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Google LLC v. Oracle America, Inc.

COMMENT ON: 141 S. Ct. 1183 (2021)

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IN AN ERA OF RAPID TECHNOLOGICAL PROGRESS, COPYRIGHT LAW risks becoming outdated. ¹ With no guidance from the Supreme Court in over twenty-five years, the application of fair use under the Copyright Act of 1976 — a four-factor statutory defense to copyright infringement claims ² — has been left largely to the speculation of scholars. ³ This has been particularly troublesome in software, where developers have long been forced to rely on a confusing thicket of interpretations and assumptions lacking concrete legal assurances. ⁴ A prolonged, multi-trial legal battle between two technology titans recently gave the Court cause to revisit fair use in software. Last Term, in *Google LLC v. Oracle America, Inc.*, ⁵ the Supreme Court held that Google’s copying of parts of the Java application programming interface ⁶ (API) in its creation of the Android programming platform was fair use as a matter of law. ⁷ In reaching this conclusion, the Court took a newly expansive view of transformativeness in the fair use analysis, recognizing the significance of Google’s “reimplementation” of the Java API in a

9 the Court’s expansion of transformativeness in fair use accords with the constitutional goals of the Copyright Act.

In 2005, Google acquired Android, Inc., signaling the search company’s intent to move into software development for the nascent mobile-device market. 10 To attract “a sizeable number of skilled programmers” to develop applications for Google’s Android-based smartphones, 11 Google wanted its platform to take advantage of programmers’ familiarity with the popular Java programming language. 12 It negotiated with Java’s developer Sun Microsystems to license Java technologies, but talks broke down over Sun’s insistence that “all programs written on the Android platform be interoperable.” 13 Google then elected to create its Android platform independently. 14

However, to ensure that programmers’ familiarity with Java would aid in developing Android applications, Google copied about 11,500 lines of code from the Java API. 15 The Court identified this portion of the API as “declaring code,” which matches a programmer’s typed command to the code that actually performs it. 16 Declaring code also reflects how Java’s creators “arranged and grouped” different tasks, an organizational scheme known as “structure, sequence, and organization” 17 (SSO). The code that actually performs the command, which the Court identified as “implementing code,” accounted for the vast majority of the API that Google created for Android and was independently written by Google. 18 In 2010, Oracle acquired Sun and the copyright to the Java computing platform, which includes the Java API. 19 Oracle filed a suit against Google for copyright and patent infringement soon after. 20

Following trial, a jury rejected Oracle’s patent claims and found copyright infringement only with respect to “nine lines of code,” 21 but could not agree on “whether Google could successfully assert a fair use defense.” 22 The district court held for Google that the API portion it had copied was an unprotected method of operation under the Copyright Act. 23 Both parties appealed. 24

The Federal Circuit affirmed in part and reversed in part. 25 It found that the declaring code and the SSO were copyrightable because Google was not bound to the naming conventions and structure of the Java API. 26 Thus, Google could have written its own declaring code. 27 Finding an insufficient record for a de novo review of Google’s fair use defense, the court remanded for another trial on that question. 28 The Supreme Court denied Google’s petition for a writ of certiorari. 29

A second jury then found that Google’s use of the Java API had been fair. 30 The district court denied Oracle’s motion for judgment as a matter of law, finding that the jury

The Federal Circuit reversed and remanded again.³⁴ The court concluded that the question of “whether the use at issue is ultimately a fair one is . . . review[ed] de novo.”

35 The court proceeded to reject the jury’s findings in favor of Google on three of the four fair use factors.³⁶ The balance tipped back in Oracle’s favor, and the court found that Google’s use of the Java API was “not fair as a matter of law.”³⁷ This time, the Supreme Court granted certiorari.³⁸

The Supreme Court reversed and remanded,³⁹ with Justice Breyer writing for the majority.⁴⁰ It began by affirming that the constitutional objective of copyright is “to promote the Progress of Science and useful Arts.”⁴¹ After reviewing the statutory background, the Court, to “answer [no] more than [was] necessary to resolve the . . . dispute,” assumed for the sake of argument that the Java API may be copyrightable.

42 The Court also agreed with the Federal Circuit that “fair use” [was] a legal question for judges to decide *de novo*.⁴³ It then dismissed Google’s Seventh Amendment arguments,⁴⁴ proceeding to the fair use analysis.

The Court found that all four factors favored Google⁴⁵ and held that Google’s copying was fair use as a matter of law.⁴⁶ For “expository purposes,” the majority opinion began by examining the second factor: the nature of the copyrighted work.⁴⁷ It noted at the outset that although software is copyrightable, all code is not created equal.

48 The declaring code — which was designed to be intuitive and easy to use — was primarily functional and lacked the same creative “magic” of an implementing program.

49 And unlike standalone software, the declaring code was embedded in a larger interface comprised mostly of uncopyrightable ideas and the creative expression of users.

50 Indeed, much of its value was generated not by the copyright holder, but by the community of programmers taking the time to learn the API.⁵¹ For these reasons, the declaring code was “further than are most computer programs . . . from the core of copyright,” if it was “copyrightable at all.”⁵² The Court thus viewed this factor as weighing in favor of fair use.⁵³

Turning to the first factor, the Court next addressed the purpose and character of the use.⁵⁴ Drawing on the rule articulated nearly three decades earlier in *Campbell v. Acuff-Rose Music, Inc.*,⁵⁵ the majority considered whether Google’s use imbued the copied code “with new expression, meaning or message,”⁵⁶ or, more simply, whether it was “transformative.”⁵⁷ Justice Breyer noted that the purpose of “virtually any unauthorized use of a copyrighted computer program” will necessarily be functional in service of “accomplish[ing] particular tasks,” just as Google’s was.⁵⁸ Ending the inquiry

products and programming opportunities that Android created in turn.⁶¹ Even allowing that Google's use was "commercial in nature," the majority found in favor of fair use on this factor.⁶²

In addressing the third factor — the amount and substantiality of the use — the majority noted that when the amount copied is "tethered to a [copier's] valid, transformative purpose," the factor will "generally weigh in favor of fair use."⁶³ Here, the Court characterized Google's "basic objective" as allowing programmers to use their pre-existing knowledge of the Java API to create new programs for Android.⁶⁴ As declaring code was the "key" to "unlock[ing] the programmers' creative energies,"⁶⁵ this factor weighed in favor of fair use.⁶⁶

Finally, the Court reached the fourth factor, assessing the potential market harm from Google's copying. The Court noted that the "potential loss of revenue [was] not the whole story," and that it also had to consider "the source of the loss" in addition to any "public benefits the copying [would] likely produce."⁶⁷ While the Court conceded that Google made a "vast amount of money" from Android,⁶⁸ it returned to the idea that the value Google derived from using the API was generated by "programmers'[] investment in Sun Java programs."⁶⁹ These two considerations, in combination with "creativity-related harms to the public" that might result from copyright enforcement, convinced the majority that the fourth factor weighed in favor of fair use as well.⁷⁰ As such, the Court declared Google's copying fair use as a matter of law.⁷¹

Justice Thomas dissented.⁷² He asserted that the majority skipped over the copyrightability analysis, thereby ignoring "half the relevant statutory text and distort[ing] its fair-use analysis."⁷³ He argued that by failing to analyze the Copyright Act's definition of a copyrightable "computer program,"⁷⁴ the Court created a distinction between implementing and declaring code that Congress had previously "rejected."⁷⁵ The dissent went on to critique the majority's analysis of the fair use factors and concluded that three of the four "weigh[ed] decidedly against Google."⁷⁶

Google v. Oracle has been hailed as a "huge win for developers and consumers,"⁷⁷ not to mention a "win for innovation" more broadly.⁷⁸ Despite the majority's reluctance to rule directly on the question of API copyrightability, this case's holding will "provide[] breathing room" to software developers employing similar strategies to create their products.⁷⁹ However, because transformativeness was likely determinative of fair use here, the Court's analysis may appear to some to impinge on the derivative works right belonging exclusively to the copyright holder under the Copyright Act.⁸⁰ The Act

infringement entail a transformativeness analysis, the debate over which serves to limit the other is ongoing.⁸² The Court’s expansive view of transformativeness in the fair use inquiry rightly placed a further limit on the derivative works right, allowing for broader applications of fair use in service of copyright’s goal of promoting innovation.

Transformativeness has become virtually dispositive of fair use findings since the Court introduced it.⁸³ In *Campbell*, the Court used the word “transformative” to describe the purpose and character of a fair use,⁸⁴ and it explicitly stated that “the more transformative” a work, the less “other factors, like commercialism,” will weigh against a fair use finding.⁸⁵ Truly transformative works, the Court wrote, would “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright” while “generally further[ing]” copyright’s constitutional goals.⁸⁶ Courts employ “transformative use” to conceptualize the level of creative input required for a fair use defense to succeed.⁸⁷ The concept’s growing centrality to the fair use analysis has, predictably, made it critical to copyright stakeholders and litigators.⁸⁸

Given this increasing reliance on transformativeness, courts have attempted to draw an administrable line dividing the contexts of derivative works and fair use. Lower courts have largely come to treat transformation in derivative works as “changes of form” and transformation in fair use as changes in purpose.⁸⁹ For example, translating a book into a new language or recording a text into an audiobook might constitute changes in form, falling within the derivative works right of the original copyright owner.⁹⁰ This is because the overall message of the work remains unchanged, despite the additional effort or creativity required to make the derivative work.⁹¹ However, taking several pages of the same written text and crossing out certain words to convert the prose into a work of erasure poetry would likely constitute a change in purpose, thereby supporting a finding of fair use, especially if the message of the new poem consisted of commentary on or critique of the underlying work.⁹²

Some courts have nonetheless objected to the predominance of the transformative use analysis, fearing that it will supersede the derivative works right entirely. *Kienitz v. Sconnie Nation LLC*,⁹³ which concerned a photographer’s infringement action against a company that sold apparel incorporating one of his photos, contained a rare, explicit judicial recognition of the tension between fair use and the derivative works right.⁹⁴ The *Kienitz* court expressed skepticism of the Second Circuit’s treatment of transformativeness as dispositive of the fair use inquiry, fearing that excessive focus thereon “not only replaces the [other fair use factors] but also could override [statutory]

However, the *Kienitz* court’s definition of derivative use — as any “new use [that] transforms the work”⁹⁸ — is itself an example of courts’ tendency to enlarge an already overbroad derivative works right. In the late nineteenth century, copyright expanded to include certain derivative uses that previously belonged to the public domain.⁹⁹ Since then, copyright protections have broadened through statutory expansions,¹⁰⁰ leading many to characterize copyright legislation as a “one-way ratchet” in the direction of increased protections.¹⁰¹ Courts have exacerbated this trend by untethering the final clause of derivative works’ statutory definition — consisting of “any other form in which the work is recast, transformed, or adapted”¹⁰² — from the nine specific examples of derivative use provided by the rest of the definition.¹⁰³ The result, as exemplified by *Kienitz*, has been the equation of transformation as generically understood with derivative use as a copyright term of art.

Given the overbreadth of the derivative works right, the Court’s expansion of transformativeness for the purposes of the fair use inquiry in *Google* brings an overly restrictive copyright doctrine back into the proper equilibrium.¹⁰⁴ Contrary to much of the handwringing about the harms to authors from fair use impingements on the derivative works right, fair use’s expansion in the 1990s is a relatively recent development,¹⁰⁵ and it has been to the clear benefit of innovation, especially for software.¹⁰⁶ Just as an overexpansive conception of transformative use can threaten the derivative works right, an overexpansive view of what constitutes a derivative work can threaten fair use. Thus, to the extent its conception of transformativeness expanded into territory previously occupied by derivative works, the Court only reasserted the proper “breathing space” in the face of previous overbroad constructions.¹⁰⁷

Against this backdrop, the *Google* Court correctly adopted an expansive view of transformative use in two important ways. First, it treated Google’s end goal of enabling future creative works by third-party developers as a transformative purpose independent from the particular function for which Google reimplemented the Java API. In seeking “to expand the use and usefulness of Android-based smartphones” by offering “programmers a highly creative and innovative [new] tool for a smartphone environment,” Google engaged in precisely the kind of innovation contemplated by the Copyright Clause.¹⁰⁸ Second, the Court held that even exact copies serving the same purpose as the original may constitute fair uses where they occur in sufficiently different contexts — in this case a “distinct and different computing environment.”¹⁰⁹ This emphasis on the shift from computers to smartphones is tied to the “change in form” that courts have identified with



ingredient of innovation. [111](#)

While *Google* signals an expansion in the scope of fair use, it also takes a necessary step to realign modern copyright law with its constitutional goals. The scope of the fair use doctrine has undoubtedly expanded since the Court's last fair use decision in *Campbell*, but this shift occurred in response to a copyright status quo that was overly restrictive in the first place, [112](#) and could well become so again. [113](#) The majority's reasoning will give lower courts the freedom to consider clearly transformative uses that would otherwise be masked by the functional nature of software. It will allow them to do the same in less cutting-edge circumstances, but with similarly positive results for innovation. [114](#) While restricting the rights of copyright holders, the Court's approach took an important step to further the constitutional goal of copyright law: to "promote the Progress of Science and useful Arts." [115](#)

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