution of the call by Swatch Group for purposes of marketing the copyrighted recording, but rather was for the purpose of enabling “Swatch Group executives to disseminate financial information about the company to particular analysts in a way that they believed would be advantageous.”<sup>30</sup> This assessment resulted in the fourth factor favoring fair use.

The precedents from the Supreme Court of the United States, which define fair use, have driven the evolution of the fair use doctrine. Specifically, the evolutionary development of the transformative dimension of fair use has been increasingly driven by the resolution of cases where the factual underpinnings are aberrational relative to the broad category of cases decided in lower courts.

Notwithstanding that reality, a notable exception to this premise was *Stewart v. Abend* which involved the remake of the motion picture, *Rear Window*, which was rereleased without the permission of the owner of the renewal copyright on the original underlying short story.<sup>31</sup> After an initial settlement for the first rerelease, the film was again released utilizing a variety of mediums including theatrical distribution and cable television. This second round of release resulted in multimillion-dollar profits for the defendants. The infringement action by the owner of the renewal copyright, who had been the literary agent of the original author, resulted in a finding of infringement and the rejection of the assertion of fair use.

The Supreme Court characterized the release of the original film as presenting “a classic example of an unfair use: a commercial use of a fictional story that adversely affects the story-owner’s adaptation rights.”<sup>32</sup> As a fictional work, the expansive use of the underlying story embedded in the motion picture was a more problematic use from which to assert a viable fair use defense.

*Stewart v. Abend* presented a pattern of the use of a work with significant factors supporting a finding of infringement which in turn complicated any prospect of a finding fair use. In contrast, fair use was not found in *Harper & Row Publishers,*

26. *Id.* at 84.

27. *Swatch Grp. Mgmt. Servs. Ltd.*, 742 F.3d at 33, amended by, 756 F.3d 73 (2d Cir. 2014).

28. *Swatch Grp. Mgmt. Servs. Ltd.*, 756 F.3d at 89.

29. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006).

30. *Swatch Grp. Mgmt. Servs. Ltd.*, 756 F.3d at 91.

31. *Stewart v. Abend*, 495 U.S. 207, 238 (1990).

32. *Id.*

*Inc. v. Nation Enterprises*.<sup>33</sup> That case revolved around the soon-to-be-published autobiography of former President Gerald Ford, *A Time to Heal*.<sup>34</sup> The excerpts published in THE NATION magazine, from a set of prepublication galley proofs, which, connected by editorial commentary, intended to provide a sequential context, not to expand upon the author's recitation of events and his reaction to being a witness to them. This resulted in the article in THE NATION publishing significant segments of the Ford autobiography ahead of serialization in TIME magazine and the book publication by Harper & Row.<sup>35</sup>

While *Harper & Row Publishers, Inc. v. Nation Enterprises* presented facts that provided a compelling case against a finding of fair use, the Supreme Court nonetheless identified critical elements which underpinned its determination to reject the fair use defense. From that framework, several elements are particularly applicable across cases<sup>36</sup> presenting different factual patterns from the effectively unique facts of *Harper & Row* and which position the case as a starting point in an assessment of fair use in a commercial context.

First, the Supreme Court stated that “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.”<sup>37</sup> The Court, in its broad analysis, also noted that by “establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.” At this stage of the continued development of the fair use doctrine in a modern context—including that of rapidly developing technology facilitating copying—this axiom had been extended to a general proposition that fair use and commercial use are inconsistent. That blunt approach to evaluating a commercial dimension of the allegedly infringing use has resulted in an assessment that the defendant is essentially selling the plaintiff's copyrighted work.<sup>38</sup>

Even in the early stages of the development of the transformative dimension of fair use, a significant case in the United States Court of Appeals for the Ninth Circuit identified a complementary approach integrating the competing premises of the fair use doctrine. In *Sega Enterprises Ltd. v. Accolade Inc.*,<sup>39</sup> the Court stated:

[T]he fact that computer programs are distributed for public use in object code form often precludes public access to the ideas and functional concepts contained in those programs, and thus confers on the copyright owner a de facto monopoly over those ideas and functional concepts. That result defeats the fundamental purpose of the Copyright Act—to encourage the production of original works by protecting the expressive elements of those works while leaving the ideas, facts, and functional concepts in the public domain for others to build on.<sup>40</sup>

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33. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 539 (1985).

34. *Id.* at 571.

35. *Id.* at 542.

36. *Id.* at 558.

37. *Id.* at 562.

38. *See e.g.*, *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 800 (9th Cir. 1992).

39. *Sega Enters. LTD. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

40. *Id.* at 1527.



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Accordingly, the reverse engineering of the underlying computer code used in a computer game console was deemed to be a fair use.

The most direct statement of the transformative dimension of the first factor emerged from brief statements in *Campbell v. Acuff-Rose Music, Inc.*<sup>41</sup> *Campbell* framed the issue in terms of the potential for the defendant's copying becoming "unrestricted and widespread" so as to impact the market for the underlying work. From this premise, a conclusion of unlikely competition by the copying work becomes supportive of a finding that "when . . . second use is transformative, market substitution is at least less certain."<sup>42</sup> This element was a point of emphasis in *SOFA Entertainment, Inc. v. Dodger Productions, Inc.*,<sup>43</sup> where in the musical stage production of a play, *Jersey Boys*, the use of a copyrighted seven-second clip of the Four Seasons being introduced on *The Ed Sullivan Show* was deemed fair use. The elements supporting this conclusion focused on the fact that, because the musical was not reproduced on DVD so as to be available outside of the theatrical performances, whatever demand might exist for the original clip was unaffected.

Framed more directly, the United States Court of Appeals for the Ninth Circuit summarized its holding by stating: "In the end, we are left with the following conclusion: [defendant's] use of the clip did not harm SOFA's copyrights in *The Ed Sullivan Show*, and society's enjoyment of [plaintiff] Dodger's creative endeavor is enhanced with its inclusion. This case is a good example of why the 'fair use' doctrine exists."<sup>44</sup>

From this range of approaches, a central objective was cogently summarized by the United States Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*, which formulated the transformation test in these terms: "A work is transformative if it does not merely supersede the object of the original creation. . . [but instead] adds something new, with a further purpose or different character, altering the first with new expression, meaning or message."<sup>45</sup>

Judge Pierre Leval in his defining article, *Toward A Fair Use Standard*, expansively stated, in summarizing his approach to the evolving doctrine of fair use in copyright infringement actions that:

A question to consider is whether imprecision – the absence of a clear standard – in the fair use doctrine is a strength or a weakness. The case that it is a weakness is easy to make. Writers, publishers, and other would be fair-users lack a reliable guide on how to govern their conduct. The

41. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590–91 (1994).

42. *Id.* See also *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 517–18 (7th Cir. 2002) (drawing analogy between book review being complimentary as not being a substitute for the work being reviewed where the district identified excessive copying relative to the objective of creating a collector's guide to the copyrighted stuffed toys by expansive photographic reproductions). A publicity photograph of which was deemed a complimentary work rather than an infringing substitute work emphasized limited elements carried into secondary usage, such as "a hint of [the subject's] smile" as well as the "outline of his face", while also turning the subject's face lime green, *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2015).

43. *SOFA Ent., Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273 (9th Cir. 2013).

44. *Id.* at 1280. Cf. *Tresona Multimedia LLC v. Burbank High Sch. Vocal Music Ass'n*, 933 F.3d 638, 652 (9th Cir. 2020) (where reference to a copyrighted song was deemed fair use based on the conclusion that the court was "especially swayed. . . by the limited and transformative nature of the use and the work's nonprofit educational purposes in enhancing the educational experience of high school students.).

45. *Campbell*, 510 U.S. at 579.

contrary argument is more abstract. . . . A definite standard would champion predictability at the expense of justification and would stifle intellectual activity to the deferment of the copyright objectives. We should not adopt a bright-line standard unless and it were a good one – and we do not have a good one.<sup>46</sup>

From these abstractions necessarily emerges a question relative to the ability to satisfy the gatekeepers<sup>47</sup> making fair use decisions – the question of whether *Google LLC v. Oracle America, Inc.* compliments the objective of making an abstract test more precise. Or, framed as a question: what contribution does *Google LLC v. Oracle America, Inc.* make to the determination of the transformation defense in fair use?

### III. GOOGLE LLC V. ORACLE AMERICA, INC.

In the decade-long litigation history of *Google LLC v. Oracle America, Inc.*, the case was twice tried in front of a jury, albeit on differing grounds, and appealed twice to the United States Court of Appeals for the Federal Circuit. A petition for a writ of *certiorari* was twice filed by Google LLC with the United States Supreme Court. The first was denied; the second was accepted and formed the basis for the resolution of the action in Google LLC’s favor. In the lower courts, the case divides into two distinct segments: copyrightability and the application of the fair use doctrine as a defense to a finding of infringement.

In the initial trial phase addressing copyrightability,<sup>48</sup> the jury found in favor of Oracle on the issue of infringement. The district court found the declaring code to be not subject to copyright protection and entered judgment in favor of Google LLC on the copyright claims. The district court also dismissed the patent claims asserted by Oracle, which, in turn, formed the basis for an appeal to the United States Court of Appeals for the Federal Circuit. The Federal Circuit found the declaring code subject to copyright protection and remanded the case to the district court for a trial on the issue of fair use.<sup>49</sup> In turn, a jury found for Google LLC on the defense of fair use, on which the district court entered judgement.<sup>50</sup> On the second appeal to the United States Court of Appeals for the Federal Circuit, the defense of fair use was rejected, and the case remanded for a trial on damages.<sup>51</sup> A second petition for a writ of *certiorari* was filed which was granted and framed two distinct, albeit, broad questions which followed an expansive preface.<sup>52</sup>

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46. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1135 (1990).

47. A cogent example is the changing requirements of underwriters of insurance for documentary films, perceived as evolving from an acceptance of the potential of a fair use defense to a requirement of express permission; in turn, insurance for “errors and omissions” is often – if not inevitably – required by a distributor. See PETER DECHERNY, *HOLLYWOOD’S COPYRIGHT WARS* 197 (2012).

48. *Oracle Am., Inc. v. Google, Inc.*, 750 F.3d 1339, 1347 (Fed. Cir. 2014).

49. *Id.* at 1348.

50. *Oracle Am., Inc. v. Google Inc.*, No. C10-03561-WHA, 2016 WL 5393938, at \*1 (N.D. Cal. Sept. 27, 2016).

51. *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1185 (Fed. Cir. 2018).

52. *Google LLC v. Oracle Am., Inc.*, 140 S. Ct. 520 (2019) (mem.). See also *Google LLC v. Oracle Am., Inc.* 141 S. Ct. 1183, 1195 (2021) (acknowledging the Court granted Google’s petition for certiorari to review copyrightability and fair use); *Google LLC v. Oracle Am. Inc.*, 140 S. Ct. 2737 (2020) (mem.)

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As a preliminary matter, Justice Breyer severed the question of copyrightability, confining the resolution of the case exclusively to the defense of fair use. The accompanying explanation stated: In turn, the issue of the *scope* of copyright protection is an inherent, if often unstated dimension of the ultimate resolution of the dispute on the basis of the fair use defense. This premise was emphasized by Justice Thomas in his pointed dissent.<sup>53</sup>

As perhaps befits a decade-long litigation battle over the use of significant segments of computer code – and the entirety of the use by *Google LLC v. Oracle America, Inc.* over a specific segment – known as ‘declaring code’ – the ultimate resolution by the Supreme Court is in itself complex. The resolution itself – which found that fair use provided a complete defense for Google LLC’s use of the declaring code – negated the prospect.

From an analytical perspective, the Supreme Court’s opinion presented a resolution that complicates interpreting a straightforward resolution that is couched in a fragmented assessment of the issues in the case. That is, the Supreme Court did not determine the copyrightability issues of the declaring code but rather resolved the appeal through an approach assuming the copyrightability of the code. By taking that approach, the Supreme Court did not identify the degree of originality present in the code, itself a benchmark of the *scope* of protection which the code received, if any. In turn, the Supreme Court’s approach also truncated the assessment of the degree to which the “useful article doctrine” precluded copyright protection, if it was applicable at all.<sup>54</sup>

A starting point in assessing the Supreme Court’s first fair use decision is *Campbell v. Acuff-Rose Music Inc.*,<sup>55</sup> which dealt explicitly with the question of whether *commercial* use of the copying work *precluded* fair use. There, the copying work was a parody, which in raw verbal terms, incorporated a song that the publisher had refused to license.

To clarify the Supreme Court’s approach to a result which is both far-reaching and, in the Court’s own terms, an application of its existing precedents – it is necessary to also identify the significance of the dissent by Justice Thomas, joined by Justice Alito. In brief, the dissent argued that, as the United States Court of Appeals for the Federal Circuit had in its second appeal of the case, “there is nothing fair about taking a copyrighted work verbatim and using it for the same purpose and function as the original in a competing platform.”<sup>56</sup> As an expansive evaluation of Justice Thomas’ dissent identifies, the failure to assess these preliminary, if primary, elements of copyright protection precluded a meaningful assessment of the fair use defense.<sup>57</sup> Thus, while the holding is starkly framed in terms of the outcome

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(directing the parties to file supplemental letter briefs on the “implications of the Seventh Amendment, if any,” on the standard of review of the question involving the fair use defense).

53. *Google LLC*, 141 S. Ct. at 1213 (Thomas, J., dissenting).

54. *Id.* at 1213. (Thomas, J., dissenting).

55. *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 574 (1994).

56. *Oracle America, Inc.*, 886 F.3d at 121.

57. A technological variation on the fair use defense was rejected by the court in *Hachette Book Grp., Inc. v. Internet Archive*, --F.Supp.3d--, 2023 WL 2623787 (S.D.N.Y. 2023). The defendant, Internet Archive, scanned print books which were lent to readers while retaining the print book, a practice it labeled “controlled digital lending.” In ruling for the plaintiff publishers, the district court held that “fair use does not allow... the mass reproduction and distribution of complete copyrighted works in a way that does not transform those works and that creates directly competing substitutes for the originals.” *Id.* at \*15.

of the contentious and long pending litigation, the Supreme Court's approach followed a traditional trajectory: an assessment of the four-factor test of Section 107.<sup>58</sup>

Starting with the outcome, however, permits a broader view of the potential impact of the opinion. Further, it provides a compass for identifying a commonality with the review of the United States Court of Appeals for the Second Circuit's decision in the case of *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*.<sup>59</sup> This case noted that Pop artist, Andy Warhol, used a reference photograph created by the plaintiff photographer, Lynn Goldsmith, as a base for elaborations on a photograph of the rock music artist, Prince. The United States Court of Appeals assessed the implications of the Oracle opinion on the question of fair use and found that no basis for a reversal of its earlier finding that fair use did not provide a defense to the infringement determination.<sup>60</sup>

The factual underpinnings of the asserted infringement are straightforward: Google LLC, in creating its Android operating system for use in cellular telephones, copied several thousand lines of computer code which served the function of facilitating communication with the underlying operating system program. These are known as APIs and form the "declaring code." The copied code amounted to four-tenths of one percent of the nearly three million lines of computer code, known as Java. This expansive use occurred after the parties were unable to reach a licensing agreement, a dispute which revolved around elements of subsequent use by Google LLC of code it developed in implementing its Android system, which it decided to make freely available to other users.<sup>61</sup> From this precisely defined point of disagreement – the expansive use of the declaring code of the Java programming language – litigation emerged which resulted in four lower court opinions before the ultimate disposition by the Supreme Court of the United States.

In the first trial opinion,<sup>62</sup> the district court found the copied code to be uncopyrightable; this ruling was after a jury deadlocked on the issue of fair use. Subsequently, an appeal to the United States Court of Appeals for the Federal Circuit resulted in the application of the fair use precedents of the United States Court of Appeals for the Ninth Circuit, reversal of that decision, and remand for trial on the fair use defense.<sup>63</sup> The second jury trial found in favor of fair use.<sup>64</sup> On appeal, the Federal Circuit again reversed.<sup>65</sup> From that decision, the United States Supreme Court granted Google LLC's petition for a writ of *certiorari*.<sup>66</sup>

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58. Importantly, the Court underscored the application of the fair use doctrine to computer programs, stating: "exclusive rights in computer programs are limited like any other works. . . . And just as fair use takes account of the market in which scripts and paintings are bought and sold, so too must it consider the realities of how technological works are created and disseminated." *Google LLC*, 141 S. Ct. at 1199.

59. *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022).

60. See *infra* note 102 and accompanying text relative to the specific comparison made by the Second Circuit in reaching this decision in light of its interpretation of *Oracle*.

61. This premise was emphasized by Justice Thomas in his dissent, noting if "a company wanted to customize the platform and keep those customizations for business purposes, it had to pay for a separate license" *Google LLC v. Oracle Am., Inc.* 141 S. Ct. 1183, 1212 (2021) (Thomas, J., dissenting).

62. *Oracle Am., Inc. v. Google LLC*, 872 F. Supp. 2d 974, 999–1000 (N.D. Cal. 2012).

63. *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1193 (Fed. Cir. 2018) (finding that the copying of the API packets was not fair use "as a matter of law").

64. *Google LLC*, 141 S. Ct. at 1195.

65. *Oracle Am., Inc.*, 886 F.3d at 1179. Google stipulated that it used the API packages of code for the identical purpose those code packets served in the Java programming. *Id.* at 1196.

66. See *supra* note 2.

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As a starting point, albeit unexpected in light of the overall and expansive thrust of the path of the litigation between the parties, the Supreme Court declined to evaluate one of the two central issues presented in the case. By doing so, and elaborating the reasons underpinning that decision, the Court confined itself to the issue of liability between Oracle and Google LLC. By confining the issue and taking that approach, The Supreme Court perceived that it was not attempting to address rapidly evolving technological issues.<sup>67</sup> As phrased in the majority opinion, albeit briefly:

Google LLC's petition for certiorari poses two questions. The first asks whether Java's API is copyrightable. It asks us to examine two of the statutory provisions just mentioned, one that permits copyrighting computer programs and the other that forbids copyrighting, e.g., "process[es]," "system[s]," and "method[s] of operation." Pet. for Cert. 12. Google LLC believes that the API's declaring code and organization fall into these latter categories and are expressly excluded from copyright protection. The second question asks us to determine whether Google LLC's use of the API was a 'fair use.' Google LLC believes that it was.

A holding for Google LLC on either question presented would dispense with Oracle's copyright claims. Given the rapidly changing technological, economic, and business-related circumstances, we believe we should not answer more than is necessary to resolve the parties' dispute. We shall assume, but purely for argument's sake, that the entire Sun Java API falls within the definition of that which can be copyrighted. We shall ask instead whether Google LLC's use of part of that API was a 'fair use.' Unlike the Federal Circuit, we conclude that it was.

From this identification of this sole, and hence, the central issue, the Supreme Court addressed sequentially additional elements involving computer code and the application of the fair use doctrine to it.<sup>68</sup>

The upshot, in our view, is that fair use can play an important role in determining the lawful scope of a computer program copyright, such as the copyright at issue here. It can help to distinguish among technologies. It can distinguish between expressive and functional features of computer code where those features are mixed. It can focus on the legitimate need to provide incentives to produce copyrighted material while examining the extent to which yet further protection creates unrelated or illegitimate harms in other markets or to the development of other products. In a word, it can carry out its basic purpose of providing a context-based check that can help to keep a copyright monopoly within its lawful bounds.<sup>69</sup>

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67. *Google LLC*, 141 S. Ct. at 1197.

68. *Id.* at 1198.

69. *Id.*

The Court, before turning to the precise question of the application of the fair use defense, added an observation regarding the economics of the creation and selling of computer software, stating:

Just as fair use distinguishes among books and films, which are indisputably subjects of copyright, so too must it draw lines among computer programs. And just as fair use takes account of the market in which scripts and paintings are bought and sold, so too must it consider the realities of how technological works are created and disseminated. We do not believe that an approach close to “all or nothing” would be faithful to the Copyright Act’s overall design.<sup>70</sup>

After identifying that the fair use defense presented a mixed question of fact and law, the Court concluded that in “this case the ultimate ‘fair use’ question primarily involves legal work.”<sup>71</sup> From this statement, Justice Breyer identified the framework for assessing the “basic legal question before us. Was Google LLC’s copying of the Sun Java API, specifically its use of the declaring code and organizational structure for 37 packages of that API, a ‘fair use.’”<sup>72</sup>

#### A. *The Nature of the Work*

Justice Breyer began with the second fair use factor, the nature of the copyrighted work, and identified a signal difference between the two different types of code. The Court noted that the API includes implementing code, which caused the program to operate, and that Google LLC wrote its own implementing programs which “would perform each of the tasks that the API calls up.”<sup>73</sup> From there, the Court turned to the code that was copied: the declaring code which “both labels the particular tasks in the API and organizes those tasks. . . into ‘packages’ and ‘classes.’”<sup>74</sup> This was the aspect of the program on which Oracle claimed copyright infringement.<sup>75</sup> The Court drew a sharp distinction between implementing code, which it identified as requiring “creativity,” with the declaring code. Anticipating the question of the impact on the market for Java’s APIs, the Court emphasized the judgmental elements of writing the implementing code used by Google LLC, stating: “[t]his is the very creativity that was needed to develop the Android software for use not in laptops or desktops but in the very different context of smartphones.”<sup>76</sup> This factor accordingly “points in the direction of fair use.”<sup>77</sup>

#### B. *Purpose and Character of the Use*

This factor is the central element in the assessment of the precedential impact of *Google LLC v. Oracle America, Inc.*. Accordingly, a starting point stating the

70. *Id.* at 1199.

71. *Id.*

72. *Id.* at 1200–01.

73. *Id.* at 1201.

74. *Id.*

75. *Id.* at 1192.

76. *Id.* at 1202.

77. *Id.*

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precedential role is Justice Breyer's determination that "Google LLC's copying was transformative – to the point where this factor weighs heavily in favor of fair use."<sup>78</sup> Assessment of this factor, central to the overall decision, emphasized the premise of "reimplementation" for which the Court adopted a definition proposed by an *amicus*: "the 'building of a system ... that repurposes the same words and syntaxes' of an existing system—in this case, so that programmers who had learned an existing system could put their basic skills to use in a new one."<sup>79</sup> This transformative dimension identified by the Court as a signal dimension of the fair use assessment was deemed to diminish the significance of Google LLC's unquestioned commercial interest.<sup>80</sup>

### C. Amount and Substantiality of the Portion of the Copyrighted Work Used

An important premise in interpreting the opinion is the calculation of the amount of code used by Google LLC could be defined differently, depending on the context in which it was assessed. That is, in isolation, the 11,500 lines of code were deemed significant. Viewed in conjunction with the uncopied implementing code, the amount copied was .4 percent of the overall program.<sup>81</sup> From this numeral comparison, Justice Breyer framed the operative question of whether the "excerpt copied consists of the 'heart' of the original work's creative expression."<sup>82</sup> On the other hand, copying a larger amount of material can fall within the scope of fair use where the material copied captures little of the material's creative expression or is central to a copier's valid purpose. Using this premise as a starting point, Justice Breyer redefined the point of calculation:

Several features of Google LLC's copying suggest that the better way to look at the numbers is to take into account the several million lines that Google LLC did not copy. For one thing, the Sun Java API is inseparably bound to those task-implementing lines. Its purpose is to call them up. For another, Google LLC copied those lines not because of their creativity, their beauty, or even (in a sense) because of their purpose. It copied them because programmers had already learned to work with the Sun Java API's system, and it would have been difficult, perhaps prohibitively so, to attract programmers to build its Android smartphone system without them. Further, Google LLC's basic purpose was to create a different task-related system for a different computing environment (smartphones) and to create a platform—the Android platform—that would help achieve and popularize that objective. *The "substantiality" factor will generally weigh in favor of fair use where, as here, the amount of copying was tethered to a valid, and transformative, purpose.*<sup>83</sup>

78. *Id.* at 1204.

79. *Id.* (quoting Brief for R St. Inst. et al. as Amici Curiae Supporting Petitioner, Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021) (No. 18-956) 2020 WL 252502.).

80. *Id.* at 1204.

81. *Id.* at 1205.

82. *Id.* (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564–65 (1985)).

83. *Id.* at 1205 (emphasis added)(internal citations omitted).

Accordingly, the substantiality factor was also found to favor fair use.

#### *D. Market Effects*

In addressing the impact of copying the work on the copyrighted work, the Court began with the premise that doing so in the context of a computer-based work is “more complex than at first it may seem. It can require a court to consider the amount of money that the copyright owner might lose. . . . [or] losses [from a work which serves as a market substitute] normally conflict with copyright’s basic objective: providing authors with exclusive rights that will spur creative expression.”<sup>84</sup>

From that initial set of premises on the calculation of market harm, the Court emphasized Google LLC’s reimplementation. Referencing a jury’s potential finding, the Court noted that it could have harmed neither actual nor potential markets for the copied declaring code on the premise that Sun Microsystems, Oracle’s predecessor in this technology, was “poorly positioned” to meaningfully participate in the mobile phone market, having emphasized laptop and desktop computers, amplified by an appreciation that simple mobile phones were rapidly eclipsed by smartphones.<sup>85</sup>

A concluding factor under the market effects determination involved the perceived prospective harm to the public if Oracle were allowed a “lock” on its software APIs by means of copyright. As Justice Breyer perceived that threat:

Finally, given programmers’ investment in learning the Sun Java API, to allow enforcement of Oracle’s copyright here would risk harm to the public. Given the costs and difficulties of producing alternative APIs with similar appeal to programmers, allowing enforcement here would make of the Sun Java API’s declaring code a lock limiting the future creativity of new programs. Oracle alone would hold the key. The result could well prove highly profitable to Oracle (or other firms holding a copyright in computer interfaces). But those profits could well flow from creative improvements, new applications, and new uses developed by users who have learned to work with that interface. To that extent, the lock would interfere with, not further, copyright’s basic creativity objectives.<sup>86</sup>

The Court, in interpreting the record, finalized its assessment of the market effects factor by considering the adoption by third-party programmers, a ready conversant with Java, as a significant element in Android’s profitability. That is as Justice Breyer stated: “It has correspondingly less to do with Sun’s investment in creating the Sun Java API”<sup>87</sup> than in Google’s adoption of the Android platform. Justice Breyer added an important caveat:

*We do not overturn or modify our earlier cases involving fair use—cases, for example, that involve “knockoff” products, journalistic writings, and*

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84. *Id.*

85. *Id.* at 1206. The Court further emphasized that Google LLC v. Oracle America, Inc.’s Android operating system was a ‘distinct and more advanced’ market than Java software.” *Id.* at 1207.

86. *Id.* at 1208.

87. *Id.* at 1207.



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parodies. Rather, we here recognize that application of a copyright doctrine such as fair use has long proved a cooperative effort of Legislatures and courts, and that Congress, in our view, intended that it so continue. As such, we have looked to the principles set forth in the fair use statute, § 107, and set forth in our earlier cases, and applied them to this different kind of copyrighted work.<sup>88</sup>

### *Justice Thomas' Dissent*

#### ***Introduction***

Beginning with the statement that the majority opinion is “fundamentally flawed,”<sup>89</sup> Justice Thomas, joined by Justice Alito, signaled the preference for a different outcome with a determination for infringement, paired with a fundamentally divergent analytical framework encompassing the fair use doctrine.

Specifically, the dissent emphasized the existence of copyright protection for the declaring code and its inseparability from the implementing code. As Justice Thomas perceived the relationship between the two sets of codes:

Because declaring code incorporates implementing code, it has no function on its own. Implementing code is similar. Absent declaring code, developers would have to write every program from scratch making complex programs prohibitively time-consuming to create. The functionality of both declaring code and implementing code will thus typically rise and fall together.<sup>90</sup>

That emphasis, in turn, approaches the entirety of the Java code as a single work. From this calculation, Justice Thomas, in finding the use by Google LLC led to infringement, emphatically rejected the transformation conclusion and by implication the supporting framework used by Justice Breyer in the majority opinion. The second element of the dissent’s structuring of an analysis is a direct determination that the declaring code is not an unprotectable system—or method. The collective effect of the dissent is to act as a counterstatement to Justice Breyer’s determination that the use of the declaring code by Google LLC was transformative, within the meaning of the fair use defense, and, accordingly, not actionable.

#### ***Copyrightability of the Declaring Code***

By beginning with an assessment of whether the declaring code is within the subject matter of copyright, Justice Thomas articulates a contrasting framework supporting the principal analysis of whether Google LLC’s copying of the declaring code in its entirety was a protected act. The significance of this approach is that it facilitates an assessment of the scope of protection to which the declaring code is entitled pursuant to copyright. First, it does so by identifying the distinct originality

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88. *Id.* at 1208–09 (emphasis added).

89. *Id.* at 1220.

90. *Id.* at 1213.

of the declaring code, which, in turn, supports the premise that there were a number of ways in which the declaring code could be written. Support for that premise is provided by the fact that “Apple and Microsoft managed to create their own declaring code.”<sup>91</sup>

### *Fair Use Analysis*

#### A. The Nature of the Copyright Work

Justice Thomas begins, like the majority opinion, with an assessment of the nature of the copyrighted work—the declaring code. Identifying the assessment of the second factor as a means to create a nonexistent distinction between the declaring code—copied by Google LLC—and the implementing code—written by Google LLC for the Android operating system, which “renders the former less worthy of protection than the latter.”<sup>92</sup> In turn, Justice Thomas identifies his characterization of the majority’s determination that the declaring code merits a lower level of protection as a mistake that “taints the Court’s entire analysis.”<sup>93</sup>

#### B. Market Effects

As a starting point, Justice Thomas emphasizes that while Oracle had monetized Java, Google LLC’s revenue source is independent of Android’s code which it provides without charge.<sup>94</sup> Rather, it generates revenue from advertising sales which are facilitated by, but independent of the licensing of, the Android code.<sup>95</sup> Justice Thomas accordingly perceives the use of the Android system as mischaracterized by the majority opinion: “Ultimately, the majority wrongly conflates transformative use with derivative use. To be transformative, a work must do something fundamentally different from the original. A work that simply serves the same purpose in a new context... is a derivative and not transformative.”<sup>96</sup> By violating an express right accorded by the Copyright Act,<sup>97</sup> Justice Thomas concluded that having not created a transformative product, Google LLC used the copyrighted code without paying a licensing fee.<sup>98</sup>

#### C. Amount and Substantiality of the Portion Used

As Google LLC copied the entirety of the declaring code in creating the Android operating system, the sharp point of departure between Justice Thomas in dissent and the majority opinion is whether the appropriate measure is to assess the declaring code copied against the entirety of the code in the Java system. On this

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91. *Id.* at 1214.

92. *Id.* at 1215.

93. *Id.* at 1216.

94. *Id.* at 1219.

95. *Id.*

96. *Id.*

97. 17 U.S.C. § 106(2) (providing that the rights accorded to the copyright owner include “the exclusive rights... to prepare derivative works.”).

98. *Google LLC*, 141 S. Ct. at 1219.

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premise, the two approaches do not identify a common point of departure. The dissent's premise of viewing the declaring code as an independent work is based on the characterization that the "declaring code is what attracted programmers to the Java platform and why Google LLC was so interested in that code."<sup>99</sup> Using this conclusion as a starting point, Justice Thomas identifies Android as a "market substitute" which impeded Java's marketability.<sup>100</sup>

#### IV. APPRAISING GOOGLE LLC V. ORACLE AMERICA, INC.

*Google LLC v. Oracle America, Inc.* presents a result that is both expansive in its holding and, at least in terms of a textual assessment, narrow in its potential implications. A starting point is the appreciation that the Supreme Court is reaffirming its earlier fair use decisions. As such, the framework the Court used in evacuating the defense in the case itself is squarely within the four-factor test established by Section 107 of the Copyright Act of 1976. While the Supreme Court's determination to begin with the second factor, and then migrate to the first factor containing the transformation dimension of fair use is to apply the factors in other than chronological order, the purpose was to underscore the nature of the copyrighted declaring code which was at issue before evaluating its specific purpose, as assessed by the first factor.<sup>101</sup>

Central to the limitations of assessing the transformation dimension of fair use in evacuating the defense of copyright infringement is the appreciation that it is both an established and an evolving doctrine, and, accordingly, the transformative dimension is without clear boundaries. The transformative defense is also without a precise definition, which is a bright line, which would permit an identification of its application. When the resources to litigate exist, as was the case in the nearly decades-long dispute which underpinned *Google LLC v. Oracle America, Inc.*, the result was ultimately resolved in a definitive fashion, exonerating Google LLC from liability for continued use of the declaring code.

The wholesale copying of the declaring code is illustrative of the expanding use of copyrighted works as the transition from traditional publishing and entertainment setting in which there is the potential for legal advice and risk assessment to the more contemporary usage of digital and social media. In those settings, at the same time, the expansive application of the transformation defense in *Google LLC v. Oracle America, Inc.* has the unintended potential to eclipse traditional expectations of control which a copyrighted owner is accorded by copyright law.

The result in *Google LLC v. Oracle America, Inc.* had its most direct application in *Andy Warhol Foundation v. Goldsmith*<sup>102</sup> which was granted review by the Supreme Court.<sup>103</sup> While that case presents differing, if not different, issues, at a minimum it presents the potential for applying the fair use doctrine in the context of an expressive work, rather than a functional work as was present in dealing with the declaring code.

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99. *Id.* at 1220.

100. *Id.*

101. *Id.* at 1201.

102. *Andy Warhol Found. For the Visual Arts, Inc. v Goldsmith*, 11 F.4th 26, 51–52 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022).

103. *See id.*

From this necessarily tentative assessment, two approaches of appraisal emerge. The first is the emphasis on the Supreme Court's earlier decisions on the fair use defense. Specifically, *Sony Corporation of America v. Universal City Studios, Inc.*,<sup>104</sup> involving the then-technologically advanced device, Betamax, permitting home videotaping. In a subsequent case, *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Supreme Court emphasized the district court's finding that the copied material in a magazine article, which, using unauthorized excerpts taken essentially verbatim from a copyrighted autobiography of former President Gerald Ford, required a finding of infringement as by taking "essentially the heart of the book" the qualitative rather than the quantitative dimension of the copying by *The Nation*.<sup>105</sup> This, in turn, amounted to a challenge to the marketability of the Ford autobiography, which was deemed to be the "single most important element of fair use."<sup>106</sup> However, the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*,<sup>107</sup> emphasized the totality of the four-factor inquiry, stating: "Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the result weighed together, in light of the purposes of copyright[.]"<sup>108</sup> Notwithstanding this emphasis, the first factor – and its characterization as incorporating an assessment of the transformative aspect of fair use – continued to be deemed the "heart of the fair use inquiry."<sup>109</sup> In *Acuff-Rose* the Supreme Court further elaborated on the role of the commercial dimension of a copying work:

Sony itself called for no hard evidentiary presumption. . . . Rather, . . . Sony stands for the proposition that the "fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use." But that is all, and the fact that even the force of that tendency will vary with the context is a further reason against elevating commerciality to hard presumptive significance.<sup>110</sup>

Equally problematic is the absence in the majority opinion by Justice Breyer of the underlying copyrightability, including the originality, of the declaring code. By engaging in an assumption of the protection of the declaring code, Justice Breyer failed to identify the variability of the protection accorded to a work of that type. While Justice Thomas, in his dissent, underscored the copyright protection accorded

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104. *Sony Corp. of Am. v. Universal City Studios, Inc.* 464 U.S. 417, 451 (1984). By a 5-4 vote, the Court confirmed the legality of selling home recording devices for television broadcast which included the reasoning that time shifting, that is taping a program for viewing at a later time period chosen by the viewer, "does not have its ordinary effect of militating against a finding of fair use."

105. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 565 (1985).

106. *Id.* at 566. In *Worldwide Church of God v. Philad. Church of God, Inc.*, 227 F.3d 1110, 1118 (9th Cir. 2000), the reproduction of a text central to the theology of the defendant's religious teachings, but no longer emphasized by the copyright owner which had reconfigured its teachings and no longer reprinted the book, *MYSTERY OF THE AGES*, was deemed nonetheless not a fair use as the value of the book as a marketing device as well as future derivative versions may be directly affected. *See also* *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017) (removing language and images deemed offensive and transmitting "sanitized" films to customers deemed not a fair use as the procedure was an "effective substitute" for original copyrighted film).

107. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

108. *Id.*

109. *Davis v. The Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001).

110. *Campbell*, 510 U.S. 569 at 585.

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to computer programs,<sup>111</sup> Justice Breyer’s majority opinion elected not to evaluate the degree of protection, thereby limiting the precedential dimension of *Google LLC v. Oracle America, Inc.* in assessing its applicability to more conventional works involved in fair use determinations.

These observations, notwithstanding the precedential impact of the case, are yet to be constructively assessed. Critically, the importance of *Google LLC v. Oracle America, Inc.*, extends beyond the transformative aspect of the case. In *Bell v. Eagle Mountain Saginaw Independent School District*,<sup>112</sup> the posting on Twitter of a one-page excerpt from a book-length work of 72 pages was deemed fair use. *Google LLC v. Oracle America, Inc.* was cited for

the premise that the school district had not profited from the Twitter posting, in quoting *Google LLC v. Oracle America, Inc.* the court stated that: “There is no doubt that a finding of copying was not commercial in nature tips the scales in favor of fair use.”<sup>113</sup> As additional cases work through the litigation process, the further refinement of *Google LLC v. Oracle America, Inc.* will be developed and the complexity of applying the case will be more apparent. A direct reading of the text identifies a willingness on the part of the Supreme Court to allow significant copying when the underlying elements of a traditional fair use analysis appear. When that copying results in a clear—as opposed to asserted—new product, the Supreme Court has signaled a willingness to consider the use non-infringing. To the degree that clarity on the broader issues was to emerge from the case, that clarity is absent; additional refinements of the complexities of the opinion will be needed to assess the full dimensions of the Supreme Court’s holding.

## V. CONCLUSION

*Google LLC v. Oracle America, Inc.* expresses both a clear statement in its holding on the issue of the determination that fair use is a question of law and a clear resolution on the issue of fair use. A central aspect of the opinion is the determination that a new product was created for an unaddressed market. Further, as the applicability of the fair use defense is now a matter for the court to decide as a question of law, summary judgment resolution is an increased prospect.

In deciding the underlying dispute with a focus on resolving the issue between Oracle America and Google LLC by identifying fair use as the ground on which to reach that resolution, the Supreme Court necessarily excluded a central element from the underlying dispute. While vindicating Google and effectively granting a royalty-free and permanent license for the use of the declaring code in the Android system, the Supreme Court also articulated both clearly stated and implied premises that illuminate the transformative element of fair use. The Court also placed particular emphasis on the statement that none of its earlier precedents are modified,

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111. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1212 (2021) (Thomas, J., dissenting). An expansive discussion of the copyrightability of the declaring code as a “literary work” pursuant to the Copyright Act of 1976, 17 U.S.C. § 102(a) was utilized by the United States Court of Appeals for the Federal Circuit in *Oracle Am., Inc. v. Google LLC*, 780 F.3d 1339, 1354–55 (Fed. Cir. 2014), *rev. on other grounds*, 141 S.C. 1183 (2021).

112. *Bell v. Eagle Mt. Saginaw Indep. Sch. Dist.*, 27 F. 4th 313, 321 (5th Cir. 2022).

113. *Id.* at 322.

that “[w]e do not overturn or modify our earlier cases involving fair use.”<sup>114</sup> That premise, in turn, places particular emphasis on the central element of Justice Breyer’s approach which is the importance of identifying a transformative dimension to the use made by Google LLC in incorporating the declaring code as a means of accessing the implementing code. Central to the Court’s reasoning was the unwillingness of Oracle America to license its declaring code to Google LLC in a manner that facilitated the continuing development of the Android system. Inherently, that created a different software code but one which directly incorporated the APIs in which copyright was claimed.

The determination of a transformative fair use is a determination of nonliability. The effect is to remove from the control of the owner of the copyrighted work when it is incorporated into the copying work which is deemed non-infringing. A challenge in placing this holding into the precedential order of Supreme Court authority in defining fair use is to identify the degree to which the expansive holding is consistent with the existing case law articulated by the Supreme Court.

Although the Supreme Court made an unequivocal declaration of stability in its precedents. A starting point is that the Court’s opinion, while applying the transformative dimension as the central element of its ultimate conclusion of noninfringement, also applied and underscored the importance of applying the entire set of four factors required by Section 107. Perhaps most critical in making that assessment was the unarticulated but inherent appreciation that the Supreme Court perceived the underlying API code as having a literal copyright but not an expansive scope of protection. That interpretation is consistent with Justice Breyer’s opening statement reciting a confined scope of review.

The degree of originality is a critical element in defining the allowable fair use by a subsequent user in copying the work when the transformative defense is being evaluated. Accordingly, the Supreme Court undertook a bifurcated approach and omitted the determination of copyrightability of the declaring code which in turn precluded an assessment of its degree of protection. With an appreciation of that limitation in defining the significance as precedent, the decision in *Google LLC v. Oracle America, Inc.* is overarching in furthering the evolution of the transformative element of the first factor in the fair use analysis dictated by Section 107. Transformation, as a salient consideration in evaluating the defense of copyright infringement, is both an established concept and an evolving doctrine. As such, absent clear boundaries and precepts identifying its application, transformation provides little guidance as a general statement of the fair use defense. Where the resources to litigate exist, the doctrine has provided exoneration for the complete use of the underlying source work. Where fair use is being applied in a prospective dimension, the application is problematic as the artist or writer embedding a copyrighted work in a subsequent work who perceives the new creation to be transformative is lacking in a bright line to separate protected from infringing uses.

The unauthorized and expansive use of copyrighted material is increasingly migrating to digital and social media platforms. In assessing the application of fair use as a defense to a claim of infringement, the assertion of the transformative dimension of fair use, as applied in *Google LLC v. Oracle America, Inc.* will assume an expanding role. At the same time, transformation as an evolving defense has the potential, absent clear guidance, to eclipse the traditional expectations of control

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114. *Google LLC v. Oracle Am., Inc.* 141 S. Ct. 1183, 1201–09 (2021).

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that a copyrighted work has been accorded or to be suggestive of a defense that proves to be illusory.